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COMPETITION COMMITTEE

Global Forum on Competition

COMPETITION AND POVERTY REDUCTION

Contribution from the United States

-- Session I --

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COMPETITION AND POVERTY REDUCTION

-- United States --

1. Competition law and policy can help ameliorate some of the effects of poverty. When competition leads to lower prices for the basic necessities of life, the greatest benefits may accrue to the least well off, as their access to necessities improves and, potentially, resources are freed up for discretionary spending that can allow them to invest in improvements to their lives. By focusing on anticompetitive conduct that increases costs of items essential to consumers, including disadvantaged individuals, competition agencies may directly improve the lives of their countries' poorest citizens. Further, by addressing governmentally-imposed measures that unnecessarily impede competition, competition advocacy can help allow the potential of free markets to benefit consumers, including the poor.

2. This submission will review the intersection of competition law and policy and poverty reduction, briefly identify the potential for competition to benefit the poor, along with other persons, and then focus on the experience of the United States, emphasizing the activities of the U.S. antitrust agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (the Agencies).

1. Competition's Effect on Markets for Essential Items, in Principle

3. Competition has the potential not only to improve the lot of impoverished economies as a whole, but also to improve the lives of individual consumers. Economies with competitive domestic markets tend to have higher levels and rates of growth in *per capita* income.[1] Competition in the domestic market, regardless of its origin, begets efficient, productive firms that are better able to compete on global markets, which in turn increases economic growth and standards of living. This relationship is demonstrated by a 12-year study by the McKinsey Global Institute that sought to determine why some nations remain wealthy, while others remain poor even after years of international aid. In his book presenting the results of the study, William Lewis explained that, "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."[2] Similarly, the World Development Report 2000-01 states that "markets work for the poor because poor people rely on formal and informal markets to sell their labor and products, to finance investment, and to insure against risks. Well-functioning markets are important in generating growth and expanding opportunities for poor people."[3] It follows that when anticompetitive practices interfere with the functioning of markets -- for

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1 *See* R. S. Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries,* FIAS, Occasional Paper 19, 2007, at 3; *see also* World Bank, *Global Economic Prospects and the Developing Countries*, 2003.

2 W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability*, 2004, at 103. *See also* D. P. Majoras, Chairman, Federal Trade Commission, *National Champions: I Don't Even Think it Sounds Good* (Mar. 27, 2006), at 3, *available at* www.ftc.gov/speeches/majoras/070326munich.pdf.

3 World Bank, *World Development Report 2000/2001, Attacking Poverty*, 2001, at 6-7.

example, a cartel raises the price of a farmer's fertilizer or of a family's basic foodstuffs, or exclusionary practices impede establishment of small businesses or lead to artificially high telecommunications costs --, this will have a disproportionate impact on the poor.

4. While the more affluent may be able to absorb anticompetitive overcharges by reducing discretionary spending – possibly without even recognizing that they are doing so – a poor person may have to curtail spending on basic necessities such as food or health care. Paying more for necessities means that fewer resources will be available to make longer-term investments, such as opening a small business, investing in equipment that will make a farmer more productive, or investing in education.[4]

5. Further, poorly designed government policies may unwittingly or unnecessarily impede the competitive process, and thereby impose undue, and perhaps unintended, burdens on consumers. In such a case, the poor often pay higher prices, face more limited access to goods and services, and receive lower-quality goods and services than a competitive market would deliver.[5] Ill-designed regulation may also make it difficult for poor consumers to legally establish small businesses, such as farms, retail establishments, and taxis that might compete with established firms. Through their competition advocacy functions, competition agencies can urge reconsideration of regulatory measures that are not serving their intended goals or are unnecessarily impeding competition.

6. Finally, supplier collusion in public procurement imposes costs on consumers, especially poor ones. It has been observed that "even small improvements in the performance of public procurement programs can yield large social benefits, especially for the least affluent citizens. Public procurement outlays account for just under twenty percent of GDP in the United States; in formerly planned economies, the state's share can exceed fifty percent. Many of these expenditures are for infrastructure and social services that are designed in large measure to assist economically disadvantaged populations."[6]

2. Competition's Effects on Markets for Essential Items, In Reality

7. This section provides real-world examples of how, in practice, promoting competition can lead to lower prices, higher quality, and other benefits to the poor.

8. In addition to competition, the FTC's consumer protection arm also addresses issues affecting the poor. For example, the FTC has shut down numerous scams that take advantage of the most financially fragile consumers through deceptive mortgage servicing practices, abusive debt collection tactics, bogus credit repair services, mortgage, tax, and debt relief offers, and fraudulent job and business opportunity schemes.[7]

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4 Department for International Development Investment Climate Team, *A Competition Assessment Framework: An Operational Guide for Developing Countries*, 2007, at 29; *see also* R. S. Khemani, *supra*, note 1.

5 For example, a World Bank (2004) report states that there was improved quality and delivery of food grains at lower prices when competitive market-oriented measures were introduced in state-dominated food distribution systems. Other studies by the World Bank Group and various development organizations also point out that "the poor pay more or receive lower quality for such services as water, sanitation, electricity, and even primary school education than do residents in the formal economy." *See* R.S. Khemani, *supra,* note 1.

6 W. E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage,* 25 WASH. U. J.L. & POL'Y 101, 105-106 (2007).

7 *See*, *e.g.*, FTC Press Release, *FTC Sends Refunds to Consumers Allegedly Deceived by First Universal Lending Mortgage Loan Modification Scheme*, Sept. 8, 2012, *available at*

2.1 The Experience in the United States: the Health Care Story

9. The Agencies have addressed competition issues throughout the economy, targeting areas in which the Agencies could provide the greatest benefit for consumers. While the Agencies have addressed competition issues that impact the poor in many sectors, notably, food,[8] energy,[9] telecommunications,[10] and banking,[11] this submission will focus on the Agencies' efforts to promote competition in health care markets and thereby protect consumers, including, in particular, less affluent consumers, from higher prices and lower quality service. If the poor have to pay more for health care due to anticompetitive mergers or conduct, they may face restricted access to care. Moreover, to the extent that they can afford care, they may have less money available to spend on other basic necessities.

10. Health care consumes nearly 18 percent of the U.S. GDP.[12] Many Americans are uninsured or underinsured and must pay nonemergency health care costs out of pocket or do without certain needed care or medicines.[13] Even for the insured, the high cost of health care may be reflected in the cost of insurance premiums, various co-payment, deductible or other cost-sharing mechanisms, or reductions in the scope of their insurance benefits, which do not necessarily cover all essential services.[14] Moreover, as the U.S. public health agencies have noted, competition is important to improving health care quality and access to health care, for the publicly insured as well as private consumers.[15] The sector has long been a major enforcement priority of the Agencies.

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http://ftc.gov/opa/2012/08/firstuniversal.shtm; FTC Press Release, *Bank of America Subsidiary Reversing or Refunding $36 Million in Fees to Resolve FTC Allegations That it Overcharged Struggling Homeowners*, Sept. 2, 2012, *available at* www.ftc.gov/opa/2012/02/bachomeloans.shtm; FTC, *Tennessee Attorney General Permanently Halt Medical Discount Scheme*, Jul. 11, 2011, *available at* www.ftc.gov/opa/2011/11/usbenefits.shtm; *see also* Address by Commissioner Edith Ramirez, *Last Dollar Fraud: The FTC's Response to the Foreclosure Crisis*, Women in Housing and Finance, Jan. 27, 2011, *available at* www.ftc.gov/speeches/ramirez/110127whf.pdf.

8 See, *e.g.*, In *the Matter of Tops Markets LLC, et al.,* FTC Docket C-4295, *available at* www.ftc.gov/os/caselist/1010074/index.shtm.

9 *See* Section II/B.

10 *See*, *e.g.*, *United States v. AT&T, Inc.,* 1: 11-CV-01S60, 2011 (D.D.C., August 31, 2011), *available at* www.justice.gov/atr/public/press_releases/2011/274615.htm.

11 *See, e.g., In the Matter of First Niagara Bank N.A. and HSBC Bank USA N.A., available at* www.justice.gov/atr/public/press_releases/2011/277266.htm.

12 *See* Prepared Statement of the Federal Trade Commission, *The FTC in FY2013: Protecting Consumers and Competition*, Before the House Committee of Appropriations, Mar. 5, 2012, *available at* www.ftc.gov/os/testimony/120305appropriationstestimony.pdf.

13 The Patient Protection and Affordable Care Act of 2010 aims to address some of these issues and make health care more affordable and accessible, among other goals, through such means as an individual mandate and subsidies for less affluent consumers. *See* Patient Protection and Affordable Care Act, Public Law 111-48, 124 Stat. 119 (2010).

14 *See*, *e.g.*, Dep't Health and Human Serv's, ASPE Issue Brief, Essential Health Benefits: Individual Market Coverage, Dec. 16, 2011, *available at* http://aspe.hhs.gov/health/reports/2011/IndividualMarket/ib.pdf (noting, for example, that 62 percent of insured patients lack maternity coverage and 9 percent lack prescription drug coverage).

15 Dep't Health and Human Serv's, Centers for Medicare & Medicaid Serv's, 42 CFR Part 425, Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, Final Rule, 76 Fed. Reg. 67802, 67809 (Nov. 2, 2011).

2.1.1 Hospitals

11. The *FTC v. ProMedica Health System* matter involved a merger of two hospitals serving Toledo, Ohio. Toledo is characterized by a declining industrial base, high unemployment, and a relatively high poverty rate. The FTC challenged the transaction out of concern that it would significantly harm consumers in the Toledo area by creating a combined hospital system with an increased ability to raise prices. This would increase the burden on both uninsured and underinsured poor people seeking elective care,[16] as well as on the insured working poor and near poor because the hospitals could obtain supra-competitive reimbursement rates on necessary services, such as inpatient obstetric care, from commercial health plans, and, ultimately, from their members. At the FTC's request, a court enjoined the merger, and the Commission ultimately determined that it would be anticompetitive.[17] ProMedica filed an appeal with the 6th Circuit Court of Appeals where the case is currently pending.

12. In *FTC v. Phoebe Putney Health System*, the FTC challenged the attempt by Phoebe Putney, one of two hospitals in Albany, Georgia, to acquire Palmyra Park Hospital from HCA, Inc. Albany is in one of the poorest counties in the United States. Post-transaction, the combined entity would have a market share in excess of 85 percent. The FTC alleged that the transaction would enhance Phoebe Putney's ability and incentive to increase reimbursement rates charged to commercial health plans and their members, leading to higher health care costs in the area. Phoebe and Palmyra had been close rivals that competed for patients in the general acute-care hospital services market. That competition spurred each to increase the quality of its patient care; the FTC argued that this important "non-price" competition would be eliminated by the proposed transaction to the detriment of consumers in Albany.[18] While the court agreed with the FTC's assertion that the merger would reduce competition, the court concluded that the merger was immune from challenge because a regulatory scheme under Georgia law immunized the transaction from federal antitrust review under the state action exemption. That conclusion, which was affirmed on appeal, was ultimately overturned by the U.S. Supreme Court. The Supreme Court held that because the State of Georgia did not clearly articulate and affirmatively express a policy allowing hospital authorities to make acquisitions that substantially lessen competition, state action immunity did not apply to this acquisition.[19]

13. The Agencies also prosecute other anticompetitive practices by hospitals. For example, in 2011, DOJ reached a settlement with United Regional Health Care System, the largest hospital in its area, requiring United Regional to abandon anticompetitive contracts with insurance companies. These contracts had effectively prevented insurers from including other facilities in their networks, thereby (a) delaying or preventing expansion of services and capacity by existing rivals and entry by new competitors,

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16 Under U.S. law, hospitals may generally not refuse emergency treatment to anyone, whether insured or not. However, even insured patients may feel effects similar to the uninsured. First, high hospital care prices may be reflected in high insurance costs, paid both directly and indirectly by individual beneficiaries. Also, in some cases, insurance policies available to poor people may have low maximum benefits and high deductibles, imposing direct out-of-pocket costs for health care services even for the insured.

17 *In the Matter of ProMedica Health System, Inc.*, FTC Docket No. 9346, Opinion of the Commission, Jun. 25, 2012, *available at* www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf (noting that the insurers or managed care organizations "would not themselves absorb the higher rates; the higher rates would be passed on to the community-at-large.").

18 FTC Press Release, *FTC and Georgia Attorney General Challenge Phoebe Putney Health System's Proposed Acquisition of Palmyra Park Hospital as Anticompetitive*, Apr. 20, 2011, *available at* www.ftc.gov/opa/2011/04/phoebeputney.shtm.

19 *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. ____ (2013), *available at* http://www.ftc.gov/os/caselist/1110067/130219phoebeopinion.pdf.

likely leading to higher health care costs and higher insurance premiums and (b) reducing quality competition between United Regional and its competitors, among other anticompetitive effects.[20]

14. A common argument raised in hospital matters is that hospitals that are freed from competitive pressures are able to offer more charity care to poor consumers because insured patients, particularly managed care and privately insured patients, cross-subsidize a hospital's charity care.[21] The FTC's Bureau of Economics analyzed the argument that increased competition in the health care sector inhibits a provider's ability to offer charity care, and concluded that there is little relationship between the absence of competition and the provision of charity care.[22] To the extent that there is a relationship, the study found, in fact, that increased concentration is associated with reduced charity care and that reduced competition may lead to higher prices for uninsured patients.[23] The study noted "the lack of any statistically significant evidence for the cross-subsidization hypothesis. The data provides no statistically significant evidence that increased competition leads to reductions in charity care. The claim that hospitals will use market power to increase services to the poor is largely unsupported."[24]

2.1.2 Health Insurance

15. DOJ vigilantly polices anticompetitive practices in the health-insurance sector. These practices can inflate the price of health insurance, making it more difficult for less affluent consumers to afford appropriate health insurance.

16. In recent years, DOJ has challenged a variety of anticompetitive conduct by health insurers. For example, DOJ has a pending lawsuit challenging Blue Cross Blue Shield of Michigan's use of most-favored-nation clauses—including clauses requiring hospitals to charge other insurers more than it charges Blue Cross—in contracts with hospitals. These clauses, DOJ alleges, have prevented entry and expansion in health-insurance markets in Michigan, likely increasing prices for health insurance and hospital services.[25] Similarly, in November 2011, DOJ challenged an agreement between the owners of New West Health Services, Inc., an insurer operating in Montana, and Blue Cross Blue Shield of Montana that likely would have caused New West to exit the market. A settlement required the divestiture of New West's commercial health-insurance business to a third party, thereby preserving New West as a competitive factor and likely preventing an increase in prices and a decrease in quality.[26] Additionally, in 2010, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan abandoned their proposed merger after DOJ announced its intention to challenge the transaction. DOJ determined that the merger would have engendered higher prices, fewer choices, and a reduction in the quality of health-insurance plans purchased by residents and employers in the Lansing, Michigan, area. Additionally, the merged firm

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20 Competitive Impact Statement at 4, *United States v. United Reg'l Health Care Sys.*, No. 11-cv-00030 (N.D. Tex. Feb. 25, 2011), *available at* www.justice.gov/atr/cases/f267600/267653.pdf.

21 *See* B.C. Vladeck, *Paying for Hospitals' Community Service*, Health Affairs, v25, Jan./Feb. 2006, at pp. 34-43.

22 C. Garmon, Bureau of Economics, Federal Trade Commission, *Hospital Competition and Charity Care* Working Paper No. 285 October 2006, at 15, *available at* www.ftc.gov/be/workpapers/wp285.pdf.

23 *Id.*, at 17-18.

24 *Id.*, at 18.

25 Complaint ¶¶ 1-6, *United States v. Blue Cross Blue Shield of Mich.*, No. 10-cv-15155 (Oct. 10, 2010), *available at* www.justice.gov/atr/cases/f263200/263235.htm.

26 Competitive Impact Statement at 2-5, *United States v. Blue Cross & Blue Shield of Mont.*, No. 11-cv-00123 (Nov. 8, 2011), *available at* www.justice.gov/atr/cases/f277100/277173.pdf.

would have had the ability to control physician reimbursement rates in a manner that could have harmed the quality of health care delivered to consumers.[27]

17. DOJ's activities have extended to public health-insurance programs, namely, Medicareand and Medicaid. For example, in 2012, the Division determined that WellPoint Inc.'s proposed acquisition of Amerigroup would have resulted in a merger to monopoly in Medicaid managed care in certain areas. The divestiture of Amerigroup's Virginia operations addressed DOJ's concern that the transaction would have substantially lessened competition in the provision of Medicaid managed-care plans in Northern Virginia.[28] Similarly, in March 2012, DOJ reached a settlement requiring significant divestitures before Humana, Inc. proceeded with its acquisition of Arcadian Management Services, Inc. Specifically, the settlement required the divestiture of Medicare Advantage plans in 51 counties and parishes in 5 states. Without the divestitures, the transactions likely would have resulted in higher premiums and reduced benefits and services.[29] In short, antitrust enforcement has helped ensure that these public programs are able to harness the forces of competitive markets to the benefit of their participants.

2.1.3 Pharmaceutical Prices

18. Another good example of where competition policy can impact a market for essential goods is in the area of so-called "pay-for-delay" patent settlement cases. The FTC has challenged agreements between generic and patented drug manufacturers through which patented drug manufacturers settle patent infringement litigation by paying generic manufacturers to stay out of the market. These agreements effectively block all other generic drug competition for a growing number of branded drugs. According to an FTC study, pay-for-delay agreements cost consumers and taxpayers $3.5 billion in higher drug costs every year.[30] The FTC has challenged a number of these agreements in court;[31] the results in these cases have been mixed,[32] and the U.S. Supreme Court is considering one of the matters, which may result in a

27 Press Release, Antitrust Div., U.S. Dep't of Justice, Blue Cross Blue Shield of Michigan & Physicians Health Plan of Mid-Michigan Abandon Merger Plans (Mar. 8, 2010), *available at* www.justice.gov/atr/public/press_releases/2010/256259.htm.

28 Press Release, Antitrust Div., U.S. Dep't of Justice, Amerigroup Corp.'s Divestiture of its Virginia Operations Addresses Department of Justice's Concerns with Wellpoint Inc.'s Proposed Acquisition of Amerigroup (Nov. 28, 2012), *available at* www.justice.gov/atr/public/press_releases/2012/289428.htm.

29 Competitive Impact Statement at 1, *United States v. Humana Inc.*, No. 12-cv-00464 (Mar. 27, 2012), *available at* www.justice.gov/atr/public/press_releases/2012/289428.htm.

30 *See* Jon Leibowitz, Pay-for-Delay Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Health Care Reform (The $35 Billion Solution), Speech at Center For American Progress, Jun. 23, 2009, at 12, *available at* http://ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf.

31 See, e.g., In the Matter of Schering-Plough Corp., Upsher-Smith Labs., and American Home Products *Corp*., Docket No. 9297, Opinion of the Commission (Dec. 18, 2003), *available at* www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf, *vacated*, 402 F.3d 1056 (11 Cir. 2005), *cert. denied,* 126 S. Ct. 2929 (2006); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 908 (6th Cir. 2003); *Bristol-Myers Squibb Co.*, No. C-4076 (April 18, 2003), *available at* www.ftc.gov/os/2003/04/bristolmyerssquibbdo.pdf; *Abbott Laboratories*, No. C-3945 (May 22, 2000) (consent order), *available at* www.ftc.gov/os/2000/03/abbott.do.htm; *Hoechst Marion Roussel, Inc.*, No. 9293 (May 8, 2001) (consent order), *available at* www.ftc.gov/os/2001/05/hoechstdo.pdf.

32 *Compare, e.g., In re K-Dur Antitrust Litig.*, 2012 WL 2877662 (3d Cir. July 16, 2012), *with In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370 (2d Cir. 2005).

decision clarifying the law in this area. The FTC also supported legislation in Congress that would restrict pay-for-delay settlements.[33]

19. Competitive drug prices may be key to access or the ability to follow recommended treatment for many people. As an article noted, "when costs are high, people who cannot afford something find substitutes or do without. The higher the cost of health insurance, the more people are uninsured. The higher the cost of pharmaceuticals, the more people skip doses or do not fill their prescriptions."[34]

2.1.4 Professional Services

20. The Agencies also has been active against professionals that conspire to raise prices or limit output to the detriment of poor consumers. A few cases illustrate the Agencies' approach to this problem.

21. In 2000, the South Carolina legislature eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive dental care in a public health setting. The goal was to allow schoolchildren, particularly those from low-income families, to receive preventive dental care. In July 2001, however, the South Carolina Board of Dentistry adopted an emergency regulation that re-imposed the dentist examination requirement. As a result of the Board's actions, a hygienist-owned company that had begun sending hygienists to schools to provide preventive care was forced to change its business model and was able to serve far fewer patients. The FTC challenged the Board's action, alleging that they "hindered competition in the delivery of preventive dental services to school-aged children and deprived thousands of school children – particularly economically disadvantaged children – of the benefits of preventive oral health care."[35] The case was resolved by a consent order that required the Board to publicly announce its support for the current state policy – that hygienists can provide such care in public health settings without a dentist's examination – and to notify the Commission before adopting rules or taking other actions related to preventive dental services provided by dental hygienists in public health settings.[36]

22. Similarly, in January 2013, the Division reached a settlement preventing the Oklahoma State Chiropractic Independent Physicians Association from jointly determining prices and negotiating contracts with insurers on behalf of competing chiropractors. The settlement put an end to conduct that had caused consumers to pay higher fees for chiropractic services in Oklahoma.[37]

23. Another recent example involved the use of competition advocacy to seek to eliminate anticompetitive state scope-of-practice regulations that made it more difficult for lower-cost health care practitioners to serve low income patients. In the state of Louisiana, state law prohibited Advanced Practice Registered Nurses (APRNs) to serve Louisiana health care consumers unless they had written

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33 *See* Statement of Federal Trade Commission Chairman Jon Leibowitz on K-Dur 20 Matter, *available at* www.ftc.gov/opa/2012/07/kdur.shtm; *see also* Federal Trade Commission, *Pay-for-Delay: When Drug Companies Agree Not to Compete*, *available at* www.ftc.gov/opa/reporter/competition/payfordelay.shtml.

34 W. Sage, D.A. Hyman & W. Greenburg, *Why Competition Law Matters to Health Care Quality,* 22 Health Affairs 31, 35 (Mar./Apr. 2003).

35 *In the Matter of South Carolina State Board of Dentistry, Docket. No. 9311,* Complaint, at 1, *available at* www.ftc.gov/os/2003/09/socodentistcomp.pdf.

36 *See* FTC Press Release, *South Carolina Board of Dentistry Settles Charges That it Restrained Competition in the Provision of Preventive Care by Dental Hygienists*, Jun. 20, 2007, *available at* www.ftc.gov/opa/2007/06/dentists.shtm.

37 Competitive Impact Statement at 2-4, *United States v. Okla. State Chiropractic Indep. Physicians Ass'n*, No. 13-cv-21 (N.D. Okla. Jan. 10, 2013), *available at* www.justice.gov/atr/cases/f291200/291221.pdf.

"collaborative practice" agreements with physicians before they can offer health care services within the APRNs' scope of practice. Those agreements may be costly or difficult to establish in some areas. Without competition from APRNs, the least well off are likely to be harmed. FTC staff wrote to the Louisiana state legislature in support of a proposed law that would remove this requirement for certain APRNs who practice in medically underserved areas or treat medically underserved populations.[38] The letter noted reports of shortages affecting both the availability and accessibility of primary health care providers in many parts of Louisiana, and a recent Institute of Medicine (IOM) report pointing out that excessive regulatory restrictions impede APRNs' ability to help alleviate such shortages.[39] The staff letter stated that removing undue restrictions on APRNs "may improve access and consumer choice for primary care services, especially for rural and other underserved populations, and may also encourage beneficial price competition that could help contain health care costs."[40] The FTC staff asked the legislature to carefully consider expert findings on APRN safety – such as those of the IOM – and its own experience, to determine whether such formal regulations are in fact necessary to assure patient safety.

2.2 Energy

24. The FTC and DOJ carry out a broad program of antitrust law enforcement in the energy sector, which comprises a number of industries of critical importance to consumers. Energy – in the form of electricity, crude oil, refined petroleum products, natural gas, and others – is indispensable to the functioning of the entire U.S. and world economy. Ensuring that competition prevails in energy industries is vital to consumers at all income levels. Consumers at the lower end of the income spectrum spend relatively more of their incomes on such necessities as electricity, gasoline, home heating oil, and natural gas, and they experience more deeply than affluent consumers the direct and indirect effects of price increases brought about by anticompetitive conduct in those industries. The U.S. agencies vigilantly protect competition in the energy sector: the agencies closely review proposed mergers among energy companies and also scrutinize possibly anticompetitive conduct.[41] This careful oversight of the energy industry, with strong remedies where appropriate, can benefit consumers at all income levels, but redounds in particular to the benefit of low income consumers who can least afford to pay prices inflated by anticompetitive behavior.

2.3 Bid Rigging

25. Cartels are recognized as "the supreme evil of antitrust."[42] Research has shown that consumers in developing countries suffer from widespread effects of global cartels.[43] Since the 1990s, DOJ's efforts

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38 FTC Staff Comment Before the Louisiana House of Representatives on the Likely Competitive Impact of Louisiana House Bill 951 Concerning Advanced Practice Registered Nurses, Apr. 20 2012, *available at* www.ftc.gov/os/2012/04/120425louisianastaffcomment.pdf.

39 *Id.*

40 *Id.*, at 2.

41 *See*, *e.g.*, *In the Matter of Irving Oil Limited, a Canadian corporation, and Irving Oil Terminals Inc., a corporation*, FTC File No. 101 0021, *available at* www.ftc.gov/os/caselist/1010021/index.shtm; *In the Matter of Union Oil Company of California*, FTC Docket No. 9305, *available at* www.ftc.gov/os/adjpro/d9305/index.shtm. Gasoline and diesel price variations have a large impact on food pricing largely due to transportation costs. *See* http://ftc.gov/ftc/oilgas/gas_price.htm. In the electricity sector, DOJ successfully challenged mergers (*e.g.*, Exelon and Constellation, *available at* www.justice.gov/atr/cases/f284900/284934.pdf) and agreements (*e.g.*, U.S. v. KeySpan Corporation, *available at* www.justice.gov/atr/cases/f266700/266778.htm) that affect electricity prices to consumers.

42 *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

to aggressively investigate cartels and criminally prosecute cartelists has led to the detection of wide-ranging global cartels affecting basic commodities sold worldwide, and uncovered domestic schemes affecting distressed and disadvantaged consumers.

2.3.1 The International Lysine and Vitamins Cartel Cases: Examples of Cartel Enforcement Affecting Basic Commodities

A. Lysine

26. Undercover audio and video tapes of secret meetings among senior executives from the world's major lysine producers captured an international cartel in the act of fixing prices in the mid 1990's. Lysine is a key feed additive used in swine and poultry feed by farmers around the world, with over $600 million annual worldwide sales of lysine at the time of the cartel (1992 -1995). The tapes show executives from lysine companies in the US Korea, Japan, and other countries carving up the worldwide market for lysine, agreeing on the exact tonnage each of them would produce the next year, and fixing global lysine prices down to the penny, to be effective the very next day. DOJ introduced these tapes as powerful evidence at the trial of some of these executives, and the tapes are well-known to the international antitrust community.[44] Individuals convicted of participating in the lysine cartel were sentenced to jail terms in the U.S., and the firms paid criminal fines as high as $100 million in the United States for their participation in the cartel. The lysine cartel affected pork and poultry consumers around the world, raising prices for basic food commodities and harming the most vulnerable residents of many countries.

B. Vitamins

27. The decade-long vitamins cartel was one of the most wide-ranging global cartels DOJ ever prosecuted, with harmful effects extending to the poorest consumers around the world. Vitamins cartel members agreed upon prices and sales volumes on a country-by-country basis for every major vitamin sold throughout the world for human or animal consumption, including vitamins A, B2, B5, C, E, Beta Carotene, and vitamin premixes, which are used to enrich breakfast cereals and many other foods. The conspiracy artificially inflated the cost of such everyday necessities as milk, bread, orange juice, and cereal, which were fortified with the vitamins produced by these conspirators. The vitamins conspirators reaped hundreds of millions of dollars in additional revenues at the expense of consumers around the world simply trying to fill their pantries with basic foodstuffs. The cartel resulted in a monumental $500 million against F. Hoffmann-La Roche—at the time the largest criminal antitrust fines ever imposed.[45]

2.3.2 Real Estate Foreclosure Auctions and E-Rate: Examples of Domestic Collusion and Fraud Affecting Distressed and Disadvantaged Americans

A. Real Estate Foreclosure Auctions

28. In recent years, DOJ has partnered with the U.S. Federal Bureau of Investigation (FBI) to investigate and prosecute bid rigging and fraud targeting the real estate market. While the U.S. faced unprecedented home foreclosure rates, conspirators eliminated competition at real estate foreclosure

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43 *See* Margaret Levenstein and Valerie Y. Suslow, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," Antitrust Law Journal, vol. 71 (2004), p. 801, *available at* www-personal.umich.edu/~maggiel/ALJ.pdf.

44 *See* Scott D. Hammond, "Caught in the Act: Inside an International Cartel," OECD Competition Committee, Paris, France (October 18, 2005), *available at* www.justice.gov/atr/public/speeches/212266.htm.

45 See www.justice.gov/atr/cases/indx136.htm and www.justice.gov/atr/public/criminal/sherman10.html.

auctions around the country and artificially drove down foreclosed home prices, enriching the colluding real estate investors at the expense of distressed homeowners and lending institutions. These schemes also have far-reaching effects for struggling communities and homeowners because they negatively affect home prices in the neighbourhoods where the foreclosed properties are located. To date, the initiative has resulted in guilty pleas from 51 individuals and two corporations around the U.S. Similar collusive conduct has also been detected among bidders for public tax liens.

29. DOJ's efforts to combat bid rigging and collusion at real estate foreclosure auctions is part of the work of President Obama's Financial Fraud Enforcement Task Force (FFETF), which was created in November 2009 to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The FFETF has more than 20 federal agencies, 94 U.S. attorneys' offices and state and local partners, partnering in the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to facilitate increased investigation and prosecution of financial crimes, enhance coordination and cooperation among federal, state and local authorities, address discrimination in the lending and financial markets, and conduct outreach to the public, victims, financial institutions and other organizations. Over the past three fiscal years, DOJ has filed more than 10,000 financial fraud cases against nearly 15,000 defendants, including more than 2,700 mortgage fraud defendants. [46]

B. Nationwide E-Rate Investigation

30. From 2005 through 2011, DOJ conducted a nationwide investigation of bid rigging and fraud in the Federal E-Rate program. Congress created the E-Rate program to help economically disadvantaged schools and libraries obtain computer and telecommunications services, but the Division investigation uncovered extensive fraud and collusion in this industry by criminals who took advantage of the program to enrich themselves. As a result of DOJ's investigation into fraud and anticompetitive conduct in the E-Rate program, a total of seven companies and 24 individuals pled guilty, were convicted at trial, or entered civil settlements. Those companies and individuals were sentenced to pay criminal fines and restitution totalling more than $40 million. Eighteen individuals were sentenced to serve prison time.

3. Conclusion

31. Competition law and policy can play an important role in combating poverty. Enforcement activities may focus on ensuring access to lower-priced, higher-quality goods and services, which can directly impact the nutritional, health, and educational needs of the poorest in developing countries. Challenges to anticompetitive conduct in those sectors can bring disproportionate benefits to low income sectors of society.[47]

32. The lower prices that can result from increased competitive pressures expand markets and make goods and services more affordable, especially to poor populations. Indeed, "through the use of its research and advocacy tools, the competition agencies can identify barriers to competition and seek to persuade legislatures and regulatory bodies to adopt measures that yield important economic and social benefits."[48]

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46 For more information on the Financial Fraud Enforcement Task Force, visit www.stopfraud.gov.

47 T. K. Cheng, *Convergence and its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 Chi. J. Int'l L. 478 (2012).

48 W. E. Kovacic, *supra*, note 6.