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

-- 2012 --

*This report is submitted by the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 June 2013.*

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## 1. Introduction

1. This report describes federal antitrust developments in the United States for the period of October 1, 2011 through September 30, 2012 (“FY 2012”).<sup>1</sup> It summarizes the competition enforcement and policy activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Federal Trade Commission (“Commission” or “FTC”). The two agencies are collectively referred to throughout this report as the “Antitrust Agencies” or “Agencies.” For additional information on the Agencies’ activities during FY 2012, see the *FTC in 2012* annual report, available at [www.ftc.gov/os/highlights/2012/index.shtml](http://www.ftc.gov/os/highlights/2012/index.shtml), and the DOJ’s Spring 2013 Division Update, available at [www.justice.gov/atr/public/division-update/2013/index.html](http://www.justice.gov/atr/public/division-update/2013/index.html).

### 1.1 Senior Leadership Update

2. On January 3, 2013, William J. Baer was sworn in as Assistant Attorney General (“AAG”) for the Division, following confirmation by the U.S. Senate. Prior to his arrival, Deputy Assistant Attorney General (“DAAG”) for Criminal and Civil Operations Renata B. Hesse served as Acting AAG after the November 16, 2012 resignation of Acting AAG Joseph F. Wayland. Leslie C. Overton became DAAG for Civil Enforcement in November 2011; she began supervising the Division’s international program in April 2013, upon the departure of Rachel Brandenburger, the Special Advisor for International Matters; also at this time, Patricia A. Brink, Director of Civil Enforcement, took on the role of coordinating civil case cooperation. Aviv Nevo became DAAG for Economic Analysis on March 31, 2013.

3. President Obama designated FTC Commissioner Edith Ramirez to serve as Chairwoman, effective March 4, 2013. Chairman Jon Leibowitz resigned in February 2013. On January 11, 2013, following confirmation by the U.S. Senate, Joshua Wright was sworn in as Commissioner. Maureen K. Ohlhausen was sworn in as Commissioner on April 4, 2012.

4. On December 31, 2012, the FTC’s Director of the Bureau of Consumer Protection David Vladeck and Executive Director Eileen Harrington resigned and Chairman Leibowitz appointed Charles Harwood Acting Director of the Bureau of Consumer Protection and Pat Bak Acting Executive Director. On November 13, 2012, General Counsel Willard Tom resigned and Chairman Leibowitz appointed David Shonka Acting General Counsel. On August 3, 2012, Chairman Leibowitz appointed Andrew Gavil as Director of the Office of Policy Planning and Steven Bellovin as the FTC’s Chief Technologist. On July 1, 2012, Howard Shelanski began serving as Director of the Bureau of Economics.

## 2. Changes in law or policies

### 2.1 Changes in Antitrust Rules, Policies, or Guidelines

5. **FTC Investigatory Process.** On September 27, 2012, after a public comment period, the FTC issued changes to agency procedure that are aimed at streamlining the FTC’s investigatory process, keeping pace with electronic evidence discovery, and providing more detail on how the FTC evaluates allegations of misconduct by attorneys practicing before the Commission. The changes concern the procedures in Parts 2 and 4 of the FTC’s Rules of Practice, ensuring that they are efficient, effective, and not unduly burdensome on outside parties. See [www.ftc.gov/opa/2012/09/finalrule.shtm](http://www.ftc.gov/opa/2012/09/finalrule.shtm).

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<sup>1</sup> In some sections of the Report, e.g., the following section on Senior Leadership Update, more recent information is provided.

6. **Changes to Premerger Notification Rules.** On August 13, 2012, the Commission issued a Notice of Proposed Rulemaking proposing changes to the premerger notification rules under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) related to the transfer of exclusive patent rights in the pharmaceutical industry. The proposed rule clarifies when a transfer of exclusive rights to a patent in the pharmaceutical industry results in a potentially reportable asset acquisition under the HSR Act. The comment period ended on October 25, 2012, and the Commission is finalizing the amendments. See [www.ftc.gov/opa/2012/08/hsr.shtm](http://www.ftc.gov/opa/2012/08/hsr.shtm).

7. **Enforcement Policy Regarding Accountable Care Organizations.** On October 20, 2011, following a public comment period, the Agencies issued a joint policy statement detailing how the Agencies will enforce U.S. antitrust laws with respect to new Accountable Care Organizations (“ACOs”). An ACO is an organization of health care providers that jointly offer services to reduce costs and improve the quality of patient care. Under the Affordable Care Act, ACOs will serve Medicare fee-for-service beneficiaries under the Medicare Shared Savings Program. The Agencies will not challenge as *per se* illegal a Shared Savings Program ACO that jointly negotiates with private insurers to serve patients in commercial markets if the ACO satisfies certain conditions. The policy statement also preserves an antitrust “safety zone” for certain ACOs. To fall within the safety zone, an ACO’s independent participants that provide a common service must have a combined share of 30 percent or less of each common service in each participant’s Primary Service Area (“PSA”), where two or more participants provide that service to patients in that PSA. The Agencies will offer voluntary expedited 90-day reviews for newly formed ACOs that are seeking additional guidance. See [www.justice.gov/atr/public/press\\_releases/2011/276482.pdf](http://www.justice.gov/atr/public/press_releases/2011/276482.pdf).

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

8. On July 7, 2012, FTC Commissioner Edith Ramirez testified before Congress, expressing concern about the prospect that companies that own standard-essential patents that are subject to commitments to license on reasonable and non-discriminatory terms may be able to “hold up” other firms by obtaining an injunction or exclusion order blocking those firms’ products from the U.S. market. See [www.ftc.gov/opa/2012/07/septestimony.shtm](http://www.ftc.gov/opa/2012/07/septestimony.shtm).

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

### 3.1 *Staffing and Enforcement Statistics*

#### 3.1.1 *FTC*

9. During FY 2012, the FTC employed approximately 544 staff and spent approximately \$136 million in furtherance of its Maintaining Competition mission.

10. During FY 2012, 1,429 proposed mergers and acquisitions were reported for review under the HSR Act, a 1.4 percent decrease from the number of HSR transactions reported during FY 2011. Commission staff issued requests for additional information (“second requests”) in 20 transactions. The Commission challenged 25 mergers, 15 of which were settled with consent orders, and seven of which were abandoned or restructured as a result of antitrust concerns raised during the investigation. The Commission challenged three mergers in federal court. In one matter, the Commission’s action prompted the parties to abandon the merger; in the second case, the Commission secured a preliminary injunction after which the parties abandoned the merger. In the third matter, the Commission issued a consent order requiring divestiture of the assets with a competitive overlap, but allowing the acquisition to proceed in other respects.

11. During FY 2012, the FTC staff opened 32 non-merger initial phase investigations. The Commission brought four non-merger enforcement actions. Three of these actions were resolved by consent order. In the fourth matter, the FTC filed complaints against the three largest U.S. suppliers of iron pipe fittings for illegally conspiring to set prices, and against one of the companies for illegally maintaining its monopoly power. The charges against the first two companies were resolved by consent orders. Regarding the third company, the FTC's administrative law judge dismissed illegal price-setting charges, but found that the company illegally excluded competitors from the market for U.S. made ductile iron pipe fittings.

12. The Commission filed *amicus curiae* briefs in ten cases (two before the Supreme Court and eight before federal appeals and district courts). The FTC provided one advisory opinion (see Section 3.5 below) and submitted 16 advocacy filings (see [www.ftc.gov/opp/advocacy\\_date.shtm](http://www.ftc.gov/opp/advocacy_date.shtm)).

### 3.1.2 DOJ

13. At the end of FY 2012, the Division had 691 employees: 332 attorneys, 49 economists, 147 paralegals, and 163 other professional staff. For FY 2012, the Division received an appropriation of \$159.6 million.

14. During FY 2012, the Division opened 108 investigations and filed 80 civil and criminal cases in federal district court. In FY 2012, the Division was party to six antitrust cases decided by the federal courts of appeals.

15. During FY 2012, the Division filed 67 criminal cases, in which it charged a total of 16 corporations and 63 individuals with federal crimes. Thirty-three corporate defendants and 31 individuals were assessed fines totaling \$1.5 billion and 45 individuals were sentenced to a total of 33,603 days of incarceration; another four individuals were sentenced to spend a total of 540 days in some form of alternative confinement.

16. During FY 2012, the Division investigated 74 mergers and challenged eight of them in court; 11 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announcement by the Division that it would otherwise challenge the transaction. In addition, the Division screened a total of 519 bank mergers. The Division opened 83 civil investigations (merger and non-merger), and issued 474 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints. Also during FY 2012, the Division issued one business review letter.

## 3.2 Antitrust Cases in the Courts

### 3.2.1 United States Supreme Court

17. On March 25, 2013, the U.S. Supreme Court heard oral arguments in *Federal Trade Commission v. Actavis*, a "pay-for-delay" case concerning the testosterone-replacement drug AndroGel. On February 2, 2009, the FTC filed a complaint in federal district court challenging agreements in which Solvay Pharmaceuticals, Inc. paid generic drug makers Watson Pharmaceuticals, Inc., Paddock Laboratories, Inc., and Par Pharmaceutical Companies, Inc. to delay generic competition to Solvay's branded testosterone-replacement drug, a prescription pharmaceutical with annual sales of more than \$400 million. The complaint alleged that the companies violated the antitrust laws when Solvay paid the generic firms millions of dollars annually in exchange for their agreements to abandon their patent challenges to Solvay's drug and to refrain from marketing a generic version of AndroGel until 2015.

18. The main issue before the Supreme Court concerns the standard of review for "pay-for-delay" or reverse-payment settlements. Presently, there is a split of authority among the United States federal Courts

of Appeal as to the standard of review. The Antitrust Agencies and at least one U.S. court support a “presumptively unlawful” standard, under which patent infringement lawsuit settlements that involve a reverse payment would be treated as “presumptively anticompetitive under a ‘quick look’ rule of reason analysis.”<sup>2</sup> Other U.S. courts have held that “absent sham litigation or fraud in obtaining the patent, a reverse payment settlement” does not violate the antitrust laws “so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.”<sup>3</sup> See [www.ftc.gov/opa/2012/10/androgel.shtm](http://www.ftc.gov/opa/2012/10/androgel.shtm). The Supreme Court is expected to issue a ruling in the case in June 2013.

19. On February 19, 2013, the U.S. Supreme Court unanimously ruled in favor of the FTC that the state-action doctrine did not immunize Phoebe Putney Health System, Inc.’s acquisition of Palmyra Park Hospital, Inc. from the federal antitrust laws. *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013). The FTC filed suit on April 20, 2011, seeking to block the proposed combination of the only two hospitals in Albany, Georgia. The Commission alleged that the deal would reduce competition significantly and allow the combined Phoebe/Palmyra to raise prices for general acute-care hospital services charged to commercial health plans, harming patients and local employers and employees.

20. Under the state-action doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws. The Supreme Court, unanimously upholding the FTC’s position and reversing the lower court, held that Georgia law, which creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, did not clearly articulate and affirmatively express a state policy to permit acquisitions that substantially lessen competition. The Court reasoned that, because Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, the clear-articulation test is not satisfied and the state-action doctrine does not apply. See [www.ftc.gov/opa/2013/02/phoebe.shtm](http://www.ftc.gov/opa/2013/02/phoebe.shtm).

### 3.2.2 U.S. Court of Appeals Cases

21. On July 11, 2012, the U.S. Court of Appeals for the Eleventh Circuit upheld the FTC’s adjudicative ruling that Polypore International, a manufacturer of battery components, had illegally acquired Microporous Products L.P., a rival manufacturer. The Commission found that Polypore’s acquisition of Microporous violated the antitrust laws by reducing competition in three of four North

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<sup>2</sup> In re K-Dur Antitrust Litig., 686 F.3d 197, 218 (3d Cir. 2012) (rejecting the scope of the patent test, and applying “a quick look rule of reason analysis based on the economic realities of the reverse payment settlement rather than the labels applied by the settling parties”); *FTC v. Actavis, Inc.*, Brief for the Petitioner at 17, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/12-416tsUnitedStates.pdf>; *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, No. 05-2851 (2d Cir. 2009), Brief for the United States in Response to the Court’s Invitation, available at <http://www.justice.gov/atr/cases/f247700/247708.pdf>.

<sup>3</sup> *FTC v. Watson Pharm., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012), cert. granted, 133 S. Ct. 787 (2012); see also *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 105 (2d Cir. 2010), cert. denied, 131 S. Ct. 1606 (2011) (“Most courts, . . . including this Court, have held that the right to enter into reverse exclusionary payment agreements fall within the terms of the exclusionary grant conferred by the branded manufacturer’s patent.”) (citations omitted); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1333 (Fed. Cir. 2008), cert. denied, 129 S. Ct. 2828 (2009); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 208-09 & n.22, 212-13 (2d Cir. 2006) (reverse-payment settlements are illegal only if the patentee is extending the scope of its patents or is engaging in fraud or sham litigation); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065-66 (11th Cir. 2005) (same).

American markets for flooded lead-acid battery separators. The Commission decision was made after an administrative trial and an initial decision by an administrative law judge. The U.S. Court of Appeals for the Eleventh Circuit upheld in full both the FTC's finding of liability and its remedy ordering the divestiture of all acquired assets. The U.S. Supreme Court denied Polypore's request to appeal the ruling. See [www.ftc.gov/opa/2012/07/polypore.shtm](http://www.ftc.gov/opa/2012/07/polypore.shtm).

22. On June 27, 2012, in a unanimous en banc decision, the U.S. Court of Appeals for the Seventh Circuit held that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") "sets forth an element of an antitrust claim, not a jurisdictional limit on the power of federal courts." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc). The court then addressed the FTAIA's import commerce and direct effects exceptions. The court held that "[t]hose transactions that are directly between the plaintiff purchasers and the defendant cartel members are the import commerce of the United States" and that a plaintiff challenging conduct involving import commerce under the Sherman Act must show that the conduct had a substantial and intended effect in the United States. Then the court turned to what it should mean for foreign conduct to have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. The court rejected as too restrictive an interpretation that an effect is "direct" only when it follows "as an immediate consequence" of the defendant's conduct. Instead, the court adopted a standard urged by the United States as *amicus curiae*, that "direct" effect in the FTAIA context requires only "a reasonably proximate causal nexus."

23. In other court of appeals cases, the United States defended various criminal convictions and sentences based on established principles of criminal antitrust law, procedure, and evidence.

### **3.3 Statistics on Private and Government Cases Filed**

24. According to the 2012 Annual Report of the Director of the Administrative Office of the U.S. Courts, 702 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2012. See Table C-2 of the report, available at [www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf](http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf).

### **3.4 Significant Enforcement Actions**

#### **3.4.1 DOJ Criminal Enforcement**

25. The Division obtained very significant fines and prison sentences in FY 2012, and won jury trial victories relating to the liquid crystal display ("LCD"), municipal bonds, and coastal freight investigations. The Division also obtained many convictions in investigations of cartels involving auto parts, real estate foreclosure auctions, and tax liens.

26. In FY 2012, the Division filed 67 criminal cases and obtained a record \$1.14 billion in criminal fines. In these cases, the Division charged 16 corporations and 63 individuals, and courts imposed 45 prison terms with an average sentence of just over two years per defendant.

27. The FY 2012 \$1.14 billion criminal fine total is the highest ever obtained by the Division in a single year and the second time since 2009 that total fines exceeded \$1 billion. Since 2009, the Division has obtained more than \$3 billion in criminal fines. During FY 2012, 78 percent of the individuals sentenced in Division cases were sentenced to prison time. The Division is now sending approximately twice as many defendants to prison as it did in the 1990s, and the defendants sentenced to prison are serving longer terms, reflecting the harm inflicted by the cartels in which they participated. In FY 2012, the average prison sentence for Division defendants was almost 25 months, more than three times the average of eight months in the 1990s.

28. Eighteen foreign nationals were sentenced to average prison sentences of 16 months in connection with international cartel investigations during FY 2012, including two 36-month sentences imposed upon individuals from Taiwan convicted at trial for conspiring to fix prices in the liquid crystal display panel industry, and 24-month sentences for two Japanese executives for their participation in conspiracies to fix prices and rig bids in the auto parts industry.

29. **Liquid Crystal Display Panels (“LCDs”).** The Division’s ongoing investigation into price fixing in the LCD panel industry has resulted in criminal fines totaling \$1.39 billion. As a result of the investigation, 10 companies and 13 executives have been convicted. On March 13, 2012, following an eight-week trial, a jury in the Northern District of California returned guilty verdicts against Taiwan-based AU Optronics (“AUO”), its American subsidiary, AU Optronics America, and the former president and former vice president of AUO, respectively, for their participation in the price-fixing conspiracy. On September 20, 2012, AUO was sentenced to pay a \$500 million fine and the convicted executives each were sentenced to serve three years in prison. In December 2012, the Division retried a third AUO executive after the jury in the March trial was unable to return a unanimous verdict as to that executive. After a three week trial, on December 18, 2012, the third executive was found guilty. See [www.justice.gov/atr/public/press\\_releases/2012/281032.pdf](http://www.justice.gov/atr/public/press_releases/2012/281032.pdf) and [www.justice.gov/atr/public/press\\_releases/2012/287189.pdf](http://www.justice.gov/atr/public/press_releases/2012/287189.pdf).

30. **Municipal Bonds.** The Division’s ongoing investigation into bid rigging in the municipal bonds market has resulted in convictions of 19 individuals and one company, including convictions of six individuals at two separate jury trials. On May 11, 2012, three former General Electric Co. executives were convicted for their participation in conspiracies related to bidding for contracts for the investment of municipal bond proceeds and other municipal finance contracts. On August 31, 2012, three former UBS AG executives were convicted at trial of conspiracy and fraud charges for corrupting the bidding process for more than a dozen investment agreements to increase the number and profitability of the agreements awarded to UBS. The municipal bonds investigation has also produced settlements with a number of large financial institutions involved in the conspiracies. To date, the implicated firms have agreed to pay a total of nearly \$745 million in restitution, penalties, and disgorgement to federal and state agencies. See [www.justice.gov/atr/public/press\\_releases/2012/283187.pdf](http://www.justice.gov/atr/public/press_releases/2012/283187.pdf) and [www.justice.gov/atr/public/press\\_releases/2012/286598.pdf](http://www.justice.gov/atr/public/press_releases/2012/286598.pdf).

31. **Coastal Freight.** The Division’s ongoing investigation into price fixing, bid rigging, and other anticompetitive conduct in the coastal water freight transportation industry has resulted in convictions of three companies and six individuals. To date, the investigation has resulted in \$46 million in criminal fines and prison sentences for five individuals, ranging from seven months to four years. On January 29, 2013, following a two-week trial, a jury in Puerto Rico convicted the former president of a coastal shipping company for his participation in a conspiracy to fix rates and surcharges for freight between the continental United States and Puerto Rico. He now awaits sentencing. The following corporate fines have been obtained in the coastal freight investigation:

- Crowley Liner Services Inc., \$17 million ([www.justice.gov/atr/public/press\\_releases/2012/285625.pdf](http://www.justice.gov/atr/public/press_releases/2012/285625.pdf))
- Sea Star Line LLC, \$14.2 million ([www.justice.gov/atr/public/press\\_releases/2011/277501.pdf](http://www.justice.gov/atr/public/press_releases/2011/277501.pdf))
- Horizon Lines LLC, \$15 million ([www.justice.gov/atr/public/press\\_releases/2011/267605.pdf](http://www.justice.gov/atr/public/press_releases/2011/267605.pdf))

32. **Auto Parts.** The Division has dedicated significant resources to the ongoing automobile parts investigation. To date, the investigation has yielded charges against nine companies and 12 individuals and more than \$809 million in criminal fines for participation in conspiracies to fix prices of and rig bids



on automobile parts, including safety systems such as seatbelts, airbags, steering wheels, and antilock brake systems, and critical parts such as instrument panel clusters and wire harnesses. Two of the executives charged thus far are Japanese citizens; each was sentenced in 2012 to serve two years in prison, the longest sentences ever imposed on foreign nationals voluntarily submitting to U.S. jurisdiction for an antitrust violation. During FY 2012, this investigation also yielded the third-largest criminal antitrust fine ever imposed—a \$470 million fine against Yazaki Corporation. The Division continues to cooperate with its counterparts in Japan, Korea, the EU, and Canada, among others, on this investigation. The following corporate fines have been imposed on the following parties in the course of the auto parts investigation since the beginning of FY 2012:

- Tokai Rika Co. Ltd., \$17.7 million ([www.justice.gov/atr/public/press\\_releases/2012/288353.pdf](http://www.justice.gov/atr/public/press_releases/2012/288353.pdf))
- Nippon Seiki Co. Ltd, \$1 million ([www.justice.gov/atr/public/press\\_releases/2012/286416.pdf](http://www.justice.gov/atr/public/press_releases/2012/286416.pdf))
- TRW Deutschland Holding GmbH, \$5.1 million ([www.justice.gov/atr/public/press\\_releases/2012/285504.pdf](http://www.justice.gov/atr/public/press_releases/2012/285504.pdf))
- Autoliv Inc., \$14.5 million ([www.justice.gov/atr/public/press\\_releases/2012/283960.pdf](http://www.justice.gov/atr/public/press_releases/2012/283960.pdf))
- Fujikura Ltd., \$20 million ([www.justice.gov/atr/public/press\\_releases/2012/282538.pdf](http://www.justice.gov/atr/public/press_releases/2012/282538.pdf))
- G.S. Electech Inc., \$2.75 million ([www.justice.gov/atr/public/press\\_releases/2012/281867.pdf](http://www.justice.gov/atr/public/press_releases/2012/281867.pdf))
- Yazaki Corporation, \$470 million ([www.justice.gov/atr/public/press\\_releases/2012/279734.pdf](http://www.justice.gov/atr/public/press_releases/2012/279734.pdf))
- DENSO Corporation, \$78 million ([www.justice.gov/atr/public/press\\_releases/2012/279734.pdf](http://www.justice.gov/atr/public/press_releases/2012/279734.pdf))

33. **Real Estate Foreclosure and Tax Liens Auctions.** The Division’s ongoing efforts to investigate and prosecute bid rigging and fraud at real estate auctions across the U.S. thus far have resulted in charges against 53 individuals and two companies. The Division has partnered with the Federal Bureau of Investigation (“FBI”) to combat a pattern of collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators work together to keep public auction prices artificially low by paying each other to refrain from bidding or holding unofficial “knockoff” auctions among themselves. Similar collusive conduct also has been detected among bidders for public tax liens, and eight individuals and three companies have pleaded guilty as part of an ongoing investigation into bid rigging and fraud related to municipal tax lien auctions in New Jersey. *See* [www.justice.gov/atr/public/press\\_releases/2012/286053.pdf](http://www.justice.gov/atr/public/press_releases/2012/286053.pdf) and [www.justice.gov/atr/public/press\\_releases/2012/287435.pdf](http://www.justice.gov/atr/public/press_releases/2012/287435.pdf).

34. **LIBOR.** On February 6, 2013, the Division announced that RBS Securities Japan Limited, a wholly-owned subsidiary of The Royal Bank of Scotland plc (“RBS”), agreed to plead guilty to a criminal information charging it with one count of wire fraud for engaging in a scheme to defraud counterparties to interest rate derivatives trades by secretly manipulating the Japanese Yen London Interbank Offered Rate (“LIBOR”), a leading benchmark used in financial products and transactions around the world. RBS Securities Japan agreed to pay a \$50 million fine. Additionally, it was announced that a criminal information would also be filed against RBS as part of a deferred prosecution agreement (“DPA”), charging RBS with wire fraud for its role in manipulating LIBOR benchmark interest rates, and with participation in a price-fixing conspiracy by rigging the Yen LIBOR benchmark interest rate with other banks. The DPA requires the bank to admit and accept responsibility for its misconduct, to continue

cooperating with the Justice Department in its ongoing investigation, and to pay a \$100 million penalty beyond the fine imposed on RBS Securities Japan. See [www.justice.gov/atr/public/press\\_releases/2013/292421.pdf](http://www.justice.gov/atr/public/press_releases/2013/292421.pdf) and [www.justice.gov/atr/public/press\\_releases/2012/290478.pdf](http://www.justice.gov/atr/public/press_releases/2012/290478.pdf).

35. Together with approximately \$462 million in regulatory penalties and disgorgement – \$325 million as a result of a Commodity Futures Trading Commission (“CFTC”) action and approximately \$137 million as a result of a UK Financial Services Authority (“FSA”) action – the Department’s criminal penalties bring the total amount of the resolution with RBS and RBS Securities Japan to approximately \$612 million.

36. In addition, a criminal complaint was unsealed in the U.S. District Court for the Southern District of New York in December 2012, charging two former senior UBS traders with colluding to manipulate the Yen LIBOR rate. These defendants remain fugitives.

#### 3.4.2 DOJ Civil Non-Merger Enforcement

37. **Verizon Cable Spectrum.** In *U.S. and State of New York v. Verizon Communications Inc., et al.*, the Division required Verizon and four of the largest cable companies in the U.S. – Comcast, Time Warner Cable, Bright House Networks, and Cox Communications – to revise a series of agreements concerning both the sale of bundled wireless and wireline services, and the formation of a technology research joint venture. According to the complaint filed on August 16, 2012, the agreements, if left unaltered, would have harmed competition by diminishing the companies’ incentive to compete, resulting in higher prices and lower quality for consumers. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. The settlement removed provisions that would lessen the companies’ incentives to compete aggressively in the areas where Verizon’s FiOS services offer a critical competitive alternative to the cable companies’ video and broadband products. It also limited the duration of the companies’ collaboration to December 2016 in important respects, ensuring that they retain incentives to compete against one another. The announcement came after a closely coordinated investigation with the Federal Communications Commission and the New York State Attorney General’s Office. The Division also stated that it would allow both Verizon’s proposed acquisitions of spectrum from the cable companies and T-Mobile USA’s contingent purchase of a significant portion of that spectrum from Verizon to go forward. The Division said that the spectrum transactions facilitate active use of an important national resource and thereby promise substantial benefit to wireless consumers. The case is currently awaiting court approval. See [www.justice.gov/atr/public/press\\_releases/2012/286098.pdf](http://www.justice.gov/atr/public/press_releases/2012/286098.pdf).

38. **E-Books.** On April 11, 2012, Attorney General Eric Holder and then-Acting AAG Sharis Pozen announced in a press conference that the Division filed an antitrust lawsuit against Apple Inc. and five major book publishers – Hachette Book Group (USA), HarperCollins Publishers L.L.C., Simon & Schuster Inc., Holtzbrinck Publishers LLC, which does business as Macmillan, and Penguin Group (USA) – for conspiring to end e-book retailers’ freedom to compete on price, take control of pricing from e-book retailers, and substantially increase the prices that consumers pay for e-books. The Division said that the publishers prevented retail price competition resulting in consumers paying millions of dollars more for their e-books. On the same day, a proposed settlement was filed simultaneously with the complaint to resolve the Division’s antitrust concerns with Hachette, HarperCollins, and Simon & Schuster, and required the companies to grant retailers the freedom to reduce the prices of their e-book titles. The settlement also imposed a strong antitrust compliance program on the three companies. The court approved the settlement on September 6, 2012. The Division reached similar settlements, currently awaiting court approval, with Penguin and Macmillan on December 18, 2012, and February 8, 2013, respectively. The trial against Apple began in June 2013. The Division and the European Commission cooperated closely throughout the course of their respective investigations. The Division also worked

closely with the states of Connecticut and Texas. See [www.justice.gov/atr/public/press\\_releases/2013/292578.pdf](http://www.justice.gov/atr/public/press_releases/2013/292578.pdf).

### 3.4.3 *FTC Non-Merger Enforcement Actions*

39. **In the Matter of Motorola Mobility LLC and Google, Inc.** On January 3, 2013, the FTC accepted for public comment a settlement agreement containing a consent order generally barring Google, and its wholly-owned subsidiary Motorola, from seeking injunctive relief based on infringement of a FRAND-encumbered standard-essential patent (SEP) unless certain conditions are met. Under the terms of the settlement agreement, Google is abiding by the terms of the proposed Order while the Commission considers the public comments. The Complaint alleges that Google engaged in unfair methods of competition by breaching its commitments to standard-setting organizations (SSOs) to license its SEPs on FRAND terms.<sup>4</sup> Except in limited circumstances (such as where a firm that explicitly states it will not license Google's SEPs on FRAND terms), the proposed Order requires that: (a) at least six months prior to pursuing injunctive relief against a potential licensee, Google make a binding written offer to license its SEPs to such licensee; and (b) at least 60 days prior to pursuing injunctive relief against a potential licensee, Google make a binding written offer of binding arbitration to establish a licensing agreement. Furthermore, if a potential licensee seeks judicial determination of FRAND (in any U.S. district court), the Order prohibits Google from seeking injunction during the pendency of the judicial proceeding, including any appeals. Google is relieved of its obligation under the Order not to seek an injunction if a potential licensee does not commit to entering a license on terms determined through the binding arbitration or FRAND determination proceeding the licensee elects to participate in. Other than demanding reciprocity (i.e., conditioning an offer to license on receiving a cross-license to the licensee's FRAND-encumbered SEPs to the same standard), Google cannot require additional patents be included in binding arbitration and is not required to accept a potential licensee's request to include other patents (except for a demand of reciprocity). The potential licensee may select the arbitration organization from among those identified in the Order and the arbitration is to be conducted pursuant to the rules of the organization. Google and the potential licensee may alter the terms of binding arbitration in any manner they wish by mutual agreement.

40. With respect to pending legal actions, the proposed Order bars Google from obtaining or enforcing injunctive relief based on infringement of its FRAND-encumbered SEPs unless it satisfies the conditions in the Order. Lastly, the proposed Order provides that Google is not prohibited from seeking injunctive relief against a potential licensee who violates its own FRAND commitment by seeking to enjoin a Google product based on infringement of the potential licensee's FRAND-encumbered SEP.

41. **Google Inc.** Also on January 3, 2013, the Commission closed its extensive investigation into allegations that Google had manipulated its search algorithms to harm vertical websites and unfairly promote its own competing vertical properties (a practice commonly known as "search bias"). The Commission concluded that, "the evidence presented at this time does not support the allegations that Google's display of its own vertical content at or near the top of its search results page was a product design change undertaken without a legitimate business justification."<sup>5</sup> Similarly, the Commission concluded that it did not find "sufficient evidence that Google manipulates its search algorithms to unfairly disadvantage vertical websites that compete with Google-owned vertical properties."<sup>6</sup>

<sup>4</sup> Complaint ¶ 1, available at <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolacmpt.pdf>.

<sup>5</sup> Commission Stmt. Regarding Google's Search Practices at 3, available at <http://www.ftc.gov/os/2013/01/130103googlesearchstmttoftcomm.pdf>.

<sup>6</sup> Id.

42. Among other things, the FTC also investigated allegations that Google: (a) misappropriated content, such as user reviews and star ratings, from competing websites in order to improve its own vertical offerings; and (b) used contractual conditions governing the use of its AdWords API to make it more difficult for an advertiser to simultaneously manage a campaign in search advertising.

43. In response to the FTC's investigation, Google voluntarily agreed to (a) make available a web-based notice form that provides website owners with the option to opt out from display on Google's Covered Webpages of content from their website that has been crawled by Google, and (b) remove restrictions on the use of its online search advertising platform, AdWords, that may make it more difficult for advertisers to coordinate online advertising campaigns across multiple platforms.

44. **Coopharma Pharmacy – Farmacia Cuquimar.** On November 7, 2012, following a public comment period, the Commission approved a final order settling charges that a Puerto Rican cooperative of pharmacy owners, Cooperativa de Farmacias Puertorriquenas, known as "Coopharma," harmed competition by negotiating and entering into agreements among its member pharmacies to fix prices and by acting collectively to pressure third-party payers to pay its members higher prices. The final order prohibits Coopharma from entering into or facilitating agreements between or among any pharmacies, and prohibits it from facilitating information exchanges between pharmacies regarding whether, or on what terms, to contract with a payer. It also bars attempts to engage in any of the conduct prohibited by the order. Finally, the order requires Coopharma to terminate its primary services contracts upon the payer's request. See <http://ftc.gov/opa/2012/11/coopharma.shtm>.

45. **Sigma/McWane Inc.** On February 28, 2012, following a public comment period, the Commission approved a final order settling charges that Sigma Corporation engaged in illegal anticompetitive practices to protect its share of the market for iron pipe fitting used in municipal water systems nationwide. In settling the FTC's charges, Sigma agreed not to use similar anticompetitive tactics in the future. At the same time the FTC settled with Sigma, it also charged Sigma's competitors, McWane, Inc. and Star Pipe Products, Ltd., with acting anticompetitively in the market for iron pipe fittings. On March 20, 2012, Star Pipe Products agreed to settle charges that it conspired with Sigma and McWane to increase the prices at which pipe fittings were sold nationwide. Under a proposed order settling the FTC's charges, Star will be barred from similar anticompetitive conduct in the future. On May 9, 2013, an administrative law judge issued a decision holding that McWane violated the antitrust laws when it excluded competitors from the market for U.S.-made ductile iron pipe fittings, but dismissed charges that McWane illegally conspired with its competitors to raise and stabilize the price of ductile iron pipe fittings. See [www.ftc.gov/opa/2013/05/mcwane.shtm](http://www.ftc.gov/opa/2013/05/mcwane.shtm).

46. **Pool Corp.** On January 13, 2012, following a public comment period, the Commission approved a final order resolving charges that Pool Corp., the largest distributor of swimming pool products in the United States, used its monopoly power to thwart entry by new competitors by blocking them from buying pool products directly from manufacturers. The FTC alleged that Pool Corp.'s strategy significantly raised the costs incurred by its rivals, thereby lowering sales, increasing prices, and reducing the number of choices available to consumers. The final FTC order requires Pool Corp. to stop engaging in the anticompetitive practices through which it has allegedly been keeping out new competitors in local markets around the nation. See [www.ftc.gov/opa/2012/01/ftcpoolcorp.shtm](http://www.ftc.gov/opa/2012/01/ftcpoolcorp.shtm).

### 3.5 *Advisory Letters from the FTC*

47. Under its Rules, the Commission or its staff may offer industry guidance in the form of advisory opinions regarding proposed conduct in matters of significant public interest. These competition advisory opinions inform the public about the Commission's analysis in novel or important areas of antitrust law. In FY 2012, the FTC staff issued one advisory opinion on a voluntary fee program in the heating oil industry

to fund consumer education and training purposes (discussed in ¶ 47 below). For more information on the Commission's advisory letters, see [www.ftc.gov/ftc/opinions.shtm](http://www.ftc.gov/ftc/opinions.shtm).

48. **Independent Connecticut Petroleum Association.** On July 2, 2012, FTC staff issued an advisory opinion letter in response to a request from the Independent Connecticut Petroleum Association, stating that it has no present intention to recommend a challenge to the proposed system, which would collect a voluntary assessment from heating oil retailers and use the money to fund consumer education and retailer training programs. The FTC staff concluded that this new program is unlikely to harm competition, for several reasons. First, the education and training programs are likely to create value to consumers, which likely will outweigh any minimal incremental increase in costs. Second, the voluntary nature of the program will allow retailers to withdraw from the program and compete on the basis of lower prices as they see fit. Finally, any data collected through the program will be aggregated before it is transferred and reported, so that industry members will not learn competitively sensitive information about other firms in the market. The Commission further noted that the proposed program is similar to one previously approved by the U.S. Congress. See <http://ftc.gov/opa/2012/07/connheating.shtm>.

### 3.6 *Business Reviews Conducted by the DOJ*

49. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued two business review letters in FY 2012. The business review letters can be found at [www.usdoj.gov/atr/public/busreview/letters.htm](http://www.usdoj.gov/atr/public/busreview/letters.htm).

50. **Joint Venture of Nuclear Power Plant Operators.** On July 3, 2012, the Division announced it would not challenge a proposal by seven nuclear power plant operators to share resources and coordinate best practices and other operational activities through a proposed venture to be named the STARS Alliance LLC. The members of the proposed venture each operate single nuclear electric generation plants of a similar design – pressurized water reactors – and vintage. None of the proposed activities involve the procurement of goods and services or the sale or purchase of electric power. Membership and participation in all of the activities of the proposed STARS joint venture is voluntary. Based on the representations made by STARS members, the Division concluded that it does not appear likely that the cooperative activities STARS proposes to undertake will restrict competition. The prohibitions on STARS members sharing competitively sensitive information provide additional safeguards to avoid any threat to competition.

51. **Worker Rights Consortium and Designated Suppliers Program.** On December 16, 2011, the Division announced that it would not challenge a proposal by the Worker Rights Consortium (“WRC”) to implement the Designated Suppliers Program. The WRC is a nonprofit corporation that was formed to improve working conditions and labor standards. According to the proposal by the WRC, the Designated Suppliers Program is designed to enable colleges and universities to ensure that apparel with their school names and insignia is made in factories that provide fair labor conditions for their employees, including paying their employees a living wage. Based on the representations made by the WRC, the Division noted that the proposal is unlikely to lessen competition in the collegiate apparel sector. Incorporation of the proposed licensing terms is optional and is unlikely to have a substantial effect on licensing competition among potentially participating schools. The Division also noted that the proposal is unlikely to have a substantial effect on downstream competition for apparel sales, and that the factories affected by the proposed licensing terms are likely to constitute only a tiny portion of the labor market.

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

##### ***4.1 Enforcement of Pre-merger Notification Rules***

52. On September 25, 2012, the Division announced that Biglari Holdings Inc. would pay an \$850,000 civil penalty to settle charges that it violated premerger reporting and waiting requirements when it acquired Cracker Barrel voting securities. According to the complaint, Biglari Holdings failed to comply with the antitrust premerger notification requirements of the HSR Act before acquiring voting securities of Cracker Barrel Old Country Store Inc. in June 2011. Although the HSR Act exempts from its premerger notification requirements certain acquisitions “solely for the purpose of investment,” Biglari Holdings’ acquisitions were not made solely for the purpose of investment. The complaint alleged that Biglari Holdings was in violation of the HSR Act from June 8, 2011, through September 22, 2011. At the same time, the Division filed a proposed settlement that, if approved by the court, will settle the charges. See [www.justice.gov/atr/public/press\\_releases/2012/287345.pdf](http://www.justice.gov/atr/public/press_releases/2012/287345.pdf).

53. On May 3, 2012, the Division announced that Mr. Kyoungwon Pyo, an executive of Hyosung Corporation, had agreed to plead guilty and serve five months in a U.S. prison for obstruction of justice charges in connection with an automated teller machine (“ATM”) merger investigation conducted by the Division. The Division said Mr. Pyo, in his role as senior vice president for corporate strategy of Hyosung Corporation, an affiliate of Korea-based Nautilus Hyosung Holdings Inc. (“NHI”), altered and directed subordinates to alter numerous existing corporate documents before they were submitted in conjunction with mandatory premerger filings. The Division said that Mr. Pyo’s actions took place in or about July and August 2008. At the time, the Division was investigating NHI’s proposed acquisition of Triton Systems of Delaware Inc. NHI abandoned the proposed acquisition of competitor Triton Systems before the Division reached a decision determining whether to challenge the transaction. On October 20, 2011, NHI pled guilty and paid a \$200,000 criminal fine for its role in the obstruction of justice. See [www.justice.gov/atr/public/press\\_releases/2012/282873.pdf](http://www.justice.gov/atr/public/press_releases/2012/282873.pdf).

54. On December 16, 2011, the Division announced that Comcast Corporation’s CEO Brian L. Roberts would pay a \$500,000 civil penalty to settle charges that he violated premerger reporting and waiting requirements when he acquired Comcast voting securities. According to the complaint, which was filed with a proposed settlement, Mr. Roberts failed to comply with the antitrust premerger notification requirements of the HSR Act before acquiring voting securities of Comcast as part of his compensation as chairman and chief executive officer of Comcast beginning on October 22, 2007, which resulted in his holding more than \$119.6 million of Comcast stock. On August 25, 2009, Mr. Roberts made a corrective filing for Comcast voting securities he had acquired. Although this was the first time Mr. Roberts has been charged with an HSR Act violation, he has twice previously made corrective filings regarding transactions that, he acknowledged, were reportable under the HSR Act, asserting that the failures to file and observe the waiting period were inadvertent. See [www.justice.gov/atr/public/press\\_releases/2011/278338.pdf](http://www.justice.gov/atr/public/press_releases/2011/278338.pdf).

##### ***4.2 Select Significant Merger Matters***

###### ***4.2.1 FTC Public Merger Investigations and Challenges***

55. **Renown Health/Reno Heart Physicians.** On August 6, 2012, the FTC challenged Renown Health’s acquisitions of two cardiology groups in the Reno, Nevada area – Sierra Nevada Cardiology Associates (SNCA) and Reno Heart Physicians (RHP). Renown is the largest provider of acute care hospital services in northern Nevada. Prior to the acquisitions, virtually all of the cardiologists in the Reno area were affiliated with either SNCA or RHP and Renown Health did not employ any cardiologists. The FTC alleged that Renown Health’s acquisitions of SNCA’s and RHP’s medical practices created a highly concentrated market for the provision of adult cardiology services in the Reno area. The Commission’s

consent order required Renown to release its staff cardiologists from non-compete contract clauses, allowing up to 10 of them to join competing cardiology practices. See [www.ftc.gov/os/caselist/1110101/index.shtm](http://www.ftc.gov/os/caselist/1110101/index.shtm).

56. **Novartis AG/Fougera.** On July 16, 2012, the FTC challenged Novartis AG's \$1.5 billion acquisition of rival pharmaceutical firm, Fougera Holdings, Inc. The Commission alleged that Novartis's acquisition likely would have harmed competition in the markets for the marketing rights to four topical skin care medications. The final order resolving the charges preserves competition in the markets by requiring Novartis to end a marketing agreement that allows it to sell three of the products, and return the rights to the fourth product to its manufacturer. See [www.ftc.gov/os/caselist/1210144/index.shtm](http://www.ftc.gov/os/caselist/1210144/index.shtm).

57. **Koninklijke Ahold N.V./Safeway.** On June 15, 2012, the FTC challenged Koninklijke Ahold N.V.'s acquisition of Genuardi's supermarket chain from Safeway, Inc. Ahold is the parent company of Giant Food Stores, LLC. The Commission alleged that Ahold's acquisition of Genuardi's would reduce the number of supermarket competitors in Newtown, Pennsylvania's local grocery market from three to two. To resolve competitive concerns, the Commission required Ahold to sell a supermarket in Newtown to McCaffrey's supermarkets. See [www.ftc.gov/os/caselist/1210055/index.shtm](http://www.ftc.gov/os/caselist/1210055/index.shtm).

58. **Johnson & Johnson/Synthes.** On June 11, 2012, the FTC challenged Johnson & Johnson's \$21.3 billion acquisition of Synthes, Inc. Johnson & Johnson and Synthes are competing manufacturers of medical devices. The Commission charged that Johnson & Johnson's acquisition of Synthes likely would be anticompetitive and reduce competition for volar distal plating systems, which are medical devices used for surgically treating serious wrist fractures. The Commission's consent order requires Johnson & Johnson to sell its system for surgically treating serious wrist fractures to a third company, Biomet, Inc. See <http://ftc.gov/os/caselist/1110160/index.shtm>.

59. **Kinder Morgan/El Paso.** On May 1, 2012, the Commission challenged Kinder Morgan, Inc.'s \$38 billion acquisition of El Paso Corporation. The Commission alleged that the acquisition likely would have reduced competition in several natural gas pipeline transportation and gas processing markets in the Rocky Mountains region. The Commission's consent order requires Kinder Morgan to sell three natural gas pipelines and two gas-processing plants and associated storage capacity in the Rocky Mountains region. See [www.ftc.gov/os/caselist/1210014/index.shtm](http://www.ftc.gov/os/caselist/1210014/index.shtm).

60. **CoStar/LoopNet.** On April 26, 2012, the Commission challenged CoStar Group's \$860 million acquisition of LoopNet, alleging that the acquisition likely would have been anticompetitive in the market for commercial real estate information services. To resolve these charges, the Commission issued a consent order requiring CoStar to sell LoopNet's ownership interest in Xceligent, thus maintaining an independent third party in the market. The Commission also ordered CoStar to lift non-compete provisions and allow its customers in long-term contracts to terminate those early, allowing for competitors such as Xceligent to expand or enter more easily into the commercial real estate information services market. See [www.ftc.gov/os/caselist/1110172/index.shtm](http://www.ftc.gov/os/caselist/1110172/index.shtm).

61. **Western Digital/Hitachi.** On March 5, 2012, the FTC challenged Western Digital Corporation's \$4.5 billion acquisition of rival Hitachi Global Storage Technologies. Both companies manufacture desktop hard disk drives used in personal computers. The FTC alleged that the acquisition would leave only two companies in control of the entire worldwide market for hard disk drives, likely resulting in increased prices to consumers. The Commission entered a consent order requiring Western Digital to divest to a third company, Toshiba, assets used to manufacture and sell desktop hard disk drives. See [www.ftc.gov/os/caselist/1110122/index.shtm](http://www.ftc.gov/os/caselist/1110122/index.shtm).

62. **Carpenter/Latrobe.** On February 29, 2012, the FTC challenged Carpenter Technology's \$410 million merger with specialty metals manufacturer Latrobe. The Commission alleged that Carpenter and Latrobe were the only companies that made two highly specialized alloys used in the aerospace industry. The Commission also alleged that the combination of the two companies likely would be anticompetitive and increase prices for purchasers of the alloys by creating a monopoly in the market. The Commission's consent order required Carpenter to divest assets necessary for manufacturing the two alloys to another metals manufacturer, Eramet S.A. See [www.ftc.gov/os/caselist/1110207/index.shtm](http://www.ftc.gov/os/caselist/1110207/index.shtm).

63. **Fresenius/Liberty.** On February 28, 2012, the Commission challenged Fresenius Medical Care AG & Co. KGaA's \$2.1 billion acquisition of Liberty Dialysis Holdings, Inc. The Commission alleged that Fresenius's acquisition of Liberty would eliminate head-to-head competition between the two dialysis providers in 43 regional markets, leading to higher prices and reduced quality for dialysis consumers. The Commission's consent order required Fresenius to sell 60 outpatient dialysis clinics in 43 local markets. See [www.ftc.gov/os/caselist/1110170/index.shtm](http://www.ftc.gov/os/caselist/1110170/index.shtm).

64. **AmeriGas/Energy Transfer Partners.** On February 28, 2012, the FTC issued a final order requiring AmeriGas L.P. and Energy Transfer Partners L.P. (ETP), two of the nation's largest propane distributors, to amend AmeriGas's proposed \$2.9 billion acquisition of ETP's Heritage Propane business as part of a settlement with the FTC. The settlement resolves FTC charges that the transaction would reduce competition and raise prices in the market for propane exchange cylinders that consumers use to fuel barbeque grills and patio heaters. The FTC's settlement protects consumers by requiring AmeriGas to exclude ETP's cylinder exchange business, Heritage Propane Express, from the acquisition. See [www.ftc.gov/os/caselist/1210022/index.shtm](http://www.ftc.gov/os/caselist/1210022/index.shtm).

65. **Valeant International Inc./Johnson & Johnson and Valeant International Inc./Sanofi.** On February 22, 2012, the FTC approved final orders requiring Valeant Pharmaceuticals International, Inc. ("Valeant") to divest three drugs used to treat different skin ailments, as conditions of acquiring Ortho Dermatologics, Inc. from Johnson & Johnson, and Dermik Laboratories, Inc. from Sanofi. Under the settlements, Valeant will sell the manufacturing and marketing rights to drug products that treat acne and actinic keratosis, a pre-cancerous skin lesion, to Mylan Pharmaceuticals Inc. Valeant also will sell the marketing rights to a drug that treats fine line wrinkles to Spear Pharmaceuticals, Inc. Both settlements preserve competition and prevent higher prices that likely would have resulted from the acquisitions. See <http://ftc.gov/os/caselist/1110215/index.shtm> and <http://ftc.gov/os/caselist/1110216/index.shtm>.

66. **Omnicare/PharMerica.** On January 27, 2012, the Commission issued an administrative complaint challenging Omnicare, Inc.'s hostile acquisition of rival long-term care pharmacy provider PharMerica Corporation. The complaint alleged that the transaction would combine the two largest U.S. long-term care pharmacies, harming competition and enabling Omnicare to raise the price of drugs. The FTC also alleged that that combining Omnicare and PharMerica would significantly increase Omnicare's already substantial bargaining leverage for certain prescription drug plans. In February 2012, Omnicare abandoned the proposed acquisition, and the FTC dismissed its administrative complaint. See [www.ftc.gov/os/adjpro/d9352/index.shtm](http://www.ftc.gov/os/adjpro/d9352/index.shtm).

67. **LabCorp/Orchid Cellmark.** On December 8, 2011, the FTC required laboratory testing companies Laboratory Corporation of America Holdings ("LabCorp") and Orchid Cellmark Inc. ("Orchid") to divest a portion of Orchid's paternity testing business to resolve the FTC complaint alleging that LabCorp's \$85.4 million acquisition of Orchid would have an anticompetitive impact in the market for paternity testing services used by government agencies. The divestiture of Orchid's paternity testing company to a third testing company, DNA Diagnostics Center, resolved the Commission's charges that the acquisition was anticompetitive by restoring a competitor in the market. See [www.ftc.gov/os/caselist/1110155/index.shtm](http://www.ftc.gov/os/caselist/1110155/index.shtm).



68. **Graco/Illinois Tool Works.** On December 15, 2011, the FTC challenged Graco Inc.'s proposed \$650 million acquisition of ITW Finishing LLC from Illinois Tool Works Inc., Graco's largest competitor. The Commission alleged that the transaction would harm competition in the market for equipment used to apply paints and other liquid finishes to a variety of manufactured goods, such as cars, wood cabinets, and major appliances. The Commission issued an administrative complaint and sought a preliminary injunction in the U.S. District Court for the District of Columbia to halt the transaction pending resolution of the administrative litigation. In March 2012, the Commission withdrew the matter from litigation to consider a proposed consent agreement. The Commission resolved the matter through entry of a consent order requiring Graco to hold separate and divest the worldwide liquid finishing equipment of Illinois Tool Works, Inc. and ITW Finishing. See [www.ftc.gov/os/caselist/1110169/index.shtm](http://www.ftc.gov/os/caselist/1110169/index.shtm).

69. **OSF Healthcare System/Rockford Health System.** On November 18, 2011, the FTC filed an administrative complaint challenging OSF Healthcare System's proposed acquisition of Rockford Health System, alleging that the acquisition would substantially reduce competition among hospitals and primary care physicians in Rockford, Illinois, and significantly harm local businesses and patients. The FTC filed a separate complaint in federal district court seeking an order to halt the transaction temporarily to preserve competition for Rockford area residents pending the FTC's administrative proceeding and any subsequent appeals. On April 5, 2012, the court granted the FTC's request for a preliminary injunction, pending a full administrative trial on the merits. OSF Healthcare subsequently abandoned the proposed transaction, and the FTC dismissed the complaint. See [www.ftc.gov/os/caselist/1110102/index.shtm](http://www.ftc.gov/os/caselist/1110102/index.shtm).

70. **Healthcare Technology Holdings/SDI Health LLC.** On October 28, 2011, the FTC issued a complaint challenging Healthcare Technology Holdings, Inc.'s proposed acquisition of SDI Health LLC. The Commission alleged that the acquisition would greatly reduce competition and increase prices in the promotional and medical audit markets, which are highly concentrated. To resolve these competitive concerns and restore the competition that would be lost with the acquisition, the Commission issued a consent order requiring the sale of SDI's promotional audit and medical audit businesses to an FTC-approved buyer. See [www.ftc.gov/os/caselist/1110097/index.shtm](http://www.ftc.gov/os/caselist/1110097/index.shtm).

71. **Teva/Cephalon.** On October 7, 2011, the Commission issued a complaint that Teva Pharmaceutical Industries, Ltd.'s proposed \$6.8 billion acquisition of Cephalon, Inc. would reduce the number of generic versions of Actiq, a cancer pain drug, from three to two, and lessen competition in the relevant market. The Commission also alleged that the acquisition would eliminate potential competition between Teva and Cephalon and reduce the number of generic competitors in the future for Amrix, a muscle relaxant. The Commission's consent order required Teva to sell its rights and assets related to the two drugs to Par Pharmaceuticals, Inc. Teva also agreed to enter into a supply agreement to allow Par to sell a generic version of Cephalon's wakefulness drug, Provigil, to resolve the Commission's concerns that the merger would limit generic suppliers in that market. See [www.ftc.gov/os/caselist/1110166/index.shtm](http://www.ftc.gov/os/caselist/1110166/index.shtm).

#### 4.2.2 *DOJ Public Merger Investigations and Challenges*

72. The Division challenges proposed and consummated mergers in US federal district court. The court determines whether to prohibit the transactions. During fiscal year 2012, the Division challenged eight mergers in district court, including the proposed merger of NYSE Euronext and Deutsche Börse AG, which was subsequently abandoned by the parties. In addition, due to expressed Division concerns, six transactions were abandoned, two transactions were restructured, and three transactions were not challenged when parties agreed to modify their conduct. The Division's challenges to mergers frequently result in conditions that resolve anticipated anti-competitive harm and allow the merger to proceed. Cases filed in court may be settled by a judicial consent order allowing the parties to consummate the transaction subject to appropriate conditions.

73. **3M/Avery Dennison.** On September 4, 2012, the Division announced that 3M Co. abandoned its plan to acquire Avery Dennison Corp.'s Office and Consumer Products Group after the Division informed the companies that it would file a civil antitrust lawsuit to block the deal. The Division said that the proposed acquisition would have substantially lessened competition in the sale of labels and sticky notes, resulting in higher prices and reduced innovation for products that millions of American consumers use every day. See [www.justice.gov/atr/public/press\\_releases/2012/286647.pdf](http://www.justice.gov/atr/public/press_releases/2012/286647.pdf).

74. **UTC/Goodrich.** In *U.S. v. United Technologies Corporation and Goodrich Corporation*, the Division challenged United Technologies Corporation's ("UTC") proposed \$18.4 billion acquisition of Goodrich Corporation; the acquisition was the largest merger in the history of the aircraft industry. According to the complaint, filed on July 26, 2012, the acquisition, as originally proposed, would have lessened competition substantially in the worldwide markets for the development, manufacture, and sale of large main engine generators, aircraft turbine engines, and engine control systems for large aircraft turbine engines. Aircraft main engine generators, which are used to produce the electrical power in communication and navigation equipment, environmental control systems, interior and exterior lighting and other aircraft systems, are complex mechanical devices that are difficult to produce, and for which no substitutes exist. The proposed acquisition would have combined the only two significant suppliers of large main engine generators for aircraft in the world. Furthermore, Goodrich's engine control systems business supplied critical components to several of UTC's leading competitors for aircraft turbine engines. In addition, as part of the proposed acquisition, UTC, one of the three leading suppliers of engine control systems for large aircraft turbine engines, would acquire Goodrich's 50 percent share in a joint venture that formed one of the other two producers of such engine control systems. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. The settlement, approved by the court on May 29, 2013, required UTC to divest Goodrich's business that designs, develops, and manufactures large main engine generators and engine control systems. It also required UTC to divest Goodrich's shares in the joint venture that manufactures engine control systems. The Division, the European Commission, and the Canadian Competition Bureau cooperated closely throughout the course of their respective investigations. The Division also held discussions with other competition agencies, including the Federal Competition Commission in Mexico and the Administrative Council for Economic Defense in Brazil. See [www.justice.gov/atr/public/press\\_releases/2012/285420.pdf](http://www.justice.gov/atr/public/press_releases/2012/285420.pdf).

75. **Standard Essential Patents.** The Division announced on February 13, 2012, the closing of its investigations into Google Inc.'s acquisition of Motorola Mobility Holdings Inc., the acquisitions of certain Nortel Networks Corporation patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd., and Apple's acquisition of certain Novell Inc. patents. In all of these transactions, the Division conducted an in-depth analysis into the potential ability and incentives of the acquiring firms to use the patents they proposed acquiring to foreclose competitors. In particular, the Division focused on standard essential patents ("SEPs") that Motorola Mobility and Nortel had committed to license to industry participants through their participation in standard-setting organizations. After a thorough review of the proposed transactions, the Division determined that each acquisition was unlikely to substantially lessen competition and to significantly change existing market dynamics. The Division's concern about the potential anticompetitive use of SEPs was lessened by the clear commitments by Apple and Microsoft to license SEPs on fair, reasonable, and non-discriminatory terms, as well as their commitments not to seek injunctions in disputes involving SEPs. Google's commitments were more ambiguous and did not provide the same direct confirmation of its SEP licensing policies. The Division said that it will continue to monitor the use of SEPs in the wireless device industry and will not hesitate to take appropriate enforcement action to stop any anticompetitive use of SEP rights. During the course of its investigation of the Google/Motorola Mobility transaction, the Division cooperated closely with the European Commission and had discussions with the Australian Competition and Consumer Commission, Canadian Competition Bureau, Israeli Antitrust Authority, and the Korean Fair Trade Commission. With regard to the investigations relating to the Nortel patent assets, the Division worked closely with the states of New York

and California and with the Canadian Competition Bureau. See [www.justice.gov/atr/public/press\\_releases/2012/280190.pdf](http://www.justice.gov/atr/public/press_releases/2012/280190.pdf).

76. **International Paper/Temple Inland.** In *U.S. v. International Paper Company and Temple-Inland Inc.*, the Division challenged the proposed \$4.3 billion merger between International Paper Company and Temple-Inland Inc. The complaint, filed on February 10, 2012, alleged that the transaction, as originally proposed, would have substantially lessened competition in the production and sale of containerboard, the type of paper used to make corrugated boxes, in the United States. Corrugated boxes made from containerboard are used to ship more than 90 percent of all goods in the United States. According to the complaint, International Paper and Temple-Inland are the largest and third-largest producers, respectively, of containerboard in North America. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. The settlement required the companies to divest three containerboard mills. The court approved the settlement on May 3, 2012. See [www.justice.gov/atr/public/press\\_releases/2012/280125.pdf](http://www.justice.gov/atr/public/press_releases/2012/280125.pdf).

77. **Deutsche Börse/NYSE Euronext.** The Division announced on December 22, 2011, that it would require Deutsche Börse AG to direct a subsidiary to sell its 31.5 percent stake in Direct Edge Holdings LLC and agree to other restrictions in order for Deutsche Börse to proceed with its planned \$9 billion merger with NYSE Euronext, one of the two largest and most prestigious stock exchange operators in the United States. Direct Edge is the fourth-largest stock exchange operator in the U.S. The Division said that the transaction, as originally proposed, would have substantially lessened competition for displayed equities trading services, listing services for exchange-traded funds, and real-time proprietary equity data products in the United States. The Division cooperated closely with the European Commission on their respective investigations of the transaction. In February 2012, the European Commission prohibited the merger; the differing conclusions of the two agencies resulted from differences in the markets in the respective jurisdictions. The parties subsequently abandoned the transaction, and the Division withdrew the complaint and proposed settlement. See [www.justice.gov/atr/public/press\\_releases/2011/278537.pdf](http://www.justice.gov/atr/public/press_releases/2011/278537.pdf).

78. **Exelon/Constellation Energy.** In *U.S. v. Exelon Corporation and Constellation Energy Group, Inc.*, the Division challenged the proposed \$7.9 billion merger of Exelon Corporation and Constellation Energy Group Inc. The complaint, filed on December 21, 2011, alleged that the transaction, as originally proposed, likely would have substantially lessened competition for wholesale electricity, ultimately increasing electricity prices for millions of consumers in the mid-Atlantic region of the country. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. The settlement required the merged firm to divest three electricity generating plants in Maryland, which in total provide more than 2,600 megawatts of generating capacity. The court approved the settlement on May 23, 2012. See [www.justice.gov/atr/public/press\\_releases/2011/278473.pdf](http://www.justice.gov/atr/public/press_releases/2011/278473.pdf).

79. **Google/Admeld.** On December 2, 2011, the Division announced the closing of its investigation into Google Inc.'s proposed acquisition of Admeld Inc. After a thorough review of the evidence, the Division concluded that the transaction was not likely to substantially lessen competition in the sale of display advertising. The Division's investigation focused on the potential effect of the proposed transaction on competition in the display advertising industry. The investigation determined that web publishers often rely on multiple display advertising platforms and can move business among them in response to changes in price or the quality of ad placements. Given Google's significant presence in search, the Division also carefully evaluated whether Google's acquisition of Admeld would enable Google to extend its market power in the Internet search industry to online display advertising through anticompetitive means. The Division said it will continue to monitor transactions affecting evolving markets such as display and other forms of online advertising, as well as search, to ensure they do not inhibit competition or innovation. See [www.justice.gov/atr/public/press\\_releases/2011/277935.pdf](http://www.justice.gov/atr/public/press_releases/2011/277935.pdf).

## **5. International antitrust cooperation and outreach**

### ***5.1 International Antitrust Cooperation Developments***

80. The Antitrust Agencies continued to play a lead role in promoting cooperation and convergence toward sound competition policies internationally, through building strong bilateral ties with major enforcement partners and participation in multilateral bodies such as the International Competition Network (“ICN”), the Competition Committee of the Organization for Economic Cooperation and Development (“OECD”), the United Nations Conference on Trade and Development (“UNCTAD”), and the Asia-Pacific Economic Cooperation (“APEC”).

81. On September 27, 2012, the Agencies signed an antitrust Memorandum of Understanding (“MOU”) with India’s Ministry of Corporate Affairs and the Competition Commission of India. The agreement contains provisions for increased communication and cooperation on policy and enforcement matters and technical cooperation, and is subject to confidentiality protections. It also contemplates periodic meetings among officials to discuss policy and enforcement developments. See [www.ftc.gov/opa/2012/09/indiamou.shtm](http://www.ftc.gov/opa/2012/09/indiamou.shtm).

82. On September 24-25, 2012, the Agencies and the three Chinese anti-monopoly agencies – the Ministry of Commerce (“MOFCOM”), the National Development and Reform Commission, and the State Administration for Industry and Commerce – held the first Joint Dialogue on competition policy in Washington, DC. The high-level meetings covered a range of policy and technical subjects, including promoting competition in a global economy and various aspects of civil and criminal enforcement. As previously reported, the agencies of the two countries signed an antitrust MOU on July 27, 2011, to promote communication and cooperation. See [www.ftc.gov/opa/2012/09/chinamou.shtm](http://www.ftc.gov/opa/2012/09/chinamou.shtm).

83. On November 29, 2011, the Agencies and MOFCOM met in Washington, DC, to discuss issues of common interest in antitrust merger enforcement. This was the first high-level MOFCOM visit to the Agencies since the signing of the MOU in July 2011. The agencies discussed recent antitrust enforcement and policy developments, the role of antitrust enforcement in times of economic downturn, and cooperation among the three agencies in merger investigations. The three agencies developed further guidance for cooperation on investigations when one of the U.S. antitrust agencies and MOFCOM are reviewing the same merger. The guidance is available at [www.justice.gov/atr/public/international/docs/277772.pdf](http://www.justice.gov/atr/public/international/docs/277772.pdf).

84. On December 19, 2011, the heads of the antitrust agencies of the United States, Canada, and Mexico participated in a trilateral meeting to reaffirm their mutual commitment to effective enforcement cooperation. The discussions covered a wide range of enforcement and policy issues, including updates on merger policy and enforcement in the three jurisdictions and the sharing of recent experience in areas of mutual enforcement interest.

85. On October 14, 2011, the Agencies and the European Commission’s DG Competition issued revised Best Practices on Cooperation in Merger Investigations and also celebrated the 20<sup>th</sup> anniversary of the US-EU antitrust cooperation agreement. The Best Practices, originally issued in 2002, were revised in light of the Agencies’ practical experience and provide an advisory framework for cooperation when a U.S. Agency and DG Competition review the same merger. The main purposes of issuing the revised Best Practices were (1) to be transparent about the Agencies’ cooperation – including when and what they communicate with one another and their aim at compatible outcomes and (2) to suggest how merging parties and third parties can facilitate coordination and resolution of those reviews. In addition, the Best Practices address the complexity of coordinating merger review timetables between the authorities and emphasize the need for coordination among the agencies at key stages of their investigations, including the

final stage when agencies consider potential remedies to preserve competition. The Best Practices also recognize that more authorities have become more engaged in the review process, requiring coordination with a larger number of agencies. The revised Best Practices are *available at* [www.ftc.gov/os/2011/10/111014eumerger.pdf](http://www.ftc.gov/os/2011/10/111014eumerger.pdf); [www.justice.gov/atr/public/international/docs/276276.pdf](http://www.justice.gov/atr/public/international/docs/276276.pdf).

86. During FY 2012, the Agencies cooperated on merger reviews with many competition agencies around the world, including those of Australia, Brazil, Canada, China, Colombia, the European Union, France, Germany, Japan, Mexico, New Zealand, Singapore, South Africa, Turkey, and the United Kingdom. In some instances, cooperation with these authorities was extensive.

87. The FTC had over 50 substantive contacts in merger and non-merger cases and cooperated on 23 merger matters (of which 15 were completed within FY 2012) and three conduct investigations. As an example of international cooperation, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including newer authorities, reviewing Western Digital's proposed acquisition of Hitachi. The cooperating agencies included those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of remedies. Commission staff cooperation with non-U.S. counterparts also included extensive coordination on a number of non-public matters in which the Commission ultimately closed its investigation without taking enforcement action or that resulted in abandonment of the transaction by the parties, some after second requests were issued. Even in matters in which the effects vary among jurisdictions or procedural requirements result in different albeit non-conflicting outcomes, Commission staff often cooperate extensively with their international counterparts, as for example, in *Vivendi/EMI*, in which FTC staff closely cooperated with the EC's DG Competition in reaching its decision to allow the transaction to proceed.

88. In FY 2012, the Division cooperated with international counterparts on many civil non-merger, merger, and cartel investigations. Among the Division's most notable instances of international cooperation were its *e-book* and *UTC/Goodrich* matters. In April 2012, the Antitrust Division filed a civil lawsuit against Apple Inc. and five of the largest book publishers in the United States, alleging that they conspired to increase the prices consumers pay for e-books. With waivers from the parties, the Division cooperated closely with the European Commission throughout the course of their respective investigations, with frequent contact between the investigative staffs and the senior officials of the two agencies. And, in *UTC/ Goodrich*, also with party waivers, the Division worked closely with the EC and the Canadian Competition Bureau throughout their investigations. Staff communicated through regularly scheduled conferences, conducted joint interviews with third parties, and held joint pre-decisional meetings with the parties via video conference. In total, the Division cooperated with international counterparts in roughly a dozen merger investigations in FY 2012. The Division also coordinated and cooperated with competition agencies in other jurisdictions in many ongoing international cartel investigations.

89. In FY 2012, the Agencies continued to play leadership roles in the ICN, and continued to serve as ICN Steering Group members. During this year, the ICN and OECD worked together to undertake a comprehensive study on the state of international enforcement cooperation. The OECD team and the ICN project team, led by the DOJ and the Turkish Competition Authority, worked closely to produce two separate, but complementary, reports based on survey responses from 57 member agencies. The OECD report addressed a wide range of topics, including competition agencies' experiences engaging in international enforcement cooperation and the limitations to effective cooperation. The ICN report focused on ICN members' views on the usefulness of existing ICN cooperation-related work, and on ICN members' needs and priorities for future ICN cooperation-related work.

90. During FY 2012, the FTC served as co-chair of the ICN's Agency Effectiveness Working Group ("AEWG"), together with the Mexican Federal Competition Commission and the Norwegian Competition Authority. The FTC co-led the Investigative Process Project with the EC's DG Competition, which produced reports on investigative tools and agency transparency practices. The FTC also participated in the drafting of two chapters for the Competition Agency Practice Manual on knowledge management and human resources management. Finally, the FTC heads the Curriculum Project, which produced new modules on planning an investigation, competition advocacy within government, and challenges faced by competition agencies in developing economies.

91. During FY 2012, the Division served as co-chair of the ICN Cartel Working Group, together with Germany's Bundeskartellamt and the Japan Fair Trade Commission. As co-chair, the Division participated in the drafting of a chapter for the Anti-Cartel Enforcement Manual on international cooperation and information sharing, as well as a discussion call series on leniency. The Division also participated in the 2012 Cartel Workshop in Panama City, Panama.

## **5.2 Outreach**

92. In FY 2012, the Agencies continued to provide technical cooperation on competition law and policy matters to their international counterparts. The FTC's international technical assistance antitrust program conducted 38 foreign technical missions in 19 countries, including China, Colombia, Costa Rica, Dominican Republic, India, Indonesia, Morocco, South Africa, and Vietnam. The FTC also conducted judicial trainings in Mexico and Russia. The Division's international technical assistance antitrust program conducted 11 foreign technical missions in 8 countries. As part of U.S. efforts to assist China in implementing its antitrust law, the Agencies held discussions with the Chinese antitrust agencies in the United States and China. In June 2012, senior officials and staff from the Agencies participated in a workshop in China on antitrust analysis of intellectual property-related matters. The Agencies are also working with the Competition Commission of India (CCI) as it implements its 2002 Competition Act and new merger regime. Since FY 2010, the FTC has conducted 11 capacity-building workshops for the CCI, including three workshops in FY 2012; in FY 2012, the Division hosted senior CCI merger officials for a week and organized a day of presentations for a delegation of senior CCI economists on economic analysis. The Agencies also engaged in technical cooperation with their international counterparts in Australia, China, Mexico, Peru, Poland, and South Africa.

93. As part of its ongoing effort to build effective relationships, the FTC provides opportunities for staff from foreign agencies to spend several months working directly with FTC staff on investigations, subject to appropriate confidentiality protections through its International Fellows and Interns program. In FY 2012, the FTC hosted 12 International Fellows and Interns from countries including Australia, Brazil, Canada, Egypt, India, Lithuania, Mauritius, Turkey, and the UK. The FTC also sent staff on details lasting several months in the competition agencies of Canada and Mexico. These assignments provide valuable opportunities for participants to obtain a deeper understanding of their international partners' laws and challenges. This knowledge provides critical support for coordinated enforcement and promotes cooperation and convergence towards sound policy.

94. One of the Division's senior career officials spent two weeks visiting the EC's DG Competition in July 2012, and the Division hosted two senior managers, one from DG Competition and the other from the Japan Fair Trade Commission, in Washington, D.C., in December 2012. The exchange was a second round in the Division's new Visiting International Enforcers Program ("VIEP"). Participants in the VIEP are exposed to all aspects of the Division's work, consistent with the Division's confidentiality obligations, and receive training from senior Division officials regarding the Division's civil and criminal enforcement programs. Participants also have the opportunity to participate in meetings with Division decision-makers,

parties, and third parties, and are invited to provide training to the Division on a topic of their choice related to their jurisdiction's antitrust law.

95. In FY 2012, the Agencies continued their work with the World Intellectual Property Organization ("WIPO") on its ongoing project to study relationships between intellectual property and competition policy. In October 2012, Deputy Assistant Attorney General Renata B. Hesse visited the WIPO secretariat in Switzerland as part of this project. DAAG Hesse also spoke at the International Telecommunications Union on standard-setting, IP, and competition policy in the telecommunications context.

## 6. Regulatory and Trade Policy Matters

### 6.1 Regulatory Policies

#### 6.1.1 DOJ Activities: Federal and State Regulatory Matters

96. In January 2013, the Division and the U.S. Patent & Trademark Office ("PTO") issued a policy statement recommending that the U.S. International Trade Commission ("ITC") undertake fact-based, case-specific decisions regarding the enforcement of a patent essential to a standard that is encumbered by a commitment to license that patent on reasonable and non-discriminatory ("RAND") or fair, reasonable, and nondiscriminatory ("FRAND") terms to those implementing the standard. The statement does not encourage compulsory licensing of F/RAND-encumbered patents essential to a standard; it applies only to *voluntary* standards development and commitments to license on F/RAND terms that were *voluntarily* made by patent owners—which are the antithesis of mandatory nationalized standards. In the Division's view, an ITC order excluding certain products based on infringement of F/RAND-encumbered patents essential to a standard may be in the public interest only in limited circumstances, such as when a potential licensee is not subject to the jurisdiction of a court that can award damages, refuses to engage in a negotiation, or engages in a constructive refusal to negotiate (such as insisting on terms clearly outside of F/RAND), or is not subject to a court that could award damages. See U.S. Dep't of Justice & U.S. Patent and Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 2013), [www.justice.gov/atr/public/guidelines/290994.pdf](http://www.justice.gov/atr/public/guidelines/290994.pdf).

97. On December 22, 2011, the Division submitted comments to the Federal Maritime Commission ("FMC"), urging the FMC to carefully consider, and to order appropriate limiting conditions to, proposed amendments seeking antitrust immunity for a pool agreement among ocean carriers and non-regulated transportation firms involving common usage of "chassis" (metal trailer frames used for over-the-road transport of shipping containers). Noting that the Department "has long taken the position that the general antitrust exemption for international ocean shipping carrier agreements is no longer justified," the Division observed that the proposed amendments expanded the original purpose of the pool agreement to activities "further removed and possibly independent from actual ocean transportation." See [www.justice.gov/atr/public/comments/278992.pdf](http://www.justice.gov/atr/public/comments/278992.pdf).

#### 6.1.2 FTC Staff Activities: Federal and State Regulatory Matters

98. **Health Care, Health Professions.** On September 7, 2012, at the request of West Virginia State Senator Daniel Foster, FTC staff provided testimony to a legislative panel on the potential benefits to West Virginia health care consumers that could come from making it simpler for Advanced Practice Registered Nurses to prescribe medications. See [www.ftc.gov/opa/2012/09/wva.shtm](http://www.ftc.gov/opa/2012/09/wva.shtm).

99. **Utilities, Electricity.** On September 6, 2012, the FTC submitted comments to the U.S. Federal Energy Regulatory Commission ("FERC") recommending ways to lower the barriers faced by companies seeking to enter regional and local markets to sell services that maintain or enhance the reliability of electricity generation, transmission, and distribution. In its comments, the FTC discussed ways to promote

more efficient pricing of these services in areas beyond those with organized wholesale electricity markets. The FTC also encouraged FERC to enrich its geographic market analysis by following the analysis set forth in the 2010 Horizontal Merger Guidelines. See [www.ftc.gov/opa/2012/09/ferc.shtm](http://www.ftc.gov/opa/2012/09/ferc.shtm).

100. **Utilities, Electricity.** On June 14, 2012, the FTC submitted comments to a FERC workshop on the allocation of capacity on new merchant transmission projects. The workshop sought to identify procedures to ensure non-discriminatory allocation of capacity on new transmission lines proposed by merchant firms. Workshop participants considered whether the FERC could achieve open access and non-discrimination by requiring public notice of a new transmission line, followed by private, bilateral negotiations over access. As an alternative, participants considered whether the FERC should use an auction-like “open season” to allocate at least some of a line’s capacity on pre-announced terms. In its comments, the FTC noted that neither option would prevent firms from exercising market power. The Commission suggested that the FERC consider setting up a process for reviewing proposals to address concerns and possibly require modifications to plans that are flawed, or reject those that are not in the public interest. See [www.ftc.gov/opa/2012/06/ferc.shtm](http://www.ftc.gov/opa/2012/06/ferc.shtm).

101. **International Trade and Intellectual Policy.** On June 6, 2012, at the request of the U.S. International Trade Commission (“ITC”), the FTC commented on the propriety of granting an exclusion order in favor of a standard essential patent (“SEP”) holder that has committed to license on reasonable and non-discriminatory (“RAND”) terms. The FTC expressed concern that a patentee can make a RAND commitment as part of the standard setting process, and then seek an exclusion order for infringement of the RAND-encumbered SEP as a way of securing royalties that may be inconsistent with that RAND commitment. The FTC further stated that the ITC has a range of remedies available to it to give effect to its statutory obligation to consider “competitive conditions in the United States economy ... and United States consumers[,]” and to refrain from imposing Section 337 remedies in conflict with the public interest. For example, the ITC could find that Section 337’s public interest factors support denial of an exclusion order unless the holder of the RAND-encumbered SEP has made a reasonable royalty offer. Alternatively, the ITC could delay the effective date of its Section 337 remedies until the parties mediate in good faith for damages for past infringement and/or an ongoing royalty for future licensed use, with the parties facing the respective risks that the exclusion order will (a) eventually go into effect if the implementer refuses a reasonable offer, or (b) be vacated if the ITC finds that the patentee has refused to accept a reasonable offer. See [www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf](http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf).

102. **Dentistry.** On May 25, 2012, at the request of a member of the North Carolina House of Representatives, the FTC commented on proposed legislation that would impose significant restrictions on the business organization of dental practices in North Carolina. FTC staff expressed concern that the bill may deny consumers of dental services the benefits of competition spurred by the efficiencies that Dental Service Organizations (“DSOs”) can offer, including the potential for lower prices, improved access to care, and greater choice. FTC staff urged the legislature to consider the potential anti-competitive effects of the legislation – including higher prices, reduced access, and decreased choices for consumers – and to reject the House bill and its companion Senate bill. See [www.ftc.gov/opa/2012/05/ncdentists.shtm](http://www.ftc.gov/opa/2012/05/ncdentists.shtm).

103. **Veterinarians.** On April 26, 2012, at the request of a member of the Alabama House of Representatives, the Commission filed comments regarding an Alabama House bill that would allow veterinarians to be employed by a limited services 501(c)(3) nonprofit facility that performs only spay and neuter surgeries and vaccinations given at the time of surgery, designates a licensed veterinarian to supervise veterinary medical practice, and has received an approved premises permit from the Board of Veterinary Medical Examiners. FTC staff commented that the bill is likely to benefit consumers by increasing consumer access to, and choices among, spay and neuter services for their pets, and thus supports the passage of the bill. See [www.ftc.gov/opa/2012/04/alabamavets.shtm](http://www.ftc.gov/opa/2012/04/alabamavets.shtm).



104. **Health Care, Nursing.** On April 20, 2012, FTC staff responded to a request from two members of the Louisiana House of Representatives regarding a bill that would remove the collaborative practice requirement for Advanced Practice Registered Nurses (“APRNs”) who practice in medically underserved areas or treat medically underserved populations. FTC staff recommended that, given the potential benefits of eliminating unwarranted impediments to APRN practice, the Louisiana legislature should seek to ensure that statutory limits on APRNs are no stricter than patient protection requires. In its comments, the FTC concluded that the bill appears to be a procompetitive improvement in the law that would benefit Louisiana health care consumers. See [www.ftc.gov/opa/2012/04/louisiana.shtm](http://www.ftc.gov/opa/2012/04/louisiana.shtm).

105. **Health Care, Health Professions.** On March 27, 2012, the Commission submitted comments to a Missouri State Representative regarding a proposed bill to regulate providers of pain management services, advising that the legislature should carefully investigate patient safety issues and ensure that any statutory limits on certified registered nurse anesthetists (“CRNAs”) are no stricter than patient safety requires. Staff cautioned that by restricting the provision of services by CRNAs, the proposed bill could exacerbate problems of access to care, especially for rural and other underserved populations. Staff further cautioned that the bill could also impede price and non-price competition among providers of pain management services and increase costs to Missouri citizens. See [www.ftc.gov/opa/2012/03/missouripain.shtm](http://www.ftc.gov/opa/2012/03/missouripain.shtm).

106. **Health Care, Health Professions.** On March 26, 2012, staff advised a member of the Kentucky State Senate regarding a proposed bill, suggesting that the legislature carefully investigate patient safety issues and ensure that any statutory limits on APRNs are no stricter than patient safety requires. Eliminating the currently required collaborative prescribing agreement requirement may improve access and consumer choice for primary care services, especially for rural and other underserved populations, and may also encourage beneficial price competition that can help contain health care costs. The Commission advised that the bill appears to be a procompetitive improvement in the law that would benefit Kentucky health care consumers. See [www.ftc.gov/opa/2012/03/kentucky.shtm](http://www.ftc.gov/opa/2012/03/kentucky.shtm).

107. **Dentistry.** On November 16, 2011, the Commission responded to a request for comments from the Executive Secretary of the Maine Board of Dental Examiners. FTC staff stated that the dental hygienist rules proposed by the Board, designed to implement a pilot project to test expanded access to dental care in underserved areas of Maine, contain restrictions that could undermine the project’s purpose and deny consumers the benefits of competition among providers of dental health services. The FTC further recommended that the Board not impose the proposed restrictions. See [www.ftc.gov/opa/2011/11/mainedental.shtm](http://www.ftc.gov/opa/2011/11/mainedental.shtm).

108. **Health Care, Physician Collective Bargaining.** On October 20, 2011, FTC staff responded to a request from a New York State Senator to comment on a proposed bill. The bill, if enacted, would authorize independent health care providers to collectively negotiate a variety of contract provisions with certain health plans, including fees and other non-fee-related matters. In its comments, the FTC stated that New York consumers would likely face higher health care costs and decreased access to health care services under the proposed legislation, beyond what the antitrust laws permit. FTC staff recommended that the New York State Assembly reject the bill. See [www.ftc.gov/opa/2011/10/nyhealthcare.shtm](http://www.ftc.gov/opa/2011/10/nyhealthcare.shtm).

### 6.1.3 DOJ and FTC Trade Policy Activities

109. The Agencies are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Agencies participate in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative, and provide antitrust and other legal advice to U.S. trade agencies. The Division also works with other Department components (including the Civil, Criminal, and Environmental and

Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole.

110. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate in competition policy discussions associated with APEC and the Trans-Pacific Partnership (“TPP”) negotiations.

## 7. New Studies Related to Antitrust Policy

### 7.1 *Joint Conferences and Reports*

111. **Patent Assertion Entity Activities Workshop.** On December 10, 2012, the Agencies jointly hosted a workshop in Washington D.C. to explore the impact of patent-assertion entity (“PAE”) activities on innovation and competition and the implications for antitrust enforcement and policy. The workshop examined, among other topics, the legal treatment of PAE activity, economic theories concerning PAE activity, and industry experiences. Additional information on the workshop is *available at* [www.ftc.gov/opp/workshops/pae](http://www.ftc.gov/opp/workshops/pae).

112. **Workshop on Most-Favored-Nation Clauses and Antitrust Enforcement and Policy.** On September 10, 2012, the Agencies held a joint public workshop in Washington, DC on most-favored-nation clauses (“MFNs”). The workshop provided a forum to explore the use of MFN clauses and the implications for antitrust enforcement and policy. The workshop consisted of a series of panels examining, among other topics, the legal treatment of MFNs, economic theories concerning MFNs and why they are used, and industry experiences with MFNs. Additional information on the workshop is *available at* [www.ftc.gov/opa/2012/08/mfn.shtm](http://www.ftc.gov/opa/2012/08/mfn.shtm).

### 7.2 *FTC Conferences, Reports, and Economic Working Papers*

#### 7.2.1 *Conferences and Workshops*

113. **Pet Medications.** On October 2, 2012, the FTC hosted a workshop to examine competition and consumer protection issues in the pet medications industry. The workshop considered: (a) how current industry distribution and other business practices effect consumer choice and price competition for pet medications; (b) the ability of consumers to obtain written, portable prescriptions that they can fill wherever they choose; and (c) the ability of consumers to verify the safety and efficacy of pet medications that they purchase. The workshop also examined the extent to which recent changes to restricted distribution and prescription portability practices in the contact lens industry might yield lessons applicable to the pet medications industry. Additional information on the workshop is *available at* [www.ftc.gov/opp/workshops/petmeds/index.shtml](http://www.ftc.gov/opp/workshops/petmeds/index.shtml).

#### 7.2.2 *Bureau of Economics Working Papers*

114. The FTC’s Bureau of Economics issued the following working papers during FY 2012. The papers are *available at* [www.ftc.gov/be/econwork.shtm](http://www.ftc.gov/be/econwork.shtm).

- David J. Balan, George Deltas, Better Product at Same Cost, Lower Sales and Lower Welfare, June 2012
- Nathan Wilson, Local Market Structure and Strategic Organizational Form Choices, March 2012
- Nathan E. Wilson, The Impact of Vertical Contracting on Firm Behavior: Evidence from Gasoline Stations, January 2012

- Nathan E. Wilson, Branding, Cannibalization, and Spatial Preemption: An Application to the Hotel Industry, November 2011

### 7.3 *DOJ Conferences, Reports, and Economic Working Papers*

#### 7.3.1 *DOJ Conferences and Reports*

115. **Competition and Agriculture Report.** In May 2012, the Department issued a report entitled, “Competition and Agriculture: Voices From the Workshops on Agriculture and Antitrust Enforcement in Our 21st Century Economy and the Way Forward,” that shared with agriculture and antitrust communities what the Division learned at a series of five agriculture competition workshops held jointly with the U.S. Department of Agriculture during 2010. The workshop sessions covered a range of agricultural commodities including row crops, dairy products, hogs, cattle, and poultry. The series of one-day conferences held at venues around the United States explored viewpoints across a wide spectrum including farmers, processors, retailers, government officials and academics. The report delineates the major issues discussed at the workshops. One lesson of the workshops is that antitrust enforcement and competition advocacy play a crucial role in fostering a healthy and competitive agriculture sector. But it is also clear that many of the challenges facing the agriculture sector today fall outside the purview of the antitrust laws and will require public and private cooperation to find solutions. The report is *available at* [www.justice.gov/atr/public/reports/index.html](http://www.justice.gov/atr/public/reports/index.html). Transcripts and video of the workshops as well as links to more than 18,000 public comments are *available at* [www.justice.gov/atr/public/workshops/ag2010/](http://www.justice.gov/atr/public/workshops/ag2010/).

#### 7.3.2 *DOJ Economic Analysis Group Discussion Papers*

116. The DOJ Economic Analysis Group issued the following papers during FY 2012. The papers are *available at* [www.usdoj.gov/atr/public/eag/discussion\\_papers.htm](http://www.usdoj.gov/atr/public/eag/discussion_papers.htm).

- Anthony Creane and Thomas D. Jeitschko, Endogenous Entry in Markets with Unobserved Quality, August 2012
- Thomas D. Jeitschko and Nanyun Zhang, Adverse Effects of Patent Pooling on Product Development and Commercialization, July 2012
- Anthony Creane and Thomas D. Jeitschko, Shipping the Good Apples Out Under Asymmetric Information, April 2012
- William W. Nye, Some New Evidence About the Effects of U.S. Antidumping Orders and Their Administrative Reviews on the Prices of Covered Imports, April 2012
- Yan Li and Russell Pittman, The Proposed Merger of AT&T and T-Mobile: Are There Unexhausted Scale Economies in U.S. Mobile Telephony?, April 2012
- Charles J. Romeo, Incorporating Prior Information into a GMM Objective for Mixed Logit Demand Systems, April 2012

## APPENDICES

**Department of Justice: Fiscal Year 2012 FTE<sup>7</sup> and Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	282	\$65,667
Civil Enforcement	423	\$98,500
Total	705	\$164,167

**Federal Trade Commission: Fiscal Year 2012 Competition Mission FTE and Dollars by Program, Bureau & Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission		
<i>Bureau of Competition</i>	271.0	49,962.9
<i>Bureau of Economics</i>	73.7	12,146.2
<i>Regional Offices</i>	25.1	4,266.5
<i>Mission Support</i>	136.2	49,287.0
Premerger Notification		
<i>Bureau of Competition</i>	21.7	3,348.3
<i>Bureau of Economics</i>	0.1	16.2
<i>Regional Offices</i>	0.4	64.8
Merger & Joint Venture Enforcement		
<i>Bureau of Competition</i>	130.1	22,051.9
<i>Bureau of Economics</i>	42.5	6,915.0
<i>Regional Offices</i>	7.3	1,190.3
Merger & Joint Venture Compliance		
<i>Bureau of Competition</i>	1.6	246.8
<i>Bureau of Economics</i>	---	---
<i>Regional Offices</i>	---	---

<sup>7</sup> An "FTE" or "full time equivalent" amounts to one employee working full time for a full year. Because the number of employees fluctuates throughout the year through hiring, attrition, and varying schedules, an agency typically has more employees than FTEs (e.g. two employees working 20 hours per week for one full year equals one FTE).

Nonmerger Enforcement		
<i>Bureau of Competition</i>	105.3	18,486.2
<i>Bureau of Economics</i>	20.4	3,365.5
<i>Regional Offices</i>	12.9	2,116.7

Nonmerger Compliance		
<i>Bureau of Competition</i>	0.3	46.3
<i>Bureau of Economics</i>	---	---
<i>Regional Offices</i>	---	---

	<b>FTE</b>	<b>Amount (\$ in thousands)</b>
Antitrust Policy Analysis		
<i>Bureau of Competition</i>	0.3	46.3
<i>Bureau of Economics</i>	6.6	1,072.4
<i>Regional Offices</i>	---	---
Other Direct		
<i>Bureau of Competition</i>	11.7	2,737.1
<i>Bureau of Economics</i>	4.1	777.1
<i>Regional Offices</i>	4.5	894.7
Support	136.2	49,287.0