Responses to Post-Hearing Questions
for FTC Chairman Deborah Majoras

Antitrust Oversight Hearing on March 7, 2007
Subcommittee on Antitrust, Competition Policy and Consumer Rights

QUESTIONS FROM CHAIRMAN LEAHY:

You both highlight in the testimony presented to the Committee that you have made a priority of promoting "antitrust policy convergence" with the international community. This is an issue that was also stressed in the Department of Justice's and Federal Trade Commission's testimony during the last oversight hearing in September 2002. Then-Assistant Attorney General Charles James testified that "[i]ncreased globalization is one of the dramatic changes taking place in our economy that is creating new challenges for antitrust enforcement." He promised that, after years of talk about convergence, "[n]ow the Antitrust Division is taking aggressive steps to turn this talk into action." Similarly, then-FTC Chairman Muris testified that "[b]ecause competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program."

(a) What concrete progress has been made in antitrust policy convergence since 2002?

(b) What are the biggest obstacles to convergence that remain?

(c) In what specific ways have, or may, different competition enforcement policies in foreign jurisdictions affected business practices in the United States?

(d) What issues are implicated by the extra-territorial reach of foreign competition laws on United States law? Is such extra-territorial reach a concern for the antitrust enforcement agencies and, if so, what steps are you taking to address it?

The FTC, along with DOJ's Antitrust Division, has worked to promote convergence toward sound antitrust policy and enforcement among the world's increasing number of antitrust agencies. In January 2007, I combined the staff in various offices to establish the Office of International Affairs to give additional strength and prominence to our efforts.

(a) What concrete progress has been made in antitrust policy convergence since 2002?

Following the *GE/Honeywell* case, the U.S. antitrust agencies and the European Commission established working groups to pursue convergence on merger review issues, including on review procedures and the analysis of conglomerate mergers, and have consulted on numerous policy initiatives in all areas of antitrust policy. Examples of progress in convergence since 2002 include:

1. In 2002, the FTC, DOJ and European Commission issued "Best Practices on

Cooperation in Merger Investigations,"[1] which sets forth steps the agencies follow when they concurrently review proposed mergers and provides guidance to business and the bar on facilitating coordination between the reviewing agencies.

2. In 2004, the EC changed the substantive test for mergers from the dominance test, which occasionally led to different analyses in trans-Atlantic investigations, to a standard that is virtually identical with the substantial lessening of competition test in Section 7 of the Clayton Act.

3. In 2004, the EC adopted horizontal merger guidelines that, in most regards, provide for the same analysis as under the DOJ-FTC horizontal merger guidelines.

4. The EC's and U.S. agencies' policies on merger remedies have grown closer, building on the EC's 2001 remedies notice, which as issued after close consultation with the FTC and DOJ.

5. The EC created the office of Chief Competition Economist, reporting to the Director General for Competition, to incorporate more economic analysis in all areas of EC competition policy enforcement. Economists from this office work closely with FTC and DOJ economists on significant cross-border investigations.

6. In 2004, the EC issued Technology Transfer Block Exemption Guidelines, which provide that the Commission will evaluate most intellectual property license agreements under a rule of reason, moving EC enforcement policy closer to American antitrust principles, as embodied in 1995 DOJ-FTC guidelines on IP licensing and antitrust.

7. Canada's recent policy statements on merger remedies, regulated conduct, and the treatment of information under the Competition Act that provide for policies that closely parallel the U.S. approaches to these subjects.

8. Japan has revised its merger guidelines of 2004 and 2007 move its framework of analysis closer to the DOJ-FTC horizontal merger guidelines.

9. During the past few years, over 35 jurisdictions have changed their merger review systems to conform more closely to the International Competition Network's Recommended Practices for Merger Notification and Review Procedures, including by changing notification thresholds to ensure a connection between the merger and the reviewing jurisdiction (e.g., Brazil, Estonia, Korea), replacing market share thresholds with thresholds based on objective criteria such as sales or assets (e.g., Belgium, Colombia, Romania), and increasing the flexibility of

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1 Http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

notification timing (e.g., EC, Denmark, Poland). These reforms have been praised for reducing unnecessary costs and burdens in the review of multi-jurisdictional mergers, as well as facilitating coordination among reviewing agencies. The FTC chaired the ICN group that developed the Recommended Practices, as well as Guiding Principles for Merger Notification and Review Procedures that call for, among other things, transparency, procedural fairness, and non-discrimination based on nationality.

10. Over the past years, the U.S. agencies also have instituted reforms that increase our conformity with polices and practices toward international best practice. For example, we have reformed our merger review system to conform more closely to the ICN recommended practices, including through the FTC merger process reforms, the FTC/DOJ merger Commentary, issuing more published explanations of decisions to close second stage investigations, and raising and indexing our premerger notification thresholds.

The FTC continues to work toward convergence through its strong network of bilateral relationships and its leadership in multilateral organizations. Bilaterally, we meet regularly with the staff and heads of foreign antitrust agencies. In addition to our regular meetings with the EC, Japan, and Canada, senior FTC and DOJ officials and I have conducted and continue to participate high-level meetings in China in connection with their draft Anti-Monopoly Law and the new draft guidelines for the review of acquisitions by foreign firms. We also conduct an active technical assistance program around the world, funded principally by AID, in which we assist young antitrust agencies to apply new competition laws in a sound manner.

The FTC is a leader in the ICN. It co-chairs the new working group on unilateral conduct, which will seek to increase convergence in the analysis of monopolization and the conduct of dominant firms. The FTC heads the ICN group that is promoting further implementation of the Recommended Practices, and will be active in an expected new project, led by the Justice Department, on convergence in substantive merger analysis. The FTC plays an active role in the OECD Competition Committee and other international competition fora such as APEC and UNCTAD.

The results of the FTC's work toward international convergence do not always result in a concrete document, and it may not be possible to prove that a compatible outcome in a multi-jurisdictional investigation was attributable to a particular meeting or project. However, although I recognize that there have been major cases in which competition authorities treated a single transaction or practice dissimilarly, there are many more cases in which, as a result of cooperation and increasingly similar analyses, firms benefit from sound and compatible antitrust treatment from antitrust agencies around the world. Despite fears of a serious US-EC rift in the wake of the *GE/Honeywell* matter, there has not been a single merger case in which the U.S. agencies and the EC reached different outcomes in the over five years since that decision, while the US agencies and the EC have reached consistent outcomes in numerous matters.[2]

(b) What are the biggest obstacles to convergence that remain?

Given that over 100 nations with different legal systems, levels of economic development, experience with market economies, and cultures now have antitrust laws, most of which are relatively new, differences in laws and their implementation are inevitable notwithstanding the best of efforts to converge. In some cases, convergence is impeded by different degrees of confidence in the ability of markets to self-correct and work for the benefit of consumers. A lesser degree of confidence in markets can lead to a more interventionist antitrust enforcement policy than the U.S. agencies follow. Similarly, many antitrust authorities strike the balance between the risks of over- and under-enforcement to weigh the risks of under-enforcement more heavily than the U.S. agencies, which are careful to avoid deterring procompetitive conduct. In addition, many antitrust authorities do not rely as heavily as the United States agencies on economic analysis, or do not have the resources or expertise to apply sophisticated economic tools.

While there has been substantial convergence in anti-cartel enforcement and mergers, there is less commonality of approach toward antitrust enforcement involving single firm conduct. This is perhaps the most challenging of areas for antitrust policy, given the fine line between aggressive procompetitive conduct and unlawful exclusionary conduct. The FTC and DOJ are conducting hearings to inform their own policies in this area.

Many jurisdictions enforce antitrust or similar laws against "unfair" practices in situations in which the United States agencies would not act because the firm does not have market power or the practice injures competitors but not competition. Many foreign competition agencies find dominance at levels below U.S. standards for monopoly power, and have a more expansive view of what constitutes illegal conduct by dominant firms – for example, aggressive pricing and marketing policies. The U.S. agencies are working to reduce differences in this area both bilaterally, including in our dialogue with the European Commission regarding their Article 82 review, and multilaterally, particularly in the ICN. The EC appears to be moving toward an analysis that is based more on economic effects than on market structure. Achieving significantly greater convergence in this area is probably a long-term process. The U.S. agencies are making the investments that we hope will bear fruit as agencies gain more experience enforcing their laws and working with international counterparts.

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2 Recent cases in which the FTC has cooperated closely with the EC and other foreign agencies include: Linde/BOC (*see* FTC press release at http://www.ftc.gov/opa/2006/07/lindeBOC.htm, noting cooperation with the EC), Procter & Gamble/Gillette (*see* FTC press release at http://www.ftc.gov/opa/2005/09/pggillette.htm, noting cooperation with the EC, Canadian, and Mexican competition agencies) and Boston Scientific/Guidant (*see* FTC press release at http://www.ftc.gov/opa/2006/04/bostonscigui.htm, noting cooperation with the EC, the Canadian Competition Bureau, and the Japan Fair Trade Commission), and EC press release at http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/491.

Lack of convergence can also arise from the application by some foreign antitrust agencies or governments of factors beyond what the U.S. agencies consider competition policy. These can include protecting small businesses, protecting local employment, and creating "national champions." Last week, I participated in a program at the International Competition Conference in connection with European Competition Day on the topic of national champions, where I took the opportunity to advocate that competition agencies stick to competition analysis, and pointed out the drawbacks of government policies to promote national champions.

(c) In what specific ways have, or may, different competition enforcement policies in foreign jurisdictions affected business practices in the United States?

The United States business community is in a better position than the agencies to respond to this question, but I offer the following based on the agency's experience and perceptions.

Given globalization of business and the proliferation of antitrust laws, it is inevitable that foreign competition policies will affect U.S. firms. We recognize the right of foreign agencies to enforce their competition laws against U.S. firms based on the "effects doctrine," just as we apply U.S. rules to conduct by foreign firms that affects U.S. commerce and consumers. For examples, the U.S. agencies routinely review acquisitions by foreign firms, and require divestitures, including of foreign assets, as a condition of clearance.

The proliferation of competition laws, to over one hundred worldwide, poses challenges for businesses. For example, the increase in merger review regimes, to over seventy-five worldwide, imposes procedural costs and burdens, including multiple filings to agencies with different filing deadlines, information requirements, and timetables for review, as well as potentially onerous translation and authentication rules. The ICN's work in this area, led by the FTC, has contributed significantly to mitigating these costs and burdens. The multiplicity of regimes with different substantive tests also risks divergent analyses and conflicting outcomes although, with the benefit of cooperation and comity, this has occurred rarely to date.

To the extent that competition rules affecting multinational firms differ, it is possible, particularly where markets are local, that firms can calibrate their local activities to conform to different national rules. However, in transnational markets, firms may choose to adopt practices that conform to the rules of many or all of the jurisdictions in which they do business. This risks sacrificing some conduct that we would consider procompetitive in the United States to comply with more restrictive foreign rules.

I believe that the competition enforcement policies of our major trading partners are mostly well-aligned with those of the U.S. agencies, such that foreign competition policies do not significantly distort business practices in the United States. However, I am aware that differences remain, such as more restrictive views by some foreign agencies of the conduct permitted by dominant firms. The FTC therefore continues to work toward increased convergence toward antitrust enforcement principles based on economics and the encouragement of procompetitive conduct.

(d) What issues are implicated by the extra-territorial reach of foreign competition laws on United States law? Is such extra-territorial reach a concern for the antitrust enforcement agencies and, if so, what steps are you taking to address it?

See response to question (c), above. In addition, the U.S. agencies operate under a network of formal and informal cooperation agreements[3] and arrangements with our major trading partners that are designed both to promote cooperation and to minimize and manage conflict. Pursuant to the agreements, the FTC and other agencies notify one another of enforcement matters that affect each other's important interests. The agreements provide a framework for investigative assistance, and for coordinating parallel investigations. They set forth parameters to apply comity factors to take into account the other party's interests, and most include positive comity provisions. The agreements also provide consultation mechanism for disputes, although there has rarely been a need to invoke them.

[3] *See* http://www.ftc.gov/bc/international/coopagree.htm.

QUESTIONS FROM CHAIRMAN KOHL

1. In the last 15 years there has been a tremendous amount of consolidation in the oil industry – the GAO counts 2600 mergers and acquisitions in this industry since 1990 alone. During this time, the FTC has approved most of the oil industry mergers it has reviewed, including the gigantic ones like Exxon/Mobil, Chevron/Texaco and Conoco/Phillips. While each one of these mergers may not have seemed problematic when reviewed, taken as a whole these mergers have greatly increased concentration in the industry.

Many wonder whether new rules or merger guidelines are necessary because of the special circumstances in the oil industry. For example, it is not easy to increase capacity to meet growing demand because of environmental and other restrictions to building new refineries. In addition, consumers cannot respond to higher prices by buying substitute products – people must buy gas to drive to work, and must buy heating oil or natural gas to heat their homes in the winter.

Shouldn't the joint Justice Department/FTC merger guidelines be revised to give extra scrutiny to mergers in the oil industry because of these special conditions?

Although it is true that there have been many mergers and acquisitions in the petroleum industry since 1990, including most of the larger mergers that were consummated in the late 1990s, this does not necessarily mean that the industry has become highly concentrated. Most of the 2600 transaction cited by GAO were acquisitions of production assets, an area in which concentration remains low. Despite moderate increases in concentration at some production levels over the last two decades, particularly since the mid-1990s, most sectors of the petroleum industry at the national, regional, or state level generally remain unconcentrated or moderately concentrated. As measured by the Herfindahl-Hirschman Index,[4] refining concentration in PADDs II through V[5] remains moderate. Although the concentration for refining in PADD I had increased to 2713 by January of 2006, significant additional competition in this area is provided by Gulf Coast shipments and imports which are not factored into the PADD I HHI numbers. Wholesale and brand-level retail concentration at the state level remains unconcentrated or moderate (that is, below 1800) in most cases.[6] In addition, the growth of independent (non-integrated) marketers and hypermarkets has increased competition at the wholesale and retail

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4 The Commission and the Department of Justice measure market concentration by means of the Herfindahl-Hirschman Index (HHI), which is calculated by summing the squares of the market shares of all firms in the market. Under the DOJ/FTC Horizontal Merger Guidelines, markets with HHIs between 1000 and 1800 are deemed "moderately concentrated," while markets with HHIs exceeding 1800 are deemed "highly concentrated."

5 "PADD" stands for "Petroleum Administration for Defense District." PADD I consists of the East Coast. PADD II consists of the Midwest. PADD III includes the Gulf Coast. PADD IV consists of the Rocky Mountain region. PADD V is made up of the far Western states and includes Alaska and Hawaii.

6 The correct definition of a market in an antitrust case is a detailed, fact-intensive inquiry that involves both product and geographic components. We must ascertain for which product (or products) the transaction may harm competition, and we also must determine the geographic area over which any anticompetitive effects will be felt. In our analysis of petroleum mergers, national, state, or PADD-wide "markets" rarely correspond to properly defined geographic markets.

levels in many areas.

I believe it would be a mistake to adjust the DOJ/FTC Horizontal Merger Guidelines to require heightened scrutiny of petroleum industry mergers and acquisitions. The antitrust laws are general statutes designed to apply across all industries. They are flexible and adaptable to changes in industry structures and economic learning over time. Applying the same laws and enforcement procedures to all sectors of the economy has served consumers well for over one hundred years. Of course, each industry has unique features, but the Commission and the Antitrust Division are experienced in adapting their investigations to take those features into account. The ease of entry, the exposure to foreign competitors, the pace of technological change, and many other factors are considered in the course of decisions to investigate or prosecute in any industry. After accounting for these factors, the underlying antitrust violations of conspiracies in restraint of trade or unilateral exclusionary conduct, or in the case of mergers, an acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly," are common to all industries and require consistent treatment.

In fact, the Commission already gives extra scrutiny to the petroleum industry, due to its importance to the national economy and consumers' pocketbooks. Data released by the Commission show that we have brought merger cases in this industry at lower concentration levels than for cases brought in other industries.[7] These data show that the current Guidelines are sufficient for the Commission to identify, and prosecute, anticompetitive acquisitions in the petroleum industry. It is unnecessary to modify the Guidelines as they apply to this particular industry in order for the Commission to effectively enforce the antitrust laws.

It is difficult to predict all of the consequences of changing enforcement guidelines for one industry. However, it is quite likely that starting down that path will bring calls for special treatment for other industries as well; indeed, calls to change the antitrust laws or Guidelines as they are applied to an individual industry are almost always calls to weaken enforcement, and to allow mergers to proceed that we would regard as anticompetitive. As the Commission has often noted, the antitrust laws are flexible enough to take account of industry variations, such as those you describe, and to protect consumers across all sectors of the economy. At the end of the day, if antitrust enforcement is balkanized, with each industry being subject to a different standard, the Guidelines will become useless, and consumers and business interests will lack useful guidance.

2. Last year, we all saw alarming gas price increases, and gas prices reached record levels of over $3 per gallon in many places around the country last summer. While gas prices receded last Fall, they are rising again. I wrote to you last year asking that you investigate allegations of anti-competitive behavior causing gas prices to rise. What is the status of this investigation today? And what can antitrust enforcement do should gas prices continue to rise?

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[7] Horizontal Merger Investigations Data, Fiscal Years 1996-2005 (Jan. 25, 2007), available at http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf.

I share your concern about gasoline price spikes, and we continue to examine them in detail. You may recall that, on May 22, 2006, the Commission delivered to Congress a report on whether gasoline prices had been manipulated, for example, through tightening of refining capacity, and whether gasoline price gouging occurred after Hurricane Katrina.[8] Examining multiple levels of the petroleum industry – including refining and bulk distribution – the Commission investigated various means by which oil companies might have manipulated the supply of gasoline in order to increase prices. We found no evidence that the companies were engaging in such behavior. As for post-Katrina price gouging, we identified 15 instances in which gasoline refiners, wholesalers, or retailers met the definition of "gouging" laid down by Congress in the appropriations statute that mandated this part of the investigation.[9] In all but one such instance, however, local or regional competitive circumstances appeared to explain the price increases imposed by these firms.[10]

On April 25, 2006 – while the investigation described above was in progress – the President called on the Commission to work with the Departments of Justice and Energy to conduct further inquiry as to manipulation of gasoline markets. The Commission received similar requests from then-Chairman DeWine and yourself, as well as others in Congress. In response, FTC staff, with assistance from the Departments of Justice and Energy, began an examination of gasoline prices and industry conditions throughout the United States last year and the many usual and unusual factors that affected prices. Staff is continuing its work on this matter and plans to report its findings to me soon.

I note that the antitrust laws do not prevent all price increases. Indeed, for an economy to function efficiently, prices must be free to rise and fall as supply and demand factors fluctuate. To the extent that prices rise because demand is strong or there are problems in the supply chain, the antitrust laws cannot, and should not, prevent such increases. The antitrust laws prevent price increases caused by collusive behavior between competitors or by unilateral exclusionary conduct by a firm with market power. Commission staff is constantly on the lookout for any evidence of price manipulation through illegal activities.

In addition to our formal investigative work in the petroleum industry, the Commission monitors gasoline and diesel fuel price movements continuously in 20 wholesale regions and approximately 360 retail areas across the nation to identify conduct in petroleum markets that may violate the antitrust laws. Commission attorneys and economists examine each unusual price movement to assess whether it might result from any unlawful anticompetitive conduct.

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[8] Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (2006), *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf.

[9] Section 632 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108, § 632, 119 Stat. 2290 (Nov. 22, 2005).

[10] Some thoughtful reports also have come out of recent efforts by State AGs to examine gasoline prices. *See, e.g.*, Goss, Morse & Thompson, *Report of the Attorney General's Task Force on Motor Fuel Pricing in Nebraska* (Jan. 2006), *available at* http://www.ago.state.ne.us/content/gas_gouging.pdf.

Our ongoing detection efforts complement state and local investigations and oversight of practices in the petroleum industry, including any investigations conducted under the authority of state antitrust or consumer protection laws or pursuant to state price gouging statutes that are triggered when emergency situations develop. The Commission will take swift and decisive action if scrutiny of price movements reveals the use of illegal anticompetitive practices.

3. We have heard many concerns from U.S. companies with global operations about being treated unfairly by other nations' antitrust enforcement agencies. These companies assert that complying with conflicting antitrust review processes is very expensive, burdensome and time consuming. They are also concerned with conflicting results among international antitrust authorities, particularly between the EC and the United States. There are several prominent recent examples that raise concerns, including Microsoft facing numerous antitrust investigations in Europe, and the EC blocking the GE-Honeywell merger in 2002 after the U.S. Justice Department approved. Complaints have also been raised about unfair treatment given to U.S. companies by foreign antitrust authorities in order to protect competing businesses in the foreign nations.

I am very concerned about the burdens placed on U.S. companies from international antitrust authorities. What have you done to achieve greater co-ordination and harmonization between U.S. and foreign antitrust enforcement agencies? Is there anything that we in Congress can do?

The Federal Trade Commission recognizes these concerns, and is a leader in international initiatives to address them. I recently combined the staff in various offices to form the Office of International Affairs to provide increased strength and prominence to the FTC's international competition and consumer protection programs. Promoting convergence toward best practices is a primary goal of the FTC's international antitrust program. While we regret the divergence of outcomes in the two matters to which the question refers, we have, as indicated in our response to Senator Leahy (see response to question (a)), achieved greater convergence with the EC in several policy areas, and have reached consistent outcomes in numerous cases every year.

In recent years, the number of nations with antitrust laws has grown from approximately twenty, many of which did not actively enforce the laws, to over one hundred. Well-designed and implemented antitrust laws can benefit both the local economy and firms doing business internationally. Sound competition policy can support the development of free markets and provide a level playing field for new entrants. However, a multiplicity of antitrust rules also creates the potential for duplication and conflict. Given the number and diversity of jurisdictions with new antitrust laws, some disharmony is inevitable, although significant substantive conflict among agency decisions is rare, and virtually limited to the examples cites. We are concerned about the types of problems referenced in your question, and place a high priority on working to eliminate them by supporting the development of sound competition policy and working toward international convergence both in the analysis of specific cases subject to multijurisdictional review and on antitrust enforcement policies.

1. Effective enforcement coordination: Following *GE/Honeywell,* the U.S. antitrust agencies and the European Commission redoubled their efforts to coordinate their reviews of mergers subject to parallel review. In 2002, the FTC, DOJ, and European Commission issued "Best Practices on Cooperation in Merger Investigations,"[11] which sets forth steps the agencies follow when they concurrently review proposed mergers and provides guidance to business and the bar on facilitating coordination between the reviewing agencies. During the past five years, the FTC has consulted with the European Commission in 50 merger investigations, resulting in the coordination of compatible remedies in 17 of them (most recently, for example, in connection with the *Linde/BOC* merger in the industrial gases industry[12]). Since the conflicting *GE/Honeywell* decisions over five years ago, there have been no instances of conflicting merger outcomes, and numerous cases on which the U.S. agencies and the EC cooperated successfully to achieve consistent analyses and outcomes. More generally, the U.S. agencies cooperate with agencies around the world through formal and informal agreements and arrangements on mutual review of cases to achieve consistent outcomes and minimize enforcement conflicts.

2. International policy convergence: We work closely with counterpart agencies around the world bilaterally and in multilateral organizations to promote convergence. As discussed in my response to Chairman Leahy (attached), the agency's work with the European Commission to minimize differences has contributed to the EC's reforming its substantive merger review test to one that closely resembles the Clayton Act test, and to EC guidelines on merger remedies and technology transfer that move significantly in the direction of U.S. law and policy. We are working with the EC on the issues in its current Discussion Paper on Article 82 enforcement, which would move the EC closer to the U.S. approach to analyzing single firm conduct, and on the EC's draft guidelines on the analysis of non-horizontal mergers. We maintain strong relations and ongoing dialogue with other major counterparts, including the Canadian Competition Bureau on many antitrust guidelines they have issued in recent years, the Japan Fair Trade Commission, including on the recent amendments to their merger guidelines, and the Korean Fair Trade Commission, with which we are negotiating a cooperation agreement.

Multilaterally, in the International Competition Network, which includes almost every antitrust agency in the world, the FTC chairs the Merger Notification and Procedures subgroup, which produced internationally-agreed Guiding Principles and Recommended Practices to streamline multi-jurisdictional merger review. The principles include non-discrimination on the basis of nationality. Over forty jurisdictions have made or plan to make changes to their merger review systems to bring them into greater conformity with these standards, including by changing notification thresholds to ensure an appreciable nexus with the transaction and to base their thresholds on objective criteria. These reforms have reduced costs and burdens on parties engaged in mergers subject to multijurisdictional review. The FTC also co-heads the ICN's new working group on unilateral conduct, the area of antitrust policy on which there is currently the least international consensus. We are working with a large group of ICN members and private

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11 Http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

12 *See* FTC press release at: http://www.ftc.gov/opa/2006/07/lindeBOC.htm; EC press release at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/737.

sector advisors from the U.S. and abroad to build the basis for convergence toward sound policies in this area. We also play an active role the OECD Competition Committee and the competition bodies of APEC and UNCTAD.

3. Technical assistance. The FTC, along with the Department of Justice, conducts a program of technical assistance to assist younger agencies in understanding and soundly implementing new competition laws. The program includes assisting with the development of framework laws and the establishment of new agencies, training competition agency personnel in substantive legal principles, analysis, and investigative techniques, and education directed at supporting institutions including other government agencies, universities, business groups, consumer associations, and the press. We also provide comments to dozens of agencies on proposed competition laws and amendments, and host scores of officials from foreign agencies, who meet with our staff and observe how our agency operates.

The Antitrust Modernization Commission recently issued its final report, which includes recommendations for legislative amendments concerning the International Antitrust Enforcement Assistance Act and funding of the agencies' technical assistance program. We are studying these and other recommendations addressing international antitrust, and would be happy to discuss these with you.

4. Under current law, the Federal Trade Commission is prevented from taking action to prevent anti-competitive conduct in the telecommunications sector because of the common carrier exemption. This exemption divests the FTC from jurisdiction over common carriers, including telecommunications common carriers. Many concerned with antitrust enforcement believe this common carrier exemption should be repealed, in order to strengthen antitrust enforcement over this industry. Do you believe the FTC's common carrier exemption should be repealed with respect to the telecommunications industry? How does this common carrier exemption hinder the FTC's enforcement efforts? What would be the benefits from the repeal of the common carrier exemption?

The Commission has taken the position that the FTC's common carrier exemption should be repealed with respect to the telecommunications industry. The exemption is a relic from a period when telecommunication services were subject to close economic regulation by the Federal Communications Commission (FCC). In recent decades, Congress and the FCC have done away with most of the regime of economic regulation that once applied to the telecommunications carriers, and numerous providers of telecommunications service compete for consumers' business. Furthermore, telecommunications firms have taken the opportunity to expand into many lines of business, such as the offering of Internet access services, that do not constitute common carrier activities. In addition, convergence of technologies has blurred the lines between traditional telecommunications and other goods and services. In light of these market changes and new business activities, the limitations on the FTC's jurisdiction are no longer justified.

As with other industries, FTC oversight of telecommunications firms' business activities is important to ensure that consumers reap the full benefits of a fair and open marketplace. The expertise and tools that the FTC brings to bear are relevant and appropriate to the telecommunications industry and its expanded business activities.

The most urgent problem has been that the exemption stands as a serious impediment to the agency's consumer protection enforcement efforts. Because of the exemption, consumers of many telecommunications services do not receive the benefit of FTC enforcement of the FTC Act's prohibitions against deceptive and unfair practices. The common carrier exemption frustrates effective consumer protection with respect to a wide array of activities in the telecommunications industry, including advertising, and billing practices. Further, as telecommunications carriers expand into other businesses and as traditionally distinct businesses converge, the common carrier exemption frustrates the FTC's ability to stop deceptive and unfair acts and practices with respect to interconnected communications, information, entertainment, and payment services.

As a practical matter, the continuing exemption unnecessarily causes FTC resources to be diverted to determining the reach of the exemption. For example, although common carriage has been outside the FTC's authority, the Commission considers the FTC Act applicable to non-common carrier activities of telecommunications firms. Continuing disputes over the breadth of the FTC Act's common carrier exemption hamper the FTC's oversight of the non-common carrier activities. These disputes increase the costs of pursuing an enforcement action, or may cause the FTC to narrow an enforcement action - for example, by excluding some participants in a scheme - to avoid protracted jurisdictional battles and undue delay in securing a remedy.

QUESTIONS FROM RANKING MEMBER SPECTER

1. Patent Settlements

Why is it not important to take into account the strength of patent claims asserted by the patent holder when considering the competitive effects of a settlement agreement that resolves Hatch-Waxman infringement litigation? It seems to me that if the patent claims being asserted are strong, delayed entry might be justified. And, a settlement payment might permit a generic to settle where the litigation is a bet-the farm, must win undertaking or it could bridge a reasonable disagreement over the strengths of the patent claim. The point is, there may be circumstances in which such a settlement agreement is not anticompetitive, correct?

The Commission's concern about settlements in which a drug patent holder pays the generic challenger to drop the patent challenge and stay off the market does not rest on the premise that the strength of the patent is unimportant or irrelevant to evaluating competitive effects. On the contrary, the problem with exclusion payment settlements is that the patent holder is buying more protection from competition than the patent standing alone affords. That is why the patent holder is paying the generic – to induce its would-be competitor to accept an entry date that is later than the generic would otherwise accept after weighing its prospects for success in continued litigation. The payment is thus used to bolster the strength of the patent. Indeed, the weaker the drug patent holder's prospects of blocking generic entry by the strength of its patent alone, the more likely the patent holder will resort to paying the generic to give up its challenge.

Some have suggested that the only way account for the strength of the patent when assessing a settlement is through some form of direct inquiry into the relative merits of parties' positions. The Commission's approach, however, which looks to the behavior of the litigants, properly focuses the competitive assessment on the circumstances at the time of the settlement (as antitrust law demands), and acknowledges both the uncertainty inherent in patent litigation and the fact that the litigants themselves have the most information with which to assess the likely outcome at that point. Indeed, given the inherent difficulty in predicting the outcome of a never-completed patent case, along with other concerns, courts have declined to undertake a direct assessment of the strength of the patent, even when there has already been a district court decision in the underlying patent case. *See In re Tamoxifen Citrate Antitrust Litigation*, 429 F.3d 370, 387-88 (2d Cir. 2005), *amended*, 466 F.3d 187 (2006), *petition for cert. filed*, http://www.supremecourtus.gov/docket/06-830.htm (Dec. 13, 2006) (No. 06-830).

That a payment may facilitate settlement if parties disagree over the strength of the patent does not suggest that the settlement is benign. When parties settle a Hatch-Waxman patent case without an exclusion payment, their competing interests should operate to ensure that the deal they negotiate fairly reflects the merits of the patent case. But if the parties settle with a payment to the generic to stay out of the market, their negotiation drastically changes. The generic firm profits by not competing, and the brand name company pays the generic and still makes more profit than it would if the generic came to market. In other words, both companies will be better off by avoiding competition than by competing – while consumers lose the prospect of competition and the resulting savings. That is true even when parties disagree on the strength of the patent. Finally, as the Commission's January 2007 testimony discusses, if exclusion payments are not permitted, litigants can and do find other ways to settle their patent disputes.

Can you explain why you believe the Solicitor General's brief in opposition to your certiorari petition in *Schering-Plough* was wrong?

The Solicitor General's brief argued that the Supreme Court should not review the *Schering* case to address what all agreed was an important antitrust issue, but instead should wait for a better vehicle to resolve the question presented. There are several reasons why the Commission thought that the case warranted review, including the following.

The Eleventh Circuit's ruling places settlements of Hatch-Waxman patent litigation nearly beyond the reach of antitrust enforcement. While it was suggested that the decision could be interpreted somewhat narrowly, it is clear that both courts and the industry are reading the decision as establishing an extremely lenient rule.

There is a conflict between the Eleventh Circuit's decision and the policy choices of Congress set forth in the Hatch-Waxman Act. That law sought to encourage challenges to weak patents and provided procedures for early litigation of such challenges, in order to speed generic drugs to market. The Commission disagrees with the court's view that exclusion payment settlements are a natural by-product of this unique patent challenge process and does not believe that the Hatch-Waxman Act may create unique justifications for reverse payments. The Commission has maintained that a law that was designed to facilitate generic entry, should not be turned into a justification for payments designed to keep generics out of the hands of consumers.

In its brief, the FTC argued that the critical importance of this antitrust issue to our nation's health-care costs counseled against waiting. As was discussed in the Commission's testimony before the Senate Judiciary Committee in January of this year, the pharmaceutical industry has reacted to the court decisions and resumed settlements combining compensation to the generic challenger with a restriction on generic entry, with the potential for billions of dollars in higher drug costs every year. It is apparent from recent settlements filed with the FTC that paying the generic challenger to settle has quickly become common practice in the drug industry.

2. Health Care

It sometimes appears as if your two agencies are working at cross purposes in the health care industry. The Antitrust Division continues to approve mergers that strengthen the market power of health plans and insurers while the FTC continues to prosecute groups of doctors that try to counter that market power. The situation seems somewhat untenable.

Do you have any suggestions for what can be done about this situation?

I do not believe that the FTC and the Antitrust Division are working at cross purposes. On the contrary, both agencies are committed to serving consumers by protecting and promoting competition in health care markets, at all levels of the industry. As part of this commitment, the agencies together undertook a series of hearings on a wide range of competition issues in health care, the results of which are detailed in a 2004 report, "Improving Health Care: A Dose of Competition." Among other things, these joint hearings examined competition issues involving health insurers and physicians.

As you know, the agencies allocate enforcement responsibility through a clearance process that strives to make the most effective use of the two agencies' resources. For the past several years, the Division has taken the lead on matters involving health insurers. The Division has investigated several mergers of health insurers and ordered divestitures in some instances.

For its part, the FTC has taken action where physician groups have engaged in naked price fixing, sometimes backed up by collective refusals to deal, in order to extract higher fees from health plans. Such conduct raises the cost of health care and harms individual consumers and others who pay for physician services, including employers, both public and private, as well as government benefit programs that rely on selective contracting with providers.

Although the question suggests that FTC physician price-fixing cases have targeted doctors trying to counter insurer market power, in fact, the joint pricing the agency has challenged was typically not limited to only the largest health plans with which the doctors dealt. Moreover, the size of a market participant, by itself, does not necessarily signify market power. In any event, experience does not support the notion that allowing otherwise competing providers to get together in a unified block to bargain with large insurers leads to lower costs, better service, or other efficiencies or benefits to consumers. There is, however, ample support for the proposition that, in the absence of a suppliers' cartel, the competition among individual providers to enter into contracts with insurers and other third-party payers benefits consumers. In my view, the FTC's actions challenging price fixing by competing, independent physicians make good economic sense and are good for consumers.

Can you also comment on how well the health care enforcement policy statements are working, since we are hoping you will use those as a model for the insurance industry once we repeal the McCarran-Ferguson antitrust exemption?

I believe that the 1996 Statements of Antitrust Enforcement Policy in Health Care are generally working quite well. I am told that members of the bar and the public have found them helpful in understanding how the agencies approach particular issues of recurring interest concerning conduct by health care providers. In general, such policy statements can be a helpful way to address uncertainty that might have the potential to chill procompetitive behavior. Furthermore, clarifying how the agencies understand and interpret the case law and apply it in particular settings can promote compliance.

The FTC and the Department of Justice have also issued antitrust guidelines that are broadly applicable to agreements among horizontal competitors across industries, and thus are relevant to the insurance industry (except to the extent conduct is protected by an antitrust exemption or immunity). The Antitrust Guidelines for Collaborations Among Competitors, adopted in 2000, address a wide range of horizontal agreements among competitors, including joint ventures, strategic alliances, and other competitor collaborations. The guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors. Like the Health Care Statements, these guidelines help businesses assess the antitrust implications of collaborations with rivals, thereby encouraging procompetitive arrangements and deterring agreements likely to harm competition and consumers.

3. <u>Oil</u>

I commend the extensive work that the FTC has done in petroleum and other energy markets. You have testified that, after a number of investigations, you found little evidence of intentional market manipulation. My question for you is whether you find the type of information exchanges and interdependent commercial arrangements that routinely occur in the downstream markets at all troubling?

As you know, the Commission has conducted a number of important investigations of petroleum markets in recent years, including the Midwest Gasoline Price Investigation[13] and the Western States Gasoline Investigation.[14] In these and other investigations, the potential anticompetitive effect of information exchanges has been an important part of the staff's analysis.[15] In addition, in every merger investigation, Commission staff is alert to any information that may suggest collusive activity between oil companies. To date, the Commission has not brought a case against downstream product exchanges or other interdependent commercial arrangements because the information collected in our investigations did not indicate that such arrangements were anticompetitive.

Some background information may be helpful for purposes of this discussion. Petroleum is largely a fungible product. Although there are different recognized grades of oil – with cleaner

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13 Midwest Gasoline Price Investigation, Final Report of the Federal Trade Commission (Mar. 29, 2001), *available at* http://www.ftc.gov/os/2001/03/mwgasrpt.htm.

14 FTC Press Release, *FTC Closes Western States Gasoline Investigation* (May 7, 2001), *available at* http://www.ftc.gov/opa/2001/05/westerngas.htm.

15 *See, e.g.*, complaints in *TC Group LLC, Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III*, L.P., Dkt. No. 4183 (complaint and consent order Jan. 24, 2007, final consent order Mar. 14, 2007), *available at* http://www.ftc.gov/os/caselist/0610197/index.htm; *Chevron Corp. and Unocal Corp.*, Dkt. No. C-4144 (complaint issued June 6, 2005, final consent order July 27, 2005), *available at* http://www.ftc.gov/os/caselist/0510125/0510125.htm; *Valero L.P., and Kaneb Services LLC*, Dkt. No. C-4141 (complaint issued June 14, 2005, final consent order July 26, 2005), *available at* http://www.ftc.gov/os/caselist/0510022/0510022.htm.

and lighter crude receiving a price premium – many refineries can process more than one grade of crude oil. For this reason, the crude oil market is considered a world market, and production from one part of the world can be substituted for production from another part. Refined petroleum products of like grade can similarly be substituted for each other.

Supply and demand conditions in the crude oil and refined products markets can change rapidly, and oil companies sometimes find themselves "short" or "long" on product in one market or another. When this happens, the companies may engage in bartered exchange agreements, or contractual buy/sell agreements in lieu of exchange agreements, to trade product in markets in which they temporarily have too much for product in markets in which they may not have enough.

There are several reasons why companies might engage in exchange agreements. Transportation costs can be minimized because a company does not have to ship the product it owns to the market that is experiencing a shortage; the crude oil or refined products it receives in the exchange in the other market will meet that need instead. Reduced shipping means a reduction in environmental problems from potential spills. Further environmental benefits may occur if crude oil is swapped in order to provide refineries with a source of oil that is better suited to any particular refinery's configuration. Swapping can also alleviate supply disruptions that may temporarily disrupt supply/demand forces in a particular market.

Another type of commercial arrangement that oil companies may engage in is the sharing of downstream facilities, such as terminals or pipelines. Sharing may be efficient if it allows the companies to capture economies of scale that would otherwise be lost because neither company needs an efficient-sized facility.

The antitrust concern with exchange agreements and arrangements to share downstream facilities is that they may be used to exchange information sufficient to facilitate coordination and the detection of deviations from cartel arrangements. The Commission takes these concerns seriously. Nevertheless, the antitrust laws do not flatly prohibit all such arrangements. Because these commercial arrangements may be an efficient means of reducing costs or rationalizing markets, the antitrust laws dictate a rule of reason analysis to determine whether any particular arrangement, on balance, has anticompetitive effects. The evaluation of these kinds of arrangements is a fact-intensive process that requires extensive factual, legal, and economic analysis before a judgment can be made.

4. <u>NFL</u>

Chairman Majoras, I understand that Mr. Barnett has recused himself from issues involving the National Football League since the League is a former client of his, so I'd like to ask your opinion on this. The NFL member teams, which collectively exercise significant market power, have jointly agreed to limit the sale of the rights to televise their games through an exclusive agreement with DirecTV and by selling certain other rights exclusively through their own network, the NFL Channel. It is my understanding that the

NFL's arrangements with cable and satellite providers, including the arrangement with DirecTV and regarding the NFL Network, are not protected from antitrust scrutiny by the Sports Broadcasting Act. I know that you are probably hesitant to condemn such arrangements without conducting a full investigation, but I am interested to know whether the FTC has ever considered conducting such an inquiry with regard to the joint practices of the member teams of the NFL, specifically with respect to their sale of television rights?

The Sports Broadcasting Act grants a narrow exemption from the antitrust laws to sports leagues, including professional football, to transfer telecasting rights collectively. One limitation of this exemption is that the exemption will not apply to an agreement or arrangement where a league places any geographic restriction on where the games are telecast, except that the league may restrict the telecasting of a game into the market of the home team. To the extent that a league places other geographic restrictions on the telecasts, the entire arrangement likely would be outside the narrow exemption offered by the Sports Broadcasting Act.

Nevertheless, the failure to qualify for the exemption does not, by itself, mean that the arrangement is unlawful under the antitrust laws. Due to the potential efficiencies attendant to some exclusive dealing contracts, they are analyzed under the rule of reason, whereby the procompetitive benefits are balanced against any potential anticompetitive effects. Any investigation of this type of contract would have to consider such questions as whether the contracts result in an expansion of the relevant product (presumably out of market NFL games) to additional consumers, whether some new type of product is being produced that could not be produced by each team individually (perhaps some consumers want to buy a package consisting of all games and choose which game to watch each week depending on current won/loss records or the teams), and whether any individual team could replicate these products. Commission staff keeps alert for any indications of anticompetitive effects of such arrangements, and we will, of course, consider any complaints that we receive.

5. Net Neutrality/Telecommunications

As you know, the members of Congress have been considering whether legislation is necessary to protect consumers as the telecommunications market, and especially the internet market, transforms from a near monopoly in many markets to a somewhat competitive market. It is my understanding that, in many markets, consumers have either one or two companies from which to choose to get access to the internet. You have specifically indicated that you do not believe Congress should enact legislation in this area. Does that mean you believe a market in which there is one, or at most two viable competitors, is a competitive market?

To date, I have not taken a position on whether Congress should legislate in this area. I have, however, urged caution and careful study in considering whether and how to regulate, and last year put forward a proposed framework for considering the issue. Recognizing the importance of this issue to consumers and consistent with my belief in a studied approach to it, I announced the formation of the FTC's Internet Access Task Force. The Task Force has been meeting with interested persons on all sides of the numerous issues in the debate, and in February 2007, the Commission hosted a public workshop on broadband connectivity competition policy. The workshop brought together experts from business, government, and the technology sector, consumer advocates, and academics to explore competition and consumer protection issues relating to broadband Internet access, including so-called "network neutrality." One of the workshop panels explored the current and future state of competition in the market for broadband Internet access, including the role that wireless, satellite, and other competitors play in this market. The Task Force expects to issue a report of the workshop later this year.

Regardless of whether new legislation is adopted, the antitrust laws apply to companies in Internet-related industries, and the FTC will continue to enforce them. As an antitrust law enforcement agency, the Commission analyzes competition in the context of specific facts, including details of the particular product and geographic markets involved. The product market for broadband Internet access, for example, appears to have significantly different characteristics in different localities. A meaningful competition analysis also would have to address the potential for new entry, either with existing technologies or with new technologies under development, as well as the likely time line for such new entry. For example, whether a locale in which one or two competitors provide a particular product is competitive necessarily depends substantially both on what products are part of the relevant product market, and on the reasons for the lack of additional competitors and the opportunities for additional entry.

QUESTIONS FROM SENATOR GRASSLEY

(a) What is the status of the Commission study on the practice of "authorized generics" that I requested almost 2 years ago with Chairman Leahy and Senator Rockefeller? When can we expect to obtain that study?

The Commission has designed a study to examine the short- and long-term effects of authorized generic drugs on competition in the pharmaceutical marketplace. In the short term, the entry of an authorized generic may benefit consumers by creating additional competition that reduces generic drug prices. Many generic manufacturers assert, however, that in the long term, consumers will be harmed because an expectation of competition from an authorized generic will decrease the incentives of generic manufacturers to enter by challenging patents held by branded manufacturers. Subject to approval under the Paperwork Reduction Act ("PRA"), the study proposed by the FTC will gather data and documents relevant to assessing both sets of competitive effects.

Because information must be gathered from numerous drug manufacturers, the PRA requires certain steps before issuing the information requests. Last year, the Commission started the process by announcing its proposed study through a notice published in the Federal Register. The notice requested public comments regarding the proposed information requests. Thirteen public comments were filed. Most were supportive of the study's goals, but several stressed the need to better focus the information requests in order to avoid imposing unnecessary burdens on responding businesses.

Commission staff has reviewed the comments carefully, and I believe that the Commission soon will authorize publication, pursuant to the PRA, of a second Federal Register notice that will respond to the initial round of comments, explain revisions to the information requests, and give the public 30 days to submit additional comments. At the same time, the Commission must present a justification for the proposed study, along with the information requests and responses to comments, for review by the Office of Management and Budget. The Commission may issue its information requests 60 days later, unless OMB lodges objections.

It is difficult to project precisely how long it will take to complete the study after information requests have been issued. To a large extent, timing will depend on the promptness of compliance and the difficulties that emerge in working with the data. Prior FTC studies of this nature have been completed roughly 14-15 months after issuance of the information requests. If this study turns out to follow a similar path, it would be completed in 2008, probably in the late summer. I will look for ways to expedite the matter as much as possible.

(b) Could you describe the capacity of the Federal Trade Commission to investigate and make determinations under its industry guidance procedures? What is the potential impact on this capacity should the practices of additional industry sectors, such as agriculture or insurance, become eligible for such reviews?

The Federal Trade Commission responds to requests for business guidance in several different ways including Commission advisory opinions and staff advisory opinions and letters. The Commission may issue an Advisory Opinion when "(1) [t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) [t]he subject matter of the request and consequent publication of Commission advice is of significant public interest." 16 CFR § 1.1 (a). A Commission Advisory Opinion requires a vote of the Commission. The Commission has also authorized its staff "to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted." 16 CFR § 1.1 (b). Under the rule, the staff does not answer hypothetical questions and "a request for advice will ordinarily be considered inappropriate where (1) [t]he same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) [a]n informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." 16 CFR § 1.1 (b).

Most of the FTC's Advisory Opinions on antitrust issues (from both the Commission and the staff) involve the area of health care. This reflects the fact that this industry has been shifting to new forms of organization, resulting in particular legal uncertainties. During FY 1997-2006, the FTC issued 39 Advisory Opinions involving health care. In addition to its health care Advisory Opinions, the FTC has provided Advisory Opinions and staff opinion letters involving other industries. These have involved such varied industries as replacement mechanical parts, real estate sales, dietary supplements, fashion products, and mass-media advertising.

The FTC has been able to respond to all requests for Advisory Opinions where the issuance of such an opinion is appropriate. If the FTC's jurisdiction is expanded to include industries for which statutes current limit jurisdiction, the FTC expects that it will continue to have the capacity to respond to these requests in a timely fashion.

(c) Some countries are investigating Visa and MasterCard's practices in setting payment card interchange fees on behalf of their competing member banks. Merchants in the United States are paying some of the highest interchange fees in the world, yet the United States antitrust agencies have not taken any position relative to this practice. Would you like to comment on the competitive effects of interchange fees? Does the FTC plan to become more engaged on the subject of interchange fees in the near future?

The FTC has not studied Visa or MasterCard interchange fees or any competitive effects of these fees. Historically, banking issues and firms have been within the particular expertise of the Antitrust Division. Recently, for example, DOJ litigated an antitrust case against Visa and Mastercard: *United States v. VISA U.S.A. Inc.*[16] In this case, DOJ alleged that Visa's and MasterCard's exclusionary rules, which prohibited their member banks from issuing credit and

16 163 F. Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

charge cards on rival networks (particularly the American Express and Discover networks), were anticompetitive. On appeal, the Second Circuit affirmed the district court decision, concluding that the exclusionary rules "harm competition by 'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition." Although this matter did not specifically involve interchange fees, given the expertise gained by the Antitrust Division in litigating this matter, I believe the FTC would continue to defer to the Division on the subject of competitive issues involving Visa's and MasterCard's interchange fees.