S. HRG. 106–1088

REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION (FTC)

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS, FOREIGN COMMERCE AND TOURISM

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

FEBRUARY 9, 2000

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ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION (FTC)

WEDNESDAY, FEBRUARY 9, 2000

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER AFFAIRS,
FOREIGN COMMERCE AND TOURISM,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:40 a.m., in room SR–253, Russell Senate Office Building, Hon. John Ashcroft, Chairman of the Subcommittee, presiding.

Staff members assigned to this hearing: Robert Taylor, Republican counsel; and Moses Boyd, Democratic chief counsel.

OPENING STATEMENT OF HON. JOHN ASHCROFT, U.S. SENATOR FROM MISSOURI

Senator ASHCROFT. Good morning, and I thank you all for coming, and I am pleased to call this meeting to order.

Chairman Pitofsky, and Commissioners, thank you very much for taking your time to discuss the issues surrounding the reauthorization of the Federal Trade Commission.

It is important to reauthorize the FTC. It is true not only because we should ensure that all Federal agencies have Congressional authorization before spending taxpayers funds, but also because it gives us a forum in which to discuss the appropriate role of the Federal Government.

It also gives us a chance to look at changes in the regulated industries. Two recent trends in the way businesses are operating are the backdrop for today's hearing.

Number one is the Internet. The growth in Internet commerce and the increase in merger applications are the two main focuses of this hearing. As we all recognize, the Internet has sparked unprecedented economic growth in the country.

Entrepreneurship, innovation and market forces, not government programs, have provided Americans with access to advanced telecommunication services, unlimited information, and unlimited opportunities. And I believe these economic forces should continue to prosper without unnecessary interference from those in Washington.

In addition, our laws should be technology neutral. The government should not pick winners or losers, the markets should do that. Consumers should make that determination by the kinds of commitments they make.

I also believe that merger review authority should be conducted promptly, efficiently, and predictably. We must establish a framework to allow small mergers that will not create an anti-competitive impact and make sure that they are not burdened with costly government interference.

The precious resources of Americans should not be squandered on the feeding of the bureaucracy unnecessarily, and I believe that we can accomplish this goal and continue to protect American consumers from anti-competitive mergers, which, I think, is what our objective should be. In fact, I believe we can provide even better protection.

Whether mergers are large or small, there should be some predictability in the process. It is important that merger applicants be given full opportunity to address anti-competitive concerns before the applications are denied.

Such a system is necessary to ensure that U.S. companies can continue to compete in the growing global marketplace.

With those principles in mind, I would like to call on my colleagues to make opening statements, and it would be my privilege now to call upon the ranking minority member of the Subcommittee, Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Senator HOLLINGS. Thank you, Mr. Chairman. I would ask permission to include my statement in the record in its entirety.

Senator ASHCROFT. Without objection.

Senator HOLLINGS. We have a concurrent hearing before the Budget Committee on the President's budget.

Let me say that we are lucky to have a very strong Federal Trade Commission, and it has been doing an outstanding job. One, I agree with their request. Our Chairman's bill is excellent reauthorization proposal.

Although I do not think the amount is sufficient, I am sure we can compromise and negotiate that out especially given that the demands upon the Federal Trade Commission are just almost insurmountable, including with increased requests for mergers.

Along that line, I rather agree with Senator Hatch. We have got to raise the level of review. We really had in mind large mergers, but with the volume involved, and the time required, the reality is that we are going to have to include these issues with Senator Hatch's bill.

However, I disagree with his ministerial review on that Second Request, the FTC's current process has been working, and it is working in a real fine fashion. The distinguished Chairman just this morning talked about bureaucracy. I did not know you further bureaucratize with appeals, and appeals, and appeals as a solution.

I am at the other end of the spectrum about this cutting the size of government, which I agree with, but we have to meet every year to increase the size of key agencies, namely at the law enforcement level in relation to the Department of Justice. Its budget has increased in ten years from $4 billion to $22 billion. You ought to look at it.

I mean, everything that we can think of relative to running for public office, we seek to make it a federal law, a felony, or whatever, and we have got more marshals, more U.S. attorneys, more judges, more appeals courts, more bankruptcy courts, more reviews here and there, and everything else of that kind.

So, I would oppose a ministerial review of the Second Request, which is the main thing I am concerned about.

With respect to the issue of privacy, the Chairman has noted that we are going to have a full Committee hearing on the issue—and I thank Chairman McCain for setting that up.

However, I understand the main thrust this morning is the reauthorization of the Commission, which is very, very important. You are going to have to be King Solomon to determine reauthorization requests, but you are the best entity when it comes to protecting America's consumers. You have certainly got the jurisdiction.

You had it with Senator Bryan's bill on children's privacy. And it is working. And you have made one report to the Congress in another review, and in an appearance in July of last year, you noted your preference for allowing market forces to deal with privacy, as opposed to legislation.

If, however, we would have permitted the market forces to operate on the economy, we would not have voted 95 to nothing for Greenspan's reappointment.

So government is necessary, and it is going to be necessary in this one. I would love for the market forces to operate, but the Internet folks have gotten together—they put out a policy, but they only got ten percent adherence to that particular policy.

So it is going to ultimately fall with us—you have been doing the right thing of meeting with the business folks and meeting with the consumer groups. It is going to be tough. It is not going to be easy, but we can finesse it.

We have got to really come along with it.

One hundred percent of the problem is the Internet. We have had privacy with respect to doctors, with respect to financial records, and everything else of that kind, with respect to lawyers and their clients, but it comes now to the jurisdiction of this Committee with respect to the Internet privacy.

And the gimmick of appointing these task forces is to bring in these super-duper folks from Silicon Valley, with pockets full of money, and ooh, and ahh, and every other thing like that, say, "Yes, I did not know that." And they muck up the possibility of really getting good legislation, in my opinion.

I want to make that observation on the record because I saw it happening last year with the provision of Section 271 of the Telecommunications Act of 1996. That section was hammered out by the Bell companies, along with long distance companies.

And they are the ones, the lawyers—we politicians like to say—wrote the bill—who worked out the 14-point checklist. And that is why to their satisfaction, and to everyone else's satisfaction, we could get 95 votes.

Now, they want to extend that monopoly. They can get into long distance anytime they want—outside of their monopoly—but they do not want to do that. They merely want to extend that monopoly.

But finally, thanks to Bell Atlantic, they have now qualified, showing it is possible that it was not really the Federal Communications Commission's rewriting the rules or anything of that kind.

They complied in the most complex and competitive area, New York, which is now the reason why the other Bell companies can comply. The fact is that we can do away with the task forces and allow the Committee to perform its work with respect to Internet privacy. We will be looking to you folks for leadership and guidance on that score. I appreciate it very much.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

Let me take this opportunity to commend the FTC Commissioners, including my good friend Robert Pitofsky, for the fine work the agency is doing nowadays. I have been advised that morale has never been better at the FTC and that you are handling and prosecuting more consumer protection cases than ever before in the history of the agency, resulting in tens of billions of dollars of savings to consumers.

On this basis, I am strongly supporting the Commission's reauthorization. Senator McCain has introduced a bill to reauthorize the Commission for the next two fiscal years. That legislation, S. 1687, is pending before the Committee, and will be a focus of today's hearing. I am aware that the FTC—though obviously supporting the bill—is requesting a higher level of funding than is provided for in Senator McCain's bill. Having reviewed the FTC's request, and the authorization amounts in the Chairman's bill, I am certain we will be able to come to an agreement on the authorization levels by the time the legislation is presented for markup.

Of course, the Commission, with all of its capable and distinguished Commissioners present today, will be able to make its case on the record why it needs additional authorization amounts. I am sure their testimony will be well received and given the consideration it deserves.

I also would like to comment briefly on two other issues that will be discussed today. First with respect to the matter concerning the Hart-Scott-Rodino Merger Application Program, it appears that there is some consensus that some reforms of the program are needed, particularly regarding the thresholds that are used to trigger the filing of applications. More complicated is the matter of the FTC's and DOJ's substantive review of the applications and their ability to pre-approve certain mergers. Though I am interested in working on a solution to this matter, I am very hesitant to support any reforms that will severely hinder the capability of the FTC and DOJ to investigate and challenge mergers that they feel threaten competition in the marketplace. In fact, I have been one who has been critical of the agencies from the other end—believing that they aren't as aggressive as they should be in their enforcement. Given the enormous consolidation that is occurring in many significant industries, including the communications sector, the last thing we need is legislation that weakens the authority of the FTC and DOJ.

Finally, on the issue of privacy, I have made it clear to my Democratic and Republican colleagues my concerns about this issue and my plans to pursue legislative action. As a recent Wall Street Journal poll has indicated, personal privacy is one of the main concerns of Americans as we head into the 21st Century. In a survey conducted by the Federal Trade Commission (FTC), 87% of the respondents expressed concerns about threats to their privacy when they use the Internet. In response to a nationwide survey by the National Consumers League, 70% of the respondents expressed uneasiness about providing personal information to businesses online.

Initially, we were advised to defer to self-regulation. But studies show that self-regulation is not working. In fact, in a survey financed by the industry itself, it was discovered that of the 93% of commercial websites that collected personal information, only 10% included a comprehensive privacy policy. It is clear that we are at the point where legislative action is needed. I believe that a minimum, a baseline of privacy protection is needed to ensure consumers can confidently use the Internet. I look forward to working with my colleagues on both sides of the aisle.

I thank the Chair and welcome the testimony of our witnesses.

Senator ASHCROFT. Thank you very much, Senator Hollings.

I now call on Senator Stevens.

STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

Senator STEVENS. Thank you very much, Mr. Chairman.

I am pleased to be able to be here with you this morning. I do thank members of the FTC for the conversations that they permitted me to have with them about the subject I am going to discuss, but I am extremely disturbed with the decision of the FTC to litigate rather than negotiate the BP/Arco merger.

We have watched now for a series of months the negotiations that had been taking place with the Commission. There has been obviously a substantial delay. And the process that we go through in Alaska which is a fairly extensive one in order to be able to expand our reserves and increase the throughput of the Trans-Alaska pipeline is very difficult.

Satellite fields, those are the step off fields, their development is down. Exploration is down. Heavy oil development is down.

Overall exploration is down. In 1999, the exploration budget was half of what was spent in 1998. And in 1999, more than half of Arco's added reserves came from improvements and revised estimates in their activities. They are not expanding.

I have communicated to the FTC my opinion that what affects consumer prices in California is the supply of oil from Alaska. And yet, I think the FTC has been more concerned with California refiners than it has consumers or the State of Alaska per se. The policy making processes that the FTC is in the process of changing have had a substantial impact now on our state.

But we already have had substantial impact from this administration. We have lost jobs in our four major resource areas. Fisheries is down. Timber is down. Mining is down. We now rank last among the states in annual pay growth, although we led that before this Administration came to office.

Also 20 percent of our 20- to 35-year-old people have left our state in the last eight years because of the lack of job opportunities. And our main resources are oil and gas.

My state undertook to negotiate with the companies involved in a merger, a long negotiation. And the results of that negotiation have been ignored by the FTC. This is state-owned property where this oil is. We have a state regulatory system that is equal to or better than the FTC. And yet, the FTC has seen fit now to force this into court.

But the interesting thing, Mr. Chairman, what goes into court is not the position that was negotiated with the FTC right up to the last minute. It is the original proposal. The original proposal is now before the courts.

I think that law has to be changed, and I intend to see that we try to change it on this bill, if it gets to the floor.

The problem I really have is that it does seem to me, Mr. Pitofsky, that you are trying to change the rules of the game. As a matter of fact, you have said so, and it is a difficult proposition. I believe that the FTC, if it has this power to talk to the people involved in these negotiations, to bring about a modification, has the responsibility to negotiate.

But, Mr. Pitofsky, you have said at one point, "I have made a counteroffer, and it is no."

There was no negotiable stance on the part of the FTC. It has delayed this, and now we are going to court on the part of the original offer as far as the merger is concerned.

But it is sad to me that of all the mergers that have gone by—this is not the biggest merger in history, but this is the first one that I have seen the FTC in 31 years here in the Senate act the way it has acted on this issue.

And I have been here for a long time on this Committee, longer than any other member except Senator Hollings. It does seem to me that the whole process needs to be reviewed. If one man can destroy the economy of a state, then I intend to review it very deeply.

Thank you, Mr. Chairman.

Senator ASHCROFT. Thank you very much.

I now call on Senator Wyden.

STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman. And having a difference of opinion with Chairman Stevens is about the least fun assignment that a fairly new member of this Committee can have.

I think he knows that this is an extremely important issue on the West Coast, and I am anxious as this process goes forward to see if we can find some common ground, but the heart of the problem is that seven out of every ten barrels of Alaskan crude oil sold on the West Coast are going to come from this newly merged entity.

In my state, one company would control what amounts to 90 percent of the gas sold in our state. What we have seen over the years is a systematic reduction in the number of competitive forces we have had in our state.

There is a reduced number of gas stations. There is a reduced number of independents that are a source for competition.

And our concern is that if the deal goes forward as written now, in effect this newly merged entity would be able to work in our state, essentially through the Arco system, and further freeze out the independent gas stations.

At least what we have had in the past is two big companies had to fight among themselves and go at it in the kind of free enterprise system; we would not have that in the future.

Senator Stevens makes a valid point that what will be before the court is the original proposal. Frankly, I am just as concerned about some of the changes that were made because I do not see how the Federal Trade Commission could even monitor such a complicated sort of arrangement.

Some of these anti-trust deals are starting to have so many divestments and the like, we are going to have to have whole new federal agencies to operate them. And certainly, anti-trust law needs to be kept up with the times, and I want to work with Chairman Stevens in that regard.

Frankly, on some of these telecommunication deals, the bigger threat is probably the First Amendment than it is direct head-to-head competition.

So I just want Chairman Stevens to know that there is a difference of opinion here, and I intend to work as closely as we can to see if we can find some common ground.

One last point, if I could, Chairman Ashcroft, on this privacy matter that we are going to be dealing with on the third panel: I know that for some, privacy protection is becoming the third rail of the digital economy. They just do not want to touch it, and they do not want to get near it.

I think that that is a huge mistake because the fact of the matter is that capitalism requires confidence. And if we have an Exxon Valdez of privacy where a tremendous amount of private data gets out about individuals, their medical records, their financial records, where people feel, literally, as a result of this information getting out, that their lives are practically over, that will do a lot of damage to the work that this Committee has done in terms of trying to have a climate that makes e-commerce grow.

This is the Committee from whence the Internet Tax Freedom bill came, and we teamed up on a bipartisan kind of basis. That was a bill that encourages the growth of the economy.

You have a tsunami of privacy violations along the lines of what we are starting to see. That can do a lot of damage to capitalism. Senator Burns and I have put in a bipartisan bill on this topic, and I think Senator Hollings made a number of good points on it.

What I have people coming to me and saying is that maybe Conrad and I shot too low. Maybe we ought to have more than disclosure and opt out, and I just hope that we are serious about dealing with these privacy issues because we cannot afford a series of calamities that would undermine the most vibrant part of our economy.

And I thank you for the chance to make this statement, Mr. Chairman.

Senator ASHCROFT. Thank you, Senator Wyden.

Senator Brownback.

STATEMENT OF HON. SAM BROWNBACK, U.S. SENATOR FROM KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman. I appreciate you holding the hearing.

Thank you very much, FTC members, for coming here. I look forward to your testimony. There are a lot of issues to be discussed. We have heard from several people.

One issue that I want to throw into the mix and I hope you will address, is you have a study that is going on about marketing of violence to children.

This Committee had a hearing on this topic less than a year ago. There were a number of people testifying that violence is actually used as a marketing tool to children to get them to buy products.

You are in the middle of a study on that, and I hope that study is going well. And I also hope you are being aggressive in pursuing that study, and that you are finding out from these companies what their marketing efforts and strategies are.

We have not been able to secure this information in the Senate. I have requested that information and the companies say it is not available, that they do not know who they are selling these products to, and they do not know their marketing strategies, which I find just unbelievable.

This is a very serious issue for the country particularly when we have so much violence. I trust that the aggressive pursuit and timely completion of this study is a top priority of the FTC, particularly given the importance placed on it by both the U.S. Senate and the White House. I also hope that you will make a concerted effort to check and verify the information supplied to you by the entertainment industry, given the interests they have in the outcome of this report.

There will be more hearings on these topics of violence, violence being marketed to children. And that is an area that I hope you all are going to address today so I can hear about that and some of the other topics that are here.

Mr. Chairman, thanks for holding the hearing, and I look forward to the testimony and some questions.

Senator ASHCROFT. I want to thank the members of this panel for attending and being a part of this. And it is a tribute to the Commission that so many Senators would make themselves available for the hearing.

I understand that Chairman Pitofsky has an opening statement on behalf of the Commission. However, I want to give each Commissioner, after his statement, an opportunity to make brief statements. We would like to hear from all of you, if you want to say anything.

Since we have a number of witnesses today, I am going to ask you to try and keep your remarks to five minutes or less. And obviously, there will be no penalty for the "or less" part.

Without objections from other members of the Committee, I will assure you that your written statements will be made part of the record.

With that in mind, it is a pleasure to welcome you, Mr. Chairman, and I thank you for coming, and you may begin your testimony.

STATEMENT OF HON. ROBERT PITOFSKY, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY HON. SHEILA F. ANTHONY, COMMISSIONER; HON. MOZELLE W. THOMPSON, COMMISSIONER; HON. ORSON SWINDLE, COMMISSIONER; HON. THOMAS B. LEARY, COMMISSIONER

Commissioner PITOFSKY. Thank you, Mr. Chairman, and members of the Committee.

Let me take a moment to introduce my colleagues. Commissioner Sheila Anthony, Commissioner Mozelle Thompson, Commissioner Orson Swindle, and our newest Commissioner, Tom Leary.

Both in our consumer protection and protecting competition roles, the FTC today is a very busy place. We are encouraged by the fact that between those two missions, we estimate, along the lines that GPR sets out for estimating these sort of things, that we saved consumers $1.6 billion in Fiscal 1999, $14 for every $1 that we spent on our operations.

On the competition side, as several of you have indicated, we are most active in merger review. There were three times as many merger filings in 1999 as 1991. The total value of assets acquired through acquisition was 11 times as great as just 8 years ago. 29 transactions in Fiscal 1999 exceeded $10 billion in value.

While the merger wave review takes up two-thirds of our competition protection resources, we have been active in non-merger work as well. Perhaps the most notable recent example was our suit and then settlement with the Intel Corporation in which Intel agreed to discontinue certain allegedly monopolizing conduct.

We drafted an order that we intended to provide guidelines to the high-tech industry for refusals to deal with customers and competitors. And I am glad to say that the company and we described the settlement as a win/win situation.

On the consumer protection side, we continue to discharge our usual responsibilities—challenging deceptive advertising, credit abuses, and marketing fraud, especially in the telemarketing area. The great change since we were here in reauthorization some four years ago is our commitment to challenge fraud and invasions of privacy with respect to consumers on the Internet.

We have brought over 100 Internet fraud-related cases in the last several years, established a database that 220 law officials use, and a consumer help line where consumers can register their complaints which then go into our database.

In 1996, we devoted 14 Commission personnel to Internet review. Today, it is 79 personnel, 23 percent of all the people we have working on consumer protection issues.

We also deal with new and significant initiatives that we have been asked to take on, and one that Senator Brownback mentioned is particularly important, our study of marketing of violent entertainment materials to children. I hope to have an opportunity to answer questions about that, Senator.

We have handled these new responsibilities without any major increase in budget by restructuring the agency for efficiency. We have very constructive relationships these days with the states. We have reduced drastically mid-management review.

We make earlier decisions on cases that we will pursue, and we have vacated 50 percent of the rules and guides that were on our books, mostly obsolete rules and guides, that were on our books just five years ago.

Nevertheless, there is a limit to what we can do with present resources, and therefore, the Commission has asked for a budget of $165 million and personnel totaling 1,113 in 2001, substantially more than this Committee allowed in its reauthorization proposal.

The vast majority of this increase is to staff enforcement missions that have grown or have been added in recent years.

Finally, let me say just a word about Hart-Scott reform since the panel that will follow will discuss the issue. Also, my newest colleague, Commissioner Tom Leary, will address that issue briefly.

I agree with the Hatch proposal that would reduce the number of proposed mergers that need to be filed with the government, but I believe the fees on very large transactions should be increased so as to adequately finance FTC anti-trust enforcement activities.

If we change the filing requirement, as the Hatch bill proposes, 40 percent of the mergers that we now review would not have to be filed.

With respect to the proposal to refer objections to our request for information to the judiciary, I believe that would lead to unnecessary delay and would put the judiciary in a position where they would need to make decisions without adequate information. If there are problems, and perhaps there are, we can and will address them through internal reforms.

I would, of course, be delighted to answer any questions from members of the Committee and I look forward to an opportunity to answer some of the comments by Senator Stevens, to the extent I can, because the matter is in litigation and I am limited in what I can say, about our BP/Arco initiative. Thank you very much.

Senator ASHCROFT. Thank you.

[The prepared statement of Commissioner Pitofsky follows:]

PREPARED STATEMENT OF HON. ROBERT PITOFSKY, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman, the Federal Trade Commission (FTC) is pleased to appear before the Subcommittee to present its views on the agency's reauthorization. Since our last reauthorization hearing in 1996, the FTC has continued to protect American consumers in dynamic domestic and world marketplaces. The FTC is the only federal agency with both consumer protection and competition jurisdiction over broad sectors of the economy.[1] Congress has charged the FTC with maintaining a free and fair marketplace by, among other things, protecting American consumers and businesses from unfair methods of competition and unfair or deceptive acts or practices. Our national experience demonstrates that competition among producers and accurate information in the hands of consumers yield the best products at the lowest prices, spur innovation, and strengthen the economy.

As a deliberative body and an independent agency, the FTC is well situated to study and respond to a changing marketplace, and to champion consumer interests in this dynamic setting. The FTC has investigatory power and often serves as a research resource for Congress. The FTC also has limited regulatory power, which it uses sparingly to address specific, widespread problems, often in response to express Congressional mandates. First and foremost, however, the FTC is a law enforcement agency. It is a small agency, but one with a record of achievement for American consumers.

Highlights of recent accomplishments include:

- Saving consumers an estimated $1.6 billion in fiscal year 1999 from law enforcement actions brought in our consumer protection and competition missions, achieving an estimated consumer savings of $14 for every $1 spent on agency operations.
- Protecting consumers and business from anticompetitive mergers before they occur by reviewing the increasing number of proposed merger transactions filed under the Hart-Scott-Rodino provisions of the Clayton Act. Reported transactions have tripled from 1,529 in fiscal year 1991 to 4,642 in fiscal year 1999 and have increased eleven-fold in total value during this period, from $169 billion to $1.9 trillion.
- Targeting 78 percent of FTC antitrust resources in fiscal year 1999 to four sectors of the economy—energy and natural resources, information and technology, health care and pharmaceuticals, and consumer goods and services, thus focusing on industries with major pocketbook benefits for consumers.
- Fighting Internet-related fraud since 1994 by bringing 100-plus enforcement actions, which have targeted 300 corporate and individual defendants on behalf

[1] The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq. With certain exceptions, the statute provides the agency with jurisdiction over nearly every sector of the economy. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partially exempt from FTC jurisdiction. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 additional statutes and more than 30 rules governing specific industries and practices.

of millions of online consumers and small business. The FTC's enforcement actions have collected over $20 million in redress, obtained orders freezing another $65 million, and stopped Internet schemes with estimated annual sales of over $250 million.

• Offering consumers and business toll-free access to the FTC through a consumer helpline. Launched in July 1999 with additional funds appropriated by Congress, 1–877–FTC–HELP allows people from anywhere in the United States to call with questions or complaints and speak to trained counselors. The FTC now receives more than 9,000 consumer inquiries or complaints per week.

• Operating Consumer Sentinel, a secure database developed by the FTC and now shared with over 220 law enforcement agencies in the U.S. and Canada. Currently containing more than 225,000 entries, the database allows law enforcement to identify companies and individuals engaging in fraud and to stop scams as they emerge.

• Safeguarding consumer privacy by implementing the Children's Online Privacy Protection Act and by bolstering industry self-regulation through educational efforts. The FTC continues to monitor consumer privacy in cyberspace by, among other things, conducting surveys to reassess how websites are implementing fair information practices.

• Educating consumers and businesses about their rights and responsibilities, and alerting them to potential frauds, by distributing 8.6 million educational publications in print and online during fiscal year 1999.

Increased Resources to Meet Growing Challenges. To meet the growing challenges in protecting consumers and keeping the marketplace competitive, we request that our reauthorization include an increase in resources. Over the past decade, the FTC has performed its mission in the face of a rapidly changing marketplace. We have done so primarily by stretching our resources, re-inventing our processes, and simply doing more with less. But if we are to keep up with the growing demands that will be imposed by the 21st Century marketplace, we need significant additional resources.

Two marketplace developments have greatly increased the demands on the FTC—the explosive growth of the Internet and the dramatic increase in corporate mergers. Use of the Internet has grown exponentially since commercial web browsers first became available in 1994—123 million Americans now have access to the Internet.[2] Internet purchasing also is skyrocketing, forecasted to rise from $20 billion in 1999 to $184 billion in 2004.[3] Developing Internet-related policies and halting cyberfraud during just the few years of the Internet's existence already has taxed the FTC's resources. In 1996, the FTC's Bureau of Consumer Protection (BCP) devoted 14 FTEs, about 4 percent of BCP total resources, to Internet-related activities. In 1999, the workload required 79 FTEs, or about 23 percent of the BCP workforce, which overall remained at about the same level as 1996.[4]

Similarly, the corporate merger wave continues into its tenth straight year and strains FTC resources. *The Washington Post* recently characterized the merger wave as "a frenzy of merger madness, capping a dramatic wave of global corporate consolidation that has been gaining momentum through much of this decade," quoting merger experts who note that a key force driving merger activity is the Internet.[5] This restructuring may be necessary for companies to compete in the new global, high-tech marketplace. At the same time, antitrust review is necessary to identify and stop those combinations that could diminish competition in specific markets as this restructuring proceeds.

While the number of Hart-Scott-Rodino mergers has tripled in the past decade, the dollar value of commerce affected by these mergers is on an even steeper trajectory, increasing eleven-fold.[6] Overall, merger transactions are increasingly larger and significantly more complex, requiring more exacting analysis when they raise

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[2] Nielsen Media Research and NetRatings Inc., The Nielsen/Netratings Reporter (visited Jan. 13, 1999) <http://www.nielson-netratings.com/press_releases/pr_000113.htm>.

[3] Forrester Research Inc., Online Retail to Reach $184 Billion by 2004 as Post-Web Retail Era Unfolds (visited Sept. 28, 1999) <http://www.forrester.com/ER/Press/Release/0,1769,164,FF.html>.

[4] See Attachment 1. Internet-related initiatives include anti-fraud law enforcement, consumer and business education, online privacy initiatives, and the development of international consumer protection guidelines for commerce.

[5] Sandra Sugawara, Merger Wave Accelerated in '99; Economy, Internet Driving Acquisitions, Wash. Post, Dec. 31, 1999 at E1.

[6] See Attachment 2.

competitive issues. As a result, merger investigation and litigation are more resource-intensive than before.[7]

The FTC is working cooperatively with industry and the antitrust bar to assess what changes can be made in Hart-Scott-Rodino merger investigations to minimize burden and make the process work as efficiently as possible. The FTC already has 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.

Finally, several other significant initiatives are straining FTC resources. Two current examples are studying the marketing of violent entertainment materials to children and creating an identity theft database. Late in fiscal year 1999, several Senators and the White House both asked the FTC to study the marketing of violent entertainment materials to children in the aftermath of school shootings in Littleton, Conyers, Jonesboro, West Paducah, and Pearl.[8] The entertainment industry is large (over $40 billion a year in sales and rentals of movies, video games, and music recordings), and this undertaking is substantial: FTC staff is seeking relevant information from industry members, parents' and children's advocacy groups, other consumer groups, academics, and parents and children themselves, and the Commission will issue a report.

The FTC also has devoted resources to issues involving identity theft—using someone else's personal identifying information to commit fraud, such as opening a credit card account using the stolen name. Congress passed the Identity Theft and Assumption Act of 1998,[9] which directs the FTC to establish a "centralized complaint and consumer education service" for victims of identity theft. The FTC has implemented three parts of the program: establishment of a toll-free number (877–ID THEFT) for reporting and seeking information on identity theft; a database to track these complaints; and a consumer education program, including a soon-to-be-published booklet and a website devoted to identity theft issues—www.consumer.gov/idtheft.

The FTC has been both innovative and aggressive in meeting its expanding responsibilities. We reorganized and streamlined our workforce by hiring cost-efficient paralegals to perform tasks previously performed by attorneys, and by moving positions, wherever possible, out of administrative offices and into front-line law enforcement. We have prioritized our cases, shifting resources, to the extent possible, to areas of highest need and with greatest consumer impact. We have leveraged our efforts through cooperative arrangements with the states and the private sector to obtain the greatest benefit for each dollar spent.

Nonetheless, the growing demands of the marketplace are exceeding the FTC's ability at current resource levels to maintain its missions adequately. We need additional staff and funds to do the work effectively. An increase to the FTC's resources would be a sound investment, reaping abundant dividends for American consumers and business.

Forward-Looking Law Enforcement for American Consumers and Business. At the brink of a new century, the FTC's law enforcement is forward-looking and innovative. We are pleased to describe our accomplishments in (1) keeping pace with the dynamic growth of electronic commerce, (2) anticipating and responding to the changing marketplace to promote consumer and business welfare, and (3) promoting efficient law enforcement.

1. Keeping Pace with the Dynamic Growth of Electronic Commerce. The FTC is working to keep pace with rapidly expanding Internet activity through a multitude of programs and law enforcement efforts.

Fighting Electronic Fraud. The FTC is fighting to protect consumers and business against new high-tech frauds, ingenious scams that exploit the design and architecture of the Internet to defraud consumers. FTC staff identified two tricks, "pagejacking" and "mousetrapping," in *FTC v. Carlos Pereira,*[10] in which defendants in Portugal and Australia allegedly captured unauthorized copies of U.S.-based

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[7] The demands from the merger wave and the requirements and statutory deadlines under Hart-Scott-Rodino have forced a diversion of resources from the FTC's nonmerger responsibilities, such as potentially anticompetitive agreements in health care and other industries. While in 1991, the FTC spent 56 percent of competition resources on merger matters and 44 percent on nonmerger matters; in 1999, that ratio changed to 67 percent for mergers and only 33 percent for nonmergers. The nonmerger cases that have been opened in the past several years are proceeding more slowly because of the lack of resources.

[8] S. 254, 106th Cong. (1999). The specific provision of the proposed legislation, Amendment No. 329, passed by a vote of 98–0.

[9] 18 U.S.C.§ 1028.

[10] *FTC v. Carlos Periera* d/b/a atariz.com, No. 99–1367–A (E.D. Va., Sept. 14, 1999).

websites, including those of Paine Webber and The Harvard Law Review, and produced look-alike versions that were indexed by major search engines. The defendants then diverted unsuspecting consumers to a sequence of pornography sites from which they could not exit, essentially trapping them at the site. The FTC obtained a court order stopping the scheme and suspending the defendants' website registrations.

The FTC also protects consumers from more traditional scams that have found new life on the Internet. In fact, most of the FTC's 100-plus cases challenging Internet fraud concern old frauds on a new medium—28 cases challenge credit repair schemes, 13 cases challenge deceptive business opportunities, and 11 cases challenge pyramid schemes. The Internet can give these old scams a sleek new veneer as well as provide access to vastly more victims at little cost.

Among the most pernicious of old frauds finding a new home on the Internet are health-related frauds. The Internet offers consumers immediate, free access to health information and a convenient and (sometimes) less expensive source for health products. Not surprisingly, consumers are turning to the Internet more and more for their health needs.[11] Yet, there are potential risks: the quality of Internet information varies widely, and it can be difficult to distinguish reliable sites from inaccurate or even fraudulent ones. To address the proliferation of health claims on the Internet, the FTC implemented Operation Cure.All, which began with two comprehensive "surfs" of the Internet for suspicious health products and ended with cease-and-desist actions—four to date.[12] To educate consumers, the FTC publishes online brochures on how to spot health scams, linked the FTC website to reliable Internet health sites, and posted several "teaser" Internet sites that mimic health scams and alert consumers to potential online health fraud.

Maintaining the Competitive Promise of the Internet. Just as the work of the FTC's consumer protection mission strives to keep the Internet free from fraud, the work of its competition mission strives to secure the competitive promise of the Internet. In just a few years, the Internet has changed traditional sales and distribution patterns for products of all types, promising faster, cheaper, and more efficient ways to deliver goods and services. Antitrust scrutiny is necessary to ensure that anticompetitive practices do not stunt development of these innovations. In 1998, for example, the FTC charged 25 Chrysler dealers with an illegal boycott designed to limit sales by car dealers that marketed on the Internet. The dealers allegedly had planned to boycott Chrysler if it did not change its distribution methods to disadvantage Internet sellers.[13] A successful boycott could have limited the use of the Internet to promote price competition and could have reduced consumers' ability to shop from dealers serving a wider geographic area via the Internet.

Using Electronic Tools to Detect, Deter, and Educate about Fraud. To stay on top of Internet developments, and to stop cyberfraud in its incipiency, the FTC has developed innovative tools. Two of the most effective tools are Consumer Sentinel, the comprehensive fraud database,[14] and 1–877–FTC–HELP, the toll-free consumer helpline.

The FTC also holds "Surf Days" to use new technology to detect and analyze emerging problems in the online marketplace. Through organized Internet surfing, FTC staff and its law enforcement partners learn about online practices and identify possible targets for law enforcement. To date, the FTC and 250 partners have conducted 20 Surf Days on topics ranging from pyramid schemes to health claims to environmental marketing claims, and have identified over 4,000 sites making dubious claims. One way that FTC staff responds when it discovers questionable claims is to use e-mail simply to warn website operators that their sites appear to violate the law—some operators are new entrepreneurs unaware of existing laws. Although the results vary, the warnings appear generally effective in prompting operators to correct or remove their websites without any formal FTC enforcement action.

Second, the FTC has created "teaser sites" to educate consumers about exercising caution in dealing with website enterprises. Now numbering over a dozen, these sites mimic common Internet scams, such as pyramid schemes and business opportunities, and contain the customary glowing testimonials and false promises. After a few "clicks" from the home page, the FTC teaser sites warn consumers that they

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[11] One recent poll reveals that 80 million American adults went online for health information during the previous 12 months. Harris Poll (Aug. 1999).

[12] Magnetic Therapeutic Technologies, Inc., C–3897 (FTC Sept. 7, 1999); Pain Stops Here!, Inc., C–3898 (FTC Sept. 7, 1999); Melinda R. Sneed and John L. Sneed d/b/a Arthritis Pain Care Center, C–3896 (FTC Sept. 7, 1999); Body Systems Technology, Inc., C–3895 (FTC Sept. 7, 1999).

[13] Fair Allocation System, Inc., C–3832 (FTC Oct. 30, 1998).

[14] In 1998, Consumer Sentinel received the Interagency Resources Management Conference Award as an exceptional initiative to improve government service.

could be defrauded by participating in similar schemes and provide tips on how to distinguish fraudulent pitches from legitimate ones.

Finally, the FTC organized the development of www.consumer.gov to educate consumers. With more than 100 federal agencies contributing information, the website is a one-stop shop for consumers turning to the federal government seeking information, from health to money to technology.[15]

Protecting Privacy Online. Since 1995, the FTC has been at the forefront of issues involving online privacy. Among other activities, the FTC has held public workshops; examined website practices on the collection, use, and transfer of personal information; and commented on self-regulatory efforts and technological developments intended to enhance consumer privacy. The FTC has issued three reports to Congress based on its initiatives in the privacy area.[16] The most recent, Self-Regulation and Privacy Online,[17] issued in July 1999, examined website collection of consumer information, consumer concerns about online privacy, and the state of self-regulation. The report recommended effective self-regulation at that time instead of legislation, but called for further efforts to implement "fair information principles" and continued FTC monitoring.

The FTC is particularly concerned about issues involving the online collection of personal information from children. In its 1998 privacy report, the FTC documented the widespread collection of children's information, and recommended that Congress adopt legislation setting forth standards on online collection. Four months after the report was issued, Congress enacted the Children's Online Privacy Protection Act of 1998.[18] As required by the Act, the FTC issued a rule to implement the Act's fair information standards for commercial websites collecting information from children under 13.[19] The rule, which takes effect in April 2000, describes what constitutes "verifiable parental consent" in the collection of information from children.

The FTC also has brought law enforcement actions to protect privacy online. One action challenged the allegedly false representations by the operator of a "Young Investors" website that information collected from children in an online survey would be maintained anonymously,[20] and another challenged the practices of an online auction site that allegedly obtained consumers' personal identifying information from a competitor site (eBay.com) and then sent deceptive, unsolicited e-mail messages to those consumers seeking their business.[21]

Since the 1999 privacy report, the FTC, together with the Department of Commerce, held a public workshop on "online profiling"[22] to educate the public about this practice and its privacy implications, and to examine current industry efforts to implement fair information practices. The FTC also has convened an advisory committee of e-commerce experts, industry representatives, security specialists, and consumer and privacy advocates to examine the costs and benefits of implementing online the fair information practices of "access" and "security."[23] This advisory committee, convened pursuant to the Federal Advisory Committee Act,[24] will provide a written report to the FTC in May 2000. Later this month, the FTC will conduct another survey on commercial website practices of personal information collection and their use of fair information practices of notice, choice, access, and security.

Working to Protect Consumers and Businesses in International E-Commerce Markets. The FTC participates in international forums on e-commerce with two major goals: tackling cross-border fraud, and developing e-commerce policies that facilitate a safe and predictable commercial environment for businesses and consumers. To stop international fraud, the FTC works with both domestic and foreign law enforce-

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[15] In 1999, www.consumer.gov received the Vice President's Hammer Award, which recognized the site's innovative approach to providing online links to the websites of federal agencies.

[16] Self-Regulation and Privacy Online: A Report to Congress (FTC July 1999) <http://www.ftc.gov/os/1999/9907/index.htm#13>; Privacy Online: A Report to Congress (FTC June 1998) <http://www.ftc.gov/reports/privacy3/toc.htm>; Individual Reference Services: A Report to Congress (FTC Dec. 1997) <http://www.ftc.gov/bcp/privacy/wkshp97/irsdoc1.htm>.

[17] Id. The Commission vote to authorize release of the report was 3–1, with Commissioner Anthony concurring in part and dissenting in part.

[18] 15 U.S.C. § 6501. The Final Rule is available at <http://www.ftc.gov/opa/1999/9910/childfinal>.

[19] 16 C.F.R. Part 312.

[20] Liberty Financial Companies, Inc., No. C–3891 (FTC Aug. 12, 1999).

[21] *FTC v. Reverse Auction.com, Inc.*, No. 00–0032 (D.D.C. Jan. 6, 2000).

[22] Online profiling is the practice of aggregating information about consumers' interests, gathered primarily by tracking their movements online, and using the resulting consumer profiles to create targeted advertising on websites.

[23] "Access" refers to an individual's ability to review data maintained about him or herself and the ability to correct inaccuracies in that data. "Security" refers to a data collector's obligation to protect against loss and the unauthorized access, destruction, use, or disclosure of the data.

[24] 5 U.S.C. App. § 9(c).

ment partners to shut down offshore scam artists who target U.S. consumers, to repatriate ill-gotten gains moved offshore, and to combat cross-border fraud. We enhance international cooperative efforts through our involvement in international organizations, such as the 29-nation International Marketing Supervision Network; and task forces, such as the U.S.-Canada Telemarketing Task Force and the Mexico-U.S.-Canada Health Fraud Task Force. We also participate in information sharing arrangements, such as through Consumer Sentinel.

To develop e-commerce policies, the FTC is active in the public policy debate on international consumer protection principles that should govern the global electronic marketplace.[25] The FTC sponsored a June 1999 international workshop addressing these issues. Additionally, the FTC just announced that it will host, together with the Department of Commerce, a workshop this spring on the use of alternative dispute resolution mechanisms for consumer transactions in the borderless online marketplace.

2. Anticipating and Responding to the Changing Marketplace to Promote Consumer and Business Welfare. Electronic commerce, deregulation, and globalization are transforming the American economy. The FTC is responding to these changes by shifting resources to those areas where consumers and business are at increasing risk from fraud, deception, or anticompetitive practices.

Responding to the Retail Revolution. The United States, indeed the world, is undergoing a "retail revolution." To remain competitive, retailers—whether brick and mortar or online—are restructuring and merging, and seeking new ways to market both new and old products to a growing consumer market. Food retailing is experiencing just such a period of consolidation. The number of supermarket mergers increased from 20 in 1996, to 25 in 1997, to 35 in 1998.[26] While most supermarket mergers do not raise competitive concerns, some do appear to threaten consumers' food bills, and the FTC has responded. Five supermarket mergers reviewed by the FTC in the past 12 months have involved firms with total annual sales of over $110 billion, including Albertson's acquisition of American Stores (the second and fourth largest chains in the U.S.) and Kroger's acquisition of Fred Meyer, which created the largest U.S. supermarket chain. In the last four years, the FTC has brought more than 10 enforcement actions involving supermarket mergers, requiring divestitures of nearly 300 stores, in order to maintain competition in local markets spread across the U.S.[27]

The FTC is addressing not only anticompetitive mergers, but also anticompetitive practices that could hinder consumers from reaping the full benefits of retail restructuring. For example, the Commission sued Toys "R" Us, the nation's largest toy retailer, alleging abuse of market power by trying to stop warehouse clubs from selling popular toys, such as Barbie dolls. Although new to selling toys, warehouse clubs, such as Costco, were selling them at lower prices and beginning to take market share from more traditional retailers, including Toys "R" Us. In response, Toys "R" Us allegedly pressured toy manufacturers to deny popular toys to warehouse clubs or to sell to them only on less favorable terms. The FTC issued an administrative order to stop these practices, and the matter is now on appeal in the U.S. Court of Appeals for the Seventh Circuit.[28]

Protecting Competition and Consumers in Electric Power Deregulation. Deregulation is transforming the huge electric power industry, which has annual sales of over $200 billion. The FTC is working to ensure that consumers receive the benefits of deregulation and that formerly regulated monopolists do not use their market power to impede competition. The FTC has provided testimony and other comments to Congress on issues of electric power deregulation. FTC staff has participated in various industry forums and has provided comments to the Federal Energy Regulatory Commission and 13 state governments to assist in the transition to a competitive market. The FTC also conducted a workshop for state utility regulators and Attorneys General on market power and consumer protection issues that states are

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[25] Attachment 3 lists the international working groups on electronic commerce to which the FTC belongs.

[26] "How Big is Too Big? The Role of the FTC in Supermarket Industry Mergers," 2 Grocery Headquarters 24 (Feb. 1, 1999).

[27] Red Apple/Sloan, C–9266 (FTC Mar. 29, 1995); Schnucks/National, C–3584 (FTC June 8, 1995); Schwegman/National 119FTC 783 (July 5, 1995); Stop & Shop/Purity Supreme, C–3649 (FTC April 2, 1996) ; Ahold/Stop & Shop, C–3687 (FTC July 7, 1996); Jitney Jungle/Delchamps C–3784 (FTC Sept. 23, 1998); Albertson's/Buttrey, C–3838 (FTC Dec. 8, 1998); Ahold/Giant, C–3861 (FTC Oct. 20, 1998); Kroger/Fred Meyer, C–3917 (FTC June 7, 1999); Albertson's/American Stores, No. 981–0339 (June 30, 1999); Shaw's/Star, No. 991–0075 (FTC July 6, 1999); Kroger/John C. Groub, C–3905 (Nov. 8, 1999).

[28] Toys "R" Us, Inc., No. 9278 (FTC 1998) appeal docketed, No. 98–4107 (7th Cir. Apr. 16, 1999).

likely to face as they deregulate and restructure the electricity industry. The FTC continues to emphasize the need to (1) adopt policies that lessen the market power held by the formerly regulated monopolies to promote competition, (2) ensure that consumers receive accurate and non-deceptive information to make informed decisions among the choices that the competitive market should offer; and (3) ensure fair and non-deceptive billing practices.[29]

Protecting Consumers from Deceptive Telecommunications Practices. The FTC is addressing consumer protection issues in another deregulating industry—telecommunications. While deregulation can bring consumers substantial benefits in the form of greater choice in products, services, and prices, it also has brought new opportunities for fraud and deception. Among the most serious fraudulent practice is "cramming"—placing charges for unauthorized purchases of goods and services on consumers' telephone bills. In 1998, cramming ranked second among complaints received by the FTC's Consumer Response Center, with almost 10,000 complaints.[30] Along with State Attorneys General, the FTC has filed law enforcement actions against crammers, seeking injunctions and restitution for injured consumers.[31] The FTC also amended its Pay-Per-Call Rule[32] to require, among other things, express verifiable authorization for charges placed on consumer telephone bills.[33] Finally, the FTC commented on the Federal Communications Commission's "Truth-in-Billing" initiative, designed to make it difficult to cram unauthorized charges on to consumers' phone bills by making the bills easier to read and understand.[34]

The FTC also has worked closely with the FCC on "dial-around" long distance telephone services, another innovation of the deregulated environment. Dial-around allows consumers to bypass their pre-subscribed long-distance provider by using access codes—a "10–10–XXX" number.[35] Through national advertising, long-distance carriers, both large and small, heavily promote dial-around services, which now gross approximately $3 billion per year.[36] Nearly all of this advertising focuses on price claims, and, unfortunately, much of it appears deceptive. Early in fiscal year 2000, the FTC and the FCC jointly sponsored a public workshop to focus attention on deceptive advertising and to examine how both agencies might provide additional guidance to industry on advertising these services non-deceptively.

Safeguarding Consumer Privacy as Financial Markets Restructure. Financial markets also will be restructuring in the wake of the Gramm-Leach-Bliley Act,[37] which dismantled Depression-era legal walls between the banking, insurance, and securities industries. Despite the promise of more efficient financial markets, the new law raises concerns about the privacy of personal financial information, given the technology available to collect and distribute this information. The Act directs the FTC and the bank regulatory agencies to develop rules to implement privacy protections, including requiring notice of an entity's privacy policies and providing an opportunity, in certain circumstances, to restrict the sharing of non-public personal information. Release of the FTC's rule is scheduled for May 2000, just six months after the President signed the Act.

Providing Expertise on the Evolving Pharmaceutical Market. As part of its program to study evolving industries, the FTC's Bureau of Economics completed a detailed report on the rapidly changing pharmaceutical industry,[38] an industry of increasing importance to the nation's aging consumers. Developments in information technology, new state drug substitution laws, federal legislation, and the emergence

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[29] The FTC also has reviewed mergers that affect the delivery of electricity to consumers and has taken action when concerned about the merger's impact on competition and prices. See PacifiCorp, No. 9710091 (FTC consent agreement, Feb. 18, 1998) (transaction subsequently abandoned); Dominion/Consolidated Natural Gas Co. C–3901 (FTC Dec. 9, 1999).

[30] Telecommunications—State and Federal Actions to Curb Slamming and Cramming, (GAO/RCED–99–193, July 1999) .

[31] *FTC v. Interactive Audiotext Services, Inc.,* No. 98–3049 CBM (C.D. Cal., Apr. 22, 1999); *FTC v. International Telemedia Associates, Inc.* No. 1–98–CV–1935 (N.D. Ga., July 10, 1998); *FTC v. Hold Billing Services, Ltd.,* No. SA–98–CA–0629–FB (W.D. Tex., July 15, 1998). See also *FTC v. American TelNet* No. 99–1597–CIV–King (S.D. Fla. June 14, 1999); *FTC v. Communication Concepts & Investments, Inc.,* No. 98–7450 (S.D. Fla., Dec. 22, 1998).

[32] 16 C.F.R. Part 30 (1999).

[33] 63 Fed. Reg. 58,524 (Oct. 30, 1998).

[34] Truth-in-Billing and Billing Format First Report and Order and Further Notice of Proposed Rulemaking, 63 Fed. Reg. 55,077 (Oct. 14, 1998).

[35] Every long-distance carrier has an access or "10–10" code that allows callers to access that carrier's network, even if callers have previously chosen a different carrier to be their regular long-distance company.

[36] 10–10 Long Distance Calling, Consumer Reports, May 1999, at 64.

[37] Pub. L. No. 106–102, 113 Stat. 1338 (1999)

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

of market institutions such as health maintenance organizations and pharmacy benefit management firms all have contributed to a rapid pace of change in this market. The industry also has undergone significant structural changes that include growth of the generic drug segment and substantial horizontal and vertical consolidation. The report attempts to provide a more complete understanding of the competitive dynamics of this market and discusses possible anticompetitive concerns and procompetitive explanations for new pricing strategies and other evolving industry practices.

In preparing the report, FTC staff drew upon its experience in reviewing mergers in the pharmaceutical and health care industries. These industries have been in the midst of a merger wave in the last several years, and during that time, the FTC has brought 11 enforcement actions challenging several of these mergers.[39] Antitrust scrutiny is vital because these transactions could have a substantial and immediate impact on large numbers of consumers, possibly threatening higher prices and slowing innovation of new life-enhancing products.

Investigating Mergers in a Globalized Economy. Globalization means that increasing numbers of the FTC's merger investigations involve companies with international ties and require cooperation with foreign competition authorities to resolve concerns. For example, in the $80 billion oil mega-merger of Exxon Corporation and Mobil Corporation, the FTC closely coordinated its investigation, not only with the Attorneys General of several states, but also with the European Commission. Actions brought by United Kingdom and German authorities closely track the proposed FTC order. Upon completion of its review, the FTC's order would require the largest retail divestiture in FTC history—the sale or assignment of 2,431 Exxon and Mobil gas stations in the Northeast and Mid-Atlantic, as well as in California, Texas and Guam. In addition, certain assets would be sold, including an Exxon refinery in California, terminals, and a pipeline.[40]

Similarly, the FTC coordinated with foreign authorities in the investigation and eventual settlement of an international pharmaceutical merger, of Zeneca Group PLC, based in the United Kingdom, and Astra AB, based in Sweden. The parties agreed to divest rights to a long-acting local anesthetic to a third party to ensure continued competition in this important drug market. The European Commission and FTC staff shared their respective analyses of the case, and the parties facilitated the process by waiving confidentiality rights to permit full communication among FTC and EC staff and the parties.[41]

Formulating Guidelines on Competitor Collaborations. Globalization and new technologies are driving companies toward a variety of complex collaborations enabling them to expand into foreign markets, fund innovation, or lower costs. The increasing use and variety of these collaborations among competitors have led to requests for greater clarity regarding their treatment under the antitrust laws. In response, the FTC and the Department of Justice have issued, in draft, the first set of joint guidelines that comprehensively address horizontal agreements among competitors.[42] The draft guidelines seek to enhance understanding of the possible antitrust implications of a wide range of joint ventures, strategic alliances, and other collaborations among competitors, thus encouraging procompetitive collaboration and deterring collaboration likely to harm competition and consumers.

3. Promoting Efficient Enforcement. The FTC attempts to leverage resources to obtain the greatest efficiency by, among other things, working cooperatively with other law enforcement agencies, at both the state and federal levels. The FTC also attempts to promote direct and immediate benefits for consumers by seeking disgorgement or restitution remedies in appropriate cases to put money back in their pockets. Finally, the FTC seeks to minimize burden on business throughout its enforcement and compliance programs.

Coordinating "Sweeps" to Fight Consumer Fraud. An important innovation in the fight against consumer fraud is the "sweep"—a cooperative and concentrated fraud crackdown by federal, state, and private groups. These efforts have led to multiple law enforcement actions targeting a certain type of fraud, often with extensive press coverage, and are more likely to reduce fraud than isolated actions by the various

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[39] Hoechst AG, 120 F.T.C. 1010 (Dec. 5, 1995); Glaxo PLC, 119 F.T.C. 815 (June 14, 1995); Upjohn Co., 121 F.T.C. 44 (Feb. 8, 1996); Johnson & Johnson, 121 F.T.C. 149 (Mar. 16, 1996); Ciba-Geigy Ltd., 123 F.T.C. 842 (Mar. 24, 1997); Baxter Int'l, Inc., 123 F.T.C. 904 (Mar. 24, 1997); American Home Products Corporation, 123 F.T.C. 1279 (May 16, 1997); Roche Holding Ltd., C–3809 (May 22, 1998); Zeneca Group PLC, C–3880 (June 7, 1999); Medtronic, Inc., C–3879 (June 10, 1999).

[40] Exxon Corporation, No. 9910077 (proposed consent order, Nov. 30, 1999).

[41] Zeneca Group PLC, C–3880 (FTC June 7, 1999).

[42] 64 Fed. Reg. 54,483 (1999).

state and federal groups. Since 1995, the FTC has partnered with state and federal agencies and formed alliances to lead 49 sweeps culminating in 1,321 law enforcement actions on a variety of scams. These actions include 306 brought by the FTC itself, which have prevented an estimated $500 million in consumer injury.[43] The FTC also partners with private sector organizations in education campaigns on how consumers can avoid being defrauded.

Redressing Anticompetitive Price Increases. The FTC won a preliminary motion in its effort to give money back to millions of American consumers who were faced with sudden and huge price increases when they filled prescriptions for two generic drugs for treating anxiety. In late 1998, the FTC, along with 10 State Attorneys General, filed charges against Mylan Laboratories, Inc., the nation's second largest generic drug manufacturer, and others, alleging that the company had anticompetitively eliminated much of its competition by tying up the key active ingredients for the two drugs.[44] The complaint charges that Mylan's actions allowed it to raise prices of two drugs: for one drug, the price increase was 25 times the initial level; for the other, more than 30 times. In total, the price increases allegedly cost American consumers over $120 million. Trial is set for fall 2000.

Saving Homes and Stopping Abusive Lending Practices. The dramatic growth of subprime lending—lending to higher-risk borrowers—has been accompanied by reports of abusive lending practices. The abusive practices often involve lower-income elderly and minority borrowers and threaten their biggest assets—their homes. The FTC has made abusive lending practices an enforcement priority, and last July announced settlements[45] with seven subprime mortgage lenders from across the country charged with violating the Home Ownership and Equity Protection Act (HOEPA).[46] The FTC alleged these lenders made loans without regard to the consumers' ability to repay the loans, included prohibited terms in the loan agreements, increased interest rates after default, or imposed illegal prepayment penalties or balloon payments. The settlements included injunctive and other relief and consumer redress totaling $572,500 with injured consumers receiving an average of $2,100 each.

The FTC also is prosecuting an action against Capital City Mortgage Corporation,[47] a Washington D.C. area mortgage lender. Filed in 1998, the complaint alleges that the defendants made high-interest loans (up to 24%), many to elderly and minority home owners living on fixed or low incomes, without fully disclosing their terms. The loans were often interest-only balloon loans, with the full principal amount due at the end, allegedly leading to foreclosure and loss of homes when poor borrowers could not raise tens of thousands of dollars quickly to make these unexpected payments. The action seeks to obtain redress for hundreds of victimized homeowners.

Reducing Burden on Business. While protecting consumer interests, the FTC has taken steps to minimize burden on business in the following ways:

- Maintained a comprehensive regulatory review program that covers all FTC rules and industry guides since 1992. The program provides for review of every rule and guide at least every ten years.
- To date, the FTC has repealed roughly half of the guides and discretionary trade regulation rules in effect in 1992 (21 of 40 guides and 12 of 25 rules).
- The FTC has revised other rules to simplify disclosure requirements, provide more flexible compliance options, or promote international harmonization to facilitate trade. For example, the FTC revised its Rule on Care Labeling of Textile Wearing Apparel to permit the use of symbols in place of words, relieving manufacturers and distributors of the need to translate care instructions into multiple languages for trade purposes among NAFTA counties.

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[43] Attachment 4 provides the list of sweeps the FTC has participated in since 1995.

[44] *FTC v. Mylan Laboratories, Inc.,* CV–98–3115 (D.D.C. 1999) (mem).

[45] *FTC v. Barry Cooper Properties,* No. 99–07782 WDK (Ex) (C.D. Cal. July 30, 1999); *FTC v. Capitol Mortgage Corp.,* No. 2–99–CV–580G (D. Utah July 28, 1999); *FTC v. CLS Financial Services, Inc.,* No. C–99–1215 (W.D. Wash. July 30, 1999); *FTC v. Granite Mortgage LLC,* No. 99–289 (E.D. Ky. July 28, 1999); *FTC v. Interstate Resource Corp.,* No. 99–CIV–5988 (S.D.N.Y. July 30, 1999); *FTC v. LAP Financial Services, Inc.,* No. 3:99–CV–496–H (W.D. Ky. July 28, 1999); *FTC v. Wasatch Credit Corp.,* No. 2–99–CV–579 (D. Utah July 28, 1999).

[46] 15 U.S.C. § 1639.

[47] *FTC v. Capital City Mortgage, Inc.,* No. 1:98 CV 00237 (D.D.C., Jan. 29, 1998).

• Rules currently under review include those concerning the funeral industry,[48] franchise and business opportunity ventures, pay-per-call services,[49] amplifiers used in home entertainment products,[50] home insulation products,[51] and textile wearing apparel.[52]

• Maintained an extensive program of business education and outreach to achieve compliance without the burden of formal legal action. The efforts have included public workshops, online and hard copy business guides, general and individual compliance advice, "Surf Day" follow-up alerts, trade association and trade press contacts, speeches and other presentations.

• Streamlined its administrative trial procedures, establishing a one-year start-to-finish procedure for certain matters.[53]

• Sunsetted over 10,000 administrative orders, with automatic sunsetting of all such orders more than 20 years old.

• Reduced the average time to grant "early termination" on H–S–R mergers to less than 20 days, even though the statute allows a 30-day review period.

Mr. Chairman, we appreciate the opportunity to provide our views on the Commission's reauthorization and to report on our accomplishments on behalf of American businesses and consumers. We would be pleased to respond to any questions you or the other Members may have.

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[48] See Funeral Industry Practices Rule, 16 C.F.R. Part 453 (1999), Request for Comments, 64 Fed. Reg. 24,250 (May 5, 1999).

[49] See Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308 (1999), Notice of Proposed Rulemaking, 63 Fed. Reg. 58,524 (Oct. 30, 1998).

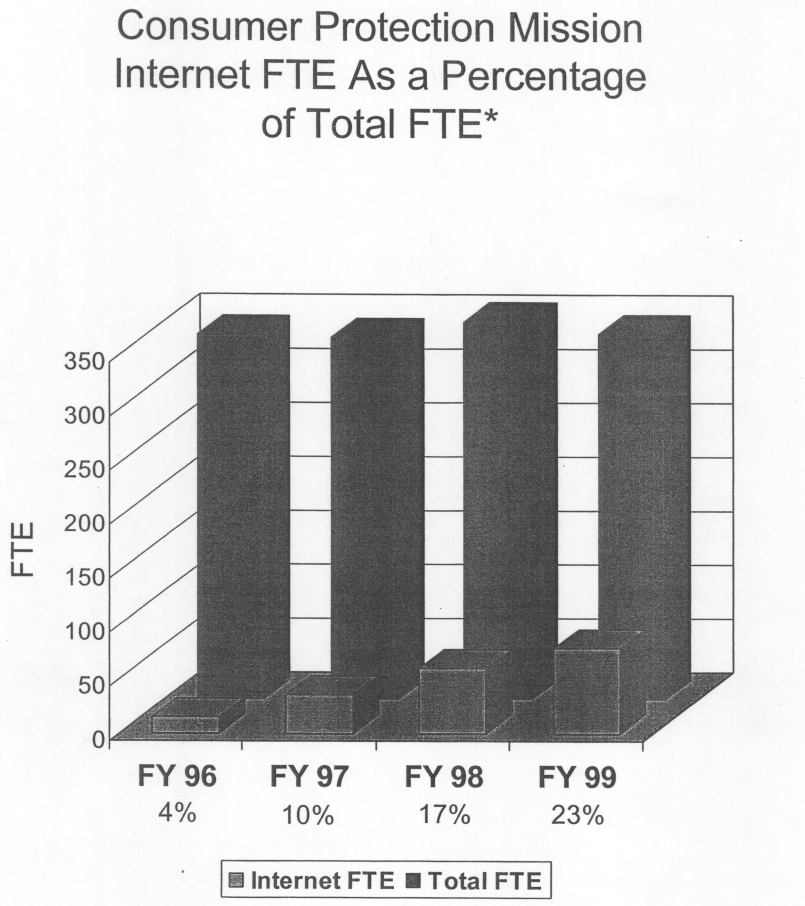
[50] See Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 C.F.R. Part 432 (1999), Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 37,237; see also Notice of Proposed Rulemaking, 64 Fed. Reg. 38,610 (July 19, 1999).

[51] See Labeling and Advertising of Home Insulation, 16 C.F.R. Part 460 (1999), Advance Notice of Proposed Rulemaking, 64 Fed. Reg. 48,025 (Sept. 1, 1999).

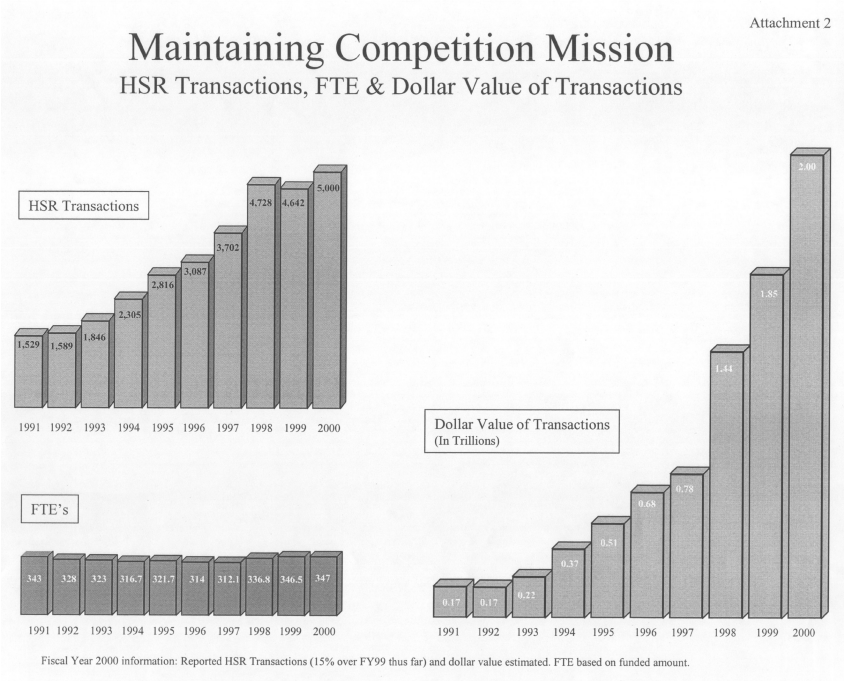
[52] See Care Labeling of Textile Wearing Apparel and Certain Piece Goods As Amended, 16 C.F.R. Part 423 (1999), Advance Notice of Proposed Rulemaking, 60 Fed. Reg. 67,102 (Dec. 28, 1995); see also Notice of Proposed Rulemaking, 64 Fed. Reg. 38,610 (July 19, 1999).

[53] 16 C.F.R. § 3.11A (1999).

Attachment 1



*Includes FTE in the Bureau of Consumer Protection and Regional Offices.



Attachment 3

The Federal Trade Commission's International Organization Participation

• **The Organization of Economic Cooperation and Development (OECD) Consumer Policy Committee** is comprised of the consumer protection and related agencies of 29 countries, the Business and Industry Advisory Committee, and Consumers International. The Committee recently issued international guidelines on consumer protection in e-commerce, and will continue to focus on related issues. The FTC heads the U.S. delegation to this committee.

• **Trans-Atlantic Business Dialogue (TABD)** is a framework for cooperation between the trans-Atlantic business community and the governments of the E.U. and U.S, whereby European and American companies and business associations develop joint EU-US trade policy recommendations. E-commerce continues to be one area of focus for these recommendations.

• **Trans-Atlantic Consumer Dialogue (TACD)** is a framework for cooperation between the trans-Atlantic consumer community and the governments of the E.U. and U.S, whereby European and American consumer associations develop joint EU-US policy recommendations. This group also has focused on e-commerce issues.

• **Asia-Pacific Economic Cooperation (APEC) Electronic Commerce Steering Group** involves government and private sector representatives from APEC countries. The group is addressing Internet jurisdiction and consumer protection in e-commerce.

• **Free Trade Area of the Americas (FTAA) Joint Government-Private Sector Committee of Experts on Electronic Commerce,** a representative subset of the 34 countries in the Western Hemisphere which comprise the FTAA, makes recommendations on how to increase the benefits of electronic commerce. Its focus includes consumer protection.

• **The Global Business Dialogue on Electronic Commerce (GBDe),** a coalition of international business representatives from the Internet industry, has launched a coordinated dialogue at the global level with governments and international orga-

nizations to address conflicting rules and regulations that could create obstacles to global electronic commerce.

• **The American Bar Association Internet Jurisdiction Project** is comprised of business representatives, academics and government agencies from around. This group plans to issue recommendations on Internet jurisdiction for consumer protection as well as other areas at an international meeting in London this summer.

• **The Internet Law and Policy Forum (ILPF)** is a global organization of Internet-centric companies that seeks to provide a comparative identification and evaluation of legal issues. It is currently examining the potential contribution of technology, alternative dispute resolution, self-regulation, governmental cooperation, and harmonization of laws.

• **The International Marketing Supervision Network (IMSN)** is a membership organization composed of law enforcement and consumer protection agencies in OECD countries. The IMSN is a vehicle for information exchange and a forum for international law enforcement cooperation in the area of consumer protection.

Attachment 4

CONSUMER PROTECTION MISSION ANTI-FRAUD LAW ENFORCEMENT SWEEPS

Since 1995, the Federal Trade Commission has joined with its partners in federal, state, and local government to bring 1,323 law enforcement actions in 49 sweeps against fraudulent operators. This includes 306 actions by the FTC that have prevented over $500 million in consumer injury. Each sweep is supported by an active and creative education program aimed at preventing future losses by the public.

FISCAL YEAR 2000

Operation S.O.S.

• *Target:* Fraudulent business opportunities

• *Partners:* DOJ, COBRA Task Force (Search Warrant), 8 Attorneys General (23 actions)

• *FTC cases:* 12 Section 13(b) cases; 22 civil penalty cases referred to DOJ; to be filed beginning 2/2/00

Operation Misprint

• *Target:* Bogus office and maintenance supply telemarketing schemes targeting large and small businesses and nonprofit organizations.

• *Partners:* Illinois Attorney General's Office (2 actions)

• *FTC cases:* 13 cases; court orders ending these allegedly fraudulent operations were issued in 10 cases; 3 cases are not yet final

FISCAL YEAR 1999

Operation Auction Guides

• *Target:* Deceptive marketing of "how to" guides which made misrepresentations to induce consumers to pay for auction or business opportunity information

• *Partners:* U.S. Postal Inspection Service, California Attorney General, Tulare County, California District Attorney's Office (2 actions)

• *FTC cases:* 4 cases resulted in orders for over $18 million in consumer redress

Operation Missed Giving

• *Target:* Fraudulent solicitations for charitable donations

• *Partners:* 40 state charities enforcement agencies (34 actions)

• *FTC cases:* 5 cases resulted in orders for over $1.4 million in consumer redress

Operation Clean Sweep

• *Target:* Bogus business operators who ship unwanted and unordered cleaning and janitorial supplies to small organizations

• *Partners:* 2 Attorneys General and U.S. Postal Inspection Service (3 actions)

• *FTC cases:* 1 case resulted in a settlement requiring $110,000 in consumer redress

Operation New ID—Bad Idea I

• *Target:* Credit identity scams

• *Partners:* National Association of Attorneys General, State Attorneys General, Treasury Inspector General for Tax Administration, and other federal, state, and local law enforcement agencies (14 actions)

• *FTC cases:* 22 cases; 16 settlements obtained full consumer redress; remaining cases pending final disposition

Operation Advance Fee Loan

• *Target:* Advance fee loan scams

• *Partners:* 6 State Attorneys General, state banking officials (10 actions); Canadian law enforcement authorities brought several criminal actions against Canadian telemarketers

• *FTC cases:* 8 cases resulted in orders for close to $3.9 million in consumer redress

Internet Pyramid Schemes

• *Target:* Internet pyramid schemes; effort included a two-day Internet surf to identify sites that may be hosting illegal pyramid schemes

• *Partners:* North American Securities Administrators Association, U.S. Postal Inspection Service, Securities and Exchange Commission, 27 State Attorneys General, other state and local law enforcers (32 actions)

• *FTC cases:* Filed 1 complaint; court issued an order halting the scam and freezing the defendant's assets; the case is in litigation

Operation New ID—Bad Idea II

• *Target:* Credit identity scams

• *Partners:* DOJ, U.S. Postal Inspection Service, Attorneys General, other state and local law enforcers from 8 states (8 actions)

• *FTC cases:* Filed 8 complaints for consumer redress or civil penalties; cases are pending final disposition

Operation Cure.All

• *Target:* Deceptive health claims for products advertised on the Internet; identified targets in two Internet health claims surf days

• *Partners:* Food and Drug Administration, U.S. Postal Inspection Service, Canadian and Mexican organizations, other federal, state and local officials (50 actions)

• *FTC cases:* 4 cases resulted in settlements with companies identified in Internet surf

Small Business Sweep

• *Target:* Companies that cram purported web design charges onto the telephone bills of small businesses

• *Partners:* State Attorney General (1 action)

• *FTC cases:* Filed 5 complaints; negotiating settlements

Operation Trip Trap

• *Target:* Companies that misrepresented the vacation packages they sell through fraudulent telemarketing and other deceptive practices

• *Partners:* 21 state law enforcement authorities (47 actions)

• *FTC cases:* Filed 5 complaints seeking consumer redress; cases are pending final disposition

Operation Home Inequity

• *Target:* Subprime mortgage lenders using lending practices that violated various federal laws

• *FTC cases:* 7 cases resulted in settlements requiring payment of $572,500 in consumer redress or a ban from making certain loans

Credit Card Protection Sweep

• *Target:* Fraudulent telemarketers of credit card protection services

• *Partners:* 6 Attorneys General (3 actions); FTC initiated a major consumer education campaign designed to alert consumers of their credit card rights, including working with its public and private sector partners to distribute over one million educational bookmarks to college students

• *FTC cases:* Filed 2 complaints, not yet finally disposed of, and a settlement that includes payment of $100,000 in consumer redress

FISCAL YEAR 1998

Operation Loan Shark II

• *Target:* Telemarketers of advance fee loans; victims were U.S. military personnel and their families

• *Partners:* 2 Attorneys General, other state officials, Canadian law enforcement (3 actions)

• *FTC cases:* 9 cases resulted in orders for over $215,000 in consumer redress

Foreign Lottery Tickets

• *Target:* Canadian firms targeting U.S. residents in foreign lottery schemes

• *Partners:* Attorney General (1 action)

• *FTC cases:* 4 cases resulted in orders for close to $1.4 million in consumer redress

Postal Job Fraud

• *Target:* private companies that falsely promise postal service jobs

• *Partners:* U.S. Postal Service (8 actions)

• *FTC cases:* 3 cases resulted in orders for over $245,000 in consumer redress

Operation Money Pit

• *Target:* Fraudulent business opportunities promising returns of many times the cost of investments

• *Partners:* Attorneys General and law enforcement officials in 4 states (7 actions)

• *FTC cases:* 3 cases resulted in orders for $4.5 million in consumer redress

Operation Show Time

• *Target:* Seminar operators selling a variety of business and investment schemes

• *Partners:* Attorneys General, securities officials, and other law enforcement officials from 11 states (18 actions)

Campana Alerta II

• *Target:* false and unsubstantiated health claims directed to Spanish-speaking consumers

• *Partners:* Officials from the Mexican government and the FTC jointly produced a Public Service Announcement that was broadcast on major Spanish-language network affiliates across the United States and Mexico

• *FTC cases:* 3 cases resulted in settlements prohibiting unsubstantiated health claims

Operation Net Op

• *Target:* Get-rich-quick schemes using the Internet and hi-tech products to peddle fraudulent business opportunity and pyramid scams

• *FTC cases:* 6 cases resulted in orders for $4.9 million in consumer redress

Operation Eraser

• *Target:* Fraudulent credit repair companies that promise consumers that they can restore their creditworthiness for a fee

• *Partners:* State Attorneys General, DOJ (11 actions)

• *FTC cases:* 21 cases resulted in orders for close to $1.5 million in consumer redress

Project House Call

• *Target:* Sellers of medical billing business opportunities

• *Partners:* Florida state officials (1 action)

• *FTC cases:* 3 cases resulted in orders for $90,000 in consumer redress

Risky Business

• *Target:* Bogus entertainment and media-related investment opportunity scams

• *Partners:* Securities and Exchange Commission and 20 members of the North American Securities Administrators Association (55 actions)

• *FTC cases:* 4 cases resulted in orders for over $36 million in consumer redress

Operation vEnd Up Broke

• *Target:* Vending machine fraud

• *Partners:* Attorneys General and other state officials from 10 states (36 actions)

• *FTC cases:* 4 cases resulted in orders for $565,000 in consumer redress and payment of an $11,000 civil penalty

FISCAL YEAR 1997

Operation Missed Fortune

• *Target:* Get-rich-quick self-employment schemes

• *Partners:* State security regulators, state Attorneys General, other consumer protection officials (64 actions)

• *FTC cases:* 11 cases resulted in orders for close to $2 million in consumer redress.

Operation Trip-Up

• *Target:* Vacation scams

• *Partners:* 12 state Attorneys General (31 actions)

• *FTC cases:* 5 cases resulted in orders for close to $10.7 million in consumer redress

Operation Waistline

• *Target:* Misleading weight loss claims

• *Partners:* Weight-Control Information Network on educational issues

• *FTC cases:* 7 settlements requiring payment of $787,500 in consumer redress; letters and a media screening tip sheet sent to 80 publications that disseminated weight loss advertisements urging them to improve their screening

Operation False Alarm

• *Target:* Fraudulent fund raising done in the name of police, fire, and public safety groups

• *Partners:* 50 state Attorneys General, Secretaries of State, and other state charities regulators (54 actions); FTC launched nationwide public education campaign with the National Association of Attorneys General

• *FTC cases:* 3 cases resulted in court orders requiring $240,000 in consumer redress

Operation MagaScheme

• *Target:* Fraudulent telemarketers of magazine subscriptions who conned consumers with phony prize offers and "free" subscription promises

• *FTC cases:* 3 cases resulted in orders for over $1 million in consumer redress

Project Mousetrap

• *Target:* Invention promotion industry

• *Partners:* 2 state Attorneys General (2 actions)

• *FTC cases:* 5 cases resulted in orders for over $1.2 million in consumer redress

Field of Schemes

• *Target:* Investment-related telemarketing fraud

• *Partners:* Securities regulators from 21 states and 2 Canadian provinces, North American Securities Administrators Association, Securities and Exchange Commission, Commodity Futures Trading Commission, FBI, and other law enforcement authorities (62 actions)

• *FTC cases:* 9 cases resulted in court orders for close to $72.5 million in consumer redress

Project Workout

• *Target:* Second phase of Operation Waistline targeting exaggerated advertising claims made by exercise equipment manufacturers

• *Partners:* Educational materials issued nationwide in conjunction with the American College of Sports Medicine, the American Council on Exercise, the American Orthopaedic Society for Sports Medicine, and Shape Up America!

• *FTC cases:* 4 cases resulted in settlements prohibiting future misrepresentations

Campana Alerta

• *Target:* Deceptive advertisements directed at Spanish-speaking consumers

• *Partners:* Officials from the Mexican government, the Food and Drug Administration, and 7 state Attorneys General (10 actions)

• *FTC cases:* 4 cases resulted in settlements prohibiting unsubstantiated health claims

Peach Sweep

• *Target:* Georgia-based telemarketers

• *Partners:* 8 Attorneys General, U.S. Postal Inspection Service, FBI, U.S. Attorney's Office in Atlanta, local law enforcers, and consumer and civic organizations (23 actions)

• *FTC cases:* 3 cases resulted in orders for $1 million in consumer redress

Project Trade Name Games

• *Target:* Business opportunities to own and service in-store carousel racks that display products licensed by well known companies

• *Partners:* Attorneys General and other officials from 8 states (12 actions); educational component launched in coordination with industry members, including Disney and Warner Brothers, whose trade names were used by scam artists to sell the bogus business opportunities

• *FTC cases:* 6 cases resulted in orders for $29.4 million in consumer redress

Operation Yankee Trader

• *Target:* Fraudulent vending machine business opportunity firms

• *Partners:* Officials from 3 New England states (7 actions)

• *FTC cases:* Filed one complaint; preliminary injunction obtained

Project Mailbox

• *Target:* Direct mail scams that prey on senior citizens

• *Partners:* National Association of Attorneys General, U.S. Postal Inspection Service, state Attorneys General, local law enforcement officials, AARP (188 actions)

• *FTC cases:* 2 cases resulted in orders for $565,000 in consumer redress

FISCAL YEAR 1996

Operation Roadblock

• *Target:* Sellers of fraudulent high-tech investments

• *Partners:* 20 state securities regulators (77 actions)

• *FTC cases:* 8 cases resulted in orders for more than $12.6 million in consumer redress

Project Senior Sentinel

• *Target:* Sweepstakes, recovery rooms, and similar frauds that target senior citizens

• *Partners:* FTC participated in this sweep coordinated by DOJ the FBI

• *FTC cases:* 5 cases resulted in orders for close to $8.5 million in consumer redress

Operation Loan Shark I

• *Target:* U.S. and Canadian firms offering advance-fee loans

• *Partners:* 15 state Attorneys General, British Columbia law enforcers (8 actions)

• *FTC cases:* 5 cases resulted in orders for $2.5 million in consumer redress

Operation CopyCat

• *Target:* Office and cleaning supply fraud operations that targeted small businesses and not-for-profit organizations

• *Partners:* U.S. Postal Inspection Service, state Attorneys General, other state and local officials (12 actions)

• *FTC cases:* 5 cases resulted in orders for $13.7 million in consumer redress

Operation Payback

• *Target:* Fraudulent credit repair telemarketers

• *Partners:* 10 state Attorneys General (11 actions)

• *FTC cases:* 4 cases resulted in orders for close to $300,000 in consumer redress

Project Jackpot

• *Target:* Prize promotion schemes

• *Partners:* State Attorneys General; U.S. Postal Service (48 actions)

• *FTC cases:* 8 cases resulted in orders for $1.65 million in consumer redress

Project Career Sweep

• *Target:* Scam artists who falsely promised to obtain jobs for consumers in exchange for up-front fees

• *FTC cases:* 7 cases resulted in orders for over $3.2 million in consumer redress

Project $cholar$cam

• *Target:* Scams aimed at high school and college students seeking financial aid

• *Partners:* State Attorney General (1 action); massive education campaign in which the FTC, Sallie Mae, National Association of College Stores, and others distributed 2.9 million bookmarks, posters, and flyers, and posted warnings at several popular Web sites

• *FTC cases:* 7 cases resulted in court orders for close to $8.9 million in consumer redress

Project Net Scam

• *Target:* Traditional scams marketed on the Internet

• *FTC cases:* 9 cases resulted in 8 consent agreements and 1 settlement for $55,000 in consumer redress

Project BuyLines

• *Target:* 900-number business opportunity frauds

• *FTC cases:* 7 cases resulted in orders for approximately $15.5 million in consumer redress

FISCAL YEAR 1995

Project Telesweep

• *Target:* Business opportunity scams

• *Partners:* DOJ, state securities regulators, state Attorneys General (58 actions)

• *FTC cases:* 34 cases resulted in orders requiring payment of more than $11.2 million in consumer redress and more than $200,000 in civil penalties

Recovery Room Sweep

• *Target:* Telemarketers who misrepresent that they will recover all or a substantial portion of the money lost by consumers in previous scams

• *FTC cases:* 6 cases resulted in orders for over $540,000 in consumer redress

Commissioner ANTHONY. Senator, in the interest of time, I have not prepared a statement this morning. And I will defer to my colleagues.

Senator ASHCROFT. Well, that is not only interest of time, but that is a much appreciated wisdom.

Commissioner Thompson.

Commissioner THOMPSON. Following a wise lead, I agree.

Commissioner SWINDLE. Same here.

Senator ASHCROFT. Thank you very much, Commissioner, Commissioner, and Commissioner.

And it looks as if you have almost been set up, but I understand that you have——

Commissioner LEARY. Mr. Chairman, members of the Committee——

Senator ASHCROFT. You have already been introduced by the Chairman as having remarks, and so we are pleased to receive them.

Commissioner LEARY. I would like to say something because at my confirmation hearing last fall, I assured you and other members of the Committee that reform of the Hart-Scott-Rodino process was a top priority for me. It still is.

Some of these reforms require action by Congress; some can be implemented by the agencies themselves; and some require cooperative efforts among the agencies and the private sector.

I am speaking now from the standpoint of someone new to government service who previously spent over 40 years representing business clients on general anti-trust matters, and over 20 years specifically on Hart-Scott issues. I obviously have different responsibilities today, but I want to assure you that my basic philosophy has not changed.

With the Chairman here, I support Congressional action to raise the jurisdictional threshold for pre-merger filings, and I also believe it makes sense to have a different fee structure for large and small transactions. Like our Chairman, I am not wedded to any particular structure.

I personally would prefer more categories on a scale more directly keyed to the size of the transaction. But, however they are done, I believe these modifications should be justified by considerations of good government and general equity rather than as a vehicle either to increase or decrease agency funding.

Ideally, agency funding would be decoupled from filing fees entirely. But I recognize that this may not be realistic at the present time. I also believe, and I have believed for many years, and said so, that it would be a mistake for Congress to provide for active participation by the federal judiciary in the so-called Second Request process.

The process really does work well most of the time. I also recognize that the process has sometimes failed, and the failures are serious. Lawyers in the private bar and lawyers in government both have horror stories to tell about massive inefficiencies that have resulted from the failure of their counterparts to be reasonable, realistic, or considerate.

As the Chairman has testified, we are committed to visible and durable institutional reforms that promptly address significant elements of the problem on our side.

And we are working now with the private bar, hopefully, to develop various best practice recommendations applicable both to the public and private sectors that are both balanced and practical. However, I do not believe that any involvement of federal magistrates or the imposition of mandatory cost benefit calculations

would be a constructive step at this time. They would add further cost and delay to a process that can already be too burdensome.

The principal flaw in the Second Request process today is that parties on both sides sometimes regard it as a purely adversarial proceeding in which they stake out positions, keep their cards close to their chests, and jockey for tactical advantage.

Formalistic processes would tend to reinforce these unproductive attitudes and lead to more adversarial posturing, not less.

A very small percentage of matters notified under HSR wind up in litigation. And it is a mistake to treat the HSR process like litigation. I would say here what I have said as a private lawyer for many years: The HSR process works best when both sides regard it as a mutual educational process rather than an adversarial one.

I am optimistic that the present efforts with the private bar will lead to concrete progress in that direction.

Thank you, Mr. Chairman.

Senator ASHCROFT. I want to thank you very much.

Let me begin the questioning, I think, since you have all made whatever remarks you are going to make.

I want to pursue this idea that was raised, I think, in the remarks of Senator Stevens. In years past, the FTC engaged in, and a long time ago, in a fix-it-first policy with respect to mergers, and then I think the Reagan Administration and succeeding administrations changed that, began to be involved in more negotiation.

And that seems to be in line with what Mr. Leary says is necessary, less of a legal battle and more of a cooperative approach to developing things.

And it seems to me that the Senator from Alaska has mentioned, and I would inquire: Is the FTC changing its position back to—what factors have caused the FTC to just to say, "Well, our negotiating posture is no," and go to court?

Commissioner PITOFSKY. Let me start, Mr. Chairman. We have not changed our posture. We have surely settled our fair share of cases. Most of the cases in which we have a concern, result not in litigation, but in some form of settlement.

Now, the suggestion has been made that we refused to negotiate on this matter involving a proposed merger of BP and Arco, and let me just take a minute to explain what happened here.

I do not believe that I personally—and I think this is perhaps true for my colleagues as well—have ever spent more time with the lawyers, and the economists, and the business people from two firms seeking to merge than I personally did on this matter. I met with them time, and time, and time again.

And I do not think that I ever laid out in greater detail what my concerns were with respect to the impact of this merger in Alaska and on the West Coast.

They are smart people. They realize if those are your concerns, this is the way to fix it. They chose in the end, as is their right to do, not to give the Commission what the majority of the Commission thought was necessary to remedy anti-trust problems here, but to take the case to court.

But we never hid the ball. We never said no. We were available to negotiate. They knew exactly where the line was and they de-

cided to offer something that fell short of that line. I do not think that is a failure to negotiate.

My other colleagues may want to address that question.

Senator ASHCROFT. I would be happy to hear them on this issue. Any of you care to make remarks regarding this question?

Commissioner THOMPSON. This is one area where I have to agree with the Chairman. I spent a lot of time with the parties in this case, and I guess one of my big disappointments was not to see any real interest in addressing our substantive concerns until not just the eleventh hour, but 11:59.

That, and to date, there are still areas of concerns which they have not addressed, at least in talking to me, at all.

Now, I think the end result that I am concerned about is timing. I am very concerned about all people of the United States, including the consumers, and the producers in Alaska. But in the end result, I think one of the challenges for us, too, is to ensure that in the long run, that there is a situation that is better off for all of us.

I was disappointed in some ways on how the parties chose to proceed, but in the end result, I think that we are a market responder, that we are left with what they provide us. We respond to the transaction that they propose to us, and I think that that is the choice that we had.

Commissioner LEARY. Mr. Chairman, I just want to add, as one of the two Commissioners who dissented from the decision to go forward with the litigation, that people can view specific facts on these issues differently but I, at least for my part, I do not see this decision as reflecting an institutional shift in the agency's basic approach.

I had, like the other dissenting Commissioner, maybe a different view of some factual issues than the majority had, but I do not see the decision as an underlying sea change.

Senator ASHCROFT. Any other Commissioner care to make a comment to that?

Commissioner Swindle.

Commissioner SWINDLE. Thank you, Mr. Chairman. I was one of the other dissenting Commissioners, or the other dissenting Commissioner.

I would disagree with Senator Stevens in the sense that I do not think that the Commission was overbearing in any delays. I, in fact, made the comment to Mr. Brown, the Chairman and CEO of BP, that I thought that there had been delays on the part of not only perhaps the FTC, but certainly BP. They were slow to come to the table with an offer directly to us.

As we all know, they were working their deal with the state, which is fine. In my mind, personally, it complicated matters extremely.

I agree with Commissioner Leary, I do not see any great institutional shift in direction here. This is a very complex case as Senator Stevens certainly knows, and those who have looked at it certainly know. I just think we were premature in our action.

And that was my statement, or actually a joint statement, from Commissioner Leary and myself. Thank you, sir.

Senator ASHCROFT. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

I very much appreciate the point that has been made because clearly there was a difference of opinion there and a pretty vigorous debate. And to know that there were not any major policy changes in how the FTC approaches these issues is helpful.

My question I would like to begin with, Mr. Pitofsky, deals with what you and I talked about the last time you were here when Chairman McCain looked into some of the anti-trust issues and I asked you about copycat mergers, which you said at that time, was one of the great policy challenges in this field.

In the oil business, we had first in recent days, British Petroleum acquire Amoco in 1998. The FTC approved that, subject to certain conditions. Then Exxon and Mobil followed with their mega merger which was, again, approved with conditions late last year.

Now we have got BP and Arco going through with their proposal. And I think what concerns me is when you have two major competitors in one industry merging together in a deal, this often prompts the others to come forward and to copy that.

Now the first merger may make sense, might be sensible, and efficient, and the like, but it seems to me where we are heading in the oil business is, in effect, you have got copycats trying to copy the copycat. And as a result, we are going to end up with less and less competition.

And my question to you is: What are the key factors—I know you cannot comment on a particular case that is now pending. But what are the key factors in your view which we ought to be looking at to determine whether this series of copycat mergers crosses the line and brings about too much concentration in a vital industry like the oil business?

Commissioner PITOFSKY. Let me start. I do not want to ever imply that any decision about a particular merger is not made on the basis of the facts with respect to that merger. Not the last one, not the one before that, not the one that people rumor might happen afterwards. There was a suggestion that we have changed the rules of the game.

But I would just point to the legislative history of Section 7 of the Clayton Act which is what this case is all about. Congress said to us, in the clearest terms, that we must take a rising tide of concentration and a trend toward concentration into account. The courts have supported that. The Supreme Court has emphasized trend toward concentration in case, after case, after case.

So when you see a series of mergers like BP/Amoco which we approved, Texaco/Shell, a joint venture which we also approved, Exxon/Mobil which we have conditionally approved, then the fourth one comes along, and the fourth one is not guilty by association because of what happened before, but you must take into account the level of concentration nationally and locally with respect to each and every merger. And, of course, that is what we would do, and that is what we have done, industry after industry, and case after case, over the last 30 years. There is nothing about this that is a departure.

Senator WYDEN. Besides the concern about copycat mergers in the oil business—and I was concerned about three of them and you mentioned essentially four—I think it is important that we have on

the record your concern about what this means for folks on the West Coast.

We have the dubious honor in the State of Oregon of paying just about the highest gasoline prices in the country. And we are very troubled by the trends, you know, fewer stations, fewer independents, fewer suppliers.

I mean, shoot, the day there was the refinery problem in California, they raised gasoline prices on my constituents in Oregon, and we were getting our gas from a refinery in Washington State. So everywhere we look, these arguments do not add up to anything other than more bad news for West Coast gasoline consumers.

And I think it would be helpful if you could just lay out what the Commission's concerns were about how the BP/Arco proposal would reduce competition and ultimately raise prices on folks in Oregon, Washington, and California.

Commissioner PITOFSKY. Senator, as appropriate as that question is, it would be unwise for me or any of us to answer that question because depending on how this plays out, this matter may be back at the Commission, and we will then be acting in our judicial role.

We did file a complaint which is public, and we did—joined by the AGs of California, Oregon, and Washington, we filed a memorandum in support of our complaint. I thought I could make that available to people who are concerned about it, but it was filed under seal, and it is going to take a little while to expurgate some of the information we obtained under commitments of confidentiality.

I think it might be available today, certainly tomorrow. And I would like to make that available to you, rather than for me to deal with the details of what could very well be a case back at the Commission.

Senator WYDEN. That will be fine. It will be helpful to have further details certainly. What we want for the record is to have what you already found previously, which of course, you know, was a matter of public interest and was made available to the press. And if you could, update it because this is of enormous concern to folks on the West Coast.

Commissioner PITOFSKY. My general counsel tells me that the memorandum is on the web now. So, it is available.

Senator WYDEN. Could you then just summarize, you know, for us then, what is public information in terms of your big concerns?

Commissioner PITOFSKY. I do not think I should do it.

Senator WYDEN. All right. We will just refer everybody to the web.

My time is expired and I hope I will have a chance to ask a couple of more, if we could, after my colleagues.

Senator ASHCROFT. I think we might be willing to go in for a second round here. There appears to be an interest.

Senator Stevens.

Senator STEVENS. Thank you very much.

Mr. Pitofsky, the thing that disturbed me most about this situation was that I heard, and I want you to correct me if this is not correct, but as these meetings went on with the Petitioner, BP, the Commission asked BP to divest itself of the Arco production, and

it did make the concession that it would divest itself of 380,000 barrels a day, roughly.

The throughput of the pipeline is about 2.1 million barrels—was about 2.1 million barrels. It is about 1.2 to 1.4 now. The combined company would have about 70 percent of that. We are dealing with something like 900,000.

If they divest themselves of 280,000, they are dealing with, at the most, 520,000 barrels a day left in BP. BP, when it was 1.2 million barrels a day, controlled 1 million barrels a day.

The demand structure in California was roughly 25 million barrels, and now it is up. It is up considerably. I do not know how high it is now, 30-some-odd, but BP would control then 520,000 out of this elevated demand.

And yet you say—as I understand it, you said at that point, "But all right, but you have got to"—but the Petitioner had to agree that you would be allowed to approve the purchaser of that production, you.

Now I do not see anything in the Sherman Act or the Clayton Act that gives you the authority to approve a purchaser which ought to be a competitive sale. Did you request the authority to approve the purchaser of the 380,000 barrels a day?

Commissioner PITOFSKY. We asserted that that was part of our responsibilities, sir.

Senator STEVENS. On what basis did you have that authority?

Commissioner PITOFSKY. Our role in settling a case on a restructuring proposal is to ensure, and the Courts direct this, to ensure that the situation after the merger is equivalent in competitive terms to before the merger. That requires——

Senator STEVENS. Excuse me. In Alaska or in California?

Commissioner PITOFSKY. Oh, I think in both, Senator.

Senator STEVENS. In both.

Commissioner PITOFSKY. Yes. And therefore, we—the purchaser of the asset must be sufficient in competence, experience, financial resources, and so forth to replace the divested company in such a way as to be an effective competitor.

I think several people mentioned the fact that we have approved Exxon/Mobil fairly recently, or conditionally approved it, but we did the same thing in Exxon/Mobil as we did here. We have done the same thing——

Senator STEVENS. Oh, you did not demand the right to approve the purchaser. You did not.

Commissioner PITOFSKY. Senator——

Senator STEVENS. You did not demand the right to approve the purchaser of the assets divested by Exxon.

Commissioner PITOFSKY. Senator, let me submit a memorandum. I do not think that is right. We definitely did. We interviewed prospective purchasers. We made it clear to Exxon and Mobil that we were not going to allow them——

Senator STEVENS. You interviewed them, but you are saying something that should go out competitively that affects—you know, my state owns that oil. They own the land and they own the oil. They worked out a deal with them. I do not know any state in the union that has a relationship between a producer that Alaska does

because of the fact that we own the land, we own the oil. We have the right. They negotiated a position, which you ignored.

Commissioner PITOFSKY. Senator, we did not——

Senator STEVENS. Now that you—you did ignore it because you did not approve it. If you would have approved it, we would not be here today. I would not be here today. You would be, but I would not be. And I can assure you that you are going to be before more hearings than this before this is over.

Commissioner PITOFSKY. I would like the opportunity to explain what——

Senator STEVENS. On what basis did you demand the authority to approve the purchaser of that oil?

Commissioner PITOFSKY. Let me say again——

Senator STEVENS. What authority, legal authority now?

Commissioner PITOFSKY. All right. Well, our responsibility——

Senator STEVENS. And authority. And authority, sir. This is this inherent executive authority, again. Do all Commissioners agree with this?

You have the power to approve the purchaser of oil after the proponent agrees to divest itself of production, that you have the authority to demand the right to approve who is going to purchase that before you approve the merger? Did you all agree to that position?

Commissioner THOMPSON. Senator, I—leaving aside the particular facts of this particular case——

Senator STEVENS. I only have 5 minutes.

Commissioner THOMPSON. As a general proposition of law, I agree completely with what the Chairman said.

Senator STEVENS. You have the inherent authority to demand the right to approve the purchaser of assets that are to be divested?

Commissioner THOMPSON. The Commission has the authority to insist that the competitive problem be fixed, and that may include——

Senator STEVENS. I am going to get to that, Mr. Commissioner. That is a condition that was not on his proposal.

Commissioner THOMPSON. I understand, sir.

Senator STEVENS. If you want to fix the competitive problem in Alaska, you would have to reconstruct Arco. Arco is going out of existence. Mobil has gone out of existence. Amoco has gone out of existence.

We used to have an enormous number of players out there. Now that number is decreasing because of higher costs in the future.

But as a practical matter, the Chairman said he wanted to restore the competitive condition in Alaska, too. How are you going to do that, Mr. Chairman? How are you going to restore the competitive position in Alaska under your approach?

Commissioner PITOFSKY. As we have in scores of other cases, we required that the assets be sold to another company, the offending asset be sold to another company, that is capable of competing effectively with that asset. And unless we know who the purchaser is, we cannot—we cannot do that.

Senator, I would like our staff to submit a memorandum to you. I understand how concerned you are about this——

Senator STEVENS. Concerned.

Commissioner PITOFSKY. —as a matter of law——

Senator STEVENS. My state faces bankruptcy if you have this delayed for three or 4 years. You have refused to negotiate. You sat down, but what offer did you ever make them to settle it, now?

Tell me that, on the record. You said "what the majority believed necessary." What was it that you told BP was necessary to secure approval?

Commissioner PITOFSKY. Senator, we told them in the clearest terms what it would take to settle this case.

Senator STEVENS. No. I was on the phone. You would not tell me either. You just said, "I am going to wait and see what they offer."

Commissioner PITOFSKY. Senator, I do not think this is appropriate for me to be discussing confidential negotiations in front of the press or outsiders. But the fact of the matter is—and I will submit this in a memo as well, exactly what we told them was necessary to negotiate a settlement of this case. And I will have that in writing to you.

Senator STEVENS. I would like to see it.

Commissioner PITOFSKY. You were misinformed by some people about this matter.

Senator STEVENS. I am sorry about the timeframe here. This is a matter of survival for my state. If you all do not understand that, I wish you would come up and talk to our Governor, talk to those of us who are involved in this.

We have lost our four basic major industries now. And we are a state that has a substantial cost of doing business. None of us really want to see Arco go away. Do not misunderstand me.

If I had my way—we would have higher oil prices, and Arco would survive forever. But this is a practical matter.

Now the question is: What happens in the future? How long is this going to take? And what was the role of the FTC in bringing it about? Now, I believe you stalled this. I believe you stalled it because you want to set a new milepost, and you hope to get there one of these days.

And I think you are right. I think there is a new milepost being set here. The Commission let a lot of other things go through, and now it wants to set up a new standard.

Commissioner PITOFSKY. Senator, if I may, I would like to send you a chronology of the negotiations to see who it was that delayed bringing this to a conclusion. I will submit that to you as well.

Senator STEVENS. All right. But as you do that, tell me what you told them each time. Tell me what you told them because I checked with you twice, and you said, "Well, I am going to wait and see what they say." You never said, "This is what the Commission believes you must do."

You did that—I checked with Exxon. You did that with Exxon. You told Exxon what you believed that they should do, and they said, "Okay." And that went through. You never did that with this company. And if you did, then I will stand corrected, but I do not believe you did. I have been told you did not.

And I think you did handle this differently than you did Exxon. I do not know why, but I am going to find out why.

Commissioner PITOFSKY. That is fair enough, Senator, and I would be glad to address all your concerns.

Senator STEVENS. Thank you.

Senator ASHCROFT. Senator Brownback.

Senator BROWNBACK. Mr. Chairman, I have a whole different line of questioning. If the Chairman or Senator Wyden wants to continue this line——

Senator ASHCROFT. It is very generous to suggest that we go back to Senator Wyden. He may want to——

Senator BROWNBACK. Or Chairman Stevens, if Ted wants to go ahead, I will wait for a little bit.

Senator WYDEN. And I will wait for——

Senator BROWNBACK. So that you can go ahead and ask——

Senator STEVENS. I do not think we have any problem with Oregon or California. We are not in this on the basis of trying to have some differences in that regard.

But I do believe the basic difference with Congress and FTC ought to be, have you altered the supply coming from Alaska in the years to come? You have. You have delayed it. They are not going to be making investments this year they should be making. They did not make them last year either.

And you are going to pay the price in California and Oregon when that supply comes down even further. Supply ought to be the consideration of Congress in terms of world oil prices today, and I do not believe the FTC had its eyes on the supply at all.

Thank you.

Senator BROWNBACK. I have just one question.

Senator WYDEN. And I thank my friend from Kansas. And again, it is obvious feelings run strongly on this Committee. And I want to ask just another policy kind of question as it relates to the BP/Arco issue so we do not pull you into litigation. It is along the lines of the copycat kind of question.

I would like to just ask the question about the impact of globalization on anti-trust enforcement. What we have had in the past is a lot of these, you know mega-mergers, when somebody raises the concern that it violates anti-trust, they come back and say it is a global market.

And they argue that even though a merger is going to create a company with a big share of the U.S. market, the company's share of the worldwide market is going to be small. That was an argument that we saw again in the BP/Arco deal.

It seems to me that if that now becomes a dominant factor in this debate about anti-trust laws, we are headed toward toothless U.S. anti-trust laws because then—even a deal that results in a gigantic monopoly in the United States that clobbers, for example, my constituents in a small state 3,000 miles from Washington, D.C., a deal that, you know, does have huge monopolistic ramifications in the United States. Everybody would say, "It is a small share of the worldwide situation and so it ought to go forward."

Again, from a policy standpoint, not getting into the litigation, my question to you, Chairman Pitofsky, is: How does the FTC try to deal with the ramifications of the global economy as it relates to trying to enforce the anti-trust laws domestically to protect our consumers?

Commissioner PITOFSKY. Let me be brief because my colleagues will probably want to address that as well. The question of whether a market is local, regional, national, hemispheric, or global is a question of fact.

The FTC held hearings four years ago, extensive hearings, in which the widest range of business people, consumer people, academics came in and said that as we address that fact question, we pretty much got it right.

My own view is that there are more and more products that compete in broader and broader markets, world markets, hemispheric markets. And we try to take that into account.

But, you know, just saying it is a world market, that is so common now. That turns on whether or not, you know, in the local area—some part of the country, the players after the merger can raise price without losing so much business that it will make the price rise unprofitable. That is the standard that the courts and our guidelines apply. And we do it case by case, item by item.

We cleared Chrysler/Daimler-Benz, at least in part, because we believed the local dealers largely compete in a world market. There are other—there are other similar product areas.

There are some areas that most of what they do is a world market, but there are pockets of localized competition, so it is a fact-intensive inquiry. We have a chapter in our report which deals with it.

Virtually everybody who participated in our hearings said, not just us, but the Department of Justice and the Courts have got it right. My colleagues may want to address this same question.

Commissioner THOMPSON. I agree with the Chairman here. Your concern about the impact of globalization is one that I think concerns all of us. It certainly concerns me.

But in the end result, you really have to look at the application of anti-trust principles to the particular case that is in front of you. And whether it is BP, or Exxon, or any other case in pharmaceuticals or whatever, you really have to look at what the impact is going to be on consumers in the United States. And I think that we spend a lot of time trying to look at that very, very carefully. There is not a one-size-fits-all approach.

Senator WYDEN. I am going to give this time back to Senator Brownback who has been so gracious.

I think that what you have said is that you are going to be very vigilant in looking at the global kind of issues. And just know that I, and I think some others, are troubled by if we just say "The global economy ought to govern here," we could literally render toothless U.S. anti-trust laws. You all have satisfied me that you are going to look at these factors.

And again, thank you, Sam, for letting me have this extra time.

Senator BROWNBACK. Sure. Thanks.

And I want to switch to an "easier" issue: marketing violence.

[Laughter.]

In regards to the study you are conducting on marketing violence to children, the White House requested and made a top priority of this study. The Senate passed a bill 98 to 0 to authorize this study. The results are important to us. We are hopeful on holding hear-

ings on a final version of this report on marketing violence to youth in either May or June. Will the report be ready by then?

Commissioner PITOFSKY. May or June? I do not think so. I think it will be well into the summer before the report is available.

Senator BROWNBACK. That is going to make it awfully difficult for us to give proper oversight to in this year. Will you have a preliminary report by then?

Commissioner PITOFSKY. Let me take a little step back because I know how interested you are and informed you are about this particular issue.

Actually, our study is going well. The companies who said at the outset that they would cooperate on a voluntary basis have been as good as their word. They are cooperating on a voluntary basis. But there are a lot of aspects to this, the rating system, marketing, advertising. There are three industries: Music, video games, movies. So it is a major project on our part.

Senator BROWNBACK. Are they providing you with demographic purchasing of adult-labeled materials by children?

Commissioner PITOFSKY. We have asked for it, and they have indicated that they will provide it. And the——

Senator BROWNBACK. They indicated that it is available.

Commissioner PITOFSKY. Yes, I think so. Yes, they have, and it is available.

Senator BROWNBACK. And they will be providing that to you?

Commissioner PITOFSKY. Yes.

Senator BROWNBACK. Will you be verifying the information that the industry is providing to you with other objective sources?

Commissioner PITOFSKY. We have in mind of doing several surveys. One involves parents and children, concerning the way in which they understand these rating systems. Another has to do with whether or not the retailers are paying attention to the rating system.

I mean, it is not going to do any of us any good if the originators say "for a mature audience" or "for adults only," and then nobody pays attention to that at the retail level. So we will do an independent survey of that.

Senator BROWNBACK. Well, a lot of people suspect that adult-labeled entertainment products are actually being geared to kids, with the companies knowing that children will purchase it. There is often a kind of a forbidden-fruit type of scenario where because of "Well, because I cannot have it, therefore I want it more and get it for me."

Industry officials know this, and may even plan on it in their decisions on how to place and market the product, even where it is positioned on the shelves. Sometimes a lot of the mature-rated videos are put right next to others that are labeled for children.

Everybody knows that few children are going to be carded going into movies. You wonder whether executives just put these ratings because kids want to go to these, knowing that they will be allowed.

So I really do hope you look at these issues, and I would like to have these hearings. And I hope you pursue that study more aggressively and more expeditiously, Mr. Chairman, so that we could have a hearing on that information.

I am going to ask you another line of questions that I have been asked about back home, and that is on the Internet marketing of pharmaceutical products. And you mentioned that in your statement.

Are you seeing a great deal of fraud happening at some of the Internet sites on pharmaceuticals? I notice you have a particular program targeted to that on Operation Cure. You have had, if I am reading your report right, four cases of cease-and-desist orders to date.

Tell me about the nature of that problem. And are you anticipating any need for Congressional action in dealing with that?

Commissioner PITOFSKY. At this point, I do not see any need for Congressional action. We have broad authority to challenge deception, unfairness, and so forth. To directly answer your question, some of the worst frauds I have seen are now on the Internet involving claims about health care. So we are looking at it.

I know that the FDA is looking at the pharmaceutical issue as well. These health care claims are a high priority for us. We have consumers being told that shark cartilage extract is going to cure arthritis, cancer, and AIDS.

Senator BROWNBACK. All three?

Commissioner PITOFSKY. What?

Senator BROWNBACK. All three at the same time?

Commissioner PITOFSKY. I do not know. I would be glad to give you some examples of some cases that we brought—I have been doing this sort of thing for a long time, and I have to tell you that the snake oil sales programs that we see on the Internet are worse than anything that I have seen in terms of taking advantage of a vulnerable audience, worse than anything I have seen in other media.

I do not know why it happens. I think it is probably because they feel that nobody is watching, or we cannot find them, we cannot detect it, they can change their address. But this is raw, fraudulent stuff.

Senator BROWNBACK. And you are bringing cases aggressively against the proponents or the authors of these sort of health cures?

Commissioner PITOFSKY. We have.

Senator BROWNBACK. Now I understand that as well there is a lot of marketing of lifestyle type of pharmaceuticals on the Internet, some that my Attorney General of the state is saying, in a fraudulent manner as well as without prescriptions, without a number of things. Is that taking place, too?

Commissioner PITOFSKY. I am not as familiar with that, Senator.

Senator BROWNBACK. Are any of the Commissioners?

Commissioner THOMPSON. Just to the extent that I know that the Bureau Director, Jody Bernstein, testified last year about some of the concerns that we had about some websites marketing products generally, without adequate supervision or a prescription where one is required. And we are working closely with the FDA in trying to get a handle on that.

Senator BROWNBACK. I would like for you if you could, Mr. Chairman, to provide to me some of the examples of the fraudulent cases on the marketing of pharmaceutical products because I can see the point that you are making about preying upon a vulnerable popu-

lation and now here is a ways and a means of being able to do that, and what you are doing in addressing these topics. I would appreciate that.

Thank you for being here; and thank you, Mr. Chairman.

Senator ASHCROFT. Thank you, Senator Brownback.

Senator Wyden had a sort of followup question or maybe you wanted to open a new topic, but please limit this. We have six more witnesses, and I think I will be the Senator that entertains these witnesses and maybe the Senator——

Senator WYDEN. You have been incredibly kind, and I am going to sit with you because I know that you have gone out of your way to make time. And I will be brief.

I wanted to ask one question about privacy. And the question is for you, Mr. Pitofsky, if I might. It seems to me that there is a giant wave of consumer fear about privacy that is headed toward Washington, D.C. This issue has just gone off the charts in terms of the polling and the like.

And I guess my question to you is: On privacy, what steps do you think ought to be taken to beat the tsunami before it hits the shore, because where we are now, you have got an FTC task force working on this. You have legislation in the works.

The big problem seems to be enforcement. We have a lot of sites out there, and they are pretty good, but the question is: How do you enforce them? And my question to you is: What do you think ought to be done before this tidal wave just engulfs you and the Congress and everybody's phone just rings off the hook?

Commissioner PITOFSKY. Well, let me start by saying that this is an issue in which, like any good group of Commissioners, there are slightly different points of view as to what ought to happen.

But the first thing that ought to happen, we should make good on our commitment to Congress to conduct a surf very soon, and analyzing the level of privacy protection through self regulation. That is going on right now, and we will have that report.

We are going to surf the Net in the next 30 days, and we will have the report along with our analysis of it, in a few months.

Secondly, I am increasingly coming around to the view that there is no single answer to these privacy questions. Self-regulation has a role. Legislation has a role. We supported legislation with respect to financial records, children, and in other areas.

On the other hand, there is going to be a role for self-regulation; that is for sure. And what we need, I think, what Congress should have from us, is a series of recommendations as to the right mix in that area. And we will have that on the basis of data very shortly.

Senator ASHCROFT. Let me just—go ahead, Commissioner Swindle.

Commissioner SWINDLE. Just a comment. I think the Senator described the phenomenon of the giant wave of consumer fear regarding privacy. I think that may be an excessive description.

I think there is a lot more awareness of what personal privacy—how it can be under attack by new technology, but we always had privacy concerns. And it goes back to Senator Brownback talking about these cure-alls and everything. Those things have been around.

If you ever read *Argosy* when you were a kid, you know, the men's magazine, it always had these miracle cures and all these wonderful things. This stuff is not new, but it is just that it moves at the speed of light now. It covers so much, so quickly.

I think as more people become aware, I think we will see consumers be more accountable for their own actions. I mean, they have a responsibility, too, not to be duped by this stuff, but by the same token, the Senator mentioned there are a lot of sites out there.

The last figures I saw about a month or so ago, there are roughly 5 million commercial websites in existence. They are increasing at about a half a million a month. And I think it was Senator Wyden who mentioned in the BP/Arco matter, the proposed settlement was so complex we could not monitor it.

I think the same analogy would hold true in the case of websites. It would be impossible for a government agency to monitor this.

Industry has the motive to do it right, satisfied customers. As more customers become aware of their personal privacy and what might happen, good or bad, I think they will demand of the people that they deal with on the Net, that those commercial sites—and it does not necessarily have to be commercial sites; it can be entertainment or whatever, as we have seen in some of the cases here recently—they will demand to be satisfied.

If their demand is commensurate with the growth, I think we will see industry come along. I think that ultimately will be the best solution of all.

We are looking, as the Chairman mentioned, at a survey, which is our third annual survey I believe now, and it should be out in the spring.

We also have an advisory committee. I think this may be what the Senator was referring to on the matter of access and security. We have fair information practices, notice, choice, access, and security. And when you—the first two, you can comprehend those.

When you start talking about a privacy policy that would allow access and gets into the security matter, this is a whole new kettle of fish. It is a very complex process, and we are having a very distinguished group of people representing all aspects of this issue, from technology to advocacy, looking and trying to see how we can cost effectively provide reasonable access and security.

I think we need to look at their findings and recommendations along with our study. In fact, I think one should not precede the other. I think they should sort of join hands and march out the door together. So, we are working on this, and it is going to be a tough thing to solve.

Senator WYDEN. Just know that when Conrad Burns and I put in a bill, that was considered a very moderate centrist bill. And a lot of people, including business folks, are hoping that becomes public policy because they think we are headed, given the Wall Street Journal new poll that says this is one of the top concerns in the 21st Century, that we are heading for something much more extreme.

Commissioner SWINDLE. I think people are more aware of it. The more they are aware of it, the more we will hear about it. And then it takes on proportions that I think industry will have to respond

to; otherwise, they lose customers. It only takes one little click and you just lost a customer.

I know one company has been somewhat adamant about saying "We want regulations," and that is Hewlett-Packard. But I have not heard a lot of enthusiasm from others, although there is some concern about the states going out and having 50 different forms of it. But I think that if we move too fast in regulation, we will do some severe damage to an industry.

Senator ASHCROFT. You may have just posed a final question on this. There are places where I buy my shirts and suits. They know that I do not buy button-downs. I buy pointed collars. Do you have a plan to ask them not to divulge that, or are you only focused on Internet here?

Commissioner PITOFSKY. Oh, that is not an issue that we have addressed up to this point. But I am increasingly concerned, Senator, that the arguments as to why privacy needs to be protected on-line, apply equally to off-line. I take no position. I just think that all of us who are concerned about privacy have to begin to address that question.

Senator ASHCROFT. But when you request information from the entertainment industry, you are asking for information about public consumption yourself in some ways. Without being client specific, you are violating the privacy of the people who consume it.

Commissioner PITOFSKY. I hope not. I hope not.

Senator ASHCROFT. Well, you are finding out something about the public that they may not have wanted to tell you.

Commissioner PITOFSKY. Yes, but when we ask——

Senator ASHCROFT. Yes, but——

Commissioner PITOFSKY. —for information from the companies, that is not personally identifiable information.

Senator ASHCROFT. That is correct. It is not identifiable to an individual. But I think this is a very sensitive question. If the lady at the diner knows that I normally say "Hold the onions on the burger," she should not have to be worried about whether she makes a violation in telling somebody that.

It is my understanding that you are conducting—you have a committee on on-line access and security made up of consumer and business experts.

Commissioner PITOFSKY. We do.

Senator ASHCROFT. When will that report be ready?

Commissioner PITOFSKY. Well, they held their first meeting last week. There will be four meetings in total. They will advise us specifically on questions that Senator Wyden raised. Not about privacy policies——

Senator ASHCROFT. My question was: When will that report be ready?

Commissioner PITOFSKY. I hope by June.

Senator ASHCROFT. It seems to me to be a good idea not to conduct the privacy sweep until we have the recommendation of the advisory group so that we would know what to look for in the review.

Commissioner PITOFSKY. I think that they can—excuse me.

Senator ASHCROFT. I just think that if they had some special wisdom to impart for some value in this committee—it seems to me

that it might be a good idea to wait until the committee is done before conducting the sweep.

Commissioner PITOFSKY. We are planning to proceed on parallel tracks. The first exercise is really data gathering, and we are gathering pretty much the same data we gathered before, but we are——

Senator ASHCROFT. That is my point. You are gathering data which is the same as what you gathered before, but the committee might be able to tell us that we need to look for different kinds of data or different kinds of practices. That is my point there.

It is my understanding that you are considering internal reforms of the merger review process. I want to go back to merger review for a moment. And Commissioner Leary sort of indicated that there are a lot of things that he thought needed to be done, but should be done internally.

It is a big problem for Congress to decide what we have to mandate in the law and what we can count on to be done internally. If it should have been done internally, why had it not been done?

And what is the Congress for, if we just ought to rely on the good will, or if every time there is a need for reform, we come up against it, and the Commission says, "Well, we were about to do something about that, so we are people of good will, and we will do something about that"?

Would you—can you explain or describe the reforms and the expected benefits that you would get from the reforms that you are now considering?

Commissioner PITOFSKY. Well, first of all, we have introduced reforms. I believe the situation is better now than it was 5 years ago.

Let me just give you an illustration. People complain, and I understand why they would, about the burdens of Second Requests, the great amount of documents that have to be produced as a result of our investigations.

But the fact of the matter is right now, 80 percent of the merger investigations that we undertake, and issue a Second Request, the target companies never produce all the documents. We do it on a quick-look basis.

Now, I do not know what the number was 5 years ago, but it was not 80 percent. So we have modified the burden on the business community, which we recognize is substantial, greatly.

Looking forward, I would advise the Committee that we are introducing a reform right now. One of the things I have learned from bar association representatives is that they are concerned that the staff does not on a regular basis tell the parties what it is that is bothering them that leads us to introduce a Second Request. I did not do anything about that issue because, frankly, I thought the staff was already doing that.

But the bureau director has been directed to tell everybody in our agency, "When you go to a Second Request, you have an obligation to tell the parties what it is that leads you to this more substantial investigation." That will be changed on a going-forward basis.

Senator ASHCROFT. Let me ask you this: How effective is the process for deciding which agency, the FTC or the anti-trust division of DOJ, will be when you are allocating mergers? There was

a target established of a ten-day target. Is that working? Is that being adhered to, and how is it going?

Commissioner PITOFSKY. It is working. I think the coordination, cooperation is better than any time in my recollection. And we have got it down to about 9.5 days, so we have hit the target. And I would like to do even better, and I think we can do even better, but we certainly have reduced substantially the time it takes to sort this out.

Senator ASHCROFT. Anything else, Senator Wyden?

Senator WYDEN. No, thank you.

Senator ASHCROFT. Let me thank you very much for your appearance here today, and I would hope that you would be available to answer any inquiries in writing that members of the Committee who could not attend today will submit.

We will try to get anything to you that we would want answers from you on relatively quickly. And thank you very much for your appearance and for your service to America.

Commissioner PITOFSKY. Thank you very much.

Senator ASHCROFT. Let me thank this group of individuals who will address the Hart-Scott-Rodino Act and merger issues. I ask them to keep their remarks to 5 minutes.

And I would be very pleased if, your having done so, you wanted to submit additional remarks for inclusion in the record, and I am confident that the good will of Senator Wyden will provide unanimous consent that that will be done.

So with that in mind, let me first call on Mr. Howard Adler, Junior, of Baker McKenzie here in Washington, D.C. to proceed with such remarks as he would make in the 5 minutes.

STATEMENT OF HOWARD ADLER, JR., ESQ., BAKER MCKENZIE, AND CHAIRMAN, U.S. CHAMBER OF COMMERCE HART-SCOTT-RODINO TASK FORCE

Mr. ADLER. Good morning, Mr. Chairman, Senator Wyden, I am the Chairman of the Hart-Scott-Rodino Task Force of the United States Chamber of Commerce. I am here to testify in support of S. 1854, which the Chamber supports; but I want to address my oral remarks mainly to the issue of the Hart-Scott-Rodino filing fees.

It has long been the position of the Chamber that those fees should be abolished, and that the funding of antitrust enforcement should be decoupled from the fees collected from acquiring companies in the Hart-Scott-Rodino process.

We understand that a kind of an addiction has developed to the filing fees, and that addiction is not going to be cured overnight. But we want to plant the seed; we want to start the ball rolling for a real reconsideration of the propriety of basing the funding of antitrust enforcement on the HSR filing fees.

We heard Commissioner Leary say this morning that ideally antitrust should be funded from appropriated funds. I believe that if you ask Chairman Pitofsky, or Assistant Attorney General Klein what they think, they would agree that in a perfect world, the funding should come from public funds. It is the Chamber's position that we ought to work toward a perfect world. There is no reason why we should settle for less.

In my prepared statement, we go into considerable depth as to why that should be the case. Let me make a few points.

The filing fee was not part of the original legislation. It came into being in 1989 when there were huge budget deficits. It appeared to be "easy money"—a way of funding antitrust off-budget. But we are a long way from that today. We have got surpluses, and people are arguing about what to do with them. So we are in a totally different environment fiscally than we were in 1989.

I should emphasize that the U.S. Chamber supports strongly vigorous antitrust enforcement. Everyone benefits; the public benefits; our members benefit. Since everyone benefits, everyone should pay. Under the present system, most of antitrust enforcement is funded by companies that happen to be making mergers in a particular year—mergers which in more than 95 percent of the cases do not even call for a Second Request for information. In other words, they are benign competitively; they are probably pro-competitive; and they are lawful. Thus, we have an irrational system where companies doing what they should be doing—that is investing their money in productive acquisitions, are funding antitrust enforcement and not the public at large. We think it is time to end that irrational process.

Some have said that there is an analogy between the merger filing fee and a user or regulatory fee that can properly be imposed by a government facility or a regulatory body.

We have spelled out in our prepared statement why that is false. Essentially, a valid user fee must be reasonably related to the cost incurred on behalf of the person who is assessed the fee and to the benefit he receives. That is not true at all with the Hart-Scott-Rodino fees.

For more than ninety percent of the filings that are made, we know from experience that somebody is going to look at it for 5 minutes and say, "This is trivial." Yet the $45,000 fee has to be paid.

Another problem with the fees, and particularly with the linkage between the fees and the funding, is that it creates perverse incentives. Everybody knows that there are huge categories of transactions that never present a competitive problem. Yet the Federal Trade Commission, in considering whether to create new exemptions, is faced with a Hobson's choice: Either it continues to call for filings on trivial and competitively benign transactions or it cuts down on those useless filings and then loses its funding.

This is a dilemma the FTC would not have if we put the funding back where it belongs, that is in treasury funds, which is what every other country does.

So I hope we can at least start a dialogue on this issue and have this Committee and others begin to reconsider whether in the year 2000, when we are fiscally in such a different circumstance than we were in 1989, we should perpetuate the present filing fee system.

Let me say a word on the bill. We support raising the threshold. We think it is irrational that in doing that we have to raise the fee to $100,000 on larger transactions in order "to preserve budget neutrality." This is another consequence of the "addiction" to the Hart-Scott-Rodino fees.

I have looked at the numbers, while you would think $100 million mergers would call for more attention than others, in fact 95 percent of those mergers do not get a Second Request.

My time has expired. Thank you very much.

[The prepared statement of Mr. Adler follows:]

PREPARED STATEMENT OF HOWARD ADLER, JR., ESQ., BAKER MCKENZIE, AND CHAIRMAN, U.S. CHAMBER OF COMMERCE HART-SCOTT-RODINO TASK FORCE

Introduction

Mr. Chairman and members of the Committee, good morning. I am Howard Adler, Chairman of the Hart-Scott-Rodino Task Force at the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is a business federation representing more than three million businesses and organizations of every size, sector and region. The U.S. Chamber of Commerce welcomes this opportunity to present its views regarding Hart-Scott-Rodino (HSR) filing fees and S. 1854, the Hart-Scott-Rodino Antitrust Improvements Act. Positions on issues of importance to the business community are developed by a cross-section of the Chamber's members serving on Committees, Subcommittees and Task Forces. This Statement is the product of the Chamber's Council on Antitrust Policy and its HSR Task Force. The Task Force was originally set up to address the Chamber's members' concerns about the burdensome over-reporting required under the existing HSR process. These concerns have been exacerbated by the $45,000 filing fee and the over-dependence of the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division on revenues derived from those fees. The Chamber believes the HSR system is broken and needs to be fixed.

The Chamber's testimony will address two points: First, there is no principled justification for the present HSR filing fees, and they should be abolished. Second, although S. 1854, introduced by Senators Hatch, Kohl and DeWine, does not solve the filing fee issue, it represents a commendable effort to limit the number of unnecessary filings and to moderate the abuses of the Second Request process. S. 1854, therefore, has the strong support of the Chamber.

I. The Present HSR Filing Fee System Should Be Abolished

Congress originally imposed a $20,000 filing fee in 1989 during a period of large budget deficits. The fee was subsequently raised to $25,000 and then to $45,000 per transaction. Since 1989, we have gone from a time of budgetary deficits to one in which the great political debate is over how to use the enormous surpluses we now anticipate. Furthermore, the number of reported transactions has escalated from 2,883 in 1989 to more than 4,500 in fiscal year 1998. As a result, in that year, the HSR filing fee extracted more than $200 million from the reporting companies, including many Chamber members.

While budget deficits in 1989 may have made the HSR filing fees an attractive expedient, in 2000 the present system is indefensible on several grounds: (a) antitrust enforcement benefits all Americans and should be paid for by all Americans; (b) the analogy to a user or regulatory fee is false; the HSR filing fee is a tax arbitrarily imposed on overwhelmingly lawful transactions and which bears no relation to either the cost to the Government or the value to the "taxpayer"; and (c) the over-dependence of the enforcement agencies on HSR filing fees creates anomalous incentives and outcomes.

Antitrust Enforcement Should Be Paid For Out of Appropriated Funds

In urging repeal of the HSR filing fees the Chamber is not advocating any curtailment in the funding available to the FTC and Antitrust Division. To the contrary, the Chamber supports continued antitrust enforcement which maintains a competitive marketplace, to the benefit of the Chamber's members and all Americans. The Chamber strongly believes, however, that since antitrust enforcement benefits all Americans it should be paid for by all Americans and not only by U.S. and foreign companies making overwhelmingly lawful and procompetitive mergers.

More than 80 countries, impressed with the U.S. competitive model, now have some form of antitrust law. To the best of the Chamber's knowledge, no country other than the U.S. funds its antitrust enforcement largely from merger reporting fees rather than appropriated funds. It is anomalous that the richest of all these countries does not also use its general treasury to support this vital and beneficial

function.[1] The time has come to decouple antitrust enforcement funding from the HSR filing fees.

The HSR Filing Fees Do Not Qualify As Valid User Or Regulatory Fees

Superficially, the HSR filing fees resemble user or regulatory fees that are often and properly imposed by government entities; however, the HSR fees do not meet the well-established requirements for those legitimate fees.

In a June 1994 statement opposing a proposed increase in the HSR filing fee,[2] the Chamber pointed out that that fee is totally inconsistent with the Independent Offices Appropriation Act of 1952 (IOAA), as amended (31 U.S.C. § 9701 (1992)). IOAA provides that when a federal agency wants to impose a user fee, that fee must be "(1) fair; and (2) based on (A) the cost to the Government; (B) the value of services or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." (1994 Chamber Statement at 9.) There is no way that the HSR filing fees could meet these criteria. There has never been even a pretense that the filing fees are related to the cost of processing the HSR filings, and any attempt to make that argument would fail. In fiscal 1998, according to the enforcement agencies' HSR Annual Report, 4,575 transactions were reported.[3] Of that number, less than 10 percent were even cleared to one of the antitrust agencies for a competitive review (Id. Table III); and substantive Second Request investigations were conducted in only 125 cases, amounting to less than 3 percent of the reported transactions. (Id. Table II.)

Thus, there can be no doubt that the vast majority of HSR filings are unconscionably profitable for the government. The vast bulk of the more than $200 million collected in fiscal 1998 was used to finance the investigation of a small number of anticompetitive mergers and other antitrust enforcement. As set forth in the 1994 Chamber Statement (at 10), "Since 90 percent or more of the reportable transactions require no substantive review, there is . . . no significant cost to the Government which must merely receive and review the filing to see that it is in one of the categories that historically have presented no competitive problem. The disproportion between that ministerial task and the [then proposed] $40,000 fee is neither fair nor based on 'the cost to the Government.'" On the other hand, for those relatively few filings that lead to full-scale enforcement actions, the fee is merely a drop in the bucket. Nor can there be a viable argument that the overwhelming preponderance of companies whose filings raise no competitive issue receive any "value" in return for their fees.

On September 20, 1996, Chairman Archer of the House Committee on Ways and Means made the same point in a letter to Congressman Livingston, Chairman of the House Committee on Appropriations. Writing in opposition to a proposed increase in the HSR filing fee, Chairman Archer referred to a Statement issued by the Speaker which sets forth criteria for differentiating between "'true' regulatory fees" and taxes that historically are within the jurisdiction of the Committee on Ways and Means. The criteria for a regulatory fee are:

> (i) The fees are assessed and collected solely to cover the costs of specified regulatory activities (not including public information activities or other activities benefiting the public in general);
>
> (ii) The fees are assessed and collected only in such manner as may reasonably be expected to result in an aggregate amount collected during any fiscal year which does not exceed the aggregate amount of the regulatory costs referred to in (i) above;
>
> (iii) The only persons subject to the fees are those who directly avail themselves of, or are directly subject to, the regulatory activities referred to in (i) above; and
>
> (iv) The amounts of the fees (a) are structured such that any person's liability for such fees is reasonably based on the proportion of the regulatory activities which relate to such person, and (b) are nondiscriminatory between foreign and domestic entities.

Archer Letter, at 1–2 (emphasis added). While Chairman Archer was writing about a proposed increase in the current $45,000 fee, he correctly pointed out that the

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[1] It is particularly anomalous because U.S. antitrust enforcers generate significant revenues through the collection of fines. For example, in fiscal year 1999, the Antitrust Division alone collected more than $1 billion in criminal fines.

[2] Statement of the U.S. Chamber of Commerce in Opposition to Proposed Increase of Hart-Scott-Rodino Filing Fee From $25,000 to $40,000 per Transaction (1994 Chamber Statement).

[3] FTC and Antitrust Division, Annual Report to Congress, Fiscal Year 1998, Pursuant to Subsection (j) of Section 7A of the HSR Act (HSR Annual Report (1998)) at 25.

"FTC does far more than merely regulate acquisitions subject to the Hart-Scott-Rodino Act [and that] there is reason to believe that the amount of the current premerger notification fees substantially exceeds the costs of the FTC and Antitrust Division in evaluating reportable transactions under the antitrust laws." (Id. at 2.) Accordingly, the current $45,000 fee violates criteria (i), (ii) and (iii).

While the Senate is not bound by either IOAA or the Statement cited by Chairman Archer, both of these authorities make clear that the HSR fees are not reasonably related to the Government's merger review costs or to the "value" to the companies that pay the fees. They, therefore, amount to "a tax on a small category of regulated entities." (Archer Letter at 2.)

Like Chairman Archer, the Chamber would not object to HSR filing fees decoupled from the funding of federal antitrust enforcement "as long as the amount of fees are reasonably related to the relevant regulatory cost and fairly apportioned among affected entities." (Archer Letter at 2.) Other jurisdictions do this[4] and we believe it would be feasible to fashion an appropriate formula in the United States, provided the fees are not used to fund general antitrust enforcement.

The Present Reliance on HSR Filing Fee Revenues To Fund Antitrust Enforcement Creates Anomalous Incentives and Outcomes

When less than three percent of more than 4,500 transactions even merit a Second Request, it is apparent that there is a vast amount of overreporting, creating an unnecessary burden on both American businesses and the enforcement agencies. Yet the agencies' dependency on filing fee revenues compromises their ability to deal objectively with the problem.

There are, as the Chamber has pointed out, well-recognized categories of transactions that historically have not had anticompetitive effects (see 1994 Chamber Statement at 5–7); but the FTC's ability to eliminate useless HSR reports is frustrated by the linkage between the filing fees and the agencies' funding. As the Chamber stated on an earlier occasion, "The Commission is confronted with a Hobson's choice; continue to demand substantially useless HSR filings or substantially curtail the number of such filings and lose needed funding."[5]

Another way to deal with the massive overreporting is to raise the size-of-transaction reporting threshold above the $15 million level set a quarter century ago. S. 1854 does this by raising it to $35 million, thereby eliminating approximately one third of the filings now required. Regrettably, believing it necessary to "ensure budget neutrality" (Judiciary Committee News Release, November 4, 1999), the sponsors of the bill propose to raise the fee for transactions valued at more than $100 million to $100 thousand, irrespective of whether the transaction presents any significant competitive issues. In fact, according to HSR statistics, nearly 80 percent of transactions above $100 million were not even cleared to one of the agencies for competitive review, and 94 percent failed to merit a Second Request.[6] Thus, the proposed increase may achieve budget neutrality but, like the basic fee, it has no cost or value-based justification. Nevertheless, for reasons indicated in Part II of this Statement, the Chamber supports S. 1854, despite the fee increase it proposes.

II. The Chamber Supports Enactment of S. 1854

S. 1854 does two things. It raises the size-of-transaction threshold to $35 million and it provides long-needed Second Request reform. While the benefits of raising the threshold are diluted by the perceived need to ensure budget neutrality, the Chamber nevertheless supports this aspect of the bill since it will eliminate hundreds of essentially useless low-end filings. In addition, the Chamber is particularly in favor of the bill's provisions that deal with what has come to be known as the "Second Request."

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[4] In Germany, "the fee is determined according to the personnel and material expenses of the enforcement agency, with account also being taken of the economic significance of the concentration." [Rowley and Campbell, Multi-Jurisdictional Merger Review—Is It Time For A Common Form Filing Treaty?, in Policy Directions for Global Merger Review at 9, Appendix IV, note 9.] In Ireland, there is no fee for "Preliminary Merger Notifications." [*Id.* note 12] and in Switzerland, no fee is charged for a "First Phase Assessment" but an hourly rate is charged for a "Second Phase Assessment."

[5] Comments of the U.S. Chamber of Commerce on Federal Trade Commission's Proposed Changes in Hart-Scott-Rodino Rules Issued July 28, 1995. In April 1996, the FTC implemented certain limited changes in the HSR coverage. In light of the 1998 data cited above, those changes had only minimal impact. *See also* Comments of the U.S. Chamber of Commerce before the International Competition Policy Advisory Committee, April 22, 1999, at 6 ("[T]he incentive to consider the appropriate scope of the premerger reporting obligations has been adversely affected, because consideration of limitations that may be warranted on the basis of competition objectives must now be weighed against the collateral fiscal effects.").

[6] HSR Annual Report (1998), Exhibit A, Statistical Tables, Tables I and III.

As originally conceived, the Second Request was to be a simple mechanism through which the federal enforcement agencies would be able to require the parties to produce at an early stage of the investigation a small number of nonprivileged documents that would allow the agencies to identify potential antitrust concerns and conduct a preliminary antitrust analysis.[7] More traditional agency investigative tools that are subject to judicial review—subpoenas, in the case of the FTC and civil investigative demands, in the case of the Antitrust Division—were available for more extensive information collection. By virtue of the law of unintended consequences, however, the Second Request has grown into a huge burden upon the business community.

The typical Second Request now requires the production of hundreds (and frequently thousands) of boxes of documents, each page of which must be sorted, numbered and catalogued according to an ever-increasing list of agency instructions and requirements. Additionally, the parties must respond to extensive requests for interrogatory responses that must be compiled into multiple volume answers or condensed into complex databases, again subject to whatever instructions and requirements agency lawyers and economists may devise at the moment. Indeed, the process has spawned a cottage industry of copying vendors, database managers and temporary personnel firms, all of them supporting a hugely costly process that Congress never intended to exist.

Effective merger enforcement obviously requires an extensive amount of information, and the agencies must have an effective way of getting that information in a timely manner. The Second Request process, however, has become excessive. Virtually every company that has undergone a Second Request investigation can tell horror stories of unreasonably broad demands, unnecessary burdens and huge compliance costs, all seemingly unrelated to the real issues under investigation. All too often many of the document boxes are not even opened.

The reasons for this excess are twofold. First, the assembly of these voluminous submissions takes time, and the statute stays the waiting period until compliance with the Second Request has been completed. Thus, the more burdensome and time-consuming the Second Request, the more time the agency has to conduct its investigation. This relationship between time and burden has become so clear that many agency staffs now insist that a party promise not to comply before a certain date as a precondition to obtaining any meaningful modification of the Request. Second, the agencies have absolutely no incentive to minimize the burden. For all practical purposes, the agencies' power with regard to these requests is functionally unreviewable. Recognizing that the parties have no ability to obtain impartial review of their Second Request determinations, the agencies have no incentive to narrow the requests or to minimize the burden; quite the contrary, their incentive is to avoid any risk of missing any conceivably relevant fact by insisting that the parties produce everything.

Modern merger analysis probably has become too fact-intensive to return the Second Request back into what Congress initially intended. Given the time within which the agencies must investigate these complex transactions, the Second Request likely must remain the government's principal investigative tool. Effective merger investigation, however, does not require that the agencies be totally free to impose excessive costs on the parties. S. 1854, sponsored by Senators Hatch, Kohl and DeWine, represents a step in the right direction, protecting the agencies' need for the prompt submission of necessary information, while providing safeguards against unnecessary burdens and agency abuse. The proposed legislation improves the Second Request process in two principal ways.

First, it introduces fair standards. The statute currently requires that a party substantially comply with a Second Request. The substantial compliance standard, however, imposes no limits upon the agency in seeking information and does not lend itself to an obvious definition of when appropriate compliance has been reached. Accordingly, the agencies feel free to ask for just about anything and to insist upon strict or literal compliance when it is to their advantage to do so.

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[7] As Congressman Rodino made clear in the House Debate, "[P]lainly, Government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government. But lengthy delays and extended searches should consequently be rare. . . . In sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable. In these cases, a failure to comply with such unreasonable portions of a request would not constitute a failure to 'substantially comply' with the bill's requirements." [House Debate, September 16, 1976, 122 Cong. Rec. H30877.]

S. 1854 provides that the agencies can only seek information that is not "unreasonably cumulative or duplicative," and that does not impose a burden or expense that "substantially outweighs the benefit of the information." Additionally, the bill would define substantial compliance to mean that a party's submission "does not contain a deficiency that materially impairs the ability" of the agencies to investigate the transaction.

Second, S. 1854 provides a mechanism through which both the parties and the agencies can obtain rapid judicial determinations with respect to HSR compliance disputes through proceedings before a federal magistrate. The availability of review by a neutral third party will introduce needed balance into the Second Request process. Neither side will enter into judicial review lightly. If the agency prevails, the parties may not proceed with their transaction until compliance has been achieved. If the submitting party prevails, the waiting period will continue to run. Under this scenario, the prospect of judicial review will discipline both sides, so that actual challenges should be minimal.

Because Congress initially believed that the Second Request would impose only a minimal burden upon the premerger notification process, it did not feel a need to include the types of procedural safeguards that would ordinarily accompany this type of governmental discovery right; however, now that the Second Request process has emerged as an important (and often oppressive) tool in government merger enforcement, procedural safeguards are needed. The addition of a minimal amount of government accountability—i.e., clearly articulated standards and an opportunity for review by an impartial third party—will only benefit the overall HSR premerger notification scheme.

For these reasons, the Chamber strongly supports and urges enactment of S. 1854

Senator ASHCROFT. Thank you very much. It is good to have witnesses that do not suffer the impairment of color blindness.

That light comes on, you go off, which is—the Senate is—is afflicted mightily, and I am glad to see that you are not.

It is my pleasure now to call upon Mr. Albert A. Foer. He is the president of the American Antitrust Institute and—and a former FTC official.

So thank you very much.

STATEMENT OF ALBERT A. (BERT) FOER, PRESIDENT, AMERICAN ANTITRUST INSTITUTE

Mr. FOER. Thank you, Mr. Chairman.

The American Antitrust Institute is an independent non-profit education research and advocacy organization.

I would like to make a brief comment about the FTC reauthorization and then turn to proposed changes in the merger process.

To summarize my written statement, the Federal antitrust agencies are substantially understaffed and underfunded, in view of the law enforcement challenges that they face.

Given the continuation of unprecedented demands of the job, we believe that the authorizations being proposed in S. 1687 represent only the extreme low end of what is needed.

The FTC's request to increase its full-time equivalents from—from 979 to 1,133 in Fiscal Year 2001 seems well justified.

This would be permitted by a funding level of $165 million, and would still leave the FTC one-third smaller than it was in 1980, when it was not faced with the demands that it is today.

Turning to the Hart-Scott-Rodino amendments, I am going to address four questions. First, what reforms are appropriate with regard to Second Requests?

Before passage of the landmark Hart-Scott-Rodino legislation, mergers and similar transactions were effectively, though not formally out of the reach of the antitrust laws.

Under Hart-Scott-Rodino, the antitrust agencies have created an administrative system that identifies those mergers that are likely to be problematic and quickly allows the vast majority to move forward.

All filings that do not get Second Requests—that is about 97 percent—are dealt with in an average of 20 days.

Although you may hear horror stories about the amount of data being demanded by the agencies in their Second Requests, these tend to caricature reality.

First, the volume of Second Requests is not very large. In 1998, it covered 125 transactions, only 2.7 percent of all transactions.

Second, a very few large complicated and hard-fought cases may color perceptions of what is involved. Over 85 percent of the FTC Second Request transactions are resolved before there is substantial compliance with the request.

Over 70 percent of the FTC Second Requests result in productions of 50 document boxes or less and over 60 percent result in productions of under 20 boxes.

The average time to complete a Second Request investigation is only three to four months. About 60 percent of Second Requests result in successful law enforcement actions. I submit that these are very impressive numbers.

The agencies have a generally strong record of working with parties to narrow requests and accommodate to what is feasible.

Given their workload and the deadlines that HSR imposes on them, the agencies have a strong incentive to reduce the size of document requests.

Review of Second Requests by a magistrate sounds better on paper than it is likely to be in practice.

Indeed, we expect it would slow down the merger review process and make it more expensive for all concerned.

The parties would spend a lot of time sparring in and out of court. Moreover, it would change the strategic dynamics of the premerger process.

The public gets only one bite at the merger apple and it should be a full bite.

At a pre-discovery stage, which we are talking about, enforcement officials should not be held to an unrealistic standard requiring them to know exactly what data they will need or what theory they will ultimately pursue.

The agencies have demonstrated a willingness to cooperate with the private bar in streamlining the HSR process. Instead of legislation, therefore, we believe the enforcement agencies should be encouraged by this Committee to build on their current internal appeals processes; perhaps creating a more formally defined route for appeal within each agency structure.

The second question: Is it appropriate to increase the thresholds for pre-merger notification reporting?

Because of the uncertainties and the tradeoffs—I recognize this seems like a done deal, that everybody is in agreement that we should raise it—but there are tradeoffs that need to be taken into account.

On the one hand, smaller companies would save time and money. On the other hand, we would not only allow 37 to 40 percent of the

nation's merger transactions to effectively disappear from the antitrust net, but we would also eliminate the antitrust deterrent against any competitive smaller mergers.

So we recommend instead—instead of giving a de facto waiver to all these mergers, let's substantially reduce the filing fees and direct the enforcement agencies to reduce the reporting burden on small merging companies.

Third question: Is it appropriate to increase the fees payable for larger transactions?

We endorse increasing the fee from $45,000 to $100,000 for transactions larger than $100 million.

And we further suggest there should be created a mega-merger category for the 4.2 percent of transactions, 193, that are larger than a billion dollars.

And we would urge that the user fee for these be considerably higher, for instance, $500,000.

What effect, fourth question, last question—what effect will a reformed fee structure have on antitrust enforcement?

I basically agree with Howard Adler that the user fee is not the right way to fund antitrust, but this is a problem that applies to many agencies besides the FTC.

I also agree with Howard that it cannot be resolved immediately. We have to look at where we are.

So starting from the current situation, it is important that any modifications to the filing fees should preserve the current anticipated level of funding.

The analysis in our written statement indicates that S. 1854 would result in an appropriations reduction of approximately $3.6 million, and therefore would not be revenue neutral.

Thank you for this opportunity to present our views.

Senator ASHCROFT. I am grateful to you. Thank you for your clear presentation.

[The prepared statement of Mr. Foer follows:]

PREPARED STATEMENT OF ALBERT A. (BERT) FOER, PRESIDENT, AMERICAN ANTITRUST INSTITUTE

These are comments of the American Antitrust Institute concerning S. 1687, the Federal Trade Commission Reauthorization Act of 1999, and S. 1854, the Hart-Scott-Rodino Antitrust Improvements Act of 1999. The American Antitrust Institute is an independent, non-profit education, research, and advocacy organization that believes the antitrust laws should play a more expansive and effective role in the national economy. I am Albert A. Foer, President of the AAI.[1]

The Federal Trade Commission Reauthorization Act of 1999

Early last year the American Antitrust Institute published a 40-page paper history of antitrust funding, titled "The Federal Antitrust Commitment: Providing Resources to Meet the Challenge." Copies were made available to the Appropriations Committees at that time and can be found at the AAI website.[2] While some of the numbers require updating, the argument we offered remains valid, namely that the two federal antitrust agencies, i.e., the Federal Trade Commission and the Department of Justice Antitrust Division, are substantially underfunded and understaffed, in view of the law enforcement challenges they face. In our paper, we urged Congress to contemplate a three-year expansion of federal antitrust personnel on the

[1] Information concerning the AAI is available at *http://antittrustinstitute.org*. Albert A. Foer is an attorney with experience in private practice and also as C.E.O. of a chain of retail stores. From 1975–1981, he held Senior Executive positions at the FTC, including Acting Deputy Director of the Bureau of Competition.

[2] Available at (*http://www.antitrustinstitute.org/recent/23.cfm.*).

order of 30–50%. At the time we wrote, the FTC's budget for f.y. 1999 was $119 million. The increase in S. 1687 to an authorization of $149 million in f.y. 2001 would be 25% and to $156 million in f.y. 2002 would be 31%. Given the continuation of the unprecedented challenges that are before us, we believe that the authorizations being proposed in S. 1687 would be at the extreme very low end of what is needed.[3] The FTC's request to increase its FTEs from 979 to 1133 in f.y. 2001 seems well-justified.[4] This would be permitted by a funding level of $165 million.

What are the challenges that require additional federal antitrust attention? First, we have a merger wave of unprecedented size and scope, which is rapidly restructuring the American and the world economy.[5] The number of merger filings tripled from 1,529 in fiscal year 1991 to 4,642 in fiscal year 1999. We are seeing something like a 15% increase this year. The dollar value of merger filings increased over 11 fold during this period, an indication that mergers are becoming larger and more complicated. Merger analysis is labor intensive. Much depends on careful fact-gathering and analysis. Neither the FTC nor the Justice Department is staffed adequately to deal with what is arriving each and every day. The result is a rapid movement toward more and more concentration in market after market.[6]

Second, the promise of deregulation has not been kept. That promise was that antitrust would replace direct economic regulation as the public's protection against the abuse of market power. It only partially happened, with the result that consumers have not yet received all of the benefits from competition to which they are entitled. More needs to be done in the formerly regulated sectors of our economy and special care must be given to the deregulation of electricity, where the rules of the new game are yet to be written. The FTC has played an extraordinarily important role in helping the States adjust to electricity deregulation, but it has depended very largely on one lone economist spending only half of his time on this subject.

Third, the economy has become more of a global marketplace, changing the modes and challenges of antitrust. Even as some markets become freer and more competitive, others are ruled by international cartels. While these are more often under the Antitrust Division's beat than the FTC's, both agencies have found that globalization increases their workload. For example, antitrust analysis now regularly requires understanding the international dynamics of an industry. Discovery becomes more time consuming and complicated. Cooperation with foreign antitrust agencies—which have proliferated since 1989—takes time.

Fourth, new technologies have created new antitrust issues, such as the potential of network effects creating persistent monopolies. The FTC already plays an important role in educating the public on the consumer and competition aspects of rapidly changing technology-driven markets, but merely keeping on top of developments, not to mention developing and carrying out prudent public policies, is especially time-consuming at this critical time in economic history.

The FTC has done a remarkable job of streamlining and improving its productivity. However, today, the agency can only be described as "strapped". The FTC's budget request does not contain new programs. It does request additional staff to carry out a number of tasks Congress has imposed, such as implementing new identity theft legislation, and it requests funding for certain internal technological improvements, to make it possible, for example, to file Hart-Scott-Rodino information on-line. Mainly, the FTC seeks funding for additional staffing made necessary by the demands of the merger wave and the rapid emergence of e-commerce. We urge that the authorization be increased to better recognize these needs.

The Hart-Scott-Rodino Antitrust Improvements Act of 1999

We were also asked to comment on S. 1854, the Hart-Scott-Rodino Antitrust Improvements Act of 1999. We direct our comments to the following four questions: (1) What reforms are appropriate with regard to "Second Requests"? (2) Is it appropriate to increase the thresholds for PMN reporting and, if yes, are the thresholds proposed in S. 1854 appropriate? (3) Is it appropriate to increase the fees payable

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[3] Our primary interest is in the Competition Mission rather than the Consumer Protection Mission, which was not the subject of our research. Our comments assume that the Competition Mission will receive approximately half of the FTC's overall funding.

[4] In 1980, this number was 1,719!

[5] The FTC has testified before Congress approximately 38 times on mergers and consolidations, in the 105th and 106th Congresses, reflecting substantial national concern about this merger wave.

[6] As William Satire wrote in the New York Times on December 13, 1999, "Oversight pays for itself; indeed. Justice brings in $10 in fines for every $1 in its budget. But the F.T.C. and Justice are overwhelmed by the rising momentum toward concentration throughout American big business."

for larger transactions and if yes, are the fees proposed in S. 1854 appropriate? And (4) What effect will a reformed fee structure have on antitrust enforcement?

(1) What reforms are appropriate with regard to Second Requests?

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 brought a revolution to the antitrust laws with respect to merger enforcement. Before this landmark legislation, mergers and similar transactions were effectively, though not formally, out of the reach of the antitrust laws. It was nearly impossible to obtain an injunction that would stop a merger before it was consummated. Rather, the merger had to be attacked after the fact. This assured that litigation would be a prolonged process and that in most cases there would be no effective remedy, because, as the saying went, it's too difficult to "unscramble the eggs" once they have been cracked, stirred together and fried. H-S-R changed all this, very dramatically. Today, mergers are challenged before they are consummated. This has brought a much higher degree of certainty to the process, speeded it up, and made it possible to obtain effective remedies in those relatively few situations where the transaction would violate the antitrust laws.

The antitrust agencies have worked diligently to make the premerger notification program effective and they should be congratulated on their success. They have created an administrative system that identifies those mergers that are likely to be problematic and quickly allows the vast majority to move forward.[7] With respect to those that may be problematic, they seek more information through a "Second Request". About 60% of Second Requests lead to successful law enforcement actions, and the Second Request process generally takes less than four months.[8] These are impressive facts, given the complexity of today's mergers. It should also be mentioned that a 60% success figure is probably about as high as good public policy would warrant: if the agencies only sought more information on those situations which were more or less automatic "winners", they would not be casting their net widely enough.

S. 1854 would modify provisions of the H-S-R Act with respect to Second Requests. Second requests would be limited to information that (a) is not unreasonably cumulative or duplicative, and (b) does not impose a cost or burden on the parties that substantially outweighs the benefits to the agencies in conducting their antitrust review. Parties would have the right to petition a U.S. magistrate to review whether a Second Request meets those standards. In addition, parties would have the right to petition a U.S. magistrate for a determination of substantial compliance with a Second Request. The waiting period after substantial compliance would be extended from 20 days to 30 days.

We would be pleased to see the waiting period extended from 20 to 30 days. This would facilitate a more careful evaluation of the materials received and would relieve some of the stress that the current timeframe imposes on everyone.

With respect to the other proposals, it is not clear to us that a significant problem exists, and we think the solution proposed is unworkable. Although you may hear horror stories about the amount of data being demanded by the agencies, these caricature the reality. First, the volume of Second Requests is not very large. In 1998, it covered 125 transactions, only 2.7% of transactions.[9]

Second, a few very large, complicated, and hard-fought cases may color perceptions of what is involved. Over 85% of the FTC's Second Request transactions are resolved before there is substantial compliance with the request. Over 70% of the FTC's Second Requests result in productions of 50 document boxes or less and over 60% result in productions of under 20 boxes. The average time to complete a Second Request investigation is three-to-four months, and many are completed in much shorter time.[10]

The agencies have a generally strong record of working with parties to narrow requests and accommodate to what is feasible.[11] Given their workload and the deadlines that H-S-R imposes on them, the agencies have a strong incentive to reduce the size of document requests. The Antitrust Division has an internal appeal procedure for disputes, leading to the Deputy Assistant Attorney General. In 4 years, we

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[7] In fiscal year 1998, almost 70% of the filings received early termination, on average in less than 16 days. For all filings that did not receive a Second Request, the average time for review was less than 20 days. Letter from William J. Baer, Director, Bureau of Competition, FTC, to International Competition Policy Advisory Committee.

[8] Id.

[9] This percentage is a little less than typical. The average for 1987–1997 was 3.58%.

[10] FTC letter to ICPAC, note 6 above.

[11] For instance, in 1995, after discussions with the private bar, the agencies produced a model Second Request form, so that the bar would know what kind of information would be requested and could plan ahead accordingly.

understand, this process has been utilized only three times, and in two of the three situations, the Deputy sided with the merging parties. The FTC has an informal process that involves the Director or Deputy Director of the Bureau of Competition whenever there is a Second Request conflict between the parties and the investigation staff.

The reality seems to be that there has been only a handful of investigations requiring submission of large numbers of boxes of documents. Usually, these were multibillion dollar, multi-market transactions that transform entire industries. These are precisely the type of transactions where a detailed and probing examination is appropriate and where interconnections may not be apparent until data is obtained. When an agency issues a Second Request, it does not have enough information to evaluate the potential benefits of the information requested. Its information in hand is extremely limited. Unlike the parties to a transaction, the agency has no company officials engaged in the business in question to whom it can turn for information about the industry and its products, competitors and customers.

You may hear complaints that the agencies "game" the premerger rules, using Second Request demands to delay a transaction. The other side, too, plays games, of course, sometimes dumping tons of documents on an overworked agency staff in the hope of wearing them out and causing them to overlook a needle buried in the haystack.

Introduction of a formal right of appeal in the midst of a Second Request places a professionally conducted investigation in an untenable chicken-and-egg conundrum: the enforcement officials cannot necessarily determine the focus of the investigation until they have examined the data; if they are precluded from the data on the basis that they haven't identified their theories clearly enough, they will never obtain the data needed for a professional evaluation of the various possible theories.

It is also important to understand that a change in the rules will affect the strategic dynamics of merger enforcement. Many cases are efficiently settled because the merging parties know that they have documents that will reveal the anticompetitive nature of their transaction and that the data will have to be provided to the investigators. By increasing the probability that they will not have to provide data (maybe they can persuade the magistrate that it is not necessary), we would be reducing the probability of settlement in these cases.

As we see it, the intervention of a review by a magistrate sounds better on paper than it is likely to be in practice. Indeed, we expect it would slow down the merger review process and make it more expensive for all concerned, with the parties spending a lot of time sparring in and out of court. Magistrates tend to be busy and there is no guarantee that their intervention will be swift. In the worst scenario, if the magistrate happens to be unsympathetic to the antitrust laws or unfamiliar with how an antitrust case is put together, he or she could represent an open invitation for challenges that would have the effect of making it more difficult to obtain important evidence and properly evaluate the case. Moreover, a magistrate is used to participating in civil cases where the plaintiff has had more opportunity to develop the facts of the case; here, the government has typically had to rely on the initial filings and a few telephone calls. Its Second Request must necessarily be broad, often broader than what would be acceptable to a magistrate who is used to reviewing discovery in private civil litigation. This, it must be stressed, is a pre-discovery situation.

We are reluctant to see a generally satisfactory administrative process be revised by legislation, which can be inflexible and difficult to adjust at a later time. The agencies have demonstrated a willingness to cooperate with the private bar in streamlining the process.[12] We believe there is a better way to deal with whatever Second Request problem exists: the enforcement agencies should be encouraged by this Committee to build on their current internal processes, perhaps creating a more formally defined route for appeal within the structure. Decisions in the relatively few situations that will occur can best be made by people who understand how an antitrust case is put together and can decide quickly. Importantly, the top officials of the agency (perhaps, in the case of the FTC, the General Counsel or a designated Commissioner) would have an appropriate background for understanding the dynamics of an investigation and an incentive not to waste resources. More to the point, however, is that we are talking about an investigation of a law violation, not a judicial determination of responsibility. It is premature at this stage to insert the judiciary into the process.

Some may argue that the enforcement agency does not need so much data, because they are only preparing for a motion for a preliminary injunction and more

[12] They are currently in the midst of a working with an American Bar Association task force on Second Requests. Also see note 11 above.

complete data can be obtained during discovery for trial. In the context of modern merger practice, this is misleading. It is almost always the case today that the decision of the Federal District Court in a preliminary injunction determines whether or not the transaction will go forward; in effect, the preliminary injunction hearing is the trial and the parties need all their ammunition for that one hearing. The public gets one bite at the apple and it should be a full bite.

(2) Is it appropriate to increase the thresholds for PMN reporting, and, if yes, are the thresholds proposed in S. 1854 appropriate?

The thresholds for reporting a planned merger were created in the original Hart-Scott-Rodino law, dating back to 1976. They have not been modified to reflect inflation. If the initial thresholds were in some sense "correct," then it is not unreasonable to modify them upwards one time and thereafter to index them for future inflation. On the other hand, the original thresholds were arbitrary then and remain arbitrary now.

The important question is how many anticompetitive mergers will escape federal attention if the threshold is lifted? How do the negative effects of this compare to the positive effect of freeing a substantial number of transactions from the reporting requirement?

The fact that a merger is relatively small does not necessarily mean that it will not have an adverse impact on competition, if the market itself is small. This is frequently the case in industries that serve a primarily local market, such as radio broadcasting or certain types of medical care. Moreover, there are many situations where the dollar size of the transaction is unrelated to its importance. For example, in the high tech industries, it is not unusual for a firm to have little in the way of revenue, but to own intellectual property that can create a new market or bring a big change to an existing market. To exempt small transactions from reporting means that the parties can go forward and consummate their deal without antitrust interference. If the government later determines that the transaction was anticompetitive, the only remedy is to try to "unscramble the eggs." The cost to the federal government of pursuing relatively small mergers after the fact is likely to prove to be too high, with too small a return. Therefore, the practical effect of raising the limit for reporting will also be to provide a de facto safe harbor from federal intervention for mergers that fall under the reporting threshold.[13]

How many transactions will be affected? S. 1854 would raise the filing threshold from $15 million to $35 million.[14] The impact of S. 1854 would appear to be, roughly, the elimination of 37% of the currently reported transactions. In absolute numbers, this would be approximately 1,700 transactions.

In FY 1998, there were a total of 17 Second Requests by the two agencies in the <$35 million range.[15] This is only 1% of the reported transactions under $35 million, and .4% of all transactions reported. Over 60% of the FTC's Second Requests in the 1999 fiscal year resulted in successful enforcement actions.[16] It is likely that 7–8 mergers that would have been stopped or modified would fall through the net if the threshold is lifted to $35 million.

Changes in government policies and procedures often have unanticipated consequences as parties "re-game" the system in light of the new rules. If we raise the threshold to permit 7–8 anticompetitive mergers to pass through the antitrust net,

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[13] Some small mergers that are anticompetitive may be scrutinized by State officials, but the States play a relatively small role in merger enforcement and many of them are not equipped to challenge mergers.

[14] An initial problem is that official data on premerger notification does not neatly correspond with the $35 million benchmark. According to the most recent Annual Report to Congress on the Hart-Scott-Rodino law. for f.y. 1998 of the 4,728 merger transactions reported to the FCC and DOJ, 5.2% were smaller than $15 million, 21.7% were in the $15–$25 million category, and 25.4% were in the $25–$50 million category. If we make the assumption (not necessarily precise, but an indicator of magnitude) that transactions in the $25–50 category are spread equally, then those from $25–$35 million would account for 10/25ths (.4) of the statistical category, or 10.16% of transactions.

[15] Again applying .4 to the $25–50 million data supplied by the agencies.

[16] Remarks of Richard Parker, Director, FTC Bureau of Competition, to panel discussion sponsored by Charles River Associates, reported in FTC:WATCH, Nov. 8, 1999. We do not know whether the 60% figure applies evenly to all categories of transactions by size or if it remains fairly constant from year to year, but if we make the assumption that it does and that the same proportion applies to the Antitrust Division (which in fact is believed to have a lower percentage), then the number of enforcement actions in the <$35 million range during 1998, the record high year, was about 10. If indeed the Division has a smaller percentage of Second Requests going to successful enforcement, then it is likely that the actual number of enforcement actions that would have been lost under S. 1854 in FY 1998, had the proposed threshold been applied would be in the range of 7–8.

we are also sending a signal to others in the small-size category that they need no longer worry about antitrust. Their legal advisors will be able to counsel them that horizontal mergers previously unthinkable can now be undertaken with minimal concern of antitrust interference. A probable effect of the change in threshold, therefore, would be the triggering of more anticompetitive mergers in local and regional markets.

There is no commonly accepted methodology for converting these considerations into a consumer welfare loss. There is also no way to predict whether these mergers, most probably local or regional in effect, would be challenged (most likely, after the fact) by state antitrust authorities.

To the extent that elimination of 37% of the premerger filings frees up government staff, this should not be viewed as a savings; rather it would release resources that could be shifted from relatively quick reviews of small transactions to work on larger transactions, of which there is a plentiful supply. During the current merger wave, which has utterly stretched the resources of the two antitrust agencies, this reallocation might slightly relieve a little of the need for more personnel, but it should not result in noticeable budgetary savings.

We draw the following conclusions: (1) Raising the threshold to $35 million will allow approximately 37% of currently reported mergers to disappear from the antitrust radar screen. (2) At current merger rates, this will mean that something on the order of 17 transactions that would have merited further investigation will be left unattended and something on the order of 7–8 transactions that would have triggered successful enforcement actions will be allowed through the net. (3) These numbers need to be adjusted, on the one hand, for possible actions by State law enforcement agencies, and, on the other hand, for the de facto permission that lack of enforcement will give companies to engage in a larger but unpredictable number of anticompetitive mergers having a primarily local or regional impact. (4) Merging companies will clearly save over $100 million in filing fees and attorney fees, but consumers will pay many millions of dollars a year in additional monopoly rents. Depending on the magnitude of price increases that are the result of anticompetitive mergers and assumptions made with respect to point (3) above, the loss to consumers could be either less than or in excess of the savings for companies.

Because of the uncertainties in the tradeoff, we would recommend an alternative way of attacking the issue. Instead of giving a de facto waiver to all of these mergers, substantially reduce their filing fee and direct the enforcement agencies to reduce the initial reporting burden on small merging companies.

(3) Is it appropriate to increase the fees payable for larger transactions and, if yes, are the fees proposed in S. 1854 appropriate?

The fee paid for filing a premerger notice is a user fee and should in some rough way be apportioned to the costs imposed on the government. In a general way, it is likely that the larger transactions require more of the government's time and expenses, because larger transactions tend to be more complicated, involve more product lines and more geographic markets, thus more data and analysis. It is therefore appropriate to increase the fees for larger transactions.

S. 1854 increases the fee from $45,000 to $100,000 for transactions >$100 million. In 1998, this would have involved 1,326 transactions. We endorse this and further suggest that there should also be a mega-merger category for the 193 (4.2%) of transactions above $1 billion. These are the most complicated and most costly to investigate, on average, and we urge that the user fee for these be considerably higher, e.g., $500,000.[17]

(4) What effect will a reformed fee structure have on antitrust enforcement?

The federal antitrust effort has become dependent on H-S-R filing fees. By law, fees collected by the agencies in conjunction with the receipt of premerger notifications are for the exclusive use of the two antitrust enforcement agencies.[18] The

[17] These largest mergers also have the most dramatic impact on the public in terms of plant closings, layoffs, community desertions, etc. For this class, we urge that the merging companies be required to file information with the public as to the nature of the merger, the markets that are involved, and explanations for any claimed efficiency gains (including anticipated layoffs and plant closings). To increase the transparency of decisions regarding the largest mergers, we suggest that the agencies provide a written report when they close the investigation after a Second Request has been answered.

[18] See Pub. L. No. 101–162, sec. 605, 103 Stat. 1031 (1989), as amended by Pub. L. No. 101–302. Title II, 104 Stat. 217 (1990) ("Fees collected for [H-S-R filings] shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division'. . . *Provided further*

Continued

funds are split evenly between the Antitrust Division and the FTC, although the FTC uses roughly half of its funding for consumer protection.

In recent federal budgets, Congress has tied the agencies' funding to the premerger notification income. Again in 2000, 100% of the antitrust budget will come from filing fees.[19] We are not persuaded that it is in the public's long-term interest for antitrust enforcement to be tied to the level of merger activity in this way. For the moment, it provides some stability in funding, but of course this can change if the merger wave slows down—or if Congress changes the formulation for income. When an agency "earns" its funding as a result of a certain type of activity, it is subject to a skewing of its activities in favor of that activity. Moreover, in the case of antitrust, the merger wave, which drives mandatory deadlines under the HSR law, has forced the agencies to focus on mergers, to the exclusion of many other types of situations that might better deserve their focus. Roughly speaking, the two antitrust agencies now must spend 75% of their resources on mergers, up from about 33% not so many years ago. This implies that other types of antitrust concerns are probably getting less attention than they should.

However, starting from the current situation, it is important that any modifications to the PMN filing fees should preserve the current anticipated level of funding. We have seen that the fees which will be lost at the <$35 million end of the spectrum would have amounted to $76.5 million in 1998. The new fees that would be generated at the >$100 million end would be $55,000 (the new fee of $100,000 minus the old fee of $45,000) times 1,326 transactions, or $72.9 million. This amounts to an appropriations reduction of approximately $3.6 million, and is therefore not revenue neutral.[20]

Thank you for this opportunity to present the views of the American Antitrust Institute.

Senator ASHCROFT. Mr. Stephen Bolerjack is the senior counsel of the Ford Motor Company with the Antitrust and Trade Regulations Division.

His practice areas include franchising, antitrust and trade regulation.

It is a pleasure to have you here, Mr. Bolerjack. Please proceed.

STATEMENT OF STEPHEN BOLERJACK, COUNSEL, ANTITRUST AND TRADE REGULATIONS, FORD MOTOR CO., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. BOLERJACK. Thank you very much, Mr. Chairman, Senator Wyden. I am here today representing the National Association of Manufacturers, presenting their views on this, and we thank the Committee for the opportunity to be here today.

Three general points, all on the Hart-Scott reform issue. Number one, like everyone who has addressed the point so far, the NAM believes that merger enforcement by the antitrust agencies should not be funded through these fees.

It creates a built-in conflict of interest at the agencies. We lay out in our written remarks other deleterious effects of having the fees fund the agencies.

That fees made available to the Federal Trade Commission and the Antitrust Division herein shall remain available until expended.") Filing fees were initially proposed by Senator Howard Metzenbaum as a method of supplementing antitrust revenues, beginning in fiscal year 1990. The FTC's dependence on filing fees has increased from 20% in 1990 to 100% in f.y. 2000.

[19] This arrangement means that Congress can fund antitrust without taking anything from any other program's budget. If Congress were looking for an additional way to increase antitrust funding, it could look to the fines and penalties levied by the Department of Justice in antitrust cases. In most past years, this ran in the range of $100 million, but last year, as the Department became particularly active with respect to international cartels, it was over $ 1 billion. This money goes to a fund for crime victims, but some of it could probably be diverted to antitrust law enforcement.

[20] Although it is theoretically possible that some large transactions will not be undertaken as a result of the increased cost of filing under S. 1854, this seems highly unlikely in view of the fact that $55,000 is only .05% of a $100 million transaction. As noted earlier, we do not believe that the 37% reduction of the filings will actually translate into material savings for the agencies.

However, again, as the other speakers have already identified, we view this as more of a long-term effort. We do not believe these changes can occur immediately.

But the NAM strongly supports a return to the situation as it existed prior to 1989 where the general revenues are used to fund the agencies and there not be a linkage between merger filing fees, if any, and the funding of the agencies. We are proposing the fees be eliminated.

Point number two: We strongly support an increase in the threshold that was passed in 1976 and has not been changed, the $15 million threshold.

Again, as speakers have already addressed, and I will not belabor the point, we believe that for several reasons.

You have the agency staffers looking at very small transactions that have little or no chance of imposing an anti-competitive impact in any market.

We lay out the statistics in some detail in the written testimony, but for transactions $25 million and below, Second Requests are issued in approximately 9/10th of 1 percent of all filings. However, there is a $45,000 fee for each of those filings.

The FTC does not publicly release the data based on the $35,000—excuse me, the $35 million value of the transaction figure.

For the figure between $25 and $50 million that 9/10ths of 1 percent goes up to approximately 1.3 percent of the transactions that are subjected to a Second Request; again, a very, very small number.

And I would also submit that excluding these transactions from the filing requirement is not giving a waiver to the parties involved. If customers, competitors, or suppliers have concerns about a merger, they can certainly raise them with the Trade Commission or the Department of Justice.

They can take action at the Department of Justice by issuing a CID. At the Trade Commission there is subpoena authority.

It is not a free pass. It is not insulation.

The third point is Second Request reform. We have had a number of discussions—of horror stories. Everyone agrees there are horror stories.

These requests are incredible. They require the production of tens or hundreds of thousands or even millions of pages of documents.

To put things in perspective, we heard some figures about production of boxes of documents. Estimate between four and five thousand pages of documents per box, so we hear, "Gee, we are doing a great job. The request involved only 50 boxes."

That is a quarter of a million pages of documents, all of which have to be searched for, photocopied, indexed, and little sticky labels applied in the appropriate and designated method.

The legislation has created a cottage industry of this that Congress never intended to establish. It is not going to go away.

The NAM supports merger enforcement at an appropriate level.

The NAM recognizes that the agencies, number one, must receive significant amounts of information about problematic mergers on a very timely basis.

There is no one gainsaying that.

Another point is the ability to internally resolve these concerns. We have seen in the past the agencies attempt through one method or another, in very good faith, to attempt to resolve these concerns.

And the administration changes. They may view their attempts as more successful than their customers, if you will, have viewed them.

We feel that some reform of this must be embedded in legislation. And so the NAM strongly supports S. 1854, the amendment legislation.

Thank you for your time.

[The prepared statement of Mr. Bolerjack follows:]

PREPARED STATEMENT OF STEPHEN BOLERJACK, COUNSEL, ANTITRUST AND TRADE REGULATIONS, FORD MOTOR CO., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, and members of the Subcommittee, my name is Stephen Bolerjack. I am before you today representing the views of the National Association of Manufacturers (NAM).

The NAM is the nation's largest national broad-based industry trade group. Its 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. The NAM's member companies and affiliated associations represent every industrial sector and employ more than 18 million people.

The NAM's mission is to enhance the competitiveness of manufacturers and improve living standards for working Americans by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's strength.

I will focus my comments on the premerger notification regime established by the Hart-Scott-Rodino (HSR) Act in 1976. The NAM believes that the current system is imposing unneeded costs and delays on businesses engaged in an acquisition, and is much in need of reform.

Filings under the HSR Act are required from both sides for acquisitions of voting securities or assets in excess of $15 million (or 15 percent of the acquired party), a threshold that has not been changed in twenty-four years. Acquisitions involving very small businesses, those with total gross sales or assets of less than $10 million for the business and its owners, do not require a filing. In this case, the buyer still must pay a filing fee of $45,000, and the parties must serve a thirty-day "waiting period" after filing before the transaction may be closed. If the antitrust agencies believe the deal may present concerns, they can issue a "Second Request" for additional information, which requires both sides to search for, copy and index hundreds of thousands or even millions of pages of documents, produce stacks of responses to interrogatories, and provide executives for deposition. The deal may not be closed until both sides have "fully complied" with the Second Request, and served an additional twenty-day waiting period. The antitrust agencies' determination to issue a Second Request, the scope of the information and documents required, and the decision whether the parties have provided sufficient information to comply, are, in essence, unreviewable in court.

The NAM was very pleased last year when Senate Judiciary Committee Chairman Orrin Hatch raised the question of premerger filing fees with the Attorney General during oversight hearings of the Department of Justice. The NAM wrote Chairman Hatch to thank him for raising this issue since it has been a concern of the NAM for many years. In addition, NAM President Jerry Jasinowski also notified members of the Federal Trade Commission (FTC) and others with an interest—including the full membership of the Senate Committee on Commerce, Science and Transportation—that the NAM would try to pursue reform of HSR fees and processes. Thus, the NAM was even more pleased when Chairman Hatch began discussions and released draft HSR reform legislation for review. Prior to adjourning for the first session, Chairman Hatch introduced S. 1854, the Hart-Scott-Rodino Antitrust Improvements Act of 1999.

The NAM appreciates your reviewing the topic of HSR reform during the FTC reauthorization hearings. The NAM understands that you and your Subcommittee intend to work with Chairman Hatch during the second session to see what reforms

are possible for enactment this Congress. Thank you for exploring this issue and for any assistance that you can provide in order to bring about sound and meaningful HSR reforms as soon as possible.

1. The Filing Fee Should Be Eliminated

The NAM has long opposed the HSR filing fee. Currently set at $45,000 per premerger notification, it is a tax on transactions, not a user fee, and should be eliminated. The NAM would like to note that House Ways and Means Committee Chairman Bill Archer has expressed agreement with this view. In a letter to House Appropriations Committee Chairman Bill Livingston dated September 20, 1996, Chairman Archer noted that "the mere reauthorization of a preexisting fee that had historically been a tax would not necessarily require a sequential referral to the Committee on Ways and Means. However, if such a preexisting fee were fundamentally changed, it properly should be referred to the Committee on Ways and Means." Chairman Archer's letter specifically was about the proposal a few years back to substantially increase the fees once more without any offsetting reform. A copy of Chairman Archer's letter is attached, for the Subcommittee's convenience.

HSR fees have generated more than $200 million in revenue in recent years. The fees provide almost all the budget for the Antitrust Division of the Department of Justice and the Federal Trade Commission—funding not only merger enforcement, but also the Division's criminal enforcement efforts and many of the FTC's consumer protection activities.

Dependence on the merger filing fees for agency operations is bad public policy for three reasons. First, reliance on filing fees for funding exposes the agencies to a substantial funding cut when the current merger wave ends, which is inevitable. For example, filings dropped more than 40 percent between 1989 and 1991. Second, the filing fee eliminates any incentive for the agencies to achieve efficiencies by reducing the workload generated by the filings; decisions about new exemptions from filing that are warranted based on competition policy must be weighed against the resulting funding cuts. Third, overburdening the agencies with a large number of filings on deals with little or no competitive concerns in order to maintain funding diverts resources from matters of real concern.

Sound public policy requires that this built-in conflict of interest be eliminated. Congress should fund the law-enforcement missions of the agencies based on the priorities assigned to competing funding requests, as it did prior to 1989.

2. The Filing Threshold Should Be Increased

The $15 million "size of the transaction" threshold has been unchanged since the legislation was enacted in 1976, and should be substantially increased to account for inflation. It should also be indexed to account for future inflation, so the same problem will not need to be faced in the future. These changes will eliminate the need for filings on the smallest deals—those least likely to raise serious antitrust concerns but that nevertheless impose needless burdens on the antitrust agencies and the filing parties.

When passed in 1976, the HSR Act was described as covering only the largest acquisitions—the sponsors estimated about 150 transactions a year. Although the number of filings was never that small, the number of filings has rapidly increased in recent years, reaching almost 5,000 filings in 1998. If the original threshold had been indexed for inflation using the Consumer Price Index (CPI-U), it would now be more than $40 million and the number of filings would be substantially reduced. Using the gross domestic product deflator, the threshold should be around $27 million.

The threshold needs to be changed to account for the inflation of the past twenty-four years. The NAM supports the threshold proposed in S. 1854, the "Antitrust Improvements Act of 1999": $35 million. This in essence takes account of inflationary effects since President Ford signed the HSR Act and wisely places the updated threshold between the two indicators mentioned above.

In addition, the threshold needs to be indexed to account for inflation in the future to assure this problem does not recur. It is noteworthy that the fine for violating HSR is indexed to account for inflation, but the dollar value for determining whether a filing is required is not. Again, S. 1854 remedies this dichotomy. I would note as well that the fees—while not part of the HSR Act when passed—have more than increased from $20,000 to $45,000.

Restoring the line drawn in the original statute between small mergers, which would not be subject to the expense and delay required by premerger notification, and larger mergers, which would remain subject to the premerger review system, is unlikely to interfere with the mission of protecting competition. The statistics published by the FTC indicate that in fiscal year 1998, it received filings on 1,235

transactions valued at $25 million or less, and issued Second Requests in 11 transactions, or less than 1 percent. The agency does not publish statistics for transactions valued at $35 million or below, but for transactions valued between $25 million and $50 million, an additional 16 Second Requests were issued in 1,163 transactions, or about 1.3 percent of the time. Of course, a majority of the Second Requests in these larger mergers would likely be in mergers that would continue to be subject to premerger review.

Unfortunately, filing fees generate most of the budget of each of the agencies. To assure that the change in threshold, which will significantly reduce the number of filings, is revenue neutral, S. 1854 sets up a two-tier fee system: $45,000 for transactions valued between $35 million and $100 million, and $100,000 for transactions over $100 million. The NAM supports this increase in order to obtain the other benefits of the legislation, but continues to believe that filing fees should be eliminated.

3. Second Request Reform

The experience of NAM member companies is that the Second Request process is extremely burdensome and cries out for reform, giving due recognition to the need of the agencies for information necessary to conduct an antitrust analysis of the proposed transaction. Existing procedure encourages the agencies to issue requests for any information and documents they believe might conceivably be relevant to analysis or useful in possible litigation, without regard to the burden placed on the parties. The power of agency staffers to insist on literal compliance with an overbroad request is functionally unreviewable. Since a Second Request automatically extends the deadline for final agency decisions, the Second Request option is available for the agencies' convenience whenever there is a backlog.

Responding to a Second Request is an incredible undertaking. It frequently requires the parties to review the files of hundreds of employees, searching for documents which number in the hundreds of thousands or often millions of pages, which must be copied, numbered and indexed according to agency requirements. The parties must also prepare mounds of responses to interrogatories, frequently developing data never used in the course of business or creating databases to specifications set by agency lawyers and economists. The cost for this process is frequently measured in the millions of dollars, and sometimes in the tens of millions. These costs are frequently incurred in transactions that go forward as presented to the agency.

Examples of unreasonable actions by the agencies during the course of a Second Request abound. Every practitioner I know can tell stories of numerous boxes of documents returned unopened, refusals to eliminate demands for documents on subjects completely unrelated to the issues under investigation, and refusals by agency staff to even identify what they thought the issues were or the basis for any antitrust concern.

The current procedure provides no incentive whatever for the agencies to reduce the burden imposed by a Second Request. There is no practical way for the parties to obtain impartial, third party review of agency actions taken pursuant to a Second Request. Thus, the incentive among agency staff is to insist that the parties literally comply with the request to eliminate any possible criticism for missing any data. A number of years ago I was discussing a potential Second Request with a staffer and requested that a product line that the staffer agreed was unlikely to raise competitive concerns not be included. The staffer refused to exclude the product line, and frankly told me that issuing a full Second Request raised no questions from his superiors, but he had to justify any changes from the standard form or exclusions of data requested.

The Second Request procedure is broken. The balance of power is so far skewed toward the agencies that these requests are placing an enormous burden on business. For this reason the NAM strongly supports S. 1854, sponsored by Senators Hatch, Mike DeWine and Herb Kohl. The NAM recognizes that some of these problems can be alleviated through internal agency procedures. Nevertheless, only legislative changes will ensure continued and long-term relief.

The NAM supports effective merger oversight, and recognizes that the agencies need significant amounts of information in a timely manner to perform this mission. S. 1854 protects the ability of the agencies to obtain needed information, but also protects parties to a transaction under review from unnecessary burdens. First, the bill limits the ability to issue burdensome requests; the agencies may not request information that is "unreasonably cumulative or duplicative," or requests that impose a burden or expense on the parties that outweighs any likely benefit to the agencies in conducting "a preliminary antitrust review of the proposed transaction." This will help prevent abuses by staffers insisting on literal compliance with unreasonable requests. Second, the bill also sets a standard for "substantial compliance"; a party has complied if there is no "deficiency that materially impairs the ability

of [the agencies] to conduct a preliminary antitrust review of a proposed transaction." In any review by a third party, this focuses attention on the legitimate need for the information, rather than on literal compliance with the request.

Finally, S. 1854 provides a procedure for the parties or the agencies to obtain review by a federal magistrate of Second Request compliance disputes. The availability of review by a neutral third party provides balance to a process that is skewed toward the agencies, and will provide the incentive, currently missing, for the agency staffs to reduce the burden imposed on business. The NAM believes the parties will carefully consider all alternatives before invoking the procedure and taking the risks inherent in judicial review, and the review will not become a part of most or many Second Request proceedings.

For these reasons, the NAM strongly supports and urges enactment of S. 1854 and, again, appreciates the opportunity to appear before you. I will be happy to try to answer any questions that you may have.

Committee on Ways and Means
U.S. House of Representatives
Washington, DC

September 20, 1996

The Honorable Bob Livingston
Chairman
Committee on Appropriations
H–218 U.S. Capitol
Washington, DC 20515

Dear Chairman Livingston:

I am writing to you regarding the proposed increase in Hart-Scott-Rodino fees adopted by the Senate Appropriations Committee in an amendment to H.R 3814, the "Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997." I strongly object to any increase in the overall amount of these fees and wish to inform you of my opposition, especially as you work on a possible continuing resolution.

As you know, I am committed to protecting the jurisdictional interests of the Committee on Ways and Means and to ensuring that all revenue measures are properly referred to this Committee. To this end, the Committee on Ways and Means relies upon the statement issued by Speaker Foley in January 1991 (and reiterated by Speaker Gingrich on January 4, 1995) regarding the jurisdiction of the House Committees with respect to fees and revenue measures. Pursuant to that statement, the Committee on Ways and Means generally will not assert jurisdiction over "true" regulatory fees that meet the following requirements:

> (i) The fees are assessed and collected solely to cover the costs of specified regulatory activities (not including public information activities and other activities benefiting the public in general);
>
> (ii) The fees are assessed and collected only in such manner as may reasonably be expected to result in an aggregate amount collected during any fiscal year which does not exceed the aggregate amount of the regulatory costs referred to in (i) above;
>
> (iii) The only persons subject to the fees are those who directly avail themselves of, or are directly subject to, the regulatory activities referred to in (i) above; and
>
> (iv) The amounts of the fees (a) are structured such that any person's liability for such fees is reasonably based on the proportion of the regulatory activities which relate to such person, and (b) are nondiscriminatory between foreign and domestic entities.

Additionally, pursuant to the Speaker's statement, the mere reauthortization of a preexisting fee that had not historically been considered a tax would not necessarily require a sequential referral to the Committee on Ways and Means. However, if such a preexisting fee were fundamentally changed, it properly should be referred to the Committee on Ways and Means

Currently, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 imposes a $45,000 premerger notification filing fee on certain acquisitions. Proceeds from these fees are used as offsetting collections in appropriating funds for the Federal Trade Commission (the "FTC") and the Antitrust Division of the Department of Justice (the "Antitrust Division"). The modification proposed by the Senate Appropriations Committee would establish a three-tiered fee structure (ranging from $25,000 to

$95,000). Proceeds from these fees would be used to fund entirely the budgets of the FTC and the Antitrust Division.

These increased fees are inconsistent with requirements (i), (ii), and (iv) listed above. The FTC does far more than merely regulate acquisitions subject to the Hart-Scott-Rodino Act. Indeed, there is reason to believe that the amount of current premerger notification fees substantially exceeds the costs of the FTC and Antitrust Division in enforcing the Hart-Scott-Rodino Act and evaluating reportable transactions under the antitrust laws. Under the proposed fee increase, any pretext regarding linkage of the fees to regulatory costs is abandoned. This is plainly an attempt to fund the entire FTC and Antitrust division, which both have broader consumer protection responsibilities, by imposing a tax on a small category of regulated entities. Accordingly, any additional premerger notification "fees" are more properly viewed as taxes within the jurisdiction of the Committee on Ways and Means.

The jurisdictional interest of the Committee on Ways and Means relates solely to the use of the Hart-Scott-Rodino premerger notification fees as a means of generally financing the FTC and the Antitrust Division. We do not have an interest regarding how much funding should be available to the FTC and the Antitrust Division and how Hart-Scott-Rodino fees should be designed (as long as the amount of fees are reasonably related to the relevant reguiatory costs and fairly apportioned among affected entities).

I look forward to working with you to address these concerns. With best personal regards,

Sincerely,

Bill Archer
Chairman

Senator ASHCROFT. Senator Wyden.

Senator WYDEN. I do not have any questions. I think it's been an excellent panel. And you have—you have the challenge of trying to compete with the Federal Trade Commission and all that we asked of them, but your comments have been very, very helpful. And we appreciate it and we will look carefully at them as we review the statute. Thank you.

Senator ASHCROFT. Thank you. I would like for any of you to answer this for me.

The proposed legislation is to reduce the workload by about 40 percent of the cases of merger applications.

If you were to look at that 40 percent in the last four or 5 years, and I think this may be your Second Request language, Mr. Bolerjack, but how many of those would have been denied as mergers of that 40 percent?

Mr. BOLERJACK. That is very difficult to answer. I think if you get into our written testimony, even where they imposed the Second Request, you are talking about a grand total, for mergers of under $50 million, of 26 Second Requests out of—I don't have the number handy, not that it matters.

Senator ASHCROFT. Well, what I am asking is not—it seems to me that after a Second Request it still might be that they do not deny the merger.

Mr. BOLERJACK. Absolutely, yes, sir.

Senator ASHCROFT. So does anyone know the answer to the question of how many are denied?

Mr. Foer.

Mr. FOER. I have done some analysis that is in the prepared statement. The numbers I was working with were from fiscal year 1998, which were the last published——

Senator ASHCROFT. Yes.

Mr. FOER. —but what it came down to was probably seven or eight mergers a year that would have been stopped or substantially changed would fall through the net.

And I say would fall through the net, because I do not think anybody would go after them once the threshold is lifted.

They would have to be attacked after consummation of the merger, which is very difficult, costly and often usually in the past did not result in very effective relief.

So I think that counselors——

Senator ASHCROFT. But the law is the same, is it not? I mean, basically the offensive law——

Mr. FOER. It would be——

Senator ASHCROFT. —so what you are saying is a court would not reach the same judgment as the FTC would.

Mr. FOER. What I am saying is I do not think that the FTC or Justice Department would ever challenge these.

Senator ASHCROFT. They would not even think it was worth it.

Mr. FOER. It would not be worth it.

Senator ASHCROFT. So it is not a very—well, that—that answers my question.

Mr. FOER. But I would like to add one more point.

Senator ASHCROFT. Because if it is not worth it to do it, why were they doing it in the first place?

And if—if we take a number of—of things that are worth doing down to zero, that should settle this question.

Mr. FOER. May I respond?

Senator ASHCROFT. Well, I—yes, you can. Go ahead.

Mr. FOER. Well, first of all, there is a difference in the cost benefit analysis, if you are going to seek an injunction before the merger or if you are going to have to come after it after the eggs have been broken and mixed together and fried. That was—that was too difficult to do.

On relatively small mergers, it just will not be done. And these mergers will, in effect, have a free pass.

Now, is it important? We said—I said seven or eight. But if counselors are now——

Senator ASHCROFT. I understand your other point——

Mr. FOER. Okay.

Senator ASHCROFT. —which you have made in your remarks. I got the answer to my question and—but you—you—you—you think that there is a certain appropriate chilling effect that the filing has.

Mr. FOER. Yes.

Senator ASHCROFT. And you do not want to lose that?

Mr. FOER. Yes.

Senator ASHCROFT. I—I understand that.

Mr. ADLER. May I add a comment, Mr. Chairman?

Senator ASHCROFT. Yes, you may.

Mr. ADLER. If you go back to the original intent of Hart-Scott-Rodino, it was never intended that it was going to pick up absolutely every merger. The legislative history shows that it was understood that some mergers would not be pre-reported. So if you miss seven or eight in the reporting process, that is perfectly consistent with the original intent of Congress.

Senator ASHCROFT. Well, if—and if the harm is not so egregious as to even when it is understood later on occasion the pursuit by the authorities, you've got to wonder whether the harm is that substantial to the culture.

[Pause.]

Let me just clarify your points about fees. Your point is not that these fees just fund the merger supervision activities, but that they fund the entirety of the FTC, so it is a massive subsidization.

Mr. ADLER. Yes. Because if——

Senator ASHCROFT. But you are against—you would be against a fee which just funded the merger supervision?

Mr. ADLER. Yes. Because what you would have would be the acquiring companies in thousands of benign and even procompetitive mergers cross-subsidizing the enforcement costs for the Exxon/Mobils and other huge cases that are very resource consuming.

Senator ASHCROFT. Well, you could avoid a cross-subsidy if your fee structure were related to cost like bank examiners.

If they spend 2 days in the bank, they charge 2 days. If they spend 2 years, they charge 2 years, so in theory, you are against even if they had specific cost allocations, you are against it?

Mr. ADLER. No, and we say in our prepared statement that if you could fashion a fee that would be related to cost, that would be more akin to a user fee, and we would not oppose that. Indeed, that is what Germany does.

Senator ASHCROFT. I am not proposing it. I just kind of wanted to clarify what your position was.

I have only been involved in one merger myself. It was 31 years ago, I think, my wife would remind me.

There was a fee attendant there too. And I do not know what we were subsidizing, but it has been a good merger.

I do not have any further questions, if the Senator from Oregon, I thank you for your kindness and you all have—I—I concur with him in that your testimony has been valuable and helpful and straightforward. I appreciate it.

And I would now like to call the next group of witnesses to the witness table.

[Pause.]

It is my pleasure to welcome you. I thank you for your patience, and I am delighted that you are here to help us.

We first call upon Mr. Daniel Jaye, the Chief Technology Officer for Engage Technologies. Engage delivers interactive data based marketing products and information services.

Mr. Jaye, thank you for coming to help us understand better this area of concern related to privacy. Thank you.

STATEMENT OF DANIEL JAYE, CHIEF TECHNOLOGY OFFICER, ENGAGE TECHNOLOGIES

Mr. JAYE. Thank you, Mr. Chairman. I appreciate the opportunity to testify before you today on these issues of importance to your Committee, to Internet users, and to the future of our Internet economy.

As you said, I am Daniel Jaye, with Engage Technologies of Andover, Massachusetts, a CMGI company.

Engage is a leading provider of Internet marketing solutions.

Engage's technologies and services allow web site operators and advertisers to tailor their commercial and editorial content in innovative ways likely to be of the greatest interest to a visiting Internet user—all without ever learning an individual's identity.

I would like to address two topics today; first, Engage's technology is a powerful example of just how effectively the marketplace can and will meet consumer demand for privacy; and second; industry self-regulation as meaningful further assurance of consumer privacy online.

Engage's business model not only accommodates, but is in fact borne of consumers' interest in protecting their privacy online.

When I joined with CMGI Chairman and CEO David Wetherell to create Engage in 1995, we were guided by a few simple but fundamental propositions.

If the Internet was truly to deliver an abundant array of information and services that were both affordable and appealing to a mass audience, the medium would require advertising support.

And if that support was to prove sustainable, the medium would have to demonstrate particular proficiency at delivering the right ads to the right audience.

At the same time, all businesses agree that, in order for the Internet to be successful, consumers must have trust and confidence in the medium.

However, different companies have different business models.

In our business, we believed that privacy-sensitive technology brings a competitive advantage.

From the onset, in our approach, marketers do not need to know the actual identity of a consumer to effectively market online.

In our approach, they simply need to know the interests, general vicinity and broad demographics of a website visitor to provide information about the products and services that the visitor is most likely to find useful.

At Engage we do not collect names, e-mail addresses, home addresses or personal or other sensitive information of any kind.

And we firewall that non-personally identifiable information we collect through a patent-pending technology we call dual-blind identification.

This ensure that individual websites can never determine a web browser's identity or know what other sites the user may have visited.

Indeed, Engage itself does not maintain information about when a browser visits a particular web page. Instead, we accumulate information about the aggregate amount of time spent on different types of content to gain some sense of a visitor's likely interest, but not who that visitor is or when and where they have been on the web.

Our solution is built upon the principle that it should never be possible for us or anyone else to determine or even triangulate a visitor's real world identity based on the data that we store.

We have built our business on the fundamental belief that consumers will feel comfortable with a technology specifically designed to protect their privacy.

Consumer comfort and security is no less critical to the businesses who are our customers.

Advertisers and website publishers that want to protect their brand and retain loyal customers cannot afford to do business with companies that ignore consumer privacy concerns.

And, of necessity, they will ultimately embrace only those technologies and practices that can provide tailored and effective online advertising without compromising consumer privacy.

This is a powerful marketplace force, and the growing industry support of technologies like ours is proof that the market is working.

Beyond the protections inherent in technologies such as ours, policymakers can and should rely as well on our industry's commitment to and strong self-interest in effective self-regulation.

In the few short years over which the Internet has blossomed, the online industry has already made tremendous strides in voluntary or industry-mandated adoption of the right way to do business.

Online companies can ill-afford to be out of step with rising industry standards for privacy protection.

Industry self-regulatory programs that establish and enforce meaningful privacy principles are thus essential to effective consumer privacy protection.

Our industry has quickly and aggressively risen to this challenge.

The Online Privacy Alliance has brought together more than 90 associations and corporations in a cross-industry coalition that has produced not only widespread implementation of its substantive guidelines, but also significant progress in consumer education on this subject.

Consumers wishing to make informed choices about the privacy practices of the websites they visit have become increasingly familiar with the seal and the guidelines of the various third-party organizations that have come to police compliance with online privacy standards. These include TRUSTe and the Better Business Bureau's BBBOnline program.

Beyond this—these industry-wide self-regulation efforts, other groups have been at work to tailor standards to particular segments of the online marketplace.

We are participating in the Network Advertising Initiative, working with our counterparts, to expand industry standards in a way that ensures consumer confidence in the privacy afforded by the critical marketing support services our businesses provide.

One tool common to this array of programs is the posting of privacy statements and the full disclosure in simple language and in plain sight, of all data collection and use practices.

If I can just have a minute to finish on the self-regulatory principles?

Senator ASHCROFT. Please——

Mr. JAYE. Thank you. Numerous companies now contractually require publishers to post privacy policies.

Another standard approach affords consumers the ready choice to opt out of information collection and use.

As you know the Federal Trade Commission has encouraged our industry's extensive self-regulatory efforts, and now the agency has

convened a new Advisory Committee on Online Access and Security.

As a member of this committee, the committee is working to develop even more effective means to ensure that consumers feel and are safe and secure in their online travels.

These self-regulatory and FTC oversight initiatives bolster what are already formidable marketplace checks on online businesses' protection of consumer privacy.

Effective self-regulation of the Internet is not only the right thing to do, it is the necessary thing to do.

In fact, 70 to 80 percent of the ad space on the Internet today is unsold or undersold.

For Web publishers to attain profitability, they must be allowed to deploy and use the innovative marketing capabilities that initially attracted advertisers.

Thus, this is not the time to risk undermining the effectiveness of online advertising.

The viability of e-commerce, of an advertising-supported Internet, and thus of all of the Internet's tremendous economic and societal benefits depends on it.

Thank you.

Senator ASHCROFT. Thank you. You were true to your one-minute word. Thank you.

[The prepared statement of Mr. Jaye follows:]

PREPARED STATEMENT OF DANIEL JAYE, CHIEF TECHNOLOGY OFFICER, ENGAGE TECHNOLOGIES

Thank you, Mr. Chairman. I appreciate the opportunity to testify before you today on these issues of importance to your Committee, to Internet users, and to the future of our Internet economy.

My name is Daniel Jaye. I am the Chief Technology Officer and Co-Founder of Engage Technologies, Inc. of Andover, Massachusetts.

Engage is a leading provider of "next generation online marketing solutions." Just what does that description mean, free of at least some of the Internet jargon?

It means that Engage technology and services allow web site operators and advertisers to tailor their commercial and editorial content in innovative ways likely to be of the greatest interest to a visiting Internet user—all without ever learning an individual's identity.

And we know how important that is to Internet companies, as Engage is a majority-owned operating company of CMGI, Inc.—an Internet incubator and investment company that funds or operates a tremendous array of successful Internet businesses.

I would like to address two topics today: first, Engage's technology as a powerful example of just how effectively the marketplace can and will meet consumer demand for privacy; and, second, industry self-regulation as meaningful further assurance of consumer privacy online.

Let me begin, then, with an explanation of how Engage's business model not only accommodates, but is in fact borne of, consumers' interest in protecting their privacy online. When I joined with CMGI Chairman & CEO David Wetherell to create Engage in 1995, we were guided by a few simple but fundamental propositions. If the Internet was truly to deliver an abundant array of information and services that were both affordable and appealing to a mass audience, the medium would require advertising support. And if that support was to prove sustainable, online advertising would have to make up in quality what it lacked in quantity: the medium would have to demonstrate particular proficiency at delivering the right ads to the right audience. At the same time, all businesses agree that, in order for the Internet to be successful, consumers must have trust and confidence in the medium.

Different companies have different business models. In our own business, we believed that privacy-sensitive technology would bring a competitive advantage. So, from the outset, Engage has developed a unique technology in which online marketers understand the interests of web site visitors based strictly upon anonymous,

non-personally identifiable information. In our approach, marketers do not know the actual identity of a consumer to effectively market online. They simply know the interests, general vicinity, and broad demographics of a web site visitor in order to provide information about products and services that visitor is most likely to find useful. We do not collect names, e-mail addresses, home addresses, or personal (or otherwise sensitive) information of any kind.

And we firewall the non-personally identifiable information we collect through a patent-pending technology we call "dual-blind" identification: this ensures that individual web sites can never access the identity even of the individual's web browser or know what other sites a user may have visited. Indeed, Engage itself does not maintain information about when a browser visits a particular web page. Instead, we accumulate information about the aggregate amount of time spent on different types of content in order to gain some sense of a visitor's likely interests—but not who that visitor is or just when and where they have been on the web. Our solution is built upon the principle that it should never be possible for us (or anyone else) to determine (or even "triangulate") a visitor's real world identity based on our abstracted data.

We have built our business on the fundamental belief that consumers will feel comfortable with a technology specifically designed to protect their privacy. Consumer comfort and security is no less critical to the businesses who are our customers. Advertisers and web site publishers that want to protect their brand and retain loyal customers cannot afford to do business with companies that ignore consumer privacy concerns. And, of necessity, they will ultimately embrace only those technologies and practices that can provide tailored and effective online advertising without compromising consumer privacy. This is a powerful marketplace force, and the growing industry support of our technology is proof that the market is working.

Beyond the protections inherent in technologies such as ours, policy makers can and should rely as well on our industry's commitment to—and strong self-interest in—effective self-regulation. In the few short years over which the Internet has blossomed, the online industry has already made tremendous strides in voluntary or industry-mandated adoption of "the right way" to do business. And for the same competitive reasons I mentioned a moment ago, online companies can ill afford to be out of step with rising industry standards for privacy protection.

Industry self-regulatory programs that establish and enforce meaningful privacy principles are thus essential to effective consumer privacy protection. (Indeed, other countries' forays into governmental regulation of privacy have only confirmed the greater efficacy of active industry self-regulation.) Our industry has quickly and aggressively risen to this challenge.

The Online Privacy Alliance has brought together more than 90 associations and corporations in a cross-industry coalition that has produced not only widespread implementation of its substantive guidelines, but also significant progress in consumer education on this subject.

Consumers wishing to make informed choices about the privacy practices of the web sites they visit have become increasingly familiar with the seal and the guidelines of the various "third party" organizations that have come to police compliance with online privacy standards. These include TRUSTe, of which Engage is proud to be a licensee and sponsor, and the Better Business Bureau's BBBOnline.

Beyond these industry-wide self-regulation efforts, other groups have been at work to tailor standards to particular segments of the online marketplace. We are participating in the Network Advertising Initiative, working with our counterparts in online network advertising to expand industry standards in a way that ensures consumer confidence in the privacy afforded by the critical marketing support services our businesses provide.

One tool common to this array of self-regulatory programs is the posting of privacy statements and the full disclosure, in simple language and in plain sight, of all data collection and use practices. And, reflective of how our competitive industry is driven to compete in terms of privacy protection as well, Engage has been a leader in contractually requiring our customers to post a privacy page disclosing their relationship to us and to provide a direct link to our privacy page.

Another standard approach affords consumers the ready choice to "opt out" of information collection and use. In our case, consumers need only visit our *www.engage.com* privacy page, click on our opt-out link, and their browser will no longer be the subject of any behavioral information collection or use.

As you know, the Federal Trade Commission has encouraged our industry's extensive self-regulation efforts, and now the agency has convened a new Advisory Committee on Online Access and Security. I am proud to be joining with this broad array of industry and consumer representatives working to develop even more effec-

tive means to ensure that consumers feel—and in fact are—safe and secure in their online travels.

These self-regulation and FTC oversight initiatives bolster what are already formidable marketplace checks on online businesses' protection of consumer privacy. The needs of our advertisers to attract—and not repel—consumers will ensure that we get the job done.

Effective self-regulation of Internet privacy is thus not only the right thing to do—it's the necessary thing to do. In fact, 70–80 percent of the ad space on the Internet today is unsold or undersold. For Web publishers to attain profitability, they must be allowed to deploy and use the innovative marketing capabilities that initially attracted advertisers.

Thus, this is no time to risk undermining the effectiveness of online advertising. The viability of e-commerce, of our advertising-supported Internet, and thus of all the Internet's tremendous economic and societal benefits depends on it.

Thank you.

Senator ASHCROFT. It is my pleasure now to call upon the Honorable William H. Sorrell.

Mr. Sorrell is the Attorney General of the State of Vermont and it is a pleasure to have you here, Mr. Sorrell.

STATEMENT OF WILLIAM H. SORRELL, ATTORNEY GENERAL, STATE OF VERMONT

Mr. SORRELL. Thank you very much, Mr. Chairman, Senator Wyden.

I am pleased to be here and grateful to the Committee for hearing from the National Association of Attorneys Generals on certain of the matters that are before the Committee today.

I have prepared some written comments, which I have filed and I hope will be accepted as part of the record of these——

Senator ASHCROFT. Without objection, they will be included and so would any submissions by those who join you on the panel.

Mr. SORRELL. Thank you, Mr. Chairman. I want to just—in less than 5 minutes—highlight a few of the points that I raise in my written comments.

First of all, we support the reauthorization of the Federal Trade Commission.

The FTC has a long history of excellent work to protect consumers in this country.

At the same time, I want to highlight the fact that the Attorneys General around the country have a long history of aggressively enforcing our consumer protection laws.

We are at ground zero, if you will, in dealing with consumer fraud.

We have worked individually. We have worked on a multi-state basis. We have worked collectively with the FTC, particularly in the area of telemarketing fraud—and I think effectively as partners.

But as the chair suggested earlier this morning, we are in a changing world and with the Internet the pace of change, as we heard at an AG's meeting in Palo Alto, California, last month—on the Internet that exponential change is now an accepted sociological fact.

And so we, in trying to exert our traditional enforcement powers are struggling to keep up with this rate of exponential change.

We have taken aggressive actions to deal with—Senator Brownback was talking—online pharmacies and unlicensed practice of medicine and unlicensed pharmacies doing business.

We have also taken action in a number of states to deal with the sale of Bidis, or flavored cigarettes to children.

We've dealt with issues of false health claims that we heard the chair of the Federal Trade Commission talking about earlier.

We have also been very, very concerned about consumer privacy, about the collection of information about what consumers do, and not just the purchases they make on the Internet, but the sites that they browse, and where they browse within individual sites.

And we are very concerned about the technology that allows the collection of vast amounts of personal data and very easy transmittal of this data to other entities for commercial and other purposes.

We have—through our chair, our president this year, Washington Attorney General Christine Gregoire set up a privacy study group. And we are very actively concerned as Attorneys General—we will be meeting next month and talking about the Internet. And we will be talking about privacy. And those will be ongoing concerns for us.

We urge you that whatever you—what action you should take in regulating the Internet commerce going forward that you not preempt the States' ability to go our own ways.

In the same way that you have given us the authority in telemarketing fraud and such to have the States be laboratories and to go further, if they wish, to protect individual state's consumers.

We urge you to continue to give us that right to do so as it relates to Internet commerce.

Certainly, with the rate of exponential change, with the thousands of websites coming online daily, with those who prey upon people, either criminally from child pornography, to online gaming, to those who fraudulently conduct online commerce, the challenges to the FTC and to the States to try to stay abreast of that and to try to regulate those activities that prey upon consumers—the challenges are great.

We need adequate resources to be able to do that. The Federal Government has been generous in terms of giving resources to the Department of Justice and to the FTC to deal with telemarketing fraud, also to the states.

We have greatly benefited from Federal resources at the state level in dealing with telemarketing fraud. We hope that as you continue your work in this area relating to the Internet that you will see fit to provide adequate resources for us to be able to do the job.

Thank you very much, Mr. Chairman.

Senator ASHCROFT. Thank you, Attorney General Sorrell.

[The prepared statement of Attorney General Sorrell follows:]

PREPARED STATEMENT OF WILLIAM H. SORRELL, ATTORNEY GENERAL, STATE OF VERMONT

Chairman Ashcroft, Senator Bryan, and members of the Subcommittee, thank you for your invitation to testify today on issues of importance to the state Attorneys General: supporting and strengthening the long-standing partnership between the states and the Federal Trade Commission in protecting this nation's consumers; protecting consumers as they navigate the Information Superhighway; and preserving the privacy of those consumers.

The Attorneys General strongly support the work of the Federal Trade Commission, with which we have had an ongoing, longstanding, and valued partnership. As the Commission stated after the passage of the FTC's Telemarketing Sales Rule,

which gave the states the ability to go into federal court and obtain nationwide relief against fraudulent telemarketers, there are now "fifty-one cops on the beat" against telemarketing fraud. This collective enforcement approach has been very successful. Since 1996, the states have obtained more than 300 injunctions against and over 150 convictions of fraudulent telemarketers. Many of those injunctions have been obtained in concert with the FTC, and the FTC has served as an invaluable resource to the states as they pursue fraudulent telemarketers. In addition, with the help of funding from the Department of Justice, the National Association of Attorneys General has coordinated the training of over 500 state and local law enforcers from all 50 states, the District of Columbia, and three territories in the investigation and prosecution of fraudulent telemarketers. This collaborative effort with district attorneys and state and local investigators has allowed state and local governments to leverage scant resources and shared expertise in the telemarketing fraud arena.

The states and the FTC have continued their partnership as fraud has shifted from the phone lines to cyberspace. Joint state-federal enforcement sweeps and surfs—targeting false health claims, fraudulent business opportunities, and pyramid schemes—have put cyber-scammers on notice that we will continue our "zero tolerance" policy, no matter the medium chosen to exploit consumers.

State Attorneys General have recently recognized the need for a coordinated, "real time" state and local effort to root out Internet fraud. Federal, state and local law enforcers are already at work to develop a "24/7" network of investigators and prosecutors dedicated to the detection, investigation, and prosecution of Internet criminals. Certainly, increased funding to ensure that the state and local network is strong, smart, and well-equipped will, as in the telemarketing arena, enable state and local enforcers to provide a valuable complement to federal civil and criminal cyber-enforcement efforts.

We look forward to a continued cooperative relationship with the FTC.

Apart from our coordinated efforts with the FTC, the nation's Attorneys General have long been the local cops on the beat protecting consumers from fraudulent business practices. In the early 1990's, the office of Iowa Attorney General Tom Miller revolutionized telemarketing fraud enforcement when it instituted an undercover taping protocol through which fraudulent telemarketers' deceptive pitches were captured on tape. Iowa's work provided the evidence for myriad state and local criminal and civil prosecutions of fraudulent telemarketers, both in this country and abroad. Iowa's work grew into the National Tape Library, a joint state-federal repository housing tens of thousands of fraudulent tape recordings. The National Association of Attorneys General currently serves as chair of the joint state-federal steering committee that oversees the operation of the Library.

In fulfilling our mission to protect the consumers in our states, we have followed fraudulent scammers as they moved from Main Street to the Information Superhighway. The Attorneys General have pursued such traditional law violations as deceptive sales, investment and business opportunity scams, pyramid schemes, and false health claims onto the Internet. In addition, the states have taken the lead on some law enforcement problems that are peculiar to the Internet. Led by Kansas Attorney General Carla Stovall, the Attorneys General have brought law enforcement actions against dozens of defendants for the illegal online sale of prescription drugs. The Attorneys General also have attacked the illegal sale of India bidis cigarettes to this nation's youth; online auction fraud; Internet gambling; and Internet spamming, cramming, and slamming. What has emerged as a result of our activity is a united and concerted assault at the state level on myriad forms of Internet fraud.

Protecting consumers who travel on the Internet is a priority for the state Attorneys General. When she became NAAG's President last summer, Washington Attorney General Christine Gregoire deemed the Internet as one of the major initiatives of her Presidential year. Toward that end, last month NAAG convened a conference at Stanford University Law School to address the impact of the Internet and high technology on the mission of the Attorneys General. The conference, which was hosted by California Attorney General Bill Lockyer, highlighted the ongoing Internet-related law enforcement initiatives undertaken by the Attorneys General and provided a forum at which Attorneys General could grapple with upcoming Net issues and challenges. We also addressed the best means by which state Attorneys General and their federal and local partners can attack cybercrime.

The state Attorneys General have a particular interest in addressing consumers' concerns about protecting their privacy as Internet commerce becomes the norm. NAAG has created a Privacy Working Group, which I serve as co-chair. Many Attorneys General have introduced legislation that will enhance the privacy of consumers who transact business over the Internet. Idaho Attorney General Al Lance, Illinois

Attorney General Jim Ryan, Minnesota Attorney General Mike Hatch, Missouri Attorney General Jay Nixon, New York Attorney General Eliot Spitzer, Washington Attorney General Christine Gregoire, and I have recently introduced Internet privacy legislation targeting spam; prohibiting Internet companies from selling personal information obtained from Internet users; and requiring web sites that collect information from users to disclose how that information will be used.

The concerns of the Attorneys General and our constituents are also reflected in the Report of Washington Attorney General Christine Gregoire's Privacy Task Force. The Task Force included business, consumer, and legislative leaders. During a four-month span, more than 125 consumers testified, wrote to, or e-mailed the Task Force. Consumers' concerns included: the frequency with which personal information is collected; the entities with whom that information is shared; the disclosure of that personal information without the consent or knowledge of the consumer; consumers' lack of access to the information that is collected from and disseminated about them; the accuracy of the information that is disseminated; and the need for meaningful regulatory and/or enforcement approaches to these issues.

In closing, I want to stress a couple of points. First, any federal law enforcement approach to protecting consumers who travel the World Wide Web must include the states. We ask you to take such steps to ensure that the states can play a full and constructive role in the effort to police the Internet. Second, we urge you to not preempt the states. As fifty-one Attorneys General recently said to each of you with respect to pending Electronic Signatures bills, "[w]e have strong concerns about any federal legislation that preempts state laws in areas traditionally reserved to the states, particularly when there should be no conflict between the federal goals and state jurisdiction. . . ." Consumer protection on the Internet is one such area.

Thank you.

Senator ASHCROFT. Ms. Deirdre Mulligan has done work focusing on developing legal and technological means to increase individual control over personal information that is held by commercial and governmental parties.

And it sounds to me like your area of expertise is the subject of what we are interested in, so we are very pleased to hear from you.

Would you proceed with your testimony?

STATEMENT OF DEIRDRE MULLIGAN, STAFF COUNSEL, CENTER FOR DEMOCRACY AND TECHNOLOGY

Ms. MULLIGAN. Thank you. It's a pleasure to be here. And you made me realize that I need to rewrite my biography. It is a little bit of a mouthful.

CDT is, as you said, a non-profit. We work on First Amendment and privacy issues, particularly in the burgeoning area of the digital marketplace.

We firmly believe that the Internet has much potential to offer consumers and individuals a vibrant experience, both for our cherished democratic values, and also for the exchange of things like goods and services.

We also believe that the Internet poses some real risks, and right now one of those risks happens to be the loss of personal privacy.

We firmly believe that technology has a role to play here. As Mr. Jaye has elaborated, there are many technical decisions that are being made in the marketplace today about where to store data, what kind of data to collect, how to retain it. There are standards being developed, such as the platform for privacy preferences and tools that will hopefully come to the marketplace to enable individuals to exercise realtime control over their data.

We also firmly believe that there is a role for self-regulation to play and that both through technology leadership and through policy leadership, by stepping up to the plate and working with the Federal Trade Commission, the state AG's, and with consumer or-

ganizations and privacy organizations, that the private sector can help set benchmarks.

We also believe that Congress has a role to play here. We believe that the Children's Online Privacy Protection Act, which was a product of some very fine leadership by members of the full Committee, working with the Federal Trade Commission, the business community, children's advocates and privacy advocates, provided a sound model for crafting public policies that can map onto the Internet in an incredibly sensitive and technologically appropriate way.

I have an article that I would like to submit for the record. What I would like to do is highlight a few of the new issues that are facing consumers today.

There has, indeed, been an effort in the business community to address some consumer concerns. We know that there are laudable efforts such as TRUSTe and BBBOnline to promote raising the privacy bar in the private sector. There are members of those organizations. Unfortunately, those members are still relatively small. If you take TRUSTe, right now, membership is about 1,000.

As we heard from Commissioner Swindle, there are about three million commercial websites, and they are growing tremendously each month.

You can see that self—self-regulatory agencies have an awful lot of water to carry if they want to get from 1,000 to—3 million and growing.

We believe that their efforts need to be bolstered and that legislation should, in fact, provide a baseline upon which good business practices will produce a race to the top.

But consumers on the Internet looking for privacy policies, unfortunately, sometimes find them very difficult to read.

An expert in communications to the public who has a broad range of specialities, particularly looking at consent forms in the context of managed care and other things, sent me an analysis of a privacy policy of a very large business on the web. In his estimation, he said it was basically a graduate level reading text and that on average the sentences contained about 26 words.

And he graded the sentences as being "complex, pompous, and very difficult to comprehend." I think, in fact, that is what many consumers find when they are out on the web.

However, reading those policies happens to be the core of protecting your privacy today. Frequently what individuals find is that to maintain control over their information, which is core of privacy—an individual's ability to determine what happens to personal data—they must "opt out."

There are instances where individuals can act anonymously, protecting their privacy completely—but the goal here is to facilitate a whole range of interactions, some of them commercial where individuals are going to willingly turn over information, because they are really interested in the goods or service. And the question is what happens to their data after that point. Today, the answer is consumers have to take steps to protect it. One of the things they frequently have to do is opt out. And that means that as an individual you can object and tell a company not to use your data for other purposes.

Today, opting out can be quite a task. It means reading a privacy policy at every single website you come to.

In November, CDT unleashed a new website, and that website is designed to help consumers find a single one-stop shop to remove their names from profiling databases, marketing lists, telemarketing lists, to simplify "opting out" by giving consumers a single place where they can do this rather than having to visit all these separate shops.

In addition to helping thousands of consumers who were very thankful to have this one-stop shop, we found that many of the services that were provided by businesses to "opt out," in fact, did not work.

I will use the online profiling companies as an example. Features at Flycast and Matchlogic just did not perform and had to be corrected. While consumers were being told they could take a step to protect their privacy, in fact, the feature did not function.

More troublingly we found that one of the self-regulatory seals being displayed was expired.

Once they have been told that they can protect their privacy, we now have—may I take another minute or two of the—of the Chair's time?

Senator ASHCROFT. You have one more minute——

Ms. MULLIGAN. I will wrap up.

Senator ASHCROFT. We have gone a minute over on previous cases. Keep going.

Ms. MULLIGAN. You have got it.

Consumers have found that once they finally figured out where to look, they are supposed to be looking for privacy policies with the business that they were doing business with, they now find that there are new ventures on the marketplace, ad profiling, and ad management companies that are, in fact, reaching through those websites and collecting information from consumers.

These are businesses that consumers have no relationship with.

They are frequently unaware of these organizations. And these organizations are reaching through and collecting detailed information and creating profiles that are used at a whole host of websites to target—as we heard earlier from Mr. Jaye—both advertising and content. In other words, this information is being used to make decisions about what you see and what you view on the Web.

I look forward to working with the Committee. I thank you for holding this hearing. The FTC has played an enormously useful role in moving discussions of privacy forward. And I hope to continue to be able to work with them. Their funding is critically important.

Senator ASHCROFT. Thank you very much.

[The prepared statement of Ms. Mulligan follows:]

PREPARED STATEMENT OF DEIRDRE MULLIGAN, STAFF COUNSEL, CENTER FOR DEMOCRACY AND TECHNOLOGY

I. Introduction

The Center for Democracy and Technology (CDT) is pleased to have this opportunity to testify about privacy in the online environment and the Federal Trade Commission's role in developing privacy policy. CDT is a non-profit, public interest organization dedicated to developing and implementing public policies to protect and advance civil liberties and democratic values on the Internet. One of our core goals

is to enhance privacy protections for individuals in the development and use of new communications technologies. We thank the Chairman for the opportunity to participate in this hearing and look forward to working with the Committee to develop policies that support civil liberties and a vibrant Internet.

To being, I would like to offer three points to guide the Committee as it begins to address the protection of individual privacy:

- The Internet presents new challenges and opportunities for the protection of privacy. Our policies must be grounded in an understanding of the medium's unique attributes and its unique potential to promote democratic values. It must also address the unique risks the Internet poses to our values including personal privacy. As many .coms tout the benefits of customized content and personalized advertising they play down the personalized tracking and profiling that support such applications. The Internet will best serve individuals if we recognize the risks to privacy and develop public policies and technologies that address them. There is little doubt that the Internet holds great promise for maximizing our democratic values and growing our economy, however sound public policies play an integral part in ensuring we achieve these goals. I look forward to working with the Committee to explore legislative options for protecting privacy on the Internet.
- Increasingly, the rules that govern society are embodied in computer code. This code, and the products built upon it, can enhance or limit the collection of personal information and can either afford or deny individuals control over their information. Technical decisions including whether a product is designed to keep information on an individual's own computer or on a remote server, what personal information a product collects, and for how long information is retained have important implications for privacy. The availability of robust encryption, the development of strong authentication devices, and the deployment of technical standards such as the Platform for Privacy Preferences are an important component of protecting privacy on the Internet.
- Privacy is a complex value. Ensuring that individuals' long-held expectations of autonomy, fairness, and confidentiality are respected as daily activities move online requires a thoughtful, multi-faceted approach combining self-regulatory, technological, and legislative components. These expectations exist vis-à-vis both the public and the private sectors. By autonomy, I mean the individual's ability to browse, seek out information, and engage in a range of activities without being monitored and identified. Fairness requires individuals maintain control over the information that they provide to the government and the private sector. The concept of fairness is embodied in the Code of Fair Information Practices [1]—long-accepted principles specifying that individuals should be able

[1] The Code of Fair Information Practices as stated in the Secretary's Advisory Comm. on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens, U.S. Dept. of Health, Education and Welfare, July 1973:

There must be no personal data record-keeping systems whose very existence is secret.

There must be a way for an individual to find out what information about him is in a record and how it is used.

There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.

There must be a way for the individual to correct or amend a record of identifiable information about him.

Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intruded use and must take precautions to prevent misuse of the data. Id.

The Code of Fair Information Practices as stated in the OECD guidelines on the Protection of Privacy and Transborder Flows of Personal Data http://www.oecd.org/ [at the time this hearing was held].

1. Collection Limitation Principle: There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

2. Data quality: Personal data should he relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

3. Purpose specification: The purposes for which personal data are collected should be specific not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

4. Use limitation: Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with the "purpose specification" except: (a) with the consent of the data subject;, or (b) by the authority of law.

Continued

to "determine for themselves when, how, and to what extent information about them is shared."[2] In terms of confidentiality, we need a strong Fourth Amendment in cyberspace.

I have attached a law review article that elaborates on these three points, authored by CDT's Executive Director, Jerry Berman, and myself. I will devote the remainder of my testimony to providing the Committee with an overview of important privacy issues on the Internet and some thoughts on the roles of the Federal Trade Commission and Congress as we seek policies to protect privacy.

II. Privacy policies on the Web

Last July, I provided the Subcommittee on Telecommunications with CDT's report, "Behind the Numbers: Privacy Practices on the Web." The report concluded that Fair Information Practices were the exception rather than the rule on the World Wide Web; private sector enforcement programs covered a very small segment of commercial Web sites; and individuals' privacy concerns remained largely unaddressed. The report was based in part on the Georgetown Internet Privacy Policy Survey, released last July, which found that while more Web sites were mentioning privacy, only 9.5% provided the types of notices required by the Online Privacy Alliance, the Better Business Bureau and TRUSTe.

The Georgetown Survey found that an increased number of Web sites provided consumers with some information about what personal information is collected (44%), and how that information will be used (52%). But, on important issues such as access to personal information and the ability to correct inaccurate information, the survey found that only 22% and 18% respectively of the highly trafficked Web sites surveyed provided consumers with *notice* of their rights. On the important issue of providing individuals with the capacity to control the use and disclosure of personal information, the survey found that 39.5% of these sites said that consumers could make some decision about whether to be re-contacted for marketing purposes—most likely an "opt-out"—and fewer still, 25%, said they provided consumers with some control over the disclosure of data to third parties.[3]

While a year has passed, a recent report indicates that adherence to Fair Information Practices is not the norm on the Web. A report released last week on the privacy policies and practices of health Web sites found that while 19 of the 21 Web sites surveyed had privacy policies, they failed to meet Fair Information Practice Principles.[4]

Overall, reports and surveys over the past year have found that even the most frequently trafficked consumer Web sites do not adequately inform individuals about how their personal information is handled. More troubling is the finding that health Web sites, where individuals divulge sensitive information, are not providing individuals' personal information with strong privacy protections. At the same time these same busy consumer-oriented Web sites are collecting increasingly detailed personal information.

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5. Security safeguards: Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.

6. Openness: There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

7. Individual participation: An individual should have the right (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him; (b) to have communicated to him, data relating to him:

—within a reasonable time;

—at a charge, if any, that is not excessive;

—in a reasonable manner, and,

—in a form that is readily intelligible to him; (c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to he able to challenge such denial; and, (d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified completed or amended.

8. Accountability: A data controller should be accountable for complying with measures which give effect to the principles stated above.

[2] Alan Westin. Privacy and Freedom (New York: Atheneum, 1967), 7.

[3] This number is generated using the data from Q32 (number of sites that say they give consumers choice about having collected information disclosed to outside third parties)—64—and dividing it by 256 (the total survey sample (364) minus the number of sites that affirmatively state they do not disclose data to third-parties (Q29A) (69) and the number of sites that affirmatively state that data is only disclosed in the aggregate (Q30) (39)).

[4] Report on the Privacy Policies and Practices of Health Web Sites, Janlori Goldman and Zoe Hudson, Health Privacy Project, Georgetown University, and Richard M. Smith. http://ehealth.chcf.org [at the time this hearing was held].

III. New threats to individuals' privacy

It is difficult for individuals to limit the use and disclosure of their personal information. Where "privacy statements" are posted they are frequently written in complex and confusing language. An expert in communicating with the public provided CDT with an analysis of a prominent company's privacy statement. He found the statement to be written at the graduate school reading level with each sentence averaging 24 words.

If a consumer finds a privacy statement and successfully deciphers it she frequently finds that if she fails to "opt-out" (object) her name, address, and other personal information will be shared with undefined "others." Today, to limit the reuse of personal information an individual must search every Web site for an opportunity to "opt-out," and hope that the opt-out features work as promised, which CDT has found is not always the case.

On November 15, CDT launched a new Web site, "Operation Opt-Out," to give consumers a simple one-stop location to "get off the lists"—the mailing and telephone lists and profiling databases that have proliferated with the digital economy. Operation Opt-out has assisted thousands of individuals to limit the use of their personal information.

In addition to helping individuals, Operation Opt-Out produced useful information about whether companies do what they say. During its second week Operation Opt-Out ran a feature on how to "opt-out" of the online profiling or "network advertising" companies data systems. We found several problems with the opt-out features offered by the online profiling companies. Problems ranged from broken "opt-out" features at Flycast[5] and Matchlogic,[6] to Matchlogic's display of an expired TRUSTe seal.

Individual's ability to limit the use and disclosure of their personal information by businesses with which they have chosen to interact remains difficult. But of increasing concern are the activities of online profiling companies, or network advertisers, who collect data without the individual's knowledge or consent. With growing frequency, navigational and other data is being captured by advertising networks or "profiling companies." With the permission of the Web site, but not the individual, these profiling companies place unique identifiers on individuals' computers. These identifiers are then used to track individuals as they surf the Web. The individual's profile grows with time, because online profiling is a continuing collection of his online behavior, despite the fact that the individual disconnects. The navigational data collected may include information such as Web sites and Web pages visited, the time and duration of the visit, search terms typed in search engines' forms, and other queries, purchases, "click through" responses to advertisements, and the previous page visited. In addition to long lists of collected information, a profile may contain "inferential" or "psychographic" data—information that the business infers about the individual based on the behavioral data captured. From this amassed data, elaborate inferences may be drawn, including the individual's interests, habits, associations, and other traits.[7]

The practices of online profiling companies have far-reaching impacts on consumers' online privacy. The companies that engage in profiling are hidden from the individual. They reach through the Web site with whom the individual has chosen to interact and, unbeknownst to the individual, extract information about the individual's activities. In the rare instances where individuals are aware of the fact that a third party is collecting information about them, they are unlikely to be aware

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[5] To Flycast's credit, they were quick to fix this problem once we contacted them, however, we have no idea how long the opt-out was broken and how many consumers were effected by this problem.

[6] Matchlogic now provides an online opt-out feature.

[7] A psychographic study "joins consumers' measurable demographic characteristics with the more abstract aspects of attitudes, opinions and interests." Data mining specialists code demographic, media, purchasing and psychographic data from surveys, throw them together and analyze them until some groups with shared characteristics can be distinguished from all other groups. They can identify those groups most likely to buy specific products and services by including questions relating to a product about past buying habits or future intentions to purchase. Every kind of psychographic study adds the dimension of psychology and/or lifestyles to a demographic inquiry and uses quantitative survey techniques. Cf. Rebecca Piirto HEATH, Psychographics: Qu'est-Ce Que C'est?, Marketing Tools, Nov.–Dec. 1995; http://www.demographics.com/publications/mt/95__mt/9511__mt/MT3gg.htm (last viewed on Nov. 12, 1999).

that this information is being fed into a growing personal profile maintained at a data warehouse,[8] on which data mining[9] can be exercised.

At many Web sites individuals are told that "cookies" are harmless bits of data that help customize and personalize their experience. While "cookies" themselves are not per se bad, the use of "cookies" to secretly tag and monitor individuals across multiple Web sites undermines individuals' ability to determine to whom and under what circumstances to disclose information about themselves. The practices of these profiling companies undermines individuals' expectations of privacy by fundamentally changing the Web experience from one where consumers can browse and seek out information anonymously, to one where an individual's every move is recorded.

While several of the companies engaged in profiling state that they do not correlate information with identifying information such as name, and e-mail address, this does not on its own address the privacy concerns at issue. The highly detailed nature of the profiles and the capture of information that can be reasonably easily associated with a specific individual raise questions about the claims of anonymity and promises of non-identifiability. While the companies, in some instances, may not be tying information that they gather about individuals' use of the Internet to their name and address, the information may be quite capable of revealing the individual's identity, through the use of various computer tools and software.

While the name and e-mail address of the individual may remain obscure, the information the individual is able to access, the offers made to the individual are being determined by the business based on specific information collected about the individual. While the concern raised by the use of information about the individual to alter what information they see in the context of advertising may appear relatively trivial, this same practice, and perhaps data, can be used to make other decisions about the individual that even a privacy-skeptic may find objectionable. The info collected about the individual could be used to alter the prices at which goods or services, including important services such as life and health insurance, are offered, employed by a government, and could be used to alter the information viewed by individuals. While the impact of altered advertisements on the individual—harm? benefit?—can be disputed, these other examples indicate that there is a privacy interest in information about individuals actions and interactions when it is collected and used to make decisions about them.

Recently it has become clear that DoubleClick intends to attach identities to the extensive profiles they collect about individuals' online activities. It is unclear whether other online profiling companies will follow a similar path. DoubleClick's privacy statement had stated that its cookies identified computers, not people—that it couldn't link its "cookies" to names and home addresses or other elements of personal identity and didn't want to do so. After its purchase of the consumer transaction database Abacus, DoubleClick acknowledged that it intended to tie surfing habits and online searches to personal identity. DoubleClick's Abacus Alliance has arranged to collect names, addresses, and other personal information from Web sites where Internet users knowingly register. So far, at least ten Web sites (the Company hasn't said who they are) have agreed to participate by providing DoubleClick the identity of their subscribers. Thus, DoubleClick, to whom an individual has never revealed her identity, may have access to an individual's name, credit card number, and home address.

As these companies merge with each other and with companies such as Abacus that maintain detailed personally identifiable profiles about individuals' offline activities, the consolidation of offline and online profiles will erode the distinction between online and offline identity. Online companies are aware of the sensitivity this

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[8] A "data warehouse" is a system used for storing and delivering huge quantities of data, while data warehousing refers to the process used to extract and transform operational data into informational data and loading it into a central data store or "warehouse". Data warehousing allows data from disparate databases to be consolidated and managed from a single database., which in turn allows for the development of longer and more "accurate" profiles more efficiently and less expensively.

[9] "Data mining" is "a set of automated techniques used to extract buried or previously unknown bits of information from large databases." (Ann CAVOUKIAN, Data Mining: Staking a Claim on your Privacy (Information and Privacy Commissioner of Ontario, Canada), Jan. 1998, http://www.ipc.on.ca/web_site.eng/matters/sum_pup/PAPERS/datamine.htm (last viewed on Oct. 6, 1999). A successful data mining operation will make it possible to unearth patterns and relationships, and afterwards, use the new information to make proactive knowledge-driven business decisions. Data mining focuses on the automated discovery of new facts and relationships in data. For more information, cf. Kurt Thearling, From Data Mining to Database Markering, Oct. 1995, http://www3.shore.net/kht/text/wp9502/wp9502.htm (last viewed on Oct. 17, 1999).

raises. Consumers have shown an aversion to having their online activities tied to their identity. Finally, recent revelations about government demands for access to individual profiles created in the consumer marketplace warn us that even the most benign information, such as grocery purchases, that provides insights into individuals' behavior are sought out by the government.

The profiling activities of these companies pose unique threats to individual privacy.

IV. Consumer Reaction to Profiling

On February 1, 2000, CDT launched a consumer campaign to alert consumers to the threat that online profiling poses to privacy and to encourage consumers to say no to DoubleClick's plans to create a data system to track individuals' online and offline activities and their identities. At CDT's Web site consumers are able to "opt-out" of DoubleClick's tracking activities, send a letter to DoubleClick's CEO and send a letter to several prominent companies that use DoubleClick's services. In less than three days 13,000 people used our Web site to opt-out of DoubleClick's tracking; over 6,000 individuals sent messages to DoubleClick's CEO; and, in the first 36 hours, over 4,400 e-mail messages were sent to prominent DoubleClick affiliates. Several companies have responded to consumer concerns and clarified their policy of not disclosing subscriber information to DoubleClick.

We believe that the public's voice is important when evaluating whether a business' practices comport with individuals' expectations of privacy. The e-mail we received from individual citizens and the participation of thousands of individuals in our campaign indicates that many individuals object to DoubleClick's practice of tracking and monitoring individuals and do not want information about their identity included in such a system.

V. The Federal Trade Commission's role in protecting individual privacy

Over the past five years the Federal Trade Commission's activities in the area of information privacy have expanded. The Commission has convened seven workshops to explore privacy on the Internet, issued several reports, conducted surveys, and brought several important enforcement actions in the area of privacy. Finally, the Commission played a pivotal role in shaping the Children's Online Privacy Protection Act and crafting rules to implement it that map onto the Internet. The Commission's work has played an important role in bringing greater attention to privacy issues and pushing for the adoption of better practices in the market place.

While the Commission's contributions to the protection of individual privacy have and will continue to be important, their mission and jurisdiction places limits on their involvement in many important privacy issues such as government collection and use of personal information. They are not able to provide the forum for all privacy discussions—and there are many important privacy discussions waiting to occur.

However, keeping with its mission, the FTC must have the resources and staff to continue their privacy agenda. The upcoming Web survey, the Advisory Committee on Online Access and Security, the ongoing exploration of online profiling are important. The detailed and thorough work of the Commission enables advocates, businesses, and policy makers to better understand the privacy issues and to choose the appropriate tools to address them. Over the next few months the Commission's work will produce reports and surveys that will aid this Committee as it evaluates the growing number of legislative proposals to protect privacy and examines the role of ongoing self-regulatory efforts. It is important that the FTC be provided with funding to hold workshops, issue reports, enforce the Children's Online Privacy Protection Act, and take action against abuses of privacy in the marketplace.

VI. The role of Congress

As Congress moves forward this year, we look forward to working with you and all interested parties to ensure that fair information practices are incorporated into business practices on the World Wide Web. We must adopt enforceable standards, both self-regulatory and legislative, to ensure that information provided for one purpose is not used or redisclosed for other purposes without the individual's consent and to ensure that the Fourth Amendment follows our personal information into cyberspace.

The challenge of implementing privacy practices on the Internet is ensuring that they build upon the medium's real-time and interactive nature to foster privacy and that they do not unintentionally impede other beneficial aspects of the medium. Implementing privacy protections on the global and decentralized Internet is a complex task that will require new thinking and innovative approaches. Both legislation and self-regulation are only as good as the substantive policies they embody. As we said at the start, crafting meaningful privacy protections that map onto the Internet re-

quires us to resolve several critical issues. While consensus exists around at least four general principles (a subset of the Code of Fair Information Practices)—notice of data practices; individual control over the secondary use of data; access to personal information; and, security for data—the specifics of their implementation and the remedies for their violation must be explored. We must wrestle with difficult questions: When is information identifiable? How is it accessed? How do we create meaningful and proportionate remedies that address the disclosure of sensitive medical information as well as the disclosure of inaccurate marketing data? For the policy process to successfully move forward these hard issues must be more fully resolved.

The Federal Trade Commission and several members of the full Senate Commerce Committee are well aware of the hard issues that must be resolved and are working to address them. I am a member of the Federal Trade Commission's Committee on Online Access and Security tasked with exploring how to implement the important principle of providing consumers with access to their data and what security measures are appropriate to protect personal information on the Internet. I believe that the work of that Committee will provide useful information to Congress as it examines options for protecting privacy. I would welcome the opportunity to provide the Committee with information about our progress and look forward to working with members of this committee, to develop a framework for privacy protection in the online environment.

The Online Privacy Protection Act, S. 809, introduced by Senators Burns (R-MT) and Wyden (D-OR), the Electronic Rights for the Twenty-First Century (E-RIGHTS), S. 854, introduced by Senator Leahy (D-VT), forthcoming proposals, and the Children's Online Privacy Protection Act of 1998 (COPPA) provide an excellent starting point for this discussion. COPPA demonstrated that Congress could take action to protect privacy and ensure consumer trust in electronic commerce. By providing some flexibility to the Federal Trade Commission Congress ensured that technology and innovation would not be unintentionally stunted by efforts to protect children's privacy. The leadership of Internet-savvy members of this Committee and others will be critical as we seek to provide workable and effective privacy protections for the Internet.

VII. Conclusion

No doubt, privacy on the Internet is in a fragile state. Providing protections for individual privacy is essential for a flourishing and vibrant online community and marketplace. It is clear that our policy framework did not envision the Internet as we know it today, nor did it foresee the pervasive role information technology would play in our daily lives. Providing a web of privacy protection to data and communications as they flow along networks requires a unique combination of tools—legal, policy, technical, and self-regulatory. I believe that legislation is an essential element of the online privacy framework and we look forward to working with this Committee toward that end. Whether it is setting limits on government access to personal information, ensuring that a new technology protects privacy, or developing legislation all require discussion, debate, and deliberation. I thank the Committee for the opportunity to share our views and look forward to working with the members and staff and other interested parties to foster privacy protections for the Digital Age.

Senator ASHCROFT. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. I know both of us are supposed to be somewhere at 1 o'clock. And you have been so kind to me. Would you like to go and ask your questions first?

Senator ASHCROFT. I do not think I have got questions to ask. There are a lot of questions that could be asked.

Senator WYDEN. Yes.

Senator ASHCROFT. I mean this is kind of like—should be like a law school class. I mean, I should be asking you are you in favor of allowing businesses to sell at a discounted price to people who are willing to let their data be involved in a data base, you know, or—you know, are you willing to let the costs reflect—I mean, I think there are lots of very interesting questions here.

But I think you have done a great job of sort of priming this pump. And I hope you would keep information flowing to us, because there are just—there are a lot of very interesting things.

I—some people want—Ms. Mulligan mentioned that some people want to be able to be included on lists.

I know I like the Cool Fares that come out from Continental Airline, so I want them to know that I am interested in their fares. And they ship them to me every Tuesday in case I can get somebody from my family to go visit my son in Houston. And I want to know about that.

So some of the information, we all want people to have. Others, we do not. And getting this properly managed, well——

I have no questions. I want to say that there could—there are lots of questions. I do not think I have the time to do it today.

I need to be out of here in 2 minutes, as the seconds fly.

Senator WYDEN. John, thank you. And I'm going to ask a couple of real quick ones.

And what is your pleasure? Would you like me to adjourn at that point?

Senator ASHCROFT. My sense is that if you would like to ask questions, then you are welcome to do so and I——

Senator WYDEN. I will do two or three minutes worth.

Senator ASHCROFT. —and I would invite the members of this panel to submit in writing any additional comments they would like to make.

And I thank them all for coming. And I thank you for being willing to continue the hearing.

Senator WYDEN. I thank you for giving me all the time this morning.

A couple of just real quick questions. Again, sorry, that we are just so jammed for time.

Question for you, Mr. Sorrell. I have not been any big fan of preemption. We have worked very closely with the attorneys general since my days with the Gray Panthers. I am going to consumer rights causes.

And I guess at the same time, if the Internet is not interstate commerce, I do not know why you have an Article 1, because, I mean, this seems to me to be about the clearest, most straight forward, you know, case of an area where you really ought to have, you know, Federal jurisdiction.

What would be your response to that?

Mr. SORRELL. Well, Senator, I thank you. Telemarketing fraud is not limited to a state by state operation.

Frankly, a lot of the telemarketers since the states have become more aggressive in—in moving against fraudulent telemarketers have moved north of the border and they are operating out of Canada right now.

So clearly the extent of e-commerce is more than what is happening in the telemarketing area. And the speed of it is more.

I guess the question is: Is it sufficiently different in kind and scope that a national standard makes sense or should the individual states as their own laboratories be able to for themselves to—to—to balance that issue between not wanting to retard or deny to its state's consumers the benefits of e-commerce, but at the same time, be able to go further?

You suggested earlier that—that you have submitted a bill—introduced a bill and you are being told that maybe you should have gone further on the issue of opt-in versus opt-out.

If the Congress decides, for example, that there should be an opt-out standard, why would not Vermont, which has gone further than a number of other states on privacy issues—for example, the access to personal credit histories and such—why should not Vermont balancing that issue of the—the—the potential drag or potential hindrances to Vermont consumers, be able to go further if protecting consumers even more than a national standard if that is what Vermonters want to do?

Senator WYDEN. I just remained concerned about the possibility of 50 standards and, you know, you are a small Oregon business or a small Vermont business, and all of a sudden you are trying to do business with a kind of blizzard of various state kind of rules.

And I would like to think that maybe there are some lessons that we have learned in the past in terms of how to come up with something that makes sense for you all—and hang on just a second—makes sense for you all, and addresses what I think is inherently an interstate, you know, activity—the Internet to me is an interstate. I think you might as well get rid of, you know, Article 1.

Now, in the Electronics Signatures Bill, we specifically allow the states to enact their own electronic transaction laws as long as they are consistent with the Uniform Commercial Codes, Uniform Electronic Transactions Act model.

This assures that the Federal and the state laws specifically recognize that it is inherently, you know, interstate in nature and yet that was something that the state AG's supported.

They said, "You know, that is something that we think is fair on both sides."

And my question would be not that kind of model be a good one for us to look at in the privacy area as well, given the fact that you all have been willing to support that in the Electronics Signature?

Mr. SORRELL. First, I—I do not—I do not want to suggest that states necessarily are going to go further than whatever Congress will do, because we do not know what Congress will do.

But I want to express a concern on behalf of the states that if the states's hands are tied and they are not able to go further, we think that would be unfortunate.

As to the electronic transfers issue, I really have to study that issue more because I was under the understanding that we maintained flexibility in that—in that area.

So I would like the opportunity to submit something in writing to the Committee in response to your question.

Senator WYDEN. Let—let—let us do that. It is very important. You know, we are anxious to work with you, as I say.

I—I think you all perform an enormous service. Oregon has a fabulous attorney general, Hardy Myers, who——

Mr. SORRELL. Yes. He is—he is one of the good ones.

Senator WYDEN. Right.

Mr. SORRELL. There are a lot of good ones. Hardy is very good.

Senator WYDEN. Yes. Right. I talk to you now continually and, frankly, the thing I am looking for is something that might serve as a model.

And our understanding was that states could enact their own electronic transaction laws as long as it was in line with the Uniform Commercial codes effort in this area.

And if you guys would take a look at this and give it to us for the record, my question is: Does this have some promise as a kind of model that would be fair to you folks and—and——

Mr. SORRELL. I know that in Vermont right now, we are debating in the commerce committee in—in the House what—which Vermont laws are to be exempted from the Digital Signatures provisions, and it is hotly contested right now.

Senator WYDEN. Yes. Ms. Mulligan, just one question. And I feel sort of like Senator Ashcroft. I would stay here for hours asking you all questions if we were not so under the gun and I think you know we are probably one of the more conspicuous consumers of CDT, you know, work in terms of using your products.

And my question to you is it is not unlike what I asked Mr. Pitofsky is, you know, we have got this tidal wave of, you know, consumer fear coming and I really see the tsunami hitting the shore here quickly.

My question to you is: What is your sense of how you establish in law a kind of baseline of conduct to make it clear that you are sending a very powerful message to bad actors, you know people are not willing to do even the minimal in terms of privacy protection, are not willing to even enforce, you know, the minimal.

How do you have a baseline of conduct for the bad actors so that you deal with them, while at the same time encouraging and rewarding the companies that adhere to the kind of standards that you all and others that lead this field have been putting forward.

Ms. MULLIGAN. Thank you for the question. We have really appreciated your leadership on this issue.

And I think that the bill that was introduced by yourself and Senator Burns certainly sets out a model similar to the Children's Online Privacy Protection Act where you are looking to create incentives for good industry behavior.

There is a notion of safe harbors. Now, the safe harbors do not mean anybody can sail in. It still involves the FTC and a public review, ensuring that those safe harbors actually meet the concerns that need to be addressed.

But it does allow for the flexibility that, I think, you and I both believe is critically important.

And I think that the rulemaking under Children's Privacy Protection Act, highlights that there are still going to be issues that come up.

I think that because the Act provided flexibility, the FTC can hear new issues and new proposals can come in.

If there is a new industry that springs up and it needs its own—it believes it has a different approach that needs to be examined, it can come in with a proposal for a safe harbor and it can get a fair shake to see if it meets the test.

And I think that is the kind of flexibility that will make sure that any proposal that comes through, at least this Committee, is technically astute.

And I think that is critically important. We do not want a law that is out of date.

Senator WYDEN. Well, I should quit while I am ahead. You all are the people that we are going to be calling often, all three of you, in terms of trying to work on these kinds of issues.

Because I think everybody is struck by how—the velocity at which this issue is moving. People have known it was important, but now in poll after poll, these privacy issues are like the second or third biggest concern, you know, in the country.

It sort of goes education, you know, prescription drugs and privacy in some sort of, you know, order. So we are going to be counting on the input and the Counsel of all three of you frequently.

And unless you have anything to add further, just in the interest of time, we will let you go at this point. So the Subcommittee is adjourned.

[Whereupon, at 1:02 p.m., the hearing was adjourned.]

APPENDIX

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN ASHCROFT TO ROBERT PITOFSKY, SHEILA F. ANTHONY, THOMAS B. LEARY, ORSON SWINDLE, AND MOZELLE W. THOMPSON

Question 1. The FTC has announced that it will conduct another sweep of privacy policies posted on commercial web sites within the next few weeks. The Commission has also established an Advisory Committee on Online Access and Security, made up of consumer and business experts, to study the complex issues involved in providing consumer access to, and security of personally identifiable information. Both the survey and the Commission recommendations will help this Committee and Congress determine if privacy legislation is necessary and if so what type of legislation would be necessary. It would make sense for the Commission to provide the data from the sweep and the recommendations of the Advisory Committee in one package that will help the Committee interpret the data from the results of the survey. Will the Commission issue both of these reports in one package or will one report precede the other?

Answer. As your question indicates, the Commission is conducting a survey of commercial web sites to help determine whether self-regulation has continued to improve the protection of consumer privacy. The survey will be qualitative as well as quantitative: it will look beyond the mere existence of policies and examine the adequacy of those policies. In particular, we are looking for clear disclosure of what type of information is collected and what is done with it, whether consumers can exercise choice about how information is collected and shared, whether access to information is afforded along with any ability to correct errors, and what, if any, sort of security is provided.

As you also note, the Commission has established a Federal Advisory Committee on Online Access and Security to advise the Commission on the cost and benefit issues of access and security in the online context. The Advisory Committee's report, which need not reach any consensus views, is expected in mid-May, also will provide information relevant to the Commission's consideration of how to best address the fair information principles of online access and security.

The survey of web sites, analysis of the data, and the work of the Advisory Committee are parallel but complementary initiatives. Assuming these projects are completed on schedule, we will address them in reporting to Congress.

Question 2. There is a natural tension between access and security of private data. The broader the requirements for data access, the greater the danger from hackers or other inappropriate disclosures. We just saw Yahoo shut down for three hours on Monday by hackers. Yesterday, E-bay, Amazon.com, CNN and Buy.com were shut down as well. How will the FTC balance the interest of consumer access to data versus the need for data security?

Answer. The Federal Advisory Committee on Online Access and Security currently is considering how to balance issues involving the interplay between the interest in providing consumers with access to their data and the need for appropriate security for that data. In examining how and what information is collected and stored, the Committee also will consider whether the consolidation of consumer information databases to facilitate access makes the information more vulnerable to security breaches by hackers. Another issue addresses whether technology provides sufficiently sound authentication mechanisms to permit access and protect security simultaneously. We look forward to reviewing the Committee's findings and recommendations on these important issues.

Question 3. How will the FTC address the question of barriers to entry for small and mid-sized Internet business that might not have the staff and financial resources to provide the same or similar levels of access and security as larger or more well established e-businesses?

Answer. The Commission is sensitive to the special issues that may be presented to particular sectors of the business community and took care to ensure that representatives from small and medium sized companies and from industry associa-

tions were appointed to the Advisory Committee. The Advisory Committee is considering the costs and benefits of providing online access and security for small and medium businesses. We expect the Advisory Committee's report to examine whether access and security issues raise special concerns for these sectors, and the Commission also will consider these points in its report on online privacy.

Question 4. During the hearing Chairman Pitofsky mentioned that one way to address privacy may be through a mix of legislation and self-regulation based on the type of information collected. Usually, consumers list health records, financial records and information about children as sensitive enough to require protection under the law as opposed to self-regulation. What other areas would you consider of interest to require protection?

Answer. The Commission has supported legislation requiring privacy protections for the most sensitive types of personal information, including the Children's Online Privacy Protection Act (information collected from children) and the privacy provisions of the Gramm-Leach-Bliley Act (personal financial information). Additionally, the Commission has indicated its support for HHS's proposed privacy rules governing medical records. The question remains, however, how best to address other aspects of online privacy, including issues involving profiling, as discussed in response to Question 5 below.

In June 1999, a majority of the Commission concluded that self-regulatory initiatives should be given greater opportunity to develop. These industry initiatives have resulted in notable progress. In 1999, a study showed that the posting of at least one privacy disclosure had increased in one year from 14 percent to 66 percent of Web sites surveyed. Nonetheless, the Commission has challenged industry to continue this progress by improving both the quantity and quality of privacy disclosures.

The Commission is in the process of assessing the progress of industry self-regulatory initiatives through its comprehensive survey of commercial Web sites, described in response to Question 1. Moreover, the report of the Advisory Committee will provide the Commission with additional important information that will assist it in addressing online privacy protection for consumers.

Question 5. Currently, much of the discussion of privacy had focused on the Internet. However, we are beginning to see the merger of information collected both online and offline. Do you believe it will continue to make sense to draw a distinction between information collected online and offline?

Answer. The FTC has focused much of its attention to privacy on the Internet because this has been identified as a principal concern to consumers. Indeed, surveys consistently tell us that many consumers are reluctant to purchase products or services from Web sites because of privacy concerns. These apprehensions are understandable in light of technology that makes it possible to collect, store, manipulate and disclose personal information on an unprecedented scale and at unprecedented speed.

As your question recognizes, however, new issues are emerging. We are concerned about the growing industry practice of collecting online "profiling" data from consumers, with or without their knowledge, that may be merged with information from any source, online or offline. A related issue to consider is to what extent the reasons behind our efforts to protect online privacy also apply to information gathering in the offline world.

Question 6. H.R. 1858, the "Consumer and Investor Access to Information Act" gives the FTC enforcement authority over the sale or distribution of certain public databases. Have you had a chance to review this bill and determine how you would enforce such a regulation? Do you feel the FTC is the appropriate agency to enforce the provisions of this bill?

Answer. Last summer, the Commission had the chance to review and comment extensively on H.R. 1858, the proposed "Consumer and Investor Access to Information Act of 1999," in response to a request from Chairman Tauzin of the House Subcommittee on Telecommunications, Trade and Consumer Protection. As noted in that 1999 statement, the Commission appreciates the recognition of its experience with the underlying enforcement issues that the proposed vesting of enforcement authority reflects. At the same time, however, the statement observes that the enforcement burden would appear to be considerable. No federal administrative agency has previously had jurisdiction over claims of misappropriation or infringement of intellectual property-type rights, and the Commission would be hampered in its efforts to provide effective enforcement without a commensurate increase in its resources.

The Commission's statement identifies several complex rule-making and adjudicative issues raised by H.R. 1858, such as the amount of investment by the database's creator, the degree of subsequent copying, disaggregation of governmental and pri-

vate content in databases, determination of what constitutes misuse, and evaluation of effects of the duplicate database on the original database creator's market and returns to investment. If called upon to enforce the legislation, the Commission would exercise its best judgment as to enforcement priorities, in keeping with its statutory responsibility to issue complaints "if it should appear to the Commission that a proceeding by it . . . would be to the interest of the public." 15 U.S.C. § 45. Competitive implications would appear to be appropriate considerations in this context.

A complete copy of the Commission's 1999 statement is attached for your reference.*

Question 7. Under S. 1854 a magistrate must use the standards "unreasonably cumulative or duplicative" and "imposes a burden or expense that substantially outweighs any likely benefit" to evaluate the propriety of an agency's Second Request. Some have argued that this standard is vague and will be difficult for the magistrate to use. How do you respond to those concerns?

Answer. The Commission opposes S. 1854's provisions for revising the "Second Request" process. The current LISR premerger notification process is essentially sound, allowing the agencies to clear roughly 97 percent of the notified transactions within the initial waiting period without issuance of a Second Request. We recognize that there have been some cases where the Second Request process has not been entirely satisfactory. The antitrust agencies and the private bar are currently engaged in a cooperative effort to improve the process, and we expect visible results. In fact, as a result of information developed during this process, the Commission has just approved a new appeals process for parties who have disputes with staff attorneys regarding a Second Request. Achieving the desired improvements to the Second Request process does not require legislative change. Moreover, we are concerned that the provisions in the bill would handicap and delay the agency's efforts to assess whether proposed mergers are likely to be anticompetitive, with little or no industry benefit. In fact, some have argued that S. 1854 contains provisions that will make the merger review process considerably more cumbersome for government and industry alike.

Although the limitations on the Second Request process contained in S. 1854 may sound reasonable in theory, in practice they are unworkable. At the time a Second Request is issued, the agency generally cannot evaluate the cost-benefit trade-off of a request. At that point, the agency has only limited knowledge about the competitive concerns raised by the transaction, and thus about the potential benefit of the information to the investigation. The agency also is unfamiliar with the manner in which particular parties maintain their records, and thus has no way to weigh the costs of submission against the benefits, or to determine which requests will be cumulative or duplicative. Typically, these concerns are addressed successfully through negotiation, during which the parties provide information relevant to the need for particular material. Imposing the bill's unworkable constraints on the scope of the Second Request at the outset would hinder the agencies' ability to conduct the investigations necessary to halt anticompetitive transactions.

Because only a single Second Request is allowed, an agency cannot address burden concerns by staging requests through a narrow initial request and then serving additional requests as it learns more. The "staging" of information to he supplied is currently addressed through negotiations between the agencies and the parties, using information the parties provide to the agency and other information staff develops to winnow its areas of competitive concern.

S. 1854 would appear to limit the agencies' ability to obtain materials needed for a preliminary antitrust review. This approach fails to recognize the basic structure of the HSR statute, which requires the agency to seek a preliminary injunction at the conclusion of its investigation where warranted by competitive concerns. Courts often examine the entire substance of the agency's case, usually pursuant to parties' requests, even in preliminary injunction actions. For example, in the FTC's most recent preliminary injunction action, the court held a seven-week hearing and examined the entire case in detail.[1] Thus, even where the matter before the court is a request for preliminary injunction, the agency must be prepared to present its entire case on the merits. The bill's limitation would seriously harm the agency's ability to do so.

S. 1854 would limit agency premerger investigations even further. In non-merger investigations, the agency may seek any materials relevant to the investigation. Under S. 1854, parties could fail to provide some of the required information, yet claim substantial compliance with the request. The agency could then insist on sub-

*The information referred to has been retained in the Subcommittee files.

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

mission only of information whose absence would "materially impair" the antitrust review. "Materially impair" is an extraordinarily high standard, and the bill apparently would allow a party to claim substantial compliance and refuse further submissions regardless of the burden—even if that burden is small and the information is relevant. Imposition of so high a standard would obviously create perverse incentives to make less than candid disclosures.

The bill's restrictions on Second Requests would likely lead to instances of both under-enforcement and over-enforcement. If investigations are too severely limited, the agency could be unable to obtain enough information even to identify competitive problems that may exist in a proposed merger. Where the agency is able to identify problems, it could still be unable to obtain enough evidence through a narrowed Second Request to initiate an action to enjoin the merger temporarily. In other instances, the bill's Second Request restrictions could put the agency in the untenable position of filing suit within the statutory time limits, but before it had an appropriate opportunity to discover information needed to evaluate adequately the likely competitive effects of a merger. This information deficit would force the agencies to rely heavily on post-complaint discovery in preliminary injunction actions, and deprive the agencies and the merger proponents of an important opportunity to avoid litigation. This could result in unnecessary lawsuits and waste of resources—of the parties, the agencies, and the judiciary.

The bill would also create a magistrate judge review process for Second Requests that would be impracticable and impose delay on both the agency and the parties investigated. The bill would permit review by a magistrate judge of the scope of the Second Request and of any claim of deficient submissions. The fundamental flaw is that magistrate review would likely involve too much delay—through preparation, hearing, and the magistrate's decision process—in an inquiry that should proceed as expeditiously as possible. We believe that the HSR review process works best when it is least adversarial. Magistrate review and other formalistic elements would inject an adversarial tone throughout the process, and hamper ready resolution of potential antitrust concerns.

The Commission recognizes that there are instances in which the HSR Second Request process may have imposed unnecessary costs and burdens on merging parties. While we believe that these instances are rare, we are committed to exploring ways to improve the process. Specifically, the Commission is currently conducting an internal review of its HSR procedures and practices. As part of this review process, Commission staff is meeting with members of the antitrust bar and the business community to listen to their concerns.

This process is already yielding effective results. The Commission has just put in place a new appeals process for parties who believe that compliance with portions of the Second Request should not be required. Under this new appeals process, parties who have exhausted reasonable efforts to obtain a modification to a Second Request from the lead staff attorney and the Assistant Director in charge of the investigation may file a petition with the General Counsel of the Commission. The General Counsel is independent of the Bureau of Competition which conducts merger investigations. After a party has filed a petition, the General Counsel will hold a conference with the petitioning party and the investigating staff. The conference shall take place within seven business days of the petition. The petitioning party and the investigating staff may both submit, no later than three business days before the conference, a five-page brief to the General Counsel setting forth their positions with regard to the requested Second Request modification. The General Counsel is then required to issue a final decision on the petition within three business days after the conference. Thus, the entire appeals process should take no longer than 10 business days.

As the internal review process continues, we will make additional appropriate changes to its HSR procedures and practices. These changes will be made public. We believe that this internal review process is likely to yield better results than the proposed legislation.

Question 8. This year at least 22 states will consider legislation affecting Internet privacy and online fraud. As more state legislatures address these issues, are you concerned that a patchwork quilt of Internet regulation will spring up making it difficult for businesses and consumers to determine which laws apply?

Answer. As you note, legislation is pending in several states that would mandate privacy protections, often in terms that vary from state to state. For example, California proposes to restrict Internet service providers from disclosing personal information without consent; New York is considering restrictions on the collection and disclosure of personal information by both online service providers and financial institutions, among others. Differences in legal requirements across state boundaries may lead to confusion among consumers and businesses and could add to compli-

ance costs for businesses. This highlights the need to carefully consider the impact of legal regulations, at the federal or state level, on consumers and businesses.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. SAM BROWNBACK TO ROBERT PITOFSKY

Question 1. The latest the Senate will be able to adequately review the FTC report on marketing violence to children in a hearing would be in July. We would like to review it sooner, preferably in May. When will the final FTC report on the marketing of violence to children be ready for Senate review? If the final report is not ready until June or July, can we expect a preliminary report in April or May?

Answer. I recognize the importance of the issues we are studying and the need to complete the report as quickly as possible. I believe the report will offer parents important information on the operation of industry self-regulatory efforts, and will also provide a basis for improved self-regulatory efforts.[1]

Given the scope of the Commission's study, it would be difficult if not impossible to issue the report sooner than late summer. The Commission staff sent information request letters to 51 companies, including movie studios, video and computer game manufacturers and software developers, music recording companies, retail store outlets, and movie theater chains. The letters requested extensive information and documents, including general background on the companies and their sales figures; marketing plans for products that have been rated or labeled due to violence; Internet advertising and marketing information; information on audience demographics; policies or practices to restrict or limit the sale of rated or labeled products; research regarding purchasers of rated or labeled products; and complaints received about violence in products or advertising. The companies are still in the process of submitting the requested documents and information, and we do not expect to receive full productions until the middle of April.[2] Staff may also need to follow up with some of the companies. In addition to the requests to the industry members, staff is gathering information from an array of other sources. For example. staff is contracting with an independent survey firm to conduct a nationwide survey of parents and children to learn their understanding and use of the various rating systems, and also is conducting Internet surfs to review online marketing and product accessibility. In addition, staff has collected information from the industry trade associations and ratings groups, as well as from parents' and children's advocacy groups.

Question 2. To ensure the accuracy of the information you retrieve, I assume that you will be corroborating the information received from entertainment industry sources with outside sources. What steps are you taking to corroborate industry information?

Answer. Staff is taking a number of steps to ensure the accuracy of the information we are receiving. First, staff directed the companies to certify their responses as correct and complete and to list any responsive materials being withheld. The letters specifically state that anyone who knowingly and willfully makes false statements or representations to a United States government agency is subject to fines and/or imprisonment. In addition, staff is conducting its own advertising monitoring. For example, staff has contracted with a company to screen print advertisements for the products in question, so that we can see where the products are being advertised. Staff is videotaping certain television programs popular with teens and reviewing their advertising. In addition, staff has contracted with a television monitoring service to provide information on where advertisements for the products ran. Staff has also asked parents and children's advocacy groups to provide information on the advertising of rated products in media popular with young people.

Question 3. One of the best indicators of whom violent entertainment is being marketed to is who buys it. Have you been able to obtain demographic purchasing data of adult-rated or labeled entertainment products?

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[1] Indeed, some industries have taken steps to improve the operation of the system since the study was initiated. For example, the Interactive Digital Software Association (the trade association for the video game industry) announced an advertising campaign to increase awareness of video game ratings among parents, which included the use of public service announcements by Tiger Woods and the requirement that television ads announce a game's rating in the audio portion of the ad. IDSA and the Entertainment Software Rating Board, which rates video games, announced the formation of an Advertising Review Council. The Council issued advertising guidelines designed to avoid inappropriate or deceptive advertising, a program whereby game magazines would screen advertisements for compliance with the ad guidelines, and an advertising complaint review process.

[2] The request letters were sent right after the New Year, following a four-month Paperwork Reduction Act-required public comment process.

Answer. I agree that data on the demographics of purchasers of entertainment products that are rated as inappropriate for children due to violence would be valuable to our study. Staff has asked each of the companies for any information they have on the ages of the target audiences for their entertainment products that are rated or labeled due to violent content, as well as any information on the actual purchasers of these products. Thus, to the extent that the companies have this information, it is responsive to our requests and should be provided. Staff is also purchasing data on teen attendance at movies and similar demographic purchasing data.

Question 4. Will the final FTC report include information on the total amount spent by children on adult-labeled entertainment products?

Answer. Staff has requested that the companies provide information on their total sales as well as sales of products that are rated due to violent content. Staff has not requested data on the amount spent by children on products rated as inappropriate for children. Based on what we know at this time, it is unlikely that such data exist. Moreover, the data are unlikely to be broken down according to the product's rating or it may not be clear if a child or adult purchased the product. (For example, one marketing company surveys opening-night movie theater attendance in select cities for some films. This survey will yield what percentage of the audience was under 18 on opening night in those cities, but it will not indicate whether a parent or a child purchased the child's ticket.) Accordingly, it may not be possible to report on the total amount spent by children on these products.

Question 5. Will you be investigating the cross-marketing of characters and themes from adult-rated video games and movies to children via toys, action figures, and Halloween costumes?

Answer. Staff has requested that the industry members provide information regarding the cross-marketing of their products through whatever means, including toys, action figures, Halloween costumes, fast-food promotions, etc. Staff also requested information on the relationship between the licensors and the licensees, including control over advertising and packaging copy to help us learn the workings of these cross-marketing arrangements.

Question 6. Will the report contain information on which entertainment companies market adult-labeled entertainment to children, and how much profit they gain as a result?

Answer. Within the constraints of the confidentiality provisions of the Federal Trade Commission Act and the Commission's Rules of Practice, the study will report on the practices of a broad cross-section of the entertainment industry, including the major film studios, music recording companies, video and personal computer game manufacturers, movie theater chains, and electronic goods and mass merchandise retail stores. The report may contain publicly available information regarding sales and profitability, for example from such sources as annual reports, other reports for investors, or public filings with the Securities and Exchange Commission. However, the Commission is prohibited by Section 6(f) of the Federal Trade Commission Act, 15 U S.C. § 46(f), from making public trade secrets or other confidential commercial or financial information.

Question 7. In your testimony before the Committee, you stated that the process for determining which agency, the Department of Justice, Antitrust Division or the FTC will review a merger was down to about 9.5 days. It is my understanding that this represents an average time period. How many mergers take longer than ten days and do you have a list of transactions that have taken longer?

Answer. During FY 1999, the FTC and Justice cleared 422 HSR merger investigations to each other. Of these, 77% were cleared before the 10th day of the HSR waiting period (i.e., within 10 days of the date on which the parties submitted their HSR premerger notification forms to the agencies). Issues of clearance need to be resolved as early in the HSR waiting period as possible, so that investigating staff has as much of time as possible to investigate the proposed transaction. Without sufficient time to obtain preliminary information about a transaction during the initial waiting period, staff may believe it necessary to seek the issuance of Second Requests that ultimately prove to have been unnecessary.

Our Second Request statistics demonstrate that issuance of Second Requests because of insufficient time is highly unlikely. Of the 47 transactions cleared to the FTC after the 10th day of the HSR waiting period in FY 1999, the Commission issued only 3 Second Requests.

We keep careful records of clearance requests that required longer than 10 days. From those records we review problem areas to improve the processes of coordination between our agency and the Antitrust Division.

Question 8. During the hearing you mentioned that you are currently working with the anti-trust bar to resolve problems affecting the Hart-Scott-Rodino Act

merger process. How are these discussions going and when do you expect to complete this process and make additional recommendations for changes to the process?

Answer. Over the past few months, we have engaged in an ongoing dialogue with members of the private bar and members of the business community that we believe is providing information helpful to improvement efforts by both agencies Our discussions have included representatives of the Antitrust Section of the ABA, the New York City Bar Association, the National Association of Manufacturers, the Chamber of Commerce and the American Antitrust Institute.

In addition, over the past year the Premerger Notification Office has conducted a regular series of brown bag lunches used to solicit practitioners' views on improvements to the HSR process. Input has proven invaluable in determining areas of the HSR rules that require substantive revision, as well as assisting in improvements to the administrative process.

Our effort to hear and appropriately address concerns continues. Within the next two or three months, we believe we will implement a number of changes to the HSR process to address concerns raised by the business community and private bar, and we are already undertaking improvement efforts. The Commission's Bureau of Competition has instituted a formal review of all proposed Second Requests in the Bureau Director's office to make certain that the requests are no broader than necessary. To encourage better communication between staff and parties to the transaction, the Bureau Director is directing his staff, soon after a request has been issued, to offer by to meet with the parties to discuss the anticompetitive concerns raised by the proposed transaction. So that modification proposals for Second Requests are resolved expeditiously, the Bureau Director is directing his staff to respond to each modification request within five business days of receipt of the modification proposal.

Moreover, the Commission has just put in place a new appeals process for parties who believe that compliance with portions of a Second Request should not be required. Under this new appeals process, parties who have exhausted reasonable efforts to obtain a modification to a Second Request from the lead staff attorney and the Assistant Director in charge of the investigation may file a petition with the General Counsel of the Commission. The General Counsel is independent of the Bureau of Competition which conducts merger investigations. After a party has filed a petition, the General Counsel will hold a conference with the petitioning party and the investigating staff. The conference shall take place within seven business days of the petition. The petitioning party and the investigating staff may both submit, no later than three business days before the conference, a five-page brief to the General Counsel setting forth their positions with regard to the requested modifications. The General Counsel is then required to issue a final decision on the petition within three business days after the conference. Thus, the entire appeals process should take no longer than 10 business days.

We are working on other possible modifications as well, and based upon our continuing work with the private bar and the business community we expect these to be implemented in the near future.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN MCCAIN TO ROBERT PITOFSKY

Question 1. Given that the FTC will not complete its congressionally-mandated report on "Marketing Violence to Children" until it is too late for the Senate to hold hearings on the content of this report, will you agree to submit an interim or preliminary report to the U.S. Senate no later than May 31, 2000?

Answer. I recognize the importance of the issues the agency is studying and the staff is striving to complete the report as quickly as possible. I believe strongly that it is essential to the integrity of the study that its specific findings be reported in context once the entire review is complete. Staff is still in the process of receiving information and documents from industry members and does not expect to have received full returns until mid-May. Agency staff is also commissioning a survey of parents and children about the entertainment rating systems and their purchasing behavior, and does not expect to receive that data until June. A partial report based on an incomplete review of the data runs a risk of error, as well as of unfairness, by possibly penalizing those companies that provided information in a more timely manner than others.

In addition, issuing a preliminary report would raise several procedural difficulties. Almost all the information received has been marked confidential; under the Federal Trade Commission Act and our Rules of Practice, we are required to give the companies notice before such information can be released. The companies then

have the opportunity to challenge that release in federal district court, and the Commission is prohibited from releasing the information until the court rules. The industry members have already voiced strong concerns about our study and the release of any marketing information they deem confidential. A preliminary report increases the risk of early intervention by industry and ultimate delay.

Staff remains available to brief the Committee or its staff on the status of the report, as well as on the methodology followed in conducting this study.

Question 2. Will you provide a list of the companies from which you requested information?

Answer. The following is a list of the companies and trade associations from which staff requested information. This list has not been made public:

Video/Personal Computer Game Companies

Acclaim
Activision
Apogee Software
Capcom
Eidos
Electronic Arts
GT Interactive
Id Software
Interplay
Konami
Midway Games
Sega
Sierra

Movie Studios

Metro-Goldwyn-Mayer
Miramax Films
New Line Cinema
Paramount Pictures
Sony Pictures Entertainment
Twentieth Century Fox
United Artists
Universal Studios
Walt Disney Company
Warner Bros.

Movie Theaters

AMC Theatres
Carmike Cinemas
Cinemark Theatres
General Cinema
Loews Cineplex
National Amusements
Regal Cinemas

Music Recording Companies

BMG
EMI
Sony Records
Time Warner
Universal Music Group (includes Polygram)

Music Television Channels

Black Entertainment Television (BET)
Music Television (MTV)

Retailers

Amazon.com
Babbage's
Best Buy
Blockbuster Video
cdnow.com
Electronics Boutique
E-Toys.com
Hollywood Video
Musicland (includes Sam Goody)

Target Stores, Inc.
Tower Music
Toys 'R' Us
Trans World Entertainment Corp. (includes Record Town, Saturday Matinee, and Camelot)
Wal-Mart

Trade Associations

Entertainment Software Rating Board
Interactive Digital Software Assn.
Motion Picture Assn. of America
National Assn. of Recording Merchandisers
National Assn. of Theatre Owners
Recreational Software Advisory Council
Recording Industry Assn. of America
Video Software Dealers Assn.

Question 3. Will you provide the Senate with information pertaining to the amount of money spent by children on adult-rated products, as well as toys, action figures, Halloween costumes, and dolls based on characters or themes from adult-labeled products?

Answer. Agency staff is seeking information regarding the amount of money spent by children on adult-rated products, as well as toys and other products based on characters or themes from adult-rated products. Staff has asked each of the companies for any information they have on the ages of the purchasers of these products. Staff has also requested that the industry members provide information regarding the cross-marketing of their products through whatever means, including toys, action figures, Halloween costumes, and dolls. Thus, to the extent that the companies have this information, it is responsive to the requests and should be provided. The information staff has received thus far, however, suggests that the marketers and the retailers do not routinely collect and record the ages of those purchasing their products. As a result, staff is looking for other sources for this data. For example, staff is purchasing data on teen attendance at movies and similar demographic purchasing data. Although surveys are occasionally conducted, staff has not yet found a source for comprehensive data on the ages of purchasers. In addition, the sales data for these industries may not be broken down according to the product's rating or the rating of the product on which it is based. Accordingly, it may be difficult to construct accurate data on how much money children spend on adult-rated products and related toys, etc.

Question 4. The amount of money spent by children on adult-labeled entertainment products is of obvious importance to this study. Will you provide Congress with that information?

Answer. Staff has requested that the companies provide information on their total sales as well as sales of products that are rated or labeled due to violent content. As explained above, however, it does not appear that theaters and other retailers make it a practice to record the ages of their customers. Accordingly, it likely will not be possible to report comprehensively on the total amount spent by children on these products.

Question 5. Will the final report include information on methodology and level of responsiveness of each company, should the Congress or the White House feel the need to extend the research period?

Answer. The final report will describe how staff collected the information, including the methodologies used to conduct the study, and will attach as appendices the survey instruments and demand letters used to collect the information. Almost all of the companies contacted expressed a willingness to comply voluntarily and are currently supplying the information requested. Each company was directed to certify its responses as correct and complete and to list any responsive materials being withheld; the agency will report which companies provided those certifications and note any companies that failed to supply any of the key materials requested.

SUPPLEMENTAL PREPARED STATEMENT OF HOWARD ADLER, JR., ESQ., BAKER MCKENZIE, CHAIRMAN, U.S. CHAMBER OF COMMERCE, HART-SCOTT-RODINO TASK FORCE

I respectfully request permission to supplement my Statement before the Subcommittee of February 9, 2000, to add to the record relevant portions of the Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust ("ICPAC Report"). That Re-

port is the product of an intensive two-year study of international antitrust issues by a distinguished committee appointed by the Attorney General.[1] It was presented to Attorney General Reno and Assistant Attorney General Klein on February 28, a little more than two weeks after my testimony.

The Advisory Committee addressed three issues of major importance for the global economy and international competition: "multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts." (ICPAC Report at 1.) Because the Committee's analysis and recommendations on the first of these topics bear directly on the subject of the February 9 hearing, I have asked the Subcommittee to add the following excerpts from the Report to the hearing record.[2]

The Advisory Committee analyzed with great thoroughness the merger review practices in the approximately 60 countries that now have some form of merger control. It found that the number of merger control regimes, the divergences in reporting thresholds and requirements, and a variety of deficiencies in reporting thresholds, review time periods, and other practices created a significant burden on international trade. It, therefore, recommended "a number of practices designed to rationalize the application of review procedures." (Id. at 13.) Moreover, believing that "one of the most effective ways in which the United States can stimulate global reform is leading by example," the Committee recommended that the United States should "examine its own merger review system in an attempt to identify and correct those aspects of the system that create uncertainty and unnecessary transaction costs." (Id. at 13.)

In so recommending, the Advisory Committee relied on the U.S. Chamber's plea for U.S. reform.

> In light of the proliferation and disparity of filing requirements around the globe, the increasingly complicated regulatory framework, and the associated escalation of transaction costs to meet the demands of the myriad jurisdictions, the United States can serve an important role by establishing a benchmark for the rest of the world. Before the United States can legitimately lay claim to a position of global leadership in the field of merger review, however, the US. first needs to conduct a balanced, candid assessment of its domestic requirements.

(Id. at 123–24) (emphasis added). In line with that recommendation, the Committee conducted such an assessment. It made a number of recommendations, several of which add support to the positions advocated by the Chamber in its February Statement and, by so doing, support the objectives of S. 1854. The following excerpts incorporate the essence of the Committee's recommendations with regard to (a) The HSR Reporting Threshold; (b) The Need to Delink Funding of Antitrust Enforcement From the HSR Filing Fees; and (c) The Second Request Process.

A. The Recommendations Re. the Filing Fee Threshold

The Advisory Committee strongly recommends an increase in the HSR size-of-transaction threshold to somewhere in the range of $33 million to $43 million, with three members advocating an increase to $50 million. The following excerpts highlight the factual basis and reasoning for this recommendation:

> [T]he Advisory Committee recommends that the current notification thresholds be carefully reviewed to ensure that they are only as broad as necessary to identify transactions that may cause an appreciable anticompetitive effect. *While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed by the premerger notification regime are too low and capture too many lawful transactions.* The Advisory Committee believes that the United States

[1] The Co-Chairs of ICPAC were James F. Rill, Assistant Attorney General for Antitrust in the Bush Administration, and Paula Stern, former Chairman of the International Trade Commission. Its Executive Director was Merit E. Janow, Professor in the Practice of International Trade in the School of International and Public Affairs, Columbia University. Members of ICPAC were Zoë Bard, President, The Markle Foundation; Thomas E. Donilon, Senior Vice President, General Counsel and Corporate Secretary, Fannie Mae; John T. Dunlop, Lamont University Professor, Emeritus, Harvard University; Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law; Raymond V. Gilmartin, Chairman, President and Chief Executive Officer, Merck & Company, Inc.; Vernon E. Jordan, Jr., Senior Managing Director, Lazard Frères & Co. LLC; Steven Rattner, Deputy Chairman, Lazard Frères & Co. LLC; Richard P. Simmons, Chairman, Allegheny Technologies Incorporated; G. Richard Thoman, President and Chief Executive Officer, Xerox Corporation; and David P. Yoffie, Max & Doris Starr Professor of International Business Administration, Harvard Business School.

[2] The full Report can be found at http://www.usdoj.gov/atr/icpac/finalreport.htm.

will not be well positioned to advocate that other jurisdictions review and revise their own premerger notification thresholds until it has addressed these same issues in its own system. (Committee's emphasis)

* * *

[O]nly a small percentage of transactions captured by the notification thresholds currently in place leads to enforcement action. Indeed, no enforcement action is taken against more than 98 percent of all notified transactions. In addition, the annual level of filings made with the U.S. antitrust agencies has increased significantly since the HSR Act was enacted. The Advisory Committee believes that this increased level of filings is attributable not only to increased merger activity, but also to the failure to adjust the notification thresholds. They have not been changed since the HSR Act was enacted in 1976.

* * *

Enforcement statistics for 1998 suggest that adjusting the notification thresholds to keep up with inflation measured in 1998 dollars should not materially compromise the enforcement mission of the US. antitrust agencies. Depending on the base year and deflator used, that calculation would mean increasing the size-of-transaction threshold in the $33 million to $43 million range. Although data are not publicly available for that range, HSR statistics show that raising the threshold to $25 million or $50 million would have eliminated approximately 25 to 50 percent of transactions notified in fiscal year 1998. (Chamber's emphasis)

In 1998 transactions valued below $25 million raised few competitive concerns. In that year, the agencies received filings on 1,235 transactions valued at $25 million or less. The agencies issued Second Requests in only 11 (less than 1 percent) of these transactions. Indeed, in 95 percent of the 1,235 transactions, neither agency sought clearance to even contact the parties. The filing fees alone in the 1,224 transactions in which no Second Request was issued, however, cost the acquiring parties $55.1 million.

Likewise, only 27, or just over 1 percent, of the 2,398 transactions valued at $50 million or less received Second Requests. Although Second Request investigations represented only a small percentage of notified transactions valued below $50 million, almost 9 percent of all investigated transactions involve transactions valued at less than $25 million and approximately 20 percent of all investigations involve transactions valued at less than $50 million, indicating that some small transactions raise sufficient antitrust concerns to warrant a more complete investigation.

If a transaction is not captured by the thresholds, however, the agencies have the authority to investigate and take enforcement action, if needed. For example, in each of the last two years the DOJ opened more than 50 investigations of transactions that were not reportable under the HSR Act. Although the agencies contend they have very little ability to detect nonreportable transactions, the Advisory Committee balances that concern with the recognition that only a small fraction of transactions that fall below notification thresholds will pose the threat of competitive harm. Thus, the Advisory Committee concludes that increasing the filing threshold in the $33 million to $43 million range should not materially affect the quality of Clayton Act enforcement efforts. Three Advisory Committee members advocate raising the size of the transaction threshold higher, to $50 million. (Chamber's emphasis)

To sum up, the Report strongly supports raising the filing fee threshold roughly to reflect inflation since 1976. Doing so would set a good example for foreign merger authorities, and "should not materially compromise the enforcement mission of the U.S. antitrust agencies." ICPAC Report at 127. In view of the findings of the Advisory Committee, the $35 million threshold proposed in S. 1854 is at the very low end of the range recommended in the Report. The U.S. Chamber agrees with the three Committee members who advocated raising the size of action threshold to $50 million, and urges Congress to adopt the $50 million size of transaction threshold.

B. The Recommendation to Delink Filing Fees from Antitrust Enforcement Funding

In recommending an increase in the reporting threshold, the Advisory Committee recognized the unfortunate fact that antitrust funding has become dependent on HSR filing fees. Echoing the view expressed by Commissioner Leary and the Chamber at the February 9 hearing, the Committee stated,

> "*Ideally, no competition authority should be dependent on filing fees for its budgets, staff salaries, or bonuses.* A linkage of this nature may skew incentives to revise notification thresholds because consideration of limitations that may be warranted on the basis of competition-oriented objectives must be weighed against the collateral fiscal effects. Another risk that must be considered is that the ability of competition authorities to fund their law enforcement activities may be compromised when the current merger wave subsides." (Chamber's emphasis.)

(ICPAC Report at 105–06.) Because this undesirable dependency on filing fees presently exists, the Committee specified that the increase in the filing threshold should not be done at the expense of the antitrust enforcement budget. Its preferred solution, like the Chamber's, is total delinkage of the fees from the budget. The following excepts reflect the Committee's reasoning on this point.

> *Any efforts to revise notification thresholds must account for the fact that filing fees currently constitute a significant source of revenue for the U.S. antitrust agencies. To ensure that the DOJ and FTC will be able to pursue their enforcement missions vigorously, it is imperative to provide alternative sources of funding to offset the loss of any funds that may result from revision of HSR thresholds.* (Committee's emphasis) *This goal may he accomplished by delinking the fees from the budget and by direct funding from general revenue.* If funds are not directly appropriated, alternative funds may be realized in a variety of ways, including raising the filing fee, adjusting the fee based on the size of the transaction, or assessing the fee based on the complexity of the transaction and the amount of work performed by the reviewing agency, *although these alternatives would not accomplish delinking the fees from the budget.* (Chamber's emphasis).
>
> The existing linkage between filing fees and funding for the DOJ and FTC creates a conflict of interest for the agencies and also exposes them to substantial funding cuts if filings were to decrease, as occurred between 1989 and 1991 when filings dropped more than 40 percent. The Advisory Committee is of the view that filing fees should be delinked from funding for the agencies, but that any efforts to do so must occur in an environment where sufficient funds are assured from other sources. *This step would be beneficial both for the United States and for those countries around the world that have followed the US. lead in implementing filing fees and have linked them to agency budgets.* (Chamber's emphasis)

(ICPAC Report at 129.)

While finding the linkage of "filing fees to agency budgets clearly . . . undesirable as a matter of sound public policy" (ICPAC Report at 106), the Committee recognized the necessity of accomplishing that goal without denying appropriate funding to the enforcement agencies. As noted, the Committee's preferred method is "direct funding from general revenue" (id. at 129); however, the Committee recognized several alternatives under which the HSR filing fees would more closely resemble a traditional regulatory or user fee:

> For example, the revision of thresholds could be accompanied by measures to increase filing fees for reportable transactions, or to levy filing fees scaled to the size of the transaction. Similarly, filing fees also could be assessed based on the amount of work performed by the reviewing authorities. In Germany, for example, the size of the filing fee for a transaction depends upon the economic importance and complexity of the case. Filing fees generally range from DM10,000 to DM100,000 (for straightforward cases, it is typically less than DM20,000). In exceptional cases, the fee may amount to as much as DM200,000.(39) Similarly, in Switzerland, no fee is required if a transaction is cleared within the initial review period. A filing fee is imposed if a second-stage investigation is opened and is based on the amount of work performed by the agency.

(Id. at 106.) The Committee explicitly recognized, however, that "these alternatives would not accomplish delinking the fees from the budget" (id. at 129) and "that when a transaction must be reviewed in several jurisdictions, filing fees will quickly mount." (Id. at 106.)

For all of the reasons stated in the Chamber's February 9 testimony, in its submission to the Advisory Committee, and in the ICPAC Report, the Chamber strongly believes that total delinkage of agency funding from the HSR filing fees can only be accomplished by a return to the practice of funding the highly important antitrust enforcement activities through general funds, as was the practice at the time HSR was enacted. While the other funding alternatives cited by the Committee

would be a modest improvement over the present system, the Chamber agrees with the Committee that they would not accomplish delinkage and would foster costly and undesirable proliferation of filing fees around the world. The Chamber is also concerned that an uncapped fee based on work performed by the antitrust agency could lead to excessive investigating.

C. The Second Request Process

Although the Advisory Committee does not recommend legislative reform of the Second Request process, its study revealed the serious defects in that process that have caused the Chamber to support the reform provisions of S. 1854. The following excerpts reflect these findings of the Committee:

> Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, *it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide.* The Advisory Committee recognizes, however, the flexibility of the U.S. system that enables the agencies and merging parties to resolve issues in many matters with only limited production of documents and information. Data provided by the U.S. agencies indicate that more than half of all firms complied only partially with the Second Request and that many transactions were resolved with the submission of 50 or fewer boxes of documents. (Emphasis added)
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> Many business groups and practitioners that appeared before the Advisory Committee, however, perceive the Second Request process to be "unduly burdensome." The Advisory Committee too is concerned that the data may not indicate the full extent of the burden. For example, even if parties ultimately did not substantially comply with the Second Request, they may still have undertaken a full document search to be prepared to comply fully with the Second Request in the event that settlement negotiations break down. In addition, in a handful of notable instances, merging parties have been required to submit hundreds of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception of the unduly burdensome nature of the Second Request process. (ICPAC Report at 137)
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> The U.S. agencies can take several measures to address perceptions regarding the Second Request process. First, the Advisory Committee recommends that when the agencies issue a Second Request, they give the merging parties their reasons (either orally or in writing) for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the Second Request will facilitate transparency in the merger review process and will help the parties to understand that the Second Request is based on genuine substantive concerns rather than on strategic motivations. (Id. at 139)
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> Merging parties and agency staff frequently are able to negotiate modifications to the scope of Second Requests. *The level of willingness to engage in productive negotiations of this nature appears to vary greatly among staff members and merging parties, however, and modification requests sometimes may not be resolved in a timely fashion.* To institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating timely modifications to the scope of requests. Success in this endeavor also requires a willingness on the part of merging parties and their advisors. (Emphasis added)
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> When modification negotiations break down, parties should be encouraged to use the appeals process. Since its inception in 1995, however, that process has never been used at the FTC and has been used only three times at the DOJ. . . . Because the agencies want the appeals process to be used, the Advisory Committee recommends that the agencies make the procedure more attractive to merging parties. Commentators have suggested this can be achieved by making the appeals process more expeditious and its outcome more transparent. Further, the agencies should actively encourage merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.

> The Advisory Committee recommends that the agencies attempt to institutionalize these and other best practices to ensure the integrity and effectiveness of the Second Request process. The institutionalization of these best practices is particularly important because at least some of the perceived problems identified by the private bar appear to stem from differences in practices by individual staff attorneys. Thus, the agencies at the highest levels should articulate principles or best practices to guide staff during the Second Request process and should ensure that procedures are practiced consistently throughout the agencies. (Id. at 140–41)

The U.S. Chamber generally agrees with the Committee's descriptions of the problems but questions whether these long-standing deficiencies can be resolved through voluntary institutionalization of best practices. S. 1854 provides a legislative clarification as well as an effective appeals process that the Chamber, for reasons set forth in its February 9th Statement, believes should be enacted.

JOINT PREPARED STATEMENT OF JANET L. MCDAVID, HOGAN & HARTSON LLP, AND JOHN SIPPLE, CLIFFORD CHANCE ROGERS & WELLS

My name is Janet McDavid. I practice law at Hogan & Hartson LLP in Washington, DC. I am the current Chair of the Section of Antitrust Law of the American Bar Association, but I am providing this statement today in my individual capacity and not on behalf of either the ABA or the Antitrust Section. John Sipple of Clifford Chance Rogers & Wells assisted in preparing this statement. John is a former head of the FTC's Premerger Office and is also active in the Antitrust Section, but he also is providing this statement in his individual capacity.

The Antitrust Section is studying S. 1854, but we have not yet completed our analysis. Nor have we sought ABA approval to take any position on the Bill. We do hope to be in a position to discuss these issues in greater detail soon and to provide final views on various elements of the Bill. Today, both John and I are providing our personal views on the pros and cons of the major elements of the Bill without taking any position on the merits—our views are not necessarily the views of the ABA or the Antitrust Section.

My practice has been almost entirely in the area of antitrust law for more than 20 years. During that period, I have spent well over two-thirds of my time on investigations of mergers, acquisitions, and joint ventures by the Federal Trade Commission and Antitrust Division, so I am very familiar with the process. Most recently, I represented Mobil in its merger with Exxon and American Electric Power in its merger with CSW.

I believe that the merger review process is one of the most important law enforcement responsibilities of both Agencies, and they generally do an excellent job with inadequate resources. However, in recent years I have become increasingly concerned about problems in the merger review process in transactions being reviewed at both the FTC and the Antitrust Division. The problems I have encountered are not universal. In fact, there are many staff in both Agencies who conduct efficient, focused, fair reviews of mergers. As Chair of the ABA Antitrust Section, I have set up a small working group of lawyers from the private bar and both Agencies to work together to try to improve the process from the perspective of both the merging parties and the Agencies. That work began last Fall and is continuing.

I should emphasize that not all of the problems that I have observed in the process are the fault of the Agencies. There are those in the private bar who are not cooperative in the process, who withhold or delay providing information requested by the Agencies, and who even mislead the Agencies. That conduct makes it hard for the Agencies to do their job properly. There are no provisions in S. 1854 to address those problems by private lawyers and their clients. But it is important to remember that this is not a one way street with and that not all of the problems are on the Agency side.

S. 1854, the premerger reform legislation introduced by Senators Hatch, DeWine, and Kohl, has several critical elements. The first two elements relate to filing thresholds and filings fees. The other major elements make substantive revisions to the standards governing Second Requests and establish procedures for review by a Federal Magistrate in the District of Columbia. Again, I want to emphasize that we are presenting only our personal views, and that we are identifying both pros and cons of the major elements of the Bill without taking any position on the Bill.

S. 1854 increases the size of transaction threshold under the HSR Act from $15 million to $35 million.

Pros:

• Many HSR filings are unnecessary. Each year, the Agencies conclude that at least 70% of filings raise no competitive concerns at all. Serious investigations are conducted in only about 10% of filings. As a result, the premerger notification reporting net is being cast far too wide. These unnecessary filings impose substantial burdens on the business community—legal fees, filing fees, and time devoted to compliance.

• The proposed increase in the transaction threshold will decrease the burden on the business community by reducing the number of transactions subject to the notification and waiting period requirements of the HSR Act. It is estimated that approximately one third of the 4,642 transactions reported in FY 1999 fall below the proposed $35 million threshold and will no longer require notification if S. 1854 is enacted.

• The size of transaction dollar threshold has not been raised since the HSR Act was enacted in 1976. As a result, in real dollars, the reporting threshold has fallen to a level equivalent to about $4.5 million in 1976, requiring notification for many transactions that the law was never intended to reach. The proposed increase is an adjustment that is long overdue.

• Increasing the threshold is essentially a cost benefit analysis, weighing the burden on the business community against the interests in having the antitrust Agencies notified of every transaction prior to its consummation. Although the antitrust Agencies will not receive notification for some smaller transactions that may raise competitive concerns, the burden placed on the business community for smaller transactions arguably outweighs the benefits to the antitrust agencies. In any event, the Agencies can and do review transactions that are not reportable

Cons:

• Fewer filings will mean less revenue for the antitrust enforcement Agencies (which are funded almost entirely by filing fees), unless the filing fees are increased.

• Since the FTC and the Antitrust Division will no longer be notified of transactions valued at $35 million or less, some transactions that raise serious antitrust concerns may go undetected by the enforcement Agencies or be consummated prior to detection. Although the Agencies are empowered to investigate transactions that are not subject to the HSR Act requirements, the detection of smaller transactions that may violate the antitrust laws is more difficult and will depend on complaints, reviewing the trade press, and other means.

• The increase in the dollar threshold will result to some extent in the loss of the deterrent effect that results from the recognition that a transaction must be notified to the enforcement Agencies before consummation.

S. 1854 establishes a two-tiered filing fee structure based on the dollar value of the transaction and increases filing fees.

Pros:

• A filing fee based on the dollar value of the transaction appears to be more equitable than a flat filing fee. Larger transactions may be more complex and require greater Agency resources.

• The funding for the antitrust Agencies will not be adversely affected by the increase in the size of transaction dollar threshold (which reduces the number of filings) because the two-tiered structured is designed to make the threshold increase revenue neutral.

Cons:

• Funding the budgets of the FTC and the Antitrust Division through filing fees sets a bad example for other nations that have adopted or are about to adopt merger notification requirements. If the use of filing fees to fund antitrust en-

forcement Agency budgets is adopted by other jurisdictions (as it has been), transaction costs will increase for multinational transactions.[1]

• Funding almost the entire budget of both the FTC and the Antitrust Division from revenues derived from filing fees is inequitable because it requires firms involved in reportable transactions to fund the enforcement activities of the Agencies unrelated to the review of mergers and acquisitions. For instance, the filing fee funds the consumer protection function of the FTC and non-merger antitrust enforcement work of the FTC and the Antitrust Division.

• Since the budgets of the Agencies are based on filing fees, the Agencies have no incentive to adopt new exemptions, they can do under the HSR Act, to exempt classes of transactions that are unlikely to violate the antitrust laws. Thus, as a matter of public policy, provisions should be included in S.1854 to eliminate this disincentive.

• The creation of a two-tiered filing fee structure will be more difficult to administer than a flat filing fee or a filing fee based on the total assets or annual net sales of the acquiring person. The total assets or annual net sales are relatively easy to determine using the most recent, regularly prepared financial statements. The precise value of a transaction is much more difficult to determine.

• The change in filing fees creating a two-tiered system based on the value of the transaction will pose many valuation issues and require several changes to the HSR Rules. Basing the filing fee on the value of the transaction will require the modification and adoption of several new rules. For example, rules will be required to address the following issues:

—How will parties determine the value of a transaction when notification is filed based on a letter of intent or an agreement in principle rather than an executed agreement?

—Will the affidavit requirement require modification to require parties attest that a "good faith valuation" has been performed?

—How will parties determine the value of an exclusive license?

—What is the dollar value of a voting securities acquisition involving the purchase of shares for the 15%, 25% or 50% thresholds? Is the value of the transaction to be based on the value of the shares meeting the reporting threshold or the value of the highest number of shares that can be acquired if the threshold is met (15% versus 24.99%). If a person files to met or exceed the 50% threshold, should the fee be based on the number of shares that can be acquired of the 50% threshold is met, the actual percentage of shares that the person intends or has contracted to acquire or 100%.

• Given the complexities of the HSR Rules and the interpretations that have developed over the life of the program, drafting modifications to the HSR Rules is a very arduous, and time consuming process. It is important that any modifications that are adopted must be consistent with regulatory scheme that is in place.

S. 1854 establishes substantive standards for agency requests for information in a merger review. Under the Bill, Agency requests must not be unreasonably cumulative and may not impose undue burden or expense on the parties that outweighs the benefits to the Agency of receiving that information. If information is not supplied, the Agency may raise deficiencies only if its ability to review the transaction has been materially impaired.

Pros:

• There is no doubt that many Agency requests today are over-broad and unduly burdensome. The Bill would impose some discipline on the Agencies and result in more narrow, focused requests.

Cons:

• These are very uncertain standards, and neither the Agencies nor the bar has any idea what they mean or how to interpret them.

• It is very hard for the Agencies to conduct a cost benefit analysis at an early stage in the investigation—especially before the Agency has had access to some

[1] Many people have questioned whether it is appropriate to fund a law enforcement function, such as antitrust enforcement, through user fees at all.

of the data it seeks. It is impossible to do so if private counsel fail to produce relevant information prior to the issuance of the Second Request, which is a tactic used by some lawyers.

The Bill requires that the Agencies identify their competitive concerns at the time a Second Request is issued.

Pros:

- This will force the Agencies to focus their requests on the real concerns.
- Because staff must justify Second Requests to their management, this is already done internally so it imposes little additional burden on the Agencies.
- Indeed, Chairman Pitofsky has already committed that the FTC will do this orally on a non-binding basis. I welcome that commitment, and hope that Antitrust Division will follow his lead.

Cons:

- The Agency may not know all the issues early in the process, so this statement could foreclose inquiry into issues that arise later in the investigation.
- The Agencies may provide broad, largely meaningless requests to minimize that risk, and thereby undermine this requirement.

The Bill provides that the parties to the merger may petition a designated Magistrate Judge in the U.S. District Court in the District of Columbia to review the issuance and scope of a Second Request and the parties' compliance with the request.

Pros:

- This "levels the playing field" by interposing a disinterested third party review so the Agencies no longer hold all the cards.
- This review could provide the parties with some recourse for burdensome requests.
- The only appeal now available is internal review by Agency management. Most parties hesitate to seek review because they believe that management will back the staff and that they will alienate the staff by "going over their heads."

Cons:

- This is likely to result in both the parties and the Agencies becoming "dug in" and intransigent at an early stage in the process, which is not conducive to a negotiated resolution. This could increase the burdens on both the parties and the Agencies.
- Magistrates are unfamiliar with the merger review process and the legal issues involved in mergers, so they are not well equipped for this task. These disputes are not like the typical civil discovery disputes that Magistrates regularly review, where the presumptions typically favor the party seeking discovery. There could be uncertain or confused precedents as a result.
- The review process could result in significant delays for all involved. No time limits or deadlines are proposed in the Bill, although it appears that review should be expeditious. The risk of delay alone could discourage parties from seeking review.
- Unlike typical civil discovery rules (e.g. Fed. R. Civ. P. 37), there is no requirement that the parties and the Agency attempt to resolve their dispute prior to invoking review by a Magistrate.
- We in the private bar are working with the Agencies to improve the merger review process—with or without legislation. We are hopeful that our efforts will yield improvements. After the Antitrust Section has completed it detailed analysis of S. 1854 and secured ABA approval to convey its position to Congress, we will be happy to work with Congress on addressing the important issues raised by the Bill.

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