Prepared Statement of the Federal Trade Commission

Before the

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

Concerning

An Overview of Federal Trade Commission Antitrust Activities

[redacted]

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

Our testimony today will outline the principles that underlie the Commission's agenda, and describe a number of our accomplishments. While my colleagues and I bear the ultimate responsibility for the agency's actions, we rely on a dedicated, prof13(gen)13(.,9m6g(h)13(i)1n)13(d-3(an a(W)-39(h)1ghe r)4(er)-7(y)]TJ 0 Tc5 cs 6.173-2 Tm1 1 Tf 0.004 15 0 T[(quaom)-

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

- The FTC assists and cooperates with competition agencies in countries throughout the world.

Merger enforcement continues to be a major focus of the FTC's competition workload. Stopping mergers that lessen competition ensures that consumers will have the benefit of lower prices and greater choices in their selection of goods and services. During the unprecedented merger wave in the late 1990s through 2000, the agency was forced to divert resources to meet its statutory responsibilities under the Hart-Scott-

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

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

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

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

patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.[15] Becaus

- Generic Drug Study. In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," which evaluated whether Hatch-Waxman is susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products.[24] The report recommended changes in the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identified in the FTC study.[25] Last month, the FDA approved a new rule to curb one of the abuses uncovered by the FTC study - pharmaceutical firms' alleged misuse of the Hatch-Waxman patent listing provisions - to speed consumer access to lower-cost generic drugs.[26] In addition, both the Senate and House of Representatives recently passed bills that incorporate the FTC study's two major legislative recommendations.[27]

- Hearings on Health Care and Competition Law and Policy . To explore developments in the dynamic health care market, the FTC, working with DOJ's Antitrust Division, commenced a series of hearings on "Health Care and Competition Law and Policy" on February 26, 2003.[28] Over a seven-month period, the FTC and DOJ are spending almost 30 days of hearings in a comprehensive examination of a wide range of health care issues, involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, and consumer information, among others. To date, the hearings have focused on the specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues.[29] A public report that incorporates the results of the hearings will be prepared after the hearings.

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

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

2. Other Energy Industry Initiatives

x Study of Refined Petroleum Product Prices is-16(y5(i)-)-3(b)13(ei)-11.68 32446-3 0 T2.a6.2(r)n.8-3(g4ngh5(c) BT s2.36)i pr

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

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

C. Technology

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

1. Law Enforcement Actions Involving Technology

As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often pro-competitive, the standard-setting *process* [illegible]

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

- Internet Competition Workshop. In October 2002, the Commission hosted a three-day public workshop examining potential barriers to e-commerce in ten different industries.[39] The purpose of the workshop was to (1) enhance the Commission's understanding of the nature of competition in e-commerce; (2) help educate policymakers about the effects of overly restrictive state regulations; and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic. The workshop included panel discussions addressing specific industries that have grown via the Internet, but where competition may be constrained by state regulations or business practices.

- E-commerce Advocacy. The Internet Task Force has taken the lead in drafting a number of competition advocacy pieces. Two have had a clear impact in helping decision-makers take consumers' interests into account: (0.004 Tc -aBT 52(s)1e lions.2 434.88 o ET 1bn 94.(he)13(nT 1bnD 10 n)13(nT 1bnD 10 n)13(nT 1x)2tessbou

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

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

B. The State Action and Noerr -Pennington Doctrines

The state action doctrine - first articulated in *Parker v. Brown*[(48)] - provides a defense to certain antitrust claims involving the regulatory conduct of state governments. Similarly, the *Noerr-Pennington* doctrine - first articulated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*[(49)] and *United Mine Workers of America v. Pennington*[(50)] - provides immunity for private parties' efforts to "petition" the government. When properly applied, both doctrines serve important Constitutional interests. The state action defense is grounded in principles of federalism and is intended to

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

2. Noerr-Pennington Task Force

The *Noerr-Pennington* Task Force is conducting a similar analysis of existing case law regarding *Noerr-Pennington* immunity. As in the state action context, the Task Force has observed that some courts have applied the doctrine too

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

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

C. Facilitating Negotiation of Merger Remedies

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

D. Transparency in FTC Decision Making

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

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

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

2. 15 U.S.C. § 18a, as amended, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

3. Throughout the 1990s, the FTC typically had no more than one or two antitrust cases in administrative litigation. The eight nonmerger administrative cases currently pending are *Schering-Plough Corp.*, Dkt. No. 9297 (July 2, 2002) (Initial Decision); *Polygram Holding, Inc.*, Dkt. No. 9298 (June 28, 2002) (Initial Decision); *Rambus, Inc.*, Dkt. No. 9302 (June 18, 2002) (complaint); *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint); *California Pacific Medical Group, Inc. dba Brown and Toland Medical Group*, Dkt. No. 9306 (July 8, 2003) (complaint); *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (July 8, 2003) (complaint); *Movers Conference of Mississippi, Inc.*

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

20. *Carlsbad Physician Association, Inc., et al.*, Dkt. No. C-4081, (June 13, 2003) (consent order); *Anesthesia Service Medical Group, Inc.*, Dkt. No. C-4085 (July 11, 2003) (consent order); *Grossmont Anesthesia Services Medical Group, Inc.*, Dkt. No. C-4086 (July 11, 2003) (consent order); *SPA Health Organization, doing business as Southwest Physician Associates,* File No. 011-0197 (June 9, 2003) (proposed consent order accepted for public comment); *Washington University Physician Network*, File No. 021-0188 (July 11, 2003) (proposed consent order accepted for public comment); *The Maine Health Alliance and William R. Diggins,* File NiD 1 orde(A)4()) (-)T3(i)-1Tf -0.015 Tw 9 -0 0 9 72 612.84 Tm

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

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

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

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

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

51. American Bar Association Section of Antitrust Law, *The State of Antitrust Enforcement - 2001, Report of the Task Force on the Federal Antitrust Agencies - 2001*, at 42 (2001), *available at*
<http:/ (tp:01

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

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