GEORGE MASON UNIVERSITY SCHOOL OF LAW

MORE THAN LAW ENFORCEMENT: THE FTC'S MANY TOOLS – A CONVERSATION WITH TIM MURIS AND BOB PITOFSKY

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MORE THAN LAW ENFORCEMENT: THE FTC'S MANY TOOLS—A CONVERSATION WITH TIM MURIS AND BOB PITOFSKY*

I. OVERVIEW

Q. *Bob, in your 1995 confirmation hearing, you said you wanted to rejuvenate the FTC's non-litigation role and "address the question, perhaps through investigative hearings, of whether U.S. antitrust law and other regulatory policies need to be adjusted to take into account some of the major changes that have taken place in the commercial world" (U.S. Congress 1995, 5). Why did you emphasize that role?*

A. When Woodrow Wilson and Congress created the FTC in 1914, they wanted more than litigators and adjudicators. The Justice Department already had a unit to bring cases. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court had recognized that antitrust needed more than simple rules. Many antitrust problems had to be analyzed with greater sophistication under a rule of reason, either under the Sherman Act or under a new standard, prohibiting unfair methods of competition, that the FTC would enforce. The agency was to provide that needed sophistication. It would hold hearings, conduct studies, and report to Congress and the public. It would develop the law and obtain compliance with that law, without litigation when possible, with litigation when necessary.

Though the balance has fluctuated over the years, the Commission never relied solely on litigation. The original Commissioners held hearings on foreign trade, which led to the Webb-Pomerene Act, 15 U.S.C. §§ 61–66 (2004). The agency soon held hearings and produced a report on resale price maintenance—an effort that hardly proved definitive, of course, but showed the FTC grappling with an issue that still stirs debate.

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* This is the edited version of the original conversation at the FTC 90th Anniversary Symposium (Sept. 22, 2004), transcript *available at* http://www.ftc.gov/ftc/history/transcripts/040922transcript003.pdf.

References within the text are to sources listed in a bibliography at the end of the article. To avoid confusion, references to the same source in the same year are indicated with lower case letters (b, c, d . . .), e.g., 2002b.

Later decades saw, among many others, the Public Utilities Hearings of the 1920s and 1930s, FTC contributions to the Temporary National Emergency Committee of the 1930s and 1940s, and the antibiotics and oil cartel reports of the 1950s. Whether FTC hearings and studies led to legislation or litigation or simply informed the public debate, they represent a long and important tradition.

II. GLOBAL, HIGH-TECH HEARINGS

Q. *Bob, the hearings on antitrust and consumer protection in a global, high-tech economy had an ambitious agenda. How did they exemplify the FTC's use of non-enforcement tools?*

A. The hearings were the first major step in establishing the FTC as a key modern center of what Tim would call "competition policy research and development" (Muris 2003: 403). For competition, we held nineteen days of hearings, orchestrated by the Office of Policy Planning. Over 120 witnesses testified; others submitted written statements. Our witnesses, including Tim Muris, came from academia, business, economic consulting, law firms, and state and foreign enforcement agencies.

The hearings sought "to articulate recommendations that would effectively ensure the competitiveness of U.S. markets without imposing unnecessary costs on private parties or governmental processes" (FTC 1996a: 3). The staff report explored how the increasingly global and high-tech market environment affects antitrust issues and interests: efficiencies and market definitions, failing firms and small businesses, innovation, intellectual property, and new technologies, networks and standards, and joint ventures. The hearings yielded an influential report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* (FTC 1996a), helped stimulate the revision of the efficiency component of the Merger Guidelines (DOJ & FTC 1997), and inspired promulgation of the Competitor Collaboration Guidelines (DOJ & FTC 2000). More broadly, they helped create expectations that the Commission would use its distinctive capabilities to explore other major policy and enforcement issues in the future. The B2B workshop and report show how nonpolicy tools supplied ideal means to quickly address other issues that suddenly rose on the agenda (FTC 2000e).

The consumer protection hearings examined a range of developing technologies, but we focused primarily on the Internet. The Internet was in its infancy, and the Commission had brought only one Internet case, *FTC v. Corzine*, No. 94-1446 (E.D. Cal. filed Sept. 12, 1994) (complaint). The hearings gave us an opportunity to explore this developing technology and how it might transform the marketplace. For consumers, the Internet meant a global market, ready access to almost unlimited information, high-speed transactions, and the convenience of shopping from home. On the flip side, what made the Internet attractive to consumers made it attractive to fraudsters. They could perpetrate scams quickly, cheaply, anonymously, and on a massive, global scale. The FTC's challenge was, and remains, to protect consumers without impeding the Internet's growth.

In four days of consumer protection hearings, we heard from over seventy experts in law, business, technology, economics, marketing, and education. We discussed with them the technology, its impact, the challenges to law enforcement, and the role of the private sector. Participants had differing views, but a general consensus seemed to emerge on the elements of an effective and balanced consumer protection program: coordinated law enforcement against fraud and deception by state and federal agencies, industry self-regulation, and an important role for consumer education.

The final report, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace* (FTC 1996b), spelled out the steps that should be taken and helped define the Commission's role in the new online marketplace. Many FTC consumer protection initiatives in my term grew out of the hearings, including a major law enforcement program aimed at Internet fraud, the use of the Internet as an enforcement tool and an important education tool, new global partnerships and stronger partnerships with federal, state, and local enforcement agencies, and a major policy initiative to address emerging concerns about privacy online.

Q. *Tim, did you pursue or build on the initiatives that grew out of these hearings?*

A. Those hearings re-energized one of the FTC's most valuable functions—to gather leaders in business, economics, law, and related disciplines to discuss tough, emerging problems and prepare public reports on the facts, issues, governing law, and the need, as appropriate, for change. Like Bob's global hearings, our major hearings took on big issues. We examined the intersection of intellectual property and competition law, issuing a report after twenty-four days of hearings that featured over 300 panelists (FTC 2003a). With the Justice Department, we issued a report on competition policy and health care after twenty-seven days of hearings with over 250 panelists (FTC & DOJ 2004). In both cases, we studied areas where competition policy needs to be understood, defined, and defended against other policies that are sometimes seen to be competing.

Many other initiatives during my tenure can be traced to the 1995 globalization hearings and the initiatives Bob described. The focus on consumer privacy and the Internet has blossomed into a rich menu of workshops on information sharing, spam, and online privacy, as well as hearings about the next generation of consumer technologies, such as radio frequency identifiers and the increase of "spyware," which some believe is becoming the next spam.

III. HEALTH CARE: A CASE STUDY

Q. *Tim, how did the FTC's multiple tools, including workshops, advocacy, reports, and studies, enable the agency to perform its competition mission in the health care industry?*

A. As a competition policy agency, the FTC promotes competition as the principal means of organizing the U.S. economy. The Commission cannot fulfill that mission solely, or even principally, by litigation. We emphasize competition policy R&D because the FTC is blessed with this broad range of tools. Continuing, substantial efforts to increase the agency's knowledge base are vital to address new commercial phenomena, to analyze complex technical issues involving health and safety, and to respond to new technologies. For example, our report with the Justice Department on competition policy in health care drew upon the views of over 300 witnesses who appeared either at an FTC workshop in 2002 or at the FTC/DOJ hearings in 2003. From these voluminous proceedings (the transcripts covered over 6000 pages) and independent research, our report developed wide-ranging recommendations to payers, governments, and providers (FTC & DOJ 2004). The recommendations focused on removing barriers to more effective competition and suggested how competition could encourage physicians, hospitals, insurers, and others to provide consumers with high-quality, cost-effective health care.

Health care poses major challenges for competition law and policy. Improvements in medical technology and pharmaceuticals have greatly improved health care delivery and the prospects for recovery. Competition has helped spur these improvements; American markets for innovation in pharmaceuticals and medical devices are second to none. At the same time, many doubt competition's role in ensuring that health care is affordable, accessible, and of good quality. Major increases in health care costs have strained public and household budgets, as well as the employment-based health insurance system. Health care quality varies widely, even after controlling for cost, source of payment, and patient preferences. Many Americans lack health insurance coverage at some point during the year, and the costs of providing uncompensated care

are a great burden for many providers. The FTC/DOJ report grapples with these issues, identifies barriers to more effective competition, and proposes how to surmount them.

We also used other forms of advocacy to address health care issues. In health care and other areas, the FTC must use persuasion, not fiat, to induce regulatory authorities to cooperate in law enforcement and other forms of policymaking. Many FTC advocacy initiatives have sought to curb costs by promoting competition for medical services, pharmaceuticals, and health insurance. For example, we acted aggressively to eliminate restraints on advertising through advocacy before other governmental bodies (most notably involving direct-to-consumer prescription drug advertising), we helped persuade states to deny antitrust exemptions allowing medical professionals to fix prices, and we opposed regulatory restrictions that would reduce competition in the sale of eye wear.

The pharmaceutical sector illustrates how the Commission has applied a mix of litigation and non-litigation tools. In 2000 Bob reinvigorated the use of Section 6(b) authority and began the FTC's influential study of entry by generic drugs. The study helped generate cases[1] and resulted in a report (FTC 2002a) whose recommendations received a highly public endorsement from the President, induced regulatory reforms at the Food and Drug Administration (FDA), and inspired legislative amendments to the Hatch-Waxman Act.[2] We also filed an amicus brief in an important case raising issues about generic drug entry.[3] Moreover, we commented to the Rhode Island legislature on the economic impact of any willing provider legislation. By requiring health insurers and employee benefit plans to include in their networks any pharmacy willing to accept terms that are offered, such legislation would reduce incentives of pharmacies to develop attractive or innovative proposals. Finally, we testified in Congress on the effects of drug regulation on drug prices, and our joint FTC/DOJ health care hearings reviewed the state of competition in the pharmaceutical industry.

For those keeping score, this is the agency equivalent of hitting for the cycle. Cases, a major 6(b) study, a report that generated federal

[1] *See, e.g.*, Bristol-Myers Squibb Co., No. C-4076 (Apr. 14, 2003) (order), *available at* http://www./ftc.gov/os/2003/03/bristolmyersdo.pdf; FTC v. Perrigo Co. & Alpharma Inc., No. 04-1397 (D.D.C. Aug. 25, 2004) (orders), *available at* http://www.ftc.gov/os/caselist/0210197.htm.

[2] Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 15, 21, 28, & 35 U.S.C.).

[3] *In re* Buspirone Patent & Antitrust Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (order adopting much of the FTC's reasoning).

legislative reform, amicus briefs, Congressional testimony, advocacy, and public hearings and reports—all promoting competition in the pharmaceutical industry. These examples underscore why I say the FTC is not only a law enforcement agency but also a nationwide proponent of competition policy.

Q. *Bob, how did you use the FTC's multiple tools to address consumer protection issues in health care?*

A. The problem of misleading health claims involves consumers' safety and well-being, and we made it a top priority. A problematic area for many decades, we were committed to a fresh approach. We did use law enforcement, including "sweeps" with international and domestic partners. But we also used our complaint database to identify problems, consumer education and business guidance, public workshops and conferences, and our powers of persuasion to encourage industry self-regulation.

We targeted our law enforcement efforts in areas where misleading health and safety claims were proliferating. With growing numbers of consumers seeking health information online, we focused on Internet marketing, conducting several "surf days" with national and international partners to identify problematic claims. We brought the first sweep of cases (Operation Cure All) against Internet marketers making bogus health claims. We also focused enforcement efforts on the pervasive problem of deceptive marketing of weight-loss products and services, launching an enforcement and education program in 1997, Operation Waistline. We devoted considerable resources to attacking the growing problem of misleading and unsubstantiated claims for dietary supplements, an effort Commissioner Sheila Anthony very much encouraged.

In each area we combined law enforcement with a multifaceted education program—including brochures, special Web sites, public service announcements, news articles, and bookmarks—to give consumers the basic information they need to make sound decisions and to protect themselves from misleading marketing practices.

We also provided business guidance. One of our most successful efforts was our brochure, *Dietary Supplements: An Advertising Guide for Industry*, describing the application of basic principles of advertising law to health and safety claims for dietary supplements (FTC 2001a). Based on lengthy consultations with the industry, consumer groups, and experts in the field, the plain-English guide aimed to ensure that consumers would get accurate and substantiated claims about these products. The guide has been widely recognized as an invaluable aid to the industry.

We also encouraged industry self-regulation. With other government and non-government bodies, we convened a public conference to explore what information consumers need to evaluate weight-loss products and services. After this conference, a new Partnership for Healthy Weight Management, with forty-one public and private sector members, issued voluntary guidelines designed to educate industry members about the information consumers need and how to provide it clearly and accurately (Partnership for Healthy Weight Management 1999). We also began to encourage media organizations not to run advertisements that make the most obviously spurious weight-loss claims, an initiative that Tim later pursued actively with, I understand, very promising results.

Q. *Tim, did you similarly make health claims a priority, and did you use the same or new tools to address misleading claims?*

A. As in most areas, there was great continuity. We were very fortunate to inherit an agency that Bob and his team left in such great shape. We too made health and safety claims a priority, working closely with the FDA and a growing number of partners at home and abroad to maximize our impact. The scale of our efforts grew enormously. In a recent six-month period, for example, the FTC brought actions against deceptive marketing practices involving over $1 billion in health care products.

We targeted many areas that Bob had made priorities, including Operation Cure-All to combat Internet health fraud and programs to pursue deceptive weight-loss and dietary supplement claims. We also used the FTC's wide array of tools, including research and advocacy, to advance sound regulatory approaches to health and nutritional claims for food and dietary supplements.

An example was our program to address deceptive weight-loss claims. Obesity is fast becoming one of the nation's top health concerns. Consumers need protection from hucksters who try to exploit these concerns and accurate information to enable them to make sound purchasing decisions. Our comprehensive approach used vigorous law enforcement to challenge misleading efficacy and safety claims, a significant campaign to educate consumers, and important empirical research that led to a report on the nature and scope of deceptive weight-loss advertising claims (FTC 2002b). From a review of some 300 weight-loss advertising claims, FTC staff found that misleading or unsubstantiated claims were rampant. We held a follow-up public workshop to explore the impact of deceptive ads on public health and approaches to stem the proliferation of misleading claims. Here we worked closely with the Partnership for Healthy Weight Management.

As Bob mentioned, we got the mainstream media more involved in reviewing and rejecting facially false weight-loss ads. With active FTC encouragement, particularly from Commissioner Anthony, BCP Director Howard Beales and I met with media executives and trade associations to enlist their help in refusing to run facially false weight-loss claims. We developed a clear, concise, plain-English guide, *Red Flag: A Reference Guide for Media on Bogus Weight Loss Claim Detection,* on how to spot these claims (FTC 2003b). Finally, we worked with the Electronic Retailing Association and the Better Business Bureau to help establish a promising new self-regulatory screening process for infomercials. Through these efforts, after years of unsuccessfully trying to stop deception by enforcement alone, obviously false weight-loss ads began to decrease.

IV. CONSUMER PROTECTION

A. Benefits of Consumer Protection and Competition in a Single Agency

Q. *Tim, why combine consumer protection and competition missions in a single agency?*

A. Consumer protection and competition naturally complement each other: both serve to improve consumer welfare. The FTC's experience illustrates the benefits of combining the two missions in one public institution. The consumer protection function can provide useful insights about how to execute competition policy. Most important, the focus is on consumers. Antitrust once forgot that essential insight by seeking to protect competitors. In several important instances, enforcement of laws concerning advertising and marketing practices has improved the FTC's understanding of how markets operate.

In turn, the FTC's antitrust duties now ensure that it understands that robust competition is the best single means to protect consumers. Without a constant reminder of competition's benefits, consumer protection programs can impose controls that ultimately diminish the very competition that increases consumer choice. For example, truthful advertising has often been restricted in the name of consumer protection. The FTC's antitrust mission has helped it see the enormous benefits of truthful advertising and the costs of "consumer protection" that restricts such communication.

Q. *Bob, what do you see as the benefits of combining these functions?*

A. I very much agree that it is a winning combination. The two missions share the same goal—improving consumer welfare—and take complementary paths to achieve it. When joined in one agency, the two missions inform and influence one another, and both are the better for it. Just one example is our national advertising program. Here the agency has two aims: rid the marketplace of deception and promote the free flow of accurate information to consumers. Both are essential, not only to protect consumers, but to assure fair, competitive markets.

Deception harms consumers, honest sellers, and the functioning of the marketplace. It causes consumers economic injury and sometimes threatens their physical well-being, as well. Deception also handicaps competitors who provide truthful information. Indeed, as seen in early cases, such as *FTC v. Raladam Co.,* 283 U.S. 643 (1931), the FTC's original deception authority was based on its power to protect competition, not consumers.

Our advertising program's second goal—to promote the free flow of accurate information—recognizes the important role of information. Truthful advertising fuels competition among marketers to offer consumers better information, better prices, and better products. So historically our efforts to suppress deception have worked in tandem with our efforts to attack private restraints on truthful advertising.[4] But perhaps better evidence of the synergy between the two programs is the fact that two antitrust scholars—Bob Pitofsky and Tim Muris—could serve so comfortably and successfully as Consumer Protection Bureau Directors.

B. Areas of Study

Q. *Bob, as Chairman you sought to restore the agency's historic role of using its research and reporting capabilities to address antitrust and consumer protection issues and to shape public policy. What specific areas of consumer protection did you report on?*

A. We undertook a sustained study of online privacy, an issue we first considered during the 1995 global hearings. We surveyed Web sites, studied the marketplace, and held numerous public workshops. We issued five reports to Congress on various aspects of online privacy. We also undertook an in-depth study of the marketing of violent entertainment products to children by the movie, music recording, and electronic game industries (FTC 2000a). President Clinton asked the FTC to do the study after the shootings of high school students in Littleton, Colorado. It was the first time anyone had studied these issues comprehensively. Our

[4] *See* American Medical Ass'n, 94 F.T.C. 701, 1029 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

report led the motion picture and electronic game industries to made real changes in their marketing practices. In response to congressional requests, we issued two follow-up studies of these industries (FTC 2001b; FTC 2001c). Finally, at the request of the congressional appropriations committees, we conducted a comprehensive study of the marketing of alcohol products to underage audiences (FTC 1999a).

Q. *Tim, have you continued to study these areas? Did you examine other areas?*

A. Like Bob, I believe that the FTC has a vital role to play in advancing consumer protection policies through its non-case tools. Bob deserves great credit for revitalizing this role. During my Chairmanship, we revisited the marketing of violent entertainment products to children and the marketing of alcohol to minors. These efforts continued to stimulate the industry to make reforms. We also expanded our research agenda to enhance the FTC's knowledge base in several areas. For example, as part of our privacy initiatives, working closely with Commissioner Orson Swindle, we held a workshop on "information flows" in our economy, to examine the benefits and costs to consumers and businesses of the collection and use of consumer information. Panelists presented original research and debated the appropriate use of cost/benefit analysis and methodologies for evaluating information practices. The workshop and the research it will likely spur enrich the policy debate on the complex issues involving privacy.

Similarly, in confronting the tidal wave of spam flooding in-boxes and threatening the viability of e-mail, we held a three-day forum on unsolicited e-mail. Supported by the staff's own empirical research, this event provided the intellectual framework and leadership for seeking workable, effective solutions to spam.

Our research agenda also included significant empirical studies. In addition to our study of weight-loss advertising claims, we analyzed two decades of nutrition and health claims in food advertising (Ippolito & Pappalardo 2002), studied how fraud affects American consumers (Anderson 2004), surveyed false claims in spam and other spam-related issues (FTC 2003c), and did a nationwide study of identity theft (Synovate/FTC 2003). Such studies, and our overall investment in R&D, give the FTC the knowledge base to understand and properly respond to challenges in the marketplace. Among other lessons, we learned that regulation had reduced truthful information about diet and health, that Hispanic (and other minority) consumers were systematically greater victims of fraud, and that identity theft was a larger problem than we had realized.

C. PRIVACY

Q. *Bob, how did you study privacy? What were your initiatives in this area?*

A. Privacy emerged as a consumer protection issue in the mid-1990s, when the rapid growth of the Internet raised concerns about how information was being collected and used online. Although the Internet offered easy access to a host of goods and services, evidence suggested that consumers were wary of participating in it due to concerns about privacy. There was also a perception that the Internet made it easier to collect information from consumers and store it and share it with others. We undertook an ambitious effort to study this new issue through public workshops, industry surveys, and other means. From the beginning, we recognized that the FTC Act authorizes the agency only to address particular practices determined to be deceptive or unfair and that any broad privacy mandates would need to come from Congress.

We concluded that greater protections were needed for personal information collected online. We then pursued various initiatives to promote these protections. First, we called for greater self-regulation by online businesses. In particular, we called on them to follow certain widely recognized principles for the collection and use of information, the so-called Fair Information Practices of notice, choice, access, and security. Second, we educated the public through public workshops and outreach efforts. Third, we brought cases challenging deception by online companies. Finally, at the request of Congress, we assessed current business practices and prepared reports detailing our findings and recommendations.

In 1998, after an extensive survey of Web sites' information practices, the Commission recommended legislation to protect children's online privacy. That same year Congress enacted the Children's On-Line Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (2004). Two years later, following further Web site surveys, a Commission majority concluded that although self-regulation had increased privacy protections, it had failed to achieve comprehensive protections and that legislation was needed to require all commercial Web sites that collect personal information to implement privacy protections.

The vast majority of our efforts was devoted to learning about privacy issues and raising public awareness. I think most would agree that those efforts succeeded. Of course, the issue has evolved significantly since 1995 and even 2000; but the Commission played an important role in spotting and addressing privacy issues at a critical time.

Q. *Tim, you too made privacy a priority. How did your approach differ from Bob's?*

A. Although we built on the Pitofsky Commission's important work, and particularly the identification of privacy as a key emerging consumer protection issue, here, more than in any other area of consumer protection, we took the Commission in a different direction. Because privacy was a new topic for me when I became Chairman, I spent much of my first year reviewing the issues. Howard Beales and I held dozens of meetings with technology experts, academics, and consumer and business groups with diverse views on privacy. We reviewed academic and policy literature and held many briefings with FTC staff. I was impressed by the widespread agreement on the importance of privacy issues, and the FTC's prominence and influence in this area.

We concluded that, while Fair Information Practices seem to offer an appealing model based on consumer consent, the model is flawed. In practice, most consumer consent is illusory. When given the opportunity, most consumers do not exercise choice. The costs of doing so, even if not very high, are not worth the perceived benefits. Thus, when billions of privacy notices were sent to consumers under the Gramm-Leach-Bliley Act, 15 U.S.C. § 6803 (2004), few chose to opt-out of having their information shared. For most consumers, the notices were government-mandated "junk mail." As I said, quoting the old Earl Long line, they were as useful to most Americans as "socks on a rooster."

In our search for a better model to guide privacy policy, it became apparent that any model should recognize the importance and benefits of information sharing in our economy and to consumers. For example, information sharing is at the heart of a consumer credit system that enables consumers with good credit to obtain a loan of $10,000 or more and drive away in a new car in less than an hour. This "miracle of instant credit" is only possible because sensitive credit information is readily shared for legitimate purposes, without consumer consent, under our credit reporting laws. If Fair Information Practices were required under this system, consumers could decide when they did not want creditors to report accurate, but negative, credit information about them and withhold their consent. The credit system, as we know it, would collapse.

In our information economy, consumers benefit enormously from legitimate uses of information, and they willingly share information to get credit, shop online, and obtain services. Beneficial use of their information does not trouble them. Consumers are concerned, however, that their information, once collected, may be misused to harm them or disrupt their daily lives. We believed that these risks of adverse consequences drive most consumer concerns about privacy. Thus, our privacy program focused on those harms. We quadrupled the resources the agency spent on privacy. In some important areas, like identity theft and spam, we built on and expanded programs begun in the Pitofsky Commission. Other initiatives grow out of the new way we approached privacy.

Perhaps our most ambitious initiative, which illustrates the benefits of our approach to privacy, was the "Do Not Call" rulemaking.[5] Our approach was simple and straightforward: give consumers a meaningful option. In one easy step, by telephone or online, consumers can put their numbers on the Registry and make it unlawful for almost all telemarketers to call to their number. By any measure, the Registry has been a phenomenal success. More than 62 million phone numbers have been registered. A recent Harris Interactive survey showed that 92 percent of those who signed up report getting fewer calls, and 78 percent report a substantial reduction. The Harris Poll called the Registry "remarkable" and said "[i]t is rare to find so many people benefit so quickly from a relatively inexpensive government program."[6]

Another new initiative focused on information security, a core part of our program to prevent misuse of sensitive information. Poor security practices put consumer information at risk and can ultimately lead to identity theft or other serious information misuse, the very consequences that fuel consumers' concern about their privacy. As part of our privacy initiative, we therefore gave a priority to ensuring that data collectors maintain security procedures that are reasonable in light of the sensitivity of the information they maintain. We challenged false statements by major corporations about their security practices, bringing cases against Eli Lilly,[7] Microsoft,[8] Guess?,[9] and Tower Records.[10] And the Commission has a new tool—the Gramm-Leach-Bliley Safeguard Rule[11]—which

[5] Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310). For an index of the rulemaking record for the final amended rule, see http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.htm.

[6] The Harris Poll, *Do Not Call Registry Is Working Well* (Feb. 13, 2004), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=439.

[7] Eli Lilly, No. C-4047 (May 8, 2002) (complaint), *available at* http://www.ftc.gov/os/2002/01/lillycmp.pdf.

[8] Microsoft Corp., No. C-4010 (May 15, 2001) (complaint), *available at* http://www.ftc.gov/os/2001/05/mscmp.pdf.

[9] Guess?, Inc., No. C-4091 (July 13, 2003) (complaint), *available at* http://www.ftc.gov/os/2003/08/guesscomp.pdf.

[10] MTS, Inc., No. C-4110 (May 28, 2004) (complaint), *available at* http://www.ftc.gov/os/caselist/0323209/040602comp0323209.pdf.

[11] Standards for Safeguarding Customer Information, 67 Fed. Reg. 36,484 (May 23, 2002) (codified at 16 C.F.R. pt. 314).

requires broadly defined "financial institutions" to implement comprehensive data security programs to help promote and enforce good security practices. We also launched a Web site to educate the public about information security and held several workshops to promote better security practices by consumers and businesses alike.[12]

D. Marketing Violent Entertainment and Alcohol Products

Q. *Bob, why did you take on the issue of the marketing of violent entertainment products? What was the result of your study?*

A. In 1999 the country had been shocked by shootings at schools across the country. In June of that year, President Clinton asked the Commission, with the assistance of the Justice Department, to examine whether the motion picture, music recording, and video game industries were marketing products with violent content to youngsters. The request tapped one of the agency's greatest institutional strengths: the ability to examine and objectively report on commercial practices.

I believed the study would inform Congress and the President on the status quo. It would provide a basis for the industry to improve its self-regulatory efforts. And it would provide information to parents, who were trying to do the right thing for their kids. I expect that in some ways it accomplished all of the above.

The President asked us to answer two specific questions: Do the entertainment industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And are these advertisements intended to attract children and teenagers? After a year-long study, in which the FTC contacted dozens of industry members and reviewed thousands of pages of industry marketing documents, the Commission published its report (FTC 2000a).

Our answer to the President's questions, unfortunately, was "yes." Industry was aggressively and systematically marketing violent R-rated movies, music labeled with a parental advisory, and Mature-rated electronic games to children. Such pervasive marketing, we believed, undermined the credibility of ratings and labeling systems, and frustrated parents' attempts to limit their children's exposure to such material.

We recommended that the entertainment industries improve and expand their self-regulatory programs, explicitly prohibit such market-

[12] *See* http://www.ftc.gov/bcp/conline/edcams/infosecurity/index.html.

ing, limit sales of such products to children, and educate parents about the content and ratings of these products. Following Congressional hearings, many segments of the entertainment industry announced reforms. To track those changes, Congress asked the Commission to do two follow-up reports. Our first follow-up report, issued in April 2001, showed real improvements, particularly by the motion picture and video game industries (FTC 2001b).

Given the Commission's concerns that we not tread on First Amendment protections, the FTC's focus was then, and I believe continues to be, to encourage better industry self-regulation and more responsible industry marketing practices.

Q. *Tim, does marketing violent entertainment continue to be an area of Commission study? If so, have you taken the same approach?*

A. The Commission has continued this important work. We issued follow-up reports in 2001, 2002, and another in 2004 (FTC 2001c, 2002c, 2004a). These reports continued to document progress by industry members. Building on Bob's effort, we held the agency's first public workshop to explore these issues, sponsored a new "mystery shopper" survey of retailer compliance with self-regulatory principles, and adapted our consumer complaint system to accept complaints from consumers on the marketing of these products to kids.

I believe that culture does matter. Thanks to what Bob started and we continued, there has been a much-needed spotlight on industry practices that motivates industry change. Importantly, under Bob's leadership, the agency steered a careful course of public disclosure about industry practices, while resisting calls for intervention that might have intruded on the First Amendment. I expect that the Congress will want the Commission to continue to monitor the industry to guard against a return to the practices uncovered in the Commission's 2000 report.

Q. *Bob, how did the study on marketing alcohol originate, and what did you conclude about the marketing practices?*

A. The congressional appropriations committees requested the study, but we had been concerned for some time about some ads we had seen on programming with sizable underage audiences. The industry had voluntary guidelines for marketing to underage audiences. The questions were whether the guidelines were sufficiently strong and whether compliance was sufficiently high.

The Commission staff prepared its 1999 report based on "special reports" filed by eight major industry members and in-depth discussions with trade associations, consumer groups, and other interested government agencies (FTC 1999a). Our review of the data showed that, for the most part, industry members complied with the standards set by the voluntary advertising codes, which prohibited blatant appeals to young audiences and advertising in venues where most of the audience is under the legal drinking age. Many individual companies followed their own more stringent internal standards for the placement and content of their advertisement.

Our report, however, found a need to improve code standards and their implementation. We proposed creation of independent external review boards with responsibility and authority to address complaints, strengthening the then-current standard that permitted advertising placement where just over 50 percent of the audience was twenty-one or older, and adopting best practices followed by some industry members to reduce the appeal of ads to minors.

I have long believed that "real" industry self-regulation could be a realistic, responsive, and responsible approach to many issues raised by underage drinking. It can deal quickly and flexibly with a range of advertising issues and can bring an industry's accumulated experience and judgment to bear without the rigidity of government regulation. It can be particularly suitable in this area where government restrictions, especially if they involve partial or total advertising bans, raise very substantial First Amendment issues.

Q. *Tim, did you continue to study this area of marketing? Did you take a similar approach?*

A. Yes. I share Bob's view that self-regulation can provide a better, more flexible response than the government, but only if it is strong and industry adheres to it.

In September 2003, after Congress again asked the agency to study self-regulation by the alcohol industry, the FTC published a second report (FTC 2003d). Like the prior report, it was based upon the responses to compulsory process requests to industry members, as well as interviews with a wide range of interested parties. That year, the industry adopted a 70 percent adult audience standard for placement of alcohol ads (FTC 2003d, 13). Although the industry has not adopted a universal system of third-party review of code compliance, it has made important improvements in its enforcement of code standards. One firm adopted a system of public third-party review through the Better Business Bureau, two companies started to use external boards to review periodically their compliance, and the distilled spirits industry trade association enhanced its compliance review system. Given the First Amendment concerns that government regulation of these practices would pose, effective self-regulation can be a useful, highly welcome way to address many issues.

E. LAW ENFORCEMENT PRIORITIES

Q. *Bob, given the broad prosecutorial discretion available under Section 5 and the large number of statutes the FTC enforces, how did you select enforcement priorities and cases?*

A. We developed a number of tools to better identify and then target the most pressing consumer protection issues. Two of the most important are annual strategic planning and the creation of our Consumer Sentinel complaint database. Jodie Bernstein instituted the strategic planning process at the outset of her term as BCP Director. She involved staff at all levels of the Bureau and regional offices, giving them an opportunity to think broadly about consumer protection issues and use their first-hand experience to propose new, more effective ways of doing things. This inclusive process made the final plan a team effort and one that reflected the best thinking of our talented staff. The strategic plan's benefits were striking. Among them: the establishment of clear law enforcement priorities; the identification of the most pressing and the newly emerging consumer issues and the best approaches to tackling them; the ability to allocate resources to the most serious problems; and increased efficiency across the Bureau.

To assist the planning process, BCP developed enormously creative tools to monitor the marketplace. Perhaps the most creative was Consumer Sentinel (Sentinel), a database of consumer complaints accessible online to U.S. and Canadian law enforcement officials at all levels of government. Started in 1997, the database quickly grew as an increasing number of complaint-gathering organizations and government entities fed their complaints into Sentinel. The FTC contributed the many complaints it collects from consumers through the agency's toll-free telephone number and online form. Sentinal provided up-to-date information about individual law violators, the spread of scams, and trends at the state, national, and international levels. With this data, law enforcement bodies, acting alone or collectively, could identify and pursue the most pernicious schemes in a timely fashion.

Another creative use of technology devised by the Bureau staff was the Internet "surf," a way to search the online marketplace for deceptive practices. Over my term as Chairman, FTC staff, often in collaboration with many other enforcement agencies, conducted dozens of surf days, uncovering and following up on thousands of Web sites found to be engaged in deceptive practices.

In short, the Commission entered a new era of using technology as a tool to pro-actively monitor the marketplace, identify the most problematic activities, and pursue them more quickly than in the past. The global hearings had raised the possibility of using technology to protect consumers, but few probably could have imagined the creative ways that BCP staff would actually put technology to use.

Q. *Tim, did you find strategic planning a useful process? Did you continue or modify it? Have you used other tools to identify priorities?*

A. No public institution can achieve policy success without a coherent strategy for exercising its authority and spending its resources. Before I was sworn in, I talked extensively with Jodie Bernstein about management strategies. She emphasized that strategic planning had played a significant role in increasing productivity during her tenure. I was extremely impressed by her management innovations.

Howard and I continued to use the planning process we inherited and to review and update our strategic plan to reflect changes in the marketplace and other exigencies. We also instituted a rigorous process for assessing our strengths and weaknesses, as well as the opportunities before us.

We benefited enormously from the innovative tools created during the Pitofsky era, most notably the Sentinel and the Identity Theft databases. Sentinel allowed the Commission to respond to emerging law enforcement needs. When Congress directed the FTC to collect and then share ID theft complaints with other agencies in response to soaring consumer complaints about identity theft, the FTC was able to do so through the Sentinel System. Like Sentinel, the ID Theft database gives the FTC a better way to help consumers, assist other law enforcement agencies, and develop the data needed to plan consumer protection policy.

To supplement these sources of data and test whether they accurately reflected the nature and prevalence of problems most consumers face, we conducted two comprehensive national surveys of the American population. One survey systematically determined the extent and nature of identity theft. The results revealed more victims (almost 10 million) and greater losses (estimated at $48 billion for businesses and nearly $5 billion for consumers) than we had thought (Synovate/FTC 2003, 7). We also learned more about how data is stolen and used. With our database, the survey provided a foundation for building more effective solutions for this increasingly serious problem.

Second, we commissioned a comprehensive survey to determine how fraud affects American consumers, and to see whether our Sentinel database accurately reflects the extent of fraud. The survey results highlighted Sentinel's strengths and identified some weaknesses. We found that fraud victimized nearly 25 million adults—11.2 percent of the adult population—during the year studied. The most frequently reported type of consumer fraud was advance fee loan scams, followed by fraudulent buyers' club memberships and credit card insurance scams (Anderson 2004, ES-2).

The survey also revealed that Hispanic consumers are more than twice as likely to be victims of certain frauds as non-Hispanic whites (Anderson 2004, ES-5)—information the Sentinel data base did not reflect. With that data, we developed our Hispanic Outreach and Law Enforcement Initiative to tackle problems in this community comprehensively. This program now has a prominent place in the agency's strategic plan. The FTC translates much of its consumer education material into Spanish, it has more than doubled its number of Spanish-speaking professionals, it attacks fraud and deception in Spanish-language media, and it held law enforcement and outreach workshops to improve its ability to protect this previously underserved part of the American population.

Sentinel proved so successful that it was stretched to the breaking point by the time I arrived. We spent $5.5 million to upgrade the part of our IT infrastructure that captures and analyzes hundreds of thousands of consumer complaints made to Sentinel each year and that makes these complaints available to over 1000 U.S. and foreign law enforcement agencies. We could not have implemented the Do Not Call program without upgrading Sentinel. These upgrades maintain the FTC's position as the leader in consumer protection, and confirm the key role that technology plays in combating consumer fraud.

F. FRAUD

Q. *Tim, when you were BCP Director, you began the Commission's anti-fraud law enforcement program, using Section 13(b) of the FTC Act. Why did you lead the Bureau in that direction? How did you start the program, and what was its scope and focus?*

A. A criticism justly lodged against the FTC for some time—for example in the ABA's 1969 Report on the FTC (American Bar Association 1969)—was that the agency did too little to combat fraud. The FTC made excuses, claiming that it lacked jurisdiction to bring fraud cases and that, even if it had jurisdiction, it lacked adequate remedies. Congress took this to heart and in 1973 gave the agency a new enforcement tool, the second proviso of Section 13(b) of the FTC Act. Section 13(b) empowered the FTC to go directly to the federal courts, using its own attorneys instead of Justice Department attorneys, and request the courts to exercise the full panoply of their injunctive powers. Nevertheless, in the eight years after 1973, the FTC used the provision only once. While fraud continued with virtually no response on the national level, BCP was immersed in numerous ill-conceived, resource-intensive trade regulation rules that addressed everything from television advertising directed to children (the notorious "Kid Vid" rulemaking) to warranties for mobile homes.

When I became BCP Director under Chairman Jim Miller in October 1981, I was determined to refocus the Bureau's efforts and priorities, drop the wasteful rulemaking proceedings, and instead tackle the most basic consumer problem of all, theft by fraud. Dave Fix, an attorney still in BCP, deserves enormous credit for taking the first step on this new path. Dave recommended that the agency use Section 13(b) to attack an investment scam run that bilked investors out of more than $150 million. The result was *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 (N.D. Cal. 1983), which established the template for Section 13(b) actions and returned almost $7 million in consumer redress to fraud victims. Dave Fix also recommended a second early landmark case, *FTC v. U.S. Oil & Gas Corp.*, No. 83-1702 (S.D. Fla. July 7, 1983) (complaint), which attacked a scam that cost consumers about $51 million. The FTC settlement recovered $47 million for consumers. BCP gradually built on these initial successes and targeted frauds based on offbeat investments like gemstones, precious metals, cellular phone licenses, and purported Salvador Dali art pieces.

In 1981 we were like the Wright brothers, struggling to get off the ground. We got to the point that we could reliably make successful, long-range flights. When I returned after twenty years to succeed Bob, piloting the 13(b) fraud program was more like flying the corporate jet. It could go confidently anywhere, anytime, and at top speed to get the job done.

From 1981 onward, these efforts have created a solid body of Section 13(b) case law and laid the foundation for the Telemarketing Fraud and Abuse Prevention Act, which put telemarketing fraud on the national agenda and strengthened the FTC's and the states' ability to attack one of the most pervasive and serious problems consumers encounter.

Q. *Bob, you too made fraud a major part of your law enforcement effort. What frauds did you pursue?*

A. In my tenure there was a high level of continuity with what BCP had done in the Steiger years, but Jodie Bernstein also transformed and strengthened the program in several ways. One innovation was to leverage our limited resources by teaming up with counterparts in the states to orchestrate large "sweeps"—clusters of cases brought simultaneously across the country to attack a specific type of fraud. The template for this approach was Project Telesweep, which targeted business opportunity scams that we identified from classified ads in scores of newspapers across the country. Project Telesweep's law enforcement participants filed approximately 100 cases nationwide.[13]

Building on relations with the state attorneys general that Janet Steiger had strengthened as Chairman, we recruited partners for dozens of sweeps targeting such frauds as bogus scholarship referral services, phony prize promotions, worthless diet aids, business opportunity scams, so-called "credit repair" services, scams targeting small businesses, and work-at-home schemes. Sweeps raised public consciousness about specific frauds because the sheer size and scope of these projects made them newsworthy and therefore effective vehicles for consumer education and fraud prevention messages.

We also began a concerted effort to stop abuses in the subprime mortgage lending industry, practices that are often lumped together under the rubric of "predatory lending." It is widely thought that such lenders target communities (often minority communities) with large populations of the poor and less educated. As elsewhere, our law enforcement and education efforts worked hand-in-hand. We began with a law enforcement sweep against relatively small lenders engaged in abusive practices and later brought cases against some of the industry giants (The Associates and Citigroup) that the Muris Commission ultimately settled successfully.[14]

Another priority was the growing problem of Internet fraud. We brought over 100 Internet cases. Some fraudulent operators merely repackaged age-old frauds, such as pyramid schemes, and promoted them on the Internet. In *FTC v. Fortuna Alliance, L.L.C.*, No. 96-799 (W.D. Wash. Feb. 24, 1997) (order), we faced a case of "old wine in new bottles." I found it fascinating, but disheartening, that the Internet had resurrected pyramid schemes, which we thought had pretty much been stamped out decades earlier.

We also attacked high-tech scams that depended on new technologies. Consider our case against the infamous Moldovan computer hijacking

[13] Press Release, FTC, Major State-Fed Crackdown Targets Business Opportunity Scam "Epidemic" (July 18, 1995), *available at* http://www.ftc.gov/opa/1995/07/scam.htm.

[14] FTC v. Citigroup, Inc., No. 01-606 (N.D. Ga. Mar. 6, 2001) (complaint).

scam, *FTC v. Audiotex Connection, Inc.*, No. 97-726 (E.D.N.Y. Feb. 13, 1997) (complaint). Consumers who landed on the defendant's Web site were tricked into downloading purported "viewer" software, that, when executed, disconnected the consumer's computer from the Internet, silently dialed an overseas number to Moldova, reconnected to the Internet, and racked up exorbitant per-minute international charges on the user's phone line. We achieved full redress for consumers in that case.

Q. *Tim, did you pursue these same areas of fraud or give priority to other areas?*

A. As I said at my confirmation hearings (U.S. Congress 2001):

> Twenty years ago we shifted the FTC's emphasis away from cumbersome rulemakings designed to transform entire industries towards aggressive law enforcement of the basic rules that we already have, rules against fraud, against deception, and against breach of contract. Our vision was that the FTC would forge a bipartisan consensus on how to protect consumers and would work with other federal and state agencies to provide maximum benefits for consumers from the FTC's limited resources. Today, through the hard work of hundreds of people over the past 20 years, and superb leadership at the Commission, most recently by Bob Pitofsky and his fellow Commissioners, and by Jodie Bernstein, that dream has become reality.

The challenge today is to continue to improve the fraud program. In my tenure, attacking fraud remained BCP's largest enforcement program. We brought about 100 cases a year and achieved record levels of redress, with over $1 billion in consumer redress ordered in the last two fiscal years (FTC 2004b, 14). Like the Pitofsky Commission, we focused on fighting cyberscams and used sweeps to increase our impact. In four Netforce sweeps, we joined the FBI, the Postal Inspection Service, the SEC, the CFTC, dozens of states, and, in some instances, Canadian law enforcers to bring over 150 civil and criminal law enforcement actions.

Not surprisingly, we also saw new scams that exploit Internet technology. In *FTC v. BTV Industries*, No. 02-0437 (D. Nev. Mar. 7, 2002) (complaint), the defendant sent deceptive spam promising a free prize. When consumers followed the directions to claim the prize, they were hijacked to the defendant's adult Web site via a 900 number that charged up to $3.99 a minute. In *FTC v. Zuccarini*, No. 01-4854 (E.D. Pa. Sept. 25, 2001) (complaint), the defendant diverted consumers to a Web site by exploiting errors they easily can make in typing a URL, and then holding them captive on the site by "mousetrapping"—opening an endless cascade of windows promoting gambling and pornography. (In this case we used the Commission's unfairness authority to pursue practices that did not fit neatly under the deception theory.) We brought over sixty cases to tackle spam, a source of much Internet fraud. While the difficulties of identifying and pursuing fraudulent spammers suggest that law enforcement alone will not solve the problem, enforcement actions anchored our multi-faceted approach to spam.

As more fraud migrated across national borders, we pursued initiatives begun in the Pitofsky era to build and strengthen international partnerships. We promoted sound international consumer protection policies, just as we have done for antitrust. We created a new International Division of Consumer Protection in BCP and substantially increased the staff and resources dedicated to our international work. Commissioner Mozelle Thompson tirelessly traveled the globe to increase international cooperation. We brought joint law enforcement actions. We continued to work with longstanding partners and to participate actively in multilateral organizations and forged new global partnerships to address emerging problems such as spam. Applying existing laws, the FTC already has had a positive influence in coordinating cross-border law enforcement and promoting market-oriented approaches to consumer protection. Under the proposed International Consumer Protection Act, which would facilitate information-gathering and information-sharing in cross-border matters, the agency could do even more.

In 2002 I outlined a five-part plan for fighting cross-border fraud (Muris 2002a). The plan provided for a workshop, which we held in 2003, on private/public sector cooperation to combat cross-border fraud. The plan also provided that we would urge the OECD to adopt a recommendation to address cross-border fraud—a measure the OECD endorsed in 2003 (OECD 2003). The plan further called for new multilateral and bilateral agreements to combat cross-border fraud and the strengthening of existing agreements. Since then, the FTC has entered into a new bilateral consumer protection agreement with Ireland (Memorandum of Understanding 2003) and a trilateral agreement on spam enforcement cooperation with Australia and the United Kingdom (Memorandum of Understanding 2004). We also increased assistance to developing countries. Since 2002 the FTC has conducted consumer protection technical assistance missions in Budapest, Ljubljana, Lima, Bucharest, Kiev, Sofia, and Buenos Aires; it recently taught a seminar on Internet investigations in Singapore and conducted another training session in London. Finally, we proposed to seek new legislation to improve our ability to fight cross-border fraud. The FTC today continues to press proposed legislation before Congress.

To address the disproportionate impact of fraud on Hispanics, we began to monitor Spanish-language ads in all media. One result: a sweep of seven cases alleging deceptive advertising in high-circulation Spanish-language media—magazines, cable television, and newspapers—involving weight-loss products, work-at-home business opportunities, junk computers, and fraudulent international driving permits (FTC 2004c).

Another priority program with impact on minority communities combats subprime lending abuses. Here we built on and expanded the program begun in the Pitofsky Commission. Since 1995 the Commission has brought some twenty cases against subprime lenders, mortgage brokers, and loan servicers.[15] In the *Citigroup* case that Bob initiated, we obtained the largest settlement in FTC history—$215 million in redress to consumers.

Finally, as effective as civil enforcement actions against fraud have been, I believe that increased criminal enforcement is crucial for greater progress. We strove to obtain follow-up criminal actions, with some success. In the *Zuccarini* Internet mousetrapping case the defendant was arrested and sentenced to thirty months in federal prison on charges that he created and used misleading domain names to deceive minors into logging on to pornographic web sites. We created a Criminal Liaison Unit (CLU) to increase the criminal prosecution of consumer fraud cases. Although FTC staff has long worked with federal and state criminal law enforcers to encourage and assist their pursuit of actors whose conduct violates both FTC law and criminal statutes, our efforts had been ad hoc. The CLU seeks to strengthen these relationships and provide greater coordination of effort. The results so far have been impressive. Some thirty-six companion criminal cases were underway by July 2004.

Q. *Bob, using new technologies for fraud, perpetrators can operate faster and from anywhere in the world, reach more victims, hide their identities, disappear suddenly, and reappear just as quickly. How did the FTC adapt to these challenges?*

A. We gave every staff member desktop access to the Internet and the opportunity to learn how to use online tools to identify worthy targets and to investigate and develop cases. We created Consumer Sentinel and our Consumer Response Center, which gave us a modern, up-to-date system for gathering and analyzing consumer complaint data. For the first time, the staff had the tools needed to know what consumers were experiencing *in real time*. We no longer relied on state and local

[15] *E.g.*, FTC v. Citigroup, Inc., No. 01-606 (N.D. Ga. Mar. 6, 2001) (complaint); FTC v. Fairbanks Capital Corp., No. 03-12219 (D. Mass. Nov. 12, 2003) (complaint); FTC v. Stewart Finance Co., No. 03-2648 (N.D. Ga. Sept. 4, 2003) (complaint).

consumer affairs offices or consumer groups to identify problems and belatedly alert us. The FTC became adept at doing this for itself. These two innovations were powerful new tools for identifying frauds quickly, spotting particular bad actors, and locating potential witnesses who could provide evidence for a 13(b) case.

We streamlined our internal processes to improve our ability to get into court while the scam was still in progress. In *FTC v. Verity International, Ltd.*, No. 00-7422 (S.D.N.Y Oct. 2, 2000) (complaint), from the time we received the first consumer complaint until we served the TRO was about fourteen days. While that was exceptionally fast, we succeeded in being pretty nimble in all of our 13(b) cases.

As technology-based fraud became more global, we drew on and strengthened cooperative relationships with our foreign counterparts—building on Chairman Steiger's success in establishing good relations with sister agencies at home and abroad. We all realize that we need global partners to tackle the growing problem of cross-border fraud.

Q. *Tim, did you have to adapt in similar ways to the changes brought about by even newer technologies and globalization?*

The pace of change seems only to increase, requiring the FTC to adjust its plans and programs. Fortunately, we inherited excellent tools from the Pitofsky Commission to aid this effort, especially Sentinel. We updated all our technology, now so vital to our law enforcement and education work. We built on existing relations with foreign enforcement agencies and forged new relationships. Further, we developed cooperative relations with private entities. As an example, we held a workshop on how members of certain industries, such as private mail box operators and Internet service providers, can help combat global scams that use their services.

G. NATIONAL ADVERTISING

Q. *Bob, what prominent issues did you address as part of the national advertising program?*

A. One great FTC strength is its ability to focus resources on evolving consumer problems. When I first joined the agency in 1970, national advertising was clearly one of those issues. There was no widely accepted set of principles or acceptable practices, and I think the industry had the sense that no one was watching or would hold them accountable. We changed that. When I became Chairman in 1995, standards were clearer, and self-regulatory programs were active and effective. National advertisers knew the FTC and the states were watching closely. For the most part, national advertisers were serious about compliance.

So we focused on new issues. In advertising, as elsewhere, I wanted to make sure our remedies were appropriate. We litigated the first corrective advertising case in thirty years, and Jodie Bernstein led an effort to transform the agency's traditional administrative cease-and-desist order approach to advertising enforcement into a modern, district court based, enforcement program with tough remedies like disgorgement and redress. And as in almost everything she did, Jodie was very successful.

We also spent considerable time trying to educate a new generation of high-tech advertisers on advertising fundamentals—for example, that using fine-print footnotes and video disclaimers to correct deceptive claims is unacceptable. Some examples of small-print disclaimers our staff brought us made you want to laugh. How could anyone think these kinds of disclaimers are acceptable? Again we were very successful.

Finally, new areas of advertising and new media required our attention. Just as television was the advertising technology of the 1970s, we knew the Internet was the advertising technology of the future. To educate advertisers on how to operate in this new medium, we issued publications that made clear that traditional advertising principles applied to marketing in the electronic marketplace and provided guidance on how to comply in this new medium (FTC 2000b, 2000c). These and other initiatives were important to assure that the Internet would not be the "Wild West," but a marketplace subject to traditional consumer protection rules and a credible place for consumers to shop.

Q. *Tim, what were your major initiatives in this area? This area is a far less prominent part of FTC work than when you and Bob directed BCP. Why?*

A. As Bob suggests, many reasons explain why national advertising is less prominent in the Commission's consumer protection enforcement program now than in the 1970s and 1980s. First, thanks to FTC enforcement program in those decades, the standards governing national advertisers are much clearer. Second, industry self-regulation programs, which Bob helped foster as BCP Director, have improved compliance with those standards. Third, companies increasingly use private civil (Lanham Act) actions to challenge misleading advertising by rivals. Finally, national advertisers have come to understand that the consequences of FTC enforcement actions are not worth the risks. An FTC enforcement action, with its attendant publicity, can tarnish a firm's reputation with consumers substantially and can depress its stock price as well (Mathios & Plummer 1988; Peltzman 1981, 403–04).

Of course, the Commission remains vigilant in its monitoring of such advertising. We filed cases against high profile national advertisers, such as Wonderbread and Kentucky Fried Chicken.[16] We challenged deceptive claims in "infomercials," a newer form of national advertising. In one recent case the FTC took the unusual step of simply banning a defendant from using infomercials to advertise any product, as well as banning the defendant from using any media to make health or disease claims for any product.[17]

As suggested by the infomercial market, one side effect of the media revolution is a large increase in the avenues for deceptive and misleading advertising to reach national audiences. The FTC advertising program appropriately devotes substantial resources to attacking fraudulent ads that are disseminated regionally or nationally. We moved these advertising cases away from administrative enforcement actions; increasingly, we bring them ex parte in federal district court, seeking preliminary relief and asset freezes. By monitoring deceptive infomercials more closely, by going more swiftly to federal court to stop them, and by more aggressively alleging that facially implausible claims were false, rather than merely unsubstantiated, in many cases we disrupted the cycle in which these products move from direct response advertising to retail markets. This new approach reduced both the harm that deception caused consumers and the financial incentives to engage in the fraud in the first instance.

The FTC's national advertising program still plays an important policy development role. As it has evolved over the years through a succession of administrations, the program has become a model for advertising regulation by other federal agencies, the states, and even international bodies. Because it has consumer protection and competition responsibilities, the FTC long has understood that consumers can suffer just as much from private or governmental restraints that unnecessarily restrict truthful advertising as they can from deception. Bob's work as BCP Director in the 1970s to eliminate private restraints on comparative advertising helped revolutionize advertising, making it more informative for consumers.

During my tenure as Chairman, we actively advocated the Commission's approach to advertising regulation. We worked closely with the FDA, responding to its requests for comment on possible approaches to issues, such as direct-to-consumer prescription drug advertising, nutri-

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[16] Interstate Bakeries Corp., No. C-4042 (Apr. 16, 2002) (complaint); KFC Corp., No. C-4118 (Sept. 9, 2004) (complaint).

[17] FTC v. Trudeau, No. 03C-3904 (N.D. Ill. June 9, 2003) (complaint), *available at* www.ftc.gov/opa/2003/06/trudeau.htm.

tional food labeling, and health claims for food and dietary supplements. In the health claims proceeding the FTC used empirical studies to show how advertising gives consumers valuable health information and to highlight the damping effect unnecessarily restrictive regulation can have. The Commission urged the FDA to allow marketers to communicate non-misleading health claims when appropriately qualified to include the level of scientific support. The final FDA staff reports on these issues adopted much of what we recommended.

H. Unfairness

Q. *The other half of the Commission's consumer protection jurisdiction is unfairness. Bob, how did you use it when you were Chairman? How important do you consider it?*

A. Consumer unfairness is a very important part of the FTC's consumer protection authority. Used wisely, it gives the agency flexibility to reach practices that, though not legally deceptive, harm consumers. Some of the most important FTC consumer protection accomplishments, like the 1964 Cigarette Rule (FTC 1964) and the advertising substantiation policy (FTC 1984), were based initially on unfairness jurisdiction (Pitofsky 1977, 681–83).

During my Chairmanship we used unfairness authority to attack some aspects of "cramming"—placing unauthorized charges on consumer phone bills (FTC 1999b)—and to challenge the "Joe Camel" cigarette advertising campaign, which we alleged was aimed at teenagers.[18] Still, I confess to being cautious in the use of unfairness. In the past the vagueness of the Commission's unfairness authority had been a source of concern both within the agency and without. As amply demonstrated during the 1970s, ill-considered use of the agency's unfairness authority can hurt the agency's reputation and operation. That is why I so strongly advocated the Commission's 1980 Unfairness Policy Statement (FTC 1980) and why I think codification of the Policy Statement in Section 5(n) of the FTC Act was so useful.

Q. *Tim, one interesting—one might say ironic—development of your recent tenure at the FTC has been increased use of unfairness. Can you describe your approach?*

A. Like Bob, I believe that unfairness, used wisely, can be a very useful consumer protection tool. Howard Beales and I criticized the misuse of

[18] R.J. Reynolds Tobacco Co., FTC Docket No. 9285 (May 28, 1997) (complaint), *available at* http://www.ftc.gov/os/1997/05/d9285cmp.pdf.

unfairness that occurred in the 1970s, and I agree with Bob that those problems largely reflected the lack of a principled test for exercising unfairness authority before the 1980 Unfairness Policy Statement (Muris & Beales 1991).

There remains an important role for unfairness. Properly applied, unfairness can be a more flexible tool than deception because, as the theory has evolved, it allows the Commission to make reasoned judgments about what constitutes unfair practices based on an assessment of the benefits and costs of practices to consumers, businesses, and the economy as a whole.

In my tenure, we used the unfairness doctrine to police abusive Internet practices. Newly emerging technologies often present a bundle of costs and benefits. Especially in recent years, we saw many instances in which the misuse of technology injured consumers. If we view all of these practices through the lens of deception, we might establish per se rules that could retard the growth of technology or leave harmful practices unaddressed. The use of unfairness allowed us to better tailor the remedy to the harm.

One example is drawing the line between beneficial Internet advertising and abuses like mousetrapping. In *Zuccarini* the defendant registered an estimated 6,000 domain names that were misspellings of popular Web sites—for example, Cartoon *Netwok* instead of Cartoon *Network*. Once consumers reached an unintended destination, a series of nine windows opened, advertising products like online gambling, psychic services, and adult Web sites. When you closed one window, nine more opened up.

This is precisely the sort of misconduct the FTC should challenge. But how? If we treat the practice as deception, we could end up with a rule that makes it difficult to distinguish good sites from bad. The FTC's deception authority looks at claims made to consumers. If claims are materially misleading, they are illegal. We might have argued that the "x" in the box is a claim that clicking on an "x" would close the window. Many programs, however, may ask "Are you sure?" before closing, or may offer one more pop-up before closing. Perhaps one could interpret the claim to mean that the consumer could exit in a reasonable time, and thus protect these uses of pop-up ads, but stretching deception in this way would just be an indirect way of applying cost/benefit analysis. The direct method of using unfairness seems far preferable. In this context, unfairness also avoids the considerable problem of determining just how reasonable consumers interpret the claims.

J. CONSUMER EDUCATION

Q. *Bob, how did the role of consumer education change in your tenure?*

A. Consumer education always has had a role at the FTC, but Jodie Bernstein transformed it to make consumer and business education one of three pillars of BCP's strategic plan. She allocated more resources to the enterprise, hired talented people, and created an Office of Consumer and Business Education (OCBE) that was absolutely top notch. We went from distributing often densely written pamphlets with a uniform look, to a wide variety of stylish, clearly written, electronic and printed educational products. As Jodie said, OCBE's materials redefined the term "government-issue."

Jodie integrated consumer education into all our law enforcement programs. We used free media to publicize BCP enforcement actions and to tell consumers how to protect themselves from the scams we were stopping. We wrote our materials in plain language, not legalese, and trained staff attorneys to make our messages usable by the media. We involved OCBE in all aspects of the Bureau's work. For example, when we launched a toll-free number, OCBE created a campaign to educate consumers so they would identify the FTC as the nation's consumer protection agency, the place to report complaints about fraud or deception and the source of practical consumer information. It was a key feature of our effort to build the Consumer Sentinel database.

OCBE found myriad new ways to reach larger audiences. We used the Internet to transmit our information to millions, rather than thousands, of consumers. Our creative staff developed an award-winning site and found inventive ways to educate consumers online, such as "teaser" sites that mimicked popular fraudulent sites and caught consumers at "teachable moments"—that is, exactly when they were looking for the information on the Web. We broadened our reach by encouraging our many public and private sector colleagues to distribute our information. Jodie and her staff deserve great credit for elevating the role of consumer and business education at the FTC and achieving a high standard of excellence in its operation.

Q. *Tim, did you build upon these initiatives? What were your priorities in this area?*

A. Of the many improvements implemented by the Pitofsky-Bernstein team, consumer and business education was among the most impressive. The FTC is now broadly recognized as a national leader in the field of consumer education. Never has that work been more important to the Commission's mission.

During my tenure, we continued to exploit OCBE's place as the best in the business in educating consumers. We covered more topics, issuing about fifty new publications a year, and reached larger audiences directly. In the past year, the OCBE distributed 7.2 million publications and logged over 25 million accesses of publications online.

As the Internet anchored more of our education efforts, we developed successful special sites devoted to the most troubling consumer issues, such as spam, financial literacy, and information security. We recruited more partners to distribute our material. For example, we enlisted private and public sector partners to help distribute our most popular identify theft publications by giving them CDs with the booklet and printing instructions, along with our blessing to print the material with their own name on it.

Consumer and business education has played a key part in all of our major initiatives, such as the programs on weight-loss claims and subprime lending abuses. Two other measures deserve special mention. One is the Spanish-language outreach program. OCBE has translated nearly 70 consumer publications into Spanish and has another 160 in the works. In just the past year, OCBE distributed over 725,000 Spanish-language publications in print and on the Web at www.ftc.gov/spanish. We began regularly to place consumer information in the nation's Spanish-language media, to distribute public service announcements and news releases in Spanish, and to present exhibits at national conferences that focus on Hispanic consumers. We formed the FTC's first Hispanic outreach liaison, and the agency now has two staff working full time at this task.

Another significant initiative was the marketing of the National Do Not Call Registry. The results speak for themselves. We achieved almost universal recognition of the Registry, and over 62 million telephone numbers registered. In May 2004 the Washington, D.C. chapter of the American Marketing Association honored the FTC's Do Not Call campaign with its M Award as the year's best government marketing program.

K. Management and Organization

Q. *Bob, you mentioned that the Office of Policy Planning orchestrated the 1995 Global Hearings. What were some of the significant changes in management and organization of BCP during your tenure as Chairman?*

A. All credit for improving the management of BCP goes to Jodie Bernstein, who combines the best management and legal skills of any person I know. We already discussed how her introduction of strategic planning contributed to the Bureau's management. In an initiative called "Improving the Workplace," Jodie ended the practice of requiring long staff memos for the Bureau Director to support recommendations to investigate or open cases. She replaced them with streamlined memos and bi-weekly meetings with division leaders to review and decide on specific actions. These reforms had impressive results. By targeting their efforts according to the strategic plan, staff avoided wasted effort on projects that might later be rejected, and Jodie was able to make decisions quickly on most matters.

Our one major organizational change in BCP was to form a new Division of Planning and Information (DPI), which assumed responsibility for new initiatives, such as Sentinel and the Consumer Response Center with its toll free number, and for implementing recent identity theft legislation. DPI's duties also included our international consumer protection work. When we created DPI, we eliminated another BCP division as part of an overall effort to use our resources most effectively to keep pace with the rapidly changing marketplace.

Q. *Tim, what institutional changes did you make in BCP as Chairman?*

A. When I arrived, BCP was functioning at a very high level, and I saw no need for major changes. Howard and I did form two new organizations in the Bureau. We created a new International Division of Consumer Protection to address the growing importance of global consumer protection issues. The new Division works to bolster and increase global partnerships, seeks legislation to improve the FTC's ability to fight cross-border fraud, provides technical assistance to developing countries, and helps develop consistent international consumer protection rules and policies. We also formed the Criminal Liaison Unit to strengthen coordination with criminal law authorities and encourage their prosecution of violators of FTC law whose conduct also violates criminal laws.

L. Broadening Partnerships and Public Participation

Q. *Bob, during your tenure BCP developed new public and private partnerships at home and abroad. You also invited broad public participation in your proceedings. What motivated these initiatives, and do you think they were effective?*

A. The FTC now works with public and private sector partners in almost every area of our consumer protection work. Chairman Steiger started us on this path with her tireless efforts to strengthen the FTC's relations with state law enforcement officials. It is one of her most important and lasting legacies. In my tenure, we expanded our partnerships enormously to leverage our limited resources in law enforcement, consumer and business education, and self-regulation initiatives. In law enforcement, we led over sixty sweeps with hundreds of law enforcement partners. For each FTC case, our partners brought three. We also developed hundreds of private sector partners, especially to help educate consumers and businesses and to develop self-regulatory programs.

We invited broad public participation through our workshops, a wonderful innovation first used in 1993 to explore controversial issues associated with the proposed Telemarketing Sales Rule. We used workshops many times, not only in connection with rulemaking, but also to review guides, to explore emerging issues—such as online privacy, identity theft, and cross-border fraud— and to give business guidance. The workshops fostered dialogue and were invaluable in helping the FTC to understand the issues and formulate sound policies to address them.

Q. *Tim, you used and expanded on these techniques. Where have they been most helpful?*

A. The public workshop brilliantly augmented the FTC's arsenal of tools and showed how the agency can find innovative ways to carry out its consumer protection mission. We used this policy instrument extensively to study key issues—from marketing violent entertainment to weight-loss products, to examining the costs and benefits of information sharing, and to considering how private partners might help to stop global scams. Partnerships have become ever more crucial to the FTC's work, as today's challenges are outstripping the agency's capacity to cope on its own. Increasingly, the FTC must engage public and private partners, domestic and international, to join in its work and must enlist criminal authorities to help prosecute fraud. These needs explain why we founded BCP's new International Division and CLU and gave them key roles to strengthen partnerships with other public and nongovernment bodies.

V. COMPETITION

A. MERGERS

Q. *Bob, mergers reported under the Hart-Scott-Rodino Act rose from 1,529 filings in fiscal year 1991 to roughly 4,500 in fiscal year 1998. How did the merger wave affect your tenure?*

A. It stretched our competition resources. Despite the increased merger activity, the total work years budgeted for the competition mission remained essentially flat. We kept pace by being more efficient, working longer hours, and shifting resources from nonmerger enforcement (Pitofsky 1998). In 1995, the first year of my tenure, merger review consumed two-thirds of the FTC's antitrust budget, compared to an historical average of roughly 50 percent. That continued for several years.

As a result, we opened fewer nonmerger investigations than we could have otherwise and could not move as quickly on those we had opened. Nonetheless, we accomplished a great deal in the nonmerger area. Significant cases included *Intel, Toys "R" Us, Dell Computer, Mylan,* and *RxCare,*[19] and the generic drug anticompetitive settlement cases (*Abbott-Geneva* and *Hoechst-Andrx*[20]). Bill Baer (and his successors Rich Parker and Molly Boast) were masters at switching personnel around to address pressing needs. We conducted the global competition hearings and launched the generic drug study and other initiatives. But the fact remains that staffing constraints limited what we could do in the nonmerger area because antitrust investigations are very resource intensive.

Q. *Tim, you were spared a merger wave. How did that affect your tenure?*

A. When I arrived, I marveled at what good shape the Bureau of Competition (BC) was in, despite the merger wave. That it was still standing was itself amazing! Because merger activity was down substantially during my tenure, we had more freedom on the non-HSR front. We restored balance in the resource allocation between mergers and nonmergers and began many new initiatives (Muris 2003). We established task forces to study the state action and *Noerr* immunity doctrines because I felt that courts had broadened those antitrust exemptions beyond the policies underlying the doctrines. We also formed a task force on e-commerce and competition issues, and we looked carefully at antitrust issues involving standard setting. We held hearings on health care and our patent system, and broadened our competition advocacy and amicus programs. Had the merger wave persisted, we could not have done as much. The merger wave during Bob's tenure and its ebbing during mine makes comparisons of our Chairmanships more difficult.

B. PROCESS IMPROVEMENTS

Q. *Bob, you and Tim strove to improve the merger review process. Can you describe how?*

[19] Intel, 128 F.T.C. 213 (1999) (consent order); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); Dell Computer Corp., 121 F.T.C. 616 (1996) (consent order); FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999); RxCare of Tennessee, Inc., 121 F.T.C. 762 (1996) (consent order).

[20] Abbott Labs., No. C-3945 (May 22, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/05/c3945.do.htm; Geneva Pharmaceuticals, Inc., No. C-3946 (May 22, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/05/c3946.do.htm;

A. My predecessor, Janet Steiger, and Anne Bingaman, the head of the Antitrust Division, started the ball rolling by announcing reforms that we then implemented and built upon. The reforms had several parts. We streamlined the clearance process by setting target deadlines for determining which agency will handle each matter. That substantially cut the time the agencies took to reach that decision. This gave the reviewing agency more time to do the initial review of a proposed merger and yielded better-informed decisions on whether to issue a second request.

The agencies jointly adopted a model second request to make their investigative process more similar. Our staff also adopted a "quick look" procedure in appropriate cases. (Pitofsky 1996). They first reviewed the information on an issue that could determine whether the investigation should proceed. If the quick look showed the transaction was not anticompetitive, the company was relieved from full compliance with a second request. That procedure saved time and effort for the parties and staff in some cases. Finally, we adopted a procedure to resolve disagreements between the staff and recipients of second requests regarding the scope of such requests. At first, the reviewing official was the BC Director, but the FTC later assigned the function to the General Counsel, whom outside parties perceived to be a more neutral arbiter.

We also adopted additional exemptions from HSR filing requirements. In 1996 the FTC, with the Antitrust Division's concurrence, promulgated new rules exempting five categories of transactions (FTC 1996c). This reduced the number of reportable transactions by about 7–10 percent from the level it would otherwise have been.

These measures went a long way to streamline merger review and reduce burdens, but this is something that has to be monitored on an ongoing basis. When two agencies share merger review jurisdiction, there will be cases where both agencies want to review a merger and clearance gets delayed. There also is a natural tendency for staff to want to add transaction-specific questions to the model second request. While often appropriate, that should be monitored. Investigative procedures also should be revisited from time to time to ensure they are in tune with trends in electronic data storage and transmission.

Our reforms also went beyond the HSR process. In September 1996 we announced rule changes to streamline administrative trial procedures (FTC 1996d). The perception (and sometimes the reality) was that

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Hoechst Marion Roussel, Inc., No. C-9293 (May 8, 2001) (consent order), *available at* http://www.ftc.gov/os/2001/05/hoechstdo.htm.

administrative litigation took too long. The reforms set new, shorter deadlines, streamlined pretrial discovery, and sped up the trial. In most cases, the reforms require the administrative law judge to issue an initial decision within one year after the Commission issues an administrative complaint. The one-year deadline means that most trials will be significantly shorter than they were before the rule amendments. The FTC also broadened its policy of terminating orders after twenty years. These steps removed remedial requirements that were no longer necessary and may even have been counterproductive by constraining business conduct unduly. As adopted in 1994 the "sunset" policy applied only to competition orders, and respondents under orders that met the twenty-year requirement had to file a petition to terminate the order. In 1995 we made the sunset policy applicable to both competition and consumer protection orders, and old orders sunset automatically without petitioning by respondents.

We took steps to make the merger review process more transparent, to give the business community and the broader public more information on why we took certain actions. That is relatively easier to do when we undertake an enforcement action, but also important—and more difficult—when we close an investigation. The difficulty is that much of the information that goes into our decision making is confidential under our laws, and this limits what we can say about an investigation. But we made an effort.

The best example is the statement I issued, with Commissioners Steiger, Starek, and Varney, when we closed the Boeing/McDonnell Douglas merger (FTC 1997). It was important to speak. There had been speculation that the U.S. antitrust authorities might let this merger—particularly the commercial aircraft production elements—proceed because aircraft manufacturing is a global market, and the United States, to compete in that market, needs a single powerful "national champion." The argument was that a powerful U.S. firm would improve the nation's balance of trade and provide jobs for American workers.

We made clear that the national champion argument did not explain our decision. The agency has no discretion to authorize anticompetitive but "good" mergers because they may be thought to advance national trade interests. If that were a wise approach, only Congress could implement it. In any event, the national champion argument is almost certainly a delusion. The best way to boost U.S. exports, address concerns about the balance of trade, and create jobs is to require U.S. firms to compete vigorously at home and abroad. Our task as enforcers was to ensure the free market's vitality by preventing private actions that may substantially lessen competition or tend to create a monopoly. The Boeing/McDonnell Douglas merger did not pose that threat.

Q. *Tim, how did you preserve and build upon these measures?*

A. I agree with Bob that the merger review process requires continuing attention. The battle to curb burdens never ends and probably will require the attention of each new chairman. Although Bob improved the process from start to finish, the incentives for a burdensome system are inherent in HSR. To cut those burdens, we held workshops across the country in which FTC staff, the outside bar, and economists discussed various aspects of merger investigations (FTC 2002d, 2002e).[21] We then issued guidelines on best practices for merger investigations (FTC 2002f), handling accounting and financial data (FTC 2002g), and negotiating remedies (2003e). In addition, the FTC, the Antitrust Division, and the European Union jointly issued best practices in coordinating merger reviews across jurisdictions (United States & European Union 2002).

To make more transparent the substantive aspects of merger review, we released two data sets concerning characteristics of horizontal mergers we had investigated and challenged (FTC & DOJ 2003b; FTC 2004d). We also increased transparency on a case-specific basis. While Chairman, we issued twelve press releases or statements on closing an investigation. One example was the investigations of two proposed cruise line mergers, Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and the competing offer for P&O Princess by Carnival Corporation, Carnival Corporation/P&O Princess Cruises plc. There was a rare split decision among the Commissioners, and both the majority and dissenters issued statements (FTC 2002h). The analysis was complex, the ultimate decision depended on close scrutiny of industry-specific facts, and the transactions had attracted unusually extensive media coverage—some of it wrong, even as to the number of firms involved. In those circumstances, we explained our decision in detail. Another example was closing the investigation of Genzyme Corporation's 2001 acquisition of Novazyme Pharmaceuticals (FTC 2004e). The investigation involved innovation market analysis, which itself is controversial and requires a particularly intense factual investigation. I issued a statement explaining my views (Muris 2004), as did two other Commissioners (Thompson 2004; Harbour 2004).

C. INTERNATIONAL COOPERATION IN INVESTIGATIONS

Q. *Bob, beyond the results of the globalization hearings, it seems that the FTC increasingly has cooperated with foreign agencies, particularly on cross-border mergers. How did international cooperation evolve and contribute to the FTC's enforcement activities?*

[21] The transcripts and written submissions from the workshops are available on the FTC Web site at http://www.ftc.gov/bc/bestpractices/index.htm.

A. The international component of our work increased substantially in recent years. This was driven by many developments, including the globalization of business and the rapid proliferation of competition laws around the world—a proliferation I applaud. During my tenure, the United States signed formal cooperation agreements with several jurisdictions, including Brazil, Israel, Japan, and Mexico, adding to our existing agreements with the EC, Canada, Australia, and Germany.[22] With Australia, we also signed the first agreement under the International Antitrust Enforcement Assistance Act, enabling us to share confidential information and to obtain evidence on behalf of the other national party. Our cooperation took place mainly, but not exclusively, on mergers. Although much press ink has focused on the rare cases of disagreement, such as Boeing/McDonnell Douglas and General Electric/Honeywell, in the vast majority of cases we and our foreign counterparts have achieved consistency in analysis and compatibility in remedies. Merging parties routinely waive confidentiality protections to facilitate cooperation, suggesting that they, too, find agency cooperation to be beneficial.

Q. *Tim, did GE/Honeywell throw cooperation off course? Has there been meaningful convergence in antitrust thinking between U.S. and foreign authorities, including the EC?*

A. *GE/Honeywell* exposed some real differences between U.S. and EC analyses of certain issues, but the matter was clearly an outlier. We continued to cooperate closely on dozens of cases, facilitating consistent results and promoting policy convergence. Joint U.S./EC working groups on merger process, analysis, and remedies led to joint best practices for merger review. Differences remain among jurisdictions with competition laws; given the variation in cultures, legal systems, and levels of development, this is unremarkable. Yet the overall trend is increased convergence in analysis and enforcement based on consumer welfare and sound economics, and increased cooperation among national authorities.

In 2001 we helped found the International Competition Network (ICN), and we played a major role in its leadership and operations. The ICN admits to its membership all competition authorities around the world and facilitates convergence by using studies and conferences to identify best practices in antitrust enforcement. One early manifestation of the ICN's work is that the process of reviewing cross-border mergers is becoming much more similar across jurisdictions globally. The ICN is also building a Resource Center that will create and allow ready access to an invaluable collection of information, including existing statutory

[22] *See* Antitrust Division, U.S. Dep't of Justice, Antitrust Cooperation Agreements, *available at* http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

provisions, advocacy filings, and international experts on a variety of topics. Second, the FTC has expanded its efforts, begun during Janet Steiger's tenure and continued under Bob, to provide technical assistance to competition and consumer protection authorities in emerging markets Sometimes their officials come here; sometimes FTC staff goes there. In these and other activities, the FTC is building relationships that should improve international cooperation, in mergers and elsewhere.

D. HORIZONTAL MERGERS

Q. *Bob, you earlier mentioned the 1997 revision to the horizontal merger guidelines bearing on the efficiency defense. What were the purpose and impact of that change?*

A. Before, merger guidelines had grudgingly interpreted efficiency defenses. As a practical matter, they limited the effect of efficiency claims to influencing prosecutorial discretion. Once the government was in court challenging a merger, it was inclined to ask the court to restrict efficiency claims to the point that they were virtually irrelevant (Pitofsky 2002, 589–90). Supreme Court doctrine from the 1960s supported that approach, most notably in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967), where the Court said, "Possible economies cannot be used as a defense to illegality."

The treatment of efficiencies in merger analysis was out of sync with most other areas of antitrust. For a number of years, the courts had introduced or attached greater weight to efficiency claims in cases involving horizontal restraints, joint ventures,and vertical distribution arrangements.[23] In merger review, however, efficiencies were relevant to the exercise of prosecutorial discretion, but irrelevant when a transaction was examined in court. Nevertheless, lower courts resisted the absolute ban on efficiency claims in merger cases and often took efficiencies into account,[24] *though no court has declared an otherwise illegal merger to be legal because of substantial efficiencies.*

As I noted before becoming Chairman, hostility to efficiency claims in merger analysis was odd (Pitofsky 1992, 206–08). The legislative history of the Sherman and Clayton Acts does not justify exclusion or even special skepticism toward efficiency claims, and antitrust is supposed to

[23] *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) (horizontal restraint); Nat'l Bancard Corp. v. Visa U.S.A. Inc., 779 F.2d 592, 599 (11th Cir. 1986) (joint venture); Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (nonprice vertical restraint).

[24] *See, e.g.,* FTC v. University Health, Inc. 938 F.2d 1206, 1222 (11th Cir. 1991); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 680 (D. Minn. 1990).

encourage efficiency in order to serve consumer welfare. The state of the law became odder still as American firms were increasingly locked in commercial combat with foreign firms, often located in countries where barriers to mergers are extremely low or nonexistent, or where efficiency claims are generously viewed.

The 1997 revisions sought to modernize U.S. merger analysis through four basic changes. First and most significant, the revisions tied efficiencies directly into competitive effects analysis. They recognize that cost reductions may reduce the likelihood of coordinated interaction or the incentive to raise price unilaterally. In these and other market situations, efficiencies are likely to lead to benefits to consumers.

Second, the revisions refined the concept that efficiencies must be attributable to the merger and could not be achieved in a less anticompetitive way. Instead of requiring proof that claimed efficiencies could not be achieved through some *hypothetical alternatives,* the agencies committed themselves to evaluate claimed efficiencies against other *practical alternatives.* Third, the analysis expressly incorporated a sliding scale approach. The agencies would require proof of greater efficiencies as the likely anticompetitive effects of a merger increased; efficiencies should almost never justify a merger to monopoly or near-monopoly. Finally, the revisions defined more clearly and explicitly which efficiencies are "cognizable." They must not arise from anticompetitive reductions in output, service, or other competitively significant categories, such as innovation (Pitofsky 1999, 486–87). In sum, efficiencies count in favor of the legality of a merger only if shown to be substantial, merger-specific, and likely to benefit consumers.

Satisfying these conditions is a formidable task, but that was anticipated. The central idea was to allow efficiencies as a tie-breaker in close cases—usually mergers of five-to-four or four-to-three in a properly defined market—but not to allow them to justify extremely high levels of concentration.

I think the revisions had a significant effect on how efficiencies are presented and analyzed. Lawyers began to present their efficiency claims, within the FTC and in court, in a more organized and realistic way. People dealing with the agency found reactions to efficiency claims more consistent. There are now standards to which defense lawyers, enforcement officials, and judges can turn in arguing efficiency questions.

I do not want to oversell the influence of efficiency claims on prosecutorial discretion, but they sometimes played a role. For example, in hospital mergers it is often (though not always) the case that significant efficiencies can be achieved through a merger, and FTC staff relied on such efficiencies in recommending that some mergers not be challenged. In the Tosco-Unocal merger, involving a combination of refineries in California, the decision not to challenge similarly was influenced by a conclusion that there were real synergies to the deal. In Chrysler/Daimler Benz early presentation of evidence of efficiencies influenced the decision not even to issue a second request (Pitofsky 1999, 487).

Q. *Tim, did the Guidelines strike the proper balance? How have they worked in practice?*

A. The revisions were a positive step. They signaled broader acceptance of efficiency claims and made useful changes, such as tying efficiencies directly to competitive effects analysis, rejecting any requirement that efficiencies be unique to the transaction at issue, and rejecting a rigid requirement that cost savings be "passed on" to consumers.

But they did not go far enough. The Guidelines are still skeptical about the broad range of efficiencies that mergers can produce, such as efficiencies in management, promotion, and capital costs (Muris 1999, 733–35). Economists and other commentators have shown that mergers can reduce cost in various ways (Muris 1999, 734–35; Leary 2002). To the extent some efficiency claims are not well-received because they are harder to prove, remember that the merging parties have the evidentiary burden. If good evidence does not support their claims, those claims will not have much weight.

We are at something of an impasse in the role of efficiencies in actual cases. Perhaps due to a misunderstanding of the role of efficiencies in the Merger Guidelines, in prosecutorial decisions, and in court decisions, some antitrust attorneys advise their clients not to make the effort to present their best efficiencies case (Muris 2002b). On the FTC side, the dearth of presentations with sound factual support has led the staff usually to dismiss the claimed efficiencies. When parties present back-of-the-envelope calculations or inadequately support efficiency claims, the staff rejects them—for good reason. Although this may have given the staff a reputation for not welcoming efficiency claims, the only deserved reputation is one for rejecting poorly developed efficiencies arguments.

The dilemma is obvious. Parties do not provide good evidence, and, without such evidence, the agency rejects efficiency arguments. It is the classic "chicken and egg" problem. I discussed this problem at a mergers workshop in December 2002, where we sought to get a better understanding of the factors that motivate mergers and the reasons for successful outcomes.[25] Unfortunately, I saw no change in the willingness of parties to present well-supported efficiencies claims. I encourage parties to do so. In my years at the FTC, the agency took solid, credible efficiencies seriously, and I am sure that was the case with Bob as well. Of course, the merging parties' counsel should also remember that efficiencies can be important in cases that result in consent decrees. Presentation of credible efficiencies claims can lead to settlements that preserve competition while allowing the parties to achieve most, if not all, of the efficiencies they believe will flow from the merger.

Q. *Bob, what were highlights of your horizontal merger enforcement?*

A. We had many very significant cases. Our goal was to be moderately aggressive, but to pay serious attention to efficiency claims, preserve incentives to innovate, and recognize economic changes resulting from the globalization of competition. We also stood firm and insisted on strong remedies when we thought a merger was problematic. One of my goals coming in as Chairman was to strengthen the FTC's litigation capabilities, to ensure that we would be in a credible position to insist on strong remedies. I initially appointed experienced antitrust litigators to head the Bureau: Bill Baer as Director and Molly Boast and Rich Parker as Deputies, and eventual successors. We were ready to litigate if necessary, and did so on several occasions. I mention just a few major cases.

Exxon/Mobil obviously was a major case. Our consent order achieved all the relief we could have hoped for through litigation—it eliminated *all* overlaps in areas where the FTC had evidence of competitive concerns. The order included the largest retail divestiture in FTC history—the sale or assignment of 2,431 Exxon and Mobil gas stations in the Northeast and Mid-Atlantic, and California, Texas, and Guam—as well as other significant refining, pipeline, and terminal assets.[26]

I would highlight another point. There have been charges that the Commission was too lenient on petroleum mergers. The evidence does not bear this out. The FTC released a staff analysis of horizontal merger investigations for fiscal years 1996 to 2003, including tabulations of HHI concentration levels and changes in HHI in markets where enforcement action was either taken or not taken (FTC 2004d, Table 3.1). The data

[25] The agenda, transcripts, and other materials from the workshop are available at http://www.ftc.gov/be/conferencesroundtables.htm.

[26] Exxon Corp. and Mobil Corp., No. C-3907 (Jan. 26, 2001) (consent order), *available at* http://www.ftc.gov/os/2001/01/exxondo.pdf.

show that the FTC was quite tough against petroleum mergers, sometimes acting in moderately concentrated markets that might not have raised serious concerns in other economic sectors. For example, all FTC enforcement actions in moderately concentrated markets with HHIs below 1800 involved petroleum mergers (FTC 2004d, Tables 3.1 and 3.3). The agency took enforcement action in 55 moderately concentrated petroleum markets. In contrast, in other sectors the agency's enforcement actions involved markets that were highly concentrated, with HHIs well above the Merger Guidelines threshold of 1800 for high concentration (DOJ & FTC 1992, § 1.51). That does not mean that we applied different standards to petroleum mergers—each industry and market was analyzed on its own merits—but it is wrong to say that the FTC was lax against the oil industry.[27] In the national market, there were 14 to 16 major players at the time of each of those mergers; in local markets where there were overlaps, we insisted on restructuring.

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), was another major litigation. It was most significant for its use of economic data to assess such key issues as the definition of the relevant product market and whether the merger would create or enhance market power. Because the goods sold by Staples and Office Depot are also sold by numerous retail outlets, a critical issue was whether office supply "superstores" constituted a relevant market in which firms could exercise market power. In antitrust analysis, market definition ordinarily is an intermediate step to the ultimate market power issue, and we do that by examining the characteristics of a given set of products or markets, defining differences between that set and actual or potential competitors, and then predicting that prices could be raised substantially without losing sufficient business to make the price rise unprofitable. In *Staples/Office Depot*, though, we used economic data to show actual price effects across markets with different degrees of retail competition. We showed that, in those cities where one chain faced no other superstore competition, office superstores already had raised prices significantly over a substantial period of time without losing sufficient business to make those prices unprofitable. While this market definition method differs from the usual case, it ultimately does not depart from conventional merger analysis. Price effect data simply showed that superstores are a separate product market.

Staples/Office Depot also illustrates the modern judicial trend to recognize the importance of potential efficiencies. The most important claim

[27] *See* Shell Oil Co. & Texaco, Inc., 125 F.T.C. 769 (1998); British Petroleum Co. & Amoco Corp., 127 F.T.C. 515 (1999); Exxon Corp. & Mobil Corp., No. C-3907 (Jan. 26, 2001) (consent order), *available at* http://www.ftc.gov/os/2001/01/exxondo.pdf; BP

was that the combined firm would have augmented purchasing power and could extract better prices from its various vendors. The court seriously considered the claim but rejected it for two reasons. It appeared exaggerated when compared to internal documents; the cost savings estimate submitted in court exceeded by almost 500 percent the figures given to the boards of directors of the two firms when they approved the merger. Assuming that increased buying power is an "efficiency," the merger was not necessary to increase buying power because both parties to the merger were expanding rapidly.

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998), is also significant for its analysis of efficiency claims. The case involved proposed mergers between Cardinal Health and Bergen and between McKesson and Amerisource—the four largest drug wholesalers in the United States. If both mergers had proceeded, the two surviving firms would have combined markets shares ranging from 63 percent to 80 percent of the pharmaceutical wholesale market. The parties claimed hundreds of millions of dollars in efficiencies and that at least 50 percent of these would be passed along to consumers. The FTC argued that the claims were inflated (efficiencies seemed to grow as the parties came closer to a trial date), and that a commitment to pass along half the savings really amounted to a net consumer loss, because competition in the past had led the parties to pass along approximately 80 percent of any cost savings to their powerful customers. Judge Sporkin ultimately concluded that the defendants had not made their case, because the evidence indicated that continued competition among the four firms would achieve much of the savings anticipated from the mergers.

I believe the decision is important and sound, not just for its treatment of efficiency claims but, more broadly, for all of antitrust analysis. In recent decades, the enforcement agencies and the courts have abandoned reliance on structural presumptions—i.e. on market shares alone indicating competitive concerns—and have become more sensitive to other factors that diminish the likelihood that even high market shares will lead to anticompetitive effects. These include the possibility of new entry if post-merger prices rise, difficulties in achieving post-merger coordinated pricing, supply substitution in the event of price increases—and, now, claims of efficiency. But Judge Sporkin reminds us that even when these additional considerations are present to some extent, we must not neglect or forget the market shares that represent the initial stage of analysis. When two firms, as a result of mergers, will account

Amoco p.l.c. & Atlantic Richfield Co., No. 3907 (Aug. 29, 2000), *available at* http://www.ftc.gov/os/2000/08/bparco.do.pdf.

for as much as 80 percent of a properly defined relevant market protected against entry, these other considerations, including efficiency claims, should rarely trump evidence of illegality. It is one thing to examine whether market share numbers really mean what they suggest (as directed by the Supreme Court in *United States v. General Dynamics Corp.,* 415 U.S. 486, 501 (1974)), but another to forget them in the process of further review (Pitofsky 1999, 492–93).

In *FTC v. H.J. Heinz Co.,* 246 F.3d 708 (D.C. Cir. 2001), we lost in district court but prevailed on appeal. The merging parties, Heinz and Beech-Nut, were the second- and third- largest U.S. manufacturers of baby food; Gerber was the longstanding market leader with about 60 percent of industry sales. Because most supermarkets carry only two brands of baby food, and one is almost invariably Gerber, Heinz and Beech-Nut were accustomed to fighting for the second slot on grocers' shelves. Much of the case turned on the significance of losing competition at the wholesale level.

The district court focused on retail competition and found insufficient evidence of anticompetitive effects, but the D.C. Circuit Court held that, factually, there was significant evidence of retail competition between Heinz and Beech-Nut. Moreover, the D.C. Circuit held that the district court committed two legal errors in rejecting the FTC's argument regarding the loss of wholesale competition. First, the panel noted that no court had ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level. Second, the panel held that it was not the Commission's burden to prove such impact with certainty. The D.C. Circuit thus held that the Commission had established a prima facie case by showing that the merger would substantially increase concentration in an already highly concentrated market and that there were high barriers to entry. It noted that "no court has ever approved a merger to duopoly under similar circumstances." 246 F.3d at 717.

On efficiencies, the D.C. Circuit held that "the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies," 246 F.3d at 720 and that the court "must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than speculation and promises about post-merger behavior," 246 F.3d at 721. It found that the district court had not undertaken that analysis. I think the D.C. Circuit's opinion is fully consistent with the Merger Guidelines. Merging parties face a high hurdle to justify a merger to very high concentration levels, such as that present in this case.

I would like to turn again to *Boeing/McDonnell Douglas*. The matter broke no new ground, and the Commission's decision to close the investigation was not particularly difficult, given the facts of the case, but I think the FTC's forward-looking analysis was notable. On its face, the merger appeared to raise serious antitrust concerns. The transaction involved the acquisition by Boeing, a company that held roughly 60 percent of the sales of large commercial aircraft, of a non-failing competitor in a market containing one other significant rival, Airbus Industrie, and extremely high barriers to entry. The critical point for the FTC was that Douglas Aircraft, McDonnell Douglas's commercial arm, had little prospect of playing a significant competitive role in the commercial aircraft market in the future. Because the courts have said that future market potential is a critical factor, rather than past market shares, the FTC had little basis to mount a challenge.

McDonnell Douglas, looking to the future, no longer constituted a meaningful competitive force in the commercial aircraft market, and there was no economically plausible strategy that the firm could follow, acting alone or as part of another concern, that would change the grim prospect. The investigation revealed that McDonnell Douglas's failure to improve the technology and efficiency of its commercial aircraft products had diminished the Douglas product line to the point that the vast majority of airlines no longer considered purchasing Douglas aircraft and that the company was no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market.

Q. *Tim, what were the highlights of your horizontal merger enforcement?*

A. Judge Posner has said the FTC's handling of the *Staples* merger showed that "[e]conomic analysis of mergers had come of age" (Posner 2001, 158). Our merger data release, covering both of our tenures, reveals the sophistication of modern merger analysis (FTC 2004d; FTC & DOJ 2003). (I participated in less than 20 percent of the markets considered in the data release, mostly because of the merger wave and because Bob's tenure was almost twice as long as mine.)

What did the data show? First, statistical analysis by FTC economists confirmed that Bob's tenure and mine were not different. Second, concentration and the number of significant competitors—two variables that are closely correlated—are crucial, but at much higher levels than Bill Baxter postulated in the 1982 Guidelines. Bill thought a merger leaving five firms—an HHI of 2000 if the firms were the same size—raised very serious problems and set the HHI threshold at 1800 to reflect his concerns. After hundreds of investigations, we now know that industries with five significant firms are usually competitive. Jim Rill's 1992 changes to the Guidelines all but eliminated the significance of the number 1800. Today, four-to-three is the tipping point for most industries. The agencies will almost certainty challenge with fewer firms than three and are not likely to challenge with more firms than three. Third, other facts can be crucial. If your customers complain or your documents are bad, you are highly likely to be challenged. Ease of entry remains a trump card for proposed mergers.

Regarding the mergers we challenged, there were several highlights. First, we placed renewed emphasis on coordinated interaction theory. To avoid overlooking some potential problems, we tried especially hard to bring coordinated interaction cases. Several enforcement actions focused on coordinated interaction,[28] and we released statements about two merger investigations that focused on coordinated interaction but were closed for lack of evidence: *Cruise Lines* (FTC 2002h) and *RJ Reynolds Tobacco/British American Tobacco.*[29] *The Cruise Lines* matters involved particularly intensive economic inquiry, and the Bureau of Economics described in detail our analysis of potential merger effects (Coleman et al. 2003).

We continued to bring appropriate unilateral cases. We also started a healthy debate about simulation models, which are econometric tools sometimes used to predict post-merger prices based on certain assumptions about how firms behave, combined with data from computer scanners. This tool can be overused; in most cases, it is not yet ready for prime time (Werden et al. 2004).

We also challenged a significant number of consummated mergers, six in three years.[30] If there was substantial evidence that the merger harmed competition and there was still a viable remedy, we tried to fix the problem even though we might have had to litigate through a full trial.

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[28] Examples include Diageo PLC and Vivendi Universal S.A., No. C-4032 (Feb. 4, 2002) (consent order) (rum); Nestlé Holdings, Inc., No. C-4082 (Nov. 6, 2003) (consent order) (superpremium ice cream).

[29] Statement of the Federal Trade Comm'n for RJ Reynolds Tobacco Holdings, Inc./ British Am. Tobacco p.l.c., FTC File No. 041 0017, *available at* http://www.ftc.gov/os/2004/06/040622batrjrstmt.pdf.

[30] These include MSC Software Corp. No. 9299, http://www.ftc.gov/os/2001/10/msccmp.htm (Oct. 29, 2002) (consent order), *available at* http://www.ftc.gov/os/2002/11/mscdo.pdf (Nastran computer-aided engineering software); Aspen Technology, Inc., No. 9310 (Dec. 20, 2004) (consent order), *available at* http://www.ftc.gov/os/adjpro/d9310/041221do.pdf (process engineering simulation software; litigated and settled; divestiture required); Chicago Bridge & Iron Co., No. 9300 (Dec. 21, 2004) (Commission decision and order) (industrial and water storage tanks), *available at* http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm; Evanston Northwestern Healthcare Corp., No. 9315

Throughout this all, I had the benefit of a knowledgeable and effective senior staff. We had excellent Bureau Directors, Joe Simons and Susan Creighton. We had a well-known antitrust scholar, Bill Kovacic, as General Counsel. And we had people like Mel Orlans, now BC's Senior Litigation Counsel, who for nearly three decades has fought in the trenches on mergers, our early 13(b) cases, and other high-priority competition and consumer protection cases.

Finally, let me comment on the oil industry. The merger wave had subsided by the time I became Chairman, but we continued to study and increase our understanding of structural change and other developments in the industry. As Bob indicated, the merger data that we released showed the Commission has been tougher on mergers in the petroleum industry than in other industries. A new Bureau of Economics study of oil mergers provides an explanation (FTC 2004f). It involves the dynamics of resolving these complex merger investigations quickly and efficiently. The BE report explains that a particular oil merger may involve an unusually large number of relevant markets and thus may require an extraordinary amount of time to ascertain whether anticompetitive effects are likely. Merging parties sometimes desire to settle competitive concerns quickly and avoid a lengthy investigation of an unusually large number of relevant markets. The report indicates that in such instances, the FTC staff adopted screens using HHI thresholds at levels low enough to assure that any plausible competitive concerns are remedied. To protect the public interest in competitive markets, while accommodating those who desire to close quickly, the FTC consistently has required merger parties to bear the risk that relief might be over-inclusive, rather than imposing on the public the risk that relief might be under-inclusive. We followed the same procedure in the Reagan Administration, at even lower HHI levels.

E. Vertical Mergers

Q. *Bob, you brought a number of vertical merger cases. What was your underlying philosophy in those cases?*

A. While many, if not most, vertical mergers are likely to be efficiency-enhancing, some can be anticompetitive. I think it is important to look closely at the strategic implications of vertical mergers, particularly in a new market environment. For example, by acquiring the supplier of a critical input for which there are few or no alternatives, a firm may be

(Feb. 10, 2004) (complaint) (hospitals), *available at* http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf.

able to raise the input costs of its rivals or foreclose entry. We had several cases of that type. I will discuss three of them below.

Silicon Graphics, Inc., 120 F.T.C. 928 (1995), presented vertical foreclosure concerns that threatened to eliminate innovative competition in both vertical levels. Silicon Graphics, the dominant provider of entertainment graphics workstations with a 90 percent market share, proposed to acquire Alias and Wavefront, two of the three dominant developers of Unix-based entertainment graphics and animation software that operate on those workstations. There were strong indications that the combination of the complementary capacities of SGI, Alias, and Wavefront would lead to important innovation, but the Commission was concerned about vertical foreclosure in both directions: rival workstation manufacturers could not compete effectively if Alias and Wavefront designed software to be compatible only with SGI's workstations, and rival entertainment graphics software manufacturers would be foreclosed from 90 percent of a market if SGI closed its previously open software interface so that only Alias and Wavefront could design compatible software.

Our consent order imposed three main conditions on the merger. First, to preserve workstation competition, we required the merged entity to enter into a Commission-approved porting agreement with a workstation competitor under which SGI would use best efforts to ensure optimal interoperation of Alias's leading software programs with the competitor's workstations. Second, a firewall provision prohibited the transfer to SGI of the workstation competitor's proprietary information. Finally, to maintain software competition, SGI had to maintain an open architecture and publish its application programming interfaces for its workstations, and to refrain from discriminating against outside software rivals of Alias and Wavefront. The order was admittedly "regulatory," with an ongoing supervisory role for the Commission that is usually best avoided. The alternative, though, was to block a vertical merger in a dynamic sector of the economy that offered exceptionally strong prospects for innovation (Pitofsky 2001, 554).

AOL/Time Warner[31] also presented foreclosure concerns at two levels. The merger combined two firms with leading positions in three markets: AOL was far and away the leading Internet service provider (ISP); Time Warner was a leading provider of cable distribution of Internet services, with a dominant position in New York and Los Angeles, as well as a leading global entertainment programmer with substantial holdings in various media. The Commission had concerns that the merged company

[31] America Online, Inc. and Time Warner, Inc., No. C-3989 (Apr. 17, 2001) (consent order), *available at* http://www.ftc.gov/os/2001/04/aoltwdo.pdf.

would be in a position to make it difficult for rival ISPs to gain broadband carriage in certain geographic markets, and competing programmers might be disadvantaged in distributing programming over AOL's broadband facilities. To address these concerns, we required AOL Time Warner to open its cable system to competitor ISPs and prohibited the firm from interfering with content passed along the bandwidth contracted for by non-affiliated ISPs or discriminating on the basis of affiliation in the transmission of content. Because of the industry's rapidly changing technologies, the consent order had a short, five-year sunset.

The Barnes & Noble/Ingram transaction in 1999, which the parties abandoned when it became clear that FTC staff opposed it, presented concerns under a raising rivals' cost theory. Barnes & Noble was the country's largest book retailing chain, with 34 percent of national sales. Ingram was by far the largest wholesaler of books in the United States, and was exceptionally aggressive in supporting smaller book stores with terms of sale, delivery dates, and marketing specials. FTC staff saw the merger as a serious competitive threat to thousands of independent book retailers. By acquiring an important upstream supplier, such as Ingram, Barnes & Noble might have been able to raise the costs of rival booksellers by foreclosing access to Ingram's services or denying access on competitive terms. If rivals became less able to compete, Barnes & Noble could have increased its profits at the retail level or prevented its profits from being eroded by competition from new business forms, such as Internet retailing (U.S. Congress 2000).

Q. *Bob, what do these cases suggest about the 1984 Justice Department Vertical Merger Guidelines?*

A. The 1984 Guidelines are outdated. They describe very narrow circumstances for challenging a vertical merger, and recognize only three theories of harm (Pitofsky 2005). One theory turns on entry barriers. A vertical merger would substantially increase difficulties of entry for potential rivals in the sense that they would need to enter at both levels to be effective; the theory is that two-level entry is more expensive, risky, and less likely to occur, and thus the vertical merger raises barriers. The second theory is that a vertical merger or series of mergers may facilitate collusion or other horizontal effects. An obvious example is where a merger involves acquisition of a disruptive seller or buyer. Finally, a vertical merger may affect rate regulation. A monopolist whose rates are set by government regulation may acquire a supplier and then take its profits at the supplier level by increasing the level of transfer payments by the monopolist to the supplier.

No vertical merger case during my tenure could have been brought if the Guidelines were controlling. The cases were all based on some variation of modern foreclosure theory.[32] The Guidelines ignore any formulation of foreclosure theory—old fashioned or modern—as a basis for predicting that a vertical merger could have anticompetitive effects. Unlike the Horizontal Merger Guidelines, which may be the most influential piece of government regulation in the past fifty years, and the Conglomerate Merger Guidelines, which seem to have caught the direction the law was going, the Vertical Merger Guidelines have been widely ignored. They should be revisited and updated.

Q. *Tim, can you describe your vertical merger enforcement?*

A. We were appropriately cautious in vertical mergers. It is widely accepted in law and economics that most vertical transactions are unlikely to harm consumers. Vertical mergers involve firms in a noncompetitive relationship and usually have a plausible, procompetitive business rationale. A few transactions are problematic, though, and we challenged three. We acted when we had a clear theory of competitive harm, strong evidentiary support for the theory, and a good understanding of the firms' incentives.

Our examination of two vertical mergers is illustrative. The Commission voted to block *Cytyc/Digene,* and the parties then abandoned the deal.[33] Cytyc products accounted for 93 percent of U.S. liquid-based PAP-tests, the most widely used sensitive primary screening tool for detection of cervical cancer; Digene was the only company in the United States selling a DNA-based test for human papillomavirus, which was believed to cause nearly all cervical cancer cases. At roughly the same time, we voted to close *Synopsys/Avant!*.[34] Avant! had a roughly 40 percent share of so-called "place-and-route" or "back-end" tools for chip design, while Synopsys had a nearly 90 percent share of "logical synthesis" or "front-end" tools.[35]

Although the theory of harm in each case involved the combined firm's incentive to use its market power in one product to harm competition in

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[32] For a more recent and influential analysis of how to examine foreclosure issues in vertical mergers, see Riordan & Salop (1995, 516–19).

[33] *See* Press Release, FTC, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), *available at* http://www.ftc.gov/opa/2002/06/cytyc_digene.htm.

[34] *See* Press Release, FTC, Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc. (July 26, 2002), *available at* http://www.ftc./gov/opa/2002/07/avant.htm.

[35] *See* Statement of Comm'r Thomas B. Leary, Synopsys Inc./Avant! Corp., File No. 021-0049 (July 26, 2002), *available at* http://www.ftc.gov/os/2002/07/avantlearystmnt.htm.

the complementary product, the method by which harm would occur, the incentives of the firms to act anticompetitively, the potential impact on competition and consumers, and the FTC's ability to forecast the likelihood of future events differed significantly.

The means by which the combined Cytyc firm could harm rivals were well-defined. The theory was that Digene would no longer support rival liquid PAP test suppliers in obtaining FDA approval needed to use Digene's product in combination with the rival's products. By purchasing Digene, Cytyc would have been able to limit the access of its only existing liquid PAP test competitor, TriPath Imaging, to Digene's HPV test by making it more difficult for TriPath to secure needed FDA approvals. In contrast, the *Synopsys* theory was that the firm would make improvements to its product that worked better with the Avant! product than with rival products. Exactly what changes would occur was unclear. Cytyc/Digene appeared to have strong incentives to act anticompetitively, while Synopsys/Avant!'s incentive to limit interoperability with its rivals (and antagonize customers) was unclear.

Moreover, in *Cytyc* the other liquid PAP test competitor and potential new entrants would have been substantially impeded without the merged firm's cooperation. In contrast, Avant! faced significant competitors downstream who would not be substantially impeded. Another difference between the cases involved timing. In *Cytyc* the alleged potential harm would occur in the short term. In *Synopsys* the competitive harm was not anticipated to happen until sometime in the future, if at all.

Q. *Tim, how do you view the Vertical Merger Guidelines and Bob's vertical merger cases?*

A. I agree that the Guidelines are outmoded. Raising rivals' costs (RRC)—not mentioned in the Guidelines—can be a viable theory in some cases. I am not sure, though, that there is a consensus on how to revise the guidelines.

As for Bob's cases, it is generally very hard to second guess the handling of a specific merger that was settled by consent, unless you worked on it or the agency was unusually transparent in explaining its action. Take *AOL/Time Warner*. Based on the Commission's description of the case, there may have been a potential RRC problem, but it is hard for an outsider to tell whether all the factual predicates were present. Moreover, the decree was quite regulatory, and some of its premises did not turn out to be accurate. For example, AOL's narrowband dominance did not translate into broadband dominance, as the FTC feared. When Bob announced the settlement in December of 2000, he said that he did not know if it would work. That is a problem with regulatory orders; Bob had the very good sense to put in a short sunset.

More broadly, Bob was probably somewhat more aggressive in this area than I was. Take *Time Warner, Inc.,* 123 F.T.C. 171 (1997) (consent order). The merger's vertical aspect combined Time Warner's cable system with Turner's programming assets, including CNN and TBS. One of the vertical concerns the FTC expressed was that competing news channels might be foreclosed from entering the market because Time Warner's cable systems would favor CNN. I agree with the dissent's skepticism.[36] Time Warner had less than 20 percent of cable subscribers in the United States, so a foreclosure problem was not apparent. Nonetheless, the FTC's consent order required Time Warner to carry an independent all-news channel. In retrospect, even on the complaint's premises, mandatory carriage of a second all-news channel was unnecessary.

F. "Regulatory decrees"

Q. *Bob, Tim and you have called some decrees from your tenure "regulatory." Were you concerned about such decrees? Why did you decide they were appropriate?*

A. The characterization of some orders as "regulatory" is correct in a limited sense. The *AOL/Time Warner* consent is not your typical merger decree that requires divestiture or blocks a transaction altogether. It contains both affirmative and negative obligations, but does not prescribe and regulate post-merger conduct on an ongoing basis. It sought to address particular problems in a limited manner while allowing the transaction as a whole to go forward. I think the order was forward-looking and innovative.

Our overarching objective was to protect access to markets. As I noted before, the two firms had leading positions in three markets. AOL was the leading Internet service provider; Time Warner was a leading provider of cable distribution of Internet services (with a dominant position in New York and Los Angeles), as well as a leading global entertainment programmer with substantial holdings in various media. The basic concern we sought to address was that the merger would make it difficult for competitors to gain access to broadband carriage of Internet services. There were also concerns that rivals of Time Warner would not be able to compete on a level playing field in distributing programming over AOL/Time Warner's broadband facilities.

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[36] *See* Dissenting Statement of Comm'r Mary L. Azcuenaga, Time Warner, Inc., FTC File No. 961-0064, *available at* http://www.ftc.gov/os/1996/09/twazcuena.htm; *see also* Dissenting Statement of Comm'r Roscoe B. Starek, III, Time Warner, Inc., FTC File No. 961-0064, *available at* http://www.ftc.gov/os/1996/09/twstarek.htm.

We approved the merger, but imposed conditions to preserve access to the market by competitors at the programming and ISP levels. The combined companies were required, in part, to make cable broadband service available to an identified ISP (which turned out to be EarthLink) pursuant to terms and conditions negotiated by the companies but evaluated and approved by the FTC. Extensive ancillary provisions, including binding arbitration, sought to ensure that the contracts would not discriminate against competing ISPs. The order was limited to five years—unprecedented in its brevity—because the market was changing rapidly and ongoing supervision of business arrangements should be avoided except in exceptional circumstances (Pitofsky 2002b, 180).

By protecting access, the order went to a fundamental element of competition. An essential condition of a free market is that unreasonable and unnecessary barriers to entry do not block access to the market by new firms, products, or ideas. The access issue is exceptionally important in high-tech markets, where progress occurs, and competition is invigorated, by introducing new technologies. Access is also important in the communications area, where open access preserves diversity of views consistent with values embodied in the First Amendment.

The order illustrates our general remedial approach. We tried not to be caught in a go/no-go situation in which the only alternatives were to challenge all aspects of the merger or clear the deal. For example, where substantial efficiencies could be shown, the FTC was willing—especially in vertical mergers but elsewhere as well—to allow a transaction to proceed on condition that an order was entered designed to ensure that a new entrant can feasibly enter the market. By concentrating on the market's long-term competitiveness, rather than immediate market effects, some deals that might have been struck down on the basis of conventional analysis were conditionally allowed (Pitofsky 1996).

G. Retrospective Studies

Q. *Bob, the Commission has used its general investigative authority to examine the results of its own past merger enforcement measures. Why did you undertake such studies?*

A. The reason to review past enforcement actions is simple. We learn from our successes and failures. Enforcement agencies have a responsibility to identify and avoid past mistakes. More broadly, learning from experience provides valuable input into long range planning.

One reason the Divestiture Study (FTC 1999c) was undertaken was that the antitrust agencies had been offered more ambitious and complicated restructuring proposals in recent years to address potential anticompetitive effects of mergers. There was a sense among the staff that certain divestiture provisions tended to work better than others, but we wanted to study more systematically what factors to consider in weighing particular proposals (Pitofsky 2000). Further, no such study had been conducted since HSR was enacted, so it probably was past due. We examined the results of thirty-five divestiture orders, including licensing orders, entered between 1990 and 1994. The study was somewhat limited in scope. It focused on whether the divestiture process proceeded as contemplated in the FTC order and resulted in a successful divestiture. "Success" was measured by whether the purchaser of the assets was able to begin operating the assets in the relevant market relatively quickly and had the ability to compete effectively. The study did not assess the divestiture's competitive effect, which would have been a much larger undertaking. Nonetheless, we gained valuable insights into how to enhance the likelihood of a successful divestiture.

I think such studies should be conducted on a more regular basis. I once suggested that it might be useful if the Commission regularly conducted investigations six-to-twelve months after divestiture to measure how the process has worked (Pitofsky 1996). We lacked the resources to do that because of the merger wave, but I commend Tim for conducting some other retrospective studies under his watch.

Q. *Tim, how did you build on Bob's efforts?*

A. The study of past enforcement efforts was part of our competition R&D. To make intelligent contributions to competition policy through litigation or non-litigation instruments, the agency should conduct research to increase its understanding of how markets and firms operate, the conditions under which business conduct is likely to be anticompetitive, and whether the agency's previous enforcement efforts succeeded.

One example was our study of consummated hospital mergers that the agency did not challenge.[37] The Commission and Justice Department are batting zero in their last seven litigated hospital merger challenges. Obviously, the template for trying hospital merger cases developed in the 1980s and early 1990s no longer works. Although some suggested the FTC should fold its tent and ignore hospital mergers, that response is unacceptable (Muris 2002b). The agency's hospital merger task force studied some unchallenged mergers to determine whether post-consum-

[37] *See* Press Release, FTC, Federal Trade Commission Announces Formation of Merger Litigation Task Force (Aug. 28, 2002), *available at* http://www.ftc.gov/opa/2002/08/mergerlitigation.htm.

mation enforcement would be warranted. It also took a hard look at which strategies worked and which did not in prior hospital merger cases, to develop new strategies for future cases.

To date, that retrospective has resulted in an administrative action challenging the Evanston/Highland Park hospital merger, consummated in January 2000.[38] The Commission also investigated the merger of Victory Memorial Hospital and Provena St. Therese Medical Center in Waukegan, Illinois, but found insufficient evidence of likely anticompetitive effects resulting from the merger.[39] The staff is finishing the evaluation of other hospital mergers, and I expect that it will publish the results.

Other retrospectives we did involve petroleum. One was a study of the competitive effects of the Marathon/Ashland joint venture, which the FTC had not challenged (Hosken & Taylor 2004). The 1998 joint venture combined the two firms' refining and marketing assets and significantly increased concentration in the wholesale and retail sale of gasoline in some areas of the Midwest. The study focused on Louisville, Kentucky, the area most likely to have experienced competitive harm. It found that the FTC correctly predicted that the joint venture likely would not adversely affect gasoline prices. This study used methodology superior to that of a GAO study, which found that some oil mergers during Bob's tenure increased prices. For reasons the Commission has discussed at length (U.S. Congress 2004), the GAO study is deeply flawed and cannot form the basis for policy decisions.

The Bureau of Economics also produced a major revision of the 1982 and 1989 FTC staff reports on oil mergers (FTC 2004f). The new study, like its predecessors, focuses on merger activity and the causes of structural change in the petroleum industry. It had two basic goals: to inform public policy concerning competition in the petroleum industry and to make more transparent how the FTC analyzes mergers and other competitive phenomena in this sector.

H. Up-Front Purchasers

Q. *Bob, another remedial innovation you brought to the Commission was to insist upon the identification of up-front purchasers of assets to be divested as*

[38] Evanston Northwestern Healthcare Corp., Docket No. 9315 (Feb. 10, 2004) (complaint), *available at* http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf.

[39] *See* Press Release, FTC, FTC Closes Investigation into Merger of Victory Memorial Hospital and Provena St. Therese Medical Center (July 1, 2004), *available at* http://www.ftc.gov/opa/2004/07/waukegan.htm; Statement of the Federal Trade Commission, Victory Memorial Hospital/Provena St. Therese Medical Center, File No. 011 0225, *available at* http://www.ftc.gov/os/caselist/0110225/040630ftcstatement0110225.htm.

part of a merger remedy. Why did you pursue this innovation? Did it meet your expectations?

A. I first want to clear up a misperception. We did not always insist on an up-front purchaser. We considered what kind of divestiture the merging parties were offering. Up-front buyers was the preferred approach, especially where it seemed likely to enhance the likelihood of a successful remedy. With Bill Baer as Director, the Bureau of Competition moved toward this approach during the first year of my tenure (Baer 1996). This was well before we finished the Divestiture Study in 1999. Our merger and compliance division managers had observed that some divestitures took too long, and some divestiture packages may not have included sufficient assets to be readily saleable or to present a sufficient likelihood of success. Those concerns were reinforced by a preliminary review of divestiture orders by the Bureaus of Competition and Economics. One logical solution to the problem was to require an up-front purchaser when there were doubts about the likelihood that a proposed settlement would succeed.

An up-front purchaser is particularly valuable when staff and the parties are having trouble agreeing on a divestiture package. If a respondent confidently asserts that a divestiture package will resolve the Commission's competitive concerns and be saleable, it can alleviate doubts by presenting a buyer for the agency to evaluate when it initially weighs the settlement. The FTC then can evaluate the proposal with more concrete evidence, and the public will be well served by a divestiture that is accomplished more quickly, requires fewer Commission resources, and is more likely to succeed.

Q. *Tim, do you think the use of up-front buyers has worked?*

A. This was one of Bob's best innovations. An up-front buyer is one of several devices the FTC can use to increase the likelihood of a successful divestiture, and was part of our evolving strategies. The problem of merger remedies has been with us since the beginning of merger enforcement. Ken Elzinga's classic study, published in 1969 with the memorable title *The Antimerger Law: Pyrrhic Victories?*, showed that 35 of 39 orders in pre-1960 cases did not establish an independent competitor in a timely fashion (Elzinga 1969). HSR was passed in 1976 in response to this problem, but HSR's premerger notification procedures did not solve the problem of how to craft divestiture orders.

By 1983, when I became BC Director, it was clear we needed to do more on the remedy front. We started by adding order provisions authorizing the FTC to appoint a divestiture trustee, who would take over the divestiture process if the firm unreasonably failed to divest within the time the order required (FTC 1999c, 5–6).[40] But divestiture problems continued, and the use of an up-front buyer is an important extension. There were some procedural problems early on—lack of coordination among the litigation and compliance shops and delay in finalizing a settlement. Those problems were mostly eliminated by the time I came back to the Commission.

We did use this tool a little less often than during Bob's tenure. Some of the staff were becoming too enamored of up-front buyers; and it should not automatically be the preferred remedy.

J. Competition Advocacy

Q. *Tim, when we discussed health care, you mentioned advocacy to address governmentally imposed limits (existing or threatened) on competition. Similar concerns arise in many contexts. Why did you focus on these concerns and how did the FTC address them while you were Chairman? Why and how did you use advocacy before legislatures and other agencies?*

A. I believe it essential that the FTC, by advocacy and other means, address governmentally imposed restraints on competition. Competition policy is more than law enforcement—it is a way to organize our economy. It is a form of regulation that competes with other regulatory regimes, many of them hostile to markets. Advocates for competition policy should be aggressive in defending the market system and in promoting a culture of competition.

The Commission has long been a competition advocate in courts and in executive councils, before national and local legislatures, and through other public statements. We produced evidence and rhetoric to defend the market. We used broader initiatives, such as the report of our State Action Task Force. (We also created a *Noerr-Pennington* Task Force, whose results I discuss below when considering dominant firms.) Based on our experience with both competition and consumer protection, for example, we identified when competitive harm is likely to flow from a proposed law or regulation, purportedly aimed at protecting consumers, would swamp its intended benefits.

Of course, the drive to restrict competition is powerful, and does not stop when an antitrust case ends. If we stop it in the private marketplace, we may just channel the impulse to another arena—the political forum. The Supreme Court was right to create the state action doctrine, to leave

[40] *See* Texaco, Inc., 104 F.T.C. 241 (1984) (consent order); Chevron Corp., 104 F.T.C. 597 (1984) (consent order), *modified,* 105 F.T.C. 228 (1985) (consent order).

the states latitude to substitute regulation for competition when full, open, and democratic processes called for such a rule. However, this doctrine must not only be scrupulously enforced, but also carefully circumscribed if it is not to become an open invitation to would-be cartelists, when their private price-fixing schemes are thwarted, to elicit from state bodies a "rule" that "compels" them to fix prices.

Other FTC Chairmen were competition advocates. Consider Lewis Engman, for whom Cal Collier served as General Counsel. In 1974 Engman argued that a cause of the country's economic problems was burdensome transportation regulation that displaced competition. The Civil Aeronautics Board raised prices by limiting entry of new carriers and controlling the distribution of airline routes. The Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. Engman concluded that the lack of sound competition policy increased transportation costs, which in turn hurt the overall economy. His speech received substantial press coverage, including a page-one story in *The New York Times* (Metz 1974). During the next decade, in submissions to agencies and legislative committees as well as speeches, the Commission aggressively advocated transportation deregulation. Scholars estimate that this deregulation improved consumer welfare by more than $50 billion annually (Crandall & Ellig 1997, 2). Although it is hard to quantify the impact of FTC advocacy, it is fair to conclude that its efforts, later joined by the Antitrust Division, helped create a policy climate for liberalizing transportation regulation.

Another example of successful competition advocacy with which I have substantial personal experience is the regulation of professions. In many professions, regulatory bodies and/or practitioners continually seek to restrict advertising, proscribe relationships with commercial firms, prevent consumers from buying related goods and services from non-professionals, and expand the list of services that only professionals can provide.

Since the 1970s a combination of court challenges and FTC advocacy before regulatory bodies has eliminated most barriers to truthful, non-deceptive advertising by professionals. As a result, prices have dropped. But other types of barriers to competition remain. For example, some states allow only funeral directors to sell caskets; in 2002 the FTC filed an amicus brief in a case seeking to overturn such a law in Oklahoma.[41] Others require home buyers to hire a lawyer to handle real estate and

[41] Brief of Amicus Curiae Federal Trade Commission, Powers v. Harris, No. 01-445 (W.D. Okla. 2002). The district court rejected the FTC's position, and the Tenth Circuit affirmed. 379 F.3d 1208 (10th Cir. 2004).

mortgage closings. The FTC addressed such restrictions in a series of advocacy pieces spanning Bob's and my tenures.[42]

Competition advocacy is a vital, complex, and difficult process. Complete victories are relatively rare. Constant vigilance and continuing efforts are necessary because there will always be pressures from the private sector (and often its government allies) to maintain anticompetitive constraints or to create new ones.

Q. *Bob, what are your views on governmentally imposed restraints on competition and the Commission's role in addressing these issues?*

A. Tim was right to give high priority to smoothing out the rough edges of both the state action doctrine and *Noerr-Pennington* immunity. Both doctrines rest on solid foundations. The state action doctrine shields thoughtful state regulation from unwitting preemption by the Sherman Act, and the *Noerr* doctrine creates important "breathing space" immunities from antitrust liability for conduct exercising First Amendment rights to speak and to petition government. Taken to extremes, though, both can immunize from FTC review acts that greatly harm consumers but are neither truly authorized by the state nor genuine attempts to appeal to government for redress.

More generally, I believe that the organizing principle for competition policy at the FTC ought to be—and has been throughout both the George W. Bush and Bill Clinton Administrations—to administer a moderately aggressive antitrust program, with remedies fit for the case, but to combine this with a sensitivity to the values of preserving efficiencies and encouraging incentives to innovate and with a recognition of economic changes resulting from globalization of competition. This antitrust policy is good public policy; it should guide regulators as well as antitrust enforcers. Consistent with this framework, I think it is commendable, subject to resource constraints, to engage in advocacy of such policy beyond the boundaries of the FTC and throughout our regulatory arenas, federal and state.

K. Horizontal Restraints

Q. *Bob, the FTC's horizontal restraints cases during both of your tenures focused on hard, cutting-edge questions. What were your principal achievements?*

A. I just mentioned the central organizing principle of antitrust administration today. Applying that principle means, I think, that the

[42] *See* http://www.ftc.gov/be/advofile.htm (Index of FTC advocacy filings, 1994–2004).

central concern of antitrust should be to detect and deter cartel behavior—usually price fixing, bid rigging, and market division—and to block horizontal mergers likely to lead to high levels of concentration and then to coordinated reductions in price and nonprice competition or to dominant-firm behavior. In practical terms, that means that the government should put most, but not all, of its resources into anti-cartel enforcement and careful review of horizontal mergers.

We did just that. Of course, hard-core criminal price fixing is the province of the Justice Department. And during my Chairmanship we witnessed a merger wave of unprecedented proportions, diverting resources from other competition initiatives. Still, I think we played an active and constructive role in policing against cartel practices, outside the area of criminal price fixing, that facilitate cartel behavior.

For example, in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), we stopped the largest U.S. toy retailer from denying key sources of supplies to price clubs with which it was competing. Toys "R" Us induced certain manufacturers not to sell to price clubs, or to sell on discriminatory terms, to prevent the clubs from competing effectively with Toys "R" Us. In *Fair Allocation System, Inc.*, 126 F.T.C. 626 (1998), we also challenged a boycott by conventional automobile dealers to limit sharply the sale of new cars on the Internet. These proceedings challenged practices that, with few if any efficiencies or other justifications, facilitated cartels or led to the accumulation or maintenance of high levels of market power. Much of the most aggressive government enforcement efforts during the 1990s—depending, to be sure, on well-established principles of law—were directed to preserving open access. The *Toys "R" Us* and car sale cases shared that feature.

A horizontal restraints agenda should also focus on practices whose principal purpose and effect are to facilitate collusion. Consider our consent in *RxCare of Tennessee, Inc.*, 121 F.T.C. 762 (1996). RxCare was the leading provider of pharmacy services in Tennessee. Its contracts with pharmacies had a "most-favored-nation" clause. If a pharmacy in RxCare's network agreed to accept a lower reimbursement rate for providing prescription drugs to any other plan's subscribers, the pharmacy had to give RxCare the lower rate. RxCare's network included more than 95 percent of chain and independent pharmacies in Tennessee. Given this market share and the amount member pharmacies stood to lose by accepting lower reimbursement from other plans, we alleged that RxCare in effect established a price floor for prescription drugs in the state. The most-favored-nation clause in this case facilitated what was effectively price fixing in prescription reimbursement rates.

Although the FTC does not bring criminal cases, I want to mention significant changes in criminal cartel law, the backdrop for all antitrust enforcement. First, the U.S. Sentencing Guidelines, adopted by Congress in 1987, required a uniformity of approach toward so-called white-collar crimes. That made jail time for price fixing more common and severe. Second, under the revised Criminal Fines Improvement Act, 18 U.S.C. § 3571(d) (2000), fines for price fixing can consist of twice the gross pecuniary gain or loss resulting from a violation. Third, in 1993 the Justice Department greatly strengthened its leniency program to give the first firm to disclose illegal price fixing immunity from criminal prosecution. Antitrust fines have risen astronomically, and, in a recent one-year period, parties convicted of cartel behavior received average sentences of nearly fifteen months in jail (Hammond 2002).

Q. *Tim, what was your agenda for horizontal restraints?*

A. As Bob suggested, the Commission's agenda here is shaped in part by what we do not do: we do not prosecute criminal price-fixing conspiracies, a crucial part of antitrust's core response to horizontal restraints. (Because the cases are better brought civilly, we did bring nearly twenty cases against physician price fixing.) The other crucial part does involve the FTC: to superintend the law of horizontal restraints, the doctrine that distinguishes permissible from impermissible competitor collaborations. The Pitofsky administration made an important contribution to this area by issuing the Competitor Collaboration Guidelines (FTC & DOJ 2000). We tried to address these issues as well, particularly in Part III litigation. We put sixteen competition cases (and five consumer protection cases) into Part III,[43] stepping up the use of Part III to the highest level it has been since I was Bureau Director in the mid-1980s. Some of these cases have reached administrative resolution and borne significant fruit.

For example, the *PolyGram* case, now under review by the D.C. Circuit, discussed in detail the initial stages of rule of reason analysis.[44] *PolyGram* involved two firms that owned competing recordings and agreed to produce and sell a third recording of the same genre—but did not undertake to integrate the production and marketing of all of their competing recordings. We held that the firms' agreement to refrain

[43] For an index to these adjudicative proceedings, *see* http://www.ftc.gov/os/adjpro/index.htm, starting with Docket No. 9298. This figure omits precomplaint settlements.

[44] PolyGram Holding, Inc., FTC Docket No. 9298 (July 24, 2003) (order and opinion), *available at* http://www.ftc.gov//os/adjpro/d9298/030724commoppinionandfinalorder.pdf, *appeal docketed,* No. 03-1293 (D.C. Cir. Sept. 22, 2003).

from discounting and advertising their products that remained outside the joint venture was sufficiently akin to price fixing to be treated as an "inherently suspect" horizontal restraint. Moreover, we established a clear, specific test—carefully rooted in precedent—for what defenses could be advanced to defend such a restraint. We held that, once such a restraint is shown, the defendants can avoid summary condemnation only if they can come forward with proffered efficiencies that are cognizable under antitrust principles and which are plausible under the factual circumstances of the case. Should the defendants succeed in this endeavor—and in *PolyGram* we explained carefully why that was not the case—only then is a full-blown rule of reason inquiry appropriate. Such an inquiry may include a more detailed examination of market conditions and market power, as well as evidence of actual anticompetitive effects and any realized efficiencies.

Second, in *Schering-Plough* we demonstrated what a full rule of reason inquiry looks like and one way to manage it responsibly.[45] The allegation in that case, filed at the end of Bob's tenure, was that the holder of a patent for a dominant drug settled two patent infringement cases brought by potential generic challengers and in each case included in the settlement a multimillion-dollar payment to compensate the challenger for agreeing to a later entry date. In the fully litigated case, we carefully examined the facts underlying the settlement and were able confidently to state that the evidence clearly showed that a $60 million payment from Schering-Plough to its rival, wholly or in substantial part, was in fact for delayed entry and not, as stated on the face of the settlement, for some licenses to other drugs thrown into the settlement that Schering-Plough was not really interested in pursuing. In addition, we carefully examined the facts concerning these specific drugs and the branded/generic prescription drug market generally. As a result, we found, from direct evidence of price effects, that the parties had market power. Thus, the evidence showed specifically and directly—not with assumptions and presumptions or shortcuts of any kind—the antitrust rule of reason trilogy: power, purpose, and effect. Although the Eleventh Circuit rejected the FTC's analysis, I expect and hope that, through further appellate proceedings, *Schering-Plough* will become a paradigmatic full rule of reason case, just as I hope and expect that *PolyGram* establishes the framework for cases in which full analysis is unnecessary.

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[45] Schering-Plough Corp., FTC Docket No. 9297 (Dec. 8, 2003) (order), *available at* http://www.ftc.gov/os/adjpro/d9297/031218finalorder.pdf, *enforcement denied,* 402 F.3d 1056 (11th Cir. 2005).

A third horizontal restraints case is *South Carolina State Board of Dentistry*.[46] Because it remains in adjudication, I will discuss only the complaint and the recent FTC opinion on a motion to dismiss. The complaint alleges that the Board of Dentistry conspired to prevent dental hygienists from performing certain services without the supervision of a dentist, with the consequences of its action falling particularly heavily on economically disadvantaged children. In its opinion the Commission held that the alleged conduct was not immune under the so-called state action doctrine because the state had not clearly articulated a policy to suppress the competition the dentists stopped.

L. Dominant Firms

Q. *Bob, you and Tim both pursued noteworthy dominant firm matters, but with different emphases. What were your goals?*

A. Two cases—*Mylan* and *Intel*—were central to our efforts with respect to dominant firms. Crucial to each was the question of remedies, always a central issue in monopoly law. In many cases, one might prove that a firm has a monopoly, but this will achieve little unless a remedy, without impeding efficient and innovative behavior, restores competition effectively and compensates for the harms inflicted by the monopolist.

In *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), we focused on compensation and obtained judicial recognition of the FTC's ability to seek disgorgement. Mylan, the leading producer and seller of two widely used drugs, entered into long-term exclusive supply licenses with the only suppliers of an ingredient needed to produce the drugs. Then Mylan raised the drugs' prices. In just over a year, it took in $120 million in additional profits by cornering the market. That Mylan engaged in illegal monopolization was fairly straightforward. The more challenging issue involved the remedy. A simple cease-and-desist order would not have affected Mylan's profits, and consumers who paid monopoly prices to pharmacies for the drugs—often elderly consumers on fixed incomes—did not purchase directly from Mylan and probably were not entitled to damages under federal law. Accordingly, we sought disgorgement. After the district court denied the company's motion to dismiss

[46] South Carolina State Board of Dentistry, FTC Docket No. 9311 (Sept. 12, 2003) (complaint), *available at* http://www.ftc.gov/os/2003/09/socodentistcomp.pdf; order denying motion to dismiss (July 28, 2003), *available at* http://www.ftc.gov/os/adjpro/d9311/040728orderdenymotodismiss.pdf.

the remedy, Mylan agreed to pay $100 million into a fund for injured consumers and state agencies.[47]

The FTC should be cautious in seeking disgorgement, to avoid over-reaching or possible undue multiple liability. At a minimum, disgorgement should be sought only if an antitrust violation is clear (perhaps including evidence that the company acted knowingly or recklessly), the amount of illegal profits can be calculated with reasonable accuracy, and victims can be identified. When those conditions are met, I think a remedy would be deficient if it left all or a substantial part of the illegal gains in the violator's hands.

The challenge in *Intel* was to protect the incentives of market participants to innovate. The complaint alleged that Intel was a monopolist in the microprocessor market. It gave preferred customers essential technical information and samples of new microprocessor products, which allowed the preferred customers to compete effectively. Three customers became involved in intellectual property disputes with Intel; each claimed that Intel infringed its intellectual property. When they rejected settlement offers, Intel cut off each from Intel's technical information and product samples. The issue for us was whether a monopolist may use its legitimate intellectual property to coerce challengers to license *their* intellectual property to Intel on favorable terms. The complaint alleged that, by resorting to self-help, Intel would discourage innovation by potential challengers in its monopoly market.

We settled the case with a comprehensive order. *Intel Corp.*, 128 F.T.C. 213 (1999) (consent order). The central idea was to restrain Intel from using its dominance to limit competition from actual or potential rivals, without imposing anything approaching a compulsory licensing regime that would undermine even a monopolist's incentives to innovate. Accordingly, the order proceeded from an express assumption that a monopolist is free not to license its intellectual property in the first instance. Once licensing occurs, however, access to intellectual property cannot be discontinued for reasons relating to an intellectual property dispute that leads to a lawsuit. The order further identifies legitimate business reasons why Intel could cut off licensees, such as when a licensee fails to protect the confidentiality of intellectual property. In short, the order rests on the premise that the public interest resides in both the monopolist and its challenger continuing to compete in the marketplace

[47] *See* Press Release, FTC, FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market (Nov. 29. 2000), *available at* http://www.ftc.gov/opa/2000/11/mylanfin.htm.

for the welfare of consumers. Neither party, directly or indirectly, should be allowed to put the other out of business. If they cannot compromise in their dispute, then the matter should be referred to the courts, not resolved by self-help, because courts are more likely to vindicate the public interest.

Although I am proud of our dominant firm efforts, I would be the first to admit that more remains to be done. The modern antitrust consensus holds that firms with monopoly power may not engage in conduct that is unreasonably exclusionary. This approach improves on suggestions in earlier cases that any conduct with an exclusionary effect violates Section 2, suggestions that are no longer taken seriously.[48] But, although a balancing approach is an improvement, such a simple balancing statement—without any indication of the nature, weight, and priority of factors involved—leaves much to be desired. It will have to do until something better comes along; the challenge of finding "something better" remains.

Q. *Tim, what were your goals in dominant firm cases?*

A. We were quite active in pursuing conduct by firms with market power. Our cases were built around the theme of "cheap exclusion," an apt phrase that BC Director Susan Creighton first used. A cheap exclusion is one that is inexpensive for a monopolist and hence an attractive strategy to employ.

Using the government to exclude or hinder rivals is a time-honored form of cheap exclusion, and most of our cases involved allegations of misuse of the government. Some involved misusing the Hatch-Waxman Act to exclude generic competition. Under the original Hatch-Waxman Act, a manufacturer of a branded drug could manipulate the regulatory system to delay entry by rival generic drugs. The law required that branded-drug manufacturers file information with the FDA, specifying the patents that claim their drug products. Once a branded drug is approved, the FDA lists the patents in an agency publication widely known as the "Orange Book." Another provision of the law granted an automatic thirty-month stay of FDA approval of generic drugs if a branded drug's patent holder brings an infringement suit against an applicant for FDA approval of a generic. Until the law was revised, a branded manufacturer could manipulate this system, and delay generic entry, by listing numerous patents in the Orange Book as claiming its

[48] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

branded product, and then filing an infringement suit to trigger the automatic thirty-day delay. Our cases contended that patent listings that do not meet the statutory and regulatory requirements for inclusion in the Orange Book may constitute an unlawful restraint on competition.[49]

Unocal also involves standard setting,[50] a feature it shared with another major case, *Rambus*, that involved a private standard-setting body.[51] Both *Unocal* and *Rambus* remain in litigation, and I will thus limit my remarks. The central question both cases raise is what limits are placed on the behavior of firms if they achieve market power in whole or in part because their technology is blessed by a powerful standard-setting institution and if, as the complaints allege, the market power arose only because the firm manipulated the standard-setter.

Rambus involves a private, nonprofit standard-setting organization, JEDEC, which serves as the semiconductor and solid-state engineering standardization body of the Electronic Industries Alliance. JEDEC developed standards for computer memory chip design. The complaint alleges that Rambus joined the JEDEC group and participated in its deliberations while, without informing JEDEC or its members, Rambus worked privately to obtain patents on the very technologies JEDEC considered. Allegedly, a variety of JEDEC rules required Rambus to divulge various patent information, but the company did not do so. Rather, the complaint charges that Rambus waited until after JEDEC had adopted a standard and members had locked into use of the new standard. The ALJ found for Rambus, and the case is now on appeal to the Commission.[52]

In *Unocal*, because a government agency set the standard, there can be no doubt under the state action doctrine that the standard is valid, even though it restrains trade by limiting the kinds of gasoline that can be sold in California in the summertime to reduce emissions. The Commission has already addressed certain legal issues in reversing the Administrative Law Judge's pretrial decision to dismiss the complaint. According to the Commission decision (which I authored), Unocal's alleged behavior—asserting that certain information was in the public

[49] *See, e.g.,* Biovail Corp., No. C-4060 (Oct. 2, 2002) (consent order); Bristol-Myers Squibb Co., No. C-4076 (Apr. 14, 2003) (consent order).

[50] Union Oil Co. of Cal., FTC Docket No. 9305 (Mar. 4, 2003) (complaint), *available at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[51] Rambus Inc., FTC Docket No. 9302 (June 18, 2002) (complaint), *available at* http://www.ftc/.gov/os/adjpro/d9302/020618admincmp.pdf.

[52] Rambus Inc., FTC Docket No. 9302 (Feb. 17, 2004) (order), *available at* http://www.ftc./gov/os/adjpro/d9302/040217rambus.pdf; Rambus Inc., FTC Docket No. 9302 (Mar. 1, 2004) (notice of appeal), *available at* http://www.ftc.gov/os/adjpro/d9302/040301noticeofappeal.pdf.

domain while secretly obtaining a patent that rested upon that very information—falls into a carefully delineated misrepresentation exception to otherwise protected communications to government.[53]

M. Vertical Nonmerger

Q. *Bob, what were the main elements of your vertical restraints cases?*

A. I am glad you posed that question and framed it that way. In a sense, there is rarely a pure vertical restraints case. What we usually mean by a "vertical restraints case," in my view, is one that challenges a vertical arrangement with horizontal effects. With one exception, modern antitrust law converges on this point. Thus, *Toys "R" Us* was one of our most significant horizontal cases, although the specific practices challenged involved arrangements between Toys "R" Us and its suppliers (arrangements whereby those suppliers agreed to refuse to sell to price clubs that competed with Toys "R" Us or to sell only on discriminatory terms). We judged tie-in and exclusive dealing practices by the same standard we applied to agreements between competitors, asking whether the practices created market power, at either the upstream or downstream level, without an overriding efficiency justification.

This consensus and convergence, however, has yet to be realized in one crucial area, the approach to minimum resale price maintenance (RPM). For this reason, one of the most interesting of our "vertical restraints matters" involved an investigation into minimum advertised price policies adopted by the five leading prerecorded music distributors. This matter, which led to five consent orders, belies the often-expressed view that minimum RPM is almost never harmful.[54] We found that retail margins for prerecorded music were slashed as a result of an extended price war. Consequently, the music companies seriatim adopted nearly identical policies providing that minimum prices be identified in all advertising, including ads funded solely by the retailer, as a prerequisite for obtaining cooperative advertising funds.

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[53] Union Oil Co. of Cal., FTC Docket No. 9305 (July 6, 2004) (opinion), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[54] Sony Music Ent'mt, Inc., FTC Docket No. 3971 (Aug. 30, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/09/sony.do.htm; Time Warner, Inc., FTC Docket No. 3972 (Aug. 30, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/09/timewarn.do.htm; BMG Music, FTC Docket No. 3973 (Aug. 30, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/09/bmg.do.htm; Universal Music & Video Distribution Corp., Docket No. 3974 (Aug. 30, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/09/uni.do.htm; Capitol Records, Inc., FTC Docket No. 3935 (Aug. 30, 2000) (consent order), *available at* http://www.ftc.gov/os/2000/09/emi.do.htm; *see also* Press Release, FTC, Record Companies Settle FTC Charges of Restraining Competition in CD Market (May 10, 2000), *available at* http://www.ftc.gov/opa/2000/09/fyi0049.htm.

What was the basis for public antitrust concern? Why were we not content with the view that manufacturers gain their profits at the wholesale level, would want to maximize retail sales after that, and so would have adequate incentives to assure retailer competition? Because that argument rests on a short-run and rather impractical view of the distribution process. Pressures on retail prices frequently generate pressures on wholesale prices. That, we had reason to believe, happened here. In its complaints and subsequent press statements, the FTC indicated it was prepared to prove that restrictions on minimum price advertising were adopted not only to preserve retail profit margins, but because the music companies realized that if the price war was not stopped wholesale margins would eventually be affected. Here was an example of "vertical restraints" having "horizontal effects," even though those restraints appeared in the form of a minimum RPM practice.

Another important RPM case was *American Cyanamid Co.*, 123 F.T.C. 1257 (1997). We challenged an unusual rebate program through which American Cyanamid induced dealers of agricultural chemicals to sell at or above specified minimum resale prices. This was no trivial matter; Cyanamid sold more than $1 billion of these chemicals in 1995. Under its program, the pre-rebate cost to the dealer equaled the specified minimum price. If the dealer sold the product for less, it received no rebate and the sale would be at a loss. Obviously, dealers complied with the specified minimum resale price. Equally obviously, we believed the scheme amounted to illegal minimum RPM. The practice was enjoined by a consent order.

Q. *Tim, what were the main elements of your vertical restraints cases?*

A. We did bring "vertical"cases involving both mergers and dominant-firm exclusionary practices. But let me put the issue in context. Under the consensus that prevails today, antitrust is a simple, unitary concept. It protects consumers against the unwarranted aggregation of market power. Nothing more, nothing less. Market power, of course, exists only at the horizontal level. Only actual and potential rivals can constrain those who seek to exercise market power. The now-classic statement of what constitutes market power and the tests for examining it are in the Merger Guidelines. It is simplistic but true to say that the Guidelines contain the agenda for antitrust. (Although, as we explained in *PolyGram*, discussed above, some nonmerger agreements among competitors are so inherently likely to cause significant anticompetitive harm that we condemn them summarily, even without a detailed examination of market power, absent plausible evidence of a cognizable efficiency that might be capable of justifying the restraint.)

We believe, for example, that Schering-Plough obtained the kind of market power from its patent settlement that it might have obtained by merging with its putative rival. The primary issue is not how a firm gets market power—by merger, by unilateral conduct, by horizontal or vertical agreement. The issue is instead whether, following the Guidelines and the principles of the *Schering-Plough* opinion, a firm or firms acquired durable market power by acting inefficiently, in an inherently anticompetitive or exclusionary fashion, and without some immunity, such as that provided by the state action doctrine or *Noerr-Pennington* protection. Of course, whether behavior is inefficient and exclusionary is often a very difficult question and often requires us to judge whether certain behaviors should typically not be judged unlawful, except in very specific instances, because of the collateral risk of condemning efficient acts. Justice Scalia addressed such issues in his opinion in *Verizon Communications., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

In one sense, then, there are no vertical cases because an agreement between buyer and seller whose effects are confined to the relationship between buyer and seller cannot cause antitrust harm. One could argue all day over whether a particular case is "vertical or horizontal" or is an "agreement or unilateral." The short answer is that is the wrong focus. An antitrust case is about market power, not horizontal, vertical, unilateral, or concerted. Good cases that are vertical in form are firmly based on the market power issue.

As I understand it, in only one area of substantive law can purely vertical effects lead to a finding of illegality. That is minimum resale price maintenance (RPM). If a manufacturer and a retailer agree on the precise minimum price below which the retailer may not sell, that agreement violates the Sherman Act as interpreted in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), without regard to the market power of either party or the purpose or effect of the agreement on competition. Unfortunately, the rule that forbids manufacturer dictation of minimum resale prices to retailers was predicated on the assumption that such agreements produce effects at the retail level similar to those that occur if retailers agree among each other on the item's price. Since the Court decided *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), though, any horizontal agreement on price can be condemned only if it is not a reasonably necessary means to achieve an overriding efficiency. I understand that Bob Pitofsky agrees that the time has come for the same Supreme Court that invented the "per se rule" against minimum RPM to qualify that rule with the *BMI* caveat. This step will open RPM agreements to, at the very least, the defense that they were adopted to avoid inefficient free riding by certain retailers on the efficient efforts of manufacturers or other retailers.

N. DISGORGEMENT

Q. *Bob, you discussed above the breakthrough in* Mylan, *where the Commission obtained disgorgement in a competition case. That breakthrough represents a potential broad-reaching development in the Commission's remedial authority. What lessons does this development pose for the Commission?*

A. *Mylan* confirms that this powerful remedy is available, under proper circumstances, in an FTC competition case. The Commission has an obligation to invoke that remedy responsibly, in appropriate cases, so that consumers are adequately protected from competitive harm. A critical shortcoming of antitrust civil enforcement is that it has largely been limited to remedies that direct alleged violators to cease and desist illegal behavior (often characterized as "go and sin no more"), but takes no steps to extract illegal profits from the wrongdoer (Pitofsky 2002b, 173–76). Broadly speaking, the theory is that if the party that signs the consent order violates its provisions, it will be subject to substantial penalties (at present, $11,000 per day for each violation), and that extraction of illegal profits as a result of the behavior that led to the consent order will be left to private plaintiffs seeking treble damages and attorneys' fees for injuries resulting from the anticompetitive behavior.

The problem with relying on private actions to obtain relief for antitrust injury is that many procedural barriers have developed over the years, making private enforcement difficult, though certainly not impossible. The principal barrier to private enforcement is that federal law permits only direct purchasers to sue for antitrust injury.[55] For example, if manufacturers fix a price, wholesalers or direct-buying retailers can sue in federal court for treble damages, but consumers who buy from retailers and who eventually pay the inflated price cannot. The result is that those consumers are not adequately protected.

Mylan provides another tool for protecting consumers from anticompetitive injury. I believe the case represents good antitrust policy. As I noted earlier, disgorgement should be used cautiously because of dangers of overreaching or possible undue multiple liability.

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[55] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 732, 737 (1977). About twenty states have rejected *Illinois Brick* by statute, but it is still a barrier to private state enforcement in most of the country and to all private enforcement under federal law.

Q. *Tim, how did you build upon these efforts?*

A. *Mylan*, as you indicated, was a breakthrough, and I commend Bob for it. The case firmly established the legal proposition that the FTC can obtain disgorgement as a competition remedy. The agency had long taken the position that disgorgement or restitution was available in competition cases, but the decrees through which it had obtained monetary relief up to that point were consent judgments, although in *FTC v. Abbott Laboratories*, 1992-2 Trade Cas. (CCH) ¶ 69,996, at 68,833 (D.D.C. 1992), the district court came close to holding that monetary remedies are available in a 13(b) competition case.

The broader theme that *Mylan* reveals is that antitrust is about protecting consumers. The role of monetary relief has long been established under the FTC's consumer protection jurisdiction, but not so on the competition side. *Mylan* provides a complementary tool on the antitrust side to protect consumers.

With legal authority more firmly established, we formulated a policy about when the Commission should seek disgorgement or restitution in a competition case. The FTC's policy statement emphasized that disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies, such as divestiture, restrictions on conduct, private damages, and civil or criminal penalties (FTC 2003). The U.S. antitrust enforcement regime is multifaceted, and there are flexible tools, as well as multiple potential enforcers, available to address competitive problems in a particular case.

The policy statement identified three factors the FTC will consider to determine whether to seek disgorgement or restitution in a competition case. First, the agency ordinarily will seek monetary relief only when the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of a remedial payment. Third, the Commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings. A strong showing in one area may tip the decision whether to seek monetary remedies. For example, a particularly egregious violation may justify pursuit of these remedies even if there appears to be some likelihood of private actions. On the other hand, the pendency of numerous private actions may tilt the balance the other way, even if the violation is clear.

Following these principles, the Commission recently brought a disgorgement action. According to the FTC's complaint, Perrigo paid Alpharma—the only other manufacturer of OTC store-brand children's liquid ibuprofen approved by the U.S. Food and Drug Administration—to eliminate Alpharma as a competing supplier. The settlements called for Perrigo to pay $3.75 million and Alpharma to pay $2.5 million to the FTC, as well as to pay state attorneys general an additional $1.5 million, to resolve their claim challenging the same agreement.[56] Although the dollar value here was relatively small, such cases may become an important use of disgorgement because they are less likely to attract class actions than cases with large damages.

O. IP/PATENT

Q. *Tim, why did the intersection between intellectual property and antitrust come to occupy a significant amount of time in the later 1990s?*

A. Our patent system confers privileges on innovators. By rewarding innovation, the most efficient and procompetitive behavior, we stimulate more of it. The privileges conveyed can confer market power. Given the importance of innovation, as long as that power is within the proper bounds of the privilege, this is an expected and laudable result. At the same time, antitrust has been concerned when the patent privilege was used beyond what was necessary to stimulate innovation. As we move deeper and deeper into an economy based on ideas and information, proper maintenance of this patent/antitrust interface becomes more and more important.

Because of the issue's importance, I am particularly proud of the efforts we undertook regarding the antitrust/patent interface. Principal among them, of course, were the extensive public hearings we held on this topic and the accompanying public report (FTC 2003a). Bob suggested to me that we study this topic, and it was great advice. The FTC report recognizes that both competition and patent policy can foster innovation, but stresses that each requires a proper balance with the other to do so. As the report explains, "[e]rrors or systematic biases in how one policy's rules are interpreted and applied can harm the other policy's effectiveness" (FTC 2003a, 1). The report applies a competition perspective to the patent system. Although it finds much to praise, it also observes that problems with patent quality may contribute to unwarranted market power. It makes recommendations for the legal standards, procedures, and institutions of the patent system to address such concerns. I believe that the report will set the agenda for antitrust/patent law, both in enforcement and in scholarship, for decades to come.

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[56] FTC v. Perrigo Co. & Alpharma Inc., No. 04-1397 (D.D.C. Aug. 25, 2004) (final orders), *available at* http://www.ftc.gov/os/caselist/0210197.htm.

Many of our most significant cases have involved antitrust restraints on the patent grant or the patentee. Cases, such as *Schering-Plough* and our Section 2 cases involving Hatch-Waxman, derived much of their significance from the role that patents played in each matter. There is little doubt that the patent/antitrust interface will and should continue to account for large blocks of the FTC's time and resources for the foreseeable future.

Q. *Bob, what were yours and Tim's principal contributions in this area?*

A. First, I want to commend Tim and his colleagues for their immensely valuable work in this critical area. Antitrust's relationship with patents and intellectual property generally has always been legally complicated. It is now increasingly economically urgent because our economy depends more and more on products and services that embody ideas—that is, intellectual property.

The Supreme Court has ducked almost every important antitrust/IP issue to come along. Under Tim, the FTC showed courage and foresight to step up to the plate on these issues. The Muris Commission's Hearings and Report were a model of how the Commission can bring together business, economics, law enforcement, and academia for thoughtful, constructive analysis. The proposals that emerged were practical and right on target.

I am proud to say that we took actions that helped set the stage for the inquiries and cases under Tim's leadership. I already discussed how *Intel* paved the way for designing orders that achieve appropriate antitrust remedies without invading incentives to innovate.

We focused on both antitrust standards and remedies in *Dell Computer Corp.*, 121 F.T.C. 616 (1996). We alleged that Dell joined the Video Electronics Standards Association (VESA), a nonprofit standard-setting organization composed of virtually all major U.S. computer hardware and software manufacturers. VESA was setting a design standard for a computer part (VL-Bus) that carried information between a computer central processing unit and peripheral devices. A Dell representative certified in writing that the proposed standard "does not infringe on any trademarks, copyrights, or patents" possessed by Dell. After the standard was adopted, Dell told several VESA members that implementation of the VL-Bus violated Dell's intellectual property rights. We alleged that this was an unlawful act of monopolization. Dell settled, agreeing not to enforce its patent against computer manufacturers incorporating the VL-Bus design, nor to enforce in the future any patent rights that it intentionally failed to disclose upon request of a standard-setting organization during the standard-setting process. The remedy was designed to maintain incentives to innovate created by patent law by leaving in place Dell's patent rights for all purposes other than enforcement against competitors who had relied on the apparently open standard. The enforcement action aimed to protected the integrity of the private standard-setting process, itself an essential device to help introduce new products, without punitive action against Dell's patent.

Another area in which we initiated important action at the patent/antitrust intersection involves branded and generic pharmaceutical drugs and the effects of regulation and litigation. Under federal law, the first company to file with the Food and Drug Administration an application to market a generic bio-equivalent to a brand-name drug is given a 180-day period of exclusivity, after the patent expires or is declared invalid in a patent suit, during which other generic competitors cannot come to market. In both the *Abbott-Geneva* and *Hoechst-Andrx* cases, mentioned earlier, the branded pharmaceutical paid the first-to-file generic company a large sum—exceeding the amount the generic company might otherwise have earned by marketing the product—to keep the generic off the market. The agreements acted as corks in a bottle, precluding competition not only by the generic company that was paid not to challenge the branded drug but also by other potential generic competitors; the 180-day period does not begin to run until the generic comes to market. These arrangements did nothing to encourage innovation while effectively extending the patent's de facto duration by private agreement.

I think that in each of these areas we see complex legal standards confronting a common behavior—efforts to, in effect, extend the scope or duration of a patent—that appears in various forms. To control such behavior without dampening incentives to innovate is a challenge. I believe that we got off to a good start in this area and that Tim built upon that beginning in ways that deserve commendation.

P. SECTION 5 AUTHORITY

Q. *Bob, it's traditionally a matter of hornbook law that Section 5's prohibition of competition can reach conduct not proscribed by other antitrust laws. What do you believe is the potential of Section 5 in that regard?*

A. I have never been comfortable with the idea that practices that are legal under the Sherman and Clayton Acts become illegal under Section 5 of the FTC Act because they fall in the "penumbra" of some competition policy. Among other problems, it means that certain behavior would be legal or illegal depending on whether the suit was brought by the DOJ

Antitrust Division under the Sherman Act or the FTC under Section 5. I have therefore believed that the unfairness jurisdiction, especially in antitrust matters, should be used very cautiously. I can understand its use to fill unintended gaps in Congress' formulation of legislation. For example, I have no real doubt that Section 3 of the Clayton Act, dealing with exclusive dealing contract and tie-in sales, would have covered advertising as the tying or tied product if Congress had thought about the issue. There are inexplicable gaps in the Robinson-Patman Act—although they are not nearly as important these days because the government rarely enforces this statute. Beyond those and a few other narrow circumstances, I would not advocate use of the FTC's unfairness jurisdiction to cover what are thought to be otherwise legal practices.

Q. *Tim?*

A. Ideally, Section 5 should coincide with the antitrust laws. I can see one possible use of a separate Section 5 count. When there is actual evidence of a price or other effect, the normal indirect proof of defining markets is not required. When the contract is unilateral, it should be covered by Section 2, but courts might get confused over market share thresholds, and refuse to find a violation. In such a case, I would support use of Section 5.

Q. Wrap-Up Questions

Q. *Tim, although a Chairman might sometimes wish otherwise, the FTC is a collegial body with five Commissioners. What is the significance of its collegial structure?*

A. The FTC works best when a strong Chairman provides direction. Although the agency always had a Chairman, the Commissioners used to select their own Chairman and rotate the position annually. Further, while the Chairman in those days presided at meetings, he had no special administrative responsibility. The lack of an executive and administrative head contributed to agency drift. The 1950 Reorganization Plan changed that.[57] Now we have a Chairman, who is selected from among the Commissioners by the President, and who serves as the agency's executive and administrative head. Of course, a strong Chairman doesn't guarantee success—witness the Commission's struggles over the years. But a strong Chairman, with a positive agenda that reflects the shared learning developed over the years, will contribute greatly to success.

Collegiality can contribute importantly to success as well. The give-and-take of our collegial process can improve the quality of our decisions,

[57] Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 25, 1950).

reports, and rules. The collegial contribution, particularly when contributions reach across party lines, gives added weight to those decisions, reports, and rules. Further, each Commissioner brings to the agency his or her own focus, interests, and insights. The Commissioners have tended to specialize on certain projects in recent years; such specialization adds additional strength to the FTC's impact. Tom Leary's scholarly contributions and insights, especially on antitrust and the intersection of competition and consumer protection, Orson Swindle's work on privacy and new technologies, Mozelle Thompson's work on international consumer protection, Sheila Anthony's knowledge of and work with the Congress, Pamela Jones Harbour's experience with state enforcement, have all contributed to the FTC's success.

Q. *Bob, you were the only Commissioner to leave the agency and then return as Chairman. Having seen the agency from both perspectives—as well as the perspective of Bureau Director—do you think that the Commission's collegial structure is important?*

A. You could argue theoretically in favor of a single Commissioner structure, or perhaps three Commissioners, or five, or even seven. The advantage of a multi-Commissioner structure, and the limitation that only three may come from the same political party, generally ensures a variety of views. Beyond theory, my impression is that in recent years (maybe not before 1970) the FTC has been a collegial body in which members worked together well and profited from their colleagues' views. I would leave the arrangement as it is.

I also want to strongly second Tim's remarks about the advantage of having individual Commissioners bring their own special experience, focus, insights, and interests to the development of policy at the agency. I've mentioned several times the enormous contribution Janet Steiger made in presenting a united front to Congress and the public and in finding creative ways to deal with substantive issues. She was a tower of strength at the FTC. Christine Varney and Sheila Anthony instinctively thought of enforcement in terms of consumer welfare and pressed the staff to undertake important initiatives. Tom Leary is a scholar in the best sense of the word—balanced, experienced, and knowledgeable about antitrust and consumer protection. His contribution to merger analysis was especially valuable. Orson Swindle forced us to test our first principles and by his questioning led us to think more clearly and more deeply about what we were doing. Mozelle Thompson became extremely interested in international coordination and cooperation in the consumer protection area and was effective in leading FTC efforts in that direction. Finally Ross Starek and Mary Azcuenaga were exceptionally thorough and rigorous in their analysis of particular issues. Each Commissioner brought an insight and enthusiasm for particular issues that made the whole greater than its individual parts.

Q. *Bob, how was your Chairmanship influenced by your long involvement with the agency, including earlier work as a Bureau Director and as a Commissioner, as well as your work on the 1969 and 1989 ABA Commissions to study the FTC?*

A. I suspect the greatest influence on my behavior as Chairman relates to my service as counsel to the 1969 Kirkpatrick Commission. Candidly, I saw the Commission during perhaps its worst of times and had the opportunity to examine closely what needed to be done to achieve reforms. The ABA Commission to study the FTC—one of the most extraordinary groups I have ever worked with in any capacity—summarized those problems by concluding that the agency lacked a sense of direction in its planning, was preoccupied with trivia, lacked an arsenal of effective remedies, and was hampered by the poor quality of staff. In all my subsequent work, I always had these criticisms and recommendations in mind. I look at the FTC today and believe that it reflects the aims of the Kirkpatrick Commission to reform that agency and create an effective regulatory program.

Q. *Tim, your prior involvement with the Commission was also extensive. How was your Chairmanship affected by your years as a member of the staff, Director of the Bureau of Consumer Protection and then the Bureau of Competition, a member of the 1989 ABA Commission, and as an academic viewing the FTC?*

A. To begin with, I kept returning to the Commission because I cared about the institution and its mission. When I was not at the FTC, I was often studying it, sometimes as part of a team, sometimes for my own scholarship. My commitment to the agency has deepened through the years. My respect for what it can accomplish, and for many years now has accomplished, has grown as well.

I learned more specific lessons, of course. I learned that a Chairman must have, and articulate, a positive agenda. The Chairman needs a strong senior management team, smart and in tune with the Chairman's approach—and it's a great bonus if they have FTC experience. The team I headed at the Commission, like the team Bob headed, shows the value of both brains and experience.

Q. *Tim, from your vantage point with the Commission and studying the agency for more than three decades, how do you think the agency fares today?*

A. Building on the work of Bob Pitofsky and others before him, the FTC today has become one of the most respected and productive institutions in the United States, if not the world. It recognizes that the goal of both its missions—competition and consumer protection—is to protect consumers. It relies on sound economics, both theoretical and empirical. It addresses current problems, anticipates new ones, uses a broad range of policy tools and remedies and, while not shying away from big initiatives, recognizes its institutional capabilities. It strives for transparency, working continuously to articulate a positive agenda and to state the assumptions that guide its policy formulations.

Too often, in the 1960s the Commission focused on trivia. Later, it overreached by trying to break up major companies and acting as the second most powerful legislature in Washington. My highest testimonial to the agency now is that it focuses on important issues without overreaching. I hope that the FTC, having learned the lessons of the past, will continue to focus on important issues, will continue to do them well, and will avoid the temptation, which can accompany success, to overreach again.

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