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

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ANNUAL REPORT ON DEVELOPMENTS IN COMPETITION IN THE UNITED STATES

(October 1, 1994 through September 30, 1995)

This report is submitted by the Delegate of the United States to the Committee on Competition Law and Policy to be held on 24 to 26 April 1996.

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Introduction

1. This report describes federal antitrust developments in the United States for Fiscal Year 1995 ("FY95" -- October 1, 1994 through September 30, 1995). It summarizes the activities of the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").

2. Robert Pitofsky was sworn in as Chairman of the FTC in April, 1995. He appointed William Baer as Director of the Bureau of Competition, Joan Bernstein as Director of the Bureau of Consumer Protection, Jonathan Baker as Director of the Bureau of Economics, and Stephen Calkins as General Counsel.

3. Joel I. Klein became Principal Deputy Assistant Attorney General with responsibility for international and policy matters in August 1995. Other Deputies appointed in 1995 were Lawrence R. Fullerton (August; merger enforcement), David S. Turetsky (August; civil and regulatory matters), Gary R. Spratling (February; criminal enforcement), and Carl B. Shapiro (August; economic analysis).

I. Changes in law or policies

A. Changes in Antitrust Rules, Policies or Guidelines

4. *The International Antitrust Enforcement Assistance Act (IAEAA).* As reported in last year's annual report, President Clinton signed the IAEAA into law on November 2, 1994. The new law authorizes the Department of Justice and the FTC to negotiate reciprocal assistance agreements with foreign antitrust enforcement authorities, provided those authorities protect law enforcement information with the same degree of confidentiality accorded it in the United States. The law greatly expands the ability of the DOJ and the FTC to cooperate with foreign antitrust authorities. It does so by permitting the agencies to use their investigative powers in response to a request from a foreign antitrust authority, and to exchange most forms of confidential information, all in accordance with the terms of the mutual assistance agreement. The law also permits the U.S. Attorney General to apply to a U.S. court for an order requiring the production of evidence by a person in the United States to assist a foreign antitrust authority. The assistance may be given without regard to whether the conduct under investigation violates U.S. antitrust laws, but the foreign antitrust law must prohibit conduct similar to conduct prohibited under U.S. antitrust law. The law permits the sharing with foreign antitrust authorities of most otherwise confidential information, subject to strict assurances against its improper use or disclosure. The law does not, however, permit the sharing of Hart-Scott-Rodino premerger notification information or certain other categories of information related to national security.

5. On March 23, 1995, the Commission and Department announced eight major steps to streamline the Hart-Scott-Rodino ("HSR") premerger review process in order to reduce the cost of compliance and make the process quicker and more efficient. The eight step program involves: a determination of which agency will review proposed mergers within nine business days from the date of filing; issuance of a joint, annotated model "second request"; establishment of a procedure for preclearance coordination by the agencies; adoption of a formal internal appeals process for second requests; open invitations for parties to identify issues and provide analysis to assist the reviewing agency in early termination of the investigations; pursuit of a joint project with the American Bar Association's Section of Antitrust Law to study second request practice issues; expansion of cooperative efforts to harmonize merger review and promote consistency; and development of proposals to exempt certain categories of transactions from premerger notification (see below, paragraph 12).

6. The DOJ and FTC issued their *Antitrust Enforcement Guidelines for International Operations* on April 5, 1995, replacing those issued by the DOJ in 1988. The new Guidelines articulate the agencies' resolve to protect both American consumers and American exporters from anticompetitive restraints where such restraints have direct, substantial and reasonably foreseeable effects on U.S. commerce. As more countries have adopted national antitrust laws, cooperation between national antitrust enforcement agencies has increased, and the Guidelines emphasize the importance of such international cooperation. The Guidelines also recognize that comity-based doctrines such as sovereign compulsion may counsel against antitrust enforcement in some circumstances (outlined in the Guidelines) or indicate that U.S. agencies should work with foreign agencies.

7. The DOJ and FTC issued *Antitrust Guidelines for the Licensing of Intellectual Property* on April 6, 1995. The Guidelines explain the generally complementary relationship between the antitrust laws and the laws that protect intellectual property, and the circumstances in which an attempt to exploit intellectual property rights can raise antitrust concerns. The Guidelines replace those provisions and examples in the 1988 International Guidelines that related to intellectual property licensing. The Guidelines recognize that antitrust policy and intellectual property protection share the common goal of fostering innovation as a means of advancing consumer welfare and that antitrust analysis is sufficiently flexible to accommodate the special characteristics of intellectual property. They acknowledge that the licensing of intellectual property is generally procompetitive and that ownership of intellectual property does not by itself constitute the possession of market power. To provide greater certainty where antitrust risks are small, the Guidelines announce a "safety zone" within which the agencies generally will not challenge most licensing arrangements if the parties collectively account for no more than 20 percent of each relevant market.

8. On May 30, l995, Commission Chairman Pitofsky announced the creation of an internal task force to review agency rules and policies governing litigation in administrative cases. The objective of the task force is to evaluate current rules in Part 3 of the FTC Rules of Practice and related rules with a view to recommending possible changes to minimize delay, increase clarity and streamline procedures. Public comments were requested until July 30, l995.

9. The Commission announced two new Commission policies on June 22, l995, aimed at reducing the burden on companies involved in FTC merger cases. Noting that the HSR premerger notification law works so well as a tool for protecting consumers and the public from anticompetitive mergers, the FTC decided to no longer routinely require parties to a merger it has challenged to obtain prior approval for future transactions in the same market. The FTC, however, may impose a narrow prior-approval or prior-notice provision where there is a credible risk that the parties will engage in another anticompetitive transaction. At the same time, the FTC issued a policy statement announcing that it will determine on a case-by-case basis whether to pursue administrative litigation after a federal district court judge has refused to bar parties to a proposed merger from merging pending the outcome of such litigation. The FTC also clarified the issues it will consider in making that determination.

10. On June 21, l995, the FTC announced a new policy that will expand cooperative efforts between the Commission and the state Attorneys General in all merger investigations. Under the new policy, states may receive two types of information previously unavailable in HSR investigations: (1) information obtained from third parties, except for the identity of third parties and other identifying information which will continue to be protected unless the third party consents to disclosure; and (2) staff analytic memoranda, once the Commission has determined whether or not to challenge the merger. Requests for information from states will be decided on a case-by-case basis, taking into account whether they are consistent with the Commission's law enforcement mission.

11. On July 19, 1995, the FTC announced that it would hold public hearings at Commission headquarters beginning in October, l995 to examine the need for changes in enforcement of antitrust and consumer protection laws stemming from the increasingly global and innovation- based nature of competition. The agency, among other things, will seek input on whether the changing nature of competition requires modifications in: the analysis of market power; efficiency claims or the failing firm defense; the application of competition policy to markets in which companies compete based on innovation rather than price; and FTC procedures to enhance its ability to protect consumers and promote competition. The hearings will bring together U.S. business leaders who have first-hand experience with such issues as well as consumer representatives, and recognized leaders from state law enforcement agencies and the academic, legal and economics communities. The Commission's objective is to learn what is working well in its enforcement policy and what may need some adjustments. Following the conclusions of the hearings, a report on the findings and possible policy recommendations will be released.

12. The FTC proposed on July 21, 1995, new rules, drafted in cooperation with the Department, to exempt from HSR reporting requirements certain classes of transactions that, based on enforcement experience, are not likely to raise antitrust concerns. The exemptions are intended to reduce an unnecessary regulatory burden on business and to allow both the FTC and DOJ to focus resources on transactions more likely to pose competitive harm. The proposals were subject to public comment until September 25, 1995. On March 25, 1996, the Commission adopted new rules amending the HSR reporting requirements that would exempt the following classes of transactions: (1) certain purchases of goods or realty in the ordinary course of business, including certain purchases of used durable goods where the purchase is designed to replace or expand production capacity; (2) certain real estate acquisitions, such as acquisitions of shopping centers and hotels and motels, not likely to violate the antitrust laws; (3) acquisitions of oil and natural gas reserves and certain associated production and exploration assets valued at $500 million or less; (4) acquisitions of coal reserves and certain associated productions and exploration assets valued at $200 million or less; (5) acquisitions of voting securities of companies that hold real property or carbon-based mineral reserves the direct acquisition of which would be exempt, and other assets valued at $15 million or less; and (6) acquisitions of realty acquired solely for rental or investment purposes.

13. A new antitrust cooperation agreement, which became effective on August 3, l995, reflects the significant growth in recent years in the coordination of antitrust enforcement investigations between the United States and Canada and extends cooperation to cover deceptive marketing practices laws. The agreement replaces a non-binding memorandum of understanding executed in l984. The parties, among other things, agree to exchange antitrust-related information consistent with confidentiality restraints, to coordinate related enforcement activities, to assist each other in locating evidence and witnesses, and to maintain the confidentiality of sensitive information provided by the other party. The agreement also contains a "positive comity" provision modeled on the l991 U.S.-EC antitrust cooperation agreement. The agreement is not a comprehensive antitrust mutual assistance agreement of the kind permitted by the International Antitrust Enforcement Assistance Act of 1994.

14. On August 9, l995, the Commission announced that, effective immediately, the core injunctive provisions of future administrative orders in FTC antitrust cases ordinarily will terminate after 20 years, absent the filing of a complaint or consent decree alleging an order violation. Supplemental provisions in future administrative competition orders will terminate after ten years.

15. In FY 95, the Division continued its efforts to coordinate with State Attorneys General in the enforcement of state and federal antitrust laws. These efforts led to more than a dozen joint investigations. Increased state-federal cooperation avoids unnecessary duplication of enforcement efforts and harmonizes

the application of state and federal antitrust laws, thus creating greater certainty for businesses and their counsel and lowering compliance costs.

16. The Charitable Gift Annuity Antitrust Relief Act of 1995, Public Law 104-63, was signed into law by President Clinton on December 5, 1995. The Act provides antitrust protection to qualified charities that issue charitable gift annuities by creating a specific statutory exemption for charities that "use, or...agree to use" uniform rates for the purpose of issuing charitable gift annuities. While antitrust exemptions generally are disfavored by U.S. lawmakers, the protection afforded in this narrowly tailored measure reflects a strong policy concern that the funds of charities not be placed at risk in treble damage litigation.

Telecommunications Act of 1996

17. The "Telecommunications Act of 1996," Public Law 104-104, was signed into law by President Clinton on February 8, 1996. It is designed to open up the entire telecommunications industry to the influence of competitive market forces. By bringing down long-established barriers to competition in the local telephone and cable markets, and requiring incumbent telecommunications monopolies to open their network facilities to competing firms, the new law should enable consumers to benefit from lower prices, improved service, increased choices, and improved technology.

18. One of the key competition issues addressed in the new law is how to determine whether and when the Bell operating companies, which have held a monopoly in local telephone service in their respective regions for most of this century, can safely be permitted to offer long distance service in their regions. Providers of long distance service still largely depend on the local telephone exchange as an "essential facility" to reach their customers and connect them to one another. The old Bell System abused this essential facility to impede competition in long distance service. This was a central concern underlying the DOJ's antitrust enforcement action that led to the 1984 breakup of the Bell System under the Modification of Final Judgment (MFJ), which has now been superseded by the new law.

19. The new law addresses this concern by requiring that, before a Bell company may provide long distance service in a State within the region where it has historically possessed a monopoly in local telephone service, it must satisfy specified interconnection and related requirements. These requirements, known collectively as the "competitive checklist," combined with the requirement that there be a facilities-based local telephone service competitor in the area, will give important impetus to the arrival of local competition.

20. These requirements are augmented by a requirement that the Federal Communications Commission ("FCC") find the proposed Bell company entry into long distance to be in the public interest, and a requirement that the FCC consult with the Attorney General regarding the proposed entry and accord "substantial weight" to the Attorney General's evaluation. Under the public interest test, the FCC has authority to consider a broad range of competitive issues.

21. The legislation also includes an antitrust savings clause, so that the antitrust laws will continue to apply fully. The antitrust savings clause, combined with the "substantial weight" requirement, will ensure that the antitrust laws, and the DOJ, can continue to perform their historical role in nurturing and safeguarding competition.

22. The new law provides an important additional safeguard against possible abuse of local telephone market power. It requires that, for a minimum of three years after a Bell company is permitted to provide long distance service, it must do so only through a separate affiliate, with separate accounting,

and with all transactions kept at arm's length. The FCC may extend the three-year period for as long as it determines the public interest may require. In providing services to each other, the Bell companies and their affiliates are prohibited from discriminating against competing telecommunications service providers. Similar separate affiliate and nondiscrimination requirements apply to telecommunications equipment manufactured by a Bell company, and to information services provided by a Bell company, two other lines of telecommunications business in which Bell company abuse of monopoly power has historically been a concern.

II. Enforcement of Antitrust Laws and Policies: Action against anticompetitive practices

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

23. During FY95 the Division continued its increase in personnel, adding 5 attorneys and 39 paralegals. At the end of FY95, the Division had 768 employees, comprised of 330 attorneys; 51 economists; 170 paralegals and 217 support staff.

24. In FY95, the Antitrust Division opened 249 investigations and filed 84 antitrust cases, both civil and criminal, in federal court. The Division was a party to 11 U.S. antitrust cases decided by the federal Courts of Appeals and filed amicus curiae briefs in four Court of Appeals cases and one Supreme Court case.

25. In FY95, the Division filed 60 criminal cases against 40 corporations and 32 individuals. Thirty-three corporate defendants and 25 individuals were assessed fines totaling $41.7 million and 16 defendants were sentenced to a total of 3,902 days of incarceration. Another 16 individual defendants were sentenced to spend a total of 2,933 days in some form of alternative confinement. The Division obtained the highest criminal antitrust fines ever in its still ongoing investigation of the commercial explosives industry, which has generated over $27 million in criminal fines. The $15 million fine paid by Dyno Nobel (see below, paragraph 60) was the biggest fine ever imposed in a criminal antitrust matter. The larger fines obtained recently in criminal cases reflect in part the Division's focus on more significant cases. In 1992, the average corporate fine imposed was slightly under $500,000. The average fine imposed on corporations in FY95 exceeded $1.2 million. The Division is concentrating its resources on international and nationwide conspiracies -- nearly 25 percent of its grand juries are focused on international price-fixing cartels and another 25 percent are focused on national price-fixing conspiracies.

26. In FY95, the Division reviewed 2,816 notified merger transactions, as well as a number of structural transactions that did not fall under the Hart-Scott-Rodino pre-merger notification requirements. The Division investigated 134 mergers and challenged 18.

27. The Division opened 227 civil investigations in FY95, both merger and non-merger, and issued 2,029 civil investigative demands (a form of compulsory process). During the year, the Division filed 24 civil complaints and 18 proposed consent decrees or final judgments.

2) FTC Staffing and Enforcement Statistics

28. At the end of FY95, the FTC's Bureau of Competition had 219 employees: 151 attorneys, 38 other professionals, and 30 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

29. During FY95, 2,816 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the Hart-Scott-Rodino Act. Fifty-eight second requests were issued. The Commission authorized the staff to seek preliminary injunctions in federal district court to block five proposed mergers, accepted 30 consent agreements for public comment to settle anticompetitive concerns raised by proposed transactions, and issued two administrative complaints. This is the largest number of mergers challenged since at least 1980. In addition, acting on two cases begun in previous years, the Commission dismissed one administrative complaint and upheld another. Another eight mergers or acquisitions were abandoned before the Commission could act and after FTC staff raised concerns that the transactions might reduce competition. A wide variety of industries were involved, including medical devices, drugs and vaccines, national defense, computer software, consumer money wire transfers, retail pharmacies and supermarkets.

30. In the non-merger area, 12 enforcement cases were brought during fiscal year l995. Eleven of these cases were settled by consent agreements; ten concerned cases of alleged horizontal restraints, including boycotts, market allocation or price fixing, and one concerned an alleged vertical restraint. One administrative complaint was filed that concerned an alleged horizontal restraint. An initial decision was issued by an Administrative Law Judge upholding a l993 Commission complaint. The anticompetitive conduct was engaged in by, among others, baby furniture manufacturers, medical professionals, athletic shoe makers, video rental stores, automobile dealers and cable TV providers.

31. The Commission obtained $225,000 in civil penalties against a U.S. company for violations of an outstanding order and $425,000 in civil penalties against a U.S. company for its failure to observe the premerger notification requirements and waiting periods under the HSR Act before consummating a notifiable acquisition.

32. Staff of the Bureau of Competition also responded to eight requests from industry for advice on whether specific health care arrangements might violate antitrust laws. These letters can help businesses avoid enforcement actions.

B. Antitrust Cases in the Courts

1) United States Supreme Court

a. DOJ or FTC Cases

33. There were no DOJ or FTC cases decided in the Supreme Court in FY95.

b. Private Cases

34. There were no private antitrust cases decided in the Supreme Court in FY95.

2) Court of Appeals Cases

a. Significant DOJ Cases Decided in 1995

35. *United States v. Western Electric Co.*, 46 F.3d 1198 (D.C. Cir. 1995) ("*AT&T-McCaw Appeal*") involved a petition for modification of the 1982 AT&T antitrust consent decree (Modification of Final Judgment or "MFJ"), which broke up the old Bell System and imposed line-of-business restrictions on the divested Bell Operating Companies ("BOCs"). The decree also prohibited AT&T from "acquir[ing] the stock or assets of any BOC." Because cellular systems in which BOCs held majority interests were BOCs as defined in the decree, AT&T needed a partial waiver or modification of this decree prohibition in order to consummate its acquisition of McCaw Cellular Communications, Inc., which owned stock in several such systems. The United States supported AT&T's motion for a limited modification of the decree for this purpose; BellSouth opposed it. Judge Greene granted the modification; BellSouth and Bell Atlantic appealed. The D.C. Circuit Court of Appeals affirmed. Both courts agreed with the United States that BOC ownership of "Block A" cellular systems, originally assigned by the FCC to nonwireline carriers, was a significant changed circumstance not foreseen by the parties when the decree was entered, and that the resulting unintended prohibition on AT&T's acquisition, in most major markets, of either of the two cellular systems the FCC has licensed, made the decree's prohibition on AT&T more onerous. The courts also agreed with the government that a limited modification allowing AT&T to acquire McCaw's interests in BOC cellular systems, subject to continuing equal access obligations, would not undermine the decree's central procompetitive purposes and was suitably tailored to the changed circumstances. Accordingly, the modification was proper under Fed. R. Civ. P. Rule 60(b), and the Supreme court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The United States brought a separate action under Section 7 of the Clayton Act, which was settled with the filing of a proposed consent decree. The Telecommunications Act of 1996, enacted on February 8, 1996, (see paragraphs 17-22 above) eliminated any prospective effect of the *AT&T* decree and the proposed *AT&T-McCaw* decree.

36. In *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), the district court (Sporkin, J.), refused to enter a consent judgment proposed by the Department of Justice and Microsoft, concluding that entry of the decree would not be "in the public interest" as required by the Tunney Act, 15 U.S.C. 16(e). The proposed decree, among other things, prohibited Microsoft from employing "per processor" licenses that, the Department alleged, raised barriers to entry in the operating system market. The court of appeals reversed the district court's judgment that the decree should not be entered, concluding that the court exceeded its authority in requiring the government to explain why it failed to file a different Complaint, and in concluding that the decree did not provide a sufficient remedy for the allegations the Complaint contained. The court of appeals also removed Judge Sporkin from the case, concluding that he appeared biased against Microsoft.

37. *United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995). As a result of monopolization cases brought by the government, Kodak was subject to two consent decrees relating to the sale of film. The first, entered in 1921, barred Kodak from selling film without its name on the package, and prohibited exclusive dealing contracts. The second, entered in 1954, barred it from tying or bundling the sale of film and photoprocessing. On Kodak's motion, opposed by the Department, a district court terminated both decrees, finding that Kodak no longer had monopoly power in the sale of film or photoprocessing in the United States. The Second Circuit Court of Appeals affirmed. It accepted the government's contention that the standard for relief was whether the purposes of the decree, including the elimination of monopoly and unduly restrictive practices, had been achieved. However, while recognizing that another fact finder might have found otherwise, it concluded that the United States as appellant had not carried its burden of showing on appeal that the district court abused its discretion in finding, based on the volume of film imports and exports, that the relevant geographic market for film was world-wide, that Kodak had four competitors in that market, and that its market share of 36 percent was too small to support the exercise of monopoly power. The court, despite Kodak's domestic market share (67 percent measured in units, and 75 percent dollar share), rejected the government's contentions that the United States should be considered a separate geographic market. It found no substantial evidence that Kodak was able to engage in price discrimination against United States customers; it saw no error in the district court findings that the retail premium for Kodak film and the stated preference for Kodak film in consumer surveys were not significant; and it was unpersuaded that Kodak's admitted "own elasticity" of two, which normally implies prices twice marginal cost, showed market power.

b. FTC Cases Decided in 1995

38. *The Coca Cola Company and Coca Cola Enterprises v. FTC*, Nos. 94-1595 etc. (D.C. Cir.) were petitions to review an order of the Commission holding that the Coca Cola Company's proposed 1986 acquisition of the Dr Pepper company was unlawful. On May 18, 1995, the case was dismissed by stipulation of the parties to permit entry of a modified order of the Commission settling the case (FTC Docket No. 9207). The modified order deleted a provision that had expressly defined Coca-Cola Enterprises, Inc. as a Coca-Cola Co. subsidiary or affiliate subject to prior-approval requirements before acquiring certain brand-name soft-drink concentrate manufacturers for the next ten years. The Commission found that there was no need to single out Coca-Cola Enterprises in the order for identification as a subsidiary or affiliate since it was not a party to the cases against Coca-Cola Co.

39. *FTC v. Freeman Hospital*, 69 F.3d 260 (8th Cir. 1995), was a suit to enjoin a proposed consolidation of two hospitals pending an administrative proceeding to determine the legality of the transaction under Section 7 of the Clayton Act. The court of appeals held that the district court did not abuse its discretion in concluding that the Commission had failed to make the requisite showing of a geographic market in support of its complaint.

3) Private Cases Having International Implications

40. In *United Phosphorus, Ltd. v. Angus Chemical Co.*, (available in Westlaw at 1994 WL 577246 or Lexis at No. 94C 2078, 1994 U.S. Dist. LEXIS 14786 (N.D. Ill. Oct. 13, 1994)), the plaintiffs, two Indian companies and a U.S. company, alleged that the defendants, a U.S. company, its German subsidiary, and their Indian customer, engaged in a multitude of anticompetitive acts to thwart the plaintiffs from entering the market for certain chemicals necessary for the production of a tuberculosis treatment drug. Plaintiffs alleged that the defendants' conduct had prevented them from manufacturing the chemicals in India, and later in the United States. The court held that the jurisdictional provisions of the Foreign Trade Antitrust Improvements Act (FTAIA) applied. To meet the FTAIA standard, the plaintiffs had to show a "direct, substantial, and reasonably foreseeable effect" on domestic commerce from the foreign commercial conduct. Although some of the alleged anticompetitive conduct had taken place in the U.S., the court noted that "it is the situs of the effect, not the conduct, which is crucial." Allegations concerning the defendants' intent to affect domestic commerce were not relevant, as the "test is whether the effect would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown." Although many of the effects alleged in the complaint would occur in India, there were also allegations of antitrust injury in the U.S., albeit broad and conclusory ones, as the plaintiffs claimed that but for the anticompetitive conduct they would have entered the U.S.

market as well as the Indian one. Although the court denied the defendants' motion to dismiss, it noted that "the allegations will need much more than merely economic theories to survive later dispositive motions."

41. *Virgin Atlantic Airways v. British Airways*, 872 F. Supp. 52 (S.D.N.Y. 1994). Virgin Atlantic sued British Airways ("BA"), alleging various claims, including attempted monopolization, monopoly leveraging, and unreasonable restraint of trade, in relation to transatlantic airline passenger service between the United Kingdom and the United States. In pre-trial motions, BA sought to dismiss the complaint. The court rejected justiciability defenses based on (1) the act of state doctrine (the acts alleged were those of BA, not of the UK government, and there was no suggestion that BA's conduct was "compelled" or "necessitated" by the UK government), (2) the political question doctrine (no evidence that the suit would interfere with executive branch foreign affairs responsibility in negotiating aviation treaties), and (3) international comity (the complaint alleged "specific harms to competition and consumers in the United States"; although any relief granted would "have extraterritorial effect," there was no showing that remedies would be "disproportionate"). The court then weighed a series of factors relevant to BA's forum non conveniens claim and concluded that BA had failed to demonstrate that the balance of convenience was strongly in favor of trial in a foreign forum. On the monopolization claim, BA argued for dismissal on the grounds that international treaty constraints made acquisition of monopoly power impossible and that BA's alleged market shares were too low to sustain a finding of a dangerous probability that it would be able to control prices or exclude competition in transatlantic air travel. The court rejected BA's argument, noting that whether monopoly power exists depends on a number of factors (e.g., the strength of competition, the probable development of the industry, consumer demand, the defendant's market share, and the effect of government regulation). The court also observed that the market shares alleged (39 percent to 52 percent of potentially relevant markets) may in "certain circumstances demonstrate dangerous probability of acquiring monopoly power." The court also denied BA's motion to dismiss the monopoly leveraging claim based on BA's monopoly power over London airports used to gain an unfair competitive advantage in transatlantic routes, and the claim based on allegations of unlawful exclusive dealing arrangements in corporate travel programs and travel agent incentive programs. Other antitrust and common law claims were dismissed.

42. In *Eskofot A/S v. E.I. DuPont De Nemours & Co.*, 872 F. Supp. 81 (S.D.N.Y. 1995), Eskofot, a Danish manufacturer of printing equipment, brought suit against a United States corporation, DuPont, and a British subsidiary of DuPont, alleging that the defendants had monopolized the domestic and international market for specified printing equipment and materials, and that they continued to engage in intentional conduct restraining trade. The court rejected defendants' motion to dismiss for lack of subject matter jurisdiction. Eskofot argued that the defendants' anticompetitive conduct had precluded it from exporting to the U.S., causing a significant anticompetitive effect on U.S. commerce. The court held that these allegations, combined with claims that defendants had initiated marketing activities in the U.S. and that U.S. consumers would be hurt by higher monopoly prices, were sufficient to allege "an impact on import trade and import commerce into the United States." The FTAIA standard ("direct, substantial, and reasonably foreseeable effect"), which does not apply to restraints on import commerce, therefore was not applicable to this case. The court also rejected the UK subsidiary's argument that it did not have the minimum contacts with the U.S. necessary to sustain personal jurisdiction. The court held that Eskofot's allegations in this regard were sufficient because if true they would establish the requisite level of foreseeability that the subsidiary's anticompetitive conduct outside the U.S. would have an effect in the U.S. This finding was buttressed by allegations relating to two alternative grounds for asserting personal jurisdiction, transaction of business in the U.S. and "general contacts," even though on their own the latter would not have been sufficient. The defendants' argument that the case should be dismissed or stayed on international comity or judicial efficiency grounds, based on the plaintiff's filing of a suit against the UK subsidiary alleging violations of article 86 of the Treaty of Rome four months prior to filing in the U.S.,

was also rejected, on the grounds that the English action would not resolve various issues in the U.S. case (the lawfulness of defendants' conduct under U.S. law, for example) and DuPont, a major party in the U.S. action, was a party there.

43. *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206 (6th Cir. 1995) concerned arbitral proceedings in Zurich pursuant to the arbitration clause of a contract between a U.S. subsidiary of a Swiss company and a German corporation. The contract was a license for the manufacture and marketing of machines in the U.S. Fischer, the U.S. company, brought suit in the U.S., alleging that its defense in the arbitration proceeding -- that the defendant had violated U.S. antitrust law (which would give rise to a claim for treble damages) -- would not be recognized by the Swiss arbitral tribunals, which did not have the power to grant treble damages. The Sixth Circuit Court of Appeals sustained the District Court's dismissal of the suit without prejudice, on the grounds that it was not ripe: the Swiss tribunal had not yet decided what law to apply. The Court noted that "if any part of a contract, including a choice-of-law provision, waives a party's right to collect damages for antitrust violations, the provision is void for public policy reasons." If the eventual arbitral award were to violate U.S. public policy on these grounds, "the aggrieved litigant may request a federal court, at the award-enforcement stage, to determine whether the arbitration award violates public policy."

C. Statistics on Private and Government Cases Filed During CY 1995

44. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 811 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in the calendar year ending December 30, 1995.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

45. The Division is working to develop leads to significant national and international criminal antitrust cases by obtaining more referrals of possible antitrust crimes from other investigative and prosecutorial agencies, such as U.S. Attorneys' Offices, the Fraud Section of the DOJ's Criminal Division, the Federal Bureau of Investigation, and the Inspector Generals' Offices of federal agencies. These organizations, in the course of investigations in their particular areas of responsibility, often obtain evidence of conduct that amounts to criminal antitrust violations. FY95 saw an increased number of cases in which the Division employed statutes other than the Sherman Act to prosecute anticompetitive schemes. The use of other criminal statutes, sometimes as the primary offense, gives the Division additional capacity to stop a wider range of anticompetitive criminal activity and to undertake joint investigations, or to make cooperative arrangements, with other law enforcement agencies. The other statutes used include those relating to tax fraud, securities fraud, mail fraud, and false statements; individual cases are described in more detail in the case descriptions below.

46. The Division filed 60 criminal antitrust cases against 40 corporations and 32 individuals in FY95. Sentences resulted in $ 41.7 million in total fines, 3,902 days of actual incarceration, and 2,933 days of alternative forms of confinement. Significant cases are discussed below; more detailed summaries of indictments and informations can be found at 6 Trade Reg. Rep. (CCH) ¶ 45,095.

47. On October 20, 1994, the Division charged two executives of a defunct New Jersey company -- AM-PM Sales Co. Inc. -- for their involvement in a $25 million big rigging and kickback conspiracy for contracts awarded by Philip Morris Inc. in New York City to supply product advertising and display

materials to retail stores. The two defendants were also charged with tax fraud in connection with a conspiracy to raise and accumulate substantial amounts of cash to pay kickbacks to purchasing agents at Philip Morris and engaging in series of transactions, many of them sham deals, to receive approximately $3 million in false billings to overstate their company’s expenses, take false tax deductions and conceal substantial cash income. These cases are part of the Division’s ongoing antitrust investigation of bid rigging, commercial bribery and tax-related offenses in the display industry.

48. On November 21, 1994, the Division brought criminal contempt charges against a Chicago bedding company, Restonic Corporation, for allegedly violating a 1960 consent decree that prevented it from assigning geographic territories to its licensees for the distribution of its products. According to the 1960 suit, Restonic and three other companies who licensed trademarks for the sale of mattresses, conspired with its licensee owners to allocate territories and fix resale prices. This case was the Division's first antitrust enforcement effort using criminal contempt laws since 1990. On March 23, 1995, Restonic pled guilty and was fined $220,000.

49. On November 22, 1994, the Division filed a one-count felony information in federal district court in Tampa, Florida, charging two residential door manufacturers -- Illinois Flush Door Inc. and LEDCO, Inc. -- with participating in a conspiracy to fix the prices of residential flush doors. On January 30, 1995, following guilty pleas, Illinois Flush Door and LEDCO were fined $160,000 and $250,000, respectively. On February 23, 1995, the Division charged Southwood Door Company of Quitman, Mississippi with participating with a co-conspirator in a price-fixing conspiracy for sales of eight-foot solid core and bifold Colonist-style doors in the southeastern United States. On August 11, 1995, following a guilty plea, Southwood Door was fined $25,000. This marks the fifth case filed as a result of the Division's investigation into collusive practices in the $600 million flush door industry. To date, more than $6 million in fines have been imposed.

50. On December 9, 1994, the Division filed a one-count felony information in the federal district court in Fort Worth, Texas, charging two companies, Morrison Supply Company and Amarillo Winnelson Company, Inc., and two individuals with fixing prices on wholesale plumbing supplies in Amarillo, Texas. On May 5, 1995, another Amarillo, Texas wholesale plumbing supply company, Fields & Company, was charged with conspiring with others to raise, fix, and maintain prices of wholesale plumbing supplies. In addition, on September 28, 1995, a federal grand jury in Dallas indicted two more Texas wholesale plumbing companies -- Oberkampf Supply Company of Lubbock, Texas and Clowe & Cowan Inc. of Amarillo, Texas and the president of the Lubbock company -- for conspiring to fix prices on wholesale plumbing supplies.

51. On December 15, 1994, the Division filed a one-count indictment in the federal district court in Chicago, charging a former executive of the Russell-Stanley Corporation, a manufacturer of steel drums, with conspiring to fix prices on steel drums used for packaging chemicals and petroleum products. This indictment resulted from the Division's investigation in the metal container industry -- an investigation that has resulted in criminal cases against 13 companies and 16 individuals and over $10 million in fines over a three year period.

52. On January 12, 1995, the Division filed a one-count felony information in the federal district court in New York City, charging a former salesman of Southern Container Corporation with conspiring to rig bids on Philip Morris Inc. advertising contracts worth millions of dollars in New York City. The effect of the conspiracy was to provide Southern Container Corporation with $10 million in contracts to supply Philip Morris with "point-of-purchase" display materials used to advertise and promote products in retail stores. On May 11, 1995, following a guilty plea, the defendant was fined $100,000 and was sentenced to two years’ probation.

53. On January 19, 1995, the Division filed a one-count felony information in the federal district court in Philadelphia charging Federal Food Marketers, a Rumson, New Jersey, food marketing company, with mail fraud for submitting false and fictitious bids to a federal agency to manipulate the awarding of $1.5 million in contracts for canned foods, such as sweet potatoes, which are distributed to armed forces personnel in the United States. According to the information, Federal Food, an agent for manufacturers and distributors of processed food items, submitted false bids to create the appearance of competition and avoid submitting to the federal agency information to justify its prices.

54. On April 6, 1995, the Division filed a one-count information in the U.S. District Court in Manhattan, New York, charging a leading international dealer in rare banknotes with bid rigging in connection with a November 1990 auction involving the sale of old and rare banknotes, proofs and specimens from the archives of the American Bank Note Company. The Division alleged that the William Barrett Numismatics Limited, a Canadian corporation, and its co-conspirators agreed to refrain from bidding against one another at a major auction conducted by Christie, Manson & Woods International Inc. in New York City in November 1990. On April 7, 1995, following a guilty plea, the defendant was fined $125,000. On September 7, 1995, the Division filed an indictment charging Mel Steinberg, Inc., a dealer in rare banknotes, with conspiring to rig bids on the purchase of old and rare banknotes at the same November 1990 auction in November 1990. Following a guilty plea, Mel Steinberg, Inc. was fined $50,000.

55. On May 9, 1995, the Division filed a one-count information in the U.S. District Court in Boston, Massachusetts, charging Elof Hansson Paper & Board Inc., a New York based importer of fax paper produced in Japan, and a wholly owned subsidiary of Elof Hansson AB of Sweden, with conspiring with others to fix and raise the price of thermal fax paper sold in the United States from August 1991 through March 1992. The Division alleged that the New York-based subsidiary of Elof Hansson AB had meetings and telephone contacts with competitors in order to facilitate the price-fixing conspiracy which caused a 10 percent increase in the cost of thermal fax paper to U.S. customers. On June 9, 1995, following a guilty plea, Elof Hansson Paper was fined $200,000. Similar charges were brought in the summer of 1994 against Mitsubishi Corporation of Tokyo, Japan -- the first criminal antitrust prosecution of a major Japanese corporation headquartered in Tokyo. On September 26, 1995, two additional Japanese paper companies, Mitsubishi Paper Mills Ltd. and New Oji Paper Co. Ltd., agreed to plead guilty and to pay fines totaling more than $3.5 million for their involvement in the same fax paper price- fixing conspiracy. This prominent example of international cooperation was jointly investigated by Canadian antitrust authorities and the Division.

56. On June 1, 1995, the Division filed a five-count felony information in the U.S. District Court in Los Angeles, California, charging three California companies and two executives with conspiring in 1991 to fix the price of aluminum parts that are used as structural support in airplanes. These aluminum parts are known as small press hard alloy aluminum extrusions. The companies involved -- TD Materials, Inc., Pioneer Aluminum Inc., and Tiernay Metals -- in the conspiracy accounted for approximately 75 percent of the $150 million worldwide market.

57. On June 7, 1995, the Division filed two one-count felony informations in the U.S. District Court in Atlanta, Georgia, charging Sunrise Carpet Industries Inc. of Chatsworth, Georgia and Johnny A. West, its chief executive officer, with conspiring with others to fix, raise, and maintain the prices of carpet sold throughout the United States. These were the first criminal charges to come out of a nationwide investigation into alleged price fixing in the $9 billion-a-year carpet industry.

58. On June 14, 1995, the Division filed a one-count felony information in the U.S. District Court in Harrisburg, Pennsylvania, charging Ben's Truck Parts & Equipment Inc., a Toledo, Ohio, truck parts

company and its president, Donald Solomon, with conspiring to rig bids on the purchase of $2 million worth of military surplus materials, such as vehicles and vehicle parts, sold at government auctions in Pennsylvania. From the same investigation, on September 13, 1995, the Division charged the owner of a Dover, Delaware jeep parts company with conspiring to rig bids on the purchase of military surplus material sold at government auctions in the Harrisburg, Pennsylvania area.

59. On August 22, 1995, the Division filed a one-count felony information in the U.S. District Court in Dallas, Texas, charging ICI Explosives USA, Inc. with conspiring with others from the Fall of 1988 through mid-1992 to rig bids for the sale of commercial explosives sold in western Kentucky, southern Indiana, and southern Illinois. One day earlier, on August 21, 1995, ICI's senior vice president of sales was also charged with bid rigging. Following a guilty plea and later court approval, ICI was sentenced to pay a record $10 million fine. The $10 million fine was at the time the largest fine from a single defendant and the first time that the statutory maximum had been levied and approved. The sale of commercial explosives is an approximately $1 billion-per-year market in the United States.

60. On September 6, 1995, from the same investigation, the Division charged Dyno Nobel, the world's largest manufacturer of commercial explosives, with conspiring to fix the prices of commercial explosives and eliminating competition in the sale of commercial explosives to three limestone quarries in central Texas. Dyno Nobel agreed to plead guilty and pay $15 million in criminal fines, the biggest fine ever imposed in a criminal antitrust matter. Also on September 6, 1995, Mine Equipment & Mill Supply Inc., a 50 percent joint venture by Dyno, also pleaded guilty as a co-conspirator, and agreed to pay a $1.9 million fine. The Division in FY95 obtained record corporate criminal antitrust fines in its investigation of the commercial explosives industry which is still ongoing, generating over $26,950,000 in criminal fines.

61. On September 14, 1995, the Division filed a two-count information in the U.S. District Court in New York City, charging a New York executive and his company with bid rigging, contract allocation, and conspiring to defraud the federal government. The charges arose out of contracts awarded by a Connecticut liquor company to supply product advertising and display materials to retail stores. The defendants were also charged with tax fraud in connection with a conspiracy to raise and accumulate cash to pay kickbacks to purchasing agents and engaging in sham transactions to overstate company expenses, take false tax deductions and conceal cash income not reported to tax authorities.

62. On September 22, 1995, the Division filed a one-count information in the U.S. District Court in Buffalo, New York, charging Elkem Metals Company, a subsidiary of Elkem A/S of Norway, one of the world's leading producers of ferrosilicon products, with participating in a nationwide conspiracy between late 1989 and mid-1991 to fix prices of commodity ferrosilicon products sold in the United States. Commodity ferrosilicon products are alloys of iron and silicon, used primarily in the production of steel and cast iron. Sales in the ferrosilicon products industry exceed $100 million a year.

63. On September 27, 1995, the Division filed a one-count felony information in the U.S. District Court in Philadelphia charging Action Embroidery Corporation, a manufacturer of embroidered military insignia, with conspiring to rig bids between January 1990 and December 1993 on sales of military insignia to the Army-Air Force Exchange for resale to United States military personnel at military facilities throughout the United States and abroad. The Division also charged D.M.E. Industries Inc. with participating in the bid-rigging conspiracy.

64. On September 27, 1995, the Division filed separate felony informations in the U.S. District Court in Alexandria, Virginia, charging two real estate buyers with conspiring to rig bids at public residential real estate foreclosure auctions in northern Virginia. On September 28, a third real estate buyer

was charged. The three buyers had conspired with a group of real estate speculators who agreed not to bid against each other at certain real estate foreclosure auctions. This agreement allowed them to buy real estate for low, noncompetitive prices. The charges resulted from the Division's ongoing antitrust investigation into foreclosure auction bid rigging in northern Virginia. Thus far, 12 individuals and one corporation have been convicted.

65. On September 27, 1995, a federal grand jury in Dallas returned a two-count indictment charging Mrs. Baird's Bakeries Inc., a Forth Worth, Texas baking company, and its former president with conspiring for more than 15 years to raise and maintain the prices of bread and bread products sold in much of Texas. They were also charged with participation in price-fixing and bid-rigging conspiracies on contracts to supply bread and bread products to governmental entities located in west Texas. In addition, a former president of Campbell Taggart Baking Companies' Dallas bakery was charged with making false statements to a federal grand jury about discussions he had with competitors about raising prices for bread and bread products.

66. On September 28, 1995, the Division filed a two-count felony information in the U.S. District Court in San Francisco, California, charging Municipal Government Investment Associates, Inc., a California securities brokerage firm, with wire fraud and securities fraud for arranging false and noncompetitive bids during the restructuring of a Tampa, Florida, municipal bond escrow account. The firm was charged with fraudulently deriving more than $1.2 million by colluding with co-conspirators to rig bids on specialized securities known as forward supply contracts. There was no Sherman Act charge because the Division determined that securities and mail fraud charges were the most effective way to prosecute this case. The charges resulted from a federal grand jury investigation into collusive bidding and fraud in the municipal bond escrow restructuring business. It was the first prosecution of its kind.

67. On September 29, 1995, the Division filed a one-count criminal information in the U.S. District Court in Atlanta charging Alliance Metals Inc., a Pennsylvania aluminum company, and its chief executive with conspiring with other sellers and distributors of painted aluminum products to fix, raise, and maintain prices of painted aluminum products they sold throughout the United States. These charges were the first charges to come out of a nationwide investigation into price fixing in the painted aluminum industry.

68. As of December 31, 1995, the Division had filed 132 criminal cases against 79 corporations and 84 individuals in the milk and dairy products industry. To date, 66 corporations and 59 individuals have been convicted and fines imposed total $59.8 million. Twenty-nine individuals have been sentenced to serve a total of 5,776 days, or an average of approximately seven months in jail. Civil damages total approximately $8 million. Ten grand juries in seven states continue to investigate the milk industry.

2) DOJ Non-Merger Civil Enforcement

69. The Division filed a civil suit in *U.S. v. Association of Retail Travel Agents*, No. 1:94CV02305 (D.D.C. filed Oct. 25, 1994). The complaint charged the trade association, which represents 2,000 travel agents in the $90 billion-a-year travel industry, with boycotting travel providers such as airlines and car rental companies who would not adhere to the association's commission levels and other policies. The Association entered into a consent decree that prohibited it from engaging in such activities and required it to conduct periodic reviews of antitrust requirements with its officers and directors. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 70,957.

70. In *U.S. v. Classic Care Network, Inc., et al.*, No. 94-5566 (E.D.N.Y. filed Dec. 5, 1994), the Division filed a complaint charging eight Long Island, N.Y., hospitals with setting up an organization to

jointly resist cost-cutting efforts by health maintenance organizations and managed care plans. According to the Division's complaint, Classic Care acted as the hospitals' exclusive bargaining agent by ensuring that all HMO agreements were approved by the other members of the network, by deterring discounting on inpatient services, and by prohibiting per diem pricing in HMO contracts, and by adopting one payer's most favored nation clause for the reimbursement of outpatient services. At the same time, the Division filed a proposed consent decree that would prevent the Classic Care Network (a hospital network), and its eight member hospitals from coordinating their contract negotiations with HMOs and other third party payers, and from engaging in any further efforts to prevent hospital discounts or using Classic Care as a joint sales agent. The consent decree was entered on May 18, 1995 and the text appears at 1995-1 Trade Cas. (CCH) ¶ 70,997. For a similar case involving the illegal use of most favored nation clauses in contracts, see *U.S. v. Oregon Dental Service*, No. C95-1211-FMS (N.D. Cal. filed Apr. 10, 1995). A summary of the complaint appears at 6 Trade Reg. Rep. (CCH) ¶ 45,095 (Case No. 4130) and the text of the consent decree is located at 1995-2 Trade Cas. (CCH) ¶ 71,062.

71. In December 1994, the Division filed a lawsuit and a proposed consent decree in *U.S. v. Topa Equities*, No. 1994-179 (D.V.I. filed Dec. 7, 1994), to end anticompetitive practices by a Virgin Islands liquor wholesaler who controlled about 96 percent of the Islands' liquor business. The Division alleged that Topa obtained the exclusive Virgin Islands distribution rights of almost every brand of distilled spirits in the world market, and that actions to obtain and retain these rights were contracts in restrain of trade. In a consent decree, entered on July 14, 1995, the wholesaler, Topa Equities Ltd., agreed to let its suppliers deal with other wholesalers and not to interfere with the business operations of its competitors. The text of the consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71,061.

72. The Division filed a complaint and consent decree in *U.S. v. Vision Service Plan,* No. 94CV02693 (D.D.C. filed Dec. 15, 1994) accusing Vision Service Plan, the nation’s largest vision care insurance plan, of reducing discounting and price competition through a contract provision known in the industry as a "most favored nation" clause, that inhibited doctors from reducing their fees to competing vision care insurance plans and to individual patients. As a result of the most favored nation clause, vision care insurance plans that had previously contracted with doctors at discounts between 20 and 40 percent were no longer able to obtain discounts at that level. The consent decree eliminates the most favored nation clause and prevents Vision Service Plan from engaging in other actions that would limit future discounting by its participating doctors. The text of the consent decree appears at ¶ 50,792.

73. In a significant action coordinated with the U.S. Securities and Exchange Commission, the Division in December 1994 obtained $25 million in civil antitrust fines from Steinhardt Management Company and Caxton Corporation for their settlement of antitrust charges connected with the auction of U.S. Treasury securities. The Division's complaint, filed in the Southern District Court of New York on December 16, 1994 (No. 94CIV 9044), charged that Steinhardt and Caxton conspired to limit the supply of, or to "squeeze," the Two-Year Treasury note issued in April 1991, causing investors to pay inflated prices for the securities. In addition to paying $25 million in antitrust fines and $51 million in securities fines, Caxton and Steinhardt agreed to an injunction that will prevent them from conspiring to inflate the price of Treasury securities in the future. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 70,983.

74. In January 1995, the Division filed a complaint and proposed consent decree in *U.S. v. El Paso Natural Gas Co.*, No. 95-0067 (D.D.C. filed Jan. 12, 1995) to prohibit El Paso Natural Gas -- a major gas pipeline owner and gatherer in the San Juan Basin (ranging from New Mexico to Colorado) -- from tying the sale of meters and meter installation services to the use of the company's gas gathering system. The Division alleged that El Paso was requiring producers to purchase El Paso's meter installation service as a condition for connecting natural gas wells to the El Paso system. The consent decree ends this tying

arrangement and allows producers to seek alternative contractors, which could lower the cost of natural gas production and save millions of dollars. The text of the consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71,118.

75. In *U.S. v. Playmobil USA, Inc.*, No. 95-0214 (D.D.C. filed Jan. 31, 1995), the Division filed a civil antitrust suit and proposed consent decree accusing Playmobil, one of the nation’s largest specialty toy companies, of reaching agreements on retail price levels with certain dealers and threatening others with termination in order to induce them to cease discounting. A consent decree, finalized on May 22, 1995, prohibits Playmobil from attempting to coerce its dealers to adhere to any specified level of resale prices and from withholding advertising rebates from a dealer who advertises Playmobil products at a discount. This case was referred to the Division by the Pennsylvania Attorney General's office and was the second vertical price-fixing case filed by the Division. The text of the consent decree appears at 1995-1 Trade Cas. (CCH) ¶ 71,000.

76. In June 1995, the Division filed a civil lawsuit and proposed consent decree in *U.S. v. American Bar Association*, No. 1:95CV01211 (D.D.C. filed June 27, 1995), to resolve charges that the ABA process for accrediting law schools had been distorted to serve the interests of faculty members. The ABA was charged with fixing faculty salaries at inflated rates and effectively boycotting state-accredited law schools and their students. Under the consent decree, the ABA would be prohibited from enforcing base salary and benefit requirements among ABA- accredited schools or making it a stipulation of the accreditation process. The ABA would also have to allow ABA-accredited schools to accept students from non-accredited schools and provide transfer credits. Finally, the ABA would no longer be able to refuse to accredit a school simply based on its for-profit status. The decree also opens up the accreditation process so that it is no longer controlled by the law school faculty. The text of the proposed consent decree is located at 7 Trade Reg. Rep. (CCH) ¶ 50,782.

77. On August 2, 1995, the Division filed a petition in the U.S. District Court in Detroit against the Florists' Transworld Delivery Association (FTD) for violating a 1990 consent decree. The FTD, after it had been purchased by an investment banking group in 1994, split into a for- profit corporation that handles the business, including the Mercury network, and into a non-profit trade association that provides assistance to retail florists. The for-profit corporation had set up an incentive program which allowed members financial and other benefits if they gave up their membership with other flower wire services. This so-called "FTD Only" program was a clear violation of the 1990 Consent Decree because it had the effect of limiting membership to FTD. The FTD agreed to end the "FTD Only" program and to set up an internal antitrust compliance program.

78. In September 1995, the Division joined the Attorney General of Connecticut in filing a joint complaint against medical providers in Danbury, Connecticut, in *U.S. v. HealthCare Partners, Inc. et al.*,, No. 395-CV-01945NC (D.Conn. filed Sept. 13, 1995). The complaint alleged that Danbury Hospital, the only acute care hospital in its area, had conspired with a majority of the doctors on its staff to delay and impede the development of managed health care plans in the Danbury area. The complaint also charged that the hospital had hindered competition among local physicians by working with doctors to limit the size and scope of its medical staff. The hospital was charged with illegally abusing its monopoly position in inpatient services to maintain profits and to gain undue power in the market for outpatient services. A proposed consent decree was negotiated that would end the anticompetitive practices and that would allow doctors and hospitals to cut costs while preventing them from limiting competition. This case, along with a similar case the Division filed in St. Joseph, Missouri on the same day (*U.S. v. Health Choice of Northwest Missouri, Inc. et al.*, No. 95-6171-CVSJ6 (D.Mo. filed Sept. 13, 1995), represents the Division's first venture into lawsuits pertaining to physician- hospital organizations. The text of the consent decree in *HealthCare* which was finalized on Feb. 15, 1996, appears at at 6 Trade Reg. Rep.

(CCH) ¶ 50,786. The text of the proposed consent decree in *Health Choice* appears at 6 Trade Reg. Rep. (CCH) ¶ 50,787.

79. In September 1995, the Division filed a complaint and proposed consent decree in *U.S. v. National Automobile Dealers Ass'n*, No. 1:95CV01804 (D.D.C. filed Sept. 20, 1995), to end anticompetitive practices by the National Automobile Dealers Association (NADA), which represents 80 percent of all U.S. franchised car dealers. NADA was engaged in a pattern of anticompetitive activities such as (1) attempts to persuade car dealers to boycott or reduce purchases from auto manufacturers offering consumer rebates, (2) asking member dealers to reduce inventories so that manufacturers would be pressured to reduce high-volume discounted sales to fleet buyers, and (3) attempting to persuade member dealers to stop advertising retail prices based on the dealer's wholesale cost which NADA believed led to lower retail prices. The proposed consent decree prohibits these practices and forbids NADA from terminating the membership of a dealer for reasons relating to the dealer's prices or advertising policies. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50,788.

80. In September 1995, the Division filed a lawsuit and a proposed consent decree in *U.S. v. Lykes Bros. Steamship Co., Inc.*, No. 1:95CV01839 (D.D.C. filed Sept. 26, 1995), to challenge an agreement between the Lykes Bros. Steamship Co., Inc., a major carrier of wine and spirits, and the Universal Shippers Association, the largest association of importers of wine and spirits. The agreement between Lykes and Universal Shippers required Lykes to charge other importers at least five percent more in shipping costs than it charged Universal. This agreement made it more difficult for smaller domestic competitors to transport products from Europe to the United States at lower prices. The lawsuit alleged that the contract provision, called an "automatic rate differential," gave Universal an unreasonable advantage over its competitors. Universal handles about half of the wine and spirits carried from Europe to the United States. The consent decree prohibits Lykes from agreeing to or enforcing an automatic rate differential clause in any contract. It also requires Lykes to nullify any automatic rate differential clause in any existing contract and to maintain an antitrust compliance program. The text of the final consent decree which was entered on December 20, 1995, is located at 1996-1 Trade Cas. (CCH) ¶ 71,272.

81. On September 28, 1995, the Division filed a civil antitrust suit and proposed consent decree in the U.S. District Court in Washington, D.C., challenging a lease provision used by Greyhound Lines Inc., the nation's largest bus company, that prevented smaller bus companies that lease space at Greyhound terminals from making tickets available for purchase anywhere else within 25 miles. The "25-mile" rule caused bus tickets to be sold in fewer places and caused other bus companies to offer riders fewer services (such as intercity bus service, service at competing bus terminals, college campuses, train stations and airports) and limited other bus companies from competing effectively against Greyhound. In the consent decree Greyhound agreed to drop its 25-mile rule from all its lease agreements and to cease using leasing in other ways to limit bus companies from selling tickets outside Greyhound terminals. The text of the final consent decree appears at 1996-1 Trade Cas. (CCH) ¶ 71,334.

3) Modification or Termination of DOJ Consent Decrees

82. In documents filed on January 11, 1995, the Division agreed to terminate a 1919 consent decree against the New England Fish Exchange, an operator of a daily auction for the purchase and sale of fresh fish on the Boston Fish Pier. The 1919 judgment had settled a civil action which alleged that the New England Fish Exchange and numerous other defendants had conspired to monopolize and restrain interstate trade and commerce in the fresh fish industry. The Division agreed to terminate the decree because the New England Fish Exchange faces competition from several other auction houses and the

industry has changed significantly, such that none of the Exchange's co-defendants are currently active in the industry.

83. On September 15, 1995, the Division filed documents in U.S. District Court in New York City, agreeing to terminate a 1968 consent decree against Gestetner Corporation, a Greenwich, Connecticut seller of stencil duplicators, printers, digital duplicators, fax machines, and related products. The Division agreed to terminate the consent decree since there have been dramatic changes in the industry resulting in Gestetner no longer having market dominance. In addition, a competitor was recently released from a more restrictive consent decree.

4) FTC Non-Merger Enforcement Actions

a. Commission Administrative Decisions

84. On October 25, l994, the Commission issued an administrative complaint charging the International Association of Conference Interpreters (AIIC), a voluntary professional association of interpreters based in Geneva, Switzerland, and the United States Region of the International Association of Conference Interpreters, its U.S. affiliate members, with conspiring or combining to fix or stabilize the fees that they could charge for interpretation services performed in the U.S., and with imposing a variety of restrictions that illegally restrain competition among them such as limitations on the numbers of hours members may work per day and specified minimums as to the number of interpreters per job. The FTC is seeking an order that would prohibit the organizations from, among other things, fixing, or otherwise interfering with price, fee or certain other forms of competition among members working in the U.S. The case is currently before an Administrative Law Judge. *International Ass'n of Conference Interpreters*, Docket No. 9270, 5 Trade Reg. Rep. (CCH) ¶ 23,705.

85. On July 17, 1995, an Administrative Law Judge found that the California Dental Association (CDA), through its component societies and members, conspired to illegally restrict dentists' truthful, nondeceptive advertising about prices and quality of service by adopting rules to prohibit such advertising and coercing compliance through expulsion and other means. The Administrative Law Judge issued an order prohibiting the CDA, whose members comprise 75 percent of the dentists in the state, from interfering with any truthful, nondeceptive advertising in which its members engage and to take steps to correct the membership status of dentists who have been suspended, disciplined, or denied membership by CDA for certain advertising practices. The decision upholds charges in an administrative complaint issued in l993. *California Dental Association*, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 23,866.

86. The Commission gave final approval to separate consent agreements with Baby Furniture Plus Association, Inc. (BFPAI) and the New England Juvenile Retailers Association (NEJRA) on January 18, l995, settling charges that they separately threatened to boycott manufacturers that sold their products through the New Hampshire Buyer's Service (NHBS), which operates a mail- order juvenile-products catalog with prices discounted up to 20-40 percent below specialty store prices. The final order against NEJRA prohibits NEJRA-member retailers and their officers from combining, agreeing or conspiring to fix or maintain prices of juvenile furniture or to engage in actual or threatened boycotts or actual or threatened refusals to deal in order to influence or coerce how or to whom a juvenile furniture manufacturer distributes its products or which marketing method it uses. The order also would require the dissolution of NEJRA within 60 days, and prior thereto requires NEJRA to send a letter to manufacturers it allegedly threatened outlining the terms of the consent order. The final order against BFPAI would prohibit it from taking any action on behalf of its members or encouraging its members to interfere with a juvenile-manufacturers' decisions on distributing its products or from coercing, through actual or

threatened refusals to deal, such manufacturers to use or not use any marketing method. *New England Juvenile Retailers Ass'n*, Docket No. C-3541; *Baby Furniture Plus Ass'n Inc.*, Docket No. C-3553, 5 Trade Reg. Rep. (CCH) ¶ 23,661.

87. On June 2, l995, the Commission gave final approval to a consent agreement settling charges that the Medical Association of Puerto Rico, its physiatry section, and two of its individual physiatrists (collectively "respondents") coordinated and supported a long-standing boycott campaign against a government insurance program in order to obtain exclusive referral powers and to increase reimbursement rates from insurers in Puerto Rico. The final order prohibits the respondents from encouraging, organizing or entering into any boycott or refusal to deal with any third-party payer or from encouraging, organizing, or entering into any agreement to refuse to provide services to patients covered by any third-party payer. The order also contains various provisions designed to prevent the respondents from engaging in conduct that might lead to another illegal boycott. *Puerto Rican Physiatrists*, Docket No. C-3583, 5 Trade Reg. Rep. (CCH) ¶ 23,785.

88. The Commission issued a final consent order on June 20, l995 settling charges that the Korean Video Stores Association of Maryland and its individual members agreed to raise and fix the rental fees for Korean-language video tapes charged by members' stores throughout the Washington, D.C. area. The final order would prohibit the Association and its members from entering into any agreement to raise or fix prices in the retail video tape business and would require the members to display an announcement of the settlement in their respective stores as well as publish such an announcement in three Korean-language newspapers. *Korean Video Stores*, Docket No. C-3588, 5 Trade Reg. Rep. (CCH) ¶ 23,789.

89. In another price fixing case, the Commission issued on July 18, 1995 a final consent order settling charges that Reebok International, Ltd. and its subsidiary, The Rockport Company, Inc., agreed with certain retailers to maintain at certain levels the resale price at which they sold Reebok and Rockport brand athletic and casual shoes. The settlement would prohibit both companies from fixing the prices at which dealers advertise or sell athletic or casual footwear products to consumers in the future. *Reebok International, Ltd*., Docket No. C-3610, 5 Trade Reg. Rep. (CCH) ¶ 23,813.

90. On August 11, l995, the Commission gave final approval to a consent order settling charges that Physicians Group, Inc., an unintegrated association of competing physicians in the Danville, Virginia area, and its board of directors conspired to prevent third-party payors from doing business, to fix terms of reimbursement from payors, and to resist their cost-containment measures. The settlement would require the dissolution of Physicians Group, Inc. and prohibit its seven board members from engaging in similar anticompetitive conduct with regard to third- party payors. Prior to its dissolution, the settlement requires Physicians Group to distribute copies of the complaint and settlement to its members and each payor who communicated any interest in contracting for physician services with the group or its directors since it was established. *Physicians Group, Inc*., Docket No. C-3610, 5 Trade Reg. Rep. (CCH) ¶ 23,807.

91. The Commission accepted for public comment on June 5, l995 a proposed consent agreement with the Council of Fashion Designers of America, the trade association representing most of the nation's best-known fashion designers, and 7th on Sixth, Inc., an organization that produces the two major fashion shows for the industry each year, settling charges that they agreed to fix prices paid by designers for models' fees. The proposed consent agreement, among other things, contains provisions that would prohibit similar illegal conduct and require the respondents to take steps to educate their members, officers and directors that such conduct is illegal and prohibited by the settlement. [Final on October 17, 1995] *The Council of Fashion Designers of America*, Docket No. C-3621, 5 Trade Reg. Rep. (CCH) ¶ 23,837.

92. The Port Washington Real Estate Board (PWREB) agreed to settle FTC allegations that is has restrained competition among real estate brokers and between brokers and homeowners in the sale of residential real estate in and around Port Washington, New York. The complaint alleged that several PWREB rules governing membership, advertising, and listing have substantially reduced competition by limiting the use of signs, open houses, exclusive-agency listings (listings permitting homeowners to pay a reduced fee or commission, or no fee or commission, if they sell the properties themselves), and advertising as well as a requirement for member brokers to maintain a staffed office in the PWREB service area in order to use the multiple listing service. Under the proposed settlement which was accepted for public comment on June 14, l995, the Board would be prohibited from, among other things, restricting the use of exclusive-agency listings; fixing commission splits between listing and selling brokers, restricting brokers from advertising free services to property owners; and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service. [Final on November 6, l995] *Port Washington Real Estate Board*, Docket No. C-3625, 5 Trade Reg. Rep. (CCH) ¶ 23,847.

93. On July 3, l995, the Commission accepted for public comment a consent agreement with Summit Communications Group, Inc. and seven Wometco Cable TV companies settling charges that they illegally agreed to allocate between themselves customers they would serve in Cobb County, Georgia where their local cable systems overlap. The settlement would prohibit Summit and Wometco from engaging in similar illegal conduct to allocate or divide markets, customers, contracts or territories for cable television service in any of the 14 counties where they offer cable service in Georgia. [Final on October 20, l995] *Summit Communications Group Inc.*, Docket No. C-3623, 5 Trade Reg. Rep. (CCH) ¶ 23,858.

94. On July 31, l995, the Commission accepted for public comment a proposed consent agreement with the Santa Clara Country Auto Dealers Association to settle charges that the Association members agreed to cancel ads each had scheduled for the San Jose Mercury News and withheld their advertising after the paper ran an article advising consumers on how to analyze new car factory invoices so they could better negotiate their purchase of new cars. The proposed consent would prohibit the Association in any effort to boycott any media outlet (newspaper, periodical, television or radio station) and would require it take certain steps to educate its members about the Commission's action. [Final on December 13, l995] *Santa Clara Motor Car Dealers*, Docket No. C-3630, 5 Trade Reg. Rep. (CCH) ¶ 23,874.

95. On September 22, l995, the Commission accepted for public comment proposed consent agreements to resolve charges in related complaints that the nation's two largest sellers of fast- turnaround verbatim news transcripts, Federal News Service Group, Inc. (FNS) and Reuters America, Inc. entered into market allocation agreements that ended competition between them, which resulted in FNS becoming the sole producer of verbatim news transcripts at higher prices. The agreement, among other things, would prohibit each from soliciting, entering into, renewing or continuing any agreement to allocate customers or divide markets with any provider of new transcripts; to prevent competition between themselves; or to fix or maintain any resale price for news transcripts. [Final on December 18, l995] *Reuters America, Inc.*, Docket No. C-3632; *Federal News Service Group, Inc.*, Docket No. C-3631, 5 Trade Reg. Rep. (CCH) ¶ 23,900.

b. Federal District Court Decisions

96. On August 18, 1995, the district court entered a final judgment approving a settlement for $225,000 in civil penalties in a case involving violations by Onkyo U.S.A. Corp., a manufacturer of audio

components, of a 1982 Commission order prohibiting it from fixing or maintaining the resale price at which its products are sold. *FTC v. Onkyo U.S.A. Corp*., No. 95-1378-LFO (D.D.C.).

E. Business Reviews Conducted by the Department of Justice

97. From October 1, 1994 through September 30, 1995, the Antitrust Division responded to 49 requests for review of written business proposals and issued 23 business review letters. Eight of the 23 letters issued dealt with health care joint provider networks. An example of a joint provider network business review follows in paragraph 98.

98. On October 31, 1994, the Division cleared a proposal by Pulmonary Associates Ltd. and Albuquerque Pulmonary Consultants P.A. to merge their two groups. The Division concluded that the combination of the two groups, which would contain about ten physicians, would not create an entity that has market power -- the power to raise prices and affect the availability of certain specialized surgical services. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44,094 (Letter 94-21).

99. On February 22, 1995, the Division approved a proposal by the Intermodal Council of the American Trucking Associations Inc. to begin a series of fora to discuss how people who work in the intermodal freight transportation industry can improve their efficiency in shipping cargo. The Division stated that the fora could enhance competitiveness among shippers by demonstrating that intermodal service is an attractive low-cost option because it is a more efficient and effective way to ship freight. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-2).

100. On March 7, 1995, the Division approved a proposal by the Association of Independent Television Stations Inc. ("INTV") in which INTV would collect information from its members about the prices they are paying to A.C. Nielsen Company for television ratings services, aggregate the information to mask the identity of the reporting stations and issue an annual report on its findings. INTV is a non-profit trade association composed of television stations not affiliated with the ABC, CBS, or NBC networks, whose membership consists of some 460 of the nation’s more than 1,100 commercial television stations. The Division concluded that the proposed information sharing in a manner that did not reveal the prices paid by individual stations would not hamper competition among the stations, and might be beneficial. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-3).

101. On March 9, 1995, the Division approved a proposal by Northwestern National Life Insurance Company ("NWNL"), a Minneapolis insurance company, to work with its competitors, HMOs, and self-funded employer health plans, to weed out fraudulent medical claims. The Division stated that NWNL has alleviated any competitive concerns by proposing safeguards to prevent the exchange of competitively sensitive information among NWNL, the Special Investigations Unit (especially created for uncovering medical claim fraud and abuse) and outside clients. The text of the business review letter is located at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-4).

102. On July 14, 1995, the Division approved a proposal by Business Travel Contractors Corporation ("BTCC"), a Pennsylvania business travel corporation, to form a joint buying group to negotiate domestic air travel fares on behalf of its corporate customers. To avoid the risk of creating undue collective buyer power, BTCC will limit the total number of customers (as a group) to not more than 35 percent of the purchases of air transportation services in any city-pair transportation market. The Division stated that the proposal will not affect competition in any markets where a single BTCC member already has market

power and may actually have a procompetitive effect to the extent that it provides corporations with another option for purchasing air travel services, or reduces the cost and improves the efficiency of corporate air services purchases. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-8).

103. On July 18, 1995, the Division cleared a proposal by the Promotion Marketing Association of America ("PMAA") to receive, aggregate and distribute information relating to rebate fraud in order to facilitate effective law enforcement against such conduct. The Division stated that the proposal may have procompetitive effects to the extent that it reduces the costs to manufacturers of stolen or counterfeit rebate certificates which may reduce prices and expand output to the benefit of consumers. The text of the business review letter is located at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-10).

104. On July 21, 1995, the Division announced that it would not challenge a proposal by the American Society of Composers, Authors & Publishers, Broadcast Music, Inc. and SESAC, Inc. to participate in a series of meetings to be held to discuss proposed legislation concerning the licensing practices of musical rights societies. The Division stated that the antitrust laws do not proscribe joint activities among economic rivals conducted for the purpose of petitioning the Government for legislative action. While there are exceptions to this general rule, none appear to be involved in the joint discussions and agreements that would be reached with respect to the legislation in this case. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-11).

105. On July 27, 1995, the Division approved a proposal by the National Court Reporters Association ("NCRA") to add provisions to its Code of Professional Ethics that would require a member, when making the official court record, to inform all parties to the litigation if it has a contractual relationship with one of the parties. In approving the proposal the Division provided four guidelines that the amendments to the NCRA's Code of Ethics should follow in order to avoid raising any antitrust concerns. Adherence to these guidelines ensures that the ethical codes will not have the effect of restraining price or quality competition, limiting output, or discouraging innovation. The text of the business review letter appears at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-12).

106. On September 29, 1995, the Division stated that it would not challenge a proposal by the Metal Building Manufacturers Association ("MBMA") to make company certification under the American Institute of Steel Construction Metal Building Certification Program a condition of MBMA membership. According to information provided to the Division, the proposal would not appear to have the effect of facilitating price collusion or reducing output. In fact, the proposal may have procompetitive effects to the extent that it promotes safety, or lower costs by making compliance with the law cheaper. The text of the business review letter may be found at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (Letter 95-14).

III. Enforcement of Antitrust Laws and policies: Mergers and Concentrations:

A. Department of Justice and FTC Merger Statistics

107. The Department and the Commission maintain statistics respecting the mergers and acquisitions reported under the Hart-Scott-Rodino Act (HSR). The HSR Premerger Notification Program was enacted to provide the enforcement agencies with a meaningful opportunity to review proposed transactions and to take enforcement action, if appropriate, to prevent consummation of transactions that violate the antitrust laws. Only those mergers meeting certain size or other criteria are required to be reported under the Act. During FY95, 2,816 proposed mergers and acquisitions were submitted under the notification and filing requirements of the HSR Act. This represents a 20 percent increase over the number reported in the previous fiscal year.

1) DOJ Review of Mergers

108. The Division initiated 134 merger investigations, 89 HSR and 45 non-HSR. Of the 89 HSR investigations, 56 involved second requests and/or civil investigative demands ("CIDs"). Of the 45 non-HSR merger investigations, nine involved the issuance of CIDs.

2) FTC Review of Mergers

109. The Commission initiated 81 merger investigations, 61 HSR and 20 non-HSR. Of the 61 HSR investigations, 58 involved second requests for information.

3) Enforcement of Premerger Notification Rules

110. The Commission and the Department actively have enforced the filing requirements of the Hart-Scott-Rodino (HSR) Act by bringing cases in federal court to obtain civil penalties. The complaints and settlements typically are filed in the United States District Court for the District of Columbia.

111. On January 11, 1995, in connection with a complaint filed by the FTC, a stipulated civil penalty judgment for $425,000 was filed in settlement of charges that William J. Farley had failed to observe Hart-Scott-Rodino waiting periods in acquiring stock of West-Point Pepperell, Inc. *United States v. Farley*, No. Civ. 92 C1071 (N.D. Ill.).

B. Merger Cases

1) DOJ Merger Challenges or Cases

112. Calendar year 1995 represented a record year in merger activity in the United States: 8,956 mergers worth a total of $457.88 billion. In FY95, the Division challenged or restructured 18 transactions. Of the nine actions filed in district court, two led to full trials. Of the cases summarized below, only one resulted from a non-HSR merger investigation (see paragraph 118).

113. On October 27, 1994, the Division filed a complaint and a proposed settlement to alleviate the anticompetitive aspects of Nextel Communications' purchase of the assets of Motorola's specialized radio service. Without the settlement, the acquisition would have eliminated competition in 15 major

metropolitan cities in the United States and would have caused higher prices and poorer services for consumers. Under the proposed settlement, Nextel and Motorola have to relinquish control of certain specialized mobile radio channels they own or manage. The consent decree does not affect Nextel's strategy to create a wireless telephone service that will compete with cellular telephone service, and the decree will allow Nextel to proceed with its plans to introduce new digital wireless telephone technology. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50,771.

114. On December 1, 1994, the Division joined the Attorney General of Maryland and the Attorney General of Florida in filing a joint complaint against Browning-Ferris Industries in connection with Browning-Ferris' hostile takeover of Attwoods. The complaint alleged that the acquisition of Attwoods would lessen competition in small containerized waste hauling service, or so-called "dumpster" service, in certain areas of Maryland, Florida, Pennsylvania, and Delaware. A consent decree was filed that required the divesture of Attwoods' small container assets in markets where both Attwoods and Browning-Ferris compete. Moreover, in the Baltimore, Maryland area and in Polk and Broward counties in Florida the consent decree stipulates that Browning-Ferris must offer commercial customers new contracts that contain terms less restrictive than those it currently uses. These less restrictive contracts should enable new entrants to build profitable routes in these markets. On March 30, 1995, the consent decree was entered. The text of the final consent decree appears at 1995-2 Trade Cas. (CCH) ¶ 71,079.

115. On January 26, 1995, the Division approved a restructured merger between the two largest marine construction companies in the Gulf of Mexico -- McDermott International Inc. and Offshore Pipelines Inc. The two companies proposed merging their domestic and international marine construction operations. The proposed merger raised antitrust concerns in the markets for furnishing barge services to lay pipe and for providing derrick barge services in the Gulf of Mexico, a $50 million a year business. To satisfy the Division's concerns, Offshore Pipelines agreed to sell a pipelay barge to Sub Sea International Inc. and a derrick barge to Global Industries Ltd.

116. On February 6, 1995, the Division filed an antitrust suit and a proposed consent decree in the U.S. District Court in Washington, D.C. challenging the proposed acquisition of Midcoast Aviation from Trans World Airlines by Sabreliner Corp. Midcoast and Sabreliner are the only two providers of aircraft fueling, cleaning, de-icing, and certain other terminal services at Lambert International Airport in St. Louis, Missouri. The consent decree required Sabreliner to divest its transient general aviation fueling facilities at Lambert Field in St. Louis, Missouri, since the merger would have created a monopoly in the sale of jet fuel to transient general aviation customers. The text of the consent decree which was entered on May 5, 1995, is located at 1995-1 Trade Cas. (CCH) ¶ 70,995.

117. On March 7, 1995, the Division approved a restructured merger between BJ Services, the third largest U.S. pressure pumping service company, and The Western Company of North America, the fourth largest U.S. provider of pressure pumping services to the oil and gas industry. After the Division indicated that the proposed merger raised serious antitrust questions in oil pressure pump services market in the Rocky Mountain region, BJ Services agreed to sell its pressure pumping equipment located at its Brighton, Colorado facility.

118. On March 28, 1995, the Division filed suit in the U.S. District Court in Fayetteville, Arkansas, to block the common ownership of the two local daily newspapers serving the Fayetteville/Springdale metropolitan area. The complaint, filed against D.R. Partners and NAT, L.C., alleged that since both newspapers are owned and controlled by the same family trusts and are each other's primary competitor, combining them under common ownership and control would lead to lower quality and higher prices for newspaper readers and advertisers. On June 30, 1995, after an eight day trial, the U.S. District Court in Fayetteville, agreed with the Division and issued a permanent injunction against the merger of the

Northwest Arkansas Times and the Morning News of Northwest Arkansas. This was the first merger case won by the Division in the Clinton Administration which was litigated from start to finish. See 1995-1 Trade Cas. (CCH) ¶ 70,049.

119. On April 18, 1995, the Division approved a $120 million deal that allowed The Hearst Corporation, which operates The Houston Chronicle, to buy its major daily newspaper competitor in Houston, The Houston Post, because the Post fulfilled the requirements of the "failing firm" defense. In this case, each of the three elements of the failing firm defense were satisfied: (1) The Houston Post was unable to meet its financial obligations in the immediate future; (2) The Post was unable to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) The Post had completed good faith efforts to elicit reasonable alternative offers of acquisition that would keep its assets in the market.

120. On April 27, 1995, the Division filed a civil antitrust suit in the U.S. District Court in San Francisco to challenge Microsoft's planned $2 billion acquisition of Intuit, Inc., the dominant producer of personal finance/checkbook software. The Division alleged that the acquisition would substantially reduce or eliminate competition in the personal software market, leading to higher prices and lessened innovation. At the time of the suit, Intuit's Quicken software was the leading home personal computer software product with a 1994 market share of 70 percent and Microsoft's Money was the number two competitor with a market share of 22 percent, and between them Intuit and Microsoft would have accounted for more than 90 percent of the personal finance software sales in the United States. The Division also alleged that allowing Microsoft to buy a dominant position in such a highly concentrated market would have resulted in higher prices and lessened innovation. In addition, the Division claimed that Microsoft's control of the personal finance software market would have given it a cornerstone asset that could be used with its existing dominant position in operating systems for personal computers to seize control of the markets of the future, including PC-based home banking. The Division rejected Microsoft's proposed "fix" in which some, but not all, of its Money assets would have been transferred to Novell Inc. since the Division believed that Novell would not be as effective a competitor with Money as was Microsoft. Microsoft announced on May 20, 1995 that it would no longer pursue its proposed acquisition of Intuit, Inc.

121. On May 25, 1995, the Division approved Ingersoll-Rand Company's $1 billion cash tender offer to buy Clark Equipment Company after Ingersoll-Rand sold its asphalt paver business to a third party who will operate it as a viable on-going business. Initially, the Division expressed concern that the original proposal would lessen competition in the manufacture and sale of medium and large asphalt pavers since it would have combined two of the five competitors in the U.S. asphalt paver industry.

122. On June 12, 1995, in the U.S. District Court in Macon, Georgia, the Division sued to block Engelhard Corporation's proposed acquisition of Floridin Company -- Engelhard's largest competitor in the gel clay business. The Division's complaint alleged that Engelhard's proposed acquisition of Floridin's processing plant and reserves would make it the largest company in the industry, controlling approximately 83 percent of the $20 million a year U.S. gel clay business. In addition, the Division claimed that the acquisition would lead to higher prices for gel clay and reduce product innovation. The Division rejected Engelhard's attempted "fix" -- a contract with ITC, Inc., an export distributor of Floridin's clay products -- as inadequate. The trial ended in August 1995, and the parties are awaiting the court's decision.

123. In a significant international matter, the Division filed a complaint and proposed consent decree on July 13, 1995, in the U.S. District Court in Washington, D.C. to restructure the proposed alliance of Sprint/France Telecom/Deutsche Telekom (involving a $4 billion purchase of Sprint stock). The alliance was intended to promote more competition in international telecommunications markets. However, according to the Division’s complaint, the deal as originally proposed -- a combination of foreign

monopolies with a U.S. long distance carrier -- could actually reduce competition in international telecommunications by placing other U.S. telecommunications firms at a competitive disadvantage. Under the consent decree, Sprint and the joint venture cannot own, control or provide certain services until competitors have the opportunity to provide similar services in France and Germany. Likewise, they are prohibited from obtaining anticompetitive advantages from their affiliation with FT and DT. In addition, they cannot gain proprietary information or pricing data about their US competitors that FT or DT may have gained through their relationship as suppliers to Sprint's and the joint venture's competitors. Moreover, the French and German public telephone networks and public data networks cannot limit access to those networks in such a way as to exclude competitors of Sprint and the joint venture. The text of the final consent decree appears at 1996-1 Trade Cas. (CCH) ¶ 71,300.

124. On July 20, 1995, the Division filed a complaint and proposed settlement in the U.S. District Court in Chicago that substantially modified the proposed acquisition of Continental Baking Company (maker of Wonder Bread) by Interstate Bakeries Corporation (maker of Sunbeam, Butternut and Weber's). The complaint alleged that the merger would reduce competition for white pan bread in five local markets -- Los Angeles, San Diego, Chicago, Milwaukee and Central Illinois. Under the proposed settlement, Interstate has agreed to sell either the Wonder brand name or one of Interstate's premium white pan breads brands in each of the geographic areas where the transaction may have an anticompetitive effect. It will also sell any other assets, such as bread plants and route systems, that may be needed to maintain the divested brand's level of sales in the marketplace. On January 9, 1996, the final consent decree was entered. The text of the decree appears at 1996-1 Trade Cas. (CCH) ¶ 71,271.

125. On July 28, 1995, the Division filed a complaint and proposed settlement in the U.S. District Court in Washington, D.C., to alleviate the anticompetitive aspects of the $1.7 billion acquisition of Legent Corporation by Computer Associates, the largest and second-largest independent vendors of systems management software products for IBM mainframe computers. The Division’s complaint alleged that the acquisition would have had an anticompetitive effect in the markets for five relevant software products for use with the VSE operating system: (1) security software, (2) tape management software, (3) disk management software, (4) job scheduling software, and (5) automated operations software. The proposed settlement has three key elements and is designed to offer customers of certain products an alternative to Computer Associates. First, a new viable competitor would be established for each of the five computer systems management software products. Second, the proposed settlement would give the Department total discretion on whether to accept or reject proposed licensees. Third, if suitable licensees cannot be found, the settlement would permit the court to order Computer Associates to dispose of additional assets or to establish a new viable competitor. The text of the proposed consent decree appears at 6 Trade Reg. Rep. (CCH) ¶ 50,785.

126. On September 27, 1995, the Division approved the acquisition by Land-O-Sun Dairies Inc. of Flav-O-Rich Inc. after Mid-America Dairymen Inc., the owner of Flav-O-Rich, agreed to divest milk distribution routes to a strong third party. The divestiture of milk routes to Valley Rich Dairy will help assure that school milk prices in Virginia, West Virginia, North Carolina, South Carolina and Tennessee remain competitive.

127. In September 1995, the Division concluded its investigation of United Healthcare's $1.65 billion purchase of MetraHealth Companies after the state of Missouri entered into an agreement with the parties. The agreement required the divestiture of MetraHealth's St. Louis subsidiary. The Division worked closely with Missouri officials during the investigation, and the agreement resolved the Division's competitive questions.

128. Another case that went to trial during FY94 and ended in FY95 involved the merger of two hospitals -- the Mercy Health Center and Finley Hospital -- in Dubuque, Iowa. A bench trial took place from September 26, 1994 to October 6, 1994. Closing arguments were held on December 5, 1994. On October 27, 1995, the judge issued an opinion and judgment refusing to enjoin the merger. He found that regional hospitals offered a competitive alternative to the merged Dubuque hospitals. The Division has appealed his judgment. See 1995-2 Trade Cas. (CCH) ¶ 71,162.

2) Merger Cases Brought by the FTC

a. Preliminary Injunctions Authorized

129. In October, 1994, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, B.A.T. Industries, Inc.'s ("B.A.T.") proposed acquisition of assets of American Tobacco Co.("ATC"), alleging restraint of trade in the market for cigarettes. The case was dismissed in December, 1994, pursuant to a settlement of the administrative proceeding, requiring that B.A.T. divest ATC's manufacturing facility in Reidsville, North Carolina and a number of ATC's cigarette brands as a condition of its completing the acquisition. *FTC v. B.A.T. Industries*, Docket No. 9271, 5 Trade Reg. Rep. (CCH) ¶ 23,733.

130. In November, 1994, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would combine the only two hospitals in Port Huron, Michigan. Before the court could rule on the FTC's request for a preliminary injunction, the parties subsequently abandoned the transaction and entered an administrative consent order requiring the parties to terminate their merger agreement. *Local Health System, Inc.*, Docket No. C-3618, 5 Trade Reg. Rep. (CCH) ¶ 23,854.

131. In January, 1995, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisitions by Boston Scientific Corporation of Cardiovascular Imaging Systems ("CVIS") and SCIMED Life Systems, Inc., alleging that the transaction would eliminate competition in the market for the intravascular ultrasound catheters ("IVUS") used in the diagnosis and treatment of heart disease. The matter was resolved by an administrative consent decree that, among other things, requires Boston Scientific to grant a non-exclusive license to Hewlett Packard or another Commission-approved purchaser to a broad package of patents and technology related to the manufacturing, production and sale of IVUS catheters; and to sell IVUS catheters to the licensee and provide the technical assistance and advice to obtain the Food and Drug Administration approval to manufacture IVUS catheters. The order also prohibits Boston Scientific from entering into exclusive contracts with manufacturers of IVUS consoles that would exclude a new IVUS-catheter producer from the market. *FTC v. Boston Scientific Corp.*, Docket No. C-3573, 5 Trade Reg. Rep. (CCH) ¶ 23,774.

132. In February, 1995, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would combine two of the only three general acute care hospitals in Joplin, Missouri -- Freeman Hospital and Oak Hill Hospital. A district court judge denied the Commission's request, but the court of appeals entered an injunction pending appeal and directed the district court to hold an evidentiary hearing. Following the hearing, the district court again denied the Commission's request for injunctive relief, and, on November 1, 1995, the court of appeals affirmed. The Commission thereafter dismissed its adjudicative complaint issued on March 21, l995. *FTC v. Freeman Hospital*, Docket No. 9273, 5 Trade Reg. Rep. (CCH) ¶ 23,936.

133. In July, l995, the Commission authorized its staff to seek a federal court order to enjoin, pending the outcome of an administrative trial, the acquisition by Ferro Corp. of Chi-Vit Corporation on the grounds that the acquisition would combine two of the three leading producers of a specialty glass called "frit" and likely would lead to higher prices, reduced product innovation, and reduced customer service. The parties abandoned the transaction. *Ferro Corp.*, File No. 951-0032.

b. Commission Administrative Decisions

134. In August 4, l995, the Commission unanimously dismissed charges that the 1990 acquisition by R.R. Donnelly & Sons Co of Meredith/Burda Company L.P. would reduce competition would substantially reduce competition in a section of the U.S. commercial printing business. The Commission found that the product market for analyzing the effects of the acquisition was not as narrow as alleged and that the competitive effects were unlikely. The Commission decision reversed the initial decision issued in l994 by the Administrative Law Judge, nullifying the initial order that Donnelly divest various printing plants. *R.R. Donnelly & Sons*, Docket No. 9243, 5 Trade Reg. Rep. (CCH) ¶ 23,876.

135. On February 1, l995 the Commission gave final approval to a consent agreement with Oerlikon-Burhle Holding AG settling charges that its proposed acquisition of Leybold AG could raise prices and reduce innovation in markets for two markets: the U.S. market for turbomolecular pumps used in the manufacturing of semiconductors and other scientific applications; and the world market for compact disc metallizers used in making compact discs. Under the final order, Oerlikon-Burhle can proceed with the acquisition but must divest its turbomolecular pump and Leybold's compact disc metallizer business to entities that will operate them as ongoing, viable businesses independent of Oerlikon-Burhle. *Oerlikon-Burhle Holding AG*, Docket No. C-3555, 5 Trade Reg. Rep. (CCH) ¶ 23,697.

136. The Commission issued a final consent order on February 14, l995 against Charter Medical Corp., settling charges that its purchase of National Enterprise's ("NME") psychiatric facilities would substantially lessen psychiatric care competition in four geographic markets - Atlanta, Memphis, Orlando and Richmond. Under the final order, Charter agreed to modify its purchase agreement to delete acquisition of the NME facilities in these four localities. *Charter Medical Corp*. Docket No. C-3558, 5 Trade Reg. Rep. (CCH) ¶ 23,711.

137. On the same day, the Commission gave final approval to a consent agreement with American Home Products Corp. ("AHP"), settling charges that its acquisition of American Cyanamid Corp. may substantially lessen competition in the U.S. market for tetanus and diphtheria vaccines, for certain biotechnology drugs used in treating cancer, and for research for a vaccine for treating rotavirus. Under the final order, AHP will divest its tetanus and diphtheria vaccine business to a Commission-approved buyer and manufacture the vaccines for the buyer, under contract, while the buyer awaits the Food and Drug Administration's approval to manufacture them, and will license Cyanamid's rotavirus vaccine research to a Commission- approved licensee and provide the licensee with certain technical assistance. Also the order requires that AHP change a previously-established licensing agreement to assure that it does not obtain competitively-sensitive data about a class of drugs used in chemotherapy. *American Home Products*, Docket No. C-3557, 5 Trade Reg. Rep. (CCH) ¶ 23,712.

138. On March 23, l995, the Commission gave final approval to a consent agreement with Wright Medical Technology, Inc., settling charges that Wright's proposed acquisition of Orthomet, Inc. would eliminate potential competition in the market for the sale of orthopaedic implants used in human hands. Under the final order, the respondents, among other things, are required to transfer to the Mayo Foundation a full and complete copy of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets,

and grant Mayo a license to those assets with the rights to sublicense them in perpetuity. The consent order is intended to free the Mayo Foundation to find another non-exclusive licensee to develop orthopaedic implants used or intended for use in human hands for eventual commercialization to compete against Wright. Also Wright is required to make any arrangements necessary to enable Mayo to find a licensee and then assist that licensee for six months following the effective date of the order. *Wright Medical Technology, Inc*., Docket No. C-3546, 5 Trade Reg. Rep. (CCH) ¶ 23,659.

139. In *IVAX Corp.*, the Commission issued on March 27, l995 a final consent order settling charges that a proposal by IVAX to acquire all of the voting securities of Zenith Laboratories, Inc. would lead to a monopoly resulting in higher prices and/or reduced supply in the U.S. market for the drug used to treat patients with chronic cardiac conditions -- generic verapamil in extended-release form. Under the final order, IVAX would be permitted to acquire Zenith except for Zenith's rights to market or sell the extended-release verapamil under Zenith's exclusive distribution agreement with Searle. Also IVAX would be barred from renegotiating an exclusive agreement with Searle following the acquisition of Zenith. *IVAX Corp.*, Docket No. C-3571, 5 Trade Reg. Rep. (CCH) ¶ 23,734.

140. On April 4, l995, the Commission gave final approval to a consent agreement with Reckitt & Colman PLC, settling charges that Reckitt's acquisition of L&F Products, Inc. would reduce substantially competition in the U.S. market for carpet-deodorizer products. Under the final order, Reckitt was required to divest the carpet-deodorizer assets to a Commission- approved buyer, which it complied with by selling the assets to Playtex Products Inc. *Reckitt and Colman PLC*, Docket No. C-3566, 5 Trade Reg. Rep. (CCH) ¶ 23,752.

141. In *Alliant Techsystems Inc*., the Commission on April 7, l995 settled charges that Alliant's proposed acquisition of the aerospace division of Hercules Inc. would reduce weapons research, innovation, and quality. The complaint alleged that once Alliant became a propellant supplier by virtue of the acquisition, its ammunition and munitions division could gain access to significant, nonpublic information concerning other ammunition and munitions suppliers. The final order would permit the acquisition but would require Alliant to prevent its newly-acquired propellant division, which needs certain nonpublic information from other ammunition and munitions makers in order to provide them with propellant and explosives, from sharing the information with Alliant's ammunition and munitions division. Alliant also must notify its propellant customers of the Commission order before obtaining any nonpublic information from them. *Alliant Techsystems, Inc.*, Docket No. C-3567, 5 Trade Reg. Rep. (CCH) ¶ 23,714.

142. The Commission gave final approval to a consent agreement on April 11, l995 settling charges that an existing long-term supply agreement between Del Monte Corp. and Pacific Coast Producers ("PCP") --under which Del Monte effectively took control over PCP's canned fruit business -- eliminated PCP as a substantial and direct competitor to Del Monte. The final order requires, among other things, PCP and Del Monte to terminate the purchase option agreement and the provisions of the supply agreement that relate to planning for the l995 canning season within three days after the order becomes final and to terminate the remaining provisions of the supply agreement by June 30, l995. *Del Monte Corp*., Docket No. C-3569, 5 Trade Reg. Rep. (CCH) ¶ 23,747.

143. On April 12, l995, the Commission issued a final consent order against HEALTHSOUTH Corp. settling charges that HEALTHSOUTH's merger with ReLife Inc. could lead to higher prices or reduced services at rehabilitation hospital facilities in Birmingham, Alabama, Charleston, South Carolina, and Nashville, Tennessee. Under the final order, HEALTHSOUTH is required to divest Nashville Rehabilitation Hospital, which was owned by a ReLife-controlled partnership, to a entity that would operate it in competition with HEALTHSOUTH. Also HEALTHSOUTH must terminate management

contracts to operate rehabilitation units in Birmingham and Charleston. *HEALTHSOUTH Corp.*, Docket No. C-3570, 5 Trade Reg. Rep. (CCH) ¶ 23,738.

144. In *Sensormatic Electronics Corp.*, the Commission charged that Sensormatic's proposed acquisition of Knogo Corp. would decrease competition in research and development for new systems to prevent retail shoplifting. Under the final consent order issued on April 12, l995, Sensormatic was allowed to proceed with the acquisition except that it is prohibited from acquiring patents and other exclusive rights for Knogo's "SuperStrip" manufacturer-installed disposable anti-shoplifting labels, as they pertain to the U.S. and Canada, and exclusive rights to manufacture and sell SuperStrip labels outside the U.S. and Canada. *Sensormatic Electronics Corp.*, Docket No. C-3572, 5 Trade Reg. Rep. (CCH) ¶ 23,742.

145. On May 8, l995 the Commission gave final approval to a consent agreement with Tele-Communications, Inc. (TCI), settling charges that TCI's acquisition of TeleCable Corp. would eliminate competition for cable television in Columbus, Georgia. Under the final order, TCI was allowed to acquire TeleCable but must divest its own Columbus cable TV assets, or those of TeleCable within 12 months. *Telecommunications, Inc.*, Docket No. C-3575, 5 Trade Reg. Rep. (CCH) ¶ 23,760.

146. In *Lockheed Corp.*, the Commission charged that the merger of Lockheed and Martin Marietta into a new entity called Lockheed Martin would substantially reduce competition in the U.S. markets for military aircraft, military satellites and satellite launching-vehicles. The final consent order issued on May 9, l995, requires the merged firm, Lockheed Martin, to open up the exclusive teaming arrangements that each individual firm, prior to the merger, had with infrared sensor products, so as to restore competition for certain types of military satellites. The order also prohibits certain divisions of Lockheed Martin from gaining access through other divisions to competitively-sensitive information about competitors' satellite launch vehicles or about competitors' military aircraft. Finally the settlement places restrictions on Lockheed Martin's ability to modify a military aircraft infrared navigation device in any way that could disadvantage competing military aircraft manufacturers. *Lockheed Corp.*, Docket No. C-3576, 5 Trade Reg. Rep. (CCH) ¶ 23,748.

147. On May 15, l995, the Commission gave final approval to a consent agreement settling charges that The Penn Traffic Co.'s plan to acquire 45 grocery stores in Pennsylvania and New York from Acme Markets, Inc. would reduce supermarket competition substantially and possibly lead to higher grocery prices and reduced selection and quality in three areas of northeastern Pennsylvania. Under the final order, Penn Traffic is required to divest one supermarket in each of the three areas within 12 months. *The Penn Traffic Co.*, Docket No. C-3577, 5 Trade Reg. Rep. (CCH) ¶ 23,754.

148. On the same day, the Commission gave final approval to a consent agreement with Service Corporation International (SCI) settling charges that its acquisition of Uniservice Corporation would substantially reduce competition for funerals and perpetual care cemetery services in and around Medford, Oregon. The final order allows SCI to acquire Uniservice provided it divests all of Uniservices's Medford facilities within 12 months to a Commission- approved purchaser and keeps all of the Medford assets and operations separate from its own until they are sold. *Service Corporation International*, Docket No. C-3579, 5 Trade Reg. Rep. (CCH) ¶ 23,776.

149. On May 25, l995, the Commission issued a final consent order resolving charges that the formation of Montell Polyolefins, a joint venture between the world's largest polypropylene producers, Montedison S.p.a. and the Royal Dutch/Shell Group, could reduce competition substantially in several polypropylene and polypropylene-related production and licensing markets, and reduce U.S. export sales. The settlement would require the Royal Dutch/Shell Group to divest all of Shell Oil's polypropylene assets

to Union Carbide Corp., or to another Commission-approved acquirer, that would then compete with Montell, Shell and Montedison. The Commission also challenged the royalty and profit-sharing agreement between Montedision and Mitsui Petrochemical Industries Ltd, Montedison's partner for the licensing of both polypropolyene technology and catalyst, as restricting price competition and allocating markets. The settlement would require Montedison to forsake revenues under the agreement from future U.S. licenses by Mitsui and would prohibit the company from entering into similar illegal agreements. *Royal Dutch Petroleum Co*., Docket No. C-3580, 5 Trade Reg. Rep. (CCH) ¶ 23,749.

150. On June 2, l995, the Commission gave final approval to a consent agreement with Schwegmann Giant Super Markets, Inc., settling charges that its acquisition of 28 supermarkets in New Orleans, Louisiana, and elsewhere from National Holdings, Inc. would combine direct supermarket competitors in New Orleans and would lessen competition substantially. Under the final order, Schwegmann was required to divest seven stores in the New Orleans area within 12 months to entities that would operate them in competition with Schwegmann. *Schwegmann Giant Super Markets, Inc.*, Docket No. C-3584, 5 Trade Reg. Rep. (CCH) ¶ 23,780.

151. In *Schnuck Markets, Inc.*, the Commission charged that Schnuck's acquisition of the U.S. supermarkets owned by National Holdings, Inc would combine direct supermarket competitors in St. Louis and could lead to higher prices and a decrease in quality and selection of food and other grocery products. Under the final order issued on June 8, l995, Schnuck must divest 24 stores in the St. Louis area within 12 months to entities that would operated them in competition with Schnuck. *Schnuck Markets, Inc*., Docket No. C-3585, 5 Trade Reg. Rep. (CCH) ¶ 23,780.

152. On June 7, l995, the Commission announced that, based on new evidence obtained during the comment period for the proposed settlement announced in December, l994, it had closed its investigation of Nestle Food Co.'s proposed acquisition of Alpo PetFoods and nullified the agreement under which Nestle would have been required to divest an Iowa cat food plant. In closing the case, the Commission said that the new evidence, which related to the definition of the relevant product market, market concentration and entry conditions, cast substantial doubt on the evidentiary basis underlying its allegation that the transaction would violate the antitrust laws. *Nestle S.A.*, File No. 941-0124, 5 Trade Reg. Rep. (CCH) ¶ 23,839.

153. On June 14, l995, the Commission issued a final consent order against Glaxo plc, settling charges that its acquisition of Wellcome plc could substantially lessen competition in the U.S. market for the research and development of an improved class of medicines in a non-injectable form for the treatment of migraine headaches, known as $5HT_{1D}$ agonists. The final order requires Glaxo to divest Wellcome's worldwide research and development assets for non-injectable $5HT_{1D}$ agonists in order to create a viable competitor to replace the competition lost in the acquisition. *Glaxo plc*, Docket No. C-3586, 5 Trade Reg. Rep. (CCH) ¶ 23,784.

154. In *Eli Lilly and Co.*, the Commission on July 28, l995 gave final approval to a consent agreement with Lilly settling charges that is acquisition of McKesson Corp.'s prescription management business("PBM"), PCS Health Systems, Inc., ("PCS") would reduce competition substantially in the manufacture and sale of pharmaceuticals, potentially leading to higher prices and reduced quality. The final order requires Lilly to take measures to ensure that its drugs are not given unwarranted preference over those of its competitors in the PBM services Lilly will provide to health insurers and others after the acquisition, including, among other things, a requirement that PCS maintain an "open formulary." The order also prohibits PCS and Lilly from sharing proprietary or other non-public information, such as price data, from competitors of Lilly whose drugs may be placed on a PCS formulary or from PBM competitors of PCS that must deal with Lilly to complete their formularies. Also, citing the potential for

anticompetitive results in the rapidly evolving markets for pharmaceutical products and PBM, the Commission pledged to monitor the industry carefully and cautioned that it might take future action, including post-acquisition divestiture, if it concluded there were signs of anticompetitive conduct in the industry. *Eli Lilly and Co*., Docket No. C-3594, 5 Trade Reg. Rep. (CCH) ¶ 23,783.

155. The Commission on September 8, l995 gave final approval to a consent agreement with The Scotts Co., settling charges that its acquisition of Stern's Miracle-Gro Products, Inc. would substantially lessen competition and increase prices for water-soluble fertilizers for U.S. consumers. Under the final order, Scotts is required to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Co. or another Commission-approved buyer no later than December 31, l995. *The Scotts Co*., Docket No. C-3616, 5 Trade Reg. Rep. (CCH) ¶ 23,823.

156. The Commission accepted for public comment on April 21, l995 a proposed consent agreement with Columbia/HCA Healthcare Corp. to resolve charges that its proposed merger with Healthtrust, Inc. would impair hospital competition in six different geographic areas resulting in higher prices and/or reduced services for acute-care inpatient hospital services. Under the proposed settlement, Columbia would be required to divest seven hospitals in five different geographic areas and to terminate a joint venture that owns another hospital in sixth geographic area. [Final on October 3, l995] *Columbia/HCA Healthcare Corp*., Docket No. C- 3619, 5 Trade Reg. Rep. (CCH) ¶ 23,804.

157. On June 9, l995, the Commission issued for public comment a proposed consent agreement with Silicon Graphics, Inc. ("SGI") to resolve charges that SGI's proposed acquisition of Alias Research, Inc. and Wavefront Technologies, Inc. would reduce substantially competition on the basis of price and innovation for software and hardware (workstations) involved in producing sophisticated computer-based graphics for the entertainment industry. The proposed order, among other things, would require SGI to enter into a Commission-approved porting agreement by March 31, l996 with Digital Equipment Corp., Hewlett-Packard Corp., IBM Corp., Sun Microsystems, Inc., or another Commission-approved partner, by which Alias's two major entertainment graphics software programs could be run on their porting partner's computer system; and require SGI to maintain an open architecture and to publish its application programming interfaces so that software developers other than Alias and Wavefront could develop entertainment graphics software for use on SGI's workstations. [Final on November 14, l995] *Silicon Graphics, Inc*., Docket No. C-3626, 5 Trade Reg. Rep. (CCH) ¶ 23,838.

158. In *Mustad International Group NV*, the Commission provisionally accepted a consent agreement, subject to public comment, on July 24, l995 to settle charges that, through a series of acquisitions, Mustad International and its subsidiary, Mustad Connecticut, illegally monopolized the manufacture and sale of rolled horseshoe nails in the U.S., allowing Mustad to raise prices as much as 50 to 75 percent. The proposed settlement requires Mustad to either divest all of its Connecticut horseshoe nail manufacturing assets, or to divest four, fully-functioning nail machines and to license technology and know-how to operate them, to a Commission-approved acquirer by May 15, l996, in order to re-establish a viable competitor. [Final on October 30, l995] *Mustad International Group NV*, Docket No. C-3624, 5 Trade Reg. Rep. (CCH) ¶ 23,875.

159. On August 23, l995, the Commission accepted for public comment a consent agreement with Phillips Petroleum Co. whereby it agreed to modify its proposed acquisition of certain natural gas pipeline gathering systems owned by Enron Corp. so that Enron would not sell 830 miles of pipe and related assets within the Texas and Oklahoma Panhandle region to Phillips. The consent agreement would settle charges that the proposed acquisition would eliminate competition between the two companies in providing natural gas gathering services in the region, resulting in higher prices and reduced gas drilling and production.

[Final on December 28, l995] *Phillips Petroleum Co.*, Docket No. C-3634, 5 Trade Reg. Rep. (CCH) ¶ 23,882.

160. The Commission accepted for public comment on August 28, l995 a proposed consent agreement with Columbia/HCA Healthcare Corp. to resolve charges that its proposed acquisition of John Randolph Medical Center in Hopewell, Virginia, which has an inpatient psychiatric unit, would increase the already high level of concentration in the market for psychiatric hospital services in the Tri-Cities area of south central Virginia and would eliminate John Randolph Medical Center as a substantial competitive force there. Under the proposed order, Columbia will divest Poplar Spring Hospital, its psychiatric hospital in Petersburg, Virginia to a Commission-approved entity that would operate it in competition with Columbia. [Final on November 24, l995] *Columbia /HCA Healthcare Corp.*, Docket No. C-3627, 5 Trade Reg. Rep. (CCH) ¶ 23,885.

161. On September 18, l995, the Commission issued for public comment a proposed consent agreement with Hoechst AG settling charges that its merger with Marion Merrell Dow, Inc. ("MMD") would injure competition in four drug markets -- a hypertension and cardiac drug (diltiazem), drugs used to treat severe leg cramps caused by arteriosclerosis; a drug used to treat inflammatory bowel disease (oral-dosage forms of mesalamine); and a drug used to treat tuberculosis (rifadin). With the exception of the diltiazem market, the proposed order would require divestitures to a Commission- approved entity that would develop and market the drugs in competition with the ones that Hoechst retains. As to the diltiazem market, the Commission alleged that competition was injured because the possibility of merger with MMD affected Hoechst's incentives to jointly develop a new, competing drug (Tiazac) with Bioval Corp. Apart from returning the rights to Tiazac to Bioval Corp., the proposed order requires Hoechst to take additional steps to ensure that Tiazac becomes an effective competitive product, including removing barriers to entry for new drugs by, among other things, requiring Hoechst to agree to settle ongoing litigation between MMD and Biovail and to provide Biovail with a toxicology package necessary to secure additional approvals of the Food and Drug Administration. [Final on December 5, l995] *Hoechst AG*, Docket No. C-3629, 5 Trade Reg. Rep. (CCH) ¶ 23,895.

162. The Commission provisionally accepted on September 21, l995 a consent agreement with First Data Corp. settling charges that its proposed merger with First Financial Management Corp. would lead to higher prices in the consumer money wire transfer services industry since they are the only two companies in the U.S. that offer these services. Under the proposed settlement, the merged company would divest either the Western Union or MoneyGram business to a Commission-approved entity that will operate it in competition with the merged company. [Final on January 16, l996] *First Data Corp.*, Docket No. 3635, 5 Trade Reg. Rep. (CCH) ¶ 23,899.

163. As a condition of the Commission agreeing not to challenge the acquisition by Rite Aid Corp. of several Brooks retail pharmacies in Maine from Maxi Drug, Inc., Rite Aid entered into an agreement with the Commission under which it can proceed with the acquisition but must maintain the viability and marketability of both its own and the Brooks pharmacies in specified areas in Maine until the Commission investigation is complete. The arrangement preserves the Commission's ability to take whatever action is necessary to restore retail pharmacy competition in those areas under investigation, if the Commission determines that the merger substantially reduces competition in those areas. *Rite Aid Corp.*, File No. 951-0120, 5 Trade Reg. Rep. (CCH) ¶ 23,906.

IV. Regulatory and Trade Policy Matters

A. Regulatory Policies

1) DOJ Activities with Respect to Federal and State Regulatory Matters

164. The Division participates actively in regulatory proceedings in order to promote competition. Past Division efforts influenced regulatory decisions to allow greater competition in the agriculture, railroad, electricity, and securities industries, among others. During FY95, the Division continued these efforts by filing comments in:

- Federal Energy Regulatory Commission proceedings involving power pooling arrangements and electric transmission access rules.

- Securities and Exchange Commission proceedings on new rules governing the execution and price improvement of small orders on the NASDAQ stock market.

- Department of Agriculture proceedings relating to the economic effects of marketing orders for tart cherries.

- Interstate Commerce Commission proceedings involving the consolidation of major railroads.

165. In FY95, the Division reviewed seven applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of seven new certificates. The goods and services covered by the certificates included textiles, fruit, and trade facilitation services.

166. In May 1995, the Division filed an amicus brief in connection with an agreement between Trans World Airlines and travel agents to settle a private case brought by the American Society of Travel Agents and other travel agents over the issue of commission caps. In response to concerns expressed by the Division, TWA and the travel agents modified their settlement by removing those parts of the settlement that fixed the commission levels TWA would pay all competing travel agents and created a collective incentive among all travel agents to favor TWA over its competitors. The Division then filed a brief noting that it did not object to the modified settlement (however, the Division expressed no position on the merits of the private antitrust action). (See related case at paragraph 69.)

2) FTC Activities with respect to Regulatory and State Legislative Matters

167. As part of its competition and consumer protection mission, the Commission seeks to prevent or lessen consumer injury that may be caused by governmental activities that interfere with the proper functioning of the marketplace. In some instances, laws or regulations may injure consumers by restricting entry, protecting market power, chilling innovation, limiting competitive response of firms, or wasting resources. The goal of the advocacy program is to reduce such possible harms to consumers by advising appropriate governmental entities of the potential effects on consumers, both positive and negative, of proposed legislation or rulemaking.

168. Advocacy comments on antitrust issues are prepared by the Staffs of the Bureaus of Competition and Economics, and the ten Regional Offices under the general supervision of the Office of Consumer and Competition Advocacy. The Office of Consumer and Competition Advocacy is the central source of

planning, coordination, review and information for the staff's work in this area. In fiscal year 1995, the Commission staff submitted comments or amicus briefs to federal and state entities on competition issues in such areas as telecommunications, broadcasting, transportation, patents, electric power, funeral establishments and cemeteries, motor vehicle brokering and health.

a. Federal Agencies

169. The staff of the Bureau of Economics filed comments with the Federal Aviation Administration (FAA) on the effectiveness and viability of its High-Density Rule (HDR), which was adopted to help alleviate delays caused by congestion at certain high density airports -- Kennedy and LaGuardia in New York, O'Hare in Chicago, and National in Washington, D.C. Staff supported the FAA's efforts to encourage the use of market-based systems to allocate scarce airport resources, including the use of price-based and quality-based allocation schemes, but suggested that the FAA consider under what conditions the use of quantity-based regulation systems, such as the HDR, may be more efficient than price-based regulation systems. Staff recommended that the FAA consider rescinding the two year prohibition on the sale of slots obtained through a lottery, expanding the HDR to include additional airports that might be prone to congestion and delays due to excess demand for limited capacity during peak time periods, and expanding its slot usage data base to include such information as the size and destination of the airplane using a particular slot, the prices at which carriers sell slots to another, and rates at which slots are leased. Staff suggested, that the HDR promotes, rather than limits, new entry because it creates a market in which potential new entrants can obtain operating privileges.

170. The staff of the Bureau of Economics filed reply comments with the Federal Communications Commission (FCC) in response to an FCC Public Notice concerning AT&T's request to be reclassified as a "nondominant" carrier. A comment filed with the FCC by a National Economic Research Associates (NERA) Study rejected a key assumption of a BE study, filed earlier in this proceeding. Staff suggested that NERA may have inappropriately generated its data using estimates from the BE study, and that had appropriate data been used, the results in the NERA might have been consistent with those of the BE study.

171. The staff of the Bureau of Economics filed comments with the Federal Communications Commission (FCC) about proposals to eliminate or relax the FCC's Prime Time Access Rule (PTAR), which limits how much network programming major market TV affiliates can broadcast during "prime time." According to the comment, the FCC believed adoption of the rule in 1970 would increase competition in independent production of programs, reduce network control over their affiliates' programming decisions, and increase the diversity of programs available to the public. Staff advised they could not conclude that competitive performance in the market for television programming would be threatened if the PTAR was eliminated. The networks and their affiliates have considerable mutual incentives to televise programming that is attractive to audiences and therefore valuable to advertisers, the major networks are now subject to greater competitive constraints than they were at the time of the rule's adoption, and factors other than PTAR, such as the emergence of cable television systems, are far more important contributors to the current strength of independent broadcasters. Staff concluded that when assessed under a "public interest" standard, which seeks to promote consumer welfare, justification for the rule's continuance is questionable.

172. The staff of the Bureau of Economics filed comments with the Federal Energy Regulatory Commission (FERC) supporting its proposed rulemaking to promote competition in the electric power industry. Staff commended FERC for its proposal to uncouple power generation capability from transmission services, but pointed out that their "functional unbundling" approach would leave utilities with both the incentive and the opportunity to exercise market power and that preventing them from doing

so would be problematic. Thus, staff suggested that "operational unbundling" could prevent discrimination and achieve the competitive benefits of open access more effectively and efficiently than would an attempt to mandate, regulate and monitor access. Staff also warned that competition problems in concentrated generation markets still must be addressed under open access, and further review is needed. Staff urged FERC to reform its transmission pricing policy at the same time it implements changes in transmission access, noting that pro-competitive reforms will not achieve their objectives, and might even prove counterproductive, unless prices and terms for transmission services also become economically efficient signals about investment and output. Staff recommended that if FERC adopts a program to recover stranded costs, that is, uneconomic costs that a utility already has incurred, it should adopt a method that would minimize price distortions and maintain incentives to innovate.

173. In comments filed with the Patent and Trademark Office (PTO), FTC staff urged the PTO to proceed cautiously in developing new guidelines in its handling of applications for software patents, to avoid inadvertently granting overly broad patent protection. Staff noted that PTO recognizes the need to improve its ability to determine whether software products meet the tests for novelty and nonobviousness. Staff also noted that the dangers of overly broad unwarranted patent protection are especially acute in an industry such as software where the innovative process at issue is characterized by the accumulation of relatively small steps, rather than discrete leaps, and thus runs a greater risk of infringing possibly overbroad prior patents.

b. States

174. The staff of the Seattle Regional Office submitted comments to the Alaska State Legislature on a proposal to regulate competition among marine pilots in Alaska. Staff suggested that as long as entry and rates are not artificially constrained by law or by other means, pilots in Alaska should have the usual market-based incentives to compete for customers through lower prices, innovation and increased efficiency. The concern that such competition would compromise safety standards has sometimes been cited as a reason to permit, or even require, pilots to form a cartel insulated from competitive pressure, as well as to prohibit ships from hiring pilots as employees. However, if safety concerns justify requiring all ships to use pilots of proven qualifications, those concerns can be vindicated through discipline against unsafe practices, application of competency-based, pilot-licensing standards, and sanctions against shipowners that fail to obey mandatory piloting requirements. Staff concluded that establishing a monopoly in piloting, by limiting the number of pilots and setting their rates, is likely to result in higher prices or poorer service without assuring increased safety.

175. The staff of the Bureau of Economics filed comments with the California Public Utilities Commission (CPUC) on proposals that would promote competition in the electric utility industry. Concerning the Federal Energy Regulatory Commission (FERC) proposal to uncouple power generation capability from transmission services using "functional unbundling," staff pointed out that it would leave utilities with both the incentive and the opportunity to exercise market power and that preventing them from doing so would be problematic. Thus, staff suggested "operational unbundling" could prevent discrimination and achieve the competitive benefits of open access more effectively and efficiently than would an attempt to mandate, regulate and monitor access. Staff warned that competition problems in concentrated generation markets still must be addressed under open access, and further review is needed. Staff emphasized the importance of reforming transmission pricing policy, noting that pro-competitive reforms will not achieve their objectives, and might even prove counterproductive, unless prices and terms for transmission services also become economically efficient signals about investment and output. Staff recommended that if a program to recover stranded costs is adopted, the method should minimize price distortions and maintain incentives to innovate.

176. The staff of the Bureau of Consumer Protection submitted comments to the Kansas Legislature on a bill to amend Kansas' laws governing optometry. The bill would clarify the restrictions on commercial forms of practice and should make it easier for optometrists to locate in space leased from optical goods stores. Staff concluded that relaxing constraints on commercial practices is consistent with the direction the Commission took in its Eyeglasses II rulemaking and clarifying conditions under which optometrists may lease space from optical goods stores could benefit consumers through greater competition and efficiencies in operation.

177. The Cleveland Regional Office testified before the Michigan State House of Representatives on proposed legislation that would amend the Michigan statutes regulating the licensing and operation of funeral establishments and cemeteries in Michigan. Staff supported the legislation, concluding that joint ownership or operation of a funeral establishment and a cemetery could make possible new business formats and improvements in efficiency and could encourage entry of new competitors, which could in turn lead to lower prices and improved service to consumers.

178. The Chicago Regional Office submitted comments to the Minnesota State Senate on a bill to provide for licensing certain motor vehicle brokers that may be provided by individual brokers and by organizations such as credit unions and buying clubs. Staff cautioned that if the bill were applied to discourage or prohibit brokering services paid for directly by consumers, the result would be unfortunate. Staff suggested, instead, that the legislature consider permitting all kinds of broker services to compete effectively, which could benefit Minnesota consumers by saving them money and inconvenience.

179. The San Francisco Regional Office submitted comments to the State Assembly of Nevada on a bill that would prevent used vehicle dealers from brokering new vehicle sales for consumers. The bill would redefine "new" and "used" vehicles and change the permitted functions of dealers in a way that could discourage the business of acting as a broker to arrange sales or leases of new cars and trucks. Under the bill, vehicle brokering services to consumers could be curtailed, because parties that now offer those services would be prevented from continuing to do so, while those that are still permitted to offer the services may have little incentive to promote them. Thus staff concluded that the bill's effects on alternative methods of arranging new vehicle transactions could reduce competition and deprive consumers of savings that they could realize by using these methods.

180. The staff of the Bureau of Economics testified before the Joint Committee on the Public Interest in Competitive Practices in Healthcare of the Vermont legislature on a proposal to exempt certain cooperative agreements among providers from antitrust oversight. The proposal would authorize the issuing of a "certificate of public advantage" to applicants who demonstrate that the likely benefits of the agreement outweigh disadvantages attributable to reduction in competition. The testimony suggested that such a proposal runs a risk of encouraging or permitting agreements that could reduce choices of and raise prices for healthcare services. If approved, however, staff recommended adopting effective procedures for reviewing how the agreements are working, and for terminating those that are working to consumers' detriment. Specifically, staff suggested modifying the proposal so that certificates are issued only for defined, limited terms.

B. Department of Justice Trade Policy Activities

181. The Division is extensively involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative and is a participant in the trade policy activities of the National Economic Council (NEC), a cabinet-level advisory

group. The Department provides antitrust and other legal advice to U.S. trade negotiators. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve cooperation in the enforcement of competition laws.

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

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

184. The Division led the interagency group that drafted comments on behalf of the U.S. Government on the Japan Fair Trade Commission's proposed Antimonopoly Act Guidelines concerning the activities of trade associations. The Division urged the JFTC to ensure that trade associations do not engage in anticompetitive exclusionary behavior that impedes the ability of foreign companies to compete effectively in Japan.

185. The Division also led the interagency group that drafted comments on behalf of the U.S. Government on the JFTC's proposed revisions to its premiums regulation. The Division urged the JFTC to liberalize further its restrictions on the use of premiums and other sales promotions, which currently inordinately affect the ability of new producers and new providers, both foreign and domestic, to gain a toe-hold in the Japanese market.

186. The Division co-chairs (with the Office of the U.S. Trade Representative) the Deregulation and Competition Policy portion of the U.S.-Japanese Framework discussions. In these discussions, the United States has urged the Japanese government to strengthen its enforcement of Japan’s antimonopoly law, to make its administrative procedures fair and open, and to accelerate an effective program of deregulation to open markets to competition.

187. The Division, with the participation of the FTC and other U.S. government agencies, chairs the Competition Policy Working Group of the U.S.-Korea Dialogue for Economic Cooperation. The working group focussed on a broad range of antitrust enforcement and competition-related topics. As a result of the discussions, the Korean Government decided to take steps toward strengthening the Monopoly Regulation and Fair Trade Law and its enforcement, applying competition principles in its deregulation efforts, improving access to television and radio advertising slots, addressing anticompetitive or unfair practices by industry associations, and revising KFTC regulations and guidelines that may impede procompetitive activities.

V. New Studies related to Antitrust Policy

A. Antitrust Division Economic Analysis Group Discussion Papers

188. The Division issued six Economic Analysis Group Discussion Papers during the period October 1, 1994 through September 30, 1995.

94-1 Werden, Gregory J., Froeb, Luke M., and Tardiff, Timothy J., "The Use of the Logit Model in Applied Industrial Organization, " EAG 94-1, November 1, 1994. Published at 3 *International Journal of Business Economics* 85 (1996).

94-2 Gilbert, Richard J. and Sunshine, Steven C., "Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets," EAG 94-1, November 2, 1994. Published at 63 *Antitrust Law Journal* 569 (1995).

94-3 McCabe, Mark J., "Principals, Agents, and the Learning Curve: The Case of Steam-Electric Power Plant Design and Construction," EAG 94-3, November 17, 1994. Forthcoming in *Journal of Industrial Economics*.

95-1 Schwartz, Marius, and Werden, Gregory J., "A Quality-Signaling Rationale for Aftermarket Tying," EAG 95-1, September 11, 1995. Published at 64 *Antitrust Law Journal* 387 (1996).

95-2 Werden, Gregory J., and Froeb, Luke M., "Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries," EAG 95-2, September 18, 1995. Forthcoming in Malcolm B. Coate & Andrew N. Kleit, eds., *Competition Policy Enforcement: The Economics of the Antitrust Process*, Kluwer Academic Press, 1996.

95-3 Gillespie, William, "Cheap Talk, Price Announcements, and Collusive Coordination, " EAG 95-3, September 25, 1995.

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

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

189. Although the Commission is primarily a law enforcement agency, it also collects, analyzes and publishes information about various aspects of the nation's economy. This work is done by the Bureau of Economics, and consists of studies on a broad array of topics relating to antitrust, consumer protection and regulation. A list of FTC studies that are available to the public is provided below. Studies may be obtained from the Federal Trade Commission, Division of International Antitrust, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580

1) Economic Reports

190. Michael R. Ward, *Measurements of Market Power in Long Distance Telecommunications*, April 1995. This study assesses empirically the competitiveness of the long distance telephone market. To do

so, it estimates firm-specific long-run demand elasticities for AT&T and its rivals for long distance service marketed to households and small businesses during 1988-91.

2) Working Papers

191. Oliver Grawe, Dolly Howarth, and Morris Morkre, *Did Depreciation of the Dollar Render the Steel VRA's Nonbinding?* (WP#208), December 1994.

192. John Simpson, *When Does New Entry Deter Collusion?* (WP#209), December 1994.

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SUMMARY OF HIGHLIGHTS FROM FY95 REPORT

In fiscal year 1995 (October 1, 1994 - September 30, 1995), the Antitrust Division and the Federal Trade Commission pursued important initiatives designed to provide guidance to the business community. In March, the FTC and Division announced eight steps to streamline the Hart-Scott-Rodino premerger review process in order to reduce the cost of compliance and to make it speedier and more efficient. In April, the agencies announced the joint adoption of two sets of guidelines on the enforcement of U.S. antitrust laws -- one covering international operations and the other covering the licensing of intellectual property.

The International Antitrust Enforcement Assistance Act of 1994 was signed into law in November, and the United States and Canada entered a new, expanded antitrust cooperation agreement in August, extended to cover deceptive marketing practices laws as well. On February 8, 1996, President Clinton signed the Telecommunications Act of 1996, opening the entire telecommunications industry to the influence of competitive market forces.

As part of the FTC's updating and streamlining efforts, the Commission announced in June two policy changes designed to reduce the burden on companies involved in FTC merger cases. Under the first, the FTC decided no longer routinely to require parties to a merger that it has challenged to obtain prior approval for future transactions in the same market; but the Commission retains the right to impose a narrow prior-approval or prior-notice provision where there is a credible risk that the parties will engage in another anticompetitive transaction. Under the second policy change, the Commission reaffirmed the value of pursuing litigation against allegedly anticompetitive mergers in an administrative setting, after a federal district court judge has refused to bar the companies from merging pending the outcome of an administrative trial. However, under the new policy, the Commission will determine whether to pursue such litigation on a case-by-case basis, and will consider the public interest as a part of that decision. In July, the FTC announced that it would hold public hearings at Commission headquarters beginning in October, l995 to examine the need for adjustments in the enforcement of antitrust and consumer protection laws stemming from the increasingly global and innovation-based nature of contemporary competition.

The Division filed 60 criminal cases against 40 companies and 32 individuals, and recorded record criminal fines of $41.7 million, including the highest fine ever -- $15 million -- in the ongoing investigation of the commercial explosives industry. The Division also filed 15 civil non-merger enforcement cases, and was especially active in two areas: health care and trade associations.

The FTC brought 35 merger and 13 non-merger cases, for a total of 48 - a 70% increase over FY 1994. The non-merger antitrust cases brought by the FTC's Bureau of Competition involved a wide variety of industries. The agency challenged allegedly anticompetitive conduct - - including boycotts, marketing allocation agreements or price fixing -- by, among others, manufacturers of baby furniture, medical professionals, athletic shoe makers, video rental stores, automobile dealers, and cable TV providers.

The two agencies reviewed 2,816 proposed acquisitions and mergers submitted for review under the premerger notification provisions of the Hart-Scott-Rodino Act, an increase of almost 20% over the previous year. The Commission's 35 merger cases -- the largest number challenged since at least l980 -- involved allegedly anticompetitive mergers in a wide variety of industries, including medical devices, drugs and vaccines, national defense, hospitals, computer software, consumer money wire transfers, retail pharmacies and supermarkets. Another eight mergers or acquisitions were abandoned before the Commission could act, after the FTC staff raised concerns that the transactions might lead to higher prices or reduced quality and selection for consumers. The Division challenged or restructured 18 transactions, of which two went to a full trial in court.

All public documents issued by the FTC and DOJ are available on the Internet. The FTC's World Wide Web site is located at: *http://www.ftc.gov*. The Division's address is *gopher@usdoj.gov* or *http://www.usdoj.gov*; the Division's e-mail address is *antitrust@usdoj.gov*.