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agreements in criminal cases. Previously, in appropriate cases, corporate plea agreements included a provision offering non-prosecution protection to those employees who cooperated with the investigation and whose conduct did not warrant prosecution. The Division excluded, or carved out, employees who were believed to be culpable. In certain circumstances, it also carved out employees who refused to cooperate with the Division's investigation, employees against whom the Division was still developing evidence, and employees with potentially relevant information who could not be located. The names of all carved-out employees were included in the corporate plea agreements, which were publicly filed in the district courts where the charges were brought. As a result of the announced changes, the Division no longer carves out employees for reasons unrelated to culpability, and the Division will not include the names of carved-out employees in the plea agreement itself. Those names will instead be listed in an appendix to be filed with the court under seal. See http://www.justice.gov/atr/public/press_releases/2013/295747.htm.

2.2 Proposals to Change Antitrust Laws, Related Legislation or Policies

7. On July 23, 2013, FTC Chairwoman Ramirez testified before Congress, expressing concern about anticompetitive "pay-for-delay" agreements in the pharmaceutical industry. Chairwoman Ramirez stated that following the Supreme Court decision in *FTC v. Actavis, Inc.*, which held that pay-for-delay agreements are subject to a rule of reason analysis (see Section 3.2.1 below), the FTC will continue to challenge anticompetitive "pay-for-delay" agreements in court, and continue to support legislation that would make these agreements presumptively illegal to enhance clarity, create a stronger deterrent effect, and help the FTC move more quickly to stop these harmful agreements. See <http://www.ftc.gov/public-statements/2013/07/prepared-statement-federal-trade-commission-pay-delay-deals-limiting>.

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

3.1 Staffing and Enforcement Statistics

3.1.1 FTC

8. During FY 2013, the FTC employed approximately 538 staff and spent approximately \$113.4 million in furtherance of its Maintaining Competition mission.

9. During FY 2013, 1,286 proposed mergers and acquisitions were reported for review under the HSR Act, a 10.0 percent decrease from the number of HSR transactions reported during FY 2012. The Commission staff issued requests for additional information ("second requests") in 25 transactions. The Commission challenged 23 mergers, 16 of which were settled with consent orders, two in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation, four in which the Commission initiated administrative litigation, and one in which the Commission filed a complaint in federal court seeking permanently to enjoin the merger.

10. During FY 2013, the FTC staff opened 23 non-merger initial phase investigations. The Commission brought four non-merger enforcement actions, each of which was resolved by a consent order.

11. The Commission filed *amicus curiae* briefs in 11 cases (one before the Supreme Court and ten before federal appeals and district courts). The Commission provided three advisory opinions (see Section 3.5 below) and submitted 14 advocacy filings (see <http://www.ftc.gov/policy/advocacy>).

The Court acknowledged that the provision effectively precluded individual – and thus any – claims, but thought that the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.

19. On March 27, 2013, the Supreme Court decided *Comcast Corp. v. Behrend*, reversing the certification of a class action in an antitrust suit. The district court had certified the class, and the court of appeals affirmed. The suit alleged that Comcast’s practice of “clustering” its cable systems, by which it acquired additional systems adjacent to its existing systems in a metropolitan area, was an antitrust violation. To pursue a case on a class basis, however, the district court must find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” It found that was true of only one of the four theories of anticompetitive effect asserted, that the clustering deterred “overbuilding” by competing cable operators. The lower courts rejected Comcast’s argument that the econometric study that plaintiffs had submitted to show damages was not capable of measuring damages for the class injured under that theory, holding that such an argument went to the merits of the case and was not suitable for decision at the class certification stage. The Supreme Court held that the plaintiffs must show that damages can be measured on a classwide basis; their evidence here fell short, and the court must consider that in certifying the class, even if the issue overlaps the merits.

20. On February 19, 2013, in *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court unanimously ruled that the state action immunity doctrine did not immunize Phoebe Putney Health System, Inc.’s acquisition of Palmyra Park Hospital, Inc. from the federal antitrust laws. The FTC filed suit on April 20, 2011, seeking to block the proposed combination of the only two hospitals in Albany, Georgia. The Commission alleged that the deal would reduce competition significantly and allow the combined Phoebe/Palmyra to raise prices for general acute-care hospital services charged to the commercial health plans harming patients and local employers and employees.

21. Under the state action doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws. The Supreme Court held that Georgia law, which creates special-purpose

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during FY 2013, with an average sentence of 15 months. The Division remains committed to ensuring that culpable foreign nationals serve prison sentences for violating the U.S. antitrust laws, just as U.S. price-fixers do.

28. **Real Estate Foreclosure Auctions Cartel.** On March 11, 2014, following a four-week trial, a California federal jury convicted two real estate investors of conspiring to rig bids at public real estate foreclosure auctions in San Joaquin County, California. One of the defendants also was convicted of obstruction of justice for destroying evidence. The jury could not reach a verdict on a count of conspiracy to commit mail fraud against these two defendants. The jury found a third defendant, an auctioneer, not guilty.

29. The convicted investors and their co-conspirators agreed to suppress and restrain competition by rigging bids to obtain selected properties offered at public auctions. Evidence showed that after the conspirators' designated bidder bought a property at a public auction, they often would hold a second, private auction at which each participating conspirator would bid the amount above the public auction price he or she was willing to pay. The conspirator who bid the highest amount at the end of the private auction won the property. The difference between the price at the public auction and that at the second auction was the group's illicit profit, and it was divided among the conspirators in payoffs. This was money that otherwise would have gone to pay off mortgages and, in some cases, the defaulting homeowners. The bid-rigging conspiracy lasted from September 2008 or earlier until October 2009 or later. To date, 46 individuals either have pled guilty or agreed to plead guilty in connection with the real

have agreed to serve prison sentences ranging from a year and a day to two years. The Division continues to cooperate on this investigation with its counterparts in Canada, the EC, Japan, and South Korea, among others. *See* press releases and case filings at <http://www.justice.gov/atr/public/division-update/2014/auto>

agreed to pay a combined total of nearly \$750 million in restitution, penalties, and disgorgement to federal and state agencies for their roles in the conduct. See <http://www.justice.gov/atr/public/division-update/2014/muni-bonds.html#press-releases>.

37. **Airline Charter Services.** On February 24, 2014, the Division obtained the fifth guilty plea to arise out of its ongoing investigation into fraud and anticompetitive conduct in the airline charter services industry. A former employee of Aviation Fuel International, Inc. (AFI) pleaded guilty to a felony charge. The charge against him stemmed from the investigation into kickback payments by AFI and its employees to the former vice president of ground operations for Ryan International Airlines. The defendant worked for AFI from June 2007 to March 2008, and during that time Ryan's vice president received kickback payments from AFI on aviation fuel, services, and equipment sold by AFI to Ryan. AFI's owner and operator pleaded guilty on March 6, 2014, bringing the total number of guilty pleas to six. Four of the six individuals who have pleaded guilty have been ordered to serve sentences ranging from 16 to 87 months in prison and to pay more than \$580,000 in restitution. See http://www.justice.gov/atr/public/press_releases/2013/300683.htm; http://www.justice.gov/atr/public/press_releases/2013/300000.htm; and http://www.justice.gov/atr/public/press_releases/2013/299559.htm.

38. **Ocean Shipping.** On February 27, 2014, the Division brought charges in its investigation of a conspiracy involving ocean shipping services. Compañía Sud Americana de Vapores S.A. (CSAV), a Chilean corporation, was the first company charged in the conspiracy to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for the sale of international ocean shipping services for roll-on, roll-off cargo. This is non-containerized cargo that can be rolled onto

Commission approved a final settlement order in which Bosley agreed not to communicate such information and to institute an antitrust compliance program. See <http://www.ftc.gov/enforcement/cases-proceedings/1210184/bosley-inc-aderans-america-holdings-inc-aderans-co-ltd>.

46. **In the Matter of Práxedes E. Alvarez Santiago, M.D., et al.** On February 28, 2013, the Commission challenged eight independent nephrologists in Puerto Rico alleging that they illegally collectively bargained with insurers and refused to treat health plan patients when their price demands were rebuffed. On May 3, 2013, the FTC approved a final order settling the charges and barring the doctors from jointly negotiating prices, jointly refusing to deal with any insurer, and jointly refusing to treat patients. See <http://www.ftc.gov/enforcement/cases-proceedings/1210098/praxedes-e-alvarez-santiago-md-et-al-pr-nephrologists-matter>.

47. **In the Matter of IDEXX Laboratories, Inc.** On February 12, 2003, the Commission approved a final order settling charges that IDEXX Laboratories, Inc. – the largest U.S. supplier of diagnostic testing products used by small animal veterinarians – acted anticompetitively by engaging in exclusive dealing arrangements with three national distributors and two large regional distributors, and threatening to drop them if they carried other competing companies’ products. IDEXX agreed to an order that prohibits it from entering into concurrent exclusive distribution arrangements with distributors of point-of-care diagnostic testing products. See <http://www.ftc.gov/enforcement/cases-proceedings/101-0023/idx-laboratories-inc-matter>.

3.5 Advisory Letters from the FTC

48. Under its Rules, the Commission or its staff may

activities were unlikely to unreasonably restrain trade and, therefore, FTC staff did not intend to recommend an enforcement action against Norman PHO. See http://www.ftc.gov/sites/default/files/documents/advisory-opinions/norman-physician-hospital-organization/130213normanphoadvltr_0.pdf.

51. **The Methodist Hospital System.** The FTC staff's advisory opinion dated November 30, 2012, addressed the proposal of The Methodist Hospital System ("Methodist"), a not-for profit hospital system, to sell at cost drugs to Baytown EMS during the pendency of nationwide shortages of certain critical drugs. Baytown EMS is a division of the Baytown, Texas, city government, and serves as the exclusive 9-1-1 emergency transport service for Baytown residents by city ordinance. As an emergency transport, Baytown EMS also often administers certain pharmaceuticals en route to the hospital. The FTC staff advised that Methodist's proposal was a permissible emergency humanitarian gesture. Pursuant to the Supreme Court's precedent in *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.* regarding a hospital's role in an emergency and the Commission's similar discussion in its *St. Peter's Hospital of the City of Albany* advisory opinion, the staff opinion says Methodist may resell the needed pharmaceuticals to Baytown EMS as a humanitarian gesture during the shortages. See http://www.ftc.gov/sites/default/files/documents/advisory_opinions/methodist-hospital-system/121130advopinionltrmethodist.pdf.

3.6 *Business Reviews Conducted by the DOJ*

52. Under the Department's business review procedure, a person may submit a proposed business action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued four business review letters in FY 2013. The business review letters can be found at <http://www.justice.gov/atr/public/busreview/letters.html#page=page-1>.

53. On December 20, 2012, the Department announced it would not challenge a proposal by a group of seven nuclear power plant operators to procure jointly certain goods and services; each of them operates a single nuclear electric generation plant and they seek to obtain efficiencies similar to those of a nuclear ac944op:in du-3(o)1-1h7(s)9()12(c)12(ane)-1(tt)7(epa)10(rtm7(a)-1(wrs)1t7(e a n.)1(ould)1ored in 1w QUV 22r

to pay a \$480,000 civil penalty. See <http://www.ftc.gov/news-events/press-releases/2013/07/barry-diller-pay-480000-settle-ftc-allegations-related-premerger>.

55. On June 20, 2013, the investment firm of MacAndrews & Forbes Holdings, a New York-based holding company owned by Ronald O. Perelman, was charged with violating pre-merger reporting and waiting requirements when it acquired voting securities of Scientific Games Corporation, a provider of lottery and gaming services. Although this was the first time that MacAndrews & Forbes was charged with an HSR Act violation, the firm had previously made a corrective filing in May 2011 for what it asserted was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of the consent decree filed simultaneously with the charges, MacAndrews & Forbes was required to pay a \$720,000 civil penalty. See <http://www.ftc.gov/news-events/press-releases/2013/06/investment-firm-macandrews-forbes-pay-720000-penalty-resolve-ftc>.

4.2 *Select Significant Merger Matters*

4.2.1 *FTC Public Merger Investigations and Challenges*

56. **In the Matter of Actavis, Inc. and Warner Chilcott PLC.** On September 27, 2013, the

license its and Intermec's patents for 2D scan engines to Datalogic IPTECH s.r.l. for the next 12 years. *See* <http://www.ftc.gov/enforcement/cases-proceedings/131-0070/honeywell-international-inc-matter>.

60. **Solera Holdings, Inc.** On July 22, 2013, the Commission challenged Solera Holdings, Inc.'s ("Solera") consummated 2012 acquisition of Actual Systems of America, Inc. ("Actual Systems"). The Commission alleged that the acquisition harmed comp

68. **Watson Pharmaceuticals/Actavis Inc.** On October 15, 2012, the Commission challenged Watson Pharmaceuticals, Inc.'s ("Watson") \$5.9 billion proposed acquisitions of Actavis alleging that the acquisition would have been anticompetitive in the markets of 21 current and future generic drugs used to treat a wide range of conditions. The final order settling the Commission's charges required Watson and Actavis to sell the rights and assets to 18 drugs to Sandoz International GmbH and Par Pharmaceuticals, Inc., and to relinquish the manufacturing and marketing rights to three other drugs to protect competition in the markets for these generic drugs. See <http://www.ftc.gov/enforcement/cases-proceedings/1210132/watson-pharmaceuticals-actavis-inc>.

69. **In the Matter of Magnesium Elektron North America, Inc.** On October 12, 2012, the Commission challenged magnesium plate producer Magnesium Elektron's consummated acquisition of rival plate manufacturer Revere Graphics Worldwide, Inc. According to the FTC, Magnesium Elektron's 2007 acquisition of Revere Graphics Worldwide was anticompetitive and resulted in the combination of the only two makers and sellers of magnesium plates for photoengraving in the world. In an effort to restore competition in the market, the consent order required Magnesium Elektron to sell technology and know-how used to manufacture magnesium plates for photoengraving to Universal Engraving, a company uniquely positioned to become an effective competitor in this market because it already sold other metals

and resources involved in negotiating waivers. The model waiver updates and replaces the Agencies' prior waiver forms. It reflects both Agencies' recent experience with waivers, incorporating updated language

patents which owners have committed to licensing on fair, reasonable, and nondiscriminatory (F/RAND) terms. As noted above in para. 91, in August 2013, the U.S. Trade Representative relied on the policy statement in disapproving an ITC exclusion order barring the importation of certain Apple Inc. products into the United States. The Trade Representative echoed concerns in the policy statement about the potential harms from owners of F/RAND-encumbered, standards-essential patents gaining undue leverage and engaging in hold-up.

99. **Telecommunications Markets.** The Division also advocates actively for competition in the telecommunications sector. On April 11, 2013, the Division filed comments in a Federal Communications Commission (“FCC”) proceeding regarding mobile spectrum holdings. The comments urged that rules for spectrum auctions ensure that smaller nationwide networks have the opportunity to acquire low-frequency spectrum and thereby improve the competitive dynamics among nationwide carriers and benefit consumers. *See* _____

while still maintaining appropriate consumer protections. The comments further recommended that CPUC be guided by the principle that any restriction on competition designed to address potential harm should be narrowly crafted to minimize its anticompetitive impact. See http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf.

6.1.3 *DOJ and FTC Trade Policy Activities*

106. The Agencies are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Agencies participate in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative, and provide antitrust and other legal advice to U.S. trade agencies. In addition, the Division works with other Department components (including the Civil, Criminal, and Environmental and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole. The FTC coordinates on consumer protection aspects of trade policy with a number of U.S. government agencies.

107. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. The FTC and the Division participate in competition policy discussions associated with the Trans-Pacific Partnership (“TPP”) and the Transatlantic Trade and Investment Partnership (“TTIP”) negotiations.

7. **New Studies Related to Antitrust Policy**

7.1 *Joint Conferences and Reports*

108. **Patent Assertion Entity Activities Workshop.** On December 10, 2012, the Agencies jointly hosted a workshop in Washington D.C. to explore the impact of patent assertion entity (“PAE”) activities on innovation and competition and the implications for antitrust enforcement and policy. The workshop examined, among other topics, the legal treatment of PAE activity, economic theories concerning PAE activity, and industry experiences. Additional information on the workshop is *available at* <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>.

7.2 *FTC Conferences, Reports, and Economic Working Papers*

7.2.1 *Conferences and Workshops*

109. **Microeconomics Conference.** On November 15-16, 2012, the FTC held its Fifth Annual Microeconomics Conference bringing together researchers from academia and other government agencies and organizations to discuss antitrust, consumer protection, and policy issues that the economists in the FTC’s Bureau of Economics encounter in their work. The conference also provided an opportunity for scholars outside the FTC to gain a better understanding of the work of the FTC and the economic analysis conducted within the FTC’s Bureau of Economics. The topics addressed at the Conference included health care competition, innovation, mergers, monopolization, collusion, and intellectual property. For more information on the conference, see <http://www.ftc.gov/news-events/events-calendar/2012/11/fifth-annual-microeconomics-conference>.

110. **Pet Medications.** On October 2, 2012, the FTC hosted a workshop to examine competition and consumer protection issues in the pet medications industry. The workshop considered: (a) how current industry distribution and other business practices affect consumer choice and price competition for pet medications; (b) the ability of consumers to obtain written, portable prescriptions that they can fill wherever they choose; and (c) the ability of consumers to verify the safety and efficacy of pet medications

APPENDICES

Department of Justice: Fiscal Year 2013 FTE² and Resources by Enforcement Activity

| | FTE | Amount (\$ in thousands) |
|----------------------|-----|--------------------------|
| Criminal Enforcement | 262 | \$62,686 |
| Civil Enforcement | 392 | \$93,880 |
| Total | 654 | \$156,466 |

Federal Trade Commission: Fiscal Year 2013 Competition Mission FTE and Dollars by Program, Bureau & Office

| | FTE | Amount (\$ in thousands) |
|-------------------------------------|-------|--------------------------|
| Total Promoting Competition Mission | | |
| <i>Bureau of Competition</i> | 278.8 | 46,706.4 |
| <i>Bureau of Economics</i> | 72.3 | 12,174.8 |
| <i>Regional Offices</i> | 21.1 | 5,183.6 |
| <i>Mission Support</i> | 132.7 | 49,359.9 |
| Premerger Notification | | |
| <i>Bureau of Competition</i> | 24.3 | 3,820.0 |
| <i>Bureau of Economics</i> | --- | --- |
| <i>Regional Offices</i> | 0.3 | 44.5 |
| Merger & Joint Venture Enforcement | | |
| <i>Bureau of Competition</i> | 138.8 | 23,744.4 |
| <i>Bureau of Economics</i> | 44.6 | 7,427.0 |
| <i>Regional Offices</i> | 9.8 | 2,671.0 |
| Merger & Joint Venture Compliance | | |
| <i>Bureau of Competition</i> | 3.1 | 487.3 |
| <i>Bureau of Economics</i> | 0.1 | 16.6 |
| <i>Regional Offices</i> | --- | 0.8 |

² An "FTE" or "full time equivalent" amounts to one employee working full time for a full year. Because the number of employees fluctuates throughout the year through hiring, attrition, and varying schedules, an agency typically has more employees than FTEs (e.g., two employees working 20 hours per week for one full year equals one FTE).

