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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- 2009 --

*This report is submitted by the US Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 16-17 June 2010.*

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## Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2008, through September 30, 2009 (“FY 2009”). 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 Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

### Senior DOJ and FTC staff

2. On November 18, 2008, Thomas Barnett resigned as Assistant Attorney General (“AAG”) responsible for the Antitrust Division. President Barack Obama appointed Christine A. Varney to be the new AAG, and she was sworn in on April 21, 2009. On April 22, AAG Varney announced the new leadership team at the Antitrust Division, including Sharis Arnold Pozen as Chief of Staff and Counsel, Molly S. Boast as Deputy Assistant Attorney General (“DAAG”) for Civil Matters, William F. Cavanaugh, Jr. as DAAG for Civil Matters, Carl Shapiro as DAAG for Economic Analysis, Philip J. Weiser as DAAG for International, Policy, and Appellate Matters, and Gene I. Kimmelman as Chief Counsel for Competition Policy and Intergovernmental Relations. In January 2010, Rachel Brandenburger joined the Division as the AAG’s special advisor for international matters.

3. President Obama designated Commissioner Jon Leibowitz as FTC Chairman on March 2, 2009. On April 14, Chairman Leibowitz announced the appointments of Richard Feinsein as Director of the Bureau of Competition, Joseph Farrell as Director of the Bureau of Economics, David Vladeck as Director of the Bureau of Consumer Protection, Susan DeSanti as Director of the Office of Policy Planning, and Joni Lupovitz as Chief of Staff. On May 21, Chairman Leibowitz announced the appointment of Willard Tom as General Counsel, Pete Levitas as Deputy Director of the Bureau of Competition, and Howard Shelanski as Deputy Director of the Bureau of Economics, and on November 30, he announced the appointment of Cecelia Prewett as Director of the Office of Public Affairs and Norm Armstrong, Jr. as Deputy Director of the Bureau of Competition.

4. In November 2009, President Obama announced the nomination of Edith Ramirez and Julie Brill as FTC Commissioners. Their nominations were confirmed by the U.S. Senate on March 3, 2010, and Commissioner Ramirez and Commissioner Brill were sworn in by FTC Chairman Jon Leibowitz on April 5 and April 6, 2010, respectively. Pamela Jones Harbour resigned as Commissioner effective April 6, 2010, after six-and-a-half years on the Commission.

## 1. Changes in law or policies

### 1.1 *Changes in Antitrust Rules, Policies, or Guidelines*

5. On September 22, 2009, the FTC and DOJ (“Agencies”) announced that they would solicit public comment and hold joint public workshops to review and update the Horizontal Merger Guidelines. The goal of the workshops was to determine whether the Guidelines accurately reflect the current practice of merger review at the Agencies as well as to take into account legal and economic developments that have occurred since the last significant revision in 1992. The five workshops took place in December 2009 and January 2010, in Washington, Chicago, New York, and San Francisco. On April 20, 2010, the FTC released a proposed revision of the Guidelines for public comment. See <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.

6. On August 6, 2009, pursuant to its authority under the Energy Independence and Security Act of 2007, the Commission issued its Petroleum Market Manipulation Rule. The Rule became effective in November 2009. In a rulemaking proceeding that generated over 150 comments from consumers and

businesses, the Commission crafted a Rule that prohibits fraud or deceit in wholesale petroleum markets, including omission of material information, that is likely to distort petroleum markets. The Commission staff prepared a compliance guide for businesses that sets out examples of Rule violations, such as false public announcements of planned pricing or output decisions, false statistical or data reporting, and wash sales intended to disguise the actual liquidity of a market or the price of a particular product. See <http://www.ftc.gov/opa/2009/08/mmr.shtm>.

7. On May 11, 2009, the Division withdrew the report “Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act,” which had been issued in September 2008 (*see* FY 2008 Annual Report, ¶¶78-79), explaining that it would be guided by Supreme Court precedent with regard to Section 2 of the Sherman Act. In withdrawing the report, AAG Varney commended the efforts of those who participated in the Section 2 hearings and stated that the report provided a valuable discussion of the issues surrounding Section 2 enforcement.

8. In May 2009, the Division launched its Recovery Act initiative to help detect fraud in the award of stimulus projects resulting from the \$787 billion American Recovery and Reinvestment Act of 2009. The Division’s initiative is designed to help procurement officials prevent collusion and fraud in the award of stimulus projects and to detect and prosecute collusion and fraud if they do occur. As part of the initiative, the Division is training procurement and grant officials, government contractors, and agency auditors and investigators regarding signs of collusion and fraud and will assist agencies in investigating and prosecuting collusion and fraud that occurs. The Division has already trained thousands of federal and state procurement and grant officials nationwide. Consumers, contractors, and agencies can report suspicious activity and review information about antitrust laws through the Division’s Recovery Act Initiative website, located at [www.justice.gov/atr/public/criminal/economic\\_recovery.htm](http://www.justice.gov/atr/public/criminal/economic_recovery.htm).

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

9. On October 14, 2009, AAG Varney testified before the Senate Committee on the Judiciary at a hearing on “Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry.” With respect to the 1945 McCarran-Ferguson Act and its broad antitrust exemption for the business of insurance, AAG Varney noted the Department’s general opposition to exemptions from the antitrust laws in the absence of a strong showing of a compelling need. She also highlighted the general consensus that health insurance reform should be built on a strong commitment to competition in all health care markets, including those for health and medical malpractice insurance. Without taking a position as to how or when Congress should address the issue of repealing antitrust exemptions, she emphasized that the flexibility of the antitrust laws and their crucial importance to the economy argue strongly against antitrust exemptions that are not clearly and convincingly justified.

10. During FY 2009, the FTC twice presented testimony to committees of the U.S. House of Representatives supporting legislation to ban anticompetitive “pay-for-delay” patent settlements between generic and brand-name drug companies that keep lower-cost generic drugs off the market. On June 3, 2009, Richard A. Feinstein, Director of the Bureau of Competition, testified on behalf of the Commission before the U.S. House Subcommittee on Courts and Competition Policy of the Committee on the Judiciary in support of the Protecting Consumer Access to Generic Drugs Act of 2009, H.R. 1706, which would prohibit pay-for-delay settlements.

11. On March 31, 2009, Commissioner J. Thomas Rosch testified on behalf of the FTC before the U.S. House Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce. In his testimony, Commissioner Rosch said that anticompetitive patent settlements in the U.S. pharmaceutical industry “impose enormous costs on consumers and the health care system,” and that congressional action to prohibit these pay-for-delay settlements is “both appropriate and timely.” The

testimony explained that pay-for-delay agreements were successfully challenged by FTC enforcement actions between 2000 and 2004, but recent appellate decisions have significantly undermined these efforts, leading to a dramatic increase in the number of these agreements.

12. The FTC is committed to use its authority under Section 5 of the Federal Trade Commission Act (“FTC Act”) to prohibit “unfair methods of competition,” including conduct that violates Section 2 of the Sherman Act. In October 2008, the FTC held a workshop to examine possible interpretations of Section 5, its relationship to other antitrust statutes, and examples of business conduct that it may address.

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

### **2.1 Staffing and Enforcement Statistics**

#### *2.1.1 FTC*

13. During FY 2009, the FTC had 509 staff working on competition enforcement, including 301 lawyers, 74 economists, and 134 “other” professionals, including investigators, merger analysts, compliance specialists, industry analysts, research analysts, financial analysts/accountants, paralegals, and support staff. The FTC’s Maintaining Competition Mission expended approximately \$108 million in FY 2009.

14. During FY 2009, 713 proposed mergers and acquisitions were reported for review under the HSR Act. Commission staff opened 135 initial phase investigations and issued requests for additional information (“second requests”) in 15 transactions. The Commission challenged 19 mergers, nine of which were settled with consent orders. Five transactions were abandoned following the FTC’s filing of a preliminary injunction in federal court and concurrent issuance of an administrative complaint, and three mergers were abandoned after the Commission informed the parties of its concerns about the proposed transaction. In addition, the Commission filed a permanent injunction in federal court to undo a consummated acquisition; the matter is currently pending. The Commission also brought an administrative action to challenge a merger; the matter was settled with divestitures.

15. During FY 2009, the Commission brought seven non-merger enforcement actions challenging a variety of anticompetitive conduct, six of which were resolved by consent agreement. The Commission also filed a preliminary injunction. Practices challenged included alleged refusals to deal, price fixing, market allocation agreements, and a trade association’s anticompetitive sharing of sensitive information.

16. The Commission filed *amicus curiae* briefs in two cases (one jointly with the United States before the Supreme Court and one before the Federal Circuit) and a petition for writ of *certiorari* in another case. The FTC provided one advisory letter and submitted nine advocacy filings, including one submitted jointly with the DOJ.

#### *2.1.2 DOJ*

17. At the end of FY 2009, the Division employed 792 persons: 353 attorneys, 57 economists, 174 paralegals, and 208 other professional staff. For FY 2009, the Division received an appropriation of \$157.8 million.

18. During FY 2009, the Division opened 214 investigations and filed 81 civil and criminal cases in federal district court. In FY 2009, the Division was party to three antitrust cases decided by the federal courts of appeals.

19. During FY 2009, the Division filed 72 criminal cases in which it charged 22 corporations and 65 individuals. Sixteen corporate defendants and 27 individuals were assessed fines totaling \$974.3 million

and 35 individuals were sentenced to a total of 25,396 days of incarceration. Another 9 individuals were sentenced to spend a total of 2,195 days in some form of alternative confinement.

20. The Division investigated 66 mergers and challenged seven of them in court; five 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. In addition, the Division screened a total of 463 bank mergers. The Division opened 123 civil investigations (merger and non-merger), and issued 510 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY 2009, the Division issued five business review letters.

## **2.2 Antitrust Cases in the Courts**

### **2.2.1 United States Supreme Court**

21. In *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (May 24, 2010), the Supreme Court addressed the issue whether a sports league structured as a joint venture of separately owned teams should be considered a single economic entity for purposes of the Section 1 concerted action requirement. The United States filed an *amicus curiae* brief in the case on September 25, 2009. The United States urged the Supreme Court to vacate the judgment of the U.S. Court of Appeals for the Seventh Circuit, which had upheld a district court's summary judgment in favor of the NFL and its separately owned teams on the grounds that they had acted as a single entity when licensing and marketing their logos and trademarks under an exclusive licensing agreement with Reebok International, Ltd. In discussing whether a sports league and its member teams should be deemed to function as a single entity, the brief argued that such treatment is only appropriate if (1) the teams and the league have effectively and legitimately merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams; and (2) the challenged restraint does not significantly affect actual or potential competition among the teams outside their merged operations. In addition to urging the Supreme Court to vacate the judgment, the brief suggested that the case be remanded for further proceedings and application of the correct legal standard for single-entity analysis. On May 24, 2010, the Supreme Court unanimously reversed the court of appeals on the basis that the NFL teams compete in the market for intellectual property so collective licensing decisions by the NFL teams deprive the marketplace of independent centers of decision-making. Even if the relevant decisions were not directly made by the teams, but rather the league's licensing entity, the Court held that its actions were not those of a single economic entity because it acted as an instrumentality of the teams. Consequently, the Court remanded the case to the lower court for further proceedings consistent with the Supreme Court's holding, so the collective conduct at issue can be analyzed under the rule of reason.

22. In *Pacific Bell Tel. Co. v. linkLine Communications, Inc., et al.*, 129 S. Ct. 1109 (2009), the Supreme Court addressed the unilateral conduct of Pacific Bell, which was a local exchange carrier with a comprehensive local telephone network. Its parent company, AT&T Corp., had agreed with the Federal Communications Commission as a condition of permitting an acquisition that it would provide wholesale digital subscriber line ("DSL") transport (a form of broadband Internet service) to Internet service providers that compete with it at the retail level. Although AT&T provided the transport service, linkLine and three other independent Internet service providers filed suit under Section 2 of the Sherman Act, 15 U.S.C. §2, alleging that AT&T was seeking to monopolize the retail market by engaging in a "price squeeze," charging them high wholesale prices, while charging its retail customers low prices, leaving insufficient margin between them for the plaintiffs to make a profit. The district court denied a motion to dismiss, but certified its order for interlocutory appeal. The court of appeals affirmed. When the Supreme Court granted *certiorari*, the United States filed a brief as *amicus curiae* urging reversal, and the Supreme Court agreed. In the Court's view, its earlier decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), precluded any challenge to the wholesale price; since there

was no antitrust duty to provide wholesale transport, there was no duty to provide it on any particular terms. Conversely, competition policy encourages low prices unless they are predatory as defined in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and there was no allegation of predatory retail pricing in the complaint. The Court declined to hold unlawful the relationship between lawfully established wholesale and retail prices of a vertically integrated firm. It remanded to the court of appeals, however, the question whether an amended complaint the plaintiffs had filed adequately pleaded predatory retail pricing.

23. The Supreme Court also denied two petitions for writs of *certiorari* filed in connection with the FTC's antitrust enforcement actions. In denying a petition for a writ of *certiorari*, the Supreme Court does not rule on the merits of a dispute, but is simply deciding not to hear a further appeal in the matter. The first petition was filed by North Texas Specialty Physicians in response to an appellate decision upholding the FTC's opinion that this group of independent competing physicians had restrained competition by orchestrating a price agreement among its member physicians, negotiating price terms in payor contracts on behalf of its physicians, and refusing to deal with payors except on collectively agreed-on terms. The second petition was filed by the FTC in response to an appellate decision vacating the agency's cease-and-desist order against Rambus, Inc., which the FTC claimed had unlawfully monopolized markets for four computer memory technologies that were incorporated into industry standards for dynamic random access memory chips. The Supreme Court denied both petitions on February 23, 2009.

#### 2.2.2 *U.S. Court of Appeals Cases*

- Significant FTC Cases Decided in FY 2009

No U.S. Court of Appeals issued a decision on an FTC antitrust enforcement action in FY 2009. On December 31, 2009, however, Realcomp filed a petition for review of an FTC order with the U.S. Court of Appeals for the Sixth Circuit. On November 2, 2009, the FTC had found that this realtors' group had violated Section 5 of the FTC Act by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services, and ordered Realcomp to take certain actions in response. The matter is pending.

- Significant DOJ Cases Decided in FY 2009

There were no reported FY 2009 decisions in antitrust cases in which the United States was a party or participated as *amicus curiae*.

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

24. According to the 2009 Annual Report of the Director of the Administrative Office of the U.S. Courts, 812 new civil antitrust actions, both government and private, were filed in the federal district courts in 2009.

#### 2.4 *Significant DOJ and FTC Enforcement Actions*

##### 2.4.1 *DOJ Criminal Enforcement*

25. At the close of FY 2009, the Division had 144 pending grand jury investigations, the greatest number of pending grand jury investigations since 1992. The Division filed 72 cases against 65 individuals and 22 companies, which is the greatest number of criminal cases in a fiscal year since 1993. The Division obtained the second highest fine total in its history, with over \$1 billion in fines. Courts imposed more than 25,000 jail days against Division defendants, also the second highest total in Division history, with an

average jail sentence of 24 months. The Division prosecuted price fixing, bid rigging, market and customer allocations, and other fraudulent, anticompetitive schemes involving sales of household and personal electronics, air transportation services, ocean shipping services, oil transportation products, Internet services for disadvantaged schools and libraries, supplies and services for War Zone locations, and hurricane remedial work. The Division also launched a major initiative to prevent and detect fraud and abuse in procurement projects associated with The American Recovery and Reinvestment Act of 2009.

26. **Liquid Crystal Display Panels:** The ongoing investigation of multiple price-fixing conspiracies in the thin-film transistor liquid crystal display (“TFT-LCD”) panel industry has resulted in charges against six non-U.S. manufacturers, one U.S. subsidiary of one of the manufacturers, and nine non-U.S. executives. By the end of 2009, defendants had paid or agreed to pay fines of over \$860 million. In December 2008, Japanese manufacturer Sharp Corporation pleaded guilty to participating in three separate conspiracies to fix prices of TFT-LCD panels sold to (1) Dell for computer monitors and laptops, (2) Apple Computer for iPod portable music players, and (3) Motorola for Razr mobile phones. Sharp was sentenced to pay a \$120 million fine. In December 2008, Korean manufacturer LG Display Co., Ltd. (“LG”) and its U.S. subsidiary LG Display America, Inc. pleaded guilty and were sentenced to pay a \$400 million criminal fine—the second largest fine in Division history. In January 2009, Taiwanese manufacturer Chunghwa Picture Tubes, Ltd. (“Chunghwa”) pleaded guilty and was sentenced to pay a \$65 million fine. In May 2009, Japanese manufacturer Hitachi Displays Ltd. pleaded guilty and was sentenced to pay a \$31 million fine. In August 2009, the Division charged Japanese electronics manufacturer Epson Imaging Devices Corporation with fixing prices of TFT-LCD panels sold to Motorola. Epson pleaded guilty and was sentenced to pay a \$26 million criminal fine. Also, in the beginning of FY 2010, the Division charged Chi Mei Optoelectronics with fixing prices of TFT-LCD panels; Chi Mei, a Taiwanese manufacturer, agreed to plead guilty and pay a fine of \$220 million.

27. The Division has also charged nine non-U.S. executives from Korea, Japan, and Taiwan with fixing TFT-LCD panel prices. Five of those executives have entered guilty pleas, including a former Chairman and Chief Executive Officer of Chunghwa and the head of LG’s Taiwan subsidiary. They have been sentenced to serve between six months and one year in prison and to pay fines ranging from \$20,000 to \$50,000. Four executives are under indictment, including another former Chairman and Chief Executive Officer of Chunghwa.

28. **Cathode Ray Tubes:** In FY 2009, the Division charged two non-U.S. executives in its investigation of international cartels in the cathode ray tube industries. Both of these executives have also been indicted in the TFT-LCD investigation on price-fixing charges. In February 2009, a former Chairman and Chief Executive Officer of Chunghwa was charged in a two-count indictment with fixing prices, reducing output, and allocating market shares of color display tubes (“CDTs”) and with fixing prices for color picture tubes used in television sets. CDTs are a type of cathode ray tube used in computer monitors and other specialized applications. In August 2009, a federal grand jury in San Francisco indicted a former executive of a large Taiwanese CDT manufacturing company on the charge of conspiring to fix prices, reduce output, and allocate market shares of CDTs.

29. **Air Transportation:** The Division continued its prosecutions of price-fixing conspiracies in the air transportation industries. These conspiracies affected both passenger fares and prices for innumerable goods shipped by air transportation, including produce, clothing, electronics, and medicine. At the end of FY 2009, a total of 15 companies and four individuals have pleaded guilty to participating in these conspiracies. In addition, one executive is under indictment. Criminal fines of more than \$1.6 billion have been imposed, and four executives have been sentenced to serve prison sentences.

30. In FY 2009, six airlines and two individuals were charged with fixing prices for the shipment of cargo by air. In January 2009, LAN Cargo S.A. (“LAN Cargo”), Aerolinhas Brasileiras S.A. (“ABSA”),



and El Al Israel Airlines Ltd. ("EL AL") were charged with fixing air cargo prices. LAN Cargo, a Chilean company, and ABSA, a Brazilian company that is substantially owned by LAN Cargo, pleaded guilty and were sentenced to pay a single criminal fine of \$109 million. EL AL, an Israeli company, pleaded guilty and was sentenced to pay a criminal fine of \$15.7 million. In April 2009, Luxembourg-based Cargolux Airlines International S.A.; Japan-based Nippon Cargo Airlines Co., Ltd.; and Korea-based Asiana Airlines, Inc. were each charged with fixing prices for international air shipments. Asiana was also charged with fixing passenger fares for flights from the United States to Korea. Cargolux pleaded guilty and was sentenced to pay a \$119 million criminal fine. Nippon pleaded guilty and was sentenced to pay a \$45 million criminal fine, and Asiana pleaded guilty and was sentenced to pay a \$50 million criminal fine. Also in April 2009, the Division charged the former Vice President of Cargo Sales in Europe for Martinair Holland N.V with conspiring to fix prices for international air shipments. The executive pleaded guilty and was sentenced to serve eight months in jail and to pay a \$20,000 criminal fine. In August 2009, a grand jury indicted the former Vice President of Global Sales of SAS Cargo Group A/S on charges of allocating customers and coordinating increases in certain surcharges for international air shipments, conspiring to obstruct justice, and obstructing justice.

31. **Coastal Shipping:** In October 2008, the Division charged four shipping executives with allocating customers, rigging bids, and fixing prices for coastal shipping services between the United States and Puerto Rico. All of the defendants pleaded guilty to the charges. Sales of freight services in the United States to Puerto Rico shipping lane total hundreds of millions of dollars every year, as ocean shipping is a primary way for people in Puerto Rico to receive essential goods. The defendants' employers shipped a variety of goods, including heavy equipment, medicine, food, and consumer goods, between the United States and Puerto Rico.

32. In January 2009, one of the four executives was sentenced to serve 48 months in prison, which is the longest jail sentence ever imposed on a single antitrust count. This case represents the first time that an individual has been sentenced to more than three years for a single antitrust charge since Congress raised the maximum prison sentence for antitrust crimes from three years to ten years in June 2004. A fifth executive has pleaded guilty to obstruction of justice in the investigation.

33. **Marine Hose:** During FY 2009, the Division continued its investigation of collusion in the marine hose industry. Marine hose is used to transfer oil between tankers and storage facilities and is purchased by companies that are involved in the off-shore extraction and transportation of petroleum products. It is also purchased and used by the Department of Defense. During the conspiracy, the conspirators sold hundreds of millions of dollars worth of marine hose and related products in the United States and elsewhere. As of the end of 2009, the Division had charged 12 individuals and three companies with fixing prices, rigging bids, and allocating market shares. Nine of the individuals have pleaded guilty, and two were acquitted at trial. One remains a fugitive. All three companies have pleaded guilty. In FY 2009, the Division charged British manufacturer Dunlop Oil & Marine Ltd., French manufacturer Trelleborg Industrie S.A.S., and a Japanese executive with allocating market shares, fixing prices and rigging bids for sales of marine hose in the United States and elsewhere. The Japanese executive was also charged with conspiring to make corrupt payments to foreign officials to secure business for his employer and its U.S. subsidiary in violation of the Foreign Corrupt Practices Act. The executive pleaded guilty to the charges and was sentenced to serve two years in prison and to pay an \$80,000 fine. The companies were sentenced to pay fines totaling more than \$8 million.

34. **Procurement Fraud:** The Division continues to play an active role in combating procurement fraud, including through the Department's National Procurement Fraud Task Force and Hurricane Katrina Fraud Task Force. As of the end of 2009, the Division has charged more than three dozen defendants in its War Zone investigations. In the last fiscal year, the Division brought cases that included various kickback, bribery, and fraud charges involving contracts for private security services for the Afghanistan

Infrastructure Rehabilitation Project, contracts for the delivery of bunkers and barriers and asphalt paving services at Bagram Airfield in Afghanistan, contracts with the Army Corps of Engineers in Afghanistan and Iraq, and contracts awarded at Camp Arifjan, Kuwait, including construction and fencing contracts.

35. In FY 2009, the Division prosecuted the niece of a U.S. Army major for conspiring to obstruct the investigation of bribes paid to her uncle for awarding contracts in support of Army troops in Iraq. The major, his wife, and sister were prosecuted earlier for their roles in the bribery scheme, and all the family members were sentenced in December 2009. The major pleaded guilty in 2008 to bribery, conspiracy to defraud the United States and to commit bribery, and conspiracy to launder money for his participation in the complex bribery scheme involving his work as an Army contracting officer in Kuwait. In return for awarding contracts, he received more than \$9 million in bribes, the largest amount of bribe money any U.S. military officer has ever been prosecuted for taking. The major also directed contractors to pay his wife and sister, among others, in order to conceal bribe payments. The major was sentenced to serve 17 ½ years in prison, the longest prison sentence ever imposed in a Division prosecution, and to pay \$9.6 million in restitution. His wife and sister, who also pleaded guilty to conspiracy to commit money laundering, were sentenced to prison and to pay restitution.

36. In April 2009, the Division obtained convictions after trial of a former contractor consultant with the U.S. Army Corps of Engineers and a dirt, sand and gravel subcontractor for bribery and conspiracy to commit bribery in connection with a \$16 million project for the reconstruction of a levee south of New Orleans. The subcontractor was sentenced to five years in prison, and the Corps of Engineers employee was sentenced to serve five years and ten months in prison. Another Corps of Engineers employee previously pleaded guilty to bribery in connection with the scheme.

37. The Division continued to bring charges in its military restraints and marine products investigations relating to sales to the Department of Defense. In FY 2009, the Division charged the owner of a New York designing and manufacturing company with conspiring to allocate a DOD contract for Navy straps used to secure munitions and other supplies on ships and airplanes. The Division also charged the Chief Executive Officer of a former Virginia marine products company with conspiring to rig bids and allocate customers for sales of foam-filled fenders and buoys sold to the Navy, Coast Guard, and other public and private entities. The fenders are used as a cushion between ships and structures such as piers, docks, and other ships. The buoys are used as channel markers and navigational aids. The Division also charged the former President of a California marine products company with conspiring to rig bids and allocate customers for sales of plastic marine pilings sold to the Navy, Coast Guard, and other public and private entities for use in port and pier construction. All of these defendants pleaded guilty to the charges against them.

38. The Division also continued to prosecute fraud in the Federal Communications Commission's E-Rate program. This program is designed to provide Internet access and telecommunications services to disadvantaged schools and libraries. In June 2009, the Division indicted a former Michigan school superintendent on charges of conspiring to accept a bribe and to commit mail fraud in connection with the receipt of free goods and services from an E-Rate vendor and with obstructing the Division's investigation. His trial is scheduled to begin in September 2010. As of the end of 2009, a total of seven companies and 19 individuals have pleaded guilty, been found guilty at trial, or entered civil settlements as a result of the Division's E-Rate investigations. These companies and individuals have been sentenced to pay more than \$42 million in fines and restitution. One individual defendant remains a fugitive.

39. In FY 2009, the Division brought six cases charging subcontractors and an employee of a prime contractor with conspiring to defraud the EPA at two New Jersey Superfund sites and with related offenses. The conspirators subverted the competitive bid process by paying kickbacks to employees of a

prime contractor in return for the award of subcontracts. The conspirators also inflated prices in order to cover the kickbacks. All defendants except two have pleaded guilty.

#### 2.4.2. DOJ Civil Non-Merger Enforcement

40. On September 18, 2009, the Department advised the U.S. District Court for the Southern District of New York that it should not accept the proposed class action settlement in *The Authors Guild Inc. et al. v. Google Inc.* due to concerns regarding class action, copyright, and antitrust law. The settlement agreement between Google and the authors and publishers aims to resolve copyright infringement claims brought against Google by the Authors Guild and five major publishers in 2005 raised by Google's efforts to digitally scan books contained in several libraries. In its filing, the Department proposed that the parties should be encouraged to continue their productive discussions on changes to the agreement so as to address several concerns, including imposing limitations on the most open-ended provisions for future licensing, eliminating potential conflicts among class members, providing additional protections for unknown rights holders, addressing the concerns of foreign authors and publishers, eliminating the joint-pricing mechanisms among publishers and authors, and, whatever the settlement's ultimate scope, providing some mechanism by which Google's competitors can gain comparable access. The Department filed another brief in this matter on February 4, 2010. See [http://www.justice.gov/atr/public/press\\_releases/2009/250181.htm](http://www.justice.gov/atr/public/press_releases/2009/250181.htm).

41. On May 4, 2009, the Department announced that it had reached a proposed settlement with Consolidated Multiple Listing Service Inc. ("CMLS") that requires CMLS to change its rules to allow low-priced and innovative real estate brokers to compete with traditional brokers in the Columbia, South Carolina area. A multiple listing service, like the one operated by CMLS, is a joint venture of real estate brokers that combines its members' home listings information into an electronic database that is made available to all member brokers. Access to the database – and therefore membership in CMLS – was critical for any broker seeking to service clients in the area. The Department's settlement, finalized in August 2009, required CMLS (1) to change rules imposing burdensome prerequisites to membership that prevented some brokers, such as those who would compete most aggressively on price, from listing homes for sale, and (2) to repeal rules that required brokers to provide a full set of brokerage services regardless of the client's desires. See [http://www.justice.gov/atr/public/press\\_releases/2009/245505.htm](http://www.justice.gov/atr/public/press_releases/2009/245505.htm).

42. On April 16, 2009, the Department told the U.S. District Court responsible for the *Microsoft* final judgment that it was necessary to extend the term of certain portions of that judgment by at least 18 months, through May 12, 2011. The Department said that an extension was necessary to ensure the quality of the technical documentation Microsoft provides to licensees. Section III.E of the final judgment requires that Microsoft make available to competing server software developers, on reasonable and non-discriminatory terms, certain technology used by Microsoft to make its server operating systems interoperate with client PCs running the Windows operating system. Microsoft must provide licensees with technical documentation that is designed to enable them to use this technology in their own server products so that those products work better with Windows. Microsoft and antitrust enforcers from 17 states and the District of Columbia joined in the filing. See [http://www.justice.gov/atr/public/press\\_releases/2009/244922.htm](http://www.justice.gov/atr/public/press_releases/2009/244922.htm). The court entered the modified judgment on April 22, 2009.

43. On November 5, 2008, the Department announced that Yahoo! Inc. and Google Inc. had abandoned their advertising agreement after the Department informed the companies that it would file an antitrust lawsuit to block its implementation. The Department said that if implemented, the agreement between these two companies accounting for 90 percent or more of each relevant market would likely harm competition in the markets for Internet search advertising and Internet search syndication. The agreement would have enabled Yahoo! to replace a significant portion of its own Internet search results advertisements with search results advertisements sold by Google. After an extensive investigation facilitated by the companies' cooperation and agreement to provide the Department time to investigate

prior to implementation, the Department concluded that Google and Yahoo! would have become collaborators rather than competitors for a significant portion of their search advertising businesses, materially reducing important competitive rivalry between the two companies. See [http://www.justice.gov/atr/public/press\\_releases/2008/239167.htm](http://www.justice.gov/atr/public/press_releases/2008/239167.htm).

#### 2.4.3 *Enforcement of DOJ Consent Decrees*

44. On January 14, 2009, the U.S. District Court for the District of Columbia found AT&T in civil contempt of a March 2008 consent decree and a related court order in connection with AT&T's acquisition of Dobson Communications Corporation. Under the consent decree, AT&T was required to divest mobile wireless telecommunication businesses in three rural service areas. The United States alleged that AT&T violated the two court orders by failing to separate confidential customer account information of the divested businesses from its own customer records and by failing to take other actions needed to prevent unauthorized disclosure. AT&T personnel consequently obtained unauthorized access to the divested businesses' competitively sensitive customer information and used it to solicit and win away some of the divested businesses' customers. AT&T agreed to pay more than \$2 million as part of a civil settlement with the Department that resolved AT&T's alleged court order violations. See [http://www.justice.gov/atr/public/press\\_releases/2009/241435.htm](http://www.justice.gov/atr/public/press_releases/2009/241435.htm).

#### 2.4.4 *FTC Non-Merger Enforcement Actions*

45. **Cephalon, Inc.** The Commission is charging Cephalon with an illegal pay-for-delay agreement for its branded drug, Provigil. Provigil is a Food and Drug Administration ("FDA")-approved treatment for excessive sleepiness in patients with sleep apnea, narcolepsy, and shift-work sleep disorder, with annual U.S. sales of over \$800 million. The Commission charges that Cephalon paid four firms to refrain from selling generic versions of Provigil until 2012. The Commission's complaint was filed in February, 2008, and the Commission argued in opposition to a motion to dismiss the complaint in October 2009. The motion to dismiss was denied in March 2010 and the case is currently pending in the Eastern District of Pennsylvania. See <http://www.ftc.gov/os/caselist/0610182/index.shtm>.

46. **Alta Bates Medical Group, Inc.** Alfa Bates Medical, a 600-physician independent practice association serving the Berkeley and Oakland, California area, agreed to settle FTC claims that it fixed prices charged to health care insurers. The FTC's complaint focused on Alta Bates's contracts with health plans to provide fee-for-service medical care. Under these arrangements, the payor compensates physicians for services pursuant to agreed-upon fee schedules. According to the complaint, since at least 2001, Alta Bates has orchestrated collective negotiations for fee-for-service contracts. The FTC order, approved in July 2009, prohibits Alta Bates from collectively negotiating fee-for-service reimbursements or engaging in a related group boycott. See <http://www.ftc.gov/opa/2009/06/altabates.shtm>.

47. **National Association of Music Merchants (NAMM).** On March 4, 2009, the FTC settled charges that the NAMM violated federal law by enabling and encouraging the exchange of competitively sensitive price information among its 9,000 members nationwide. NAMM is a trade association whose members include most U.S. manufacturers, distributors, and dealers of musical instruments. The FTC alleged that NAMM organized meetings at which its members were encouraged to communicate, and did in fact share, information about prices and business strategy. To the detriment of consumers, NAMM's conduct enhanced the members' ability to coordinate price increases for musical instruments. According to the FTC's complaint, NAMM's conduct crossed the line that divides legitimate trade association activities from unfair methods of competition. While trade associations such as NAMM often provide valuable pro-competitive functions, the FTC contended that NAMM violated federal law when the association engaged in conduct that had the "principal tendency or likely effect of harming competition and consumers." In settling the complaint, NAMM has agreed to stop engaging in such conduct. See <http://www.ftc.gov/opa/2009/03/namm.shtm>.

48. **Bristol-Myers Squibb Company (BMS).** On March 31, 2009, pursuant to Section 5(I) of the Federal Trade Commission Act, the FTC brought its first civil penalty action to enforce the reporting requirement of the Medicare Modernization Act (MMA). The Commission obtained \$2.1 million – the largest fine available by law – from BMS for failing to inform the FTC of agreements reached with Apotex, Inc., regarding potential generic competition to its blockbuster drug Plavix. BMS's conduct allegedly violated a 2003 FTC Order and the MMA, which require that certain drug company agreements be accurately reported to both the Commission and the DOJ. In this first action under the MMA, the Commission charged the BMS failed to disclose that, as part of a patent settlement with Apotex, BMS orally promised that it would not compete with Apotex during the first 180 days that Apotex marketed its new generic drug. See <http://www.ftc.gov/opa/2009/03/bmsplavix.shtm>.

49. **Watson Unimed.** In February 2009, the Commission and the California Attorney General challenged an agreement between Solvay Pharmaceuticals, Inc., maker of AndroGel, and two generic drug manufacturers – Watson Pharmaceuticals and Par Pharmaceuticals – to abandon their patent challenges and delay marketing a generic formulation until 2015. AndroGel is Solvay's branded testosterone-replacement drug, a prescription pharmaceutical with sales of more than \$400 million a year. According to the FTC's complaint, the generic manufacturers each sought regulatory approval from the FDA to market generic versions of AndroGel. In their FDA filings, both companies certified that their products did not infringe the only patent Solvay had relating to AndroGel, and that the patent was invalid. The complaint charges that Solvay agreed to pay the generic companies to abandon their patent challenges and agree not to bring a generic AndroGel product to market for nine years. This case was transferred to the Northern District of Georgia, and in February 2010, the court dismissed the FTC's complaint. See <http://www.ftc.gov/os/caselist/0710060/index.shtm>.

50. **West Penn Multi-List.** West Penn, the operator of the only real estate multiple listing service (MLS) in the Pittsburgh, Pennsylvania metropolitan area, agreed to settle FTC charges that certain restrictions on access to its MLS services were anticompetitive. The MLS provider limited brokers that could utilize its services by mandating that each broker have a traditional full-time listing agreement with their seller, thus constraining the ability of brokers with non-traditional listing agreements to compete, as use of the service is necessary for a broker to provide effective residential real estate brokerage services to buyers and sellers in the area. The FTC's consent order was issued in January 2009. See <http://www.ftc.gov/opa/2009/01/westpenn.shtm>.

51. **AllCare IPA.** In December, 2008, the Commission challenged the conduct of AllCare Individual Practice Association, alleging that AllCare restrained competition in fee-for-service contracts by fixing prices and other contract terms with payors, engaging in collective negotiations over the terms and conditions of dealing with payors, and preventing group members from negotiating with payors except on terms approved by AllCare. The Commission issued a consent order prohibiting AllCare from entering into agreements between or among physicians: 1) to negotiate on behalf of any physician with any payor; 2) to refuse to deal, or threaten to refuse to deal, with any payor; 3) to designate the terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; 4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than one involving AllCare. See <http://www.ftc.gov/opa/2008/12/allcare.shtm>.

52. **Boulder Valley IPA.** The Commission challenged the conduct of Boulder Valley Individual Practice Association for refusing to deal, or threatening to refuse to deal with insurance providers that failed to increase fees paid to group doctors, and also prevented members from contracting with payors, except through Boulder Valley. During the period between 2001 and 2006 Boulder Valley IPA threatened to terminate contracts with payors unless they agreed to pay increased fees-for-service set by Boulder Valley, effectively engaging in illegal price fixing, and harming Boulder county area consumers by charging higher prices for the various physician services offered. On December 24, 2008, the FTC issued a consent order against Boulder Valley in similar terms to the AllCare IPA. See <http://www.ftc.gov/opa/2008/12/allcare.shtm>.

53. **Golf Galaxy Inc./Golf Town Canada, Inc.** In October, 2008, the Commission issued a consent order to settle concerns that Golf Galaxy, a subsidiary of Dick's Sporting Goods Inc., entered into an illegal agreement with Golf Canada to allocate the market for golf merchandise in the United States and Canada. The agreement barred Golf Canada from opening stores in the United States in exchange for privileged business information from Golf Galaxy, including blueprints, merchandising plans, and sales reports. The Commission's consent order prevents Golf Galaxy from further dividing or allocating the market, and rendered its 2004 non-compete agreement with Golf Canada unenforceable. See <http://www.ftc.gov/opa/2008/10/dickssg.shtm>.

## **2.5 *Advisory Letters from the FTC***

54. Under its Rules, the Commission or its staff may offer industry guidance in the form of an advisory opinion regarding proposed conduct in matters of significant public interest. In recent years, the staff of the Bureau of Competition has issued several advisory opinions in the area of health care provider collaboration. These competition advisory opinions, which can be found on the Commission website (see <http://www.ftc.gov/ftc/opinions.shtm>), inform the public about the Commission's analysis in novel or important areas of antitrust law. In FY 2009, the FTC issued an advisory opinion on clinical integration.

- On April 13, 2009, FTC staff issued an opinion letter on a proposal from TriState Health Partners, Inc., a physician-hospital organization based in Hagerstown, Maryland, to clinically integrate its operations, including joint contracting by its members with health plans and self-insured employers. The advisory opinion explained that *bona fide* clinical integration efforts have the potential to achieve significant cost savings while improving the quality of care, especially when the members coordinate their clinical practice in a substantial way. FTC staff concluded that even though the group has a large market presence, the program will be non-exclusive, allowing members to contract individually outside of the proposed program. Under these conditions, TriState's joint contracting with payors would be subordinate and reasonably necessary to achieve clinical integration of its members. Based on these representations, the FTC staff did not recommend a challenge to the program in its opinion letter. See <http://www.ftc.gov/opa/2009/04/tristate.shtm>.

## **2.6 *Business Reviews Conducted by the Department of Justice***

55. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued four business review letters in FY 2009. The Department's business review letters can be found at <http://www.usdoj.gov/atr/public/busreview/letters.htm>.

- On September 8, 2009, the Department announced it would not challenge a proposal by seven regional less-than-truckload ("LTL") freight transportation companies to jointly bid and engage in other collaborative activity as part of their LTL joint venture, Reliance Network. Each company operates in a distinct North American region, and the collaboration will allow the companies to offer "seamless" nationwide LTL services. The Department said that the proposed conduct is not likely to reduce competition in regional LTL freight transportation markets and could enhance competition in the long haul LTL market.
- On September 4, 2009, the Department announced it would not challenge a proposal by Memorial Health Inc. and St. Joseph's/Candler Health System to enter into an exclusive joint purchasing agreement to jointly evaluate and purchase certain medical and surgical supplies. Both Memorial and St. Joseph's/Candler said they will abide by the purchasing requirements of the antitrust safety zone set forth in Statement 7 of the 1996 DOJ/FTC *Statements of Antitrust Enforcement Policy in Health Care*.

- On November 24, 2008, the Department announced it would not challenge the proposed formation of Concepta Services LLC, a consortium that will offer large commercial insurance policies to companies. Concepta membership will be limited to insurers who do not have the ability to offer such large policies on their own. It will allow commercial insurers to combine their insurance capacity to jointly offer larger commercial insurance policies. The Department said that the consortium might provide a competitive new option for those businesses looking to purchase these large policies.
- On October 21, 2008, the Department announced it would not challenge a proposal by RFID Consortium LLC, a group of companies each holding at least one essential ultra high frequency radio frequency identification (“UHF RFID”) patent, to jointly license patents needed to comply with standards for UHF RFID technology. UHF RFID is a type of automatic identification and data capture technology using radio frequency waves. The Department said that the proposed arrangement would likely yield procompetitive benefits because it limits the ability of the consortium’s members to use their intellectual property rights to block or delay the implementation of the UHF RFID standards, thus creating cost savings and allowing greater access to the technology.

### 3. Enforcement of antitrust laws and policies: mergers and concentrations

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

56. In FY 2009, the Department, at the request of the FTC, filed two lawsuits alleging violations of the Hart-Scott-Rodino Act’s pre-merger notification requirements. First, on June 23, 2009, the DOJ announced that it had filed a complaint and proposed civil settlement in which media executive John Malone agreed to pay a \$1.4 million civil penalty for acquiring voting securities in Discovery Holding Co., a leading provider of non-fiction television entertainment, in violation of the Act’s notification and waiting requirements. Various acquisitions by Malone in 2005 through April 2008 resulted in holdings above the notification thresholds then in effect, and after Malone made a corrective filing, he made additional purchases of Discovery voting securities during the waiting period triggered by that filing. Second, on December 15, 2008, the DOJ announced that two related investment funds, ESL Partners L.P. and ZAM Holdings L.P., had agreed in a proposed settlement to pay civil penalties totaling \$800,000 for acquisitions in 2004 that resulted in each of them holding voting securities of AutoZone Inc. valued in excess of the reporting threshold then in effect. The court in both cases promptly approved the civil penalty settlements.

#### 3.2 Significant Merger Cases

##### 3.2.1 FTC Merger Challenges and Cases

57. **K&S AG/Dow Chemical.** In September, 2009, the Commission challenged K+S Aktiengesellschaft’s \$1.68 billion acquisition of Morton International, two major suppliers of bulk de-icing salt to state and local governments. The Commission’s complaint alleged that the transaction as originally proposed would have substantially reduced competition in both the Maine and Connecticut local markets, leading to higher prices for this essential commodity sold to local and state governments to treat roads. In order to remedy these concerns, the parties agreed to sell bulk de-icing assets in Maine and Connecticut to FTC-approved buyers. Commission staff worked closely with the Attorneys General for Maine and Connecticut in its investigation. See <http://www.ftc.gov/opa/2009/09/mortonsalt.shtm>.

58. **Thoratec Corporation/HeartWare International, Inc.** The FTC successfully challenged Thoratec’s proposed \$282 million acquisition of rival medical device maker HeartWare in July 2009, charging that the proposed acquisition would have enhanced Thoratec’s existing monopoly in the market

for left ventricular assist devices (“LVADs”) used to treat patients with advanced heart failure. Prior to its proposed acquisition, HeartWare was positioned to obtain FDA approval for its LVAD device in 2012, making it the only LVAD device to challenge Thoratec’s LVAD monopoly. The parties abandoned the transaction after the Commission announced its intention to challenge it. See <http://www.ftc.gov/opa/2009/07/thoratec.shtm>.

59. **Carilion Clinic/Center for Advanced Imaging.** On July 24, 2009, the FTC issued an administrative complaint challenging Carilion Clinic’s 2008 acquisition of two outpatient clinics in the Roanoke, Virginia area. According to the FTC’s administrative complaint, the two clinics – the Center for Advanced Imaging and the Center for Surgical Excellence – had strong reputations for offering high-quality care and convenient services at prices much lower than Carilion’s. The acquisitions therefore eliminated important competition that benefitted patients, employers, and health plans in the Roanoke area. Following the transaction, Carilion faced competition for outpatient imaging and surgical services from only one other provider, HCA, the other major hospital system in the Roanoke area. In light of the FTC’s challenge, Carilion agreed to sell the two outpatient clinics and related assets to FTC-approved buyers. See <http://www.ftc.gov/opa/2009/07/carilion.shtm>.

60. **Talecris Biotherapeutics/CSL.** On May 27, 2009, the FTC approved an administrative complaint to block CSL Limited’s proposed \$3.1 billion acquisition of Talecris Biotherapeutics. CSL and Talecris are two of the world’s leading makers of plasma protein therapies (immune globulin (“Ig”), Albumin, Rho-D, and Alpha-1) used to treat blood borne illnesses. The proposed acquisition would reduce the number of competitors in the U.S. markets for Ig and Albumin from five to four. In addition, in the U.S. markets for Rho-D and Alpha-1, the proposed transaction would reduce the number of competitors from three to two. The FTC’s complaint alleged that a history of consolidation in the plasma industry has shown that the industry uses consolidation as a tool to limit supply and drive prices higher. According to the complaint, the proposed acquisition of Talecris was particularly concerning because it was undergoing substantial expansion that – absent the acquisition – would have increased availability, and lowered prices, of these life-saving therapies. In approving the administrative complaint, the Commission authorized the staff to seek a preliminary injunction in federal district court in Washington, D.C., to stop the transaction pending completion of the administrative trial. Soon after the FTC filed its complaint, the companies announced their decision to abandon the merger. See <http://www.ftc.gov/opa/2009/05/talecris.shtm>.

61. **BASF/Ciba Specialty Chemicals.** BASF settled FTC charges in April 2009, that its proposed \$5.1 billion acquisition of Ciba would lead to reduced competition for two widely used high performance pigments (bismuth vanadate and indanthrone blue). High performance pigments provide color to a range of products, including inks, coatings, plastics, and fibers, used in a wide variety of every day products. High performance pigments offer superior durability and light-fastness compared to other types of chemical pigments, making them particularly suited for products exposed to sunlight and weather, such as car coatings and building materials. Under the terms of the Commission’s settlement, BASF agreed to sell all assets, including intellectual property, related to the two pigments to an FTC-approved buyer. The FTC and the European Commission cooperated extensively throughout the course of their investigations. See <http://www.ftc.gov/opa/2009/04/basf.shtm>.

62. **Lubrizol/Lockhart Chemical.** In February 2009, the FTC challenged Lubrizol Corporation’s acquisition of the oxidate assets of The Lockhart Company, which had the effect of substantially lessening competition in the already highly concentrated U.S. market for chemical rust inhibitors. These inhibitors are commonly used to prevent rusting during the manufacture of metal products such as automobiles and other heavy equipment. According to the Commission’s complaint, the acquisition removed Lubrizol’s last substantial competitor in the relevant market. In addition, the Commission challenged a non-compete agreement included in the terms of the acquisition which prevented Lockhart from competing in the relevant market for 5 years as anticompetitive because it restrained the ability of new firms to enter the



market. The Commission issued a consent order remedying its anticompetitive concerns requiring the divestiture of the oxidate assets in question to Additives International and the elimination of the non-compete agreement. See <http://www.ftc.gov/opa/2009/02/lubrizol.shtm>.

63. **Dow Chemical/Rohm&Haas.** In January, 2009, the Commission challenged Dow Chemical's \$18.8 billion proposed acquisition of Rohm & Haas Company as anticompetitive in the markets for various acrylics and other industrial chemicals used to make coated paper products, paints, and adhesives. According to the Commission's complaint, the product markets in question include acrylic monomers, used in goods ranging from hygiene products to paints and industrial coatings, hollow sphere particles, used in paper products, and acrylic latex polymers, used in traffic paints. Given the high concentration in each of the product markets, the proposed acquisition would have represented a merger to monopoly. To remedy its anticompetitive concerns, the Commission required Dow to divest its assets in the aforementioned product markets to an FTC approved buyer. Throughout the course of the investigation, the FTC cooperated extensively with the European Commission, the Canadian Competition Bureau, and the Mexican Federal Competition Commission, to resolve competition concerns raised by the acquisition. See <http://www.ftc.gov/opa/2009/01/dow.shtm>.

64. **Inverness Medical Innovations, Inc./ACON.** To restore competition in the U.S. market for consumer pregnancy tests, the Commission, in December 2008, effectively reversed a consummated transaction in which Inverness Medical Innovations, purchased the assets related to the development of a water-soluble dye based pregnancy test from ACON Laboratories. According to the Commission's complaint, Inverness, holding a relevant market share of 70%, restrained competition in two ways. First, it issued covenants not to compete to ACON, took profits from ACON's joint venture with Church & Dwight, and purchased intellectual property rights which would restrict ACON from developing competing products. Second, Inverness limited product innovation by purchasing, but not using, the water-soluble dye test technology purchased from ACON, one of the only companies utilizing that technology. The Commission's consent order ended any restrictions Inverness had over the joint venture between ACON and Church & Dwight, and required that Inverness divest its assets relating to the water-soluble dye technology and its related pregnancy test product. See <http://www.ftc.gov/opa/2008/12/inverness.shtm>.

65. **King Pharmaceuticals/Alpharma.** On December 28, 2008, the Commission issued a consent order to restore competition in the market for oral long-acting opioids ("LAOs"), which are used to manage moderate-to-severe chronic pain. The FTC intervened in King Pharmaceutical's proposed \$1.6 billion acquisition of rival drug-maker Alpharma Inc. because the transaction would have joined the two leading producers of morphine sulfate oral LAOs in the U.S., a market which was already highly concentrated and which had annual sales of \$4 billion in 2007. Other drugs such as short-acting opioids or non-oral opioids are not close therapeutic substitutes for the oral LAO products. In order to maintain competition in the market, the Commission's consent order required King to divest its Kadian business to Actavis, a company which already manufactured the drug for King, and which could then produce a generic equivalent of the drug sooner than would have been permitted under King's patent, which would not have expired until 2010. See <http://www.ftc.gov/opa/2008/12/alpharma.shtm>.

66. **Teva Pharmaceuticals/Barr Pharmaceuticals.** In December 2008, the Commission settled antitrust concerns raised by the proposed \$8.9 billion acquisition of Barr Pharmaceuticals by Teva Pharmaceutical Industries. The proposed acquisition would have lessened competition in the markets for 17 commonly used generic medications including drugs used in the treatment of cancer, bacterial infections, diabetes, acid reflux, and depression as well as several varieties of oral contraceptives. According to the Commission's complaint, the acquisition would have likely led to higher prices for consumers through the removal of one of only four competitors in each of these markets. The Commission also contended that entry into the market for manufacturing and selling the relevant drugs would not be timely, likely, or sufficient to counteract the anticompetitive impacts of the acquisition. It estimated that

the combination of the time needed to develop new drugs and gain FDA approval would typically be at least two years. Further, some of the relevant markets are relatively small and in decline, so the sales opportunities for a new entrant likely would be insufficient to warrant the time and investment needed to enter the relevant markets. The Commission's consent agreement required both Teva and Barr to sell assets in 29 U.S. markets. The rights to manufacture and market the drugs were to be divided between Watson Pharmaceuticals or Qualitest Pharmaceuticals, both of which were already competitors in other generic drug markets. See <http://www.ftc.gov/opa/2008/12/tevbarr.shtm>.

67. **Ovation Pharmaceuticals, Inc.** The FTC filed a complaint in the U.S. district court in Minneapolis on December 16, 2008, seeking a permanent injunction to remedy harmful effects from Ovation Pharmaceutical's 2006 acquisition of the rights to sell NeoProfin, a drug used to treat congenital heart disease in approximately 30,000 premature babies each year in the U.S. When it acquired NeoProfen, Ovation already held the rights to Indocin I.V., the only other drug used to treat this serious condition. Ovation purchased the rights to Indocin from Merck in August 2005. At that time, NeoProfen was awaiting regulatory approval by the FDA. According to the FTC's complaint, Ovation expected that NeoProfen, once approved, would take a substantial portion of sales from Indocin. The FTC charged that to eliminate the threat that NeoProfen posed, Ovation acquired the U.S. rights to NeoProfen from Abbott Laboratories in January 2006. The NeoProfen transaction fell below the regulatory threshold for reporting acquisitions to the federal antitrust authorities. In the week-long trial in December 2009 before the U.S. district court in Minneapolis, the FTC argued that Ovation used its monopoly position to raise prices for the drug from \$36 to \$500 per vial. The FTC is seeking divestiture and disgorgement of all unlawfully obtained profits since the merger; closing arguments were heard on March 11, 2010. See <http://www.ftc.gov/opa/2008/12/ovation.shtm>.

68. **Huntsman Corporation/Hexion Specialty Chemicals Inc.** On October 2, 2008, the FTC issued a consent order in relation to Hexion LLC's proposed \$10.6 billion acquisition of rival chemical manufacturer Huntsman Corporation. The order requires the divestiture of Hexion's specialty epoxy business, and prevents the sharing of sensitive and non-public information which could lead to coordination of prices. Subsequently, Hexion LLC and Huntsman Corporation petitioned the Commission to reopen and set aside two orders related to their proposed merger because they terminated their planned merger and withdrew their premerger notification filings. The Commission determined that the firms have satisfactorily shown that changed conditions require that the matter be reopened. In particular, the firms have abandoned the acquisition that the Orders were intended to remedy. In its decision, the Commission set aside the Asset Maintenance Order in its entirety, as well as the Decision and Order regarding Huntsman. Throughout the investigation, the FTC coordinated with the European Commission, the Canadian Competition Bureau, and the Mexican Federal Competition Commission, to resolve competition concerns raised by the acquisition. See <http://www.ftc.gov/opa/2008/10/hexion.shtm> and <http://www.ftc.gov/opa/2009/06/hexion.shtm>.

69. **CRH plc/Robert Schlegel.** On January 14, 2009, the FTC issued an administrative complaint to challenge Oldcastle Architectural's (a subsidiary of CRH) proposed \$540 million acquisition of Pavestone Companies as anticompetitive in the US market for drycast concrete hardscape products sold to retailers such as The Home Depot, Lowe's, and Wal-Mart Stores. According to the complaint, the acquisition would reduce competition by combining the only two companies capable of the national manufacture and sale of these heavy products, which include concrete pavers, segmented retaining wall blocks, and concrete patio products, due to the difficulty in distribution of such products, and the fact that both Oldcastle and Pavestone already possess large distribution networks. The acquisition would result in Oldcastle gaining a 90% market share for the manufacture and sale of these drycast products to home centers in the United States. In addition to the administrative complaint, the Commission authorized staff to file a complaint in Federal District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction to prevent consummation of the proposed transaction pending an administrative

trial on the merits. Since the respondents announced that they decided not to proceed with the proposed merger, the Commission dismissed the administrative complaint on January 29, 2009. See <http://www.ftc.gov/opa/2009/01/crh.shtm>.

70. **Mitchell International/CCC Information Services.** On November 25, 2008, the FTC filed suit to block the acquisition of CCC Information Services by Mitchell International. The transaction valued at \$1.4 billion, and, according to the Commission, would be anticompetitive in the market for “estimatics,” a database system used by auto insurers and repair shops to generate repair estimates for consumers. The FTC’s administrative complaint alleged that the transaction would also harm competition in the market for total loss valuation systems, which are used to inform consumers when their vehicle has been totaled. FTC staff concurrently filed a complaint in federal district court and on March 9, 2009, the U.S. District Court for the District of Columbia ordered a preliminary injunction and temporary restraining order preventing the parties from consummating the transaction pending a full administrative trial on the merits. The administrative complaint was dropped on March 13, 2009, since the respondents announced that they decided not to proceed with the proposed merger. See <http://www.ftc.gov/opa/2008/11/cccmitchell.shtm>.

71. **Red Sky Holdings/Newpark Resources.** On October 23, 2008, the FTC issued an administrative complaint to block CCS Corporation’s proposed \$85 million acquisition of Newpark Environmental Services. According to the complaint, the proposed transaction was anticompetitive because it would consolidate two of the leading providers of waste disposal services for the offshore oil and natural gas exploration and production (“E&P”) in the Gulf Coast Region, leading to higher prices and decreased service levels. E&P waste is generated during the drilling and production of oil and gas, and includes earth and rock displaced from drilling, drilling fluids, and produced water. Because these wastes are toxic, they must be handled and disposed of according to applicable environmental laws, using specialized techniques and facilities. The FTC filed a complaint in federal district court seeking a temporary restraining order and preliminary injunction to preserve the competitive *status quo*, pending an administrative trial on the merits. The parties decided to abandon the transaction in November 2008 and the FTC dismissed its administrative complaint in December 2008. See <http://www.ftc.gov/opa/2008/10/redsky.shtm>.

### 3.2.2 DOJ Merger Challenges and Cases

72. **Microsemi Corporation/Semicoa Inc.** On August 20, 2009, the Department filed a proposed settlement with the U.S. District Court for the Central District of California requiring Microsemi Corporation (Microsemi) to divest all of the assets that it acquired from Semicoa Inc. (Semicoa) on July 14, 2008. Without the divestiture, the original transaction would have reduced competition in the development, manufacture and sale of certain semiconductor devices used in military and civil applications ranging from satellites to nuclear missile systems. These semiconductor devices, small transistors and ultra-fast recovery rectifier diodes, are used to control the flow of electric current. Prior to the acquisition, Microsemi and Semicoa were the only manufacturers of small signal transistors qualified for military and civil applications. Microsemi’s acquisition of Semicoa’s assets, as originally proposed, would have resulted in increased prices and slower delivery of these semiconductor devices, including critical military and space components. Microsemi, headquartered in Delaware, reported total sales of approximately \$500 million in 2008. Semicoa, headquartered in California, reported sales of approximately \$15 million in 2008. See [http://www.justice.gov/atr/public/press\\_releases/2009/249246.htm](http://www.justice.gov/atr/public/press_releases/2009/249246.htm). The court entered final judgment on January 29, 2010.

73. **Sapa/Indalex.** On July 30, 2009, the Department filed a proposed settlement with the U.S. District Court for the District of Columbia that would require Sapa Holding AB (Sapa) and Indalex Holdings Finance Inc. (Indalex) to divest a North Carolina aluminum sheathing facility in order to proceed with Sapa’s proposed \$150 million acquisition of Indalex. Sapa, a Swedish corporation, and Indalex, based in Illinois, were the only two manufacturers of aluminum sheathing in the United States prior to the

merger. Aluminum sheathing is used to make coaxial cables, which are purchased by cable television companies for use in transmitting high frequency broadband signals to their subscribers. Without the Department's proposed modifications, the transaction would have substantially lessened competition for the manufacture and sale of aluminum sheathing in the U.S., resulting in increased prices and reduced quality, service and innovation. At the time of the proposed merger, Indalex had been in the process of filing for bankruptcy. In 2008, Sapa's sales of aluminum sheathing were approximately \$30.7 million and Indalex's sales were approximately \$12 million. See [http://www.justice.gov/atr/public/press\\_releases/2009/248514.htm](http://www.justice.gov/atr/public/press_releases/2009/248514.htm). The court entered final judgment on January 15, 2010.

74. **PNC/National City.** On December 11, 2008, the Department announced that the PNC Financial Services Group Inc. (PNC) and National City Corporation (National City) had agreed to sell 61 of National City's branch banking offices in western Pennsylvania, with deposits totaling approximately \$4.1 billion as of June 30, 2008, in order to resolve competitive concerns about the companies' pending merger. The divestures also included the commercial loans associated with the divested branches. As a result of the acquisition, PNC was to become the fifth largest bank in the U.S., with about \$289 billion in assets and about \$180 billion in total deposits. Without the divestures, the original transaction would have reduced competition in local markets for retail banking, small business banking and middle market banking services. The proposed settlement also included a divestiture of approximately half of National City's lending and related business that served customers seeking to borrow over \$1 million in Pittsburgh, and nearly all of the same business in Erie. PNC, headquartered in Pittsburgh, reported approximately \$128 billion in assets in 2008. National City, headquartered in Cleveland, reported approximately \$151 billion in assets in 2008. See [http://www.justice.gov/atr/public/press\\_releases/2008/240315.htm](http://www.justice.gov/atr/public/press_releases/2008/240315.htm).

75. **InBev/Anheuser-Busch.** On November 14, 2008, the Department filed a proposed settlement in the U.S. District Court for the District of Columbia requiring InBev N.V./S.A. (InBev) to divest subsidiary Labatt USA, along with a license to brew, market, promote and sell Labatt brand beer for consumption in the U.S., in order to proceed with InBev's \$52 billion acquisition of Anheuser-Busch Companies Inc. The transaction, as originally proposed, would have led to higher prices of beer in the Buffalo, Rochester and Syracuse metropolitan areas of New York. Prior to the merger, Anheuser-Busch's Budweiser brands, including Budweiser and Bud Light, and InBev's Labatt brands, including Labatt Blue and Labatt Blue Light, were the two biggest selling beer brand families in these regions. The original transaction would have eliminated competition between Labatt USA and Anheuser-Busch, resulting in higher prices to consumers. See [http://www.justice.gov/atr/public/press\\_releases/2008/239430.htm](http://www.justice.gov/atr/public/press_releases/2008/239430.htm). The court entered final judgment on August 11, 2009.

76. **JBS/National Beef.** On October 20, 2008, the Department filed a civil antitrust lawsuit with the U.S. District Court in Chicago to block the proposed acquisition by JBS S.A. (JBS), the third-largest U.S. beef packer, of National Beef Packing Company LLC (National Beef), the fourth-largest U.S. beef packer. If not blocked, the merger would have substantially changed the structure of the country's beef packing industry, eliminating a competitively significant packer and placing more than 80% of domestic fed cattle (cattle ready for slaughter) packing capacity in the hands of three firms: JBS, Tyson Foods Inc., and Cargill Inc. The combined entity would have become the largest beef packer in the country, with the ability to slaughter more than one-third of the national fed cattle packing capacity. Beef packers purchase \$30 billion in fed cattle annually from feedlots, slaughter them, and process them into USDA-graded cuts of beef and other products. Packers then package the cuts as boxed beef for sale to wholesalers and grocery chains. The merger would have lessened competition among packers for the purchase of fed cattle in certain domestic regions, as well as lessened competition among packers in the production and sale of USDA-graded boxed beef nationwide. This would have resulted in lower prices paid to cattle suppliers and higher beef prices paid by consumers. On February 20, 2009, JBS and National Beef announced their decision to abandon the JBS/National Beef transaction. The Department consequently terminated the pending litigation. See [http://www.justice.gov/atr/public/press\\_releases/2008/238382.htm](http://www.justice.gov/atr/public/press_releases/2008/238382.htm).

77. **Manitowoc/Enodis.** On October 6, 2008, the Department filed a proposed settlement in the U.S. District Court for the District of Columbia requiring The Manitowoc Company Inc. (Manitowoc) and Enodis plc (Enodis) to divest Enodis's entire U.S. ice machines business in order to proceed with Manitowoc's proposed \$2.7 billion acquisition of Enodis. The original transaction would have substantially reduced competition in the development, production, distribution and sale of commercial cube ice machines in the U.S., resulting in increased prices and reduced quality and innovation. Commercial cube ice machines are used by restaurants, convenience stores, hotels and other businesses that require significant volumes of cube ice. Manitowoc and Enodis were two of only three significant manufacturers of commercial cube ice machines operating in the U.S. Headquartered in London, Enodis was a global food service equipment company with sales of \$153 million in commercial ice machines and related equipment in the U.S. Under the terms of the proposed settlement, Manitowoc and Enodis were required to divest Enodis's entire business in the development, production, distribution and sale of ice machines, ice machine parts and related equipment in the U.S. The remedy contained in the Department's proposed settlement was consistent with the remedy obtained in a concurrent antitrust investigation conducted by the European Commission. The Department and the European Commission cooperated extensively throughout the course of their investigations. See [http://www.justice.gov/atr/public/press\\_releases/2008/237997.htm](http://www.justice.gov/atr/public/press_releases/2008/237997.htm). The court entered final judgment on February 17, 2009.

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

##### **4.1 *International Antitrust Cooperation Developments***

78. The Agencies have played a lead role in promoting cooperation and convergence towards sound competition policies internationally, through both building strong bilateral ties with their major enforcement partners and their participation in multilateral bodies such as the International Competition Network (ICN), the Competition Committee of the Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the Asia-Pacific Economic Cooperation (APEC). In June 2009, Assistant Attorney General Varney was elected chair of the OECD Competition Committee's Working Party No. 3 on Cooperation and Enforcement.

79. On November 10, 2009, the Agencies signed a Memorandum of Understanding (MOU) on antitrust cooperation with the Russian Federal Antimonopoly Service (FAS). The purpose of the MOU is to promote greater cooperation and further strengthen the relationships between the U.S. antitrust agencies and the FAS through technical cooperation and regular communication. While the United States has several cooperation agreements with foreign jurisdictions, this is the first antitrust cooperation MOU entered into directly between competition agencies, and the Agencies expect that it will become a model, as appropriate, for future MOUs.

80. In FY 2009, the Agencies continued to play a lead role in the ICN. Based on the work of the Merger Working Group, co-chaired by the DOJ and Irish Competition Authority, ICN members adopted recommended practices addressing competitive effects in horizontal merger analysis. The ICN Unilateral Conduct Working Group, co-chaired by the FTC and the German Bundeskartellamt, produced comparative reports covering tying, bundled discounting, and loyalty discounts and rebates, and in March 2009 hosted a workshop on assessing dominance/substantial market power and evaluating unilateral conduct. The Cartel Working Group continued its series of international enforcer workshops in October 2009 and held a series of discussions on the criminalization of hard core cartel conduct. In addition, FTC Commissioner Kovacic serves as ICN's Vice-Chair for Outreach and, with his FTC team, launched the ICN Blog and Bulletin Board project (see <http://www.icnblog.org>).

## **4.2. Outreach**

81. In FY 2009, the Agencies continued to provide technical assistance on competition law and policy matters to their international antitrust enforcement counterparts. The Agencies' international technical assistance programs conducted over 60 missions in over 30 countries. As part of U.S. efforts to assist China as it implements its new antitrust laws, senior FTC and DOJ officials and staff held discussions with the Chinese antitrust agencies in the United States and China. The Agencies are also working with India's Competition Commission as it begins to implement its 2002 Competition Act. The Agencies' training missions included programs in Brazil, Bulgaria, Egypt, Hungary, Kazakhstan, Kenya, Russia, South Africa, Tanzania, and Turkey, and the FTC placed long-term resident advisors in Latin America and Vietnam. Recognizing the importance and quality of the FTC's work in this regard, Congress provided the FTC additional funding to provide international technical assistance.

82. In October 2009, the Agencies issued a report on the findings from their 2008 public workshop on technical assistance (see ¶ 60, FY 2008 Annual Report). The workshop brought together panelists—including officials from the competition authorities of Hungary, Italy, Mexico, and Peru, leading academics, private practitioners, and international organizations such as OECD and the World Bank—to discuss the FTC's and the Antitrust Division's technical assistance programs. The report is available at: <http://www.justice.gov/atr/public/reports/250908.htm>.

83. As part of its ongoing effort to build effective relationships, the FTC provides opportunities for counterparts from foreign agencies to spend several months working directly with FTC staff on investigations, subject to appropriate confidentiality protections. The FTC's International Fellows and Interns program is based on the FTC's U.S. SAFE WEB Act authority, which also enables the FTC to send staff members to work in foreign competition agencies. In FY 2009, the FTC hosted 12 International Fellows and Interns from countries such as Argentina, Austria, Israel, Poland, and Singapore. It also sent FTC staff to work in foreign competition agencies such as the EC's Directorate General for Competition, the U.K. Competition Commission, and the U.K. Office of Fair Trading. These assignments provide valuable opportunities for participants to obtain a deep understanding of their international partners' laws and challenges. This knowledge provides critical support for coordinated enforcement and promotes convergence toward sound policy.

## **5. Regulatory and Trade Policy Matters**

### **5.1. Regulatory Policies**

#### *5.1.1. Joint DOJ-FTC Activities: Federal and State Regulatory Matters*

84. In a joint comment filed with the Supreme Court of Hawaii on April 20, 2009, the Agencies advised that a proposed rule concerning the unauthorized practice of law could unduly restrict the activities of non-lawyers in Hawaii. In January 2008, the Agencies had commented on the original version of the rule proposed by the Hawaii State Bar Association, which adopted a broad definition of "practice of law" that would restrict non-lawyers from competing with lawyers. Although the definition was revised to limit the definition to instances in which there is a client relationship of trust or reliance, the joint comment raised the concern that the definition was still too broad and created an irrebuttable presumption that the identified activities are the practice of law. While the revised proposed rule contains many exceptions and exclusions to allow non-lawyers to compete with lawyers in Hawaii, the Agencies' April 2009 comment states that "exceptions cannot capture every instance where consumers would benefit from lawyer/non-lawyer competition." In August 2009, the Hawaii Supreme Court tabled the proposed rule "with no immediate plans for further consideration."

### 5.1.2 *FTC Staff Activities: Federal and State Regulatory Matters*

85. In September 2009, the FTC submitted comments to the Federal Communications Commission (“FCC”) concerning the development of a National Broadband Plan. In its comments, the FTC states that the FCC should take into consideration the FTC’s two primary missions – promoting competition and protecting consumers in the marketplace. The FTC comments point out that competition and consumer protection work together to benefit consumers. Competition pressures producers and service providers to offer customers the most attractive array of choices with respect to price, quality, and other options. At the same time, consumer protection policy promotes informed decision-making by customers and requires sellers to provide meaningful, timely information about their products and services. The FTC’s comments questioned whether there is significant competition within the broadband arena. To evaluate competition and tailor appropriate regulatory policies, the FTC suggests that the FCC use some of the analytical tools used by the FTC and DOJ in antitrust cases.

86. On May 1, 2009, FTC staff provided comments to the Louisiana House of Representatives concerning proposed Louisiana House Bill 687, which would restrict the practice of in-school dentistry in the state. Among others, with a limited exception, the bill would prohibit dentists from offering in-school services unless they have provided services for at least six months during the past five years, even though such services would expand and improve dental care. According to the comment, the FTC staff was concerned that if the proposed legislation becomes law, “fewer students – especially the indigent and economically disadvantaged – will receive dental care,” as they may not have access to dental treatments outside of school. A comment was provided on May 22, 2009, on the amended version of the proposed bill. After the bill was passed allowing dentistry to continue in schools but mandating that the Board of Dentistry adopt rules to ensure safe delivery of care, the FTC filed additional comments in December, advocating that the Board strike proposed rule provisions that would make it more difficult to conduct dentistry in a mobile setting. The comment explained that, if enacted, the bill is likely to make the most vulnerable of Louisiana’s children worse off by denying many the opportunity to receive dental care.

87. On April 28, 2009, the FTC submitted a comment concerning the Federal Energy Regulatory Commission’s (“FERC”) competitive assessments of partial acquisitions of electric power providers, including acquisitions by private equity firms holding investments in competing electric power providers. FERC policy is also relevant in evaluating the eligibility of a public utility to sell wholesale electricity at market-based rates. In its comment, the FTC encouraged FERC to avoid adopting policies that assess competitive effects based solely on control and that fail to examine closely the competitive effects of partial acquisitions that fall short of control. The FTC urged FERC to engage in careful, case-by-case analysis of the potentially significant competitive effects that can stem from partial – but not control-conferring – acquisitions.

88. On March 31, 2009, FTC staff filed a comment stating that provisions of New York State Senate Bill 58 would likely have the unintended consequence of increasing prices that New York consumers and health plans pay for prescription drugs. As a result, the bill may also decrease the number of New York citizens with insurance coverage for such drugs, the comment stated. Health plans often contract with pharmacy benefit managers, which administer the plans’ prescription drug benefits. Portions of the New York bill would mandate that the pharmacy benefit manager make certain disclosures relating to the cost of its services, its contracts with manufacturers, and actual and potential conflicts of interest. The bill would also impose certain types of contractual relationships between pharmacy benefit managers and health plans. The bill appears to try to prevent possible conflicts of interest that a pharmacy benefit manager could have in managing the drug benefit program for a health plan. The FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics submitted the joint comment in response to State Senator James L. Seward’s request.

89. On March 18, 2009, in response to a request from State Representative Tom Emmer for the FTC's views, the FTC filed a comment on legislation before the Minnesota legislature that seeks to authorize collective bargaining by Minnesota health care cooperatives. The FTC staff comment observes that the bills appear to authorize anticompetitive activities, including price fixing and concerted refusals by the cooperatives and their members to deal with health plans and other purchasers. According to the comment, "Nothing in the bills is likely to prevent the harmful effects that arise from immunizing price fixing . . . [and] these bills would deprive health care consumers of the protections of the antitrust laws and the benefits of competition." The comment states that the bill is likely to harm Minnesota consumers through higher prices for health care services, higher insurance premiums, lower levels of insurance coverage, and lower wages.

90. On January 26, 2009, the FTC submitted a comment on retail electricity competition to the Arizona Corporation Commission ("ACC"). The comment, which addresses the possibility that retail electricity competition may be reopened within Arizona, brings two documents to the ACC's attention: 1) the FTC's December 2008 dynamic pricing comment to the Pennsylvania Public Utility Commission, and 2) a five-agency report to Congress (to which FTC staff contributed) on electric market competition. Both documents described the merits of establishing retail electricity prices that reflect the marginal cost of electricity. According to the FTC's comment, if the ACC determines that the benefits of retail electricity competition outweigh the costs, the interagency report to Congress includes potentially useful recommendations about how to increase the likelihood that such competition will work well. The FTC also encouraged the ACC to examine dynamic pricing as a means to address a wide array of electric system problems.

91. On December 17, 2008, the FTC filed a comment with the Pennsylvania Public Utility Commission ("PA PUC") concerning the PA PUC's implementation plan for its Energy Efficiency and Conservation Program. The comment also replies to the November 18, 2008 presentation made by the Retail Energy Supply Association ("RESA") at the PA PUC's *en banc* hearing on demand-side response, energy efficiency, and conservation. The FTC recommended that the PA PUC should: 1) encourage real-time or other dynamic pricing programs that increase economic efficiency; 2) urge utilities to design and market dynamic pricing programs that appeal to customers; 3) eliminate regulatory provisions that financially penalize power suppliers if they facilitate efficient dynamic pricing; 4) offer fair standby pricing policies for customers with onsite generation investments; and 5) advocate for demand response bid flexibility. The FTC comment states that "[d]ynamic pricing and demand response programs can be powerful tools to empower customers to help manage peak and overall load."

92. On November 3, 2008, FTC staff submitted a letter to Administrative Law Judge G. Harris Adams of the Colorado Public Utilities Commission ("CPUC") regarding the application of Union Taxi Cooperative for permanent authority to operate a taxi service in Denver. The staff's letter did not address the merits of the application, but instead was intended to provide general guidance to the CPUC in considering whether allowing entry is likely to be in the public interest. According to the staff letter, studies show that deregulation of taxicab markets has not led to significant harm to consumers or competition and, in some instances, has generated consumer benefits in the form of lower prices and improved service. The staff also noted that while special issues have sometimes arisen following regulatory reform, as in the case of taxicab lines at airports and rail stations, these problems do not provide a justification for restricting entry. The letter concludes that new entry is highly unlikely to harm the public interest.

### 5.1.3. DOJ Activities: Federal and State Regulatory Matters

93. On August 5, 2009, the Department and the U.S. Department of Agriculture announced that the two agencies would hold joint workshops to explore competition issues affecting the agriculture industry in the 21<sup>st</sup> century and the appropriate role for antitrust and regulatory enforcement in that industry. The workshops began in March 2010 and have addressed the dynamics of competition in agriculture markets, including buyer power and vertical integration.



94. On April 17, 2009, the Department submitted comments to the Montana Supreme Court on a proposal by the Commission on the Unauthorized Practice of Law to revise the rules on the unauthorized practice of law (UPL). If adopted, the revised definition of UPL could have barred non-lawyers from competing with lawyers for a range of services and could have unnecessarily increased the prices paid by Montanans for those services. In addition, on October 10, 2008, the Department submitted comments to the Wisconsin Supreme Court regarding revisions to Supreme Court Rule 07-09 proposed by the State Bar of Wisconsin. In each of the above submissions, the Department suggested that the definition of UPL should be limited to activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present.

95. On February 13, 2009, the Department submitted comments to the New Mexico Senate urging it not to enact Senate Bill 398, which would have introduced minimum service requirements for consumers of real estate brokerage services. The comments suggested that minimum service requirements harm consumers by limiting options available to consumers and protecting full-service brokers from having to respond to competition from non-traditional brokers. The comments noted that the vast majority of states allow consumers to select and purchase only those real estate brokerage services that they want, thereby allowing consumers to save thousands of dollars when selling their homes, and forcing traditional full-service brokers to offer more competitive prices, more innovative solutions and higher quality services. Enacting Senate Bill 398 would have led to reduced competition, higher prices, less innovation and lower quality services for the majority of homebuyers and sellers in New Mexico.

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

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

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

98. The Division co-chairs (with the Office of the U.S. Trade Representative) and the FTC participated in 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 more fair and open, and accelerate an effective program of deregulation to open markets to competition.

## 6. New studies related to antitrust policy

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

#### 6.1.1. *Conferences and Workshops*

99. **How Will Journalism Survive the Internet Age?** On December 1-2, 2009, and March 9-10, 2010, the FTC held workshops to consider how the Internet has affected journalism. Representatives from print, online, broadcast and cable news organizations, academics, consumer advocates, and other new media representatives discussed how journalism will evolve in the future as consumers increasingly turn to the Internet for news and information. The workshops considered a wide range of issues, including the economics of journalism in print and online; the wide variety of new business and non-profit models for journalism online; factors relevant to the new economic realities for news organizations; and ways in which the costs of journalism could be reduced without reducing quality. A final workshop was held in June, 2010, and agency staff intends to publish a report on the project in the Fall of 2010. More information on the workshops is available at <http://www.ftc.gov/opp/workshops/news/index.shtml>.

100. **The Evolving IP Marketplace.** Between December 2008 and May 2009, the FTC conducted a series of hearings to explore changes in intellectual property law, patent-related business models, and new learning regarding the operation of the IP marketplace. The first hearing, held on December 5, 2008, examined broad aspects of the evolving IP marketplace, including developing business models, recent and proposed changes in remedies law, and legal doctrines that affect the value and licensing of patents. The set of hearings held on February 11-12, 2009 focused on remedies in patent infringement cases. The hearings held on March 18-19, 2009 examined the operation of markets for IP and technology, the notice function of patents, and the impact of patent policies on those markets. The April 17, 2009 hearing looked at how corporations, inventors, and patent intermediaries value and monetize patents, strategies for buying and selling patents, and the role of secondary markets for intellectual property. The May 4-5, 2009 sessions explored how markets for patents and technology operate in different industries, whether those markets operate efficiently, and how patent policy might be adjusted to respond to problems in those markets in order to better promote innovation and competition. During the course of the hearings, the Commission heard from more than 100 experts and received 47 public comments. FTC staff is drafting a report analyzing the competitive implications of information learned from the hearings. More information on the hearings is available at <http://www.ftc.gov/bc/workshops/ipmarketplace/>.

101. **Resale Price Maintenance under the Sherman Act and the Federal Trade Commission Act.** In February and May 2009, the FTC held a series of workshops to explore, for the purposes of enforcing Section 1 of the Sherman Act and Section 5 of the FTC Act, how to best distinguish between uses of resale price maintenance (RPM) that benefit consumers and those that do not. More information on the workshops is available at <http://www.ftc.gov/opp/workshops/rpm/>.

102. **Emerging Health Care Competition and Consumer Protection Issues.** On October 30, 2008, the FTC held two public workshops and roundtables on two distinct areas in which competition and consumer protection policies are implicated: (1) competition among health care providers based on quality information; and (2) competition provided by developing an abbreviated regulatory approval pathway for follow-on biologic drugs. More information on the roundtables is available at <http://www.ftc.gov/bc/workshops/hcbio/index.shtml>.

103. **HSR Premerger Notification.** In recognition of the 30<sup>th</sup> anniversary of the HSR Act, the FTC hosted a workshop on October 23, 2008, on the basis of HSR premerger notification, covering such topics as how to determine whether premerger notification is required and how to prepare an HSR filing. More information about the workshop is available at <http://www.ftc.gov/bc/workshops/hsr/>.

104. **Section 5 as a Competition Statute.** The FTC hosted a workshop on October 17, 2008 to consider the appropriate scope of the prohibition of “unfair methods of competition” in Section 5 of the FTC Act. Participants in the workshop considered the scope of Section 5 in light of legal precedent, economic learning, and changing business practices in a global and high-tech economy. The workshop focused on three subject areas: (1) the history of Section 5, including Congress’s enactment, the FTC’s enforcement, and the courts’ response; (2) the range of possible interpretations of Section 5; and (3) examples of business conduct that may be unfair methods of competition addressable by Section 5. Participants included members of the legal, academic, and business communities. More information about the workshop is available at <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

#### 6.1.2 *Studies and Reports*

105. **Authorized Generics: An Interim Report.** On June 24, 2009, the FTC published the first set of results from a study conducted to examine the short-term and long-term effects of “authorized generics” on competition in the prescription drug marketplace. An authorized generic exists when a pharmaceutical manufacturer sells a drug under both a brand-name and generic label. The interim report addressed effects of authorized generic competition on wholesale and retail generic prices during the Hatch-Waxman Act’s 180 days of marketing exclusivity, as well as effects on the revenues and sales quantities of independent generics during that period. The FTC conducted the study in response to requests from Congress as issues related to generic drug competition are relevant to current legislative debates and health care reform. The report also presented analysis of pay-for-delay agreements. The Commission’s Bureau of Economics found that eliminating pay-for-delay settlements would save consumers \$3.5 billion a year and \$35 billion or more over ten years as it would also reap significant savings for the federal government that pays approximately one-third of all prescription drug costs. The report is available at <http://www.ftc.gov/opa/2009/06/generics.shtm>.

106. **Follow-on Biologic Drug Competition.** On June 10, 2009, the FTC released a report entitled “Emerging Health Care Issues: Follow-on Biologic Drug Competition” that examines whether the price of biologic drugs – products manufactured using living tissues and microorganisms – could be reduced by competition from so-called “follow-on biologics” (“FOBs”). Biologics are increasingly used to treat arthritis, cancer, diabetes, and other diseases. No pathway currently exists for such FOBs to enter the market and compete with their pioneer counterparts. Based on its study, the FTC concluded that special procedures are unnecessary to encourage FOBs to enter and compete with branded biologics and would likely harm consumers. Instead, the patent system and the ability to charge a monopoly price during the patent term likely will continue to incentivize further innovation by brand companies and entry by FOB firms. The report is available at <http://www.ftc.gov/os/2009/06/P083901biologicsreport.pdf>.

107. **Merger Efficiencies at the Federal Trade Commission 1997-2007.** The FTC’s Bureau of Economics released a report in February, 2009 that studies the treatment of efficiencies in FTC merger matters. The study examined the ten years following the 1997 issuance of the expanded efficiencies section of the Horizontal Merger Guidelines. Bureau of Economics staff undertook the paper to determine the types of efficiency claims parties made in 186 merger matters before the Commission. Further work explored how the staff treated specific types of claims. The report is available at <http://www.ftc.gov/opa/2009/02/bemergers.shtm>.

#### 6.1.3 *Bureau of Economics Working Papers*

108. The FTC’s Bureau of Economics issued the following working papers during FY 2009. The papers may be obtained at <http://www.ftc.gov/be/econwork.htm>.

- Viola Chen, The Evolution of the Baby Food Industry 2000-2008, April 2009.

- Steven Tenn and John M. Yun, The Success of Divestitures in Merger Enforcement: Evidence from the J&J-Pfizer Transaction, April 2009.
- Aileen Thompson, The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction, January 2009.
- Deborah Haas-Wilson and Christopher Garmon, Two Hospital Mergers on Chicago's North Shore: A Retrospective Study, January 2009.
- Steven Tenn, The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction, November 2008.

## **6.2. Department of Justice Conferences, Reports, and Economic Working Papers**

### *6.2.1. Conferences and Workshops*

109. The Department issued a report on November 17, 2008, highlighting the expanded product offerings, increased quality of products, and increased competition from separate technology platforms that have emerged in the market for consumer telecommunications services. The report, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*, available at <http://www.justice.gov/atr/public/reports/239284.pdf>, followed a public symposium hosted by the Department on November 29, 2007. The symposium examined the current state of competition in telecommunications and multichannel video services and future prospects for additional competition. It was structured around four panel discussions that examined entry into multichannel video services, entry into telecommunications services, wireless technologies, and other alternative technologies including satellite and broadband over power lines. The issues explored included the introduction of new facilities-based competition providing a bundle of voice, video and broadband services to consumers, the effects of such competition on the price, quality and diversity of services, and the existence of regulatory and other potential barriers to entry.

110. On October 23, 2008, the Antitrust Division hosted a one-day workshop on recent developments in airline antitrust and competition research to mark the 30-year anniversary of airline deregulation in the U.S.

### *6.2.2. Department of Justice Economic Analysis Group Discussion Papers*

111. The Economic Analysis Group issued the following papers during FY 2009, which are available at [http://www.usdoj.gov/atr/public/eag/discussion\\_papers.htm](http://www.usdoj.gov/atr/public/eag/discussion_papers.htm).

- Sheldon Kimmel, Why Prices Rise Faster than They Fall, EAG 09-4, July 2009.
- Russell Pittman, Who Are You Calling Irrational? Marginal Costs, Variable Costs, and the Pricing Practices of Firms, EAG 09-3, July 2009.
- Russell Pittman, Railway Mergers and Railway Alliances: Competition Issues and Lessons for Other Network Industries, EAG 09-2, May 2009. Published at *Competition and Regulation in Network Industries* (2009).
- Ken Heyer and Sheldon Kimmel, Merger Review of Firms in Financial Distress, EAG 09-1, March 2009. Published at *Competition Policy International* (2009).
- William W. Nye, Competitive Advocacy Opportunity: Zeroing in U.S. Antidumping Enforcement, EAG 08-13, December 2008.
- Jennifer K. Shanefelter, Restructuring, Ownership and Efficiency: The Case of Labor in Electricity Generation, EAG 08-12, December 2008.
- Ashley Langer and Nathan Miller, Automobile Prices, Gasoline Prices, and Consumer Demand for Fuel Economy, EAG 08-11, December 2008.

## APPENDICES

**Department of Justice:  
Fiscal Year 2009 FTE<sup>1</sup> and Actual Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	305	\$63,256
Civil Enforcement	457	\$94,884
Total	762	\$158,140

**Federal Trade Commission: Fiscal Year 2009 Competition  
Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	509.0	\$107,819.5
<i>Bureau of Competition</i>	273.3	44,960.1
<i>Bureau of Economics</i>	74.1	11,864.6
<i>Regional Offices</i>	27.3	4,195.5
<i>Mission Support</i>	134.3	46,799.3
Premerger Notification	21.4	3,083.7
<i>Bureau of Competition</i>	21	3,023.3
<i>Bureau of Economics</i>	0.0	0.0
<i>Regional Offices</i>	0.4	60.4
Merger & Joint Venture Enforcement	205.2	33,196.9
<i>Bureau of Competition</i>	152.2	24,976.7
<i>Bureau of Economics</i>	40.6	6,388.4
<i>Regional Offices</i>	12.1	1,831.8
Merger & Joint Venture Compliance	5.6	810.1
<i>Bureau of Competition</i>	5.3	763.0
<i>Bureau of Economics</i>	0.3	47.1

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

	FTE	Amount (\$ in thousands)
<i>Regional Offices</i>	---	---
Nonmerger Enforcement	105.1	17,535.4
<i>Bureau of Competition</i>	74.3	12,741.2
<i>Bureau of Economics</i>	16.1	2,571.7
<i>Regional Offices</i>	14.7	2,222.5
Nonmerger Compliance	2.2	317.6
<i>Bureau of Competition</i>	2.2	317.6
<i>Bureau of Economics</i>	0.0	0.0
<i>Regional Offices</i>	---	---
Antitrust Policy Analysis	9.5	1,132.4
<i>Bureau of Competition</i>	---	---
<i>Bureau of Economics</i>	9.5	1,132.4
<i>Regional Offices</i>	---	---
Other Direct	25.7	3,413.0
<i>Bureau of Competition</i>	18.0	2,765.9
<i>Bureau of Economics</i>	7.6	647.1
<i>Regional Offices</i>	0.1	---
Support	134.3	46,799.3