DEPARTMENT OF JUSTICE

A REVIEW OF RECENT ANTITRUST DIVISION ACTIONS

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Despite having been in a leadership transition period for more than six months, the Antitrust Division has been quite active in all areas of antitrust enforcement. (And I am pleased to report, our transition is drawing to a close. Acting Assistant Attorney General Hew Pate received a unanimous Senate Judiciary Committee vote in favor of his nomination and awaits a floor vote; Dr. David Sibley recently joined us from the University of Texas to become our Deputy Assistant Attorney General for Economics; Bruce McDonald will become the legal Deputy Assistant Attorney General for Regulatory Matters on June 30; and we hope to announce appointment of our new International Deputy soon.) I thought I would take this opportunity to describe the broad array of actions that the Antitrust Division has taken over the last several months.[1]

I. CRIMINAL ENFORCEMENT

Criminal antitrust enforcement remains at the core of our mission. The cartel activity uncovered in Division investigations over the last several years has cost U.S. consumers and businesses many hundreds of millions of dollars annually. Last fiscal year, defendants in Division prosecutions received more than 10,000 days of jail time–a record high–with the average sentence reaching a new high of more than 18 months and a record high individual sentence of 10 years. This fiscal year, we have obtained criminal sentences for 23 individuals, totaling 6,791 days of jail time.

We have maintained a strong focus on international cartels because of the tremendous volume of commerce typically associated with such conspiracies. Currently, there are more than

[1]For Division matters on which I am recused, I have no inside knowledge and provide only information taken from Division briefs or other public sources.

40 sitting grand juries investigating international cartel activity. But we are equally committed to rooting out illegal anticompetitive conduct wherever it occurs and whatever form it takes and have roughly 60 grand juries investigating domestic cartels. Many of our recent criminal cases have been significant domestic cases involving price fixing and bid-rigging. Before discussing cases, though, I would like to describe briefly how these cases come to our attention and the substantial benefits from self-reporting.

The Division's corporate amnesty program continues to be our most active generator of criminal investigations. Under the Division's corporate leniency policy, a corporation that reports its illegal antitrust activity at an early stage will not be charged criminally for this activity if the company meets the requirements of the amnesty program.[2] If a corporation comes forward after an investigation has begun, to be eligible for amnesty, the Division must not yet have evidence against the company that is likely to result in a sustainable conviction. In addition to avoiding a corporate conviction, the amnesty policy also provides the substantial additional benefit of non-prosecution coverage to the company's executives who cooperate with the investigation.

Acceptance into the Division's amnesty program can save a company tens of millions of dollars in fines and can avoid the prosecution and incarceration of its culpable executives. Companies that choose not to report an antitrust violation take a significant risk that the conspiracy will be reported by others or otherwise be detected and that they will be subjected to

[2]These requirements include (i) being the first company involved that reports the conduct, (ii) cooperating with the Division in its investigation, and (iii) paying restitution to victims. *See* http://www.usdoj.gov/atr/public/criminal.htm.

heavy fines and the incarceration of their culpable executives. It is far riskier in today's enforcement environment to "roll the dice" and attempt to evade detection and prosecution than previously. The Division's ability to detect antitrust offenses has dramatically improved in recent years due to a number of factors, including the higher rate of amnesty applications, the Division's proactive use of amnesty, the Division's increasing use of search warrants, and the increased assistance provided by foreign antitrust authorities, including coordinated searches in multiple jurisdictions. The amnesty application rate has surged over the last year to better than two per month, and in the first six months of this fiscal year to more than three per month. As a result of this increased interest, the Division frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty. Of course, only the first company to qualify receives amnesty. Notably, the Division's success with the amnesty program has influenced antitrust authorities around the world to adopt or strengthen their own leniency policies.

You should also know that often our investigations are initiated by evidence obtained as a result of an investigation of a completely separate industry. For example, a new investigation results when a company approaches the Division to negotiate a plea agreement in a current investigation and then seeks to obtain more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, companies that chose to self- report and cooperate in a second matter can obtain what is referred to as "Amnesty Plus." In such a case, the company will receive amnesty, pay zero dollars in fines for its participation in the second offense, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with that second offense. Plus, the company will receive a substantial additional discount by the Division in calculating an appropriate fine for its participation in the first conspiracy.

As with most things in life, there is a flip side: we have a “Penalty Plus” policy. Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences. If a company participated in a second antitrust offense and does not report it, and the conduct is later discovered and successfully prosecuted, where appropriate, we will urge the sentencing court to consider the company’s and any culpable executive’s failure to report the conduct voluntarily as an aggravating sentencing factor. For a company, the failure to self-report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of commerce affected by the second offense versus no fine at all on the Amnesty Plus product. For an executive, failure to self-report under Amnesty Plus could mean the difference between a lengthy jail sentence and avoiding jail altogether.

Our confidentiality policy is an important footnote to this self-reporting discussion: the Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. The Division will not disclose an amnesty applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the Amnesty Program, the Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure. Frequently, though, the Division obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved.

In addition to amnesty and leniency applications, the Division discovers antitrust violations from a variety of sources, including citizen complaints made to the Division's New Case Unit or to a Division field office, leads from foreign antitrust authorities, and news reports. In addition, citizen complaints may come from a new entrant whom cartel members have tried to recruit into an ongoing antitrust conspiracy, a customer who has suspected price fixing or bid-rigging, a disgruntled cartel member, or even a relative of a cartel member or industry insider.

Many of you may be familiar with some of our recent cases that have yielded jail time and made headlines: (i) the prosecution of Sotheby's former Chairman, Alfred Taubman, who was convicted after trial and sentenced to a year in prison and a $7.5 million fine for his role in the auction-house price-fixing scheme between Sotheby's and Christie's; (ii) the three-year jail term imposed on Elmore Roy Anderson for rigging USAID bids and defrauding USAID in connection with construction work in Egypt that the U.S. government funded as part of the Camp David Peace Accords; (iii) the 63-month jail term imposed on Melvyn Merberg for his role in rigging bids submitted to, and defrauding, Newark public schools and other government, not-for-profit, and private entities in the New York City metropolitan area; and (iv) a record-breaking ten-year sentence imposed on Austin "Sonny" Shelton, a former Guam government official, for orchestrating a bid-rigging, bribery, and money-laundering scheme involving FEMA-funded contracts in Guam.

While these are important cases with substantial deterrent effect, they are only a few of the cases prosecuted pursuant to the Division's vigorous criminal enforcement program under the leadership of Jim Griffin, Deputy AAG for Criminal Enforcement and Scott Hammond, Director of Criminal Enforcement. International cartel prosecutions have included:

* Hoechst A.G., an international chemical conglomerate based in Germany, pled guilty and accepted a $12 million fine for its participation in a conspiracy that suppressed competition in the world markets for monochloroacetic acid (or "MCAA"), an industrial chemical used in the production of commercial and consumer products, including pharmaceuticals, herbicides, and plastic additives. Hoechst is the third company to plead guilty in this conspiracy, following pleas by the Dutch chemical company Akzo Nobel Chemicals B.V. and Elf Atochem of France and fines of $12 million and $5 million, respectively;
* Morganite, Inc., a U.S. company, and its U.K. parent corporation, The Morgan Crucible Company plc, pled guilty to participating in an international cartel to fix the price of various types of electrical carbon products, mostly carbon brushes, sold in the United States and elsewhere. Morganite agreed to a $10 million fine and its U.K. parent agreed to a $1 million fine for its attempts to conceal the conspiracy;
* Two British executives pled guilty, becoming our fifth and sixth convictions in an international conspiracy to fix the price of carbon cathode block, a carbon product known for its strength and resistance to heat and chemical reaction and commonly used in aluminum smelters or pots in the production of primary aluminum

manufactured in the United States and elsewhere. Earlier pleas included those by U.S., Japanese, and German companies, yielding fines of more than $2 million;

* Arteva Specialties, S.a.r.l., d/b/a KoSa, a Luxembourg-based manufacturer of polyester staple, and its former U.S. director of textiles pled guilty to participating in a conspiracy to fix prices and allocate customers in the polyester staple industry. Polyester staple is a petroleum-derived fiber used to make products such as clothing, table linens, and upholsteries. The corporation agreed to a $28.5 million criminal fine, and the executive agreed to serve eight months in prison and to pay a $20,000 fine;
* In our 29th case involving the international vitamins cartel, DuCoa L.P., a U.S. manufacturer of animal health and nutrition products based in Highland, Illinois, pled guilty to participating in a worldwide conspiracy to raise and fix prices and allocate market shares for choline chloride (vitamin B4) sold in the United States and elsewhere and agreed to pay a $500,000 fine.

The increasing jail sentences, even for foreign nationals, and the huge multi-million dollar fines that have characterized international cartel prosecutions have caught the public's attention, as they should. But the Antitrust Division in no way limits its prosecutorial reach to the "headliner" cases. On the contrary, the Division has prosecuted multiple cases that, while seemingly small, are quite significant to the victims, as well as to our broad efforts at deterrence.

One of our most productive recent bid-rigging investigations, which arises from the advertising, printing, and graphics industry in New York City, is ongoing. The investigation is being conducted by the Division's New York Field Office, with the assistance of the FBI and the

IRS's Criminal Investigation Division. Since September 2002, this case has produced twelve guilty pleas, and two other defendants await trial. Although this case also involves tax fraud and other corrupt business practices, as many cases do, at its heart it was a straightforward bid-rigging scheme pursuant to which, from 1994 to 2001, defendants conspired to rig bids and allocate contracts awarded by various advertising firms to graphics and printing vendors. In the most significant part of the bid-rigging conspiracy, Grey Global Group Inc., an advertising agency headquartered in Manhattan, put contracts out for bid to graphic services vendors for work performed on behalf of Brown & Williamson Tobacco Corp., one of its clients. In order to secure the best price for its contracts, Brown & Williamson required Grey to obtain three competitive bids before awarding contracts. The conspirators obtained intentionally high "cover" bids from vendors in order to make it appear to Brown & Williamson that it was receiving the benefit of true competition, when, in fact, it was not. One of the defendants, Mitchell E. Mosallem of Manhattan, the former executive vice president and director of graphic services at the Grey Global Group, pled guilty to 11 antitrust, fraud, and tax crimes, and agreed to serve a prison term of 63 to 78 months – the longest jail-time plea in Division history.

Additional bid-rigging prosecutions during the past year have included: the owner/president of a Maryland home improvement and renovation company who falsified bids to homeowners participating in a federally funded home improvement repair program; a New York metropolitan area supermarket executive who defrauded his company and consumers by taking kickbacks to steer contracts to produce vendors rather than having them compete for the store's business; two companies in North Carolina and Tennessee that shared bid information despite their certification of sealed bids for a federal highway construction project; two employees of Odyssey House Inc., a Manhattan-based, not-for-profit substance abuse treatment organization, who engaged in a bid-rigging, kickback, and embezzlement scheme that affected nearly $10 million in contracts to vendors who supplied Odyssey House with food, health and beauty aids, baby supplies, office supplies, and janitorial supplies; and two individuals who rigged bids and paid artificially low prices for cars at public sheriffs' auctions, depriving owners and creditors of the full value of the auctioned properties.

We are committed to and will vigorously pursue anticompetitive criminal conduct. You, as corporate counsel, should be acutely aware of this and ensure that your companies' executives know we are on the lookout for such conduct and take the precautions necessary to ensure your company is not engaging in such conduct.

II. MERGER ENFORCEMENT

As one might expect because of changes in our business environment, the number of Hart-Scott-Rodino filings dropped from nearly 10,000 in the year 2000 to less than half that number in 2001, and halved again in 2002. (Part of the reduction, of course, in 2001 and 2002 results from the 2000 amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which raised the HSR filing threshold from $15 million dollar transactions to $50 million dollar transactions.) In this fiscal year, we have had nearly 1,325 HSR filings through May. Nevertheless, we have confronted important antitrust issues, leading to several challenges, most of which were resolved by consent decree, and we have a number of major transactions currently under investigation, including GE/Instrumentarium, News Corp./DIRECTV, and First Data/Concord. Let me refer to a few recent challenges and highlight the significance of each challenge from a policy standpoint.

<u>Recent Merger Challenges</u>

United States v. UPM Kymmene Oyj: Just this week, the Division began a preliminary injunction hearing in U.S. District Court in Chicago, in an effort to block UPM Kymmene's Raflatac subsidiary from acquiring Bemis Company's MACtac subsidiary. Raflatac and MACtac are the second and third largest producers of pressure sensitive labelstock in North America, which is the base material for labels used in a variety of applications that American consumers encounter everyday, including shipping labels and supermarket scale labels. The Division concluded that the merger would facilitate coordination between the merged company and other North American producers of bulk paper labelstock, and would substantially reduce competition in the production of bulk paper labelstock and result in higher prices for bulk paper labelstock throughout the United States.

UPM had competed aggressively to build its customer base and expand sales volume, leading or substantially contributing to market-wide erosion of prices and producer profitability. While customers of paper labelstock derived substantial benefit from this competition, MACtac's president and CEO has stated that, from his vantage point, UPM's aggressive pricing "ruined the industry." Indeed, shortly after announcement of the transaction, MACtac's CEO, whom UPM has chosen to manage UPM's North American labelstock business after the transaction, advised a securities analyst that the transaction should bring pricing "discipline" to UPM. And senior UPM officials advised at least two labelstock customers that UPM planned to increase prices after the transaction.

The hearing began on June 9, 2003, less than two months after the Division filed its complaint on April 15.

DirecTV/Echostar : Filed last December, this case illustrates the heightened scrutiny we imposed upon a merger that would have resulted in a loss of one of three competitors in many urban markets and a merger to monopoly in numerous rural areas. The case is also significant for other reasons. First, this matter demonstrates the need for merging parties to make settlement proposals that completely resolve our competitive concerns with a proposed merger in a timely fashion. The merging parties abandoned this proposed merger of the nation's two most significant direct broadcast satellite services after the Division filed suit to block it. Very late in the process, the parties proposed a partial divestiture remedy that they had not even yet finalized. So, when the parties sought an expedited trial schedule, we opposed it, noting in our court filings that the Division needs sufficient time to review and take discovery on late arising issues. The court agreed, and set a more reasonable yet still aggressive trial schedule.

The case is also interesting because the parties had argued that their transaction would result in substantial efficiencies and had expended substantial resources to demonstrate those efficiencies. While the Division recognized that some efficiencies might result, we concluded that the parties could not demonstrate efficiencies of a magnitude sufficient to outweigh the substantial adverse impact of the transaction on competition and consumers.

Northrop Grumman/TRW: This defense industry acquisition raised some interesting vertical and conduct remedy issues. TRW was one of a few companies to serve as a prime contractor in the construction of reconnaissance satellites, and Northrop was one of two producers of the payloads that are used in such satellites. The Division concluded that the vertical integration created by this merger would have given Northrop the ability and incentive to lessen competition. The consent decree included certain restrictions and other conduct requirements to ensure continued competition for reconnaissance satellite systems as a condition to proceeding with the merger. This matter, of course, involved a single customer, the Department of Defense. To further ensure Northrop's compliance with the conduct requirements, the consent decree requires Northrop to work with a Compliance Officer, chosen by the Secretary of Defense. The Compliance Officer will oversee Northrop's compliance with the terms of the consent decree, and has the ability to impose a $10 million civil penalty for violations. While the Division has a preference for structural relief in merger cases, in this set of unique circumstances, conduct relief was warranted.

ICAP plc/BrokerTec LLC: This transaction between two of the world's largest interdealer brokers presents an example of resolution of competitive problems through a "fix-it-first" remedy. The Division was concerned that the deal as initially proposed would have reduced competition for interdealer brokerage services in the trading of U.S. Treasury and agency securities, services that only a small number of firms provide, whether electronically or through voice trades. Interdealer brokers act as conduits between the dealers of such securities in the secondary market for these instruments. Interdealer brokers facilitate trading so that dealers are able to hedge risks and adjust their inventory positions more quickly, efficiently, and at lower prices, than other trading venues. BrokerTec, an electronic interdealer broker, was owned by a consortium of eight global fixed income dealers (Goldman Sachs, JP Morgan, Merrill Lynch, Morgan Stanley, CSFB, Deutsche Bank, Lehman Brothers, and Salomon Smith Barney).

As originally structured, the parties' agreements would have obligated BrokerTec's shareholders to pay ICAP at least $61.3 million annually for three years in what amounted to pre-paid commissions; imposed a maximum cap of $97.6 million on commissions, which BrokerTec's shareholders could extend for up to five years; imposed a non-compete provision on the BrokerTec shareholders; and imposed a most-favored nation clause requiring ICAP to give the shareholders the lowest commission rates. BrokerTec's shareholders were also granted the right to appoint one member to ICAP's Board of Directors. In response to the Division's antitrust concerns, the parties restructured their transaction prior to closing: certain products (Treasury bills, off-the-run Treasury coupons, and agency securities) were removed entirely from the revenue commitments, which reduced the minimum commitment to $40.6 million; the terms were limited to three years with respect to remaining products; the non-compete and most-favored nation clauses were eliminated; and the maximum cap on commissions was lowered to $71.5 million. BrokerTec's shareholders also will not have the ability to appoint an ICAP board member.

Univision/HBC: This transaction raised important partial ownership issues. Univision, the largest broadcaster of Spanish-language television programming in the United States, was proposing to acquire Hispanic Broadcasting Corporation (HBC), the nation's largest Spanish-language radio broadcaster. Univision, however, already owned an approximately 30 percent equity and seven percent voting sake in Entravision, HBC's principal competitor in Spanish-language radio in many geographic areas. The Division was concerned about competition in six markets in which HBC and Entravision directly competed because even partial ownership can increase firms' ability to coordinate with a competitor through exercise of voting rights as a shareholder; participation in a rival firm's corporate governance; and access to competitively sensitive business information. As a result of our investigation, Univision agreed to sell a significant portion of its 30 percent partial ownership interest in Entravision in order to proceed with its acquisition of HBC. Our enforcement action in this $3 billion matter reflects the Division's continued interest in evaluating the extent to which partial ownership in a rival may constitute control, as well as how partial ownership can affect incentives to compete.

Non-reportable Transactions

It is important to note that we review deals that fall below the $50 million HSR reporting threshold if they merit close antitrust scrutiny. We learn about these deals in several ways. First, many parties self-report transactions under the threshold. These parties seek to cooperate with the Division and obtain our views on the deal before it is consummated, to avoid the expense and difficulty of defending a merger or acquisition after closing should we determine that the deal raises competitive problems. Second, competitors and customers who have reason to believe that the transaction may have an adverse effect may contact the Division. And, finally, the Division's staff learns of non-reportable transactions by reviewing the trade press and financial publications.

Right now we are examining numerous non-reportable transactions, most of which require that we act quickly to investigate and, if necessary, take enforcement action while the parties are still competing in the marketplace.

In April, the Division filed a lawsuit to block SGL Carbon AG and its U.S. subsidiary, SGL Carbon L.L.C., from acquiring certain assets of Carbide/Graphite Group in a bankruptcy court action. SGL Carbon and Carbide/Graphite Group are two of the only four producers capable of manufacturing quality 18-inch diameter and larger graphite electrodes for sale in the United States. Graphite electrodes are a critical input into electric arc furnace steel production, in which scrap metal is melted and refined into steel. We were concerned that the acquisition would facilitate coordination among the three remaining producers of large graphite electrodes for sale in the United States, and substantially reduce competition in their production. This is an industry that has been prosecuted in the past for collusion.

The Division filed the complaint to ensure that it could seek to enjoin closing of the acquisition by SGL Carbon in the event it prevailed in the auction process. That same day, the bankruptcy court determined that SGL Carbon's bid was not the highest and best offer at the auction and awarded the assets to C/G Electrodes Acquisition LLC, a bidder that stated its intention to maintain Carbide/Graphite Group's graphite electrodes business as an independent competitor. After receiving notice that C/G Electrodes had closed on the assets, the Division voluntarily dismissed its complaint.

In some instances, we have only learned about transactions after they have closed. Consummation will prevent neither our review nor enforcement efforts should the competitive impact of the merger or acquisition raise concerns. In April, the Division, along with the Commonwealth of Kentucky, filed a lawsuit seeking to compel the Dairy Farmers of America (DFA) to divest the interests it acquired last year in Southern Belle Dairy Company in a non-reportable transaction. The Department alleged that DFA's partial acquisition of Southern Belle – previously the only competitor in the region in which DFA did not own a stake – eliminates or reduces competitive choice for the dozens of school districts for whom the DFA and Southern Belle dairies previously competed. This lawsuit is pending.

Ensuring Compliance with the HSR Act

We continue to vigilantly enforce the Hart-Scott-Rodino Antitrust Improvements Act of 1976, or HSR Act, which is still the primary way we obtain information regarding potentially anticompetitive transactions. In the past six months, we have taken two important actions.

The first case, *United States v. Gemstar-TV Guide International, Inc.,* involved so-called "gun jumping" – illegal premerger coordination. In February, we filed a complaint and announced a settlement with Gemstar-TV Guide International, Inc. that required the company to pay a record $5.67 million in civil penalties and agree to certain restrictions to resolve our allegations that, prior to their merger in July 2000, Gemstar and TV Guide had fixed prices, allocated customers, and violated pre-merger waiting period requirements. In its Complaint, the Department alleged that beginning in June 1999, while they were negotiating a possible joint venture between them, the two companies entered into agreements, including a "slow roll" agreement, that reduced or eliminated competition between them. They later announced that they would merge in October 1999, and filed pre-merger notification forms pursuant to the HSR Act. During the time the DOJ was reviewing the transaction, prior to its consummation, Gemstar and TV Guide secretly agreed to allocate markets and customers, agreed on prices and material terms they would offer, and started to jointly conduct their IPG business.

The Division alleged that the "gun jumping" violated the HSR Act and Section 1 of the Sherman Act. The civil penalty reflects the statutory maximum of $11,000 per day (for each day in violation of the Act) per company, and represents the highest civil penalty ever paid in a "gun jumping" case. In addition to the civil penalty, the settlement requires the parties to provide customers that signed contracts with TV Guide during the pre-merger period a chance to rescind those contracts.

In a second case, *United States v. Smithfield Foods, Inc.*, filed in February, we sued Smithfield Foods, Inc., the country's largest hog producer and pork packer, for twice failing to comply with the HSR Act's premerger notification requirements before making certain acquisitions of stock of its competitor, IBP Inc., the country's second largest pork packer. The Act provides an exemption for certain stock acquisitions that are made "solely for the purpose of investment." In this case, however, we contend that the exemption does not apply because Smithfield was also considering and taking steps toward a Smithfield-IBP combination at the time of the acquisitions. We are seeking a civil penalty of $5.478 million from Smithfield.

III. CIVIL NON-MERGER ENFORCEMENT

Our civil non-merger enforcement efforts are directed at non-criminal conduct under the Sherman Act. In addition to the filed cases described below, the Division has several pending investigations, including examinations of joint ventures in on-line media, financial services, and electronic air passenger ticketing.

Competitor Collaborations

The Division remains active in examining, and, where necessary, challenging, horizontal collaborations. This past December, we settled *United States v. Mountain Health Care, P.A.*, when Mountain Health Care, an independent physicians organization headquartered in Asheville, North Carolina, agreed to cease its operations and dissolve. Mountain Health Care restrained price and other forms of competition among physicians in Western North Carolina by adopting a uniform fee schedule governing the prices of its participating physicians. Physicians and physician groups that normally would have competed with each other adopted a uniform price schedule and authorized Mountain Health Care to negotiate with health plans on their behalf. Mountain Health Care only agreed to contracts with managed care purchasers that incorporated the collectively set fees. These actions resulted in higher rates charged to health plans leading to higher health costs for ultimate consumers. In addition, Mountain Health Care neither clinically nor financially integrated its physicians to create any potentially countervailing efficiencies. Under the settlement, Mountain Health Care must cease negotiating and contracting with health care plans on behalf of participating physicians.

In *United States v. MathWorks*, we challenged an agreement between two head-to-head competitors in the design software field: MathWorks and Wind River. Competition between these two had resulted in significant technical improvements and price reductions for consumers. But their collaboration agreement on the sale and development of software gave MathWorks control over the prices, marketing, support, and future development of the Wind River software and required Wind River to stop its own development and marketing. Shortly after the agreement, Math Works announced that it would undertake no further development of the Wind River products. We reached a settlement with MathWorks pursuant to which a trustee was appointed to sell the Wind River assets, which were successfully sold to National Instruments.

In a similar "takeout" case, two publishers of alternative news weeklies, apparently tired of competing with each other in Cleveland and Los Angeles, two cities in which their operations overlapped and where their profits had been "pinched," simply "swapped": each agreed to withdraw from a market, which guaranteed the remaining party a monopoly. They papered the agreement as though it were a merger, one paid the other $2 million, and the other paid $11 million. But it was not a merger. The agreements provided for no meaningful integration of assets, such as logos, articles, or staff. Instead, when they reached their agreement, one shut down in Cleveland, and the other shut down in L.A. We reached a settlement that required each company to sell the critical assets of the former publication to an entrant capable of restoring the lost competition.

Pending Litigation

One of our civil non-merger cases – an exclusive dealing case – is pending following a bench trial in the U.S. District Court in Delaware that concluded last September. In *United States v. Dentsply*, we challenged two exclusive dealing practices by Dentsply, which has an 80 percent share of the artificial tooth market in the United States and sells all of its teeth through dealers. Under Dentsply's dealer agreements, if a dealer selling Dentsply teeth begins selling a competitive brand, Dentsply pulls its teeth from that dealer (no pun intended). In addition, Dentsply has a practice of requiring new dealers to drop some or all competitive brands in order to get the Dentsply tooth business in the first instance. We await the district court's decision.

Consent Decree Enforcement

As you know, the Division and nine states reached a settlement with Microsoft in November 2001. In November 2002, Judge Colleen Kollar-Kotelly in the United States District Court for the District of Columbia approved that settlement with a minor revision and entered it as a Final Judgment. Notably, the Judge commended the quality of the Proposed Final Judgment, stating that it "adopt[ed] a clear and consistent philosophy such that the provisions form a tightly woven fabric . . . tak[ing] account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations." Nine other states had decided not to join the settlement, and pursued a separate action seeking additional remedies at trial on remand. After the trial on remand, however, Judge Kollar-Kotelly rejected virtually all of the non-settling states' additional proposals and entered a final judgment in that case with remedies nearly identical to those in the Division's Final Judgment obtained by the settlement. Two states, Massachusetts and West Virginia, have appealed the judgment received by the non-settling states. The Division is not a party to that appeal.

The Division has a dedicated, experienced team of lawyers and economists working, together with 17 state attorneys general, to ensure full compliance with the consent decree. The Division has also undertaken to issue, as appropriate, Microsoft Consent Decree Compliance Advisories, to inform the public with regard to decree issues and events to assist our enforcement efforts. In these and other ways, the Division has been active and responsive to concerns from the public in carrying out our responsibility to ensure Microsoft's compliance with all the terms of the settlement. There have been many instances in which Division input, as informed by any concerns expressed by the public, has directly led to changes in Microsoft's actions taken in compliance with the settlement decree. The Division also has initiated with the court a procedure for periodic status reports and court conferences on compliance and enforcement activities involving the Division, the settling states, and Microsoft.

IV. APPEALS

The Division has several important appeals pending. In *United States v. Microsoft*, No. 03-5030 (D.C. Cir.) (*en banc*), the Division is an appellee along with Microsoft in an appeal brought by two non-party, computer-industry trade associations that contest the District Court's denial of their motion to intervene for purposes of appeal in the District Court proceedings on approval of the settlement. In the District Court, the Division opposed the motion to intervene because the trade associations' comments were considered with all the others during the Tunney Act proceedings, and there was no basis for these two associations to specially intervene. Although the Division is a joint appellee with Microsoft, the Division will file a separate brief next Wednesday, defending the denial of intervention. Oral argument is scheduled for November 4.

The Division's case against American Airlines, *United States v. AMR Corporation*, is also pending on appeal. The Division alleged in its complaint that American Airlines had violated Section 2 of the Sherman Act by adding money-losing capacity to drive lower-cost competitors out of four of American's Dallas-Fort Worth Airport routes. The district court granted American's motion for summary judgment and the Division appealed. Among other things, we argue on appeal that the district court failed to understand that American's capacity increases were predatory because the increases made no business sense unless they excluded rivals and that American was unlikely to recoup the losses it incurred as a result of those capacity increases. The Tenth Circuit Court of Appeals heard oral argument on September 23, 2002, and we await that decision.

Finally, a decision in *United States v. VISA USA, Inc.*, which was argued in the Second Circuit Court of Appeals on May 8, 2003, is also pending. Count One of the government's complaint in this civil antitrust case concerned certain governance rules of Visa and MasterCard that allowed members of each to sit on the Board of Directors of either Visa or MasterCard, but not both. The district court held that the government had failed "to prove that dual governance has significantly diminished competition and innovation in the credit and charge card industry." The Division did not appeal the district court's decision on this Count. Count Two of the complaint alleged that Visa and MasterCard limited competition by forbidding their members from issuing credit cards on competing networks. The district court agreed. On appeal, defendants argue, among other things, that they lack market power, that any restraint is vertical rather than horizontal, and that their rules have no anticompetitive effects.

V. BUSINESS REVIEWS

Under the business review procedure, a firm may describe proposed business activity to the Division and then receive a letter stating whether the Division would challenge the action as a violation of the federal antitrust laws. For companies, the review procedure provides a valuable tool for testing the waters with proposed ventures or conduct that might be actionable under the antitrust laws--before resources are fully committed or irreversible actions are taken. In addition, a company may learn at the outset what, if any, steps it can take to remedy the competitive problem with the proposed conduct. For the Division, business reviews are an additional avenue–besides challenges and litigation–for providing guidance to the business community. Last October, the Division updated the index of the review letters, going back to 1968, and that index, as well as a digest of all the letters issued since 1968, are on the Division's website. In addition, all of the review letters issued since 1993 are available in their entireties on our website.

Among the recent business review letters the Division has provided are:

* a business review letter stating our intent not to challenge at that time, a proposal by Texas-based BroChem Marketing Inc. (BroChem) to establish a computer database aimed at giving chemical distributors efficient access to the information they need when marketing chemicals sold to them by chemical producers. The Division's statement came after BroChem modified its original proposal by agreeing to establish computer safeguards to ensure that price-sensitive information is not accessible to competitors. In addition, BroChem modified its proposal to ensure that the database will not include information added by BroChem that could facilitate price coordination.
* a business review letter in which we stated our intent not to challenge a proposal, which permitted the American Trucking Associations (ATA) to develop and circulate a model contract to its members to help increase efficiency in contract negotiations and reduce transaction costs. The ATA will offer the proposed model contract to its members, who, in turn, will use the model contract provisions in negotiations with their customers. The features critical to non-suit were: (i) the use of individual provisions or the entire model contract would be left to the unilateral, voluntary decision of each carrier; and (ii) all rate-related terms and charges in the model contract would be left blank for individual negotiation by the carrier and its customers.

* a business review letter allowing the 3G Patent Platform to establish, without challenge at that time, a patent licensing and evaluation structures -- commonly referred to as “patent platforms” -- for “Third Generation” (3G) wireless telecommunications technology. The original proposal raised potentially significant competitive concerns because it included a single patent platform and uniform licensing terms for all five competing 3G wireless technologies, which likely would have reduced competition among the different technologies and created the opportunity for collusion among licensees of 3G technologies. The Division agreed to not to challenge the proposal after the Partnership agreed to separate the single patent platform into five largely independent platforms, one for each competing 3G wireless technology. The modified platform arrangements likely will not impede competition because each platform will include only the essential patents related to a single 3G technology. The limited shared functions among the five platforms will exclude competitively sensitive activities, such as setting royalties for standard licenses, and will preclude the sharing of competitively sensitive information. No patent holder will be compelled to join a platform if it did not have its patents evaluated or receive licenses under the platform terms. Licensors and licensees will remain free to negotiate independently to license 3G technology rather than using standardized platform agreements.
* a business review letter that stated the Division’s intent not to oppose at that time a proposal by the American Welding Society ("the Society") to establish a

standard for ensuring the interoperability of the various devices that make up a robotic welding cell. Significantly, the utilization of the standard adopted by the Society will be voluntary. Purchasers and manufacturers will remain free to purchase or produce robotic welding cells that do not satisfy the Society's standard.

* a business review letter that allowed for a group of private sector firms to form a consortium to offer taxpayers an easier way to obtain free electronic tax preparation and filing services in coordination with the Internal Revenue Service (without a challenge by the Division at that time). Our review found that the consortium, as proposed, would likely pose no threat to competition in the market for providing tax services to individuals. The participants in the consortium will each continue to offer their own electronic tax preparation and filing services in competition with each other outside the consortium structure, and to otherwise compete with each other and the consortium. The consortium will be open to all providers of electronic tax services to individuals who meet IRS-approved requirements, provided they agree to offer free electronic tax preparation and filing.
* a business review letter indicating that the Division had no current intention of challenging the Washington State Medical Association's ("WSMA") proposal to conduct a fee and reimbursement survey of physicians and physician assistants and to publish the survey results. With respect to surveying members regarding physician charges, we found that the proposal complies with the joint DOJ/FTC

Health Care Guidelines because the survey will be managed by the WSMA professional staff; will utilize underlying data that is at least three months old at the time that the survey results are disseminated; and will aggregate the underlying data in a manner designed to prevent the identification and misuse of individual provider information. With respect to surveying members regarding insurer reimbursement data, we found that the survey raised the possibility of anticompetitive effects, in particular because the WSMA plans to identify average reimbursements paid by individual insurers, which could lead to boycotts or collusive pricing. The WSMA asserted, however, that there were procompetitive justifications for the survey and that it intends to take active steps to prevent use of the survey for anticompetitive conduct. The review letter noted our concerns, but on balance, indicated the Division's current intent not to challenge the proposal. That position is, of course, susceptible to reversal if we learn that our concerns were borne out in practice.

VI. COMPETITION ADVOCACY AND POLICY

The Division also serves an important role as a competition advocate within the federal government, in state governments, in private lawsuits through amicus filings, and in the international arena.

Federal Government

The Division has devoted substantial resources to working with the Federal Communications Commission (FCC) in the "Section 271" process. The AT&T consent decree that resolved the antitrust suit brought by the Division prohibited the independent Bell Operating

Companies (BOCs), from providing in-region long distance services. The Telecommunications Act of 1996 continued that prohibition until the BOCs met specific requirements designed to demonstrate that the local market was open to competition. The statute provides that in considering whether to approve a BOC's application for long distance authority under Section 271 of the Act, the FCC must consult with the Department of Justice and give "substantial weight" to our assessment of competitive conditions and whether the BOC should be permitted to provide in-region long distance services.

We have taken this responsibility seriously, and developed a standard by which we support Section 271 applications when a BOC has demonstrated that local markets in a state are "fully and irreversibly open to competition." To perform this sophisticated analysis, attorneys in our Telecommunications and Media Section, together with Division economists, all of whom have substantial expertise in this area, review the formal record at the FCC and typically engage in extensive discussions with BOCs, competing local exchange carriers, state commissions, and FCC staff. To date, the Department has provided the FCC with 35 evaluations of applications for long distance covering 43 states and the District of Columbia. In the last year alone, the Division submitted 13 evaluations covering 29 states. Overall, six of our evaluations recommended denial, 17 recommended qualified approval, and 12 did not recommend approval or denial. The FCC has granted 271 authority covering 41 states and the District of Columbia.

The Division has also served as competition advocate with the Department of Transportation (DOT) in certain transportation matters. One context in which this advocacy occurs involves domestic airline alliances, which the Division and DOT each has authority to independently investigate. The Division carefully reviews such alliances to determine whether they potentially violate Section 1 of the Sherman Act while DOT’s review is pursuant to the Federal Aviation Act. The Division attempts to coordinate its investigation with DOT and, in the advocacy context, influence DOT's competitive analysis through meetings, telephone conferences, and sharing of information, to the extent permitted by the parties.

In its own enforcement, in January, the Division reached an agreement with Northwest, Continental, and Delta Airlines after investigating their proposed marketing alliance and codeshare agreement. The Division approved the alliance, subject to certain conditions, including: (i) a prohibition on codesharing on one another's flights wherever they offer competing nonstop service, such as between their hubs; and (ii) a requirement that the carriers act independently when setting award levels or other benefits of frequent flyer programs or when competing for corporate contracts. There is no sharing or pooling of revenues, so each carrier continues to compete for passengers, and the Division’s conditions prohibit conduct that the alliance carriers could use to collude on fares or otherwise reduce competition. We believe the conditions will help preserve competition by preventing signaling and other forms of illegal coordination, while preserving the alliance’s procompetitive potential.)

Under appropriate circumstances, the Division also provides input to rulemaking proceedings. For example, earlier this week, the Division submitted Reply Comments in response to DOT’s notice of proposed rulemaking concerning the rules that govern airline computer reservations systems (CRS). The comments advised that evidence that many of the rules have been ineffective in achieving their goals, together with changed conditions in the CRS industry, justify allowing certain rules regulating CRSs to expire. The Division also recommended, however, that DOT retain rules that prevent CRSs from biasing their information against particular airlines and rules that require equal treatment in the updating of airline information in their systems.

State Governments

Recently, we have continued our work jointly with the Federal Trade Commission in countering efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of opinions and laws by state courts and legislatures relating to the unlicensed practice of law. We have urged the American Bar Association ("ABA") and the States of Georgia, Kentucky, Virginia, Rhode Island, and North Carolina to reject such restrictions, through letters and through an amicus curiae brief filed with the Kentucky Supreme Court. The ABA has proposed a very broad model definition of the practice of law. If adopted by state governments, the definition likely would reduce or eliminate competition between nonlawyers and lawyers to provide a number of services, leading to higher prices and a reduction in competitive choices for consumers. For example, the model definition could be interpreted to prevent lay service providers from closing real estate loans; real estate agents from explaining the smoke detector or termite laws in their states; tenants' associations from informing renters of their legal rights and responsibilities; and software makers from selling will-writing and other software. The proposed definition also could prohibit income tax preparers, accountants, investment bankers, and other business planners from providing advice to their clients that includes information about various laws. The FTC and the Division have also expressed concern that the model definition likely would prevent consumers from benefitting from lay competition that may better suit their individual needs. For example, in the area of real estate closings, nonlawyers may offer to close loans at hours or locations that are more convenient for consumers. Likewise, consumers may choose to use will-making software because it is relatively easy and convenient to use.

Amicus Advocacy

Our federal and state antitrust laws form a patchwork of antitrust enforcers that includes not only federal and state enforcers, but also private parties. Private antitrust cases generate case law every bit as much as we do – if not more – and we often are asked by courts, including the Supreme Court, or by private parties to weigh in. Sometimes (through rarely) we identify an antitrust issue that is so important that we choose to wade in uninvited.

Several recent briefs we filed present important antitrust issues. First, in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, together with the FTC, we filed a brief in support of defendants petition for rehearing en banc in the D.C. Circuit. This private action arose out of the Division's criminal investigation of and resulting multiple guilty pleas from the global vitamins conspiracy. *Empagran* was brought as a class action on behalf of foreign corporations that purchased vitamins abroad from non-U.S. vitamin companies for delivery outside of the United States. The district court had dismissed the claims for lack of subject matter jurisdiction, holding that although plaintiffs had alleged that the vitamins cartel had a direct effect in the United States, that effect was not the basis for plaintiffs' alleged injury, as required by the Federal Trade Antitrust Improvements Act of 1982 (FTAIA). The D.C. Circuit reversed, in a 2-1 decision, holding that the FTAIA only requires that the harmful effect on U.S. commerce must give rise to a claim by someone, even if not the foreign plaintiff before the court.

In our brief in support of rehearing, which the D.C. Circuit requested, the Department and the FTC urged the Court to grant rehearing en banc because the decision deepens a circuit split on an issue of great importance regarding the scope of the U.S. antitrust laws. We also urged the Court to grant rehearing because, as we argued in an amicus brief filed in *Statoil ASA v. HeereMac*, in the Supreme Court, the agencies take the position that the FTAIA bars private suits when the claims do not arise from the U.S. effects of the allegedly anticompetitive conduct. Not only do the FTAIA's statutory text, history, and purposes support that interpretation, but the Court's decision would create a disincentive for companies and individuals to report violations and seek leniency under our Corporate Leniency Policy and would burden U.S. courts with wholly foreign claims.

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, the Department, again together with the FTC, first filed an amicus brief urging the Court to grant certiorari on Verizon's appeal from a Second Circuit decision, and then another brief after the Court granted cert. The appellate court held that a customer of AT&T's local phone service had stated an antitrust claim for monopolization under Section 2 of the Sherman Act when it alleged that Verizon had not fulfilled its duties to competitors, as set forth in the 1996 Telecomm Act. The court relied on the "essential facilities" doctrine, finding that a monopolist has a duty to provide rivals with reasonable access to facilities the monopolist controls without which one cannot compete. The court also held that plaintiff had stated a claim for monopoly leveraging.

In our briefs, we submit that the Second Circuit's decision dramatically expands antitrust liability for failure to assist rivals and, in doing so, that it conflicts with the law of other circuits. The decision is erroneous because it imposes duties on rivals without requiring that the firm's challenged conduct be exclusionary or predatory – i.e., that the refusal to deal does not make economic sense except as an effort to diminish competition. On the monopoly leveraging claim, the decision is erroneous because it means that mere use of monopoly power is enough to state a claim under Section 2, which is inconsistent with Supreme Court precedent. It also suffers from the same problem as the essential facilities rationale in that it does not require exclusionary or predatory conduct. We are hopeful the Supreme Court will clarify these Section 2 issues.

In *Stock Exchange Options Trading Antitrust Litigation*, 317 F.3d 134 (2d Cir. 2003), the Division filed an amicus brief supporting a petition for rehearing en banc. In that brief, the Division argued that the panel's holding that the antitrust laws had been repealed with respect to the conduct at issue conflicts with a long line of Supreme Court decisions establishing that because "[t]he antitrust laws represent a fundamental national economic policy, . . . [i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Nat'l Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1988).

<u>International Initiatives</u>

There are now roughly 100 national and regional antitrust regimes in the world, with roughly 65 requiring some form of premerger notification. While this is a positive development, at least in part resulting from our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm some of the very competitive values that antitrust is meant to protect. In addition, as the number of antitrust regimes increases, the chances that there will be policy and enforcement divergences among enforcers also increases. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial policy or protectionism, and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement, and to promote convergence around sound principles and practices.

In Fall 2001, we, along with the FTC, were among the lead jurisdictions to launch the International Competition Network ("ICN"), a global network of competition authorities focused exclusively on competition. The ICN has two goals: (1) to provide support for new competition agencies both in enforcing their laws and in building a strong competition culture in their countries, and (2) to promote greater convergence among these authorities by working together and with interested parties in the private sector to develop guiding principles and "best practices" to be endorsed and then implemented voluntarily. The ICN, which was formed by 14 jurisdictions, now includes 70 jurisdictions on six continents.

The ICN exists as a "virtual" network through which agency heads commission and guide the efforts of working groups focused on specific competition law issues. The working groups themselves are directed by government personnel, who receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. The working groups' recommendations will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

For the first annual ICN conference held last September, in Naples, Italy, nearly 60 antitrust agencies from around the world participated by sending at least one representative, including (in addition to the "usual suspects" from the United States, Canada, Europe, and

Australia) representatives from nations such as Armenia, Croatia, the Czech Republic, Hungary, Korea, Latvia, Tunisia, and Zambia, many of their trips funded by nations with more robust budgets.

The ICN initiated two major projects in the first year of its existence. First, the ICN's, Merger Working Group addressed several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks pursuant to which mergers are reviewed around the world, and investigative techniques. As I said before, roughly 65 jurisdictions have adopted merger notification regimes of some variety. Notification requirements have the benefit of giving antitrust authorities the ability to identify, investigate, and potentially remedy problematic transactions before they close, protecting competition for the benefit of consumers. But, of course, I do not need to tell you that there are costs to merger notification — costs in determining where to notify, costs in notifying and providing information, and costs in increased uncertainty for the transaction. Given that the vast majority of transactions are either pro-competitive or competitively neutral, it is important that merger notification and review schemes not impose unnecessary costs or bureaucratic roadblocks that might deter efficient, pro-competitive mergers.

The ICN has taken an important first step in rationalizing the current thicket of multi-jurisdictional merger enforcement in a way that well-serves the competitive process worldwide. The participating nations in Naples adopted eight Guiding Principles For Merger Notification and Review and three Recommended Practices For Merger Notification Procedures, which the Merger Working Group had proposed. Consistent with the informal and project-oriented nature of the ICN, these principles and practices are aspirational and non-binding. Jurisdictions must now implement them through legislation, regulation, or changes in practice, as appropriate.

The eight Guiding Principles are: (1) Sovereignty, (2) Transparency, (3) Non-discrimination on the basis of nationality, (4) Procedural fairness, (5) Efficient, timely, and effective review, (6) Coordination, (7) Convergence, and (8) Protection of confidential information.

We believe that adherence to these guiding principles will make the merger review process more efficient and effective, while at the same time reducing delay and the investigative burden on merging firms.

The three Recommended Practices are:

> (1) Nexus to Reviewing Jurisdiction. Jurisdiction should only be asserted over those transactions that have an appropriate nexus with the jurisdiction concerned. Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification, and the nexus should be based on activity within the jurisdiction, as measured by reference to the activities of at least two parties to the transaction or of the acquired business in the local territory.
>
> (2) Notification Thresholds. Notification thresholds should be clear and understandable and should be based on objectively quantifiable criteria and information that is readily accessible to the merging parties.
>
> (3) Timing of Notification. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed

> transaction. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.[3]

The members have also developed additional Recommended Practices on several other subjects, with the intention of adopting them at the next annual conference in Mexico in June.

The key to making both the Guiding Principles and Recommended Practices meaningful is implementation. At the Antitrust Division, as well as at the FTC, we plan to lead by example by publicizing the Principles and Practices as I am doing today and by comparing our own procedures to them. We urge the private sector, both in North America and abroad to draw the attention of foreign legislatures and opinion makers to these ICN achievements and to urge jurisdictions to take steps to implement the consensus reached in Naples. We recognize that there may be some principles and practices that some jurisdictions may not be able to implement at this time. Nonetheless, we would consider our efforts a success if the ICN guiding principles and practices become well-accepted in the international arena, even if not all jurisdictions are able to adapt their systems to them.

Also on the merger front, the ICN Merger Working Group is concentrating on investigative techniques for merger review. In November, we hosted a conference in Washington for merger officials from 41 agencies representing 36 jurisdictions, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes and the analytical framework for merger review. And, in an effort to

[3] *See* http://www.internationalcompetitionnetwork.org/practices.pdf.

make merger laws more transparent and accessible, the ICN is compiling each jurisdiction's merger-related laws and materials on dedicated web pages, which will be hyperlinked to the ICN website, so that the public will have ready access to this information.

With respect to the second ICN initiative, the head of the Mexican antitrust agency led a working group on competition advocacy, a subject that is particularly important to developing countries and countries in transition. This working group produced a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis, among other things, for deriving recommended practices for competition advocacy.

New ICN projects include a Capacity Building and Competition Policy Implementation project that will study the needs of developing countries and the technical assistance that developed nations might provide, and a new round of Recommended Practices for Merger Notification Procedures.

<u>Competition Policy Initiatives</u>

The Department has also actively pursued a diverse collection of important policy initiatives recently.

IP Hearings. This past November we concluded more than 20 days of hearings over a period of six months examining Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. These hearings, which we conducted jointly with the Federal Trade Commission, represent the first public hearings the Division has ever hosted.

Over the course of the hearings, we heard testimony from leading business people, attorneys, and economists from the private, public, and academic sectors. The topics our esteemed panelists addressed included:

- background on the patent process;
- patent pools and cross-licensing;
- standard setting;
- refusals to license intellectual property;
- patent settlements;
- IP bundling/extension of IP rights;
- analyzing ambiguous IP rights; and
- international comparative law perspectives.

We are in the midst of drafting our report, which we are confident will meet our goal of enhancing understanding at the agencies and among practitioners regarding how antitrust and intellectual property law and policy impact innovation and consumer welfare.

Health Care Hearings. In February, we began another set of hearings, again co-hosted with the FTC, addressing Health Care Competition Law and Policy. This series will include approximately thirty days of hearings over eight months, including approximately seven days addressing consumer protection topics.

We have encouraged participation from a diverse cross-section of the health care sector. Our panels often include representatives from insurance companies, physician groups, and hospitals, as well as leading health care economists and lawyers from the private sector and academia.

A key enforcement priority for the Division remains the evaluation of competition among health insurers. We were thus pleased to be able to assemble panelists to delve into issues such as health insurance monopoly and "monopsony," which is a term used to describe buyers' exercise of substantial market power over sellers. We have also had productive sessions on a wide range of topics addressing physician and hospital issues. We will conclude the hearings in October and draft a joint report thereafter.

Internal Policy Efforts. We are also pursuing internal policy initiatives designed to sharpen our analytical skills and improve our investigative techniques.

We have now rolled out internally an approximately 200-page Coordinated Effects policy manual designed to serve as a resource for Division staff attorneys and economists. The response among staff and management alike has been quite enthusiastic. As former AAG Charles James explained during a speech to the ABA Antitrust Section last summer, after issuance of the 1992 Merger Guidelines, unilateral effects became the predominant theory of economic harm asserted in government merger investigations and challenges. Unilateral effects cases are certainly important. Former AAG James warned, however, that "if we reach too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis, we might miss important cases that should be brought or craft our relief too narrowly in cases that we actually pursue." Our internal policy manual should certainly allow us to sharpen our analytical skills, improve the quality of our analysis, and increase the likelihood that we will prevail in transactions challenged based upon coordinated effects theories.

Our ongoing study of merger remedies has also been productive, and we are continuing to revise a promising draft of our Remedies Manual, which relies on sound legal and economic principles to provide Division staff attorneys and economists a framework for fashioning and implementing appropriate relief in merger cases.

We have also made progress in our ongoing project to evaluate and institutionalize "best practices" for conducting merger investigations. Once completed, this project, should result in a manual that will permit our staffs to use techniques that have proven most productive in real investigations, and avoid those techniques that have been unsuccessful.