ANTITRUST ENFORCEMENT AGENCIES: THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE AND THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION

HEARING

BEFORE THE

TASK FORCE ON ANTITRUST

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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Note: The Task Force on Antitrust was established on March 26, 2003 and consists of all the Members of the full Judiciary Committee.

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ANTITRUST ENFORCEMENT AGENCIES: THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE AND THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION

THURSDAY, JULY 24, 2003

HOUSE OF REPRESENTATIVES,
TASK FORCE ON ANTITRUST,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force on Antitrust met, pursuant to call, at 2:04 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith presiding.

Mr. SMITH. The Task Force on Antitrust of the Committee on the Judiciary will come to order. I am going to recognize Members for their opening statements, and then we will move to introduce the witnesses.

I do want to say to the witnesses and to the people who are in the room that, for good or for bad, we expect about eight votes in half an hour, and so we do expect to take a fairly lengthy recess at that point. But we certainly want to get through the witnesses' testimony by that time and perhaps ask a few questions.

I will recognize myself for purposes of an opening statement.

And, again, today is an oversight hearing on the Antitrust Enforcement Agencies: the Antitrust Division of the Department of Justice, and the Bureau of Competition of the Federal Trade Commission.

The Committee on the Judiciary has exclusive jurisdiction over America's antitrust laws. Today's hearing will focus on the Federal agencies charged with enforcing the antitrust laws, the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission. This Committee last conducted a general oversight hearing on these agencies 3 years ago, and the Chairman intends to conduct a general oversight hearing of this nature on a more regular basis.

Last year, corporate mergers and acquisitions totalled $460 billion. While last year's total was less than that reached in 2001, increasing consolidation in key national markets only underlines the importance of aggressively enforcing antitrust laws in a manner that promotes competition and maximizes the consumer welfare of all Americans. As Justice Thurgood Marshall observed, antitrust laws are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom in our free enterprise sys-

tem as the Bill of Rights is to the protection of our fundamental personal freedoms.

The Antitrust Enforcement Agencies are charged with adapting essentially static antitrust laws to rapidly changing economic circumstances. This has led some to question the efficiency of existing antitrust law and its application to the new information-based economy. As Judge Richard Posner has observed, "The mismatch between law time and new economy real-time is troubling, because an antitrust case involving a new-economy firm may drag on for so long, relative to the changing conditions of the industry, as to become irrelevant and ineffectual."

This Committee has worked to ensure that the antitrust laws reflect the shifting needs of the modern economy. Last Congress, this Committee reported legislation to create the Antitrust Modernization Commission, which will examine key antitrust issues, including the intersection between antitrust and intellectual property, the role of State agencies in antitrust enforcement, international antitrust enforcement, and other issues.

With respect to international antitrust, some have expressed concerns that foreign antitrust authorities have applied their antitrust laws in a discriminatory manner that unfairly advances foreign commercial interest at the expense of American businesses and American jobs. Others have expressed concerns about the lengthy period of time required for civil nonmerger investigations at both antitrust agencies.

While I recognize that complex and novel issues are often presented, protracted delays during merger and nonmerger investigations may hinder the ability of innovative companies to bring competition and choice to consumers.

There are other areas of particular interest to this panel. This Committee played a critical role in drafting market opening provisions in the Telecommunications Act of 1996. The policy compromise upon which this legislation was predicated permitted the Bell Companies to compete in the long distance market if they opened their own markets to competition. Section 271 of the Telecom Act ensured that the Department of Justice would play an important role in reviewing Bell Company applications for long distance entry to ensure that reciprocal opportunities for local nonincumbents existed.

Over the last 6 years, the Antitrust Division has reviewed section 271 applications in over 40 States. In its recent Triennial Review rulemaking, the Federal Communications Commission examined unbundling and line-sharing obligations that have helped form the basis of effective local telephone competition.

While the Telecom Act provides no statutory mechanism compelling Antitrust Agencies to consult with the FCC during these proceedings, the antitrust implications of these reviews may necessitate a more proactive role from either or both of the agencies represented here today.

This Committee is also closely monitoring the Supreme Court's review of the *Trinko Decision* which concerns the continued application of the antitrust laws to the telecommunications industry and judicial deference to the explicit antitrust savings clause contained in the Telecommunications Act of 1996.

In addition, the SEC recently voted to substantially liberalize broadcast media ownership rules, a decision some believe might undermine the localism and consumer choice that are essential to a vibrant marketplace of ideas.

While the Chairman of this Committee intends to conduct a hearing on this subject in the near future, it is his hope that the considerable antitrust expertise of both agencies is not ignored during these critical proceedings.

In the coming months, this Committee's Task Force on Antitrust will conduct a series of robust hearings on current antitrust topics ranging from broadcast media ownership to the antitrust implications of college athletic conferences.

The Chairman wishes to thank the witnesses in advance for appearing at today's hearing, and to assure them that the testimony we receive will help this Committee better assess the needs, activities, and priorities of the vital agencies that each of you all represent.

The gentleman from Michigan, the Ranking Member of this Committee, is now recognized for his opening statement.

Mr. CONYERS. Thank you, Chairman Lamar Smith. I am happy to be here. I have always had an interest in this activity. And I want to commend you for the numbers of hearings and subject matters that you propose.

Now, I don't want to get our two guest witnesses in trouble, but you seem to be doing a pretty good job, guys, and I don't know what they are going to do with this information downtown when I—I mean, maybe I should really come on at you real hard this afternoon, so everybody will sleep more comfortably tonight.

But I think we are starting off in some good directions, I think, the Antitrust and FTC. I welcome you here, and I hope that we have a continuing exchange of ideas and suggestions, issues over and above the formal hearings that we both feel are required. And I know Lamar will join me in that.

Now, somebody besides me is troubled by the historical line of increasing mergers, consolidations, takeovers, that have marked the last generation. And it is not that we can sit around the table and turn that around, but I think what it means is it has to be analyzed and to be understood. We are in an economy where in Detroit, right this moment the big three automakers and the Union of the Collective Bargaining Representatives are in negotiations.

And outside of health care considerations, the next issue on the table is, how many plants are we going to close down? How many more thousands of people from which automobile lines are going to be closed up? And yet, at the same time, there are mergers going on at a pace—and I might as well tack on the other part of it, is that foreign car makers each year get a little bit more of the American car market. And I know this takes us into—and this is one of the things we want to talk about. It takes us into the whole area that, let us face it, some auto makers abroad are subsidized by their government. Many of their workers work at a fraction of the remuneration that our automobile employees, under collective bargaining agreements, work. There are many reasons for these things, but I think that this not only bears some analysis on our

part, it may be the subject of a hearing, but I think our meetings in between the hearings could be very, very important.

The one sad note that I have to bring to your attention is the Univision merger. And I will say no more about it, but I think that that impact on the Hispanic community is not going to be beneficial. And, with that, I would turn back any time I have.

Mr. DELAHUNT. Would you yield?

Mr. CONYERS. Sure. I would be happy to yield to the gentleman from Massachusetts.

Mr. DELAHUNT. First of all, I want to publicly state that I really think that what the Chairman has done in terms of the creation of this task force is extremely important. And I think the work that both the FTC and DOJ Antitrust Division does is probably as important as any work that is done by a Government agency in terms of the impact on our economy and our way of life. And I really want to applaud Chairman Sensenbrenner and Chairman Smith. And I would associate myself with the remarks by the Ranking Member, Mr. Conyers.

And the concern that I have—and maybe you can address this in your testimony—is, do you have enough resources to do the job? Because this, I think in terms of magnitude, will only increase, particularly in the areas we talk about, the global economy, the international antitrust issues. And if you don't have the resources, I know that OMB gets very upset with you and gets angry, but, you know, let us make believe that this is a hearing where no one else is present, and that it is—I don't want to call it a secret hearing, but one that promotes candor and frankness. Because if you don't have the tools, if you don't have the resources to do this, we are going to pay for it otherwise.

With that, I yield back.

Mr. SMITH. Thank you, Mr. Conyers. Thank you, Mr. Delahunt.

What I would like to do is to introduce the witnesses, and then we will recess for the series of eight votes, and then reconvene an hour later, just so you all can plan and so that people who are in the audience can plan as well.

Our first witness is the Honorable R. Hewitt Pate, Assistant Attorney General for Antitrust at the U.S. Department of Justice. Mr. Pate was nominated by President Bush and confirmed by the Senate as Assistant Attorney General for Antitrust on June 16, 2003. Prior to his Senate confirmation, Mr. Pate served as Acting Assistant Attorney General for the Antitrust Division since November 23, 2002. Prior to that, Mr. Pate was a Deputy Assistant Attorney General in the Antitrust Division, a position he has occupied since June 3, 2001.

Prior to his appointment to the Antitrust Division, Mr. Pate practiced law at Hunton & Williams, where he was a partner on the firm's antitrust team and was involved in litigating cases related to regulation of the competitive process, including antitrust, patent, trademark, trade secrets, false advertising, and other business torts.

After graduating from law school, Mr. Pate clerked for Supreme Court Justice Anthony Kennedy, former Supreme Court Justice Louis F. Powell, Jr., and Judge Harvey Wilkinson, III, U.S. Court of Appeals for the Fourth Circuit.

Mr. Pate was a frequent lecturer and author of articles related to antitrust and other legal matters. In 1999, he served as the Ewald Distinguished Visiting Professor of Law at the University of Virginia.

Mr. Pate received his bachelor's degree with honors from the University of North Carolina in 1984, and earned his law degree from the University of Virginia in 1987, where he graduated first in his class and was a member of the Order of the Coif. Mr. Pate is a member of the Virginia and District of Columbia bars, and past Chair of the Virginia Bar Antitrust Section. He is also a member of the American Bar Association, the Federalist Society, and the Fourth Circuit Judicial Conference. And we welcome Assistant Attorney General Pate.

Our second witness is the Honorable Timothy J. Muris, Chairman of the Federal Trade Commission. Mr. Muris was sworn in June 4, 2001, as Chairman of the FTC. Prior to serving as Chairman, Mr. Muris has held three previous positions at the Federal Trade Commission. From 1974 to 1976, he was Assistant Director of the Planning Office; from 1981 to 1983, he was Director of the Bureau of Consumer Protection. And from 1983 to 1985, he was Director of the Bureau of Competition.

Mr. Muris also served with the Executive Office of the President Office of Management and Budget for 3 years. He has also been a law professor at George Mason University School of Law and interim dean of the law school from 1996 to 1997. Mr. Muris has also spent time in the private sector, and was of counsel with the law firm of Collier, Shannon, Rill & Scott, and with the firm of Howrey, Simon, Arnold & White.

Mr. Muris graduated with high honors from San Diego State University in 1971, and received his JD from UCLA in 1974. He is a member of the American Bar Association's Antitrust Section, and has written widely on antitrust, consumer protection, regulatory, and budget issues.

Mr. Muris resides in Oakton, Virginia, with his wife, Pamela Harmon, and three children. Welcome, Chairman Muris, as well.

Without objection, although there are no other Members here, we will make their opening statements a part of the record. And the Committee will now stand in recess until 3:15 just so people can make plans accordingly.

[Recess.]

Mr. SMITH. The Task Force on Antitrust of the Judiciary Committee will reconvene.

Thank you all for your patience. The votes obviously took longer than we expected. We hope it will not deter our witnesses from appearing before us again in the future, but this is very unusual, it being the last week before we adjourn for the August District Work Period.

We now go to our witnesses, and we look forward to their testimony. And, General Pate, we will begin with you.

STATEMENT OF R. HEWITT PATE, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. PATE. Thank you very much, Chairman Smith. It is a privilege to be here before the Committee today to talk about the activities of the Antitrust Division.

As the Members of your Committee are well aware, competition is the cornerstone of our Nation's economic foundation, and antitrust enforcement promotes and protects a robust free-market activity, helps consumers obtain innovative, high-quality goods and services, and to obtain those at lower prices.

Antitrust enforcement has really enjoyed tremendous bipartisan support, and we are very appreciative to the Members of this Committee for that. I would like to particularly recognize Chairman Sensenbrenner's efforts and those of others on the Committee in putting in place the Antitrust Modernization Commission. We look forward to working with that Commission as it explores ways that we can improve and strengthen antitrust enforcement in the United States.

I would like to spend just a few minutes, if I may, highlighting three major enforcement areas for the Division.

First, our criminal program, which detects, punishes, and deters price fixing and other types of illegal cartel behavior. Secondly, our merger review program, which prevents anticompetitive combinations that can lead to higher prices or to greater opportunities for collusive behavior. And then, finally, I will mention some aspects of our civil nonmerger program.

On the criminal enforcement side, this is a core priority of the Division. And the reason for that is that cartel activity robs U.S. consumers and businesses of literally hundreds of millions of dollars each year. And this occurs over a wide range of products.

During the current fiscal year, the Antitrust Division has been very active. We have already obtained almost $60 million in criminal fines, and obtained convictions of 11 corporations and 17 individuals. In the past fiscal year, we obtained $75 million in fines, with convictions of 20 corporations and 23 individuals. And at the Division, our emphasis has been on seeking longer and more certain prison terms, because we believe that—as opposed to fines, which often, even when they are imposed in large amounts, can be seen as a cost of doing business by some of these corporations who are involved—prison sentences are the real and most effective deterrent in this area. And we have obtained in the last fiscal year 10,000 jail days of prison time and increased the average sentence to approximately 18 months, which is an all-time high for the Division. And we are at approximately that pace this year.

We focus not only on international cartels, which are important because of their breadth and the range of the illegal activity they can involve, but also local conduct in the United States.

Our amnesty program is really the key driver to the success of our criminal program. By allowing leniency for one participant in a cartel who comes in and exposes illegal conduct, this allows us to prevent cartels from forming, to destabilize those that do form, and to get reports of criminal activity that would otherwise go undiscovered. We want to look at ways of improving this leniency program.

And more fundamentally, we will look forward to working with this Committee, because I think the time has come to consider whether it would be appropriate to increase the criminal penalties associated with antitrust violations, particularly in the wake of the Sarbanes-Oxley legislation which has raised the minimum prison terms and penalties associated with mail fraud, wire fraud, and other offenses that we often see in tandem with antitrust misconduct. We want to make sure that antitrust criminal behavior brings with it the type of penalties that reflect its seriousness in terms of the damage it does to consumers and to our economy.

On the merger enforcement side, as you know, another key part of the Division's mission is enforcing section 7 of the Clayton Act. We do this through section 7A of the Clayton Act, the Hart-Scott-Rodino Act, which requires reporting of mergers of a certain size.

Certainly a big story there has been that the merger wave of the late 1990's has very much retreated from the dizzying pace that you saw there, and merger filings are still dramatically down from what they were at the height of the late-1990's activity.

Thus far this fiscal year, the Division has opened 73 preliminary investigations and issued second requests for additional information in 16 of those investigations, and we have brought challenges to 13 mergers. Among those investigations that are currently pending that are of significance, the News Corporation/DirectTV transaction, First Data/Concord, and GE/Instrumentarium are occupying a good deal of time at the Division.

Since June of 2001, when I began working at the Division, we have successfully challenged 20 of the 21 transactions that we deemed anticompetitive. We have resolved six of those by consent decree, nine through a restructuring of the transaction, four were abandoned after we indicated we would challenge the transaction, and two—the General Dynamics/Newport News and DirectTV/Echostar transactions—were abandoned after the Division filed suit.

As to our civil nonmerger program, these involve cases other than criminal prosecutions based on anticompetitive conduct challenged under the Sherman Act. We have been very active in this area as well. Perhaps the best-known case is the *Microsoft* case, in which we continue to be active in enforcing the decree, the consent decree that the Division obtained following the court of appeals's opinion in that case. Just this morning, Division attorneys were in court with Judge Kollar-Kotelly for a status conference. I am pleased to say that we have managed to obtain significant improvements, particularly with respect to Microsoft's licensing terms, which have been a subject of some interest with respect to the enforcement of the settlement.

We are going to vigorously monitor Microsoft's compliance with the settlement to make sure that consumers get the full benefit of the settlement.

A final activity that I will mention, since you mentioned it, Mr. Chairman, in your opening statement, is our work in the telecom area. We have been very active in section 271 reviews of RBOC applications to enter local service provision in a variety of markets. That process has taken a good deal longer than some thought that it should, but we have been very diligent in trying to ensure that

the Regional Bell Operating Companies put in place an operating system and other conditions that are going to lead to the introduction of competition in those areas. We are moving in that direction and moving toward the end of that process. And with the ability of different firms to offer packages of telecom service, and with the appearance on the scene of more significant cable telephany, we hope to see an improving outlook for competition there.

We have been active in other areas as well, which I won't detail—gun-jumping, market-allocation cases, and others. We want to work to continue to improve the timeliness of our civil nonmerger activity to make sure that cases don't go on longer than they should and to make sure we are moving swiftly to get relief for consumers.

We will continue to be active on the international front as globalization continues. Over 100 countries now have some form of national or regional antitrust enforcement regime, and so this is going to need to be a continued focus of the Division, working together with the Federal Trade Commission, through a variety of institutions such as the International Competition Network, the OECD, and others to make sure that antitrust enforcement on a global basis goes forward on sound terms.

Mr. SMITH. General Pate, just as you don't want those cases to go on longer than they should, we are going to need to move on to the next testimony as well.

Mr. PATE. Well, if I might conclude, then, just to say on resources, since it was raised, we appreciate the support we have gotten from this Committee. We are in with a request this year for a $141 million budget, which we think is a judicious request. I know right now we are looking at a figure of about $128 million in the mark that is currently there, and I hope that the Committee will take seriously our need for sufficient resources to do our important work.

I appreciate the opportunity to be here today.

Mr. SMITH. Thank you, General Pate.

[The prepared statement of Mr. Pate follows:]

PREPARED STATEMENT OF R. HEWITT PATE

Good afternoon, Mr. Chairman and members of the committee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to discuss the Division and its enforcement activities to protect consumers and businesses through sound and vigorous antitrust enforcement.

As members of this Committee appreciate, competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy. It has helped American consumers obtain more innovative, high- quality goods and services at lower prices; and it has strengthened the competitiveness of American businesses in the global marketplace.

That is not the same as guaranteeing the success of any particular competitor; we are not in the business of picking winners and losers, or dictating how a market should be structured. Those decisions should be made by competitive market forces. The goal of antitrust enforcement is to ensure that anticompetitive agreements, conduct, and mergers do not distort market outcomes.

Antitrust enforcement has enjoyed substantial bipartisan support through the years, and we appreciate this Committee's active interest in and strong support for our law enforcement mission.

The first part of my testimony today will review recent developments in the Division's three core enforcement programs: criminal, merger, and civil non-merger. Then I will describe some ongoing international and policy developments at the

Antitrust Division to strengthen the foundation for effective antitrust enforcement here and around the world.

ENFORCEMENT ACTIVITIES

Let me spend a few minutes highlighting some of the Antitrust Division's recent work in each of these three major enforcement areas. In brief, the Antitrust Division's criminal program detects, punishes and deters price-fixing and other illegal conduct by those who conspire to cheat consumers rather than compete to win their business. Our merger review program prevents anticompetitive combinations that can lead to higher prices or to increased opportunities for collusive behavior. And our civil non-merger program prevents the unlawful creation or abuse of monopoly power.

Criminal Enforcement

Criminal enforcement remains a core priority, and we are continuing to move forcefully against hard-core antitrust violations such as price-fixing, bid-rigging, and market allocation. Cartel activity essentially robs U.S. consumers and businesses of many hundreds of millions of dollars annually. This causes higher prices for virtually all consumers because of the wide range of products that cartel activity implicates, such as school milk, electricity, clothing, and food products, just to mention a few areas of prosecutions in recent years.

During the current fiscal year, the Antitrust Division has obtained almost $60 million in criminal fines, with convictions of 11 corporations and 17 individuals; in the previous fiscal year, the Division obtained over $75 million in fines, with convictions of 20 corporations and 23 individuals. We have continued a recent trend toward more certain and longer prison terms for individual antitrust offenders. In the last fiscal year, defendants in Division prosecutions received more than 10,000 days of jail time—a record high—with convicted individuals receiving sentences averaging more than 18 months, another record high average that is continuing thus far in the current fiscal year.

The following cases from the last couple of years give good examples of the types of jail time we have been successful in pursuing: (i) the prosecution of Sotheby's former Chairman, Alfred Taubman, who was convicted after trial and sentenced to a year and a day in prison and a $7.5 million fine for his role in the auction-house price-fixing scheme between Sotheby's and Christie's; (ii) the three-year jail term imposed on Elmore Roy Anderson for rigging USAID bids and defrauding USAID in connection with construction work in Egypt that the U.S. government funded as part of the Camp David Peace Accords; (iii) the 63-month jail term imposed on Melvyn Merberg for his role in rigging bids submitted to, and defrauding, Newark public schools and other government, not-for-profit, and private entities in the New York City metropolitan area; and (iv) a record-breaking ten-year sentence imposed on Austin "Sonny" Shelton, a former Guam government official, for orchestrating a bid-rigging, bribery, and money-laundering scheme involving FEMA-funded contracts in Guam.

We have maintained a strong focus on international cartels because of the tremendous volume of commerce typically associated with such conspiracies. Currently, there are almost 50 sitting grand juries investigating international cartel activity. But we are committed to rooting out criminal anticompetitive conduct wherever it occurs, and have more than 70 grand juries investigating domestic cartels. Many of our recent criminal cases have been significant domestic cases involving price fixing and bid-rigging.

Some of our recent criminal prosecutions include the following:

- In April of this year, two more individuals pled guilty to participating in a conspiracy to rig bids and allocate markets for advertising printing and graphics in the New York City area. This is a continuing investigation that since September 2002 has resulted in 13 guilty pleas, with two additional defendants scheduled for trial this October. Thus far, three defendants have been sentenced to prison terms of 37, 21, and 15 months, and an additional defendant has agreed to a prison term of 63–78 months when he is sentenced later this year. In addition, these defendants have been ordered to pay millions in restitution to victims and back taxes to the IRS. The charges arose out of wide-ranging bid-rigging and kickback schemes, pursuant to which the advertising executives subverted competitive bidding requirements and steered valuable contracts to suppliers who gave them cash, airline tickets, expensive clothing, limo service, and other kickbacks.
- In February of this year, Hoechst A.G., an international chemical conglomerate based in Germany, pled guilty and agreed to a $12 million fine for its

role in a conspiracy that suppressed competition in the world markets for monochloroacetic acid (referred to as "MCAA"), an industrial chemical used in the production of commercial and consumer products including pharmaceuticals, herbicides, and plastic additives. Hoechst was the third company to plead guilty and accept a multi-million-dollar fine in this ongoing investigation, following Dutch company Akzo Nobel Chemicals B.V.'s $12 million fine and French company Elf Atochem's $5 million fine. The top executive of each company agreed to serve 3 months in prison.

- In November 2002, Morganite, Inc., pled guilty to participating in a decade-long international cartel to fix prices for carbon brushes and collectors used to transfer electrical current in direct current motors, and agreed to pay a $10 million fine. At the same time, the company's UK parent, Morgan Crucible Co. PLC, pled guilty to obstructing our investigation by giving us false information in an attempt to convince us that their price-fixing meetings with competitors were legitimate business meetings and by composing a written script containing this false information for a co-conspirator to use in answering Division questions. The parent company agreed to pay a $1 million fine.
- In October 2002, Arteva Specialties S.a.r.l., a Luxembourg company doing business out of Charlotte, North Carolina as KoSa, pled guilty to price-fixing and market allocation in polyester staple, a synthetic fiber used in textile products such as clothing, table and bedding linens, upholsteries, carpeting, and air and water filters. The company agreed to pay a $28.5 million fine, and its former director of textile staples pled guilty and agreed to eight months in prison and a $20,000 fine. This is part of a continuing investigation.

Other markets where the Antitrust Division has brought recent criminal prosecutions include: industrial chemical markets for organic peroxides, used in the manufacture of polyvinyl chloride, low-density polyethylene, and most polystyrene products such as containers and packaging; carbon cathode block, a heat- and chemical-resistant product used in aluminum smelters; nucleotides, used to enhance food flavor; magnetic iron oxide (MIO) particles, used in the manufacture of video and audio tapes; tactile tile; scrap metal; automotive tooling; industrial pumps used in wastewater treatment equipment; vitamins used in human nutritional supplements and livestock feed additives; federal highway construction contracting; home improvement contracting; periodical magazine distribution; sheriff's auctions; collectible stamp auctions; and automotive replacement glass.

The Division's corporate leniency, or amnesty, program continues to be our most active generator of criminal investigations. Under the Division's corporate leniency policy, a corporation that reports its illegal antitrust activity at an early stage will not be charged criminally for this activity if the company meets the requirements of the leniency program. For a corporation that comes forward after an investigation has begun to be eligible for leniency, the Division must not yet have evidence against the company that is likely to result in a sustainable conviction. Executives of the company who cooperate with the investigation are also covered by the leniency. Acceptance into the Division's leniency program can save a company tens of millions of dollars in fines and can avoid the prosecution and incarceration of its culpable executives.

This policy, while allowing leniency for one participant in the cartel, has tremendous benefits to enforcers and consumers. First, the mere possibility that one of the cartel members will get leniency if it is the first to come in to the Division works to prevent cartels from forming in the first place, because businesses have an increased risk they will be targeted for prosecution as a result of a fellow cartel member reporting on their illegal activities, subjecting them to heavy criminal fines and incarceration of their culpable executives. Second, even if a cartel does form, the benefits associated with the leniency policy lead to destabilization of the cartel by creating a powerful incentive for a company to report the cartel to antitrust authorities. Third, having a member of the cartel provide evidence to authorities helps ensure that prosecutions of the cartel are likely to be more successful than without such cooperation. Fourth, companies targeted for prosecution as a result of a particular grant of leniency not infrequently seek to negotiate a plea agreement and seek to obtain more lenient treatment than otherwise by reporting on activity of an unrelated cartel. Thus, the leniency program has something of a domino effect. One leniency grant may ultimately have the effect of enabling the Division to prosecute multiple cartels.

The Division's leniency policy is a very important factor behind the Division's increased ability to crack cartels in recent years; of course there are also other factors, including the Division's increasing use of search warrants and the increased assist-

ance provided by foreign antitrust authorities, including coordinated searches in multiple jurisdictions. We intend to continue to look for ways to improve the leniency program in order to destabilize and prosecute more cartels on behalf of American businesses and consumers. Notably, the Division's success with the leniency program has influenced antitrust authorities around the world to adopt or strengthen their own leniency policies. The European Union revised its leniency program last year to closely mirror our own, making it easier for corporations who need a "package deal" to come forward and cooperate.

In addition to leniency applications, the Division discovers antitrust violations from a variety of sources, including citizen complaints made to the Division's New Case Unit or to a Division field office, leads from foreign antitrust authorities, and news reports; leads may also come from a new entrant whom cartel members have tried to recruit into an ongoing antitrust conspiracy, a customer who has suspected price-fixing or bid-rigging, a disgruntled cartel member, or even a relative of a cartel member or industry insider.

While the increasing jail sentences and huge multi-million dollar fines that have characterized international cartel prosecutions are vitally important, the Antitrust Division does not limit its enforcement to those cases; we also prosecute multiple cases that, while seemingly small, are significant to the victims and to our overall efforts at deterrence. We are determined to bring antitrust violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those in our country and around the world who would victimize American consumers and the American marketplace. For that reason, I believe it is time to consider whether it is appropriate to increase the penalties associated with criminal antitrust violations. I look forward to working with this Committee on that issue.

Merger Enforcement

Another core element of the Division's enforcement mission is enforcing section 7 of the Clayton Act against mergers and acquisitions that may substantially lessen competition or tend to create a monopoly. Section 7 authorizes the Division to file suit to block anticompetitive mergers, and section 7A of the Clayton Act, known as the Hart- Scott-Rodino Antitrust Improvements Act, requires parties to most mergers above a certain dollar value threshold ($50 million) to file notification with the federal enforcement agencies and observe a prescribed waiting period in order to give the agencies adequate time to review the merger.

The merger wave of recent years has subsided from its dizzying heights of a few years ago. We received Hart-Scott-Rodino Act pre-merger filings for 1,187 transactions in Fiscal Year 2002, and have received filings for over 800 thus far this fiscal year, compared to over 4,500 in each of the previous two fiscal years. Part of that reduction is due to the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 2000, which significantly raised the HSR filing thresholds. Even so, it is apparent that merger activity is down.

Despite the slowdown, there are still many mergers that require careful review, and we are working hard to ensure that those transactions are receiving appropriate levels of scrutiny. Thus far this fiscal year, the Antitrust Division has opened 75 preliminary investigations, issued second requests for additional information to the parties in 16 of those investigations, and challenged 13 mergers. We have a number of important merger investigations ongoing, including investigations involving News Corp./DirectTV, First Data/Concord and GE/Instrumentarium, among others. We will closely examine those transactions, and all mergers we review, for potential anticompetitive impacts on consumers.

Since June 2001, the Division has challenged 34 mergers it deemed anticompetitive, and we have been successful in 31 of the 32 matters that have thus far reached a conclusion. Nine of these matters were resolved by consent decree, twelve through a "fix-it-first" restructuring, seven were abandoned after the Division indicated that it would file suit, and three—General Dynamics/Newport News, Hughes/Echostar, and SGL Carbon/ Carbide/Graphite Group—were abandoned after the Division filed suit. The Division was unsuccessful in seeking to block the Sungard/Comdisco merger, a transaction the Division asserted was likely substantially to lessen competition in the market for shared "hotsite" disaster recovery services. Two of the merger challenges remain in litigation.

The range of markets involved in these merger challenges includes airlines, airline reservation systems, banking, defense contracting, dairy processing, fresh bread, corn wet milling, molded doors and doorskins, industrial rapid prototyping systems, radio broadcasting, satellite multichannel video programming distribution, electric power, ready-mix concrete, college textbooks, computer-based testing, com-

puter processing center "hotsite" disaster recovery services, and nuclear submarine construction.

Some of our recent and significant recent merger challenges include:

- *UPM Kymmene OYI/MACtac.* The Division sued and had a preliminary injunction hearing last month in an effort to block a merger between Raflatac (a UPM subsidiary) and MACtac, the second and third largest producers of pressure sensitive labelstock in North America. Labelstock is the base material for labels used in a variety of applications that American consumers encounter every day, including shipping labels and supermarket scale labels. The Division concluded that the merger would facilitate coordination between the merged company and other North American producers of bulk paper labelstock, and would substantially reduce competition in the production of bulk paper labelstock and result in higher prices for bulk paper labelstock throughout the United States.
- *Northrop Grumman/TRW.* Northrop was one of only two U.S. companies that design, develop, and produce the payload used in reconnaissance satellites. TRW was one of only a few companies with the ability to serve as a prime contractor on U.S. government reconnaissance satellite programs. Since Defense Department contracts typically rely on the prime contractor to select sub-systems, Northrop's acquisition of TRW—which enabled it to be both prime contractor and payload provider for reconnaissance satellites—resulted in a vertical combination that could have substantially lessened competition in the development and sale of reconnaissance satellites systems used by the U.S. military, by giving Northrop the ability and incentive to lessen competition by favoring its in-house payload to the detriment or foreclosure of its payload competitors and by refusing to sell, or selling at disadvantageous terms, its payload to competing prime contractors. To prevent this result, the Division challenged the merger and entered into a consent decree requiring Northrop to act in a non-discriminatory manner in (1) choosing a payload for a satellite program where Northrop is acting as the prime contractor, and (2) supplying its payload to prime contractors competing with Northrop for U.S. satellite programs. The consent decree, fashioned in consultation with the Defense Department, also gives the Secretary of the Air Force significant power to ensure compliance with the consent decree, including the ability to ask the Department of Justice to seek civil penalties of up to $10 million for each violation of the decree.
- *Hughes/Echostar.* Hughes Electronics's DirecTV and Echostar's DISH Network were the only two significant direct broadcast satellite licensees in the United States. Their proposed merger would have created a monopoly in areas where cable television is not available, primarily rural areas, thereby eliminating competitive choice for millions of households. It also would have left tens of millions of other households—for whom DirecTV, DISH Network, and the local cable company now compete to provide multichannel video programming distribution service—with only two competitive choices. After the Division filed suit to block the merger as anticompetitive, the parties abandoned the merger.
- *Dairy Farmers of America/Southern Belle.* This 2002 merger between two dairy processors was not subject to the Hart-Scott-Rodino premerger notification requirements, because its dollar value fell below the statutory threshold for reporting, and the Division did not learn about it until after it had been completed. DFA's acquisition eliminated the only other independent bidder for school milk in the area, resulting in a monopoly in 47 school districts in Kentucky and Tennessee, and reduced the number of independent bidders from three to two in 54 other school districts in those two states. The Division filed suit in April of this year to require DFA to divest its interests in Southern Belle Dairy in order to restore competition for milk prices in those school districts. The enforcement action is pending.
- *General Dynamics/Newport News.* General Dynamics and Newport News were the only two nuclear-capable shipyards and the only designers and producers of nuclear submarines for the U.S. Navy. The two shipbuilders also led opposing teams to develop the next generation propulsion system for use in submarines and surface combatants, so-called electric drive. Our staff worked in close consultation with the Department of Defense, the only customer, in evaluating the proposed merger. Our complaint alleged that the combination would create a monopoly in nuclear submarine design and construction, and would substantially lessen competition for electric drive and surface combat-

ants. After the parties terminated their merger agreement, Newport News received a second bid from Northrop Grumman, which did not raise significant competitive issues.

- *Suiza/Dean.* Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk markets. The parties agreed to divest eleven dairies to National Dairy Holdings, L.P. (NDH), a newly formed partnership that is 50 percent owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza's supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.
- *United/USAirways.* At the time of the transaction, United and USAirways were the second and sixth largest U.S. airlines. The Division concluded that USAirways was United's most significant competitor on densely traveled, high-revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington D.C. and Baltimore, and on many routes up and down the East Coast. The acquisition would have given United a monopoly or duopoly on nonstop service on over 30 routes, where consumers spend over $1.6 billion annually, and would have substantially limited the competition it faced on numerous other routes representing over $4 billion in revenues. The parties abandoned the transaction after the Division indicated its intention to challenge it.
- *3D Systems/DTM.* The Division concluded that the acquisition as initially proposed would have substantially lessened competition in the U.S. industrial rapid prototyping systems market, by reducing the number of competitors in the U.S. market from three to two and limiting the dynamic competition that has resulted in lower prices to customers and technological improvements to rapid prototyping systems. Rapid prototyping is a process by which a machine transforms a computer design into three-dimensional objects, speeding the design process for everything from cellular phones to medical equipment. The Division filed suit to block the transaction, and subsequently reached a settlement with 3D Systems Corporation that allowed the company to go forward with its purchase of DTM Corporation, provided that 3D and DTM agreed to license their rapid prototyping patents to a company that will compete in the U.S. market. The settlement was designed to permit new entry by requiring 3D and DTM to license their rapid prototyping-related patents to a firm that will compete in the U.S. market and that currently manufactures rapid prototyping equipment.

We have also been very active in cases related to our merger enforcement program, filing several cases against "gun-jumping" and other violations of the Hart-Scott-Rodino premerger notification and waiting period requirements. It is important that merging parties strictly adhere to the requirements of the HSR Act and maintain their companies as separate and independent firms during the HSR waiting period.

In a case we filed against Gemstar and TV Guide in February of this year, we charged Gemstar with assuming premature control over TV Guide prior to its July 2000 acquisition, in violation of the HSR Act's pre-merger waiting period requirements, as well as with fixing prices and allocating customers in violation of section 1 of the Sherman Act. Starting in mid-1999, a full year before the merger, Gemstar and TV Guide had agreed to stop competing for customers, decided together on prices and terms to be offered, and jointly managed their interactive program guide business. Filed along with our complaint was a consent decree under which Gemstar agreed to pay a record civil penalty of $5.67 million, and that also gave customers that signed contracts with TV Guide during the pre-merger period a chance to rescind those contracts.

We brought similar case in September 2001 against Computer Associates International, Inc. and Platinum Technology International, Inc., charging that the parties had agreed that Platinum would limit the price discounts and other terms it offered its customers during the premerger waiting period, and that Computer Associates had obtained premature operational control of Platinum, prematurely reducing competition between the two companies. In April 2002, the Division entered into a consent decree with Computer Associates requiring the payment of $638,000 in civil penalties and prohibiting Computer Associates from agreeing on prices, approving or rejecting proposed customer contracts, or exchanging prospective bid information with any future merger partner.

Civil Non-merger Enforcement

Civil non-merger cases are cases, other than criminal prosecutions, that are based on anticompetitive conduct under the Sherman Act. We have been very active in this area as well.

The Division's best-known recent civil non-merger case is the Microsoft case. After the court of appeals rendered its decision narrowing the basis of liability and vacating the remedy, and ordering a new remedy hearing before a different district judge, we reached a settlement with Microsoft, which the district court approved and entered with minor revisions. The consent decree enjoins the conduct found to be unlawful from recurring and takes proactive steps to restore lost competition. All states that joined in the Division's enforcement action either joined in our settlement or have reached separate settlements with Microsoft, except for Massachusetts, which is appealing the district court's decision denying the vast majority of the additional relief it and eight other states had sought. We are not participating in that appeal, but we have filed appellate briefs supporting the decision by the district court to deny a motion by the Computer and Communications Industry Association and the Software & Information Industry Association to intervene in our case in order to appeal the court's approval of the settlement.

We are continuing to actively monitor Microsoft's compliance with the decree. In April, we prompted Microsoft to revise its terms for licensing to third parties certain technology used by Microsoft server operating system products to interoperate with Windows operating system products, to eliminate the non-disclosure agreement covering the licensing terms and to make the licenses more accessible and functional. Earlier this month we filed a compliance report with the district court describing our recent compliance enforcement activities, including a separate section written by Microsoft describing its compliance efforts. The Division remains committed to enforcing complete compliance with the consent decree.

Let me mention some other recent civil non-merger cases.

In January of this year, the Division filed a lawsuit against NT Media (New Times) and Village Voice Media, charging them with unlawful market allocation in violation of section 1 of the Sherman Act. New Times and Village Voice Media are the nation's two leading publishers of alternative news weeklies, and had been head-to-head competitors in publishing alternative news weeklies in Cleveland and Los Angeles. In October 2002, however, New Times agreed to shut down its Los Angeles news weekly, the New Times Los Angeles, if Village Voice Media would close its news weekly in Cleveland, the Cleveland Free Times. Thus, the companies "swapped" markets, leaving New Times with a monopoly in Cleveland and Village Voice Media with a monopoly in Los Angeles. The lawsuit was settled by consent decree, in which the parties agreed to terminate their illegal market allocation agreement, allow affected advertisers in Los Angeles and Cleveland to terminate their contracts, and divest the assets of the New Times Los Angeles and the Cleveland Free Times to new entrants in those markets.

Last December, the Division sued Mountain Health Care, an independent physicians organization in Asheville, North Carolina, charging that it was restraining price and other forms of competition among physicians in Western North Carolina by adopting a uniform fee schedule governing the prices of its participating physicians and negotiating with health plans on their behalf, resulting in higher rates charged to health plans, and ultimately higher health costs for ultimate consumers. The case was settled with a consent decree requiring Mountain Health to cease operations and dissolve.

Last summer, the Division sued The MathWorks Inc. and Wind River Systems Inc. to stop them from illegally allocating the markets for software used to design dynamic control systems. Dynamic control system design software enables engineers to develop the computerized control systems of sophisticated devices, such as antilock braking systems for automobiles, guidance and navigation control systems for unmanned spacecraft, and flight control systems for aircraft. High-technology products like these work behind the scenes to help build some of the most sophisticated products in our economy. We concluded that the "licensing" arrangement between the parties operated primarily to force the exit of the Wind River product from the market and to prevent it from re-emerging in the hands of some other party. The parties settled the case with a consent decree requiring The MathWorks to divest Wind River's design control software assets.

We also have cases currently in litigation. In our case against Visa and MasterCard, we are defending against an appeal challenging the district court's finding of partial liability—the district court found against the Division on its challenge to the dual governance structure, permitting member banks to simultaneously participate in management of both networks, but found for the Division on its challenge to the practice of prohibiting members from issuing competing cards. In the

case against Dentsply International for unlawfully maintaining its monopoly in the market for artificial teeth, we completed trial in May 2002, and post-trial briefing and argument last September, and are now awaiting the court's ruling.

INTERNATIONAL AND POLICY INITIATIVES

International

Increased economic globalization is continuing to create new challenges for antitrust enforcement. With corporations and corporate alliances stretching across the world, and with nearly 100 national and regional antitrust regimes now operating in the international arena, seeking convergence in procedure and substance where possible—without compromising sound enforcement principles—helps minimize the cost, complexity, and sheer uncertainty of enforcement and compliance that could otherwise become a major hindrance to procompetitive business activity and economic growth. Accordingly, we have continued working with antitrust enforcers abroad to forge effective cooperative relationships based on our core beliefs in competition.

A special focus has been the European Union, which stands as the most important antitrust enforcer outside our borders. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, the U.S. and EU enforcement agencies have been able to develop largely consistent competition policies, built on sound economic foundations directed at the goal of promoting consumer welfare through competition rather than on protecting firms from efficiency-enhancing mergers and other arrangements that may increase competitive pressures. The past two years have been among the most productive ever in our relationship, as a result of increased contact between senior antitrust officials on both sides of the Atlantic, as well as a reinvigorated U.S.-EU merger working group. The working group has analyzed important merger topics such as efficiencies and our differing policies towards conglomerate mergers. It has also developed a set of merger review "best practices" that the Division, the FTC, and the EC published last October.

In addition to our bilateral efforts with the EU, Canada, Japan, and others, we are also pursuing multilateral efforts to promote cooperation and convergence around sound antitrust principles, through the International Competition Network. The ICN, which we and the FTC helped take the lead in launching less than two years ago, has emerged as a global network of antitrust authorities from more than 70 developed and developing countries on six continents, representing nearly 90 percent of the world's Gross Domestic Product. Its virtual network structure, and its organization around diverse working groups that consult frequently and informally throughout the year, have enabled the ICN to produce meaningful results very quickly.

At an ICN conference last month in Merida, Mexico, we adopted guiding principles and recommended practices for merger notification and review procedures that had been prepared by the ICN Merger Review Working Group; the recommended practices are non-binding, and governments will implement them voluntarily, as appropriate. We also discussed efforts to assist new antitrust agencies in developing economies, as described in a report by the ICN Capacity Building and Competition Policy Implementation Working Group. And the Competition Advocacy Working Group led discussions on how competition advocacy efforts can promote procompetitive outcomes across other areas of government. The ICN also established a new working group on the role of competition enforcement in regulated sectors, and it agreed to explore the potential for work on the topic of cartel enforcement.

Through these and other international efforts, the Antitrust Division is committed to promoting convergence around sound antitrust principles in order to strengthen enforcement while minimizing unnecessary burdens on corporations doing business around the world.

Policy

The Division has also been undertaking a number of policy initiatives to revitalize our economic and legal approaches in several areas of enforcement policy, including intellectual property, remedies, coordinated effects in merger enforcement, and health care.

Our intellectual property hearings are a response to the increasing frequency with which intellectual property issues have arisen in our merger and civil conduct investigations and enforcement actions in recent years. While intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare, issues at the intersection of intellectual property and antitrust can be murky. More than ever before, the creation and dissemina-

tion of intellectual property is a major engine driving economic growth. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, care must be taken to maintain proper incentives for the innovation and creativity on which our national economy depends. Our joint hearings with the FTC on this subject, which took place from February to October of last year, drew from a broad cross-section of business leaders, legal practitioners, economists, and academic experts with extensive experience in these areas. We expect to publish a report by the end of this year, which we hope will provide helpful insights into the effects of competition and patent law and policy on innovation and other aspects of consumer welfare.

Our remedies policy initiative is a response to the basic fact that we not only need to win the battle, we need to win the war. That is, it does not help consumers to enforce against an illegal merger or other agreement if, at the end of the day, the relief reached does not fully and adequately protect competition. The Division has been reviewing this important component of antitrust enforcement, examining our guiding principles and the legal and economic basis for imposition of particular remedies, as well as administrative issues, to better ensure that our remedies protect and preserve the competitive interests that gave rise to our enforcement action.

Another recent policy initiative is our reinvigoration of coordinated effects analysis in merger review. In recent years, theories of unilateral effects, focusing on the potential for the merged firm to exercise market power on its own, have predominated in our merger challenges. We are committed to considering coordinated effects theories, which focus on the potential for the merged firm to exercise market power in coordination with other firms in the market. A team of Division lawyers and economists undertook a months-long re-examination of coordinated effects analysis, and the results of their efforts will be used throughout the Division in appropriate situations.

Our joint hearings with the FTC on health care competition law and policy reflect the continuing strong interest of antitrust enforcers and the public in the variety of complex issues in this area. Since the hearings began in February of this year, there have been 22 days of hearings on a wide range of important topics, including defining hospital markets properly for analysis, the role of specialty hospitals, the significance of hospitals' non-profit status, vertical arrangements, entry barriers and monopoly and monopsony power in health insurance, physician collective bargaining, the state action and Noerr- Pennington doctrines, and enforcement agency guidance. Future sessions will cover such topics as defining physician markets properly, physician information sharing, group purchasing organizations, criminal and civil remedies, and international perspectives. The hearings are generating valuable input from relevant medical, insurance, legal, academic, and government groups on these important topics, enhancing understanding in these areas. We expect the hearings to continue until October, and anticipate publishing a public report on the hearings sometime in the spring of 2004.

CONCLUSION

Mr. Chairman, the men and women of the Antitrust Division approach our critical mission to enforce the U.S. antitrust laws with the utmost seriousness. We are committed to continuing the excellent work that has always been done by the Division, while positioning ourselves to meet the challenges of the future. Given the important role of competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our antitrust laws.

Thank you. I would be happy to answer any questions.

Mr. SMITH. Chairman Muris.

STATEMENT OF THE HONORABLE TIMOTHY J. MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. MURIS. Thank you very much, Mr. Chairman, and Mr. Conyers. I am pleased to appear here before you today with Hew Pate, my friend and colleague from the Antitrust Division, to discuss these important issues.

Competition, the cornerstone of our economy, promotes lower prices, higher quality, and greater innovation. Let me briefly review three principles that underlie our efforts to promote competition. First, we focus on segments of the economy that have the big-

gest impact on consumers. Second, we consider the scope of antitrust as well as its content. Third, we constantly work to improve our processes, including the ways we inform the public about our policies and enforcement standards.

To begin, we take full advantage of a uniquely broad set of tools to promote and protect competition in key sectors of the economy. For example, we focus on health care because it accounts for over 15 percent of our GDP, a quarter more than in 1990.

Prescription drug prices have grown even faster, doubling between 1995 and 2000. Nearly 25 percent of our new antitrust investigations involve pharmaceuticals.

Specifically, we have used our various tools to stem abuses of the Hatch-Waxman amendments. Hatch-Waxman increased generic drug entry, helping consumers save billions. Some brand-name manufacturers, however, have gamed the amendments to forestall generic competition. The Commission issued a report evaluating anticompetitive uses of Hatch-Waxman. The House and Senate have each passed bills that incorporate the study's major legislative recommendations.

The Commission has also brought cases against brand-named firms' alleged efforts to slow generic entry either through agreements to pay generic manufacturers to stay out of the market, or through improper action to trigger delay under Hatch-Waxman. The Commission recently obtained strong, and in some cases unprecedented, relief against Bristol-Myers Squibb for allegedly engaging in both types of conduct.

We also filed an amicus brief in a private case involving some of the same practices in which Bristol-Myers asserted Noerr-Pennington immunity. The court ruled against Bristol-Myers, adopting much of our reasoning.

Thus, we applied our research and reporting function, our powers of persuasion, and law enforcement to address abuses of the Hatch-Waxman amendments. This combined approach produced significant results for consumers.

Turning to energy. The FTC has also focused considerable resources. Besides reviewing petroleum and natural gas mergers, the Commission has charged Union Oil Company of California with monopolization by allegedly failing to disclose its patents in a regulatory proceeding, which may cost California consumers millions in higher gas prices.

The FTC is also studying, and will report on, the causes of volatility in refined petroleum products prices, and is monitoring gasoline prices to identify possible anticompetitive activities.

Besides health and energy, the continuing development of high-tech industries influences our agenda. For example, the FTC is studying a variety of new technology issues through its Internet Task Force. The Task Force has organized a public workshop on E-commerce issues, advocated consumers' interest in regulatory decisions affecting E-commerce, and completed a report on how restrictions on Internet sales raised prices and reduced choices in wine markets.

Let me discuss briefly the Commission's efforts to consider the scope of certain antitrust immunities. We established task forces to study two doctrines: State action and Noerr-Pennington, that insu-

late certain activity from the antitrust laws. Properly applied, both doctrines serve important constitutional interests, but some court decisions have expanded both doctrines beyond the Supreme Court's original precepts.

Our Task Forces have resulted in cases that may provide an opportunity for clarification of the law.

I will conclude with our efforts to improve our internal processes. Currently, we are working with the Antitrust Division to refine and test an electronic HSR notification system to reduce filing burdens and provide us with valuable data collection. The Commission staff also obtained input from experienced antitrust practitioners around the country on possible improvements in merger investigations and remedy negotiations. These efforts resulted in public statements on both issues designed to improve our processes.

Moreover, the Commission has worked to increase public awareness and understanding of its actions by explaining why it decided not to take action in certain cases, drafting more informative analyses to aid public comment on consent agreements, and publishing its responses to public comments on consent agreements.

We will continue to maintain a competitive marketplace for U.S. businesses and consumers. I thank you for your support of our important work.

Mr. SMITH. Thank you, Chairman Muris.

[The prepared statement of Mr. Muris follows:]

PREPARED STATEMENT OF TIMOTHY J. MURIS

Mr. Chairman and Members of the Task Force, I am Timothy J. Muris, Chairman of the Federal Trade Commission ("Commission" or "FTC"). I am pleased to appear before you to discuss the FTC's activities to promote competition.[1]

Our testimony today will outline the principles that underlie the Commission's agenda, and describe a number of our accomplishments. While my colleagues and I bear the ultimate responsibility for the agency's actions, we rely on a dedicated, professional, and highly-qualified staff.

I. INTRODUCTION

Through vigorous enforcement of the antitrust laws and related activities, the Federal Trade Commission helps ensure that markets operate freely and openly. Aggressive competition promotes lower prices, higher quality, and greater innovation. The work of the FTC is critical in protecting and strengthening the free and open competition that is the cornerstone of our economy. As the Commission implements its competition agenda, we confer regularly with our colleagues in the Department of Justice's Antitrust Division to ensure a consistent federal approach.

It is virtually undisputed today that the purpose of antitrust is to protect consumers, that economic analysis should guide decisions, and that horizontal cases involving mergers and agreements among competitors are the mainstays of antitrust. A freely functioning market, subject to the rules of antitrust, provides maximum benefits to consumers.

To maximize our success, we need to articulate both our substantive aims and the strategies we will employ to achieve them. By doing so, we can be proactive rather than reactive, and we can better protect consumers.

Our strategic framework includes the following key elements:

- The FTC concentrates on those segments of the economy that have the biggest impact on consumers, which currently include health care, energy, and technology-related markets, and on conduct that poses the largest threat to consumer welfare.

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

- We take full advantage of the uniquely broad set of powers and capabilities that Congress has entrusted to us, including law enforcement, research and reporting, and advocacy on behalf of consumers and competition.
- The Commission recognizes that the scope of its activities is as important as their content. While certain immunities from the antitrust laws are necessary and appropriate, undue expansion of those immunities, beyond the original intent and purpose, harms consumers.
- The FTC conveys to the public, with as much clarity as possible, the policies and standards it applies in its decisions. To minimize the costs that our work imposes on the economy, we also continuously seek to improve our processes.
- The FTC assists and cooperates with competition agencies in countries throughout the world.

Merger enforcement continues to be a major focus of the FTC's competition workload. Stopping mergers that lessen competition ensures that consumers will have the benefit of lower prices and greater choices in their selection of goods and services. During the unprecedented merger wave in the late 1990s through 2000, the agency was forced to divert resources to meet its statutory responsibilities under the Hart-Scott-Rodino Act ("HSR").[2] With the significant recent decline in merger activity, the Commission has been able to restore the historical balance of enforcement efforts to both merger and nonmerger areas. Since the peak in merger activity in 2000, when the agency opened only 25 nonmerger investigations, the FTC has worked to reinvigorate its nonmerger enforcement program. In 2001, the agency opened 56 new nonmerger investigations, and in 2002, the agency opened another 59 nonmerger investigations. The results of this renewed investment in non-merger enforcement are now emerging, and include a total of 16 non-merger enforcement actions taken thus far in FY 2003, more than any year since 1980; as well as eight non-merger matters in administrative litigation.[3]

In the remainder of this testimony, I will elaborate on both our strategic framework and the results it has helped us obtain.

II. FOCUSING ON KEY SECTORS OF THE ECONOMY

As part of its proactive approach, the FTC concentrates resources on anticompetitive conduct in areas of the economy that have a major impact on consumers' budgets, including energy, health care, and technology. The FTC employs a variety of tools to promote and protect competition in these and other areas. In addition to enforcing the antitrust laws, the agency holds workshops, conducts studies, writes reports, and advocates on behalf of consumers and competition before other government entities.

A. Health Care

Health-related products and services account for more than 15 percent of the United States gross domestic product, an increase of 25 percent since 1990. Without effective antitrust enforcement, those figures could grow even higher. In the twenty years since the Supreme Court affirmed the FTC's jurisdiction over health care professionals in the *American Medical Association* case,[4] the FTC has worked to enable new and more efficient arrangements for delivering and financing health care services by challenging artificial barriers to competition among health care providers.

1. Law Enforcement Actions Involving Health Care

The FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality.

a. Law Enforcement Involving Pharmaceutical Companies. The growing cost of prescription drugs is a significant concern for patients, employers, and gov-

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[2] 15 U.S.C. § 18a, as amended, Pub. L. No. 106–553, 114 Stat. 2762 (2000).

[3] Throughout the 1990s, the FTC typically had no more than one or two antitrust cases in administrative litigation. The eight nonmerger administrative cases currently pending are *Schering-Plough Corp.*, Dkt. No. 9297 (July 2, 2002) (Initial Decision); *Polygram Holding, Inc.*, Dkt. No. 9298 (June 28, 2002) (Initial Decision); *Rambus, Inc.*, Dkt. No. 9302 (June 18, 2002) (complaint); *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint); *California Pacific Medical Group, Inc. dba Brown and Toland Medical Group*, Dkt. No. 9306 (July 8, 2003) (complaint); *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (July 8, 2003) (complaint); *Movers Conference of Mississippi, Inc.*, Dkt. No. 9308 (July 8, 2003) (complaint); and *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (July 8, 2003) (complaint).

[4] *American Medical Assn.,* 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (order modified, 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982), and 114 F.T.C. 575 (1991)).

ernment. Drug expenditures doubled between 1995 and 2000.[5] In response, the FTC has increased its pharmaceutical-related investigations. In 1996, fewer than five percent of new competition investigations involved pharmaceuticals, while in 2002, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- *Mergers Affecting the Pharmaceutical Industry.* In April, the Commission settled with Pfizer Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation to resolve concerns that their $60 billion merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions.[6] The settlement required divestitures to protect consumers' interests in those markets while allowing the remainder of the transaction to go forward.

  Other recent FTC pharmaceutical industry merger actions include (1) Baxter/Wyeth, in which the FTC obtained a settlement requiring divestitures to protect competition in the market for propofol, a general anesthetic commonly used for the induction and maintenance of anesthesia during surgery, and the market for new injectable iron replacement therapies used to treat iron deficiency in patients undergoing hemodialysis;[7] and (2) *Amgen/Immunex*, in which the FTC obtained an agreement settling allegations that Amgen Inc.'s $16 billion acquisition of Immunex Corporation would reduce competition for three important biopharmaceutical products used to treat rheumatoid arthritis, Crohn's disease, psoriatic arthritis, and side effects of chemotherapy.[8]
- *Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.* To address the issue of escalating drug expenditures, and to ensure that the benefits of pharmaceutical innovation would continue, Congress passed the Hatch-Waxman Amendments[9] ("Hatch-Waxman") to the Food, Drug and Cosmetic Act ("FDC Act").[10] Hatch-Waxman established a regulatory framework that sought to balance incentives for continued innovation by research-based pharmaceutical companies and opportunities for market entry by generic drug manufacturers.[11] Hatch-Waxman has increased generic drug entry, helping consumers save $8–10 billion on retail prescription drug purchases in 1994 alone, according to the Congressional Budget Office.[12] Hatch-Waxman has been subject to some abuse, however. Some drug manufacturers have allegedly attempted to "game" the system, securing greater profits for themselves without providing a corresponding benefit to consumers. Many of the FTC's pharmaceutical industry investigations have focused on this problem.

  (1) First Generation Cases. The Commission has challenged conduct by firms that allegedly have "gamed" the Hatch-Waxman framework to deter or delay generic competition. Our "first generation" of such matters involved agreements through which a brand-name drug manufacturer allegedly paid a generic drug manufacturer not to enter and compete. One aspect of a recent major settlement with Bristol-Myers Squibb ("BMS"), involved allegations of this type of conduct.[13] The FTC's complaint charged that BMS engaged in a series of anticompetitive acts over the past decade to obstruct entry of low-price generic competition for three of BMS's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar. The conduct included a $72.5 million payment to a would-be generic rival to abandon its legal challenge to the validity of a BMS patent and to stay out of the market until the patent expired.

  The Commission has settled three additional cases of this type, including an April 2002 settlement resolving charges that American Home Products en-

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[5] *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*>.

[6] *Pfizer Inc.,* Dkt. No. C–4075 (May 27, 2003) (consent order).

[7] *Baxter International Inc. and Wyeth,* Dkt. No. C–4068 (Feb. 3, 2003).

[8] *Amgen Inc. and Immunex Corp.,* Dkt. No. C–4056 (Sept. 3, 2002).

[9] Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98–417, 98 Stat. 1585 (1984) (codified as amended 21 U.S.C. § 355 (1994)).

[10] 21 U.S.C. § 301 et seq.

[11] *See* H.R. Rep. No. 98–857, pt. 1, at 14 (1984), reprinted in 1984 U.S.C.C.A.N. 2647, 2647.

[12] 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*>.

[13] *Bristol-Myers Squibb Co.,* Dkt. No. C–4076 (Apr. 14, 2003) (consent order).

tered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars.[14] An action against Schering-Plough and Upsher-Smith, which remains in administrative litigation, raises similar issues.

(2) Second Generation Cases. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book" list of approved drugs and their related patents. 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. Our "second generation" of enforcement activities has involved allegations that individual brand-name manufacturers have delayed generic competition through the use of improper Orange Book listings that trigger the FDA's automatic 30-month stay of approval of a generic drug.

One facet of the FTC's BMS settlement involved allegedly improper Orange Book listings. The complaint stated that BMS misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book;" breached its duty of good faith and candor with the U.S. Patent and Trademark Office, while pursuing new patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.[15] Because of BMS's alleged pattern of anticompetitive conduct and the extensive resulting consumer harm, the Commission's proposed order necessarily contains strong—and in some respects unprecedented—relief.[16]

Another recent FTC success in this area is an October 2002 settlement with Biovail Corporation, which resolved charges that Biovail illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book as claiming Biovail's high blood pressure drug Tiazac.[17]

(3) Agreements Between Generic Manufacturers. In a case against Biovail and Elan Corporation, plc (Elan), the Commission alleged that the companies entered into an agreement that provided substantial incentives for the two firms not to compete in the market for the 30 mg and 60 mg dosage strengths of generic Adalat CC, an anti-hypertension drug. The Commission approved a consent order in August 2002 requiring the firms to terminate their agreement and prohibiting them from entering similar agreements in the future.[18]

b. Other Merger Enforcement Involving Health Care. In June 2002, the Commission authorized the staff to seek a preliminary injunction blocking Cytyc Corporation's proposed acquisition of Digene Corporation, involving the merger of two manufacturers of complementary cervical cancer screening tests.[19] The complaint alleged that the combined firm would have an incentive to use its market power in one product to stifle increased competition in the complementary product's market. Thus, if the merger had been consummated, rivals would have been substantially impeded from competing. Following the Commission's decision, the parties abandoned the transaction.

c. Law Enforcement Involving Health Care Providers. For decades, the FTC has worked to facilitate innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. These efforts continue. In the past three months alone, the FTC has settled with seven groups of physicians for allegedly colluding to raise

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[14] *Schering-Plough Corp.,* Dkt. No. 9297 (Apr. 3, 2002) (consent order as to American Home Products Corp.); *see also Abbott Laboratories*, Dkt. No. C–3945 (May 22, 2000) (consent order), *Geneva Pharmaceuticals, Inc.*, Dkt. No. C–3946 (May 22, 2000) (consent order); *Hoechst Marion Roussel, Inc.*, Dkt. No. 9293 (May 8, 2001) (consent order).

[15] *Bristol-Myers Squibb Co.,* Dkt. No. C–4076 (Apr. 14, 2003) (consent order).

[16] The proposed order includes a provision prohibiting BMS from triggering a 30-month stay for any BMS product based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug.

[17] *Biovail Corp.,* Dkt. No. C–4060 (Oct. 2, 2002) (consent order).

[18] *Biovail Corp. and Elan Corp. plc.,* Dkt. No. C–4057 (Aug. 20, 2002) (consent order).

[19] FTC 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>.*

consumers' costs[20] and issued an administrative complaint against another.[21] Many of these cases involve significant numbers of doctors—more than three-quarters of all doctors in the Carlsbad, New Mexico area in one matter, over 1,000 physicians in Dallas, Texas in another, and an organization consisting of more than 1,500 San Francisco physicians in the case in administrative litigation. The Commission's consent orders put a stop to allegedly collusive conduct harming employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

2. Other Health Care Initiatives

In addition to enforcement action, the FTC has used its research and reporting capabilities as well as its powers of persuasion to foster competition in health care.

- In re Buspirone *Amicus Brief.* In January 2002, the FTC filed an amicus brief in pivotal private litigation involving allegations of improper Orange Book listing practices.[22] *In re Buspirone* involves allegations that BMS violated the antitrust laws by wrongfully 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 Commission 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.[23] The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff still must prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from antitrust scrutiny.
- *Generic Drug Study.* In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," which evaluated whether Hatch-Waxman is susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products.[24] The report recommended changes in the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identified in the FTC study.[25] Last month, the FDA approved a new rule to curb one of the abuses uncovered by the FTC study—pharmaceutical firms' alleged misuse of the Hatch-Waxman patent listing provisions—to speed consumer access to lower-cost generic drugs.[26] In addition, both the Senate and

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[20] *Carlsbad Physician Association, Inc., et al.,* Dkt. No. C–4081, (June 13, 2003) (consent order); *Anesthesia Service Medical Group, Inc.*, Dkt. No. C–4085 (July 11, 2003) (consent order); *Grossmont Anesthesia Services Medical Group, Inc.*, Dkt. No. C–4086 (July 11, 2003) (consent order); *SPA Health Organization, doing business as Southwest Physician Associates*, File No. 011–0197 (June 9, 2003) (proposed consent order accepted for public comment); *Washington University Physician Network*, File No. 021–0188 (July 11, 2003) (proposed consent order accepted for public comment); *The Maine Health Alliance and William R. Diggins*, File No. 021–0017 (July 18, 2003) (proposed consent order accepted for public comment); and *Physician Network Consulting*, File No. 021–0178 (July 22, 2003) (proposed consent order accepted for public comment).

[21] *California Pacific Medical Group, Inc. dba Brown and Toland Medical Group,* Dkt. No. 9306 (July 8, 2003) (complaint).

[22] *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>.*

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

[24] GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (July 2002), *available at <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.*

[25] White House Press Release, *President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs* (Oct. 21, 2002), *available at <http://www.whitehouse.gov/news/releases/2002/10/20021021–2.html>.*

[26] Applications for FDA Approval to Market a New Drug: Patent Submission and Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not Be Infringed, 68 Fed. Reg. 36675 (2003); *see also* FTC Press Release, *Statement of FTC Chairman Supporting FDA's Final Generic Drug Rule* (June 12, 2003), *available at <http://www.ftc.gov/opa/2003/06/030612murisstmtgdr.htm>.*

House of Representatives recently passed bills that incorporate the FTC study's two major legislative recommendations.[27]

- *Hearings on Health Care and Competition Law and Policy.* To explore developments in the dynamic health care market, the FTC, working with DOJ's Antitrust Division, commenced a series of hearings on "Health Care and Competition Law and Policy" on February 26, 2003.[28] Over a seven-month period, the FTC and DOJ are spending almost 30 days of hearings in a comprehensive examination of a wide range of health care issues, involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, and consumer information, among others. To date, the hearings have focused on the specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues.[29] A public report that incorporates the results of the hearings will be prepared after the hearings.
- *Hospital Merger Retrospectives.* In addition, the Bureaus of Economics and Competition are evaluating the effects of consummated hospital mergers in several cities. The agency will announce the results of these retrospective studies whether the mergers in question may have been beneficial or harmful to consumers. If the analysis reveals that one or more of the mergers considered were anticompetitive, then the Commission will carefully consider whether an administrative enforcement action would be warranted. The availability of an appropriate remedy will obviously influence the FTC's decision(s). In any event, the agency will obtain useful real-world information about the consequences of particular transactions and the nature of competitive forces in health care, which will be enormously helpful in analyzing and possibly challenging future hospital mergers.

B. Energy

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

1. Law Enforcement Actions Involving Energy

- *Oil Merger Investigations.* The Commission has an extensive history of carefully investigating mergers in the petroleum industry. These mergers typically involve a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. Most recently, in the *Conoco/Phillips* merger, the Commission issued a consent order requiring the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.[30]
- *Natural Gas Merger Investigations.* The FTC also has investigated mergers in the natural gas industry and taken necessary action to preserve competition. In July 2003, the Commission finalized a consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area.[31] The order conditionally would allow Southern Union Company's $1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation, while requiring Southern Union to terminate an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City area. Absent the settlement agreement, the transaction would have placed the two pipelines under common ownership or common management and control,

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[27] H.R. 1, 108th Cong. §§ 1101–1118 (2003); H.R. 1, incorporating S. 1, 108th Cong. §§ 701–706, 901–911 (2003).

[28] *See* FTC Press Release, *FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003* (Nov. 7, 2002), *available at <http://www.ftc.gov/opa/2002/11/murishealthcare.htm>*; Public Hearings: Health Care and Competition Law and Policy, 67 Fed. Reg. 68672 (2002).

[29] Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at *<http://www.ftc.gov/ogc/healthcarehearings/index.htm>*.

[30] *Conoco Inc. and Phillips Petroleum Company,* Dkt. No. C–4058 (Feb. 7, 2003) (consent order).

[31] *Southern Union Co.,* Dkt. No. C–4087 (July 16, 2003) (consent order).

eliminating direct competition between them, and likely resulting in consumers' paying higher prices for natural gas in the Kansas City area.

- *Gasoline Monopolization Case.* In March 2003, the Commission issued an administrative complaint in an important nonmerger case involving the Union Oil Company of California ("Unocal").[32] The complaint alleges that Unocal violated Section 5 of the FTC Act by subverting the California Air Resources Board's ("CARB") regulatory standard-setting procedures of the late 1980s relating to low-emissions reformulated gasoline ("RFG"). According to the complaint, Unocal misrepresented to both CARB and industry participants that some of its emissions research was non-proprietary and in the public domain, while at the same time pursuing a patent that would permit Unocal to charge royalties if CARB used such emissions information. The complaint alleged that Unocal did not disclose its pending patent claims and that it intentionally perpetuated the false and misleading impression that it would not enforce any proprietary interests in its emissions research results. The complaint states that Unocal's conduct has allowed it to acquire monopoly power over the technology used to produce and supply California "summer-time" RFG, a low-emissions fuel mandated for sale in California from March through October, and could cost California consumers five cents per gallon in higher gasoline prices. This case is being litigated before an Administrative Law Judge.

2. Other Energy Industry Initiatives

- *Study of Refined Petroleum Product Prices.* Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of volatility in refined petroleum product prices. In two public conferences, held in August 2001 and May 2002, participants discussed key factors that affect product prices, including increased dependency on foreign crude oil sources, changes in industry business practices, and new governmental regulations.[33] The information gathered through these public conferences will form the basis for a report to be issued later this year.
- *Gasoline Price Monitoring.* In May 2002, the FTC announced a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities to determine if a law enforcement investigation would be warranted.[34] This project tracks retail gasoline prices in approximately 360 cities nationwide and wholesale (terminal rack) prices in 20 major urban areas. The FTC Bureau of Economics staff receives daily data purchased from the Oil Price Information Service ("OPIS"), a private data collection company. The economics staff uses an econometric (statistical) model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This model relies on current and historical price relationships across cities, as well as other variables.

  As a complement to the analysis based on OPIS data, the FTC staff also regularly reviews reports from the Department of Energy's Consumer Gasoline Price Hotline, searching for prices significantly above the levels indicated by the FTC's econometric model or other indications of potential problems. Throughout most of the past two years, gasoline prices in U.S. markets have been within their predicted normal bounds. Of course, the major factor affecting U.S. gasoline prices is the substantial fluctuation in crude oil prices. Prices outside the normal bounds trigger further staff inquiry to determine what factors might be causing price anomalies in a given area. These factors could include supply disruptions such as refinery or pipeline outages, changes in taxes or fuel specifications, unusual changes in demand due to weather conditions and the like, and possible anticompetitive activity.

  To enhance the Gasoline Price Monitoring Project, the FTC has recently asked each state Attorney General to forward to the FTC's attention consumer complaints they receive about gasoline prices. The staff will incor-

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[32] *Union Oil Co. of California,* Dkt. No. 9305 (Mar. 4, 2003) (complaint).

[33] FTC Press Release, *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August* (July 12, 2001), *available at <http://www.ftc.gov/opa/2001/07/gasconf.htm>*; FTC Press Release, *Factors That Affect Gasoline Prices To Be Discussed at FTC Conference* (May 1, 2002), *available at <http://www.ftc.gov/opa/2002/05/gasolineprices.htm>*. Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at *<http://www.ftc.gov/bc/gasconf/index.htm>*.

[34] FTC Press Release, *FTC Chairman Opens Public Conference Citing New Model To Identify and Track Gasoline Price Spikes, Upcoming Reports* (May 8, 2002), *available at <http://www.ftc.gov/opa/2002/05/gcr.htm>*.

porate these complaints into its ongoing analysis of gasoline prices around the country, using the complaints to help locate price anomalies outside of the 360 cities for which the staff already receives daily pricing data.

The goal of the Monitoring Project is to alert the FTC to unusual changes in gasoline prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to have market-driven causes, the FTC staff will consult with the Energy Information Agency of the Department of Energy. The FTC staff also will contact the offices of the appropriate state Attorneys General to discuss the anomaly and the appropriate course for any further inquiry, including the possible opening of a law enforcement investigation.

C. Technology

The continuing development of "high-tech" industries and the significance of intellectual property rights influence our antitrust agenda. The U.S. economy is more knowledge-based than ever. While the fundamental principles of antitrust do not differ when applied to high-tech industries, or other industries in which patents or other intellectual property are highly significant, the issues are often more complex, take more time to resolve, and require different kinds of expertise. To address these needs, we now have patent lawyers on staff, and we sometimes hire technical consultants in areas such as electrical engineering or pharmacology.

1. Law Enforcement Actions Involving Technology

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 issued in June 2002, the Commission has 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.[35] 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 Commission's complaint, which is currently being litigated before an Administrative Law Judge, 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.[36] Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech products and innovation, the Commission will continue to pursue investigations in this important area.[37]

2. Other Technology Initiatives

- *Intellectual Property Hearings.* In 2002, the FTC and DOJ commenced a series of ground-breaking hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy."[38] These hearings, which took place throughout 2002 and were held in Washington and Northern California, involved testimony from academics, industry leaders, technologists and others about the increasing need to manage the issues at the intersection of competition and intellectual property law and policy. The FTC anticipates releasing a report on its findings later this year.
- *Internet Task Force.* The Internet boom, heralded by many as the next industrial revolution, has immense potential as an engine for commerce and offers consumers enormous freedom. Contrary to the perception of the Internet as a virtually unfettered free market, however, extension of pre-existing state regulations to the Internet or potentially anticompetitive business practices may be limiting the cost savings or convenience that the Internet affords, without offsetting benefits. The FTC's Internet Task Force has been analyzing

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[35] *Rambus Inc.,* Dkt. No. 9302 (June 18, 2002) (complaint).

[36] *Id.*

[37] 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.,* 121 F.T.C. 616 (1996) (consent order).

[38] FTC Press Release, *Muris Announces Plans for Intellectual Property Hearings* (Nov. 15, 2001), *available at <http://www.ftc.gov/opa/2001/11/iprelease.htm>.* Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at *<http://www.ftc.gov/opp/intellect/index.htm>.*

state regulations that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. It also is examining barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales.

- *Internet Competition Workshop.* In October 2002, the Commission hosted a three-day public workshop examining potential barriers to e-commerce in ten different industries.[39] The purpose of the workshop was to (1) enhance the Commission's understanding of the nature of competition in e-commerce; (2) help educate policymakers about the effects of overly restrictive state regulations; and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic. The workshop included panel discussions addressing specific industries that have grown via the Internet, but where competition may be constrained by state regulations or business practices.
- *E-commerce Advocacy.* The Internet Task Force has taken the lead in drafting a number of competition advocacy pieces. Two have had a clear impact in helping decision-makers take consumers' interests into account: (1) the Connecticut Board of Examiners for Opticians decided in June 2003, in accordance with our advice, that out-of-state sellers who ship contact lenses to Connecticut residents need not have a Connecticut optician's license, provided that the lenses are sold pursuant to a lawful prescription;[40] and (2) on January 24, 2003, the North Carolina State Bar released two opinions eliminating the requirement that an attorney be physically present at real estate closings, and allowing non-attorneys to obtain signatures and receive and disburse funds, as we had recommended in joint comments with the DOJ.[41]
- *Report on Internet Wine Sales.* Earlier this month, the Commission released a staff report concluding that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers.[42] The empirical study found that state bans on direct shipping prevent consumers from saving as much as 21 percent on some wines and from conveniently purchasing many popular wines from suppliers around the country. The report also concluded that states may be able to limit sales to minors through less restrictive means than an outright ban on direct shipping, such as by requiring that a supplier verify the recipient's age and obtain an adult's signature before delivering the wine.

III. THE SCOPE OF ANTITRUST

A. Antitrust Immunity Generally

As a general matter, immunity from the antitrust laws is exceptional and disfavored.[43] The antitrust laws, "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition," rest on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.'[44] Accordingly, few industries or competitive situations are not subject to the antitrust laws. In fact, there

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[39] FTC Press Release, *FTC Releases Agenda for Public Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Sept. 30, 2002), *available at <http://www.ftc.gov/opa/2002/09/ecomagenda.htm>*. Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at *<http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>*.

[40] *See* 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* (Connecticut Board of Examiners for Opticians, Mar. 27, 2002), *available at <http://www.ftc.gov/be/v020007.htm>*.

[41] *See* Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General, Department of Justice, to E. Fitzgerald Parnell III, President, North Carolina State Bar (July 11, 2002), *available at <http://www.ftc.gov/os/2002/07/non-attorneyinvolvment.pdf>*.

[42] POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (July 2003), *available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>*.

[43] *Cf. Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) (implied antitrust exemptions are not favored).

[44] *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

has been a trend to deregulate industries and remove antitrust immunities rather than to create more of them.[45]

Proponents of antitrust immunity frequently claim a need for special treatment because firms engaged in a particular industry or activity need to collaborate on matters that have special value or importance to our economy, national security, or other societal interests. They assert that the antitrust laws will impose burdensome compliance obligations or chill beneficial activity. They also frequently claim that an exemption would only clarify that the conduct, which is already permissible, does not violate the antitrust laws. They therefore assert that the situation warrants special treatment.

We do not believe these reasons provide a sound basis for an antitrust exemption. Antitrust analysis today is highly capable of distinguishing harmful and unreasonable conduct from conduct that has a legitimate justification, and can therefore accommodate any legitimate needs for competitor collaboration. Further, case precedents, interpretive Guidelines, and advisory opinions from the FTC and the DOJ, along with advice from antitrust counsel, can enable firms to make well-informed judgments about whether a proposed activity will present antitrust risks. Therefore, antitrust exemptions generally are not necessary.

Moreover, unnecessary antitrust exemptions have significant potential to be harmful. First, an exemption for conduct that does not violate the antitrust laws inevitably will encourage more demands for similar treatment, gradually eroding the fundamental principle that antitrust constitutes the cornerstone of a competitive market economy. Second, an unnecessary exemption can create confusion or uncertainty whether the relevant conduct would otherwise violate the antitrust laws. Third, unnecessary, imprecise, or excessively broad antitrust immunities may harm consumers by providing a pretextual reason for parties inappropriately to discuss and collaborate on matters that are not, or should not be, exempt.[46] Such conduct is difficult to detect and prosecute and can hinder, rather than facilitate, the important economic and security contributions that it was hoped the particular industry would make. Therefore, we believe that selective antitrust exemptions generally are unwise as well as unnecessary.[47]

B. The State Action and Noerr-Pennington Doctrines

The state action doctrine—first articulated in *Parker* v. *Brown*[48]—provides a defense to certain antitrust claims involving the regulatory conduct of state governments. Similarly, the Noerr-Pennington doctrine—first articulated in *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight*[49] and *United Mine Workers of America* v. *Pennington*[50]—provides immunity for private parties' efforts to "petition" the government. When properly applied, both doctrines serve important Constitutional interests. The state action defense is grounded in principles of federalism and is intended to prevent antitrust enforcement from interfering with legitimate state regulatory activities. *Noerr* immunity, on the other hand, is grounded in First Amendment principles and is intended to protect a citizen's right to petition the government for the redress of grievances.

While the core principles underlying these doctrines have validity, some lower court decisions have expanded the reach of both doctrines beyond the precepts originally articulated by the Supreme Court. Moreover, when the governing standard is

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[45] For example, Section 601(b)(2) of the Telecommunications Act of 1996 repealed the FCC's ability to confer immunity on telephone company mergers submitted to the FCC for review, and the Department of Transportation's authority to approve domestic airline mergers expired in 1989 pursuant to 49 U.S.C. App. § 1551 (1988). Such mergers are now subject to ordinary application of the antitrust laws.

[46] Any meeting among competitors, regardless of whether an antitrust exemption applies, carries some risk that the discussion may spill over into competitively sensitive matters. An antitrust exemption, however, may be perceived as providing shelter for firms inclined to discuss off-limits topics, particularly when there is some interpretive flexibility about what subject matters are reasonably "related to" the objectives of the legislation.

[47] We are aware, of course, that there have been rare instances in which Congress enacted statutory grants of immunity for joint action of competitors. In those situations, the exemption typically applied to specific industries or activities that were subject to a special regulatory regime, or to a specific transaction or agreement that had been approved by a federal agency, again usually in the context of a regulated industry. Prior approval of an agreement by a federal agency has not been required when the scope of the immunity was very limited, but broader grants of immunity have been accompanied by strict controls on the development and implementation of agreements. Without such strict limits, the dangers of antitrust exemptions are even greater.

[48] 317 U.S. 341 (1943).

[49] 365 U.S. 127 (1961).

[50] 381 U.S. 657 (1965).

unclear, enforcement (and deterrence) can be problematic. Thus, for example, the American Bar Association Antitrust Section's 2001 report on antitrust policy recommended a reexamination of the scope of the state action doctrine.[51]

The scope of these doctrines has important consequences for consumers. Through study and analysis, and by bringing carefully-selected enforcement actions, the FTC can help to clarify the limits of the state action and *Noerr-Pennington* doctrines. To that end, we established FTC Task Forces to examine state action and *Noerr* issues. The work of both Task Forces has resulted in a variety of actions, including antitrust enforcement, amicus briefs, and competition advocacy.

1. State Action Task Force

The State Action Task Force has been conducting a careful analysis of existing case law on the scope of the state action defense. The Task Force has observed that some courts have applied the doctrine too broadly, thereby protecting anticompetitive conduct of parties acting in their own interest, rather than the interest of "the state itself." An overbroad application can be especially problematic when the party purportedly acting pursuant to a delegation of state authority is a private market participant with strong incentives to restrain trade. The Task Force's work has resulted in investigations that we hope will clarify the two key elements of the state action defense—"clear articulation" of the state's intent to displace competition, and "active supervision" of any anticompetitive private agreements. In the Analysis to Aid Public Comment in the Commission's recent *Indiana Movers* consent order, for example, we described three factors relevant to showing that the state has "actively supervised" the conduct for which the state action defense is asserted: (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits that would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives; and (3) a specific assessment—both qualitative and quantitative—of how the private action comports with the substantive standards established by the state legislature, particularly when the standards include competition or consumer welfare.[52] Earlier this month, the Commission issued administrative complaints in three similar cases involving associations of household goods movers in three states.[53] The complaints allege that the associations have violated the FTC Act by engaging in collective action in the form of filing tariffs containing collective rates on behalf of their members. One or more of these cases may eventually present an opportunity for further clarification of the contours of the state action doctrine.

Movers Conference of Mississippi, Inc., Dkt. No. 9308 (July 8, 2003) (complaint); and *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (July 8, 2003) (complaint).

2. Noerr-Pennington Task Force

The *Noerr-Pennington* Task Force is conducting a similar analysis of existing case law regarding *Noerr-Pennington* immunity. As in the state action context, the Task Force has observed that some courts have applied the doctrine too broadly. In some instances, parties have been granted immunity in spite of the fact that the anticompetitive conduct at issue had no "petitioning" component whatsoever. In other instances courts have immunized abusive tactics, such as repetitive lawsuits and misrepresentations, that clearly were intended to delay a competitor's entry or raise its costs, rather than legitimately to petition the government. The Task Force has worked to identify situations that may be inconsistent with the underlying rationale for *Noerr* immunity even when petitioning of the government may be involved. For example, members of the Task Force played a key role in preparation of the Commission's amicus brief in *In re Buspirone*, discussed above.

Several recent FTC enforcement actions also involve *Noerr* issues. For example, in the Commission's BMS settlement, discussed above, most of the acts challenged involved use of governmental processes.[54] Thus, the complaint affirmatively pled that *Noerr* did not immunize BMS's actions. Among other reasons cited, the complaint indicated that BMS's alleged knowing and material misrepresentations to the FDA fell outside of *Noerr* protection. The Commission's *Unocal* case, also discussed above, raises a similar issue.[55] If proven, the allegation that Unocal urged the Cali-

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[51] American Bar Association Section of Antitrust Law, *The State of Antitrust Enforcement—2001, Report of the Task Force on the Federal Antitrust Agencies—2001*, at 42 (2001), *available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>*.

[52] Analysis of Proposed Consent Order to Aid Public Comment, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C–4077 (Apr. 25, 2003) (consent order).

[53] *Alabama Trucking Association, Inc.* Dkt. No. 9307 (July 8, 2003) (complaint);

[54] *Bristol-Myers Squibb Co.,* Dkt. No. C–4076 (Apr. 14, 2003) (consent order).

[55] *Union Oil Co. of California,* Dkt. No. 9305 (Mar. 4, 2003) (complaint).

fornia air-quality board to adopt a standard for clean-burning gasoline, while misrepresenting its intentions regarding any intellectual property rights in the standard may present the Commission with an opportunity to evaluate more fully the significance of misrepresentations to a government entity for a *Noerr* immunity claim.

BMS also raised the question whether *Noerr* protects conduct that merely triggers ministerial government action rather than seeking a discretionary decision.[56] Noting the court's observation in *In re Buspirone Antitrust Litigation*,[57] the Commission stated that Orange Book filings are not entitled to *Noerr* protection because they involve no petitioning; the FDA merely accepts the NDA holder's representations and exercises no intervening judgment.[58]

In addition, the Commission noted in *BMS* that a clear and systematic pattern of anticompetitive misuse of governmental processes—such as BMS's alleged inequitable conduct at the PTO, wrongful Orange Book listings, sham litigation, and payments for generics not to enter is inconsistent with *Noerr* protection—caused the challenged conduct to fall outside the scope of *Noerr* protection. In the Commission's view, the logic and policy underlying the Supreme Court's *California Motor Transport*[59] decision, which held a pattern of filings undertaken without regard to their merits to be outside the protections of *Noerr*, supported the application of a pattern exception for BMS's alleged pattern of conduct.[60]

IV. IMPROVING INTERNAL PROCESSES AND TRANSPARENCY

A. Electronic Premerger Filing

As part of an overall movement to make government more accessible electronically, the FTC, working with the DOJ, is conducting final refinement and testing of an electronic system for filing HSR premerger notifications. The system, along with rules changes necessary to allow filing electronically, should be complete and ready for use this fall. E-filing will reduce filing burdens for businesses and government and create a valuable database of information on merger transactions to inform future policy deliberations.

B. Improving HSR Merger Investigations

The agencies have taken steps to reduce the burden on merging parties in document productions responsive to Second Requests. In response to legislation amending the HSR Act,[61] the Commission amended its rules of practice to incorporate new procedures.[62] The amended rules require Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establish a procedure for the General Counsel to review the request and promptly resolve any remaining 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.

In 2002, the Bureau of Competition held a series of "brown bag" meetings in cities around the country to obtain comments and suggestions from experienced antitrust practitioners on additional possible improvements in the merger investigation process.[63] In December 2002, the Bureau announced new Guidelines for Merger Investigations that incorporate the learning from those sessions.[64] The new measures include promptly releasing investigational hearing transcripts to testifying witnesses, simplifying how documents responsive to a Second Request are produced, easing the burdens associated with parties' claims of privilege, avoiding or minimizing additional document searches, providing information about the standards used in evaluating Second Request compliance, and facilitating the search for and submission of electronic materials.

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[56] *Bristol-Myers Squibb Co.,* Dkt. No. C–4076 (Apr. 14, 2003) (consent order).

[57] 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002)

[58] Bristol-Myers Squibb Co., Dkt. No. C–4076 (Mar. 7, 2003) (Analysis of Proposed Consent Order To Aid Public Comment).

[59] *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

[60] *Id.*

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

[62] *See* 16 C.F.R. § 2.20 (Jan. 24, 2001).

[63] *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>.*

[64] Federal Trade Commission, Bureau of Competition, *Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations* (Dec. 11, 2002), *available at <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>.*

C. Facilitating Negotiation of Merger Remedies

A parallel series of public workshops held last year focused on issues involved in fashioning remedies, especially in merger cases. Topics about which the FTC sought the public's views included: identifying which assets should be divested and the terms of a proposed divestiture; criteria for evaluating proposed buyers; when "up-front" divestiture is necessary or desirable; use of "crown jewel" provisions; third-party rights; pre-divestiture risks to competition; and divestiture success. Information gained from these workshops formed the basis of the "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies," issued this past March.[65] The Statement is designed to streamline merger settlement negotiations by increasing the transparency of the process.

D. Transparency in FTC Decision Making

The Commission's law enforcement efforts are also made more effective by public awareness of what types of conduct are likely to be challenged as law violations. Transparency helps to serve the FTC's objectives in a number of ways: understanding fully what kinds of transactions or conduct the Commission is likely to challenge, and why, greatly facilitates antitrust lawyers' counseling of their clients, and prevents many harmful mergers or anticompetitive practices without need for government intervention. Each successful enforcement action not only promotes competition in the specific market(s) at issue, but also serves to communicate to the business and legal communities that the FTC can and will move successfully to challenge the type of merger transaction or conduct at issue. The Commission has sought to expand public awareness and understanding of its actions in several new ways (in addition to its traditional means of communicating, including adjudicative opinions, press releases announcing enforcement actions, analyses to aid public comment on consent agreements, speeches, guidelines, and other policy statements).

While it may seem obvious that documents associated with enforcement actions (e.g., press releases, analyses to aid public comment, and pleadings) convey important information to the public, it is also true that explaining why the Commission decided not to take action in a particular case may well provide at least as much useful information. Thus, on several occasions in the recent past, the Commission issued statements explaining why it declined to take actions involving mergers for which the agency had issued a second request or otherwise conducted a significant inquiry.[66] The agency has also put more emphasis on drafting informative analyses to aid public comment. Most recently, the Commission published on its Web site its responses to comments submitted by members of the public on a consent agreement (in addition to the comments themselves, which the Commission has published for some time).[67]

V. INTERNATIONAL ACTIVITIES: NEW INITIATIVES, ENFORCEMENT AND ASSISTANCE

Because competition increasingly takes place in a worldwide setting, 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 Commission 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 and enforcement divergences.

- *ICN.* In 2001, the FTC, the DOJ, and 12 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 competi-

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[65] FTC Press Release, *FTC Competition Director Announces Guidelines for Negotiating Merger Remedies* (Apr. 2, 2003), *available at <http://www.ftc.gov/opa/2003/04/mergerremedies.htm>.*

[66] *See, e.g.,* FTC Press Release, *Investigation of Kroger/Raley's Supermarkets Transaction Closed* (Nov. 13, 2002) *available at <http://www.ftc.gov/opa/2002/11/krogerraley.htm>*; Federal Trade Commission, *Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corp./P&O Princess Cruises plc, File No. 021–0041* (Oct. 4, 2002), *available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>* and *<http://www.ftc.gov/os/2002/10/cruisedissent.htm>* (Commissioners Anthony and Thompson, dissenting).

[67] *Wal-Mart Stores, Inc.,* Dkt. No. C–4066 (Feb. 27, 2003) (consent order), letters to commenters *available at <http://www.ftc.gov/os/caselist/c4066.htm>.*

tion 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. Seventy-one jurisdictions have joined the ICN. The FTC is a leading participant in the ICN's projects, which include multi-jurisdictional mergers, capacity building and competition policy implementation, and antitrust enforcement in regulated sectors.

- *Trade Agreements.* The FTC co-chairs the U.S. delegation to the WTO working group on trade and competition policy and is actively involved in the preparations for the Cancun Ministerial Conference. We also continue to work with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas, and are actively involved in the development of competition chapters of bilateral free trade agreements such as those concluded with Chile and Singapore and under negotiation with Australia.
- *OECD.* The FTC is participating in the valuable continuing work of the OECD Competition Committee on, among other things, merger process convergence and regulatory reform.
- *Technical Assistance.* For the past 12 years, the FTC, along with the DOJ, has assisted developing nations that have made the commitment to market and commercial law reforms. With funding from the U.S. Agency for International Development and the U.S. Trade & Development Agency, the two antitrust agencies have provided technical assistance to about 30 nations to help them develop their competition and consumer protection laws. The program is presently active in South America, Mexico, South Africa, North Africa, Indonesia, Southeastern Europe, and the former Soviet Union. 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 is taken to avoid any intrusions on time and planning for domestic enforcement projects.

VI. CONCLUDING REMARKS

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

Mr. SMITH. Let me direct my first question to both of you all. And that is, to ask you if you currently seek any changes in the antitrust laws and procedures from the point of view of either Department of Justice or the FTC?

Mr. PATE. Well, Mr. Chairman, I would just, if I might, just pick up on something I mentioned in my opening statement. We think that the time has come to consider whether we need to increase the criminal penalties.

Mr. SMITH. Actually, you have anticipated my next question as well. If you want to go to that, please do. I was going to ask you specifically about criminal penalties. You did mention it in your oral statement a while ago. Why don't you expound on that.

Mr. PATE. Thank you, I will. Particularly, as I mentioned, after the criminal penalties for mail and wire fraud under the Sarbanes-Oxley legislation have been raised to maximum 20-year terms, we think that the time has come to examine whether there should be an increase in the maximum prison sentences under the antitrust laws. There is legislation pending in the other Chamber that would call for an increase to 10 years. We fully support that. We think, while I don't have a firm position on a number or a final position with respect to fines, that likewise we would welcome the oppor-

tunity to work with this Committee to consider increases on that front as well.

Mr. SMITH. Okay. What about my first question? Any changes in antitrust laws, other than criminal penalties, that you would like to see?

Mr. MURIS. No. We are requesting new legislation to deal with cross-border fraud for our consumer protection mission, but we are not requesting any new legislation for antitrust.

Mr. SMITH. Okay. And what about civil penalties with FTC? Would you like to see any changes there?

Mr. MURIS. No, we are not proposing any changes there.

Mr. SMITH. Okay. And you see nothing wrong with the criminal penalties mentioned by——

Mr. MURIS. We don't have criminal enforcement. I would certainly defer to General Pate. But, in general, criminal enforcement is very important, and I see no reason why we should not increase the penalties.

Mr. SMITH. Okay. Very good. Thanks.

The next question goes to international antitrust agreements, both on the status and on where you see yourselves going in the future in that regard. General Pate.

Mr. PATE. We have been very active particularly with the international competition network, which is a network of approximately 40 jurisdictions who have antitrust enforcement now. We are going to continue to devote a lot of resources to making sure that we have convergence on sound antitrust principles, and that we avoid disputes and divergences of approach that we think can be harmful to competition and may have negative impacts on American companies who are seeking to bring competitive products to global markets. And so we are going to continue to be active on that front.

Mr. SMITH. A quick question. You mentioned in your testimony a few minutes ago the 21 cases, and it sounded to me like you felt that you had had an impact on 21 out of 21 cases. Is that because you choose your cases carefully, or because you are particularly effective?

Mr. PATE. Well, when we bring a case, we have done a lot of work ahead of time to make sure it is a good one. And so, yes, I think our success rate, once we decide to bring a challenge, is higher.

My colleague handed me a figure. The actual figures on cases we have challenged may be a little higher than what I mentioned there, but the full statement perhaps has even greater numbers that you should take a look at. But, yes, we do think that is what we do.

Mr. SMITH. Thank you, General Pate. Thank you, Chairman Muris. I have some written questions actually to direct to both of you all, and I would like to do so and ask you to reply to them within 10 days, if you would.

Mr. PATE. I would be pleased to do that.

Mr. SMITH. Thank you very much.

[The information referred to follows in the Appendix]

Mr. SMITH. The gentleman from Michigan, the Ranking Member, is recognized for his questions.

Mr. CONYERS. Thank you, Mr. Chairman.

I am happy to have you both here, as I have said before. The only problem that has arisen in this hearing is helping me out here. We have a case in which the head of the Antitrust Division joins in an amicus brief with a Government monopoly to seek to reform the antitrust rules before the Supreme Court. And I am talking about the *Verizon* case. A gratuitous involvement to be sure, but I am told by staff it has enormous consequences if Verizon and the Antitrust Division of DOJ prevail in the United States Supreme Court.

Mr. PATE. Representative Conyers, I would appreciate an opportunity to address the *Trinko* case, which is an important case in which we were happy to see the Supreme Court accept review. It has been part though not of a gratuitous involvement but of a continued and balanced involvement of the Division to deliver two important messages about the Telecom Act and its relation to the antitrust laws.

On the one hand, we have made clear in the *Trinko* case, and in other cases, that the Telecom Act does not create an exemption from the antitrust laws, that the antitrust laws will apply fully to the conduct of the Bell Operating Companies.

On the other hand, what was at issue in the *Trinko* case is the question of whether the regulatory requirements of the 1996 Act would be imported into section 2 of the Sherman Act. And we think Congress was equally clear in its savings clause under that legislation that it would not, and that the case at issue in *Trinko* was not a meritorious case and that it would be harmful to section 2 for those regulatory obligations to be imported. So we believe that is an important case.

Mr. CONYERS. So do I, but not for the reasons that you have put forward.

Mr. SMITH. Without objection, the gentleman from Michigan is recognized for another 2 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Here is page 7 of the amicus: In the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense apparent from its tendency to reduce or eliminate competition.

Now, what does that mean? It means that no matter how big the harm to consumers and competition, if there is a small benefit to the monopolist, we may ignore the harm.

Now, you are appearing as an amicus supporting Verizon's position, and now you are telling me that you are merely clearing up what you think that we meant in the Congress when that law was passed. I disagree. And I think we are going to have to spend a lot more time, your lawyers and my lawyers and maybe some outside scholars, clearing this up, because this is not the kind of signal that makes me or the consumers that I had in mind when we passed the law sleep more comfortably in their beds at night.

Mr. PATE. Representative Conyers, we would welcome the opportunity to do that. The standard you mentioned from page 7 of that brief is the same standard well-established in the law that we used as a plaintiff in the *Microsoft* case, and in the *American Airlines* case we brought. We think it certainly does not mean by any means that great harm to consumers would be excused because of

any benefit to a monopolist. And so I would be more than happy to spend time with your staff working through that standard and how we think it appropriately applies. And I appreciate the opportunity to address it here.

Mr. CONYERS. Thank you.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from North Carolina, Mr. Coble, is recognized.

Mr. COBLE. I thank the Chairman. Mr. Chairman, I apologize to you and the Ranking Member for my abrupt departure. But not unlike waning days prior to a District Work Period, it has been chaotic around here today. I apologize to the witnesses as well.

Mr. Pate, do I recall that the Chairman said you studied in North Carolina?

Mr. PATE. I did, in Chapel Hill.

Mr. COBLE. Are you a native Carolinian?

Mr. PATE. My mother is from Greensboro, but I grew up in Virginia.

Mr. COBLE. Well, that is close enough. That is my district, so I will claim that.

Gentlemen, let me ask you this. To what extent do either the Department of Justice Antitrust Division or the Bureau of Competition at the FTC consult with the FCC during Triennial and Biennial Review proceedings?

Mr. PATE. I think that question is probably best directed toward the Division because of our work in the telecom field. We do not have a practice of routinely filing written comments. We have done that from time to time at a staff level. We make our expertise available to the Commission when it asks for it, and that occurs from time to time. Not every issue that the Commission deals with is an antitrust issue, though; they have much broader public policy telecom issues. And with respect to those, it would be much less likely that we would be involved.

Mr. COBLE. Mr. Muris.

Mr. MURIS. It has been a longstanding arrangement between the two agencies, because there are two of us enforcing many of the same laws, that we don't duplicate each other's work. This is an area that the Antitrust Division does and not the FTC.

Mr. COBLE. Gentlemen, to what extent do foreign countries abuse antitrust laws to the detriment of American businesses, A. And, B, what have the Antitrust Division and the FTC done to prevent this from occurring if it is a problem?

Mr. MURIS. There is certainly the potential and there have been occasional disagreements with other countries. I recently noted one involving the Antitrust Division. It is very important with the proliferation of antitrust agencies that we spend as much time as possible explaining how we do antitrust to other countries to encourage agencies around the world to adopt best practices. As General Pate mentioned, the International Competition Network was formed very recently in the last few years to do that. I think it has had a positive impact. We have a close working relationship with the Europeans, for example, and we spend a lot of time, particularly since the disagreement I alluded to, working with them to improve relations and understanding of how we do things together. I think this has to be persuasive. But because we are the leaders in

the antitrust analysis and have many more resources than other parts of the world, I think we are much more successful than not in encouraging best practices, in encouraging the focus not on protecting competitors but on protecting consumers.

Mr. PATE. I agree entirely with what Chairman Muris said with respect to the GE/Honeywell matter involving the European Commission that he alluded to. I think, since that time, you have seen a great effort on the part of Mario Monti over at the European Union to try to reform and improve their merger processes. I was at a conference with him recently whereby Bob Pitofsky, who was in Tim's seat during the Clinton administration, participated. And it was good to see agreement there that antitrust should not be misused to defend national champions and to try to exclude American or other businesses from external markets.

And so I think there is some good progress being made there, and I agree with what Tim has to say about the ICN and other places we can do that.

Mr. COBLE. Well, the work that you all are doing in the area of antitrust is indeed important. And I am sure our Committee is concerned and interested. And I appreciate each of you being here.

And, Mr. Chairman, I yield back my time.

Mr. SMITH. Thank you, Mr. Coble.

The gentlewoman from California, Ms. Lofgren, is recognized for her questions.

Ms. LOFGREN. Thank you, Mr. Chairman. I doubt that I will use the entire 5 minutes. And I would echo Mr. Coble's comments. This has been a chaotic day, and I am sorry that we have not all of us been able to sit here throughout the entire proceedings with you.

I want to go back and touch on the issue raised by the Ranking Member, Mr. Conyers. I am concerned that the Department is pursuing a standard that is a departure from practice. And you mentioned the *Microsoft* case and the Department's posture in that. And I don't want to get into the whole *Microsoft* case, except to note that it is my understanding that the D.C. Circuit sitting en banc did find that the plaintiff must demonstrate that the anticompetitive harm or the conduct outweighs the procompetitive conduct, which is a finding that I think is at variance from the brief that Mr. Conyers quoted from and that you discussed. Am I misreading that, or could you comment on that?

Mr. PATE. There have been a variety of standards articulated under section 2 of the Sherman Act. With respect to the standards stated in the *Trinko* brief, though, you have to look at the context, which is one of a claimed duty of assistance to a rival. And I think there, if you look at the Supreme Court's decision in the *Aspen* case, one of the most recent in that line of cases, you will see in that case an explanation of the fact that the monopolist declined to undertake a transaction that would have made business sense for it apart from the attempt to exclude a rival.

So we think the standard that we are advocating in the *Trinko* brief is well-supported in existing law and in the context that it involves a claim for a duty of assistance to a competitor, that it is an appropriate standard and one that has strong support in a number of Division cases and decided cases.

Ms. LOFGREN. I don't know if you saw it—and I just saw excerpts because none of us have time to read very much except reports. But in Bloomberg on March 18, our former FTC Chairman, Mr. Pitofsky, said that your argument, and I quote, changes the goal line in his view for proving illegal monopolization, and that, in his view, it is adding something that has not been there before in antitrust case law.

Why do you think he would reach that conclusion that is so at variance with what you are saying here?

Mr. PATE. Well, Bob and I have talked about this case in the past. As I say, there are a variety of articulated standards under section 2. We think this is an appropriate one that is supported in past case law. Perhaps he prefers a different one, but we think that having a standard under section 2 for unilateral conduct, particularly where the claim is for assistance to a competitor under the so-called "essential facilities doctrine" which was at issue in that case, that a standard that looks to whether the conduct makes business sense but for exclusion of a competitor is a well-recognized one that is going to lend objectivity to section 2 of the Sherman Act and have a beneficial effect.

And as to Mr. Pitofsky's views on that, I haven't, I am sure, got to the bottom of that. But——

Mr. CONYERS. Could——

Ms. LOFGREN. Well, if I could just say and then I will yield to the Ranking Member. I just don't see it the way that you have described. And I think that the Department has taken it upon itself to argue for a change in what has been the standard. And I would yield to the Ranking Member, my senior Member on the Committee.

Mr. MURIS. Mr. Chairman, since we are referring to something my predecessor said, and since I was at the panel; Hew and I were both at the panel where this was discussed. Bob Pitofsky was not referring to the brief on the merits. I think what he was—and obviously, he could speak for himself if he were here. But clearly, from the date he was not, because the brief was filed, I think, 2 months later. He was referring to what I thought was a misinterpretation of some statements made in the brief seeking certiorari.

I agree with what General Pate is saying in that if we did have this case where we had very—the standard does not mean, and I think the brief is pretty clear in its whole context, that if we do have clear harm to consumers, that there is nothing in this brief that would stop bringing such a case.

Mr. CONYERS. So you are telling us not to worry?

Mr. MURIS. Well, I think that the Commission—a unanimous commission—joined this brief, and I am the only Bush appointee. There were four Clinton appointees. And I do not think—obviously, you can take a sentence or two in any brief and read it in a way that might cause concern. I think in context, though, I personally would not have joined the brief if it had the kind of consequences that you are suggesting.

Mr. CONYERS. Well, that is why we have lawyers and that is why this is the Judiciary Committee. And that is why we all agreed that we will be in informal discussions about these matters, much of which started before you got to your positions. So it is not a mat-

ter of holding you personally accountable. But I don't know why the Members of the Committee, most lawyers, can't understand what it seems like the people in the executive branch seem to appreciate to have a completely different interpretation. That is great stuff. This is what we wake up in the morning hoping to come to find, that there is an honest legal difference of view and interpretation, and now we have found one.

Mr. SMITH. The gentlewoman's time has expired. The gentleman from Utah, Mr. Cannon, is recognized for his questions.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. Pate are you surprised or disappointed that since—pardon me. Let me apologize first of all for being late. This has been a hectic day here on the Hill with lots of votes. And I appreciate——

Mr. MURIS. We have heard.

Mr. CANNON. Yes, I am sure, people in and out. And this is a matter of great interest to many of us, and I apologize for not having heard your testimony, and I am, frankly, still trying to figure out the last exchange which I came in the middle of. Were we talking about *Trinko* and the *Trinko* brief there?

Mr. PATE. Yes.

Mr. CANNON. Good. So we won't revisit that. Thank you. You can breathe easier on that one.

But anyway, I apologize for the fact that we are back and forth. And we appreciate your time and willingness to be here.

But, Mr. Pate, are you surprised or disappointed that since the 1996 Telecommunications Act, the Bells have not entered each other's territories to compete? I understand that one Bell CEO suggested recently that it wouldn't be right to do so, to compete. Do you have any antitrust concerns around this subject because it implies an agreement not to compete? And, did the Department open an investigation at any point since that statement was made or investigate this in the context of an already open investigation?

Mr. PATE. I am familiar with the statement you mentioned. We did look into that. The statement itself did not indicate an agreement. Obviously, a unilateral decision as to what territories a Bell operating company would contest is a very different matter from a concerted agreement as to where they would be. I am not aware of evidence of any such agreement.

With respect to competition in local areas, we think as the section 271 process has moved toward its conclusion, there has been a good deal of introduction of local competition. And as I mentioned earlier, as we began to see Internet telephony come on line as well, I think the competitive situation there is improving.

Mr. CANNON. I think we are going to have competition, I agree with that. But I am wondering, have you seen much competition between the Baby Bells? I am not sure of anyplace where Baby Bells have gone into another Baby Bell territory and competed aggressively in land lines.

Mr. PATE. The primary competition we have seen has been by the companies most associated with long distance service coming in, and then so-called CLECs, competitive local exchange carriers coming into those areas.

Mr. CANNON. The whole environment is evolving. What I am wondering in particular, does it concern you that you are not see-

ing competition by the monsters in this industry in each other's historic territories? And while I agree that a unilateral statement is not the same thing as a real agreement, it does indicate a position and a nominal agreement that appears to actually exist in reality.

Mr. PATE. We welcome the introduction of competition from wherever it comes, and think the level of competition is growing. I think it is beneficial that as you see the section 271 process, you are going to see competition among different carriers for packages of service.

So I would not go to the conclusion that the failure to see more entry into the territories of—each by the others—necessarily indicates we are not achieving the benefits.

Mr. CANNON. But, I am not asking about competition in society. I am wondering if you guys are looking at a rationale behind the failure of the RBOCs to compete within each others territories?

Mr. PATE. We monitor this situation very closely. If at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it.

Mr. CANNON. But you have absolute evidence of a declining to compete, because nobody is doing it; none of the RBOCs are doing it in any of the other RBOCs markets.

Mr. PATE. Right. And my point is, that under the antitrust laws, unilateral decisions, even tacit coordination, that results in that situation is not a violation of the antitrust laws.

An agreement would be. If we find an agreement, then we will pursue a violation.

Mr. CANNON. Are you looking for an agreement? Because, obviously something is happening, to not have competition? Are you looking for an agreement?

Mr. PATE. If we find any evidence that indicates an agreement, we will pursue it very aggressively.

Mr. CANNON. I think the fact that you don't have any RBOCs, in my experience, competing, especially in places where you have got great opportunities to compete, places where, for instance, AT&T is now doing—last I heard they had a couple of thousand lines in Michigan. And yet no other—no RBOC has stepped in to compete in that open territory, would suggest to the mind, that there was more than just a hint of the attitude of one company in that statement.

But I hope will you continue looking, because I love competition. I think it is going to serve us awfully well.

Mr. CONYERS. Could the gentleman consider yielding?

Mr. CANNON. I would certainly yield.

Mr. CONYERS. I thank the gentleman. Because we have got a letter here to Attorney General Ashcroft in which—I will just read it so you get the drift. In this context, dated December 18, 2002——

Mr. CANNON. Mr. Conyers, if I could reclaim my time for a moment. I see that my time has expired. I did have a question I wanted to ask of behalf on Mr. Goodlatte.

Mr. SMITH. Without objection, the gentleman from Utah is recognized for an additional 2 minutes.

Mr. CANNON. Thank you. I would be happy to recognize the gentleman.

Mr. CONYERS. I thank the gentleman. I am going to seek the generosity of the Chair to get some additional time.

Mr. CANNON. Thank you. That being the case, let me ask a question, if I can find it here. There we go. Chairman Muris, I recognize this question is a bit off topic, and so I apologize for that, but it is very important to ask you while we have you here before us today, because there has been a great deal of characterization of your position and the Commission's position recently on the creation of a National Do Not Spam Registry at the FTC.

Do you think that the Congressionally mandated creation of a Do Not Spam List by the FTC is advisable at this time? Would it be cost effective? And would it stop most spam?

Mr. MURIS. This is complex. I think I need to back up and just approach the question this way. There are three issues involved in the spam problem, which is the toughest consumer protection problem that I have ever seen. One is—and to which legislation could be addressed how can we find the spammers?

Second is can we punish them effectively? And third is what are the standards for legitimate businesses to send unsolicited commercial e-mail?

Most of the legislation is addressed toward the third issue, because of the difficulty of dealing with the first two issues. We have, for example, offered some very modest suggestions on what would make it easier for us to find spammers. Those have not found their way into the legislation.

This Committee has proposed criminal enforcement. I do think that would help us both find them and punish them better, although we are working right now, without this legislation, with many U.S. Attorneys on criminal prosecution of spam.

There are problems in the various bills. The Senate bill, for example, unless we got a favorable court interpretation, if it became law, would impose a knowledge standard that could easily make the bill of little use for us. In that context let me address Do Not Spam. It is an intriguing idea. As you know, we have a National Do Not Call Registry which is extremely popular; I am very supportive of it.

Leaving aside technological questions, and there are people on both sides of the technology issue whether it is feasible at a tolerable cost to Do Not Spam. With Do Not Call, we can assure Americans that on October 1, if you are on the list, you are going to receive a lot fewer calls. That is just not true with Do Not Spam. We have looked—we collect spam. We are the only people in the world that like to get spam. We get over a hundred thousand a day. We search them. We have looked at random samples of spam.

Overwhelmingly, the spam right now is, without looking hard, is either product categories like pornography that are dubious, or it is obviously false. And we can't—these guys are very hard to find. So I think a Do Not Spam List at this time would not be a useful expenditure of anyone's money.

Mr. CANNON. Mr. Chairman, Mr. Goodlatte couldn't be here. He had a follow-up question. Could I ask the Subcommittee's indulgence for an extra 2 minutes to ask a follow-up question?

Mr. SMITH. Mr. Cannon, rather than do that, I think we are going into a second round of questions. If you will wait, we will be able to recognize you in just a minute.

Mr. CANNON. Be happy to.

Mr. SMITH. The gentleman from California, Mr. Berman, is recognized for his questions except those on the subject that deal with the Chairman's constituent firms.

The gentleman from California.

Mr. BERMAN. Well, in that case, Mr. Chairman, I have no questions. Understanding the jesting and whimsical nature in which the Chairman recognized me, I will pretend I didn't hear it.

Mr. Pate, in a January 2002, letter I asked Attorney General Ashcroft to initiate a Justice Department investigation into whether Clear Channel Communications—is this under the old map or the new map in Texas?

Mr. SMITH. Under either map.

Mr. BERMAN. Under either map, into whether Clear Channel Communications was violating antitrust laws. Among other things, I relayed widespread reports that Clear Channel owned radio stations have tied air play of some musicians' music to their use of a Clear-Channel-owned concert promotion company.

Three months after I sent my letter, Assistant Attorney General Dan Bryant responded that DOJ was monitoring the situation and was willing to receive any information about practices that might raise antitrust concerns warranting an investigation.

I found it somewhat curious that DOJ would essentially ask Congress and private parties to do the investigating for it. Nonetheless, over the course of the next year, I encouraged the many people who continued to contact me with credible concerns to, in turn, relay those concerns to the designated Antitrust Division attorney.

I assumed that DOJ would do its job, namely that it would vigorously investigate these allegations. Most of the folks I sent to DOJ expressed frustration at the lack of responsiveness. I am unaware of any attempts by DOJ to proactively contact potentially affected parties, as you would expect in a serious investigation.

For a time my own staff was able to get their calls to DOJ returned, until I testified before the Senate Commerce Committee in January of this year and noted DOJ's unresponsiveness. I am extremely dissatisfied with DOJ's apparent unwillingness to initiate any kind of investigation into these serious allegations.

And I would like to know, once and for all, what DOJ has done to investigate the allegations of antitrust violations by Clear Channel. If it has investigated those allegations and found them lacking credibility, I would like to know that, and I think Clear Channel would as well. If it has an ongoing investigation, I would also like to know that.

Mr. PATE. Representative Berman, I am aware of your letter. And I have looked into these questions personally. The Clear Channel matter is one of importance to us. We have two open investigations of Clear Channel at this point. Our staff lawyers have conducted a number of interviews with witnesses that I believe your office has directed our way, and for that we are very appreciative.

We certainly do not rely on outside parties to undertake our investigations, and we have likewise undertaken significant efforts to

find additional evidence with respect to the type of allegations that you raise.

I have no question that some of the folks with whom you may have been talking are frustrated. But the important point to bear in mind is that commercial frustration that artists and others may have with Clear Channel from time to time is a different question from whether we could prove the presence of market power and abuse of that power in a tying situation under the Sherman Act.

We have an open investigation, and we are going to continue to pursue that.

Mr. BERMAN. So there is an open investigation of this issue?

Mr. PATE. On that issue, that is correct. And an additional investigation.

Mr. BERMAN. I do want to mention that none of the people that I normally would expect to be contacted in such a proactive investigation have been contacted.

Mr. PATE. Well, we do not publicize investigative measures we undertake. So I can't comment as to who has or has not been contacted.

Mr. BERMAN. I just want to note that the people who you contact can publicize that they have been contacted. And at least with some pretty good contacts among the likely people, we have submitted names, I haven't received any indication from them, that if they haven't come to you they have been contacted.

Mr. PATE. Well, one thing that is not acceptable for me is for you to fail to get timely responses from us. If you are good enough to be directing parties our way who have an antitrust complaint, I hope you and your staff will feel comfortable to contact me, personally, if you feel you are not getting a response on that, and I will make sure that it is attended to immediately.

Mr. BERMAN. Then in summary, and I appreciate that and I will follow it up, but from what I understand at this time, there is an investigation ongoing?

Mr. PATE. That is correct. We have two open investigations of Clear Channel.

Mr. BERMAN. At least one of them is tied to the issues I raised in my letter?

Mr. PATE. That is correct.

Mr. BERMAN. Okay.

Mr. SMITH. Thank you, Mr. Berman. The gentleman from Michigan, Mr. Conyers, is recognized for additional questions.

Mr. CONYERS. Thank you very much. General Pate, one of the tests by which many of us on this Committee measure the antitrust division is how they handle vertical price-fixing cases, which you are aware of the differences. And long before you got there, we had been dismayed by the very few vertical price-fixing cases that have been contemplated or brought by the Antitrust Division. And I would just like you to know how interested we are in following that area of your responsibility.

Mr. PATE. Thank you, Representative Conyers. That is an area in which I know Members of Congress have been interested over the years. I think you are well aware of the legal standards that govern those cases. And at the Division, we need to assess how to

best direct our resources to protect consumers, and we are going to continue doing that. I appreciate your interest in that subject.

Mr. CONYERS. Now, with reference to the letter that Congresswoman Lofgren and I sent to Antitrust, in which we have—we were asking about the investigation of the potential collusion of some of the Bells. And we sent that letter on December 18, 2002. And since this is before your time, I am going to make sure your staff gets copies of this and the response that we received from Jamie Brown, then the Acting Assistant Attorney General, and sort of bring us all up to date.

Because the response we received from your predecessor was that we were assured that the Division will carefully review the information in our letter and other information available to us from past investigations and will continue to carefully monitor competitive developments in this important industry.

Now, we want to reraise this issue with you now. And that is what we are doing now that we are all together in the same place.

Mr. PATE. Well, this goes to the issue that I was discussing with Representative Cannon, regarding the statement by a BOC executive. Again, the important point for our enforcement is that a unilateral decision as to what territory to enter is a very different thing from a concerted agreement that would violate section 1. And given the position that the BOCs have consistently taken in litigation and otherwise, that it was inappropriate for the CLECs and others to be taking advantage of certain of the provisions of the 1996 Act to enter competitively into local markets, I have to wonder how difficult it would be to meet the Supreme Court standard for proving an agreement that you must find conduct that would be inconsistent with unilateral action, given that the letter that you—the statement that you mentioned from the executive does not explicitly say that an agreement has taken place, and given the standards that have to be met to prove such an agreement.

We have monitored and looked carefully at the situation. If we find evidence that indicates an illegal agreement, we will pursue it aggressively. But the statement that you referenced certainly is not, in and of itself, proof of that violation, even though it may rightly give you concern that there is not as much competitive entry as you would like to see in the industry.

Mr. CONYERS. Well, I didn't suggest that it was the proof. And furthermore, what I want is the assurance that your unit is looking into this and are deeply concerned about this. Because, there is—there is a lot of discussion out there about this. But finally, let's take a look at Univision; you have not mentioned that.

Now, here is a situation where radio and television market power has been brought together. And you signed off on that. And I find that, again, something that we should be able to discuss much more.

Mr. PATE. Well, I think we should if you are under the impression that our role was to sign off on the proposed Univision transaction. We obtained some very important relief for consumers in that transaction. We found that in a number of cities there were overlaps with respect to radio competition, and that because of its partial ownership position in Entravision, approximately a 30 percent ownership interest that Univision would have had in

Entravision, there was the potential for harm to competition in those markets, and that is why in the consent decree that we obtained in that decision, Univision is required to divest, to give up, to divest its holdings down to a level that would be consistent with a passive investment, to give up its ability to control Entravision's operations.

And by doing all of that, we protected consumers in those markets—by our challenge to that aspect of the transaction. So we think our role there was very important.

Mr. CONYERS. I do too. But what about television?

Mr. PATE. We looked at——

Mr. SMITH. The gentleman from Michigan is recognized for an additional 2 minutes. If the witness will respond briefly.

Mr. PATE. The transaction was not one that involved television overlaps. It was one in which a number of groups suggested that we should look at a combined market for Spanish-language media and to lump television and radio together, if you will.

That would have been something the Division has not done in media cases previously. It is something that in examining the markets that were at issue, and how those who were affected by the transaction viewed, or in this case did not view radio and television as competitive alternatives, we found that would not have been an appropriate way to define the market.

I wouldn't rule out the possibility that we would, in other circumstances, find it appropriate to define a market that way. But that is the basis on which we approached the television issues in the transaction.

Mr. CONYERS. Well, let me thank you very much. And look forward to our future exchanges.

Mr. PATE. Thank you.

Mr. SMITH. Thank you, Mr. Conyers. The gentleman from Utah, Mr. Cannon, is recognized for additional questions.

Mr. CANNON. Thank you, Mr. Chairman. I appreciate that. Your agency, Mr. Muris, is struggling with spam. Congress is struggling with spam. All of America is struggling with spam. If you would indulge me for one more question.

Mr. MURIS. Yes.

Mr. CANNON. But first, Mr. Chairman, I would like to ask unanimous consent to submit for the record several letters and position papers on the subject.

Mr. SMITH. Without objection they will be made part of the record.

Mr. CANNON. Thank you, Mr. Chairman.

In this environment where technology is changing, security issues are a major concern. I am concerned about creating a database with millions of valid e-mail addresses which can be a potential gold mine for spammers who have proved themselves to be ingenious in this regard.

Can you give us a rock-solid guarantee that we could actually protect a database like that? And/or do you have any comment on that?

Mr. MURIS. We held a 3-day spam forum a few months back. And there was—I would say the majority opinion then expressed serious concerns about our ability to do that. Since then we have had a lot

of additional talks with people about the technology. There are—some people on our staff, however, are convinced that the technological issues can be dealt with. I don't know at what cost, and we are still looking at it.

I think, obviously, since we are dealing with people who aren't complying with laws that exist in any event, that the danger you talked about is a very serious danger of putting—you know, the potential of someone getting a list of valid e-mail addresses.

Mr. CANNON. Thank you, Mr. Muris.

General Pate, I just have one other question. Does this potentially raise antitrust issues in your mind when a company holding a monopoly share of the voice market, and a significant share of the broadband market, refuses to sell broadband to a customer if that customer wants to buy voice service over the monopoly's loop from a competing company?

Mr. PATE. It potentially does. We would need to look at the market facts, the presence or absence of market power in a particular situation. The antitrust laws don't set up a regulatory regime of open access under all circumstances. So there may be access that a competitor would seek in a situation where denial of that access would not raise antitrust concerns.

But yes, it could. It would be something that merits examination on a case-by-case basis.

Mr. CANNON. Are you aware that several States have found that is not anticompetitive? And is that significant in your mind?

Mr. PATE. That a State public utility commission, for example, would or would not determine that an open access rule is required as part of its regulatory oversight, would not govern whether we might find an antitrust problem with a particular business practice. They are two different inquiries.

Mr. CANNON. Are you looking at any situations like that currently?

Mr. PATE. I am not aware, sitting here, of an open investigation of that type. I wouldn't rule out the possibility that our staff has its eye on a situation like that, but I don't have one in mind I could mention to you today.

Mr. CANNON. Thank you very much, General Pate.

Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Cannon. That concludes our questions. General Pate and Chairman Muris, we appreciate your testimony today. It has been very helpful. And as you might have gathered from my opening statement, we expect to see you all again sometime soon as well, but we appreciate your expertise and your interest in this subject.

The Committee stands adjourned.

Mr. PATE. Thank you, Mr. Chairman.

[Whereupon, at 5:10 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

COMMITTEE ON THE JUDICIARY TASK FORCE ON ANTITRUST

Questions from Chairman F. James Sensenbrenner, Jr.

- How can this Committee help ensure the efficient and effective enforcement of our nation's antitrust laws?
- To what extent has the Bureau of Competition at the FTC consulted with the FCC during Triennial and Biennial Review proceedings?
- Do you believe the Bureau of Competition should have a more formal, continuing role in these proceedings?
- To what extent do foreign countries abuse antitrust laws to the detriment of American businesses? What has the FTC done to prevent this from occurring?
- Does the Bureau of Competition currently seek any changes to the antitrust laws, the procedural mechanisms available to it, or to any of its organizational statutes?
- What steps has your agency taken to ensure effective competition in the pharmaceutical and health care industries?
- There has been some level of confusion concerning the allocation of responsibility of responsibility for merger reviews by the Department of Justice and Federal Trade Commission. Has this situation been resolved?
- To what extent has the Federal Trade Commission been involved in international antitrust agreements? Does the Federal Trade Commission actively consult with foreign antitrust authorities, or advise the United States Trade Representative on antitrust matters contained in Free Trade Agreements or multilateral trade pacts?

Question from the Honorable Lamar Smith

- It is my understanding that the Department of Transportation (DOT) has authority to regulate the airline Computer Reservation System (CRS) market because the FTC Act specifically grants DOT this authority. In 1952, Congress also gave DOT authority over ticket agents. DOT used to consider CTS companies "air carriers" when they were owned by the airlines, but the full airline divestiture of all US CRS systems, today this is no longer so. The DOT argues that CRS companies are "ticket agents" even though the contracts between the CRS companies and the airlines specifically disclaim any relationship and CRS companies automate ticket agents, but are not ticket agents themselves. Do you believe the Federal Trade Commission should be exercising jurisdiction in this market, or are you content with the present arrangement?

"The Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission"
House Committee on the Judiciary Task Force on Antitrust
July 24, 2003

FTC Chairman Muris' Responses To Questions For The Record

Questions from Chairman F. James Sensenbrenner, Jr.

Q. "How can this Committee help ensure the efficient and effective enforcement of our nation's antitrust laws?"

A. Committee oversight hearings that explore enforcement initiatives and priorities of the federal antitrust agencies help ensure efficient and effective enforcement of our nation's antitrust laws. Such hearings provide guidance to the agencies regarding the Committee's priorities and concerns.

Q. "To what extent has the Bureau of Competition at the FTC consulted with the FCC during Triennial and Biennial Review proceedings?"

A. The Bureau of Competition has not consulted with the FCC during those proceedings.

Q. "Do you believe the Bureau of Competition should have a more formal, continuing role in those proceedings?"

A. We do not believe that the Bureau of Competition requires a more formal, continuing role in those proceedings. The Department of Justice's Antitrust Division has a long history of industry oversight and consultation with the FCC in this area. Given this background, and the Bureau of Competition's lack of expertise on Biennial and Triennial review issues, we do not recommend a change in the current allocation of responsibility with regard to those proceedings.

Q. "To what extent do foreign countries abuse antitrust laws to the detriment of American businesses? What has the FTC done to prevent this from occurring?"

A. In recent years there has been a large increase in the number of countries with antitrust laws. In general, we believe there is substantial commonality in the principles underlying these laws, and significant progress toward convergence in the way they are applied. Nevertheless,

there are, inevitably, difference among the laws and the manner in which they are applied based on, among other things, differences in levels of economic development, legal systems, cultures, priorities, etc.

It has been our general observation that antitrust laws are applied in a non-discriminatory manner. Nevertheless, we are aware of occasional allegations that foreign countries abuse their antitrust laws, including to the detriment of American businesses.[1] As noted above, there are differences in the ways in which jurisdictions design, interpret, and implement their antitrust laws. Moreover, the decision whether to bring or not bring any particular antitrust case is generally based on complex and often nonpublic information. Hence, it is difficult to determine whether a foreign enforcers' decision to bring or not bring a given case constitutes an "abuse." Thus, the Federal Trade Commission is not in a position to judge whether foreign countries abuse antitrust laws to the detriment of American businesses.

The Federal Trade Commission, together with the Department of Justice Antitrust Division, is actively involved in international efforts to discourage discriminatory[2] or otherwise unsound antitrust enforcement. First, the FTC promotes sound, non-discriminatory enforcement through its own example, to which antitrust agencies around the world look for guidance in formulating their own policies. For example, as stated in the DOJ/FTC Antitrust Enforcement Guidelines for International Operations, "[t]he Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties."[3]

In addition, we promote sound, non-discriminatory antitrust enforcement in international fora such as the OECD Competition Committee, the WTO Working Group on the Interaction Between Trade and Competition Policy, the Asia-Pacific Economic Forum, and the International Competition Network (ICN). For example, the FTC was a founding member of the ICN, which now includes competition agencies from seventy-one jurisdictions, and is active in its leadership. The FTC chairs an ICN subcommittee on merger notification and procedures, which has developed Guiding Principles and Recommended Practices for merger notification and review that have been adopted by the ICN; these include a Guiding Principle on non-discrimination that provides:

> **Non-discrimination on the basis of nationality**. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations

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[1] *See, e.g., International Antitrust*, Hearing before the Senate Judiciary Subcommittee on Antitrust, Business Rights, and Competition, May 4, 1999, Serial No. J-106-21; *International Antitrust Enforcement: How Well is it Working?*, Hearing before the Senate Judiciary Subcommittee on Antitrust, Business Rights, and Competition, Oct. 2, 1998, Serial No. J-105-124.

[2] There may be overriding justifications for favoring domestic firms in certain limited circumstances, such as where national security is involved.

[3] *Antitrust Enforcement Guidelines for International Operations* at §2 (April 1995), available at: http://www.usdoj.gov/atr/public/guidelines/internat.htm.

on the basis of nationality.
http://www.internationalcompetitionnetwork.org/mergers_guiding.pdf

The FTC also maintains close working relationships, including through bilateral agreements and informal arrangements, with antitrust agencies around the world. These arrangements provide a mechanism for cooperation and coordination that, among other benefits, reduce the possibility of discriminatory enforcement.

Finally, the FTC also provides technical assistance, largely funded by the Agency for International Development, to newer antitrust agencies around the world with the aim of promoting sound enforcement and convergence in antitrust enforcement and policy. Our assistance includes discouragement of policies favoring "national champions" that could be implemented in a discriminatory manner.

Q. To what extent has the Federal Trade Commission been involved in international antitrust agreements? Does the Federal Trade Commission actively consult with foreign antitrust authorities, or advise the United States Trade Representative on antitrust matters contained in free trade agreements or multilateral trade pacts?

A. The United States is a party to numerous bilateral antitrust agreements.[4] The FTC participated in negotiating each of these agreements and is, along with the Department of Justice, defined as the "competition authority" responsible for carrying out the agreements.

Pursuant to these agreements and through other informal arrangements, the FTC consults regularly with many antitrust authorities. With our major trading partners, such as the EU and Canada, we work very closely both on individual cases of mutual concern and on broader policy coordination. On individual cases, these consultations promote consistency of analyses and outcomes. On broader policy matters, our contacts, such as through US-EC working groups on merger policy and on intellectual property policy, promote convergence toward best practices.

The FTC also participates actively in the negotiation of competition provisions in trade agreements. Working closely with the Office of the United States Trade Representative and other U.S. agencies, FTC staff participated in the United States delegations that negotiated the competition chapters of NAFTA and of the recent free trade agreements with Chile and with

[4]These include cooperation agreements with Australia (1982), Brazil (1999), Canada (1984 and 1995), the European Communities (1991), Germany (1976), Israel (1999), Japan (1999), and Mexico (2000), an agreement with the European Communities on "positive comity" (1998), and an agreement pursuant to the International Antitrust Enforcement Agreement Act with Australia (1999). The agreements are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm. The United States is also a party to the OECD Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade (1967, *as amended* 1995), which contains provisions similar to the bilateral cooperation agreements. See http://www.usdoj.gov/atr/public/international/docs/council_recs.htm.

Singapore, and now participates in the U.S. delegation to the U.S.-Australia free trade agreement negotiations. The FTC also co-chairs, with the Office of the United States Trade Representative, the U.S. delegation to the WTO Working Group on the Interaction Between Trade and Competition Policy, and will be part of the U.S. delegation to the WTO Ministerial Conference in Cancun, Mexico this September.

Q. "Does the Bureau of Competition currently seek any changes to the antitrust laws, the procedural mechanisms available to it, or to any of its organizational statutes?"

A. The Bureau of Competition does not currently seek any such changes.

Q. "What steps has your agency taken to ensure effective competition in the pharmaceutical and health care industries?"

A. The FTC continues to focus its competition resources in significant areas of the economy through law enforcement actions and continuing assessment of ongoing developments in the marketplace. One of these areas is the health care industry – health-related products and services account for over 15 percent of gross domestic product. Our competition efforts include antitrust investigations involving pharmaceutical companies and health care providers, as well as antitrust reviews of mergers affecting health care. Furthermore, to position the FTC to make informed contributions to competition policy through litigation or non-litigation instruments, the FTC makes substantial investments in studies and research that might be called "competition policy R&D." A prominent example of this "R&D" is a study of generic pharmaceutical competition embodied in a July 2002 FTC report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study." This report has helped inform FTC investigations of exclusionary practices by certain pharmaceutical companies, and has sparked Food and Drug Administration examination of regulatory policy in this area. Another example of competition policy R&D is a September 2002 two-day FTC public workshop focusing on the impact of competition law and policy on the cost, quality, and availability of health care. That workshop helped set the stage for a comprehensive set of hearings on "Health Care and Competition Law and Policy," launched jointly by the FTC and the Justice Department's Antitrust Division in February 2003. Those hearings, which are ongoing, will culminate in a major public report. The FTC's activities bearing on health care and pharmaceutical competition are discussed in greater detail below.

Prescription Drugs: Anticompetitive actions to forestall generic entry have been a major focus of Commission nonmerger enforcement. The FTC's cases primarily focus on three types of conduct: (1) unilateral conduct by a branded manufacturer to delay generic entry, (2) agreements between a brand-name drug manufacturer and a generic firm, and (3) agreements among generic drug manufacturers.

The FTC's recent settlement agreement with Bristol-Myers Squibb ("BMS") is an

example of a branded manufacturer allegedly engaging in a series of unilateral anticompetitive acts to obstruct entry of low-price generic competition. The Commission alleged that BMS obstructed the entry of generic drugs that would have competed with three of BMS's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar. Among other things, the Commission's complaint alleged that BMS, to protect nearly $2 billion in annual sales for these products, abused Food and Drug Administration ("FDA") regulations to obstruct generic competitors; misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book" list of approved drugs and their related patents; breached its duty of good faith and candor with the U.S. Patent and Trademark Office ("PTO"), while pursuing new patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs. The complaint also alleged that BMS paid a would be generic rival $72.5 million to abandon its legal challenge to the validity of a BMS patent and to stay out of the market until the patent expired.[5]

The Commission has challenged several agreements between a brand-name drug manufacturer and a generic firm, where the branded manufacturer allegedly paid the generic firm not to compete. For example, in April 2002, the Commission issued a consent agreement against American Home Products to settle 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.[6]

The Commission's August 2002 settlement with Biovail Corp. and Elan Corp. exemplifies the third category of cases – alleged agreements among generic firms to obstruct competition in the generic drug market. The Commission's complaint alleged that the two companies entered into an agreement that provided substantial incentives for the two companies not to compete in the markets for 30 milligram and 60 milligram dosage strengths of the generic drug Adalat CC, an anti-hypertension drug.[7]

The FTC's focus on competition in the prescription drug industry goes beyond cases; the report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," evaluated whether the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act are susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name

[5] *Bristol-Myers Squibb Co.*, Dkt No. C- (2003). The Order included a provision prohibiting BMS from triggering a 30-month stay based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug. See also, *Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002) (consent order to settle charges that Biovail illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book as claiming Biovail's high blood pressure drug Tiazac).

[6] *Schering-Plough Corp.*, Dkt. No. 9297 (Apr. 2, 2002) (consent order as to American Home Products). An ALJ's initial decision, filed on June 27, 2002, dismissed all allegations of anticompetitive conduct against Schering-Plough and Upsher-Smith Laboratories. *Schering-Plough Corp.*, Dkt. No. 9297 (June 27, 2002) (appeal pending with the Commission).

[7] *Biovail Corp. and Elan Corp.*, Dkt. No. C-4057 (Aug. 15, 2002).

drug products.[8] The report recommended changes to the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identified in the FTC study.[9] The FDA has proposed a new rule to curb one of the abuses uncovered by the FTC – pharmaceutical firms' alleged misuse of the Hatch-Waxman patent listing provisions – to speed up consumer access to lower-cost generic drugs.[10] Finally, many of the recommendations included in this report are embodied in proposed legislation pending before Congress, the "Greater Access to Affordable Pharmaceuticals Act," which would amend the Hatch-Waxman Act.[11]

Health Care Providers: For decades, the Commission has worked to enable innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. Recently the Commission has settled seven cases alleging that physicians colluded to raise their fees, as well as consumers' costs, and the Commission continues to investigate similar cases.[12]

Health Care Mergers: The Commission reviews, and where necessary, seeks relief from, mergers in the health sector involving pharmaceutical manufacturers and other health care companies. For example, in April 2003, the Commission reached a settlement with Pfizer Inc., the largest pharmaceutical company in the United States, and Pharmacia Corporation to resolve concerns that their $60 billion merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions. Annual sales in the nine product markets currently total more than $3 billion. The settlement will require divestitures to protect consumers' interests in those markets while allowing the remainder of the transaction to go forward.[13]

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[8]Report available at <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.

[9]President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs (Oct. 21, 2002), *available at* http://www/whitehouse.gov/news/releases/2002/10/20021021-2.html>.

[10]Applications for FDA Approval to Market a New Drug: Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug is Invalid or Will Not Be Infringed; Proposed Rule, 67 Fed. Reg. 65448 (Oct. 24, 2002).

[11]See Prepared Statement of the Federal Trade Commission Before the U.S. Senate Committee on Judiciary (Aug. 1, 2003).

[12]*Grossmont Anesthesia Servs. Med. Group, Inc.*, Dkt. No. C-4086 (July 15, 2003); *Anesthesia Serv. Med. Group, Inc.*, Dkt. No. C-4085 (July 15, 2003); *Carlsbad Physicians,* Dkt. No. C-4081 (June 20, 2003); *System Health Providers*, Dkt. No. C-4064 (Oct. 24, 2002); *R.T. Welter & Assoc., Inc.* (Professionals in Women's Care), Dkt. No. C-4063 (Oct. 8, 2002); *Physician Integrated Servs. of Denver, Inc.*, Dkt. No. C-4054 (July 16, 2002); *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. C-4055 (July 16, 2002).

[13]*Pfizer Inc., Dkt. No.* C-4075 (May 30, 2003).

Other recent health care mergers investigated by the FTC include:

Amgen/ Immunex. The Commission entered a consent agreement requiring divestiture of assets and licensing of intellectual property rights in three biopharmaceutical markets to cure anticompetitive effects from Amgen Inc.'s $16 billion acquisition of Immunex Corp.[14]

Cytyc/Digene. The Commission challenged Cytyc Corporation's proposed $420 million acquisition of Digene Corporation, alleging that the combination would reduce competition and increase consumer prices in the market for primary cervical cancer screening tests. The parties abandoned the merger before FTC staff filed a motion in a federal district court to enjoin the transaction.[15]

Quest Diagnostics/Unilab. The Commission entered a consent agreement to resolve concerns that Quest Diagnostics, Inc.'s $827 million acquisition of Unilab Corporation would harm competition for clinical lab services in Northern California.[16]

Hospital Merger Retrospective. In addition to investigating and challenging specific mergers, the Commission formed a Merger Litigation Task Force to investigate recently consummated hospital mergers. In light of the antitrust agencies' lack of success in challenging hospital mergers over the past several years, the Commission has charged the Task Force with examining the actual effects of the mergers.

Hearings on "Health Care and Competition Law and Policy": Consistent with the broad mandate of the FTC Act, the Commission, jointly with DOJ's Antitrust Division, is conducting almost 30 days of hearings to examine health care issues, including competition law and policy issues raised by hospitals, insurers, quality and consumer information, physicians, and non-price competition. In addition, the hearings include discussion about pharmaceuticals, long-term care, Medicare, remedies for anticompetitive conduct, and international perspectives on competition law and policy. A public report that incorporates the results of the hearings will be prepared after the hearings are concluded.[17]

Q. "There has been some level of confusion concerning the allocation of responsibility for merger reviews by the Department of Justice and Federal Trade Commission. Has the situation been resolved?"

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[14] *Amgen Inc. and Immunex Corp.*, Dkt. No. C-4056 (Sept. 3, 2002).

[15] FTC 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>.

[16] *Quest Diagnostics Inc. and Unilab Corp.*, Dkt. No. C-4074 (Apr. 8, 2003).

[17] The FTC web site for the hearings is http://www.ftc.gov/ogc/healthcarehearings/index.htm. All documents, including a detailed agenda for the hearings' sessions, appear on the web site.

A. As you know, the Department of Justice and the Federal Trade Commission work together in deciding which of the two agencies should review a particular proposed merger notified to them under Section 7A of the Clayton Act. Under a long-standing agreement between the agencies, matters are cleared for review to one of the agencies, based primarily on the agency's recent relevant expertise. Each agency has developed expertise in a number of particular industry subject matter areas. In the majority of cases, it is apparent that a proposed merger falls within the expertise of only one of the agencies, and that matter is quickly and routinely assigned to the expert agency. In those instances in which staff at each agency believes it has the expertise to handle a particular proposed transaction, discussions ensue between the agencies.

Until the 1990s, this process worked well. In recent years, the process has become more contentious as the convergence of industries has blurred the boundaries between industries. At times, these disputes have caused significant investigational delays. Last year, the agencies implemented a revised clearance agreement that provided definitive allocations of investigational responsibility by industry sector. This agreement was intended to minimize clearance debates, and during the brief period this agreement was in effect, there were no clearance disputes. The new agreement faced significant opposition from Senator Hollings, however, and was abandoned. Since then, the agencies have disagreed from time to time about the clearance of particular matters. In some cases, these disagreements have required substantial resources to resolve. Although the current agreement does not work as smoothly as the agreement that provided clear allocations of responsibility by industry, the agencies continue to work together to resolve disputes.

Question from the Honorable Lamar Smith

Q. "It is my understanding that the Department of Transportation (DOT) has authority to regulate the airline Computer Reservation System (CRS) market because the FTC Act specifically grants DOT this authority. In 1952, Congress also gave DOT authority over ticket agents. DOT used to consider CTS companies "air carriers" when they were owned by the airlines, but the full airline divestiture of all US CRS systems, today this is no longer so. The DOT argues that CRS companies and the airlines specifically disclaim any relationship and CRS companies authornate [sic] ticket agents, but are not ticket agents themselves. Do you believe the Federal Trade Commission should be exercising jurisdiction in this market, or are you content with the present arrangement?"

A. The FTC Act does not address computer reservation systems specifically. Section 5 of the FTC Act exempts from FTC enforcement "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." Both the FTC and the Antitrust Division of the Department of Justice enforce our nation's antitrust laws, and the agencies have procedures to avoid duplicating each other's work. The Justice Department has had longstanding enforcement expertise in this area, and is best equipped to continue to deal with questions involving the CRS market. We would note, however, that the FTC has commented and will continue to comment on CRS-related regulatory issues that bear on interpretation of the FTC Act. For example, on June 6, 2003, the FTC filed comments with DOT concerning proposed DOT rules governing CRS. The FTC's comments addressed references to FTC case law and policy in the DOT's analysis of its proposed revisions of the CRS regulations. The FTC's comments are available at http://www.ftc.gov/os/2003/06/dotcomment.htm.

DOJ/FTC *AMICUS* BRIEF IN *VERIZON V. TRINKO*

Representatives Conyers and Lofgren have posed questions regarding the Commission's position on the test for exclusionary conduct set forth in the DOJ/FTC *amicus* brief in *Verizon v. Trinko* (*Trinko* brief). The following discussion addresses broadly the issues raised by those questions.

As discussed in the agencies' brief, historically there have been a variety of tests for monopolization. As with most of antitrust law, the analysis of alleged monopolization conduct is highly fact-specific, and the law accommodates the use of a mode of analysis suitable to the context at hand. As the brief explains, the offense of monopolization is broadly defined as (1) the willful acquisition or maintenance of monopoly power (2) by the use of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992), quoting *United States v. Griffith,* 334 U.S. 100, 107 (1948).

Thus, as explained by a leading treatise, a *sine qua non* for any monopolization or attempted monopolization claim is anticompetitive conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651f, at 83-84 (2d ed. 2002). Further, for conduct to be "anticompetitive," it must be "exclusionary" or predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). As the *Verizon* brief further explains, conduct is exclusionary or predatory if it "not only (1) tends to impair the opportunities of rivals, but also (2) does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32, quoting 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

The government's *Trinko* brief recognizes that there are several tests for exclusionary or predatory conduct that would satisfy the Court's definition. One such test is to examine whether the conduct would make economic sense but for its tendency to eliminate or lessen competition. The *Trinko* brief recognizes, however, that exclusionary conduct need not always entail substantial economic sacrifice. Brief at 11 n.2. For example, the enforcement of a fraudulently-obtained patent may involve limited expenditures, but may well amount to exclusionary conduct, if it also has the requisite effect on competition. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1966). Likewise, sham litigation or bad-faith administrative filings may impose little cost on a monopolist, but create substantial anticompetitive impact. See, *e.g., California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). Thus, citing a leading antitrust treatise, the *Trinko* brief notes that, although the application of Section 2 of the Sherman Act does not entail an open-ended "'balancing' of social gains against competitive harms," and "a firm is under no obligation to sacrifice its own profits," an act may be unlawfully exclusionary if it "produce[s] harms disproportionate to the resulting benefits." 3 Areeda & Hovenkamp, *supra,* ¶¶ 651a, 658f, at 72, 131-32, 135.

In *Verizon v. Trinko,* the government advocated the first of these tests, the "but for"

analysis. The context of that case drove the choice of tests. The offense of monopolization – indeed, antitrust law in general – most often involves a defendant's breach of a *negative* duty – *i.e.*, an obligation to refrain from engaging in competitively harmful conduct. The basic principles of monopolization law are readily applied in delimiting the scope of a firm's duties in that context. *Verizon v. Trinko* involved a substantially different situation. That case involved the scope of a firm's *affirmative* duties under the antitrust laws – in particular, the scope of its duty to assist rivals. The government's *Trinko* brief thus focused on the analysis of the defendant's conduct in that particular context.

As noted in the *Trinko* brief, the antitrust laws generally afford all firms, including monopolists, considerable discretion in determining with whom they will and will not deal. The concern raised by the Second Circuit's decision in *Verizon v. Trinko* was a potential broad expansion of firms' affirmative duties, without a limiting principle – *i.e.*, uncabined by the usual requirement that the challenged conduct be exclusionary or predatory, as those terms are normally understood in antitrust law. The monopolization claim in *Verizon v. Trinko* was essentially based on the defendant's alleged failure to comply with requirements of the Telecommunications Act of 1996, not upon the breach of a duty arising under the antitrust laws. As such, the Second Circuit's approach would encourage litigants to seek antitrust remedies for ordinary commercial and regulatory disputes and subject firms to antitrust liability for simply refusing to assist competitors. As the *Trinko* brief states, the Second Circuit's decision "creates the risk of Section 2 liability based merely on the needs of the rival, the violation of regulatory requirements, or perhaps even simple breach of contract. It imposes 'precisely the kinds of affirmative duties to help one's competition that . . . do not exist under the unadorned antitrust laws.'" Brief at 14, quoting *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000).

The government therefore suggested the "but for" test as a limiting principle in the context of that case. The test is consistent with the Supreme Court's analysis in *Aspen Skiing*, and in fact would capture a substantial spectrum of conduct that would constitute the offense of monopolization, because exclusionary conduct often involves the sacrifice of short-term profits or goodwill will to maintain or obtain long-term monopoly power. *See Aspen Skiing*, 472 U.S. at 608-610-11.

I emphasize, however, that the "but for" analysis is not an exclusive test for exclusionary conduct. Indeed, as the *Trinko* brief emphasizes, the "but for" test is a special standard applicable to those cases in which the plaintiff asserts that the defendant was under a duty to assist a rival. Monopolization cases are very fact specific, and the agency looks closely at the hard facts of each particular case.

Because of the litigation status of the matter, it would not be appropriate for me to address the issues in further detail at this time. Of course, the agency's analysis of monopolization issues will be guided by the Supreme Court's opinion in *Verizon v Trinko*. I expect that the Supreme Court will address many of the issues Representatives Conyers and Lofgren have raised.

COMMITTEE ON THE JUDICIARY TASK FORCE ON ANTITRUST

Questions from Chairman F. James Sensenbrenner, Jr.

- How can this Committee help ensure the efficient and effective enforcement of our nation's antitrust laws?
- Does the Antitrust Division support enhancing criminal penalties for antitrust violations?
- To what extent has the Antitrust Division consulted with the FCC during Triennial and Biennial Review proceedings?
- Do you believe the Antitrust Division should have a more formal, continuing role in these proceedings?
- To what extent do foreign countries abuse antitrust laws to the detriment of American businesses? What has the Antitrust Division done to prevent this from occurring?
- Does the Antitrust Division currently seek any changes to the antitrust laws, the procedural mechanisms available to it, or to any of its organizational statutes?
- Has the Antitrust Division undertaken any investigations of alleged anticompetitive conduct by the Bell operating companies in their local markets after Section 271 applications have been granted?
- Under what circumstances do you foresee the Antitrust Division undertaking such investigations to ensure that competition in local markets remains fully and irreversibly open to competition?
- To what extent does the *Trinko* case threaten to exempt the telecommunications industry from the antitrust laws? Are entities exempt from the antitrust laws simply because they have been subject to regulation, or benefitted from deregulation overseen by the FCC or any other federal agency?
- Does the Antitrust Division fully comprehend the potential impact of this case?
- How can Congress ensure that the resources of the Antitrust Division and FTC are utilized in a manner that avoids duplication of responsibility?

- There have been allegations of anti-competitive behavior by regional Bell companies against nonincumbent carriers. What evidence would the Department need to open a Section 2 investigation?

- Has the Antitrust Division investigated competitive aspects of exclusive agreements in the sheet music industry? Has the Division investigated exclusive arrangements which have prevented online sheet music companies from receiving sheet music content? Does the Division recognize the competitive benefits of online distribution in the sheet music industry?

- The DOJ took the position in its amicus brief in *Trinko* that a monopolist's refusal to deal with rivals is only exclusionary and potentially unlawful if it "involves a sacrifice of profits or business advantage." *(US/FTC Brief at 19)* But in the nearly identical factual setting of the old Bell System monopoly, the government took the position that anti-competitive conduct could involve raising rivals costs. How do you explain the enormous change in the government's position on this point?

- Under the "sacrificing profits" test you've proposed in the *Trinko* brief, wouldn't it have been impossible to have brought the antitrust cases that resulted in the breakup of the old AT&T Bell System monopoly? Because AT&T's conduct primarily involved refusals to deal, yet didn't involve the sacrifice of short term profits, could the government have met the test you propose? Has this test ever been embraced by any court?

- Congress reserved a special role for the Department in evaluating section 271 applications, requiring the FCC to give "substantial deference" to the Department's evaluation. In its latest evaluation of the Michigan 271 application, the Department expressed concern regarding SBC's wholesale billing practices. SBC has filed a 271 application for the remaining four Ameritech states. How will the Antitrust Division ensure that its evaluation of the latest 271 application is not only comprehensive, but given the substantial deference by the FCC that Congress intended?

- We routinely authorize substantial resources for the Telecommunications Task Force. When the 271 process is completed, where will the attorneys and economists of the task force be directing their efforts?

- The Bells have requested that all of their broadband offerings be deregulated nationwide, including those for residential customers, small businesses, and large businesses. In light of the fact that there are numerous geographic areas throughout the country where – even at the retail level – residential customers have access only to Bell-provided broadband services, does this development raise anticompetitive issues?

- At the wholesale level, ISPs contend that there are no true alternatives to wireline broadband services, because cable has not generally implemented ISP access. Do you believe that wholesale competition should be protected? Do you agree that any deregulation that would impair the provision of wholesale transport to ISPs would be ill-advised?

- There has been some level of confusion concerning the allocation of responsibility of responsibility for merger reviews by the Department of Justice and Federal Trade Commission. Has this situation been resolved?

- To what extent has your agency been involved in international antitrust agreements? Does the Antitrust Division actively consult with foreign antitrust authorities, or advise the United States Trade Representative on antitrust matters contained in Free Trade Agreements or multilateral trade pacts?

- Legislation adopted in Illinois that would have substantially raised the prices at which the Bells furnish unbundled elements of their local networks to competitors and which several competitors say would have led them to curtail their competitive efforts in Illinois, recently was enjoined by the courts. In states where long-distance authority under 271 has not been granted, if such legislation were adopted, would you seriously consider its impact on the marketplace in determining whether to support long-distance entry?

- There has been speculation that one of the big "long-distance" companies like AT&T or MCI will consolidate with Bell companies. A few years ago, former FCC Chairman Reed Hundt called the possibility of an ATT/SBC merger "unthinkable." Do you have any views on whether such mergers are more "thinkable" or "unthinkable" today and whether such mergers could occur in a manner consistent with the antitrust laws?

- In spite of the fact that the Bells are passing up certain very attractive markets in each other's territories by not competing against one another, in spite of the statement by Mr. Notebaert, CEO of Qwest (and former CEO of Ameritech) that although it might be a way to make a "quick dollar" that doesn't "make it right" to do so, and in spite of suggestions by various Bells to regulators that they would compete vigorously but have not done so, the Antitrust Division has apparently not opened an antitrust investigation into potential collusion. How can you ensure more effective competition in this industry?

- Cooperative agreements proposed by the International Air Transport Authority (IATA) must receive approval for an antitrust exemption from the Department of Transportation. Under the Federal Aviation Act, the Department of Transportation must disapprove proposed agreements which reduce or eliminate competition unless these agreements meet a serious transportation need or advance important public policy objectives which cannot be achieved through less anti-competitive alternatives. It is my understanding that the IATA has proposed an increase in high volume low density shipping rates that would raise international shipping costs by as much as 20 percent, imposing additional burdens on a

wide range of shippers and American consumers. I also understand that the Department of Transportation has not announced public hearings to consider the potential impact of this issue. As a general matter, competitors should be exempted from antitrust scrutiny only in exceptional circumstances. Has the Antitrust Division formally submitted its views concerning this exemption to the Department of Transportation? If not, why not, and how can the Antitrust Division ensure that applications for these exemptions are reviewed with the scrutiny they deserve?

- An article in the June 27, 2003 issue of *The Wall Street Journal* reported that Comcast, "now the nation's biggest cable operator ever, is looking to use [its] clout to shift the balance of power between those who supply content and those who distribute it." The article detailed efforts by Comcast to force cable programmers to lower the rates that they charge for programming. Has the Antitrust Division examined whether Comcast is using its market power in an anticompetitive manner?

Questions from the Honorable Lamar Smith

- I read with interest the recent *Washington Post* story on the Antitrust Division's recent report to the District Court expressing concern that Microsoft is not abiding by the terms of its consent decree with the Department of Justice. What is the Antitrust Division doing to ensure full compliance with this agreement?

- Has Microsoft been fully cooperative with the Antitrust Division? Have they fully addressed your concerns in a timely manner?

- The protocol licensing program mentioned in the *Post* story is the first of its kind and, in developing it, apparently Microsoft solicited the input of the Department of Justice, states and prospective licensees. Is that your understanding as well?

- Microsoft's protocols are the company's intellectual property, and as I understand it, Microsoft is allowed to charge a nondiscriminatory fee for this property, and some have companies have already paid this fee to license these protocols. It sounds like the program is working. Microsoft is establishing new programs as required and soliciting input from the Division and others in doing so. Do you have reason to believe that Microsoft will not continue to work with the Division in a transparent and cooperative manner?

- The Department of Transportation (DOT) is currently engaged in a rulemaking concerning Computer Reservation Systems (CRS) that has drawn sharp criticism from all sectors of the industry and many part of the government. These CRS rules were put into place 20 years ago to prevent airlines from exercising their control over CRS to engage in anticompetitive

conduct. Airlines have sold their stakes in CRSs. Today, the marketplace has dramatically changed, while the rules have not. The Department of Justice has stated that "two recent industry developments – domestic airlines no longer own CRSs and now use the Internet to sell tickets – have reduced the need for extensive regulation [in this field]." In fact, the Department of Justice has called for near deregulation of this industry. This contradicts DOT's proposal, which includes new rules which would invalidate existing contracts between CRSs, airlines, and travel agents. You have said that existing rules "may have imposed costs of their own on consumers, and should not be extended." Could you elaborate on the nature of these costs, and could you explain what further damage to competition will occur if DOT fails to follow your guidance regarding deregulation of the CRS industry?

- Since the DOJ filing, virtually all of the major US airlines have locked in long term booking fee discounts with the now independent CRSs in exchange for access to all these airlines' fares and inventories. DOT's proposed rules seem to be based on the proposition that the government should give the airlines more bargaining leverage to reduce these fees. But the marketplace seems to have taken care of theat concern to nearly everyone's satisfaction as a result of arms length bargaining in a dynamic market. Does this development bolster your argument that current CRS rules are obsolete and additional rules are counterproductive?

Questions from Ranking Member John Conyers, Jr.

- Why did DOJ ask Univision to divest itself of paper assets only and not material assets such as Entravision radio stations? In addition, why didn't you ask for a complete divestment instead of a mere paper divestment from 30% to 10%?

- Why was Univision given six years to perform this divestment? This seems exceedingly long considering that the longest previous period for divestment offered by this Administration's DOJ was only 270 days.

- Your responses to my questions about Univision seemed to suggest that you are not concerned about the enormous market power of Univision's television holdings (80-85% of the national Spanish language TV market) and the possible effects it could have on competition though purchasing the largest Spanish language radio syndicate in the country. Why is that?

- The FCC has acknowledged that it does not have antitrust expertise and therefore does not take antitrust matters into account as it reviews activity in the telecom industry. How willing is DOJ to retain its involvement in assessing whether or not certain activities are anticompetitive in the telecommunications industry. What role do you envision for the DOJ in telecommunications matter outside of Section 271 applications?

- You cited to the government's position in the *American Airlines* and *Microsoft* cases. Didn't the D.C. Circuit Court of Appeals in Microsoft apply a balancing test under Section 2 rather than the test urged by the government in *Trinko* for refusal to deal cases? And the government lost the *American Airlines* case on summary judgment, correct? Are there any cases where the government has won a Section 2 refusal to deal claim where the court applied the standard urged by the government in *Trinko*?

- What happens in a refusal to deal case plead under the standard you urge the Supreme Court to apply in *Trinko* where the monopolist knew or had reason to believe that its conduct would have significant anticompetitive effects, but decided to undertake the conduct or refusal to deal anyway, reasonably expecting a comparatively small benefit for itself independent of those effects?

- Are you currently willing to file antitrust cases under Section 2 (including refusal to deal cases) alleging that a monopolist is illegally maintaining its monopoly, where a monopolist's behavior causes harm to competition and consumers that is disproportionate to any independent benefit to the monopolist, even where the "sacrifice" test is not met? Have any such claims been filed by your agency within the past 2 years?

- How does the test that you present in your Supreme Court brief in *Trinko* for refusal to deal cases address a monopolist's conduct that involves no sacrifice of profits but "raises rivals costs"?

- Isn't the standard that you urge the Supreme Court to apply in *Trinko* in refusal to deal

cases hard to assess at the pleading stage because the monopolist's business justification and the independence from any exclusionary effects of that justification seems fact intensive such as to require discovery? Unlike the government, which can obtain substantial pre-complaint discovery, private parties cannot- what will be the impact of the standard on the enforcement efforts of "private attorneys general" under Section 4 of the Clayton Act, an important component of the nation's competition policy?

- Do you agree that a monopolist will not necessarily pass the benefits of any small savings or efficiency it may realize from its conduct through to consumers, particularly where that conduct also has significant exclusionary effects? Please comment.

Questions from the Honorable Zoe Lofgren

- In the *Trinko v. Verizon* case, your joint brief states that "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." There has been some confusion over this argument. Is it your position that if a defendant shows that the alleged conduct provides any efficiency or cost-savings, now matter how small, the inquiry ends there? If not, what level of efficiency must the defendant show to escape liability for exclusionary conduct? Should the court balance the harm to the public against this efficiency?

- Do you intend to use the standard advocated in your *Trinko* brief to evaluate whether or not to bring an antitrust enforcement action under section 2 of the Sherman Act?

Questions from the Honorable Anthony Weiner

- In light of the Glyphosate Antitrust Inquiry of the Antitrust Division of U.S. Department of Justice, as announced in Monsanto's 10-K filed with the SEC on March 13, 2003, at page 14, I would like to ask you a few questions:

(1) Is it true that Monsanto still controls 100% of the glyphosate molecule market in the United States?

(2) Is it true that there are many glyphosate-based herbicides that are "equivalent" to Monsanto's Roundup?

(3) Are these other glyphosate herbicide firms paying Monsanto handsome "rewards" in order to get on the approved list?

(4) Monsanto's patent on the glyphosate component of the Roundup Branded Herbicides (Roundup, Roundup UltaMax, Roundup WeatherMax) expired in September of 2000. Is it true that other companies that now market glyphosate based herbicides still have to get their raw glyphosate from Monsanto, and that they do so under glyphosate supply agreements with Monsanto? I am referring to Cheminova, Glyfos, Glyfos X-Tra, BASF, Acquire, Microflo, Gly-Flo, Cyanamid, Extreme, Backdrift, Nufarm, Credit, Syngenta/Zeneca, Touchdown, Dow Agro, Glyphomax, Glyphomax Plus. Do all of these companies get all of their glyphosate from Monsanto?

(5) Are you investigating the sorts of questions raised in the recent spate of suits charging

it with tying arrangements in the present context? *See, e.g.*, E. I. Du Pont De Nemours And Company v. Monsanto Company, U. S. Dist. Ct. D. S. C., Civil Action No. 4:00-952-23; Chemical Products Technologies, LLC v. Monsanto Company, U. S. Dist. Ct. So. Ca. (Florence >Division)(filed Nov. 12, 2001); Sample v. Monsanto Sample f/k/a Blades f/k/a Pickett, Et al., v. Monsanto Company, Et al., E.D.Mo. No. 4:01cv65RWS. Do you have access to the information developed in these cases? What about the fact that the DuPont and the Chemical Products Technologies cases were settled out of Court under confidential terms? Do you have access to those terms?

(6) Are you aware that Monsanto's Roundup Rewards program, bundling Roundup herbicides with the technology fee replant refund on the expensive Roundup Ready and Bollgard of Bt traits, insulated Roundup herbicides from true competition from generics such as Glyfos, Gly-Star, ClearOut, Classic, Touchdown? Here, every farmer purchasing the "limited license to use [the] Roundup Ready [trait] . . . AGREE[S] . . . to use on Roundup Ready crops a Roundup agricultural herbicide or other [Monsanto] authorized non-selective herbicide . . . ."[1] Do you agree that in this way Monsanto restrains trade in, and attempts to monopolize, the glyphosate market.

(7) Are you aware that the 2003 Monsanto Claim Report that farmers must submit when making claims under the Roundup Rewards program, such as a claim for a waiver of the technology fee in the event that the farmer's first planting does not produce a "stand" and the farmer is forced to replant, requires the farmer to sign the following statement: I agree to use Roundup Branded Herbicide (Roundup WeatherMax, UltraMax, Original, Original II) as my only source of Glyphosate for burndown and In-crop applications on all of my Monsanto Technology Acres. Do you agree that in this way Monsanto restrains trade in, and attempts to monopolize, the glyphosate market? Do you agree that this makes it very difficult for generics such as Glyfos, Gly-Star, ClearOut, Classic, Touchdown to compete with Roundup branded herbicides on the merits?

(8) Are you investigating issues (6) and (7)? If not, why not?

(9) In 1999 and 2000, DOJ considered and objected to Monsanto's acquisition of Delta & Pine Land Co., the largest cotton seed producing company in the world. As a result of substantial objections and conditions imposed by DOJ, that acquisition fell through. In light of that, have you considered the global settlement announced in April of 2002 wherein Monsanto and DuPont made a supposedly confidential settlement resolving about 15 lawsuits between then, including the one identified in (5) above. Given the fact that DuPont now owns Pioneer Hi-Bred International, the largest seed corn company in the world, and one of the largest soybean seed companies, do you consider that there are serious antitrust concerns here? Does not the fact that Monsanto owns Asgrow, DeKalb, Hartz, Holden's and many other corn and soybean seed companies add to those antitrust concerns?

(10) Monsanto has argued that they are simply exercising their rights as patent-holders when they take actions which force farmers to buy Roundup branded herbicides. On June 28, 2001, the Court of Appeals for the District of Columbia effectively dispatched this approach with the following language: Microsoft argues that the license restrictions are legally justified because, in imposing them, Microsoft is simply "exercising its rights as the holder of valid copyrights." . .

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[1]2003 Monsanto Technology/Stewardship Agreement, pages 1 & 2.

. . Microsoft's primary copyright argument borders on the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." . . . . That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws." In re Indep. Serv. Orgs. Antitrust Litig., 203 F. 3d 1322, 1325 (Fed. Cir. 2000). Would you agree that Monsanto that Monsanto is using its patent rights like the aforementioned baseball bat?

Questions for the Record
Oversight Hearing on the Federal Antitrust Enforcement Agencies
Committee on the Judiciary Task Force on Antitrust
July 24, 2003

Questions from Chairman F. James Sensenbrenner, Jr.

Question 1: How can this Committee help ensure the efficient and effective enforcement of our nation's antitrust laws?

Answer: The Antitrust Division appreciates the constructive relationship it has enjoyed over the years with the House Judiciary Committee. I believe the maintenance of this relationship on an ongoing basis, coupled with the Committee's own oversight and legislative efforts, including support for the Division's budget requests, will help promote continued efficient and effective antitrust enforcement.

Question 2: Does the Antitrust Division support enhancing criminal penalties for antitrust violations?

Answer: The Antitrust Division continues to evaluate whether criminal penalties for antitrust violations need to be enhanced.

Question 3: To what extent has the Antitrust Division consulted with the FCC during Triennial and Biennial Review proceedings?

Answer: The Antitrust Division has not filed formal comments in connection with these proceedings. The Division has long maintained an informal dialog with the FCC regarding issues relevant to competition in a variety of contexts, including rulemakings and other matters. Through these exchanges we seek to improve our understanding of specific communications issues as well as help the FCC improve its understanding of competition and antitrust issues.

Question 4: Do you believe the Antitrust Division should have a more formal, continuing role in these proceedings?

Answer: The Division does not believe a more formalized role is necessary in order for our views about competition to be appropriately considered by the FCC. Requiring a more formalized role would likely make it more difficult for the Division to maintain its

informal consultative role.

Question 5: To what extent do foreign countries abuse antitrust laws to the detriment of American businesses? What has the Antitrust Division done to prevent this from occurring?

Answer: We firmly believe that the antitrust laws should not be misused to defend national champions or to try to exclude American or other businesses from foreign markets. This concern is sometimes raised in instances in which the Antitrust Division and a foreign antitrust authority reach divergent conclusions in parallel investigations. We recognize that we may not always agree on antitrust actions with our counterparts in Europe, for example, because there are different legal requirements in the two jurisdictions, and there can be different factual circumstances in the European market as compared with ours (different market shares, different conduct, etc.). Given that, the possibility of different outcomes is to be expected from time to time. At the same time, the underlying basis for antitrust action should be appropriate legal and economic analysis. It should be noted the EU has embarked on an aggressive modernization program to substantially reform their system. Commissioner Mario Monti deserves great credit for his efforts in this regard. We believe those changes will help improve EU enforcement efforts. The Antitrust Division has been and continues to be very active in the international arena with nations outside the EU, whether it be through the Organization for Economic Cooperation and Development, the World Trade Organization, bilateral discussions on a nation-to-nation basis, or through the International Competition Network (ICN). As more and more nations, including developing nations, undertake antitrust enforcement, the efforts of the ICN will be particularly important. The ICN has been a remarkable success in its first two years, having emerged as a global network of antitrust authorities from nearly 70 developed and developing countries, representing 90 percent of the world's Gross Domestic Product. It is serving as an important vehicle for international convergence on substantive and procedural issues by developing guiding principles and best practice recommendations.

Question 6: Does the Antitrust Division currently seek any changes to the antitrust laws, the procedural mechanisms available to it, or to any of its organizational statutes?

Answer: As discussed in response to Question 2 above, the Antitrust Division continues to evaluate whether changes to the antitrust laws are warranted.

There is a technical revision to the antitrust laws that would be helpful. The International Antitrust Enforcement Assistance Act ("IAEAA"), 15 U.S.C. § 6201 et seq., permits the Department of Justice to enter into bilateral assistance agreements with other countries to provide mutual assistance in the gathering and sharing of evidence relevant to criminal and civil antitrust violations. Where such an agreement exists, section 2 of the Act, 15 U.S.C. § 6201, permits the Department to provide foreign antitrust authorities with evidence useful to determine whether a person has violated a foreign antitrust law or to enforce such a law, subject to a number of limitations, including those provided in section 5 of the Act, 15 U.S.C. § 6204. Section 5(2) provides that evidence that is a matter

occurring before a grand jury cannot be shared with foreign antitrust authorities except under the provisions of Fed. R. Crim. P. 6(e)(3)(C)(iv), which, at the time the IAEAA was enacted, permitted the Department to ask a judge to approve the sharing of grand jury materials with state officials investigating violations of state criminal laws. After the 2002 revisions to the Rules of Criminal Procedure, this authority to share grand jury material with the states is now set forth as Fed. R. Crim. P. 6(e)(3)(E)(iii). Thus, there should be a conforming amendment to section 5(2) of the Act to replace the existing reference to Fed. R. Crim. P. 6(e)(3)(C)(iv) with a new reference to Fed. R. Crim. P. 6(e)(3)(E)(iii).

Alternatively, section 5(2) of the Act could be rewritten so as to eliminate this type of cross-reference issue in the future, as follows:

> "(2) Antitrust evidence that is a matter occurring before the grand jury and with respect to which disclosure is prevented by Federal law, except that for the purposes of applying the grand jury secrecy provisions of the Federal Rules of Criminal Procedure to this section, disclosure of antitrust evidence with respect to which a particularized need for such evidence is shown may be made to a foreign antitrust authority for the purpose of enforcing a foreign antitrust law in the same manner as disclosure may be made to an appropriate official of any of the several States for the purpose of enforcing a State criminal law."

Question 7: Has the Antitrust Division undertaken any investigations of alleged anticompetitive conduct by the Bell operating companies in their local markets after Section 271 applications have been granted?

Answer: While compliance with the market-opening requirements of the Telecommunications Act of 1996 is primarily the responsibility of the Federal Communications Commission, the Antitrust Division continues to actively monitor the telecommunications marketplace for possible violations of the Sherman Act. The Division has evaluated a number of complaints regarding Bell operating conduct; to date, no investigation has resulted in an enforcement action.

Question 8: Under what circumstances do you foresee the Antitrust Division undertaking such investigations to ensure that competition in local markets remains fully and irreversibly open to competition?

Answer: In answering this question, it is important to distinguish between an antitrust violation and noncompliance with the Telecommunications Act. While both are important in a competitive sense, they would be subject to different types of enforcement actions to remedy them. A proceeding to withdraw Section 271 approval may be appropriate for failures to comply with the Telecommunications Act, such as certain failures to keep a market fully and irreversibly open to competition. At the same time,

certain conduct by carriers may constitute an antitrust violation, and if so, then an antitrust enforcement action would be appropriate. In general, the Antitrust Division will investigate as appropriate when we have reason to believe that the incumbent local provider may be engaging in anticompetitive conduct in violation of the antitrust laws. Each investigation is specific to its own facts, and we would encourage anyone who believes they have evidence that may suggest such conduct to bring it to our attention.

Question 9: To what extent does the *Trinko* case threaten to exempt the telecommunications industry from the antitrust laws? Are entities exempt from the antitrust laws simply because they have been subject to regulation, or benefitted from deregulation overseen by the FCC or any other federal agency?

Answer: In the amicus brief filed jointly with the Federal Trade Commission in the *Trinko* case, we have emphasized two important points about the continuing application of the antitrust laws in the telecommunications marketplace since enactment of the 1996 Act. First, the antitrust laws continue to apply fully in that marketplace; second, the 1996 Act did not add new antitrust prohibitions to the Sherman Act. We believe that both these points are made clear in the antitrust savings clause in the 1996 Act. Absent an explicit statutory provision to the contrary, entities are generally not exempt from the antitrust laws simply because they have been subject to regulation by another federal agency, although if there is a plain repugnancy between a regulatory scheme and the application of the antitrust laws, the antitrust laws may be displaced to the extent of the repugnancy. To the extent that a pervasive regulatory scheme is removed or scaled back through deregulatory efforts, the antitrust laws often become more relevant to the conduct that was formerly subject to the pervasive regulatory scheme.

Question 10: Does the Antitrust Division fully comprehend the potential impact of this case?

Answer: The Antitrust Division is very much aware of the importance of this case, as reflected in our filings in the Supreme Court.

Question 11: How can Congress ensure that the resources of the Antitrust Division and FTC are utilized in a manner that avoids duplication of responsibility?

Answer: The Antitrust Division and the FTC have a longstanding arrangement to avoid duplication of investigatory effort. Under this "clearance" process, a matter is assigned to one agency or the other, generally to whichever agency has the most extensive recent investigatory experience in the markets involved. This not only conserves enforcement resources, but also avoids placing duplicative investigatory burdens on private parties. Although there are occasional clearance disputes that have to be resolved, and the agencies do and should continually review the process with an eye toward improvement, the arrangement has generally worked well over the years.

Question 12: There have been allegations of anticompetitive behavior by regional Bell companies against non-incumbent carriers. What evidence would the Department need to open a Section 2 investigation?

Answer: In general, the Antitrust Division will investigate as appropriate if we have reason to believe that an incumbent local provider may be engaging in exclusionary or predatory conduct for the purpose of acquiring or maintain a monopoly. Each investigation is specific to its own facts, and we would encourage anyone who believes they have evidence that may suggest such conduct to bring it to our attention.

Question 13: Has the Antitrust Division investigated competitive aspects of exclusive agreements in the sheet music industry? Has the Division investigated exclusive arrangements which have prevented online sheet music companies from receiving sheet music content? Does the Division recognize the competitive benefits of online distribution in the sheet music industry?

Answer: The Antitrust Division is currently evaluating whether or not there is a sufficient basis to open an investigation pertaining to allegations of exclusive agreements affecting the distribution of sheet music and would encourage anyone who has information that they believe may suggest conduct in violation of the antitrust laws to contact us with such information.

Question 14: The DOJ took the position in its amicus brief in *Trinko* that a monopolist's refusal to deal with rivals is only exclusionary and potentially unlawful if it "involves a sacrifice of profits or business advantage." (*US/FTC Brief* at 19) But in the nearly identical factual setting of the old Bell System monopoly, the government took the position that anticompetitive conduct could involve raising rivals' costs. How do you explain the enormous change in the government's position on this point?

Answer: The *Trinko* brief is well-grounded in Supreme Court precedent, including particularly *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). These cases all support the proposition set forth in *Trinko* that "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." The Department's brief does not represent a marked departure from past Department positions. We have litigated using the standard set forth in *Trinko* in both *Microsoft* and *American Airlines*. In addition, the essence of the Department's position, grounded primarily in *Aspen*, can be found in the 1991 Brief for the United States as Amicus Curiae, submitted in *Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, S.Ct. No. 90-380 (attached). The Department's position is thus well-grounded in current Supreme Court precedents and consistent with the Department's policy as developed over many years.

Question 15: Under the "sacrificing profits" test you've proposed in the *Trinko* brief, wouldn't it have been impossible to have brought the antitrust cases that resulted in the breakup of the old AT&T Bell System monopoly? Because AT&T's conduct primarily involved refusals to deal, yet didn't involve the sacrifice of short term profits, could the government have met the test you propose? Has this test ever been embraced by any court?

Answer: The *Trinko* brief is well-grounded in Supreme Court precedent, including particularly *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). These cases all support the proposition set forth in *Trinko* that "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." The AT&T case was not tried to completion and the facts were developed from a different perspective. However, we believe that were the case to be tried today, it is likely that it could be framed in terms of the sacrifice test.

Question 16: Congress reserved a special role for the Department in evaluating section 271 applications, requiring the FCC to give "substantial deference" to the Department's evaluation. In its latest evaluation of the Michigan 271 application, the Department expressed concern regarding SBC's wholesale billing practices. SBC has filed a 271 application for the remaining four Ameritech states. How will the Antitrust Division ensure that its evaluation of the latest 271 application is not only comprehensive, but given the substantial deference by the FCC that Congress intended?

Answer: The Antitrust Division has now provided comments to the FCC regarding section 271 applications for all but one of the 48 states, and the District of Columbia, to which section 271 applies, and the FCC has granted applications in all but six states. The Division has enjoyed a good working relationship with the FCC throughout the period of section 271 implementation. Although Congress directed that the FCC be the final decision-maker on section 271 applications, it also directed the FCC to give the Justice Department's evaluation substantial weight in reaching its decision. The Antitrust Division believes its views have been accorded the required substantial weight in applications thus far, and fully expects that to be the case with the remaining few applications.

Question 17: We routinely authorize substantial resources for the Telecommunications Task Force. When the 271 process is completed, where will the attorneys and economists of the task force be directing their efforts?

Answer: The Antitrust Division has played an important role in protecting competition in the telecommunications industry for decades and fully intends to continue doing so through vigorous antitrust enforcement. As part of the Antitrust Division's reorganization in 2001, the name of the Telecommunications Task Force was changed to the Telecommunications and Media Section, to more accurately reflect the scope of its

responsibilities. Evaluating section 271 applications is only a fraction of the section's overall responsibilities. The section also is responsible for investigating proposed mergers and potentially anticompetitive conduct in a wide variety of communications and media markets, as well as engaging in competition advocacy as appropriate at the state and federal levels. In the past few years, the section has, for example, been responsible for a number of the Division's major merger challenges such as Hughes/Echostar, Sprint/WorldCom, and Primestar/News Corp., as well as the extensive investigation of the AT&T/Comcast merger. We anticipate that there will continue to be an active workload with respect to these areas of their responsibility.

Question 18: The Bells have requested that all of their broadband offerings be deregulated nationwide, including those for residential customers, small businesses, and large businesses. In light of the fact that there are numerous geographic areas throughout the country where – even at the retail level – residential customers have access only to Bell-provided broadband services, does this development raise anticompetitive issues?

Answer: Telephone company broadband service to residential customers is generally for Internet access, which is not regulated by the FCC. Consumers in many areas have the option of purchasing Internet access from a cable TV company, or in some areas from a satellite communications provider. In addition, some firms provide Internet access to customers using their own DSL equipment, which is co-located in the central offices of the telephone companies and attached to local loops leased pursuant to the Telecom Act. But it is certainly true that in many areas of the country, consumers have only the Bell-provided option. The Antitrust Division is alert in all markets for conduct that impedes competition in violation of the antitrust laws.

Question 19: At the wholesale level, ISPs contend that there are no true alternatives to wireline broadband services, because cable has not generally implemented ISP access. Do you believe that wholesale competition should be protected? Do you agree that any deregulation that would impair the provision of wholesale transport to ISPs would be ill-advised?

Answer: The FCC is currently considering whether its rules relating to the obligation of telephone companies to provide competing ISPs access to their facilities and services (the "computer rules") should be modified in light of recent developments in the industry. The Antitrust Division has not at this point taken a position as to whether such changes are necessary, but intends to monitor developments at the FCC.

Question 20: There has been some level of confusion concerning the allocation of responsibility for merger reviews by the Department of Justice and Federal Trade Commission. Has this situation been resolved?

Answer: The Antitrust Division and the Federal Trade Commission have a longstanding arrangement for allocating responsibility for merger reviews and other investigations, as a means of avoiding duplication of investigatory effort. Under this "clearance" process, a

matter is assigned to one agency or the other, generally to whichever agency has the most extensive recent investigatory experience in the markets involved. This not only conserves enforcement resources, but also avoids placing duplicative investigatory burdens on private parties. Although there are occasional clearance disputes that have to be resolved, the arrangement has generally worked well over the years. As part of our ongoing efforts to improve the clearance process, in the spring of 2002 the two agencies announced a clearance agreement that would have formally allocated responsibility for investigations in specified industrial sectors to one agency or the other. While these formal allocations essentially reflected current practice on ad hoc clearances, concerns expressed by the Chairman of the Senate Appropriations Commerce-Justice-State Subcommittee led the agencies to withdraw the agreement. The longstanding matter-by-matter clearance arrangement remains in effect.

Question 21: To what extent has your agency been involved in international antitrust agreements? Does the Antitrust Division actively consult with foreign antitrust authorities, or advise the United States Trade Representative on antitrust matters contained in Free Trade Agreements or multilateral trade pacts?

Answer: The Justice Department, together with the FTC, has had, and will continue to have, the lead role in negotiating all our bilateral antitrust cooperation agreements. We are also closely involved in negotiating competition-related chapters of trade agreements. Recently, for example, Justice Department officials have been either heads of delegation or co-heads of delegation (with USTR) for the competition chapters of the Chile and Singapore FTAs, and for the competition chapters of the Australia FTA and the Free Trade Agreement of the Americas, which are currently under negotiation.

Question 22: Legislation adopted in Illinois that would have substantially raised the prices at which the Bells furnish unbundled elements of their local networks to competitors and which several competitors say would have led them to curtail their competitive efforts in Illinois, recently was enjoined by the courts. In states where long-distance authority under 271 has not been granted, if such legislation were adopted, would you seriously consider its impact on the marketplace in determining whether to support long-distance entry?

Answer: The possible effects of the prices for unbundled elements resulting from such a law on the ability of competitors to obtain them would be a factor in our assessment of whether the local exchange market in the state is fully and irreversibly opened to competition, the standard by which we evaluate section 271 applications.

Question 23: There has been speculation that one of the big "long-distance" companies like AT&T or MCI will consolidate with Bell companies. A few years ago, former FCC Chairman Reed Hundt called the possibility of an AT&T/SBC merger "unthinkable." Do you have any views on whether such mergers are more "thinkable" or "unthinkable" today and whether such mergers could occur in a manner consistent with the antitrust laws?

Answer: Our merger investigations are highly fact-intensive, and it is not possible to prejudge whether a hypothetical merger would be likely to substantially lessen competition in violation of section 7 of the Clayton Act. Given the history of antitrust enforcement in this industry and the developing state of competition in local exchange, long distance, and wireless markets, the Antitrust Division would certainly give any such proposed merger a very careful review.

Question 24: In spite of the fact that the Bells are passing up certain very attractive markets in each other's territories by not competing against one another; in spite of the statement by Mr. Notebaert, CEO of Qwest (and former CEO of Ameritech), that although it might be a way to make a "quick dollar," that doesn't "make it right" to do so; and in spite of suggestions by various Bells to regulators that they would compete vigorously but have not done so, the Antitrust Division has apparently not opened an antitrust investigation into potential collusion. How can you ensure more effective competition in this industry?

Answer: Market opening and competition enhancement as envisioned in the Telecommunications Act of 1996 are primarily the responsibility of the FCC. The Antitrust Division plays an important complementary role by – in addition to evaluating section 271 applications – enforcing the Sherman Act against restraints of trade and monopolistic conduct that would lessen competition, and taking into account current and emerging marketplace developments in our analysis of the likely competitive effects of proposed telecom mergers. You can be assured that, if we receive information giving us reason to believe that the Bell operating companies are agreeing among themselves not to enter each other's local exchange territories, we will investigate and take any appropriate enforcement action as warranted by the evidence.

Question 25: Cooperative agreements proposed by the International Air Transport Authority (IATA) must receive approval for an antitrust exemption from the Department of Transportation. Under the Federal Aviation Act, the Department of Transportation must disapprove proposed agreements which reduce or eliminate competition unless these agreements meet a serious transportation need or advance important public policy objectives which cannot be achieved through less anti-competitive alternatives. It is my understanding that the IATA has proposed an increase in high-volume low-density shipping rates that would raise international shipping costs by as much as 20 percent, imposing additional burdens on a wide range of shippers and American consumers. I also understand that the Department of Transportation has not announced public hearings to consider the potential impact of this issue. As a general matter, competitors should be exempted from antitrust scrutiny only in exceptional circumstances. Has the Antitrust Division formally submitted its views concerning this exemption to the Department of Transportation? If not, why not, and how can the Antitrust Division ensure that applications for these exemptions are reviewed with the scrutiny they deserve?

Answer: On May 29, 2003, the Antitrust Division formally submitted comments to the Department of Transportation on the International Air Transport Authority's (IATA) application for an antitrust exemption on its cooperative agreement to change the volume

conversion factor for low-density cargo. In that filing, the Division noted that the proposed agreement is a price-fixing agreement among horizontal competitors, and thus is anticompetitive, and further stated that IATA did not proffer any efficiency justifications or other public benefits for the agreement. The Division also argued that DOT should re-examine "whether approval and antitrust immunity should be withdrawn for all IATA agreements on fares or rates charged by United States airlines for passenger tickets or air freight carriage sold in this country to consumers for travel or shipments to and from the United States ... [and for] IATA agreements on airline fares, rates and charges in other contexts in which United States national interests are strong." The Division argued that the foreign policy and international comity justifications for the previous grant of immunity do not apply with the same force today. The DOT proceeding is pending.

Question 26: An article in the June 27, 2003 issue of *The Wall Street Journal* reported that Comcast, "now the nation's biggest cable operator ever, is looking to use [its] clout to shift the balance of power between those who supply content and those who distribute it." The article detailed efforts by Comcast to force cable programmers to lower the rates that they charge for programming. Has the Antitrust Division examined whether Comcast is using its market power in an anticompetitive manner?

Answer: In connection with our investigation of the AT&T/Comcast merger and other cable mergers, the Division has looked at the issue of whether the creation of a larger multiple-system operator was likely to create a firm with monopsony power. In AT&T/Comcast, we concluded that the combined market share of these two companies was not sufficient to raise concerns that the merged firm would be able to exercise monopsony power. The Division is committed to ensuring that all companies, including Comcast, stay within the proper bounds of the antitrust laws. If we receive information that leads us to believe that an antitrust violation may have occurred, we will conduct an appropriate inquiry and take whatever enforcement action may be warranted.

Questions from the Honorable Lamar Smith

Question 1: I read with interest the recent *Washington Post* story on the Antitrust Division's recent report to the District Court expressing concern that Microsoft is not abiding by the terms of its consent decree with the Department of Justice. What is the Antitrust Division doing to ensure full compliance with this agreement?

Answer: The Antitrust Division has a dedicated, experienced team of lawyers and economists working, together with 17 state attorneys general, to actively monitor Microsoft's full compliance with all of its obligations under the Final Judgment. The Division has reviewed and investigated complaints from industry, frequently meeting with complainants and Microsoft about the substance of the complaints when necessary. The Division has been coordinating enforcement efforts with the two state plaintiff groups – the New York Group and the California Group – through a special information sharing agreement. The Division has issued, as appropriate, Microsoft Consent Decree Compliance Advisories, to inform the public with regard to decree issues and events and to assist our enforcement efforts. There have been many instances in which Division input, as informed by any concerns expressed by the public, has led Microsoft to change its conduct so as to improve compliance. The Division also has initiated with the court a procedure for periodic status reports and court conferences on compliance and enforcement activities involving the Division, the two state groups, and Microsoft.

Question 2: Has Microsoft been fully cooperative with the Antitrust Division? Have they fully addressed your concerns in a timely manner?

Answer: Since the Final Judgment was entered, the Division has engaged Microsoft on a variety of compliance issues. On those occasions, Microsoft has been cooperative and responsive and has made substantial changes to the manner in which it is complying with the Final Judgment. While resolving these issues has required the commitment of considerable resources, Microsoft has been responsive and cooperative for the most part thus far.

Question 3: The protocol licensing program mentioned in the *Post* story is the first of its kind and, in developing it, apparently Microsoft solicited the input of the Department of Justice, states, and prospective licensees. Is that your understanding as well?

Answer: Microsoft's Communications Protocol Licensing Program (the "MCPP") is part of its obligation under Section III.E of the Final Judgment. After receiving the licensing documentation for the MCPP, the Antitrust Division carefully reviewed the license terms, in coordination with the state plaintiffs, and with industry input, to assess whether the terms were commercially reasonable. The Division identified numerous concerns with the MCPP generally, and with certain license terms and requirements specifically, and has raised these concerns with Microsoft over the past several months. In response,

Microsoft has made many significant changes to the MCPP license terms and royalty structure and rates.

Question 4: Microsoft's protocols are the company's intellectual property, and as I understand it, Microsoft is allowed to charge a nondiscriminatory fee for this property, and some companies have already paid this fee to license these protocols. It sounds like the program is working. Microsoft is establishing new programs as required and soliciting input from the Division and others in doing so. Do you have reason to believe that Microsoft will not continue to work with the Division in a transparent and cooperative manner?

Answer: At this time, the Antitrust Division has no reason to believe that the current cooperative and productive relations with Microsoft will not continue.

Question 5: The Department of Transportation (DOT) is currently engaged in rulemaking concerning Computer Reservation Systems (CRS) that has drawn sharp criticism from all sectors of the industry and many parts of the government. These CRS rules were put into place 20 years ago to prevent airlines from exercising their control over CRS to engage in anticompetitive conduct. Airlines have sold their stakes in CRSs. Today, the marketplace has dramatically changed, while the rules have not. The Department of Justice has stated that "two recent industry developments – domestic airlines no longer own CRSs and now use the Internet to sell tickets – have reduced the need for extensive regulation [in this field]." In fact, the Department of Justice has called for near deregulation of this industry. This contradicts DOT's proposal, which includes new rules which would invalidate existing contracts between CRSs, airlines, and travel agents. You have said that existing rules "may have imposed costs of their own on consumers, and should not be extended." Could you elaborate on the nature of these costs, and could you explain what further damage to competition will occur if DOT fails to follow your guidance regarding deregulation of the CRS industry?

Answer: Evaluating a regulatory provision's effect on competition involves considering not only the magnitude of the competitive harm the regulation is designed to prevent or curtail, and the likely effectiveness of the regulation in preventing or curtailing that competitive harm, but also any costs that complying with the regulation are likely to impose on business efficiency. These factors will differ for each particular regulation and will also vary depending on how each regulation is written. Pages 23-34 of the comments the Antitrust Division has filed in the DOT rulemaking, a copy of which is attached, discuss some of these factors for some of the principal elements of DOT's current and proposed CRS rules. We are confident that DOT will carefully consider our comments, along with the other input it has received, and we expect that the rules DOT adopts will reflect that consideration.

Question 6: Since the DOJ filing, virtually all of the major U.S. airlines have locked in long-term booking-fee discounts with the now-independent CRSs in exchange for access to all these airlines' fares and inventories. DOT's proposed rules seem to be based on the proposition that the government should give the airlines more bargaining leverage to reduce these fees. But

the marketplace seems to have taken care of that concern to nearly everyone's satisfaction as a result of arm's-length bargaining in a dynamic market. Does this development bolster your argument that current CRS rules are obsolete and additional rules are counterproductive?

Answer: The negotiation of CRS fee discounts by major U.S. airlines is a positive development and may lead to lower airline distribution costs, ultimately benefitting consumers. This development is consistent with our view, as stated in our comments to DOT, that ongoing changes in air travel ticket distribution have enabled some airlines to put competitive pressure on travel agencies and CRSs to reduce costs through traditional channels, that there is less need for industry-wide regulation in this area, and that DOT should rely largely on market forces to lower costs and improve service quality in the distribution of airline tickets. However, the negotiation of CRS fee discounts does not demonstrate that CRS fees are now at competitive levels, or that CRS vendors no longer have market power. As we stated in our comments to DOT, DOT should reassess, after some reasonable transition period, whether developments in the market continue to erode CRS market power or inhibit its exercise.

Questions from Ranking Member John Conyers, Jr.

Question 1: Why did DOJ ask Univision to divest itself of paper assets only and not material assets such as Entravision radio stations? In addition, why didn't you ask for a complete divestment instead of a mere paper divestment from 30% to 10%?

Answer: Requiring Univision to divest most of its substantial equity interest in Entravision and to give up extensive governance rights is more comprehensive and effective relief than requiring divestiture of Univision/HBC radio stations in the specific areas in which they overlap with Entravision radio stations. Divestiture of specific radio stations would have addressed only the competitive problems in those specific geographic markets in which there is a current overlap. It would not have addressed the full range of potential competitive problems inherent in Univision's substantial ownership interest and extensive governance rights in Entravision, which go beyond just the current overlap markets. The Department was concerned that, after the merger, not only would Univision/HBC's substantial ownership interest in Entravision give it a strong incentive to stop competing aggressively against Entravision, but also that Univision/HBC's governance rights in Entravision would enable it to interfere with Entravision's strategic decision-making by preventing, or threatening to prevent, Entravision from making acquisitions or raising capital. Even if Univision/HBC never actually exercised its governance rights in this fashion, the mere prospect that it might do so would likely constrain Entravision's normal competitive behavior against it.

The proposed consent decree sufficiently limits Univision/HBC's equity stake and governance rights that these potential competitive concerns do not arise; this relief is reinforced by specific prohibitions in the proposed decree against Univision voting even its limited equity stake or having access to Entravision's competitively sensitive information. Cf. 15 U.S.C. §18a(c)(9) (HSR exemption for acquisitions solely for purposes of investment not exceeding 10% of the stock). For these reasons, requiring Univision/HBC to divest its entire equity interest in Entravision was not necessary in order to preserve competition between them.

Question 2: Why was Univision given six years to perform this divestment? This seems exceedingly long considering that the longest previous period for divestment offered by this Administration's DOJ was only 270 days.

Answer: There are different considerations for preserving competition when the required divestiture involves stock rather than assets. In asset divestiture cases, the Division generally seeks rapid divestiture because we are concerned that the risk that the assets' ongoing competitive viability may deteriorate increases the longer they are not being aggressively utilized in the market. Stock divestitures, on the other hand, do not raise that kind of spoilation concern; indeed, they may raise an opposite kind of concern, that a forced divestiture of a company's stock within too short a time period could materially

depress the stock price to the point that the company would be unable to issue new equity to fund new business expansion or ongoing operations, undermining the company's competitive vitality both in the short term and in the long term. The two-tiered divestiture period here (reduction to 15% ownership in three years and 10% ownership in six years) strikes an appropriate balance between maintaining Entravision as a strong competitor to the unified Univision/HBC and reducing the risk of harm to competition during the interim period during which Univision/HBC retains a larger equity interest in Entravision. Note that the proposed decree requires HBC/Univision to relinquish the governance rights before the merger is consummated.

Question 3: Your responses to my questions about Univision seemed to suggest that you are not concerned about the enormous market power of Univision's television holdings (80-85% of the national Spanish language TV market) and the possible effects it could have on competition though purchasing the largest Spanish language radio syndicate in the country. Why is that?

Answer: Merger analysis under Section 7 of the Clayton Act requires the Antitrust Division to define, or identify, the relevant product and geographic markets in which a merger's likely effects on competition are to be evaluated. The Antitrust Division considered whether the evidence would support the existence of a combined television-radio market in this investigation – whether the combination of Univision's Spanish-language television stations with HBC's Spanish-language radio stations in areas where both are located was likely to cause significant anticompetitive effects for advertisers in those areas. After reviewing over a million pages of documents and interviewing numerous advertisers, we ultimately concluded that the evidence did not support defining such a combined television-radio market for this case. While the Division has not found sufficient basis for defining such a market in any of its previous media investigations, we have investigated this issue on a number of occasions and are likely to continue to do so in the future. Each investigation is fact-specific, and we do not rule out the possibility that we might in some future investigation find sufficient basis for such a market definition.

Question 4: The FCC has acknowledged that it does not have antitrust expertise and therefore does not take antitrust matters into account as it reviews activity in the telecom industry. How willing is DOJ to retain its involvement in assessing whether or not certain activities are anticompetitive in the telecommunications industry. What role do you envision for the DOJ in telecommunications matters outside of Section 271 applications?

Answer: The Antitrust Division remains committed to vigorous antitrust enforcement in the telecommunications marketplace as in other sectors of our economy. We will investigate and take appropriate enforcement action when we have reason to believe that market participants may be violating Section 1 or 2 of the Sherman Act or when a mergers is proposed that we have reason to believe may harm competition. In addition, we will continue to engage in competition advocacy at the state and federal level as appropriate where we believe our competitive analysis can assist in promoting and

maintaining the development of competition. Also, it is our understanding that the FCC does take competition analysis into account in some of its actions – for example, as part of its public interest review of proposed license transfers.

Question 5: You cited to the government's position in the *American Airlines* and *Microsoft* cases. Didn't the D.C. Circuit Court of Appeals in Microsoft apply a balancing test under Section 2 rather than the test urged by the government in *Trinko* for refusal to deal cases? And the government lost the *American Airlines* case on summary judgment, correct? Are there any cases where the government has won a Section 2 refusal to deal claim where the court applied the standard urged by the government in *Trinko*?

Answer: See the answer contained after Question 9, below.

Question 6: What happens in a refusal to deal case pled under the standard you urge the Supreme Court to apply in *Trinko* where the monopolist knew or had reason to believe that its conduct would have significant anticompetitive effects, but decided to undertake the conduct or refusal to deal anyway, reasonably expecting a comparatively small benefit for itself independent of those effects?

Answer: See the answer contained after Question 9, below.

Question 7: Are you currently willing to file antitrust cases under Section 2 (including refusal to deal cases) alleging that a monopolist is illegally maintaining its monopoly, where a monopolist's behavior causes harm to competition and consumers that is disproportionate to any independent benefit to the monopolist, even where the "sacrifice" test is not met? Have any such claims been filed by your agency within the past 2 years?

Answer: See the answer contained after Question 9, below.

Question 8: How does the test that you present in your Supreme Court brief in *Trinko* for refusal to deal cases address a monopolist's conduct that involves no sacrifice of profits but "raises rivals costs"?

Answer: See the answer contained after Question 9, below.

Question 9: Isn't the standard that you urge the Supreme Court to apply in *Trinko* in refusal to deal cases hard to assess at the pleading stage because the monopolist's business justification and the independence from any exclusionary effects of that justification seems fact intensive such as to require discovery? Unlike the government, which can obtain substantial pre-complaint discovery, private parties cannot. What will be the impact of the standard on the enforcement efforts of "private attorneys general" under Section 4 of the Clayton Act, an important component of the nation's competition policy?

Answer to Questions 5-9:

You have asked a number of questions relating to the Amicus brief filed by the Department of Justice and Federal Trade Commission in *Verizon v. Trinko*.

Trinko involves a claim asserting that the defendant engaged in monopolistic conduct in violation of Section 2 of the Sherman Act. The offense of monopolization is broadly defined as (1) the willful acquisition or maintenance of monopoly power (2) by the use of exclusionary or predatory conduct to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

The position that the Department and FTC have taken in the Amicus brief in *Verizon v. Trinko* is that in evaluating single-firm conduct in the context of claims for the violation of a duty to assist competitors, the appropriate standard is whether the conduct asserted as an antitrust violation would make economic sense for the defendant but for the elimination or lessening of competition. This test sets forth an objective, economically-based framework for assessing single-firm conduct. Furthermore, we do not believe this standard is appropriately characterized as either pro-plaintiff or pro-defendant.

Indeed, the standard in our brief is well-grounded in Supreme Court precedent, including particularly *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). These cases all support the proposition set forth in our *Trinko* brief that "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."

The Department's brief does not represent a marked departure from past Department positions. We have litigated using the standard set forth in our *Trinko* brief in both *Microsoft* and *American Airlines*. In *American Airlines*, the court of appeals appears to have accepted the Department's liability standard but found a failure of proof. In *Microsoft*, the district court accepted the Department's proposed standard, and our understanding of the court of appeals' language about balancing is that it relates to the analysis to be applied following a demonstration that the conduct was exclusionary under the Department's standard. It is not our understanding that the D.C. Circuit advocated an open-ended "balancing" approach – to do so would have been inconsistent with well-accepted antitrust principles. In addition, the essence of the Department's position, grounded primarily in *Aspen*, can be found in the 1991 Brief for the United States as Amicus Curiae, submitted in *Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, S.Ct. No. 90-380 (attached).

Certain of the questions appear to inquire whether there would have to be a large sacrifice of profits for the standard set forth in our *Trinko* brief to be met. As explained in our *Trinko* brief, such activities as enforcement of a fraudulently obtained patent, sham

litigation and bad-faith contacts with administrative agencies may create a substantial anticompetitive impact and violate Section 2; yet these activities need not entail a large sacrifice of profits.

Question 10: Do you agree that a monopolist will not necessarily pass the benefits of any small savings or efficiency it may realize from its conduct through to consumers, particularly where that conduct also has significant exclusionary effects? Please comment.

Answer: In general, and not with particular respect to any pending case, economic theory and our experience suggest that a monopolist can be expected to pass along savings to consumers to the extent, and only to the extent, that it is profitable for the monopolist to do so. In particular, to the extent that a monopolist affects savings in its marginal costs, it could be expected to pass through a substantial portion of that reduction. If conduct produces some efficiencies but is nevertheless exclusionary, consumers ultimately will be harmed.

Questions from the Honorable Zoe Lofgren

Question 1: In the *Trinko v. Verizon* case, your joint brief states that "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." There has been some confusion over this argument. Is it your position that if a defendant shows that the alleged conduct provides any efficiency or cost-savings, now matter how small, the inquiry ends there? If not, what level of efficiency must the defendant show to escape liability for exclusionary conduct? Should the court balance the harm to the public against this efficiency?

Answer: Your question is whether any efficiency or cost-saving ends the inquiry under the standard in our *Trinko* brief. The issue is not whether any efficiency or cost-saving is found, but instead whether the benefit is worth the investment required to achieve it, apart from any benefit derived from excluding competition. We believe that this test sets forth an objective, economically-based framework for assessing single-firm conduct.

Question 2: Do you intend to use the standard advocated in your *Trinko* brief to evaluate whether or not to bring an antitrust enforcement action under section 2 of the Sherman Act?

Answer: The position that the Department and FTC have taken in our brief in *Verizon v. Trinko* is that in evaluating single-firm conduct in the context of claims for the violation of a duty to assist competitors, the appropriate standard is whether the conduct asserted as an antitrust violation would make economic sense for the defendant but for the elimination or lessening of competition; otherwise that conduct is not exclusionary or predatory. We believe that this test sets forth an objective, economically-based framework for assessing single-firm conduct. Furthermore, we do not believe this standard is appropriately characterized as either pro-plaintiff or pro-defendant. The standard is well-grounded in Supreme Court precedent, including particularly *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). We have litigated using the standard set forth in our *Trinko* brief in both *Microsoft* and *American Airlines*. We will, of course, factor in any Supreme Court guidance from *Trinko* in evaluating future enforcement actions.

Questions from the Honorable Anthony Weiner

In light of the Glyphosate Antitrust Inquiry of the Antitrust Division of U.S. Department of Justice, as announced in Monsanto's 10-K filed with the SEC on March 13, 2003, at page 14, I would like to ask you a few questions:

Question 1: Is it true that Monsanto still controls 100% of the glyphosate molecule market in the United States?

Answer: Assistant Attorney General Pate is recused from this matter. It is under the supervision of Deputy Assistant Attorney General McDonald. The Department of Justice has an on-going active investigation in the glyphosate industry. In light of the pending legal investigation, it would be inappropriate to comment on the specific factual matters referred to in your questions. As a general matter, the Antitrust Division has and uses, as appropriate, the means to compel production of information relevant to investigations of potential antitrust law violations. See Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314. In its investigations, the Department typically considers all the facts and circumstances that are relevant to the competitive issues under investigation. After that information is reviewed, analyzed, and evaluated, the Department will decide whether there is sufficient basis to file a lawsuit alleging that particular conduct is in violation of the U.S. antitrust laws.

Question 2: Is it true that there are many glyphosate-based herbicides that are "equivalent" to Monsanto's Roundup?

Answer: See answer to Question 1.

Question 3: Are these other glyphosate herbicide firms paying Monsanto handsome "rewards" in order to get on the approved list?

Answer: See answer to Question 1.

Question 4: Monsanto's patent on the glyphosate component of the Roundup Branded Herbicides (Roundup, Roundup UltaMax, Roundup WeatherMax) expired in September of 2000. Is it true that other companies that now market glyphosate based herbicides still have to get their raw glyphosate from Monsanto, and that they do so under glyphosate supply agreements with Monsanto? I am referring to Cheminova, Glyfos, Glyfos X-Tra, BASF, Acquire Microflo, Gly-Flo, Cyanamid, Extreme, Backdrift, Nufarm, Credit, Syngenta/Zeneca, Touchdown, Dow Agro, Glyphomax, Glyphomax Plus. Do all of these companies get all of their glyphosate from Monsanto?

Answer: See answer to Question 1.

Question 5: Are you investigating the sorts of questions raised in the recent spate of suits charging it with tying arrangements in the present context? *See, e.g.,* E.I. DuPont DeNemours And Company v. Monsanto Company, U.S. Dist. Ct. D.S.C., Civil Action No. 4:00-952-23; Chemical Products Technologies, LLC v. Monsanto Company, U.S. Dist. Ct. So. Ca. (Florence Division)(filed Nov. 12, 2001); Sample v. Monsanto Sample f/k/a Blades f/k/a Pickett, Et al., v. Monsanto Company, Et al., E.D. Mo. No. 4:01 cv65RWS. Do you have access to the information developed in these cases? What about the fact that the DuPont and the Chemical Products Technologies cases were settled out of Court under confidential terms? Do you have access to those terms?

Answer: See answer to Question 1.

Question 6: Are you aware that Monsanto's Roundup Rewards program, bundling Roundup herbicides with the technology fee replant refund on the expensive Roundup Ready and Bollgard of Bt traits, insulated Roundup herbicides from true competition from generics such as Glyfos, Gly-Star, ClearOut, Classic, Touchdown? Here, every farmer purchasing the "limited license to use [the] Roundup Ready [trait] . . . AGREE[S] . . . to use on Roundup Ready crops a Roundup agricultural herbicide or other [Monsanto] authorized non-selective herbicide . . . ." 2003 Monsanto Technology/Stewardship Agreement, pages 1 & 2. Do you agree that in this way Monsanto restrains trade in, and attempts to monopolize, the Glyphosate market?

Answer: See answer to Question 1.

Question 7: Are you aware that the 2003 Monsanto Claim Report that farmers must submit when making claims under the Roundup Rewards program, such as a claim for a waiver of the technology fee in the event that the farmer's first planting does not produce a "stand" and the farmer is forced to replant, requires the farmer to sign the following statement: I agree to use Roundup Branded Herbicide (Roundup WeatherMax, UltraMax, Original, Original II) as my only source of Glyphosate for burndown and In-crop applications on all of my Monsanto Technology Acres. Do you agree that in this way Monsanto restrains trade in, and attempts to monopolize, the glyphosate market? Do you agree that this makes it very difficult for generics such as Glyfos, Gly-Star, ClearOut, Classic, Touchdown to compete with Roundup branded herbicides on the merits?

Answer: See answer to Question 1.

Question 8: Are you investigating issues (6) and (7)? If not, why not?

Answer: See answer to Question 1.

Question 9: In 1999 and 2000, DOJ considered and objected to Monsanto's acquisition of Delta & Pine Land Co., the largest cotton seed producing company in the world. As a result of substantial objections and conditions imposed by DOJ, that acquisition fell through. In light of that, have you

considered the global settlement announced in April of 2002 wherein Monsanto and DuPont made a supposedly confidential settlement resolving about 15 lawsuits between then, including the one identified in (5) above. Given the fact that DuPont now owns Pioneer Hi-Bred International, the largest seed corn company in the world, and one of the largest soybean seed companies, do you consider that there are serious antitrust concerns here? Does not the fact that Monsanto owns Asgrow, DeKalb, Hartz, Holden's and many other corn and soybean seed companies add to those antitrust concerns?

Answer: See answer to Question 1.

Question 10: Monsanto has argued that they are simply exercising their rights as patent-holders when they take actions which force farmers to buy Roundup branded herbicides. On June 28, 2001, the Court of Appeals for the District of Columbia effectively dispatched this approach with the following language: Microsoft argues that the license restrictions are legally justified because, in imposing them, Microsoft is simply "exercising its rights as the holder of valid copyrights." . . . . Microsoft's primary copyright argument borders on the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." . . . . That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws." *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed.Cir. 2000). Would you agree that Monsanto that Monsanto is using its patent rights like the aforementioned baseball bat?

Answer: See answer to Question 1.

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