

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

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- 2008-2009 --

This report is submitted by the United States Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 9-11 June 2009.

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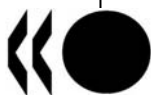


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Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2007, through September 30, 2008 (“FY 2008”). It summarizes the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

Senior DOJ and FTC staff

2. In 2009, President Barack Obama appointed Christine A. Varney to be the new Assistant Attorney General, and she was sworn in on April 21, 2009. On April 22, Ms. Varney announced the new leadership team at the Antitrust Division, including Sharis Arnold Pozen as Chief of Staff and Counsel, Molly S. Boast and William F. Cavanaugh, Jr. as DAAGs 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. Throughout the period covered by this report, Thomas O. Barnett was Assistant Attorney General.

3. In March 2009, President Barack Obama designated Commissioner Jon Leibowitz as FTC Chairman. He replaced William E. Kovacic, who had served as Chairman since March 2008. Kovacic replaced Deborah P. Majoras, who was FTC Chairman from 2004 to March 2008.

4. On April 14, 2009, Chairman Leibowitz announced the appointments of Richard Feinstein 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. Further changes in staff leadership in 2008 included the appointment of Marian Bruno as Deputy Director of the Bureau of Competition and the appointment of David Shonka as Principal Deputy General Counsel replacing John Graubert. With the departure of William Blumenthal, David Shonka was named Acting General Counsel, and with the departure of Nancy Judy, Claudia Bourne Farrell was named Acting Director, Office of Public Affairs.

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

1.1. Staffing and Enforcement Statistics

1.1.1. FTC

5. The FTC’s Bureau of Competition has 361 staff working on competition enforcement, including 226 lawyers and 86 “other” professionals, including investigators, merger analysts, compliance specialists, industry analysts, research analysts, financial analysts/accountants, and paralegals. The Bureau of Economics dedicates 49 economists to work on competition matters. The FTC’s Maintaining Competition Mission expended approximately \$102 million in FY 2008.

6. During FY 2008, the Commission brought 21 merger-related enforcement actions. Commission staff opened 223 initial phase investigations and issued requests for additional information (“second requests”) in 21 transactions. Thirteen consent orders were accepted for comment, and six transactions were abandoned as a result of the Commission’s antitrust concerns. The Commission authorized staff to file one preliminary injunction and two administrative complaints. The FTC brought two civil penalty actions concerning a violation of the pre-merger notification requirements.

7. During FY 2008, the FTC brought four non-merger enforcement actions challenging a variety of anticompetitive conduct, three of which were resolved by consent agreement. The Commission also filed one preliminary injunction.

1.1.2. DOJ

8. At the end of FY 2008, the Division employed 782 persons: 345 attorneys, 60 economists, 162 paralegals, and 215 other professional staff. For FY 2008, the Division received an appropriation of \$147.8 million.

9. During FY 2008, the Division opened 208 investigations and filed 73 civil and criminal cases in federal district court. In FY 2008, the Division was party to six antitrust cases decided by the federal courts of appeals.

10. During FY 2008, the Division filed 54 criminal cases in which it charged 25 corporations and 59 individuals. Twelve corporate defendants and 23 individuals were assessed fines totalling \$696.5 million and 19 individuals were sentenced to a total of 14,331 days of incarceration. Another 11 individuals were sentenced to spend a total of 2,045 days in some form of alternative confinement.

11. During FY 2008, 1,656 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 656 bank mergers. The Division further investigated 84 mergers and challenged 15 of them in court. One transaction was restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 119 civil investigations (merger and non-merger), and issued 355 civil investigative demands (a form of compulsory process). The Division filed four non-merger civil complaints. Also during FY 2008, the Division issued three business review letters.

1.2. Antitrust Cases in the Courts

1.2.1. United States Supreme Court

12. There were no reported FY 2008 decisions in antitrust cases in which the United States was a party or participated as *amicus curiae*.

1.2.2. U.S. Court of Appeals Cases

1.2.2.1. Significant FTC Cases Decided in FY 2008

13. In the case of *North Texas Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), the U.S. Court of Appeals for the Fifth Circuit upheld a Commission decision that North Texas Speciality Physicians (NTSP), a group of independent competing physicians based in Fort Worth, Texas, had restrained competition among its member physicians. In September 2003, the FTC issued an administrative complaint charging NTSP with unlawfully restraining competition, resulting in increased health care costs for consumers in the Fort Worth area. The Commission charged the group with violating federal law by implementing agreements among its participating physicians on price and other terms, refusing to deal with payors except on collectively agreed-upon terms, and refusing to submit payor offers to participating doctors unless the offers' terms complied with NTSP's minimum-fee standards. The Commission's final decision was announced on December 1, 2005, and subsequently appealed by the defendants to the U.S. Court of Appeals for the Fifth Circuit. Issuing a unanimous opinion in favor of the FTC on May 14, 2008, the Court agreed with the Commission that the anticompetitive effects of NTSP's practices were "obvious." In particular, NTSP was found to have participated in horizontal price-fixing that was not related to any procompetitive efficiencies. The appellate court's decision fully endorsed the

analytical framework applied by the Commission in its decision, which found NTSP's conduct to be "inherently suspect," with "no procompetitive justification." Per remand by the Court, the Commission modified one provision of its remedial order, issuing a Final Order on September 12, 2008. On February 23, 2009, the U.S. Supreme Court denied NTSP's petition for review.

1.2.2.2. Significant DOJ Cases Decided in FY 2008

14. *United States v. Beaver*, 515 F.3d 730 (7th Cir. 2008), involved a price-fixing conspiracy among concrete producers to limit their "net-price" discounts offered to customers. On appeal from the conviction of one of the conspirators (who was also convicted for making false statements to a federal law enforcement agent), the Seventh Circuit held that there was sufficient evidence that "a price-fixing conspiracy existed, that [the defendant] joined the conspiracy, [and] that he made false statements" to federal agents. As the court explained, although a price-fixing conviction requires proof of an agreement to restrain trade, "the government did not need to show that the producers reached a 'formal agreement' to limit their discounts. Rather, the government was required only to establish that the concrete producers had 'a tacit understanding based upon a long course of conduct' to limit their discounts." The court concluded that there was "ample evidence at trial that showed that the concrete producers shared a 'tacit understanding' that they were to limit their net-price discounts collectively." The court deemed it irrelevant that the producers "occasionally cheated" on the agreement, noting that "§ 1 of the Sherman Antitrust Act does not outlaw only perfect conspiracies to restrain trade. It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy." Here, sufficient evidence proved not only that there was an illegal conspiracy but also that the defendant participated in it.

1.2.3. Private Cases with International Implications

15. In *In re Dynamic Random Access Memory Litigation*, 546 F.3d 981 (9th Cir. 2008), the Ninth Circuit, agreeing with the D.C. Circuit's conclusion in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1043 (2006), and the Eighth Circuit's conclusion in *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007), held that the Foreign Trade Antitrust Improvements Act (FTAIA) exception for foreign conduct whose anticompetitive effect on United States commerce "gives rise to" a Sherman Act claim requires a direct or proximate cause relationship, rather than a lesser "but for" relationship. A British plaintiff who made its "purchases entirely outside the of the United States" alleged a "global conspiracy to fix DRAM prices," claiming that higher DRAM prices in the United States gave rise to "higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States." This theory, the court held, did not satisfy the proximate cause standard. The domestic effects of the alleged price-fixing scheme, higher U.S. prices, "might have been necessary to sustain the higher prices globally," but they were not the direct cause of plaintiff's injury: "Other actors or forces may have affected the foreign prices. In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad." The court noted that the plaintiff "has recourse under its own country's antitrust laws." Concurring, Judge Noonan observed that, "[i]n the instant case, it would seem that reasonably prudent persons in the position of the defendants would see that their actions setting prices in the United States would negatively affect customers in the United States and elsewhere. But it has been the judgment of Congress and the Supreme Court that the economic interests of consumers outside the United States are normally not something that American law is intended to protect."

1.3. *Statistics on Private and Government Cases Filed*

16. According to the 2008 Annual Report of the Director of the Administrative Office of the U.S. Courts, 1,318 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2008.

1.4. *Significant DOJ and FTC Enforcement Actions*

1.4.1. *DOJ Criminal Enforcement*

17. **Marine Hose:** In FY 2008 the Division continued its prosecution of the worldwide conspiracy to rig bids, fix prices, and allocate market shares of marine hose in the United States and elsewhere. Marine hose is a flexible rubber hose used to transfer oil between tankers and storage facilities. Victims of the conspiracy included firms involved in the off-shore extraction and/or transportation of petroleum products and the U.S. Department of Defense.

- On November 6, 2007, two executives of the French firm Trelleborg Industrie S.A.S. agreed to plead guilty to participating in the conspiracy and on December 20, 2007 each was sentenced to serve 14 months in jail.
- In December 2007, the Division was able to obtain plea agreements from three British nationals. The 30, 24, and 20-month sentences the defendants agreed to serve were the three longest sentences ever agreed to by foreign nationals for antitrust offenses, and the plea agreements addressed the possible criminal prosecution and imposition of jail sentences upon the defendants in a foreign jurisdiction for a cartel offense. After the three British nationals entered their guilty pleas in U.S. district court in accordance with the terms of the plea agreements, the district court deferred the U.S. sentencing and the defendants were escorted in custody to the United Kingdom, where the Office of Fair Trading charged the three executives with violating the U.K. Enterprise Act. On Nov. 14, 2008, the U.K. Court of Appeal modified the sentences imposed by the U.K. lower court to 30, 24, and 20 months, respectively, in prison. The U.S. plea agreements in effect provided for concurrent prison sentences in the United States and in the U.K. Thus, because the U.K. prison sentences matched the sentences recommended in the U.S. plea agreements, the defendants were not required to serve prison sentences in the United States.
- On December 26, 2007, the Department announced the indictment of a German national for his participation in the conspiracy between 2000 and 2002.
- On April 17, 2008, the Department announced that a former U.S. executive of the Italian firm Manuli Rubber Industries Spa would plead guilty and serve 12 months and one day in jail. On July 28, the Department announced that Manuli had agreed to plead guilty and pay a fine of \$2 million; Manuli was the first corporation to be charged in the investigation. The former president of Manuli's U.S. subsidiary also agreed to plead guilty and to serve 14 months in prison. An Italian citizen and manager of Parker ITR S.r.l.'s Oil and Gas Business Unit was sentenced to pay a \$20,000 criminal fine and serve six months under house arrest.

18. **Air Cargo:** On September 30, 2008, the Department announced that a British citizen and former executive of British Airways World Cargo had agreed to plead guilty, serve 8 months in jail, and pay a fine for participating in the conspiracy to fix rates for international air cargo shipments. Two U.S. citizens have also been charged in the air cargo investigation, along with nine companies. In July 2008, SAS, Cathay Pacific Airways Limited, Martinair Holland N.V., Société Air France and Koninklijke Luchtvaart Maatschappij N.V. (KLM Royal Dutch Airlines) pled guilty to conspiring to fix prices on air cargo rates.

SAS was sentenced to pay a \$52 million criminal fine, Cathay was sentenced to pay a \$60 million criminal fine, Martinair was sentenced to pay a \$42 million criminal fine, and Air France-KLM, which now operates under common ownership by a single holding company, was sentenced to pay a \$350 million criminal fine. Later in 2008, the former highest-ranking cargo executive in the U.S. for SAS Cargo Group A/S (SAS) was sentenced to 6 months in jail after pleading guilty to conspiring to fix the rates charged to U.S. and international customers on air cargo shipments. In January 2008, Qantas Airways Limited pled guilty and was sentenced to pay a \$61 million criminal fine for its role in the conspiracy. Later in 2008, Qantas' former highest-ranking executive employed in the United States pled guilty and was sentenced to serve six months in jail and pay a \$20,000 criminal fine for fixing cargo rates. In May 2008, Japan Airlines pled guilty and was sentenced to pay a \$110 million criminal fine for conspiring to fix rates for international cargo shipments.

19. **E-Rate:** The Division's investigation of collusion and other fraud in connection with the Federal E-Rate program continued in FY 2008. The E-Rate program was created by Congress in 1996 to help economically disadvantaged schools and libraries obtain computer and telecommunications services. The Division helped to uncover massive fraud in this program: at the end of FY 2008, a total of seven companies and 17 individuals have pleaded guilty, have been convicted and found guilty, or entered civil settlements, resulting in more than \$40 million in criminal fines, civil settlements and restitution and jail sentences totalling nearly 29 years. In FY 2008, significant E-Rate prosecutions continued, including: an individual was found guilty after trial of bribery in Georgia and sentenced to five years in prison; a former South Carolina school official was sentenced to serve two years in prison and pay \$468,496 in restitution for defrauding the E-rate program; an electrical contracting company pleaded guilty and agreed to pay \$3.3 million in criminal fines and restitution for bid-rigging in California; the former owner of three Kansas computer service companies and a family member were indicted for participating in a conspiracy to defraud the E-Rate program; co-owners of a New Jersey-based computer service provider agreed to plead guilty to participating in a conspiracy to defraud the program; a former education consultant from California was sentenced to serve 7 ½ years in prison for rigging bids and defrauding technology projects in seven states funded by the E-Rate program; and the former president and owner of a vendor that provided computer-related goods and services through the E-Rate program to schools in Texas was sentenced to serve three years in prison following his conviction for defrauding the program.

1.4.2. DOJ Civil Non-Merger Enforcement

20. **Real estate brokerage services industry:** On May 27, 2008, the Department reached a proposed settlement with the National Association of Realtors (NAR) requiring NAR to allow Internet-based residential real estate brokers to compete with traditional brokers. Under the terms of the settlement, NAR would repeal its anticompetitive policies and require affiliated multiple listing services to repeal their rules that were based on those policies. The settlement would resolve concerns raised in the Department's 2005 antitrust lawsuit challenging two NAR policies. One policy required multiple listing services to permit traditional brokers to withhold their listings from brokers who serve their customers through virtual office websites, even though NAR does not permit brokers to withhold their listings from traditional broker members. The second policy prevented a broker from educating customers about homes for sale through a virtual office website and then referring those customers, for a referral fee, to other brokers, who would help customers view homes in person and negotiate contracts for them. The NAR settlement was one of the most significant actions that the Department pursued in the real estate brokerage industry. The Department also filed a lawsuit on May 2, 2008, against the Consolidated Multiple Listing Service of Columbia, South Carolina (CMLS), for rules that caused consumers buying or selling homes in the Columbia area to pay more for real estate brokerage services. The Department alleged that CMLS required brokers to perform a prescribed set of services, excluding competitors who might offer innovative options and preventing customers from performing some of the tasks on their own to save money. Unlike brokers elsewhere in the country, CMLS members were also prevented from offering home sellers the opportunity to avoid paying a

broker's commission if the seller located a buyer on his or her own. The Department also reached a settlement on October 16, 2007, with Multiple Listing Service of Hilton Head Island Inc. (HHMLS) requiring the group to change its membership rules so that low-priced and innovative real estate brokers could compete in the Hilton Head, South Carolina area. HHMLS had imposed prerequisites to membership that (1) prevented some real estate brokers from listing homes for sale in the multiple listing service database, (2) stabilized the price of brokerage services by forcing its broker members to provide a certain set of broker services regardless of whether a client desired the services, and (3) granted its Board of Trustees authority to adopt rules that effectively could directly regulate the commissions that brokers paid each other.

21. **Visa:** On July 1, 2008, in response to the Department's investigation of its operating regulations, Visa Inc. (Visa) decided to rescind its rule requiring merchants to treat Visa-branded debit cards differently, when used as a PIN-debit card and processed via non-Visa networks, from the same cards when used as signature debit cards and processed on the Visa network. Visa adopted amended rules that allow banks issuing Visa-branded debit cards to enable their customers to use the PIN debit functionality of those cards without entering a PIN. Prior to the change, the Department had been investigating whether the rule adversely affected competition in the debit card industry by restricting certain PIN debit transactions, particularly small-value and Internet transactions, and by potentially interfering with the introduction of new types of PIN debit services. Since Visa's new operating regulations resolved the competition concerns that initially prompted the Department to scrutinize the matter, the Department closed its investigation.

1.4.3. Enforcement of DOJ Consent Decrees

22. On December 3, 2007, the DOJ announced that ALLTEL Corporation, the fifth-largest provider of mobile wireless voice and data services in the U.S., had agreed to pay \$1.3 million as part of a civil settlement with the DOJ and the state of Minnesota to resolve alleged violations of two court orders entered earlier in the year in connection with ALLTEL's acquisition of Midwest Wireless Holdings LLC. These court orders required ALLTEL to divest mobile wireless businesses in four rural service areas in southern Minnesota; pending divestiture a management trustee was appointed to oversee the businesses and ALLTEL was required to preserve the assets and provide the trustee with detailed timely reports describing its plans for capital expenditures in the divestiture markets and adhere to all existing plans for maintenance and capital improvements. According to a petition filed by the DOJ and Minnesota, ALLTEL failed to adhere to existing plans and to provide relevant information on capital improvement plans, and furnished misleading reports on the progress of capital improvement projects to the management trustee.

23. On November 26, 2007, the DOJ announced that Cal Dive International Inc. and its parent company, Helix Energy Solutions Group Inc., had agreed to pay \$2 million as part of a civil settlement with the DOJ to resolve alleged violations of a 2005 consent decree. In connection with Cal Dive's acquisition of assets from Stolt Offshore Inc. and S&H Diving LLC, the DOJ obtained a consent decree and court order requiring Cal Dive to divest two saturation diving vessels and other assets used for subsea construction projects, repair services, and recovery and salvage after damage to structures. The DOJ alleged that Cal Dive engaged in a course of conduct that delayed the sale of one of the vessels and other assets so as to profit during a period of high demand due to clean up from Hurricanes Katrina and Rita, and eventually failed to divest the vessel in the same condition in which it was acquired from Stolt. The \$2 million payment represented disgorgement of profits gained through the violations and reimbursement of the cost of the DOJ's investigation.

1.4.4. *FTC Non-Merger Enforcement Actions*

24. **Motor Oil Importers of Puerto Rico:** On August 28, 2008 the Commission charged that a motor oil lubricant importer illegally conspired with its competitors to restrict the importation and sale of these products in Puerto Rico, which resulted in higher prices paid by consumers. According to the FTC's complaint, during 2005 and 2006, American Petroleum joined with numerous others in the Puerto Rico lubricants industry to lobby for the delay, modification, or repeal of Puerto Rico Law 278, which imposes an environmental recovery fee of 50 cents per quart. With the effective date of the law approaching, the importers adopted a strategy of refusing to import lubricants as a means of forcing a change. The consent order settling the charges barred American Petroleum from conspiring with its competitors to restrict output, refuse to deal, or boycott any lubricant buyer or potential buyer. For additional information, including the complaint and consent order issued for this matter, see the press release at <http://www2.ftc.gov/opa/2007/06/lube.shtm>.

25. **Connecticut Chiropractors:** On March 5, 2008, the Commission challenged the conduct by two Connecticut chiropractic associations and one of their attorneys to implement a collective refusal to deal with a cost-saving health plan in Connecticut. The FTC's complaint alleged that the Connecticut Chiropractic Association (CCA), the Connecticut Chiropractic Council (CCC), and Robert L. Hirtle (CCA's legal counsel) conspired through a campaign of meetings and other communications to encourage and facilitate a collective refusal to deal with American Specialty Health (ASH). The purpose and effect of the boycott was to prevent ASH from providing its cost-saving chiropractic benefits administration program in Connecticut. According to the Commission's findings, the challenged conduct had no legal justification and, thus, was a naked boycott among competitors and a clear *per se* violation of the antitrust laws. The proposed consent order prohibited the parties from entering into, or facilitating, any agreement among chiropractors: (1) to negotiate with payors on any chiropractor's behalf; (2) to deal, not to deal, or threaten not to deal with payors; or (3) terms on which to deal with payors. For additional information, including the complaint and consent order issued in this matter, see the press release at <http://www2.ftc.gov/opa/2008/03/chiro.shtm>.

26. **Cephalon, Inc:** On February 13, 2008, the Commission filed a complaint in federal district court charging Cephalon, Inc. with preventing competition to its branded drug Provigil. The conduct under challenge included paying four firms to refrain from selling generic versions of Provigil until 2012. Cephalon's anticompetitive scheme, according to the Commission, denied patients access to lower-cost, generic versions of Provigil and forced consumers and other purchasers to pay hundreds of millions of dollars a year more for Provigil. According to the complaint, Cephalon entered into agreements with four generic drug manufacturers that each planned to sell a generic version of Provigil. Each of these companies had challenged the only remaining patent covering Provigil, one relating to the size of particles used in the product. The complaint charged that Cephalon was able to induce each of the generic companies to abandon its patent challenge and agree to refrain from selling a generic version of Provigil until 2012 by agreeing to pay the companies a total amount in excess of \$200 million. In so doing, the FTC asserted that Cephalon achieved a result that assertion of its patent rights alone could not. See the press release to view the complaint and other court pleadings at <http://www2.ftc.gov/opa/2004/08/cimacephalon.shtm>.

27. **Negotiated Data Solutions, LLC:** On January 23, 2008, the Commission entered into a consent agreement with Negotiated Data Solutions LLC (N-Data). The Commission had charged that N-Data violated Section 5 of the FTC Act by engaging in unfair methods of competition. N-Data acquired patent rights originally held by National Semiconductor Corp. that were included in an IEEE industry standard for autonegotiation technology, which allows Ethernet devices made by different manufacturers to work together. Ethernet is a computer networking standard that is used in nearly every computer sold in the U.S. N-Data reneged on National Semiconductor's commitment to charge a one-time royalty of \$1000 to

manufacturers or sellers of products using the IEEE standard, and demanded higher royalties from users. In the proposed consent agreement resolving the charges, the Commission ordered N-Data to stop enforcing the patents at issue unless N-Data has first offered a license under the original terms. The Commission vote to issue the complaint and accept the consent order was 3-2, with Commissioners Harbour, Leibowitz, and Rosch voting in the majority and Chairman Majoras and Commissioner Kovacic dissenting and issuing separate statements. For additional information including statements issued by Commissioners, see the press release at <http://www2.ftc.gov/opa/2008/01/ethernet.shtm>.

28. **Multiple Listing Service, Inc.:** On December 12, 2007, the FTC settled charges that Multiple Listing Service, Inc. (MLS), a group of real estate professionals based in Milwaukee, Wisconsin, adopted rules that withheld valuable benefits of the multiple listing service it controls from consumers who chose to enter into nontraditional listing contracts with real estate brokers. The rules blocked less-than-full-service listings from being transmitted by MLS to popular Internet websites, but provided this important benefit for traditional forms of listings. Under the terms of the December 2007 consent, MLS was barred from adopting or enforcing rules that treat one type of real estate listing agreement more advantageously than any other, and from interfering with the ability of its members to enter into any kind of lawful listing agreement with home sellers. See the press release at <http://www2.ftc.gov/opa/2007/12/mls.shtm>.

29. **Rambus:** In August 2006, the Commission issued an opinion concluding that Rambus, Inc. unlawfully monopolized markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAMs are widely used in personal computers, servers, printers, and cameras. In February 2007, the Commission issued its opinion prescribing a set of remedies. In April 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated the FTC's final order to cease and desist. *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). On February 23, 2009, the Supreme Court denied the Commission's petition for writ of certiorari. *FTC v. Rambus Inc.*, 129 S. Ct. 1318 (U.S. 2009). On May 14, 2009, the Commission formally dismissed the complaint.

1.5. Advisory Letters from the Commission

30. **Kaiser Foundation Health Plan, Inc.:** FTC staff issued an opinion letter on February 13, 2008, concerning whether Kaiser Foundation Health Plan, Inc. could lawfully purchase discounted pharmaceuticals for use in certain programs to provide health care services under the Non-profit Institutions Act (NPIA) exemption to the Robinson-Patman Act. The NPIA exempts from the Robinson-Patman Act "purchases of . . . supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." Kaiser is a non-profit California corporation currently providing care to its members as a health maintenance organization (HMO) in California and other states (including the District of Columbia). The letter concluded that, with certain caveats, Kaiser's proposed program would fall within the NPIA. Noting that (i) Kaiser previously had been held to be an "eligible entity" under the NPIA, (ii) its drug purchases under the proposed program appeared to be for Kaiser's "own use" in that they would further Kaiser's intended institutional function, and (iii) all the savings earned through the use of the NPIA-discounted pharmaceuticals would accrue only to Kaiser, and not to the self-insuring employers. The Commission's advisory letters are available at <http://www.ftc.gov/bc/advisory.shtm>.

1.6. Business Reviews Conducted by the Department of Justice

31. 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 three business review letters in FY 2008.

32. On April 11, 2008, the Department announced it would not challenge proposed changes to procedures for auditing and accrediting audience measurement products by the Media Ratings Council (MRC), an industry association of advertisers, broadcasters, and other members with common interest in measuring the size and demographics of media audiences. The proposal changes existing voluntary procedures by requesting that rating services seeking to replace current audience measurement products voluntarily disclose data, obtain accreditation, and undergo an independent audit before commercialization. The Department said that auditing and accrediting activities by associations of customers do not necessarily raise antitrust issues and with appropriate safeguards in place, can reduce the uncertainty of replacement services and provide valuable information to the marketplace. On July 1, 2008, the Department announced it would not challenge a proposal by External Compliance Officer Inc. (ECO), a New Jersey anti-money laundering consulting company, to collect and divulge information on the termination of money transmitter agents. Money transmitters are companies that provide electronic money transfer services to individuals. The Department said that the proposed database was not likely to reduce competition and could serve to facilitate compliance with prohibitions against money laundering and terrorist financing. On September 17, 2008, the Department announced it would not oppose a proposal by the CEO Roundtable on Cancer (CRC) to develop and publicize model contract language for clinical trials of potential new cancer treatments. CRC is a non-profit organization composed principally of pharmaceutical and biotechnology companies committed to the elimination of cancer as a public-health problem. The Department said the proposed language was not likely to be anticompetitive and could be used to help increase efficiency in contract negotiations, potentially reducing costs and shortening the time needed to begin clinical trials. The Department's business review letters can be found at: <http://www.usdoj.gov/atr/public/busreview/letters.htm>.

2. Enforcement of antitrust laws and policies: mergers and concentrations

2.1. Enforcement of Pre-merger Notification Rules

33. On October 15, 2007, the DOJ filed a lawsuit and proposed consent decree against Iconix Brand Group for its failure to produce certain required documents as part of its pre-merger filing before buying the Rocawear brand. The Hart-Scott-Rodino (HSR) Act and Rules require that parties to a transaction that requires premerger reporting must supply with their notification form certain documents prepared or reviewed by the company's officers and directors in connection with their evaluation or analysis of competitive aspects of the transaction. Iconix submitted no such documents, despite the fact that such documents existed, including a formal presentation made to its Board of Directors about the transaction and a less formal e-mail among officers and directors. In addition, when initially asked to review whether such documents existed, the company falsely reaffirmed that no such documents existed. Under the terms of the consent decree, Iconix paid a \$550,000 civil penalty to settle the lawsuit. The HSR Act permits a federal court, upon the Department's request, to assess a civil penalty of up to \$11,000 for each day a party is in violation. On December 19, 2007, the Department, at the request of the Federal Trade Commission, filed a civil lawsuit and proposed consent decree against ValueAct Capital Partners L.P., a San Francisco-based investment fund, alleging that ValueAct violated premerger reporting requirements with respect to acquisitions of voting securities of three issuers in 2005. Each of the three acquisitions, when aggregated with ValueAct's prior holdings of each issuer, resulted in holdings sufficient to trigger the HSR Act notification and waiting period requirements. In 2003, ValueAct had made corrective HSR filings relating to three other failures to file and had outlined steps it would take to avoid future violations. Under the terms of the consent decree, ValueAct paid a \$1.1 million civil penalty.

2.2. *Significant Merger Cases*

2.2.1. *FTC Merger Challenges and Cases*

34. **Whole Foods/Wild Oats:** *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd by FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869 (D.C. Cir. 2008). The Commission issued an administrative complaint, and sought a federal court temporary restraining order (TRO) and preliminary injunction, against Whole Foods Market, Inc.'s proposed acquisition of its main rival, Wild Oats Markets, in June 2007. According to the complaint, the transaction raised competition problems in 21 local markets where Whole Foods and Wild Oats both operated stores and were each other's closest competitors among premium natural and organic supermarkets. The district court granted the TRO, but subsequently denied the preliminary injunction after an abbreviated hearing, concluding that the merger's likely effect would not reduce competition substantially in violation of Section 7 of the Clayton Act. The Commission appealed the district court's ruling on grounds that the lower court failed to apply the proper legal standard that governs preliminary injunction applications by the Commission in Section 7 cases. The Court of Appeals for the District of Columbia ruled in favor of the Commission in July 2008 and remanded the case to the district court for further proceedings. In a settlement on March 6, 2009, Whole Foods agreed to sell the name brand of Wild Oats, along with 32 of the company's stores.

35. **Hexion LLC/Huntsman Corporation:** On October 2, 2008, Hexion LLC agreed to settle Federal Trade Commission charges that its proposed \$10.6 billion acquisition of rival chemical manufacturer Huntsman Corporation would violate antitrust laws by substantially lessening competition in the North American markets for various end-use markets for specialty epoxy resins and the market for methyl diisocyanate (also known as diphenylmethane diisocyanate and commonly called MDI). Hexion and Huntsman had been the primary competitors in the specialty epoxy resin market for many years. Together, the two companies accounted for between 60 and 90 percent of sales in the various North American markets for specialty epoxy resins; each had close to \$1 billion in specialty epoxy resins sales in 2007. According to the Commission's complaint, the proposed transaction would be anticompetitive and violate Section 5 of the FTC Act and Section 7 of the Clayton Act, as amended, leading to reduced competition for specialty epoxy resins in the various application-specific markets in North America by eliminating direct competition between Hexion and Huntsman, and increasing the likelihood of the exercise of unilateral market power. The settlement required that Hexion divest its specialty epoxy business and institute procedures to ensure that the MDI business it acquired would not have access to competitively sensitive non-public information obtained by its formaldehyde division. A restriction on sharing certain information between the parties was also included based on the fact that prior to the acquisition, Hexion sold formaldehyde to Huntsman to make MDI. Following the acquisition, Hexion would produce MDI and also sell formaldehyde to two other MDI competitors. The order therefore prohibited Hexion from obtaining nonpublic information from MDI competitors that could be used to coordinate prices and other activities over time.

36. **Reed Elsevier/ChoicePoint Inc.:** On September 16, 2008, the Commission issued a complaint charging that Reed Elsevier's proposed \$4.1 billion acquisition of ChoicePoint would violate the antitrust laws, as it would combine the two largest providers of electronic public record services to U.S. law enforcement customers. Public records services compile public and non-public records about individuals and businesses, including credit data, criminal, motor vehicle, property, and employment records used by law enforcement to investigate a wide variety of crimes. The transaction, as proposed, allegedly would have removed the intense rivalry that had led to lower prices, product innovations, and improved services and support for law enforcement customers by eliminating the competition between Reed Elsevier's LexisNexis product and ChoicePoint's AutoTrackXP and CLEAR products. The Commission required divestiture of ChoicePoint's product lines to Thomson Reuters Legal Inc. The Commission worked with the Attorneys General of 18 states on this investigation.

37. **Fresenius SE/Daiichi Sankyo Company, Ltd.:** On September 15, 2008, the Commission challenged Fresenius Medical Care's proposed purchase from Daiichi Sankyo Company of an exclusive sublicense to manufacture and supply Venofer to U.S. dialysis clinics. Venofer is an intravenously administered iron sucrose preparation used primarily to treat iron-deficiency anemia in dialysis patients with chronic kidney disease. The Commission alleged that the agreement would have given Fresenius, the largest operator of dialysis clinics in the country, the ability to artificially inflate its internal costs for Venofer and because of its market presence, it could effectively increase the amount Medicare pays for the drug. The Commission issued a consent order requiring Fresenius to report an objective market-based price for Venofer to Medicare.

38. **Polypore International Inc./Microporous Products L.P.:** On September 10, 2008, the Commission issued an administrative complaint challenging Polypore International's February 2008 acquisition of Microporous Products based on anticompetitive effects in the global market for battery separators. According to the Commission's complaint, the acquisition led to decreased competition and higher prices in North American markets in four different battery separator markets. Additionally, the Commission alleged that Polypore engaged in anticompetitive conduct by entering into a joint marketing agreement with a competitor, restricting the competitor's entry into one separator market. The Commission also charged that Polypore sought to maintain monopoly power through anticompetitive means in several battery separator markets. This proceeding is now before the Commission's Administrative Law Judge.

39. **Sun Pharmaceutical Industries, Ltd./Taro Pharmaceuticals Industries, Ltd.:** On August 13, 2008, the Commission announced its challenge of Sun Pharmaceutical Industries Ltd.'s (Sun) acquisition of Taro Pharmaceutical Industries Ltd. (Taro). The FTC staff found that Sun's proposed acquisition of Taro would substantially reduce competition and likely result in higher prices for three distinct generic formulations of the anticonvulsant drug carbamazepine, used widely to prevent and control seizures. In order to remedy these concerns, Sun agreed to divest all of its rights and assets needed to develop three generic forms of carbamazepine: (1) immediate-release tablets; (2) chewable tablets; and (3) extended-release tablets.

40. **McCormick&Company/Unilever Group:** On July 30, 2008, the Commission issued a complaint charging that McCormick&Company's proposed \$605 million acquisition of the Lawry's and Adolph's brands of seasoned salt products from Unilever N.V. would be anticompetitive and likely result in higher prices for U.S. consumers. According to the Commission's complaint, the proposed deal would combine the two companies that comprise almost the entire \$100 million market for seasoned salt, increasing the likelihood that McCormick would be able unilaterally to increase prices. McCormick agreed to divest its Season-All business to Morton, an FTC-approved buyer, within ten days of completing the acquisition.

41. **Pernod Ricard/V&S Spirits:** The Federal Trade Commission issued a complaint on July 17, 2008 charging that Pernod Ricard's (Pernod) proposed \$9 billion acquisition of Swedish spirits company Vin & Sprit (V&S) would violate U.S. antitrust laws because it would effectively remove the close national competition between the sellers of two "super-premium" vodka brands, Absolut and Stolichnaya. To eliminate the anticompetitive effects of the proposed transaction, the FTC required that Pernod end its distribution agreement with the owners of Stolichnaya, Spirits International BV (SPI), within six months of acquiring V&S and the Absolut brand. The Commission approved the issuance of a modified final consent order including this provision on October 17, 2008.

42. **Carlyle Partners IV, L.P./INEOS Group Limited:** On June 30, 2008, the Commission issued a complaint charging that Carlyle Partners IV, L.P.'s (Carlyle) proposed acquisition of the worldwide sodium silicate and silicas business of INEOS Group Limited (INEOS) violated of the federal antitrust

laws. Carlyle owns PQ Corporation (PQ), and the transaction as proposed would have combined PQ – the largest sodium silicate producer and seller in the highly concentrated Midwest region of the United States – with INEOS, its third-largest competitor. To remedy the alleged anticompetitive effects of the transaction, the companies entered into a consent agreement with the Commission that required them to sell PQ's sodium silicate plant and businesses in Utica, Illinois, to an FTC-approved buyer. The order also required the companies to license all of the intellectual property related to sodium silicate product at the Utica plant.

43. **Inova Health System/Prince William Health System:** The Commission successfully blocked Inova Health System's proposed acquisition of Prince William health System, after filing an administrative complaint and an action for a preliminary injunction in the Eastern District of Virginia. The Commission's federal court complaint, filed jointly with the Virginia Attorney General, alleged that the acquisition would have reduced competition for general acute care inpatient hospital services in the Northern Virginia area, leading to higher prices for consumers and reduced incentives for improved services. The Commission charged that the merger, which would have given Inova control of 73 per cent of the licensed hospital beds in Northern Virginia and six of the ten hospitals in the region, would have eliminated the beneficial competition that allows health care plans in that area to negotiate lower prices. The FTC filed its complaint on May 12, 2008, and soon after the filing of the complaint, the companies announced their decision to abandon their merger plans.

44. **Agrium Inc./UAP Holding Corporation:** On May 5, 2008, the Federal Trade Commission issued a complaint charging that Agrium, Inc.'s (Agrium) proposed \$2.65 billion acquisition of UAP Holding Corporation (UAP) violated federal antitrust laws. The FTC contended the deal would reduce competition in the market for the retail sale of bulk fertilizer and farm stores in several areas of the United States. Under the terms of a consent order resolving the Commission's charges, Agrium was required to sell five UAP farm stores in Michigan and two Agrium stores in Maryland and Virginia within 180 days of the date of the acquisition.

45. **Schering-Plough Corp/AkzoNobel N.V.:** On January 4, 2008, the Commission charged that Schering-Plough's proposed \$14.4 billion acquisition of Organon Biosciences N.V. from AkzoNobel N.V. threatened to substantially reduce competition in the U.S. market for three popular vaccines used to treat poultry, a staple in American food markets. The November 2007 order settling the charges required the sale of assets required to develop, manufacture, and market these vaccines to Wyeth. In addition, Schering-Plough was required to sign a supply and transition services agreement with Wyeth, under which Schering will provide the vaccines for two years, allowing time for the necessary FDA approvals.

46. **Great Atlantic & Pacific Tea Company (A&P)/ Pathmark Stores, Inc:** On January 4, 2008, the Commission intervened in the proposed \$1.3 billion acquisition of Pathmark Stores by A&P, alleging that the transaction would have reduced competition among grocery stores in the highly concentrated markets of Staten Island and Shirley, New York. The Commission's consent order required A&P to divest five supermarkets in Staten Island, and one supermarket in Shirley.

47. **Google/DoubleClick:** On December 20, 2007, the Commission closed its investigation of Google's proposed \$3.1 billion acquisition of internet advertising server DoubleClick Inc., concluding that the acquisition was unlikely to substantially lessen competition. While the Commission noted that the acquisition would not harm competition in the relevant market, it noted its potential impact on consumer privacy and issued a set of proposed behavioral marketing principles. The Commission vote to close the investigation was 4-1, with Commissioner Pamela Jones Harbour dissenting. See the press release at <http://www2.ftc.gov/opa/2007/12/googledc.shtm>

48. **Owens Corning/Compagnie de Saint Gobain:** On December 7, 2007, the Commission remedied competitive problems raised by Owens Corning's proposed acquisition of glass fiber

reinforcements and composite fabric assets from Compagnie de Saint Gobain. The investigation involved cooperation among staff of the FTC, the European Commission, and Mexico's Federal Competition Commission. After staff from the competition agencies raised antitrust concerns, the parties modified their agreement to exclude Saint Gobain's glass fiber reinforcement assets in the U.S. and certain assets in Europe. The FTC's consent order addressed additional competitive problems in the highly concentrated North American market for continuous filament mat, which is used in the production of non-electrical laminate, marine parts and accessories, and other products. The order required Owens Corning to divest sufficient U.S. continuous filament mat facilities, assets, and intellectual property to enable the buyer effectively to produce and sell the products in competition with the new Owens Corning/Saint Gobain joint venture.

49. **Kyphon Inc./Disc-O-Tech Medical Technologies, Ltd:** On December 7, 2007, the Commission challenged Kyphon Inc.'s \$220 million proposed acquisition of the spinal assets of Disc-O-Tech Medical Technologies, Ltd. and Discotech Orthopedic Technologies (collectively Disc-O-Tech) as anticompetitive in the market for minimally invasive vertebral compression fracture treatment products. Disc-O-Tech's Confidence products promised real benefits to patients in treating these painful fractures in a minimally invasive way, and threatened Kyphon's near-monopoly on treatment options. The Commission's consent order required that Kyphon divest all assets, intellectual property, and development rights related to the Confidence brand to an FTC-approved buyer.

50. **Mylan Laboratories, Inc./Merck KGaA:** On November 6, 2007, the FTC ordered divestitures to resolve competitive concerns in the U.S. market for five generic drugs stemming from Mylan Laboratories' proposed acquisition of the generic arm of Merck Pharmaceuticals, a transaction valued at approximately \$6.6 billion. Under a September 2007 consent order with the Commission, Mylan and Merck were required to divest all assets relating to flecainide acetate tablets, acebutolol hydrochloride capsules, guanfacine hydrochloride tablets, nicardipine hydrochloride capsules, and sotalol hydrochloride. The generic drugs at issue are used for the treatment of many conditions, including hypertension and heart arrhythmia. The order required the divestiture of all assets related to the relevant products to Amneal Pharmaceuticals, a generic drug manufacturer.

2.2.2. *DOJ Merger Challenges and Cases*

51. **Daily Gazette Company/MediaNews Group:** On June 19, 2008, the U.S. District Court in Charleston, West Virginia, issued an order and opinion that permitted the Department to proceed with its antitrust lawsuit and present its case in court against the Daily Gazette Company (Daily Gazette) and MediaNews Group Inc. (MediaNews). In May 2007, the Department filed a lawsuit challenging a series of transactions that resulted in the Daily Gazette's acquisition of the only other daily newspaper in Charleston from MediaNews. In its complaint, the Department alleged that the Daily Gazette and MediaNews substantially lessened competition in the Charleston local daily newspaper market and gave the Daily Gazette a monopoly in that market. The Department sought to remedy the competitive damage by requiring the two companies to rescind the transactions and restore the competition benefiting readers and advertisers that existed before the transactions.

52. **XM/Sirius:** On March 24, 2008, the Department announced the closing of its investigation into the proposed merger of XM Satellite Radio Holdings Inc. (XM) and Sirius Satellite Radio Inc. (Sirius). The Department determined that the merger would not substantially reduce competition for satellite radio services for the following reasons: (1) absent the merger, significant competition did not exist between the parties for subscribers of either service, as subscribers could not easily switch between the two systems due to the lack of interoperable radio signal processing equipment; (2) as a result of long-term, sole-source contracts that XM and Sirius had entered into with major car manufacturers, which provide a large and growing share of total satellite radio sales, there was not likely to be significant competition for satellite

radio equipment and service distributed through the automotive channel for many years; (3) in the mass market retail channel, the evidence did not support limiting the relevant market definition to only the two satellite radio firms and excluding alternative sources of audio entertainment, nor did it establish that the merger would limit competition substantially in part because efficiencies and cost savings resulting from the transaction would benefit consumers; and (4) a number of technology platforms under development were expected to offer new or improved alternatives to satellite radio by the time contracts between the parties and car manufacturers expired.

53. **UnitedHealth Group/Sierra Health Services:** On February 25, 2008, the Department filed a proposed settlement with the U.S. District Court for the District of Columbia requiring UnitedHealth Group Inc. (UnitedHealth) to divest most of the assets of its Medicare Advantage business in the Las Vegas, Nevada area, in order to proceed with its acquisition of Sierra Health Services (Sierra). Congress established the Medicare Advantage program as an alternative to traditional Medicare. Under the program, private insurers compete to offer various types of health insurance plans to senior citizens, ranging from HMOs to private-fee-for service plans. Many Medicare Advantage plans provide richer benefits at lower costs to enrollees than traditional Medicare. UnitedHealth, the largest health insurer in the United States, and Sierra are the first and second largest sellers of Medicare Advantage plans in Las Vegas. The transaction as originally proposed would have created a combined company controlling 94 percent of the Medicare Advantage health insurance market in the Las Vegas area and resulted in higher prices, fewer choices, and a reduction in quality of plans offered. After receiving approval from the Department, UnitedHealth divested most of the assets of its Medicare Advantage business in Las Vegas to Humana, Inc. Humana is the second-largest provider of Medicare Advantage plans in the nation after UnitedHealth, but before the sale had no significant presence in the Las Vegas market. The Department cooperated closely with the Nevada Attorney General's office in the investigation.

54. **Thomson/Reuters:** On February 19, 2008, the Department filed a proposed settlement with the U.S. District Court for the District of Columbia that would require The Thomson Corporation (Thomson) to sell data in three financial data markets in order to proceed with its \$17 billion acquisition of Reuters Group PLC (Reuters). The proposed consent decree also required the merging parties to provide licensing of related intellectual property, access to personnel, and transitional support to ensure that purchasers of the data could offer comparable products. Without the Department's proposed modification, the original transaction would have eliminated competition, increased price and reduced innovation for three categories of products—fundamentals data, earnings estimates data, and aftermarket research reports—data routinely used by institutional customers in making investment decisions and providing advice to their firms and clients. Thomson, a Canadian corporation, and Reuters, based in the United Kingdom, are two of only a few firms that supply such data. The remedies contained in the Department's proposed settlement with respect to the three financial data markets were consistent with those obtained in a concurrent antitrust investigation conducted by the European Commission. The European Commission also sought relief in an additional product market for which the Department found no competitive concerns based on market conditions in the United States. The Department cooperated extensively with the European Commission and the Canadian Competition Bureau.

55. **AT&T/Dobson:** On October 30, 2007, the Department filed a proposed settlement with the U.S. District Court for the District of Columbia that would require AT&T Inc. (AT&T) to divest assets to address competition concerns in seven markets for mobile wireless services, including rights to the Cellular One brand, in order to proceed with its \$2.8 billion acquisition of Dobson Communications Corporation (Dobson). The divestitures were required to assure continued competition in markets where the merger would otherwise have resulted in a significant loss of competition. The proposed transaction would have substantially reduced competition for mobile wireless telecommunications services in rural service areas of Kentucky, Oklahoma, Texas, and Missouri, where businesses wholly or partially owned by Dobson and AT&T collectively served more than 60 percent of subscribers. In three rural service areas in Kentucky and

Oklahoma, AT&T and Dobson each held one of the two cellular licenses and were the most significant competitors. In two rural service areas in Missouri and Texas, AT&T had a minority equity interest in, and important control rights over, the primary wireless competitor to Dobson. Similarly, the divestiture of the Cellular One brand and associated rights was required to ensure continued competition in two markets in Pennsylvania and Texas where a Cellular One licensee was the primary wireless competitor to AT&T.

56. **Abitibi/Bowater:** On October 23, 2007, the Department filed a proposed settlement with the U.S. District Court for the District of Columbia requiring the nation's largest newsprint manufacturers, Abitibi-Consolidated Inc. (Abitibi) and Bowater Inc. (Bowater), to divest a newsprint mill in Arizona in order to proceed with their proposed \$1.6 billion merger. Without the required divestiture of Abitibi's mill in Snowflake, Arizona, one of the largest and most profitable newsprint mills in North America, the combined company could have strategically closed capacity, raised prices, and substantially lessened competition in the production and sale of newsprint in North America. In addition to the divestiture, Abitibi and Bowater were required by the consent decree to notify the Department before acquiring an additional interest in any mill or machine that either Abitibi or Bowater jointly owned with a third party, if the value of the acquisition exceeded \$2 million. Abitibi reported worldwide newsprint sales of approximately \$4.8 billion in 2006, \$1.7 billion of which were North American sales. Bowater, a Delaware company based in Greenville, South Carolina, reported total sales of approximately \$3.5 billion in 2006, \$1.1 billion of which were North American sales.

3. International antitrust cooperation and outreach

3.1. *International Antitrust Cooperation Developments*

57. The FTC and DOJ have played a lead role in promoting convergence towards sound competition policies internationally, both through their participation in multilateral bodies such as the OECD Competition Committee, the International Competition Network, UNCTAD, and APEC, and through building strong bilateral ties with their major enforcement partners. The ICN Unilateral Conduct Working Group, co-chaired by the FTC and the German Bundeskartellamt, produced a set of recommended practices on the assessment of substantial market power and the application of unilateral conduct rules to state-created monopolies, and in March 2009 hosted a successful workshop on assessing dominance/substantial market power and evaluating unilateral conduct, attended by more than 125 delegates from over 35 jurisdictions. Based on the work of the ICN Merger Working Group, co-chaired by the DOJ and Irish Competition Authority, ICN members adopted three recommended practices addressing the legal framework for merger analysis, the use of market shares and measures of market concentration, and the assessment of firm entry and expansion. At the ICN's annual conference in April 2008, the Cartel Working Group introduced a report on effective cartel settlement systems, and the Competition Policy Implementation Working Group presented a study of what makes a competition agency effective.

3.2. *Outreach*

58. In FY 2008, the DOJ and FTC continued to provide technical assistance on competition law and policy matters to newer competition agencies, including agencies in Brazil, Central America, China, Egypt, India, South Africa, and Turkey. The agencies also provided commentary on non-OECD countries' proposed laws, regulations, and guidelines, hosted visits and study missions by officials of younger agencies (e.g., Zambia), sent officials and staff to participate in seminars and conferences hosted by other agencies (e.g., Turkey, Brazil, Poland, and Taiwan), and engaged in other assistance efforts to young agencies, such as providing advice on cases and issues by e-mail, phone, and video conferences. In addition, DOJ and FTC provided experts to many of the OECD's regional training center events, including workshops on cartels, quantitative techniques, and unilateral conduct. The United States participates in both the ICN's consultation program and its partnership program and in its experience-sharing calls for

new agencies, and the FTC co-chairs the ICN's Competition Policy Implementation Working Group's Subgroup on Technical Assistance.

59. As part of its ongoing effort to build effective relationships, the FTC's "International Fellows and Interns" program provided opportunities for staff from counterpart foreign agencies to spend several months at the FTC to work directly with FTC staff on investigations, subject to appropriate confidentiality protections. During FY 2008, the FTC hosted 12 International Fellows and Interns from Argentina, Australia, Austria, Brazil, Canada, Egypt, Hungary, Israel, Mexico, and Turkey. In addition, the Commission, for the first time, used its U.S. SAFE WEB Act authority to send a staff member to work in a foreign agency, the UK Office of Fair Trading (OFT), for six months.

60. On February 6, 2008, DOJ and FTC held a public workshop on technical assistance. 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 workshop featured five interactive panel discussions and was attended by approximately 100 people. The agencies received positive feedback on their efforts so far, as well as many valuable suggestions for maximizing the effectiveness of their programs for the future.

61. In May 2008, DOJ held its second annual training program on antitrust and economics for both DOJ employees and officials of foreign antitrust agencies. Sixteen officials from ten different foreign antitrust agencies attended the program. The training session addressed a variety of topics, including unilateral and coordinated effects, exclusive dealing, and remedies. It concluded with practical programs about the common mistakes that are made in antitrust investigations.

62. For the FTC and the DOJ, overall capacity-building and technical assistance activities included 39 missions to 25 countries, involving 60 different agency staff experts. In addition, the FTC maintained long-term resident advisors in Peru/Colombia and South Africa.

4. Regulatory and Trade Policy Matters

4.1. Regulatory Policies

4.1.1. Joint FTC-DOJ Activities: Federal and State Regulatory Matters

63. On January 25, 2008, FTC and DOJ provided comments on a proposed addition to the rules of the Supreme Court of Hawaii from the Hawaii State Bar Association to create a new rule defining the practice of law. The agencies indicated that the proposed rule would bar non-lawyers from competing with lawyers for a range of services and could unnecessarily increase the prices paid for those services. The agencies suggested that the definition of the practice of law 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. The agencies noted in particular that the proposed definition could preclude use of a number of services that provide reasonable options for some consumers, such as (1) tenants' associations informing renters of landlords' and tenants' rights and responsibilities, (2) lay organizations and consumer associations providing citizens with information about legal rights and issues, and (3) human resources management advising employers about employment discrimination and sexual harassment rules, and other regulatory compliance issues.

64. On September 12, 2008, the agencies announced a joint statement to the Illinois Task Force on Health Planning Reform regarding certificate-of-need (CON) laws, which generally prevent firms from entering certain areas of the health care market unless they can demonstrate to state authorities that there is an unmet need for their services. The agencies argued that these laws: undercut consumer choice, stifle

innovation, weaken the ability of markets to contain health care costs, impede the efficient performance of health care markets by creating barriers to entry and expansion, and create opportunities for existing competitors to exploit the CON process to thwart or delay new competition, i.e., the laws can facilitate anticompetitive agreements among providers and the CON process itself may be susceptible to corruption.

4.1.2. FTC Staff Activities: Federal and State Regulatory Matters

65. On January 29, 2008, the Commission filed an amicus curiae brief in support of appellants and urging reversal in: *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, sub nom. *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, No 08-1097 (Fed. Cir.). In the brief, the FTC urged the Court of Appeals to reverse the District Court's decision and hold that patent laws do not immunize patent settlements between pharmaceutical firms from antitrust scrutiny. The Commission filed the brief based on "the importance of the issues presented to its mandated mission and the serious risk to consumer welfare posed by anticompetitive settlement agreements" between drug companies.

66. On February 1, 2008, FTC staff gave comments to the Puerto Rico House of Representatives regarding Senate Bill 2190, which sought to permit health care collective bargaining on the part of diverse health care providers or their representatives regarding fees, reimbursement methods, and other matters. FTC staff expressed concern that the bill, if enacted, likely would foster illegal price fixing, and that the potential rise in prices would not be accompanied by any improvements in quality of service.

67. On February 15, 2008, the FTC submitted comments regarding Ohio Executive Order 2007 – 23S entitled "Establishing Collective Bargaining for Home Health Care Workers." The order sought to establish collective bargaining for independent home health care providers (IHCPs), defined as "those providers of ongoing Medicaid reimbursed direct care services that are paid for through a Medicaid waiver program in the State of Ohio and not employed by a private agency." The order stipulated state recognition of "one representative as the exclusive collective bargaining representative for all IHCPs," and that "the State, acting through the Office of the Governor or his designee, shall engage in collective bargaining with the elected representative of IHCPs regarding reimbursement rates, benefits, and other terms." The Commission indicated its belief that the executive order was likely to foster certain anticompetitive conduct such as illegal price fixing, which conduct could harm Ohio home health care consumers.

68. On February 18, 2008, at the request of Governor Sarah Palin and the Alaska Department of Health and Social Services, the Federal Trade Commission submitted written testimony to the Standing Committee on Health, Education, and Social Services of the state's House of Representatives concerning health care competition, Alaska's certificate of need (CON) laws, and House Bill 337 (H.B. 337), which would modify or repeal certain aspects of the state's CON requirements. The FTC's testimony highlighted Alaska's CON law as being one of the most stringent in the country, resulting in entry barriers that were likely difficult to overcome for a broad range of health care service providers.

69. On April 18, 2008, the FTC filed a comment with the Federal Energy Regulatory Commission (FERC) concerning proposals aimed at strengthening competition in organized electric power markets to increase economic efficiency, improve electric system reliability, and enhance consumer welfare. Specifically, the comment encouraged the FERC to facilitate improvements in pricing and direct load control – collectively known as "demand response."

4.1.3. DOJ Activities: Federal and State Regulatory Matters

70. On October 10, 2007, the Department launched a new website to educate consumers of real estate brokerage services on the potential benefits that competition can bring. The website can be accessed at:

http://www.usdoj.gov/atr/public/real_estate/index.htm. Features of the website include maps identifying states with real estate laws that can inhibit competition and a calculator to help consumers tally their potential savings when brokers pursuing new business models compete for their business. New real estate brokerage models have the potential to reduce the estimated median commission paid by home sellers by thousands of dollars; however, a number of states have passed laws making it illegal for brokers to offer rebates and limited-service packages that can benefit customers. Data presented on the new website show how the elimination of these types of barriers can save consumers thousands of dollars in real estate commissions when selling or buying a home. The website also explains how consumers are harmed when states forbid competition between lawyers and non-lawyers to conduct real estate closings, and when brokers tailor the rules governing local multiple listing services to exclude lower-cost rivals.

71. On January 31, 2008, the DOJ submitted comments to the Department of the Treasury in response to the latter's request for comments on the Regulatory Structure Associated with Financial Institutions. The comments noted that based on the DOJ's experience investigating competitive conditions in various financial markets, including financial futures, options, and equities, the DOJ believed that certain regulatory policies governing financial futures may have inhibited competition among financial futures exchanges, potentially discouraging innovation and perpetuating high prices for exchanges services. The comments noted that in contrast to the situation prevailing in equity and options exchanges, the control exercised by futures exchanges over clearing services has made it difficult for exchanges to enter and compete in the trading of financial futures contracts. If greater head-to-head competition for the exchange of futures contracts could develop, this would likely result in greater innovation in exchange systems, lower trading fees, and other procompetitive benefits, leading to increased trading volume. The DOJ recommended a careful review by the Treasury Department to determine whether the current regulatory structure for interest rate futures could be improved to make entry by new exchanges easier.

72. On September 4, 2008, the Department wrote to the Montana Board of Realty Regulation, urging the Board to include in proposed regulations on real estate brokerage services an option for consumers to waive minimum service requirements. The DOJ letter noted that the vast majority of states allow consumers to select and purchase only those real estate brokerage services they want, thereby allowing consumers to save thousands of dollars when selling their homes, and forcing traditional full-service brokers to compete harder, putting downward pressure on the price of their services. The Department also announced on April 1, 2008, that the Board had voted to repeal a rule forbidding real estate brokers from offering rebates and other incentives to their customers, in response to an investigation by the Antitrust Division. The Department applauded the resulting benefits for consumers from the removal of this key impediment to competition between real estate brokers.

73. In letters dated December 10, 2007, February 28, 2008, and October 10, 2008, the Department commented to the Wisconsin Supreme Court on proposals by the State Bar of Wisconsin to create a new rule to define the practice of law. The DOJ's letters noted that the proposed definitions would bar non-lawyers from competing with lawyers for a range of services and could unnecessarily increase prices paid for those services. The letters suggested limiting the proposed definition to services where specialized legal skills are required and an attorney-client relationship is present, and recommended restricting these services to those "where there is a relationship of trust or reliance."

74. On June 6, 2008, the Department wrote to the Michigan Senate, criticizing proposed certificate-of-need (CON) standards for proton beam therapy (PBT), a highly sophisticated radiation therapy for cancer patients. The proposed standards would likely permit only one PBT provider to operate in Michigan, and the entity granted the CON would have to include at least five of the nine largest radiation oncology hospitals in the state, allowing a majority of the current competitors to block any PBT center from being built in Michigan. The DOJ letter concluded that the proposed standards were likely to impose

substantial costs on consumers and the market for radiation therapy and may violate the Sherman Act. The DOJ recommended rejection of the standards.

4.2. DOJ and FTC Trade Policy Activities

75. 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.

76. 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 with the Office of the U.S. Trade Representative and other U.S. agencies in competition policy discussions associated with Asia-Pacific Economic Cooperation (APEC), and co-chaired the negotiating team for the competition chapters in the U.S.-Malaysia free trade agreement negotiations that occurred in FY 2008. 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.

77. 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 fair and open, and accelerate an effective program of deregulation to open markets to competition.

5. New studies related to antitrust policy

78. On September 8, 2008, the DOJ issued a report, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, to inform consumers, businesses, and policymakers about issues relating to single-firm conduct under the antitrust laws. The report examined whether and when specific types of single-firm conduct violate Section 2 of the Sherman Act and discussed the following issues: monopoly power, conduct standards, predatory pricing and bidding, tying, bundled and single-product loyalty discounts, unilateral, unconditional refusals to deal with rivals, exclusive dealing, remedies and international perspectives. The report drew extensively on commentary from a series of joint DOJ and FTC hearings on Section 2, scholarly research, and the jurisprudence of the U.S. Supreme Court and lower courts. The report sought to make progress toward the goal of developing sound, clear, objective, effective and administrable standards for Section 2 analysis.

79. On September 8, 2008, FTC Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch jointly issued a statement in response to the DOJ report, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*. FTC Chairman William E. Kovacic also issued his own individual statement. Commissioners Harbour, Leibowitz, and Rosch raised concerns that the standards adopted in the Department's report would be more onerous than those imposed under current Section 2 case law, and that not all the views of the various section 2 stakeholders present at the hearing had been accommodated. Chairman Kovacic's statement noted that much of the report incorporated the work of FTC employees who helped draft it, although the conclusions remained DOJ's own. He

also stated that the report would have benefitted from a fuller examination of the history of modern doctrine and policy.

80. FTC staff associated with the joint FTC/DOJ Section 2 hearings prepared a series of working papers covering several topics addressed by the hearings. The working papers are available on the Commission's website, at www.ftc.gov/os/sectiontwohearings/index.shtm. One working paper, on the *Enforcement of Section 2 of the Sherman Act, Theory and Practice*, surveys all electronically published Section 2 cases during a seven-and-a-half-year period and discusses the benefits and costs of pursuing clear rules and an analysis of the false positives/false negatives debate. Another paper, entitled *General Standards for Exclusionary Conduct*, evaluates various frameworks that have been proposed for analyzing single-firm conduct. A third paper, *Monopoly Power: Use, Proof, and Relationship to Anticompetitive Effects in Section 2 Cases*, examines the meaning of monopoly power and the challenges posed in defining markets in the Section 2 context, paying particular attention to the "Cellophane Fallacy" and addressing the role of inferences based on competitive effects. Finally, a paper, *Cheap Exclusion: Role and Limits*, addresses the legal and policy issues raised by using Section 2 to challenge deceptive conduct and other similar practices collectively known as "cheap exclusion." The paper summarizes policy considerations for and against Section 2 challenges to these practices and proposes principles for determining when applying Section 2 is most appropriate.

81. On January 18, 2008, the Federal Trade Commission issued a report entitled *Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors*. The report identified and quantified the Postal Service's economic burdens and advantages due to its status as a federal government entity, as well as those resulting from its postal and mailbox monopolies. The report also examined the net economic effect of the relevant laws governing the Postal Service and its private competitors. The report concluded that the USPS's burdens and benefits create marketplace distortion--, e.g., legal constraints increase the USPS's costs --and implicit subsidies that the USPS enjoys partially mask the USPS's higher costs from consumers. The report further explored ways that the Postal Regulatory Commission or Congress may be able to minimize or eliminate such distortions. The report is available at <http://www.ftc.gov/os/2008/01/080116postal.pdf>.

82. On November 29, 2007, the Department hosted a public symposium to examine the current state of competition in telecommunications and multichannel video services and future prospects for additional competition. The symposium 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. Based on the discussion and comments made at the symposium, 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*, is available at <http://www.usdoj.gov/atr/public/reports/239284.pdf>.

5.1. *FTC Conferences, Reports, and Economic Working Papers*

5.1.1. *Commission Conferences and Workshops, and Studies and Reports*

5.1.1.1. Conferences and Workshops

83. In May 2008, the FTC held a one-day public workshop to examine developments in the health care sector relating to “clinical integration” among health care providers. More information about the “Clinical Integration in Health Care: A Check-Up” workshop is available at <http://www.ftc.gov/bc/healthcare/checkup/index.shtm>.

84. In April 2008, the Commission hosted a workshop examining recent trends and competition and consumer protection issues regarding particular health care delivery innovations. More information about the “innovations in Health Care Delivery” workshop is available at <http://www.ftc.gov/bc/healthcare/hcd/index.shtm>.

85. The Commission hosted a unilateral effects analysis and litigation workshop in February 2008. The workshop focused on the application of unilateral effects theory to mergers of firms that sell competing, but differentiated products. Further information on this workshop is available at <http://www.ftc.gov/bc/unilateral/index.shtm>.

5.1.2. *Studies and Reports*

86. In 2008, the FTC engaged in an in-depth self-assessment exercise to encourage acceptance of a norm of periodic self-assessment, to create a template for the agency to engage regularly in an analysis of its performance, and to identify approaches for improvement over both the short and long term. The assessment, called “The FTC at 100”, involved a mix of internal deliberations and external consultations, including more than 30 international consultations with overseas agencies, consumer groups, business groups, academics, and the private bar. More information about the consultations is available at <http://www.ftc.gov/ftc/workshops/ftc100/index.shtm>. The principal focus of the assessment was to determine criteria that should be used to assess the FTC’s work, as well as the techniques to measure the agency’s success in meeting these normative criteria. The results of the self-assessment are available in a report at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>. In addition to providing detailed commentary about how the FTC can best achieve its mission, the report identifies characteristics of good administrative practice for all competition and consumer protection agencies, including a well-articulated purpose and strategy, a communications plan, and routine evaluation processes.

5.1.3.) *Commission Economic Working Papers*

87. The FTC’s Bureau of Economics issued the following working papers during FY 2008. The papers may be obtained at <http://www.ftc.gov/be/econwork.htm>.

- 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.

5.2. *Antitrust Division Economic Analysis Group Discussion Papers*

88. The Economic Analysis Group issued the following papers during FY 2008. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.gov). They can also be viewed online at: http://www.usdoj.gov/atr/public/eag/discussion_papers.htm. Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 1024, Liberty Square Building, 450 5th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 616-4529 or e-mail (janie.ingalls@usdoj.gov).

- William W. Nye, The Implications of 'Zeroing' on Enforcement of U.S. Antidumping Law, EAG 08-10, August 2008.
- Alexander Raskovich, Should Banking Be Kept Separate from Commerce, EAG 08-9, August 2008.
- Nicholas Hill, Analyzing Mergers Using Capacity Closures, EAG 08-8, August 2008.
- Nathan Miller, Competition when Consumers Value Firm Scope, EAG 08-7, August 2008.
- Nisvan Erkal and Deborah Minehart, Optimal Sharing Strategies in Dynamic Games of Research and Development, EAG 08-6, June 2008.
- Russell Pittman and Vanessa Yanhua Zhang, Electricity Restructuring in China: The Elusive Quest for Competition, EAG 08-5, April 2008.
- Jeff Lien, Electricity Restructuring: What Has Worked, What Has Not, and What is Next, EAG 08-4, April 2008.
- Fan Zhang, Dynamic Contract Breach, EAG 08-3, March 2008.
- Dennis W. Carlton and Ken Heyer, Appropriate Antitrust Policy Towards Single-Firm Conduct, EAG 08-2, March 2008.
- Dennis W. Carlton and Michael Waldman, Safe Harbors for Quantity Discounts and Bundling, EAG 08-1, January 2008.
- Dennis W. Carlton, Mergers in Regulated Industries: Electricity, EAG 07-16, December 2007.
- Dennis W. Carlton, The Need to Measure the Effect of Merger Policy and How to Do It, EAG 07-15, December 2007.
- W. Tom Whalen, Dennis W. Carlton, Ken Heyer, and Oliver Richard, Proposal for a Market-Based Solution to Airport Delays, EAG 07-14, October 2007. Published at 31 *Regulation* (2008).

APPENDICES

**Department of Justice:
Fiscal Year 2008 FTE and Actual Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	379	\$ 75,219
Civil Enforcement	411	\$ 81,488
Total	790	\$156,707

**Federal Trade Commission: Fiscal Year 2008 Competition
Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	502.0	101,944.4
<i>Bureau of Competition</i>	271.3	40,805.6
<i>Bureau of Economics</i>	74.0	11,855.2
<i>Regional Offices</i>	22.3	3,416.8
<i>Mission Support</i>	134.4	45,866.8
Premerger Notification	31.9	4,300.5
<i>Bureau of Competition</i>	30.9	4,154.3
<i>Bureau of Economics</i>	0.1	15.0
<i>Regional Offices</i>	0.9	131.2
Merger & Joint Venture Enforcement	170.7	26,856.7
<i>Bureau of Competition</i>	116.1	18,713.4
<i>Bureau of Economics</i>	41.0	6,148.3
<i>Regional Offices</i>	13.6	1,995.0
Merger & Joint Venture Compliance	7.1	954.9
<i>Bureau of Competition</i>	7.1	954.9
<i>Bureau of Economics</i>	-	0.0
<i>Regional Offices</i>	-	0.0

	FTE	Amount (\$ in thousands)
Nonmerger Enforcement	117.1	16,594.2
<i>Bureau of Competition</i>	93.9	13,077.4
<i>Bureau of Economics</i>	16.7	2,522.4
<i>Regional Offices</i>	6.5	994.4