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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. I am pleased to be here with you once again. I want to talk today about recent Commission actions and how we approach the problems we see. I should note that these views are my own and not necessarily those of the Commission or any other Commissioner.

At the present time, the competition mission of the FTC is proceeding briskly, despite a marked reduction in mergers and acquisitions attributable to the economy. Because 60% of our resources are normally devoted to mergers, this branch of our work can tend to overshadow the non-merger program. Last time we met my remarks focused on merger review. Today I'd like to spend some time discussing what I regard as the Commission's vigorous, traditional and economically rational non-merger program. Then I will report on some interesting merger developments, and enforcement actions involving HSR filing rules. Finally, I want to update you briefly on the challenging work that we and DOJ have been asked to do in exporting competition policy to the formerly Communist countries.

The recent year has been an interesting one in terms of the Commission's non-merger actions. As I mentioned last year, the Bureau of Competition, heeding the advice of the Kirkpatrick report, established a task force to focus on non-merger matters involving complicated legal and economic issues. This task force has now been elevated to a separate division. Solicitations to collude -- that is, invitations from one competitor or another to raise prices or otherwise agree not to compete -- are among the issues this division is investigating. As Commissioner Owen will discuss more fully in her presentation tomorrow, these solicitations have antitrust implications, even in the absence of an agreement.

Such solicitations can be actionable under a number of theories. First, if the solicitations occur over the phone, the Antitrust Division of the Department of Justice takes action under the wire fraud statutes. Second, they may be actionable under an American Airlines theory for attempt to monopolize. Third, they may be violations of Section 5, as incipient violations of the antitrust laws. It is premature to speculate as to the outcome of these and other matters. Nevertheless, we continue to pursue alleged antitrust violations -- both routine and novel -- when we hear of them.

We are examining allegations of such a solicitation in a number of matters. In one case, the investigation involves a CEO of a consumer product company who allegedly called on the "market leaders" to increase prices 6 to 7% across the board for the following year. In another case, the dominant firm in an industry requested that its chief competitor cease engaging in a form of discounting. In a third case, a competitor requested that a new entrant in a industry, allegedly a discounter, increase prices to the level charged by the other manufacturers in the industry.

Regarding non-merger actions we have completed, for the first time in nearly a decade, the Commission took action against resale price maintenance. First, we entered into a consent order with Kreepy Krauly, a manufacturer of automatic swimming-pool cleaning devices, that we charged with systematically entering into written agreements with dealers to maintain resale prices. More recently, the Commission accepted for public comment a consent order with Nintendo of America to settle charges that the firm fixed the prices at which dealers advertise and sell Nintendo home video game hardware to consumers. The Nintendo case is also noteworthy because it represents a milestone in federal-state cooperation. Virtually every state has accepted a consent order requiring the same prospective relief as that obtained by the Commission. Thus, Nintendo is subject to the same rules nationwide, rather than confronting separate obligations in each state, and consumers and dealers are afforded the same rights.

Another type of anticompetitive conduct we have taken action against is the use of tying arrangements. In a tying arrangement, a seller uses its power in one product market to force the purchase of a product in another market. Recently, in a complaint accompanying a consent order, the Commission charged Sandoz Pharmaceuticals Corporation with unlawfully requiring those who purchased its schizophrenia treatment drug, clozapine, to buy the distribution and patient monitoring services arranged by Sandoz as well. According to the FTC's complaint, Sandoz sold its drug, Clozaril, as part of a package which included monitoring and distribution services. Sandoz called this package the Clozaril Patient Management System ("CPMS"). While careful monitoring of patients using this drug is necessary to detect a possible fatal side-effect, institutional purchasers of the drug contended that they could ably and less expensively administer their own patient monitoring services. For example, the Veterans Administration estimated that it could save $20 million a year by providing these services itself.

Because Sandoz possesses under the Food, Drug and Cosmetic Act the exclusive right to market clozapine in the United States until September 1994, the company was able to force purchasers to obtain the whole package if they wanted to obtain the drug. But, under our consent order, Sandoz agreed not to require purchase of the entire CPMS system, and overall it appears the price of clozapine therapy has decreased from the previous price of about $9,000 a year per patient.

Another area of concern is the potential for trade associations to engage in anticompetitive conduct. Of course, trade associations have many legitimate functions. For instance, the collection and dissemination of information is a core function of trade associations and can be palpably procompetitive. Similarly, association seminars, newsletters and other legitimate information exchanges can benefit consumers by reducing the cost of business planning and enabling firms to compete more effectively.

Sometimes, however, associations go beyond legitimate information sharing and take actions whereby members of the association -- competitors -- agree not to compete. Much of our recent activity has been in the health care field. Our vigor in this area goes bac' several years, for we were pioneers at the

FTC in our concerns about competition in the health care area. Such conduct was alleged in the FTC's complaint accompanying a consent agreement reached with the Connecticut Chiropractic Association ("CCA"). CCA allegedly adopted and maintained three anticompetitive provisions in its Ethical Code. First, it prohibited members from offering and advertising free or discounted services, including the use of coupons. Second, the code forbade members to run advertisements that CCA considered to be "sensational", "undignified" or not in "good taste." Finally, CCA prohibited its members from implying that they possess "unusual expertise" unless they met certain requirements established by CCA.

The association coerced its members to comply with the Ethical Code, according to the complaint, by threatening to expel members who violated the code and by threatening to report them to chiropractic malpractice insurance carriers. CCA also allegedly threatened those who offered free or discounted services that it would attempt to influence health insurance companies to disallow or reduce reimbursements to their patients.

The Commission has long found that restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. The two "efficiency justifications" that we often hear -- prevention of deceptive advertising and maintaining professional dignity -- have been repeatedly rejected by the Commission and courts. It is not necessary to ban whole categories of advertising simply to prevent deception. And, as the Commission noted in its Mass. Board opinion, arguments that restricting advertising is necessary to uphold professional dignity "are premised on the notion that competition itself is inappropriate...."

Similarly, while it is appropriate for groups of competitors to form legitimate joint ventures, we have taken action against competitors who form sham joint ventures merely to facilitate collective action that would otherwise violate antitrust laws. In Southbank, we obtained a consent against an allegedly sham independent practice association, known as an IPA, and its 23 physician members located in the Jacksonville, Florida vicinity. At issue was the formation of the IPA as a collective bargaining agent for the member physicians in order to obtain higher fees. The IPA was also the vehicle through which the physicians engaged in threatened and actual boycotts of third-party payers in order to achieve higher fees for IPA participants.

Legitimate independent practice associations are organizations of health care providers that contract with HMOs or with other payers to provide care to subscribers. They reflect integration in the form of financial risk sharing -- profit or loss -- among the IPA's members and often undertake significant services to their physician members, such as quality and utilization review and claims processing. The issue of whether IPAs or other associations of physicians undertook to offer new service and high quality or whether such associations attempted to cover illegal price-fixing activties was first addressed in Arizona v. Maricopa County Medical Society. The question of whether an IPA is legitimate is determined on the facts of each case. In Southbank, the complaint alleges that Southbank was not a legitimate IPA because its sole function was to collectively negotiate contracts with third-party payers on behalf of its physician members and to threaten to boycott payers who did not meet its demands.

Once it is decided that an IPA is not a legitimate joint venture, and therefore its actions need not be analyzed under the rule of reason, condemnation of its conduct is simple. Under Superior Court Trial Lawyers Association, a "naked" agreement among competitors to coerce purchasers to pay higher fees is per se illegal. In this case, Southbank consented to its dissolution and each of the members agreed not to engage in illegal price-fixing activity in the future.

In another action, the Commission charged the medical staffs of two Fort Lauderdale hospitals with conspiring to prevent competition from the Cleveland Clinic Foundation by boycotts and other means. The Cleveland Clinic, based in Cleveland, Ohio, is a nationally known provider of comprehensive health care services to patients requiring specialized medical care. The clinic is organized and operated as a multi-specialty group medical practice, offering consumers an alternative to the more traditional individual and single-specialty group forms of practice.

Beginning in 1984, Cleveland Clinic allegedly sought to establish a regional branch, the Cleveland Clinic Florida (CCF), that would operate as a fully integrated, multi-specialty group practice -- a form of practice CCF officials believed would be attractive to consumers in that area. In order to offer all of the features of Cleveland Clinic's form of practice, CCF needed access to a highly specialized or tertiary care hospital in the area.

According to the complaint, when CCF physicians attempted to obtain hospital privileges at two nearby hospitals, Broward General and Holy Cross, the medical staffs took a number of actions to prevent this. They allegedly threatened to stop admitting patients to the two hospitals if the hospitals agreed to affiliate with Cleveland Clinic; conspired to prevent CCF physicians from becoming staff members; and conspired to act collectively in deciding whether, and on what terms, to make patient referrals to CCF's physicians.

There is no question that medical staffs have a role to play in determining whether applicants should obtain medical privileges. It can be procompetitive for medical staffs to use their expertise in assisting hospital boards in evaluating applicants. However, antitrust issues can be raised when physicians effectively make final decisions on privileges rather than simply making a recommendation to the hospital's board of directors. The appropriate antitrust analysis varies depending on the specific conduct in question.

In Cleveland Clinic, the physicians allegedly agreed to boycott a hospital because it gave privileges to physician-competitors. In such instances, the physicians in the group have agreed that in order to exclude a rival they would agree to deal with the hospital only on collectively determined terms. That means that they have agreed not to compete with each other concerning whether and on what terms they will deal with the hospital. If the physicians had made only a collective decision or recommendation to deny hospital privileges, a more thorough rule of reason analysis would be called for, because there might be sound reasons to deny privileges. The simple point is that under the antitrust laws medical staffs cannot use joint coercion to advance their interests.

At the same time I want to emphasize that the antitrust laws do not -- repeat, do not -- interfere in the many customary responsible efforts undertaken by health care professionals to promote high quality and cost-effective health care. The General Accounting Office recently conducted a study to determine the effect of the antitrust laws on the ability of physician groups and third-party payers to take responsible actions to reduce ineffective medical practice activities in the area of peer review and practice guidelines by third-party payers. The GAO Report concluded that: "[t]he antitrust laws need not unduly interfere with the responsible actions of physicians to reduce ineffective practice patterns and inappropriate utilization, or with those of payers to adopt practice guidelines. There appears to be no need at present for legislation providing antitrust immunity to physicians or payers to facilitate these activities."

The Commission agreed with the Report's conclusion, and our letter to the GAO, included in the Report, highlights specifically FTC policy on certain issues. The Commission noted that: (1) hospital-based peer review is generally procompetitive and raises antitrust issues primarily when abused to restrict competition for reasons not grounded in the efficient delivery of high-quality services; (2) advisory practice standards and other educational programs are highly unlikely to cause antitrust concerns; (3) mandatory practice standards are likely to be procompetitive if adopted by integrated joint ventures; and (4) insurers' unilateral adoption of practice guidelines to govern their payment decisions does not violate the antitrust laws.

As groups deal with an evolving health care marketplace, we stand ready to help them abide by the antitrust laws. Indeed, Bureau of Competition staff has worked with groups seeking to set up preferred provider organizations, and with associations striving to regulate deceptive advertising by their members. While remaining vigilant in cases of law violations, we welcome the opportunity to help health care providers comply with the law.

Mergers

On the merger front, we continue to be busy, despite a significant drop in filings. In the last fiscal year, 1991, we received 1529 filings, compared to 2262 in fiscal year 1990. We took enforcement actions in 14 merger matters.

The enforcement actions we took are as varied as the industries we investigated. In some cases, the only adequate remedy was to block the transaction, so the Commission authorized staff to seek a preliminary injunction against the proposed transaction. Such was the case in acquisitions involving recodable locks, x-ray security screening equipment and molecular beam epitaxy systems, equipment used to produce materials used in advanced semiconductor devices. In one case, involving a hospital acquisition by a non-profit corporation in Georgia, staff sought and obtained, after a district court hearing and an appeal to the 11th Circuit, an injunction under the Clayton Act. The appeals court held that the Commission had jurisdiction over acquisitions made by non-profit hospitals under the Clayton Act, a decision consistent with that made by the Commission in its Ukiah case.

In other cases, the Commission found that consent agreements were adequate remedies. The Commission is open to considering consents that deviate from standard divestiture orders, if compelling reasons for that departure can be given. The key to obtaining acceptance of a consent agreement lies in the recognition of some basic points. First, and most important, the remedy -- whether divestiture or licensing -- must ultimately undo the likely competitive problems. Second, the consent order must insure against any interim harm to competition while the actions required under the agreement are undertaken. Third, the consent must include certain standard provisions, such as a prior approval requirement for future acquisitions.

Finally, the consent must not be overly regulatory. The Commission has neither the resources nor the inclination to become involved in policing the many potential technical and legal controversies engendered by certain types of consent provisions.

In some cases, including those involving funeral homes and title plants, simple divestiture orders have been adequate. In others, the respondents agreed to eliminate obstacles to a competitive marketplace. In the RWE/Vista matter, the acquisition involved an overlap in the world market for high-purity alcohol process alumina. The proposed consent was designed to help establish a new company with the technology required to build a plant and the experience to establish itself as a producer of high-purity alcohol process alumina comparable to the merging parties. To achieve this, the consent requires RWE to grant a licensee the rights to patents, trade secrets and other information relating to the processing of this alumina. The consent requires licensing of both RWE and Vista alumina. The licensee would operate a joint venture in which RWE would hold a minority ownership share, which would enable RWE to share its experience and provide it with an incentive to create a successful competitor. Shortly after the agreement was accepted for comment, RWE granted a technology license to Discovery Aluminas and established a joint venture between Discovery and Vista to produce the alumina.

There is some evidence that the result we hoped for in approving one consent is beginning to occur. In the ARCO/Union Carbide matter, the divestiture included a provision whereby ARCO could not initiate a lawsuit against Texaco to prevent it from entering the production of one of the chemicals at issue. Recently, we learned that Texaco is indeed beginning construction of a plant and taking steps to provide the competition from a third competitor that we hoped for.

Of course, our ability to protect consumers from anticompetitive mergers at all depends largely on our ability to investigate and, if warranted, challenge them before assets have been scrambled. Thus, we insist on compliance with the Hart-Scott-Rodino premerger notification program. Last year, in conjunction with the Department of Justice, we took actions in 5 cases where companies violated the premerger rules. In one matter, ARCO and Union Carbide each agreed to pay $1 million in civil penalties. The complaint charged that Union Carbide transferred beneficial ownership of certain assets to ARCO and received the full price before the required premerger filing was made. Union Carbide allegedly acted only as a caretaker and essentially stopped acting as an independent competitor before an antitrust review was completed. As it turned out, there were substantive antitrust concerns and a consent agreement was obtained on the merits as well.

In another matter, Equity Group Holdings, a partnership controlled by Steven and Mitchell Rales, agreed to pay $850,000 in civil penalties. The Rales' were charged with using a particular structure to purchase stock in order to avoid making a filing. Settlements were obtained in two other matters in which the complaints alleged that parties failed to fulfill premerger notification requirements, resulting in civil penalties of $550,000 and $500,000. Finally, a complaint was filed in an ongoing action against General Cinema Corp. in the U.S. District Court for the District of Columbia for its alleged violations of the HSR rules.

We have also taken steps to expedite civil penalty cases under the premerger notification law. In the recognition that agreements between so-called competitors may be efficient, we recently entered into a Memorandum of Agreement with the Department of Justice whereby the Commission can file an HSR penalty case if the Department does not advise the Commission of its views within 45 days. We believe this will allow the Department to focus on the policy implications of a case, without requiring it to undertake the burden of litigating each case it approves.

Cooperation with other Antitrust Enforcement Agencies

We continue to have productive relations with other antitrust enforcement agencies. Our relationship with Justice, both in terms of deciding which agency will deal with a specific case and on issues such as technical assistance to foreign nations, remains a positive one. We continue to work closely with the states as well. The Executive Working Group between the FTC, DOJ and the National Association of Attorneys General continues to meet periodically and has been a useful forum in which to share views. We have referred a number of cases to each other, and the states have provided amicus support on a range of cases. In the investigation of CNBC's proposed acquisition of

FNN, numerous states supported the Commission's request that the U.S. bankruptcy court in the Southern District of New York allow us time to review the matter. In the Ticor case, involving questions of the state action doctrine, 33 states also submitted an amicus brief in support of the government's petition for certiorari. Finally, as I mentioned earlier, the Nintendo matter represents a significant step in federal-state cooperation.

Our cooperative efforts extend beyond the boundaries of this country as well. In late September, the United States and the European Community signed an agreement designed to promote cooperation and coordination in enforcement of their respective antitrust laws. Under this agreement, U.S. and EC competition authorities can ask each other to proceed against anticompetitive conduct that is harmful to their own interests. The competition authorities may coordinate enforcement activities and are to consult with each other to resolve the inevitable conflicts that will occur. This agreement was negotiated and signed in less than one year, which shows the importance both sides place on the coordination of antitrust enforcement. By making it possible to resolve conflicts at an early stage, this agreement will make antitrust enforcement more efficient, and we trust it will lessen the chance of inconsistent enforcement. This agreement may be particularly helpful in analyzing mergers with extraterritorial effects. The Commission has also modified its rules to allow foreign attorneys who are not licensed to practice in the United States, but who are licensed to practice law by an EC member state and authorized to represent clients before the EC Commission, to appear before the FTC.

The newly emerging democracies have also expressed an interest in U.S. competition policies and enforcement mechanisms. Because the demand for technical assistance has been so great, the Agency for International Development has provided the FTC and the DOJ with $7.2 million of funding to support a three-year program for Central and Eastern European governments involved in the development and implementation of competition law and policy. Currently, we have an FTC attorney and DOJ economist spending a year in Czechoslovakia and a DOJ attorney and FTC economist in Poland.

Our years of experience enable our agencies to provide assistance on both procedural and substantive issues. As I discussed at yesterday's conference at Fordham, one area in which we have some expertise is how to coordinate enforcement activities among different agencies. We have also provided information on the nuts and bolts of how we conduct investigations -- whom we call, how we obtain information and the like. We are delighted to have this opportunity to assist nations who are developing market economies and we hope to help them protect consumers in their countries as we strive to do in ours.