FY 2005 — Changing of the Guard Unlikely to Alter Course in U.S. M&A Antitrust Review

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In 2005, global M&A activity reached approximately 32,568 announced transactions valued at $2.7 trillion, with the United States alone accounting for 9,045 announced transactions valued at $1.13 trillion.[1] This pace represents a 38.4 percent increase in M&A activity globally over 2004 and a 33.3 percent increase in U.S. M&A activity. The Federal Trade Commission ("FTC") received 1,695 notifications under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR" Act) for fiscal year ("FY")[2] 2005, up 16 percent from 1,454 for FY 2004.[3] In FY 2005, the FTC and the Department of Justice ("DOJ") combined issued approximately fifty Second Requests (i.e., about 3 percent). As discussed in greater detail below, the agencies, on a combined basis, in FY 2005 obtained relief in fourteen transactions (eleven of these transactions were notified in FY 2005), challenged another transaction (that settled during litigation), and, in another matter, the parties abandoned their transaction, reportedly due to antitrust concerns. Taking into account the consents released during the first four months of FY 2006 for transactions announced during FY 2005, in approximately one-third of the transactions in which a Second Request issued in 2005, the agencies took further action. These results are consistent with the overall results over the last few years of enforcement history.[4]

Both agencies, as well as the competition authorities and practitioners from about eighty other countries, participated in the Fourth International Competition Network ("ICN") meetings held in Bonn, Germany on June 6-8, 2005. The ICN's Merger Working Group consists of three subgroups:

(1) notifications and procedures;
(2) analytical framework; and

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(3) investigative techniques.[5]

The notifications and procedures subgroup issued an implementation report that indicates that over 50 percent of ICN members with merger review laws have made or planned revisions to their processes to conform with the recommended practices.[6] The notification and procedures subgroup submitted two additional "recommended practices," relating to:

(1) remedies;[7] and
(2) competition agency powers.[8]

The subgroup also developed a model waiver of confidentiality form and completed a comparative study on merger notification filing fees.

The analytical framework subgroup distributed a draft checklist on merger guidelines and presented a study of merger remedies. The investigative techniques subgroup finalized and presented key investigative tools in a handbook.

This article discusses U.S. M&A antitrust review activity as well as the policies pronounced by the federal agencies during FY 2005.

AGENCIES' LEADERSHIP CHANGES UNLIKELY TO AFFECT MATERIALLY M&A ENFORCEMENT POLICY

The leadership of both agencies has been in flux this year. Chairman Deborah Platt Majoras joined the FTC, effective August 16, 2004, and Commissioner Jonathan Leibowitz's term began on September 1, 2004.[9] Commissioner Orson Swindle departed on June 30, 2005, with the President nominating William Kovacic on July 28, 2005 to replace him,[10] and the Senate confirming that nomination on December 17, 2005.[11] In the interim, the FTC had only four members, and Chairman Majoras was recused from several matters, which resulted in one two:one decision to bring an action in the *Aloha* matter,[12] and in one matter both Chairman Majoras and Commissioner Pamela Jones Harbour were recused because of their husbands' respective employments. Commissioner Thomas Leary's term expired in September 2005, but he remained in the position until the President nominated J. Thomas Rosch to succeed him,[13] and the Senate confirmed that nomination in December 2005.[14] The FTC commenced 2006 with a full slate of commissioners.

At the U.S. DOJ, Assistant Attorney General ("AAG") R. Hewitt Pate departed on June 21, 2005 and since that time Thomas O. Barnett has been the

acting AAG while awaiting confirmation by the Senate as AAG.[15] On September 1, 2005, Congress confirmed Gerald F. Masoudi as the Deputy Assistant Attorney General in charge of International, Policy, and Appellate Matters, replacing Makim Delrahim.[16] On February 2, 2005, Scott D. Hammond became the Deputy Assistant Attorney General for Criminal Enforcement, replacing James M. Griffin, who retired from the DOJ in December 2004.[17] Marc Siegel replaced Hammond as the Director of Criminal Enforcement for the Division.

As reflected in the ABA Section of Antitrust Law's *The State of Federal Antitrust Enforcement 2004*, antitrust has found "a middle ground reflecting moderately aggressive enforcement, accompanied by sensitivity to efficiencies, preservation of incentives to innovate and global competition considerations."[18] Thus, as noted by former President Clinton appointee Robert Pitofsky and former President Bush appointee Timothy Muris, the policies under both administrations did not significantly differ.[19] Given the extensive antitrust expertise of the new leadership, it seems unlikely that changes will occur in any but the closest of decisions, and even then, to the extent that an individual official decides a matter in one direction or another, will most likely be decided not on the existence of any fundamental differences in principles or objectives but a difference in how they view the facts and the likely effects of the conduct in the particular matter.

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NOTEWORTHY TRENDS AT BOTH AGENCIES

Agencies continue to issue press releases in certain cleared transactions

Both agencies have provided greater transparency and guidance in their decision-making process through the issuance of statements in certain transactions not requiring relief and more detailed press releases in matters in which the agency obtained relief. These statements cite, among other things, entry[20] and efficiencies[21] as the bases for not challenging the respective transactions. Also, the recognition of changed market conditions that mitigated the potential for the exercise of market power (a/k/a the *General Dynamics* defense) appears to have featured prominently in several agency decisions clearing high profile transactions without requiring any relief (albeit after protracted investigations).[22]

In the Federated/May transaction, for example, the FTC deviated from the previously established market definition consisting of traditional or conventional department stores,[23] a definition that would have resulted in this transaction creating "high levels of concentration among conventional department stores in many parts of the country, and thus facially appeared to raise issues of competitive concerns."[24] The FTC statement detailed the evolution of the retail industry and concluded that the evidence of pricing patterns "provides the most compelling, objective demonstration that … conventional department stores are not in a distinct market."[25] Instead, the FTC found that department stores face competition from multiple retail formats and must take these alternative formats into account when they make inventory and pricing decisions. Accordingly, the FTC's statement clearly reflected a diametric shift in the treatment of department store transactions due to the changes that have occurred in the retail industry in the last decade.[26]

Agencies continue to be successful in consummated merger challenges

The HSR Act provides the federal agencies with the opportunity to investigate, and, where appropriate, to challenge, preconsummation, under Clayton Act Section 7, those transactions that likely would substantially lessen competition. The agencies can also challenge a consummated transaction in a federal district court, or, in the FTC's case, also as an administrative case before an Administrative Law Judge ("ALJ"). Although still fairly uncommon, the FTC brought a number of these challenges in the last few years.[27] Most of these challenges settled before trial; two remained unresolved at the outset of FY 2005.

On October 25, 2001, the FTC challenged Chicago Bridge and Iron Company's acquisition of Pitt-Des Moines, Inc.'s industrial and water storage tank assets; a full hearing commenced before the ALJ on November 12, 2002. On June 12, 2003, the ALJ ruled in favor of the FTC and ordered Chicago Bridge to unwind the acquisition.[28] On November 12, 2003, Chicago Bridge argued before the FTC that the ALJ erred in concluding that its 2001 acquisition was illegal because it did not take into account changes in the marketplace, including the entry of global companies.[29] The FTC's counsel responded that foreign firms may have won contracts since the merger, but only because prices had risen sufficiently that the bids by overseas companies were now competitive.[30] Thus, the appeal focused on the extent to which entry of other providers in this matter restored competition. Another key aspect of the appeal centered on remedies, with the FTC staff seeking not only the divestiture of the acquired facilities, but

also a portion of the tank construction contracts and personnel required to build and design the tanks even though such a remedy would force Chicago Bridge to pay customers to break commercial contracts and to incentivize employees to join the new entity.[31]

Pending the appeal, the FTC staff became aware of Chicago Bridge's decision to close a Provo, Utah facility.[32] In an emergency motion to the FTC, the FTC staff argued that closing the facility would significantly impair its ability to remedy the competitive harm caused by the 2001 transaction if it were to prevail in the appeal.[33] The staff believed that elimination of these facilities and the workers would lower the value of the divested assets and make it less likely that the buyer would become a successful new competitor. On January 2, 2004, the FTC approved an interim order that:

(1) forbids Chicago Bridge from altering in any way the assets it acquired, except due to the ordinary course of business or wear and tear; and
(2) requires Chicago Bridge to notify the FTC at least sixty days before disposing of any assets.[34]

On May 10, 2005, the FTC issued its opinion, rejecting most of Chicago Bridge's arguments that competition had grown in the construction of liquefied gas tanks and other equipment and that, accordingly, it should be relieved of its obligation to divest enough assets to create a viable competitor. The FTC's opinion indicated that:

> Respondents' entry argument … misses a crucial point—the fact that actual or potential entry constrains the monopolist's ability to increase price without limit does not show that competition lost from an acquisition has been replaced. … Where a new entrant has some ability to compete, but lacks the ability to restore the competition lost from an acquisition, a monopolist will not necessarily lower its price to the level that prevailed before the acquisition. To do so would mean foregoing monopoly profits. We see this dynamic in the facts of this case. … CB&I has adhered to an unwavering policy of insisting on sole-source contracts post-acquisition … [35]

In addition, the FTC noted: "As numerous courts have observed, 'At a high enough price, even poor substitutes look good to the consumer.'"[36]

Chicago Bridge also raised procedural concerns regarding the imposition of the remedy without being provided ample opportunity to raise issues it had with the relief imposed by the ALJ. Although somewhat dismissive of the claims, the

FTC indicated a willingness to consider Chicago Bridge's arguments regarding the scope of the definition of "Relevant Business" as being too encompassing.[37]

On February 10, 2004, the FTC filed an administrative complaint alleging that the January 2000 hospital merger between Evanston Northwestern Healthcare Corporation ("ENH") and Highland Park Hospital resulted in significantly higher prices being charged to health insurers, and, therefore, higher costs to purchasers in two geographic markets:

(1) northeastern Cook County, Illinois; and
(2) southeastern Lake County, Illinois.[38]

ENH argued, among other things, that Highland Park was losing money prior to the acquisition, and that ENH invested approximately $85 million in improvements to the hospital, thereby justifying the price increases. On October 20, 2005, ALJ McGuire ordered ENH to divest Highland Park.[39]

The DOJ has also challenged transactions post-consummation in a federal district court, most recently appealing to the Sixth Circuit the October 25, 2005 dismissal of its case on summary judgment in *Dairy Farmers Association* ("DFA").[40] In addition, on August 8, 2005, the DOJ announced that it had reached a settlement with Waste Industries USA Inc. in Norfolk, Virginia under which, among other things, Waste Industries will sell certain waste collection assets it had acquired in August 2003.[41]

FTC OBTAINS RELIEF IN TEN TRANSACTIONS

As in FY 2004, the FTC's merger enforcement activities in FY 2005 predominantly involved transactions in two industries:

(1) pharma/health care; and
(2) petroleum.

The FTC also entered into consents to resolve concerns raised by the following proposed transactions:

(1) Cemex, S.A./RMC Group plc;[42]
(2) Cytec Industries Inc./UCB SA's Surface Specialties division;[43]
(3) Penn National Gaming, Inc./Argosy Gaming Company;[44]
(4) OxyChem-Vulcan;[45] and
(5) Procter & Gamble/Gillette.[46]

In addition, the parties abandoned one transaction reportedly on the basis that the FTC would seek to block the transaction.[47] The FTC has been significantly more receptive to post-consummation divestitures in the last few years than during the Clinton years, with only about a half of the FTC's consents entered into during FY 2005 continuing to provide for an upfront buyer.[48]

Pharma/health care industry consents

The FTC has significant expertise in evaluating pharmaceutical/medical device transactions and entering into consent decrees that resolve the concerns raised in discrete overlapping therapeutic categories. The two pharmaceutical consents entered into by the FTC during this FY appear to be consistent with this approach, but, as discussed below, the FTC staff exhibited some flexibility in the remedy required of the parties in the Genzyme matter to permit the transaction parties to retain the use of the drug in certain non-overlapping operations.[49]

Genzyme/Ilex

On December 20, 2004, the FTC entered into a consent order in connection with Genzyme Corporation's proposed acquisition of Ilex Oncology, Inc.[50] The FTC alleged that the transaction would likely have reduced competition in the market for solid organ transplant ("SOT") acute therapy drugs. Genzyme is the leading supplier, with Ilex's product, Campath, quickly gaining market share, and the two companies were each others' closest competitors. The consent requires Genzyme to divest to Schering, who already distributes and markets Campath in the United States, all contractual rights to Ilex's Campath for SOT use, but permits Genzyme to retain the right to Campath for uses other than SOT acute therapy.

Novartis/Eon

On July 19, 2005, the FTC entered into a consent agreement that resolved its concerns with Novartis AG's acquisition of Eon Labs. Novartis agreed to divest all assets necessary to manufacture and market in the United States three overlapping generic drugs to Amide Pharmaceutical, Inc.:

(1) desipramine hydrochloride tablets, a tricyclic antidepressant;
(2) orphenadrine citrate extended release tablets, a muscle relaxant; and
(3) rifampin oral capsules, a tuberculosis drug.[51]

In all three markets, branded products sell for significantly more than the generics such that generics are considered to be a separate market. Novartis and Eon are significant competitors in each of these markets, with only one other small competitor existing. The FTC's complaint asserts both unilateral and coordinated effects from the transaction.

On May 27, 2005, the European Union ("EU") cleared the transaction, requiring Novartis to sell:

(1) Cacihexal, used to treat osteoporsis, in Poland;
(2) Diclac, an anti-rheumatic drug, in Germany; and
(3) Apurin and Allopurnol, used to treat gout, in Denmark.

Petroleum industry transactions continue to be closely scrutinized

The FTC had another active year reviewing petroleum industry mergers. During FY 2005, the FTC entered into consent agreements to resolve concerns in three petroleum industry transactions and challenged the consummation of another petroleum industry transaction in a federal district court.[52] In another transaction, the FTC issued a Second Request to verify that its prior market findings were still correct before permitting the transaction to proceed.[53]

Chevron/Unocal

On June 10, 2005, the FTC entered into dual consent orders with Chevron Corporation and Unocal Corporation resolving its concerns with Chevron's proposed acquisition of Unocal and settling its 2003 monopolization complaint against Unocal alleging anticompetitive abuses of the regulatory process related to the California Air Resources Board's ("CARB") reformulated gasoline ("RFG") regulations.[54]

The 2003 administrative complaint alleged that in the 1990s Unocal illegally acquired monopoly power in the technology market for producing CARB by misrepresenting, among other things, that Unocal's research was non-proprietary and in the public domain, while at the same time pursuing a patent that would enable it to charge substantial royalties once California incorporated the research into the CARB RFG regulations.[55] Unocal's conduct also reportedly permitted Unocal to undermine competition and harm consumers in the downstream product market for CARB gasoline.[56] The complaint further alleged that, in the absence of Unocal's deceptive conduct, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's patent claims.

In November 2003, ALJ Michael Chappell dismissed the complaint.[57] In July 2004, the full FTC overturned the ALJ's decision and remanded the matter for an adjudicative hearing.[58] Trial commenced on October 19, 2004 and concluded on January 28, 2005. The parties were engaged in post-trial briefing when the matter was withdrawn from adjudication on June 8, 2005, for the FTC's consideration of the consent.

The FTC asserted that, absent relief, Chevron's proposed acquisition of Unocal would likely have resulted in even greater competitive harm to downstream consumers than would have occurred if the patents remained in Unocal's hands. While Unocal is not a refiner or marketer of CARB gasoline, Chevron is a major refiner and marketer of CARB. Because of these refining and marketing assets, Chevron would have a greater ability than Unocal to obtain additional profits by coordinating with its competitors downstream. As part of Unocal's license agreements, Unocal regularly collects detailed reports from licensees about their production of CARB and other refinery operations. Thus, in addition to the royalties that Unocal threatened to collect upon enforcement of the patents, Chevron's ownership of Unocal would enable it to coordinate interaction among downstream refiners and marketers of CARB gasoline.

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In order to remedy the FTC's concerns, Chevron and Unocal agreed to:

(1) upon closing of the merger, cease and desist from all efforts, and not undertake any new efforts, to assert or enforce any of Unocal's patents;
(2) within thirty days following the merger, disclaiming or dedicating the patents to the public for the remaining term of the patents; and
(3) within thirty days following the merger, moving to dismiss with prejudice all pending legal actions relating to alleged infringement of the patents.

Valero/Kaneb

On June 15, 2005, the FTC accepted for public comment a consent that resolved its concerns with the proposed acquisition of Kaneb Services LLC and

Kaneb Pipe Line Partners (collectively referred to as "Kaneb") by Valero L.P., an entity in which Valero Energy Corporation owned 46 percent pre-transaction, and would continue to own 23 percent following the Kaneb transaction.[59] The FTC asserted that the Kaneb acquisition would, absent relief, eliminate competition in each of the following markets:

(1) terminaling services for bulk suppliers of light petroleum products ("LPPs") in the greater Philadelphia area;[60]
(2) pipeline transportation and terminaling services for bulk suppliers of LPPs in the Colorado Front Range;[61]
(3) terminaling services for bulk suppliers of refining components, blending components, and LPPs in Northern California;[62] and
(4) terminaling for bulk ethanol in Northern California.[63]

For purposes of its analysis of potential harm, the FTC attributed Valero Energy's assets to Valero on the basis that Valero Energy exercised considerable influence and control over Valero. The FTC required within four months divestitures of terminals in the greater Philadelphia and San Francisco areas; pipeline and terminal assets in the Colorado Front Range; and nondiscriminatory conduct restrictions to eliminate the concerns with bulk ethanol supply in Northern California for the terminals that it permitted Valero to acquire from Kaneb.[64]

Aloha/Trustreet

On July 27, 2005, the FTC voted two-one[65] to file a complaint seeking a temporary restraining order and preliminary injunction in the U.S. District Court for the District of Hawaii to block the consummation of Aloha Petroleum, Ltd.'s $18 million purchase of Trustreet Properties, Inc.,[66] which is a bulk supplier of gasoline in Hawaii. The FTC alleged that the combination would result in a loss of competition in the marketing of gasoline to retailers, in particular sales to nonintegrated retailers, and in the retail sale of gasoline, in Hawaii. Aloha and Trustreet jointly own a terminal in Hawaii and both operate gasoline stations in Hawaii—Aloha under the "Aloha" brand, and Trustreet under the "Mahalo" brand.

There are two refineries on Oahu, owned respectively by Chevron Corporation and Tesoro Corporation, that can, between them, supply all gasoline demand for the State of Hawaii. Gasoline must be stored in tanks at terminals on Oahu for distribution in Oahu or to be shipped by barge to neighbor islands. The FTC asserted that apart from the terminals owned by the two refiners, there exist

only two other competitively significant terminals on Oahu capable of receiving gasoline imports—one owned by Royal Dutch Shell, and the second being the Barbers Point Terminal jointly owned by Aloha and Trustreet.[67] A third terminal owned by ConocoPhillips has reportedly exited the market due to ConocoPhillips' sale of its retail stations in Hawaii. A fourth terminal owned by Hawaii Fuels Facility Consortium reportedly only stores jet fuel.

The FTC asserted that the ability to import cargoes of gasoline is necessary to obtain a competitive bulk supply price from refiners on Oahu.[68] Gasoline is sold on Oahu by both "integrated" and "nonintegrated" retailers. Only Tesoro, Aloha, and Trustreet supply or have bid to supply gasoline to both integrated and nonintegrated retailers, with nonintegrated retailers allegedly constraining the retail price charged by Chevron, Shell, and Tesoro.[69] The FTC asserted that the proposed transaction would reduce the number of bulk suppliers in Hawaii from five to four and the number of bulk suppliers selling to nonintegrated retailers from three to two, with timely entry into Hawaii by a new bulk supplier sufficient in magnitude and scope to deter or counteract the anticompetitive effects, being characterized as "unlikely."[70] In addition, Aloha and Trustreet are reportedly two of the lowest-priced retailers of gasoline on Oahu, with a combined market share that places them in the number two position. The FTC indicated that the proposed acquisition would substantially increase concentration in retail geographic markets, and the Aloha business records suggested that at some locations the Aloha and Mahalo stations competitively constrained one another. The FTC asserted that Trustreet is Aloha's closest competitor. Moreover, injunctive relief is purportedly needed since the reestablishment of Trustreet as an independent viable competitive entity would reportedly be difficult.

The FTC withdrew its complaint on September 6, 2005,[71] after Aloha announced that it would enter into a twenty-year throughput agreement with Mid Pac Petroleum LLC granting Mid Pac substantial rights to use the Barbers Point terminal to import virtually unlimited quantities of gasoline into Hawaii.[72]

THE DOJ

During FY 2005, the DOJ obtained relief in only five matters:[73]

(1) Connors Bros.' Acquisition of Bumble Bee;[74]
(2) Cingular's Acquisition of AT&T Wireless;
(3) ALLTEL's acquisition of Western Wireless;
(4) SBC's acquisition of AT&T Corp.; and

(5) Verizon's acquisition of MCI.

In addition, Reuters Ltd. and Moneyline Telerate restructured their transaction to alleviate the DOJ's concerns.[75]

The relatively low number of consents, however, is misleading. The DOJ was extremely busy this FY, particularly in analyzing a series of complex telecom transactions that in the aggregate, along with other regulatory, technological, and marketplace developments, should transform the telecommunications industry.[76] Former AAG Pate recognized the likelihood of such transactions in a 2004 speech entitled *Competition and the End of Geography* and indicated that the DOJ's analysis:

> Also needs to be realistic in recognizing emerging trends and technological innovation and the impact these are having, or may soon have, on the existing providers. On the other hand, the legal standards of antitrust do not turn on what new gadgets capture the imagination of the public and the press. The antitrust laws protect everyone and not just the early adopters or cutting-edge consumers … The introduction of new technology, convergence of services and providers and substantial shifts in how services are offered, purchased and used need to be taken into account in analyzing mergers and other potentially anticompetitive conduct.[77]

During FY 2005, the DOJ studied six communications industry transactions:

(1) Arch Wireless;[78]
(2) Cingular/AWS;
(3) Sprint/Nextel;
(4) ALLTEL/Western Wireless;
(5) SBC/AT&T; and
(6) Verizon/MCI.

As discussed below, the DOJ ultimately required some relief in all but the Arch Metrocall and Sprint/Nextel transactions, although even in the other transactions, the relief required by the DOJ reflected the DOJ's recognition of efficiencies, entry, and changing market conditions.

Cingular/AT&T Wireless

Cingular Wireless' proposed purchase of AT&T Wireless Corporation ("AWS") marked the first significant transaction in this industry.[79] Following a

thorough nine-month investigation, the DOJ announced on October 25, 2004 a proposed settlement agreement with Cingular. The DOJ required the parties to divest assets in thirteen local markets, ten of these markets on the basis that the transaction would reduce competition for mobile wireless telecommunication services, and in the remaining three markets due to a reduction in competition in the emerging wireless broadband service market. In one of the ten wireless telecommunication services markets, AWS and Cingular (or entities they have interests in) were the two largest incumbent providers and in all ten markets, the merged firm would be the largest. The merged firm must also render passive its minority interests in providers serving an additional four areas and divest its minority interests in two additional areas. In the areas raising wireless broadband concerns, the merged firm must divest 10 MH_z of contiguous PCS wireless spectrum, for one of those areas—Knoxville—the merged firm has the option instead of restructuring the existing AWS relationship so that it no longer has any equity, managerial, or other interest in that license.[80]

In addition, on August 11, 2004, the DOJ agreed to modify the original 2002 consent decree, which dealt with SBC Communications and Bell South creating Cingular Wireless, to permit Cingular to reacquire certain of the divested spectrum licenses from AWS, contingent upon AWS' agreeing to relinquish all control and influence over the use or disposition of the Von Donup licenses in five of the Indiana license areas.[81]

Cingular Wireless' proposed purchase of AT&T Wireless Corporation marked the first significant transaction in this industry.

On October 26, 2004, the FCC released its Memorandum Opinion and Order approving the transfer of control of the AWS licenses to Cingular.[82] The FCC required divestitures in twenty-two of the Commission's 734 Cellular Market Areas (most of these markets are the same as the DOJ list). In addition, the FCC conditioned its consent on the parties' fulfilling their commitment:

(1) to divest any post-transactions spectrum holdings in excess of 80 MH_z (i.e., forty-three counties in Texas, Tennessee, and Georgia); and
(2) not to bid in Auction No. 58 (Broadband PCS) for any licenses in any BTA in which Cingular controls or has a 10 percent or greater interest in, 70 MH_z or more of spectrum.

The FCC also conditioned its approval on the consummation of the transactions with T-Mobile and Triton under which certain spectrum will be exchanged.

ALLTEL/Western Wireless

In the ALLTEL Corporation/Western Wireless acquisition, the agencies evaluated the impact of consolidation among facilities-based wireless providers serving rural areas, where there are typically fewer facilities-based providers. On July 7, 2005, the DOJ entered into a consent with the parties that required within four months of consummation, the divestiture of assets in sixteen rural areas in three states—Arkansas, Kansas, and Nebraska—in which post-merger, the combined company would account for over half of subscribers. Because ALLTEL competes in some of the areas in which Western Wireless has licensed the Cellular One service mark to third parties, it is also required to divest the service market. ALLTEL was permitted to retain the Western Wireless assets used in these areas solely to provide roaming services to carriers who use GSM technology. The FCC approved the transaction on July 11, 2005.

Sprint/Nextel

On August 3, 2005, the DOJ announced that it would permit the acquisition of Nextel Communications by Sprint Corporation to proceed without any relief.[83] The DOJ investigated the transaction's likely impact on both mobile wireless telecommunications services and developing products such as advanced wireless broadband services. The staff found no substantial proof that the combined firm would be able to exercise market power unilaterally or that the acquisition would make coordinated interaction among the remaining providers more likely.

Sprint was (and would remain post-acquisition) the third largest wireless provider in the country behind both Cingular and Verizon; Nextel was the fifth. The staff examined:

(1) the shares of the two transaction parties;
(2) how closely positioned their offerings were and the breadth of coverage and service features they offered; and
(3) their respective local network quality.

This analysis showed that in every local area in which they competed, the combined firm would face competition from Cingular, Verizon, as well as smaller regional firms and that these rival carriers were perceived to offer alternatives that are sufficiently close to those of the transaction parties to maintain competition. Therefore, the DOJ concluded that no relief was required.

On the same day, the FCC announced that it too approved the merger without any condition.[84]

SBC/AT&T and Verizon/MCI

On October 27, 2005, the DOJ entered into consents addressing the narrow concerns raised by the SBC/AT&T and Verizon/MCI transactions in connection with local private line services to business customers in the acquirers' respective territories. The consents require SBC and Verizon to lease (referred to as "indefeasible rights of use")[85] certain fiber strands for ten years for approximately 350 buildings in each of their territories for which the acquired firm is the only other firm providing competing private line service *and*—due to the location of these buildings vis-à-vis other CLEC fiber and the level of demand to that building—the DOJ determined that third-party entry was unlikely.[86] After conducting an extensive investigation, the DOJ did not require relief to resolve any additional overlaps in either transaction, including in the overlapping provision of business telecommunications services and residential local and long-distance service and Internet backbone services within the acquirers' region. The DOJ concluded that except for the limited buildings identified, the transactions would not harm competition and would likely benefit consumers, due to existing competition, emerging technologies, the changing regulatory environment, and exceptionally large merger-specific efficiencies.[87]

In rare instances, though, the analysis and conclusions of federal authorities and state attorneys general deviate substantively in a particular transaction. The Federated/May transaction … marks such a departure.

STATES ALSO ACTIVE IN MERGER REVIEW

The states' attorneys general continue to review mergers, both entailing strictly local concern as well as national interests. These reviews include smaller, localized transactions that are not HSR reportable. Typically, in HSR reportable transactions, the states work with the federal enforcement agencies in investigating the transaction. Ultimately, in those joint investigations that are challenged under Clayton Act Section 7, the federal agencies and pertinent state attorneys general often, but not always, file the complaint jointly. When the transaction raises concerns that are resolved by the entering of a consent, separate consents

are typically required by the federal agencies and the pertinent attorneys general that are usually very similar in nature.[88]

In rare instances, though, the analysis and conclusions of federal authorities and state attorneys general deviate substantively in a particular transaction. The Federated/May transaction discussed briefly above marks such a departure. As noted previously, the FTC ultimately concluded that a changed retail marketplace warranted abandonment of the traditionally narrow market definition employed in prior department store reviews. Five states—California, Massachusetts, Maryland, Pennsylvania, and New York—disagreed. Federated committed to selling twenty-six California, seven Massachusetts, four Maryland, three New York and seven Pennsylvania stores, with priority given to certain specified potential buyers (which are each traditional department store competitors). Federated must accept a qualified offer from these qualified buyers even if it receives a higher offer from a non-department store. Any acquiring department store chain must commit to operate the location as a department store for at least seven years.[89]

OTHER FTC/DOJ ACTION

Federal agencies bring HSR Act and consent violation challenges

The agencies continue to enforce vigorously breaches in compliance with the HSR Act[90] notification and waiting period requirements. Failure to comply with the HSR Act notification and waiting periods can result in, among other things, civil penalties of up to $11,000 per day per company.[91] The agencies view certain conduct undertaken by the transaction parties prior to the expiration of the applicable HSR Act waiting period as constituting "gun jumping." Specifically, the agencies take issue with conduct that would not typically be undertaken by two independent firms but, rather, is indicative of a transfer of beneficial ownership and control or the coordination of business affairs.[92] Such conduct may include sharing strategic information, requiring review or approval by the acquiring party of strategic plans and pricing decisions, allowing the acquiring party to exercise managerial control, treating one of the parties as the agent or representative of the other, requiring customers to deal with only one of the parties, and acting jointly on business opportunities. In addition, the agencies have continued to investigate, and even seek monetary penalties, for violations of consent terms in merger matters.

On November 10, 2004, the DOJ announced that it had reached a settlement with Smithfield under which Smithfield would pay $2 million in civil penalties

in connection with its violations of the HSR Act notification procedures on the two occasions in connection with its purchases of IBP stock.[93] In a press release issued that same day, Deputy Assistant Attorney General J. Bruce McDonald indicated that "acquisition of stock in a firm that is also being considered as a takeover target or merger partner is 'not solely for the purposes of investment'" and, therefore, must be notified.[94] Interestingly, the DOJ did not attack the purchases on the grounds that Smithfield, as a competitor of IBP, was ineligible to claim passive investor status, although, as mentioned above, the original Statement of Basis and Purpose relating to the passive investment exemption indicated that an acquirer's status as a competitor by itself "could be … viewed" as inconsistent with passive investment intent.[95] To the extent that the DOJ's omission was intentional, it suggested a recognition by the enforcement agencies that competitors *may* in some situations invest in one another with the intention of remaining passive and the analysis should be undertaken on a case-by-case basis.

On September 26, 2005, a Connecticut hedge fund manager (Mr. S. Sacane) agreed to pay a $350,000 civil penalty to settle charges that he violated premerger reporting requirements. The DOJ, at the request of the FTC, filed a civil lawsuit in the U.S. District Court in Washington, D.C., against him for violating the HSR Act. According to the complaint, Sacane failed to comply with antitrust premerger notification and waiting period requirements before making substantial acquisitions of two companies through an investment fund that he controlled, Durus Life Science Master Fund. Sacane ultimately held more than 50 percent of the voting securities of Aksys Ltd. and more than $100 million of voting securities of Esperion Therapeutics Inc. without complying with the Act.[96]

Agencies to provide further guidance concerning merger process

The U.S. agencies are seeking to adopt policies that will streamline the burden of Second Request productions. In a recent speech, then FTC Bureau of Competition Director Susan Creighton indicated:

> As electronic data storage has become cheaper and more convenient, people and firms have retained ever-increasing volumes of documents. The result is that the number of documents that need to be searched and produced per custodian has grown exponentially. Data from one source that we received suggested that a custodian who maintained four boxes of documents in 1998 would be likely to maintain roughly 140 boxes of documents today … . The increasing sophistication of substantive merger analysis, the rigorous standards required by the

> courts, and in particular the steadily increasing use of data-dependent economic analysis, all are factors that must be taken into account in any review of the efficiency and effectiveness of HSR merger review.
>
> In recognition of the challenges posed by these simultaneous developments, Chairman Majoras has embraced the goal of reducing the burden on the Commission and the parties posed by the review and production of large volumes of documents … . The Merger Process Task Force consists of 18 attorneys, economists and managers, most of whom have a decade or more experience investigating cases under the HSR regime. The Task Force has spent the past several months assessing the merger review process and is now developing proposed recommendations designed to change the process … .[97]

On February 16, 2006, the FTC announced certain changes to the Second Request process designed to streamline the process and reduce the costs and time for compliance.[98]

The United States has not been alone in studying, and refining, its merger policy. The EU and Canada exemplify other regimes that have been actively reforming their substantive merger control rules. In the EU, the Commission marked the first year of practice under the new Merger Regulation, Council Regulation (EC) No 139/2004, by publishing a set of detailed interpretative guidelines on the interpretation of certain aspects of the newly enacted law.[99] In addition, the EU has issued a report studying the efficacy of merger conditions undertaken in transactions consummated between 1991 and 2004.[100]

During the FY, the Advisory Panel on Efficiencies, appointed by the Canadian Competition Bureau, worked on a report regarding the role that efficiency gains should play in the merger review process.[101] The Competition Bureau also worked on an information bulletin concerning merger remedies.[102]

As discussed above, the U.S. competition enforcement agencies have been active both in their investigation of specific transactions as well as in studying the merger review process, both substantively and procedurally. The U.S. agencies also have exhibited an increased level of transparency in stating the reasons for their decisions. Such transparency and opportunities for discussion appear likely to continue next year. The new officials at both agencies are likely to continue the course delineated by their predecessors in M&A enforcement

decisions. As a result, transaction parties should develop as early as possible the evidentiary record that establishes not only a properly delineated relevant market, but also the full array of cognizable mitigating factors, including, to the extent applicable, evidence supporting findings of entry, efficiencies, and changing market conditions.

NOTES

1. Thomson Financial, *Mergers and Acquisitions Review* (4th Quarter 2005), *available at* www.thomson.com/cms/assets/pdfs/financial/league_table/mergers_and_acquisitions/4Q2005/4Q05_MA_Financial_Advisory.pdf. All data reflect transactions completed between 01/01/2005 and 12/31/2005.

2. Each FY commences October 1 and ends September 30.

3. Federal Trade Comm'n, *Announced Action for August 16, 2005: Release of Commission Report* (Aug. 16, 2005), *available at* www.ftc.gov/opa/2005/08/fyi0560.htm.

4. The statistics in this paper for FY2005 are "unofficial" since the agencies do not report their enforcement activity to Congress until August or September of the following year. Also, given the time lags between filing, issuance of a Second Request, and ultimate resolution of the review for any particular transaction, it is not possible to ensure the direct correlation for each of these statistics. *See, e.g.,* Federal Trade Comm'n, *Annual Report to Congress, Fiscal Year 2004* (Oct. 8, 2005), *available at* www.ftc.gov/reports/hsr05/050810hsrrpt.pdf.

5. *See generally* International Competition Network, *Working Groups: Mergers* (last visited Nov. 18, 2005), *available at* www.internationalcompetitionnetwork.org/mergers.html for a description of the working groups of the ICN. The ICN has now combined the analytical framework subgroup and the investigative techniques subgroups into the new merger investigation and analysis working subgroup.

6. *See* International Competition Network, *Implementation of the Recommended Practices for Merger Notification and Review Procedures* (Apr. 2005), at 4, *available at* www.internationalcompetitionnetwork.org/050505Merger_NP_ImplementationRpt.pdf.

7. The remedies recommended practice addresses the objective of a remedy, advocates transparency, and recommends that procedures be established to ensure that remedies are effective and easily administrable and that appropriate means are provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.

8. This recommended practice aims to vest with competition agencies the authority and tools necessary to enforce their merger laws and advocates that agencies have sufficient independence to ensure the objective application and enforcement of merger review laws.

9. *President to Install New F.T.C. Chief*, N.Y. Times, July 31, 2004, at C14; *see also* James O'Connell, *A Brief Look at Recess Appointments*, The Antitrust Source (Sept. 2004), *available at* www.antitrustsource.com.

10. White House, *Personnel Announcement* (July 28, 2005), *available at* www.whitehouse.gov/news/releases/2005/07/20050728-4.html.

11. Federal Trade Comm'n, Press Release, *U.S. Senate Confirms William E. Kovacic and J.*

Thomas Rosch as Newest FTC Commissioners (Dec. 19, 2005), *available at* www.ftc.gov/opa/2005/12/commconfirm.htm.

12. *See* discussion *infra* p. 20. *See also* Cecile Kohrs Lindell, *FTC Merger Recusals Create Complications*, The Daily Deal, Oct. 3, 2005.

13. *See* White House, *Personnel Announcement* (Sept. 29, 2005), *available at* 63.161.169.137/news/releases/2005/09/20050929-2.html.

14. *See* Press Release, *supra* note 11.

15. *See* U.S. Dep't of Justice, Press Release, *Attorney General Gonzalez Announces Interim Leadership in the Antitrust Division* (June 22, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/209655.htm.

16. *See* U.S. Dep't of Justice, Press Release, *Antitrust Division Names New Deputy Assistant Attorney General* (Sept. 1, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/210907.htm.

17. *See* U.S. Dep't of Justice, Press Release, *Antitrust Division Names New Deputy Assistant Attorney General: Scott D. Hammond to Serve as Deputy Assistant Attorney General for Criminal Enforcement* (Feb. 2, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/207522.htm.

18. ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement 2004* (2004), at 8, *available at* www. abanet.org/antitrust /comments/2004/state_of_fed_enforc.pdf.

19. Timothy Muris, *Principles for a Successful Competition Agency*, 72 U. Chi. L. Rev. 165, 168 (2005); Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement of the Federal Trade Commission*, 11 72 U. Chi. L. Rev. 209, 212 (2005).

20. *See* U.S. Dep't of Justice, Press Release, *Department of Justice Antitrust Division Issues Statement on the Closing of Its Investigation of Arch Wireless' Acquisition of Metrocall Holdings* (Nov. 5, 2004), *available at* www.usdoj.gov/atr/public/press_releases/2004/206339.htm; Omnicare Inc./Neighborcare (most skilled nursing facilities have 3 or more independent IPs when 100 miles and relatively easy entry conditions); *see also* U.S. Dep't of Justice, Press Release, *Department of Justice Antitrust Division Statement on the Closing of Its Two Stock Exchange Investigations* (Nov. 16, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/213062.wpd.

21. U.S. Dep't of Justice, Press Release, *Justice Department Approves US Airways Merger; No Antitrust Issues Seen in Agreement With America West* (May 15, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/209709.htm. One of the reasons cited by the DOJ for not requiring additional relief on the SBC/AT&T and Verizon/MCI transaction was efficiencies.

22. Federal Trade Comm'n, Press Release, *FTC Closes Its Investigation of Omnicare's Tender Offer for NeighborCare – Transaction Analyzed in Light of Changed Market Conditions* (June 16, 2005), *available at* www.ftc.gov/opa/2005/06/omnicare.htm (significant changes will occur in the health care market due to Medicare Modernization Act, which will "profoundly affect the payment structure of IP market"); *see also* U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T* (Oct. 27, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/212407.htm.

23. *See, e.g.*, The Bon-Ton Stores, Inc. v. The May Dep't Stores Co., 881 F. Supp. 860 (W.D.N.Y. 1994).

24. Federal Trade Comm'n, Press Release, *FTC Issues Statement on Closure of Federated/May Investigation* (Aug. 30, 2005), *available at* www.ftc.gov/opa/2005/08/federatedmay.htm.

25. *Id.*

26. Several states disagreed with this analysis, however, and entered into consents with the transactions parties requiring the divestiture of select stores consistent with a narrow market definition, *see infra* p. 20.

27. *See* In the Matter of Aspen Technology, Inc., No. 9310 (Aug. 7, 2003) (complaint), *available at* www.ftc.gov/os/2003/08/aspencmp.pdf; In the Matter of MSC.Software Corp., No. 9299 (Oct. 28, 2002) (consent order), *available at* www.ftc.gov/os/2002/07/mscsoftwareorder.htm; In the Matter of Airgas, Inc., No. 001-0040 (Oct. 26, 2001) (agreement containing consent order), *available at* www.ftc.gov/os/2001/10/airgasagr.htm; In the Matter of Chicago Bridge & Iron Co., No. 9300 (Oct. 25, 2001) (complaint), *available at* www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm.

28. *See* Chicago Bridge & Iron Co., Press Release, *CB&I Responds to FTC Ruling* (June 13, 2003), *available at* www.cbiepc.com/ir/release.aspx?releaseid=111362.

29. Jaret Seiberg, Chicago Bridge *Case Tests Limits*, The Daily Deal, Nov. 14, 2003, at 1.

30. *Id.* at 8.

31. *Id.*

32. Jaret Seiberg, *FTC Protects Post-Merger Powers*, The Daily Deal, Jan. 5, 2004, at 2.

33. *Id.*

34. In the Matter of Chicago Bridge & Iron Co., No. 9300 (Jan. 2, 2004) (interim consent order), *available at* www.ftc.gov/os/adjpro/d9300/040102interimconsentorder.pdf.

35. In the Matter of Chicago Bridge & Iron Co., No. 9300 (May 10, 2005) (decision and order partially denying respondents' petition for reconsideration and directing further briefing on specific remedy issues), *available at* www.ftc.gov/os/adjpro/d9300/050510dopartially.pdf, at 10 *et seq.*

36. *See supra* 49, at 11; U.S. v. Eastman Kodak Co., 853 F. Supp. 1454, 1469 (W.D.N.Y. 1994).

37. *See supra* 49, at 24.

38. *See* Federal Trade Comm'n, Press Release, *FTC Challenges Hospital Merger That Allegedly Led to Anticompetitive Price Increases* (Feb. 10, 2004), *available at* www.ftc.gov/opa/2004/02/enh.htm. The FTC alleged that the merger increased prices to 8 payers by between 15 and 190%.

39. *See* Federal Trade Comm'n, Press Release, *Administrative Law Judge Orders Evanston Northwestern Healthcare Corporation to Sell Highland Park Hospital* (Oct. 21, 2005), *available at* www.ftc.gov/opa/2005/10/evanston.htm.

40. On October 25, 2005, the Sixth Circuit reversed the decision of the District of Kentucky granting DFA's motion for summary judgment. U.S. v. Dairy Farmers of America, Inc., 426 F.3d 850 (6th Cir. 2005). The Sixth Circuit held that the district court was required to rule on the legality of the original DFA/Southern Belle Dairy Co. agreement because defendants had not met their burden of proving the claim moot. The Court also regarded the district court's conclusion that a lack of control or influence precludes a Clayton § 7 claim, and held that the DOJ had presented sufficient evidence (including econometric evidence of higher prices post-acquisition) to raise a genuine issue of material fact regarding whether DFA's acquisition violated Clayton § 7 under both the original and revised agreements. For a more detailed discussion of the prior history of this case, *see* Ilene Knable Gotts, *FY 2004 – U.S. Antitrust Enforcement Policy Continues on Same Course While M&A Activity Remains Low,* Antitrust Rep., Winter 2005, at 3, 28-29.

41. U.S. Dep't of Justice, Press Release, *Justice Department Reaches Settlement With Waste Industries USA Inc.* (Aug. 8, 2005), *available at* www.usdoj.gov/atr/releases/2005/210465.htm.

42. Federal Trade Comm'n, Press Release, *With Conditions, FTC Allows Cemex's Acquisition of RMC* (Feb. 14, 2005), *available at* www.ftc.gov/opa/2005/02/cemex.htm (divestiture of RMC's ready-mix concrete assets in Tucson within 6 months of closing).

43. Federal Trade Comm'n, Press Release, *Protecting Competition, FTC Clears Cytec's $1.8 Billion Acquisition of UCB S.A.'s Surface Specialties Division* (Mar. 1, 2005), *available at*

www.ftc.gov/opa/2005/03/cytec.htm. The FTC required divestiture within 6 months of UCB's amino resins for industrial liquid coatings and rubber adhesion promotion businesses, including two manufacturing facilities—one in Massachusetts and the other in Germany, UCB's right to obtain amino resins from Solutia Canada, the assignment of certain contracts, as well as the divestiture of certain lines of additives that are the only other products that UCB manufactures at the plant in Germany. Interestingly, while the complaint alleged that the relevant geographic market is no broader than North America and potentially limited to the United States, the parties were required to divest the UCB plant in Germany, including the other additives produced at that plant.

44. In the Matter of Penn National Gaming, Inc., No. 051-0029 (July 27, 2005) (analysis of agreement containing consent orders to aid public comment), *available at* www.ftc.gov /os/caselist/0510029/050727anal0510029.pdf.

45. Federal Trade Comm'n, Press Release, *With Conditions, FTC Clears Occidental Chemical's Purchase of Vulcan's Chemical Assets* (June 3, 2005), *available at* www.ftc.gov /opa/2005/06/vulcan.htm (FTC alleged that OxyChem's purchase of Vulcan would reduce competition in the markets for potassium hydroxide, potassium carbonate, and anhydrous potassium carbonate).

46. The FTC required divestitures in three discrete product markets:

(1) Gillette's Rembrandt at home teeth whitening business within 3 months;
(2) P&G's Crest SpinBrush battery powered and rechargeable toothbrush business (to Church & Dwight); and
(3) Gillette's Right Guard antiperspirant business within 4 months.

In addition, P&G must amend its joint venture with Phillips Oral Health care regarding the Crest Sonicore IntelliClean System rechargeable toothbrush to permit Phillips independently to market and sell the product and to eliminate the noncompete. The FTC press release discloses that the staff investigated and rejected that the combined firm would have an increased ability to take advantage of its position as "category manager" or "category captain" to obtain premium retailer shelf space and potentially exclude or disadvantage competitors in various categories, such as oral care or antiperspirants. Federal Trade Comm'n, Press Release, *FTC Consent Order Remedies Likely Anticompetitive Effects of Procter & Gamble's Acquisition of Gillette* (Sept. 30, 2005), *available at* www.ftc.gov/opa/2005/09/pggillete.htm. The FTC determined that most retailers generally make decisions on individual products that are perceived to be close substitutes within these broad categories. The EC, Canada, and Mexico also reviewed the proposed merger and consulted and cooperated with each other during their respective investigations. *See* William Blumenthal, General Counsel, Federal Trade Comm'n, *The Status of Convergence on Transatlantic Merger Policy,* Remarks Before the ABA Section of International Law 2005 Fall Meeting (Oct. 27, 2005), *available at* www.ftc.gov/speeches /blumenthal/051027transatlantic.pdf. The EC had only mandated the divestiture of P&G's SpinBrush battery operated toothbrush business, Procter & Gamble/Gillette, Case No. COMP/M.3732, EUR-Lex 32005M3732 (July 15, 2005), *available at* http://europa.eu.int/ comm/competition/mergers/cases/decisions/m3732_20050715_20212_en.pdf. The EC also reportedly considered, but rejected, a portfolio effect in the toothbrush category. *Id.* at 3.

47. *See* Federal Trade Comm'n, Press Release, *FTC Seeks Court Order to Force Blockbuster to Comply With Premerger Rules* (Mar. 4, 2005), *available at* www.ftc.gov/opa /2005/03/blockbuster.htm (announcing intention to block Blockbuster/Hollywood transaction). The transaction is also noteworthy as one of two court challenges to the issue of substantial compliance in entire history of the HSR Act. *See* FTC v. Blockbuster Inc. (D.D.C. Mar. 4, 2005) (complaint), *available at* www.ftc.gov/os/caselist/blockbuster/0503

04compblockbuster.pdf.

48. *See* In the Matter of Penn National Gaming Inc., File No. 051-0029 (July 27, 2005) (analysis of agreement containing consent orders to aid public comment), *available at* www.ftc.gov/os/caselist/0510029/050727anal0510029.pdf (4 months, plus possibly a two-month extension if the State of Louisiana is still reviewing, to divest Baton Rouge Casino to Columbia Sussex Corporation); Federal Trade Comm'n, Press Release, *With Conditions, FTC Clears Occidental Chemical's Purchase of Vulcan's Chemical Assets* (June 3, 2005), *available at* www.ftc.gov/opa/2005/06/ vulcan.htm (sale within 10 days of Consummation to ERCO Worldwide); In the Matter of Genzyme Corporation and Ilex Oncology, Inc., File No. 041 0083 (Dec. 20, 2004) (analysis of agreement containing consent orders to aid public comment), *available at* www.ftc.gov/os/caselist/0410083/041220anal0410083.pdf (divestiture to Schering); Federal Trade Comm'n, Press Release, *Protecting Competition, the Federal Trade Commission Approves Novartis AG's Acquisition of Eon Labs* (July 19, 2005), *available at* www.ftc.gov/opa/2005/07/novartis.htm (within 10 days of consummation to Amide).

49. Since the conclusion of FY 2005, the FTC has entered into 3 additional industry consents for transactions announced in FY 2005. On November 2, 2005, the FTC announced a consent agreement in connection with Johnson & Johnson's proposed acquisition of Guidant Corp that requires relief in 3 product markets:

(1) drug elevating stents ("DES");
(2) endoscopic vessel harvesting devices used in coronary artery bypass graft ("ABG") surgery; and
(3) proximal anastomotic assist devices ("AAD").

See Federal Trade Comm'n, Press Release, *FTC Reviews Divestiture of Assets to Allow Johnson & Johnson's Purchase of Guidant Corp.* (Nov. 2, 2005), *available at* www.ftc.gov/opa/2005/11/jandj.htm. The consent requires J&J to:

(1) provide a transferable license to Guidant's intellectual property surrounding its Rapid Exchange ("Rx") delivery system to Abbott Labs, one of only two companies with a DES program in development that is best positioned to replicate the potential competition of Guidant in the relevant time period;
(2) license to DataScope, which has other products used in cardiac surgery, including in CABG procedures, its EVH product line; and
(3) end its distribution agreement with Novacare for EnClose, a proximal AAD.

The EC and Canada also reviewed the transaction and cooperated with each other during the course of their respective investigations. Yet, as reflected by the EU's decision, the EU had concluded that the imminent entry of Medtronic Inc. and Abbott Laboratories into the DES business would "be likely to exert a significant competitive constraint" on a combined J&J/Guidant. Commission Press Release, *Mergers: Commission Approves Takeover of Guidant Corporation by Johnson & Johnson, Subject to Conditions* (Aug. 25, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1065&format=HTML&aged=0&language=EN&guiLanguage=en. The FTC appears to have reached its conclusion that some relief was necessary on the basis that only J&J, Guidant, and Boston Scientific (not Abbott or Medtronic) are free to offer Rx versions of DES devices under license arrangements. The EU is requiring that the combined entities must "divest either J&J or Guidant Endoscopic Vessel Harvesting products ("EVH"), plus Guidant's EEA endovascular business and J&J's EEA Steerable Guidewires business." *Id.*

In addition, on October 4, 2005, the FTC accepted for public comment an order resolving the competitive issues raised by DaVita, Inc.'s proposed purchase of rival outpatient dialysis clinic operator Gambro Healthcare Inc. Federal Trade Comm'n, Press Release, *FTC Accepts Settlement to Remedy DaVita's Acquisition of Rival Outpatient Dialysis Clinic Provider, Gambro* (Oct. 4, 2005), *available at*

www.ftc.gov/opa/2005/10/davita.htm. The order requires DaVita to sell 69 clinics in 35 markets to an upfront buyer. DaVita and Gambro were the second and third largest providers of outpatient dialysis services nationally. Entry is reportedly difficult due to factors such as the difficulty associated with locating nephrologists with established patient pools to serve as clinical medical directors. In a third of the markets, the combination would decrease the number of providers from 2 to 1 or 3 to 2 and in the remainder of the markets the FTC found that the merger parties were head-to-head competitors that health insurance companies played off of each other during negotiations (i.e., a unilateral effect). The order provides for certain transition services and restricts DaVita for two years from attempting to hire clinic employees or customers from those clinics. The agreement similarly prevents DaVita from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for 3 years, to provide the divestiture buyer with the time necessary to build goodwill and working relationships with those directors.

Also, on January 23, 2006, the FTC accepted for public comment a consent decree in connection with Teva Pharmaceutical Industry Ltd.'s acquisition of IVAX Corporation. The consent requires Teva to sell the rights and assets to manufacture and market 15 overlapping generic pharmaceutical products. The transaction would otherwise have reduced the number of competing generic suppliers, which the FTC believes has a direct and substantial effect on generic pricing as each additional generic supplier can have a competitive impact on the market. Moreover, the FTC indicated that because there are multiple generic equivalents for each of the products at issue, the branded versions no longer significantly constrain the generics' pricing. In markets for generic pharmaceuticals, a customer can use the potential switching to a competitor as a means to constrain price. For 11 of the products, Teva and IVAX currently are two of a small number of suppliers offering the products, and in several they are the only generic suppliers. In 4 other product markets, both Teva and IVAX have generic products either on market or in development and there are few other firms capable of, and interested in, entering. The consent specifies either Par Pharmaceutical Companies, Inc. or Barr Pharmaceuticals Inc. as the divestiture buyer for each of those products.

50. *See* In the Matter of Genzyme Corp. and Ilex Oncology, Inc., File No. 041 0083 (Dec. 20, 2004) (agreement containing consent orders), *available at* www.ftc.gov/os/case/04/0410083/041220do0410083.pdf.

51. Novartis also agreed to supply Amide with orphenadrine citrate ER and desipramide hydrochloride tablets until Amide obtains FTD approval to manufacture the products itself and to assist Amide in obtaining all necessary FDA approvals; Amide already manufactures for another company rifampin capsules so did not need any transitional supply or assistance arrangements for that product.

52. *See* Federal Trade Comm'n, Prepared Statement of the Federal Trade Comm'n, *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets*, Hearing Before the Committee on Commerce, Science, and Transportation and the Committee on Energy and Natural Resources U.S. Senate (Nov. 9, 2005), at 13-14, *available at* www.ftc.gov/os/testimony/051109gaspricestest3.pdf.

53. *See* Cecile Kohrs Lindell, *FTC Okays Valero's Premcor Buy*, The Daily Deal, Sept. 1, 2005.

54. Press release and links to further documents are *available at* www.ftc.gov/opa/2005/06/chevronunocal.htm.

55. In the Matter of Unocal Oil Co. of Cal., No. 9305, 2003 FTC LEXIS 19 (Mar. 4, 2003) (complaint), *available at* www.ftc.gov/os/2003/03/unocalcmp.htm.

56. The sale of any gasoline other than CARB is prohibited in California, with production of CARB being limited to relatively few produc-

ers.

57. In the Matter of Unocal Oil Co. of Cal., No. 9305, 2003 FTC LEXIS 177 (Nov. 25, 2003), *available at* www.ftc.gov/os/adjpro/d9305/031125aljsinitialdecision.pdf.

58. In the Matter of Unocal Oil Co. of Cal., No. 9305 (F.T. C. July 6, 2004) (decision and order), *available at* www.ftc.gov/os/adjpro/d9305/040706ordreversvacateandremand.pdf; In the Matter of Unocal Oil Co. of Cal., No. 9305, 2004 FTC LEXIS 115 (July 7, 2004) (order), *available at* www.ftc.gov/os/adjpro/d9305/040706commission opinion.pdf.

59. In the Matter of Valero, L.P., File No. 051 0022 (June 15, 2005) (agreement containing consent orders), *available at* www.ftc.gov/os/caselist/0510022/050615agree0510022.pdf.

60. *Id. at* 40, 67-68.

61. *Id. at* 47-49; 69-70.

62. *Id. at* 56-58; 71-72.

63. *Id. at* 65; 73-76.

64. *Id.*

65. Chairman Majoras was recused from the decision.

66. The transaction was not reportable under the HSR Act. On July 26, 2005, the FTC authorized the commencement of this action. Defendants advised the FTC that in the absence of a court order, they would consummate the proposed merger after July 28, 2005. *See* FTC v. Aloha Petroleum, Ltd., No. CV 05 00471 (D.H.I. July 27, 2005) (complaint), *available at* www.ftc.gov/os/caselist/1510131/050728comp1510131.pdf [hereinafter Aloha Complaint].

67. Aloha Complaint ¶ 14.

68. *Id.* ¶ 16.

69. *Id.* ¶ 19.

70. *Id.* ¶¶ 24-25.

71. Federal Trade Comm'n, Press Release, *FTC Resolves Aloha Petroleum Litigation* (Sept. 6, 2005), *available at* www.ftc.gov/opa/2005/09/alohapetrol.htm.

72. Aloha's 20-year throughput agreement with Mid Pac will essentially substitute Mid Pac for Trustreet as a bulk supply gasoline marketer in Hawaii. Mid Pac owns and operates several retail gasoline stations in Hawaii under the Union 76 brand. Mid Pac also supplies gasoline to several other Union 76 stations owned by third parties. The FTC indicated that the Aloha-Mid Pac agreement will restore competition that would otherwise have been lost. *Id.*

73. In addition, on October 18, 2005 (i.e., FY 2006), the DOJ obtained a consent decree in connection with the proposed acquisition of Stolt Offshore Inc. by Cal Dive International, Inc.—two of three firms operating in the Gulf of Mexico to provide saturation diving services—that requires divestiture of two vessels and a separate saturation system. Together, Cal Dive and Stolt would have over half of the capacity in the market and resulted in only one other competitor, with the remainder of the capacity. U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in Cal Dive International's Acquisition of Stolt Offshore* (Oct. 18, 2005), *available at* www.usdoj.gov/atr/public/press _releases/2005/212131.htm.

On December 20, 2005, the DOJ conditioned clearance of UnitedHealth Group Inc.'s proposed acquisition of PacifiCare Health Systems with:

(1) divestiture of portions of PacifiCare's commercial health insurance business in Tucson, Arizona and Boulder Colorado; and
(2) terminating its network access agreement with Blue Shield of California after one year.

U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in UnitedHealth Group's Acquisition of PacifiCare Health System* (Dec. 20, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/213814.htm. The DOJ's complaint indicates that United and PacifiCare are two of the

three largest health plans in Tucson selling commercial health insurance to small-group employers (defined as between 2-50 employees). U.S. v. UnitedHealth Group Inc., No. 1:05CV02436 (Dec. 20, 2005) (complaint), *available at* www.usdoj.gov/atr/cases/f213800/213815.htm. Also, the complaint asserts, the combination would have given United the ability to lower the reimbursement rates of physicians in the Tucson and Boulder areas, which would have resulted in a reduction in the quantity and quality of physician services provided to patients. *Id.* To address those concerns, United must divest a portion of PacifiCare's membership in those areas. The DOJ found that PacifiCare and Blue Shield of California are among each other's principal competitors, both in the sale of commercial health insurance and for the purchase of physician and hospital services. The DOJ believed that the continuation of United's close relationship with Blue Shield of California after the merger would provide United and Blue Shield with opportunities and incentives to coordinate their competitive activities and could reduce competition between them. *Id.* The DOJ also required United to drop its all products clauses in provider contracts in Tucson, which requires a provider as a condition of participating in one plan to participate in other plans.

On December 22, 2005, the DOJ conditioned its clearance of the proposed merger of AMC Entertainment and Loews Cineplex Entertainment with the divestiture of certain movie theaters in Boston, Chicago, Dallas, New York, and Seattle. U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in AMC Entertainment's Merger With Loews Cineplex Entertainment* (Dec. 22, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/213858.htm.

74. *See* U.S. v. Connors Bros. Income Fund, No. 1:04CV01494 (D.D.C. Apr. 18, 2005) (final judgment), *available at* www.usdoj.gov/atr/cases/f208700/208712.htm. The DOJ entered into an agreement with Connors in April 2004 that permitted the transaction, which involved complex financing arrangements under Canadian law, to proceed with its acquisition provided the parties agreed to divest up to three specific brands of canned fish—one "premium" brand and two key "value" brands—should the DOJ determine that the divestitures were required to maintain competition. At the conclusion of the investigation on August 31, 2004, the DOJ determined that divestiture of just one of the key "value" sardine brands within 4 months would be sufficient to maintain competition in the relevant markets. Connors and Bumble Bee were reportedly the only two significant sellers of sardine snacks in the United States, with Connors and Bumble Bee accounting for approximately 63% and 13%, respectively, and the remaining sales being widely dispersed among numerous firms with insignificant shares. Moreover, brand recognition is purportedly important to consumers; the transaction combined the two owners of the four most successful brands in the U.S. Sardine snacks, sometimes referred to as "mainstream" sardines, which consist of herring and other small varieties of fish that are packed in snack sized 3.75 ounce and 4.4 ounce cans. The DOJ indicated that a small but significant price increase for sardine snacks would not cause enough consumers to switch to other sardine products, such as premium sardines and ethnic sardines, to render the price increase unprofitable. Entry conditions are difficult due to the high sunk costs, including promotional expenditures and slotting allowances needed to create brand awareness. Therefore, absent the divestiture, the acquisition gave Connors full power profitably to increase prices unilaterally for one or more brands of sardine snacks. *See* U.S. v. Connors Bros. Income Fund, No. 1:04CV01494 (D.D.C. Oct. 19, 2004) (Plaintiff's Competitive Impact Statement), *available at* www.usdoj.gov/atr/cases/f205900/205900.pdf.

75. U.S. Dep't of Justice, Press Release, *Reuters Ltd. and Moneyline Telerate Restructure Proposed Deal to Alleviate Justice Department's Antitrust Concerns* (May 24, 2005), *available at* www.usdoj.gov/atr/public/press_releases/

2005/209146.htm. Under the restructuring, Telerate will license to HyperFeed Technologies Inc. its TRS software platform, which is used by companies to distribute and analyze a broad range of financial information, and Active8, which users need to interact with the TRS software platform. The DOJ asserted that the transaction as originally proposed would have reduced competition for market data distribution software platforms. The DOJ also reported that it collaborated with the EC in the investigation and restructuring of the transaction.

76. In addition, among other industries, the DOJ evaluated the impact of the acquisition of Instinet Group Inc. by The NASDAQ Stock Market Inc. and the proposed merger of the New York Stock Exchange Inc. ("NYSE") and Archipelago Holdings Inc. After a thorough investigation of these two Exchange mergers, the DOJ concluded that planned and likely entry of several firms, including regional stock exchanges supported by investments from some of the nation's largest securities firms and investment banks, would be sufficient to resolve any competitive concerns raised by the transactions. U.S. Dep't of Justice, Press Release, *Department of Justice Antitrust Division Statement on the Closing of Its Two Stock Exchange Investigations* (Nov. 16, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/213062.wpd.

77. Remarks by R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Competition and the End of Geography* (Aug. 23, 2004), *available at* www.usdoj.gov/atr/public/speeches/205153.htm.

78. *See* U.S. Dep't of Justice, Press Release, *Department of Justice Antitrust Division Issues a Statement on the Closing of Its Investigation of Arch Wireless' Acquisition of Metrocall Holdings* (Nov. 16, 2004), *available at* www.usdoj.gov/atr/public/press_releases/2004/206339.htm.

79. As described above, the DOJ looked at approximately the same time as the Cingular/AWS transaction the proposed combination of Metrocall and Arch, two paging companies, and determined there was no need to relief, due to the availability of services from other paging carriers, self-provision options, as well as "new wireless technologies, such as Wi-fi that should continue to broaden the alternatives available to customers." *See* U.S. Dep't of Justice, Press Release, *Department of Justice Antitrust Division Issues a Statement on the Closing of Its Investigation of Arch Wireless' Acquisition of Metrocall Holdings* (Nov. 16, 2004), *available at* www.usdoj.gov/atr/public/press_releases/2004/206339.htm.

80. U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in Cingular Wireless's Acquisition of AT&T Wireless* (Oct. 25, 2004), *available at* www.usdog.gov/atr/public/press_releases/2004/205960.htm.

81. U.S. Dep't of Justice, Press Release, *Department Announces Agreement to Modify SBC/Bell South Consent Decree* (Aug. 11, 2004), *available at* www.usdog.gov/atr/public/press_releases/2004/204985.htm.

82. Federal Communications Comm'n, *FCC Consents With Conditions to Cingular Wireless Acquisition of AT&T Wireless Licenses and Authorizations* (Oct. 26, 2004), *available at* www.hranfoss/fcc.gov/edocs_public/attachmatch/DOC-25345A1.doc.

83. U.S. Dep't of Justice, Press Release, *Statement of the Department of Justice Antitrust Division, on the Closing of the Investigation of Sprint Corporation's Acquisition of Nextel Communications Inc.* (Aug. 3, 2005), *available at* http://usdoj.gov/atr/public/press_releases/2005/210412.htm.

84. *See* Federal Communications Comm'n, Press Release, *FCC Consents to Sprint Corporation Acquisition of Nextel Communications Licenses and Authorizations* (Aug. 3, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260394A5.pdf.

85. *See* SBC Competitive Impact Statement, at 8.

86. IRUs are commonly used in the telecom industry (including by AT&T and MCI) to provide the holder the right to use specified strands of fiber.

87. U.S. Dep't of Justice, Press Release, *Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T* (Oct. 27, 2005), *available at* www.usdoj.gov/opa/pr/2005/October/05_at_571.html.

88. *See, e.g.*, California v. Valero, L.P. (N.D. Cal. June 15, 2005) (consent and final judgment), *available at* http://caag.state.ca.us/newsalerts/2005/05-043consent.pdf.

89. PA Attn'y Gen'l, Press Release, *AG Corbett Resolves Antitrust Concerns Following Merger of Federated Department Stores and the May Company* (Aug. 30, 2005), *available at* www.attorneygeneral.gov/press/release.cfm?p=093757EC-AFC3-E88-91754088B02FBC02 (in 2 other locations in Pennsylvania, the companies may sell the properties to buyers for any purpose); N.Y. Att'y Gen'l, Press Release, *Department Store Chain to Divest Three NY Stores as Part of Acquisition* (Aug. 30, 2005), *available at* www.oag.state.ny.us/press/2005/aug/aug30b_05.html.

90. 15 U.S.C. § 18a (2004).

91. *Id.*

92. For a general discussion of preconsummation limitations, *see* Ilene Knable Gotts & Michael B. Miller, *Information Sharing in the Pre-merger Context: How to Avoid Antitrust Liability*, 45 Prac. Law. 23 (1999). *See also* William Blumenthal, General Counsel, Federal Trade Comm'n, *Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel*, Remarks Before the Association of General Counsel (Nov. 10, 2005), *available at* www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf.

93. U.S. Dep't of Justice, Press Release, *Smithfield Foods to Pay $2 Million Civil Penalty for Violating Antitrust Premerger Notification Requirements* (Nov. 10, 2004), *available at* www.usdoj.gov/atr/public/press_releases/2004/206229.htm; under 16 C.F.R. § 802.9 (2004), acquisitions of voting securities that ordinarily would be reportable are exempt from the notification requirements if the acquisition is "solely for the purpose of investment" and the stock acquired or held does not exceed 10 percent of the outstanding voting securities of the issuer.

94. *Id.*

95. 43 Fed. Reg. 334, 656 (1978).

96. U.S. Dep't of Justice, Press Release, *Hedge Fund Manager Will Pay Civil Penalty for Violating Antitrust Pre-Merger Notification Requirements* (Sept. 26, 2005), *available at* www.usdoj.gov/atr/public/press_releases/2005/211494.htm.

97. Susan Creighton, Director, Bureau of Competition, Federal Trade Comm'n, *Hart-Scott-Rodino Second Request Process*, Prepared Remarks Before the Antitrust Modernization Commission (Nov. 17, 2005), *available at* www.ftc.gov/speeches/creighton/051117amcstatementhsr.pdf.

98. www.ftc.gov/opa/2006/02/mergerprocess.htm.

99. *See* Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, No. 2005/C 56/04 (Mar. 5, 2005), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_056/c_05620050305en00320035.pdf [hereinafter Simplified Procedure Notice]; Commission Notice on Case Referral in Respect of Concentrations, No. 2005/C 56/02 (Mar. 5, 2005), *available at* http://europa.eu.int/comm/competition/mergers/legislation/referral.htm; Commission Notice on restrictions directly related and necessary to concentrations, No. 2005/C 56/03 (Mar. 3, 2005), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_056/c_05620050305 en00240031.pdf; DG Competition Information Note on Art. 6 (1) c 2nd Sentence of Regulation 139/2004 *(Abandonment of Concentrations), available at*

http://europa.eu.int/comm/competition/mergers/legislation/abandonment_of_concentrations_en.pdf. The new EC Commission Simplified Procedure Notice applies now also if a party proposes acquiring sole control of an undertaking over which it already has joint control, subject to further caveats. It reflects the various additional referral mechanisms introduced by the new ECMR. The recent Spanish gas matter has raised new questions regarding the jurisdictional tests and the EC has indicated that it will consider whether the Commission should have additional powers to exert jurisdiction even where the 2/3rds test is not satisfied.

100. European Commission, *Merger Remedies Study: Public Version* (Oct. 2005), *available at* http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf.

101. On October 31, 2005, the panel released its report, which concluded that Canadian competition policy should continue to encourage efficiency gains. Canadian Competition Bureau, *Report of the Advisory Panel on Efficiencies: Submitted to Sheridan Scott, Commissioner of Competition August 2005* (Oct. 31, 2005), *available at* http://www.competitionbureau.gc.ca/PDFs/FinalPanelReportEfficiencies_e.pdf. The panel recommended certain amendments to the Competition Act to include explicitly efficiency gains as a factor to be considered.

102. On October 19, 2005, the Bureau released the bulletin. *See* Canadian Competition Bureau, *Informational Bulletin on Merger Remedies in Canada* (Oct. 19, 2005), *available at* http://www.competitionbureau.gc.ca/PDFs/info_bulletin_mergerremedies_051017_e.pdf. ❖