ANTITRUST AGENCIES: DEPARTMENT OF JUSTICE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION BUREAU OF COMPETITION

HEARING

BEFORE THE

TASK FORCE ON ANTITRUST
AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

SEPTEMBER 25, 2007

Serial No. 110–158

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

37–977 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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ANTITRUST AGENCIES: DEPARTMENT OF JUSTICE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION BUREAU OF COMPETITION

TUESDAY, SEPTEMBER 25, 2007

HOUSE OF REPRESENTATIVES,
TASK FORCE ON ANTITRUST
AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 1:15 p.m., in room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (acting Chair of the Task Force) presiding.

Present: Representatives Lofgren, Cohen, Sutton, Chabot, Keller, Lungren, Cannon, Issa, Smith, and Pence.

Staff present: Stacey Dansky, Majority Counsel; Stewart Jeffries, Minority Counsel; Ted Kalo, General Counsel-Deputy Staff Director; Sean McLaughlin, Minority General Counsel; Teresa Vest, Majority Chief Clerk.

Ms. LOFGREN. [Presiding.] Good afternoon. The hearing will come to order. And the Chair is authorized to call a recess at any time. In the absence of our Chairman, Mr. Conyers, who is temporarily detained at a meeting, I will invite our Ranking Member to make his opening statements in hopes that Mr. Conyers will be here soon to give his.

Mr. KELLER. Well, thank you, Madam Chairwoman, for initiating and convening this important hearing of the Task Force on Antitrust and Competition Policy. And I want to especially thank our witnesses, Mr. Barnett and Ms. Majoras for being here today.

Antitrust law affects nearly every industry. So far this Antitrust Task Force has held important hearings on the proposed XM-Sirius Satellite Radio merger and the somewhat controversial issue of credit card interchange fees.

Previously the Judiciary Committee has held hearings on telecommunications, sports, oil and gas, utilities, ocean shipping, airlines, agriculture, and financial services related to antitrust issues. Given the impact of antitrust law on the American economy, it is vital that we examine how well these laws are working, particularly in light of the innovation that today's high-tech economy has brought. Today's hearing gives us the opportunity to see how those laws are being enforced and whether there are any areas where congressional intervention would be appropriate.

From their written testimony, it appears that last year the Antitrust Division of the Department of Justice and the Federal Trade Commission have both been very active. These two agencies have been involved in enforcement actions in the real estate, oil and gas, health care, airline and telecommunications fields, just to name a few. Both agencies have filed amicus briefs in numerous cases before the U.S. Supreme Court in what has been one of the most active periods of antitrust jurisprudence in years.

The antitrust agencies are also in the best position to assess recent trends in international antitrust enforcement such as the European Union's recent decision in the Microsoft case and to provide Congress with guidance on how best to promote comity between the multiple antitrust enforcement agencies around the world. Because of their activities, DOJ and FTC can also serve as a guide for this task force as it considers future hearings.

For instance, I understand that the FTC has particular interest in legislation that would make certain types of settlements in pharmaceutical patent litigation illegal. I am very interested to hear their views on this topic and perhaps possibly holding hearings on this issue in the future if needed.

Again, I want to thank the witnesses very much for being here today. And I look forward to hearing your testimony later.

And, Madam Chairman, at this point I will yield back the balance of my time.

Ms. LOFGREN. Thank you.

Mr. Smith, if you wanted to put your opening statement in the record or——

Mr. SMITH. Yes, Madam Chair. I ask unanimous consent to have my opening statement made a part of the record. Thank you.

Ms. LOFGREN. So ordered.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for convening this first hearing of the Task Force on Antitrust and Competition Policy.

Vigorous, unimpeded competition sustains our economy and keeps it strong. It leads to innovative products that better our lives and keep prices low. The Judiciary Committee has a long history of oversight to ensure that American markets retain healthy competition.

At the heart of that competition is the Sherman Act, which the Supreme Court has dubbed the "Magna Carta of free enterprise." Sections 1 and 2 of the Act, which Congress passed in 1890, are deceptively simple; each is only one sentence long.

However, those two sentences have come to regulate all manner of business dealings in this country, including who a company can—and must—deal with, how it prices its goods, and whether it can merge with a rival company.

The antitrust laws are unique in American legal culture in that they are enforced by two federal agencies, the Department of Justice and the Federal Trade Commission. In addition, each state's attorney general can bring suit under both federal and state antitrust laws.

The antitrust laws can be enforced both criminally and civilly. Private citizens can also bring suit to recover damages and enjoin anticompetitive business practices.

Antitrust enforcement has also expanded beyond America's borders. When the United States passed the Sherman Act over 100 years ago, it was alone in the world. Today over 100 countries have some sort of competition law, and more are considering them.

In fact, China is currently debating its own antitrust laws, despite being a country that does not necessarily share America's fundamental economic principles.

Today's hearing gives us the opportunity to see how the two antitrust agencies are faring in enforcing the law. On the one hand, I am heartened by the recent announcement that British Airways and Korean Air Lines have agreed to pay criminal fines of $300 million each for their part in a price fixing scandal.

Similarly, I am pleased to see that the FTC, after studying the broadband industry, has found that there is healthy competition in that sector. DOJ, too, has found that competition in that industry is robust and the so-called "problem" that net neutrality advocates are trying to "fix" has not been adequately demonstrated.

On the other hand, there have been some recent missteps as well. It was troubling to read that the FTC, in the course of its efforts to block the merger between Whole Foods and Wild Oats food stores, disclosed—albeit inadvertently—competitively sensitive information about the transaction. The FTC subsequently lost its challenge in court, but, according to the written testimony of Chairwoman Majoras, continues to pursue administrative remedies against the parties.

And, the European Union's recent action in the Microsoft case raises questions about whether—and how—comity and a common understanding of antitrust laws can be promoted between the United States and the rest of the world.

I look forward to hearing the testimony of Chairwoman Majoras and Assistant Attorney General Barnett on these and other matters.

I yield back the balance of my time.

Ms. LOFGREN. And all Members may put their opening statements in the record. Mr. Conyers may wish to deliver his opening statement when he arrives from his meeting.

I will just note that I think the antitrust portfolio is one of the most important of the DOJ. Those of us who are fortunate to live in a country that has a vigorous capitalist economy also know that competition is protected through vigorous antitrust review.

And I will note that I do have concerns over the level of review of mergers that have occurred in DOJ and other enforcement activities. And I will certainly get into that when it is time for questions.

At this point, I would like to introduce our witnesses and ask them to make their opening statements.

First we have Deborah Platt Majoras, who is our first witness. She is the Chairman of the Federal Trade Commission (FTC). Ms. Majoras has spent much of her career working on antitrust issues.

From April of 2001, through 2003, she served first as the Deputy Assistant Attorney General and then as the Principle Deputy for the Department of Justice's Antitrust Division. Prior to her time at the Justice Department, she was a partner in the antitrust section of the Jones Day Law Firm.

Welcome to you, Ms. Majoras.

Next we have Thomas O. Barnett. Mr. Barnett is the Assistant Attorney General for the Department of Justice's Antitrust Division. He was confirmed as Assistant Attorney General in 2006, but had been serving as the Acting Assistant Attorney General for the division since July of 2005.

Prior to his tenure as Acting Assistant Attorney General, Mr. Barnett had, since 2004, served as the Antitrust Division's Deputy Assistant Attorney General for civil enforcement. Before joining the Justice Department, Mr. Barnett was a partner at Covington and Burling, where he was vice-chair of the firm's antitrust and consumer protection practice group.

Welcome, Mr. Barnett.

And if you would note the machine on the table, we have 5 minutes to hear your oral testimony. We do ask when the yellow light

goes on that you have about a minute left and that you sum up. And your full written statements will be made part of the record.

So first, let me call on you, Ms. Majoras, to give us your statement.

TESTIMONY OF THE HONORABLE DEBORAH PLATT MAJORAS, CHAIRMAN, FEDERAL TRADE COMMISSION (FTC)

Ms. MAJORAS. Madam Chairwoman, Ranking Member Keller, Members of the Task Force, thank you for the opportunity to discuss the FTC's efforts to protect consumers by ensuring competition, which is a critical underpinning of our market economy, remains robust. To this end, at the FTC we focused our enforcement effort on the areas that are most likely to impact consumers, namely, health care, energy, real estate, technology and retail sectors.

During the past 3 fiscal years, the FTC's competition work has produced 51 merger enforcement actions or withdrawals of mergers, which derived from 84 second requests, that is, expanded investigations, and 22 nonmerger actions. During the same time period, we have completed 12 statutorily mandated rule makings and reports, eight public conferences and workshops, plus a set of hearings on issues arising under section 2 of the Sherman Act, and nine reports on competition issues significant to consumers.

Through the first 11 months of this fiscal year, 2007, pre-merger filings have increased 23 percent in the same period in the last fiscal year. And the number of investigations that we have undertaken reflects this continual uptick. Since January of this year, we have litigated three preliminary injunction actions in Federal court.

On the health care front last month, the Commission ruled that Evanston Northwestern Health Care Corporation's consummated acquisition of Highland Park Hospital was anticompetitive, that it resulted in higher prices, and a substantial lessening of competition for acute care in-patient hospital services in parts of Chicago's northern suburbs.

The Commission also has challenged several recent health care transactions and achieved substantial relief for consumers in the areas of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services.

The Commission continues to work to detect and investigate anticompetitive agreements between drug companies that delay generic entry. Indeed, our Federal court challenge to an alleged anti-competitive agreement involving Ovcon, a branded oral contraceptive product, has led to the introduction of lower priced generics.

So far in 2007, the Commission has challenged three mergers in the energy industry. Western Refinery's acquisition of Giant Industries, unsuccessful in district court. Equitable Resources' proposed acquisition of The Peoples Natural Gas Company, which is still in litigation, and the proposed $22 billion deal whereby energy firm, Kinder Morgan would be taken private by its management and a group of investment firms, including the Carlysle Group and Riverstone Holdings. We also charged the American Petroleum Company with illegally conspiring with competitors to restrict the importation and sale of motor oil lubricants in Puerto Rico.

The FTC has actively investigated restrictive practices in the residential real estate industry recognizing that the purchase of a home is the most significant investment that most consumers will ever make. In the past year alone, the agency has brought eight enforcement actions against associations of realtors or brokers who adopted restrictive rules that allegedly withheld the valuable online benefits of their multiple listing services that they control from consumers who chose to enter into nontraditional type contracts with real estate brokers.

In the critical technology arena, in February of 2007, the Commission issued a final opinion and order finding that technology developer, Rambus, Inc., had unlawfully monopolized the markets for four computer memory technologies that had incorporated into industry standards for D-ram chips. And we required Rambus to license its SD-ram and DDRSC-ram technologies according to maximum allowable royalty rates. This was the Commission's first litigated case in the standards setting area and we believe the first time in 22 years that the Commission has heard a monopolization case in administrative litigation.

The Commission also guards against anti-competitive conduct in the retail sector. And I would be happy to elaborate on that later.

In addition, complementing our law enforcement work in the past year, we have issued reports on competition issues in real estate, gasoline, broadband and intellectual property, and provided competition analysis to policy makers regarding such areas as attorney advertising and pharmacy benefit managers. We aided the NHS modernization commission in its examination of the U.S. antitrust laws. And to ensure that our knowledge remains fresh, we are actively engaged in market research with recent hearings examining the boundaries of permissible and impermissible conduct under section 2 of the Sherman Act, a workshop to examine broadband connectivity competition policy, and a 3-day conference on energy markets in the 21st century.

Madam Chairman, Members of the Task Force, the FTC is committed to working to preserving competition and to protecting consumers. And we look forward to speaking with you further about this. And we appreciate your support. Thank you.

[The prepared statement of Ms. Majoras follows:]

PREPARED STATEMENT OF THE HONORABLE DEBORAH PLATT MAJORAS

I. Introduction

Chairman Conyers, Ranking Member Keller, and Members of the Task Force, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission ("FTC" or "Commission").[1] The Commission has great respect for the Congressional oversight process, and I am pleased to appear before you to present the testimony of the FTC providing an overview of the Commission's recent antitrust enforcement activities.

Competition is the critical underpinning of the free and open markets that are the foundation of a vibrant economy. The goal of the Commission's competition mission is to remove the obstacles that impede competition and prevent its benefits from flowing to consumers.

The Commission has been active in protecting consumers from anticompetitive mergers and anticompetitive conduct. Through 11 months of fiscal year 2007, the agencies have received 1967 premerger filings, an increase of 23 percent from the same time period of fiscal year 2006. Reflecting an increase in investigative activity, the number of requests for additional information issued by the Commission increased over the same period. The Commission's merger enforcement actions also have increased this year. Thus far in fiscal year 2007, there have been 21 mergers in which the Commission brought merger enforcement actions to preserve competition or the parties abandoned proposed mergers after Commission staff expressed concerns about anticompetitive harm. This number includes three litigated preliminary injunction actions in federal district court seeking to block proposed mergers involving

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

petroleum refiners, natural gas companies, and premium natural and organic supermarkets. Also this year, the Commission has brought 12 nonmerger enforcement actions. The Commission continues to focus its enforcement efforts on sectors of the economy that have the greatest impact on consumers, such as health care, energy, retail, technology, and real estate.

II. Health Care

The health care industry plays a crucial role in the U.S. economy in terms of the impact that it has on consumer spending and welfare. Health care expenditures in the United States represent almost $2 trillion and have been increasing steadily for the last 30 years. The Commission dedicates substantial resources to protecting health care consumers. The agency investigated, and challenged where appropriate, agreements among pharmaceutical companies and physicians that deprive consumers of lower prices and higher quality. The Commission also has challenged several mergers and achieved substantial relief for consumers in the areas of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services.

A. Pharmaceuticals

The Commission was particularly active in enforcing the antitrust laws in the pharmaceutical industry. In October 2006, the FTC challenged Barr Pharmaceuticals' proposed acquisition of Pliva.[2] In settling the Commission's charges, Barr is required to divest its generic antidepressant, trazodone, and its generic blood pressure medication, triamterene/HCTZ. Barr is also required to divest either Pliva's or Barr's generic drug for use in treating ruptured blood

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[2] *In the Matter of Barr Pharms., Inc.*, FTC Docket No. C-4171 (finalized Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610217/0610217barrdo_final.pdf.

vessels in the brain. Finally, Barr is required to divest Pliva's branded organ preservation solution.

Also in October 2006, the FTC protected competition for thirteen generic drug products by challenging Watson Pharmaceuticals, Inc.'s acquisition of Andrx Corporation. In settling the charges, the Commission issued an order requiring that Watson: (1) end its marketing agreements with Interpham Holdings, Inc.; (2) assign and divest the Andrx rights necessary to develop, make, and market generic extended release tablets that correct the effects of type 2 diabetes; and (3) divest Andrx's rights and assets related to the developing and marketing of 11 oral contraceptives.[3]

In December 2006, the Commission challenged Johnson & Johnson's proposed $16.6 billion dollar acquisition of Pfizer's consumer health division to preserve competition for certain over-the-counter medications. The Commission order settling the charges requires that Pfizer sell its Zantac, Cortizone, and Unisom divisions as well as Johnson & Johnson's Balmex division. At issue in this matter was competition for non-prescription H-2 blockers, hydrocortisone anti-itch products, nighttime sleep aids, and diaper rash treatments.[4]

In January 2007, the Commission challenged Hospira Inc.'s proposed $2 billion acquisition of rival drug manufacturer Mayne Pharma Ltd. The Commission's order requires the companies to sell assets used to manufacture and supply five generic injectable pharmaceuticals

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[3] *In the Matter of Watson Pharms., Inc., and Andrx Corp.*, FTC Docket No. C-4172 (finalized Dec. 12, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610139/061212do_public_ver0610139.pdf.

[4] *In the Matter of Johnson & Johnson and Pfizer Inc.*, FTC Docket No. C-4180 (finalized Jan. 16, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder_publicversion.pdf.

and thereby preserves competition in the markets at issue.[5]

In April 2007, the Commission challenged the Actavis Group hf.'s proposed acquisition of Abrika Pharmaceuticals, Inc., alleging that the transaction would create a monopoly in the U.S. market for generic isradipine capsules, a drug typically prescribed to patients to lower their blood pressure and to treat hypertension, ischemia, and depression. Under a consent order that allowed the deal to proceed, the companies divested all rights and assets needed to make and market generic isradipine capsules to Cobalt Laboratories, Inc., an independent competitor.[6]

1. Agreements that Delay Generic Entry

The Commission continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry, including investigating some patent settlement agreements between pharmaceutical companies that are required to be filed with the Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. In these "exclusion payment settlements" (or, to some, "reverse payment settlements"), a brand-name drug firm pays a potential generic competitor to abandon its patent challenge and delay entering the market. Such settlements restrict competition at the expense of consumers, whose access to lower-priced generic drugs is delayed, sometimes for many years. These anticompetitive patent settlement present one of the greatest threats American consumers face today.

Recent court decisions, however, have made it more difficult to bring antitrust cases to

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[5] *In the Matter of Hospira, Inc. and Mayne Pharma Ltd.*, FTC Docket No. C-4182 (finalized Mar. 21, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0710002/070323do0710002.pdf.

[6] *In the Matter of Actavis Group*, FTC Docket No. C-4190 (finalized May 18, 2007) (decision and order), *available at* http:///www.ftc.gov/os/caselist/0710063/index.shtmn.

stop exclusion payment settlements, and the impact of those court rulings is becoming evident in the marketplace. These developments threaten substantial harm to consumers and others who pay for prescription drugs. For that reason, the Commission supports a legislative solution to prohibit these anticompetitive settlements, while allowing exceptions for those agreements that do not harm competition.[7]

In the meantime, the Commission continues to investigate, and challenge, where appropriate, anticompetitive agreements that limit consumer access to lower-priced generic drugs. The Commission's challenge to an alleged anticompetitive agreement involving Ovcon, a branded oral contraceptive product, has led to the introduction of lower priced generic products. In November 2005, in the case of *F.T.C. v. Warner Chilcott Holdings Company III, Ltd.*, the Commission filed a complaint in federal district court seeking to put an end to an agreement between drug manufacturers Warner Chilcott and Barr Laboratories that, by allegedly violating the antitrust laws, denied consumers the choice of a lower-priced generic version of Warner Chilcott's Ovcon 35.[8] Under threat of a preliminary injunction sought by the FTC, in September 2006 Warner Chilcott waived the exclusionary provision in its agreement with Barr that prevented Barr from entering with its generic version of Ovcon. The next day, Barr announced

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[7] *See Anticompetitive Patent Settlements in the Pharmaceutical Industry - The Benefits of a Legislative Solution: Hearing Before the Senate Committee on the Judiciary* (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), *available at* http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf.

[8] *FTC v. Warner-Chilcott Holdings Co. III,* No 1:05-cv-02179-CKK (D.D.C. filed Nov. 7, 2005) (complaint filed), *available at* http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20pdf.

its intention to start selling a generic version of the product.[9] Under an agreement settling the case, entered in October 2006, Warner Chilcott must: (1) refrain from entering into agreements with generic pharmaceutical companies in which the generic agrees not to compete with Warner Chilcott and there is either a supply agreement between the parties or Warner Chilcott provides the generic with anything of value and the agreement adversely effects competition; (2) notify the FTC whenever it enters into supply or other agreements with generic pharmaceutical companies; and (3) for three months, take interim steps to preserve the market for the tablet form of Ovcon in order to provide Barr the opportunity to compete with its generic version.[10] Though Warner Chilcott settled, the FTC's case against Barr is ongoing. Today, consumers are enjoying the full benefits of competition and are able to choose between Barr's generic product, an authorized generic product, and the original branded product.[11] The Commission is proud of this result and is actively seeking other cases where it can directly benefit consumers of generic drugs.

B. Medical Devices and Diagnostic Systems

This past year, the Commission actively enforced the antitrust laws against transactions that it believes would have reduced competition for several types of medical devices and

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[9] FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), *available at* http://www.ftc.gov/opa/2006/10/chilcott.htm.

[10] *FTC v. Warner-Chilcott Holdings Co. III,* No 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated final permanent injunction and final order), *available at* http://www.ftc.gov/os/caselist/0410034/finalorder.pdf.

[11] FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), *available at* http://www.ftc.gov/opa/2006/10/chilcott.htm. Though Warner Chilcott settled in October 2006, the FTC's case against Barr is ongoing. *FTC v. Warner Chilcott Holdings Co. III,* No. 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated permanent injunction and final order), *available at* http://www.ftc.gov/os/caselist/0410034/finalorder.pdf.

diagnostic systems. In July 2006, the Commission challenged the $27 billion acquisition of Guidant Corporation by Boston Scientific Corporation to preserve competition in markets for life-saving medical devices. These two companies are the largest market share holders in several coronary medical device markets in the United States, together accounting for 90 percent of the U.S. percutaneous transluminal coronary angioplasty balloon catheter market and 85 percent of the U.S. coronary guidewire market. The Commission order resolving the charges required the divestiture of Guidant's vascular business to an FTC-approved buyer.[12]

In August 2006, the Commission challenged Hologic, Inc.'s proposed acquisition of Fischer Imaging to preserve competition in the market for breast cancer diagnostics, specifically for prone stereotactic breast biopsy systems. The Commission consent order required the divestiture of the key biopsy system assets to Siemens, a company well-positioned to become a competitor in this market.[13]

In December 2006, the Commission challenged the proposed $12.8 billion merger between Thermo Electron and Fisher Scientific. The Commission's order requires that Thermo Electron divest Fisher's Genevac division, thereby maintaining competition in the market for centrifugal vacuum evaporators, a tool used in the health care industry.[14]

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[12] *In the Matter of Boston Scientific Corp. and Guidant Corp.*, FTC Docket No. C-4164 (July 21, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610046/060725do0610046.pdf.

[13] *In the Matter of Hologic, Inc.*, FTC Docket No. C-4165 (Aug. 9, 2006)(decision and order), *available at* http://www.ftc.gov/os/caselist/0510263/0510263decisionandorderpubrecver.pdf.

[14] *In the Matter of Thermo Electron Corp.*, FTC Docket No. C-4170 (Nov. 30, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610187/061205do0610187.pdf.

C. Hospitals and Clinics

The Commission has worked vigorously to preserve competition in local hospital markets. Last month, the Commission ruled that Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital was anticompetitive,[15] upholding an October 2005 Initial Decision by an FTC Administrative Law Judge that the consummated acquisition of its important competitor, Highland Park Hospital, resulted in substantially higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.[16] Several other hospital mergers have been announced within the past several months, and the FTC has active investigations pending.

In September 2007, the Commission protected competition for kidney dialysis patients by challenging an agreement between American Renal Associates, Inc. and Fresenius Medical Care Holdings, Inc. to close Fresenius clinics close to competing ARA clinics and for ARA to acquire other Fresenius clinics. The Commission alleged that this agreement would have eliminated direct competition between ARA and Fresenius and resulted in ARA operating the only dialysis clinics in certain local markets in Rhode Island and Massachusetts. The parties terminated their agreement after Commission staff objected. A proposed Commission order, subject to public

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[15] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (Opinion of the Commission), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[16] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 2005) (initial decision), *available at* http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf.

comment through October 9, 2007, prevents the parties from entering into similar agreements in the future.[17]

D. Physicians and Dentists

The Commission continues to investigate and challenge unlawful price fixing and other restraints by health care providers that may lead to higher costs for consumers.

In August 2006, the Commission challenged agreements among 30 competing members of the Puerto Rico Association of Endodontists that the Commission believes led to higher costs for consumers. The Commission alleged that the members had agreed to set the prices they would charge dental insurance plans and had refused to deal with plans that would not accept the collectively determined prices. The Commission settled the matter by approving a final order that prohibited the members from engaging in such conduct.[18]

Also in August 2006, in the matter of New Century Health Quality Alliance, the Commission approved a final consent order settling charges against two independent practice associations and eighteen member physician practices in the Kansas City area. The Commission's Complaint challenged the independent practice associations' and physician practices' alleged refusal to deal with health care plans, except on collectively agreed-upon terms, including price.[19]

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[17] *In the matter of American Renal Associates, Inc.*, FTC File No. 051-0234 (complaint), *available at* http://www.ftc.gov/os/caselist/0510234/index.shtm.

[18] *In the Matter of Puerto Rico Ass'n of Endodontists, Corp.*, FTC Docket No. C-4166 (finalized Aug. 24, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510170/0510170c4166praedecisionorder.pdf.

[19] *In the Matter of New Century Health Quality Alliance, Inc.*, FTC Docket No. C-4169 (Sept. 29, 2006) (decision and order), *available at*

In February 2007, the FTC challenged agreements among organizations representing more than 2,900 independent physicians in the Chicago area. The charges involved Advocate Health Partners (a "super-PHO" with numerous physician-hospital organizations as members), which, along with ten related parties, collectively set prices that otherwise independent physicians would charge to health plans, without any sort of efficiency-enhancing integration among the member practices that would justify their conduct. Specifically, the Commission alleged that AHP negotiated contract rates with health plans on behalf of its members, terminated member contracts with a health plan that rejected a proposed collective rate, and threatened that it would not contract with a health plan for hospital services unless that plan stopped contracting with individual physicians and agreed instead to a group contract. The Commission settled the charges and approved a consent order that prohibits AHP and the other named parties from engaging in such anticompetitive conduct in the future.

Some time after the allegedly unlawful conduct in this case began, AHP and the other respondents developed and implemented a clinical integration plan, seeking to integrate the member practices in such a way as to justify collective rate-setting. The Commission has made no determination on the legality of the plan, and although the order does not prohibit the parties from proceeding with it, it does contain mechanisms allowing the Commission to monitor the ongoing development, implementation, and results of the plan. The Commission fully intends to continue this monitoring, and retains the ability to challenge conduct related to the plan if it determines at any time that such a challenge is warranted and in the public interest.

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http://www.ftc.gov/os/caselist/0510137/0510137nchqaprimedecisionorder.pdf.

In June 2007, the Commission announced a settlement of its 2003 administrative complaint charging that the South Carolina State Board of Dentistry, composed primarily of practicing dentists, unlawfully restrained competition by adopting a rule that required a dentist to examine every child before a dental hygienist could provide preventive care. The South Carolina State Board of Dentistry's restriction resulted in far fewer children, particularly underprivileged children, receiving care. The Commission's action protected access to preventive dental services for children in school programs by requiring the Board to publicly announce its support for the current state policy – that hygienists can provide such care in public health settings without a dentist's examination – and to notify the Commission before adopting rules or taking other actions related to preventive dental services provided by dental hygienists in public health settings.[20]

In July 2007, the Commission charged a Puerto Rico optometrists' group and two of its leaders with price fixing. The Commission's complaint alleged that a group representing all optometrists in Puerto Rico refused, and threatened to refuse, to deal with payors, unless the payors raised the fees paid to the optometrists. The consent order bars the group's doctors from jointly negotiating prices or terms of service, while allowing them to participate in legal joint arrangements.[21]

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[20] *In the Matter of South Carolina State Board of Dentistry*, FTC Docket No. D-9311 (June 20, 2007) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9311/070620decision.pdf.

[21] *In the Matter of Colegio de Optometras*, FTC Docket No. C-4199 (finalized Sept. 6, 2007) (decision and order), available at http://www.ftc.gov/os/caselist/0510044/070911decision.pdf.

III. Energy

Few issues are more important to American consumers and businesses than the decisions being made about current and future energy production and use. The Commission plays a key role in maintaining competition and protecting consumers in energy markets. In doing so, the Commission has assembled vast competition policy and enforcement expertise in matters affecting the production and distribution of gasoline and natural gas liquids used in heating and other industrial applications. The agency invokes all the powers at its disposal – including investigation of possible antitrust violations, prosecution of cases, industry studies and analyses, and advocacy before other government agencies – to protect consumers from anticompetitive conduct in the energy sector. So far in 2007, the Commission has challenged three mergers in the energy industry.

In January 2007, the Commission challenged the terms of a proposed $22 billion deal whereby energy firm Kinder Morgan would be taken private by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings.[22] The Commission alleged in its complaint that Carlyle and Riverstone held significant positions in Magellan Midstream, a major competitor of Kinder Morgan in the terminaling of gasoline and other light petroleum products in the southeastern United States, and that the proposed transaction would threaten competition in those markets. In settling the Commission's charges, Carlyle and Riverstone agreed to turn their investment in Magellan passive and to restrict the flow of sensitive information between Kinder Morgan and Magellan.

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[22] FTC News Release, *FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings* (Jan. 25, 2007), *available at* http://www.ftc.gov/opa/2007/01/kindermorgan.shtm.

This past spring, the Commission challenged Equitable Resources' proposed acquisition of The Peoples Natural Gas Company, a subsidiary of Dominion Resources.[23] Equitable and Dominion Peoples are each other's sole competitors in the distribution of natural gas to nonresidential customers in certain areas of Allegheny County, Pennsylvania, which includes Pittsburgh. In March, the Commission filed an administrative complaint against the acquisition, and in April, the staff sought an injunction in federal district court. Both actions alleged that the proposed transaction would result in a monopoly for many customers who now benefit from competition between the two firms. The district court denied the Commission's request for an injunction, asserting that because the Pennsylvania Utility Commission has the power to approve the merger, the Commission is banned from taking action under the state action doctrine. The Third Circuit has issued an injunction pending appeal, and the appeal will be argued on October 3, 2007.

In the most recent petroleum merger challenge, the Commission challenged Western Refining's acquisition of Giant Industries to preserve competition in the bulk supply of light petroleum products to northern New Mexico, an area of the country where the Commission alleged that the two companies are direct and significant competitors.[24] The Commission's complaint for a preliminary injunction filed in federal court and its subsequently issued administrative complaint alleged that, if it were not acquired by Western, Giant would soon

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[23] *FTC v. Equitable Resources, Inc., Dominion Resources, Inc., et al.,* No. 07-cv-490 (W.D. Pa. filed April 13, 2007) (complaint filed), *available at* http://www.ftc.gov/os/adjpro/d9322/070413cmpltforpi-tro.pdf.

[24] FTC News Release, *FTC Files Complaint in Federal District Court Seeking to Block Western Refining's Acquisition of Rival Energy Company Giant Industries, Inc.* (April 12, 2007), *available at* http://www.ftc.gov/opa/2007/04/westerngiant_tro.shtm.

increase the supply of gasoline to northern New Mexico, and that the transaction as proposed would prevent this. The U.S. district judge in New Mexico denied the Commission's request for a preliminary injunction, and the Commission has withdrawn its administrative complaint in order to consider whether to continue the litigation.

In November 2006, Chevron and USA Petroleum abandoned a transaction in which Chevron would have acquired most of the retail gasoline stations owned by USA Petroleum, the largest remaining chain of service stations in California not controlled by a refiner. USA Petroleum's president acknowledged that the parties abandoned the transaction because of resistance from the FTC.[25]

Consistent with past practice, the Commission continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major markets across the country to identify possible anticompetitive activities and determine whether a law enforcement investigation is warranted. If Commission staff members detect unusual price movements in an area, they research the possible causes and consult, when appropriate, with state attorneys general, state energy agencies, and the federal Energy Information Administration. If evidence of anticompetitive conduct is found, the Commission will open an investigation and pursue all appropriate law enforcement action.

The Commission also actively monitors energy markets, and markets for related consumer products, for anticompetitive conduct. In June 2007, the Commission charged the

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[25] *See* Elizabeth Douglass, *Chevron Ends Bid to Buy Stations,* L.A. TIMES, Nov. 18, 2006, *available at* http://www.latimes.com/business/la-fi-chevron18nov18,1,7256145.story?coll=la-headlines-business&ctrack=1&cset=true.

American Petroleum Company, Inc. with illegally conspiring with its competitors to restrict the importation and sale of motor oil lubricants in Puerto Rico, in an attempt to force the legislature to repeal a law that charged importers and others within the distribution chain an environmental deposit of 50 cents for each quart of lubricants purchased.[26] Specifically, the Commission alleged that American Petroleum agreed with its competitors to boycott the import and sale of lubricants into Puerto Rico beginning on the day the law took effect and to continue the boycott until the law was repealed. This per se illegal conduct hurt the consumers of Puerto Rico. The Commission's consent order bars American Petroleum from engaging in such conduct in the future.

On April 25, 2006, President Bush directed the Department of Justice ("DOJ") to join the FTC and the Department of Energy ("DOE") to inquire into "illegal manipulation or cheating related to the current gasoline prices."[27] Accordingly, staff of the FTC and the DOJ Antitrust Division, with assistance from the DOE's Energy Information Administration, conducted an economic analysis and investigation of the likely factors that led to higher national average gasoline prices during the spring and summer of 2006. This study identified six major factors that contributed to price increases during the spring and summer of 2006: (1) the market effects of the summer driving season; (2) an increase in the price of crude oil; (3) an increase in the price of ethanol; (4) capacity issues related to the transition to ethanol from methyl tertiary-butyl ether,

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[26] *In the Matter of American Petroleum Company, Inc.*, FTC File No. 061-0229 (June 14, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610229/0610229decisionorder.pdf.

[27] President George W. Bush, Remarks to the Renewable Fuels Summit 2006 (Apr. 25, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/04/20060425.html.

a gasoline additive; (5) refinery outages; and (6) increased demand. A report detailing the findings was sent to the President in August 2007.[28]

In May 2006, the Commission released its report on gasoline price manipulation and post-Katrina gasoline price increases.[29] This report contained the findings of a Congressionally-mandated FTC investigation into whether gasoline prices nationwide were "artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices." The report also contains the agency's findings concerning gasoline pricing by refiners, large wholesalers, and retailers in the aftermath of Hurricane Katrina. In its investigation, the FTC examined evidence relating to a broad range of possible forms of manipulation. It found no instances of illegal market manipulation leading to higher prices during the relevant time periods, but found fifteen examples of pricing at the refining, wholesale, or retail level that fit the relevant legislation's definition of evidence of "price gouging." Other factors such as regional or local market trends, however, appeared to explain these firms' prices in nearly all cases. The report reiterated the Commission's position that federal gasoline price gouging legislation, in addition to being difficult to enforce, could cause more problems for

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[28] "*Federal Trade Commission Report on Spring Summer 2006 Nationwide Gasoline Price Increases*" (August 30, 2006), *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf. Commissioner Leibowitz dissented from the Report. *See* http://www.ftc.gov/speeches/leibowitz/P010401gas06dissent.pdf.

[29] Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf; But see Concurring Statement of Commissioner Jon Leibowitz, *available at* http://www.ftc.gov/speeches/leibowitz/060518LeibowitzStatementReGasolineInvestigation.pdf.

consumers than it solves, and that consumers are likely to be better off if competitive market forces are allowed to determine the price for gasoline that drivers pay at the pump.

In December 2006, the FTC issued a report that examined the current state of ethanol production in the United States and measured market concentration using capacity and production data.[30] The study, which is the second in a series of annual reports, concludes that U.S. ethanol production currently is not highly concentrated, and that market concentration has decreased over the past year by between 21 and 35 percent. The study also examined the possible effect on concentration of agreements between ethanol producers and third-party marketers. These findings on the level of concentration in ethanol production do not justify a presumption that a single firm, or a small group of firms, could wield sufficient market power to set or coordinate price or output levels. As the report notes, staff cannot rule out the possibility that future mergers within the industry may raise competitive concerns.[31] The FTC is currently working on a 2007 study of the ethanol market.

IV. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make, and anticompetitive industry practices can raise the prices of real estate services. In the past year, the agency has brought eight enforcement actions against associations of competing realtors or brokers. The associations, which control multiple listing

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[30] FTC News Release, *FTC Issues 2006 Report to Congress on Ethanol Market Concentration* (Dec. 5, 2006), *available at* http://www.ftc.gov/opa/2006/12/fyi0678.htm.

[31] Federal Trade Commission, *2006 Report on Ethanol Market Concentration* (Dec. 1, 2006), *available at* http://www.ftc.gov/reports/ethanol/Ethanol_Report_2006.pdf.

services, adopted rules that allegedly discouraged consumers from entering into non-traditional listing contracts with real estate brokers. These actions ensure that consumers who choose to use discount real estate brokers will not be handicapped by rules intended to disadvantage the discount brokers.

In July 2006, the Commission charged that the Austin Board of Realtors violated the antitrust laws by preventing consumers with real estate listing agreements for potentially lower-cost unbundled brokerage services from marketing their listings on important public web sites.[32] In September 2006, the Commission issued a final consent order settling charges against the Austin Board of Realtors. The order prohibits the Austin Board of Realtors from adopting or enforcing any rule that treats one type of real estate listing agreement more advantageously than any other listing type and from interfering with the ability of its members to enter into any kind of lawful listing agreement with home sellers.[33]

In October 2006, the Commission, in its first antitrust law enforcement sweep, charged the operators of several multiple listing services in parts of Colorado, New Hampshire, New Jersey, Virginia, Wisconsin, and Michigan with anticompetitive conduct. In this sweep, the Commission filed administrative complaints against two groups: RealComp II Ltd., and

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[32] FTC News Release, *FTC Charges Austin Board of Realtors With Illegally Restraining Competition* (July 13, 2006), *available at* http://www.ftc.gov/opa/2006/07/austinboard.htm.

[33] *In the Matter of Austin Bd. of Realtors*, FTC Docket No. C-4167 (Aug. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510219/0510219c4167AustinBoardofRealtorsDecisionandOrder.pdf.

MiRealSource, Inc.[34] Five other matters were resolved by consent order. The administrative complaints against RealComp and MiRealSource charged that these two real estate groups illegally restrained competition by limiting consumers' ability to obtain low-cost real estate brokerage services. The first complaint alleged that MiRealSource adopted a set of rules to exclude low-cost listings from its multiple listing service, as well as other rules that restricted competition in real estate brokerage services. The second complaint alleged that Realcomp II engaged in anticompetitive conduct by prohibiting information on Exclusive Agency Listings and other forms of nontraditional listings from being transmitted from the multiple listing service it maintains to public real estate web sites. The complaints alleged that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the multiple listing service and/or public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the multiple listing service from real estate brokers who did not go along.[35] In March 2007, the Commission entered a consent order in the matter of MiRealSource, in which MiRealSource agreed to provide its services to all member brokers.[36] The RealComp II matter is currently in administrative litigation, and closing arguments were held earlier this month.

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[34] FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.htm.

[35] *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Oct. 10, 2006) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf; *In the Matter of REALCOMP II LTD.*, FTC Docket No. 9320 (Oct. 10, 2006) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf.

[36] *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9321.

The five other consent orders in this real estate sweep were: (1) Williamsburg Area Association of Realtors, Inc.; (2) Monmouth County Association of Realtors; (3) Northern New England Real Estate Network, Inc.; (4) Realtors Association of Northeast Wisconsin, Inc.; and (5) Information and Real Estate Services, LLC.[37] The complaints in this sweep charged the associations with violating the FTC Act by adopting anticompetitive rules or policies that, when implemented, prevented properties with non-traditional listing contracts from being displayed on a wide range of public web sites. Each respondent, prior to the Commission's acceptance of the consent orders for public comment, rescinded or modified its rules to discontinue the challenged practices. The orders require that these services remain open to all types of listing agreements.[38]

V. Technology and Defense

Technology is another area in which the Commission has acted to protect consumers by safeguarding competition. In February 2007, the Commission issued an opinion and final order

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[37] FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.htm; FTC News Release, *FTC Approves Final Consent Orders in Real Estate Competition Matters* (Dec. 1, 2006), *available at* http://www.ftc.gov/opa/2006/12/fyi0677.htm.

[38] *In the Matter of Information and Real Estate Servs., LLC*, FTC Docket No. C-4179 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610087/0610087do061201.pdf; *In the Matter of Northern New England Real Estate Network, Inc.*, FTC Docket No. C-4175 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510065/0510065do061128.pdf; *In the Matter of Williamsburg Area Ass'n of Realtors, Inc.*, FTC Docket No. C-4177 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610268/0610268do061128.pdf; *In the Matter of Realtors Ass' of Northeast Wisconsin, Inc.*, FTC Docket No. C-4178 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610267/0610267do061130.pdf; *In the Matter of Monmouth County Ass'n of Realtors*, FTC Docket No. C-4176 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510217/0510217do061128.pdf.

on remedies in the legal proceeding against computer technology developer Rambus, Inc.[39] Previously, in July 2006, the Commission determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAM chips are widely used in personal computers, servers, printers, and cameras.[40] In addition to barring Rambus from making misrepresentations or omissions to standard-setting organizations again in the future, the February 2007 order, among other things, requires Rambus to license its SDRAM and DDR SDRAM technology; with respect to uses of patented technologies after the effective date of the order, bars Rambus from collecting more than the specified maximum allowable royalty rates; and requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates.[41] Rambus has appealed the Commission's rulings to the U.S. Court of Appeals for the District of Columbia Circuit.

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[39] FTC News Release, *FTC Issues Final Opinion and Order in Rambus Matter* (Feb. 5, 2007), *available at* http://www.ftc.gov/opa/2007/02/070502rambus.htm.

[40] *In the Matter of Rambus, Inc.,* Docket No. 9302 (July 31, 2006) (opinion of the Commission), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

[41] *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy) (Harbor, P, and Rosch, T, concurring in part, dissenting in part), *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

In October 2006, the Commission entered into a consent order with the Boeing Company and Lockheed Martin Corporation regarding their proposed joint venture, United Launch Alliance, L.L.C. The Commission complaint alleged that, by combining the only two suppliers of U.S. government medium to heavy launch services, the joint venture as originally structured would have reduced competition in the markets for medium to heavy launch services and space vehicles. During each stage of the investigation and in fashioning the relief in this case, the FTC worked closely with the Department of Defense. The Commission's consent order requires the parties to take the following actions: (1) United Launch Alliance must cooperate on equivalent terms with all providers of government space vehicles; (2) Boeing and Lockheed's space vehicle businesses must provide equal consideration and support to all launch services providers when seeking any U.S. government delivery in orbit contract; and (3) Boeing, Lockheed, and United Launch Alliance must safeguard competitively sensitive information obtained from other space vehicle and launch services providers.[42]

In December 2006, the Commission challenged General Dynamics' proposed $275 million acquisition of SNC Technologies, Inc. and SNC Technologies, Corp., and entered into a consent order. General Dynamics and SNC were two of only three competitors providing the U.S. military with melt-pour load, assemble, and pack (LAP) services used during the manufacture of ammunition for mortars and artillery. The Commission's consent order

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[42] *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510165/0510165decisionorderpublicv.pdf; *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (agreement containing consent order), *available at* http://www.ftc.gov/os/caselist/0510165/0510165agreement.pdf.

alleviated the alleged anticompetitive impact of the proposed acquisition by requiring General Dynamics to divest its interest in American Ordnance to an independent competitor.[43]

VI. Retail and Other Industries

The Commission also guards against anticompetitive conduct in the retail sector. In June 2007, the Commission sought a preliminary injunction in federal district court blocking Whole Foods' acquisition of its chief rival, Wild Oats Markets, Inc.[44] The Commission charged that the proposed transaction would violate federal antitrust laws by eliminating the substantial competition between these two uniquely close competitors in numerous geographic markets across the country in the operation of premium natural and organic supermarkets. On August 16, 2007, a judge for the U.S. District Court of the District of Columbia denied the FTC's motion for preliminary injunction, and on August 23, the Court of Appeals denied the FTC's emergency motion for an injunction pending appeal.[45] The matter remains in administrative litigation.

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[43] *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Feb. 7, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610150/0610150decisionorder.pdf; *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Dec. 28, 2006) (agreement containing consent orders), *available at* http://www.ftc.gov/os/caselist/0610150/0610150agreement.pdf.

[44] *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 1:07-cv-01021 (D.D.C. filed June 5, 2007), (complaint filed), *available at* http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf.

[45] *FTC v. Whole Foods Markets and Wild Oats Markets,* No. 07-1021 (D.D.C. Aug. 16, 2007); *FTC v. Whole Foods Markets and Wild Oats Markets,* No. 07-5276 (D.C. Cir. Aug. 23, 2007).

In June 2007, the Commission challenged Rite Aid Corporation's proposed $3.5 billion acquisition of the Brooks and Eckerd pharmacies from Canada's Jean Coutu Group (PJC), Inc.[46] To remedy the alleged anticompetitive impact of the proposed transaction, the Commission ordered Rite Aid and Jean Coutu to sell 23 pharmacies to Commission-approved buyers to preserve the competition that would otherwise be lost in the merger.

In March 2007, the Commission settled charges that the Missouri State Board of Embalmers and Funeral Directors illegally restrained competition by defining the practice of funeral directing to include selling funeral merchandise to consumers on an at-need basis.[47] The Board's regulation permitted only licensed funeral directors to sell caskets to consumers on an at-need basis, thereby restricting competition from other retailers. The Board ended the restriction last year and agreed that it will not prohibit or discourage the sale of caskets, services, or other funeral merchandise by unlicensed persons, thereby settling the Commission's challenge.

The Commission also challenged the proposed combination of the nation's two largest funeral home and cemetery chains, Service Corporation International and Alderwoods Group Inc. In its complaint, the Commission alleged that the proposed merger of the two companies would lessen competition for funeral or cemetery services in 47 local markets, leaving consumers with fewer choices and the prospect of higher prices or reduced levels of service. Under the consent agreement, SCI must sell funeral homes in 29 markets and cemeteries in 12 markets across the

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[46] *In the Matter of Rite Aid Corporation and The Jean Coutu Group,* FTC Docket No. C-4191 (June 4, 2007) (complaint filed), *available at* http://www.ftc.gov/os/caselist/0610257/070604complaint.pdf.

[47] *In the Matter of Missouri Board of Embalmers and Funeral Directors,* FTC File No. 061 0026 (Mar. 9, 2007) (proposed decision and order), *available at* http://www.ftc.gov/os/caselist/0610026/0610026decisonorder.pdf.

United States. In six other markets, SCI must sell certain funeral homes that it plans to acquire or end its licensing agreements with affiliated third-party funeral homes.[48]

In September 2006, the Commission protected competition in the industrial gases market by approving a final consent order in the matter of Linde AG and the BOC Group PLC. The consent order required Linde to divest its air separation units and all other assets in eight localities across the United States. In addition, the order required Linde to divest its bulk refined helium assets to Taiyo Nippon Sanso Corporation. The consent order maintains competition in the markets for liquid oxygen, liquid helium, and bulk refined helium in several U.S. markets.[49]

VII. Merger Review Process Improvements

The FTC works to facilitate cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes. Last year, the FTC implemented reforms to the merger review process and electronic filing of Hart-Scott-Rodino pre-merger notification forms, both of which are aimed at streamlining the merger review process. To increase the transparency of the merger review decision-making process, the FTC and the DOJ Antitrust Division jointly released a commentary on the agencies' Horizontal Merger Guidelines.

The Commission continues to implement significant merger process reforms, first announced in February 2006, aimed at reducing the costs borne by both the FTC and merging

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[48] *In the Matter of Service Corp. Int'l and Alderwoods Group Inc.*, FTC Docket No. C-4174 (Dec. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610156/070105do0610156.pdf.

[49] *In the Matter of Linde AG and The BOC Group PLC*, FTC Docket No. C-4163 (Aug. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610114/0610114c4163LindeBOCDOPubRecV.pdf.

parties.[50] These reforms include, most importantly: reducing the number of custodians from which parties must supply information to a maximum of 35 per party in most cases, provided the parties agree to certain conditions; reducing the time period for which parties are required to search for documents from three to two years in general; providing parties with the right to meet with the Bureaus of Competition and Economics management regarding data requests, if necessary; allowing the parties to preserve substantially fewer backup tapes; and allowing parties to submit privilege logs that contain much less detailed information.[51]

In March 2006, the FTC and DOJ jointly released a "Commentary on the Horizontal Merger Guidelines" ("Commentary") that continues the agencies' ongoing efforts to increase the transparency of their decision-making processes – in this case, with regard to federal antitrust review of "horizontal" mergers between competing firms. The analytical framework and standards used to scrutinize the likely competitive effects of such mergers are embodied in the Horizontal Merger Guidelines, which the agencies jointly issued in 1992, and revised, in part, in 1997. The Commentary explains how the FTC and DOJ have applied particular Guidelines principles in the context of actual merger investigations over the last thirteen years.[52] The Commentary brings greater transparency to the Agencies' merger analysis and greater certainty to

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[50] FTC News Release, *FTC Chairman Announces Merger Review Process Reforms* (Feb. 16, 2006), *available at* http://www.ftc.gov/opa/2006/02/merger_process.htm.

[51] *Reforms to the Merger Review Process: Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission* (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

[52] *Commentary on the Horizontal Merger Guidelines* (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

businesses and merger practitioners, and enhances the quality of communications between the government and merging parties during the merger review process.

The Commission encourages merging parties to utilize an electronic filing system, implemented by the FTC and DOJ in June 2006, that allows parties to submit via the Internet the premerger notification filings required by the Hart-Scott-Rodino ("HSR") Act.[53] This new system eliminates the time and expense entailed in duplicating and delivering documents. Previously, parties were required to submit to both the FTC and the DOJ paper copies of their forms and documentary attachments. 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 the form 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.

In January 2007, the FTC published a report showing the trend in merger enforcement investigations for the fiscal years 1996-2005. The report promotes transparency in the Commission's merger enforcement by providing information on the market structures and other features of the investigations that resulted in Commission enforcement actions.[54]

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[53] FTC News Release, *Federal Trade Commission and Department of Justice Allow Electronic Submission of Premerger Notification Filings* (June 20, 2006), *available at* http://www.ftc.gov/opa/2006/06/premerger.htm.

[54] Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2005* (Jan. 25, 2007), *available at* http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf.

VIII. Competition Advocacy

The FTC's competition advocacy work is a significant tool for strengthening competition. The Commission and staff frequently provide comments to federal and state legislatures and government agencies, sharing their expertise on the competitive impact of proposed laws and regulations when they alter the competitive environment through restrictions on price, innovation, or entry conditions. In fact, Commissioners and senior staff of the FTC already have testified 18 times before the 110th Congress, including six times on competition matters covering petroleum industry consolidation,[55] gasoline prices,[56] intellectual property,[57] pharmaceutical patent litigation settlements,[58] and antitrust law enforcement.[59]

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[55] *Petroleum Industry Consolidation, Hearing Before the Joint Economic Committee* (2007) (Prepared Statement of the FTC, Presented by Dr. Michael A. Salinger), *available at* http://www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf.

[56] *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Hearing Before the H. Subcomm on Oversight and Investigations* (2007) (Prepared Statement of the FTC, Presented by William E. Kovacic, Commissioner), *available at* http://www.ftc.gov/os/testimony/070522FTC_%20Initiatives_to_Protect_Competitive_Petroleum_Markets.pdf.

[57] *American Innovation at Risk: The Case for Patent Reform: Hearing Before the H. Subcomm. on Internet and Intellectual Property* (2007) (Prepared Statement of the FTC, Presented by Suzanne Michel), *available at* http://www.ftc.gov/os/2007/02/02152007patenttestimonyhouse.pdf.

[58] *Anticompetitive Patent Settlements in the Pharmaceutical Industry - The Benefits of a Legislative Solution: Hearing Before the Senate Committee on the Judiciary* (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), *available at* http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf; and *On Protecting Consumer Access To Generic Drugs: The Benefits Of A Legislative Solution To Anticompetitive Patent Settlements In The Pharmaceutical Industry*, Hearing Before the United States House of Representatives Committee On Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), *available at*

Experience has shown that government-imposed restrictions are among the most effective and durable restraints on competition. Recent FTC advocacy efforts have contributed to several positive consumer outcomes. In the past year, the agency has commented on competition issues related to attorney advertising rules, real estate settlement services, real estate brokerage, gasoline prices, and pharmacy benefit managers.

In September 2006, the Commission authorized staff to file comments with the New York Unified Court System regarding the court's proposed rules governing attorney advertising. Staff was concerned that several provisions in the proposed rules were overly broad, could restrict truthful advertising, and could adversely affect prices paid and services received by consumers. Staff suggested that the court protect consumers from false and misleading advertising by revising the rules and using less restrictive means, such as requiring clear and

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http://www.ftc.gov/os/testimony/P859910%20Protecting_Consume_%20Access_testimony.pdf.

[59] *An Overview of Commission Antitrust Enforcement Activities, Hearing before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights* (Prepared Statement of the FTC, Presented by Chairman Deborah Platt Majoras), *available at* http://www.ftc.gov/os/testimony/P072104AntitrustEnforcementActivitiesTestimonySenate03072007.pdf.

prominent disclosure of certain information.[60] In January 2007, the court promulgated revised rules, adopting nearly all of the staff's recommendations.

In October 2006, FTC staff filed comments with the Virginia House of Delegates on the subject of pharmacy benefit managers. The staff argued that the proposed legislation, which would regulate some aspects of the contractual relationships between pharmacy benefit managers and health benefit plans and pharmacies, might indirectly lead to higher drug prices for Virginia consumers.[61] This proposed legislation was not enacted.

In April 2007, the Commission authorized the filing of comments with the New York State Assembly Committee on the Judiciary regarding proposed legislation to expand the scope of activities constituting the unauthorized practice of law. These comments were prepared

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[60] FTC Staff Comments to Michael Colodner, Counsel, New York State Unified Court System (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-image.pdf. In the past year, FTC staff also has submitted comments to the Louisiana and Florida bars, the Indiana Supreme Court, and the Supreme Court of New Jersey concerning proposals that would restrict attorney advertising to varying degrees. *See also* FTC Staff Comments to S. Guy deLaup, President, Louisiana State Bar Association (Aug. 10, 2007), *available at* http://www.ftc.gov/os/2007/08/V070013larules.pdf; FTC Staff Comments to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), *available at* http://www.ftc.gov/be/V070001.pdf; FTC Staff Comments to the Florida Bar (Mar. 23, 2007), *available at* http://www.ftc.gov/be/V070002.pdf; FTC Staff Comments to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court (May 11, 2007), *available at* http://www.ftc.gov/be/V070010.pdf; Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the New Jersey Supreme Court Committee on Attorney Advertising (May 8, 2007), *available at* http://www.ftc.gov/be/V070003opinion39.pdf.

[61] FTC Staff Comments to Terry G. Kilgore, Member, Commonwealth of Virginia House of Delegates (Oct. 2, 2006), *available at* http://www.ftc.gov/be/V060018.pdf. FTC staff also filed comments with the New Jersey Assembly in April 2007, expressing its concerns regarding proposed legislation that would limit the ability of pharmacy benefit managers, health benefit plans, and pharmacies to enter into efficient, mutually advantageous contracts and potentially increase pharmaceutical prices in New Jersey. FTC Staff Comments to Assemblywoman Nellie Pou, Chair, Appropriations Committee, New Jersey General Assembly (Apr. 17, 2007), *available at* http://www.ftc.gov/be/V060019.pdf.

jointly with the Antitrust Division of DOJ. The Agencies were concerned that the proposed legislation, which was identical to legislation introduced last year and addressed by the Agencies in a June 2006 letter,[62] would prevent non-lawyers from competing with lawyers in situations where there is no clear showing that non-attorney services have caused consumer harm.[63] Shortly after the Agencies filed their comments, the legislature rejected the bill, thereby preserving attorney/non-attorney competition in real estate settlement services in New York.

In May 2007, the FTC and DOJ sent a joint letter to Michigan Governor Jennifer Granholm in response to a request from her staff for our views on proposed legislation involving minimum-service requirements in the area of real estate brokerage. In the letter, the Agencies explained that, although the current version of the bill posed fewer competitive concerns than the prior version on which the Agencies had commented in 2005,[64] there still was no evidence that minimum-service requirements are needed to protect consumers. Further, the Agencies argued that a provision in the bill that restricted the manner in which certain discount brokers could

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[62] Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (June 21, 2006), *available at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf.

[63] Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (Apr. 27, 2007), *available at* http://www.ftc.gov/be/V070004.pdf. FTC staff also submitted comments to the Rules Committee of the Connecticut Superior Court regarding its proposed definition of the practice of law, recommending that the Committee revisit its proposed definition to avoid unnecessary restraints on attorney/non-attorney competition. FTC Staff Comments to Carl E. Testo, Counsel, Rules Committee of the Connecticut Superior Court (May 17, 2007), *available at* http://www.ftc.gov/be/V070006.pdf.

[64] Federal Trade Commission and United States Department of Justice Comments to Alan Sanborn, Michigan State Senate (Oct. 18, 2005), *available at* http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf.

market their clients' houses was likely to reduce competition in the real estate brokerage market.[65]

Also in May 2007, FTC staff submitted comments to the Connecticut House of Representatives regarding proposed legislation that would require gasoline retailers to base their price on historic gasoline costs and would ban zone pricing. The staff observed that limiting retailers' ability to react to wholesale price increases is likely to harm consumers by reducing the market's ability to ameliorate supply shortages and by causing retailers to hold smaller inventories of gasoline than they otherwise would. Further, staff explained how zone pricing can allow refiners and lessee-dealers to share risk more efficiently. Staff noted that, by allowing refiners more easily to capture profits from retail locations, zone pricing can increase incentives to locate stations in currently less-competitive areas.[66] This proposed legislation was not enacted.

IX. Amicus Briefs

As in the past, the Commission has been active in providing amicus briefs to aid the courts in analyzing and resolving competition-related policy issues. The matters in which the agency has intervened range from cases arising under Section 2 of the Sherman Act, to price fixing matters, to vertical price restraints.

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[65] Federal Trade Commission and United States Department of Justice Comments to Governor Jennifer M. Granholm of Michigan (May 30, 2007), *available at* http://www.ftc.gov/be/v050021.pdf.

[66] FTC Staff Comments to Christopher R. Stone, State of Connecticut House of Representatives (May 2, 2007), *available at* http://www.ftc.gov/be/V070008.pdf. FTC staff also filed comments with the Council of the District of Columbia in June 2007, in support of proposed legislation that would repeal D.C.'s ban on jobber, or wholesaler, operation of retail service stations. FTC Staff Comments to Councilmember Mary M. Cheh, Chairperson, Committee on Public Services and Consumer Affairs, Council of the District of Columbia (June 8, 2007), *available at* http://www.ftc.gov/os/2007/06/V070011divorcement.pdf.

In January 2007, the FTC and DOJ filed a joint amicus brief with the U.S. Supreme Court in the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, addressing whether an agreement between a supplier and dealer that sets the dealer's minimum retail price constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The brief argues that the *per se* rule against vertical minimum resale price maintenance established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is irreconcilable with modern economic analysis and the Court's modern antitrust jurisprudence, and should be overruled[67] – a position later adopted in the 5-4 decision of the Court.

Also in January 2007, the FTC and DOJ filed a joint amicus brief in the case of *Credit Suisse First Boston v. Glen Billing,* addressing the application of the antitrust laws to activities subject to SEC regulation. The brief argues that collaborative underwriting activities occurring during the initial public offering of securities that are expressly or implicitly authorized under the securities laws, as well as conduct inextricably intertwined with such activities, are immune from the antitrust laws. At the same time, the brief cautions that not all underwriting activities occurring in connection with an initial public offering are exempt from the antitrust laws. The

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[67] Brief of the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc* No. 06-480 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2007/01/070122Leegin06-480amicusPDC.pdf. The Commission vote approving the filing of the joint brief was 3-2, with Commissioners Pamela Jones Harbour and Jon Leibowitz voting no.

brief urges the U.S. Supreme Court to vacate the lower court rulings, neither of which struck the appropriate balance between the interests of the antitrust and securities laws.[68]

In May 2007, the FTC and DOJ filed a joint amicus brief in the case of *In re DDAVP Direct Purchaser Antitrust Litigation* in the United States Court of Appeals for the Second Circuit. The brief was in support of plaintiffs-appellants, who were direct purchasers of the prescription brand-name drug DDAVP. Plaintiffs had brought this putative class action under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that defendants Ferring B.V. and Ferring Pharmaceuticals, Inc., who owned the patent for desmopressin acetate -- the active ingredient in DDAVP, and Aventis Pharmaceuticals, Inc., the patent's exclusive licensee in the United States, violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by maintaining and enforcing a patent procured by intentional fraud on the Patent and Trademark Office (PTO). In their brief, the antitrust agencies urge the court of appeals to reverse the district court's holding that plaintiffs lacked antitrust standing to bring monopolization claims against defendant drug manufacturers arising out of the manufacturers' maintenance and enforcement of a patent allegedly procured through intentional fraud on the PTO (a so-called "Walker Process" antitrust claim).[69]

In two joint amicus briefs, filed in May and August 2006, the FTC and DOJ urged the U.S. Supreme Court to grant *certiorari* and reverse the Ninth Circuit Court of Appeals decision

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[68] Brief of the United States as Amicus Curiae Supporting Vacatur, *Credit Suisse First Boston v. Glen Billing* No. 05-1157 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2007/01/070122creditsuisse05-1157amicus).pdf.

[69] Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellants, *In re DDAVP Direct Purchaser Antitrust Litigation* No. 06-5525 (2d Cir. May 25, 2007) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2007/05/DDAVPCommission-DoJBrief.pdf.

in the case of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*. The Ninth Circuit 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 approved instructions that allowed a jury to find a violation based on assessments of factors such as "fairness" and "necessity."[70] On February 20, 2007, the U.S. Supreme Court vacated and remanded the Ninth Circuit decision, and held that the *Brooke Group* test applies to predatory bidding claims.

The FTC also participated in discussions with DOJ and other federal agencies regarding the position taken by the United States as amicus in several cases involving intellectual property, which had important implications for competition and consumer interests.[71] In the cases decided to date, the Supreme Court has vacated or reversed lower court rulings that threatened consumer interests by taking an unduly rigid approach to patent litigation and remedies.[72]

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[70] Brief for the United States as Amicus Curiae, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. May 26, 2006) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2006/05/P062112WeyerhaeuservRoss-SimmonsAmicusBrief.pdf; Brief for the United States as Amicus Curiae Supporting Petitioners, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. Aug. 25, 2006) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/ogc/briefs/05381weyerhaeuser217988.pdf. The Commission vote authorizing the staff to file the brief jointly with the DOJ was 3-2, with Commissioners Jon Leibowitz and J. Thomas Rosch voting no.

[71] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *eBay Inc. and Halfcom, Inc. v. MercExchange, LLC,* 126, S.Ct. 1837 (2006) (No. 05-130); Brief for the United States of America Supporting Petitioner, *MedImmune, Inc. v. Genentech, Inc.,* 127 S.Ct. 764 (2007)(No. 05-608); Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR In'l Co. v. Teleflex, Inc.*, No. 04-1350 (U.S. Aug. 2006).

[72] *See MedImmune, Inc. v. Genentech, Inc.,* 127 S.Ct. 764, 777 (2007); *eBay Inc. and Half.com, Inc. v. MercExchange, LLC,* 126 S. Ct. 1837, 1838-39 (2006).

X. Hearings, Conferences, Workshops, and Reports

Hearings, conferences, and workshops organized by the FTC represent a unique opportunity for the agency to develop policy research and development tools. These events and agency reports foster a deeper understanding of the complex issues involved in the economic and legal analysis of antitrust law.

In May 2007, the FTC and DOJ concluded a series of public hearings designed to examine the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.[73] The primary goal of the hearings was to examine whether and when specific types of single-firm conduct are procompetitive or benign, and when they may harm competition. During the 19 days of hearings, the FTC solicited input directly from businesses, business schools professors, and historians, as well as lawyers and economists with antitrust expertise. Now that the hearings have concluded, staff from the agencies are drafting a public report that incorporates the results of the hearings, as well as relevant scholarship and research.

Also in May 2007, the FTC and the DOJ Antitrust Division released a joint report, *Competition in the Real Estate Brokerage Industry*. The purpose of the report is to inform consumers and other industry participants about important competition issues involving residential real estate, including the impact of the Internet, the competitive structure of the real estate brokerage industry, and obstacles to a more competitive environment.[74] To complement

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[73] Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single Firm Conduct as Related to Competition, *available at* http://www.ftc.gov/os/sectiontwohearings/index.htm.

[74] Federal Trade Commission and United States Department of Justice Report, *Competition in the Real Estate Brokerage Industry* (Apr. 2007), *available at* http://www.ftc.gov/reports/realestate/V050015.pdf.

the report, the FTC simultaneously released a consumer education publication, *Buying a Home: It's a Big Deal*, which has tips for considering the services of a real estate professional and using the Internet as a source of real estate information.

In April 2007, the FTC and the DOJ Antitrust Division issued a joint report, titled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,* to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property.[75] The report discusses issues including: refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. This second report on antitrust and intellectual property joins an FTC report issued in 2003 following extensive hearings on this important topic.[76]

Also in April 2007, the FTC held a three-day conference on *Energy Markets in the 21st Century: Competition Policy in Perspective.*[77] The conference brought together leading experts from government, the energy industry, consumer groups, and the academic community to participate on panels to examine such topics as: (1) the relationship between market forces and

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[75] Federal Trade Commission and Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 17, 2007), *available at* http://www.ftc.gov/opa/2007/04/ipreport.shtm.

[76] Federal Trade Commission Report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[77] FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10-12, 2007), *available at* http://www.ftc.gov/bcp/workshops/energymarkets/index.html.

government policy in energy markets; (2) the dependence of the U.S. transportation sector on petroleum; (3) the effects of electric power industry restructuring on competition and consumers; (4) what energy producers and consumers may expect in the way of technological developments in the industry; (5) the security of U.S. energy supplies; and (6) the government's role in maintaining competition and protecting energy consumers. The Commission expects to issue a report detailing the findings of this conference.

In November 2006, the Commission released a report that provides enforcement perspectives on the *Noerr-Pennington* doctrine, which precludes application of the antitrust laws to certain private acts that urge government action. The report provides FTC staff's views on how best to apply the doctrine to conduct that imposes significant risk to competition but does not further the important First Amendment and governmental decision-making principles underlying the doctrine.[78]

Last year, the FTC created an Internet Access Task Force to examine issues raised by converging technologies and regulatory developments, and to inform the enforcement, advocacy, and education initiatives of the Commission. Under the leadership of the Internet Access Task Force, the FTC staff recently addressed two issues of interest to policy makers.

First, in October 2006, the FTC released a staff report, *Municipal Provision of Wireless Internet*. The report identifies the potential benefits and risks to competition and consumers

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[78] FTC Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (Oct. 2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf.

associated with municipal provision of wireless Internet service.[79] Second, in February 2007, the FTC hosted a public workshop on "Broadband Connectivity Competition Policy."[80] This workshop brought together experts from business, government, and the technology sector, as well as consumer advocates and academics. The workshop examined competition and consumer protection issues relating to broadband Internet access, including "network neutrality." It explored issues raised by recent legal and regulatory determinations that providers of certain broadband Internet services, such as cable modem and DSL, are not subject to the Federal Communications Commission's common carrier regulations. Following this workshop, in June 2007, the FTC released a staff report, *Broadband Connectivity Competition Policy*, which summarizes the Task Force's findings in the area of broadband Internet access, including so-called "network neutrality." The report proposes guiding principles for assessing this complex issue, and makes clear that the FTC will continue to enforce vigorously the antitrust and consumer protection laws and expend considerable efforts on consumer education, industry guidance, and competition advocacy in the important area of broadband Internet access.[81]

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[79] FTC Staff Report, *Municipal Provision of Wireless Internet* (Sept. 2005) *available at* http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

[80] *FTC Workshop, Broadband Connectivity Competition Policy* (Feb. 13-14, 2007), *available at* http://www.ftc.gov/opp/workshops/broadband/index.html.

[81] FTC Staff Report, *Broadband Connectivity Competition Policy* (June 2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

In March 2006, FTC staff initiated an ongoing study on authorized generic drugs.[82] The study is intended to help the agency understand the circumstances under which innovator companies launch authorized generics; to provide data and analysis of how competition between generics and authorized generics during the Hatch-Waxman Act's 180-day exclusivity period has affected short-run price competition and long-run prospects for generic entry; and to build on the economic literature about the effect of generic drug entry on prescription drug prices.

XI. International Coordination and Technical Assistance

In January 2007, the FTC established a new Office of International Affairs to coordinate more effectively the full range of the agency's international activities. The Office unites the FTC's international antitrust, consumer protection, and technical assistance programs, enabling us to take advantage of the synergies between our international functions and enhancing the prominence of the FTC's international work.

Cooperation with competition agencies around the world is a vital component of the FTC's enforcement and policy, facilitating our ability to collaborate on cross-border cases, and promoting convergence toward sound, consumer welfare-based competition policies. Our staff regularly coordinates with foreign antitrust agencies on mergers and anticompetitive conduct cases of mutual concern. The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the FTC's views in connection with developing their policies. For example, the FTC consulted with the European Commission regarding its review of policies on monopolization, its draft guidelines for the review of non-

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[82] FTC News Release, *FTC Proposes Study of Competitive Impacts of Authorized Generic Drugs* (Mar. 29, 2006), *available at* http://www.ftc.gov/opa/2006/03/authgenerics.htm.

horizontal mergers, and its draft revisions to its guidelines on remedies in merger cases. We provided our views to the Japan Fair Trade Commission on its proposed intellectual property licensing guides, to the Korea Fair Trade Commission on proposed new rules on excessive pricing, and to the Canadian Competition Bureau on merger remedies and health care issues. The FTC participated in consultations in Washington and in foreign capitals with top officials of the competition agencies of the European Union, Japan, and Korea, and Mexico.

We have engaged with Chinese officials regarding their Anti-Monopoly Act and merger review rules. In 2006, I became the first FTC Chairman to visit China, helping to build relationships with officials involved in developing their antitrust law and policies. We will closely follow the implementation of the law. The FTC also participates in the US-China Strategic Economic Dialogue to promote market-based competition and further the innovation agenda.

The FTC plays a lead role in key multilateral fora – including the International Competition Network, the Organization for Economic Cooperation and Development, the United Nations Conference on Trade and Development, and the Asia-Pacific Economic Cooperation -- that provide important opportunities for competition agencies to enhance mutual understanding and promote cooperation and convergence. We are a member of the ICN's Steering Group and lead its work on unilateral conduct, merger notification and procedures, and competition policy implementation. The FTC also participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, such as the recently signed agreement with Korea.

The FTC assists developing nations that are moving toward market-based economies with the development and implementation of competition laws and policies. Our program is

conducted jointly with the DOJ Antitrust Division and is funded primarily by the United States Agency for International Development. In 2007, the FTC sent 23 staff experts on 26 technical assistance missions to 20 countries, including the ASEAN community, Azerbaijan, Central America, China, Egypt, India, Philippines, Russia, South Africa, and Tanzania.

XII. Outreach Initiatives

The FTC is committed to enhancing consumer confidence in the marketplace through enforcement and education. This year, Commission staff launched a multi-dimensional outreach campaign targeting new and bigger audiences with the message that competition, supported by antitrust enforcement, helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as by encouraging more choices in the marketplace. The FTC is building a library of brochures, fact sheets, articles, reports and other products – both in print and online – in its efforts to reach consumers, attorneys and business people, and is planning to leverage its limited resources through a "wholesale/retail" approach to outreach that involves partnering with other organizations to disseminate information on its behalf.

The Commission's website, www.ftc.gov, continues to grow in size and scope with resources on competition policy in a variety of vital industries. The FTC has launched industry-specific websites for Oil & Gas,[49] Health Care,[50] Real Estate,[51] and Technology[52]. These minisites serve as a one-stop shop for consumers and businesses who want to know what the FTC is doing to promote competition in these important business sectors. In the past year, the FTC also issued practical tips for consumers on buying and selling real estate, funeral services, and generic drugs, as well as "plain language" columns on oil and gas availability and pricing.

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Mr. Chairman and Members of the Task Force, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American consumers, and we appreciate the strong support that we have received from Congress. I am happy to answer any questions that you may have.

Ms. LOFGREN. Thank you very much.

Mr. Barnett, you are now welcome to deliver your oral testimony.

TESTIMONY OF THE HONORABLE THOMAS O. BARNETT, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. BARNETT. Madam Chairwoman, Ranking Member Keller, and other Members of the Task Force, it is a pleasure to appear before you. I thank you for the opportunity to highlight the Division's accomplishments and answer your questions. I also appreciate the active interest and strong support of our law enforcement mission that the Judiciary Committee through the continuing work of the Antitrust Task Force has provided to us.

Competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects the robust free market economy by helping ensure that anti-competitive agreements, conduct, and mergers do not harm consumers. In my short time, I will briefly highlight just a few of our outstanding achievements.

On cartel enforcement, we thank the Committee for its efforts in increasing the criminal fines and statutory maximum sentences for Sherman Act offenses in 2004 as well as for making antitrust offenses a predicate act for wiretapping authorities. The division's cartel enforcement efforts had an outstanding year for fiscal year 2007, which ends this week. The division more than doubled its record for the most total jail time imposed, obtained the second highest amount of fines in division history, and succeeded in obtaining the longest jail sentence for a foreign national ever charged with an antitrust offense.

As one specific example of success, on August 23rd of this year, British Airways and Korean Airlines each pleaded guilty and were sentenced to pay separate $300 million fines for fixing cargo and passenger fares. Each fine ties the record for the division's second largest fine ever.

On the same day, the United Kingdom's Office of Fair Trading announced a similar resolution with British Airways with a fine of approximately $250 million. This was the first time that the Division and the OFT have brought parallel charges.

One important focus of the Division's criminal enforcement efforts in the past year has been fraud and corruption in the bidding, contracting, and procurement process. These cases take money out of the pocket of every American taxpayer and deserves severe condemnation. They deal with U.S. operations in Iraq, construction in New Orleans following Hurricane Katrina, U.S. Navy, the Department of Defense, U.S. schools, among others.

Merger enforcement continues to be one of the Division's core priorities. The Division is committed to challenging mergers that the evidence developed through a thorough investigation evaluated pursuant to rigorous economic analysis demonstrates is likely to harm U.S. consumers and businesses.

In fiscal year 2007, six transactions were restructured or abandoned by the parties in response to a Division investigation. And the Division filed an additional four merger enforcement actions in district court.

Some of our most significant recent merger actions include the following: The Division challenged Monsanto's $1.5 billion proposed merger between Monsanto and Delta and Pine Land and obtained a consent decree that required Monsanto and DPL to divest a major seed company, multiple cotton seed lines, and other valuable assets.

The Division is currently litigating to challenge to a transaction between two daily newspapers in Charleston, WV. In August 2006, the Division challenged Mittal's proposed acquisition of Arcelor as likely to adversely affect competition in the $2 billion tin mill products market in the Eastern United States.

The Division also seeks continually to improve its merger review process and its transparency. In December of last year, we announced a revision to the 2001 merger review process initiative. This initiative helps us identify and devote increased resources to those transactions that should be challenged. Our transparency efforts also have included the release of a joint DOJ-FTC commentary on the Horizontal Merger Guidelines in March of 2006.

The Division remains active in other areas such as holding hearings in conjunction with the FTC on section 2 standards. In addition, with more and more countries adopting an antitrust enforcement regimes, we make a priority of strengthening international cooperation and promoting antitrust policy convergence.

In the last year, we have worked closely with multi-lateral organizations around the world such as the OECD and the International Competition Network and further developed strong bilateral relationships in other countries. I emphasize that none of what I have discussed today could have been accomplished without the dedicated career staff of the Antitrust Division. It is an honor and a privilege to serve with them.

I am pleased with what we have accomplished, but I recognize that the hallmark of any successful organization is a continuing desire to improve. In that regard, we look forward to working with the Members of the Task Force and your respective staff.

[The prepared statement of Mr. Barnett follows:]

PREPARED STATEMENT OF THE HONORABLE THOMAS O. BARNETT

Good afternoon, Mr. Chairman and members of the Task Force. It is a pleasure for me to appear before you today on behalf of the Department of Justice and the dedicated professionals of its Antitrust Division. I thank you for this opportunity to highlight the Division's accomplishments, answer your questions about our work, and listen to your thoughts about sound and vigorous enforcement of the antitrust laws. Mr. Chairman, I also appreciate the active interest and strong support of our law enforcement mission by the Judiciary Committee through the continuing work of the Antitrust Task Force. Antitrust enforcement has enjoyed substantial bipartisan support through the years, and I believe the work of the Task Force will ensure it remains on the right track.

Competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy by helping ensure that anticompetitive agreements, conduct, and mergers do not distort market outcomes. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices, and it has strengthened the competitiveness of American businesses in the global marketplace.

I am pleased to report on some of the recent outstanding accomplishments in the Division. In many areas we have achieved record levels of enforcement, benefiting American consumers and businesses. The first part of my testimony today will review recent developments in the Division's three core enforcement programs: criminal, merger, and civil non-merger. Following that discussion I will describe some ongoing competition policy initiatives at the Antitrust Division aimed at benefiting consumers and businesses and strengthening the foundation for effective antitrust enforcement, both here and around the world.

The Antitrust Division pursues its mission through an enforcement hierarchy that emphasizes pursuing illegal cartels, anticompetitive mergers, and civil non-merger conduct that unreasonably restrains competition or leads to the unlawful creation or abuse of monopoly power. Within each area, the Division strives to identify and pursue vigorously violations of the antitrust laws, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and cost associated with our investigations.

Cartel Enforcement

The detection, prosecution, and deterrence of cartel offenses—such as price fixing, bid rigging and market allocation—continue to be the highest priority of the Antitrust Division. There is no plausible procompetitive rationale for this behavior. The Division places particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining record-breaking corporate fines.

The Division has made significant strides in the prosecution of individuals involved in cartel offenses. In this regard, the Division thanks the House Judiciary Committee for its efforts in increasing the criminal fines and statutory maximum sentences for Sherman Act offenses in 2004 as well as in making antitrust offenses a

predicate crime for wiretapping authority last year. The most effective way to deter and punish cartel activity is to hold the most culpable individuals accountable and send them to jail. Antitrust offenders are being sent to jail with increasing frequency and for longer periods. This Committee's efforts will help us continue this important trend that benefits American consumers and businesses.

The Division's cartel enforcement efforts were outstanding for Fiscal Year 2007, which ends this week. The Division set a record for the most total jail time imposed (almost 30,000 jail days); obtained the second highest amount of fines in the Division's history (over $630 million); and succeeded in obtaining the longest jail sentence for a foreign national charged with an antitrust offense (14 months). These accomplishments reflect great strides in the Division's efforts to rid the marketplace of cartels and their harm to consumers.

With respect to particular criminal enforcement efforts in the past year, the Division has focused on three areas of crucial importance to our economy: international cartels, domestic cartels, and contracting and procurement fraud and corruption that subverts the competitive process. What follows is a brief description of some of our most recent and most important criminal prosecutions:

<u>International Cartels</u>

One of the remarkable features of many current international cartel cases is the cooperation and coordination with international competition enforcers that these matters entailed. This is a relatively new and important development in

enforcement that increases our ability to protect American consumers from the harms caused by international cartels.

British Airways/Korean Air Lines—On August 1, 2007, the Division charged Korean Air Lines Co., Ltd. with conspiring to fix international cargo rates and conspiring to fix fares charged to passengers and travel agents for flights from the United States to Korea. The Division also charged British Airways Plc with conspiring to fix international cargo rates and conspiring to fix the passenger fuel surcharge for long-haul international air transportation. (I am recused from the British Airways prosecution.) On August 23, both companies pleaded guilty and were sentenced to pay separate $300 million criminal fines, each tying the record for the Division's second largest fine ever. On the same day the Division filed charges, the United Kingdom's Office of Fair Trading announced British Airways had agreed to pay a fine of approximately $246 million for collusion on long-haul passenger fuel surcharges. This was the first time that the Division and the OFT have brought parallel charges. Our investigation is ongoing.

Dynamic Random Access Memory—The Division's continuing investigation of the DRAM cartel has yielded total fines of more than $732 million, and courts imposed over 3,000 days of jail time for individual defendants. On February 14, 2007, a Korean national and current president of Samsung's U.S.-based subsidiary was sentenced to pay a criminal fine of $250,000 and to serve 10 months in jail. In May 2007, another Samsung executive was sentenced to pay a $250,000 fine and to serve fourteen months in prison—the longest prison sentence ever imposed on a foreign national for violating U.S. antitrust laws. Over the course of the

investigation, this matter has so far resulted in charges against five companies and 18 individuals, of which 11 are foreign nationals who have served or agreed to serve time in U.S. prisons.

Marine Hose Investigation—In May 2007, eight executives in the marine hose industry who were attending an industry conference in Houston were arrested and charged by criminal complaint with conspiring to rig bids, fix prices, and allocate market shares for marine hose. Marine hose is a flexible rubber hose that is used to transport oil between tankers and storage facilities and buoys. The arrested executives were from the United Kingdom, France, Italy, and Japan. Simultaneous with the arrests, agents of the Defense Criminal Investigative Service (DCIS) of the Department of Defense's Office of Inspector General conducted searches at locations across the U.S. While those searches were being conducted, the Office of Fair Trading in the UK and the European Commission also conducted searches in Europe. On September 13, one of the eight arrested executives and an additional executive were indicted for their participation in the conspiracy.

Domestic Cartels

The Division also continues to vigorously pursue domestic cartels that harm American consumers. One particular domestic cartel enforcement action to note is discussed below.

Ready-Mixed Concrete—The Division has successfully prosecuted price fixing in the ready-mixed concrete industry in the U.S. Midwest. In November 2006, Ma-Ri-Al Corporation and two of its executives were convicted after trial for fixing

prices of ready-mixed concrete in Indiana. Each executive was sentenced to serve 27 months in jail, and the company was ordered to pay a $1.75 million fine. In total, four corporations and eight executives have pled guilty to fixing prices of ready-mixed concrete, and jail sentences of five to fourteen months have been imposed on the pleading executives. Fines imposed in the investigation total over $35 million, including a $29.2 million fine against Irving Materials, Inc., which is the single largest fine imposed for a domestic price-fixing cartel.

Contracting and Procurement Corruption

One important focus of the Division's criminal enforcement efforts in the past year has been fraud and corruption involving bidding, contracting, and procurement. These cases take money out of the pocket of every American taxpayer and deserve severe condemnation. These cases deal with U.S. operations in Iraq, construction in New Orleans following Hurricane Katrina, the U.S. Navy, the Department of Defense, and U.S. schools, among others.

Iraqi Contracting Investigation—As part of the Department's National Procurement Fraud Task Force, the Division filed three cases in July of this year in its investigation of fraud in Iraqi procurement contracts. Three defendants were indicted in August 2007 on bribery, conspiracy, money laundering, and obstruction charges arising out of one of the defendant's service as an Army contracting officer in Kuwait in 2004 and 2005. The defendants allegedly accepted millions of dollars in bribe payments in return for awarding co-conspirator contractors and others DOD contracts through a rigged bidding process. Cash bribes paid to the

defendants and other co-conspirators allegedly totaled $9.6 million. All three defendants face up to 20 years in prison and a fine of $500,000 for the charge of money laundering conspiracy, and up to five years in prison and a fine of $250,000 for each of the conspiracy counts. One defendant also faces up to 15 years in prison and a $250,000 fine on the charge of bribery.

U.S. Navy Contracting—The vice president of a Virginia marine products company agreed in August 2007 to plead guilty, serve a sentence, and pay a criminal fine for his role in a conspiracy to rig bids and allocate customers with respect to certain marine products purchased by the U.S. Navy, the U.S. Coast Guard, and other public and private entities. He participated in a conspiracy between December 2000 and May 2003 to allocate customers and rig bids for contracts to sell plastic marine pilings. He and other conspirators discussed and agreed among themselves which of them would win contracts from the Department of Defense (DOD), the Department of Homeland Security, and others.

In addition, his former supervisor pleaded guilty to multiple felony counts, including charges that he participated in the plastic marine pilings conspiracy, served time in prison, and paid a $100,000 criminal fine. Other executives that have pleaded guilty in this investigation include the company's former chief financial officer, who agreed to plead to two felony counts. He was charged for participating in the bid rigging and customer allocation conspiracy among manufacturers of foam-filled marine fenders and buoys, and was sentenced to 18 months in prison and to pay a $75,000 criminal fine. A fourth executive also pleaded guilty, agreed to serve four months in jail and serve four months in home detention, and to pay a

$50,000 criminal fine for his involvement in a related bid-rigging and customer allocation conspiracy.

U.S. Department of Defense Contracting—The president and owner of a Medford, New York defense company pleaded guilty in September 2007 and agreed to pay a $20,000 criminal fine for participating in a conspiracy to rig bids on military contracts for products that are used to secure cargo on vehicles, vessels and aircraft. In July 2007, a former executive of a Long Island, N.Y., defense company pleaded guilty, agreed to serve 10 months in prison, and will also pay a $10,000 criminal fine for participating in the conspiracy, and for soliciting a kickback in connection with those contracts. In addition, two Pennsylvania executives pleaded guilty in February 2007 and are currently awaiting sentencing.

New Orleans Levee Reconstruction—As part of the Department's Hurricane Katrina Fraud Task Force, the Division secured a guilty plea from a former contract employee of the U.S. Army Corps of Engineers in August 2007. The former contract employee was a construction official in the New Orleans office of the U.S. Army Corps of Engineers. He agreed to plead guilty to bribery in connection with a $16 million hurricane protection project for the reconstruction of the Lake Cataouatche Levee, south of New Orleans. Between August and October of 2006, he agreed to accept cash payments from a sand and gravel subcontractor in exchange for providing confidential information used by the Corps to evaluate bids.

Nationwide E-Rate Investigation—The Division actively is pursuing a nationwide investigation of bid rigging and fraud in the E-Rate program. Congress created the E-Rate program to help economically disadvantaged schools and

libraries obtain computer and telecommunications services, but the Division has uncovered extensive fraud in this industry by criminals who took advantage of the program to enrich themselves. In total, the Division thus far has charged 12 corporations and 17 individuals with collusion and fraud affecting dozens of schools in 11 states. A total of six companies and ten individuals have pled guilty, agreed to plead guilty, or entered civil settlements, and have paid or agreed to pay criminal fines and restitution totaling approximately $40 million and have been sentenced to more than 4,000 days in prison.

In addition, on September 14, 2007, a jury convicted a former sales representative of 22 counts of bid rigging, fraud, collusion, aiding and abetting, and conspiracy for her role in schemes to defraud the E-Rate program.

New York City Department of Education Contracting—A New York City Public School custodial engineer pleaded guilty in December 2006 to conspiring to commit mail fraud in connection with a kickback scheme used to defraud the New York City Department of Education and its predecessor, the Board of Education of the City of New York. Beginning in approximately July 1997 and continuing until at least June 2003, he received kickbacks in exchange for allocating contracts for industrial cleaning and maintenance supplies to companies associated with his two unnamed co-conspirators.

Merger Enforcement

Merger enforcement continues to be one of the Antitrust Division's core priorities. The Division is committed to challenging mergers that the evidence developed in a thorough investigation evaluated pursuant to rigorous economic analysis demonstrates will harm U.S. consumers and businesses. Six transactions were restructured or abandoned by the parties in response to a Division investigation, and the Division filed an additional four merger enforcement actions in district court in Fiscal Year 2007.

The Division has obtained divestitures or other relief to prevent harm to competition from mergers in important industries, such as telecommunications and banking, among others. Additionally, in April 2006, the Division also obtained a settlement in which QUALCOMM Inc. and Flarion Inc. agreed to pay $1.8 million in civil penalties for violating premerger waiting period requirements.

A number of our most significant recent merger actions include the following:

Monsanto/Delta and Pine Land—After a thorough investigation of Monsanto's $1.5 billion proposed merger between Monsanto Co. and Delta and Pine Land Co. (DPL), the Division filed a lawsuit along with a consent decree that required Monsanto and DPL to divest a significant seed company, multiple cottonseed lines, and other valuable assets, in order to proceed with the merger. As originally proposed, the merger would have harmed farmers in cotton growing regions in the Mid-South and Southeastern U.S. by reducing competition in the sale

of cottonseed that has been genetically modified to include desirable traits like insect resistance or herbicide resistance. DPL had worked with other biotech companies to develop cottonseed with traits that would compete with seed containing Monsanto's traits. The merger would have eliminated DPL as a non-Monsanto partner for these trait developers.

The Division's consent decree remedied the threat to competition by requiring that the merged firm: (1) divest Monsanto's Stoneville cottonseed business, which will be enhanced by other assets including germplasm from DPL; (2) divest to Syngenta DPL seed lines containing VipCot; and (3) permit trait licensees to stack Monsanto's traits with non-Monsanto traits. The proposed consent decree is being reviewed by the U.S. District Court in Washington, D.C., under the Tunney Act process.

Charleston JOA—Until 2004, the Daily Gazette Company and MediaNews operated within a joint operating agreement (JOA) and each owned a 50 percent interest in an entity called Charleston Newspapers. The JOA performed many of the commercial functions of The Charleston Gazette and Daily Mail, the only two daily newspapers in Charleston, West Virginia. In May 2004, Daily Gazette Company acquired MediaNews' ownership interest in the JOA and ownership of the Daily Mail. As a result, Daily Gazette Company gained ownership of all of the assets and the ability to control all of the business operations of both newspapers.

The Division filed a civil antitrust lawsuit in May 2007 alleging that the Daily Gazette Company and MediaNews Group Inc. (MediaNews) violated the antitrust laws when they entered a series of transactions in May 2004 that resulted in the

acquisition by Daily Gazette Company of the Daily Mail newspaper from MediaNews. The Division's complaint alleges that Daily Gazette Company, owner and publisher of The Charleston Gazette, bought the Daily Mail with the purpose and intent to shut it down, and began using its new control over that newspaper to initiate the termination of the second paper, but suspended those actions in December 2004 when the Division learned of the transactions and began an investigation. The Division's lawsuit seeks an order requiring the parties to undo their transactions and restore the competition that existed before May 2004.

Mittal Steel/Arcelor—In 2006, the Mittal Steel Company launched a hostile $33 billion takeover of Arcelor S.A., a transaction that would combine the world's two largest steel producers. In August 2006, the Division announced that it had concluded that Mittal's proposed acquisition of Arcelor would adversely affect competition in the $2 billion tin mill products market in the eastern United States by eliminating constraints on the ability of producers to coordinate their behavior and thereby increase the price of tin mill products to can manufacturers and other customers. Tin mill products are finely rolled steel sheets that are normally coated with tin or chrome and used in many consumer-product applications, such as sanitary food cans and general line cans for aerosols, paints, and other products.

To remedy the Division's concerns, the proposed consent decree required Mittal to divest a steel mill that supplied tin mill products to the eastern United States. The court entered the consent decree in May 2007. The Division ultimately determined pursuant to the decree that Mittal must divest its Sparrows Point facility in Maryland, a profitable and diversified facility that has the capacity to

produce more than 500,000 tons of tin mill products annually. That divestiture is proceeding.

Exelon/PSEG—In the energy industry, last year the Division investigated the proposed merger of Exelon Corporation and Public Service Enterprise Group Inc. The $16 billion merger would have combined the assets of two of the largest electricity generators in the mid-Atlantic region and would have created one of the largest electricity companies in the United States.

Huge variations in the marginal cost of running different kinds of generators affect the competitive dynamic in the wholesale market for electricity. The marginal costs of running a hydroelectric dam generator or nuclear power plant are substantially less than the marginal costs of running coal-fired steam turbine generators or gas-fired combustion turbine generators. The prevailing price in the market is determined by the least efficient plant necessary to meet demand. As a result, it is possible for an electricity company with a relatively small market share to have the incentive and ability to increase market prices due to the combination of generation plants it owns. In short, the company might withhold output from selected higher-cost plants to drive up the market-clearing price, which would benefit its sales from its remaining lower-cost plants.

The Exelon/PSEG merger would have combined a firm that had significant low-cost nuclear and hydroelectric generating capacity (owned by Exelon) with a firm that had significant higher-cost coal-fired steam turbine capacity (owned by PSEG). The Division concluded that the combined firm would have significantly more incentive and ability to withhold output from selected high-cost plants than

either firm had independently before the merger. Under the terms of a proposed consent decree, the merged firm would have been required to divest six electricity plants in Pennsylvania and New Jersey that provide more than 5,600 megawatts of generating capacity and that included key generating units in the mid-range of the fuel curve—units that often were on or near the margin and thus would have enhanced the ability of the merged firm to exercise market power. Exelon ultimately abandoned its effort to acquire PSEG.

Telecommunications—The telecommunications industry has kept the Division busy for many years, and the last few years have been no exception. The Division has recently investigated the mergers of Verizon and MCI, SBC and AT&T, the new AT&T and BellSouth, Sprint and Nextel, and Cingular and AT&T Wireless, among others. The Division took action to challenge portions of these transactions to protect competition, and decided not to challenge others after concluding that they were not likely to result in a substantial lessening of competition.

DFA/Southern Belle—After a victory in the court of appeals, the Division obtained a settlement negotiated on the eve of a district court trial that required Dairy Farmers of America Corp. (DFA) to divest its interest in Southern Belle Dairy Co. This result successfully ended the Division's lawsuit challenging DFA's acquisition of a 50 percent interest in Southern Belle. The complaint charged that the partial acquisition reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA significant partial ownership interests in two dairies—the Southern Belle dairy and the nearby Flav-O-

Rich dairy—that competed against each other for such contracts. As a result, the acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee.

Merger Review Process and Transparency

Bringing enforcement actions is the most well-known aspect of the Division's merger activities, but it is not the only one. The Division also seeks continually to improve its merger review process and its merger enforcement transparency. Improving in these areas improves overall merger enforcement and benefits American consumers and businesses.

In December 2006, the Division announced a revision to its 2001 Merger Review Process Initiative. The Process Initiative helps us identify and devote increased resources to those transactions that should be challenged while at the same time spending fewer resources on transactions that are not anticompetitive. That is good government.

Thanks to the Hart-Scott-Rodino (HSR) premerger review process that Congress enacted in 1976, today most federal merger challenges occur before deals close, when effective injunctive relief is available, structural relief is more practical and effective, and harm to consumer welfare has not yet occurred. The HSR Act gives the Antitrust Division and the FTC an opportunity to examine most large transactions before they close. Our goal is to identify quickly both transactions that

threaten harm to competition and those that do not threaten competition, devoting our resources to challenging the former while letting the latter proceed.

Merger analysis itself has evolved significantly since the HSR Act was passed. There was a time when the Supreme Court affirmed decisions blocking mergers based largely on market share and a perceived unwritten guiding principle that the government always won. Times have changed. Courts have shifted their focus from a static analysis of market shares and concentration toward a fuller analysis of the future, dynamic competitive process in the relevant market. We certainly closely look at market shares and HHIs, but we also closely examine the competitive process for unilateral or coordinated effects, entry, and efficiencies as well. We frequently employ the increasingly sophisticated economic tools that have been developed by the antitrust community, such as regressions, merger simulations, diversion ratios, and critical loss analyses. While our advances in economic analysis can help us make better enforcement decisions, they often require significant quantities of data and information to conduct properly.

Consequently, the second request process can be costly and time consuming. Indeed, there has been an explosion in the volume of documents and information produced by parties in response to second requests. While there was a time when the production of a few hundred boxes of documents was a large production, now we talk in terms of gigabytes, terabytes, and millions of pages of documents. In the Verizon/MCI and SBC/AT&T mergers, for example, the Division obtained approximately 25 million pages of documents.

Given the tremendous increases in review burdens on both the Antitrust Division staff and parties to proposed mergers, we seek ways to limit those burdens, while at the same time retaining our ability to effectively assess and challenge anticompetitive mergers. A significant step in that direction was the Division's 2001 Merger Review Process Initiative, which included means of improving our ability to identify those transactions that do not threaten harm to competition during the initial HSR waiting period without issuing a second request. The Initiative also provided means to improve the efficiency of our review process after a second request issues.

The Initiative worked. Notwithstanding the significant number of enforcement matters last year, the Division has improved its ability to close investigations of transactions that are not anticompetitive. After the Initiative was announced, for matters that did not lead to an enforcement action, the average number of days between the opening of a preliminary investigation and the closing of the investigation (either before or after issuance of a second request) fell from about 93 days to 57 days. The average length of second request investigations dropped from 213 days for the two years before the Initiative to 154 days, a drop of over 25 percent.

While the 2001 Initiative has resulted in investigations that are more focused and efficient, it was clear that improvements could still be made. Therefore, the Division announced last December a number of significant refinements that build on the successes of the 2001 Initiative. Many of the changes formally adopt merger investigation procedures already successfully used by Antitrust Division staff, such

as commonly used second request modifications and a revised Model Second Request that accounts for problems that have arisen in past investigations.

We are committed to continued improvements in the merger review process. At the same time, we will not forgo getting the information we need to successfully challenge anticompetitive mergers. If we proceed to a judicial challenge, the courts expect the Division to present a thorough and detailed empirical analysis of a challenged merger's likely anticompetitive effects, and they expect us to do so promptly after the complaint is filed. We fully intend to meet that expectation to protect U.S. consumers and businesses from anticompetitive mergers.

I would now like to turn to the issue of transparency. Transparency is readily achieved when the Division brings an enforcement action. Theories and evidence of anticompetitive harm are available to the public through complaints, press releases, and competitive impact statements. The public often has as much, if not greater, interest, however, in why the Division decides not to bring an enforcement action in particular cases. While confidentiality restrictions place significant limits on what the Division may say publicly about its HSR investigations, we have been active and intend to remain active in issuing closing statements in mergers that we do not challenge after extensive investigations. These statements describe our rationale for the enforcement decision within confidentiality limits. Thus, for example, we issued closing statements detailing our rationales for not challenging the AT&T/Bellsouth and Maytag/Whirlpool mergers. We will continue to do so where appropriate to help the public better understand our actions.

The Division's transparency efforts also have included the release of a joint DOJ/FTC Commentary on the Horizontal Merger Guidelines in March 2006. The Commentary is the latest chapter in the agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce Section 7 of the Clayton Act.

The analytical framework and standards used to analyze the likely competitive effects of mergers are embodied in the Horizontal Merger Guidelines, which the Division and the FTC jointly issued in 1992 and revised in 1997. The Commentary, which is available on both agencies' websites, explains how the Division and the FTC have applied particular guidelines provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the Commentary are summaries of actual mergers that the agencies analyzed under the Merger Guidelines.

Civil Non-Merger Conduct

Civil non-merger enforcement is based on anticompetitive conduct under the Sherman Act. Although it can involve unreasonable restraints of trade under Section 1 of the Sherman Act, it more frequently implicates single-firm conduct under Section 2 of the Sherman Act. Enforcement of Section 2 of the Sherman Act presents some of the most difficult challenges in antitrust law today. An important part of the Division's mission is to advance development of antitrust law in

procompetitive ways. Sound antitrust enforcement policy requires prosecution of exclusionary conduct that reduces output and increases prices while at the same time striving to avoid condemnations that chill procompetitive behavior.

Determining when unilateral conduct is unlawful under Section 2 has proven difficult because the aggressive, unilateral behavior typically at issue in Section 2 cases often resembles the healthy, aggressive competition that the antitrust laws seek to promote. The antitrust laws should encourage vigorous competition—even by companies with a large share of the relevant market. Because the current state of the law does not always define clearly what is lawful and what is not, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct. For this reason, the Antitrust Division, in conjunction with the FTC, conducted hearings to help advance our own thinking about unilateral conduct, better inform our judgment about when it is appropriate for the United States to bring enforcement actions under Section 2 of the Sherman Act, and help us to develop clear and objective standards that will apply in Section 2 matters. During 18 days of hearings, spanning over 11 months and concluding in May 2007, the Division and the FTC received submissions and heard from 28 different panels and 130 panelists.

A number of prominent practitioners and economists participated in these hearings, and the Antitrust Division is grateful to them for agreeing to share their insights. We also received important participation from the business community, consumer groups, and business historians. The hearings focused on predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty

and market share discounts, misleading and deceptive practices, market definition and market power, and remedies. There were also hearings on foreign antitrust enforcement, empirical studies, business history and strategy, and business and academic perspectives on single-firm conduct.

Hearings are an important tool for increasing our enforcement capacity in the area of civil non-merger enforcement—an area where the law is less clear, and where it is more difficult to discern whether aggressive competitive behavior harms competition—but it is also important to bring appropriate enforcement action when the antitrust laws are violated. We have been active in bringing enforcement action in the civil non-merger area in the past year. Some of our most recent significant enforcement efforts in this area include:

Real Estate Services—The Division's enforcement against anticompetitive agreements included its extensive efforts to stop anticompetitive practices in the real estate services industry, including its lawsuit against the National Association of Realtors (NAR). For many people, the purchase or sale of a home not only represents the fulfillment of the American dream but is their single most significant personal financial transaction. The Division has focused its enforcement activities to ensure that the industry and consumers can take advantage of newer business models. In addition, the Division, often in collaboration with the FTC, has vigorously pursued competition advocacy efforts by commenting on the detrimental competitive effects of various legislative and regulatory proposals that limit

competitive alternatives at the state level. I will discuss these efforts in greater detail later on.

In September 2005, the Division filed suit after NAR promulgated rules that would limit competition from real estate brokers who use the Internet to serve their customers. (I am recused from this matter.) The lawsuit alleges that NAR's policy prevents consumers from receiving the full benefits of competition and threatens to lock in outmoded business models and discourage discounting. In November 2006, a U.S. District Court denied NAR's motion to dismiss. The lawsuit is now in the discovery phase.

Cable Entry into Telecommunications Services—Blue Ridge and Service Electric requested authority for their telephone affiliates to provide local telecommunications services in Commonwealth Telephone Enterprises' rural telephone service area. The entry of Blue Ridge and Service Electric presented the first opportunity for widespread residential competition in that area, and Commonwealth filed protests regarding the requests before the Pennsylvania Public Utility Commission. In 2006, Commonwealth entered into settlement agreements with Blue Ridge and Service Electric, obtaining terms that restricted the geographic scope of the companies' entry in exchange for agreeing to withdraw the protests against certification.

The Division informed Commonwealth of its competitive concerns about these settlements in early 2007. In response to the Division's concerns, the settlement agreements with Blue Ridge and Service Electric were amended to remove the restrictions imposed on their entry.

Federation of Physicians and Dentists—The Federation of Physicians and Dentists coordinated its approximately 120 Cincinnati-area OB-GYN member physicians, who constitute a large percentage of Cincinnati-area OB-GYNs, to negotiate or renegotiate higher fees in their contracts with Cincinnati-area healthcare insurers. The Federation, with substantial assistance from three physicians, allegedly helped implement its members' concerted demands to insurers for higher fees and more favorable related terms, demands which were accompanied by threats of contract terminations.

The Division filed an antitrust lawsuit against the Federation, one of its employees, and the three physicians, alleging that their actions caused Cincinnati-area health care insurers to raise fees paid to the Federation's OB-GYN members above the levels that the OB-GYNs likely would have obtained if they had negotiated competitively with those insurers. The Federation and its employee settled the charges against them in June 2007. (The three physicians settled earlier.)

Bristol-Myers Squibb—In May 2007, Bristol-Myers Squibb Company (BMS) agreed to plead guilty and pay a $1 million criminal fine for lying to the federal government about a patent deal involving Plavix, the most widely prescribed blood-thinning drug in the world. Approximately 48 million Americans take Plavix daily to prevent potentially fatal blood clots.

In 2006, BMS and another company, Apotex Inc., were engaged in litigation over the validity of the patent for Plavix and were negotiating a settlement of that litigation. At the time, BMS was subject to a separate consent decree for unrelated conduct with the Federal Trade Commission (FTC) that required BMS to submit

any proposed patent settlements for review and approval by the FTC. The FTC warned BMS that it would not approve a settlement of the Plavix litigation if BMS agreed not to launch its own generic version of Plavix that would compete against Apotex for generic sales. A former senior BMS executive made oral representations to Apotex with the purpose of causing Apotex to conclude that BMS would not launch its own generic version of Plavix in the event that the parties reached a final settlement agreement. The Division further alleged that these representations ultimately resulted in an understanding between BMS and Apotex that BMS would not launch its own generic version of Plavix. Finally, the Division charged that BMS took steps deliberately to mislead the FTC by first concealing and then later lying about the existence of its representations to and understanding with Apotex Inc.

BMS agreed to plead guilty to two violations of the federal False Statements Act and to pay a fine of $1 million—the maximum fine permitted for these violations by statute.

Arizona Hospital and Healthcare Association—In May 2007, the Division reached a settlement in a lawsuit against the Arizona Hospital and Healthcare Association and its subsidiary, AzHHA Service Corporation, which controls the AzHHA Registry, a group purchasing organization for temporary nursing services. The lawsuit challenged actions by the parties that caused the bill rates paid to agencies, and ultimately the wages paid to temporary nurses in Arizona, to stagnate and fall below competitive levels. The settlement prohibits AzHHA and its member hospitals from agreeing on competitively sensitive contract terms, including uniform bill rates paid to nurse staffing agencies. The proposed settlement also prevents

AzHHA from boycotting or discriminating against agencies or hospitals that choose not to participate in the AzHHA Registry.

Competition Advocacy

In addition to its law enforcement role, the Antitrust Division regularly seeks to promote competition through broader advocacy efforts. Competition advocacy includes providing advice and analysis concerning a variety of matters, such as Supreme Court cases, international efforts, and legislation and regulation at both the federal and state levels. Anticompetitive constraints imposed by government action can have a much broader negative impact on consumers than any single cartel or merger—potentially affecting entire sectors of the economy—but are generally exempt from direct challenge under the antitrust laws. Moreover, governmentally-imposed restraints are likely to be more durable than private restraints because market forces are less likely to overcome them. The Division believes that robust competition advocacy is an important part of our mission to protect competition on behalf of American consumers.

International: The Division is focused and active on the international front. With more and more countries adopting antitrust enforcement regimes, the Antitrust Division has made a priority of strengthening international cooperation and promoting antitrust policy convergence. In the last year, the Division pursued these goals by continuing to work closely with multilateral organizations around the world, and by working to develop and maintain strong bilateral relationships with enforcement agencies in other countries.

Two organizations stand out for their recent work in achieving consensus on important antitrust issues: the International Competition Network (ICN), which the Division and the FTC helped to launch in 2001, and the Organization for Economic Cooperation and Development (OECD).

The ICN provides an opportunity for senior antitrust officials and non-governmental advisors, from both developed and developing countries, to work together to achieve practical improvements in international antitrust enforcement. In just over five years, the ICN has grown from 14 founding members into a global network of 100 members from 88 jurisdictions. At the Moscow ICN conference in May 2007, under the Division's leadership as chair of the Merger Working Group, the ICN began work on substantive merger policies. In 2006, the Division was heavily involved in the ICN's Unilateral Conduct Working Group, which the FTC co-chairs. The working group announced plans to focus on the objectives of single-firm enforcement and the standards for analysis of dominance (monopoly power).

The OECD's 30 member countries share a commitment to democratic government and market-based economies, and the OECD provides an effective forum for governments to seek answers to common problems, identify best practices, and coordinate policies. The Division has been closely involved in all phases of the OECD's competition work. Since 2006, I have chaired the OECD's Competition Committee Working Party on International Cooperation and Enforcement, where, among other work, I led roundtables on issues affecting all three major areas of antitrust enforcement: cartels, merger review, and unilateral conduct.

The Division remains committed to developing strong, productive bilateral relationships with its foreign counterparts. Working productively with the European Commission remains a priority, and the Division continues to work closely with its counterpart in Brussels on a wide range of cartel, merger, and other enforcement and policy matters. For example, in February 2006, the Division confirmed publicly that it was coordinating with the EC and other foreign competition authorities in investigating potentially anticompetitive practices in the air cargo industry. The Division also attended numerous meetings with its sister agencies in the governments of United States trading partners, such as Japan and Korea. Further, U.S., Canadian, and Mexican agencies created working groups on unilateral conduct and intellectual property. The Division will continue to promote sound antitrust analysis and international cooperation abroad.

We have devoted special attention to China in recent years. The Division followed closely China's efforts to enact its first comprehensive antitrust law, and on August 30, 2007, the Chinese legislature passed the new Antitrust Act (ATA), which will become effective on August 1, 2008. The Division has provided comments on several draft versions of the ATA and met with relevant Chinese Government officials periodically to discuss the draft law in detail.

The Chinese demonstrated a willingness to listen to our concerns and, through several revisions, addressed some potential problems in draft versions of the ATA. We also believe that implementation of the law after it is passed is extremely important. The statute necessarily sets forth general principles and leaves significant portions of the analysis to be developed through individual cases

and/or regulations. Accordingly, we have already begun discussing with Chinese officials how we can help in the implementation phase of their antitrust regime.

On the domestic front, the U.S. Supreme Court has taken an active docket of antitrust and competition-related cases in the past year, and the Division has assisted the Solicitor General in submitting the views of the United States as *amicus curiae*. In 2006, the court issued decisions in *Texaco Inc. v. Dagher*, stating that "rule of reason" analysis generally governs pricing decisions by joint venturers; *Illinois Tool Works Inc. v. Independent Ink, Inc.*, holding that the mere fact that a tying product is patented does not support a presumption of market power for purposes of antitrust tying analysis; and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, clarifying the standards for secondary-line price discrimination claims under the Robinson-Patman Act. In each case, the Court reached the conclusion urged by the United States.

Later in 2006, the Division assisted in briefs filed in *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co., Inc.*, regarding the standards governing buyer-side predatory pricing. The Supreme Court issued a unanimous decision in February 2007, consistent with the United States' position. The Division also assisted in briefs filed in *Bell Atlantic Corp. v. Twombly*, concerning pleading standards for antitrust civil conspiracy claims, resulting in a 7-2 decision consistent with the government's amicus brief; in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, on the question of whether vertical minimum price maintenance agreements should be evaluated under the rule of reason, resulting in a 5-4 decision consistent with the government's amicus brief; and *Credit Suisse First Boston Ltd. v. Billing*, considering the test for

implied immunity from the antitrust laws based on the operation of securities regulations and statutes. The Supreme Court held that in the particular circumstances at issue a "serious conflict" between application of the antitrust laws and proper enforcement of the securities law required implied antitrust immunity. The Court nevertheless reaffirmed the basic principle that "an implied repeal of the antitrust laws" should "be found only where there is a plain repugnancy between the antitrust and regulatory provisions."

The Division, together with the FTC, also educates policymakers and the general public about the benefits of competition in a variety of markets. One market we have devoted substantial efforts to is the real estate market. The Division provides assistance and information to entities considering rules—such as rules that prohibit rebates to consumers or that undermine online brokerage models—that would inhibit some types of competition that can lower the cost of buying or selling a home.

During 2006, several states modified proposed or existing laws and regulations to enhance competition to the benefit of consumers. Delaware, Ohio, Tennessee, and Wisconsin all passed bills that included a waiver provision to enable individual consumers to choose not to purchase unwanted types of real estate brokerage services. The West Virginia Real Estate Commission, the Tennessee Real Estate Commission, the Kentucky Real Estate Commission, the South Dakota Real Estate Commission, and the State of South Carolina all lifted bans on consumer rebates and other inducements to consumers in real estate transactions. The result

is that consumers in these states now have the potential to save thousands of dollars on the purchase of a home.

The Division is also engaged in a broader effort to ensure that all American consumers will continue to benefit from competition in the real estate services industry. A well-attended workshop in October 2005, jointly sponsored by the Antitrust Division and the FTC, was a key part of that effort. Participants from brokerage firms, NAR, local realtor associations, fee-for-service and internet referral brokers, and buyers' brokers spotlighted the competitive issues facing this industry. The Division will continue to maintain its enforcement and advocacy efforts in this area to ensure that consumers enjoy the benefits of better service, increased choice, and lower prices resulting from competition.

The Division also joined with the Federal Trade Commission in April 2007 to issue a report, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property. The report discusses issues including refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. This report is an important example of our efforts to increase the transparency of our enforcement decisions and to advance the state of knowledge on the intersection of antitrust and intellectual property rights.

Conclusion

I emphasize in closing that none of what I have discussed could have been accomplished without the dedicated career staff of the Antitrust Division. It is because of their experience, talent, and dedication to the mission of protecting consumers that we have been able to achieve the successes we have. It is an honor and privilege to serve with them.

Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with the members of this Task Force and your respective staff.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to questions at this time.

Ms. LOFGREN. Thank you, Mr. Barnett. And thank you both for your testimony.

We will now move to questions from the task force. And we will begin with our Ranking Member, the gentleman from Florida, Congressman Ric Keller.

Mr. KELLER. Thank you, Madam Chairman.

And, Ms. Majoras, let me begin now with you. I know you only had 5 minutes to give us your opening statement. And one of the things you weren't able to expound upon was some of the work you do on behalf of consumers in the retail sector to tackle anticompetitive behavior.

Let me begin by asking you if you had a chance, you or your staff, to observe the hearing that this task force did in July on the issue of credit card interchange fees and the impact those have on the retail sector.

Ms. MAJORAS. Thank you, Ranking Member Keller. I know that we followed the issue with some interest. I will say this, though. The Justice Department and the FTC try to divide our work. And I hate to do this on the very first question, but the interchange fee issues have traditionally resided with the Department of Justice. And so, they have brought cases in the area. And so, we are less informed on the issue.

Mr. KELLER. Okay.

And, Mr. Barnett, let me ask you. Was that a hearing that you were able or your staff was able to observe? And is there anything that your office is doing to take a look at this interchange fee issue and the impact on the retail sector and consumers?

Mr. BARNETT. Yes, we are very focused on this issue, not only through events such as the hearing, but through conducting our own monitoring activities and investigations in the area. Without commenting on any specific investigation, I would observe that these markets are somewhat complicated. They are what our economists like to call two-sided markets, which makes the analysis of competitive effects and the impact on consumer welfare more challenging than some other areas.

Notwithstanding that, that is a challenge that we think is a very important area of the economy. It is an important sector. And so, we are looking at it. We have significant resources devoted to evaluating that issue right now.

Mr. KELLER. Well, thank you. And it is also a two-sided issue, as you know. And certainly, the credit card electronic payment system has revolutionized the world and made it easier. And we are all thankful for that.

And then on the other side, we hear the retailers telling us, "Hey, this is 60 percent of the market share, MasterCard, Visa. And they can charge us as much as we want, and there is nothing we can do about it." So we are actively looking at both sides as well, as you are.

While I have you there, Mr. Barnett, let me ask you. We had a hearing back in February on the XM-Sirius satellite merger. Were you or your staff able to observe that hearing and the testimony of our witnesses such as the CEO, Mel Karmazin?

Mr. BARNETT. Certainly, Ranking Member Keller, any transaction for which we are conducting a full-fledged investigation. And

that is certainly a transaction on which we are quite focused and conducting an extensive evaluation. We try to obtain information from wherever we think we can that will be useful to us. And information through hearings such as the one as this Committee held having industry participants providing testimony is very relevant information. And——

Mr. KELLER. And I don't want to cut you off, but my time is running out. So let me just do a follow-up and give you a chance to answer it.

I know there is some things you can't talk about. And I am not going to ask you what your decision is going to be or what your thoughts are. But can you give us an idea of the timeframe for whatever decision is ultimately made and what the status of this review is right now?

Mr. BARNETT. I can't. I would like to, but I can't give you an exact timeframe. We want to make sure that we get the information that we need so that we can conduct an appropriate analysis and evaluation. And we will not decide until we have done that.

We want to do that as quickly as possible. But we also want to get to the right answer.

Mr. KELLER. Thank you.

I have several more questions, but my time is expired, Madam Chairman. So I will yield back the balance.

Ms. LOFGREN. Thank you, Mr. Keller.

I want to follow-up on the credit card interchange fee issue because the hearing that we had was really pretty stark. And it became pretty clear in the course of the hearing that this is a very one-sided operation where the retailers in some cases they weren't even permitted to see the contracts. And they are very high fees.

I actually was so frustrated at the apparent lack of action in DOJ that I contacted the attorney general of California to see if States have an opportunity. And they actually have an active investigation ongoing on this issue.

I am wondering, if you can't tell us obviously what you are going to decide, what is your estimate on the timeframe for your investigation of this situation. Can you tell us that, Mr. Barnett?

Mr. BARNETT. Again, I don't have a precise estimate. I can tell you that we try to be thorough and comprehensive in our evaluation. To give you an example, when the Division brought an action in the credit card industry involving Visa and MasterCard, that investigation took a number of years before we had collected the information that we felt was necessary to pursue the challenge. We then filed a suit and ultimately prevailed.

So this is a much more recent investigation. I expect that it will take us some time. But again, we like to do these as quickly as we responsibly can. And that is what we are committed to do here.

Ms. LOFGREN. May I ask how many investigators you have assigned to this?

Mr. BARNETT. I don't have an exact number here.

Ms. LOFGREN. If you could get back to us on that, I would appreciate it. You know, obviously we want a thorough investigation. But how much effort you put into something also depends on how fast it is going to be done. And in the meanwhile, if the testimony we received is correct, there is a lot of retailers in the country that

are being on the short end of the stick and consumers paying higher prices than they really should.

Mr. BARNETT. Well, Madam Chairwoman, it is a little difficult for me to give an exact number in that the number of people involved at any given point in time varies depending on what is going on in the investigation. If we are taking depositions——

Ms. LOFGREN. Well, perhaps you can give me a range how many and over what period of time.

I want to talk about standard setting. I don't want to get into individual cases. But in the tech world, it is a difficult matter. You do want standard setting. You know, that really does advance the growth of technology. On the other hand, you can have problems with standard setting, as we all know.

And I know that the joint I.P. report that you have issued indicates that the agencies are going to evaluate joint activity to establish licensing terms under the rule of reason. Have you been able jointly to do that kind of follow-up and tracking of these standard setting operations? And if so, what have you found?

Mr. BARNETT. Well, we are continually monitoring various developments in different industries. The Division has issued a couple of business review letters, one involving VITA, an organization called VITA, the other one, I believe, IEEE, where we applied a rule of reason type analysis to some disclosure policies that those organizations were interested in pursuing to try to address the issue of what some people called, sort of, hold-up issues after they set a standard, a member who has a patent——

Ms. LOFGREN. Right. No, I am familiar with the issue.

Mr. BARNETT. And in those instances, we found that under a rule of reason type approach that the disclosure policies were reasonable and we thought would be potentially procompetitive.

Ms. LOFGREN. I am wondering—my time is almost up—whether you can explain to us maybe in a follow-up letter how you go about tracking this, as you said you would in the report, and whether it is pursuant to the National Cooperative Research Act and if you have a comment on how that has worked in terms of spurring this kind of disclosure. It would be very helpful.

I know, Ms. Majoras, in the remaining seconds.

Ms. MAJORAS. Very happy to do that. We have been very active in the standards setting arena. And we are monitoring complaints and so forth as we get them from standard setting organizations, so we can absolutely give you a follow-up on that.

Ms. LOFGREN. I would appreciate that. My time has expired with actually 18 seconds to go.

And so, I will now call on the gentleman from Ohio, Mr. Chabot, for his questions.

Mr. CHABOT. Thank you very much, Madam Chair.

And I would ask the first question to either or both of the witnesses here. The Antitrust Modernization Commission made a series of recommendations regarding the Hart-Scott-Rodino Act and the merger process as it relates to the roles and responsibilities of the FTC and the Department of Justice.

What have you done to facilitate the implementation of these responsibilities, particularly as it relates to prompt clearance to either the FTC or the Department of Justice and parity among the

FTC and Department of Justice enforcement mechanisms? And you can both take a shot at it, if you would like.

Ms. MAJORAS. All right. Well, before the AMC even issued its recommendations, we had already been working on those things. The issue of burden in the merger review process is one that has been with us for years and one that I have been particularly interested in both in the private sector, at the DOJ, and at the FTC.

And so, in February of 2006, we put into place some new measures to try to curb the burdens in that process. Some of those match pretty completely to the AMC recommendations. Some of them don't.

A few of the AMC recommendations we don't necessarily agree with because we think it is such an effort to micro-manage the process that in the realities of trying to do a merger investigation, it would inhibit our abilities. But we are trying very hard to curb the burden because, frankly, it puts a lot of burden on us as well.

The second thing on the clearance issues, we have currently—this issue has been with us for years. We have tried to fix this, you know, how we allocate the work between us. We are trying again.

We have people from both agencies sitting down working together and trying to come up with a new system. But some people on the bar, of course, in the business community think that we should work with Congress to actually make a decision.

Mr. CHABOT. Okay. Thank you very much.

Anything you would like to add, Mr. Barnett?

Mr. BARNETT. Just quickly on the burden of the review process. The Division back in 2001, frankly, when chairman Majoras was at the Division, launched a review process initiative that was designed to reduce the burden, increase the efficiency. That has worked very well. We nonetheless updated and revised it a bit in December of last year.

Overall we think we are more successful in clearing transactions without having to issue a second request identifying them early as not a threat to competition. And we continue to work in that regard because, as the Chairman says, the vast volumes of information and documents that we receive are a burden on us as well as the parties.

On clearance, I readily endorse what the Chairman said. We have people working on it right now, and we are committed to trying to improve that process as well.

Mr. CHABOT. Thank you very much.

My second question is what are the implications of the increasing globalization of antitrust law. Does America's view of antitrust law, that it seeks to protect competition, not particular competitors, hold true in other jurisdictions? And should America be promoting its view of antitrust laws abroad? And if so, how should we do that? And again, you can both take a shot at it.

Mr. BARNETT. Sure. Well, there are two sides to the coin on this one. On the cartel enforcement front, the globalization of enforcement has been a benefit to the United States. It has made it easier for us to detect, gather evidence about and prosecute cartels and those that prey upon American consumers. So that has been a—and the example of the OFT going after B.A. at the same time we did is a good illustration of the benefits.

With respect to mergers and other kinds of conduct, there are challenges that are there that having different approaches, different processes can create burdens. Having divergent outcomes can create very significant concerns. And we at both agencies have been very focused on this for years.

That was part of the purpose of the agencies helping to found the International Competition Network in 2001 and why we are so engaged through organizations, through bilateral relationships, why we have sent people to China who has recently enacted an anti-monopoly law. It is a concern, and it is one that we are trying to address.

Mr. CHABOT. Thank you.

Ms. Majoras?

Ms. MAJORAS. Thank you. There is no question that we in our work internationally—and that includes with developed countries, so our major trading partners, but also with developing countries who now have antitrust agencies and are trying to develop market economies after years of having state-based economies. So we are doing work with all of them.

And, yes, we definitely are trying to influence the process by what we have learned that we have done well and that we haven't done so well in enforcement of antitrust over the years in the United States. So that is clearly a big part of what we are doing.

It is a challenge. In 1990, we had about 25 competition agencies worldwide. And today we have over 100. So it is a lot to absorb into the competition group, if you will, in a short period of time.

Mr. CHABOT. Thank you very much.

I think my time is expired, Madam Chair. Thank you.

Ms. LOFGREN. Thank you.

The gentlewoman from Ohio, Ms. Sutton?

Ms. SUTTON. Thank you, Madam Chair.

Thank you both for your testimony. You made it clear in your remarks that in the United States the Antitrust Divisions of the Department of Justice and, of course, the FTC review various mergers and acquisitions to consider whether they have anti-competitive effects. And this sort of follows up on my colleague from Ohio's question.

So when a major hospital or hospital firm or a bank seeks to acquire another, we consider here in this country if the merger would put any single player in a market in a position to manipulate the market. But while antitrust considerations apply to U.S. firms, we are now, as you point out in your testimony, living in a global world.

Trade agreements, starting with the 1994 NAFTA and the 1995 WTO, contain various service sector market access conditions that provide the right for foreign firms in covered sectors to establish and operate in the United States through mergers and acquisitions and startups. And the market access rights for those foreign firms established in the WTO's general agreements on trade and services and the NAFTA and CAFTA and other free trade agreements, including the one that will be voted on shortly here with Peru, guarantees such market access rights free of government limits on the size of the firm, the number of employees.

The United States has submitted its own hospitals, insurance, banking and other financial service sectors to such commitment. So I have a couple of questions.

I mean, can you tell me what would happen when a foreign firm already operating with a sizeable market in the U.S. then sought to acquire another large U.S. operation in the same sector? And wouldn't those extreme service sector market access rights for foreign firms in our trade agreements conflict with our own domestic antitrust policies?

Mr. BARNETT. If I understand the question, my understanding at least is if a foreign firm has operations in the United States and they seek to acquire another United States firm, that transaction would be subject to section 7 of the Clayton Act and section 1 of the Sherman Act. And we would review it.

And if we found it constituted a violation of the law, we would pursue it. I am not aware of there being a trade barrier or a bar to our pursuing such a transaction.

Ms. MAJORAS. Indeed, I would just add that today, despite what trade agreements say, if a foreign firm that operated in the United States and sold goods to our consumers wanted to merge with another foreign firm that also had sales in the United States and that were to present a competitive problem, we could go after that merger as well. So I agree with Mr. Barnett. I don't see that as raising a problem for our enforcement.

Ms. SUTTON. And has that happened at all? Have you gone after any foreign firms?

Ms. MAJORAS. Sure. I am trying to think of the particular examples. I mean, we required certainly, for example, we had British Petroleum take over Amoco some years ago. And the FTC required major divestitures in that particular case.

Mr. BARNETT. I would give the example of Mittal, Arcelor last year, two steel companies. Mittal is Indian, but based in Europe. And Arcelor, the target, is a French headquartered company. They both had operations in the U.S. And we sought and obtained a significant divestiture to remedy competitive harm in the United States.

Ms. SUTTON. Okay, just so I understand correctly, you are saying that all of our antitrust policies can be applied to foreign firms operating in the United States?

Ms. MAJORAS. That is essentially how the jurisdiction works. Obviously, there are legal terms for exactly how it works, but foreign firms operating in the United States that sell goods here we have not had a jurisdictional problem in attacking practices when necessary.

Ms. SUTTON. Are you consulted when the United States is negotiating the trade agreements to make sure that there aren't any conflicts?

Mr. BARNETT. We not only are consulted, but we, particularly with some of the recent trade agreements, there have been competition chapters or sections to it. We have been active participants. We have been at the table to help guide those negotiations and generally think they have gone quite well.

Ms. SUTTON. And both of you?

Ms. MAJORAS. That is correct, both agencies together with USTR and commerce.

Ms. SUTTON. Okay, great. Thank you.

I yield back.

Ms. LOFGREN. The gentlelady yields back.

I would like to recognize the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Madam Chairwoman.

And I thank the witnesses for appearing. This may sound like a strange question coming from me, but when we talk about that we applaud the globalization of the antitrust concept and that we attempt to influence or exert our influence effectively as we can for other countries to adopt the same approach, I wonder how you respond to the question from some other countries about the multiplicity of authorities that can handle antitrust cases in the United States.

Not only the two of you, but, as a former Attorney General of California, we jealously guarded our authority. We attempted, I thought, to try and work with the Justice Department, particularly the U.S. Justice Department to ensure that we were working in concert and didn't sort of double up in inconsistent ways.

But if we were to look at a foreign country and we were to look at them with a regimen for antitrust law or call it what you will, that appeared to have a multiplicity of authorities to which American companies would have to respond and in some ways just the time it would take to go through the multiplicity of authorities would delay our entry into the marketplace or effective way of doing it, we might take umbrage at that.

And so, my question is, can you give us an idea of how you would explain the legitimacy of having a multiplicity of authorities, how you attempt to ensure that that does not inadvertently add uncertainty to the economic decision-making that really doesn't go to the core of antitrust questions, but to the core of decision making.

Ms. MAJORAS. Terrific question, one that we do grapple with. We have been asked many times.

I can remember very recently in China being asked very specifically about why we have two antitrust agencies and how that all works. And to tell you the truth, my response is that if you were starting from scratch, you might not do it this way.

I think our system is working very well today because we have adapted it. But one has to ask the question how many layers of enforcement do you need, because, of course, the problem with overenforcement of the antitrust laws is that the market starts to freeze up, as heavy regulation does in other contexts.

And so, suddenly the very competition that you want to protect you are squelching instead. And so, we talk about that. We talked about how we work together with each other, how we worked with sectoral regulators like the FTC, how we work with the States and how private enforcement works and some of the ways in which private enforcement, which Europe is now looking at, might be done in a way to avoid some excesses.

Mr. BARNETT. I completely agree with that and would just add briefly that it does present potentially a very significant burden and obstacle to marketplace competition and efficient operation of

the markets. I think it is incumbent upon the various antitrust enforcement authorities—for example, the FTC, the DOJ, and the various State attorneys general—to coordinate and to cooperate in a way that minimizes those burdens.

And one example I have given is if we are going to pursue a joint enforcement action or a joint investigation, it should appear to the parties as if there really is only one investigator and one prosecutor. That is the ideal situation to try and minimize that burden. But the potential for harm is very real.

Mr. LUNGREN. Ms. Majoras, let me just ask you a question on a particular case. The FTC recently had the case of the proposed merger between Whole Foods and Wild Oats Grocery Stores, which was unsuccessful in Federal District Court. In your written testimony you indicate that the Federal Trade Commission is still pursuing an administrative action against Whole Foods.

Can you explain that? Because from the outside it would appear you lost in court, but it is like, okay, we lost there, but we still got you.

Ms. MAJORAS. Of course. The way the Congress set up the FTC when we believe that a merger would be anticompetitive, we file an administrative action within the FTC. But in order to stop the merger long enough to be able to proceed in the administrative action, we go to Federal court for that purpose. That is different from the Justice Department.

Mr. LUNGREN. Right.

Ms. MAJORAS. Where we are now is if we have lost in District Court, which we have, the next step will be to decide whether, in fact, we will go forward in an administrative action. I mean, it is there now because it was filed months ago. The question now is whether we will proceed.

The Commission has a test that it goes through in deciding that. And it has been the very rare case that we have proceeded after losing in District Court.

Mr. LUNGREN. Thank you very much.

Thank you, Madam Chairwoman.

Ms. LOFGREN. The gentleman's time is expired.

The gentleman from Utah is recognized for 5 minutes.

Mr. CANNON. Thank you, Madam Chair.

If I could just followup with both of you briefly on Mr. Chabot's line of questioning and to some degree, Mr. Lungren's, could you describe what we are doing with especially the European community to harmonize our laws. Or do we have a process, and how aggressively are we pursuing that?

Mr. BARNETT. We have a very extensive process at multiple levels, both at the European Commission level as well as at the member State level now because most of these member States have their own regimes and, indeed, enforce not only their member State laws, but also European competition laws.

We have annual bilateral consultations with the European Commission. Our staffs communicate on virtually a daily basis on individual investigative matters. Where there are issues of concern that come up, it gets elevated and either both agencies—I think we speak directly to their senior management on those issues.

We also work through multilateral organizations such as the OECD or the ICN publishing best practices, as an example, a merger review that helps persuade those organizations, including the European Commission to improve their processes. And, you know, on the cartel enforcement front, as an example, we have been very active with the European Commission as well as the OFT and some others on working on their enforcement programs.

Mr. CANNON. Thank you.

The FTC is currently reviewing the proposed Google-Double Click merger. And my understanding is that it took the FTC and DOJ more than the 30-day period under the Hart-Scott-Rodino premerger notification process to determine which of the two agencies would review the merger.

Why did this take so long? And would DOJ and FTC and ultimately the parties themselves benefit if Congress were to allow you to enter into an agreement similar to the agreement you had in 2002 that helped spell out which mergers would be reviewed by which agency in advance?

Ms. MAJORAS. Yes, I think we would be benefited. I was at the Justice Department at the time we negotiated that agreement with the FTC where I now am. And it was an effort to fix this problem. And some Members of Congress asked us to stand down. And we did so, but I think to the detriment of the system overall.

Why did this one take longer? Unfortunately, in higher profile mergers in interesting markets, first of all, they tend to be converging markets, so it is not clear which of us has the best experience. And then our staff are eager. They are interested in what they do.

And so, we have a big back and forth over who has the most experience and who ought to get the matter. I am not proud of the process. It embarrasses me, quite frankly. And I have been talking about that for years.

We have tried to make as many internal reforms as we can. But during my confirmation hearing, I was asked to please refrain from going back to the 2000 agreement, and I agreed to do it. So I think it would take some action from Congress before I could do that again.

Mr. CANNON. Let me try and get one last question in. I had a startling experience this last week. I have a 9-year-old who is now old enough to have a telephone. And I have a son who just returned to the United States. So in the last month or so, I have purchased two telephones.

And I noticed that you and the other body talked about the commentary exemption frustrating the FTC's ability to deal with deceptive and unfair acts. Is that the case? And in particular, this is a complex area of law. I used to Chair the Committee on Commercial and Administrative Law. Now I am the Ranking Member there. And clearly, there are some commercial aspects here of contracts of adhesion.

And with my son it was fairly straightforward. I had to ask about the $175 termination fee, which I had read about elsewhere that was with my daughter. But with the most recent phone, we went through this elaborate process where I signed documents that I didn't have time to read, didn't have an interest in reading, and

then had to take a phone call from the company where I agreed to certain terms.

But none of the really significant—I didn't think it was significant terms. And finally, the phone didn't get qualified until they sent me an e-mail or a text message and I responded to the text message. I am amazed at the process. I mean, what you have here is a convergence of many carriers on several items that cost consumers a great deal of money. Is that what is driving your concern?

Ms. MAJORAS. What is driving our concern is that with the convergence of technologies and the like and when new technologies come up, consumer expectations aren't necessarily set. So consumers need very good disclosures about what they are paying for.

Here are markets in which if the company claims that they have common carrier status, it is true, the FTC has no jurisdiction, so we can't assert our authority to battle deceptive practices. So, yes, that is what we are trying to get at.

Mr. CANNON. This is an amazing thing where poor people are way disproportionately affected by these harsh decisions. I think there is now a universal deal that you can't terminate a contract even 1 day before the 2-year period runs without incurring a $175 fee. I would encourage you to pursue that. And if we need to help with some kind of change to the law, I would like to know that.

Ms. MAJORAS. All right. Thank you.

Ms. LOFGREN. The gentleman's time is expired.

The gentleman from Indiana, Mr. Pence, is recognized.

Mr. PENCE. Thank you, Chairman. Thanks for calling this hearing and bringing these two distinguished public servants before this Task Force.

I appreciate your service to the country. And I am curious about a couple of kind of headline issues and what either one of you might be doing with them.

Number one would be when I am back in Muncie, Indiana, people are not so much worried about some of the issues we fight about out here. But they are pretty worried about gasoline prices.

And to the Chair of the FTC I would ask, you know, this calls for regulation of the oil and gas industry here in Congress, price gauging statutes have been advanced. I haven't supported them, but, I mean, as Federal solutions.

I know the FTC has looked at this. And I would like to know what has the FTC actually found at this point with regard to collusion in the pricing of gasoline.

And secondly, also ripped from the headlines, Mr. Barnett, this whole issue of real estate, mortgages, and the concern that we all have about when all these ARMs come due at the end of this year. I know that the Antitrust Division under your leadership has undertaken a civil action regarding real estate broker activities. And I just wondered if you might comment as appropriate on that and how you think that kind of enforcement will benefit homeowners in the future.

Ms. MAJORAS. We are well aware at the FTC that there is virtually no product in the United States that is sold that affects consumers as much as gasoline and, certainly, the price of gasoline, which has gone up in recent years. So we spend an enormous amount of time studying gasoline markets, investigating gasoline

markets and making sure that companies are adhering to the antitrust laws.

We have done several studies in recent years, including a major study after Hurricanes Katrina and Rita. We have not found collusion among the oil companies. Obviously, we have OPEC at the upstream end, which is another story. But we have not found it.

What we have found, which is hard for people to hear, is a market that behaves pretty competitively according to laws of supply and demand. Now, in recent years, demand has been going up. Our supply has not kept pace. People ask, "Well, how could that happen? How could there be competitive markets but our refining capacity is not keeping pace?"

Well, the problem has been—and we sort of have short memories, I am afraid. It was just a few years ago that refineries were not making so much money. Their profits were not going up. And so, that inhibited investment.

What we are seeing now—and we just saw a major announcement by Royal Dutch Shell that, in fact, they are increasing their capacity in Port Arthur, Texas by 325,000 barrels a day, which is enormous. That is a third of all of our imports that we get.

So we are seeing what we thought we would see with these higher prices, increased investment. And we think that that is going to be a good thing for consumers.

Mr. PENCE. And British Petroleum was trying to increase its capacities in Indiana until very recently.

Ms. MAJORAS. Yes, indeed.

Mr. PENCE. I want you to be very aware.

Ms. MAJORAS. So it is a big area, obviously, of discussion. I would be happy to talk more, but I don't want to use up all your time.

Mr. PENCE. Very good. Thank you.

Mr. BARNETT. Well, if there is any one market that is as important as the gasoline market, it might well be the real estate market, given that that is by far and away the largest transaction that most people engage in in their lives. I don't think it is appropriate for me to comment on pending litigation.

Mr. PENCE. I understand.

Mr. BARNETT. But more generally, the Department of Justice and very much in cooperation with the Federal Trade Commission, has been quite active in the real estate area. It is not only through investigations and enforcement actions such as a couple of years ago when we took an action against the Kentucky Real Estate Commission, which banned rebates by brokers, essentially banning price discounts to brokers.

We have been engaged in through advocacy efforts with a variety of States who either have regulations or laws that ban such price discounting or that are considered to do so as well as something they call minimum service requirements.

Mr. PENCE. Right.

Mr. BARNETT. It means they force you as a purchaser of brokerage services to buy a package of services even if you don't want all of them. And we have found that by freeing up the market to let consumers and suppliers make these choices, there is indications that consumers can save thousands of dollars on a transaction, which is a very significant benefit to Americans.

Mr. PENCE. I thank the Chair.

I thank the general.

I yield back.

Ms. LOFGREN. In consulting with the Ranking Member, we are going to do a quick second round of questions. Not that everybody has a second round, but Mr. Keller, I think, has a quick question. I know I do.

So Mr. Keller is now recognized for 5 minutes.

Mr. KELLER. Well, thank you, Madam Chairman.

Mr. Barnett and Ms. Majoras, you know here in Congress we essentially have two types of laws, one, the noncontroversial laws that we can all agree on on a bipartisan basis. We pass those in the House through the suspension calendar. And the Senate has a procedure called the hot line.

And then the controversial laws, which are the ones that grab all the headlines. I want to start with noncontroversial laws and ask you, as people who deal with the antitrust issues on a daily basis far more than Members of Congress do: Is there any sort of noncontroversial technical changes to the antitrust laws that you feel would be helpful and would be needed to help you protect consumers or to otherwise do your jobs?

Mr. Barnett, I will start with you and give you both a shot at that.

Mr. BARNETT. The short answer is, I think, no. And I don't know if you would call this controversial or not, but I want to underscore our gratitude for the 2004 act that you all worked on to increase the statutory maximum fines for criminal cartel price fixing activities.

The effects of that are really only just being felt now. And we are optimistic that we are going to see very significant increases in actual penalties imposed. And we appreciate your efforts in helping us get there.

Mr. KELLER. Okay.

Ms. Majoras, any thoughts along those lines?

Ms. MAJORAS. Congressman Keller, I can't think of anything off the top of my head. But if I may, may I think about that a little bit and submit something to you in writing if we think of it?

Mr. KELLER. Please. Yes, please get it to me and also Chairman Conyers.

Ms. MAJORAS. Great.

Mr. KELLER. And then let me just follow-up with the second part of that question. Is there any law that might be considered controversial by some sector or another that you all think that nevertheless would be good for consumers or otherwise would be helpful for you to do your job? And what comes to mind?

Ms. Majoras, I know some folks with the FTC, I have heard, important legislation that preserves access to Affordable Generics Act or—I am not really up on it, but something to do with settlements and pharmaceutical patent litigation that may be illegal. Or I understand that is controversial, but along those lines.

And let me again start with Mr. Barnett. Any big ticket laws that you think that should be proposed or considered that might be controversial?

Mr. BARNETT. Well, I would mainly point to one recommendation of the Antitrust Modernization Commission, which in my testimony before them we supported, which is a reevaluation of any antitrust exemptions that are out there. We do believe that not only should they be rarely passed, but they ought to be periodically reevaluated to see that the conditions that may have justified them at one point in time are still warranted.

Mr. KELLER. Even baseball?

Mr. BARNETT. Well, I am not going to take anything off the table. So——

Mr. KELLER. If you are going to make headlines, let us swing for the fence here.

Mr. BARNETT. Yes, there you go.

Mr. KELLER. All right.

All right, Ms. Majoras?

Ms. MAJORAS. As you mentioned, we have been in discussions with some Members of Congress about an issue that has concerned us for some time, which is the issue of branded pharmaceutical and generic pharmaceutical companies entering in settlements together where the branded pays the generic to stay out of the market for a particular period of time. It is a complicated issue, I will grant you.

But we and our economists have looked at it. And we actually think that consumers are being harmed and that it is not just a matter of exercising patent rights in a legal way. So we have been very concerned about that.

The Antitrust Modernization Commission has recommended that the Robinson-Patman Act be repealed. I think it is something that is worth taking a look at. I think that statute has probably seen better days.

And as we talk about the international realm that we find ourselves in, that act is put in our faces constantly as a measure that was put in place years and years ago to protect small businesses. We know a lot more now about what it takes to have a vibrant marketplace that even includes small businesses. And I don't think the Robinson-Patman Act is something that is protecting consumers as it was intended to.

Mr. KELLER. On the pharmaceutical end real quick, are you suggesting any changes to Hatch-Waxman?

Ms. MAJORAS. I would rather see the change in Hatch-Waxman than see the change in the antitrust laws. But there is no question. Hatch-Waxman created this situation, no doubt about it.

It was an unintended consequence of Hatch-Waxman, which, of course, had a very good purpose in both protecting the branded intellectual properties so they could get return on investment but at the same time, making sure that affordable generics come into the market as appropriate. So this has been caused by Hatch-Waxman. So if we are going to act, I think that is the way to do it.

Mr. KELLER. Thank you.

And, Madam Chairman, I yield back the balance of my time.

Ms. LOFGREN. The gentleman yields back.

I just have a couple of quick questions. I will note that, as I said in my brief opening remarks, the antitrust portfolio is an essential one. And I have had the sense over the last several years that the

enforcement at DOJ at least has not been as vigorous as it has been in past years. And the statistics seem to back that up.

Using the Department of Justice's own statistics, there was a 59 percent decline in merger investigations in the past 4 years of the Bush administration compared to the last 4 years of the Clinton administration. And with respect to merger challenges, in the last 4 years, reveal a 75 percent decline compared to the last 4 years of the Clinton administration and a 37 percent decline even for nonmerger enforcement.

There are times when I feel that, you know, the most vigorous antitrust activity is really occurring with State A.G.'s. But there are some things I think that it is very difficult for them to do. And that really comes to my question regarding the Internet.

I believe that the rules that were in place until the FTC decision in 2005 really did play a tremendous, important role in fostering innovation and an even playing field in that section. And I was very surprised, frankly, that the department submitted a filing with the FCC just recently in late opposing the concept of net neutrality. And I was wondering why this filing was months late, after the comment period was over, and what motivated the department to do this. And who did you meet with?

I note in the filing there was a mention of the opponents of that neutrality, Hands Off the Internet and Consumers for Cable Choice, which I think are sometimes referred to as astro-turf groups, really funded by the phone companies, AT&T and Verizon. I am wondering, did you meet with the opponents of the phone companies before you filed. Who did you meet with in reaching the conclusion?

Mr. BARNETT. Well, Madam Chairwoman, I respectfully disagree with your assessment regarding the DOJ's enforcement activities. With respect to merger enforcement, we applied consistently across—I tend to believe—across Administrations the Horizontal Merger Guidelines that both agencies——

Ms. LOFGREN. Well, my question was about the net neutrality filing.

Mr. BARNETT. I understand that, Madam Chairwoman. I just note that between the last 4 years of the Clinton administration and the last 4 years of the Bush administration there was perhaps a 70 percent drop in the number of mergers. So you would expect the number of reviews and the number of challenges would be likely to go down.

With respect to net neutrality, I was the one who made the decision to file those comments. We certainly collected information from a wide range of sources.

Ms. LOFGREN. Can you give me a list after this hearing?

Mr. BARNETT. And the gist of the comments or the bottom line is not necessarily to say that some regulation is ever inappropriate. It was to say that as we understand it—and this is a core part of our competition advocacy mission—as we understand it, in general we let markets work with antitrust enforcement as a backdrop. We try not to intervene with Government regulation, unless there is a specific case to be made for that.

And we had not seen—until we reviewed the other comments that had been filed with the FCC. We reviewed them, and we did

not see that a case had been made. That doesn't necessarily mean that a case can't be made down the road. But we were providing our experience, our expertise in this industry for the benefit of the FCC.

Ms. LOFGREN. I would like to know, and you can provide it in writing afterwards. I don't want you to orally list it. But I would like to know who you met with or who the department met with prior to that filing.

And I also would note, because my time is about to expire, that 96 percent of the residential broadband market nationwide is really controlled by a duopoly. And I just can't think of why that wouldn't be a compelling public policy goal to disrupt that kind of market control. And how you can possibly think that that is a competitive market is just astounding to me.

So I will not belabor it. I will look for your report on who you met with after this hearing. And I will now call on the gentleman from—I guess our gentleman has left.

My time is expired. And Ms. Sutton has left. And I guess we have closed down this hearing. And at this point, we will note that the hearing record remains open for 5 days. Members have 5 days to submit additional questions. And we would ask the witnesses if we forward additional questions to answer them as promptly as you may.

And with that, this hearing is adjourned.

[Whereupon, at 2:17 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND CHAIRMAN, TASK FORCE ON ANTITRUST AND COMPETITION POLICY

Statement of John Conyers, Jr.
Task Force on Antitrust and Competition Policy
Oversight Hearing: "The Antitrust Enforcement Agencies: The Department of Justice Antitrust Division and The Federal Trade Commission Bureau of Competition"
Tuesday, September 25, 2007

Good afternoon, the hearing will come to order and the Chair is authorized to call a recess at any time.

I can think of no better first hearing in the newly constituted Task Force on Antitrust and Competition Policy than one in which we hear testimony from the two agencies responsible for enforcing the antitrust laws – the Department of Justice Antitrust Division and the Federal Trade Commission Bureau of Competition.

I want to start out by expressing my strong concern that the agencies – particularly the Department of Justice – are not doing their job. At a time when major industries are becoming more and more concentrated and consumers are losing choices, antitrust enforcement should be a top priority. Instead, it appears to be at its laxest since the Reagan years.

I have two key points to make.

First, according to the Justice Department's own statistics, there has been a 59% decline in merger investigations in the past 4 years of the Bush Administration compared to the last 4 years of the Clinton Administration. Even worse, with respect to merger challenges, the last 4 years reveal a 75% decline compared to the last 4 years of the Clinton Administration.

Even for non-merger enforcement, the Department has initiated 37% fewer investigations in the past 4 years, compared to the last 4 years of the Clinton Administration.

The FTC, on the other hand, has a much better track record. It has

recently brought several merger challenges and has taken a lead in several key areas, such as challenging reverse payments between patent and generic drug companies.

But the DOJ seems to have taken such a hands-off approach to mergers that even the most controversial proposals are considered likely be approved. I intend to explore this with our witnesses during today's hearing.

Second, regarding Section 2 of the Sherman Act, I have become increasingly disturbed by what I perceive to be Assistant Attorney General Barnett's views regarding monopolies. Some comments in his written testimony are particularly revealing, including Mr. Barnett's inherent presumption that typical Section 2 monopolistic behavior can often be interpreted as healthy, aggressive competition.

These comments by Barnett are not new. Mr. Barnett made similar comments in his opening remarks for the DOJ/FTC Hearings on Single Firm Conduct. Recognizing that monopoly has the potential to inhibit competitive zeal, Barnett goes on to say that "there is another side to monopoly. The potential to obtain monopoly profits serves as an important incentive to create better products for consumers." Again, there is a very real difference between competition and behaving like a monopolist. Mr. Barnett seems to think they are one and the same.

Another example came just last week, when Mr. Barnett criticized the European Union for enforcing the antitrust laws against what the EU perceived as a dominant firm attempting to eliminate both actual and potential competition. Instead, Barnett describes the EU's decision as potentially having "the unfortunate consequence of harming consumers by chilling innovation and discouraging competition." Regardless of what one thinks about the merits of the EU's decision in the Microsoft case, this is a disturbing overall attitude for the man who is in charge of antitrust enforcement for the Department of Justice.

Vigorous enforcement of our antitrust laws is the cornerstone of preserving our free market economy. For over a century, the antitrust laws have provided the ground rules for fair competition -- our economic bill of rights.

Antitrust principles are necessary to preserve competition and to prevent monopolies from stifling innovation. Competition produces better products and lower prices – all to the benefit of consumers. Without aggressive enforcement agencies, however, the antitrust laws are meaningless.

Although this Committee has not held an oversight hearing on the enforcement agencies in several years, it is clear that times have changed. Today's hearing will be one of several I intend to have on DOJ and FTC. I highly recommend that next time we have this hearing, your track record on mergers and civil non-merger enforcement has improved.

I now recognize Mr. Keller the task force ranking member, for an opening statement.

Thank you. Without objection, other Members' opening statements will be included in the hearing record.