



**COMPETITION COMMITTEE**

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

**OCTOBER 2002-SEPTEMBER 2003**

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## Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2002, through September 30, 2003 (“FY 2003”). It summarises the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

2. Following the departure of Assistant Attorney General Charles James on November 22, 2002, Deputy AAG R. Hewitt Pate served as Acting AAG until his confirmation as AAG on June 16, 2003. David S. Sibley began serving as the DAAG for Economic Analysis on May 6, 2003, and J. Bruce McDonald started as DAAG for Regulatory Matters on June 29, 2003. Makan Delrahim became DAAG for international, policy, and appellate matters on July 27, 2003.

3. In August 1, 2003, Susan Creighton assumed the position of Director of the FTC’s Bureau of Competition, following the resignation of Joseph Simons. On the same day, Luke Froeb replaced David Scheffman as the Director of the Bureau of Economics at the Commission.

### I. Changes in law or policies

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

4. Premerger Notification: As part of an overall movement to make government more accessible electronically, the FTC, working with DOJ, has accelerated efforts to complete an electronic system for filing Hart-Scott-Rodino (HSR) premerger notifications. Providing an e-filing option will reduce burdens for both business and the government. The FTC also made available to the public a searchable database of thousands of letters memorialising advice from staff in responding to inquiries about interpretations of HSR rules.

5. Guidelines and Statements for Merger Investigations: In December 2002, following a series of workshops on possible improvements to the merger investigation process nationwide, the Commission announced a new set of Guidelines for Merger Investigations, which incorporate the learning from these workshops. The new measures include a host of reforms including: prompt release of investigational hearing transcripts to testifying witnesses; simplification of Second Requests responses; increased transparency regarding the standards used in evaluating Second Request compliance; and facilitation of the submission of electronic materials. The Guidelines are available at: <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>. The Commission also released a statement on best practices for empirical analyses, encouraging practices that facilitate effective incorporation of merger-related empirical analyses, while reducing the burden on parties in complying with data requests. Among other reforms, the staff is also completing work on a Model Second Request, including industry-specific variations.

6. Transparency of Decision-Making: The Commission has sought new ways to expand public awareness and understanding of its merger assessment beyond adjudicative opinions, press releases, and analyses to aid public comment on consent agreements traditionally employed. In particular, the FTC has provided more insight into Commission decisions *not* to intervene by issuing statements in matters in which the agency conducted a significant inquiry but brought no enforcement action.

7. On December 12, 2003, the Antitrust Division announced that it would on appropriate occasions issue a public statement describing the reasons for closing an antitrust investigation. Considerations

underlying the new policy include the Division's belief that public dissemination of both enforcement and non-enforcement rationales benefits businesses attempting to comply with complex antitrust standards and consumers through a better understanding of the antitrust laws. In addition, transparency of analysis encourages international convergence and helps to prevent non-competition issues from influencing antitrust enforcement.

8. Use of Monetary Equitable Remedies: On July 31, 2003, the Commission issued a policy statement on the use of monetary equitable remedies such as disgorgement and restitution in competition cases, specifically, those involving violations of the HSR Premerger Notification Act, the FTC Act, and the Clayton Act. While the decision to seek such remedies will be determined on a case-by-case basis, the Commission stated that disgorgement and restitution can play a useful role in some competition cases. In determining whether to seek disgorgement or restitution, three factors will be considered. First, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of remedial payment. Third, the FTC will consider the value of seeking monetary relief in light of other remedies available in the matter, including private actions and criminal proceedings. In general, however, the policy statement explained that the FTC will continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.

9. Increase in Administrative Litigation: The FTC had more competition cases in administrative adjudication than at any time in recent history. Cases on the docket in FY 2003 involved, among other issues, price fixing in physician services, collective rate setting in the household moving industry and the role of the State Action defence, and consummated mergers involving hospitals and high-tech markets.

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

10. In October 2003, the DOJ and FTC concluded more than 25 days of public hearings that began in February covering competition issues related to the health care industry, including health insurances, hospitals, and other health care providers. The Agencies used the hearings and the preparation of a report to enhance their understanding in this area and to promote learning among the various participants in the healthcare field. The Agencies expect to issue the report in 2004.

11. Clarifying the State Action Doctrine: After a two year study, the Commission released a staff report on the reach and applicability of the State Action doctrine, which had been first articulated by the Supreme Court 60 years earlier. The doctrine states that certain regulatory conduct is shielded from federal antitrust enforcement, provided that the conduct is in furtherance of a clearly articulated state policy and is actively supervised by the state. The report concluded that many courts have applied the doctrine too broadly and recommended several approaches the agency should take. The staff report concluded that courts have interpreted the “clear articulation” requirement too broadly, often focusing on the “foreseeability” test to find a general grant of authority to a local government entity to act in a specific area, while overlooking the substance of the state’s policy choice. The report recommended a return to the principle that the authorising statute must evince also an intent to displace competition with respect to the particular conduct at issue. The report noted that more guidance is needed on the “active supervision” prong of the doctrine and advocates use of the three-part test used in a recent FTC case: (1) obtain information sufficient to determine the actual character of the private conduct at issue, (2) measure that conduct against the legislature’s stated policy criteria, and (3) come to a clear decision that the private conduct satisfies that criteria, so as to make the final decision that of the State itself. Finally, the report urged that courts consider “spillover” effects on citizens of other states in determining whether the State Action doctrine protects the alleged conduct, and that courts should impose an active supervision requirement on municipalities that participate in the marketplace in competition with private firms. In addition to these recommendations, the agency also is pursuing enforcement matters to clarify the State

Action defence. Recent matters include administrative litigation against an intrastate mover association and the South Carolina Board of Dentistry.

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

12. The International Competition Network (ICN) was launched in October 2001 as a network for antitrust officials from around the world to address proposals for procedural and substantive convergence in antitrust enforcement. In its third year, the ICN has grown from 15 founding members to include over 80 antitrust agencies in over 70 jurisdictions and has experienced increased participation from both international organisations, such as the OECD, and non-governmental advisors, including academics, industry groups, legal practitioners and consumer groups. Since the first conference, ICN working groups focused on substantive and procedural issues in multi-jurisdictional merger review, competition advocacy, and capacity building. The Merger Review Working Group pursued ways of making merger review more efficient and effective by reducing unnecessary delay and burdens. The DOJ is chair of the Group, which has subgroups focusing on three areas: notification and procedures, chaired by the FTC; the analytical framework for merger review; and investigative techniques. The Notifications and Procedures subgroup produced, and ICN members adopted, seven detailed Recommended Practices for merger notification procedures, including issues of jurisdiction, transparency, timing, and the scope of merger notifications. The Investigative Techniques subgroup held a two-day conference, hosted by the U.S., on merger investigative techniques.

13. The ICN's Advocacy Working Group explored the role of agency advocacy in promoting a culture of competition, especially in interaction with other government entities, and developed an online information and resources centre, prepared a compilation of advocacy provisions, conducted sectoral studies of advocacy, and assembled a "tool kit" of competition advocacy mechanisms. Its work continues in the Capacity Building and Competition Policy Implementation Working Group. The Capacity Building Group prepared a report on the challenges developing countries face in implementing competition policies; one of its subgroups, co-chaired by the FTC, is conducting a study on the types of technical assistance that work best. At its June 2003 conference, the ICN created a new working group to explore antitrust enforcement in regulatory sectors and agreed to pursue work related to hard core cartels.

14. On October 30, 2002, AAG James, Chairman Muris, and Commissioner Monti of the European Commission released a set of "best practices" for coordinating merger reviews. The best practices were developed by a working group of staff lawyers and economists from the three agencies. The objectives of the best practices are to enhance cooperation between the U.S. antitrust agencies and the European Commission in merger review, minimise the risk of divergent outcomes and reduce burdens on parties participating in merger investigations. The best practices recommend that investigative staffs establish schedules for conferring with each other and encourage senior antitrust officials in the U.S. and EU to engage in discussions at key stages of one another's investigations. They also offer merging parties a meeting at an early point in each review to discuss timing issues. In addition, the best practices encourage joint interviews of parties and third-parties, where appropriate, and provide for increased coordination with respect to remedies.

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

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

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

15. At the end of FY 2003, the Division employed 797 individuals: 357 attorneys, 58 economists, 162 paralegals, and 220 other professional staff. For FY 2003, the Division received an appropriation of \$133.3 million.

16. During FY 2003, the Division opened 282 investigations and filed 55 civil and criminal cases in federal district court. The Division was party to three antitrust cases decided by the federal courts of appeals.

17. During FY 2003, the Division filed 41 criminal cases in which it charged 16 corporations and 28 individuals. Seventeen corporate defendants and sixteen individuals were assessed fines totalling \$64.2 million and 15 individuals were sentenced to a total of 9,341 days of incarceration. Another six individuals were sentenced to spend a total of 1,025 days in some form of alternative confinement.

18. During FY 2003, 1,014 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 994 bank mergers. The Division further investigated 95 mergers and challenged 9 of them in court. An additional six 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 128 civil investigations (merger and non-merger), and issued 631 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints. Also during FY 2003, the Division responded to twelve requests for review of written business proposals.

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

19. At the end of FY 2003, the FTC's Bureau of Competition had 269 employees: 186 attorneys, 36 other professionals, 25 paralegals and 22 clerical staff. The FTC also employed about 58 economists who participate in its antitrust enforcement activities. In FY 2003, \$45,333,900 was directly allocated to the Commission's competition mission, and an overall \$75,998,300, which includes indirect support for the mission, was attributed to the mission.

20. During FY 2003, the Commission brought a total of 44 competition enforcement actions. The Commission staff opened 209 initial phase investigations under the mergers and joint ventures program and issued requests for additional information ("second requests") in 15 transactions. In the "merger" context, the Commission challenged 11 transactions. Three preliminary injunctions were authorized; 7 consent orders were accepted; 1 Part III (administrative adjudication) complaint was issued; 5 transactions were abandoned after the issuance of the second request and 5 abandoned during the course of the investigation.

21. In the non-merger area, the Commission brought 23 enforcement actions challenging a variety of anticompetitive conduct. Six were tentatively resolved by consent agreements, five of which were pending at the end of FY 2003. There were seven administrative complaints issued during the fiscal year, 11 trials are pending at the end of FY 2003.

**B. Antitrust Cases in the Courts**

1) *United States Supreme Court*

22. The United States Supreme Court did not decide any antitrust cases in FY 2003. The Court granted the petition for *certiorari* in an antitrust case, not involving the Antitrust Division or the Commission, brought against an agency or instrumentality of the United States (*United States Postal Service v. Flamingo Industries (U.S.A.) LTD.*, 123 S. Ct. 2215 (2003)). On February 25, 2004, the Supreme Court held that the United States Postal Service was not a “person” separate from the United States itself, and since the United States is not a “person” subject to liability under the Sherman Act, neither is the United States Postal Service. 2004 WL 344016. The Court also granted the petition for *certiorari* in a case where the United States submitted a brief *amicus curiae* urging the Court to do so (*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 123 S. Ct. 1480 (2003)). On January 13, 2004, the Supreme Court ruled in favour of Verizon, concluding that the 1996 Telecommunications Act did not create a duty to deal with rivals enforceable under Section 2 of the Sherman Act, and that the plaintiff had failed to adequately allege the anticompetitive conduct element of a Section 2 offence. 2004 WL 51011. The government was not a party to this private case, but the United States and the FTC filed as *amici curiae*, advocating the result the Court reached.

23. The Court denied a petition for *certiorari* in a case where the United States submitted a brief *amicus curiae* opposing review (*Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*, 123 S. Ct. 2638 (2003)). (The court of appeals decision in *Dee-K* was discussed in the FY02 annual report.)

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

a. Significant DOJ Cases Decided in FY 2003

24. There were four dispositions by U.S. courts of appeals in Antitrust Division cases in FY 2003, two civil and two criminal. In one of the civil cases, the court of appeals affirmed a district court judgment that MasterCard International, Inc., Visa U.S.A., Inc., and Visa International, Inc., violated Section 1 of the Sherman Antitrust Act by reason of their exclusivity rules (*United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)). In the other, the court affirmed a district court grant of summary judgment for the defendant in a case alleging monopolisation and attempted monopolisation by American Airlines at its Dallas, Texas hub; the court concluded that the government’s evidence failed to establish liability under the government’s legal theories (*United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003)). In one of the criminal cases, the court of appeals affirmed convictions for bid-rigging in the meat products industry (*United States v. David Solomon*, 2002-2 Trade Cas. (CCH) ¶ 73,892 (2d Cir. 2002)). In the other, involving bid-rigging on Egyptian construction contracts financed by the U.S. Agency for International Development, the court of appeals affirmed convictions as to liability but remanded on sentencing issues (*United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003)).

25. There was a final decision in a federal antitrust case in which the United States participated as *amicus curiae*. In *In re Stock Exchanges Options Antitrust Litigation*, 317 F.3d 134 (2d Cir. 2003), the court affirmed summary judgment for the defendants in a case in which plaintiffs alleged that aspects of conduct related to the listing and trading of equity options violated the antitrust laws. The court ruled that the securities regulation statute effected an implied repeal of the antitrust laws with respect to this conduct. The United States had filed an *amicus* brief taking the contrary position. The United States also filed an *amicus* brief supporting plaintiffs’ petition for rehearing *en banc*, which the court denied.

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

26. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), is the latest Court of Appeals decision addressing, under the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA), 15 U.S.C. § 6a, the extent to which foreign plaintiffs may bring suit under the Sherman Act for injuries suffered when they purchased fixed-price goods abroad, where the cartel as a whole had a "direct, substantial, and reasonably foreseeable effect" on United States commerce, but the foreign plaintiffs' claims do not arise from those domestic effects. A three-judge panel held that there was jurisdiction under the FTAIA, taking a position it described as somewhere between the positions previously taken by the Fifth Circuit in *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), and the Second Circuit in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002). In response to a request from the court, the United States recommended that the full court of appeals rehear the case, but the court declined to do so. In early FY04, the Supreme Court granted a petition for *certiorari*, and the United States has filed an *amicus* brief in the matter arguing that the case was wrongly decided by the court of appeals.

27. In *United Phosphorus, Ltd. v. Argus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), the court held that the requirements of the FTAIA involve the subject matter jurisdiction of the court (the alternative possibility being that the FTAIA states an additional element of a Sherman Act claim). Thus, satisfaction of the FTAIA requirements can be tested early in litigation, on a motion to dismiss for lack of subject matter jurisdiction.

28. In *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836 (7th Cir. 2003), the court considered the same FTAIA issue but concluded that there was no need to decide it in the case, because the plaintiffs had adequately alleged injury resulting from transactions that took place within the United States.

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

29. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 805 new civil and criminal antitrust actions, both government and private, were filed in the federal district courts in FY 2003. (We do not have data on private cases filed in state courts.)

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

1) *DOJ Criminal Enforcement*

30. Electrical Carbon Products: On November 4, 2002, Morganite, Inc., a U.S. company, agreed to plead guilty and pay a \$10 million criminal fine for participating in an international cartel to fix the price of various types of electrical carbon products sold in the United States and elsewhere. These products included carbon brushes used to transfer electrical current in direct current motors, which are used in a variety of products including automobiles, battery electric vehicles, and public transit vehicles, and carbon collectors, which are used to transfer electrical current from wires or rails for use in vehicles that are not independently powered. At the same time, Morganite's UK parent corporation, the Morgan Crucible Company plc, agreed to plead guilty and to pay a \$1 million fine for attempting to obstruct the investigation of the price-fixing conspiracy.

31. On September 24, 2003, the DOJ announced that charges had been filed against Robin Emerson, a former Marketing Coordinator for Morgan, Jacobus Kroef, former Chairman of Morgan's Industrial and Traction Division, and F. Scott Brown, former Global President and Board Member of Morgan Advanced Materials & Technology. Emerson, a UK citizen and resident, was indicted for conspiracy to obstruct justice and obstruction of justice, and subsequently pled guilty to the obstruction of justice charge and was

sentenced to serve five months in prison in the United States and to pay a \$20,000 fine. Kroef was charged with obstruction of justice via witness tampering; Kroef, a Dutch national, pled guilty and was sentenced to serve a four-month jail sentence in the United States and to pay a \$20,000 fine. Brown was charged with aiding and abetting obstruction of justice related to document destruction; Brown pled guilty and was sentenced to serve a six-month jail sentence and pay a \$20,000 fine. Ian Norris, a former Chief Executive Officer of Morgan and a UK resident and citizen, was also charged with conspiracy to obstruct justice and to corruptly persuade others to destroy or conceal documents, and with witness tampering; in a superseding indictment of October 15 he was charged in addition with participating in an international conspiracy to fix the price of certain electrical and mechanical carbon products.

32. The indictments charge that the co-conspirators created a task force to search through Morgan's files and to remove and conceal or destroy any documents or records that they found in the files that reflected the pricing agreement Morgan had with its competitors. According to the charges, Norris and Emerson, along with their co-conspirators, also prepared a "script" for the co-conspirators to follow in the event they were questioned during the course of the investigation. According to the indictments, the "script" falsely characterised the price-fixing meetings as joint venture meetings and deliberately omitted any references to the pricing discussions held with competitors. The indictments charge that the "script" was given to competitors who participated in the price-fixing agreement with instructions that they follow the script to try to convince the Antitrust Division to close its investigation and to prevent the investigation in the U.S. from spreading to the European antitrust authorities.

33. MCAA: On February 6, 2003, Hoechst Aktiengesellschaft, an international chemical conglomerate based in Germany, agreed to plead guilty and pay a \$12 million fine for its participation in a conspiracy that suppressed competition in the world markets for monochloroacetic acid (MCAA). This fine represented a substantial upward departure from the fine calculated under the Sentencing Guidelines because of Hoechst's prior price-fixing convictions in the 1990s. MCAA is an industrial chemical used in the production of commercial and consumer products, including pharmaceuticals, herbicides, and plastic additives, with annual U.S. sales of approximately \$50 million. Hoechst was the third company to plead guilty to participating in this conspiracy. In June 2001, Akzo Nobel Chemicals BV pleaded guilty and was sentenced to pay a \$12 million fine for its involvement in this conspiracy. In March 2002, Elf Atochem of France pleaded guilty to participating in the conspiracy and was fined \$5 million.

34. MIO: On January 30, 2003, Ishihara Sangyo Kaisha Ltd. (ISK Japan) of Japan pleaded guilty and was sentenced to pay a \$5 million fine for its role in a conspiracy to fix the prices of and to allocate customers for the sale of video magnetic iron oxide (MIO) particles in the United States and elsewhere. Video MIO particles are used in the manufacture of polyester film-based video tapes to give the tapes magnetic quality to pick up sound and images.

35. Methyl Glucamine: On September 18, 2003, Rhône-Poulenc Biochimie S.A., a subsidiary of the French-based pharmaceutical company, Aventis S.A., agreed to plead guilty and pay a \$5 million fine for participating in a conspiracy to fix prices and allocate customers for pharmaceutical grade methyl glucamine sold in the United States and elsewhere. Methyl glucamine is a chemical used to slow the rate at which dyes disperse throughout the body during x-rays and other medical imaging procedures. Eric Descourauz, Rhône-Poulenc's former sales and marketing director for active pharmaceutical ingredients, was also indicted for his role in the conspiracy.

36. Polyester Staple: On October 31, Arteva Specialties, S.a.r.l., d/b/a KoSa, a Luxembourg-based manufacturer of polyester staple, and its former U.S. director of textile staples, Troy F. Stanley, Sr., agreed to plead guilty to participating in a conspiracy to fix prices and allocate customers in order to suppress and eliminate competition in North American polyester staple industry from at least September 1999 through

January 2001. Polyester staple is a petroleum-derived fiber used to make products such as clothing, table linens, and upholsteries. KoSa agreed to pay a \$28.5 million criminal fine, while Stanley agreed to pay a \$20,000 fine, and to serve eight months jail time. The cases of KoSa and Stanley were the second and third to be brought in the polyester staples industry.

37. Tankers: On September 30, 2003, Norwegian-based Odfjell Seachem AS and its executives, Bjorn Sjaastad, CEO of its parent, Odfjell ASA, and Erik Nilsen, Vice President, both Norwegian citizens, agreed to plead guilty to participating in an international cartel to allocate customers, rig bids and fix prices on parcel tanker affreightment contracts for the shipment of specialty liquids to and from the United States and elsewhere. Parcel tanker shipping is the ocean transportation of bulk chemicals, edible oils, acids and other specialty liquids. Parcel tankers are deep sea vessels equipped with compartments designed to carry shipments of various sizes. A contract of affreightment is a contract between a customer and a parcel tankers shipping company for the transportation of bulk liquids from one port to another. The company, Odfjell Seachem, agreed to pay a \$42.5 million fine for its role in the cartel. Sjaastad agreed to pay a \$250,000 fine and to serve four months in prison, and Nilsen agreed to pay a fine of \$25,000 and to serve three months in prison. Odfjell Seachem is one of the largest parcel tanker shippers in the world. Moreover, on December 8, 2003, Hendrikus van Westenbrugge, a Dutch citizen and former co-Managing director of JO Tankers B.V., based in the Netherlands, pleaded guilty to the same charges and agreed to serve three months in jail and pay a fine of \$75,000.

2) *DOJ Civil Non-Merger Enforcement*

38. Microsoft: The DOJ's complaint and the subsequent proceedings against Microsoft have been described in prior years' reports. In November 2002, the district court approved the settlement, finding that entry of the Final Judgment was in the public interest. The court emphasized that, "[w]hile the proposed final judgment, in general, is appropriately crafted to address the anticompetitive conduct, ... the Court regards the document as laudable not for these traits alone, but for the clear, consistent, and coherent manner in which it accomplishes its task. Far from an amalgam of scattered rules and regulations pieced and patched together, ... the proposed Final Judgment adopts a clear and consistent philosophy such that the provisions form a tightly woven fabric." *United States v. Microsoft Corp.*, 231 F. Supp. 2d 203, 259 (D.D.C. 2001).

39. The United States has assembled an enforcement team of lawyers, economists, and technical experts to monitor Microsoft's compliance with the Final Judgment. The Justice Department coordinates its efforts with the various state enforcement authorities to collectively ensure the remedial effect intended by the Final Judgment. Over the past year, the Department helped resolve a number of complaints against Microsoft, including two that resulted in a changes to the Windows XP user-interface. The Department also has reviewed and continues to oversee Microsoft's communication protocol licensing program, a significant provision of the final judgment. Through this process, the Department has required Microsoft to make substantial improvements to the program's terms, royalty rates, format, and scope.

40. Raytheon/DRS: On August 20, 2003, the DOJ announced that Raytheon Company and DRS Technologies Inc. had agreed to modify their proposed agreement on infrared sights for military vehicle programs to alleviate the DOJ's concerns with respect to development and production of sights for future programs. The parties agreed to modify the teaming agreement, which covers joint production of certain infrared sights, so that it would not apply to future programs. The DOJ and Department of Defence worked closely throughout the investigation.

41. Orbitz: AAG Pate announced on July 31, 2003 that the Division had closed its investigation of the Orbitz joint venture, a travel website owned by five major domestic airlines. After an extensive investigation, the DOJ concluded that none of the theories of harm were borne out by the information

collected by the Division. These concerns included whether certain Orbitz contract terms would facilitate collusion among the participating airlines or reduce their incentives to discount resulting in higher fares and whether those contract terms would make Orbitz dominant in online air travel distribution. The Division found that those terms did not result in higher fares or make Orbitz dominant in online air travel distribution.

42. National Council on Problem Gambling: On June 13, 2003, the DOJ reached a settlement with the National Council on Problem Gambling (NCPG) and filed a proposed consent decree that would free NCPG state affiliates to sell problem gambling products or services outside their home states. The DOJ alleged that the NCPG violated Section 1 of the Sherman Act by facilitating an unlawful territorial allocation to prevent its affiliates from selling outside of their home states. The NCPG does not create the services offered by its affiliates, but rather each affiliate independently creates and markets problem gambling services, such as training and certification programs workshops and telephone help-lines. While many associations have legitimate, pro-competitive territorial allocations, in this case the NCPG was not designing a distribution system to enhance economic efficiency. The DOJ's complaint alleged that problem gambling service providers were threatened with sanctions or loss of their NCPG membership for bidding outside of their territory.

43. NT Media/Village Voice Media: On January 27, 2003, the Division filed a lawsuit against NT Media (New Times) and Village Voice Media, charging them with unlawful market allocation in violation of Section 1 of the Sherman Act. New Times and Village Voice Media are the two leading publishers of alternative news weeklies in the U.S., and had been head-to-head competitors in publishing alternative news weeklies in Cleveland and Los Angeles. In October 2002, however, New Times agreed to shut down its Los Angeles news weekly if Village Voice Media would close its news weekly in Cleveland. Thus, the companies "swapped" markets, leaving New Times with a monopoly in Cleveland and Village Voice Media with a monopoly in Los Angeles. The lawsuit was settled by consent decree, in which the parties agreed to terminate their illegal market allocation agreement, allow affected advertisers in Los Angeles and Cleveland to terminate their contracts, and divest the assets of the New Times Los Angeles and the Cleveland Free Times to new entrants in those markets.

44. Northwest/Continental/Delta: On January 17, 2003, the DOJ announced an agreement with Northwest, Continental, and Delta Airlines that would allow them to proceed with their proposed marketing alliance and code share agreement under certain conditions to preserve competition. Under the proposed alliance agreement, the carriers sell seats on each other's flights, placing their own "code" on partners' flights. There was to be no sharing or pooling of revenues, so each carrier would continue to compete for passengers. One of the DOJ's conditions prohibited the carriers from code sharing on each other's flights wherever they offer competing non-stop service, such as service between their hubs. The conditions also required the carriers to continue to act independently when setting award levels or other benefits of their own frequent flyer programs and when they are competitors for corporate contracts. In the DOJ's view, the alliance would benefit consumers by offering code share service to new cities, increasing frequencies or improving connections to cities already served by the carriers, and by permitting frequent flyers to earn and redeem their miles on any participating carrier. Corporations could also benefit from joint bids for contracts from alliance airlines where the airline partners offer complementary rather than competing service.

45. Mountain Health Care: On December 13, 2002, the Division sued Mountain Health Care, an independent physicians' organisation in Asheville, North Carolina, charging that it was restraining price and other forms of competition among physicians in Western North Carolina by adopting a uniform fee schedule governing the prices of its participating physicians and negotiating with health plans on their behalf, resulting in higher rates charged to health plans, and ultimately higher health costs for ultimate

consumers. The case was settled with a consent decree requiring Mountain Health to cease operations and dissolve.

3) *FTC Non-Merger Enforcement Actions*

46. The FTC's record in fiscal year 2003 revealed the success of its recent investment in these initiatives. The agency initiated 21 no merger enforcement actions, including multiple cases in each of its priority areas, including healthcare, energy, and technology-related markets. These cases include 14 consent agreements and seven administrative complaints. The number of enforcement actions exceeds that of any fiscal year in at least the past two decades.

47. Independent Physicians Associations: In the past year, the Commission has charged a number of groups of physicians with colluding to raise consumers' costs. The Commission obtained consent agreements in nine matters and issued administrative complaints against another two groups involving significant numbers of doctors, including:

- A settlement with a Dallas/Fort Worth area physicians association with 1,000 members and an administrative complaint against a separate Dallas/Fort Worth physicians group of 600 members;
- A settlement with 900 faculty physicians and 600 community physicians serving St. Louis, Missouri and surrounding areas;
- An administrative complaint against an organisation with more than 1,500 San Francisco physicians, and the subsequent settlement with that organisation; and
- A settlement with two San Diego County, California anaesthesiologists groups whose members work on approximately 70 percent of a San Diego area hospital's cases requiring anaesthesiology services.

48. The FTC's enforcement actions stop, or seek to stop, allegedly collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. The two administrative complaints issued in FY 2003 are:

California Pacific Medical Group, Inc.: On July 9, 2003, the FTC issued an administrative complaint against California Pacific Medical Group, Inc., doing business as Brown & Toland, a physicians' organisation, for allegedly fixing the prices and terms under which its doctors would contract with payers to provide services for Preferred Provider Organisation (PPO) enrollees. In filing the complaint, the FTC sought to prohibit Brown & Toland from unlawfully negotiating PPO contracts with health plans on behalf of its member physicians and to nullify the allegedly anticompetitive contracts the group has already negotiated with health plans. On February 9, 2004, Brown & Toland settles charges that its business practices violated federal antitrust laws.

North Texas Specialty Physicians: On September 17, 2003, the FTC issued an administrative complaint against a group of Texas physicians, charging that they unlawfully restrained competition, increasing the cost of health care for consumers in the Fort Worth area. The FTC alleged that North Texas Specialty Physicians (NTSP) violated federal law by negotiating agreements among its participating physicians on price and other terms, refusing to deal with payers except on collectively agreed-upon terms, and refusing to submit payer offers to participating physicians unless the terms complied with NTSP's minimum-fee standards. The case remains in administrative litigation.

49. Collusion Involving Hospitals: The Commission also pursued collusive actions against organisations that include hospital services (physician-hospital organisations). For example, on July 11, 2003, the Commission accepted a consent agreement with Maine Health Alliance (MHA), a group of 325 physicians and 11 hospitals, to resolve charges that MHA engaged in collusion that raised health care prices in a five-county area in Maine. In a similar consent agreement, South Georgia Health Partners, a group consisting of 15 hospitals and 500 physicians, settled charges that the group collectively fixed prices. These two cases represent the Commission's first challenges to provider organisations allegedly engaged in collusive conduct in providing hospital services. In December 2002, the Commission settled charges that Frye Regional Medical Centre and its parent, Tenet Healthcare Corporation, were instrumental in facilitating price-fixing by local physicians in four North Carolina counties. This settlement represents the first case in which the Commission named a hospital as a participant in an alleged provider price-fixing conspiracy.

50. South Carolina Board of Dentistry: On September 15, 2003, the Commission authorised staff to file an administrative complaint challenging a board regulation that prohibited licensed dental hygienists from providing basic preventive dental care services in a school setting unless the patient first had been seen by a dentist and a treatment plan had been established. According to the complaint, the South Carolina state legislature passed a law in 2000 that eliminated a statutory requirement for a dentist to examine a child before a hygienist was permitted to provide preventive care in schools, and the Board responded by issuing an emergency regulation reinstating and expanding the restrictions. The administrative complaint alleges that the Board's action artificially insulated dentists from competition that licensed and trained hygienists can provide, and thus deprived children – particularly economically disadvantaged children – of important preventive dental health care. The case remains in administrative litigation.

51. Bristol-Myers Squibb: On March 7, 2003, the Commission settled charges with Bristol-Myers Squibb Company (Bristol), one of the world's largest drug makers, that it engaged in a series of anticompetitive acts over the past decade to obstruct the entry of low-price generic competition for three of Bristol's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar. According to the FTC's complaint, Bristol's illegal conduct protected nearly \$2 billion in annual sales at a high cost to cancer patients and other consumers who were denied access to lower-cost alternatives, and were forced to overpay by hundreds of millions of dollars for important and often life-saving medications. Under one of the provisions of the proposed consent order, Bristol will not be able to obtain a 30-month stay, as provided in the Hatch-Waxman Act, on later-listed patents.

52. Union Oil Company of California (Unocal): On November 25, 2003, the Administrative Law Judge (ALJ) dismissed the agency's challenge to Unocal's alleged misrepresentations to the California Air Resources Board and to Unocal's competitors. The ALJ based his decision in large part on his conclusion that the *Noerr-Pennington* doctrine insulates Unocal's conduct from antitrust challenge and rejected various arguments why *Noerr Pennington* should not apply to Unocal's alleged misrepresentations. The case is on appeal before the Commission.

53. Moving Associations: Alabama Trucking Association, Inc., Movers Conference of Mississippi, Inc., Kentucky Household Goods Carriers Association, Inc.: On July 9, 2003, the Commission authorised staff to file three complaints against associations in Alabama, Kentucky, and Mississippi. These matters concerned the collective filing by competing household goods movers of rates for intrastate moving services in those states. The complaints alleged that each of these agreements violated Section 5 of the FTC Act. The cases were settled on October 20, 2003. If litigated, these cases would have presented an

opportunity for the Commission and the courts to provide greater analysis and elaboration of the state action doctrine as a defence under the antitrust laws.

54. Rambus, Inc.: On June 19, 2002, the Commission authorised staff to file an administrative complaint against Rambus, as described in last year's report. The complaint charged that Rambus violated the antitrust laws by knowingly failing to disclose its relevant intellectual property holdings to a standard setting organisation in which it was a participant. According to the complaint, Rambus failed to disclose to the Joint Electron Device Engineering Council (JEDEC) patents or patent applications covering critical technologies that were the subject of that standard setting organisation's work at the time, in violation of JEDEC goals, policies, rules and procedures, thereby allowing Rambus to obtain monopoly power over technology covered by JEDEC standards. On February 24, 2004, the Administrative Law Judge issued an initial decision concluding that Rambus's conduct did not amount to deception or violation of Rambus's duties to JEDEC, that there was no causal link between JEDEC standardisation and Rambus's acquisition of monopoly power, and that the challenged conduct did not result in anticompetitive effects because JEDEC likely would have selected Rambus technology in any event. The matter is now on appeal before the Commission.

55. The Three Tenors: On June 28, 2002, the Commission issued a final decision in "The Three Tenors" case against subsidiaries of Vivendi Universal, S.A., as discussed in last year's report. The case involved allegations that two music distribution companies (Vivendi and Warner) entered into an anticompetitive agreement not to advertise or discount certain older albums and video recordings in an effort to channel consumers toward purchasing the newly released album and video recordings of the 1998 Three Tenors concert. The unanimous Commission opinion, upholding the ALJ's finding of illegality, provided a blueprint of how the Commission will analyse "inherently suspect" horizontal restraints, based on established case law principles. The Commission found that the respondents' agreements not to discount or advertise Three Tenors products were inherently suspect, and thus "presumptively anticompetitive" even absent a showing of market power -- because restrictions of this sort generally pose significant competitive hazards. The Commission also determined that there was no legitimate efficiency justification for the challenged restraints. Respondents have appealed, and the case is now pending before the U.S. Court of Appeals for the District of Columbia Circuit.

56. Schering-Plough: On December 18, 2003, the Commission reversed and vacated an initial decision by the administrative law judge in June 2002 to dismiss all allegations of anticompetitive conduct brought by the Commission in its complaint against pharmaceutical manufacturers Schering-Plough Corporation (Schering) and Upsher-Smith Laboratories with respect to delayed launching of a generic version of Schering's k-dor drug. The opinion explained that the applicable substantive test of legality of horizontal restraints is not determined by bright lines of demarcation, but rather by a continuum "ranging from per se condemnation of particularly egregious conduct to a detailed examination of more ambiguous behaviour, responsive to the facts of individual cases." In this case, the Commission conducted a more detailed examination than was required in Three Tenors, but rejected the ALJ's conclusion that it was necessary to define markets indirectly, because the Commission found direct evidence of anticompetitive effects. Schering has appealed the case to the U.S. Court of Appeals for the Eleventh Circuit.

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

57. In FY 2003, the DOJ issued business review letters announcing that it would approve the proposals by (1) Texas-based BroChem Marketing Inc. (BroChem) to establish a computer database aimed at giving chemical distributors efficient access to the information they need when marketing chemicals sold to them by chemical producers, after BroChem agreed to make substantial modifications to address the Department's competitive concerns, (2) the Woodwork Institute of California, a voluntary membership association in the architectural millwork industry, to conduct a survey of general financial, cost, and sales

data in an attempt to increase the efficiency of their operations, and (3) the American Trucking Associations, which represent the interests of motor carriers, state trucking associations, and national trucking conferences, to develop and circulate a model contract to members to help increase efficiency in contract negotiations.

58. In addition, the Department cleared a proposal by the 3G Patent Platform Partnership, a group that currently has nineteen European and Asian companies as members, to establish five patent licensing and evaluation structures for “Third Generation” (3G) wireless telecommunications technologies. The assent was given after the 3G Patent Platform Partnership agreed to make substantial modifications to address the Department’s concerns. These modifications mainly involved the separation of the original proposal’s single patent platform into five largely independent platforms.

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

59. In FY 2003, FTC staff issued the following advisory letters: (1) to Bay Area Preferred Physicians, stating that the conduct, concerning a proposed physician’s network to establish a common messenger arrangement aimed at minimising costs associated with their members contracting with health plans and other third-party payers, does not appear anticompetitive; (2) two letters to hospitals regarding the Non-Profit Institutions Act (NPIA) on the sales of pharmaceuticals, stating that pharmaceuticals dispensed by the hospitals would be covered by the NPIA; (3) to PriMed Physicians regarding a proposal of PriMed Physicians, a physician group practice with 55 physician employees located in Dayton, Ohio, that the Commission has no present intention to recommend law enforcement action against the group’s creation, with other Dayton-area physicians, of an advocacy group to collect and disseminate information about Dayton health care market conditions.

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

#### ***Enforcement of Premerger Notification Rules***

60. On February 6, 2003, the Department filed a civil antitrust complaint and proposed consent decree resolving its allegations that Gemstar and TV Guide had fixed prices, allocated customers, and violated pre-merger waiting period requirements (a practice known as “gun-jumping”) prior to their merger in July 2000. On July 11, 2003, the court entered a final judgment ordering Gemstar-TV Guide to pay a record \$5.67 million in civil penalties and to comply with certain restrictions to prevent it from engaging in similar conduct in the future. Prior to mid-1999, Gemstar and TV Guide competed to provide interactive program guides, or IPGs, to cable and satellite television service providers. IPGs allow television viewers to use a television remote control device to view program schedule information and select programs for viewing. Gemstar and TV Guide stopped competing for some customers in June 1999, when they were negotiating a possible joint venture, and subsequently announced that they would merge in October 1999, and filed a pre-merger notification under the HSR Act. Pending consummation of the transaction, and while the DOJ conducted its review of the transaction, Gemstar and TV Guide secretly agreed to allocate markets and customers, agreed on the prices and material terms that customers would be offered, and began jointly conducting their IPG business.

61. On February 28, 2003, the Department filed a civil lawsuit against Smithfield Foods Inc., the largest U.S. hog producer and pork packer, for twice failing to comply with premerger notification requirements before making certain acquisitions of stock of its competitor, IBP Inc., the second largest pork packer. The complaint, which is still pending, seeks a civil penalty of \$5.5 million. The HSR Act exempts from its premerger filing requirements and the mandatory waiting period certain stock acquisitions that are “solely for the purpose of investment.” The Department alleges that Smithfield’s

acquisitions were not exempt because Smithfield was also considering and taking steps toward a Smithfield-IBP combination.

### *Significant Merger Cases*

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

62. Hughes/Echostar: On October 31, 2002, the Department filed an antitrust lawsuit in U.S. District Court in Washington, D.C., to block the proposed acquisition of Hughes Electronics Corp. by Echostar Communications Corp. The Department was joined in its lawsuit by the Attorneys General of 23 states, the District of Columbia and the Commonwealth of Puerto Rico. The Federal Communications Commission had previously announced its objection to the proposed merger on October 10, 2002, and ordered the matter set for an administrative hearing. The Department's Complaint alleged that if the merger were allowed to proceed, it would eliminate competition between the nation's two most significant direct broadcast satellite services - Hughes's DirecTV and Echostar's DISH Network - and would substantially reduce competition in the multichannel video programming distribution business to the detriment of consumers throughout the United States. In areas where cable television was not available, the merger would have created a monopoly, eliminating the only competitive choice for millions of households, and in most areas of the country where cable television was available, the merger would have reduced the number of competitors from three to two. On December 10, 2002, the parties abandoned their proposed merger.

63. Alcan/Pechiney: On September 29, 2003, the Department reached a settlement with Alcan Inc. that requires Alcan to divest Pechiney S.A.'s aluminum rolling mill in Ravenswood, West Virginia, if Alcan's pending \$4.6 billion tender offer for Pechiney is successful. Alcan and Pechiney are among the world's leading aluminum producers, producing a similarly wide range of rolled aluminum products. The Department said the acquisition, as originally proposed, would substantially lessen competition in the development, production, and sale of brazing sheet and would likely result in higher prices. Brazing sheet is a class of custom-engineered aluminum alloy used in fabricating the major components of heat exchangers for motor vehicles, including radiators, heaters, oil coolers, and air conditioners.

64. GE/Instrumentarium: On September 16, 2003, the Department reached a settlement with General Electric Corporation (GE), requiring the divestiture of two Instrumentarium OYJ businesses – its Spacelabs patient monitor business and its Ziehm C-arm business – in order for GE to proceed with its acquisition of Instrumentarium. The Department said the acquisition, as originally proposed, would have lessened competition in the sale of monitors for patients requiring critical care and mobile C-arms used for basic surgical and vascular procedures, and would likely have resulted in higher prices or reduced quality for consumers. Critical care patient monitors are medical devices used by hospitals and other healthcare facilities to measure and display the vital physiologic signs of patients in serious medical condition. Mobile C-arms developed for basic surgical and vascular procedures are full-size, fluoroscopic x-ray machines that provide continuous, real-time viewing of patients during those procedures. GE and Instrumentarium are two of only a few competitors that provide these important medical devices to healthcare providers and have competed head to head on price, product features, and service. The DOJ communicated and cooperated extensively with the EU in the course of this investigation.

65. DFA/Southern Belle: On April 24, 2003, the Department filed a lawsuit against Dairy Farmers of America Inc. (DFA) and Southern Belle Dairy Co. LLC to compel DFA to divest its interests in Southern Belle Dairy in order to prevent higher milk prices in more than 100 school districts in Kentucky and Tennessee. The Department said DFA's acquisition eliminated the only other independent bidder for school milk – resulting in a monopoly – in 47 school districts, and reduced the number of independent bidders from three to two in 54 school districts, in Kentucky and Tennessee. The litigation is ongoing.

66. Northrop Grumman/TRW: On December 11, 2002, the Department announced that it would require Northrop Grumman Corporation to agree to certain restrictions to ensure continued competition for reconnaissance satellite systems in order for Northrop Grumman to proceed with its proposed \$7.8 billion acquisition of TRW Inc. Reconnaissance satellites obtain information important to the nation's defence that is unavailable by other means, through key components called payloads that detect radar signals that bounce off of objects, and that detect radiation emitted or reflected by an object. Northrop is one of only two U.S. companies that design, develop, and produce the payload used in reconnaissance satellites. TRW is one of only a few companies with the ability to serve as a prime contractor on U.S. government reconnaissance satellite programs. Northrop's acquisition of TRW will allow it to be both the prime contractor and the payload provider for reconnaissance satellites. Absent the requirements proposed by the consent decree, the vertical integration created by this merger would give Northrop the ability and incentive to lessen competition by favouring its in-house payload to the detriment or foreclosure of its payload competitors and by refusing to sell, or selling at disadvantageous terms, its payload to competing prime contractors.

67. SGL Carbon: On April 15, 2003, the Department filed a lawsuit to block SGL Carbon AG and its United States subsidiary, SGL Carbon L.L.C., from acquiring certain assets of Carbide/Graphite Group in a bankruptcy court auction. SGL Carbon and Carbide/Graphite are two of the only four producers capable of manufacturing quality 18-inch diameter and larger graphite electrodes for sale in the United States. Graphite electrodes are a critical input into electric arc furnace steel production, in which scrap metal is melted and refined into steel. The Department said that the acquisition would have facilitated coordination among the three remaining producers of large graphite electrodes for sale in the United States, and would have substantially reduced competition in the production of large graphite electrodes. On May 8, 2003, the Department filed a voluntary notice of dismissal after receiving notice that the alternative bidder at the bankruptcy auction had purchased the assets on May 2, 2003.

68. Univision/HBC: On March 26, 2003, the Department announced that it would require Univision Communications Incorporated to sell a significant portion of its partial ownership interest in Entravision Communications Corporation and agree to other restrictions in order to proceed with its \$3 billion acquisition of Hispanic Broadcasting Corporation (HBC). The Department said that, without these conditions, Univision's acquisition of HBC would have lessened competition in the sale of advertising time on many Spanish-language radio stations because HBC is Entravision's principal competitor in Spanish-language radio in many geographic areas.

69. UPM-Kymmene Oyj/Morgan Adhesives: On April 15, 2003, the Department filed suit in the U.S. District Court for the Northern District of Illinois to block UPM-Kymmene Oyj's proposed acquisition of Morgan Adhesives Co. from Bemis Company, Inc. The Department's complaint alleged that the proposed transaction would have lessened competition in North American markets for the production and sale of pressure-sensitive label stock. In July 2003, after substantial discovery and a two-week hearing on the Department's motion for preliminary injunction, the District Court ruled in favour of the Department. Upon the Court's issuance of a preliminary injunction, the defendants abandoned the proposed transaction.

2) *FTC Merger Challenges or Cases*

a. Preliminary Injunctions Authorised

70. Kroger Company/Raley's: (non-public) In October 2002, the Commission authorised staff to seek a temporary restraining order to prevent Kroger's from acquiring 18 supermarkets in Las Vegas, Nevada. The parties gave the Commission a timing agreement after the Temporary Restraining Order was

authorised. Upon further investigation, staff concluded that there were no antitrust concerns with the proposed transaction. The investigation was closed on November 13, 2002.

71. Nestle Holdings/Dreyer's Grand Ice Cream: On March 4, 2003, the Commission authorised staff to file a motion for a preliminary injunction based on staff recommendations that the merger would eliminate competition and raise prices for super premium ice cream. If allowed to proceed, Nestlé would have about 60 percent of the market for super premium ice cream, and together with Unilever, about 98 percent of the market. The motion was not filed, however, and on June 25, 2003, the parties settled FTC charges by agreeing to divest three of Dreyer's brands and Nestlé's distribution assets, to make available Dreyer's license to manufacture, distribute, and sell another of its super premium brands, and other measures aimed at remedying the Commission's concerns.

72. Vlasic Pickle Co./Claussen Pickle Co.: On October 22, 2002, the Commission authorised staff to file a motion for a preliminary injunction, based on concerns that Vlasic's proposed acquisition of Claussen would eliminate competition and the rivalry between these two national pickle brands. Claussen is the dominant producer of refrigerated pickles and Vlasic serves as the primary price constraint on Claussen. If the acquisition proceeded as proposed, the companies allegedly would have a monopoly share of the refrigerated pickle market in the United States. The motion for preliminary injunction was filed in federal district court in Washington DC on October 23, 2002. The parties abandoned the transaction on October 29, 2002.

b. Commission Administrative Decisions

73. Aspen Technology: On August 7, 2003 the Commission authorised staff to file an administrative complaint alleging that Aspen Technology's acquisition of Hyprotech in 2002 was anticompetitive and led to the elimination of a significant competitor in the provision of process engineering simulation software for industry. Aspen remains in administrative litigation.

74. Chicago Bridge and Iron: As discussed in last year's report, this merger already had been consummated when the Commission authorised staff to file an administrative complaint on October 25, 2001. On June 27, 2003, the Administrative Law Judge (ALJ) upheld complaint allegations that the acquisition by Chicago Bridge & Iron Company N.V. (CB&I) of the Water Division and the Engineered Construction Division of Pitt-Des Moines, Inc. (PDM) violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The ALJ found that complaint counsel had established that the effect of CB&I's acquisition of the PDM assets may be to substantially lessen competition in four relevant product markets in the United States in which both CB&I and PDM competed. CB&I and PDM appealed the initial decision to the Commission. On January 2, 2004, the Commission approved an interim consent order, subject to public comment, that stipulated that CB&I cannot alter in any way the assets acquired from PDM subsequent to February 7, 2001, except in the ordinary course of business or for ordinary wear and tear. The order also stated that if CB&I wished to dispose of any assets at its Provo, Utah facility, it had to notify the Secretary of the FTC, complaint counsel, and the Commission's Compliance Division at least 60 days before taking such an action. It further ordered CB&I to take steps to notify employees at the Provo facility that it has no plans to close the facility.

75. DSM/Roche: On September 23, 2003, the Commission reached a settlement agreement with DSM and Roche. DSM is a multi-national firm active in numerous industries, including food, pharmaceuticals, and transportation. Roche is a global healthcare firm that researches, develops, manufactures, and sells vitamins, carotenoids, and fine chemicals used in the animal nutrition, food, pharmaceutical, and chemical industries. DSM and Roche are in alliances with BASF and Novozymes, respectively, that produce and market phytase. Phytase is added to poultry and swine feed to promote digestibility of phosphorous and other nutrients that are vital to livestock production. Without the

divestiture, the transaction would lead to DSM being part of alliances that supply more than 90 percent of the phytase market worldwide. The settlement will protect competition in the market for phytase, and allowed DSM to proceed with the acquisition of Roche, but with the requirement that DSM divest its phytase business.

76. GenCorp/ARC: On December 30, 2003 the Commission issued a consent order allowing GenCorp, Inc.'s acquisition of Atlantic Research Corporation on the condition that GenCorp divest its in-space liquid propulsion business to a Commission-approved buyer, at no minimum price, within six months of the date of the acquisition. The Commission issued the order after finding that GenCorp's acquisition of ARC would lessen competition in the U.S. markets for the research, development, manufacture and sale of four different types of in-space propulsion thrusters: 1) monopropellant thrusters; 2) bipropellant apogee thrusters; 3) dual mode apogee thrusters; and 4) bipropellant attitude control thrusters. For all four of these thrusters, the Commission found that the U.S. market is highly concentrated, that in some cases they were the only viable suppliers and in many the closest competitors, and that high entry barriers made the possibility of a new entrant unlikely.

77. Genzyme/Novazyme: On January 13, 2004, the Commission closed its investigation into the 2001 acquisition of Novazyme Pharmaceuticals, Inc. (Novazyme) by Genzyme Corporation (Genzyme). At the time of its acquisition, Novazyme was engaged primarily in conducting early pre-clinical studies relating to enzyme-replacement treatment (ERT) for Pompe disease. Genzyme was also engaged in such preclinical animal testing of ERTs. The Commission's investigation focused on the transaction's potential impact on the pace and scope of research into the development of a treatment for Pompe disease. There are three separate statements on the decision to close the investigation. The Chairman's statement recognised the limitations on innovation market analysis, noting that economic theory and empirical investigations have not established a general causal relationship between innovation and competition. Instead, a careful, intense factual investigation was conducted that focused on how the transaction would affect the pace and scope of research into pharmaceutical products to address a condition for which no treatment presently exists. According to the Chairman's statement, the facts of the investigation did not support a finding of anticompetitive harm; moreover, on balance, the merger more likely created benefits that will save patients' lives. Commissioner Thompson, however, dissented, asserting that this case involved a merger among two rival innovators that resulted in a merger to monopoly and, based on the FTC/U.S. Department of Justice Horizontal Merger Guidelines, is presumptively anticompetitive. Further, the Commissioner stated that the acquisition should have been challenged irrespective of this presumption because the merger in this specific innovation market eliminated the only other rival in the world, while providing no merger-specific efficiencies. Commissioner Harbour abstained, since that Commissioner had only joined the Commission in the final stages of considering the complex issues raised by the acquisition.

78. Pfizer/Pharmacia: On April 11, 2003, the Commission ordered Pfizer, Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation to make certain divestitures to resolve concerns that their merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions. The settlement required all divestitures to occur no later than ten days after the Pharmacia acquisition was consummated, and that if the Commission determined that the specified buyers were not acceptable purchasers, the assets had to be divested to a Commission-approved buyer no later than six months from the date the consent order became final.

79. Southern Union (Panhandle Pipeline): On July 16, 2003, the Commission approved a final consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area. The order allowed Southern Union Company's purchase of the Panhandle pipeline from CMS

Energy Corporation, after Southern Union terminated an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City, Missouri area. The complaint alleged that the transaction, if allowed to proceed as originally proposed, would have placed the two pipelines under common ownership or common management and control, eliminating direct competition between them, and likely resulting in consumers paying higher prices for natural gas in the Kansas City area.

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

##### **A. Regulatory Policies**

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

80. On May 29, 2003, the Department filed comments with the Department of Transportation (DOT) concerning the application by the International Air Transport Association (IATA) for approval of and antitrust immunity for an agreement reached by IATA members to change the volume conversion factor used to calculate freight rates for low density shipments. DOJ recommended that the DOT deny approval and antitrust immunity because the proposal was “effectively a price-fixing agreement to increase rates for low density shippers, and IATA has not demonstrated any offsetting important public benefit or fulfillment of a serious transportation need” as required by the applicable statute. In addition, the Department urged DOT to re-examine whether approval and antitrust immunity should be withdrawn from all IATA agreements on fares or rates charged by U.S. airlines for passenger tickets or air freight carriage sold in the U.S. to consumers for travel or shipments to and for the U.S., as well as with respect to IATA agreements on airline fares, rates and charges in other contexts in which U.S. national interests are strong. The Department argued that such agreements are contrary to fundamental U.S. competition policy as set forth in the antitrust laws, and any foreign policy or international comity justifications for immunising such agreements have further eroded as other countries increasingly adopt policies more reliant on market competition.

81. On June 9, 2003, the DOJ filed comments with the DOT concerning regulatory supervision of the travel agent computer reservations systems (CRS) industry. The DOJ noted that many of the regulations, in effect for nearly twenty years, had failed to make the CRS industry more competitive, may have imposed costs of their own on consumers, and should not be extended. The DOJ also noted that two recent developments – domestic airlines no longer own CRSs and now use the internet to sell tickets – have reduced the need for extensive regulation. Adopting the Division’s analytical approach and most of its factual findings and recommended regulatory responses, the DOT decided to allow most of its rules to lapse on January 31, 2004, while keeping a few (relating to system bias and “most favoured nation” clauses in contracts with airlines) for an additional 6 month transition period.

82. In FY2003, the DOJ continued to file comments with the Federal Communications Commission (FCC) in several “Section 271” proceedings involving the FCC’s determination of whether local telecommunications markets are 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 last 271 comments were filed in the fall of 2003 as the FCC granted 271 approval to the last state at the end of 2003. The Regional Bell Operating Companies are now permitted to offer long distance services anywhere in the country. The Division’s comments are available at <http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm>.

83. On December 20, 2002, the DOJ and FTC issued a joint letter urging the American Bar Association (ABA) to substantially narrow or reject a proposed model definition of the practice of law. The letter stated that if adopted by state governments, the definition likely would reduce or eliminate

competition between non-lawyers and lawyers to provide a number of services, leading to higher prices and a reduction in competitive choices for consumers. The DOJ/FTC letter argued that the proposed model definition would prevent non-lawyers from offering many of the services they now provide in areas such as real estate and landlord-tenant law and trusts and estates.

84. On March 20, 2003, the DOJ and FTC issued a joint letter urging the Georgia State Bar's Standing Committee on the Unlicensed Practice of Law to reject a request for an opinion that would prevent non-lawyers from competing with lawyers to perform certain real estate closing-related functions. The DOJ and FTC noted that if the opinion is approved, Georgia consumers and businesses could end up paying more for real estate closing-related services and may be prevented from benefiting from competition from out-of-state and internet lenders. The letter explained that laws that only permit lawyers to prepare deeds and facilitate their execution are less apt to protect purchasers because the lawyer performing the services will likely have been hired by the lender, not the consumer. The agencies sent similar letters to the Rhode Island Senate (June 30, 2003) and House of Representatives (March 28, 2003) urging those bodies to reject a proposed bill that would prevent non-lawyers from competing with lawyers to perform real estate closings.

85. In FY2003, the Division approved three applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations. The ETC applications involved various products and services such as corn, apples, and professional consulting to facilitate trade overseas.

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

86. Intellectual Property: Competition and patents can foster innovation, but errors or systematic biases in one policy's rules can harm the other policy's effectiveness in promoting innovation. A failure to strike the proper balance between them can harm innovation. The FTC and DOJ held 24 days of hearings on this topic, with more than 300 expert panellists and 100 written submissions generating over 5,000 pages of transcripts. During the hearings many participants reported that, although competition and patents often work well together, too many questionable patents are harming innovation and competition. To address these concerns, the FTC issued a report in October 2003 entitled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy." The Commission's report makes ten recommendations to reduce the proportion of questionable patents. Among other steps, the report recommends new procedures for challenging patent validity, careful application of patent law to prevent or invalidate obvious patents, and thoughtful integration of economic insights into patent law and policy.

87. Health Care Advocacy: Although the FTC typically uses its law enforcement authority to challenge potentially anticompetitive hospital mergers, the agency employed another of its tools to comment on the potential anticompetitive effects of the proposed acquisition of Slidell Memorial Hospital by Tenet Healthcare. Under Louisiana law, both the voters and the state Attorney General must approve the sale of a nonprofit hospital, such as Slidell, and the Attorney General requested the FTC's views on the transaction. In response, the FTC staff explained that the proposed merger of the Slidell area's only two full-service hospitals raised concerns about likely anticompetitive effects, including increased prices. The analysis focused on the possible effects of the acquisition on health care plans, which ultimately must reimburse hospitals in whole or in part for services provided to covered patients. Seventy seven percent of area voters disapproved of the merger. In April 2003, the Commission voted unanimously to authorize the filing of the staff's comments. In issuing its comments to the Attorney General, FTC staff noted that the Commission currently has an ongoing investigation of the proposed transaction.

88. Retrospectives and Other Economic Studies: The FTC continued its examination of selected topics to develop policy positions and inform its enforcement activities. During FY 2003, the FTC staff conducted retrospective studies of mergers involving hospitals and the oil industry. In *Experimental Gasoline Markets*, the authors investigated the competitive effects of zone pricing on consumers, retail stations, and refiners. In another paper, *The Economic Effects of the Marathon - Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure*, FTC economists analysed whether there were anticompetitive price effects from a merger cleared by the FTC. The learning derived from these studies facilitates better case selection and provides important economic support that helps the agency succeed in its enforcement initiatives. Further information on these studies is provided in section V.B below.

89. Generic Drug Report: This past year saw the implementation of specific recommendations made in the FTC's July 2002 report on generic drugs, entitled *Generic Drug Entry Prior to Patent Expiration: An FTC Study*, as discussed more fully in last year's annual report. The FDA approved a final rule in June 2003 that eliminates multiple 30-month stays on FDA approval of generic drugs, which the FTC study had identified as harmful to consumers, and also limits the patents that can be listed in the FDA Orange Book, consistent with another FTC recommendation. Moreover, the Medicare Act passed in 2003 implements key FTC recommendations to facilitate entry of generic drugs and requires that the FTC be notified of certain agreements between branded and generic drug firms. Information about the requirements to notify the FTC can be found at: <http://www.ftc.gov/os/2004/01/040106pharmrules.pdf>

90. Gasoline Price Monitoring and Investigation Initiative: In 2002, the FTC initiated a project to monitor gasoline prices to identify unusual movements in prices and then examine whether any such movements might result from anticompetitive activity. FTC economists developed a statistical model for the purpose of identifying such movements. The staff incorporates into their analysis customer complaint data received from the states and the Department of Energy and also examines movements in the level of gasoline prices and the spread between the price of crude oil and the price of gasoline. If the staff detects unusual price movements, they research the possible causes, including, if appropriate, consulting with the staff of various federal and state agencies. The FTC staff also contacts the appropriate State Attorney General's Office to discuss the pricing anomaly and to discuss the appropriate course for further inquiry, including the possible opening of a law enforcement investigation.

91. Energy - Motor Fuel: The FTC staff submitted comments to the North Carolina Attorney General stating that amendments to the state's Motor Fuel Marketing Act could have significant potential to harm consumers by causing higher gasoline prices at the pump. Under current North Carolina law, it is illegal to sell gasoline below cost as a regular business practice with the intent to injure competition. Proposed amendments to the statute would have eliminated the "intent" and "business practice" requirements and would have redefined "cost" in a way that would not always reflect discounts to retailers. Because the proposal could make dealers liable for procompetitive price-cutting, the staff was concerned that it would deter aggressive competition, to the detriment of consumers. The FTC staff filed comments on similar proposals pending in Alabama, New York, and Kansas, and an existing law in Wisconsin.

92. Energy - Electricity and Natural Gas: The FTC continued to provide its expertise and assistance in connection with the ongoing process of opening electricity markets to competition. In FY 2003, agency staff submitted comments to the Federal Energy Regulatory Commission on Market-Based Rates and Authorisations, and on Remediating Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design. In addition, the staff submitted comments to the Illinois Commerce Commission on Asset Transfers Among Affiliated Companies, to the California Public Utilities Commission on Exit Fees and Distributed Generation, and to the Georgia Public Service Commission on Standards for Determining Whether Natural Gas Prices Are Constrained by Market Forces.

93. Professional Services: In addition to the joint DOJ/FTC letters noted above, the FTC staff provided comments to the Indiana State Bar Association opposing proposals that would unduly limit the ability of non-lawyers to compete in the market for real estate closings. The FTC staff also provided comments to the Tennessee legislature on proposed regulations for the practice of optometry, noting that consumers could end up paying more for eyeglasses because the operation of commercial optometry practices, especially chain optical stores, could be more difficult.

94. Financial Services: The agency recently submitted a letter urging the Commodity Futures Trading Commission (CFTC) to support more competition in the market for futures trading by allowing a new entrant to establish a competing U.S.-registered commodity futures exchange. The letter cited two recent studies that found that securities-based options listed on multiple exchanges, rather than a single exchange, have significantly lowered bid-ask spreads, a result consistent with the effects of multiple exchanges in equity markets. The letter also criticized public restraints, such as regulatory barriers, that impede competition, limit new entrants, stifle innovation, and raise prices in this sector. After receiving the FTC's letter, the CFTC voted unanimously to approve the new entrant's application, with one CFTC Commissioner issuing a statement acknowledging the FTC's analysis.

95. Computer Reservation Services: FTC comments to the Department of Transportation (DOT) urged that the Department use caution in applying monopoly leveraging and essential facilities theories in a proposed rulemaking on airline computer reservation systems and that conduct not be condemned on these grounds without a showing that it is exclusionary. DOT's final rule eliminated most of the proposed rules governing airline computer reservations systems and included a sunset provision to terminate the other rules later this year.

96. Internet Wine Sales Report: In July 2003, the FTC released a staff report, *Possible Anticompetitive Barriers to E-Commerce: Wine*, which concluded that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers. The empirical study found that state bans on direct shipping prevent consumers from saving as much as 21 percent on some wines and from conveniently purchasing many popular wines from suppliers around the country. The report also concluded that states can limit sales to minors through less restrictive means than an outright ban on direct shipping, such as by requiring that a supplier verify the recipient's age and obtain an adult's signature before delivering the wine.

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

97. Both the Division and the FTC are extensively 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 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, and has been actively involved in certain NAFTA Chapter 11 arbitrations relevant to competition issues and in the WTO Mexican telecommunications case. The Division also works with other Justice components (including the Environment and Civil Divisions) on international trade and investment issues that affect the interests of those components or of the Department as a whole.

98. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve cooperation in the enforcement of competition laws. The Division and the FTC participate in a number of negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative and State and

Commerce Departments in competition policy groups associated with the Free Trade Area of the Americas (FTAA) and Asia-Pacific Economic Cooperation (APEC), and chaired or co-chaired the negotiating teams for the competition chapters of the FTAA and U.S.-Australia free trade agreements. The antitrust agencies also have played an important role in the working group established by the World Trade Organisation (WTO), which the FTC co-chairs for the U.S. delegation, to study issues relating to the interaction between trade and competition policy.

99. For more than a decade the Department and the FTC have assisted transition and developing economies that have made the commitment to market and commercial law reforms. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programs create long-term cooperative relationships with policy and enforcement officials in the countries involved. During FY 2003, the technical assistance program was active in Asia, South and Central America, Eurasia, Southeast Europe, the ANDEAN Community, Mexico and South Africa. The FTC continued its resident advisor program in Indonesia, and, with the Department, continued its resident advisor program in South Africa. The FTC and DOJ's short term programs have emphasised the development of investigative skills. These programs rely on a combination of resident advisors, regional workshops, and targeted short term missions.

100. 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***

101. The Economic Analysis Group issued the following papers during FY2003. 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). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail (janie.ingalls@usdoj.gov).

Eric Emch, GECAS and the GE/Honeywell Merger: A Response to Reynolds and Ordovery, EAG 03-13, August 2003.

Charles J. Romeo, Estimating Discrete Joint Probability Distributions for Demographic Characteristics at the Store Level Given Store Level Marginal Distributions and a Market-Wide Joint Distribution, EAG 03-12, August 2003.

Dean V. Williamson, Renegotiation, Dynamic Efficiency, and Vertical Restraints in Electricity Marketing Contracts, EAG 03-11, August 2003.

Russell Pittman, Railways Reform and Electricity Reform in Russia, and the Role of the Ministry for Antimonopoly Policy, EAG 03-10, August 2003.

Russell Pittman, Regulatory Reform: Lessons for Korea, EAG 03-9, August 2003.

Gregory J. Werden, *The American Airlines Decision: Not with a Bang but a Whimper*, EAG 03-8, August 2003.

William W. Nye, *Jumping the Gun: The Cellophane Strategy and the Incentives of Firms Contemplating Merger*, EAG 03-7, April 24, 2003.

W. Tom Whalen, *Constrained Contracting and Quasi-Mergers: Price Effects of Code Sharing and Antitrust Immunity in International Airline Alliances*, EAG 03-6, April 24, 2003.

Russell Pittman, *A Note on Non-Discriminatory Access to Railroad Infrastructure*, EAG 03-5, April 24, 2003.

Jeffrey Wilder, *Competing for the Effort of a Common Agent: Contingency Fees in Commercial Insurance*, EAG 03-4, February 21, 2003.

Fred Gramlich, *Coupon Remedies in Antitrust Cases: The Form of the Discount Also Matters*, EAG 03-3, February 10, 2003.

Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, EAG 03-2, January 2003.

Craig Peters, *Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry*, EAG 03-1, January 2003.

Sheldon Kimmel, *The Supreme Court's Efficiency Defense*, EAG 02-13, September 2002. Forthcoming in the *Supreme Court Economic Review*.

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

### *1) Commission Conferences and Workshops*

102. Merger Efficiencies: In December 2002, the Bureau of Economics held a two-day roundtable on merger efficiencies, entitled "Understanding Mergers: Strategy & Planning, Implementation and Outcomes." The roundtable brought together experts on mergers from economics departments, business schools, M&A consulting, antitrust law practice, and business. The goals of the roundtable included: (1) better understanding the M&A process from the development of a corporate strategic plan through the various stages to the end of the implementation; and (2) obtaining a broader perspective on mergers that might shed light on the factors that make mergers succeed or fail. A unique aspect of the roundtable was the participation of several business executives from firms who have been action in M&A for over a decade. Materials from the roundtable are available at: <http://www.ftc.gov/be/rt/mergerroundtable.htm>.

103. E-Commerce: In October 2002 the Commission held a three-day workshop on possible anticompetitive efforts to restrict competition on the Internet. The goal of the conference was to address the growing concern about possible anticompetitive efforts to restrict competition on the Internet either by state regulations enacted to aid existing bricks-and-mortar businesses at the expense of new Internet competitors, or practices where private companies are curtailing e-commerce by employing tactics such as collectively pressuring suppliers or dealers to limit sales over the Internet. The workshops featured testimony regarding industries that have experienced substantial growth in commerce via the Internet, but that also may have been hampered by anticompetitive restrictions. In particular, the workshop had panels on the following industries: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles;

(5) caskets; (6) online legal services; (7) health care (telemedicine and online pharmaceutical sales); (8) auctions; (9) real estate, mortgages, and financial services; and (10) retailing. Materials from the workshop are available at: <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

2) *Economic Working Papers*

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

Steven Tenn, Estimating Promotional Effects with Retailer-Level Scanner Data, September 2003.

Cary A. Deck and Bart J. Wilson, Experimental Gasoline Markets, August 2003.

Christopher P. Adams & Van V. Brantner, New Drug Development: Estimating Entry from Human Clinical Trials, July 2003.

David Schmidt, Robert Shupp, James Walker, Resource Allocation Contests: Experimental Evidence, July 2003.

Abraham L. Wickelgren, Moral Hazard and Renegotiation: Multi-Period Robustness, April 2003.

Alan Wiseman and Jerry Ellig, How Many Bottles Makes a Case Against Prohibition? Online Wine and Virginia's Direct Shipment Ban, March 2003.

Patrick DeGraba, Volume Discounts, Loss Leaders, and Competition for More Profitable Customers, February 2003.

Christopher P. Adams and Laura L. Bivins, Focusing on Demand: Using eBay Data to Analyse the Demand for Telescopes, January 2003.

David J. Balan, Have Lazear-Style Implicit Contracts Disappeared?, January 2003.

Daniel P. O'Brien and Abraham L. Wickelgren, A Critical Analysis of Critical Loss Analysis, January 2003.

Martin Gaynor and William Vogt, Competition Among Hospitals, January 2003.

Christopher P. Adams, Agent Discretion, Adverse Selection and the Risk-Incentive Trade-Off, December 2002.

Christopher P. Adams Does Size Really Matter? Empirical Evidence on Group Incentives, October 2002.

*Appendices*

**Department of Justice: Fiscal Year 2003 FTE and Actual Amount by Enforcement Activity**

	<i>FTE</i>	AMOUNT
CRIMINAL ENFORCEMENT	269	\$41,656,000
Civil Enforcement	500	\$77,362,000
TOTAL	769	\$119,018,000

**Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	488.9	\$75,998.3
<i>Bureau of Competition</i>	262.9	\$32,410.0
<i>Bureau of Economics</i>	80.6	\$9,807.2
<i>Regional Offices</i>	26.3	\$3,116.7
<i>Mission Support</i>	119.1	\$30,664.4
Premerger Notification	26.8	\$2,933.9
<i>Bureau of Competition</i>	25.9	\$2,828.4
<i>Bureau of Economics</i>	0.8	\$94.0
<i>Regional Offices</i>	0.1	\$11.5
Merger & Joint Venture Enforcement	173.7	\$20,773.3
<i>Bureau of Competition</i>	121.9	\$14,540.9
<i>Bureau of Economics</i>	46.2	\$5,585.4
<i>Regional Offices</i>	5.6	\$647.0
Merger & Joint Venture Compliance	8.5	\$928.2
<i>Bureau of Competition</i>	8.4	\$916.4
<i>Bureau of Economics</i>	0.1	\$11.8
<i>Regional Offices</i>	--	--
Nonmerger Enforcement	129.0	\$16,592.0
<i>Bureau of Competition</i>	90.1	\$11,952.5
<i>Bureau of Economics</i>	18.8	\$2,280.4
<i>Regional Offices</i>	20.1	\$2,359.1

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	FTE	Amount (\$ in thousands)
Nonmerger Compliance	1.4	\$152.6
<i>Bureau of Competition</i>	1.4	\$152.6
<i>Bureau of Economics</i>	--	--
<i>Regional Offices</i>	--	--
Antitrust Policy Analysis	10.3	\$1,282.4
<i>Bureau of Competition</i>	--	--
<i>Bureau of Economics</i>	10.3	\$1,282.4
<i>Regional Offices</i>	--	--
Other Direct Mission Resources	20.1	\$2,671.5
<i>Bureau of Competition</i>	15.2	\$2,019.2
<i>Bureau of Economics</i>	4.4	\$553.2
<i>Regional Offices</i>	0.5	\$99.1