

# Whither Merger Review? Looking Forward While Looking Back

Timothy P. Daniel

President Obama's antitrust team is now in place. Federal Trade Commissioner Jon Leibowitz became Chairman Leibowitz in early March, and he named his senior management team, including Bureau of Competition Director Richard Feinstein and Bureau of Economics Director Joseph Farrell. The full Senate confirmed Christine Varney in April as Assistant Attorney General (AAG) for Antitrust in the Department of Justice. And in March, Carl Shapiro returned to the Antitrust Division as Deputy Assistant Attorney General for Economic Analysis.

These officials take their positions at a time when the antitrust enforcement record of the Bush Administration has faced criticism for being too lax, particularly the Antitrust Division's merger enforcement record. In fact, Shapiro co-authored one of the more widely cited articles<sup>1</sup> criticizing the Bush Administration's merger enforcement record, arguing that the Antitrust Division's merger enforcement recently has been lax because the number of merger enforcement actions as a percent of Hart-Scott-Rodino (HSR) filings was significantly lower during the recent Bush Administration than it was during the Clinton and first Bush Administrations.<sup>2</sup> While some commentators have risen to the defense of the Bush Administration Antitrust Division's merger enforcement record,<sup>3</sup> the selection of these senior officials makes it virtually certain that the Obama Administration will increase the intensity of merger review.<sup>4</sup>

When that happens, what exactly would it mean? Would it mean that the newly appointed antitrust officials applaud the merger challenges brought during the latter years of the Bush Administration and simply instruct the legal and economic staff at the agencies to "do more like that"? Or would it mean that the newly appointed antitrust officials will seek to modify the agencies' approach to merger enforcement and instruct the staff to pursue a different mix of merger cases from those brought during the Bush Administration? How the agencies allocate their scarce merger enforcement resources is clearly a critical issue, as noted in Chairman Leibowitz's statement that the settlement in the FTC's litigation with Whole Foods "allows the FTC to shift resources to other important matters."<sup>5</sup> The question, therefore, is how the new competition enforcement officials will define "other important matters" with respect to merger enforcement.

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<sup>1</sup> Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008.

<sup>2</sup> *Id.* at 30.

<sup>3</sup> See, e.g., Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008.

<sup>4</sup> During the 2008 campaign, presidential candidate Senator Obama promised as much. In February 2008, Senator Obama criticized the Bush administration for having "what may be the weakest record of antitrust enforcement of any administration in the last half century." Statement of Senator Barack Obama for the American Antitrust Institute, Feb. 20, 2008, available at <http://www.antitrustinstitute.org/Archives/obama2.ashx>. As a consequence of this perceived weakness, Senator Obama pledged that his administration would "reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not." *Id.*

<sup>5</sup> Press Release, Fed. Trade Comm'n, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats Was Anticompetitive (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/wholefoods.shtm>.

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*The merger enforcement agenda during the last two years of the Bush Administration, while active, tended to focus on relatively small transactions and/or ones with relatively narrow antitrust markets, from a geographic and/or product market perspective.*

This article provides context for this question by examining in detail the merger enforcement records of the FTC and the Antitrust Division in 2007 and 2008. I believe a careful look at this record uncovers the merger enforcement priorities in place during the latter years of the Bush Administration and gives insight into the likelihood that the Obama Administration appointees will instruct the agencies' merger enforcement staff to shift direction in meaningful ways. Some recent articles have examined the number of merger challenges over time in an effort to compare the enforcement records of various administrations.<sup>6</sup> Studies such as these that count the number of challenges do not account for the nature of the challenges, i.e., whether the parties operated in national or local markets and whether the industries involved were large or small. This article analyzes such issues.

My primary conclusions are that the merger enforcement agenda during the last two years of the Bush Administration, while active, tended to focus on relatively small transactions and/or ones with relatively narrow antitrust markets, from a geographic and/or product market perspective. Further, the transactions challenged by the antitrust agencies involved relevant markets where the merging parties' combined share was typically well above 50 percent, which in turn implies market concentration levels well above the thresholds identified in the Horizontal Merger Guidelines.<sup>7</sup> The extent to which the agencies' recent merger challenges only occurred in markets with such high combined share levels for the merging firms and market concentration levels is striking. When economic activity and merger activity pick up, the newly appointed antitrust enforcement officials may well seek to expand merger enforcement into more sizable markets with lower concentration levels, thereby targeting larger transactions that affect a broader cross-section of the economy's consumers.<sup>8</sup>

<sup>6</sup> See, e.g., Baker & Shapiro, *supra* note 1; John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, ANTITRUST, Summer 2008.

<sup>7</sup> This latter observation is consistent with the findings in the report released by the FTC in December 2008, *Horizontal Merger Investigation Data, Fiscal Years 1996–2007*, available at <http://www.ftc.gov/opa/2008/12/horizmerger.shtm>. According to that report, of the 870 markets included in enforcement actions taken by the FTC in horizontal mergers over this period, 714 (or approximately 82 percent) involved post-merger Herfindahl measures of 2400 or higher, and 615 (or approximately 71 percent) involved post-merger Herfindahl measures of 3000 or higher. *Id.* tbl. 3.1. According to the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>, a market with a Herfindahl measure in excess of 1800 is considered to be "highly concentrated." *Id.* § 1.5.

<sup>8</sup> It is unclear whether the Obama Administration antitrust officials will alter the analytical approach to horizontal merger enforcement embodied in the Horizontal Merger Guidelines. The bipartisan Antitrust Modernization Commission (AMC) concluded in its Report in April 2007 that "the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound." Antitrust Modernization Comm'n, Report and Recommendations 9, available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm). The AMC's lone recommendation regarding the Horizontal Merger Guidelines was relatively minor—clarification of the analytical approach to mergers that involve innovation—and did not challenge the overarching analytical framework embedded in the Horizontal Merger Guidelines. *Id.* at 11. Newly appointed AAG Varney applied the Horizontal Merger Guidelines during her tenure as a Commissioner at the Federal Trade Commission in the 1990s. See Christine Varney, The Health Care and Antitrust Interface in an Era of Fundamental Industry-Wide Realignment, Speech at the SMS Health Executives Forum (Oct. 23, 1995), available at <http://www.ftc.gov/speeches/varney/pitoc23.shtm>. She also supported their expansion to include a section on efficiencies in 1997. See Press Release, Fed. Trade Comm'n, FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers, (Apr. 8, 1997), available at <http://www.ftc.gov/opa/1997/04/effpress.shtm>. On the other hand, Joe Farrell and Carl Shapiro recently have advocated an alternative approach to the Horizontal Merger Guidelines' focus on market shares and concentration in differentiated products mergers. Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (Nov. 25, 2008), available at <http://faculty.haas.berkeley.edu/shapiro/alternative.pdf>. For a discussion of this article and others written by Farrell and Shapiro, see Gregory K. Leonard & Mario A. Lopez, *Farrell and Shapiro: The Sequel*, ANTITRUST, Summer 2009.

## Merger Enforcement in the Latter Years of the Bush Administration

Assessing a particular administration's merger enforcement priorities is complicated because the horizontal transactions that generate public information are not a random sample of all horizontal transactions. In fiscal year 2007, for instance, the federal antitrust agencies received Hart-Scott-Rodino filings for 2201 transactions, of which only sixty-three (2.9 percent) resulted in the issuance of a second request.<sup>9</sup> And, of those transactions for which a second request was issued, only a subset generated public information regarding the investigating agency's competitive analysis and enforcement decision. Thus, information is not readily available for merger investigations that were viewed by the investigating agencies as relatively "close calls" but ultimately closed.<sup>10</sup>

While acknowledging these selection issues in this article, I examine the press releases issued by the two antitrust agencies during 2007 and 2008. The press releases provide details on the mergers that were challenged, remedied, or cleared, and thus provide important information on the agencies' merger enforcement practices and priorities. In addition, the agencies' practice during the Bush Administration of issuing statements when certain investigations were closed means that the press releases provide information on investigations that fall on both sides of the enforcement line.

A review of the agencies' press releases indicates that the agencies actively challenged mergers during the final two years of the Bush Administration. Table 1 shows, for calendar years 2007 and 2008, the number of horizontal merger investigations for which the FTC and the Antitrust Division issued press releases announcing an official action.<sup>11</sup> Over this two-year period, the FTC issued thirty-two press releases pertaining to merger enforcement decisions and the Antitrust Division issued thirty-five press releases.<sup>12</sup> Table 1 divides these decisions into four categories: (1) the agency challenged the proposed merger and sought to prevent it by filing for a preliminary injunction in district court; (2) the parties resolved the agency's concerns by signing a consent decree specifying a particular remedy (divestiture, licensing, etc.); (3) the agency issued a closing statement explaining why the transaction was not challenged; and (4) the agency issued a statement following the parties' decision to abandon the transaction due to the competitive concerns identified during the investigation. The remainder of this article discusses the agencies' decisions in more detail.

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<sup>9</sup> See Fed. Trade Comm'n & Dep't of Justice Antitrust Div., Hart-Scott-Rodino Annual Report Fiscal Year 2007, App. A, available at <http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf>.

<sup>10</sup> A lack of information also applies to investigations of consummated transactions that are not subject to the HSR pre-merger filing requirements; the transactions for which information on the agencies' analysis and decision are available represent a select few of the consummated transactions that occurred during the relevant time period.

<sup>11</sup> See Appendix for Tables. In September 2008, the FTC reached a settlement with Fresenius and Daiichi Sankyo to resolve a purely vertical concern. Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008), available at <http://www2.ftc.gov/opa/2008/09/fresenius.shtm>. This vertical matter is not included in the totals in Table 1. Also not included are the Evanston/Highland Park and Chicago Bridge & Iron merger litigations, both of which produced court decisions in merger investigations launched years earlier. Press Release, Fed. Trade Comm'n, FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporation's Acquisition of Highland Park Hospital (Apr. 28, 2008), available at <http://www.ftc.gov/opa/2008/04/evanston.shtm>. Press Release, Fed. Trade Comm'n, Federal Appeals Court Rules in Favor of FTC in Case Against Chicago Bridge & Iron Co. (Jan. 25, 2008), available at <http://www2.ftc.gov/opa/2008/01/cbi.shtm>.

<sup>12</sup> The antitrust agencies may issue multiple press releases related to a particular transaction, such as one press release when the transaction is initially challenged or cleared and subsequent press releases related to the final approval of the remedy or resolution of litigation. A particular merger investigation is counted only once in Table 1.

*While it is of course true that consumers can be harmed by small transactions that fall below the HSR thresholds, the fact that so many of the litigated merger challenges in 2007 and 2008 fell into this category suggests that the agencies devoted disproportionate resources to litigating small transactions where the measure of overall consumer harm simply cannot be that pronounced.*

## Litigated Mergers

Table 1 reveals that the FTC has been willing to challenge mergers in court over the past two years: eight court challenges in two years represent an active litigation record under any standard.<sup>13</sup> The Antitrust Division also was willing to go to court, but at a lower rate: three court challenges in two years.<sup>14</sup> But a detailed look at these litigated matters reveals that the significant resources devoted by the agencies to merger litigation often focused on relatively small transactions (i.e., those below the HSR filing thresholds)<sup>15</sup> or relatively small relevant markets.

Over one-third of the merger litigations in 2007–08 involved transactions that fell below the HSR filing thresholds: two of the eight FTC merger litigations and two of the three Antitrust Division litigations over this two-year period fit this description.<sup>16</sup> While it is of course true that consumers can be harmed by small transactions that fall below the HSR thresholds, the fact that so many of the litigated merger challenges in 2007 and 2008 fell into this category suggests that the agencies devoted disproportionate resources to litigating small transactions where the measure of overall consumer harm simply cannot be that pronounced.

Of the remaining six FTC merger litigations in 2007 and 2008—the ones for which HSR filings were required—four involved a single, localized geographic market (Dominion/Equitable; Western/Giant; Inova/Prince William; and CCS/Newpark), one involved a relatively narrow product market (premium natural and organic supermarkets) across multiple local geographic markets (Whole Foods/Wild Oats), and the last involved a highly specialized commercial software product

<sup>13</sup> For instance, in the last year of the Clinton Administration, the FTC merger litigation record was described as “busy and productive” during which the agency “filed four preliminary injunctions in merger matters.” And of these four matters, two were not litigated because the parties abandoned the transaction after the FTC filed its request for a preliminary injunction. See Molly S. Boast, Acting Director, Bureau of Competition, Fed. Trade Comm’n, Report from the Bureau of Competition Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2001), available at <http://www.ftc.gov/speeches/other/boastmollys.shtm>.

<sup>14</sup> In 2008, each agency issued a press release when a proposed transaction was abandoned after the agency expressed serious concerns. These transactions were Herff/Jones (class rings) for the FTC and Google/Yahoo! (Internet advertising) for the Antitrust Division. These outcomes also reflect the agencies’ willingness to go to court if necessary to challenge an allegedly anticompetitive transaction. See Press Release, Fed. Trade Comm’n, Statement of FTC’s Bureau of Competition Regarding Announcement that Herff Jones and American Achievement Group Have Terminated Their Acquisition Agreement (Dec. 8, 2008), available at <http://www.ftc.gov/opa/2008/12/classrings.shtm>; Press Release, Dep’t of Justice Antitrust Div., Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/239167.htm](http://www.usdoj.gov/atr/public/press_releases/2008/239167.htm).

<sup>15</sup> The HSR size of transaction threshold that triggered an obligation to file was \$56.7 million on Jan. 1, 2007, increased to \$59.8 million on Feb. 21, 2007, and increased again to \$63.1 million on Feb. 28, 2008. See Press Release, Fed. Trade Comm’n, Commission Announces Revised Jurisdictional Thresholds for Section 8 and Section 7A of the Clayton Act (Jan. 16, 2007), available at <http://www.ftc.gov/opa/2007/01/fyi0708.shtm>; Press Release, Fed. Trade Comm’n, Commission Announces Revised Jurisdictional Thresholds for Section 8 and Section 7A of the Clayton Act (Jan. 18, 2008), available at <http://www.ftc.gov/opa/2008/01/clayton.shtm>.

<sup>16</sup> For the FTC, these two matters are Polypore/Microporous (battery separators—in administrative litigation), and Ovation (prescription drugs for rare disease affecting newborns—in administrative litigation). Press Release, Fed. Trade Comm’n, FTC Issues Administrative Challenge to Polypore International, Inc.’s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct (Sept. 10, 2008), available at <http://www2.ftc.gov/opa/2008/09/polypore.shtm>; Press Release, Fed. Trade Comm’n, FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition (Dec. 16, 2008), available at <http://www.ftc.gov/opa/2008/12/ovation.shtm>. For the Antitrust Division, these two matters are Daily Gazette/Media News (newspapers in West Virginia—in litigation), and Microsemi/Semicoa (specialized semiconductors for use in defense applications—in litigation). Press Release, Dep’t of Justice Antitrust Div., Justice Department Files Antitrust Lawsuit Against Daily Gazette Company and MediaNews Group (May 22, 2007), available at [http://www.usdoj.gov/atr/public/press\\_releases/2007/223466.htm](http://www.usdoj.gov/atr/public/press_releases/2007/223466.htm); Press Release, Dep’t of Justice Antitrust Div., Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/240549.htm](http://www.usdoj.gov/atr/public/press_releases/2008/240549.htm).

(CCC/Mitchell).<sup>17</sup> As with the non-HSR merger litigations summarized above, the magnitude of the consumer harm from these transactions is necessarily limited by the scope of the markets involved (with the possible exception of the CCC/Mitchell transaction, which involved software used nationwide to estimate the value of repairs from automobile accidents, which number in the millions).

During 2007 and 2008, the Antitrust Division litigated only one matter that required an HSR filing: JBS/National (beef purchasing and processing).<sup>18</sup> The parties ultimately abandoned the transaction in February 2009 rather than continue to pursue litigation with the Antitrust Division.<sup>19</sup>

To be clear, I am not saying that consumers were not at risk from the eleven mergers litigated by the FTC and the Antitrust Division during 2007 and 2008—these cases may well have been meritorious from a consumer welfare perspective. Yet it seems fair to say that the mergers litigated in 2007 and 2008 involved relatively small amounts of potential consumer injury because they involved transactions that either did not require an HSR filing or, with some exceptions, involved narrow antitrust markets (on a geographic and/or product dimension.) Looking forward, FTC Chairman Leibowitz and AAG Varney may well re-examine whether the agencies' litigation resources are being deployed to maximal consumer benefit.

### **Mergers Settled with a Consent Decree and Remedy**

Most merger investigations do not end up in court. Well over half of the merger-specific press releases issued by the agencies in 2007 and 2008 pertain to merger investigations that were resolved when the parties agreed to divest assets to address the competitive concerns raised by the transaction. These two years are typical in this regard—merger investigations frequently conclude when the parties and the investigating agency agree on a remedy. Thus, merger investigations that ultimately settle provide important evidence on the agencies' merger enforcement priorities.

Table 1 indicates that the FTC settled twenty-two merger matters and that the Antitrust Division settled twenty-six merger matters in 2007 and 2008. To better assess the agencies' overall merger enforcement agendas during this period, Tables 2 and 3 place these merger settlements into a number of discrete categories.

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<sup>17</sup> In these six litigated matters, the FTC suffered losses in district court in three of them: Whole Foods/Wild Oats (request for preliminary injunction denied by the district court, preliminary injunction then granted on appeal, case settled Mar. 6, 2009), *see* Press Release, *supra* note 5; Dominion/Equitable (complaint dismissed by district court on jurisdictional grounds, deal abandoned while the FTC appealed this ruling), *see* Press Release, Fed. Trade Comm'n, FTC Dismisses Administrative Complaint Challenging Acquisition of The Peoples Natural Gas Company from Dominion Resources, Inc. (Feb. 4, 2008), *available at* <http://www2.ftc.gov/opa/2008/02/dom.shtm>; Western/Giant (request for a preliminary injunction denied by the district court and the FTC declined to appeal), *see* Press Release, Fed. Trade Comm'n, FTC Ends Administrative Litigation in Western Refining Case (Oct. 3, 2007), *available at* <http://www2.ftc.gov/opa/2007/10/western.shtm>. In the remaining three FTC challenges that involved deals that required HSR filings, the parties abandoned the transaction, two prior to the preliminary injunction hearing (Inova/Prince William and CCS/Newpark) and the other after a district court granted the FTC a preliminary injunction (CCC/Mitchell). *See* Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition Regarding Inova Health System's Announced Withdrawal of Plans to Merge with Prince William Health System (June 6, 2008), *available at* <http://www2.ftc.gov/opa/2008/06/inova.shtm>; Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition Regarding Announcement that Parties Have Terminated the Agreement for CCS Corporation to Acquire Newpark Environmental Services (Nov. 24, 2008), *available at* <http://www.ftc.gov/opa/2008/11/redsky.shtm>; Ron Knox, *Companies Abandon Deal After Antitrust Injunction*, GLOBAL COMPETITION REV., Mar. 12, 2009, <http://www.globalcompetitionreview.com/news/article/13068/companies-abandon-deal-antitrust-injunction>.

<sup>18</sup> Press Release, Dep't of Justice Antitrust Div., Justice Department Files Lawsuit to Stop JBS S.A. from Acquiring National Beef Packing Company (Oct. 20, 2008), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2008/238382.htm](http://www.usdoj.gov/atr/public/press_releases/2008/238382.htm).

<sup>19</sup> Press Release, Dep't of Justice Antitrust Div., Department of Justice Statement on the Abandonment of the JBS/National Beef Transaction (Feb. 20, 2009), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2009/242857.htm](http://www.usdoj.gov/atr/public/press_releases/2009/242857.htm). One indication of the economic downturn is that this is the only press release related to merger enforcement issued by the Antitrust Division during the first six months of 2009.

**FTC Merger Settlements.** With regard to the FTC, Table 2 shows that the twenty-two merger settlements reached in 2007 and 2008 can be placed into the following six general product categories:

- Pharmaceutical mergers (8): Merger-specific competitive concerns in certain segments of the pharmaceutical industry were resolved via divestitures, allowing the overall transaction to proceed.
- Consumer products mergers (4): Merger-specific competitive concerns in certain product markets were resolved via divestitures, allowing the overall transaction to proceed.<sup>20</sup>
- Highly specialized business software mergers (2): Merger-specific competitive concerns in specific market segments were resolved via divestitures and non-structural relief (e.g., termination of existing long-term contracts and elimination of non-compete agreements), allowing the overall transaction to proceed.<sup>21</sup>
- Highly specialized industrial products mergers (4): Merger-specific competitive concerns in certain product segments were resolved via divestitures and non-structural relief (such as licensing of intellectual property), allowing the overall transaction to proceed.<sup>22</sup>
- Retail mergers (3): Merger-specific competitive concerns in local geographic markets were resolved via divestitures, allowing the overall transaction to proceed.
- Terminating of refined petroleum products merger (1): Merger-specific competitive concerns in local geographic markets were resolved via non-structural relief (e.g., ownership interests of the merging parties in certain entities were modified to be passive), allowing the overall transaction to proceed.

Categorizing these settlements in this way brings the FTC's merger enforcement priorities during 2007 and 2008 into focus. Of primary interest for the FTC is the pharmaceutical sector, consistent with the agency's historic focus on health care issues. Recent announcements of several large pharmaceutical mergers, some of which are now under investigation at the FTC, indicate that the pharmaceutical sector will continue to be an area where the FTC will allocate considerable merger enforcement resources.<sup>23</sup>

Table 2 indicates that the pharmaceutical transactions resulting in settlements involved very highly concentrated markets. Of the eight pharmaceutical transactions that resulted in settlements, five included at least one merger-to-monopoly market, one included a market where the merging parties had a combined share in excess of 90 percent, one involved a 3-to-2 transaction, and one involved the combination of two close competitors in an already highly concentrated market. These exceedingly high concentration and share levels are not surprising, given the significant barriers to entry in pharmaceutical markets. What is perhaps a bit surprising is that markets with similarly high concentration and share figures dominated other non-pharmaceutical merger settlements reached by the FTC in 2007 and 2008, as discussed below.

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<sup>20</sup> The product markets at issue in these four matters were fishing line, super-premium vodka and other liquors, spices, and pregnancy tests.

<sup>21</sup> The product markets at issue in these two matters were specialized human resources software, and electronic records and related software used by law enforcement agencies.

<sup>22</sup> The product markets at issue in these four matters were continuous filament mat, sodium silicate, waterjet cutting systems, and specialty epoxy resins.

<sup>23</sup> Among the mergers recently announced are Pfizer/Wyeth and Merck/Schering-Plough. Both are under investigation at the FTC. See Rosalind Donald, *Pfizer May Sell Animal Health Business to Clear Wyeth Merger*, GLOBAL COMPETITION REV., Mar. 19, 2009, <http://www.globalcompetitionreview.com/news/article/13105/pfizer-may-sell-animal-health-business-clear-wyeth-merger/>; Rosalind Donald, *FTC Digs Deeper in Merck Merger*, GLOBAL COMPETITION REV., June 23, 2009, <http://www.globalcompetitionreview.com/news/article/16219/ftc-digs-deeper-merck-merger/>.

With regard to FTC merger settlements involving national markets other than pharmaceuticals, the transactions involve four matters for which the merging parties' customers are final consumers and six matters for which the merging parties' customers are businesses. Table 2 indicates that in nine of these ten matters, the parties had a combined share in excess of 60 percent (and in several cases in excess of 80 percent), or the transaction combined the two leading firms in the relevant market.<sup>24</sup> From a purely structural perspective, therefore, these matters were not close calls, with Herfindahl measures well in excess of the "highly concentrated" threshold of 1800 contained in the Horizontal Merger Guidelines.<sup>25</sup> While a full competitive analysis of each of these transactions must go beyond a consideration of concentration and shares, it is notable that the settlements reached by the FTC in the last two years of the Bush Administration involved only transactions with concentration levels high above the concentration thresholds articulated in the Horizontal Merger Guidelines. One question is whether the new Administration will continue this practice, or instead seek remedies in transactions with lower concentration levels as well.

Finally, the FTC has long been the agency that reviews retail mergers and transactions in the distribution of refined petroleum products. In these industries, competitive issues arise in localized geographic markets. In the four such matters settled during 2007 and 2008, Table 2 indicates that the merging parties' shares of relevant local markets were relatively high, including one matter with post-transaction shares of between 50 and 100 percent (depending on the geographic market) and another that combined the nation's top two farm-store retailers.

All in all, the FTC's recent merger settlements reflect an enforcement policy that obtains remedies in narrowly circumscribed markets (product or geographic) with very high concentration levels, with a particular focus on the pharmaceutical sector. The vast majority of settlements arose in markets where the merging parties would have had a post-transaction share of at least 60 percent. Going forward, it will be interesting to see whether the FTC under Chairman Leibowitz also seeks remedies in merger matters with considerably lower concentration levels, i.e., those closer to the thresholds contained in the Horizontal Merger Guidelines.<sup>26</sup>

**Antitrust Division Merger Settlements.** With regard to the Antitrust Division, Table 3 shows that the twenty-six merger settlements reached in 2007 and 2008 can be placed into the following six general product categories, some of which overlap with the FTC's categories:

- Consumer products merger (1): Merger-specific competitive concerns in product segment (beer sold in several local markets in upstate New York) were resolved via divestitures, allowing the overall transaction to proceed.
- Highly specialized business software mergers (2): Merger-specific competitive concerns in

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<sup>24</sup> The tenth matter is TALX Corporation, in which the FTC challenged a series of consummated transactions that ultimately resulted in two highly concentrated software markets. Press Release, Fed. Trade Comm'n, FTC Challenges Acquisitions by TALX Corp. that Stifled Competition in Unemployment Compensation Management and Employment Verification Services (Apr. 28, 2008), available at <http://www2.ftc.gov/opa/2008/04/talx.shtm>.

<sup>25</sup> A transaction that produces a firm with a post-transaction share of 60 (80) percent would imply a Herfindahl measure of at least 3600 (6400).

<sup>26</sup> It also will be interesting to see whether the FTC expands the reach of horizontal merger enforcement using innovative theories. For instance, Commissioner Rosch's concurring statement in the Ovation Pharmaceuticals matter advocated challenging transactions that did not alter market shares or concentration but could be shown to create incentives to increase prices post-transaction. Concurring Statement of Commissioner J. Thomas Rosch, *Federal Trade Commission v. Ovation Pharmaceuticals, Inc.* at 1 (Dec. 18, 2008), available at <http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf>. Chairman Leibowitz's concurring statement in the same transaction expressed support for Commissioner Rosch's analysis. Concurring Statement of Commissioner Jon Leibowitz, *Federal Trade Commission v. Ovation Pharmaceuticals, Inc.* at 1 (Dec. 18, 2008), available at <http://www2.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf>.

specific market segments were resolved via divestitures and non-structural relief (e.g., licensing agreements) allowing the overall transaction to proceed.<sup>27</sup>

- Highly specialized industrial and business products mergers (5): Merger-specific competitive concerns in certain product segments were resolved via divestitures, allowing the overall transaction to proceed.<sup>28</sup>
- Agricultural products merger (1): Merger-specific competitive concerns in certain product segments (cotton seeds) were resolved via divestitures and licensing agreements, allowing the overall transaction to proceed.
- Local market mergers (14): Merger specific competitive concerns in local markets were resolved via divestitures, allowing the overall merger to proceed.<sup>29</sup>
- “Smokestack” industries operating in regional, national, or international geographic markets mergers (3): Merger-specific competitive concerns were resolved via divestitures of manufacturing facilities, allowing the overall transaction to proceed.<sup>30</sup>

Looking at these outcomes more closely, the Antitrust Division, like the FTC, reached settlements in transactions where the merging parties’ post-transaction share typically was very high. With regard to transactions involving products sold to businesses in national or regional markets, Table 3 shows that seven of the eight settlements involved transactions where the post-merger share of the merging parties would have been 64 percent or higher, and in most cases above 80 percent.<sup>31</sup> Shares were similarly high in the fourteen transactions involving a variety of local geographic markets: Table 3 shows that in all but one of these transactions the merging parties would have had a post-transaction share in excess of 50 percent (and typically higher) or that the transaction combined the two major players in the relevant markets.<sup>32</sup> These settlements, like many of those reached by the FTC, involved markets where the merging parties’ shares are high, and market concentration levels were well above the “highly concentrated” threshold contained in the Horizontal Merger Guidelines.

The parties’ market shares were somewhat lower in the three settlements in “smokestack” industries, and in the one settlement involving a consumer product (beer). In these cases, the parties’ combined shares were estimated by the Antitrust Division to be between 37 and 45 percent. A combination of factors, particularly the finding that key rivals in capital-intensive industries were capacity constrained, led the Antitrust Division to conclude that divestitures of some capacity was needed to prevent the transactions from reducing competition.

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<sup>27</sup> The product markets at issue in these two matters were software used for financial research and clinical tests for individuals with speech and language disorders.

<sup>28</sup> The product markets at issue in these five matters were end-of-car cushioning systems for railroad cars, drop cable used by cable providers, carbon bonded ceramics, college and university textbooks, and commercial ice makers.

<sup>29</sup> These remedies were obtained in several industries that the Antitrust Division has historically reviewed: building materials (such as cement and aggregates); banking; wireless telephony; radio/TV broadcasting; health insurance; movie theaters; and miscellaneous transportation-related markets (bus service, waste collection and hauling, and airport services).

<sup>30</sup> The product markets at issue in these three matters were tin mill products, newsprint, and coated recycled boxboard.

<sup>31</sup> The one exception to this trend was the Cenage/Houghton Mifflin transaction, which involved the sale of college textbooks. The merging firms in this transaction had a combined share of approximately 35 percent, and the transaction increased the Herfindahl index by approximately 500 to over 3000 in each relevant market. See *United States v. Cenage Learning Holdings I, L.P.*, Case No. 1:08-cv-00899, Competitive Impact Statement (May 28, 2008), available at <http://www.usdoj.gov/atr/cases/f233600/233677.htm>.

<sup>32</sup> The one exception is the PNC/National City transaction, for which the publicly available information does not include information on the parties’ shares in the relevant local banking markets.

In sum, the Antitrust Division's merger settlement record over the final two years of the Bush Administration resembles the FTC's record: settlements were reached in matters with relatively narrow geographic and/or product markets with high levels of post-transaction concentration. The magnitude of consumer harm associated with these transactions cannot be dismissed, but it certainly appears limited by the nature of the markets involved.

## Conclusion

The installation of President Obama's antitrust team promises to bring change to antitrust enforcement in the merger area, particularly at the Antitrust Division. AAG Varney has criticized the Antitrust Division's recent merger enforcement record; one commentator noted that during her confirmation hearings AAG Varney stated that the Bush Administration's reliance on the Chicago School approach to merger enforcement "had created a reluctance for the government to go forward and attempt to block mergers in the marketplace."<sup>33</sup> DAAG Shapiro also has been critical of the Antitrust Division's merger enforcement record, pointing in particular to the low level of merger enforcement during the Bush Administration measured either against other time periods or against the FTC's merger enforcement actions during the same time period.<sup>34</sup>

AAG Varney and DAAG Shapiro have been understandably vague regarding what they would have done had they held their current positions during the Bush Administration, so it is unclear how the merger enforcement statistics reported above might have been different had these new officials been making the decisions. Still, both Varney and Shapiro have hinted that they might have challenged the Whirlpool/Maytag and XM/Sirius mergers that were cleared by the Antitrust Division.<sup>35</sup> Interestingly, both of these high profile mergers conform to the recent Bush Administration's merger enforcement record described above in one respect—post-transaction concentration levels would have been well above the Horizontal Merger Guidelines' thresholds under market definitions that would have supported a challenge. Where these two cleared transactions differ from those typically challenged during the final two years of the Bush Administration is their size and reach—both Whirlpool/Maytag and XM/Sirius involved sizable transactions in large, national markets.

While the ultimate merger enforcement agenda of the newly appointed antitrust officials will only become clear with time, these officials have pledged to be more aggressive than their immediate predecessors. Our review of the last two years of the Bush Administration merger enforcement record indicates that the agencies' recent focus has been on transactions in national industries that traditionally fall to one agency or the other (pharmaceutical mergers to the FTC, "smokestack" mergers to the Antitrust Division) and on transactions where the competitive issues arise in narrow markets, from a product and/or geographic market perspective, with relatively high post-transaction share and concentration levels. With regard to merger settlements, the extent to which share and concentration levels typically have exceeded the benchmarks contained in the Horizontal Merger Guidelines by such a wide margin is quite striking. One possible path to reinvigorating merger enforcement would entail FTC Chairman Leibowitz and Assistant Attorney General Varney instructing their merger staffs to consider challenging transactions in larger markets, even if they involve lower concentration levels. ●

*One possible path to reinvigorating merger enforcement would entail FTC Chairman Leibowitz and Assistant Attorney General Varney instructing their merger staffs to consider challenging transactions in larger markets, even if they involve lower concentration levels.*

<sup>33</sup> Andrea Agathoklis, *In Their Own Words: Predicting Enforcement Under Varney and Leibowitz*, ANTITRUST, Summer 2009, at 6.

<sup>34</sup> Baker & Shapiro, *supra* note 1, at 30.

<sup>35</sup> See Agathoklis, *supra* note 33, at 7 (quoting Varney as saying during her confirmation hearings that "from the outside, those [Whirlpool/Maytag and XM/Sirius] looked like mergers in horizontal markets that one wonders why they were not challenged."); see also Baker & Shapiro, *supra* note 1, at 32 (similarly questioning the Antitrust Division's decisions to close both of these merger investigations).

## Appendix

**TABLE 1**  
**Horizontal Merger Investigations Announced by the Federal Trade Commission**  
**and Department of Justice Antitrust Division by Action Type**  
**2007–2008**

Action Type	Federal Trade Commission		Department of Justice Antitrust Division	
	2007	2008	2007	2008
(a)	(b)	(c)	(d)	(e)
Agency Challenged Merger	3	5	1	2
Transaction Settled with Remedy	10	12	10 <sup>1</sup>	16
Transaction Not Challenged	1	0	2	3
Parties Abandoned Transaction	0	1	0	1
<b>Total:</b>	<b>14</b>	<b>18</b>	<b>13</b>	<b>22</b>

Note: The Evanston/Highland Park and Chicago Bridge & Iron Company/Pitt-Des Moines, Inc. transactions reviewed by the Federal Trade Commission are excluded from this analysis. While court decisions relating to these two transactions were made during this time period, the merger investigations were launched years earlier.

<sup>1</sup> Includes merger between FirstGroup PLC and Laidlaw International Inc., which resulted in a fix-it-first decision. In such situations, the agency agrees not to issue a complaint if the parties fix the competitive concerns up front.

Source: Press Releases, Federal Trade Commission and Department of Justice Antitrust Division, available at <http://www.ftc.gov> and <http://www.usdoj.gov/atr>.

**TABLE 2**  
**Horizontal Merger Investigations Announced by the Federal Trade Commission (“FTC”) Where the Merging Parties and the FTC Agreed to a Remedy**  
**2007–2008**

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Pharmaceutical</b>				
1/18/2007	Hospira Inc.; Mayne Pharma Ltd.	5 Generic Injectable Drugs: (1) Hydromorphone Hydrochloride (2) Nalbuphine Hydrochloride (3) Morphine Sulfate (4) Preservative-free Morphine (5) Deferoxamine Mesylate	n.a.	(1) Companies are 2 of 3 suppliers of generic version of Hydromorphone Hydrochloride. (2) Hospira is only supplier of generic injectable Nalbuphine Hydrochloride. Mayne is in process of entering market. (3) Hospira is leading producer of generic injectable Morphine Sulfate. There are currently only three suppliers and Mayne is in process of entering market. (4) Hospira is one of two producers of generic injectable Preservative-Free Morphine. Mayne is in process of entering market. (5) Hospira is one of two producers of generic injectable Deferoxamine Mesylate. Mayne is in process of entering market.
4/16/2007	Actavis Group hf.; Abrika Pharmaceuticals, Inc.	Generic isradipine capsules	100%	<b>Merger-to-monopoly:</b> Companies are the only two suppliers of generic isradipine capsules in the United States.
9/27/2007	Mylan Laboratories (Merck Generics); E. Merck oHG	5 Generic Drugs: (1) Acebutolol hydrochloride capsules (2) Flecainide acetate tablets (3) Guanfacine hydrochloride tablets (4) Nicardipine hydrochloride capsules (5) Sotalol hydrochloride AF tablets	(1) Acebutolol hydrochloride capsules: 100% (2) Flecainide acetate tablets: 78% (3) Guanfacine hydrochloride tablets: >53% (4) Nicardipine hydrochloride capsules: 86% (5) Sotalol hydrochloride AF tablets: n.a.	<b>Merger-to-monopoly:</b> Acebutolol hydrochloride capsules <b>Three-to-two merger:</b> Nicardipine hydrochloride capsules, Sotalol hydrochloride AF tablets <b>Five-to-four merger:</b> Flecainide acetate tablets Guanfacine hydrochloride tablets—Mylan, Merck/Par, Watson and Actavis, are the only suppliers of the 2 mg formulation of guanfacine. Because many customers prefer to purchase the 1 mg and 2 mg formulations of the product from one supplier, the competitive significance of the other four suppliers who do not sell these formulations is limited.
10/9/2007	Kyphon, Inc.; Disc-O-Tech (Medical & Orthopedic Technologies)	Minimally Invasive Vertebral Compression Fracture (MIVCF) treatment products	>90%	Kyphon has 90% share in MIVCF product. Disc-O-Tech's Confidence is its closest substitute.
11/16/2007	Schering-Plough Corp.; Organon BioSciences N.V. (includes subsidiary Intervet, Inc.)	3 live poultry vaccines for the prevention and treatment of: (1) Georgia 98 strain of infectious bronchitis (2) Fowl cholera due to Pasteurella Multocida (3) Mycoplasma Gallisepticum (MG)	(1) Live Georgia 98: 100% (2) Fowl cholera due to Pasteurella Multocida: > 85% (3) Mycoplasma Gallisepticum: >72%	Schering-Plough and Intervet are two of only three major suppliers of Pasteurella Multocida and are the only suppliers of Live Georgia 98 vaccine in the United States.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Pharmaceutical</b>				
8/13/2008	Sun Pharmaceutical Industries Ltd.; Taro Pharmaceutical Industries Ltd.	3 generic formulations of anticonvulsant drugs carbamazepine: (1) Immediate-release carbamazepine tablets (2) Chewable carbamazepine tablets (3) Extended-release carbamazepine tablets	(1) Immediate-release carbamazepine tablets: 68% (2) Chewable carbamazepine tablets: 35% (3) Extended-release carbamazepine tablets: 100% (anticipating FDA approval)	<b>Merger-to-monopoly:</b> Extended-release carbamazepine tablets <b>Three-to-two merger:</b> Chewable carbamazepine tablets <b>Four-to-three merger:</b> Immediate-release carbamazepine tablets
12/19/2008	Teva Pharmaceuticals Industries Ltd; Barr Pharmaceuticals Inc.™	29 individual generic drugs: (1) Tetracycline hydrochloride (HCl) capsules; (2) Chlorzoxazone tablets; (3) Desmopressin acetate tablets; (4) Metoclopramide HCl tablets; (5) Carboplatin injection; (6) Tamoxifen citrate tablets; (7) Metronidazole tablets; (8) Trazodone HCl tablets; (9) Glipizide/metformin HCl tablets; (10) Cyclosporine liquid; (11) Cyclosporine capsules; (12) Flutamide capsules; (13) Mirtazapine orally disintegrating tablets; (14) Deferoxamine injection; (15) Epoprostenol sodium (freeze-dried powder) injection (epop); (16) Weekly fluoxetine capsules; and (17)-(29): 13 generic oral contraceptive markets equivalent to: (17) Ortho-Cept (18) Mircette (19) Triphasil (20) Alesse (21) OrthoNovum 1-35 (22) OrthoNovum 7/7/7 (23) Loestrin FE (1mg/.02mg & 1.5mg/.03mg) (24) Loestrin FE (1mg/.2mg) (25) Loestrin FE 24 (26) Ovcon 35 (27) Ortho-Cyclen (28) Ortho Tri-Cyclen (29) Ortho Tri-Cyclen Lo 28	(1) Tetracycline hydrochloride (HCl) capsules: 100% (2) Chlorzoxazone tablets: 100% (3) Desmopressin acetate tablets 100% (4) Metoclopramide HCl tablets: 82% (5) Carboplatin injection: 60% (6) Tamoxifen citrate tablets: 73% (7) Metronidazole tablets: 89% (8) Trazodone HCl tablets: 75% (9) Glipizide/metformin HCl tablets: 51% (10) Cyclosporine liquid: 55% (11) Cyclosporine capsules: 41% (12) Flutamide capsules: 42% (13) Mirtazapine orally disintegrating tablets: 36% (14) Deferoxamine injection: 16% (15) Epoprostenol sodium (freeze-dried powder) injection (epop): 100% (16) Weekly fluoxetine capsules: n.a. (17) Ortho-Cept: n.a. (18) Mircette: n.a. (19) Triphasil: n.a. (20) Alesse: n.a. (21) OrthoNovum 1-35: n.a. (22) OrthoNovum 7/7/7: n.a. (23) Loestrin FE (1mg/.02mg & 1.5mg/.03mg): n.a. (24) Loestrin FE (1mg/.2mg): n.a. (25) Loestrin FE 24: n.a. (26) Ovcon 35: n.a. (27) Ortho-Cyclen: 68% (28) Ortho Tri-Cyclen: 51% (29) Ortho Tri-Cyclen Lo 28: n.a.	<b>Merger-to-monopoly:</b> Generic Tetracycline HCl tablets, Chlorzoxazone tablets, and Desmopressin Acetate tablets. <b>Three-to-two merger:</b> Generic Tamoxifen Citrate, Cyclosporine Liquid, and generic oral contraceptives equivalent to Ortho-Cyclen and Ortho Tri-Cyclen. <b>Four-to-three merger:</b> Metoclopramide HCl tablets, Carboplatin Injection, Metronidazole tablets, Trazodone HCl tablets, Cyclosporine capsules, Flutamide capsules, Glipizide/Meformin HCl tablets, Deferoxamine Injection, and Mirtazapine ODT. For the other products, this transaction would eliminate one of up to four competitors in each of the relevant markets.
12/29/2008	King Pharmaceuticals, Inc; Alpharma, Inc.™	Long-acting opioid (LAO) analgesic drug, Kadian	n.a.	The transaction would reduce the close and substantial competition between King and Alpharma in the relevant market, which is already highly concentrated.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Consumer Products</b>				
8/9/2007	Jarden Corp.; K2 Incorporated.	Monofilament fishing line	n.a.	Companies are the two most significant suppliers of monofilament fishing line in the US.
7/17/2008	Pernod Picard; V&S Vin & Spirit	Super-premium vodka, cognac, domestic cordials, coffee liqueur and popular gin	n.a.	Companies produce the two leading brands of "super-premium" vodka sold nationwide-Absolut and Stolichnaya.
7/30/2008	McCormick & Company, Incorporated; Unilever's Lawry's and Adolph's Brands	Lawry's and Adolph's brand of seasoned salt products	Nearly 80%	
12/23/2008	Inverness Medical Innovations, Inc.; ACON Laboratories, Inc.	Consumer pregnancy tests	70%	
<b>Highly Specialized Business Software</b>				
4/28/2008	TALX Corporation; James E. Frick, Inc.; Johnson & Associates, LLC; assets from Gates McDonald & Company; Sheakley-Uniservice, Inc.; TBT Enterprises, Inc. UI Advantage, Inc., Jon-Jay Associates, Inc.; Employers Unity, Inc.	(1) US market for outsourced unemployment compensation management (UCM) (2) US market for verification of income and employment (VOIE) services	n.a.	The Agency considers each of the relevant markets to be highly concentrated, and the acquisitions have served to substantially increase concentration (measured by both the Herfindahl-Hirschman Index or by the number of competitively significant firms remaining in the market).
9/16/2008	Reed Elsevier Inc.; ChoicePoint Inc.	Sale of electronic public records services to law enforcement customers	over 80%	Agency considers these two firms as the only two significant suppliers of electronic public records services to US law enforcement customers.
<b>Highly Specialized Industrial Products</b>				
10/26/2007	Owens Corning; Compagnie de Saint Gobain	Continuous filament mat (CFM) and related technology	90% of CFM sold in North America	
6/30/2008	Carlyle Partners IV, L.P. (owns PQ corporation); INEOS Group Limited	Sodium silicate	62% in Midwest United States	<b>Four-to-three merger:</b> Combination of largest competitor (PQ) with 3rd largest competitor (INEOS). This transaction would reduce the number of competitors from 4 to 3 in the Midwest United States market.
7/10/2008	Flow International; OMAX Corp.	Waterjet cutting systems	n.a.	Flow is the leading supplier of water jet cutting systems in the United States while OMAX is the second leading supplier of water jet cutting systems in the United States.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Highly Specialized Industrial Products</b>				
10/2/2008	Hexion LLC; Huntsman Corporation	Specialty epoxy resins and methyl diisocyanate (MDI)	60%–90%, depending on geographic market	<b>Four-to-three merger:</b> There are only four US producers of MDI and the two companies account for between 60 and 90 percent of sales in the various North American markets for specialty epoxy resins.
<b>Retail</b>				
6/4/2007	Rite Aid Corporation; Brooks and Eckerd pharmacies (from Canada's Jean Coutu Group)	Pharmacy services	50%–100%, depending on geographic market	Each of the 23 local markets identified in the Commission's complaint is highly concentrated with respect to the retail sale of pharmacy services to cash customers. In all of the markets, companies are two of a small number of pharmacies offering cash services, and combined, account for at least half—and up to 100 percent—of the pharmacies in those markets.
11/27/2007	The Great Atlantic & Pacific Tea Company, Inc. (A&P); Pathmark Stores, Inc.	Supermarkets	n.a.	Companies are supermarket competitors in the highly concentrated areas of Staten Island, NY and Shirley, Long Island, New York.
5/5/2008	Agrium, Inc.; UAP Holding Group	Bulk fertilizer and farm stores	n.a.	Agrium is the largest retail farm store operator in the US while UAP is the second-largest farm store operator in the US. Agency considers these two firms direct competitors in six overlapping areas. New farm store entry has become highly infrequent due to the risks involved in expending significant sunk costs.
<b>Terminaling of Refined Petroleum Products</b>				
1/25/2007	Kinder Morgan, Inc.; Carlyle, Riverstone, and KMI management	Terminaling of gasoline and other light petroleum products	n.a.	Investment funds controlled by Carlyle and Riverstone would hold interests in both KMI and Magellan, leading to a reduction in competition in the terminaling of gasoline in eleven markets in the Southeast where customers have few competitive alternatives. Agency considers merging parties two primary independent participants in these eleven Southeast US markets.

Sources: Press Releases and the Analysis of Agreement Containing Consent Orders to Aid Public Comment, Federal Trade Commission, available at <http://www.ftc.gov>.

**TABLE 3**  
**Horizontal Merger Investigations Announced by the Department of Justice Antitrust Division (“Antitrust Division”)**  
**Where the Merging Parties and the Antitrust Division Agreed to a Remedy<sup>1</sup>**  
**2007–2008**

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Consumer Products</b>				
11/14/2008	InBev N.V./S.A.; Anheuser-Busch Companies, Inc.	Beer	Rochester and Buffalo: 45% Syracuse: 41%	AB accounts for approximately 50% of beer sales in the US while Inbev accounts for less than 2% in the large majority of US markets. Agency believes the transaction could lead to higher prices in the Buffalo, Rochester, and Syracuse, NY metropolitan areas. In these three metropolitan areas, the combined firm and one other major competitor (Miller/Coors) would control about 70% of sales, with no other competitor controlling more than 5% of sales in these markets.
<b>Highly-Specialized Business Software</b>				
1/24/2008	Pearson PLC; Harcourt Assessment, Inc.	(1) Adaptive behavior clinical tests (2) Speech and language clinical tests (3) Adult abnormal personality clinical tests	(1) Adaptive behavior clinical tests: 92% (2) Speech and language clinical tests: 90% (3) Adult abnormal personality clinical tests: >93%	Companies are two of only a few firms that supply adaptive behavior and speech and language clinical tests. (1) Pearson's Vineland and Harcourt's ABAS (two of the merging parties' products) are considered as closest substitutes. (2) Pearson's CASL and OWLS are also considered substitutes for Harcourt's CELF product. (3) Pearson is a dominant supplier of adult abnormal personality clinical tests. Harcourt is currently developing a computer-based product akin to Pearson's, but the agency contends that the proposed merger would eliminate Harcourt as a potential competitor in this market.
2/19/2008	The Thomson Corporation; Reuters Group PLC	(1) Fundamentals data (2) Earnings estimates data (3) Aftermarket research reports	(1) Fundamentals data: n.a. (2) Earnings estimates data: >70% (3) Aftermarket research reports: >90%	(1) Fundamentals data: merging parties are two of the world's top four providers of fundamentals data. Their products are each others' closest substitutes. (2) Earnings estimates data: Merging parties are two of the three largest suppliers worldwide. (3) Aftermarket research reports: Merging parties are top two suppliers worldwide.
<b>Highly-Specialized Industrial and Business Products</b>				
4/18/2007	Amsted Industries Incorporated; FM Industries	New and reconditioned end-of-car cushioning units (EOCC's)	New EOCC's: 100% Reconditioned EOCC's: >80%	<b>Merger-to-monopoly:</b> Companies are only two manufacturers of new EOCC units. <b>Three-to-two merger:</b> Companies are two of three suppliers of reconditioned EOCC units used in the railway industry.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Highly-Specialized Industrial and Business Products</b>				
12/6/2007	CommScope, Inc.; Andrew Corporation	Drop cable	64%–74%	<b>Four-to-three merger:</b> Companies are two of four companies that provide drop cable to cable television companies in the US. CommScope is the leading manufacturer, with 60% to 70% market share while Andrew Corporation's Andes is the third largest manufacturer of drop cable, with about 4% market share.
3/4/2008	Cookson Group PLC; Foseco PLC	Carbon bonded ceramics (CBC's) used in the continuous casting steelmaking process	75%	<b>Three-to-two merger:</b> companies are two of only three competitors that produce CBC's in North America.
5/28/2008	Cengage Learning, Inc.; Houghton Mifflin Harcourt Publishing Company's College Division	Textbooks and related educational materials	>35%	Cengage is the second largest publisher of college text books and ancillary materials in US. HM College is the fifth largest publisher of higher education textbooks in the US. The agency contends that the proposed acquisition will increase the HHI by more than 500, creating a post-merger HHI of more than 3000 in each relevant market.
10/6/2008	Manitowoc Company, Inc.; Enodis	Commercial cube ice machines	70%	Companies are two of only three significant manufacturers in the US, and are the two largest manufacturers in the US.
<b>Local Market</b>				
4/4/2007	Cemex S.A.B. de C.V.; Rinker Group	Ready mix concrete (RMC), concrete block and aggregate	100% of RMC supply in Flagstaff AZ, 60% share of concrete block in Tampa/ St. Petersburg, and 69% share of concrete block in Fort Myers/Naples, FL	<b>Merger-to-monopoly:</b> Flagstaff—companies are the only two competitors able to supply RMC for large projects. <b>Three/Four-to-two merger:</b> in other areas in which divestiture is being required, the companies are two of three/four firms capable of serving "large" projects. In Tucson, AZ, companies are among a small number of firms able to supply aggregates meeting specifications of Department of Transportation. Cemex is the largest supplier of RMC and seventh largest supplier of aggregate in US. Rinker is the second largest supplier of RMC and fifth largest supplier of aggregate in US.
6/12/2007	First Busey Corporation; Main Street Trust, Inc.	Commercial and retail banking services	n.a.	Two major banks based in central Illinois.
9/27/2007	FirstGroup PLC; Laidlaw International Inc.	School bus service	n.a.	Laidlaw Inc. is the largest school bus service company in the US.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Local Market</b>				
10/30/2007	AT&T, Inc.; Dobson Communications Corporation	Mobile wireless telecommunications services	>60% of subscribers in five local markets	AT&T is the largest mobile wireless telecommunications provider in US while Dobson is the ninth largest mobile wireless telecommunications provider in US. In five local markets, the two companies serve greater than 60% of customers.
11/13/2007	Vulcan Materials Company; Florida Rock Industries, Inc.	Coarse aggregate	Southeast Atlanta and South Hampton Roads: 100% of most specifications	<b>Merger-to-monopoly:</b> Southeast Atlanta, South Hampton Roads and some customers in Northwest Atlanta, Southwest Atlanta, South Atlanta, Columbus, and Chattanooga areas. <b>Three-to-two-merger:</b> Northwest Atlanta, Southwest Atlanta, South Atlanta, Columbus, and Chattanooga, and some customers in West Atlanta. <b>Four-to-three merger:</b> West Atlanta Vulcan is the largest construction aggregates producer in US. Florida Rock is one of largest suppliers of construction aggregates.
2/13/2008	Clear Channel; Bain Capital, Thomas H. Lee Partners	Radio advertising	<b>Advertising Revenue:</b> Houston: 37% Cincinnati: 65% <b>Listener Share:</b> Houston: 34% Cincinnati: 59% <b>Spanish-language listener share:</b> Houston: 75% Las Vegas: 73% San Francisco: 70% <b>Spanish-language advertising revenue:</b> Houston: 79% Las Vegas: 78% San Francisco: 63%	Clear Channel is largest operator of radio stations in the US. The Agency contends that four radio markets in particular, Cincinnati, Houston, Las Vegas, and San Francisco would experience price increases as a result of this merger. Merging companies are each others' best substitutes for Spanish-language listeners in Houston, Las Vegas and San Francisco.
2/25/2008	UnitedHealth Group, Inc.; Sierra Health Services, Inc.	Medicare Advantage Plans	94% in Las Vegas area	UnitedHealth is the largest health insurer in the US, while Sierra Health is the largest health insurer in the Las Vegas area.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
<b>Local Market</b>				
4/29/2008	Regal Cinemas, Inc. Consolidated Theatres Holding GP	First-run commercial movie theaters	<b>Proportion of box office revenues:</b> South Raleigh: 100% North Raleigh: 79% Asheville: 77% Southern Charlotte: 75%	In South Raleigh, the merging parties would control the only two first-run commercial theaters. In North Raleigh, the parties would control three out of five first-run commercial theaters. In Asheville, the merging parties would control four out of six first-run commercial movie theaters, and in Southern Charlotte, the merging parties would control four out of six first-run commercial theaters. <b>Post-merger HHI:</b> South Raleigh: 10000 (increase of 3167 points) North Raleigh: 6523 (increase of 2315 points) Asheville: 6355 (increase of 2777 points) Southern Charlotte: 6058 (increase of 2535 points)
6/10/2008	Verizon Communications Corp.; Rural Cellular Corp. (Unicel)	Mobile wireless telecommunications services	60%–94% of subscribers in 6 local markets in Vermont, New York, and Washington	Verizon is the second largest mobile wireless telecommunications services provider in the US (based on number of subscribers) while Rural Cellular Corp. is the tenth largest.
7/3/2008	Signature Flight Support Corporation; Hawker Beechcraft's flight support services business	Flight support services, also known as fixed-base operations	100% at Indianapolis International Airport	Signature is the largest owner and operators of fixed-base operations in the US. Hawker Beechcraft has fixed-base operations in seven airports in the US.
8/28/2008	Raycom Media, Inc.; WWBT-TV	Local broadcast TV advertising	>50% of TV spot advertising revenue in Richmond, VA designated market area	As originally proposed, transaction would give Raycom ownership of two of the four local broadcast stations in the Richmond designated marketing area.
10/30/2008	Verizon Communications Corp.; Alltel Corp	Mobile wireless telecommunications services	55%–100% share of subscribers	Parties are each others' closest competitors for a significant set of customers in 94 Cellular Marketing Areas. Verizon is the second largest mobile wireless telecommunications provider in the US, as measured by number of subscribers. Alltel is the fifth largest mobile wireless telecommunications services provider in the US, as measured by number of subscribers.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
12/3/2008	Republic Services, Inc.; Allied Waste Industries, Inc.	Collection and disposal of municipal solid waste from commercial businesses	<p><b>Municipal Solid Waste Disposal:</b> Denver, CO: 87% Charlotte, NC: 80% Cape Girardeau: 70% Houston, TX: 70% Northwest Indiana: 64% Cleveland, OH: 56% Forth Worth, TX: 55% Philadelphia, PA: 52% Flint, MI: 51% Greenville-Spartanburg, SC: 50% San Francisco, CA: 50% Atlanta, GA: 46% Los Angeles, CA: 39%</p> <p><b>Small Container Commercial Waste Collection Markets:</b> Atlanta, GA: 50% Cape Girardeau: 64% Charlotte, NC: 70% Forth Worth, TX: 42% Houston, TX: 56% Greenville-Spartanburg, SC: 69% Lexington, KY: 75% Lubbock, TX: 63% Northwest Indiana: 44%</p>	<p>Firms are only two of a few significant firms providing commercial waste hauling or municipal solid waste disposal services in 15 metropolitan areas.</p> <p><b>Municipal Solid Waste Disposal</b></p> <p><b>Three-to-two merger:</b> Cape Girardeau, Missouri Area; Charlotte, NC; Greenville-Spartanburg, SC; Houston, TX; Philadelphia, PA; San Francisco, CA</p> <p><b>Four-to-three merger:</b> Atlanta, GA; Cleveland, OH; Denver, CO; Flint, MI; Fort Worth, TX, Los Angeles, CA; Northwest Indiana</p> <p><b>Small Container Commercial Waste Collection Markets</b></p> <p><b>Three-to-two merger:</b> Charlotte, NC; Greenville-Spartanburg, SC; Houston, TX; Lexington, KY</p> <p><b>Four-to-three merger:</b> Atlanta, GA; Fort Worth, TX, Northwest Indiana; Lubbock, TX; Cape Girardeau</p>
12/11/2008	PNC Financial Services Group, Inc.; National City Corporation	Banking services	n.a.	PNC will become fifth largest bank in nation. The Agency contends that this merger will have a significant adverse effect on competition in local markets for retail banking, small business banking, and middle market banking services in Western PA.
<b>Smokestack Industries Operating in Regional/National (or Larger) Geographic Markets</b>				
2/20/2007	Mittal Steel Company N.V.; Arcelor S.A.	Tin mill products	37% in Eastern US	Prior to the merger, Mittal and one other integrated steel producer accounted for greater than 74% of all tin mill product sales in the eastern US. Prior to the merger, Arcelor, along with its subsidiary, Dofasco, competed actively with these two firms.
10/23/2007	Abitibi Consolidated, Inc.; Bowater, Inc.	Newsprint market	40% in North America	Abitibi and Bowater are the two largest North American newsprint producers, and they compete against one another to produce and sell newsprint.
3/5/2008	Alvity Packaging LLC; Graphic Packaging International, Inc.	Coated recycled paperboard used to make folding cartons for consumer and commercial packaging, including cereal boxes	42%	Alvity is the largest producer of coated recycled paperboard while Graphic is fourth largest producer of coated recycled paperboard in North America.

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(a)	(b)	(c)	(d)	(e)
<b>Agricultural Products</b>				
5/31/2007	Monsanto Company; Delta & Pine Land Company	Traited cottonseed	95% in both the Midsouth and the Southeast regions of the US	Post-acquisition HHI will increase by 3310 in the Midsouth to 9110. In the Southeast, the proposed acquisition will increase the HHI by 1489, resulting in a post-merger HHI of 9184.

<sup>1</sup> Includes merger between FirstGroup PLC and Laidlaw International Inc., which resulted in a fix-it-first decision. In such situations, the agency agrees not to issue a complaint if the parties fix the competitive concerns up front.

Sources: Press Releases and Competitive Impact Statements, Department of Justice Antitrust Division, available at <http://www.usdoj.gov/atr>.