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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE ON REGULATING MARKET ACTIVITIES BY PUBLIC SECTOR

-- Note by the United States --

This note is submitted by the United States Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting (8-9 June 2004).

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English text only

1. The commercial activities in which various levels of government in the United States – federal, state, and local – are involved are quite limited. Moreover, the objectives of those activities are usually quite specialised and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. Thus, there do not appear to be any "competitive neutrality" issues of consequence. There is no significant regulatory mechanism dealing with these commercial activities, and there is little public debate in the U.S. about these issues.

2. Following are examples of areas in which the government is involved in commercial activity that competes in some sense with the private sector, although the products offered are usually highly differentiated and the government's involvement has not been controversial:

- Federal and state governments operate national parks, including privately-operated concessions for on-site hotels and restaurants. These compete at some level with private attractions or off-site hotels and restaurants. The government is not ordinarily attempting to maximise profit or revenue in the operation of these facilities, however, but rather is trying to control the environment, atmosphere, and congestion of the park while maximising access and visitor enjoyment and limiting any deficits from the operations.

- Federal, state, and local governments own and operate transportation facilities. The federal government owns and operates the national passenger rail system (AMTRAK), and sub-federal bodies own smaller rail connections. They compete to some extent with privately owned airlines and buses. The government authorities own them because of the business failures of predecessor private owners. The chief objectives of their operations are to maximise access and provide relief from road congestion while minimising deficits.

- Local and, to some extent, state governments own some major sports facilities. These may compete somewhat with privately owned venues in the same locality for concerts and other events. The local government building such a facility does so to attract major sports teams to the area and to spur general economic development. It hopes for long-run profitability of the individual facility, though this has proven to be an elusive goal.

- All states and some localities operate colleges and universities in competition with private colleges, but the state system provides availability and access to state residents beyond that provided by private colleges. The two forms of higher education compete, although public and private colleges are usually highly differentiated, with private colleges charging significantly higher fees. Similar co-existence of public and private educational systems exists at the secondary and primary levels as well.

3. There are a few areas where commercial activities of governmental entities have generated some controversy. For example:

- The United States Postal Service (USPS) is an independent establishment of the executive branch. The USPS offers certain physical delivery services in competition with private sector service providers, such as United Parcel Service and FedEx. The Congress has largely allowed full competition between public and private entities in package and overnight physical delivery. Questions have been raised about whether the USPS is a "fair" competitor because it pays no taxes and may have other benefits associated with its governmental status; however, the USPS maintains that these advantages are outweighed by its obligation to execute numerous non-economic social policies, including universal service, uniform rates for letters, non-commercial rates for certain types of mail or mailers, small post office preservation, and purchasing requirements. Some observers believe that the private sector providers are more efficient and

have lower overall costs than the USPS. The private sector firms have gained share in these markets to commanding positions in recent years. Federal law reserves to the USPS a monopoly over non-urgent letters. The letter monopoly is designed to protect the USPS's revenues, which proponents of this arrangement argue are necessary to preserve universal service.

- Some states and localities reserve for themselves the right to distribute various forms of alcoholic beverages in their own retail outlets. Although the states that have enacted such restrictions generally assert that they are intended to promote temperance and to minimise underage drinking, opponents of the restrictions have called this reasoning into question. In their view, the states' purported public health objectives could be reached without the need to eliminate competition, suggesting that the restrictions are, in fact, intended to support a means of revenue generation for the state or locality.

4. The Federal Trade Commission has submitted an addendum to this paper describing its recent work on the state action and *Noerr/Pennington* exemptions to the antitrust laws.

Annex I. by the FTC

1. Although situations in which governmental entities compete directly with private firms as market participants are rare,[1] there are situations in which private market participants, through delegations of governmental authority, essentially function as regulators, which creates both a conflict of interest and a potential competitive problem. Furthermore, there are instances in which private firms invoke governmental processes to disadvantage their competitors, rather than to seek a legitimate regulatory outcome.

2. Two judicially crafted doctrines -- the state action and *Noerr-Pennington* doctrines -- create exemptions from U.S. antitrust enforcement, of limited scope, for regulatory and political conduct that may have significant competitive consequences. In order to address growing concerns that these exemptions have, in some instances, been interpreted too broadly – thereby magnifying the competitive distortion resulting from public sector participation in a given market, self-interested regulatory conduct, and predatory petitioning – the Federal Trade Commission has assembled two task forces of Commission staff to investigate the issue, and to address any competitive problems with the regulatory tools at the Commission's disposal.

3. In addition to the uncommon situations in which the public sector engages in market activities directly, there are at least two other situations in which less obvious participation by the public sector can harm competition in a given market. The first of these involves the self-interested use of delegated regulatory authority. In the U.S., it is not uncommon for a governmental entity, for reasons of resources or expertise, to delegate regulatory authority to selected members of a regulated group. Perhaps the best example is the professions. Doctors, lawyers, and accountants, for example, are often regulated not by a state government directly, but rather by a board of professional licensure staffed by a group of their peers acting pursuant to a delegation of state authority. Although this arrangement often functions quite well, it entails an inherent conflict of interest. While these self-interested regulators generally exercise their authority in a manner that is consistent with the wishes of the delegating entity, there are strong incentives to exercise it in a more anticompetitive manner, which benefits the incumbent members of the industry at the expense of both competitors and the public.

4. The second involves the predatory use of governmental process. In the U.S., almost every level of government is open to private petitioning. This is particularly true of the judiciary, which is characterised by lenient standing requirements and abundant private rights of action. Although this generous level of access to government has numerous benefits, and is generally regarded as a strength of the U.S. system, it is not without costs. The use of governmental process, whether voluntary or involuntary, can impose a substantial financial burden, much of which may be incurred regardless of the outcome of the process. Perhaps the best example is litigation. Private lawsuits provide firms with an important means of protecting their interests, both commercial and otherwise. However, the substantial costs associated with litigation create strong incentives for firms to invoke the process as a means of burdening competitors, or raising the costs of entry, rather than as a means of vindicating political rights.

5. In the U.S., the federal courts have recognised a need to balance the objectives of antitrust policy with federalism and free speech concerns. The courts have endeavoured to achieve this balance through a pair of antitrust exemptions. The first – the state action doctrine – exempts from antitrust enforcement the actions of state governments, as well as certain actions undertaken at the behest of state governments. The objective is to prevent federal antitrust enforcement from unduly limiting a state government's genuine regulatory efforts. The second – the *Noerr-Pennington* doctrine – exempts private efforts to request or

urge governmental action. The objective is to prevent antitrust enforcement for unduly chilling *bona fide* political conduct.

The State Action Doctrine – Origins and Problems

6. The state action doctrine was first articulated by the U.S. Supreme Court in *Parker v. Brown*.[2] The doctrine emerged in response to efforts to apply antitrust rules designed to regulate business conduct to the activities of state governments. The Court based the doctrine on the notion that, in passing the Sherman Act, Congress intended to protect competition, not to limit the sovereign regulatory power of the states. Thus, pursuant to the doctrine, actions that could be attributed to "[t]he state itself" would be shielded from antitrust scrutiny.

7. The Supreme Court subsequently addressed delegations of state authority in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*.[3] In that case, the court set forth a two-part test. The conduct of a party acting pursuant to a delegation of state authority is shielded from antitrust enforcement under the state action doctrine if: (1) the party is acting pursuant to a "clearly articulated" state policy, and (2) the conduct is being "actively supervised" by the state.

8. Since *Parker*, however, the scope of state action immunity from the antitrust laws has increased considerably. At times, courts have failed to consider carefully whether the anticompetitive conduct in question was truly necessary to accomplish the state's objective. Other courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state.

9. With respect to *Midcal's* "clear articulation" prong, some courts have adopted an overly generous view of foresee ability. For example, some courts have inferred an intent to restrain competition from a grant of general corporate powers. In their view, anticompetitive contracts are a foreseeable result of the general power to contract, and anticompetitive mergers are a foreseeable result of the of the general power to make acquisitions. Other courts have refused to recognise sensible limitations on regulatory schemes. Instead, they have concluded that a state's decision to authorise regulation in a particular industry reflects an intention to displace competition in a wholesale manner, thereby rendering almost any regulatory restraint foreseeable.

10. With respect to *Midcal's* "active supervision" prong, the problem is somewhat different. To date, the courts have simply declined to elaborate clear standards for application of the requirement. As a result, unless there is a complete absence of supervision, courts have been reluctant to apply the "active supervision" requirement.

11. These problems with the doctrine are magnified by the potential for interstate "spillovers," which force the citizens of one state to bear the burden of anticompetitive regulations imposed by a neighbouring state. *Parker*, for example, involved an agricultural marketing program regulating raisin production that extended to California growers only. Because the vast majority of the affected raisins were sold outside California, however, the burden of this program was borne almost exclusively by out-of-state consumers.

The Noerr Pennington Doctrine – Origins and Problems

12. The *Noerr-Pennington* doctrine was first articulated in a pair of Supreme Court cases: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*[4] and *United Mine Workers of America v. Pennington*.[5] Under the *Noerr* doctrine, a private party petitioning for government action – even anticompetitive government action – is exempted from antitrust enforcement.

13. The *Noerr* case itself involved efforts to petition a legislature, while *Pennington* involved efforts to petition the executive branch. The doctrine was subsequently extended to efforts to petition government through administrative and judicial proceedings, including the filing of lawsuits, in *California Motor Transport Co. v. Trucking Unlimited*.[6] In each instance, the Court's intention was to prevent antitrust enforcement from preventing, or chilling, legitimate political conduct. The *Noerr* Court explained that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature . . . to take particular action,"[6] and refused to "impute to Congress an intent to invade" the First Amendment right to petition.[7]

14. Like the state action doctrine, the scope of the *Noerr* doctrine has grown considerably, and in a manner that potentially threatens competition. In some instances, anticompetitive conduct has been shielded from enforcement efforts despite the fact that it had no "petitioning" component whatsoever. In others, courts have granted *Noerr* protection to abusive tactics, such as repetitive lawsuits and misrepresentations, that were clearly intended to delay a competitor's entry or raise its costs, rather than legitimately to petition government.

15. Much of the growth in the scope of *Noerr* protection appears to be attributable to the erosion of key limitations on the doctrine. The first of these is the definition of "petitioning" itself. This definition – the first and most fundamental limitation on *Noerr* immunity – has continued to grow. The Fifth Circuit's decision in *Coastal States Marketing*[8] is representative of this trend. *Coastal States* involved threats of litigation, some of which were not even directed to specific parties. Plaintiff argued that because the threats – as opposed to the litigation itself – were not directed to the government, they could not constitute immunised petitioning. The Fifth Circuit held otherwise. Other courts have retreated from the position that immunised petitioning may entail no government involvement at all, but have yet to specify the precise level of involvement that is required.

16. While the definition of "petitioning" continues to grow, the other key limitation on the scope of *Noerr* immunity – the "sham" exception – continues to shrink. The "sham" exception, which was first articulated in the *Noerr* case itself, was most recently re-visited by the Supreme Court in *Professional Real Estate Investors* ("PRE").[9] The *PRE* Court set forth a two prong test for "sham" petitioning. First, a party must demonstrate that the petitioning effort in question is "objectively baseless."[10] If this objective prong is satisfied, the party must then satisfy a second, subjective prong by demonstrating that the petitioning effort reveals an intent to "'use the governmental *process*, as opposed to the *outcome* of the process, as an anticompetitive weapon.'"[11]

17. Due to some courts' extremely restrictive interpretations of the "objectively baseless" requirement, however, the "sham" analysis has increasingly been limited to a single step. The Eighth Circuit's decision in *Porous Media*, for example, has held that mere denial of a defendant's summary judgment request conclusively demonstrates the absence of "sham."[12] In practice, *PRE's* first prong has almost always proven insurmountable for a single petition.

Monitoring and Enforcement

18. In order to address these problems, in July 2001 the Federal Trade Commission assembled both a State Action Task Force and a *Noerr-Pennington* Task Force. The two task forces were charged with reviewing developments in state action and *Noerr* case law, as well as antitrust exemption issues raised by the Commission's own investigations and cases. As a result of that effort, both task forces have formulated recommendations regarding clarifications of the doctrines that would bring them more closely in line with their underlying objectives. The task forces have also been engaged in a variety of efforts to implement these recommendations, including through competition advocacy, *amicus* briefs, and administrative litigation.

Clarifying the State Action Doctrine

19. In September 2003, the State Action Task Force issued a comprehensive report.[13] The Task Force Report surveys current state action case law, identifies problematic interpretations of the doctrine, and makes a number of recommendations regarding specific clarifications. The principal recommendations are:

1. Clarify proper interpretation of the "clear articulation" requirement.

2. Elaborate clear standard for the "active supervision" requirement.

3. Consider explicit recognition of a "market participant" exception to the state action doctrine.

4. Consider judicial recognition of the problems associated with overwhelming interstate spillovers.

20. The Commission has sought to implement the recommendations of the State Action Task Force through a variety of means. The first of these is competition advocacy. An important part of the Commission's competition policy agenda involves cooperative, non-litigation advocacy efforts. Frequently, the Commission receives inquiries from state governments regarding the potential consumer impact of proposed legislative or regulatory initiatives. In these instances, the Commission is happy to lend its institutional expertise in the antitrust area to the state decision-making process.

21. The Commission has recently engaged in a number of competition advocacy efforts in the state action area. These include the following:

1. Physician Collective Bargaining Legislation – FTC staff opined that such legislation would likely increase costs and reduce access, without improving the quality of care. Staff also opined that the supervisory mechanisms proposed in specific bills – in Alaska, Washington, and Ohio – likely were not adequate to satisfy the "active supervision" requirement of *Midcal*.[14]

2. Non-Lawyer Participation in Real Estate Closings – In joint letters to a number of different entities, the FTC and the Department of Justice opined that prohibitions on the involvement of non-attorneys, such as real estate agents and paralegals, in real estate closings would increase costs significantly while providing little in the way of additional anti-fraud protection. These efforts addressed specific regulatory initiatives in North Carolina, Rhode Island, and Indiana, as well as a proposal by the American Bar Association.15 The FTC and the Department of Justice also filed joint amicus briefs in litigation addressing this issue before the Supreme Courts of Georgia16 and West Virginia.17

3. Licensing of Out-of-State Contact Lens Sellers – FTC staff opined that requiring stand-alone sellers of replacement contact lenses to obtain Connecticut optician and optical establishment licenses would increase the price of replacement lenses, reduce consumer convenience, harm consumer health (by inducing consumers to replace their lenses less frequently), and impede the expansion of e-commerce.18

4. E-Commerce Issues – FTC staff examined a number of industries to determine whether legacy laws, enacted prior to the rise of the Internet, are disproportionately burdening e-commerce and preventing consumers from realising the benefits of advancements in information technology. In October 2002, the Commission held a public workshop on this subject, which examined potential regulatory barriers affecting Internet auctions and legal services, as well as online sales of such products as automobiles, caskets, wine, and prescription drugs.[19] Staff reports documenting regulatory barriers to Internet sales of wine[20]and contact lenses[21] have already been published. Other reports are expected to follow.

22. The Commission's state action efforts also involve the filing of *amicus* briefs. In November 2003, the Commission filed a brief before the Sixth Circuit in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[22] This case involved a rule promulgated by a high school athletic association that prohibited schools participating in the state's most prestigious and desirable sports leagues from offering financial aid, thereby allegedly raising the cost of private education throughout the state. The FTC brief focused on a narrow issue of state action. Specifically, the Commission argued that the test used to determine whether an entity is a "state actor" for purposes of constitutional analysis is *not* the same as the test to determine whether a party is exempted from Sherman Act enforcement under the antitrust state action doctrine.

23. Finally, when other alternatives fail, the Commission has resorted to administrative litigation to protect competition. In the state action context, these litigation efforts have targeted both governmental entities and private parties engaged in anticompetitive conduct that is purportedly authorised by "the state itself." Our most recent efforts have addressed both the "clear articulation" and "active supervision" prongs of the *Midcal* test.

24. With respect to "clear articulation," the Commission recently filed the *South Carolina Board of Dentistry* case. As in most U.S. jurisdictions, a dental hygienist working in the state of South Carolina must be supervised by a licensed dentist. In early 2000, however, the South Carolina legislature amended the Dental Practices Act to reduce the level of required supervision, in order to enable dental hygienists to provide certain oral health care services at lower cost in institutional settings, such as nursing homes and public schools. After the legislature had adjourned for the year, however, the Board immediately passed an "emergency" regulation that re-imposed the pre-amendment level of supervision. According to the complaint filed by FTC staff,[23] the Board=s emergency regulation unreasonably restricted the ability of dental hygienists to deliver preventive services, including cleanings, sealants, and fluoride treatments, to South Carolina school children. A motion to dismiss on state action grounds is currently pending before the Commission.

25. With respect to "active supervision," the Commission recently issued a number of complaints against rate bureaus of intrastate household goods movers. The *Indiana Movers* case was the first of these matters, and involved allegations that an association of movers, charged only with the responsibility of jointly filing its members' rates with the state Department of Revenue, went well beyond that role by actually facilitating its members price fixing. Similar cases were subsequently filed against movers associations in Alabama, Mississippi, Minnesota, Iowa, and Kentucky.[24] The Indiana case was ultimately resolved by consent order, and in the Analysis to Aid Public Comment that accompanied the consent order, the Commission set forth clear guidelines that it would use to determine whether the "active supervision" requirement has been satisfied in future cases. Specifically, the Commission will look for: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how private action comports with the substantive standards established by the state legislature.[25]

Clarifying the Noerr-Pennington Doctrine

26. Although the *Noerr* Task Force has not yet published its final report, it has nevertheless formulated a number of preliminary recommendations regarding clarifications of the doctrine. These recommendations have focused primarily, though not exclusively, on clarifying the validity and scope of various non-"sham" exceptions to the *Noerr* doctrine. To date, they include the following:[26]

1. Apply a more restrictive view of the varieties of conduct that constitute immunised "petitioning."

2. Apply the *Walker Process* exception to *Noerr* beyond the patent prosecution context.[27]

3. Advocate full recognition of an independent material misrepresentation exception to *Noerr*.

4. Clarify the parameters of a pattern, or repetitive petitioning, exception to *Noerr*.

27. As in the state action context, the Commission has sought to implement the preliminary recommendations of the *Noerr* Task Force through a variety of means. The first of these is the filing of *amicus* briefs. In January 2002, the Commission filed such a brief in *In re Buspirone*.[28] The *Buspirone* case addressed whether Bristol-Myers Squibb Co. ("BMS") violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the Food and Drug Administration's ("FDA") Orange Book, thereby triggering an automatic 30-month stay of generic approval under the Hatch-Waxman Act and blocking generic entry.

28. BMS argued that its communications with the FDA were petitioning efforts protected by *Noerr*. In response, the Commission filed its *amicus* brief, which asserted that Orange Book filings are purely ministerial, and involve no exercise of governmental discretion. The court agreed, holding that Orange Book filings are analogous to tariff filings, and simply do not constitute "petitioning."[29]

29. The court then advanced a second objective of the Task Force by holding that, even if Orange Book filings did constitute "petitioning," application of the *Walker Process* exception would nevertheless preclude a finding of immunity in the case at bar.[30] Notably, the *Buspirone* case, which addressed conduct before the FDA, is one of the first to extend *Walker Process* beyond the PTO context.

30. The Commission has also attempted to implement the preliminary recommendations of the *Noerr* Task Force through administrative litigation. To date, the Commission has filed two cases: *Bristol-Myers Squibb*, which was resolved by consent order, and *Unocal*, which is currently pending before the Commission.

31. The Commission's action against BMS was substantially more complicated than the *Buspirone* case, and encompassed a variety of anticompetitive conduct with respect to three different drug products: BuSpar, Taxol, and Platinol. The Commission's complaint also alleged a broader range of objectionable conduct. First, the Commission alleged that, during the patent prosecution process, BMS deceived the PTO to receive unwarranted patent protection. Second, that, during the new drug approval process, BMS deceived the FDA by listing in the Orange Book patents that did not satisfy the listing criteria. Third, that BMS filed merit less patent infringement actions. And fourth, that BMS entered into collusive agreements to further delay generic entry.

32. The BMS case was ultimately resolved by consent order and, consequently, the *Noerr-Pennington* issue was not litigated. However, as in the *Indiana Movers* case, the Commission used the

Analysis to Aid Public Comment that accompanied the order to provide substantial guidance on the immunities issue.

33. The Analysis sets forth independent reasons why each of BMS's alleged anticompetitive practices is not subject to *Noerr* immunity. However, it also states that "the logic and policy underlying the Supreme Court's decision in *California Motor Transport* support the application of a pattern exception, and provide a separate reason to reject *Noerr* immunity in this case." The Analysis further states that "just as the repeated filing of lawsuits brought without regard to the merits warrants rejection of *Noerr* immunity, so too does the repeated filing of knowing and material misrepresentations with the PTO and FDA."[31]

34. The *Unocal* case, in contrast, is the most recent in a line of FTC cases seeking to impose antitrust liability for so called "patent ambush" conduct. Specifically, these cases involve the nondisclosure, and subsequent enforcement, of intellectual property rights in conjunction with industry-wide standard setting proceedings. The principal difference is that, while the Commission's prior cases involved private standard setting organisations, *Unocal* involves standard setting before a governmental entity: the California Air Resources Board ("CARB").

35. In response to the Commission's complaint,[32] Unocal filed a motion to dismiss on *Noerr* grounds, asserting that its communications with CARB constituted protected petitioning. That motion was ultimately granted by the Administrative Law Judge ("ALJ").[33] However, the ALJ's opinion was subsequently appealed to the full Commission.

36 In the briefing before the Commission, FTC Complaint Counsel made three principal arguments in opposition to dismissal. First, that Unocal's conduct did not constitute "petitioning." Second, that even if it did constitute "petitioning," the misrepresentation exception applies. And third, that the *Noerr* doctrine is rooted in the Sherman Act, and does not apply to the FTC Act. A decision by the Commission remains pending.

NOTES

1. See related DOJ/FTC submission to this round table.

2. 317 U.S. 341 (1943).

3. [2]445 U.S. 97 (1980).

4. 365 U.S. 127 (1961).

5. 381 U.S. 657 (1965).

6. 404 U.S. 508 (1972).

   6*Noerr*, 365 U.S. at 136.

7. *Id.* at 138.

8. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).

9. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

10. *Id.* at 60.

11. *Id.* at 61 (quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991)) (emphasis in original).

12. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080-81 (8th Cir. 1999).

13. Report of the State Action Task Force (Sept. 2003) *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>. *See also* Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective* (Oct. 24, 2003) *available at* <http://www.ftc.gov/speeches/muris/ fordham031024.pdf>; Susan A. Creighton, *A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates* (Oct. 1, 2003) *available at* <http://www.ftc.gov/speeches/other/ 031001naag.htm>.

14. *See* FTC Staff Letter on Alaska Senate Bill 37 (Jan. 18, 2002) *available at* <http://www.ftc.gov/be/ v020003.htm>; FTC Staff Letter on Washington House Bill 2360 (Feb. 8, 2002) *available at* <http://www.ftc.gov/be/v020009.pdf>; FTC Staff Letter on Ohio House Bill 325 (Oct. 16, 2002) *available at* <http://www.ftc.gov/os/2002/10/ohb325.htm>.

15. *See* FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) *available at* <http://www.ftc.gov/be/ v020006.htm>; FTC/DOJ Letter to the President of the North Carolina State Bar re: Proposed North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions (July 11, 2002) *available at* <http://www.ftc.gov/os/ 2002/07/non-attorneyinvolvment.pdf>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) *available at* <http://www.ftc.gov/be/ v020013.pdf>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28,

2003) *available at* <http://www.ftc.gov/be/v020013.htm>; FTC/DOJ Letter to the Indiana State Bar Ass'n Unauthorised Practice of Law Comm. re: *Proposed Amendment to Indiana Supreme Court Admissions & Discipline Rule 24* (Oct. 1, 2003) *available at* <http://www.ftc.gov/os/2003/ 10/uplindiana.htm>; FTC/DOJ Letter to the ABA re: Proposed Model Definition of the Practice of Law (Dec. 20, 2002) *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>.

16. *See* Brief *Amici Curiae* of the United States of America and the Federal Trade Commission (July 28, 2003) *available at* <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

17. *See* Brief *Amici Curiae* of the Federal Trade Commission and the United States of America (May 25, 2004) *available at* <http://www.ftc.gov/be/V040017.pdf>.

18. *See* FTC Staff Comment before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) *available at* <http://www.ftc.gov/be/v020007.htm>.

19. *See* Federal Trade Commission, Public Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 8-10, 2002) *available at* <http://www.ftc.gov/opp/ ecommerce/anticompetitive/index.htm>.

20. *See* FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>. *See also* FTC Staff Letter on New York Assembly Bill 9560-A/Senate Bills 6060-A and 1192 (Mar. 29, 2004) *available* at <http://www.ftc.gov/be/v040012.pdf>

21. *See* FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004) *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

22. *See* Brief of Federal Trade Commission as *Amicus Curiae* Supporting Cross Appellant and Urging Reversal (Nov. 13, 2003) *available at* <http://www.ftc.gov/os/2003/11/ brentwoodbrief03114.pdf>.

23. *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>.

24. *Alabama Trucking Ass'n, Inc.*, Docket No. 9307 (Dec. 4, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/12/031205alabamadod9307.pdf>; *Movers Conference of Mississippi, Inc.*, Docket No. 9308 (Dec. 4, 2003) (consent order) *available at* <http://www. ftc.gov/os/2003/12/031205mississippimoversdo.pdf>; *Minnesota Transport Services Ass'n*, Docket No. C-4097 (Sept. 15, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/ 09/minnesotado.pdf>; *Iowa Movers and Warehousemen's Ass'n*, Docket No. C-4096 (Sept. 10, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/iowamoversdo.pdf>; *Kentucky Household Goods Carriers Ass'n, Inc.*, Docket No. 9309 (July 8, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/07/ ktadmincmp.pdf>.

25. *See Indiana Household Movers and Warehousermen, Inc.*, Docket No. C-4077, at 5 (Apr. 25, 2003) (Analysis to Aid Public Comment) *available at* <http://www.ftc.gov/os/2003/ 03/indianahouseholdmoversanalysis.pdf>.

26. *See* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359 (2003). *See also* John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, 17 ANTITRUST 36, 37 (2003); John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 ANTITRUST 77 (2003).

27. In *Walker Process*, the Supreme Court recognised a *Noerr* exception that was broader than the traditional "sham" exception. Specifically, the Court held that an antitrust plaintiff may bring a valid monopolisation claim based on a competitor's efforts to enforce a patent through infringement litigation where the patent at issue was originally procured through fraud on the Patent and Trademark Office ("PTO"). The Court's

decision was based, in part, on the fact that the PTO has limited information gathering capabilities, and consequently relies heavily on the accuracy of parties' representations. *See Walker Process Equip., Inc., v. Food Mach. & Chem. Corp.,* 382 U.S. 172 (1965). Applying *Walker Process* in other contexts simply recognises that these limitations on information gathering capacity are not unique to the PTO.

28. *See* Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss (Jan. 8, 2002) *available at* <http://www.ftc.gov/ os/2002/01/busparbrief.pdf>.

29. *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002).

30. *Id.* at 372-75.

31. *Bristol Myers Squibb Co.*, File Nos. 001-0221, 011-0046, 021-0181 at 16 (Mar. 7, 2003) (Analysis to Aid Public Comment) *available at* <http://www.ftc.gov/os/2003/03/ bristolmyersanalysis.htm>.

32. *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/03/unocalcmp.htm>.

33. *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision) *available at* <http://www.ftc.gov/os/adjpro/d9305/031125aljsinitialdecision.pdf>.