# Prepared Statement of the Federal Trade Commission

**Presented by**
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**Before the**

**Committee on the Judiciary**
**United States House of Representatives**

**Concerning**

**An Overview of FTC Antitrust Enforcement**

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Mr. Chairman and members of the Committee, I am pleased to appear before you today to present testimony of the Federal Trade Commission that will provide an overview of our antitrust enforcement activities.[(1)] I will review the Commission's activities during the approximately two and a half years since I returned to the Commission to serve as its chairman.

## I. Antitrust Policy

The Commission strongly believes in the bedrock principle that protecting competition from the improper exercise of market power will enhance the welfare of consumers. That is the purpose of the antitrust laws. Congress long ago decided that a competitive economy would provide more benefits for consumers in the form of lower prices, optimal quality and quantity of goods and services, and greater innovation than would an economy based on government control or the accumulation of market power by private interests. That conclusion has proved true over time.

Starting with those basic principles, the Commission's approach to antitrust enforcement is twofold: to enforce the antitrust laws with vigor and protect consumers from abuses of market power, but also to avoid unnecessary intrusions and burdens on businesses. We also have a responsibility to make sure that antitrust policy makes sense and is sensibly applied. It must stay in tune with the competitive realities of the modern business environment, so that we can continue to advance consumers' interests into the 21st Century.

I will start with a broad overview of enforcement activities.

## II. An Overview of Enforcement Activities

We have been very busy. One measure of our workload is the level of merger activity. The number of mergers reported to the FTC and the Department of Justice pursuant to the Hart-Scott-Rodino Act has more than doubled in the last five years, from 1589 transactions in fiscal 1992 to 3702 transactions in fiscal 1997. Thus far in fiscal 1998, the trend is continuing. The volume of filings last month was the highest ever for October.

Merger enforcement is an important part of our work, not only because we have specific statutory responsibilities with respect to mergers, but also because merger enforcement serves to prevent the creation of market conditions that are likely to lessen competition and harm consumers. The current merger wave has made this an even larger part of the Commission's antitrust mission. Through productivity gains and old fashioned hard work, the Commission -- more specifically, its dedicated staff -- has handled the increased workload with basically the same staffing level it had in 1991.

Unlike the conglomerate merger wave of the late 1960s, and the leveraged buyout, hostile takeover, junk bond activities of the 1980s, this current wave of mergers does not seem to be mainly motivated by financial market considerations. Rather, a larger percentage of these transactions appears to be a strategic response to changes in the world economy. Many are a response to the sharp increase in global competition (e.g., pharmaceuticals), others to new economic conditions produced by deregulation (e.g., telecommunications and electric utilities), and still others to over-capacity in some industries and to a perceived need to bring supply more in line with demand (e.g., defense industries and hospitals). While many mergers in this current wave appear to be motivated by a legitimate response to quickly changing business conditions, a larger proportion than in the recent past seems to involve direct competitors. As a result, the threat of increased market power, and potential adverse effects on consumer welfare, must be carefully assessed.(2)

We have sought to target our scarce resources on the most important areas of the economy. The bulk of the Commission's antitrust enforcement effort is devoted to six market sectors that are important to us all in our everyday lives: health care, pharmaceuticals, energy, information and technology, other consumer goods and services, and defense. It is indicative of the changes taking place in several of those markets that during the three-year period from fiscal 1995 through fiscal 1997, about 78% of our competition actions were in those six sectors, compared to about 63% in the previous three-year period.

Rather than recite a litany of cases, let me discuss a few examples that illustrate significant Commission actions in various sectors of our economy, and how consumers have benefitted.

**A. Merger Enforcement**

A prime example of consumer benefit from merger enforcement is the important case earlier this year in which the Commission challenged the proposed $4 billion merger of Staples and Office Depot, the two leading office supply superstores.(3) This was the largest merger challenged in court by the government in recent years. The two firms together had about 1,000 superstores and competed head-to-head in numerous metropolitan areas across the country. In 15 major metropolitan areas, including Washington, D.C., Baltimore, San Diego and Tampa-St. Petersburg, Staples and Office Depot were the only superstores, and the merger would have resulted in a monopoly. In 27 other metropolitan areas, the two firms had only one other superstore competitor.

The Staples/Office Depot merger was very likely to result in increased prices, and also prevent increased competition in areas where one of the firms was planning to enter the other's territory.

In fact, Commission staff developed evidence that in markets where three superstores competed, prices were lower for some products than in markets where only two stores competed. The staff's estimates indicate that by blocking that merger, we may have saved consumers around $1 billion over a five-year period, or about $200 million per year.[(4)] Such projections are always subject to some degree of uncertainty, but in this case the data available to make such an estimate were unusually rich, because we were able to compare actual pricing patterns in one-, two-, and three-superstore markets. Thus, it appears that the annual savings to consumers from this one case are roughly double the FTC's annual budget.

Another example involving consumer goods or services is the case challenging the merger of two firms, First Data Corporation and First Financial, that operated the only two consumer money wire transfer services in the U.S., MoneyGram and Western Union. These services are used by thousands of people who need emergency cash when they are away from home, such as travelers and students, and by people who do not have a bank account -- estimated at around 25% of U.S. households. The Commission's consent order requiring divestiture of one of those businesses saved consumers an estimated $15 million to $30 million each year in money wire transfer fees.[(5)]

A different kind of consumer benefit was at stake in the merger of pharmaceutical giants Ciba-Geigy and Sandoz earlier this year.[(6)] That merger would have given Ciba-Geigy a monopoly in certain patents and trade secrets for the development of gene therapies, which hold promise for the treatment of some forms of cancer and AIDS. As a result, there would have been less competition in the research and development of those products, and the race to commercialize the products, assuming there would be a race, would have been on Ciba-Geigy's terms. The Commission's consent order required Ciba-Geigy to license certain patents and technologies so that the effort to develop those products would not be dominated by a single firm.

The *Ciba-Geigy* case illustrates the importance of enforcing the antitrust laws carefully but assertively in high-technology industries. A firm's competitive strength in high-tech markets is often derived from its intellectual property. We are cautious in dealing with intellectual property because it is important not to lessen the incentives to innovate. But it is as important to protect against anticompetitive consolidations or other abuses of intellectual property as it is to prevent the acquisition or abuse of market power with respect to other assets.

At the retail level in pharmaceuticals, the Commission challenged several mergers involving large drugstore chains so that consumers would continue to have the benefit of price competition. Some of these cases, such as *Rite Aid/Revco*,[(7)] prevented the acquiring company from garnering market power that would give it undue leverage in negotiations to provide pharmacy dispensing services to pharmacy benefit plans -- an important segment of the industry.[(8)]

In the area of medical devices and equipment, a recent injunction action resulted in the abandonment of a merger of the two leading firms engaged in the rental of medical equipment to hospitals,[(9)] and the consent order in another case preserved competition in the market for cranial shunts used in the treatment of hydrocephalus.[(10)]

In hospital mergers, the vast majority of transactions do not raise substantial antitrust concerns, and we do not challenge them; but we do take action when the evidence indicates that consumers are likely to be harmed. The Commission issued consent orders in several cases,[(11)] but there were also disappointments in preliminary injunction actions in two other cases involving mergers of local hospitals.[(12)] Despite those setbacks, we have an obligation to review each transaction on its own merits.

In the information and technology area, one of the more important enforcement actions involved the acquisition of Turner Broadcasting Corporation by Time Warner.[(13)] This merger made Time Warner a powerhouse in the production of video programming (such as HBO, CNN and TBS) for cable television and other non-broadcast distribution, and it also increased the level of vertical integration in the industry by linking Turner Broadcasting's video programming with Time Warner's cable operations. After an extensive investigation of some very complicated issues, a majority of the Commission voted to issue a consent order that prevents competitive harm in three ways: (1) it prevents Time Warner from exercising market power in the sale of video programming to cable companies and other distributors by bundling the sale of programming on an all-or-nothing basis; (2) it prevents Time Warner from discriminating against potential competitors of its cable companies, such as DBS systems and wireless cable, by selling important video programming on unfavorable terms; and (3) it prevents Time Warner from requiring its cable companies to favor programming produced by Turner Broadcasting and thereby discriminating against competitors at the programming production level.

The consent order also required Time Warner cable systems to accept carriage of a new all-news cable channel to compete with CNN. The use of an access requirement deserves some discussion. Access requirements are not common in antitrust because they have regulatory overtones and complications with which antitrust is not entirely comfortable. The competitive concern in *Time Warner* was that an all-news channel needs broad distribution in order to be viable, and that carriage by some Time Warner cable systems would be important because of Time Warner's substantial share of the distribution market. However, Time Warner's ownership of CNN would reduce the incentive for its cable companies to carry another all-news channel. The Commission's order dealt with that problem in the most practical way, by requiring carriage of a competitor to CNN for a limited period. It left the selection of the second competitor and the terms of carriage to be worked out by the parties.

*Cadence Design Systems*[(14)] is another case that illustrates the role of antitrust in protecting market access in industries that are undergoing deregulation or technological change. In that case, a majority of the Commission voted to issue a consent order that prevented Cadence's acquisition of Cooper & Chyan Technology from lessening competition for key software used to automate the design of integrated circuits, or "microchips."[(15)]

In the energy sector, our recent cases have been in the natural gas area. Most notably, the Commission blocked Questar Corporation, the exclusive transporter of natural gas to Salt Lake City, from acquiring a major interest in a firm that not only was planning to enter the Salt Lake City market, but whose early negotiations for sales were already having a downward effect on the price of transportation services.[(16)] The *Questar* case illustrates another reason antitrust enforcement is important in newly deregulated industries. Deregulation of major sectors of the natural gas industry has made possible the emergence of competition in the sale and transportation of natural gas to industrial customers. These changes were starting to occur in Salt Lake City, but competition could have been nipped in the bud if the acquisition had been permitted. Antitrust enforcement preserved the benefits of that emerging competition.

In the defense sector, our staff has maintained a productive working relationship with Department of Defense staff in accordance with the Defense Science Advisory Board guidelines for antitrust review of defense industry mergers. The Commission has been careful not to interfere unnecessarily with the positive, procompetitive aspects of defense mergers, and we take careful account of special characteristics of defense procurement. However, we have taken action when a merger, or certain aspects of a merger, threatened to increase market power and result in higher prices, lower output, or reduced quality, service or innovation. The product markets involved in recent cases in which we negotiated consent orders include high altitude endurance unmanned air vehicles and space launch vehicles,[(17)] military tactical fighter aircraft,[(18)] satellite communications systems,[(19)] a component for an anti-missile program,[(20)] and Aegis destroyers.[(21)]

The Commission also reviewed the defense industry aspects of the Boeing/McDonnell Douglas merger.[(22)] Although both companies develop fighter aircraft, the evidence indicated that there are no current or future procurements of fighter aircraft by the Department of Defense in which the two firms would likely compete. Therefore, the merger was not likely to lessen competition in defense procurement.

**B. Non-Merger Enforcement**

The FTC also plays a special role in antitrust enforcement because it engages in administrative litigation, primarily in non-merger cases. In substantial part, the FTC was created because Congress believed that it would be helpful to have the assistance of an agency with specialized expertise in analyzing complex business transactions to resolve the difficult competition issues that may arise. The Commission has applied this expertise on numerous occasions over the years, resulting in important antitrust decisions such as the *American Medical Association*[(23)] case in 1979, which opened the door for alternative forms of health care delivery at a time when the AMA's actions deterred change from more expensive fee-for-service health care delivery, which was then the predominant system. Later cases established the principle that consumers can be harmed by collusive and unjustified denials of important services as well as by collusive arrangements that more directly affect price competition. For example, in *FTC v. Indiana Federation of Dentists,*[(24)] the Supreme Court upheld the Commission's finding that a group of dentists had harmed their patients by refusing to provide their dental x-rays to insurance companies to facilitate the insurers' pretreatment review.

A current case provides another example of the Commission's adjudicatory function.[(25)] In late September, an administrative law judge issued a decision upholding an FTC complaint that charged Toys "R" Us, the nation's largest toy retailer, with using market power to force toy manufacturers to stop selling their popular toys to warehouse clubs, or to sell the clubs only combination packs so consumers could not easily compare prices.[(26)] I cannot discuss the merits of the case since it is pending on appeal before the full Commission, but the ALJ's decision addresses a number of interesting issues. The case alleges that a buyer, rather than a seller, exercised market power and that the buyer orchestrated agreements among the sellers to adhere to the restrictions on sales to the buyer's competitors. Resolution of these kinds of complex issues requires the kind of expertise that Congress expected the Commission to apply when the FTC was established.

The Commission's non-merger enforcement, like its merger program, has focused on cases that have an impact on consumers. One recent case illustrates the continuing role the Commission plays in protecting competition in health care. The College of Physicians-Surgeons of Puerto Rico and three physician groups recently settled charges that they engaged in an unlawful boycott and agreements related to prices for services under Puerto Rico's government-managed health care plan for the indigent (Medicaid).[(27)] According to the complaint, the physicians attempted to coerce the Puerto Rican government to recognize the College as the exclusive bargaining agent for all physicians of Puerto Rico, and called a strike of all physicians for all non-emergency patient care. There was no efficiency justification for the attempted collective fee setting. The boycott forced many indigent people to go to local hospital emergency rooms for care they ordinarily would have received in a physician's office, while others had to forgo medical care altogether. In addition to agreeing not to engage in those boycott and collective fee setting practices, the College agreed to pay $300,000 to the catastrophic fund administered by the Puerto Rico Department of Health. The Commission's analysis and the remedy embodied in the consent order reflect the care we take to ensure that consumers are protected from anticompetitive conduct, while also ensuring that legitimate efficiency-enhancing joint venture activities are not discouraged.

Another case involved allegations of boycotts and other agreements to fix the prices physicians would accept from third-party payers as well as to impede the entry of managed care.[(28)] The consent order in that case does not prohibit the respondents from operating legitimate joint ventures, but the agreements in question were not justified by any efficiency-producing integration among the health care providers. Enforcement actions such as this one serve to ensure that consumers have a competitive range of health care delivery and financing options from which to choose.[(29)]

In another case last year, a majority of the Commission found that an association of California dentists unlawfully restrained truthful and nondeceptive advertising by dentists regarding the price, quality and availability of dental services. The Commission's decision was recently affirmed by the United States Court of Appeals for the Ninth Circuit.[(30)] That case continued a line of Commission cases challenging anticompetitive aspects of codes of ethics adopted by professional associations, dating back to the landmark case in 1979 against the American Medical Association.[(31)]

In addition, the Commission continued to enforce the law against minimum resale price agreements. Two recent cases involved manufacturers of athletic shoes.[(32)] Another case, earlier this year, involved an unusual rebate scheme that amounted to resale price fixing in a $1 billion market for agricultural chemicals.[(33)] These cases illustrate the Commission's policy of joining in cooperative investigations with the states whenever there is mutual interest and advantage in a joint investigation. In appropriate cases, that is an effective way to pool resources and advance the enforcement interests of both the states and the Commission.[(34)] Another example is the *Staples/Office Depot* merger case, where a number of states cooperated with our investigation and filed an amicus brief in support of the Commission's case.

While the Commission continues to apply the rule of *per se* illegality to minimum resale price agreements, it no longer supports the application of the *per se* rule with respect to vertical restrictions on the maximum price downstream sellers may charge. In April of this year, the Commission joined with the Department of Justice in urging the Supreme Court to abandon the rule of *per se* illegality for maximum resale price agreements.[(35)]

Finally, in what may have been the first case of its kind, a majority of the Commission decided in 1996 to issue a consent order involving charges that a computer manufacturer had abused a standard-setting process by certifying that it had no patent or other intellectual property claims to a technology that was being proposed as a standard, and then asserting patent claims after the standard had been adopted.[(36)] Knowledge of those patent claims might have allowed the standards organization to make an informed choice that may have resulted in the selection of a different standard. The manufacturer's conduct, if successful, would have imposed costs on its rivals, either in the form of royalties or in the form of costs to redesign their products to use another standard. To prevent those effects, the Commission's order prohibits the respondent from enforcing its patent rights against computer manufacturers that have adopted the standard. The Commission's order is consistent with the common law doctrine of equitable estoppel, and it serves to protect the integrity of the standard-setting process.

In sum, the Commission has been active in reviewing and, when necessary, challenging a wide variety of non-merger conduct. That is not to say that the Commission has achieved the optimal level of enforcement. The resource demands of dealing with the merger wave have forced the reassignment of some staff from non-merger investigations to merger work. As a result, the number of new non-merger investigations has decreased since the merger wave began -- there is a clear and predictable inverse relationship. This will have effects in the future because non-merger investigations can take a significant amount of time to develop. As a result, over the next few years these resource constraints may cause us to experience a drop in the number of non-merger cases and some delays in bringing these cases to fruition. Nonetheless, we will attempt to maintain a healthy level of non-merger enforcement that produces major benefits for consumers. A broad-ranging benefit is the deterrence of other persons from engaging in anticompetitive conduct similar to that challenged in our cases.

## III. Enforcement Strategies

The success of the enforcement program depends on its implementation. The Commission employs multiple strategies to ensure antitrust enforcement that best serves the public interest and achieves the twin goals of making antitrust enforcement effective, while keeping it efficient and minimally burdensome.

Foremost is an insistence on rigorous analysis, to ensure that reasons for competitive concern are valid and well-supported by the evidence. Our goal is to stop real threats to competition, but to refrain from intervening unless it is necessary. That policy is exemplified by the Commission's analysis of the Boeing/McDonnell Douglas merger this year.[(37)] While the companies' market shares in the commercial aircraft sector -- roughly 60% for Boeing and slightly less than 5% for McDonnell Douglas -- did raise some initial concerns, the staff's extensive investigation revealed that McDonnell Douglas was no longer a significant competitive factor; its prospects for future commercial aircraft sales were dim, and so were its prospects for a turn-around. As a result, it was unlikely that the merger would significantly lessen competition, and the Commission decided not to take action.[(38)]

But when there is a real problem, the Commission insists on a meaningful solution. To that end, the Commission has renewed its focus on ensuring effective, targeted remedies. In 1995, the Bureaus of Competition and Economics undertook a pilot study of orders in recent Commission merger cases to determine whether they were achieving the intended results, to re-examine what kinds of order provisions generally work well, and to assess what kinds are more likely to have complications. As a result of that study, the Commission's policies regarding consent orders were revised in a number of respects. The Commission prefers that divestitures be accomplished in a shorter time so that competition is restored more quickly and assets are less likely to deteriorate in the interim. In addition, in some cases the Commission requires the respondent to identify a purchaser for the assets before the consent agreement is accepted. As a result, the average time for divestiture was reduced from about 15 months in 1995 to slightly less than nine months in 1997. In addition, the Commission continues to ensure that divestiture packages are competitively viable and provide effective solutions to problems that have been identified.

The Commission's orders are monitored closely to ensure compliance, and trustee provisions are invoked if a respondent fails to divest in a timely fashion. Moreover, civil penalty actions are initiated for serious violations of an order. In a recent example, a company agreed to pay a $3 million civil penalty -- the largest ever for an order violation -- for allowing some supermarket stores to deteriorate pending divestiture.[(39)]

While most enforcement actions are resolved with a settlement and issuance of a consent order, which is an efficient and effective way of handling many cases, the Commission has also taken a strong stance when settlement negotiations do not produce an adequate remedy. A strong bargaining position requires a credible back-up position -- a willingness to litigate if necessary. A recent example is the *Staples/Office Depot* case. The companies offered a settlement, but a majority of the Commission concluded that it was not enough to prevent consumer injury. As a result, the Commission sought and obtained a preliminary injunction, and the merger was abandoned.

Finally, the Commission has maintained an active enforcement program to ensure compliance with the premerger notification provisions of the Hart-Scott-Rodino Act. Premerger notification is an essential part of merger enforcement, and full compliance with the Act is critically important. Therefore, the Commission has taken firm action against serious violations.[(40)]

The Commission also uses several non-case-related tools to advance its competition policy goals. One is the issuance of staff advisory opinions to inform private parties whether a proposed course of action may violate the antitrust laws. For example, last month Commission staff issued an advisory opinion on a proposal by the Direct Marketing Association to implement a program that would protect consumers from unwanted mail and telephone solicitation. The program would require DMA members to honor requests by consumers to have their names removed from direct mail advertising lists and telephone solicitation lists, and to prevent the sale of a customer's name, address and other information. In effect, the DMA's proposal is a form of industry self-regulation to protect the privacy rights of consumers. Based on the information provided by the DMA, Commission staff concluded that DMA's program is not likely to be anticompetitive, and that it may well be procompetitive by making consumers more willing to deal with marketers that provide assurances of confidentiality.

The Commission also undertakes special projects, such as the request by the Congressional Task Force on Tobacco and Health for an analysis of the potential economic impact of the proposed settlement of tobacco litigation. In September, Commission staff issued a detailed report on the likely effect of the proposed settlement on cigarette prices, industry profits and government revenues.[(41)] In addition, staff provided an analysis of the industry's proposed antitrust exemption for activities relating to the settlement. As you know, the Commission has a very long history of preparing special reports on important economic and legal issues. For example, an early study of the securities industry led to the enactment of the Securities Exchange Act in 1934.

## IV. Minimizing Burdens on Businesses

The last several years have also seen a number of steps to further reduce burdens that antitrust enforcement places on businesses. Some burden is inevitable because rigorous antitrust analysis requires a great deal of information, but unnecessary burdens must be avoided. The Commission has implemented significant changes in three areas: investigations, order termination and administrative litigation.

### A. Investigations and Orders

Building on reforms announced by my predecessor, Janet Steiger, and the Assistant Attorney General for the Antitrust Division at the time, Anne Bingaman, the FTC and the Department of Justice have worked to streamline the merger review process. For example, the agencies have substantially reduced the time needed for the clearance process to determine which of the agencies will handle a particular matter. That, in turn, has allowed more time for the initial investigation of proposed mergers, which enables the Commission to make a better- informed decision on whether a full investigation, with the issuance of requests for additional information (a "second request"), is needed.

The agencies also jointly adopted a model second request, so that the investigative procedures of the two agencies are more similar. In addition, Commission staff use a "quick look" procedure in appropriate cases, which can relieve a company from full compliance with a second request if information on a threshold issue leads to a conclusion that the transaction is not anticompetitive. This procedure can result in savings of time and effort for both the parties and Commission staff.

Another major burden reduction initiative was the adoption of additional exemptions from HSR filing requirements. In 1996, the FTC, with the concurrence of the Assistant Attorney General, promulgated new rules exempting five categories of transactions.[(42)] As a result, the number of reportable transactions is about 7-10% lower than it would have been without the new exemptions. Incidentally, these exemptions reduced the agencies' revenues from HSR filing fees, on which they are dependent for a substantial part of their funding. The staff is exploring the possibility of additional exemptions, as well as a revision to the premerger reporting form to eliminate the need to provide certain information. The staff is also seeking to provide additional guidance on specific information requirements, to ensure that merging parties understand their obligations.

The Commission also broadened its policy of terminating orders after 20 years. As adopted in 1994, this "sunset" policy applied only to competition orders, and respondents under existing orders that met the 20-year requirement had to file a petition to terminate the order. In 1995, the Commission made the sunset policy applicable to both competition and consumer protection orders, and the sunsetting of old orders was made automatic; respondents no longer have to file a petition to make it happen. These steps removed remedial requirements that were no longer necessary and may even have been counterproductive by constraining business conduct unnecessarily.

These efforts to reduce burdens are part of a larger Commission-wide effort to remove unnecessary regulatory burdens. For example, since 1994 the Commission has eliminated 42% of its trade regulation rules, primarily in the consumer protection area, which are no longer necessary because industry or state requirements exist or technology has changed.

### B. Administrative Litigation Rules Reform

In September 1996, the Commission announced a set of procedural rule changes designed to streamline the Commission's administrative trial procedures for both antitrust and consumer protection cases. The perception, and sometimes the reality, was that administrative litigation took too long. The amendments establish new and shorter deadlines, streamline pre-trial discovery, and speed up the trial itself. In most cases, the amendments require the administrative law judge to issue an initial decision within one year after the Commission issues an administrative complaint. This one-year deadline means that trials will be significantly shorter than they were prior to the rule amendments; the deadline may be modified only in extraordinary circumstances.

There have been no cases fully litigated under these new rules to date, but the Commission is hopeful that they will succeed in substantially shortening administrative trials. The benefits will be significant, but the changes themselves are not without cost. Cases likely will need a larger litigation staff, at least on complaint counsel's side, to handle the expedited schedule. That will not deter us from our commitment to further streamline administrative procedures, however. The process of procedural reform is continuing.

## V. Antitrust for the 21st Century

In another area of major antitrust initiatives, the Commission has acted on its responsibility to make sure that antitrust policy recognizes the needs of the contemporary business environment. The Commission has done that in several ways.

## A. Global Competition Hearings

One of the early initiatives during the past two and a half years was to hold a series of hearings on antitrust and consumer protection policy in the new high-tech, global business environment. Business leaders, antitrust scholars and members of the bar from across the country were invited to testify and submit written papers. The FTC staff issued a comprehensive report in May 1996. There have been two major outgrowths from those hearings to date. First, Commission staff and their counterparts at the Department of Justice conducted a study of how efficiency considerations should be analyzed in merger investigations and cases. That study resulted in a recommendation for a revision of the efficiencies section of the 1992 Horizontal Merger Guidelines. The agencies adopted the recommendation and revised the Merger Guidelines in April 1997. The revised guidelines clarify what kinds of efficiency claims will be considered, and how they enter into the overall analysis of the competitive effects of a merger. The revisions provide merging firms, the agencies and the public a clearer roadmap for determining whether efficiencies will result in lower prices or new products or will otherwise enhance competition.

Second, the Commission, in collaboration with the Department of Justice, initiated a project to determine whether antitrust guidance to the business community can be improved through clarifying and updating policies regarding joint ventures and other forms of competitor collaborations. There are no agency guidelines covering those activities, except in certain areas such as health care and intellectual property. One outcome of the project, now in its initial stages, could be the development of additional guidelines or a series of policy statements that describe the antitrust analysis of these types of business arrangements.

## B. Multi-Provider Networks in Health Care

Last year, the Commission participated in a dialogue before this Committee on the appropriate legal standard for reviewing certain activities of health care networks. The Commission's testimony before this Committee noted that enforcement actions concerning physician networks involved those that had a direct and substantial effect on price but lacked the compensating consumer benefits that can occur when there is financial integration within the network. Those kinds of networks are subject to the *per se* standard of illegality. We also noted, however, that some physicians may have been reading the agencies' health care antitrust enforcement policy statements too strictly in terms of what kinds of network efficiencies might justify the more flexible "rule of reason" standard of review. Our testimony further noted that the FTC staff was then engaged in a review, involving discussions with all segments of the health care industry, to re-examine whether there might be efficiencies other than financial integration that would justify rule of reason treatment. This was part of an ongoing effort to encourage efficient arrangements for delivering health care, and to provide antitrust guidance for health care providers who wish to participate in such arrangements.

In 1996, Commission staff completed that review, which resulted in a more thorough understanding of the potential procompetitive benefits of newer forms of network arrangements. As a result of that study, and thanks to the efforts of this Committee, in August 1996 the Commission and the Department of Justice revised their enforcement policy statements regarding physician network joint ventures and multi-provider networks. The new guidelines make clear that a wider range of physician networks will be reviewed under the more flexible rule of reason standard than was announced in previous policy statements. As a result, the new guidelines give providers greater latitude to develop alternative forms of efficient networks and, together with the agencies' advisory opinion procedures, provide greater assurance that such efforts will not run afoul of the antitrust laws.

### C. International Antitrust

In an economy that is increasingly international in scope, antitrust cannot be insular. International cooperation is essential. To that end, in April of this year the Commission and the Department of Justice announced an antitrust assistance agreement between the United States and Australia, the first under the International Antitrust Enforcement Assistance Act of 1994.[(43)] The agreement is an important first step in protecting consumers and the business community from international anticompetitive activities. The Commission also works with international organizations such as the OECD, and with the other parties to NAFTA and the proposed Free Trade Area of the Americas, to promote competition policies and enforcement practices that are consistent with the goals of maintaining competitive and open markets and enhancing consumer welfare. With financial support from the Agency for International Development, the Commission also provides technical assistance on competition issues to new antitrust authorities in Central and Eastern Europe, several states in the former Soviet Union, and Latin America.

## VI. Conclusion

In summary, consumers are well served by antitrust enforcement, which produces substantial dollar savings by preventing anticompetitive price increases and preserves the benefits of innovation for the future. The Commission continues to ensure that these benefits are achieved with the minimum possible burden on business.

I would be happy to take your questions.

## Endnotes:

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

2. The enforcement statistics bear out this increased level of marketplace activity. During the three-year period from fiscal year 1995 through fiscal 1997, the Commission initiated an average of 80.7 "competition actions" per year, including both merger and non-merger cases, compared to an average of 46.7 during the preceding three-year period (from fiscal 1992 through fiscal 1994). "Competition actions" are actions that advance or resolve a case and include administrative complaints issued, consent agreements accepted, preliminary injunctions authorized, merger transactions withdrawn after the issuance of requests for additional information, initial decisions in cases litigated before an administrative law judge, final litigated orders issued by the Commission, civil penalty actions filed, and prior approval of divestiture proposals and acquisition requests.

3. *FTC v. Staples, Inc.*, Civ. No. 97-701 (TFH) (D.D.C. June 30, 1997) (preliminary injunction granted and transaction abandoned).

4. This estimate was calculated by FTC staff using company data. The estimate has two components: (1) an estimate of savings that consumers will realize as a result of continuing competition, based on Staples' projections of

downward pressure on profit margins resulting from competition between itself and Office Depot in existing two-superstore markets, and additional competition in an increasing number of markets with three superstores, and (2) an estimate of savings from preventing an increase in prices that would have resulted from the elimination of competition from Office Depot, reducing the existing two-superstore markets to Staples-only markets, and reducing three-superstore markets to two-superstore markets. In other words, without the merger, prices are likely to decrease in markets where Staples faces superstore competition, whereas prices were likely to increase above existing levels if the merger took place and competition from Office Depot was eliminated. The difference between the without-merger and with-merger price levels is the total price difference. The estimates were calculated econometrically using company pricing data and holding all other factors constant.

5. *First Data Corp.*, Dkt. C-3635 (consent order, Jan. 16, 1996). The consumer savings estimate is based on pricing patterns before and after MoneyGram entered the market to compete with Western Union, previously a monopolist. Before MoneyGram's entry, Western Union had imposed annual price increases of 5 to 8%; competition from MoneyGram forced Western Union to forgo those price increases. In addition, Western Union reduced its price from $29 to $22 for an average-sized transaction when MoneyGram entered; an increase back to $29 after the merger would have represented a 30% price increase. MoneyGram's fee for a transaction of the same size was around $10 to $13, which likely would have increased had the merger been permitted; an increase to Western Union's level would have represented more than a doubling of price. Commission staff used estimated percentage increases in the lower range of these possibilities to calculate a total dollar savings of $15-30 million per year.

6. *Ciba-Geigy Ltd.*, Dkt. C-3725 (consent order, Mar. 24, 1997) (Comm'r Azcuenaga concurring in part and dissenting in part).

7. *Rite Aid Corp.*, FTC File No. 961 0020 (preliminary injunction action authorized, Apr. 17, 1996; transaction abandoned Apr. 26, 1996). Ultimately, Revco was acquired by CVS, which preserved the competition that would have been lost from the earlier merger.

8. Rite Aid's acquisition of Revco would have given it control of almost 5,000 retail drug stores located in New York and various Midwestern and Mid-Atlantic states.

9. *FTC v. MEDIQ, Inc.*, Civ. No. 97-1916 (SS) (D.D.C.) (complaint filed, Aug. 22, 1997). The parties abandoned the transaction prior to a hearing on the Commission's motion for a preliminary injunction.

10. *Johnson & Johnson*, Dkt. C-3645 (consent order, Mar. 19, 1996).

11. E.g., *Tenet Healthcare Corp.*, Dkt. C-3743 (consent order, May 20, 1997); *Columbia/HCA Healthcare Corp.*, Dkt. C-3627 (consent order, Nov. 24, 1995); *Columbia/HCA Healthcare Corp.*, Dkt. C-3619 (consent order, Oct. 3, 1995) (acquisition of Healthtrust); *Local Health System, Inc.*, Dkt. C-3613 (consent order, Oct. 3, 1995) (Port Huron Hospital and Mercy Health Services).

12. *FTC v. Freeman Hospital*, 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, No. 96-2440 (6th Cir. July 8, 1997).

13. *Time Warner, Inc.*, Dkt. C-3709 (consent order, Feb. 3, 1997) (Comm'rs Azcuenaga and Starek dissenting).

14. *Cadence Design Systems, Inc.*, Dkt. C-3761 (consent order, Aug. 7, 1997) (Comm'r Azcuenaga concurring in part and dissenting in part; Comm'r Starek dissenting).

15. The Commission's consent order permitted the acquisition but requires Cadence to provide continued non-discriminatory access to its software development programs so that independent software developers can continue to develop software that will interface with Cadence products. This resolution preserves any efficiencies from the merger while protecting access opportunities.

16. *FTC v. Questar Corp.,* No. 2:95CV 1137S (D. Utah 1995) (transaction abandoned).

17. *The Boeing Co.,* Dkt. C-3723 (consent order, Mar. 5, 1997) (acquisition of Rockwell's Aerospace and Defense business).

18. *Lockheed Martin Corp.*, Dkt. C-3685 (consent order, Sept. 18, 1996) (acquisition of Loral Corp.; the transaction also involved air traffic control systems and commercial satellites).

19. *Raytheon Co.*, Dkt. C-3681 (consent order, Sept. 3, 1996) (acquisition of Chrysler Technologies Holding).

20. *Hughes Danbury Optical Systems,* Dkt. C-3652 (consent order, Apr. 30, 1996).

21. *Litton Industries, Inc.,* Dkt. C-3656 (consent order, May 7, 1996).

22. *Boeing/McDonnell Douglas*, FTC File No. 971 0051. The commercial aircraft part of the merger is discussed later in this testimony.

23. 94 F.T.C. 701 (1979), *enforced as modified,* 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court,* 455 U.S. 676 (1982).

24. 476 U.S. 447 (1986).

25. *Toys "R" Us*, Dkt. 9278 (complaint issued, May 16, 1997) (Comm'rs Azcuenaga and Starek dissenting).

26. *Toys "R" Us, Inc.,* Dkt. 9278 (Initial Decision, Sept. 25, 1997).

27. *FTC v. College of Physicians-Surgeons of Puerto Rico,* Civ. No. 97-2466HL (D.P.R. 1997) (stipulated final judgment for permanent injunction).

28. *Montana Associated Physicians, Inc.,* Dkt. C-3704 (consent order, Jan. 13, 1997).

29. Other cases involving medical practitioners in recent years include *Physicians Group, Inc.,* Dkt. C-3610 (consent order, Aug. 11, 1995); *Puerto Rican Physiatrists,* Dkt. C-3583 (consent order, June 2, 1995). Another important case involved the use of "most favored nation" clauses by RxCare of Tennessee, the leading provider of pharmacy network services in that state, in contracts with pharmacies. *RxCare of Tennessee, Inc.,* Dkt. C-3664 (consent order, June 10, 1996). These clauses required that, if a pharmacy in the network agreed to accept a lower reimbursement rate for providing prescription drugs to any other plan's subscribers, the pharmacy had to give RxCare the lower rate as well. Ordinarily, one might think that the subscribers to pharmacy benefit plans served by RxCare would benefit from the most favored nation clause, since they would benefit from lower reimbursement rates offered to competing plans. In this case, however, RxCare's network had such a large market share that member pharmacies had more to lose than to gain from seeking additional business through lower reimbursement rates for other plans. In effect, the most favored nation clause established a price floor and prevented lower-priced networks from being able to enter the market.

30. *California Dental Ass'n v. FTC,* No. 96-70409 (9th Cir. Oct. 22, 1997), *affirming California Dental Ass'n*, Dkt. 9259 (final order, Mar. 24, 1996) (Comm'r Azcuenaga dissenting; Comm'r Starek concurring in part and dissenting in part). The Court of Appeals affirmed the finding of illegality of price-related advertising restraints based on a "quick look" rule of reason analysis rather than the *per se* analysis applied by the Commission.

31. *American Medical Ass'n,* 94 F.T.C. 701 (1979), *supra* n.23.

32. *New Balance Athletic Shoe, Inc.*, Dkt. C-3683 (Sept. 10, 1996) (Comm'r Starek dissenting); *Reebok Internat'l, Ltd.*, Dkt. C-3592 (July 18, 1995) (Comm'r Starek dissenting).

33. *American Cyanamid*, Dkt. C-3739 (consent order, May 12, 1997) (Comm'r Starek dissenting). In part, the consent order prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for American Cyanamid products.

34. For example, in the American Cyanamid matter, a multi-state task force consisting of all 50 states, the District of Columbia and the Commonwealth of Puerto Rico obtained a settlement valued at $7.3 million in a companion case.

35. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *State Oil Co. v. Khan*, No. 96-871. The agencies' amicus brief observed that maximum resale price agreements may serve the important and procompetitive purpose of limiting a dealer's ability to exploit market power.

36. *Dell Computers, Inc.*, Dkt. C-3658 (consent order, May 20, 1996) (Comm'r Azcuenaga dissenting).

37. FTC File No. 971 0051.

38. Commissioner Azcuenaga expressed a dissenting view.

39. *FTC v. Schnuck Markets, Inc.*, Civ. No. 4:97CV01830CEJ (E.D. Mo. 1997) (consent judgment).

40. In fiscal 1997, the Commission negotiated civil penalty settlements in two cases, resulting in a total of $5.75 million in civil penalties. The bigger settlement involved a transaction between two engine parts manufacturers, Mahle GmbH and Metal Leve S.A. They agreed to pay $5.6 million in civil penalties, the largest penalty to date for a failure to file under HSR. In fiscal 1996, there were four civil penalty actions, resulting in settlements totaling $7.65 million in civil penalties.

41. "Competition and the Financial Impact of the Proposed Tobacco Industry Settlement," Report prepared by the staff of the Bureaus of Economics, Competition and Consumer Protection of the Federal Trade Commission at the request of the Congressional Task Force on Tobacco and Health, September 1997.

42. 61 Fed. Reg. 13,666 (Mar. 18, 1996).

43. The agreement was published in the Federal Register for public comment and is awaiting final action.