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## DOES YOUR CORPORATE ANTITRUST COMPLIANCE PROGRAM NEED TO BE AMENDED?

On April 30, 2004, the United States Sentencing Commission formally presented amendments to the Organizational Sentencing Guidelines (the "Guidelines") that are used to direct judges in determining penalties for corporate criminal law violations, including criminal antitrust offenses. The amendments include significant changes to the federal sentencing Guidelines for organizations, which include corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, unincorporated organizations, governments, and non-profit entities. If the amendments to the Guidelines become effective, organizations including companies and trade associations, will be required to re-assess the sufficiency of their antitrust and other compliance programs. As the amendments relate to corporate antitrust policies, organizations will be expected to provide more oversight and involvement by key decision-makers in creating and maintaining the programs that help employees identify and prevent the occurrence of federal antitrust law violations.

The changes provide more precise standards for creating effective corporate compliance and ethics programs, which are essential for any organization seeking to mitigate its punishment for a corporate criminal offense. The amendments will take effect November 1, 2004 unless Congress acts to modify or disapprove them. In light of the amendments, corporate counsel should review and update their corporate compliance programs and policies to ensure compliance with the Organizational Sentencing Guidelines.

The current Guidelines provide for mitigation of an organization's culpability for corporate criminal conduct by employees, if the organization has an "effective program to prevent and detect violation of the law". The Commission's recent amendments replace the existing vague "effective program" language with specific criteria and more rigorous standards that an organization must follow. At a minimum, the promotion of an organizational culture that encourages ethical conduct requires compliance with the following seven

requirements: **First**, the organization should establish standards and procedures to prevent and detect criminal conduct. **Second**, the amendments make boards of directors and company executives more responsible for the oversight and management of compliance programs. In essence, this means that members of boards of directors and high level executives must take an active leadership role in establishing the content and operation of the compliance program. In addition, compliance and ethics officers and individuals with day-to-day responsibility for the program must have sufficient authority and resources to carry out their responsibilities as well as direct access to members of the board and high level personnel. **Third**, the organization should take reasonable steps to prevent any individual whom the organization knew or should have known was involved in past illegal activities from having any substantial authority. **Fourth**, the organization should conduct effective training programs regarding the relevant legal standards and obligations for members of the board of directors, high level executives, lower level employees, and agents of the company. **Fifth**, the organization should take periodic steps to ensure that the program is followed, *including monitoring and auditing to detect criminal conduct*; to evaluate the effectiveness of the program; and to publicize a system, which includes mechanisms that allow employees and agents to report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. **Sixth**, the program should be promoted and enforced consistently through appropriate incentives to perform in accordance with the program and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. **Seventh**, the

organization should take reasonable steps to respond appropriately and to prevent further criminal conduct once criminal conduct has been detected.

Under the amendments, most organizations would no longer receive any sentencing reduction for having a corporate compliance program *unless* the program meets all seven criteria. For example, all organizations would be required to perform periodic assessments of the risk that criminal conduct will occur within the organization. In the internal antitrust compliance context, this most likely means that key individuals must become more involved in education, monitoring, and enforcement of policies designed to prevent price-fixing, market allocation, and other antitrust violations. The organization must consider the nature and seriousness of potential criminal conduct, the likelihood that the conduct would occur based on the nature of the organization's business, and the prior history of the organization. To that end, it might be advisable for organizations to conduct compliance audits on potential risk areas, such as antitrust, and to ensure that compliance training materials clearly inform employees in a manner that gives them options when confronted with possible antitrust violations.

Given that eligibility for mitigation can have a significant impact on the reduction of criminal penalties imposed on an organization, corporate counsel and executives should review and update their corporate compliance programs to ensure that their programs comply fully with the Sentencing Commission's new requirements.

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## EUROPEAN UNION'S ANTITRUST REFORMS

Mario Monti, Competition Commissioner of the European Union ("EU") referred to May 1, 2004 as the "big bang." On May 1, Regulation 1/2003 and Regulation 139/2004 took effect to modernize European antitrust enforcement. The goals of these reforms are to improve the effectiveness of competition policy and assist in opening and maintaining competitive markets. This is particularly challenging as: 1) the EU welcomed 10 new members in May 2004, totaling 25 member states that must implement the same competition policy constraints, despite the divergences between economic development and competition; and 2) the EU undertakes the Lisbon strategy, an economic reform agenda liberalizing markets to encourage growth.

Regulation 1/2003 will result in at least three outcomes. The first is to enhance the Commission's ability to better target its enforcement activities. The second is that companies benefit from greater legal certainty as to what is allowed under competition rules. The third result is greater cooperation between the Commission and the national competition authorities and courts to ensure efficient enforcement of competition rules.

### Outcome 1: Increased Enforcement

Since the new reforms abolished the previous notification system, the Commission must employ a proactive stance in antitrust enforcement, relying more on complaints and its own investigations.

Furthermore, Regulation 139/2004 increases the Commission's powers by changing the test used to assess mergers. Previously, Mr. Monti could

block mergers if the merged entity was dominant, or controlled at least 40 percent of the market, unless evidence indicated that the companies likely colluded. But under the new test, the Commission can block mergers that are a "significant impediment to effective competition," such that it controls 20-40 percent of the market. Although the new test is not as broad as the U.S.'s "substantial lessening of competition" test under Section 7 of the Clayton Act, the Commission does have broader scope in addressing mergers as compared to the pre-reform period.

### Outcome 2: Greater Legal Certainty

To assist companies in understanding what is allowed under competition rules, the Commission revised its block exemptions regulations and produced guidelines on the types of business practices and agreements that are effected by competition rules. The revisions focus more on economic principles than a strictly legal approach. For example, under the new type of block exemption regulations, companies with little market power may act within "safe harbors" such that compatibility of their agreements with EU competition law is not of concern.

### Outcome 3: Cooperation Between the Commission and National Competition Authorities and Courts

Prior to the May 1, 2004 reforms, once the Commission was notified of an antitrust claim, the member-country court suspended proceedings. According to the new regulation, the Commission and national competition authorities and courts share joint responsibility to enforce the EU antitrust rules. To ensure such cooperation and coordination, the Commission created the

European Competition Network to decide issues such as allocation of case-work, the exchange of confidential information, joint investigations or implementing a common intranet to permanently connect all the members for daily contacts.

The regulation also sets forth several methods of cooperation with national courts. First, national judges may ask the Commission questions regarding the application of EU competition law. Second, the Commission and national competition authorities may submit *amicus curiae* submissions to the courts.

## Conclusion

The antitrust reforms synchronize antitrust law in Europe and the United States. The aggressive reforms may result in more work for firms doing business in Europe. There may also be increased private litigation in member-country courts, although limited damage awards, prohibitions on contingent fees and restrictions on class actions may prove to be great barriers. The reforms will likely widen the scope and increase antitrust enforcement in the EU, however the extent of the changes remains uncertain as a new Commission takes office in November.

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## FTC ALLOWS FOOT LOCKER TO BUY FOOTSTAR - DOES IT IMPACT OTHER RETAIL MERGERS?

On May 4th, the FTC declined to issue a second request in response to Foot Locker's purchase of Footstar, allowing Foot Locker to consummate its \$225 million purchase of the bankrupt owner of

Foot Action. Despite concerns raised by competing bidders that the combination would hinder competition in the sales of specialty premium athletic footwear, the FTC decided that the merged entity would not possess enough market power to pose an anticompetitive threat to the market.

Foot Locker has previously announced that it intends to continue to operate all 2,891 Foot Locker stores and all 350 Foot Action stores. To prevent the two retailers from cannibalizing each other, Foot Locker will change Foot Action from a retailer of premium athletic footwear to a discount athletic footwear store, radically altering Foot Action's traditional line of business.

Many antitrust observers thought that the purchase of Footstar by Foot Locker would pose significant anticompetitive concerns warranting a second request. The observers hypothesized that the relevant product market could have initially been defined as the market for premium athletic footwear sold by specialty athletic footwear retailers. Under such a theory, other shoe retailers, such as department stores, discount stores, and name brand stores, such as The Nike Store, would have been excluded from the relevant product market definition. The theory has some support as premium athletic footwear manufacturers do not supply premium athletic shoes to department or discount stores, and the target customers, athletic and street fashion conscious males between the ages of twelve and twenty-four, do not consider the shoes offered by other retailers to be substitutes for the premium athletic shoes sold by stores like Foot Locker. In addition, premium athletic footwear retailers consistently sell sneakers for 20 percent more than general sporting goods stores and 28 percent more than department stores, indicating

that consumers do not consider the shoes offered by sporting goods and department stores as substitutes. Prior to the acquisition, only four premium specialty athletic footwear retailers (Foot Locker, Foot Action, Finish Line, Inc., and The Athlete's Foot) competed in this line of business, and, more troubling, only three would service it after the acquisition.

Another noteworthy point with respect to the FTC's review of this retail merger is that many antitrust observers believed the FTC would define the geographic market narrowly, possibly restricting its review to individual zip codes or even individual malls. Again, the facts relating to this merger lend some support for such a theory. Of the 350 Foot Action stores, 248 were located in the same malls in which a Foot Locker was located. Thus, a significant overlap existed. Some observers believed that an aggressive FTC staff could possibly force Foot Locker to divest some Foot Action stores in a number of malls where the acquisition would result in Foot Locker having a monopoly on premium athletic footwear retailers.

Although the FTC would normally have thirty days following the filing of the Hart-Scott Rodino notification to review a proposed purchase of a company, the Commission only had fifteen days to review Foot Locker's purchase of Footstar because Footstar was under bankruptcy protection. Given this shortened time frame, many antitrust observers thought that the FTC would issue a second request to investigate the overlaps more thoroughly.

Even though there appeared to be enough facts to support a second request, one factor was noticeably absent: a complaining customer. While complaints from losing bidders or competitors are helpful in building a case against a merger, the

staff normally views these complaints with skepticism unless accompanied by credible customer testimony. Indeed, most significant mergers prompt large customers or suppliers to express concerns. In this case, however, the FTC probably found few customers or suppliers willing to complain. Consumers of high end athletic shoes, generally males between the ages of fifteen and twenty-five, individually lacked the financial incentive to complain about the merger before the FTC. Suppliers of premium athletic footwear to specialty athletic footwear retailers, such as Reebok, Adidas, and Nike, probably did not complain because they probably believe that they are free to market and distribute their premium athletic shoes to any of a number of retail stores. Furthermore, the suppliers of premium athletic footwear are financially strong enough to deter any anticompetitive price increases by Foot Locker by denying Foot Locker access to the latest brands of premium athletic footwear and instead offering new products through their own stores.

In the end, the FTC staff correctly decided that a second request was not warranted because under any market definition the staff was not likely to insist on divestitures since no credible customers or suppliers were complaining. The FTC might have also determined that a broader product market definition is more appropriate (including retailers of all athletic and leisure footwear). The inclusion of major department and discount stores as competitors lessens the concentration levels significantly.

If the FTC decided to approve Foot Locker's acquisition of Footstar based upon a broader product market definition, it may have indicated that the merger between prescription eyeglass retailers Cole National Corporation, owner of Pearle Vision, and Luxottica Group SpA, owners



of Lens Crafters, has a better chance of being approved, despite the FTC having issued a second request. Luxottica and Cole National may argue that chains selling premium eyewear, like chains selling premium athletic footwear, must compete against all retailers of a similar product. The FTC may distinguish the two mergers, however, by holding that the suppliers in the prescription eyewear market lack the relative clout of the suppliers of premium athletic footwear, and force the merged entity to divest certain locations where the merger would diminish competition. In addition, department and discount stores serviced by Cole National may complain to the FTC about the merger, which would give the FTC more evidence with which to work than it would have had in an action challenging Foot Locker's purchase of Footstar. Given these significant differences in the two merger investigations, the approval of Foot Locker's purchase of Footstar probably has few implications for the FTC's ongoing investigation of the Luxottica and Cole National merger.

The approval of Foot Locker's purchase of Footstar indicates that the FTC, after broadening the product market definition beyond premium athletic shoes and after finding few complaining parties, conceded that it could not build a case against the merger. If the FTC's decision marks a new willingness to use broad product market definitions, then merging parties will find the approval process considerably easier. More likely, though, approval came more from apathy amongst the affected parties than from a change in the FTC's practices, and merging parties will find the approval process as difficult as ever.

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## HSR RULES MUST BE TAKEN SERIOUSLY

On May 3, the Department of Justice's ("DOJ") Antitrust Division, at the request of the Federal Trade Commission ("FTC"), filed two civil suits against alleged violators of pre-merger notification filing requirements under the Hart-Scott-Rodino ("HSR") Act of 1976. The HSR Act imposes notification and waiting period requirements on individuals and companies over a certain size before they can consummate acquisitions of stock or assets valued at more than \$50 million. The purpose of the HSR Act is to provide federal antitrust enforcement agencies an opportunity to investigate proposed transactions and determine whether the transactions would violate the antitrust laws. If the reviewing agency determines that a transaction violates the antitrust laws, it may seek to block that transaction before the waiting period expires. Therefore, the antitrust agencies take HSR violations very seriously, even ones where no competition overlaps exist. Indeed, a party is subject to a maximum civil penalty of \$11,000 a day for each day it is in violation of the HSR Act.

While the HSR Act requires pre-merger notifications to be filed with both the DOJ and the FTC, a number of exemptions exist. For example, the HSR Act exempts notifications of acquisitions of 10 percent or less of a company's stock made "solely for the purpose of investment." To qualify, the investment must constitute less than 10 percent of a company's shares, and the investor cannot play any role in the acquired company's decision making.

The DOJ filed complaints along with proposed consent agreements that will settle the charges. The first alleged violation involves Bill Gates as an individual and the second alleged violation

involves Manulife Financial Corporation, a Canadian-based insurance and financial services company. Both improperly relied on the investment exemption.

Mr. Gates agreed to pay \$800,000 to settle charges that he violated the HSR Act in 2002 when he acquired more than \$50 million of ICOS Corporation ("ICOS") stock without first notifying antitrust regulators of the deal. The DOJ's complaint alleged that Mr. Gates was in violation of the Act from May 9, 2002 through August 26, 2002.

Apparently, Mr. Gates contended that no HSR filing was required for his purchase of ICOS stock because purchases for investment purposes are exempt from the filing requirements. According to the complaint, however, Mr. Gates did not qualify for the "solely for the purpose of investment" exemption to the pre-merger notification requirements because he intended to participate in the basic business decisions of ICOS through his longstanding membership on the board of directors of ICOS, a pharmaceutical company headquartered in Bothell, Washington. While the antitrust agencies normally will not penalize a company or individual for an inadvertent mistake, Mr. Gates had been previously made aware of the rules and the agencies considered the violation a second mistake that required a substantial penalty.

On the same day, Manulife agreed to pay a \$1 million civil penalty to settle charges that the company violated pre-merger notification requirements when it acquired approximately \$150 million of John Hancock common stock in the spring of 2003. Following the alleged pre-merger notification, Manulife and John Hancock announced their intentions to merge on September 28, 2003, and they consummated that transaction on April 28, 2004. While the DOJ's suit does not

challenge the combination, the complaint alleges that at the time of these stock acquisitions in the spring of 2003, Manulife was considering a Manulife-John Hancock combination. Thus, Manulife's purchases of John Hancock stock were not made solely for the purpose of investment and were not exempt from the Act's notification and waiting period requirements. Moreover, the complaint alleged that Manulife was in violation of the Act from on or before March 24, 2003 through October 27, 2003, however, the penalties were reduced because Manulife brought the violation to the DOJ's attention and cooperated with the investigation.

Both settlement agreements send a strong message to corporate executives and lawyers to take HSR reporting requirements seriously. The HSR Act's investment exemption is limited to acquisitions that are "solely" for the purpose of a passive investment and does not apply if a corporation or individual intends on participating in the business of the company being acquired. The antitrust agencies have construed the exemption narrowly and the agencies have made it abundantly clear that they will prosecute those that rely on aggressively broad interpretations of HSR exemptions.

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## **SECOND CIRCUIT REFUSES TO ACCOMMODATE HOTEL OWNERS' "COMMERCIAL BRIBERY" CLAIM UNDER RP-ACT SECTION 2(C)**

The attempt by a group of hotel owners to condemn the conduct of their management company as "commercial bribery" in violation of Section 2(c) of the Robinson-Patman Act met an

inhospitable result when the U.S. Court of Appeals for the Second Circuit affirmed the trial court's dismissal of the complaint on May 20. The hotel owners successfully persuaded the appellate court that the district court erred in requiring the plaintiffs to show "competitive injury" for their Section 2(c) claim. But this was a pyrrhic victory, as the 2nd Circuit held that the management company's alleged receipt of "kickbacks" from vendors did not constitute "commercial bribery" in violation of 2(c). *Blue Tree Hotels Investment (Canada), Ltd., v. Starwood Hotels & Resorts Worldwide, Inc.*, 2004 WL 1119588. Among other things, the result demonstrates how sound legal theories can be undermined by contemporaneous correspondence that fails to support the legal assertions that are fundamental to the ability of the complaint to withstand judicial scrutiny.

Plaintiffs, a group of companies that own seven Westin Hotels in Canada and the United States ("Blue Tree Hotels"), found themselves bound to management agreements with defendants Starwood Hotels & Resorts and related entities ("Starwood") after Starwood purchased the entire chain of Westin Hotels except for those owned by Blue Tree, and became successor to the management contracts for plaintiffs' hotels. After discovering what they alleged was a scheme by Starwood to receive "kickbacks" from vendors servicing Blue Tree Hotels (and other properties owned or managed by Starwood), plaintiffs sued Starwood in federal district court, alleging that the kickbacks constituted commercial bribery in violation of Section 2(c).

Section 2(c) makes it "unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount

in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or on behalf of is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." It was enacted primarily to target the practice of "dummy brokerages," whereby large retail buying groups - such as large grocery store chains, which unlike smaller stores, did not need to use intermediary brokers to purchase their merchandise - would require suppliers to pay fees to "dummy brokers," who then passed the fees on to the large retailer, effectively reducing the price the retailer paid for the goods. Some courts applying Section 2(c) to circumstances far removed from the paradigmatic "dummy brokerage" scheme have held that it also proscribes commercial bribery.

Blue Tree Hotels asserted that Starwood engaged in an "unlawful kickback scheme" by seeking and obtaining various rebates and discounts in connection with purchasing goods and services for the Blue Tree Hotels, as well as other hotels owned and/or managed by Starwood. Blue Tree further alleged that as a consequence of the "kickback scheme," Starwood was acting as a "dishonest competitor," because the Blue Tree Hotels compete with the other hotels owned and managed by Starwood, including the Westin and Sheraton brands. It contended that Starwood's conduct: (1) deprived Blue Tree Hotels of the opportunity to obtain advantageous prices and terms that would otherwise be available from vendors who did not participate in the kickback scheme, and (2) increased the cost of goods to Blue Tree Hotels while at the same time reducing the cost of goods and generating profits for



Starwood. Blue Tree Hotels sought treble damages, attorneys' fees, and permanent injunctive relief, prohibiting Starwood from continuing to obtain and retain kickbacks.

The federal district court dismissed the complaint, concluding that Blue Tree Hotels lacked standing under Section 2(c) because they did not directly compete with the hotel vendors which allegedly paid commercial bribes to Starwood. On this ground, the Second Circuit disagreed. The court ruled that "competitive injury" is not necessary where there is a *prima facie* violation of Section 2(c). Unlike Robinson Patman Act Section 2(a), which requires competitive injury, a claim under Section 2(c) does not require a showing that the illicit practice has had an injurious or destructive effect on competition.

However, in concluding that Blue Tree Hotels failed to make out a claim of "commercial bribery," the court criticized the plaintiffs' theory for offering little more than the following tautology: Because "the vendors pay kickbacks to Starwood, they are engaged in commercial bribery, and because the parties are engaged in commercial bribery, the payments made by vendors are kickbacks." The court stressed that substituting the plaintiffs' repeated use in their complaint of the "freighted word 'kickback' with the more benign 'vendor payment' reveals" that Blue Tree Hotels has "not alleged any improper intent or conduct on the part of the vendors who made the payments to Starwood."

The court acknowledged that Starwood's failure to turn vendor payments over to Blue Tree Hotels might constitute a breach of its fiduciary duties under the management agreements, but that commercial bribery cannot be committed unilaterally by an alleged bribe receiver: "one

cannot be guilty of receiving a commercial bribe unless someone else is guilty of paying it." The court pointed out that in New York, commercial bribery is defined as conferring, or offering or agreeing to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs. N.Y. Penal L. Section 180.00. The essence of bribery is the intent to influence improperly the conduct of another by bestowing a benefit and the essence of bribe receiving is in the agreement or understanding that the recipient's conduct will be influenced by the benefit.

The court emphasized that in the absence of any allegations that the vendor payments were, in fact, bribes - that is, that they were paid by the vendors with the intent to improperly influence or corrupt Starwood's conduct on behalf of Blue Tree Hotels - Starwood's alleged breach of its fiduciary duties was insufficient to establish commercial bribery. Although improper intent on the part of the vendors might be inferred from Blue Tree Hotel's allegation that vendors who were unwilling or unable to make the vendor payments were precluded from competing for the Blue Tree Hotels' business and, as a result, Blue Tree Hotels was unable to negotiate advantageous prices and terms with such vendors, this theory was contradicted by letters attached to Blue Tree Hotels' complaint. Those letters objected to the manner in which Starwood allocated vendor payments, but did not challenge the vendor payments as unlawful or pursuant to illicit agreements between Starwood and the vendors to act contrary to Blue Tree Hotels' interests. Rather, the letters showed that Blue Tree Hotels was aware that Starwood was receiving vendor payments as a result of its volume purchasing power.

Ultimately, while Blue Tree Hotels survived the district court's erroneous conclusion that "competitive injury" was necessary for their Section 2(c) claim, the facts - at least those established by contemporaneous letters of Blue Tree Hotels - could not support the legal theory of "commercial bribery" under Section 2(c).

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## SPACE LAUNCH MARKET TRULY WORLDWIDE IN SCOPE

On April 23, 2004, the United States District Court for the Middle District of Florida partially granted defendant aircraft manufacturer's motion to dismiss on the grounds that, although plaintiffs stated a relevant market, neither a company's officers nor an employee of its competitor, could enter into a conspiracy to monopolize.

In *Lockheed Martin Corp. v. Boeing Co.*, 2004 WL 869369 (M.D. Fla. 2004), Lockheed Martin sued Boeing, and three of Boeing's employees, (one of whom formerly worked for Lockheed), claiming that the former employee stole trade secrets related to a bid competition to provide the U.S. Government space launch capability. Lockheed alleged that this theft violated the RICO and Sherman Acts.

Lockheed and Boeing competed in a bid process related to the Evolved Expendable Launch Vehicle ("EELV") Program, an Air Force Program that seeks assistance from private contractors to develop a cost-efficient national space launch capability. Lockheed alleged that Boeing, and its employees Erskine, Satchell, and Branch intended to obtain monopoly power for Boeing by

acquiring and using Lockheed's trade secrets in preparation for Boeing's EELV bid.

Under *Spectrum Sports*, in order to state a claim for attempted monopolization under the Sherman Act, a plaintiff must allege facts that, if proven, would satisfy his burden at trial to prove that (1) the defendant has engaged in predatory or anticompetitive conduct; (2) with specific intent to monopolize; and that there is a dangerous probability that defendant will achieve monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). This third element requires a two part showing that a defendant is close to acquiring controlling market power over the relevant market. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993). Defendant Boeing challenged Lockheed's allegations of the relevant market and of Boeing's proximity to acquiring a controlling market share.

Lockheed alleged that the outer boundary of the relevant product, or relevant service market, is the world EELV market because EELV's are highly complex, and there are no other technological substitutes. Boeing did not dispute this world market definition. Alternatively, Lockheed argued that the U.S. Government EELV market was a relevant market because the U.S. Government can purchase only from domestic suppliers and would be the victim of reduced innovation and higher prices if one of its potential suppliers had a "monopoly" on the government's purchases. The Court rejected the limitation to the U.S. market because it was not persuaded that the characteristics of purchasers, other than their demands, should define the relevant market.

After defining the relevant market as the worldwide market for EELV products, the Court

noted that Lockheed's Complaint did not include any allegations about Boeing's relative share of the worldwide commercial EELV market. The Court noted that such allegations would be the minimum required to survive a motion to dismiss. The Court concluded that because the U.S. Government EELV market was not the relevant market, and because Lockheed failed to allege facts related to Boeing's market power in the worldwide commercial EELV market, the attempted monopolization claims were dismissed.

Lockheed had also alleged that Boeing and its employees conspired to monopolize the U.S. Government EELV market. Because this was not the relevant market, the Court dismissed Lockheed's claims. The Court found, alternatively,

that the *Copperweld* doctrine, which holds that employees cannot conspire with their employer, barred Lockheed's claims against the individual Boeing employees. As such, the Court granted defendants' motions to dismiss as to the antitrust claims.

If Lockheed had developed additional facts as to a worldwide product market, including Boeing's share within that market, then its claims may have survived. Indeed, the relevance of a world market for EELV was largely responsible for the Court's dismissal of Lockheed's claims.

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## RECENT ACTIVITIES

### DOJ ANTITRUST HIGHLIGHTS

- On May 27, Sturgis Iron & Metal Co. Inc. ("Sturgis"), a Michigan scrap metal dealer/processor with seven facilities in Michigan and Indiana, agreed to plead guilty to mail fraud in connection with a scheme to defraud nine of its scrap metal suppliers over a period of four years between 1996 and 2000. Under the plea agreement, Sturgis agreed to pay a \$206,000 criminal fine and to pay an additional \$59,000 in restitution to its victims. Scrap metal dealers/processors such as Sturgis purchase waste metal generated by businesses such as industrial manufacturers and stamping plants. The scrap metal dealers/processors then sort and process the metal and resell it to end users including steel mills and foundries. Sturgis is charged with short weighing, an industry term used when misrepresented weights are used to calculate what the supplier of the scrap is to be paid. While suppliers of scrap metal often dispute the weights calculated by the scrap dealer, scrap dealers complain that the scrap brought to the yard usually contains a certain amount of contaminants such as trash, dirt, or snow. Scrap dealers can only process certain scrap that can be sold to steel mills and foundries so they do not wish to pay for the weight of the contaminants. Despite this normal business conflict, the Antitrust Division charges that Sturgis' scheme involved reprinting tickets generated by the scales used to weigh scrap metal from its suppliers. The scales weighed the material accurately, but Sturgis employees replaced the accurate tickets with ones they reprinted to reflect lower weights. Sturgis then mailed the reprinted tickets and checks that were based on the lower weights to its suppliers. The charge resulted from the Cleveland Field Office of the Antitrust Division's ongoing antitrust and short weighing investigation of the scrap metal industry.

**RECENT ACTIVITIES****DOJ Antitrust Highlights (Continued)**

- On May 26, the DOJ, Alcan Inc. (“Alcan”) and Pechiney, S.A. (“Pechiney”) reached an agreement to modify an earlier antitrust settlement that would resolve the government's competitive concerns stemming from Alcan's successful tender offer for Pechiney. The amended settlement allows the parties to have the option to sell either Alcan's aluminum rolling mills in Oswego, New York, and Fairmont, West Virginia, or Pechiney's aluminum rolling mill in Ravenswood, West Virginia. The Antitrust Division agreed to amend the settlement, in part, because the companies may be able to divest Alcan's brazing sheet business more quickly than Pechiney's brazing sheet business.
- On May 25, the Antitrust Division announced in a business review letter that it will not challenge an online fee survey proposal among competing Internationally Board Certified Lactation Consultants (“IBCLC”). Lactation consultants provide breast feeding assistance to babies and mothers. The Division said that the survey proposed will determine the range of prices customarily charged by self employed IBCLCs and will allow independent practitioners who are not affiliated with hospitals or doctors' offices to set reasonable fees for their area. The survey should provide procompetitive benefits while raising little risk of anticompetitive effects. The Antitrust Division, however, cautioned lactation consultants to not use the data to coordinate pricing activity in any region or to artificially maintain higher than competitive pricing as that would be considered illegal.
- On May 18, the DOJ and Oracle Corp. (“Oracle”) finalized their witness lists for their trial scheduled to begin on June 7. The DOJ will call executives from Microsoft and a dozen other major corporations such as Cox Communications Inc., Verizon Communications Inc., Neiman Marcus Group, Pepsi Americas, Apartment Investment and Management Co., Nextel Communications, Metro-North Commuter Railroad, BearingPoint, DaimlerChrysler, and Kerr-McGee to testify against Oracle's hostile bid to buy rival software company PeopleSoft (“PeopleSoft”). Most of these companies will provide customer views on the merger. The DOJ filed suit earlier this year to block the deal after concluding that it would harm competition in the market for enterprise application software sold to large business customers to manage finances, human resources, sales forces and other functions. Oracle has dismissed competition concerns and has accused the Division of “gerrymandering” the market to make it look as if it includes only three companies -- Oracle, PeopleSoft and Germany's SAP. Oracle contends that many smaller companies also can compete for large customers. Microsoft's testimony is important for the case because Oracle has routinely cited Microsoft as a potential competitor, however, if Microsoft is on the Division's witness list, it probably means that Microsoft will testify that it has no plans to enter the market at issue within the next two years. The customers on the DOJ's witness list will provide their views about the likely impact of an Oracle-PeopleSoft combination and the current state of competition. Oracle's witness list, on the other hand, includes a number of its own executives, a different Microsoft executive, as well as executives from other providers of software such as IBM, Siebel Systems, Novell, Automatic Data Processing Inc., Lawson Software, PeopleSoft, and SAP. While the DOJ plans on focusing its case on customers who happen to be credible buyers of the products at issue, Oracle is taking a different strategy by focusing on competitors, who have an interest in testifying that the market is competitive.

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## RECENT ACTIVITIES

### FTC ANTITRUST HIGHLIGHTS

- On May 27, Chairman Muris issued an extensive statement challenging the findings of the Government Accounting Office ("GAO") in its final report entitled "Effects of Mergers and Market Concentration in the U.S. Petroleum Industry." The GAO study, issued in May of 2004, essentially attributes higher wholesale gasoline prices in the United States from the mid- 1990s through 2000 to the mergers and increased market concentration in the industry during the same period. Though GAO examined the wave of mergers, acquisitions and joint ventures that occurred during the 1990s, it focused on several large combinations, including Exxon-Mobil, Shell-Equilon-Motiva, Texaco, Chevron-Texaco, BP-Amoco-Arco, Marathon-Ashland, Conoco-Phillips and UDA-Valero. GAO's econometric analyses concluded that six of the largest mergers during the relevant period examined led to wholesale gasoline price increases, averaging 1 cent to 2 cents per gallon. For conventional gasoline, the typical type used in the U.S., the change in wholesale prices due to the mergers and increased concentration ranged from a decrease of about 1 cent per gallon to an increase of about 5 cents per gallon. For "boutique" fuels sold on the East Coast and in Gulf Coast regions, wholesale prices increased by 1 cent per gallon; West Coast "boutique" fuels sold in California increased by over 7 cents per gallon.

Throughout the GAO report process, the FTC continually asserted, since the Commission staff reviewed early GAO drafts of the study, that the econometric analyses were flawed and unreliable. GAO, however, disagreed; it believed its methodology and analyses were sound.

In his May 27 statement, Chairman Muris again emphasized that in his 30 years as an antitrust enforcer, academic and consultant, he has never seen a report so "fundamentally flawed" as the GAO study. According to Muris, the report has "major methodological mistakes" that make the quantitative analyses wholly unreliable; it relies on critical assumptions that are unstated and unjustified; and the report presents conclusions that lack any quantitative foundation. As a result, Chairman Muris claims the report does not meet GAO's own standards of "accountability, integrity, and reliability."

- On May 25, the FTC advised Bristol-Myers Squibb ("BMS") that its proposed settlement with Teva Pharmaceuticals USA, Inc. ("Teva") does not raise antitrust or competitive issues under Section 5 of the Federal Trade Commission Act. The Commission's consent order in Docket C-4076, issued in 2003, requires BMS to obtain such advice prior to entering into certain agreements to settle litigation over alleged infringement of a BMS patent. The Commission issued the order in connection with a complaint that alleged that BMS paid Schein Pharmaceutical, Inc. \$72.5 million not to market Schein's generic version of BMS's BuSpar product until BMS's patent expired. BuSpar is used to treat certain anxiety disorders. The complaint also alleged that BMS engaged in anticompetitive efforts to maintain its monopolies in Taxol and in Platinol, both used in cancer chemotherapies.

BMS and Teva have been engaged in litigation over Teva's alleged infringement of BMS's patent for the drug marketed under the brand-name Paraplatin®. Although the patent expired on April 14, 2004, BMS received a six-month pediatric exclusivity period, until October 14, 2004, based on certain filings with the Food and Drug Administration ("FDA"). In seeking the required advice, BMS explained that Teva and BMS had agreed to settle their litigation, with Teva forgoing any challenge to the exclusivity period in exchange for receiving the right to distribute, beginning June 24, 2004, Paraplatin® purchased from BMS. Thus, BMS has agreed to share the last



## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

half of its exclusivity period with Teva. Upon expiration of the exclusivity period, Teva or any other company that has received FDA approval may begin to market its generic product. In giving its advice, the Commission noted that the proposed settlement reflected a reasonable assessment of the respective litigation position, provided no mechanism for BMS to share supracompetitive profits with Teva, and did not prevent Teva from marketing its own product after expiration of the exclusivity period.

- On May 21, the Commission announced it had received an application for approval of a proposed divestiture from GenCorp, Inc. (GenCorp"), related to the FTC's consent order conditionally allowing GenCorp's purchase of the propulsion business of Sequa's Atlantic Research Corporation ("ARC"). Under the terms of the consent order, first announced on October 15, 2003, and made final on December 30, 2003, GenCorp was required to divest ARC's in-space liquid propulsion business within six months of completing the acquisition of ARC. Through the application received by the FTC and announced today, GenCorp has petitioned the Commission for approval to divest ARC's in-space liquid propulsion assets, as that term is defined in the order, to American Pacific Corporation. The Commission is accepting public comments on the proposed divestiture for 30 days, until June 19, 2004.
- On May 11, the Commission announced the publication of transcripts of the joint FTC/DOJ workshop on merger enforcement. The Commission has published transcripts of the three-day joint FTC/DOJ Workshop on Merger Enforcement held in Washington, D.C. on February 17-19, 2004. In addition to the transcript documents, which can be found on the FTC's web site at [www.ftc.gov/bc/mergerenforce/index.html](http://www.ftc.gov/bc/mergerenforce/index.html), the Commission also has made available the workshop agenda and presentations, public comments on the workshop, two sets of merger investigation data for 1996-2003 and 1999-2003, the previously published workshop announcement, and a press release related to the event. The workshop brought together prominent practitioners, academics, and enforcement officials to discuss the FTC's and DOJ's Horizontal Merger Guidelines. It explored state-of-the-art applications of the Guidelines by those with the most experience using them.

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## FTC CONSUMER PROTECTION HIGHLIGHTS

- FTC Chairman Muris testified before the Senate Committee on Commerce, Science and Transportation on May 20 that the agency has established a special task force to target illegal spam e-mail. The task force will include both federal and state law enforcement efforts. According to Muris, the task force is comprised of 136 members representing 36 states as well as staff from the DOJ and the FTC, which sponsors the effort along with the Attorney General's Office of Washington. The FTC currently trains other law enforcement community members on investigative techniques used to track senders of spam email, and also conducts monthly conference calls with other task members in order to exchange information relating to enforcement efforts, according to Muris' testimony.

## RECENT ACTIVITIES

### FTC Consumer Protection Highlights *(Continued)*

Muris also told the Committee that the agency is on track to complete its various rulemaking and report requirements under the CAN-SPAM Act, which was enacted December 16, 2003.

- On May 19, the FTC's rule requiring all spam that contains sexually-oriented material to include the warning "SEXUALLY-EXPLICIT" became effective. Under the rule, such spam emails must contain that specific phrase in the subject line, or face fines for violations of the CAN-SPAM Act. The Act was passed by Congress in 2003, and directed the agency to adopt a rule requiring a mark or notice to be included in spam that contains sexually-oriented material. The final rule implements one of the purposes of the Act, which is intended to protect email recipients from unwitting exposure to sexually explicit emails. Spammers who fail to comply with the rule and the corresponding portion of the CAN-SPAM Act face civil lawsuits and civil and criminal penalties.
- On May 18, the FTC filed a complaint in federal district court in Los Angeles, California against marketers of the "Balance Bracelet." According to the complaint, the defendants made false and unsubstantiated claims about the product. The FTC alleged in the complaint that Media Maverick, Inc. and its officers, Mark Jones and Charles Cody, violated the FTC Act by deceptively claiming that the Balance Bracelet is a fast-acting, effective treatment for many types of pain. According to the agency, clinical testing has found that ionized bracelets (such as the Balance Bracelet) are no more effective at relieving muscular and joint pain than placebo bracelets. The FTC is seeking permanent injunctive relief, including redress to consumers who purchased the Balance Bracelet.
- On May 14, the FTC announced that tens of thousands of consumers who were alleged victims of an Internet pyramid scam may qualify to share in a \$20 million court-ordered redress fund. According to the FTC, consumers who invested in SkyBiz.com will be notified by email from the court-appointed fund administrator that they may qualify to share in the redress fund. Consumers must submit all claims to the redress administrator, Robb Evans & Associates, at [www.skybiz-redress.com](http://www.skybiz-redress.com). In June 2001, the FTC filed suit charging that SkyBiz.com and related defendants promoted a work-at-home business opportunity with claims of quick riches. In various promotional materials, the FTC alleged, the defendants touted the opportunity to earn thousands of dollars a week by recruiting new "Associates" into the program, and required an upfront payment of \$125 as well as other investments. The defendants eventually settled the claims after the agency and other stated international law enforcement agencies investigated the matter. The settlement provides \$20 million for consumer redress and bars Nanci Corporation and related individual defendants from engaging in pyramid schemes and making false and misleading statements.
- On May 13, the FTC announced that one of the nation's largest debt-collection firms, the NCO Group ("NCO"), will pay \$1.5 million to settle charges that it violated the Fair Credit Reporting Act ("FCRA") by reporting inaccurate information about consumer accounts to credit bureaus. This civil penalty is the largest civil penalty ever obtained in a FCRA case. The proposed consent decree orders the NCO and related defendants to pay civil penalties of \$1.5 million, and permanently bars them further from violations of the FCRA. Additionally, NCO must ensure that all reported credit reporting errors are corrected quickly.

## RECENT ACTIVITIES

### FTC Consumer Protection Highlights (Continued)

- On May 13, the FTC announced that a federal district court in Illinois issued a permanent injunction against Peter J. Porcelli, II and several of his Largo, Florida-based companies, including Bay Area Business Council, Inc. and American Leisure Card Corp. According to the FTC's complaint, the defendants offered consumers guaranteed low-interest unsecured MasterCard credit cards for an advance fee, and then also charged consumers additional undisclosed fees as part of their scam. The defendants victimized tens of thousands of consumers. The judge granted the FTC's request for summary judgment, and ordered the defendants to pay over \$12 million. The court's final order also prohibits the defendants from telemarketing and from selling credit-related products.

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## INTERNATIONAL ANTITRUST HIGHLIGHTS

- A report released May 10 indicated that Canada's mergers and acquisitions market saw transaction values jump 63 percent in the first quarter from the same period a year earlier. It also stated, however, that the relative importance of the so-called "mega-deal" appeared to be fading. In the first three months of the year, Toronto-based investment bank Crosbie & Company said transactions totaled \$23.5 billion, compared with \$14.4 billion in last year's first quarter. The latest number was also up 14 percent from the fourth quarter of 2003.
- On May 6, Joao Grandino Rodas, president of Brazil's antitrust agency known as CADE, said that Interbrew SA's ("Interbrew") takeover of the country's biggest brewer, Cia. de Bebidas das Americas, would have limited impact on competition in Brazil's beer market. At a hearing in the lower house of Congress held to look into Interbrew's planned acquisition of AmBev, the antitrust regulator stated that because Interbrew is not a competitor in Brazil, the \$11.2 billion transaction would not pose a competition problem. Rodas comments signaled that the acquisition of AmBev would clear antitrust review. Barbara Rosenberg, director of the justice ministry's economic protection and defense department, another competition watchdog agency, also said the entry of Interbrew, which does not market its beer brands in Brazil did not cause concern over competition.
- It was announced May 5 that SABMiller Plc ("SABMiller"), the world's second- biggest brewer, offered HK \$3.04 billion (\$391 million) for China's Harbin Brewery Group Ltd. ("Harbin"), taking on Anheuser-Busch Cos. in what may be the country's first hostile takeover battle. SABMiller offered HK \$4.30 a share for the 70.6 percent of Harbin Brewery that it did not own, including a 29 percent stake bought by Anheuser-Busch earlier that week. Harbin's shares surged as much as 50 percent to HK \$4.825 in Hong Kong, as investors bet Anheuser-Busch, the world's biggest brewer, would make a higher bid. A bidding war between SABMiller and Anheuser-Busch was expected. Apparently Anheuser-Busch has the backing of the Harbin government and the company's management, and is likely to be the eventual winner. A day after SABMiller's bid, Tsingtao Brewery Group lent its support to its U.S. joint venture partner, Anheuser-Busch, giving it further key political cover.

## RECENT ACTIVITIES

### International Antitrust Highlights (Continued)

- On May 3, it was announced that the European Commission ("EC") was set to make formal charges against the proposed merger between Sony Music ("Sony") and Bertelsmann Music Group ("BMG"). The EC is still widely expected to approve the deal with relatively minor conditions, however. Formal objections to the tie-up were sent out by the EC on May 19, but it has yet to identify damning arguments that would block the deal outright. The EC formally halted the investigation to allow the two parties to respond to its inquiries, and also to give it more time to sift over the data and the arguments in the case. It is supposed to rule on the case by July 22. Ever since a parallel merger between Time Warner and EMI failed to materialize, the EC has been expected to clear the Sony-BMG deal. Nevertheless, it will still call for some divestments and behavioral commitments. Independent record labels, which are opposed to the merger, met with Commission officials at the end of April to reiterate their concerns about the alleged market dominance of the enlarged recorded music group.

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## FCC ANTITRUST HIGHLIGHTS

- Should a federal appeals court reject the FCC's most recent effort to limit media concentration, the Commission may radically revise its approach to restricting broadcast mergers. The FCC currently restricts the size of the audience a broadcaster may reach in local markets. In contrast, the new method would cap the number of people who actually view cable and television broadcasts. Adopting the new approach could open the door to more mergers. The federal appeals court in Philadelphia is expected to overturn portions of the FCC's media merger rules, which the agency adopted last year amid a fractious national debate over the perils of media consolidation. Such a decision will force the FCC to find a new approach to controlling media concentration. Advocates of the viewership model argue the current system is faulty because owning a broadcast station does not necessarily mean anyone is watching a company's programming. Without a detailed viewership assessment, the FCC cannot accurately measure media diversity, a key goal of the agency's rules. According to some sources close to the FCC, in discussions prior to the revision of the media merger rules in June 2003, FCC Chairman Michael Powell was considering a plan that would permit a company to buy additional TV stations in a market if its share of the audience based on Nielsen Media Research data is 25 percent or less. Moreover, Chairman Powell would retain the ban on owning more than one of the top four stations in a given market. At the same time, the viewership cap would not replace the national cap on the percentage of U.S. households a single TV company could serve, which Congress has set at 39 percent of U.S. households.
- On May 27, Chairman Powell summoned representatives of the nation's largest regional and long-distance telephone companies to meetings at the agency's headquarters on the following day. The talks, which were scheduled to run through the weekend, included high-level executives from long-distance giants AT&T Corp. ("AT&T") and MCI Inc. ("MCI"), as well as from regional phone companies Verizon Communications Inc.,

## RECENT ACTIVITIES

### FCC Antitrust Highlights *(Continued)*

BellSouth Corp. and SBC Communications Inc. The phone companies have been deadlocked since March, when a federal appeals court in Washington threw out FCC regulations that effectively guaranteed rivals discounted rates for access to the regional phone companies' telephone networks and equipment. Companies such as AT&T and MCI have relied on those regulations in recent years to launch their own brands of local telephone service to more than 20 million customers. Chairman Powell prodded the parties to the negotiating table just as the DOJ faces a decision on whether to appeal the D.C. court's decision to the Supreme Court. That decision would force the White House to decide between two powerful interests: the long-distance companies that support an appeal and the regional telephone companies that oppose one. A negotiated agreement would effectively eliminate the need for an appeal. Among the issues on the table at the negotiations was a proposal to do away with so-called non-disclosure agreements in deals. While the regional phone companies want to keep the details of their agreements private, the long-distance companies and other competitors want the deals to be public to ensure companies are treated equitably. Further, AT&T, MCI and other rivals of the regional phone giants argue that without a viable agreement that provides reasonable leasing terms or a Supreme Court appeal, they will likely be forced out of the local phone business. According to them, such a move would inevitably lead to higher rates for consumers and more layoffs in an already troubled industry.

- Under orders from key House members, the FCC launched an inquiry into the plausibility of cable and satellite companies offering channels on an a la carte basis on May 25. One week earlier, the Commission received a bipartisan letter from leaders of the House Energy and Commerce Committee, who punted a la carte issues to the agency partly to assuage the concerns of a la carte proponent Rep. Nathan Deal (R-Ga.). The House letter gave the FCC until November 18 to respond with a detailed report answering nearly three-dozen questions about the offering of cable networks a la carte under various legal, technical and practical scenarios. The report will serve as the FCC's most detailed look at a la carte in more than one decade. Additionally, in a May 19 letter to FCC chairman Michael Powell, Sen. John McCain (R-Ariz.) asked the agency to determine whether it currently has the authority to ensure that consumers have a la carte access to cable and satellite programming. Large cable companies and a cross-section of programmers oppose mandated a la carte, claiming that it would raise rates and devastate niche networks that need to incubate in large tiers in order to find audiences. McCain, chairman of the Senate Commerce Committee, is an a la carte booster who pulled an amendment in March that would have required cable and satellite companies to offer all of their channels a la carte without denying them the right to offer tiers simultaneously. In his letter, McCain noted that U.S. pay TV customers have limited a la carte opportunities. He asked the FCC to study how Canadian cable companies provide their consumers with a la carte options and closed the letter to Powell by bemoaning the fact that cable companies will not even experiment with a la carte. "That is why I urge you to use any existing authority you have to promote, or to create incentives to promote, an a la carte pricing option in conjunction with whatever tiers cable and satellite companies already offer," McCain said.
- According to a May 21 FCC press release, beginning on May 24, the ability of consumers to change their wireless telephone provider and keep their number expands to cover the entire country as FCC number portability rules take effect in smaller markets, covering an additional 70 million Americans. "Now all Americans can enjoy the



## RECENT ACTIVITIES

### FCC Antitrust Highlights *(Continued)*

benefits of competition," said FCC Chairman Michael Powell. "These changes will bring lower prices, more innovation and better service to everyone. Wireless carriers will now, more than ever, deliver for rural America." Last November, the FCC required wireless carriers in only the 100 largest cities to start allowing customers to switch and keep their numbers. Over 3.5 million numbers have been switched. Most of these - approximately 3.34 million - involved wireless customers switching from one wireless carrier to another. Approximately 229,000 involved landline customers taking their landline number to a wireless carrier. Just over 7,000 people transferred a wireless number to a landline phone. "Your phone number belongs to you, and you can take it with you - no matter where you live," said Powell.

- On May 13, Vivendi Universal said that it bought media entrepreneur Barry Diller's personal stake of 1.5 percent in Vivendi Universal Entertainment ("VUE") for \$275 million, fulfilling the conditions of an earlier deal that cleared the way for the May 12 merger of VUE with NBC. Speaking to investors on a conference call, Vivendi Universal chief operating officer, Jean-Bernard Levy, said Diller's Internet company InterActiveCorp. ("IAC") would retain its 5.4 percent stake in VUE, now 80 percent-owned by NBC and 20 percent-owned by Vivendi Universal. In addition, Levy said the legal dispute between Vivendi Universal and IAC over tax obligations on its stake - which Diller claims could amount to \$620 million over time - had yet to be resolved by a Delaware court. According to Levy, "[T]he tax liability is still outstanding. We expect this to be resolved, but we can't state how long it will take. We haven't provided for it in the balance sheet, as we think it has no merit."

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