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# ANTITRUST OVERSIGHT

# HEARING

BEFORE THE

## SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND COMPETITION

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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# ANTITRUST OVERSIGHT

**WEDNESDAY, MARCH 22, 2000**

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS,
AND COMPETITION,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:12 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine (chairman of the subcommittee) presiding.

Also present: Senators Grassley, Kohl, and Leahy.

## OPENING STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Good afternoon. Welcome to the Antitrust, Business Rights, and Competition Subcommittee hearing. This hearing is the fourth in a series of antitrust oversight hearings held by our subcommittee. We are happy to have back here today Assistant Attorney General Joel Klein from the Antitrust Division and Chairman Pitofsky from the Federal Trade Commission. They will testify about antitrust enforcement efforts being made by their respective agencies.

As they are both aware, the merger wave that has engulfed our economy for the last several years shows certainly no signs of abating. In fact, the mergers seem to be getting larger in size and scope all the time. The most recent example is the proposed merger between AOL and Time Warner for $185 billion. Moreover, as the American economy becomes more and more integrated with the economies of other nations, it is likely that more companies will propose mergers as a means to successfully compete in the global marketplace.

These trends indicate that the antitrust enforcement agencies will continue to play an important role in maintaining the competitive environment necessary for our economy to thrive both at home and abroad. Indeed, as international trade and business contacts escalate, it will be increasingly important for the antitrust agencies to carefully police the actions of foreign companies to assure that they are playing by the rules of fair competition.

The Antitrust Division has been particularly successful in its efforts to fight international price-fixing cartels. In fiscal year 1999, the Antitrust Division collected over $1 billion in criminal fines, most of which were the result of prosecution of foreign cartels. The price-fixing activity targeted by the Antitrust Division, this particular activity would distort markets, undermine competition, and

unfairly raise prices for consumers, and I commend their vigilance in prosecuting these crimes.

Part of our effort to combat anti-competitive actions abroad is the use of antitrust cooperation agreements with foreign enforcement agencies. These agreements have been fairly successful in some instances, but we have had some problems with their implementation in other cases and we continue to face significant challenges with regard to international enforcement in general.

Mr. Klein recognized these difficulties, and 2 years ago, the Justice Department appointed an advisory committee to examine these issues and to offer recommendations. This group, the International Competition Policy Advisory Committee, has recently issued its report and we look forward to discussing some of the recommendations in our hearing today.

Before I turn to Senator Kohl, I think it is important to discuss one particular aspect of the merger wave, and that is the increasing consolidation in the entertainment, news, and media industries. I have repeatedly expressed my concern that increased consolidation in these industries will decrease the number of information and entertainment providers and may eventually erode competition in the so-called marketplace of ideas. I know that this type of discussion is not part of the traditional antitrust analysis, but I believe that such mergers do raise important public policy and competition issues and I would like to discuss some of those issues today.

On a related point, some have argued that the mergers in media industries and other important industries, such as telecommunications, oil, railroads, and defense, have gotten to the point where we need to rethink our general approach to antitrust analysis. Some people have gone so far as to suggest that in reviewing the so-called mega-mergers, antitrust enforcement agencies should be examining the ripple effect of the deal. In other words, even if a particular merger is not anticompetitive, the agencies, it is argued, should consider whether that particular merger will kick off a mini-wave of industry mergers that will decrease competition and ultimately harm consumers.

I discussed this notion several years ago with our witnesses, the same witnesses we have today, in the context of defense consolidation. Based on my experience as chairman of the Antitrust Subcommittee, I believe it is somewhat risky to attempt to predict the future based on just one merger, and I think there is good reason to maintain the current standard of reviewing mergers one deal at a time. Nonetheless, this issue deserves some consideration, especially as we look towards a world where key industries at the core of daily life are controlled by a handful of very large companies.

This is an exciting and important time in the arena of antitrust enforcement. As consolidation increases, it is essential that the antitrust agencies be able to handle the increased merger workload while still maintaining their ability to detect and prosecute illegal cartel behavior which harms American consumers. This subcommittee will continue to work with our witnesses to vigorously address these new challenges and ensure that the marketplace remains competitive, both at home and throughout the world, and I

look forward to discussing with both of our witnesses today how we can achieve these goals.

I turn to the ranking minority member of the committee, Senator Kohl.

**STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator KOHL. Thank you. Let me start by commending our chairman, Mike DeWine, for ensuring the bipartisanship and effectiveness that has characterized our subcommittee's work.

Today, we are privileged to hear from our two witnesses, Joel Klein and Bob Pitofsky. We have been very impressed with your leadership, gentlemen, and the talent and skills with which you and your dedicated staffs, the unsung heroes of antitrust, have enforced the antitrust laws and promoted competition in our national economy.

The past several years have been critical times. We have witnessed an incredible wave of mergers and acquisitions, touching virtually every sector of our economy. In the space of just 8 years, from 1991 to 1999, the value of mergers reviewed by the antitrust agencies increased tenfold, from $169 billion to over $1.8 trillion. Big is not necessarily bad, to be sure, but we must always be careful to ensure that increasing levels of concentration do not hurt the folks that we represent.

Application of antitrust laws is not limited to corporate mergers, of course. In industries as varied as computers, software, airlines, and food processing, your agencies have moved swiftly and decisively to prevent anticompetitive conduct by companies that harm consumers.

The resolution of these issues is ultimately for the courts, but let me make plain that we are committed to ensuring that you have sufficient resources to do your job, and we will reject any effort to play politics with your budget in response to your action on any specific case.

The great increase in merger activity has unquestionably burdened your agencies with a very heavy workload and we, therefore, support sufficient funding for your budgets. But the thresholds under which companies enter into mergers and acquisitions must report their transactions to the FTC and Department of Justice have not been adjusted even for inflation since the passage of Hart-Scott-Rodino in 1976. This has led the agencies to review far more transactions, many irrelevant, at least from an antitrust perspective, than Congress intended.

So we have authored, with Senators Hatch and DeWine, legislation to raise the pre-merger notification thresholds in most cases from $15 million to $35 million. This overdue reform will enable you to focus your efforts on the deals which are most likely to raise competitive concerns. We intend to work closely with you to ensure that nothing in the bill weakens your ability, Mr. Klein and Mr. Pitofsky, to carry out your responsibilities.

Unfortunately, Senator DeWine and I do not have as much confidence in the FCC's ability to get the job done, so we intend to move quickly our legislation to put strict time limits on the FCC's merger review process.

In addition, we also have concerns about the increasing level of concentration in agriculture, so we intend to focus on this issue because we are very concerned that farmers are getting the short end of the stick. Senators Daschle, Leahy, and I will soon be introducing a bill on this subject and we would like for you to work with us on it.

One more thing. For a long time, I have wondered how we ever got to a system where we have two agencies administering exactly the same program. In a perfect world governed by the efficiencies that your agencies are asked to promote, I ask, would it not be better for all concerned if there was a single agency charged with guarding against anticompetitive conduct?

Mr. Chairman, in this era of ever-quicker technological change and ever-increasing corporate consolidation, the need for vigorous enforcement of our antitrust laws has never been greater. Mr. Klein and Mr. Pitofsky, you both have been equal to the challenge and we are very fortunate that you are both occupying your offices at this critical time.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Leahy.

## STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I would join in the comments of the distinguished Senator from Wisconsin in praising the way you have handled this, but I would include him in the praise. He was too modest to include himself, but I would. I think the both of you have set a fine standard. It has been very helpful to all the other Senators who serve on Judiciary on both sides of the aisle because of the leadership the two of you have given.

Mr. Klein, I want to thank you for appointing a special counsel on agricultural matters. As Senator Kohl mentioned about the legislation that he and I and Senator Daschle and others will introduce soon, it is intended to enhance competition in rural America and protect farmers and ranchers from sometimes deceptive and unfair business practices of agribusiness.

One of the difficulties I have had is knowing who has bought whom and when and why and how. A lot of companies are buying other companies for free, in their thought, because they have got highly-inflated stock, part of the exuberance, I suppose, that Chairman Greenspan speaks of.

Unfortunately, we start at a point where you have one merger, and this is somewhat related to what Senator DeWine said, and then you have a string of defensive mergers. A company will buy another company to buy another company to stop a company from buying them, and all that fueled by high stock prices. In the end, you end up with one huge conglomerate and nobody can tell who is in charge.

I sent a letter recently to Mr. Klein about a company that is in a buying frenzy, Suisse Foods of Texas. I know you filed a complaint against them in Kentucky because you are concerned about potential higher school milk prices. In the competitive impact statement filed by the Department of Justice in that case, you mentioned that Suisse acquired a company with a history of school milk

bid rigging, Flavoridge, and now you suddenly have a new company, but they own the old company that did the bid rigging.

I remember that case well because I had introduced a bill to ensure that dairies which are convicted of school lunch bid rigging would be debarred from continuing to participate in the school lunch program. I did this from the Agriculture Committee because we try to fund the school lunch program, but there is only so much money and we need competition to make sure that we get what we pay for. That bill became the law of the land with very strong bipartisan support.

The dairy farmers in my part of the country are concerned about the unyielding market power of Suisse Foods, but I think the concern would be any part of the country, whether it is in the Midwest, the West, anywhere else. You want to make sure that there is still competition.

Senator John Sherman, who over a century ago did the Sherman Antitrust Act, said that we will not endure a king over the production, transportation, and sale of any of the necessities of life, and I think we all still feel that way.

Chairman Pitofsky, I am glad you are here. As I mentioned to you before we started, the FTC has been quite busy these days. Of course, you have superb people over there, which helps a lot, and especially with your very hands-on leadership. You are going to have the fun of looking at the AOL-Time Warner merger, something that we discussed in this committee. But the issue at stake is not just what it does for a company's shareholders but what kind of choice we as consumers have. Your consumer privacy workshops have been very good, and I do want to sit down and talk with you at some point about that. Finally, I am also interested in the views of both of you on the need for reform for the Hart-Scott Rodino Act.

I have concerns over the limitations in document production under the reform bill introduced by Chairman Hatch and Chairman DeWine and Senator Kohl, but I agree with them that we should increase the size of the transaction thresholds and adjust the fee structure, and that is something I want to work more on.

Thank you very much.

Senator DEWINE. We will turn to our panel. Joel Klein is, of course, the Assistant Attorney General for the Antitrust Division at the Department of Justice, a post he has held since July of 1997. He is certainly a very familiar face at this committee's hearings and we welcome you back, Attorney General Klein.

Robert Pitofsky was sworn in as Chairman of the Federal Trade Commission in April 1995. He has also testified many times before this committee and we welcome him back, as well.

Mr. Klein, we will start with you this afternoon, if you could just make any opening statement that you wish. Your written statement, of course, will be made a part of the record.

**STATEMENT OF JOEL I. KLEIN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE**

Mr. KLEIN. Thank you very much, Mr. Chairman, Senator Kohl, Senator Leahy. I appreciate your kind remarks, and more importantly, I want to note that I think the way this subcommittee has operated is truly exemplary in terms of legislative-executive rela-

tionships. Your oversight has been tough, it has been constant, it has been vigilant, but it has always been fair, and most importantly, I believe the commitment of you and Senator Kohl to appropriate antitrust enforcement to protect America's consumers, America's businesses, and ultimately America's economy, because our economy is the strongest in the world in large measure because it is the most competitive in the world. And for that, while I know on specific cases, like any other matter, we may have a difference of views, I think the relationship has really been extraordinary and I want to thank both you and the ranking member for that, Mr. Chairman.

Let me just say very briefly, since I think a large part of opening remarks actually you already read, so I can be mercifully brief here. I do think a lot of great significance is going on, both in the American economy—I think this really is a watershed time in history. I think one could go back and look at the industrial revolution and the agricultural revolution and we are now at the third of those great historic moments, the technology revolution, coupled with globalization, that are related.

I think the significance of antitrust enforcement to those changes is absolutely critical and I think it has now been well demonstrated that the role of antitrust in the new economy is going to be every bit as important as it was in the old economy, and our 100-year history in this endeavor has demonstrated to the rest of the world that they have to play catch-up, a point that you have noted many times, Mr. Chairman.

Let me say, with respect to our enforcement efforts, I think first and foremost, what has happened in international cartel enforcement is truly extraordinary. You mentioned the $1 billion-plus dollars we brought in in fines last year. That is on a criminal enforcement budget that is significantly less than $50 million. So those who said we have questioned the private market, I propose that we be allowed to take the Antitrust Division private. I think those kind of margins would do us well.

More important, we cracked open last year the single largest cartel in history, the vitamins cartel, and this has had enormous consequence for America's farmers, who have to buy these vitamins. These are vitamins they feed to their wildlife. What is significant about this is not just that it was such a huge conspiracy, but that the hub of this conspiracy, the dominant players were all major European companies and it took an American enforcement effort to bring down Hoffman-LaRoche, BASF, and ultimately Rhone Poulenc, who cooperated with us, and I think that has affected a major shift in global attitude.

Second, last year, as part of our enforcement effort, we prosecuted two very high-level executives at the Archer Daniels Midland Company, successfully prosecuted, and they are now serving time in prison in Illinois, significant prison terms, and I think that America has been successful in cartel enforcement because we have individual liability and prison terms. We currently have two Europeans serving time in American prisons in the vitamin cases and those are ongoing investigations.

Second, our civil enforcement program has been, I think, very, very robust and I think it raised several key cases with respect to

monopoly practices, the *Microsoft* case, the *Visa-MasterCard* case, and the *American Airlines* case, each of which, I think, raised important issues about antitrust in the new economy. We are enormously gratified by the Federal District Court's ruling on findings of fact in the *Microsoft* case. We have a trial scheduled in a couple of months in the *Visa-MasterCard* matter, and later toward the end of this year in *American Airlines*.

I think these cases are going to raise some of the key issues about market power in network economies. In each of the three cases I have mentioned, what the real barriers to entry are all about there are these network effects, these increasing returns to scale, which is very different from the kind of things we saw during the industrial revolution.

Finally, you and Senator Kohl have both gone on at some length about the merger wave we are experiencing. I do think no matter how enormous the numbers are, we cannot fully appreciate the real sea change in our economy to see what is going on. We have had a strong merger enforcement program. We blocked, as you know, Senator DeWine, the Lockheed Martin-Northrup Grumman shortly after those hearings we had on defense consolidation, and I think that sent an important signal in the defense industry.

You talk about media consolidation. We blocked the Primestar acquisition of the Rupert Murdoch assets with respect to satellite transmission and we facilitated a close to $2 billion divestiture of the Internet backbone assets in the Worldcom-MCI merger.

In the farming area, we have had several key cases, one of which I would simply mention, the *Cargill-Continental* case, not just because of the significance on farm producers in the United States, but also because that is one of two cases we brought in the past several months where, for the first time in a long time, we asserted a buyer power, not a seller power, but a buyer power theory. That is, the producers who have to sell to these large conglomerates could have been hurt in an anticompetitive fashion, and I think that marks a step that reflects our vigilance and concern in this area. In addition, we took an action with respect to a tractor merger, and finally with respect to two big agribusiness biotechnology issues involving the Monsanto Company.

Lastly, Mr. Chairman, let me just note that your concerns about international enforcement and our relationship with our trading partners throughout the world continues to be a great concern to us. We are analyzing the ICPAC, the Competition Policy Advisory Committee's report, and I will say here now we have had some success with respect to the Saber matter on a positive comity referral and this committee has been tough with us on positive comity, but I think your suggestions and your recommendations have helped strengthen the process and I want to thank you for that, as well.

Senator DEWINE. Mr. Klein, thank you very much.

[The prepared statement of Mr. Klein follows:]

PREPARED STATEMENT OF JOEL I. KLEIN

Good afternoon, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear again before you today on behalf of the Antitrust Division of the Department of Justice. I would like to say a few words about the current environment in which we enforce the antitrust laws, and then highlight some of our recent enforcement initiatives.

As members of this Subcommittee appreciate, sound antitrust enforcement is vital to America's economic health. Competition is the cornerstone of this country's economic foundation. American consumers and businesses all benefit from the kind of robust free-market economy that antitrust enforcement promotes and protects. Effective antitrust enforcement helps consumers obtain more innovative, high-quality goods and services at lower prices, and enhances the competitiveness of American businesses in the global marketplace by promoting healthy rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors.

Antitrust enforcement has rightly enjoyed substantial bipartisan support through the years, and we appreciate the active interest and strong support this Subcommittee has shown toward our law enforcement mission.

Our economy is in the midst of dramatic changes, with increased globalization and rapid technological innovation, and deregulation creating an environment in which many firms are choosing to merge or undertake other types of strategic business alliances. While most of these arrangements foster efficiency to the benefit of consumers and businesses alike, some can result in market power that decreases competition. That is why we must look at these arrangements carefully, so that we can take appropriate steps to protect American consumers and businesses from those that threaten competition.

## RESPONDING TO CURRENT CHALLENGES

Before I turn to some of our recent enforcement actions, let me talk for a minute about what the changes in the marketplace mean for antitrust enforcement, and how we are responding.

*Globalization of markets*

We are responding to the fact that we live in a global marketplace. Our legal authority under the antitrust laws reaches anticompetitive conduct that take place off U.S. soil if it has significant effects here, as reaffirmed most recently in the *Nippon Paper Industries Co.* case. But to make effective use of that authority, we often need help from foreign competition authorities to obtain crucial evidence. We have negotiated numerous mutual assistance agreements with our foreign counterparts to facilitate this kind of cooperation, including one agreement thus far, with Australia, under the International Antitrust Enforcement Assistance Act of 1994, which allows us to share certain confidential information under appropriate protections.

There are an increasing number of mergers that cross international boundaries and are subject to review by more than one country's antitrust authority. To minimize the burden of multi-jurisdictional review on merging parties, and the conflicts that can result from differing conclusions regarding a merger, we have worked hard to cultivate good relations with foreign enforcers so that we understand each other's merger enforcement policies and practices, and to coordinate where it makes sense, bearing in mind each country's understandable interest in conducting its own review of mergers that impact its markets. We learned some valuable lessons from the Boeing/McDonnell-Douglas merger, where the FTC and the EC reached differing conclusions. I believe the more recent MCI/WorldCom and Dresser/Halliburton mergers are a good model for how close consultation in international merger enforcement can and should work. The parties agreed to waive confidentiality, enabling us and the EC to share our independent analyses as they evolved, and we ultimately reached essentially the same conclusions. We've formed a U.S.–EU merger working group, along with the FTC, to build on our experiences in these cases.

At times, due to jurisdictional and practical limitations, it may make more sense, if a foreign country's markets are most directly affected, for the antitrust authority in that country to investigate a matter in the first instance. To that end, we have included so-called "positive comity" provisions in bilateral cooperation agreements with several of our major trading partners, including the European Union, Canada, Japan, Israel, and Brazil—as well as a special enhanced positive comity agreement with the EU. Our one formal positive comity experience to date—the referral to the European Commission of possible anticompetitive conduct by several European airlines with respect to computer reservation systems—has thus far been successful. The Subcommittee has played an important constructive role in our thinking about how to make positive comity an effective tool in international antitrust enforcement.

*Rapid technological change*

We have also responded to the challenges posed by the rapid technological advances evidenced in many industries. We spend significant time and energy developing the expertise needed to understand the competitive impact of the new technology. We are mindful that technological change can bring industries previously considered separate and distinct into the same competitive marketplace. And we

critically evaluate the increasingly frequent claim by the parties we are investigating, that technology is changing their industry so rapidly that we should not be concerned. We know, however, that in some cases rapid technological change can actually increase barriers to entry through network externalities and first mover advantages that may cause the market to tip quickly toward a dominant supplier and thereby make new entry extremely difficult.

The more important that innovation becomes to society, the more important it is to preserve economic incentives to innovate. Timely and effective antitrust enforcement may be essential to preserving the kind of environment in which companies new and old, large and small, can be confident that there will be no anticompetitive barriers to bringing their new products and services to market.

*Deregulation and the introduction of competition*

In recent decades, legislative and regulatory changes in the United States have reversed a generation of pervasive government regulation and deregulated such basic industries as telecommunications, energy, financial services, and transportation. As competition displaces regulation as the industry norm, antitrust enforcement becomes important to ensuring that the procompetitive goals of deregulation can be achieved. In telecommunications, we are seeing the effects of the 1996 Act unfold. When successfully implemented, that Act will significantly restructure the industry and bring enormous competitive benefits to consumers and the economy; but bringing competition to segments of an industry in which regulated monopolies have long held sway will not be fully accomplished overnight. In addition the role we play in advising the Federal Communications Commission on section 271 long-distance entry applications, helping to ensure that the local market is open to competition before long distance entry is granted, we are also paying close attention to mergers and alliances being undertaken in response to deregulation, to ensure that competition is able to spread and flourish.

For example, we challenged the proposed acquisition by Primestar, a joint venture controlled by five of the largest cable companies in the U.S., of the direct broadcast satellite assets of News Corp. and MCI, because we were concerned that it would allow those cable companies to prolong their monopoly in multi-channel video programming distribution. The assets in question included a satellite at the last orbital slot available to independent DBS firms for reaching the entire continental U.S., and allowing it to be transferred to the dominant cable companies would have eliminated one of the most important avenues of new competition to cable. In the face of our challenge, Primestar abandoned the acquisition.

The electric power industry is beginning to follow a similar path from regulation to competition, and we and others in the Administration look forward to working with Congress to ensure that regulatory restructuring at the federal level is consistent with fundamental competitive principles, and that competition is protected and nurtured as restructuring in the industry proceeds.

## RECENT ENFORCEMENT INITIATIVES

I would not like to highlight a few of our important enforcement initiatives over the past year or so, first in criminal enforcement, then in merger enforcement, and finally in civil non-merger enforcement.

*Criminal enforcement*

In the area of criminal enforcement, we are continuing to more forcefully against hard-core antitrust violations such as price-fixing and market allocation. In the past few years, a significant number of our prosecutions have been against international price-fixing cartels that have directly impacted substantial volumes of U.S. commerce. We have found that many of these international price-fixing cartels were highly sophisticated, involved leading firms in the industry, and affected a wide variety of goods sold to business and individual consumers. They are also often particularly brazen.

The past fiscal year set yet another new record in terms of criminal antitrust fines secured, on top of several previous record-breaking years—a total of $1.1 billion. One single fine, the $500 million fine against Swiss pharmaceutical giant F. Hoffman La Roche in relation to the international vitamin cartel, was the largest criminal fine in the entire history of the Department of Justice, antitrust or otherwise.

You should not presume that we will continue breaking records every year. The order of magnitude of criminal antitrust fines since fiscal year 1997 is unprecedented—in the previous decade, they averaged $29 million annually, and that average was itself higher than previous periods. In fact, the amount of fines obtained since fiscal year 1997 is many multiples higher than the sum total of all criminal fines imposed previously for violations of the Sherman Act, dating all the way back

to the Act's inception in 1890. The fiscal year 1999 record was itself an almost four-fold leap over the record set the previous year. But the recent fine levels are a direct result of our sustained effort to crack not just domestic price-fixing schemes, but also to focus our resources on the biggest international cartels that victimize American consumers and businesses, to bring the violators to justice, and to send a strong deterrent message throughout the world—and effort that we will continue.

International cartels typically pose an even greater threat to American businesses and consumers than domestic conspiracies, because they tend to be extremely broad in geographic scope and amount of commerce affected, as well as highly sophisticated, characterized by precise and elaborate agreements among the conspirators to carve up the world market by allocating sales volumes among themselves and agreeing on what prices would be charged to customers around the world, including in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year.

The record-setting fine I mentioned a minute ago resulted from a major investigation into an international cartel organized to fix prices and allocate market shares for vitamins. The conspiracy affected $5 billion in U.S. commerce, involving vitamins used not only as nutritional supplements and food additives, but also as important additives in animal feed; it may well be the most harmful conspiracy we have ever uncovered. The victims who purchased directly from the cartel members included companies with household names such as General Mills, Kellogg, Coca-Cola, Tyson Foods, and Proctor and Gamble. As a result, for nearly a decade, every American consumer—anyone who took a vitamin, drank a glass of milk, had a bowl of cereal, or ate a steak—ended up paying more so that conspirators could reap hundreds of millions of dollars in additional, ill-gotten revenues.

Last May, two firms, F. Hoffman-La Roche and a German firm, BASF Aktiengesellschaft, agreed to plead guilty, with Hoffman-La Roche to pay a fine of $500 million and BASF to pay a fine of $225 million. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry in which there have been 14 prosecutions to date. It has resulted thus far in convictions against Swiss, German, Canadian, and Japanese firms, with over $875 million in criminal fines against the corporate defendants, and in convictions against seven American and foreign executives who are now serving time in federal prison or awaiting potential jail sentences along with heavy fines.

Other industries where we have brought major criminal prosecutions recently, in addition to vitamins, include: graphic electrodes used in electric arc furnaces in steel mills to melt scrap steel; sorbates used as chemical preservatives to prevent mold in cheese, baked goods, and other food products; marine construction and transportation services; point-of purchase display materials such as plastic and neon signs; the livestock feed additive lysine; citric acid; the industrial cleaner sodium gluconate; commercial explosives; real estate foreclosure auctions; and metal buildings insulation.

International enforcement of our criminal antitrust laws is a top priority of the Antitrust Division. At present, more than 35 sitting U.S. antitrust grand juries are looking into suspected international cartel activity. We are determined that international cartels not be permitted to prey on American businesses and consumers with impunity. An equally important goal is to ensure that every business person around the world who contemplates price-fixing behavior that could adversely impact American businesses and consumers will choose to forgo such illegal activity because of concern that we will find out about it and prosecute to the full extent of the law. Our efforts to achieve that goal will continue unabated this year and for years to come.

*Merger enforcement*

We are in the midst of a continuing merger wave throughout our economy. A record $1.4 trillion in U.S. merger transactions took place in 1999. In each of the last two fiscal years, more than 4600 transactions were reported to us under the Hart-Scott-Rodino Act, the most in our history, and more than double the number being filed per year just a few years ago. And in the first five months of fiscal year 2000 there have been more than 2000 reported transactions, an approximately 18-percent jump over the same period in the previous fiscal year.

We have devoted tremendous energy to staying on top of this merger wave, so that we can challenge the mergers that would harm competition while minimizing any delays and disruptions in competitively beneficial or benign business combinations, which constitute the overwhelmingly majority.

In the last fiscal year, we brought 47 merger challenges, the highest level of merger enforcement in our history. So far this fiscal year, we have brought 12 more.

While most of our merger challenges have been resolved by consent decrees, we have not hesitated to seek to block transactions in their entirety when necessary to preserve competition. Both the Lockheed Martin/Northrop Grumman and the Primestar transactions were abandoned after we filed complaints and were well into discovery, and parties have abandoned other transactions, such as Monsanto/Delta & Pine Land, after learning of our intention to sue. Since July 1, 1997, we have gone to court nine times to full-stop block merger transactions; and on seven other occasions we have been prepared to go to court to full-stop block a merger, but the parties abandoned the transaction prior to our filing a lawsuit.

Our important merger enforcement actions of the past year include the Cargill/Continental Grain merger, where we insisted on divestitures in a number of grain storage facilities throughout the Midwest and in the West, as well as in the Texas Gulf, to protect competitive options for grain and soybean producers and to protect competition in the delivery points for the corn and soybean futures markets. This was a particularly important case in that it demonstrates that antitrust enforcement is concerned not only with market power in the possession of sellers, but so-called "monopsony" power in the possession of buyers. In this case, the concerns that led to our challenge had to do entirely with the creation of monopsony power in the mergers firm as buyers of grain and soybeans.

In addition to Cargill/Continental and Primestar, other recent merger challenges include:

• Lockheed/Northrup Grumman, where the merger would have resulted in unprecedented vertical and horizontal concentration in the defense industry, substantially lessening and in some cases outright eliminating competition in major product markets critical to our national defense. In the face of our challenge, the parties abandoned the merger.

• Northwest/Continental, where the proposed transaction would allow Northwest to acquire voting control over Continental, substantially diminishing the incentives for the two airlines—the nation's fourth and fifth largest—to compete against each other. This case is pending and is currently scheduled for trial in October.

• Monsanto/Dekalb Genetics, where the merger as proposed would have substantially lessened competition in biotechnological innovation in corn. Monsanto agreed to spin off claims to an important cutting-edge technology used to introduce new genetic traits into corn seed, and to license its proprietary Holden's corn germplasm, to numerous seed companies so they could develop their own special hybrids.

*Civil non-merger enforcement*

Civil non-merger enforcement has become especially important in this era of rapid technological change and the growth of network industries, and we have also been very active in this area to ensure that antitrust enforcement keeps up with these changes to protect competition in a variety of industries important to our economy.

Perhaps our best-known recent civil non-merger case is our pending case against Microsoft under sections 1 and 2 of the Sherman Act for its efforts to use exclusionary practices to protect its monopoly in personal computer operating systems and to extend its monopoly power into the Internet browser market. As you know, Judge Jackson issued findings of fact in November, the parties have filed briefs as to proposed conclusions of law and concluded oral arguments, and we are now awaiting the court's conclusions of law.

The Microsoft case is obviously one of our top priorities, and we consider it to be very important for our economy. But let me turn briefly to a few of our other important civil non-merger cases.

First let me say a few words about our pending case against American Airlines under section 2 of the Sherman Act for monopolizing airline passenger service on routes emanating from its hub at Dallas/Ft. Worth International Airport. As the complaint we filed sets forth in detail, American repeatedly sought to drive small, start-up airlines out of DFW by saturating their routes with additional flights and cut-rate fares. After it succeeded in driving out the new entrant, American would re-establish high fares and reduce service. Passenger traffic surged when the low-cost airline began operations and more people could afford to fly, and then fell back dramatically after American had driven out the upstart and resumed monopoly pricing. American knew this strategy was a money-loser in the short term, but expected to make that up by preserving its ability to set fares at monopoly levels.

American, like anyone else in our capitalist economy, is free to compete, and compete aggressively. But is crossed a fundamental line into predation. This is the first predation case brought against an airline by the Antitrust Division since the industry was deregulated in 1979. I think it will be tremendously important for our traveling public throughout the country, who deserve the lower fares and expanded choices available in a competitive airline marketplace.

Out case against VISA/MasterCard is also an important civil non-merger enforcement action. We are charging VISA and MasterCard, the two dominant general purpose credit card networks, with restraining competition among themselves through overlapping governance arrangements among the large banks that own and control them, as well as adopting rules to prevent their member banks from dealing with other credit card networks. The result is that competition and innovation are severely impaired. This case is also pending, and trial is expected this summer.

A third civil non-merger case I'll mention is our case against Dentsply International for unlawfully maintaining a monopoly in the market for artificial teeth in the U.S. Dentsply entered into restrictive dealing arrangements with more than 80 percent of the nation's tooth distributors, preventing them from selling products made by its competitors. Dentsply's efforts to deprive its rivals of an effective distribution network have resulted in increased prices for artificial teeth; they have reduced innovation; they have prevented other firms from competing effectively; and they have deterred new entry into the market. Trial in this case is expected sometime this year.

ANTITRUST DIVISION BUDGET AND STAFFING

As you can see, our workload is expanding, its complexity is increasing, and its importance to American businesses and consumers has never been greater. To continue to effectively carry out our mission, we need increased resources.

For the current fiscal year, the Antitrust Division's budget is $110 million, providing for an appropriated staffing level of approximately 360 attorneys. In light of our tremendous ongoing workload and its projected expansion, the President's fiscal year 2001 budget request for the Antitrust Division is $134 million, which includes increases to handle cost-of-living expenses as well as to hire additional attorneys, economists, paralegals, economic research assistants, and other critical support. This increase is needed in light of our increasing workload and the clear importance of competition to the nation's economic health and prosperity. It will for the first time in 20 years enable us to bring our staffing level back to where it was in 1980, a time when the economy was significantly smaller, less complex, and less globalized. I can assure you that we will put the additional resources to productive and cost-effective use.

CONCLUSION

The Supreme Court has described the Sherman Act as the "Magna Carta" of the free enterprise system. The responsibility we are given to enforce it is one we take very seriously. We are working hard to carry out our enforcement mission to protect competition in the marketplace against private efforts to thwart it. We are not in the business of picking winners and losers. In a free market economy, that responsibility falls to consumers, who make that determination through their purchasing decisions. The job of the antitrust enforcement is to ensure that the benefits of the competitive process are not blocked by private anticompetitive conduct. We look forward to meeting the ongoing challenge to ensure that businesses can compete on a level playing field and that consumers and businesses are benefited by competition that produces low prices, high quality, and innovative goods and services.

Senator DEWINE. Chairman Pitofsky, thank you very much for joining us.

## STATEMENT OF ROBERT PITOFSKY, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. PITOFSKY. Thank you, Mr. Chairman.

Senator DEWINE. We are glad to have you back.

Mr. PITOFSKY. Thank you very much. Senator Kohl, Senator Grassley, as always, I am very pleased to appear before this committee to discuss the FTC's activities in antitrust enforcement.

In my years at the agency, we have worked in an exceptionally constructive way with members of this committee and I want to echo what my friend Joel Klein just said, that we appreciate the support and the guidance that we have received in the oversight process. In my experience, I have not seen as fine a relationship

between an oversight committee and a regulatory agency than we have seen with this group.

This is an unusually interesting time to be engaged in antitrust enforcement. There have been several mentions already of the merger wave, and I am sure we will come back to that; rapid globalization of trade, which changes the nature of measurement of market power; rapid expansion of the high-tech sector of the economy, which means you have to be careful in applying old precedent to very new structures; deregulation of vast sectors of the economy, including telecommunications and electricity; and finally from our point of view, because we are so committed to enforcement in this area, a distribution revolution which has opened up markets to access and consumers to greater opportunities for choice. I have in mind principally the online commerce sector, which was $15 billion this year and is predicted to be $78 billion by 2003.

The challenge is to take this 19th century discipline which has served this country so well and apply it to 21st century problems. I know that we have to adjust in applying precedent in this area and I hope we are in the process of doing so.

I would like to single out just three areas of the many that we are involved in for a statement. First, the merger wave, 3 times as many filings in 1999 as 1991, and now we find this year filings are up another 18 percent. One cannot help asking where this will all end, 10 or 11 times as many assets scooped up in mergers as 10 years ago.

My own view is that the merger wave is not the problem. It is primarily a consequence, an inevitable consequence, of the most dynamic economy this country has seen in a generation. The problem is, the mega-mergers that we see now, some of which are exceeding $100 billion in value, among firms that already have great market power and sometimes between firms that are direct competitors with each other.

Nevertheless, the fact is that we thoroughly investigate only 3 percent of the mergers that are filed. We challenge a little over 1 percent. Ninety-eight or 99 percent of these mergers go through, but the ones that do not, I think deserve very aggressive review.

On distribution, my own view is that the United States has the most open wholesaling and retail sector of its economy of any country in the world. I think it has served the country well and I believe that one of the success stories of antitrust is the way it has kept distribution open.

But now we find new challenges. For example, I mentioned online distribution. One of the more interesting cases in the last year involved a pattern of behavior in which 25 conventional Chrysler dealers went to the Chrysler Company and said, there is somebody selling cars on the Internet at a very low price. Do something about that company. Cut them back. Cut them down. Chrysler referred their complaint to us and we entered into a consent order preventing that kind of behavior. It was a fairly conventional boycott. I hope that our action in that area will convince other brick-and-mortar distributors that that is not an appropriate way to deal with the new competition offered on the Internet.

We challenged a proposed vertical merger between Barnes and Noble, the number one book-selling chain in the United States, and

Ingram, the number one retailer, because we were concerned that small booksellers and new entrants in the Internet sector of book selling would not have a secure wholesale source of supply. That deal was abandoned before we got to court, but it seems to me, again, it was an effort to keep markets open.

Finally, just a few weeks ago, we settled a case with McCormick spice company. Our complaint alleged that they were providing discriminatory discounts in the nature of slotting allowances, shelf space allowances, conditioned on the chain giving McCormick spice 70 or 80 percent of the shelf space in the store, injuring smaller competitors in the spice market, disadvantaging smaller chains and independents who did not receive the discount.

I believe the case was important. I am even more enthusiastic about the fact that we will hold a workshop at the FTC in a month or two in which we will invite private sector people, consumer people, academics, to discuss the role of slotting allowances in the modern economy. I think that is in the tradition of my agency, which is not supposed to be just a law enforcement agency but is supposed to anticipate commercial problems and report findings to Congress.

Finally, very briefly, we spend a lot of our resources on the health care market because inflation in that area seems to be quite pronounced, the usual merger concerns among pharmaceutical firms. We have a case in court now in which the allegation is that Mylan, a genetic pharmaceutical firm, cornered the market, allegedly, on a key ingredient for their product, and having cornered the market, raised the price in January 1998, from $11.36 for 500 capsules to $377, and this was a product needed by many people who are on rather fixed incomes. An unusual aspect of the case is that we are seeking not just the conduct remedy, but disgorgement of allegedly ill-gotten profits.

Finally, we brought a case just—well, two cases came up just 2 weeks ago, one we settled and one we are going to be in court on, involving rather similar conduct, and that is a situation in which a branded pharmaceutical, as it sees its patent winding down and is threatened by a challenge by a generic, enters into an agreement with the generic firm, paying millions of dollars per month for the generic firm to stay out of the market or to delay its entry into the market. We settled one case and we will litigate the other. The question of competition between branded pharmaceuticals and generics is one that we are paying a lot of attention to at the present time.

Let me simply conclude where you started, Mr. Chairman. We are extremely busy. I think we can handle the merger wave by reassigning people from one part of our agency to the other. I do worry that there are conduct cases that are not being handled as aggressively and as promptly as they should be because our resources have been moved so much in the direction of merger review.

Thank you very much, and I look forward to answering your questions.

Senator DEWINE. Mr. Chairman, thank you very much.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

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 percent. 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 com-

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

[2] See Attachment 1.

plex 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 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 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 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

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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.

[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 inline 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.

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 percent 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.

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 percent of the electric power generation capacity in the Commonwealth of Virginia, proposed to acquire Consolidated Natural Gas ("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

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

[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.

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

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

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 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 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 become 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.

We have also challenged a number of other large mergers involving products and services that are highly important to consumers, including pharmaceutical prod-

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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.).

[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.

ucts,[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 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 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 percent of reported transactions receive a request for additional information (the so-called "second request"). The issuance of a second request is not undertaken lightly,

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[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).

[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).

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 percent of the investigations result in productions of fewer than 20 boxes of responsive documents, and over 85 percent 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 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.

## 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.

## 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.

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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.

[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.

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 or 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 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.

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 in May 31 and June 1. This session will bring together people from manufacturing, retailing, eco-

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[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 bought 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.

[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).

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

nomics, and other relevant disciplines to discuss the issues involved in this very complex subject.

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 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

[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).

[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.

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 exclusively rights under the Hatch-Waxman Act. Abbott was charged with 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 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 for 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 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 nonmerger 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 fis-

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[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).

[35] Summit 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>).

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

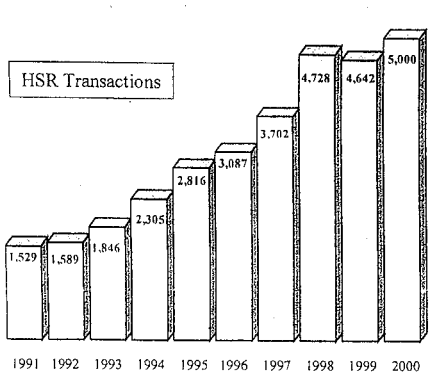
cal year 2001 asks for an additional 69 workyear, over the current fiscal year, for our antitrust enforcement efforts.[38] We ask the Committee's support for additional resources for this important mission.

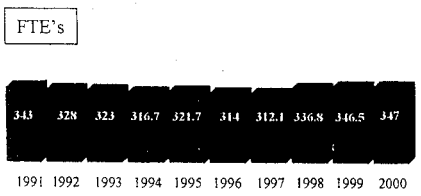
Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American businesses and consumers. We would be pleased to respond to any questions you may have.

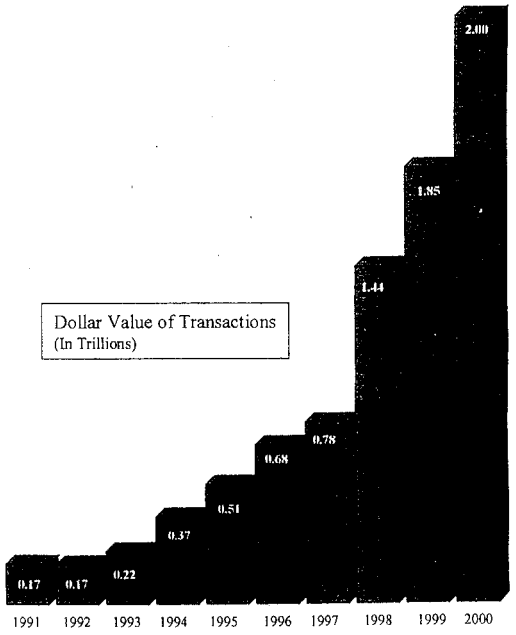
[38] The President's proposed budget also includes additional resources for the FTC's consumer protection mission.

# Maintaining Competition Mission

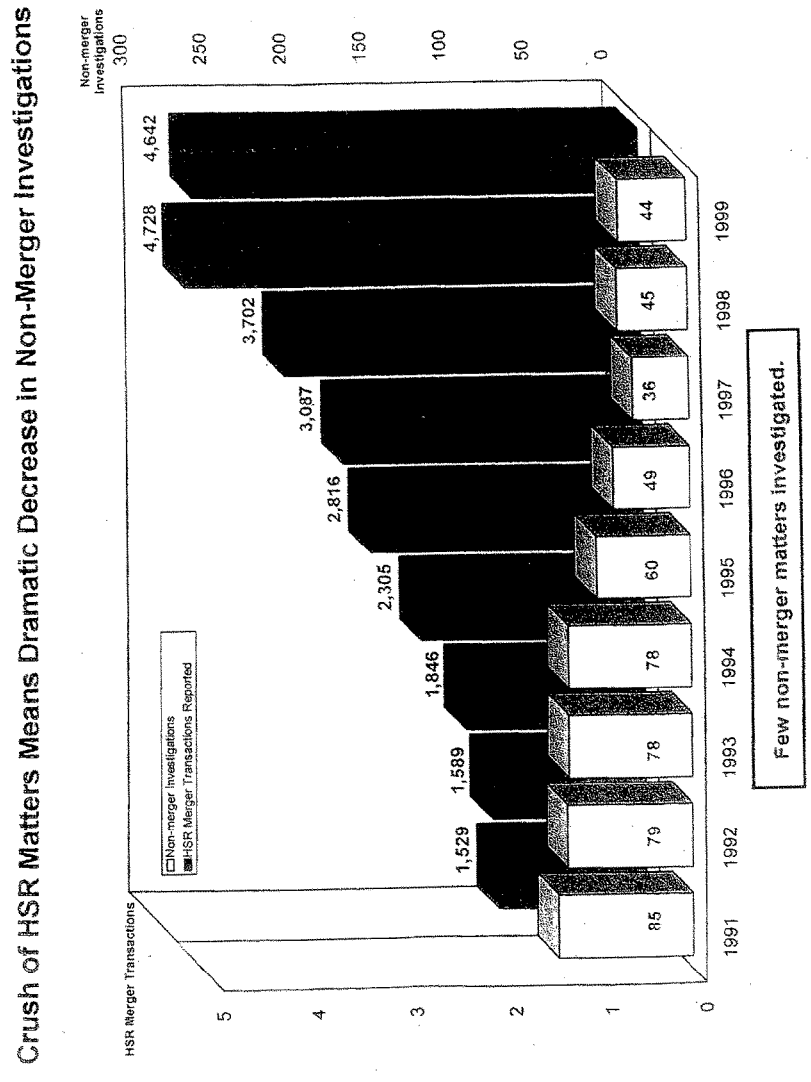
## HSR Transactions, FTE & Dollar Value of Transactions




Fiscal Year 2000 information: Reported HSR Transactions (15% over FY99 thus far) and dollar value estimated. FTE based on funded amount.


Crush of HSR Matters Means Dramatic Decrease in Non-Merger Investigations
HSR Merger Transactions
Non-merger Investigations
Non-merger Investigations
HSR Merger Transactions Reported
0
1
2
3
4
5
0
50
100
150
200
250
300
1,529
1,589
1,846
2,305
2,816
3,087
3,702
4,728
4,642
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78
60
49
36
45
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1991
1992
1993
1994
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1996
1997
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1999
Few non-merger matters investigated.

Senator DEWINE. Before we move to the questions, I am going to at this point call on Senator Grassley for any opening statement that he would like to make.

**STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. What I want to do, because I have to go to a three o'clock meeting with a large farm group that has come from my State, is submit for the record my statement, and then to each of you, I would have a series of questions.

But I would like to take just a couple of minutes outside of my comments and my questions to visit with my colleagues here as well as with Mr. Klein about a bill that I introduced. The reason I am a little bit uncomfortable visiting with you about it, Mr. Klein, is because you have been responsive to our concerns about agribusiness mergers and you have put a person on staff to look into those, and then you see that I introduced the bill that I have introduced and you might think, well, I do not think that you are at all concerned about what is going on in rural America, and I feel that you have tried hard to get an understanding of that and even to respond to it in some way.

So I have introduced the Agricultural Competition Enhancement Act and I see it as a starting point, hopefully to begin a constructive dialogue with both the Justice Department and the Federal Trade Commission, as well as the Department of Agriculture, about the best way to address farmers' concerns. There are other members, in fact, I understand that before I got here that Senator Leahy had addressed this issue, and so there are going to be bills put in by other members, and so I would like to work with Senator Kohl and I would like to work with Chairman DeWine on this issue.

But most importantly, to Mr. Klein, we do not substantively amend the antitrust laws. We do not change any of the powers of the Justice Department. We do put the U.S. Department of Agriculture at the table in those instances where it affects the family farm, and probably the one thing you will not like about the bill is that if through the regular process of considering mergers the Department of Justice would decide that they should not be challenged, we would allow, if the Agriculture Department feels disagreement with the Department of Justice after they have made their decision, to allow the U.S. Department of Agriculture, through special counsel, to go into court in narrow instances. The process is a fairly dramatic departure from the practice of the last 110 years, but I do not believe that the antitrust laws are substantively changed in my legislation.

So I just throw that out for consideration to my colleagues, because I believe you felt the concerns of famers in September when you were in Iowa. It is still there, and I think even if economic times get better, it will still be there because there is just a feeling that there is just a lack of competition and too much concentration. So I just throw this out to you and to my colleagues for your consideration. I intend to move ahead with the bill, but I also know that the reality of it is that there are a lot of other ideas that are here regarding agriculture concentration, as well, and then prob-

ably a lot of people that think that nothing needs to be done. But I feel strongly that something needs to be done.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Grassley, thank you very much. Of course, your full statement will be made a part of the record, as will your questions, and they will be submitted to the two witnesses.

Let me also state that I intend to look at your bill, Senator Grassley. I am anxious to take a good look at that, as well as Senator Leahy's bill.

[The questions and answers of Senator Grassley were not received at presstime.]

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR GRASSLEY

Chairman DeWine, thank you for holding this hearing today. As you know, I've been very interested in antitrust matters and how they impact my constituents, such as whether the high price of airline tickets for Iowans is the result of anti-competitive business practices, or whether mergers and acquisitions in agribusiness are not being reviewed as carefully as they should. In particular, I've been following the merger mania trend, because so many of my constituents are concerned about rapid consolidation in a number of industries, and the impact mergers have on rural America. I've received phone calls and letters on practically every industry experiencing consolidation. From telecommunications to railroads, banking to meat packing, airlines to the entertainment industry, you name it, I've gotten constituent communication expressing concern. I am the first to say that mergers and acquisitions can be beneficial, bringing efficiencies, innovation, and other benefits to our economy and to consumers. But these transactions need to be reviewed carefully to make sure they do not stifle competition. I know that we have the antitrust laws to ensure that the market functions properly, bad actors are stopped, and consumers are not harmed. But many of my constituents are concerned that either the antitrust laws are not being enforced, or they are not producing effective outcomes. Farmers and small independent producers are particularly concerned about this issue, because they believe that vertical and horizontal mergers and acquisitions occurring in agribusiness are not being reviewed appropriately for all possible ramifications in the marketplace.

Earlier this week, I introduced a bill addressing agriculture competition issues, and enhancing USDA's role in reviewing and challenging agri-business transactions. The Agriculture Competition Enhancement Act, the "ACE" Act, is just a starting point, hopefully to begin a constructive dialogue with both the Justice Department and Federal Trade Commission, as well as the Department of Agriculture, about what is the best way to address farmers' concerns. Other members are working on agriculture competition proposals, so I'd also like to express my desire to work with Chairman DeWine and Senator Kohl, as well as other interested members of the Judiciary Committee, on this important matter.

I look forward to hearing from the Justice Department and Federal Trade Commission about their efforts to enforce the antitrust laws and to ensure competition is not harmed by anti-competitive behavior or by bad mergers and acquisitions. I am interested in hearing from Mr. Klein and Mr. Pitofsky about the concerns my constituents have, and how they are being addressed. Thank you.

Senator DEWINE. Let me move, if I could at this point, to the questions. This first question will be to either of you or both of you. A recent Washington Post article mentioned a study that analyzed the 700 most expensive mergers during the past 3 years and found that 83 percent of these mergers failed to increase shareholder value and more than half had reduced shareholder value.

Now, we certainly understand that shareholder gain in and of itself is not the focus of antitrust review, but does this statistic indicate that some merging parties may be overselling the efficiencies to be gained from their deals, and if so, how should these types of

concerns be addressed, if at all, during merger reviews? Mr. Klein, Mr. Chairman, either one.

Mr. KLEIN. I think the way——

Senator DEWINE. It is an interesting statistic.

Mr. KLEIN. It is an interesting statistic. It is also a little hard to know how you measure post-merger shareholder value versus what it would have been had the company stayed separately. There is no control group.

Senator DEWINE. That is true.

Mr. KLEIN. But having said that, I certainly take the point in the following sense. From our point of view, Mr. Chairman, the focus of our inquiry, first and foremost, is on the anticompetitive effect. In other words, we look to see where the action is. Now, in that process, we do look at efficiency claims, but I have actually spoken to this and we and the Federal Trade Commission together actually adopted some efficiency guidelines.

We know the minds of lawyers and the minds of economists can be quite imaginative in the merger process, and so we are pretty tough in analyzing efficiency claims. I would say, on a transaction, we might get claims that there will be $100 million or $200 million, and much more often than not, we cut those down in our assessment significantly. But even then, what we look at first and foremost is if there is any significant anticompetitive effect, that is what drives the analysis. It is only when you see a very small anticompetitive effect and potentially significant efficiencies that you are likely to come out the other way.

The second point I would make in terms of that study, Mr. Chairman, is whether there are efficiencies or not, in a lot of mergers where there is no anticompetitive effect, the merger may not take. The new company may not work well with the old company and management styles may be different, particularly now when we are seeing such dramatic stuff.

And so a lot of times, even though mergers have no competitive impact in any significant way, in terms of shareholder value or company benefit, they do not work out particularly well. That is not an antitrust problem, that is really a kind of a business problem.

Mr. PITOFSKY. I agree with that. I, too, at times wonder about some of the deals that we see going by. Someone mentioned inflated stock and inflated value of the acquired asset. I know it has been said that there is some irrational exuberance in the stock market. I sometimes think there is irrational exuberance in the capital market, as well.

I take courage from the fact that a very similar thing happened in the 1980's. That conglomerate merger frenzy in the early and mid-1980's, in which everybody seemed to be buying one of everything, but subsequent studies showed that about, I think it was about two-thirds of those mergers came apart.

Senator DEWINE. How many? I am sorry.

Mr. PITOFSKY. I think it was about two-thirds. I can get the number. Mike Sherer's book discusses this matter. But if they are a bad idea, then the market will exact its vengeance over foolish corporate acquisitions.

I do not think the government should be blocking mergers because they are a bad idea. I think the government should be alert to blocking mergers that have an anticompetitive or an anti-consumer effect, and that is where I think we ought to be putting our resources.

Senator DEWINE. Let me follow up to something that Senator Leahy said and Senator Grassley said. Mr. Klein, I also am very glad to see that you appointed a counsel, special counsel to focus on the antitrust issues involving the agriculture industry. I wonder if this, in your opinion, has this appointment been useful and what type concerns does the division have in this area that need to be addressed?

Mr. KLEIN. Well, first of all, I do think the appointment is useful. I think we have a very distinguished lawyer with a lot of prosecutorial experience.

Senator DEWINE. And that appointment was made how long ago?

Mr. KLEIN. I would say probably 3 months ago now.

Senator DEWINE. Three months ago?

Mr. KLEIN. And he has already had the opportunity to travel out to the Midwest, a number of States, meet with affected groups. A number of the groups that have been in town over the last several weeks have had the opportunity to talk with Doug. He is a very seasoned and distinguished lawyer with very long-term ties to the State Attorneys General organization, which he worked with, as well, which is obviously a critical liaison for us in that regard.

So I am delighted, and really, the Senate Agriculture Committee as well as this committee encouraged this action and I am pleased that we did it.

I think this is an important area in a variety of ways, and I just want to sort of make a few comments, because a number of members of the subcommittee have raised the issue. I personally have been very concerned, and I think Senator Grassley alluded to the fact, I had the privilege to accompany him and Senator Harkin out to Iowa to meet with a large group of farmers. I had the opportunity to go, as well, to Minnesota and meet with a large group of farmers, and I have been privileged to have a large number of these farm groups visit with me in my office here in Washington.

There are a mixture of concerns, some of which are antitrust related, a lot of which have to do with other phenomena and other factors in the global market. Some of the Asian crisis had a huge impact on demand for U.S. farm products. There are other issues about the economy that are not antitrust issues.

Having said that, I think, and the Attorney General has said this, I think it is appropriate for the Department to focus on these concerns. Agriculture has been a mainstay of antitrust concern and enforcement. As people have pointed out, if you go back to the original Sherman Act, these issues were part of the genesis of why we are here today.

I think, from our point of view, we have had a very, very powerful enforcement effort. I mentioned Continental-Cargill, in which the farm community supported us strongly for the tough monopsony action we took. We took a similar—I remember being told at one of these meetings that there were going to be—first, there were red tractors, then yellow tractors and green tractors, and now it

looked like the red and the green are going to merge and we are going to have turquoise tractors and this and that, and we did something significant on that merger, as well.

I think on cotton seeds and corn seeds, two very, very critical products for farmers, we took strong actions with respect to Monsanto acquisitions, one of which, the Delta and Pine Land matter, which was an important cotton seed matter. Actually, the parties abandoned the transaction in the face of our efforts.

The other point we have made clear is from the Archer Daniels Midland through the vitamins cartel cases that we have dealt with, we are dealing with farm products in which there are inflated prices, which is an input that farmers have to bear the cost and suck it in on. So I think that we have done a lot, but I have personally said that given the concerns, I want to make sure every stone is unturned. That is why we appointed Doug. That is why my chief of staff, Adam Golodna, has probably devoted more time to agriculture issues than any other issue in the division, and that is why I personally have promised the Attorney General that we are going to stay alert in these matters. We will gladly review Senator Leahy's bill, Senator Grassley's bill, and engage on that, as well.

Senator DEWINE. We certainly would appreciate that.

Mr. Klein, have you put together internally any kind of document that would summarize what you have done in the antitrust area in regard to agriculture, or is there something you could supply this committee that we could make a part of the record of this hearing?

Mr. KLEIN. I would be delighted to do that, Senator.

Senator DEWINE. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you, Senator DeWine.

Mr. Klein, an antitrust issue that has been the focus of enormous public attention, as you know, is the government's lawsuit against Microsoft. I recognize that you are limited as to what you can say regarding a pending court case, but this is a matter of high public concern, so if I can, I would just like to pose a few questions to you.

First, do you believe it is likely or possible that you will be able to reach an out-of-court settlement with Microsoft, or do you have some sense of the possibility of this?

Mr. KLEIN. Senator, with respect to that particular question, I think, as you may know, we are in the middle of a mediation process and that is governed by the strictest of confidentiality rules, and as an officer of the court, I would not comment on the prospects.

What I can say is two things. I believe the District Court's findings in this case reveal what the Department had asserted, which was that Microsoft had engaged in a serious pattern of anticompetitive practices, and I think that a remedy ought to be commensurate with those practices. It has always been my view and the Department's view that settlement is better than litigation, but the settlement would have to be, of course, appropriate to deal with the concerns that the court documented in its opinion.

Senator KOHL. I will ask, and I hope you can make a comment, is there any possibility of a resolution short of a structural solution?

Mr. KLEIN. Again, I think with the matter pending at this point, I think it would be better for me not to comment on it. I think there are special sensitivities about a mediation process, and actually, this process, although there have been occasional breaches, has been remarkably confidential. So I think it would be better at this point for me to observe those rules, Senator.

Senator KOHL. All right. Mr. Klein and Chairman Pitofsky, I would like to turn to another issue that has been the subject of much public interest, namely the airline competition. In our subcommittee, we continue to be concerned about competition in the industry. For example, start-up carriers face serious obstacles in establishing competing service to the incumbent carriers. We plan to hold a hearing shortly on how to improve competitive conditions in this industry.

But, Mr. Klein, consumers in the upper Midwest have been suffering from limited choice for much of their air travel due to the dominance of Northwest Airlines in this upper Midwest area. As I understand it, you are still investigating Northwest's conduct and practices. If you conclude that Northwest has engaged in anticompetitive practices, will you bring an enforcement action to stop this conduct?

Mr. KLEIN. Yes, we will, Senator. If we reach such a conclusion. Indeed, the proof of that is that we investigated American Airlines' conduct in the Dallas hub and did, indeed, bring a monopoly action challenging American with respect to its practices and the way that it essentially tackled these new low-cost carriers in Dallas. So we are, as you say, continuing our investigation on Northwest and obviously that will be decided on the merits of the investigation. But if we determine there is a violation, I assure you we will proceed.

Senator KOHL. It may be that the conduct engaged in by Northwest or other major airlines does not meet the legal definition of illegal conduct under the antitrust laws or the technical requirements to make out a predatory pricing case, but as you know, the Transportation Act also authorizes the Department of Transportation to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation." So, do you not think that the Transportation Department could, if it wishes, use its statutory authority to prevent anticompetitive practices to curb the unfair but otherwise legal conduct that some airlines may perhaps be engaging in?

Mr. KLEIN. There is no question, Senator, that they do have the statutory power, and I think they are continuing to look at an appropriate response. Let me just say, though, I think something significant has happened. I think the case against American Airlines, which is scheduled to go to trial, I think is a watershed case because I think that this will be one that has a real opportunity to set the rules nationally. I acknowledge what you said, so-called predatory pricing or predatory capacity cases are tough cases in the antitrust laws, but I think this is a strong and a meritorious case. Of course, that will be ultimately for the court to decide.

But I think this case will have significance. This is the first case since deregulation in which any Antitrust Division has challenged these kinds of practices and they go to the heart of the concerns that you are articulating, which is that, given the opportunity for

these new low-cost carriers to grow and develop and create real competition in the United States, we can see instead of a single hub dominance structure, we could see multi-carriers providing real choices throughout the United States.

I think that this *American Airlines* case could give us some real guidance on that. That is not to say there is not an appropriate role for DOT, but I think this is a major event, even though I understand right now we are focusing on one airline, but this will have national repercussions, I have no doubt.

Senator KOHL. Talking about the telecommunications industry, gentlemen, Chairman Pitofsky, you have been eloquent in the past expressing your view, which I share, that when dealing with mergers in the media, unlike mergers in other industries, such as cereal companies, banks, or oil companies, for example, we must give them a different type of scrutiny because these media mergers affect competition in the marketplace of ideas so central to the First Amendment.

Are you worried, Chairman Pitofsky, that the level of consolidation in the media is beginning to threaten these values by reducing the number of major sources of information available to the American public?

Mr. PITOFSKY. I am concerned about concentration in the media. We were concerned about it when we reviewed Time-Warner, Turner, TCI about 4 or 5 years ago, and we insisted upon an order in that case designed to preserve access for smaller companies and new entrants. Now, there are some major mergers going on in this industry, but there is also innovation in the form of the Internet, extension of cable resources to many homes.

So whether there is more concentration right now or less concentration, I am not exactly sure. I do look at each of these mergers, and especially the mega-mergers, with heightened concern. There is no question in my mind that we should give these transactions the most careful review.

Senator KOHL. Mr. Klein, with all the consolidation we have seen, are you concerned that we are in danger of a very few companies controlling the broad band delivery of the Internet?

Mr. KLEIN. Well, we have got some investigations ongoing into those issues right now. What I think is the following on this, Senator Kohl, that it is very early in the process of broad band rollout and there are going to be some very interesting and tricky developments with respect to both the cable modem, the DSL on the telephone lines, satellite, and other forms of delivery.

What I think is encouraging for the first time is because of digitalization, we now have the possibility that instead of having a single cable pipe—that always worried me much more, a single telephone line, because if you control the means of distribution, whether you force access or not, the consumer still only has one means of distribution.

And my own view, the model that I have really cared for and we made a big dent in it, not a complete solution, in the *Primestar* case is let us get lots of means of access to the home so that then, through digitalization, you can bring voice, you can bring data. The cable modem, for example, can now, instead of just bringing you cable TV, can bring you voice, can bring you Internet access, can

bring you data, and then you want to see that happen on the other means of access to the home or to the business.

Once that happens, if there are three or four pipes and digital transmission and broad band, we will see competition that we have not seen in any of these media. If anything, I am going forward more encouraged because my hope is that through the multiplicity of pipes, we are going to see something that we have not seen, which was one copper wire or one cable into the home.

I agree with the chairman, of course, that I think these megamergers in the media deserve very, very careful and thorough scrutiny and both agencies, and we consult a lot about this because we are both involved in it, but both agencies, I believe they are getting that thorough scrutiny.

Senator KOHL. Chairman Pitofsky, we have heard complaints from small medical device manufacturers about the conduct of large buying organizations that buy medical supplies for hospitals, the group purchasing organizations. The small medical device manufacturers claim that hospitals will not buy their products because these products are not on the approved lists of devices kept by the GPO's. They claim that hospitals will not buy products which are not on the GPO list because hospitals would lose the significant discounts they get for buying products which are on the approved list.

We understand that buying medical devices through GPO's lowers hospital costs generally, but could there be a problem here, namely that the smaller medical device manufacturers are insulated from competition, and just as important, will you commit to looking at this, and if necessary, revisiting your health care guidelines which permit GPO's?

Mr. PITOFSKY. Yes, I certainly would commit to do that, and I think you framed the question exactly right. On the one hand, you want these joint buying organizations to have the advantage of introducing efficiencies, especially, or primarily, when they are passed on to consumers in one way or the other.

On the other hand, these joint organizations do raise the question of whether or not they can be a device to exclude smaller competitors or new entrants, and you are trading that sort of thing off constantly. We have some matters in this area. The health care guidelines address it. Our new draft joint venture guidelines address some of these issues, and we certainly will keep a very careful eye on the issue that you raise.

Senator KOHL. Do you have a view on that, Mr. Klein?

Mr. KLEIN. I agree with Chairman Pitofsky.

Senator KOHL. Thank you, Senator DeWine.

Senator DEWINE. Senator Kohl, thank you very much.

Senator Hatch is in a meeting at the present time with Attorney General Reno, and he has asked me to express his regrets to both of our witnesses for not being able to be here today. But he has requested that on his behalf I pose to you the following two questions. So assuming that I can read the honorable Senator's writing, I will read the questions to you. These are Senator Hatch's questions.

Mr. Klein, as you well know, our antitrust laws allow for extraterritorial prosecution of anticompetitive acts abroad. In re-

cent years, you have used this extraterritorial jurisdiction to prosecute anticompetitive behavior, such as those in the Bilkington Glass matter, and you have done this to the benefit of U.S. consumers and I want to commend you for that.

Now, we are all aware of the recent increases in gasoline prices at the pumps. Much of this is attributable to the anticompetitive restrictions on oil production by OPEC and by the OPEC countries. My question is this. I would like to know if you have examined the possibility of applying our antitrust laws to examine any anticompetitive behavior on the part of foreign oil producers, that is, whether these producers are private actors or government bodies acting in a commercial capacity, which, as I understand, will not afford them protection under our foreign sovereign immunity laws. Do you believe this might be an avenue the administration, through trade negotiations, might address?

Mr. KLEIN. Senator, you can tell my friend, Senator Hatch, that this is actually an area in which the Federal Trade Commission has taken the lead, so——

Senator DEWINE. Would you like to defer the question?

Mr. KLEIN. I would like to have Chairman Pitofsky respond.

Senator DEWINE. All right.

Mr. PITOFSKY. What an unusual honor. Let me say that I want to answer the question, because I notice I was quoted in the paper this morning as saying that we have opened an investigation of the antitrust aspects of the OPEC cartel. Not quite true. Not quite true.

We have been asked to testify, and our bureau director will testify next week before a House committee, and we have been asked to address the question of whether or not the antitrust laws could apply to OPEC. I am aware that there are some old cases, one in the Ninth Circuit about 15 years ago that said OPEC was protected by the state action doctrine.

So we are looking at this question and we are reviewing the old cases. We want to see how they would apply to the modern situation with respect to the international oil industry, and Rich Parker, our bureau director, will testify next week. But we have not opened a formal investigation, but we will look at these questions.

Senator DEWINE. And you have not opened a formal investigation, why? Why have you not done that?

Mr. PITOFSKY. I think, given the history of antitrust enforcement in this area, we really have to take the measure of these older cases, the state action doctrine. I know the state action doctrine has been interpreted by the Supreme Court in recent years in the non-oil context, so before we fire off with anything approaching an investigation, we want to do our research and answer the questions that are put to us by the Congress.

Senator DEWINE. Mr. Chairman, let me ask you the second question. Now, this one is directed at you, but if you want to send this over to Mr. Klein, I am sure that would be more than fair. This is Senator Hatch's second question.

The administration has asked for substantial increases for the budget of both the Antitrust Division as well as the FTC. The administration proposed to pay the requested increases with significant increases in HSR antitrust filing fees. The justification for the

increases are yet to be provided, and both this committee and the appropriators will determine the appropriate funding level in due course.

What I want to address, Senator Hatch continues, is the FTC's funding in general, and specifically the funding of the FTC's worthy but non-antitrust activities with antitrust fees imposed on those in the business community. Do you believe it is justified to fund the FTC's expanding non-antitrust functions with increased fees imposed on merger parties as the President proposes, or should we begin to consider other appropriate avenues for funding the Commission?

Mr. PITOFSKY. A very interesting question because, until recently, merger fees covered our antitrust mission, but the Treasury covered our non-antitrust mission. It is only in the last few years that our entire budget has been covered by merger fees. It is a call that is made by Congress and our appropriators rather than appropriate for me. There is enough money right now in merger fees to cover our entire budget, and if we amend the merger filing fee approach, which I know Senator Hatch has proposed and each of you has supported, then there would be enough money to cover even an expanded operation at the FTC.

I support a sliding scale and raising the threshold amount. I can only say that whether it should cover only our antitrust function or all of our functions is a question that I am going to leave to Congress to decide.

Senator DEWINE. This is my question. Mr. Chairman, let me ask you one additional question. As you know, this subcommittee held a hearing in 1998 concerning the BP-Amoco merger and what its impact would be within the petroleum industry. At that time, we anticipated the BP-Amoco merger was the beginning of a wave of consolidation, and in fact, we have seen a good deal of consolidation since then.

At that time, however, some representatives in the industry asserted that larger oil companies would be in a much better position to compete in the global market for oil production, and/or oil exploration. Is there any evidence thus far that this has been the case, and have you seen any other benefits to consumers as a result of mergers in the oil industry, or is it too early to tell?

Mr. PITOFSKY. We have struggled with the question of whether or not oil companies in this country and around the world are not large enough to achieve all the efficiencies that they possibly could. I have always been very skeptical about the argument that you need to be larger and larger and larger to be better. I have heard the quote from Steve Case, actually, of AOL, that larger is not better, better is better, and I think that is exactly right.

As to these particular mergers, and BP-Amoco is the second in the string, then Exxon-Mobil and then BP-ARCO, we have been presented with contentions, claims that these mergers will reduce costs. We never were required to address that issue in Exxon-Mobil because the company agreed in a clean sweep to divest great amounts of assets that overlapped. So having eliminated what we felt was the competitive problem, we did not have to get to the efficiency issue.

I think it is quite possible in an international, in a global oil market, that some of these mergers would lead to significant efficiencies. We have just never gotten to the point in any of our enforcement efforts where we had to argue pro and con on that issue. I think it is possible, but I would not take it sort of as given that you have to be larger in order to be more efficient. By and large, my experience is that is not the case.

Senator DEWINE. I appreciate your answer. At the hearing that we held, the proponents of the mergers were adamant about this particular point, that they had to be this big in order to be able to sustain the production and the exploration. I had some questions about it at the time, and I guess time will tell and maybe give us a better idea whether they are correct in that area or not.

Let me address this question to both of you, or either one of you. The increasing importance of the world market means that companies need the capacity and ability to compete globally. An effective international enforcement of the antitrust laws is essential to enable U.S. businesses to compete fairly.

In this setting, the agreements and cooperation we have with foreign governments are certainly a critical aspect of maintaining competition in the global marketplace. We have seen advances during the past several years, especially with regard to our work with the Canadian and the European enforcement agencies, but we seem to be having less success, certainly a lot less success in other markets, such as the Japanese flat glass market. What are your thoughts on the overall progress of international enforcement and what steps are you taking to improve that enforcement?

And second, a related question, we have signed a positive comity agreement with the Japanese government. Article 8 of the agreement provides a mechanism under which you are able to consult with the Japanese enforcement agencies on a yearly basis on a variety of antitrust and competition issues. Are you willing to use that provision to continue discussion with the Japanese government on the flat glass issue? Mr. Klein.

Mr. KLEIN. Sure. I think it is a very important question, and I think, as you know, really prompted by comments that you and other members of the subcommittee have made, the Attorney General, on my recommendation, appointed the International Advisory Committee and they issued its report and addressed some of the front-end issues you asked about, Mr. Chairman.

But my general sense is that you are right, that this progress in terms of international cooperation is really at its height with respect to our work with Europe and Canada and is really at very beginning stages in many ways with respect to the Pacific Rim, Japan, Korea.

I thought we took a major step last year in signing this cooperation agreement. It took many, many years. But there is a very long-term view in Japan about antitrust enforcement. Until quite recently, they did not even review global mergers outside their borders. They have really not been, I think, a major player in the same way that the Europeans and Canadians have.

Having said that, I think this new cooperation agreement is a very important first step. We have in the past consulted at our annual consultations with the Japan Fair Trade Commission respect-

ing flat glass. We made inquiries not only during consultation time, but separate inquiries, and we have met numerous times and will continue to meet, I personally, my principal deputy who I charged with making sure that we took extra efforts in this area, to work with the parties to see what actions are appropriate, and I will certainly in our next bilateral consultation raise our concerns with respect to this matter again, Mr. Chairman.

Senator DEWINE. Mr. Klein, last month, Senator Kohl and I announced the results of a General Accounting Office, GAO, study that we sponsored, and this had to do with the development of competition in local telephone markets. The report concluded that local telephone markets are becoming increasingly competitive, but that incumbent local telephone providers still have 97 percent market share in the local markets.

When we announced the study results, we knew the continuing importance of competitor access to the local network. This issue was raised yet again in a recent dispute between Bell Atlantic and local competitors in New York. Specifically, Bell Atlantic had some problems handling orders submitted by competing local phone companies and had to pay $13 million in fines. As you know, Bell Atlantic was the first company to fulfill the requirements of Section 271 of the Telecommunications Act of 1996, and we hope to see others do so in the near future.

Specifically, Mr. Attorney General, what steps can be taken to ensure that we do not have similar problems in other local markets, and more generally, what is your assessment of the progress in competition among local telephone service providers under the Telecommunications Act? Why have we not seen more applications under section 271?

Mr. KLEIN. Again, it is a series of very important questions. Let me just say, I think the principal problem we had with 271 and why it took a while before we saw our first successful application in Bell Atlantic was arguments over the price of access. When you have one company competing with another over the same copper wire, then the charge that the one company makes to the other can be very critical, and there was a lot of litigation that the local incumbents brought to challenge the pricing and, indeed, ultimately the constitutionality of the Act. We won all those cases, in essence and substantially, and I think we are now back on track.

As a result, we saw the Bell Atlantic application. We have an advisory role in that process and we were concerned about Bell Atlantic. We thought they were very close to the finish line, but were not over the finish line, and we communicated that view in the 271 process.

The Commission did grant their application and it was a tough call. It was one where I thought reasonable people could disagree on. But I think it is very important, Mr. Chairman, to make sure that all the "i"s are dotted and "t"s are crossed so that we do not have the kind of post-entry problems we had in Bell Atlantic.

As a result, we had another application quite recently by SBC out of Texas, and again, this application is a serious application in that it reflects real progress and the beginnings of some real competition in Texas. But we still thought, while SBC had gone a long way, it had not gone over the finish line and we came in with a

clear recommendation against the FCC approving that, because I do think, again, in order for this to stick—it is easy to get the application in, but in order to make competition stick, we need to do it.

I am optimistic about this for two reasons, Mr. Chairman. I think what I said to Senator Kohl before, because of what we are seeing with respect to digitalization, there may be alternative pipes that can conduct telephony. AT&T is now in the process of rolling out and developing a roll-out plan for telephone over cable, and there is going to be obviously Internet telephony that is going to be expanded.

I think the solution will become that much better when we have multiple means of access so that consumers can choose different pipes. Until then, we will continue to work with the FCC to ensure tough measures so that when people get in there, we will see greater competition.

I want to say, we have seen tremendous success on the business side. It has been a true success story in terms of local competition. In large measure, that has been because the businesses are typically in concentrated areas. You can lay your own fiber. The competitive people can. But we are beginning to see, and it is small but it is significant, we are beginning to see 5, 6, some States 7, 8, 9 percent competition in local markets.

Three years ago in this Congress, or 3½ years ago when the Congress passed the Act, or 4 years ago, there was zero. So we are moving in the right direction and it is going to move more rapidly in the years to come. I have always said that this is going to take some patience, but we are on the right track, and I think that is being borne out.

Senator DEWINE. Mr. Klein, I understand that you are currently reviewing the application of American Airlines to join in an alliance with Swiss Air and Sabina as a replacement for Delta Airlines. My understanding is that the immunity for alliances between KLM, Northwest, and United-Lufthansa are both past the 5-year expiration and, therefore, eligible for review, as well.

Now, without taking a position on the competitive merits of any of these alliances, does it make sense to review one in a vacuum without examining the entire array of alliances currently in existence?

Mr. KLEIN. I think this is an issue we have been doing some thinking about at the Antitrust Division in the following sense, Mr. Chairman. These antitrust immunity agreements—we do not favor antitrust immunity as a rule. We are in the enforcement business, not the immunity business. These immunity agreements come out of the fact that these deals are negotiated on a bilateral basis with our trading partners throughout the world in terms of issues of market access and the like. And so often, in order to get open skies agreements, which still increase competition, the Department of Transportation confers antitrust immunity.

We are now moving into a new area. There are some important policy considerations as we, shall we say, enter this next phase, and I think we will certainly be taking a hard look and meeting with our colleagues at the Department of Transportation to talk

about how to think about the second phase and what changes might or might not be appropriate.

Senator DEWINE. I want to thank our panel. Again, as always, you both have been very eloquent and very helpful to this committee and I think to the American people. I think that today's hearing has made it clear that antitrust enforcement is very important in today's economy, especially given the increasingly global economy and the continuing impact of mergers here at home.

Both our witnesses have been doing an excellent job to help promote antitrust enforcement. Their testimony here today has been very useful to this committee as we continue to work to improve the competitive environment for businesses and consumers in this country.

Let me conclude, though, by making two specific points regarding issues that were raised during today's hearing. First, with regard to the Hart-Scott-Rodino pre-merger notification law, I think it is important that we continue our efforts to reform it. The law has not been substantially modified since it was enacted in 1976 and it is clear from our discussions with the business community and members of the antitrust bar that reform is long overdue. I look forward to working with our witnesses, along with Senator Hatch and Senator Kohl, to address this very important issue.

Second, I am also very concerned about the state of competition in the Japanese flat glass market. I appreciate the efforts of Mr. Klein and others at the Antitrust Division to engage their counterparts in the Japanese enforcement agencies on this issue, and I am hopeful that those efforts will succeed in opening the market in Japan.

But I must say that my patience is wearing thin. American businesses have been unfairly excluded from the Japanese flat glass market for years and I am beginning to wonder if our enforcement agencies have enough tools currently at their disposal. If we do not see progress in the near future, I will consider legislation to remedy this problem. For global trade and commerce to flourish, we must have fair access to markets all over the world, and the flat glass market in Japan is most certainly not open to fair competition today. I will be watching carefully to see if this changes.

Again, let me thank both of our witnesses for joining us here today in what I think has been a very productive hearing. The subcommittee is adjourned.

[Whereupon, at 3:31 p.m., the subcommittee was adjourned.]

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