

**Prepared Statement of
The Federal Trade Commission**

**Before the
Subcommittee on
Commerce, Justice, State, and the Judiciary
of the
Committee on Appropriations, United States Senate**

Washington, D.C.

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I. INTRODUCTION

Mr. Chairman, I am Timothy J. Muris, Chairman of the Federal Trade Commission. I am pleased to appear before the Subcommittee today to testify in support of the FTC's Fiscal Year 2003 Appropriation request.⁽¹⁾

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.⁽²⁾ We enforce laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, as well as promote informed consumer choice and public understanding of the competitive process. The work of the FTC is critical in protecting and strengthening free and open markets in the United States.

The FTC's record is impressive. The agency has fulfilled its mission of protecting American consumers by pursuing an aggressive law enforcement program during rapid changes in the marketplace - the past decade saw the largest merger wave in history, the rapid growth of technology, and the increasing globalization of the economy. Through the efforts of a dedicated and professional staff, the FTC has shouldered an increasing workload despite only modest increases in resources. I would like to thank the Chairman and members of the Subcommittee for their continued support of the Commission's mission.

The guiding word at the FTC is "continuity." The agency continues aggressively to pursue law enforcement initiatives, launch consumer and business education campaigns, and organize forums to study and understand the changing marketplace, just as we have done for several years. We will continue to address competition and consumer protection issues in the evolving economy with the same expertise and commitment as before.

Our competition mission continues to reflect the following widely shared consensus: (1) the purpose of antitrust is to protect consumers; (2) the mainstays of antitrust enforcement are horizontal cases - cases involving the business relations and activities of competitors; (3) in light of recent judicial decisions and economic learning, appropriate monopolization and vertical cases are an important part of the antitrust agenda; and (4) case selection should be guided by sound economic and legal analysis, and made with careful attention to the facts. The FTC is primarily a law enforcement agency, and we will continue aggressive enforcement of the antitrust laws within the agency's jurisdiction. The FTC is also an independent expert agency and a deliberative body, and is thus well suited to studying an evolving marketplace and developing antitrust policy - we will continue to hold public hearings, conduct studies, and issue reports to Congress and the public.

Similarly, there is widespread agreement on how the FTC best carries out its consumer protection

mission. Twenty years ago, the FTC shifted its emphasis toward more aggressive enforcement of the basic laws of consumer protection. The staple of our consumer protection mission is to identify and fight fraud and deception. The FTC monitors trends and developing issues in the marketplace to determine the most effective use of its resources. The FTC has become the national leader in consumer protection and partners with other law enforcement agencies at the federal, state, local, and international levels to maximize benefits for consumers.

To accomplish our mission in FY 2003, the FTC requests \$176,599,000 and 1,074 FTE. These figures represent an increase over the current year of \$20,617,000, but no additional FTE. Almost 25 percent of the requested dollar increase would be devoted to comply with proposed legislation requiring all federal agencies to begin funding directly certain retirement and health benefits. Funding at the requested level would allow the FTC to build on a record of solid achievement on behalf of American consumers.

During FY 2003, the FTC will address significant law enforcement and policy issues throughout the economy, devoting the major portion of its resources to those areas in which the agency can provide the greatest benefits to consumers. This testimony in support of our FY 2003 appropriation highlights program priorities in the FTC's two missions. In the Consumer Protection Mission, we discuss Privacy; Internet Law Enforcement; Health, Safety, and Economic Injury; Media Violence, Gambling, and Children; Globalization; and Consumer Outreach. In the Maintaining Competition Mission, we discuss Merger Enforcement; Streamlining the Merger Review Process; Nonmerger Enforcement; Targeting Resources for Consumer Impact; and Outreach Efforts. The testimony concludes with a brief summary of the FTC's FY 2003 appropriation request.

II. CONSUMER PROTECTION MISSION

A. Privacy

During FY 2003, the FTC intends to devote significant resources to privacy protection. Consumers are deeply concerned about the privacy of their personal information, both online and offline. Although privacy concerns have been heightened by the rapid development of the Internet, they are by no means limited to the cyberworld. 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. Of course, the nature of Internet technology may raise its own special set of issues.

The FTC currently enforces a number of laws that address consumers' privacy,⁽³⁾ and intends to increase substantially 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. Privacy Law Enforcement

The FTC will pursue law enforcement efforts in the following areas:

Enforcing privacy promises, focusing on cases involving sensitive information, transfers of information as part of a bankruptcy proceeding, and the failure of companies to meet commitments made under the Safe Harbor Program to comply with the European Commission's Directive on Data Protection.⁽⁴⁾ For example, in January 2002, the FTC accepted a consent order with Eli Lilly & Company to resolve allegations that Lilly violated the FTC Act. According to the complaint, Lilly claimed that it employed measures appropriate under the circumstances to protect the confidentiality of personal information obtained from consumers who visited its Prozac.com Web site, when in fact it did not.⁽⁵⁾

Enforcing the Children's Online Privacy Protection Act (COPPA),⁽⁶⁾ which prohibits the collection of personally identifiable information from young children without their parents' consent. Since 2001, the Commission has brought a number of COPPA enforcement actions resulting in more than \$100,000 in civil penalties.⁽⁷⁾

Bringing actions against fraudulent or deceptive spammers. In February of this year, the Commission launched a crackdown on deceptive junk email, or "spam," and announced six settlements with seven defendants who allegedly continued to send deceptive chain email after being warned that the chain email scheme was illegal.⁽⁸⁾ The FTC maintains a special electronic mailbox, uce@ftc.gov, to which Internet customers can forward spam. This database currently receives 10,000 new pieces of spam every day. We will continue to use this mailbox to identify targets for law enforcement action.

Challenging "pretexting," the practice of fraudulently obtaining personal financial information, often by calling banks under the pretense of being a customer. Earlier this month, the Commission announced settlements in three federal district court actions against information brokers who allegedly engaged in illegal pretexting.⁽⁹⁾

Enforcing the privacy protections of the Fair Credit Reporting Act,⁽¹⁰⁾ which ensures the integrity and accuracy of consumer credit reports and limits the disclosure of such information to entities that have "permissible purposes" to use the information.

2. Privacy Rulemaking

The Commission is engaged in the following rulemaking activities:

Considering proposed amendments to the Telemarketing Sale Rule,⁽¹¹⁾ which were announced in January 2002.⁽¹²⁾ Among other things, the proposed amendments would create a national do-not-call list to allow consumers to make one call to remove their names from telemarketing lists. The proposed amendments also would address the misuse of "pre-acquired account information," lists of names and credit card account numbers of potential customers. Misuses include billing consumers who believed they were simply accepting a free trial, or billing consumers for products or services that they did not purchase.

Completing the current rulemaking on safeguarding consumers' financial information pursuant to the Gramm-Leach-Bliley Act.⁽¹³⁾

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

The agency will continue to conduct workshops and other educational activities:

Training law enforcement officials about identity theft. 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.⁽¹⁴⁾

Collecting information about identity theft with the FTC's new ID Theft Affidavit. In February 2002, 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 will help victims recoup their losses and restore their legitimate credit records more quickly.

Continuing to explore and monitor the privacy implications of new and emerging technologies through workshops, reports, and other public meetings. Earlier this month, the FTC released a summary and update of the proceedings of a workshop sponsored by the Commission

titled, "The Mobile Wireless Web, Data Services, and Beyond: Emerging Technologies and Consumer Issues."⁽¹⁵⁾ On May 20-21, 2002, the FTC will host a two-day public workshop to explore issues related to the security of consumers' computers and the personal information stored in them or in company databases.⁽¹⁶⁾

B. Internet Law Enforcement

The FTC will continue aggressively to monitor the Internet to ferret out frauds and schemes. Since 1994, the early days of the Internet, the FTC has brought 222 Internet-related law enforcement actions against 688 defendants, stopping consumer injury estimated at more than \$2.1 billion. These cases often pose novel challenges: tracking anonymous fraud artists, unraveling complex technological schemes, and responding at lightning speed to frauds moving just as rapidly.

A growing number of these high tech schemes exploit the design and architecture of the Internet. A recent example is *FTC v. Zuccarini*, C.A. No. 01-CV-4854 (E.D. Pa., filed Sept. 25, 2001), in which the defendant allegedly used more than 5,000 copycat Web addresses to hijack surfers from their intended destinations to one of his Web sites, hold them captive, and pelt them with a barrage of ads, some of them pornographic. According to the FTC's complaint, the defendant was able to divert consumers who misspelled addresses of popular legitimate sites because he had registered multiple misspelled variations of those sites. Once he had lured consumers to his sites, the defendant "mousetrapped" them by disabling their browsers' "back" and "exit" commands. At the FTC's request, the court enjoined the defendant from continuing these activities. The FTC will seek an order requiring the defendant to disgorge as much as \$1 million in ill-gotten gains.

As in past years, the FTC's Internet fraud campaign is combating scams that jump from news headlines - this year, scams that have appeared since September 11th. The FTC, working with 30 State Attorneys General, the New York Better Business Bureau, the California Department of Health, the FDA, and other federal agencies identified more than 200 Web sites pitching products to protect against, detect, or treat illnesses caused by biological or chemical agents, including anthrax. These products, most of them bogus or ineffective, include herbal remedies for anthrax, air filters, gas masks, and do-it-yourself kits to test mail for anthrax. After identifying these Web sites, the FTC sent warning letters to the operators of 121 sites, and published two consumer alerts to warn the public that fraudsters follow the headlines and tailor their offers to prey upon the public's latest fears. As of March 1, 2002, 62 percent of those warned had dropped the troubling claims from their Web sites, and the FTC continues to monitor the remainder of the Web sites. The FTC brought two law enforcement actions against the operators of Web sites engaging in more egregious practices. In one case, the FTC obtained a federal court order prohibiting a marketer from selling anthrax home test kits.⁽¹⁷⁾ In second, the FTC has issued a consent order prohibiting a vendor from making anthrax cure claims for a colloidal silver product.⁽¹⁸⁾

Because the Internet transcends national boundaries, future cases increasingly will involve cross-border scams. During the past fiscal year, the FTC, other federal agencies, state agencies and foreign agencies from nine countries participated in "Operation Top Ten Dot Cons." Through this sweep, the largest in FTC history, the FTC and its partners filed 209 actions around the world attacking the top 10 Internet scams, as identified by data received in our consumer complaint database.⁽¹⁹⁾

C. Health Safety, and Economic Injury

The Commission also will continue to bring law enforcement actions in cases involving consumers' health and safety, and in cases resulting in significant economic injury. Just two weeks ago, for example, the Commission announced consent agreements in cases challenging allegedly deceptive advertising claims that, as a good source of calcium, Wonder Bread helps children's minds work better and helps children remember things.⁽²⁰⁾ In a recent case involving significant economic injury,

the Commission announced that a group of "buying clubs" had agreed to pay \$9 million to settle charges by the FTC and State Attorneys General. The defendants were charged with misleading consumers into accepting trial buying club memberships and 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.⁽²¹⁾

In addition, last month the FTC obtained a stipulated preliminary injunction in a federal district court action against the promoters of "Miss Cleo" psychic services.⁽²²⁾ 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, among other things. The FTC estimates that the defendants billed consumers at least \$360 million in connection with this alleged scheme.

D. Media Violence, Gambling, and Children

The FTC is continuing to monitor violent media directed toward children, and appreciates the leadership of Senators Hollings, McCain, Gregg, and other Subcommittee members on this issue. In a September 2000 report, the agency reported that the entertainment industry targeted advertising and promotion of violent video games, movies, and music to children.⁽²³⁾ We received requests from Congress to take a variety of steps to follow up on this report. In particular, this Subcommittee requested that the FTC continue its efforts in child protection through three related initiatives: consumer research and workshops, an underage shopper retail compliance survey, and marketing and data collection.⁽²⁴⁾

In response to these requests, in April 2001 the FTC released a follow-up report outlining improvements in the movie and electronic game industries but finding no appreciable change in the music industry's target marketing practices.⁽²⁵⁾ The agency released a second follow-up report in December 2001, finding that the movie and electronic game industries had made continued improvements. The December 2001 report also found that the music industry had made some progress in disclosing parental advisory label information in its advertising, but the Commission's review of advertising placement showed that the music industry had not altered its marketing practices since the September 2000 report.⁽²⁶⁾ The December report also described the results of a second underage shopper retail compliance survey. The FTC will release a third follow-up report in June 2002. In addition, as requested by this Subcommittee, the Commission's staff is conducting research on appropriate consumer education messages for parents. The Commission is also working to respond to the language in last year's appropriations bill regarding the marketing of on-line gambling sites to children. We will be reporting our findings and announcing a consumer education initiative in the near future.

E. Globalization

The FTC will continue to respond to the challenges created by the increasingly global marketplace. First, the FTC will participate in international efforts to craft policies and self-regulatory programs to protect consumers. Second, we will build new international partnerships to tackle cross-border fraud through information sharing and coordinated law enforcement. An example is the FTC's participation in the International Marketing Supervision Network (IMSN), a network of consumer protection and fair trade organizations from more than two dozen countries. The IMSN identifies worldwide enforcement issues, facilitates the sharing of information about cross-border commercial activities affecting consumer interests, and encourages international cooperation among law enforcement agencies. Another example is [econsumer.gov](#), a joint effort by the United States and fifteen other countries to gather and share cross-border e-commerce complaints.

Third, to meet the challenge of identifying critical consumer issues in the global marketplace, the FTC

plans to continue to use its *Consumer Information System*, a consumer complaint database, to identify and target the most serious consumer problems. By sharing fraud complaints with a broad group of law enforcement partners through the secure *Consumer Sentinel* Web site, the FTC enhances the effectiveness of law enforcement agencies across the United States, Canada, and Australia. The FTC also will continue training enforcement officials on how to bring cases involving new technologies. Since FY 2001, the FTC has educated more than 1,750 law enforcement personnel from more than 20 countries, 38 states, 23 U.S. federal agencies, and 19 Canadian agencies on use of the fraud database.

F. Consumer Outreach

Just as consumer outreach is a key component of the FTC's efforts to protect consumers' privacy, the FTC will continue to place great emphasis on consumer outreach involving fraud and deception. Our consumer education programs provide two key benefits. First, they inform consumers of their rights under various consumer protection laws. Second, they give consumers the information they need to identify and avoid fraud and deception in the marketplace. In FY 2002, the FTC will use national and local media, state and local government agencies, business and consumer groups, and the ftc.gov and consumer.gov Web sites to reach millions of consumers across the country. The FTC also will continue to reach consumers through its Consumer Response Center and the hundreds of consumer protection organizations that distribute FTC materials and provide links to the FTC Web site. In FY 2001, the FTC issued 77 publications, distributed more than 5.4 million print publications, and logged more than 9.6 million accesses of its publications on the ftc.gov Web site. The FTC also will continue to host workshops to highlight the FTC's activities and resources for Congressional district office staff. By July of this year, the FTC will have held workshops in each of its regional offices for all Congressional district offices.

III. MAINTAINING COMPETITION MISSION

A. Merger Enforcement

Merger enforcement will continue as a major focus of the competition agenda for FY 2003. Stopping mergers that lessen competition ensures that consumers will have the benefit of lower prices and greater choice in their selections of goods and services. The recently revised Hart-Scott-Rodino Act ("HSR")⁽²⁷⁾ filing threshold, coupled with economic conditions during the last fiscal year, reduced the number of reportable filings by approximately two-thirds from their peak. Reported mergers, however, continue to increase in scope, complexity, and size. In FY 2001 alone, the total value of all reported mergers was over \$1 trillion. Large, multifaceted transactions - the ones still subject to HSR - are the ones most likely to raise antitrust issues, and typically involve a number of separate product and geographic markets, each requiring analysis.⁽²⁸⁾ Further, mergers in high tech markets require careful analysis, because new technical issues continue to emerge.

We will devote resources to searching for mergers that are no longer subject to premerger reporting requirements under HSR, but that could be anticompetitive. While the revised HSR filing threshold eliminated the reporting requirement for smaller mergers, it did not change the substantive standard of legality under section 7 of the Clayton Act.⁽²⁹⁾ The agency will be alert to smaller mergers that could harm consumers by substantially lessening competition. Since the fiscal year began, the FTC has opened investigations into mergers that were not reportable under the HSR Act, and has issued an administrative complaint challenging one merger that fell below the amended HSR threshold.⁽³⁰⁾

Litigation to challenge anticompetitive mergers requires significant resources. While the FTC resolves most merger cases through settlement (this fiscal year we have obtained settlements of ten administrative or court complaints),⁽³¹⁾ it is sometimes necessary to litigate challenges to certain proposed or consummated mergers. Since the fiscal year began, the Commission has authorized the staff to file complaints in five merger cases, three of which are in litigation⁽³²⁾ and two of which have

settled.⁽³³⁾ The FTC must have the resources and expertise needed to support effective challenges in complex and high-stakes cases to protect consumers from higher prices, limited choices, and thwarted innovation.

B. Streamlining the Merger Review Process

The FTC has been working with the Antitrust Division at the Department of Justice to establish procedures to make the HSR merger review process more efficient and transparent. The FTC has focused on several areas for streamlining, including:

- **Electronic Premerger Filing.** As part of an overall movement to make government more accessible electronically, the FTC, working with DOJ, will accelerate its efforts in FY 2003 to develop an electronic system for filing HSR premerger notifications. E-filing will reduce filing burdens for businesses and government and create a valuable database of information on merger transactions to inform future policy deliberations.
- **Burden Reduction in Investigations.** The agencies have taken steps to reduce the burden in document productions responsive to requests for additional information under the HSR Act ("second requests"). In response to legislation amending the HSR Act,⁽³⁴⁾ the FTC amended its rules of practice to incorporate new procedures. The rule requires Bureau of Competition staff to schedule conferences to discuss the scope of a second request with the parties and also establishes a procedure for the General Counsel to review the request and rule promptly on any remaining unresolved issues.⁽³⁵⁾ 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 addition, we recently have announced that agency staff will participate in a series of discussions with the bar and other interested parties to elicit suggestions on further improvements to the second request process, and to provide information on our investigation procedures.
- **Improved FTC/DOJ Clearance Process.** The achievement of an efficient division of work between the two federal antitrust enforcement agencies has occupied the energies of the Department of Justice and the FTC since the Commission began operating in March 1915. For many years, the two agencies have allocated matters 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.⁽³⁶⁾ On average, from 1982 through 1989, 10 clearance disputes arose each year. In contrast, between 1990 and 2001, the annual number of contested matters has equaled or exceeded 45, and in three years exceeded 100. On average, 83 clearance disputes occurred annually during this period.
- These disputes result in significant delays. Delays averaging three weeks occurred in 24 percent of the matters on which either agency sought clearance from the beginning of FY 2000 through January 28, 2002. Cumulatively, these investigations were delayed by 4,521 business days - more than 17 years. During this time, neither agency could investigate potentially serious allegations of illegal behavior.⁽³⁷⁾ Recognizing the severity of the problem, FTC Chairman Robert Pitofsky and Assistant Attorney General Joel Klein attempted to negotiate a global clearance agreement for over a year, but could not reach consensus.
- Consistent with his authority,⁽³⁸⁾ Chairman Muris negotiated a new clearance agreement with Assistant Attorney General for Antitrust Charles James.⁽³⁹⁾ The new agreement will allocate matters between the two agencies more efficiently, rationally, and predictably. This agreement allocates primary areas of responsibility for antitrust enforcement on an industry-wide basis, and implements expedited clearance dispute resolution procedures. The new agreement will enhance the quality of antitrust enforcement, and will benefit businesses,

consumers, and taxpayers.⁽⁴⁰⁾ Moreover, an agreement that allocates primary areas of enforcement responsibility enjoys overwhelming support within the antitrust and business communities.⁽⁴¹⁾ The clearance agreement requires that the agency heads review the allocation of industries in four years to determine whether the goal of efficiently and rationally allocating competition matters is being achieved.

- In response to concerns about the agreement expressed by the Chairman of this Subcommittee, the agencies have provided information on clearance procedures, the historical allocation of matters, and clearance delays. We will, of course, provide any additional information that the Subcommittee desires.

C. Nonmerger Enforcement

The FTC will continue the trend, begun last year, to devote more resources to nonmerger enforcement. In FY 2001, the agency opened 56 nonmerger investigations, more than double the number of such investigations begun in the previous year, when deadline-sensitive HSR merger investigations siphoned away resources allocated for nonmerger work. Thus far in FY 2002, the agency has opened 15 nonmerger investigations. The major focus of our nonmerger work will concern activities among competitors, reflecting the broad consensus in antitrust policy that horizontal arrangements that fix prices or restrict output are the ones most likely to harm consumers.

Efforts in this area are producing benefits for consumers. Just last month, the FTC settled litigation against American Home Products (AHP) to resolve charges that Schering-Plough Corporation (Schering) illegally agreed to pay AHP millions of dollars in exchange for AHP's agreement to delay introduction of a generic potassium chloride supplement, which would have competed with Schering's branded K-Dur 20, used to treat patients with low potassium, which can lead to cardiac problems.⁽⁴²⁾ In another recent matter, the agency achieved a settlement with one defendant in a price-fixing case last fiscal year, and is presently in litigation with the other defendant.⁽⁴³⁾

The settlement with AHP marks the third instance in which the FTC has reached a settlement with generic or branded drug manufacturers regarding alleged anticompetitive conduct designed to delay generic entry.⁽⁴⁴⁾ A major portion of the American health care dollar purchases prescription drugs, and we will continue our efforts to prevent firms from engaging in anticompetitive practices that raise drug prices. In particular, we will strive to ensure that anticompetitive practices do not delay market entry of generic drugs, which cost less than name-brand pharmaceuticals. We will seek to ensure that protections provided to drug innovators under the Hatch-Waxman Act are not abused to the detriment of consumers. As you know, Hatch-Waxman was designed to increase the flow of new pharmaceuticals into the marketplace by carefully balancing two public policy objectives: encouraging vigorous competition from generic drugs, while maintaining incentives to invest in the development of innovator drugs.

In addition to agreements between makers of brand-name drugs and makers of generics, under which the generic entrant is essentially paid not to compete, the FTC continues to investigate unilateral conduct by branded manufacturers designed to forestall competition. For example, some branded manufacturers list additional patents in the FDA's "Orange Book," often shortly before their original patents expire, which sets the stage for launching 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. If the listings do not meet statutory and regulatory requirements, their inclusion in the Orange Book may constitute unlawful restraints on competition.⁽⁴⁵⁾

To uncover whether strategies such as these are isolated examples or represent patterns of anticompetitive conduct, the Commission has undertaken a study, as requested by Representative Henry Waxman, to provide a more complete picture of how generic competition has developed under the Hatch-Waxman Act. The Commission has issued nearly 100 orders to innovator and generic drug companies to obtain documents related to the issues identified through investigations and to identify

any other anticompetitive strategies that may exploit certain Hatch-Waxman provisions. The facts obtained through this study may provide a basis for policy recommendations in this area.

D. Targeting Resources for Consumer Impact

In both its merger and nonmerger programs, the FTC will continue to focus competition resources in sectors of the economy that have a substantial impact on consumers' wallets. Because of the important cost implications for consumers, one critical area is health care. Health related products and services account for over 13 percent of gross domestic product, up from 10.9 percent in 1988.⁽⁴⁶⁾ In addition to preserving opportunities for generic drugs to compete, the FTC's enforcement agenda also includes agreements among doctors and other health professionals to restrict competition, codes of conduct containing anticompetitive provisions, and mergers of hospitals and suppliers of health care products.

Another critical sector is energy. Representing a significant portion of the total U.S. economic output, energy is a vital input to virtually all parts of the economy. The FTC has garnered considerable experience with energy issues over the past two decades, investigating numerous oil mergers and bringing cases in appropriate instances. Recently, the FTC obtained two significant settlements to prevent loss of competition resulting from the Chevron/Texaco⁽⁴⁷⁾ and Valero/Ultramar Diamond⁽⁴⁸⁾ mergers.⁽⁴⁹⁾ To understand current issues involving energy markets, the agency has recently announced that we will hold a second public conference to examine factors that affect prices of refined petroleum products in the U.S. The agency held a preliminary conference on the subject last fiscal year. In addition, the FTC will continue to investigate pricing behavior, where appropriate, in energy markets. In just the past year, we investigated various price spikes or pricing anomalies in petroleum products. Staff also investigated the gasoline price spikes in the aftermath of the September 11th terrorist attacks. Thus far, we have found no evidence of collusive activity in violation of the antitrust laws. Commission investigations nonetheless both have a deterrent effect on wrongdoing and provide the basis for action when anticompetitive practices have occurred.

Yet another sector of the economy involves high tech industries. Our economy increasingly has become more knowledge-based; for some companies, patent portfolios represent far more valuable assets than manufacturing or other physical facilities. Thus, an increasing number of the FTC's competition matters require the application of antitrust law to conduct relating to intellectual property. Both antitrust and intellectual property law share the common purposes of promoting innovation and enhancing consumer welfare. On occasion, however, there have been tensions in how to manage the intersection between the doctrines, as well as questions about how best to spur innovation through competition and intellectual property law and policy. The FTC and DOJ currently are holding a series of hearings on competition and intellectual property law and policy to help understand the interplay between intellectual property and antitrust law.⁽⁵⁰⁾ Issues to be addressed in the hearings include standard-setting, cross-licensing and patent pools, unilateral refusals to deal, proliferation of patents, and the changing scope of patents. In addition to the hearings, we continue to pursue antitrust investigations involving issues concerning intellectual property.

E. Outreach Efforts

The FTC will continue competition outreach to various constituencies during FY 2003. Among these efforts, the agency strives to increase understanding and awareness of important emerging industries and issues, such as business-to-business (B2B) and business-to-consumer (B2C) electronic commerce. The FTC also increases awareness of antitrust law through guidance to the business community; outreach efforts to Federal, state and local agencies, business groups, and consumers; the development and publication of antitrust guidelines and policy statements; speeches; and publications. The agency will assess the need for additional workshops, and whether its ongoing outreach efforts effectively target audiences and address critical issues in the marketplace.

IV. NEEDED RESOURCES - FISCAL YEAR 2003

To accomplish our mission in FY 2003, the FTC requests \$176,509,000 and 1,074 FTE. The increase of \$20,527,000 over FY 2002 includes:

- \$7,352,000 for base expenses (including pay raises, non-pay inflation, increased rental of space, and increased Consumer Response Center contract costs);
- \$5,000,000 for expenses related to generating a National Do-Not-Call List to protect consumers' privacy;
- \$3,265,000 for systems support and the increased physical security for staff; and
- \$4,910,000 to comply with proposed legislation (to require agencies to pay the full Government share of accruing costs of retirement for current CSRS employees and post-retirement health benefits).

The FTC's FY 2003 budget request is calculated based on using two sources of offsetting collections: an estimated \$173,509,000 from HSR Premerger Filing Fees and an estimated \$3,000,000 from a new Do-Not-Call fee. The HSR fee estimate is based on a three-tiered filing rate structure mandated by Congress, with an effective date of February 1, 2001. The new Do-Not-Call fee would be assessed, collected, and used to cover the costs of developing, implementing, and maintaining a national database of telephone numbers of consumers who choose not to receive telephone solicitations from telemarketers. This new fee structure will be subject to notice and comment as part of a rulemaking process.

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Mr. Chairman, the FTC appreciates your past support and that of this Subcommittee. I would be happy to answer any questions that you and other Members may have about the FTC's budget request and programs.

Endnotes:

1. The 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. The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* With certain exceptions, the statute provides the agency with jurisdiction over nearly every sector of the economy. Certain entities, such as depository institutions and common carriers, as well as at the business of insurance, are wholly or partially exempt from FTC jurisdiction. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 additional statutes and more than 30 rules governing specific industries and practices.
3. See, e.g., Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* (prohibiting deceptive or unfair acts or practices, including violations of stated privacy policies); Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (addressing the accuracy, dissemination, and integrity of consumer reports); Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* (including the Telemarketing Sales Rule, 16 C.F.R. Part 310) (prohibiting telemarketers from calling at odd hours, engaging in harassing patterns of calls, and failing to disclose the identity of the seller and purpose of the call); Children's Online Privacy Protection Act, 15 U.S.C. § 6501 *et seq.* (prohibiting the collection of personally identifiable information from young children without their parents' consent); Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. §1028 (directing the FTC to collect identity theft complaints, refer them to the appropriate credit bureaus and law enforcement agencies, and provide victim assistance); Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (requiring financial institutions to provide notices to consumers and allowing consumers (with some exceptions) to choose whether their financial institutions may share their information with third parties).
4. The European Commission's Directive on Data Protection became effective in October 1998, and prohibits the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standard for privacy protection. To bridge different privacy approaches between the U.S. and the EU, and to provide a streamlined means for U.S. organizations to comply with the Directive, the U.S. Department of Commerce, in consultation with the European Commission, developed a "Safe Harbor" framework, which was approved by the EU in July 2000. Companies that self-certify to the Department of Commerce that they comply with the Safe Harbor Principles may be deemed by the EU to provide "adequate" privacy protection under the EU Directive. The FTC will give priority to referrals of non-compliance with safe harbor principles from EU Member States. See Department of Commerce's Safe Harbor Website, www.export.gov/safeharbor.

5. *Eli Lilly & Co.*, No. 012-3214 (Jan. 18, 2002) (consent agreement accepted subject to public comment).
6. 15 U.S.C. § 6501 *et seq.*
7. *United States v. American Pop Corn Co.*, No. C02-4008DEO (N.D. Ia., Feb. 28, 2002) (consent decree); *United States v. Lisa Frank, Inc.*, No. 01-1516-A (E.D. Va., Oct. 3, 2001) (consent decree); *United States v. Looksmart, Ltd.*, No. 01-606-A (E.D. Va., Apr. 23, 2001) (consent decree); *United States v. Bigmailbox.com, Inc.*, No. 01-605-A (E.D. Va., Apr. 23, 2001) (consent decree); *United States v. Monarch Servs., Inc.*, No. AMD 01 CV 1165 (D. Md., Apr. 20, 2001) (consent decree).
8. *FTC v. Boivin*, No. 8:02-CV-77-T-26 MSS (M.D. Fla., Jan. 15, 2002) (consent decree); *FTC v. Estenson*, No. A3-02-10 (DND, Feb. 5, 2002) (consent decree); *FTC v. Larsen*, No. 8:02-CV-76-T-26MAP (M.D. Fla., Jan. 16, 2002) (consent decree); *FTC v. Lutheran*, No. 02 CV 0095 K (RAB) (S.D. Cal., Jan. 18, 2002) (consent decree); *FTC v. Va.*, No. 02-60062-Civ-Zloch (S.D. Fla., Jan. 18, 2002) (consent decree); *FTC v. Pacheco*, No. 02-CV-31L (D.R.I., Jan. 22, 2002) (consent decree).
9. "Information Brokers Settle FTC Charges," FTC Press Release (Mar. 8, 2002), available at <<http://www.ftc.gov/opa/2002/03/pretextingsettlements.htm>>>.
10. 15 U.S.C. § 1681 *et seq.*
11. See Telemarketing Sales Rule, 16 C.F.R. Part 310.
12. 67 Fed. Reg. 4492 (Jan. 30, 2002).
13. The Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801(b) and 6805(b), requires the FTC to issue a rule establishing appropriate standard for safeguards to ensure the security, confidentiality, and integrity of customer records and information.
14. See Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028. This Act makes the FTC a central clearinghouse for identity theft complaints. Under the Act, the FTC is required to log and acknowledge such complaints, provide victims with relevant information, and refer their complaints to appropriate entities (e.g., the major consumer reporting agencies and other law enforcement agencies).
15. The report is available at <<http://www.ftc.gov/opa/2002/03/wireless.htm>>>.
16. See "FTC to Host Public Workshop on Consumer Information Security," FTC Press Release, available at <<http://www.ftc.gov/opa/2002/03/security.htm>>>.
17. *FTC v. Vital Living Products, Inc.*, Civ. No. 3:02CV74-MU (W.D.N.C., proposed consent decree filed with court, Feb. 25, 2002).
18. *Kris A. Pletschke*, C-4040 (Feb. 22, 2002) (consent order).
19. The top 10 targeted frauds were: Internet Auction Fraud, Internet Service Provider Schemes, Internet Web Site Design/Promotions (Web Cramming, Internet Information and Adult Services), Credit Card Cramming, Multi-level Marketing/Pyramid Schemes, Business Opportunities and Work-At-Home Scams, Investment Schemes and Get-Rich-Quick Schemes, Travel/Vacation Fraud, Telephone/Pay-Per-Call Solicitation Frauds (including modem dialers and videotext), and Health Care Frauds.
20. *Interstate Bakeries Corp.*, File No. 012 3182 I (consent agreement accepted subject to public comment, Mar. 6, 2002); *Campbell Mithun LLC*, File No. 012 3182 (consent agreement accepted subject to public comment, Mar. 6, 2002).
21. *FTC v. Ira Smolev*, No. 01-8922-Civ-Zloch (S.D. Fla., consent decree entered as to all except two defendants, Nov. 28, 2001).
22. *FTC v. Access Resource Services, Inc.*, No. 02-60226 Civ. Gold (S.D. Fla., stipulated preliminary injunction entered Feb. 20, 2002).
23. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000), available at <<http://www.ftc.gov/reports/violence/vioreport.pdf>>>.
24. Conf. Rpt. on H.R. 2500 (FY 02 appropriations), H.Rep. No. 278, 107th Cong., 1st Sess. 162 (Nov. 9, 2001).
25. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (April 2001), available at <<http://www.ftc.gov/reports/violence/violence010423.pdf>>>.

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

27. 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553; 114 Stat. 2762 (2000).

28. For example, the FTC's settlement agreement in *Chevron Corp./Texaco Inc.*, No. C-4023 (Jan. 2, 2002) (consent order), provided for relief in (1) retail gasoline markets in numerous metropolitan areas in various parts of the country, including Alaska and Hawaii, the western United States (including Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), and the southern United States (including Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia); (2) marketing of CARB gasoline in California; (3) refining and bulk supply of CARB gasoline for sale in California; (4) refining and bulk supply of gasoline and jet fuel in the Pacific Northwest; (5) the bulk supply of RFG II gasoline into St. Louis; (6) terminaling of gasoline and other light petroleum products in several metropolitan areas in Arizona, California, Mississippi, and Texas, and on four Hawaiian islands; (7) transportation of crude oil from California's San Joaquin Valley; (8) transportation of crude oil in the eastern Gulf of Mexico; (9) pipeline transportation of natural gas in the Central Gulf of Mexico; (10) natural gas fractionating in Texas; and (11) marketing of general aviation gasoline in 14 states (Alaska, Alabama, Arizona, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Tennessee, Utah, and Washington).

29. 15 U.S.C. § 18.

30. *MSC.Software Corp.*, No. D-9299 (complaint issued Oct. 10, 2001) (alleging that a dominant supplier of a popular type of advanced computer-aided engineering software acquired its only two competitors).

31. This fiscal year, the Commission has issued final consent orders in the following eight merger cases: *Ina-Holding Schaeffler KG/FAG Kugelgischer Georg Schafer AG*, No. C-4033 (Feb. 15, 2002); *Nestle Holdings, Inc./Ralston Purina Co.*, No. C-4028 (Feb. 8, 2002); *Diageo p.l.c./Vivendi Universal S.A.*, No. C-4032, (Feb. 8, 2002); *Chevron Corp./Texaco Inc.*, No. C-4023 (Jan. 2, 2002); *Valero Energy Corp./Ultramar Diamond Shamrock Corp.*, No. C-4031 (Feb. 19, 2002); *Koninklijke Ahold N.V./Bruno's Supermarkets, Inc.*, No. C-4027 (Jan. 16, 2002); *Metsø Oyj/Svedala Industri AB*, No. C-4024 (Oct. 23, 2001); *Airgas*, No. C-4029 (Dec. 18, 2001). On March 7, 2002, the Commission accepted subject to public comment a settlement in the matter of *Deutsche Gelatine-Fabriken Stoess AG/Goodman Fielder Ltd.*, File No. 011-0117. In addition, the Commission obtained a consent decree in the matter of Hearst's acquisition of J.B.Laughery. *FTC v. The Hearst Trust*, No. 1:01CV00734 (D.D.C., Dec. 18, 2001).

32. *MSC.Software*, *supra* n. 30; *Chicago Bridge Iron Co., Inc.*, Dkt. No. 9300 (complaint issued Oct. 25, 2001); *Libbey, Inc./Newell Rubbermaid, Inc.*, No. 1:02CV00060 (D.D.C., complaint filed Jan. 14, 2002).

33. *Diageo/Vivendi* and *Deutsche Gelatine-Fabriken Stoess/Goodman Fielder*, *supra* n. 31.

34. 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553; 114 Stat. 2762 (2000).

35. 16 CFR § 2.20. To date, two appeals have been filed under this procedure; both have been completed.

36. Perhaps the most notable example of industry convergence and resulting clearance disputes concerns electricity and natural gas. Historically, electricity matters have been handled by the DOJ, and natural gas matters have been handled by the FTC. Convergence of these industries has led to contentious clearance disputes. Each merger of an electricity company and a natural gas company has been hotly contested by the agencies. Disputes over these convergence mergers have accounted for approximately 10 percent of all clearance disputes since the beginning of FY 2000. Moreover, to resolve clearance disputes generally, it became increasingly necessary to employ conditions - such as Chairman Pitofsky's agreement that, in return for receiving clearance to investigate the matter, the FTC would not cite its expertise in AOL/Time Warner as a source of expertise in future clearance disputes.

37. The number of disputes has decreased somewhat recently, particularly since Chairman Muris and Charles James assumed office last summer and resolved a clearance dispute that had lasted for more than a year. In effect, they declared a cease-fire in the clearance war while attempting to negotiate a peaceful settlement. In any event, the Commission believes that its scarce resources should be spent on investigating allegations of misconduct, and in developing appropriate expertise, rather than in fighting with the Antitrust Division. Moreover, the recent decline in clearance disputes may reflect the recent decline in merger filings. Changing market conditions could lead to an increase in merger filings and, consequently, an increase in clearance disputes.

38. See Statement of Commissioners Orson Swindle and Thomas B. Leary on the Memorandum of Agreement Concerning Clearance Procedures for Investigations (Jan. 18, 2002) (stating that "We are not troubled by the process by which the Agreement was fashioned. Not only was negotiation of the Agreement with Assistant Attorney General James the prerogative of Chairman Muris; it was also simply the most effective way to get the job done. Historically, the agencies employed a procedure for dealing with clearance issues that was based on a case-by-case approach, with the Chairman and the Assistant Attorney General making the ultimate decision when necessary (with little or no involvement by other Commissioners). This long course of interagency discussion and negotiation then established "precedent" for allocating antitrust review responsibilities between the agencies -- a kind of "private law" for the kinds of matters that the Agreement was designed to describe publicly. It is proper that the agency heads were the ones to devise a new arrangement that would have injected greater efficiency and clarity into the allocating system -- a system in which the Chairman, and not other Commissioners, will continue to have operational responsibilities."), available at

<<<http://www.ftc.gov/opa/2002/01/ftcdojostl.htm>>>.

39. See Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, available at <<<http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>>>.

40. See Statement of Commissioners Orson Swindle and Thomas B. Leary on the Memorandum of Agreement Concerning Clearance Procedures for Investigations (Jan. 18, 2002), *supra* n.38; "FTC Releases Antitrust Clearance Process Documents," FTC Press Release (Feb. 27, 2002), available at <<<http://www.ftc.gov/opa/2002/02/clearance.htm>>>; and "FTC and DOJ Announce New Clearance Procedures for Antitrust Matters," FTC Press Release (Mar. 5, 2002), available at <<<http://www.ftc.gov/opa/2002/03/clearance.htm>>>.

41. See Letter from Robert Pitofsky, *et al.* to Timothy J. Muris and Charles A. James (Feb. 4, 2002), available at <<<http://www.ftc.gov/opa/2002/02/clearance/multileters.pdf>>>; Letter from Roxane C. Busey, Chair, Section of Antitrust Law, American Bar Association, to Timothy J. Muris and Charles A. James (Jan. 23, 2002), available at <<<http://www.ftc.gov/opa/2002/02/clearance/aba.pdf>>>; and Letter from the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce to Timothy J. Muris (Feb. 25, 2002), available at <<<http://www.ftc.gov/opa/2002/02/clearance/brt.pdf>>>. Of course, most of the signatories to these three letters did not possess detailed knowledge of the recent, industry-specific expertise of the FTC and the DOJ. Accordingly, they could not, and did not, opine on specific allocations between the FTC and the DOJ. Some consumer groups, however, have expressed concerns about the agreement. See Jeffrey Chester, Center for Digital Democracy, "FTC-DOJ Clearance Agreement Will Hurt Consumers," available at <<<http://www.democraticmedia.org/news/dojclearance.html>>>; Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Senator Ernest F. Hollings (Jan. 22, 2002), available at <<<http://www.mediaaccess.org/press/hollingsletter.pdf>>>.

42. *American Home Products Corporation*, Dkt. No. 9297 (consent agreement accepted subject to public comment, Feb. 19, 2002). Complaints against Schering and Upsher-Smith are currently before an FTC administrative law judge. *Schering-Plough Corporation, Upsher-Smith Laboratories, Inc.*, Dkt. No. 9297 (complaints filed Apr. 2, 2001).

43. In September of 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." *Warner Communications, Inc.*, No. C-4025 (Sept. 17, 2001) (consent order). The case against Vivendi Universal S.A., the successor corporation to Polygram, is currently before an FTC administrative law judge, Dkt. No. 9298.

44. The other two cases are *Abbott/Geneva* (*Abbott Laboratories*, No. C-3945 (May 22, 2000), and *Geneva Pharmaceuticals, Inc.*, No. C-3946 (May 22, 2000) (consent orders)) and *Hoechst Marion Roussel, Inc./Andrx Corp.*, No. C-9293 (May 11, 2001) (consent order).

45. The FTC recently filed an amicus brief in the *In Re Buspirone Patent Litigation* that addresses some of these issues. The *Buspirone* litigation concerns whether Bristol-Myers Squibb Company ("BMS") violated Section 2 of the Sherman Act by making false filings with the U.S. Food and Drug Administration that caused BMS's newly issued patent to be wrongfully listed in the FDA's Orange Book in order to block generic competition to its branded drug, BuSpar. BMS argued that a claim based on its allegedly improper filing of a patent in the FDA's Orange Book could not proceed because its actions were entitled to immunity under the *Noerr-Pennington* doctrine. The *Noerr* doctrine immunizes genuine petitioning activity directed at persuading government bodies to adopt a particular course of action. In its brief, the Commission argued that Orange Book filings, even when made properly, are decidedly not "petitions." Rather, they are mechanical, informational filings that do not trigger any exercise of legal or discretionary judgment by the FDA and do not call for any agency decision-making. FDA's role in receiving and publishing Orange Book information is simply ministerial. As such, Orange Book filings are akin to tariff filings, which have consistently been held not to constitute immunized *Noerr* petitioning. The district court recently issued a decision on a motion to dismiss in this case that accepted the arguments made by the Commission and squarely held that Orange Book filings are not petitioning under *Noerr*. *In Re Buspirone Patent Litigation*, MDL Dkt. No. 1410, 2002 U.S. Dist. LEXIS 2625, (S.D.N.Y., motion to dismiss granted in part and denied in part, Feb. 14, 2002). The Commission's amicus brief is available at <<<http://www.ftc.gov/os/2002/01/busparbrief.pdf>>>.

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

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

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

49. Additionally, in recent years, the agency has achieved significant settlements, requiring divestitures of oil fields, refineries, pipelines, and gas stations to prevent loss of competition resulting from the Exxon/Mobil and BP/ARCO mergers. *Exxon Corp./Mobil Corp.*, No. C-3907 (January 26, 2001) (consent order) and *BP Amoco p.l.c./Atlantic Richfield Co.*, No. C-3938 (Aug. 29, 2000) (consent order).

50. See FTC/DOJ Hearings to Highlight Further Business and Economic Perspectives on Competition and Intellectual Property Policy, "FTC Press Release (Mar. 12, 2002), available at <<<http://www.ftc.gov/opa/2002/03/ftcdoihearing.htm>>>; FTC/DOJ Hearings to Highlight Business and Economic Perspectives on Competition and Intellectual Property Policy," FTC Press Release (Feb. 15, 2002), at <<<http://www.ftc.gov/opa/2002/02/ipsecon.htm>>>; "FTC/DOJ Hearings to Focus on the Implications of Competition and Patent Law and Policy," FTC Press Release (Jan. 30, 2002), at <<<http://www.ftc.gov/opa/2002/01/iphearings.htm>>>; "Muris Announces Plans for Intellectual Property Hearings," FTC Press Release (Nov. 15, 2001), at <<<http://www.ftc.gov/opa/2001/11/prelease.htm>>>.