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before the
Committee on the Judiciary
Subcommittee on Antitrust, Business Rights and Competition

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The Federal Trade Commission is pleased to have the opportunity to discuss its activities in the international antitrust area. The Commission also comments on the proposed Trade Law Enforcement Improvement Act of 1998, S. 2252, introduced by Senator Abraham.[(1)]

1. International Antitrust Cases Benefiting U.S. Business

The mission of America's antitrust agencies is to ensure that U.S. markets function competitively. The agencies -- the FTC and the Antitrust Division of the Department of Justice ("DOJ" or "Department") -- do so by attempting to eliminate unreasonable competitive restraints, preventing anticompetitive mergers and acquisitions, and encouraging reliance on market-driven solutions. The FTC applies its competition enforcement policies to all conduct that has the requisite effects on U.S. commerce and injures either U.S. consumers or U.S. businesses, whether they are relying on foreign firms as suppliers of goods and services or competing through exports with foreign-based firms here and abroad. Because it prevents or redresses injury to them, U.S. businesses are among the major beneficiaries of the FTC's international antitrust activities. The Federal Trade Commission challenges anticompetitive conduct and transactions, whether by U.S. or foreign actors.

Four recent FTC cases illustrate how we have applied our enforcement policies in merger cases involving foreign entities. Premerger notifications under the Hart-Scott-Rodino Act totaled over 4,500 in the recently-closed fiscal year, up from 3,000 just two years ago. About half of the FTC's pending merger investigations involve some foreign element - either a foreign-based party (or parties), foreign-located documents or other information sources, or foreign-based assets. The FTC also reviews non-merger anticompetitive activity, and it has several pending investigations that involve foreign firms, information or assets. The FTC frequently finds that foreign enforcement agencies are reviewing the same matter at the same time. This means that the agencies most often investigate in cooperation with foreign authorities, rather than using "positive comity," described in more detail later in this statement, which is not useable in the merger context.

The first case, brought in 1994, involved a transaction in which Royal Dutch Shell, a Netherlands firm, and Montedison, an Italian firm, proposed to combine their worldwide polypropylene production and technology licensing businesses in a joint venture. Shell already was part of a U.S.-based joint venture with Union Carbide Corporation to produce

polypropylene and license its production technology. The proposed joint venture between Shell and Montedison raised competitive concerns in the worldwide markets for polypropylene technology and its licensing, given that the joint venture's technologies would have accounted for over 70% of worldwide polypropylene manufacturing capacity. Based on evidence obtained in the investigation, the FTC was concerned that, among other things, the creation of the joint venture between Shell and Montedison would have caused Shell to further reduce its support of its U.S.-based joint venture with Union Carbide and to impair that venture's ability to export. The FTC's complaint charged that the joint venture between Shell and Montedison would have a direct, substantial, and reasonably foreseeable anticompetitive effect on export commerce, as defined in the Foreign Trade Antitrust Improvements Act of 1982 (the FTAIA).[(2)] The case was ultimately settled with Shell's divestiture to Union Carbide of its half interest in their joint venture.[(3)]

The second case, brought in 1996, concerned an acquisition of Metal Leve, a Brazilian firm, by Mahle, a German firm, both of which operated subsidiaries in the United States. The FTC concluded that the transaction would have led to a monopoly in the United States in the articulated piston market.[(4)] We estimated that had the merger been allowed, the merged firm's customers, particularly U.S. diesel engine manufacturers, would have paid $25 million per year in higher prices. We therefore required Mahle to divest Metal Leve's U.S. piston business. The FTC also fined the firms $5.6 million for failing to comply with the premerger notification requirements of the Hart-Scott-Rodino Act.

The third example involved the 1996 merger between Swiss pharmaceutical firms Ciba-Geigy and Sandoz, which raised antitrust concerns in the United States, Canada, and Europe. The FTC was concerned with the effects of the transaction in the market for, among others, the development of gene therapies for treating diseases including AIDS and cancer. In particular, we believed that it was very unlikely that a competing firm, such as a U.S. pharmaceutical company, could enter the market and replace the competition lost through the merger. To resolve this concern, Ciba-Geigy and Sandoz agreed to license their patent rights to Rhône-Poulenc Rorer, the Pennsylvania-based subsidiary of the French firm, Rhône-Poulenc.[(5)]

The fourth case is the 1997 merger of Guinness and Grand Metropolitan, plc, which raised antitrust concerns in Europe, the United States, Canada, and Mexico. While the market structures for distilled spirits in these regions differ due mainly to how the distribution of alcohol products are regulated, the prospective competitive effects of the merger were quite similar in each jurisdiction. The FTC worked closely with the European Commission, as well as the competition authorities in Canada, Mexico, and Australia, and reached a settlement with the parties requiring divestitures that satisfied the competitive concerns arising out of this merger in each of the jurisdictions in which it was reviewed.[(6)]

Whether a transaction involves only U.S. or both U.S. and foreign-based firms, the FTC takes a consistent approach. For example, in the 1998 merger between the U.S. firm, Federal Mogul, and the British firm, T&N, the FTC concluded that the parties would control over 80% of the North American and European markets for automotive and light truck thinwall engine bearings. Auto producers were concerned that this would raise the cost of a critical

engine component and would retard technological development of a key component. The FTC's settlement of this matter requires Federal Mogul to divest T&N's thinwall bearing business by December 21, 1998.[(7)] The FTC reached this settlement in close cooperation with the competition authorities of France, Germany, Italy, and the United Kingdom. This cooperation paved the way for a settlement that required divestiture of key foreign assets of T&N, which was achieved without creating tension over the extra-territorial application of U.S. antitrust law.

Of course, the vast majority of transactions the antitrust agencies review, including those involving foreign parties, do not raise antitrust concerns. In those cases, the agencies decide quickly not to challenge them, and coordinate with foreign antitrust authorities to explain the U.S. agencies' rationale. For example, in the Daimler/Chrysler merger (involving German and U.S. automakers) and the Lucas/Varity merger (involving U.S. and British auto parts producers), the FTC did not see any significant issues under U.S. antitrust law, and worked closely with the European Commission to help ensure expeditious clearance.

2. Cooperation with Foreign Antitrust Authorities

All of these cases involved cooperation with at least one foreign antitrust enforcement agency. The U.S. antitrust agencies cooperate with other antitrust enforcement agencies pursuant to bilateral agreements, such as those with the European Communities[(8)] and Canada,[(9)] or under a Recommendation adopted by the 29 member countries of the Organization for Economic Cooperation and Development (OECD).[(10)] These instruments provide that the antitrust authorities will notify the governments of other countries whose important interests might be affected by an antitrust investigation or proceeding conducted by the notifying authority, in return for which the affected countries agree to cooperate with the notifying authorities, consistent with their laws. The important interests that could trigger notification under these instruments include concerns about requests for evidence needed for a foreign antitrust investigation or local assets that could be implicated in remedies that a foreign antitrust authority is considering imposing. The antitrust agencies also have long-standing cooperation agreements with Germany[(11)] and Australia.[(12)] The Australian agreement will soon be supplemented by the first agreement that the antitrust agencies have reached with a foreign government under the 1994 International Antitrust Enforcement Assistance Act[(13)] (the "IAEAA").[(14)]

While the U.S. analysis of an antitrust matter is always done pursuant to our own statutory mandates, cooperation in some matters with foreign counterparts can result in greater efficiency and consistency in enforcement. This benefits not only the agencies but often the parties, for example, by ensuring that U.S. firms whose conduct is subject to review in more than one jurisdiction do not face inconsistent remedial action, such as divestitures or other commitments designed to maintain competition in the relevant markets. In some cases, cooperation can allow the United States to pursue its law enforcement goals abroad in situations that would otherwise have been difficult to gather evidence, or where there would have been significant obstacles to achieving its remedial goals.

In some matters, the antitrust agencies' analyses and conclusions will differ from those of

their foreign counterparts -- there may be differences in applicable laws, or differences in the conclusions drawn from the available evidence, which itself may differ across jurisdictions. This is to be expected. However, even in those instances, the antitrust agencies have not altered the course of action that they believed was appropriate under U.S. law, as illustrated by the FTC's decision not to challenge Boeing's acquisition of McDonnell Douglas despite the European Commission's concern about the merger in conjunction with Boeing's exclusive supply agreement with several airlines.[(15)] Sometimes, as in the Ciba-Geigy/Sandoz transaction, the roles are reversed -- in that case, the FTC took remedial action in the gene therapy market, while the EC did not see a need to pursue similar relief in that market.[(16)]

3. Policy Development

In addition to the FTC's cooperative work in specific cross-border cases, the Commission has been able to study, develop, and apply new international antitrust policies based on its work in other related antitrust areas. For example, the FTC's enforcement action in the Ciba-Geigy/Sandoz case involving the gene therapy market reflected the Commission's approach to innovation markets that developed during the hearings that led to the issuance of the May 1996 FTC Staff Report on Competition Policy in the New High-Tech, Global Marketplace ("FTC Staff Report"). Those hearings were the beginning of a continuing effort by the FTC to review its enforcement policies to determine what adjustments might be necessary to account for the vast changes that have occurred in commercial markets in the second half of the 20th century. In addition, the FTC Staff Report generated a review of the consideration of efficiencies in merger analysis which, in turn, led to amendment of the Horizontal Merger Guidelines in 1997. As a further step in this process, the FTC last year commenced its Joint Venture Project to consider the competition issues raised by joint ventures -- a form of business organization that is frequently used in transnational business dealings. Coincidentally, the European Commission is conducting a review of its analysis of joint ventures and other non-merger horizontal agreements and EC staff has discussed issues and exchanged views with FTC staff. It is too early to predict what will develop from these reviews, but the EC and FTC staff discussions have been useful in clarifying the issues that we confront in the antitrust analysis of joint ventures. Moreover, our discussions have enabled the FTC to share with its sister agencies observations and insights about competition trends in the increasingly-global marketplace.

4. Positive Comity

The antitrust agencies' enforcement activities in recent years have tried to take cooperation with foreign agencies a step further, particularly in matters where anticompetitive conduct is occurring outside of the U.S., is adversely affecting American consumers or exporters, and is being conducted by persons who may be beyond the jurisdictional reach of U.S. law. In some of those instances, the agencies have asked the antitrust enforcement agency in the country where the conduct is occurring whether it would investigate the matter and proceed against the anticompetitive conduct. This is an enforcement tool called "positive comity." Positive comity refers to a country's consideration of another country's request that it initiate or expand an antitrust enforcement proceeding against conduct that is harming the interests

of the requesting country. The positive comity principle was embodied in a 1973 OECD recommendation,[(17)] and was incorporated in our 1991 antitrust enforcement cooperation agreement with the European Communities and our 1995 agreement with Canada.

Earlier this year, the antitrust agencies entered into a new agreement with the EC elaborating on the 1991 agreement by clarifying the circumstances under which the antitrust authorities would refer cases of anticompetitive activities to each other.[(18)] The antitrust agencies believe this agreement will have several significant benefits, including facilitating the efficient deployment of limited enforcement resources, avoiding difficulties encountered in obtaining evidence and in implementing remedies abroad, and reducing friction that can arise in transborder enforcement. Thus, use of the agreement may result in the elimination of anticompetitive practices abroad that are injuring U.S. exporters and/or U.S. consumers without using U.S. resources. In addition, the desired results may also be accomplished without engendering complaints that have been raised in the past about the United States' assertion and exercise of extra-territorial jurisdiction and without the practical impediments that the antitrust agencies often face in conducting investigations and seeking to impose remedies beyond U.S. borders.

A key feature of the US-EC agreement is that the antitrust agency of the party making a positive comity request agrees that it will normally defer or suspend its own pending or contemplated enforcement activities while the requested party is conducting its investigation. However, this pledge is contingent upon the requested authority's agreement to numerous conditions including that it will devote adequate resources to the investigation, promptly pursue adequate enforcement activities, keep the requesting party apprised of the status of the investigation, and use best efforts to complete the investigation within six months (Article IV.2.).

It is important to recall that the US-EC agreement specifically does not preclude the requesting party from later initiating or reinstituting its own investigation (Article IV.4.). Thus, by making a positive comity request, the antitrust agencies would in no way relinquish their right to pursue their own investigation should they conclude that U.S. interests are not adequately being served by the EC's investigation.

Although the FTC has yet to make a formal positive comity request to the EC, we have found that informal requests or referrals have produced positive outcomes; this experience informed our approach toward the negotiation of the new agreement. For example, the FTC informally encouraged the Italian antitrust authority to end a production quota agreement by a consortium of ham producers that exported to the United States, harming U.S. consumers with supracompetitive prices. The Italian Competition Authority conducted an investigation, found that the consortium's production quota violated Italian law, and required the consortium to end the production quota.[(19)] The FTC also has facilitated direct contact between U.S. firms and foreign competition agencies to which they could directly address their complaints.

While positive comity is a promising enforcement tool, it is not a "silver bullet." The agencies cannot expect that the EC or other countries' competition authorities always will be

able or willing to receive and pursue a positive comity request. Nor should the agencies -- or companies bringing the complaints -- expect that the foreign authorities will always succeed in investigating and prosecuting a complaint.

5. Comments on the Proposed Trade Law Enforcement Improvement Act of 1998

In 1982, Congress passed the Foreign Trade Antitrust Improvements Act ("FTAIA"), clarifying that the U.S. antitrust laws cover, among other things, anticompetitive practices that have a "direct, substantial, and reasonably foreseeable effect" on U.S. export trade or commerce. In 1988, the Department of Justice issued Antitrust Enforcement Guidelines for International Operations.[(20)] Footnote 159 to the Guidelines set forth the Department's enforcement policy under which, notwithstanding the clear mandate of the FTAIA, it would exercise its prosecutorial discretion to bring cases involving conduct that harmed only U.S. consumers, as opposed to U.S. exports or exporters.

In 1992, the Department's Antitrust Division, under Assistant Attorney General Rill, rescinded that policy and restored the Department's mandate under the FTAIA to prosecute foreign anticompetitive practices that injure U.S. exports. This change in enforcement policy was reflected in the 1995 Antitrust Enforcement Guidelines for International Operations, which the Department and the FTC issued jointly.[(21)] Consistent with this change, the Commission fully intends to investigate appropriate cases involving such conduct.

Section 2 of S. 2252, the Trade Law Enforcement Improvement Act of 1998, would codify the repeal of footnote 159 of the 1988 Enforcement Guidelines by amending the Sherman Act and the Federal Trade Commission Act to state that they will apply to anticompetitive conduct "without regard to the effect of such conduct on consumers in the United States." While the FTC supports the objective of this clarification, we believe that it is unnecessary. The Sherman Act and the FTC Act clearly confer jurisdiction over foreign conduct that harms U.S. exporters, and the joint DOJ/FTC enforcement guidelines explicitly affirm and adopt this position.

The proposed legislation also would alter the manner in which the antitrust agencies define the market in which they assess whether conduct has a "substantial" effect on U.S. commerce. Market definition is a complex analysis, driven by economic principles that have been developed and refined over many years. The antitrust agencies' current enforcement policy on market definition is reflected in their joint merger guidelines,[(22)] which state that "[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer responses."[(23)] This focus is based on judicial decisions holding that:

> The general rule when determining a relevant product market is that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it."[(24)]

The legal and business communities have come to rely upon this methodology.

The proposed legislation invites the agencies to substitute for their normal product and geographic market definition disciplines a statutory formula unrelated to the economic

principles of market definition reflected in unanimous Supreme Court case law and the agencies' practice and guidelines. In particular, it suggests that the agencies could define the market to include only the product affected by a particular alleged anticompetitive practice. This would ignore reasonably substitutable products that would normally be included in the product market, and would consider only the geographic area in which the alleged practices occur, regardless of whether there is competition in a broader area.

The FTC believes that Congress should not address in legislation complex market definition issues and redefine the principles on which the courts, the antitrust agencies, and the business community rely and find to be well-adapted to their task. However, the Commission can assure the Congress that the concerns that apparently underlie this proposed legislation -- ensuring that the U.S. antitrust agencies can adequately address anticompetitive foreign practices that injure U.S. exporters -- will continue to be carefully considered and addressed.

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1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or any other Commissioner.

2. Pub. L. No. 97-290, 96 Stat. 1234, Title IV, *codified at* 15 U.S.C. §§ 6a and 45(a)(3).

3. *Montedison S.p.A., et al.*, FTC Docket No. C-3580, Consent Order issued (May 25, 1995), *reported in* 119 F.T.C. 676 (1995) and 5 Trade Reg. Rpt. (CCH) ¶ 23,749. The European Commission also reviewed this joint venture in close cooperation with the FTC; *see* Shell/Montecatini, Commission Decision 94/811/EC of 8 June 1994, Case IV/M.0269, OJ L 332/48 (22 Nov. 1994), *revised* 24 June 1996, OJ L 294/10 (19 Nov. 1996).

4. *Mahle GmbH*, FTC Docket No. C-3746, Consent Order issued (June 4, 1997), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,286.

5. *Ciba-Geigy, Ltd., et al.*, FTC Docket No. C-3725, Consent Order issued (March 24, 1997), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,182. The European Commission also reviewed this merger in close cooperation with the FTC, but decided not to take enforcement action similar to that taken by the FTC in the gene therapy market; *see* Ciba-Geigy/Sandoz, Case No IV/M.737, Commission Decision of 17 July 1996, OJ L 201 (29 July 1997), ¶ ¶ 95-107.

6. *Guinness plc, et al.* FTC Docket No. C-3801, Consent Order issued (April 21, 1998), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,359. *See also* Guinness/Grand Metropolitan, Case No. IV/M.938, Commission Decision of 15 October 1997 [not yet published in the Official Journal].

7. *Federal Mogul Corporation and T&N PLC*, FTC File No. 981-0011, Proposed Consent Order and Complaint (March 5, 1998), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,400.

8. Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504; and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995).

9. Agreement Between The Government of the United States of America and The Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995,

reprinted in 4 Trade Reg. Rpt. (CCH) ¶ 13,503.

10. Organization for Economic Cooperation and Development, Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL, 27-28 July 1995, available on the OECD's World Wide Web site at http://www.oecd.fr/daf/ccp/rec8com.htm. This Recommendation was first adopted in 1967 and was revised in 1973, 1979, 1986, and 1995.

11. Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,501.

12. Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,502.

13. *See* FTC Press Release, "First International Antitrust Assistance Agreement under new law announced by FTC and DOJ," April 17, 1997, published with the text of the proposed agreement on the FTC's World Wide Web Site at http://www.ftc.gov/opa/1997/04/iaeaa.htm.

14. Pub. L. No. 103-438, 108 Stat. 4597, *codified at* 15 U.S.C. §§ 6201-6212.

15. The Boeing Co., et al., Joint Statement closing investigation of the proposed merger and separate statement of Commission Mary L. Azcuenaga, FTC File No. 971-0051, announced July 1, 1997, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,295; Boeing/McDonnell Douglas, Case No IV/M.877, European Commission Decision of 30 July 1997, OJ L 336/16 (8 Dec. 1997).

16. *Supra*, note 5.

17. *Supra*, note 9.

18. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, June 4, 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504A; and OJ L 173/26 (18 June 1998).

19. Consorzio del Prosciutto di San Daniele - Consorzio del Prosciutto di Parma (Rif. I138) Delibera del 19.06.96 - Boll. N. 25/1996.

20. U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, (Nov. 1988), *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,109.

21. U.S. Department of Justice and the Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (April 1995), *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,107, at fn. 62.

22. U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,104.

23. *Supra*, note 21, § 1.0. Supply substitution factors -- i.e., possible production responses -- are also considered in identifying the firms that participate in the relevant market and in analyzing entry.

24. *Federal Trade Commission v. Staples, Inc. and Office Depot, Inc.*, 970 F.Supp. 1066, 1074 (D.D.C. 1997), *citing Brown Shoe v. United States*, 370 U.S. 294 (1962) and *United States v. E.I. DuPont de Nemours and Co.*, 351 U.S. 377 (1956).