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REPORT FROM THE FEDERAL TRADE COMMISSION

PREPARED REMARKS OF
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CHAIRMAN

FEDERAL TRADE COMMISSION

BEFORE

SECTION OF ANTITRUST LAW

OF

THE AMERICAN BAR ASSOCIATION

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

Good morning. It is a pleasure to be here again before this distinguished group for my fifth "Report from Official Washington," and to share the responsibility for the first time with my friend Anne Bingaman. She has continued the spirit of cooperation between the agencies that I consider one of our best achievements over the past half decade. This morning, I would like to discuss the Commission's antitrust activities during the past year, with particular emphasis on our activities in a few key industries whose dynamic nature presents some of our greatest challenges. I will also note some of the key achievements of our very active consumer protection mission. Finally, I will address some initiatives that I believe will improve our institutional effectiveness, and which I pledged to undertake when I was before you last year. As always, the views I express are my own, and not necessarily those of the Commission or any other Commissioner.

I. ANTITRUST ACTIVITIES IN KEY INDUSTRIES UNDERGOING RAPID CHANGE

The only constant in our competitive, free enterprise economy is change. The genius of this form of economic organization is the market's ability to respond rapidly to changing consumer demand, and the new opportunities offered by technological development, by shifting resources into and out of individual companies and whole industries. Right now, we see some industries undergoing enormous change: technological change, changes in demand, new forms of collaboration and evolving regulatory environments.

Antitrust enforcement must of course recognize its role in making sure that, in the face of such change, competition is preserved: that the evolutionary process does not create undue market power in either growing or shrinking industrial sectors, and at the same time that this process is not impeded by collusion. As one of the agencies responsible for enforcing federal antitrust law, the Commission must focus its scarce enforcement resources to ensure that the opportunities that change presents are not misused to cause competitive harm to consumers.

Recent commentary has tended to highlight the rapidly changing business environments of three areas of industry: health care, defense, and high technology, particularly communications. It is probably not coincidental that the Commission has recently taken significant enforcement action in each of these areas. I believe that our actions have demonstrated a careful regard both for the irresistible forces of change and for the unchanging value of free and fair competition.

A. Health Care

It is a commonplace that health care is an industry in the throes of restructuring. Apart from whatever changes may eventually emerge from the ongoing legislative efforts, the industry appears both to be anticipating the direction of those efforts and responding independently to the concern for cost-containment that partly animates them.

The Commission pursued several cases during the past year concerning mergers in this industry, three of which involved the same company, Columbia Healthcare Corporation. In the space of a year Columbia has increased the number of hospitals it owns from about two dozen to almost two hundred through its mergers with Galen Health Care Inc. and HCA-Hospital Corporation of America.¹ The three Commission challenges arose directly or indirectly from these transactions, but it is notable that they reflect careful, market-by-market scrutiny of competitive impact, not a shotgun approach. The Commission challenged the Galen and HCA transactions in only two markets although these transactions covered the acquisition of about 170 hospitals throughout the country by Columbia.

Last May, a district court in Florida granted the Commission's request for a preliminary injunction against Columbia's acquisition of a hospital from Adventist Health System.² The Commission alleged that this \$40 million transaction would have harmed competition in the market for acute-care inpatient hospital services in Charlotte County, Florida. The Commission's administrative complaint in this case was withdrawn from adjudication, and a consent agreement was

¹ See Caprino, Columbia Shows Way In Health-Care-Industry Mergers, Washington Times, Dec. 28, 1993 at B-7.

² Federal Trade Commission v. Columbia Hospital Corp., 1993-1 Trade Cas. (CCH) ¶ 70,209 (M.D. Fla. 1993).

accepted for public comment in February.³ On the same date that this agreement was announced, the Commission also announced acceptance for comment of an agreement with Columbia and HCA, stemming from the \$4 billion merger of the two corporations, that would require divestiture of HCA Aiken Regional Medical Center in Aiken, South Carolina. The proposed complaint accompanying the agreement charged that the combination under single ownership of the Aiken hospital and Columbia's Augusta Regional Medical Center was likely to reduce competition substantially in the market for inpatient, acute-care services in the Augusta, Georgia area.⁴

These two consent agreements come on the heels of a consent order with Columbia that became final last November, settling charges that Columbia's acquisition of Galen would have substantially lessened competition for acute-care inpatient hospital services in Osceola County, Florida, by combining ownership of two competing hospitals in that county. To prevent that result, the order required that Columbia divest Kissimmee Memorial Hospital, located in Kissimmee, Florida.⁵

Also on the hospital merger front, at the end of January the Commission authorized its staff to seek a preliminary injunction to block the combination of the only two general acute care

³ Columbia Hospital Corporation (Medical Center Hospital), FTC Dkt. 9256 (consent accepted for comment Feb. 4, 1994).

⁴ Columbia Hospital Corporation (HCA), FTC File No. 9410005 (consent accepted for comment Feb. 8, 1994) (Commissioner Owen dissented; Commissioner Azcuenaga dissented in part).

⁵ Columbia Hospital Corp. (Galen), FTC Dkt. C-3472 (consent order final Nov. 19, 1993).

hospitals in Pueblo County, Colorado. The transaction was to have involved the acquisition of Parkview Episcopal Medical Center by the Sisters of Charity Healthcare Systems, Inc., which owns St. Mary-Corwin Hospital in Pueblo. The parties abandoned the transaction following announcement of the Commission's intentions, before the matter reached court.

Finally, just two weeks ago the Commission authorized staff to seek a temporary restraining order and preliminary injunction blocking HealthTrust, Inc.-The Hospital Co. from acquiring three hospitals from Holy Cross Health Services of Utah. Both organizations operate hospitals along the Wasatch Front, which includes the Salt Lake City metropolitan area.

Notwithstanding the number of Commission challenges to hospital mergers in the last few months, from a broader perspective such challenges have been the exception rather than the rule. Most hospital mergers investigated by the Commission have been, on balance, competitively unobjectionable. There have been well over 200 hospital mergers since 1987, and the Commission and the Department of Justice together have challenged only a dozen.⁶ These statistics appear to indicate that the trend toward consolidation in the health industry, including hospital consolidation, is in most instances driven by the attempt to achieve efficiencies in the delivery of this vital

⁶ See "Mergers Thrive Despite Wailing About Adversity," *Modern Healthcare*, Oct. 12, 1992, at 30; Department of Health & Human Services, Report of the Secretary's Task Force on Hospital Mergers, 9, 11 (January 1993).

product. Current health care reform proposals, if enacted, could well accelerate this trend toward consolidation.

As in any industry, of course, there are instances where hospital consolidation can be anticompetitive. The Commission will continue to scrutinize such transactions to protect competitive incentives for the provision of high quality hospital services at competitive prices.

The Commission also recently accepted for public comment a consent agreement involving a merger of drug store chains: TCH Corporation's proposed \$1.16 billion acquisition of the PayLess drug stores.⁷ TCH already owns the Thrifty drug store chain and the Bi-Mart chain of membership discount stores. Under the agreement, TCH would have to divest within a year either its own stores or the stores to be acquired in five cities in the Northwest where potential adverse effects on competition are alleged.

The Commission has also been active in health care outside the merger field during the past year, issuing two administrative complaints -- one of which has since been settled -- and accepting three pre-complaint consent agreements for public comment. These cases largely reflect the important role of antitrust enforcement in supporting cost containment in health care, while at the same time preserving strong incentives for competition as to quality.

⁷ TCH Corporation, FTC File No. 9410024 (consent accepted for comment Feb. 24, 1994) (Commissioner Owen dissented).

One problem the Commission addressed last year involves the achievement of market power by certain health care providers -- market power that could enable these providers to charge supra-competitive prices or degrade quality. In November 1993, the Commission accepted for public comment consent agreements in the two Home Oxygen cases, the first federal antitrust cases involving joint ventures created by physicians to provide services ancillary to their professional practices.⁸ The Home Oxygen consents each involve a partnership formed by pulmonologists to supply oxygen delivery systems to patients in their homes. Almost all use of home oxygen systems is the result of a prescription by a pulmonologist. The proposed complaints accompanying the agreements allege that the pulmonologists in partnership in the markets at issue are able to influence patients' choice of oxygen suppliers.

The complaints allege that roughly 60 percent of the practicing pulmonologists in each geographic market invested in the partnership there, or practiced in groups with such investors, and that each of the partnerships thus acquired market power in the provision of home oxygen in its geographic market, and also created barriers to entry into those markets.

Because the antitrust problem arises from structural concerns, the proposed consent orders require divestiture of

⁸ Home Oxygen & Medical Equipment Co., FTC File No. 9010109, and Homecare Oxygen & Medical Equipment Co., FTC File No. 9110020 (consents accepted for comment Nov. 2, 1993) (Commissioner Starek dissented).

sufficient partnership interests to reduce to 25 percent or less the percentage of practicing pulmonologists in each geographic market that remain affiliated with either partnership.

The Home Oxygen orders do not undertake to prohibit self-referral. Our concern as antitrust enforcers is not with self-referral as such but rather with the role that it may play in the creation or enhancement of market power in the market for the ancillary service. The Commission will remain vigilant to prevent anticompetitive physician joint ventures to provide ancillary services, since such joint ventures have potentially important adverse effects on cost-containment efforts.

A long-standing antitrust problem in the health care sector, first addressed by the Commission in our 1979 American Medical Association decision,⁹ is that of agreements among competing providers of health care goods or services to attempt to thwart cost-containment efforts, either directly or by preventing the development of alternative care delivery modes. Last September, the Commission issued an administrative complaint in Maryland Pharmacists Association, alleging that the parties undertook a concerted boycott to frustrate cost-containment. In that case, in which a consent order has now become final, the Commission alleged that two associations, the Maryland Pharmacists Association and the Baltimore Metropolitan Pharmaceutical Association, conspired to boycott a prescription drug plan for

⁹ American Medical Ass'n, 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982).

Baltimore city employees after the plan announced a reduction in payments for drugs.¹⁰ The consent order prohibits the associations from entering into, organizing, or encouraging any agreement among pharmacies to refuse to enter into, or to withdraw from, any participation agreement offered by a third-party payor.

Another very recent case reflects allegations of price-fixing by a group of health care providers. Just this week, the Commission made final a consent order with the McLean County Chiropractic Association, which consists of 13 competing chiropractors practicing in the Bloomington-Normal area of Illinois.¹¹ According to the complaint accompanying the order, the association set, and then periodically voted to raise, the maximum fees its members could charge patients and third-party payors (such as health insurers) for their services, and attempted to negotiate collectively on behalf of its members the terms and conditions of agreements with third-party payors. While an agreement that explicitly sets only price ceilings may seem to carry less threat of consumer injury than one setting price floors, the Supreme Court in Maricopa held that such an agreement is nonetheless per se illegal because it disables the normal function of pricing in competitive markets, discourages

¹⁰ Maryland Pharmacists Ass'n, FTC Dkt. 9262 (consent order final Feb. 25, 1994).

¹¹ McLean County Chiropractic Association, FTC Dkt. C-_____, FTC File No. 9110121 (consent order final April 7, 1994).

entry, and "may be a masquerade for an agreement to fix uniform prices."¹²

Another antitrust problem the Commission has encountered in the health care context -- concerted restraints by associations of providers on their members' advertising -- may seem less obviously connected to the objectives of facilitating cost-containment efforts and preserving competition on quality and price. But if providers cannot advertise pricing practices or innovative services, their incentives to compete in either dimension are sharply reduced.

The Commission last year filed a complaint against the California Dental Association alleging such advertising restraints.¹³ The complaint alleges that the Association, which encompasses 75 percent of the dentists in California, prevents its members from providing truthful, non-deceptive advertising to consumers, with the effect that consumers are deprived of useful information and dentists' incentives to offer discounts or special services are decreased.

One of our most significant achievements in the area of health care in the past year was not an enforcement action: It was the joint issuance of the Statements of Antitrust Enforcement Policy in the Health Care Area by the Commission and the

¹² Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982).

¹³ California Dental Ass'n, F.C. Dkt. 9259 (complaint issued July 9, 1993).

Antitrust Division.¹⁴ We issued these Statements to clarify Commission and Justice Department policy regarding mergers and joint activities in health care, responding to concerns that uncertainty about antitrust exposure was impeding efficient integrations in this industry. The Statements do not change current law or policy, but they clearly set out six "safety zones" for conduct that will not be challenged absent extraordinary circumstances. The Statements also summarize the antitrust analysis that will be applied to conduct falling outside the safety zones.

The Statements provide concrete guidance in six areas where questions about antitrust enforcement have arisen: (1) hospital mergers; (2) hospital joint ventures for the purchase or lease of medical equipment; (3) physicians' provision of information to purchasers of health care services; (4) hospital exchanges of price and cost information; (5) joint purchasing arrangements among health care providers; and (6) physician network joint ventures. The Statements also commit the agencies to respond to requests for advice no later than 90 days after all necessary information is received regarding any matter addressed in the statements, except requests relating to hospital mergers outside the safety zone. The agencies will also respond to advisory opinion or business review requests regarding other non-merger

¹⁴ United States Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in the Health Care Area (Sept. 15, 1993).

health care matters within 120 days after all the necessary information is received.

Two months ago, in response to a request for an advisory opinion received prior to the issuance of the joint Statements, the Commission advised the American Medical Association and the Chicago Medical Society that a program they had proposed involving peer review of physician fees is not likely to violate federal antitrust laws and, in fact, could benefit consumers, as long as the disciplinary aspect of the program is limited to abusive practices. Our letter observed that "Advisory peer review can give patients, and payors [such as health insurance companies], information about the basis for a fee and an informed opinion about its reasonableness, and help them decide whether to pay a disputed bill or to continue to patronize a particular doctor." We added that "In cases where the fee charged arose from abusive behavior, professional discipline may also improve the functioning of the market by deterring such behavior." Our analysis noted that we had recognized the benefits of properly-run fee-review programs in the past, but that the mandatory participation element of the present proposal distinguished it from the earlier instance. We concluded, however, that mandatory physician participation in advisory fee review is "reasonably related" to making information about fees available to consumers and is not likely to endanger competition, so long as care is taken that the results of review not be binding on any party.

We nonetheless reaffirmed the basic antitrust principle that a group of competitors may not regulate each others' fees. Accordingly, we did not approve the proposal so far as it contemplated medical societies disciplining members on the basis of fee levels alone, without finding abusive conduct. We emphasized, however, that societies could take other steps -- such as requiring physicians to pre-disclose price information to patients.

B. Defense

The defense industry is of course also undergoing significant restructuring, in response to a perceived reduction in defense needs and the resulting defense budget cuts. As this sector contracts, some analysts are predicting more mergers among defense contractors. It is important, however, that antitrust principles not yield uncritically to this trend. The Commission will analyze each such transaction carefully to be certain that it does not oppose procompetitive or competitively neutral mergers, but will continue to challenge those mergers that appear anticompetitive. Our staff has already examined a number of mergers in this industry that have not been challenged; but in a few instances, consolidation has raised significant antitrust issues.

The Commission brought to a conclusion an important merger case in this industry just prior to last year's meeting, by making final a consent order settling its administrative

complaint challenging the proposed acquisition by Alliant Techsystems Inc. of assets of Olin Corporation related to the production of various types of ammunition used by the Abrams tank and the Apache helicopter.¹⁵ The Commission's complaint alleged that the transaction would have constituted a merger to monopoly in the production of 120mm tank ammunition. Under the consent order, Alliant agreed to abandon its acquisition of Olin.

Just two weeks ago, the Commission accepted for comment a consent agreement concerning Martin-Marietta's acquisition of the Space Systems Division of General Dynamics, a transaction with implications for both military and civilian markets.¹⁶ The proposed order would protect competition by prohibiting Martin-Marietta's launch vehicle division, which will be expanded by the acquisition, from disclosing to the company's satellite division any non-public information it obtains from a competing satellite manufacturer.

C. Telecommunications

As I observed earlier, the Commission has also been active recently in the area of telecommunications. The current pace of technological advance in this field has inevitably attracted new resources and proposals for combinations of hitherto unrelated

¹⁵ Alliant Techsystems Inc., FTC Dkt. 9254 (consent order final March 16, 1993).

¹⁶ Martin-Marietta Corporation, FTC File No. 9410038 (consent accepted for comment March 24, 1994) (Commissioner Owen dissented).

players in these industries -- either to achieve striking efficiencies of integration or strangling concentrations of power, depending on whom you believe. This activity has also attracted Commission resources to ensure that the competitive environment is preserved as technologies and markets change.

The proposed acquisition of Paramount Communications by a group led by TCI, QVC, Liberty Media and others would have been one of the largest of a number of recent mergers and proposed mergers in this area. The Commission investigated this proposal because of several potential antitrust concerns, and ultimately accepted for public comment a consent agreement, to be effective unless QVC terminated or abandoned its attempted acquisition, or failed to acquire more than 10 percent of Paramount's stock.¹⁷ Ultimately, the competing offer of Viacom for Paramount prevailed, rendering the consent non-binding and causing the Commission to withdraw its acceptance. Still, the agreement reached with TCI and Liberty stands as an illustration of the care with which we approach such complex transactions, and also as an indication of our analysis of vertical mergers.

The complaint in this case detailed the markets in which the firms involved compete. Paramount is primarily a producer of entertainment programs, although it is also a partial owner of a cable network. The proposed acquiring company, QVC, owns two home shopping companies. QVC has a number of substantial share-

¹⁷ Tele-Communications, Inc./Liberty Media Corporation, FTC File No. 9410008 (consent accepted for comment Nov. 15, 1993) (Commissioners Azcuenaga and Owen dissented).

holders, the largest of which is Liberty Media, which is also controlled by the individuals that control TCI. TCI is the nation's largest cable-television system owner and, with Liberty Media, is an owner of substantial interests in cable programming networks. The combination of all of these companies, the proposed complaint alleged, would have had a substantial market presence at all three levels of the cable television industry -- production, packaging, and distribution.

The transaction as announced raised vertical foreclosure concerns at two of these levels. The complaint accompanying the consent alleged that as a result of TCI/Liberty Media's gaining influence over Paramount, the acquisition might have substantially lessened competition at the programming packaging level, specifically, the market for cable television premium movie channels. Second, the complaint alleged that the acquisition could have made it necessary for entrants into subscription television distribution also to enter at the programming level.

The anticompetitive effects of this acquisition could have included a reduction in the output and quality of premium movie channels, the complaint alleged. Additionally, the acquisition could have resulted in the TCI group acquiring sufficient market power to raise cable subscription fees to consumers, to raise programming fees to cable operators, and to increase entry barriers into subscription television distribution.

These competitive concerns flowed from the vertical relationship between TCI/Liberty Media and QVC/Paramount. To remedy these concerns, the consent order would have severed that relationship by eliminating TCI's and Liberty Media's interest in, and influence over, QVC. In addition to the required divestiture, the order further prohibited TCI and Liberty Media from entering into any agreements with QVC or Paramount for exclusive distribution of certain movie rights prior to completing the divestitures.

II. COMMISSION ANTITRUST ENFORCEMENT IN OTHER AREAS

To this point, I have stressed our enforcement record in the past year in the rapidly evolving health care, defense, and high technology sectors. Obviously, we did not let down our guard with respect to other, less "trendy" sectors. Indeed, the year saw a broad range of both merger and non-merger enforcement in a whole spectrum of industries.

A. Mergers

In fiscal year 1993, the agencies reviewed 1,846 Hart-Scott-Rodino premerger notification transactions and issued forty so-called "second requests" seeking additional information. The number of transactions filed in the fourth quarter of the year surpassed any quarter since 1989. And this accelerated pace has continued during the first six months of fiscal 1994, with 1,099 transactions and eighteen second requests. I have already

described a number of the enforcement actions that arose out of this activity, in the health care, defense, and telecommunications industries.

In addition to those cases, the Commission last September authorized a preliminary injunction action to prevent the acquisition of Chrysler's railcar assets by General Electric. The acquisition would have combined the two largest boxcar leasing companies in the United States and Canada. That transaction was abandoned after the injunction action was authorized.¹⁸ And the Commission reached a stipulated settlement of Occidental Petroleum Corporation's appeal from the Commission's adjudicative decision announced shortly after last year's meeting that Occidental's acquisition of certain assets of Tenneco Polymers, Inc. violated the antitrust laws. The settlement, which has been approved by the Second Circuit, requires Occidental to divest two polyvinyl chloride plants.¹⁹

In other merger enforcement activity since last year's meeting, the Commission has accepted consent orders affecting products and industries as diverse as dehydrated onions,²⁰ coal

¹⁸ General Electric Co., FTC File No. 9310110.

¹⁹ Occidental Petroleum Corp., FTC Dkt. 9205 (decision and order Dec. 22, 1992), aff'd as modified by stipulation, No. 93-4122 (2d Cir. Jan. 12, 1994) (Commissioner Owen dissented in part).

²⁰ McCormick & Co., Inc., FTC Dkt. C-3468 (consent order final Nov. 17, 1993).

shipping facilities,²¹ acrylic-plastics,²² low voltage industrial fuses,²³ residential non-selective herbicides,²⁴ horizontal carousels used in materials handling,²⁵ coating resins,²⁶ and structural blind rivets.²⁷

Let me describe a couple of the more interesting of these cases. In the dehydrated onion case, the Commission challenged the acquisition of Haas Foods by McCormick & Company. The two companies were horizontal competitors in the U.S. dehydrated onion business. Dehydrated onions are a unique product, used in the preparation of manufactured foods like powdered soups and chili mixes and in restaurants and other institutions for the bulk preparation of foods. Dehydrated onions in fact cannot be grown from regular onion seeds; the seeds have to be specially developed. The need to possess these special seeds constitutes a substantial barrier to entry into the production of dehydrated

²¹ Consol, Inc., FTC Dkt. C-3460 (consent order final Sept. 27, 1993).

²² Imperial Chemical Industries, PLC, FTC Dkt. C-3473 (consent order final Dec. 1, 1993) (Commissioner Owen dissented).

²³ Cooper Industries, FTC Dkt. C-3469 (consent order final Oct. 26, 1993) (Commissioner Azcuenaga dissented).

²⁴ Monsanto Co., FTC Dkt. C-3458 (consent order final Sept. 1, 1993).

²⁵ Alvey Holdings, Inc., FTC Dkt. C-3488 (consent order final March 30, 1994).

²⁶ Valspar Corp., FTC Dkt. C-3478 (consent order final Jan. 28, 1994) (Commissioner Owen dissented).

²⁷ Textron, Inc., FTC Dkt. 9226 (consent accepted for comment Oct. 26, 1993) (Commissioner Azcuenaga dissented).

onions, and the merger of these two producers raised competitive concerns. The consent order settling the case required McCormick to divest enough specially bred seeds to produce a total of 100 million pounds of low-water onions and at least 5,000 additional pounds of onion seeds for future planting, in order to provide a new entrant with the seeds necessary to compete.

The coal case is also interesting. There, the Commission charged that the acquisition of a company that provided coal export terminal services in the port of Baltimore by Consol, Inc., its lone horizontal competitor, would allow Consol to exercise market power unilaterally, which could raise the price of export services to coal producers in the northern Appalachian region. The market for export loading services includes unloading coal from railroad cars, placing it in ground storage, blending it to achieve the proper mix, and loading it onto transoceanic ships. The unilateral exercise of market power at this level could create a bottleneck to exporting coal and increase Appalachian producers' costs of serving overseas markets. The Commission's consent required Consol to divest the acquired Baltimore export terminal to a Commission-approved acquirer.

Even this list is not a full indication of the Commission's law enforcement impact in the merger area during this period. For example, in fiscal 1993 a total of twenty mergers investigated by the Commission's staff were either restrained by court order, subjected to consent agreements, or abandoned by the

parties after staff expressed concern to the parties about the potentially anticompetitive nature of the transactions.

Before I move on to a discussion of our non-merger activity, let me mention an action taken during the past year in the merger-related field of joint ventures that I think is notable as indicating the Commission's ability to recognize and adapt to changed circumstances. In April 1984, the Commission accepted a consent order with General Motors and Toyota Motor Corporation that gave the go-ahead to formation of their joint venture, New United Motor Manufacturing, Inc., but limited the venture to a duration of 12 years, and limited the annual production to be sold to GM to about 250,000 vehicles. Last June, the parties petitioned to reopen the order and set it aside, arguing that the industry had changed since 1984 in ways that rendered the order unnecessary and even anticompetitive. Last November, the Commission granted this petition, saying that GM and Toyota "have shown changed conditions of fact that eliminate the need for the order and make its continued application to the respondents inequitable and harmful to competition."²⁸ I think that this willingness to reconsider our orders, in response to a proper showing, is important to fulfillment of our mission.

²⁸ General Motors/Toyota, FTC Dkt. C-3132 (order reopened and set aside Oct. 29, 1993).

B. Non-Merger Activity

The Commission has been similarly active in non-merger enforcement in the past year. I discussed last year the Commission court actions and administrative complaint in the so-called Infant Formula cases: In June 1992 the Commission had filed both an administrative and a district court complaint against Abbott Laboratories, and district court complaints against American Home Products and Mead Johnson & Company alleging a number of anticompetitive activities in the distribution of infant formula under the Supplemental Food Program for Women, Infants and Children (WIC) and, in some of the complaints, that the companies as members of the Infant Formula Council agreed not to advertise formula via mass media directly to consumers, in an effort to impede entry into their market.²⁹ American Home Products and Mead Johnson signed stipulated orders which were filed with the court complaints, providing for restitution in the form of infant formula for the WIC program.

I am not just rehashing old war stories, but introducing a sequel: At the end of February 1994, the Commission made final a settlement of the administrative complaint against Abbott in which Abbott agreed not to conspire with competitors to restrict

²⁹ Federal Trade Commission v. Abbott Laboratories, Civ. No. 92-1364 (D.D.C. filed June 11, 1992); Federal Trade Commission v. Mead Johnson & Co., Civ. No. 92-1366 (D.D.C. June 11, 1992) (consent decree); Federal Trade Commission v. American Home Products, Civ. No. 92-1367 (D.D.C. June 11, 1992) (consent decree); Abbott Laboratories, D. 9253 (administrative complaint issued June 11, 1992).

mass media advertising of infant formula to consumers.³⁰ Under this settlement, Abbott is also prohibited from soliciting its competitors to adopt or adhere to restrictions against consumer advertising found in any trade association guidelines.

The district court complaint against Abbott, in which the Commission seeks permanent injunctive relief and restitution under § 13(b) of the FTC Act, came on for trial from February 7 to March 10 of this year. The court has reserved decision, so perhaps you will get yet another feeding of Infant Formula next year!

The Commission issued final consent orders in the past year involving allegations of horizontal anticompetitive conduct, and providing appropriate remedies, with an association of engineers, based on alleged restraints on advertising;³¹ with an association of soil engineers, based on an alleged agreement to restrain competitive bidding among members;³² with an association of manufacturers of bullet-proof vests, based on an alleged agreement restricting both comparative advertising and the offering of product-liability insurance as a purchase incentive

³⁰ Abbott Laboratories, FTC Dkt. 9253 (consent order final Feb. 4, 1994) (Commissioner Azcuenaga dissented in part).

³¹ National Society of Professional Engineers, FTC Dkt. C-3454 (consent order final Aug. 10, 1993) (Commissioner Starek dissented).

³² ASFE (Soil Engineers), FTC Dkt. C-3430 (consent order final June 18, 1993).

for law-enforcement agencies;³³ and with an association of real estate brokers, based on allegations of various restraints in the market for residential real estate brokerage.³⁴

We also accepted for public comment consent agreements with a state automobile dealer association, based on charges that it agreed with its member dealerships to restrict non-deceptive comparative and discount advertising, and advertising concerning the terms and availability of consumer credit;³⁵ and with two associations of professional conference interpreters, based on allegations that they conspired to fix the fees their members could charge for services, and engaged in other illegal efforts to restrain competition among their members.³⁶ And, in our long-running Detroit Auto Dealers Association adjudicative case, the Commission accepted for public comment a consent agreement with the bulk of the remaining dealer respondents to resolve the complaint's allegations concerning agreements to limit hours of operation.³⁷

³³ Personal Protective Armor Association, FTC Dkt. C-3481 (consent order final March 17, 1994).

³⁴ United Real Estate Brokers of Rockland, Ltd., FTC Dkt. C-3461 (consent order final Sept. 27, 1993).

³⁵ Arizona Automobile Dealers Association, FTC File No. 9310056 (consent accepted for comment Feb. 22, 1994).

³⁶ American Society of Interpreters and The American Association of Language Specialists, FTC File No. 9110022 (consent accepted for comment Jan. 28, 1994).

³⁷ Detroit Automobile Dealers Association, FTC Dkt. 9189 (consent accepted for comment Jan. 26, 1994).

Finally on the subject of our antitrust enforcement activities, let me describe a final consent order issued a week ago in a resale price maintenance case. In Keds Corporation, the Commission alleged that a manufacturer of shoes restricted price competition among retailers of its products by obtaining agreements with retailers on the resale prices of the manufacturer's products.³⁸ The consent agreement applies to athletic or casual footwear. It requires Keds to refrain from fixing the prices at which any dealer may advertise or sell the product, coercing any dealer to adhere to any resale price, seeking commitments from dealers about the prices at which they will advertise or sell the products, or requiring or suggesting that dealers report other dealers who advertise or sell Keds products below a suggested resale price. Also, the order requires Keds to inform its dealers by mail that they are free to advertise and sell Keds products at prices of their own choosing. And I am happy to say that in settling this matter the Commission worked closely with the office of New York State's Attorney General, which announced a separate, multi-state agreement to settle similar allegations against Keds at the same time last September that the Commission accepted its consent agreement for public comment.

³⁸ Keds Corp., FTC Dkt. C-3490 (consent order final April 1, 1994).

III. CONSUMER PROTECTION

Cooperation with other law enforcement entities is also one of the major themes -- and one of which I am most proud -- running through the Bureau of Consumer Protection accomplishments this past year. The NAAG-FTC Telemarketing Fraud Data base which provides over 60 law enforcement organizations with instant access to thousands of consumer complaints and to information about investigations and enforcement actions, is used on a daily basis by both civil and criminal law enforcement agencies to challenge telemarketing fraud. In addition to our efforts with the data base, our regional offices have joined with the attorneys general from each region to create regional telemarketing fraud strike forces in every region in the country. These efforts are a good example of the Commission having an enforcement impact well beyond its size and resources.

A new breed of telemarketing fraud involves telefunders who entice consumers with the promise of extravagant prizes in return for a donation to a real or purported charity. Just this week our San Francisco Regional Office filed a complaint in district court against United Holdings Group, Inc.,³⁹ alleging violations of Section 5 for misrepresentations made during telephone solicitations for a charitable organization. I mention this case to you today because it is a good example of our joint work with other law enforcement agencies. The staff coordinated its case

³⁹ FTC v. United Holdings Group, Inc., No. CV-S-94-331-HDM (RLH) (D. Nev. filed Apr. 5, 1994).

with a multi-agency group including Las Vegas based law enforcement officials from the FBI, the U.S. Attorney's Office and the Nevada Attorney General's Office. The other reason I raise this case is that it was developed in part by using the NAAG/FTC data base. The staff was able to obtain the names of consumers from the data base to prepare declarations for their case.

Turning now to the national advertising area, there have been a number of important actions during the past year, especially in the areas of food advertising, octane advertising, infomercials, food supplements and health care. In addition, many of the commercial diet program companies, and very low calorie diet program companies are either under Commission order or headed for trial on charges initiated by the FTC.

The Commission still faces a number of important and challenging issues. I expect the Commission to deal as quickly as possible with the question of harmonizing the FTC food advertising enforcement policies with the new FDA regulations, and implementing the Nutrition Labeling and Education Act of 1990. The FDA regulations become effective in May. Despite the difficulty of some of the issues posed, I would hope that we can complete this effort by that time.

Other noteworthy areas of Commission action in the consumer protection arena include certain mandated rulemaking efforts pursuant to the Energy Policy Act of 1992, which established a comprehensive national energy strategy. The Commission is

engaged in a number of rulemaking proceedings, some involving amendments to existing rules such as the Appliance Labeling Rule and others requiring new rules in the areas of plumbing products and alternative fuels and alterative fueled vehicles. As part of these rulemaking efforts, the Octane Rule has been renamed the Fuel Rating Rule, and specifically extended to cover alternative liquid fuels.⁴⁰ Finally, the Commission remains active in the credit area as well. One item of particular note during this past year was a joint settlement the Commission entered into with the Department of Justice in a mortgage discrimination case with Shawmut Mortgage.⁴¹

IV. INSTITUTIONAL IMPROVEMENTS

I would also like to report a number of initiatives and activities that I might group together under the broad heading of institutional improvement -- attempts to operate more effectively, make ourselves more understandable to those who must deal with us, enhance our level of cooperation with other enforcement authorities, and perhaps refine our understanding of the substance of our mission in certain respects.

Since I first came to the Commission in 1989, I have sought to engage state enforcement agencies in cooperative dialog and to

⁴⁰ The Fuel Rating Rule took effect October 25, 1993. See 58 Fed. Reg. 41356 (Aug. 3, 1993) (to be codified at 16 C.F.R. Part 306).

⁴¹ United States v. Shawmut Mortgage Co., No. 3:93CF-2453 (D. Conn. 1993).

ensure that our enforcement efforts complemented and strengthened each other, and I believe this effort has been largely successful. I am proud of our cooperation with the multi-state enforcement effort in the Keds settlement I mentioned a little earlier, and I hope that case can serve as a model for more such cooperative efforts in the service of consumers. And I believe that our cooperation with the Antitrust Division has never been more fruitful, as manifested in part by the Joint Horizontal Merger Guidelines of 1992 and this past year's joint Statements of Antitrust Enforcement Policy in the Health Care Area. Further, as I noted at the recent observance of the Antitrust Division's sixtieth anniversary, this past June marked the less-celebrated forty-fifth anniversary of our liaison agreement with the Division, as well as the adoption in December of an agreement to improve and expedite the operation of that agreement's current successor.

We have also taken a number of small steps to make our processes more understandable -- more "user-friendly," to those who (borrowing another computer term) "interface" with the Commission. And the focus of most of this activity has been the pre-merger notification process, perhaps our most technical and time-pressured interaction with the world of private-firm and corporate counsel -- the world most of you inhabit. One example is the participation of the head of our Premerger Notification office, John Sipple, and Dick Smith and Melea Epps of his staff, as faculty members in this Section's February 25 CLE program,

"Successful Premerger Notification: Basic Problems and Practical Solutions." This is just one of John's recent outreach efforts: He has also given two other speeches just since January intended to air the views of the Premerger Office on such topics as the application of the notification requirements to transfers of intellectual property. In addition, you should soon see action on two other premerger fronts: publication of a rulemaking proposal concerning modifications to the premerger notification forms, and publication of Guide V of the Introductory Guides to the Premerger Notification Program, which contains our modified model second request.

Following up on efforts to provide guidance to members of the health care community, the Commission's staff shortly will make public topic and yearly indices of Commission and staff advisory opinions, that involve health care matters. These indices will provide in an organized and easily accessible format information about advisory opinions, dating back to 1982. Copies of the index, and the advisory opinions listed, will be available from our Public Reference Branch. In this way, health care providers, and their counsel, will have easy access to the more than 40 advice letters providing guidance on a wide variety of topics, such as joint ventures, peer review, and price agreements and practices.

I also mentioned efforts to refine our understanding of our antitrust mission. In a very real sense, such efforts are unremarkable simply because they are going on all the time, in

connection with the staff analyses of each case or possible case that comes to our attention. But we are currently involved in planning a less routine undertaking: a two-day conference this May 26th and 27th, co-sponsored by the Commission, the Antitrust Division, this Section, and the Georgetown University Law School. As planned, this conference will bring together lawyers and economists to discuss the most important new thinking in antitrust economics and attempt to assess the implications of this thinking for analysis of the competitive significance of business conduct. In addition to officials of both the Commission and the Division, the faculty will include eminent outside scholars and practitioners; and I think I can promise you a very spirited discussion of an extremely important topic.

Last year, I addressed the criticism of your Task Force Report on the FTC's record of dealing with the problem of delay in our proceedings. With very special thanks for the leadership of Commissioner Starek - I am pleased to say that we have unanimously determined to take action to meet this criticism.

The Commission is announcing that it has established deadlines for each of the principal stages of preparation of adjudicative opinions, including separate statements. Generally speaking the drafting process on the usual case should last about eight months. While we would not expect that every opinion will proceed according to the deadlines, the Commission will hold quarterly meetings in which the progress of each pending adjudicative matter will be reviewed. After one year the

Commission will review its compliance with the new deadline procedures and make whatever adjustments in procedures are necessary to improve our record in speeding up the opinion writing process.

Adoption of procedures to help us in expediting our decision-making in adjudicative matters is, of course, a significant step towards achieving that goal. The other commissioners and I are well aware, however, that procedures alone will not suffice to produce opinions on a date certain. We know that results speak louder than promises. With that in mind, I can only say that all five commissioners are confident that if you watch our adjudicative docket over the next several months, you will, in fact, see the improvement we hope to effect.

We are also announcing three other reforms to deal with the perception that delay is a problem at the FTC. First, we are establishing for the first time a provision whereby the Commission Secretary may reassign an unmoved matter to another Commissioner.

Second, if a matter has been considered at a closed Commission meeting - and this applies by and large to our most important matters - and no action is taken at that meeting - the case or matter will automatically be proposed to be docketed on subsequent agendas for discussion, until resolved.

Third, a motion made by written circulation currently can now remain pending for as long as three months without action

before failing for lack of a majority. Henceforward, motions will die after the 30th day if no votes are cast.

CONCLUSION

I believe that the past year has been an exciting one for the Commission, including important enforcement efforts in a number of industries undergoing rapid and fundamental economic change, and over a broader spectrum of the economy as well. At the same time, we have made at least incremental progress in improving both our internal operations and the way we deal with the "outside world." In none of these respects, however, can we afford to rest on our laurels: Our missions are more important than ever, and our efforts will reflect this.