**Report from the Bureau of Competition**
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Joseph J. Simons, Director, Bureau of Competition

## I. Introduction

Good morning. It's a pleasure to be back here with you to discuss the progress we have made at the Bureau of Competition over the past year. This morning I will review the highlights of our enforcement program, both for mergers and non-mergers. Then I will discuss some of the other important activities in which the Bureau participates. Before I go further, though, allow me to give the usual disclaimer: my comments this morning represent my own views, and not necessarily those of the Commission or any individual Commissioner.

## II. Overall Enforcement Philosophy

Let me start with a quick review of our enforcement philosophy. The FTC follows certain key principles in setting out the agenda for its antitrust mission. While some of our workload involves reacting to external developments (e.g., HSR merger filings, and complaints received from consumers, businesses, and Congressional offices), we nevertheless are able to take a systematic and proactive approach to developing much of our agenda. First, we bear in mind the unique variety of institutional capabilities (including law enforcement, advocacy, research, and education) available, and select the tool best suited to address the issue at hand. I'll talk more about the tools other than enforcement later on. Second, assuming we are focusing on possible enforcement actions, the criteria we use in evaluating possible cases, include:

- whether the conduct allegedly involved is of a type (such as agreements among competitors about price or other elements of competition) that poses the greatest threat to consumer welfare;

- whether the matter involves a sector of the economy that significantly affects consumers' budgets (e.g., health care, including prescription drugs; energy; food, and e-commerce);

- whether the agency has enforcement experience in an area that will enable us to make an impact quickly and efficiently; and

- whether the matter presents a legal issue that might benefit from further study and illumination.

Third, we continually seek to be as efficient as possible, both with respect to taxpayer resources, and the burdens that our work necessarily imposes on private parties Finally, we recognize the need for continuing investment in our store of knowledge about how markets work, the conditions that foster anticompetitive conduct, and the extent to which antitrust intervention may help a given market operate more freely.

## Litigation emphasis

Before turning to specifics, let me first highlight that we have a renewed emphasis on litigation in the Part III adjudicative process. Today, five cases are pending in administrative litigation before the Commission (two cases)(1) or an Administrative Law Judge (three cases).(2) With the change in HSR filing thresholds, and with more nonmerger investigations nearing completion, I expect that number will be higher before it is lower.

Why the renewed focus on Part 3 litigation? The answer has several parts. First, we are investigating more consummated mergers due in part to the increase in HSR filing thresholds. Preliminary injunction actions in Federal court are obviously not an option for these cases.

Second, we have a renewed emphasis on non-merger investigations. Particularly when the stakes are very high, parties are more inclined to litigate these cases. For example, if a case is about the legality of conduct that would permit a branded drug manufacturer to squeeze out another year or two of monopoly status after the patent expires for a billion dollar a year drug, there is an incentive to fight.

Third, the duration of FTC administrative proceedings is no longer a drawback. U.S. District Judge George H. Revercomb referred in an opinion 17 years ago to "the glacial pace of an FTC administrative proceeding" as one reason for denying a preliminary injunction in a merger proceeding, citing the average time of nearly 35 months from complaint issuance of a complaint to the Administrative Law Judge's initial decision in FTC merger cases from 1979 to 1986.(3) Today, thanks to reforms put in place under Chairman Pitofsky in September 1996 and February 1998,(4) the process is considerably faster. The reforms established deadlines, streamlined discovery, and reduced delays during trial. Most important, the new rules require ALJs in most cases to manage Part 3 cases in such as way that permits the issuance of the initial decision within 12 months of the Commission's issuance of the complaint.(5)

Fourth, Part 3 proceedings have substantial public policy benefits. As former Chairman Pitofsky has observed, "In substantial part, the FTC was created because Congress believed that it would be helpful to have the assistance of an agency with specialized expertise in analyzing complex business transactions to resolve the difficult competition issues that may arise."(6) In addition, the Part 3 process increases the transparency of Commission decision-making. The carefully written opinions that accompany a Commission final litigated order can give considerable guidance to the bar and the business community on applicable standards and enforcement policy.

Finally, the Part 3 process is an instrument for developing the law. For example, the AMA case(7) helped open the door for alternative forms of health care delivery, and Indiana Federation of Dentists(8) established the principle that the direct evidence of anticompetitive effects minimizes the need for a rigid showing of market definition and power.

Settlements clearly are efficient, and we could not afford to litigate every case, but for all these reasons, administrative litigation has substantial benefits, and we anticipate regularly having cases in Part 3 litigation over the coming years.

## III. Nonmerger Enforcement

## Overall picture of nonmerger enforcement

Those of you who follow the FTC closely know that Chairman Muris has, over the past two years, laid out a fairly detailed agenda for the nonmerger area. What I am here to tell you today is that we've adhered to that agenda in defining our nonmerger activities, and results of our investments in these areas are emerging in a big way.

First, though, I want to say a brief word about the conditions that have made it possible for us to focus substantially in the nonmerger area. As we've discussed, merger activity reached an all-time peak in 1999-2000 - not just more than any previous period, but more by a wide margin. I didn't have this job then, for which I am thankful, because the Bureau was under enormous pressure to keep up with the flood of merger filings. It did so, of course, in part through heroic efforts of managers and staff, and in part, of necessity, by diverting resources away from nonmerger matters. Lacking any other rational choice, the Bureau reassigned staff to merger matters, with the result that it opened fewer nonmerger investigations, staffed the existing ones more leanly than is typical, and moved them forward less quickly.

In the past two years, the Bureau has been able to re-direct resources back to the nonmerger areas. Since the peak in merger activity in 2000, when we opened only 25 nonmerger investigations, we have worked to reinvigorate our nonmerger enforcement program. In 2001, we opened 56 new nonmerger investigations and we opened another 59 nonmerger investigations in 2002. Those investigations have begun to result in completed enforcement actions, as described further below.

**Part 3 Litigation** - We have four nonmerger cases in Part 3. Most recent is *Unocal*, in which the Commission issued an administrative complaint last month.(9) The complaint charges that Unocal subverted the process under which the California Air Resources Board ("CARB") adopted regulations on phase 2 reformulated gasoline. The complaint further alleges that Unocal made materially false and misleading statements to CARB and others, which led CARB unknowingly to adopt regulations requiring the use of technology covered by Unocal patents.

In a complaint issued last June, the Commission 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.(10) The standard at issue involved a common form of computer memory used in personal computers and other electronic products. According to the complaint, the inclusion of Rambus' patented technology in the standard placed it in a position to gain millions of dollars in royalties each year, and potentially more than a billion dollars over the life of the patents, all at the expense of consumers in the form of higher prices.

In addition to these two matters, the Commission has heard oral arguments in appeals from Initial Decisions in two matters. Under the FTC's Rules of Practice, the Commission can conduct a full *de novo* review of the administrative law judge's findings of fact and the legal conclusions

in matters in which it hears an appeal.(11) In *Schering-Plough Corporation*, a case involving allegations that Schering illegally paid Upsher-Smith Laboratories $60 million to delay marketing a generic version of K-Dur 20, we (FTC complaint counsel) have appealed the matter following the administrative law judge's Initial Decision dismissing the complaint following trial.(12)

The Commission also heard oral argument in a case known as *The Three Tenors*. This matter involves allegations that several music distribution companies entered into an illegal price fixing agreement not to advertise or discount earlier albums and video recordings of concerts featuring the Three Tenors.(13) In this case, Chief Administrative Law Judge James P. Timony upheld the FTC's charges and ordered the respondents to cease and desist from entering into any agreement on price with wholesale producers or sellers of audio or video products.

## Nonmerger enforcement in key sectors of the economy

We try to put our resources into areas where consumers get the biggest bang for the taxpayer buck. This means we focus on sectors of the economy that have the biggest impact on consumers in their everyday lives, including health, prescription drugs, and energy.

**Health** - The health care sector remains enormously significant to both consumers and the national economy. Health-related products and services account for more than 15 percent of our gross domestic product, and that share has grown by about 25 percent since 1990.(14) Without effective antitrust enforcement, those figures undoubtedly would be even higher.

In the past year, the Commission has reached settlements with five groups of physicians for allegedly colluding to raise consumers' costs.(15) The number of physicians involved ranged from twelve in Denver to more than 1,200 hundred in the Dallas-Fort Worth area. The Commission's orders put a stop to further anticompetitive collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. A number of similar cases are currently under investigation.

**Prescription drugs** - The growing cost of prescription drugs is another significant concern for consumers, government and private entities that reimburse health costs. Anticompetitive actions to forestall generic entry has been a major focus of Commission nonmerger enforcement. The agency has brought three types of cases, involving (1) agreements between a brand-name drug manufacturer and a generic firm, (2) unilateral conduct by a branded manufacturer to delay generic entry, and (3) agreements among generic drug manufacturers. Examples include:

- A consent order settling FTC allegations that Biovail Corporation ("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.(16) Under current law, that action triggered an automatic 30-month stay of FDA approval of any generic competitor to the branded product.

- A settlement of charges that Biovail and Elan Corporation, plc (Elan) entered into an agreement that effectively divided the market for the 30 mg and 60 mg dosage forms of generic Adalat CC.(17)

- A consent agreement, accepted for public comment last month, resolving charges that Bristol-Myers Squibb Company (Bristol) - one of the world's largest drug makers - engaged in a series of anticompetitive acts over the past decade to obstruct the entry of low-price generic competition for three of it's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar.(18) According to the complaint, Bristol's illegal conduct protected nearly $2 billion in annual sales at a high cost to cancer patients and other consumers, who - being denied access to lower-cost alternatives - were forced to overpay by hundreds of millions of dollars for important and often life-saving medications.

**Energy** - The importance of antitrust law enforcement is particularly clear in the oil and gas industry, where fuel price increases can strain the budgets of many consumers and can have a direct and significant impact on businesses of all sizes throughout the U.S. economy. Enforcement of the antitrust laws helps ensure that the oil and gasoline industries are, and remain, competitive. Although most of the Commission's energy-related enforcement actions have involved mergers, the nonmerger side is important as well. Notably, the Commission's recent administrative complaint against Unocal, which I have already mentioned, alleges that Unocal's enforcement of its patents could potentially cost California consumers hundreds of millions of dollars per year in higher gasoline prices. Unocal's own economic expert reported that 90 percent of any royalty payments (resulting from Unocal's unlawfully withholding information from the CARB) would be passed on to drivers in the form of higher retail gas prices.(19)

**Professions/associations/boards** - Agreements among professionals to restrict competition, often under the guise of professional association by-laws, codes of conduct, or other rules, can harm consumers in the same manner and degree as a "smoke-filled room" conspiracy. We recently completed two consent agreements in this area, and are actively pursuing many other potentially harmful restrictions imposed by professional associations, trade associations, or boards. The American Institute for the Conservation of Historic and Artistic Works, for example, agreed to settle charges that its Commentaries to the Guidelines for Practice condemn as "unprofessional behavior" the "consistent undercutting of local or regional market rates."(20) Another consent agreement resolved charges that the National Academy of Arbitrator's Code of Professional Responsibility forbade virtually all forms of advertising.(21)

## Clarifying the Boundaries of Antitrust

The Noerr-Pennington and State Action antitrust immunity doctrines have carved out a substantial amount of commercial activity from the beneficial forces of competition. As Robert Bork observed nearly a quarter century ago, we have seen "an enormous proliferation of regulatory and licensing authorities at every level of government."(22) The result of this growth in the role of government, he warned, has been an "almost limitless possibilities for

abuse."(23) At the same time, the Noerr and State Action doctrines restrict the role of antitrust in protecting consumers from rent seeking behavior involving government institutions.

While the core principles underlying these doctrines have validity, some lower court decisions have expanded the reach of both doctrines well beyond the precepts originally articulated by the Supreme Court. Through study and analysis, and by bringing carefully-selected enforcement actions, we hope to ensure that the application of these doctrines remains true to the intent of the Supreme Court's decisions.

**State action** - The state-action doctrine shields from antitrust liability certain private conduct taken pursuant to state policy. When first articulated in *Parker v. Brown*(24), the doctrine rested on the notion that Congress did not limit the sovereign regulatory power of the states when it passed the antitrust laws. Since then, however, some courts have not considered whether the anticompetitive conduct in question was intended by the state legislature to accomplish the state's objective. In other instances, courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state. We are conducting investigations that we hope will clarify the two key elements of the state action defense, a "clear articulation" of the state's intent to displace competition, and "active supervision" of any anticompetitive private agreements. In the recent *Indiana Movers* consent, for example, we described four factors relevant to showing sufficient supervision: (1) notice and comment; (2) a written decision; (3) reference to the statutory standards; and ( 4) if consumer welfare is one standard, a quantitative estimate of those effects.(25) We likely will complete other, similar cases, in the near future.

**Noerr-Pennington** - *Noerr* states that firms may collectively petition for anticompetitive decisions, or may individually petition for a grant of monopoly rights, without violating the Sherman Act.(26) In such cases, any anticompetitive effects will come from the government action (which is subject to correction through the political process) rather than through the firms' own market power.

*Noerr* immunity can be defeated in several ways. The filing of a sham lawsuit - a lawsuit that is objectively and subjectively baseless, and intended to directly burden a competitor rather than to influence the government - is not protected by Noerr. Other ways to defeat the application of Noerr that are of particular interest to us include:

- *Material Misrepresentations to the government*. Since Noerr immunity rests on the government having knowingly granted petitions for action having anticompetitive effects, conduct that deceives the government- to a sufficient standard of severity - should be outside that immunity. The recent Unocal complaint alleges that Unocal urged the California air-quality board to adopt a standard for clean-burning gasoline, while representing both to that board and to industry groups that it would not assert any intellectual property rights in the standard. Only after commitment to the new standard did Unocal demand royalties, according to the complaint. The Commission's complaint in the Bristol-Myers settlement, announced last month, alleges that the firm took inconsistent positions before two agencies, obtaining a patent by telling the PTO that its application did not claim the drug BuSpar, and then stated that the patent did cover the

drug when listing it in FDA's Orange Book.

- *Triggering ministerial actions*. If Noerr protects "petitioning" conduct, then the immunity is not appropriate for conduct that merely triggers ministerial government action, as the party has not truly asked for a discretionary decision. For example, pharmaceutical firm's listing of a patent in the FDA's Orange Book, together with an infringement suit against a generic manufacturer, would result in an automatic FDA stay on generic entry, under current law.(27) Since the result is automatic, and therefore involves no government "decision," Noerr arguably does not protect the firm from antitrust challenge to its conduct.

- *Pursuing a pattern*. Actions that are on the fringe of possible Noerr protection become more troublesome when taken in combination. Thus, for example, the Commission's recently settled case against Bristol-Myers,(28) relied on the combination of the firm's inequitable conduct at the PTO, wrongful Orange Book listings, sham litigation, and payments for generics not to enter, all to obtain or maintain monopoly power.

## IV. Merger Enforcement

I have less that is new or remarkable to report concerning mergers. Indeed, the hallmark of merger enforcement today is the near universal support for the basic analytical methodology that has been in place since 1982. Simply put, we continue to rely on the same principles, use the same merger guidelines, applied in the same way, and reach conclusions which, in aggregate, would be unlikely to differ much from conclusions the Commission likely would have reached 10 or 15 years ago.

There is, however, one area of significant difference: consummated mergers. While fewer proposed mergers are subject to premerger reporting requirements following amendment of the HSR Act in 2001,(29) the standard of legality under Section 7 of the Clayton Act remains unchanged. Consequently, we now devote more effort to identifying (through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies) those unreported, usually consummated, mergers that could harm consumers. While it can be difficult to "unscramble the eggs" and effectively restore competition after consummation of a merger, the Commission will challenge a consummated merger where it is warranted. The number of investigations of mergers not reported under HSR is up sharply since the change in reporting thresholds. The Commission issued administrative complaints challenging two consummated mergers in October, 2001.

Our challenge of MSC Software Corporation's 1999 acquisitions of Universal Analytics, Inc. (UAI) and Computerized Structural Analysis & Research Corp. (CSAR) was resolved by consent last spring.(30) MSC, the largest supplier of computer-aided engineering simulation software in the world, held 90 percent of the market in Nastran, an engineering simulation software program used throughout the aerospace and automotive industries. In 1999, MSC acquired the two firms that split the remaining 10 percent of the market in transactions that were not HSR-reportable. The Commission nevertheless became aware of the acquisitions, and issued an administrative complaint in October 2001, alleging that the acquisitions enabled MSC to create and enhance its

power to raise prices above a competitive level or delay product development and enhancements. The settlement requires MSC to divest at least one clone copy of its current advanced Nastran software, including the source code, through a royalty-free, perpetual, non-exclusive license.

The Commission also challenged Chicago Bridge and Iron Company's acquisition of Pitt-Des Moines, Inc.'s industrial and water storage tanks assets.(31) Before the acquisition, CB&I and PDM competed against each other as the two leading U.S. producers of large, field-erected industrial and water storage tanks and other specialized steel-plate structures. If we prevail in this challenge, it may not be an easy task to unscramble the eggs, but we are confident that the Commission will be able to restore the competition lost as a result of the merger.

## Merger enforcement in key sectors of the economy:

**Health Care** - The Commission completed several health-related merger cases in the past year, including:

- An action challenging Cytyc Corporation's (Cytyc) proposed $420 million acquisition of Digene Corporation (Digene), in which the FTC alleged that the combination which would reduce competition and increase consumer prices in the market for primary cervical cancer screening tests.(32) The parties abandoned the merger before FTC staff filed a motion in a federal district court to enjoin the transaction.
- A consent agreement requiring divestiture of assets and licensing of intellectual property rights in three biopharmaceutical markets to cure anticompetitive effects of Amgen Inc.'s $16 billion acquisition of Immunex Corp.(33)
- A settlement in Baxter International Inc.'s $316 million acquisition of Wyeth Corporation to preserve competition in markets for certain general anesthetics, neuromuscular blocking agents, antiemetics, and new injectable iron replacement therapies.(34)
- 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.(35)

In addition, the Commission formed a Merger Litigation Task Force last summer. The task force is investigating recently consummated hospital mergers and, in light of the antitrust agencies' lack of success in challenging hospital mergers over the past several years, will examine the actual effects of the mergers.

**Energy** - In recent years, the Bureau of Competition has spent almost one-third of its total enforcement budget on investigations in energy industries. Much of this effort has involved oil industry mergers, including *Exxon/Mobil*(36), *BP/Amoco*,(37) *Shell/Texaco*,(38) and many others. In these large and complex transactions, involving many different product and geographic markets, the Commission has identified those markets in which the merger posed a threat to competition and those markets in which the merger would not affect competition, and required divestitures in the former markets to preserve competition. Most recently, the agency's review of the proposed*Phillips/Conoco* merger resulted in a proposed consent order that will require 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.(39)

**Food** - The food industry is of obvious importance to all consumers. The Commission has carefully monitored merger transactions at all levels of this industry, including retail grocery stores and food wholesaling. In the recent acquisition of Amigo, the largest supermarket chain in Puerto Rico, by Wal-Mart, the largest general merchandiser in the world, the Commission required divestiture of four Amigo stores where direct competition would be eliminated between Wal-Mart club stores or a supercenter and Amigo supermarkets. Although the Commission has defined the relevant product market as supermarkets in past cases, evidence here indicated that many Puerto Rico consumers use club stores interchangeably with full-service supermarkets and supercenters. Thus, we modified our analysis in this case to use an expanded market definition.(40) Kroger's acquisition of 18 Raley's supermarkets in the Las Vegas, Nevada area last year also illustrates how the Commission takes into account the facts specific to each transaction. Though it had taken enforcement action in a Las Vegas supermarket merger in 1999, the Commission found that significant new entry had occurred in the interim. Concluding that the merger therefore was unlikely to harm competition, the Commission closed the investigation with no action.(41)

Last month, the Commission authorized staff to seek a preliminary injunction to block this $2.8 billion proposed merger of Nestle's and Dreyer's ice cream businesses. Nestle and Dreyer's along with Unilever, the marketer of Ben & Jerry's ice cream, account for about 98 percent of superpremium sales.(42) The purchase of Dreyer's would give Nestle, alone, 60 percent of this market. This matter highlights the importance of fact intensive product market analysis, which in this case demonstrated the existence of a distinct superpremium ice cream market. The competitive importance of effective, not readily duplicatable distribution systems also came to the fore in staff's analysis of this case. The Commission's challenge to the proposed combination of Claussen, the dominant firm in the market for refrigerated pickles, with its most significant competitor in refrigerated pickles and the largest national brand of shelf-stable pickles, Vlasic, represents another example of the Commission's merger enforcement in wholesale food markets.(43)

Other significant merger matters in the past year included *Bayer AG/Aventis CropScience Holdings S.A.*, resolved by a consent order requiring divestitures in several product categories, including new generation chemical insecticide active ingredients and products, post-emergent grass herbicides for spring wheat, and cool weather cotton defoliants;(44) *Shell Oil Company/Pennzoil-Quaker State Company*, a $1.8 billion acquisition in which a settlement required divestitures to preserve competition in the U.S. and Canadian market for Group II paraffinic base oil;(45) and *Solvay/Ausimont*, a transaction that threatened competition in the world market for polyvinylidene fluoride (PVDF), a fluoropolymer used in a wide variety of applications.(46)

Both *Bayer/Aventis* and *Solvay/Ausimont* raised concerns in both the U.S. and Europe, and the FTC worked closely with European Community authorities and the parties to obtain remedies satisfactory to all.

## Merger Litigation

The Commission resolves most merger challenges through settlement, but it is sometimes necessary to litigate, particularly when the merger at issue already has been consummated. Merger litigation requires enormous resources. At the height of preparation, a single merger case requires the full-time attention of numerous staff members - not only lawyers, but also economists, paralegals, and support staff. To counter arguments and evidence presented by merging parties, these cases also require analysis and testimony by outside experts with specialized knowledge, which can be extremely costly.

**PI actions authorized** - In the past year, the Commission has authorized federal court challenges to four proposed mergers, including Meade Instruments Corporation's proposed acquisition of Tasco Holdings, Inc.'s Celestron International (involving performance telescopes and Schmidt-Cassegrain telescopes),(47) as well as *Cytyc/Digene*, *Vlasic/Claussen*, and *Nestle/Dreyer's* (discussed above)(48). In the first three, the parties abandoned the planned acquisition before a court decision. The outcome of *Nestle/Dreyer's* has yet to be determined.

**Enforcing FTC Orders** - We will also litigate, when necessary, to vindicate the Commission's authority to order relief to protect competition. Just a week ago today, U.S. District Judge Patti B. Saris ruled in a case brought to enforce an order agreed to by Boston Scientific Corporation ("BSC") in a merger settlement involving medical technology used to diagnose and treat heart disease.(49) To preserve competition in the market for intravascular ultrasound catheters following its acquisition of two competitors, BSC agreed to license its catheter technology to Hewlett-Packard Company ("HP"). Finding that BSC "acted in bad faith," took an "obstreperous approach" to its obligation, and materially impacted HP's decision to exit the market, the court assessed a civil penalty of more than $7 million. This represents the largest civil penalty ever imposed for violation of an FTC order.

## Vertical mergers

Vertical mergers are much less likely to have anticompetitive effects than are mergers between direct competitors, but the Commission nevertheless evaluates the specific facts presented by each vertical transaction, and takes enforcement action where necessary to protect competition. The Commission's investigations of the proposed *Cytyc/Digene* and *Avant!/Synopsys* vertical mergers illustrate how different facts lead to different outcomes. In *Cytyc/Digene*, a proposed merger of two leading producers of cervical cancer screening tests, the Commission concluded, that Cytyc would be in a position to limit access to Digene's HPV test. In so doing, Cytyc could eliminate its only existing competitor and thwart other future entrants by making it more difficult for them to secure the needed FDA approvals. The potential for consumer harm was very real, and so the Commission voted to sue to block the deal (which the parties then abandoned).(50) *Avant!/Synopsys* involved software that is used in the design of computer chips. Synopsys had a nearly 90% share of "logical synthesis" or "front-end" tools for chip design, and Avant! had a share of about 40% of so-called "place and route" or "back-end" tools. We examined numerous theories of competitive harm, including whether the merger would give Synopsys the ability and incentive to enhance the back-end competitive position of the formerly independent Avant!, by making it harder for competing back-end products to communicate with

Synopsys's dominant front-end product. We found little evidence, however, that Synopsys would have either the incentive or the ability to foreclose competitive products sufficiently to harm consumers.(51) The common element in these two matters was that they turned on individual facts rather than any preconception about the effects of vertical mergers.

## Improvements in Merger Process

As part of its law enforcement role, the Commission has responsibilities to seek improvements in the merger investigation process to minimize costs and other burdens on parties (and itself), to promote public awareness of its enforcement policies, standards, and analytical methods, and to ensure that the remedies it orders effectively accomplish the intended purpose.

**Premerger Notification**- As part of an overall movement to make government more accessible electronically, the FTC, working with the DOJ, is accelerating its efforts to complete an electronic system for filing HSR premerger notifications. 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. The Commission also made available to the public, a searchable database of thousands of letters memorializing advice provided by agency staff in response to inquiries about interpretation of the HSR rules.

**Streamlining investigations** - Last spring, the Bureau of Competition held a series of workshops in cities around the country to obtain comments and suggestions from experienced antitrust practitioners on possible improvements in the merger investigation process. In December, we announced a new set of Guidelines for Merger Investigations, which incorporate what we learned from those workshops.(52) 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 search for and submission of electronic materials.

In addition, the Bureau of Economics released a statement of Best Practices relating to empirical analyses.(53) Empirical analyses, including econometric analyses, have an important role in antitrust investigations and litigation. The Bureau of Economics has been increasing its emphasis on developing empirical analyses in antitrust investigations. The Bureau's statement encourages practices that facilitate effective incorporation of empirical analyses into antitrust investigations while reducing the burden on parties in complying with data requests.

Our efforts to improve the merger investigation process continue. We are studying additional issues raised during the workshops last spring. In addition, we are completing work on a revised model second request, as well as some industry specific variations, all of which will be available to the public. Finally, we are encouraging, and seeking ways to facilitate, electronic production of documents in response to second requests.

## Transparency

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 our objectives through deterrence: 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 anticompetitive mergers from being proposed or anticompetitive practices being implemented. 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. In the past year, the Commission has sought ways 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 seems 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 during the past year, 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.(54) We have put more emphasis on drafting informative analyses to aid public comment. Most recently, in a development that may have received little attention, 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).(55)

**Remedies** - Several of the merger "best practices" workshops we held last spring focused on remedies issues. The remedies topics on which we sought the public's views included identifying the assets to 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 jewels provisions, third-party rights, pre-divestiture risks to competition, and divestiture success. Just this week, we announced the issuance of the "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies."(56) The Bureau hopes the Statement will streamline merger settlement negotiations by increasing transparency of the process.

## V. Use of Nonenforcement Tools

Congress provided the FTC with a unique collection of capabilities to address competition-related policy issues. These capabilities include expansive power to conduct studies or perform research about the economy and a broad charter to act as an advocate for competition before other government bodies, in addition to the authority to initiate administrative and federal court litigation. We make full use of these capabilities in pursuing a multi-dimensional approach in pursuing our mission. As with our merger and nonmerger enforcement work, we apply our

nonenforcement tools to those sectors of the economy that have the greatest impact on consumers.

## Health Care

Last September, we held a workshop on competition law and policy in health care, featuring presentations by academics, providers, insurers, employers, patient groups, and representatives of the Commission, the Department of Justice, and state attorneys general.(57) The workshop had more than a dozen speakers and five panel discussions. The panels focused on clinical integration, payor/provider issues, group purchasing organizations, generics and branded pharmaceuticals, and direct-to-consumer advertising of pharmaceuticals. Each panel presented a broad range of views on each of these subjects from knowledgeable panelists. Several hundred people attended the workshop. The workshop also made clear that there is a considerable diversity of views on the appropriate role and priorities for the Commission and other enforcement agencies.

Because the workshop only began to explore the complex and interdependent issues, the Commission authorized an extended set of hearings on health care and competition policy, commencing in February 2003 and continuing through the year.(58) Co-sponsored with the Department of Justice, the hearings are examining the state of the health care marketplace and the role of antitrust and consumer protection in satisfying the preferences of Americans for high-quality, cost-effective health care.(59) Also in the past year, we addressed a proposed antitrust exemption for Ohio physicians engaging in collective bargaining in a competition advocacy filing last October,(60)and provided several advisory opinions relating to health care services markets.

## Prescription Drugs

In July 2002, the Commission released a report, *Generic Drug Entry Prior to Patent Expiration*, focusing on certain aspects of generic drug competition under the Hatch-Waxman Amendments.(61) The study examined whether drug firm conduct at issue in FTC enforcement actions, which relies upon certain Hatch-Waxman provisions, represents a typical pattern of behavior of pharmaceutical companies or a few isolated examples. The study also examined more broadly how the process that Hatch-Waxman established to permit generic entry prior to expiration of a brand-name drug product's patents has worked between 1992 and 2000. The report suggested certain changes in balance between competition and intellectual property law, such as permitting only one automatic 30-day stay per drug product, per generic entry application pending patent infringement litigation, which the FDA has proposed. As one example of the value of FTC analysis and information dissemination efforts, President Bush prominently cited the report when he announced the FDA's proposed regulatory measures to foster competition in the pharmaceutical industry last October.(62)

## Professions

In many regulated professions, regulatory bodies and groups of practitioners regularly attempt to restrict advertising and prevent competition from those outside the profession. These restrictions

result in higher prices, less information, and fewer choices for consumers. When it is not feasible to use our enforcement authority to challenge competitive restraints in the professions, we seek to persuade policymakers of the benefits of competition. Most recently, we and the Department of Justice's Antitrust Division submitted a joint letter to the ABA urging it to substantially narrow or reject a proposed model definition of the practice of law, which would likely reduce or eliminate competition from non-lawyers in providing certain services.(63) Previously, we submitted a joint letter with the Antitrust Division urging the North Carolina State Bar to approve a proposed opinion that would explicitly permit non-lawyers to compete in real estate and mortgage closing services.(64) In other advocacy work during the past year, we:

- provided staff comments to the Alabama Supreme Court on attorney advertising rules, urging that any restrictions should be narrowly tailored to prevent unfair or deceptive acts or practices, and that the rules permit communication of truthful and non-deceptive information,(65) and
- filed an amicus brief in a case seeking to overturn an Oklahoma law that permits only funeral directors to sell caskets.(66)

## Energy

The Commission is pursuing a number of projects involving the petroleum industry, given its overall importance to consumers. In light of increased public concern about the level and volatility of gasoline prices in recent years, the Commission is studying the central factors that may affect the level and volatility of refined petroleum products prices in the United States. The Commission held a second public conference on this topic in May.(67) The Commission expects to summarize and discuss its work in a public report to be issued this year. A major revision of the 1982 and 1989 FTC staff reports on oil mergers is also underway,(68) as is an empirical study of the effects of various oil mergers of the past decade. The Commission also authorized staff comments to the Environmental Protection Agency in connection with its study of the impact of different environmental regulations on product distribution and, ultimately, on supply and price of products in various markets.(69) Finally, we are monitoring wholesale and retail prices of gasoline - by far, the largest single refinery product. Members of the staff inspect wholesale gasoline prices for 20 cities and retail gasoline prices for 360 cities throughout the United States and seek explanations of any pricing anomalies.(70) FTC staff also submitted comments in Hawaii and New York on the effect of state laws requiring a mandatory minimum mark-up on the price of gasoline,(71) and addressed competition issues raised by the deregulation of electricity, in a number of separate comments filed with the Federal Energy Regulatory Commission.(72)

## E-Commerce

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 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. This work has resulted in investigations into possible anticompetitive restrictions on e-commerce, and the Task Force has taken the lead in drafting several competition advocacy pieces. In October, the Commission hosted a three-day public workshop examining potential barriers to e-commerce in ten different industries.(73) The Commission also testified before Congress concerning these issues.(74)

## IP Hearings

In November, the Commission and Department of Justice concluded 24 days of hearings over nine months on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.(75) The hearings responded to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. A public report that incorporates the insights of business persons, consumer advocates, inventors, practitioners, and academics who participated in the hearings, as well as other research, is being prepared.

## Other Research and Development

In passing the federal antitrust laws, Congress adopted an evolutionary scheme in which courts would alter doctrine by "recognizing and adapting to changed circumstances and the lessons of accumulated experience."(76) The rapid changes in many markets can result in new competitive strategies that present new antitrust issues. Consequently, the rationality of our antitrust system requires continuing efforts to refine economic theory and empirical research, and evaluate what new strategies raise antitrust concerns and how the FTC should respond to ongoing developments. This process can be viewed as competition policy "research and development."(77)

In addition to the work described above, we have conducted other R&D efforts to inform our decision making on antitrust issues. For example, to assess the efficacy of merger enforcement, we need to analyze the effects of past enforcement actions, including non-enforcement decisions. Specifically, we need to understand the industry and firm specific conditions relevant to the potential for anticompetitive effects. We also need to know much more about the nature and likelihood of significant procompetitive effects of mergers. Understanding the efficiencies that can arise from mergers and how they are achieved would provide us with greater ability to evaluate prospective mergers.

The Bureau of Economics ("BE") held a Roundtable (Understanding Mergers: Strategy & Planning, Implementation and Outcomes) in December 2002 that brought together experts on mergers from economics departments, business schools, M&A consulting firms, antitrust law, and business.(78) The goals included to better understand the M&A process in its entirety and to obtain a broader perspective on the factors that make mergers succeed or fail. BE economists

also published papers on topics such as the use of econometric evidence in merger investigations and the development of various policy issues under the Merger Guidelines.(79)

## Conclusion

As you can see, we are quite busy. I thank you for being here this morning and for your keen interest in what we are doing in the Bureau of Competition.

## Endnotes:

1. *Polygram Holding, Inc.*, Docket No. 9298 (June 28, 2002) (Initial Decision); *Schering Plough Corp.*, Docket No. 9297 (July 2, 2002) (Initial Decision).

2. *Chicago Bridge & Iron Co.*, Docket No. 9300 (October 25, 2001)(complaint), *Rambus Inc.*, Docket No. 9302 (June 18, 2002) (complaint), *Union Oil Co. of California*, Docket No. 9305 (Mar. 4, 2003) (complaint).

3. *FTC v. Occidental Petroleum Corp.*, 1986 U.S. Dist. LEXIS 26138; 1986-1 Trade Cas. (CCH) P67,071 (1986).

4. *See* 61 Fed. Reg. 50639 (Sept.26, 1996) and 63 Fed. Reg. 7525 (Feb. 13, 1998).

5. *Id.*; 16 C.F.R. § 3.51(a) (2003).

6. Robert Pitofsky, *An Overview of FTC Antitrust Enforcement*, prepared testimony of the Federal Trade Commission, Before the House Committee on the Judiciary (Nov. 5, 1997 ).

7. *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)).

8. *Indiana Fed'n of Dentists v. FTC*, 745 F.2d 1124 (7th Cir. 1984), rev'd, 476 U.S. 447 (1986).

9. *Union Oil Co. of Calif., supra* note 2.

10. *Rambus Inc., supra* note 2.

11. 16 C.F.R. § 3.54(a) (2003).

12. *Schering Plough Corp., supra* note 1.

13. *Polygram Holding, Inc., supra* note 1.

14. See Centers for Medicare & Medicaid Servs., *U.S. Health Care System*, available at

<http://www.cms.gov/charts/series/sec1.pdf>.

15. *System Health Providers*, Docket No. C-4064 (Oct. 24, 2002) (consent order); *R.T. Welter & Assoc., Inc.* (Professionals in Women's Care), Docket No. C-4063 (Oct. 8, 2002) (consent order); *Physician Integrated Servs. of Denver, Inc.*, Docket No. C-4054 (July 16, 2002) (consent order); *Aurora Associated Primary Care Physicians, L.L.C.*, Docket No. C-4055 (July 16, 2002) (consent order); *Obstetrics and Gynecology Med. Corp. of Napa Valley*, Docket No. C-4048 (May 14, 2002) (consent order).

16. *Biovail Corp.*, Docket No. C-4060 (Oct. 2, 2002) (consent order).

17. *Biovail Corp. and Elan Corp.*, Docket No. C-4057 (Aug. 15, 2002) (consent order).

18. *Bristol-Myers Squibb Co.*, File Nos. 001-0221, 011-0046, and 021-0181 (Mar. 7, 2003) (proposed consent order accepted for public comment).

19. *See Union Oil Co. of Calif., supra* note 2.

20. *American Institute For Conservation of Historic and Artistic Works*, Docket No. C-4065 (Nov. 1, 2002) (consent order).

21. *National Academy of Arbitrators*, Docket No. C-4070 (Jan. 17, 2003) (consent order).

22. Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 347 (1978).

23. *Id*.

24. *Parker v. Brown*, 317 U.S. 341 (1943).

25. *Indiana Household Movers and Warehousemen, Inc.*, File No. 021-0115 (Mar. 18, 2003) (proposed consent order accepted for public comment).

26. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

27. Pursuant to the FDC Act, a brand-name drug manufacturer seeking to market a new drug product must first obtain FDA approval by filing a New Drug Application ("NDA"). At the time the NDA is filed, the NDA filer must also provide the FDA with certain categories of information regarding patents that cover the drug that is the subject of its NDA. 21 U.S.C. § 355(b)(1). Upon receipt of the patent information, the FDA is required to list it in an agency publication entitled "Approved Drug Products with Therapeutic Equivalence," commonly known as the "Orange Book." Id. § 355(j)(7)(A).

28. *Bristol-Myers Squibb Co., supra* note 17.

29. 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

30. *MSC.Software Corp.*, Docket No. 9299 (Oct. 29, 2002) (consent order).

31. *Chicago Bridge Iron Co., Inc., supra* note 2.

32. FTC Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* File No. 021-0098 (June 24, 2002), *available at*</opa/2002/06/cytyc_digene.htm>.

33. *Amgen Inc. and Immunex Corp.*, Docket. No. C-4056 (Sept. 3, 2002) (consent order).

34. *Baxter International Inc. and Wyeth*, Docket No. C-4068 (Feb. 3, 2003) (consent order).

35. *Quest Diagnostics Inc. and Unilab Corp.*, Docket No. C-4074 (Feb. 21, 2003) (consent order).

36. *Exxon Corp.*, Docket No. C-3907 (Nov. 30, 1999) (consent order).

37. *British Petroleum Co., p.l.c.* , Docket No. C-3868 (April 19, 1999) (consent order).

38. *Shell Oil Co.*, Docket No. C-3803 (April 21, 1998) (consent order).

39. *Conoco Inc. and Phillips Petroleum Company*, Docket No. C-4058 (Feb. 7, 2003) (consent order).

40. *Wal-Mart Stores, Inc.*, Docket No. C-4066 (Feb. 27, 2003) (consent order).

41. FTC Press Release, Investigation of Kroger/Raley's Supermarkets Transaction Closed (Nov. 13, 2002), *available at*</opa/2002/11/krogerraley.htm>.

42. FTC Press Release, *FTC to Challenge Nestlé, Dreyer's Merger* (Mar. 4, 2003), *available at* </opa/2003/03/dreyers.htm>.

43. *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, LP*, Civ. Action No. 1:02-cv-02070-RWR (D.D.C. filed Oct. 23, 2002). A notice of voluntary dismissal was filed on October 31, 2002.

44. *Bayer AG and Aventis S.A.*, Docket No. C-4049 (July 24, 2002) (consent order).

45. *Shell Oil Company and Pennzoil-Quaker State Company*, Docket No. C-4059 (Nov. 22, 2002) (consent order).

46. *Solvay S.A.*, Docket No. C-4046, (May 2, 2002)

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

48. *See supra* notes 32, 42, and 43.

49. *United States v. Boston Scientific Corporation*, Civ. Action No. 00-12247-PBS, Memorandum and Order (D. Mass. March 28, 2003).

50. FTC Press Release, *Federal Trade Commission Seeks to Block Cytyc' Corporation's acquisition of Digene Corporation*, File No. 021-0098 (June 24, 2002), *available at* </opa/2002/06/cytyc_digene.htm>.

51. *See* FTC Press Release, *Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc.*, File No. 021-0049 (July 26, 2002), *available at* </opa/2002/07/avant.htm>. As three Commissioners noted in their separate statements, the Commission intends to watch this market closely in the future, and we have not ruled out the possibility of seeking relief in the future if market effects prove to be more harmful than was apparent in advance of the merger. *Statement of Commissioner Thomas B. Leary, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at* </os/2002/07/avantlearystmnt.htm>;*Statement of Commissioner Mozelle W. Thompson, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at*</os/2002/07/avantthompsonstmnt.htm>; *Statement of Commissioner Sheila F. Anthony, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at* </os/2002/07/avantanthonystmnt.htm>.

52. 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* </os/2002/12/bcguidelines021211.htm>.

53. Federal Trade Commission, Bureau of Economics, *Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations* (Nov. 7, 2002), *available at* </be/ftcbebp.pdf>.

54. *See*, e.g., FTC press release, *Investigation of Kroger/Raley's Supermarkets Transaction Closed* (Nov. 13, 2002) *available at*</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 (Commissioners Anthony and Thompson dissenting) (Oct. 4,2002), *available at* </os/2002/10/cruisestatement.htm> and </os/2002/10/cruisedissent.htm>.

55. *Wal-Mart Stores, Inc.*, Docket No. C-4066 (Feb. 27, 2003) (consent order), letters to commenters available at </os/caselist/c4066.htm>.

56. FTC Press Release, *FTC Competition Director Announces Guidelines for Negotiating Merger Remedies* (April 2, 2003), *available at*</opa/2003/04/mergerremedies.htm>.

57. *See* FTC Press Release, *FTC to Host Workshop on Health Care and Competition Law and Policy September 9-10, 2002 - Washington, D.C.* (Jul. 10, 2002), *available at* </opa/2002/07/hlthcarecompwrkshop.htm>. Agenda, transcript, public comments and other materials are available at </ogc/healthcare/index.htm>.

58. 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* </opa/2002/11/murishealthcare.htm>.

59. Agenda, transcripts, public comments, and other materials are available at </ogc/healthcarehearings/index.htm>.

60. *See* FTC Press Release, *FTC Staff Opposes Ohio Bill To Allow Physician Collective Bargaining* (Oct. 21, 2002), *available at*</opa/2002/10/physicians.htm>.

61. Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at*</os/2002/07/genericdrugstudy.pdf>.

62. 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>; see 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. 65,448 (Oct. 24, 2002).

63. Letter from Federal Trade Commission and U.S. Department of Justice to American Bar Association Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), *available at* </opa/2002/12/lettertoaba.htm>.

64. Letter from Federal Trade Commission and U.S. Department of Justice to North Carolina State Bar (Jul. 11, 2002), *available at*</os/2002/07/non-attorneyinvolvment.pdf>.

65. Letter from Federal Trade Commission Staff to Alabama Supreme Court (Sept. 30, 2002), *available at* </be/v020023.pdf>.

66. Memorandum of Law of Amicus Curiae the Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D.Ok. Aug. 29, 2002).

67. FTC Press Release, *Factors That Affect Gasoline Prices To Be Discussed at FTC Conference* (May 1, 2002), *available at*</opa/2002/05/gasolineprices.htm>; agenda, transcripts, public comments, and other materials available at </bc/gasconf/index.htm>.

68. Federal Trade Commission, *Mergers in the Petroleum Industry* (Sept. 1982); Federal Trade Commission, *Bureau of Economics, Mergers in the U.S. Petroleum Industry, 1971-1984: An Updated Comparative Analysis* (1989).

69. Federal Trade Commission Staff, *Comments on Study of Unique Gasoline Fuel Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution and Potential Improvements, EPA 420-P-01-004 Public Docket No. A-2001-20* (Jan. 20, 2002), *available at*</be/v020004.pdf>.

70. *See* 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* </opa/2002/05/gcr.htm>.

71. Federal Trade Commission Staff Testimony, *Competition and the Effects of Price Controls in Hawaii's Gasoline Market* (Jan. 28, 2003), *available a*t </be/v030005.htm>; letter from Federal Trade Commission Staff to New York Governor George E. Pataki (Aug. 8, 2002), *available at* </be/v020019.pdf>.

72. FERC, Docket No. RM01-12 (Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design) (Nov. 15, 2002); FERC, Docket No. RM01-12 (Working Paper on Standardized Transmission Service and Wholesale Electric Market Design) (Jul. 23, 2002); FERC, Docket No. RM01-12 (Electricity Market Design and Structure: RTO Cost/Benefit Analysis Report) (Apr. 23, 2002); FERC, Docket No. RM01-12 (Electricity Market Design and Structure: Strawman Discussion Paper for Market Power Monitoring and Mitigation) (Apr. 3, 2002).

73. FTC Press Release, *FTC Releases Agenda for Public Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Sept. 30, 2002), *available at* </opa/2002/09/ecomagenda.htm>; agenda, transcripts, and public comments available at </opp/ecommerce/anticompetitive/index.htm>.

74. Federal Trade Commission, *Testimony Before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives* (Sept. 26, 2002), *available at* </os/2002/09/020926testimony.htm>.

75. FTC Press Release, *Muris Announces Plans for Intellectual Property Hearings* (November 15, 2001), *available at*</opa/2001/11/iprelease.htm>; agendas, transcripts, public comments, and other materials available at </opp/intellect/index.htm>.

76. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

77. Timothy J. Muris, Chairman, Federal Trade Commission, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Prepared Remarks before the Milton Handler Annual Antitrust Review*, New York, New York (Dec. 10, 2002), *available at* </speeches/muris/handler.htm>.

78. Roundtable: *Understanding Mergers: Strategy & Planning, Implementation and Outcomes, Before the Federal Trade Commission*(Dec. 9-10, 2003), *available at* </be/rt/mergerroundtable.htm>.

79. *See, e.g.* David Scheffman, Malcolm Coate, and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective* (June 2002), *available at* <http://www.usdoj.gov/atr/hmerger/11255.htm>.