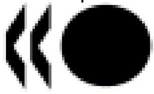

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- From 1 October 1999 to 30 September 2000 --

This report is submitted by the Delegation of the United States to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting to be held on 31 May-1 June 2001.

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UNITED STATES

(From 1 October 1999 to 30 September 2000)

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(October 1, 1999 through September 30, 2000)

Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, l999, through September 30, 2000 ("FY2000"). 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. Assistant Attorney General Joel I. Klein resigned from the Antitrust Division at the end of September 2000. A. Douglas Melamed became Acting Assistant General at that time. On July 3, 2000, the DOJ announced the appointment of Joseph V. Farrell as Deputy Assistant Attorney General for economic analysis.

I. Changes in law or policies

A. Changes in Antitrust Rules, Policies, or Guidelines

3. The FTC and the DOJ announced parallel improvements to merger review procedures relating to "second requests" for information or documents in the merger review process. The improvements, many of which clarified or enhanced existing practices, are designed to make the process for obtaining information in a merger investigation more efficient, to the benefit of both the agencies and merging parties. The improvements include: centralized high-level review of second requests prior to issuance; early conferences with the merging parties to identify competitive issues; quick turn-around of requests for modifications of a second request; new procedures for appealing second request issues; specialized staff training on second request investigations; and ongoing consultation with the industry and the private bar to identify further means of easing merger review.

4. The Antitrust Guidelines for Collaborations Among Competitors, drafted by the FTC and the Antitrust Division, became effective on April 7, 2000.[1] The Guidelines are designed to enable businesses and their counsel to evaluate proposed joint ventures and certain other horizontal arrangements with greater understanding of possible antitrust implications.

5. The Premerger Notification Office of the FTC, with the concurrence of the Antitrust Division, issued a Formal Interpretation under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the recent Gramm-Leach-Bliley Act concerning certain "mixed" transactions in which some portions are

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[1] The text of the guidelines can be found at http://www.ftc.gov/os/2000/04/index.htm#7.

subject to competitive review by a bank regulatory agency and other non-bank portions may be subject to review by the antitrust agencies.[2]

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

6. On February 28, 2000, the International Competition Policy Advisory Committee (ICPAC) delivered its report and recommendations to the Attorney General.[3] The report sets forth recommendations designed to improve multi-jurisdictional merger review; to enhance cooperation between governments and private industry in addressing restraints that impede open access to markets; and to establish a global initiative to improve transparency and understanding regarding antitrust enforcement, thereby promoting global competition and consumer welfare.

7. With respect to multi-jurisdictional merger review, the ICPAC report recommends taking several short and medium-term steps to increase compatibility among merger enforcement regimes (*i.e.*, convergence). These steps are designed to minimize the potential for divergent decisions by enforcement agencies on the legality of a transaction, incompatible remedies, and international friction. In addition, the report identifies specific enforcement practices that might be improved and suggests targeted reforms. A major focus is on ensuring that each enforcement agency concentrates only on those mergers that raise competition concerns within its territory. The proposed reforms are also designed to ensure that each regime refrains from imposing unnecessary burdens during the course of the merger review process while at the same time maintains the tools necessary to identify and remedy anticompetitive transactions.

8. With respect to enforcement cooperation and anti-cartel enforcement, the report recommends that the United States continue to aggressively prosecute international cartels, use transparent standards that encourage cartel participants to report illegal activity and cooperate with enforcers, and impose serious penalties on cartel participants. The report calls on the U.S. antitrust authorities to continue to pursue cooperative relations with other competition authorities on practical aspects of enforcement.

9. With respect to the intersection of trade and competition policy, the ICPAC report offers a multi-pronged approach for addressing anticompetitive business practices by private firms that block access to foreign markets as well as government-initiated or encouraged measures that impede competition. It recommends further development of bilateral agreements with positive comity provisions as well as the use of extraterritorial enforcement tools where necessary. Further, the report urges the formulation and adoption of new multilateral approaches. Noting that "all competition problems are not trade problems, and hence not all competitive problems that are *global* will find a natural home in the WTO," ICPAC concludes that the WTO "should not develop new competition rules under its umbrella." Rather, the report proposes a new Global Competition Initiative for addressing the global competition agenda.

10. DOJ officials testified on several occasions before Congressional Committees considering legislation related to antitrust issues. DOJ testimony in FY2000 included:

- support for a bill to remove the antitrust exemption for ocean carriers;
- support for a proposed increase in the reporting thresholds and change in the filing fee structure for mergers reviewed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, revising the filing fee threshold structure to account for inflation and economic growth since the Act was enacted in 1976.

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[2] The text of the interpretation is available at http://www.ftc.gov/os/2000/04/hsrformalinterp17_.htm.

[3] The text of the report is available at http://www.usdoj.gov/atr/icpac/icpac.htm.

11. FTC Chairman Robert Pitofsky testified before the Senate Committee on the Judiciary that the antitrust laws do not pose potential obstacles to self-regulatory ratings systems by the entertainment industry designed to guard against the targeted marketing to children of violent entertainment products, and that an exemption from the antitrust laws is unnecessary for the industry. In its report, "Marketing Violent Entertainment Material To Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries," released on September 11, 2000, the Commission found that self-regulation by the entertainment industry fulfills an important role in shielding children from material more appropriate for mature audiences.

12. Chairman Pitofsky testified before the House of Representatives' Commerce Committee regarding gasoline price increases in the Midwestern United States. The Commission subsequently issued an interim report to Congress on its investigation, discussing several factors cited as potential causes of the price rises, but concluding that no single factor appeared likely to provide a full explanation. The investigation into the possibility of collusion or tacit coordination is continuing.

C. International Antitrust Cooperation Developments

13. Assistant Attorney General Joel Klein, in a September 14, 2000, speech at the Tenth Anniversary Conference on EC Merger Control, endorsed ICPAC's recommendation to create a new venue for government officials, nongovernmental organizations, and others to consult on matters of competition law and policy. Klein suggested that a joint working group be formed by interested jurisdictions and organizations (including OECD, WTO, UNCTAD, and the World Bank). This working group would first exchange views and then fully explore a Global Competition Initiative, along the lines of the ICPAC report. In addition, Klein suggested that these groups develop a coordinated and expanded commitment to cooperate with, and provide technical assistance to, emerging competition authorities.

14. On July 11, 2000, FTC Chairman Pitofsky, Assistant Attorney General Klein, and Mexico's Secretary of Trade and Industrial Development, Herminio Blanco Mendoza, signed an antitrust cooperation agreement in Mexico City. On October 26, 1999, the two U.S. agency heads and Brazil's Minister of Justice, Jose Carlos Dias, signed a U.S.-Brazil antitrust cooperation agreement in Washington. Both agreements contain provisions relating to antitrust enforcement cooperation and coordination, notification of enforcement actions that may affect the other country, positive comity, conflict avoidance and consultations with respect to enforcement actions, technical cooperation, and confidentiality protection.

15. On October 7, 1999, representatives of the DOJ, FTC, and the Government of Japan signed an antitrust cooperation agreement. The agreement includes provisions for notification of enforcement activities, enforcement cooperation and coordination, conflict avoidance and consultations, positive comity, and confidentiality and use limitations. The U.S.-Japan agreement is similar to existing cooperation agreements between the U.S. agencies and the EU and Canada.

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

16. At the end of FY2000, the Division employed 824 individuals: 351 attorneys, 56 economists, 183 paralegals, and 234 other professional staff. For FY2000, the Division received an appropriation of $110,000,000.

17. During FY2000, the Antitrust Division opened 277 investigations and filed 86 civil and criminal cases in federal district court. The Division was a party to three antitrust cases decided by the federal Courts of Appeals.

18. During FY2000, the Division filed 63 criminal cases in which it charged 40 corporations and 60 individuals. Twenty-six corporate defendants and 43 individuals were assessed fines totaling $308 million and 18 defendants were sentenced to a total of 5,584 days of incarceration. Twenty individuals were sentenced to spend a total of 2,567 days in some form of alternative confinement.

19. During FY2000, 4,926 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”). In addition, the Division screened a total of 1,373 bank mergers. The Division further investigated 177 mergers and challenged 21 of them. An additional 27 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 218 civil investigations, (merger and non-merger), and issued 951 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY2000, the Division responded to nine requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

20. At the end of FY2000, the FTC's Bureau of Competition had 251 employees: 159 attorneys, 39 other professionals, 24 honors paralegals and 29 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities. In FY 2000, $25,486,200 was allocated to the Commission’s competition mission.

21. During FY2000, the Commission brought 47 enforcement actions. Based on its review of premerger notification filings, the Commission staff opened 210 initial phase investigations and issued requests for additional information (“second requests”) in 43 transactions. The Commission challenged 32 transactions. Five preliminary injunctions were authorized. Four of those transactions were ultimately abandoned; one produced a consent order. Nine transactions were abandoned after the issuance of the second requests. In 18 transactions the Commission accepted consent orders; final decisions and orders were issued in 12 of those matters during the fiscal year, while final decisions were pending in 6 cases.

22. In the non-merger area, the Commission brought 15 enforcement actions challenging a variety of anticompetitive conduct, of which 14 were resolved by consent agreements. Of these, 8 were issued as final decisions and orders by the end of FY2000 and 6 were pending.

23. Staff of the Bureau of Competition provided guidance to industry through an advisory opinion letter on whether the purchase of pharmaceuticals by a hospital and affiliated nonprofit institutions might violate antitrust laws.

BA. Antitrust Cases in the Courts

1) United States Supreme Court

24. The United States Supreme Court did not decide any antitrust cases in FY2000. A direct appeal to the Supreme Court in *Microsoft Corporation v. United States* was denied, and the case was remanded to the Court of Appeals. 121 S. Ct. 25 (2000).

2) U.S. Court of Appeals Cases

a. Significant DOJ Cases Decided in FY2000

25. There were three dispositions by the Courts of Appeals in Antitrust Division cases in FY2000, and two dispositions in cases in which the Division had participated as *amicus curiae*. All three Antitrust Division cases were criminal antitrust cases. One criminal case is discussed immediately below, and one of the *amicus* cases, *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, is discussed in Section II. B. 2)(c).

26. In *United States v. Andreas*, 216 F.3d 645 (7th Cir.), *cert. denied*, 121 S. Ct. 573 (2000), the defendants had been convicted, after a jury trial, of violating Section 1 of the Sherman Act, by conspiring with Japanese and Korean producers of lysine to fix worldwide lysine prices and to allocate sales volume of lysine among the conspirators. On appeal, the Court of Appeals addressed a number of issues relating to the conduct of the trial and sentencing, affirming the conviction. It also held that although it is more usual for cartels to allocate customers than to allocate sales volume, this did not preclude finding that the conspirators' agreement to allocate sales volume was *per se* illegal -- that is, illegal without proof of anti-competitive effect in the individual case. The Court held that the agreement to allocate sales volume clearly operated as a restriction on the competitors' output, and accordingly was *per se* illegal under Section 1 of the Sherman Act.

b. Significant FTC Cases Decided in FY2000

27. In *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000), the Ninth Circuit Court of Appeals, on remand from the U.S. Supreme Court, held that the Commission had failed to prove that advertising by members of the Association was anticompetitive. In a statement accompanying the Commission's subsequent order to dismiss the case, three Commissioners disagreed with the Court's assessment of the evidence, and asserted that the Commission's analytical approach to advertising restraints had not been challenged.

28. The Court of Appeals for the Seventh Circuit affirmed and enforced the Commission's order against Toys "R" Us, the nation's largest retailer of toys. The Court found substantial evidence to support the Commission's finding that the company had exercised market power and organized a horizontal agreement among toy manufacturers to limit sales to low-priced warehouse club stores, thereby reducing competition. *Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000).

3) Private Cases Having International Implications

29. In *Virgin Atlantic Airways Limited v. British Airways PLC*, 69 F.Supp.2d 571 (S.D.N.Y. 1999), Virgin alleged that British Airways (BA) had used incentive agreements with travel agents and corporate customers to leverage or achieve monopoly power in the market for air travel to, through and from Heathrow airport, and that the incentive agreements unlawfully restrained trade, in violation of Sections 1 and 2 of the Sherman Act. The district court granted summary judgment for BA, holding that (1) expert testimony relating to "predatory foreclosure" was based on unsubstantiated assumptions relating to extra flights by BA, (2) conclusions with respect to the "bundling" of BA's monopoly and competitive routes in the incentive programs were not based on any evidence of actual consumer choices, and (3) therefore there was no evidence produced with respect to the Section 1 claim of anticompetitive effects from the alleged unlawful restraint.

30. In *Access Telecom, Inc. v. MCI Telecommunications Corporation*, 197 F.3d 694 (5th Cir. 1999), Access Telecom, Inc. (ATI), a Texas corporation, had in 1993 and 1994 sold U.S. phone services to customers in Mexico by providing "reorigination" services. A Mexican customer would call ATI in Texas and enter the phone number it was trying to reach in the U.S.; ATI would dial this number and splice the new call to the incoming call, allowing the customer to benefit from cheaper rates than Mexico's monopoly provider, Telmex, would have charged for the entire call. The Mexican leg of the ATI call was carried on toll-free numbers that ATI received from MCI; MCI in turn leased the lines from Telmex. At some point in 1994, Telmex, through MCI, disconnected ATI's numbers, ending ATI's business; 80 other similarly situated U.S. businesses also collapsed. ATI sued Telmex and MCI, alleging various tort and federal and state antitrust claims. On appeal of the district court's summary judgment dismissing various claims, the Court of Appeals held that ATI's business was not unlawful under Mexican law and that the "U.S. export market for reorigination services was a definite and sizable export market, and the failure of these 80 businesses is clearly an effect on export trade from the United States" sufficient to confer jurisdiction under the Sherman Act. The Court noted that had the sale of such services in Mexico been illegal, there would have been no antitrust injury to support jurisdiction. The Court also reversed the district court's dismissal of the claims against Telmex for lack of personal jurisdiction. Telmex did not have sufficient overall contacts with Texas or with the entire U.S. to support general or Clayton Act personal jurisdiction, but specific jurisdiction over Telmex was appropriate: "Telmex may have avoided doing business in Texas, but it made sufficient contacts with Texas and received sufficient benefits that personal jurisdiction in Texas is proper to answer for the consequences of the actions it allegedly took, directed towards Texas, to protect its business with Texas."

31. In *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), the plaintiff Carpet Group Int'l (CGI) had sought to bypass rug importer/wholesalers by establishing direct links between retailers in the U.S. and foreign rug manufacturers. CGI alleged a broad horizontal conspiracy among the U.S. importer/wholesalers to restrain the domestic rug trade between foreign manufacturers and domestic retailers at CGI's trade shows, and to restrain sales between foreign manufacturers and such retailers on buying trips abroad. The district court dismissed the case on jurisdictional grounds. The Third Circuit reversed. In holding that the defendants' conduct "'involved' import trade or commerce" and was therefore not the type of conduct subject to the jurisdictional limitations of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. §6a, the Court cited the following allegations: "threats not to purchase rugs from any manufacturer that participates in [CGI's] trade shows; threats not to purchase rugs from any manufacturer that sells rugs to any retailer on a buying trip; reducing or ceasing purchases of rugs from manufacturers that participate in [CGI's] trade shows; and inducing the Carpet Export Promotion Council of India, the Export Promotion Board of Pakistan, and the Pakistan Carpet Manufacturers and Exporters Association not to subsidize the participation of manufacturers from those countries in [CGI's] trade shows." The United States participated as *amicus curiae* in support of plaintiff-appellants.

C. Statistics on Private and Government Cases Filed

32. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 877 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in FY2000.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

33. Vitamins: On May 5, 2000, the DOJ announced that two German pharmaceutical manufacturers -- Merck KgaA and Degussa-Huls AG -- and two U.S. pharmaceutical companies -- Nepera Inc. and Reilly Industries -- had agreed to plead guilty and pay criminal fines totaling $33 million for participating in an international conspiracy to suppress and eliminate competition in the vitamin industry. In addition, two former executives of Nepera, U.S. citizens, agreed to plead guilty, pay a fine of $150,000, and to serve prison time for their role in the cartel. On April 6, 2000, the DOJ announced that three former executives of BASF AG and one former executive of F. Hoffmann-La Roche Ltd. (all foreign nationals) had agreed to plead guilty, submit to the jurisdiction of the federal court in Dallas, serve prison sentences ranging from three to four months, and pay fines ranging from $75,000 to $350,000 for their participation in the cartel. Including these cases, the Division has prosecuted 24 cases resulting from its continuing investigation of the worldwide vitamin industry.

34. Flame Retardant and Fumigant Products: An Israeli chemical company, Dead Sea Bromine Company Ltd., pled guilty and paid a $7 million criminal fine for participating in a price-fixing conspiracy to suppress and eliminate competition in connection with the sale of certain flame retardant and fumigant products in the United States. In a one-count criminal case filed in U.S. District Court in Dallas on July 27, 2000, the Department charged the company with conspiring to allocate customers and fix, increase, and maintain the price for certain bromine products in violation of Section 1 of the Sherman Act.

35. Bridge Projects: In August 1999, Jean Pierre Cagnat, the former chief executive officer of Freyssinet International et Cie ("Freyssinet"), a French construction firm, was indicted for conspiring to rig bids for cable-stayed bridge projects from September 1996 until December 1997, in violation of the Sherman Act. The indictment charged that Mr. Cagnat and his co-conspirators met in London, England and agreed to participate in a bid-rotation scheme. They carried out the conspiracy by exchanging price information for upcoming stay-cable system bids, and submitting noncompetitive, rigged bids on the projects. In September 1999, Freyssinet was charged with rigging bids on cable-stayed bridge projects. The company pled guilty and was fined $720,000. In January 2000, Dywidag-Systems International USA Inc., and its president, Adam Allan, a Canadian citizen, pled guilty to fixing prices and allocating market shares for post-tensioning bridge construction projects in California. Allan was fined $30,000. In addition to pleading guilty to the post-tensioning bridge construction project conspiracy, Dwidag-Systems also pled guilty to rigging cable-stayed bridge projects and was fined a total of $1,328,000 for its participation in both schemes. In February 2000, John H. Browning, the former president and CEO of Dywidag-Systems, pled guilty to charges of bid rigging for cable-stayed bridge projects and was fined $25,000. In August 2000, Avar Construction Systems Inc., a United States firm, and its project manager, Rene Friedrich, a Swiss citizen, were charged with fixing prices and allocating market shares for post-tensioning bridge projects in California from December 1994 until August 1996.

36. USAID Construction Contracts in Egypt: American International Contractors Inc. (AICI), pled guilty and was sentenced to a $4.2 million fine for participating in a conspiracy to rig bids for construction

contracts funded by the United States Agency for International Development (USAID) in the Arab Republic of Egypt. In a one-count felony case filed on August 11, 2000, in U.S. District Court in Birmingham, Alabama, AICI was charged with participating in a conspiracy involving bid rigging on certain wastewater treatment facilities construction contracts from June 1988 until at least January 1995, in violation of Section 1 of the Sherman Act. In addition, Philipp Holzmann AG, a Frankfurt, Germany construction company, pled guilty and was sentenced to pay a $30 million fine for its participation in the cartel.

37. Isostatic Graphite: On March 13, 2000, Caribone of America Industries Corp., a Parsippany, New Jersey manufacturer of isostatic graphite, and Michael Coniglio, its President and Chief Executive Officer, agreed to plead guilty to participating in an international cartel to fix the price of non-machined and semi-machined isostatic graphite sold in the United States and elsewhere. The conspiracy began as early as July 1993 and continued until at least February 1998. The company agreed, and was sentenced, to pay a fine of $7.15 million, and Coniglio agreed, and was sentenced, to pay a fine of $100,000.

38. Graphite Electrodes: On November 17, 1999, two Japanese graphite electrodes producers -- SEC Corporation and Nippon Carbon Co. Inc. -- agreed to plead guilty and pay criminal fines totaling $7.3 million for their role in a conspiracy to fix prices and allocate the volume of graphite electrodes sold in the United States and elsewhere. The conspiracy lasted from as early as July 1992 to at least June 1997. The Division also announced on January 19, 2000, that Mitsubishi Corporation of Tokyo, Japan and Georges Schwegler, a former executive of UCAR International, now headquartered in Nashville, Tennessee, were indicted for participating in the international graphite electrodes conspiracy.

39. Food Preservatives: On July 25, 2000, three top executives of Daicel Chemical Industries Ltd., a large Japanese chemical producer, were indicted for participating in an international price-fixing and volume-allocation conspiracy in the food preservatives industry. On the same day, Daicel agreed to plead guilty and pay a criminal fine of $53 million for its role in the conspiracy which involved the market for sorbates and lasted from 1979 to 1996. The indictment charged that, among other activities, the three executives and their co-conspirators attempted to conceal the activities of the conspiracy by avoiding holding meetings in the United States, agreeing to stagger the order and timing of pricing announcements, and agreeing to destroy evidence of conspiracy meetings. Daicel was the fourth company to be charged in the sorbates conspiracy; the total fines imposed in the investigation exceed $120 million.

2) DOJ Civil Non-Merger Enforcement

40. Options Exchanges: On September 11, 2000, the Department filed a civil antitrust action against the four leading options exchanges, charging that they illegally agreed that they would not list equity option classes listed already on one of the other exchanges. At the same time, the Department filed a proposed consent decree to resolve the lawsuit. Additionally, the Securities and Exchange Commission, which cooperated with the Department during its investigation, issued an order requiring important reforms by the options exchanges. Collectively, the consent decree and the order prohibit anticompetitive conduct and restructure the options industry to ensure greater competition in the future. Under the terms of the consent decree, the exchanges are prohibited from entering into, continuing, or reinstating their listing agreement in any form; prohibited from threatening, harassing, or intimidating exchanges or exchange members that seek to multi-list an option class; and prohibited from maintaining rules or policies that prohibit multiple listing. The exchanges are also required to provide reports relating to listing decisions and allegations of harassment or intimidation to the Department and to put antitrust compliance procedures in place.

41. Tomato Seeds: On September 15, 2000, the Department filed a civil antitrust suit against LSL Biotechnologies Inc., Seminis Vegetable Seeds Inc., and their joint venture, LSL PlantScience, to void an agreement that prohibits a competitor, Hazera Quality Seeds Inc., from competing to develop and sell seeds for the production of long-shelf-life tomatoes in North America. The Department said the agreement had reduced competition in the development and sale of tomato seeds. According to the complaint, LSL and Hazera entered into a contract to develop seeds that produce long-shelf-life tomatoes, which enable farmers to grow vine-ripened tomatoes during the winter months and ship them to market before spoiling. The contract expired many years ago except for a provision that prohibits Hazera from developing and selling a competing long-shelf-life tomato seed in North America. Currently, LSL and Seminis together are the dominant sellers of seeds used to grow fresh-market tomatoes in North America during the winter. The Department's lawsuit alleges that Hazera, one of the largest producers of seeds in Europe and the Middle East, is one of only a few companies with the interest and expertise to develop and market new long-shelf-life tomato seeds to North American farmers in competition with the defendants.

42. Microsoft: The DOJ's Complaint and subsequent trial were described in prior years' reports. After finding Microsoft liable for violations of the antitrust laws, the Court requested parties to submit proposals on remedies. In its proposal, the DOJ requested that the court order both conduct restrictions and a structural reorganization that would divide Microsoft into an Operating Systems Business and a separate Applications Business. Microsoft proposed more limited conduct remedies. On May 24, 2000, the Court held a hearing on the relief proposals, and on June 7, the Court entered a final judgment substantially similar to the DOJ's proposal. Microsoft filed a notice of appeal, and the DOJ sought direct appeal to the United States Supreme Court pursuant to a special statute that allows such appeals in antitrust cases brought by the United States. The Supreme Court declined to hear the appeal in the first instance, and instead sent it the Court of Appeals for initial review.

43. Artificial Teeth: In *United States v. Dentsply International, Inc.*, 2000-1 Trade Cas. (CCH) ¶72,919 (D.Del. 2000), the DOJ sued Dentsply alleging violations of federal antitrust laws in the form of exclusive dealing arrangements that effectively deny effective distribution outlets to competing manufacturers, both domestic and foreign, of prefabricated artificial teeth. Prior to trial, the DOJ sought information from Dentsply concerning its market share in Canada, Australia, England, France, and Germany and on whether it had a similar exclusive dealing policy in those countries. Dentsply refused to provide the information, arguing that the relevant market at issue was the U.S. market and that evidence concerning foreign markets was irrelevant and would be overly burdensome to produce. The trial court, noting that "[l]iberal discovery is particularly appropriate in a government antitrust suit because of the important public interest involved," granted the DOJ's motion to compel production of the information. The court ruled that "a comparison between Dentsply's distribution policies in this country and in other markets could be probative of the purpose and significance" of the exclusive dealing policy in the U.S. The DOJ asserted that it had evidence indicating that Dentsply did not impose this policy in other countries and that its market share in those countries was lower than its U.S. share, and that the evidence sought was "probative of the intent and competitive effects" of the policy.

3) Modification or Termination of DOJ Consent Decrees

44. Modification of ASCAP Consent Decree: On September 5, 2000, the Department of Justice and the American Society of Composers Authors and Publishers (ASCAP) agreed to modify the 1941 consent decree that requires ASCAP to provide performance rights licenses to music users upon request and to distribute license fees to its members. The proposed decree would promote increased competition in music licensing, update the procedures for settling license fee disputes, and eliminate certain costly and outdated provisions of the original decree. ASCAP is a performing rights society, headquartered in New York, N.Y., that licenses and collects fees for the use of music written or published by its members. ASCAP

currently licenses approximately 50 percent of all musical performances in the United States. The agreed upon modifications resulted from extensive negotiations between ASCAP and the Division. The Court will conduct a hearing on the proposed modifications on June 11, 2001. The Department has been conducting a broad review of the music performance rights industry, including the ASCAP decree and a similar decree involving Broadcast Music Inc. (BMI). That review is continuing.

45. United States v. Smith International, Inc. and Schlumberger, Ltd.: In July 1999, the DOJ petitioned the U.S. District Court in Washington, D.C. to find Smith International Inc. and Schlumberger Ltd. in criminal and civil contempt for violating a 1994 Final Judgment that settled an antitrust lawsuit filed by the DOJ in connection with a merger between two producers of fluids for drilling oil and gas wells. Smith and Schlumberger had formed a joint venture that violated the terms of the Final Judgment. On December 9, 1999, the Court found both companies guilty of criminal contempt, and ordered each of them to pay a criminal fine of $750,000. The companies also agreed to pay a total of $13.1 million to settle the civil contempt case. This amount represented a full disgorgement of the joint venture's profits from the date of the contemptuous actions until the date of settlement and was the first time the DOJ had obtained full disgorgement in an antitrust contempt action. The case was also the first criminal contempt case in a merger decree in more than 15 years. Civil contempt is a sanction to enforce compliance with an order of the court, and a court may order payment of a daily fee to compel a company to comply with that order. Criminal contempt is a sanction to punish a violation of an order of the court, and a court may impose fines.

4) FTC Non-Merger Enforcement Actions

a. Commission Administrative Decisions[4]

46. The Commission's restraint of trade and monopolization case against Mylan Laboratories was concluded with a record $100 million settlement. Mylan, the nation's second largest generic drug manufacturer, and three other companies were charged with conspiring to obtain monopoly power for Mylan in the U.S. markets for two widely-prescribed anti-anxiety drugs, lorazepam and clorazepate. Pursuant to statutory authority under §13 of the FTC Act, Mylan will pay the money into a fund for distribution to injured consumers and state agencies.[5] *Mylan Laboratories, Inc. et al.,* File No. 981-0145, Civ. No.1: 98CV003114 (D.D.C., filed Dec. 22, 1998).

47. McCormick & Company, the world's largest spice company, agreed to settle Commission charges that it engaged in unlawful price discrimination in the sale of its spice and seasoning products. According to the complaint, McCormick violated the Robinson-Patman Act by charging some retailers a substantially higher net price for its spice and seasoning products than it charged other competing retailers. The FTC alleged that McCormick sold its products at different prices and provided competing retailers discriminatory aggregate discounts off the list prices of its products. These aggregate discounts took a variety of forms, including up-front cash payments similar to slotting allowances, free goods, off-invoice discounts, cash rebates, performance funds, and other financial benefits. The consent order prohibits McCormick from engaging in price discrimination unless the price differences are permitted by defenses recognized by the Act. (C-3939)

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4 Copies of the complaints, consent orders, and related documents can be obtained from the FTC's web site at: *http//www.ftc.gov* utilizing the "search" button on the home page and inserting the respondent's name.

5 On April 27, 2001 the District Court granted preliminary approval to a plan for the distribution of the settlement fund.

48. The Commission accepted consent decrees to settle charges that two drug makers, Abbott Laboratories and Geneva Pharmaceuticals, Inc., entered into an anticompetitive agreement in which Abbott paid Geneva substantial sums to delay bringing to market a generic alternative to Abbott's brand-name hypertension and prostate drug, Hytrin. (C-3945; C-3946) The Commission also charged in an administrative complaint that Hoechst Marion Roussel (now Aventis) engaged in similar practices by agreeing to pay Andrx millions of dollars to delay bringing to market its generic drug that would compete with Hoechst's Cardizem CD, a widely prescribed drug for the treatment of hypertension and angina. (D.09293)

49. The Commission charged the five largest distributors of music CDs with anticompetitive use of "minimum advertised price" (MAP) programs in order to discourage a retail price war that had led to lower CD prices for consumers. The Commission's complaint alleged that all five distributors illegally modified their existing cooperative advertising programs to discourage retailers from charging consumers lower prices for CDs than the distributors' suggested prices, allowing the distributors to raise their own prices. The five distributors agreed to separate consent orders that require them to discontinue their MAP programs for seven years, among other things. Sony Music Entertainment (C-3971); Time Warner, Inc. (C-3972); BMG, a Partnership dba BMG Entertainment (C-3973); Universal Music & Video Distribution Corp. (C-3974); and Capitol Records, Inc. dba EMI Music Distribution (C-3975).

50. Other proposed or final consent orders include: Colegio de Cirujanos Dentistas de Puerto Rico (price-fixing) (C-3953); Nine West Group Inc. (resale price maintenance) (C-3937); Alaska Healthcare Network (price-fixing) (File No. 991 0103).

b. Federal District Court Decisions

51. None

E. Business Reviews Conducted by the Department of Justice

52. In FY2000 the DOJ approved the following proposals by means of business review letters:

- a proposal by the Electric Power Research Institute -- a nonprofit organization committed to providing and disseminating science and technology-based solutions to energy industry problems -- that will allow its members to exchange information that will improve the way electric power industries protect themselves against cyber-threats;

- a proposal by the Apparel Industry Partnership that would allow the group to establish a voluntary Workplace Code of Conduct and associated Monitoring Principles regarding "sweatshop" working conditions in apparel and footwear manufacturing;

- a proposal to create and operate a joint sales and purchasing venture by five regional manufacturers of steel drums;

- a series of ten proposals by individual fishing cooperatives that would allow their members to allocate among themselves the amount of fish, specifically Alaskan ollock, awarded to them as a group as their share of an annual harvest quota administered by the federal government; and

- a proposal by a behavioral health care providers network -- Midwest Behavioral Healthcare

LLC -- to offer multiple behavioral health care specialities in North Dakota and Northwestern Minnesota.

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

A. Enforcement of Premerger Notification Rules

53. No cases were filed during FY2000 involving enforcement of the pre-merger notification rules.

B. Significant Merger Cases

1) DOJ Merger Challenges or Cases

54. Case/New Holland: On November 4, 1999, the Department announced that New Holland and Case Corp. had agreed to sell New Holland's four-wheel-drive and large two-wheel-drive tractor businesses and Case's interest in its hay tool business, in order to eliminate antitrust concerns involving New Holland's proposed $4.3 billion acquisition of Case Corporation. Without the divestitures, the merger would likely result in higher prices for this farm machinery. The consent decree requires that the purchaser of the divested assets continue to operate them in the manufacture and distribution of four-wheel-drive tractors, large two-wheel-drive tractors, and hay tools. New Holland and Case compete directly in the manufacture and distribution of large two-wheel-drive and four-wheel-drive agricultural tractors in North America. They also compete directly in the manufacture and sale of a variety of hay tools. According to the Department's complaint, the acquisition would likely have harmed competition in the approximately $1.5 billion market for agricultural tractors and in the $250 million hay tools markets.

55. Alcoa/Reynolds: On May 3, 2000 the Department announced that Alcoa Inc. and Reynolds Metals Company -- two of the world's largest aluminum companies -- had agreed to sell a Reynolds refinery in Corpus Christi, Texas, and Reynolds' controlling interest in a high volume, state-of-the-art, refinery in Australia, to resolve the Department's antitrust concerns involving their proposed $5 billion merger. The required divestitures involve refineries that produce alumina, a powder used in aluminum and other products. According to the Department's complaint, the proposed acquisition would have substantially lessened competition in the refining and sale of smelter grade alumina (SGA) and chemical grade alumina (CGA). The acquisition of Reynolds by Alcoa, as originally proposed, would have resulted in higher prices to aluminum manufacturers and their customers, as well as to consumers who purchase products containing alumina. Without the proposed divestitures, Alcoa, as a result of the acquisition of Reynolds, would have owned or controlled approximately 38 percent of the world SGA market. In CGA, Alcoa would have held approximately 59 percent of the North American market. In both markets, the merger would have increased concentration significantly. The Department cooperated closely with the European Commission in its review of this case.

56. AlliedSignal/Honeywell: The Department announced on November 8, 1999, that AlliedSignal and Honeywell had agreed to divest significant portions of their avionics businesses in order to resolve competitive concerns involving their proposed $16 billion merger. AlliedSignal and Honeywell are major providers of avionics and other advanced technology products to a broad range of commercial, space and U.S. defense customers. The Department said the deal, as originally proposed, would have been anticompetitive, resulting in higher prices and lower quality for these products. According to the complaint, the proposed merger would have substantially lessened competition in four product areas -- traffic alert and collision avoidance systems; search and surveillance weather radar; reaction and

momentum wheels; and inertial systems. In each of the identified product areas, the merger of AlliedSignal and Honeywell would have left at most two or three major competitors. As a result, the Department alleged that those competitors would have been able to coordinate their pricing and more easily raise prices to customers. The Department cooperated closely with the European Commission in its review of this case.

57. Compuware/Viasoft: On October 29, 1999, the Department filed a civil antitrust lawsuit to block Compuware Corporation from acquiring Viasoft. The Department challenged the transaction because it would have reduced competition substantially in the markets for two types of mission-critical software products for mainframe computers. Those software products are testing and debugging software, which is used to check for errors in software development and also to fix and test code corrections in the event of a processing failure, and fault management software, which automates the diagnosis of the causes of processing failures. In its complaint, the Department alleged that Compuware is the world’s dominant producer of both mainframe testing and debugging software and fault management software. It also alleged that Viasoft is Compuware’s closest rival in the market for testing and debugging software and that Viasoft is a recent entrant in the market for fault management software, with a promising product that should enable it to become a significant competitor to Compuware. On January 19, 2000, the companies agreed to terminate their proposed merger.

58. AT&T/MediaOne: The Department announced on May 25, 2000, that AT&T Corp. had agreed to divest its interest in Road Runner, the second largest provider of broadband Internet access, in order to resolve the Department’s antitrust concerns about AT&T Corp.’s proposed merger with MediaOne Group Inc. Broadband Internet access permits users to transmit and receive data at much greater speeds than are possible through “narrowband” access over ordinary telephone lines. In its complaint, the Department alleged that the combination of AT&T’s interests in Excite@Home and MediaOne’s interests in Road Runner would substantially lessen competition in the aggregation, promotion, and distribution of broadband content. Under the terms of the consent decree, AT&T is required to exit the Road Runner joint venture no later than December 31, 2001. The agreement requires AT&T to exit the joint venture prior to that date if other relevant owners of Road Runner agree to an earlier departure. AT&T is permitted to retain Road Runner assets used exclusively to provide cable modem service and broadband service to MediaOne customers.

59. JDS Uniphase/E-Tek: On June 22, 2000, the Department announced that JDS Uniphase Corporation and E-TEK Dynamics Inc. -- two leading manufacturers of components for fiber optic communication networks -- had agreed to sell their rights to purchase a key input to fiber optic components in order to resolve antitrust concerns involving their proposed $15 billion merger. The Department said the deal as originally proposed would have likely resulted in a reduction of supply or increased prices for dense wavelength division multiplexers (DWDMs), used in communication networks. The Department’s lawsuit to block the proposed transaction was accompanied by a consent decree resolving the Department’s competitive concerns. According to the complaint, JDS Uniphase and E-TEK compete to sell DWDMs to telecommunication equipment manufacturers who incorporate the DWDMs into fiber optic systems, and then sell those systems to telecommunications carriers. The proposed transaction would have resulted in the combined company accounting for approximately 70 percent of the world market for DWDMs with 16 or fewer channels. In addition, alternative sources to JDS and E-TEK for DWDMs have been producing at or near their capacity, in significant part because of restrictions in their access to thin film filters. Under the terms of the consent decree, the merged firm must modify certain contractual rights in supply agreements it holds with several thin film filter suppliers.

60. WorldCom/Sprint: On June 27, 2000, the Department sued to block the merger of WorldCom Inc. and Sprint Corporation because the deal would reduce competition in many of the nation’s most important telecommunications services and would result in higher prices for millions of consumers and

businesses. The proposed merger, between two of the three largest U.S. telecommunications companies, is the largest merger challenge by the Department. In the residential long distance telephone markets and several other telecommunications markets, WorldCom and Sprint are the only substantial competitors to AT&T and to each other. Each has constructed national and international fiber optic networks and developed sophisticated systems for handling millions of customer accounts, hired and trained large workforces capable of providing a variety of high-quality telecommunications services to customers throughout the nation, and invested billions of dollars over many years to establish widely known and trusted brands. On July 13, 2000, WorldCom and Sprint announced they were abandoning their merger plans. The Department cooperated closely with the European Commission in its review of this case.

61. Clear Channel/AMFM: On July 20, 2000, the Department announced that Clear Channel Communications Inc. and AMFM Inc. had agreed to sell 99 radio stations in 27 markets nationwide after the Department expressed antitrust concerns about Clear Channel's pending $23.5 billion merger with AMFM. The Department said the merger was the largest radio transaction ever to be reviewed by the Antitrust Division. Clear Channel is one of the largest radio broadcast companies in the United States. Without the divestitures, the Department said the proposed transaction would have led to a loss of head-to-head competition between the two companies, resulting in increased prices for radio advertising in the 27 markets where divestitures are required. The value of the divestitures required by the Department is approximately $3.4 billion. Under the agreement, Clear Channel and AMFM agreed to sell the majority of the radio stations in the divestiture package before proceeding with their merger. On August 29, 2000, the Department filed a complaint and a proposed consent decree to resolve competitive issues by requiring the prompt divestiture of the remaining radio stations. The decree also addressed separate concerns related to outdoor advertising by requiring AMFM to divest its partial ownership stake in Lamar Advertising Company, which competed directly with Clear Channel's outdoor advertising subsidiary.

62. L'Oreal/Carson: L'Oreal USA Inc. and Carson Inc., two suppliers of hair care products, agreed to sell two retail brands of women's hair relaxers in order to resolve antitrust concerns involving L'Oreal's proposed acquisition of Carson. As originally proposed, the $79 million cash tender offer would have resulted in L'Oreal controlling about 50 percent of the retail sales of women's hair relaxer kits and three of the top five selling brands. Hair relaxers are beauty products used to straighten naturally curly hair. On July 31, 2000 the Department filed a complaint and a proposed consent decree resolving the lawsuit. According to the complaint, the proposed acquisition would have substantially lessened competition in the sale of women's hair relaxer kits sold through retail channels in the United States. L'Oreal and Carson compete directly in the production, marketing, and sale of hair relaxer kits, and are two of the nation's three largest producers of these products. The consent decree requires L'Oreal and Carson to divest Carson's *Gentle Treatment* and *Ultra Sheen* brands and certain related assets. The divestiture brands are sold throughout the United States and together account for approximately 14 percent of all women's hair relaxer kits sold through retail channels in the United States.

63. SBC/BellSouth: On August 30, 2000, the Department announced that SBC Communications Inc. and BellSouth Corporation had agreed to sell wireless businesses in 16 markets to resolve the Department's antitrust concerns about the combination of SBC's and BellSouth's domestic wireless assets included in their proposed joint venture. The divestitures would include the major metropolitan areas of Los Angeles, Indianapolis, New Orleans, and Baton Rouge. According to the complaint the SBC/BellSouth joint venture as originally proposed would have significantly increased concentration in 16 markets for wireless mobile telephone services, resulting in a loss of head-to-head competition between the wireless businesses of SBC and BellSouth in those markets. In addition, the Department said the original proposal would have created higher prices, reduced quality and quantity of service, and led to fewer network improvements. Under the terms of the consent decree, SBC and BellSouth are required to divest their interest in one of the two overlapping wireless businesses that they own either in whole or in part in the 16 affected markets, which have populations of more than 20 million.

64. Bell Atlantic/GTE/Vodafone: As noted in paragraph 78 of last year's report, the Department required divestitures of 62 overlapping wireless telephone systems to resolve antitrust concerns about Bell Atlantic Corporation's merger with GTE Corporation. On December 6, 1999, the Department announced that in order to resolve additional antitrust concerns about Bell Atlantic's partnership with Vodaphone AirTouch Plc, it would require Bell Atlantic, Vodafone and GTE to divest 34 additional wireless telephone businesses, for a total of 96. The new divestiture package resolves antitrust concerns about the combination of Bell Atlantic, Vodafone and GTE's domestic wireless assets. The proposed merger of Bell Atlantic and GTE, and the partnership between Bell Atlantic and Vodafone, will lead to the creation of a coast-to-coast wireless network. The proposed consent decree ensures that the creation of this national network does not increase concentration in any geographic market. The Department said the original proposal between Bell Atlantic and Vodafone, as well as Bell Atlantic and GTE, would have led to a loss of head-to-head competition in wireless mobile telephone services in 96 markets. The decree calls for divestitures in these 96 markets in 15 states, likely making this the largest divestiture package ever required by the Antitrust Division in a consent decree.

65. Franklin Electric/United Dominion Industries: On May 31, 2000, the Department filed a civil antitrust lawsuit to block a proposed joint venture between Franklin Electric Co. and United Dominion Industries Inc. because the transaction would eliminate competition and create a monopoly in the production and sale of submersible turbine pumps (STPs) used in the United States. STPs are pumping mechanisms used at gasoline service stations to transfer gasoline from underground storage tanks to above-ground island dispensers. Over 90 percent of gasoline service stations in the United States use STPs to pump gasoline. Franklin Electric and United Dominion are the only two producers of STPs used at gasoline service stations in the United States. United Dominion has approximately a 60 percent market share and sells STPs under the brand name "Red Jacket" through its subsidiary The Marley Company. Franklin Electric sells STPs under the brand name "FE Petro" through its subsidiary FE Petro, and has approximately a 40 percent market share. According to the complaint, United Dominion's Red Jacket was the dominant STP sold in the United States until Franklin Electric Petro introduced new technology and began to take a significant market share from Red Jacket in the 1990's. The joint venture would eliminate the head-to-head competition that currently exists between the two companies. Further, the joint venture would combine the assets of FE Petro and Marley into a joint entity 75 percent owned by Franklin Electric and 25 percent owned by United Dominion. On August 30, 2000, after a trial on the merits, the Court entered an injunction prohibiting the parties from proceeding with their joint venture.

2) FTC Merger Challenges or Cases

a. Preliminary Injunctions Authorized

66. Swedish Match/National Tobacco: In *FTC v. Swedish Match North America Inc.*, Civ. No. 00-1501 (D.D.C.), the Commission sought a preliminary injunction to halt the acquisition of the loose leaf chewing tobacco business of National Tobacco Company, L.P., by Swedish Match. The complaint charged that the transaction would combine the largest and third-largest producers and create a firm with approximately 60% of a market where two firms would control 90% of sales. In hearings before the district court a primary focus was whether moist snuff and loose leaf chewing tobacco are in the same product market.[6]

[6] On December 14, 2000 the district court issued a preliminary injunction against the merger, finding that the two products do not constrain each other's prices. The parties subsequently abandoned the transaction.

67. BP Amoco/Arco: In *FTC v. BP Amoco*, PLC, Civ. No. 00-416 (N.D. Cal.), the Commission sought a preliminary injunction to block a transaction that would create the third-largest private petroleum company in the world and the largest U.S. oil producer and refiner. In its complaint, the Commission alleged three separate relevant markets: (1) the production, sale, and delivery of crude oil to West Coast refineries; (2) bidding for rights to explore the Alaska North Slope; and (3) pipeline and oil storage services in Cushing, Oklahoma. The Commission alleged that the effects of the merger would be to eliminate ARCO as an effective competitor, eliminate substantial actual competition between BP and ARCO, eliminate the likelihood of even greater competition between BP and ARCO in the future, and increase the market power that BP exercises in the sale of crude oil to targeted West Coast refiners. After the proposed merger, BP would control over 40 percent of the pipeline and storage capacity serving Cushing. The court case was adjourned by agreement of the parties and a final consent order was entered on August 29, 2000. BP Amoco was required to divest to Phillips Petroleum Company ARCO's complete, free-standing businesses, including oil and gas interests, tankers, pipeline interests, real estate exploration data and selected long-term supply agreements. To address the competitive concerns involving pipeline and oil storage services in Cushing, Oklahoma, the order required that BP Amoco divest ARCO's crude oil terminal facilities in Cushing and Midland, Texas, as well as other pipeline holdings. (C-3938)

68. Kroger/Winn-Dixie: In *FTC v. The Kroger Company*, No.3-00CV1196-R (N.D. Tex.), the Commission sought a preliminary injunction to block the Kroger Company's proposed acquisition of 74 Winn-Dixie supermarkets in Texas and Oklahoma. About half of the stores are in metropolitan Fort Worth, where Winn-Dixie and Kroger are the second- and third-largest supermarket chains, respectively. According to the Commission complaint, the combined Kroger/Winn-Dixie presence in Fort Worth would account for 33 percent of all supermarket sales within the market, leading to the likelihood of competitive harm to consumers. Although Forth Worth and Dallas are in an area known as Metroplex, the Commission alleged that metropolitan Fort Worth is geographically distinct from Dallas for supermarket customers. The parties withdrew the transaction shortly after the case was filed.

69. Conso/McCall Pattern: In *FTC v. Conso International Corporation*, No. 00 CIV 5786 (S.D.N.Y.), the Commission sought a preliminary injunction to block the proposed acquisition of McCall Pattern Company by Conso International Corp. (Conso), alleging that the transaction would reduce competition in the U.S. market for home sewing patterns. Conso is the largest sewing pattern company in the United States. The acquisition would reduce the number of significant U.S. sewing pattern designers and producers from three to two, and would result in the combined firm controlling more than three-quarters of the U.S. sales of domestic home sewing patterns. The transaction was withdrawn shortly after the case was filed.

70. Heinz/ Beech-Nut: In *FTC v. Heinz Company*, No.1:00 CV 01688 (D.D.C.), the Commission sought a preliminary injunction to block H.J. Heinz Company's (Heinz) proposed acquisition of Milnot Holding Company, owner of Beech-Nut Nutrition Corporation (Beech-Nut), from Madison Dearborn Capital Partners, L.P., alleging that the transaction would reduce the number of competitors in the baby food market from three to two. Heinz and Beech-Nut are the nation's second and third-largest producers of prepared baby food. Gerber, the industry leader, currently has approximately 65% of the baby food market, and after the transaction two firms would control 98 percent of the market. The Commission alleged that entry barriers are high, and that there has not been any significant entry in the market for over 60 years. The case was tried in September 2000.[7]

7 The Commission's motion for a preliminary injunction was denied by the district court in October 2000, as was its motion for an injunction pending appeal. The court of appeals granted an injunction pending appeal in November 2000 and on April 27, 2001, reversed the lower court and ordered that a preliminary injunction be issued. The parties then abandoned the transaction.

b. Commission Administrative Decisions[8]

71. The merger of SmithKline Beecham plc and Glaxo Wellcome plc created the world's largest research-based pharmaceutical company with an estimated market capitalization of $182 billion and annual sales of $26 billion. The Commission's investigation led to competitive concerns in nine product markets; the parties agreed to a consent order that required divestitures in six product markets: 1) antiemetics (drugs used in chemotherapy to reduce the incidence of side effects); 2) the antibiotic ceftazidime; 3) oral and intravenous antiviral drugs for the treatment of herpes, chicken pox and shingles; 4) topical antiviral drugs for the treatment of cold sores; 5) prophylactic vaccines for the treatment of genital herpes; and 6) over-the-counter H-2 blocker acid relief products. In three markets where competitive overlaps exist due to existing agreements with other research and development firms, the consent order addresses: 1) topoisomerase I inhibitor drugs used to treat certain solid tumors; 2) drugs for treating migraines; and 3) drugs to treat irritable bowel syndrome. (C-3990)

72. The Philip Morris Companies and the Nabisco Holdings Corporation accepted a consent order that would allow them to combine their food businesses to create the world's largest company in that sector. The Commission identified five markets in which the combination would have an anticompetitive effect and required divestitures of dry-mix gelatin desserts, dry-mix puddings, dry-mix no-bake deserts, baking powder and "intense" mints. (C-3987)

73. The Commission alleged that the merger of Pfizer Inc. with Warner-Lambert Company would have anticompetitive effects in four overlap markets. The companies signed a consent order that required divestitures in markets for: 1) selective serotonin reuptake inhibitor/selective norepinephrine reuptake inhibitors (SSRI/SNRI), the leading class of antidepressants; 2) treatments known as pediculicides for head lice infestation; 3) drugs for treating Alzheimer's disease, for which, absent the Commission's order, the merger would have created a monopoly; and 4) EGFr-tk inhibitors being developed for the treatment of solid tumor cancers. (C-3957)

IV. Regulatory and trade policy matters

A. Regulatory Policies

1) DOJ Activities: Federal and State Regulatory Matters

74. On April 5, 2000, the DOJ filed comments with the Securities and Exchange Commission (SEC) supporting the SEC's efforts to establish an inter-market linkage plan for multiply-traded options.

75. On March 6, 2000, the DOJ filed comments with the Surface Transportation Board supporting a shipper's petition to reopen an earlier proceeding that had approved the merger that created the Burlington Northern Santa Fe Railroad, on the grounds that a condition of that merger intended to preserve competition in Southeast Iowa had proven ineffective as a result of unforeseen intervening events.

76. In FY2000, the DOJ filed comments with the Federal Communications Commission (FCC) in "Section 271" proceedings involving the FCC's determination of whether local telecommunications markets were fully and irreversibly open to competition, a condition that must be met before a Regional

[8] Copies of the complaints, consent orders, and related documents can be obtained from the FTC's web site at: *http//www.ftc.gov* utilizing the "search" button on the home page and inserting the respondent's name.

Bell Operating Company is permitted to offer long-distance service in its own area. The DOJ's comments involved proceedings involving New York, Texas, Kansas, Massachusetts, and Oklahoma.

77. On November 10, 1999, the DOJ filed comments with the Securities and Exchange Commission regarding a proposed rule that would set the fees for new participants to the Options Price Reporting Authority, through which option exchanges disseminate option quote and trade information to the public.

78. On March 30, 2000, the Division filed an amicus brief with the Drug Enforcement Administration (DEA) concerning the application of Johnson Matthey, Inc. to become an importer of raw opium and concentrate of poppy straw in order to process them into analgesic products. The Division supported the application so as to assure competitive markets, provided the DEA determined that it was able to regulate the applicant effectively to avoid unlawful diversion of the materials.

79. In FY2000, the Division reviewed six applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations. The ETC applications spanned various products and services such as coal, chicken meat, processed red cherries, almonds, and the promotion of trade expositions overseas.

2) FTC Staff Activities: Federal and State Regulatory Matters

80. The goal of the Commission's advocacy activities is to prevent or reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of FY 2000 advocacies. All of the complete comments filed are available at http://www.ftc.gov/be/advofile.htm.

Federal Reserve System: Predatory Lending Practices, V000012 (Sept. 7,2000)

Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform, V000009 (July 20, 2000)

Arkansas Public Service Commission: Standard Service Package, V000011 (July 6, 2000)

Public Service Commission of West Virginia, Charleston: Restructuring the Electric Utility Industry, V000008 (May 22, 2000)

Arkansas Public Service Commission: Market Power Analysis, V000007 (Apr. 14, 2000)

Virginia State Corporation Commission: Regional Transmission Entities, V000004 (Feb. 11, 2000)

Response to Chairman Bliley: Electricity Competition and Reliability Act, V000002 (Jan. 14, 2000)

New Mexico Public Regulation Commission, Affiliate Codes of Conduct, V990017 (Dec. 6, 1999)

FDA: 180-Day Marketing Exclusivity for Generic Drugs, V990016 (Nov. 4, 1999)

District of Columbia City Counsel, Letter to D.C. City Counsel on Bill To Permit Physicians To Collectively Bargain with Health Plans (Oct. 29, 1999)

Tentative Agreements among ICANN, the U.S. Department of Commerce, and Network Solutions, Inc. (Oct. 29, 1999)

B. DOJ and FTC Trade Policy Activities

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

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

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

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

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

V. New studies related to antitrust policy

A. Antitrust Division Economic Analysis Group Discussion Papers

86. The Economic Analysis Group issued the following papers during FY2000. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.com). Other Division public materials may be obtained through the Antitrust Documents Group of the Division’s Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 221, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached at (202) 514-2481.

Ghosal, Vivek, *Potential Foreign Competition in U.S. Manufacturing*, EAG 00-7, September 22, 2000.

Romeo, Charles, *A Gibbs Sampler for Mixed Logic Analysis of Differentiated Product Markets Using Aggregate*, EAG 00-6, September 18, 2000.

Estache, Antonio, *Andrea Goldstein, and Russell Pittman, Privatization and Regulatory Reform in Brazil: The Case of Freight Railways*, EAG 00-5, September 16, 2000.

Schwartz, Marius, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, EAG 00-4, March 15, 2000.

Nye, William W., *Fable in Another Key: Path Dependence and the Licensing of Music Performance Rights*, EAG 00-3, March 31, 2000.

Sullivan, Mary W., *The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services*, EAG 00-2, March 17, 2000.

Helfat, Constance, and Ruth Raubitschek, *Product Sequencing: Co-Evolution of Knowledge, Capabilities and Products*, EAG 00-1, February 18, 2000. Published at 21 *Strategic Management Journal* 961 (2000).

Greenlee, Patrick, *Endogenous Formation of Competitive Research Sharing Joint Ventures*, EAG 99-2, December 2, 1999.

Kimmel, Sheldon, *The Goals of Milk Policy*, EAG 99-1, December 1, 1999.

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

1) Workshops

87. Business-to-Business (B2B) Electronic Marketplaces. B2B e-marketplaces use the Internet to electronically connect businesses with each other, primarily for the purposes of buying and selling a wide variety of goods and services. The Commission held a 2-day workshop to gain a broader understanding of how B2B e-marketplaces function, the efficiencies and enhanced competition that they may create, and the antitrust issues that they may raise.[9]

88. In a substantively related matter, the Commission issued a letter closing its investigation of whether the formation of Covisint – the first B2B venture to be reviewed by the FTC -- violated the antitrust laws. Covisint is a B2B for firms in the automotive industry supply chain; the automotive manufacturers involved in founding Covisint account for roughly one-half of total worldwide auto production. In notifying the parties of its action, the Commission noted that, because Covisint was in the early stages of development and had not yet adopted by-laws, operating rules, or terms for participant access, because it was not yet operational, and because its founders represented such a large share of the

[9] A staff report, "Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces: A Report by Federal Trade Commission Staff," was issued in October, 2000. The text is available at http://www.ftc.gov/os/2000/10/index.htm#26

automobile market, the Commission could not say that implementation of the Covisint venture would not cause competitive concerns.[10]

89. Slotting Allowances and Other Grocery Marketing Practices. Slotting allowances are lump-sum, up-front payments from a manufacturer or producer to a retailer to have a new product carried by the retailer and placed on its shelf. The Commission held a 2-day workshop to learn more about the nature and function of these and other grocery marketing practices, drawing on the experiences and insights of grocery manufacturers and retailers, antitrust practitioners, and academics. The workshop, which included over 40 panelists and drew 200 attendees, explored concerns expressed by small manufacturers, the substantial debate over the competitive impact of various grocery marketing practices, and possible theories of competitive harm, among other things.[11]

2) *Studies and Reports*

90. Transformation and Continuity: The U.S. Carbonated Soft Drink Bottling Industry and Antitrust Policy Since 1980, Harold Saltzman, Roy Levy and John C. Hilke, November 1999. This report analyzes the U.S. carbonated soft drink (CSD) industry, with its primary focus on the 1980s and early 1990s, a period of rapid structural change that transformed the industry. In addition to documenting these changes, an empirical model is developed to evaluate the antitrust merger policies that were pursued by the FTC during this period. The FTC challenged large horizontal acquisitions of Dr Pepper and 7-UP franchises by Coca-Cola and Pepsi-Cola bottlers, but did not challenge vertical acquisitions of CSD bottlers by their franchisors or other horizontal bottler acquisitions. The findings – measured in terms of price and volume effects – tend to support or are consistent with these policies, but also identify areas that seem to warrant further study.

91. Economic Perspectives on the Internet, Alan E. Wiseman, July 2000. This report provides a detailed overview of the body of economic research that is relevant to the Internet and Internet-based markets. The report provides an introduction to Internet technology and history, and addresses four topics in particular: a) different methods of pricing user access, b) the pricing of goods and services sold via the Internet, c) network effects and firm behavior, and d) taxation of electronic commerce. Drawing on recent Internet-related economic scholarship, and more traditional studies of pricing practices and market structure, the report considers some possible antitrust implications for firms operating in this rapidly changing marketplace, as well as pointing to areas for future research.

92. Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform, John C. Hilke, et al. July 2000. This report is a compendium of previous FTC staff comments on state and federal electricity restructuring issues. It also provides some description of a September 1999 FTC workshop on competition and consumer protection issues raised by electricity restructuring.

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[10] The Commission's press release on the Covisint matter is available at http://www.ftc.gov/opa/2000/09/covisint.htm

[11] A staff report, "Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry: A Report by Federal Trade Commission Staff," was issued in February, 2001. The text is available at http://www.ftc.gov/opa/2001/02/slotting.htm.

3) Economic Working Papers

93. The following may be obtained from the FTC home page, http://www.ftc.gov/be/econwork.htm:

The Effect of Asymmetric Entry Costs on Bertrand Competition (WP #228), Charles J. Thomas, October 1999.

Complements Integration and Leverage: The Case of the Middleman (WP #229), Christopher Garmon, December 1999.

How Do Retailers Adjust Prices?: Evidence From Store-Level Data (WP #230), Daniel Hosken, David Matsa and David Reiffen, January 2000.

A Comparison of Auctions and Multilateral Negotiations (WP #231), Charles J. Thomas and Bart J. Wilson, July 2000.

Import Competition and Market Power: Canadian Evidence (WP #232), Aileen J. Thompson, July 2000.

Innovation, Market Structure and the Holdup Problem With Horizontal Product Differentiation (WP #233), Abraham L. Wickelgren, August 2000.

Appendices

Federal Trade Commission: Fiscal Year 2000 Full Time Equivalent ("FTE") and Budgeted Amount by Program/Bureau

	FTE	AMOUNT
Total Direct Mission	**469.5**	**$58899.1**
Bureau of Competition	251.8	$25,486.2
Bureau of Economics	69.7	$6974.1
Regional Offices	33.2	$3,351.8
Mission Support	114.8	$23,087.0
Premerger Notification	**30.9**	**$2,786.1**
Bureau of Competition	30.2	$2,720.1
Bureau of Economics	.01	9.8
Regional Offices	0.6	$56.2
Merger & Joint Venture Enforcement	**208.6**	**$21,359.0**
Bureau of Competition	139.3	$14,492.6
Bureau of Economics	46.0	$4,510.9
Regional Offices	23.3	$2,355.5
Merger & Joint Venture Compliance	**8.4**	**$765.1**
Bureau of Competition	8.3	$765.1
Bureau of Economics	0.1	$9.8
Regional Offices	---	---
Nonmerger Enforcement	**90.5**	**$8,591.6**
Bureau of Competition	70.9	$6,782.4
Bureau of Economics	7.6	$701.8
Regional Offices	12.0	$1,107.4
Nonmerger Compliance	**5.3**	**$505.8**
Bureau of Competition	1.5	$144.6
Bureau of Economics	0.9	$87.9
Regional Offices	2.9	$273.3
Antitrust Policy Analysis	**5.2**	**$511.0**
Bureau of Competition	---	---
Bureau of Economics	5.2	$511.0
Regional Offices	---	---

Other Direct Mission Resources	**16.4**	**$1,967.3**
Bureau of Competition	10.6	$1,204.1
Bureau of Economics	4.9	$615.0
Regional Offices	0.9	$148.2

Department of Justice: Fiscal Year 2000 FTE and Budgeted Amount by Enforcement Activity

	FTE	**AMOUNT**
Merger Enforcement	**271**	**$39,362,000**
Civil Non-Merger Enforcement	**143**	**$20,823,000**
Criminal Enforcement	**190**	**$27,356,000**
Competition Advocacy	**25**	**$3,942,000**
TOTAL[12]	**629**	**$91,483,000**

12 The 629 employee and $91,483,000 totals reflect full time employees and budget allocation in the areas of Merger, Civil Non-Merger, Criminal, and Competition Advocacy only. These figures should not to be confused with those in II.A.1 above which cite the total number of positions and total budget allocation for the entire Antitrust Division.