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Report from the Bureau of Competition Prepared Remarks of Molly S. Boast, Acting Director Bureau of Competition, Federal Trade Commission, before the American Bar Association Antitrust Section Spring Meeting 2001, Washington, D.C., March 29, 2001

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FEATURE ARTICLE

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Report from the Bureau of Competition Prepared Remarks of Molly S. Boast, Acting Director Bureau of Competition, Federal Trade Commis- sion, Before the American Bar Asso- ciation Antitrust Section Spring Meeting 2001, Washington, D.C., March 29, 2001

I. Introduction

I appreciate the opportunity to present this overview of developments at the Bureau of Competition over the last twelve months.¹ I have the distinct honor of succeeding Rich Parker, who presented the Bureau's report last year. As illustrated by the Bureau's record during his tenure, I have large shoes to fill (or, in his case, cowboy boots). Fortunately, Rich left a Bureau with a highly talented and dedicated staff focused on serving the public interest.

Once again, the Bureau had a busy and productive year. We filed four preliminary injunction actions in merger cases, and had favorable outcomes in three of them - a win, and two transactions abandoned before

trial - and a temporary setback in *Heinz/Beechnut*, which is now before the D.C. Circuit, the court having granted an injunction pending appeal. In addition, we negotiated successful resolutions to identified competitive problems in 20 merger cases in which the Commission accepted consent agreements. In seven other matters the parties abandoned the merger before Commission action. In nonmerger actions, we obtained a \$100 million consent judgment in *Mylan*, a pharmaceutical monopolization case, and the Commission entered into eight consent agreements.

One increasingly important aspect of our work is the number of litigated cases. Some have criticized the enforcement agencies for writing themselves out of the process of making antitrust law by generally accepting consent agreements rather than litigating the tough cases. If that charge was ever true, it is not so today. Under the guidance and leadership of my predecessors, Bill Baer and Rich Parker, the Bureau's litigation skills have become stronger and deeper. This year we were put to an unprecedented challenge, preparing for litigation in several cases, including conducting two simultaneous trials - *Swedish Match* and *Heinz* - the first time the agency has done that since the enactment of the Hart-Scott-Rodino Act. In the past year alone, the Commission has been involved in a number of important litigated decisions, including the Seventh Circuit decision in *Toys R Us*, the Ninth Circuit decision in *California Dental Association*, and the District Court decisions in *Swedish Match*, *Heinz*, and *Mylan*. So much for the charge that the Commission has forsaken litigation as a vehicle for elucidating anti-trust law.

I will start this overview with a brief discussion of the recent HSR reform legislation and our ongoing efforts to reduce second request burdens, and then move on to recent merger litigation, merger remedies, and the principal areas of merger and nonmerger enforcement at the FTC during the past year - energy, pharmaceuticals and

health care, consumer goods, and media mergers. I will try to offer some thoughts on factors that led us not to bring certain cases, and then finish with a brief note about international cooperation.

II. HSR Reform

In December, 2000, Congress passed legislation amending the Hart-Scott-Rodino Act. The FTC and the Justice Department worked with the leadership of the Senate and House Judiciary Committees, business and industry groups, the ABA Antitrust Section, and other members of the private bar to update the Act, which had been untouched for a quarter century. Among other things, the legislation made several changes to reporting thresholds that will substantially reduce the number of reportable transactions, probably by as much as 50 percent. The most significant change is the increase in the size-of-transaction threshold from \$15 million to \$50 million. In large part, this change adjusted for inflation since HSR enactment twenty-five years ago. The legislation also eliminated the alternative 15 percent threshold. Together, these changes mean that the new \$50 million threshold will be an absolute floor - no transaction resulting in an acquiring person holding less than \$50 million in assets or voting securities of an acquired person is reportable.

Another statutory change was implemented to capture some competitively significant transactions previously not reportable. Transactions valued at greater than \$200 million are now reportable without regard to the "size-of-person" threshold.² This change addressed the concern that some competitively significant firms, particularly high-tech start-ups, may have few sales or assets reflected in their financial statements, but an acquisition nonetheless may raise competitive concerns. Finally, the legislation requires adjustment of the size-of-transaction and size-of-person dollar thresholds each

fiscal year, beginning with FY 2005, for changes in GNP during the previous year.

While the number of filings will decrease, the filing fees will increase. To make these changes revenue-neutral, Congress implemented a tiered fee structure. A \$45,000 fee is retained for transactions valued at less than \$100 million; transactions of not less than \$100 million but less than \$500 million now pay a filing fee of \$125,000; and transactions valued at \$500 million or more now pay a filing fee of \$280,000.

The estimated 50 percent reduction in the number of reportable transactions does not mean a commensurate reduction in the agency's workload. The bulk of the Competition Bureau's resources have been devoted to the relatively few transactions that appear to raise potentially significant competitive concerns, and that will continue. The greater number of nonreportable transactions do not necessarily mean less expenditure of resources. Some of these transactions will raise competitive problems, but without the protection of HSR these matters will be more resource intensive and time-consuming. It can be more difficult to identify anticompetitive mergers without an HSR filing, and the process of investigating and challenging nonreportable transactions that have been consummated can be demanding. To the extent the HSR reforms do free up any resources from merger enforcement, those resources are needed in the Commission's nonmerger program, which has been understaffed for several years during the crush of merger review.

The HSR statutory reforms and the interim rules implementing the reforms took effect on February 1st. The premerger staff also has proposed a number of other rules changes, most of them ministerial, but some substantive, to streamline the premerger notification process and make it less burdensome. The public comment period for these proposed rules ended on March 19, and staff has begun analyzing the comments. The next round of rulemaking will seek to convert the reporting of prod-

uct information on the HSR notification form from the old Standard Industrial Classification System to the newer North American Industrial Classification System. This proposed rule is expected to be on the public record for comment soon, with an effective date of July 1, 2001.

The Premerger Office, under the leadership of Assistant Director Marian Bruno, recognizes that outreach is critical to increasing transparency and reducing burdens. The HSR portions of our website receive more "hits" than any other parts of the Bureau's web pages. There you can learn more than you can imagine (or wanted to know) about everyday questions HSR practitioners face. The premerger staff continues its informal brown bag lunches with HSR practitioners to elicit input on needed changes and to provide guidance. This past year the staff conducted over a dozen of these sessions and gained extremely helpful input from practitioners. Please contact us if you would like to participate

III. Second Request Process

The Hart-Scott-Rodino amendments contain provisions requiring the agencies to conduct an evaluation of the second request process and enact internal reforms within 120 days after the statute became law. Last April, the Bureau adopted several reforms to improve the second request process, including improvements based on ideas received from the ABA Antitrust Section and individual private practitioners. Several of these reforms have been included in the FTC's Rules of Practice. The reforms include:

- * the Assistant Director of Operations thoroughly reviews all proposed second requests to eliminate unnecessary burdens before they are sent to the parties;

- * staff is instructed to convene a second request conference with parties to a transaction within five business days after the issuance of a second request unless otherwise agreed;
- * staff is instructed to respond to a request for modification of a second request within five business days after the request has been made; and
- * the General Counsel serves as the arbiter in disputes over modifications or compliance with the second request and will decide any appeal within ten business days.

For the past few months we have conducted an internal evaluation of the second request process to determine whether the April 2000 reforms have been effective. All of the second requests issued after the reforms have been reviewed, and my staff has spoken to numerous private counsel involved in these investigations. We recently conducted a brown bag lunch in which the merger staff heard from both corporate and law firm counsel about the burdens of second requests. I am currently evaluating a set of initiatives to help further improve the second request process and reduce the burdens imposed by that process. As always, we welcome the input of the Antitrust Section and practitioners in general on these issues.

IV. Mergers

The Commission's competition activities in FY 2000 and thus far in FY 2001 reflect its continuing commitment to protect consumers from potentially anticompetitive mergers. FY 2000 saw the continuation of the merger wave. More than 4,900 merger notifications

were filed during the year, the largest number ever. This continued a ten-year trend in which the number of filings more than tripled since 1991. The total value of reported transactions in FY 2000 exceeded \$3 trillion - more than a tenfold increase over the past decade. Some of the largest mergers in history were reviewed during FY 2000, including AOL/Time-Warner (over \$100 billion), Glaxo Welcome/SmithKline (\$182 billion), Pfizer/Warner Lambert (\$90 billion), and BP/ARCO (\$27 billion). Over 70 percent of the Commission's competition resources were devoted to merger enforcement during the last fiscal year, a level far above the historic average. The merger workload has eased in recent weeks, but that simply means that the Bureau is very busy rather than extraordinarily busy.

A. Merger Litigation

The past year has seen substantial activity in merger litigation. It began with our litigation to obtain a preliminary injunction against the merger between BP and ARCO which, as I describe below, was resolved with a complete settlement. Since then we filed four other preliminary injunction actions. Two of the cases (*Swedish Match/National Tobacco* and *Heinz/BeechNut*) were litigated, and the other two transactions (*Kroger/Winn-Dixie* and *Conso/McCall*) were abandoned shortly after we commenced litigation.

Swedish Match/National Tobacco

The agency successfully challenged the proposed acquisition of the loose leaf chewing tobacco business of National Tobacco Company, L.P., by Swedish Match North America Inc. This acquisition would have combined the nation's largest and third-largest makers and sellers of loose leaf chewing tobacco, giving Swedish Match approximately 60 percent of sales and creating a

market in which two firms would control 90 percent of sales. The parties dropped the transaction after the district court issued a preliminary injunction.

Product market definition was one of the major issues in this case. Defendants argued that moist snuff and loose leaf chewing tobacco compete in the same market. Although the district court found that the two products are functionally interchangeable, and thus both products were part of some broader market,³ the court also agreed with the FTC that the correct test for antitrust purposes is whether the two products constrain each other's prices.⁴ The court concluded that in this case they did not. The court looked to both *Brown Shoe* criteria (sensitivity to price changes, distinct prices, and industry or public recognition)⁵ and the *Merger Guidelines'* hypothetical monopolist test in concluding that "substitution to moist snuff is unlikely in the event of a price increase in loose leaf tobacco."⁶ The court found it implausible that loose leaf users would substitute premium moist snuff in response to a ten-cent increase in the price of loose leaf, because premium moist snuff would still be much more expensive. The court rejected substitution to price-value snuff as a significant constraint on loose leaf prices both because of the small sales volume of price-value snuff and because price-value snuff is sold primarily by loose leaf firms. Consequently, the court found, a loose leaf monopolist would lose only a small amount of business to moist snuff, and would regain that lost business in sales of its other product.⁷

Defendants' attempt to rebut the Commission's *prima facie* case relied on the argument that the industry was declining, and that declining demand was a disincentive to increase price after the acquisition.⁸ But defendants failed to explain how consistently wide margins and a steady increase in loose leaf prices had survived the fiercely competitive environment they asserted.⁹ The court concluded that the industry exhibited oligopolistic behavior stemming from high concentration in the mar-

ket, and that the merger would increase the likelihood of coordinated action by increasing concentration and reducing the number of competitors.¹⁰

Swedish Match is the first case, to our knowledge, to ratify the differentiated product diversion theory, articulated in Section 2.21 of the *Merger Guidelines*. The court found "the weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."¹¹ Under the diversion theory, the court explained, "Swedish Match will raise prices as long as the profit gained by the higher prices of Swedish Match products in addition to the profit diverted to National's brands is greater than the profit lost through diversion to non-Swedish Match brands."¹²

Finally, the court found that even assuming that efficiencies were a viable defense in some cases, the defense was inappropriate in a case in which the acquisition would result in such high market share and increased concentration.¹³ The court also found it was speculative whether any savings would be passed on to consumers in the form of lower prices.¹⁴ The court enjoined the merger and the parties dropped the transaction.

Heinz/Beech-Nut

The FTC challenged Heinz's proposed acquisition of Beech-Nut, a merger of the second and third largest manufacturers of baby food. This market is critically important to millions of consumers with infant children. Most supermarkets carry only two brands of baby food, and one of the brands almost invariably is Gerber, the long-standing market leader. Thus, Heinz and Beech-Nut were accustomed to fighting for the second slot on grocers' shelves. There was extensive record evidence of this head-to-head competition as the merging firms sought to

displace each other from existing accounts. While both firms had traditional regional strongholds, both also were fighting to increase their national presence. This movement was reinforced by mergers of supermarkets that did not have the same supplier for their second baby food slot. These mergers often led to competition between Heinz and Beech-Nut for the post-merger consolidated account. The head-to-head competition for supermarket accounts resulted in very substantial price concessions to retailers and promotional programs directed to consumers. The merger would put an end to this competition. This merger to duopoly raised very serious concerns that consumers would be harmed from higher prices, less innovation, and less consumer choice.

Heinz and Beech-Nut defended the merger on three principal grounds. First, they argued that because Gerber is a dominant firm (if not a monopolist) that set the market price, the merger would not result in higher prices. Second, they argued that the merger would give Heinz a national presence and a scale of operations necessary to compete with Gerber. Third, they argued that the merger would produce substantial efficiencies, in large part by consolidating production into Heinz's newer plant. Heinz argued that it would use its "value pricing" strategy for the new, consolidated product line, and thus consumers would receive Beech-Nut quality at a new, lower price.

The district court denied a preliminary injunction.¹⁵ We believe the court erred on several grounds, and we sought a stay pending appeal. In its memorandum opinion granting the stay, the D.C. Circuit stated that "[t]he FTC has demonstrated a substantial probability of success on the merits."¹⁶ The Court noted that the premerger HHI of 4775 and increase of 510 points "creates, by a wide margin, a presumption that the merger will lessen competition at the retail level."¹⁷ The Court also noted that "it is indisputable that the merger will eliminate competition between the two merging

parties at the wholesale level, where they are currently the only competitors for what the district court described as the 'second position on the supermarket shelves.'"¹⁸ The Court found none of the "usual rebuttals to a prima facie case available here," because the district court found that new entry is "difficult and improbable," and that neither appellee is a "failing firm."¹⁹ As to the parties' efficiencies defense, the Court stated that "[b]alanced against the FTC's strong evidence that the merger will lessen competition, appellees' claim, that post-merger efficiencies will permit so much increased retail competition between the merged entity and Gerber as to outweigh any anticompetitive effects, is sufficiently uncertain to give the FTC a substantial probability of success on the merits."²⁰ The Court concluded that, while "appellees' efficiencies defense may yet carry the day, . . . only the grant of interim relief will both afford this court an opportunity to determine whether that should be the case and protect the public interest in the event that it is not."²¹ You can find our appellate briefs on the FTC website.²² Oral argument on the appeal was on February 12.

Kroger/Winn-Dixie

In this transaction, Kroger proposed to acquire 74 Winn-Dixie supermarkets in Texas and Oklahoma. About half the stores are in metropolitan Fort Worth, where Winn-Dixie and Kroger are the second- and third-largest stores and together account for about 33 percent of all supermarket sales. One of the interesting aspects of this case was geographic market definition. Although Fort Worth and Dallas both are within an area known as the Metroplex, substantial evidence pointed to metropolitan Fort Worth as a market economically and geographically distinct from Dallas for supermarket consumers. This market is highly concentrated, and certain towns outside Fort Worth are even more highly concentrated. The

parties also contended that their stores were not each other's closest substitutes in the eyes of consumers. I cannot address that contention in detail, because our brief was filed under seal, but our analysis of the evidence indicated that, for a number of reasons, both unilateral and coordinated effects were likely from the merger. The parties withdrew the transaction shortly after the Commission filed for a preliminary injunction.

Conso/McCall

Our fourth preliminary injunction case involved the proposed acquisition of McCall Pattern Company by Conso International Corp., in the market for home sewing patterns. Conso, which owns the popular Simplicity brand, is the leading firm in what is essentially a three-firm market. The acquisition would have left Conso in control of nearly three-quarters of U.S. sales in this market. This transaction, too, was withdrawn shortly after the Commission filed for a preliminary injunction.

B. Merger Remedies

The alternative to litigation, of course, is a negotiated settlement. The Bureau has given a lot of thought to merger remedies in recent years, and that continues. This is an extremely important aspect of merger enforcement, because we have an obligation to restore competition as closely as possible to premerger levels if a settlement is the route we choose. Otherwise, we haven't adequately protected competition and consumers.

In the mid-90s, the Bureau began to look back at its remedy practices and found that some remedies were not working as well as they should. The Bureau began to focus more on ensuring that remedies would be effective. This has been an evolving process. A formal divestiture study, which was completed somewhat later, reinforced the view that some kinds of remedy provisions tended to

work better than others. We now hear criticisms that we have gone too far - that our policies are too inflexible, that they impose unnecessary burdens, and that it takes too long to reach a resolution. Our preference for upfront buyers under certain circumstances is particularly singled out for criticism. I will address those criticisms, but first will set out some introductory premises.

The first premise is that there are no entitlements involved here. Much of the complaining about remedies seems to stem from a sense of entitlement to the merger. That is not where we begin the analysis. We begin from a position of neutrality. We don't start with a presumption in favor of the merger, but we don't start with a presumption against it either. Our task is to undertake an objective but critical review of the merger, and see where that takes us. We do not pursue a remedy out of some calculus that "maybe we should see what we can do about competition in this industry." Rather, we start with a complete analysis of the merger's possible competitive effects. Only after we have determined through investigation that the merger is likely to be anticompetitive do we consider what to do about it. Of course, if the merger does not raise competitive problems, the parties are right - they are entitled to proceed with the merger. But that's not the situation we face once we've found reason to believe the merger will be anticompetitive. At that point, there are no entitlements.

The second premise is that once we have determined that the merger is likely to be anticompetitive, we have an obligation to seek an effective remedy. We have two choices - either seek to enjoin the merger pending a full trial, or seek a negotiated settlement. Thus, it is important to recognize that discussions about remedy in a particular case are held in the context of our determination that we will seek to enjoin the transaction unless a remedy can be negotiated that resolves our competitive concerns with sufficient protections for consumers. The negotiated remedy is, by definition, settlement of what otherwise would be a lawsuit. Again, there are no entitle-

ments. In contrast to private settlements that often involve some degree of compromise, the Commission's negotiating posture is not likely to compromise consumer interests. There is no way to "split the baby," as is often the case in private monetary settlements. Thus, there should not be an expectation that the Commission will be satisfied with less than a fully effective remedy.

The third premise is that consumers should not bear the risk of an inadequate or ineffective remedy. A merger is forever (at least relatively speaking), and therefore so is the harm caused by an incomplete remedy. Thus, even assuming *arguendo* there are efficiencies that are foregone while settlement negotiations take place or while the parties look for a buyer up front, we also have to consider the potential long-term costs of a remedy that doesn't work. Consumers should not bear the risk of a cheap, hurried settlement.

So what are we looking for when we consider remedies? If the parties are willing to divest an ongoing stand-alone business, where there are prospective and interested buyers capable of restoring competition, the Commission often accepts a post-order divestiture, typically within 4-6 months. If the parties are not willing to divest an ongoing, stand-alone business - and frequently they are not willing - the Bureau has a preference for upfront buyers to help ensure that the asset package will be sufficient, in the right hands, to restore competition, and will be saleable. In other cases, we are willing to consider remedies other than divestiture to solve competitive problems, so long as they provide an effective cure. The Commission accepted non-divestiture remedies within the last year in cases such as Koch-Entergy and DTE-MichCon. I will discuss those two cases a little later.

The merger remedy process works best with dedicated staff who can focus on the issue of remedies and order violations. Fortunately, at the Commission we have a talented and hardworking Compliance Division led by Dan Ducore, which focuses exclusively on these

issues. The Compliance Division helps ensure that best practices in negotiating, drafting and enforcing orders are developed and followed across the Bureau. The Compliance Division staff has the best experience with what works and what doesn't, and how to craft enforceable orders. Their participation assures consistency of approach. We try hard to ensure that the merger investigation staff involves the Compliance Division staff as soon as remedy questions arise. We strive for a seamless team comprising those investigating the merger and those negotiating a settlement.

Sometimes negotiated remedies don't work out the way they were intended, and the Compliance Division has an enforcement role. Let me give you two recent examples. Last week the Commission made final the divestiture order involving RHI's 1999 acquisition of Global Industries, which raised competitive problems in two refractories markets for the steel industry. The case was settled in late 1999, and RHI divested to an upfront buyer, Resco Products, Inc., in early March 2000. Why didn't the Commission make the order final earlier? Although RHI completed the vast part of the divestiture as required, disputes quickly arose between RHI, Resco, and us about remaining obligations. RHI worked with the Compliance Division and the Commission's monitor trustee to resolve these problems. Ultimately, RHI and Resco settled their dispute with an agreement that RHI will perform certain additional obligations, and will pay Resco \$5 million. When the Commission made the order final, it made certain modifications from the original version, with RHI's consent, that conform the order to the ultimate agreements between RHI and Resco, and that specifically incorporate the settlement agreement into the order. This means that the Commission can require RHI to perform its settlement agreement obligations through an order enforcement action.

Another example of the Compliance Division's order enforcement role is the case against Boston Scien-

tific Corporation for an order violation.²³ The case is currently in litigation, so I will not talk about it in detail, but you should read the complaint. In 1995, Boston Scientific sought to acquire Cardiovascular Imaging Systems ("CVIS"), and the Commission went to court to enjoin the transaction. Before the preliminary injunction hearing, Boston Scientific entered into a consent order²⁴ with the Commission, pursuant to which it was required to license certain technology to Hewlett-Packard Company to remedy the proposed merger's anticompetitive effects in the intravascular ultrasound ("IVUS") catheter market. Boston Scientific entered into a licensing agreement with Hewlett-Packard, which was approved by the Commission, and which imposed certain obligations on Boston Scientific. The Commission withdrew its court challenge, and Boston Scientific acquired CVIS (and Scimed, another firm poised to enter the IVUS catheter market).

Boston Scientific licensed much of the CVIS patent portfolio, but not all, and disputes arose between Hewlett-Packard and Boston Scientific as to the completeness of Boston Scientific's compliance with its obligations. When the Compliance Division became aware of these disputes, we conducted an extensive investigation of Boston Scientific's compliance. We were not able to achieve any resolution of those disagreements, however, and the Commission sued Boston Scientific for civil penalties and other relief. The complaint alleges five violations of our order. First, Boston Scientific failed to license one of the patents required to be licensed under the Order. Counts 2-4 allege that Boston Scientific failed to provide information to Hewlett Packard on a timely basis concerning three new IVUS catheters introduced by Boston Scientific, as required by the licensing agreement. Count 5 alleges that Boston Scientific refused to supply its Discovery catheter to Hewlett-Packard pursuant to the interim supply provisions of the Order and the agreement. Our case against Boston Scientific provides a clear

lesson of the dangers in failing to comply with the Commission's final orders.

V. Review of Enforcement Actions

While the Commission's antitrust actions involved a broad range of markets, this overview will focus on four industry segments that are particularly close to the consumer: energy, pharmaceuticals; consumer goods; and media mergers.

A. Energy

Energy industries have long been a priority at the FTC. With energy prices now at the forefront of everyone's thinking, and with deregulatory measures being introduced to additional parts of the industry, careful antitrust scrutiny is crucial. In the last year the Bureau has been busy with petroleum mergers, transactions in the natural gas and electricity industries, and gasoline pricing investigations.

Petroleum

BP/ARCO. The big petroleum case of the last year was the challenge to BP Amoco's acquisition of Atlantic Richfield. The filing of a preliminary injunction action was noted in our report from the Bureau at last year's Spring Meeting, but the matter had not yet been heard. In a nutshell, the merger proposed to combine the two largest producers of crude oil on the North Slope of Alaska (ANS), one of the largest sources of crude oil in the free world. These firms were the two largest suppliers of ANS crude oil to refineries in California and Washington, and the two most successful competitors in bidding for exploration leases on the North Slope. In addition, the

combined firm would have had a dominant interest in the oil pipeline and storage facilities that serve the crude oil marketing center in Cushing, Oklahoma, the delivery point specified by the New York Mercantile Exchange for physical delivery of the world's most heavily traded petroleum futures contracts.

One of the interesting issues in this case was the evidence that, contrary to the conventional wisdom that crude oil trades in a worldwide market in which no single firm has market power, BP in fact was exercising market power in the supply of crude oil to certain West Coast refiners. BP's market power was demonstrated by its use of price discrimination, including efforts to reduce the supply of crude oil on the West Coast by selling ANS crude to Asia, the U.S. Gulf Coast, or the U.S. Mid-continent. Another interesting issue, rather unique in a merger case, was that the concern about BP's potential market power over the infrastructure in Cushing was not simply the effect on the price for use of the infrastructure, but also the potential that control of the infrastructure could be used strategically to manipulate physical deliveries to benefit BP's trading positions on the market and result in artificially high futures prices.

The district court did not have occasion to decide these issues, because the case was settled. Under the terms of the settlement, BP was required to make a "clean sweep" divestiture of all the assets involved in ARCO's crude oil production on Alaska's North Slope. BP also agreed to divestitures of facilities in Cushing. In essence, the settlement provided all the relief that successful litigation would have. Press reports valued the Alaska divestiture to Phillips Petroleum at an estimated \$7 billion, the largest dollar-value divestiture ever. This remedy ensured that upstream sources of supply remained competitive and that downstream refineries, retailers and millions of consumers on the West Coast, as well as the owners of the natural resource rights on the North Slope (the United States Government and the State of Alaska), would benefit from that competition.

Natural Gas

Natural gas is another tremendously important energy industry, because gas is the fuel of choice for many industrial and residential users. Mergers in this industry are particularly interesting and analytically challenging because of the range of issues they present. They can raise not only horizontal concerns, but also transportation bottleneck issues that can affect electricity markets. Natural gas is used in electric power generation, and it is often the fuel of choice for new electric generating plants, particularly self-generation and co-generation facilities. Natural gas can also compete head-to-head with electricity for certain residential and commercial applications. Natural gas thus helps keep electricity markets competitive. The acquisition of gas pipeline assets by an electric generating company or a local distribution utility may enable the acquirer to raise rivals' costs. An acquisition of upstream natural gas assets by an electric or gas local distribution utility also may, in some circumstances, enable the utility to evade rate regulation by paying inflated input costs which are then passed on to utility consumers. A merger also may eliminate some degree of direct cross-fuel competition between gas and electricity. Continuing consolidation in the industry during the past year raised all of these competitive concerns.

DTE Energy/MichCon. A consent agreement involving the proposed acquisition of MCN Energy Group by DTE Energy Company is the most recent Commission action in this area. DTE is the parent of Detroit Edison Company, the largest electrical utility in Michigan. MCN is the parent of Michigan Consolidated Gas ("MichCon"), a major natural gas utility in Michigan. The Edison and MichCon service areas overlap in several counties in southeast Michigan, including Detroit and most of the surrounding metropolitan areas. With the exception of

Detroit, Edison is the sole distributor of electricity in the overlap area, and MichCon is the sole distributor of natural gas. The merger raised several competitive issues. First, the merger would enable DTE to raise input costs for customers who want to use natural gas for self-generation or co-generation of electricity as an alternative to being supplied by Edison. Natural gas is the fuel of choice for such customers, and the evidence showed that having this self- or co-generation alternative resulted in lower prices and better service from Edison.

Second, within the city of Detroit, the municipally-owned Detroit Public Lighting Department ("PLD") is a direct competitor of Edison for new non-residential customers, and the PLD depends on MichCon for delivery of natural gas for its generating plant. After the merger, the PLD would have to rely on its electricity competitor for delivery of natural gas. Third, the merger would eliminate the direct competition that exists between electricity and natural gas for certain commercial and industrial applications such as powering air compressors, commercial cooking, and various process applications. MichCon had been actively seeking to switch customers from electricity to natural gas for such applications. Edison would not have the same incentive to promote such energy-saving conversions. This was the first time the agency challenged an acquisition on the basis of direct competition between electricity and gas for end use applications.

The remedy for these competitive problems is somewhat novel - the divestiture of an easement in the MichCon natural gas distribution system to a third party who would become an independent alternative supplier of natural gas in the overlap area. The easement essentially gives the buyer unlimited capacity for use in serving customers who use natural gas for on-site generation. The buyer is Exelon Energy Company, the parent of Commonwealth Edison, the utility that serves Chicago and northern Illinois. Exelon already markets natural gas

to buyers in southeastern Michigan and is the exclusive Midwest distributor for Honeywell/Allied-Signal, one of the leading producers of microturbines and distributed generation equipment. Exelon therefore is well situated to be a viable competitor to MichCon in the natural gas market.

Entergy/Koch. A different set of concerns was presented by Entergy Corporation's acquisition of a 50 percent interest in the Gulf South Pipeline Company in a joint venture transaction with Koch Industries. Competitive concerns arose because the acquisition could facilitate the evasion of utility rate regulation. Entergy operates gas and electric utilities in areas of Louisiana and Mississippi, where it has the exclusive right to sell and distribute. Those utilities use Gulf South to transport natural gas to their facilities. Entergy also has subsidiaries engaged in the wholesale marketing and trading of natural gas and electricity, in which Koch would acquire a 50 percent interest in another part of the transaction. Although Entergy's utility's rates are regulated, the utilities can, subject to review, pass through increased natural gas costs to their customers. The transaction would give Entergy the ability to take advantage of this pass-through provision by using its ownership interest in Gulf South to pay inflated prices for gas and gas transportation, pass through the higher costs to consumers, and share in the higher profits earned by Gulf South. Although Entergy's rates are subject to review, natural gas pricing is complex, and some of the pricing is not transparent. Without close monitoring, it would be difficult to determine whether Entergy was paying a competitive price at any given time. To protect consumers from thus paying higher prices on their gas and electric utility bills, the FTC obtained a consent order that requires Entergy to implement an open, transparent process for its gas purchases, so that regulators will be able to determine whether Entergy is paying inflating prices.

El Paso/PG&E; El Paso/Coastal. Two acquisitions of natural gas pipeline systems by El Paso Energy Corporation, from Pacific Gas & Electric and the Coastal Corporation, raised conventional horizontal concerns. In some areas, El Paso and its merger partner were the only two transportation options available to customers, and in other areas they represented two of only three options. The Commission obtained consent agreements in both transactions to prevent competitive harm. El Paso is required to divest interests in a total of 14 pipeline systems to firms that would operate the systems independently of El Paso and thus preserve competition in parts of Florida, New York, Wisconsin, Indiana, New Mexico, Texas, and producing areas in the Gulf of Mexico.

Gasoline Pricing Investigations

The Commission conducted two investigations of gasoline pricing conduct, one on the West Coast and one in the Midwest. The West Coast investigation was based on complaints that retail gasoline prices in several western states have been persistently higher than they are in other parts of the country, for no apparent reason. The Midwest investigation focused on the price spike that occurred in the spring and summer of 2000, resulting in retail gasoline prices that were significantly higher than in other areas. Chairman Pitofsky recently informed members of Congress that the Midwest investigation did not uncover any evidence of collusion among industry members to restrict output or raise prices. A report to Congress detailing the results of the investigation will be issued in the near future. We have not yet taken any final action with respect to the West Coast investigation.

B. Pharmaceuticals and Health Care

The pharmaceutical industry has been another priority for the Commission, for obvious reasons - high drug prices are a big pocketbook issue for consumers and businesses, and for government as well. The Commission's monitoring of the industry has resulted in several recent merger and nonmerger enforcement actions.

Mylan. The Commission's monopolization case against Mylan Laboratories, which was noted in last year's report, was concluded with a record \$100 million settlement - almost full recovery of the alleged \$120 million in ill-gotten gains. Mylan, the nation's second-largest generic drug manufacturer, and others were charged with monopolization, attempted monopolization and conspiracy to eliminate much of Mylan's competition for generic versions of two drugs used by millions of patients to treat anxiety, lorazepam and clorazepate. The complaint alleged that Mylan tied up the key active ingredients for these drugs. The conduct led to sudden and huge price increases of up to three thousand percent. The case was settled before trial with Mylan agreeing to disgorge \$100 million into a fund to compensate injured consumers and state agencies. The \$100 million judgment was the largest to date for the Commission in a Section 13(b) antitrust action.

This was a particularly appropriate case to bring under Section 13(b): (1) the alleged illegal activity caused significant, observable harm to an identifiable group of consumers; (2) the Commission could measure the harm with some degree of accuracy; (3) the benefit to the violator from violating the law far exceeded the cost to that party of the remedies available in administrative litigation; and (4) the anticompetitive character of the conduct was clear cut.

California Dental Association. Of course, we don't always prevail when we litigate. Last September, the Ninth Circuit rejected the Commission's challenge to advertising restrictions imposed by the California Dental Association. After the Supreme Court's 5-4 vote to remand for a more detailed examination of the record under the rule of reason, the appeals court panel held that the FTC had failed to prove that CDA's advertising rules were anticompetitive.²⁵ In a statement issued along with the Commission's order dismissing the case, three of the Commissioners expressed their disagreement with the panel's assessment of the evidentiary record, but made it clear that nothing in the decision undermines the Commission's basic approach to analysis of professional association advertising restraints.²⁶

Notwithstanding the disappointing final outcome, the litigation of this matter was important. First, the Supreme Court unanimously affirmed the Commission's jurisdiction over nonprofit associations whose activities provide economic benefits to their for-profit members. This ruling settled a significant issue that Supreme Court's 1982 evenly divided opinion in the *American Medical Association* case had left unresolved. In addition, the Supreme Court's ruling clarified an important question regarding the contours of rule of reason analysis. The Court squarely rejected the contentions of CDA that it was necessary to do a so-called "full blown" analysis, including a detailed definition of dental services markets in California, and demonstration of market power. Thus, the notion that horizontal restraints not coming within the "per se" or "quick look" categories automatically fall off the cliff into full blown, merger-type analysis was put to rest. One further point about *California Dental*. Some have suggested that the Supreme Court's decision represents a fundamental rejection of the government's general approach to horizontal restraints, in favor of a new, more demanding standard of proof of anticompetitive harm - one that will require demonstrable evidence of

actual anticompetitive effects before a violation is found. There is little to suggest the Court intended such a conclusion. As many have already noted, the decision seems to have turned on the concern of the five members of the majority that special issues relating to the professions had not been adequately addressed.²⁷ Outside that context, the rule of reason approach outlined in the Commission's original decision seems appropriate. And the recent *Continental Airlines v. United Air Lines* decision - which applied an abbreviated rule of reason analysis to condemn an agreement among competing airlines to restrict the size of carry-on luggage - supports the view that the courts are likely to apply the *California Dental* decision in light of its professional trade association context.²⁸ After examining the nature of competition in the industry, the court in *Continental Airlines* had no difficulty in concluding that the restraint was likely anticompetitive. The case shows that *California Dental* is not as confining as some have suggested.

Before leaving the topic of anticompetitive conduct matters, let me make a point about the process of our investigations. Periodically firms take the stall and delay tactic, of refusing to comply with CIDs in nonmerger investigations. This tactic is shortsighted since the Commission is not reticent in requiring compliance with its investigational tools. During the investigation of The Hearst Corporation's acquisition of Medi-Span, Inc., two witnesses from Hearst refused to answer the most basic fact questions concerning an alleged failure to submit documents required by item 4(c) of the HSR form. (Notably, there had been no petition to quash the subpoena when it was issued.) The witnesses asserted attorney-client and attorney work product privilege objections very broadly, to try to shield themselves from any reasonable discovery. For example, the person who certified the HSR notification would not even answer if she had read the form before signing it. The Commission filed a subpoena enforcement petition in

federal court to compel answers to our questions. The petition was resolved prior to a court hearing, but the point should be clear that the Commission takes its processes seriously and will not hesitate to enforce its discovery demands.

On the merger front, the Commission's activities included enforcement actions involving two very large transactions:

Glaxo Wellcome/SmithKline Beecham. The merger of Glaxo Wellcome and SmithKline Beecham created the world's largest research-based pharmaceutical company, with an estimated market capitalization of \$182 billion and annual sales of \$26 billion. The merger threatened competition in numerous product markets in which the companies have competing products either on the market or in the developmental pipeline. The Commission secured a consent agreement that required divestitures in nine markets, including antiemetics drugs used in chemotherapy to reduce the incidence of side effects, antibiotics, antiviral drugs for the treatment of herpes, chicken pox and shingles, and antiviral drugs for the treatment of cold sores. All of the divestitures were accomplished within 10 business days after consummation of the merger.

Pfizer/Warner-Lambert. The FTC's consent agreement in Pfizer's \$90 billion merger with Warner-Lambert similarly required divestitures in several major markets, including (1) the \$7 billion market for antidepressants used to treat the 10 million Americans diagnosed with depression each year; (2) the \$270 million market for drugs used to treat Alzheimer's disease; (3) a future market estimated to be worth as much as \$1 billion for drugs that both companies were developing for the treatment of solid tumor cancers diagnosed in more than 1.2 million Americans each year; and (4) the \$150 million market for over-the-counter treatments for head lice, which are used to treat 8 to 12 million children each year.

C. Consumer Goods

Toys "R" Us. The Commission's exclusionary conduct case against Toys "R" Us was brought to a successful conclusion when the Commission's decision and order was affirmed by the Seventh Circuit Court of Appeals. Toys "R" Us, the nation's largest retailer of toys, was charged with conduct aimed at curtailing the emerging competition from low-price club stores. To stem this competitive threat, Toys orchestrated an agreement among toy manufacturers not to sell hot-selling toys to the clubs, or to sell to them only on disadvantageous terms. To facilitate this agreement, Toys acted as a middleman, conveying assurances from one supplier to another that they would all adhere to the requested practices and thus would not be put at a relative competitive disadvantage. Last August the Seventh Circuit upheld the Commission's finding of an unlawful agreement.

Music Distributors. The Commission entered into consent agreements with the five largest distributors of prerecorded music, who together account for 85 percent of industry sales, for using cooperative advertising programs that imposed unreasonable price restrictions on retailers and resulted in higher prices for consumers. Known as "minimum advertised price" (MAP) programs, they were intended to squelch discount music retailing, and, in turn, relieve pressures on the distributors' margins and enable them to raise their own prices. I'll first describe how the MAP programs worked, and then comment on why they were anticompetitive. The MAP programs required retailers to advertise CDs at or above the MAP set by the distributor in order to qualify for substantial cooperative advertising payments. The respondents used a very broad definition of advertising, defining it as everything except the price sticker on the CD. To discourage retailers from selling below the manu-

factors' desired price levels, the manufacturers withheld promotional funds from retailers who advertised sales prices below the desired levels, even when the stores used their own advertising money rather than the manufacturers' cooperative advertising funds. A large retailer could lose millions in cooperative advertising funds each year if it did not comply.

Several factors led to the conclusion that these MAP programs could not pass muster under a rule of reason test. First, the programs were intended to stabilize retail prices and relieve pressures on distributors' margins, and they achieved those objectives. Although the programs did not actually prohibit retailers from selling below the MAP price, the MAP program prevented retailers from effectively communicating discounts to consumers. Retailers therefore had little incentive to employ a competitive strategy of actually selling products at a discount. Further, given the highly concentrated industry, the stabilizing effect of the MAP programs increased the risk of collusion or interdependent conduct. The Commission therefore found reason to believe that these restraints violated the antitrust laws in two respects. First, when considered together, the MAP programs constituted practices that facilitated horizontal collusion among the distributors. Second, when viewed individually, each distributor's MAP arrangement constituted an unreasonable vertical restraint of trade. Agency staff estimated that U.S. consumers paid substantially more for CDs than they otherwise would have over the past three years.

The five distributors agreed to a consent order that prohibits them from linking any promotional funds to the advertised prices of their retail customers for the next seven years, and for 13 years after that, the companies would be prohibited from conditioning promotional money on the prices contained in advertisements they do not pay for. The order also prohibits the companies from terminating relationships with any retailer based on that retailer's prices.

Supermarket Mergers. This is another priority for us. The industry is continuing to undergo substantial consolidation, and it is important to examine these mergers very closely to ensure that consumers do not suffer from a loss of competition at the grocery checkout counter. The past year was no exception; we had three enforcement actions. First, as previously noted, Kroger's proposed acquisition of 74 Winn-Dixie supermarkets in Texas and Oklahoma was abandoned after the FTC filed an injunction action. Second, the proposed \$3.6 billion consolidation of Food Lion and Hannaford raised competitive concerns in local markets in Virginia and North Carolina. The transaction was allowed to go forward only after the Commission secured a consent agreement that required the divestiture of 37 supermarkets needed to maintain competition in those markets.

Third, the proposed acquisition of 72 Jitney-Jungle and Delchamps stores by Winn-Dixie raised serious concerns in various local markets in Florida and Mississippi. The unique aspect of this case is that the transaction had been approved by a Bankruptcy Court. The transaction obviously involved failing firm issues, and the key question was whether Jitney-Jungle had made good-faith efforts to elicit reasonable alternative offers for the stores. For the most part Jitney-Jungle was not successful in obtaining reasonable alternative bids, but in four markets there were alternative purchasers that did not pose competitive problems. Those four markets did not qualify for the failing firm defense, and the Commission challenged the acquisition in those four markets. Winn-Dixie agreed to a consent order that precludes the company for a period of ten years from acquiring the four Jitney-Jungle stores located in the four relevant geographic markets, as well as any other supermarkets in designated areas.

The important aspect of the transaction was how quickly we conducted and concluded our review. Because of the posture in bankruptcy we completed our

merger review and issued an order in just over one month. We recognize the need for expediency in the bankruptcy context and endeavor to complete these investigations as expeditiously as possible.

Let me mention one other issue regarding supermarket mergers: whether the Commission has a preference for an individual type of buyer by size - large or small firm. The record shows there is no Commission preference for any type of buyer. The Commission's approach to supermarket divestitures has not precluded smaller or local grocery stores from participating as buyers because it believes that effective competitors come in all shapes and sizes. In addition, the Commission is sensitive to the fact that small supermarket chains often offer greater product variety and choice than other supermarkets - witnesses testified to that important dimension of competition in our recent Slotting Allowances workshop. Over the past five years the Commission issued 14 orders that required divestitures of 317 supermarkets. Of the 317 stores, 124 have been purchased by independents, whereas only 73 have been purchased by large chains. The remaining 120 were sold to small regional chains. As these statistics confirm, the Commission neither favors nor disfavors any particular category of purchaser. The ultimate objective of the Commission's process is for the divested assets to be sold to a firm that can fully restore the competitive situation prior to the merger.

Before leaving the supermarket aisles, I want to mention our innovative approach to the issue of slotting allowances. Slotting allowances are typically lump-sum, up-front payments by food manufacturers to have their products placed on supermarket shelves. Although this is a controversial practice, there is relatively little public information on it. To enhance transparency and begin a dialogue on the legal and economic issues on the subject, the Commission held a two-day public workshop on the subject to learn more about the nature and function of these allowances and related marketing practices such as

pay-to-stay arrangements and exclusivity agreements, drawing on the experiences and insights of food suppliers, retailers, academics, antitrust practitioners, and economists. A staff report ("Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry") was issued in February, 2001. The staff concluded that slotting fees and related practices such as pay-to-stay fees and exclusive dealing arrangements should be analyzed under the usual antitrust standards for exclusionary conduct, and the report sets forth a framework for analyzing such conduct. The report concludes with a set of recommendations for future examination of practices in this area, including empirical study of slotting arrangements, careful review of exclusive dealing contracts, and attentiveness to possible monopsony concerns in supermarket mergers.

Consumer Products. Various consumer products industries are also undergoing considerable consolidation. In the past year, two transactions raised major competitive concerns. I have already mentioned the Heinz/Beech-Nut merger involving prepared baby food. The acquisition of Nabisco Holdings Corp. by Philip Morris created the world's largest food company, with over \$100 billion in food sales. The transaction raised serious concerns in five highly concentrated markets with combined industry sales of almost \$750 million - dry-mix gelatin desserts, dry-mix puddings, dry-mix no-bake desserts, and baking power. The parties agreed to divest Nabisco's businesses in these markets in order to preserve competition.

D. Media Mergers

AOL/Time Warner. America On Line's acquisition of Time Warner was one of the most closely watched transactions of the year. The proposed merger of these two giants in consumer communications and media carried

the prospect of major structural change in several industries. It appeared that the merged firm might be able to gain dominance in three markets. The first of these is broadband Internet access services. AOL is the dominant narrowband ISP, and it is well positioned to become a significant broadband ISP as well. Time Warner already provides broadband Internet access through its Road Runner service. The marriage of the two firms could substantially lessen competition in this market by dominating broadband Internet access over Time Warner's cable systems.²⁹ The second market that was in potential jeopardy was residential broadband Internet transport services. The two most common forms of residential broadband access today are cable and DSL. Before the merger, DSL was the principal means of broadband AOL access, but the merger would reduce AOL's incentives to market and promote broadband access via DSL. Given AOL's overwhelming popularity as an Internet service provider, the merged firm could use that advantage to favor Time Warner's cable system over DSL transport for AOL access. The third market involves interactive television services ("ITV"). AOL recently launched AOL TV, a first generation ITV service, and is well positioned to become the leading ITV provider. Since cable television lines have distinct competitive advantages over DSL in providing ITV services, the merged firm would have the ability as well as an incentive to prevent or deter rival ITV providers from competing with AOL's ITV service.

After a comprehensive investigation, the Commission imposed strict conditions before permitting the merger. The merged firm was required to open its cable systems to competing ISPs, prohibited from discriminating on the basis of affiliation in the transmission of content, and prohibited from discriminating in AOL's DSL subscriber fees in favor of Internet access via Time Warner's cable system. The Commission's order thus protects consumers from higher prices and reduced product quality, and ensures that consumers have a reasonable range of choices in the marketplace.

Time-Warner/EMI. The Bureau also took a very close look at a proposed joint venture between Time Warner and EMI plc, which would have combined two of the five major recorded music companies and the two largest music publishing companies in the United States and the world. Both of the companies control multiple record labels that span a number of different musical genres. Their businesses involve a full range of activities in the recorded music business, including "label" functions, which involve discovering artists, working with artists to produce records, and releasing, promoting and marketing those records, as well as distributor functions, which consist of manufacturing, warehousing, sales and marketing, and distribution.

The transaction presented concerns over both unilateral and coordination effects. Obviously, recorded music and music publishing are differentiated products, which suggests that the joint venture could selectively raise prices for certain recordings and published songs. Our concerns were heightened because there appeared to be some possibility that a previous acquisition in the record industry had been followed by unilateral price increases by the merged firm.

As significant, if not more so, were our concerns that the merger would enhance coordinated interaction in the highly concentrated recorded music market. Structurally this is a tight oligopoly, with a history of price coordination, and formidable impediments to entry. These structural concerns were reinforced by our separate investigation of the industry's use of minimum advertised price (MAP) programs. As discussed above, our investigation indicated that these MAP programs were likely to facilitate coordinated behavior. The MAP case illustrates that the industry can coordinate on general competitive practices, such as cooperative advertising, even though product differentiation may complicate price coordination on particular products. Although the Commission's consent order put an end to that particular

practice, the industry has faced collusion charges in a number of other cases, some of which resulted in substantial fines or settlements. In addition, the evidence indicated that substantial amounts of competitively sensitive information are accessible by firms in the industry.

We looked at entry conditions, of course, and it appeared that entry or expansion by small recording companies or distributors was not likely to be sufficient to defeat an anticompetitive price increase. The smaller firms generally serve special segments of the industry, and do not compete head-on with the mainstream music companies. Unlike the five major record companies, these small independent record labels do not have the breadth of genres, the established artists and catalog, nor the wholly-owned distribution companies to support their efforts. Further, some of the independents labels depend on the five major record firms for distribution.

We also looked at the likely impact of technological change such as digital distribution via sites like Napster. These forms of Internet music distribution appeared to have little impact on conventional music distribution, and in any event, the majors are involved in several of the Internet distribution ventures as well. For example, Bertelsmann Music Group, which has recently formed an alliance with Napster, is working on a fee for service model for Napster and is reported to have invited the other major record companies to work with them.

The AOL/Time Warner transaction also had implications for the analysis of the Time Warner/EMI joint venture, because of the combination of AOL's leading position in Internet access, Time-Warner's substantial position in broadband Internet delivery, and Time-Warner's recorded music library and music publishing holdings. The AOL merger made Time-Warner a substantial potential player in Internet music distribution, and with control of both Time Warner and EMI music content, AOL could have been in a position to favor Time

Warner/EMI content at the expense of other record and Internet sites. In the end, Time Warner and EMI have abandoned their proposed joint venture.

E. A Note on Transparency: Some Matters We Didn't Challenge

We periodically hear from the private bar a desire that we address investigations in which we decide not to bring enforcement actions. Our ability to do that is limited by considerations of confidentiality, but today I am able to address two recent matters in which we chose not to go forward.³⁰

BASF/Chemdal. Last year we investigated BASF AG's proposed acquisition of the super absorbent polymer business of Chemdal Corporation from Amcol International Corporation. Chemdal and BASF were direct competitors in super absorbent polymers ("SAP"), virtually all of which is used to make diapers absorbent. In the United States there are five SAP manufacturers and this case turned on the definition of geographic market. In a U.S. market the merger would have resulted in a guidelines violation but in a world market the concentration levels were significantly lower. At first, there was a serious question about whether a world market was defensible since the level of imports was rather small, typically no more than a few percent per year. However, there were several reasons to believe that SAP imports could increase in response to a price increase. First, SAP is not a perishable commodity and it is easily shipped from Asia in one-ton "supersacks." The cost of shipment from Asia did not substantially increase the cost of the product and thus customers could turn to Asian imports without a significant effect on their underlying cost. Second, there is substantial overcapacity of SAP in Asia. The difference between Asian pricing and U.S. pricing was relatively close. In addition, there was evidence that current com-

petitors had to cut costs in the past in response to bids from Asian suppliers. Based on each of these factors we concluded that a worldwide market was appropriate.

Glaxo Wellcome/SmithKline Beecham. I mentioned the consent agreement in the Glaxo Wellcome/SmithKline Beecham merger, but there was one market where we decided enforcement action was not appropriate — drugs for smoking cessation. The issue posed was whether the relevant product market consisted of both over-the-counter (“OTC”) and prescription drugs. SmithKline markets the two leading OTC smoking cessation products, Nicoderm CQ transdermal nicotine patch and Nicorette nicotine gum, while Glaxo markets Zyban, the leading prescription product for quitting smoking. The smoking cessation products of SB and Glaxo comprise the vast majority of all smoking cessation products in this market with over \$700 million in sales. Although the Commission typically excludes OTC drugs from prescription drug markets, in this case defining a relevant market was a close question. The Commission continued the investigation during the public comment period to resolve the issue.

As in past cases, in this case, several factors favored the traditional analysis of keeping the markets separate: Glaxo’s Zyban requires a visit to a doctor (although evidence did indicate that demand for Zyban is generated by consumers) while Nicorette and Nicoderm CQ do not; the channels established for the distribution of OTC products are separate from those for prescription drugs; consumers may compare the price and quality of Nicoderm CQ and Nicorette with private label patches and gum (that comprise most of the remainder of the OTC smoking cessation market) at the drugstore and grocery shelf while patients who choose Zyban are removed from any pricing decisions; and the side effects and mechanism of action of an oral prescription pill are far different than those of OTC nicotine replacement

products designed to deliver the nicotine to which the smoker is already addicted.

Despite the presence of these factors, however, a combination of recent changes in the marketing of prescription drugs, as well as the fact that the products of both companies comprise the vast majority of all smoking cessation products on the market, led the staff to examine more closely the question of whether Glaxo's Zyban and SB's Nicoderm and Nicorette constrained each other's pricing. The lifting of prohibitions on direct-to-consumer ("DTC") advertising of prescription drugs has produced big changes in the marketing of pharmaceuticals - we've all noticed the proliferation of television and print advertisements of prescription drugs. Glaxo's Zyban is a prime example of a prescription drug that is heavily promoted to consumers. The advertisements for Zyban and the OTC products appear to make competing claims - Zyban's advertisements always assert that Zyban is the nicotine-free way to quit smoking, and some advertisements for Nicorette and Nicoderm tell the viewer that one need not visit a physician to try them.

After extensive analysis, we concluded that although Zyban and SB's Nicoderm patch and Nicorette gum target similar consumers, Zyban does not constrain the pricing of SB's OTC products, and they do not affect the pricing of Zyban. Other characteristics of the particular smoking cessation product, as well as the unique smoking characteristics of each smoker influence the manner by which people will attempt to quit far more than price.

VI. International Activities

As economies across the globe continue to become increasingly interconnected, so have our interactions with competition authorities around the world.

Bilateral cooperation. The FTC cooperates routinely with many foreign antitrust agencies to enforce the antitrust laws in cases in which the parties and the effects of their conduct may be subject to scrutiny in foreign countries as well as in the United States. For example, in recent transnational mergers such as AOL/Time-Warner, Time-Warner/EMI, Boeing/Hughes, Exxon/Mobil, and AstraZeneca/Novartis, our staff worked closely with that of the European Commission and other foreign antitrust authorities to coordinate our analysis and approach to remedies. We also work with foreign antitrust agencies on nonmerger investigations such as Covisint, where we worked with Germany and other foreign authorities. This produces substantial benefits, both in particular cases and in fostering substantive and procedural convergence.

Along with the Department of Justice, the Commission has formalized our cooperative relationships by entering into inter-governmental agreements, including, most recently, a cooperation agreement with Mexico in July 2000. We hope to enter into an enhanced agreement on positive comity with Canada, along the lines of our 1998 agreement with the European Community, in the near future. FTC, DOJ, and the European Commission staff also participate in a Mergers Working Group to pursue further convergence - the Working Group has already made progress in the area of remedies, and will be exploring other subjects in the coming year.

International Fora. The Commission participates in international organizations, such as the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and the Asia Pacific Economic Cooperation (APEC), to promote competition policies and enforcement practices that can benefit all member countries and are consistent with the goals of maintaining competition and open markets and enhancing consumer welfare. We are also exploring ways in

which the proposed Global Competition Initiative ("GCI") can deal with the challenges that continuing globalization poses for competition policy.³¹ We participate in the Negotiating Group on Competition Policy in the Free Trade Area of the Americas negotiation which is considering the role of competition policy in a hemispheric free trade agreement, and are involved in negotiating possible competition provisions in new Free Trade Agreements with Singapore and Chile.

VII. Conclusion

In summary, it has been another challenging year for antitrust enforcement at the FTC, in terms of the number of cases we litigated, the substantial settlements we achieved in other cases, and the substantive issues we addressed in a variety of contexts. I believe the competition mission at the FTC has well served consumers, competition, and the marketplace.

Endnotes

1. The views expressed are my own and do not necessarily reflect the views of the Federal Trade Commission or any Commissioner.
2. The current size of person test (which generally requires one side of the transaction to have sales or assets in excess of \$100 million and the other \$10 million) will continue in place for transactions valued between \$50 million and \$200 million.
3. *FTC v. Swedish Match*, D.D.C. Civ. No. 00-1501 (TFH) (slip op. Dec. 14, 2000), at 13-14 ("smokeless tobacco constitutes a broader market in [the] case, comprised of both loose leaf and moist snuff which at some level compete with one another").
4. *Id.* at 14 ("the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes").
5. *Id.* at 14-26.

6. *Id.* at 15. The court placed significant weight on the parties' internal documents, which described their view of the contours of the market and were consistent with the testimony of their customers and competitors. *Id.* at 19-23. The court rejected defendants' attempt to contradict this evidence with econometric analysis, finding it not credible.
7. *Id.* at 18 n. 8.
8. *Id.* at 29-30.
9. *Id.* at 31.
10. *Id.* at 31-32, n.13
11. *Id.* at 33.
12. *Id.* at 34.
13. *Id.* at 38.
14. *Id.* at 38-39.
15. *FTC v. H.J. Heinz, Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000), *appeal pending*, No. 00-5362 (D.C. Cir.).
16. Memorandum Opinion, *FTC v. H.J. Heinz*, No. 00-5362 (D.C. Cir. Nov. 8, 2000), at 1.
17. *Id.*
18. *Id.*
19. *Id.* at 1-2.
20. *Id.* at 2.
21. *Id.* at 3.
22. [Http://www.ftc.gov/bc/heinz/ftcvhjheinzcoetal.htm](http://www.ftc.gov/bc/heinz/ftcvhjheinzcoetal.htm).
23. *United States v. Boston Scientific Corporation*, Civil Action No. 00 CV12247.
24. *In re Boston Scientific Corporation*, Docket No. C-3573, 119 F.T.C. 549 (1995).

25. *California Dental Association v. Federal Trade Commission*, 224 F.3d 942 (9th Cir. 2000).

26. Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson Respecting the Commission's Decision Not to Petition for Certiorari in *California Dental Association v. FTC* (Feb. 15, 2001) (available at www.ftc.gov).

27. See, e.g., Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Sup. Ct. Econ Rev. 265 (2000); Marina Lao, *Comment: The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 Antitrust L.J. 499 (2000); Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 Antitrust L.J. 495 (1999); David Balto, *Some Observations on California Dental Association v. FTC*, Antitrust 68 (Fall 1999).

28. *Continental Airlines v. United Air Lines*, 2001 U.S. Dist. LEXIS 210 (E.D. Va. Jan. 5, 2001), *appeal pending*.

29. Time Warner controls about 20 percent of the nation's residential cable markets in terms of households, and in most markets there is only one cable operator.

30. The firms discussed here have consented to this discussion.

31. Initially recommended by ICPAC, the proposed GCI has generated interest on the part of governments, bar groups, and international organizations. The FTC is participating in the ongoing dialogue to explore the organization and role of a GCI in dealing with the international antitrust agenda.

