

Prepared Statement of the Federal Trade Commission

Before the

**Committee on the Judiciary
Antitrust Task Force
United States House of Representatives**

Concerning

An Overview of Federal Trade Commission Antitrust Activities

July 24, 2003

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

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

I. INTRODUCTION

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

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

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

Our strategic framework includes the following key elements:

- The FTC concentrates on those segments of the economy that have the biggest impact on consumers, which currently include health care, energy, and technology-related markets, and on conduct that poses the largest threat to consumer welfare.
- We take full advantage of the uniquely broad set of powers and capabilities that Congress has entrusted to us, including law enforcement, research and reporting, and advocacy on behalf of consumers and competition.
- The Commission recognizes that the scope of its activities is as important as their content. While certain immunities from the antitrust laws are necessary and appropriate, undue expansion of those immunities, beyond the original intent and purpose, harms consumers.

- The FTC conveys to the public, with as much clarity as possible, the policies and standards it applies in its decisions. To minimize the costs that our work imposes on the economy, we also continuously seek to improve our processes.
- The FTC assists and cooperates with competition agencies in countries throughout the world.

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

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

II. FOCUSING ON KEY SECTORS OF THE ECONOMY

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

A. Health Care

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

1. Law Enforcement Actions Involving Health Care

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

a. Law Enforcement Involving Pharmaceutical Companies. The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000.⁽⁵⁾ In response, the FTC has increased its pharmaceutical-related investigations. In 1996, fewer than five percent of new competition investigations involved pharmaceuticals, while in 2002, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- **Mergers Affecting the Pharmaceutical Industry.** In April, the Commission settled with Pfizer Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation to resolve concerns that their \$60 billion merger would harm competition in nine separate and wide-ranging product markets,

including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions.⁽⁶⁾ The settlement required divestitures to protect consumers' interests in those markets while allowing the remainder of the transaction to go forward.

Other recent FTC pharmaceutical industry merger actions include (1) *Baxter/Wyeth*, in which the FTC obtained a settlement requiring divestitures to protect competition in the market for propofol, a general anesthetic commonly used for the induction and maintenance of anesthesia during surgery, and the market for new injectable iron replacement therapies used to treat iron deficiency in patients undergoing hemodialysis;⁽⁷⁾ and (2) *Amgen/Immunex*, in which the FTC obtained an agreement settling allegations that Amgen Inc.'s \$16 billion acquisition of Immunex Corporation would reduce competition for three important biopharmaceutical products used to treat rheumatoid arthritis, Crohn's disease, psoriatic arthritis, and side effects of chemotherapy.⁽⁸⁾

- **Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.** To address the issue of escalating drug expenditures, and to ensure that the benefits of pharmaceutical innovation would continue, Congress passed the Hatch-Waxman Amendments⁽⁹⁾ ("Hatch-Waxman") to the Food, Drug and Cosmetic Act ("FDCA").⁽¹⁰⁾ Hatch-Waxman established a regulatory framework that sought to balance incentives for continued innovation by research-based pharmaceutical companies and opportunities for market entry by generic drug manufacturers.⁽¹¹⁾ Hatch-Waxman has increased generic drug entry, helping consumers save \$8-10 billion on retail prescription drug purchases in 1994 alone, according to the Congressional Budget Office.⁽¹²⁾ Hatch-Waxman has been subject to some abuse, however. Some drug manufacturers have allegedly attempted to "game" the system, securing greater profits for themselves without providing a corresponding benefit to consumers. Many of the FTC's pharmaceutical industry investigations have focused on this problem.

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

The Commission has settled three additional cases of this type, including an April 2002 settlement resolving charges that American Home Products entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars.⁽¹⁴⁾ An action against Schering-Plough and Upsher-Smith, which remains in administrative litigation, raises similar issues.

(2) *Second Generation Cases.* Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book" list of approved drugs and their related patents. Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Our "second generation" of enforcement activities has involved allegations that individual brand-name manufacturers have delayed generic competition through the use of improper Orange Book listings that trigger the FDA's automatic 30-month stay of approval of a generic drug.

One facet of the FTC's BMS settlement involved allegedly improper Orange Book listings. The complaint stated that BMS misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book"; breached its duty of good faith and candor with the U.S. Patent and Trademark Office, while pursuing new

patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.⁽¹⁵⁾ Because of BMS's alleged pattern of anticompetitive conduct and the extensive resulting consumer harm, the Commission's proposed order necessarily contains strong - and in some respects unprecedented - relief.⁽¹⁶⁾

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

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

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

c. Law Enforcement Involving Health Care Providers. For decades, the FTC has worked to facilitate innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. These efforts continue. In the past three months alone, the FTC has settled with seven groups of physicians for allegedly colluding to raise consumers' costs⁽²⁰⁾ and issued an administrative complaint against another.⁽²¹⁾ Many of these cases involve significant numbers of doctors -- more than three-quarters of all doctors in the Carlsbad, New Mexico area in one matter, over 1,000 physicians in Dallas, Texas in another, and an organization consisting of more than 1,500 San Francisco physicians in the case in administrative litigation. The Commission's consent orders put a stop to allegedly collusive conduct harming employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

2. Other Health Care Initiatives

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

- ***In re Buspirone Amicus Brief.*** In January 2002, the FTC filed an *amicus* brief in pivotal private litigation involving allegations of improper Orange Book listing practices.⁽²²⁾ *In re Buspirone* involves allegations that BMS violated the antitrust laws by wrongfully listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine - a legal rule providing antitrust immunity for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the Commission argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order denying *Noerr* immunity and adopting much of the Commission's reasoning.⁽²³⁾ The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff still must prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from antitrust scrutiny.

- **Generic Drug Study.** In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," which evaluated whether Hatch-Waxman is susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products.⁽²⁴⁾ The report recommended changes in the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identified in the FTC study.⁽²⁵⁾ Last month, the FDA approved a new rule to curb one of the abuses uncovered by the FTC study - pharmaceutical firms' alleged misuse of the Hatch-Waxman patent listing provisions - to speed consumer access to lower-cost generic drugs.⁽²⁶⁾ In addition, both the Senate and House of Representatives recently passed bills that incorporate the FTC study's two major legislative recommendations.⁽²⁷⁾
- **Hearings on Health Care and Competition Law and Policy.** To explore developments in the dynamic health care market, the FTC, working with DOJ's Antitrust Division, commenced a series of hearings on "Health Care and Competition Law and Policy" on February 26, 2003.⁽²⁸⁾ Over a seven-month period, the FTC and DOJ are spending almost 30 days of hearings in a comprehensive examination of a wide range of health care issues, involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, and consumer information, among others. To date, the hearings have focused on the specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues.⁽²⁹⁾ A public report that incorporates the results of the hearings will be prepared after the hearings.
- **Hospital Merger Retrospectives.** In addition, the Bureau of Economics and Competition are evaluating the effects of consummated hospital mergers in several cities. The agency will announce the results of these retrospective studies whether the mergers in question may have been beneficial or harmful to consumers. If the analysis reveals that one or more of the mergers considered were anticompetitive, then the Commission will carefully consider whether an administrative enforcement action would be warranted. The availability of an appropriate remedy will obviously influence the FTC's decision(s). In any event, the agency will obtain useful real-world information about the consequences of particular transactions and the nature of competitive forces in health care, which will be enormously helpful in analyzing and possibly challenging future hospital mergers.

B. Energy

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

1. Law Enforcement Actions Involving Energy

- **Oil Merger Investigations.** The Commission has an extensive history of carefully investigating mergers in the petroleum industry. These mergers typically involve a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. Most recently, in the *Conoco/Phillips* merger, the Commission issued a consent order requiring the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.⁽³⁰⁾
- **Natural Gas Merger Investigations.** The FTC also has investigated mergers in the natural gas industry and taken necessary action to preserve competition. In July 2003, the Commission finalized a consent

order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area.⁽³¹⁾ The order conditionally would allow Southern Union Company's \$1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation, while requiring Southern Union to terminate an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City area. Absent the settlement agreement, the transaction would have placed the two pipelines under common ownership or common management and control, eliminating direct competition between them, and likely resulting in consumers' paying higher prices for natural gas in the Kansas City area.

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

2. Other Energy Industry Initiatives

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

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

To enhance the Gasoline Price Monitoring Project, the FTC has recently asked each state Attorney General to forward to the FTC's attention consumer complaints they receive about gasoline prices. The staff will incorporate these complaints into its ongoing analysis of gasoline prices around the country, using the complaints to help locate price anomalies outside of the 360 cities for which the staff already receives daily pricing data.

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

C. Technology

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

1. Law Enforcement Actions Involving Technology

As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint issued in June 2002, the Commission has charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose - in violation of the organization's rules - that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.⁽³⁵⁾ The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The Commission's complaint, which is currently being litigated before an Administrative Law Judge, alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents.⁽³⁶⁾ Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech products and innovation, the Commission will continue to pursue investigations in this important area.⁽³⁷⁾

2. Other Technology Initiatives

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

arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales.

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

III. THE SCOPE OF ANTITRUST

A. Antitrust Immunity Generally

As a general matter, immunity from the antitrust laws is exceptional and disfavored.⁽⁴³⁾ The antitrust laws, "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition," rest on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."⁽⁴⁴⁾ Accordingly, few industries or competitive situations are not subject to the antitrust laws. In fact, there has been a trend to deregulate industries and remove antitrust immunities rather than to create more of them.⁽⁴⁵⁾

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

We do not believe these reasons provide a sound basis for an antitrust exemption. Antitrust analysis today is highly capable of distinguishing harmful and unreasonable conduct from conduct that has a legitimate justification, and can therefore accommodate any legitimate needs for competitor collaboration. Further, case precedents, interpretive

Guidelines, and advisory opinions from the FTC and the DOJ, along with advice from antitrust counsel, can enable firms to make well-informed judgments about whether a proposed activity will present antitrust risks. Therefore, antitrust exemptions generally are not necessary.

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

B. The State Action and Noerr-Pennington Doctrines

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

While the core principles underlying these doctrines have validity, some lower court decisions have expanded the reach of both doctrines beyond the precepts originally articulated by the Supreme Court. Moreover, when the governing standard is unclear, enforcement (and deterrence) can be problematic. Thus, for example, the American Bar Association Antitrust Section's 2001 report on antitrust policy recommended a reexamination of the scope of the state action doctrine.⁽⁵¹⁾

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

1. State Action Task Force

The State Action Task Force has been conducting a careful analysis of existing case law on the scope of the state action defense. The Task Force has observed that some courts have applied the doctrine too broadly, thereby protecting anticompetitive conduct of parties acting in their own interest, rather than the interest of "the state itself." An overbroad application can be especially problematic when the party purportedly acting pursuant to a delegation of state authority is a private market participant with strong incentives to restrain trade. The Task Force's work has resulted in investigations that we hope will clarify the two key elements of the state action defense - "clear articulation" of the state's intent to displace competition, and "active supervision" of any anticompetitive private agreements. In the Analysis to Aid Public Comment in the Commission's recent *Indiana Movers* consent order, for example, we described three factors relevant to showing that the state has "actively supervised" the conduct for which the state action defense is asserted: (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits that would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives; and (3) a specific assessment - both qualitative and quantitative - of how the private action comports with the substantive standards established by

the state legislature, particularly when the standards include competition or consumer welfare.⁽⁵²⁾ Earlier this month, the Commission issued administrative complaints in three similar cases involving associations of household goods movers in three states.⁽⁵³⁾ The complaints allege that the associations have violated the FTC Act by engaging in collective action in the form of filing tariffs containing collective rates on behalf of their members. One or more of these cases may eventually present an opportunity for further clarification of the contours of the state action doctrine.

2. Noerr-Pennington Task Force

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

Several recent FTC enforcement actions also involve *Noerr* issues. For example, in the Commission's BMS settlement, discussed above, most of the acts challenged involved use of governmental processes.⁽⁵⁴⁾ Thus, the complaint affirmatively pled that *Noerr* did not immunize BMS's actions. Among other reasons cited, the complaint indicated that BMS's alleged knowing and material misrepresentations to the FDA fell outside of *Noerr* protection. The Commission's *Unocal* case, also discussed above, raises a similar issue.⁽⁵⁵⁾ If proven, the allegation that Unocal urged the California air-quality board to adopt a standard for clean-burning gasoline, while misrepresenting its intentions regarding any intellectual property rights in the standard may present the Commission with an opportunity to evaluate more fully the significance of misrepresentations to a government entity for a *Noerr* immunity claim.

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

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

IV. IMPROVING INTERNAL PROCESSES AND TRANSPARENCY

A. Electronic Premerger Filing

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

B. Improving HSR Merger Investigations

The agencies have taken steps to reduce the burden on merging parties in document productions responsive to Second Requests. In response to legislation amending the HSR Act,⁽⁶¹⁾ the Commission amended its rules of practice to incorporate new procedures.⁽⁶²⁾ The amended rules require Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establish a procedure for the General Counsel to review the request and promptly resolve any remaining issues. Measures adopted include a process for seeking modifications or clarifications of Second Requests, and expedited senior-level internal review of disagreements between merging parties and agency staff; streamlined internal procedures to eliminate unnecessary burdens and undue delays; and implementation of a systematic management status check on the progress of negotiations on Second Request modifications.

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

C. Facilitating Negotiation of Merger Remedies

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

D. Transparency in FTC Decision Making

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

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

V. INTERNATIONAL ACTIVITIES: NEW INITIATIVES, ENFORCEMENT AND ASSISTANCE

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

- **ICN.** In 2001, the FTC, the DOJ, and 12 other antitrust agencies from around the world launched the International Competition Network ("ICN"). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee ("ICPAC") that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Seventy-one jurisdictions have joined the ICN. The FTC is a leading participant in the ICN's projects, which include multi-jurisdictional mergers, capacity building and competition policy implementation, and antitrust enforcement in regulated sectors.
- **Trade Agreements.** The FTC co-chairs the U.S. delegation to the WTO working group on trade and competition policy and is actively involved in the preparations for the Cancun Ministerial Conference. We also continue to work with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas, and are actively involved in the development of competition chapters of bilateral free trade agreements such as those concluded with Chile and Singapore and under negotiation with Australia.
- **OECD.** The FTC is participating in the valuable continuing work of the OECD Competition Committee on, among other things, merger process convergence and regulatory reform.
- **Technical Assistance.** For the past 12 years, the FTC, along with the DOJ, has assisted developing nations that have made the commitment to market and commercial law reforms. With funding from the U.S. Agency for International Development and the U.S. Trade & Development Agency, the two antitrust agencies have provided technical assistance to about 30 nations to help them develop their competition and consumer protection laws. The program is presently active in South America, Mexico, South Africa, North Africa, Indonesia, Southeastern Europe, and the former Soviet Union. The program emphasizes the development of investigative skills, and relies on a combination of resident advisors, regional workshops, and targeted short-term missions. These activities have enabled a large number of career staff to share their expertise, although great care is taken to avoid any intrusions on time and planning for domestic enforcement projects.

VI. CONCLUDING REMARKS

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

Endnotes:

1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.
2. 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553, 114 Stat. 2762 (2000).
3. Throughout the 1990s, the FTC typically had no more than one or two antitrust cases in administrative litigation. The eight nonmerger administrative cases currently pending are *Schering-Plough Corp.*, Dkt. No. 9297 (July 2, 2002) (Initial Decision); *Polygram Holding, Inc.*, Dkt. No. 9298 (June 28, 2002) (Initial Decision); *Rambus, Inc.*, Dkt. No. 9302 (June 18, 2002) (complaint); *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint); *California Pacific Medical Group, Inc. dba Brown and Toland Medical Group*, Dkt. No. 9306 (July 8, 2003) (complaint); *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (July 8, 2003) (complaint); *Movers Conference of Mississippi, Inc.*, Dkt. No. 9308 (July 8, 2003) (complaint); and *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (July 8, 2003) (complaint).
4. *American Medical Assn.*, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (order modified, 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982), and 114 F.T.C. 575 (1991)).
5. See National Health Expenditures, by Source of Funds and Type of Expenditures, Health Care Financing Administration, available at <<http://www.hcfa.gov/stats/nhe-oact/tables/t3.htm>>.
6. *Pfizer Inc.*, Dkt. No. C-4075 (May 27, 2003) (consent order).
7. *Baxter International Inc. and Wyeth*, Dkt. No. C-4068 (Feb. 3, 2003).
8. *Amgen Inc. and Immunex Corp.*, Dkt. No. C-4056 (Sept. 3, 2002).
9. Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended 21 U.S.C. § 355 (1994)).
10. 21 U.S.C. § 301 et seq.
11. See H.R. Rep. No. 98-857, pt. 1, at 14 (1984), reprinted in 1984 U.S.C.C.A.N. 2647, 2647.
12. Congressional Budget Office, How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry (July 1998), available at <<http://www.cbo.gov>>.
13. *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).
14. *Schering-Plough Corp.*, Dkt. No. 9297 (Apr. 3, 2002) (consent order as to American Home Products Corp.); see also *Abbott Laboratories*, Dkt. No. C-3945 (May 22, 2000) (consent order), *Geneva Pharmaceuticals, Inc.*, Dkt. No. C-3946 (May 22, 2000) (consent order); *Hoechst Marion Roussel, Inc.*, Dkt. No. 9293 (May 8, 2001) (consent order).
15. *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).
16. The proposed order includes a provision prohibiting BMS from triggering a 30-month stay for any BMS product based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug.
17. *Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002) (consent order).
18. *Biovail Corp. and Elan Corp. plc.*, Dkt. No. C-4057 (Aug. 20, 2002) (consent order).

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

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

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

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

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

24. Generic Drug Entry Prior to Patent Expiration: An FTC Study (July 2002), available at <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.

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

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

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

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

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

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

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

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

33. FTC Press Release, *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August* (July 12, 2001), available at <http://www.ftc.gov/opa/2001/07/gasconf.htm>; FTC Press Release, *Factors That Affect Gasoline Prices To Be Discussed at FTC Conference* (May 1, 2002), available at

<http://www.ftc.gov/opa/2002/05/gasolineprices.htm>>. Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at <http://www.ftc.gov/bc/gasconf/index.htm>>.

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

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

36. *Id.*

37. In 1996, the FTC brought a similar case against Dell Computer, alleging that Dell had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. *Dell Computer Co.*, 121 F.T.C. 616 (1996) (consent order).

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

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

40. See Comments of the Staff of the Federal Trade Commission, Intervenor, *In re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* (Connecticut Board of Examiners for Opticians, Mar. 27, 2002), available at <http://www.ftc.gov/be/v020007.htm>>.

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

42. Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>>.

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

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

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

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

47. We are aware, of course, that there have been rare instances in which Congress enacted statutory grants of immunity for joint action of competitors. In those situations, the exemption typically applied to specific industries or activities that were subject to a special regulatory regime, or to a specific transaction or agreement that had been approved by a federal agency, again usually in the context of a regulated industry. Prior approval of an agreement by

a federal agency has not been required when the scope of the immunity was very limited, but broader grants of immunity have been accompanied by strict controls on the development and implementation of agreements. Without such strict limits, the dangers of antitrust exemptions are even greater.

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

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

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

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

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

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

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

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

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

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

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

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

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

60. *Id.*

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

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

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

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

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

66. See, e.g., FTC Press Release, *Investigation of Kroger/Raley's Supermarkets Transaction Closed* (Nov. 13, 2002) available at <<http://www.ftc.gov/opa/2002/11/krogerraley.htm>>; Federal Trade Commission, *Statement of the Federal*

Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corp./P&O Princess Cruises plc, File No. 021-0041 (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm> and <http://www.ftc.gov/os/2002/10/cruisedissent.htm> (Commissioners Anthony and Thompson, dissenting).

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