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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

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

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

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Introduction

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

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

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

1. Changes in law or policies

1.1 Changes In Antitrust Rules, Policies, or Guidelines

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

1. complete and submit the form and all attachments in hard copy;

2. complete the electronic version of the form and submit it and all attachments electronically; or,

3. complete the electronic version of the form and submit it electronically while submitting all documentary attachments in paper copy.

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

1.2 Proposals to Change Antitrust Laws, Related Legislation or Policies

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

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

1.3 International Antitrust Cooperation Developments

9. On May 3-5, 2006, the Department of Justice and Federal Trade Commission participated in the fifth annual International Competition Network (ICN) Conference in Cape Town, South Africa. The

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

2.1 Department of Justice and FTC Statistics

2.1.1 DOJ Staffing and Enforcement Statistics

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

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

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

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

2.1.2 FTC Staffing and Enforcement Statistics

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

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

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

21. In *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005), the Sixth Circuit reversed the district court's grant of summary judgment to Dairy Farmers of America, Inc. ("DFA") in this government challenge to DFA's partial acquisition of a dairy. That acquisition, the government claimed, violated § 7 of the Clayton Act, 15 U.S.C. § 18, because it threatened to lessen competition in the numerous school milk markets where that dairy competed with another dairy partially-owned by DFA. The court of appeals did "not agree with the district court's conclusion that a lack of control or influence precludes a Section 7 violation." Rather, the "key inquiry is the [acquisition's] effect on competition, regardless of the cause." The government presented evidence that, at the time of the acquisition, DFA had sufficient governance rights over the acquired dairy to provide a "mechanism by which DFA exercised

the European Union is in the process of attempting to 'stimulate' private actions for antitrust violations in its own jurisdictions."

24. Other courts considering conduct with a foreign dimension have applied the Supreme Court's *Empagran* holding. For instance, in *CSR Limited v. CIGNA Corp.*, 405 F. Supp. 2d 526 (D. N.J. 2005), the

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

30. In two cases, *In re Microsoft*, 428 F. Supp. 2d 188 (S.D.N.Y.2006) and *In re Microsoft Corp.*,

2.4 Significant DOJ and FTC Enforcement Actions

36. **Norris Extradition**: Extradition proceedings continue in the United Kingdom against Ian P. Norris, a defendant in the Division's carbon brushes price-fixing investigation. Mr. Norris, the former

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

2.4.2 DOJ Civil Non-Merger Enforcement

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

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

42. On June 23, 2006, the American Bar Association (ABA) agreed to acknowledge that it had not complied with certain provisions of a 1996 consent decree and to pay $185,000 to reimburse fees and costs incurred in the Department's investigation. The Department charged in a court petition that the ABA had violated multiple structural and compliance provisions of the decree, which prohibited anticompetitive behavior in the law school accreditation process. The provisions required the ABA to: (1) certify decrae4.9(ae42c85,0

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

! **Health Care Alliance of Laredo**: In February 2006, a physicians' independent practice association in Texas agreed to settle FTC charges that it engaged in unlawful collective bargaining in setting fees its members would accept from health insurance plans. The Commission charged that the practice resulted in higher medical costs for consumers. The consent order will prohibit the association from engaging in similar conduct in the future.

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

2.5 Advisory Letters from the Commission

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

- **St. John's Health System**: Letter dated September 13, 2006, concerning the provision of **pharmaceuticals** by St. John's Regional Health Center in Missouri, a non-profit hospital. The staff of the Bureau of Competition advised St. John's Health System that its proposed plan to provide pharmaceuticals to patients of both its affiliated hospital and its affiliated clinic, through three hospital-owned pharmacies, falls within the Non-Profit Institutions Act (NPIA). That statute exempts from the Robinson-Patman Act "purchases of . . . supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

- **Alpena Public Schools**: Letter dated June 16, 2006, concerning a program to transfer pharmaceuticals at cost between a non-profit hospital and a non-profit public school system. The letter advis**ed Alpena that its proposed plan to have pharmaceuticals transferred to it for use by its employees, by the Alpena Regional Medical Center, with actual distribution of the pharmaceuticals being made by certain Alpena-area pharmacies, falls within the Non-Profit Institutions Act (NPIA).**

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

3.1 Enforcement of Pre-merger Notification Rules

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

3.2 Significant Merger Cases

3.2.1 FTC Merger Challenges or Cases

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

52. **Evanston/Highland Park**: In an Initial Decision issued in October 2005, an Administrative Law Judge (ALJ) found that Evanston Northwestern Healthcare Corporation's completed acquisition of an

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

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

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

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

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

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

61. **Enterprise/TEPPCO**: In August 2006, the Commission announced a law enforcement action challenging a 2005 acquisition that combined the natural gas liquids (NGL) storage businesses of Enterprise Product Partners, L.P. and TEPPCO Partners, L.P. under common ownership. The

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

65. **Whirlpool/Maytag**: On March 29, 2006, the Department announced the closing of its investigation of the proposed acquisition by Whirlpool Corporation (Whirlpool) of Maytag Corporation (Maytag). Whirlpool is the largest appliance manufacturer in the U.S., with annual sales of $14 billion.

4. Advocacy, Regulatory and Trade Policy Matters

4.1 Advocacy: Joint FTC-DOJ Amicus Briefs

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

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

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

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

72. In June 2006, the Commission and DOJ jointly filed an amicus brief in the case of *Latino Quimica-Amtex S.A., v. Atofina S.A* which involved an international price fixing conspiracy by manufacturers of two chemicals. The chemicals, sodium monochloroacetate and monochloroacetic acid, are used in manufacturing foods, pharmaceuticals, herbicides, and plastics. At issue was the Sherman Act claims of several foreign companies that purchased the chemicals from manufacturers located outside the

4.2 Regulatory Policies

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

73. The Department and FTC filed joint comments in FY 2006 with authorities in the state of Michigan in opposition to legislative proposals that would restrict the ability of local real estate professionals to offer consumers a variety of options regarding customized real estate services. Full-service brokers charge consumers a single price for a bundle of individual real estate services. In contrast, limited-service brokers offer consumers the option to pick and choose from a menu of different real estate services according to each respective consumer's individual needs. The proposal in Michigan would amend existing law to require a state-mandated minimum service package. Consumers would end up with fewer choices and prices for traditional full-service packages w2.4((2.4((26ik)13.5(ely)13.5(in)13.5(cre)11.7(a)0.8(se

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

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

Rene Kamita, Analyzing the Impact of Antitrust Immunity: Price Effects Following the Aloha- Hawaiian

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

APPENDICES

Department of Justice: