102 Antitrust Law Primer for Small Department Practitioners

Alden F. Abbott
Assistant Director for Policy and Evaluation
Bureau of Competition, Federal Trade Commission

William T. Garcia
Senior Legal Counsel
Gannett Co., Inc.

Jeff Siebach
International Counsel
Intel Corporation

Jaak Treiman
Director, Legal Department
Cardservice International, Inc.

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Faculty Biographies

Alden F. Abbott

Alden F. Abbott is assistant director for policy and evaluation in the Federal Trade Commission's (FTC) Bureau of Competition in Washington, DC. He directs the FTC office charged with evaluating potential antitrust cases and helps develop antitrust policy initiatives.

Prior to assuming his current position, Mr. Abbott served in a variety of senior government positions at the Department of Commerce (DOC) and the Department of Justice (DOJ), including acting general counsel, DOC; assistant general counsel for finance and litigation, DOC; chief counsel, National Telecommunications and Information Administration, DOC; counselor to the general counsel, DOC; senior counsel, Office of Legal Counsel, DOJ; special assistant to the Assistant Attorney General, DOJ; and special counsel, Office of Legal Policy, DOJ. Mr. Abbott also served as an associate with the Washington, DC law firm of Fried, Frank, Harris, Shriver, & Kampelman and was an attorney-advisor in the Office of Policy Planning, FTC.

Mr. Abbott has written and lectured extensively on antitrust, intellectual property law, communications law, international trade law, and regulation. He has been an adjunct professor of law at George Mason University Law School (GMULS) for over 10 years. He served as associate dean for technology policy and founding director of the National Center for Technology and Law, GMULS. Mr. Abbott is listed in Who's Who in America.

He earned his BA from the University of Virginia (Phi Beta Kappa), his JD from Harvard University (Comment and Note Editor, *Harvard International Law Journal*), and his MA in Economics from Georgetown University.

William T. Garcia

Bill Garcia is senior legal counsel of Gannett Co., Inc., owner of USA TODAY and 94 other daily newspapers, 22 TV stations, and Newsquest, England's largest regional newspaper publisher. He advises all of the company's operations in the areas of antitrust, mergers and acquisitions, advertising, distribution and dealer networks (including independent contractor relationships), general corporate and commercial matters, insurance, government investigations, personal injury and workers' compensation, and trade and telemarketing regulation.

Prior to Gannett, Mr. Garcia's practice with the Washington office of Willkie Farr & Gallagher included antitrust counseling, securities and white collar criminal litigation, and foreign asset control regulations. He began his career with the Washington law firm of Howrey & Simon specializing in antitrust and white collar criminal work, including representation in investigations by the Justice Department's Public Integrity Section and a congressional ethics committee.

Mr. Garcia is vice chair of the ABA's Litigation Section Committee on Corporate Counsel and frequently speaks at ABA and ACCA meetings. He is a member of the Advisory Council for the Lawyers Committee for Human Rights, and has served as president of the board of Holy Trinity School in Georgetown.

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He received his undergraduate degree from Harvard University, where he received a varsity letter in fencing and he graduated from the University of Chicago Law School.

Jeff Siebach

Jeffrey Siebach is international counsel for Intel Corporation. His responsibilities include legal oversight for Intel's sales activities worldwide as well as non-sales activities occurring outside the United States.

Prior to being appointed international counsel, Mr. Siebach was Asia counsel for Intel in Hong Kong where he served for 13 years. Prior to joining Intel, Mr. Siebach served as Asia counsel for Lotus Development.

Mr. Siebach received a BA from Brigham Young University and is a graduate of Brigham Young University's J. Reuben Clark Law School.

Jaak Treiman

Jaak Treiman is director of legal department of Cardservice International, Inc. located in Moorpark, CA. His employment responsibilities include supervision of a six person legal department, which is part of the First Data Corporation's general counsel's office. His specific practice areas include contracts, supervision of outside litigation counsel, legal issues related to outside sales people, electronic commerce, and issues related to credit card processing.

Prior to CardService, Mr. Treiman was employed in the private practice of law for over 25 years, emphasizing litigation and business related issues. He served as a Judge pro tem in the Los Angeles Traffic, Small Claims and Municipal Courts. Mr. Treiman taught continuing education courses at Los Angeles Valley College for California real estate brokers and licensees. He was also a guest lecturer in international business courses at Loyola Marymount College and UCLA extension.

Mr. Treiman served in the United States Army for two years, stationed in Fort Belvoir, VA. He was honorably discharged as a Specialist 5. He has served as Honorary Consul for Estonia in California for over 15 years, and he served many years as treasurer of the Los Angeles Consular Corps. Mr. Treiman currently serves on the Board of Directors of the U.S.-Baltic Foundation and served as the Foundation's board chair for several years. He served many years on the Board of Directors of the Canoga Park Chamber of Commerce and the Canoga Park Community Center Foundation and he served a one year term as president for each of these organizations.

Mr. Treiman received a BA from the University of Southern California, a JD from the University of Southern California School of Law and a master of arts in International Relations from the University of Chicago.

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Market Definition

April 24, 2002
Jerome A. Swindell
Assistant to the Director
Bureau of Competition
Federal Trade Commission

I. Defining the Relevant Market

- Purpose of defining market is to identify the products and services that compete with each other to some substantial degree
- Once the market is defined, trier of fact can assess likelihood that a market participant may possess significant market power using market share data and other relevant factors

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Relevant Statutes

- Sherman Act § 1
  - Prohibits agreements that unreasonably restrain trade
- Sherman Act § 2
  - Prohibits illegal acquisition of monopoly power
- Clayton Act § 7
  - Prohibits mergers or acquisitions that substantially lessen competition or tend to create a monopoly

Relevant Statutes Continued

- Robinson-Patman Act
  - Prohibits certain types of price discrimination where the likely effect may be to substantially lessen competition
- Section 5 of the FTC Act
  - Any practice that violates Sections 1 and 2 of the Sherman Act will also violate Section 5 of the FTC Act

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II. How to Define the Relevant Market

- Relevant Product Market
  - Products or services that compete with one another ("interchangeability of products") (*Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962); *FTC v. Cardinal Health,* 12 F.Supp.2d 34, 46 (D.D.C. 1998)).
- Geographic Market
  - "area of effective competition…in which the seller operates…" *(United States v. Phila. Nat. Bank,* 374 U.S. 321, 359 (1963)).

Product Markets

Courts

- have defined markets in terms of cross-elasticity of demand (consumers' practical ability to switch between products) (*Brown Shoe,* 370 U.S. at 325)

Merger Guidelines

- define market by analyzing impact of pricing behavior in hypothetical monopoly markets

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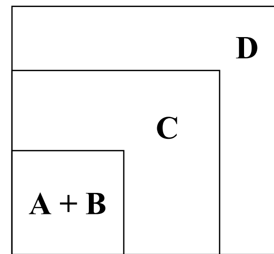
Merger Guidelines Analysis

1) Begin with the products of two merging firms
2) Determine whether hypothetical monopolist could profitably raise prices on those products
3) If hypothetical monopolist is unable to profit from a price increase, repeat test until group of products identified for which price increase would be profitable



In *Brown Shoe*, Supreme Court identified several practical indices of market:

1) Industry of public recognition of market as separate economic entity
2) Product's peculiar characteristics and uses
3) Unique production facilities
4) Distinct customers
5) Distinct prices
6) Sensitivity to price changes
7) Specialized vendors

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The Role of Supply-Side Substitution

Courts:

- ➢ Focus most attention on demand-side substitution when defining relevant markets
- ➢ Have found products to be in same market if firms can readily switch production capabilities without significant barriers

The Role of Supply-Side Substitution Continued

Enforcement Agencies*(Merger Guidelines):*

- ➢ Do not focus separately on supply-side substitution in defining market
- ➢ Consider supply-side substitution in hypothetical monopolist test

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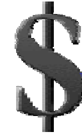
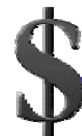
Impact of Price Discrimination



- Price discrimination has received substantial attention from enforcement agencies
- **Inframarginal customers** are customers who have a strong preference for a product
- To attract **marginal customers**, producers and sellers must often set prices lower than what inframarginal customers will pay
- Sometimes producers and sellers can charge different prices to marginal customers and inframarginal customers

Impact of Price Discrimination continued



- *Merger Guidelines* recognizes possibility of price discrimination
- In this situation, agencies will consider a relevant product market that consists of a use by the targeted buyers for whom hypothetical monopolist would profitably and separately impose price increase

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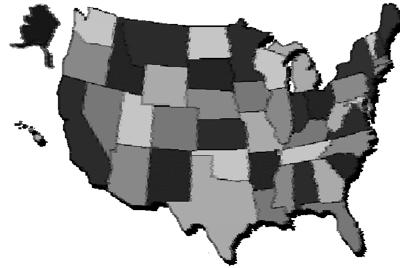
Geographic Market

- In *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 359 (1963), the Supreme Court defined the relevant geographic market as "the area of effective competition…in which the seller operates and to which purchasers can practically turn for supplies."



Geographic Market Continued

- Primary focus of courts and enforcement agencies is **demand-side substitution**
- Once market is defined, **supply-side substitution** is used to identify market participants

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Factors Courts have Considered in Analyzing Geographic Markets

- Actual sales patterns
- Relationship of prices in different areas
- Cost of transportation between areas
- Governmental barriers
- Industry practices

Merger Guidelines

- Seeks to find smallest geographic area in which hypothetical monopolist would be only supplier of relevant product
- Test:
  - Begin by looking at location of each merging party and positing significant and nontransitory price increase in that area
  - If price increase not profitable, agencies add location from which production is next best substitute
  - Test repeated until identify smallest geographic area within which price increase profitable

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Special Markets

1) "Submarkets" or Narrow Markets : narrowly defined relevant markets that may be found where initial product market definition was too broad
2) Cluster Markets : groups of products and services that constitute one market even though the individual products and services are not substitutes for one another

Special Markets Continued

3) Single Brand Markets: when there is no substitute for a specific brand's product and that brand may be a relevant product market
4) Innovation Markets: markets that consist of intellectual property as opposed to products and services

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Alden Abbott
Assistant Director for Policy and Evaluation
Bureau of Competition, Federal Trade Commission

I. Introduction

A. Role of FTC, Justice Department, state, and private enforcement. Note especially availability of business review letter advice from DOJ and FTC

B. Role of FTC consumer protection (very brief comments on deceptive advertising, Internet fraud)

II. Merger Enforcement

A. Basic Merger Guideline rules — far more emphasis on horizontal as compared to vertical (let alone conglomerate) mergers

B. Hart-Scott-Rodino Premerger Notification Rules

C. Second Request and Merger Remedies Process Reforms

D. Importance of Efficiencies Analysis

III. Non-Merger Enforcement

A. Emphasis on horizontal collusion, most likely to harm consumers — hard core price fixing/market division conspiracies handled by Justice Dept.

B. Vertical restraints most likely a problem where anticompetitive effects among competitors at horizontal level (Post-Chicago theories of harm used sparingly, only where hard facts support a case). But a cautionary note —still a great deal of private enforcement in this area.

C. Robinson-Patman Act largely left to private enforcement; federal resources best-deployed to higher-valued initiatives

IV. Hot Sectors for FTC Enforcement — standard-setting, intellectual property, abuse of market power in health care area (patent cases and private conspiracies not involving patents), paring back antitrust limitations on petitioning conduct and anticompetitive acts allegedly shielded by state action immunity. Also cooperating actively with foreigner jurisdictions (EU particularly) on antitrust cooperation and harmonization. Focus on hard facts and actual anticompetitive effects, stress on those activities that impose greatest harm on consumers.

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AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW

The 50th Annual Spring Meeting:

MARKET DEFINITION

April 24, 2002

Jerome A. Swindell
Assistant to the Director of
the Bureau of Competition
Federal Trade Commission
Washington, D.C.

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Market Definition[1]

I. Market Definition is A Significant Issue in Virtually All Antitrust Cases

Defining the relevant market is the starting point for most antitrust cases.[2] This is so because any analysis of an antitrust defendant's alleged market power must begin with ascertaining the defendant's market share. Obviously, the defendant's market share cannot be known without first making a determination concerning the boundaries of the relevant market. The purpose of market definition, therefore, is to identify the products and services that compete with each other to some substantial degree. Once the market is properly defined, the trier of fact can begin to assess the likelihood that a market participant may possess significant market power or monopoly power by reviewing market share data[3] and other information relating to the relevant market.

The relevant antitrust statutes require private plaintiffs and the enforcement agencies to prove that a defendant possesses or attempted to obtain significant market power or monopoly power. This can be done only after the market has been defined.

Sherman Act § 1.[4] Prohibits agreements that unreasonably restrain trade. With the exception of certain *per se* cases, the reasonableness of the restraint will depend on the position of the parties in the market and an analysis of the impact of the restraint upon that market. Thus, defining the relevant market is essential.

Illegal tying cases require definition of the market for the tying product because the plaintiff must prove that the defendant has market power in that market.[5]

Sherman Act § 2.[6] Prohibits illegal acquisition or maintenance of monopoly power in any properly defined relevant market.

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[1] The presenter gratefully acknowledges the contributions of Marian R. Bruno, Assistant Director, Federal Trade Commission, in the preparation of these materials. The views expressed in this presentation are the views of the contributors and not necessarily the views of the Bureau of Competition, the Commission or any individual Commissioner.

[2] In certain *per se* cases, such as price fixing or customer allocation, market definition may not be required. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-36 (1990); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

[3] Market share data is an indirect, and imperfect, method of measuring market power. Market shares can sometimes overstate a firm's ability to increase prices or reduce output. For example, low entry barriers may keep prices at competitive rates because the incumbent firm(s) will not want to entice the emergence of new competitors. Thus, while market share is an important factor, it rarely, if ever, is the sole determinant of market power.

[4] 15 U.S.C. § 1.

[5] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

[6] 15 U.S.C. § 2.

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Clayton Act § 7.[7] Prohibits mergers or acquisitions that substantially lessen competition or tend to create a monopoly "in any line of commerce . . . in any section of the country." The language of the Clayton Act clearly contemplates proper definition of both a relevant product and a relevant geographic market.

Robinson-Patman Act.[8] Prohibits certain types of price discrimination where the likely affect may be substantially to lessen competition "in any line of commerce." Determining competitive effects in a "line of commerce" generally requires a definition of the relevant market.[9]

Section 5 of the FTC Act.[10] The FTC does not enforce the Sherman Act directly. Nevertheless, any practice that violates Sections 1 and 2 of the Sherman Act also will violate Section 5 of the FTC Act. Thus, to the extent that the Sherman Act requires a definition of a relevant market, actions brought under Section 5 to enforce provisions of the Sherman Act will require the same.

II. How to Define the Relevant Market

Defining a relevant market requires two related, but distinct inquiries.[11] The first is to determine the relevant product market. The product market identifies the products or services that compete with one another. This often is referred to as the interchangeability or cross-elasticity of the products. In short, it is the ability of one product to be a reasonable substitute for another product. *See Brown Shoe Co. v United States*, 370 U.S. 294, 325 (1962); *FTC v. Cardinal Health*, 12 F. Supp.2d 34, 46 (D.D.C. 1998). The second is to determine the relevant geographic market, which refers to the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Phila. Nat'l. Bank*, 374 U.S. 321, 359 (1963). Thus, the inquiry is whether the customer reasonably can substitute one supplier for another given the locations of the suppliers.

Demand-Side v. Supply-Side Substitution

Courts and the enforcement agencies focus most of their attention on demand-side substitution (*i.e.*, reasonable interchangeability of use) when defining relevant markets. Conversely, supply-side substitution (*i.e.*, the reasonable interchangeability of production) typically is used to identify the actual or potential market participants once the market has been defined. Nevertheless, courts have found products to be in the same market if firms can readily switch their production capabilities from one product to another without significant barriers. *E.g., Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976) (ability of

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7 15 U.S.C. § 18.

8 15 U.S.C. § 13(a).

9 *See Bathke v. Casey's Gen. Stores*, 64 F.3d 340, 344-45 (8th Cir. 1995).

10 15 U.S.C. § 45.

11 Market definition analysis is generally the same under any of the relevant competition statutes. *See, e.g.*, *United States v. Grinnell Corp*., 384 U.S. 563, 572-73 (1966); *United States v. Syufy Enters.*, 712 F. Supp. 1386, 1396 (N.D. Cal. 1989)

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growers to produce different types of flowers precludes a chrysanthemum-only market); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) (ability of full-service gasoline suppliers to convert pumps to self-service, cash-only pumps at virtually no cost, requires full-service gas to be included in the relevant market despite price differential).

The enforcement agencies, through the *Merger Guidelines*, generally do not focus separately on supply-side substitution in defining the relevant market. Instead, supply-side substitution is implicitly considered in the hypothetical monopolist test as it attempts to identify the firms currently participating in or likely to enter the relevant market. *Merger Guidelines* § 1.0.

A. Product Market

Generally, interchangeability is determined by focusing on demand-side substitution. Demand-side substitution focuses on the actions of the consumers of the product in question. In short, the goal is to identify those other products to which consumers of the product in question would switch in the event that the producer of the product in question chose to raise the price or restrict the output of the product. Thus, Courts have attempted to define product markets in terms of the consumer's practical ability to switch between products. This can be referred to as the cross-elasticity of demand. *See Brown Shoe*, 370 U.S. at 325. Cross-elasticity of demand measures the extent to which the quantity of demand for one product will change in response to changes in the price of a second product. A high cross-elasticity value indicates that the products are good substitutes and probably are in the same product market.[12]

The primary issue to resolve in defining a relevant market is whether customers are willing to substitute one product for the other. The Supreme Court, in *Brown Shoe*, identified several practical indicia of markets[13]:

1) industry or public recognition of the market as a separate economic entity, *e.g., Fineman v. Armstrong World Indus.*, 980 F.2d 171, 199 (3d Cir. 1992) (reviewing both evidence of consumer preference and evidence of industry perception of various floor coverings), *cert. denied*, 507 U.S. 921 (1993).

2) the product's peculiar characteristics and uses;

3) unique production facilities;

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12 *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956)

13 Although the Court was speaking specifically in the context of its "submarkets" concept, the usefulness of the Court's practical indicia is not limited by such categorizations. *See H.J., Inc. v. ITT*, 867 F.2d 1531, 1540 (8th Cir. 1989) ("the same proof which establishes the existence of a relevant product market also shows (or . . . fails to show) the existence of a product submarket.").

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4) distinct customers, *e.g., NCAA v. Board of Regents*, 468 U.S. 85, 111 (1984) (finding that Saturday afternoon college football broadcasts deliver a uniquely attractive audience to advertisers);

5) distinct prices, *e.g., FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997) (reviewing evidence that prices of consumable office supplies were different at office superstores than the prices of the same products sold in other stores);

6) sensitivity to price changes, *e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956); and

7) specialized vendors, *e.g., Seabury Mgmt., Inc v. Professional Golfers Ass'n of Am.*, 1995-1 Trade Cas. ¶ 70,991, at 74,625 (4th Cir.) (product market limited to trade shows and excludes other marketing techniques).

The *Merger Guidelines* approach market definition by analyzing the impact of pricing behavior in hypothetical monopoly markets. Thus, according to the *Merger Guidelines*, a market is defined as a "product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant." *Merger Guidelines* § 1.0. The smallest group of products for which the hypothetical monopolist profitably could raise prices is a market. *Merger Guidelines* § 1.11.

Merger Guidelines analysis begins with the products of the two merging firms. If the hypothetical monopolist profitably could raise prices on those products, then those products may be a relevant market for antitrust purposes. If the hypothetical monopolist is unable to profit by increasing the prices of the merging parties' products, then the trier of fact must expand the analysis to include products made by other producers. The test is then repeated as often as necessary until a group of products is identified for which the price increase would be profitable for the hypothetical monopolist.

B. Geographic Market

In *United States v. Phila. Nat'l. Bank*, 374 U.S. 321, 359 (1963), the Supreme Court defined the relevant geographic market as "the area of effective competition . . . in which the seller operates and to which purchasers can practicably turn for supplies." As with product markets, the primary focus of the courts and the enforcement agencies is on demand-side substitution. Again, supply-side substitution primarily is used to identify the market participants once the market is defined.

Courts have focused on the following factors when analyzing geographic markets:

- actual sales patterns, *e.g., Tampa Electric Co. v. Nashville Coal*, 365 U.S. 320 (1961) (evidence that coal is shipped into Florida from at least seven states).

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- relationship of prices in different areas, *e.g., Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (no evidence that prices in one area are independent of prices in another area).

- cost of transportation between areas, *e.g., FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967) (manufacturer sales limited to 300 mile radius from plant due to high transportation costs).

- governmental barriers, *e.g., Foremost Dairies*, 60 F.T.C. 944 (1962) (differing local health and other regulations).

- industry practices, *e.g., United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1278 (W.D. Pa. 1977) (separate pricing zones)

The *Merger Guidelines* approach to geographic markets is similar to its treatment of product markets. The *Merger Guidelines* attempt to find the smallest geographic area in which the hypothetical monopolist would be the only present and future supplier of the relevant product. The agencies begin by looking at the location of each merging party and positing a small but significant and nontransitory price increase in that area. If the price increase would not be profitable, then the agencies will add to the equation the location from which production is the next-best substitute for production at the merging firm's location. The test is then repeated until the agencies identify the smallest geographic area within which the price increase will be profitable. *See Merger Guidelines* § 1.21

As with product markets, courts have applied *Brown Shoe's* "submarkets" concept when analyzing geographic markets. Again, however, the *Merger Guidelines* do not reference geographic "submarkets." Instead, the *Merger Guidelines* recognize that the ability to engage effectively in price discrimination may result in the delineation of a narrower market. *Merger Guidelines* § 1.22.

C. Price Discrimination

Price discrimination has received substantial attention from the enforcement agencies in market definition analysis. Customers who require or have a strong preference for a product are sometimes referred to as inframarginal customers. In many contexts, producers and sellers must set one price that is lower than what inframarginal customers would be willing to pay for their product so that, in addition to the inframarginal customers, the producers or sellers also could attract sufficient marginal customers to maximize profits. There may be circumstances, however, where producers or sellers effectively are able to charge a competitive price to marginal customers and a higher price to the inframarginal customers. In those circumstances, the trier of fact may be able to find a separate market consisting only of the products that are reasonable substitutes from the perspective of the inframarginal customer. *See R.R. Donnelly & Sons Co.*, 5 Trade Reg Rep. (CCH) ¶ 23,876, at 23,643 (FTC July 21, 1995).

The *Merger Guidelines* explicitly recognize the possibility of price discrimination. *Merger Guidelines* § 1.12. A product may exist where the hypothetical monopolist would

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identify and set a separate price for a targeted set of buyers *and* other buyers (arbitragers) likely would not purchase the product at the lower price and then resell to the targeted buyers. *Id.* In those situations, the agencies will consider a relevant product market that consists of a use or uses by the targeted buyers for whom the hypothetical monopolist would profitably and separately impose the price increase. *Id.*

D. Special Issues

1. "Submarkets" or Narrow Markets: In *Brown Shoe*, the Supreme Court first articulated the concept of "submarkets" that may exist within broader relevant markets. As used by the Court in *Brown Shoe*, "submarkets" are narrowly defined relevant markets that may be found where the initial product market definition was too broad. While *Brown Shoe* specifically dealt with a relevant product "submarket," the concept is applicable equally to geographic market definition. As indicated above, however, the criteria the Court used to identify a "submarket" is identical to the criteria Courts and the enforcement agencies use to identify any market. Thus, while many courts continue to use the term "submarkets," there is little, if any, independent significance to the term.

2. Cluster Markets: The Court articulated the concept of cluster markets in *United States v. Phila. Nat'l. Bank*, 374 U.S. 321 (1963). In that case the Court found that the group of products and services provided by commercial banks; *e.g.*, check writing privileges, savings accounts, credit, trust administration, etc., constituted one market even though the individual products and services are not substitutes for one another. This is because, the Court found, customers typically demand the full range of services from commercial banks.

3. Single Brand Markets: In most circumstances, a relevant market cannot be limited to the product of a single manufacturer. There are rare situations, however, where there may be no substitutes for a specific brand and a court may find that brand to be a relevant product market. For example, in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), the Court found a separate market for spare parts and services related to Kodak copiers, as opposed to all copiers.

4. Innovation Markets: Frequently, firms market the rights to their intellectual property separately from the goods and services for which the intellectual property is used; *e.g.*, licensing a patented manufacturing process. Courts and the enforcement agencies may recognize technology markets consisting not of actual products or services, but rather intellectual property. The market may include the subject intellectual property and other intellectual property or products, if any, that constrain the ability of the owner of the intellectual property to exercise market power.[14]

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14 *See United States Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property* (April 1995), ¶ 3.2.2.

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In the merger context, the enforcement agencies have challenged mergers where the effect was to reduce research and development activities toward new products and processes.[15]

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[15] *See United States v. General Motors Corp.*, No. 93-530 (D. Del. filed Nov. 16, 1993) (DOJ challenge included claim that merger would reduce innovation in the design, development, and production of certain automatic transmissions).

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MERGER ENFORCEMENT AT THE FTC

Joseph J. Simons
Director, Bureau of Competition
Federal Trade Commission

Keynote Address to the New York City Bar Association and the Antitrust Section of the American Bar Association Conference on "Mergers and Acquisitions: Getting Your Deal Through In The New Antitrust Climate"

June 13, 2002, New York City

I. Introduction

Good afternoon. It's an honor and a pleasure to have the opportunity to appear here today. I have been back at the FTC as Director of the Bureau of Competition for just about a year now, so it is a good time to take stock of what we've done in the past year and what we expect for the future. Before I say another word, allow me to give the usual disclaimer: my comments this morning represent my own views, and not necessarily those of the Commission or any individual Commissioner.

Those of you who follow the Commission have no doubt heard the word "continuity" used a great deal recently in the vicinity of 6th and Pennsylvania. In one of his first speeches as Chairman, Tim Muris addressed the Antitrust Section at the ABA Annual Meeting last August, and his prepared remarks on that occasion bore the title, "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity."[1] "Continuity will be the norm," he said, "with changes at the margins."[2]

Three months later, in testimony before the Commission's oversight subcommittee in the House, the Chairman expressed a similar thought: "The guiding word at the FTC will be 'continuity.'"[3] And just two weeks ago, in testimony supporting the FTC's funding request for Fiscal Year 2003 before the agency's House appropriations subcommittee, the Chairman repeated the statement, changing only the verb tense from future to present: "The guiding word at the FTC is "'continuity.'"[4]

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1 Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, Remarks Before American Bar Association Antitrust Section Annual Meeting (Chicago, Il. Aug. 7, 2001).

2 *Id.*

3 Timothy J. Muris, Testimony Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee (Nov. 7, 2001).

4 Timothy J. Muris, Testimony Before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the House Committee on Appropriations (Apr. 10, 2002).

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So you've probably gotten the idea by now that the choice of the word "continuity" was not inadvertent. But what does that mean, exactly? Is the talk of "continuity" meant as a soothing lullaby to calm those who might oppose a radical new agenda in the works? Or does "continuity" mean "lack of creativity"?

Not surprisingly, the answer is "neither." It should also be clear, from the record over the past year, that the Commission's merger enforcement remains on essentially the same course it has been on for about 20 years now. There truly is a broad policy consensus. As you may know, Tim Muris' first public remarks after becoming Chairman were a well-deserved tribute to outgoing Chairman Pitofsky, citing him as "one of the key Founding Fathers of the modern FTC," and praising his implementation of "a coherent, principled vision for the agency [with] resounding success."[5] At the same, the Chairman noted that, "Bob [Pitofsky] and I are of like mind, but have not always agreed."[6] And the word "continuity" has been followed by the phrase "with changes at the margins."[7] So the current agenda is not necessarily a carbon copy of last year's agenda.

Having identified what "continuity" does not mean, let me offer some general thoughts on what it does mean:

- First, it means we think our predecessors had it fundamentally right, so we're building on their accomplishments, not trying to undo them;

- Second, it means we are still dealing in the same issues, applying the same principles, using the same analytical framework, and reaching essentially the same outcomes;

- Third, we'll do some things differently (as anyone would) for no other reason than the fact that the world is continually evolving and we need to adapt to keep up with it, and

- Fourth, we'll pursue some initiatives that, while new, are still well within the mainstream of modern antitrust.

With this context in mind, I'll turn to some more specific topics relating to the Commission's merger enforcement program. Here is a quick preview of what I plan to address: First, one thing that is probably apparent to everyone is that merger activity has declined significantly from the unprecedented levels of the late 1990's. However, closer examination shows that current amount of merger activity is still quite high by historic standards. Second, mergers are becoming

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5 Timothy J. Muris, *Chairman Robert Pitofsky: Public Servant and Scholar*, Remarks Before the American Antitrust Institute, Second Annual Conference (Washington, D.C. June 12, 2001).

6 *Id.* at 1.

7 *See e.g.* Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, *supra* note 1.

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larger and more complicated, increasing the demand on our resources. Despite the decline in merger transactions, we continue to be busy with investigations and enforcement actions. Third, the increase in HSR filing thresholds has resulted in fewer filings to review, but also an increase in the attention we devote to non-reportable transactions. Fourth, HSR remains the backbone of our merger program, and we'll continue to enforce its requirements vigorously.

I also want to comment on what we are doing to improve our merger process. First, we have launched a series of workshops at which we hope to hear a range of ideas for further improvement to our second request process. Second, as you are no doubt aware, we tried to improve the clearance process but encountered some opposition. Third, we are taking a look at remedies issues, to see what improvements are in order there. With that quick overview, let me now turn to the substantive standards that we apply in our merger investigations.

II. Mergers

Merger Standards

The hallmark of merger enforcement today is the nearly universal support for the analytical methodology that has been in place, with modest fine-tuning, since 1982. As Bill Baer put it shortly after his return to the Commission in 1995:

> One other thing that has changed, and for the better, is the sophistication of the analysis that goes into the examination of competition issues, both at the Commission and the Antitrust Division. In the last decade and a half, government antitrust enforcement has become more analytically sound, more closely aligned with mainstream industrial organization economics, and more predictable.
>
> . . . [A] lion's share [of the credit] goes to . . . my friend and former antitrust professor, Bill Baxter.
>
> It was Bill Baxter's Antitrust Division that issued the 1982 Merger Guidelines, which revolutionized the way we think about and analyze mergers. The 1982 Guidelines explained new concepts and methodologies for defining relevant markets, for measuring potential market power, and for analyzing competitive effects. The Guidelines reflected a recognition that most mergers are not anticompetitive, and that they may well be procompetitive. The 1982 Guidelines also recognized the significance of world markets and import competition -- issues that are increasingly important today.[8]

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8 William Baer, *A Report on Recent Antitrust Developments at the Federal Trade Commission,* Remarks Before the American Bar Association's Antitrust Law Section (Chicago, Il. Aug. 9, 1995).

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Those words remain equally true today. In fact, merger policy has remained unaltered in its fundamentals for the past twenty years. For those who may not have seen Commissioner Thomas Leary's speech on the essential stability of U.S. merger policy, I recommend it to you.[9] Commissioner Leary describes a significant change in merger policy in the early 1980's (foreshadowed before the 1980 presidential election), followed by gradual adjustment at the margins since.[10] He traces the evolution of merger policy from early in the century, though the adoption of the first merger guidelines in 1968, a number of Supreme Court cases during the 1970's injecting more economic analysis into antitrust, and the passage of the HSR amendment to Section 7 in 1976.[11]

Although we have seen revisions to the merger guidelines in 1984 and 1992, the foundation of the analytical method remains intact. As Commissioner Leary points out, the changes were in a few specific areas (e.g., in market definition,[12] incorporating a distinction between "committed" and "uncommitted" entrants[13]) which do not change the basic enforcement approach.

Commissioner Leary also reviewed statistical data on merger enforcement over the past two decades. In particular, he examined the hypothesis that a lax merger enforcement program during the 1980's became more rigorous in the 1990's. Although the numbers he examined were somewhat inconclusive, the data did *not* support the theory that merger enforcement policy has shifted back and forth from more rigorous to more lax and vice versa depending on the party in control of the White House.[14]

Today, we continue to rely on the same principles, use the same merger guidelines, applied in the same way, and reach conclusions which, in aggregate, would be unlikely to differ much from conclusions the Commission likely would have reached 10 or 15 years ago.

Level of Merger Activity

After a decade of exceptional growth in the number of mergers and the dollar value of merger transactions, merger activity began to ease in FY 2001 and into the first half of FY 2002. The revised HSR reporting thresholds, which became effective on February 1, 2001,[15] caused much of the decline in reported mergers, but general economic conditions contributed as well.

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9 Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, Remarks Before the Berkeley Center for Science and Technology, University of California at Berkeley School of Law and Escole Nationale Superieure des Mines de Paris (Paris, France Jan. 17, 2002), *available at* <http://www.ftc.gov/speeches/leary/learyuseu.htm>.

10 *See id*. at 2.

11 *Id*. at 2-5.

12 *Id.* at 5-6.

13 *Id.* at 8.

14 *Id.* at 8-10.

15 *See* 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553; 114 Stat. 2762 (2000) [hereinafter HSR Amendments].

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When we say current activity is "down," however, that is from a narrow perspective, comparing it to the last year or two. Merger filings did decline significantly in 2001, in part because of the implementation of the new reporting thresholds. So far in 2002, filings are down even more. But before we conclude that the Bureau has a lot of time on its hands these days, let's look at the numbers in a different perspective. Yes, merger activity is much lower today than it was in years leading up to 2000. But remember that the level of activity during that period was in no way "normal," at least according to our previous 20 years of experience under HSR. So, "relative to what" is a question we should ask.

Let's look at current activity relative to what we all perceived at the time as the "merger wave" of 1993 through 1995. To adjust for the effect of the revised filing thresholds, we'll look at the number of transactions that would have been subject to the filing requirement if today's rules had been in effect in past years. Under today's filing rules, 703, 918, and 1191 transactions would have been reportable in 1993 through 1995, respectively; that's an average of 937 per year. In 2001, we received filings for 1736 transactions reportable under the new rules – that's 85% more than what we were seeing during the so-called 93-95 merger wave. So far this year filings are down even more, but we are still seeing them come in at a rate 23 percent higher than in the then record-setting period 1993-1995.

Total dollar value tells a similar story. In 2001, for example, we received filings reporting transactions amounting to more than $1 trillion. That's 82% more than the 1995 total in nominal terms, even without any adjustment for the different filing thresholds. In fact, the $1 trillion total in 2001 – what we perceived as a "down" year for mergers, *exceeded* the average total dollar value of reported transactions during the booming 1991-2000 decade.

Increased Size and Complexity of Transactions

One difficulty in looking at these numbers as a measure of the demands placed upon us is that mergers vary widely in size and complexity. The average size (in nominal terms) of HSR transactions more than tripled over the decade 1991 to 2001. The big transactions demand more of our resources, for three reasons.

First, all else being equal, a $10 billion deal is more likely to involve competitive overlaps than a $40 million deal (the kind no longer subject to the filing requirement), as a matter of statistical probabilities. I am not sure how one would measure this, but it would seem self-evident that firms worth, or able to pay, $10 billion in a merger deal are likely to be involved in more markets than much smaller firms. The probability that we will need to – at a minimum – put time into an investigation of a mega-deal is fairly high, while the infrequency of challenges to the under $50 million mergers led Congress to exempt them from HSR altogether.

Second, for similar reasons, the *number* of competitive overlaps involved in a single transaction is likely to be higher, on average, as the size of the transaction increases. A single merger raising antitrust issues in multiple markets can be the equivalent of multiple merger investigations. There are more documents involved, more sets of customers to interview, and more analyses to perform. You have economies of scale and scope, of course, but overall more

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resources are needed. I think you will readily recognize this from your own experience in counseling firms in large and small transactions.

Third, and again, all else being equal, firms involved in larger transactions are more likely to be big players in the markets in which they compete. Markets vary widely in size, of course, but in general, a Chevron or a Hewlett Packard, for example, is not likely to be the number 8 firm in markets in which it competes.

To give a more concrete example, the biggest transaction we reviewed in the past year was the *Chevron/Texaco* matter.[16] That was a $45 billion merger. Just looking at the consent order gives an idea of the scope of the investigation. The Commission obtained relief in these markets:

- retail gasoline markets in numerous metropolitan areas in various parts of the country, including Alaska and Hawaii, the western United States (including Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), and the southern U.S. (including Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia);
- marketing of CARB gasoline in California;
- refining and bulk supply of CARB gasoline for sale in California;
- refining and bulk supply of gasoline and jet fuel in the Pacific Northwest;
- the bulk supply of RFG II gasoline into St. Louis;
- terminaling of gasoline and other light petroleum products in several metropolitan areas in Arizona, California, Mississippi, and Texas, and on four Hawaiian islands;
- transportation of crude oil from California's San Joaquin alley;
- transportation of crude oil in the eastern Gulf of Mexico;
- pipeline transportation of natural gas in the Central Gulf of Mexico;
- natural gas fractionating in Texas; and
- marketing of general aviation gasoline in 14 states (Alaska, Alabama, Arizona, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Oregon, Tennessee, Utah, and Washington).[17]

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16 *Chevron Corp./Texaco Inc*., Dkt. C-4023 (Jan. 2, 2002) (consent order).

17 *Id.*

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That's eleven different categories, and within some categories, there are many individual markets. And that includes only the markets where our investigation indicated relief was necessary. There were others, of course, where we investigated and concluded the merger posed no competitive threat. *Chevron/Texaco* represented just one HSR filing, but you can readily see how it disproportionately consumed resources.

To summarize, if we control for all other factors, we believe that:

- Mergers today tend to be significantly larger than they have been in the past (three times larger on average in the past 10 years);

- Larger mergers are more likely to require investigation; and

- Investigations of larger mergers are likely to require more resources than investigations of smaller mergers.

Consequently, a given number of merger transactions in 2002 will likely demand more of our resources than the same number of mergers 10 years ago.

Level of Enforcement

Despite the smaller number of reported HSR transactions, our level of enforcement activity remains at about the same level as past years. This year we are opening merger investigations at a rate of about 204 per year, which is only slightly lower than the average of 213 per year during the peak of the merger wave in 1996 through 2000. We issued 15 second requests in the first half of this year, which is about 70% as many as we typically issued from 1996 to 2000. Perhaps most interesting, the Commission took enforcement action in 17 merger transactions through the first half of this year, which is right at the average for the midpoint over the last 5 years. In other words, we remain very busy in the merger area, despite the reduced volume of transactions.

Non-Reportable Transactions and Consummated Mergers

The Commission is also committed to enforcing the antitrust laws with regard to mergers that do not meet the threshold for reporting under the Hart-Scott-Rodino Act. The reporting requirements were modified last year to require reporting for all acquisitions in excess of $200 million or, under more limited circumstances, acquisitions in excess of $50 million.[18] The new thresholds eliminate the reporting burden for smaller-sized mergers, but they do not alter the substantive standard under Section 7. Consequently, along with the higher reporting thresholds, we can expect to see more enforcement activity concerning transactions not subject to the HSR reporting requirement.

18 *See supra* note 18.

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Last year, we began to increase our efforts to identify non-reportable mergers that may harm competition. To that end, we monitor the trade press and Internet, and we follow up case leads from Congressional offices, other Executive Branch agencies, and state and local government. We also encourage consumers, businesses, and the Bar to notify us of possibly anticompetitive mergers that may have flown under the radar. But we also want to send the message that exempt from reporting does not mean exempt from scrutiny. We look to the parties in proposed merger transactions to conduct a thorough, honest, and conservative antitrust appraisal of the merger before going forward. If a merger raises substantial competitive issues, we will learn about it eventually, and we will be ready, willing, and able to challenge such a merger administratively if warranted.

In fact, the Commission has challenged two consummated mergers already this fiscal year. First, the Commission challenged MSC Software Corporation's 1999 acquisitions of Universal Analytics, Inc. (UAI) and Computerized Structural Analysis & Research Corp. (CSAR).[19] MSC is the dominant supplier of a popular type of advanced computer-aided engineering software known as "Nastran." If the Commission's charges are upheld, we will likely seek an order that would reestablish two viable competitors offering advanced versions of Nastran.

The Commission also challenged Chicago Bridge and Iron Company's acquisition of Pitt-Des Moines, Inc.'s industrial and water storage tanks assets.[20] Before the acquisition, CB&I and PDM competed against each other as the two leading U.S. producers of large, field-erected industrial and water storage tanks and other specialized steel-plate structures. If we prevail in this challenge, it may not be an easy task to unscramble the eggs, but we will nevertheless seek to restore the competition lost as a result of the merger.

HSR Enforcement

The Commission has continued to show its determination to move forcefully to seek strong sanctions against parties who fail to produce competitively sensitive studies and analyses of the deal as required under section 4(c). At stake is the integrity of the premerger notification system upon which we rely.

The vast majority of companies fulfill their obligations fully and in good faith, but where there is temptation, there will always be some who yield. For example, when the Hearst Corporation acquired J.B. Laughery, Inc., including the Medi-Span drug information database business, Hearst violated Section 7A by omitting several high-level corporate documents that it had prepared to evaluate

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19 *MSC Software Corp*., Dkt. 9299 (Oct. 10, 2001) (complaint issued).

20 *Chicago Bridge Iron Co., Inc*., Dkt. 9300 (Oct. 25, 2001) (complaint issued).

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the acquisition and its competitive effects, according to the Commission's complaint filed in connection with a settlement of the matter.[21] The Commission obtained a $4 million civil penalty, the largest penalty ever levied against a single company for a violation of the premerger notification law.[22]

The acquisition also raised Section 7 issues. When it acquired Medi-Span, Hearst already owned First DataBank, the other integrable drug information database that pharmacies, hospitals, doctors, third-party payers, and patients rely on to obtain information about drug prices, drug effects, drug interactions and the eligibility for drugs under various payment plans. In a separate action the Commission alleged that the acquisition, completed in January 1998, created a monopoly in the sale of integratable drug information databases, and that First DataBank used that monopoly to increase prices substantially to all database customers.[23] We negotiated a settlement requiring Hearst both to divest the Medi-Span database and to disgorge $19 million in illegal profits resulting from the acquisition.[24] This settlement marked the first time the Commission had sought either divestiture or disgorgement of profits in a federal court action for a consummated merger. The combination of civil penalty, divestiture, and disgorgement of profits in response to the omission of 4(c) documents and the underlying Section 7 violation should send a strong message. When it comes to compliance with the HSR process, the Commission has upped the ante for playing regulatory roulette.

III. Merger Process

For many years now – at least since the early 1990's – it seems the private bar has been more unhappy with the process of merger review than with the substance. As Bill Baer reported in 1996, "[i]t is interesting that the criticism has not been so much focused on the substantive merits of cases but rather on the HSR merger process itself. As a private practitioner, I shared at least some of those concerns, and part of my early effort at the agency has been to push for reforms where they seem justified."[25] And the ABA Antitrust Section's 2001 Report of the Task Force on the Federal Antitrust Agencies ("2001 Task Force Report") included among its recommendations one titled "The Merger Process Needs Continued Attention," while making no

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21 *United States of America v. The Hearst Trust and The Hearst Corporation*, Civ. Act. No. 1:01CV02119, (D.D.C., Oct. 10, 2001) (Stipulation and Proposed Final Judgement).

22 *Id*.

23 *FTC v. The Hearst Trust, The Hearst Corporation, and First DataBank, Inc.,* Civ Act. No.1:01CV00734, (D.D.C. Apr. 5, 2001) (complaint).

24 *FTC v. Hearst*, supra note 30 (Stipulation for Entry of Final Order and Stipulated Permanent Injunction, Nov. 9, 2001).

25 Baer, *1996 Report*, *supra* note 9, at 6.

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comment on the content or application of merger policy.[26] The good news here is that this focus on process reflects the fundamental consensus on merger policy.

The flip side of that observation, however, is this question: if there have been complaints about the process for so long, why hasn't it been fixed already? The reason, I believe, is that the merger review process reflects is an inherently imperfect balance between the competing goals of minimizing the burden of responding to second requests and allowing the reviewing agency to make the best possible enforcement decisions based on the most accurate information. Some tradeoffs between those goals will never disappear. As the 2001 Task Force Report noted, "There are good reasons why this balance is hard to strike."[27] Even so, there is always room to refine that balance and improve the process.

Efforts Toward Further Improvement

We are committed to reducing the burden of second requests and to making the remedies process as streamlined and efficient as possible, consistent with effective enforcement. We recognize that there have been some instances in which the number of boxes received in response to second requests has been astounding. For example, in fiscal year 1999, one matter resulted in over 20,000 boxes being received, and many others resulted in over 1,000 boxes each.

Some of this, to be sure, is the result of deliberate choices of parties, but clearly, there is room for us to do better. To this end, I now designate a senior person in my office to monitor each second request investigation. This helps keep me better informed, helps ensure consistency of approach in negotiating modifications to requests, and helps to identify and resolve problems at an early stage. Also, I recognize that, while rare, personality conflicts can arise. I can think of one example, in a case I won't name, where the relationship between staff and the lawyers for the parties was not good and was, in fact, impeding the investigation. By being more closely involved at the early stages, we were able to spot this problem early and take some steps that helped get past the difficulty. The lawyer for one of the parties recognized what we had done and wrote to express his appreciation.

In short, the Bureau is committed to working with the parties constructively to ensure that our second requests focus on production of the documents most likely to shed light on the competitive impact of the merger. However, the private bar also must work with Commission staff to avoid "dumps" of documents that are of dubious responsiveness to the second request. Finally, the very large numbers of boxes produced in some cases should not obscure the fact that most investigations result in reasonable document productions.

In March, I announced the latest initiative in our ongoing improvement efforts. We have begun a series of public workshops regarding modifications and improvements to the Commission's merger investigations and remedies process. The Commission will use these

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[26] American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2001, Report of the Task Force on the Federal Antitrust Agencies – 2001* (Jan. 2001) [hereinafter ABA Antitrust Section, *2001 Task Force Report*].

[27] *Id.* at 29.

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"best practices" workshops to solicit input from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, consumer groups, and others who have participated in the FTC's or Antitrust Division's merger review process.[28] These "brown bag" workshops are being held during the next several months in Chicago, Los Angeles, New York, San Francisco, and Washington, D.C. Specific areas in which the Commission is seeking input include: the efficiency of the merger review process; the time and expense involved in the process; the perceived stringency of the remedy requirements; and the information that parties should provide during the review process. To solicit maximum information, we are holding two sets of workshops simultaneously: one focusing on merger investigations, and the other focusing on remedies issues. The merger investigations workshops will cover such topics as:

- the use of voluntary information requests or access letters during the initial HSR waiting period before issuance of any second request;

- the content and scope of the second request;

- the process of negotiating modifications to the second request, timing agreements, the treatment of foreign-language documents, and the appeal procedure for resolving disputes over the second request;

- special issues concerning electronic records and accounting or financial data, such as the use of e-mail, backup tapes or electronic storage systems; the use of accounting or financial data for economic analyses; and communications between the FTC and the merging parties' IT or accounting personnel; and

- other information or data-gathering methods, including information-gathering from third parties, and issues surrounding access to transcripts of investigational hearings or depositions conducted during a merger investigation.[29]

Dialogue with the affected parties is always valuable. However, the Best Practices process is intended to go beyond dialogue. We hope that it will lead to concrete improvements in the merger review process. The input we are receiving is helping us to identify specific areas for improvement. We want to develop consistency in practices within the FTC merger shops. We want to reduce the burden – both in terms of time and costs. And we want to make principled, and factually driven assessments of proposed mergers. We appreciate the significant input we are getting.

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28 *See* Press Release, *FTC Initiates "Best Practices Analysis" for Merger Review Process* (Mar. 15, 2002) <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

29 *Id.*

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Clearance

The time needed to determine which of the two antitrust enforcement agencies will review certain proposed merger transactions – the clearance process – has been a persistent problem for both the agencies and merger parties. Since the clearance process has been in the news recently, I'll take a few minutes to give you a little perspective on the problem, and explain what we and the Antitrust Division had hoped to accomplish by way of the new agreement that we were forced to rescind last month.

The basic problem we faced was that disagreements over clearance sometimes consumed a significant portion of the initial 30 day review period for mergers reported under HSR. In the 28 months from the beginning of FY 2000 through January of this year, 300 matters were delayed by an average of three weeks before clearance was resolved. A prolonged clearance process sometimes left little time to investigate during the initial statutory waiting period. Consequently, there have been instances – not many, but some – in which the Commission or the Antitrust Division found it necessary to issue a second request in order to continue the investigation. Our goal was a more efficient clearance process that would leave more time for the initial investigation of a proposed merger, allowing us to make a better-informed decision on whether a full investigation, with second requests, was needed.

To see why we sought a fundamental reform to solve this problem area, let's look back at some of the many good faith efforts to fix it over the past several years. The Antitrust Section's 1993 Task Force found the problem of clearance delays to be of such consequence that it recommended that we promulgate regulations under the HSR Act requiring clearance in most transactions within a week of the filing date, and in every case by the 10th day of the waiting period. Although the idea of solving the clearance issue by regulation went no further, we, along with the Department of Justice, have tried many other remedies, with some limited success. Notably, former Chairman Steiger and the former head of the Antitrust Division, Ann Bingaman, announced a series of reforms in March 1995, including one designed to ensure clearance within a maximum of nine days.[30]

A year later, Bill Baer described the new procedures in his presentation to the Antitrust Section Spring Meeting, and reported that:

Clearance times are also down dramatically under the new procedures. Previously it took an average of more than 17 days out of the 30 day waiting period to resolve clearance disputes. That clearly was not acceptable. Since April, we have

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30 *See* Press Release, *Federal Trade Commission Announces New Joint Hart-Scott-Rodino Merger Review Procedures With the Department of Justice* (Mar, 23, 1995) <http://www.ftc.gov/opa/predawn/F95/h-s-r-reform.htm>.

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shortened the average time period by almost 40 percent, to about 10 calendar days – which works out to about 7 business days. While we still have a ways to go, the progress is significant.[31]

The following year, in 1997, the issue remained on the Bureau's agenda, as Bill indicated that "[p]rompt clearance of transactions between the agencies remains a priority."[32] Then, in 1998, he commented that,

Delays in the granting of clearance to the Commission or the Antitrust Division to pursue particular matters are, we fully appreciate, a problem not just for the two agencies but for the parties filing under HSR. If the investigative staff are late getting started, there is a risk that second requests will issue that might otherwise be avoided. The 1995 revisions to the clearance process seem largely to have expedited clearance decisions.[33]

He went on to say that the Bureau had investigated some reports of delayed clearances and found that they generally involved matters in which an antitrust issue appeared late in the initial waiting period, rather than from delays in the clearance process itself.[34]

By the spring of 1999, Director Baer, who clearly is a very patient and persistent individual, reported that, "[a] well-functioning clearance process between the FTC and the Department of Justice is important to the timely review of merger filings. Overall, the system works pretty well, but there have been a few cases that have taken too long and gained some notoriety. We are conscious of the need to resolve clearance issues promptly, and we'll keep working on it."[35]

In 2000, the new Bureau Director, Rich Parker, picked up the theme: "The clearance process is another issue frequently raised by practitioners. Both the Antitrust Division and the FTC are dedicated to resolving clearance disputes as expeditiously as possible, and we almost always meet our goal of resolving these disputes within ten days."[36]

In 2001, the ABA Task Force reported on the clearance issue, eight years after having cited it as a significant problem:

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31 Baer, *1996 Report*, *supra* note 9, at 7.

32 William J. Baer, *Report from the Bureau of Competition*, Prepared Remarks Before the ABA Antitrust Section Spring Meeting, at 7 (Washington, D.C. Apr. 9-10, 1997).

33 William J. Baer, *Report from the Bureau of Competition*, Remarks Before the ABA Antitrust Section Spring Meeting, at 11-12 (Washington, D.C. April 2, 1998).

34 *Id.*

35 William J. Baer, *Report from the Bureau of Competition*, Remarks Before the ABA Antitrust Section Spring Meeting at 17 (Washington, D.C. April 15, 1999).

36 Parker, *Report from the Bureau of Competition*, supra note 37, at 4.

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"The agencies report that currently only about 50 transactions annually are not cleared within a week, and only a few of these result in second requests. This is obviously very significant progress, for which the agencies deserve our congratulations. Nevertheless, this is an area that requires constant attention . . . . to pay careful attention to any signs of slippage, and to ensure that the vast majority of transactions that admittedly have no antitrust significance at all are not unnecessarily delayed."[37] The Task Force went on to state its view that "it is much more important that the clearance decision be made quickly than which agency eventually handles the matter, and [the Task Force] suggests serious consideration be given to setting an absolute limit of ten days for all clearance decisions, if necessary made by a coin flip or some similar random method."[38]

In sum, it was taking an inordinate amount of continued, high-level management attention to sustain limited improvement in the clearance process. As the ABA Task Force observed, "constant attention" is necessary to avoid slippage. Even with a high level of attention to minimize the problems, one cannot say that the system worked well. The fundamental problem has remained, despite the worthy, and partially successful, efforts to reduce its scope. In 1998, the Washington Post reported that the clearance process and related issues "have a subtle, though often profound, effect on antitrust matters, experts say. Mergers have been held up, costing the parties millions of dollars in legal fees, as the agencies squabble over who gets to oversee the case."[39] I do not necessarily subscribe to that particular statement in its entirety, but clearly that perception was widely held.

We found that a relatively small percentage of matters were affected by clearance delays in FY 2000, 2001, and part of 2002, but in absolute terms the number was significant. Clearance took more than a week in 300 matters over the 28 month time period. Of greater significance, there were disagreements resulting in significant delays in 136 matters. On average, these matters took 17.8 business days, or about 3_ weeks, to resolve.

Consequently, we and the Antitrust Division began to explore a more fundamental reform of the clearance process, such as a structural change that could be implemented and then would not require significant ongoing attention. The solution that emerged was in the form of a more formal ratification of the previously informal allocation of matters between the agencies.[40] While flexibility has virtues, that very flexibility had been the source of the inter-agency

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37 ABA Antitrust Section, *2001 Task Force Report*, *supra* note 33, at 29.

38 *Id.*

39 David Segal, *Wrestling for Glory in the Antitrust Arena*, The Washington Post, Jun. 12, 1998 at F-1.

40 *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002).

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debates over the handling of individual matters that created the problematic delays in clearance. The new clearance procedure was designed to produce lasting improvement in the system.

It is also important to note that the *substantive* change in the clearance system would have been quite minor. The new procedure essentially would have codified existing rules of thumb. For some time, the agencies have allocated matters on the basis of which had the greater relevant expertise. In theory, that should have worked out well, but in practice it did not. In some instances, each agency had some relevant expertise, so the allocations were not always consistent. And, of course, the inconsistencies provided fodder for future disagreements, because one agency or the other would have at least some plausible claim on the particular matter in question.

The short-lived reform – which divided sectors of the economy between the agencies on the basis of an objective look at their respective experience – was in fact more faithful to the principles of the original clearance procedure: the agency with the greater industry expertise can presumably conduct the current investigation more efficiently because it can build on its previous investigative experience in the industry.

In all of the discussion about the adoption of the new procedures, the basic mechanics of the process were largely overlooked, so I'd like to take just a moment to describe how it was to work. First, the agreement called for the two agencies to harmonize their practices by using common forms, terminology, and procedures, including a single, shared database to track HSR and clearance matters.

Based on the allocation of industries in an appendix to the agreement, the proper agency to handle most matters would have been obvious, and the agreement called for those matters to be cleared within 48 hours. When the decision was not obvious, the agencies were to seek resolution of the matter within 144 hours (6 days) of the clearance request, after which they were to refer the matter to the agency heads. The agreement gave the agency heads 48 hours to either resolve the matter or refer it to a neutral evaluator, so that every clearance matter would be resolved or in the hands of an evaluator within 192 hours (8 days) of the clearance request. We expected that very few matters would proceed to an evaluator, but in any case, the agreement allowed 48 hours for the evaluator to make a decision, so that the maximum time between clearance request and resolution would have been 10 days. In sum, the new procedure provided a set of "default" clearance decisions based on industries, and for the rest, it eliminated a layer of review, set tight deadlines, and provided for a third party decision mechanism to ensure a resolution one way or the other within 10 days.

The process worked very well while it lasted. We resolved clearances in an average of only 1_ days, an enormous improvement over our past experience.

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It remains to be seen whether some alternative approach will enable us to obtain at least some of this needed improvement. We will continue to seek a lasting solution to the long-standing clearance problem through discussions with the Antitrust Division as well as with interested members of Congress.

Remedies

I would like to turn, now, to another area of significant practical interest to many of you: remedies for mergers that would otherwise be anticompetitive. Over the last five years, the FTC has become more flexible in the types of divestitures it will accept, but with the corresponding trend that we must impose more stringent requirements on implementation of the divestitures. After briefly discussing this trend, I will share my thoughts on how that should be factored into your strategy for getting your transaction efficiently through the HSR process.

Until the mid-1990s, the normal way to resolve what might otherwise be an anticompetitive merger was for the parties and the commission to agree to a divestiture of assets, with the divestiture to occur after the transaction closed. In the 1980s, for example, remedies for merger transactions generally involved the sale of on-going businesses, divisions or subsidiaries. Thus, it was pretty clear that the assets to be divested were viable and that buyers would be available.

But then in the 1990s, the Commission began to accept more and more consent decrees that required the buyer of the divested assets to be identified up-front before consummation of the parties' transaction. This was partly in response to the fact that merger parties had started pushing much more limited divestitures – asking the Commission to accept only parts of ongoing businesses as a remedy. This made the Commission's job much more difficult because it then put our staff in a position of having to evaluate what parts of particular businesses would be sufficient to make a viable competitor.

The trend towards limited divestitures had at least two effects. First, it took longer for us to evaluate proposed remedies as the remedies became more complicated. Second, it put the staff in the position of having to second guess the judgment of the buyer of the divested assets in terms of the sufficiency of those assets. We have received a lot of criticism on this point, but as I see it, this role is unavoidable as long as we entertain limited divestiture proposals. Let me explain.

There are three players involved in a divestiture for all practical purposes:

- the acquiring firm in the main transaction, who is usually responsible for managing any divestiture as well;
- the buyer of the divested assets; and
- the FTC.

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And let's look at the incentives of each. Because we're talking about the divestiture of a business that will compete with the acquiring firm, the acquiring firm has an incentive to divest a set of assets that are as non-competitive in the marketplace as possible and to divest them to a buyer that is not positioned to make those assets competitive.

The incentive of the buyer of the divested assets is to buy the assets at a price that will allow the buyer to make a good return on its investment. The buyer is not necessarily focused on using the divested assets to restore competition to the pre-existing level. It would just as soon buy inferior assets at a very low price as long as it can make a good return on its investment. And the seller may be very happy to sell them at a low price in order to reduce competition in the market.

Finally, there is the FTC. We are the only ones that have an incentive to make sure the assets to be divested are sufficient, when sold to the right buyer, to re-create the pre-existing level of competition.

This presents us with a problem. The acquiring firm, who is already in the business, and who knows the business, the assets and the personnel, has an incentive to reduce competition. So we cannot trust the acquiring firm to pick the right assets and the right buyer.

The buyer will be putting up real money and has an incentive to make sure the business it is acquiring will be viable, even if it does not fully replace the pre-existing level of competition. So the buyer's views on the assets it needs get us part of the way there, but not all of the way.

Then, as I mentioned, there is the FTC. We would seem to have the right incentives in seeking a remedy that restores competition, but our claim to expertise in picking the assets is less than ideal, to put it mildly. In an ideal world, the folks with the expertise would also have the right incentives. Unfortunately, we don't have that. As a result, we have to strike a difficult balance when injecting ourselves into the remedy process.

So what does all this mean? It means that the length of time it takes to negotiate a consent decree depends on what the parties are willing to divest. If it's an ongoing stand-alone business, things can go through pretty quickly, probably in a few weeks.

On the other hand, if the parties want to divest something very minimal, then it could take us a long time to evaluate the sufficiency of what's being proposed and negotiate over additions to the package. Where a limited package of assets is being divested, it is sometimes difficult for us to be comfortable that we have identified the right assets. In those cases, we find it helpful to talk to the potential buyer. That is why we often favor identifying the buyer up front in these cases. In addition, it assures us that there is in fact a buyer for the assets.

So how should all of this impact your strategy for navigating your transaction through the HSR process?

First, you should carefully consider the type of remedies that may be available, what remedy makes the most sense from the strategic business perspective, and then factor in the time

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required to execute that remedy with the Commission. Most companies want to complete their transaction within a certain period of time and do not want the uncertainty of litigation at play. Consequently, most companies will ultimately pursue a negotiated remedy if there is an antitrust problem. By giving advanced consideration to the remedies issue, you can better determine how to spend your time and money.

You should first determine whether you are willing to divest an on-going stand-alone business. If you can get to that position, you can spend more time trying to convince the Commission that no remedy is needed, because once you decide to engage in settlement discussions, things will move fairly quickly.

If you determine that you want to propose a more limited divestiture, then you needed to evaluate whether a buyer up front will by requested by the Commission. If there is substantial doubt over whether there will be an appropriate buyer and whether the proposed assets are sufficient, then a buyer up front will likely be required. In that case, you will probably have less time to argue the merits of the substantive antitrust issues to the Commission because it will take some time to identify a buyer, negotiate a contract and vet it with the Commission – unless, of course, you already have a buyer identified. In short, paying attention to remedies issues at the outset – and planning your approach to the Commission accordingly – can save parties a lot of grief later on.

The Diageo/Seagrams transaction with Pernod was a good example of the benefit of an effective remedies strategy. Recognizing how time-consuming it would be to argue with the Commission over multiple products, some or all of which may have required up front buyers, the parties decided instead to fix most of the potential problems at the outset, and to limit their arguments to one product could be remedied easily if that became necessary. The Malibu rum business, which Diageo was ultimately required to divest, was such an attractive business that there was little doubt a buyer could be found.

I would contrast the well-orchestrated and relatively smooth remedies strategy used in *Diageo,* with the riskier and, it appears, ultimately unsuccessful strategy pursued by Libbey, Inc., in its proposed acquisition of Anchor Hocking. Libbey is the largest maker and seller of soda-lime glassware to the U.S. food service industry, with more than 65 percent of all U.S. food service glassware sales. Anchor is the third-largest seller of food service glassware and, as the Judge found, is "Libbey's most formidable competitor."[41]

After we filed our complaint challenging the transaction, the parties reached an amended agreement, which nominally excluded Anchor's food service glassware business from the transaction. The Commission argued that the modification made no material difference, because the loss of other key ingredients of the successful business – manufacturing plants, molds, key employees, brand name, and customer relationships – would impede Anchor's ability to maintain a competitive presence in that market. Significantly, the transaction was not amended as part of

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41 *Federal Trade Commission v. Libbey, Inc.*, Civ. Act. No. 02-0060 (RBW) (mem. op.) (D.D.C. Apr. 22, 2002).

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a negotiated consent decree, but, rather, as a unilateral attempt to undermine the basis for the Commission's decision to seek a preliminary injunction.

We were gratified by U.S. District Judge Reggie B. Walton's decision to grant the preliminary injunction despite the amendments to the transaction. The Court's analysis agreed with our own: "Having concluded that the FTC has demonstrated that the effect of the amended agreement could result in the elimination of what is now Anchor as a competitor in the food service glassware market, the Court believes that the impact on the market that might occur as a result of the amended agreement may be substantially identical to the impact the original agreement would have had on the market."[42]

The significance of the *Libbey* decision lies in the fact that the court looked beyond the parties' argument that the amended agreement eliminated the competitive overlap, and focused instead on how the restructured transaction would affect competition. The court recognized that many elements are necessary to sustain a successful business. In other words, the court implicitly endorsed the sort of scrutiny that we apply to proposed merger remedies to determine whether they will accomplish the intended result.[43] It is not enough simply to get rid of the competitive overlap if the transaction will undermine an incumbent's significance as a viable competitor. To his credit, Judge Walton recognized this, and he agreed with our analysis that the deal, even as restructured, should be enjoined.

Two questions I am frequently asked are whether it is essential to the Commission that there be an up-front buyer and whether the proposed remedy must be "zero-delta," that is, whether the remedy must reduce market concentration to the previous level so that the merger-plus-divestiture results in no change in the Herfindahl-Hirschman Index ("HHI").

On the first question, there is no presumption at the FTC that an up-front buyer must be found. To the contrary, we have accepted a number of consents without up-front buyers. Two recent examples are the consent allowing Diageo and Pernod to acquire Seagram, which gave Diageo six months to divest the Malibu rum business, and the consent allowing Bayer AG to purchase Aventis CropScience Holdings S.A. from Aventis S.A., which identified an up-front buyer for some assets but not for others.

Ultimately, what matters is our level of confidence that a buyer will be found who can restore competition to its previous level and that the assets will not be dissipated in the mean time. If you have an up-front buyer whom we can interview, whose business plan we can test, and whose competitive strength we can assess, it simplifies things tremendously. Without an up-front buyer, our confidence in the end result will depend, in part, on the package of assets to be divested and on the time-frame for divestiture. Our analysis may vary by industry: in the supermarket business, there might be too high a risk of failure without up-front buyer, while a refinery could operate for a year or more without dissipating the assets.

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42 *Id.* at 8.

43 *Id.* at 6-8.

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On the second question, the FTC does not have a zero-delta policy. Zero delta is preferable, but it is not an absolute requirement. Ultimately the goal is to restore competition, not market concentration by itself. We recognize that a buyer who is in the business already – perhaps a big firm that is a small player in this market – may produce a better fix than a *de novo* potential buyer whose purchase would lead to a zero delta. Therefore, in connection with Valero Energy Corporation's acquisition of Ultramar Diamond Shamrock ("UDS"), we approved the divestiture of the former UDS Glen Eagle refinery, seventy gasoline stations, and related assets to Tesoro Petroleum Corp., even though Tesoro was an incumbent California gasoline marketer, which meant that the divestiture to Tesoro would necessarily increase market concentration beyond what existed prior to Valero's acquisition of UDS. When voting to approve the divestiture, Commissioner Thompson issued a concurring statement to express his general disapproval of divestitures that fail to achieve a zero delta, but also his assessment, in this case, that Tesoro was relatively insignificant in the California markets and, consequently, the divestiture was not likely to decrease competition and could possibly benefit California consumers.

The "best practices" workshops I mentioned earlier will provide a vehicle for public input to the agency on remedies issues. As I indicated, these workshops will have two tracks, one focusing on merger investigations and the other on remedies. The specific remedies topics on which are seeking the public's views include:

- identification of the package of assets to be divested and the terms of a proposed divestiture (e.g., seller financing, supply agreements, technical assistance agreements, and other ongoing relationships between the parties);
- criteria for evaluating proposed buyers;
- when "up front" divestiture is necessary and whether the Commission should encourage "fix it first" arrangements;
- use of crown jewels provisions;
- reconciliation of third-party rights under existing contracts; and
- risks to competition prior to divestiture and assessment of the success of divestitures in preserving/restoring competition in the relevant market(s).

The first remedies workshop will be held on June 18, 2002. I look forward to gaining additional insights into remedies issues from these workshops.

Let me add one other thought on the crafting of remedies in merger cases. As suggested by the topics outlined for the workshops, designing a suitable divestiture remedy is a lot more difficult that it may first appear. I appreciate that you and your clients may become frustrated with the seemingly very stringent conditions upon which we insist. Still, while we like to see settlements that allow pro-competitive aspect of transactions to go forward, our fundamental obligation

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is to ensure that settlements protect the interests of consumers by fully replicating the competition that existed in the market before the merger. It is not enough just to require the sale of relevant assets; we need to ensure that the competitive significance of those assets remains intact.

International Merger Coordination

Let me turn to an increasingly important topic: merger analysis in a global economy. More and more, U.S. firms and the U.S. antitrust agencies are interacting with our antitrust agency counterparts in other countries. These interactions raise a multitude of procedural and substantive issues. As transactions having effects in multiple jurisdictions increase, and as antitrust regimes continue to proliferate worldwide, cooperation and convergence are increasingly essential. Accordingly, the Commission is giving increasing attention to international issues by:

- Continuing and intensifying our cooperation and coordination with foreign antitrust enforcement authorities to promote the effective handling of particular matters involving multiple jurisdictions;

- Forging ahead with bilateral discussions with foreign counterparts to establish a consensus on "best practices" in process and substantive analysis; and

- Participating actively in multilateral efforts to encourage streamlined merger review based on sound analytical principles.

The United States has entered into antitrust-specific bilateral cooperation agreements with eight of our major trading partners, and we cooperate with many others pursuant to the OECD's Recommendation on antitrust cooperation among its members. Other jurisdictions have entered similar bilateral and multilateral cooperation arrangements among them. These agreements provide an important framework for working together to achieve efficient and effective merger reviews. They have also proven to be an important vehicle to foster analytical convergence.

Notwithstanding the outcome of the *General Electric/Honeywell* transaction last year, to which I will turn shortly, cooperation among antitrust enforcers has remained strong. Two recent cases involving the FTC are illustrative:

First, the *Solvay/Ausimont*[44] transaction raised concerns in the world market for polyvinylidene fluoride (PVDF), a fluoropolymer used in a wide

44 *Solvay/Montedison-Ausimont*, Case No. COMP/M.2690, European Commission press release IP/02/532 of 9 Apr. 2002, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?

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variety of applications. The EC shared the FTC's concern that the merger could make coordinated interaction among the remaining producers of PVDF more likely. The parties submitted a divestiture proposal that was acceptable to both the EC and FTC, and we are now in the process of implementing that relief. The case raised a separate issue, exclusive to Europe, in the market for persalts, used in the production of detergents, that was addressed by a separate divestiture commitment between the parties and the EC.

Second, *Bayer/Aventis CropScience*[45] raised concerns on both sides of the Atlantic as to certain insecticides and herbicides. Although the geographic market for such products was limited to national boundaries, the limited number of market participants led to similar competitive effects across national boundary lines. Accordingly, a common remedy made sense from the point of view of both the parties and the enforcers, and, through a high degree of cooperation, a common remedy was achieved.

These cases continue a trend that includes, for example *Boeing/Hughes,*[46] in which parallel FTC and EC settlements were announced the same day; *CVC/Lenzing*,[47] where the EC press release acknowledged its close cooperation with the FTC; and *Hewlett-Packard/Compaq*. Notably, confidentiality waivers by the parties facilitated the information sharing that allowed the agencies to conduct parallel analyses and arrive at compatible solutions to the competitive issues. These cases demonstrate our continued commitment to work with our enforcement partners and the parties to achieve consistent enforcement outcomes.

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p_action.getfile=gf&doc=IP/02/532|0|RAPID&lg=EN&type=PDF (public version of decision not yet available); *Solvay S.A.*, File No. 021-0067, Docket No. C-4046, FTC press release of May 2, 2002, with link to settlement documents available at: http://www.ftc.gov/opa/2002/05/solvayausimont.htm.

45 *Bayer/Aventis CropScience*, Case No. COMP/M.2697, European Commission press release IP/02/570 of 17 April 2002, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/02/570|0|RAPID&lg=EN&type=PDF (public version of decision not yet available). *Bayer AG, and Aventis S.A.*, File No. 011 0199, Docket No. C-4049, FTC press release of May 30, 2002, with link to settlement documents available at: http://www.ftc.gov/opa/2002/05/bayeraventis.htm.

46 *In the Matter of the Boeing Company,* FTC Press Release (Sept. 27, 2000), FTC Complaint, Consent Agreement, Decision and Order, and Analysis to Aid Public Comment, *available at* <http://www.ftc.gov/opa/2000/09/boeing.htm>; *Boeing/Hughes*, Case No IV/M.1879, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1879_en.pdf>.

47 *See* European Commission Press Release IP/01/1436, *Commission prohibits CVC's acquisition of Austrian fibre company Lenzig* (17 Oct. 2001), *available* at <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1436|0|RAPID&lg=EN>; *CVC/Lenzing,* Case No. COMP/M.2187, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2187_en.pdf>.

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It is also important to remember that cases in which agencies reach different results do not necessarily signal a failure of cooperation or convergence. More often, they reflect that the geographic markets were national or regional rather than worldwide. For example, in *Air Liquide/Air Products/BOC*, the EC cleared the part of the merger over which it had jurisdiction (subject to substantial conditions), but the parties abandoned the transaction in the face of likely opposition from the FTC. But the different outcomes were based on differing market conditions in the U.S. and Europe, prompting the EC to specifically note in its press release that its "decision . . . [did] not prejudice the outcome of the assessment in the United States."[48]

Where there are true differences in enforcement approaches that can result in incompatible outcomes across jurisdictions, it is our duty to try to address them in order to try to eliminate the difference or minimize its impact. As the *General Electric/Honeywell* matter dramatically illustrated, we have not achieved full convergence even with the EC, with which we have probably the closest working relationship. This situation is, at once, predictable, troubling, and manageable. It is predictable because despite best efforts at convergence, there will inevitably be differences in how jurisdictions with different laws, systems, and cultures approach antitrust enforcement, and these differences will inevitably manifest themselves in different outcomes in some cases. It is troubling because we seek to minimize instances in which competition enforcers who purport to subscribe to the same basic analytical principles reach divergent results on the same set of issues. But it is manageable because these instances are rare and we are taking measures to reduce them further.

In 1999, the U.S. antitrust agencies and the EC established a working group to pursue greater convergence in our procedures and in our substantive analysis of mergers. Last September, the FTC, the Antitrust Division, and the EC Competition Directorate committed to intensifying the work of this group, and established task forces to examine and address differences in our merger review procedures and in our analyses of tying and bundling issues in conglomerate mergers. We hope that these efforts will increase mutual understanding of each other's policies and ultimately yield greater support for consistent merger policies based on principles of economic efficiency and consumer welfare.

The worldwide proliferation of antitrust laws in general, and merger control laws in particular, have led multilateral institutions to pay increased attention to competition policy. Among the organizations that have been addressing these issues are the OECD, the WTO, UNCTAD, and various free trade agreement negotiations. The United States participates actively in these fora

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48 *See* European Commission Press Release IP/00/46, *Commission approves the acquisition of parts of BOC (UK) by Air Liquide (France) subject to conditions* (18 Jan. 2000); *Air Liquide/BOC,* Case No COPM/M.1630, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1630_en.pdf>.

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to promote sound principles of antitrust enforcement. Most recently, agencies from fourteen jurisdictions, including the United States, launched a new forum, the International Competition Network, or ICN, to promote convergence and best practices in antitrust policy and enforcement.

Unique among existing fora, the ICN consists exclusively of antitrust agencies, and encompasses developed and developing countries - as we like to say, the ICN is "all antitrust all the time." The ICN also draws heavily on input from the private sector - representatives of the business, legal, consumer, and academic communities are involved in all phases of the work, although decisions are taken exclusively by agency members. The ICN will seek to promote best practices through concrete, non-binding recommendations to members for voluntary implementation at national level. The ICN now includes agencies from sixty-one jurisdictions from six continents.

The ICN's two main projects address multijurisdictional mergers and competition advocacy. The Mergers Working Group, chaired by the U.S. Department of Justice, comprises three subgroups. The subgroup on merger notification and procedures, chaired by the FTC, will promulgate guiding principles and best practices for merger notification and review. The subgroup on analytical framework, chaired by the UK Office of Fair Trading, is examining the substantive tests for merger review. The subgroup on investigational techniques, chaired by the Israel Antitrust Authority, will hold a conference to share experiences on methods of and tools for conducting merger investigations.

The ICN also consults with the other major multilateral organizations involved in international competition policy to ensure that work is not duplicated and that each organization focuses on the areas in which it can provide unique added value. We are hopeful that the ICN's work will promote convergence toward sound and efficient merger review among a wide array of jurisdictions in the foreseeable future.

IV. Conclusion

I'll close this program by thanking all of you who came today. I appreciate your keen interest in the Bureau's merger enforcement program. I hope I've been able to give you a little insight into the issues we are dealing with and the efforts we are making on behalf of consumers.

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Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws

Preface

The Bureau of Competition of the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) share responsibility for enforcing laws that promote competition in the marketplace. Competition benefits consumers by keeping prices low and the quality of goods and services high.

The FTC is a consumer protection agency with two mandates under the FTC Act: to guard the marketplace from unfair methods of competition, and to prevent unfair or deceptive acts or practices that harm consumers. These tasks often involve the analysis of complex business practices and economic issues. When the Commission succeeds in doing both its jobs, it protects consumer sovereignty -- the freedom to choose goods and services in an open marketplace at a price and quality that fit the consumer's needs -- and fosters opportunity for businesses by ensuring a level playing field among competitors. In pursuing its work, the FTC can file cases in both federal court and a special administrative forum.

The FTC has prepared this booklet to help you understand the antitrust laws -- how they can benefit consumers, and how they can affect you if you operate a business. The booklet explains how antitrust laws can be violated, answers frequently asked questions about potential violations, describes how you can help keep markets competitive, and tells where to find more information about the antitrust laws.

The FTC also has available other publications that explain its numerous consumer protection activities.

"Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

--The Supreme Court, United States v. Topco Associates, Inc. 1972

An Antitrust Primer

The antitrust laws describe unlawful practices in general terms, leaving it to the courts to decide what specific practices are illegal based on the facts and circumstances of each case.

* Section 1 of the Sherman Act outlaws "every contract, combination . . . , or conspiracy, in restraint of trade," but long ago, the Supreme Court decided that the Sherman Act prohibits only those contracts or agreements that restrain trade unreasonably. What kinds of agreements are unreasonable is up to the courts.

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* Section 2 of the Sherman Act makes it unlawful for a company to "monopolize, or attempt to monopolize," trade or commerce. As that law has been interpreted, it is not necessarily illegal for a company to have a monopoly or to try to achieve a monopoly position. The law is violated only if the company tries to maintain or acquire a monopoly position through unreasonable methods. For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification.

* Section 5 of the Federal Trade Commission Act outlaws "unfair methods of competition" but does not define unfair. The Supreme Court has ruled that violations of the Sherman Act also are violations of Section 5, but Section 5 covers some practices that are beyond the scope of the Sherman Act. It is the FTC's job to enforce Section 5.

* Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Determining whether a merger will have that effect requires a thorough economic evaluation or market study.

* Section 7A of the Clayton Act, called the Hart-Scott-Rodino Act, requires the prior notification of large mergers to both the FTC and the Justice Department.

Some cases are easier than others. The courts decided many years ago that certain practices, such as price fixing, are so inherently harmful to consumers that a detailed examination isn't necessary to determine whether they are reasonable. The law presumes that they are violations (antitrust lawyers call these per se violations) and condemns them almost automatically.

Other practices demand closer scrutiny based on principles that the courts and antitrust agencies have developed. These cases are examined under a "rule of reason" analysis. A practice is illegal if it restricts competition in some significant way and has no overriding business justification. Practices that meet both characteristics are likely to harm consumers -- by increasing prices, reducing availability of goods or services, lowering quality or service, or significantly stifling innovation.

The antitrust laws are further complicated by the fact that many business practices can have a reasonable business justification even if they limit competition in some way. Consider an agreement among manufacturers to adopt specifications that require fire-resistant materials for certain products. The set of specifications may be called a standard. The agreement to adopt the standard is restrictive: the manufacturers have limited their own ability to use other materials, and they have limited consumer choice. But the agreement to adopt the standard may benefit consumers in that it provides assurances of safety.

What if manufacturers did not use a uniform standard for electrical outlets and plugs? The likely result would be incompatibilities between parts produced by different manufacturers. But because of the standard, parts manufactured by different companies become interchangeable; competition for the parts increases, and prices go down.

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Illegal Business Practices

Horizontal agreements among competitors:
Agreements among parties in a competing relationship can raise antitrust suspicions. Competitors may be agreeing to restrict competition among themselves. Antitrust authorities must investigate the effect and purpose of an agreement to determine its legality.

Agreements on price. Agreements about price or price-related matters such as credit terms potentially are the most serious. That's because price often is the principal way that firms compete. A "naked" agreement on price -- where the agreement is not reasonably related to the firms' business operations -- is illegal. Hard core -- clear or blatant -- price-fixing is subject to criminal prosecution.

Are similarity of prices, simultaneous price changes or high prices indications of price-fixing? Not always. These conditions can result from price-fixing, but to prove the charge, antitrust authorities would need evidence of an agreement to fix prices. Price similarities -- or the appearance of simultaneous changes in price -- also can result from normal economic conditions. For example, vigorous competition can drive prices down to a common level. A general increase in wholesale gasoline costs due to production shortages can cause gasoline stations to increase retail prices around the same time. As for the appearance of uniformly "high" prices, collusion may not be the only basis for the situation. Prices may increase if consumer demand for a product is particularly high and the supply is limited. Ask any shopper in search of a particularly popular children's toy.

Agreements to restrict output. An agreement to restrict production or output is illegal because reducing the supply of a product or service inevitably drives up its price.

Boycotts. A group boycott -- an agreement among competitors not to deal with another person or business -- violates the law if it is used to force another party to pay higher prices.

Boycotts to prevent a firm from entering a market or to disadvantage a competitor also are illegal. Recent cases involved a group of physicians charged with using a boycott to prevent a managed care organization from establishing a competing health care facility in Virginia and retailers who used a boycott to force manufacturers to limit sales through a competing catalog vendor.

Are boycotts for other purposes illegal? It depends on their effect on competition and possible justifications. A group of California auto dealers used a boycott to prevent a newspaper from telling consumers how to use wholesale price information when shopping for cars. The FTC proved that the boycott affected price competition and had no reasonable justification.

Market division. Agreements among competitors to divide sales territories or allocate customers -- essentially, agreements not to compete -- are presumed to be illegal. At issue in one recent case was an agreement between cable television companies not to enter each other's territory.

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Agreements to restrict advertising. Restrictions on price advertising can be illegal if they deprive consumers of important information. Restrictions on non-price advertising also may be illegal if the evidence shows the restrictions have anticompetitive effects and lack reasonable business justification. The FTC recently charged a group of auto dealers with restricting comparative and discount advertising to the detriment of consumers.

Codes of ethics. A professional code of ethics may be unlawful if it unreasonably restricts the ways professionals may compete. Several years ago, for example, the FTC ruled that certain provisions of the American Medical Association's code of ethics restricted doctors from participating in alternative forms of health care delivery, such as managed health care programs, in violation of the antitrust laws. The case opened the door for greater competition in health care.

Restraints of other business practices. Other kinds of agreements also can restrict competition. For example:

* A large group of Detroit-area auto dealers agreed to restrict their showroom hours, including closing on Saturdays. The agreement reduced a service that dealers normally provide -- convenient hours -- and made it difficult for consumers to comparison shop. The FTC challenged the agreement successfully.

* A group of dentists refused to make patients' X-rays available to insurance companies. The FTC maintained that the agreement restricted a service to patients, as well as information that would be relevant to reimbursements. The Supreme Court upheld the FTC's ruling.

Proving a violation in these kinds of cases depends largely on proving the existence of an agreement. An explicit agreement can be demonstrated through direct evidence -- a document that contains or refers to an agreement, minutes of a meeting that record an agreement among the attendees, or testimony by a person with knowledge of an agreement. But an agreement also can be demonstrated by inference -- a combination of circumstantial evidence, including the fact that competitors had a meeting before they implemented certain practices, records of telephone calls, and signaling behavior -- when one company tells another that it intends to raise prices by a certain amount. This evidence must show that a company's conduct was more likely the result of an agreement than a unilateral action.

Vertical agreements between buyers and sellers

Certain kinds of agreements between parties in a buyer-seller relationship, such as a retailer who buys from a manufacturer, also are illegal. Price-related agreements are presumed to be violations, but antitrust authorities view most non-price agreements with less suspicion because many have valid business justifications.

Resale price maintenance agreements. Vertical price-fixing -- an agreement between a supplier and a dealer that fixes the minimum resale price of a product -- is a clear-cut antitrust violation. It also is illegal for a manufacturer and retailer to agree on a minimum resale price.

The antitrust laws, however, give a manufacturer latitude to adopt a policy regarding a desired level of resale prices and to deal only with retailers who independently decide to follow that

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policy. A manufacturer also is permitted to stop dealing with a retailer who breaches the manufacturer's resale price maintenance policy. That is, the manufacturer can adopt the policy on a "take it or leave it" basis.

Agreements on maximum resale prices are evaluated under the "rule of reason" standard because in some situations these agreements can benefit consumers by preventing dealers from charging a non-competitive price.

Non-price agreements between a manufacturer and a dealer. Manufacturer-imposed limitations on how or where a dealer may sell a product, e.g., service obligations or territorial limitations, are generally not illegal. These agreements may result in greater sales efforts and better service in the dealer's assigned area, and more competition with other brands. Some non-price restraints may be anticompetitive. For example, an exclusive dealing arrangement may prevent other manufacturers from obtaining enough access to sales outlets to be truly competitive. Or it might be a way for manufacturers to stop competing so hard against each other. Take the case against the two principal manufacturers of pumps for fire trucks. It involvedagreements that required their customers, the fire truck manufacturers, to buy pumps only from the manufacturer that was already supplying them. That meant that neither pump manufacturer had to fear competition from the other.

Tie-in sales. The sale of one product on condition that a customer purchase a second product, which the customer may not want or can buy elsewhere at a lower price, is a tie-in. Requirements like these are illegal if they harm competition. A recent example: The FTC charged a pharmaceutical manufacturer with tying the sale of clozapine, an antipsychotic drug, to a blood testing and monitoring service.

Maintaining or Creating a Monopoly

While it is not illegal to have a monopoly position in a market, the antitrust laws make it unlawful to maintain or attempt to create a monopoly through tactics that either unreasonably exclude firms from the market or significantly impair their ability to compete. A single firm may commit a violation through its unilateral actions, or a violation may result if a group of firms work together to monopolize a market.

A common complaint is that some companies try to monopolize a market through "predatory" or below-cost pricing. This can drive out smaller firms that cannot compete at those prices. But the lower prices a large retailer offers may simply reflect efficiencies from spreading overhead costs over a larger volume of sales. Because the antitrust laws encourage competition that leads to low prices, courts and antitrust authorities challenge predatory activities only when they will lead to higher prices.

While the FTC has not found predatory pricing violations in recent years, it examines potential violations very carefully and maintains a close watch for other kinds of tactics -- like raising competitors' costs -- that may disadvantage rivals.

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Special situations

The solicitation of price fixing -- also called an "invitation to collude" -- indicates an inclination to engage in illegal behavior, but usually is not unlawful under the Sherman Act. Section 5 of the FTC Act provides more flexibility to challenge this kind of undesirable behavior.

Mergers

The United States is in the midst of a "merger wave." The number of mergers reported under the Hart-Scott-Rodino Act rose from 1,529 in 1991 to a record 3,702 in 1997 -- a 142 percent jump. During this period, the FTC successfully challenged a host of potential mergers, saving consumers millions of dollars that they otherwise would have paid in higher prices. Identifying and challenging anticompetitive mergers is a difficult task that can take thousands of hours of investigative work and often, litigation.

Most mergers actually benefit competition and consumers by allowing firms to operate more efficiently. But some are likely to lessen competition. That, in turn, can lead to higher prices, reduced availability of goods or services, lower quality of products, and less innovation. Indeed, some mergers create a concentrated market, while others enable a single firm to raise prices.

In a concentrated market, there are only a few firms. The danger is that they may find it easier to lessen competition by colluding. For example, they may agree on the prices they will charge consumers. The collusion could be in an explicit agreement, or in a more subtle form -- known as tacit coordination or coordinated interaction. Firms may prefer to cooperate tacitly rather than explicitly because tacit agreements are more difficult to detect, and some explicit agreements may be subject to criminal prosecution.

When a merger enables a single firm to increase prices without coordinating with its competitors, it has created a unilateral effect. A firm might be able to increase prices unilaterally if it has a large enough share of the market, if the merger removes its closest competitor, and if the other firms in the market can't provide substantial competition.

Generally, at least two conditions are necessary for a merger to have a likely anticompetitive effect: The market must be substantially concentrated after the merger; and it must be difficult for new firms to enter the market in the near term and provide effective competition. The reason for the second condition is that firms are less likely to raise prices to anticompetitive levels if it is fairly easy for new competitors to enter the market and drive prices down.

Under these conditions, one of three basic kinds of mergers might facilitate coordinated or unilateral anticompetitive behavior: horizontal mergers, which involve two competitors; vertical mergers, which involve firms in a buyer-seller relationship; and potential competition -- or conglomerate mergers -- in which one of the firms is likely to enter the market and become a potential competitor of the other.

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Horizontal mergers
In a horizontal merger, the acquisition of a competitor could increase market concentration and increase the likelihood of collusion. The elimination of head-to-head competition between two leading firms may result in unilateral anticompetitive effects.

Witness the recent attempt by Staples, Inc., one "superstore" retailer of office supplies, to acquire Office Depot, another giant retailer of office supplies. In many areas of the country, the merger would have reduced the number of superstore competitors, often leaving Staples as the only superstore in the area. Evidence from the companies' pricing data showed that Staples would have been able to keep prices up to 13 percent higher after the merger than without the merger. The FTC blocked the merger, saving consumers an estimated $1.1 billion over five years.

Vertical mergers
Vertical mergers involve firms in a buyer-seller relationship -- a manufacturer merging with a supplier of component products, or a manufacturer merging with a distributor of its products. A vertical merger can harm competition by making it difficult for competitors to gain access to an important component product or to an important channel of distribution. This is called a "vertical foreclosure" or "bottleneck" problem.

Take the merger of Time Warner, Inc., producers of HBO and other video programming, and Turner Corp., producers of CNN, TBS, and other programming. The FTC was concerned that Time Warner could refuse to sell popular video programming to competitors of cable TV companies owned or affiliated with Time Warner or Turner -- or offer to sell the programming at discriminatory rates. That would allow Time Warner-Tuner affiliate cable companies to maintain monopolies against competitors like Direct Broadcast Satellite and new wireless cable technologies. What's more, the Time Warner-Turner affiliates could hurt competition in the production of video programming by refusing to carry programming produced by competitors of both Time Warner and Turner. The FTC allowed the merger, but prohibited discriminatory access terms at both levels to prevent anticompetitive effects.

Potential competition mergers
A potential competition merger is the acquisition of a company that is planning to enter a market and compete with the acquiring company (or vice versa). It results in the elimination of a potential competitor. That can be harmful in two ways. For one thing, it can prevent the increased competition that would result from the firm's entry. For another, a firm can have a procompetitive effect on a market simply by being recognized as a possible entrant. The reason? The firms already in the market will avoid raising prices to levels that would make the outside firm's entry more likely. The elimination of the potential entrant through a merger would remove the threat of entry and make anticompetitive pricing a real possibility.

Several years ago, the Questar Corp., which operated the only pipeline transporting natural gas to Salt Lake city, tried to acquire a major part of a firm that was planning to begin service to the city. The potential entrant was already having a procompetitive effect on pricing. The FTC blocked the merger, preserving the price benefits for Salt Lake City consumers.

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Price Discrimination

A seller charging competing buyers different prices for the same "commodity" or discriminating in the provision of "allowances" -- compensation for advertising and other services -- may be violating the Robinson-Patman Act. This kind of price discrimination may hurt competition by giving favored customers an edge in the market that has nothing to do with the superior efficiency of those customers. However, price discriminations generally are lawful, particularly if they reflect the different costs of dealing with different buyers or result from a seller's attempts to meet a competitor's prices or services.

Price discrimination also might be used as a predatory pricing tactic -- setting prices below cost to certain customers -- to harm competition at the supplier's level. Antitrust authorities use the same standards applied to predatory pricing claims under the Sherman Act and the FTC Act to evaluate allegations of price discrimination used for this purpose.

Frequently Asked Questions

Q: The gasoline stations in my area have increased their prices the same amount and at the same time. Is that price-fixing?

A: A uniform simultaneous price increase could be the result of price fixing, but it also could be the result of independent business responses to market conditions. For example, if conditions in the international oil markets result in an increase in the price of crude oil, there could be a ripple effect. Local gasoline stations may respond to the wholesale price of gasoline by increasing their prices to cover their higher costs. However, if there is evidence that the operators of the gasoline stations talked to each other about increasing prices, it may be an antitrust violation.

Q: Shopping for a stereo loudspeaker made by Sound Corporation, I couldn't find a dealer who would sell it for less than the manufacturer's suggested retail price. Isn't that price-fixing?

A: The key is evidence of an agreement. If the manufacturer and a dealer entered into an agreement on a resale price or minimum price, that would be a price-fixing violation. The agreement could be formal, through a contract, or informal, when the dealer's compliance is coerced. However, if the manufacturer has established a policy that its dealers should not sell below a minimum price level, and the dealers have independently decided to follow that policy, there is no violation.

Q: The medication my doctor prescribed for my heart condition is available from only one manufacturer, and the price is very high. Is that a monopoly?

A: If the manufacturer achieved a monopoly by acquiring a competitor or obtaining a patent by fraud, its monopoly may be illegal. If the only reason for the lack of competition is that no one else has developed a suitable alternative medication, the monopoly probably is legal. Many pharmaceutical products are protected by patents, which give the manufacturer the right to be the only producer of the product until the patent expires. That gives the manufacturer a legally

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acquired monopoly during the life of the patent. The antitrust laws accommodate the goal of the patent laws to encourage innovation: They prevent other firms from reaping the benefits of the invention before the inventor is rewarded for the risk and cost of the innovation.

Often, an alternative drug, made by another company, can be prescribed for a particular condition. If those companies decided to merge, or if one tried to buy the other's patent, that would be illegal, especially if the situation resulted in a substantial lessening of competition.

Q: My town has given an exclusive franchise to one firm to provide all trash-collection services. I think I could get a better price from another hauler. Isn't the franchise restraining competition?

A: Although the town's decision to grant an exclusive franchise prevents competition in trash collection, it probably is within the municipal powers granted by the state. If so, the town is immune from the antitrust laws under the state action doctrine, which says that the antitrust laws are not meant to apply to the actions of a state.

Q: I own a small jewelry store and the manufacturer of TimeCo brand watches recently dropped me as a dealer. I'm sure it's because my competitors complained that I sell below the suggested retail price. The explanation was the manufacturer's policy: its products should not be sold below the suggested retail price, and dealers who do not comply are subject to termination. Is it legal for the manufacturer to dictate my prices?

A: The law allows a manufacturer to have a policy that its dealers should sell a product above a certain minimum price, and to terminate dealers that do not honor that policy. Manufacturers may choose to adopt this kind of policy because it encourages dealers to provide full customer service and prevents other dealers, who may not provide full service, from taking away customers and "free riding" on the services provided by other dealers. If TimeCo got you to agree to maintain the suggested retail price, it would be illegal. It also would be illegal if TimeCo agreed with your competitors to drop you as a dealer to help maintain a price to which they had agreed. However, a complaint from a competing retailer is not sufficient to prove such an agreement, because the manufacturer may have decided independently that its interests were better served by sticking with its policy.

Q: I own a retail clothing store and the Brand Company refuses to sell me any of its line of clothes. These clothes are very popular in my area, so this policy is hurting my business. Isn't it illegal for Brand to refuse to sell to me?

A: It could be illegal if the refusal to sell is based on an agreement between Brand and your competitors. Without an agreement, the antitrust laws allow manufacturers substantial leeway in selecting the dealers with whom they deal. Indeed, manufacturers select dealers for a variety of reasons, including a preference for those who carry a full line of their products, the desire to maintain a certain "image" for the product line, or the ability to maintain a minimum volume of business to minimize distribution costs. The antitrust laws do not interfere with business decisions like these as long as the manufacturer acts unilaterally and not as part of a scheme to monopolize a market.

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Q: I operate two stores that sell recorded music. My business is being ruined by giant discount store chains that sell their products for less than my wholesale cost. I thought there were laws against price discrimination, but I can't afford the legal fees to fight the big corporations. Can you help?

A: Although it appears that the discount chains are receiving their recorded music products at a lower wholesale price, it may be because it costs a manufacturer less, on a per-unit basis, to deal with large volume customers. If so, the manufacturer may have a "cost justification" defense to the differential pricing and the policy would not violate the Robinson-Patman Act. However, if the wholesale price differences are not justified on the basis of cost or other differences, and retail competition is being harmed to the detriment of consumers, antitrust authorities would want to know about the situation.

Q: I bought a Total Motors car a few years ago, and now, when I need parts replaced, I have to get them from the TM dealer. They're very expensive. Isn't this illegal monopolization?

A: Distribution arrangements like this usually are permitted. TM has the exclusive right to produce TM brand parts, so it is not illegal for the company to have a monopoly for its own parts. In addition, TM's decision to make the parts available only through its dealers wouldn't constitute monopolization of the service market unless the dealerships were owned by TM and it appeared that the company was trying to monopolize the service market through unreasonable means. Most automobile dealerships are independently owned, but even if that were not the case, a manufacturer may have legitimate reasons for making the parts available only through its dealers. For example, it may want to ensure quality of performance by requiring the parts to be dealer installed.

Q: When I read about mergers, price-fixing, or other competition issues in the newspaper, sometimes it's the FTC that's in charge and sometimes it's the Justice Department. Who decides which agency has responsibility and why?

A: With certain exceptions, the two agencies have antitrust jurisdiction in most industries. To avoid duplicating efforts, they consult before opening an investigation. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its antitrust resources to segments of the economy where consumer spending is high: health care, pharmaceuticals, other professional services, food, energy, and certain high-tech industries like computer technology, video programming and cable television. The FTC also is involved in preserving competition in defense industries, to save taxpayer dollars on acquisitions costs.

Some anticompetitive practices -- such as hard-core price fixing -- are prosecuted as criminal violations under the Sherman Act. That's handled by the Justice Department because it is a function of the Executive Branch of the government. The Justice Department also has sole antitrust jurisdiction over certain matters that are subject to special industry regulation by other

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agencies, such as the telephone industry and other telecommunications matters, railroads and airlines.

Finally, only the FTC can challenge certain practices that are beyond the reach of the other antitrust laws -- practices that "violate the spirit" but not the exact letter of the other laws.

Keeping Markets Competitive

Consumers and business owners can help keep markets competitive. Here's how:

Do your homework. Competition is fostered both by sellers vying for your business and shoppers seeking the best deal. Take the time to think about what you really need or want, research the alternatives, and know the prices and product offerings of different retailers and manufacturers. An informed shopper is in the best position to detect a suspicious lack of competition for no apparent reason.

Alert federal and state antitrust agencies if you suspect illegal behavior. Consumers and businesses are important sources of information about competitive conditions in the marketplace. While the FTC cannot act on behalf of an individual consumer or business, the information you provide can be helpful in revealing harm to competition and to consumers.

Don't forget to write. If you have an antitrust problem or complaint, or if you wish to provide information that may be helpful in an investigation, contact the FTC:

* **via mail.** Office of Policy and Evaluation, Bureau of Competition, FTC, Washington, D.C. 20580, or your closest FTC regional office. Addresses are on the inside back cover.

* **via telephone.** Dial (202) FTC-HELP [(202) 382-4357 for FTC headquarters, or your closest regional office. Telephone numbers are on the inside back cover.

* **via e-mail.** Send a message to **antitrust@ftc.gov**, or contact us on the Internet at **www.ftc.gov**. E-mail communications are not secure; if you wish to submit confidential information, send it by mail and mark it Confidential.

With few exceptions, FTC investigations are not public. If you provide information or make a complaint, it will be kept confidential. Neither the information nor your identity will be disclosed outside the FTC. Similarly, if you contact us about an investigation, you may be told that we cannot discuss it, or even confirm or deny its existence. Still, we can receive your information and make sure it gets to appropriate FTC staff. In some cases, a staff person may wish to use the information in court if the case is litigated. In that event, you may be asked to provide an affidavit or other statement under oath, or appear as a witness at the trial. These situations are relatively rare, however. If those circumstances arise, your identity will have to be disclosed to the lawyers representing the companies or persons under investigation. FTC staff will seek your cooperation before making such disclosures.

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Prepared Statement
of
The Federal Trade Commission

on

Reauthorization

Before the
Subcommittee on Consumer Affairs, Foreign Commerce and Tourism
of the
Committee on Commerce, Science, and Transportation
United States Senate

Washington D.C.

July 17, 2002

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee, the Federal Trade Commission (FTC) is pleased to appear before you to support our reauthorization request for Fiscal Years 2003 to 2005. Since our last reauthorization hearing in February 2000, the FTC has continued to take innovative and aggressive actions to protect consumers and promote competition.

The FTC is the only federal agency with both consumer protection and competition jurisdiction over broad sectors of the economy.(1) We enforce laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers. We also promote informed consumer choice and public understanding of the competitive process. The work of the FTC is critical in protecting and strengthening free and open markets in the United States and, increasingly, the world.

The FTC is a small agency, but one with a large mission. The FTC has shouldered an ever-increasing workload as the economy becomes more global and more high tech. The agency has met its broad responsibilities with only modest increases in resources. Highlights of recent accomplishments include:

* Enhancing consumer privacy and security. Since April 2001, the FTC has brought 22 cases involving privacy and security issues, ranging from "pretexting" (obtaining personal information under false pretenses) and children's privacy to "spam" (unsolicited commercial e-mail). The agency also has held three workshops to address privacy issues such as financial privacy notices and the security of consumer information.

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* Recovering as much as $60 million for nearly 18,000 consumers who were victims of fraudulent lending under the terms of a proposed settlement that requires court approval. Working with the AARP, six states, and individual plaintiffs, in March 2002 the FTC settled charges against a mortgage company and its CEO for misleading consumers about fees they would be charged, which amounted to 10 to15 percent of the loans.

* Attacking fraud. Since June 2001, the FTC has filed 98 federal court actions and obtained judgments for more than $160 million.

* Stopping branded drug manufacturers from eliminating competition from cheaper generic equivalents. Recent cases addressing conduct allegedly stifling generic competition have involved drugs for high blood pressure, anxiety, and angina and other cardiac problems.

* Preventing anticompetitive effects of mergers in the petroleum industry. Last year, the FTC reviewed three multi-billion dollar oil mergers and, where necessary, required divestitures in two of the proposed mergers to ensure continued competition in refining, distribution, and retail sales of gasoline in markets across the United States.

* Ensuring competition among health care providers. The FTC is challenging as illegal agreements among providers to fix fees and boycott health plans that resist paying higher fees. The FTC's goal is helping to insure the existence of a competitive health care industry that consistently delivers high-quality care at competitive costs.

In accomplishing these goals, there is a high degree of unity among the five Commissioners. In fact, there is near unanimity in voting patterns, particularly with respect to votes concerning law enforcement matters. The near unanimity of voting patterns reflects both a broad consensus among the Commissioners about the types of cases the Commission should pursue, and the careful and deliberate process by which the Commissioners consider matters, consulting with the staff to address the issues and concerns of individual Commissioners. As Chairman Muris has stated,(2) through the efforts of a talented, dedicated, and professional staff, the current Commission is building on the extraordinary work of former Chairman Robert Pitofsky.

II. MISSION FOCUS

In the next few years, the FTC will focus its resources in significant areas of the economy through law enforcement actions, consumer and business education campaigns, and continuing assessment of ongoing developments in the marketplace. As we explain in detail below, the FTC's activities fulfill its mission on behalf of American consumers by:

* Continuing emphasis on critical areas of law enforcement - stopping and preventing consumer fraud and deception as well as stopping anticompetitive mergers;

* Enhancing consumer privacy and security;

* Preventing deceptive and anticompetitive health care practices;

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* Promoting and maintaining competitive energy markets;

* Keeping pace with technology and the changing marketplace;

* Targeting special initiatives to specific groups of consumers; and

* Advancing efficient law enforcement.

A. CONTINUING EMPHASIS ON CRITICAL AREAS OF LAW ENFORCEMENT

Two areas in the FTC's jurisdiction have become staples of its law enforcement agenda - (1) fighting consumer fraud and deception, and (2) preventing anticompetitive mergers. Since 1995, the FTC has attacked fraud and deception by bringing 1,052 federal court and administrative actions, and obtaining orders for more than $825 million in consumer redress.(3) During the same time period, the FTC reviewed over 26,000 proposed mergers worth a total of nearly $10 trillion, opened about 1,600 formal investigations (issuing "Second Requests" in more than 300 matters), and took enforcement action in over 230 transactions. Over the next few years, the FTC plans to devote significant resources to build on its solid record of achievement in these areas.

1. Consumer Fraud and Deception

The FTC targets both traditional types of fraud and deception and those types that capitalize on new technologies. Simply stated, our mission is to identify the most egregious forms of fraud and deception; to bring cases, on our own and with our law enforcement partners across the country and around the globe; and to educate industry about complying with the law, consumers about how to protect themselves from fraud and deception, and ourselves about emerging issues.

The FTC has two toll-free telephone numbers and an online form available to consumers who have questions or complaints. Consumer complaints are entered into a number of FTC databases, which are accessible to increasing numbers of domestic and foreign law enforcement partners. To identify the most pervasive forms of fraud and deception, and to target wrongdoers for law enforcement actions, we analyze the information collected through the following data systems:

* **Consumer Response Center**. The FTC's Consumer Response Center (CRC) fields complaints and inquiries on a wide variety of consumer protection issues. Consumers can use a toll-free number (1-877-FTC-HELP), as well as an online form and the mail, to contact the CRC with complaints and inquiries. The CRC now responds to more than 55,000 inquiries and complaints a month.

* ***Consumer Sentinel*.** Established by the FTC in 1997, *Consumer Sentinel*(4) is a fraud database available online to law enforcement agencies across the U.S. and Canada. It receives complaints from the FTC's CRC and from a growing number of other organizations in the U.S. and Canada. *Sentinel* now contains more than 680,000 complaints, and is the richest source of consumer fraud data available to law enforcement agencies. Since June 2001, the FTC has recruited 115 new *Sentinel* members, bringing the total number of *Sentinel* users to more than 460 law enforcement agencies. Law enforcement agencies can use this centralized database to

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identify trends and target companies that have received a large number of consumer complaints. Consumers also can access publicly available sections of this Web site for statistics about fraud, including the schemes that garner the most consumer complaints, the location of companies subject to complaints, and tips on how to avoid fraud.

* **Identity Theft.** Another FTC toll-free number, 1-877-ID-THEFT, is a central clearinghouse and a critical source of consumer complaint data on ID theft. Calls have increased from 2,200 calls per week one year ago to over 3,000 today. Building on its experience with *Consumer Sentinel*, the FTC began making the data available to its law enforcement partners through an online database. More than 350 law enforcement agencies - 46 separate federal agencies and 306 state and local agencies - now can access the data. Among the agencies represented are more than half of the state Attorneys General, as well as law enforcement authorities from a number of major cities including Baltimore, Dallas, Los Angeles, Miami, San Francisco, and Philadelphia. To encourage even greater participation, we have conducted law enforcement training and outreach since April of this year to demonstrate the efficacy of the clearinghouse. As one example of positive results from these efforts, within three weeks after our most recent training seminar in Chicago, approximately a third of the participating agencies without prior access to the clearinghouse had signed up. We will continue to focus resources and to devise new methods to expand law enforcement access to the database. Finally, FTC investigators, working with the Secret Service, have started to prepare preliminary investigative reports based on clearinghouse data, which are referred to Financial Crimes Task Forces for possible prosecution.

* **Spam Database.** Since 1998, the FTC has maintained an electronic mailbox (uce@ftc.gov) to which Internet customers can forward unsolicited commercial e-mail, commonly known as "spam." This database currently receives, on average, 42,000 new pieces of spam every day. The total number of spam e-mails has grown from 700,000 in the first year to more than 10 million today. The FTC staff searches the database to identify trends and select law enforcement targets.

* **Surf Days.** The FTC ferrets out online fraud and deception through "Surf Days." First used in 1996 to look for online pyramid schemes, the law enforcement surf is now a staple of FTC online scheme identification, usually conducted with other law enforcement agencies. It provides both a window to learn about online practices and a way to alert new Web site providers - some of whom are new entrepreneurs unaware of relevant laws - that their sites appear to violate the law. Since May 2001, the FTC has conducted six surfs with more than 140 partners, focusing on claims about unsubscribing from spam, remedies or preventive products for anthrax and other serious diseases, bioterror protection devices, e-tailer holiday shipping, and ultrasonic pest-control devices.

Drawing on consumer complaint data and information gathered from Surf Days, the FTC targets fraudulent and deceptive practices. The FTC's cases reflect a broad range of illegal activity, including telemarketing fraud, franchise fraud, business opportunity and work-at-home schemes, advance fee loan and credit loss protection schemes, and false and unsubstantiated claims for health and weight loss products. The FTC also has continued to bring deceptive advertising

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cases, focusing in particular on cases that involve health or safety issues, or significant economic injury. Recent cases include:

* **Project Busted Opportunity.** In June 2002, the FTC, the Department of Justice, and 17 state law enforcement agencies announced law enforcement actions against 77 targets engaged in the sale of business opportunities or work at home schemes. The targets allegedly used deceptive earnings claims and paid "shills" to promote their schemes or otherwise violate consumer protection laws.(5)

* **Operation Dialing for Deception.** In April 2002, the FTC announced the filing of 11 federal district court complaints challenging "in-bound" telemarketing fraud - situations in which consumers call companies based on classified ads, Internet banners, or other promotions. Among those charged were the purveyors of advance-fee loans and credit cards, at-home medical billing programs, work-at-home envelope stuffing schemes, and a "consumer protection" agency that was, in reality, no more than a shill for a vending machine business opportunity.(6)

* **Magazine Telemarketing.** A federal court ordered a group of magazine subscription telemarketers to pay $39 million in consumer redress for violating the terms of a 1996 FTC settlement. Among other provisions, the FTC's 1996 order barred the defendants from misrepresenting the cost of subscriptions, charging consumers' accounts without authorization, and threatening to harm consumers' credit ratings. To facilitate the redress process, the FTC established a special hotline for consumers who think that defendants may have billed them improperly.(7)

* **"Miss Cleo."** The FTC obtained a federal court order against the promoters of "Miss Cleo" psychic services after charging that defendants misrepresented the cost of services, billed for services never purchased, and engaged in deceptive collection practices. Among other provisions, the court's order enjoins the defendants from any future misrepresentations about the cost of psychic readings and from making harassing telemarketing calls. The FTC estimates that the defendants billed consumers $360 million in connection with this alleged illegal scheme.(8)

* **Ab Devices.** In "Project ABsurd," the FTC challenged widely advertised "ab" devices. In suits against three marketers of electronic abdominal exercise belts, the FTC charged that infomercials falsely advertised that users would get "six pack" or "washboard" abs without exercise. The 30-minute infomercials were heavily aired on national cable television stations, such as USA, TNN, Lifetime, E!, FX, and Comedy Central, and were among the ten most frequently aired infomercials in weekly U.S. rankings. The FTC's action seeks a permanent injunction to stop future false or deceptive claims and the payment of redress to consumers who bought the devices.(9)

* **Wonder Bread.** In March 2002, the FTC announced a settlement with the marketers of Wonder Bread concerning allegedly deceptive ads claiming that Wonder Bread could improve children's brain function and memory.(10)

* **Palm, Inc.** Palm, the leading manufacturer of Personal Digital Assistants (PDAs), agreed to a settlement concerning its claims that its PDAs come with built-in wireless access to the

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Internet and e-mail, as well as other common business functions - claims that the FTC alleged were not true for many models of the popular PDAs. Announced in March 2002, the settlement requires Palm to disclose, clearly and conspicuously, when consumers have to buy add-ons to perform advertised functions.(11)

2. Anticompetitive Mergers

Merger enforcement also continues to be a staple of the FTC's enforcement agenda. Stopping mergers that substantially lessen competition ensures that consumers pay lower prices and have greater choice in their selections of goods and services than they otherwise would. The level of merger activity in the marketplace, along with other factors, affects the FTC's merger workload. During the 1990s, record-setting levels of mergers, both in numbers and in size, required extraordinary efforts by the FTC staff to manage the necessary reviews within statutory time requirements. Recent economic conditions have reduced merger activity, and amendments to the Hart-Scott-Rodino Act(12) have cut the number of proposed mergers reported to the government. Even so, FTC merger enforcement remains a significant challenge for the following reasons:

* **The size, scope, and complexity of mergers have increased.** The number of mergers still remains relatively high by historic standards, and mergers also continue to grow in size, scope, and complexity. The dollar value of last year's reported mergers was about 82 percent higher, in nominal terms, than the 1995 total, even without any adjustment for the different filing thresholds. In fact, the $1 trillion total in 2001 exceeded the average annual total dollar value of reported transactions during the booming 1991-2000 decade. The size of mergers affects the FTC's workload because mergers among large diversified firms are likely to involve more products than mergers among smaller firms, and thus generally involve more markets requiring antitrust investigation. In addition, larger firms are more likely to be significant players in the markets in which they compete - increasing the need for antitrust review. Finally, as new technologies continue to grow and as the economy becomes more knowledge-based, the resulting complexity of many mergers requires more extensive inquiry.

* **Large numbers of mergers still require scrutiny.** The number of proposed mergers raising competitive concerns remains significant. Despite fewer reported transactions, the FTC's level of enforcement activity remains at a high level. Through the first eight months of this year, for example, we opened well over 100 merger investigations and issued 20 requests for additional information under the HSR Act (Second Requests), numbers only slightly below those during the peak merger wave years 1996 through 2000. Thus far in FY 2002, the FTC has taken enforcement action in 21 mergers. Thus, despite a drop in the number of merger filings, our merger enforcement workload remains high because the workload derives mostly from the number of transactions raising antitrust concerns, not from the overall number of filings.

* **Non-reportable mergers now require greater attention.** Although fewer proposed mergers remain subject to the reporting requirements of the HSR Act, the standard of legality under Section 7 of the Clayton Act remains unchanged.(13) Consequently, we need to identify through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies, those unreported, usually consummated, mergers

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that could harm consumers. So far this fiscal year, the FTC has challenged two non-reportable mergers.(14)

* **Resource-intensive litigation is more frequently needed.** While the FTC resolves most merger challenges through settlement, it is sometimes necessary to litigate, particularly when the merger at issue already has been consummated. Merger litigation requires enormous resources. At the height of preparation, a single merger case requires the full-time attention of numerous staff members - not only lawyers, but also economists, paralegals, and support staff. To counter arguments and evidence presented by merging parties, these cases also require analysis and testimony by outside experts with specialized knowledge, which can be extremely costly. Since the fiscal year began, the FTC has filed two administrative actions,(15) and has authorized federal court challenges to five proposed mergers involving products including rum,(16) food service glassware,(17) pigskin and beef hide gelatin,(18) telescopes,(19) and cervical cancer screening products.(20)

B. PROTECTING CONSUMER PRIVACY AND SECURITY

A major focus of the FTC for the next several years will be the protection of consumer privacy and security. Consumers are deeply concerned about the privacy and security of their personal information, both online and offline. Although privacy concerns have been heightened by the rapid development of the Internet, concerns are by no means limited to the cyberworld. This fiscal year, we have substantially increased resources dedicated to privacy protection. The agency has undertaken several major privacy initiatives to reduce the serious consequences to consumers that can result from the misuse of personal information.

1. Do Not Call Initiative

The FTC has proposed amending the Telemarketing Sales Rule (TSR)(21) to create a national do-not-call list that would be binding on telemarketers and allow consumers to make one call to remove their names from most telemarketing lists. The proposal also would restrict the use of "preacquired account information" - lists of names and credit card numbers of potential telemarketing customers - to ensure that these lists are not used to bill consumers for unwanted goods or services. To date, the FTC has received over 40,000 comments on the TSR proposal, reflecting a high degree of public interest.

2. Public Workshops

In December 2001, the FTC co-hosted, with seven other federal agencies, a public workshop titled *Get Noticed: Effective Privacy Notices under Gramm-Leach-Bliley*, which assessed the impact of GLB privacy notices, identified successful privacy notices, discussed strategies for communicating complex information, and encouraged industry "best practices" and consumer and business education.(22) In May 2002, the FTC hosted a two-day public workshop to explore issues related to the security of consumers' computers and the personal information stored in them or in company databases.(23)

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3. ID Theft

In 2001, identity theft was the number one consumer complaint made to the FTC. To help stamp out this growing consumer problem, the FTC has undertaken a number of initiatives:

* **Identity Theft Law Enforcement Training.** Last March, the FTC, the U.S. Secret Service, and the Department of Justice kicked off a series of nationwide training seminars to provide hundreds of local and state law enforcement officers with practical tools to enhance their efforts to combat identity theft.

* **ID Theft Affidavit.** In October 2001, the FTC joined with several companies and privacy organizations to create a universal identity theft affidavit for victims of identity theft to submit to creditors. Available online, the form helps victims recoup their losses and restore their legitimate credit records more quickly.

* **Identity Theft Education.** The FTC has coordinated with other government agencies and organizations to develop and disseminate comprehensive consumer education materials for victims of identity theft and those concerned with preventing this crime. Since its publication, the FTC has distributed more than 850,000 hard copies of its best-selling publication, "Identity Theft: When Bad Things Happen to Your Good Name," and has logged over 700,000 visits to its Web version. The FTC also launched an outreach effort to Spanish-speaking victims of identity theft, releasing Spanish versions of the identity theft booklet (Robo de Identidad: Algo malo puede pasarle a su buen nombre) and the ID Theft Affidavit. We have added Spanish-speaking phone counselors to our hotline staff and will soon launch a Spanish version of our online complaint form.

4. Privacy Enforcement Actions

The FTC brings law enforcement actions when it has reason to believe that laws protecting privacy have been violated. Recent FTC privacy enforcement actions include:

* **Children's Privacy.** Over the past year, the FTC brought six cases involving the rule implementing the Children's Online Privacy Protection Act (COPPA) for alleged violation of the requirement that commercial Web sites give notice of their information practices and obtain parental consent before collecting, using, or disclosing personal information about children under 13. As part of these settlements, the companies agreed to pay civil penalties totaling $175,000.(24)

* •***Eli Lilly.*** The FTC settled charges that Eli Lilly & Company unintentionally had disclosed the e-mail addresses of users of its Prozac.com and Lilly.com Web sites by failing to take reasonable steps to protect the confidentiality and security of that information. The settlement requires Lilly to establish a security program to protect consumers' personal information against any reasonably anticipated threats or hazards to its security, confidentiality, or integrity.(25)

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* **Pretexting Cases.** The FTC has taken its first steps to enforce prohibitions against "pretexting" - the use of false pretenses to obtain customer financial information - which is prohibited under the Gramm-Leach-Bliley Act.(26) FTC staff found apparent violations after a surf of 1,000 Web sites and a review of 500 publications. The FTC sent warning notices to 200 firms and settled three actions in federal court involving the most egregious situations.(27)

* **Preacquired Account Information.**(28) A group of "buying clubs" has agreed to pay $9 million to settle charges by state Attorneys General and the FTC that they deceptively enticed consumers into accepting free trial memberships and deceptively obtained billing information from the consumers, which they used to bill consumers for membership in the "buying clubs" without the consumers' knowledge or authorization.(29)

* **Spam**. In February 2002, the FTC announced federal court settlements with seven individuals who allegedly were disseminating deceptive chain-letter e-mails involving pyramid schemes with "get rich quick" schemes.(30) In April 2002, the FTC announced a law enforcement action challenging "spam" e-mail messages that deceptively claimed that consumers had won a free Sony PlayStation 2 or other prize through a promotion purportedly sponsored by Yahoo, Inc. When consumers responded to the e-mail message, they were routed to an adult Internet site via a 900-number modem connection that charged them up to $3.99 a minute.(31)

C. PREVENTING DECEPTIVE AND ANTICOMPETITIVE HEALTH CARE PRACTICES

The cost of health care has become increasingly significant to both the economy and the American family. Health-related products and services account for over 13 percent of gross domestic product, up from 10.9 percent in 1988.(32) A major FTC objective is to root out deceptive practices that waste consumer dollars on ineffective or bogus remedies, and to stop collusion and other anticompetitive practices that drive up health care costs and decrease quality.

1. Internet Health Fraud and Deception

The Internet has become the newest venue for marketing snake oil. Promoters of fraudulent products and services continue to use the Internet to plague consumers searching for cures for various diseases and preventative treatments to manage their health. The FTC has in place several program to protect consumers from scam artists who prey upon consumers' fears and concerns about their health.

* **Bioterrorism Project.** Following the tragedies of September 11 and the anthrax attacks, the FTC targeted purveyors of phony products related to bioterrorism diseases. Last October, staff from the FTC, the Food and Drug Administration (FDA), and the offices of 30 state Attorneys General conducted a surf and followed it up with warning letters to 121 Web sites. These sites were exploiting bioterrorism fears by marketing ineffective products, ranging from oregano oil to gas masks. To date, over 70 of the 121 warned sites have eliminated their objectionable claims. In February, the FTC announced settlements with marketers of an ineffective anthrax home test kit(33) and an on-line seller of a colloidal silver product advertised to treat anthrax.(34)

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* **"Teaser" Web Sites.** One of the principal challenges facing the FTC is reaching consumers *before* they fall victim to a fraudulent scheme. Knowing that many consumers use the Internet to shop for information, agency staff have developed 14 different "teaser" sites that mimic fraudulent sites and that are found easily by consumers who conduct research on the Internet with popular search engines. Within three clicks, the teaser sites link back to the FTC's site, where consumers can find practical, plain language information on recognizing fraudulent claims on a range of topics, including health care products. Feedback from the public on FTC teaser sites has been overwhelmingly positive.(35)

* **"Operation Cure.All."** In June 2001, the FTC, in cooperation with the FDA, Health Canada, and various state Attorneys General, announced "Operation Cure.All," the latest round of enforcement actions against online purveyors of health products that purported to cure serious diseases. The FTC challenged allegedly unfounded claims regarding a DHEA hormonal supplement, St. John's Wort, various multi-herbal supplements, colloidal silver, and a variety of electrical therapy devices.

Commissioner Sheila Anthony recently discussed Operation Cure.All before the Food and Drug Law Institute's 45th Annual Educational Conference in a speech titled "Combating Deception in Dietary Supplement Advertising" (April 16, 2002).(36) This speech discussed the FTC's recent law enforcement actions and proposed a strengthened self-regulatory response and more media responsibility to address the widespread problem of deceptive and unsubstantiated health claims for dietary supplement products.

2. Collusion and Other Anticompetitive Practices

During the past year, the FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality**.**

(a) Antitrust Investigations Involving Pharmaceutical Companies. The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000.(37) In response, the FTC dramatically has increased its attention to pharmaceutical-related matters in both merger and non-merger investigations. The agency now focuses one-quarter of all competition mission resources on this industry. We also have opened increasingly more pharmaceutical-related investigations. In 1996, less than 5 percent of new competition investigations involved pharmaceuticals, while in 2001, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

* **Mergers Affecting the Pharmaceutical Industry.** Last year, the FTC took action to restore competition in the market for integrated drug information databases in a case involving violations of both Sections 7 and 7A of the Clayton Act. This case marked the first time the FTC sought disgorgement of profits as a remedy in a merger case. The case resulted from the 1998 acquisition by Hearst Corporation of the Medi-Span integratable drug information database business. Pharmacies, hospitals, doctors, and third-party payors rely on such databases for information about drug prices, drug effects, drug interactions, and the eligibility for drugs under various payment plans. At the time of the acquisition, Hearst already owned First DataBank,

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Medi-Span's only competitor. The FTC alleged that the acquisition created a monopoly in the sale of integratable drug information databases, causing prices to increase substantially to all database customers.(38) We negotiated a settlement requiring Hearst to divest the Medi-Span database and to disgorge $19 million in illegal profits, which will be distributed to injured consumers.(39)

* **Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.** In its non-merger enforcement cases, the FTC focused on efforts by branded drug manufacturers to slow or stop competition from lower-cost generic drugs. While patent protection for newly developed drugs sometimes limits the role of competition in this industry, competition from generic equivalents of drugs with expired patents is highly significant. The Congressional Budget Office reports that consumers saved $8 to 10 billion in 1994 alone by buying generic versions of branded pharmaceuticals.(40) The first generic competitor typically enters the market at a significantly lower price than its branded counterpart, and gains substantial share from the branded product. Subsequent generic entrants typically bring prices down even further.(41) Anticompetitive "gaming" of certain provisions of the Hatch-Waxman Act(42) to forestall generic entry has been a major focus of FTC enforcement actions. FTC Hatch-Waxman abuse cases have fallen into three categories:

(i) Agreements Not to Compete. The first category involves agreements between manufacturers of brand-name drugs and manufacturers of generics in which the generic firm allegedly is paid not to compete. The FTC has settled three such cases, including a recent settlement with American Home Products (AHP). That settlement resolved charges that AHP entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars. The FTC had alleged that an AHP generic would have competed with Schering's branded K-Dur 20, used to treat low potassium conditions, which can lead to cardiac problems.(43)

(ii) Fraudulent "Orange Book" Listings. The second category deals with unilateral conduct by branded manufacturers to delay generic entry. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book." Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Certain branded manufacturers have attempted to "game" this regulatory structure by listing patents in the Orange Book improperly. Such a strategy permits the company to abuse the Hatch-Waxman's stay provision to block generic competition without advancing any of the Act's procompetitive objectives. The FTC recently filed an action against Biovail Corporation (Biovail), alleging that it had illegally acquired a license to a patent and engaged in such an anticompetitive patent listing strategy with respect to its high blood pressure drug, Tiazac. The matter was resolved through a consent order, which requires Biovail to: (1) transfer certain rights in the acquired patent back to their original owner; (2) terminate its infringement suit against the generic competitor, thereby terminating the 30-month stay; (3) refrain from any action that would trigger another 30-month stay; (4) refrain from future improper Orange Book listing practices; and (5)

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provide the FTC with prior notice of the acquisitions of any patents it intends to list in the Orange Book.(44)

The FTC also recently filed an *amicus* brief in pivotal private litigation involving allegations of fraudulent Orange Book listing practices.(45) *In re Buspirone* - which is the subject of continuing litigation - involves allegations that Bristol-Myers Squibb Co. ("BMS") violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine - a legal rule providing antitrust immunity for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the FTC argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order denying *Noerr* immunity and adopting much of the Commission's reasoning.(46) The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff must still prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from the antitrust laws or exempt from their scrutiny.

(iii) Agreements Between Generic Manufacturers. The third category of cases involves agreements among manufacturers of generic drugs. In our recent complaint against Biovail and Elan Corporation, plc (Elan), the FTC alleged that the companies violated the FTC Act by entering into an agreement that provided substantial incentives not to compete in the market for the 30 mg and 60 mg dosage forms of generic Adalat CC. Biovail and Elan are the only companies with FDA approval to manufacture and sell 30 mg and 60 mg generic Adalat products. In October 1999, Biovail and Elan entered into an agreement involving both companies' generic Adalat products. Under their agreement, in exchange for specified payments, Elan would appoint Biovail as the exclusive distributor of Elan's 30 mg and 60 mg generic Adalat products and allow Biovail to profit from the sale of both products. Our complaint alleged that the companies' agreement substantially reduces their incentives to introduce competing 30 mg and 60 mg generic Adalat products. The proposed order, which has a ten-year term, remedies the companies' alleged anticompetitive conduct by requiring them to terminate the agreement and barring them from engaging in similar conduct in the future.(47)

Commissioner Thomas B. Leary has written and spoken in depth about the issues that we must confront as we proceed with these cases at the intersection of intellectual property rights and antitrust enforcement.(48)

* **Generic Drug Study.** The FTC currently is conducting an industry-wide study focused on certain aspects of generic drug competition under the Hatch-Waxman Amendments. The study has examined whether the Commission's enforcement actions against alleged anticompetitive agreements, which relied on certain Hatch-Waxman provisions, were isolated examples or representative of conduct frequently undertaken by pharmaceutical companies. The study also has examined more broadly how the process that Hatch-Waxman established to permit generic entry prior to expiration of a brand-name drug product's patents has worked between 1992 and 2000.(49)

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(b) Antitrust Investigations Involving Health Care Providers. So far this year, the agency has reached settlements with three groups of physicians for allegedly engaging in collusive practices that drove up consumers' costs. In May, the FTC announced a settlement with two Denver-area physician organizations to resolve charges that they entered into agreements to fix fees and to refuse to deal with health plans. According to the complaints, primary care doctors - who compete with each other as internists, pediatricians, family physicians, or general practitioners - formed groups to negotiate contracts for higher fees and other terms more advantageous than they could obtain by bargaining separately. The FTC's proposed orders put a stop to further anticompetitive collusive conduct.(50)

Earlier this year, the FTC settled charges that a group of Napa County, California, obstetricians and gynecologists agreed to fix fees and other terms of dealing with health plans and refused to deal with health plans except on collectively determined terms. The FTC's complaint further alleged that the physicians' actions harmed employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. To resolve the matter, the physicians agreed to refrain from engaging in similar conduct in the future, and to dissolve the organization through which they conducted their allegedly anticompetitive activity.(51)

(c) Workshop on Health Care and Competition Law and Policy. On September 9-10, 2002, the Commission will hold a public workshop focusing on the impact of competition law and policy on the cost, quality, and availability of health care, and the incentives for innovation in the field. Given the significance of health care spending in the United States, it is important that competition law and policy support and encourage efficient delivery of health care products and services. Competition law and policy should also encourage innovation in the form of new and improved drugs, treatments, and delivery options. Developing and implementing competition policy for health care raises complex and sensitive issues. The goal of this workshop is to promote dialogue, learning, and consensus building among all interested parties (including, but not limited to, the business, consumer, government, legal, provider, insurer, and health policy/health services/health economics communities).

D. PROMOTING AND MAINTAINING COMPETITIVE ENERGY MARKETS

Representing a significant portion of total U.S. economic output, energy is vital to the entire economy. The FTC focused considerable resources on energy issues, including conducting in-depth studies of evolving energy markets and investigating numerous oil company mergers.

1. Oil Merger Investigations

In recent years, the FTC has investigated numerous oil mergers. Last year, the agency reviewed three large oil mergers and analyzed the competitive effects in a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. In Chevron/Texaco, the FTC accepted a consent agreement that allowed the proposed $45 billion merger to proceed but required substantial divestitures to cure the possible anticompetitive aspects of the transaction in 10

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separate relevant product markets and 15 sections of the country comprised of dozens of smaller relevant geographic markets.(52) In Valero/Ultramar, the FTC obtained a settlement requiring Valero to divest a refinery, bulk gasoline supply contracts, and 70 retail service stations to preserve competition.(53) In Phillips/Tosco, applying the same standards, the Commission concluded that the transaction did not pose a threat to competition and voted unanimously to close the investigation.(54)

2. Study of Refined Petroleum Prices

Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of the recent volatility in refined petroleum product prices. During an initial public conference held in August 2001, participants identified key factors, including increased dependency on foreign crude sources, changes in industry business practices, restructuring of the industry through mergers and joint ventures, and new governmental regulations. This information assisted the agency in structuring a second public conference in May 2002, focusing in greater depth on those factors identified as most important in the earlier conference. The information gathered through these public conferences will form the basis for a report to be issued later this year.

3. Gasoline Price Monitoring

The FTC also recently announced a project to monitor wholesale and retail prices of gasoline. FTC staff will inspect wholesale gasoline prices for 20 U.S. cities and retail gasoline prices for 360 cities. Anomalies in the data will prompt further inquiries and likely will alert the agency to the possibility of anticompetitive conduct in certain parts of the country. It will also increase our understanding of the factors affecting the price of gasoline.

4. Consumer Gas-Savings Tips

In addition to focusing resources on protecting competition to keep the family gasoline budget down, the FTC developed a series of consumer education publications to help families fuel up wisely: *Gas-Saving Products: Facts or Fuelishness?*; *The Low-Down on High Octane Gasoline*; *How To Be Penny Wise, Not Pump Fuelish*; and *Gas-Saving Products: Proceed with Caution*. Two of the publications were produced in cooperation with the American Automobile Association. To date, distribution totals for the four publications exceed 277,000.

E. KEEPING PACE WITH TECHNOLOGY AND THE CHANGING MARKETPLACE

As an agency with a history of studying marketplace developments,(55) the FTC is well-positioned to take a leading role in assessing the impact of high technology and globalization on domestic and world markets. In 1995, the agency held 23 days of hearings on these twin phenomena, which culminated in a comprehensive, two-volume Staff Report.(56) Building on this base, the FTC continues to study the impact of technology in general and specific innovations, such as the Internet, and to work increasingly with foreign government agencies and international bodies to promote competition and protect consumers both at home and around the globe. The FTC organizes numerous task forces, workshops, hearings, and conferences to gather information.

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1. Technology

* **Internet Lab.** To keep pace with rapidly changing Internet technology, the FTC established an Internet Lab in 1999. Equipped with state-of-the-art personal computers, the lab is a resource for ongoing efforts to understand the medium and to search for fraud, deception, and anticompetitive practices in a secure environment. It provides the necessary equipment and software to capture Web sites and preserve them as evidence. The lab also provides the latest tools for staff to track the manner in which technology is changing the way that commercial information is transmitted to consumers. Unlike advertising in traditional media, for example, advertising in electronic media may vary in content and appearance depending on the appliance and Web browser used by the consumer. FTC Internet enforcement cases reflect the broad range of illegal activity carried out online, from traditional scams like pyramid schemes, health fraud, and bogus investments to high-tech frauds that take advantage of the technology itself to scam consumers. Since June 2001, the FTC has brought over 51 cases involving fraudulent or deceptive Internet marketing practices, bringing the total number of Internet cases filed since 1994 to 236.

* **Internet Task Force.** In August 2001, an Internet Task Force began to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. The Task Force grew out of the already-formed State Action Task Force, which had been analyzing potentially anticompetitive state regulations generally, and out of the FTC's longstanding interest in the competition aspects of e-commerce. Over the past year, the Task Force has met with numerous industry participants and observers, including e-retailers, trade associations, and leading scholars, and reviewed relevant literature. The Task Force discovered that many states have enacted regulations, ostensibly for other purposes, that have the clear effect of protecting existing bricks-and-mortar businesses from new Internet competitors. The Task Force also is considering whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics, such as by collectively pressuring suppliers or dealers to limit sales over the Internet. To date, three advocacy filings have resulted in large part from the Task Force's efforts: (1) a joint FTC/DOJ comment before the North Carolina state bar expressing concerns about the impact on consumers of ethics opinions requiring that an attorney be physically present for all real estate closings and refinancings; (2) a joint FTC/DOJ comment before the Rhode Island legislature on similar requirements in a real estate bill; and (3) an FTC staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.(57)

* **Internet Competition Workshop.** In October, the Commission will hold a public workshop on possible efforts to restrict competition on the Internet. The workshop will include panel discussions to address certain specific industries that are important to consumers and that have experienced some growth in commerce via the Internet, but that may have been hampered by potentially anticompetitive state regulations or business practices. For example, the workshop will include panels on some or all of the following industries: retailing, automobiles, cyber-charter schools, real estate, health care, wine sales, auctions, contact lenses, and caskets. The Internet Task Force expects that the workshop will (1) enhance the Commission's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state

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regulations, and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic.

* **Standards Setting.** As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint filed last month, the FTC charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose - in violation of the organization's rules - that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.(58) The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The FTC's complaint alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents, all of which would be passed on to consumers through increased prices for the downstream products.(59) Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the FTC will continue to pursue investigations in this important area. (60)

* **Intellectual Property Hearings.** In February 2002, the FTC and the DOJ commenced a series of hearings on "*Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*."(61) The hearings respond to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. During the hearings, business persons, consumer advocates, inventors, practitioners, and academics are focusing on:

(a) what economic learning reveals, and does not reveal, regarding the relationships between intellectual property and innovation, and between competition and innovation;

(b) "real-world" experiences with patents and competition;

(c) procedures and substantive criteria involved in prosecuting and litigating patent claims;

(d) issues raised by patent pools and cross-licensing and by certain standard-setting practices;

(e) the implications of unilateral refusals to deal, patent settlements, and licensing practices;

(f) international comparative law perspectives regarding the competition/intellectual property interface; and

(g) jurisprudential issues, including the role of the Federal Circuit.

A public report that incorporates the results of the hearings, as well as other research, will be prepared after the hearings.

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* **Wireless Workshop.** In March, FTC staff released a summary and update of the proceedings of its December 2000 workshop, "The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues."(62) The workshop addressed five topics: (1) an overview of the relevant technologies; (2) privacy issues raised by these technologies; (3) security issues; (4) advertising and disclosures in the wireless area; and (5) self-regulatory programs. The FTC will continue to monitor the development of wireless technologies, along with the privacy, security, advertising, and other consumer protection issues they raise.

2. Globalization

* **International Antitrust.** Because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program. Given differences in laws, cultures, and priorities, it is unlikely that there will be complete convergence of antitrust policy in the foreseeable future. Areas of agreement far exceed those of divergence, however, and instances in which our differences will result in conflicting results are likely to remain rare. The agency has increased its cooperation with agencies around the world, both on individual cases and on policy issues, and is committed to addressing and minimizing policy divergences.

* **ICN and ICPAC.** Last fall, the FTC, the DOJ, and twelve other antitrust agencies from around the world launched the International Competition Network (ICN). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee (ICPAC) that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Sixty-one jurisdictions already have joined the ICN, and we are working on initial projects on mergers and competition advocacy.

* **Free Trade Agreement of the Americas.** The FTC is working with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas.

* **OECD.** The FTC is participating in the continuing work of the OECD on, among other things, merger process convergence, implementation of the OECD recommendation on hard-core cartels (*e.g.*, price-fixing agreements), and regulatory reform.

* **Technical Assistance.** For the past ten years, the FTC has been able to participate in assisting developing nations that have made the commitment to market and commercial law reforms. With funding principally from the U.S. Agency for International Development, and in partnership with the DOJ, about thirty nations have received technical assistance with development of their competition and consumer protection laws. Currently, the technical assistance program is active in South and Central America, South Africa, and Southeastern Europe. The program emphasizes the development of investigative skills, and relies on a combination of resident advisors, regional workshops, and targeted short term missions. These activities have enabled a large number of career staff to share their expertise, although great care

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is taken to avoid any intrusions on the time and planning for domestic enforcement projects. Future plans are focused on expanding this reimbursable program to the former Soviet Union and to Asia.

* **International Consumer Protection.** The number of consumer protection cases with an international component continues to rise. Consumers now increasingly participate in a global marketplace, often receiving telemarketing or e-mail solicitations from vendors outside the U.S. Increasingly, the FTC is called upon to lead or participate in international organizations. Last year, Commissioner Swindle became head of the U.S. delegation to the OECD Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. The revised guidelines will be released in early September and will promote a "culture of security" in which we all have a role to play. This spring, Commissioner Thompson was elected Chair of the OECD's Committee on Consumer Policy.

* **Cross-Border Fraud.** The FTC is increasing its efforts to counter fraud that transcends borders. In particular, our partnerships with Canadian officials allow the FTC to respond more effectively to telemarketing scams emanating from Canada. The FTC has forged two city-specific partnerships to coordinate our law enforcement efforts: the Ontario Strategic Partnership, in which the FTC's Midwest Regional Office has worked with Canadian law enforcers to focus on Toronto-based telemarketing; and Project Emptor, in which the Northwest Regional Office has partnered with British Columbia officials to target Vancouver boiler rooms. Drawing on these partnerships, in June 2002 the FTC and 17 Canadian and U.S. law enforcement and consumer protection agencies announced a coordinated criminal and civil law enforcement initiative to stop fraudulent cross border schemes and recover money for victims, many of whom are elderly. Fraudulent schemes targeted by the initiative included illegal international lottery scams, phony advance-fee credit card offers, and bogus credit card loss-protection schemes.(63) The FTC has brought seven actions and obtained nine final orders in cases involving cross-border fraud between the U.S. and Canada in 2002.

* **IMSN Findings on Cross-Border Remedies.** Last spring, the International Marketing Supervision Network - an organization of consumer protection agencies from 29 countries - under the leadership of the FTC, issued "Findings on Cross-Border Remedies," which outlines obstacles to cross-border enforcement of consumer protection laws and suggestions for overcoming these obstacles.

* ***econsumer.gov*.** In April 2001, 13 countries and the OECD launched *econsumer.gov* , a public Web site where consumers can file cross-border e-commerce complaints with law enforcement agencies around the world, access education materials about e-commerce, and contact consumer protection agencies. The site is available to consumers in English, French, Spanish, and German. Since its launch, three additional countries have joined the project. To date, we have received over 1,700 complaints from consumers in six continents about companies in more than 68 countries. Next steps for this project include adding additional members, increasing outreach and publicity, adding consumer education materials, and adding information about alternative dispute resolution for e-commerce complaints on the site.

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F. TARGETING SPECIAL INITIATIVES TO SPECIFIC CONSUMER GROUPS

The FTC has initiated a variety of programs that seek to assist specific consumer groups. Among these groups are children, minorities and non-English speaking sections of the U.S. population, and homeowners who may be special prey for fraudulent lenders.

1. Children and Violent Media

In response to Congressional requests, the FTC continues to monitor violent media directed toward children. An FTC September 2000 report concluded that the entertainment industry targeted advertising of violent video games, movies, and music to children.(64) Subsequently, Congress directed that the FTC continue its efforts through three related initiatives: consumer research and workshops, an underage shopper retail compliance survey, and marketing and data collection.(65) In response, the FTC released a follow-up report, in April 2001, outlining improvements in the movie and electronic game industries but finding no appreciable change in the music industry's target marketing practices.(66) The FTC's second follow-up report, in December 2001, found that the movie and electronic game industries had made continued improvements, and that although the music industry had made progress in disclosing parental advisory label information, it had not altered its marketing practices.(67) The FTC's third follow-up report, released in June 2002, found continued progress by the movie and electronic game industries and improvement by the music industry in including rating information in advertising that would help parents identify material that may be inappropriate for their children. This most recent report also showed compliance by the movie and electronic games industries with industry promises to limit ad placements, although the report found advertisements by all three industries continue to appear in some media popular with teens.(68) The report concludes that the music industry continues to advertise music with explicit content on television shows and in print magazines popular with teens.

2. Children and Gambling

The FTC also is assessing the marketing of online gambling sites to children. In June, the FTC announced the results of an informal survey of web sites to determine the access and exposure that teens have to online gambling.(69) The FTC visited over 100 popular gambling web sites and found that minors can, indeed, access these sites easily, and that minors often are exposed to ads for online gambling on non-gambling web sites. The FTC staff has met with representatives of the online gambling industry to seek voluntary corrective action, and with interested consumer advocates. The FTC, in conjunction with industry representatives, has launched a consumer and business education campaign warning about the dangers of underage online gambling. Online gambling industry representatives have advised FTC staff that they will devise a "Guide to Best Practices" regarding clear and conspicuous warnings about prohibited underage gambling, effective blocking methods, and restricted placement of industry advertisements.

3. Spanish-Speaking Consumers

To reach the expanding population of Spanish-speaking consumers in the United States, the FTC instituted an Hispanic Outreach Program in January 2002. This effort includes the creation of a

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dedicated page on the FTC Web site, *Proteccion para el Consumidor*, that will mirror the English page, and translation of 14 consumer publications, printed or posted to the Web. We also translated the FTC Consumer Complaint Form into Spanish. In addition, the FTC is conducting media outreach and providing interviews in Spanish.

4. Native Americans

The FTC has partnered with the Indian Arts and Crafts Board, the Alaska State Council on the Arts, and the Alaska Attorney General's office in developing and distributing more than 100,000 postcards and brochures to assure the authenticity of Alaskan Native art and help prevent fakes. The materials provide numerous tips - mostly centered on a "Silver Hand" certification program - on how to be confident that Alaskan Native art is truly Native.

5. Homeowners

The FTC also has focused its consumer protection efforts on homeowners, especially those in poorer urban areas, who sometimes are the victims of deceptive lending practices. Since 1998, the FTC has brought 15 cases involving a variety of deceptive lending practices. This past March, the FTC, six states, AARP, and class action and individual plaintiffs settled claims against First Alliance Mortgage Company and its chief executive officer. The complaint alleged that the defendants misled consumers about the existence and amount of origination fees for their loans (which typically constituted 10 to 25 percent of the loan) and the interest rate and monthly payments of their adjustable rate mortgage loans. Consequently, according to the complaint, consumers believed they were borrowing less money at lower interest rates than they actually were. The settlement, which requires court approval, creates a consumer redress fund that will include all of the remaining assets of First Alliance and its affiliates, now under liquidation in bankruptcy court, as well as a payment of $20 million from the company's principals. Nearly 18,000 borrowers could receive as much as $60 million in redress, making this one of the FTC's largest cases ever.

G. ADVANCING EFFICIENT LAW ENFORCEMENT

The FTC has undertaken a variety of efforts to streamline its practices, leverage its resources, and minimize the burden on the public. These ongoing "good government" initiatives share a common theme: they represent efforts to go beyond the regular, ongoing work of the agency and to find ways to make the FTC's work more effective, more efficient, and less costly for businesses and consumers. We seek to use our limited resources wisely, because each day or dollar saved can be applied to additional activities that benefit consumers.

1. Sweeps and Partnerships with Enforcement Agencies

The FTC leverages its resources through coordinated enforcement actions with other law enforcement agencies, both state and federal. In particular, the FTC conducts "sweeps" to investigate and bring actions against specific types of frauds and deceptions. In the past 12 months, the FTC and 12 partners have participated in sweeps covering Internet health fraud,

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cold-call telemarketing, Internet scams, and business opportunities, resulting in over 170 separate law enforcement actions.

2. Training Staff from Other Agencies

Another way that the FTC promotes efficient law enforcement is to train staff from other law enforcement agencies in new technologies or techniques pioneered by the FTC. One example is the FTC's ongoing Internet fraud training program. The FTC has created a series of regional "Netforces" made up of law enforcement agencies that have participated in our training. On April 2, 2002, the FTC began the first of these efforts by joining eight state agencies in the northwest United States and four Canadian agencies in an initiative targeting deceptive spam and Internet fraud. Together, these agencies have brought 63 law enforcement actions against Web-based scams ranging from alleged auction fraud to bogus cancer cure sites, and have sent more than 500 letters warning of the illegality of deceptive spam.

3. Streamlining Merger Review

A major focus of FTC efficiency efforts is the merger review process. The FTC is working on a number of reforms to speed the process and reduce the burden on merging parties without sacrificing the sufficiency of information required by the agency.

* **Electronic Premerger Filing.** As part of an overall movement to make government more accessible electronically, the FTC, working with the DOJ, will accelerate its efforts in FY 2003 to develop an electronic system for filing HSR premerger notifications. E-filing will reduce filing burdens for both businesses and government, and also will create a valuable database of information on merger transactions to inform future policy deliberations.

* **Burden Reduction in Investigations.** The agencies have taken steps to reduce the burden in document productions responsive to Second Requests. In response to legislation amending the HSR Act, the FTC amended its rules of practice to incorporate new procedures. The rule requires Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establishes a procedure for the General Counsel to review the request and rule promptly on any remaining unresolved issues. Measures adopted include a process for seeking modifications or clarifications of Second Requests, and expedited senior-level internal review of disagreements between merging parties and agency staff; streamlined internal procedures to eliminate unnecessary burdens and undue delays; and implementation of a systematic management status check on the progress of negotiations on Second Request modifications.

* **Merger Investigation Best Practices.** The FTC is conducting a series of national public workshops regarding modifications and improvements to the merger investigation process. The FTC will solicit input from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, and consumer groups, on topics such as using more voluntary information submissions before issuance of a Second Request, reducing the scope and content of the Second Request, negotiating modifications to the Second Request, and focusing on special issues concerning electronic records and accounting or financial data.(70)

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* **Merger Remedies.** Other "best practices" workshops will solicit comments on merger remedies. Among the issues to be addressed are structuring asset packages for divestitures, timing of divestitures (*i.e.*, up front or after consummation), evaluating the competitive adequacy of proposed buyers, and assessing the preservation of competition after divestitures.

4. Consumer and Business Education

Yet another way the FTC seeks to make law enforcement more efficient is by disseminating information about deceptive practices in the marketplace. The less often consumers are victimized by deceptive practices, the fewer enforcement actions the FTC must bring. Further, the more that businesses, especially small businesses, understand their obligations, the more readily they can comply. Thus, consumer and business education is the first line of defense against fraud and deception.

With each major consumer protection enforcement initiative, the FTC launches a comprehensive and creative education campaign. Between May 2001 and May 2002, the FTC issued 108 consumer protection publications: 94 for consumers and 14 for businesses. Of those publications, 67 are new and 41 are revisions; 23 are translations into Spanish, and six are joint efforts between the public and private sectors. The FTC continues to exceed previous distribution records. In the last year, the FTC distributed more than 5.6 million printed publications to the public, and received more than 12.5 million "hits" on publications posted on the consumer protection portion of the FTC's Web site. Special FTC educational undertakings include:

* **National Consumer Protection Week.** For the fourth consecutive year, the FTC took the lead in organizing National Consumer Protection Week. This year, the event focused on privacy. Other participants were the National Association of Consumer Agency Administrators, AARP, the National Consumers League, the Council of Better Business Bureaus, the Consumer Federation of America, the U.S. Postal Service, the U.S. Postal Inspection Service, the National Association of Attorneys General, and the DOJ.

* ***www.consumer.gov*.** The FTC continues to manage *www.consumer.gov* and to recruit new members to participate in the site, which offers one-stop access to federal consumer information. In the past year, the number of members has grown from 135 to 178.

* **Response to 9/11.** In the wake of September 11th, the FTC worked with other groups to alert consumers to possible fund-raising fraud. The FTC released a Consumer Alert, *Helping Victims of the Terrorist Attacks: Your Guide to Giving Wisely* on September 21, at a press conference held by the FTC's Northeast Regional Office in conjunction with the New York Attorney General and the New York Better Business Bureau.

III. LEGISLATIVE RECOMMENDATIONS

To improve the FTC's ability to implement its mission and to serve consumers, we make the following recommendations for legislative changes. We would be happy to work with the Committee to develop appropriate language.

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A. ELIMINATE THE FTC ACT'S EXEMPTION FOR COMMUNICATIONS COMMON CARRIERS

The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition. This exemption dates from a period when telecommunications were provided by government-authorized, highly regulated monopolies. The exemption is now outdated. In the current world, firms are expected to compete in providing telecommunications services. Congress and the Federal Communications Commission (FCC) have dismantled much of the economic regulatory apparatus formerly applicable to the industry. Telecommunications firms also have expanded into numerous non-common carrier activities. Oversight by the FTC of telecommunications firms' activities thus has become increasingly important.

The FTC Act exemption has proven to be a barrier to effective consumer protection, both in common carriage and in other telecommunications businesses. The exemption also has prevented the FTC from applying its legal and economic expertise regarding competition to mergers and other possible anticompetitive practices, not only involving common carriage, but in other high-tech fields involving telecommunications. We believe that Congress should eliminate the special exemption to reflect the fact that competition and deregulation have replaced comprehensive economic regulation.

FTC efforts to halt fraudulent or deceptive practices by telecommunications firms have sometimes been stymied by the common carrier exemption. While common carriage has been outside the FTC's authority, we believe that the FTC Act applies to non-common carrier activities of telecommunications firms, even if the firms also provide common carrier services.(71) Continuing disputes over the breadth of the FTC Act's common carrier exemption hamper the FTC's oversight of the non-common carrier activities. These disputes have arisen even when the FCC does not have, or does not exercise, jurisdiction over the non-common carrier activity. These disputes may increase the costs of pursuing an enforcement action, or may cause the agency to narrow an enforcement action - for example, by excluding some participants in a scheme - to avoid protracted jurisdictional battles and undue delay in providing consumer redress.

The FTC has the necessary expertise to address these issues. The FTC is the federal agency with broad consumer protection and competition experience covering nearly all fields of commerce. The FTC has extensive expertise with advertising, marketing, billing, and collection, areas in which significant problems have emerged in the telecommunications industry. In addition, the FTC has powerful procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry if the FTC were authorized to reach them.

The common carrier exemption also significantly restricts the FTC's ability to engage in effective antitrust enforcement in broad sectors of the economy. The mix of common carrier and non-common carrier activities within particular telecommunications companies frequently precludes FTC antitrust enforcement for much of the telecommunications industry. Further, because of the

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expansion of telecommunications firms into other high-tech industries and the growing convergence of telecommunications and other technologies, the common carrier exemption increasingly limits FTC involvement in a number of industries outside telecommunications.

B. TECHNICAL CHANGES

The FTC also requests two new limited grants of authority: (1) the ability to accept reimbursement for expenses incurred by the FTC in assisting foreign or domestic law enforcement authorities, and (2) the ability to accept volunteer services, in-kind benefits, or other gifts or donations. Both new authorities would be useful as the FTC tries to stretch its resources to meet its statutory responsibilities.

The authority to accept reimbursement for expenses incurred in assisting foreign or domestic law enforcement authorities would be especially useful, since the FTC has been working closely with domestic and foreign law enforcement authorities to address possible law violations. Partnering with these law enforcement authorities has resulted in enhanced law enforcement efforts and greater sharing of significant information. In some of these situations, our foreign or domestic partner is interested in reimbursing the FTC for the services it has provided or in sharing some of the costs of investigating or prosecuting the matter. Without specific statutory reimbursement authority, however, the FTC cannot accept and keep such reimbursements because of constraints under appropriations law.(72)

In addition, the FTC requests authority to accept donations and gifts, such as volunteer services and in-kind benefits. Congress has conferred this authority by statute on various agencies, including the Office of Government Ethics, the FCC, and the Consumer Product Safety Commission.(73) Without this authority, the FTC cannot accept services or keep items because of appropriations law constraints. This broad restriction on acceptance of gifts sometimes limits the FTC's ability to fulfill its mission in the most cost-effective manner. For example, the FTC cannot accept volunteer services from individuals wishing to provide such services to the agency. In addition, agency officials must sometimes refuse donated items that could otherwise be useful in carrying out the agency's mission, such as books and similar mission-related items.

IV. CONCLUDING REMARKS

Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace, free of deceptive and unfair practices, for American businesses and consumers. We believe that the Commission's antitrust and consumer protection enforcement has demonstrable benefits for consumers and the American economy - benefits that far outweigh the resources allocated to maintaining our mission. We would be pleased to respond to any questions you may have.

ENDNOTES

1. The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*. The statute provides the agency with jurisdiction over the most of the economy. Certain entities, such as depository institutions and common carriers, are wholly or

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partially exempt from FTC jurisdiction, as is the business of insurance. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 statutes.

2. Timothy J. Muris, *Chairman Robert Pitofsky: Public Servant and Scholar*, Remarks Before the American Antitrust Institute, Second Annual Conference (Washington, D.C., June 12, 2001), available at <http://www.ftc.gov/speeches/muris/muris010612.htm>.

3. Much of what the FTC challenges in its consumer protection mission is hard-core fraud, and given the transient nature of many of these illegitimate operations, we frequently are unable to collect the full amount of the monetary judgment ordered. The judgment amount, however, gives some indication of the extent of fraud and deception stopped by the FTC.

4. This web site is available at <http://www.sentinel.gov>.

5. Press Release, *State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams* (June 20, 2002), available at <http://www.ftc.gov/opa/2002/06/bizopswe.htm>.

6. Press Release, *FTC Sweep Protects Consumers from "Dialing for Deception*" (Apr. 15, 2002), available at <http://www.ftc.gov/opa/2002/04/dialing.htm>.

7. *FTC v. H.G. Kuykendall, Jr.*, No. CIV-96-388-M (W.D. Okla. Mar. 4, 2002).

8. *FTC v. Access Resource Servs., Inc.*, No. 02-60226 (S.D. Fla. Feb. 20, 2002).

9. *FTC v. Electronic Products Distribution*, L.L.C., No. 02CV0888 H(AJB) (S.D. Cal. May 7, 2002); *FTC v. United Fitness of America, LLC,* No. CV-S-02-648-KJD-LRL (D. Nev. May 7, 2002); *FTC v. Hudson Berkley Corp.*, No. CV-S-0649-PMP-RJJ (D. Nev. May 7, 2002).

10. *Interstate Bakeries Corp.*, Docket No. C-3402 (Apr. 16, 2002) (consent order).

11. Palm, Inc. Docket No. C-4044 (April 18, 2002) (consent order)

12. 15 U.S.C § 18a, *as amended*, Pub. L. No 106-553, 114 Stat. 2762 (2000).

13. *See* 15 U.S.C. § 18a, *as amended*, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

14. *MSC Software Corp*., Docket No. 9299 (Oct. 10, 2001) (complaint issued) (alleging that two MSC acquisitions violated Clayton Act).

15. *MSC Software Corp*., Docket No. 9299 (Oct. 10, 2001) (complaint issued) (involving engineering software); *Chicago Bridge Iron Co., Inc.*, Docket No. 9300 (Oct. 25, 2001) (complaint issued) (pertaining to field-erected specialty industrial storage tanks).

16. Press Release, *FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A.* (Oct. 23, 2001), available at <http://www.ftc.gov/opa/2001/10/diageo.htm>.

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17. *FTC v. Libbey, Inc.*, Civ. Act. No. 02-0060 (RBW) (Memorandum Opinion) (D.D.C. Apr. 22, 2002) (granting FTC's request for a preliminary injunction).

18. Press Release, *FTC to Challenge DGF Stoess's Proposed Acquisition of Leiner Davis* (Jan. 15, 2002), available at <http://www.ftc.gov/opa/2002/01/gelatin.htm>.

19. Press Release, *FTC Authorizes Injunction to Pre-empt Meade Instruments' Purchase of All, or Certain Assets, of Tasco Holdings, Inc.'s Celestron International* (May 29, 2002), available at <http://www.ftc.gov/opa/2002/05/meadecelestron.htm>.

20. Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* (June 24, 2002), available at <http://www.ftc.gov/opa/2002/06/cytyc_digene.htm>.

21. Telemarketing Sales Rule, 67 Fed. Reg. 4492 (Jan. 30, 2002) (proposed Rule amendments).

22. Press Release, *Workshop Planned To Discuss Strategies for Providing Effective Financial Privacy Notices* (Sept 24, 2001), available at <http://www.ftc.gov/opa/2001/09/glbwkshop.htm>.

23. Press Release, *FTC to Host Public Workshop on Consumer Information Security* (Mar. 12, 2002), available at <http://www.ftc.gov/opa/2002/03/security.htm>.

24. *United States v. The Ohio Art Co.,* No. 3:02CV7203 (N.D. Ohio filed Apr. 19, 2002); *United States v. American Pop Corn Co.*, No. C02-4008DEO (N.D. Iowa Feb. 28, 2002) (consent decree); *United States v. Lisa Frank, Inc.*, No. 01-1516-A (E.D. Va. Oct. 3, 2001) (consent decree); *United States v. Looksmart, Ltd.*, No. 01-606-A (E.D. Va. Apr. 23, 2001) (consent decree); *United States v. Bigmailbox.com, Inc.*, No. 01-605-A (E.D. Va Apr. 23, 2001) (consent decree); *United States v. Monarch Servs., Inc.*, No. AMD 01 CV 1165 (D. Md. Apr. 20, 2001) (consent decree).

25. *Eli Lilly & Company*, Docket No. C-4047, (May 10, 2002) (final order).

26. 15 U.S.C. § 6801.

27. *FTC v. Information Search, Inc.*, No. AMD-01-1121 (D. Md. Mar. 15, 2002); *FTC v. Guzzetta*, No. CV-01-2335 (E.D.N.Y. Feb. 25, 2002); *FTC v. Garrett*, No. H 01-1225 (S.D. Tex. Mar. 26, 2002).

28. The cases challenging the misuse of preacquired account information and deceptive spam also involved issues of fraud.

29. *TechnoBrands, Inc., and Charles J. Anton,* Docket No. C-4041 (Apr. 15, 2002) (decision and order), available at <http://www.ftc.gov/os/2002/04/technobranddo.pdf>; *FTC v. Technobrands, Inc.*, No. 3:02-CV-86 (E.D. Va. filed Feb.15, 2002); *FTC v. Ira Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. filed Oct. 23, 2001).

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30. *FTC v. Boivin*, No. 8:02-CV-77-T-26 MSS (M.D. Fla. Jan. 15, 2002) (consent decree); *FTC v. Estenson*, No. A3-02-10 (DND Feb. 5, 2002) (consent decree); *FTC v. Larsen*, No. 8:02-CV-76-T-26MAP (M.D. Fla. Jan. 16, 2002) (consent decree); *FTC v. Lutheran*, No. 02 CV 0095 K (RAB) (S.D. Cal. Jan. 18, 2002) (consent decree); FTC v. Va, No. 02-60062-Civ-Zloch (S.D. Fla. Jan. 18, 2002) (consent decree); *FTC v. Pacheco*, No. 02-CV-31L (D.R.I. Jan. 22, 2002) (consent decree).

31. *FTC v. BTV Industries*, No. CV-S-02-0437-LRH (PAL) (D. Nev. filed Mar. 7, 2002).

32. Katharine Levit *et al., Inflation Spurs Health Spending in 2000*, 21 Health Affairs 172 (Jan. - Feb. 2002).

33. *FTC v. Vital Living Products, Inc.*, No. 3:02CV74-MU (W.D. N.C. Mar. 13, 2002).

34. *FTC v. Pletschke,* Docket No. C-4040 (Feb. 22, 2002) (decision and order).

35. The titles of the teaser sites are: Looking for Financial Freedom?; The Ultimate Prosperity Page; Nordicalite Weight Loss Product; A+ Fast Ca$$h for College; EZTravel: Be an Independent agent; EZTravel: Certificate of Notification; EZToyz Investment Opportunity; HUD Tracer Association; CreditMenders Credit Repair; NetOpportunities: Internet is a Gold Mine; National Business Trainers Seminars; VirilityPlus: Natural Alternative to Viagra; ArthritiCure: Be Pain-Free Forever.

36. Commissioner Sheila F. Anthony, Remarks Before the Food & Drug Law Institute, 45th Annual Educational Conference, *Combating Deception in Dietary Supplement Advertising* (Apr. 16, 2002), available at <http://www.ftc.gov/speeches/anthony/dssp2.htm>.

37. *See* National Health Expenditures, by Source of Funds and Type of Expenditures, Health Care Financing Administration, available at <http://www.hcfa.gov/stats/nhe-oact/tables/t3.htm>

38. *FTC v. The Hearst Trust, The Hearst Corp., and First DataBank, Inc.,* Civ Act. No.1:01CV00734 (D.D.C. Apr. 5, 2001) (complaint) (Commissioner Leary and Commissioner Swindle dissenting).

39. *FTC v. Hearst*, Civ. Act. No. 1:01CV00734 (D.D.C. Nov. 9, 2001) (Stipulation for Entry of Final Order and Stipulated Permanent Injunction).

40. Congressional Budget Office, How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry (July 1998), available at <http://www.cbo.gov>.

41. *Id*.

42. *See* Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 *et seq*. The Hatch-Waxman amendments were contained in the Drug Price Competition and Patent Restoration Act of 1984,

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Pub. L. No. 98-417, 98 Stat. 1585 (codified at 15 U.S.C. §§ 68b, 68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282 (1984)).

43. *Schering-Plough Corp*., Dkt. 9297 (Apr. 2, 2002) (consent order as to American Home Products). In an initial decision filed on June 27, 2002, an FTC Administrative Law Judge (ALJ) dismissed all allegations of anticompetitive conduct in a March 2001 Federal Trade Commission complaint against pharmaceutical manufacturers Schering-Plough Corporation (Schering) and Upsher-Smith Laboratories (Upsher-Smith). *Schering-Plough Corp*., Dkt. 9297 (June 27, 2002) (initial decision) (available at <http://www.ftc.gov/os/2002/07/scheringinitialdecisionp1.pdf, and http://www.ftc.gov/os/2002/07/scheringinitialdecisionp2.pdf . An appeal is pending with the Commission.

44. *Biovail Corp.,* File No. 011-0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment).

45. *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss *available at* <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

46. *In re Buspirone,* 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

47. *Biovail Corp.,* File No. 011-0132 (June 27, 2002) (proposed consent order accepted for placement on public record for comment).

48. See Thomas B. Leary, Commissioner, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes, Part II,* Remarks Before the American Bar Association's Antitrust Healthcare Program, Washington, D.C., (May 17, 2001) <http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.htm>; Thomas B. Leary, Commissioner, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes*, Address Before the Sixth Annual Antitrust Healthcare Forum, Northwestern University School of Law, Chicago, Illinois (Nov. 3, 2000), available at <http://www.ftc.gov/speeches/leary/learypharma.htm>. The Commission also submitted testimony this Spring on competition in the pharmaceutical industry before the Committee on Commerce, Science, and Transportation, U.S. Senate. The testimony is available at <http://www.ftc.gov/os/2002/04/pharmtestimony.htm>.

49. *See* 65 Fed. Reg. 61334 (Oct. 17, 2000); 66 Fed. Reg. 12512 (Feb. 27, 2001).

50. *Physician Integrated Servs. of Denver, Inc., Michael J. Guese, M.D., and Marcia L. Brauchler*, File No. 011-0173 (May 13, 2002) (proposed consent order accepted for placement on public record for comment); *Aurora Associated Primary Care Physicians, L.L.C., Richard A. Patt, M.D., Gary L. Gaede, M.D., and Marcia L. Brauchler*, File No. 011-0174 (May 13, 2002) (proposed consent order accepted for placement on public record for comment).

51. *Obstetrics and Gynecology Med. Corp. of Napa Valley*, File No. 011-0153 (May 14, 2002) (final order).

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52. *Chevron Corp./Texaco Inc*., Docket No. C-4023 (Jan. 2, 2002) (consent order).

53. *Valero Energy Corp./Ultramar Diamond Shamrock Corp.*, Docket No. C-4031 (Feb. 19, 2002) (consent order).

54. *Phillips Petroleum Corp./Tosco Corp.*, File No. 011-0095 (Sept. 17, 2001) (Statement of the Commission).

55. For example, an FTC study of the broadcasting industry influenced passage of the Radio Act of 1927 (a predecessor to the Federal Communications Act of 1934), and the FTC's disclosure of securities abuses played a role in heightening Congressional recognition of the need for securities regulation and led to the Securities Act of 1933.

56. Staff of the Federal Trade Commission, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (May 1996).

57. Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to The Honorable John B. Harwood, Speaker of the Rhode Island House of Representatives (regarding proposed bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities) (Mar. 29, 2002); Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to Ethics Committee, North Carolina State Bar (regarding North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions) (Dec. 14, 2001); and Comments of The Staff of the Federal Trade Commission, Intervenor, *In Re: Declaratory Ruling Proceeding On the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* (Ct. Bd. Of Examiners for Opticians, Mar. 27, 2002).

58. *Rambus Inc.*, Docket No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

59. *Id.*

60. In 1996, the FTC brought a similar case against Dell Computer, alleging that Dell had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. *Dell Computer Co.*, Docket No. C-3658 (May 20, 1996) (consent order) (Commissioner Azcuenaga dissenting).

61. *See* 66 Fed. Reg. 58146 (Nov. 20, 2001).

62. Federal Trade Commission, Public Workshop: The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues (Feb. 2002), available at <http://www.ftc.gov/bcp/reports/wirelesssummary/pdf>.

63. Press Release, *U.S., Canadian Law Enforcers Target Cross-Border Telemarketing* (June 10, 2002), available at <http://www.ftc.gov/opa/2002/06/crossborder.htm>.

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64. Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Sept. 2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

65. *See* Conf. Rep. No. 107-278, at 162 (Nov. 9, 2001).

66. Federal Trade Commission, Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Apr. 2001), available at <http://www.ftc.gov/reports/violence/violence010423.pdf>.

67. Federal Trade Commission, Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Dec. 2001), available at <http://www.ftc.gov/os/2001/12/violencereport1.pdf>.

68. Federal Trade Commission, Marketing Violent Entertainment to Children: A Twenty-One Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (June 2002), available at <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf>.

69. Press Release, *FTC Warns Consumers about Online Gambling and Children* (June 26, 2002), available at <http://www.ftc.gov/opa/2002/06/onlinegambling.htm>.

70. *See* Press Release, *FTC Initiates "Best Practices Analysis" for Merger Review Process* (Mar. 15, 2002), available at <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

71. *See, e.g., FTC v. Verity Int'l, Ltd.*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002).

72. The Securities and Exchange Commission (SEC) currently has authority to accept payment and reimbursement for investigative or other assistance that it provides to a foreign securities authority. *See* 15 U.S.C. § 78d(f). If Congress were to grant the FTC similar authority, that would permit the agency to accept reimbursement from foreign or domestic law enforcement authorities for services provided or for cooperative investigative or law enforcement activities.

73. *See* 5 U.S.C. App. 4, §403(b); 47 U.S.C. § 154(g)(3); and 15 U.S.C. § 2076(b)(6).

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