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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES OF
AMERICA**

-- 2008 --

This report is to be presented by the Delegation of the United States of America to the Competition Committee at its 103rd meeting on the 11th and 12th June 2008.

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1. Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2006, through September 30, 2007 (“FY 2007”). It summarizes the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

2. In April 2007, Deborah A. Garza was appointed as the Deputy Assistant Attorney General responsible for regulatory matters, overseeing transportation, energy, agriculture, telecommunications, and other regulatory matters for the Antitrust Division.

3. In January 2007, following the creation of the Commission’s Office of International Affairs, Randolph Tritell was appointed Director of International Affairs, and Elizabeth Kraus was appointed Deputy Director for International Antitrust. In June 2007, Michael Baye was appointed the Commission’s Director of the Bureau of Economics.

2 Changes in law or policies

2.1 Changes In Antitrust Rules, Policies, or Guidelines

4. On April 17, 2007, the DOJ and FTC issued a joint report, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, to inform consumers, businesses, and holders of intellectual property rights (IPRs) 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 IPRs, and methods of extending market power conferred by a patent beyond the patent’s expiration. The report followed an extensive series of hearings jointly conducted by the agencies, and indicates that the agencies will analyze the vast majority of conduct involving IPRs using a flexible rule of reason approach that considers both the efficiencies of a particular activity as well as any anticompetitive effects it may create.

5. On December 15, 2006, the Department announced it was amending its 2001 Merger Review Process Initiative in order to further streamline the merger investigation process to improve the efficiency of investigations while reducing the cost, time, and burdens faced by parties. The goal of the 2001 Initiative was to help the Division identify critical legal, factual and economic issues regarding proposed mergers more quickly; facilitate more efficient and more focused investigative discovery; and provide for an effective process for the evaluation of evidence. The amendments include a voluntary option that would limit the documents sought in a second request to certain central files and a targeted list of 30 employees whose files must be searched for responsive documents. The Division also changed the model second request to reduce compliance burdens further, for example by reducing the default search period to two years prior to the date of the request’s issuance. Similar FTC reforms were discussed in the agencies’ 2006 annual report.

2.2 Proposals to Change Antitrust Laws, Related Legislation or Policies

6. On May 8, 2007, the FTC and the Department issued a joint report, *Competition in the Real Estate Brokerage Industry*, to inform consumers and others involved in the industry about important competition issues involving residential real estate, including the competitive structure of the industry, the impact of the Internet, and obstacles to a more competitive environment. The report followed a workshop conducted by the agencies in October 2005. The agencies concluded that although the real estate industry has undergone a number of substantial changes in recent years – particularly as a result of technological advances such as the Internet – competition in the industry has been hindered as a result of actions taken by

some real estate brokers acting through multiple listing services and the National Association of Realtors, state legislatures, and state real estate commissions.

7. In May 2007, the agencies completed the hearings on single-firm conduct that began in June 2006. There were 19 days of hearings, with 29 separate panels and over 100 different panelists making presentations, covering how different kinds of single-firm conduct have been and should be treated under the antitrust laws, and including a session with foreign antitrust officials and practitioners. The topics covered included predatory pricing and predatory bidding, refusals to deal with a rival, tying, exclusive dealing, rebates and discounting, and ascertaining monopoly power. In September 2008, the DOJ issued a report, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, drawing extensively on the joint hearings. FTC Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch jointly issued a statement responding to the DOJ report and Chairman William E. Kovacic issued a separate statement on Section 2 of the Sherman Act.

8. In April 2007, following three years of hearings and deliberations, the Antitrust Modernization Commission (AMC) issued its Report and Recommendations. Among the principal conclusions of the AMC's Report were the following:

- Free-market competition should remain the touchstone of United States economic policy.
- The core antitrust laws—Sherman Act sections 1 and 2, Clayton Act section 7, and FTC Act section 5—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.
- New or different rules are not needed for industries in which innovation, intellectual property, and technological change are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

2.3 *International Antitrust Cooperation Developments*

9. Assistant AG Thomas Barnett and FTC Chairman Deborah Majoras participated in the sixth annual International Competition Network (ICN) conference in Moscow from May 30 through June 1. The conference took significant further steps towards strengthening international antitrust convergence. The ICN Merger Working Group, for example, will begin developing consensus recommendations for substantive merger analysis, beginning with three topics: the efficacy of an agency's legal framework for analyzing mergers, the use and role of presumptions and safe harbors or thresholds, and the analysis of entry and expansion. The Unilateral Conduct Working Group, co-chaired by the FTC and the German Bundeskartellamt, presented the results of its survey of ICN members and non-governmental advisors in a report that included chapters on the objectives of unilateral conduct laws, the assessment of dominance/substantial market power, and state-created monopolies. The Working Group will continue its work on the analysis of unilateral conduct by examining predatory pricing (led by the FTC) and single branding/exclusive dealing (led by the Bundeskartellamt) based on questionnaires that will result in two papers that will summarize agency practice with respect to predatory pricing and exclusive dealing/single branding.

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

3.1 Department of Justice and FTC Statistics

3.1.1 DOJ Staffing and Enforcement Statistics

10. At the end of FY 2007, the Division employed 789 persons: 343 attorneys, 62 economists, 183 paralegals, and 201 other professional staff. For FY 2007, the Division received an appropriation of \$147.8 million.

11. During FY 2007, the Division opened 221 investigations and filed 46 civil and criminal cases in federal district court. In FY 2007, the Division was party to one antitrust case decided by the federal courts of appeals.

12. During FY 2007, the Division filed 40 criminal cases in which it charged 10 corporations and 47 individuals. Twelve corporate defendants and 25 individuals were assessed fines totalling \$630.8 million and 34 individuals were sentenced to a total of 31,391 days of incarceration. Another 5 individuals were sentenced to spend a total of 1,085 days in some form of alternative confinement.

13. During FY 2007, 2,201 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 1,030 bank mergers. The Division further investigated 101 mergers and challenged 4 of them in court. Eight transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 124 civil investigations (merger and non-merger), and issued 527 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY 2007, the Division issued five business review letters.

3.1.2 FTC Staffing and Enforcement Statistics

14. The FTC's Bureau of Competition has 382 non-administrative staff working on competition enforcement, including 235 lawyers, 50 economists, and 97 "other" professionals (the "other" category includes paralegals, investigators, merger analysts, compliance specialists, industry analysts, research analysts, and financial analysts/accountants). The FTC's Maintaining Competition Mission spent approximately \$94.5 million in FY 2006.

15. During FY 2007, the Commission brought a total of 22 competition enforcement actions in the merger field. The Commission staff opened 251 initial phase investigations and issued requests for additional information ("second requests") in 31 transactions. 14 consent orders were accepted for comment, and 5 transactions were abandoned because of antitrust concerns, of which 4 were abandoned after the issuance of the second request. The Commission authorized staff to file 3 preliminary injunctions and 3 administrative complaints. The FTC brought one civil penalty action concerning a violation of the pre-merger notification requirements.

16. The Commission brought 11 enforcement actions challenging a variety of anticompetitive conduct, 9 of which were resolved by consent agreement. The Commission also issued two administrative complaints during the fiscal year.

3.2 *Antitrust Cases in the Courts*

3.2.1 *United States Supreme Court*

17. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), a divided Supreme Court overruled the nearly century-old and much-criticized *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) case law. As the Solicitor General's brief on behalf of the government urged, the Court held that vertical minimum resale price maintenance (RPM) agreements should not be deemed per se illegal under Section 1 of the Sherman Act, but should instead be evaluated under the rule of reason. "Resort to per se rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output'" (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, at 723 (1988)). The Court noted that "[m]inimum resale price maintenance can stimulate interbrand competition . . . by reducing intrabrand competition The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition'" (quoting *State Oil Co. v. Khan*, 522 U.S. 3, at 15 (1997)). "As the rule would proscribe a significant amount of procompetitive conduct, [RPM] agreements appear ill suited for per se condemnation." Justice Breyer, joined by three other justices, dissented, characterizing the arguments on which the majority relied as neither new nor sufficient to justify the majority's departure from long established precedent.

18. The question in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), was the degree of specificity required to allow a plaintiff to survive a motion to dismiss and proceed to discovery. As the Solicitor General's brief on behalf of the government urged, the Court held that alleged parallel conduct, together with a conclusory allegation of conspiracy, are not sufficient to state a claim under Section 1 of the Sherman Act. Thus, a Section 1 complaint alleging "that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action . . . should be dismissed." The Court added that its decision does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

19. *Credit Suisse Securities (USA) v. Billing*, 127 S. Ct. 2383 (2007), involved the extent to which certain conduct that is prohibited under the regulatory scheme governing public offerings of securities is immune from liability under the federal antitrust laws. The Supreme Court 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 Court noted that determinations of implied immunity "may vary from statute to statute depending upon the relation between the antitrust laws and the regulatory program" and "the relation of the specific conduct at issue to both sets of laws." The private treble damage complaint in this case alleged violations of regulatory and antitrust laws in connection with "underwriters' efforts jointly to promote and to sell newly issued securities" – an activity "central to the proper functioning of well-regulated capital markets." Taking into consideration the extensive regulatory authority exercised by the Securities and Exchange Commission over such conduct, the Court found that, in this particular context, the private litigation was "likely to prove practically incompatible with the SEC's administration of the Nation's securities laws." Such a "serious conflict" between "application of the antitrust laws" and "proper enforcement of the securities law," the Court held, requires implied antitrust immunity. The Court's opinion did not address the scope of implied antitrust immunity for other securities-related conduct or in other regulated industries.

20. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), the Court clarified the law applicable to the allegation that defendants engaged in "predatory bidding" constituting exclusionary conduct for purposes of Section 2 of the Sherman Act. Unanimously agreeing with the views

of the Solicitor General, the Court held that the standard for predatory pricing set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), applies to such conduct. Thus a plaintiff alleging predatory bidding in violation of Section 2 must prove (1) that the alleged predatory bidding led to below-cost pricing of the predator's outputs and (2) that the defendant had a dangerous probability of recouping its loss through the exercise of monopsony power.

3.2.2 U.S. Court of Appeals Cases

Significant FTC Cases Decided in FY 2007

21. In *Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc.*, Docket No. 9300 (Federal Trade Commission Decision 2005), the Commission affirmed an Administrative Law Judge's ruling, issued in June 2003, that Chicago Bridge & Iron Company (CB&I) illegally acquired certain Pitt-Des Moines, Inc. (PDM) assets. CB&I completed the acquisition of PDM assets in February 2001, during the pendency of a Commission investigation. The Commission found that CB&I's acquisition of PDM substantially lessened competition in four relevant product markets. Prior to the merger, CB&I and PDM competed against each other as the leading U.S. producers of large, field-erected industrial and water storage tanks. During the trial, economists from the Commission's Bureau of Economics testified that CB&I and PDM were far and away the two strongest competitors in the U.S. market at the time of the merger and that other firms could not readily replace the competition lost through the merger. The Commission held that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act and therefore was anticompetitive. The Commission ruled to restore competition as it existed prior to the merger, and ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. In January 2008, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of the FTC and upheld the Commission's opinion in the case.

22. In *Equitable Resources/Dominion Peoples*, the Commission filed an administrative complaint in March 2007, and a federal court injunction action in April 2007 to block Equitable Resources' proposed acquisition of The Peoples Natural Gas Company, a subsidiary of Dominion Resources. The Commission challenged the merger-to-monopoly in natural gas distribution. The Commission ruled that the merger would be detrimental to nonresidential customers in certain areas of Allegheny County, Pennsylvania, which includes Pittsburgh. In May 2007, the federal district court in Pittsburgh denied the FTC's motion for a preliminary injunction and dismissed the complaint, ruling that because the Pennsylvania Public Utility Commission has the power to approve the merger, the Commission is barred from taking action under the state action doctrine. In June 2007, the U.S. Court of Appeals for the Third Circuit granted the Commission's motion for an injunction pending appeal. Since then, the parties abandoned the transaction in January 2008, and in February 2008, the Commission dismissed the administrative complaint and moved to vacate the district court's decision. The Third Circuit granted the Commission's motion to vacate in February 2008.

Significant DOJ Cases Decided in FY 2007

23. There were no reported FY 2007 decisions in antitrust or related cases in which the United States was a party or participated as *amicus curiae*.

3.2.3 Private Cases with International Implications

24. In *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007) (*MSG*), the Eighth Circuit, agreeing with the D.C. Circuit's conclusion in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1043 (2006) (*Empagran II*), held that the

Foreign Trade Antitrust Improvements Act (FTAIA) exception for foreign conduct whose anticompetitive effect on United States commerce “gives rise to” a Sherman Act claim requires a direct or proximate cause relationship, rather than a lesser “but for” relationship.” As in *Empagran II*, plaintiffs purchased only outside the United States, but they claimed that because defendants’ products were fungible and marketed worldwide, the alleged global price-fixing scheme included and depended on controlling prices both inside and outside the United States. This theory, the court held, did not satisfy the proximate cause standard. The domestic effects of the alleged price-fixing scheme, higher U.S. prices, were not the direct cause of plaintiffs’ injury; they “constituted merely one link in the causal chain” and established, at best, an “indirect connection” that “is too remote to satisfy the proximate cause standard.”

25. *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007), addressed the important topic of bundled discounts. PeaceHealth, a dominant hospital, gave insurers a deeper discount if the insurer obtained all of its primary, secondary, and tertiary services from PeaceHealth than if the insurer obtained some of its primary and secondary services from PeaceHealth’s smaller rival (which does not provide tertiary care). In this decision, the court of appeals vacated a jury finding that PeaceHealth’s bundled discounts constituted attempted monopolization. Recognizing that “bundled discounts, while potentially procompetitive by offering bargains to consumers, can also pose the threat of anticompetitive impact by excluding less diversified but more efficient producers,” the court sought to craft a rule with a “strong caution against condemning bundled discounts that result in prices above a relevant measure of costs.” The court rejected the “aggregate discount” rule—which condemns bundled discounts only when the incremental cost of producing the entire bundle exceeds the bundled price—because “anticompetitive bundled discounting schemes that harm competition may too easily escape liability.” It also rejected any rule based on plaintiff’s—rather than defendant’s—costs, because that would provide inadequate ex ante guidance to sellers and “could require multiple suits to determine the legality of a single bundled discount.” Instead, the court adopted the “discount allocation” rule, which is the first prong of the Antitrust Modernization Commission (AMC) test:

Under this standard, the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2. This standard makes the defendant’s bundled discounts legal unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product.

26. The court, however, expressly rejected the AMC’s two other suggested prongs: proof of a dangerous probability of recoupment and proof of an adverse effect on competition. Although the court made clear that, in addition to proving exclusionary conduct via the discount allocation test, a plaintiff must still prove antitrust standing, the court did not elaborate whether that would include proof of anticompetitive effects. Further, the court of appeals limited its holding to attempted monopolization and declined to address whether a plaintiff must prove below-cost pricing on a tying claim in the context of bundled discounts.

3.3 *Statistics on Private and Government Cases Filed*

27. According to the 2007 Annual Report of the Director of the Administrative Office of the U.S. Courts, 1,038 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2007.

3.4 *Significant DOJ and FTC Enforcement Actions*

3.4.1 *DOJ Criminal Enforcement*

28. **Marine Hose:** On May 2, 2007, agents assisting the Division arrested eight foreign executives from the United Kingdom, France, Italy, and Japan in Houston and San Francisco for their roles in a conspiracy to rig bids, fix prices, and allocate markets for United States sales of marine hose. Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities that is purchased by companies engaged in offshore extraction and transportation of petroleum products. Simultaneous with the arrests, agents of the Defense Criminal Investigative Service (DCIS) of the Department of Defense's Office of Inspector General executed coordinated search warrants at locations across the United States. While those searches were being conducted, competition authorities abroad, including the United Kingdom's Office of Fair Trading (OFT) and the European Commission, executed search warrants in Europe. In December 2007, the Division was able to obtain plea agreements from three British nationals. The 30, 24, and 20-month sentences the defendants agreed to serve were the three longest sentences ever agreed to by foreign nationals for antitrust offenses, and the plea agreements addressed the possible criminal prosecution and imposition of jail sentences upon the defendants in a foreign jurisdiction for a cartel offense. After the three British nationals entered their guilty pleas in U.S. district court in accordance with the terms of the plea agreements, the district court deferred the U.S. sentencing and the defendants were escorted in custody to the United Kingdom, where the OFT charged the three executives with violating the UK Enterprise Act, which provides for criminal sanctions for individuals who engage in cartel offenses.

29. **Air cargo and passenger transportation:** On August 1, 2007, the Division charged British Airways with conspiring to fix international air cargo rates and international passenger fuel surcharges, and also charged Korean Air Lines with conspiring to fix international air cargo rates as well as passenger fares for flights from the United States to Korea. Both companies pled guilty and each was sentenced to pay a fine of \$300 million. On the same day the Division's cases were filed, the United Kingdom's Office of Fair Trading (OFT) announced that it would fine British Airways £121.5 million (approximately \$250 million) for collusion on the price of passenger fuel surcharges, marking the first time that the Division and the OFT brought parallel prosecutions. On November 27, 2007, Qantas Airways Limited also agreed to plead guilty and pay a \$61 million criminal fine for its role in the conspiracy to fix international air cargo rates. These are among the largest and most far-reaching antitrust conspiracies ever prosecuted by the Division, and the Division's investigation is ongoing.

30. **Procurement fraud:** In FY2007, the Division prosecuted a number of defendants involved in subverting competition on Department of Defense (DOD) contracts for goods and services in or destined for military personnel in the Middle East. In a separate procurement fraud matter involving a bribery case in connection with post-Hurricane Katrina rebuilding efforts in New Orleans, agents assisting the Division arrested U.S. Army Major John Cockerham, along with his wife and his sister in July 2007. Major Cockerham, a former contracting officer responsible for awarding DOD contracts in support of operations in the Middle East, was charged with bribery in connection with the award of at least \$100 million of bottled water contracts. As charged in the indictment, Major Cockerham agreed to accept at least \$9.6 million in return for various contracting actions. Major Cockerham, his wife and sister were also charged with conspiring to defraud the United States, conspiring to commit money laundering, and conspiring to obstruct justice. Raul Miranda, a former contract employee of the U.S. Army Corps of Engineers, agreed to plead guilty to bribery charges brought by the Division in connection with a \$16 million project to reconstruct a levee as part of Hurricane Katrina re-building efforts in August 2007. Miranda had provided confidential information used to evaluate bids to a subcontractor in exchange for approximately \$299,000 in kickbacks.

31. **E-Rate:** The Division's investigation of collusion and other fraud in connection with the Federal E-Rate program continued in FY2007. The E-Rate program was created by Congress to help economically disadvantaged schools and libraries obtain computer and telecommunications services. The Division helped to uncover massive fraud in this industry and has thus far charged twelve corporations and seventeen individuals with collusion and fraud affecting dozens of schools. A total of six companies and ten individuals have pled guilty or entered civil settlements and have paid or agreed to pay criminal fines and restitution totaling approximately \$40 million. In FY2007, the Division tried and won two E-Rate cases. The Division obtained a conviction of the owner of a computer vendor in February 2007 for schemes to defraud the federal E-Rate program in Texas school districts. In September 2007, the Division obtained a conviction against a former sales representative in California, Judy Green, on all twenty-two charged counts of bid rigging, wire fraud, and conspiracy to commit mail and wire fraud in connection with E-Rate projects at schools in seven states. Green was subsequently sentenced to seven and a half years of jail time in March 2008.

32. **Bristol-Myers-Squibb:** The Division's prosecution of Bristol-Myers Squibb Company (BMS) in May 2007 emphasizes the importance of maintaining the integrity of government investigations of, and judicial decrees relating to, anti-competitive conduct. The Division charged BMS with two counts of false statements in violation of 18 U.S.C. § 1001 for making false statements to, and concealing a material fact from, the FTC in relation to a proposed settlement of patent litigation. The patent litigation involved the validity of BMS' patent for the active ingredient in Plavix, the most widely used blood thinner in the world. At the time of the false statements, BMS was the subject of a consent decree that required FTC review and approval of any proposed BMS patent settlements with generic drug producers. In early May 2006, the FTC informed BMS that it would reject a proposed settlement of the Plavix litigation, in part due to a provision prohibiting BMS from launching an authorized generic version of Plavix during an exclusive license period for the patent challenger. BMS thus withdrew the proposed settlement. However, later in May, during the renegotiation of the settlement agreement, BMS and the patent challenger reached an oral understanding that BMS would not launch an authorized generic of Plavix if the parties reached a final settlement. BMS' submission of the revised written settlement agreement to the FTC did not include any reference to this oral understanding. In June 2006, the FTC requested a written certification from BMS that it had not made any representation or promise to the patent challenger that was not contained in the revised written settlement agreement, including a representation that BMS would not launch an authorized generic version of Plavix during the challenger's period of exclusivity. BMS thereafter submitted a certification to FTC that did not disclose the oral representations or understanding from the May meeting with the patent challenger. BMS pled guilty to the false statement charges and was sentenced in June 2007 to pay a \$1 million fine, the combined statutory maximum for the two offenses.

33. **Domecq:** The Division continued its efforts in FY2007 to prosecute international fugitives attempting to evade U.S. jurisdiction. In March 2007, the Division obtained the return of defendant Michael Domecq, the former president and co-owner of Domecq Importers, who had been a fugitive from the United States for more than six years. A 2000 indictment had charged that Domecq and other top executives at Domecq Importers diverted more than \$14.6 million from Domecq Importers into their personal offshore bank accounts with assistance from certain outside vendors of advertising materials and services. After being arrested in the United Kingdom in 2006 on other charges, Domecq ultimately consented to extradition to the United States. Domecq pled guilty to tax and mail fraud conspiracy charges contained in the indictment, and in December 2007, Domecq was sentenced to serve 10 years in prison.

3.4.2 *DOJ Civil Non-Merger Enforcement*

34. **Microsoft:** In an August 30, 2007 filing, the Department submitted an evaluation of the final judgment entered in 2002 to resolve the antitrust case against Microsoft; the final judgment was scheduled to expire in November 2007, except for the portions that were extended by consent in 2006. The

Department explained that competition and consumers have benefited from the final judgment entered because of the Department's antitrust enforcement efforts against Microsoft. In particular, the judgment has protected the development and distribution of middleware -- including web browsers, media players, and instant messaging software -- that has increased choices available to consumers. The Department's filing discussed a number of developments in the competitive landscape relating to middleware and to PC operating systems generally that suggest that the final judgment was accomplishing its stated goal of fostering competitive conditions among middleware products, unimpeded by anticompetitive exclusionary obstacles erected by Microsoft. As part of the Department's regular enforcement of the Final Judgment, on June 19, 2007, the Department filed a joint status report (JSR) with the Court announcing that it had reached an agreement with Microsoft to resolve a complaint submitted by Google regarding the lack of alternatives to Microsoft's desktop search function in Windows Vista. The agreement specifies that Microsoft must (1) create a mechanism for end users and original equipment manufacturers to select a default program to handle desktop search and (2) enable independent software vendors to register their desktop search products for this default. Microsoft agreed to incorporate these changes into an updated version of Windows Vista. The Department also reported that Microsoft is continuing its efforts to improve the technical documentation provided to licensees under the final judgment and will be documenting additional protocols that were discovered during a company audit.

35. **Citizens Communications:** Prior to the consummation of the acquisition of Commonwealth Telephone Enterprises (Commonwealth) by Citizens Communications (Citizens), the Department expressed concern over two private settlement agreements that Commonwealth had previously entered into with two providers of local telecommunications services, Blue Ridge and Service Electric, that restricted the geographic scope of the latter's entry in exchange for Commonwealth's withdrawal of protests against their certification filed with the Pennsylvania Public Utility Commission. The entry of Blue Ridge and Service Electric had presented the first opportunity for widespread residential competition in Commonwealth's rural telephone service area. On June 25, 2007, Citizens agreed to strike these restrictive provisions to alleviate the Department's concerns. Citizens also made binding commitments not to oppose future applications by either company to provide voice telephone services using their own facilities and has given all cable television operators in its Pennsylvania service area rights to enforce a separate private settlement, which provides that Citizens will not protest future applications by those companies to provide facilities-based telephone services in its territory.

36. **Federation of Physicians and Dentists:** On June 19, 2007, the Department reached an agreement with the Florida-based Federation of Physicians and Dentists (Federation) that would resolve concerns raised by the Department in a 2005 lawsuit alleging that the actions of a Federation employee and three physicians had 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 settlement, which prohibits the Federation and its employees from being involved in the review, communication, and negotiation of contracts or terms between a physician and payer, prevents the Federation from coordinating members' negotiations for fees and terms.

37. **Arizona Hospital and Healthcare Association:** On May 22, 2007, the Department filed a proposed settlement in district court with the Arizona Hospital and Healthcare Association (AzHHA) and its subsidiary, the AzHHA Service Corporation, prohibiting the organizations from setting uniform bill rates paid by AzHHA member hospitals to nurse staffing agencies. The Department said that the parties' actions had 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 and prevents AzHHA from boycotting or discriminating against agencies or hospitals that choose not to participate in AzHHA's group purchasing organization for temporary nursing services. The settlement was approved by the U.S. District Court in Phoenix, Arizona, in September 2007.

3.4.3 *Enforcement of DOJ Consent Decrees*

38. On May 8, 2007, the Department filed a petition asking the district court to find Allied Waste Industries Inc. (Allied) in civil contempt of a 2000 consent decree entered in connection with Allied's acquisition of Browning-Ferris Industries Inc. (BFI). The Department alleged that Allied violated a provision of the decree when it acquired assets in the Chicago area from Homewood Disposal Services Inc. (Homewood) in January 2004, without first obtaining approval from the Department. Chicago was one of several geographic regions where Allied was required to seek advance approval from the Department to acquire any waste collection and disposal assets. Allied, currently the second largest non-hazardous solid waste management company in the country, agreed to pay \$125,000 as part of its settlement with the Department. This settlement is the second time the Department has moved to enforce Allied's compliance with provisions in the 2000 consent decree. The Department's settlement of the first violation, relating to Allied's premature termination of disposal rights at a former BFI landfill, required Allied to implement a compliance program to review its conduct. As a result of the requirement, Allied submitted its Homewood acquisition to the Department as a potential violation of the decree.

3.4.4 *FTC Non-Merger Enforcement Actions*

39. **Health Care.** The FTC continues to vigilantly detect and investigate agreements between drug companies that delay generic drug entry. In FY2007, the Commission brought enforcement actions against agreements among physicians designed to boycott third-party payors and fix prices. Further, the agency successfully defended a challenge to its administrative decision in a case in which the Commission alleged anticompetitive practices that were detrimental to children's dental care. By challenging these kinds of anticompetitive practices, the FTC strives to ensure that essential health care services will be available to consumers at prices established in an open, competitive market.

40. **New Century Health Quality Alliance:** Within the health care sector, in October 2006, following a public comment period, the Commission approved a final consent order settling Commission charges that two independent practice associations and 18 member physician practices in the Kansas City, Missouri area refused to deal with health care plans except on collectively agreed-upon prices and other terms.

41. **Advocate Health Partners:** In February 2007, the Commission approved a final consent order settling the FTC's challenge against the conduct of several organizations representing more than 2,900 independent Chicago-area physicians for agreeing to fix prices and for refusing to deal with certain health plans except on collectively determined terms. The FTC continues to monitor a clinical integration plan set up by respondents for any anticompetitive effects.

42. **Real Estate.** The FTC has actively investigated restrictive practices in the residential real estate industry, including efforts by private associations of brokers to impede competition from brokers who use non-traditional listing arrangements. The FTC brought several enforcement actions against associations of realtors or brokers who adopted rules that withheld the valuable benefits of the association-controlled Multiple Listing Services (MLSs) from consumers who chose to enter into non-traditional, and often less expensive, listing contracts with real estate brokers. Such association policies limit home sellers' ability to choose a listing type that best serves their specific needs.

43. **Real Estate Competition Law Enforcement Sweep: Williamsburg Area Association of Realtors, Inc.; Monmouth County Association of Realtors; Northern New England Real Estate Network, Inc.; Realtors Association of Northeast Wisconsin, Inc.; Information and Real Estate Services, LLC; RealComp II Ltd; MiRealSource, Inc.:** In October 2006, the FTC's Bureau of Competition filed its first law enforcement sweep in the real estate industry, which challenged rules in

seven jurisdictions that withheld valuable benefits of the MLSs they control from consumers who chose to enter into non-traditional listing contracts with real estate brokers. Six of the seven rules blocked non-traditional, less than full-service listings from being transmitted by the MLS to a wide range of popular Internet sites, while the seventh blocked such non-traditional brokerage contracts from the MLS entirely. In October 2006, the Commission consent agreements with five of the groups operating MLSs in parts of Colorado, New Hampshire, New Jersey, Virginia, and Wisconsin that agreed to stop discriminating against non-traditional listing arrangements. Two real estate groups in the Detroit, Michigan, area did not settle, and the FTC issued administrative complaints alleging anticompetitive practices against these groups. In February 2007, the Commission settled with one of these Michigan groups, which agreed to abandon the challenged practices.

44. **Technology Nonmerger Enforcement.** The Commission also places great emphasis on safeguarding competition in the high technology sector, such as the computer hardware and software industries.

45. **Rambus:** In August 2006, the Commission issued an opinion concluding that Rambus, Inc. unlawfully monopolized markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAMs are widely used in personal computers, servers, printers, and cameras. The Commission found that Rambus was able to distort a critical standard-setting process and engage in an anticompetitive “hold up” of the computer memory industry through a course of deceptive conduct. The Commission held that Rambus’ acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act and contributed significantly to Rambus’s acquisition of monopoly power in four relevant markets. In February 2007, Chairman Majoras issued the opinion of the Commission on remedy, in which the Commission prescribed a set of remedies barring Rambus from making misrepresentations or omissions to standards-setting organizations, requiring Rambus to license its SDRAM and DDR SDRAM technology, and setting limits on the royalty rates it can collect under its licensing agreements, including with those firms that may have already incorporated its DRAM technology. The order also required Rambus to employ a Commission-approved compliance officer to ensure that Rambus discloses relevant patent information to any standard-setting organization in which it participates. In April 2008, the Court of Appeals for the D.C. Circuit set aside the FTC’s decision. The Commission petitioned the court for an en banc hearing, but its request was denied in August 2008.

3.5 *Advisory Letters from the Commission*

46. In FY 2007, FTC staff issued the following advisory letters. FTC advisory letters are available at <http://www.ftc.gov/bc/advisory.shtm>.

- **Greater Rochester Independent Practice Association, Inc. (GRIPA):** Letter dated September 17, 2007, concerning a proposal under which GRIPA would negotiate contracts, including price terms, with payors on behalf of its physician members in connection with the sale of a program of “integrated services” by GRIPA. The staff of the Commission’s Bureau of Competition advised the Commission not to challenge GRIPA’s proposed program because the integration has the potential to result in significant efficiencies that may benefit consumers.
- **MedSouth, Inc.:** Letter dated June 18, 2007 regarding MedSouth’s proposed establishment and operation of a “clinically integrated” physician network joint venture. The staff of the Commission’s Bureau of Competition confirmed its advisory letter of February 9, 2002, in which it concluded that the proposed program “appears to involve partial integration among MedSouth physicians that has the potential to increase the quality and reduce the cost of medical care that the physicians provide to patients.”

3.6 Business Reviews Conducted by the Department of Justice

47. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued five business review letters in FY 2007.

- On October 30, 2006, the Department announced it would not challenge a patent and license disclosure policy proposed by VMEbus International Trade Association (VITA), an organization that promotes standardized computer data path system specifications. The Department concluded that disclosure of a patent holder's most restrictive licensing terms under the policy could generate competitive benefits as patent holders compete to offer the most attractive combination of technology and licensing terms.
- On December 27, 2006, the Department announced it would not challenge the Southeastern Public Service Authority of Virginia's (SPSA) proposed one-year service contract with a competing construction and demolition debris disposal services provider. The Department said the contract would not likely facilitate coordination of services or rates between the two competitors.
- On April 10, 2007, the Department announced it would not oppose an operational and financial survey of small and midsize trucking companies proposed by the National Association of Small Trucking Companies (NASTC), a coalition of small trucking companies, and Bell & Company (Bell), an independent accounting firm. The Department concluded that adequate safeguards were in place to ensure that the survey would not result in exchanges of competitively sensitive business information.
- On April 20, 2007, the Department announced it would not oppose a second patent and license disclosure policy proposed by the Institute of Electrical and Electronics Engineers Inc. (IEEE), an organization that has developed standards in several industries. The Department stated that increased information that may become available under the policy could improve the efficiency of standard-setting activities.
- On August 23, 2007, the Department announced it would not oppose the formation of the Advanced Energy Consortium for the purpose of applying nanotechnology research to oil and gas exploration. The Department stated that the terms stipulated for creating the joint venture, which address issues such as funding, ownership, and intellectual property rights, appeared to be structured so as to prevent the research activities from adversely affecting the amount, variety, or commercialization of nanotechnology research, and, to the extent that AEC engages in research efforts not undertaken by individual firms, the joint venture may have the pro-competitive effect of promoting innovation. DOJ business review letters are available at <http://www.usdoj.gov/atr/public/busreview/letters.htm>.

4 Enforcement of antitrust laws and policies: mergers and concentrations

4.1 Enforcement of Pre-merger Notification Rules

48. The Department, at the request of the Federal Trade Commission, filed a civil lawsuit against Texas hedge fund manager James Dondero for failure to comply with the pre-merger reporting and waiting period requirements of the Hart-Scott-Rodino Act of 1976 (HSR) before exercising options in February 2005 to acquire stock of Motient Corp., where he served on the board of directors. As a result of exercising the options, Dondero and the investment fund that he controlled, Highland Capital Management L.P., held

voting securities of Motient valued in excess of the \$50 million HSR reporting threshold then in effect. The threshold is now adjusted annually to reflect changes in gross national product. Less than a year before the violation alleged in the complaint, Dondero made a corrective HSR filing relating to a failure to file regarding Highland's acquisitions of stock in another company, and as part of that filing, outlined steps it would take to avoid future violations. The Department alleged that Dondero was in violation of the Act from February 28 until May 28. A party is subject to a maximum civil penalty of \$11,000 for each day it is in violation of the HSR Act. Dondero agreed to pay \$250,000 in civil penalties.

4.2 *Significant Merger Cases*

4.2.1 *FTC Merger Challenges and Cases*

49. The Commission continues to face a demanding merger review workload as the number of mergers requiring pre-merger notification continues to increase, and the proposed mergers and the products and services at issue grow in complexity. Over the past three years, the Commission has faced a 30% increase in pre-merger filings and a comparable increase in second requests issued. The following were significant merger cases during FY 2007.

50. **Evanston/Highland Park:** In an Initial Decision issued in October 2005, the FTC's Administrative Law Judge found that Evanston's acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and a substantial lessening of competition for acute-care inpatient services in parts of Chicago's northern suburbs, and ordered the divestiture of Highland Park Hospital. The ALJ ruled that Evanston must divest and convey Highland Park Hospital to a Commission-approved buyer and in a Commission-approved manner. In addition, the ALJ ordered Evanston to comply with all terms of the divestiture agreement approved by the Commission and to cooperate with the acquirer to ensure that the hospital assets are maintained as competitive pending their divestiture. In August 2007, the full Commission affirmed the ALJ's finding on liability, but ordered a more limited remedy. The Commission held that the long time that elapsed between the merger's closing and the conclusion of the litigation "would make a divestiture much more difficult, with greater risk of unforeseen costs and failures." It therefore imposed an injunctive order, requiring Evanston to establish separate and independent negotiating teams – one for Evanston and Glenbrook Hospitals, and another for Highland Park – to allow managed care organizations (MCOs) to negotiate separately for those competing hospitals, thus re-injecting competition between them for the business of MCOs.

51. **Whole Foods/Wild Oats:** The Commission issued an administrative complaint, and sought a federal court temporary restraining order (TRO) and preliminary injunction, against Whole Foods Market, Inc.'s proposed acquisition of its main rival, Wild Oats Markets, in June 2007. According to the complaint, the transaction raised competition problems in 21 local markets where Whole Foods and Wild Oats both operated stores and were each other's closest competitors among premium natural and organic supermarkets. The district court granted the TRO, but subsequently denied the preliminary injunction after an abbreviated hearing, concluding that the merger's likely effect would not reduce competition substantially in violation of Section 7 of the Clayton Act. The Commission appealed the district court's ruling on grounds that the lower court failed to apply the proper legal standard that governs preliminary injunction applications by the Commission in Section 7 cases, and the Court of Appeals for the District of Columbia ruled in favor of the Commission in July 2008.

52. **Barr/Pliva:** The FTC settled charges in this matter with a consent order finalized in December 2006. The complaint alleged that Barr Pharmaceuticals' (Barr) proposed \$2.5 billion acquisition of Pliva would have eliminated current or future competition between the firms in certain markets for generic pharmaceuticals treating depression, high blood pressure, and ruptured blood vessels, and in the market for organ preservation solutions, thereby increasing the likelihood that consumers would pay more for these

vital products. The consent order required Barr to sell its generic antidepressant trazodone and its generic blood pressure medication triamterene/HCTZ. Barr was also required to divest either Pliva's or Barr's generic nimodipine drug for use in treating ruptured blood vessels in the brain, and to divest Pliva's branded organ preservation solution Custodial.

53. **Johnson & Johnson/Pfizer:** The Commission had concerns about the competitive effects of Johnson & Johnson's (J&J) proposed \$16.6 billion acquisition of Pfizer's Consumer Healthcare in the markets for over-the-counter (OTC) H-2 blockers used to prevent and relieve heartburn, hydrocortisone anti-itch products, night-time sleep aids, and diaper rash treatments. The issues were settled with a consent order that requires Pfizer to sell its Zantac, Cortizone, and Unisom divisions, and Johnson & Johnson to sell its Balmex division.

54. **Kinder Morgan/Carlyle Group and Riverstone Holdings:** In January 2007, the Commission challenged the terms of a proposed \$22 billion transaction whereby energy transportation, storage, and distribution firm Kinder Morgan would be taken private by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings. The Commission's complaint alleged 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 eleven metropolitan areas in the Southeast U.S., and that the proposed transaction would threaten competition in those markets, likely resulting in higher prices for gasoline and other light petroleum products. In settling the Commission's complaint, Carlyle and Riverstone agreed to be only passive investors in Magellan and to restrict the flow of sensitive information between Kinder Morgan and Magellan.

55. **EPCO/TEPPCO:** In October 2006, the FTC issued a final consent order settling charges related to Enterprise Product Partners' (EPCO) \$1.1 billion acquisition of TEPPCO Partners' NGLs salt dome storage businesses. The FTC's order required TEPPCO to divest its interests in the world's largest NGLs storage facility in Mont Belvieu, Texas, to an FTC-approved buyer. In February 2007, the Commission approved the divestiture following a public comment period.

56. **Chevron/USA Petroleum:** 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 independent chain of service stations in California not controlled by a refiner. USA Petroleum's president stated that the parties abandoned the transaction due to the FTC's competition concerns.

57. **Boeing/Lockheed Martin:** In May 2007, the Commission intervened in the formation of United Launch Alliance (ULA), a proposed joint venture between Boeing and Lockheed Martin. The FTC's complaint alleged that the formation of ULA as originally structured would have reduced competition in the markets for U.S. government medium to heavy launch services and space vehicles. In settling the Commission's charges, the parties agreed to take certain actions, such as implementing nondiscrimination requirements and firewalls, to address ancillary competitive harms not inextricably tied to the national security benefits of ULA.

58. **General Dynamics/SNC Technologies:** In February 2007, the Commission approved the petition for divestiture in General Dynamics' proposed \$275 million acquisition of SNC Technologies. The FTC's complaint alleged that the planned deal would have undermined competition by bringing together two of only three competitors providing the U.S. military with melt-pour load, assemble, and pack services used during the manufacture of ammunition for mortars and artillery. Absent relief, the FTC's complaint alleged that the proposed acquisition would likely force the U.S. military to pay higher prices for these munitions. Under the terms of the consent agreement, General Dynamics was required to sell its interest in American Ordinance to an FTC-approved buyer within four months of acquiring SNC.

59. **Fresenius AG/American Renal Association:** In October 2007, the Commission settled charges stemming from American Renal Associates' (ARA) proposed acquisition of assets from Fresenius AG, which would have made ARA the only operator of dialysis clinics in the Warwick/Cranston area of Rhode Island. The purchase agreement called for the sale of five Fresenius clinics to ARA, including two in the Warwick/Cranston area, and the closure of an additional three Fresenius clinics in Rhode Island and Massachusetts. The parties terminated their purchase agreement after FTC staff raised antitrust concerns, but the Commission challenged the closure of the three clinics and alleged a Section 7 violation in the Warwick/Cranston market for dialysis services. The Commission's order bars the parties from entering into any agreement to close dialysis centers, and requires ARA to notify the Commission if it intends to acquire any dialysis centers in the area for a period of 10 years.

4.2.2 *DOJ Merger Challenges or Cases*

60. **Chicago Mercantile Exchange/CBOT Holdings:** On June 11, 2007, the Department announced the closing of its investigation into the proposed acquisition of CBOT Holdings Inc. (CBOT) by Chicago Mercantile Exchange Holdings Inc. (CME). CME is the largest futures exchange in the United States and traded over one billion contracts in 2005. CBOT is the second largest futures exchange in the United States and offers trading in more than 50 different futures products. Futures contracts were first developed to enable contract holders to hedge risk in the fluctuating prices of commodities, but now many contract holders also use futures to hedge against interest-rate risk, foreign exchange risk, and other types of risk. After an extensive investigation of the proposed transaction and of a pre-existing agreement for CME to clear trades for CBOT, the Department found that a merger between the two exchanges, which account for most financial futures contracts traded at exchanges in the United States, was not likely to substantially reduce competition for the following reasons: the products offered by the exchanges seldom compete directly with each other and are not perceived as close substitutes; the exchanges are unlikely to introduce new products that compete directly with each other's products due in part to the difficulty of overcoming an incumbent exchange's liquidity advantage in an established futures contract; the combination would not directly result in less innovation and fewer new products as evidence suggests that past and ongoing innovation have been driven by the prospect of winning business from the market for non-exchange products that may be substitutes for futures rather than by competition between the parties; and the proposed acquisition would not foreclose entry by other exchanges into financial futures, as several exchanges have publicly stated their intent to offer competing products.

61. **Monsanto/Delta & Pine Land Company:** On May 31, 2007, the Department of Justice announced that Monsanto Company and Delta & Pine Land Company (DPL) must take certain actions to proceed with their \$1.5 billion merger. Prior to the merger, DPL and Monsanto, via its Stoneville business unit, were significant producers of traited cottonseed in the United States, accounting for over 90% of traited cottonseed sold in the MidSouth and Southeast cotton growing regions. Traitred cottonseed is seed that has been genetically modified to include highly desirable characteristics, such as resistance to insects or tolerance to herbicides. At the time of the merger, Monsanto was the dominant provider of insect-resistant and herbicide-tolerant traits for cotton. DPL had, however, been working with several other trait producers to develop alternatives to Monsanto's cotton traits. The most advanced work with Syngenta Crop Protection AG was to introduce an insect-resistant trait to compete with Monsanto's; DPL had planned to begin marketing cottonseed with this trait as early as 2009. The Department required the merged firm to divest Monsanto's Stoneville Pedigreed Seed Company, 20 proprietary DPL cottonseed lines, and other significant assets, and to provide Stoneville with trait licenses as favorable as those held by DPL pre-merger. The merged firm also had to divest to Syngenta a group of DPL cottonseed lines that contain Syngenta's insect-resistant trait. Finally, the Department required Monsanto to amend certain terms in its trait license agreements with other cottonseed companies to allow them, without penalty, to stack non-Monsanto and Monsanto traits and to sell cottonseed that includes non-Monsanto traits. The Department determined that the required relief was necessary to preserve current competition for traitred

cottonseed, to prevent any significant delay in bringing cottonseed with non-Monsanto traits to the marketplace, and to ensure the continued presence in the market of a firm independent of Monsanto with traited cottonseed development capabilities sufficient to provide a platform for future trait development and commercialization.

62. **Daily Gazette Company/MediaNews Group:** On May 22, 2007, the Department filed a lawsuit in federal district court alleging that the Daily Gazette Company and MediaNews Group Inc. (MediaNews) violated antitrust laws when they entered into a series of transactions that resulted in the Daily Gazette Company's acquisition of the only other daily newspaper in Charleston, West Virginia, from MediaNews. The Department contends that the Daily Gazette Company bought the second newspaper with the intent of shutting it down, but suspended those actions when the Department began its investigation. The Department learned about the transactions after they had been consummated since the parties were not required to report them under the Hart-Scott-Rodino Act. Prior to the transactions, the two firms had been operating under a joint operating agreement as permitted by the Newspaper Preservation Act. The Department alleged that when the firms entered into an agreement for the Daily Gazette Company to own all assets and control all business operations of both newspapers, the companies violated the requirements of the Act, taking them outside the scope of any antitrust immunity the Act would otherwise provide. The Department's lawsuit seeks an order requiring the two companies to rescind the transactions and restore the competition benefiting readers and advertisers that existed before the transactions.

63. **Amsted/FM Industries:** On April 18, 2007, the Department announced that it had filed a proposed consent decree to resolve competitive concerns with the acquisition of FM Industries (FMI) by Amsted Industries Incorporated (Amsted). The Department investigated the transaction after it had been consummated because the value of the transaction fell below the Hart-Scott-Rodino Act reporting thresholds. The companies were the only manufacturers of new end-of-car cushioning units (EOCCs) and two of only three suppliers of reconditioned EOCCs. EOCCs are hydraulic devices that protect sensitive cargos by mitigating the forces experienced by railcars during transit and coupling. The Department said that the acquisition removed Amsted's only competitor in EOCCs, resulted in higher prices, and substantially lessened competition in the market for used EOCCs. The consent decree required Amsted to divest all of the intangible and other manufacturing assets needed to produce new and reconditioned EOCCs that it acquired from FMI. Because the FMI business was discontinued as a result of the transaction and only one Amsted facility manufactures EOCCs, the decree also required Amsted to grant a perpetual license to its own intellectual property to account for gaps in the FMI assets. Moreover, Amsted was prohibited from acquiring any assets of or any interest in the development, production, or sale of EOCCs in the United States if the value of such an acquisition exceeds \$1 million, without first providing notification through procedures set out in the decree.

64. **SBC/AT&T and Verizon/MCI:** On March 29, 2007, the U.S. District Court approved entry of the Department's proposed consent judgments for two telecommunications transactions: the acquisition of AT&T Corp. (AT&T) by SBC Communications (SBC) and the acquisition of MCI Inc. (MCI) by Verizon Communications (Verizon). The review proceedings were conducted pursuant to the Tunney Act, which requires the court to find that a proposed consent decree is in the public interest before entering it. After reviewing the comments of several third parties, the Court determined that the settlements, which required the merged firms to divest certain fiber-optic facilities, were adequate to remedy the competitive harm alleged in the Department's Complaints and were in the public interest. The Court's opinion represented the first extensive judicial analysis of amendments made to the Act in 2004. *United States v. SBC Comm'n, Inc.*, 489 F.Supp.2d 1, 2-3 (D.D.C. 2007).

65. **Regions/AmSouth:** On October 19, 2006, the Department announced that it had reached an agreement with Regions Financial Corporation (Regions) and AmSouth Bancorporation (AmSouth) that would require the divestiture of 52 AmSouth branch offices with approximately \$2.7 billion in deposits in

Alabama, Mississippi, and Tennessee, in order to resolve competitive concerns raised by the companies' proposed merger. The divestitures included the consumer and commercial loans associated with the divested branches. The merger between Regions and AmSouth would create the largest bank in Alabama and Mississippi and the 2nd largest bank in Tennessee. The Department maintained that without the divestitures, the merger would adversely affect competition in local markets in the three states for small business lending, resulting in fewer choices for small business customers. The Department emphasized that physical branches are valuable assets because the facilities are already set up for the business of banking and may facilitate entry into or expansion within a market. The companies also agreed that in selected areas in Alabama, Florida, Louisiana, Mississippi and Tennessee where the merging firms overlap, if a branch office is closed within three years of the merger, they will sell or lease the office to a commercial bank-buyer if the offer meets or exceeds the best offer from a non-bank buyer.

66. **AT&T/BellSouth:** On October 11, 2006, the Department announced the closing of its investigation into the proposed acquisition of BellSouth Corporation (BellSouth) by AT&T Inc. (AT&T). The Department determined that the proposed merger was unlikely to reduce competition substantially. The merged firm would continue to face competition in all areas where the two companies competed, including residential local and long distance services, business telecommunications services, and Internet services. Moreover, the Department concluded that the merger would not significantly increase concentration in the ownership of spectrum in any geographic area or give AT&T control over a large enough share of spectrum suitable for wireless broadband services to raise competition concerns.

67. **Dairy Farmers of America/Southern Belle Dairy:** On October 2, 2006, the Department filed a proposed consent decree settlement in U.S. District Court that would require Dairy Farmers of America Inc. (DFA) to divest its interest in Southern Belle Dairy Co. LLC (Southern Belle). DFA and DFA's partner, the Allen Family Limited partnership (AFLP), agreed to sell their interests in Southern Belle to Prairie Farms Dairy Inc., a buyer approved by the Department. The settlement restores competition for school milk contracts in Kentucky and Tennessee school districts. DFA's acquisition of its interest in Southern Belle, which reduced the number of independent bidders for school milk contracts from two to one for 45 school districts in eastern Kentucky and from three to two bidders for 55 school districts in eastern Kentucky and Tennessee, would have given DFA ownership interests in Southern Belle and Flav-O-Rich dairy, which the Department challenged because the two dairies competed against each other for school milk contracts. The case was initially dismissed by the district court but reversed and sent back for trial after the Department's successful appeal to the U.S. Court of Appeals for the Sixth Circuit. The Department and DFA reached agreement on the settlement before retrial of the case. *United States v. Dairy Farmers of America, Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75,650 (E.D. Ky. Apr. 24, 2003).

5 Regulatory and Trade Policy Matters

5.1 Regulatory Policies

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

68. In the real estate sector, the agencies submitted joint comments to the Governor of Michigan regarding proposed legislation that the agencies suggested would impose unnecessary restrictions on a real estate broker's ability to compete for customers and might unnecessarily restrict certain forms of advertising. The agencies also submitted comments to the New York state legislature on a proposed bill that would establish that certain services related to real estate transactions may be provided only by attorneys. The agencies recommended that the bill be rejected to preserve attorney/non-attorney competition in situations in which there is no clear showing that non-attorney service providers have caused consumer harm. The agencies noted that they were not aware of evidence demonstrating that consumers have been harmed by non-attorneys giving advice or negotiating terms and conditions for the

sale of real property, preparing contracts or agreements for such transactions, or conducting title searches—activities that non-attorneys commonly provide in many states.

5.1.2 FTC Staff Activities: Federal and State Regulatory Matters

69. In FY 2007, FTC staff offered testimony to Congress on issues including pharmaceutical competition, gasoline price regulation, and the real estate brokerage industry. FTC staff also filed numerous comments with state legislatures, as described below.

70. In March 2007, Commission staff filed comments before the Louisiana State Bar Association Rules of Professional Conduct Committee regarding proposed rules on lawyer advertising and solicitation. Staff recognized that false and deceptive advertising by attorneys should be prohibited, but noted that consumers are worse off when states ban an entire class of attorney advertising without evidence that such advertising is either actually or inherently deceptive or misleading. Staff expressed concern that the revised rules would prohibit many forms of non-deceptive attorney advertisements, and that the proposed pre-screening provision raised competitive concerns. Staff recommended modification to the rules.

71. In June 2007, Commission staff filed comments with Washington, DC, Councilmember Mary Cheh regarding the “divorcement” provisions of the District Retail Service Station Act, which prohibit the operation of retail gasoline services in the District by a “jobber, producer, refiner, or manufacturer of motor fuels.” Councilmember Cheh introduced a proposal into the Washington, DC, Council to allow gasoline jobbers to operate retail service stations, and requested comments on the likely competitive impacts of the Act’s divorcement provision. The FTC staff commented that given the empirical evidence that bans on vertical integration in gasoline retailing leads to higher retail gasoline prices, the Act’s divorcement provisions likely cause DC residents to pay more for gasoline than they otherwise would. Accordingly, the staff letter supported Councilmember Cheh’s proposal, while noting that eliminating the divorcement provisions entirely would provide consumers with more benefits than a partial repeal.

72. In October 2007, Commission staff submitted comments to the Massachusetts Department of Public Health (PDH) concerning proposed regulations for the licensing of limited service clinics (LSCs). Staff commended the regulations, observing that LSCs have the potential to expand access to basic health care services for certain consumers and could spur price or quality competition with more traditional clinics or physician practices. The comments noted, however, that the proposed requirement that all LSC advertising be pre-approved by the DPH “may be overly restrictive,” and recommended that it be struck from the regulations.

5.1.3 DOJ Activities: Federal and State Regulatory Matters

73. On September 6, 2007, the DOJ filed comments with the Federal Communications Commission (FCC) concerning “net neutrality,” a term encompassing a variety of proposals that seek to regulate how broadband Internet providers transmit and deliver Internet traffic over their networks. The comments stated that precluding broadband providers from charging content and application providers directly for faster and more reliable service could shift the entire burden of implementing costly network expansions and improvements onto consumers, and that if the average consumer is unwilling or unable to pay more for broadband Internet access, the result could be to reduce or delay critical network expansion and improvement. The Department noted that it may make economic sense for content providers who want a higher quality of service to pay for the Internet upgrades necessary to provide such service, arguing that any regulation that prohibits this type of pricing may leave broadband providers unable to raise the capital necessary to fund these investments. Differentiating service levels and pricing is a common and often efficient way of allocating scarce resources and satisfying consumer demand, and is practiced, for example, by the U.S. Postal Service. The DOJ cautioned against imposing regulations that could hamper the

development of the Internet and related services and concluded that the FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws. The comments are available at <http://www.usdoj.gov/atr/public/comments/225767.htm>.

74. On January 25, 2007, the DOJ submitted comments to the Federal Energy Regulatory Commission (FERC) on its new statutory authority to issue rules regarding transparency in electricity and natural gas markets. The Energy Policy Act of 2005 explicitly provides that FERC may issue rules mandating the collection and public dissemination of information about these markets. The DOJ comments, available at <http://www.usdoj.gov/atr/public/comments/223049.htm>, summarized the benefits of transparency, which promotes market efficiency by facilitating efficient production and investment, ultimately reducing prices for consumers. The comments noted, however, that the structural characteristics of these markets may make them susceptible to coordinated interaction, and that public disclosure of detailed firm- and transaction-specific information may increase the risks of coordination and raise prices to consumers. The comments suggested that given the amount of information currently available, the incremental benefit of increased public dissemination may be small relative to the risk of coordination. The DOJ concluded that if FERC decides to increase the public dissemination of additional information, it may be able to reduce the potential for facilitating coordination by adopting certain safeguards, including aggregating information, masking the identities of individual participants, and releasing information with an appropriate time lag.

75. On April 30, 2007, the Department submitted letters to legislatures in Connecticut, Florida, Illinois, Massachusetts, Minnesota, Nevada, Ohio, Tennessee, and Wisconsin regarding proposed legislation in those states to reform the process for granting franchises to new video-service providers. The DOJ's letters suggested that consumers typically are best served when market forces determine when and where competitors enter, and that regulatory restrictions that make it difficult for companies to enter markets tend to shield incumbents from competition and lead to higher costs. Consumer gains in both video and related broadband services are more likely to be realized if franchising authorities do not impose restrictions on entry (such as landscaping or build-out requirements) beyond those necessary to protect the public interest. The letter concluded that consumers will benefit from legislation that (1) establishes standard, enforceable time frames as well as a statewide process for acting on franchise applications; (2) establishes objective criteria for determining what, if any, concessions localities may demand; and (3) addresses the standard that local franchise authorities should apply in deciding whether to approve service areas proposed by new entrants.

76. In FY2007 the Department submitted comments to the Idaho legislature, criticizing a bill that would require that Idaho real estate brokers provide certain services to their customers, even if those customers would rather save money by performing those services themselves. Another DOJ letter made similar comments with respect to proposed legislation in Rhode Island. The DOJ also wrote to the Tennessee legislature recommending rejection of a proposed bill that would prohibit real estate brokers in that state from paying "cash rebates, cash gifts, or cash prizes" to home buyers or home sellers in real estate transactions.

77. In February 2007, a Division official testified before a legislative committee of the Georgia legislature on health care and certificate of need laws, stating that by their very nature, these laws create barriers to entry and expansion and thus are anathema to free markets. Certificate of need laws undercut consumer choice, weaken markets' ability to contain healthcare costs, and stifle innovation.

78. In March 2007 the Division submitted comments to the Pennsylvania Public Utility Commission (PUC) on proposed modifications to the application form for approval of authority to offer, render, furnish or supply telecommunications services to the public in Pennsylvania. The comments expressed concern that the PUC's current certification process for competitive local exchange carriers (CLECs) seeking to

serve rural areas created opportunities for abuse, because it allowed rural incumbent local exchange carriers (ILECs) to delay entry by new competitors simply by filing protests, regardless of the merits of the objections raised, triggering long and expensive administrative processes. Moreover, these delays gave rural ILECs leverage to obtain agreements from CLECs that may restrict competition at the expense of consumers. The comments proposed possible reforms to reduce entry barriers and encourage facilities-based competition in rural ILEC territories in Pennsylvania.

5.2 *DOJ and FTC Trade Policy Activities*

79. Both the Division and the FTC are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative. The Division provides antitrust and other legal advice to U.S. trade agencies. The Division also works with other Justice components (including the Civil, Criminal, and Environment and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole.

80. Both the FTC and DOJ participate in bilateral and multilateral discussions and projects to improve cooperation in the enforcement of competition laws. The agencies participate in negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative and other U.S. agencies in competition policy discussions associated with Asia-Pacific Economic Cooperation (APEC), and chaired or co-chaired the negotiating teams for the competition chapters in the U.S.-Korea and U.S.-Malaysia free trade agreement negotiations that occurred in FY2007. The agencies are active participants in the annual UNCTAD Intergovernmental Group of Experts meetings on competition topics of interest to developing as well as developed countries.

81. The Division co-chairs (with the Office of the U.S. Trade Representative) the Cross-Sectoral Working Group under the U.S.-Japan Regulatory Reform and Competition Policy Initiative. In these discussions, the United States has urged the Japanese government to take a variety of actions to strengthen its enforcement of Japan's antimonopoly law, take effective measures to eliminate bid rigging, make its administrative procedures fair and open, and accelerate an effective program of deregulation to open markets to competition.

5.3 *Outreach*

82. In 2007, the DOJ and the FTC continued to provide technical assistance on competition law and policy matters to new competition agencies, with active USAID-funded programs to the Association of South East Asia Nations (ASEAN), and in Azerbaijan, Egypt, Guatemala, India, Nicaragua, Russia, and South Africa. In addition, the agencies have, on their own initiative, engaged in technical cooperation programs with China. The FTC and the DOJ also provided commentary on non-OECD countries' proposed laws and regulations, hosted a number of visits and study missions by officials of younger agencies (*inter alia* those of Barbados, Pakistan, and South Africa), sent officials and staff to participate in seminars and conferences hosted by other agencies (*e.g.*, Thailand), and engaged in other assistance efforts to young agencies, such as providing advice on cases and issues by e-mail, phone, and video conferences. In this light, the United States participates in both the ICN's consultation program and its partnership program, and co-chairs the ICN's Competition Policy Implementation's Working Group Subgroup on Technical Assistance.

83. In the multilateral organization arena, with OECD, the agencies hosted a workshop in Vietnam in March 2007 for ASEAN member nations on abuse of dominance, and participated in OECD case analysis

programs in Budapest. Jointly with the International Competition Network, the agencies also hosted a merger workshop in Pretoria for ten African countries in June 2007.

84. In addition, in 2007, the FTC began working with the ASEAN Secretariat and several member countries to help in regional coordination and training in the area of consumer protection.

85. The FTC implemented a pilot program for its SAFE WEB “International Fellowship” program, which allows foreign agency employees to spend up to six months at the FTC learning how the FTC legal and economic staffs conduct their work. The pilot program included Fellows from Brazil’s Administrative Council for Economic Defense, the Hungarian Competition Office, and the Canadian Competition Bureau.

86. In May 2007, the Department added a new feature to its international outreach efforts. The Division has long had a robust training program for its own employees, and last year, for the first time, ten agencies from eight different countries participated in a part of that program – an intensive training program on antitrust economics. The training session addressed a variety of topics, including unilateral effects, bundling, predatory pricing and remedies. It concluded with practical programs about the common mistakes that are made in antitrust investigations. The 2007 training session’s success has led the Department to make it a permanent feature of its training program.

87. For the FTC and the DOJ, overall capacity-building and technical assistance activities included 31 missions to 13 countries, involving 47 different agency staff experts. In addition, the FTC maintained a resident advisor in Jakarta, Indonesia, through April 2007, to assist the member states of ASEAN.

6 New Studies related to antitrust policy

6.1 *Antitrust Division Economic Analysis Group Discussion Papers*

88. The Economic Analysis Group issued the following papers during FY 2007. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.gov). They can also be viewed online at: http://www.usdoj.gov/atr/public/eag/discussion_papers.htm

Alexander Raskovich, The Holdout Problem and Long-Term Contracting, EAG 07-13, September 2007.

Abraham Dunn, Do Low-Quality Products Affect High-Quality Entry? Multiproduct Firms and Nonstop Entry in Airline Markets, EAG 07-12, September 2007.

John Hoven, Anticompetitive Restraints on Public Charter Schools, EAG 07-11, September 2007.

Matthew Osborne, Consumer Learning, Switching Costs, and Heterogeneity: A Structural Examination, EAG 07-10, September 2007.

Russell Pittman, Consumer Surplus as the Appropriate Standard for Antitrust Enforcement, EAG 07-9, June 2007. Forthcoming in *Competition Policy International*.

Matthew Magura, How Rebate Bans, Discriminatory MLS Listing Policies, and Minimum Service Requirements Can Reduce Price Competition For Real Estate Brokerage Services and Why it Matters, EAG 07-8, May 2007.

Nisvan Erkal and Deborah Minehart, Optimal Sharing Strategies in Dynamic Games of Research and Development, EAG 07-7, April 2007.

Dennis W. Carlton, Market Definition: Use and Abuse, EAG 07-6, April 2007.

Russell Pittman, Oana Diaconu, Emanuel Šip, Anna Tomová, and Jerzy Wronka, Will the Train Ever Leave the Station? The Private Provision of Freight Railway Service in Russia and Central and Eastern Europe, EAG 07-5, January 2007. Forthcoming in the *Journal of Competition Law and Economics*.

Jeremy A. Verlinda, Price-Response Asymmetry and Spatial Differentiation in Local Retail Gasoline Markets, EAG 07-4, January 2007.

Dennis W. Carlton, Does Antitrust Need to be Modernized?, EAG 07-3, January 2007. Published in 21 *Journal of Economic Perspectives* 2007.

Wayne R. Dunham, Cold Case Files: The Athenian Grain Merchants 386 B.C., EAG 07-2, January 2007.

Sayaka Nakamura, Cory Capps and David Dranove, Patient Admission Patterns and Acquisitions of “Feeder” Hospitals, EAG 07-1, January 2007.B. Commission Studies and Reports, and Economic Working Papers.

89. Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail (janie.ingalls@usdoj.gov).

6.2 Commission Studies and Reports, and Economic Working Papers

6.2.1 Commission Studies and Reports

90. In June 2007, the Commission published a report on broadband connectivity competition policy. The report identifies guiding principles that policy makers should consider in evaluating proposed regulations or legislation relating to broadband Internet access and network neutrality. (Report available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>)

91. In April 2007, the Commission released a report on competition in the real estate brokerage industry. The report informs consumers and others involved in the industry 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. (Report available at <http://www.ftc.gov/reports/realestate/V050015.pdf>)

92. The Commission published a report on municipal provision of wireless Internet in September 2006. The report describes the various wireless Internet technologies currently in use or under development, identifies a range of operating models that have been used to provide or facilitate wireless Internet service, summarizes the major arguments for and against municipal participation, and describes various types of legislative proposals related to municipal Internet service. (Report available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>)

6.2.2 Economic Working Papers

93. The following FTC Bureau of Economics working are available at <http://www.ftc.gov/be/econwork.htm>.

Daniel Hosken, Robert McMillan, Christopher Taylor, Retail Gasoline Pricing: What Do We Know , May 2007; revised February 2008.

R. Dennis Murphy, Pauline M. Ippolito, Janis K. Pappalardo, Consumer Perceptions of Heart-Health Claims for Cooking Oils and Vegetable Oil Spreads, April 2007.

Loren K. Smith, Slow Market Adjustment to Tax Changes: Evidence from the Market for Used Wide-body Commercial Aircraft, May 2007.

Christopher T. Taylor, Nicholas Kreisle, Paul R.Zimmerman, Vertical Relationships and Competition in Retail Gasoline Markets: Comment, September 2007.

Steven Tenn and John Yun, Biases in Demand Analysis Due to Variation in Retail Distribution, February 2007.

David J. Balan, Sometimes it's Better to Just Let them Shirk, October 2006.

Christopher Garmon, Hospital Competition and Charity Care, October 2006.

APPENDICES

**Department of Justice:
Fiscal Year 2007 FTE¹ and Actual Resources by Enforcement Activity**

	FTE	Amount (\$ in thousands)
Criminal Enforcement	268	\$54,162
Civil Enforcement	499	\$100,586
Total	767	\$154,748 ²

**Federal Trade Commission: Fiscal Year 2007 Competition
Mission FTE and Dollars by Program by Bureau/Office**

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	488.4	\$94 561.6
<i>Bureau of Competition</i>	270.3	\$39 935.3
<i>Bureau of Economics</i>	70.5	\$10 195.5
<i>Regional Offices</i>	21.6	\$3 135.6
<i>Mission Support</i>	126.0	\$41 295.2
Premerger Notification	28.2	\$3 684.2
<i>Bureau of Competition</i>	27.4	\$3 571.7

¹ An "FTE" or "full time equivalent" amounts to one employee working full time for a full year. Because the number of employees fluctuates throughout the year through hiring, attrition, and varying schedules, an agency typically has more employees than FTEs (e.g. two employees working 20 hours per week for one full year equals one FTE).

² As noted in para. 10, the Division's FY 2007 actual appropriation was \$147.8 million. Prior year available funding and other adjustments provided resources for the Division to incur \$154.748 million in obligations for FY2007.

	FTE	Amount (\$ in thousands)
<i>Bureau of Economics</i>	0.1	\$14.2
<i>Regional Offices</i>	0.7	\$98.3
Merger & Joint Venture Enforcement	189.3	\$28 504.1
<i>Bureau of Competition</i>	126.6	\$19 604.0
<i>Bureau of Economics</i>	46.2	\$6 552.3
<i>Regional Offices</i>	16.5	\$2 347.8
Merger & Joint Venture Compliance	7.9	\$1 032.4
<i>Bureau of Competition</i>	7.5	\$975.7
<i>Bureau of Economics</i>	0.4	\$56.7
<i>Regional Offices</i>	--	--
Nonmerger Enforcement	105.5	\$15 356.5
<i>Bureau of Competition</i>	87.1	\$12 729.1
<i>Bureau of Economics</i>	14.4	\$2 056.6
<i>Regional Offices</i>	4.0	\$570.8