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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

OLIS : 15-May-1998
Dist. : 20-May-1998

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

DAFFE/CLP(98)10/07
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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(1st October 1996 - 30 September 1997)

This report is submitted by the United States Delegation to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting on 11-12 June 1998, under item VII of the Agenda.

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Summary of Highlights

In Fiscal Year 1997, the Federal Trade Commission and the Antitrust Division of the Department of Justice adopted a revision of the efficiencies section of the 1992 Horizontal Merger Guidelines that clarifies what kinds of efficiency claims will be considered, and how they enter into the overall merger analysis. This revision was the result of a joint staff study which was inspired by one of the proposals of the FTC report on its 1995 hearings on Global and Innovation-Based Competition. On April 24, 1997, the agencies announced an antitrust mutual assistance agreement between the United States and Australia, the first such agreement negotiated under the International Antitrust Enforcement Assistance Act (IAEAA) of 1994. Both countries now are pursuing their respective procedures for finalizing the agreement. In April, the Department announced its first formal positive comity request under the terms of the 1991 U.S.-EU antitrust cooperation agreement; the Department asked EU competition authorities to investigate possible anticompetitive conduct by European airlines that may be preventing U.S.-based airline computer reservation systems from competing effectively in certain European countries. In January 1997, the FTC announced its "Joint Venture Project" to clarify and, if necessary, update antitrust policies regarding joint ventures, strategic alliances and other forms of competitor collaborations. The FTC held public hearings in June and December 1997 and is consulting with the Antitrust Division as the project develops.

During FY97, the Division opened 362 investigations and filed 58 antitrust cases, both criminal and civil, in federal court. The Division filed 38 criminal cases, bringing indictments against 29 individuals and 24 corporations. Record criminal fines amounting to $203.9 million were levied against 30 corporate defendants. In addition, seventeen individuals were assessed fines totaling $1.25 million. To date, the Division's investigation into price-fixing and sales allocation in the international food additives industry has yielded more than $195 million in criminal fines, including the two largest criminal antitrust fines in history. The Division opened 362 civil investigations, both merger and non- merger, issued 1,629 civil investigative demands (a form of compulsory process), and filed 6 civil nonmerger complaints during FY97.

The U.S. Court of Appeals for the First Circuit, in *United States v. Nippon Paper Industries*, held that Section 1 of the Sherman Act applies criminal as well as civil penalties to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Accordingly, the court reversed a district court dismissal of an indictment alleging that a Japanese manufacturer and others held meetings in Japan that culminated in an agreement to fix the price of thermal fax paper in North America.

In the non-merger area, the FTC pursued a variety of legal theories, including horizontal restraints such as price fixing and concerted refusals to deal and resale price maintenance, in such sectors as toys, agricultural chemicals, new car sales and health care. The FTC accepted four consent agreements and issued one administrative complaint against a physicians' organization for conspiring to fix the price and other competitive terms of dealing with third-party payers and with collectively refusing to deal with other payers. An Administrative Law Judge issued an initial decision finding that Toys "R" Us, the nation's largest toy retailer, entered into vertical agreements with toy manufacturers and horizontal agreements among otherwise competing toy manufacturers to restrict their sales to warehouse clubs that sold toys at prices lower than Toys "R" Us. The decision currently is on appeal before the Commission. In *International Association of Conference Interpreters* ("AIIC"), the Commission issued a final order prohibiting, among other things, AIIC and its U.S. affiliate members from entering into agreements that fix or suggest fees for interpretation, translation or language services performed in the U.S., and to amend the association's rules and bylaws to conform with the Commission's order. The U.S. Court of Appeals for the Ninth Circuit affirmed the Commission's order against the California Dental Association to refrain from enforcing ethical guidelines that in practice have the effect of prohibiting truthful, nondeceptive advertising by dentists.

During FY97, the two agencies reviewed 3,702 transactions reported under the Hart-Scott-Rodino ("HSR") Act, an increase of 20 percent over the previous year. A wide variety of industries were involved including defense, hospitals, pharmaceuticals, transportation, computer technology and energy. The Division initiated 277 merger investigations and challenged 14 mergers; 17 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The FTC initiated 285 investigations of HSR transactions and investigated 45 transactions with second requests for information which resulted in 18 consent orders, seven abandoned transactions, and authorization of the filing of preliminary injunction actions to block three proposed mergers, two of which were abandoned by the parties. One of the FTC's most notable merger investigations involved the *Staples/Office Depot* transaction, the largest merger litigated by the government in recent years. The Commission estimates that by blocking the merger, it saved consumers around $1 billion over a five year period. In addition, the FTC secured a record-high of $9.35 million in civil penalties in HSR enforcement actions against firms that failed to observe the premerger notification requirements and waiting periods under the HSR Act before consummating a notifiable merger.

TABLE DES MATIERES

Introduction

1. This report describes federal antitrust developments in the United States for Fiscal Year 1997 ("FY97" -- October 1, 1996 through September 30, 1997). It summarizes the activities of the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").

2. Joel I. Klein was confirmed by the Senate on July 17, 1997 to be the Assistant Attorney General in charge of the Antitrust Division. A. Douglas Melamed became Principal Deputy Assistant Attorney General, overseeing the Division's civil enforcement program, appellate activities, and international efforts, on October 15, 1996.

1. Changes in law or policies

A. Changes in antitrust rules, policies or guidelines

3. On December 18, 1996, the Federal Energy Regulatory Commission (FERC) issued a policy statement concerning its merger policy under the Federal Power Act. In applying the Act's standard that public utility mergers in the electric power industry must be consistent with the public interest, FERC will generally take into account three factors: the effect on competition, the effect on rates, and the effect on regulation. The policy statement indicates that FERC's ?analysis of the effect on competition will more precisely identify geographic and product markets and will adopt the Department of Justice/Federal Trade Commission Merger Guidelines as the analytical framework for analyzing the effect on competition.?

4. The FTC and DOJ adopted a revision of the efficiencies section of the 1992 Horizontal Merger Guidelines in April, 1997. This revision was an outgrowth of one of the proposals of the FTC report on its 1995 hearings on Global and Innovation-Based Competition (*see* FY 1996 report ¶6) which inspired a joint FTC/DOJ staff study of how efficiency considerations should be analyzed in merger investigations and cases. The revised guidelines clarify what kinds of efficiency claims will be considered, and how they enter in the overall analysis of the competitive effects of a merger. The revisions provide merging firms, the agencies and the public a clearer roadmap for determining whether efficiencies will result in lower prices or new products or will otherwise enhance competition.

5. On April 9, 1997, the Department of Defense (DOD) issued a *Report on the Effects of Mergers in the Defense Industry*. The report concluded that defense mergers have had ?little adverse impact? on competition for defense contracts and have helped reduce excess capacity and costs to the government. In May, the DOD's Defense Science Board task force report on *Vertical Integration and Supplier Decisions* warned however that consolidation in the defense industry could lead to future reduction of competition and innovation as a result of vertical integration.

6. In July 1997, Congress passed the "Charitable Donation Antitrust Immunity Act of 1997," Pub. L. No. 105-26, which clarifies that federal and state antitrust laws do not apply to charitable gift annuities or charitable remainder trusts.

7. In September 1997, Congress passed the "Need-Based Educational Aid Antitrust Protection Act of 1997," Pub. L. No. 105-43, which extends, until September 30, 2001, a temporary exemption from the antitrust laws for certain agreements among institutions of higher education with respect to need-based financial aid.

B. Proposals to change antitrust laws, related legislation or policies

8. In January 1997, the Commission announced its "Joint Venture Project" to clarify and, if necessary, update antitrust policies regarding joint ventures, strategic alliances and other forms of competitor collaborations. The Commission subsequently held public hearings on this project in June and December 1997 on certain issues concerning the nature of competitor collaborations prevalent in today's markets. The project grew out of the FTC's 1995 public hearings on Global and Innovation-Based Competition (see above). DOJ's Antitrust Division will provide input as the project develops. At present there are two sets of guidelines issued jointly by the FTC and DOJ that provide guidance relevant to joint ventures in the areas of health care and intellectual property. One possible outcome could be the development of additional guidelines to describe the antitrust analysis of joint ventures and other competitor collaborations.

9. In July 1997, Director Baer of the FTC's Bureau of Competition testified before a Congressional subcommittee on H.R. 10, The Financial Services Act of 1997, which would remove substantial regulatory restraints on large segments of the banking and financial services industries and would streamline the remaining regulation now subject to statutory and regulatory oversight. Baer's testimony focused on the need for strong antitrust and consumer protection law enforcement to protect and nurture the potential for increased competition and consumer welfare after the changes proposed by H.R. 10.

C. International antitrust co-operation developments

10. In April 1997, the Commission and Department announced an antitrust assistance agreement between the United States and Australia, the first under the International Antitrust Enforcement Assistance Act ("IAEAA") of 1994. In accordance with section 7 of the IAEAA, the proposed agreement was published for comments in the Federal Register on April 24, 1997. The United States and Australia currently are pursuing their respective procedures for finalizing the agreement. The agreement will become a model for other IAEAA-type agreements and is an important first step in protecting consumers and the business community from international anticompetitive activities.

11. During the course of its investigation of the Boeing Company's acquisition of McDonnell Douglas Corporation, the FTC informally consulted frequently with the European Commission's Competition Directorate (DGIV) which was also investigating the proposed acquisition. On July 1, 1997, the FTC announced its decision that the acquisition would not violate U.S. antitrust laws. At that time, the European Commission's investigation was still ongoing, and it appeared likely to the companies involved and to the U.S. Government that the Commission might challenge the transaction under the EU's Merger Control Regulation. The Justice Department requested consultations with the European Commission under the 1991 bilateral cooperation agreement in order to ensure that the Commission took into account specific U.S. concerns. Those concerns involved both the military procurement aspects of the transaction and fears that a forced divestiture of McDonnell Douglas's commercial aircraft assets would have anticompetitive consequences (specifically, that a new purchaser would not be able to preserve Douglas as a participant in the market for new aircraft and might tend to treat aftermarket sales and service in an opportunistic fashion). Senior representatives of the Justice and Defense Departments met with senior members of DGIV in Brussels in mid-July to discuss U.S. concerns. As the Commission's final decision in this case notes, the Commission took the U.S. concerns into account as it determined to allow the transaction to go forward subject to certain conditions. Commission Decision of 30 July 1997 (C(97)2598 final) OJ L 336/16 (8 Dec. 1997).

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

12. At the end of FY97, the Division had 804 employees: 345 attorneys, 49 economists, 186 paralegals and 224 support staff.

13. During FY97, the Antitrust Division opened 362 investigations and filed 58 antitrust cases, both civil and criminal, in federal court. The Division was a party to 12 U.S. antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in three Court of Appeals cases and two Supreme Court cases.

14. During FY97, the Division filed 38 criminal cases and indicted 24 corporations and 29 individuals. Thirty corporate defendants and 17 individuals were assessed fines totaling $205.2 million and 3 defendants were sentenced to a total of 789 days of incarceration. Another 9 individual defendants were sentenced to spend a total of 1,270 days in some form of alternative confinement.

15. During FY97, 3,702 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which represents an increase of 20 per cent over the previous year. A wide variety of industries were involved including defense, hospitals, pharmaceuticals, transportation, computer technology and energy. The Division investigated 277 mergers and challenged 14; 17 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Division also screened a total of 1,850 bank mergers. The Division opened 362 civil investigations, both merger and non-merger, and issued 1,629 civil investigative demands (a form of compulsory process). The Division filed 6 non-merger civil complaints. Also during FY97, the Division responded to 38 requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

16. At the end of FY97, the FTC's Bureau of Competition had 224 employees: 141 attorneys, 44 other professionals and 33 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

17. The Commission staff initiated 285 investigations of HSR transactions and investigated 45 transactions with second requests for information. The Commission also investigated 89 non-HSR mergers. The Commission's investigations resulted in 18 consent orders, seven abandoned transactions and authorization of the filing of preliminary injunctions actions to block three proposed mergers, two of which were abandoned by the parties. The Commission also issued one administrative complaint and one final order.

18. In the non-merger area, the Commission accepted four consent agreements during FY97 that involved legal theories such as boycotts, resale minimum price fixing, and horizontal price-fixing in such sectors as health care, agricultural chemicals, and retail sales of automobiles. An Administrative Law Judge issued an initial decision upholding a Commission complaint. The Commission issued one final order.

19. In addition, the Commission filed two civil penalty enforcement actions totaling $5.75 million under Section 7A of the Clayton Act for violations of the premerger notification requirements. One represented the largest civil penalty ever obtained under the HSR Act for a single transaction - $5.6 million dollars. In addition, the Commission filed two civil penalty actions for violations of final cease

and desist orders, totaling $3.6 million. The total civil penalties assessed were a record-high of $9.35 million.

20. Staff of the Bureau of Competition provided guidance to industry through 11 advisory opinion letters on whether specific health care arrangements might violate antitrust laws. The arrangements concerned the following: medical standards, pharmaceutical sales, pharmacist network, ambulance network, optical firm network, hospital prices survey, physician network, pharmaceutical sales and oral surgery network.

B. Antitrust cases in the Courts

1) United States Supreme Court

21. There were no antitrust cases decided in the Supreme Court in FY97.

2) Court of Appeals cases

a. Significant DOJ Cases Decided in FY97

22. There were eight dispositions by the courts of appeals in Antitrust Division cases in FY97, but only three of these resulted in published opinions. One of these three involved an issue of mootness, and another involved interpretation of the Tunney Act (a statute that prescribes procedures to be followed prior to entry of consent judgements in government antitrust cases). The third, described in the next paragraph, concerned international antitrust enforcement.

23. In *United States v. Nippon Paper Industries*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998), the district court had dismissed the indictment in this criminal case, for failure to state an offense, but the court of appeals reversed. The indictment alleged that a Japanese manufacturer and others held meetings in Japan that culminated in an agreement to fix the price of thermal fax paper in North America. The court of appeals held that Section 1 of the Sherman Act, 15 U.S.C. §1, applies criminal as well as civil penalties to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Accordingly, the court held, the indictment adequately alleged an offense, and should not have been dismissed.

b. FTC cases decided in FY97

24. *FTC v. Butterworth Health Corp.* was an appeal from a decision of the district court that denied the Commission's request for a preliminary injunction to prevent a proposed merger between the two leading hospitals in the state of Michigan's second largest city, Grand Rapids. In July, 1997, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision of the previous year. In an unpublished decision, the court of appeals held that the district court did not abuse its discretion in concluding that the welfare of consumers would be enhanced by the merger and that competition would therefore not be lessened. 1997-2 Trade Cas. (CCH) ¶71,863 (6th Cir. 1997). The Commission subsequently dismissed its complaint pursuant to its 1995 policy statement under which the FTC determines case-by-case whether to pursue administrative litigation where a federal district court declines its request for a preliminary injunction.

25. *California Dental Ass'n v. FTC* was an appeal from a decision of the Commission that ordered the California Dental Association to refrain from enforcement of ethical guidelines that in practice had the effect of prohibiting truthful, nondeceptive advertising by dentists. In October 1997, the United States Court of Appeals for the Ninth Circuit affirmed the Commission's order, holding that the Commission had

jurisdiction over the activities of nonprofit trade associations that provided substantial pecuniary benefits to their members, and that the Commission had properly found CDA's price and non-price advertising restraints unlawful under a "quick look" rule of reason analysis. 128 F.3d 720 (9th Cir. 1997).

3) Private cases having international implications

26. In *In re Potash Antitrust Litigation*, 954 F. Supp. 1334 (D. Minn. 1997), purchasers of potash, a mineral used in the manufacture of fertilizers, alleged that Canadian and U.S. potash producers had conspired to fix prices in the period from 1987 to 1994. The allegations centered on the conduct of a Canadian producer, privatized in 1989, whose price increases were matched by the other defendants during a period when antidumping proceedings eventually culminating in a suspension agreement were underway in the U.S. Plaintiffs pointed to numerous communications between the defendants, to parallel pricing behavior allegedly against defendants' self-interest, and to opportunities and motive for unlawful price-fixing. The district court adopted an exhaustive report of the magistrate recommending summary judgement for defendants on the grounds that in the oligopolistic potash market, the evidence did not support reasonable inferences of collusive, as opposed to independent ?follow the leader,? behavior. The court thus entered summary judgement for defendants.

27. In *Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F. Supp. 1209 (D. Utah 1977), a U.S. producer of steel is seeking treble damages for violations of Title VII (Unfair Competition) of the Act of September 8, 1916, 39 Stat. 756 (15 United States Code secs. 71-74), sometimes referred to as the Antidumping Act of 1916. Plaintiff alleged that defendants commonly and systematically imported steel plate from Russia, China and the Ukraine and sold it in the United States at a price substantially less than its actual market value or wholesale price in those countries, with the intent of injuring the U.S. steel industry. Plaintiff did not allege that defendants' intent was predatory and, therefore, defendants filed a preliminary motion to dismiss the case for failure to state a proper claim. The district court rejected defendants' motion. Its holding differs from interpretations of the 1916 Act previously made by U.S. Courts and by the U.S. Government. However, the court also cautioned that the plaintiff's burden of actually proving intent to harm the U.S. industry may be difficult. Given that an expected defense was that the defendant importers wanted solely to make a profit, the court stated that mere knowledge that importers' sales would take sales away from U.S. competitors, standing alone, would not be sufficient to establish the requisite intent. The case is now in the pretrial discovery phase and is scheduled to go to trial in two years.

28. In *Godix Equipment Export Corp. v. Caterpillar, Inc.*, 948 F. Supp. 1570 (S.D. Fla. 1996), plaintiffs were independent resellers who exported genuine Caterpillar machinery replacement parts. They alleged that Caterpillar had implemented an export policy with members of its dealer network intended ?to eliminate what it recognized as an ongoing problem of free-riding and dealer misconduct among resellers.? The policy, through various price discounting and black listing schemes, allegedly prevented plaintiffs from acquiring Caterpillar parts for export. The complaint stated that Caterpillar and its authorized dealers conspired to fix the price of replacement parts and exclude plaintiffs from the market, and that Caterpillar attempted to monopolize the market for Caterpillar replacement parts. The parties agreed that the relevant geographic market was worldwide. The district court found that in the relevant product market of replacement parts for Caterpillar machines, which included genuine and non-genuine ?will-fit? parts, plaintiffs presented no evidence that Caterpillar could exclude interbrand competitors, relying only on effects on competitors in the intrabrand market. In this context, the court granted defendants' motion for summary judgement on the Sherman Act claims, finding insufficient evidence of any conspiracy to raise prices and no evidence of market power or likelihood of monopolization.

29. In *S. Megga Telecommunications Limited v. Lucent Technologies, Inc.*, 1997 WL 86413 (D. Del.), plaintiffs were Chinese and Malaysian companies who manufactured consumer products for Lucent, a U.S. telecommunications equipment corporation made up of former AT&T businesses. Plaintiffs sued Lucent alleging various contract and tort claims, as well as attempted monopolization, stemming from

losses relating to a cordless telephone manufacturing plant built by Megga in China using Lucent technology. The district court dismissed the monopolization claims, which were based on lost sales to Lucent, on jurisdictional grounds, noting that there were ?no factual allegations that plaintiffs themselves imported or planned to import any product into the United States.?

30. In *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D. N.Y. 1997), a French corporation and its U.S. subsidiary sued France Telecom and its U.S. subsidiary alleging a section 2 (monopolization) violation of the Sherman Act for failure to make available to Filetech usable information on French telecom subscribers for use in preparing a data base to be sold as a direct marketing tool. The district court described a long history of litigation, much of it ongoing, concerning competition and data privacy issues involving Filetech, France Telecom, and other parties before French commercial and criminal courts and competition authorities. The court granted France Telecom's motion to dismiss on grounds of international comity. The court could not determine, based on the parties' diametrically opposing interpretations of French law, whether French law ultimately would conflict with a ruling under U.S. antitrust law. However, ?France Telecom's substantial claim, consistently asserted in France and not yet finally adjudicated there, is sufficient to implicate? the ?conflict of law? comity factor. The court found that most of the other comity factors (nationality and location of parties, extent to which enforcement by either state would achieve compliance, relative significance of effects in the U.S. and elsewhere, extent of explicit purpose to harm or affect U.S. commerce, foreseeability of such effect, and relative importance of conduct within the U.S. and abroad) also militated in favor of dismissal on international comity grounds. An appeal is pending.

31. In *Trugman-Nash v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D. N.Y. 1997), the court reversed an earlier decision and dismissed antitrust claims on comity and other grounds. Plaintiffs were U.S. importers of New Zealand (NZ) cheese who sued the NZ Dairy Board and two of its closely related U.S. corporations for failure to deliver a contracted-for quantity of cheese. In addition to contract and fraud claims, plaintiffs alleged antitrust claims related to the sale of NZ cheese in the U.S. The court found that under NZ's statutory scheme, cheese exporters were required to apply to the Board for permission to export; the Board in turn was directed to consider whether export markets were subject to import quotas and whether exports to those markets would reduce overall returns to the NZ dairy industry. The U.S. had a statutory import quota system, and the NZ statute ?mandates Board disapproval of sales price competition among [NZ] dairy producers in respect of exports to nations like the United States that restrict import quantities.? Therefore, ?granting to individual [NZ] producers of the sort of export licenses envisioned by plaintiffs would violate that mandate,? and there was an ?actual and material conflict? between U.S. and NZ law ?sufficient to entitle defendants to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity.? The court also held that other factors relating to an international comity analysis were also relevant and pointed in the direction of declining jurisdiction.

32. In *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 96 Civ. 6465 (S.D. N.Y. 1997), plaintiffs were corporations operating in New York that sued two English banks alleging various contract and tort claims, and Sherman Act ?antitrust claims that defendants conspired to deny them banking services necessary to their business and thereby attempted to monopolize the international currency-transfer market.? The district court observed that the real party in interest with respect to many of the allegations was an English affiliate of the plaintiffs' that was refused service by NatWest; similarly, ?the vast majority of the claims against Barclays [the second defendant bank] concern its decision to terminate services it had previously provided to plaintiffs' English affiliate, and other conflicts between Barclays and that affiliate.? The court dismissed the complaint on grounds of *forum non conveniens*, noting that the antitrust claims could be brought in an English court under Articles 85 and 86 of the Treaty of Rome, which are incorporated in English domestic law and permit an action for damages. The court noted that most of the conduct took place in England, and most of the witnesses and documents were located there.

C. Statistics on Private and Government Cases Filed During FY 1997

33. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 632 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in FY97.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

34. On August 27, 1996, the Division filed six one-count felony informations in the U.S. District Court in Chicago, charging two Japanese firms, a U.S. subsidiary of a Korean company, and three of their executives with conspiring to fix prices to eliminate competition and allocate sales in the lysine market worldwide. The Division alleged that Ajinomoto Co. Inc. and its executive Kanji Mimoto, Kyowa Hakko Kogyo Co. Ltd. and its executive, Masaru Yamamoto, and Sewon America Inc. and its President, Jhom Su Kim, agreed to increase the price of lysine and allocate the volume of lysine to be sold among the corporate conspirators, and participated in meetings and conversations for the purpose of monitoring and enforcing adherence to the agreed-upon prices during the period of June 1992 through June 27, 1995. On October 15, 1996, following guilty pleas, the defendants entered plea agreements to pay fines in excess of $20 million.

35. On October 15, 1996, in the same investigation, the Division filed a two-count felony information in the U.S. District Court in Chicago charging Archer Daniels Midland Co. with conspiring to suppress and eliminate competition in the lysine market and in the citric acid market. Following a guilty plea, ADM agreed to pay a $100 million criminal fine -- at that time the largest criminal antitrust fine ever -- for its role in the two conspiracies. Lysine, a $600 million a year industry, is an amino acid used by farmers as a feed additive to ensure the proper growth of poultry and swine. Citric acid, a $1.2 billion a year industry, is a flavor additive and preservative found in soft drinks, processed food, detergents, and pharmaceutical and cosmetic products.

36. On December 3, 1996, a third round of charges was filed in conjunction with this investigation. Three ADM executives, Michael D. Andreas, Mark E. Whitacre, and Terrance S. Wilson, as well as the managing director of Ajinomoto Co. Inc., Kazutoshi Yamada, were indicted in the U.S. District Court in Chicago for their role in the conspiracy (trial has been scheduled for July 1998). The same day, Cheil Jedang Ltd. (a.k.a. Cheil Foods & Chemicals), a Korean company agreed to plead guilty and pay a $1.25 million fine for participating in the lysine price fixing and sales volume allocation scheme.

37. In the fourth round of charges brought in the investigation, the Division filed a felony information in the U.S. District Court for the Northern District of California on January 29, 1997, charging Harmaan & Reimer Corporation, a U.S. subsidiary of the German firm Bayer AG, with participating in an international conspiracy to fix prices and allocate sales in the citric acid market. Also charged was Hans Hartmann, a senior executive with the Harmann & Reimer. Following a guilty plea, the Harmaan & Reimer Corporation agreed to pay a $50 million criminal fine. Mr. Hartmann agreed to pay a criminal fine of $150,000.

38. The Division filed a fifth round of charges in the food additives investigation on March 26, 1997, charging two Swiss chemical companies and two of their executives with conspiring to suppress and eliminate competition in the citric acid market from July 1991 to June 1995. In a single- count felony information filed in the U.S. District Court for the Northern District of California, the Division charged Jungbunzlauer International AG and F. Hoffmann-La Roche Ltd., as well as executives Rainer Bichlbauer and Udo Haas. Jungbunzlauer pleaded guilty and agreed to pay an $11 million criminal fine; Hoffmann-La Roche also pleaded guilty and agreed to $14 million in criminal fines. Dr. Bichlbauer and Mr. Haas pleaded guilty and each paid a $150,000 criminal fine. As of April 1998, the investigation of

antitrust violations in the lysine and citric acid industries has yielded almost $200 million in criminal fines.

39. On September 24, 1997, the Division brought charges against two Dutch pharmaceutical companies, Akzo Nobel Chemicals BV and Glucona BV, and two of their executives, Cornelis R. Nederveen and Marcel L. Van Eekhout. In three single-count felony informations filed in the U.S. District Court for the Northern District of California, the defendants were charged with participating in an international conspiracy to fix the price and allocate market shares globally for sodium gluconate. Sodium gluconate is an industrial metal and glass cleaner, generally used for bottle washing, food service and utensil cleaning, food processing equipment cleaning, and paint removal. Worldwide, the industry earns $50 million each year. Both companies pleaded guilty and agreed to pay a combined $10 million criminal fine. The two executives also entered guilty pleas and will each pay a $100,000 criminal fine.

40. On September 3, 1997, a federal grand jury in Kentucky indicted David P. True, an executive with the Austin Powder Company, a commercial explosives manufacturer in Cleveland, Ohio. The defendant was charged with conspiring to fix prices and rig bids on commercial explosives sold in Kentucky, Illinois, and Indiana between 1988 and 1993. A $1 billion a year industry in the U.S., commercial explosives are used primarily by the mining, oil and gas, and construction industries. Thus far, thirteen explosives manufacturers and distributors, as well as three executives, have pleaded guilty to price fixing and bid rigging in the commercial explosives market, yielding nearly $40 million in criminal fines.

41. Many of the indictments brought in FY97 resulted from ongoing investigations:

- the Department has continued its investigation into suspected bid rigging on sales of ammunition components manufactured at the Milan, Tennessee Army Ammunition Plant. The investigation has thus far produced eight indictments. (most recent case: *U.S. v. Charles E. Green & Son, Inc.*);

- as a result of an ongoing investigation of the point-of-purchase advertising display industry, in FY97 two companies and four executives pleaded guilty and agreed to pay nearly $10 million in criminal fines; two executives were also sentenced to 13-month jail terms. The defendants admitted to fixing prices, rigging bids, and allocating contracts for display materials sold primarily to breweries, such as signs, lights, and clocks containing the breweries' brand names. Point-of-purchase display materials constitute a $100 million a year industry in the U.S. (most recent cases: *U.S. v. Everbrite, Inc.; U.S. v. Henry C. Zeni;* and *U.S. v. Jon S. Wamser*);

- a continuing investigation into a scheme to rig bids at residential real estate auctions in northern Virginia has already produced guilty pleas or convictions from 18 individuals and one corporation. The latest indictment came on August 14, 1997, when a federal grand jury in Virginia charged a real estate speculator with conspiring to suppress bids at foreclosure auctions and then profiting from the resale of the property purchased at the fixed price. (most recent case: *U.S. v. Lawrence L. Rosen*);

- throughout FY97, the Division brought five cases in an ongoing investigation into price fixing in the metal building insulation industry. In the most recent case, Mark Albert Maloof, the sales manager of a metal insulation manufacturer, was indicted on May 15, 1997 on two counts of conspiring to fix prices and commit wire fraud. On December 18, 1997, a

jury in Houston found Maloof guilty of both counts. He is currently awaiting sentencing. (most recent case: *U.S. v. Mark Albert Maloof*).

2) DOJ Non-merger civil enforcement

42. On December 3, 1996, the Department announced it would close its investigation into the way AC Nielsen Co. contracted its services for tracking retail sales because the company had reached an agreement with the European Commission that alleviated any anticompetitive concerns. The Division had been investigating whether Nielsen, in contracting with multinational customers, had illegally bundled or tied the terms of contracts in one country with those of other countries. This type of conduct occurred mostly in Europe and had its greatest impact there, and was the subject of an antitrust investigation by EU competition authorities. DOJ and DG-IV officials cooperated extensively throughout the course of their investigations, and when Nielsen formally committed to the European Commission that it would not tie or link the terms of its contracts in one country to the terms of contracts for similar services in other countries, the Department concluded that the practices it had been investigating would not continue, and closed its investigation.

43. On January 22, 1997, Judge Harold Greene ruled on an important discovery issue relating to the Department's investigation of allegations of worldwide price-fixing and group boycott behavior by the five major record companies in connection with music videos supplied to music video programmers. The record companies had responded to civil investigative demand (CID) requests related to their domestic activities but refused to produce U.S.-located documents and information related to foreign activity on the grounds that the Division lacked jurisdiction to investigate this conduct. Judge Greene rejected these arguments, holding that (1) jurisdictional challenges to CIDs should not be upheld absent a ?patent lack of jurisdiction;? (2) the Foreign Trade Antitrust Improvements Act does not exempt foreign price-fixing from the reach of the Sherman Act if that activity has the requisite effect on U.S. domestic or export commerce; and (3) it was premature to consider the issue of international comity at the investigative stage.

44. On April 28, 1997, the Department disclosed that it had made a formal request to the EU's competition authorities to investigate possible anticompetitive conduct by European airlines that may be preventing U.S.-based airline computer reservation systems from competing effectively in certain European countries. This was the first formal positive comity request under the 1991 U.S.-EU antitrust cooperation agreement. The Department had been investigating whether the three large EU airlines that own Amadeus, the dominant computer reservation system in Europe, maintained that dominance by withholding air fare information and functionality from U.S. computer reservation systems that do business in Europe. The Department concluded that the European Commission was in the best position to investigate the conduct because it occurred in its home territory and consumers there are the ones principally harmed if competition has been diminished. The Department maintains a strong interest in the matter, and will continue to investigate the possibility that similar conduct may be preventing U.S.-based computer reservations systems from competing effectively in a number of countries in South America.

45. On July 18, 1997, the Division filed a civil suit against two U.S. and one Swiss oil trading firms for allegedly colluding in order to lower their payments to U.S. oil brokers. In *United States v. AIG Trading Corporation* (7 Trade Reg. Rep. (CCH) ¶45,097 Case No. 4295, S.D.N.Y.), the Division alleged that the three companies exchanged information on broker commissions involving contracts for North Sea crude oil in an effort to lower their payments to U.S. brokers. According to the terms of the consent decree reached between the Division and the defendants, the companies are prohibited from agreeing with any trader to fix, lower, raise, stabilize, or maintain any brokerage commission or to exchange any information concerning such commissions.

3) Modification or termination of DOJ Consent Decrees

46. On July 30, 1997, the Division initiated a consent decree modification regarding a 1950 consent decree governing the foreign licensing activities of the American Society of Composers, Authors, and Publishers (ASCAP). The court approved the requested modifications on November 12, 1997. The modifications removed language in the decree, written long before the advent of home taping royalties, that prevented ASCAP from being able to collect these monies from foreign performing rights societies. Provisions restricting ASCAP's interaction with foreign performing rights societies (e.g., the ability to cross license) were also removed. Other provisions, however, which prohibit ASCAP from interfering with its members' right to license music directly to users outside the U.S. remain in force.

4) FTC Non-merger enforcement actions

a. Commission administrative decisions

47. The Commission in March 1997, issued a final decision finding that the International Association of Conference Interpreters ("AIIC") and its U.S. affiliate members conspired to fix or stabilize the fees for interpretation services performed in the U.S. The final order prohibits AIIC and its U.S. affiliate members from entering into agreements that fix or suggest fees for the provision of interpretation, translation, or language services performed within the United States. The order also requires the association to amend its rules and bylaws to conform to the Commission's order provisions and further requires the elimination of association rules regarding, among other things, fees, travel expenses, pro bono work, and commissions. *International Ass'n of Conference Interpreters*, Docket 9270, 5 Trade Reg. Rep. (CCH) ¶24,235.

48. In September 1997, an administrative law judge issued an initial decision finding that Toys "R" Us, the nation's largest toy retailer, entered into vertical agreements with toy manufacturers and horizontal agreements among the otherwise competing manufacturers to restrict their sales to warehouse clubs that sold toys at prices lower than Toys "R" Us prices. The net effect of these agreements was that consumers could not obtain less expensive toys from the clubs nor easily compare prices between Toys "R" Us and the clubs. The initial order, among other things, would prohibit Toys "R" Us from entering into any agreement with a supplier to restrict sales to any toy discounter, from facilitating agreements among suppliers that would limit sales to any retailers, and from taking an adverse action against suppliers because they deal with toy discounters. The case is currently on appeal before the Commission. *Toys "R" Us, Inc.*, Docket 9278, 5 Trade Reg. Rep (CCH) ¶24,331.

49. In January 1997, the Montana Associated Physicians and Billings Physician Hospital Alliance agreed to settle allegations that they engaged in agreements with their member physicians to control the prices they would accept from health insurance companies and other third party payers and engaged in a boycott to block the entry of a managed care plan. According to the complaint issued with the consent order, the physicians' acts reduced consumer choices for health care and increased the fees physicians charged for services. The consent order prohibits the two organizations from entering into any agreements with physicians to refuse to deal with third-party payers and to fix or control the fees charged for any physician's services. *Montana Associated Physicians, Inc.*, Docket C 3704, 5 Trade Reg. Rep. (CCH) ¶24,143.

50. The Commission, in May 1997, charged a western Colorado physician's organization, which comprises 85 per cent of doctors in private practice in Mesa County, with combining to fix the price and other competitively significant terms of dealing with third-party payers, and with collectively refusing to deal with other payers. The proposed relief would prevent Mesa physicians from acting exclusively through their independent practice association (IPA) in the future and would reduce the likelihood that the IPA would be used to facilitate other anticompetitive behavior by its members. [The matter was settled in

February 1998.] *Mesa County Physicians Independent Practice Ass'n, Inc.*, Docket 9284, 5 Trade Reg. Rep. (CCH) ¶24,266.

51. American Cyanamid, in May 1997, agreed to settle allegations that it fixed the resale prices of its agricultural chemical products by entering into agreements with its retail dealers offering substantial rebates if the dealers sold its chemicals at or above specific prices. The consent order prohibits American Cyanamid from entering into agreements that control prices and conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. *American Cyanamid Co.*, Docket C 3739, 5 Trade Reg. Rep. (CCH) ¶24,203.

52. In June 1997, the 11 remaining dealerships in the complaint against the Detroit Automobile Dealers Association agreed to settle allegations that they conspired to limit competition in the sale of new cars by closing dealerships on Saturdays and most week nights. The order requires the dealerships to be bound by the terms and provisions of the 1995 order and shortens the duration of the affirmative hours requirement. The order prohibits all of the respondents from conspiring in any way to fix hours of operations. *Detroit Automobile Dealers Ass'n*, Docket 9189, 5 Trade Reg. Rep. (CCH) ¶24,232.

53. Other final consent orders are *Waterous Company, Inc.; Hale Products, Inc.*, Docket Nos. C 3693-94, 5 Trade Reg. Rep.(CCH) ¶24,076 (exclusive dealing, fire truck pumps).

b. Federal District Court decisions

54. In February 1997, Red Apple Companies, Inc. agreed to pay a $600,000 civil penalty for allegedly failing to divest certain supermarkets as required by a March 1997 FTC consent order. The complaint and proposed consent judgement were filed in federal district court. *Red Apple Companies*, Docket 9266, Civil Action No. 97 CV 0157, 5 Trade Reg. Rep. (CCH) ¶24,108.

55. In July 1997, the Commission announced a settlement with Schnuck Markets, Inc. under which Schnuck has agreed to pay a $3 million civil penalty -- one of the largest ever obtained for an FTC order violation -- and to divest to supermarket operators two currently closed supermarket properties. The agreement settles charges that Schnuck allowed 24 stores that it was required to divest to become damaged, understaffed and understocked before completing the required divestitures, thereby undermining the intent of the 1995 settlement to maintain competition in the area. *Schnuck Markets, Inc.*, Docket C 3585, 5 Trade Reg. Rep. (CCH) ¶24,307.

56. In September 1997, the Commission authorized the staff to file in the U.S. District Court in Puerto Rico a permanent injunction and consent decree against the College of Physician-Surgeons of Puerto Rico, whose membership includes all doctors in Puerto Rico, and three physician groups settling charges that they violated the antitrust laws by collectively attempting to coerce price-related changes under Puerto Rico's government managed care plan for the indigent by calling for a strike of all non-emergency patient care. Under the settlement, the defendants would be prohibited from jointly participating in boycotts or refusing to provide medical services, and from jointly negotiating prices or other more favorable economic terms for doctors. The consent agreement also calls for the college to pay $300,000 to the catastrophic fund administered by the Puerto Rico Department of Health. *College of Physicians and Surgeons of Puerto Rico*, File 971-0011, 5 Trade Reg. Rep. (CCH) ¶24,335.

E. Business reviews conducted by the Department of Justice

57. In FY97, the Division issued 39 Business Review Letters pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6. Thirty-two requests were granted, one was denied, 5 were declined (where DOJ determined that issuing a Business Review would be inconsistent with its regulations), and one was withdrawn. Eleven of the Business Review Letters issued pertained to the health

care industry, in particular mergers among physician practices and the formation of nonexclusive physician networks and other service networks (*e.g.*, hospitals, home health agencies). Among the other Reviews undertaken by the Division during FY97, requests were made by a grocery price auditing firm, a fisheries cooperative seeking to allocate fishing quotas amongst its members, a group developing escalator safety standards, and an organization holding patent licenses and distributing royalties. The texts of the Business Review Letters issued during FY97 can be found at 6 Trade Reg. Rep (CCH) ¶44,097; those of particular interest are described hereafter.

58. A provider of price auditing services for grocery retailers, DataCheck, Inc., sought approval to purchase shelf price data from retailers and then sell it to other retailers. The Division stated in its letter that the measures taken by DataCheck to prevent its proposed system from being used in any manner that would facilitate price fixing were satisfactory and eliminated any potential anticompetitive effects. (Letter dated January 6, 1997.)

59. Attorneys from sixteen law firms (located in 13 cities) sought a Business Review Letter concerning their plan to offer legal services to construction industry clients on a returnable flat fee basis. The plan would not obligate attorneys to charge a certain amount and members would be allowed to withdraw from the group or to accept client engagements on other terms without withdrawing. The Division stated in its letter that the effect may, in fact, be procompetitive by reducing legal prices and client uncertainty and thus did not warrant antitrust intervention. (Letter dated January 17, 1997.)

60. The Russell-Stanley Corporation, a manufacturer of steel drums, sought to organize joint sales ventures among steel drum manufacturing firms with whom it does not compete. This proposal resulted from a request by larger customers who wished to single source bids, an uncommon practice in the industry. According to the proposal, Russell-Stanley would act as the principal contractor of national bids to service those customers wishing to single source their purchases. Because the communication of pricing information would be strictly limited, the Division chose not to challenge the proposed arrangement. (Letter dated May 20, 1997.)

61. A group of four fisheries and fish processors requested a Business Review Letter regarding their proposed formation of The Whiting Conservation Cooperative, an organization to allocate amongst its members the government-established quota of Pacific Whiting, a species of fish. The Division foresaw no anticompetitive effects of the arrangement and thus chose not to challenge the proposal. (Letter dated May 20, 1997.)

62. The National Elevator Industry, Inc., a trade association consisting of thirty-four domestic manufacturers and installers of escalators, proposed a joint venture with an independent consultant to develop more uniform and comprehensive safety standards for escalator design and installation. The Division, while stating that until the new standard is developed it is impossible to ascertain its competitive impact, chose not to challenge the joint venture because it did not involve the exchange of competitively sensitive information and thus did not disadvantage non-members. (Letter dated May 30, 1997.)

63. MPEG LA, L.L.C. sought to offer a package license of intellectual property patents that are essential to compliance with the MPEG-2 compression technology standard, an international standard endorsed by the Motion Picture Experts Group of the International Organization for Standards, the International Electrotechnical Commission, and the International Telecommunications Union Telecommunication Standardization Sector. The firms holding the essential patents and wishing to participate in the joint licensing agreement were the Trustees of Columbia University, Fujitsu Limited, General Instrument Corporation, Lucent Technologies Inc., Matsushita Electric Industrial Co., Ltd., Mitsubishi Electric Corporation, Philips Electronics N.V., Scientific-Atlanta, Inc., Sony Corporation, and Cable Television Laboratories, Inc. In essence, the new group would sell licenses to manufacturers of video compression components seeking to utilize the intellectual property contained in the essential patents. The Division determined that the joint licensing agreement, limited to technically essential

patents as determined by an independent expert, would have procompetitive effects and therefore did not warrant intervention. (Letter dated June 26, 1997.)

64. In the one Business Review denied in FY97, the Division denied a request for approval of a proposed merger among three groups of gastroenterologists in Pennsylvania. The Division concluded that the merger as proposed would likely have anticompetitive effects. In its analysis, the Division found the relevant geographic market to be much smaller than the market claimed by the parties proposing the merger. As a result, the newly created group would have significant market share and would be able to increase prices for gastroenterology services in the area. (Letter dated July 7, 1997.)

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

A. Department of Justice and FTC merger statistics

1) DOJ review of mergers

65. The Division initiated 277 merger investigations, 220 HSR and 57 non-HSR. Of the 220 HSR investigations, 120 involved second requests and/or civil investigative demands ("CIDs"). Of the 57 non-HSR merger investigations, 13 involved the issuance of CIDs.

2) FTC review of mergers

66. Based on its review of premerger notification reports, the FTC investigated 45 transactions with second requests for information.

3) Enforcement of Premerger notification rules

67. The Commission and the Department actively have enforced the filing requirements of the Hart-Scott-Rodino (HSR) Act by bringing cases in federal court to obtain civil penalties. In FY97, two civil penalty actions were brought.

68. In February 1997, Harry Figgie, Jr. and Figgie International Inc. agreed to pay a $150,000 civil penalty for failing to pre-notify Mr. Figgie's acquisition of restricted voting securities of Figgie International as required by the HSR Act. *Figgie International Inc.*, File 941-0027, Civ. Action No. 1:97CV 00302, 5 Trade Reg. Rep. (CCH) ¶24,209.

69. The Commission filed a complaint and consent agreement in federal district court in June 1997, settling charges that Mahle GmbH, a German piston manufacturer, and Metal Leve S.A., a Brazilian competitor, failed to notify Mahle's proposed acquisition of a controlling interest in Metal Leve as required under the HSR Act. The agreement provides for Mahle and Metal Leve to pay a record $5.6 million civil penalty to resolve the charges. *Mahle GmbH*, File 961-0085, Civil Action No. 1:97 CV01404, 5 Trade Reg. Rep. (CCH) ¶24,291.

B. Significant merger cases

1) DOJ merger challenges or cases

70. In FY97, the Division filed four merger lawsuits against radio companies, each resulting in a consent decree requiring the restructuring of the merger. *United States v. American Radio Systems Corporation* (1997-1 Trade Cas. (CCH) ¶71,747, D.D.C.) was the first challenge ever of a radio joint sales

agreement. The original proposal would have given American Radio a 60 percent local market share, allowing it to set prices for advertisers. Under the consent decree approved by the Court, American Radio acquired two rather than four stations, and it abandoned its joint selling agreement with another competitor, thus preserving competitive advertising prices in the local radio market. In this case, the Division explained its use of a ?stepwise? analysis of horizontal agreements that are not *per se* illegal. A second case involved a merger creating the nation's largest radio group. In *United States v. Westinghouse Electric Corporation* (1997-1 Trade Cas. (CCH) ¶71,749, D.D.C.), the Division negotiated a consent decree requiring the new entity to divest two stations in Philadelphia and Boston, thereby preventing the merger from having an effect on advertising prices in these two major markets. The newly formed group operates 77 radio stations in 13 major markets across the United States. In the final two cases, *United States v. American Radio Systems Corporation* (1997-2 Trade Cas. (CCH) ¶71,898, D.D.C.) and *United States v. EZ Communications, Inc.* (1997-1 Trade Cas. (CCH) ¶71,841, D.D.C.), the Division also required the divestiture of two radio stations. The proposed station swap between EZ Communications and Evergreen Media, however, was abandoned as a result of the Division's antitrust concerns. The Division had previously launched an investigation to determine whether the swaps were part of an effort to allocate radio formats in order to lessen competition between the two cooperating groups of owners.

71. On January 3, 1997, the Division, together with the Attorney General of Colorado, filed a civil suit to block Vail Resorts Inc.'s proposed acquisition of Ralston Resorts Inc. At the same time, the Division filed a proposed settlement, agreeing to allow the merger to proceed following the divestiture of Ralston's Arapahoe Basin Ski Resort, which is located in the same area as Vail's other resorts. In *United States v. Vail Resorts, Inc.* (7 Trade Reg. Rep. (CCH) ¶50,816, D.Colo.), the Division alleged that the original merger proposal would have given Vail a 38 percent share of the local skier market, effectively allowing them to raise the prices charged to skiers in the area. The consent decree and settlement prevented Vail from exerting a dominant influence on ticket prices and thus preserved competition among ski resorts in one of the United States' most popular winter sports venues.

72. During FY97, the Division reviewed two mergers in the waste management industry, ultimately allowing the mergers to go forward after significant restructuring. The first civil suit, *United States v. Allied Waste Industries, Inc.* (7 Trade Reg. Rep. (CCH) ¶50,827, N.D.Tex.), filed on July 14, 1997, involved an acquisition by two of North America's largest waste hauling and disposal companies. In its original form, the transaction would have eliminated head-to-head competition in waste management services in the Houston, Texas area. To satisfy the Department of Justice's antitrust concerns, the companies agreed to sell landfill space in the region, thereby preserving competitive prices. In the second acquisition case, *United States v. USA Waste Services, Inc.* (7 Trade Reg. Rep. (CCH) ¶50,828, W.D. Pa.), filed on August 22, 1997, USA Waste sought to acquire its competitor, United Waste. The Division opposed the original proposal, citing the likelihood of higher prices charged to municipalities in Pennsylvania for waste disposal contracts. According to the settlement and consent decree negotiated by the Division, USA Waste Services is required to divest a landfill.

73. On July 2, 1997, the Division filed a civil suit challenging Raytheon's proposed $2.9 billion acquisition of Texas Instruments' Defense Systems and Electronics Unit. In *United States v. Raytheon Co.* (7 Trade Reg. Rep. (CCH) ¶50,825, D.D.C.), the Division alleged that the acquisition would result in a monopoly in a critical technology used in military radar equipment purchased by the Department of Defense. The proposed consent decree would result in the largest divestiture since the beginning of the post-Cold War consolidation trend in the defense industry. Under the decree, Raytheon would sell the Texas Instruments unit that produces important components for military radar systems, thereby eliminating any potential ability to raise prices or disadvantage other suppliers of radar.

74. On April 21, 1997, the Division and the Attorneys General of New York, Ohio, and Pennsylvania filed a civil complaint, *United States v. Cargill, Inc.* (1997-2 Trade Cas. (CCH) ¶71,893, W.D. N.Y.), alleging that the proposed merger between Cargill and Akzo Nobel, a Dutch corporation, would substantially reduce competition in the northeastern United States market for deicing salt, a product bought primarily by state and local governments for use in clearing public roadways during the winter, and

would reduce competition in food-grade salt in a market east of the Rocky Mountains. The two markets total $300 million per year in commerce. Under the final consent decree, Akzo Nobel would divest deicing salt assets and a food-grade salt producing facility.

75. On June 11, 1997, the Division filed a one-count complaint , *United States v. Long Island Jewish Medical Center* (1997-2 Trade Cas. (CCH) ¶71,960, E.D.N.Y.), against Long Island Jewish Medical Center, a not-for-profit academic hospital, and North Shore Health System, Inc., a not-for- profit corporation that owns and manages North Shore University Hospital. In the complaint, the Division alleged that the proposed merger of the two defendants, who compete head-to-head to be the flagship hospital in local managed care networks, would likely lead to higher hospital prices for consumers. On October 23, 1997, however, the District Court ruled in favor of the defendants and dismissed the complaint.

76. In a year of considerable consolidation within the banking industry, the Division's review of banking transactions resulted in the Division reaching agreements for divestitures or other conditions with the parties in seven transactions. In three other transactions, after review, the Division accepted the parties' initial offer of divestiture of banking offices and their associated customer relationships. In each of the ten transactions, these agreements resulted in the Division issuing a conditional competitive factors report to the responsible banking agency. On March 18, 1997, as a result of a joint investigation by the Division and the Office of the Virginia Attorney General into the proposal by First Virginia Banks, Inc. to acquire Premier Bankshares Corporation, the Division announced it would advise the Federal Reserve Board that it did not intend to challenge the merger after the parties agreed to divest three branches. This transaction would have significantly lessened competition in banking services in the southwest of Virginia. In another bank merger case, Southern National Corporation proposed to acquire United Carolina Bancshares in a transaction that would have given the new entity considerable market share throughout North Carolina. In response to concerns raised by the Division, the parties agreed to divest 20 offices and their associated customer relationships in 10 markets in North Carolina, thereby ensuring competitive loan rates and transaction fees for small businesses.

2) Merger cases brought by the FTC

a. Preliminary injuctions authorized

77. In March 1997, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed $4 billion acquisition by Staples, Inc., of Office Depot, Inc., the two largest operators of office supply "superstores," that allegedly would have allowed the combined firm to control prices of office supplies in numerous metropolitan areas in the U.S. By decision of June 30, 1997 the U.S. District Court for the District of Columbia granted the Commission's motion for a preliminary injunction. 970 F. Supp. 1066 (D.D.C. 1997). The parties subsequently abandoned the transaction. *Staples, Inc.*, File 971-0008, 5 Trade Reg. Rep. (CCH) ¶24,251.

78. In July 1997, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would join MEDIQ Inc. and Universal Hospital Services, Inc., the nation's two largest firms that rent durable, movable medical equipment (e.g., respiratory, infusion and monitoring devices) to hospitals. The FTC alleged that the $100 million transaction would give MEDIQ a monopoly in the market for national customers and a dominant share of the rental markets in many major metropolitan areas, resulting in higher rental prices. The staff filed the suit in August 1997, and the case was subsequently dismissed after the parties abandoned the transaction in September, before the start of trial. *Mediq Inc.*, File 971-0066, 5 Trade Reg. Rep. (CCH) ¶24,308.

b. Commission Administrative Decisions

79. In January 1997, Wesley-Jessen agreed to settle allegations that its acquisition of Pilkington Barnes Hind International, Inc., would create a monopoly in the market for opaque contact lenses. The order requires Wesley-Jessen to divest the Pilkington Barnes Hind opaque lens business to a Commission-approved acquirer and prohibits Wesley-Jessen from acquiring any opaque contact lens maker in the United States for 10 years without notifying the Commission in advance. *Wesley-Jessen Corp.*, Docket C 3700, 5 Trade Reg. Rep. (CCH) ¶24,117.

80. In March 1997, Boeing agreed to settle allegations that its $3.025 billion acquisition of Rockwell International Corporation's aerospace and defense business would reduce competition in two markets: high-altitude-endurance unmanned air vehicles (UAVs) and space launch vehicles. In the first market, according to the complaint issued with the consent order, the acquisition would make Boeing a member of both teams competing to develop these vehicles for the Department of Defense. Under terms of the consent order, Teledyne Ryan, the prime contractor of one team, could replace Boeing on that team, with no significant cost or risk to Teledyne Ryan, thereby protecting competition in the UAV market. In the second market, Boeing would be positioned as both a competitor in the space launch vehicle business and a provider of propulsion systems for other competitors. In addition, the consent order also establishes two firewalls: 1) preventing the flow of competitively sensitive information between Boeing's team and a division of Rockwell that currently provides wings to the other team; and 2) prohibiting Boeing from disclosing nonpublic information from any space launch vehicle manufacturer available to its own launch vehicle division. *Boeing Co., Inc.*, Docket C 3723, 5 Trade Reg. Rep.(CCH) ¶24,169.

81. In the same month Baxter International agreed to settle charges that its proposed acquisition of Immuno International AG would create the world's largest manufacturer of human plasma products used in the treatment of hemophilia and to control bleeding in surgical applications. The consent order requires Baxter to divest its Autoplex product and license Immuno's fibrin sealant to Commission-approved buyers. *Baxter International, Inc*., Docket C 3726, 5 Trade Reg. Rep. (CCH) ¶24,184.

82. Also in March, Ciba-Geigy agreed to settle allegations that its $63 billion merger with Sandoz Corporation could not only slow development or increase prices for gene therapy products, soon to be used in the treatment of cancer and other diseases, but could substantially reduce competition and raise prices for herbicides used in corn production and for flea control products. The consent order requires Novartis AG, the surviving firm, to license specified gene therapy technology and patent rights to Rhône-Poulenc Rorer, Inc., in an effort to increase competition in the market. The order also requires Sandoz to divest its U.S. and Canadian corn herbicide assets and its flea control business to Central Garden & Pet Company. *Ciba-Geigy Limited*, Docket C 3728, 5 Trade Reg. Rep. (CCH) ¶24,190.

83. In May 1997, General Mills agreed to settle allegations that its acquisition of the branded ready-to-eat cereal and snack mix businesses of Ralcorp Holdings, Inc. would restrict the entry of new private-label products similar to the branded cereals but which carry the grocery store's label or other manufacturer's or distributor's label. Under terms of the consent order, Ralcorp can transfer the right to manufacture and sell cereals identical to its Chex brand products to any successor party, without the authorization or approval of General Mills. The consent order also prohibits General Mills from delaying production of the private label Chex rival cereals. *General Mills, Inc.*, Docket C 3742, 5 Trade Reg. Rep. (CCH) ¶24,186.

84. Automatic Data Processing agreed in June 1997, to settle a 1996 administrative complaint charging that its 1995 acquisition of AutoInfo, Inc. assets was part of a plan to acquire monopoly power and raise prices in five distinct markets within the salvage yard information management industry. Under the settlement, ADP would be required to quickly divest within 150 days the former AutoInfo assets as an ongoing business, and to grant the acquirer an unrestricted license to the Hollander Interchange, now the industry standard for the cross-indexed numbering system used to identify groups of parts that are

interchangeable. ADP paid a $2.97 million fine for allegedly failing to include critical documents in its HSR filing. *Automatic Data Processing*, Docket 9282, 5 Trade Reg. Rep. (CCH) ¶24,285.

85. Also in June, Mahle, a German piston manufacturer, agreed to settle allegations that its acquisition of Metal Leve would create a monopoly in the manufacture and sale of articulated pistons used in truck engines for big highway rigs and in locomotive engines. The order requires Mahle to divest Metal Leve's two piston plants in South Carolina and a research and development center in Ann Arbor, Michigan. *Mahle GmbH*, Docket C 3746, 5 Trade Reg. Rep. (CCH) ¶24,286.

86. In the same month, Autodesk agreed to settle allegations that its acquisition of Softdesk would substantially lessen competition in the development and sale of computer-aided design (CAD) software engines. Autodesk develops and markets ?AutoCAD?, a design engine for use in Windows- based personal computers. Prior to the acquisition, Softdesk sold its developmental stage CAD engine, "IntelliCADD," to Boomerang Technology, Inc. The consent order prohibits Autodesk or Softdesk from reacquiring IntelliCADD or any entity that owns or controls it, without prior Commission notice, for 10 years and from interfering with Boomerang's ability to recruit or hire Softdesk employees who worked on the development of IntelliCADD. *Autodesk, Inc.*, Docket C 3756, 5 Trade Reg. Rep. (CCH) ¶24,247.

87. In August 1997, Cadence agreed to settle allegations that its acquisition of Cooper & Chyan Technology, Inc., would substantially reduce competition for "routing" software used to automate the design of integrated circuits or microchips. According to the complaint, the merger would reduce Cadence's incentives to permit competing suppliers of routing tools to obtain access to its layout environments resulting in less innovation, higher prices, and reduced services. In an effort to ensure that independent software developers of commercial routing tools continue to compete with Cooper & Chyan's technology, the consent order requires Cadence to allow these developers to participate in Cadence's software interface programs. *Cadence Design Systems, Inc.*, Docket C 3761, 5 Trade Reg. Rep. (CCH) ¶24,264.

88. In the same month, CVS agreed to settle allegations that its acquisition of Revco would substantially reduce competition for the retail sale of pharmacy services to health insurance companies and other third-party payers in Virginia and in the Binghamton, New York metropolitan area. The order requires CVS to divest 114 Revco stores in Virginia and 6 pharmacy counters in Binghamton. Under terms of the order, CVS agreed to divest the Revco stores to Eckerd Corporation, a subsidiary of J.C. Penney Company and the pharmacy counters to Medicine Shoppe International, Inc. *CVS Corp.*, Docket C 3762, 5 Trade Reg. Rep. (CCH) ¶24,276.

89. Also in August, Tenet agreed to settle allegations that its proposed acquisition of OrNda Healthcorp would reduce competition for inpatient hospital care in San Luis Obispo County, California. According to the complaint issued with the consent order, the acquisition would substantially lessen competition in the area for inpatient acute hospital services. The consent order requires Tenet to divest OrNda's French Hospital Medical Center and related assets in the county within six months to a Commission approved acquirer. In addition, the consent order prohibits Tenet for 10 years from combining its acute care hospitals in San Luis Obispo County with any other hospital in the area. *Tenet Healthcare Corp.*, Docket C 3743, 5 Trade Reg. Rep. (CCH) ¶24,202.

90. Other final consent orders are the following: Cooperative Computing, Inc., Docket C 3757 (electronic automotive parts catalogs), 5 Trade Reg. Rep.(CCH) ¶24,215; J.C. Penney Company, Inc., Docket C 3721-3722 (drug stores), 5 Trade Reg. Rep.(CCH) ¶24,172; NGC Corp., Docket C 3697 (natural gas fractionation), 5 Trade Reg. Rep.(CCH) ¶24,093; SoftSearch Holdings, Inc., Docket C 3759 (gas and oil production data), 5 Trade Reg. Rep. ¶24,171; Time Warner Inc., Docket C 3709 (cable television), 5 Trade Reg. Rep.(CCH) ¶24,104; Phillips Petroleum Co., Docket 3728 (natural gas transportation), 5 Trade Reg. Rep.(CCH) ¶24,190; Fresnius AG, Docket C 3689 (hemodialysis concentrate), 5 Trade Reg. Rep.(CCH) ¶24,077; Class Rings, Inc., Docket C 3701 (class commemorative rings), 5 Trade Reg. Rep.(CCH) ¶24,305.

IV. Regulatory and Trade Policy Matters

A. Regulatory policies

1) DOJ activities with respect to Federal and State Regulatory Matters

91. The Division participates actively in regulatory proceedings in order to promote competition. During FY97, the Division filed comments in:

- various Federal Communications Commission (FCC) proceedings, including Regional Bell Operating Company applications to provide in-region interLATA services in the States of Oklahoma and Michigan, and reform of access charges;

- *Antitrust Immunity for Motor Carrier Rate Bureaus*: On August 18, 1997, the Division filed comments with the Surface Transportation Board opposing continued antitrust immunity for motor carrier rate bureau agreements. Under these agreements, trucking firms enjoy immunity from the antitrust laws to meet, discuss, and agree on general rate increases. The Division's comments explained that even in a competitively-structured industry, such conduct could lead to rates in excess of competitive levels and that there is no reason to take such a risk -- rate bureau functions that benefit the public could continue without immunity. If the Board nonetheless continues antitrust immunity, the Division urged it to deny the rate bureaus nationwide authority because expanding the geographic scope of collective ratemaking could exacerbate rate bureaus' market power;

- *Judicial Conference -- adoption of ABA's recommended citation form*: On March 14, 1997, the Department filed comments with the Committee on Automation and Technology of the Judicial Conference of the United States, recommending that the federal courts adopt the case law citation form recommended by the American Bar Association (ABA). The comments state that ?[b]y keying on a particular publisher and by identifying the location of cited text on the basis of that publisher's layout of a printed book, the current system unnecessarily hampers the usage of other publishers' electronic products in two ways. The chosen publisher enjoys a special advantage and the entire system is founded on a type of textual division that is undesirable in electronic media.? The comments recommend the ABA's media-neutral citation system which will loosen restrictions on competition among case law providers and encourage innovation, outweighing the costs on the courts which would be responsible for numbering paragraphs and assigning sequential opinion numbers;

- *Railroad Merger -- Union Pacific and Southern Pacific*: On August 20, 1997, the Division filed reply comments with the Surface Transportation Board in its oversight proceeding on the effectiveness of trackage rights remedies ordered in its decision approving the UP/SP merger (discussed in FY96 annual report, para 87 -- the Division had opposed the merger as anticompetitive, arguing that it would limit competition in markets with over 6 billion in revenues, and that trackage rights would not preserve competition.) The Division's comments urged the Board to take additional action to protect shippers adversely affected by the merger, such as identifying which shippers BNSF may serve (with its trackage rights) and addressing actions by UP that prevent BNSF from offering competitive service. In addition, the Division argued that the Board should remain wary of the ultimate effectiveness

of trackage rights and should consider structural alternatives to restore competition lost from the merger;

- *Prevention of Anticompetitive Virginia State Bar Rules*: In the fall of 1996, the Virginia State Bar attempted passage of a proposed Supreme Court Opinion that would have prevented non-lawyers from competing with attorneys in performing real estate closings. At the same time, the real estate bar tried to persuade the state legislature to enact similar legislation. On January 3, 1997, the Department and FTC filed a joint letter with the state Supreme Court urging rejection of the Opinion. For over 15 years, Virginia consumers had the choice of using a lay settlement service, rather than a lawyer. In the letter, the Department and FTC pointed out that ending this competition will likely increase real estate closing costs for consumers and has not been justified by a showing of increased consumer protection. A Media General study found that average lay closings cost $158 less than those performed by lawyers. Moreover, the proposed opinion would probably increase the price of lawyers' settlement services, since competition from lay services would no longer restrain the fees lawyers could charge;

- the proposed Opinion would have been a Supreme Court rule that declared lay real estate settlements to be the unauthorized practice of law. After the Justice Department and FTC submitted the joint letter to the Court, copies of the letter were forwarded to the Virginia legislature. The legislature passed legislation allowing lay services to continue to compete with law firms in providing closings. The agencies had argued that while having a lawyer may be desirable, the choice of whether to use a lawyer should belong to consumers; the state government, rather than outright prohibiting lay settlement services, should have considered less-restrictive alternatives that could safeguard consumers from fraud. The legislature followed this route, permitting lay settlements, while imposing additional regulations to protect consumers;

- *Prevention of Anticompetitive Kentucky State Bar Rules*: In August 1997, a committee of the Kentucky Bar Association sought passage of a proposed Supreme Court Opinion that would have prohibited non-lawyers from competing with attorneys in conducting real estate closings. The Association is the official state bar of Kentucky. On September 10, 1997, the Antitrust Division filed a letter with the Kentucky Bar Association urging rejection of the Opinion. The Opinion would have deprived Kentucky consumers of the choice to use a lay settlement service, a choice the Association affirmed in 1981. In the letter, the Division explained that ending lay competition is likely to hurt Kentuckians by raising their closing costs, without demonstrating that doing so is necessary to protect consumers. The Kentucky Bar Association Board of Governors rejected the Opinion and returned it to the committee that had drafted it;

- *Elimination of Anticompetitive Accreditation Practices Through Cooperation with Department of Education*: In September 1997, the Antitrust Division filed comments with the Department of Education (DOE) challenging anticompetitive accreditation standards and practices of the Southern Association of Colleges and Schools ("SACS"). SACS is the DOE-recognized accreditor of 780 colleges and universities in the South. In 1994-95, SACS adopted new accreditation standards that prevented students registered at technical and business colleges accredited by accrediting agencies that compete with SACS from transferring course work credit to schools accredited by SACS. Since SACS accredits all of the traditional "receiving" institutions in the South, its new accreditation standards prevented

over 100,000 students enrolled at non-SACS schools in the South from transferring credits, and also injured competing accrediting agencies that accredit technical and business colleges and the institutions that they accredit. DOE staff agreed with the DOJ comments and recommended sanctions against SACS. As a result, SACS agreed in December 1997 to eliminate the accreditation standards that the Division had criticized.

92. In FY97, the Division reviewed five applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of five new certificates. The goods covered by the certificates included milled rice, dry sweet whey and edible grade lactose.

2) FTC activities with respect to regulatory and state legislative matters

93. The goal of the Commission's advocacy activities is to reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of some of these activities in FY 1997.

a Congress

94. In response to a request by the House of Representatives Task Force on Tobacco and Health, FTC staff submitted a report to Congress that analyzed the potential economic impact of the proposed tobacco settlement between the tobacco industry and 40 state Attorneys General. According to the report, certain features of the proposed settlement, particularly the antitrust exemption, have the potential to reduce competition and enhance the ability of the cigarette companies to coordinate price increases, thus producing even greater price increases and profits. Such sweeping antitrust immunity appears to be unnecessary for implementation of the settlement. Staff suggested that a narrowly focused exemption, permitting tobacco firms to collaborate with respect to certain conduct that would curtail advertising to underage smokers, might be appropriate to advance the stated goals of the settlement.

b. States

95. Staff of the Bureau of Competition and the Antitrust Division submitted a joint comment to the Virginia Supreme Court urging against adoption of the Virginia State Bar's proposal that would prevent non-lawyers and title company attorneys from handling closings of real estate transactions and refinancings (see above, para 91).

96. Staff of the Dallas Regional Office testified before the New Mexico Board of Optometry concerning its proposed rules about optometrists' commercial relationship with nonprofessionals. Staff testified that the rules would discourage optometrists from entering into lease agreements with retailers or other businesses by prohibiting an optometrist from agreeing to leave some portion of time available for walk-in patients, maintain particular office hours, share support services or personnel, and have credit accounts handled by a mercantile establishment. Staff noted that FTC staff studies have shown that restrictions on optometrists' commercial practices did not improve the quality of care, yet resulted in higher prices for consumers.

B. Department of Justice Trade Policy Activities

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

98. The Division and FTC participate in a number of negotiations and working groups related to regional trade agreements. The Division chairs the U.S. delegation to a working group on trade and competition under the North American Free Trade Agreement, and participates with the Office of the U.S. Trade Representative, the Federal Trade Commission, and State and Commerce Departments in competition policy working groups associated with the Free Trade Area of the Americas and Asia-Pacific Economic Cooperation. The antitrust agencies also play an important role in the working group established in 1997 by the World Trade Organization to study issues relating to the interaction between trade and competition policy.

99. The Division represents the Department on the Committee on Foreign Investment in the United States (CFIUS), an interagency group chaired by Treasury that advises the President on enforcement of the Exon-Florio provision, a 1988 statute that permits the President to block or suspend foreign acquisitions of U.S. assets that "threaten to impair the national security."

100. 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.

101. The Division co-chairs with the State Department the Structural Issues Working Group of the Enhanced Initiative on Deregulation and Competition Policy. In this forum the United States has encouraged the Japanese Government to: strengthen Antimonopoly Law enforcement, promote aggressively competition policy measures, deregulate the distribution network, and improve transparency of administrative practices. The Division also continues to co-chair with the Office of the U.S. Trade Representative the Deregulation and Competition Policy portion of the U.S.-Japanese Framework discussions. This group coordinates with other US agencies regarding Japanese deregulation and competition policy measures.

V. New Studies Related to Antitrust Policy

A. Antitrust Division Economic Analysis Group discussion Papers

102. The Division issued six Economic Analysis Group Discussion Papers in FY97:

96-10 Kimmel, Sheldon, ?Lowering Price by Buying Competitors in Order to Shut Them Down,? EAG 96-10, October 15, 1996.

96-11 Werden, Gregory J., ?Demand Elasticities in Antitrust Analysis,? EAG 96-11, November 29, 1996.

97-1 Werden, Gregory J. and Froeb, Luke M., ?A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of a Homogenous Product,? EAG 97-1, June 5, 1997.

97-2 Pittman, Russell, ?Competition Law in Central and Eastern Europe: Five Years Later,? EAG 97-2, June 6, 1997.

97-3 Crooke, Philip, et al., ?Effects of the Assumed Demand System on Simulated Postmerger Equilibria,? EAG 97-3, August 14, 1997.

97-4 McCabe, Mark J., ?Analyzing Welfare in Related Markets: Durable Goods and Aftermarkets,? EAG 97-4, September 12, 1997.

Copies of these reports may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779. Other Division public materials may be obtained through the public information unit of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 221, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached at (202) 514-2481.

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

103. The following may be obtained from the Federal Trade Commission, Division of International Antitrust, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

1) Economic reports

104. None on antitrust policy.

2) Working Papers

1. Market Structure and the Flow of Information in Repeated Auctions, (WP #213), Charles J. Thomas, December 1996.
2. Do Nonprofit Hospitals Exercise Market Power?, (WP #214), John Simpson and Richard Shin, December 1996.
3. Discriminatory Dealing with Downstream Competitors: Evidence From the Cellular Industry, (WP #215), David Reiffen, Laurence Schumann, and Michael R. Ward, September 1997.