UNITED STATES OF AMERICA

John R. Ingrassia and Alicia Batts of Proskauer Rose LLP

With merger and non-merger matters, guidelines and rules changes, international cooperation agreements, criminal enforcement and more, U.S. antitrust enforcers have had a busy and productive year. Investigations and enforcement actions covered a wide swath of economic activity, including internet, energy, healthcare, pharmaceuticals, banking and financial services, agriculture, poultry, high technology and intellectual property, sports, consumer products, broadcasting, software, airline ticketing and telecom. Some of the more noteworthy developments are recapped below.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

Merger Remedies Guidelines

The DOJ revised its antitrust division guidelines on merger remedies with a focus on vertical mergers, noting "vertical mergers can create changed incentives and enhance the ability of the merged firm to impair the competitive process". The revised guidelines expand the types of remedies the Division can consider and avoids the need to choose between structural remedies or no remedy at all. The revised policy places a new emphasis on conduct remedies in vertical mergers, where conduct remedies are viewed as the most appropriate means to "effectively address anticompetitive issues." The new policy seeks to create an institutional framework for the crafting and enforcement of conduct remedies in these cases.

HSR Premerger Notification Rules Changes

New HSR rules call for additional reporting for private equity and other investment firms relating to investments in competing businesses. The "associate" concept introduced by the new rules seeks to bring within its reach all entities under common operational or investment management with a filer. The revised rules also call for additional transaction-related documents to be submitted to the agencies. Prior HSR rules required the submission of certain documents that analyze a transaction with respect to, among other things, competition, competitors, markets and market shares, but the new rules expand these requirements. The FTC also announced a review of HSR coverage rules, potentially impacting the types of transactions that are subject to notification and review. The reporting requirements relating to intellectual property licenses are expected to be impacted.

Now former Assistant Attorney General for Antitrust, Christine Varney[1], remarked on the use of so-called "side agreements" in M&A deals, calling into question the practice of incorporating divestiture provisions into the terms of a privileged joint defense agreement. According to Varney, the use of side-agreements that do not make their way into the parties' HSR submissions potentially rises to a compliance issue, and should be avoided. Varney noted ". . . you execute them and don't give it to us, do it at your own peril because we will likely find out about it." Her remarks also may suggest that the agency expects to see documents relating to the parties' negotiations of side-agreements -- communications most practitioners view as privileged.

HORIZONTAL MERGERS

In the merger context, there was close scrutiny, and a general aversion to transactions that took a maverick out of the market. Aside from blockbuster deals like AT&T's attempted acquisition of T-Mobile, other transactions were challenged where reductions in competition would likely lead to consumer harm. In some cases, post consummation challenges were brought based on anticompetitive effects already seen in the marketplace.

The AT&T/T-Mobile transaction collapsed at the end of 2011 amid heavy opposition, including the filing of private lawsuits.[2] Shortly before the transaction was abandoned by the parties, U.S. Attorney General Eric Holder recently told lawmakers that the division was committed to seeing the matter through.[3] In its complaint, the DOJ identified competition at both the local and national levels. The complaint identified 97 of the top 100 cellular market areas, covering more than half of the U.S. population, in which the transaction likely would have substantially lessened

1 Attorney General Eric Holder announced August 4, 2011 the appointment of Sharis Pozen as Acting Assistant Attorney General of the Department of Justice's Antitrust Division.

2 United States and Plaintiff States v. AT&T Inc., T-Mobile USA, Inc. and Deutsche Telekom AG, http://www.justice.gov/atr/cases/atttmobile.htm

3 http://www.chicagotribune.com/business/breaking/chi-justice-dept-ready-to-take-att-to-court-20111108,0,1615072.story

competition for mobile wireless telecommunications services. In addition to wireless services provided to consumers, the DOJ also identified as a separate relevant product market mobile wireless services provided to enterprise and government customers. Positioning T-Mobile as the marketplace maverick, the DOJ noted that the company is "the value option for wireless services" and that it has historically focused on "aggressive pricing, value leadership, and innovation." The suit brought by Sprint Nextel Corp. to block the combination was initially dismissed in part, but proceeded until the transaction came apart on the claim that the merger would have made it harder for the company to gain access to the most desirable handsets.

Several other transactions involving consumer products and services were challenged this year, including the headline grabbing H&R Block/TaxACT matter[4] Arguing that "TaxACT has aggressively competed with H&R Block in the Digital DIY Tax Preparation Product market for over a decade", and that in the parties own words, the acquisition would "avoid further price erosion", the DOJ filed suit to block the H&R/TaxAct transaction, and was granted an injunction. The agency noted in its complaint that TaxAct hasbeen a 'maverick' on price, product quality, and channels of trade that continuously place competitive pressure to lower prices on Digital DIY Tax Preparation Products. The parties have since announced that they will abandon the transaction.

Despite Antitrust Division approval of NYSE Euronext's proposed merger with Deutsche Borse AG,[5] the parties were forced to abandon the transaction in the face of opposition from the European Commission. The Antitrust Division's earlier consent decree chiefly required the divestiture of Deutsche Borse's minority position in Direct Edge, which according to the Competitive Impact Statement, is the fourth largest stock exchange operator in the U.S. by volume of shares traded, along with the suspension of the parties' ability to participate in the governance or business of Direct Edge.

The merger between Exelon and Constellation was settled by the Antitrust Division at the end of the year with the agreed divestiture of three generating plants to maintain competition for wholesale energy in the affected Mid-Atlantic markets.[6] Notably, the agency said that the aim of requiring the divestitures was not simply to maintain pre-transaction market shares and HHI levels, but to eliminate the increased ability and incentive of the parties post-transaction to exercise market power by withholding output.

Alleging that without divestitures consumers would pay more for sliced fresh bread, the DOJ required a divestiture in Grupo Bimbo S.A.B. de C.V. and BBU Inc.'s acquisition of the North American Fresh Bakery Business of the Sara Lee Corporation.[7] According to the DOJ, the transaction as proposed would have lessened competition in the sale of bagged, sliced fresh bread sold at retail in number of metropolitan areas in California, Kansas, Oklahoma, Nebraska and Pennsylvania. The largest and third largest bakers and sellers of sliced fresh bread in the U.S., the parties sell under many well known brands, including Arnold, Oroweat, Brownberry, Thomas', Entenmann's, Boboli, Freihofer's and Stroehmann's for BBU and Sara Lee and EarthGrains for Sara Lee.

Potentially anticompetitive transactions in oil and gas or involving industrial products did not go unnoticed, with the FTC and DOJ bringing a number of challenges. Regal Beloit Corporation's $875 million proposed acquisition of the electric motor business of A.O. Smith Corporation, which involves the manufacture and sale of numerous types of motors, was challenged by the DOJ on the likelihood of reduced competition in electric motors for pool pumps, electric motors for spa pumps, and draft inducers for furnaces.[8] According to the DOJ, RBC and AOS are two of the three leading suppliers of electric motors for pool pumps and spa pumps in the U.S., and the loss of competition from the acquisition likely would lead to higher prices for these products. To proceed, RBC agreed to divest assets relating to its electric motors for pool pumps and electric motors for spa pumps, along with assets of AOS relating to its efforts to enter the market for certain draft inducers for furnaces.

4 U.S. v. H&R Block, Inc., et al., http://www.justice.gov/atr/cases/handrblock.html

5 U.S. v. Deutsche Börse AG and NYSE Euronext, http://www.justice.gov/atr/cases/borseag.html

6 U.S. v. Exelon Corporation and Constellation Energy Group, Inc., http://www.justice.gov/atr/cases/exelonceg.html

7 U.S. v. Grupo Bimbo, S.A.B. de C.V., BBU, Inc., and Sara Lee Corporation, http://www.justice.gov/atr/cases/grupobimbo.html

8 U.S. v. Regal Beloit Corporation and A.O. Smith Corporation, http://www.justice.gov/atr/cases/regalbeloit.html

In what was essentially analyzed as a 2 to 1 merger, the DOJ settled a challenge to GE's $3.2 billion acquisition of power conversion engineering company Converteam Group SAS with the divestiture of a low-speed synchronous electric motor manufacturing facility in Minneapolis, Minnesota.[9] Converteam's low-speed synchronous electric motors ("LSSM"s) are used in reciprocating compressors in the oil and gas industry, and GE is the company's most significant competitor according to the Competitive Impact Statement. GE's LSSMs facility is in Peterborough, Canada. Both GE and Converteam also manufacture a range of electric motors that were not the subject of the divestiture order.

Irving Oil agreed to divestitures to settle with the FTC its acquisition of petroleum products storage and transportation assets in Maine from ExxonMobil.[10] Irving initially sought to acquire ExxonMobil's petroleum products terminals in South Portland and Bangor, Maine, along with ExxonMobil's intrastate pipeline connecting the terminals. The FTC alleged that the transaction would lessen competition in the gasoline and distillates terminaling services markets in South Portland and Bangor/Penobscot Bay. Under the settlement, Irving agreed to divest the Bangor terminal and intrastate pipeline, as well as fifty percent of the South Portland terminal to Buckeye Partners, L.P./Buckeye Pipe Line Holdings, L.P. under an arrangement where Buckeye will manage and operate the terminal.

L.B. Foster Company agreed to divest a West Virginia plant used in the development, manufacture and sale of certain railroad joints to Koppers Inc. to proceed with its $114 million acquisition of Portec Rail Products Inc.[11] Rail joints are steel bars that are bolted onto the ends of two pieces of rail necessary for the track lines on the largest U.S. railroads handling most of the heavy freight rail traffic in the U.S. According to the DOJ, the acquisition would have combined the two primary U.S. manufacturers of bonded insulated rail joints and two of only three U.S. manufacturers of polyurethane-coated insulated rail joints, and would have led to higher prices, lower quality, less customer service and less innovation.

Transactions putting pharmaceuticals in play continued to generate interest, with a number of matters challenged and resulting in divestitures. The FTC settled with DaVita Inc. relating to its $689 million purchase of CDSI I Holding Company, Inc. ("DSI").[12] DaVita agreed to divest 28 dialysis clinics in 22 markets and terminate a management contract. The Commission alleged the transaction would have lessened competition for the provision of outpatient dialysis services and that entry into the outpatient dialysis services markets would not be likely at a sufficient level because, among other things, locating nephrologists with established patient pools to serve as medical directors makes it difficult to open new centers. According to the FTC, the transaction would have resulted in merger to monopoly in one market and would cause the number of providers to drop from three to two in fifteen other markets. There was also evidence that health insurance companies and other private payers were the beneficiaries of competition between DaVita and DSI when negotiating rates, and that the combination likely would have resulted in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

Generic pharmaceuticals continued to have the agency's attention as well, as the FTC challenged Perrigo Company's planned $540 million acquisition of the assets of Paddock Laboratories, Inc.[13] The agency alleged that the transaction would lessen competition in the U.S. markets for the manufacture and sale of several generic pharmaceuticals used to treat conditions such as skin disorders, allergic reactions, and nausea. The agency also alleged the transaction would eliminate future competition for a generic topical steroid and a generic anti-inflammatory drug. Under the settlement, Perrigo agreed, among other things, to divest to Watson Pharmaceuticals Perrigo's rights and assets related to certain generic testosterone gel products. Perrigo also agreed to refrain from entering into certain "pay-for-delay" arrangements, which the agency has long held can hurt consumers by delaying the introduction of cheaper drugs onto the market.

Also in generics, Hikma Pharmaceuticals agreed to divest certain assets relating to generic injectable phenytoin

9 U.S. v. General Electric Company, and CVT Holding SAS, Financiere CVT SAS, and Converteam Group SAS, http://www.justice.gov/atr/cases/f274500/274519.pdf

10 In the Matter of Irving Oil Limited, a Canadian corporation, and Irving Oil Terminals Inc., http://www.ftc.gov/os/caselist/1010021/index.shtm

11 U.S. v. L.B. Foster Company and Portec Rail Products, Inc., http://www.justice.gov/atr/cases/fosterportec.html

12 In the Matter of DaVita Inc., http://www.ftc.gov/os/caselist/1110103/index.shtm

13 In the Matter of Perrigo Company and Paddock Laboratories, Inc., http://www.ftc.gov/os/caselist/1110083/index.shtm

and generic injectable promethazine products to X-Gen Pharmaceuticals, Inc. to settle FTC charges that its $111.5 million acquisition of Baxter's generic injectable pharmaceutical business would lead to lessening of competition for those drugs, which include chronic pain, anti-infective, and anti-emetic products.[14]

The FTC settled its challenge to the $4 billion combination of Grifols, S.A. and Talecris Biotherapeutics Holdings Corp., creating the world's third-largest plasma-products manufacturer.[15] Grifols is a leading manufacturer of specialized protein therapies that help sustain the body's vital functions. The FTC approved a consent settlement enabling the transaction to be completed with a divestiture of plasma collection facilities and a processing facility to Italian producer Kedrion S.p.A., along with a supply agreement to ensure that Kedrion will have access to inputs required to make it a viable entrant and a strong competitor.

BEHAVIORAL REMEDIES

The agencies remained open to tailored resolutions as well. Conduct remedies were approved in several vertical and horizontal transactions where the parties agreed to structural or behavioral remedies, or both, in order to resolve the competitive issues. While vertical mergers do not typically combine competitors in the traditional sense, they can lead to changes in incentives and can sometimes enhance the ability of the merged firm to harm competition. Understanding that structural remedies may not be well suited to certain transactions the agencies will sometimes turn to conduct remedies such as non-discrimination obligations, firewalls, mandatory licensing provisions, transparency provisions, prohibitions on restrictive contracting practices, and provisions requiring the merged firm to provide support to one or more competitors, such as supply agreements, transfer of relevant employees, and know-how.

Extensive conduct remedies were imposed in a joint venture between Comcast Corp. and NBC Universal Inc., where the parties agreed to license programming to competitors.[16] The venture agreed, among other things, to license its broadcast, cable, and film content to online video distributors on terms comparable to those in similar licensing arrangements with traditional video programming distributors. The settlement preserves competition in content distribution by protecting emerging online video competition, prohibiting discrimination against video programmers and online video distributors or with respect to internet broadband access, and prohibiting certain restrictive licensing practices.

The DOJ settled with GrafTech International Ltd., a major producer of graphite electrodes, requiring the company to modify its supply agreement with ConocoPhillips Company before proceeding with its proposed $308 million acquisition of Seadrift Coke LP.[17] Seadrift is one of two domestic manufacturers of petroleum needle coke, a key input in the manufacture of graphite electrodes. Prior to the transaction, GrafTech had been in a long-term supply agreement with Conoco for its petroleum needle coke requirements. According to the DOJ, the supply agreement and ongoing supply arrangements could become a channel for the exchange of competitively sensitive information or enable coordination between petroleum needle coke competitors-Conoco and Seadrift. The agency said that requiring GrafTech to remove certain provisions from the GrafTech-Conoco supply agreement that potentially allowed for the exchange of competitively sensitive information between Conoco and Seadrift, along with the implementation of firewalls to protect competitively sensitive information, removed the ability and incentive for GrafTech and Conoco to coordinate on price and output.

CHALLENGES TO NON-HSR REPORTABLE TRANSACTIONS OR PREVIOUSLY CONSUMMATED TRANSACTIONS

It is sometimes overlooked that transactions not subject to Hart-Scott-Rodino ("HSR") reporting, remain subject to substantive antitrust enforcement. Several such transactions garnered attention this year. In a post consummation challenge, the FTC settled with Cardinal Health, Inc. to remedy anticompetitive effects stemming from its 2009 acquisition of Biotech's nuclear pharmacies in the Southwestern United States.[18] According to the complaint,

14 In the Matter of Hikma Pharmaceuticals PLC, http://www.ftc.gov/os/caselist/1110051/index.shtm

15 In the Matter of Grifols, S.A. and Talecris Biotherapeutics Holdings Corp., http://www.ftc.gov/os/caselist/1010153/index.shtm

16 U.S. et al v. Comcast Corp., General Electric Co., and NBC Universal, Inc., http://www.justice.gov/atr/cases/comcast.html

17 U.S. v. GrafTech International Ltd and Seadrift Coke L.P., http://www.justice.gov/atr/cases/graftech.html

18 In the Matter of Cardinal Health, Inc., http://www.ftc.gov/os/caselist/0910136/index.shtm

Cardinals' acquisition of three nuclear pharmacies from Biotech was anticompetitive and reduced competition for low-energy radiopharmaceuticals in Las Vegas, Nevada; Albuquerque, New Mexico; and El Paso, Texas. The nuclear pharmacies sell single photon emission computed tomography radiopharmaceuticals to hospitals and cardiology clinics. Cardinal agreed to reconstitute and sell nuclear pharmacies in the three cities and to take certain additional measures to restore competition resulting from the acquisition. The transaction was not subject to HSR reporting.

The Division's openness to conduct remedies – even in horizontal merger cases – was demonstrated in a transaction that was not subject to Hart-Scott-Rodino premeger review.[19] The DOJ challenged George's Inc.'s acquisition of Tyson Foods' Harrisonburg, Virginia, chicken processing complex alleging the acquisition eliminated competition for the procurement of services of chicken growers in the Shenandoah Valley area of Virginia. According to the agency, three chicken processors competed in the region for the services of local chicken growers and that the transaction decreased the number of processors in the area to two. According to the Competitive Impact Statement, the likely result of the reduction in competition "could take the form of lower base prices, fewer allowances for miscellaneous expenses, longer layouts between broiler growing services, or other unfavorable adjustments to growers' contracts." Under the settlement, which did not include a divestiture, George's agreed to make various improvements to its Shenandoah Valley poultry processing facilities to enhance the company's ability to operate the facility at a greater scale than occurred pre-transaction.

In a matter before the 11th Circuit Court of Appeals, Phoebe Putney Health System successfully fought off the FTC's challenge to its $195 million acquisition of competing hospital, Palmyra Park based on the state action doctrine.[20] According to the complaint, Phoebe and Palmyra are rivals competing for patients in the general acute-care hospital services market, and competition between them has led to an increase in the quality of patient care. The FTC challenged Phoebe's proposed acquisition of Palmyra in Albany, Georgia as a merger to monopoly, alleging the transaction would reduce competition and allow the combined hospital organization to raise prices for general acute-care hospital services. The FTC also alleged that the transaction was structured in a way to use the Hospital Authority of Albany-Dougherty County as a shield under the "state action" doctrine, which provides a narrow exception to the antitrust laws for anticompetitive conduct if it is an act of government. While the 11th Circuit maintained that the State Action doctrine was a sufficient defense based on the legislation in place for operating the hospitals, the Court agreed with the FTC that the transaction was likely to lessen competition or even lead to monopoly, a finding the FTC viewed as at least a partial win.

The FTC challenged ProMedica Health System, Inc.'s 2010 acquisition of St. Luke's Hospital in Lucas County, Ohio.[21] The agency alleged the transaction reduces competition and allows ProMedica to raise prices for general acute-care and inpatient obstetrical services. The acquisition reduces the number of general acute-care hospital competitors in Lucas County from four to three, with a market share for the combined system approaching 60 percent. In the market for inpatient obstetrical services in Lucas County, the FTC charges the acquisition increases ProMedica's market share to more than 80 percent. According to the FTC, business documents reveal that a principal motivation for the acquisition was for St. Luke's to gain enhanced bargaining leverage with health plans, and the ability to raise prices for services. In an Initial Decision issued at the end of the year, the FTC held that the transaction would substantially lessen competition in the relevant market and significantly "increase ProMedica's market share and market concentration in the already highly-concentrated GAC inpatient hospital services market, reducing the number of competing hospital providers with which MCOs can contract from four to three." The agency also rejected ProMedica's proposed alternative remedy, which would have allowed it to continue to own St. Luke's but establish a "firewalled" negotiation team to negotiate and administer health plan contracts for St. Luke's.

In another post-consummation challenge, the DOJ along with state attorneys general from Illinois, Michigan and

19 United States of America, v. George's Foods, LLC, George's Family Farms, LLC, and George's, Inc., http://www.justice.gov/atr/cases/f272500/272501.pdf

20 In the Matter of Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA Inc., Palmyra Park Hospital, Inc., and Hospital Authority of Albany-Dougherty County, http://www.ftc.gov/os/adjpro/d9348/index.shtm; http://www.ftc.gov/os/caselist/1110067/111214phoebeputneyorder.pdf

21 In the Matter of ProMedica Health System, Inc., http://www.ftc.gov/os/adjpro/d9346/index.shtm

Wisconsin settled with Dean Foods Company, requiring Dean to divest a milk processing facility in Waukesha, Wisconsin acquired from the Foremost Farms USA Cooperative.[22] According to the agency, the settlement restores competition in the sale of milk to schools, grocery stores, convenience stories and other retailers in Illinois, Michigan and Wisconsin.

PENALTY IMPOSED FOR HSR ACT VIOLATION

The Department of Justice imposed a $500,000 civil penalty on charges of a violation of the Hart-Scott-Rodino Act relating to executive compensation. According to the complaint filed by the Antitrust Division, the violations stemmed from acquisitions of stock through the vesting of restricted stock units received as part of a compensation package, and through 401(k) dividend reinvestments. High profile figures have been the subject of previous enforcement actions for failures to file, though not directly related to executive compensation. The amount of the fine in this matter was limited by, among other things, the inadvertent nature of the violation, the fact that there was not a financial gain, and that the violation was reported promptly once discovered. While those factors typically would result in little or no penalty imposed, there had been previous inadvertent violations of the HSR Act relating to the same acquirer, without charges brought after corrective filings were made. The unofficial 'one free bite' policy will often allow first-time violators to escape with little or no penalty if they come forward promptly. This action comes while many in the antitrust bar are urging new rulemaking as violations of this type tend to be inadvertent and often are inconsequential from an antitrust perspective.

CONDUCT INVESTIGATIONS

The FTC settled charges that Southwest Health Alliances, Inc., d/b/a BSA Provider Network, fixed prices charged to those offering coverage for health care services in the Amarillo, Texas, area.[23] The result was consumer harm in the form of higher prices for physicians services. BSA is an independent practice association that the agency alleged for at least ten years restrained competition and fixed prices and other terms at which it would contract with payers. According to the agency, the providers in the network did not have clinically or financially integrated practices that would create efficiencies to justify their collective practices. Under the Consent Order the network is prohibited from, among other things, entering into or facilitating agreements between or among any health care providers.

The DOJ brought actions against Morgan Stanley and KeySpan Corporation alleging that Morgan Stanley's agreements with KeySpan Corporation and Astoria Generating Company Acquisitions, LLC effectively combined the economic interests of the two largest competitors in the New York City electric market.[24] Beginning in 2006 KeySpan and Morgan Stanley entered into a derivative arrangement whereby Morgan Stanley agreed to compensate KeySpan for certain fluctuations in the market price for electricity capacity. Morgan Stanley also entered into an offsetting agreement with Astoria whereby Astoria compensated Morgan Stanley for offsetting fluctuations. According to the agency, Morgan Stanley earned approximately $21.6 million from the agreements. Retail electricity providers purchase power from electricity generators ("capacity"), and the likely effect of the agreements was to increase capacity prices for retail electricity suppliers, thereby increasing the prices consumers pay for electricity. Under the final judgment, Morgan Stanley must disgorge $4.8 million in profits obtained through the agreement. KeySpan paid $12 million as disgorgement for its role in the arrangement.

Google has the attention of antitrust enforcers in the U.S. (and elsewhere) on multiple fronts relating to recently announced acquisitions and the company's marketplace conduct more generally. Google's seemingly insatiable appetite for expanding into adjacent businesses and competing head-to-head with marketplace mainstays like Microsoft, Apple, Blackberry and others is generating significant interest. There are now pending investigations at the DOJ of Google's attempted takeovers of display ad company Admeld and handset maker Motorola Mobility, which, at $12.5 billion represents the company's biggest acquisition to date. Executive Chairman Eric Schmidt

22 United States, State of Wisconsin, State of Illinois, and State of Michigan v. Dean Foods Company, http://www.justice.gov/atr/cases/deanfoods.htm

23 In the Matter of Southwest Health Alliances, Inc., d/b/a BSA Provider Network, http://www.ftc.gov/os/caselist/0910013/110510southwestanal.pdf

24 U.S. v. Morgan Stanley, http://www.justice.gov/atr/cases/f275800/275857.pdf; United States v. KeySpan Corp., 763 F. Supp. 2d 633

testified before the U.S. Senate in a hearing called "The Power of Google: Serving Consumers or Threatening Competition?" convened to investigate the impact Google's dominance is having on competition. The FTC is widely believed to be developing a case aimed at the company's search engine monopoly and its business practices, such as allegedly using other companies' content without their permission, deceptive display of search results, and manipulation of search results to favor the company's own products. In an action aimed at Google's privacy practices related to its Google Buzz social network service, the company entered into a consent order with the FTC in which Google agreed, among other things, to refrain from misrepresenting the privacy and confidentiality of certain consumer information; to give users clear and prominent notice and to obtain express affirmative consent prior to sharing of certain information with third parties; and to maintain a comprehensive privacy program to address ongoing privacy risks.[25]

In a still pending investigation, American Airlines and other airlines, along with several leading ticket information-distribution companies, were issued civil investigative demands by the DOJ. The agency is investigating the possibility of anti-competitive practices by third party ticket distributors amid allegations by the airlines that industry global distribution systems, or GDS, dominate the market for high-margin corporate accounts. American Airlines also is suing Orbitz and Travelport in federal court for the Northern District of Texas. In the suit, American alleges the ticket distributors' anticompetitive conduct and agreements have reinforced barriers to entry by rival GDSs, blocked at least three attempted new entrants since 2004, and allowed the GDS's to charge supra-competitive booking fees and impede technological investment and change.

The DOJ reached a settlement with United Regional Health Care System, a 369 bed general acute-care hospital located in Wichita Falls, Texas.[26] According to the DOJ, United Regional responded to the competitive threats posed by other outpatient-surgery facilities by entering into contracts with health insurers that provide for a significant pricing penalty if insurers contract with certain competing facilities. The settlement prohibits United Regional from entering into contracts with commercial health insurers that effectively prevent insurers from contracting with United Regional's competitors. The action challenged United Regional's use of these contracts to maintain its monopoly for hospital services, causing consumers to pay higher prices for health care services.

The DOJ and several state Attorneys General sued American Express, MasterCard and Visa, alleging that certain of the companies' policies and practices impeded merchants' ability to provide discounts or benefits to promote the use of competing credit cards that cost the merchants less.[27] The practices, according to the agency, deter merchants from promoting competition among card networks by offering customers discounts or other benefits to encourage them to use a less-expensive credit card or other payment method. Under the settlement, American Express, MasterCard and Visa agreed to restrain from adopting rules or entering into agreements that prevent merchants from, among other things, offering discounts for the use of a particular brand or type of card or other form of payment; or promoting or expressing any preference for the use of certain brands or types of cards.

The FTC and DOJ issued a joint policy statement on antitrust enforcement regarding Accountable Care Organizations -- collaborating health care provider groups formed to improve health care quality and reduce costs under the Affordable Care Act of 2010. Noting that ACOs are collaborations among competitors, and the competitive concerns attendant to that, the agencies set forth a framework addressing issues such as market share, quality initiatives, exclusive contracting and innovative procedures. The objective is to help providers understand how best to form pro-competitive ACOs and protect consumers from higher prices and lower quality care. Under the policy, the agencies will not challenge as *per se* illegal certain ACOs that jointly negotiate with private insurers to serve patients in commercial markets and meet certain other criteria. The agencies also warn under the policy, however, that ACOs should refrain from conduct that facilitates collusion among ACO participants in the sale of competing services outside of the ACO.

25 In the Matter of Google Inc., http://www.ftc.gov/os/caselist/1023136/index.shtm

26 U.S. and State of Texas v. United Regional Health Care System, http://www.justice.gov/atr/cases/unitedregional.html

27 U.S. v. American Express Company, American Express Travel Related Services Company, Inc., MasterCard International Inc., and Visa Inc., http://www.justice.gov/atr/cases/americanexpress.html

INTERNATIONAL

Recognizing that in a global economy cooperation with competition agencies abroad is essential to effective antitrust enforcement, bilateral relationships with enforcement agencies in other jurisdictions continued to be a priority for U.S. antitrust enforcers. International antitrust enforcement with respect to cartels, mergers, and civil non-merger enforcement matters continues apace. This year marked the 10th anniversary of the ICN, a collaboration of competition enforcement officials from around the world. The DOJ entered into cooperation agreements with antitrust enforcers in China and Chile, establishing a framework for enhanced cooperation in investigations to address complex international transactions and conduct. European and U.S. antitrust enforcers marked the 20th anniversary of the agreement between the European Communities and U.S. by reaffirming their commitment and adopting revised Best Practices on Merger Cooperation. The best practices address communication between reviewing agencies; coordination on timing; collection and evaluation of evidence; and remedies/settlement in cases where a merger is being reviewed by both a U.S. agency and the European Commission.[28]

CRIMINAL

While we did not see record breaking fines in the criminal antitrust arena this year, the watchful eye of the DOJ continues to find and dismantle cartels and bid-rigging and kickback schemes. Cases were brought or completed this year in markets involving municipal bonds, compressors, real estate foreclosure auctions, air transportation services, liquid crystal display (LCD), color display tubes, power generation, ready-mix concrete, packaged ice, and environmental services. Investigations are ongoing in the auto parts and polyurethane foam markets and we expect to begin seeing significant developments in 2012.

The ongoing investigation into refrigerant compressors is continuing to produce results. Panasonic and Embraco North America Inc. agreed to a $140.9 million criminal fine in September 2010 for their role in the conspiracy to suppress and eliminate competition by coordinating price increases for refrigerant compressors to customers in the U.S. and elsewhere from 2004 to 2007. In 2011 Danfoss Flensburg GmbH agree to a $3 million penalty, and the first charges brought against company executives.[29]

The investigation into the nearly 10 year worldwide conspiracy in the sale of color display tubes from 1997 to 2006 yielded a criminal fine of $32 million against Samsung SDI Company[30] The DOJ said that producers engaged in discussions and attended meetings to fix prices, reduce output, and allocate market shares of color display tube sold in the U.S. and elsewhere. Six individuals have also been indicted in connection with the ongoing investigation.

Defendant Horizon Lines, LLC agreed to a criminal fine of $45 million payable over five years for its role in a conspiracy with other providers of water transportation for freight between the continental U.S and Puerto Rico from 2002 to 2008.[31] The agency alleged the conspirators agreed to suppress and eliminate competition by fixing the rates and surcharges charged to customers for transportation of heavy equipment, medicines and consumer goods.

A Taiwan-based provider of international air transportation services for cargo, EVA Airways Corporation, agreed to plead guilty and pay a $13.2 million criminal fine for its role in a conspiracy from 2003 to 2006 to fix air cargo prices. The shipments included sensitive equipment used to manufacture LCD panels, perishable commodities such as cherries and pet food, and consumer goods.[32] To date, a total of 22 airlines and 21 executives have been charged in the conspiracy, with more than $1.8 billion in criminal fines having been imposed and four executives sentenced to serve prison time.

The continuing investigation into a worldwide conspiracy relating to the sale of aftermarket auto lights has resulted in two corporate criminal fines to date, and the indictment of three key executives, including one jail sentence.[33] The conspiracy in the U.S. and elsewhere to suppress and eliminate competition by fixing the prices of aftermarket

28 http://www.justice.gov/atr/public/international/docs/276276.pdf

29 U.S. v. Panasonic Corporation, http://www.justice.gov/atr/cases/panasonic.html; http://www.justice.gov/atr/cases/embraco.html; http://www.justice.gov/atr/cases/f275400/275457.pdf

30 U.S. v. Samsung SDI Company, LTD., http://www.justice.gov/atr/cases/samsungsdi.html

31 U.S. v. Horizon Lines, LLC, http://www.justice.gov/atr/cases/horizon.html

32 U.S. v. EVA Airways Corporation, http://www.justice.gov/atr/cases/evair.html

33 U.S. v. Sabry Lee (U.S.A.), Inc., http://www.justice.gov/atr/cases/sabrylee.html

auto lights is alleged to have existed from September 2003 to about September 2005. Maxzone Vehicle Lighting Corp. has agreed to pay a $43 million criminal fine for its role in the conspiracy.

Local conspiracies are no less likely than their international counterparts to get the attention of the DOJ.[34] The agency is continuing to press on in a bid rigging matter first brought in 2009 that resulted this year in a conviction and 16 month prison sentence. The matter, which is now on appeal to the 7th Circuit, involves business partners who allegedly conspired to obtain a contract from the City of Chicago. Douglas Ritter, who entered into a plea agreement in 2010, owned and operated Urban Services of America with Steven Fenzl. According to the agency, Urban Services, which refurbishes residential plastic garbage carts, orchestrated sham bids and fraudulently represented that it would subcontract with minority-owned businesses to win city business.

A local conspiracy involving agreements to fix prices and/or to rig bids for ready-mix concrete sold in Iowa from January 2008 through August 2009 resulted in jail sentences and criminal fines for two company executives.[35] A third executive is awaiting sentencing. Ready-mix concrete is produced in a concrete plant and then transported to work sites by mixer trucks where it is used in construction projects, including buildings and roads.

Prison time and restitution were ordered for a former airline fuel supply company owner and operator and a former owner and operator of a flight management services company.[36] The defendants were charged with conspiring to defraud Ryan International Airlines, a charter airline company located in Rockford, Illinois in a scheme that involved kickback payments to a Ryan employee in exchange for awarding them Ryan's business.

A former bank employee pled guilty for participating in a conspiracy related to contracts for the investment of municipal bond proceeds and other municipal finance contracts.[37] The conspiracy, which ran from January 1999 to May 2002, involved kickbacks to brokers and the falsification of bank records related to municipal finance contracts, including derivative contracts. According to the DOJ, brokers manipulated the competitive bidding process so that the bank would be the winning bidder for certain investment agreements and other municipal finance contracts.

PRIVATE LITIGATION

In a matter that possibly expands the extraterritorial reach of U.S. antitrust law, a domestic purchaser of magnesite brought a Sherman Act section 1 claim against a number of Chinese producers alleging the defendants conspired to the fix price of magnesite exported to the U.S.[38] Under the Foreign Trade Antitrust Improvements Act, the Sherman Act does not apply to conduct involving trade or commerce with foreign nations except where the defendants are involved in import trade or import commerce, or where the conduct at issue has a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Addressing the scope of the Foreign Trade Antitrust Improvements Act exceptions, the Third Circuit held that engaging in the physical import of goods to the U.S. is not a prerequisite to jurisdiction, provided the alleged anticompetitive behavior was directed at an import market, or that it was reasonably foreseeable that the conduct would have a direct and substantial effect on U.S. commerce. Foreign defendants will find it harder to quickly dispense with such claims brought in the Third Circuit going forward, but the resulting circuit split may make the issue ripe for Supreme Court review in the not too distant future.

In long standing litigation between the State of California and a group of Southern California's leading grocery chains, the Ninth Circuit held that the non-statutory labor exemption did not apply to a revenue sharing arrangement among the grocers.[39] The nonstatutory labor exemption allows groups of employers and employees to bargain together in certain instances while remaining shielded from antitrust scrutiny. The chains entered into the revenue sharing arrangement during a grocery worker strike in 2003 and 2004 to make it more difficult for the grocery

34 U.S. v. Steven Fenzl and Douglas E. Ritter, http://www.justice.gov/atr/cases/fenzlritter.html

35 U.S. v. Great Lakes Concrete, Inc., http://www.justice.gov/atr/cases/greatlakes.html

36 U.S. v. David A. Chaisson, http://www.justice.gov/atr/cases/f273400/273449.htm

37 U.S. v. Brian Scott Zwerner, http://www.justice.gov/atr/cases/zwerner.html

38 Animal Science Products, Inc. v. China Minmetals Corp., et al., No. 10-2288 (3d Cir. August 2011).

39 California v. Safeway, Inc., 2011 WL 2684942 (9th Cir. 2011), 101 ATRR 82.

workers' union to employ a "divide-and-conquer strategy" against them. Under the agreement, grocers earning certain windfall revenues as a result of a strike affecting one or more competitors agreed to share a portion those revenues with the targets of the strike. Under the Ninth Circuit ruling, the agreement is not protected from antitrust scrutiny, and is subject to a rule of reason analysis to determine its legality and enforceability.

In a matter with implications for antitrust class actions, the Second Circuit invalidated a class action waiver in American Express' Card Acceptance Agreement.[40] The decision calls into question the practice of using arbitration provisions to force customers to forego class action remedies. Merchants sued American Express in a 2007 class action lawsuit, challenging a policy which forces them to accept all cards issued by the company. The court invalidated the waiver on the grounds that it precluded merchants from enforcing their statutory rights, as no small merchant would have the wherewithal to bring an antitrust lawsuit challenging the alleged tying on its own.

Proskauer Rose LLP
www.proskauer.com
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington DC
USA 20004-2533
T: (202) 416-6869
F: (202) 416-6899

40 In Re: American Express Merchants' Litigation, (2d Cir. 2011), 634 F.3d 189.