UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Prepared Statement of the Federal Trade Commission

presented by

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Before the

Subcommittee on Antitrust, Business Rights, and Competition

Committee on the Judiciary

United States Senate

March 22, 2000

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

Mr. Chairman and Members of the Subcommittee, I am pleased to appear before you to present testimony of the Federal Trade Commission that will provide an overview of our antitrust enforcement activities. Today I will review the Commission's activities since I last testified for general antitrust oversight purposes. The Commission is charged with the enormous responsibility of ensuring that consumers receive the benefits of a competitive marketplace, a mission that we share with the U.S. Department of Justice. We welcome that responsibility and believe that we are fulfilling our obligation.

The Commission strongly believes in the bedrock principle that protecting competition by preventing improper creation, acquisition, or exercise of market power enhances the welfare of consumers. Congress decided long ago that a competitive economy is vastly preferable to an economy reliant on government regulation of the conduct of firms with market power. Competition is the best way to ensure that consumers receive the benefits of lower prices, higher quality and quantity of goods and services, and greater innovation. That approach has been validated throughout the past hundred and ten years of antitrust enforcement.

These are dynamic times for the economy, and with these changes come many challenges for the antitrust agencies. The economy is rapidly being reshaped, and markets are being created or redefined, by numerous forces operating at the same time, including: the explosion of electronic commerce; deregulation of critical industries such as telecommunications, financial services and electricity; convergence of technologies and, indeed, of markets; and globalization. These forces result in a fast-changing, more complex economy, even with respect to basic sectors of the economy such as electricity. While these changes carry the promise of tremendous benefits for consumers, some may also create incentives and opportunities for anticompetitive behavior.

The challenge for us, apart from the sheer magnitude of the amount of activity, is to understand these changes and to know when antitrust intervention is appropriate.

The Commission's approach to antitrust enforcement is guided by two important principles. First, we seek to enforce the antitrust laws with vigor, and protect consumers from abuses of market power in whatever form. It is the Commission's responsibility to protect consumers from anticompetitive consequences of private agreements, the abuse of monopoly power, or illegal mergers. The Commission also recognizes, however, the costs that government intervention can place on private parties. For this reason, our second guiding principle is to avoid unnecessary intrusions and to minimize, to the extent possible, the burdens placed on businesses by our efforts to protect consumers. We have an important responsibility to ensure that antitrust policy makes sense and is sensibly and effectively applied.

I will begin this overview with a topic that is not new news, but is still big news – the astounding level of merger activity. We are busier than ever on that front. I will review some recent merger enforcement actions that have had particularly immediate significance for consumers. I will then cover several other areas that receive our close attention: competitor collaborations, retailing, and health care markets.

Level of Merger Activity

The number of mergers reported to the FTC and the Justice Department pursuant to the Hart-Scott-Rodino Act has more than tripled over the past decade, from 1,529 transactions in fiscal year 1991 to 4,642 transactions in fiscal 1999. Thus far in fiscal year 2000, filings are at a record pace; if this continues, filings for the year will be approximately 18% above the record set in fiscal 1998.

Currently, more than two-thirds of our competition resources are dedicated to merger enforcement, compared to an historical average of closer to 50%. The merger wave strains the FTC resources to the breaking point. The *Washington Post* recently characterized the merger wave as a "frenzy of merger madness, capping a dramatic wave of corporate consolidation that has been gaining momentum through much of the decade."[1] The article quotes merger experts who note that a key force driving merger activity is the new world of electronic commerce.

While the number of merger filings has more than tripled in the past decade, the dollar value of commerce affected by these mergers rises on an even steeper trajectory, increasing an astounding eleven-fold during the past decade.[2] But mere numbers do not fully capture the complexity and the challenge of the current merger wave. Today's merger transactions not only are larger, but often raise novel or complex competitive issues requiring more detailed analysis. In the past year alone, companies filed notifications for 273 mergers with a transaction size of one billion dollars or more, and many of these mergers involved overlaps in several products or services.

There are many reasons for the current merger wave. A large percentage of these transactions appear to be a strategic response to an increasingly global economy. Many are in response to new economic conditions produced by deregulation (*e.g.*, telecommunications, financial services, and electric utilities). Still others result from the desire to reduce overcapacity in more mature industries. The rapidly evolving world of electronic commerce has a substantial

[1] Sandra Sugawara, *Merger Wave Accelerated in '98: Economy, Internet Driving Acquisition*, Wash. Post, Dec. 31, 1999 at E1.

[2] *See* Attachment 1.

impact on the merger wave, because consolidations often quickly follow the emergence of a new marketplace. These factors indicate that the merger wave reflects a dynamic economy, which on the whole is a positive phenomenon. But some mergers, as well as some other forms of potentially anticompetitive conduct, may be designed to stifle competition in important sectors of this dynamic economy.

Out of necessity, our scarce resources are directed at preserving competition in the most important areas of the economy. The Commission dedicates the bulk of its antitrust enforcement to sectors that are critical to our everyday lives, such as health care, pharmaceuticals, retailing, information and technology, energy, and other consumer and intermediate goods. Rather than recite a litany of cases, I will focus on some cases that underscore the importance of the Commission's antitrust enforcement as we move forward in this new century.

Merger Enforcement

In the last two fiscal years and fiscal 2000 to date, the Commission has brought over 60 enforcement actions in industries ranging from food retailing to basic industrial products.[3] Retailing, energy, and pharmaceuticals commanded the most enforcement resources.[4]

The Commission has committed considerable resources to addressing the wave of consolidation in the petroleum and gasoline industry. In fiscal years 1999 and 2000 to date, the FTC's Bureau of Competition used a staggering one-third of its enforcement budget to address

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[3] In addition, 19 merger filings were withdrawn before the Commission's investigation was completed.

[4] Telecommunications, especially in the areas of cable and video programming, also has been, and continues to be, an area of substantial activity. See Prepared Statement of the Federal Trade Commission, Presented by Robert Pitofsky, Chairman, Before The Committee on Commerce, Science, and Transportation, United States Senate, November 8, 1999.

issues in energy industries. In February of this year, we filed an action in federal district court in San Francisco seeking a preliminary injunction against the proposed merger of BP Amoco p.l.c. and Atlantic Richfield Company ("ARCO").[5] The complaint alleges that the merger would combine the two largest firms exploring for and producing crude oil on the North Slope in Alaska; that BP already exercises market power in the sale of crude oil on the West Coast; and that by acquiring ARCO, BP would eliminate as an independent competitor the firm most likely to threaten BP's market power. ARCO, the pioneer on the North Slope, has been the most aggressive explorer for oil in Alaska's history.[6] The Commission's suit has been joined by suits filed by the States of California, Oregon, and Washington. This is the latest of a number of enforcement actions in which the Commission worked with various states in pursuit of our common interest in protecting American consumers. Last week, the Commission, the states and the parties obtained an order from the Court adjourning the preliminary injunction hearing while the Commission evaluates the parties' proposal to sell all of ARCO's Alaska operations to Phillips Petroleum Co.

The BP/ARCO case comes on the heels of the Commission's investigation of the merger between Exxon and Mobil. After an extensive review, from oil fields to the gas pump, the

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[5] *Federal Trade Commission v. BP Amoco, p.l.c.*, Civ. No. C 000416 (SI) (N.D. Cal. Feb. 4, 2000) (complaint).

[6] The complaint also alleges that the combination of BP's and ARCO's pipeline and oil storage facilities in and around Cushing, Oklahoma, a major crude oil trading center, would enable the combined firm to manipulate the market for crude oil futures contracts traded on the New York Mercantile Exchange. Those contracts involve crude oil designated for delivery in Cushing. The complaint alleges that the combination of BP's futures trading business and existing pipeline and terminal facilities with ARCO's pipelines, oil storage infrastructure, and in-line transfer business would increase BP's ability to manipulate crude oil futures trading by giving it access to information and control over pipelines and other essential facilities.

Commission required the largest retail divestiture in FTC history – the sale or assignment of 2,431 Exxon and Mobil gas stations in the Northeast and Mid-Atlantic, and California, Texas and Guam.[7] The Commission also ordered the divestiture of Exxon's Benicia refinery in California; light petroleum terminals in Boston, Massachusetts, Manassas, Virginia, and Guam; a pipeline interest in the Southeast; Mobil's interest in the Trans-Alaska Pipeline; Exxon's jet turbine oil business; and a volume of paraffinic lubricant base oil equivalent to Mobil's production. The Commission coordinated its investigation with the Attorneys General of several states and with the European Commission (about 60% of the merged firm's assets are located outside the United States).

There are several particularly noteworthy aspects of the Exxon/Mobil settlement. First, the divestiture requirements eliminated *all* of the overlaps in areas in which the Commission had evidence of competitive concerns. Second, while several different purchasers may end up buying divested assets, each will purchase a major group of assets constituting a business unit. This is likely to replicate, as nearly as possible, the scale of operations and competitive incentives that were present for each of these asset groups prior to the merger. Third, these divestitures, while extensive, represent a small part of the overall transaction. The majority of the transaction did not involve significant competitive overlaps. In sum, we were able to resolve the competitive concerns presented by this massive merger without litigation.

[7] *Exxon Corp.*, FTC File No. 991 0077 (Nov. 30, 1999) (proposed consent order).

The Commission also required divestitures in the merger between BP and Amoco,[8] and in a joint venture combining the refining and marketing businesses of Shell, Texaco and Star Enterprises to create at the time the largest refining and marketing company in the United States.[9]

The Commission challenged potentially anticompetitive mergers in other energy industries as well. Three recent matters served to protect emerging competition in electric power generation. Two of these cases were so-called "convergence mergers," where an electric power company proposed to acquire a key supplier of fuel used to generate electricity. One involved PacifiCorp's proposed acquisition of The Energy Group PLC and its subsidiary, Peabody Coal. PacifiCorp's control of certain Peabody coal mines allegedly would have enabled it to raise the fuel costs of its rival generating companies and raise the wholesale price of electricity during certain peak demand periods. The Commission secured a consent agreement to divest the coal mines, but the transaction was later abandoned by the parties.[10] In another case, Dominion Resources, an electric utility that accounted for more than 70% of the electric power generation capacity in the Commonwealth of Virginia, proposed to acquire Consolidated Natural Gas

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[8] *British Petroleum Company p.l.c.* , C-3868 (April 19, 1999) (consent order). BP/Amoco involved very large companies but relatively few significant competitive overlaps. The Commission ordered divestitures and other relief to preserve competition in the wholesaling of gasoline in 30 cities or metropolitan areas in the eastern and southeastern United States, and in the terminaling of gasoline and other light petroleum products in nine geographic markets.

[9] *Shell Oil Co.,* C-3803 (April 21, 1998) (consent order). The Shell/Texaco transaction raised competitive concerns in markets for gasoline and other refined petroleum products in the Pacific Northwest (Oregon and Washington), California, and Hawaii, for crude oil in California, and in the transportation of refined light petroleum products to several southeastern states. The Commission required the divestiture of a refinery in Washington, a terminal on the island of Oahu, Hawaii, retail gasoline stations in Hawaii and California, and a pipeline interest in the Southeast.

[10] *PacifiCorp,* FTC File No. 971 0091 (consent order accepted for public comment, Feb. 17, 1998). This order was withdrawn when the parties abandoned the transaction.

("CNG"), the primary distributor of natural gas in southeastern Virginia and the only likely supplier to any new gas-fueled electricity generating plants in that region. Dominion allegedly could have raised the cost of entry and power generation for new electricity competitors. Working closely with Commonwealth officials, the Commission required the divestiture of Virginia Natural Gas, a subsidiary of CNG.[11] In a third matter, the Commission challenged CMS Energy Corporation's proposed acquisition of two natural gas pipelines.[12] CMS itself was a transporter of natural gas, whose customers could purchase the gas from other suppliers, either for their own use or to generate electricity. The Commission alleged that the acquisition would have enabled CMS to raise the cost of transportation for its gas and electric generation customers. This case did not require divestitures, but the Commission's consent order assures that CMS cannot restrict access to its pipeline network, thus allowing new entry that should maintain a competitive market.

Another highlight from the past two years is the Commission's successful challenge to the proposed mergers of the nation's four largest drug wholesalers into two firms. McKesson Corp. proposed to acquire AmeriSource Health Corp., and Cardinal Health, Inc. proposed to acquire Bergen Brunswig Corp. The two surviving firms would have controlled over 80% of the prescription drugs sold through wholesalers. These mergers allegedly would have increased costs to these wholesalers' customers – thousands of pharmacies and hospitals. These two cases were among the few that have led to litigation in recent years (although many more had to be *prepared* for trial). The district court granted a preliminary injunction against both mergers, and the

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[11] *Dominion Resources, Inc.*, C-3901 (Dec. 9, 1999) (consent order).

[12] *CMS Energy Corp.*, C-3877 (June 2, 1999) (consent order).

transactions were later abandoned.[13] Another significant aspect of these two cases is that the district court's thoughtful and well-articulated opinion helped to update merger case law in several respects, including market definition and analysis of entry conditions, competitive effects, and efficiencies. This helps make antitrust law more transparent, and provides more guidance to the business community. The court's analysis is consistent with the Commission's analytical approach under the 1992 Horizontal Merger Guidelines, issued jointly by the Commission and the U.S. Department of Justice.[14]

Food retailing is another sector that is experiencing a period of consolidation. The number of supermarket mergers has increased dramatically just in the last three years. While the Commission has not challenged geographic expansion mergers, many mergers among direct local competitors have raised competitive concerns. The Commission has taken enforcement action where appropriate. Last June, for example, the Commission took steps to prevent undue market concentration resulting from Albertson's acquisition of American Stores – combining the second and fourth largest supermarket chains in the United States.[15] In *Albertson's* the Commission required the divestiture of over 140 stores in California, Nevada and Arizona – at the time, the largest retail divestiture in Commission history (but now surpassed by the Exxon/Mobil

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[13] *FTC v. Cardinal Health, Inc.*, 12 F. Supp.2d 34 (D.D.C. 1998).

[14] 1992 U.S. Dep't of Justice and Federal Trade Commission Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992; as amended, April 8, 1997).

[15] *Albertson's, Inc.*, FTC File No. 981 0339 (consent agreement accepted for public comment, June 21, 1999). The Commission has also challenged a number of other supermarket mergers. *E.g., Albertson's, Inc.*, C-3838 (Dec. 8, 1998) (consent order) (acquisition of Buttrey Food and Drug Store Co.); *Koninklijke Ahold N.V.*, C-3861 (April 14, 1999) (consent order) (acquisition of Giant Food, Inc.).

divestiture). In the last four years alone the Commission has brought more than 10 enforcement actions involving supermarket mergers, requiring divestiture of nearly 300 stores in order to maintain competition in local markets across the United States.

Another major transaction the agency reviewed last year was Barnes & Noble's attempted acquisition of Ingram Book Group. Barnes & Noble was the largest book retailing chain in the United States, and Ingram was by far the largest wholesaler of books in the United States. Thus, it was largely a vertical transaction. While many vertical transactions are likely to be efficiency-enhancing, and therefore few are challenged, the Commission staff saw the Barnes & Noble/Ingram transaction as a serious competitive threat to thousands of independent book retailers. The acquisition of an important upstream supplier such as Ingram might have enabled Barnes & Noble to raise the costs of its bookselling rivals by foreclosing access to Ingram's services, or denying access on competitive terms.[16] If rivals became less able to compete, Barnes & Noble could have increased its profits at the retail level or prevented its profits from being eroded by competition from new business forms such as Internet retailing. The Commission did not take formal action on this merger, because the parties abandoned the transaction before the staff made a final recommendation.

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[16] The merged firm might have been able to do so in a number of ways, including strategies short of an outright refusal to sell to the non-Barnes & Noble bookstores. For example, Barnes & Noble/Ingram could have chosen to (1) sell to non-Barnes & Noble bookstores at higher prices; (2) slow down book shipments to rivals; (3) restrict access to hot titles; (4) restrict access to Ingram's extended inventory of older titles; or (5) price services higher or discontinue or reduce services.

We have also challenged a number of other large mergers involving products and services that are highly important to consumers, including pharmaceutical products,[17] medical devices,[18] household products,[19] and insurance services.[20] In each of these cases, our goal has been to protect consumers from the potential exercise of market power by the merged firm, either unilaterally or in combination with others. Under the methodology we use to determine consumer savings pursuant to the Government Performance and Results Act, we estimate that the Commission's merger enforcement actions in fiscal year 1999 saved consumers from paying $1.2

[17] *E.g., Hoechst AG*, FTC File 991 0071 (consent agreement accepted for public comment, Dec. 2, 1999) (acquisition of Rhone-Poulenc S.A.; direct thrombin inhibitor drug); *Zeneca Group PLC*, C-3880 (June 7, 1999) (consent order) (acquisition of Astra AB; long-lasting local anesthetic); *Roche Holdings Ltd.*, C-3809 (May 22, 1998) (consent order) (acquisition of Corange Ltd.; cardiac thrombolytic agents and chemical used to detect the presence of illegal substances). The Commission also took action to prevent competitive harm from a pharmaceutical manufacturer's acquisition of a company providing services as a pharmacy benefits manager. *Merck & Co., Inc.*, C-3853 (Feb. 18, 1999) (consent order) (acquisition of Merck-Medco Managed Care, LLC).

[18] *SNIA S.p.A.*, C-3889 (July 28, 1999) (consent order) (heart and lung machines); *Medtronic, Inc.*, C-3880 (June 3, 1999) (consent order) (non-occlusive arterial pumps); *Medtronic, Inc.*, C-3842 (Dec. 21, 1998) (consent order) (automated external defibrillator).

[19] *Reckitt & Colman plc*, C-3918 (Jan. 18, 2000) (consent order) (household cleaning products); *Nortek, Inc.*, C-3831 (Oct. 8, 1998) (consent order) (residential intercoms); *S.C. Johnson & Son, Inc.* C-3802 (May 20, 1998) (consent order) (soil and stain removers); *CUC Int'l*, C-3805 (May 4, 1998) (consent order) (timeshare exchange services).

[20] *Fidelity National Financial, Inc.*, C-3929 (Feb. 25, 2000) (consent order) (title information services); *Unum Corp.*, C-3894 (Sept. 29, 1999) (consent order) (data for disability insurance); *Commonwealth Land Title Insurance Co.*, C-3834 (Nov. 10, 1998) (consent order) (title insurance); *Landamerica Financial Group, Inc*, C-3808 (May 20, 1998) (consent order) (title operations).

billion in higher prices.[21] In contrast, the Commission's budget for the competition mission in fiscal 1999 was only $55.7 million.

We have taken steps to ensure that these consumer savings are in fact realized, by implementing changes that result in better remedies. Last year, the staff completed a major study of merger remedies based on the Commission's merger cases in the early 1990s.[22] The study found that while most of the cases settled through divestitures resulted in the establishment of a new competitor to replace the one lost through the merger, there were some ways in which merger remedies could be improved to avoid potential problems. One of the steps we have taken is to require, in a greater number of cases, that the merging parties bring us qualified purchasers for the divestiture assets before the transaction may be consummated. This procedure, referred to as the "up-front buyer" requirement, requires the merging parties to find a suitable purchaser before the Commission accepts a settlement agreement. This procedure has several benefits for consumers: we know before accepting a divestiture settlement that a suitable buyer exists and that the divestiture package is an appropriate one, and we can restore the lost competition more quickly and with greater confidence that the divestiture will succeed. It also reduces the burden

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[21] The figure includes transactions that were withdrawn before the Commission's investigation was completed. Under the GPRA methodology, consumer savings estimates are based on the volume of commerce in the markets adversely affected by a merger, the percentage increase in price that likely would have resulted from the merger, and the likely duration of the anticompetitive price increase. In the absence of case-specific evidence that indicates higher or lower figures, conservative default parameters are applied to the volume of commerce: a one percent price increase for two years.

[22] Staff of the FTC Bureau of Competition, *A Study of the Commission's Divestiture Process* (1999).

of uncertainty on the merging parties, because they know up front that they have an acceptable candidate, and they can then devote their full attention to their newly merged business.

While we are on the subject of mergers, we would like to offer a few observations about Senate bill S.1854, which seeks to amend various provisions concerning the Hart-Scott-Rodino (HSR) process. First, the Commission supports efforts to raise the size-of-transaction threshold for HSR reporting from $15 million to $35 million. Although the threshold would be higher, however, the fee structure proposed in the bill is unlikely to meet the funding needs of the Commission in future years, and therefore it would need adjustment to account for future funding needs. Second, while the Commission agrees with the burden-reduction goals of S.1854, we have serious concerns about the procedures contemplated by the bill. We believe they are impractical, would themselves cause substantial delay in the process, and would seriously hinder our efforts to protect consumers from anticompetitive mergers.

The extent of burdens on the parties needs to be put into an appropriate perspective. The vast majority of merger filings are cleared within 20 days. Fewer than 3% of reported transactions receive a request for additional information (the so-called “second request”). The issuance of a second request is not undertaken lightly, and the care we take in choosing when to issue them is illustrated by the fact that a large majority of those transactions that receive second requests result in some form of enforcement action. In addition, most second request investigations are resolved without major document production. Over 60% of the investigations result in productions of fewer than 20 boxes of responsive documents, and over 85% of the second request investigations are resolved without the parties' having to complete their document production (*i.e.*, "substantially comply" with the second request).[23]

Nevertheless, we believe that there can be significant improvements in this process. Thus, we are engaged in a dialogue with members of the private antitrust bar, business representatives, and Members of Congress on how to reduce burdens by streamlining the process. We believe this can be done without legislation. Both the antitrust agencies and the private bar have a long history of cooperating in this fashion. Cooperation will lead to effective reforms that will meet the worthy goals sought by the proposed legislation, without the delays and impediments to thorough investigation that could result from the procedures contemplated by the legislation. Indeed, the FTC has already undertaken a number of internal reforms to expedite merger investigations and to provide parties with more complete information on the issues that give rise to an investigation. We will continue our efforts to make the process as efficient as possible and work with the business community to address their concerns.

In sum, we can all agree that the process can be improved, and we acknowledge the concerns of Senators Hatch, DeWine and Kohl that are reflected in the proposed legislation. Over the past several months we have been working with Congress, the business community and members of the private bar to find common ground for improving the process. We continue to believe that the issues can and should be resolved without legislation.

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[23] Many companies indicate a willingness to settle a case before completing their document production. Other companies work with staff from the Commission or Department of Justice ("DOJ") to determine some subset of documents that will enable a "quick look" at certain issues, so that resources can be focused on the topics of greatest debate.

Collaborations Among Competitors

Let us now shift gears and briefly discuss conduct in which competitors do not merge, but instead collaborate with each other. In today's markets, competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Most of these collaborations are procompetitive business arrangements that will benefit consumers; some, however, are not. Last October, the Federal Trade Commission and the Antitrust Division of the Department of Justice jointly issued draft "Competitor Collaboration Guidelines," which describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration among two or more competitors. The draft Guidelines were placed on the public record for comment, and they have received praise from sources as diverse as the Chamber of Commerce;[24] antitrust's leading treatise author, Professor Herbert Hovenkamp;[25] and practitioners, who found that "[b]y synthesizing the existing cases into an analytical framework, the Federal Trade Commission and the Department of Justice will have made antitrust analysis vastly more accessible to smaller law firms and their clients."[26] At the same time, useful suggestions have been made for clarifications and other changes to the Guidelines. The agencies are now considering those suggestions before issuing final Guidelines.

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[24] "[The Guidelines] no doubt will make a net positive contribution as a statement of agency thinking in this complex area of law." Comments of Chamber of Commerce at 2.

[25] "[The Guidelines] are quite good overall." Hovenkamp Comment at 1.

[26] Comment of Thomas F. Purcell, Lindquist & Vennum, St. Paul, Minnesota, at 1.

Retailing

As a result of global and innovation-based changes, consumers are becoming aware that a "retail revolution" is underway. To remain competitive, retailers – whether brick-and-mortar or online – are seeking new ways to market new and old products. This dynamic is leading to much pro-consumer innovation in retailing. For example, the Internet has changed traditional sales and distribution patterns for products of all types, providing faster, cheaper, and more efficient ways to deliver goods and services. A market study by Jupiter Communications estimates that annual consumer sales on the Internet will explode from $15 billion in 1999 to $78 billion by 2003. There appears to be tremendous demand for Internet-based services.

However, whenever there is great upheaval in the marketplace, traditional retailers sometimes respond by trying to forestall new forms of competition. Some of those actions may be legitimate defensive maneuvers, but when conduct steps over the lines of the antitrust laws, enforcement action is needed to ensure that anticompetitive practices do not deter development of procompetitive innovations.[27] In 1998, for example, the FTC charged 25 Chrysler dealers with an illegal boycott designed to limit sales by a car dealer that marketed on the Internet. These brick-and-mortar dealers allegedly had planned to boycott Chrysler if it did not change its distribution of vehicles in ways that would disadvantage Internet retailers. The competitive danger of such a

[27] In addition, on the consumer protection side, we must maintain vigilance to protect consumers from fraudulent practices by the few unscrupulous providers of such services. Since the agency's first Internet case in 1994, the FTC, primarily through its Bureau of Consumer Protection, has brought over 100 Internet-related cases involving over 300 defendants. The Commission has obtained injunctions stopping illegal schemes, collected over $20 million in redress for victims, and obtained orders freezing another $65 million in cases that are still in litigation. Most of these cases have involved the migration to the Internet of traditional kinds of fraud, such as business opportunity schemes, credit repair scams, pyramid schemes, and false claims for health-related products, to name a few.

tactic is obvious: a successful boycott could have limited the use of the Internet to promote price competition and reduced consumers' ability to shop from dealers serving a wider geographic area via the Internet. An FTC consent order prohibits the dealers from engaging in such boycotts in the future.[28]

The Internet is not the only place where we have seen popular new forms of retailing. Another example involves the Commission enforcement action against Toys "R" Us, the nation's largest toy retailer, alleging abuse of market power. As alleged by the Commission, Toys "R" Us used its market power to try to stop warehouse clubs, such as Costco, from selling popular toys such as Barbie dolls in ways that allowed consumers to make comparisons to the prices charged by Toys "R" Us . Warehouse clubs, as you know, are a relatively new retailing format that has grown significantly in the past decade. Toys "R" Us's concern was that warehouse clubs were selling some toys at lower prices and beginning to take market share away from traditional toy retailers. In response, Toys "R" Us allegedly pressured toy manufacturers to deny popular toys to warehouse clubs, or to sell them on less favorable terms. The FTC issued an administrative order to stop these practices, and the matter is now on appeal to the U.S. Court of Appeals for the Seventh Circuit.[29] Although the products were toys, and the rivalry was between two different kinds of brick-and-mortar firms, the enforcement principles underlying the Commission's action apply with equal – and perhaps even greater – force to the new world of online retailing.

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[28] *Fair Allocation System, Inc.*, C-3832 (Oct. 30, 1998) (consent order).

[29] *Toys "R" Us, Inc.*, Docket No. 9278 (1998), *appeal docketed*, No. 98-417 (7th Cir. Apr. 16, 1999).

Of course, even more traditional retailing practices can raise competitive concerns. Earlier this month the FTC and the Attorneys General from 56 U.S. states, territories, commonwealths, and possessions settled charges that Nine West, one of the country's largest suppliers of women's shoes, engaged in resale price maintenance, resulting in higher prices for many popular lines of shoes. To settle the charges with the states, Nine West agreed to pay $34 million, which will be used to fund women's health, vocational, educational, and safety programs.

Slotting allowances are another retailing-related topic of current interest at the Commission. The term "slotting allowance" typically refers to a lump-sum, up-front payment that a supplier, such as a food manufacturer, might pay to a retailer, such as a supermarket, for access to its shelves.[30] These allowances can amount to tens or hundreds of thousands of dollars. Slotting allowances can be either beneficial or harmful. They can be beneficial if they fairly reimburse retailers for the costs and risks of taking on an unproven new product, or when they result in lower prices to consumers. On the other hand, slotting allowances can be harmful if they permit one manufacturer to acquire a degree of exclusivity, across many retail outlets, sufficient to prevent other firms from becoming effective competitors. Still other situations fall in an intermediate grey area. To sharpen our understanding of the circumstances under which slotting allowances can be beneficial or harmful to competition and to consumers, the Commission will hold a two-day workshop on May 31 and June 1. This session will bring together people from manufacturing, retailing, economics, and other relevant disciplines to discuss the issues involved in this very complex subject.

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[30] *See* "Slotting: Fair for Small Businesses and Consumers?" Hearing before the Committee on Small Business, United States Senate (Sept. 14, 1999).

The Commission recently examined charges of price discrimination in a related retailing context. By majority vote, the Commission charged McCormick & Company, the world's largest spice company and by far the leading supplier in the United States, with engaging in unlawful price discrimination in the sale of spice and seasoning products. Some retailers allegedly were charged substantially higher net prices than were others, and discounts to favored chains allegedly were conditioned on an agreement to devote all or a substantial portion of shelf space to McCormick products. McCormick agreed to settle the charges by accepting an order that would prohibit the selling of spices at different prices to different retailers, except when permitted by the Robinson-Patman Act.

Health Care

Health care is an increasing part of overall consumer expenditures, and the significant rise in health care costs is felt by all consumers. For many years, the Commission has been at the forefront in bringing enforcement actions to protect the competitive process in all types of health care markets, including services provided by hospitals and health care professionals as well as products provided by the pharmaceutical and medical equipment industries. In the past two years alone, the Commission has brought more than a dozen enforcement actions involving health care, pharmaceuticals, and medical devices.

In one of these cases the Commission, jointly with several states, sued Mylan Laboratories, one of the nation's largest generic pharmaceutical manufacturers, charging Mylan and other companies with monopolization, attempted monopolization and conspiracy to eliminate much of Mylan's competition by tying up the key active ingredients for two widely-prescribed drugs, used by millions of patients.[31] The FTC's complaint charged that Mylan's agreements allowed it to impose enormous price increases – over 25 times the initial price level for one drug, and more than 30 times for the other. For example, in January 1998, Mylan raised the wholesale price of clorazepate from $11.36 to approximately $377.00 per bottle of 500 tablets, and in March 1998, the wholesale price of lorazepam went from $7.30 for a bottle of 500 tablets to approximately $190.00. In total, the price increases resulting from Mylan's agreements allegedly cost American consumers more than $120 million in excess charges. The Commission filed this case in federal court under Section 13(b) of the FTC Act seeking injunctive and other equitable relief, including disgorgement of ill-gotten profits. In July of last year the district court upheld the FTC's authority to seek disgorgement and restitution for antitrust violations. Trial is set for the Spring of 2001.

Just last week, the Commission charged four other companies with entering into anticompetitive agreements that allegedly delayed the entry of generic drug competition, potentially costing consumers hundreds of millions of dollars a year. The administrative complaint issued against Hoechst Marion Roussel (now Aventis) and Andrx Corporation charges that Hoechst, the maker of Cardizem CD, a widely prescribed drug for treatment of hypertension and angina, agreed to pay Andrx millions of dollars to delay bringing its competing generic drug, or any other non-infringing version, to market while Hoechst sued Andrx for alleged patent infringement.[32] Cardizem CD is a form of diltiazem, and Hoechst accounts for about 70% of the

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[31] *FTC v. Mylan Laboratories, Inc*, CV-98-3115 (D.D.C., filed December 22, 1998; amended complaint filed February 8, 1999). The drugs in question are used for treatment of anxiety.

[32] *Hoechst Marion Roussel, Inc.*, Docket No. 9293 (complaint, March 16, 2000).

sales of once-a-day diltiazem products in the United States. Hoechst's Cardizem sales in 1998 exceeded $700 million (over 12 million prescriptions). The complaint further alleges that, because the Hatch-Waxman Act[33] grants an exclusive 180-day marketing right to Andrx, Andrx's agreement not to market its product was also intended to delay the entry of other generic drug competitors.

The complaint against two other companies, Abbott Laboratories and Geneva Pharmaceuticals, Inc., which the companies agreed to settle, involved allegations of similar conduct in connection with a proprietary drug – called Hytrin – that Abbott manufactures, and a generic version that Geneva prepared to introduce.[34] Hytrin is used to treat hypertension and benign prostatic hyperplasia (BPH or enlarged prostate) – chronic conditions that affect millions of Americans each year, many of them senior citizens. BPH alone afflicts at least 50% of men over age 60. In 1998, Abbott's sales of Hytrin amounted to $542 million (over 8 million prescriptions) in the United States. The complaint alleges that Abbott paid Geneva approximately $4.5 million per month to keep Geneva's generic version of the drug off the U.S. market. This agreement also allegedly delayed the entry of other generic versions of Hytrin because of Geneva's 180-day exclusivity rights under the Hatch-Waxman Act. Abbott was charged with

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[33] Under the Hatch-Waxman Act, the first company to file an Abbreviated New Drug Application (ANDA) with the FDA for a generic drug (in this case, Andrx) has an exclusive right to market its generic drug for 180 days. Under the alleged Hoechst-Andrx agreement, Andrx could not give up that exclusivity right. Thus, by allegedly agreeing not to market its drug, Andrx prevented the 180-day exclusivity period from beginning to run, so that other sellers of generic versions of Cardizem CD also could not enter the market.

[34] *Abbott Laboratories,* FTC File No. 981 0395 (proposed consent order, March 16, 2000); *Geneva Pharmaceuticals, Inc.,* FTC File No. 981 0395 (proposed consent order, March 16, 2000).

monopolization of the market, and both companies were charged with conspiracy to monopolize. The proposed consent order enjoins such practices.

Another recent enforcement effort was directed at an anticompetitive patent pool between Summit Technology, Inc. and VISX, Inc. Summit and VISX compete in the market for equipment and technology employed in laser vision correction. Most of the approximately 140 million people in the United States with vision problems correct their vision with contact lenses or eyeglasses, but an increasing number are turning to laser techniques. Until recently, VISX and Summit were the only firms with FDA approval to market the laser equipment used for this surgery. The complaint charged that the two companies eliminated competition between themselves by placing their competing patents in a patent pool and agreeing to charge doctors a uniform $250-per-procedure fee every time a Summit or VISX laser was used. In essence, this was price-fixing under the guise of a patent cross-licensing arrangement. After the Commission issued an administrative complaint charging that the patent pool and related agreements were unlawful, the companies dissolved the patent pool and settled this portion of the case in August 1998, with an agreement not to enter into such agreements in the future.[35] The per-procedure fees charged by VISX and Summit did not immediately change as a result of the settlement – an example of "stickiness" of prices in a tight oligopoly – but competition eventually prevailed. Last month, VISX announced that it would reduce its per-procedure fee from $250 to $100 per eye, and Summit announced that it too would reduce its fee for one of its laser products.[36] Had the

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[35] S*ummit Technology, Inc. and VISX, Inc*., D. 9286 (Feb. 23, 1999) (consent order).

[36] CBS Market Watch, *Visx gets black eye from price cuts,* Feb. 23, 2000 (<http://cbs.marketwatch.com/archive>).

Commission not taken action, the millions of consumers using this procedure likely would still be paying substantially higher fees.

The Commission also plays an important role in studying the changing health care marketplace. Last year the FTC's Bureau of Economics issued a detailed report on the rapidly evolving pharmaceutical industry.[37] The report found that developments in information technology, federal legislation, and the emergence of market institutions such as health maintenance organizations and pharmacy benefit managers have accelerated change in this industry. The report attempts to provide a more complete understanding of the competitive dynamics of this market and discusses possible competitive problems and procompetitive explanations for pricing strategies and other industry practices. These kinds of studies help inform regulators, enforcers, and Congress on the important public policy issues involving health care.

Conclusion

In closing, we believe that antitrust enforcement by the Commission has demonstrable benefits for consumers – benefits that far outweigh the resources allocated to our maintaining competition mission. We are concerned, however, that our growing workload – largely the result of the continuing merger wave – has outstripped our ability to keep pace. Over the past decade, the FTC has performed its mission in the face of a rapidly changing marketplace, with staffing at about half the size it was in 1979. We have done so primarily by stretching our resources, streamlining our processes, and simply doing more with less. In no small measure, that is

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[37] FTC Bureau of Economics Staff Report, *The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change* (March 1999).

attributable to our dedicated, hard-working staff. We have also shifted resources from non-merger enforcement to mergers as a stop-gap measure. That has left us understaffed in non-merger matters, but still not at full strength in mergers. If we are to keep up with the growing demands that will be imposed by the 21st Century marketplace, we need significantly more resources. The President's proposed budget for fiscal year 2001 asks for an additional 69 workyears, over the current fiscal year, for our antitrust enforcement efforts.[38] We ask the Committee's support for additional resources for this important mission.

Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American businesses and consumers. We would be pleased to respond to any questions you may have.

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[38] The President's proposed budget also includes additional resources for the FTC's consumer protection mission.