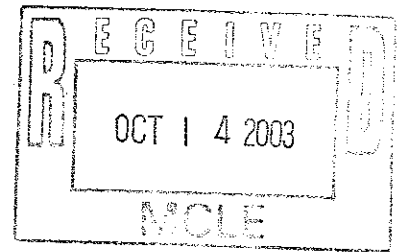


AGENDA
October 9, 2003 - CLE



- 4:50 - 5:00 Introductory Remarks by Oregon's Attorney General
- 5:00 - 5:30 Discussion of recent Federal Trade Commission enforcement actions
- 5:30 - 5:50 Discussion of recent U.S. Department of Justice Antitrust Division enforcement actions
- 5:50 - 6:20 Questions, answers and discussion

BIOGRAPHIES OF PRESENTERS

Attorney General Hardy Myers has served as Attorney General of Oregon since 1997. Prior to that, he was a Member of Oregon House of Representatives, 1975-85, including Speaker of the House from 1979-83 and Chair, Committee on Judiciary, 1977-78 and 1983-84. Prior to serving as Attorney General, he served as a law Clerk to United States District Judge William G. East, 1964-65 and worked in private practice at Stoel Rives (and its predecessors) from 1965 to 1996.

He also has a long and distinguished history serving Oregon in various civic and professional capacities such as chairing the Governor's Task Force on State Employee Benefits, co-chairing the Governor's Task Force on State Employee Compensation, and chairing other committees focused on Portland city strategic planning, criminal sentencing, transportation and judicial issues.

Richard Cohen is a trial attorney with the San Francisco Office of the United States Department of Justice's Antitrust Division. He has B.A. and J.D. degrees from the University of Washington. He has worked for the Division since 1971. In the over thirty years he has worked for the Division he has participated in criminal, civil non-merger and merger investigations. In addition to his work as a trial attorney for the Division, he teaches Antitrust Law at the University of California's Hastings College of Law.

Charles A. Harwood is the Director of the Federal Trade Commission's Northwest Region, a position he has held since June 1989. Prior to that, he served briefly as an attorney-advisor in the Office of the Chairman of the Federal Trade Commission. Before joining the staff of the FTC, Mr. Harwood served from October 1983 until May 1989 as a counsel to the U.S. Senate's Committee on Commerce, Science, and Transportation. Between 1984 and 1989, Mr. Harwood worked primarily with the Consumer Subcommittee of the Senate Commerce Committee. In 2001, Mr. Harwood received the FTC Chairman's Award, which is presented annually by the Chairman of the FTC to a staff member whose work has been of significant and far-reaching benefit to the agency and the public. Mr. Harwood is a member of the Oregon State Bar and the District of Columbia Bar.

PERSPECTIVES FROM THE FTC AND THE U.S. ANTITRUST
DIVISION:
WEST COAST TRENDS IN ANTITRUST, TRADE REGULATION
AND CONSUMER PROTECTION

Antitrust, Trade Regulation and Unfair Trade Practices Section
Oregon State Bar

October 9, 2003

Charles Harwood
Director, Northwest Region
Federal Trade Commission
Seattle WA

Prepared Statement of the Federal Trade Commission

Before the

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

Concerning

An Overview of Federal Trade Commission Antitrust Activities

July 24, 2003

Excerpts
Full statement at
<http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm>

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

I. INTRODUCTION

Merger enforcement continues to be a major focus of the FTC's competition workload. Stopping mergers that lessen competition ensures that consumers will have the benefit of lower prices and greater choices in their selection of goods and services. During the unprecedented merger wave in the late 1990s through 2000, the agency was forced to divert resources to meet its statutory responsibilities under the Hart-Scott-Rodino Act ("HSR").⁽²⁾ With the significant recent decline in merger activity, the Commission has been able to restore the historical balance of enforcement efforts to both merger and nonmerger areas. Since the peak in merger activity in 2000, when the agency opened only 25 nonmerger investigations, the FTC has worked to reinvigorate its nonmerger enforcement program. In 2001, the agency opened 56 new nonmerger investigations, and in 2002, the agency opened another 59 nonmerger investigations. The results of this renewed investment in non-merger enforcement are now emerging, and include a total of 16 non-merger enforcement actions taken thus far in FY 2003, more than any year since 1980; as well as eight non-merger matters in administrative litigation.⁽³⁾

II. FOCUSING ON KEY SECTORS OF THE ECONOMY

A. Health Care

1. Law Enforcement Actions Involving Health Care

The FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality.

a. Law Enforcement Involving Pharmaceutical Companies. The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000.⁽⁵⁾ In response, the FTC has increased its pharmaceutical-related investigations. In 1996, fewer than five percent of new competition investigations involved pharmaceuticals, while in 2002, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- **Mergers Affecting the Pharmaceutical Industry.** In April, the Commission settled with Pfizer Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation to resolve concerns that their \$60 billion merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions.⁽⁶⁾ The settlement required divestitures to protect consumers' interests in those markets while allowing the remainder of the transaction to go forward.

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

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

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

The Commission has settled three additional cases of this type, including an April 2002 settlement resolving charges that American Home Products entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars.⁽¹⁴⁾ An action against Schering-Plough and Upsher-Smith, which remains in administrative litigation, raises similar issues.

(2) *Second Generation Cases.* Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book" list of approved drugs and their related patents. Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Our "second generation" of enforcement activities has involved allegations that individual brand-name manufacturers have delayed generic competition through the use of improper Orange Book listings that trigger the FDA's automatic 30-month stay of approval of a generic drug.

One facet of the FTC's BMS settlement involved allegedly improper Orange Book listings. The complaint stated that BMS misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book"; breached its duty of good faith and candor with the U.S. Patent and Trademark Office, while pursuing new patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.⁽¹⁵⁾ Because of BMS's alleged pattern of anticompetitive conduct and the extensive resulting consumer harm, the Commission's proposed order necessarily contains strong - and in some respects unprecedented - relief.⁽¹⁶⁾

Another recent FTC success in this area is an October 2002 settlement with Biovail Corporation, which resolved charges that Biovail illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book as claiming Biovail's high blood pressure drug Tiazac.⁽¹⁷⁾

b. Other Merger Enforcement Involving Health Care. In June 2002, the Commission authorized the staff to seek a preliminary injunction blocking Cytec Corporation's proposed acquisition of Digene Corporation, involving the merger of two manufacturers of complementary cervical cancer screening tests.⁽¹⁹⁾ The complaint alleged that the combined firm would have an incentive to use its market power in one product to stifle increased competition in the complementary product's market. Thus, if the merger had been consummated, rivals would have been substantially impeded from competing. Following the Commission's decision, the parties abandoned the transaction.

c. Law Enforcement Involving Health Care Providers. For decades, the FTC has worked to facilitate innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. These efforts continue. In the past three months alone, the FTC has settled with seven groups of physicians for allegedly colluding to raise consumers' costs⁽²⁰⁾ and issued an administrative complaint against another.⁽²¹⁾ Many of these cases involve significant numbers of doctors -- more than three-quarters of all doctors in the Carlsbad, New Mexico area in one matter, over 1,000 physicians in Dallas, Texas in another, and an organization consisting of more than 1,500 San Francisco physicians in the case in administrative litigation. The Commission's consent orders put a stop to allegedly collusive conduct harming employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

B. Energy

1. Law Enforcement Actions Involving Energy

- **Oil Merger Investigations.** The Commission has an extensive history of carefully investigating mergers in the petroleum industry. These mergers typically involve a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. Most recently, in the *Conoco/Phillips* merger, the Commission issued a consent order requiring the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.⁽³⁰⁾
- **Natural Gas Merger Investigations.** The FTC also has investigated mergers in the natural gas industry and taken necessary action to preserve competition. In July 2003, the Commission finalized a consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area.⁽³¹⁾ The order conditionally would allow Southern Union Company's \$1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation, while requiring Southern Union to terminate an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City area. Absent the settlement agreement, the transaction would have placed the two pipelines under common ownership or common management and control, eliminating direct competition between them, and likely resulting in consumers' paying higher prices for natural gas in the Kansas City area.
- **Gasoline Monopolization Case.** In March 2003, the Commission issued an administrative complaint in an important nonmerger case involving the Union Oil Company of California ("Unocal").⁽³²⁾ The complaint alleges that Unocal violated Section 5 of the FTC Act by subverting the California Air Resources Board's ("CARB") regulatory standard-setting procedures of the late 1980s relating to low-emissions reformulated gasoline ("RFG"). According to the complaint, Unocal misrepresented to both CARB and industry participants that some of its emissions research was non-proprietary and in the public domain, while at the same time pursuing a patent that would permit Unocal to charge royalties if CARB used such emissions information. The complaint alleged that Unocal did not disclose its pending patent claims and that it intentionally perpetuated the false and misleading impression that it would not enforce any proprietary interests in its emissions

research results. The complaint states that Unocal's conduct has allowed it to acquire monopoly power over the technology used to produce and supply California "summer-time" RFG, a low-emissions fuel mandated for sale in California from March through October, and could cost California consumers five cents per gallon in higher gasoline prices. This case is being litigated before an Administrative Law Judge.

2. Other Energy Industry Initiatives

- **Study of Refined Petroleum Product Prices.** Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of volatility in refined petroleum product prices. In two public conferences, held in August 2001 and May 2002, participants discussed key factors that affect product prices, including increased dependency on foreign crude oil sources, changes in industry business practices, and new governmental regulations.⁽³³⁾ The information gathered through these public conferences will form the basis for a report to be issued later this year.
- **Gasoline Price Monitoring.** In May 2002, the FTC announced a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities to determine if a law enforcement investigation would be warranted.⁽³⁴⁾ This project tracks retail gasoline prices in approximately 360 cities nationwide and wholesale (terminal rack) prices in 20 major urban areas. The FTC Bureau of Economics staff receives daily data purchased from the Oil Price Information Service ("OPIS"), a private data collection company. The economics staff uses an econometric (statistical) model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This model relies on current and historical price relationships across cities, as well as other variables.

C. Technology

1. Law Enforcement Actions Involving Technology

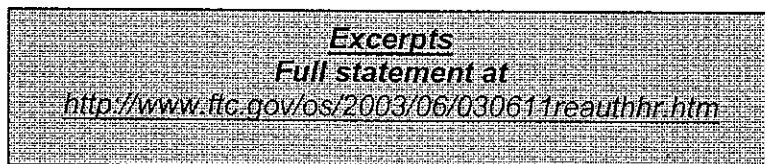
As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint issued in June 2002, the Commission has charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose - in violation of the organization's rules - that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.⁽³⁵⁾ The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The Commission's complaint, which is currently being litigated before an Administrative Law Judge, alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents.⁽³⁶⁾ Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech products and innovation, the Commission will continue to pursue investigations in this important area.⁽³⁷⁾

Prepared Statement of
The Federal Trade Commission

Before the
Subcommittee on
Commerce, Trade and Consumer Protection
of the
Committee on Energy and Commerce
United States House of Representatives

Washington, D.C.

June 11, 2003



During the past year, the FTC has applied its unique complement of law enforcement and policy instruments to address critical consumer concerns. Highlights include:

- **Privacy: "Do-Not-Call."** The Commission promulgated far-reaching amendments to its Telemarketing Sales Rule ("TSR"). Among the most important changes, the agency is poised to launch its National Do-Not-Call registry, one of the most significant consumer protection initiatives in recent years. The registry will be a central database of telephone numbers of consumers who choose not to receive telemarketing calls. Once the registry is in place this summer, telemarketers will pay a fee to gain access to the registry and then must scrub their telemarketing lists against the telephone numbers in the database. This fall, consumers who have placed their telephone numbers on the registry will begin to receive fewer and fewer unwanted telemarketing calls.
- **Health Care: Prescription Drugs.** Medical therapy increasingly relies on new pharmaceuticals as alternatives to more invasive treatments, such as surgery. A number of FTC activities will likely, directly or indirectly, help consumers to afford drugs to meet their needs. The FTC published a study examining the frequency of anticompetitive abuses to block market entry of lower-cost generic drugs; provided comments to the Food and Drug Administration ("FDA") on the potential for misusing the Hatch-Waxman Act procedures governing generic entry; and brought law enforcement actions against branded drug companies alleging improper efforts to delay generic entry. Among other significant matters, the Commission reached a settlement with Bristol-Myers Squibb ("BMS") resolving charges that BMS abused the Hatch-Waxman process to obstruct the entry of generic competition for two anti-cancer drugs and an anti-anxiety agent.
- **Financial Practices: Fraudulent Lending.** In May 2003, the court finalized a settlement to resolve FTC charges that The Associates (now owned by Citigroup, Inc.) had engaged in widespread deceptive and abusive practices involving subprime home mortgage lending. The settlement is expected to provide \$215 million in redress through cash refunds and reduced loan balances to approximately 2.2 million consumers in the U.S., Puerto Rico, and the Virgin Islands. A

related class action settlement is expected to yield an additional \$25 million, for total relief to consumers of \$240 million.

- **E-Commerce: A Unified Approach to Maintaining Efficient Markets.** The development of the Internet has created a host of consumer issues, requiring the FTC to draw on all its consumer protection and competition capabilities. Among other activities, the FTC has formed an Internet Task Force to analyze state regulations that may restrict the entry of new Internet competitors; hosted public workshops on both spam and potential anticompetitive barriers to e-commerce; and brought significant law enforcement actions that continue its historical role of leading efforts to keep e-commerce free from fraud, deception, and unfair or anticompetitive practices.

II. Consumer Protection

A. Fraud and Deception

The FTC targets the most pervasive types of fraud and deception in the marketplace, drawing substantially on data from Consumer Sentinel, the agency's award-winning consumer complaint database,⁽²⁾ and from Internet "surfs" that focus on specific types of claims or solicitations that are likely to violate the law. Since April 1, 2002, the FTC has organized 12 joint law enforcement efforts ("sweeps") with more than 165 law enforcement partners.⁽³⁾ These sweeps resulted in more than 400 law enforcement actions targeting Internet scams and telemarketing fraud, including deceptive work-at-home opportunities, deceptive health claims, advance-fee credit-related fraud, fundraising fraud, and Internet auction fraud. The FTC filed 70 of these law enforcement cases.

Overall, since April 2002, the FTC has filed more than 145 cases involving fraud or deception and has enjoyed significant success in obtaining redress orders to provide relief for defrauded consumers, with more than 65 final judgments to date ordering more than \$865 million in consumer redress.⁽⁴⁾ The agency continues to ensure compliance with district court orders by bringing civil contempt proceedings when appropriate, and by assisting in criminal prosecution of FTC defendants who flagrantly violate court orders.

In March 2003, the FTC announced settlements with five individual defendants who allegedly engaged in deceptive charitable telemarketing by misrepresenting both the charities that donations would benefit and the percentage of donations that the charities would receive.⁽⁷⁾ Between 1995 and early 1999, the defendants raised more than \$27 million. Among other terms of the settlements, defendant Mitchell Gold is subject to a \$10 million judgment. Following an FTC criminal referral, Gold was indicted for mail and wire fraud in connection with the fundraising business and another fraudulent telemarketing scheme. Gold pled guilty and was sentenced to 96 months in prison.

B. Consumer Privacy

1. Do-Not-Call. As highlighted above, the FTC has initiated a national Do-Not-Call registry, a centralized database of telephone numbers of consumers who have asked to be placed on the list. The Do-Not-Call registry - part of the FTC's 2002 amendments to the TSR - will help consumers reduce the number of unwanted telemarketing phone calls.

2. Identity Theft. The FTC's toll-free number 1-877-ID-THEFT is the nation's central clearinghouse for identity theft complaints. Calls regarding identity theft have increased from more than 36,000 calls in FY 2000 to more than 185,000 calls in FY 2002. These complaints are available to the FTC's law enforcement partners through an online database, and now more than 620 law enforcement agencies can access this data. In addition, FTC investigators, working with the Secret Service, develop preliminary investigative reports that are referred to regional Financial Crimes Task Forces for possible prosecution.

3. Safeguarding Consumer Information. In May 2002, the FTC finalized an order settling charges that Eli Lilly & Company unintentionally disclosed e-mail addresses of users of its Prozac.com and Lilly.com sites as a result of failures to take reasonable steps to protect the confidentiality and security of that information. The settlement requires Lilly to establish a security program to protect consumers' personal information against reasonably anticipated threats or risks to its security, confidentiality, or integrity.⁽⁹⁾

In December 2002, the FTC settled charges against Microsoft Corporation that, among other things, the company misrepresented the measures it used to maintain and protect the privacy and confidentiality of consumers' personal information collected through its Passport web services.⁽¹⁰⁾ Microsoft has agreed to implement a comprehensive information security program for Passport and similar services. The FTC will continue to bring actions involving claims deceptively touting the privacy and security features of products and services, as well as failures to maintain adequate security for personal information.

In May 2002, the Commission finalized its Safeguards Rule to implement the security provisions of the Gramm-Leach-Bliley Act ("GLB").⁽¹¹⁾ The Rule establishes standards for financial institutions to maintain the security of customers' financial information, and became effective in May 2003. To help businesses comply with the Rule, the agency issued a new business education publication, and will conduct other initiatives to inform businesses of the Rule and provide compliance guidance.⁽¹²⁾

4. Children's Online Privacy Protection Act ("COPPA").⁽¹³⁾ COPPA requires commercial web sites to give notice of their information practices and to obtain parental consent before collecting, using, or disclosing personal information about children under the age of 13. Since April 2001, the FTC has brought eight COPPA cases and obtained agreements requiring payment of civil penalties totaling more than \$350,000.⁽¹⁴⁾ The two most recent cases involved settlements with Hershey Foods and Mrs. Fields.⁽¹⁵⁾ Both companies agreed to settle charges that their web sites allegedly collected personal data from children without complying with COPPA requirements.

5. Spam.

In particular, deceptive spam is an ever-growing problem that the FTC is addressing through law enforcement efforts, consumer and business education, and research. An important tool the FTC uses to target law violations, identify trends, and conduct research for education is its spam database. Consumers forward spam they receive to the FTC database at uce@ftc.gov. The database receives, on average, more than 110,000 e-mail messages each day, and currently contains a total of approximately 42 million pieces of spam.