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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES**

**-- From October 1, 2004 to September 30, 2005 --**

*This report is submitted by the Delegation of the United States to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 8-9 June 2006.*

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## **Introduction**

1. This report describes federal antitrust developments in the United States for the period October 1, 2004, through September 30, 2005 (“FY 2005”). It summarizes the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

2. Assistant Attorney General R. Hewitt Pate resigned from the Department effective June 30, 2005. On July 1, 2005, Deputy Assistant Attorney General Thomas O. Barnett, who had been in charge of civil enforcement, became Acting Assistant Attorney General; Mr. Barnett was subsequently nominated by President Bush to be AAG, and was confirmed by the Senate as AAG on February 10, 2006. On February 2, 2005, AAG Pate announced that Scott D. Hammond had been appointed Deputy Assistant Attorney General for criminal enforcement, replacing James M. Griffin, who retired in December 2004. On September 1, 2005, Mr. Barnett announced that Gerald F. Masoudi had been appointed to serve as Deputy Assistant Attorney General in charge of international, appellate, and policy matters.

3. In February 2005, William Blumenthal joined the Commission as General Counsel, Jeffrey Schmidt joined as Deputy Director of the Bureau of Competition, and Jeffrey Brennan became Associate Bureau Director. In March, 2005 Lydia B. Parnes was appointed as Director of the Bureau of Consumer Protection (BCP). In May 2005, Maureen Ohlhausen was appointed Director of the Office of Policy Planning. In June 2005, Charles H. Schneider was appointed to serve as the Commission’s Executive Director. In December 2005, Jeffrey Schmidt was appointed Director of the Bureau of Competition, following the departure of Director Susan Creighton.

### **1. Changes in law or policies**

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

4. On October 21, 2004, the Department released an “Antitrust Division Policy Guide to Merger Remedies” that sets forth the Division’s policies on merger remedies and describes the legal and economic underpinnings of those policies. The guide is intended to provide the business community, antitrust bar, and economists with an understanding of the Division’s analytical framework for crafting and implementing relief in merger cases. The guide emphasizes the following points:

- structural remedies involving the divestiture of physical or intangible assets are preferred to conduct remedies; conduct remedies are appropriate only in limited circumstances;
- the divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets;
- the divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture;
- if the Division believes the merger will result in a violation, the Division will be willing to forego filing a case and accept instead a structural “fix” that the parties implement before the merger is consummated, as long as it fully eliminates the competitive harm arising from the merger;

- the Division will ensure that remedies are completely implemented and will fully enforce its judgments.

5. On March 2, 2005, the revised notification and filing thresholds for the Hart-Scott Rodino (HSR) Antitrust Improvements Act Section 7A(a)(2) became effective. Section 7A of the Clayton Act, 15 U.S.C. 18a, requires persons contemplating mergers or acquisitions that meet or exceed the jurisdictional threshold to notify the Commission and the Assistant Attorney General and wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5).

6. On April 7, 2005, the final rules implementing amendments to the Hart-Scott-Rodino Rules (HSR) (16 C.F.R. Parts 801 - 803) became effective. The amendments were aimed at reconciling the treatment of unincorporated entities with treatment of corporate entities under the HSR rules. The amendments require notification in certain instances of acquisitions of interests in unincorporated entities and formations of unincorporated entities, and extend the application of certain exemptions, including the intraperson exemption, to unincorporated entities.

7. On September 27, 2005, the agencies announced antitrust guidance and an expedited procedure for collaborations of businesses working to rebuild communities affected by Hurricanes Katrina and Rita. The agencies' programs -- The Department's "Business Review Letter" procedure and the FTC's "Staff Advisory Opinion" procedure -- allow any firm, individual, or group of firms or individuals to submit a proposed business plan or activity to one of the agencies and receive a statement whether it will challenge the activity under the antitrust laws. That process typically entails at least a 90-day review period prior to the issuance of the agency's guidance. Under the expedited procedure, the agencies would state their enforcement intentions within five business days of receiving the proposal. An applicant would have to provide the Department or the FTC by fax, e-mail, or letter a written description of the proposal, including the parties that would be involved in the effort or activity and the name and contact information of a person from whom the agencies could obtain additional information. This expedited procedure is for use solely for post-Hurricane relief efforts and may be invoked at the option of the requestor in lieu of the agencies' standard procedures.

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

8. The Antitrust Modernization Commission (AMC) was created pursuant to an act of Congress and consists of 12 members: 4 appointed by the President, 4 appointed by the leadership of the Senate, and 4 appointed by the leadership of the House of Representatives. The AMC is charged by statute: (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and submit to Congress and the President a report. The report is to "contain a detailed statement of the findings and conclusions of the Commission, together with recommendation for legislative or administrative action the Commission considers to be appropriate," and is due by July 15, 2007. Information on the AMC, its hearings, and public comments received is available at <http://www.amc.gov>. Assistant Attorney General Pate submitted a list of suggested topics for possible AMC study on January 5, 2005, available at <http://www.usdoj.gov/atr/public/comments/207122.htm>

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

9. On October 5, 2004, Attorney General John Ashcroft, FTC chairman Deborah Platt Majoras, and the Canadian Ambassador to the United States, Mr. Michael Kergin, signed an agreement enhancing the process by which Canada and the United States will refer certain cases of anticompetitive activities to each

other's authorities for appropriate law enforcement action. The "positive comity" agreement is very similar to the agreement signed by the U.S. and the European Communities in 1998, and establishes conditions under which the requesting country will normally agree to defer initiating its own enforcement activity.

10. The Commission and Department of Justice participated in the Fourth Annual International Competition Network (ICN) conference, which was held in Bonn, Germany. The conference was the largest gathering of competition officials, with more than 400 delegates, including representatives of 80 competition agencies, experts from international organizations, and members of the legal, business, consumer, and academic communities. The conference presented the work of four ICN working groups focused on mergers, cartels, competition policy implementation, and antitrust enforcement in regulated sectors. At the conference, ICN members approved recommendations designed to improve their merger review processes, underscored the importance of the ICN's anti-cartel work, and presented the progress that member jurisdictions have made in implementing ICN recommendations. ICN members also approved a new work agenda that includes establishing a new working group to study antitrust enforcement issues in the telecommunications sector.

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

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

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

11. At the end of FY 2005, the Division employed 770 persons: 350 attorneys, 54 economists, 162 paralegals, and 204 other professional staff. For FY 2005, the Division received an appropriation of \$138.8 million.

12. During FY 2005, the Division opened 273 investigations and filed 43 civil and criminal cases in federal district court. In FY 2005, the Division was party to four antitrust cases decided by the federal courts of appeals.

13. During FY 2005, the Division filed 32 criminal cases in which it charged 27 corporations and 47 individuals. Eighteen corporate defendants and twenty-two individuals were assessed fines totalling \$600.45 million and 18 individuals were sentenced to a total of 13,157 days of incarceration. Another six individuals were sentenced to spend a total of 1,270 days in some form of alternative confinement.

14. During FY 2005, 1,695 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 943 bank mergers. The Division further investigated 106 mergers and challenged 3 of them in court. One transaction was restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 128 civil investigations (merger and non-merger), and issued 727 civil investigative demands (a form of compulsory process). The Division filed eight non-merger civil complaints. Also during FY 2005, the Division responded to six requests for review of written business proposals.

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

15. The FTC's Bureau of Competition has 293 non-administrative staff working on competition enforcement, including 164 lawyers, 56 economists, 73 'other' (the "other" category includes paralegals, investigators, merger analysts, compliance specialists, industry analysts, research analysts, and financial

analysts/accountants). The FTC's Maintaining Competition Mission had a budget of \$ 85.7 million in FY 2005.

16. During FY 2005, the Commission brought a total of fourteen competition enforcement actions. The Commission staff opened fifty-one initial phase investigations and issued requests for additional information ("second requests") in twenty-five transactions. The Commission challenged fourteen mergers. One preliminary injunction was authorized; nine consent orders were accepted; no administrative complaints were issued. Four transactions were abandoned because of antitrust concerns; two transactions were abandoned after the issuance of the second request, and two were abandoned during the course of the investigation. One civil penalty action was brought with respect to a violation of the pre-merger notification requirements.

17. In the non-merger area, the Commission brought four enforcement actions challenging a variety of anticompetitive conduct; four were resolved by consent agreements. There were no administrative complaints issued during the fiscal year.

**B. Antitrust Cases in the Courts**

1) *United States Supreme Court*

18. On August 29, 2005, the Commission filed a petition for writ of certiorari with the Court to have the Schering-Plough Corporation case reviewed (FTC v. Schering-Plough, 126 S. Ct. 544 (2005)). The petition is still pending.

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

a. Significant DOJ Cases Decided in FY 2005

19. In *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006), the court of appeals reversed a district court decision that had rejected the Department's challenge to the policy of Dentsply, an artificial tooth manufacturer with a 75-80% market share, prohibiting independent dealers selling Dentsply teeth from selling other manufacturers' teeth. In addressing the Department's monopoly maintenance claim under Section 2 of the Sherman Act, the court concluded that Dentsply had monopoly power and used it to foreclose competition through its dealer policy and that, even if Dentsply's competitors had "viable" alternatives to dealer distribution, such distribution channels did not pose a real threat to Dentsply's exercise of monopoly power. Citing the economic realities of the market, the court held that direct distribution did not permit rivals to pose that threat. And given Dentsply's dominance, rivals could never steal Dentsply's dealers because no dealer could afford to forsake all of its Dentsply business in order to sell teeth of tiny rivals. The court of appeals ordered the district court to enter an injunction in favour of the United States.

20. In *United States v. Gosselin World Wide Moving N.V.*, 411 F.3d 502 (4th Cir. 2005), cert. denied, 126 S. Ct. 1464 (2006), the court reversed a finding of antitrust immunity for an agreement among defendants, U.S. freight forwarders, and others to fix the minimum through rate to be bid to the Department of Defence for the transportation of its personnel's belongings from Germany to the United States. The court held that the Shipping Act, 46 U.S.C. app. § 1701 et seq., did not provide immunity because such an agreement does not concern the foreign inland segment of through transportation. The court also held that the Shipping Act did not provide immunity from conspiracy to defraud charges. The court affirmed the fraud conviction and remanded for resentencing to allow the district court to sentence on the antitrust count as well as the fraud count.

21. In a district court decision, *Stolt-Nielsen S.A., v. United States*, 352 F. Supp. 2d 553 (E.D. Pa. 2005), the court permanently enjoined the United States from seeking the indictment of Stolt-Nielsen Transportation Group (“Stolt-Nielsen”), a member of a conspiracy to fix prices and allocate customers in the ocean parcel-tanker industry, and a Stolt-Nielsen executive. Stolt-Nielsen had received conditional leniency under the Division’s Corporate Leniency Policy. The Division, however, revoked leniency upon learning that Stolt-Nielsen had not taken prompt and effective action to terminate its participation in the illegal activity, one of the conditions of the leniency agreement. The Division had also learned that Stolt-Nielsen failed to comply with its cooperation obligations by withholding information and providing misleading and false information about the true extent of the conspiracy. The district court found that Stolt-Nielsen had a due process right to a pre-indictment determination of whether it breached the leniency agreement. The court then found that the company had not breached the agreement and, in any event, that the Division was bound by its promise not to indict Stolt-Nielsen because it had received the benefit of its bargain. On March 23, 2006, the Court of Appeals for the Third Circuit reversed the district court, concluding that the district court lacked authority to enjoin the Department’s indictments; the court of appeals did not reach the question of whether the leniency agreement had been breached. 442 F.3d 177 (3rd Cir. 2006).

b. Significant FTC Cases Decided in FY 2005

22. In *Polygram Holdings, Inc., et al. v. FTC*, 416 F.3d 29 (11<sup>th</sup> Cir. 2005), in the “Three Tenors” case, Polygram petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of a Commission order. The order held that the Polygram entered into an agreement with a competitor to temporarily suspend advertising and discounting of two record albums. The court denied Polygram’s petition for review and held that Polygram’s agreement with its competitor had deleterious effects on consumers and appeared to be a naked price fixing agreement. Although the temporary moratorium seemed to mitigate spill over effects that could have been expected to follow the aggressive launch of an album, the court stated that the “free riding” to be eliminated was nothing more than the competition of products that were not part of the joint undertaking. The court held that the remedy was reasonable because there was substantial evidence to support the finding of a significant risk for similar, future arrangements.

23. *Schering-Plough Corporation v. FTC*, 402 F. 3d 1056 (11th Cir. 2005), arose out of 1995 applications by Upsher-Smith Laboratories, Inc. and ESI Lederle, Inc. for approval of generic versions of a potassium product, along with their certifications that the products they intended to market were non-infringing generic substitutes. Schering brought patent actions against ESI and Upsher, but later entered into settlement agreements with both. The Commission issued an administrative complaint claiming that, under the settlement agreements, Schering made payments to both firms in exchange for their agreement to delay generic entry, in violation of Section 5 of the FTC Act. ESI entered into a consent agreement with the Commission in April 2002, but Schering and Upsher proceeded to trial. In December 2003, the Commission ruled that Schering’s agreements with Upsher and ESI were unlawful and amounted to payments to exclude generic competition, and that Schering had shown no competitive justification for the resulting harm to consumers. The Eleventh Circuit reversed the Commission’s decision and held that Schering’s patent provided it with the legal right to exclude Upsher and ESI from the market until they proved either that the patent was invalid or that their products did not infringe the patent. In August 2005, the Commission filed a petition for *certiorari* to the U.S. Supreme Court to ask for review of the Eleventh Circuit’s decision.

3) *Private Cases With International Implications*

24. In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), the court of appeals considered the plaintiffs’ alternative Sherman Act claim, remanded by the Supreme Court in *F.*

*Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), that the foreign injury they suffered as purchasers of vitamins outside the United States was linked to, and not independent of, the domestic effects of an international vitamin price-fixing arrangement. The plaintiffs' claim was that the arrangement would not have succeeded and injured them but for the higher prices in the United States necessary to prevent the arbitrage of this fungible and readily transported commodity. The court of appeals concluded that the claim was barred by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, which makes the Sherman Act inapplicable to conduct involving non-import foreign trade or commerce except when such conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce and such effect gives rise to a claim under the Sherman Act. The court held that the FTAIA's domestic effects exception requires a direct causal relationship, that is proximate causation, between the domestic effects and the foreign injury. While maintaining supracompetitive prices in the United States may have been at most a "but-for" cause of the foreign injury, the court held that the domestic injury must be a proximate cause of the foreign injury, and that the defendant's conduct did not satisfy this standard. The Supreme Court denied a petition for further review of this case. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, cert. denied, 126 S. Ct. 1043 (2006).

25. In *Latino Quimica-Amtex S.A.*, No. 03 Civ. 10312, 2005-2 Trade Cases ¶ 74,974 (S.D.N.Y. Sept. 8, 2005), appeal pending No. 05-5754-CV (2d Cir.), the court dismissed an antitrust case for lack of subject matter jurisdiction because the purchases plaintiffs made at allegedly fixed prices were in foreign markets for delivery in foreign countries. Rejecting plaintiffs' argument that the FTAIA's domestic effects exception applies, the court held that the FTAIA required proximate causation between the domestic effect and foreign injury, and that plaintiffs only pleaded "but for" causation. The court also denied as futile plaintiffs' request to amend the complaint to include an *Empagran*-like arbitrage theory because "the mere inter-dependence of markets cannot be sufficient to satisfy the requirement that a domestic effect 'gives rise to' the plaintiff's claim."

26. In *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D. Cal. July 20, 2005), the court dismissed from a Sherman Act case the foreign plaintiffs who purchased magnetic iron oxide (MIO) in the United States and abroad for transport to foreign destinations all at prices allegedly fixed by a worldwide conspiracy. Those plaintiffs' injuries were due to purchases in "purely foreign" commerce, the court concluded, did not have the requisite nexus with domestic effect under the FTAIA despite plaintiffs' claims that higher prices in the United States were necessary to prevent arbitrage and that the MIO purchased in foreign commerce was used to make products sold in substantial volume in U.S. commerce. As for purchases in the United States of MIO made in Japan, the court concluded the FTAIA does not apply, but that under *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), plaintiffs must show that the foreign conduct was meant to produce and did in fact produce some substantial effect in the United States. The court found that they failed to make this showing because MIO only passed through the United States en route to locations outside the United States. Lastly, the court held that plaintiffs' purchases of U.S.-made MIO were in export commerce, not "purely domestic" commerce, because the ultimate destination of that MIO was outside the United States. Plaintiffs' claim of antitrust injury in export commerce, however, was rejected as they did not allege a direct, substantial, and reasonably foreseeable effect on U.S. commerce caused by these export sales because they did not allege they were American export competitors.

27. In *Skidmore v. KPMG*, No. 3:03CV2138-B (N.D. Tex. Dec. 28, 2004), the court dismissed plaintiffs' antitrust claims because, among other reasons, they lacked domestic injury under the Sherman Act and the FTAIA specifically excludes claims causing only foreign injury unless the conduct causes significant harm to U.S. imports, domestic commerce, or U.S. exporters. The court found that the alleged injury—the dilution of plaintiffs' interest in a foreign oil exploration venture—was independent of any alleged increase in the price of oil in the United States.

28. In *World Skating Federation v. International Skating Union*, 357 F. Supp.2d 661 (S.D.N.Y. 2005), the court dismissed plaintiff's Sherman Act claims for lack of personal jurisdiction over defendants. The court held that neither section 12 of the Clayton Act, 15 U.S.C. § 22, nor the New York long-arm statute, N.Y.C.P.L.R. 302, provide personal jurisdiction over the International Skating Union, an association formed under the laws of Switzerland, or one of its executives. Section 12 only applies to corporations, and while the association shares some common attributes with corporations, it is not a corporation. The long-arm statute failed because defendants' few transactions in New York did not give rise to plaintiff's Sherman Act claim.

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

29. According to the 2005 Annual Report of the Director of the Administrative Office of the U.S. Courts, 818 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2005.

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

1) DOJ Criminal Enforcement

30. **DRAM:** On April 21, 2005, the DOJ announced that Hynix Semiconductor Inc., a Korean manufacturer of dynamic random access memory (DRAM), had agreed to plead guilty and pay a \$185 million fine for participating in an international conspiracy to fix prices in the DRAM market. DRAM is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products. There were approximately \$7.7 billion in DRAM sales in the United States in 2004. The criminal information charged that from April 1, 1999 to June 15, 2002, Hynix conspired to fix the prices of DRAM sold to certain computer and server manufacturers, including Dell Inc., Compaq Computer Corporation, Hewlett-Packard Company, Apple Computer Inc., International Business Machines Corporation, and Gateway Inc. Hynix was the second major semiconductor company, after the German manufacturer Infineon Technologies AG (Infineon), to agree to plead guilty to fixing DRAM prices. In October 2004, Infineon pled guilty and was sentenced to pay a \$160 million criminal fine. In December 2004, four Infineon executives, Messrs. T. Rudd Corwin, Peter Schaefer, Gunter Hefner, and Heinrich Florian, pled guilty to the DRAM price-fixing conspiracy. The Infineon employees served jail terms of between four and six months and each paid a fine of \$250,000. Three of the Infineon employees are German citizens.

31. **Indiana Ready Mixed Concrete:** On June 29, 2005, the DOJ announced that Irving Materials Inc., a ready mixed concrete producer in Greenfield, Indiana, pleaded guilty and was sentenced to pay a \$29.2 million criminal fine -- the largest ever in a domestic antitrust investigation -- for fixing the price of ready mixed concrete in the Indianapolis, Indiana metropolitan area. Additionally, four executives agreed to plead guilty, pay criminal fines, and serve time in prison. The company and executives were charged with conspiring with their competitors to fix prices from approximately July 2000 until May 2004. One of the executives has agreed to pay a fine of \$200,000 and the other three executives have agreed to pay \$100,000 fines each; all four agreed to serve five months in prison, followed by five months of home detention. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks. It is purchased by do-it-yourself customers and commercial customers, as well as local, state, and federal governments for use in various construction projects, including sidewalks, driveways, bridges, tunnels, and roads. In a separate conspiracy, Lee's Ready Mix Trucking Inc. agreed to plead guilty to charges of conspiring to fix the price at which ready mixed concrete was sold in three Indiana counties, beginning around February 2003 and continuing until approximately June 2004. During this period the company sold at least \$7 million worth of ready mixed concrete. Lee's Ready Mix and its

co-conspirators agreed to specific price increases for ready mixed concrete as well as to specific timing of those price increases. Additionally, the former president of Lee's Ready Mix Trucking, Mr. Larry Lee, pled guilty to a price-fixing charge, and agreed to serve eight months in prison and to pay a \$70,000 criminal fine.

32. **Rubber Chemicals:** On August 10, 2005, Jurgen Ick and Gunter Monn, two former top executives of Bayer AG, the German chemicals producer, were indicted by a federal grand jury for participating in an international price-fixing conspiracy in the rubber chemicals industry. They were charged with suppressing competition by fixing the prices of rubber chemicals sold in the United States and elsewhere. Ick was charged with participating in the conspiracy from 1995 to 2001, and Monn was charged with joining it around January 1997. The rubber chemicals at issue are a group of additives used to improve elasticity, strength, and durability of rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. Approximately \$1 billion of these rubber chemicals are sold annually in the United States. The charges are connected to guilty pleas Department has obtained from five companies – Bayer AG, Syndial S.p.A., Crompton Corporation, DuPont Dow Elastomers, and Zeon Chemicals – and, including the recent charges, a total of six executives, for fixing prices of various rubber-related products. Bayer and Crompton Corporation pleaded guilty and paid fines of \$66 million and \$50 million respectively. Four former executives from these two companies pleaded guilty to participating in the price-fixing conspiracy. One of the four executives was sentenced to serve a four-month prison term and to pay a \$50,000 fine, while the remaining three await sentencing. Syndial S.p.A. plead guilty on May 2, 2005 and agreed to pay a \$9 million criminal fine for price fixing in the polychloroprene rubber market. Approximately \$200 million of polychloroprene rubber is sold annually in the United States. Syndial was charged with conspiring with its competitors to fix the price of this rubber sold in the United States and elsewhere from September 1999 to April 2002. On January 19, 2005, the Department charged DuPont Dow Elastomers L.L.C., a Delaware company formed in 1996 by E.I. du Pont de Nemours & Company and The Dow Chemical Company, with participating in the same international conspiracy to fix prices in the polychloroprene rubber market. On March 29, 2005, the company entered a plea of guilty and was sentenced to pay an \$84 million criminal fine. The fifth company, Zeon Chemicals L.P., a Kentucky-based wholly owned subsidiary of Zeon Corporation of Tokyo, Japan, pleaded guilty and agreed to pay a \$10.5 million criminal fine for participating in a conspiracy from May 2002 through December 2002 to fix prices of acrylonitrile-butadiene (NBR), a synthetic rubber used to manufacture a variety of products including automotive parts. More than \$200 million in criminal fines have resulted from the Department's ongoing investigations of price fixing on various rubber-related products.

33. Other significant criminal investigations reported during FY05 include matters relating to the following industries: electrical contracting, linen supplies, the Federal E-rate program that subsidizes internet access for economically disadvantaged schools and libraries, roofing, fish distribution, textiles, and scrap metals.

2) *DOJ Civil Non-Merger Enforcement*

34. **National Association of Realtors:** On September 8, 2005, the Department of Justice filed a complaint against the National Association of Realtors (NAR), challenging an NAR policy that obstructed real estate brokers who used innovative internet-based tools to offer better services and lower costs to consumers. Real estate brokers share information about properties for sale, known as listings, through the local Multiple Listing Service (MLS). The purpose of the MLS is to provide customers with listings of all properties for sale, ultimately encouraging competition between brokers. NAR's policy restrained competition by requiring NAR-affiliated MLSs to adopt rules that allow brokers to withhold their clients' listings from other brokers' websites by means of an 'opt out.' When exercised, the opt-out provision prevented web-based brokers from providing all MLS listings that respond to a customer's search. Following modification of NAR's policy, the DOJ filed an amended complaint on October 4, 2005,

charging that the NAR's modified policy continues to prevent Internet-based real estate brokers from offering better services and lower costs to consumers. The modified policy provides for a "blanket opt-out," similar to the opt-out provision in the initial policy, but specifically exempts NAR's official website from the blanket opt out. NAR's modified policy, like its original policy, denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, ultimately stifling competition to the detriment of consumers.

35. **Kentucky Real Estate Commission:** On July 13, 2005, the Department announced that it had reached a settlement with the Kentucky Real Estate Commission under which real estate brokers in Kentucky would be able to offer rebates and inducements to consumers. On March 31, 2005, the Department had filed a civil antitrust lawsuit challenging the Commission's regulations that prohibited Kentucky real estate brokers from offering rebates and other inducements to attract customers. Kentucky consumers will now be able to avail themselves of the benefits of increased competition through broker-offered rebates, discounts, and other inducements.

36. **Federation of Physicians and Dentists:** On June 24, 2005, the Department filed a lawsuit against the Federation of Physicians and Dentists, which provides negotiating and consulting services to physician practice groups. The lawsuit also names as defendants Ms. Lynda Odenkirk, a Federation employee, and three Cincinnati obstetrician-gynecologist ("OB-GYN") physicians. Concurrently with the filing, the Department announced settlements of the lawsuit with the three physician defendants. The lawsuit alleged that the Federation had unlawfully coordinated its Cincinnati-area OB-GYN member physicians' negotiations with insurers. The Complaint alleged that a large percentage of Cincinnati-area OB-GYNs joined the Federation to coordinate renegotiation of higher fees in their contracts with Cincinnati-area healthcare insurers. These actions caused insurers to raise fees paid to Federation OB-GYN members above the levels that the OB-GYNs likely would have obtained if they had negotiated competitively with those insurers.

37. **West Virginia Hospitals:** On March 21, 2005, the Department announced that it would require two hospitals in southern West Virginia - Bluefield Regional Medical Center, Inc. (BRMC) and Princeton Community Hospital Association, Inc. (PCH) - to terminate their illegal agreements that allocated cancer services to PCH and cardiac-surgery services to BRMC. Upon filing this lawsuit, the Department also filed a proposed consent decree that would resolve the lawsuit and the Department's competitive concerns. The lawsuit stemmed from two agreements made between BRMC and PCH on January 30, 2003, in which BRMC agreed not to offer most cancer services and PCH agreed not to offer cardiac-surgery services in six West Virginia counties and three Virginia counties. Prior to this agreement, BRMC and PCH had been head-to-head competitors in cancer services and potential competitors in cardiac-surgery services. The proposed consent decree annuls the agreements and prohibits BRMC and PCH from entering into any agreement concerning cancer services or cardiac surgery without prior DOJ approval.

38. **Western Union:** On March 16, 2005, the Department announced the closing of its money transfer services investigation of Western Union. The Department examined whether Western Union's exclusive contracts with its retail agents were harming competition in either the domestic or international money transfer services markets, or in the domestic emergency bill-payment services market. Western Union introduced its money transfer service in 1871. It functioned as the nation's regulated telegraph monopoly and was deregulated in the 1970s by the FCC. Western Union still retains a dominant share of the U.S. money transfer services market. The Department could not conclude that Western Union's contracting practices have substantially foreclosed network competitors' access to distribution outlets in the United States. The Department also investigated whether Western Union had had an anticompetitive impact on commerce with foreign countries. The evidence did not indicate that Western Union's practices were anticompetitive. The Department's investigation found that competition for money transfer and emergency bill-payment services had persisted, and had even intensified over the last few years.

3) *FTC Non-Merger Enforcement Actions*

39. In FY 2005, there were significant developments in the Commission's non-merger enforcement in the form of consent agreements, Commission administrative adjudications, and appellate court actions.

40. Appellate Decisions: As described about at paragraphs 22-23, federal courts reviewed two of the agency's recent adjudicative decisions in the past year; one was resolved favourably for the agency and the other is still pending in the appellate process.

41. Health Care: The FTC pursued several non-merger matters involving health care. During FY 2005, the Commission approved consent orders in five cases requiring physician groups to stop fixing prices.

- **Evanston Northwestern Healthcare:** The Commission announced a partial settlement in April 2005, resolving some allegations of a complaint that alleged illegal collusion among approximately 900 doctors in Cook and Lake Counties, Illinois. Under the terms of a consent order, Evanston Northwestern Healthcare Corporation agreed to stop collectively bargaining on behalf of its members, as such joint negotiations allegedly led to reduced competition and higher prices paid by health plans and other payers to the group's salaried and independent doctors.
- **Preferred Health Services:** In April 2005, the Commission approved a final consent order with another South Carolina physician-hospital group, barring the physician-hospital group from collectively negotiating and fixing the prices it charges payers on behalf of its doctor members. According to the FTC, Preferred Health acted as a "contracting representative" for its member doctors, developing pricing contracts that it then presented to health plans and other payers. Because the organization's doctors make up approximately 70 percent of the independently practicing physicians in and around Seneca, South Carolina, health plans must have access to many of its members to provide services for consumers. Accordingly, the Commission concluded that the plans are forced to pay higher, collectively negotiated prices for health care services, and that this joint fee negotiation was done with no efficiency-enhancing integration to justify it.
- **San Juan IPA:** In May 2005, the Commission approved a final consent order with San Juan IPA, Inc., a physician independent practice association operating in the area of Farmington, New Mexico. The consent settled the Commission's charges that the association orchestrated and carried out agreements among its member doctors to set the price that they would accept from health plans, to bargain collectively to obtain the group's desired price terms, and to refuse to deal with health plans except on collectively determined price terms. The Commission claimed that this conduct resulted in higher prices for medical services for the area's consumers. The consent order settling the charges prohibits the association from collectively negotiating with health plans on behalf of its physicians and from setting their terms of dealing with such purchasers.
- **New Millennium Orthopaedics:** In May 2005, the Commission settled charges with two small groups of orthopaedic physicians (with 22 and 10 members, respectively) in the Cincinnati area that had formed an independent practice association. The charges included claims that the associations jointly negotiated contracts regarding the rates its physician members would charge health plans and other payers for their services. Under the terms of the order, New Millennium Orthopaedics, LLC (NMO) will be disbanded and its two constituent groups will be prohibited from similar collective bargaining in the future.

- **Partners Health Network:** In September 2005, the Commission approved a final settlement with this physician-hospital group, consisting of 225 physicians practicing in the Pickens County, South Carolina area. The charges claimed that Partners Health Network orchestrated and carried out agreements among its physician members to set the prices they would accept from health plans and to refuse to deal with health plans that did not agree to its collectively determined prices. The consent order settling the FTC's charges prohibits the physician-hospital group from engaging in this type of anticompetitive conduct in the future.

42. Energy: The FTC has been active in prosecuting unlawful conduct in the petroleum and natural gas industries.

- **Chevron/Unocal:** In June 2005, the Commission accepted two consent orders to resolve the Commission's complaint against Union Oil Company of California (Unocal) and antitrust concerns arising from Chevron's proposed \$18 billion acquisition of Unocal. The settlement resolved allegations of monopolization through anticompetitive abuses of the regulatory process related to California reformulated gasoline in connection with certain Unocal patents. The acquisition raised concerns that Chevron could use information obtained through patent licenses to facilitate coordinated interaction among itself and other refiners and marketers, thereby leading to higher prices for reformulated gasoline. By the terms of the order, the combined firm agreed not to enforce its relevant patents or collect royalties on those patents.

43. Other Non-merger Enforcement Activity: In FY 2005, the Commission took action against alleged anticompetitive conduct in other sectors of the economy. Two notable cases proceeded through administrative litigation.

- **Kentucky Household Movers:** In June 2005, the Commission upheld an initial decision that held that Kentucky Households Goods Carriers Association, Inc. engaged in illegal horizontal price-fixing and that the conduct was not shielded by the state action doctrine from prosecution under federal antitrust laws because the state had not actively supervise the challenged collective rate-making. The Commission ruled that the Kentucky Association must cease and desist from collective rate-making, and that the Association must cancel and withdraw all existing tariffs and tariff supplements on file with the state.
- **Rambus:** The Commission is considering an appeal from an administrative law judge's (ALJ) dismissal of the complaint in an administrative proceeding against Rambus, Inc. The complaint charged that Rambus violated the antitrust laws by knowingly failing to disclose its relevant intellectual property holdings to a standards setting organization in which it participated. In dismissing the complaint, the ALJ concluded that Rambus's conduct did not amount to deception or a violation of Rambus's duties and that complaint counsel had not proved that Rambus's conduct violated the antitrust laws. Following this ALJ decision, the Commission reopened the record to admit relevant materials from two related court proceedings. Complaint counsel appealed, and the appeal remains under consideration by the Commission.

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

44. In FY 2005, FTC staff issued the following advisory letters: (1) to Bristol-Myers Squibb, stating that its proposed settlement with Teva Pharmaceuticals USA, Inc. does not raise issues under Section 5 of the Federal Trade Commission Act; (2) to North Mississippi Health Services, stating that its purchase of pharmaceuticals to be dispensed to patients treated at a non-profit clinic and at a non-profit hospice is covered by the Non-Profit Institutions Act (NPIA); and (3) to Stevens Hospital, in Edmonds, Washington,

stating that its purchase of pharmaceuticals to be dispensed to patients treated by its clinic physicians is covered by the Non-Profit Institutions Act (NPIA).

**F. Business Reviews Conducted by the Department of Justice**

45. The Department did not issue any business review letters in FY 2005.

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

**A. Enforcement of Pre-merger Notification Rules**

46. In FY 2005, the Department of Justice recovered civil penalties in two federal district court actions for violations of premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR). On September 26, 2005, in a case brought at the request of the Federal Trade Commission, Mr. Scott R. Sacane, a Connecticut hedge fund manager, agreed to pay a \$350,000 civil penalty to settle charges that he violated premerger reporting requirements. Mr. Sacane failed to comply with notification and waiting period requirements before making acquisitions of two companies through an investment fund that he controlled. Mr. Sacane eventually held more than 50 percent of the voting securities of Aksys Ltd. and more than \$100 million of voting securities of Esperion Therapeutics Inc. without complying with HSR. On November 10, 2004, Smithfield Foods Inc., the nation's largest hog producer and pork packer, agreed to pay a \$2 million civil penalty to settle charges brought by the Department of Justice in February 2003 that the company twice failed to comply with premerger notification requirements before making acquisitions above the statutory threshold of stock of its competitor, IBP Inc., which was at the time the nation's second largest pork packer. Smithfield's claim that the acquisitions were exempt because they were "solely for the purpose of investment" was rejected by the Department because Smithfield was actively considering merging with IBP at the time.

47. In March 2005, the Commission filed an action under Section 7(A)(g)(2) of the Clayton Act to enjoin the Hollywood/Blockbuster merger, stating that the parties had not complied with the statutory rules of the HSR Act. According to the complaint, Blockbuster had failed to substantially comply with the Second Request because it provided insufficient and inaccurate pricing data. The parties resolved the issues before the court ruled on the merits, with Blockbuster agreeing to an extension of the HSR waiting period. The merging parties abandoned their proposed transaction before the Commission completed its investigation.

**B. Significant Merger Cases**

*1) FTC Merger Challenges or Cases*

48. During FY 2005, the value of merger transactions reported under the Hart-Scott-Rodino Act (HSR) increased from \$630 billion in FY 2004 to \$1.1 trillion in FY 2005; the number of mergers requiring investigation increased by over 25 percent. The following were significant merger cases during FY 2005 in the energy, health care, and other industries.

49. **Valero/Kaneb Services and Pipe Line Partners:** In July 2005, the Commission approved a final settlement requiring that Valero divest several oil terminals and a pipeline system to preserve competition in petroleum transportation and terminaling in Northern California, Pennsylvania and Colorado.

50. **Aloha Petroleum/Trustreet Properties:** In July 2005, the Commission sought a preliminary injunction to block Aloha Petroleum's proposed acquisition of Trustreet Properties' half interest in import-capable terminal and retail gasoline assets in Hawaii. The Commission claimed that the proposed

acquisition would have reduced the number of island gasoline marketers that had guaranteed access to supply from five to four, and the number of suppliers selling to unintegrated retailers from three to two. Aloha subsequently announced a long-term agreement with a third party, Mid Pac Petroleum, that would give Mid Pac substantial rights to use the terminal to import gasoline into Hawaii. The court then dismissed the Commission's complaint upon the Commission's request.

51. **Novartis/Eon Labs:** In July 2005, The Commission required the parties to divest three generic drugs that competed with Novartis's branded products before it permitted the acquisition of Eon Labs, Inc to go forward. Novartis was required to divest all the assets necessary to manufacture and market generic desipramine hydrochloride tablets, orphenadrine citrate extended release (ER) tablets, and rifampin oral capsules in the United States to Amide. Furthermore, Novartis was required to supply Amide with orphenadrine citrate ER and desipramide hydrochloride tablets until Amide obtained Food and Drug Administration (FDA) approval to manufacture the products itself. The Commission concluded that if the transaction had been allowed without any remedies, a likely result would have been higher prices in each of these generic markets.

52. **Procter & Gamble/Gillette:** In September 2005, the Commission conditionally approved The Procter & Gamble Company's (P&G) \$57 billion acquisition of rival consumer products manufacturer The Gillette Company (Gillette), with the condition that the companies divest a variety of overlapping assets, including toothbrushes and antiperspirant/deodorant, to ensure continued competition following the transaction.

53. **Occidental Chemical (OxyChem)/Vulcan Chemical:** In July 2005, the Commission approved a consent order to allow Occidental Chemical Company's (OxyChem) proposed purchase of the chemical assets of Vulcan Materials Company (Vulcan), on the condition that OxyChem divests Vulcan's Wisconsin, chemical facility and related assets. The consent order will alleviate the alleged potential anticompetitive impact of the proposed acquisition, as OxyChem and Vulcan are direct competitors in the markets for three chemicals: KOH (potassium hydroxide), APC (anhydrous potassium carbonate), and potassium carbonate.

54. **Penn National Gaming/Argosy Gaming:** To ensure continued competition in the market for casino services in Baton Rouge, Louisiana, the Commission issued a consent order that permitted Penn National Gaming, Inc.'s (PNG) \$2.2 billion acquisition of Argosy Gaming Company (Argosy), provided PNG sells Argosy's Baton Rouge casino. Because PNG and Argosy operated the only two casinos in Baton Rouge, the divestiture was necessary to preserve a competitive alternative.

2) *DOJ Merger Challenges or Cases*

55. **Sprint Corporation/Nextel Communications Inc.:** On August 3, 2005, the Department announced that it was closing its investigation into Sprint Corporation's proposed acquisition of Nextel Communications Inc. Before the merger, Sprint Corp. was the third-largest provider of wireless services in the country, with 23 million subscribers. Nextel Communications was the fifth-largest provider, with approximately 15 million subscribers. The combined company became the third-largest wireless carrier in the United States, with Cingular Wireless LLC and Verizon Wireless being the industry leaders. The Department's review focused on the proposed merger's potential effects on competition in the provision of mobile wireless voice and data services, including push-to-talk services. The Department found that the Sprint-Nextel merger would not give the companies market power in the areas in which they compete. Purchasers of mobile wireless services would continue to have a number of other carriers from which to choose after the merger.

56. **ALLTEL Corporation/Western Wireless:** On July 6, 2005, the Department announced that it had reached a settlement requiring ALLTEL Corporation to divest assets in rural areas in three states – Arkansas, Kansas, and Nebraska – in order to proceed with its \$6 billion acquisition of Western Wireless. ALLTEL, headquartered in Little Rock, Arkansas, was the sixth-largest provider of mobile wireless services, serving approximately 8.8 million customers. Western Wireless, with headquarters in Bellevue, Washington, was the ninth largest provider of mobile wireless services, serving approximately 1.4 million customers. The Department required the merged firm to divest Western Wireless' mobile wireless services business in Nebraska, Kansas, and Arkansas, in order to assure continued competition in specific markets where ALLTEL and Western Wireless were each other's most significant competitors. The transaction, as originally proposed, would allegedly have resulted in higher prices, lower quality, and diminished investment in network improvements for consumers of mobile wireless services in those areas. The required divestitures were designed to preserve competition in particular for residents of rural areas, who often have fewer choices for wireless telephone services.

57. **America West/US Airways:** On June 23, 2005, the Department announced the closing of its investigation of the proposed merger of America West and US Airways. US Airways and America West are the seventh and eighth largest U.S. carriers, in terms of revenue passenger miles. The Department concluded that the proposed merger would not reduce competition because there was very little overlap between the networks of America West and US Airways. America West serves primarily the western United States, while US Airways operates primarily in the eastern United States. In fact, the integration of airlines with end-to-end networks can achieve efficiencies that benefit customers. The consolidation of the merging parties will create the fifth largest domestic carrier and will enable the merged airline to offer U.S. consumers more and better service to more destinations throughout the country.

58. **Arch Wireless Inc./Metrocall Holdings Inc.:** On November 16, 2004, the Department announced the closing of its investigation into Arch Wireless Inc.'s proposed acquisition of Metrocall Holdings Inc. Arch was the largest provider of paging services in the country, with approximately 37 percent of all pager units in service. Metrocall was second largest nationally with an approximate 30 percent share. The Department's review focused on the proposed merger's potential effects on the sale of paging services to business customers. The findings indicated that the paging industry was declining. Over the previous five years the number of units in service had declined from over 45 million to under 12 million. There were in addition to Arch and Metrocall other firms that provided paging services nationwide and a large number of firms that provided services on a regional or local basis. The Department concluded that the merger would not substantially lessen competition in any relevant market.

59. **Cingular Wireless Corp./AT&T Wireless:** On October 25, 2004, the Department announced that it had reached a settlement requiring Cingular Wireless Corp. to divest assets in 13 markets in order to proceed with the \$41 billion acquisition of AT&T Wireless. Without the divestiture of assets in 11 states – Connecticut, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Missouri, Michigan, Oklahoma, Tennessee, and Texas – the combination of Cingular and AT&T Wireless would have resulted in higher prices and reduced innovation for consumers of mobile wireless services. Cingular and AT&T Wireless were two of six mobile wireless services providers with a national presence in areas throughout the United States. Cingular, headquartered in Atlanta, was the second-largest provider of mobile wireless services. It was jointly owned by SBC Communications Inc. and BellSouth Corporation, and served more than 24 million subscribers. AT&T Wireless, headquartered in Redmond, Washington, before the merger was the third-largest U.S. mobile wireless provider, serving more than 22 million subscribers as of August 2004. Under the terms of the settlement, the merged firm was required to divest AT&T Wireless' mobile wireless services business in parts of four states and divest minority equity interests in mobile wireless service providers in another five states. To resolve concerns related to mobile wireless broadband services, the merged firm was required to divest parts of its PCS wireless spectrum in Michigan, Tennessee, and Texas.

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

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

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

60. The Department and FTC filed comments in FY 2005 with authorities in several states – Oklahoma, Missouri, Texas, and Alabama – in opposition to proposals that would restrict the ability of local real estate professionals to offer customized real estate services. Full-service brokers charge consumers a single price for a bundle of individual real estate services. In contrast, limited-service brokers offer consumers the option to pick and choose from a menu of different real estate services according to each respective consumer’s individual needs. Proposals in these states would require limited-service brokers to bundle together certain of their service offerings into a mandatory package. Consumers would end up with fewer choices and prices for traditional full-service packages would likely increase without competition from the limited, fee-for-service brokers.

61. The FTC and Department filed comments in FY 2005 with authorities in Massachusetts and Kansas regarding proposals that would affect competition between lawyers and non-lawyers. The bar associations of both states were considering proposals for a definition of the practice of law that the agencies believed would unduly restrain this competition by prohibiting non-lawyers from providing certain services in circumstances where there was no evidence that their doing so would harm consumers. The agencies concluded that the proposals would cause harm to consumers because they were overbroad and likely to prevent non-lawyers (e.g., real estate agents, tenants’ associations, consumer associations, independent contractors, income tax preparers and accountants, and investment bankers and other business planners) from providing a number of services in competition with lawyers, thus raising costs and limiting choices for consumers. The agencies also urged the Massachusetts legislature to adopt a bill that would explicitly allow non-lawyers to compete with lawyers to perform certain real estate closing services.

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

62. On May 24, 2005, the Commission presented testimony on the effects of entry by single-specialty hospitals. The Commission defined the three essential points it considers in its examination of new entry into hospital competition. First, that vigorous competition can have important consumer welfare benefits in the hospital arena. Second, when new firms threaten to enter a market, incumbent firms may seek to deter or prevent that new competition. Third, the need for policymakers to consider the extent to which regulatory distortions may affect competition among hospitals and other firms. The Commission stated that Medicare’s administered pricing system has encouraged the entry of single-specialty hospitals and ambulatory surgical centres. Both types of entities tend to compete away the profits that general hospitals use to cross-subsidize unprofitable care. The Commission testified that reliance on cross-subsidies to ensure access to health care makes the availability of such care contingent on the location in which care is provided, the wealth and insurance status of those receiving care, and the uncompetitiveness of the market for hospital services. In concluding its testimony, the Commission claimed that “Competition can help make health care more affordable, but it cannot transfer resources to those who do not have them . . . . Competition has a number of effects on hospitals, including the potential to improve quality and lower costs. [However] competition will . . . undermine the ability of hospitals to engage in cross-subsidization.” As a result, the Commission believes that the “government should re-examine the role of subsidies in health care markets in light of their inefficiencies and potential to distort competition.”

63. On August 23, 2005, the Commission announced its approval of the filing of two comments with the Federal Energy Regulatory Commission (FERC). The first comment concerned FERC’s initiatives to reduce entry impediments in wholesale electricity markets that may stem from long-term risk in obtaining

transmission services. The Commission stated that FERC could make efficient generation entry more probable by reducing long-term transmission risk. The Commission suggests that FERC should coordinate its policies to reduce transmission risk with its policies to promote efficient transmission investment projects. The second comment concerned the need to standardize the way in which transmission owners calculate the amount of capacity available for unaffiliated users of the transmission grid. The Commission stated that standardization may help prevent transmission discrimination within the electricity industry and ensure the reliability and security of the transmission grid. The Commission stated that updating behavioural rules against undue transmission discrimination is likely to be helpful in the short-term, while the FERC continues to implement structural remedies to remove the ability and incentive for transmission owners to engage in such conduct. The Commission urged the FERC not to relax its efforts to implement RTOs and Transcos – independent, for-profit transmission companies – while improving its open access regulations.

64. On March 9, 2005, the Commission submitted comments regarding three bills that the Virginia Assembly considered. Bills 160 and 272 would prohibit optometrists from working in any location that provides direct access to a commercial establishment. Bill 2518 would ease current restrictions by allowing optometrists to lease from, and work in, a commercial establishment. The Commission staff supported Bill 2518, concluding that the bill would in fact ease some of the existing restrictions on commercial optometric practice, and likely benefit consumers with lower prices without a reduction in the quality of eye care. By contrast, the Commission concluded that Bills 160 and 272 would place further restrictions on the commercial practice of optometry, and would likely result in higher prices for consumers without providing any countervailing benefits in the form of higher quality eye care.

65. On March 8, 2005, the Commission responded to a request from North Dakota State Senator Richard L. Brown for comments concerning a bill that would regulate PBM's contracts with pharmacies and prohibit certain drug substitutions. The Commission concluded that the bill might have the unintended consequence of increasing the price of pharmaceuticals within the state and ultimately decrease the number of North Dakotans with insurance coverage for pharmaceuticals.

66. In April 2005, the Commission submitted a response to a citizen petition filed with the FDA by IVAX Pharmaceuticals in connection with its attempt to gain approval for a generic version of the cholesterol drug, Zocor. The Commission urged the FDA to reject IVAX's petition because its proposed rule would have significant negative implications for competition in the pharmaceutical industry and would be detrimental to consumers.

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

67. On May 24, 2005, the Department filed comments with the Federal Aviation Administration recommending that the FAA adopt market-based solutions to the problem of congestion at Chicago's O'Hare International Airport. The Department suggested use of congestion pricing or periodic slot auctions as the best methods to allocate scarce take-off and landing slots.

68. On August 19, 2005, the Department filed comments with the Department of Transportation on the Joint Application for Approval of and Antitrust Immunity for Alliance Agreements between Alitalia, Czech Airlines, Delta Airlines, KLM, Northwest Airlines, and Air France. The Department concluded that the current record did not support the antitrust immunity sought. The application was the first to seek immunity relating to two major U.S. airlines, and there was a significant risk that the requested immunity would reduce competition on certain international routes and reduce domestic competition related to the immunized international routes. The claimed benefits were modest, as the application applied to largely overlapping networks, not end-to-end expansions of networks, thereby increasing the risk of harm and reducing potential consumer benefits. Finally, the requested immunity was not shown to be necessary, as

the applicants already have already engaged in significant integration of their activities and could achieve a substantial portion of the claimed benefits through code-sharing of the type that presents minimal antitrust risks.

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

69. Both the Division and the FTC are involved extensively 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 actively follows various WTO negotiations. The Division 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. The Division also works with other Justice components (including the Criminal, Environment, and Civil Divisions) on international trade and investment issues that affect those components or the Department as a whole.

70. Both the FTC and DOJ 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 other U.S. agencies in competition policy discussions associated with Asia-Pacific Economic Cooperation (APEC), and chaired or co-chaired the negotiating teams for the competition chapters of the U.S.-Thailand and U.S.-Andean Community free trade agreements.

71. For nearly 15 years the FTC and the Department 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 2005, the technical assistance program was active in India, Southeast Asia, South and Central America, Russia, Southeast Europe, Mexico, Egypt, and South Africa. These programs rely on a combination of resident advisors, regional workshops, and targeted short term missions, with a focus on the development of investigative skills.

72. 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.

**5. *New Studies related to antitrust policy***

**A. *Antitrust Division Economic Analysis Group Discussion Papers***

73. The Economic Analysis Group issued the following papers during FY 2005. 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).

Dean V. Williamson, Contracting over Uncertain Property Rights: Evidence from R&D Consortium Contracts, EAG 05-5, June 2005.

Olivier Armantier and Oliver Richard, Domestic Airline Alliances and Consumer Welfare, EAG 05-4, May 2005.

Olivier Armantier and Oliver Richard, Evidence on Pricing from the Continental Airlines Code-Share Agreement, EAG 05-3, March 2005.

William D. Drake, Choosing How to Monitor a Competitor When Colluding, EAG 05-2, March 2005.

George A. Rozanski and T. Scott Thompson, Use of Econometrics at the U.S. Department of Justice, EAG 05-1, March 2005. Published as Chapter VI in ABA Section of Antitrust Law, *Econometrics* (2005).

Wayne R. Dunham, The Determination of Antitrust Liability in *U.S. v. Microsoft*: The Empirical Evidence the Department of Justice Used to Prove its Case, EAG 04-16, October 2004.

Sheldon Kimmel, Comment on Top-of-the-Market Contract-Pricing Clauses, EAG 04-15, October 2004.

William W. Nye, A Note on the Incidence and Possible Cost of ‘Critical Circumstances’ Penalties in U.S. Antidumping Enforcement, EAG 04-14, October 2004. Forthcoming in 14 *The International Trade Journal* 2005.

Patrick Greenlee, David Reitman and David S. Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, EAG 04-13, October 2004.

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

1) *Commission Studies and Reports*

a. *Conferences and Workshops*

74. **Petroleum Industry:** The Commission held a conference on the Price Effects of Mergers and Concentration in the United States Petroleum Industry on January 14, 2005. The conference reviewed two studies that examined price effects within the petroleum industry: the March 2004 case study of the effects of the Marathon/Ashland Corporation joint venture; the second, the May 2004 report by the Government Accountability Office that examined the effects of mergers and market concentration in the United States petroleum industry. Materials from the workshop are available at: <http://www.ftc.gov/ftc/workshops/oilmergers/index.htm>

75. **Patent Reform Workshop:** On June 9, 2005, the FTC, the National Academies’ Board on Science, Technology, and Economic Policy (STEP), and the American Intellectual Property Law Association (AIPLA) co-sponsored several patent reform workshops. The final workshop addressed draft patent reform legislation that would direct the implementation of a post-grant opposition system and modify the doctrine of willful infringement, as recommended in the FTC’s 2003 report, *“To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.”* Materials from the workshop are available at: <http://www.ftc.gov/opp/intellect/050601agendatowmmtg.pdf>.

b. *Studies and Reports*

76. On July 5, 2005 the Commission issued a report entitled “Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition.” The Report examines the factors that influence fluctuations in gasoline prices, including the cost of crude oil, increasing national and international demand, and federal, state, and local regulations. The Report concludes that worldwide supply, demand, and competition for crude oil are the most important factors in the national average price of gasoline in the United States. The

demand for crude oil has grown significantly over the past two decades, thus leading to higher prices at the pump. Regional differences in access to gasoline supplies and environmental requirements for gasoline affect average retail prices and the variability of regional prices. Different regions of the country differ in their access to gasoline supplies, and these differences affect gasoline prices. In addition, regional environmental requirements for “boutique” fuels can limit substitute gasoline supplies and thus lead to cost increases during supply shortages. The Report also examined state and local factors that can affect retail gasoline prices. It notes that retail prices are likely to be lower when consumers can choose among a greater number of gas stations and switch purchases among these stations. The Report discusses how state and local taxes can affect the retail price of gasoline, and how other state laws, such as bans on self-service stations and laws prohibiting below-cost sales or requiring minimum mark-ups, also affect gasoline prices. The report is available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

77. On February 15, 2005 the Commission announced its release of a study on the strength of competition in the sale of prescription contact lenses. The study examines various types of manufacturer-seller relationships and their impact on competition, the prices charged by contact lens sellers in different retail channels, the effect of state regulations on competition in the sale of contact lenses, and the impact of the Commission’s Eyeglass Rule on competition. The study finds that consumers have the ability to choose between several retail options when purchasing contact lenses, due in part to the standardization of disposable soft contact lenses, and the FCLCA-required prescription portability. The FTC found that exclusive manufacturer-seller relationships are rare. Private label and limited distribution strategies, though also rare, appear to be more common than exclusive relationships. The study concludes that these strategies do not pose a threat to competition or consumer welfare. The study also examined other issues that may affect competition in the contact lens market. According to the study, state licensing requirements that restrict consumers’ ability to buy contact lenses from out-of-state sellers or non-ECP sellers may limit competition and harm public health. The study also notes that state restrictions on truthful advertising are likely to inhibit competition and limit consumers’ ability to make informed choices about their contact lens purchases. The study additionally concludes that, by making it easier for consumers to comparison shop, the Commission’s Eyeglass Rule has had a positive impact on competition in the eyeglass market, which has lowered prices and increased consumer choice. The study is available at <http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf>.

78. On September 6, 2005 the Commission issued a report entitled “Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies.” The report examines whether private-sector entities that offer prescription drug coverage pay more for drugs when using a mail-order pharmacy owned by a Pharmacy Benefit Manager (PBM), as opposed to using a mail-order or retail pharmacy that the PBM does not own. The report concludes that, in 2002 and 2003, prescription drug plan sponsors generally paid lower prices for drugs purchased through PBM-owned mail-order pharmacies than for drugs purchased through mail-order or retail pharmacies not owned by PBMs. The report is available at <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>.

2) *Economic Working Papers*

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

Michigan Gasoline Pricing and the Marathon - Ashland and Ultramar Diamond Shamrock Transaction, John Simpson and Christopher T. Taylor, July 2005.

Consumer Perceptions of Qualified Health Claims in Advertising, R. Dennis Murphy, July 2005.

Quantity Discounts from Risk Averse Sellers, Patrick J. DeGraba, April 2005.

A Variance Screen For Collusion, Rosa M. Abrantes-Metz, Luke M. Froeb, John F. Geweke, Christopher T. Taylor, March 2005.

Pharmaceutical Development Phases: A Duration Analysis, Rosa M. Abrantes-Metz, Christopher P. Adams, and Albert Metz, October 2004.

## APPENDICES

**Department of Justice:  
Fiscal Year 2005 FTE and Actual Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	276	\$48,690
Civil Enforcement	512	\$90,423
Total	788	\$139,113

**Federal Trade Commission: Fiscal Year 2005 Competition  
Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	470.2	\$85 771
<i>Bureau of Competition</i>	262.3	\$35 887.8
<i>Bureau of Economics</i>	66.9	\$9 182.1
<i>Regional Offices</i>	25.3	\$3 344.6
<i>Mission Support</i>	115.7	\$37 357
Premerger Notification	30.4	\$3 779.8
<i>Bureau of Competition</i>	29.1	\$3 610
<i>Bureau of Economics</i>	0.4	\$53.8
<i>Regional Offices</i>	0.9	\$116
Merger & Joint Venture Enforcement	178	\$24 862.4
<i>Bureau of Competition</i>	119.1	\$16 866.4
<i>Bureau of Economics</i>	46.4	\$6 342.2
<i>Regional Offices</i>	12.5	\$1 653.8
Merger & Joint Venture Compliance	5.6	\$688.8
<i>Bureau of Competition</i>	5.5	\$675.3
<i>Bureau of Economics</i>	0.1	\$13.5
<i>Regional Offices</i>	--	--

	FTE	Amount (\$ in thousands)
Nonmerger Enforcement	104.1	\$13 911.1
<i>Bureau of Competition</i>	84.8	\$11 373.1
<i>Bureau of Economics</i>	9.1	\$1 226.3
<i>Regional Offices</i>	10.2	\$1 311.7