Federal Trade Commission

REPORT FROM THE FEDERAL TRADE COMMISSION

REMARKS OF

CHAIRMAN JANET D. STEIGER

BEFORE

SECTION OF ANTITRUST LAW

OF

THE AMERICAN BAR ASSOCIATION

Washington, D.C.

April 7, 1995

The views expressed are those of the Chairman and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Good morning. It is a pleasure to be here today to present my sixth -- and last -- "Report from Official Washington." As usual, the views I express are not necessarily those of the Commission or any other Commissioner.

The Accomplishments of the Past Year

Last year on this occasion, I emphasized the importance of our enforcement activities in sectors of our nation's economy that were undergoing especially dynamic change, "in making sure that . . . the evolutionary process does not create undue market power in either growing or shrinking industrial sectors, and at the same time that this process is not impeded by collusion." Unsurprisingly, the importance of this role has not been altered by the passage of twelve months, and, unsurprisingly, many of the industrial sectors I cited a year ago have remained dynamic, and have continued to command our close attention.

What may be more surprising is the sheer volume of corporate acquisitions to which attention must be paid. Although such cases are by no means the whole of our Competition Mission program, they have increasingly come to dominate it. Last year, I noted that the pace of such transactions had sharply accelerated. By the time fiscal 1994 ended on September 30, the number of Hart-Scott-Rodino transactions filed was up almost 25 percent over the previous year, second requests issued were up 15 percent, and merger enforcement actions taken by the Commission were up 67 percent. But at the halfway point of the current fiscal year, the pace is even faster. The number of transactions

filed is 1348, up 45% over the comparable year-ago period. there have been 32 second requests, up 78%, and 25 enforcement actions, up a remarkable 212%! Moreover, a number of the transactions have been of extraordinary size and complexity. Candidly, this acceleration of activity has put something of a strain on our resources: for example, for the first quarter of fiscal 1995, merger enforcement consumed 72% of our Maintaining Competition Mission budget, up from about 60 percent in recent years.

Nonetheless, the Commission and its staff continue to review these cases closely to identify as precisely as possible the specific competitive problems they may pose, and to seek the narrowest remedies we believe will protect competition and consumer welfare. Not infrequently, this approach calls for rather innovative remedies, and I will comment on some of these as I describe the year's cases. I will just note here by way of preview that such remedies must often be invoked where the dimension of competition we are most concerned with maintaining is innovation itself.

Health Care

As it was last year, health care remains perhaps our area of greatest emphasis. The stimulus of efforts toward cost-containment has prompted widespread changes in the health care sector. Cost containment has of course been a major focus of the health care debate, and antitrust enforcement is crucial to ensure that cost containment efforts are not stymied or

undermined by collusive activity. And the preservation of competitive market structures helps to drive costs down.

I will discuss our health care enforcement activities for the past year in terms of two principal areas: the delivery of health care services, and the manufacture and delivery of pharmaceuticals and medical devices. These activities might broadly be described as the "reactive" part of our program. First, however, let me touch briefly on our "proactive" activities -- our efforts to impart advance guidance for private conduct. Informing market participants what they can do without antitrust exposure can mean that efficient integrated activity goes forward when it might otherwise have been mistakenly deemed too risky.

A year ago, I talked about the joint issuance of the Statements of Antitrust Enforcement Policy in the Health Care Area by the Commission and the Antitrust Division,[1] designed to clarify Commission and Justice Department policy on mergers and joint activities in health care in response to concerns that uncertainty about antitrust risk was discouraging efficient integrations. Last September 27, the Commission and the Antitrust Division issued updated and expanded Statements of Enforcement Policy.[2] The new Statements include policies

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[1] U. S. Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in the Health Care Area (Sept. 15, 1993).

[2] U.S. Department of Justice and the Federal Trade Commission, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (Sept. 27, 1994).

covering three new areas, and expand the "antitrust safety zones" for others. Among other changes, they broaden the safety zone for physician network joint ventures that are non-exclusive, since such ventures are less likely to foreclose competition. The staffs of the Antitrust Division and the Commission remain available to flesh out the policy statements upon request in the context of concrete facts, as they have done on a number of occasions during the past year through advisory opinions -- business review letters in the case of the Antitrust Division -- analyzing proposed ventures on a case-by-case basis. And, as we pledged in the 1993 Statements, we will maintain time limits for answers to most health industry requests -- in many cases, 90 days.

Physician Joint Conduct

In the past year, the Commission accepted and made final two consent orders in cases alleging anticompetitive joint conduct by physicians. An additional consent agreement in such a case was accepted for comment just two weeks ago. The first case charged that Trauma Associates of North Broward, Inc., and ten surgeons in Broward County, Florida, had illegally conspired to fix the fees they were paid for their services at the trauma centers at two area hospitals.[3] The Commission alleged that when the North Broward Hospital District refused to meet the group's unlawful joint demands, the surgeons staged a walkout, forcing one of the

[3] Trauma Associates of North Broward, Inc., Dkt. C-3541 (consent order final, Nov. 1, 1994, (Commissioner Varney not participating).

delayed medically necessary treatment for some patients. Under the agreement, the association and the doctors would be barred from encouraging, organizing or entering into any boycott of any insurer.

Hospital Mergers

In its cases dealing with hospital mergers, as in the Joint Enforcement Statements, the Commission recognizes that many combinations may be on balance procompetitive, and certainly most hospital mergers we review do not raise antitrust concerns. And where they do present competitive problems, we seek a remedy carefully tailored to eliminate only the anticompetitive features of the transaction.

Since last year's meeting, the Commission has undertaken six new enforcement actions against hospital mergers. We authorized the staff to seek a preliminary injunction in three of these cases: Lee Memorial Hospital/Cape Coral Hospital; Port Huron Hospital/Mercy Hospital; and Freeman Hospital/Oak Hill Hospital. Neither the Freeman[7] nor the Port Huron[8] case has been resolved at this point. In Lee Memorial, the district court and a panel of the Eleventh Circuit Court of Appeals accepted a state action

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[7] W.D. Mo., Civ. 95-5015-CV-FW-1, 8th Cir. Dkt. 95-1448-WMS. The Commission has now issued an administrative complaint in this matter. Freeman Hospital, Dkt. 9273 (issued March 23, 1995).

[8] Port Huron Hospital, File No. 941-0076 (staff authorized to seek preliminary injunction, Nov. 9, 1994).

defense,[9] and our rehearing petition was pending when the transaction was abandoned. We had authorized an injunction suit in a fourth transaction, HealthTrust Inc./Holy Cross Health Services of Utah, just before last year's meeting, and that case was resolved with a consent agreement before a complaint was actually filed.[10]

In a sequel to my account last year of the series of hospital acquisitions by Columbia Healthcare Corp., the Commission this year accepted and made final a settlement agreement covering the successor Columbia/HCA Healthcare Corp.'s subsequent acquisition of Medical Care America, Inc. Again, we sought a surgically precise remedy, and the consent order requires the divestiture of an outpatient surgical center in Anchorage, Alaska.[11]

Near the end of 1994, the Commission accepted for public comment two more consent agreements in hospital merger cases. In Charter Medical Corporation/National Medical Enterprise, Charter agreed to drop acquisitions of NME facilities in four geographic markets.[12] In the second case, HEALTHSOUTH Rehabilitation Corp./ReLife Inc., the first time we have acted in a

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[9] FTC v. Hospital Board of Directors of Lee County, et al., 38 F.3d 1184 (11th Cir. 1994).

[10] Healthtrust, Inc., Dkt. C-3538 (consent order final, Oct. 20, 1994).

[11] Columbia/HCA Healthcare Corp., Dkt. C-3544 (consent order final, Dec. 6, 1994) (Commissioner Varney not participating).

[12] Charter Medical Corporation, Dkt. C-3558 (consent order final, Feb. 14, 1995).

centers to close and harming the timely delivery of care to trauma victims. The order requires the dissolution of Trauma Associates within 180 days, and, in addition, prohibits the surgeons from entering into any agreements of the type at issue in the future.

Those of you whose memories go back a few years may be reminded of a 1991 Commission consent order with Southbank IPA.[4] The Trauma Associates case presents a parallel in a number of significant respects: in both cases the complaints issued with the consent orders alleged that the physician organizations involved achieved no integrative efficiencies, but were simply vehicles for unlawful collective refusals to deal except on jointly determined terms; and in both cases the relief obtained included dissolution of the organizations.

In the second such case this year, the Commission made final a consent order with the medical staff of Good Samaritan Regional Medical Center in Phoenix, Arizona.[5] The agreement was to settle charges that the staff members conspired to boycott, or threatened to boycott, the hospital, to force it to end its ownership interest in a multi-specialty physicians' clinic that would have competed with the medical staff. In other words, we alleged that the medical staff used their financial leverage with the hospital to protect themselves from the price-reducing

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[4] Southbank IPA, 114 F.T.C. 783 (1991).

[5] Medical Staff of Good Samaritan Regional Medical Center, Dkt. C-3554 (consent order final, Feb. 1, 1995) (Commissioner Starek dissenting).

effects of competition, and deprive their patients of additional choices. Under the agreement, members of the medical staff would be prohibited from agreeing, or attempting to agree, to prevent or restrict the services offered by Good Samaritan, the clinic, or any other health-care provider.

The latest case on these lines resulted in acceptance of a consent agreement for comment on March 22nd. The agreement, with the Medical Association of Puerto Rico, its Physiatry Section and two of its individual physiatrist members, arose from charges that these parties illegally conspired to boycott a government insurance program in an attempt to lock up for themselves referrals from all public and private insurers for physical therapy in auto accident cases, and to increase reimbursement rates.[6] Physiatrists are medical doctors who specialize in the treatment of muscular, musculoskeletal or neurological problems. According to the complaint, at a meeting in 1990, the membership of the Physiatry Section voted to refuse to treat new patients referred by a third party payer that provides health care coverage to automobile accident victims in Puerto Rico, because the payer refused to raise reimbursements or adopt a rule that patients would be reimbursed for physical therapy services only if referred for those services to a physiatrist. Our complaint alleges that a boycott followed and that the Medical Association supported it. The complaint also charges that the boycott

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[6] Medical Association of Puerto Rico, File No. 911-0095 (consent agreement accepted for comment, March 22, 1995).

rehabilitation hospital merger, HEALTHSOUTH agreed to divest a hospital in one market and to terminate management contracts in two other markets.[13]

Finally, in Adventist Health Systems/West, a hospital merger case that was litigated before the Commission, we ultimately dismissed the complaint after finding that the evidence did not support complaint counsel's geographic market definition.[14]

The Pharmaceutical Industry (drugs and devices)

The production and distribution of pharmaceuticals and medical devices are extremely important components of the health care sector, and of its cost structure. The Commission has been very active over the past year in protecting competition in this area through merger enforcement actions. Competition in this field plays an important role in controlling health care costs, but it also plays a vital role in giving impetus to research and development, the quest for the "break-through" drugs that yield true advances in the fight against disease Because this is an innovation-driven field, a number of the cases we have brought have called for non-traditional remedies focusing on preservation of competition in the ownership and use of intellectual property.

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[13] HEALTHSOUTH Rehabilitation Corp., File No. 951-0007 (consent agreement accepted for public comment, Dec. 28, 1994). HEALTHSOUTH is the nation's leading operator of rehabilitation hospitals and other rehabilitation facilities, totaling about 340 in 34 states, and ReLife Inc. operates more than 40 rehabilitation facilities in 12 states.

[14] Adventist Health Systems/West, Dkt. 9234 (complaint dismissed, Apr. 15, 1994).

For example, the Commission accepted and made final a consent agreement with the American Home Products Corporation, settling charges that AHP's $9.7 billion acquisition of American Cyanamid Company could substantially lessen competition in a number of U.S. markets, including those for tetanus and diphtheria vaccines, for certain biotechnology drugs used in treating cancer, and for research and development for a vaccine to treat rotavirus, a diarrheal disease that causes thousands of children's deaths annually.[15] American Home Products and Cyanamid are two of only three producers of rotavirus vaccines with research projects either in or near the clinical trial stage needed before the Food and Drug Administration can give its approval: there is currently no authorized rotavirus vaccine for sale anywhere in the world.

Under the agreement, AHP must divest its tetanus and diphtheria vaccine business to a Commission-approved buyer, and manufacture the vaccines for the buyer, under contract, while the buyer awaits Food and Drug Administration approval to manufacture them. In addition, AHP would license Cyanamid's rotavirus vaccine research to a Commission-approved licensee and provide the licensee with technical assistance. The order would also require that AHP change a previously-established licensing

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[15] American Home Products Corp., Dkt. C-3557 (consent order final, Feb. 14, 1995) (Commissioner Azcuenaga concurring separately).

agreement to assure that it does not obtain competitively-sensitive data about a class of drugs used in chemotherapy.[16]

The Commission also took action in the acquisition by Marion Merrell Dow, Inc. of Rugby-Darby Group, which we alleged eliminated competition between the only two FDA-approved producers of dicyclomine.[17] This case was the Commission's first challenge of a brand name drug firm's acquisition of a generic pharmaceutical competitor. The Commission alleged that by acquiring its only generic competitor in the market for dicyclomine hydrochloride, Marion obtained a monopoly. The final consent order requires Marion to license its dicyclomine formulations and production technology to a third party to reestablish competition. It also requires Marion to manufacture dicyclomine on a contract basis for that licensee while the licensee awaits FDA approval to sell its own product.

Both the Marion Merrell Dow and American Home Products cases provide examples of the non-traditional merger remedies I mentioned earlier. In both of these cases, the main obstacle to timely entry was approval from the FDA. This is not, I hasten to

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[16] Also in pharmaceutical manufacturing, the Commission accepted and made final a consent order in Roche Holding Ltd.'s proposed acquisition of Syntex Corp., which raised competitive concerns in the market for production of drug abuse testing products. The order requires Roche to divest a Syntex subsidiary's business in that market within 12 months to a Commission-approved buyer that will operate the business in competition with Roche. Roche Holding Ltd., Dkt. C-3542 (consent order final, Nov. 22, 1994) (Commissioner Varney not participating).

[17] The Dow Chemical Co., Dkt. C-3533 (consent order final, Sept. 23, 1994) (Commissioner Azcuenaga dissenting).

add, a suggestion that FDA approval is an inappropriate obstacle, simply that we cannot ignore it when we are seeking a remedy to restore competition. Divestiture of a plant would not adequately address the loss of competition in either case, because divestiture would trigger a new FDA approval process for the buyer and operator of the assets, to demonstrate that its drug was bioequivalent to that already approved.

Thus, our approach in both matters was to require the acquiring companies to license to a third party a package of technology rights, provide the technical assistance necessary to secure FDA approval, and provide product to sell while such approval was pending. Of course, if this mandated sale provision was to provide meaningful relief, we had no choice but to assume the unaccustomed -- and temporary -- role of mandating a transfer price for the interim supply of product. In setting these prices, our challenge was to balance two concerns: that too high a price would hamstring the new competitor as competitor, while too low a price could remove that firm's incentive to become a manufacturer. And, of course, significant error in either direction would result in misallocation of resources. Fortunately, we were able to find satisfactory formulas that met with agreement from all parties.

The Commission just this week made final a consent order with Wright Medical Technology, Inc., to settle charges that Wright's proposed acquisition of Orthomet, Inc., would eliminate potential competition in the market for the sale of orthopaedic

implants used in human hands.[18] In addition, the Commission alleged that actual competition between the companies in research and development for such implants would be eliminated. The settlement is intended to restore competition by requiring Wright to transfer to the Mayo Foundation, the licensor of the implant technology to Orthomet, a complete copy of all assets relating to Orthomet's business of researching and developing these implants, enabling the Foundation either to find another non-exclusive licensee in addition to Wright, or to grant an exclusive license to an entity other than Wright. Again, the licensing remedy was employed, but at a pre-product stage -- that is, to protect competition in the market for the innovative research from which tomorrow's product competition may come.

Also last week, the Commission made final a consent order settling charges arising from the planned acquisition of Zenith Laboratories by IVAX Corporation.[19] This was our first action against a merger between generic drug producers. The two companies are the only marketers of a generic drug used to treat patients with chronic cardiac conditions -- verapamil in the extended-release form -- in the U.S. market. Under the order, IVAX is prohibited from acquiring any rights to market or sell the drug pursuant to Zenith's exclusive distribution agreement with G.D. Searle & Co. Separately, Zenith and Searle have

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[18] Wright Medical Technology, Inc., Dkt. C-3564 (consent order final, March 30, 1995).

[19] IVAX Corp., Dkt. C-3565 (consent order final, March 27, 1995).

terminated their agreement and Zenith has agreed to transfer its customers to Searle, or to a firm that Searle designates. The settlement will help to ensure that two independent competitors remain in the market.

In another case involving a medical device rather than a pharmaceutical, the Commission first authorized staff to seek a preliminary injunction and later accepted a consent agreement for public comment in the acquisitions by Boston Scientific Corporation of Cardiovascular Imaging Systems, Inc., its leading competitor in the market for intravascular ultrasound (IVUS) imaging catheters, used in the diagnosis and treatment of cardiovascular disease, and SCIMED Life Systems, Inc., deemed the most likely entrant into the market.[20] The market for IVUS catheters is expected to grow dramatically in the next few years. The order will require Boston Scientific to grant a non-exclusive license to a technology package that includes its own IVUS catheter patents, as well as the patents and technology that Boston Scientific proposed to acquire from both CVIS and SCIMED, to Hewlett-Packard Company or to another person approved by the Commission. Hewlett-Packard currently manufactures computer consoles that are used in conjunction with Boston Scientific's IVUS catheters. The order will also require Boston Scientific to provide technical assistance to ease the licensee's entry into the IVUS catheter market.

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[20] Boston Scientific Corp., File No. 951-0002 (consent agreement accepted for comment, Feb. 24, 1995) (Commissioner Azcuenaga concurring separately).

In November, the Commission accepted for comment a consent agreement affecting competition at both the production and distribution levels of the pharmaceutical industry. Eli Lilly and Company agreed to settle Commission charges that its approximately $4 billion acquisition of McKesson Corporation and its pharmacy benefit management ("PBM") business, PCS Health Systems, Inc., would substantially lessen competition in the manufacture and distribution of pharmaceuticals.[21] Pharmacy benefit managers such as PCS are playing an increasingly important role in the management of pharmacy benefits in the health care system. By the end of the century it is anticipated that a very large number of Americans will receive pharmaceutical benefits through PBMs, and our proposed consent order helps to assure that the PBM market will permit open competition between drug manufacturers.

Here, the principal concern was that Lilly's ownership of an important benefits manager could impede other manufacturers in passing through that "gateway" to distribution. The proposed consent agreement provides a behavioral remedy finely tuned to our competitive concerns. The settlement would require Lilly to take steps, such as creating an "open formulary," to ensure that its own drugs are not given unwarranted preference over those of its competitors in connection with the pharmacy-benefit management services Lilly will provide as a result of the

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[21] Eli Lilly and Co., File No. 941-0102 (consent agreement accepted for comment, Nov. 3, 1994) (Commissioner Azcuenaga dissenting, Commissioner Starek recused).

acquisition. Lilly also agreed to build a "fire wall" between its pharmaceutical sales business and PCS's pharmacy benefits management business to ensure that one division of the company does not gain access to sensitive information about competitors' drugs from another division.

Finally in the manufacturing sector, let me mention the Commission's action just this past month in accepting for comment an agreement with Glaxo plc arising from its acquisition of Wellcome plc.[22] Glaxo and Wellcome are large British drug companies with substantial sales in the United States. Our complaint alleges that both companies are competitors in the research and development of a class of drugs in non-injectable form used to combat migraine attacks. The complaint further charges that the acquisition would eliminate research and development competition between Glaxo and Wellcome and increase Glaxo's ability to unilaterally reduce research and development in this field. The proposed settlement would require Glaxo to divest Wellcome's worldwide research and development assets for these drugs in order to create a viable competitor to replace the competition allegedly lost in the acquisition.

The Commission has also taken action in the past year against two mergers at the retail level of the prescription pharmaceutical industry. In the first case of this type this year, the Commission accepted and made final a consent agreement

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[22] Glaxo plc, File No. 951-0054 (consent agreement accepted for comment, March 16, 1995).

in connection with Revco D.S., Inc.'s acquisition of Hook-SuperRx, Inc.[23] That consent order requires divestitures in three small geographic markets. In the second case, the Commission accepted and made final a consent order that resolves concerns over Rite Aid Corporation's acquisition of LaVerdiere's Enterprises, Inc.[24] The consent order requires the divestiture of retail pharmacy assets in three cities.

Defense Industries

Like the health care sector, the defense industries continue to grapple with a new reality; but for defense the reality continues to be a picture of sharply declining demand. I would not want to push the contrast with health care too hard, of course. Many actors in health care have seen sharp declines in demand in recent years, especially the hospitals as they attempt to adjust to managed-care controls on hospital stays. But in health care the sense is that this has decline overlies a longterm upward demand trend. By comparison, we may at least hope that our defense needs will never return to Cold War levels.

Yet it is clear that a healthy and competitive defense sector continues to be a vital national interest. Thus, antitrust will continue to have an important role to play in this sector, one which requires us to balance the reality of contraction with the contribution that competition makes to

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[23] Revco D.S., Inc., Dkt. C-3540 (consent order final, Oct. 31, 1994) (Commissioner Varney not participating).

[24] Rite Aid Corp., Dkt. C-3546 (consent order final, Dec. 15, 1994).

innovation, price, and quality. In the past year, a task force convened by the Defense Department made a notable contribution to striking such a balance.

Following the Commission's 1992 Alliant case,[25] the Defense Department organized a task force to recommend ways in which the Department could play a constructive role in the review and evaluation of defense industry mergers. In April of last year this Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation, chaired by Robert Pitofsky, returned with a number of recommendations: that antitrust enforcement was appropriate in the defense industry; that existing law was flexible enough to take account of the special circumstances of a downsizing industry; that the antitrust agencies are the appropriate agencies to assess competitive effects; that the Defense Department, as the customer of these firms, has much relevant information; and that the Department should develop better procedures for working with the antitrust

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[25] FTC v. Alliant Techsystems Inc., 808 F. Supp. 9 (D.D.C. 1992). The case involved Alliant Techsystems' proposed acquisition of Olin Corporation's Ordinance division. The two companies wanted to merge to avoid the Army's planned "competitive downselection," which was designed to reduce the number of 120mm tank ammunition suppliers from two to one. A district court found, however, that if competition between the firms for this one contract were eliminated, and if the Army were forced to contract with the merged company as a sole source, then it would probably have to pay between $25 and $115 million more for the ammunition. The court therefore granted the FTC's motion for a preliminary injunction blocking the acquisition. The parties subsequently announced that they had abandoned the transaction. Alliant thereafter settled an administrative complaint issued by the Commission as required by Section 13(b) of the FTC Act. Alliant Techsystems Inc., Dkt. 9254 (consent order, 1993).

agencies.[26] Such arrangements are now in place, and our experience is that they are working well. Deputy Secretary of Defense John Deutch has taken a similar view, expressing his "appreciation for the cooperation that has taken place between the Federal Trade Commission and the Department of Defense" during the course of the Lockheed/Martin Marietta merger review, and observing that "the public interest was well-served."[27]

During the past year, we have accepted consent agreements for comment in two mergers in the defense sector. In both cases, we were able to fashion somewhat non-traditional relief that I believe strikes an appropriate balance between restructuring and the maintenance of competition.

The first such case involved another acquisition by Alliant Techsystems, Inc., in this case of Hercules Inc.'s propellant division, Hercules Aerospace Company.[28] The Commission alleged that, after the acquisition, Alliant would be both an ammunition and munitions producer and the only U.S. supplier of propellant for large-caliber ammunition, and that absent the settlement, the acquisition could reduce weapons research, innovation and quality. The concern was that once Alliant became a propellant supplier, its ammunition and munitions division could gain access

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[26] Report of the Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation (Apr. 1994).

[27] Letter to Chairman Steiger from the Honorable John M. Deutch, Deputy Secretary of Defense, Dec. 29, 1994.

[28] File No. 941-0123 (consent agreement accepted for comment, Nov. 14, 1994) (Commissioner Azcuenaga concurring separately).

to significant, nonpublic information from competing ammunition and munitions suppliers about their products, since these competitors would have to supply such information to Alliant's propellant division in order to work with it. The settlement would require Alliant to prevent its propellant division from sharing such information with its ammunition and munitions division.

The other settlement accepted for comment in a defense industry merger, that is the $9 billion-plus merger of Lockheed Corporation and Martin Marietta Corporation, also included such "fire-wall" relief, in that case to prevent certain divisions of the merged company from gaining access to competitively-sensitive information about competitors' satellite launch vehicles or military aircraft.[29] But the settlement also provides relief tailored to meet two other concerns. First, the settlement places restrictions on Lockheed Martin's ability to modify a military aircraft infrared navigation device for which it is the sole supplier in any way that could disadvantage competing military aircraft manufacturers.

The second concern is expressed in the complaint's allegation that Lockheed and Martin Marietta each currently have exclusive "teaming" or joint venture arrangements -- in Lockheed's case with Hughes Aircraft Company and in Martin Marietta's with Northrop Grumman Corporation -- to develop and

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[29] Lockheed Corp., File No. 951-0005 (consent agreement accepted for comment, Jan. 10, 1995).

manufacture satellites for use in space-based early warning systems. Both Hughes and Northrop Grumman are leading producers of electro-optical sensors for use in military satellites. Under the two teaming agreements, Hughes and Northrop Grumman are prohibited from bidding on their own, or teaming with other firms to bid, on Defense Department contracts for space-based early warning systems. If these exclusive arrangements remained intact, the complaint alleges, the merger would have essentially combined the two top space-based early warning teams. The settlement undertakes to remedy this problem by prohibiting Lockheed Martin from enforcing the exclusivity provisions in the teaming agreements, thereby allowing the formation of other teams capable of competing with Lockheed Martin. Indeed, in the current $22 billion procurement procedure for a space-based early warning system, it has been reported that four teams have submitted bids, strongly suggesting that this aspect of our order is working as intended.[30]

Telecommunications

In the telecommunications sector, the rate of evolution appears to verge on revolution, at least if everyone's press releases are to be believed. While defense firms scramble for shares of a shrinking pie, however, telecommunications firms face at least the chance for enormous growth, as whole new markets are created. Yet the latter group's task is hardly easier. While the potential prize for getting astride the next technological

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[30] Defense Daily, Feb. 22, 1995.

tiger is enormous, separating tigers from turkeys has never been harder. The papers have been full of announcements of acquisitions in this field that the participants at least hope will position them to come out on top, but none of them can be sure.

On the other hand, merger enforcement in this context of uncertainty is also exceptionally challenging. As a very basic example, our assessment of the competitive effects of a merger will of course often depend on the number and relative strength of the competitors that will remain in a market if the merger is completed. But suppose there is strong speculation that the market in which the merger is occurring will soon converge with another -- that a whole new cast of competitors is poised on the market's doorstep? Suppose that if this convergence takes place the post-merger market structure would look vigorously competitive, while if it does not the market would be susceptible to cartelization or single-firm dominance? In applying the Horizontal Merger Guidelines' timeliness and likelihood criteria for consideration of market entry[31] in such a setting, it is important that our crystal ball not be too cloudy.

During the past year, we have taken enforcement action in two cases in the telecommunications sector, one a merger case, and the other growing out of an acquisition, and both involving cable television systems.

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[31] U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines Part 3 (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104

In the first of these cases, the Commission in January accepted for comment a consent agreement with Tele-Communications, Inc. (TCI) to settle charges that its acquisition of TeleCable Corporation would eliminate competition for cable television service in Columbus, Georgia.[32] This was a sizable transaction: the acquired company owned systems in 15 states, and the price exceeded $1 billion. The agreement's remedy is a garden-variety divestiture of either the acquiring or acquired company's system in the Columbus area. The case is interesting, though, for its somewhat unusual facts among cable system mergers, at least as to the Columbus area. Often, such cases require us to assess potential competition, since a single governmental entity typically licenses only one cable company to operate within its limits. Here, both the acquiring and acquired firms are licensed to offer cable service throughout the Columbus metropolitan area, and have competed in two different ways: for individual subscribers in an "overbuilt" area of about three thousand homes, and for the right to lay cable in new developments and apartment houses.

The other case, though also involving the acquisition by a cable system of an overbuilt competitor, had a different wrinkle. Rather than attacking the acquisition, which took place in 1988 and concerned a system which served a single area in California, the complaint charged that an agreement not to compete between

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[32] File No. 941-0123 (consent agreement accepted for comment, Jan. 25, 1995).

the acquirer and a part owner of the acquired company was not limited to the area in which the acquisition occurred, but would have restrained competition unreasonably in other areas. The Commission accepted and made final a consent order with Boulder Ridge Cable TV and Weststar Communications, Inc., two California-based cable companies, and their principals, to settle this charge.[33] Under the order, the parties may not enforce provisions of their agreement that would have forbidden either from involvement in a cable system within 15 miles of any community in which the other owned or operated a system, or would own or operate a system in the future. At the time, Boulder Ridge owned and operated cable television systems in Hawaii and eight counties in California, and Weststar and its principal owned and operated 22 cable television systems in California. The parties are also forbidden to enter a similar agreement in the future, unless its scope is reasonably related to the cable system being sold.

Food Production and Distribution

Let me turn from my theme of the Commission's antitrust effort in rapidly evolving economic sectors to make a contrasting point: that we have not lost sight of those areas of our national economy that are not trendy and not so very rapidly evolving. Exhibit A is an enormous segment of the economy that affects every one of us every day in the most vital of ways:

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[33] Boulder Ridge Cable TV, Dkt. C-3537 (consent order final, Oct. 20, 1994) (Commissioner Varney not participating).

food production and distribution. This has long been an area of major Commission involvement, and it continues to be. During the past year, the Commission took enforcement action in four cases involving grocery store mergers. In Red Apple Companies, Inc., it issued an adjudicative complaint, subsequently authorized staff to seek an injunction to prevent the company from selling or shutting down stores potentially subject to an order in that case, and then accepted and made final a consent order resolving the case and requiring divestiture of six New York City supermarkets.[34] In three other cases, involving Penn Traffic Company/American Stores Company,[35] Schnuck Markets, Inc./National Holdings, Inc.,[36] and Schwegmann Giant Supermarkets, Inc./National Holdings, Inc.,[37] the Commission accepted consent agreements for comment that would, respectively, require divestitures of supermarkets in three areas of Pennsylvania, 24 supermarkets in the St. Louis area, and seven supermarkets in the New Orleans area.

The Commission also issued adjudicative decisions in two cases involving soft-drink production and bottling, The Coca-Cola

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[34] Red Apple Companies, Inc., Dkt. 9266 (consent order final, Feb. 28, 1995).

[35] Penn Traffic Company, File No. 951-0009 (consent agreement accepted for comment, Jan. 18, 1995).

[36] Schnuck Markets, Inc., File No. 941-0131 (consent agreement accepted for comment, March 8, 1995) (Commissioner Azcuenaga concurring separately).

[37] Schwegmann Giant Supermarkets, Inc., File No. 941-0130 (consent agreement accepted for comment, March 8, 1995, (Commissioner Azcuenaga concurring separately).

Company,[38] holding that a merger of branded carbonated soft drink producers violated section 7 of the Clayton Act and Section 5 of the FTC Act and was not mooted by abandonment of the transaction after an injunction was issued, and The Coca-Cola Bottling Company of the Southwest,[39] reversing the administrative law judge's dismissal of the case on issues relating to product and geographic market definition. We also accepted for comment a consent agreement with Del Monte Corporation and Pacific Coast Producers in a case that did not involve a merger but, the complaint alleges, nonetheless effectively removed Pacific from the canned fruit market in the United States.[40] This was the alleged result of a long-term supply agreement between the two companies under which Pacific manufactured the canned fruit and Del Monte marketed it, making all of the pricing decisions, arranging the orders with customers, and directing Pacific as to what products Del Monte needed manufactured for the coming year. The order would terminate the agreement and for ten years require FTC prior approval before Del Monte could make certain

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[38] The Coca-Cola Company, Dkt. 9207 (decision and final order, June 13, 1994) (Commissioners Azcuenaga and Starek not participating).

[39] The Coca Cola Bottling Company of the Southwest, Dkt. 9215 (decision and final order, Aug. 31, 1994) (Commissioner Owen concurring in part and dissenting in part; Commissioner Azcuenaga and Commissioner Starek not participating).

[40] Del Monte Corp., File No. 921-0071 consent agreement accepted for comment, Jan. 9, 1995. (Commissioner Starek concurring separately).

acquisitions in the U.S. canned fruit market or enter into certain supply or marketing agreements.

Other Enforcement Activities

General Merger Enforcement

Since last year's meeting the Commission has accepted ten merger consent agreements in addition to those I have already described, four of which have become final. They concern such truly diverse markets as electronic surveillance labeling systems,[41] canned cat food,[42] polypropylene,[43] funeral homes and cemeteries,[44] shoe polish,[45] professional illustration software,[46] money wire transfer services between consumers,[47] aluminum polyester powder,[48] compact disc metalizers and

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[41] Sensormatics Electronics Corp., File No. 941-0126 (consent agreement accepted for comment, Dec. 28, 1994) (Commissioner Azcuenaga concurring in part and dissenting in part).

[42] Nestle Food Company, File No. 941-0124 (consent agreement accepted for comment, Dec. 28, 1994).

[43] Royal Dutch/Shell Group, File No. 941-0043 (consent agreement accepted for comment, Jan. 11, 1995).

[44] Service Corp. International, File No. 951-0012 (consent agreement accepted for comment, March 1, 1995).

[45] Sara Lee Corp., Dkt. C-3523 (consent order final, Aug. 24, 1994).

[46] Adobe Systems, Inc., Dkt. C-3536 (consent order final, Oct. 18, 1994) (Commissioner Varney not participating).

[47] First Data Corp., File No. 931-0090 (consent agreement accepted for comment, Aug. 17, 1994, but withdrawn after First Data failed to win a bankruptcy court bid) (Commissioner Azcuenaga concurring separately).

[48] Sulzer Limited, Dkt. C-3559 (consent order final, Feb. 23, 1995).

turbomolecular pumps,[49] and blind rivets.[50] I would like to say a little more about three of these cases to amplify a point I mentioned earlier about the Commission's protection of innovation as an element of competition.

The analysis of innovation as a key concern of antitrust's role in preserving competition has grown in importance with the increasing recognition that our producers' ability to innovate has become a major area of national comparative advantage, whose importance will only increase as we move into the 21st Century. As antitrust enforcers, we are called upon to give the most careful scrutiny to the potential of our merger program -- and indeed all of our enforcement activity -- for either enhancing or, if misdirected, reducing competition in innovation.

I will cite just a few of our cases from the past year where innovation concerns were particularly significant. Perhaps the most prominent of these cases is our consent agreement respecting the Royal Dutch/Shell Group joint venture with Montedison S.p.A. in the polypropylene market. Polypropylene is one of the leading thermoplastics. Although it was developed in the 1950s, demand continues to grow largely as a result of innovation in both process technology and catalysts that has reduced its cost and yielded new resin grades suitable for a growing number of uses.

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[49] Oerlikon-Buhrle Holding AG, Dkt. C-3555 (consent order final, Feb. 1, 1995).

[50] Textron Inc., Dkt. 9242 (consent order final, May 6, 1994) (Commissioner Azcuenaga dissenting).

Only one portion of the settlement concerns us at this point. The Commission's complaint alleges that Royal Dutch's American subsidiary, Shell Oil, has cooperated with Union Carbide on the research, development and licensing of polypropylene technology worldwide, combining Shell's "SHAC" polypropylene catalyst with Union Carbide's "Unipol" process technology. Unipol/SHAC has been Montedison's principal competitor in these markets. The Commission was concerned that the relationships among the principals and the new joint venture would reduce incentives for, among other things, innovation in polypropylene technology.

The settlement would require Royal Dutch to divest all of Shell Oil's polypropylene assets either to Union Carbide or to another Commission-approved acquirer that could then be expected to use these assets to compete with the joint venture Montell, as well as with Shell and Montedison, in innovation as well as the licensing of new developments.

In a second case, Sensormatic Electronics Corporation's acquisition of assets of Knogo Corporation, the focus of our complaint was exclusively on preserving research and development competition, specifically that between firms developing new systems to prevent retail shoplifting. Both firms manufacture electronic-article surveillance systems used by retailers to reduce shoplifting. Both companies also are developing labels for use in these systems that will be sturdier, less costly, and can be installed automatically by manufacturers rather than

manually by retailers. The acquisition plan called for both the transfer of certain intellectual property in this market and for royalty-free cross-licensing of improvements developed by either firm. The Commission alleged that this transaction would reduce Knogo's incentives for research and development, decrease the number of independent tracks on which such activity was taking place, and increase Sensormatic's ability to reduce such activity unilaterally. The consent agreement, basically, would prevent the transfer of certain exclusive intellectual property rights, while allowing the granting of non-exclusive licenses to manufacture and sell certain products within the U.S. and Canada.

The consent order with Adobe Systems Inc. and Aldus Corporation in their merger case, now final, contains provisions based on similar theories. Adobe and Aldus sold the only two products in a market for professional-illustration software for use on Apple Macintosh and Power Macintosh computers, a market in which Adobe and Aldus have competed vigorously on both price and product development. The complaint noted high reputational and developmental barriers to new entry in this software market, and the order provides for the sale of Aldus's software, "Freehand," to the company that developed it, Altsys Corporation, to maintain competition both in marketing and continued development.

In addition, four of the healthcare merger cases that I mentioned earlier, American Home Products Corp., Wright Medical Technology, Inc., Boston Scientific Corporation, and Glaxo plc

also exemplify our concern with innovation as a crucial dimension of competition, as does the Lockheed case in the defense sector.

Finally, before I leave the topic of merger enforcement, let me mention a case brought this past year to help preserve the crucial integrity of the premerger notification program. In that case, brought in U.S. District Court here, Pennzoil paid $2.6 million to settle charges in the complaint that it had violated the Hart-Scott-Rodino Act reporting requirement.[51] The complaint stated that Pennzoil failed to notify the Commission and the Justice Department that it had acquired $2.1 billion of Chevron Corp. stock and that Pennzoil, a competitor of Chevron, did not qualify for the exemption for purchases made solely for the purpose of investment. The $2.6 million settlement, slightly over 60% of the maximum allowed by statute, is the second-largest of its type ever received by the Commission.[52]

General Non-Merger Enforcement

Horizontal Restraints

The past year also saw a number of non-merger cases that did not fall within the economic sectors I singled out for discussion. In the horizontal restraints area, we issued one administrative complaint, dismissed another, accepted and made final three consent orders, and accepted one other consent agreement for comment.

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[51] United States v. Pennzoil Co., No. 1:94CV02077, D.D.C. (complaint and proposed consent decree filed, Sept. 26, 1994).

[52] The statutory maximum penalty is $10,000 for every day the violation continues. 15 U.S.C. § 18a(g)(1).

The new complaint, which I will not discuss in detail because it is now in adjudication, names as respondents the International Association of Conference Interpreters and its U.S. affiliate members, charging that they have combined to fix the fees they charge for interpretation services performed in the United States and imposed a variety of restrictions that illegally restrained competition among them.[53] The complaint dismissed was College Football Association,[54] in which the Commission based its ruling on jurisdictional grounds. The College Football Association, an organization of major football schools, had been charged with unreasonably restraining competition in the marketing of television rights to its members' games. The CFA moved for summary decision on the ground that it was a non-profit organization, and that the Commission thus lacked jurisdiction under Section 5. We held that complaint counsel had failed to make a sufficient showing that the association was not entitled to the non-profit exemption. In so doing, we announced a two-pronged test: the profit or non-profit nature of an entity must be assessed in light of both (1) the nature of the entities to which the organization distributed its income, and (2) the nature of the activities from which it derived that income.

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[53] International Association of Conference Interpreters, Dkt. 9270 (complaint issued, Oct. 25, 1994).

[54] Dkt. 9242 (final order and opinion issued, June 16, 1994).

Final consent orders issued in the past year include those in Community Associations Institute,[55] a case involving a professional association's anti-solicitation rules; New England Juvenile Retailers Association[56] and Baby Furniture Plus Association, Inc.[57] The latter two, which were companion cases, both involved allegations of retailers' horizontal boycott threats designed to coerce vertical restraints by manufacturers on sales to a competing catalogue vendor. The basis for all three cases was of course that consumers are injured by having their choices limited, whether by constraints on solicitations that could inform them of choices or by direct restraints on the availability of goods through discount vendors.

Finally, we have just accepted for comment a consent agreement in a rather unusual case in which the Korean Video Stores Association of Maryland and its 16 individual members are charged with agreeing to raise and fix the rental fees for Korean-language video tapes charged by members' stores throughout the metropolitan Washington area.[58] The complaint alleges that the agreement on rental rates took place essentially overtly at an association meeting in 1993, and that members later publicly

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[55] Dkt. C-3498 (consent order final, June 16, 1994).

[56] Dkt. 3552 (consent order final, Jan. 18, 1995) (Commissioner Azcuenaga dissenting).

[57] Dkt. 3553 (consent order final, Jan. 18, 1995) (Commissioner Azcuenaga dissenting).

[58] Korean Video Stores Association of Maryland, File No. 931-0134 (consent agreement accepted for comment, March 28, 1995).

announced the alleged agreement and the price increase by displaying a poster detailing the agreement in each of their retail stores. The consent would require the association and its members to refrain from such an agreement in the future, and also to post a notice of the settlement in their stores.

Intellectual Property Guidelines

We have just announced our adoption, jointly with the Department of Justice, of a final version of the Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property,[59] which were published in draft last August. These Guidelines state the antitrust enforcement policy of the two agencies with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how. The Guidelines are intended to help those who need to predict whether we will challenge a particular practice, and we expect that they will be useful. But anyone who has even skimmed the Guidelines will realize that they are not cookie cutters: the elements of judgment and discretion necessarily remain strong. Indeed, in many instances, given the unforeseeability of the factual circumstances a particular case will raise, we have limited the Guidelines to describing the kinds of considerations that we will deem significant in determining a transaction's net competitive impact. While time

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[59] These Guidelines supersede section 3.6 in Part I, "Intellectual Property Licensing Arrangements," and cases 6, 10, 11, and 12 in Part II of the U.S. Department of Justice 1988 Antitrust Enforcement Guidelines for International Operations.

and experience may yield greater certainty in some areas, a zone of uncertainty is in the very nature of the rule of reason that applies to most practices in this area. Of course, those who wish to achieve greater certainty before undertaking a particular transaction may wish to seek a Commission Advisory Opinion[60] or a Department of Justice business review letter.[61]

International Operations Guidelines

We have also just announced our joint adoption with the Department of Justice of new Antitrust Enforcement Guidelines for International Operations, superseding the Department's 1988 International Guidelines. These Guidelines reaffirm the high priority that both agencies attach to antitrust enforcement concerning international operations, as well as to cooperation wherever appropriate with foreign authorities in such matters. The new Guidelines are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to DOJ and FTC international enforcement policy. They are explicitly not intended to be comprehensive guides to our general enforcement policies. Rather, they cover such topics as subject matter jurisdiction for conduct and entities outside the U.S., comity, mutual international assistance in enforcement, and the effects of foreign government involvement on private antitrust liability.

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[60] See 16 C.F.R. §§ 1.1-1.4 (1995).

[61] See 28 C.F.R. § 50.6 (1995).

Consumer Protection Mission

I also want to give you a brief report on the Commission's Consumer Protection Mission activities during the past year. Although overall productivity in consumer protection enforcement has risen steadily in the past several years it reached a record level in fiscal year 1994. The Commission brought or completed 233 consumer protection enforcement actions, which included 48 orders requiring defendants to pay consumer redress. In addition, the Commission continued its regulatory review program, deleting three outdated industry guides from the Code of Federal Regulations. Other rules and guides are slated for review this year, including the 1992 Environmental Advertising Guidelines.

The Commission's priorities in consumer protection continue to include combatting fraudulent conduct; securing compliance with our orders, rules and special statutes; and ensuring that advertisements are not misleading and that the objective claims they make are substantiated.

Scrutiny of national health claims advertising remains a high priority. The Commission issued an enforcement policy statement last May to provide guidance regarding its policy with respect to the use of nutrient content and health claims in food advertising. The policy statement is also intended to harmonize the Commission's food advertising enforcement policy with the FDA's food labeling regulations, pursuant to the Nutrition Labeling and Education Act of 1990. In addition, we continue to bring cases where necessary to stop deceptive claims in food

advertising, as well as cases involving health claims for a variety of other products and services, including weight loss, smoking cessation, and arthritis and osteoporosis treatments.

Telemarketing fraud also continues to be a high priority for the Commission. Over eight billion telemarketing calls are made each year and, in 1991 alone, telemarketing sales exceeded $250 billion. Although the vast majority of these transactions are legitimate, losses to consumers each year from telemarketing fraud may range from $3 billion to $40 billion, in addition to the hundreds of millions of dollars lost by financial institutions serving what turn out to be unscrupulous merchants of fraud.[62] During the past several years, the Commission has filed well over 100 lawsuits in federal district court and successfully obtained strong injunctive relief, asset freezes, and the appointment of receivers to preserve assets for ultimate distribution to consumers, if possible, or for disgorgement. The Commission has obtained and returned to consumers nearly $100 million in consumer redress payments, and has obtained over $4 million in disgorgement, in actions filed under Section 13(b) of the FTC Act. The Commission obtained orders for over $4.5 million in redress in just the first quarter of fiscal year 1995.

Telemarketing fraud nonetheless remains a growth industry. A coordinated and cooperative approach is critical to combatting it and, during the past year, the Commission's staff have

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[62] H.R. Rep. No. 421, 102d Congress, 1st Sess., "The Scourge of Telemarketing Fraud: What Can Be Done Against It?" at 7 (1991).

participated in nine regional conferences throughout the country with other federal agencies, state Attorneys General, and state and local consumer protection officials to discuss and develop strategies for dealing with telemarketing fraud. One key component of this coordinated effort is the NAAG-FTC Telemarketing Fraud Database, which is targeted solely on telemarketing fraud and is available to law enforcement officials at the federal, state and local levels.

In addition, as required by the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, the Commission has issued a Notice of Proposed Rulemaking soliciting public comment on a proposed rule that would prohibit numerous deceptive or abusive telemarketing sales practices, and prohibit credit card laundering and other forms of assistance to deceptive telemarketers. Later this month, the Commission will convene a public workshop conference in Chicago seeking further input on the rule. We are working to address the difficult issues posed by this proceeding and to complete our work by next August, as the statute requires.

The emergence of new technologies has created new opportunities for consumers as well as some new risks, and the Commission has responded. For example, the Commission recently challenged advertising on the Internet for the first time, and was able to halt an allegedly deceptive credit repair scheme so

quickly that consumer losses totalled less than $2,000.[63] In addition, we brought our first enforcement action under the Pay-Per-Call or 900 Number Rule, obtaining a $500,000 civil penalty and $2 million in direct redress payments to consumers from American TelNet, a large service bureau that allegedly tried to evade the Rule's requirements by charging for entertainment services accessed by dialing an 800, or toll-free, number.[64]

Recognizing that the information superhighway or "global information infrastructure" affords new challenges in consumer protection, the Bureau of Consumer Protection will host a workshop next week to discuss a variety of issues presented by these new avenues, including advertising and marketing, payment systems, privacy, and self-governance.

1994 was also a very successful year for the Commission in bringing actions to ensure compliance with our existing orders. Twenty-five federal district court judgments ordered approximately $4 million in civil penalties in consumer protection cases. One order enforcement action resulted in the Commission's largest civil penalty judgment to date -- a $2.4 million civil penalty resolving alleged violations of prior Commission orders

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[63] FTC v. Corzine, CIV-S-94-1446 DFL (E.D. Cal. filed Sept. 12, 1994).

[64] United States v. American TelNet, Civ. Action No. 94-2551 (S.D. Fla. 1994).

prohibiting false and unsubstantiated claims for food supplements.[65]

Institutional Improvements

We have taken several steps during the past year to minimize our imposition of burdens on the private actors with whom we deal, improve the consistency and fairness of those dealings, and better inform these actors -- and their counsel -- of the bases of our decision making. Not incidentally, I believe most of these steps will enhance the internal efficiency of our operations as well.

Hart-Scott-Rodino Operational Improvements

One very recent step, which I hope and believe will be welcomed by those of you with mergers and acquisitions practices, was our joint announcement with the Antitrust Division on March 23 of eight new measures we will undertake in reviewing mergers under the Hart-Scott-Rodino Act. These measures are designed to achieve both burden reduction and improved consistency between our agencies in this review process.

Obviously, we believe merger enforcement to be an absolutely crucial part of our mission of preserving and enhancing consumer welfare and the productivity of the nation's economy, and believe that HSR procedures have enormously enhanced our ability to perform that mission. At the same time, we recognize that these benefits are not achieved without some burden on the parties to

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[65] United States v. General Nutrition, Inc., Civ. Action No. 94-686 (W.D. Pa. 1994).

o After second requests are issued, the parties typically meet with Agency staff to discuss possible modifications to reduce burden. To increase consistency in this process, the Agencies are adopting a new internal appeal process that parties may use if they believe that they are in compliance with a second request or that compliance would be unduly burdensome, but have been unable to reach agreement with Agency staff. The procedure allows for a written appeal to the Bureau of Competition Director in the case of the Commission and to the Deputy Assistant Attorney General at the Department of Justice.

o We are adopting a joint "quick look" policy to focus the investigation on an individual issue or issues that may be dispositive, thus avoiding a longer, more comprehensive investigation. Parties will be invited to propose issues they believe will be determinative in an investigation and the Agencies will on their own initiative narrow the issues to the extent possible.

o We are jointly pursuing a project with the A.B.A. Antitrust Section to study second request issues.

o We are developing new proposals to amplify and clarify exemptions to the HSR Act, in order to eliminate any unnecessary HSR filings. Under the proposals, certain classes of transactions that experience has shown are unlikely to violate the antitrust laws would be exempted from the filing requirements. The proposals include possible exemptions for certain acquisitions of realty and mineral reserves, and clarify the

proposed transactions. We are always searching for ways to eliminate any undue burdens, while preserving our ability to do our job effectively. We believe that this latest joint effort with our colleagues at the Department meets both criteria. Let me briefly summarize the eight steps announced two weeks ago.

o The agencies announced new procedures to expedite the "clearance" process by which we and the Department determine which of us will investigate particular transactions. In most cases, we will resolve clearance issues within six business days, and in all cases within nine. This will increase the time for investigation and for determining whether further investigation is warranted.

o For the first time, the agencies have jointly released a model second request which will serve as the basis for future second requests. The new joint model contains a number of burden-reducing changes from previous models, while still preserving the elements essential for effective analysis of the merger. The new model also includes annotations explaining why the information sought by each specification is necessary for review of the transaction.

o Staff of the Agencies will arrange joint meetings with the parties to HSR-reportable transactions prior to clearance in certain circumstances, to enable the parties to provide additional information or analysis early in the initial 30-day waiting period.

statutory "ordinary course of business" exemption. The proposals have not yet been reviewed formally by the Commission, and FTC staff are making them available to the public, including members of the bar and businesses with experience in the HSR process, for informal comment preparatory to developing recommendations for Commission action.

o Finally, we are sponsoring an ongoing series of joint internal training programs designed to improve staff investigatory skills, and will also train staff in certain investigations in order to facilitate the exchange of investigatory skills.

Obviously, time will tell how effective these measures will be, but I am confident that they are steps in the right direction. I should add, however, that I believe our record on the use of second requests is already pretty credible, demonstrating that our selection criteria have been tight and appropriate: For example, in FY 94 the Commission issued 46 second requests. Of those second requests in which the investigations were completed -- that is, in which the transaction was not abandoned before this occurred -- the Commission either brought an enforcement action or entered into a consent in over 63%, or almost two-thirds. This is substantially higher than any time in the past.

Modifications in Internal Procedures

I think that the Commission has a very good record for handling matters requiring expeditious treatment -- such as

mergers and acquisitions subject to HSR premerger notification requirements -- as quickly as possible, consistent with our law enforcement responsibilities. I advised you last year that the Commission had just approved two sets of procedures to increase the speed with which we handle other types of matters as well. Let me take a minute to describe how these new procedures have worked in practice.

With respect to adjudicative proceedings, the Commission set targets for completing each phase in the preparation of Final Orders and Opinions, so that the drafting process for the typical Final Order and Opinion should take no more than about eight months.

These procedures have, I think, worked very well. When I appeared before you last year, seven adjudicative matters requiring Final Orders and Opinions were pending before the Commission. By the end of September 1994, the Commission had issued Final Orders and Opinions for six of these matters, and shortly thereafter accorded final approval to a consent order resolving the seventh matter. As a consequence, only one adjudicative matter in which an oral argument has been held is currently pending before the Commission.

The Commission also adopted three modifications in its assignment and voting procedures last April. Whenever any matter is assigned to a Commissioner, the Secretary now simultaneously forwards copies of the assignment package to each other Commissioner, so that we can all begin our review as quickly as

possible. In addition -- with respect to seven digit investigation matters, rulemaking matters, and certain adjudicative filings -- if the assigned Commissioner does not make a motion within 45 days, the Secretary must reassign the matter to another Commissioner. Not a single matter has been reassigned on the foregoing basis, and my perception is that motions to resolve or discuss most matters are made within one month or less after they are assigned.

The second modification requires that, when a matter has been discussed at a meeting but no motion to resolve it has been made, the Secretary must move that it be discussed at each subsequently scheduled closed Commission meeting until a motion to resolve it is made. We now resolve the nonadjudicative matters we discuss at Commission meetings either at the meetings themselves or through written motions made very shortly thereafter.

In the third modification, we converted our "three month rule" into a "one month rule," so that a written motion fails if more than one month passes without any votes being registered.

I think these procedures have substantially reduced the time we spend evaluating and making decisions concerning the hundreds of law enforcement and other recommendations we receive from the Commission staff each year. Indeed, the average interval between staff's law-enforcement and rulemaking recommendations and Commission action has been cut in half. We will, of course,

preliminary injunction in federal district court. To put this issue in the proper perspective: we very rarely lose our merger challenges in federal district court. In the past decade, the Commission has voted to challenge 58 mergers through preliminary injunction actions. In 42 of these, the parties either abandoned the merger or entered into a consent order. Of the remaining 16, we won ten and lost four on the Section 7 merits. One is pending in district court, and one was lost on state action grounds, but the transaction was abandoned while an appeal was pending. Thus, this has been a question that, on average, we need to address only once every two years or so. Moreover, a preliminary injunction hearing is not a full adjudication on the merits, so it seems to me that our usual presumption should be that we would pursue a merger challenge where the Commission had found reason to challenge the merger in the first place.

Nonetheless, it is my personal opinion that it is appropriate to consider whether there are any circumstances that could justify a Commission decision not to pursue such a case in administrative litigation, where the federal district court denies a preliminary injunction. In this time of diminishing government resources, I think that the answer must be yes, and I personally believe that it would be useful for the Commission to issue a policy statement that would outline the factors that would be relevant in making such a determination. Two obvious factors, of course, would be whether new and significant evidence had come to light during the preliminary injunction hearing, and

whether the judge had made a new ruling of law that would influence the Commission's assessment of the legal merits of the case. It would also be appropriate to assess the resources required to go forward against the benefit of a remedy and the probability it will be achieved. I would not be surprised if Chairman-Designate Pitofsky were to address this issue early in his tenure.

The second issue concerns whether the Commission should consistently seek in merger cases a prior approval provision that prevents the parties from entering into the same or similar transactions in the ten years following a merger challenge without the prior approval of the Commission. In particular, some have questioned whether the FTC should litigate a party's refusal to agree to a prior approval provision if the parties have abandoned the proposed transaction that was the subject of the Commission challenge. Let me be quite clear: I voted in favor of the Commission's recent decision in Coke/Dr Pepper,[67] in which the Commission determined that a prior approval provision was required even though the parties had abandoned the originally proposed transaction. The Commission's opinion thoroughly discussed the reasons for that decision, and I will not attempt to summarize those reasons here. I simply wish to emphasize that I continue to find that the Commission reached the correct

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[67] The Coca-Cola Company, Dkt. 9207 (decision and final order, June 13, 1994) (Commissioners Azcuenaga and Starek not participating), petitions for review filed, Nos. 94-1595 etc. (D.C. Cir., Aug. 26, 1994).

decision in Coke/Dr Pepper, and that nothing in the recent discussion of this issue has given me any reason to change my mind with respect to that particular case.

Taking the issue out of the context of one particular case and addressing it as a policy matter that has applicability to a large variety of factual circumstances, however, may bring to light certain considerations that are worth discussion. Two of my fellow Commissioners, Commissioner Starek and Commissioner Varney, have raised questions about whether prior approval provisions are always necessary and what the appropriate scope of such provisions should be. Thus, debate on this issue is ongoing at the Commission and, once again, I would not be surprised to find it a topic that is quickly addressed by Chairman-Designate Pitofsky.

Conclusion

Finally, in winding up the process of winding up, let me just one more time express my appreciation to you, the lawyers of the antitrust bar, for your many thoughtful contributions to our competition efforts.