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**COMMITTEE ON COMPETITION LAW AND POLICY**

# ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

## (October 1, 1997 through September 30, 1998)

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**Summary of Highlights**

During FY98, the Department of Justice and Federal Trade Commission received a record 4,278 Hart-Scott-Rodino filings – an increase of 28 percent from the year before. The Division initiated 228 merger investigations and challenged 15 mergers; 36 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Commission initiated 352 merger investigations and investigated 46 transactions with a second request for information. The Commission challenged 33 transactions, leading to 23 consent orders, one administrative complaint, six abandoned transactions and three preliminary injunction proceedings authorized.

In the largest merger ever challenged by the federal government, the Division sued to block Lockheed Martin's proposed $11.6 billion acquisition of Northrop Grumman, a deal which would have combined two major suppliers of U.S. military technology. In response to the challenge, Lockheed Martin abandoned the transaction. Following the largest divestiture in merger control history, the Division allowed WorldCom Inc.'s $44 billion purchase of MCI Communications Corporation to proceed after the sale of MCI's Internet business, internetMCI. The Department of Justice and the European Union's DG-IV conducted independent investigations of the proposed transaction with extensive cooperation, pursuant to the 1991 U.S.-EC Antitrust Cooperation Agreement.

A notable merger case was the Commission's successful litigation in *Cardinal Health, Inc.*, and *McKesson Corporation* which prevented the proposed mergers of the nation's four largest pharmaceutical wholesalers into two companies. The FTC argued successfully in court that the two mergers would substantially reduce competition for drug wholesaling services – a market that is important to virtually every U.S. consumer. In *Tenet Healthcare,* the agency also obtained a preliminary injunction against the merger of the only two commercial acute care hospitals in one county in Missouri, showing that the antitrust laws can be applied to prevent consumer injury in local hospital markets. The case is currently on appeal. The Commission also put additional teeth in its merger program by obtaining in *Columbia/HCA Healthcare* a $2.5 million civil penalty to settle charges that the firm violated a 1995 order by failing to divest specified hospitals in a timely manner.

The FTC's Bureau of Competition brought a total of 50 enforcement actions – 43 percent more than in the previous year. Enforcement activity rose as a result of the record number of mergers along with increased enforcement in the health care and high-tech industries. In the non-merger area, the FTC brought 13 enforcement actions challenging a wide variety of alleged anticompetitive conduct, of which 11 were resolved by consent agreements. Of the settled cases, the *Fair Allocation System, Inc.* matter is important in that it applied established law against boycotts in the new commercial context of Internet sales in this case involving the sale of automobiles. The settlement in *Stone Container* resolved the Commission's allegation of an industry-wide invitation to join a coordinated price increase. The Commission issued a complaint against Intel Corp., the world's largest manufacturer of microprocessors, charging that the company used its monopoly power to cement its dominance over the microprocessor market when it denied three of its customers continuing access to advance technical information and product samples necessary to develop computer systems based on Intel microprocessors. On March 17, 1999, the Commission approved a settlement of its complaint, which is the subject of public comment. The proposed consent order would prohibit Intel from withholding or threatening to withhold advance technical information, or otherwise making product supply decisions, as a means of compelling intellectual property licenses, while protecting Intel's rights to withhold its information or microprocessors for legitimate business reasons. The Commission's *Summit/VISX case* focuses on misuse of intellectual property related to laser eye surgery; all of the allegations of the complaint were settled with the exception of one on patent fraud which is being litigated. In the federal courts, the Ninth Circuit Court of Appeals affirmed the Commission's decision that ordered the California Dental Association to refrain from

enforcing ethical guidelines that had the effect of prohibiting truthful, nondeceptive advertising by dentists. This decision will be reviewed by the United States Supreme Court during its current term.

The Antitrust Division opened 315 investigations and filed 85 antitrust cases, both criminal and civil, in federal court. The Division filed 62 criminal cases, bringing indictments against six individuals and one corporation. Record criminal fines amounting to $241.6 million were levied against 18 corporate defendants. In an ongoing investigation into a wide-ranging international conspiracy to fix prices and allocate market shares in the graphite electrodes industry, DOJ filed criminal charges against two major producers of graphite electrodes. One of the cases, filed against UCAR International, Inc., resulted in a guilty plea and a criminal fine of $110 million, the largest single fine in antitrust history. Also in FY98, the Division's investigation into price-fixing and sales allocation conspiracies in the worldwide lysine market resulted in the conviction of three former top executives of the Archer Daniels Midland Company (ADM). In civil enforcement, the Division opened 315 investigations, both merger and non-merger and filed six civil non merger complaints, including a complaint filed in May against Microsoft Corporation for allegedly engaging in anticompetitive and exclusionary practices to maintain its monopoly in personal computer operating systems and to extend that monopoly to Internet browsing software.

On June 4, 1998 representatives of the Commission, the Department, and the European Communities signed an agreement elaborating on the positive comity provisions of the 1991 U.S.-EC antitrust enforcement cooperation agreement. The new agreement clarifies the circumstances under which

# REPORT TO THE OECD ON UNITED STATES ANTITRUST AND COMPETITION DEVELOPMENTS FOR THE PERIOD OCTOBER 1, 1997 THROUGH SEPTEMBER 30, 1998

## Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, l997 through September 30, l998. 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").

## I. Changes in law and policies

### *A. Changes in Antitrust Rules, Policies, or Guidelines*

2. On March 11, 1998, the DOJ, the FTC and the National Association of Attorneys General released a protocol under which federal and state antitrust enforcers will cooperate on merger investigations. The protocol lists the specific steps for maintaining the confidential status of the information shared, details the procedures under which the DOJ and FTC will provide State Attorneys General with certain types of sensitive information, sets out guidelines for conducting joint investigations (emphasizing the importance of the agencies' close collaboration with respect to the settlement process), and addresses how the agencies should coordinate the release of information to the news media.

3. The Commission announced changes in the two thresholds that define when it is unlawful for an individual to serve as an officer or director of two or more competing corporations. Under the new thresholds that are effective January 20, 1998, Section 8 of the Clayton Act, which prohibits interlocking directorates, would apply if each of the two companies has capital, surplus, and undivided profits in excess of $14.73 million and the competitive sales of each corporation exceed $1.473 million. A 1990 amendment to Section 8 requires the FTC to adjust the thresholds that trigger the prohibition based on the change in the Gross National Product.

4. Premerger Notification Rule 802.70 was amended by the FTC with the concurrence of the Assistant Attorney General for Antitrust. This rule exempts from premerger reporting requirements acquisitions of assets or voting securities required to be divested by an order of the Commission or of any federal court in an action brought by the Commission or the Department of Justice. As amended, the rule also exempts divestitures pursuant to consent agreements that have been accepted for public comment, or have been filed with a court and are subject to public comment, but are not yet final orders. The amendment became effective June 25, 1998.

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

5. The International Competition Policy Advisory Committee was formed in late 1997 by Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein for the purpose of providing a medium term policy vision on international competition matters to the U.S. Department of Justice. The Advisory Committee's work focuses on matters falling under three core topic headings: multijurisdictional

cooperation in antitrust enforcement, including enforcement of laws prohibiting cartels. Members of the Advisory Committee are drawn from the U.S. business, industrial relations, academic, economic and legal communities. The Advisory Committee is co-chaired by Dr. Paula Stern, President of The Stern Group and former Chairwoman of the U.S. International Trade Commission, and James F. Rill, Senior Partner at Collier, Shannon, Rill & Scott and former Assistant Attorney General for Antitrust. Serving as Executive Director of the Advisory Committee is Professor Merit E. Janow of Columbia University's School of International and Public Affairs and former Deputy Assistant U.S. Trade Representative for Japan and

situation where one party asks the other party to investigate and take appropriate measures under its own antitrust laws to address anticompetitive conduct in the latter's territory which is harming the requesting party. The new agreement elaborates on the positive comity provisions of the 1991 U.S.-EC antitrust enforcement cooperation agreement. Among other things, it identifies the circumstances under which one party will normally defer to the other and spells out the obligations that the competition authorities undertake in handling these cases, while preserving the right of each authority to act independently.

## II. Enforcement of antitrust laws and policies

***Actions against anticompetitive practices***

*A. Department of Justice and FTC Statistics*

1) DOJ Staffing and Enforcement Statistics

10. At the end of FY98, the Division employed 848 individuals: 351 attorneys, 55 economists, 8 law clerks, 187 paralegals, and 247 other professional staff. For FY98, the Division was allocated $93,495,000. For a further breakdown of the Division's competition mission, please refer to the appendix.

11. During FY98, the Antitrust Division opened 315 investigations and filed 85 antitrust cases, both civil and criminal, in federal court. The Division was a party to 12 U.S. antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in three Court of Appeals cases and four Supreme Court cases.

12. During FY98, the Division filed 62 criminal cases and indicted one corporation and 6 individuals. Eighteen corporate defendants and 20 individuals were assessed fines totaling $244 million and 5 defendants were sentenced to a total of 1,301 days of incarceration. Another 10 individual defendants were sentenced to spend a total of 1,530 days in some form of alternative confinement.

13. During FY98, 4,728 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which represents an increase of more than 25 percent over the previous year. A wide variety of industries were involved including defense, telecommunications, cinema, radio stations and public utilities. The Division investigated 228 mergers and challenged 15; 36 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Division also screened a total of 1,923 bank mergers. The Division opened 295 civil investigations, both merger and non-merger, and issued 1,488 civil investigative demands (a form of compulsory process). The Division filed 6 non-merger

15. During FY98, the Commission brought a total of 51 enforcement actions -- 46 percent more

22. In *Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998), antitrust actions brought by the United States and private parties under Section 7 of the Clayton Act challenged purchase of a local daily newspaper by a competitor. The district court ordered rescission of the sale, and the court of appeals affirmed, ruling, *inter alia*, that the district court had properly defined the geographic and product markets, and had properly determined that a combined market share in excess of 84 percent raised a presumption of a Section 7 violation.

23. In *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the district court, on the basis of the consent decree in the Division's 1994 case against Microsoft, entered a preliminary injunction that prohibited Microsoft from requiring that computer manufacturers who license Microsoft's operating system software must license Microsoft's internet browser as well. The court of appeals reversed, finding that the district court erred procedurally in entering a preliminary injunction without notice to Microsoft, and also erred in its construction of the consent decree.

24. In *United States v. Engelhard Corp.*, 126 F.3d 1302 (11th Cir. 1997), the district court denied a permanent injunction to bar the sale of assets involving a clay used in industrial products, on the ground that the government had failed to prove the product market that it had alleged. The court of appeals affirmed, holding that the district court's finding on product market was not clearly erroneous. The court of appeals noted that the government failed adequately to ascertain the size of the product market, and did not consider the possibility that pre-formulation competition (that is, before the relevant product has been selected as an ingredient) could restrain prices of the relevant product.

25. In *United States v. Tucor International, Inc.*, N.D. Cal. No. CR-92-0425, a group of motor carriers in the Philippines was indicted for conspiring to fix the rates for carrying household goods being shipped by the U.S. Department of Defense for military personnel. The District Court held that the agreement was exempted from the U.S. antitrust laws by a clause in the Shipping Act of 1984 which provides that "[t]he antitrust laws to not apply to ... any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation in a United States import or export trade." It also construed the indictment to reach only shipments that were subject to "through transportation." The government is appealing the decision because another part of the Shipping Act provides that the Act applies only to agreements of ocean common carriers and marine terminal operators; there are no such parties to the agreement at issue. It also argues that some of the shipments were not "through transportation." The defendants have not questioned the antitrust laws' application to the alleged conspiracy in the absence of the Shipping Act.

b. Significant FTC Cases Decided in FY98

26. *California Dental Ass'n v. FTC*

otherwise have used to enter the U.S. market." The judge denied Tupperware's motion to dismiss for failure to assert antitrust injury to the U.S. market, holding that "the allegedly sham legal actions abroad had a foreseeable effect on U.S. commerce" by reducing product choice and competition in the U.S. market.

31. In *Capital Currency Exchange, N.V. v. National Westminster Bank plc*, 155 F.3d 603 (2d Cir. 1998), the plaintiff, a financial company organized under the laws of the Netherlands Antilles with affiliates in New York and the UK, sued two English banks alleging various contract and tort claims, and Sherman Act claims that defendants had conspired to deny it necessary banking services and thereby had attempted to monopolize the international currency-transfer market. The Court of Appeals upheld the district court judge's dismissal of the case on grounds of *forum non conveniens* (*see* U.S. Annual report for Fiscal Year 1997, ¶ 32). The Court agreed with the district court judge that the English courts were an adequate alternative forum, even if the substantive law to be applied was not identical to the Sherman Act, as the English courts were bound to enforce Articles 85 and 86 of the Treaty of Rome, which are "roughly analogous to Sections 1 and 2 of the Sherman Act, and create a private right of action to challenge anti-competitive, monopolistic actions." On the adequacy of the remedy available in the English courts, the Court held that "although English courts have not *yet* awarded damages in an antitrust case, it appears that English courts have the power to do so," and "the unavailability of treble damages does not render a forum inadequate." The Court also agreed that although public interests favored neither forum, the private interests strongly favored litigation in England, as most of the witnesses and the documentary evidence were located there.

32. In *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*, 982 F.Supp 1138 (E.D.Va. 1997), two U.S. purchasers of extruded rubber thread sued foreign manufacturers in Malaysia, Indonesia, and Thailand, alleging an international conspiracy to fix prices in the U.S. and world markets. The judge denied a series of motions to dismiss, including one which argued that plaintiffs could not have suffered an antitrust injury because during the period of the alleged conspiracy, the Malaysian producers were subject to antidumping duties ranging from 1.88 to 50 percent above each producer's current U.S. price. In essence, defendants argued that the Malaysian producers' prices could not at the same time be too high under the antitrust laws and too low under the antidumping laws. In denying the motion the judge noted that "'Below a fair value' does not mean 'below competitive prices in the U.S. market.' Each description relies on a separate benchmark, one measuring a fair value abroad and one a competitive price in the United States; and each benchmark is established for a different purpose, one to calculate an antidumping duty, and one to gauge the level of competition in the domestic market. In short, there is no conflict between the antidumping laws and the antitrust laws." Moreover, under the antidumping laws the defendants did not have to set a uniform price, and since the fair value and antidumping duties were set individually for each producer, there was no reason that all of the Malaysian defendants' prices should have been the same; finally this argument would not excuse the fixing of prices with Thai and Indonesian producers.

33. In *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F.Supp. 14 (D.D.C. 1998), plaintiffs included a Luxembourg telecommunications company and its Costa Rican subsidiary that had obtained a license in 1987 to provide cellular service in Costa Rica. Plaintiffs began cellular service in 1989, having obtained financing with assistance from the Costa Rican government. According to the complaint, in 1991 the government through its agency responsible for public land-line based telephone services announced it was developing its own cellular system, and proceeded to "drive plaintiffs out" of the market by means of anticompetitive actions including suits challenging the 1987 license and labor strikes which derailed legislative efforts to resolve the license issue. Plaintiffs sued the Costa Rican government and its telecommunications agency asserting Sherman Act and other claims. The judge dismissed the complaint under the Foreign Sovereign Immunities Act of 1976, which "presumes a foreign state is immune from suit in United States courts except as provided in one of the statutory exceptions." The judge rejected the argument concerning the "commercial activity" exception because "interconnectivity

37. The Division filed the first criminal charges in its ongoing investigation into the international graphite electrodes industry on February 23, 1998. Showa Denko Carbon, Inc. (SDC), a U.S. subsidiary of the Japanese firm Showa Financing KK, was charged with participating in a wide-ranging international conspiracy to fix prices and allocate market shares worldwide for graphite electrodes, entered a guilty plea, and was sentenced to pay a $32.5 million fine. On April 7, 1998, UCAR International, Inc., the largest producer of graphite electrodes in the U.S., pleaded guilty to taking part in the international cartel and agreed to pay a $110 million criminal fine, the largest single fine in antitrust history. Graphite electrodes are a component of steel mills used to generate the intense heat necessary to melt and refine steel. Annual sales in the U.S. graphite electrodes industry total approximately $500 million.

38. On December 17, 1997, a French company, Roquette Frères, and its Commercial Director, a French citizen, agreed to plead guilty and pay a $2.5 million fine for participating in an international conspiracy to fix prices and allocate markets for sodium gluconate, an industrial cleaner used for bottle washing, food process equipment and utensil cleaning, and paint removal. Worldwide sales of sodium gluconate approach $50 million each year. On February 25, 1998, a Japanese corporation, Fujisawa Pharmaceutical Co., Ltd., and its Associate Executive Director, a Japanese citizen, also agreed to plead guilty and pay a fine of $20 million for their roles in the conspiracy. On September 24, 1997, the Division brought similar charges against three Dutch pharmaceutical companies, Avebe BA, Akzo Nobel Chemicals BV, and Glucona BV. Two executives from Akzo Nobel and Glucona, both of whom are Dutch citizens,

dollar market for mainframe disk storage subsystems, which provide storage and high-speed access to data. The agreement effectively eliminated StorageTek as an independent competitor. Before the 1996 agreement, competition between the two companies had greatly benefited mainframe disk storage purchasers. Price declines in the industry eased, however, after StorageTek and IBM stopped competing

46. The Division filed a lawsuit against the Federation of Physicians and Dentists for allegedly organizing an illegal boycott of Blue Cross & Blue Shield of Delaware in an effort to maintain higher fees paid to its member orthopedists. According to the complaint filed on August 12, 1998, which is still pending in U.S. District Court, nearly all of the orthopedic surgeons in Delaware agreed to designate the Federation's executive director as their agent to negotiate the fee levels they would accept from Blue Cross. When Blue Cross declined to deal with the designated agent, the Federation allegedly facilitated its members' termination of their contract with Blue Cross. The Division is currently investigating the Federation's activities in other states.

47. On September 23, 1998, the Division filed a lawsuit against Medical Mutual of Ohio, Ohio's largest health insurer, for allegedly reducing competition among hospitals in the Cleveland area. A proposed consent decree that would resolve the Division's antitrust concerns is awaiting U.S. District Court approval. The complaint states that Medical Mutual's Most Favorable Rate ("MFR") provision required hospitals to charge other health plans 15 to 30 percent more for identical services or face significant penalties. Medical Mutual aggressively enforced its MFR clause through frequent audits resulting in millions of dollars in penalties over the years. This practice discouraged hospitals from participating in more innovative health plans and diminished the choice of health services available to businesses and consumers. In the past, the Division has successfully challenged other MFR provisions both in the health care industry and elsewhere.

3) Modification or Termination of DOJ Consent Decrees

48. On April 27, 1998, the DOJ agreed to proposed changes to a 1979 consent decree concerning the Coffee, Sugar & Cocoa Exchange. The changes decrease the effect of time differences and other burdens in order to facilitate participation in the daily quotation process by members of the sugar industry around the world, allowing the widest possible perspective of prices to be used in determining the daily spot price of sugar on world markets. These modifications do not, however, affect the decree's protections against collusion. The Division's 1977 civil case charged that the Exchange's spot price quotations for raw cane sugar were set by interested parties on a subjective basis. The original consent decree ended this anticompetitive practice and required the Exchange to determine prices on the basis of objective information.

4) FTC Non-merger Enforcement Actions

a. Commission Administrative Decisions

49. The Commission issued an administrative complaint against Summit Technology, Inc. and VISX, Inc., the only two manufacturers of lasers used in photo refractive keratectomy ("PRK") to treat vision disorders that have received marketing approval from the Food and Drug Administration. The complaint charged that the companies pooled most of their existing and certain future patents related to PRK into a partnership and used it to fix a per-procedure licensing fee and to split the proceeds according to a pre-determined formula. They also agreed that neither would license its technology without approval from the other. The effect was to eliminate competition in pricing and licensing. The complaint also charges that VISX obtained one of its key patents through fraud and inequitable conduct, specifically by withholding "prior art" information. The proposed consent would settle all the allegations of the complaint against Summit and those against VISX except one on patent fraud which is now in litigation before an Administrative Law Judge. *Summit Technology, Inc.* Docket No. 9286, 5 Trade Reg. Rep. (CCH) ¶ 24,490.

50. The FTC issued an administrative complaint against Intel Corp., the world's largest manufacturer of microprocessors, charging that the company used its monopoly power to cement its dominance over the microprocessor market. The FTC alleged that Intel illegally used its market power when it denied three of its customers, Digital Equipment Corp., Integraph Corp., and Compaq Computer Corp., continuing access to technical information necessary to develop computer systems based on Intel microprocessors, and took other steps to punish them for refusing to license key patents on Intel's terms. As a result of these practices, Intel allegedly impeded innovation and stifled competition. The case is currently before an Administrative Law Judge. *Intel Corp.*, Docket No. 9288, 5 Trade Reg. Rep. (CCH) ¶ 24,440.

51. The Commission accepted consent agreements settling charges that The Associated Octel Co. Ltd., and Ethyl Corp., the world's two largest manufacturers of lead antiknock gasoline additives, agreed

restitution to the Commonwealth. *The College of Physician-Surgeons of Puerto Rico*, File No. 971-0011, 5 Trade Reg. Rep. (CCH) ¶ 24,335

56. Other proposed or final consent orders include: *Urological Stone Surgeons and Parkside Kidney Stone Centers*, Docket No. C-3791, 5 Trade Reg. Rep. (CCH) ¶ 24,367 (price fixing); *M. D. Physicians of Southwest Louisiana*, Docket No. C-3824, 5 Trade Reg. Rep. (CCH) ¶ 24,445 (price fixing); *Dentists of Juana Diaz, Cuoma*, File No. 981-0154, 5 Trade Reg. Rep. (CCH) ¶ 24,500 (price fixing, boycott); *Institutional Pharmacy Network*, Docket No. C-3822, 5 Trade Reg. Rep. (CCH) ¶ 24,433 (price fixing); *Fastline Publications, Inc.,* Docket No. C-3819, 5 Trade Reg. Rep. (CCH) ¶ 24,426 (price advertising restrictions); *South Lake Tahoe Lodging Ass'n,* Docket No. 3830, 5 Trade Reg. Rep. (CCH) ¶ 24,466 (advertising restrictions).

b. Federal District Court Decisions

57. In *Columbia/HCA Healthcare*, the Commission obtained a $2.5 million civil penalty to settle charges that the firm violated a 1995 order to divest hospitals in Utah and Florida in a timely manner. The complaint also alleged the firm failed to honor a hold separate agreement. This was the second largest penalty ever obtained for a failure to divest within specified time periods. *FTC v. Columbia/HCA Healthcare Corp*

62. On November 3, 1997, the Division issued a business review letter stating that it would not challenge the proposed joint venture between First Priority Health, a health maintenance organization ("HMO") and subsidiary of Blue Cross of Northeastern Pennsylvania, and NEPPO Ltd., a limited partnership of 166 specialists and primary physicians. According to the proposal, the two groups would join to form First Priority Health System, a risk-bearing service delivery organization that will provide and manage medical services for HMO enrollees in Scranton, Pennsylvania and surrounding counties. The Division concluded that although the newly formed organization would create a competitive challenge to other area managed care plans, it would not prevent them from competing to serve consumers in the area.

63. On August 14, 1998, the Division approved the National Association of Manufacturers' ("NAM") proposal to allow its members and their computer services suppliers to discuss and exchange information on the Year 2000 computer problem. In a business review letter, the Division stated that the arrangement would not pose competitive risks as long as it is limited to information about the existence of and remedies for Year 2000 computer conversion problems. NAM is the nation's oldest and largest broad-based industrial trade association, with nearly 14,000 member companies and subsidiaries, including

66. On February 3, 1998, the Division issued a business review letter approving the proposed

companies worldwide that provide the full range of LWD tools and services, likely resulting in higher prices and a slower rate of innovation. Prior to the filing of the consent decree, Halliburton agreed to sell its 36 percent interest in M-I Drilling. As originally structured, the transaction would have combined the world's two largest drilling fluids competitors, M-I Drilling and Dresser's Baroid Division, in this $3 billion a year industry. Drilling fluids, which are a combination of chemical compounds and minerals, are the second largest cost -- after rental of the rig -- of drilling for oil and natural gas.

71. Lockheed Martin/Northrop Grumman: In the largest merger ever challenged by the federal government, the Division sued Lockheed Martin on March 23, 1998 to block its proposed $11.6 billion acquisition of Northrop Grumman. Both companies are major suppliers of technology to the U.S. military and are the only producers of advanced airborne early warning radar systems, electro-optical missile warning systems, and directed infrared countermeasures. The Departments of Justice and Defense cooperated in the investigation leading to the lawsuit. In response to the challenge, on July 16, 1998, Lockheed Martin announced its decision to abandon the transaction.

72. WorldCom/MCI: On July 15, 1998, the Division announced that WorldCom Inc.'s $44 billion purchase of MCI Communications Corporation would be allowed to proceed after the divestiture of MCI's Internet business, internetMCI. In what was the largest divestiture in merger control history, MCI agreed to sell internetMCI to Cable & Wireless plc, a British firm, for $1.75 billion. The Department of Justice and the European Union's DG-IV conducted independent investigations of the proposed transaction with extensive cooperation, including exchanges of views on market analysis, coordination of information gathering, and joint meetings and negotiations with the parties. Pursuant to the 1991 U.S.-EC Antitrust Cooperation Agreement, the EU formally requested the Antitrust Division's assistance in evaluating and implementing the proposed divestiture. In September, the Federal Communications Commission approved the transaction, which was subsequently finalized.

73. Aerolineas Argentina: On July 8, 1998, the Division approved American Airlines' acquisition of stock in the parent of Aerolineas Argentina, the principal Argentine air carrier, after American agreed to restructure the transaction to alleviate antitrust concerns. Under the terms of the restructured deal, American will control about 8.5 percent of Aerolineas Argentina's stock, but will not be represented on the Aerolineas Argentina board of directors or participate in any of its competitive decisions. Other than American and Aerolineas Argentina, only United Airlines services the U.S.-Argentina market. Entry and expansion in this market are limited by a restrictive bilateral aviation treaty between the two countries. The Division reserved its right to oppose any American/Aerolineas Argentina code-sharing agreement that they might submit to the Department of Transportation in the future.

74. Alcoa/Alumax; Reynolds Metal: On June 15, 1998, the Division announced that the Aluminum Company of America ("Alcoa") would be permitted to complete its $3.8 billion purchase of Alumax Inc. following a consent decree in which Alcoa agreed to sell its aluminum cast plate operations. Together Alcoa and Alumax control 90 percent of the worldwide market for cast plate, which is used in precision aircraft and automotive parts, as well as in machinery that makes frozen food packaging. A U.S. District Court has approved the consent decree and the divestiture has been made. In December 1997, Alcoa abandoned its proposed purchase of Reynolds Metal Company's Alabama aluminum rolling mill after the Division filed suit to block the transaction. The sale of Reynolds aluminum rolling assets was likely to

uses high power satellites to transmit video directly to subscribers' homes. Only three orbital slots, including the one jointly owned by MCI and News Corp., are capable of high-power broadcasting to the entire continental U.S. As a result of the Division's lawsuit, on October 14, 1998, Primestar announced its decision to abandon the proposed acquisition.

76. Haynes/Inco: On March 3, 1998, the Division announced its intention to challenge Haynes Holdings, Inc.'s acquisition of Inco Alloys International, prompting Haynes and its British majority owner, Blackstone Capital Partners, to abandon the transaction. Inco Alloys, the alloys division of the Canadian firm Inco Limited, is the world's largest manufacturer of nickel-based products; Haynes is the number two producer in the U.S. High performance nickel-based alloys are used in high temperature and highly corrosive environments, such as aerospace and chemical processing.

77. GE/Gas Turbines: On December 30, 1997, the Division cleared General Electric's ("GE") $600

to proceed following the divestiture of 25 movie theaters in Manhattan and Chicago. As originally structured, the combination of Loews and Cineplex Odeon, the two largest cinema chains in Manhattan and Chicago, would have given the new entity a 67 percent and 77 percent revenue share, respectively, of the markets in question. The consent decree was entered by a U.S. District Court on November 16, 1998.

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counties with total deposits of about $1.5 billion. Again, the parties agreed to divest middle market businesses including certain middle-market commercial loans with associated deposits.

86. In addition to the mergers and divestitures mentioned above, there were four other smaller transactions which resulted in divestitures in Virginia, New Hampshire, Indiana, and Louisiana. In three other transactions, the Division accepted the parties' initial divestiture offer. Additionally, there were five transactions in which other conditions were imposed to address competitive concerns.

2) FTC Merger Challenges or Cases

a. Preliminary Injunctions Authorized

87. The Commission filed for a preliminary injunction in March 1998 alleging that the acquisition by Cardinal Health, Inc. ("Cardinal") of Bergen Brunswig Corp. ("Bergen") would lessen competition substantially in the wholesale distribution of prescription drugs. Cardinal was the nation's third largest wholesale distributor of prescription drugs, over-the-counter pharmaceutical products and health and beauty aids. Bergen was the country's largest supplier of pharmaceuticals to the managed care market and the second largest wholesale distributor of pharmaceuticals. The court granted the Commission's motion blocking the proposed acquisition on July 31, 1998. Subsequently, the parties abandoned the transaction. *FTC v. Cardinal Health, Inc., and Bergen Brunswig Corp.,* 12 F. Supp. 2d 34 (D.D.C. 1998)

88.

91. In *The Dow Chemical Company*, the complaint alleged that the proposed acquisition by Dow Chemical Co. ("Dow") of Sentrachem Ltd would lessen competition substantially in the research, development, manufacture and sale in the U.S. of chelants, which are used in diverse applications to neutralize and inactivate metal ions. According to the complaint, Dow and Sentrachem's subsidiary, Hampshire Chemical Corp. ("Hampshire"), are the two leading of only three producers of chelants, with a combined market share of over 70 percent. Under the order, the parties were required to divest Hampshire's chelant business to Akzo Nobel N.V., a Dutch chemical company that is a leading European producer of chelants. The order also provided for the expansion of Hampshire's Lima, Ohio, facility by setting certain "milestones" that must be met to accomplish the construction of additional capacity. Docket No. C-3785, 5 Trade Reg. Rep. (CCH) ¶ 24,354.

92. In *Guinness plc, Grand Metropolitan plc, and Diageo plc*, the FTC complaint alleged that the proposed merger of Guiness plc and Grand Metropolitan plc ("Grand Met") would lessen competition substantially in the production of premium Scotch and premium gin in the United States. According to the complaint, the combined entity, known as Diageo plc, would control approximately 92 percent and 73 percent of all U.S. premium Scotch and premium gin sales, respectively. The order required divestiture of Guinness' assets used in the manufacture of "Dewar's" Scotch whisky, as well as the assets used by Grand Met in the production of "Bombay" gin to Bacardi & Company, International. FTC staff coordinated its investigation with those of the EC and Canadian competition authorities, resulting in parallel divestitures. Docket No. C-3801, 5 Trade Reg. Rep.(CCH) ¶ 24,441.

93. In *CUC International Inc., and HFS Inc.*, the complaint alleged that the proposed merger of CUC International and HFS would substantially lessen competition in the worldwide sale of timeshare exchange services to timeshare developers and owners. According to the complaint, the parties operated competing worldwide, full-service networks enabling timeshare owners to trade time periods for the use of their vacation properties. Under the order, CUC International and HFS were required to divest CUC's Interval International Inc., to a company controlled by Willis Stein & Partners, L.P., a venture capital firm, or to divest HFS' Resort Condominiums International, Inc., to a Commission-approved purchaser. Docket No. C-3805, 5 Trade Reg. Rep. (CCH) ¶ 24,360.

94. In *TRW Inc.*, the FTC alleged that TRW's proposed acquisition of BDM International Inc. ("BDM") would lessen competition substantially in (1) the research, development, manufacture and sale of a ballistic missile defense system ("BMD system") for the U. S. Department of Defense ("DoD"), and (2) the provision of systems engineering and technical assistance services ("SETA Services") to the U.S.

would lessen competition substantially in the mining, production and sale of coal and in wholesale electricity sales in the Western United States. TEG's Peabody Western Coal Co. ("Peabody") was the only viable source of coal to Navajo and Mohave, two large coal-fired power plants in Arizona and Nevada. PacifiCorp provided retail electric service in seven Western states, and competed with Navajo and Mohave. According to the complaint, substantial electricity generation assets of a merged PacifiCorp/Peabody would allow it to increase its rivals' fuel costs. The proposed order required the

certifying International Business Machines, Inc., as an alternative production source for Alpha products. Docket No. C-3818, 5 Trade Reg. Rep.(CCH) ¶ 24,421.

101. In *Merck & Co., Inc., and Merck-Medco Managed Care, L.L.C.*, the FTC alleged that the acquisition by Merck of Medco Containment Services, Inc. ("Medco"), would lessen competition substantially in the markets for the provision of pharmacy benefit management ("PBM") services, and the manufacture of HMG-CoA reductase inhibitors and angiotension converting enzyme inhibitors in the United States. Merck was engaged in the production of "Mevacor" and "Zocor" which are used for the treatment of high cholesterol, and "Prinivil" and "Vasotec" which are used for the treatment of hypertension, high blood pressure and heart disease. Medco provided PBM services to insurance companies and third-party payors that include the maintenance of a drug formulary, and claims processing, drug utilization review and pharmacy network administration. According to the complaint,

## IV. Regulatory and trade policy matters

### *A. Regulatory Policies*

#### *1) DOJ Activities: Federal and State Regulatory Matters*

104. *Formal Designation by the Securities and Exchange Commission of Securities Credit Rating Organizations*: On December 30, 1997, the Securities and Exchange Commission ("SEC") requested public comment on proposed amendments to its rule (Rule 15c3-1) relating to Nationally Recognized Securities Ratings Organizations ("NRSROs"). NRSROs provide public credit ratings to the investing public on various forms of securities in a standard, comparable format (e.g., AAA). The SEC proposed to require a formal application process and established criteria for designation of NRSRO status. On March 6, 1998, the Department submitted comments generally in support of the SEC proposal to institute a formal application process, but expressed two specific concerns about the criteria. First, the Department observed that the current structure of the market for NRSRO services is highly concentrated and dominated by two firms. The proposed criterion that the applicant be recognized as an issuer of credible and reliable ratings by the predominant users of securities ratings in the United States would likely to create a substantial barrier to *de novo* entry into the NRSRO services market. The Department suggested that the SEC consider either a less stringent recognition requirement or granting provisional NRSRO status to a *de novo* entrant for the first 12 or 18 months of its existence. Second, while ratings are generally solicited by the issuer, one or more rating companies have issued ratings that were unsolicited. While unsolicited ratings can be useful in providing information to the market, such ratings may be inconsistent with at least two of the criteria proposed by the SEC: use of systematic rating procedures designed to ensure credible and accurate ratings and access to senior level management of the issuers. The Department recommended that NRSROs, new or existing, be required to disclose whether their ratings are solicited or unsolicited at the time the ratings are issued.

105. *Peter Pan Bus Lines, Inc. --Pooling --Greyhound Lines, Inc. S.T.B. No. MC-F-20908*: On

and PSI Energy, Inc. (APSI). The Board, in its final decision, imposed the conditions recommended by the Division with respect to IPL and PSI.

107. *FCC*: In three proceedings involving applications to provide in-region interLATA services in the States of South Carolina and Louisiana, the Department of Justice recommended that the Federal Communications Commission ("FCC") deny the applications by Bell South, a Regional Bell Operating Company, because the company had not completed the steps necessary to open local telephone markets in the relevant areas to competition. The FCC subsequently denied the applications.

108. *FCC:* In October, 1997 the Division provided its views on several proposed changes to the FCC's competitive bidding procedures. The FCC sells regional "spectrums" for a variety of mobile communication services, such as personal cellular phones, through a series of auctions. In a letter from Joel I. Klein to FCC Chairman Reed Hundt, the Division endorsed rule changes to protect the integrity and competitiveness of the auction process. Specifically, the Division recommended that the FCC try to address directly the problem of too few bidders for some auctions by redesigning the auction or applying stricter scrutiny to the applications for joint bidding. Where these approaches are not feasible, the Division endorsed the FCC's proposal of adopting minimum opening bids, which would reduce the risk of collusion but could also cause delay in sales of a spectrum if the price is set above fair market value. The Division also recommended that the FCC limit the number of bid withdrawals and end the use of trailing digits on bids. These changes would make it more difficult for bidders to signal each other not to compete for certain markets, thus minimizing the risk of tacit collusion by bidders. Finally, the Division recommended that if the FCC decides to allow discussions of mergers or other intercarrier arrangements during an auction, it nonetheless should not permit two firms currently bidding against each other in a market to negotiate a resale or roaming agreement for that market -- in those circumstances, the roaming agreement (which gives access to another firm's market) could be used to compensate one firm for no longer bidding against the other, limiting the competition for that market.

109. *American Airlines/TACA Group Code-Share Application*: On January 28, 1998 the Division filed Comments with the Department of Transportation ("DOT"), responding to the DOT Show Cause Order tentatively approving the proposed American Airlines/TACA Group joint applications to engage in code-share services. The Division urged DOT to give little weight in its public interest analysis to the parties' proffered efficiencies and resulting claims of expanded networks and seamless service in the U.S. - Central American market. Code-sharing is a practice conducted in the airline industry where airlines are allowed to sell their own tickets for routes operated by code-share partner. DOT has approved code-sharing agreements in the past when they play a pro-competitive role and serve the public interest by enabling an airline to extend the reach of its route network by code-sharing with an airline that operates a route network in another geographic region -- *i.e.*, an end-to-end network combination. However, the proposed American/TACA Code-Sharing Agreement is largely horizontal, rather than end-to-end and thus

would allow the USPS to provide information to postal meter customers, including information about its meter program and the identity of authorized meter manufacturers. The Division stated that the rule would promote competition among meter manufacturers by helping ensure that consumers had accurate and timely information about their choices. The USPS adopted the rule in October 1998.

111. *Proposed American Airlines/British Airways Alliance*: on May 21, 1998, the Division filed comments with the Department of Transportation ("DOT") on the American Airlines/British Airways application for antitrust immunity for their proposed alliance. The Division argued that the alliance would significantly reduce competition in numerous U.S.-UK city pairs, and that the efficiencies created by the transaction would not outweigh the competitive harm. The alliance would eliminate nonstop competition on AA/BA overlap routes, and would also reduce competition for passengers who currently benefit from one-stop and connecting competition between AA and BA. The Division concluded that DOT should only approve the alliance as in the public interest if two conditions are met. First, the transaction should be restructured to eliminate the competitive harms in specific markets to the greatest extent possible. This would require slot divestitures to allow new entry on competitive routes and "carve outs" to limit immunity on hub-hub routes where entry is unlikely. Second, DOT must ensure that access to London Heathrow Airport is sufficient to permit the level of US-London service that would be expected in an open market. This would require an open skies agreement with the UK coupled with access to sufficient slots to permit increased service.

112. In FY98, the Division reviewed four applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the Department of Commerce's issuance of three new certificates. The goods covered by the certificates included milled rice, environmental consulting services, medical supplies, and fresh California pears.

*2) FTC Activities: Federal and State Regulatory Matters*

113. 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 these activities in FY 1998. The complete comments are available on the FTC home page (http://www.ftc.gov).

114. New England Power Pool Comment. Staff filed a comment urging the Federal Energy Regulatory Commission ("FERC") to consider structural, rather than purely behavioral, remedies for market power that might be identified in FERC's review of the New England Power Pool's application for market-based electric power generation rates. The comment noted the difficulty of detecting and documenting the exercise of market power in time-sensitive electricity markets and observed that solely behavioral remedies leave in place any existing incentive to exercise market power.

115. Internet Domain Names. This staff comment, filed with the National Telecommunications and Information Administration, discussed proposals for introducing competition into the Internet domain name system. The comment addressed the possibility that, with competition, customers who had invested in familiarizing the public with the names of their web sites could be "locked-in" by the switching costs that may ensue from changing registries. The comment also assessed the competitive consequences of self-regulating various technical functions through a not-for-profit corporation controlled by a diverse group of Internet stakeholders.

116. Satellite Television Rebroadcast of Local Television Signals. Staff submitted a comment to the Copyright Office that addressed copyright issues affecting competition in multichannel video programming

distribution markets. The comment concluded that: i) extending satellite carrier compulsory licenses to permit Direct Broadcast Satellite ("DBS") operators to retransmit local broadcast signals into their home markets could benefit consumers by enabling an allocation of resources more closely in accord with the relative costs of different video distribution methods and by making DBS a closer substitute for franchised cable service; and ii) applying "must-carry" rules to DBS may not enhance consumer welfare in light of the

122. Virginia Real Estate Commission Comment on Real Estate Licensing Requirements. This staff comment to the Virginia Real Estate Board's (Board) discussed how proposed changes to the real estate broker and salesperson licensing requirements may have an adverse impact on competition and consumer welfare. Specifically, the Board changed the definition of the term "actively engaged" which, as used in the proposed rules, would prevent individuals who have worked part-time from becoming brokers and salespersons in certain instances. The comment concluded that the proposed change in the definition of "actively engaged" in the real estate business is likely to hinder competition and harm consumers.

### *B. DOJ Trade Policy Activities*

123. 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.

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

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

126. 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.

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

## V. News studies related to antitrust policy

### *A. Antitrust Division Economic Analysis Group Discussion Papers*

128. The Economic Analysis Group issued no discussion papers during FY98. Copies of reports from previous years may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779. Other Division public materials may be obtained through the 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.

### *B. FTC Economic Reports and Economic Working Papers*

129. The following may be obtained from the Associate Director for Consumer Protection and Research, Federal Trade Commission, Bureau of Economics, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

#### *1) Economic Reports*

None on antitrust policy.

#### *2) Working Papers*

1. Are Retailing Mergers Anticompetitive? An Event Analysis (WP #216), John David Simpson and Daniel Hosken (Jan. 1998).

2. Identifying the Firm-Specific Pass-Through Rate (WP #217), Orley Ashenfelter, David Ashmore, Jonathan Baker, and Signe-Mary McKernan (January 1998).

3. Physician Networks, Integration and Efficiency (WP #218), Seth Sacher and Louis Silva (April 1998).

4. Price Movements Over the Business Cycle in U.S. Manufacturing Industries (WP #219), Bart J. Wilson and Stanley S. Reynolds (June 1998).

5. The Competitive Effects of Mergers between Asymmetric Firms (WP #220), Charles J. Thomas (August 1998).

## Appendice

**Federal Trade Commission:**
Fiscal Year 1998 FTE and Budgeted Amount by Program/Bureau

| | FTE | AMOUNT |
|---|---|---|
| Total Direct Mission | 336.8 | $30 255.6 |
| Bureau of Competition | 232.8 | 21 197.5 |
| Bureau of Economics | 61.2 | 5 469.1 |
| Regional Offices | 42.8 | 3 589.0 |
| Premerger Notification | 31.5 | $2 587.6 |
| Bureau of Competition | 29.3 | 2 408.8 |
| Bureau of Economics | 0.1 | 8.9 |
| Regional Offices | 2.1 | 169.9 |
| Merger & Joint Venture Enforcement | 199.9 | $18 105.5 |
| Bureau of Competition | 133.8 | 12 395.9 |
| Bureau of Economics | 39.3 | 3 512.0 |
| Regional Offices | 26.8 | 2 197.6 |
| Merger & Joint Venture Compliance | 10.4 | $947.0 |
| Bureau of Competition | 9.5 | 861.2 |
| Bureau of Economics | 0.6 | 53.6 |
| Regional Offices | 0.3 | 32.2 |
| Nonmerger Enforcement | 69.7 | $6 122.5 |
| Bureau of Competition | 50.1 | 4 468.3 |
| Bureau of Economics | 6.5 | 581.0 |
| Regional Offices | 13.1 | 1 073.2 |
| Nonmerger Compliance | 4.9 | $410.5 |
| Bureau of Competition | 3.3 | 271.0 |
| Bureau of Economics | 1.2 | 107.2 |
| Regional Offices | 0.4 | 32.3 |
| Antitrust Policy Analysis | 8.9 | $795.1 |
| Bureau of Competition | -------- | -------- |
| Bureau of Economics | 8.9 | 795.1 |
| Regional Offices | -------- | -------- |
| Other Direct Mission Resources | 11.5 | $1 287.4 |
| Bureau of Competition | 6.8 | 792.3 |
| Bureau of Economics | 4.6 | 411.3 |
| Regional Offices | 0.1 | 83.8 |

**Department of Justice**
Fiscal Year 1998 FTE and Budgeted Amount by Enforcement Activity

| | FTE | AMOUNT |
|---|---|---|
| Merger Enforcement | 251 | $31 444 ,000 |