

Interview with Susan Creighton, Director, FTC Bureau of Competition

Editor's Note: In this in-depth and wide-ranging interview with The Antitrust Source, Susan Creighton addresses the key issues currently before her as the Director of the FTC's Bureau of Competition. In addition to outlining her three main priorities, including the Bureau's continued focus on several important litigation matters, Creighton discusses the FTC's present merger enforcement efforts and priorities, as well as significant, non-enforcement policy initiatives.

Susan Creighton was named Director of the FTC's Bureau of Competition in August 2003 after spending the previous two years as Deputy Director. Prior to coming to the FTC, Creighton was a partner with the law firm of Wilson, Sonsini, Goodrich & Rosati, where she specialized in antitrust and intellectual property litigation. Before joining Wilson, Sonsini, Creighton clerked for U.S. Supreme Court Justice Sandra Day O'Connor and for Judge Pamela Ann Rymer of the District Court of the Central District of California. She is a graduate of Harvard University and Stanford Law School.

ANTITRUST SOURCE: Let's start by asking you to tell us something about the priorities you have as Director of the Bureau of Competition and your goals for the coming year.



SUSAN CREIGHTON: I have three priorities. One is to be maintaining and managing our very active litigation agenda. I think a lot of folks are familiar with the Commission's decisions in the *Polygram* and *Schering* cases. We also have four additional matters pending before the Commission and another five cases that are in active litigation before the Administrative Law Judges. Altogether that makes for a total of nine major antitrust cases going right now, which is a huge challenge for our staff. So one priority is to manage these cases and to litigate them well. A second priority, given that challenge, is to handle the increase in the number of HSR filings that we have seen recently. Coming on top of our litigation workload, the increase in merger review poses some challenges. My third priority is to remain focused on making sure that, despite our litigation workload and the increase in Hart-Scott review, we continue to maintain an active and aggressive non-merger agenda.

ANTITRUST SOURCE: What is the interaction, if any, between the Bureaus of Competition and Consumer Protection? Is there any effort to coordinate how the Bureaus work together to achieve the overall goals of the Commission?

SUSAN CREIGHTON: As Chairman Muris, General Counsel Bill Kovacic, and others have stated in speeches during the last couple of years, the missions of the two Bureaus are complementary, and on occasion there may be similar factual issues. For example, in our *Unocal* case, the Bureau of Competition has alleged that Unocal made intentional misrepresentations in connection with

obtaining a monopoly on reformulated gasoline. And obviously factual issues regarding deception are important in many Consumer Protection cases. Generally, though, while the missions of the Bureaus are complementary, our matters still are handled separately.

ANTITRUST SOURCE: You mentioned the uptick in HSR filings and a general sense that merger activity is increasing. What effect does that have on your ability to attract and retain talented people within the FTC? Are people drawn to the FTC when mergers pick up, or back into private practice?

SUSAN CREIGHTON: That's a good question. I think the answer is that it works both ways. In the past few years, hiring by the Agencies was somewhat lower than it had been in the 1990s because we weren't seeing a lot of staff turnover. As a result, there may have been some pent-up demand to join the Agencies, and right now we are certainly seeing a lot of really excellent applicants who would like to join us. At the same time, we're also getting a lot of calls from firms interested in recruiting from among our staff of very talented attorneys. So we're going to be challenged to make this a place where our lawyers want to stay and make their careers.

ANTITRUST SOURCE: You've had some departures from your leadership ranks recently. I'm thinking of Mike Cowie and Robby Robertson, among others. Who is going to fill those leadership roles and will there be an associated reorganization of responsibilities?

SUSAN CREIGHTON: Both Robby Robertson and Mike Cowie initially came here in connection with our increased litigation workload. We realized that we needed to be increasing our ability to litigate through trial several antitrust cases simultaneously. Mike and Robby joined us as part of that effort, and I think from the beginning the expectation was that they would be here for a couple of years. They did a tremendous job helping us build up a team of senior litigation counsel within the Bureau. That team today is led by Mel Orlans, who is a very experienced litigator previously in the General Counsel's office. We have also brought in, more recently, two very talented partners from private firms—Jack Martin from Hunton & Williams, and Tom Brock from Proskauer Rose. Together with Mel, Jack and Tom give us a core of very strong trial lawyers who are able to assist our staff in litigating our pending cases.

ANTITRUST SOURCE: Are those two recent arrivals replacements for Cowie and Robertson or are you still looking to add to your leadership ranks?

SUSAN CREIGHTON: We think we're set for the time being. Before he left, by the way, Mike Cowie had assumed responsibility as Assistant Director of what is now Mergers IV. His position as Assistant Director in Mergers IV has been taken by Chul Pak.

ANTITRUST SOURCE: While we're on the subject of mergers, do you want to comment generally on the Commission's agenda with respect to merger enforcement? Has there been any change in philosophy or focus that you think is worth addressing?

SUSAN CREIGHTON: I think it's a continuation of what Chairman Muris has been describing for the last couple of years, which is a great deal of continuity with the approach taken over the last fifteen years at the Commission.

ANTITRUST SOURCE: When Chairman Muris and former AAG Charles James entered office, they both remarked they thought coordinated effects theories had been inappropriately de-emphasized, and declared their intentions to look more to coordinated effects analysis than had been the case in the recent past. Would you say that the Bureau of Competition is more focused on concentrated industries that pose conditions conducive to coordination? Where does the balance stand now?

SUSAN CREIGHTON: Either unilateral or coordinated effects may be possible in any given case, and I don't think we are predisposed towards one theory more than the other. It's a very fact-dependent analysis that is driven by the circumstances of the case.

ANTITRUST SOURCE: Let's talk about consummated mergers for a minute. In the last couple of years, the FTC has challenged a number of consummated mergers, for example MSC Software and Chicago Bridge, and Aspen Tech lies ahead. Why is there an emphasis on consummated deals?

SUSAN CREIGHTON: To a considerable extent, the focus on consummated deals is an outgrowth of the change in the Hart-Scott filing requirements. It's not something that is really a change in focus so much as there are a lot more deals that we don't get a chance to review before the mergers are consummated. So that accounts to a considerable extent for our focus on consummated mergers. I would put in a different category, though, a challenge that we just filed to a consummated merger of two hospitals in Evanston, Illinois. As you may know, the Agencies have been unsuccessful in the courts in several Hart-Scott challenges to hospital mergers over the last decade. To improve our understanding of this important industry, we undertook a retrospective study to see what actually happened after the fact in a number of hospital mergers. In the case of Evanston, we saw very substantial price increases as a result of the merger. So the Evanston case provides an opportunity to look after the fact at what actually happened in a particular hospital merger. In so doing, potentially we can also inform and improve the antitrust analysis that should be applied when analyzing hospital mergers prospectively as well.

ANTITRUST SOURCE: Do you think that the HSR reporting threshold should be lowered, based on the experiences you've had in looking at non-reportable deals?

SUSAN CREIGHTON: No. I have not seen any systematic difficulties with the higher thresholds. The higher thresholds just mean that we need to be more diligent in the instances of cases that get brought to our attention that, though relatively small, may end up harming consumers.

ANTITRUST SOURCE: Are customer complaints the primary way your attention is drawn to non-reported deals, or is there an independent monitoring program to try to catch them?

SUSAN CREIGHTON: We do both. We do monitor media reports and industry publications; some deals have come to our attention that way. Sometimes we also hear from customers who file a complaint about a merger after the fact.

ANTITRUST SOURCE: Do you feel like you're catching most of the non-reportable deals that raise antitrust concerns or are you simply trying to catch enough of them to create a deterrent effect?

SUSAN CREIGHTON: I suppose it's always hard to know what you don't know. I'm not aware of, nor do I have any reason to believe, that there are any very substantial number of anticompetitive deals going forward that we're not hearing about.

ANTITRUST SOURCE: Let's talk for a minute about innovation markets. In the recent *Genzyme* case, the Commission decided not to challenge a merger that would have been a 2-to-1 in a so-called innovation market. What does this non-enforcement decision by the Commission tell us about the Commission's views of innovation markets?

SUSAN CREIGHTON: I believe that the Chairman's statement in closing that case should provide some guidance to those who are trying to counsel companies that are contemplating the merger of research and development programs. As for the principles articulated in the Chairman's statement in support of closing the transaction, the statement was very careful in pointing out that there is an appropriate role for innovation market analysis and that such analysis has been applied carefully and prudently by the Commission in the past. Most particularly in the pharmaceutical context, where you can identify products that already are in clinical trials and, hence, in the pipeline for approval, innovation market analysis has been used on a number of occasions by the Commission.

The *Genzyme* case, however, involved a very different set of facts. Neither company had a product in clinical trials. Rather, they were both at the early research stage, injecting different solutions into two mice, three mice. In that context, as the Chairman pointed out, and as was articulated very clearly in a Commission staff report in 1996, there is no economic basis—either theoretical or empirical—for concluding a priori that the combination of research and development at an early stage is more likely to be procompetitive or anticompetitive. Rather, whether the merger is likely to have anticompetitive consequences is a very fact-specific inquiry that turns on the circumstances of the particular case. The kinds of presumptions that we apply under the Merger Guidelines in product cases simply aren't appropriate in cases involving such early-stage research.

ANTITRUST SOURCE: You said it is a fact-specific inquiry; let me follow up. Is it objective facts or subjective facts that matter? If you found, for example, that the stage of research of the two merging parties was very preliminary, but that their intentions were to restrain competition by merging, would that matter?

SUSAN CREIGHTON: I'd say the inquiry turns on both the parties' incentives and the parties' ability to execute on those incentives. For example, in cases involving pre-clinical research, competitors don't know who else might be working on similar research or how much of a lead they might have over those rivals. That uncertainty makes it quite risky to slow down your development efforts. Parties that have products in advanced clinical trials, by contrast, have a much clearer idea of their position relative to their competitors, and that knowledge may make it much easier to ascertain whether anticompetitive conduct will induce timely and sufficient entry.

ANTITRUST SOURCE: What about vertical mergers? Is that an area of enforcement interest and, if so, how does it compare to the intensity of interest in horizontal mergers?

SUSAN CREIGHTON: The Commission has brought vertical merger challenges where appropriate in the last couple of years, for example, in the *Cytoc/Digene* case. So where we find that vertical mergers pose a competitive threat, we have and will challenge such mergers.

As far as vertical versus horizontal, I wouldn't characterize it as a question of the intensity of enforcement focus, but rather the likelihood of a vertical merger being anticompetitive compared to a horizontal merger. I think it's widely agreed that a horizontal merger is more likely on average to raise competitive concerns than a vertical merger. As a result, we're going to be challenging, on average, more horizontal mergers. That's not to say there can't be anticompetitive vertical mergers as well.

ANTITRUST SOURCE: Folks at the Commission, including the Chairman, have made remarks about the Commission's practices in regard to electronic discovery and expressed an interest in finding new ways and less burdensome ways to extract information from parties in electronic discovery, especially in merger investigations. Would you give us a progress report on developments at the FTC in this area?

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SUSAN CREIGHTON: Electronic production is a fact of life. I think that's increasingly how parties are maintaining their information in the ordinary course of business, and we're attempting to be responsive to that in a way that will impose the least burden on companies in complying with Hart-Scott. I think we've been receiving a steadily increasing number of electronic productions, actually in both merger and non-merger cases. Probably the most important recent development is that we've been encouraging parties to produce electronic documents, and even if possible paper documents that have been scanned electronically, and produce them through third-party vendors over the Internet. We've been trying to encourage parties to use this alternative, rather than deliver documents to us on CDs or other similar formats. We've found the Web-based production has been much more efficient and useful and easy for us and the parties involved. There have been a couple of productions that have gone particularly easily, but we're still a long way away from having all the wrinkles ironed out.

ANTITRUST SOURCE: When parties make electronic productions to you, normally they have engaged a vendor that provides them with tools to search the documents and make redactions, classify documents as privileged, and a lot of other things. When the FTC receives a production like that, do you request access to the tools that the parties have used to help you sort and review and de-duplicate the electronic production?

SUSAN CREIGHTON: When parties are providing an electronic production, we require that they provide access to a variety of widely available tools that help us sort and review the documents. We have placed increased emphasis on encouraging parties to produce to us through online sites hosted by third-party vendors (ASPs or Application Service Providers), and in that context, we require access to industry-standard functionalities. The exact nature of those functionalities is a case-by-case issue, and it may not always be the case that we want or need exactly the same tools that the parties use (for example, we don't typically focus on determining whether documents produced to us are privileged). But we need—and require—tools that enable us to review the production effectively and efficiently. The same is true when parties produce electronically to us by giving us the electronic files directly, rather than through an ASP (though lately we have not been encouraging this "direct" production method in merger cases).

We also request some forms of metadata. For example, an issue has come up recently in some electronic productions we've received that directly implicates metadata. Depending on format, when electronic documents are produced, documents that contain date codes will exhibit the date

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of the production as the document date—not the date on which the document was actually created. That's not much use to us. However, some metadata fields can identify or at least narrow down the actual document creation date (and also provide other useful information, such as that there's a date code in the document!).

ANTITRUST SOURCE: Is it your practice to request metadata, track changes, and all of that for every single document produced, or just selected ones?

SUSAN CREIGHTON: Metadata comes in an enormous variety of forms, so it's difficult to give a simple answer to your question. In general, to the extent the metadata is responsive—for example, it identifies document authors, readers, cc's and bcc's, hidden fields, text, codes or formulas, or provides other important information—it is clearly covered by the second request and should be produced. By the way, this is not really a new requirement; it's always been implicit in the second request. But we have made it explicit to make sure that parties are aware of their obligations on this point. Now, having said that, we are aware that a lot of metadata may not be important or useful, and may be burdensome to produce, so metadata really needs to be handled on a case-by-case basis in discussions with the staff.

ANTITRUST SOURCE: What is the purpose of the current FTC/DOJ hearings on the Merger Guidelines; what have you learned and what do you expect to come out of them?

SUSAN CREIGHTON: The quality of the comments we've received is really excellent. I have not finished going through them; I was able to watch some, but not all, of the sessions. We're still in the process of going through and understanding and thinking about a number of the issues that were raised.

In terms of what we are trying to accomplish, I think there are a couple of things. To begin with, it's important for us to make sure that the Guidelines are as accurate and as useful as possible. Since the 1992 revisions to the Guidelines, the Agencies have not formally solicited comments from the academic community and the Bar about the Guidelines as a whole. The Guidelines are used not just by the Agencies, but also provide a reference point for state enforcement agencies, the enforcement agencies of other countries, and the courts in private litigation. Under those circumstances, we believe that it's our obligation to make sure the Guidelines continue to reflect the most up-to-date economic learning. We also wanted to find out from the Bar which portions of the Guidelines work well at a practical level, as well as which areas may work less well. Finally, the hearings also aid in our effort to make as clear as possible how the Agencies, in fact, are applying the Guidelines, so that businesses can plan accordingly.

ANTITRUST SOURCE: Have you considered revising the Guidelines to reflect more accurately what your actual practice is in respect to merger enforcement?

SUSAN CREIGHTON: I haven't heard all of the comments from the attorneys and economists who testified at the hearings, but if there was an issue that attracted widespread consensus regarding the need for revision, that would be something we would take into consideration.

ANTITRUST SOURCE: Can you identify any areas that have emerged so far in your review where people have indicated a need for revisions to the Guidelines?

SUSAN CREIGHTON: It's still too early. I don't think we even have a complete transcript of all the testimony yet.

ANTITRUST SOURCE: Are there any plans or initiatives being considered or designed to increase the acceptance of the Guidelines by courts?

SUSAN CREIGHTON: I think the Guidelines are pretty widely accepted by the courts. That said, the data released by the Agencies shows that we don't view the HHI thresholds in the Guidelines as the be-all and end-all of antitrust analysis. To the extent the courts potentially place undue emphasis on those HHI thresholds, I would hope the release of our data would be useful and informative to the courts.

ANTITRUST SOURCE: Would you consider it fair game for a party to invoke the Report on Merger Enforcement Statistics to argue against strict application of the Guidelines in a particular case involving the FTC?

SUSAN CREIGHTON: As the report itself reflects, our analysis is not driven by rigid thresholds. So I doubt there would be occasion to use the report very effectively that way.

ANTITRUST SOURCE: Do you have any additional comment on the FTC's objectives in publishing the Report on Merger Enforcement Statistics, other than the idea of greater transparency?

SUSAN CREIGHTON: In addition to transparency, our objective is to enable attorneys to provide useful guidance to their clients in terms of making reasonable business decisions regarding whether to proceed with a particular transaction. I think that for people who are frequent practitioners before the Agencies, the numbers are probably not a big surprise. Even for experienced practitioners, though, the data should provide some additional clarity. For example, if you have a client who tells you that a lot of customers are likely to complain about the transaction, you know that you have some hot documents, and you know that the Agencies are likely to view it as a 3 to 2 merger, you now can provide your client with a more detailed assessment regarding the likelihood the merger will be challenged.

ANTITRUST SOURCE: Are there any other activities that the Commission is undertaking in furtherance of its transparency goals?

SUSAN CREIGHTON: The Commission has made an effort, where appropriate, to issue statements about why it decided not to bring an enforcement action. You mentioned one of those cases, the *Genzyme* case. Another example is the Commission's statement in connection with its decision not to challenge the cruise lines merger, which generated considerable discussion in the Bar a while ago. The Commission also recently issued a short statement about a merger involving some PBMs. I think that those statements can help provide some insight that goes beyond what might be inferred if you only hear from us when we do decide to challenge a transaction.

In addition to closing statements, the Commission also has taken a number of other steps to improve transparency. One of those steps is the issuance of reports that reflect the Commission's analysis on a wide range of subjects, from the updated Oil Merger Study to the Generic Drug Study. Another effort is the Commission's participation in a number of amicus or other advocacy

statements, in which the Commission is able to address a variety of issues that are of concern to the Commission.

ANTITRUST SOURCE: Let's talk a little bit about the non-merger enforcement area. Recent developments in that area would include the *Unocal* decision and the *Rambus* decision. Would you care to comment on *Unocal* and *Rambus*, what they mean for the Commission's enforcement agenda, and what the possible next steps are?

SUSAN CREIGHTON: I can't comment on the *Rambus* case, from which I am recused, beyond observing that there obviously are important issues related to standard setting and monopolization that are raised by the case. So it will provide the Commission with an opportunity to address those issues.

As our pharmaceutical cases and standard-setting cases make clear, we believe that intellectual property sometimes can be misused for anticompetitive purposes.

As for the *Unocal* case, as you know, it is currently on appeal to the Commission from a motion to dismiss. The Administrative Law Judge in *Unocal* dismissed the case both on the ground that the conduct was protected by *Noerr* immunity and on the ground that the Commission lacks jurisdiction in cases that require a determination regarding the scope of the party's patents. Those are both extremely important issues that the Commission will now have an opportunity to address. With respect to *Noerr*, since the case comes before the Commission on a motion to dismiss, all of the facts alleged in the complaint are assumed to be true—namely, that Unocal deliberately engaged in fraud before the California Air Resources Board for the purpose and with the effect of gaining a monopoly in reformulated gasoline, and California consumers will pay an extra \$0.05 or \$0.06 per gallon of gasoline as a result. Unocal's position is that antitrust law can't reach that conduct because Unocal is entitled to perpetrate a fraud on a state agency under *Noerr-Pennington*. That seems to me to be a very important policy question with ramifications that go well beyond the specifics of the *Unocal* case. The Commission has set an expedited briefing and argument schedule, so we may get a decision from the Commission within the relatively near future.

ANTITRUST SOURCE: What would it mean to the Commission's enforcement agenda if the ALJ's ruling were upheld that the FTC doesn't have jurisdiction over IP issues like determining the scope of a patent?

SUSAN CREIGHTON: It is our position that the Administrative Law Judge's position clearly is wrong and is inconsistent with precedents of the Commission itself, including the *American Cyanamid* case, which was affirmed by the Sixth Circuit Court of Appeals. Nonetheless, if the decision were to be affirmed, it would potentially implicate important aspects of our non-merger enforcement agenda. As our pharmaceutical cases and standard-setting cases make clear, we believe that intellectual property sometimes can be misused for anticompetitive purposes. And given the steadily growing significance of intellectual property in many American businesses, we expect that this trend, if anything, is likely only to increase in the future. Accordingly, if such issues were found to fall outside the scope of the Commission's ability to challenge, we believe that this result unquestionably would be bad for consumers.

ANTITRUST SOURCE: Let's turn for a minute to the health care area where the Commission held hearings last year. There's a report in the works as I understand it. Perhaps you might comment on what we can expect from that report and what you thought was notable in the hearings?

SUSAN CREIGHTON: The health care hearings took place over twenty-four days and addressed a large number of issues that we felt merited further investigation, research, and discussion. As we are drafting the report we are continuing to analyze and discuss these issues. I'm afraid that to say anything more at this point would be premature.

ANTITRUST SOURCE: When might we expect the report?

SUSAN CREIGHTON: We're hoping that the report will be out before the end of the summer.

ANTITRUST SOURCE: What is the status of the Commission's enforcement activities in the generic drug cases?

SUSAN CREIGHTON: With respect to branded/generic settlements, the *Schering* case is being appealed, so we are in the process of preparing to defend the Commission's decision in that case. More generally, the Commission's 2002 Generic Drug Study found that branded/generic settlements of the type that have raised antitrust concerns effectively came to an end as soon as the Commission started to bring enforcement actions, back in 1999 or 2000. So these types of settlements may not pose competitive issues as frequently going forward.

In addition to branded/generic settlements, the Bureau also has devoted considerable resources to investigating generic/generic settlements, as well as Orange Book listing cases. In the area of generic/generic settlements, we have already brought one enforcement action that resulted in a consent decree, the *Biovail/Elan* case, and that remains an area we are actively pursuing. In the Orange Book listing context, we obtained a consent order against Bristol-Myers involving allegations that it had improperly listed several patents on the Orange Book. We continue to focus considerable resources investigating the potential late or improper listing of patents in violation of the Hatch-Waxman statute.

ANTITRUST SOURCE: It's obvious from the Commission's enforcement activities in the area of generic drugs and patent litigation settlements that this has been a very high priority. Do you think that the best way to address the competitive concerns that arise from these situations is through enforcement actions in the courts or through legislation designed to fix the weaknesses in the law?

SUSAN CREIGHTON: Whether legislation or enforcement provides a better means of effectively addressing a particular problem depends on the circumstances. Moreover, sometimes they may work well together, as complementary approaches. The Commission's actions with regard to generic drugs provide a good illustration. As I mentioned earlier, as soon as the Commission started bringing enforcement actions against particular branded/generic settlements, we stopped seeing settlements with provisions that raised competitive red flags. Settlements didn't stop; settlements just stopped having these problematic terms. I believe that this striking change in behavior, which is well-documented in the Commission's Generic Drug Study, provides a useful example of how enforcement action sometimes may quickly and effectively change behavior to consumers' benefit.

At the same time, the Commission's Generic Drug Study made a number of recommendations regarding how statutory and regulatory provisions might be amended to reduce competitive issues regarding another important generic drug issue, involving the listing of patents in the Orange Book. These recommendations subsequently were enacted through regulatory changes made by the

FDA and Congressional action that implemented most of the Commission's recommendations. As I mentioned, we have also brought enforcement actions in the Orange Book context, including *Bristol-Meyers*, and we remain concerned regarding the potential for abuse with respect to certain Orange Book listing issues. Many of those issues, however, have been substantially remedied by the regulatory and statutory changes that followed the release of the Generic Drug Study.

ANTITRUST SOURCE: How would you characterize the feedback that you have received on the FTC's Report on Patent Law and Competition? What do you see as the major contributions the Report has made, and where do you see the process going from here?

SUSAN CREIGHTON: Overall, the feedback has been very favorable, and I think that the Report made a major contribution in bringing a competition perspective to bear on policy issues involving intellectual property. For example, the Report highlighted the widespread perception that many patents are issued that are of questionable quality, and outlined why the issuance of questionable patents is of competitive concern and might harm innovation. The Report makes a number of recommendations regarding how the problem might be corrected most efficiently and effectively. Some of those recommendations subsequently have been a matter of vigorous discussion and debate, such as the recommendation that the presumption of patent validity be lowered from a clear and convincing standard to preponderance of the evidence. Another recommendation that has been discussed at length related to tightening the legal standard for proving non-obviousness.

ANTITRUST SOURCE: As you said, one of the recommendations was to weaken the presumption of a patent's validity, if contested. And that has drawn a fair amount of attention from the patent community. Is there any plan at the FTC to advocate or promote changes in the law along those lines?

SUSAN CREIGHTON: There is going to be a conference about the Commission's IP report in April in Berkeley, California, which should provide further opportunity for discussion and debate of these issues. In addition, the National Academy of Sciences has a report that has not yet been released, but it is due out soon, addressing some of these same policy considerations. I wouldn't be surprised if at some point this discussion and debate leads to Congressional hearings, because what is at stake—the fostering of innovation in the American economy—is of tremendous long-term importance.

ANTITRUST SOURCE: Does the Commission, though, have any plans at this point to encourage changes in the patent laws along the lines that it discussed in its initial report?

SUSAN CREIGHTON: Our plan at present is to sponsor further discussion and debate of these issues. The possibility of legislative change ultimately may be an outcome of that process, but I don't expect such legislative change necessarily to be immediate.

ANTITRUST SOURCE: Speaking of reports, the air is heavy with anticipation for the second report. Do you have anything to say about the timing or contents of the second report on IP issues following the hearings?

SUSAN CREIGHTON: We've been working hard with the DOJ but I don't think I can give you any kind of useful guidance regarding the timeframe.

ANTITRUST SOURCE: Do you see a significant prospect in the near future of the IP Guidelines being revised as a result of the intensive study that the FTC and DOJ have given to the IP and antitrust interface at the hearings and in writing the reports?

SUSAN CREIGHTON: I am not aware of any extended testimony at the IP hearings regarding changes that need to be made to the IP Guidelines. So the answer would be no, not at present.

ANTITRUST SOURCE: What would you say have been your principal accomplishments to date as head of the Competition Bureau?

SUSAN CREIGHTON: I think that the principal accomplishments have been mostly internal. Getting our litigation group up and running and providing increased litigation training for our staff have been a major focus of my efforts so far. We also have pushed forward with some additional important initiatives, like the challenge to the Evanston hospital merger and the litigation of matters before the Commission that should provide the Commission with the opportunity to address issues regarding consummated mergers and merger remedies, the scope of state action, *Noerr*, and Section 2.

ANTITRUST SOURCE: Do you have any advice for practitioners dealing with the FTC staff or the Director of the Bureau of Competition based on your insights into what it's like on the inside?

SUSAN CREIGHTON: I have been at the Commission for about two-and-a-half years now, and I continue to be puzzled why some attorneys—maybe not a lot of attorneys, but not a negligible number, either—seem to believe that it works to their client's benefit not to engage staff in efforts to narrow the scope of issues, or the scope of production, or enter into meaningful substantive discussions. Instead, they seem to think that they're better off stonewalling the staff and then raising issues for the first time at the Bureau or Commission level. And I have not yet, in two-and-a-half years, ever seen that redound to the benefit of the client. In my experience, it has uniformly benefited clients when their counsel provided data earlier, engaged in substantive discussions earlier, and resisted the temptation to dump a bunch of documents and data, certify compliance, and then try to rush the Commission. I'm sure there are steps on our part that we can take to make the process better, and I'm committed to making sure that our staff is as transparent as possible in terms of what issues we're focused on and minimizing the burden on the parties. I recognize that it's a reciprocal process. But I would encourage the private bar, for its part, to commit to that process as well, because, as I said, I believe it will ultimately benefit rather than harm your client. ●