

COMPETITION LAW AND POLICY IN THE UNITED STATES

THE UNITED STATES

(From 1 October 2001 to 30 September 2002)

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

(October 1, 2001 through September 30, 2002)

Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2001, through September 30, 2002 (“FY 2002”). It summarizes the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

I. Changes in law or policies

A. Changes in Antitrust Rules, Policies or Guidelines

2. On January 4, 2002, AAG James announced a modernization of the Antitrust Division so as to address new industries, network competition, and other emerging trends in the economy. The restructuring redefines areas of responsibility and streamlines reporting lines in order to improve overall efficiency. The modernization plan concentrates investigatory and enforcement expertise and resources for commodities within particular sections and minimizes the dispersion of efforts across sections. It also assigns to each section enforcement responsibility for both civil merger and non-merger matters. The modernization effort recognizes the emergence and future importance of certain areas of the economy-- including information technology, telecommunications and industries characterized by network competition--and the need for concentrated, focused expertise in these industries.

3. After extensive internal review and analysis of the Division's best practices for investigating mergers and acquisitions, AAG James announced on October 12, 2001 the details of the Merger Review Process Initiative. The goals of the initiative are to more quickly identify critical legal, factual and economic issues regarding proposed mergers, facilitate more efficient and more focused investigative discovery, and provide for an effective process for the evaluation of evidence; it should also, where possible, reduce the investigative burden upon parties proposing transactions. The initiative, which is completely voluntary for parties proposing mergers, addresses the use of the initial 15- (for cash tenders and bankruptcy transactions) or 30-day waiting period, the issuance of the Second Request, and the post-Second Request Period:

- Initial 30-day waiting period: The staff is encouraged to be as aggressive as possible during the initial 15- or 30-day waiting period by making voluntary requests for information, and through early consultation with the parties.
- Issuance of Second Request: The staff will use the knowledge gained within the initial 15- or 30-day period to tailor the Second Requests as narrowly as possible to the transaction and the goals of the investigation.
- Post-Second Request Period: The initiative encourages staff to engage in regular consultations with the parties, and in appropriate circumstances commit to procedural agreements in exchange for specific undertakings by the parties regarding their submission of information and compliance with particular investigative requests.

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4. The Commission's Bureau of Competition has established three new task forces. The Merger Litigation Task Force is be responsible for reinvigorating the Commission's hospital merger program, which includes a review of, and potential challenge to, consummated transactions that may have resulted in anticompetitive price increases. The Task Force also focuses on merger enforcement in the retail industry, particularly regarding matters involving food, beverages, and supermarkets. Two other task forces are examining two specific antitrust immunities, the State Action Doctrine and the Noerr-Pennington Doctrine. Both of these immunities can serve important Constitutional interests but it is sound antitrust policy to seek to limit them to situations that fulfil their underlying purposes. The task forces will consider a variety of actions, including antitrust enforcement, amicus briefs, and competition advocacy.

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

5. Over the course of 2002, the Antitrust Division and the Federal Trade Commission held joint hearings entitled "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy." At these hearings, the agencies examined the appropriate balance between antitrust and intellectual property law and policy. The hearings panels included business people, academics and practitioners representing a wide range of views on topics central to the debate about intellectual property and antitrust policy. Some of the panels discussed the ways in which intellectual property rights and competition each create incentives to innovate. Other panels focused on the effects of the U.S. patent regime on competition. Another primary focus was on competition concerns related to the licensing of intellectual property. Panels examined a number of issues in detail: 1) patent pools and cross-licensing; 2) standard setting; 3) refusals to license intellectual property; 4) the bundling of intellectual property and the extension of intellectual property rights; 5) agency analysis of uncertain intellectual property rights; 6) settlements; and 7) an international comparative law perspective on refusals to license and bi-lateral/multiparty licensing. The hearings concluded in November 2002. The agencies expect to complete a joint report based on the hearing record within the next year.

6. The FTC is studying the use of disgorgement as a remedy for competition violations, including those involving the Hart-Scott-Rodino (HSR) Premerger Notification Act, the FTC Act, and the Clayton Act. The Commission has considerable experience with the use of monetary equitable remedies in consumer protection cases, but it has considered disgorgement or other forms of monetary equitable relief in fewer competition matters, and has obtained monetary disgorgement in only limited circumstances, including two recent matters, *FTC v. Mylan Laboratories, et al.* and *FTC v. The Hearst Trust, et al.* The Commission has solicited public comments on the factors it should consider in applying this remedy in competition cases and how disgorgement should be calculated. The Commission is not re-examining its statutory authority to seek disgorgement or other monetary equitable relief in competition cases.

7. The Commission's Bureau of Competition held a number of workshops in different cities during the year regarding modifications and improvements to the Commission's merger investigations process and its use of specific remedy provisions. The Commission used the workshops to solicit input from a broad range of interest groups including corporate personnel, outside and in-house attorneys, economists, consumer groups, and others who have participated in the FTC's or Division's merger review process. The workshops were held in response to criticism and suggestions received by the FTC over the past several years regarding the burdensome requirements of the second request process and the length and criteria of the process for developing and negotiating remedies. Specific areas in which the Commission sought input included: the efficiency of the merger review process; the time and expense involved in the process; the perceived stringency of the remedy requirements; and the information that parties should provide during the review process. To facilitate the discussion for the remedies workshops, the Commission published a series of "Frequently Asked Questions About Merger Consent Order Provisions" (<http://www.ftc.gov/bc/mergerfaq.htm>).

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8. In a report titled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," the Commission recommended legislative action designed to ensure that two provisions of the Hatch-Waxman Amendments do not delay generic drug entry to market. The Commission's recommendations would permit only one 30-month stay on the entry of a generic drug during pending patent-infringement litigation, and would support new legislation that would require brand-name companies and first generic applicants to provide copies of certain agreements to the FTC and the Department of Justice for review. The report states that "beyond any doubt, Hatch-Waxman has increased generic drug entry," but goes on to say that "two of the provisions governing generic drug approval (the 180-day exclusivity and the 30-month stay provisions) are susceptible to strategies that, in some cases, may have prevented the availability of more generic drugs ... [and] ... have the potential for abuse." Accordingly, the report recommends that Hatch-Waxman be amended to permit only one automatic 30-month stay per drug product, per generic entry application, and only resolve infringement disputes over patents listed in the "Orange Book" prior to the filing of the generic's entry application. The study is available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

9. During their presentation of reauthorization testimony before the Senate Subcommittee on Consumer Affairs, Foreign Commerce and Tourism of the Commerce Committee, the FTC Commissioners presented legislative recommendations that would improve the FTC's ability to implement its mission and to serve consumers. The recommendations included the elimination of the FTC Act's exemption for communications common carriers, and proposed technical changes related to the authority the FTC currently possesses, requesting: 1) the ability to accept reimbursement for expenses incurred by the agency in assisting foreign or domestic law enforcement agencies; and 2) the ability to accept volunteer services, in-kind benefits, or other gifts or donations. (<http://www.ftc.gov/opa/2002/07/reauthtest.htm>).

C. International Antitrust Cooperation Developments

10. Antitrust agencies including the DOJ and FTC from 14 countries launched the International Competition Network (ICN) in October 2001 to provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement. Nearly 80 antitrust agencies in nearly 70 jurisdictions have joined the ICN. The ICN is guided by a Steering Group made up of a total of 15 members who are elected every two years. The DOJ and FTC are members of the Steering Group.

11. ICN is project-oriented. Its first two projects are merger review and competition advocacy in emerging economies; a third project was recently added on capacity building and competition policy implementation. Projects are advanced in working groups, the members of which work together largely by Internet and frequent telephone calls. The DOJ is chair of the merger working group, which has subgroups that are initially focusing on three areas: notification and procedures, chaired by the FTC, the analytical framework for merger review and investigative techniques. Members of the private sector either participate directly in working groups or provide input through national members.

12. Members meet annually at a conference where the working groups present their accomplishments for the year and discuss new work and administrative issues. The first annual conference was held in Naples, Italy in September 2002, and was attended by ICN members and members of the private sector from 59 jurisdictions. The merger subgroup on notification and procedures developed a set of eight guiding principles around which a merger review system should be built. The guiding principles were adopted at the Naples conference. The subgroup also developed three detailed recommended practices for merger notification procedures, which were endorsed by the members in Naples, realizing a common desire to recognize the concepts of jurisdictional nexus, the development of objective and understandable merger notification thresholds, and appropriate flexibility in the timing of merger notifications. The next annual conference will be held in Merida, Mexico in June 2003.

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

13. At the end of FY 2002, the Division employed 777 individuals: 336 attorneys, 59 economists, 158 paralegals, and 224 other professional staff. For FY 2002, the Division received an appropriation of \$130,791,000.

14. During FY 2002, the Division opened 243 investigations and filed 40 civil and criminal cases in federal district court. The Division was party to two antitrust cases decided by the federal courts of appeals and one Supreme Court case.

15. During FY 2002, the Division filed 33 criminal cases in which it charged 14 corporations and 32 individuals. Seventeen corporate defendants and nineteen individuals were assessed fines totalling \$102.5 million and 19 individuals were sentenced to a total of 10,501 days of incarceration. Another sixteen individuals were sentenced to spend a total of 3,607 days in some form of alternative confinement.

16. During FY 2002, 1,187 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the HSR Act. In addition, the Division screened a total of 1,079 bank mergers. The Division further investigated 102 mergers and challenged 4 of them in court. An additional six transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 129 civil investigations (merger and non-merger), and issued 573 civil investigative demands (a form of compulsory process). The Division filed three non-merger civil complaints. Also during FY 2002, the Division responded to six requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

17. At the end of FY2002, the FTC's Bureau of Competition had 262 employees: 177 attorneys, 33 other professionals, 27 paralegals, and 25 clerical staff. The FTC also employs about 50 economists who participate in its antitrust enforcement activities. In FY 2002, \$42,413,200 was allocated to the Commission's competition mission.

18. During FY 2002, the Commission brought a total of 34 competition enforcement actions. Based on its review of premerger notification filings, the Commission staff opened 184 initial phase investigations and issued requests for additional information ("second requests") in 27 transactions. The Commission challenged 18 transactions. Five preliminary injunctions were authorized; 10 consent orders were accepted; 5 transactions were abandoned after the issuance of the second requests and 2 during the course of the investigation. One civil penalty action was brought with respect to a violation of the premerger filing requirements.

19. In the non-merger area, the Commission brought 9 enforcement actions challenging a variety of anticompetitive conduct. Eight were tentatively resolved by consent agreements, three of which were pending at the end of FY2002. There was one administrative complaint with a trial pending at the end of FY 2002.

B. Antitrust Cases in the Courts

1) *United States Supreme Court*

20. The United States Supreme Court did not decide any antitrust cases in FY 2002. The Court denied Microsoft's petition for certiorari in an Antitrust Division case (*Microsoft Corp. v. United States*, 122 S. Ct. 350 (2002)) and denied a petition for certiorari in a case where the United States submitted a brief amicus curiae opposing review (*Statoil ASA v. HeereMac v.o.f.*, 122 S. Ct. 1059 (2002)).

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

a. Significant DOJ Cases Decided in FY 2002

21. There were two dispositions by the U.S. courts of appeals in Antitrust Division cases in FY 2002, one civil and one criminal. The civil case concerned interpretation of a consent decree (*United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2001)). The criminal case grew out of the investigation into price fixing by the Christie's and Sotheby's auction houses. The court upheld the conviction of A. Alfred Taubman, the former chairman of Sotheby's (*United States v. Taubman*, 297 F.3d 161 (2d Cir. 2002)).

22. There were also two final decisions in cases where the United States participated as amicus curiae.

3) *Private Cases Having International Implications in FY 2002*

23. In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), a class action follow-on to the criminal price-fixing investigation of the Christie's and Sotheby's auction houses, the court of appeals reversed the district court's dismissal of the case for lack of subject matter jurisdiction and allowed the class of buyers and sellers at *foreign* auctions to proceed. The court reasoned that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (codified at 15 U.S.C. 6a), did not change the prior law of the Second Circuit, under which anticompetitive conduct directed at foreign markets is regulated by the Sherman Act if has the effect of causing injury to domestic commerce by (1) reducing the competitiveness of a domestic market, or (2) making possible anticompetitive conduct directed at domestic commerce. The court disagreed with the Fifth Circuit, which held previously that Section 6a(2) of the FTAIA requires that the "effect" on domestic commerce be the basis for the alleged injury suffered by the plaintiff (*Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001)). The case was recently settled by the parties.

24. In *Dee-K Enterprises, Inc. v. Heveafil SDN. BHD*, 299 F.3d 281 (4th Cir. 2002), the court of appeals upheld a jury finding that an alleged price-fixing conspiracy of Southeast Asian rubber thread producers and some of their U.S. subsidiaries and distributors did not have a "substantial effect" on United States commerce. Under the "substantial effect" test of *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) which, in conjunction with the FTAIA, limits the Sherman Act's application to foreign conduct, the district court therefore lacked subject matter jurisdiction over the case. To determine that the "substantial effect" test was the applicable legal standard, the court weighed the alleged "foreign" and "domestic" conduct and concluded that the conspiracy involved "primarily" foreign conduct. A petition for certiorari, filed by the plaintiffs, is pending in the Supreme Court, and the Court has requested the views of the United States.

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C. Statistics on Private and Government Cases Filed

25. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 830 new civil and criminal antitrust actions, both government and private, were filed in the federal district courts in FY 2002.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

26. **Federal Emergency Management Agency (FEMA):** On January 22, 2002, Austin “Sonny” Shelton, a former government official in Guam, was sentenced to 10 years in jail – the longest antitrust-related jail sentence ever imposed – for orchestrating a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts.

27. **Carbon Cathode Block:** In March 2002, Nippon Electrode Company Ltd. (NDK), a Japanese company, and VAW Carbon GmbH (VAW), a German company, agreed to plead guilty and pay fines for fixing the price of carbon cathode block. Cathode block is a carbon product known for its strength and resistance to heat and chemical reaction, and is commonly used in aluminium smelters or spots in the production of primary aluminium sold in the United States and elsewhere. NDK agreed to pay a \$450,000 criminal fine and VAW agreed to pay a \$990,000 fine. In May 2002, the former president of NDK, Shogo Ando, and a former executive of VAW, Manfred Mueller, were indicted for participating in the price-fixing conspiracy that began as early as June 1995 and continued until at least December 1997. In March 2001, an Ohio company, Anchor Industrial Products Inc., formerly Hepworth Refractories Inc. (Hepworth), was the first company to plead guilty to participating in this conspiracy, and the company paid a \$600,000 fine in April 2001. John Casewell and Ian Hutchinson, both citizens of the United Kingdom and former executives with Hepworth, agreed to plead guilty in September 2002. Casewell agreed to pay a \$28,000 fine, and Hutchinson agreed to pay a \$30,000 fine and to face a possible six-month jail sentence.

28. **Chemical Markets for Monochloroacetic Acid (MCAA) and Organic Peroxides:** In March 2002, Elf Atochem S.A., an international French-based chemical conglomerate, agreed to plead guilty and pay fines totalling \$8.5 million for participating in two anti-competitive conspiracies to suppress competition in the industrial chemical markets for MCAA and organic peroxides. In addition, two of the company’s executives pleaded guilty separately in March and August. They each agreed to serve 90-day jail sentences in the U.S., and to pay a \$50,000 criminal fine for their roles in the MCAA conspiracy. Elf Atochem was the second company to plead guilty to participating in the international MCAA conspiracy, and it was the first to be implicated in the international conspiracy involving organic peroxides. In June 2001, Akzo Nobel Chemicals BV, a Dutch company, pleaded guilty and was sentenced to pay a \$12 million fine for its role in the MCAA conspiracy, and one of its executives was sentenced to serve a three-month jail sentence in the U.S. and to pay a \$20,000 fine.

29. **Construction Contracts:** On February 12, 2002, a federal jury in Birmingham, Alabama found Elmore Anderson, former president of Bilhar International Establishment, guilty of one count of rigging bids on U.S.-funded construction projects in the Arab Republic of Egypt and one count of conspiring to defraud the United States Agency for International Development (USAID). The company pleaded guilty and agreed to pay \$54 million for its role in the big-rigging conspiracy on February 4, 2002.

30. **Food Industry:** On November 9, 2001, Melvyn Merberg, the former president of Jitney Ltd., a New York food company, was sentenced to serve 63 months in prison for his role in multi-million dollar bid rigging, fraud, and tax conspiracies. The customers victimized by the conspiracies were primarily not-for-profit social service organizations located in the New York City area, including schools, a jail, and a

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drug rehabilitation center. The fraudulent schemes affected contracts valued at more than \$210 million. The sentence at the time was the longest prison term ever imposed in a case prosecuted solely by the Department's Antitrust Division. Merberg was also ordered to pay a total of \$2.2 million in restitution to 138 victims as well as to file accurate amended tax returns and pay an estimated \$2 million in back taxes, penalties, and interest. Merberg was the 17th food company executive sentenced to prison in connection with this ongoing investigation.

31. In March 2002, Toho Tenax Co. Ltd. (Toho Japan) of Tokyo, Japan, formerly known as Toho Rayon Co. Ltd., its American subsidiary, Toho Carbon Fibers Inc. (Toho USA), and Jinnosuke Takeda, a Toho Japan executive, were indicted by a federal grand jury in Los Angeles for obstruction of justice in connection with the investigation of possible price fixing in the carbon fiber industries. The indictment charges that Toho Japan, Toho USA, and Takeda caused incriminating documents to be secretly removed from the U.S. headquarters of Toho USA and to be sent to the headquarters of Toho Japan in Tokyo, in an effort to prevent the grand jury from receiving the documents which had been subpoenaed in January 1999 by a federal grand jury investigating possible violations of Section 1 of the Sherman Act. These documents were later discovered in Toho Japan headquarters by Japanese law enforcement officials.

2) *DOJ Civil Non-Merger Enforcement*

32. **Federation of Physicians and Dentists:** On October 22, 2001, the DOJ reached a settlement with the Federation of Physicians and Dentists which would stop the national organization from engaging in illegal joint contract negotiations seeking to force health plans to pay increased physician fees. In its suit, the Department alleged that the Federation had recruited nearly all the private practice orthopaedic surgeons in Delaware as members and organized its member orthopaedists to terminate their contracts with Blue Cross & Blue Shield of Delaware to force Blue Cross to accede to their demands on increasing physician fees.

33. **Mathworks/Wind River:** On June 21, 2002, the DOJ filed a civil antitrust lawsuit and proposed consent decree against The MathWorks Inc. and Wind River Systems Inc. to stop the companies from illegally allocating the markets for software used to design dynamic control systems. Dynamic control system design software enables engineers to develop the computerized control systems of sophisticated devices, such as anti-lock brake systems for automobiles, guidance and navigation control systems for unmanned spacecraft, and flight control systems for aircraft. The MathWork's dynamic control system software is the Simulink product group, and Wind River's competing product is MATRIXx. The lawsuit alleged that the agreement with Wind River gave The MathWorks control over the prices, marketing, support, and future development of the Wind River dynamic control system design tools. The MathWorks also announced its intention to undertake no further development of the Wind River MATRIXx products. In August 2002, the Division and The MathWorks reached a settlement that requires The MathWorks to offer for sale Wind River's design control software, the MATRIXx product line.

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

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nine states sought a broad array of remedies in addition to those secured by the United States. The district court rejected virtually all of the non-settling states' proposals, finding that they exceeded the proper scope of the case. Two of the non-settling states have appealed that decision.

35. **National Association of Police Equipment Distributors:** On July 29, 2002, the DOJ reached a settlement with the National Association of Police Equipment Distributors Inc. (NAPED) that would prohibit NAPED from engaging in an unlawful group boycott of manufacturers that sell police equipment directly to state and local governments under a federal program operated by the General Services Administration (GSA). NAPED is a trade association of competing distributors and dealers who carry a wide range of police equipment products. The GSA program was established to make police equipment available to state and local law enforcement agencies directly from the manufacturer at the reduced prices negotiated by GSA for federal law enforcement agencies using the equipment for drug interdiction. The proposed settlement prohibits NAPED from taking any action to discourage or prevent manufacturers from participating in the GSA program.

36. **Visa/MasterCard:** In October 1998, the Division sued Visa and MasterCard, the two largest credit/charge card networks (accounting for 75 percent of all credit card purchases), challenging (1) the joint control of both networks by the same group of banks, and (2) exclusionary rules adopted by both networks to restrict the ability of banks to issue cards on other networks, such as American Express and Discover. The case was tried in summer 2000 in the U.S. District Court for the Southern District of New York. In October 2001, the district court held that the exclusionary rules violated the antitrust laws but that Visa and MasterCard's overlapping governance did not. Visa and MasterCard have appealed with respect to the exclusionary rules, and the parties currently await oral argument in the court of appeals.

3) *FTC Non-Merger Enforcement Actions*

37. **Schering-Plough:** The initial decision filed by the administrative law judge hearing the case dismissed all allegations of anticompetitive conduct brought by the Commission in its complaint against pharmaceutical manufacturers Schering-Plough Corporation (Schering) and Upsher-Smith Laboratories (Upsher-Smith). As previously reported, the Commission had charged these respondents and American Home Products Corporation (AHP), with entering into anticompetitive agreements aimed at keeping low-cost generic drugs off the market. The Commission's administrative complaint alleged that Schering, the maker of K-Dur 20, a widely prescribed potassium chloride supplement, illegally paid Upsher-Smith and American Home Products millions of dollars to induce them to delay launching their generic versions of the drug beyond any delay to which they might have agreed without such payments. The initial decision has been appealed and the matter is pending before the Commission. The text of the Initial Decision is available at <http://www.ftc.gov/os/2002/07/scheringinitialdecisionp1.pdf>. (D-9297)

Separately, the Commission approved a final consent agreement with AHP that would settle charges brought against it in the original complaint. The settlement prohibits several types of potentially anticompetitive agreements between AHP and other drug companies, and requires AHP to notify the Commission before entering into some other types of agreements in the future. (D-9297)

38. **Biovail/Elan:** The Commission also approved a final consent agreement against two generic drug manufacturers to resolve charges that they entered into an agreement that unreasonably reduced competition in the market for a generic anti-hypertension drug. In its complaint against Biovail Corporation (Biovail), a Canadian corporation, and Elan Corporation, plc (Elan), an Irish company, the FTC alleged that the companies had entered into an agreement that provided substantial incentives not to compete in the market for the 30 mg and 60 mg dosage forms of generic Adalat CC. The consent order requires the companies to terminate their agreement and prohibits them from entering into similar

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agreements in the future. The order is the Commission's first enforcement action regarding an allegedly anticompetitive agreement between two competing generic drug manufacturers. (C-4057)

39. **Biovail-Tiazac:** In a separate action the Commission agreed to settle its charges against Biovail for allegedly illegally acquiring an exclusive patent license and wrongfully listing that patent in the U.S. Food and Drug Administration's (FDA) "Orange Book" for the purpose of blocking generic competition to its branded drug Tiazac. According to the Commission's complaint, Biovail unlawfully acquired an exclusive patent license to protect its monopoly in the market for Tiazac and generic versions of Tiazac. Tiazac is a drug used to treat high blood pressure and chronic chest pain. The acquired license was for a patent on a unique formulation of the active ingredient in Tiazac. The complaint also alleged that Biovail maintained its monopoly by wrongfully listing the acquired patent in the Orange Book and by making misleading statements to the FDA. To resolve these charges, Biovail must divest part of its exclusive rights. The order prohibits any action by Biovail that would cause a statutory stay on generic Tiazac entry into the market, and also prohibits Biovail from wrongfully listing patents in the Orange Book in the future and requires Biovail to notify the FTC prior to acquiring patents that will be listed in the Orange Book. (C-4060)

40. **AIC:** The American Institute for Conservation of Historic and Artistic Works (AIC) agreed to a final consent order to settle FTC charges that the organization engaged in anticompetitive behaviour by discouraging its 3,100 members from engaging in price competition. AIC is an association of professional conservators -- individuals who manage, care for, preserve, or treat cultural objects, including artistic, historical, archaeological, scientific or religious objects. According to the complaint, the respondent's *Commentaries to the Guidelines for the Practice of the AIC* deemed it "unprofessional behaviour" to work at either reduced rates or at no charge, except under limited circumstances. In settling charges that the *Commentaries* invite anticompetitive behaviour, AIC has agreed not to enforce these restrictions and to remove them from its *Commentaries*. (C-4065)

41. **Rambus:** The Commission charged Rambus, Inc., based in Los Altos, California, with deliberately engaging in a pattern of anticompetitive acts and practices that served to deceive an industry-wide standard-setting organization, resulting in adverse effects on competition and consumers. The standards organization -- the JEDEC Solid State Technology Association -- develops and issues widely adopted technical standards for a common form of computer memory known as synchronous dynamic random access memory (SDRAM). Memory chips incorporating JEDEC's SDRAM standards are used in a wide variety of downstream products, including both personal and network computers, fax machines, printers, digital video recorders, video game equipment, and personal digital assistants. In developing standards for use throughout the semiconductor industry, JEDEC has endeavored to promote free competition among industry participants.

According to the complaint, Rambus participated in JEDEC's SDRAM-related work for more than four years without making it known to JEDEC or its members that Rambus was actively working to develop, and did in fact possess, a patent and several pending patent applications that involved specific technologies proposed for, and ultimately adopted in, the relevant standards. The complaint alleges that "Rambus's very participation in JEDEC, coupled with its failure to make required patent-related disclosures, conveyed a materially false and misleading impression - namely, that JEDEC, by incorporating into its SDRAM standards technologies openly discussed and considered during Rambus's tenure in the organization, was not at risk of adopting standards that Rambus could later claim to infringe upon its patents."

As alleged in the complaint, Rambus's challenged conduct has caused or threatened to cause substantial harm to competition and consumers because it has placed Rambus in a position to assert patent rights over the relevant JEDEC standards, and to obtain substantial royalties from memory manufacturers

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producing products in compliance with those standards. The complaint asserts that a number of large memory manufacturers - including such well-known companies as Samsung, Hitachi, NEC, and Toshiba - have acquiesced to Rambus's royalty demands. Under these existing license agreements, Rambus is entitled to collect royalties in the range of \$50 to \$100 million per year.

According to a detailed "Notice of Contemplated Relief" attached to the complaint, such relief may include, among other things, an order preventing Rambus from enforcing any United States patents against producers and users of SDRAM technology, to the extent such patents derive from patent applications filed prior to Rambus's withdrawal from JEDEC. In addition, such relief may include an order preventing Rambus from enforcing certain foreign patents against producers and users of SDRAM technology, with respect to products intended for import into or export from the United States. The administrative proceeding is pending before an administrative law judge. (D-9302)

42. **Physician Organizations:** The FTC reached settlements in four cases presenting similar allegations that physician organizations and various individuals entered into agreements to fix fees and to refuse to deal with payers except on collectively agreed-upon terms. According to the complaints, in all cases the challenged conduct restrained price and other forms of competition among competing physicians and their organizations, caused fees for physician services to rise, and harmed purchasers of health care services, including health plans, employers, and individual patients.

Sometimes a network of competing physicians uses an agent to convey to payers information obtained individually from the physicians about fees or other significant contract terms that the physicians are willing to accept. The agent also may convey all payer contract offers to the physicians, which the physicians then unilaterally decide whether to accept or reject. Such a "messenger model" arrangement, which is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the FTC and U.S. Department of Justice (*see* <http://www.ftc.gov/reports/hlth3s.htm>), can facilitate contracting between physicians and payers and minimize the costs involved, without fostering an agreement among competing physicians on fees or fee-related terms.

The complaints allege generally that the respondents did not use a legitimate messenger model arrangement, but instead orchestrated boycotts and agreements among physicians to fix the prices and other terms they would accept from payers. Respondents and their members have not engaged in any cooperative joint activity that would justify collective negotiations over their terms of dealing with health plans. Under the orders' core provisions, the respondents are prohibited from entering into, participating in, or facilitating any agreement: 1) to negotiate on behalf of physicians with any payer or health care provider; 2) to deal or to refuse to deal with any payer or health care provider; 3) regarding any term or condition on which physicians deal, or are willing to deal, with any payer; or 4) not to deal individually with any payer, or to deal with any payer only through an arrangement involving the respondent(s). The proposed order also would bar the respondents from exchanging information concerning any physician's willingness to deal with a payer.

Final consent orders were entered in the matters: Physician Integrated Services of Denver, Inc. (C-4054) and Aurora Associated Primary Care Physicians, L.L.C. (C-4055); System Health Providers, Inc., and Genesis Physicians Group, Inc. (C-4064); R. T. Welter and Associates, Inc. (the order names one corporation, one individual and 8 physician practice groups) (C-4063); Obstetrics & Gynecology Medical Corp. of Napa Valley (OGMC) (the order names one corporation and six individuals) (File No. 011 0153).

43. **The Three Tenors:** The initial decision of an ALJ in the Commission's administrative action against a number of subsidiaries of Vivendi Universal S.A. ordered the companies to cease and desist from entering into "any combination, conspiracy, or agreement" with producers or sellers at wholesale of audio or video products to "fix, raise, or stabilize prices or price levels" in connection with the sale in or into the

United States of any audio or video product. As previously reported, the FTC had charged Warner Communications and PolyGram (predecessor to Vivendi Universal), two of the largest music distribution companies in the world, with fixing prices in connection with an otherwise legitimate joint venture (D-9298). The charges against Warner were settled earlier in a consent order. (C-4052)

E. Business Reviews Conducted by the Department of Justice

44. In FY02 the DOJ issued five business review letters announcing that it had no current intention to challenge proposals by (1) the Washington State Medical Association to conduct a fee and reimbursement survey of physicians and physician assistants and to publish the survey results, (2) a group of seven small, geographically dispersed community hospitals in Michigan to form a network to negotiate contracts on their behalf with insurance companies, employers, and managed care plans, (3) the National Consumer Telecommunications Data Exchange to expand its credit data exchange service, currently providing credit data exchange histories to telecommunications carriers, to include the electric power, gas, and water industries, (4) the Association of Fund-Raising Distributors and Suppliers to establish a uniform product ordering format for products sold to non-profit organizations for resale in their fund-raising activities, and (5) ten towing and barge companies that operate in various U.S. waters to exchange historical cost information in an effort to reduce operating costs.

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

A. Enforcement of Premerger Notification Rules

45. In October 2001, the Hearst Corporation agreed to pay \$4 million - the largest civil penalty a company had ever paid for violating antitrust pre-merger notification requirements - to settle charges that the company failed to produce key documents before undertaking an acquisition subject to review under the Hart-Scott-Rodino Act. According to the complaint filed by the DOJ, Hearst failed to submit to the antitrust enforcement agencies documents required to have been supplied along with its pre-merger notification when it acquired Medi-Span Inc., a producer of integratable drug data files, in 1998. The FTC's challenge of Hearst's acquisition of Medi-Span is described below in paragraph 56.

46. In April 2002, the DOJ filed a proposed settlement in its case filed in September 2001 against Computer Associates International Inc. and Platinum *technology* International *inc.* for violating pre-merger waiting period requirements and agreeing to restrict Platinum's ability to offer discounts to customers during the merger waiting period. The DOJ's civil law suit said that this conduct, known as "gun-jumping," violated the HSR and Sherman Acts. The Settlement required Computer Associates to pay \$638,000 in civil penalties and prevented Computer Associates from agreeing on prices, approving or rejecting proposed customer contracts, and exchanging prospective bid information with all future merger partners. In announcing the settlement, the DOJ stated that where Computer Associates is acquiring a competitor it may conduct ordinary due diligence, which may include, under narrow and restricted circumstances, obtaining access to pending bids that are material to its understanding of the future earnings and prospects of the acquisition candidate, but that employees directly involved in the sale of a competing product were prohibited from obtaining access to such information.

B. Significant Merger Cases

1) DOJ Merger Challenges or Cases

47. **ADM/MCP:** On September 6, 2002, the Department announced that it would require Archer-Daniels-Midland Company (ADM) and Minnesota Corn Processors, LLC (MCP) to dissolve a joint venture with a competing corn wet miller in order for ADM to proceed with its proposed \$634 million acquisition of MCP. The Department said the acquisition, as originally proposed, would have substantially

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lessened competition by reducing the number of independent competitors in the corn wet milling industry to four and making coordination among the remaining firms more likely.

48. **Aggregate/Wakefield:** On September 6, 2002, the Department announced that it would require Wakefield Materials Company to divest a ready-mix concrete facility serving northern metropolitan Boston in order to resolve antitrust concerns relating to the proposed \$85 million acquisition of Wakefield by Aggregate Industries plc. Wakefield agreed to sell its ready-mix concrete facility in Wakefield, MA, to J.G. MacLellan Concrete Co., Inc., a ready-mix concrete producer that operates plants in north-eastern Massachusetts and New Hampshire. In addition to the divestiture of the Wakefield facility, Aggregate Industries reached an agreement with the Massachusetts Attorney General's Office that required it to relinquish the lease held by Wakefield to a ready-mix concrete plant located in Worcester, MA.

49. **Manitowoc/Grove Investors:** On July 31, 2002, the Department announced that it would require Wisconsin-based The Manitowoc Company Inc. to divest either its own or the Pennsylvania-based Grove Investors Inc.'s boom truck business in order for Manitowoc to proceed with its proposed \$270 million acquisition of Grove. Grove (through its subsidiary, National Crane Corp.) and Manitowoc were, respectively, the largest and third largest producers of medium- and heavy-lift boom trucks in North America; together they accounted for more than 60 percent of the boom trucks sold in this market. Absent the divestitures, Manitowoc and one other competitor would have accounted for more than 90 percent of all medium-and heavy-lift boom trucks sold in North America. A "boom truck" is a stiff boom telescopic crane mounted on a standard flat-bed commercial truck chassis.

50. **General Dynamics/Newport News:** On October 23, 2001, the Department filed a lawsuit to block the proposed \$2.6 billion acquisition of Newport News Shipbuilding Inc. by General Dynamics Corporation. The Department of Defence coordinated with the DOJ in the investigation that resulted in the lawsuit and advised the Department that it had significant competitive concerns with the transaction. General Dynamics and Newport News are the only two nuclear-capable shipyards; they are the only designers and producers of nuclear submarines, and two of only three companies that build large ships of any kind for the U.S. Navy. The two shipbuilders also lead opposing teams to develop the next generation propulsion system for use in submarines and surface combatants, so-called "electric drive." The complaint alleged that the combination would create a monopoly in nuclear submarines design and construction and would substantially lessen competition for electric drive and surface combatants. Newport News received a second, ultimately successful, bid from Northrop Grumman, which did not raise significant competitive issues.

51. **Suiza/Dean:** On December 18, 2001, the Department announced that Suiza Foods Corporation and Dean Foods Company had agreed to sell 11 dairy processing plants in Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina, Virginia, and Utah to resolve antitrust concerns about the companies' proposed merger. Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk markets. Without the divestitures, the merger would have reduced competition in markets for milk sold through schools and retail outlets in the areas around the divested plants. All 11 dairies were divested to National Dairy Holdings, L.P. (NDH), a newly formed partnership of which 50 percent is owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza's supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.

52. **SunGard/Comdisco:** On October 23, 2001, the Department filed a lawsuit to block SunGard Data Systems Inc. from acquiring certain assets of Comdisco Inc. SunGard and Comdisco were two of the three major suppliers of shared hot site services for recovery of applications that businesses run on the largest and most powerful data processing equipment, such as IBM mainframe computers or high-end platforms. The lawsuit alleged that the proposed acquisition would likely reduce competition significantly

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in the sale of shared hot site disaster recovery services provided to consumers in the event of an interruption or failure of a computer data center due to natural disaster or some other incapacitating event. After an expedited trial in November 2001, the Court declined to enjoin the transaction, finding that the Department had failed to prove that shared hot site services were a relevant product market.

2) *FTC Merger Challenges or Cases*

a. Preliminary Injunctions Authorized

53. **Cytec/Digene:** The Commission authorized staff to seek a preliminary injunction to block Cytec Corporation's (Cytec) proposed \$420 million acquisition of Digene Corporation (Digene). According to the complaint, the combination of these companies would lead to reduced competition and increased consumer prices within the highly concentrated market for primary cervical cancer screening tests, both now and in the future. Cytec's product accounts for 93 percent of U.S. liquid-based Pap tests, which are the most widely used primary screening tool available for the detection of cervical cancer. The only other company currently producing and selling an FDA-approved liquid Pap test in the United States is TriPath Imaging (TriPath). Digene is the only company in the U.S. selling a DNA-based test for the human papillomavirus (HPV) which is believed to cause nearly all cervical cancer cases. Digene's HPV test is most commonly and efficiently conducted using a residual sample obtained from a liquid Pap test. According to the FTC, TriPath and its customers must have viable commercial access to Digene's HPV test. In addition, TriPath must have continued assistance from Digene in obtaining necessary FDA approvals to be used with Digene's current and next-generation HPV tests. The filing was withdrawn before the Commission's request for an injunction was filed. (File No. 021-0098)

54. **Diageo/Seagram:** The FTC authorized its staff to seek a preliminary injunction to block Diageo plc (Diageo) and Pernod Ricard S.A.'s (Pernod) joint acquisition of Vivendi Universal S.A.'s (Vivendi) Seagram Wine and Spirits business (Seagram). Seagram and Diageo are currently the number two and three sellers of rum in the United States. According to the complaint, the transaction would reduce competition in the markets for rum sold in the United States, as well as in individual states. Subsequently, the FTC negotiated a proposed consent order that would allow the transaction to proceed with certain conditions. Under the terms of the order, Diageo is required, within six months of the acquisition of Seagram, to divest the Malibu rum business worldwide to a Commission-approved buyer. (C-4032)

55. **Libbey/Anchor Hocking:** The FTC voted to seek a preliminary injunction to block Libbey, Inc.'s (Libbey) proposed \$332 million acquisition of Anchor Hocking (Anchor), a wholly-owned subsidiary of Newell Rubbermaid, Inc. Libbey is the largest maker and seller of soda-lime glassware to the U.S. food service industry, with more than half of all food service glassware sales. Anchor is the third-largest seller of food service glassware. According to the complaint, the acquisition would eliminate the existing substantial competition between Libbey and Anchor, and would substantially reduce competition in the market for soda-lime glassware sold to the food service industry in the United States. The U.S. District Court for the District of Columbia granted the Federal Trade Commission's motion for a preliminary injunction. The parties subsequently amended the transaction and the Commission filed an administrative complaint against that deal. After the parties abandoned the transaction the Commission accepted for public comment a proposed order to resolve the alleged anticompetitive effects. Under the proposed order, Libbey cannot acquire any stock of Anchor or assets of Anchor's food service glassware business without giving prior notice to the Commission. Additionally, Newell cannot sell or transfer all or a substantial part of the assets of Anchor's food service business without prior notice to the Commission. (D-9301)

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56. **Hearst/Medi-Span:** In a previously reported action filed in federal court, the Commission reached a proposed settlement with Hearst Corporation (Hearst) under the terms of which Hearst will divest the former Medi-Span business and pay \$19 million as disgorgement of unlawful profits. The settlement is the first time the Commission has sought either divestiture or disgorgement of profits in a federal court action for a consummated merger. Hearst will divest the Medi-Span business to Facts and Comparisons, a St. Louis based business unit owned by Wolters Kluwer, n.v. The integratable drug information database, formerly owned and maintained by Medi-Span, is one of the two databases that pharmacies, hospitals, doctors, third-party payers, and patients rely on to obtain information about drug prices, drug effects, drug interactions and the eligibility for drugs under various payment plans. The only other commonly used database is owned by Hearst's subsidiary, First DataBank. As a result, the January 1998 acquisition of Medi-Span by Hearst created a monopoly in the sale of integratable drug information databases. First DataBank used that monopoly power to substantially increase prices to all database customers who will receive the proceeds of the disgorgement. The court entered a proposed final order based on the settlement. (<http://www.ftc.gov/opa/2001/12/hearst.htm>)

57. **DGF Stoess/Leiner Davis:** The Commission authorized its staff to seek a preliminary injunction to block the proposed \$170 million acquisition of Leiner Davis Gelatin Corporation and Goodman Fielder USA, Inc. by Deutsche Gelatine-Fabriken Stoess AG (DGF Stoess). The transaction, if consummated, would eliminate competition between DGF Stoess and Leiner Davis, and the two firms combined would account for more than 50 percent of the U.S. market for pigskin and beef hide gelatin. These gelatin products are used primarily by the food industry as an ingredient in edible products and by the pharmaceutical industry to produce capsules and tablets. DGF Stoess, headquartered in Germany, is the world's largest producer of gelatin. The company produces gelatin at eight manufacturing plants around the world, two of which are located in the United States. Goodman Fielder is a diversified food products company based in Australia. Leiner Davis Gelatin, a subsidiary of Goodman Fielder, is the second-largest producer of beef hide and pigskin gelatin in the world. Leiner Davis also owns and operates eight gelatin manufacturing plants around the world, with one plant located in the United States.

Subsequently, the Commission negotiated a settlement under the terms of which DGF Stoess would not acquire Goodman Fielder's entire gelatin business; rather, Leiner Davis would retain its United States and Argentine gelatin plants and all of the infrastructure, assets, and personnel related to those plants. Additionally, to protect against any anticompetitive effects resulting from a possible decision by Goodman Fielder to exit the gelatin business, the proposed settlement requires Goodman Fielder to obtain prior approval from the Commission if it later decides to divest its retained assets. (C-4045)

58. **Meade/Tasco:** The Commission authorized staff to seek a preliminary injunction to pre-empt any attempt by Meade Instruments Corporation (Meade), the leading manufacturer of performance telescopes and Schmidt-Cassegrain telescopes in the United States, to purchase all, or certain assets, of Tasco Holdings, Inc.'s Celestron International (Celestron), the number-two performance telescope provider in the U.S. and the only other supplier of Schmidt-Cassegrain telescopes. According to the complaint, an acquisition by Meade of Celestron assets would adversely affect the performance telescope market by eliminating substantial actual competition between the two companies, and by creating a monopoly in the market for Schmidt-Cassegrain telescopes. Meade had indicated its strong interest in acquiring all, or some of, Celestron's assets, which may or may not be reportable under the Hart-Scott-Rodino (HSR) Premerger Notification Act. Subsequently Meade agreed not to submit any bid for Celestron's assets and the investigation was closed. (<http://www.ftc.gov/opa/2002/05/meadecelestron.htm>)

b. Commission Administrative Decisions

59. **Airgas/Puritan Bennett:** The Commission negotiated a settlement of charges that Airgas, Inc.'s (Airgas) purchase of the Puritan Bennett Medical Gas Business (Puritan Bennett) from Mallinckrodt, Inc.

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in January 2000 had an adverse effect on competition in the nitrous oxide market in the United States and Canada (North America). Under the agreement, Airgas agreed to divest a nitrous oxide business to Air Liquide America Corporation (Air Liquide). Nitrous oxide is a clear, odorless gas mainly used in dental and surgical procedures as an analgesic agent or as a supplement to anesthesia. Airgas is the largest distributor of industrial, medical, and specialty gases in the US, and before the acquisition, Airgas and Puritan Bennett were direct competitors for a wide variety of nitrous oxide customers in the United States. The proposed agreement also requires Airgas to supply Air Liquide with a sufficient amount of bulk liquid nitrous oxide in order to ensure that Air Liquide has the same volume of gas as Airgas did before its acquisition of Puritan Bennett. (C-4029)

60. **Valero/Ultramar:** The FTC accepted a proposed consent order to resolve the competitive concerns regarding the proposed \$6 billion merger of petroleum refiners Valero Energy Corporation (Valero) and Ultramar Diamond Shamrock Corporation (Ultramar). Under the agreement, the transaction would be allowed to proceed, but Valero would be required to divest Ultramar's Golden Eagle Refinery, bulk gasoline supply contracts, and 70 Ultramar retail service stations in Northern California to a Commission-approved buyer. Both Valero and Ultramar are leading refiners and marketers of CARB gasoline in California. CARB gasoline meets the specifications of the California Air Resources Board (CARB), and is the only gasoline that can be sold in California. (C-4031)

61. **MSC/UAI:** The Commission issued an administrative complaint against MSC Software Corporation's (MSC) 1999 acquisitions of Universal Analytics, Inc. (UAI) and Computerized Structural Analysis & Research Corp. (CSAR). MSC is the dominant supplier of a popular type of advanced computer-aided engineering software known as "Nastran." UAI and CSAR were the only other suppliers of advanced versions of Nastran. According to the complaint, the acquisitions eliminated competition and created a monopoly. Nastran is a type of computer-aided engineering software used for complex simulation analysis in the aerospace and automotive industries. Subsequently, MSC agreed to settle the allegations by divesting at least one clone copy of its current advanced Nastran software, including the source code through royalty-free, perpetual, non-exclusive licenses to one or two acquirers approved by the FTC. (D-9299)

62. **Shell/Pennzoil:** The Commission conditionally approved Shell Oil Company's (Shell) proposed \$1.8 billion acquisition of Pennzoil-Quaker State Company (Pennzoil) while requiring certain divestitures to ensure continued competition in the market for Group II base oil, one of three types of paraffinic base oils produced in the United States and Canada. Paraffinic base oil is used to produce motor oil and other lubricants, and is needed to meet current performance standards for lighter-viscosity motor oil formulations. Under the terms of the proposed order, Shell and Pennzoil would be required to divest Pennzoil's 50 percent interest in Excel Paralubes, and to freeze Pennzoil's right to obtain additional Group II supply under a contract with ExxonMobil at approximately current levels. (C-4059)

63. **INA/FAG:** The Commission proposed a consent order with INA-Holding Schaeffler KG (INA) and FAG Kugelfischer Georg Schafer AG (FAG) that would permit INA to complete its acquisition of FAG, while remedying the likely anticompetitive impact in the cartridge ball screw support bearing (CBSSB) market. Under the terms of the proposed order, INA and FAG, the only two suppliers of CBSSBs in the world, would be required to divest FAG's CBSSB business to Aktiebolaget SKF (SKF). INA and FAG would also be required to provide prior notice to the Commission before entering into any joint venture activity related to North America with NTN Corporation of Japan (NTN), a large producer of bearings worldwide. INA and FAG are both German corporations engaged in the manufacture and sale of various types of ball and roller bearings. SKF, a Swedish corporation, is the largest supplier of ball and roller bearings in the world. (C-4033)

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64. **Nestle/Ralston:** The Commission reached a proposed consent order with Nestle Holdings, Inc. (Nestle) and Ralston Purina Company (Ralston) that would permit Nestle to complete its \$10.3 billion acquisition of Ralston, while remedying potential anticompetitive effects in the market for dry cat food. Under the terms of the order, Nestle would be required to divest both Ralston's Meow Mix and Alley Cat brands to J.W. Childs Equity Partners II, L.P. In addition, Nestle would be required to relinquish all international trademarks related to Meow Mix and Alley Cat, and would be required to co-pack both brands for Childs for a set period of time. (C-4028)

65. **Bayer/Aventis:** The Commission announced a proposed consent order with Bayer AG (Bayer) and Aventis S.A. (Aventis) that will allow Bayer's proposed purchase of Aventis's subsidiary Aventis CropScience Holdings S.A. (ACS). According to the Commission's complaint, the transaction would reduce competition in the U.S. markets for: 1) new generation chemical insecticide products; 2) new generation chemical insecticide active ingredients; 3) post-emergent grass herbicides for spring wheat; and 4) cool weather cotton defoliants. Under the terms of the order, Bayer will be required to divest businesses and assets in each of the four product markets. Bayer is a German corporation and Aventis is headquartered in France. The FTC's conditional approval of the \$6.2 billion acquisition follows the European Commission's approval of the transaction. (C-4049)

66. **Solvay/Ausimont:** The Commission accepted a final consent agreement to resolve competitive concerns in the polyvinylidene fluoride (PVDF) market arising from Solvay SA's proposed \$1.3 billion acquisition of Ausimont S.p.A. from Italenergia S.p.A. (Italenergia). The settlement would require Solvay to divest its U.S. operations, including its Decatur, Alabama PVDF plant and its interest in the Alventia LLC (Alventia) joint venture, which manufactures the main raw material for PVDF. The FTC and the European Commission co-operated in their analysis of Solvay's acquisition of Ausimont. (C-4046)

67. **Amgen/Immunex:** Under the terms of a final consent agreement, the Commission allowed Amgen Inc.'s (Amgen) proposed \$16 billion acquisition of Immunex Corporation (Immunex) to proceed subject to conditions. In its complaint the FTC alleged that the transaction, as originally structured, would reduce competition in the markets for: 1) neutrophil (white blood cell) regeneration factors; 2) tumor necrosis factor (TNF) inhibitors; and 3) interleukin-1 (IL-1) inhibitors. The order requires the companies to sell all of Immunex's assets related to Leukine - a neutrophil regeneration factor - to Schering AG, to grant a license to certain intellectual property rights related to TNF inhibitors to Serono S.A., and to grant certain intellectual property rights related to IL-1 inhibitors to Regeneron Pharmaceuticals Inc. Neutrophil Regeneration Factors are used to treat neutropenia, a blood condition that often results from chemotherapy. TNF Inhibitors and IL-1 Inhibitors are primarily used to treat rheumatoid arthritis. (C-4053)

68. **Phillips/Conoco:** The Commission reached a proposed consent order with Phillips Petroleum Company (Phillips) and Conoco Inc. (Conoco) that would allow the merger of the two companies to proceed upon their agreement to sell certain assets and provide other relief. Based on its investigation, the Commission identified competitive problems in a number of regional and city markets in the US and required that the parties divest refineries and terminals and enter into performance agreements with other firms. (C-4058)

69. **Chicago Bridge & Iron:** The Commission issued an administrative challenge to resolve competitive issues resulting from a previously consummated transaction in which Chicago Bridge & Iron Company N.V. (CB&I) acquired the Water Division and Engineered Construction Division of Pitt-Des Moines, Inc. (PDM). CB&I, a Dutch company, is one of the world's leading global engineering and construction companies. PDM, based in the US, was a diversified engineering and construction company, and a distributor of a broad range of carbon steel products. The FTC's complaint alleged that the acquisition significantly reduced competition in four separate markets involving the design and construction of various types of field-erected specialty industrial storage tanks in the United States.

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According to the FTC, the combination of the two companies has resulted in a monopoly in the U.S. markets for two of the more difficult and costly products to construct -- LNG tanks and thermal vacuum chambers. In addition, the combination of the two companies has resulted in a dominant firm in the U.S. markets for LPG tanks and LIN/LOX/LAR tanks. (D-9300)

IV. Regulatory and trade policy matters

A. Regulatory Policies

1) DOJ Activities: Federal and State Regulatory Matters

70. On July 11, 2002, the DOJ and FTC issued a joint letter urging the Council of the North Carolina State Bar to approve a proposed opinion that would explicitly permit non-lawyers to compete with lawyers to perform real estate closings. The agencies said the proposal would allow consumers to pay lower prices and have more choices for real estate closing services. The opinion eventually adopted was modified in light of the DOJ/FTC comments. The agencies issued a similar letter on March 29, 2002 urging the Rhode Island House of Representatives to reject a proposed bill that would prevent non-lawyers from competing with lawyers to perform real estate closings. The agencies stated that the proposed bill would likely cause Rhode Island consumers to pay more for real estate closings and prevent them from benefiting from competition from out-of-state and Internet lenders that could provide more convenient closing services. The bill eventually expired in a legislative committee.

71. On December 17, 2001, the DOJ filed comments with the Department of Transportation (DOT) recommending divestitures and other conditions on a proposed airline alliance between American Airlines and British Airways in order to protect consumers. The DOJ stated that unless DOT requires divestitures of enough slots for new entrants to offer nine daily round trips to London from New York and Boston, as well as substantial new air service from other U.S. cities, the DOJ would oppose the transaction. The DOJ also concluded the making slots available would not remedy the loss of competition in two city pairs where the airlines had hubs at both ends, Dallas-London and Chicago-London, and recommended that the DOT withhold antitrust immunity from joint pricing and related activities in those markets.

72. On June 20, 2002, the DOJ filed comments with the Federal Aviation Administration (FAA) on policy options for allocating capacity at LaGuardia Airport. The DOJ urged the FAA to rely to the maximum extent possible on market-based solutions and supported the adoption of an auction mechanism for allocating capacity. The DOJ noted that with more efficient slot allocation rules, competition among airlines both on individual routes and among alternative airline networks would increase. Market-based mechanisms (like creating a recurring auction market for slots), may increase the ability of new entrants to gain access to the airport. An administrative system, on the other hand, would not ensure that the slots - a scarce resource - are put to their highest valued use. It would also be less effective at permitting greater competition at the airport.

73. On August 30, 2002, the DOJ filed comments with the Department of Transportation (DOT) recommending denial of a petition from Aloha Airlines and Hawaiian Airlines for antitrust immunity for an agreement to coordinate capacity in Hawaiian inter-island markets. Aloha and Hawaiian are the only two significant competitors in the inter-island markets, with over 95% of the traffic in these city pairs. DOJ comments asserted that the coordinated capacity reductions proposed by the carriers would result in serious harm to consumers through higher fares and poorer service in some of the most heavily travelled city pairs in the United States, and that there had been no showing that such collusion on capacity is necessary to preserve air service in the inter-island markets.

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74. On February 19, 2002, the DOJ submitted comments to the Federal Communications Commission (FCC) in response to the FCC's request for comments on its rules and policies regarding horizontal concentration and vertical integration in the multichannel video programming distribution industry. The DOJ noted its statutory responsibility to protect competition, not diversity, and affirmed that it would continue its case-specific evaluation of transactions under the antitrust laws, and that it did not view the FCC's horizontal and vertical limits as substitutes for this evaluation.

75. In FY2002, the DOJ continued to file comments with the Federal Communications Commission (FCC) in several "Section 271" proceedings involving the FCC's determination of whether local telecommunications markets are fully and irreversibly open to competition, a condition that must be met before a Regional Bell Operating Company is permitted to offer long-distance service in its own area. The Division's comments are available at <http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm>.

76. In FY2002, the Division approved two applications for new Export Trade Certificates ("ETC") submitted under the Export Trading Company Act and its implementing regulations. Both ETC applicants provide professional consulting and technology-based promotion services to facilitate trade overseas.

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

77. In October 2001, the Commission issued a staff report that examined which features of various state retail electricity programs appear to have resulted in consumer benefits and which have not. The states that have moved toward competition in electricity generation and retail marketing are in a transition period and many of the expected benefits of competition have not yet emerged. So far, neither retail nor wholesale markets for electricity generation encourage effective demand-side responses. However, nothing that has happened so far indicates that competition -- once the transition period is completed -- will not produce additional benefits to electricity customers. The report, "Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition," updates a July 2000 FTC Staff Report and is available at <http://www.ftc.gov/reports/elec/electricityreport.pdf>.

78. In December 2001, the Commission submitted comments in support of the Federal Energy Regulatory Commission's (FERC) proposed new standards of conduct for natural gas pipelines and transmitting public utilities (jointly referred to as transmission providers). The staff found it timely for FERC to broaden and unify the coverage of its affiliate standards of conduct due to convergence of the natural gas and electric power industries and the subsequent growing importance of information flows to competition within and between both industries. Some of the risk of anti-competitive behaviour spanning the two industries may be avoided by implementing uniform regulatory treatment of electric affiliates of gas utilities and gas affiliates of electric utilities, the comment states. Separately, staff also commented concerning FERC's efforts to develop a Standard Market Design (SMD) for wholesale electric power markets. Currently, there is no single set of rules governing the transmission of electricity in wholesale markets, and an SMD would harmonize electricity spot market operations and the rules governing transmission pricing. An SMD also would harmonize the rules across geographic regions for operating the transmission grid. In its comment, FTC staff supported the efforts of FERC to increase competition in wholesale electric power markets through creation of regional transmission organizations (RTOs) in all areas of the country. The comments are available at <http://www.ftc.gov/os/2001/12/interconnectstds.htm> and <http://www.ftc.gov/be/v020022.htm>.

79. On February 13, 2002 Commission staff submitted comments to the U.S. Environmental Protection Agency (EPA) concerning the competitive effects of clean fuels regulations, which require unique gasoline fuel blends (boutique fuels), on the supply and distribution of gasoline. The comments suggested that EPA may wish to perform a "competitive analysis" to reframe certain issues and examine three possible economic effects that changes in regulations may cause in the market. First, changes in the

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clean fuel regulations may impose costs on consumers by increasing average costs to produce unique gasoline fuel blends. Second, such changes may give rise to conditions that make short-term price spikes more prevalent. Third, changes in clean fuel regulations may create or enhance market power of certain sellers or facilitate its joint exercise by more than one seller. (V020004)

80. On June 11, 2002 Commission staff testified before the Connecticut Board of Examiners for Opticians regarding the interpretation and applicability of various Connecticut laws related to the sale of replacement contact lenses. The testimony followed earlier written comments that stated that restrictive interpretations may seriously limit competition by Internet, telephone, and mail-order sellers of contact lenses, increase consumer costs, and diminish consumer convenience without providing an offsetting benefit to either public health or safety. (V020007).

81. On February 18, 2002, Commission staff filed comments with the Commonwealth of Virginia's House of Delegates regarding a bill that would prohibit retailers from selling motor fuels "below cost" to eliminate the possibility of "predatory pricing." According to the FTC staff comments, anticompetitive below-cost pricing, which rarely happens, is already illegal under federal antitrust laws, the bill would penalize some forms of price cutting that benefit consumers and if enforced vigorously likely would harm consumers by increasing the price of motor fuels. Staff also provided comments to the Governor of New York State on a similar bill pending in that state's legislature and warned of adverse effects on consumers. (V020011 and V020019).

B. DOJ and FTC Trade Policy Activities

82. The Division is extensively involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative and is a participant in the trade policy activities of the National Economic Council (NEC), a cabinet-level advisory group. The Department provides antitrust and other legal advice to U.S. trade agencies, and has been actively involved in certain NAFTA Chapter 11 arbitrations relevant to competition issues and in the WTO Mexican telecommunications case. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve cooperation in the enforcement of competition laws.

83. The Division and the FTC participate in a number of negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative and State and Commerce Departments in competition policy groups associated with the Free Trade Area of the Americas (FTAA) and Asia-Pacific Economic Cooperation (APEC), and chaired or co-chaired the negotiating teams for the competition chapters of the FTAA, U.S.-Chile and U.S.-Singapore free trade agreements. The antitrust agencies also have played an important role in the working group established by the World Trade Organization to study issues relating to the interaction between trade and competition policy.

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

85. The Division co-chairs (with the Office of the U.S. Trade Representative) the Cross-Sectoral Working Group under the U.S.-Japan Regulatory Reform and Competition Policy Initiative. In these discussions, the United States has urged the Japanese government to take a variety of actions to strengthen its enforcement of Japan's antimonopoly law, take effective measures to eliminate bid rigging, make its

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

V. New Studies related to antitrust policy

A. Antitrust Division Economic Analysis Group Discussion Papers

86. The Economic Analysis Group issued the following papers during FY2002. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.com). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763.

Suzanne E. Majewski and Dean V. Williamson, *Endogenous Spillovers, Strategic Blocking, and the Design of Contracts in Collaborative R&D: Evidence from NCRA filings of R&D Joint Ventures*, EAG 02-1, March 2002.

Russell Pittman, *Chinese Railway Reform and Competition: Vertical or Horizontal Restructuring?*, EAG 02-2, March 2002.

Eric Emch, *Does Opportunism Explain Markups in Laser Printer Toner and Memory? No and Yes. Evidence on Pricing in Laser Printer Aftermarkets*, EAG 02-3, March 2002.

Sheldon Kimmel, *Bertrand Competition Without Completely Certain Production*, EAG 02-4, April 2002.

Sean F. Ennis, *Connection and Disconnection of Networks*, EAG 02-5, April 2002.

Cindy R. Alexander, *Corporate Stock Ownership as an Alignment Mechanism: Hidden Actions and the Determinants of Corporate and Insider Ownership*, EAG 02-6, May 2002.

Suzanne E. Majewski, *Knowledge Spillovers in Strategic Alliances: The Case of Biotechnology*, EAG 02-7, July 12, 2002.

Gregory J. Werden, *Market Delineation Algorithms Based on the Hypothetical Monopolist Paradigm*, EAG 02-8, August 2002.

Gregory J. Werden, *Beyond Critical Loss: Tailoring Applications of the Hypothetical Monopolist Paradigm*, EAG 02-9, August 2002.

Andrew R. Dick, *Knowing Your Rival's Price: Some Guideposts for Evaluating Communications Between Competitors*, EAG 02-10, August 2002.

Keith Waehrer, *Mechanisms for Dividing Labor and Sharing Revenue in Joint Ventures*, EAG 02-11, June 5, 2002.

Sean Ennis, *A Nonparametric Analysis of International Long-Distance Demand*, EAG 02-12, August 2002.

B. Commission Studies, Reports and Economic Working Papers

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1) *Commission Studies and Reports*

a. Conferences and Workshops

87. **Healthcare:** The Commission held a two-day workshop to consider the impact of competition law and policy on the cost, quality, and availability of health care and the incentives for innovation in the field. The workshop featured presentations by representatives of various federal agencies and state governments and a number of academics. There were panel discussions on: 1) Health Care Services: Provider Integration; 2) Health Insurance: Payer/Provider Issues; 3) Hospital Group Purchasing Organizations; 4) Generics and Branded Pharmaceuticals; and 5) Consumer Protection and Pharmaceuticals: Direct-to-Consumer Advertising and Off-Label Promotion. Materials from the workshop are available at <http://www.ftc.gov/ogc/healthcare/index.htm>.

88. **E-Commerce:** The Commission held a three-day workshop on possible anticompetitive efforts to restrict competition on the Internet. The workshop featured testimony from senior representatives of industry, academia, state and federal government agencies, and independent public policy organizations. Testimony was presented regarding industries that have experienced substantial growth in commerce via the Internet, but that also may have been hampered by anticompetitive restrictions: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) caskets; (6) online legal services; (7) health care (telemedicine and online pharmaceutical sales); (8) auctions; (9) real estate, mortgages, and financial services; and (10) retailing. The workshop built on a Congressional hearing on "Possible State Impediments to E-commerce." The FTC's testimony at this hearing is available at <http://www.ftc.gov/os/2002/09/020926testimony.htm>. Materials from the workshop are available at <http://www.ftc.gov/ogc/healthcare/index.htm>.

89. **Refined Petroleum Prices:** The Commission held a two-day public conference to examine factors that affect prices of refined petroleum products in the United States. The goal of the conference was to solicit information and views on the major factors affecting the prices of refined petroleum products, along with the relative importance of such factors. Chairman Muris announced that the FTC has developed a statistical model that is being used to identify and monitor "unusual" gasoline price movements in 360 cities across the country. This model "will allow FTC staff to identify and track gasoline price spikes on a 'real-time' basis and to identify as quickly as possible the contributing factors," Muris said. The FTC also will publish two reports on the petroleum industry in the United States: the first will detail merger and acquisition activity by major petroleum companies and structural changes in the industry, and the second will provide an extensive review of the factors affecting the level and volatility of prices of refined petroleum products and their trends nationwide. Materials from the conference are available at <http://www.ftc.gov/bc/gasconf/index.htm>.

b. Studies and Reports

90. Quantifying Causes of Injury to U.S. Industries Competing with Unfairly Traded Imports: 1989 to 1994, Kenneth H. Kelly and Morris E. Morkre (December 2002). This study updates and extends the earlier 1994 BE Staff Report, *Effects of Unfair Imports on Domestic Industries: U.S. Antidumping and Countervailing Duty Cases, 1980 to 1988*. First, it estimates the adverse effect of dumped and subsidized imports on domestic industries for 63 final cases decided by the U.S. during 1989-1994. Injury to domestic producers from unfairly traded imports is greater in 1989-1994 compared with 1980-1988. This increase is attributable in part to an increase in dumping margins. Second, the study estimates the effects of dumped and subsidized imports on workers and consumers. U.S. consumers gain at least \$2.9 billion per year (1992 dollars) from dumped and subsidized imports. Consumer benefit per job lost ranges from a low of \$27,000 to a high of \$3.6 million. Third, the study measures how changes in demand and supply for the output of domestic industries that compete with unfairly traded imports have affected the performance of those

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industries. On average, a decline in demand is the single most important factor reducing output and revenue for these industries, and has a larger effect than unfairly traded imports. The report is available at <http://www.ftc.gov/be/economicissuespapers.htm>.

2) *Economic Working Papers*

91. The following may be obtained at <http://www.ftc.gov/be/econwork.htm>. If you have trouble accessing one of these papers, please contact Tangelia Roundtree at (202) 326-2361.

Does Size Really Matter? Empirical Evidence on Group Incentives (WP# 252) Christopher P. Adams, October 2002.

Efficient Inter-carrier Compensation for Competing Networks When Customers Share the Value of a Call (WP#251) Patrick DeGraba, September 2002.

Intellectual Property Rights, Internalization and Technology Transfer (WP# 250) Michael W. Nicholson, July 2002.

Price and Quality Relationships in Local Service Industries (WP#249) R. Dennis Murphy, June 2002.

Generic Drug Industry Dynamics (WP#248) David Reiffen and Michael R. Ward, February 2002.

Selection of "High Performance Work Systems" in U.S. Manufacturing (WP#247) Christopher P. Adams, March 2002.

Demand System Estimation and its Application To Horizontal Merger Analysis (WP#246) Daniel Hosken,

Daniel O'Brien, David Scheffman, and Michael Vita, April 2002.

The Welfare Effects of Third Degree Price Discrimination In Intermediate Good Markets: The Case of

Bargaining (WP#245) Daniel P. O'Brien, January 2002.

The Effect of Offer Verifiability on the Relationship Between Auctions and Multilateral Negotiations

(WP#244) Charles J. Thomas and Bart J. Wilson, November 2001.

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

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Appendices

Department of Justice: Fiscal Year 2002 FTE and Actual Amount by Enforcement Activity

	FTE	AMOUNT
Criminal Enforcement	270	\$40,254,000
Civil Enforcement	502	\$74,758,000
TOTAL	772	\$115,012,000

Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office¹

	FTE	AMOUNT
Total MC Mission	504.7	\$74,349.6
<i>Bureau of Competition</i>	271.6	\$31,704.7
<i>Bureau of Economics</i>	75.6	\$8,776.6
<i>Regional Offices</i>	32.7	\$3,598.4
<i>Mission Support</i>	124.8	\$30,269.9
Premerger Notification	28.7	\$2,934.5
<i>Bureau of Competition</i>	28.2	\$2,880.9
<i>Bureau of Economics</i>	0.3	\$32.8
<i>Regional Offices</i>	0.2	\$20.8
Merger & Joint Venture Enforcement	190.2	\$22,512.0
<i>Bureau of Competition</i>	125.3	\$15,055.4
<i>Bureau of Economics</i>	44.8	\$5,241.4

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Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office¹ (cont'd)

	FTE	AMOUNT
<i>Regional Offices</i>	20.1	\$2,215.2
Merger & Joint Venture Compliance	17.2	\$1,787.6
<i>Bureau of Competition</i>	16.9	\$1,754.8
<i>Bureau of Economics</i>	0.3	\$32.8
<i>Regional Offices</i>	0.0	\$0.0
Nonmerger Enforcement	110.1	\$12,607.1
<i>Bureau of Competition</i>	83.4	\$9,695.3
<i>Bureau of Economics</i>	14.3	\$1,606.4
<i>Regional Offices</i>	12.4	\$1,305.4
Nonmerger Compliance	0.9	\$91.4
<i>Bureau of Competition</i>	0.9	\$91.4
<i>Bureau of Economics</i>	0.0	\$0.0
<i>Regional Offices</i>	0.0	\$0.0
Antitrust Policy	10.6	\$1,167.4
<i>Bureau of Competition</i>	0.0	\$0.0
<i>Bureau of Economics</i>	10.6	\$1,167.4
<i>Regional Offices</i>	0.0	\$0.0

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	FTE	AMOUNT
Other Direct Mission Resources	22.2	\$2,979.7
<i>Bureau of Competition</i>	16.9	\$2,226.9
<i>Bureau of Economics</i>	5.3	\$695.8
<i>Regional Offices</i>	0.0	\$57.0