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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.

It is a pleasure to be here this morning for my third appearance before the "60 Minutes" inquisition. It is sometimes said that the third time is a charm, but I know better than to try to charm this group. Instead, I will use my time to tell you what we have been doing in the antitrust area at the Federal Trade Commission -- noting, as always, that these are my views and not necessarily those of the Commission or any other Commissioner.

Yesterday afternoon, many of you had the opportunity to hear some of my colleagues on the Commission discuss "making your case to FTC Commissioners." This morning I want to turn things around and make a case to you. My proposition is that the past year has seen significant progress toward making the 1990s the decade in which antitrust reaches maturity, particularly in terms of the coherence and consistency with which the laws are enforced.

Not long after I took this job, I described three initial goals I hoped the Commission could achieve: enhancing public confidence in the Commission's antitrust enforcement efforts; improving our relations with other institutions, including Congress and the states; and reversing the decline in the Commission's resources that was impeding our ability to do our job properly. These were baseline objectives -- fundamental prerequisites to the agency's ability to fulfill its mission effectively.

In previous remarks to this group and others, I have described our progress over the past two and a half years toward achieving those goals. There is always more to be done --

particularly in the area of resources -- but I think it is fair to say that we have made great strides in each of these areas. In particular, the past year has seen significant progress in an area that has been noted by, among others, Tom Rosch,[1] one of my inquisitors today: the increasing consistency in the basic approach to antitrust enforcement by the federal antitrust agencies, the states and even, to a degree, antitrust authorities abroad.

The just-announced joint adoption by the Commission and the Justice Department of revised Merger Guidelines surely is a prime example of this progress. Others have spent a great deal of time during this Spring Meeting discussing specific aspects of the revised Guidelines, and undoubtedly that discussion will continue for some time to come. But I believe that one of the most important aspects of the joint Guidelines is the fact that both of the federal antitrust agencies have now formally subscribed to the same statement of merger enforcement policy. This benefits all those who come into contact with the system of dual merger enforcement at the federal level, including the courts, the business community and the bar. The joint Guidelines are an important milestone in cooperation at the federal level, and I congratulate all those who had a part in bringing them about.

Before describing what I see as some of the more significant changes in the 1992 Guidelines, I should stress that, in my view,

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[1] See Rosch, "From the Section Chair," Antitrust, Vol. 5, No. 1 at 2-3 (1990).

the new Guidelines reaffirm the basic approach to merger analysis in the 1982 and 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Mergers. For the most part, the changes that have been made clarify the analysis, correct some misunderstandings under the prior Guidelines, and refine the Guidelines in light of advancements in thinking about mergers during the past decade. But on the whole, I do not expect the Commission's analysis of mergers to change substantially under the new Guidelines.

For example, the approach to market definition and measurement remains similar to that of the 1984 Guidelines, with the caveat that firms likely to enter the relevant market by obtaining new assets within one year and without significant sunk costs generally will be treated as market participants. Similarly, the discussion of market concentration has been revised to more accurately reflect the agencies' actual practice. But mergers leading to a significant (100-plus HHI) increase in concentration in highly concentrated post-merger markets (more than 1800 HHI) remain presumptively anticompetitive, and mergers in the 1000 to 1800 HHI range will continue to be regarded as potentially raising significant competitive concerns.

That said, there clearly are some noteworthy changes.

The analysis of entry has been improved in several respects. Ease of entry remains a potentially dispositive issue in any merger investigation. But I believe the Guidelines' analysis is now more analytically rigorous, and better reflects how we actually analyze entry. Proponents of some mergers have in the past advanced very broad, theoretical ease of entry arguments. The new Guidelines now make clear that entry must satisfy three conditions: it must be timely; it must be likely to occur; and it must be sufficient to deter or counteract any anticompetitive effects from the merger. The Guidelines also make clear that all phases of entry must be taken into account, from planning and permitting through marketing, distribution and satisfaction of customer testing requirements.

I also believe the new Guidelines provide a more thorough discussion of the potential for mergers to allow the unilateral exercise of market power by the merged firms. Most of our merger investigations raise issues concerning possible collusion. But in some cases the merged firms may themselves be able to profitably restrict output and raise prices. The new Guidelines discuss how this can occur both in markets involving differentiated products -- where some buyers regard the merging firms' products as particularly close substitutes -- as well as in markets where the merging firms may be able to raise prices unilaterally because other firms lack sufficient capacity to increase output and restrain the price increase. Although these theories may not come into play in a great many investigations, the new Guidelines' description of them should help the public's understanding of how these issues are analyzed.

The new Guidelines also discuss the fact that coordinated anticompetitive effects entail (1) reaching terms of coordination, (2) the ability to detect cheating and (3) the ability to punish cheating. In large part the discussion adds conceptual clarity without changing the essence of our analysis.

The new Guidelines also eliminate language from the prior Guidelines referring to the financial condition of firms in the relevant market. Some had misapplied that language, attempting to turn it into a "flailing firm" defense and arguing that an otherwise anticompetitive merger should be allowed because one party was in a weak financial position, perhaps because of a downturn in the business cycle, as opposed to being in danger of imminent failure, as is required under the "failing firm" defense. The elimination of that language and the misunderstandings that came with it are a clear improvement.

In addition to increased cooperation and consistency in antitrust enforcement at the federal level, the past year has seen continued progress in cooperation between federal and state enforcement authorities -- one of my major objectives, as I mentioned earlier.

Avenues of cooperation include the referral of complaints and investigational leads between the Commission and the states, as well as parallel investigations. For example, recently we received a request from a state Attorney General's office for an opportunity to discuss with staff competitive issues relevant to a merger that had been reported to the Commission pursuant to the Hart-Scott-Rodino Act. While there are substantial legal constraints on our ability to share HSR-submitted information with the states, in this instance the Commission received waivers of confidentiality from the parties to the transaction. Armed with these waivers, the Commission staff was free to discuss the transaction with representatives of the interested state.

The Commission is now taking steps to expand and formalize this type of federal-state cooperation in merger investigations, which until now has occurred on an ad hoc basis. In early March, the Commission announced in the Federal Register[2] the details of a proposed program that would operate in conjunction with the Voluntary Pre-Merger Disclosure Compact developed by the National Association of Attorneys General. Parties reporting transactions to the Commission under the HSR Act may "invoke" the Compact by providing HSR filings and certain other materials to a designated liaison state. If firms meet these obligations, the Compact members have in turn agreed not to serve compulsory demands for information during the HSR waiting period and prior to filing a lawsuit to enjoin the proposed transaction. Under the proposed program, if the filing parties choose to invoke the NAAG Compact and if they provide the Commission with appropriate waivers of confidentiality, the Commission staff will be authorized to provide various types of assistance to the liaison state in analyzing the merger.

I should emphasize that the federal-state cooperation I have described would occur only with the consent of the merging

[2] Request for Comment on Proposed Cooperative Program For Federal-State Cooperation in Merger Enforcement, 57 Fed. Reg. 8127 (March 6, 1992).

parties. The Commission has solicited public comments on the proposal, and I anticipate that the Commission will promptly evaluate any comments that are received.

Before leaving this topic, I want to acknowledge the assistance that the FTC has received from numerous states in connection with the Ticor litigation.[3] The principal issue in Ticor is the contours of the state action exemption, and in particular, the standard for determining when private anticompetitive conduct is "actively supervised" by the state. The case involved price fixing for title search and examination services by a rate bureau. The Commission found that the "active supervision" prong is not met unless state officials determined that the privately-set rates met the state's own statutory criteria and then affirmatively approved the rates. The Third Circuit reversed the Commission, but the Supreme Court granted certiorari and heard oral argument in January of this year. An *amicus curiae* brief in support of the Commission's position was filed by the Attorneys General of 36 states. I would like to express my appreciation to everyone involved in that project.

Progress toward cooperation in antitrust enforcement has not been confined to domestic activities. Our international activities of the past year served to deepen cooperative relationships that have been developing over the past several years. We continued to assist those countries that are striving

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3 Ticor Title Insur. Co. v. FTC, 922 F.2d 1122 (3d Cir.), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991), *cert. granted*, ___ U.S. ___ (October 7, 1991).

to convert to market economies. At the same time, we formally defined our relationship with the antitrust authorities of the European Communities, even as we participated in an effort within the Organization of Economic Cooperation and Development to identify and address differences in the merger review procedures followed in OECD member countries.

The Federal Trade Commission and the Department of Justice are cooperating in a program funded by the Agency for International Development ("AID") to provide technical antitrust and consumer protection advice to the newly-formed democracies of Central and Eastern Europe. Currently, the program covers Poland, Czechoslovakia, Hungary, Bulgaria, Romania, Estonia, Latvia and Lithuania. The technical assistance consists of four major types of activities: (1) placement of long-term resident advisors; (2) short-term assistance missions by additional attorneys and economists with particular expertise in specific industries or anticompetitive practices being addressed by the antimonopoly agencies; (3) internships in the United States to provide government officials from Central and Eastern Europe with a broader understanding of the implementation of competition law; and (4) regional workshops on enforcement issues.

Currently, the FTC and DOJ each have one professional working long-term with the competition authorities in Czechoslovakia and one each working long-term in Poland. Their role is to give those authorities the benefit of U.S. experience with antitrust law enforcement and to provide training in its practical application. A number of short-term assistance missions by attorneys and economists with particular expertise in specific industries have supplemented their work.

In March, a team of FTC and DOJ experts, headed by Commissioner Dennis Yao, gave assistance to the Hungarian Competition Agency on such matters as antitrust enforcement techniques, regulatory issues, and criminal antitrust enforcement. We are providing similar assistance to Bulgaria and Romania. Also in March, we and DOJ held a regional conference in Vienna on Competition Policy and Law Enforcement for staff from the competition agencies of Poland, Czechoslovakia, Hungary, Bulgaria, Romania, Latvia and Lithuania on the actual investigational techniques and methods for economic analyses used in the United States in antitrust enforcement.

Last September, the United States and the European Commission signed an agreement designed to promote cooperation and coordination in the enforcement of our respective competition laws. Under this agreement, U.S. and EC competition authorities have agreed to notify each other of enforcement activities which may affect important interests of the other. We also will share information with each other within the limits of our respective confidentiality laws. The Agreement takes a step beyond our existing bilateral cooperation accords by providing that we may ask each other to proceed against anticompetitive conduct that occurs on one continent and results in harm to the other. We have also agreed to meet our EC counterparts twice yearly to discuss our enforcement activities and matters of mutual interest in the application of our competition laws. This agreement was negotiated and signed in less than one year, which shows the importance both sides place on improving cooperation in antitrust enforcement and the avoidance and resolution of conflict.

As exemplified by the recent Report of the ABA Special Committee on International Antitrust, more and more attention is being focused on international antitrust harmonization. The increasingly international scope of business activity underscores the desirability of greater consistency in existing "rules of the game" from country to country, as well as the growing recognition of competition policy as an important element of an open international trading system. We have taken note of the recommendations of the ABA Special Committee's Report directed toward the strengthening and harmonization of antitrust laws throughout the world.

We continue to maintain a regular liaison with antitrust authorities in other countries, including the Japanese Fair Trade Commission ("JFTC"). In February of last year the JFTC proposed two new sets of enforcement guidelines. The Commission's staff provided comments to the JFTC and many of these comments apparently were taken into consideration in the final, published version of these guides.

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The progress I have been describing toward greater cooperation and consistency in antitrust enforcement is not an end in itself, but a means to improving the substance of enforcement activities. At the Federal Trade Commission, the past year has seen initiatives in some new areas as well as some familiar ones.

On the merger enforcement front, the decline in the number of Hart-Scott-Rodino filings that was observed in fiscal years 1990 and 1991 appears to have levelled off, with the number of reported transactions so far this fiscal year about equal to the number at this point last year. As of March 31, we had issued 12 second requests and taken 3 enforcement actions since the fiscal year began last October.

A highlight of the Commission's year in merger enforcement was the University Health case.[4] The Commission successfully blocked the proposed acquisition of St. Joseph Hospital of Augusta, Georgia, by University Health, Inc., which operates another nonprofit hospital in the Augusta area. The Commission asserted that the acquisition would have removed one of the few competitors in the market for the provision of in-patient services by acute-care hospitals in the Augusta area. This is an important decision for several reasons. First, the decision confirms that the Commission has jurisdiction over asset acquisitions by nonprofit entities. Second, the decision is important because the Eleventh Circuit rejected a number of

[4] Federal Trade Commission v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

defenses that the Commission's staff argued should not immunize the otherwise anticompetitive acquisition.

The district court originally denied the Commission's request for an injunction despite the concentrated market and a substantial barrier to entry caused by Georgia's certificate of need law.[5] The Eleventh Circuit reversed. The court of appeals rejected the notion that St. Joseph was a weak competitor, the so-called "flailing firm" defense. This is an area where, as I said earlier, I believe the revised Merger Guidelines improve upon the 1984 Guidelines, by eliminating language that has encouraged merging parties to assert the "flailing firm" defense.

The Eleventh Circuit also rejected the finding that possible efficiencies resulting from the acquisition could overcome the presumption of illegality. The court concluded that only efficiencies that "ultimately would benefit competition and, hence, consumers" can be interposed as a defense.[6] Finally, the court rejected the notion that nonprofit entities would be less likely than profit-maximizing institutions to abuse market power. A provisional settlement in this case is currently before the Commission.

Last year the Commission authorized its staff to seek a preliminary injunction and temporary restraining order in federal court to block the proposed acquisition of Heimann GmbH, a

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[5] Federal Trade Commission v. University Health, Inc., 1991-1 Trade Cas. (CCH) ¶ 69,444 (S.D. Ga. 1991).

[6] University Health, 938 F.2d at 1223.

subsidiary of Germany's Siemens AG, by EG&G, Inc.[7] The Commission believed that the proposed acquisition would have substantially decreased competition in the U.S. market for x-ray security screening equipment of the type commonly found in airport concourses. EG&G is the industry leader in the U.S. market for x-ray security equipment, with a rapidly growing presence outside the United States. Heimann is the largest x-ray screening equipment manufacturer outside this country. Although at the time of the proposed acquisition, Heimann was a relatively new entrant into the U.S. market, it had managed to obtain a significant market share here. After the Commission announced its intention to challenge the proposed acquisition, EG&G notified the Commission of its decision to restructure its proposed acquisition of Heimann and to forego acquiring those Heimann assets related to the German firm's x-ray security business.

The Commission also authorized its staff to seek to enjoin a proposed merger between two of the world's leading manufacturers of Molecular Beam Epitaxy ("MBE") systems, which are used in the manufacture of semiconductors.[8] Instruments SA had proposed to acquire the Molecular Beam Epitaxy Equipment Division of INTEVAC, Inc. The Commission believed that the proposed combination could substantially lessen competition in the manufacture and sale of

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[7] Heimann GmbH, 5 Trade Reg. Rep. (CCH) ¶ 23,037 (August 8, 1991).

[8] Instruments SA, 5 Trade Reg. Rep. (CCH) ¶ 22,995 (May 23, 1991).

MBE systems and equipment. After the Commission vote, the parties abandoned the transaction.

Among the merger cases that were resolved by consent order in the past year, the Commission recently accepted a consent agreement because it had reason to believe that UK-based Hanson's acquisition of Beazer, another British company, would substantially reduce competition in the northern California gray portland cement market.[9] The proposed acquisition allegedly would have increased concentration in an already highly concentrated market which is difficult to enter through the construction of either cement manufacturing plants or deep-sea import terminals.

The Commission also gave final approval to a consent order involving RWE Aktiengesellschaft's proposed $1.3 billion acquisition of Vista Chemical Company.[10] The Commission alleged that the acquisition would eliminate competition in the market for the worldwide manufacture and sale of high purity alcohol process alumina. The order requires RWE to take a number of steps to preserve competition in the relevant market, including licensing certain technology and assisting the licensee in the formation and initial operation of a joint venture capable of establishing itself as a viable competitor.

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[9] Hanson PLC, FTC File No. 921-0014 (December 16, 1991).

[10] Alpha Acquisition Corp., FTC File No. 911-0040 (January 25, 1991).

Recently the Commission finalized a consent and hold separate order resolving Commission charges that Mannesmann, A.G.'s proposed acquisition of Rapistan Corporation would substantially decrease competition in the market for high-speed, light-to-medium duty conveyor systems.[11] Rapistan and Buschman are both leading suppliers of high-speed conveyor systems used to transport and sort cartons for such applications as grocery and general merchandise warehouse operations. Under the settlement, Mannesmann agreed to divest its Cincinnati-based subsidiary, The Buschman Company.

In recent weeks the Commission issued a decision and order, my own first adjudicative opinion since joining the FTC, dismissing a 1988 complaint challenging Owens-Illinois' acquisition of Brockway, Inc. The transaction combined two of the three largest producers of glass containers in the United States. Despite concentration levels and entry conditions which raised competitive concerns, the Commission found anticompetitive effects to be unlikely.

Much of the opinion is devoted to product market issues, and it illustrates in some depth the theory and application of Merger Guidelines principles. The opinion rejects an all-glass-container market but determines that a small but significant and nontransitory price increase could be sustained in six inelastic end-use markets.

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[11] Mannesmann, A.G., FTC File No. 911-0110 (January 15, 1992).

The Commission concluded that under the totality of the circumstances present, selective collusion focused on identified end-use markets was unlikely. First, the Commission observed that the six inelastic end-use markets constitute less than 15% of the overall glass container industry. Then the Commission emphasized that suppliers of glass containers for the elastic uses can convert their facilities to produce containers for the inelastic markets with "extraordinary speed"--as little as five to eight hours. To this the Commission joined various supplemental factors including use of stock containers (making it possible for buyers to evade a selective collusive scheme) and concentration of large market shares in a few buyers, some with self-manufacturing capabilities and some with long-term, contractual price protection. "On the basis of [the] record as a whole," the Commission found no reasonable probability of collusion in any of the product markets.

In the merger compliance area, four civil penalty actions for violations of the Hart-Scott-Rodino premerger reporting Act and Rules have been prosecuted by the Commission's staff or referred to the Justice Department in the past year.[12] So far,

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[12] In United States v. General Cinema Corp., 1992-1 Trade Cas. (CCH) ¶ 69,681 (D.D.C. 1992), a case challenging General Cinema's claimed investment intent in purchasing shares of Cadbury Schweppes, General Cinema paid $950,000 to settle the matter. In United States v. Atlantic Richfield and U.F. Genetics, 1992-1 Trade Cas. (CCH) ¶ 69,695 (D.D.C. 1992), the United States filed actions challenging the timing of the premerger filing in Atlantic Richfield's sale of its agricultural seed company to U.F. Genetics, alleging a transfer of assets requiring filing under a beneficial ownership theory. ARCO paid (continued...)

settlements calling for payment of a total of nearly $1.4 million have been obtained in three of these cases. In some of the cases, the Commission's attorneys have acted as Special Attorneys to the United States Attorney General pursuant to the Memorandum of Agreement between the Commission and the Department of Justice, which was announced last year.

We have also continued our efforts to minimize the burden that the statutory Hart-Scott-Rodino process imposes on merging parties. The Bureau of Competition has made frequent and successful use of the "quick look" investigative procedure, which seeks the parties' cooperation in focusing on potentially dispositive issues at the outset of the investigation where specific competitive concerns can be identified, rather than proceeding directly to full compliance with the second request. Most of these "quick looks" have resulted in resolving the concerns and allowing the transaction to proceed.

The Bureau of Competition has also continued to streamline its model second request, and to achieve greater consistency among second requests proposed by the Bureau's various litigation units. Work is also in progress on possible improvements to the initial HSR reporting form that would give us a better picture of

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[12](...continued) $290,000 (93% of the maximum statutory penalty) to settle the claim in February 1992. U.F. Genetics agreed to pay $150,000, and the United States' claim under that agreement is pending in U.F. Genetics' bankruptcy proceeding in California. And in United States v. William Farley, No. 92C1071 (N.D. Ill. February 12, 1992), the United States is challenging Mr. Farley's claimed investment intent in acquiring shares of West Point Pepperell.

proposed transactions at the outset and thereby reduce the need for second requests. I should also call attention to the substantial Commission resources that are devoted each year to giving HSR compliance advice. Our HSR office handles thousands of telephone calls each year, performing a highly valuable service to the business and legal communities.

I also want to report to you this morning on the results of the just-released staff report of our Bureau of Economics titled "Case Studies of the Price Effects of Horizontal Mergers" -- what has been termed the "merger retrospective" study. Two years ago in this forum I described the project that I had asked our staff to undertake, in which several mergers that the Commission did not block would be revisited to examine their competitive effects. The study was designed in part to assess criticism that merger enforcement was too lax during the 1980s, and to identify any areas where our merger analysis might need revision.

I reported to you then the results of the shorter-term project in this study, which revealed no fundamental flaws in the Commission's original analyses but indicated the need for a more rigorous analysis of factors such as ease of entry. The more comprehensive project that has now been completed fills an important gap in the antitrust literature: empirical analysis of the effects of actual horizontal mergers on market prices. This study, undertaken by our Bureau of Economics staff, is by no means a definitive reading of the mergers' effects. The conclusions are tentative ones, but interesting nonetheless, and deserving of further study.

One of the case studies examines the 1985 merger of Kaiser Cement Corporation and Lone Star Industries -- the only two cement producers in Hawaii -- which was not challenged by either federal antitrust agency. The study notes that imports, which had been increasing prior to the merger and were readily accessible, had continued after the merger at or above prior levels. The study finds no evidence of increased prices resulting from the acquisition; instead, adjusting for demand and other factors, the study concludes that prices declined. Thus, the decision not to challenge the merger appears to have been validated. I might point out the contrast between this case, in which there was no apparent constraint on imports, and the Hanson/Beazer case I discussed earlier, in which it was alleged that in the geographic market involved in that case imports were constrained by import terminal capacities and that building additional terminal capacity was difficult.

A second case looks at a 1983 acquisition that combined the titanium dioxide assets of SCM Corporation and Gulf & Western, producing the second-largest firm in a highly concentrated industry. This acquisition also was not challenged by either agency. Although the acquisition may have created significant technology-related efficiencies, the study finds that following the merger prices went up by a statistically significant amount, after adjusting for changes in costs, demand and other factors.

The study concludes -- correctly, in my view -- that efficiencies do not necessarily prevent otherwise anticompetitive acquisitions from resulting in price increases.

The third case study involves the effects of Weyerhaeuser Company's 1980 acquisition of a corrugated medium mill owned by Menasha Corporation. Unlike the other two cases, this acquisition was challenged by the Commission. Rather than granting a preliminary injunction, however, the district court allowed the acquisition to proceed under a hold-separate order that allowed Weyerhaeuser to own, but not control, the mill pending administrative proceedings by the Commission. The administrative proceedings later were dismissed, the hold-separate order was removed and the acquisition was fully consummated.

The study's findings in this case are quite interesting. During the time the hold-separate order was in effect, prices increased significantly; but when the order was removed, prices fell to approximately premerger levels. The authors of the study conclude that the hold-separate order may have created incentives for the management of the mill to act in ways that lessened competition, while delaying the realization of vertical efficiencies from the acquisition.

In my view, this case study draws in question the notion that a hold-separate order, as opposed to a full-stop injunction, is an effective means of deterring price effects from an acquisition pending litigation. A distinction needs to be drawn here between hold-separate orders that substitute for full-stop injunctions, and the hold-separate provisions ordinarily used in Commission consent orders to maintain the viability and competitiveness of assets that are to be divested under the order pending completion of the divestiture. The latter provisions are effective means of allowing the overall transaction to proceed under the consent order while ensuring that meaningful divestiture of the competitively troubling assets can occur.

The Bureau of Economics' role in assisting with our main enforcement mission extends to the advocacy of procompetitive and deregulation positions before other government entities. In this role, the Bureau works closely with our Office of Consumer and Competition Advocacy. We have been requested by numerous state legislatures to provide advice on the effects of proposed legislation. The subjects of these advocacy efforts have recently included proposals to regulate gasoline marketing, retail optometry, funeral and cemetery regulation, HMO pharmacy access and intrastate trucking.

These advocacy efforts also include subjects of national interest. The Commission staff have recently examined regulations in fields including telecommunications, allocation of licenses through markets and administrative mechanisms, and restrictions on network ownership of programs for TV syndications. Even closer to home, the staff of the Bureau of Economics, along with our Bureau of Consumer Protection attorneys, commented on several important regulations in the consumer protection realm, including FDA's regulation of information on food labels and the FCC's regulation of 900 phone-number information providers.

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This has been an active, and interesting, year for our competition mission outside the merger area as well. In particular, we have been and continue to be active in the critical area of health care, a collection of markets in which, in the aggregate, costs have been rising at a rate in excess of ten percent a year, and in which it is anticipated that America will spend a record $817 billion in 1992. We believe that antitrust enforcement has an important role to play in this area.

Capping an investigation I reported to you last Spring, the Commission accepted for public comment a consent agreement with Sandoz Pharmaceuticals Corporation,[13] which would settle charges that Sandoz unlawfully required those who purchased its schizophrenia drug, clozapine, to also buy distribution and patient monitoring services arranged by Sandoz. While monitoring of patients using the drug is necessary to detect a possible fatal side-effect, institutional purchasers of the drug contended that they could administer their own patient monitoring services. For example, the Veterans Administration estimated that it could save $20 million a year by providing these services to its own patients.

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[13] Sandoz Pharmaceuticals Corp., FTC File No. 901-0124 (June 20, 1991).

Because Sandoz has the exclusive right under the Food, Drug and Cosmetic Act to market clozapine in the United States until 1994, and there is no close therapeutic substitute for the drug, Sandoz allegedly was able to force purchasers to obtain the whole package if they wanted to obtain the drug. Sandoz agreed not to require purchase of the entire system, though it retains the right to refuse to sell to purchasers that do not establish adequate monitoring services.

The recent consent orders with the medical staffs of Broward General Medical Center and Holy Cross Hospital[14] reiterated a long-standing theme of the Commission's work in the health-care field: protecting newcomers offering alternative modes of health-care delivery against boycotts by incumbents. The Commission charged the medical staffs of the two Fort Lauderdale hospitals with conspiring to prevent competitive entry into that area by the Ohio-based Cleveland Clinic Foundation. Cleveland Clinic is a multi-specialty group practice that offers an alternative in terms of pricing of services, providing a fixed "unit price" determined by the patient's diagnosis in advance of treatment. According to the complaints, when CCF physicians attempted to obtain hospital privileges at Broward General and Holy Cross, the medical staffs at the two hospitals threatened to stop admitting patients to the two hospitals if the hospitals affiliated with Cleveland Clinic, agreed not to refer patients to

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[14] Medical Staff of Broward General Medical Center, FTC Docket No. C-3344 (September 27, 1991), and Medical Staff of Holy Cross Hospital, FTC Docket No. C-3345 (September 27, 1991).

CCF physicians, and agreed to prevent CCF physicians from becoming staff members. The consent orders prohibit the respondents from entering, or attempting to enter, any agreements that would restrain competition between the hospitals and CCF or any CCF physician.

Another well-established theme of the Commission's health-care antitrust enforcement is careful scrutiny of combinations among health-care competitors that claim to have procompetitive goals while engaging in active pursuit of diametrically opposed objectives. In Southbank IPA, Inc.,[15] the Commission accepted a consent order with what was alleged to be a sham independent practice association and its members. At issue was the formation of the IPA and its operation as a boycott vehicle against third-party payors to achieve higher fees.

Legitimate IPAs are partially or fully integrated physician associations that contract with health maintenance organizations to provide care to HMO subscribers, entailing risk sharing by their physician members. But in Southbank, the IPA's alleged "functions" did not involve integration, but merely the facilitation of price agreements among physician members by joint negotiation of contracts with third-party payors. The Commission obtained a settlement that includes the organization's consent to its own dissolution, as well as the agreement of each of the 23

[15] Southbank IPA, Inc., FTC Docket No. C-3355 (Dec. 20, 1991).

members not to engage in illegal price fixing and boycott activity in the future.

The Commission has recently obtained consent orders in two other cases involving alleged boycotts in health care markets. In Rockford Area Nursing Homes, the Commission has taken a consent agreement subject to public comment[16] in a case in which a group of nursing homes allegedly agreed to boycott local nurse registries in order to suppress prices for hiring temporary nurse assistants. This type of alleged price fixing by buyers restricts the supply of, and limits consumer choices for, such nursing services. The case makes the point that price fixing boycotts are unacceptable under the antitrust laws, whether they are initiated by sellers or by buyers.

In another case, in which the order has now become final,[17] the former chairman of the Department of Obstetrics and Gynecology at a Miami medical center allegedly agreed with other department members to threaten to withdraw emergency room services in an attempt to coerce the hospital to offer more favorable economic terms. Under the consent order, the respondent is prohibited from agreeing with other physicians to boycott the emergency room of any hospital. In both instances, collective activity allegedly was used to advance the financial

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[16] Debes Corp., FTC File No. 891-0048 (January 16, 1992).

[17] Roberto Fojo, M.D., FTC Docket No. C-3373 (March 2, 1992).

interests of the respondents at the expense of competition and consumers.

The year ahead can be expected to be similarly fruitful for our non-merger antitrust enforcement.

For example, an investigation into possible anticompetitive practices in the infant formula industry has reached an advanced stage. This matter, previously discussed in Bureau of Competition testimony before Congress, has focused on several subjects, including concerns regarding bidding practices within the federally-funded WIC nutritional program, and the possibility of anticompetitive restrictions on advertising directed to consumers.

The Bureau of Competition is also currently pursuing another investigation involving restraints on retail prices of certain consumer goods. At issue is a possible horizontal agreement among standard-format retailers, who perceived themselves as threatened by a discounter competitor, to threaten to boycott their suppliers in order to coerce them into terminating the discounter.

The Commission's staff is also pursuing investigations in the area of solicitations, or invitations, to collude, an area in which the Antitrust Division has been active through criminal enforcement under the wire-fraud statutes. The allegations under review take a variety of forms, from visits to competitors' offices to propose price fixing or market division agreements, to threats to litigate unless a rival raises its price, to carefully planned leaks of bidding strategies for competitive bids, to public calls for competitors to raise their prices by specific amounts.

The Bureau of Competition is also looking into the antitrust significance of a form of collective activity by some physicians that has been much in the news lately: the creation of joint ventures by physicians to provide services or goods in a market that is outside of, but functionally related to, the participating physicians' professional practice. Such joint ventures may be employed, for example, to set up a clinical laboratory, a physical therapy center, or a diagnostic imaging facility.

Much of the criticism of these kinds of joint ventures has focused on self-dealing and conflict-of-interest issues. In our antitrust enforcement role, however, our interest in physicians' ancillary joint ventures lies mainly in the potential these ventures have in some cases for creating or enhancing market power in markets for the ancillary goods or services. This concern may be especially acute where the joint venture participants are specialists in a field whose patients are the main consumers of some particular ancillary service or good, so that the participants have the ability to refer patients to their own ventures.

I hope these remarks have been helpful in describing what we have been doing in antitrust enforcement, and where we may be going from here. I think you will agree that this is an exciting time to be involved in the antitrust area. Having had my say, I would be happy to take your questions.