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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN UNITED STATES

-- 2001 --

This annual report by the American Delegation is submitted FOR INFORMATION to the Competition Committee at its forthcoming meeting on 5-6 June 2002.

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UNITED STATES

(From 1 October 2000 to 30 September 2001)

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Summary of Highlights

In June 2001, Charles A. James was confirmed as Assistant Attorney General for the Antitrust Division and Timothy J. Muris was sworn in as Chairman of the Federal Trade Commission.

A number of significant changes to the pre-merger filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 were implemented in FY2001, including increases in the filing thresholds, a new tiered fee structure, and an increase in the waiting period following substantial compliance with a "second request" for information. Both agencies also completed internal reviews of their merger review filing processes and implemented reforms, summarized in reports submitted to Congress.

In the DOJ's litigation against Microsoft, a court of appeals affirmed the district court's determination that Microsoft had employed anticompetitive means to maintain a monopoly in the operating system market, but rejected eight of the twenty district court findings that particular acts constituted bases for the violation. It reversed the determination that Microsoft illegally attempted to monopolize the Internet browser market. It also vacated the trial court's judgment that Microsoft had unlawfully entered into an agreement to tie its browser to its operating system, and remanded that claim to the district court for reconsideration under the more rigorous rule of reason standard. Based in large part on the fact that the court of appeals, as the court described, "drastically altered" the district court's liability findings, the court of appeals also vacated the district court's remedial order. The case was assigned to a new district court judge, and on September 6, 2001, in consideration of the court of appeals' decision and the desire to achieve prompt and certain relief for consumers, the DOJ advised Microsoft that it would not seek a break-up of the company in the remand proceeding, nor pursue further proceedings on the tying claim, but would instead seek a remedy in the district court for the anticompetitive acts affirmed by the court of appeals. On September 28, 2001, the district court ordered the parties to engage in an intense round of settlement negotiations, expressly directing the parties to take into account what remedies remained appropriate in light of the court of appeals' decision. On November 6, 2001, the DOJ and nine of the plaintiff States reached a settlement with Microsoft; nine of the plaintiff States chose not to join in the settlement and are separately pursuing their own remedial proposals in the district court. In the DOJ's view, the settlement stops the unlawful conduct found by the court of appeals, prevents the recurrence of similar conduct in the future, and restores the competitive conditions to the market.

The DOJ continued to pursue enforcement actions against international cartels, including those involving sorbates, isostatic graphite, foreign construction contracts funded by the U.S. Agency for International Development, and graphite electrodes. In particular, in October 2000, Sotheby's Holdings agreed to plead guilty and pay a $45 million fine for fixing the price of commission rates charged to sellers of art, antiques, and other collectibles at auctions. In May 2001, a federal grand jury indicted the former chairmen of Sotheby's Holdings Inc. and Christie's International plc — the two largest auction houses in the world--for fixing commission rates charged to sellers of collectibles. A jury found Mr. Taubman of Sotheby's guilty of conspiracy on December 5, 2001; he was sentenced on April 22, 2002, to serve a term of imprisonment of one year and one day and to pay a $7.5 million fine.

The Commission charged Schering-Plough Corporation with paying two other drug companies millions of dollars to keep their competing generic drugs off the market for an extended period.

In related testimony before the Senate concerning the Hatch-Waxman Act, the Commission stated that the Act has contributed to a significant increase in the availability of generic drugs, saving consumers potentially $8-10 billion per year. To ensure that consumers continue to have timely access to generic pharmaceuticals and are protected from potentially anticompetitive arrangements, the Commission also announced that it will conduct a study of generic drug competition.

The Commission charged Warner Communications, Inc, and several subsidiaries of Vivendi Universal S.A., with illegally agreeing to fix prices for audio and video products featuring The Three Tenors. According to the FTC complaint, in an effort to shield new products from competition from earlier recordings, the companies agreed not to discount and not to advertise certain of their catalog products for a period of time. A proposed settlement was reached with Warner and an administrative trial of the charges against Vivendi was completed and is awaiting decision.

A consent agreement that required significant divestitures allowed the merger of Chevron Corporation and Texaco Inc., two of the world's largest integrated oil companies, to proceed. Under the terms of the Commission's order, the combined company was required to divest all of Texaco's interests in two joint ventures, as wells as Texaco's interests in a natural gas pipeline in the Gulf of Mexico, a fractionating plant, and its general aviation businesses in 14 states.

The DOJ concluded that the proposal for United Airlines to acquire US Airways would reduce competition, raise fares, and harm consumers on airline routes throughout the United States. The DOJ expressed its intent to file suit to block the merger and indicated that it would be joined in its suit by the Attorneys General of several states. The parties abandoned the transaction before a suit was filed.

Public documents, including more detailed descriptions or full texts of many of the matters referred to in this report, are available at *http://www.ftc.gov* and *http://www.usdoj.gov/atr*.

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(October 1, 2000 through September 30, 2001)

Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2000, through September 30, 2001 ("FY2001"). 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").

2. On June 14, 2001, Charles A. James was confirmed by the U.S. Senate as Assistant Attorney General for the Antitrust Division. On July 19, 2001, the Division named three new Deputy Assistant Attorneys General: Michael L. Katz for Economic Analysis, Deborah P. Majoras for Civil Enforcement, and R. Hewitt Pate for Regulatory Matters. On October 12, 2001, the Division named William J. Kolasky as Deputy Assistant Attorney General for International Antitrust and Policy Enforcement.

3. Timothy J. Muris was sworn in June 4, 2001 as Chairman of the Federal Trade Commission. Muris, the Commission's 55th Chairman, has held three previous positions at the Commission: Assistant Director of the Planning Office (1974-1976), Director of the Bureau of Consumer Protection (1981-1983), and Director of the Bureau of Competition (1983-1985).

I. Changes in law or policies

A. Changes in Antitrust Rules, Policies or Guidelines

4. A number of significant changes were implemented regarding the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a) ("HSR Act"), which requires parties to notify the Federal Trade Commission and the U.S. Department of Justice before completing transactions such as mergers and acquisitions. Chief among these changes was an increase from $15 million to $50 million in the transaction value threshold over which companies must file premerger notification forms, as well as the implementation of a new tiered fee structure, with companies paying $45,000 for transactions valued at less than $100 million, $125,000 for transactions valued at $100 million to $500 million, and $280,000 for transactions valued at $500 million or more.

5. The changes, which were mandated by new legislation, also eliminate the earlier 15 percent size of transaction threshold, such that no transaction resulting in an acquiring person holding $50 million or less of assets or voting securities of an acquired person will have to be reported. Transactions valued at more than $200 million will be reportable without regard to "size of person." The current size of person test (which generally requires one side of the transaction to have sales or assets in excess of $100 million and the other $10 million) will continue to be in place for transactions valued at $200 million or less. All dollar thresholds will be adjusted each fiscal year, beginning with fiscal year 2005, to reflect changes in the gross national product during the previous year. The length of the waiting period that follows substantial compliance with a "second request" for additional information will become 30 days for most transactions

(instead of 20 days under the current law). The 10-day period following substantial compliance for cash tenders (and bankruptcy transactions) will not change.

6. In accordance with these statutory reforms, the Commission, with the concurrence of the Assistant Attorney General for Antitrust, has implemented certain changes to its premerger notification rules and notification form. Further, the Commission has amended its Rules of Practice to reflect an internal appeals process for second requests, and the Division has posted its revised internal appeals process on its Internet site.

7. In accordance with additional changes to the filing form and instructions, filers are now required to: 1) report revenue data using the North American Industry Classification System ("NAICS") rather than the Standard Industrial Classification ("SIC") System; 2) use 1997 rather than 1992 as the base year for reporting revenue data; and 3) report insurance activities in the body of the form rather than in an insurance appendix. The Form, the Instructions, and several rules were amended to replace references to the SIC codes with references to the NAICS codes, and references to a 1992 base year to a 1997 base year.

8. Pursuant to the legislation, the Antitrust Division and the FTC each completed an internal review of their merger review process, implemented reforms, and submitted a report to Congress describing those reforms and their implementation and effect. As described in its report to Congress, the Division implemented the following reforms: 1) revised the *Antitrust Division Manual* in response to the legislation and any implemented reforms; 2) revised the internal appeals process for handling parties' grievances in relation to modifications of and compliance with second requests for resolution by senior management not involved in the matter; 3) committed to early conferences with parties to identify competitive issues and to quick responses to requests to modify second requests; 4) added second request negotiations to new attorney training; 5) disseminated comments gathered in the internal merger review within the Division to assist in lessening the burden of second requests and dealing with electronic production issues; and 6) committed to continue its ongoing review of its merger review process and improve the efficiency of the process. Continuing its efforts to improve the merger review process, in October 2001 the Division announced its Merger Review Process Initiative to focus parties and investigative staffs on potential ways to streamline and speed the process.

9. The FTC report addresses many reforms, including: 1) approval of interim rules to implement the legislation; 2) amendment of the Commission's Rules of Practice to incorporate procedures for modifications and clarifications of requests for additional information and documents (second requests); 3) amendment of the Commission's Rules of Practice to incorporate procedures for expedited agency review of disagreements between merging parties and agency staff regarding second request modifications or compliance; 4) review of internal processes to eliminate unnecessary burdens and undue delays; 5) implementation of a procedure for a systematic status-check on the progress of negotiations on second request modifications; 6) taking steps to address concerns regarding the production of information from electronic systems; and 7) beginning to consider a number of additional steps (as described in the report) to further reduce burdens and delay.

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

10. Former Chairman Robert Pitofsky presented the Commission's testimony before the Senate Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Committee on Commerce, Science, and Transportation concerning FTC merger enforcement in the gasoline industry. The testimony stated that nearly one-third of the total enforcement budget for the Bureau of Competition was spent on investigations in energy industries in FY 1999 and 2000, and the same level continued in fiscal year 2001.

The testimony discussed the action taken by the FTC in the *Exxon/Mobil* merger, and reviewed the Commision's investigations of the *BP/Amoco* and *BP/ARCO* mergers, and the *Shell/Texaco* joint venture.

11. The Commission's prepared testimony relating to activities involving brand and generic settlement cases in the pharmaceutical industry was presented to the Senate Judiciary Committee by former Bureau of Competition Director Molly S. Boast. According to the testimony, the Congressional Budget Office has noted that Drug Price Competition Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, has "greatly increased the number of drugs that experience generic competition, and thus, contributed to an increase in the supply of generic drugs." Citing Congress and the Committee's "strong interest in this issue," including two bills currently before the Senate, the testimony stressed that U.S. consumers saved between $8 billion and $10 billion on prescription drugs at retail pharmacies in 1994 by buying generic instead of brand-name products. The Commission has brought three recent cases challenging agreements by which drug manufacturers sought to postpone the introduction of competing generic drugs. In addition, to better understand a broader range of pharmaceutical industry practices related to the Hatch-Waxman Act, the testimony states, the Commission is currently conducting a study pursuant to its statutory authority under Section 6(b) of the FTC Act. (http://www.ftc.gov/os/2001/05/pharmtstmy.htm)

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

12. At the end of FY2001, the Division employed 815 individuals: 336 attorneys, 56 economists, 191 paralegals, and 232 other professional staff. For FY2001, the Division received an appropriation of $120,838,000.

13. During FY2001, the Division opened 275 investigations and filed 53 civil and criminal cases in federal district court. The Division was party to six antitrust cases decided by the federal courts of appeals.

14. During FY2001, the Division filed 44 criminal cases in which it charged 22 corporations and 39 individuals. Fourteen corporate defendants and 20 individuals were assessed fines totaling $272.8 million and 11 individuals were sentenced to a total of 4,800 days of incarceration. Twelve individuals were sentenced to spend a total of 1,844 days in some form of alternative confinement.

15. During FY2001, 2,376 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the HSR Act. In addition, the Division screened a total of 1,328 bank mergers. The Division further investigated 175 mergers and challenged 8 of them. An additional 24 transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 147 civil investigations (merger and non-merger), and issued 822 civil investigative demands (a form of compulsory process). The Division did not file any non-merger civil complaints. Also during FY2001, the Division responded to five requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

16. At the end of fiscal year 2001, the FTC's Bureau of Competition had 271 employees: 176 attorneys, 45 other professionals, 45 paralegals, and 22 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities. In FY 2001, $37,558,300 was allocated to the Commission's competition mission.

17. During fiscal year 2001, the Commission brought a total of 28 competition enforcement actions. Based on its review of premerger notification filings, the Commission staff opened 195 initial phase investigations and issued requests for additional information ("second requests") in 27 transactions. The Commission challenged 23 transactions. One preliminary injunction was authorized; 18 consent orders were accepted; 4 transactions were abandoned after the issuance of the second requests.

18. In the non-merger area, the Commission brought 4 enforcement actions challenging a variety of anticompetitive conduct. Two were tentatively resolved by consent agreements, both of which were pending at the end of FY2001. In the other two, administrative proceedings are pending.

B. Antitrust Cases in the Courts

1) *United States Supreme Court*

19. The United States Supreme Court did not decide any antitrust cases in FY2001.

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

a. Significant DOJ Cases Decided in FY 2001

20. There were six dispositions by the U.S. courts of appeals in Antitrust Division cases in FY2001, as well as a decision in a court of appeals case in which the United States participated as amicus curiae. Five of the six Antitrust Division cases were criminal cases: two involved sentencing issues; two concerned the Hyde Amendment (which authorizes a prevailing defendant in a criminal case to recoup its expenses if a court finds the government's position in the case was "vexatious, frivolous, or in bad faith"); and the fifth addressed a variety of evidentiary, criminal law, and sentencing issues. The remaining court of appeals decision dealt with the *Microsoft* case, which was on remand from the Supreme Court after that Court declined to hear a direct appeal (*see Microsoft Corp. v. United States*, 530 U.S. 1301 (2000)). The *Microsoft* decision and the amicus case is described below.

21. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001), the court of appeals affirmed in part the district court's findings that Microsoft had violated the Sherman Act. Specifically, it affirmed the district court's determination that Microsoft had violated Section 2 of the Act by employing anticompetitive means to maintain a monopoly in the operating system market, but rejected eight of the twenty district court findings that particular acts constituted bases for the violation. It reversed the district court's determination that Microsoft illegally attempted to monopolize the internet browser market, in violation of Section 2. It also vacated the trial court's judgment that Microsoft had unlawfully entered into an agreement to tie its browser to its operating system, and remanded that claim to the district court for reconsideration under the more rigorous rule of reason standard.

22. As to the district court's remedial order, the court of appeals concluded that the trial court should have held an evidentiary hearing to address remedy-specific factual disputes. Further, since the court of appeals, as it described, "drastically" altered the district court's liability findings, remand to reconsider remedy was appropriate for this additional reason. Finally, the court of appeals faulted the trial judge for

creating an appearance of partiality, although he showed no actual bias, and it concluded that remand to another judge for reconsideration of remedy was appropriate in these circumstances.

3) Private Cases Having International Implications

23. Several private cases in FY2001 raised the issue of whether federal courts have jurisdiction under the Sherman Act and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 1, 6a, over the claims of a foreign plaintiff that it has been injured by a conspiracy that has direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, if the foreign plaintiff's claimed injury does not arise from those domestic effects. These decisions held that plaintiffs injured outside the U.S. by such anticompetitive conduct could not establish jurisdiction where their injury did not arise from the effects on U.S. commerce, although one of them (*Kruman*) has since been overturned on appeal. *See In Re: Copper Antitrust Litigation*, 117 F.Supp.2d 875 (W.D. Wis. 2000) (alleged manipulation of London Metal Exchange); *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829 (E.D. Pa. 2001) (alleged conspiracy to lower commission rates to travel agents in Latin America and the Caribbean); *Ferromin International Trade Corporation v. UCAR International, Inc.*, 153 F.Supp.2d 700 (E.D. Pa. 2001) (FTAIA barred antitrust suit by foreign buyers of graphite electrodes when purchases were made with no U.S. connections); *Den Norske Stats Oljeselskap As v HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001) (foreign purchaser of marine construction services outside U.S.); *Kruman v. Christie's Int'l PLC,* 129 F.Supp.2d 620 (S.D.N.Y. 2001; rev'd in FY2002 at 284 F.3d 384 (2d Cir. 2002))(purchasers at fine arts auctions occurring outside the U.S.); *In Re Microsoft Corp.*, 127 F.Supp.2d 702 (D.Md. 2001) (foreign purchasers of software outside the U.S.); *Empagran S.A. v. F.Hoffman-La Roche, Ltd.*, 2001 WL 761360 (D.D.C.) (foreign purchasers of vitamins).

24. In *Coca-Cola Co. v. Omni Pacific Co., Inc.*, 2000 WL 33194867 (N.D.Cal.), the district court denied motions for summary judgment by Coca-Cola and a Hong Kong Coca-Cola bottler against antitrust counterclaims by Omni, "an export specialist which exports Coca-Cola and other products" from the U.S. taking advantage of price differentials between the U.S. and various Asian markets. The case involved Coca-Cola's exclusive territorial bottling system and allegations that independent bottlers in Hong Kong, Indonesia, Japan, and Singapore entered a *per se* unlawful horizontal conspiracy to eliminate transshipment from the U.S. into their territories, and that they jointly pressured Coca-Cola to take actions to combat transshippers. The court also held that Omni had "produced sufficient evidence to create a genuine issue of material fact as to whether [Coca-Cola] and its licensor competitors entered into an illegal conspiracy to combat transshippers." This evidence indicated that "the competing licensors are swapping information on transshippers in pursuit of their anti-transshipping policies." The court granted summary judgment motions, however, on rule of reason claims relating to Coca-Cola's vertical distribution agreements, holding that Omni failed to produce evidence of market power in the alleged relevant market (the U.S. export market for carbonated beverages) or of the alleged restraints' significant anticompetitive effects in that market.

C. Statistics on Private Cases Filed

25. According to the report of the Director of the Administrative Office of the U.S. Courts, 723 new civil antitrust actions were filed in the federal district courts in FY2001.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

26. Sotheby's/Christie's Auction Houses: In October 2000, Sotheby's Holdings, one of the world's largest auction houses, agreed to plead guilty and pay a $45 million fine for fixing the price of commission rates charged to sellers of art, antiques, and other collectibles at auctions. Its former president and chief executive officer, Ms. Diana Brooks, also agreed to plead guilty to price fixing charges. The Department also confirmed the announcement by Christie's International plc, another major auction house, that it had been cooperating with the investigation under the Antitrust Division's Corporate Leniency Program. In May 2001, a federal grand jury indicted the former chairmen of Sotheby's Holdings Inc. and Christie's International plc--the two largest auction houses in the world--for fixing commission rates charged to sellers of collectibles. The indictment charged Messrs. A. Alfred Taubman of Sotheby's and Anthony J. Tennant of Christie's with conspiring to fix auction commission rates in the U.S. and elsewhere from 1993 to 1999. Mr. Tennant is a fugitive. A jury found Mr. Taubman guilty of conspiracy on December 5, 2001; he was sentenced on April 22, 2002, to serve a term of imprisonment of one year and one day and to pay a $7.5 million fine.

27. Sorbates: On January 23, 2001, three top executives of Ueno Fine Chemicals Industry Ltd. and an executive from the Japanese chemical firm Daicel Chemical Industries Ltd. were indicted by a federal grand jury for participating in a 17-year international price-fixing conspiracy in the food preservatives industry. Ueno, a Japanese chemical producer, agreed to plead guilty and to pay an $11 million criminal fine for its role in the conspiracy, which affected nearly $1 billion in U.S. commerce. Ueno was the fifth company to be charged with participating in the sorbates conspiracy, following Eastman Chemical Company, Hoechst AG, Nippon Gohsei, and Daicel. The $11 million fine against Ueno would bring the total fines imposed in this investigation to more than $130 million.

28. Isostatic Graphite: A U.S. subsidiary of a Japanese manufacturer of isostatic graphite, which is used to make molds and dies, and a Japanese executive agreed to plead guilty and pay fines totaling more than $4.5 million for participating in an international cartel to fix the price of isostatic graphite sold in the United States and elsewhere. This is the first case in which a Japanese business executive has agreed to face a possible jail sentence for a violation of U.S. antitrust law. According to the charge filed in U.S. District Court in Philadelphia, Toyo Tanso USA Inc., of Troutdale, Oregon, a subsidiary of Toyo Tanso Co. Ltd, of Japan, and Mr. Takeshi Takagi, a Japanese citizen and resident, conspired with unnamed co-conspirators to suppress and eliminate competition in the non-machined and semi-machined isostatic graphite industry from as early as July 1993 until at least February 1998. On July 25, 2001, three top executives of Ibiden Co. Ltd.— Messrs. Masaru Endo, Shigeo Yasuda, and Akira Hashimoto — were also indicted by a federal grand jury for participating in an international cartel to fix the price of non-machined and semi-machined isostatic graphite. In addition, Ibiden, a Japanese producer of isostatic graphite, agreed to plead guilty and to pay a $3.6 million criminal fine for its role in the same conspiracy.

29. USAID Construction Contracts: On April 12, 2001, ABB MIDDLE EAST & AFRICA PARTICIPATIONS AG, an Italy-based, Swiss subsidiary of ABB Asea Brown Boveri Ltd., pleaded guilty and was sentenced to pay a $53 million fine for participating in a conspiracy to rig bids on a construction contract funded by the United States Agency for International Development (USAID) in the Arab Republic of Egypt. That sentence was the third in an ongoing government investigation. On July 25, 2001, Bill Harbert International Construction Inc. (BHIC), of Birmingham, Alabama; its foreign affiliate, Bilhar International Establishment, of Liechtenstein; and Bilhar's former president, Mr. Elmore Roy Anderson were charged with participating in a conspiracy to rig bids and to defraud the United States on over $250 million of construction work on U.S.-funded projects in Egypt from May 1988 until September 1996. Mr. Peter W. Schmidt, a former member of the management board of Philipp Holzmann AG, of Frankfurt,

Germany, was charged in a separate indictment with participating in the same conspiracy. The indictments were part of an ongoing investigation; Philipp Holzmann AG, a German construction company, was fined $30 million in August 2000, and American International Contractors Inc. was fined $4.2 million in September 2000.

30. Graphite Electrodes: On February 12, 2001, the Mitsubishi Corporation of Tokyo, Japan, was convicted after a two-week jury trial in U.S. District Court in Philadelphia of aiding and abetting a conspiracy among the world's major manufacturers of graphite electrodes to fix prices in the U.S. and elsewhere, beginning at least as early as March 1992 and continuing until at least June 1997. On May 10, 2001, Mitsubishi was fined $134 million after being convicted for its role in the international cartel. The fine was the second-highest fine imposed in the ongoing graphite electrodes investigation and was the fourth-largest fine ever imposed in an antitrust case.

31. Food Distribution Industry: On August 7 and 8, DiCarlo Distributors Inc. of Holtsville, NY, its president and co-owner, Mr. Vincent DiCarlo, and its vice president and co-owner, Mr. John DiCarlo, were sentenced for their role in a scheme to rig bids on New York City Board of Education (NYCBOE) food contracts. Mr. Vincent DiCarlo was sentenced to five and a half months in prison and five and a half months of home confinement, while Mr. John DiCarlo was sentenced to six months in prison and six months of home confinement. In addition, they were ordered to pay fines of $130,000 each and jointly to pay $530,000 in restitution to the NYCBOE. DiCarlo Distributors Inc. was sentenced to pay an additional $2.2 million in restitution to the NYCBOE. On August 9, Landmark Food Corp. of Holtsville, NY, and its president and co-owner, Mr. Gordon Kerner, were sentenced. Mr. Kerner was sentenced to 14 months in prison, and Mr. Kerner and Landmark were together ordered to pay a total of $1.5 million in restitution to the NYCBOE. In addition, Mr. Kerner was ordered to pay a $74,000 fine. On August 27, Mr. Nicholas A. Penachio was sentenced to serve four years in prison and pay a $1 million fine for his role in a scheme to rig bids on NYCBOE contracts. The sentence was the longest single prison sentence obtained in a prosecution handled by the Antitrust Division. On August 29, Nick Penachio Co. was sentenced to pay a $4.2 million fine and ordered to pay $4.2 million in restitution for its role in the bid rigging scheme.

1. DOJ Civil Non-Merger Enforcement

32. Microsoft: The DOJ's complaint and the subsequent proceedings against Microsoft have been described in prior years' reports. After the court of appeals' ruling (described above), the case was assigned to a new district court judge on August 24, 2001. On September 6, 2001, in order to accomplish its goal of achieving prompt, effective and certain relief for consumers, the DOJ advised Microsoft that it would not seek a break-up of the company in remand proceedings, nor pursue further proceedings on the tying claim, but would instead seek a remedy in the district court for the anticompetitive acts affirmed by the court of appeals under the monopoly maintenance claim. On September 28, 2001, the district court ordered the parties to engage in an intense round of settlement negotiations and expressly directed the parties to consider what portions of the former judgment against Microsoft remained appropriate in light of the court of appeals' ruling that, as described by the court of appeals, "drastically" narrowed liability. On November 6, 2001, DOJ and nine of the plaintiff States reached a settlement with Microsoft that effectively stops the conduct found unlawful by the court of appeals, prevents recurrence of similar conduct in the future and ensures that consumers will benefit from a more competitive software market. The settlement provides immediate relief for consumers without the lengthy delay of further litigation. Nine of the plaintiff States chose not to join in the settlement and are separately pursuing their own far-reaching remedial proposals in the district court. After reviewing the more than 30,000 public comments submitted to the DOJ on the Microsoft settlement, the DOJ made several clarifying modifications to the proposed settlement on February 27, 2002. On March 6, 2002, the district court held a hearing to assist it in determining whether the settlement is in the "public interest" pursuant to the Tunney Act.

33. Moody’s Investors Service: On April 10, 2001, Moody's Investors Service Inc., one of the largest credit ratings agencies in the United States, pleaded guilty and was sentenced to pay a $195,000 criminal fine for obstructing justice by destroying documents called for during an antitrust investigation. The obstruction of justice charges were in connection with a Civil Investigative Demand (CID). A CID is a civil subpoena that calls for the production of documents, answers to interrogatories, or deposition of witnesses. The CID involved in this matter was issued to Moody's in connection with a civil investigation conducted by the Division between 1996 and 1999 into alleged anticompetitive practices in the bond rating services industry.

34. Denver Rocky Mountain News/The Denver Post: On January 5, 2001, the Attorney General approved the joint operating arrangement proposed by the two daily newspapers in Denver, the Rocky Mountain News and The Denver Post. Accepting the recommendation of the Antitrust Division, the Attorney General concluded that the Denver Rocky Mountain News was in probable danger of financial failure, with persistent operating losses, and that the proposed joint operating arrangement ensured the continued editorial and reportorial independence of both newspapers. Under the Newspaper Preservation Act joint operating arrangements receive a limited antitrust exemption if the Attorney General determines that one of the newspapers in question is a "failing newspaper," and if the proposed arrangement furthers the purpose of the Act, which is the preservation of "editorially and reportorially independent and competitive" newspapers.

35. Boston Scientific Corporation: Citing several violations of a 1995 Federal Trade Commission consent order, the DOJ filed a complaint against Boston Scientific Corporation (BSC), on behalf of the Commission, seeking civil penalties and other equitable relief. According to the complaint, BSC failed to comply with the Commission’s order, which was entered to remedy the anticompetitive effects of its acquisitions of Cardiovascular Imaging Systems, Inc. (CVIS) and SCIMED Life Systems, Inc. (SCIMED). At the time of the order, CVIS was BSC's competitor in the market for intravascular ultrasound (IVUS) catheters, and SCIMED was poised to enter that market. The purpose of the Commission’s order was to ensure continued competition by allowing a new catheter manufacturer to enter the business. BSC was therefore required to license certain necessary intellectual property and provide catheters to the Hewlett-Packard. The complaint alleges that BSC failed to license all the necessary intellectual property or supply catheters and has consequently achieved a virtual monopoly over the sale of IVUS catheters and consoles in the United States. *United States v. Boston Scientific*, No. 00 CV 12247 (D. Mass.)(10/31/00)

3) FTC Non-Merger Enforcement Actions

36. FMC/Asahi: Alleging in its complaint that FMC Corporation ("FMC") and Japan's Asahi Chemical Industry Co. Ltd ("Asahi Chemical") engaged in a conspiracy to monopolize the world market for microcrystalline cellulose ("MCC"), the Commission accepted a proposed consent order that would end the allegedly illegal restraint of competition in the market for that important pharmaceutical chemical and ensure that such restraint does not recur in the future. According to the Commission, beginning in 1984 FMC and Asahi Chemical agreed to divide territories for the sale of MCC, and later FMC attempted to eliminate all vestiges of competition by inviting smaller rivals to collude. The order would prohibit the companies from engaging in such behavior and impose strict distribution rules. Derived from purified wood cellulose, MCC is used primarily as a binder in making pharmaceutical tablets, and is found in nearly all drug tablets sold in the United States. (File No. 9810237)

37. Schering-Plough: The Commission charged three drug makers, Schering-Plough Corporation ("Schering"), Upsher-Smith Laboratories ("Upsher-Smith"), and American Home Products Corporation, with entering into anticompetitive agreements aimed at keeping low-cost generic drugs off the market. The Commission's administrative complaint alleged that Schering, the maker of K-Dur 20, a widely prescribed potassium chloride supplement, illegally paid Upsher-Smith and American Home Products millions of

dollars to induce them to delay launching their generic versions of the drug beyond any delay to which they might have agreed without such payments. The agreements, according to the complaint, have cost consumers more than $100 million. (D-9297) An earlier case based on similar charges has been settled. The respondents were Hoechst Marion Roussel, now Aventis, and Andrx Corp. (D-9293)

38. Warner Communications: The Commission charged Warner Communications, Inc., and several subsidiaries of Vivendi Universal S.A., with illegally agreeing to fix prices for audio and video products featuring The Three Tenors. According to the FTC complaint detailing the charges, in 1997, Warner and PolyGram (predecessor to Vivendi Universal), two of the largest music distribution companies in the world, formed a joint venture to distribute compact discs, cassettes, videocassettes, and videodiscs to be derived from the next public performance of The Three Tenors. Warner would distribute the 1998 releases in the United States, and PolyGram would distribute the 1998 releases outside of the United States. As the concert date approached, both companies became concerned that the new products would be neither as original nor as commercially appealing as products already available to consumers. In an effort to shield the new products from competition, Warner and PolyGram agreed not to discount and not to advertise certain of their catalog products for a limited period of time, the complaint says. A proposed settlement with Warner would bar future agreements to fix prices or restrict advertising. An administrative trial of the charges against Vivendi has been completed. (D-9298)

39. Alaska Healthcare Network: Alaska Healthcare Network (AHN), an association of 86 physicians who practice in the Fairbanks, Alaska area, agreed to settle Commission charges that AHN and its members agreed to fix prices and other terms of dealing with health plans, and obstructed the entry of new health plans into Fairbanks. According to the complaint, the result was higher prices and fewer choices for patients of Fairbanks physicians. The settlement prohibited the illegal concerted actions alleged in the complaint and allowed the respondent's members to engage in legitimate joint conduct. The settlement also included a temporary structural remedy that limits for five years the proportion of Fairbanks physicians that can use AHN as a vehicle for contracting with health plans. (C-4007)

E. Business Reviews Conducted by the Department of Justice

40. In FY2001, the DOJ approved the following proposals by means of business review letters:

- a proposal by the Electric Power Research Institute (EPRI) — a nonprofit organization committed to providing and disseminating science and technology-based solutions to energy industry problems — that will allow its members to exchange information that will improve the way electric power industries protect themselves against cyber-threats;

- proposals by Carrier Credit Services Inc. and Transportation Services Inc. — billing and collection companies — that would allow them to act as common billing and collection agents for ocean carriers that serve the U.S.-Puerto Rico routes;

- a proposal by 17 rural Arkansas electric power distribution cooperatives that would allow them to jointly market electric power to retail consumers;

- a proposal by Delta Airlines Inc. and Société Air France jointly to market air cargo shipment services from the United States to points abroad;

- a proposal by truckload motor carriers, represented by the Truckload Carriers Association, under which they would exchange cost information in an attempt to increase the efficiency of their operations; and

- X a proposal from the Promotion Marketing Association (PMA) — a New York based association of consumer product and service manufacturers, and providers, promotion agencies and other firms active in the promotion marketing industry — that would expand a previously approved information sharing exchange. In 1995, PMA, after consulting with the U.S. Postal Service, established an information sharing exchange designed to reduce rebate fraud. In its current proposal, PMA added mail-order firms to the existing information exchange program in an attempt to reduce mail-order fraud, i.e. false claims that mailed merchandise was not received.

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

A. *Enforcement of Premerger Notification Rules*

41. On September 28, 2001, the DOJ filed a civil antitrust suit against Computer Associates International Inc. and Platinum *technology* International *inc.* for violating pre-merger waiting period requirements and price fixing laws by agreeing that Platinum would limit the price discounts and other terms it offered its customers during the mandatory pre-merger waiting period. The DOJ challenged Computer Associates' acquisition of Platinum in May 1999, and the case was settled when Computer Associates agreed to divest Platinum products and related assets in six mainframe systems management software markets (*see* U.S. annual report for FY99, para 79). The "gun-jumping" complaint sought a total civil penalty of $1.276 million and a prohibition on engaging in similar conduct in the future.

42. As part of the FTC complaint against The Hearst Trust, it was alleged that important information about the Medi-Span acquisition was illegally withheld. (For a complete discussion of the case, *see* paragraph 51, *infra.*)

B. Significant Merger Cases

1) *DOJ Merger Challenges or Cases*

43. <u>Northwest Airlines/Continental Airlines:</u> On November 6, 2000, the Department announced that Northwest Airlines Corp. and Continental Airlines Inc. had signed an agreement in principle requiring Northwest to sell its controlling interest in Continental. Northwest acquired stock representing more than 50 percent of the voting interest in Continental in 1998 and entered into a separate marketing alliance at the same time. The Department filed a lawsuit in October 1998, alleging that the stock acquisition would harm consumers in various markets in which the two carriers compete. Settlement of the lawsuit was contingent upon the Department's approval of the defendants' formal agreement documents and upon approval by the Court.

44. <u>Varian/IMPAC:</u> On November 6, 2000, the Department announced its intention to file a lawsuit to block Varian Medical Systems Inc.'s proposed $135 million acquisition of IMPAC Medical Systems Inc. The Department said the proposed transaction would reduce competition significantly in the sale of radiation oncology management systems software and medical devices known as linear accelerators sold in the United States. The next day, Varian Medical Systems Inc. abandoned its attempt to purchase IMPAC Medical Systems.

45. <u>Georgia-Pacific/Fort James:</u> On November 21, 2000, the Department announced that it would require Georgia-Pacific Corporation and Fort James Corporation to sell Georgia-Pacific's commercial tissue business in order to proceed with their proposed $11 billion acquisition. That same day, the

Department filed a lawsuit in U.S. District Court in Washington, D.C. to block the proposed transaction; at the same time, it filed a proposed consent decree that, if approved by the court, would resolve the lawsuit and the Department's competitive concerns. The Department's investigation benefited from close cooperation with the European Commission.

46. General Electric/Honeywell: On May 2, 2001, the Department announced that it had reached an agreement in principle with General Electric Company (GE) and Honeywell International Inc. resolving the Department's antitrust concerns with the companies' proposed $42 billion merger. The Department required the companies to divest Honeywell's helicopter engine business and to authorize a new third-party maintenance, repair and overhaul (MRO) service provider for certain models of Honeywell aircraft engines and auxiliary power units (APUs). Final approval of the transaction by the Department was conditioned upon the negotiation of an acceptable consent decree with the merging companies and entry of the decree by the U.S. District Court for the District of Columbia. Although the Department cooperated closely with officials of the European Commission in their parallel review of the transaction, the Commission blocked the merger in its entirety on July 3, 2001.

47. United Airlines/US Airways: On July 27, 2001, the Department concluded that the proposal for United Airlines to acquire US Airways would reduce competition, raise fares, and harm consumers on airline routes throughout the United States. The Department expressed its intent to file suit to block the merger and indicated that it would be joined in its suit by the Attorneys General of several states, including California, Connecticut, Delaware, Iowa, Maine, Maryland, the Commonwealth of Massachusetts, Michigan, Minnesota, New York, the Commonwealth of Pennsylvania, and Vermont. The parties abandoned the transaction on July 30, 2001, before a suit was filed.

48. Premdor/Masonite Business: On August 3, 2001, the Department announced that it would require the divestiture of a doorskin manufacturing plant in order for Premdor Inc. to proceed with its proposed $527 million acquisition of Masonite Corporation and related businesses from International Paper Company. A doorskin is the component that makes up the front and back of an interior molded door. That same day, the Antitrust Division filed a lawsuit in U.S. District Court in Washington, D.C. to block the proposed transaction. At the same time, the Department filed a proposed consent decree that, if approved by the court, would resolve the lawsuit and the Department's competitive concerns.

2) FTC Merger Challenges or Cases

a. Preliminary Injunctions Authorized

49. Hearst Trust: The Commission charged The Hearst Trust, a family-held trust based in New York, New York, communications and entertainment company The Hearst Corporation, also in New York, which The Hearst Trust owns, and First DataBank, a wholly-owned Hearst Corp. subsidiary based in San Bruno, California, with illegally acquiring a monopoly over a key type of drug information database used by pharmacists, other health care professionals, hospitals, and health plans, through Hearst's 1998 acquisition of its main competitor in that market, Medi-Span. The complaint, filed in the U.S. District Court for the District of Columbia, alleged that the acquisition violated Section 5 of the FTC Act and Section 7 of the Clayton Act by allowing Hearst to monopolize the market, resulting in "drastic" price increases for such databases. Hearst was also charged with violating subsection (a) of Section 7A of the Clayton Act by illegally withholding important information about the Medi-Span acquisition that was required for pre-merger antitrust review. The Commission asked the court to order Hearst to create a new competitor to replace Medi-Span, and to order Hearst to forfeit its profits from the anticompetitive price increases.

b. Commission Administrative Decisions

50. Boeing/Hughes: The Commission entered a consent agreement with The Boeing Company (Boeing) that allowed its acquisition of Hughes Space and Communications (Hughes), a subsidiary of General Motors Corporation. Under the agreement, Boeing is prohibited from providing systems engineering and technical assistance (SETA) services to the U.S. Department of Defense (DoD) for a classified program. The consent agreement also prohibits Boeing's launch vehicle division from gaining access to nonpublic information that its satellite division receives from competing suppliers that launch Boeing satellites. Similarly, its satellite division is prohibited from gaining access to nonpublic information that its launch vehicle business receives from competing satellite suppliers. In addition, Boeing is required to provide all necessary satellite interface information — which is used to make satellites compatible with launch vehicles — to all other launch vehicle suppliers. The Commission cooperated with the European Commission in the investigation of this case. (C-3992)

51. Novartis/AstraZeneca: Novartis AG (Novartis) and AstraZeneca PLC (Zeneca) agreed to a consent order that would allow them to combine their agricultural chemical businesses while remedying the potential anticompetitive effects of the transaction. The combined businesses will be the basis of a new Swiss company called Syngenta AG, which will have estimated sales of approximately $8 billion. Syngenta will be owned by Novartis's and Zeneca's shareholders, and the companies will have no control over Syngenta. Under the FTC order, Novartis would divest its worldwide foliar fungicide business based on the strobilurin chemical class to Bayer AG (Bayer) and Zeneca would divest its worldwide corn herbicide business based on the active ingredient acetochlor to Dow AgroSciences LLC (Dow Agro). According to the Commission's complaint, the proposed merger would have by reduced competition in the already highly concentrated markets for corn herbicides for pre-emergent control of grasses and foliar fungicides for use on cereals, peanuts, potatoes, rice, turf and vegetables. The Commission cooperated with the European Commission during its investigation. (C-3979)

52. AOL/Time Warner: America Online, Inc. ("AOL") is the nation's largest Internet service provider ("ISP") and Time Warner Inc. ("Time Warner") is a media conglomerate comprising a cable television system servicing about 20 percent of U.S. cable households, and various cable-programming networks, publishing and recording interests, and film libraries. According to the Commission's complaint challenging their proposed merger, the transaction would have lessened competition in the residential broadband Internet access market; undermined

53. AOL's incentive to promote DSL broadband Internet service as an emerging alternative to cable broadband; and restrained competition in the market for interactive television ("ITV"). Under the terms of the consent order, AOL Time Warner is required to open its cable system to competitor ISPs; prohibited from interfering with content passed along the bandwidth contracted for by non-affiliated ISPs and from interfering with the ability of non-affiliated providers of interactive TV services to interact with interactive signals, triggers, or content that AOL Time Warner has agreed to carry; prevented from discriminating on the basis of affiliation in the transmission of content, or from entering into exclusive arrangements with other cable companies with respect to ISP services or interactive TV services; and required to market and offer AOL's digital subscriber line ("DSL") services to subscribers in Time Warner cable areas where affiliated cable broadband service is available in the same manner and at the same retail pricing as they do in those areas where affiliated cable broadband ISP service is not available. (C-3989)

54. Siemens/Atecs: The Commission accepted a consent order to remedy the likely anticompetitive effects stemming from the proposed acquisition by Siemens AG ("Siemens") of certain voting securities of Atecs Mannesmann AG ("Atecs") from Vodafone Group Plc ("Vodafone"). Siemens and Vodafone, through its Dematic subsidiary, are the two leading world-wide suppliers of postal automation systems. These systems are purchased by public postal services throughout the world, including the United States

Postal Service, to process letter mail and flat mail, which includes over-sized envelopes, catalogs, and magazines. These highly integrated systems are able to cancel stamps or meter marks, read addresses using optical character recognition technology, translate addresses into destination barcodes, and use these barcodes to sort mail by country, state, city and/or street. Under the terms of the proposed order, Siemens and Vodafone will be required to divest Vodafone's Mannesmann Dematic Postal Automation business to Northrop Grumman Corp. (C-4011)

55. Lafarge/Blue Circle: The Commission accepted a consent order designed to remedy the allegedly anticompetitive effects of the merger of Lafarge S.A. (Lafarge) and Blue Circle Industries PLC (Blue Circle). Lafarge, a French corporation with global operations manufacturing and selling cement and other building materials, is one of the top three cement manufacturers in the world. It also has an ownership interest in a joint venture with Carmeuse North America Group B.V. (Carmeuse) to manufacture and sell lime. Blue Circle, based in England, also manufactures and sells cement worldwide. It is one of the top five cement manufacturers in North America, and participates in a joint venture with Chemical Lime Company (Chemical) to manufacture and sell lime. Through the order, which is subject to public comment and final approval, the companies would be required to divest Blue Circle's cement business serving the Great Lakes Region (including all or parts of Ohio, Michigan, Illinois, Wisconsin and New York); Blue Circle's cement business in the Syracuse, New York area; and Blue Circle's lime business in the southeast United States. The Syracuse cement business will be divested to Glens Falls Lehigh Cement Company (Glens Falls). The other assets will be divested to a Commission-approved acquirer. The Commission has also accepted an order to hold separate and maintain assets, which requires the companies to hold assets to be divested as separate entities and maintain them as viable, competitive and ongoing operations until the divestitures are completed. The proposed divestitures were developed in coordination with the Canadian Competition Bureau, which had required divestitures as a condition of approving the merger. (C-4014)

56. Chevron/Texaco: Through a proposed consent agreement reached with the Commission, the merger of Chevron Corp. (Chevron) and Texaco Inc. (Texaco), two of the world's largest integrated oil companies, was allowed to proceed, with significant divestitures required to remedy the likely anticompetitive impacts of the transaction as proposed. Under the terms of the proposed order, the combined Chevron/Texaco was required to divest all of Texaco's interests in two joint ventures, Equilon Enterprises, LLC (Equilon), which is currently owned by Texaco and Shell Oil Company (Shell), and Motiva Enterprises, LLC (Motiva), which is currently owned by Shell, Texaco, and Saudi Refining, Inc. (SRI). Outside "the Alliance" defined by these two joint ventures, Texaco was also required to divest assets including its one-third interest in the Discovery natural gas pipeline system in the Gulf of Mexico, its interest in the Enterprise fractionating (raw mix separation) plant in Mont Belvieu, Texas, and its general aviation businesses in 14 states. (C-4023)

57. Metso/Svedala: The Federal Trade Commission negotiated a settlement to resolve antitrust concerns stemming from Metso Oyj's (Metso) proposal to acquire 100 percent of the outstanding voting securities and convertible debentures of Svedala Industri AB (Svedala). Metso is a Finnish corporation with its headquarters in Helsinki. Svedala, headquartered in Malmö, Sweden, is a leading global supplier of equipment for the mineral processing and construction industries. Metso and Svedala are the two largest suppliers of rock processing equipment in the world. According to the complaint, the transaction, if consummated, would lead to anticompetitive effectsin a world market in four separate rock processing equipment markets: primary gyratory crushers, jaw crushers, cone crushers, and grinding mills. Under the terms of the order, Metso and Svedala agreed to divest Metso's global primary gyratory crusher and grinding mill businesses and Svedala's global jaw crusher and cone crusher businesses. The Commission cooperated with the European Commission in the analysis and resolution of this case, and held discussions with the competition authorities of Australia, Canada, and South Africa. (C-4024)

58. Dow/Union Carbide: The Commission accepted a consent order that would remedy the likely anticompetitive effects of the proposed merger of The Dow Chemical Company ("Dow") and Union Carbide Corporation ("Carbide"). Under the terms of the order, Dow would be required to divest and license intellectual property that is critical to the production of linear low-density polyethylene ("LLDPE") — a key ingredient in premium plastic products such as trash bags, stretch film and sealable food pouches — to BP Amoco plc ("BP"), its former partner in developing this technology. Dow would also be required to divest to identified up-front buyers its ethyleneamines, ethanolamines and methyldiethanolamine ("MDEA")-based gas treating products businesses. According to the complaint, polyethylene is the world's most widely used plastic, and LLDPE is the fastest-growing type of polyethylene. LLDPE is particularly well suited for applications that require both flexibility and strength, such as in trash bags, where manufacturers seek to make bags out of plastic films that are strong, thin, tear resistant and puncture resistant. Ethyleneamines are used in a broad variety of applications, including lubricating oil additives, chelating agents, wet-strength resins, epoxy curing agents, surfactants, personal care products, pulp and paper products, and fungicides. Ethanolamines are used in a broad variety of applications, including the production of ethyleneamines, and in surfactants, personal care products, herbicides, oil and gas refining applications, pharmaceuticals and fabric softeners. MDEA, a powerful solvent for removing unwanted compounds from gas streams, is used in oil refineries, natural gas plants, ammonia plants and other facilities that handle hydrocarbon gases. (C-3999)

IV. Regulatory and trade policy matters

A. Regulatory Policies

1) DOJ Activities: Federal and State Regulatory Matters

59. In FY2001, the DOJ filed comments with the Federal Communications Commission (FCC) in several “Section 271" proceedings involving the FCC’s determination of whether local telecommunications markets were fully and irreversibly open to competition, a condition that must be met before a Regional Bell Operating Company is permitted to offer long-distance service in its own area. The DOJ’s comments involved proceedings involving Connecticut, Massachusetts, Pennsylvania, Arkansas, Missouri, Kansas, and Oklahoma. The Division’s comments are available at http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm.

60. In FY2001, the Division approved three applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations. The ETC applications spanned various products and services such as ginseng, rice, and professional consulting.

2) *FTC Staff Activities: Federal and State Regulatory Matters*

61. The goal of the Commission's advocacy activities is to prevent or reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of FY 2001 advocacies. All of the complete comments filed are available at http://www.ftc.gov/be/advofile.htm.

- Electric Information Administration, Electric Power Surveys, V010007 (5/14/01)
- Department of Energy, Electric Reliability Issues, V000016 (January 4, 2000)
- Federal Energy Regulatory Commission, California Wholesale Markets, V000015 (Nov. 22, 2000)

B. DOJ Trade Policy Activities

62. The Division is extensively involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative and is a participant in the trade policy activities of the National Economic Council (NEC), a cabinet-level advisory group. The Department provides antitrust and other legal advice to U.S. trade agencies. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve cooperation in the enforcement of competition laws.

63. The Division and the FTC participate in a number of negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative, and State and Commerce Departments in competition policy groups associated with the Free Trade Area of the Americas and Asia-Pacific Economic Cooperation. The antitrust agencies also have played an important role in the working group established by the World Trade Organization to study issues relating to the interaction between trade and competition policy.

64. The Department and the FTC have an extensive program to provide technical assistance in antitrust development to countries with emerging market economies. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programs create long- term cooperative relationships with policy and enforcement officials in the countries involved.

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

V. New studies related to antitrust policy

A. Antitrust Division Economic Analysis Group Discussion Papers

66. The Economic Analysis Group issued the following papers during FY2001. 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.com). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763.

Ghosal, Vivek, *The Impact of Uncertainty and Sunk Costs on Firm Dynamics and Industry Structure: Evidence from the U.S. Manufacturing Sector*, EAG 01-1, February 18, 2001.

Sullivan, Mary, *How Many Trademarks Does It Take to Protect a Brand? The Optimal Number of Trademarks, Branding Strategy and Brand Performance*, EAG 01-2, April 18, 2001.

Ennis, Sean, *Competition and Price Dispersion in International Long Distance Calling*, EAG 01-3, April 23, 2001.

Danger, Kenneth, and H.E. Frech III, *Critical Thinking about "Critical Loss" in Antitrust*, EAG 01-4, May 18, 2001.

Romeo, Charles and Andrew R. Dick, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes*, EAG 01-5, May 24, 2001.

Greenlee, Patrick and Alexander Raskovich, *Vertical Ownership Without Control*, EAG 01-6, August 1, 2001.

Pittman, Russell, *Vertical Restructuring of the Infrastructure Sectors of Transition Economies*, EAG 01-7, September 28, 2001.

Reitman, David, *Mergers in Durable Goods Markets with Rational Customers*, EAG 01-8, September 7, 2001.

Capps, Cory, David Dranove and Mark Satterthwaite, *Competition and Market Power in Option Demand Markets*, EAG 01-9, September 20, 2001.

Waehrer, Keith and Martin K. Perry, *The Effects of Mergers in Open Auction Markets*, EAG 01-10, July 3, 2001.

B. Commission Studies, Reports and Economic Working Papers

1) *Commission Studies and Reports*

a. Workshops

67. The Commission hosted a public workshop to explore certain competition issues that arise in connection with business-to-business (B2B) and business-to-consumer (B2C) e-commerce. The workshop continued the dialogue initiated at the Commission's B2B workshop in June 2000. At the session, antitrust practitioners, economists, and business representatives presented their views on B2B mergers, interoperability, and operating rules against the background of specific hypotheticals. Selected issues associated with online distribution and marketing were examined and compared offline distribution. The session also treated issues such as price and promotional coordination between online and offline distribution channels, sole online distributorships, exclusive dealing over the Internet, and the role of information-collection technology.

68. The Commission held an initial public conference to examine factors that affect prices of refined petroleum products in the United States. Numerous interested parties testified about issues that merit further examination. To explore these issues in greater depth, the Commission announced that it will hold a second public conference on May 6-9, 2002. The Commission also seeks analytical and empirical papers and public comment to inform this examination. Experts from market participants, trade associations, consumer groups, academia, and other organizations are invited to submit analysis and empirical research on the topics discussed in this notice.

b. Studies and Reports

69. Gasoline Pricing in the Midwest: After a nine-month investigation into the causes of the gasoline price spikes in local markets in the Midwest during the spring and summer of 2000, the Commission concluded that there was no credible evidence of collusion or other anticompetitive conduct by the oil industry. The investigation found that a combination of many factors was likely responsible for the price spike. These factors included circumstances beyond the control of the industry as well as those within their control. While gasoline prices increased nationwide in the spring and early summer of 2000, increases in some local markets, particularly in the Midwest, eclipsed those experienced in past years and were far greater than those experienced in other U.S. markets. Consumers in Chicago and Milwaukee saw significant price spikes at the retail level for reformulated gasoline ("RFG") required under the Clean Air Act, and consumers throughout the Midwest saw significant price increases for conventional gasoline. In response to requests for an investigation by a bipartisan group of Senators and Representatives, the Commission began the investigation on June 20, 2000.

70. The report stated that the spike "appears to have been caused by a mixture of structural and operating decisions made previously (high capacity utilization, low inventory levels, the choice of ethanol as an oxygenate), unexpected occurrences (pipeline breaks, production difficulties), errors by refiners in forecasting industry supply (misestimating supply, slow reactions), and decisions by some firms to maximize their profits (curtailing production, keeping available supply off the market). "Primary factors for the increase included refinery production problems; pipeline disruptions and low inventories. Secondary factors included the unavailability of reformulated gasoline using MTBE as an oxygenate ("RFM") as a substitute for reformulated gasoline using ethanol as an oxygenate ("RFE") in Chicago and Milwaukee; the assertion by one refiner of certain patents relating to the production of RFG, multiple waivers of the RFG requirements that allowed the continued use of conventional gasoline in St. Louis, which increased the incentive to supply conventional gasoline to St. Louis and may have increased expectations of waivers in Chicago and Milwaukee; high crude oil prices which contributed to low inventory levels; increased demand for gasoline in the Midwest; and local gasoline sales taxes

71. Gasoline Marketing in Western States: The Commission also concluded an investigation of various marketing and distribution practices employed by the major oil refiners in Arizona, California, Nevada, Oregon, and Washington ("Western States"). After an almost three-year investigation, the Commission found no evidence of conduct by the refiners that violated federal antitrust laws. While zone pricing — the practice whereby refiners "set uniform wholesale prices and supply branded gasoline directly to their company-operated and leased stations and to some independent open dealer stations within a small but distinct geographic area called a 'price zone'" — exists in the Western States, the investigation found no evidence of collusion between oil companies in furtherance of this practice. In addition, the Commission stated that "the investigation revealed no evidence of conspiracy or coordination" in marketing practices known as "redlining" — the refiners' practice of preventing independent gasoline distributors — "jobbers" — "from competing with them to supply branded gasoline to independent dealers in metropolitan areas."

72. Generic Drug Competition Study: Seeking to ensure that consumers gain timely access to generic pharmaceuticals and are protected from potentially anticompetitive arrangements between brand-name and generic drug-makers, the Commission announced that it proposes to conduct a focused study of generic drug competition, and examine whether brand-name and generic drug manufacturers have entered into agreements, or have used other strategies, to delay competition from generic versions of patent-protected drugs. Among the issues to be explored by the proposed study is whether drug companies have manipulated certain provisions of the Hatch-Waxman Act to delay the marketing of generic drug products.

73. Electric Power Regulatory Reform Report: A new staff report examined which features of various state retail electricity programs appear to have resulted in consumer benefits and which have not. The report, "Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition," updated a July 2000 FTC Staff Report and highlighted certain jurisdictional limitations on the states' authority to design successful retail competition plans and discusses whether there is a need for federal legislative or regulatory action in this regard. The text of the report is available at http://www.ftc.gov/reports/elec/electricityreport.pdf.

2) Economic Working Papers

74. The following may be obtained from the FTC home page, http://www.ftc.gov/be/econwork.htm:

Evidence on Mergers and Acquisitions (WP# 243) Paul A. Pautler, September 25, 2001.

Collusion and Optimal Reserve Prices in Repeated Procurement Auctions (WP# 242), Charles J. Thomas, July 30, 2001.

The Use of Exclusive Contracts to Deter Entry (WP# 241), John Simpson and Abraham Wickelgren, June 27, 2001.

The Economic Effects of Withdrawn Antidumping Investigations: Is There Evidence of Collusive Settlements (WP# 240) Christopher T. Taylor, August 23, 2001.

Moral Hazard, Mergers, and Market Power (WP# 239) Abraham L. Wickelgren, June 2001.

Targeted Consumer Information and Prices: The Private and Social Gains to Matching Consumers with Products (WP# 238) David Reiffen, April 2001.

Geographic Markets in Hospital Mergers: A Case Study (WP# 237) John Simpson, January 26, 2001.

Publicity and the Optimal Punitive Damage Multiplier (WP# 236) John M. Yun, January 31, 2001.

The Effect of Exit on Entry Deterrence (WP# 235) Abraham L. Wickelgren, December 4, 2000.

Optimal Agency Relationships in Search Markets (WP# 234) Christopher Curran and Joel Schrag, October 2000.

Import Competition and Market Power: Canadian Evidence (WP# 232) Aileen J. Thompson, January 2001.

Pricing Behavior of Multi-Product Retailers (WP# 225) Daniel Hosken and David Reiffen, March 1999, Revised: May 2001.

R&D Activity and Acquisitions in High Technology Industries: Evidence from the U.S. Electronic and Electrical Equipment Industries (WP# 222) Bruce A. Blonigen and Christopher T. Taylor, May 2001.

Appendices

Department of Justice: Fiscal Year 2001 FTE and Actual Amount by Enforcement Activity[1]

	FTE	AMOUNT
Merger Enforcement	**306**	**$42,975,000**
Civil Non-Merger Enforcement	**127**	**$17,789,000**
Criminal Enforcement	**234**	**$32,863,000**
Competition Advocacy	**20**	**$3,475,000**
TOTAL	**687**	**$97,102,000**

[1] Actual FY2001 data is from the FY2003 Congressional Submission.

Federal Trade Commission: Fiscal Year 2001 Competition Mission FTE and Dollars by Program by Bureau/Office[2]

	FTE	AMOUNT
Total MC Mission	472.6	$68,182.4
Bureau of Competition	**255.8**	**$27,146.8**
Bureau of Economics	**66.9**	**$7,469.0**
Regional Offices	**28.6**	**$2,942.5**
Mission Support	**121.3**	**$30,624.1**
Premerger Notification	32.9	$3127.7
Bureau of Competition	**32.2**	**$3,058.6**
Bureau of Economics	**0.1**	**$10.4**
Regional Offices	**0.6**	**$58.7**
Merger & Joint Venture Enforcement	189.1	$20,146.7
Bureau of Competition	**135.6**	**$14,596.3**
Bureau of Economics	**40.9**	**$4,302.1**
Regional Offices	**12.6**	**$1,248.3**
Merger & Joint Venture Compliance	6.9	$657.6
Bureau of Competition	**6.9**	**$657.6**
Bureau of Economics	**0.0**	**$0.0**
Regional Offices	**--**	**--**

[2] FY 2001 actual data as of September 30, 2001; Dollars in thousands.

	FTE	AMOUNT
Nonmerger Enforcement	97.7	$10,473.7
Bureau of Competition	**67.3**	**$7,105.2**
Bureau of Economics	**15.7**	**$1,863.9**
Regional Offices	**14.7**	**$1,504.6**
Nonmerger Compliance	2.0	$193.9
Bureau of Competition	**1.1**	**$104.0**
Bureau of Economics	**0.3**	**$31.2**
Regional Offices	**0.6**	**$58.7**
Antitrust Policy	4.9	$565.3
Bureau of Competition	**--**	**--**
Bureau of Economics	**4.9**	**$565.3**
Regional Offices	**--**	**--**
Other Direct Mission Resources	17.8	$2,393.4
Bureau of Competition	**12.7**	**$1,625.1**
Bureau of Economics	**5.0**	**$696.1**
Regional Offices	**0.1**	**$72.2**