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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- 2010 --

This report is submitted by the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2009, through September 30, 2010 ("FY 2010"). It summarizes the competition enforcement and policy activities of both the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and the Federal Trade Commission ("Commission" or "FTC"). The two agencies are collectively referred to throughout this report as the "Antitrust Agencies" or "Agencies." For additional information on the agencies' activities during FY 2010 see the FTC in 2010 Report, available at http://www.ftc.gov/os/2010/04/2010ChairmansReport_screen.pdf and the DOJ 2010 Newsletter, available at http://www.justice.gov/atr/public/update/division-update-2010.html.

1. Senior DOJ and FTC Staff Appointments

2. In January 2010, Rachel Brandenburger was appointed as Assistant Attorney General (AAG) Christine Varney's special advisor for international matters. William F. Cavanaugh, Jr. resigned as Deputy Assistant Attorney General ("DAAG") for Civil Matters in July 2010, and Molly S. Boast resigned her position as DAAG in February 2011. Joseph F. Wayland became DAAG for Civil Enforcement in September 2010, and Katherine B. Forrest became DAAG for Criminal and Civil Operations in October 2010. Sharis A. Pozen became DAAG for Civil Enforcement in January 2011.

3. In November 2009, President Obama announced the nomination of Edith Ramirez and Julie Brill as FTC Commissioners. Their nominations were confirmed by the U.S. Senate on March 3, 2010, and Commissioner Ramirez and Commissioner Brill were sworn in by FTC Chairman Jon Leibowitz on April 5 and April 6, 2010, respectively. Pamela Jones Harbour resigned as Commissioner effective April 6, 2010, after six-and-a-half years on the Commission. On November 30 2009, FTC Chairman Jon Leibowitz announced the appointments of Cecelia Prewett as Director of the FTC Office of Public Affairs and Norm Armstrong, Jr. as Deputy Director of the FTC Bureau of Competition.

2. Changes in Law or Policies

2.1 Changes in Antitrust Rules, Policies, or Guidelines

4. On August 19, 2010, the Agencies issued revised horizontal merger guidelines, which mark the first major revision of the U.S. guidelines in 18 years. The revised guidelines aim to provide a better understanding of how the agencies evaluate proposed mergers to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that have no or beneficial competitive impact. Key developments include: clarification that merger analysis does not rely on a single methodology; introduction of a new section on "Evidence of Adverse Competition Effects;" discussion of the appropriate use of market definition and market concentration tools; updated explanation of the hypothetical monopolist test; revised concentration thresholds; expanded discussion of unilateral competitive effects and an expanded section on coordinated effects; an updated discussion of entry analysis; and, new sections on powerful buyers, mergers between competing buyers, and partial acquisitions. In drafting the revisions, the agencies considered a wide range of opinions from the U.S. and internationally that were gathered through a series of joint public workshops and discussion, and hundreds of public comments submitted by attorneys, academics, economists, consumer groups and businesses. The 2010 guidelines are available at http://www.ftc.gov/os/2010/08/100819hmg.pdf and http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

5. On August 13, 2010, the FTC proposed changes to improve the premerger notification form that companies must file when seeking the agencies' review of a proposed transaction under the Hart-Scott-Rodino Act. The proposal aims to eliminate requests for unnecessary information, but also requires

additional information that is needed to help the agencies during their initial review of transactions. The Commission believes the proposed changes will make the premerger notification process more efficient, and the form easier to complete. The FTC solicited public comments on the proposed, and expects to release the revised form during 2011. See http://www.ftc.gov/os/2010/08/100812hsrfrn.pdf.

2.2 Proposals to Change Antitrust Laws, Related Legislation or Policies

6. On July 27, 2010, the Commission testified before Congress, calling for legislation that will end pay-for-delay settlements, i.e. settlements between brand-name pharmaceutical companies and generic competitors that delay the entry of lower-priced generic drugs into the market. See http://www.ftc.gov/opa/2010/07/antitrust.shtm. FTC Chairman Leibowitz has made additional public statements urging courts and Congress to rethink their approach to pay-for-delay settlements, which cost American consumers $3.5 billion a year in higher prescription drug prices, and identifying the stopping of pay-for-delay settlements a top competition priority. See http://www.ftc.gov/opa/2010/04/cipro.shtm and http://www.ftc.gov/opa/2010/01/payfordelay.shtm.

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

3.1 Staffing and Enforcement Statistics

3.1.1 FTC

7. During FY 2010, the FTC had 512 FTE (full-time equivalents, a U.S. measure of work years) staff working on competition enforcement, including 302 attorneys (212 of whom work for the FTC Bureau of Competition), 60 economists (51 of whom are Phd economists), and 109 "other" professionals. The "other" category includes investigators, merger analysts, compliance specialists, industry analysts, research analysts, financial analysts/accountants, paralegals, and support staff.[1] The FTC's Maintaining Competition Mission expended approximately $119 million in FY 2010.

8. During FY 2010, 1,166 proposed mergers and acquisitions were reported for review under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"), a 63% increase from the number of HSR transactions reported during FY 2009. The agencies were authorized to request additional information with respect to 1,128 of these reported transactions (which accounts for, *inter alia,* incomplete, non-reportable and secondary transactions). Commission staff opened 186 initial phase investigations and issued requests for additional information ("second requests") in 20 transactions. During the year, the Commission challenged 22 transactions leading to 19 consent orders. 18 of these consent orders were obtained in non-adjudicative proceedings, and one was obtained after the Commission filed an administrative complaint challenging the merger. In addition, three transactions were abandoned after the Commission informed the parties of its antitrust concerns.

9. During FY 2010, the Commission brought 7 non-merger enforcement actions challenging a variety of anticompetitive conduct, 5 of which were resolved by consent agreement. Practices challenged included alleged refusals to deal, price fixing, market allocation agreements, and a trade association's anticompetitive sharing of sensitive information.

[1] Since the full-time equivalent measure does not reflect actual employees, but rather a measure of employee work years, the 512 FTEs cannot be fully split out into actual positions, thus the numbers provided are approximations.

10. The Commission filed *amicus curiae* briefs in five cases, including one submitted jointly with the United States and two before the Federal Circuit. The FTC provided 4 advisory letters and submitted 11 advocacy filings.

3.1.2 DOJ

11. At the end of FY 2010, the Division employed 787 persons: 354 attorneys, 55 economists, 170 paralegals, and 208 other professional staff. For FY 2010, the Division received an appropriation of $163.2 million.

12. During FY 2010, the Division opened 158 investigations and filed 74 civil and criminal cases in federal district court. In FY 2009, the Division was party to three antitrust cases decided by the federal courts of appeals.

13. During FY 2010, the Division filed 60 criminal cases in which it charged 21 corporations and 63 individuals. Eleven corporate defendants and 19 individuals were assessed fines totalling $343 million and 29 individuals were sentenced to a total of 26,046 days of incarceration. Another six individuals were sentenced to spend a total of 1,295 days in some form of alternative confinement.

14. The Division investigated 64 mergers and challenged 10 of them in court; eight 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. In addition, the Division screened a total of 379 bank mergers. The Division opened 102 civil investigations (merger and non-merger), and issued 480 civil investigative demands (a form of compulsory process). The Division filed four non-merger civil complaints. Also during FY 2010, the Division issued three business review letters.

3.2 Antitrust Cases in the Courts

3.2.1 United States Supreme Court

15. In *American Needle, Inc. v. NFL,* 130 S. Ct. 2201 (May 24, 2010), the Supreme Court addressed the issue of whether a sports league structured as a joint venture of separately owned teams should be considered a single economic entity for purposes of the Sherman Act Section 1 concerted action requirement. On May 24, 2010, the Court held that the NFL teams compete in the market for intellectual property and hence collective licensing decisions by the NFL teams deprive the marketplace of independent centers of decision-making. The Court held that joint venture's actions were not those of a single economic entity because it acted as an instrumentality of the teams. See a more complete discussion in the 2009 Annual Report on Competition Policy Developments in the U.S, at http://www.ftc.gov/bc/international/docs/usannualreport09.pdf.

3.2.2 U.S. Court of Appeals Cases

16. In FY 2010, the United States filed amicus briefs in a "reverse payment" pharmaceutical case. *In re Ciprofloxicin Hydrochloride Antitrust Litigation,* 604 F.3d 98 (2d Cir. 2010). As background, to market a new drug, a pharmaceutical company requires the permission of the Food and Drug Administration ("FDA"), which it seeks to obtain by filing a New Drug Application ("NDA") containing data regarding the drug's safety and efficacy. These data are time consuming and expensive to acquire. In the Hatch-Waxman Act, enacted in 1984, Congress chose to permit firms wishing to market a drug that is bioequivalent to an already approved New Drug (that is, a "generic" version of the branded New Drug) to submit an Abbreviated New Drug Application ("ANDA"), in essence taking advantage of the safety and efficacy data previously submitted with the NDA. If the new drug is indisputably protected by one or more patents, approval to market the generic is withheld until patent protection expires. The generic firm may,

however, inform the FDA (by what is called a "Paragraph IV certification") and the firm with the approved NDA that it believes either that the relevant patent is invalid, or that the generic does not infringe the relevant patent. In instances involving Paragraph IV certifications, approval to market is withheld for two and a half years (or until the patent litigation is resolved against the branded firm) and the branded firm is permitted to sue the generic firm for patent infringement even before the generic attempts to market its drug. To encourage generic firms to challenge drug patents, Congress provided for the first firm to file an ANDA and Paragraph IV certification with respect to a particular branded drug to be the exclusive generic marketer for a 180-day "exclusivity period" once it begins marketing.

17. In many instances, the branded and generic firms have chosen to settle their patent litigation instead of carrying it through to judgment. In a number of these instances, the settlement has provided that the generic firm will not market its generic product for some time but then is permitted to market it, in some cases before patent expiration. It has also provided for significant money to be paid by the branded firm to the generic firm ("reverse payment"), perhaps more than the generic firm could have earned by winning the patent litigation and then marketing the drug at the lower prices resulting from competition. Following such settlements, antitrust suits have often been filed alleging that the settlement agreement is a restraint of trade, an agreement not to compete, illegal under the Sherman Act. In re Ciprofloxicin Hydrochloride Antitrust Litigation ("Cipro") is one such antitrust case.

18. The district court in *Cipro* granted summary judgment for the defendant drug companies, reasoning that the challenged settlement agreement did not restrict competition beyond the scope of the claims in the relevant patent, and the patent is a grant of exclusivity within those claims. The court recognized, however, that the analysis would be different if the patent had been procured by fraud on the patent office or the patent owner knew that its infringement suit was objectively baseless and therefore a sham. 366 F. Supp. 2d 514 (E.D.N.Y. 2005). In subsequent litigation involving a different drug, the United States Court of Appeals for the Second Circuit substantially adopted the Cipro district court's analytic framework: "absent an extension of the monopoly beyond the patent's scope . . . and absent fraud, . . . the question is whether the underlying infringement lawsuit was 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 213 (2d Cir. 2006)

19. Different groups of plaintiffs in *Cipro* had their appeals directed to two different courts of appeal. In one appeal, the United States Court of Appeals for the Federal Circuit adopted an analytic framework substantially similar to that adopted in the *Tamoxifen* case. *In re Ciprofloxicin Hydrochloride Antitrust Litigation*, 514 F.3d 1323 (Fed. Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009). The other went to the United States Court of Appeals for the Second Circuit. After oral argument, the panel of three judges invited the United States to file an amicus brief. In that brief, the United States explained why it considered the *Tamoxifen* framework to be incorrect and argued that "reverse payment" agreements that delay entry by a potential generic competitor in exchange for a payment from a branded drug manufacturer with market power presumptively violate the Sherman Act, but that defendants are entitled to rebut that presumption by offering evidence that the reverse payment did not purchase reduced competition. The panel, however, concluded that it was bound by the earlier *Tamoxifen* decision of the same court, affirmed the district court, and invited the losing plaintiffs to ask the full court to rehear the case, the full court having the authority to depart from the *Tamoxifen* decision. *In re Ciprofloxicin Hydrochloride Antitrust Litigation*, 604 F.3d 98 (2d Cir. 2010). Plaintiffs so asked and the United States filed an amicus brief supporting that request, but the full court declined to rehear the case. 625 F.3d 779 (2010). Plaintiffs have sought Supreme Court review, and the Court has not yet decided whether to grant that review.

3.3 Statistics on Private and Government Cases Filed

20. According to the 2010 Annual Report of the Director of the Administrative Office of the U.S. Courts, 544 new civil antitrust actions, both government and private, were filed in the Federal district courts during fiscal year 2010. See page 145 of the Report, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf.

3.4 Significant DOJ and FTC Enforcement Actions

3.4.1 DOJ Criminal Enforcement

21. **Freight Forwarders**: On September 30, 2010, the Division announced that six international freight forwarders had agreed to plead guilty and pay criminal fines totaling $50 million for their roles in several conspiracies to fix a variety of fees and charges in connection with the provision of freight forwarding services for international air cargo shipments. Freight forwarders manage the domestic and international delivery of cargo for customers by receiving, packaging, preparing and warehousing cargo freight, arranging for cargo shipment through transportation providers such as air carriers and steamship lines, preparing shipment documentation, and providing related ancillary services. According to charges filed in U.S. District Court for the District of Columbia, EGL Inc., a Houston-based company; Kühne + Nagel International AG, based in Switzerland (K+N); Geologistics International Management (Bermuda) Limited, based in Bermuda; Panalpina World Transport (Holding) Ltd., based in Switzerland; Schenker AG, based in Germany; and BAX Global Inc., a U.S.-based company, engaged in one or more separate conspiracies to impose certain charges or fees on customers purchasing international freight forwarding services for cargo freight destined for air shipment to the United States during various periods between 2002 and 2007. Under the plea agreements, the six companies agreed to pay criminal fines totalling over $50 million. Each company also agreed to cooperate with the ongoing investigation.

22. **Refrigerant Compressors**: On September 30, 2010, the Division announced that Panasonic Corporation, a Japanese corporation, and Embraco North America Inc., a Whirlpool Corporation subsidiary, based in the U.S., had agreed to plead guilty and to pay a total of $141 million in criminal fines for their role in an international conspiracy to fix the prices of refrigerant compressors, which are used in refrigerators and freezers in homes and businesses. According to charges filed in U.S. District Court in Detroit, the conspiracy lasted from at least as early as October 14, 2004 until December 31, 2007. According to the plea agreements, both companies agreed to cooperate with the ongoing investigation, and Embraco agreed to pay a $92 million criminal fine and Panasonic agreed to pay a $49 million criminal fine.

23. **Air Cargo**: Several additional defendants in FY 2010 agreed to plead guilty or were indicted in the Division's ongoing investigation into price-fixing in the air transportation industry. On September 27, 2010, the Division announced that Taiwan-based China Airlines Ltd. had agreed to plead guilty and pay a $40 million criminal fine for fixing cargo rates charged for international air cargo shipments to and from the United States between 2001 and 2006. On Sept. 21, 2010, Ms. Maria Christina "Meta" Ullings, senior vice president of Cargo Sales and Marketing of Martinair Holland N.V., was indicted for participating in a conspiracy to fix and coordinate certain surcharges on air cargo shipments. On Sept. 2, 2010, Polar Air Cargo LLC was charged and agreed to enter a guilty plea and pay a fine of $17 million. On August 26, 2010, Mr. Joo Ahn Kang, former president of Asiana, and Mr. Chung Sik Kwak, former vice president of the Americas region of Asiana, both citizens and residents of the Republic of Korea, were indicted for participating in a conspiracy to suppress and eliminate competition by fixing passenger airfares for travel from the United States to Korea. Finally, on August 27, 2010, Northwest Airlines LLC pled guilty and was sentenced to a $38 million fine for its role in the air transportation price-fixing conspiracy.

24. By the end of FY 2010, a total of 18 airlines and eight executives had been charged in the ongoing investigation into price fixing in the air transportation industry. More than $1.6 billion in criminal fines had been imposed and four executives had been sentenced to serve prison time. Charges were pending against the remaining four executives. The airlines that had pleaded guilty, or agreed to plead guilty, were: British Airways Plc, Korean Air Lines Co. Ltd., Qantas Airways Limited, Japan Airlines International Co. Ltd., Martinair Holland N.V., Cathay Pacific Airways Limited, SAS Cargo Group A/S, Société Air France, Koninklijke Luchtvaart Maatschappij N.V. (KLM Royal Dutch Airlines), EL AL Israel Airlines Ltd., LAN Cargo S.A., Aerolinhas Brasileiras S.A., Cargolux Airlines International S.A., Nippon Cargo Airlines Co. Ltd., Northwest Airlines LLC, Asiana Airlines Inc., Polar Air Cargo LLC., and China Airlines Ltd. Airline executives from the following airlines had pleaded guilty: British Airways, Qantas Airways, Martinair, and SAS Cargo; other executives from SAS Cargo, Asiana, and Martinair Holland N.V., had been indicted.

25. **Municipal Finance Contracts**: The Division announced in FY 2010 a series of indictments and guilty pleas in its ongoing investigation of bid-rigging and fraud conspiracies related to contracts for the investment of municipal bond proceeds and other related municipal finance contracts. The conduct, which took place between approximately 1998 and 2006, involved companies that provide a type of contract, known as an investment agreement, to state, county, and local governments and agencies throughout the United States. These government entities seek to invest money from a variety of sources, primarily the proceeds of municipal bonds that they had issued to raise money for, among other things, public projects. The companies were hired to act as brokers and conduct a competitive bidding process primarily for contracts for the investment of the money raised when municipal bonds are issued. The Division alleged that the companies and their executives secretly manipulated and controlled the bidding process in numerous ways to enrich themselves and the co-conspirator providers of the investment agreements: designating in advance which providers would be the winning bidder for certain investment agreements, submitting intentionally losing bids, paying kickbacks, and unlawfully sharing information about prices or conditions in competitors' bids.

26. By the end of FY 2010, seven individuals had pled guilty in the ongoing municipal bonds investigation. A former employee of a national bank and three former employees of CDR Financial Products Inc. (CDR), a California-based financial products and services firm, had pled guilty to bid-rigging and fraud conspiracies, and three other individuals had pled guilty to related charges. In addition, three former financial services executives were indicted on July 27, 2010, for participating in fraud schemes and conspiracies related to the bidding for investment agreements. In October 2009, CDR, two of its employees and one former employee were charged for participating in bid-rigging and fraud conspiracies and related crimes. Trial is scheduled for September 12, 2011.

27. **Liquid Crystal Displays**: In FY 2010, the Division announced that two companies and four individuals had agreed to plead guilty, and one company and six of its executives had been indicted, in the ongoing investigation of price-fixing in the thin-film transistor-liquid crystal display (TFT-LCD) panels market during the period 2001-2006. TFT-LCD panels are used in computer monitors and notebooks, televisions, mobile phones and other electronic devices. In 2006, the worldwide market for TFT-LCD panels was valued at $70 billion. Companies directly affected by the LCD price-fixing conspiracy are some of the largest computer and television manufacturers in the world, including Apple, Dell and Hewlett Packard. At the end of FY 2010, more than $890 million in criminal fines had been imposed, and 19 executives and 8 companies had been charged, in the investigation.

28. On December 9, 2009, the Division announced that Taiwan-based Chi Mei Optoelectronics had agreed to pay $220 million in criminal fines for its role in the conspiracy. In FY 2010, four former Chi Mei executives, all residents of Taiwan, agreed to serve jail sentences in the United States ranging from 9 to 14 months and to pay criminal fines between $25,000 and $50,000. On June 29, 2010, the Division

announced that Taiwan-based HannStar Display Corporation had agreed to pay a $30 million criminal fine for its role in the conspiracy. On June 10, 2010, the Division announced that a federal grand jury had indicted AU Optronics Corporation, the largest Taiwanese TFT-LCD panels producer and seller, its U.S. subsidiary, and six of its Taiwan-resident executives for participation in the conspiracy.

29. **Carbon Brushes – Obstruction Conviction**: On July 27, 2010, a federal jury in Philadelphia convicted Ian P. Norris, the former CEO of The Morgan Crucible Company plc, a UK corporation, of conspiring with others to obstruct justice. In 2004, a federal grand jury indicted Norris, a UK citizen, on one count of fixing prices of carbon brushes and other carbon products, one count of conspiring to obstruct justice, and two counts of obstructing justice in connection with the price-fixing investigation in the carbon products industry. Carbon products are used to transfer electrical current in automobiles, trains, public transit vehicles and consumer products and are used in pumps and compressors to contain liquids and gases.

30. Norris was extradited to the U.S. in March 2010 on the three obstruction charges. The jury returned a guilty verdict on the conspiracy to obstruct justice count and not guilty verdicts on the witness tampering count and the count of corruptly persuading others to destroy or conceal documents. The conspiracy count carries a maximum penalty of five years in prison and a $250,000 fine. On December 10, 2010, Norris was sentenced to serve 18 months in prison and to pay a criminal fine of $25,000.

31. The Division alleged that Norris had conspired with his subordinates to obstruct the grand jury's investigation. Morgan Crucible employees conspired with Norris to create a false "script" that employees of both Morgan Crucible and a competitor were to follow when questioned in the investigation. Also, a "document destruction task force" was formed to collect and destroy or conceal documents from the grand jury.

32. More than $11 million in criminal fines have been obtained and four executives and two companies have pleaded guilty or have been convicted as a result of this investigation. Morgan Crucible Company plc, based in the U.K., pleaded guilty in 2002 to one count of tampering with witnesses and one count of document destruction. The company paid a $1 million criminal fine. A U.S.-based former subsidiary of the company, Morganite Inc., pleaded guilty in 2002 to fixing prices of carbon products and paid a $10 million fine. In addition, three subordinates of Norris previously pleaded guilty to obstruction charges.

33. **Iowa Ready-Mix Concrete**: On May 24, 2010, the Division announced that the president of an Iowa ready-mix concrete company had pleaded guilty to participating in a conspiracy to fix prices and rig bids for the sale of ready-mix concrete sold to various companies in 2008 and 2009. The defendant participated in a conspiracy in which he engaged in discussions concerning project bids for sales of ready-mix concrete in Iowa, submitted rigged bids at collusive and noncompetitive prices, and accepted payment for sales of ready-mix concrete at collusive and noncompetitive prices. In the same investigation of the concrete industry in Iowa, a former executive of an Iowa concrete company pled guilty on May 4, 2010, and was sentenced to serve 19 months in jail and pay a criminal fine of $100,000 for his participation in conspiracies to fix prices and rig bids.

3.4.2 DOJ Civil Non-Merger Enforcement

34. **High Technology Companies and No Solicitation Agreements:** On September 24, 2010, the Department announced that it had reached a settlement with six high technology companies – Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar – that would prevent them from entering into "no solicitation" agreements for employees. The Department filed a civil antitrust complaint and a proposed settlement in the U.S. District Court for the District of Columbia. The complaint alleged

that the companies' actions reduced their ability to compete for high tech workers and interfered with the proper functioning of the price-setting mechanism that otherwise would have prevailed in competition for employees. The settlement, which will be in effect for five years, prohibits the companies from engaging in anticompetitive no solicitation agreements. The settlement prohibits the companies from entering, maintaining, or enforcing any agreement that prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees. The companies also must implement compliance measures tailored to these practices. See http://www.justice.gov/atr/public/press_releases/2010/262648.htm.

35. **Idaho orthopedics:** On May 28, 2010, the Department reached a settlement with the Idaho Orthopedic Society, an orthopaedic practice group, and five orthopedists that would prohibit them from conspiring with competing physicians in the Boise, Idaho area to deny medical care to injured workers or to engage in group boycotts to obtain higher fees. The Department, joined by the Idaho Attorney General's office, filed a civil antitrust lawsuit and a proposed settlement in the U.S. District Court for the District of Idaho against the Idaho Orthopaedic Society, Idaho Sports Medicine Institute, and five individual orthopedists. The complaint alleged that the defendants and other orthopedists conspired to gain more favorable fees and other contractual terms by agreeing to coordinate their actions, including denying medical care to injured workers and threatening to withdraw from healthcare plans offered by Blue Cross of Idaho. Their conduct caused the state of Idaho and other healthcare consumers to pay higher fees for orthopedic services. The settlement prevents the defendants from agreeing with their competitors on fees and contract terms. The settlement also prohibits them from collectively denying medical care to patients, refusing to deal with any payer, or threatening to terminate contracts with any payer. See http://www.justice.gov/atr/public/press_releases/2010/259181.htm.

36. **KeySpan Corporation:** On February 22, 2010, the Department announced a settlement with KeySpan Corporation, requiring the company to pay the United States $12 million, as disgorgement of profit, for violating the antitrust laws by entering into an agreement restraining competition in the New York City electricity capacity market. The Department filed a civil antitrust complaint and a proposed settlement in the U.S. District Court for the Southern District of New York. According to the complaint, KeySpan and a financial services company entered into an agreement in January 2006 that gave KeySpan a financial interest in the electricity capacity sales of its largest competitor, Astoria. By providing KeySpan revenues from its competitor's capacity sales, in addition to its own, the agreement with the financial services company had the anticompetitive effect of eliminating KeySpan's incentive to sell its electricity capacity at lower prices. As a result, retail electricity prices in New York City were likely higher than they would have been without this anticompetitive agreement. The anticompetitive effects of the agreement lasted until March 2008, when regulatory conditions eliminated KeySpan's ability to affect the market price of electricity capacity. See http://www.justice.gov/atr/public/press_releases/2010/255503.htm.

37. **Microsoft Corporation/Yahoo! Inc.:** On February 18, 2010, the Department announced that it had closed its investigation into the proposed Internet search and paid search advertising agreement between Microsoft Corporation and Yahoo! Inc. The proposed transaction combined the back-end search and paid search advertising technology of both parties. U.S. market participants expressed support for the transaction and believed that combining the parties' technology would increase competition by creating a more viable competitive alternative to Google, the firm that dominated these markets at the time. The transaction between Microsoft Corporation and Yahoo! Inc. was expected to enhance Microsoft's competitive performance because it would gain access to a larger set of queries, which would accelerate the automated learning of Microsoft's search and paid search algorithms and enhance Microsoft's ability to serve more relevant search results and paid search listings. The offices of the Attorneys General of California and Washington actively participated in the division's investigation of the proposed transaction. See http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

38. **Daily Gazette Company/MediaNews Group Inc.:** On January 20, 2010, the Department announced that it had reached a proposed settlement with the Daily Gazette Company and MediaNews Group Inc. (now known as Affiliated Media Inc.), that required the companies to restructure their newspaper joint operating arrangement and take other steps to remedy the anticompetitive effects of a 2004 transaction, which was originally challenged by the Department in May 2007. In May 2007, the Department had filed a civil antitrust lawsuit alleging that the transaction violated the Clayton and Sherman Acts by consolidating ownership and control of the only two local daily newspapers in Charleston, West Virginia under the Daily Gazette Company and eliminating competition between the two publications. The Department alleged that the transaction was part of a plan by the Daily Gazette Company to terminate publication of the Charleston Daily Mail and leave Charleston with a single daily newspaper, the Charleston Gazette. The proposed settlement requires MediaNews Group to regain independent control over the operations of the Charleston Daily Mail and receive economic incentives to grow the newspaper. Additionally, the settlement requires the companies to offer substantial discounts of the Charleston Daily Mail in order to rebuild its subscriber-base and prohibits the Daily Gazette Company from discriminating against the Charleston Daily Mail in circulation, advertising sales, and other key joint activities. The settlement also requires the companies to continue publishing the Charleston Daily Mail as long as it has not failed financially. See http://www.justice.gov/atr/public/press_releases/2010/254282.htm

3.4.3 FTC Non-Merger Enforcement Actions

39. **Intel Corporation**. The FTC approved a settlement with Intel Corp. resolving allegations that the company used anticompetitive tactics to cut off rivals' access to the market and deprive consumers of choice and innovation in computer Central Processing Unit (CPU) microchips. The consent order applies to CPUs, Graphics Processing Units and chipsets and includes key provisions that: prohibit Intel from conditioning benefits to computer makers in exchange for exclusivity or retaliating against makers if they do business with non-Intel suppliers; and, requires Intel to modify certain intellectual property agreements, maintain a key interface for a least six years, disclose that Intel compilers discriminate between Intel and non-Intel chips and reimburse all software vendors wishing to recompile their software using a non-Intel compiler. See http://www.ftc.gov/opa/2010/08/intel.shtm.

40. **Realcomp II**. On November 2, 2009, the Commission issued an opinion finding that Realcomp II – a Michigan-based realtors' group – violated federal law by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services. The opinion found that Realcomp excluded discount real estate listings by refusing to transmit them through its own and other publicly available Web sites. The Commission found that these policies restricted access to these listings and harmed competition. The FTC's Final Order requires Realcomp to provide its members non-discriminatory access to non-traditional and lower-price listings on its Multiple Listing Service (MLS) and to stop preventing such listings from being sent to its public real estate sites. See http://www.ftc.gov/opa/2009/11/realcomp.shtm. On April 6, 2011, the U.S. Court of Appeals for the 6th Circuit affirmed the Commission's opinion.

41. **Minnesota Rural Health Cooperatives.** The Minnesota Rural Health Cooperative (MRHC), a group of approximately 70 doctors and 25 hospitals, representing most of the hospitals and half of the primary care physicians in southwestern Minnesota, agreed to settle FTC claims that it fixed prices at which they contract with health insurance plans. The Commission complaint charged MRHC with eliminating competition among its doctor and hospital members by orchestrating agreements to fix the prices at which they contract with health insurance plans, and alleged that MRHC refused to deal with plans that did not agree to its inflated reimbursement rates and used coercive tactics during negotiations. The settlement, announced in June 2010 (and approved in January 2011), barred the MRHC from using coercive tactics or refusals to deal to secure favorable contract terms from insurance health plans, and

required MRHC to renegotiate all existing contracts with health plans and to submit any revised contracts for state approval. See http://www.ftc.gov/opa/2010/06/ruralhealth.shtm.

42. **Amerco-Avis Budget Group.** U-Haul International, Inc. and its parent company settled Federal Trade Commission charges that they violated the FTC Act by inviting U-Haul's closest competitor, Avis Budget Group, Inc., to collude on prices for truck rentals. U-Haul and Budget control more than 70 percent of the "do-it-yourself" one-way truck rental business in the United States. The FTC's complaint alleged that on several occasions between 2006 and 2008, U-Haul tried to increase rates for one-way truck rentals by privately and publicly communicating with Budget, the second largest truck rental company in the United States. However, the complaint did not allege that U-Haul and Budget actually reached an agreement, but according to the FTC, if U-Haul would had succeeded in its price-fixing plan, the two companies could have imposed higher prices on truck-rental consumers. The FTC order, approved in July 2010, bars U-Haul and its parent company AMERCO from colluding or inviting collusion. Specifically, the companies are prohibited from inviting a competitor to divide markets, allocate customers, or fix prices, as well as participating in, maintaining, organizing, implementing, enforcing, offering, or soliciting any other company to engage in such conduct. The order also includes monitoring and compliance provisions to ensure that U-Haul and AMERCO comply with its terms. See http://www.ftc.gov/opa/2010/06/uhaul.shtm.

43. **North Carolina Dental Board**. The FTC issued an administrative complaint on July 17, 2010 alleging that the North Carolina Board of Dental Examiners (the "Dental Board") harms competition by blocking non-dentists from providing teeth-whitening services in the state. The FTC charged that the Dental Board impermissibly ordered non-dentists to stop providing teeth-whitening services, thereby making it more difficult and expensive for North Carolina consumers to obtain these services. According to the FTC's administrative complaint, teeth-whitening services are much less expensive when performed by non-dentists than when performed by dentists. The case was appealed to an Administrative Law Judge for hearing, including on state action grounds. See http://www.ftc.gov/opa/2010/06/ncdental.shtm and http://www.ftc.gov/os/adjpro/d9343/index.shtm.

44. **Transitions Optical, Inc.** Transitions Optical, Inc. the nation's leading manufacturer of photochromic treatments that darken corrective lenses used in eyeglasses, agreed to stop using anticompetitive practices to maintain its monopoly and increase prices, under a settlement with the FTC. Photochromic treatments are applied to eyeglass lenses to protect the eyes from harmful ultraviolet (UV) light. Treated lenses darken when exposed to UV light and fade back to clear when the UV light diminishes. The FTC charged that the company illegally maintained its monopoly by engaging in exclusive dealing at nearly every level of the photochromic lens distribution chain. According to the FTC's complaint, Transitions' exclusionary tactics locked out rivals from approximately 85 percent of the lens caster market, and partially or completely locked out rivals from up to 40 percent or more of the retailer and wholesale lab market. The settlement order, approved in April 2010, generally prohibits Transitions from putting any agreements or policies in place that limit customers' ability to buy or sell a competing photochromic treatment, or that require customers to give Transitions' products more favorable treatment than a competitor's product. See http://www.ftc.gov/opa/2010/03/optical.shtm.

45. **Boulder Valley IPA (M. Catherine Higgins).** In April 2010, the FTC approved the final settlement orders in the matters of Boulder Valley Individual Practice Association (BVIPA) and its executive director, M. Catherine Higgins. BVIPA is a network of about 365 physicians, competing independently or as members of small group practices. Physicians joining the association signed agreements authorizing BVIPA to contract on their behalf with health insurers and other third-party payers. In December 2008, as part of a consent order settling FTC antitrust charges, BVIPA agreed to stop fixing prices that its member physicians charge users for their services. According to the FTC, after it issued that order, Executive Director Higgins attempted to evade its terms by representing doctors in negotiations in

her individual capacity. The Commission complaint and consent order settling the FTC's charges named the Executive Director individually, and will prevent her from orchestrating or implementing price-fixing agreements among the group's competing physicians. See http://www.ftc.gov/opa/2010/02/bouldervlly.shtm.

46. **Roaring Fork Valley Physicians, IPA, Inc.** Roaring Fork Valley Physicians, IPA, Inc., a Colorado physicians' group, settled Commission charges of price-fixing by agreeing to halt its use of allegedly anticompetitive negotiating tactics against health insurers. The Commission charged Roaring Fork Valley Physicians I.P.A., Inc., which represents about 80 percent of the doctors in Garfield County, Colorado, with violating the FTC Act by orchestrating agreements among its members to set higher prices for medical services and to refuse to deal with insurers that did not meet its demands for higher rates. The group agreed to terminate its anticompetitive agreements and to notify the FTC before participating in collaborative arrangements with doctors. See http://www.ftc.gov/opa/2010/02/roaringfork.shtm.

3.5 Advisory Letters from the FTC

47. **Rx 360 International Pharmaceutical Supply Chain Consortium**. On September 15, 2010, FTC staff advised a consortium of pharmaceutical and biotechnology companies that it had no present intention to recommend that the agency challenge the Consortium's planned joint supplier quality and safety audit programs. Under these programs, consortium members were able to share both prior quality and safety audit information and the costs of sponsoring further quality and safety audits of common suppliers. However, since it appeared that the audit programs: 1) did not require exchanges of competitively significant information, 2) contained protections to reduce Rx-360 members' ability to use the programs for anticompetitive ends, 3) protected audited firms from concerted misuse of the audit programs, and 4) were intended and likely to promote efficiency, quality, and safety, FTC staff concluded that the program likely did not raise significant competitive concerns. See http://www.ftc.gov/opa/2010/09/drugfidelity.shtm.

48. **Community CarePartners, Inc.** On July 2, 2010, FTC staff issued an opinion letter on whether Community CarePartners, Inc.'s ("CarePartners") proposal to extend sales of discounted pharmaceutical products to its in-home hospice patients would fall within the Non-Profit Institutions Act ("NPIA") exemption from the Robinson-Patman Act. The opinion explained that CarePartners was likely an eligible entity under the NPIA as a non-profit, charitable healthcare organization, noting that it, in fact, already relies on the NPIA for its purchase and resale of pharmaceuticals to its inpatients. The opinion also found that the proposal was for CarePartners' "own use," to deliver comprehensive and continuing post-acute health care services, including pharmaceuticals, to all of its patients, and held that the NPIA applies to the proposal, provided that CarePartners maintained an ongoing relationship with the patients. See http://www.ftc.gov/os/2010/07/100702carepartnersopinion.pdf.

49. **University of Michigan.** On April 9, 2010, FTC staff issued an opinion letter on whether a prescription-drug benefit program proposed by the University of Michigan would fall within the Non-Profit Institutions Act ("NPIA") exemption from the Robinson-Patman Act, which prohibits anti-competitive price discrimination. The proposed program aimed to allow the University to take advantage of purchasing discounted pharmaceuticals. Staff found that the program appeared to fall within the NPIA, given that the University is an eligible institution under the NPIA and that the use of the discounted pharmaceuticals for University employees, dependents and their families fell within the NPIA's "own use" requirement. The letter noted that the program should ensure that for-profit entities would not benefit from the program. See http://www.ftc.gov/bc/advisoryopinions/100409univmichiganopinion.pdf.

3.6 Business Reviews Conducted by the Department of Justice

50. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued three business review letters in FY 2010. These business review letters can be found at http://www.usdoj.gov/atr/public/busreview/letters.htm.

- On February 24, 2010, the Department announced it would not challenge a proposal by MyWire Inc. to form the Global News Service, an online subscription news aggregation service. The service would provide interconnections among different publishers' online content, such as news articles and video and audio clips, that relate to the same topic. Based on representations made by MyWire, the Department concluded that the formation and operation of the news service would not be likely to reduce competition among Internet publishers and could provide procompetitive benefits to both publishers and consumers.

- On April 1, 2010, the Department announced it would not challenge a proposal by The Associated Press (AP) to develop and operate a voluntary news registry to facilitate the licensing and Internet distribution of news content created by the AP, its members, and other news originators. The Department said that the development and operation of the registry is not likely to reduce competition among news content owners and could provide procompetitive benefits to both participating content owners and content users.

- On April 26, 2010, the Department issued a business review letter stating it would not object to an information exchange program of Hospital Value Initiative (HVI), a coalition of three organizations in California representing group purchasers of health care services for more than 7 million people. HVI proposed to provide data on the relative costs and resource efficiency of more than 300 hospitals in California. HVI would collect, analyze and distribute aggregated comparative data on the level of reimbursement received, and the resources used, by California hospitals in providing inpatient and outpatient services. The Department determined that HVI's proposal was not likely to produce anticompetitive effects because the exchange would involve data that was at least 10 months old and the program would not disclose disaggregated data or any hospital's actual service fees. HVI's data exchange program could potentially benefit consumers by increasing the transparency of the relative costs and resource efficiency of hundreds of California hospitals.

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

4.1 Enforcement of Pre-merger Notification Rules

51. In *United States v. Smithfield Foods, Inc. and Premium Standard Farms, LLC*,[2] the government's complaint alleged that prior to the expiration of the statutory waiting period applicable to Smithfield's acquisition of Premium Standard, Premium Standard ceased to exercise independent business judgment in its hog purchases. Instead, it submitted for Smithfield's consent each of the contracts for hog purchases from independent producers that arose during the HSR waiting period. These hog procurement contracts were necessary to Premium Standard's ongoing business and entered into in the ordinary course. Through this conduct, Smithfield exercised operational control over Premium Standard's hog procurement and thereby acquired beneficial ownership of a significant segment of Premium Standard's business. Such "gun jumping" is prohibited by the Act. Under the terms of a consent decree entered by the Court on

2 United States v. Smithfield Foods, Inc. and Premium Standard Farms, LLC, No.1:10-CV-00120 (D.D.C. filed January 21, 2010).

January 22, 2010, the companies agreed to pay a total of $900,000 to settle the charges. See http://www.justice.gov/atr/cases/smith2.htm.

4.2. Significant Merger Cases

4.2.1 FTC Merger Challenges and Cases

52. **Airgas / Air Products and Chemicals**. According to the FTC complaint, Air Products' proposed acquisition of Airgas would harm competition in five regional markets for bulk liquid oxygen and bulk liquid nitrogen, which are used in a range of applications from hospital patient care to the manufacture of frozen foods. Industrial gas supplier Air Products and Chemicals, Inc. reached an agreement with the Commission requiring the company to sell certain liquid gas assets to resolve FTC charges. See http://www.ftc.gov/opa/2010/09/airproducts.shtm.

53. **Tops / Penn Traffic.** The Commission reached a settlement agreement with Tops Markets LLC that protects consumers from the potential anticompetitive effects of Tops' recent acquisition of the bankrupt Penn Traffic Company supermarket chain. To settle FTC charges that the acquisition was anticompetitive in several areas of New York and Pennsylvania, Tops agreed to sell seven Penn Traffic supermarkets to FTC-approved buyers. Because the FTC adopted a flexible process for reviewing the potential anticompetitive effects of the acquisition, none of the 79 Penn Traffic stores was liquidated in bankruptcy proceedings. See http://www.ftc.gov/opa/2010/08/tops.shtm.

54. **Nestle / Novartis AG**. The Commission's complaint challenged Novartis AG's proposed $28.1 billion acquisition of Alcon, Inc., from Nestle, S.A. The complaint alleged that this acquisition would lessen competition in the $12.4 million U.S. market for injectable miotics – a class of prescription pharmaceuticals used to induce miosis (*i.e.*, constriction of the pupil), most commonly during cataract surgery. Novartis and Alcon each produced an injectable miotics product for which there was no generic version. Novartis and Alcon were the only suppliers of injectable miotics in the U.S., with respective market shares of 67% and 33%. The complaint alleged that entry into the market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition because, in part, of lengthy FDA approval requirements and the fact that the market is small and in decline, with limited opportunities for new entrants. The consent order, issued September 28, 2010, required Novartis to divest its rights and assets in its injectable miotics product to Bausch & Lomb, Inc., an eye-health company that had not participated in the U.S. injectable miotics market. See http://www.ftc.gov/opa/2010/08/novartis.shtm.

55. Ovation Pharmaceuticals, Inc.; FTC v. Lundbeck, Inc. In December 2008, the Commission filed a complaint in the U.S. District Court for the District of Minnesota, challenging the purchase of the U.S. rights to NeoProfen – a drug for the treatment of patent ductus arteriosus ("PDA"), a potentially deadly heart defect affecting premature infants – by Ovation (which was purchased in 2009 and renamed Lundbeck, Inc.). The Commission's complaint charged that the purchase eliminated Ovation's only competitor for the drug-based treatment of PDA, and thereby preserved Ovation's U.S. monopoly in the market for FDA-approved drugs to treat PDA. At the time of the purchase, NeoProfen was awaiting approval by the FDA. According to the complaint, Ovation expected that NeoProfen, once approved, would take a substantial portion of sales from Ovation's PDA drug, Indocin, and that Ovation acquired NeoProfen to eliminate this threat. The complaint charged that, after acquiring the rights to NeoProfen, Ovation raised the price of Indocin by nearly 1,300%; and when Ovation launched NeoProfen, it set the price at virtually the same level. At the time of the complaint, Ovation had maintained prices for the two drugs at or above this level for more than two years. The complaint charged that Ovation's acquisition of NeoProfen substantially raised prices, reduced competition, and maintained Ovation's monopoly in PDA drug treatments in violation of Section 7 of the Clayton Act and Section 5(a) of the FTC Act. The complaint sought equitable relief, including divestiture and disgorgement of unlawfully obtained profits

from Ovation's sales of Indocin and NeoProfen. On August 31, 2010, the district judge held that the plaintiffs had not proved that NeoProfen and Indocin compete in the same product market, and, therefore, had failed to demonstrate that the acquisition substantially lessened competition or maintained a monopoly. As a result, the court dismissed both actions. See **http://www.ftc.gov/os/caselist/0810156/index.shtm**. The case is on appeal to United States Court of Appeals for the Eighth Circuit.

56. **NuFarm / A.H. Marks Holdings, Ltd.** Australian chemical company Nufarm Limited agreed to sell certain assets and modify some of its business agreements to settle charges that its 2008 acquisition of rival A.H. Marks Holding Limited hurt competition in the U.S. market for three herbicides that are relied upon by farmers, landscapers, and consumers. Under the settlement, Nufarm will sell rights and assets associated with two of the herbicides to competitors and will modify agreements with two other companies to allow them to fully compete in the market for the other herbicide. According to the FTC's complaint, Nufarm's acquisition of United Kingdom-based A.H. Marks gave Nufarm monopolies in the U.S. markets for two herbicides called MCPA and MCPP-P, which also are known as phenoxy herbicides, and the transaction also left only two competitors in the market for a third phenoxy herbicide, called 2,4DB. See http://www.ftc.gov/opa/2010/07/nufarm.shtm.

57. **Fidelity / LandAmerica**. To settle FTC charges that its 2008 acquisition of three LandAmerica Financial, Inc. subsidiaries was anticompetitive, Fidelity National Financial, Inc. agreed to sell several title plants and related assets in the Portland, Oregon, and Detroit, Michigan, metropolitan areas, and in four other Oregon counties. Title plants are databases used by abstractors, title insurers, title insurance agents, and others to determine the ownership of, and interests in, real property in connection with underwriting and issuance of title insurance policies and for other purposes. According to the FTC's complaint and order, Fidelity's acquisition of the LandAmerica assets reduced competition in six geographic areas for the provision of title insurance information services by title plants, and the settlement would replace the competition lost through Fidelity's acquisition of LandAmerica's title insurance subsidiaries. The order also required Fidelity to notify the FTC before acquiring 50 percent or more of any joint title plant in California, Colorado, Nevada, New Mexico, Oregon, and Texas, states in which Fidelity's acquisition of LandAmerica's subsidiaries had increased Fidelity's ownership interest in title plants. See http://www.ftc.gov/opa/2010/07/fidelity.shtm.

58. **AEA Investors / Wilh.Werhahn**. Houghton International, Inc., the leading North American provider of hot rolling oil used to process aluminum, agreed to sell some of the assets it acquired in 2008 through its purchase of D.A. Stuart GmbH, a transaction that included multiple product markets. The FTC's investigation found that Houghton's acquisition of D.A. Stuart GmbH combined the two largest suppliers of aluminum hot rolling oil (AHRO) in North America, giving the combined firm control of almost 75 percent of the North American market. The FTC's complaint alleged that, through its purchase of Stuart, Houghton the acquisition could have substantially lessened competition by, *inter alia,* unilaterally raising AHRO prices to U.S. consumers and/or decreasing innovation for this vital input into aluminum manufacturing. Under the order settling the FTC's charges, Houghton agreed to sell Stuart's AHRO business to Quaker Chemical Corporation. See http://www.ftc.gov/opa/2010/07/houghton.shtm.

59. **Flying J / Big West Oil.** The FTC required Pilot Corporation, owner of the largest travel center network in the United States, to sell 26 locations as part of a settlement that will replace the competition lost due to Pilot's proposed $1.8 billion acquisition of Flying J Inc.'s travel center network. Pilot agreed to sell the travel centers, which provide diesel, food, parking, and other amenities for truckers, to Love's Travel Stops and Country Stores, the smallest national travel center operator, currently concentrated in the South. According to the FTC's complaint, the deal between Pilot and Flying J would have reduced competition for certain long-haul trucking fleets for which Pilot and Flying J were the first and second best choices for their diesel needs. See http://www.ftc.gov/opa/2010/06/flying.shtm.

60. **Varian, Inc. / Agilent, Inc.** To settle anticompetitive concerns arising from their $1.5 billion merger, Agilent Technologies, Inc. and Varian, Inc., two leading global suppliers of high-performance scientific measurement instruments, agreed to sell three of their product lines. According to the FTC's complaint, Agilent's acquisition of Varian would have allowed Agilent to raise prices, decrease innovation or reduce customer services for three types of scientific measurement instruments for which the companies competed with one another. To resolve these competitive concerns, the parties agreed to sell assets related to the manufacture and sale of: 1) Micro Gas Chromatography (Micro GC) instruments; 2) Triple Quadrupole Gas Chromatography-Mass Spectrometry (3Q GC-MS) instruments; and 3) Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) instruments. See http://www.ftc.gov/opa/2010/05/agilent.shtm.

61. **MDR (The Dun & Bradstreet Corp) / QED.** The FTC issued an administrative complaint on May 7, 2010 challenging The Dun & Bradstreet Corporation's February 2009 acquisition of Quality Education Data (QED) and alleging that the transaction harmed consumers by eliminating nearly all competition in the market for kindergarten through twelfth-grade educational marketing databases. The data sold by these companies is used to sell books, education materials, and other products to teachers and other educators nationwide. The combination of the two companies gave Dun & Bradstreet, through its subsidiary Market Data Retrieval (MDR), more than 90 percent of the market for K-12 educational marketing data. Dun & Bradstreet acquired QED from Scholastic, Inc. for about $29 million, which was below the threshold amount that would have required the companies to notify U.S. antitrust authorities before finalizing the deal. See http://www.ftc.gov/opa/2010/05/mdr.shtm. MDR agreed to sell the QUED assets to a third party in September 2010.

62. **Google/Admob Investigation Closed.** On May 21, 2010, the FTC closed its investigation of Google's proposed acquisition of mobile advertising network company AdMob after concluding that the deal was unlikely to harm competition in the emerging market for mobile advertising networks. In its statement, the Commission said that although the combination of the two leading mobile advertising networks raised serious antitrust issues, the agency's concerns ultimately were overshadowed by recent developments in the market, most notably a move by Apple Computer Inc. – the maker of the iPhone – to launch its own, competing mobile ad network. In addition, a number of firms appear to be developing or acquiring smartphone platforms to better compete against Apple's iPhone and Google's Android, and these firms would have a strong incentive to facilitate competition among mobile advertising networks. See http://www.ftc.gov/opa/2010/05/ggladmob.shtm.

63. **SCI / Keystone North America**. Service Corporation International (SCI), the largest U.S. provider of funeral and cemetery services, settled Commission charges that its proposed acquisition of Keystone North America Inc. (Keystone), the fifth-largest funeral and cemetery services provider in North America, raised antitrust concerns in the markets for both funeral services and cemetery services. SCI agreed to sell 22 funeral homes and four cemeteries in 19 local markets to ensure that competition is preserved following its acquisition of Keystone. See http://www.ftc.gov/opa/2010/03/keystone.shtm.

64. **PepsiCo Inc./Pepsi Bottling and Coca-Cola/Coca-Cola Enterprise.** As part of separate settlement agreements, PepsiCo and the Coca-Cola Company each agreed to restrict access to commercially sensitive business information of rival Dr Pepper Snapple Group as a condition for completing their respective proposed acquisitions of their largest North American bottlers, which also distribute some of the carbonated soft drink brands of Dr Pepper Snapple Group in specific geographic areas in the United States. Under their respective settlements with the FTC, both PepsiCo, Inc., and The Coca-Cola Company agreed to create a "firewall" to ensure that only specific bottling operations personnel from each of PepsiCo., Inc., and The Coca-Cola Company obtain access to commercially sensitive confidential Dr Pepper Snapple information. In complaints filed with the settlements, the FTC alleged that

access to this information likely would have harmed competition in the U.S. markets for carbonated soft drinks. See http://www.ftc.gov/opa/2010/02/pepsi.shtm and http://www.ftc.gov/opa/2010/09/coke.shtm.

65. **Agrium / CF Industries**. Agricultural products supplier Agrium Inc. agreed to a settlement that will allow the company to move forward with its acquisition of competitor CF Industries Holdings, Inc. The proposed consent order settles charges that the acquisition would have eliminated competition between the two firms, in the Pacific Northwest and two Illinois markets, in the anhydrous ammonia fertilizer market. To address the FTC's concerns, Agrium agreed to divest identified anhydrous ammonia terminals in the Pacific Northwest and Northern Illinois and to rescind its rights to market anhydrous ammonia produced by Rentech at Rentech's East Dubuque, Illinois manufacturing facilities. See http://www.ftc.gov/opa/2009/12/agrium.shtm.

66. **Watson Pharmaceuticals / Arrow Group**. The Commission alleged that Watson Pharmaceuticals, Inc.'s acquisition of Robin Hood Holdings Limited, owner of Arrow Pharmaceuticals, would have harmed consumers by eliminating future competition for important generic drugs used to treat Parkinson's disease (cabergoline) and the side effects of chemotherapy (dronabinol). The Commission's order, issued on January 7, 2010, required the firms to sell assets related to the two drugs to FTC-approved buyers and to ensure that the acquirers have the means to compete effectively in the future. See http://www.ftc.gov/opa/2009/12/watsonarrow.shtm.

67. **SCI / Palm Mortuary.** The Commission challenged Service Corporation International's (SCI) proposed acquisition of Las Vegas rival Palm Mortuary, Inc. The Commission required that SCI, the nation's largest cemetery operator and the third-largest provider of cemetery services in Las Vegas, Nevada, to sell a cemetery and related funeral home in Las Vegas to complete its proposed acquisition of Palm. See http://www.ftc.gov/opa/2009/11/sci.shtm.

68. **Panasonic / Sanyo**. Major consumer electronics manufacturers Panasonic Corporation and Sanyo Electric Co., Ltd. agreed to sell Sanyo's portable nickel metal hydride (NiMH) battery business related assets, including a premier manufacturing facility in Japan, to allow the firms to proceed with their proposed $9 billion transaction. NiMH batteries power two-way radios, among other products, which are used by police and fire departments nationwide. The FTC alleged that the transaction combined the world's two largest manufactures and sellers of these batteries, and ordered Sanyo to sell the assets to FDK Corporation, a subsidiary of Fujitsu Ltd. See http://www.ftc.gov/opa/2009/11/sanyo.shtm.

69. **Merck / Schering-Plough**. The Commission challenged Schering-Plough's proposed $41.4 billion acquisition of Merck & Co., and required divestitures to preserve competition in markets for certain human and animal pharmaceuticals in order that the transaction could proceed. The FTC's complaint alleged that the companies were the two leading animal health suppliers in the U.S., and that the acquisition raised significant concerns in markets in which Merck, through Merial Limited, and Schering-Plough competed directly. It also alleged that the transaction raised competitive concerns with regard to human drugs identified as NK 1 receptor antagonists, with Merck having the first and only such drug approved for human use to treat common side effects of both chemotherapy and surgery and Schering-Plough in the process of licensing its drug to a third party. The FTC believed it likely that the transaction would have reduced the combined firm's incentives to launch Schering-Plough's drug. The parties agreed to a consent order requiring that Merck sell its interest in Merial Limited, an animal health joint venture with Sanofi-Aventis S.A., and that Schering-Plough sell its assets related to significant drugs for nausea and vomiting in humans. See http://www.ftc.gov/opa/2009/10/merck.shtm.

70. **Pfizer Inc. / Wyeth**. The Commission challenged Pfizer Inc.'s proposed $68 billion acquisition of Wyeth and required significant divestitures to preserve competition in multiple U.S. markets for animal pharmaceuticals and vaccines. The FTC's complaint alleged that the proposed transaction would harm

competition in these markets by reducing the number of suppliers and leaving veterinarians and other animal health product customers with limited supply options, particularly given that entry of new competitors would not would not be timely, likely or sufficient to offset the loss of competition. The consent order, approved on January 29, 2011, remedies the anticompetitive effects the Commission believed were likely to result from the transaction in numerous markets for animal vaccines and animal pharmaceutical products. The Commission concluded that the transaction did not raise anticompetitive concerns in any human health product markets. See http://www.ftc.gov/opa/2009/10/pfizer.shtm.

71. **Danaher Corp. / MDS.** The Commission challenged Danaher's proposed acquisition of MDS Analytical Technologies, requiring that MDS divest the assets related to its laser microdissection device business to Life Technologies. The Commission's complaint provided that these parties were two of four North American suppliers for these products, and alleged that the transaction would result in increased prices and decreased innovation. The proposed settlement is designed to preserve competition in the North American market for laser microdissection devices – a key tool for scientific research. See http://www.ftc.gov/opa/2010/01/danaher.shtm.

4.2.2 DOJ Merger Challenges and Cases

72. **United Airlines/Continental Airlines**: On August 27, 2010, the Division closed its investigation into the proposed merger of UAL Corporation, the parent of United Airlines Inc. ("United"), and Continental Airlines Inc. ("Continental"). The decision was made in light of an agreement by United and Continental to transfer takeoff and landing rights and other assets at Newark Liberty Airport to Southwest Airlines Co. ("Southwest"). The proposed merger will combine the airlines' largely complementary networks, which will result in overlap on a limited number of routes where United and Continental offer competing nonstop service. The largest such routes were between United's hub airports and Continental's hub at Newark airport, where Continental had a high share of service and where there was limited availability of slots, making entry by other airlines particularly difficult. Southwest is a low cost carrier that previously had no service to Newark airport. Continental's transfer of slots and other assets at Newark Airport to Southwest Airlines resolved the Division's principal competition concerns. See http://www.justice.gov/atr/public/press_releases/2010/262002.htm.

73. **Baker Hughes/BJ Services**: In *United States v. Baker Hughes Incorporated and BJ Services Company*, the Division challenged the proposed $5.5 billion acquisition of BJ Services by Baker Hughes. The complaint alleged that the acquisition, as originally proposed, would likely substantially lessen competition by combining two of only four companies that provide specialized pumping services, called vessel stimulation services, necessary for the production of oil and gas from wells in the U.S. Gulf of Mexico. These critical services prevent sand from interfering with the flow of oil and gas from wells in the Gulf and are performed using specially designed and equipped vessels that are operated by experienced crews and supported by scientists, engineers and other lab technicians who customize the stimulation job for the specific well formation. The Division filed a proposed consent decree simultaneously with the complaint, requiring divestiture of two vessels used for providing stimulation services. The court approved the decree on July 26, 2010. See United States v. Baker Hughes Incorporated and BJ Services Company, No. 1:10-CV-00659 (D.D.C. filed April 27, 2010).

74. **Cisco/Tandberg**: On March 29, 2010, the Division announced it had closed its investigation into Cisco Systems Inc.'s ("Cisco") acquisition of Tandberg ASA ("Tandberg"). The Division had analyzed the effect of combining the videoconferencing businesses of Cisco and Tandberg, focusing on a type of videoconferencing known as "telepresence," in which Cisco and Tandberg are competitors. Telepresence is a form of high-definition videoconferencing that provides an immersive experience to users, simulating face-to-face meetings. During the course of its investigation, the Division cooperated closely with the European Commission ("EC") in its review of the transaction, aided by waivers from the parties and

industry participants. As part of the EC's merger review process, Cisco made commitments to facilitate interoperability between its telepresence products and those of other companies. The commitments were designed to foster the development of open operating standards, which lower barriers to entry and can be especially procompetitive in rapidly evolving high technology markets. The Division concluded that the proposed deal was not likely to be anticompetitive, given the evolving nature of the videoconferencing market and the commitments that Cisco made to the EC to facilitate interoperability. See http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

75. **Election Systems & Software/Premier Election Solutions**: In *United States et al. v. Election Systems and Software, Inc.*, the Division, joined by nine state attorneys general (Arizona, Colorado, Florida, Maine, Maryland, Massachusetts, New Mexico, Tennessee and Washington), challenged the 2009 acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier") by Election Systems and Software, Inc. ("ES&S"). The complaint alleged that the acquisition substantially lessened competition in the market for voting equipment systems, as it combined the two largest providers of systems used to tally votes in federal, state and local elections in the United States. As a result of the acquisition, which did not require notification under the HSR Act because its $5 million value fell below the Act's size threshold, ES&S became the provider of more than 70 percent of the voting equipment systems in the United States. The Division filed a proposed consent decree simultaneously with the complaint. The decree, which was entered by the court on June 30, 2010, required that ES&S divest the Premier voting equipment systems assets it had acquired, including the means to produce all versions of Premier's hardware, software and firmware used to record, tabulate, transmit or report votes. See United States et al. v. Election Systems and Software, Inc., No.1:10-CV-00380 (D.D.C. filed March 8, 2010).

76. **Blue Cross Blue Shield/Physicians Health Plan**: On March 8, 2010, the Division announced that Blue Cross Blue Shield of Michigan's ("Blue Cross-Michigan") subsidiary, Blue Care Networks of Michigan, had abandoned its attempt to purchase Physicians Health Plan of Mid-Michigan ("PHP") after the Division informed the companies that it would file an antitrust lawsuit to block the acquisition. Blue Cross-Michigan and PHP are the two largest providers of commercial health insurance in the Lansing, Michigan area. Blue Cross-Michigan holds almost a 70 percent market share in Lansing and PHP is its largest competitor, with approximately a 20 percent market share. Had the acquisition gone forward, Blue Cross-Michigan would have gained control of nearly 90 percent of the commercial health insurance market in the Lansing, Michigan area. The acquisition would have resulted in higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers. The acquisition also would have given Blue Cross-Michigan the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers. See http://www.justice.gov/atr/public/press_releases/2010/256259.htm.

77. **Bemis/Alcan Packaging Food**: In *United States v. Bemis Company, Inc., Rio Tinto plc and Alcan Corporation*, the Division challenged the proposed $1.2 billion acquisition of the Alcan Packaging Food Americas business by Bemis Co. from Rio Tinto, the parent of Alcan Corporation. The complaint alleged that the acquisition, as originally proposed, likely would have substantially lessened competition in the development, production, and sale of flexible-packaging rollstock for chunk, sliced and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat in the United States and Canada. Flexible packaging products for natural cheese and fresh meat are unique in that they must meet strict performance standards to prevent spoilage, maintain product appearance, operate properly on customers' packaging equipment, and adhere to unique standards specific to the particular products. As a result, these types of flexible packaging are difficult to manufacture and commercialize successfully. The Division filed a proposed consent decree simultaneously with the complaint. Under the terms of the decree, Bemis was required to divest certain assets, including plants and intellectual property, used in the production and sale of flexible packaging for natural cheese and fresh meat. The court entered the decree

on July 13, 2010. See United States v. Bemis Company, Inc., Rio Tinto plc and Alcan Corporation, No. 1:10-CV-00295 (D.D.C. filed February 24, 2010).

78. **Ticketmaster/Live Nation**: *In United States et al. v. Ticketmaster Entertainment, Inc. and Live Nation, Inc.*, the Division, joined by 17 state attorneys general (Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Massachusetts, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Wisconsin), challenged the acquisition of Live Nation by Ticketmaster Entertainment. The complaint alleged that the transaction, as originally proposed, would be likely to lessen competition substantially for primary ticketing services to major concert venues located in the United States, and thus likely to result in higher prices and less innovation for consumers. Primary ticketing services, such as websites, call centers and retail networks from which tickets may be purchased, facilitate the initial sale of tickets to concertgoers. Ticketmaster was the largest primary ticketing company in the United States, and Live Nation, the largest concert promoter in the United States, had entered the market for primary ticketing services in December, 2008. A proposed consent decree was filed simultaneously with the complaint, settling the suit. Under the terms of the decree, entered by the court on July 30, 2010, the merged firm must license ticket software and divest ticketing assets to two companies, Anschutz Entertainment Group and either Comcast-Spectacor or another buyer suitable to the Division, allowing both companies to compete head-to-head with the merged firm. The decree also prohibits the merged firm from engaging in certain conduct, such as retaliating against any venue owner that chooses to use another company's ticketing services, and requires firewalls to protect confidential and valuable competitor data by preventing the merged firm from using information gleaned from its ticketing business in its day-to-day operations of its promotions or artist management business. The Division cooperated closely with the Canadian Competition Bureau throughout the investigation, and the two agencies worked together to obtain the same remedy. See United States et al. v. Ticketmaster Entertainment, Inc. and Live Nation, Inc., No. 1:10-CV-00139 (D.D.C. filed January 25, 2010).

79. **Dean Foods**: In *United States et al. v. Dean Foods Company*, the Division and the States of Illinois, Michigan, and Wisconsin filed a lawsuit in January 2010 seeking to undo Dean's April 2009 acquisition of the Consumer Products Division of Foremost Farms USA, which included two dairy processing plants located in Wisconsin. Dairy processors, such as Dean and Foremost, purchase raw milk from dairy farms and agricultural cooperatives and then pasteurize and package the milk for sale to school districts, supermarkets and other commercial customers. The complaint alleged that the acquisition was likely to substantially lessen competition both in the sale of school milk to individual school districts located throughout Wisconsin and the Upper Peninsula of Michigan and in the sale of fluid milk to purchasers located in those areas and in Northeastern Illinois. Dean and Foremost were the first and fourth largest sellers of school milk and fluid milk in the region, and the acquisition resulted in Dean making more than 57% of fluid milk sales. Because the acquisition was valued at $35 million, premerger notification to the federal antitrust agencies under the HSR Act had not been required. On March 29, 2011, the Division announced that it had reached a settlement with Dean Foods.

5. International antitrust cooperation and outreach

5.1 International Antitrust Cooperation Developments

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

81. On November 10, 2009, the Agencies signed a Memorandum of Understanding (MOU) on antitrust cooperation with the Russian Federal Antimonopoly Service (FAS). See a more complete discussion in the 2009 Annual Report on Competition Policy Developments in the U.S, at http://www.ftc.gov/bc/international/docs/usannualreport09.pdf.

82. The FTC worked on almost 40 international antitrust investigations in 2010, many of which involved coordination or cooperation with non-U.S. counterparts. Significant examples from this year include the *Panasonic/Sanyo* matter, in which the Commission worked with counterparts in the EU, Canada, and Japan to resolve competitive concerns raised by Panasonic's proposed acquisition of Sanyo. In the *Pfizer/Wyeth* matter the FTC cooperated with the competition agencies of Australia, Canada, the EU, Mexico, New Zealand, and South Africa to address competitive concerns raised by Pfizer's acquisition of Wyeth with respect to a wide variety of animal health products, including vaccines.

83. In FY 2010, the Division coordinated/cooperated with competition agencies in other jurisdictions in the vast majority of dozens of ongoing international cartel investigations, and worked on almost 40 civil investigations with an international dimension, most of which involved some level of coordination or cooperation. Significant examples of cooperation, which extended to agencies located in five continents, include *Cisco/Tandberg*, where the Division cooperated extensively with the European Commission (see *supra* at paragraph 74), and *Ticketmaster/Live Nation*, where the Division worked closely with the Canadian Competition Bureau (see *supra* at paragraph 78).

84. In FY 2010, the Agencies continued to play a lead role in the ICN. The FTC co-chairs the Unilateral Conduct Working Group, which held its second workshop and two webinars on differential pricing and abuse of dominance in the pharmaceutical sector. The Group also issued the first chapter of the Unilateral Conduct Workbook, which addresses assessing dominance. Commissioner William E. Kovacic served as ICN's Vice-Chair for Outreach. As vice chair, Commissioner Kovacic and Randolph Tritell, Director of the FTC Office of International Affairs, led the ICN Curriculum Project, which developed training materials that will serve as a virtual university on competition law and practice for competition agency officials (see http://www.internationalcompetitionnetwork.org/working-groups/vice-chair/outreach/icncurriculum.aspx . The FTC also chairs the Merger Notification and Procedures subgroup, which held a webinar on promoting implementation of its Recommended Practices on merger notification and review procedures.

85. The Division co-chaired the ICN's Merger Working Group, which had a very active 2010, headlined by ICN's adoption of new recommended practices for merger analysis on market definition and failing firm analysis. The group also organized a workshop on merger policy and procedure in Rome and facilitated substantive dialogue through teleseminars on topics including merger guidelines developments in the U.S. and UK and discussion of relevant considerations in assessing merger remedies. The Merger Working Group also began a comprehensive assessment of the use of its existing work product and ideas for the group's future direction as part of the strategy review for the path for ICN's second decade. The Legal Framework subgroup of the Cartel Working Group, co-chaired by the Division, addressed the timely topics of the criminalization of hard-core cartel conduct and effective cartel awareness and outreach efforts through two Division-organized series of widely-attended substantive discussion calls. The subgroup also compiled the world's largest collection of cartel awareness and outreach materials used by agencies. The working group continued its annual international cartel enforcer workshops covering policy discussions and training techniques in October 2010, a series started by the Division in Washington in 1999.

86. In September 2010, the U.S. Federal Trade Commission, together with competition agencies from Mexico, Chile and Panama, helped to found of the Inter-American Competition Alliance to foster antitrust enforcement cooperation in the Americas. Both U.S. agencies have actively participated in the Alliance's informal monthly teleconferences to share experience and understanding.

5.2 Outreach

87. In FY 2010, the Agencies continued to provide technical assistance on competition law and policy matters to their international antitrust enforcement counterparts. The FTC's international technical assistance antitrust programs conducted 31 missions in almost 30 countries. As part of U.S. efforts to assist China as it implements its new antitrust laws, senior FTC and DOJ officials and staff held discussions with the Chinese antitrust agencies in the United States and China. The Agencies' staff, together with U.S. judges, also provided antitrust training to over 70 judges from China's Supreme Peoples Court. The Agencies are also working with India's Competition Commission as it begins to implement its 2002 Competition Act and new merger regime. The Agencies' training missions included programs in Thailand, El Salvador, Morocco, Singapore, Paraguay, Tanzania, Kenya and Hungary. The FTC placed long-term resident advisors in Vietnam and India. Recognizing the importance and quality of the FTC's work in this regard, Congress provided the FTC additional funding to provide international technical assistance.

88. As part of its ongoing effort to build effective relationships, the FTC provides opportunities for counterparts from non-U.S. agencies to spend several months working directly with FTC staff on investigations, subject to appropriate confidentiality protections. The FTC's International Fellows and Interns program is based on the FTC's U.S. SAFE WEB Act authority, which also enables the FTC to send staff members to work in non-U.S. competition agencies. In FY 2010, the FTC hosted 13 International Fellows and Interns from Canada, Egypt, France, Kazakhstan, South Africa, South Korea, Peru, Switzerland, the United Kingdom, and Vietnam. It also sent FTC staff to work in two non-U.S. competition agencies: the U.K. Competition Commission and Competition Bureau Canada. These assignments provide valuable opportunities for participants to obtain a deep understanding of their international partners' laws and challenges. This knowledge provides critical support for coordinated enforcement and promotes convergence toward sound policy. In 2010, the Department hosted visiting antitrust delegations from Latin America, Egypt, and Panama for in-depth meetings with a range of litigating, policy, and economic sections.

6. Regulatory and Trade Policy Matters

6.1 Regulatory Policies

6.1.1 FTC Staff Activities: Federal and State Regulatory Matters

89. **Utilities, Electricity**. On September 29, 2010, the FTC submitted a comment concerning the Federal Energy Regulatory Commission's (FERC) Notice of Proposed Rulemaking (NOPR), which aimed at encouraging needed transmission construction through clearer, non-discriminatory rules on transmission planning, investment, and cost allocation. The FTC comments focused on three issues raised by the NOPR. First, the comments noted that the regional and inter-regional joint transmission planning envisioned by the NOPR likely would result in discussions and collaborations among competitors, as well as with customers. The FTC highlighted that although such interactions are not immune from antitrust scrutiny, the antitrust laws are not a barrier to competitors' (or competitors' and customers') ability to work together in procompetitive ways. Second, the FTC encouraged elimination of transmission incumbents' right of first refusal, not only for projects proposed through the regional transmission planning process, but also for transmission planning processes for individual transmission systems. Additionally, the FTC encouraged FERC to ensure that the standards set for participation in transmission projects by incumbents and non-incumbents alike are not exclusionary in favor of the incumbents. Finally, with respect to the NOPR's cost allocation proposals, the FTC encouraged FERC to seek broad consensus on cost allocation. See http://www.ftc.gov/opa/2010/10/ferc.shtm.

90. **Gasoline Prices.** On September 24, 2010, the FTC provided comments in support of a New Jersey State Senate Bill that would modify current law to allow gasoline retailers to set their prices below cost to meet competition. The FTC encouraged the passage of the Bill explaining that, if adopted, the Bill would permit gasoline retailers to meet a rival's price even if that price fell below the retailer's costs. The FTC stated the Bill would likely encourage more aggressive price competition, which would benefit New Jersey consumers through lower gasoline prices. See http://www.ftc.gov/opa/2010/09/gasolinepepsi.shtm.

91. **Veterinarians**. On August 20, 2010, the FTC filed a comment with the Texas Board of Veterinary Medical Examiners concerning the Board's proposed rule on animal teeth floating – the practice of filing the outer contours of an animal's teeth. The FTC comment observed that: 1) the rule would prohibit any non-veterinarian from floating the teeth of animals with motorized or air-powered files except under the direct supervision of a licensed veterinarian; 2) under the current rules, no such supervision is required; 3) FTC Staff is not aware of any evidence justifying this new restraint as a measure to protect animal well-being or otherwise benefit purchasers of teeth floating services; 4) the restraint would eliminate important competition between veterinarian and non-veterinarian teeth floaters, likely reducing Texas consumers' choices and increasing the prices paid for floating. For these reasons, the FTC urged the Board not to adopt the proposed rule unless the Board had credible evidence that the benefits to purchasers of teeth floating would be greater than the harm that would result from the elimination of competition. http://www.ftc.gov/opa/2010/09/texvetnufarm.shtm.

92. **Utilities, Electricity**. On April 8, 2010, the FTC submitted a comment on integration of variable energy resources ("VERs") issued by FERC. The subject of the comments focused on (i) potential discrimination against VERs; (ii) existing provisions that could serve as barriers to VERs and to their integration; and (iii) reliability. In its comment, the FTC urged FERC to structure electricity markets to accommodate VERs so that the electricity system will allow existing generators and new technologies to compete to deliver the greatest net benefits to society. The FTC encouraged active demand-side involvement as a technique for integrating VERs into the electric power system. Furthermore, the FTC recommended that FERC should integrate analysis of how markets and institutions can best harness demand- and supply-side resources in such context. Finally, the FTC: 1) applauded FERC's efforts to improve supply forecasts where benefits exceed the costs; 2) encouraged FERC to examine whether small balancing authorities lead to higher integration costs or VERs from the perspective that integration of VERs can be less costly if the geographic scale of the balancing authority is sufficient to include VERs whose low-generation periods are unlikely to coincide with each other; and 3) recommended that FERC consider ways in which capacity markets can support a transition from the status quo thermal system to a future system in which VERs and consumer participation in demand response play a larger role, and in which administrative interventions such as price caps and capacity markets are less important. See http://www.ftc.gov/opa/2010/04/ferc.shtm.

93. **Utilities, Electricity**. On March 29, 2010, the FTC provided comments in response to FERC's NOPR, which would amend its regulations in two respects. First, it would expand blanket authorizations under the Federal Power Act (FPA) for acquisitions and transfers of certain voting securities. Second, it would modify the definition of "affiliate" under FERC's regulations concerning the standards for grants of market-based rate authority under the FPA. In its comment, the FTC recommended that FERC should strengthen the proposed rule's certifications to protect against the adverse risks associated with changed competitive incentives caused by partial acquisitions, especially among competitors. Accordingly, the FTC urged FERC to address these concerns by adding two certifications to the NOPR: that "[n]either the reporting person nor any of its employees, officers, or investors competes in the same product and geographic markets as the issuer," and that "[n]either the reporting person nor any of its employees, officers, or investors owns, controls, or is affiliated with an entity that owns or controls 'inputs to electric power production'…serving the same product and geographic markets as the issuer.)", aiming to provide

structural safeguards against the range of adverse competitive effects associated with partial acquisitions. See http://www.ftc.gov/opa/2010/04/boulderelectric.shtm.

94. **Utilities, Electricity**. On March 19, 2010, the FTC submitted a comment to FERC on regional transmission organization (RTO) and independent system operator (ISO) performance metrics. The FTC recommended that FERC select performance metrics that will accurately evaluate the degree to which RTOs display required characteristics and perform their required functions. The FTC further urged FERC to explicitly address the risk of potential distortions in RTO performance that may result from flawed or incomplete performance metrics. The FTC also recommended that FERC consider adding to the minimum characteristics and functions of RTOs a requirement to operate efficiently, including being responsive to grid users and the retail customers they serve. See http://www.ftc.gov/opa/2010/04/boulderelectric.shtm.

95. **Health Care**. On January 28, 2010, in response to a request from Kentucky Cabinet for Health and Family Services ("Cabinet"), the FTC filed a comment on the proposed regulation of limited service clinics (LSCs) in Kentucky. The FTC comment observed that a proposed rule contains three categories of regulatory provisions that were likely to raise competitive concerns. The first involves limits on the scope of professional services that may be provided at an LSC – limits that do not apply to the same credentialed professionals in comparable limited care settings. The second involved certain physical or operational restrictions that do not apply to comparable limited care clinics. The third involved mandatory licensing fees in excess of those required of any other health care facility. Furthermore, the FTC noted that no justifications were offered to outweigh the competitive ramifications of these rules. Accordingly, the FTC urged the Cabinet not to adopt those regulatory provisions and suggested the consideration of two alternative approaches. First, to avoid unnecessary costs and restrictions on LSCs, the Cabinet could strike needlessly disparate requirements from the final rule. Alternatively, the Cabinet could consider whether LSC scope of service, physical plant, and operations requirements could be better specified through amendments to Kentucky's existing licensing rules for health care clinics. See http://www.ftc.gov/opa/2010/02/mjk.shtm.

96. **Dentistry**. On December 18, 2009, the FTC filed a comment with the Louisiana State Board of Dentistry concerning the Board's proposed amendments to its rules on the practice of "portable and mobile dentistry". The amendments would allow dentists to bring their portable, self-contained offices to the consumer. According to the comment, the FTC was concerned that some of the proposed amendments discriminated between mobile and office-based dentistry by making access to dental treatment in a mobile setting more difficult with the consequent denial of access to dental care for many Louisianan children. Furthermore, the FTC stated that these proposals did not seem to be calculated to provide Louisiana citizens with any countervailing benefits. For these reasons, the FTC urged the Board of Dentistry to modify the sections of the proposed rules which would likely make it more difficult for mobile dentists to operate. See http://www.ftc.gov/opa/2009/12/dentalferc.shtm.

97. **Utilities, Electricity**. On December 11, 2009, the FTC submitted a comment on the "Possible Elements of National Action Plan on Demand Response: A Discussion Draft" ("Action Plan") issued by FERC. The Action Plan discussed programs that empower consumers to reduce the cost of operating electricity system and share in the savings. The FTC hailed the Action Plan for its price-based and administrative approaches; its emphasis on consumer research; and its recognition that renewable, weather-sensitive generation technologies create new roles and challenges for demand-side programs. Nonetheless, the FTC recommended that: 1) FERC should consider expanding each of these approaches and offer concrete plans to support dynamic pricing; 2) the Action Plan should focus on understanding end-users and how their needs change the optimal design of the response programs in which they will be key players; 3) the Action Plan should support creation of infrastructure and processes that will support beneficial competition, entry, learning, and innovation. See http://www.ftc.gov/opa/2009/12/dentalferc.shtm.

98. **Utilities, Electricity**. On December 3, 2009, the FTC submitted a comment concerning issues of transmission planning and transmission cost allocation, in response to FERC's request for comment. In its comment, the FTC explained that transmission planning is most likely to be effective when the geographic scope of the planning process matches the geographic scope of power flows. The FTC encouraged FERC to require ongoing transmission planning at the Interconnection level in order to facilitate the most effective and efficient transmission planning regime for the U.S. The FTC urged FERC to foster consistent, Interconnection-wide cost allocation approaches and to refine its use of data and analysis so as to yield reasonable choices, while also acknowledging that the future holds unavoidable uncertainties. See http://www.ftc.gov/opa/2009/12/basf.shtm.

99. **Health Care**. In December 2009, the FTC provided comments to the Department of Health and Human Services' Centers for Medicare & Medicaid Services (HHS) concerning a proposed HHS Rule which, among other things, improves the plan information that enrollees in Medicare Advantage (MA) plans and Medicare prescription drug benefit (PDP) plans use to identify and select the plan that best suits their needs. In its comment, the FTC encouraged HHS to require plan sponsors to make standardized information about plan features and other tools available to consumers before they choose a plan in order to reduce search costs and facilitate competition. Moreover, the FTC encouraged HHS to explore ways in which it can release timely, plan-specific data to third parties to allow them to experiment with different ways to analyze claims and performance data to assist consumers with the identification, selection, and use of their MA and PDP plans based on plan performance or quality attributes. The comment states that if consumers can easily access information they need to make informed decisions, their purchase decisions will better reflect their needs and competition will be enhanced. See http://www.ftc.gov/opa/2009/12/hhs.shtm.

6.1.2 DOJ Activities: Federal and State Regulatory Matters

100. On October 14, 2009, AAG Varney testified before the Senate Judiciary Committee in a hearing on "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry." She concluded that the Department "generally supports the idea of repealing antitrust exemptions," noting that "[t]here are strong indications that possible justifications for the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 are no longer valid today." Her testimony is available at http://www.justice.gov/atr/public/testimony/250917.htm. As part of health care reform during the 111th Congress, the Department worked with Congress by providing this testimony along with analysis of legislation that included repeal of the McCarran-Ferguson Act as it applies to the business of health insurance, and worked with the White House to issue a Statement of Administration Policy (http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr4626r_20100223.pdf) in support of the legislation that passed the House of Representatives overwhelmingly by a vote of 406 to 19.

101. On March 24 and April 5, 2010, the Department filed comments before the Federal Aviation Administration (FAA) with respect to the FAA's decision whether to grant a waiver for the permanent exchange between Delta Air Lines and US Airways of more than 300 slots at LaGuardia and Ronald Reagan Washington National Airports. The Department's comments noted that the transaction would reduce competition and make entry by low cost carriers and others less likely at the two airports, depriving consumers of lower fares and vigorous competition, but that the FAA's proposed condition of slot divestitures, by opening up the airports to entry by carriers that traditionally found it difficult to purchase slots, would protect consumers from competitive harm. *See* comments filed with the FAA at http://www.justice.gov/atr/public/comments/comments.html#faa.

102. On December 21, 2009, the Department filed comments with the Department of Transportation (DOT) on the joint application of American Airlines, British Airways, Iberia, Finnair, and Royal Jordanian Airlines for approval of and antitrust immunity for their alliance agreements. The Department concluded

that the proposed agreements would result in competitive harm on certain transatlantic routes serving 2.5 million passengers annually. Fares between six pairs of cities could increase up to 15% under the proposed agreements. According to the comments, the airlines claimed substantial benefits would flow from an expanded alliance, but they failed to show that immunity was necessary to achieve these benefits. The Department recommended that DOT impose conditions – slot divestitures or carveouts, as appropriate – on a grant of immunity to protect the public interest in competition. *See* comments filed at http://www.justice.gov/atr/public/comments/253575.htm.

103. On January 4, 2010, the Department filed *ex parte* comments with the Federal Communications Commission (FCC) on broadband competition. The Department concluded that broadband is a cornerstone of growth and innovation in the 21st century economy, and that as part of the development of a broadband plan, the FCC should evaluate what strategies would best promote the development of an affordable and innovative broadband infrastructure in the United States. The comments suggested that these broad goals are best served by promoting competition in broadband markets. In practice, this does not mean striving for broadband markets that look like textbook markets of perfect competition, with many price-taking firms. That market structure is unsuitable for the provision of broadband services, which involve very substantial fixed and sunk costs. Rather, promoting competition is likely to take the form of enabling additional entry and expansion by wireless broadband providers, applying other appropriate policy levers, and spurring competition among broadband providers by improving the information available to consumers about the service offerings in their areas. The comments are available at http://www.justice.gov/atr/public/comments/253393.htm.

104. On June 3, 2010, the Department filed comments with the Federal Maritime Commission (FMC) supporting a proposal to broaden an exemption from statutory ocean transportation tariff publication requirements for non-vessel-operating common carriers (NVOCCs) to include short-term “spot market” agreements between NVOCCs and shippers. The Department noted that the proposed exemption would allow NVOCCs to be more flexible in a dynamic contractual environment, thereby allowing them to be more responsive to their shippers’ needs. It would likely promote competition and commerce by eliminating substantial regulatory costs to NVOCCs, a savings that could be passed on to their shipper customers in the form of lower shipping rates. The comments are available at http://www.justice.gov/atr/public/comments/259366.htm#_ftn2.

6.1.3 DOJ and FTC Trade Policy Activities

105. Both the Division and the FTC are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Agencies participate in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative, and provide antitrust and other legal advice to U.S. trade agencies. The Division also works with other Department components (including the Civil, Criminal, and Environment and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole.

106. Both the FTC and Division participate in bilateral and multilateral discussions and projects to improve cooperation in the enforcement of competition laws. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate in competition policy discussions associated with APEC and the Trans-Pacific Partnership negotiations. The Agencies are active participants in the annual UNCTAD Intergovernmental Group of Experts meetings on competition topics of interest to developing as well as developed countries, and they have also followed the competition and intellectual property component of the World Intellectual Property Organization’s (“WIPO”) Committee on Development and Intellectual Property.

7. New Studies Related to Antitrust Policy

7.1 Joint Conferences and Reports

107. **Horizontal Merger Guidelines Workshops.** During December 2009 and January 2010, the FTC and the Division held a series of five joint public workshops to explore the possibility of updating the Horizontal Merger Guidelines that are used by both agencies to evaluate the potential competitive effects of mergers and acquisitions. More information is available at http://www.ftc.gov/bc/workshops/hmg/index.shtml. After the workshops, the proposed updated guidelines were circulated for public comment in April 2010, and issued in final format in August 2010.

108. **The Intersection of Patent Policy and Competition Policy.** On May 26, 2010, the Department, FTC, and the Department of Commerce's Patent and Trademark Office (PTO) held a joint public workshop in Washington on the intersection of patent policy and competition policy and its implications for promoting innovation. One panel of experts examined how challenges posed by the patent backlog affect the competitive strategies of patent applicants and innovators. Another expert panel examined the impact of the Supreme Court's opinion in *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006), on permanent injunctions for patent infringement in district courts and at the U.S. International Trade Commission. Finally, a third panel evaluated the role of patents in connection with industry standards and the impact such standards have on competition. See http://www.justice.gov/atr/public/workshops/ip/index.html and http://www.ftc.gov/bc/workshops/ipmarketplace/.

7.2 FTC Conferences, Reports, and Economic Working Papers

7.2.1 Conferences and Workshops

109. **How will Journalism Survive the Internet Age?** On June 15, 2010, the FTC held its third and final workshop on "the future of journalism." Topics explored included: the economics of journalism on the Internet and in more traditional media; how the business models of different types of news organizations may evolve in response to the challenges associated with the Internet; and how competition may evolve in markets for journalism and advertising. Workshop participants presented a wide range of views from stakeholders that included bloggers, online publishers and traditional media companies. The FTC plans to issue a report based on these workshops. More information is available at http://www.ftc.gov/opp/workshops/news/index.shtml.

110. **Second Annual FTC and Northwestern University Microeconomics conference.** On November 19-20, 2009, the Federal Trade Commission's Bureau of Economics, and Northwestern University's Searle Center on Law, Regulation and Economic Growth, and Center for the Study of Industrial Organization hosted a conference to bring together scholars working in industrial organization, information economics, game theory, quantitative marketing, consumer behavior, law and economics, behavioral and experimental economics, and other areas related to the FTC's antitrust, consumer protection and public policy missions. More information is available at http://www.ftc.gov/be/workshops/microeconomics/2009/index.shtm.

7.2.2 Studies and Reports

111. **Pay-For-Delay: How Drug Company Pay-Offs Cost Consumers Billions.** In January 2010, FTC staff issued a study evaluating and summarizing assesses the losses U.S. consumers incurred during the past six years through pay-for-delay deals in the drug industry. The study found the number such pay-for-delay agreements to have increased from zero in 2004 to a record of 19 agreements in Fiscal Year 2009. The study reported that, on average, these potential pay-for-delay agreements precluded generic

entry for 48 months. On average, agreements with compensation from the brand company to the generic producer prohibit generic entry for nearly 17 months longer than agreements without payments. Most of these agreements are still in effect, and they currently protect at least $20 billion in sales of brand-name pharmaceuticals from generic competition. See http://www.ftc.gov/opa/2010/01/payfordelay.shtm.

112. **The U.S. SAFE WEB Act.** In December 2009, FTC staff issued a report to Congress summarizing how the agency used the expanded law enforcement authority over the three years since the U.S. SAFE WEB Act to protect American Consumers was signed into law. The report provides information on a wide range of matters mandated by Congress, including data on the number of cross-border complaints received by the Commission; a description of specific cases in which the FTC worked cooperatively with foreign agencies; the number of times the FTC issued compulsory process on behalf of foreign agencies; and implementation of the agency's International Fellows Program. See http://www.ftc.gov/opa/2009/12/safeweb.shtm.

7.2.3 Bureau of Economics Working Papers

113. The FTC's Bureau of Economics issued the following working papers during FY 2010. The papers are available at http://www.ftc.gov/be/econwork.htm.

- David J. Balan and Dan Hanner, Job Insecurity isn't Always Efficient, September 2010.
- James C. Cooper and Joshua D. Wright, State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms, August 2010.
- Paul Zimmerman, John M. Yun and Christopher T. Taylor, Edgeworth Price Cycles in Gasoline: Evidence from the U.S., June 2010.
- Matthew Chesnes, Asymmetric Pass-Through in U.S. Gasoline Prices, June 2010.
- Brett Wendling and Steven Tenn, Entry Threats and Pricing in the Generic Drug Industry, June 2010.
- Louis Silvia and Christopher T. Taylor, Petroleum Mergers and Competition in the Northeast United States, April 2010.
- Dan O'Brien and Ian Gale, The Welfare Effects of Use-or-Lose Provisions in Markets with Dominant Firms, February, 2010.
- Christopher J. Metcalf and John D. Simpson, Competition, Contracts, and Innovation, December 2009.

7.3 DOJ Conferences, Reports, and Economic Working Papers

7.3.1 Conferences and Workshops

114. In 2010, the Department and the U.S. Department of Agriculture (USDA) held five joint public workshops around the U.S. to explore competition issues affecting the agricultural sector in the 21st century and the appropriate role for antitrust and regulatory enforcement in that industry. These were the first joint Department of Justice/USDA workshops ever to be held to discuss competition and regulatory issues in the agriculture industry. The goals of the workshops were to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues as

well as to listen to and learn from parties with real-world experience in the agricultural sector. The workshops addressed the dynamics of competition in agriculture markets, including buyer power (monopsony) and vertical integration. They examined legal doctrines and jurisprudence, as well as current economic learning, and provided an opportunity for farmers, ranchers, consumer groups, processors, agribusiness, and other interested parties to provide examples of potentially anticompetitive conduct and to discuss any concerns about the application of the antitrust laws to the agricultural sectors.

7.3.2 Department of Justice Economic Analysis Group Discussion Papers

115. The DOJ Economic Analysis Group issued the following papers during FY 2010. The papers are available at http://www.usdoj.gov/atr/public/eag/discussion_papers.htm.

- The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, *Carl Shapiro* (Published in 77 *Antitrust Law Journal* 701, (2010)).

- Cumulative Innovation and Competition Policy, Alexander Raskovich and Nathan H. Miller, EAG 10-5, September 2010.

- A Theory of Quality Competition in Newspaper Joint Operating Agreements, *Charles J. Romeo and Aran Canes, EAG 10-4, July 2010.*

- Filling Out the Instrument Set in Mixed Logit Demand Systems for Aggregate Data, *Charles J. Romeo, EAG 10-3, April 2010.*

- Competition Among Spatially Differentiated Firms: An Empirical Model with an Application to Cement, *Nathan H. Miller and Matthew Osborne, EAG 10-2, March 2010.*

- The Economics of Railroad "Captive Shipper" Legislation, *Russell Pittman, EAG 10-1, January 2010* (Published in *Administrative Law Review* (2010)).

- The Entry Incentives of Complementary Producers: A Simple Model with Implications for Antitrust Policy, *Juan S. Lleras and Nathan H. Miller, EAG 09-7, November 2009.*

- Competition Issues in Restructuring Ports and Railways, Including Brief Consideration of these Sectors in India, *Russell Pittman, EAG 09-6, November 2009* (Published in *International Journal of Regulation and Governance* (2009)).

APPENDICES

Department of Justice: Fiscal Year 2010 FTE[3] and Actual Resources by Enforcement Activity

	FTE	Amount ($ in thousands)
Criminal Enforcement	319	$67,584
Civil Enforcement	478	$101,376
Total	797	$168,960

Federal Trade Commission: Fiscal Year 2010 Competition Mission
FTE and Dollars by Program, Bureau & Office

	FTE	Amount ($ in thousands)
Total Maintain Competition Mission	511.9	$118,971.2
Bureau of Competition	274.8	$46,452.8
Bureau of Economics	73.1	$11,978.8
Regional Offices	28.4	$5,081.1
Mission Support	135.6	$55,458.5
Premerger Notification	32.0	$4,795.8
Bureau of Competition	31.6	$4,733.2
Bureau of Economics	0.0	$0.0
Regional Offices	0.4	$62.6
Merger & Joint Venture Enforcement	178.2	$29,701.8
Bureau of Competition	123.9	$20,839.2
Bureau of Economics	39.8	$6,413.5
Regional Offices	14.5	$2,449.1
Merger & Joint Venture Compliance	4.0	$592.8
Bureau of Competition	3.9	$576.7
Bureau of Economics	0.1	$16.1
Regional Offices	---	---
Nonmerger Enforcement	130.4	$21,968.4
Bureau of Competition	96.7	$16,247.1
Bureau of Economics	21.4	$3,465.8
Regional Offices	12.3	$2,255.5
Nonmerger Compliance	2.8	$414.9
Bureau of Competition	2.8	$414.9
Bureau of Economics	0.0	$0.0
Regional Offices	---	---

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

	FTE	Amount ($ in thousands)
Antitrust Policy Analysis	7.3	$1,205.6
Bureau of Competition	---	---
Bureau of Economics	7.3	$1,205.6
Regional Offices	---	---
Other Direct	21.6	$4,833.4
Bureau of Competition	15.9	$3,641.7
Bureau of Economics	4.5	$877.8
Regional Offices	1.2	$313.9
Support	135.6	$55,458.5