Prepared Statement of the Federal Trade Commission

Before the

Committee on the Judiciary
Subcommittee on Antitrust, Competition, and Business and Consumer Rights
United States Senate

Concerning

An Overview of Federal Trade Commission Antitrust Activities

September 19, 2002

Mr. Chairman and Members of the Subcommittee, I am pleased to appear before you to present testimony of the Federal Trade Commission discussing an overview of our antitrust enforcement activities.[(1)]

The actions and initiatives I will discuss today are the product of, and a testament to, a professional, highly-qualified, and dedicated staff. Their work has made the FTC the well-respected agency that it is today.

I.

Introduction

By enforcing the antitrust laws, the Federal Trade Commission helps ensure that markets operate freely and efficiently. Aggressive competition promotes lower prices, higher quality, and greater innovation. 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.

The guiding word at the Commission 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. 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 Commission also has a broader role as a deliberative body and independent expert on issues affecting the market. Thus, the Commission is

well-suited to studying an evolving marketplace and developing antitrust policy. In this role, we continue to hold public hearings, conduct studies, and issue reports to Congress and the public.

Our activities of the past year illustrate how this broad role promotes competition. The Commission's testimony today will highlight three main goals and achievements: (1) building on the agency's recent history of aggressive law enforcement; (2) focusing on industries and issues significant to consumers, such as energy, health care, and matters derived from the new economy, including intellectual property rights; and (3) continuing to use the FTC's special role as an expert agency to advance the state of knowledge about particular issues central to our mission. In accomplishing these goals, there is a high degree of unity among the five Commissioners. In fact, there is near unanimity in voting patterns, particularly with respect to votes concerning law enforcement matters. The near unanimity of voting patterns reflects both a broad consensus among the Commissioners about the types of cases the Commission should pursue, and the careful and deliberate process by which the Commissioners consider matters, consulting with the staff to address the issues and concerns of individual Commissioners.

II.

An Overview of The FTC's Antitrust Enforcement Activities

A. Anticompetitive Mergers. Merger enforcement continues to be a staple of the Commission's enforcement agenda. Stopping mergers that substantially may lessen competition ensures that consumers pay lower prices and have greater choice in their selections of goods and services than they otherwise would. The level of merger activity in the marketplace, along with other factors, affects the FTC's merger workload. During the 1990s, record-setting levels of mergers, both in numbers and in size, required extraordinary efforts by the FTC staff to manage the necessary reviews within statutory time requirements. Recent economic conditions have reduced merger activity, and amendments to the Hart-Scott-Rodino Act[(2)] have cut the number of proposed mergers reported to the government. Even so, Commission merger enforcement remains a significant challenge for the following reasons:

- **The size, scope, and complexity of mergers have increased.** The number of mergers still remains relatively high by historic standards, and mergers also continue to grow in size, scope, and complexity. The dollar value of last year's reported mergers was about 82 percent higher, in nominal terms, than the 1995 total, even without any adjustment for the different filing thresholds. In fact, the $1 trillion total in 2001 exceeded the average annual total dollar value of reported transactions during the booming 1991-2000 decade. The size of mergers affects the FTC's workload because mergers among large diversified firms are likely to involve more products than mergers among smaller firms, and thus generally involve more markets requiring antitrust investigation. In addition, larger firms are more likely to be significant players in the markets in which they compete, which increases the need for antitrust review. Finally, as new technologies continue to grow and as the economy becomes more knowledge-based, the resulting complexity of many mergers requires more extensive inquiry.

- **Large numbers of mergers still require scrutiny.** The number of proposed mergers raising competitive concerns remains significant. Despite fewer reported transactions, the Commission's level of enforcement activity remains at a high level. Through the first eight months of this year, for example, we opened over 100 merger investigations and issued 24 requests for additional information under the HSR Act ("Second Requests"), numbers only slightly below those during the peak merger wave years 1996 through 2000. Thus far in FY 2002, the Commission has taken enforcement action in 23 mergers. Thus, despite a reduction in the number of HSR reported transactions, our merger enforcement workload remains high because the workload derives mostly from the number of transactions raising

antitrust concerns, not from the overall number of filings.

- **Non-reportable mergers now require greater attention.** Although fewer proposed mergers remain subject to the reporting requirements of the HSR Act, the standard of legality under Section 7 of the Clayton Act remains unchanged.[(3)]

  Consequently, we need to identify (through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies) those unreported, usually consummated, mergers that could harm consumers. So far this fiscal year, the Commission has challenged two non-reportable mergers.[(4)]

  In August, the Commission announced a settlement regarding these two mergers.[(5)]

- **Resource-intensive litigation is more frequently needed.** While the Commission resolves most merger challenges through settlement, it is sometimes necessary to litigate, particularly when the merger at issue already has been consummated. Merger litigation requires enormous resources. At the height of preparation, a single merger case requires the full-time attention of numerous staff members - not only lawyers, but also economists, paralegals, and support staff. To counter arguments and evidence presented by merging parties, these cases also require analysis and testimony by outside experts with specialized knowledge, which can be extremely costly. Since the fiscal year began, the Commission has filed two administrative actions,[(6)] and has authorized federal court challenges to five proposed mergers involving products including rum,[(7)] food service glassware,[(8)] pigskin and beef hide gelatin,[(9)] telescopes,[(10)] and cervical cancer screening products.[(11)]

B. Streamlining Merger Review. The FTC has been working with the Antitrust Division of the U.S. Department of Justice (DOJ) to establish procedures to make the HSR merger review process more efficient and transparent. The FTC has focused on several areas, including:

- **Electronic Premerger Filing.** As part of an overall movement to make government more accessible electronically, the FTC, working with the 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 on merging parties in document productions responsive to Second Requests. In response to legislation amending the HSR Act, the Commission amended its rules of practice to incorporate new procedures. The amended rules require Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establish a procedure for the General Counsel to review the request and promptly resolve any remaining issues. Measures adopted include a process for seeking modifications or clarifications of Second Requests, and expedited senior-level internal review of disagreements between merging parties and agency staff; streamlined internal procedures to eliminate unnecessary burdens and undue delays; and implementation of a systematic management status check on the progress of negotiations on Second Request modifications.

- **Merger Investigation Best Practices.** The FTC is conducting a series of national public workshops regarding modifications and improvements to the merger investigation process. The FTC will solicit input from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, and consumer groups, on topics such as using more voluntary information submissions before issuance of a Second Request, reducing the scope and content of the Second Request, negotiating modifications to the Second Request, and focusing on special issues concerning electronic records and

accounting or financial data.[12]

- **Merger Remedies.** Other "best practices" workshops will solicit comments on merger remedies. Among the issues to be addressed are structuring asset packages for divestitures, timing of divestitures (*i.e.*, up-front or after consummation), evaluating the competitive adequacy of proposed buyers, and assessing the preservation of competition after divestitures.[13]

C. Non-merger Enforcement. There is broad consensus that non-merger enforcement policy should focus primarily on horizontal agreements between or among competitors. While merger activity remains relatively high, a decline from the unprecedented levels of recent years has allowed us to restore resources to non-merger enforcement, consistent with historical allocations between merger and non-merger programs. In fiscal year 2001, the FTC opened 56 non-merger investigations, more than double the number begun in the previous fiscal year. We have opened an additional 51 investigations during this fiscal year. The Commission presently has three non-merger matters in Part III litigation,[14] and has obtained consent orders stopping anticompetitive practices in an additional 10 matters, most involving health care.[15]

D. Focus in the Areas of Energy, Health Care and Intellectual Property. Because of their great importance to consumers, the Commission gives special attention to the energy and health care industries, as well as antitrust issues related to intellectual property rights.

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

- **Oil Merger Investigations**. In recent years, the FTC has investigated numerous oil mergers. Last year, the agency reviewed four large oil mergers and analyzed competitive effects in a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. In Chevron/Texaco, the Commission accepted a consent agreement that allowed the proposed $45 billion merger to proceed but required substantial divestitures to cure the possible anticompetitive aspects of the transaction in 10 separate relevant product markets and 15 sections of the country comprised of dozens of smaller relevant geographic markets.[16]

  In Valero/Ultramar, the Commission obtained a settlement requiring Valero to divest a refinery, bulk gasoline supply contracts, and 70 retail service stations to preserve competition.[17]

  In Phillips/Conoco, the Commission has accepted for public comment a proposed consent order that will, if made final, require the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.[18]

  In Phillips/Tosco, applying the same standards, the Commission concluded that the transaction likely did not pose a threat to competition and voted unanimously to close the investigation.[19]

- **Study of Refined Petroleum Prices.** Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of the recent volatility in refined petroleum product prices. During an initial public conference held in August 2001, participants identified key factors, including increased dependency on foreign crude sources, changes in industry business practices, restructuring of the industry through mergers and joint ventures, and new

governmental regulations. This information assisted the agency in setting the agenda for a second public conference in May 2002. The information gathered through these public conferences will form the basis for a report to be issued later this year.

- **Gasoline Price Monitoring.** The FTC also recently announced a project to monitor wholesale and retail prices of gasoline. FTC staff will inspect wholesale gasoline prices for 20 U.S. cities and retail gasoline prices for 360 cities. Anomalies in the data will prompt further inquiries and likely will alert the agency to the possibility of anticompetitive conduct in certain parts of the country. It also will increase our understanding of the factors affecting gasoline prices.

2*. Anticompetitive Health Care Practices.* During the past year, the FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality.

- **Antitrust Investigations Involving Pharmaceutical Companies.** The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000.[(20)]

  In response, the FTC dramatically has increased its attention to pharmaceutical-related matters in both merger and non-merger investigations. The agency now focuses one-quarter of all competition mission resources on this industry. We also have opened increasingly more pharmaceutical-related investigations. In 1996, less than 5 percent of new competition investigations involved pharmaceuticals, while in 2001, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- **Mergers Affecting the Pharmaceutical Industry.** Last year, the Commission took action to restore competition in the market for integrated drug information databases in a novel case involving violations of both Sections 7 and 7A of the Clayton Act. This case marked the first time the Commission sought disgorgement of profits as a remedy in a merger case. The case resulted from the 1998 acquisition by Hearst Corporation of the Medi-Span integrated drug information database business. Pharmacies, hospitals, doctors, and third-party payors rely on such databases for information about drug prices, drug effects, drug interactions, and eligibility for reimbursement under various payment plans. At the time of the acquisition, Hearst already owned First DataBank, Medi-Span's only competitor. The Commission alleged that the acquisition created a monopoly in the sale of integrated drug information databases, causing prices to increase substantially to all database customers.[(21)]

  We negotiated a settlement requiring Hearst to divest the Medi-Span database and to disgorge $19 million in illegal profits, which will be distributed to injured consumers.[(22)]

- **Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.** In its non-merger enforcement cases, the FTC has focused on efforts by branded drug manufacturers to slow or stop competition from lower-cost generic drugs. While patent protection for newly developed drugs sometimes limits the role of competition in this industry, competition from generic equivalents of drugs with expired patents is highly significant. The Congressional Budget Office reports that consumers saved $8 to 10 billion in 1994 alone by buying generic versions of branded pharmaceuticals.[(23)]

  The first generic competitor typically enters the market at a significantly lower price than its branded counterpart, and gains substantial share from the branded product. Subsequent generic entrants typically bring prices down even further.[(24)]

  Anticompetitive "gaming" of certain provisions of the Hatch-Waxman Act[(25)] to forestall

generic entry has been a major focus of Commission enforcement actions. FTC Hatch-Waxman abuse cases have fallen into three categories:

(a) Agreements Not to Compete. The first category involves agreements between manufacturers of brand-name drugs and manufacturers of generics in which the generic firm allegedly is paid not to compete. The Commission has settled three such cases, including a recent settlement with American Home Products (AHP). That settlement resolved charges that AHP entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars. An AHP generic would have competed with Schering's branded K-Dur 20, used to treat low potassium conditions, which can lead to cardiac problems.[(26)]

(b) Fraudulent "Orange Book" Listings. The second category deals with unilateral conduct by branded manufacturers to delay generic entry. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book." Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Certain branded manufacturers have attempted to "game" this regulatory structure by listing patents in the Orange Book improperly. Such a strategy permits the company to abuse the Hatch-Waxman's stay provision to block generic competition without advancing any of the Act's procompetitive objectives. This spring, the Commission filed an action against Biovail Corporation (Biovail) alleging that it had illegally acquired a license to a patent and engaged in an anticompetitive patent listing strategy with respect to its high blood pressure drug, Tiazac. The matter was resolved through a consent order, which requires Biovail to: (1) transfer certain rights in the acquired patent back to their original owner; (2) terminate its infringement suit against the generic competitor, thereby ending the 30-month stay; (3) refrain from any action that would trigger another 30-month stay; (4) refrain from future improper Orange Book listing practices; and (5) provide the FTC with prior notice of future acquisitions of any patents it intends to list in the Orange Book.[(27)]

In January, the FTC also filed an *amicus* brief in pivotal private litigation involving allegations of fraudulent Orange Book listing practices.[(28)]

In re Buspirone - which is the subject of continuing litigation - involves allegations that Bristol-Myers Squibb Co. (BMS) violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine - a legal rule providing antitrust immunity for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the Commission argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order denying *Noerr* immunity and adopting much of the Commission's reasoning.[(29)]

The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff still must prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from antitrust scrutiny.

(c) Agreements Between Generic Manufacturers. The third category of cases involves agreements among manufacturers of generic drugs. In our recent complaint against Biovail and Elan Corporation, plc (Elan), the Commission alleged that the companies violated the FTC Act by entering into an agreement that provided substantial incentives not to compete in the market for the 30 mg and 60 mg dosage forms of generic Adalat CC. Biovail and Elan are the only companies with FDA approval to manufacture and sell 30 mg and 60 mg generic Adalat products. In October 1999, Biovail and Elan entered into an agreement involving both companies' generic Adalat products. Under their agreement, in exchange for specified payments, Elan would appoint Biovail as the exclusive

distributor of Elan's 30 mg and 60 mg generic Adalat products and allow Biovail to profit from the sale of both products. Our complaint alleged that the companies' agreement substantially reduced their incentives to introduce competing 30 mg and 60 mg generic Adalat products. The proposed order, which has a ten-year term, remedies the companies' alleged anticompetitive conduct by requiring them to terminate the agreement and barring them from engaging in similar conduct in the future.[(30)]

- **Antitrust Investigations Involving Health Care Providers.** So far this year, the agency has reached settlements with five groups of physicians for allegedly engaging in collusive practices that drove up consumers' costs. In August, the Commission announced settlements with a Dallas-Fort Worth-area physicians group and Denver-area physician practice groups and their agent.[(31)]

  The Commission alleged that the Dallas-Fort Worth group of more than 1,200 physicians entered into agreements to fix fees and to refuse to deal with health plans except on collectively agreed-upon terms. The Commission alleged that the Denver-area physician groups (comprised of more that 80 physicians) used their agent to enter into similar agreements to fix fees and to refuse to deal with payors except on collectively agreed-upon terms. These settlements were patterned after settlements that the Commission announced in May with two other Denver-area physician organizations.[(32)]

  Earlier this year, the Commission also settled charges that a group of Napa County, California, obstetricians and gynecologists agreed to fix fees and other terms of dealing with health plans and refused to deal with health plans except on collectively determined terms. To resolve the matter, the physicians agreed to refrain from engaging in similar conduct in the future, and to dissolve the organization through which they conducted their allegedly anticompetitive activity.[(33)]

  The Commission's proposed and final orders put a stop to further anticompetitive collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

- **Generic Drug Study.** In July, the Commission released an industry-wide study focused on certain aspects of generic drug competition under the Hatch-Waxman Amendments.[(34)]

  The study examined whether the Commission's enforcement actions against alleged anticompetitive agreements, which relied on certain Hatch-Waxman provisions, were isolated examples or representative of conduct frequently undertaken by pharmaceutical companies. The study also examined more broadly how the process that Hatch-Waxman established to permit generic entry prior to expiration of a brand-name drug product's patents has worked between 1992 and 2000.[(35)]

- **Workshop on Health Care and Competition Law and Policy.** On September 9 and 10, 2002, the Commission held a public workshop focusing on the impact of competition law and policy on the cost, quality, and availability of health care, and the incentives for innovation in the field. Given the significance of health care spending in the United States, it is important that competition law and policy support and encourage efficient delivery of health care products and services. Competition law and policy also should encourage innovation in the form of new and improved drugs, treatments, and delivery options. Developing and implementing competition policy for health care raises complex and sensitive issues. The goal of this workshop was to promote dialogue, learning, and consensus building among all interested parties (including, but not limited to, the business, consumer, government, legal, provider, insurer, and health policy/health services/health economics communities).

3*. Matters Involving the High-Tech Industry and Intellectual Property Rights*. The continuing

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

- Standards Setting. As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint filed in June, the Commission has charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose - in violation of the organization's rules - that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.[(36)]

  The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The Commission's complaint alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents, all of which would be passed on to consumers through increased prices for the downstream products.[(37)]

  Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the Commission will continue to pursue investigations in this important area.[(38)]

- **Intellectual Property Hearings**. In February 2002, the FTC and the DOJ commenced a series of hearings on *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*.[(39)]

  The hearings respond to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. During the hearings, business persons, consumer advocates, inventors, practitioners, and academics have focused on:

  - what economic learning reveals, and does not reveal, regarding the relationships between intellectual property and innovation, and between competition and innovation;
  - "real-world" experiences with patents and competition;
  - procedures and substantive criteria involved in prosecuting and litigating patent claims;
  - issues raised by patent pools and cross-licensing and by certain standard-setting practices;
  - the implications of unilateral refusals to deal, patent settlements, and licensing practices;

- international comparative law perspectives regarding the competition/intellectual property interface; and,

- jurisprudential issues, including the role of the Federal Circuit.

The hearings will conclude in October. A public report that incorporates the results of the hearings, as well as other research, will be prepared after the hearings.

III.

Antitrust Exemptions

A. Antitrust Exemptions

As a general matter, immunity from the antitrust laws is exceptional and disfavored.[(40)]

That is because our nation's economy is based on the premise that competition is the best guarantor of the optimal mix of goods and services in terms of price, quality, and consumer choice. The antitrust laws, therefore, are a fundamental part of our economic system. The Supreme Court has repeated many times that the antitrust laws are "the Magna Carta of free enterprise."[(41)]

Accordingly, there are few industries or competitive situations in which the antitrust laws do not apply. In fact, there has been a trend to deregulate industries and remove antitrust immunities rather than to create more of them.[(42)]

Proponents of antitrust immunity frequently claim that firms engaged in a particular industry or activity need to collaborate on matters that have special value or importance to our economy, national security, or other societal interests. They assert that compliance with the antitrust laws will be overly burdensome for the industry, or that the fear of antitrust liability will have a chilling effect on the activity for which they seek immunity. They also frequently claim that an exemption would only sanction conduct that would not violate the antitrust laws anyway, and that an exemption would serve simply to clarify the law and reassure everyone involved in the activity. They therefore assert that the situation warrants special treatment.

We do not believe these reasons provide a sound basis for an antitrust exemption. Antitrust analysis today is highly capable of distinguishing between conduct that is unreasonable and harmful to consumers, and that which has a legitimate justification. Antitrust law, therefore, can accommodate whatever legitimate interests competitors have in collaborating with each other. Further, there are many sources of guidance that would enable firms to avoid antitrust concerns. They can look to the many case precedents on collaborative conduct, interpretive Guidelines, and antitrust counsel. Firms also can minimize uncertainty by obtaining advisory opinions from the FTC and the DOJ before engaging in the conduct for which they seek reassurance. With the assistance of antitrust counsel, companies can make well-informed judgments about whether a proposed activity will present antitrust risks. Therefore, antitrust exemptions generally are not necessary.

Moreover, unnecessary exemptions have significant potential to be harmful. First, an antitrust exemption for conduct that does not violate the antitrust laws inevitably will lead to demands for more antitrust exemptions in other, similar situations. That will gradually erode the fundamental principle that the antitrust laws constitute one of the central pillars of a competitive market economy. Second, an antitrust exemption for conduct that does not violate the antitrust laws may create an erroneous perception that such conduct actually may raise serious competitive concerns; the exemption can create confusion or uncertainty as to whether that kind of conduct is likely to violate the antitrust laws. Third, antitrust immunities that are unnecessary, imprecise, or excessively broad may enable firms to

engage in collusive arrangements detrimental to consumers. An exemption can provide a pretextual reason for parties inappropriately to discuss and collaborate on non-exempt matters.[(43)]

Such conduct is difficult to detect and prosecute, and can hinder, rather than facilitate, the important economic and security contributions that it was hoped the particular industry would make. Therefore, we believe that, in general, selective antitrust exemptions are unwise, as well as unnecessary.[(44)]

B. Examination of State Action and Noerr-Pennington Case Law

Certain conduct that otherwise would violate the antitrust laws is exempt from antitrust challenge. For example, the state action doctrine - first articulated in *Parker v. Brown*[(45)]

- provides immunity for the regulatory conduct of state governments. Likewise, the *Noerr-Pennington* doctrine - first articulated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*[(46)] and *United Mine Workers of America v. Pennington*[(47)]

- provides immunity for private parties' efforts to "petition" the government. Understanding the proper scope of these exemptions - consistent with, but not broader than, their underlying policy rationales - has important consequences for consumers. Antitrust enforcers should identify and prevent anticompetitive conduct that may resemble, but does not constitute, protected activity. When the governing standard is unclear, however, enforcement (and deterrence) can be problematic. Thus, for example, the American Bar Association Antitrust Section's 2001 report on antitrust policy recommended a reexamination of the scope of the state action exemption.[(48)]

It is sound antitrust policy to seek to limit the state action and Noerr antitrust immunities to situations that fulfill their underlying purposes. When properly applied, both of those immunities serve important Constitutional interests. State action immunity is grounded in principles of federalism and is intended to prevent antitrust enforcement from interfering with legitimate state regulatory activities. Noerr immunity, on the other hand, is grounded in First Amendment principles and is intended to protect a citizen's right to petition the government for the redress of grievances.

New Task Forces at the FTC are examining both the state action and Noerr-Pennington exemptions. Both Task Forces are considering a variety of actions, including antitrust enforcement, amicus briefs, and competition advocacy.

- State Action Task Force. The State Action Task Force is conducting a careful analysis of existing case law on the scope of state action immunity. The Task Force has observed that some courts have applied the doctrine overly broadly, thereby immunizing the anticompetitive conduct of parties acting in their own interest, rather than the interest of "the state itself." An overly broad application can be especially problematic when the party purportedly acting pursuant to a delegation of state authority is a private market participant with strong incentives to restrain trade. The Task Force currently is working to clarify the state action doctrine to address such problems by, for example, advocating for more rigorous enforcement of Midcal's "clear articulation" and "active supervision" requirements, as well as express recognition of the market participant exception.

- Noerr-Pennington Task Force. The Noerr-Pennington Task Force is conducting a similar analysis of existing case law regarding Noerr-Pennington immunity. As in the state action context, the Task Force has observed that some courts have applied the doctrine overly broadly. In some instances, parties have been granted immunity in spite of the fact that the anticompetitive conduct at issue had no "petitioning" component whatsoever. In other instances courts have immunized abusive tactics, such as repetitive lawsuits and misrepresentations, that clearly were intended to delay a competitor's entry or raise its costs,

rather than to legitimately petition the government. The Task Force currently is working to clarify the Noerr doctrine to address such problems by, for example, advocating for express recognition of an independent misrepresentation exception and application of the Walker Process exception outside the patent prosecution context. Notably, the Task Force played an active role in preparation of the Commission's amicus brief in In re Buspirone, discussed above.

IV.

B2Bs and FTC E-Commerce Initiatives

A. B2B Marketplaces

Business-to-business electronic marketplaces, which use the Internet to connect businesses to each other, represent an important forum for commercial activity. In June 2000, the FTC hosted a public workshop on "Competition Policy in the World of B2B Electronic Marketplaces."[(49)]

In October 2000, FTC staff released a report based on its learning from that workshop.[(50)]

A second workshop was held in May 2001 to further explore these issues.[(51)]

In general, the Commission views positively the development of B2Bs because of their potential to generate significant efficiencies for our economy, winning for customers lower prices, improved quality and greater innovation. At the same time, we are aware of B2Bs' potential to inflict competitive harm. By their nature, B2Bs either bring together competitors in a collaborative environment, or constitute vertical collaborations between suppliers and purchasers in an industry or market. These arrangements may facilitate anticompetitive conduct, either in the markets for the goods and services traded on B2Bs (or derived from those traded on B2Bs), or in the market for marketplaces themselves. Despite B2Bs' innovative nature and their potential to revolutionize certain markets, however, the anticompetitive concerns they raise are not new; indeed, B2Bs are amenable to traditional antitrust analysis. The analysis of any B2B is highly particularized, depending heavily on such things as the B2B's operating rules, composition, exclusivity, and interoperability with other B2Bs. To date, the Commission has not formally taken enforcement action against any B2Bs since it closed its investigation of Covisint[(52)]

in September 2000, but we stand ready to take such action if an appropriate case arises.

B. FTC E-Commerce Initiatives

- **Internet Task Force.** In August 2001, an Internet Task Force began to evaluate regulations and potentially anticompetitive business practices that could impede e-commerce. The Task Force grew out of the already-formed State Action Task Force, which had been analyzing the competitive effects of state regulations generally, and out of the FTC's longstanding interest in the competition aspects of e-commerce. Over the past year, the Task Force has met with numerous industry participants and observers, including e-retailers, trade associations, and leading scholars, and reviewed relevant literature. The Task Force discovered that many states have enacted regulations that have the effect of protecting existing bricks-and-mortar businesses from new Internet competitors. The Task Force also received reports of private companies curtailing e-commerce by employing potentially anticompetitive tactics, such as by collectively pressuring suppliers or dealers to limit sales over the Internet. To date, three advocacy filings have resulted in large part from the Task Force's efforts: (1) a joint FTC/DOJ comment before the North Carolina state bar expressing concerns about the impact on consumers of ethics opinions requiring that an attorney be physically present for all real estate closings and refinancings; (2) a joint FTC/DOJ comment before the Rhode Island

legislature on similar requirements in a real estate bill; and (3) a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.[(53)]

- **Internet Competition Workshop**. In October, the Commission will hold a public workshop on possible efforts to restrict competition on the Internet. The workshop will include panel discussions to address certain specific industries that are important to consumers and that have experienced some growth in commerce via the Internet, but where competition may have been hampered by state regulations or potentially anticompetitive business practices. For example, the workshop will include panels on some or all of the following industries: retailing, automobiles, cyber-charter schools, real estate, health care, wine sales, auctions, contact lenses, and caskets. The Internet Task Force expects that the workshop will (1) enhance the Commission's understanding of these issues, (2) help educate policymakers about the effects of overly restrictive state regulations, and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic.

V.

International Activities: New Initiatives, Enforcement and Assistance

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

- **ICN and ICPAC**. Last fall, the FTC, the DOJ, and twelve other antitrust agencies from around the world launched the International Competition Network (ICN). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee (ICPAC) that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Sixty-one jurisdictions already have joined the ICN, and we are working on initial projects on mergers and competition advocacy.

- **Free Trade Agreement of the Americas**. The FTC is working with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas.

- **OECD**. The FTC is participating in the continuing work of the OECD on, among other things, merger process convergence, implementation of the OECD recommendation on hard-core cartels (e.g., price-fixing agreements), and regulatory reform.

- **Technical Assistance**. For the past ten years, the FTC has assisted developing nations that have made the commitment to market and commercial law reforms. With funding principally from the U.S. Agency for International Development, and in partnership with the DOJ, about thirty nations have received technical assistance with development of their competition and consumer protection laws. Currently, the technical assistance program is active in South and Central America, South Africa, and Southeastern Europe. The program emphasizes the development of investigative skills, and relies on a combination of resident advisors, regional workshops, and targeted short-term missions. These activities have enabled a large number of career staff to share their expertise, although great care is taken to avoid any intrusions on time and planning for domestic enforcement projects. Future plans are focused on expanding

this reimbursable program to the former Soviet Union and to Asia.

VI.

Concluding Remarks

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 believe that the Commission's antitrust enforcement has demonstrable benefits for consumers and the American economy - benefits that far outweigh the resources allocated to maintaining our competition mission. We would be pleased to respond to any questions you may have.

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

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

4. MSC Software Corp., Docket No. 9299 (Oct. 10, 2001) (complaint issued) (alleging that two MSC acquisitions violated Clayton Act).

5. MSC Software Corp., Docket No. 9299 (August 14, 2002) (proposed consent order accepted for placement on public record for comment).

6. MSC Software Corp., Docket No. 9299 (Oct. 10, 2001) (complaint issued) (involving engineering software); Chicago Bridge Iron Co., Inc., Docket No. 9300 (Oct. 25, 2001) (complaint issued) (pertaining to field-erected specialty industrial storage tanks).

7. Press Release, FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. (Oct. 23, 2001), available at <http://www.ftc.gov/opa/2001/10/diageo.htm>.

8. *FTC v. Libbey, Inc.,* Civ. Act. No. 02-0060 (RBW) (Memorandum Opinion) (D.D.C. Apr. 22, 2002). (granting FTC's request for a preliminary injunction).

9. Press Release, FTC to Challenge DGF Stoess's Proposed Acquisition of Leiner Davis (Jan. 15, 2002), available at <http://www.ftc.gov/opa/2002/01/gelatin.htm>.

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

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

12. *See* Press Release, FTC Initiates "Best Practices Analysis" for Merger Review Process (Mar. 15,

2002), available at <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

13. *See id.*

14. Polygram Holding, Inc., Docket No., 9298 (June 28, 2002) (Initial Decision), available at <http://www.ftc.gov/os/2002/06/polygramid.pdf>; Schering Plough Corp., Docket No. 9297 (July 2, 2002) (Initial Decision), available at <http://www.ftc.gov/os/caselist/d9297.htm>; Rambus Inc., Docket No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

15. Warner Communications Inc., Dkt. No., 4025 (consent order) (Sept. 21, 2001); Schering-Plough Corp., Dkt. 9297 (Apr. 5, 2002) (consent order as to American Home Products); Biovail Corp., File No. 011-0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment); Physician Integrated Servs. of Denver, Inc., Dkt. No. 4054 (July 19, 2002) (consent order); Aurora Associated Primary Care Physicians, L.L.C., Dkt. No. 4055 (July 19, 2002) (consent order); Obstetrics and Gynecology Med. Corp. of Napa Valley, Dkt. No. 4048 (May 17, 2002) (consent order); Biovail Corp. and Elan Corp. PLC., Dkt. No., 4057 (Aug. 20, 2002) (consent order); System Health Providers, File No. 011-0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); Professionals in Women's Care, File No. 011-0175 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); and American Institute for Conservation of Historic and Artistic Works, File No. 011-0244 (Sept. 10, 2002) (proposed consent order accepted for placement on public record for comment).

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

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

18. Conoco Inc./ Phillips Petroleum Company, File No. 0211-0040 (August 30, 2002) (proposed consent order accepted for placement on public record for comment).

19. Phillips Petroleum Corp./Tosco Corp., File No. 011-0095 (Sept. 17, 2001) (Statement of the Commission).

20. *See* National Health Expenditures, by Source of Funds and Type of Expenditures, Health Care Financing Administration, available at <http://www.hcfa.gov/stats/nhe-oact/tables/t3.htm>.

21. *FTC v. The Hearst Trust, The Hearst Corp., and First DataBank, Inc*., Civ Act. No.1:01CV00734 (D.D.C. Apr. 5, 2001) (complaint).

22. FTC v. Hearst, Civ. Act. No. 1:01CV00734 (D.D.C. Nov. 9, 2001) (Stipulation for Entry of Final Order and Stipulated Permanent Injunction).

23. Congressional Budget Office, How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry (July 1998), available at <http://www.cbo.gov>.

24. *Id*.

25. *See* Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 *et seq*. The Hatch-Waxman amendments were contained in the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified at 15 U.S.C. §§ 68b, 68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282 (1984)).

26. Schering-Plough Corp., Dkt. 9297 (Apr. 2, 2002) (consent order as to American Home Products).

27. Biovail Corp., File No. 011-0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment).

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

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

30. Biovail Corp. and Elan Corp. PLC., Dkt. No., 4057 (Aug. 20, 2002) (consent order).

31. System Health Providers, File No. 011-0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment); Professionals in Women's Care, File No. 011-0175 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment).

32. Physician Integrated Servs. of Denver, Inc., Dkt. No. 4054 (July 19, 2002) (consent order); Aurora Associated Primary Care Physicians, L.L.C., Dkt. No. 4055 (July 19, 2002) (consent order).

33. Obstetrics and Gynecology Med. Corp. of Napa Valley, Dkt. No. 4048 (May 17, 2002) (consent order).

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

35. *See* 65 Fed. Reg. 61334 (Oct. 17, 2000); 66 Fed. Reg. 12512 (Feb. 27, 2001).

36. Rambus Inc., Dkt. No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

37. *Id*.

38. In 1996, the FTC brought a similar case against Dell Computer, alleging that Dell had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. Dell Computer Co., Dkt. No. C-3658 (May 20, 1996) (consent order) (Commissioner Azcuenaga dissenting).

39. *See* 66 Fed. Reg. 58146 (Nov. 20, 2001).

40. *See generally*, Aba Section of Antitrust Law, Antitrust Law Developments 1135 (4th ed. 1997) ("With few exceptions, the antitrust laws apply to all industries."); *cf*. Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (implied antitrust exemptions are not favored).

41. *See, e.g., United States v. Topco Associates, Inc*., 405 U.S. 596, 610 (1972).

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

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

44. We are aware, of course, that there have been rare instances in which Congress enacted statutory grants of immunity for joint action of competitors. In those situations, the exemption typically applied to specific industries or activities that were subject to a special regulatory regime, or to a specific transaction or agreement that had been approved by a federal agency, again usually in the context of a regulated industry. Prior approval of an agreement by a federal agency has not been required when the scope of the immunity was very limited, but broader grants of immunity have been accompanied by strict controls on the development and implementation of agreements. Without such strict limits, the dangers of antitrust exemptions are even greater.

45. 317 U.S. 341 (1943).

46. 365 U.S. 127 (1961).

47. 381 U.S. 657 (1965).

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

49. Materials related to the workshop are available at <http://www.ftc.gov/bc/b2b/index.htm>.

50. Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces, A Report by the Federal Trade Commission Staff (October 2000), available at <http://www.ftc.gov/os/2000/10/b2breport.pdf>.

51. Materials related to the workshop are available at <http://www.ftc.gov/opp/ecommerce/index.htm>.

52. *See* Press Release, *FTC Terminates HSR Waiting Period for Covisint B2BVenture* (September 11, 2000), available at <http://www.ftc.gov/opa/2000/09/covisint.htm>.

53. Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to The Honorable John B. Harwood, Speaker of the Rhode Island House of Representatives (regarding proposed bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities) (Mar. 29, 2002); Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to Ethics Committee, North Carolina State Bar (regarding North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions) (Dec. 14, 2001); and Comments of The Staff of the Federal Trade Commission, Intervenor, *In Re: Declaratory Ruling Proceeding On the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* (Ct. Bd. Of Examiners for Opticians, Mar. 27, 2002).