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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- From October 1, 2005 through September 30, 2006 --

This annual report is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 6-7 June 2007.

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Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2005, through September 30, 2006 ("FY 2006"). It summarizes the activities of both the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and the Bureaus of Competition and Economics of the Federal Trade Commission ("Commission" or "FTC").

2. In May 2006, David L. Meyer was appointed as the Deputy Assistant Attorney General responsible for civil enforcement in the Antitrust Division, overseeing three of the Division's civil sections. In October 2006, Dennis W. Carlton was appointed to serve as the Deputy Assistant Attorney General for Economic Analysis.

3. In December 2005, Jeffrey Schmidt was appointed the Commission's Director of the Bureau of Competition. In January 2006, William Kovacic and J. Thomas Rosch were sworn in as FTC Commissioners. Deputy Directors of the Bureau of Competition, Kenneth L. Glazer and David P. Wales, Jr., were appointed in March 2006. Following the creation of the Commission's Office of International Affairs in January 2007, Randolph Tritell was appointed Director of International Affairs, and Elizabeth Kraus was appointed Deputy Director for International Antitrust.

1. Changes in law or policies

1.1 Changes In Antitrust Rules, Policies, or Guidelines

4. On November 1, 2005, the U.S. Sentencing Commission approved an amendment to the antitrust guideline in the U.S. Sentencing Guidelines. The amendment increases the base sentencing offense level for antitrust crimes and the sentencing enhancements given for various volumes of commerce attributable to a defendant. As a result of these increases, the maximum Guidelines sentencing range for an antitrust defendant has been raised from 27-33 months to 87-108 months. The Guidelines provide advisory ranges for courts to consider in the sentencing of defendants. The Sentencing Commission adopted these changes following Congress' increase of the maximum jail sentence provided for in the Sherman Antitrust Act. In 2004, Congress increased the Sherman Act jail maximum from three years to ten years. The volume of commerce enhancements in the amended antitrust guideline balance the treatment under the Guidelines of antitrust offenses and other sophisticated frauds, recognize the significant increase in the financial impact of antitrust offenses, and should provide greater deterrence of large scale cartels.

5. On March 27, 2006, the Federal Trade Commission and the Department of Justice jointly released a "Commentary on the Horizontal Merger Guidelines" that continues the agencies' ongoing efforts to increase the transparency of their decision-making processes with regard to antitrust review of horizontal mergers between competing firms. The analytical framework and standards used to scrutinize the likely competitive effects of such mergers are embodied in the Horizontal Merger Guidelines, which the agencies jointly issued in 1992, and revised, in part, in 1997. The commentary explains how the FTC and the DOJ have applied particular principles from the guidelines in the context of actual merger investigations. The commentary points out numerous examples of the integrated approach used in the guidelines analysis, in which the agencies' central focus remains on the likely competitive effects that will result from the merger under review.

6. On June 20, 2006, the DOJ and FTC implemented an electronic filing system that allows merging parties to submit via the Internet pre-merger notification filings required by the Hart-Scott-Rodino (HSR) Act. Electronic filing eliminates the time and expense entailed in duplicating and delivering documents. Parties had been required to submit to both the Department and the FTC paper copies of the required pre-merger notification form and documentary attachments (with the exception of certain documents, such as

U.S. Securities and Exchange Commission filings, that can be provided via internet links). Under the new system, filers have three options:

1. complete and submit the form and all attachments in hard copy;
2. complete the electronic version of the form and submit it and all attachments electronically; or,
3. complete the electronic version of the form and submit it electronically while submitting all documentary attachments in paper copy.

Because HSR filings are highly confidential, the electronic filing process was designed to ensure the confidentiality and security of submitted information.

1.2 *Proposals to Change Antitrust Laws, Related Legislation or Policies*

7. In November 2005, the DOJ and the FTC announced that they would sponsor a series of hearings regarding single-firm conduct, to examine whether and when specific types of single-firm conduct are pro-competitive or benign, and when they may harm consumers. In 2006, numerous hearings were held regarding, *inter alia*, predatory pricing, predatory buying, refusals to deal, international issues, empirical studies, business history, and business strategy. The hearings were completed in May 2007.

8. The Antitrust Modernization Commission (AMC) continued to hold hearings during FY2006 on topics such as merger enforcement, regulated industries, and, *inter alia*, international antitrust. The AMC was created pursuant to an act of Congress, and is charged by statute to: (1) examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) solicit views of all parties concerned with the operation of the antitrust laws; (3) evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) prepare and submit to Congress and the President a report. The AMC submitted its Report and Recommendations to Congress and the President on April 2, 2007. Information on the AMC, its hearings, and public comments received is available at <http://www.amc.gov>.

1.3 *International Antitrust Cooperation Developments*

9. On May 3-5, 2006, the Department of Justice and Federal Trade Commission participated in the fifth annual International Competition Network (ICN) Conference in Cape Town, South Africa. The conference was attended by nearly 300 delegates representing approximately 70 antitrust agencies, international organizations, and the legal, business, consumer, and academic communities. Topics at the conference focused on the recent work of the four substantive working groups: Cartels, Mergers, Antitrust Enforcement in the Telecommunications Sector, and Competition Policy Implementation. Specifically, conference discussions addressed the obstruction of justice in cartel investigations, digital evidence gathering, the interaction of public and private enforcement in cartel investigations, the analytical framework for merger review, antitrust enforcement issues in the telecommunications sector, and the promotion of competition policy in developing and transition economies. Accomplishments of the conference included: adoption of suggested best practices for antitrust enforcement in the telecommunications sector; a Merger Guidelines Workbook, designed to be a useful source for analyzing the competition effects of mergers; a Merger Notification and Review Procedures Implementation Handbook, developed as a practical tool that contains examples of legislative text, rules and practices that conform to the Recommended Practices for Merger Notification and Review Procedures; and a new ICN agenda that included a working group on unilateral conduct.

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

2.1 Department of Justice and FTC Statistics

2.1.1 DOJ Staffing and Enforcement Statistics

10. At the end of FY 2006, the Division employed 768 persons: 347 attorneys, 56 economists, 154 paralegals, and 211 other professional staff. For FY 2006, the Division received an appropriation of \$144.0 million, after rescissions.

11. During FY 2006, the Division opened 255 investigations and filed 45 civil and criminal cases in federal district court. In FY 2006, the Division was party to seven antitrust cases decided by the federal courts of appeals.

12. During FY 2006, the Division filed 34 criminal cases in which it charged 24 corporations and 37 individuals. Eighteen corporate defendants and seventeen individuals were assessed fines totalling \$473.5 million and 19 individuals were sentenced to a total of 5,383 days of incarceration. Another 13 individuals were sentenced to spend a total of 2,760 days in some form of alternative confinement.

13. During FY 2006, 1,768 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 1,048 bank mergers. The Division further investigated 97 mergers and challenged 10 of them in court. Six transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 146 civil investigations (merger and non-merger), and issued 376 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY 2006, the Division granted four requests for review of written business proposals.

2.1.2 FTC Staffing and Enforcement Statistics

14. The FTC's Bureau of Competition has 317 non-administrative staff working on competition enforcement, including 176 lawyers and 91 "other" (the "other" category includes paralegals, investigators, merger analysts, compliance specialists, industry analysts, research analysts, and financial analysts/accountants). The FTC's Maintaining Competition Mission spent \$86.1 million in FY 2006.

15. During FY 2006, the Commission brought a total of 16 competition enforcement actions in the merger field. The Commission staff opened 243 initial phase investigations and issued requests for additional information ("second requests") in 28 transactions. The Commission challenged 16 mergers. There were no preliminary injunctions authorized. Nine consent orders were accepted and no administrative complaints were issued. Seven transactions were abandoned because of antitrust concerns, and seven transactions were abandoned after the issuance of the second request. No civil penalty action was brought with respect to a violation of the pre-merger notification requirements.

16. In the non-merger area, the Commission brought six enforcement actions challenging a variety of anticompetitive conduct; five were resolved by consent agreements. There were no administrative complaints issued during the fiscal year, and there was one preliminary injunction issued for a non-merger challenge.

2.2 *Antitrust Cases in the Courts*

2.2.1 *United States Supreme Court*

17. In *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006), the Court concluded that it is not *per se* illegal under § 1 of the Sherman Act for an economically integrated joint venture to set the prices at which it sells its products. In forming the joint venture at issue, Texaco and Shell Oil exited the relevant markets as individual participants, pooled their capital, and “share[d] the risks of loss as well as the opportunities for profit,” and thereby became co-investors rather than competitors. Thus, the Court determined that the joint venture’s sale of gasoline under both the Texaco and Shell brand names at a unified price was not horizontal price fixing, but amounted instead to “little more than price setting by a single entity.”

18. In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), the Court construed the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13, which bars “discriminat[ing] in price between different purchasers of commodities of like grade and quality . . . where the effect . . . may be substantially to lessen competition.” The Court concluded that in secondary-line price discrimination cases (which involve competition among a discriminating seller’s customers), the statute prohibits discrimination between dealers competing to resell a manufacturer’s product to the same retail customers, but does not prohibit Volvo’s offering of different discounts to retailers who competed against other truck dealers (but not other Volvo dealers) in selling trucks to individual customers.

19. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), involved a tying arrangement between Illinois Tool Works’ patented products (an inkjet printerhead and ink container) and a specially formulated but unpatented ink, and raised the question of whether the mere existence of a patent on the tying product presumptively demonstrates market power in the tying product market, so as to invoke *per se* condemnation of the tie under § 1 of the Sherman Act. Given that such a presumption was recently rejected in patent law and that many tying arrangements that involve patents and requirements ties are “fully consistent with a free, competitive market,” the Court unanimously held that the presumption of market power in a patented product is unsupported in antitrust law.

2.2.2 *U.S. Court of Appeals Cases*

Significant DOJ Cases Decided in FY 2006

20. In *Stolt-Nielsen S.A., v. United States*, 442 F.3d 177 (3d Cir.), *cert. denied*, 127 S.Ct. 494 (2006), the Third Circuit reversed the grant of an injunction barring the United States from seeking the indictment of Stolt-Nielsen Transportation Group (“Stolt-Nielsen”) and one of its executives for conspiring to fix prices and allocate customers in the ocean parcel-tanker industry. Stolt-Nielsen had entered a conditional leniency agreement with the Antitrust Division under its Corporate Leniency Policy, but the Division revoked the conditional leniency upon learning that Stolt-Nielsen had not taken prompt and effective action to terminate its participation in the illegal activity upon discovering it – one of the express conditions of the conditional leniency agreement – and had failed to comply with its cooperation obligations under that agreement by withholding information and providing misleading and false information about the true extent of the conspiracy. The court of appeals held that the district court “lacked authority to employ the extraordinary remedy of enjoining the Government’s indictments of Stolt-Nielsen” and its executive. The court of appeals also instructed that, if defendants assert the conditional agreement as a defense upon being indicted, the district court must consider the conditional agreement anew and determine whether Stolt-Nielsen complied with the agreement’s conditions and obligations. After the district court vacated the injunction and dismissed Stolt-Nielsen’s complaint on remand, a federal grand jury indicted Stolt-Nielsen and two of its executives. The defendants have since moved to dismiss the indictment claiming the conditional leniency agreement as a defense.

21. In *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005), the Sixth Circuit reversed the district court's grant of summary judgment to Dairy Farmers of America, Inc. ("DFA") in this government challenge to DFA's partial acquisition of a dairy. That acquisition, the government claimed, violated § 7 of the Clayton Act, 15 U.S.C. § 18, because it threatened to lessen competition in the numerous school milk markets where that dairy competed with another dairy partially-owned by DFA. The court of appeals did "not agree with the district court's conclusion that a lack of control or influence precludes a Section 7 violation." Rather, the "key inquiry is the [acquisition's] effect on competition, regardless of the cause." The government presented evidence that, at the time of the acquisition, DFA had sufficient governance rights over the acquired dairy to provide a "mechanism by which DFA exercised some control over the business activities of [the dairy], and resulted in its controlling an undue percentage of the relevant market as well as a significant increase in the concentration of firms in that market." Expert evidence showed that even after those rights were reduced, DFA retained some leverage over the dairy, and DFA and the acquired dairy's manager "closely aligned interests to maximize profits via anticompetitive behavior." Thus, the court concluded that the evidence barred summary judgment, and the case was remanded for trial. Before trial, however, the government announced a proposed consent decree that resolves its antitrust concerns by requiring DFA and the dairy's manager to divest their interests in the dairy.

Significant FTC Cases Decided in FY 2006

22. In *Kentucky Household Goods Carriers, Inc. v. FTC*, 199 Fed. Appx. 410 (6th Cir. 2006), the United States Court of Appeals for the Sixth Circuit affirmed the Commission's final order which held that Kentucky Household had engaged in illegal horizontal price-fixing, and that its conduct was not shielded from prosecution by the state action doctrine because the state had not actively supervise the challenged collective rate-making. The Commission had previously ruled that Kentucky Household must cease and desist from collective rate-making, and that the Association must cancel and withdraw all existing tariffs and tariff supplements on file with the state.

2.2.3 Private Cases with International Implications

23. As previously reported, the Supreme Court held in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), that the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, which provides that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations" unless the conduct significantly harms imports, domestic commerce, or American exporters, permits suits for foreign injury under the Sherman Act where the conduct takes place in foreign countries only if that injury is dependent on the conduct's adverse effects in the United States, but not if the foreign injury is merely parallel to, and independent of, the domestic effects. On remand, in *Empagran, S.A. v. F. Hoffman-La Roche Ltd.*, 453 F. Supp. 2d 1 (D.D.C. 2006), the district court denied plaintiffs' motion for relief from the court's earlier final judgment, which had dismissed foreign plaintiffs' federal antitrust claims against the international vitamins cartel under the FTAIA and refused to exercise supplemental jurisdiction over their claims based on foreign law and customary international law. The court rejected the plaintiffs' argument for exercising supplemental jurisdiction – that the lack of an adequate mechanism for private enforcement of antitrust laws in the member states of the European Union warranted the extraordinary relief – because those plaintiffs were not themselves EU-based direct purchasers of vitamins and so lacked standing and because principles of "judicial economy, convenience, and comity" counsel against the court's involvement. Moreover, the court observed "the problem is not the unavailability of an adequate mechanism to obtain relief, but quite simply the procedural differences that make litigating in European courts less favorable" to private plaintiffs, and "the mere fact that foreign litigants may obtain larger damages awards at a lower cost to litigate here in the United States is not, in-and-of-itself, reason to ignore comity and permit jurisdiction over foreign plaintiffs pursuing foreign-law claims, especially when

the European Union is in the process of attempting to ‘stimulate’ private actions for antitrust violations in its own jurisdictions.”

24. Other courts considering conduct with a foreign dimension have applied the Supreme Court’s *Empagran* holding. For instance, in *CSR Limited v. CIGNA Corp.*, 405 F. Supp. 2d 526 (D. N.J. 2005), the court dismissed for lack of subject matter jurisdiction antitrust claims brought by an Australian corporation alleging that various insurers engaged, or threatened to engage, in a group boycott of insurance coverage in Australia, because that conduct directly affected only the Australian market for insurance. However, the court declined to dismiss the claims by the company’s U.S. subsidiary that the boycott affected its ability to obtain insurance coverage in the United States.

25. Similarly, in *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555 (D. Del. 2006), the court dismissed for lack of subject matter jurisdiction a U.S. corporation’s claims that Intel maintained a monopoly, in violation of § 2 of the Sherman Act, in foreign computer processor markets. The court concluded that the FTAIA applied to the alleged conduct and that the mere “ripple effect” of reduced income flowing from the corporation’s foreign subsidiary to that corporation does not satisfy the act’s requirement of a “direct, substantial, and reasonably foreseeable effect” on domestic commerce.

26. In another case turning on the FTAIA, *In re Monosodium Glutamate Antitrust Litigation*, No. 00-1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005), the court dismissed claims, by foreign direct purchasers outside of the United States of monosodium glutamate (MSG) from various MSG manufacturers, that those manufacturers participated in a global price-fixing and market allocation scheme to increase the world-wide price of MSG and that their conduct affected U.S. commerce by inflating the prices paid by purchasers in the United States. While the foreign corporations’ alleged price movements in different geographic submarkets were inextricably linked, and the manufacturers fixed U.S. prices and controlled U.S. markets not only to obtain cartel profits in those markets, but also to allow the cartel to work worldwide by preventing arbitrage, those allegations were held to establish only an indirect relationship between U.S. prices and the prices paid in foreign markets. Thus, the court concluded that the plaintiff corporations failed to satisfy the FTAIA’s requirement that the domestic effect proximately caused their injuries.

27. Likewise, in *In re Dynamic Random Access Memory Antitrust Litigation*, No. 05-3026, 2006 WL 515629 (N.D. Cal. March 1, 2006), the court dismissed claims of a global antitrust conspiracy in Dynamic Random Access Memory (DRAM) by a foreign corporation that purchased DRAM outside of the United States. Like the plaintiffs in *In re Monosodium Glutamate Antitrust Litigation*, this plaintiff suffered a wholly foreign injury but alleged that the conspirators fixed DRAM prices in the United States and needed the supracompetitive price in the United States to raise prices worldwide. These allegations, the court concluded, showed no more than “but for” causation and so failed to allege proximate causation – and a claim – under the FTAIA.

28. In a case involving personal rather than subject matter jurisdiction, the court in *American Copper and Brass, Inc. v. Mueller Europe, Ltd.*, 452 F. Supp. 2d 821 (W.D. Tenn. 2006), granted a British company’s motion to dismiss the complaint, which charged that leading producers of copper plumbing tubing formed a global cartel to fix prices of that tubing, for lack of personal jurisdiction. Where the company denied in detailed affidavits any contact with the United States or involvement in any conspiracy affecting the United States, the minimum contacts test for personal jurisdiction was not satisfied by plaintiffs’ conclusory statements that: the company’s corporate parent, a U.S. company, committed overt acts in furtherance of the conspiracy in the U.S. and that those acts are attributable to the British subsidiary; their unsubstantiated statement that the company directly or through its affiliates produced copper tubing and sold it throughout the United States; nor their bare allegation of conspiracy.

29. In *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050 (N.D. Cal. 2006), the court refused to dismiss a U.S. company's complaint, which alleged that the company purchased in the United States imported magnetic iron oxide (MIO) made in Japan and domestically-produced MIO all at prices inflated by defendants' worldwide conspiracy to fix prices and allocate markets. The court rejected defendants' argument that the rule of reason, not the *per se* rule, applies because the alleged conspiracy was formed outside the United States. Regardless of where the conspirators had meetings and conversations or where the price-fixing agreement was reached, the "straight horizontal price-fixing conspiracy" alleged here affected interstate commerce and was subject to the *per se* rule. The court concluded that the company had adequately stated a claim by alleging the elements of a *per se* violation of § 1 of the Sherman Act.

30. In two cases, *In re Microsoft*, 428 F. Supp. 2d 188 (S.D.N.Y.2006) and *In re Microsoft Corp.*, No. 06-80038, 2006 WL 825250 (N.D. Cal. Mar. 29, 2006), the courts considered whether to quash subpoenas duces tecum served by Microsoft (MS) on its competitors and their counsel seeking documents related to their communications with the European Commission concerning its ongoing antitrust proceeding against MS. MS had earlier requested the subpoenas to obtain discovery for use in that proceeding, and the courts had authorized them pursuant to 28 U.S.C. § 1782, which provides that, on the request of "any interested person," a U.S. district court "may order" a person to produce a document "for use in a proceeding in a foreign or international tribunal." Nonetheless, both courts quashed the subpoenas because (1) the European Commission opposed the involvement of the U.S. courts, (2) the documents were possessed by, or within the reach of, the Commission, (3) MS essentially sought to circumvent the Commission's own rules about MS's access to such information, and (4) MS's requests were unduly intrusive and burdensome.

31. In *Broadcom Corp. v. Qualcomm Inc.*, No. 05-3350, 2006 WL 2528545 (D.N.J. Aug. 31, 2006), the district court dismissed the complaint for failure to state a claim in an antitrust suit against Qualcomm, the owner of numerous patents related to third generation (3G) mobile telephone technologies adopted in industry-wide standards. Broadcom, a semiconductor supplier, alleged that Qualcomm violated Section 2 of the Sherman Act by monopolizing, attempting to monopolize, or maintaining a monopoly in the markets for the 3G technologies and for 3G chipsets and that it violated Section 1 of the Sherman Act by engaging in exclusive dealing and tying the sale of particular 3G chipsets to licenses for a particular 3G technology. The court found that the standards incorporating Qualcomm's patented technologies already made the technology markets "devoid of competition" and thus Qualcomm's alleged conduct was not anticompetitive for purposes of Section 2. As for the Section 2 claims involving the chipset market, the court observed that "the allegations of anticompetitive injury are broad and nonspecific" and concluded that Broadcom did not sufficiently allege that Qualcomm's conduct had anticompetitive effect. The court also rejected the tying claim because Qualcomm did not condition licenses to its patents on the purchases of its chipsets, but rather conditioned "discounts and incentives" on those purchases, and acceptance of the terms offered does not establish the coercion element of an unlawful tie. Lastly, the exclusive dealing claim similarly failed because all Broadcom showed is that discounts and incentives discouraged the purchase of non-Qualcomm chipsets, not that the licensee is required to purchase only Qualcomm chipsets. While this may disadvantage competitors, it is not in itself unlawful, since the "antitrust laws are not intended to place competitors on equal footing in the market; they are intended to address conduct that forecloses competition and unreasonably restrains trade."

2.3 Statistics on Private and Government Cases Filed

32. According to the 2006 Annual Report of the Director of the Administrative Office of the U.S. Courts, 986 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2006.

2.4 *Significant DOJ and FTC Enforcement Actions*

2.4.1 *DOJ Criminal Enforcement*

33. **DRAM:** The Division's investigation of the international DRAM cartel continued in FY 2006. DRAM or dynamic random access memory is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products. DRAM is used in personal computers, laptops, workstations, servers, printers, hard disk drives, personal digital assistants (PDAs), modems, mobile phones, telecommunication hubs and routers, digital cameras, video recorders and TVs, digital set top boxes, game consoles, and digital music players. Several billion dollars of DRAM are sold in the United States annually. In FY 2006, the Division charged three companies and eight individuals with participating in the DRAM price-fixing conspiracy. In October 2005, the Division charged Samsung Electronics Company Ltd., a Korean DRAM manufacturer, and its U.S. subsidiary, Samsung Semiconductor Inc., with participating in the cartel. The two companies pled guilty to the conspiracy, and in November 2005, were sentenced to pay jointly a \$300 million fine, the second largest criminal antitrust fine in U.S. history and the Division's largest criminal fine since 1999. In January 2006, the Division charged Japanese manufacturer Elpida Memory with fixing DRAM prices and also a separate count of bid rigging. Elpida pled guilty, and in March it was sentenced to pay an \$84 million fine. In addition, in FY 2006, the Division charged four Samsung executives and four executives of Hynix Semiconductor Inc., all of whom have either pled guilty to the price-fixing conspiracy or have agreed to plead guilty. The executives agreed to serve jail terms ranging from five to eight months. In total, the Division has charged four companies and twelve individuals with participating in the DRAM price-fixing conspiracy and one individual with obstruction of the DRAM investigation. All of these defendants have pled, or agreed to plead, guilty to the charges against them. Fines totaling more than \$731 million have resulted from the Department's DRAM investigation. The \$731 million in criminal fines is the second highest fine total obtained by the Division in a criminal antitrust investigation into a specific industry, topped only by the vitamin investigation.

34. **Hydrogen Peroxide and Sodium Perborates:** In March 2006, the Division charged Solvay S.A., a Belgian company, and Akzo Nobel Chemicals International B.V., a Dutch company, for their participation in international price-fixing cartels in the chemicals industry. Akzo pled guilty to participating in an international conspiracy to fix prices in the hydrogen peroxide market and was sentenced to pay a \$32 million criminal fine. Solvay pled guilty to participating in international conspiracies to fix prices in both the hydrogen peroxide and sodium perborates markets and was sentenced to pay a \$40.8 million criminal fine. Solvay and Akzo Nobel's roles in the conspiracies affected nearly \$350 million in United States commerce. Hydrogen peroxide is used as a bleaching agent, while sodium perborate is a cleaning agent found in detergents, toothpaste, hair care products and antiseptic products.

35. **Stolt-Nielsen:** In September 2006, a grand jury in Philadelphia indicted -Nielsen S.A., its subsidiaries--Stolt-Nielsen Transportation Group Ltd. of Liberia and Stolt-Nielsen Transportation Group Ltd. of Bermuda (collectively SNTG)--and U.S. citizen Samuel A. Cooperman and New Zealand citizen Richard B. Wingfield, for participating in a conspiracy to allocate customers, fix prices, and rig bids on contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere. Cooperman is the former chairman, president and chief executive officer of SNTG. Wingfield is the former executive vice president and managing director of tanker trading for SNTG. To date, a total of five companies and five individuals have been charged in the Division's ongoing antitrust investigation of the parcel tanker shipping industry, and fines totaling more than \$62.3 million have resulted from the investigation. Parcel tanker shipping is the transportation of bulk chemicals, edible oils, acids, and other specialty liquids by compartmentalized deep sea vessels. A contract of affreightment is a contract between a customer and a parcel tanker shipping company for the transportation of bulk liquids from port to port.

36. **Norris Extradition:** Extradition proceedings continue in the United Kingdom against Ian P. Norris, a defendant in the Division's carbon brushes price-fixing investigation. Mr. Norris, the former CEO of the Morgan Crucible Company plc, was indicted by a grand jury in the Eastern District of Pennsylvania in 2004 for fixing prices of carbon brushes used to transfer electrical current in automotive and transit applications from 1989 to 2000 and for obstructing the Division's price-fixing investigation from 1999 to 2001. In June 2005, the Bow Street Magistrates' Court in London ruled that Mr. Norris is extraditable on both the price-fixing and obstruction charges and also rejected Mr. Norris' arguments regarding the alleged lack of fairness based on the passage of time since the commission of the offenses, and his character, health, and right to home life and privacy under the European Convention on Human Rights. The defense argued during the extradition hearing that price fixing is not an extraditable offense because price fixing was not a criminal offense in the United Kingdom during the time alleged in the indictment, and that the obstruction should not be extraditable because the alleged obstruction was not obstruction of an investigation into conduct punishable in the United Kingdom. The magistrate court ruled, however, that the conduct underlying the price-fixing charge would constitute the U.K. offense of conspiracy to defraud. In September 2005, the United Kingdom's Home Secretary approved the Division's request to extradite Mr. Norris. In February 2006, the High Court of Justice in England rejected an appeal by Mr. Norris which challenged the designation of the United States under the U.K. Extradition Act of 2003 due to the lack of ratification by the United States of the 2003 U.S./U.K. Extradition Treaty and the alleged lack of consistency between extraditions requested by the United States and by the United Kingdom. Further appeals by Mr. Norris were heard in the High Court on October 17-18, 2006 regarding the dual criminality issue and whether the extradition would be unjust or oppressive due to the passage of time since the commission of the offense or incompatible with the defendant's human rights.

37. **E-Rate:** Two major domestic cartel investigations in FY 2006 involved bid-rigging fraud in the E-Rate telecommunications program and price fixing in the ready mix concrete industry. The E-Rate program was created by the U.S. Congress in the Telecommunications Act of 1996 and provides funding for equipment and services for needy schools and libraries to connect to and utilize the Internet. The Division has a national task force investigating bid rigging and fraud in the E-Rate program, with staff attorneys from each Division criminal office. The Division task force has successfully coordinated its efforts with Federal Bureau of Investigation personnel from numerous offices, the Federal Communications Commission, the Internal Revenue Service, and multiple U.S. Attorneys' Offices. In FY 2006, the Division indicted three E-Rate cases, including a 22-count indictment in the Northern District of California against six companies and six individuals charging the defendants with defrauding the E-Rate program and rigging bids on E-Rate projects at school districts located in seven states. In FY 2006 the Division also indicted a former South Carolina school district employee charging her with 12 counts of committing mail and wire fraud as part of a scheme to defraud the E-Rate program. Finally, in FY 2006, the Division successfully returned a nine-count indictment charging a former Michigan school official, his wife, and two companies he controlled with conspiracy to commit federal program fraud, mail fraud and wire fraud, as well as a money laundering conspiracy and the substantive offenses of federal program fraud, mail fraud, wire fraud, and bank fraud; the Division subsequently indicted the same official on a separate mail fraud charge related to a scheme to defraud a home loan company. To date, the task force has obtained criminal convictions against a total of five corporations and three individuals, and defendants have agreed to pay approximately \$40 million in criminal fines and restitution. In addition, seven corporations and nine individuals are awaiting trial on charges stemming from the E-Rate investigation, and one additional defendant indicted on fraud and money laundering charges is the subject of extradition proceedings in Pakistan. The Division currently has multiple grand juries opened across the country investigating allegations of collusion and fraud by scores of E-Rate contractors. The Division's task force has played a leading role in efforts to prosecute those who sought to steal funds from some of the nation's neediest schools.

38. **Ready Mixed Concrete:** In FY 2006, the Division charged five individuals and three companies with fixing prices for ready mixed concrete that was sold in the Indianapolis, Indiana metropolitan area. To date, the Division has charged five companies and ten executives for price fixing of ready mixed concrete in Indiana. Three of those individuals and one company are awaiting trial in November. The three individuals awaiting trial were also charged with making false statements to the Federal Bureau of Investigation. Fines totaling more than \$34 million have resulted from the Division's ongoing antitrust investigation of the ready mixed concrete industry. Ready mixed concrete is used in various construction projects including sidewalks, driveways, and housing foundations.

2.4.2 *DOJ Civil Non-Merger Enforcement*

39. **Microsoft:** Under the Microsoft Final Judgment, the parties - the Department, the attorneys-general of 17 states and the District of Columbia, and Microsoft - must file regular Joint Status Reports (JSRs) with the Court describing recent enforcement activities. Under Section III.E of the consent decree, Microsoft must provide to competing developers, on reasonable and non-discriminatory terms, technical documentation relating to server interoperability technology so as to enable non-Microsoft servers to work with client machines running Windows. To remedy the delays in producing complete, accurate, and usable documentation, Microsoft previously agreed to provide licensees with access server source code, certain intellectual property rights to facilitate referencing of the source code, and a full interim royalty credit until the documentation is adequate. On May 12, 2006, the Department filed a JSR requesting a two-year extension of Section III.E and related supporting provisions. Microsoft consented to the extension of portions of the Final Judgment from November 12, 2007 to November 12, 2009, which was approved by the Court on September 7, 2006. In JSRs filed in FY2006, the parties also noted a series of meetings relating to issues concerning middleware and the handling of defaults in Windows Vista, the successor operating system to Windows XP. The plaintiffs were very encouraged by the direction of these discussions; the Department reported that it believed there was an opportunity to substantially improve the methods for setting default middleware applications in Windows Vista - an important goal of the Final Judgment - as compared to the current mechanism used in Windows XP.

40. **West Virginia Real Estate Commission:** On March 15, 2006, the West Virginia Real Estate Commission voted to repeal a regulation that prohibited West Virginia real estate brokers from offering rebates, inducements, gifts, and other discounts to customers. The amended regulation entered into effect on May 4, 2006. The Department commended the Commission's quick action in addressing issues raised during the Department's investigation and said that West Virginia consumers will be able to benefit from the lower prices and better services made possible by competition. The West Virginia Real Estate Commission's decision followed the Department's March 2005 settlement with the Kentucky Real Estate Commission, which allowed Kentucky real estate brokers to offer rebates and inducements; in August 2005, the South Dakota Real Estate Commission similarly rescinded two rulings prohibiting rebates.

2.4.3 *Enforcement of DOJ Consent Decrees*

41. On February 28, 2006, the Department settled a civil contempt claim against Rolex Watch U.S.A. Inc. for violating a 1960 consent decree that prohibited U.S. importers of Swiss watches and watch parts from engaging in anticompetitive practices in the U.S. watch industry. In a petition alleging Rolex's violation of the decree, the Department stated that by refusing to sell watch parts to independent watch repair facilities unless they agreed to use Rolex parts or accessories exclusively, and by prohibiting watchmakers from reselling spare watch parts under any circumstance or charging an excessive markup for watch parts used in repairs, Rolex had illegally restricted the use, resale, and pricing of watch parts. In the course of investigating Rolex, the Department also concluded that the decree was no longer needed to protect competition, as a result of significant changes in the watch industry over the past 45 years, and

should be terminated, but without exonerating Rolex from previous compliance with the terms of the decree. Rolex agreed to pay \$750,000 to resolve the Department's allegations.

42. On June 23, 2006, the American Bar Association (ABA) agreed to acknowledge that it had not complied with certain provisions of a 1996 consent decree and to pay \$185,000 to reimburse fees and costs incurred in the Department's investigation. The Department charged in a court petition that the ABA had violated multiple structural and compliance provisions of the decree, which prohibited anticompetitive behavior in the law school accreditation process. The provisions required the ABA to: (1) certify decree compliance annually; (2) present proposed changes to accreditation standards for review; (3) ensure that no more than half of the membership of the ABA's Standards Review Committee be comprised of law school faculty; (4) educate ABA staff on the requirements of the decree; (5) obtain ABA staff's agreement to abide by the decree; and (6) to the extent reasonably feasible, include on the on-site evaluation teams a university administrator who is not a faculty member of the law school. The decree was initially established to prevent the ABA from allowing the law accreditation process to be misused by law school personnel with a direct economic interest in the outcome of accreditation reviews.

2.4.4. *FTC Non-Merger Enforcement Actions*

Appellate actions

43. **North Texas Specialty Physicians:** In January 2006, North Texas Specialty Physicians (NTSP) filed a petition for review in the United States Court of Appeals for the Fifth Circuit in response to a December 2005 Commission Order that petitioner's price fixing in its negotiations with payers, including insurance companies and health plan, was unlawful. In September 2003, the FTC had issued an administrative complaint against a group of Texas physicians, charging that they unlawfully restrained competition, increasing the cost of health care for consumers in the Fort Worth area. The FTC alleged that NTSP violated federal law by negotiating agreements among its participating physicians on price and other terms, refusing to deal with payers except on collectively agreed-upon terms, and refusing to submit payer offers to participating physicians unless the terms complied with NTSP's minimum-fee standards.

44. **South Carolina Board of Dentistry:** In May 2006, defendant's petition for review of a Commission order against the South Carolina Board of Dentistry was dismissed by the United States Court of Appeals for the Fourth Circuit for lack of jurisdiction. It was appealed to the Supreme Court in August 2006 and the petition for certiorari was denied in January 2007. The case originated in September 2003 when the Commission filed an administrative complaint challenging a board regulation that prohibited licensed dental hygienists from providing basic preventive dental care services in a school setting unless the patient first had been seen by a dentist and a treatment plan had been established. The administrative complaint alleged that the Board's action artificially insulated dentists from competition that licensed and trained hygienists can provide, and thus deprived children – particularly economically disadvantaged children – of important preventive dental health care.

Other Non-Merger Enforcement Actions

45. **Health Care.** The FTC continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic drug entry. In FY2006, the Commission also actively brought enforcement actions against agreements among physicians designed to boycott third-party payers and fix prices.

- **Warner Chilcott/Barr Labs:** In November 2005, the Commission filed a complaint in federal district court challenging an agreement between Warner Chilcott and Barr Laboratories in which Barr had agreed not to market a lower-priced generic version of

Warner Chilcott's Ovcon 35, an oral contraceptive drug, in exchange for a 20 million dollar payment. In September 2006, under the threat of a preliminary injunction sought by the Commission, Warner Chilcott waived the provision blocking Barr's entry, and the next day Barr announced its intention to start selling generic Ovcon in the U.S. Under the terms of the October 2006 order settling the Commission's charges, Warner Chilcott agreed to refrain from entering into similar anticompetitive agreements in the future. Though Warner Chilcott settled, the Commission's case against Barr continues.

- **Health Care Alliance of Laredo:** In February 2006, a physicians' independent practice association in Texas agreed to settle FTC charges that it engaged in unlawful collective bargaining in setting fees its members would accept from health insurance plans. The Commission charged that the practice resulted in higher medical costs for consumers. The consent order will prohibit the association from engaging in similar conduct in the future.
- **New Century Health/Prime Care:** In August 2006, the Commission announced its decision to challenge the conduct of two independent practice associations in the Kansas City area for refusing to deal with health care plans except on collectively agreed-upon terms, including price. The Commission's complaint charged that their actions unreasonably restrained competition, in violation of Section 5 of the FTC Act. The proposed consent order would prohibit the parties from entering into, or facilitating, any agreement between or among physicians.
- **Puerto Rico Association of Endodontists:** In July 2006, the Commission filed a complaint against 30 competing association members, charging that they acted unlawfully by agreeing to set the prices they would charge for dental insurance plans and by refusing to deal with plans that would not accept the collectively determined prices. In August 2006, the Commission approved a final consent order settling these charges.

46. **Real Estate.** The Commission continues to actively investigate restrictive practices in the residential real estate industry, including efforts by private associations of brokers to impede competition from brokers who use non traditional listing services.

- **Austin Board of Realtors:** In July 2006, the FTC filed a complaint charging the Austin Board of Realtors (ABOR) with violating the antitrust laws with its practice of preventing consumers with listing agreements for potentially low-cost, unbundled brokerage services from marketing their listings on public real estate-related Internet sites. In September 2006, the Commission entered into a final consent order settling these charges, whereby ABOR is prohibited from adopting or enforcing any rule that treats one type of real estate listing agreement more advantageously than any other or from interfering with its members' ability to enter into any lawful listing agreement with home sellers.

47. **Technology Non-Merger Enforcement.** The Commission also places great emphasis on safeguarding competition in the high technology sector, such as the computer hardware and software industries.

- **Rambus:** In July 2006, the Commission issued an opinion concluding that Rambus, Inc. unlawfully monopolized markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAMs are widely used in personal computers, servers, printers, and cameras. The Commission found that, through a course of deceptive conduct, Rambus was able to distort a critical standard setting process and engage in an anticompetitive "hold up" of the computer

memory industry. The Commission held that Rambus' acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act and contributed significantly to Rambus' acquisition of monopoly power in the four relevant markets.

2.5 *Advisory Letters from the Commission*

48. In FY 2006, FTC staff issued the following advisory letters:

- **St. John's Health System:** Letter dated September 13, 2006, concerning the provision of **pharmaceuticals** by St. John's Regional Health Center in Missouri, a non-profit hospital. The staff of the Bureau of Competition advised St. John's Health System that its proposed plan to provide pharmaceuticals to patients of both its affiliated hospital and its affiliated clinic, through three hospital-owned pharmacies, falls within the Non-Profit Institutions Act (NPIA). That statute exempts from the Robinson-Patman Act "purchases of . . . supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."
- **Alpena Public Schools:** Letter dated June 16, 2006, concerning a program to transfer pharmaceuticals at cost between a non-profit hospital and a non-profit public school system. The letter advised **Alpena that its proposed plan to have pharmaceuticals transferred to it for use by its employees, by the Alpena Regional Medical Center, with actual distribution of the pharmaceuticals being made by certain Alpena-area pharmacies, falls within the Non-Profit Institutions Act (NPIA).**
- **Suburban Health Organization:** Letter dated March 28, 2006, concerning the antitrust implications of a proposal to undertake a program involving collective bargaining between a physician-based hospital organization and insurers over doctors' fees. FTC staff advised that the proposed plan would violate federal antitrust laws,

2.6 *Business Reviews Conducted by the Department of Justice*

49. In FY2006, the Department evaluated and decided not to challenge proposals in four requests under its business review procedure. The Department issued the following business review letters: (1) to the Denver Newspaper Agency, which operates as an approved newspaper joint operating agreement for the Denver Post and the Rocky Mountain News under the Newspaper Preservation Act, stating that its proposed offering of a free edition of the Denver Post was likely to increase output and choice for Denver metropolitan area readers and advertisers (December 8, 2005); (2) to the Fair Factories Clearinghouse, stating that it was unlikely that its creation of a database of workplace conditions in manufacturing facilities around the globe would by itself have anticompetitive effects through the facilitation of collusion among the customers of the factories being audited (June 19, 2006); (3) to Linen Systems for Healthcare LLC, a joint venture of regional textile maintenance companies, stating that its proposal to bid jointly to provide textile rental and laundry services to healthcare outpatient centers (HOC) would create a new competitor for national HOC accounts without threatening to restrict output or harm competition among members of the joint venture (August 8, 2006); and (4) to the American Trucking Associations Inc. (ATA), a trade association and advocate for motor carriers, state trucking associations, and national trucking conferences, stating that its proposed development of model agreements for motor carriers and freight transportation brokers was not likely to reduce competition, since the agreements contained no provisions on rates or competitively significant terms, and ATA members could use the agreements on a voluntary, discretionary basis, gain transactional cost savings that improve the efficiency of contract negotiations, and continue to offer individually determined rates to brokers (August 10, 2006).

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

3.1 Enforcement of Pre-merger Notification Rules

50. On April 13, 2006, the Department filed a civil complaint against communications technology companies QUALCOMM Incorporated and Flarion Technologies Inc. for premerger coordination that prematurely transferred beneficial ownership of Flarion to Qualcomm in violation of the Hart-Scott-Rodino Act of 1976 (HSR). The parties agreed to pay a total of \$1.8 million in civil penalties to settle charges that QUALCOMM had obtained operational control over Flarion prior to the expiration of the premerger waiting period, thereby engaging in “gun jumping” conduct. The gun jumping occurred because the merger agreement required Flarion to seek QUALCOMM's consent before undertaking certain basic business activities, such as making new proposals to customers; in addition, although not required by the agreement, Flarion sought and followed QUALCOMM's guidance before undertaking routine activities, such as hiring consultants and employees. Because the companies had voluntarily reported the existence of gun jumping problems to the Department and took some measures to change their contract and their conduct, the civil penalty amount that the companies were required to pay was reduced from the statutory maximum. The Department's complaint did not challenge the merger, which the companies announced was consummated on January 19, 2006.

3.2 Significant Merger Cases

3.2.1 FTC Merger Challenges or Cases

51. The FTC's merger enforcement workload has steadily increased in the last three years. Compared to FY2004 levels, in FY2006 the number of filings increased by almost 30 percent and experienced an even greater increase in the percentage of second requests issued. Based on data for the first six months of FY2007, the FTC anticipates that the merger review process will continue to play an increasingly demanding role in the year to come. The following were significant merger cases during FY 2006 in energy, health care, and other industries.

52. **Evanston/Highland Park:** In an Initial Decision issued in October 2005, an Administrative Law Judge (ALJ) found that Evanston Northwestern Healthcare Corporation's completed acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and substantially lessened competition for acute care inpatient services in parts of Chicago's northern suburbs. The hospital's appeal of the ALJ's decision and order requiring divestiture of Highland Park Hospital is now pending before the Commission, which heard oral arguments in May 2006.

53. **DaVita/Gambro Healthcare:** In November 2005, the Commission ordered divestitures to protect patients who require regular outpatient dialysis services from higher prices and reduced quality or service. Under the consent order, DaVita, Inc. will divest 69 dialysis clinics in 35 markets across the United States as a condition to proceeding with its acquisition of Gambro Healthcare Inc. The two firms were the second and third largest providers of dialysis services in the nation, and the divestitures would restore competition to localized markets that allegedly otherwise would have been lost in the merger.

54. **Johnson & Johnson/Guidant Corp:** The Commission intervened on behalf of coronary artery disease patients in December 2005, by ordering divestitures to preserve competition for three life-saving medical devices used in coronary bypass surgery and implantation of medicated stents to open clogged arteries. The remedial provisions of the Commission's final consent order, approved in December 2005, would have alleviated the threats to competition posed by Johnson & Johnson's proposed \$25.4 billion acquisition of Guidant Corporation. (Johnson & Johnson later abandoned its bid for Guidant after being

outbid by Boston Scientific.) The FTC worked closely with its counterparts in the European Commission, Canada, and other countries, in this case.

55. **Allergan/Inamed:** The Commission announced, in March 2006, a settlement requiring the return of development and distribution rights to a botulinum toxin product to its manufacturer before allowing Allergan's \$3.2 billion acquisition of Inamed. Allergan markets Botox, a botulinum toxin used by many consumers as a non-surgical treatment for facial wrinkles. Inamed held the rights to Reloxin, a product in Phase III Clinical Trials with the Food and Drug Administration and the expected first competitor to Botox. Under the terms of the order, Inamed will return its development and marketing rights to Ipsen, the manufacturer of Reloxin.

56. **Teva/IVAX:** In July 2005, Teva Pharmaceutical Industries proposed buying IVAX, the fifth-largest supplier of generic drugs in the United States, for \$7.4 billion. The acquisition would make Teva the world's largest generic pharmaceutical supplier. In March 2006, the Commission signed a consent agreement, ordering Teva and IVAX Corporation to divest 15 generic pharmaceutical products, before allowing the acquisition to proceed. Among the drugs to be divested were forms of generic amoxicillin. The divestitures are expected to protect consumers from higher prices that allegedly would have resulted from this merger by restoring competition in these markets.

57. **Linde/BOC Group:** In March 2006, Linde AG proposed to acquire The BOC Group plc for approximately \$14.4 billion. The FTC filed a complaint, alleging that the proposed acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act by eliminating a significant competitor in certain regional U.S. markets for liquid oxygen and liquid nitrogen, and the worldwide market for bulk refined helium. The consent decree resolving these allegations required Linde to divest its Air Separation Units and all other assets in eight localities across the United States, and to divest its bulk refined helium assets. The EC also reviewed the proposed acquisition. Throughout the course of their investigations and during the remedial phase, FTC and EC staff communicated and cooperated regularly under the US-EC 1991 cooperation agreements and the 2002 Best Practices on Cooperation in Merger Investigations.

58. **Boston Scientific/Guidant:** In April 2006, the Federal Trade Commission reached a consent agreement in Boston Scientific's proposed \$27 billion acquisition of the Guidant Corporation (Guidant). The two companies hold the largest market shares in several coronary medical device markets in the U.S., together accounting for 90% of the U.S. PTCA balloon catheter market and 85% of the U.S. coronary guidewire market. The consent order required the divestiture of Guidant's vascular business to an FTC-approved buyer. The European Commission's Competition Directorate (EC), the Canadian Competition Bureau, and the Japan Fair Trade Commission also reviewed this proposed merger. Throughout the course of their respective investigations, FTC staff communicated and cooperated with their counterparts in these agencies under the respective bilateral cooperation agreements and, in the case of the EC, the 2002 Best Practices on Cooperation in Merger Investigations.

59. **Fresenius AG/Renal Care:** The FTC charged that Fresenius's proposed \$3.5 billion acquisition of Renal Care Group, Inc. (RCG) would harm consumers, since 66 outpatient dialysis markets identified by the Commission would have no more than one significant dialysis provider other than Fresenius and RCG. In July 2006, the Commission reached a consent agreement requiring Fresenius to sell 91 outpatient kidney dialysis clinics and financial interests in 12 additional clinics.

60. **Hologic/Fischer Imaging:** In July 2006, the Commission challenged Hologic Inc.'s 2005 purchase of the breast cancer screening and diagnosis business of Fischer Imaging Corporation. In August 2006, the Commission approved a final consent order to ensure the maintenance of competition in the market for prone stereotactic breast biopsy systems (SBBS). The order required Hologic to divest Fischer's prone SBBS assets to Siemens, a company well positioned to become a competitor in this market.

61. **Enterprise/TEPPCO:** In August 2006, the Commission announced a law enforcement action challenging a 2005 acquisition that combined the natural gas liquids (NGL) storage businesses of Enterprise Product Partners, L.P. and TEPPCO Partners, L.P. under common ownership. The Commission's complaint alleged that the transaction likely would result in higher prices and service degradations by reducing the number of commercial salt dome NGL storage providers in Mont Belvieu, Texas, from four to three. The consent order proposed by the Commission required TEPPCO to sell its interest in an NGL storage facility and associated assets to a Commission-approved buyer no later than December 31, 2006.

3.2.2 *DOJ Merger Challenges or Cases*

62. **Exelon/Public Service Enterprise Service Group:** On December 20, 2004, Exelon Corporation entered into an agreement to merge with Public Service Enterprise Group Inc. (PSEG). Exelon and PSEG are the two largest electricity firms in the area encompassing central and eastern Pennsylvania, New Jersey, Delaware, the District of Columbia, and parts of Maryland. Together they account for nearly 40 percent of the electric generating capacity in the area, and would have had wholesale electricity revenues of approximately \$19 billion. The transaction would have created one of the largest electricity companies in the U.S. with total assets of \$79 billion and annual revenues of \$27 billion. As originally proposed, the acquisition would have substantially lessened competition in the markets for wholesale electricity and increased prices for wholesale electricity in the Mid-Atlantic region. The Department had proposed a settlement that would have preserved competition by requiring Exelon to divest six electricity-generating plants, with a total generating capacity of more than 5,600 megawatts, in order to proceed with its \$16 billion acquisition of PSEG. Exelon abandoned its effort to acquire PSEG, at which point the lawsuit and proposed consent decree were no longer necessary, and the Department announced on September 28, 2006, that it had dismissed its antitrust complaint challenging the potential acquisition.

63. **Inco/Falconbridge:** On September 18, 2006, the Department announced that it would seek to dismiss its antitrust complaint regarding the potential acquisition of Falconbridge Limited by Inco Limited, since Inco formally abandoned its effort to acquire Falconbridge, thereby making the lawsuit and proposed consent decree no longer necessary. Falconbridge was instead acquired by Xstrata plc, a Swiss mining company, in August 2006. The Department found that Xstrata's acquisition of Falconbridge did not pose any competitive problems. The Department initially filed the lawsuit against Inco, alleging that the acquisition would harm competition in the market for high-purity nickel by reducing the number of significant worldwide producers from three to two. At the same time, the Department had filed a proposed settlement that would have preserved competition by requiring Inco to divest a nickel refinery in Norway and other related assets owned by Falconbridge in order to proceed with its more than \$15 billion acquisition of Falconbridge.

64. **Mittal/Arcelor:** On August 1, 2006, the Department announced that it would require Mittal Steel Company N.V. to divest one of three North American tin mills it will own after its \$33 billion acquisition of Arcelor S.A. in order to complete the transaction. Mittal Steel is the second largest supplier of tin mill products to the eastern U.S., accounting for about 31 percent of tin mill products tonnage sold in 2005. Prior to Mittal's acquisition of Arcelor, the two largest firms—Mittal and one other integrated steel producer—accounted for more than 74 percent of all tin mill product sales in the eastern U.S., but Arcelor, together with its subsidiary Dofasco Inc., provided a significant competitive constraint on these two firms. Mittal Steel's proposed acquisition of Arcelor would eliminate Arcelor and its subsidiary, Dofasco, as an independent competitor in the sale of tin mill products, further consolidating an already highly concentrated market. The acquisition, as originally proposed, would have substantially lessened competition in the market for tin mill products (finely rolled tin or chrome coated steel sheets used in manufacturing steel cans for packaging a wide range of food products) in the eastern U.S. by eliminating

constraints on anticompetitive coordination amongst producers, thereby increasing the price of tin mill products to can manufacturers and other customers in the region.

65. **Whirlpool/Maytag:** On March 29, 2006, the Department announced the closing of its investigation of the proposed acquisition by Whirlpool Corporation (Whirlpool) of Maytag Corporation (Maytag). Whirlpool is the largest appliance manufacturer in the U.S., with annual sales of \$14 billion. Maytag is the third largest appliance manufacturer in the U.S., with annual sales of \$5 billion. After thoroughly investigating the proposed acquisition of Maytag, the Division determined that the proposed transaction is not likely to reduce competition substantially or harm consumer welfare due to the combination of strong rival suppliers that have the ability to expand sales significantly and enhanced cost savings and other efficiencies that Whirlpool is likely to achieve. The investigation focused on residential clothes washers and dryers, though it considered the impact of the merger across the entire range of products offered by the two companies, and found that despite the two companies' relatively high share of laundry product sales in the U.S., any attempts to assert market power by raising prices would likely be unsuccessful. Furthermore, existing domestic and overseas competitors have excess capacity and could increase their production, and large retailers have alternatives available, which would reduce the incentive for Whirlpool to raise prices.

66. **Instinet/NASDAQ and NYSE/Archipelago:** On November 16, 2005, the Department announced the closing of its investigations of the proposed acquisition of Instinet Group Inc. (Instinet) by the NASDAQ Stock Market Inc. (Nasdaq) and the proposed merger of the New York Stock Exchange Inc. (NYSE) and Archipelago Holdings Inc. (Archipelago). The NYSE is one of the leading equities markets in the U.S. and Archipelago operates ArcaEx, which is one of the largest all-electronic stock markets in the world. Nasdaq is the other leading equities market in the U.S. and Instinet Group Inc. is the institutional brokerage and electronic trading network controlled by the Reuters Group. The investigation involved consideration of each proposed merger individually and in combination. The Department determined that neither transaction is likely to reduce competition substantially due to the imminent entry of other enterprises that should result in additional, viable alternatives to the two merged firms. After the two transactions were announced, several separate enterprises announced their intent to enter and compete in the equity trading facilities services, listing services, and/or the market data service industry, some of which were backed by many of the nation's leading investment banks and securities firms.

67. **Verizon/MCI and SBC/AT&T:** On October 27, 2005, the Department announced that it would require Verizon Communications Inc. and SBC Communications Inc. to divest portions of certain local fiber-optic network facilities in order to proceed with their respective acquisitions of MCI Inc. and AT&T Corp. Verizon was the nation's largest regional Bell operating company and earned approximately \$38.6 billion in revenues from its domestic wireline services in 2004. MCI was one of the nation's largest interexchange carriers, with revenues of approximately \$20.7 billion in 2004. SBC was another regional Bell operating company, formed in 1984 as a result of the breakup of AT&T Corp.'s local telephone business, and earned \$36.9 billion in revenues in 2004. AT&T was the nation's largest interexchange carrier with revenues in 2004 of \$30.5 billion. The transactions, as originally proposed, would have resulted in higher prices for certain business customers in eight metropolitan areas in Verizon's franchised territory and 11 metropolitan areas in SBC's franchised territory, where the merging firms controlled the only wireline access to numerous buildings. Therefore, in the absence of new entry, the merger would have eliminated competition for facilities-based local private line service to those buildings. The Division investigated all areas in which the merging firms compete, and determined that the transactions were unlikely to harm consumers due to existing competition, emerging technologies, the changing regulatory environment, and substantial merger-specific efficiencies. The transactions were also subject to review by the Federal Communications Commission (FCC), with which the Department coordinated its investigatory efforts. The U.S. District Court for the District of Columbia approved the settlements on March 29, 2007.

4. Advocacy, Regulatory and Trade Policy Matters

4.1 Advocacy: Joint FTC-DOJ Amicus Briefs

68. In one of the most active Supreme Court terms for antitrust cases in decades, the FTC and DOJ participated in several amicus briefs submitted to aid the Court in analyzing and resolving competition-related issues. The matters in which the agencies intervened range from Section 2 cases, to price fixing matters, to vertical price restraints.

69. After the U.S. Court of Appeals for the Ninth Circuit ruled in *Texaco, Inc. v. Dagher* that an agreement between the parents of a joint venture regarding the pricing of products sold by the venture could amount to a *per se* violation of the antitrust laws, the FTC and DOJ filed an amicus brief in support of the petition for certiorari, and later an amicus brief on the merits in support of reversal. The briefs argued that the pricing agreement did not qualify for *per se* condemnation because it did not eliminate any competition between petitioners in the sale of their respective brands of gasoline. The briefs explained that the Ninth Circuit's ruling failed to recognize that the formation of the joint venture had effectively merged the affected operations and terminated petitioners' prior competition. Accordingly, the briefs argued, petitioners' agreement was not "price fixing" in the antitrust sense, because it did not eliminate any competition that otherwise would have existed. On February 28, 2006, the Supreme Court unanimously reversed as described in section 2.B.1 *supra*, in keeping with the position taken in the agencies' brief.

70. In *Illinois Tool Works v. Independent Ink*, the FTC and DOJ filed an amicus brief urging the Supreme Court to reverse a lower court decision, arguing that there is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent, copyright, trademark, or other intellectual property right. The brief explained that a patented product, no matter how novel or unique for purposes of patent law, may – and often does – face competition from other products that consumers would substitute for the patented invention. The brief urged the Court to resolve any remaining doubt on the issue by squarely rejecting the presumption. As discussed in section 2.B.1 *supra*, on March 1, 2006, the Court unanimously reversed, in keeping with the position taken in the agencies' brief.

71. In two joint amicus briefs, filed in May and August 2006, the FTC and DOJ urged the U.S. Supreme Court to grant certiorari in the case of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber* and reverse the Ninth Circuit Court of Appeals decision which: 1) held that the standard for a predatory pricing claim articulated by the Supreme Court in *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.* did not apply to a case in which the plaintiff alleged "predatory bidding" in violation of Section 2 of the Sherman Act; and 2) approved instructions that allowed a jury to find a violation based on assessments of factors such as "fairness" and "necessity." In February 2007, a unanimous Supreme Court agreed with the government and vacated the Ninth Circuit's decision, holding that the Brooke Group test applies to predatory bidding claims.

72. In June 2006, the Commission and DOJ jointly filed an amicus brief in the case of *Latino Quimica-Amtex S.A., v. Atofina S.A* which involved an international price fixing conspiracy by manufacturers of two chemicals. The chemicals, sodium monochloroacetate and monochloroacetic acid, are used in manufacturing foods, pharmaceuticals, herbicides, and plastics. At issue was the Sherman Act claims of several foreign companies that purchased the chemicals from manufacturers located outside the U.S., for delivery outside of the United States. In keeping with the position previously advanced in the Empagran litigation, the brief urged the Second Circuit to affirm the dismissal of the complaint for lack of jurisdiction. Shortly after the brief was filed, the parties withdrew the appeal.

4.2 **Regulatory Policies**

4.2.1 *Joint FTC-DOJ Activities: Federal and State Regulatory Matters*

73. The Department and FTC filed joint comments in FY 2006 with authorities in the state of Michigan in opposition to legislative proposals that would restrict the ability of local real estate professionals to offer consumers a variety of options regarding customized real estate services. Full-service brokers charge consumers a single price for a bundle of individual real estate services. In contrast, limited-service brokers offer consumers the option to pick and choose from a menu of different real estate services according to each respective consumer's individual needs. The proposal in Michigan would amend existing law to require a state-mandated minimum service package. Consumers would end up with fewer choices and prices for traditional full-service packages would likely increase without competition from the limited, fee-for-service brokers.

74. In June 2006, the FTC and DOJ jointly filed comments with a committee in the New York State Assembly opposing proposed legislation to expand the scope of activities constituting the unauthorized practice of law. At present, parties to a real estate transaction in New York routinely rely on non-attorneys to conduct title abstracting and to prepare basic transactional documents. The proposed legislation would define all such work as the practice of law and by definition exclude non-attorneys from nearly all aspects of real estate transactions. The agencies believe that non-attorneys should be permitted to compete with attorneys in such matters, "except where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers."

4.2.2 *FTC Staff Activities: Federal and State Regulatory Matters*

75. In FY2006, FTC staff offered testimony to Congress on a number of issues, including pharmaceutical competition, gasoline price manipulation, and the real estate brokerage industry. The Chairman and senior staff also gave testimony to the Antitrust Modernization Commission on statutory immunities and exemptions, and international antitrust. FTC staff also filed numerous comments with state legislatures, as described below.

76. In March and April 2006, Commission staff filed comments in support of legislation in Florida and Ohio that would allow direct shipment of wine from out-of-state manufacturers to consumers in those states, provided that certain requirements were met. The proposed legislation was designed to bring Florida and Ohio law into compliance with the recent Supreme Court decision in *Granholm v. Heald*, which held (relying on the FTC's 2003 Wine Report) that states may not discriminate against out-of-state, and in favor of in-state, wineries. Staff concluded that, if enacted, the proposed legislation would benefit consumers by providing greater wine selection and lower prices, while also allowing each state to meet its other public policy goals, such as preventing underage access to alcohol and collecting taxes.

77. In May 2006, the Commission submitted comments to the U.S. Patent and Trademark Office (PTO) in response to the PTO's statement of proposed rulemaking regarding its proposed rules on continuations, whereby patent applicants may amend their claims or present additional arguments and evidence supporting patentability. The Commission supported the PTO's proposed rules and urged their adoption, as they accommodate the legitimate uses of continuations, limit abuses that can harm the competitive process, and promote the patent system's ability to provide incentives to innovate to the extent they reduce the pendency of patent applications.

78. FTC staff also provided comments in May 2006 on proposed Louisiana state legislation that would bar non-licensed auctioneers (trading assistants) from selling goods through online auction houses (e.g., eBay). The comments noted that the use of trading assistants lowers the price for consumers to use

online auction houses and that staff had found no evidence of consumer harm from the use of such trading assistants.

79. Also in May 2006, FTC staff filed comments with the Texas Bar Association's Professional Ethics Committee concerning the Committee's opinion that held Texas attorneys' participation in online legal matching services to be unethical. The FTC comments provided analysis of the opinion's likely effects on consumers, and concluded that such a restriction likely would harm Texas consumers by increasing the costs associated with finding legal representation and, ultimately, the price for legal services. Following the FTC staff advocacy, in July 2006 the Texas State Bar adopted an opinion that allows attorneys to participate in on-line legal matching services.

4.2.3 *DOJ Activities: Federal and State Regulatory Matters*

80. The Department filed comments in FY 2006 with a real estate commission (New Mexico) and with realtor associations (Ohio, and Virginia) in support of proposals that would preserve the ability of local real estate professionals to offer customized real estate services. The proposals would maintain the right of consumers to pick and choose from a menu of different real estate services according to each respective consumer's individual needs. In the case of New Mexico, the DOJ also urged the real estate commission not to adopt rules that would allow traditional brokers to block competition from Internet-based competitors.

81. In FY 2006 the Department filed three sets of *ex parte* comments with the Federal Communications Commission (FCC). The DOJ filed comments on May 10, 2006 supporting FCC efforts to implement statutory directives mandating that the local franchising process does not unreasonably interfere with the introduction of additional competition in video distribution and broadband. The DOJ recommended that the FCC adopt rules and other guidance that would (a) establish standard, enforceable time frames for acting on franchise applications, (b) establish objective criteria for determining what, if any, "concessions" localities may appropriately demand, and (c) clarify that service areas proposed by new entrants should be approved unless there is credible evidence that the proposed service areas are intended to discriminate against low-income residents in violation of the statute. By establishing nationwide rules, guidelines, or best practices on what constitutes an "unreasonable" refusal to grant a competitive franchise, the FCC could reduce barriers to entry by quickly resolving some of the outstanding issues facing local franchising authorities and new competitors, and would provide more uniformity in process and substance, which will ease entry particularly for firms seeking to provide service in areas that span multiple franchising authorities.

82. In March 17, 2006 comments, the DOJ shared its experience from wireless merger investigations on assessing the competitive role and independence of certain entities, to assist the FCC in implementing proposals intended to benefit the participation of small businesses in auctions and the provision of wireless services. In March 3, 2006 comments, the DOJ supported the FCC's proposal to make public only leading bid amounts and not bidders' identities, so as to reduce opportunities for tacit collusion among bidders in certain auctions for spectrum licenses. The DOJ agreed that revealing bidder identity can encourage tacit agreements among bidders not to bid against each other for certain licenses in an auction, noting that analyses of previous FCC auctions in the economic literature suggest that the availability of bidder identity can create an opportunity for tacit collusion.

4.3 *DOJ and FTC Trade Policy Activities*

83. Both the Division and the FTC are involved extensively in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Division participates in interagency trade policy discussions

chaired by the Office of the U.S. Trade Representative and actively follows various WTO negotiations. The Division provides antitrust and other legal advice to U.S. trade agencies, and has been involved in certain NAFTA Chapter 11 arbitrations relevant to competition issues. The Division also works with other Justice components (including the Civil, Criminal, and Environment and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole.

84. Both the FTC and DOJ participate in bilateral and multilateral discussions and projects to improve cooperation in the enforcement of competition laws. The Division and the FTC participate in a number of negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative and other U.S. agencies in competition policy discussions associated with Asia-Pacific Economic Cooperation (APEC), and chaired or co-chaired the negotiating teams for the competition chapters of the proposed U.S.-Korea and U.S.-Malaysia free trade agreements.

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

86. The FTC and the Division have been engaged in on-going discussions with the relevant Chinese government agencies and legislative committees responsible for drafting China's first comprehensive competition law. In these discussions the agencies have shared U.S. antitrust experiences and have provided advice to help ensure that the Antimonopoly Law will be based on sound economic principles and will reflect international best practices.

4.4 Technical Assistance

87. In 2006, the FTC and DOJ continued to provide technical assistance on competition law and policy matters to newer competition agencies, with active USAID-funded programs to the Association of South East Asian Nations (ASEAN) members, and in Azerbaijan, Egypt, Guatemala, India, Mexico, Nicaragua, South Africa, and Russia. In addition, during 2006 the FTC and/or the DOJ provided commentary on non-OECD countries' proposed laws and regulations, hosted visits and study missions by officials of younger agencies (*inter alia*, Barbados, Brazil, El Salvador, Jamaica, South Africa, Trinidad and Tobago), sent officials and staff to participate in seminars and conferences hosted by young agencies (*e.g.*, Czech Republic, Mexico, Turkey), and engaged in other assistance efforts to young agencies, such as providing advice on cases and issues by e-mail, phone, and videoconferences. For the FTC, these activities included 31 missions to 17 countries, involving 34 different FTC staff experts. In addition, a resident advisor was maintained in Jakarta, Indonesia, to assist the member states of ASEAN. DOJ's technical assistance activities included 24 missions to 15 countries, involving 30 DOJ staff experts.

5. New Studies related to antitrust policy

5.1 Joint FTC - DOJ Activities

88. Prompted by the substantial changes taking place in the real estate industry, as well as by consumers' interest in a competitive real estate marketplace, the FTC and DOJ co-hosted a public workshop in October 2005. The workshop provided an opportunity for stakeholders to discuss issues facing the industry, including, *inter alia*, the effect of various state regulations and private actions on emerging, non-traditional business models, such as Internet sales; the use of the Internet as an efficiency-

enhancing tool; and empirical evidence on the state of competition in the real estate industry. In attendance were representatives from several real estate trade associations, real estate commissions from across the United States and Canada, and several different types of brokerage firms, including traditional, discount, and fee-for-service brokerage firms. In May 2007, the agencies issued a joint report, "Competition in the Real Estate Brokerage Industry," available at <http://www.ftc.gov/reports/realestate/V050015.pdf>.

5.2 *Antitrust Division Economic Analysis Group Discussion Papers*

89. The Economic Analysis Group issued the following papers during FY 2006. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.gov). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail (janie.ingalls@usdoj.gov).

Ken Heyer, Predicting the Competitive Effects of Mergers by Listening to Customers, EAG 06-11, September 2006. Forthcoming in 74 *Antitrust Law Journal*, (2007).

Alexander Raskovich, Ordered Bargaining, EAG 06-10, September 2006. Forthcoming in *International Journal of Industrial Organization* 2007.

Eric Emch and T. Scott Thompson, Market Definition and Market Power in Payment Card Networks, EAG 06-9, March 2006. Published in 5 *The Review of Network Economics* 45 (2006).

Ken Heyer, Welfare Standards and Merger Analysis: Why not the best?, EAG 06-8, March 2006. Published in 2 *Competition Policy International* 2006.

Sheldon Kimmel, How and Why the *Per se* Rule Against price-Fixing Went Wrong, EAG 06-7, March 2006. Forthcoming in 16 *Supreme Court Economic Review*, 2008.

Maria Coppola Tineo, Russell Pittman, Abuse of Dominance Enforcement under Latin American Competition Laws, EAG 06-6, February 2006. Forthcoming in Philip Marsden, ed., *Trans-Atlantic Antitrust Research Handbook*.

Dean V. Williamson, Céline Jullien, Lynne Kiesling, Carine Staropoli, Investment Incentives and Market Power: An Experimental Analysis, EAG 06-5, January 2006.

Dean V. Williamson, Organization, Control and the Single Entity Defense in Antitrust, EAG 06-4, January 2006.

Tor Winston, Innovation and *Ex Ante* Consideration of Licensing Terms in Standard Setting, EAG 06- 3, March 2006.

William W. Nye, What is the Effect of U.S. Antidumping Duties on Imports? Some Evidence from the Sunset Review Process, EAG 06-2, February 2006.

Alexander Raskovich, Competition or Collusion? Negotiating Discounts Off Posted Prices, EAG 06-1, February 2006. Forthcoming in *International Journal of Industrial Organization*, 2007.

Russell Pittman, Make, Buy, or Some of Both? The Case of Russian Railways, EAG 05-11, October 2005.

Jeremy A. Verlinda, The Effect of Market Structure on the Empirical Distribution of Airline Fares, EAG 05-10, October 2005.

Rene Kamita, Analyzing the Impact of Antitrust Immunity: Price Effects Following the Aloha- Hawaiian Antitrust Immunity Agreement, EAG 05-9, October 2005.

Russell Pittman, Restructuring the Russian Electricity Sector: Re-Creating California?, EAG 05-8, October 2005. Forthcoming in *Energy Policy*, 2007.

Charles Romeo, Russell Pittman and Norman Familant, The Effect of Editorial Competition on Newspaper Circulation, EAG 05-7, October 2005.

Cory S. Capps, The Quality Effects of Hospital Mergers, EAG 05-6, October 2005.

5.3 Commission Studies and Reports, and Economic Working Papers

5.3.1 Commission Studies and Reports

90. In May 2006, the Commission released the findings of a Congressionally-mandated investigation of whether gasoline prices nationwide were “artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices,” as well as into gasoline pricing in the aftermath of Hurricane Katrina. In its investigation, the Commission examined evidence relating to a broad range of possible forms of manipulation and found no instances of illegal market manipulation that led to higher prices during the relevant time periods. While the Commission did find 15 examples of pricing fitting the relevant legislation’s definition of “price gouging,” it concluded that the other factors—such as regional or local market trends—appeared to explain the increased prices. (Report available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>)

91. In October 2006, the Commission published a September 2006 staff report, “*Municipal Provision of Wireless Internet*,” which provided a decision-tree framework to policymakers considering whether and how municipalities should provide Internet service. The report identifies the potential risks and benefits to competition and consumers associated with municipal provision of wireless Internet service. The report was the first publicly released work from the FTC’s Internet Access Task Force, which was convened by the Chairman in August 2006. (Report available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>)

5.3.2 Economic Working Papers

92. The following FTC Bureau of Economics Working Papers may be obtained at <http://www.ftc.gov/be/econwork.htm>.

James C. Cooper, Prices and Price Dispersion in Online and Offline Markets for Contact Lenses, April 2006, revised November 2006.

Daniel E. Gaynor, Technological Tying, August 2006.

Kenneth H. Kelly and Morris E. Morkre, One Lump or Two: Unitary Versus Bifurcated Measures of Injury at the USITC, March 2006 (Published in *Economic Inquiry*).

Joel Schrag, The Value of a Second Bite at the Apple: The Effect of Patent Dispute Settlements on Entry and Consumer Welfare, January 2006.

Loren Smith, Dynamics and Equilibrium in a Structural Model of Commercial Aircraft Ownership,
December 2005.

APPENDICES

**Department of Justice:
Fiscal Year 2006 FTE and Actual Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	267	\$50,382
Civil Enforcement	496	\$93,567
Total	763	\$143,949

**Federal Trade Commission: Fiscal Year 2006 Competition
Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	457.3	\$86,074
<i>Bureau of Competition</i>	252.8	34,482
<i>Bureau of Economics</i>	69.8	9,477
<i>Regional Offices</i>	24.0	3,338
<i>Mission Support</i>	110.7	38,777
Premerger Notification	30.2	3,886
<i>Bureau of Competition</i>	29.0	3,674
<i>Bureau of Economics</i>	0.4	53
<i>Regional Offices</i>	0.8	109
Merger & Joint Venture Enforcement	153.7	20,871
<i>Bureau of Competition</i>	103.7	14,122
<i>Bureau of Economics</i>	39.1	5,264
<i>Regional Offices</i>	10.9	1,484
Merger & Joint Venture Compliance	6.0	765
<i>Bureau of Competition</i>	--	--
<i>Bureau of Economics</i>	--	--
<i>Regional Offices</i>	--	--

	FTE	Amount (\$ in thousands)
Nonmerger Enforcement	118.8	16,080
<i>Bureau of Competition</i>	88.8	12,011
<i>Bureau of Economics</i>	18.6	2,502
<i>Regional Offices</i>	11.4	1,568