



Building on a Strong Foundation: The FTC Year in Review

**Federal Trade Commission
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Contents

A Broad Mission To Protect Consumers	1
Chapter 1: Competition Law Enforcement	1
I. Merger Enforcement	2
II. Non-merger Enforcement	3
III. Major Industries	4
A. Energy	4
B. Health Care	6
C. High-Tech and Intellectual Property	9
Chapter 2: Consumer Protection Law Enforcement	9
I. Identifying Fraud and Deception	10
II. An Overview of Consumer Protection Cases	11
Chapter 3: New Enforcement Initiatives	14
I. Competition	14
A. Antitrust Exemptions	14
B. E-Commerce Initiative	15
C. Improving the Empirical Foundation for Enforcement	15
II. Consumer Protection	16
A. Privacy	16
B. Class Actions	19
Chapter 4: International Activities: New Initiatives, Enforcement, and Assistance	19
I. Competition	19
A. International Competition Network	19
B. Bilateral Cooperation	19
C. Trade/Competition Fora	20
D. Multilateral Fora	20
E. Technical Assistance	20
II. Consumer Protection	20
A. Cross Border Fraud	21
B. IMSN Findings on Cross-Border Remedies	21
C. econsumer.gov	21
Chapter 5: Other Activities That Promote Competition And Protect Consumers	21
I. Education and Outreach	21
II. Workshops, Hearings, and Studies	22
III. Good Government Initiatives	24

A Broad Mission To Protect Consumers

Through its enforcement of consumer protection and competition laws, the Federal Trade Commission seeks to insure that markets operate freely and efficiently for the benefit of consumers. In addition to its broad enforcement authority, the Commission also has unique jurisdiction to identify, analyze, and report on a wide range of competition and consumer protection issues of major importance. The agency's mission is to prevent business practices that are anticompetitive, deceptive, or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these goals without unduly burdening legitimate business activity.

Our activities of the past year illustrate how the agency's broad mandate promotes competition and protects consumers. This report highlights the FTC's goals and achievements:

- retaining and building on the agency's recent history of aggressive law enforcement;
- identifying and implementing new initiatives to address emerging concerns of consumers;
- focusing on industries significant to consumers, such as health care and energy; and
- continuing to use the FTC's historical role of researching and reporting on significant developments in the marketplace to advance the state of knowledge about important economic issues.

The FTC continues an aggressive law enforcement program. In our competition mission, we have challenged a substantial number of merger transactions as likely to violate § 7 of the Clayton Act. We also have opened a large number of investigations into unilateral or coordinated conduct that may violate the antitrust laws. Our non-merger initiatives will further develop the law in areas such as standard-setting and the reach and breadth of antitrust exemptions.

In our consumer protection mission, we continue to pursue fraud and deception cases, the mainstays of this program. We are implementing new methods to identify illegal conduct, and are considering ways in which we can cooperate with other government agencies to put the most egregious recidivists in jail. In keeping with the growing importance of both online and offline privacy issues, we have implemented a three-pronged privacy agenda, consisting of law enforcement, rulemaking, and business and consumer education. This fiscal year, we are increasing by 50 percent the resources dedicated to privacy protection.

Recognizing the growing importance to American consumers of activity occurring outside the United States, we have increased our cooperation with other antitrust and consumer protection enforcement agencies throughout the world.

The actions and initiatives discussed in the following pages are the product of, and a testament to, the FTC's professional, highly-qualified, and dedicated staff. Their work has made the FTC the well-respected agency it is today.

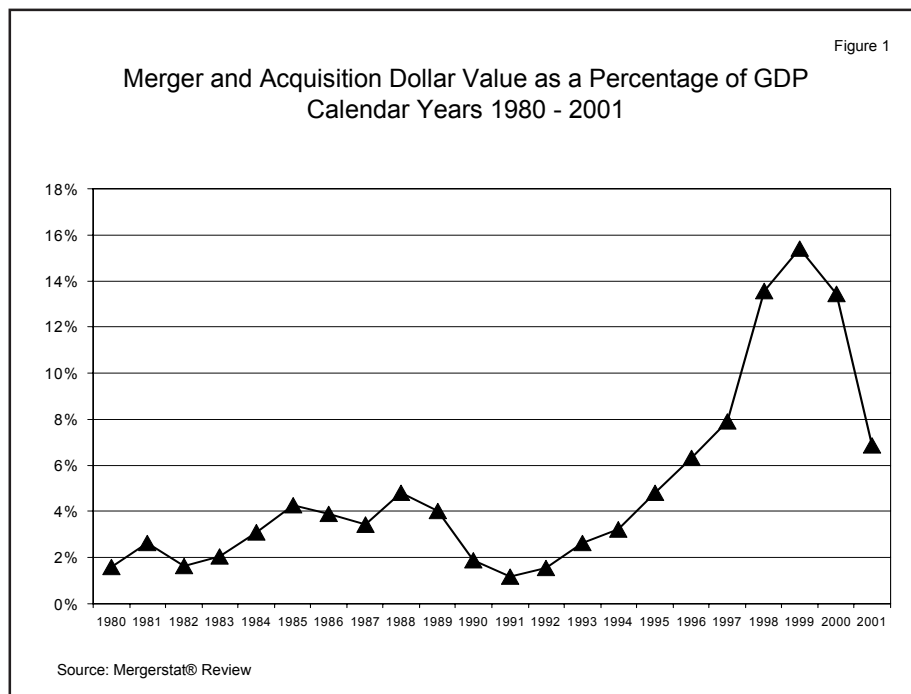
Chapter 1 Competition Law Enforcement

"Continuity" characterizes the Commission's antitrust enforcement initiatives. The agency has followed a consistent course over the past 20 years, reflecting a broad consensus that the purpose of antitrust is to protect consumers, that economic analysis should guide enforcement policy decisions, and that antitrust concerns – whether involving mergers or non-merger conduct – most likely involve direct competitors.

"Continuity" does not mean "unchanging," of course. Knowledge continues to expand, new markets emerge, existing markets develop, and the Commission's priorities, strategies, and agenda have evolved to remain current with these dynamic forces. We have embarked on new initiatives; these ventures build on the solid and uncontroversial foundation of current antitrust enforcement policy.

I. Merger Enforcement

The 1982 Merger Guidelines (as modified in 1984, 1992, and 1997) reflect the standards the Commission applies in evaluating mergers. As Commissioner Thomas Leary has traced in some detail in his speech, *"The Essential Stability of Merger Policy in the United States"* (January 17, 2002), the key principles of merger policy have remained intact over the past four Presidential administrations, with only gradual changes at the margins.



The marketplace drives the Commission's merger workload. In recent years, record-setting levels of mergers, both in numbers and in size, required extraordinary efforts to manage the necessary merger reviews within the mandated time periods.

More recently, economic conditions have reduced merger activity (see Figure 1), and amendments to the Hart-Scott-Rodino Act have raised the thresholds that determine which proposed mergers must be reported to the antitrust agencies. Nevertheless, merger enforcement remains a significant challenge for three reasons: (i) indicators other than the number of filings show continued need for extensive enforcement, (ii) numerous transactions still warrant our scrutiny, despite the lower number of filings, and

(iii) notwithstanding the change in the reporting requirement, the Commission remains responsible for protecting consumers from harm due to anticompetitive transactions.

(i) *Increasing Size, Scope, and Complexity.* Merger-related demands on the Commission remain high by historic standards, as mergers continue to grow in size, scope, and complexity. For example, even with the revised reporting thresholds in effect for most of the year, the

dollar value of merger transactions reported in FY 2001 exceeded \$1 trillion, a level reached for the first time only in 1997. See Figure 2. Mergers among large, diversified firms may raise antitrust concerns in dozens of separate product and geographic markets, each requiring investigation and analysis. Moreover, as new technologies continue to emerge and as the economy becomes more knowledge-based, the resulting complexity of many mergers requires extensive inquiry.

(ii) *Many Mergers Warrant Scrutiny.*

The number of proposed mergers raising competitive concerns appears to remain significant. Thus, the agency continues to open

investigations, issue second requests, and bring cases at a rate comparable to recent years, despite fewer filings. Through the first six months of fiscal year 2002, the Commission took enforcement action to prevent competitive problems in 17 proposed mergers.

(iii) *Focus on Non-Reportable Mergers.* Although most proposed mergers raising antitrust issues remain subject to the HSR Act, the revision to the reporting thresholds left the standard of legality under Section 7 of the Clayton Act unchanged. Consequently, we use the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and

other means to identify non-reportable transactions that may harm competition. The agency is fully prepared to challenge consummated mergers or mergers that are too small to require an HSR filing.

Two such non-reportable mergers that the Commission has challenged recently involve **MSC Software**. The Commission's administrative complaint alleges that in 1999 MSC acquired, in separate non-reportable transactions, its only two competitors, Universal Analytics, Inc. (UAI) and Computerized Structural Analysis & Research Corp. (CSAR), in the market for advanced computer-aided engineering software (Nastran).

In addition to its review of certain non-HSR reportable transactions, the Commission will challenge, when appropriate, consummated acquisitions. One such matter is **Chicago Bridge & Iron Company N.V.'s** acquisition of the Water Division and Engineered Construction Division of Pitt-Des Moines, Inc. The Commission's administrative complaint alleges that these firms were the two leading U.S. producers of large, field-erected industrial and water storage tanks and other specialized steel-plate structures. This matter is currently in administrative litigation. The Commission this year also entered into a consent order in another consummated transaction, requiring **Airgas, Inc.**, to divest assets sufficient to establish another competitor in the market for nitrous oxide.

In the past six months, the Commission also has authorized the filing of three complaints in federal district court seeking to block proposed mergers. Two of these matters were eventually settled; the third matter remains in litigation:

- **Diageo/Vivendi** To resolve concerns that the proposed \$8.15 billion joint acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. would violate § 7 by combining the second- and third-largest sellers of rum in the U.S., the Commission agreed in December to accept for public comment a proposed consent agreement calling for divestiture of the Malibu rum brand.

- **Deutsche Gelatine-Fabriken Stoess AG/Leiner Davis Gelatin Corporation** To resolve concerns that the proposed \$170 million acquisition of Leiner Davis Gelatin Corporation by Deutsche Gelatine-Fabriken Stoess AG would have anticompetitive effects in the market for pigskin and beef hide gelatin, the Commission obtained a consent order requiring the parties to modify the transactions so as to maintain Leiner Davis' operations in the relevant market.
- **Libbey Inc./Anchor Hocking** On January 14, 2002, in the United States District Court for the District of Columbia, the Commission alleged that Libbey Inc.'s proposed \$322 million acquisition of Anchor Hocking would violate § 7 in the food service glassware market. On April 22, 2002, the court granted the FTC's motion for a preliminary injunction.

II. Non-merger Enforcement

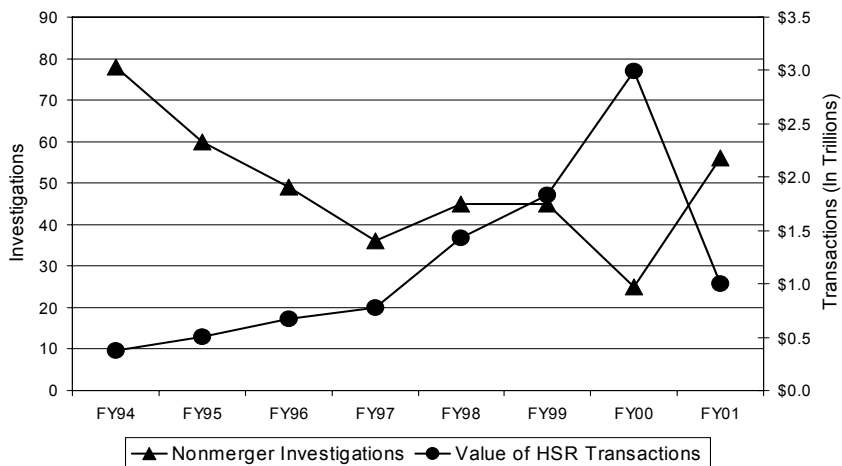
The broad consensus on antitrust policy reflects the belief that horizontal activities – agreements between or among competitors – should be the major focus of non-merger enforcement. While merger activity remains relatively high, a decline from the unprecedented levels of recent years has allowed us to restore resources to non-merger enforcement, consistent with historical allocations between merger and non-merger programs. In fiscal year 2001, the FTC opened 56 non-merger investigations, more than double the number begun in the previous fiscal year. See Figure 2. We have opened an additional 19 investigations during this fiscal year.

We presently have two non-merger matters in Part III litigation.

- **The Three Tenors** In September 2001, the FTC entered into a consent agreement with Warner Communications to resolve charges that Warner and Polygram illegally agreed to fix prices for audio and video products featuring "The Three Tenors." The case against Vivendi Universal S.A., the successor corporation to Polygram, is currently before an FTC administrative law judge.

Figure 2

Value of HSR-Reported Merger Transactions and
Number of New Non-merger Investigations
Fiscal Years 1994 - 2001



- Generic Drug Litigation** In March 2001, the Commission issued an administrative complaint alleging that Schering-Plough Corporation, the maker of K-Dur 20, a widely-prescribed potassium chloride supplement, illegally paid Upsher-Smith and American Home Products millions of dollars to induce them to delay launching their generic versions of the branded drug beyond any delay they might have agreed to without such payments. In April 2002, the Commission reached a settlement with American Home Products. The settlement prohibits AHP from entering into agreements (1) in which a branded drug manufacturer pays the maker of a generic product to delay entering the market, or (2) in which a potential generic entrant agrees with a brand-name company not to enter the market with a generic product that is not subject to a claim of patent infringement. The administrative litigation with Schering and Upsher-Smith continues.

To fulfill the FTC's charter to develop and explain the contours of antitrust law, Chairman Muris is a strong believer in using the FTC's administrative litigation process. When he was Director of the Bureau of Competition in the mid-1980s, the Commission issued 17 administrative complaints.

We presently have four competition matters in active Part III administrative litigation, substantially above the recent norm.

III. Major Industries

Because of their great importance to consumers, the Commission gives special attention to certain industries.

A. Energy

Representing a significant portion of the total U.S. economic output, energy is vital to the economy. The FTC has gained considerable experience with energy issues during the past two decades, having investigated numerous oil mergers

and other energy activity.

1. Merger Enforcement

Consistent with its long-standing analytical approach, the Commission has carefully investigated three significant oil industry mergers in the past year. In each case, it has determined the competitive effects of the proposed transaction in a host of individual product/geographic market combinations. When necessary, it has insisted on remedial divestitures to cure potential harm to competition.

- Chevron/Texaco** The Commission accepted a consent agreement that allowed the proposed \$45 billion merger of Chevron Corporation (Chevron) and Texaco Inc. (Texaco) to proceed, while requiring substantial divestitures to cure the anticompetitive aspects of the transaction. The proposed merger – combining two of the largest integrated oil companies in the world – raised antitrust concerns affecting ten separate relevant product markets and 15 sections of the country comprised of dozens of smaller relevant geographic markets.

The Commission's Order requires divestiture of all of Texaco's interests in two joint ventures, formed in 1999, that combined the downstream

operations of Texaco and Shell Oil Company. The two joint ventures, Equilon and Motiva, operate eight petroleum refineries and about 115 terminals, hold interests in crude oil and refined product pipelines, and market their products through about 23,700 branded gasoline stations. In addition, the Order requires divestiture of Texaco's interests in a natural gas pipeline system in the Gulf of Mexico and a Texas fractionating plant, along with its general aviation businesses in 14 states.

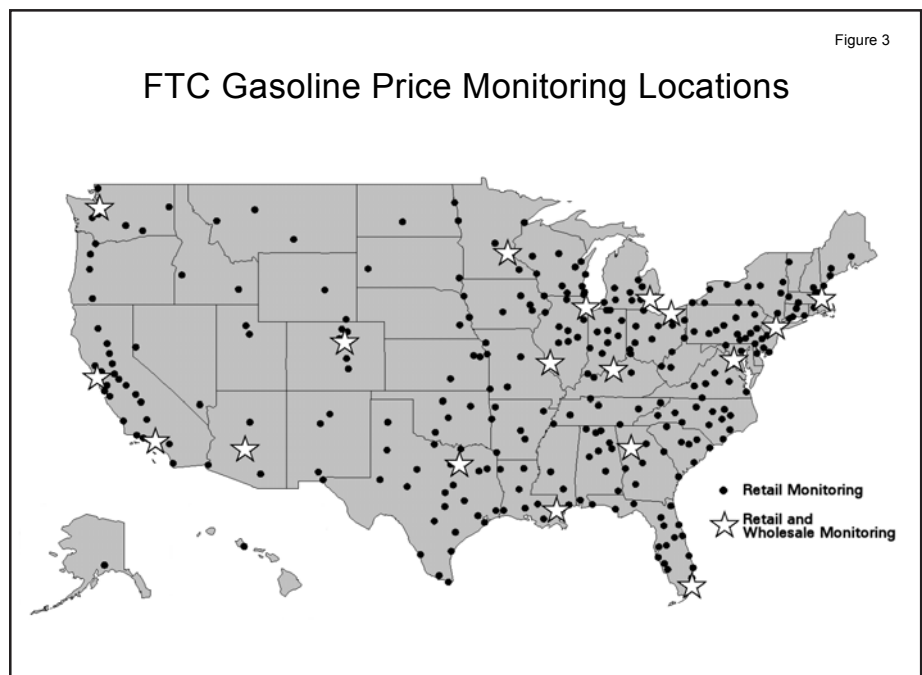
- Valero/UDS** The Commission's investigation of the proposed \$6 billion merger of oil refiners Valero Energy Corporation (Valero) and Ultramar Diamond Shamrock Corporation (UDS) focused on the market for gasoline meeting the California Air Resources Board's (CARB) requirements. All gasoline sold to California consumers must meet CARB specifications, which are designed to reduce pollution caused by gasoline exhaust. The Commission allowed the transaction to proceed, but required Valero to divest UDS's Golden Eagle Refinery, bulk gasoline supply contracts, and 70 UDS retail service stations in Northern California to a Commission-approved buyer.
- Phillips/Tosco** The Commission also investigated the \$7 billion proposed merger of Phillips Petroleum Corporation (Phillips) and Tosco Corporation (Tosco). Applying the same standards that it relies upon in all merger enforcement actions, the Commission determined that this transaction did not pose a threat to competition. It voted unanimously to close the investigation, and issued a public statement to explain its reasoning. The Commission noted that the two firms operated primarily in different parts of the country, and

that their combined share of the markets in which they both operated was small.

2. Other Activities

The Commission has undertaken other efforts that complement and support its enforcement in the energy industry. These activities build on our previous, recent investigations into high gas prices in the Midwest and in certain western states.

- Refined Petroleum Products Conference** Building on its extensive enforcement experience in the petroleum industry, the Commission will explore the causes of the recent volatility of refined petroleum product prices during a conference scheduled for May 8-9, 2002, and plans to release a report summarizing its findings later this year.
- Gasoline Price Monitoring** We are monitoring wholesale and retail prices of gasoline – by far, the single largest refinery product. Members of our staff inspect wholesale gasoline prices for 18 (soon to be 20) cities and retail gasoline prices for 360 cities throughout the U.S. See Figure 3. We will analyze this data to search for explanations of any pricing anomalies that we identify.



Box 1

Electricity Restructuring

The Commission has emphasized competition and consumer protection policy principles in its comments relating to restructuring of the electricity industry.

The Commission has adopted four principles that guide its efforts in providing advice to the states and federal agencies involved with introducing and fostering competition in the electricity industry:

- Eliminate or reduce substantial and durable horizontal market power in electricity generation markets;
- Remove incentives for vertically integrated firms to engage in undue discrimination and cross-subsidization;
- Foster accurate, non-deceptive information disclosure to customers about price and service offerings; and
- Promote uniform disclosure of the prices and other relevant attributes of offers to customers.

These principles have guided the staff's comments to 14 states as they consider whether to embark on introducing competition into the retail sale of electricity to consumers. These comments were compiled in a July 2000 FTC Staff Report.

Most recently, the staff analyzed the features of state retail competition programs that have resulted in consumer benefits and those that have not. The September 2001 Staff Report concluded that the states that have moved toward competition in electricity generation and retail marketing are in a transition period, during which retail price regulation will continue as some elements of competition are introduced. Given that many states are in a transition phase that represents a hybrid of regulation and competition, many of the expected benefits of competition have not yet emerged. Nothing that has happened so far, however, indicates that competition – once the transition period is complete – will not produce additional benefits to electricity customers.

Because the momentum toward the adoption of retail competition by additional states has stopped in light of the retail electricity restructuring problems in California, the staff has focused on providing competition policy-based advice to FERC as it fosters conditions in wholesale electricity markets that are conducive to allowing markets to operate relatively free from regulation. In the last few months, the staff has provided comments on five issues identified by FERC as important to its electricity restructuring agenda.

- **Comment to the Virginia Legislature on Proposed Predatory Pricing Legislation** The Commission's expertise on energy issues was the genesis for the staff's February 2002 letter analyzing Virginia legislation that would have outlawed "below cost" pricing of gasoline. The staff explained that genuine "predatory" pricing is already illegal under the antitrust laws, and that the legislation would likely prevent gas "price wars" and other procompetitive price-cutting. A legislator opposing the bill read excerpts from the staff letter during the hearing at which the bill was debated, and the bill failed by a vote of 12 to 9.
- **Boutique Fuel Comment** Earlier this year, the staff commented on the Environmental Protection Agency's "Study of Unique Gasoline Fuel Blends (Boutique Fuels), Effects on Fuel Supply and Distribution and Potential Improvements." The comment suggested that the EPA, in fulfilling the mandate of the President's National Energy Report, would find it useful to perform a "competitive analysis" based on the principles in the Merger Guidelines to identify how changes in regulations could affect the price and availability of gasoline. We are making suggestions to the EPA regarding how to perform such an analysis.
- **Electricity** As discussed in Box 1, the Commission has participated extensively in the debate concerning electricity restructuring efforts.

B. Health Care

The cost of health care is significant to both consumers and the economy. Health-related products and services account for over 13 percent of gross domestic product, up from 10.9 percent in 1988.

1. Non-merger Enforcement

Three of the major participants in the health care market are doctors, hospitals, and third-party payers. We are active in all three areas, with many investigations into activity that may be unlawful and anticompetitive. A recent proposed settlement illustrates conduct that can harm consumers.

- **Napa Valley OB/GYN Group** The Commission accepted, subject to public comment, a consent agreement with a group of Napa County, California obstetricians and gynecologists (OB/GYNs) charged with agreeing on the fees they would charge and engaging in an illegal boycott of health plans to extract higher fees. First informally, and then through a group they formed called Obstetrics & Gynecology Medical Corp. of Napa Valley (OGMC), the doctors demanded that they be paid according to the fee schedule they set. The complaint alleged that these actions harmed consumers, employers, and health plans by increasing the fees for OB/GYN services. Some health plans discontinued providing certain coverage in Napa County. The OB/GYNs did not engage in any activity, such as clinical or financial integration of their practices, that might have justified the collective fee agreements. To resolve the matter, the doctors have agreed to disband OGMC and to refrain from engaging in similar anticompetitive conduct in the future.

2. Pharmaceuticals

The FTC continues to work to ensure that anticompetitive practices do not delay market entry of generic drugs and to prevent firms from engaging in other anticompetitive practices that raise drug prices. We seek to ensure that protections provided to drug innovators under the Hatch-Waxman Act are not abused to harm consumers. The statute was designed to facilitate the development of new pharmaceuticals, while keeping them affordable, by balancing incentives for investment in innovation with the benefits of vigorous competition from generic drugs.

The FTC is examining two types of cases involving the anticompetitive use of Hatch-Waxman. The first type of case involves agreements between makers of brand-name drugs and makers of generic drugs, under which, it is alleged, the generic entrant essentially is paid not to compete. As explained above in Chapter 1, Section II, one of these matters is in litigation (**Schering**). The Commission just finalized a consent order with one of the parties in this litigation (American Home Products). The

Box 2

In re Buspirone Amicus Filing

Complementing our efforts to investigate Orange Book cases, the Commission filed an *amicus* brief in *In re Buspirone* in January. The *Buspirone* plaintiffs alleged that Bristol-Myers, in violation of Sherman Act § 2, improperly listed a newly-obtained patent in the Orange Book, and fraudulently represented to the FDA that the patent covered an approved use of BuSpar, despite contrary representations to the Patent and Trademark Office (PTO). Bristol-Myers filed a motion to dismiss, arguing that a claim based on its Orange Book filing could not proceed because it was immune under the *Noerr-Pennington* doctrine. Given the importance of the issue to competition in the pharmaceutical industry, and to ongoing government investigations at the FTC, and given the Chairman's longstanding interest in addressing and clarifying the *Noerr-Pennington* doctrine, the Commission filed an *amicus* brief opposing the motion to dismiss. In an opinion that relied extensively on the arguments raised in the Commission's *amicus* brief, the district court denied Bristol-Myers' motion.

The court's order rejected Bristol-Myers' claim of *Noerr-Pennington* immunity on three independent and alternative grounds. Most important, the court agreed with the Commission that Orange Book filings simply do not constitute protected "petitioning," rather, like tariff filings, they are mechanical, informational filings that do not trigger the exercise of legal or discretionary judgment by the FDA and do not call for agency decision-making. Nor, the court concluded, are Orange Book filings incidental to petitioning.

The court further held that, even if Orange Book filings were "petitioning," two specific exceptions to the *Noerr* doctrine – the *Walker Process* (*Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965)) and "sham" exceptions – would preclude a finding of antitrust immunity.

Under *Walker Process*, a patent holder may be subject to antitrust liability for attempting to enforce a patent procured through fraudulent misrepresentations to the PTO. The *Buspirone* court applied *Walker Process* beyond the PTO context and squarely held that the exception applies to FDA Orange Book listings and that plaintiffs' allegations satisfied *Walker Process*.

Finally, the court held that the plaintiffs' allegations satisfied the "sham" exception to *Noerr* immunity, because Bristol-Myers' contradictory representations to the PTO and the FDA rendered its representations to the FDA objectively baseless under *Professional Real Estate Investors Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) (*PRE*).

In re Buspirone Patent Litigation, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); the Commission's brief is available at www.ftc.gov/os/2002/01/busparbrief.pdf.

second type of case involves unilateral action by branded manufacturers allegedly to delay generic competition. For example, some branded manufacturers list additional patents in the FDA's "Orange Book," often shortly before their original patents expire, and then launch patent infringement suits against generic drug firms poised to enter the market. Under Hatch-Waxman, such litigation triggers an automatic 30-month stay on FDA approval of the generic drug. We have been investigating such conduct.

- **Biovail (Tiazac)** The Commission recently announced a settlement with Biovail Corp., a pharmaceutical manufacturer, to settle charges that Biovail's acquisition of an exclusive patent license was an unlawful asset acquisition in violation of Clayton Act § 7 and FTC Act § 5 and an unlawful monopolization in violation of FTC Act § 5. The complaint alleges that Biovail had monopoly power in the market for Tiazac and generic bioequivalent versions of Tiazac – a drug used to treat high blood pressure and chronic chest pain – and that the acquisition of an exclusive license for a patent on a unique formulation of the active ingredient in Tiazac protected Biovail's monopoly in the relevant market. Furthermore, Biovail allegedly engaged in acts willfully to maintain its Tiazac monopoly by wrongfully listing the patent in the Orange Book and making misleading statements to the FDA. To resolve the charges, Biovail must divest part of its exclusive patent rights. The proposed order also prohibits Biovail from wrongfully listing any patents in the Orange Book; prohibits any action that would trigger a statutory stay on generic Tiazac entry; and requires prior notice of acquisitions of patents that will be listed in the Orange Book.

We also have been active, as an *amicus*, in private "Orange Book" litigation. See Box 2.

3. Merger Enforcement

The Commission's health care merger practice remains active. This year we obtained significant

relief in a transaction consummated in violation of the HSR reporting requirements and reviewed a major merger among drug wholesalers.

- **Hearst/Medi-Span** In a novel case involving violations of both §§ 7 and 7A of the Clayton Act, as well as the first-time use of disgorgement of profits as a remedy in a merger case, the Commission restored competition in the market for integrated drug information databases. The court-approved final consent decree required Hearst to divest the former Medi-Span business and pay \$19 million to disgorge the allegedly unlawful profits it earned while it was the sole supplier of integrated drug information databases. In a related action, the Commission obtained a record civil penalty of \$4 million for Hearst's alleged failure to comply with the reporting requirements of the HSR Act.
- **AmeriSource/Bergen Brunswig** After conducting a full investigation of the proposed merger of AmeriSource Health Corporation and Bergen Brunswig Corporation, the 3rd and 4th largest drug wholesalers in the U.S., the Commission concluded that the evidence did not demonstrate a violation of § 7. As the Commission explained in a public statement, the AmeriSource/Bergen matter differed from the earlier challenged proposed mergers of AmeriSource Health Corporation with McKesson Corporation and Bergen Brunswig Corporation with Cardinal Health, Inc. Unlike the earlier deals, which would have left just two dominant firms at the top of the industry, this transaction, by combining numbers three and four, would create a stronger rival to compete with the top two firms. Moreover, the evidence was not consistent with any theory of competitive harm, including either price increases or a slowing in price decreases. The Commission also determined that the merging parties had presented good evidence to support their assertion that the combined company would cut its costs and invest in value-added services, and do so more quickly than either firm might have done alone.

4. Other Activities

Two initiatives complement our healthcare enforcement.

- **Hospital Merger Retrospective** We are studying consummated hospital mergers to determine whether particular hospital mergers have led to higher prices; the Commission will consider bringing enforcement actions against consummated, anticompetitive hospital mergers.
- **Generic Drugs Study** The Commission is studying competition in the sale of prescription drugs and the impact of generic competition under the Hatch-Waxman Act. The study may identify other anticompetitive strategies used to exploit Hatch-Waxman provisions and ultimately provide guidance on possible revisions to the law. See further discussion in Chapter 5, Section II.

C. High-Tech and Intellectual Property

The continuing development of “high-tech” industries and the significance of intellectual property 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 those 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. Thus we now have patent lawyers on staff, and sometimes hire technical consultants in areas such as electrical engineering or pharmacology.

For mergers, we apply the well-established framework of the Merger Guidelines to high-tech industries, with some important nuances. We proceed with perhaps even greater care than usual. The technology sector is rapidly changing, making market power often more ephemeral in nature, perhaps lessening the need for intervention in some instances. In addition, the fashioning of remedies can be more complicated in knowledge-based sectors. A firm’s intellectual property may be far more valuable than its tangible property. If a manufacturing process is protected by patent, for

example, divestiture of the machinery may be meaningless. Consequently, a thorough understanding of the technology and the applicable intellectual property is critical to the design of an effective remedy, which may include the divestiture or licensing of patents.

An increasing number of the FTC’s non-merger competition matters also require the application of antitrust law to conduct relating to intellectual property. The FTC’s efforts are focused on two areas. One is the generic drug industry (as discussed in Chapter 1, Section II). The other is standard setting, in which we have significant investigations. These investigations raise issues similar to the *Dell* case, brought by the Commission in 1995, involving attempts to influence the development of standards in which a party holds relevant intellectual property rights.

As discussed below in Chapter 5, Section II, the FTC and the Department of Justice Antitrust Division are jointly sponsoring hearings on competition and intellectual property law and policy.

Chapter 2 Consumer Protection Law Enforcement

Over the past year, the Commission has continued an ambitious program of law enforcement, targeting both traditional types of fraud and deception and those types that capitalize on new technologies. Simply stated, the FTC’s consumer protection mission is **to identify** the most egregious forms of fraud and deception; **to bring cases**, on our own and with our law enforcement partners; and **to educate** ourselves about emerging issues, industry about complying with the law, and consumers about how to best protect themselves from fraud and deception. This chapter discusses the first two parts; education is discussed in Chapters 3 and 5 below.

Box 3

Top 10 Consumer Fraud Complaints Calendar Year 2001

- 1 Identity Theft (42%)
- 2 Internet Auctions (10%)
- 3 Internet Services and Computer Complaints (7%)
- 4 Shop-at-Home and Catalog Offers (6%)
- 5 Advance Fee Loans and Credit Protection (5%)
- 6 Prizes, Sweepstakes, Gifts (4%)
- 7 Business and Work-at-Home Opportunities (4%)
- 8 Foreign Money Offers (4%)
- 9 Magazines and Buyers Clubs (3%)
- 10 Telephone Pay-Per-Call, Information Services (2%)

I. Identifying Fraud and Deception

To identify the most serious forms of fraud and deception, the FTC relies on its complaint databases, which are accessible to increasing numbers of law enforcement partners. In the past year, FTC databases have grown dramatically, and the FTC staff has recruited many new law enforcement partners at home and abroad. Some examples:

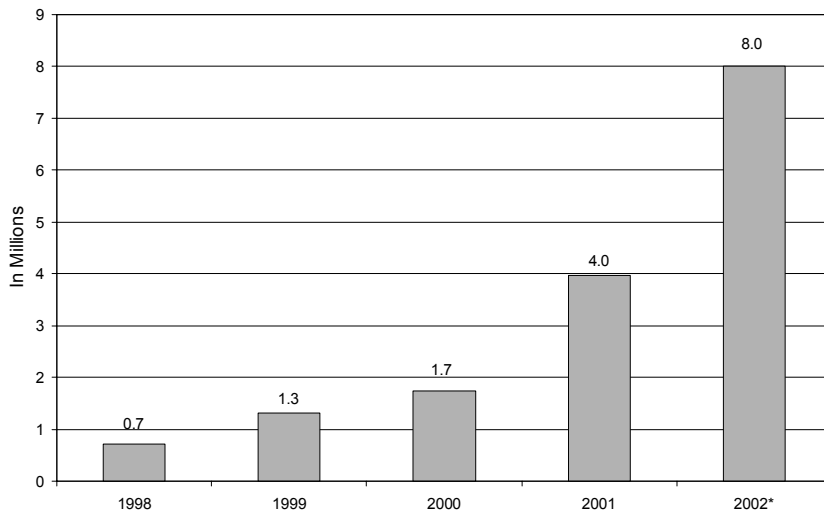
- **Consumer Response Center** The CRC is now responding to over 55,000 inquiries and complaints a week. Consumers use the FTC's toll-free number (1-877-FTC-HELP), file complaints online, and send letters. Last fiscal year, the CRC added 350,000 complaints to the FTC's database.
- **Consumer Sentinel** Established by the FTC in 1997, *Consumer Sentinel* is available online to law enforcement agencies across the U.S. and Canada. It receives fraud complaints from the FTC's CRC and from a growing number of other organizations in the U.S. and Canada. *Sentinel* now contains over 500,000 complaints, and is the richest source of consumer fraud data available to law enforcement agencies. In the last year, the FTC recruited 240 new law enforcement partners, bringing the total number of *Sentinel* users to more than 400 law enforcement agencies. Consumers also can access publicly available sections of this Web site and find a

wealth of statistics about fraud, including the scams that garner the most consumer complaints (see Box 3); the scams that cost consumers most; the location of companies complained about, by state and by province; the number of identity theft complaints, by state; the types of identity theft most frequently reported; and how to spot and avoid fraud and deception online and off.

- **Identity Theft** The FTC's toll-free number, 1-877-ID-THEFT, a central clearinghouse for ID theft complaints, is also a rich source of consumer complaint data. Calls to the FTC's toll-free number continue to increase, from 2,200 calls a week one year ago, to over 3,000 today. Building on its experience with *Consumer Sentinel*, the FTC began making the data available to law enforcement partners through an online database, and now more than 300 law enforcement agencies access the data. In addition, FTC investigators, working with the Secret Service, have begun developing preliminary investigative reports that are referred to regional Financial Crimes Task Forces for possible prosecution.
- **Spam Database** Since 1998, the FTC has maintained an electronic mailbox to which Internet customers are encouraged to forward spam, uce@ftc.gov. This database currently receives, on average, 26,000 new pieces of spam every day. The total number of spam has grown from 700,000 in the first year to over 10 million today. See Figure 4. The database is searchable, allowing the Commission staff to track trends and identify law enforcement targets.
- **Surf Days** First used in 1996 to look for online pyramid schemes, the law enforcement "Surf Day" has become a popular method for the Commission and other agencies to identify online scams of all kinds. The FTC identifies a type of deceptive practice that warrants investigation and then recruits partners to search the Web for a specified period of time using a protocol tailored

Unsolicited Commercial E-mail Forwarded to FTC's Spam Database Calendar Years 1998 – 2002

Figure 4



* Projected: Based on 2.1 million for Jan – Mar 2002

to the Surf Day's subject matter. An efficient tool, the law enforcement surf accomplishes two objectives: it provides a window to learn about online practices, and it provides an opportunity to alert new Web site providers – some of whom are new entrepreneurs unaware of existing laws – if their sites appear to violate the law. In the last year, the Commission conducted 5 surfs with over 70 partners, focusing on claims about unsubscribing from spam, bioterror protection devices, cures or preventative products for anthrax and other bioterror-related diseases, e-tailer holiday shipping, and ultrasonic pest-control devices.

II. An Overview of Consumer Protection Cases

Drawing on *Consumer Sentinel* data and Surf Days, the FTC staff targets the most pervasive types of fraud and deception. In four sweeps targeting Internet health fraud, cold-call telemarketing, and Internet scams, the Commission and 12 partners have brought over 60 law enforcement actions since May 2001. Since May, the Commission has obtained judgments ordering more than \$97 million in consumer redress.

Using the Internet, fraud promoters can mimic legitimate business and reach vast numbers of consumers. The Commission's cases reflect the broad range of illegal activity online, from traditional scams like pyramid schemes, health fraud, and bogus investments to high-tech frauds that take advantage of the technology itself to scam consumers. In the past year, the Commission has brought over 60 cases involving fraudulent or deceptive marketing practices related to the Internet, bringing the total number of Internet cases filed since 1994 to more than 225.

In addition to online fraud, the Commission continues to pursue other, more traditional deceptive schemes including telemarketing fraud, franchise fraud, business opportunity and work-at-home scams, advance fee loan and credit card loss protection schemes, and false and unsubstantiated claims for health and weight loss products.

Some of the case highlights from this year include:

- Netforce Regional Sweeps** In 2000 and 2001, the FTC conducted a comprehensive Internet Fraud Investigations Training program for local, state, federal, and international law enforcement agencies. To follow up on this Training Program, the Commission created a series of regional "Netforces" comprised of those law enforcement agencies that have participated in our training. On April 2, 2002, the FTC announced the first of these efforts by joining eight state law enforcers in the northwest United States and four Canadian agencies in an initiative targeting deceptive spam and Internet fraud. Together, these agencies have brought 63 law enforcement actions against Web-based scams ranging from auction fraud to bogus cancer cure sites, and have sent more than 500 letters warning of the illegality of sending deceptive spam.

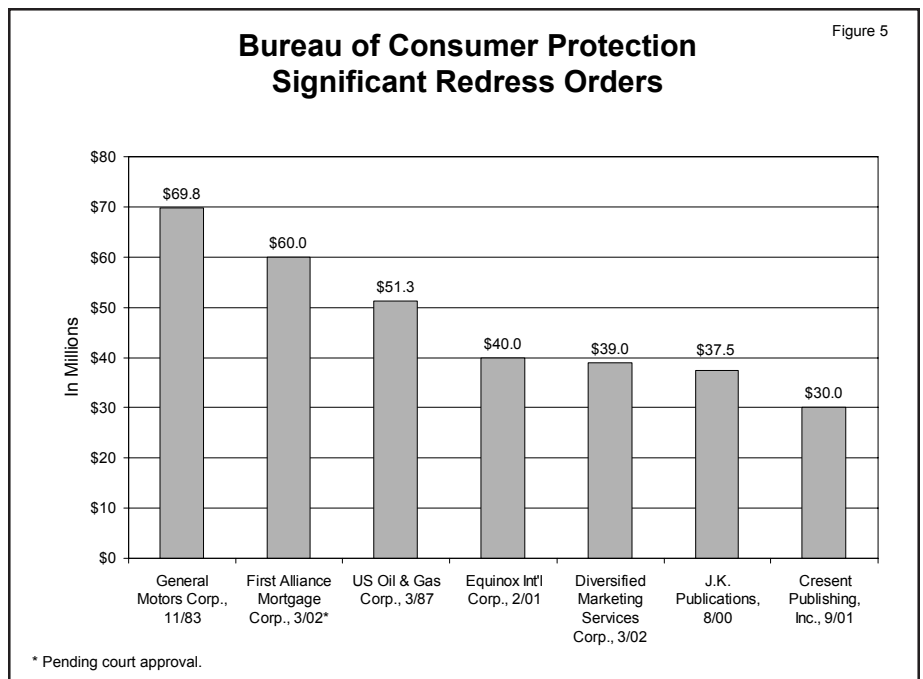
- FTC v. Verity International, Ltd.** The FTC charged Verity and its principals with misusing the international telephone billing system to charge consumers for “videotext” services – Internet-based “adult” entertainment – that the consumers never purchased or authorized. The charges for these services appeared as international calls to Madagascar. On April 1, 2002, the District Court issued an opinion and a preliminary injunction against defendant Automatic Communications Limited – an Australian corporation that contracted with AT&T and Sprint to bill line subscribers for videotext services. ACL sought dismissal, in part, by claiming that it was a common carrier, and therefore outside of the FTC’s jurisdiction. The Court held that even if ACL is a common carrier for other purposes, it was not acting as a common carrier here, and therefore was not exempt from the FTC’s jurisdiction.

- FTC v. Access Resource Services, Inc.** In February 2002, the FTC obtained a stipulated preliminary injunction in a federal district court action against the promoters of “Miss CLEO” psychic services. The FTC’s complaint alleges that the defendants misrepresented the cost of services both in advertising and during the provision of the services, billed for services that were never purchased, and engaged in deceptive collection practices. The FTC estimates that the defendants billed consumers at least \$360 million in connection with this alleged scheme.

- Bioterrorism Project** Following the tragedy of September 11 and subsequent events, the Commission initiated its Bioterrorism Project targeting individuals who purported to sell products and therapies to treat or cure bioterrorism-related diseases and health conditions. The FTC staff, with the Food and Drug

Administration and more than 30 state Attorneys General, conducted an Internet surf on October 25-26, 2001, and sent warning letters to 121 Web sites that were using various bioterror claims to market products ranging from oregano oil to gas masks. To date, over 70 of the 121 warned sites have eliminated suspect claims. On February 27, 2002, the Commission announced settlements with the marketers of a home test kit for anthrax (*FTC v. Vital Living Products*), and an online seller of a colloidal silver product purported to treat anthrax (*In re Kris A. Pletschke, individually and doing business as Raw Health*).

- Cure.All** Internet health fraud continues to plague consumers looking for solutions to serious illnesses. In June 2001, as part of an ongoing and comprehensive law enforcement and consumer education campaign begun in 1997, the FTC announced the latest round of enforcement actions against online purveyors of health products to cure serious diseases. The Commission challenged allegedly unfounded claims for a DHEA hormonal supplement, St. John’s Wort, various multi-herbal supplements, colloidal silver, and a variety of electrical therapy devices. Operation Cure.All is a coordinated effort with the FDA, Health Canada, and various



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

- ***Fraudulent Lending Practices*** Since 1998, the Commission has brought 15 cases involving subprime lending. In March 2002, one of the largest FTC settlements ever was announced. See Figure 5. The FTC, six states, AARP, and class action and individual plaintiffs settled charges that First Alliance Mortgage Company and its chief executive officer violated federal and state laws in making home mortgage loans to customers. Specifically, the complaint alleged that defendants misled consumers about the existence and amount of origination fees for their loans (which typically constituted 10% to 25% of the loan) and the interest rate and monthly payments of their adjustable rate mortgage ("ARM") loans. Consequently, according to the complaint, consumers believed they were borrowing less money at lower interest rates than they actually were. The settlement, which requires court approval, creates a consumer redress fund that will include all of the remaining assets of First Alliance and its affiliates, now being liquidated in bankruptcy court, as well as a payment of \$20 million from principal Brian Chisick and his wife, Sarah Chisick. Nearly 18,000 borrowers could receive as much as \$60 million in redress.
- ***Wonder Bread*** In March 2002, the FTC announced a settlement with the marketers of Wonder Bread over allegedly deceptive ads claiming that Wonder Bread containing added calcium could improve children's brain function and memory.
- ***Palm, Inc.*** Palm, the leading manufacturer of Personal Digital Assistants (PDAs), agreed to a settlement concerning its claims that its PDAs come with built-in wireless access to the Internet and e-mail, as well as other common business functions – claims that the FTC alleged were not true for many models of the popular PDAs. Announced in March 2002, the settlement requires Palm to disclose, clearly and conspicuously, when consumers have to buy add-ons to perform advertised functions.
- ***FTC v. John Zuccarini*** In October 2001, the Commission sued the perpetrators of a scheme allegedly involving the use of more than 5,500 copycat Web addresses to divert Internet surfers from their intended Internet destinations to one of the defendant's sites, and hold them captive while the defendant pelted their screens with ads. According to the FTC, the defendant registered Internet domain names that were misspellings of legitimate domain names or that incorporated transposed or inverted words or phrases. Surfers looking for a site who misspelled its Web address or inverted a term were taken to the defendant's sites. They were then bombarded with a rapid series of windows displaying ads for goods and services, including Internet gambling and pornography.
- ***FTC v. Diversified Marketing Service Corp.*** A federal court held a magazine subscription telemarketing group in contempt of court and ordered it to pay \$39 million in consumer redress for violating the terms of a 1996 FTC settlement. The FTC's 1996 order barred the defendants from: misrepresenting the cost or duration of the magazine subscriptions; misrepresenting the reason they obtained consumers' account information; charging consumers' accounts without authorization; refusing to cancel subscriptions; misrepresenting consumers' right to cancel telemarketing contracts under state law; and threatening to harm consumers' credit ratings. To facilitate the redress process, the Commission established a special hotline for

consumers who think they may have been improperly billed by the defendant companies.

- FTC and State of New York v. The Crescent Publishing Group, Inc.** The FTC and the New York Attorney General's office brought this joint action, alleging that defendants promoted scores of adult entertainment Web sites as "free" and purportedly required credit card numbers from consumers only to prove that they were adults. In fact, according to the complaint, thousands of consumers were charged recurring monthly membership fees ranging from \$20 to \$90, and consumers who tried to dispute the charges were met with a variety of barriers. Last November, the FTC announced that the defendants had agreed to pay \$30 million to settle the case. The settlement bars the illegal practices in the future, and requires the defendants to post bonds – \$2 million for the corporate defendants and \$500,000 each for the individual defendants – before they continue to market adult entertainment on the Internet.
- Dialing for Deception** This month, the Commission announced the filing of 11 federal district court complaints against defendants allegedly engaged in "in-bound" telemarketing fraud – in which consumers call companies based on classified ads, Internet banners, or other promotions. According to the complaint, among those charged were the purveyors of advance-fee loans and credit cards, at-home medical billing programs, work-at-home envelope stuffing schemes, and a "consumer protection" agency that was, in reality, no more than a front for a vending machine business opportunity. In each case, the Commission charged the defendants with violating the FTC Act, the Telemarketing Sales Rule, or both. In all 11 complaints, the FTC is either seeking – or has received – relief ranging from temporary restraining orders to preliminary or permanent injunctions, as well as a freeze of the defendants' assets and the appointment of a receiver to

oversee their finances pending trial, as appropriate.

Chapter 3 New Enforcement Initiatives

I. Competition

A. Antitrust Exemptions

Certain conduct that otherwise would violate the antitrust laws is exempt from antitrust challenge. An understanding of the proper scope of those exemptions – consistent with, but not broader than, the underlying policy rationale – has important consequences for consumers. Antitrust enforcers should identify and prevent anticompetitive conduct that may resemble, but does not constitute, protected activity. When the governing standard is unclear, however, enforcement (and deterrence) can be problematic. Thus, for example, the ABA Antitrust Section's 2001 report on antitrust policy ("*The State of Federal Antitrust Enforcement – 2001*") recommended a reexamination of the scope of the state action exemption.

New task forces at the FTC are examining that exemption, as well as the *Noerr-Pennington* exemption. Each is considering a variety of actions, including antitrust enforcement, *amicus* briefs, and competition advocacy.

The State Action Task Force is conducting a careful analysis of existing case law on the scope of state action immunity, as first articulated in *Parker v. Brown*. The Task Force is working to clarify the state action doctrine, including more rigorous enforcement of *Midcal's* "clear articulation" and "active supervision" requirements, when the underlying private conduct raises significant antitrust concerns.

The work of the State Action Task Force recently has provided the basis for two comments, as well as related testimony, on state legislation seeking to create an antitrust exemption for physician collective bargaining. On January 18, 2002, in response to an inquiry from Representative Lisa Murkowski, the

Commission staff commented on an Alaska Senate Bill that would have authorized collective bargaining by physicians. The staff indicated that the proposed regime likely did not satisfy the “active supervision” requirement. On March 22, 2002, as a follow-up to the written comment, Ted Cruz, Director of the Commission’s Office of Policy Planning, testified before the Labor and Commerce Committee of the Alaska House on the Alaska Senate Bill. On February 8, 2002, the Commission staff commented on Washington House Bill 2360, a bill also concerning physician collective bargaining. Although House Bill 2360 provided for different procedural safeguards than the Alaska Senate Bill discussed above, the Commission staff once again concluded that the proposed regulatory regime likely did not satisfy the “active supervision” requirement of the state action doctrine.

The *Noerr-Pennington* Task Force is conducting a careful analysis of existing case law regarding petitioning immunity, as first articulated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight* and *United Mine Workers of America v. Pennington*. The Task Force is investigating the feasibility and desirability of working to clarify the *Noerr-Pennington* doctrine, including expanded recognition of an independent misrepresentation exception to *Noerr* and the continued extension of the *Walker Process* exception beyond the Patent and Trademark Office context. The work of the *Noerr-Pennington* Task Force provided much of the basis for the Commission’s *amicus* brief in *In re Buspirone*, discussed in Box 2 on page 7.

B. E-Commerce Initiative

The Commission has formed an Internet Task Force to investigate regulatory regimes that have the intended or unintended effect of preventing consumers from enjoying the cost savings and convenience associated with e-commerce. One of the biggest myths of the New Economy is that the Internet is wide-open and unregulated. The Task Force has found that this characterization is often inaccurate, as many regulatory schemes have been extended to online competitors, frequently with significant anticompetitive results. The Task Force is

exploring various ways to reduce or eliminate these barriers to expanded e-commerce.

The work of the Internet Task Force recently has provided the basis for comments relating to both contact lens sales and real estate closings. With respect to contact lenses, the staff submitted a comment to the Connecticut Board of Examiners of Opticians, which had initiated a proceeding to determine the applicability of various state statutes and regulations concerning the sale of contact lenses. Among other points, the staff noted that requiring out-of-state replacement lens sellers to obtain Connecticut optician and optical establishment licenses, or to dispense lenses only upon the paper receipt of an original prescription, would disproportionately impact Internet sellers without providing corresponding consumer benefits. Additionally, the Commission, with the Antitrust Division of the Department of Justice, filed comments on a North Carolina Bar opinion and on proposed Rhode Island legislation that would prohibit non-attorneys from participating in real estate closings. Both comments noted that following this course of action would raise consumer costs and potentially prevent competition from Internet lenders that could provide more convenient closing services.

C. Improving the Empirical Foundation for Enforcement

Last September, the Bureau of Economics hosted an Empirical Industrial Organization Roundtable with some of the nation’s leading antitrust economists. Discussion involved the strength of the empirical base for key antitrust theories and provided suggestions on focusing our resources to improve understanding of competition issues and economics’ contribution to antitrust enforcement.

The Bureau of Economics is examining the use of econometric estimates of consumer demand using retail scanner data in investigations of branded products mergers. (The Bureau of Economics Working Paper No. 246, “*Demand System Estimation and Its Application to Horizontal Merger Analysis*,” can be found on the FTC’s Web site.) The Bureau of Economics is also engaged in a project to

help the Commission better address, define, and identify instances of coordinated interaction. The staff is also evaluating how efficiencies are handled in merger investigations.

II. Consumer Protection

A. Privacy

Although the rapid development of the Internet has heightened privacy concerns, these concerns are by no means limited to the cyberworld. Consumers are deeply concerned about the privacy of their personal information, both online and off. Consumers can be harmed as much by the thief who steals credit card information from a mailbox or dumpster as by the one who steals that information from a Web site.

The FTC currently enforces a number of laws that address consumers' privacy. This fiscal year, we are increasing by 50 percent the resources dedicated to privacy protection. Our initiatives in this area attempt to reduce the serious consequences that can result from the misuse of personal information, and fall into three major categories: vigorous enforcement of existing laws, additional rulemaking, and continued consumer and business education.

1. Enforcement Actions

Some of the case highlights from this year include:

- ***Eli Lilly*** In January, the Commission announced a proposed settlement with Eli Lilly and Company. The complaint alleged that Lilly unintentionally disclosed the e-mail addresses of users of its Prozac.com and Lilly.com Web sites by not taking appropriate steps to protect the confidentiality and security of that information. The settlement requires Lilly to establish a security program to protect consumers' personal information against any reasonably anticipated threats or hazards to its security, confidentiality, or integrity. Significantly, the settlement applies to Lilly's information practices both online and offline.
- ***Children's Privacy*** The FTC's Rule implementing the Children's Online Privacy Protection Act (COPPA) went into effect on April 21, 2000. Since April 2001, the Commission has brought five cases to enforce the Rule that requires that certain commercial Web sites give notice of their information practices and obtain parental consent before collecting, using, or disclosing personal information from children under 13. The companies under order agreed to pay civil penalties totalling \$140,000.
- ***Financial Privacy*** On July 1, 2001, the FTC's rule implementing the privacy protections of the Gramm Leach Bliley (GLB) Act became effective. The rule requires that financial institutions provide notice and an opportunity for consumers to "opt-out" of the sharing of personal financial information with third parties. The FTC has taken its first steps in enforcing the GLB's prohibition against "pretexting," the practice of using false pretenses to obtain customer financial information. The project included a surf of more than 1,000 Web sites and a review of over 500 publications, followed by warning notices to 200 firms whose advertising indicated possible GLB violations. The FTC filed three settlements in federal district court against alleged pretexters last month.
- ***Preacquired Account Information*** The Commission announced that a group of "buying clubs" had agreed to pay \$9 million to settle charges by the FTC and several state Attorneys General. The defendants' alleged ringleader, Ira Smolev, and other related companies were charged with misleading consumers into accepting trial buying club memberships and deceptively obtaining consumers' credit card account numbers, without the consumers' knowledge or authorization, from telemarketers pitching the buying clubs. Consumers then were enrolled in the clubs and charged up to \$96 in yearly membership fees.

- **Spam** Fraudulent and deceptive spam promoting chain letters, pyramid schemes or other kinds of “get rich quick” schemes imposes tremendous burdens on consumers and the Web. In February 2002, the FTC announced federal court settlements with seven individuals who allegedly were disseminating deceptive chain-letter e-mail and who even claimed to be approved by the FTC. More recently, a federal district court issued a temporary restraining order shutting down a business that allegedly used deceptive spam to sell worthless Internet domain names such as “.usa”.
- **Remove Me Surf** In an initiative announced with our Netforce partners on April 2, 2002 (see Chapter 2, above), “remove me” or “unsubscribe” options in spam were tested to determine whether they were being honored. From e-mail forwarded to the FTC’s spam database, the agencies culled more than 200 e-mails that purported to allow recipients to remove their name from a spam list. The agencies set up dummy e-mail accounts to test the pledges, but discovered that the vast majority of addresses to which they sent the requests did not exist. Based on information the Netforce gathered, the FTC has sent more than 75 letters warning spammers that deceptive “removal” claims in unsolicited e-mail are illegal.

2. Rulemakings

The FTC also is pursuing rulemakings concerning privacy. These include:

- **Telemarketing Sales Rule** In January 2001, the Commission proposed amending the Telemarketing Sales Rule (TSR) to create a national do-not-call list that would be binding on telemarketers. Under the proposal, consumers would make one call to remove their name from most telemarketing lists. The proposed amendments also would restrict the use of “preacquired account information” – lists of names and credit card numbers of potential telemarketing customers – to ensure these lists

are not used to bill consumers for goods or services they do not want. We have received over 40,000 comments on the TSR proposal. The FTC will hold a workshop on June 5-7, 2002 to discuss issues raised during the public comment period.

- **Gramm Leach Bliley Safeguards Rule** The Commission published a proposed Safeguards Rule to implement the security provisions of GLB that require the FTC to establish standards for financial institutions to maintain the security of customers’ financial information.

3. Privacy and Security Related Consumer and Business Education and Outreach

As in all of the FTC’s consumer protection efforts, consumer and business education is a significant component of the program. In particular, with two privacy rules recently becoming effective, (Gramm-Leach-Bliley and COPPA), outreach to both industry and consumers is even more important. This year’s significant accomplishments include:

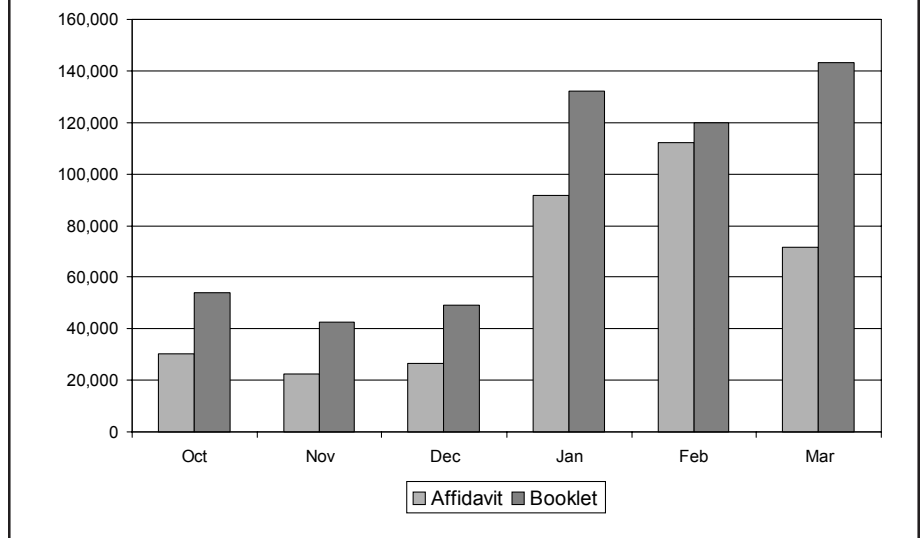
- **Identity Theft Law Enforcement Training** On March 14, 2002, the FTC, the U.S. Secret Service, and the Department of Justice kicked off a series of training seminars to provide local and state law enforcement officers with practical tools to enhance their efforts to combat identity theft.
- **ID Theft Affidavit** In October 2001, the FTC joined with several companies and privacy organizations to make available a universal identity theft affidavit that victims of identity theft can submit to creditors. This form, available online, will help victims recoup their losses and restore their legitimate credit records more quickly.
- **Identity Theft Materials** The FTC has coordinated with other government agencies and organizations to develop and disseminate comprehensive consumer education materials for victims of identity theft and those concerned with preventing this crime. Since its publication, the

FTC has distributed more than 600,000 hard copies of its best selling publication, *"Identity Theft: When Bad Things Happen to Your Good Name,"* and has recorded over 609,500 visits to our Web version. Other federal agencies also have printed and distributed this publication. See Figure 6.

To expand the reach of our consumer education message, the FTC has begun an outreach effort to Spanish-speaking victims of identity theft. Just last month, we released a Spanish version of the Identity Theft booklet (*Robo de Identidad: Algo malo puede pasarle a su buen nombre*) and the ID Theft Affidavit. In addition, we have added Spanish-speaking phone counselors to our hotline staff. We will soon launch a Spanish version of our online complaint form.

- **Children's Online Privacy Protection Act** The FTC launched a special Web page at www.ftc.gov/kidzprivacy to help children, parents, and Web site operators understand the provisions of the COPPA and how the new law affects them. Resources available on the FTC's Web site include guides for businesses and parents, and "smart surfing" tips for kids.
- **Gramm-Leach-Bliley FAQs** The staff of the FTC issued guidance to help financial institutions under the FTC's jurisdiction comply with its consumer privacy regulations under the GLB Act.
- **FCRA Landlord Project** The FTC issued a business education publication to help landlords comply with the federal Fair Credit Reporting Act (FCRA). *Using Consumer Reports: What Landlords Need to Know* provides guidance for residential property owners who use reports from credit bureaus and tenant screening services in deciding whether to rent to consumer applicants.

Identity Theft: Distribution of Universal Affidavit and Consumer Education Booklet Figure 6
Fiscal Year 2002, by Month



- **Public Workshops** Last December, the FTC co-hosted a public workshop entitled *Get Noticed: Effective Privacy Notices under Gramm-Leach-Bliley*, which assessed the impact of GLB privacy notices, identified successful privacy notices, discussed strategies for communicating complex information, and encouraged industry "best practices" and consumer and business education.

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

Next month, the Commission will host a two-day workshop to explore issues related to the security of consumers' computers and the personal information stored in them or in company databases.

B. Class Actions

- **Rule 23** In February 2002, the Commission filed comments on the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. The Commission generally supported the proposed amendments, which would affect the form and content of notice to class members, the review of class action settlements, the procedures for appointment of counsel, and the calculation of attorneys' fees. The Commission also encouraged greater competition in the selection of class counsel and recommended that the amendments include a requirement that the class notify the court of related government actions; that the court take into consideration the existence of these related actions when calculating attorneys' fees; and that the court make specific findings about the value of coupon settlements.

Chapter 4 International Activities: New Initiatives, Enforcement, and Assistance

I. Competition

A. International Competition Network

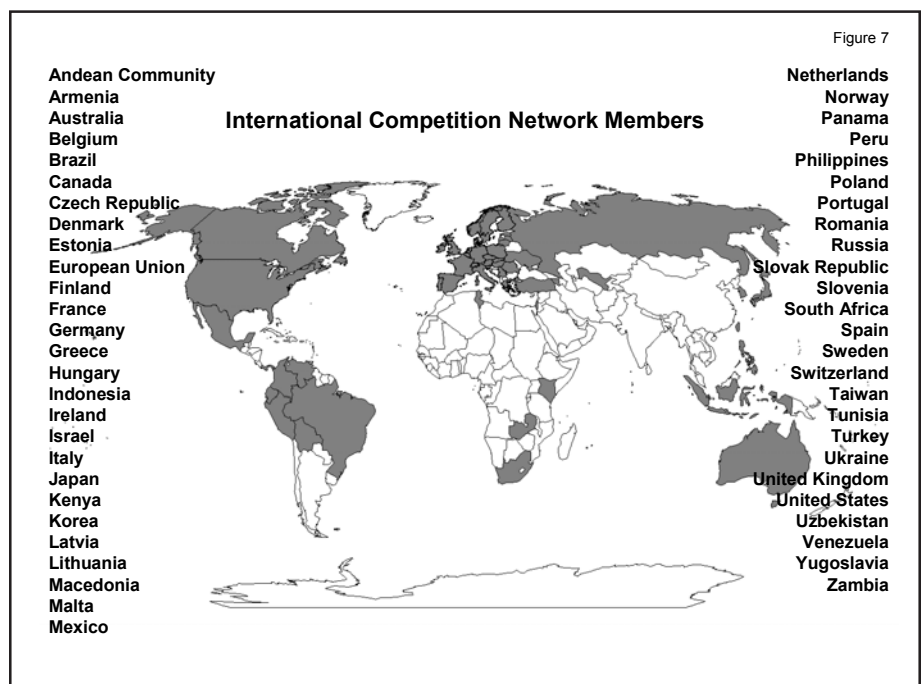
On October 25, 2001, the FTC, the Department of Justice, and twelve other antitrust agencies from around the world launched the International Competition Network (ICN). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee (ICPAC) that competition officials from developed and developing countries convene a forum to work together on competition issues raised by economic globalization and the proliferation of

antitrust regimes. ICN provides a venue for antitrust officials worldwide to achieve consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy.

Fifty-three jurisdictions already have joined the ICN, and we are working on the initial projects on mergers and competition advocacy. See Figure 7. The merger project includes notification and procedures, the substantive test, and investigative techniques. The advocacy project includes collection, analysis, and distribution of information on competition advocacy in order to develop recommendations for competition advocacy best practices. The ICN will hold its first conference this September, and the United States will host an ICN conference on merger investigation techniques in November.

B. Bilateral Cooperation

Cooperation with competition agencies in the world's major economies is a key component of our enforcement program. The FTC has broadened and deepened its cooperation with agencies around the world, both on individual cases and on policy issues. Our relationship with our colleagues in Brussels remains strong as we continue to work closely on mergers and other cases. For example, in *Hewlett-*



Packard/Compaq, the FTC and European Commission staffs, aided by the parties' confidentiality waiver, cooperated in analyzing the likely effects of the transaction on personal computer and server markets. In **LaFarge/Blue Circle**, we worked closely with the Canadian Competition Bureau in designing compatible divestitures in the U.S. and Canada. Continuing our cooperation under our 1999 agreement, economists from the FTC, DOJ, and the Japan Fair Trade Commission held productive discussions on merger analysis.

The conflicting outcomes of the Department of Justice's and European Commission's reviews of the *General Electric/Honeywell* merger provided a potent reminder that there are still important differences in some aspects of our antitrust policies. Given differences in laws, cultures, and priorities, it is unlikely that there will be complete convergence 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. Moreover, we and the EC are committed to addressing and minimizing policy divergences. We have established task forces to pursue further understanding and convergence on topics including bundling and related issues arising in the *GE/Honeywell* investigations and respective merger review procedures.

C. Trade/Competition Fora

Trade agreements increasingly involve competition issues. The FTC, with the Antitrust Division and other U.S. agencies, has been working with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas. We are negotiating competition chapters of bilateral Free Trade Agreements with Chile and Singapore. The WTO Ministerial Declaration issued in Doha last November calls for continuing work on trade and competition issues, and we continue to be active in the WTO trade and competition working group.

D. Multilateral Fora

The Organization for Economic Cooperation and Development (OECD) is an important forum for

competition officials from developed countries to share experiences and promote best practices. During the past year, the FTC has participated actively in the OECD's continuing work on, among other things, merger process convergence, implementation of the OECD hard-core cartel recommendation, and regulatory reform. We also promote sound competition policies in regional fora such as APEC (Asia-Pacific Economic Cooperation).

E. Technical Assistance

There is an understandably high demand for U.S. assistance from countries drafting new antitrust laws, countries establishing antitrust agencies, and newer agencies enforcing antitrust laws. With funding principally from the Agency for International Development, the FTC is proud to have shared our experience and expertise with nations around the world. Examples of our work include: assistance with analytical techniques in South Africa; programs on investigative methods for agencies in Southeastern Europe; briefings on regulatory reform for Russian officials; assistance in launching a new competition agency in Indonesia; and helping draft a competition law for Egypt.

II. Consumer Protection

The number of consumer protection cases with an international component continues to rise. Consumers now clearly participate in a global marketplace. U.S. consumers often receive telemarketing or e-mail solicitations from vendors outside the U.S. The Commission also has increased visibility in its participation in international organizations. In December 2001, Commissioner Orson Swindle became head of the U.S. delegation to the OECD Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. Commissioner Mozelle Thompson was elected Chair of the OECD's Committee on Consumer Protection last month.

To reflect the growing importance of international consumer protection, the Bureau of Consumer Protection established the International Division of Consumer Protection. This Division provides the

necessary expertise to focus on this important area and coordinates the broad range of law enforcement, policy, and outreach efforts in this area.

A. Cross Border Fraud

The Commission is increasing its efforts to counter fraud that transcends borders. Our development and participation in cross-border partnerships is central to our law enforcement strategy. In particular, our partnerships with Canadian officials allow the Commission to respond more effectively to telemarketing scams emanating from Canada. The Commission has forged partnerships to coordinate our law enforcement efforts in two specific cities: the *Ontario Strategic Partnership*, coordinated by the FTC's Midwest Regional office to focus on Toronto-based telemarketing, and *Project Emptor*, coordinated by the Northwest Regional office and British Columbia officials to target Vancouver boiler rooms.

The Commission, drawing on these partnerships, has brought five actions and obtained two judgments in cases involving cross-border fraud in the last year. In one case, the Commission and the U.S. Attorney's Office in Los Angeles teamed with the British Columbia Ministry of Public Safety and Solicitor General to attack a foreign lottery scam operating in British Columbia (*FTC v. Dillon Sherif*). In February 2002, the Commission alleged that defendants targeted elderly consumers to sell them shares in foreign lottery tickets or to claim that consumers had won millions in an Australian or Spanish lottery. The British Columbia authorities sued these defendants in October 2001, and froze more than \$1 million of their assets. The U.S. Attorney in Los Angeles has charged Dillon Sherif with mail and wire fraud and is seeking his extradition to the U.S. to face these charges.

B. IMSN Findings on Cross-Border Remedies

The International Marketing Supervision Network (an organization of consumer protection agencies from 29 countries), under the presidency of the U.S., issued "*Findings on Cross-Border Remedies*," which outlines obstacles to cross-border enforcement of

consumer protection laws and suggestions for overcoming these obstacles.

C. econsumer.gov

In April 2001, 15 countries and the OECD launched econsumer.gov, a public Web site where consumers can file cross-border e-commerce complaints with law enforcement agencies around the world, access education materials about e-commerce, and contact consumer protection agencies. The site is available to consumers in English, French, Spanish, and German. To date, we have received over 1,200 complaints from consumers in six continents about companies all but one continent. Next steps for this project include adding additional members, increasing outreach and publicity, adding consumer education materials, and adding information about alternative dispute resolution for e-commerce complaints on the site.

Chapter 5

Other Activities That Promote Competition And Protect Consumers

I. Education and Outreach

Consumer and business education is the first line of defense against fraud and deception. With each major consumer protection enforcement initiative, the FTC launches a comprehensive and creative education campaign. Between May 2001 and the end of March 2002, the FTC issued 83 consumer protection publications: 74 for consumers and nine for businesses. Of those publications, 51 are new and 32 are revisions; 14 are translations into Spanish, and six are joint efforts between the public and private sectors.

The FTC continues to exceed previous distribution records. In the last year, the FTC distributed more than 4.5 million print publications to the public, and received more than 10.7 million accesses of publications on the consumer protection portion of the FTC Web site.

Among our most significant activities over the last year:

- **National Consumer Protection Week** For the fourth consecutive year, the FTC took the lead in organizing National Consumer Protection Week, this year focusing on privacy. Other participants were the National Association of Consumer Agency Administrators, AARP, the National Consumers League, the Council of Better Business Bureaus, the Consumer Federation of America, the U.S. Postal Service, the U.S. Postal Inspection Service, the National Association of Attorneys General, and the Department of Justice.
- **Hispanic Outreach Program** To reach the expanding population of Hispanic consumers in the U.S., we instituted an Hispanic Outreach Program in January 2002. This effort includes the creation of a dedicated page on the FTC Web site, *Proteccion para el Consumidor*, that will mirror the English page, and translation of 14 consumer publications, printed or posted to the Web. We also translated the FTC Consumer Complaint Form. The Commission also is conducting media outreach and providing interviews in Spanish.
- **www.consumer.gov** The FTC continues to manage www.consumer.gov and to recruit new members to participate in the site, which offers one-stop access to federal consumer information. In the past year, the number of members has grown from 135 to 178 agencies.
- **Response to 9/11** In the wake of the September 11th terrorist attacks on the World Trade Center and the Pentagon, the FTC worked with other agencies and organizations to alert consumers to possible fund-raising fraud. The Commission issued a Consumer Alert, *Helping Victims of the Terrorist Attacks: Your Guide to Giving Wisely*. This publication was released on September 21st, at a New York City press conference with the New York Attorney General, New York Better

Business Bureau, and FTC Northeast Regional Office participating.

II. Workshops, Hearings, and Studies

In keeping with the Commission's historical role of researching and reporting on significant developments in the marketplace, we released several major reports, including:

- **Marketing Violent Entertainment to Children** In December 2001, the FTC released a follow-up report to its September 2000 report, "*Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries.*" The report found that the movie and electronic game industries had made continued improvements and that the music industry had made some progress in disclosing parental advisory label information in its advertising. The Commission's review of advertising placement showed that the music industry had not altered its marketing practices since the Commission's initial September 2000 report. The December report also described the results of a second underage shopper retail compliance survey. The FTC will release a third follow-up report this summer.
- **Project Scofflaw's First Five Years** In January 2002, the Commission released a staff report detailing the accomplishments of this important law enforcement program. Project Scofflaw, established in 1996, has resulted in the prosecution of 27 defendants for civil and/or criminal contempt; nearly 28 years of incarceration and home detention for 12 defendants; and almost \$4 million in penalties, fines, and redress.

The Commission also has several projects underway:

- **Generic Drug Study** Complementing its enforcement activities involving the pharmaceutical industry, the Commission is

studying the relationships between brand-name and generic drug manufacturers to identify possible obstacles to bringing new low-cost generic alternatives to the marketplace. The study is examining how generic drug competition has developed under the Hatch-Waxman Act, as well as whether agreements between makers of branded pharmaceuticals and generic drug firms to delay generic entry – the subject of recent Commission cases – are isolated instances or are more typical of industry practices. In addition, the study is focusing on how particular provisions of the Hatch-Waxman Act have been employed in practice, and the extent to which they may have been abused in furtherance of anticompetitive strategies that delay or deter market entry by generic drugs.

- Refined Petroleum Products** Building on its extensive enforcement experience in the petroleum industry, the Commission is studying the causes of the recent volatility in refined petroleum product prices. During a public conference in August 2001, participants identified key factors associated with refined petroleum product prices, including increased dependency on foreign crude sources, changes in industry business practices, the substantial restructuring of the industry through mergers and joint ventures, and new governmental regulations. This information has assisted the staff in structuring a second public conference to be held May 8 and 9, 2002. The information gathered through these public conferences, analytical and empirical papers and comments received, and additional research, will form the basis for a public report that identifies and discusses the factors affecting the prices of refined petroleum products. This knowledge also will assist the Commission in making enforcement decisions involving the petroleum industry.
- Competition and Intellectual Property Law Hearings** In February 2002, the FTC and the Antitrust Division of the Department of Justice commenced a series of hearings on “*Competition*

Improvements to the Clearance Process

Efficiently dividing work between the two federal antitrust enforcement agencies has occupied the energies of the DOJ and the FTC since the Commission began operating in 1915. For many years, the two agencies have allocated matters, through a mechanism known as the clearance process, mainly on the basis of their relative expertise. For the most part, this arrangement has worked smoothly. In the last decade, however, the convergence of industries increasingly has blurred the lines between the agencies’ historical areas of responsibility. Consequently, clearance disputes have become both more common and, in the case of major clearance disputes, more contentious. In recent years, these disputes have resulted in significant delays for merger and non-merger investigations.

On March 5, 2002, the agencies announced a new clearance agreement that allocates matters more efficiently, rationally, and predictably. Two key features of the new agreement are its allocation of primary areas of responsibility for antitrust enforcement on an industry-wide basis, and its implementation of expedited clearance dispute resolution procedures.

The new agreement allocates to the FTC primary enforcement responsibility for airframes; autos and trucks; building materials; chemicals; computer hardware; energy; healthcare; industrial gases; munitions; grocery stores and grocery manufacturing; retail stores; pharmaceuticals and most biotechnology; professional services; satellite manufacturing and launch vehicles; and textiles.

Both agencies continue to investigate potential violations of the antitrust laws with vigilance, and believe that the new agreement will promote the public’s interest in vigorous and timely antitrust enforcement. The clearance agreement does not affect the Bureau of Consumer Protection’s operations.

and Intellectual Property Law and Policy in the Knowledge-Based Economy.” The hearings respond to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the emerging understanding that it is important for intellectual property and competition policies to work together. They seek to gather facts about, and to enhance the understanding of, how the doctrines and policies of both disciplines

affect initial and follow-on innovation and other aspects of consumer welfare. During the hearings, business persons, consumer advocates, inventors, practitioners, and academics have focused on:

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

(ii) “real-world” experiences with patents and competition;

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

(iv) issues raised by patent pools and cross-licensing and by certain standard-setting practices.

Future sessions will address unilateral refusals to deal; patent settlements; licensing practices; international comparative law perspectives regarding the competition/intellectual property interface; and jurisprudential issues, including the role of the Federal Circuit.

III. Good Government Initiatives

In the past year, the Commission has undertaken several initiatives that respond to constructive criticism and suggestions for antitrust procedural and substantive reform received from the business community, the legal community, academia, various consumer groups, and Congress. These initiatives, which will increase the transparency of the FTC’s operations, procedures, and requirements, as well as improve the manner in which the agency operates, will provide for a more expeditious and efficient, but no less thorough, review of business transactions. More efficiency will benefit employees, shareholders, consumers, and taxpayers.

These initiatives include:

- the Memorandum of Agreement concerning Clearance Procedures for investigations, which streamlines and rationalizes the process for allocating competition matters between the FTC and the DOJ, see Box 4;
- conversations with the Antitrust Division and the public regarding modifications and improvements to the Commission’s merger investigations process;
- merger remedies workshops that will consider whether the Commission’s remedy provisions are necessary or sufficient to preserve competition and whether the process through which remedies are negotiated can be improved – to assist this initiative, the staff has released a document responding to “*Frequently Asked Questions*” about the merger remedy process;
- the FTC’s call for comments regarding the use of its disgorgement authority;
- additional steps to reform the Hart-Scott-Rodino merger reporting process, including the option of filing electronically;
- the development of a Bureau of Economics research agenda to support and advance our enforcement efforts;
- support of several professional development activities for the legal and economic staffs, including our seminar series in which noted legal and economic scholars present current research on competition and consumer protection issues; and
- the use of the Government Performance and Results Act (GPRA) to improve FTC operations by making greater use of planning, performance measurement, and goal setting objectives.

