Director's Report
Spring 2014

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This year, the Federal Trade Commission turns 100 years old. Like any milestone birthday, this has provoked a tinge of nostalgia and some reflection on where the FTC has been and where it is going. While we can certainly talk about the ways in which the Commission has changed over the years, what is remarkable is how much has remained the same. The Commission is still an expert independent agency, devoted to law enforcement as the primary method to protect consumers and promote competition.

In 1916, there was no Bureau of Competition, only a Bureau of Corporations. The total number of Commission employees was fewer than the Bureau of Competition has today. And the language of the first Annual Report of the Commission, with its references to the stenographic division, the number of volumes in the law library and the business men to whom the Commission directed requests for information, reflected the times.[2]

But modern times require modern methods of talking about the work we do. This year, the Commission launched *Competition Matters*, the agency's first blog devoted to competition topics. Along with effective law enforcement and thoughtful policy development, the Commission is devoted to advancing public understanding of the importance of vigorous antitrust enforcement and how we enforce the competition laws. We want to encourage transparency and predictability in what we do, and the blog is just one more way to do that.

As is evident from the work discussed below, the Bureau of Competition has been active on all fronts: investigating, litigating, negotiating settlements where appropriate, and supporting important competition policy work. In virtually all of our cases, we rely on the talented individuals in other parts of the Commission. This collaboration was most on display last year in the Commission's two victories before the Supreme Court in *Actavis* and *Phoebe Putney*. These cases demonstrate the Commission at its best: rigorous fact-development, economic research documenting the potential for consumer harm, and advocacy for the development of antitrust principles that promote market forces and enhance consumer welfare.

The FTC is first and foremost a law enforcement agency, dedicated to stopping and preventing anticompetitive mergers and business conduct. The Bureau's nearly 300 lawyers and support staff have been very busy the past 12 months. Some of that effort is seen in the breadth and number of the cases brought by the FTC, but there is also a lot of behind-the-scenes effort

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[1] The views expressed are mine and do not necessary reflect the views of the Commission or any Commissioner.

[2] Fed. Trade Comm'n, *Annual Report for Fiscal Year Ended June 30, 1916* (Nov. 15, 1916), *available at* http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1916/ar1916_0.pdf (hereinafter 1916 Annual Report).

put forth to track down leads, assess potential problems, and make recommendations, even when doing so leads the Bureau to close an investigation. The Bureau has always been attentive to marshalling its limited resources to assess potential violations by taking advantage of our expertise in the industries we investigate. The goal is not a number but a proven approach: effective and efficient antitrust investigations that lead to law enforcement, when necessary, to prevent or stop harm to competition or consumers without impeding procompetitive arrangements.

Since last spring, the Commission has entered into 18 merger consents, and, as we noted publicly in papers filed in the Ardagh administrative proceeding, staff and the parties have reached agreement on the basic terms of a proposed consent agreement under which Ardagh will divest six of its current nine glass container manufacturing plants in the U.S. in order to preserve competition for glass containers for beer and spirits.[3] Two merging hospitals abandoned their plans after we expressed concerns about the competitive impact of their transaction. In addition, we secured three consents that put an end to anticompetitive conduct—two involving trade association codes of ethics and the third having to do with improper information exchange between two independent competitors.

One of the highlights of recent months was our successful challenge to the combination of physician practices in the *St. Luke's*, after a month-long trial which took place during the government shutdown. On the conduct side, a notable event was the Commission's opinion in *McWane,* finding that McWane had illegally maintained its monopoly for domestic ductile iron pipe fillings, but dismissing other counts of the complaint.

MERGERS

Merger filings were down slightly last fiscal year as compared to the year before, dropping off by about 7 percent. In fiscal year 2013, there were 1286 adjusted transactions reported under the Hart-Scott-Rodino Act, down from 1,400 adjusted transactions in fiscal year 2012. As in most years, the Commission granted early termination of the waiting period to the majority of transactions that involved an HSR filing, with fewer than four percent of filings resulting in Second Request. The FTC issued Second Requests in 25 merger investigations in fiscal year 2013, up from 20 the year before.

The agency also continues to examine potential anticompetitive effects from non-reportable mergers, including consummated mergers.[4] The *Polypore* and *St. Luke's* cases, described below, make clear that the Commission is prepared to pursue an enforcement action against consummated mergers through trial, if necessary, to obtain effective relief.

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[3] *See*, *Order Withdrawing Matter from Adjudication for the Purpose of Considering a Consent Proposal* (Mar. 17, 2014), In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., Dkt. 9356.

[4] *See, e.g.,* In the Matter of Charlotte Pipe and Foundry, Inc., Dkt. C-4403 (Apr. 2, 2013), In the Matter of Graco, Inc., Dkt. C-4399 (Apr. 18, 2013).

Litigated Mergers

We have been active on the litigation front. The most recent merger litigation involves Ardagh Group's proposed $1.7 billion acquisition of rival glass manufacturer Saint-Gobain Containers. The Commission charged that the acquisition would combine two of the three largest U.S. manufacturers of glass beer and spirits containers.[5] This is not the first time the Commission has examined a combination of glass container suppliers. In 1992, the Commission dismissed its complaint against Owens-Illinois, rejecting an all glass-container market for the end-uses at issue and finding that collusion was unlikely. The few end-use segments where consumers would not switch to other containers, such as plastic, constituted only 15 percent of overall glass container volume and capacity could be switched from elastic end uses to inelastic ones.[6]

But industries change and facts matter in antitrust investigations. In *Owens-Illinois*, Complaint Counsel did not pursue a beer sub-market, and the Commission, upon review, rejected a distilled-spirits sub-market. Yet, in the current investigation, the Commission found that other packaging materials, such as aluminum cans or plastic containers, were not in the relevant product market because not enough brewers or distillers would switch to such products to make a small but significant and non-transitory increase in the price ("SSNIP") of glass containers to Brewers unprofitable for a hypothetical monopolist.[7] Further, over the past 20 years, there has been significant consolidation of glass suppliers and a reduction of capacity to make glass bottles. While the merger of Owens-Illinois and Brockway reduced the number of glass container suppliers from six to five, an Ardagh/Saint-Gobain combination would have left only two firms supplying U.S. glass bottle customers.

In June, the Commission filed an administrative complaint challenging the merger and staff sought a preliminary injunction enjoining the proposed transaction.[8] The parties attempted to litigate a perceived fix to the anticompetitive merger. Under Ardagh's proposal to the U.S. District Court, the parties sought to introduce evidence that the sale of four plants would solve the competitive issues. During a pre-hearing conference, however, the court, at the urging of Commission staff, ruled that hearing such evidence would be "premature and precipitous" as Ardagh did not have a signed definitive agreement with a buyer and the fix was proposed after the close of discovery. Shortly thereafter, Ardagh stipulated to the preliminary injunction, agreeing not to consummate the transaction until the conclusion of the administrative action. In early December, the parties offered a new proposal whereby Ardagh would divest six of nine plants that it owned and operated in order to complete the transaction. After weeks of ongoing negotiations and discussions, on March 10, 2014, the parties and Commission staff filed a joint motion to withdraw the matter from adjudication, which the Commission subsequently granted.

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[5] *See*, *Order Withdrawing Matter from Adjudication for the Purpose of Considering a Consent Proposal* (Mar. 17, 2014), In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., Dkt. 9356.
[6] In the Matter of Owens-Illinois, Inc. and Brockway, Inc., Dkt. 9212, 115 F.T.C. 179 (1992).
[7] Complaint at ¶ 23, In the Matter of Ardagh, Dkt. 9356 (July 1, 2013).
[8] Fed. Trade Comm'n v. Ardagh Group S.A., Compagnie De Saint-Gobain, and Saint-Gobain Containers, Inc., 1 :13-CV-01021 (BJR) (D.D.C. filed Jul. 1, 2013).

While the *Ardagh* team was litigating that matter here in D.C., another team of lawyers and support personnel from across the Commission won a hard-fought battle to restore competition in the market for primary care physician services in Nampa, Idaho. Last spring, the Commission and the Idaho Attorney General filed a joint complaint in federal district court challenging Idaho-based St. Luke's Health System's consummated acquisition of Saltzer Medical Group.[9] The Complaint alleged that the acquisition combined the two largest providers of adult primary care physician services in the Nampa, Idaho, area. The combination would increase St. Luke's ability and incentive to demand higher reimbursement rates from commercial health plans.

The competitive concern was that St. Luke's had steadily built a formidable healthcare system that included a large number of formerly competing physicians, adding in the last two years alone more than 16 previously independent physician groups across Treasure Valley, Idaho. In so doing, St. Luke's had progressively gained ever-increasing bargaining leverage and the ability to extract higher rates through its negotiations with health plans. Those health plans had previously been able to resist some of St. Luke's rate demands in part because they had a credible "outside option" – i.e., a network that does not include St. Luke's physicians but included physicians from Saltzer and nearby St. Alphonsus.

In March 2013, the U.S. District Court for the District of Idaho consolidated the Commission and Idaho Attorney General's joint action with a private action filed by two of St. Luke's rivals who similarly sought to block the acquisition. The 18-day proceeding began in September and ended in November – occurring right through the government shutdown. On January 24, 2014, the federal district court permanently enjoined the acquisition, finding that the combination would likely substantially increase St. Luke's market power over primary care physicians in the Nampa area and thus allow St. Luke's to demand higher rates for health care services, ultimately leading to higher costs for both employers and consumers.[10]

The District Court of Idaho acknowledged that health care costs have exceeded the inflation rate for years without a commensurate increase in quality of care or improvement in patient outcomes. The court further acknowledged that the health care industry, in response to these concerns, is moving away from the current fee-for-service model that rewards providers for billing high volumes of medical procedures towards a model of integrated care that rewards providers for successful patient outcomes. St. Luke's saw this shift and began purchasing independent physician groups in order to move to an integrated care model more tailored to improving patient outcomes. The court, while crediting Saltzer for its good intentions, stated: "St. Luke's is to be applauded for its efforts to improve the delivery of health care in Treasure Valley. But there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs."[11] On March 4, 2014, St. Luke's and Saltzer appealed the court's order to unwind the existing relationship and requested a stay pending the appeal.

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[9] FTC and State of Idaho v. St. Luke's Health Sys., Ltd., 1:12-cv-00560-BLW (D. Id. filed March 13, 2013), *available at* http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf.
[10] *Id*.
[11] *Id*. at 3.

After more than four years of litigation, the Commission was able to obtain a complete remedy in the consummated merger of Polypore International and Microporous. In December, the Commission approved the divestiture of the Microporous assets to a new buyer, restoring competition for different types of battery separators to their pre-merger state.[12]

In its Complaint, the Commission charged that Polypore International Inc.'s completed acquisition of Microporous violated Section 7 because it substantially reduced competition in four North American end-use markets for battery separators. In each of the four markets, the Administrative Law Judge found that the elimination of competition would have adverse effects. On appeal, the Commission upheld the decision in three of the markets and reversed in the fourth.[13]

Microporous' participation varied by market. For deep-cycle and motive batteries, Microporous operated one plant in Piney Flatts, Tennessee and was scheduled to open a second plant in Feistritz, Austria the month after the transaction. From its Tennessee plant, Microporous competed head-to-head with Polypore and the evidence showed Microporous became a stronger competitor once it began constructing its plant in Austria because of its ability to commit to making additional sales. Both the ALJ and the Commission found that the elimination of that current competition, which would only intensify, would harm competition. In the markets for deep-cycle and motive batteries, the ALJ and the Commission concluded that the merger created a monopoly and was therefore presumptively illegal in those markets. The Commission also found that the evidence of pre-acquisition competition between Polypore and Microporous, which had resulted in lower prices for customers, and Polypore's view of Microporous' planned expansion as a direct threat were further evidence of reasonably likely anticompetitive effects in these markets. Additional persuasive evidence of the merger's anticompetitive effects noted by the Commission included Polypore's contemporaneous pre-acquisition documents describing the merger as a defensive action and Polypore's effectiveness in implementing broad-based price increases six months after the merger.

Microporous had also begun to develop a third type of separator for use in starter, lighting, and ignition (SLI) batteries. The Commission rejected Polypore's argument that Microporous did not compete in the SLI market at the time of the merger. Although Microporous was not yet generating revenues from the sale of SLI separators, it had bid on several supply contracts. It had also made "meaningful progress" to supply two of the largest automotive battery manufacturers in the world. The Commission also pointed to evidence that Daramic (the relevant Polypore business) had reduced its SLI prices in response to Microporous' efforts. Indeed, business executives at Daramic perceived that Microporous was "a true legitimate big competitor entering the market and for sure they will capture volume whatever it takes."[14] In the Commission's view, although Microporous lost a bid contest for a major contract, it was exerting sufficient competitive influence to be considered a market participant. Thus, the elimination of an independent Microporous in the SLI market increased the likelihood of anticompetitive coordinated conduct between the two

[12] See Fed. Trade Comm'n, Press Release, "FTC Approves Polypore International's Application to Sell Microporous to Seven Mile Capital Partners; Sale Will Unwind Illegal 2008 Acquisition," (Dec. 18, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/12/ftc-approves-polypore-internationals-application-sell-microporous.

[13] Opinion of the Commission, In the Matter of Polypore International, Inc., Dkt. 9327, at 38 (Dec. 13, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf.

[14] *Id*. at 22.

remaining firms.[15] The Commission found the merger presumptively illegal in the SLI market because it was a merger-to-duopoly and that pricing transparency in the industry supported the presumption that post-merger coordination between the two remaining firms was likely.

Finally, Microporous had certain R&D projects underway that could have led to direct competition with Daramic's uninterruptible power source (UPS) products. On review, the Commission found the evidence insufficient to determine that Microporous was a market participant in UPS separators in North America. The Commission cited Microporous' lack of a commercially viable separator to offer UPS customers, and the absence of any customer that had qualified a Microporous UPS separator for future purchases. Moreover, there was no evidence that Daramic perceived Microporous to be a competitive threat, or that it had reacted competitively to any perceived threat. Finally, the Commission pointed to mixed evidence as to the likelihood that Microporous' R&D efforts would bear commercial fruit. On this record and in light of substantial barriers to entry that Microporous had not yet surmounted, the Commission determined that Microporous could not be counted as a market participant in the North American UPS separator market. The Commission dismissed that portion of the complaint.

Polypore also provides insight into the Commission's approach to assessing which fringe firms might be considered in the market based on excess capacity or previous sales. Respondent Polypore argued that Entek, a firm that had sold battery separators for industrial uses a decade earlier, could rapidly respond and counter any price increases by re-entering the market. After considering additional post-trial evidence offered by respondent, the Commission found there was no evidence that Entek was in a position to provide a rapid and effective supply response: "More than two years after the acquisition, and despite evidence of Daramic's post-acquisition price increases in the deep-cycle market, there is nothing to suggest Entek has entered the deep-cycle market or even qualified a product. At best, the record shows that Entek is testing product with [two potential customers], which is not enough to show that Entek is a market participant."[16]

Polypore makes clear that employing a forward-looking approach involves a fact-specific inquiry. A firm not currently making sales can nonetheless be in the market as an actual competitor based on evidence that it is already having an effect on the behavior of firms currently making sales.

Polypore also affirms two other important aspects of Commission merger enforcement. First, the Commission can investigate consummated mergers that threaten competition, and will, when appropriate, require divestitures to remedy the anticompetitive effects of a transaction. Second, an effective merger remedy is the one that most closely replicates the competition that was lost due to the merger, and may include the sale of the entire business acquired. It may also involve the divestiture of assets outside the market of concern.[17] In *Polypore*, the Commission's order, which was upheld by the 11th Circuit, required Polypore to divest assets located outside North America because such assets were necessary for the buyer to compete effectively in the North American markets for battery separators. When viewed alongside DOJ's successful

[15] *Id*. at 32.
[16] *Id.* at 25.
[17] The Commission's order, which was upheld by the 11th Circuit, required Polypore to divest assets located outside North America because such assets were necessary for the buyer to compete effectively in the North American markets for battery separators.

litigation against Bazaarvoice,[18] there is no missing the point that consummated mergers can be subject to the same antitrust scrutiny as proposed transactions.

The Commission is continuing to consider the matter of Phoebe Putney Health System and Palmyra Park Hospital. After the Court of Appeals for the Eleventh Circuit ruled that the acquisition was shielded from federal antitrust review by the state action doctrine and dissolved its injunction pending appeal, the hospitals consummated their merger on December 15, 2011. By the time the Supreme Court unanimously reversed the ruling on state action, the Commission had few options for restoring competition. Despite all of the legal steps taken by the Commission to prevent further integration of the hospitals, effective August 1, 2012, the Georgia Department of Community Health granted Phoebe Putney's request for a new, single license covering both Albany hospitals. The Commission, in accepting a consent for public comment, believed that, assuming a finding of liability following a full merits trial and appeals, the legal and practical challenges presented by Georgia's certificate of need laws and regulations would very likely prevent a divestiture of hospital assets from being effectuated to restore competition.[19] The Commission preliminarily accepted a settlement that requires the Hospital Authority and Phoebe Putney to give the FTC prior notice of future transactions and bars them from opposing certain applications by potential competitors seeking state certification to enter local health care markets, and is now determining whether to make that order final.

In another hospital merger, we continue to wait for a decision from the 6th Circuit in ProMedica. In that case, the Commission challenged ProMedica's acquisition of St. Luke's Hospital, alleging that ProMedica, a dominant three-hospital system would eliminate important competition for general acute care ("GAC") and obstetrics services in Lucas County, Ohio through its acquisition of St. Luke's, an independent community hospital.[20] The FTC won a preliminary injunction in the Northern District of Ohio[21] and the case proceeded to an administrative trial on the merits. The ALJ ruled for the FTC, finding that the acquisition was likely to harm competition for GAC services. On appeal, the Commission found that the acquisition was likely to harm competition for GAC and obstetrics services. ProMedica appealed the Commission's ruling to the 6th Circuit and oral arguments were held last March.

Taken as a whole, this year's litigation efforts demonstrate that the Commission is committed to protecting consumers and preserving competition through vigorous merger enforcement.

Merger Settlements

While our litigated challenges grab headlines, most agency antitrust enforcement occurs through challenges settled by a consent order. By sheer numbers, consent orders remain an

[18] United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).
[19] *See* Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, In the Matter of Phoebe Putney Health System, Inc., Dkt. 9348 (Aug. 22, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130822phoebeputneyanal.pdf.
[20] In the Matter of ProMedica Health Sys. Inc., Dkt. No. 9346 (complaint filed Jan. 6, 2011).
[21] FTC v. ProMedica Health Sys., Inc., No.3:11 CV 47, 2011 WL 1219281 (N.D. Ohio March 29, 2011).

important tool in the FTC's enforcement arsenal. As I discussed in a speech last September,[22] FTC consent orders are every bit as important in preserving competition and protecting consumers as are our successful litigation efforts. Moreover, they provide significant guidance about how the Commission analyzes mergers. It is time well spent to read not only the press release announcing a Commission settlement, but also the Complaint and the Analysis to Aid Public Comment. Together, these three documents provide important details about the facts and legal analysis that led the Commission to conclude that the merger would likely substantially lessen competition.

Traditional Industries

Some industries have been a mainstay of FTC enforcement activity. In 1914, the Senate directed the Commission to investigate the relations between the companies formed from the breakup of Standard Oil.[23] Soon thereafter, the Commission investigated "an extraordinarily rapid advance . . . in the price of gasoline." The Commission undertook a "rapid but comprehensive investigation . . . in order to ascertain whether it was due to normal market conditions or to artificial conditions."[24] The Commission has had a long history of investigations in the oil industry ever since.

Most recently, the Commission challenged Tesoro's $335 million acquisition of Chevron Corporation's Northwest Products Pipeline system and associated terminals, alleging that the acquisition would give Tesoro ownership of two of the three refined light petroleum products terminals in the Boise, Idaho area.[25] Tesoro Corporation owns several petroleum products terminals, including its terminal in Boise that receives light petroleum from the Northwest Products Pipeline, a 760-mile long interstate pipeline owned by Chevron that carries petroleum products from Salt Lake City to Idaho and Washington. Chevron also owned petroleum terminals along the Northwest Pipeline in Idaho and Washington State, including one in Boise. To resolve concerns that the acquisition would give Tesoro control over most of the terminal capacity in Boise, the Commission required Tesoro to sell a refined light petroleum products terminal in Boise to a Commission-approved buyer.

The Commission approved a request from Kinder Morgan to modify a 2012 final order resolving charges that Kinder Morgan's 2012 acquisition of El Paso Corporation would have harmed competition in several markets for pipeline transportation and processing of natural gas in the Rocky Mountain region. The order required Kinder Morgan to divest assets as well as provide transitional support to the company purchasing the divested assets. Kinder Morgan divested the assets to Tallgrass Energy Partners, LP in 2012. The Commission modified the

[22] "The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts," remarks of Deborah L. Feinstein at GCR Live (September 17, 2013), *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf.
[23] 1916 Annual Report, p. 12.
[24] 1916 Annual Report, p. 24.
[25] In the Matter of Tesoro Corporation, Dkt. C-4405 (June 17, 2013).

order to extend the Transition Services Agreement with Tallgrass for an additional 10 months, so Kinder Morgan can continue to support Tallgrass in operating the acquired assets.[26]

The Commission also issued a closing statement explaining its decision to close its nine-month investigation into Tesoro's acquisition of BP's southern California marketing and refining assets, including BP's Carson Refinery near Los Angeles. The Commission explained that demand for California-grade gasoline has declined over the last decade and is projected to continue to do so.[27] Moreover, while the transaction did increase concentration modestly by shifting capacity from BP to Tesoro, it did not reduce the number of refiners with the ability and incentive to use their excess capacity to respond to any effort by Tesoro or any other market participant to exercise market power. Seven refiners supplied the market before the transaction and seven would continue to do so after the transaction.

Supermarkets have also long been a subject of antitrust enforcement. This year was no exception, as we seem to have a mini supermarket transaction wave. For instance, the Commission required supermarket divestitures in 11 cities in Florida, Georgia, and South Carolina as a condition of Bi-Lo Holdings' acquisition of three Delhaize America banners: Sweetbay, Harveys, and Reid's.[28] Bi-Lo operates stores under the BI-LO and Winn Dixie banners, mainly in the Southeastern United States. In the Northeast and Southeast, Delhaize operates six supermarket chains: Sweetbay, Harveys, Reid's, Hannaford, Bottom Dollar Food, and Food Lion, which is its primary banner, accounting for 73% of its total 1,553 U.S. stores. The Commission alleged that the acquisition would result in an effective merger-to-monopoly in two relevant areas, Madison, Florida and Sylvania, Georgia, and an effective merger-to-duopoly in nine other cities: Arcadia, Dunnellon, Lake Placid, and Wauchula, Florida; Bainbridge, Statesboro, Vidalia, and Waynesboro, Georgia; and Batesburg, South Carolina. The Commission required divestitures of 12 stores.

In December, the Commission required divestitures in a supermarket transaction between Albertson's and United Supermarkets, a regional grocery retailer with 51 traditional and specialty supermarkets and seven convenience stores across North and West Texas.[29] The Commission alleged that the acquisition would likely reduce supermarket competition in two towns, Amarillo and Wichita Falls. It required Albertson's to sell its lone stores in those towns to MAL Enterprises, Inc., another regional supermarket operator.

Students of supermarket mergers will note that the Commission continues to examine competition among supermarkets, that is, stores that offer the "one-stop shopping" that consumers prefer. This relevant product market includes supermarkets within "hypermarkets," such as Wal-Mart Supercenters, that also sell an array of products that would not be found in traditional supermarkets. Hypermarkets, like conventional supermarkets, contain bakeries, delis,

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[26] Fed. Trade Comm'n, *Order Reopening and Modifying Order*, In the Matter of Kinder Morgan, Dkt. C- 4355 (Oct. 31, 2013).
[27] Fed. Trade Comm'n, *Statement of the Commission In the Matter of Tesoro Corporation / BP p.l.c.,* FTC File No. 121-0190 (May 17, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/tesoro-corporation/bp-p.l.c./130517tesoro_bpstmtofcomm.pdf.
[28] In the Matter of Bi-Lo Holdings, Inc., Dkt. C-4440 (Feb. 25, 2014).
[29] In the Matter of AB Acquisition Inc., Dkt. C-4424 (Dec. 23, 2013).

dairy, produce, fresh meat, and sufficient product offerings to enable customers to purchase all of their weekly grocery requirements in a single shopping visit. In every supermarket merger analysis, however, the Commission analyzes the closeness of competition between the merging parties and the remaining market participants, including hypermarkets if present, when reviewing the potential for competitive harm.

In another industry that has long been the subject of FTC activity, both on the competition and consumer protection side, the Commission reviewed the proposed merger between the nation's first and second largest providers of funeral and cemetery services. Service Corporation International owns and operates more than 1,449 funeral-services locations and 374 cemeteries, including 213 combined funeral-services/cemetery locations, as well as 100 crematories. Stewart Enterprises was the second-largest funeral and cemetery services provider in the nation, with 217 funeral homes and 141 cemeteries in 24 states and Puerto Rico. On May 29, 2013, SCI and Stewart entered into an agreement under which SCI would acquire Stewart for approximately $1.4 billion. After a thorough investigation that involved cooperation with eight state attorneys general, the Commission identified competitive concerns in 59 communities throughout the United States. These local markets included some in which certain funeral-service and cemetery-service locations cater to specific populations by focusing on the customs and rituals associated with one or more religious, ethnic, or cultural heritage groups. To settle charges that the proposed acquisition would likely substantially lessen competition, the parties agreed to sell 53 funeral homes in 29 local funeral services markets and 38 cemeteries in 30 local cemetery markets to acquirers who receive the approval of the Commission.[30]

The title industry is another familiar to the agency, with the Commission action against Ticor making its way to the Supreme Court two decades ago.[31] In that case, the FTC charged six of the nation's largest title insurance companies with illegal price-fixing agreements related to the fees charged for title searches and examinations. The title companies filed the agreed-upon rates with state-authorized private rating bureaus under a "negative option" system whereby the rates would often become effective with no action by the state. The Supreme Court confirmed the Commission refusal to apply state action immunity to collective ratemaking in this case, noting that the purpose of requiring active state supervision is to ensure that "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[32]

This year, the Commission had occasion to examine a merger involving title plants, which are databases used by abstractors, title insurers, title insurance agents, and others to determine the title status of real property. Fidelity National Financial, Inc., the leading provider of technology solutions and other services to the mortgage industry and the largest title insurance underwriter in the United States, proposed to acquire Lender Processing Services, Inc., a firm that provides some underwriting services, but whose core business is providing technology solutions, transaction services, and data and analytics for the mortgage and real estate industries. Although the firms face each other in markets throughout the country, Oregon law requires title

[30] In the Matter of Service Corporation International and Stewart Enterprises, Inc., Dkt. C-4423 (Dec. 23, 2013).
[31] FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).
[32] Id. at 634-5.

insurers to own an interest in a title plant in each county in which they issue policies. This requirement creates a barrier to entry for new firms seeking to provide title insurance underwriting.

According to the Commission's complaint, the proposed acquisition would eliminate one of only a few available title plants in six Oregon counties, and make it possible for Fidelity and only one other underwriter to exclude competing firms from having an interest in a joint title plant in the Portland metropolitan area.[33] Without the provisions in the consent order, the FTC alleged that the proposed acquisition was likely to increase the risk of anticompetitive coordination between title plant owners in these local markets. Consistent with the approach the Commission has taken in previous merger enforcement actions involving title plants, the Commission's order required divestiture of a copy of LPS's title plants in each of the affected counties and an ownership interest equivalent to that of LPS in the tri-county Portland-area joint plant.[34]

In a similar market involving databases, CoreLogic, Inc. agreed to settle charges that its proposed $661 million acquisition of DataQuick Information Systems, Inc. would likely substantially lessen competition in the market for national assessor and recorder bulk data, which includes current and historical public record data related to real property in a standardized bulk format.[35] Customers use this data as an input into proprietary programs and systems for internal analyses, or to create value-added products, such as risk and fraud management tools, valuation models, and consumer-oriented property websites.

According to the FTC's complaint, the proposed combination of CoreLogic's and DataQuick's national assessor and recorder bulk data businesses would eliminate one of only three providers of national assessor and recorder bulk data. The FTC's proposed settlement order requires CoreLogic to license to Renwood RealtyTrac national assessor and recorder bulk data as well as several ancillary data sets that DataQuick provides to its customers. With this license, RealtyTrac can step into the shoes of DataQuick because it will have access to all the data DataQuick had to compete. As proposed, the order facilitates the entry of RealtyTrac to replace the loss of DataQuick as an independent competitor by allowing RealtyTrac to offer customers the data and services that DataQuick now offers. To establish RealtyTrac as a viable

[33] In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc., Dkt. C-4425 (Dec. 24, 2013).

[34] In his dissenting statement, Commissioner Wright argued that the evidence presented did not provide a basis for concluding that the merger enhanced the remaining firms' incentives to coordinate, only that market concentration would increase. Fed. Trade Comm'n, *Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc.*, Dkt. C-4425 (Dec. 23, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright-matter-fidelity-national-financial-inc.lender-processing-services-inc.december-2013/131224fidelitywrightstatement.pdf. The Commission statement noted that in analyzing the evidence, it considered not only the substantial increase in concentration resulting from the merger, but also other market factors, such as the possibility of entry, before concluding that a divestiture was necessary to remedy the merger's anticompetitive effects. It also stated that, "The lens we apply to the evidence in a merger that reduces the number of firms in a market to two or three is, and should be, different than the lens we apply to a merger that reduces the number of firms to six or seven." Fed. Trade Comm'n, *Statement of the Commission, In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc.*, Dkt. C-4425 (Dec. 23, 2013), *available at* http://www.ftc.gov/system/files/documents/cases/140305fidelitcommissionstatement.pdf.

[35] In the Matter of Corelogic, Inc., FTC File No. 131-0199 (Mar. 24, 2014).

entrant, CoreLogic is required to supply the company with nationwide real property bulk data through a multi-year license. Using a license to facilitate entry replicates the current market structure and, although not typical, is appropriate because a license is the means by which DataQuick participates in this market.

We continue to review a steady stream of hospital mergers, and often encounter mergers that would create undue bargaining power for critical hospital services. Over the past several years, these investigations had resulted in several litigated hospital cases, such as in Toledo[36] and Rockford, Illinois,[37] and a few abandoned transactions in the face of likely challenges.[38] However, this year, for the first time since 1997, the Commission accepted a settlement to preserve competition for general acute care hospital services. The Commission charged that the acquisition of Health Management Associates by Community Health Systems, Inc., the second largest hospital operator in the U.S., would substantially reduce competition for general acute care inpatient services sold to commercial health plans and provided to commercially insured patients in Gadsden, Alabama and Hartsville, South Carolina.[39] Unlike the typical hospital merger involving a single facility, there was a workable settlement of the Commission's limited competitive concerns. This settlement permitted most of the acquisition to proceed after the parties agreed to hold separate and divest hospitals in the two areas of overlap. It is worth noting that although the Commission alleged a likely reduction in competition only for general acute care hospital services, the proposed divestitures included all services and operations that are affiliated with the facilities to be divested, including outpatient facilities. The to-be-divested assets had been operated on a stand-alone basis with the full range of services, and a piecemeal divestiture would not adequately preserve competition nor ensure that the Commission-approved buyer could compete immediately and effectively in each market.

Newer Industries

While we continue to examine traditional industries, much of our efforts are spent looking at markets the creators of the Federal Trade Commission likely never imagined. For example, Thermo Fisher Scientific Inc., a leading manufacturer of products used in scientific research, agreed to sell assets to settle charges that its proposed $13.6 billion acquisition of Life Technologies Corporation would have eliminated close competition between the companies in the markets for short/small interfering ribonucleic acid (siRNA) reagents, cell culture media, and cell culture sera.[40] According to the Commission, both the cell culture media and sera markets are highly concentrated, and the acquisition would substantially increase concentration by combining two of the most significant competitors. In the market for siRNA reagents, Thermo Fisher and Life Technologies are two of only four significant competitors, in large part because only these four firms have licenses for the intellectual property necessary to compete effectively. Thermo Fisher and Life Technologies offer the most advanced lines of siRNA reagents and are

[36] FTC v. ProMedica Health Sys., Inc., No.3:11 CV 47, 2011 WL 1219281 (N.D. Ohio March 29, 2011).
[37] FTC v. OSF Healthcare, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).
[38] *See, e.g.*, *Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare That it Will Abandon its Plan to Acquire Mercy Hot Springs*, (Jun. 27, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/06/statement-ftc-competition-director-richard-feinstein-todays
[39] In the Matter of Community Health Systems, Inc. and Health Management Associates, Inc., FTC File No. 131-0202 (Jan.22, 2014).
[40] In the Matter of Thermo Fisher Scientific Inc. and Life Technologies Corp., Dkt. C-4431 (Jan. 31, 2014).

the only suppliers to offer a portfolio of siRNA reagents for the full human genome. Combined, Thermo Fisher and Life Technologies would have a market share of more than 50% for individual siRNA reagents and greater than 90% for siRNA libraries.

This case was also interesting because it involved extensive international cooperation. Commission staff cooperated with antitrust agencies in Australia, Canada, China, the European Union, Japan, and Korea. The Commission worked closely with the staff of these agencies on the analysis of the proposed transaction and, in some cases, on potential remedies. For example, the Commission and the European Commission approved GE Healthcare as the divestiture buyer on the same day. For those who worry that simultaneous review creates risks for conflicting outcomes by multiple regulators, this case should provide some comfort that it is possible to achieve compatible approaches on a global scale.

In another transaction involving products with patented technology, the Commission required licensing of key intellectual property to maintain competition in the market for two-dimensional scan engines.[41] Honeywell International, Inc. proposed to acquire Intermec Inc. for $600 million, combining two of the three most significant suppliers of 2D scan engines in the U.S. 2D scan engines have a 2D image sensor that captures an image (such as a barcode) through a digital photograph. Products such as retail store scanners, kiosks and rugged mobile handheld computers utilize 2D scan engines to capture and decode digital data. The Commission required Honeywell to license for 12 years the Honeywell and Intermec U.S. patents necessary to manufacture two-dimensional scan engines and related devices to Datalogic. Datalogic markets 2D scan engines similar to those made by Honeywell and Intermec outside of the United States, but it lacked the necessary patent rights to compete in the United States. In this case, the Commission approved licensing, rather than divestiture, because the freedom to operate clear of patent restrictions was the main barrier to entry, and Datalogic already had the other assets and personnel necessary to become an effective competitor.

Software, specifically automotive recycling yard management systems ("YMS") software was the product at issue in the Commission's action against Solera Holdings' 2012 acquisition of rival Actual Systems of America, Inc.[42] Solera and Actual Systems were two of the three leading providers of YMS to the automotive recycling industry in the United States and Canada. To restore competition that was lost by the acquisition, the Commission ordered Solera to divest assets related to Actual Systems' U.S. and Canadian YMS business to ASA Holdings, an entity formed by former Actual Systems managers, and provide ASA Holdings with a 10-year license to the Hollander Interchange, an auto parts database that Hollander maintains and licenses to third parties.

Markets with on-Going Entry Efforts by Merging Firms

In several merger settlements this year, the Commission required divestitures in transactions that required assessing on-going entry efforts by firms—including one of the merging parties—not currently making sales in a market of concern. As I discussed in a speech

[41] In the Matter of Honeywell International, Inc., Dkt. C-4418 (Sept. 13, 2013).
[42] In the Matter of Solera Holdings, Inc., Dkt. C-4415 (July 22, 2013).

earlier this spring,[43] merger review under Section 7 of the Clayton Act has always been forward-looking in order to fulfill our Congressional mandate to prevent mergers that are likely to harm competition in the future. The task of merger review is to predict with some level of confidence the probability – but not absolute certainty – that the merger's likely competitive effects will result in substantial harm to competition and consumers, and to prevent that harm through divestitures or a full-stop injunction.

A forward-looking approach may reveal a competitive concern even if one of the merging parties is not currently making sales but is already having an effect on the behavior of firms in the market. This may occur, for example, when an existing competitor in one geographic market is months away from entering a new geographic market. These were the facts presented in Pinnacle Entertainment Inc.'s proposed acquisition of Ameristar Casinos.[44] The Commission filed suit in 2013 to block the transaction, in part, because the acquisition would reduce competition and lead to higher prices and lower quality for casino customers in the Lake Charles, Louisiana market where Pinnacle already operated a casino but Ameristar did not. However, Ameristar had begun building a new casino to be called Mojito Pointe that was scheduled to open by the third quarter of 2014. It was not difficult to predict that significant head-to-head competition would exist in the near future absent the acquisition. To settle claims of likely anticompetitive effects in Lake Charles, Pinnacle agreed to sell all of the assets associated with the development and construction of the Mojito Pointe casino to an FTC-approved buyer. Pinnacle also agreed to divest a casino in St. Louis where both firms operated casinos and competed head-to-head.

An acquisition also may substantially lessen competition by eliminating a future competitor whose entry, once it occurs, would have a beneficial impact on competition. For many years, the Commission has been concerned about the elimination of a potential competitor in markets for generic pharmaceuticals, either where one firm has an FDA-approved generic product and the other firm is working to introduce another generic version, or where the merging firms are two of only a limited number of likely entrants. In either scenario, the competitive concern is that the acquisition would likely delay the introduction of a generic version and thereby deprive consumers of the increased competition and likely price reductions that would have occurred as a result of the likely entry.

For instance, the Commission challenged Actavis Inc.'s proposed $8.5 billion acquisition of Warner Chilcott, claiming that the acquisition would substantially reduce competition in markets for four current and future pharmaceutical products.[45] According to the Commission, Actavis and Warner Chilcott were the only two significant manufacturers of generic Femcon FE, and the proposed acquisition would eliminate current competition between them in the market for this drug. In three other markets, Warner Chilcott sells a branded drug, but no company was selling a generic version of Loestrin 24 FE, Lo Loestrin FE, or Atelvia. According to the FTC's complaint, Actavis was likely to be the first generic supplier to compete with Warner Chilcott's

[43] "The Forward-Looking Nature of Merger Analysis," remarks of Deborah L. Feinstein before ABA Advanced Antitrust (Feb. 6, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf.
[44] In the Matter of Pinnacle Entertainment, Inc. and Ameristar Casinos, Inc., Dkt. 9355 (May 29, 2013).
[45] In the Matter of Actavis and Warner Chilcott, Dkt. C-4414 (Sept. 27, 2013).

branded version. The Commission alleged that the proposed acquisition would likely lead to higher prices for U.S. consumers, because the merged firm would have the ability to delay the entry of Actavis's generic product in each of the three markets. To resolve these concerns, the Commission required Actavis to sell all rights and assets to the four drugs to Amneal Pharmaceuticals L.L.C. Actavis was also required to relinquish its claim to first-filer marketing exclusivity for generic Lo Loestrin FE and Atelvia to preserve the incentive of the firms that were leading patent litigation against Warner Chilcott related to those products. By relinquishing its first-filer status, the merged firm could not act to delay the introduction of a generic version of these two products.

Finally, the Commission has identified concerns in pharmaceutical mergers where no firm has a commercially available product yet the merging parties are two of only a few likely entrants into a future market. For instance, the Commission required divestitures to settle charges that the merger of Endo Health Solutions Inc. and Boca Life Science Holdings, LLC would reduce future competition in two generic markets that do not yet exist, but will be highly concentrated at the time Endo and Boca enter.[46] According to the Commission, when generic entry occurs, the acquisition would harm competition by reducing the number of likely future suppliers in the market for generic formulations of Bromfed-DM and Zamicet. The Commission also required divestitures to resolve competitive concerns in four generic markets where both firms had existing products, and in one additional market where Endo had a currently-approved product and Boca was poised to be the next entrant in a highly concentrated market.

Similarly, the Commission challenged Mylan, Inc.'s proposed $1.85 billion acquisition of Agila Specialties Global Pte. Limited and Agila Specialties Private Limited from Strides Arcolab Limited, alleging that the acquisition would cause significant harm to U.S. consumers in eleven generic injectable pharmaceutical product markets, either by eliminating current or imminent competition in concentrated existing markets, or by eliminating potential competition among a small number of likely competitors in a future market.[47] The eleven injectable products at issue treat a variety of medical concerns, including several types of pediatric cancers, certain autoimmune diseases, severe hypertension, and urinary tract damage caused by a chemotherapy drug. The Commission was especially concerned about these products because injectable generic products are highly susceptible to supply disruptions caused by the inherent difficulties of producing sterile liquid drugs.

The Commission also acted to preserve competition in a likely future market in connection with Nielsen's proposed acquisition of Arbitron Inc.[48] The Commission alleged that the merger would eliminate future competition between the two firms in the emerging market for national syndicated cross-platform audience measurement services. Nielsen is a global media measurement and research firm, and the dominant provider of U.S. television audience measurement services. Arbitron also is a media measurement and research firm, and provided audience ratings for radio that are similar to Nielsen's television ratings. In response to strong customer interest, both firms were working to develop national syndicated cross-platform

[46] In the Matter of Endo Health Solutions, Inc. and Boca Life Sciences Holdings, LLC, Dkt. C-4430 (Jan. 30, 2014).
[47] In the Matter of Mylan Inc., Agila Specialties Global Pte. Ltd., Agila Specialties Private Ltd., and Strides Arcolob Ltd., Dkt. C-4413 (Sept. 26, 2013).
[48] In the Matter of Nielsen Holdings, N.V. and Arbitron, Inc., Dkt. C-4439 (Sept. 20, 2013).

audience measurement services, which would allow audiences to be measured accurately across multiple platforms, such as television and online. The Commission alleged that the elimination of future competition between Nielsen and Arbitron in this market would increase the likelihood that Nielsen would exercise market power and cause U.S. advertisers, advertisement agencies, and media programmers to pay higher prices for national syndicated cross-platform audience measurement services. To resolve these concerns, the Commission required Nielsen to divest assets related to Arbitron's cross-platform audience measurement business to a Commission-approved acquirer.[49]

Some of these matters involve fast-paced, technology-driven markets where new entrants can quickly transform the competitive landscape. Some commenters believe antitrust is ill-suited to deal with these industries. To my mind, this complaint misses the mark. Not only is merger analysis very fact-intensive, but because Section 7 has always been about the future of competition, antitrust outcomes depend on an assessing trends and identifying potentially disruptive actors or technology. In fact, preserving existing competition in technology sectors can be especially important to ensure that technological advances continue to drive growth in the economy, creating jobs and introducing more efficient products and processes into the marketplace. It is therefore important that we consider these industries as we do any others – with rigorous fact-finding and analysis to sift out likely outcomes from mere wishes or unfounded speculation when predicting what lies ahead.

Vertical Merger Enforcement

The Commission took action to prevent anticompetitive harm from one vertical merger this year, requiring a consent to allow General Electric Company's $4.3 billion acquisition of the aviation business of Avio S.p.A to proceed.[50] GE, through its joint venture CFM International, and Pratt & Whitney are the only engine manufacturers for Airbus's A320neo aircraft; they compete head-to-head for A320neo sales. Avio is the sole designer for the accessory gearbox ("AGB") on the Pratt & Whitney PW1100G engine for the Airbus A320neo aircraft. The Commission alleged that the acquisition would substantially lessen competition by giving GE the ability and incentive to disrupt the design and certification of an engine component designed by Avio for rival aircraft manufacturer Pratt & Whitney, thereby reducing competition in the sale of engines for the A320neo. To resolve these concerns, the Commission's consent order prohibits GE from interfering with Avio's design and development work on the AGB for the Pratt &

[49] The Commission approved the consent by a vote of 2-1, with Commissioner Wright dissenting. In its statement, the majority fully acknowledges the inherent difficulties associated with developing the evidence needed to predict accurately the nature and extent of competition in future markets. Despite these challenges, the majority found that there was ample evidence on which to base predictions of anticompetitive effects and accepted a remedy that it believed was tailored to address those effects. Fed. Trade Comm'n, *Statement of the Commission In the Matter of Nielsen Holdings, N.V. and Arbitron Inc.*, File No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncommstmt.pdf. *But see* Fed. Trade Comm'n, *Dissenting Statement of Commissioner Wright In the Matter of Nielsen Holdings, N.V. and Arbitron, Inc.*, File No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitron-jdwstmt.pdf. Citing the limitations of current economic tools to predict competitive effects in future markets, Commissioner Wright concluded that the evidence did not provide a reason to believe the transaction would result in a substantial lessening of competition for national syndicated cross-platform audience measurement services.

[50] In the Matter of General Electric Co., Dkt. C-4411 (July 13, 2013).

Whitney PW1100G engine, or accessing Pratt & Whitney's proprietary information about the AGB that is shared with Avio. Commission staff worked closely with the European Commission throughout the investigation, and investigated in parallel how the acquisition could change GE's relationships with rival aircraft engine manufacturers.

Closed Matters

Sometimes the Commission makes news when it decides not to take action. That was the case this year when the Commission announced that it did not have a reason to believe that the proposed merger between Office Depot and Office Max would harm competition. This no doubt surprised some given the Commission's notable success in challenging Staples' acquisition of Office Depot in 1997.[51] But, as with the Commission's examination of the Ardagh matter, the current facts – not past precedent – matter for our analysis.

In a closing statement, the Commission explained that customers now look beyond office supply superstores when buying office supplies.[52] Non-office supply superstores such as Wal-Mart and Target, along with club stores like Costco and Sam's Club, have expanded their office supply product offerings and now compete with office supply superstores. Additionally, Internet retailers of office supplies, most prominently Amazon, have grown quickly and significantly, and compete with office supply superstores.

Second, the merging parties' documents show that they are rarely each other's closest competitor for most large customers and that non-OSS competitors, including regional suppliers, take business from the parties in a substantial number of contracting opportunities. Finally, potential competitors in adjacent product categories, such as janitorial and industrial products, have existing contractual relationships with large office supply customers and can use those relationships to enter the office supply distribution market.

Does this mean that all cases involving local markets will now include online sellers? No, because antitrust analysis is fact-specific. As in any merger investigation, we will have to assess the evidence relating to changing market dynamics in real-time. If brick-and-mortar stores can successfully raise prices and make more money even if they lose some in-store sales to online buying, then the relevant market would not include online sellers. On the other hand, if the stores were forced to bring prices back down—or didn't raise prices at all knowing that they would lose money because customers would simply buy from online retailers—then online

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[51] FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[52] Fed. Trade Comm'n, *Statement of the Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc.,* FTC File No. 131-0104 (Nov. 1, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf. The Commission statement also discusses the potential impact of the Office Depot/Office Max merger on the sale of consumable office supplies to large businesses and other large customers on a contract basis, a market not at issue in 1997. In particular, staff's investigation focused on contracts for large multi-regional or national customers, which typically have the most demanding purchasing requirements and, as a result, fewer potential suppliers capable of meeting their needs. But even there, the facts led the Commission to conclude that the merger was unlikely substantially to lessen competition in the contract channel. For instance, large customers can ensure that they receive competitive pricing by sourcing (or threatening to source) certain products (like ink and toner) directly from manufacturers and or from multiple firms.

sellers may represent the kind of competitive constraint that benefits consumers and prevents an exercise of market power.

NON-MERGER MATTERS

Although merger review and enforcement often grabs the headlines, it is often through the reasoned evaluation of potentially harmful conduct that the agency is able to shape the law to sweep away impediments to vigorous competition. Whether through litigation or consent orders, the Commission seeks to identify conduct that interferes with the fundamental give-and-take of competitive rivalry without offering countervailing benefits to consumers, and to take appropriate action to stop it and prevents its recurrence.

Litigation

By the measure of pure persistence, the most important antitrust development of the last year was the Supreme Court's decision in *FTC v. Actavis, Inc.*[53] It was an important victory for consumers and a vindication of basic antitrust and free market principles that allowed the Commission to achieve one of its top competition priorities: overturning the so-called "scope-of-the-patent" test, which had been adopted by some courts and virtually immunized pay-for-delay settlements from antitrust scrutiny. Because of the *Actavis* decision, we are in a much stronger position to protect consumers from anticompetitive drug-patent settlements that result in higher drug costs.

Having succeeded in making clear that such settlements should be subject to antitrust scrutiny, we are often asked what is next in our actions against pay-for-delay settlements. While we hope that the current state of the law on pay-for-delay will deter many companies from entering into anticompetitive agreements, we will not rely on deterrence alone to protect consumers. The Commission will pursue its claims in the two pending pay-for-delay matters currently in litigation and seek appropriate relief for consumers. For example, in *FTC v. Cephalon*,[54] a case pending before a Pennsylvania federal court, the Commission is seeking equitable relief, including monetary disgorgement, to deny Cephalon its ill-gotten gains. Additionally, we are seeking prospective injunctive relief to prevent defendants from entering similar anticompetitive arrangements in the future.

We will also monitor private litigation alleging pay-for-delay agreements and use Commission experience and expertise by filing amicus briefs where appropriate. Recently, the Commission submitted an amicus brief addressing the U.S. Supreme Court's ruling in *Actavis* and expressing the Commission's view on so-call "no-authorized-generic" commitments. In our brief, we urged the court to view no-authorized-generics commitments as similar to cash payments and thus part of an anticompetitive reverse payment scheme—a position we believe is

[53] 133 S. Ct. 2223 (2013).
[54] No. 08-2141 (E.D. Pa. filed Feb. 13, 2008).

consistent with the Supreme Court's ruling in *Actavis*.[55] We will also reevaluate pending investigations in light of the changed legal standards, and examine new settlements filed with the Commission pursuant to the Medicare Modernization Act of 2003. When determining whether to pursue a case, the Commission will consider the seriousness of the violation, the potential consumer harm, the Commission's ability to remedy the harm, the legal principle at stake in each matter, and the potential deterrent effect of an enforcement action. Where there is a violation, the Commission has a number of remedial tools at its disposal, including prospective restrictions to prevent future violations, rescinding the illegal agreement, disgorgement and restitution, and taking other actions to help expedite generic entry.[56]

In other litigation news, just this month the Supreme Court agreed to review a ruling by the Fourth Circuit that upheld the Commission's rejection of state action immunity for the conduct of a self-interested regulatory board. The Commission found that the North Carolina State Board of Dental Examiners, consisting of dentists, violated Section 1 by excluding non-dentists from providing teeth whitening services, principally by issuing cease and desist orders to non-dentists.[57] This case raises the question of whether a state professional board comprised of private actors can obtain antitrust immunity for its anticompetitive acts without making a showing of active supervision under the state action doctrine. On appeal, the Fourth Circuit held that the Commission had correctly found that the Board was not entitled to antitrust immunity for its actions, and that there was substantial evidence to support the finding of antitrust liability.[58] The Fourth Circuit held that the Board was a private actor subject to active supervision because it was a state agency operated by market participants; and, like the state agency in *Goldfarb v. Va. State Bar*,[59] the Board engaged in acts to benefit dentists. The Supreme Court granted certiorari on March 3, 2014 to decide:

> Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a 'private' actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

Finally, the Commission resolved a number of charges made against three U.S. makers of ductile iron pipe fittings for unlawful collusion, information exchange, and exclusionary conduct. In 2012, the Commission issued a seven-count administrative complaint against McWane, Inc. and Star Pipe Products, Ltd., after the third pipe maker, Sigma Corporation, entered a consent

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[55] *See, e.g.*, FTC News Release, "FTC Submits Proposed Amicus Brief Concerning "No-Authorized-Generic" Commitments in Drug Companies' Patent Settlements," (Aug. 16, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/08/ftc-submits-proposed-amicus-brief-concerning-%E2%80%9Cno-authorized.

[56] For instance, under the Hatch Waxman Act, a generic company automatically forfeits its entitlement to the 180-day exclusivity period that is otherwise available to first filing generics if it is found to have violated the antitrust laws or the Federal Trade Commission Act. Amended 21 U.S.C. § 355(j)(5)(D)(i)(V) (2003).

[57] Opinion of the Commission, In the Matter of North Carolina Board of Dental Examiners, Dkt. 9343 (Dec. 7, 2011), *available at* http://dev.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf.

[58] NC Board of Dental Examiners v. FTC, 717 F. 3d 359 (4th Cir. 2013), *cert. granted*, (Mar. 3, 2014) (No. 13-534).

[59] 421 U.S. 773 (1975) (issuance of ethical opinions suggesting minimum fees for legal services by state bar association, a nominal state agency, not immune).

agreement with the Commission.[60] Star subsequently settled, and McWane contested the charges in an administrative trial. The administrative complaint charged that McWane illegally conspired with Sigma and Star to raise and stabilize prices in the fittings market. It also charged that McWane violated the antitrust laws by excluding competitors from a separate market limited to domestic fittings. Domestic fittings are a distinct market because certain projects require domestic fittings; that is, because of federal, state, or local laws requiring the use of domestic fittings, for some purposes imported fittings are not a close substitute.

Last May, the ALJ found that the evidence did not support charges that McWane illegally conspired with two of its competitors to raise and stabilize fittings prices, but ruled that McWane had reached an anticompetitive agreement that led Sigma to abandon its efforts to enter the market for domestic fittings, and that McWane illegally pressured distributors to exclude Star Pipe from the domestic fittings market.[61]

On review, the Commission dismissed the complaint counts alleging that McWane had conspired with its rivals in the public interest because it could not reach a majority. It also determined that McWane's entry into a master distribution agreement with Sigma was not anticompetitive. However, the Commission, like the ALJ, found liability under Count Six of the administrative complaint, which alleged that McWane willfully engaged in anticompetitive conduct that allowed it to maintain its monopoly in the domestic fittings market after Star entered the market in 2009.[62] The Commission found that while about 80 percent of demand for domestic fittings can be met with 100 or fewer commonly used sizes and configurations of fittings, distributors need access to a full line of domestic fittings to meet all of their customers' demands. As a new entrant, Star did not sell a full line of domestic fittings. Given these market dynamics, McWane implemented a "Full Support Program," which was, in effect, an exclusive dealing policy under which McWane threatened, subject to certain stated exceptions, that distributors who bought domestic fittings from Star could no longer purchase products from McWane. The Commission found that McWane's Full Support Program "foreclosed Star and other potential entrants from accessing a substantial share of distributors," and "created a strong economic incentive for distributors to reject Star's products, artificially diminishing Star's competitive prospects in the domestic fittings market." As a result, Star was unable to achieve the sales necessary to compete effectively and threaten McWane's monopoly. The Commission concluded that McWane maintained its monopoly power in the domestic fittings market through an unlawful exclusive dealing policy, its Full Support Program.

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[60] In the Matter of McWane, Inc. and Star Pipe Products Ltd., Dkt. 9351 (Jan. 4, 2012); In the Matter of Sigma Corp. Dkt. C-4347 (Jan. 4, 2012).

[61] Initial Decision, In the Matter of McWane, Inc., Dkt. 9351 (May 9, 2013), *available at* http://dev.ftc.gov/sites/default/files/documents/cases/2013/05/130509mcwanechappelldecision.pdf.

[62] Opinion of the Commission, In the Matter of McWane, Dkt. 9351 (Feb. 6, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion.pdf. Commissioner Wright dissented from this finding. *See* Dissenting Statement of Commissioner Wright, In the Matter of McWane, Inc., Dkt. 9351 (Feb. 6, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140206mcwanestatement.pdf.

Settlements

The Commission had several important settlements this year relating to anticompetitve conduct. In two matters announced the same day, the Commission resolved charges that certain provisions in trade association codes of ethics had interfered with fundamental aspects of competition among the members. The FTC's complaint against the Music Teachers National Association, Inc. (MTNA), which represents over 20,000 music teachers nationwide, alleges that the association and its members restrained competition through a code of ethics provision that restricted members from soliciting clients from rival music teachers.[63] MTNA is an umbrella organization for more than 500 state and local music teaching association affiliates throughout the country. Some of these affiliates have codes of ethics that restrain their members from charging fees that are lower than the average in the community, offering free lessons or scholarships, or advertising free scholarships or tuition. The proposed settlement requires MTNA to, among other things, stop affiliating with any association that MTNA knows is restricting solicitation, advertising, or price-related competition by its members. In a separate complaint, the FTC charged that the California Association of Legal Support Professionals, which represents companies and individuals that provide legal support services in California, violated the antitrust laws through code of ethics provisions that restrained its members from competing against each other on price, disparaging each other through advertising, and soliciting legal support professionals for employment.[64]

In a statement accompanying the announcement of the two proposed consent orders, the Commission made clear that trade association activity, while generally beneficial, can cross the line and inhibit rivalry among the members, often under the guise of ethical codes:

> Competing for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition. Agreements among competitors not to engage in these activities injure consumers by increasing prices and reducing quality and choice. Absent a procompetitive justification, these types of restrictions on competition are precisely the kind of unreasonable restraints of trade that the Sherman Act was designed to combat.[65]

Indeed, the Commission has a long history of taking action against anticompetitive trade association codes of conduct.[66] As the Commission's first Annual Report noted:

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[63] In the Matter of Music Teachers National Association Inc., FTC File No. 131-0118 (Dec. 16, 2013). The provision, which the MTNA added to its code in 2004, stated: "The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio."

[64] In the Matter of California Association of Legal Support Professionals, FTC File No. 131-0205 (Dec. 16, 2013).

[65] Fed. Trade Comm'n, *Statement of the Commission In the Matter of Music Teachers National Association, Inc., FTC File No. 131-0118, and In the Matter of California Association of Legal Support Professionals, FTC File No. 131-0205* (Dec.16, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/131216musicteachersstmt.pdf.

[66] *See, e.g.*, *Inst. of Store Planners*, 135 F.T.C. 793 (2003) (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, 135 F.T.C. 1 (2003) (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, 134 F.T.C. 606 (2002) (restraints on price competition); *Cmty. Ass'ns Inst.*, 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs*, 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

> One of the most important questions of trade policy at the present time relates to the practice of trade associations. Their activities are of a varied character, and many of them are of great benefit not only to the branch of trade concerned therein, but also to the public. Nevertheless, their activities have sometimes involved them in practices which have been condemned by the courts as violations of the antitrust laws.[67]

The Commission also sought relief for a standalone Section 5 violation involving improper information exchange between two competitors providing hair restoration services. The FTC alleged that for at least four years, Bosley, Inc. had exchanged competitively sensitive, nonpublic information about its business operations with Hair Club, a competing manager of medical and surgical hair restoration services.[68] Both firms had a nationwide geographic presence and national brand recognition. The information exchanged by the companies' CEOs included details about future product offerings, surgical hair transplantation price floors and discounts, plans for business expansion and contraction, and current business operations and performance. The FTC charged that directly and repeatedly exchanging competitively sensitive, nonpublic information was an unfair method of competition in violation of Section 5 of the FTC Act. According to the FTC's complaint, without a legitimate business justification, the exchange of such information could facilitate coordination between Bosley and Hair Club by reducing uncertainty regarding each other's product offerings, prices, and strategic plans.[69]

HSR ENFORCEMENT

The FTC administers the Hart-Scott-Rodino premerger notification program and enforces the filing rules. We strive to provide an efficient and effective process that prevents mergers that harm consumers. We are keenly aware of the costs, both in time and money, that the merger review process may impose on transactions that are wholly or largely beneficial to consumers, and we are open to changes that would reduce these costs, consistent with our mission.

This year, the Commission finalized two changes to the HSR Rules. The first is a common-sense modification that formalizes the long-standing position of the FTC's Premerger Notification Office regarding the withdrawal of an HSR filing, as well as the withdrawal and refiling of an HSR filing without paying an additional fee. The new withdraw and refile procedure, which is solely at the discretion of HSR filers, allows additional time for the agency to review a transaction before having to make the decision to issue a second request.[70] The rule

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[67] 1916 Annual Report at 25.

[68] In the Matter of Bosley, Inc., Aderans America Holdings, Inc., and Aderans Co., Ltd., Dkt. C-4404 (Apr. 8, 2013).

[69] *See also* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors ¶3.31(b) (Apr. 2000), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. ("The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.")

[70] 78 Fed. Reg. 41,293 (Jul.10, 2013).

provides that parties may voluntarily withdraw their filings simply by notifying both agencies of the withdrawal and will not be subject to a new filing fee if it is refiled within two business days, the proposed transaction does not materially change and meets certain other technical criteria.[71] This procedure has been used informally for 30 years. The new rule also established a procedure for the automatic withdrawal of an HSR filing when filings are made with the U.S. Securities and Exchange Commission announcing that a transaction has been terminated. The new rule aligns the treatment of abandoned transactions by the FTC and the Department of Justice with the requirements of the SEC regarding public announcements of the termination of a transaction.

The second change was to require that companies in the pharmaceutical industry report certain proposed acquisitions of exclusive patent rights to the FTC and the Department of Justice for antitrust review. The revised rules clarify when a transfer of exclusive rights to a patent in the pharmaceutical industry results in a potentially reportable asset acquisition under the Hart-Scott-Rodino Act.[72] PhRMA has filed suit challenging that rule.[73]

This year, we asked the Department of Justice to file on our behalf two actions for civil penalties, both involving failure to file notice of the acquisition of certain securities. In *United States v. Barry Diller*,[74] the Commission alleged that Barry Diller, a member of the board of directors of The Coca Cola Company, violated HSR filing requirements by failing to file the necessary notifications associated with securities purchases of Coca Cola stock. On November 1, 2010, Diller acquired 120,000 shares of Coca Cola valued at more than $63.4 million, the premerger reporting threshold under the HSR Act at the time. Between November 1, 2010, and April 26, 2012, Diller acquired an additional 605,000 shares of Coca Cola voting securities, and on April 27, he acquired 264,000 more shares, each time failing to file the required HSR notifications. These acquisitions were not the first time Mr. Diller violated the notification requirements of the HSR Act. In 1998, Mr. Diller failed to notify the agencies before acquiring voting securities of City Search, Inc. At that time, the Commission declined to seek penalties, but informed Mr. Diller that he was responsible for establishing an effective HSR compliance program. Mr. Diller made corrective filings, and agreed to settle charges relating to the violations of the HSR Act. But more was required with Mr. Diller's second violation. Under the terms of a consent decree filed simultaneously with the complaint and entered by the court on July 3, 2013, Mr. Diller agreed to pay a $480,000 civil penalty.

In *United States v. MacAndrews & Forbes Holdings*[75] the complaint alleged that investment firm MacAndrews & Forbes Holdings Inc. failed to comply with premerger notification requirements before acquiring voting securities of Scientific Games Corporation in June 2012. Although this was the first time that MacAndrews & Forbes had been charged with

[71] To take advantage of this rule, a party must also recertify the resubmitted HSR filing and ensure that 4(a), 4(b), 4(c) and 4(d) documents are updated as of the date of the resubmission and submit a new executed affidavit. 16 CFR § 803.12 (2013).
[72] 78 Fed. Reg. 68,705 (Nov. 15, 2013).
[73] *Pharma. Research & Manuf. of America v. FTC*, No. 13-cv-1974 (D.D.C.).
[74] *United States v. Barry Diller*, No. 1:13-cv-01002 (D.D.C.) (final judgment issued Jul. 3, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/07/diller-barry-us.
[75] *United States v. MacAndrews & Forbes Holdings Inc.*, No. 13-cv-0926 (D.D.C.) (final judgment issued Jul. 1, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/07/macandrews-forbes-holdings-inc.

an HSR Act violation, the firm had previously made a corrective filing in May 2011 for what it asserted was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of a consent decree filed simultaneously with the complaint and entered by the court on July 1, 2013, MacAndrews & Forbes agreed to pay a civil penalty of $720,000 to settle the charges.

As we celebrate our centennial, and the annual ABA Spring Meeting in Washington, one thing that has been constant through the years is the agency's core mission – to protect competition and consumers. Congress created the FTC specifically to guide competition policy through changing competitive environments and the antitrust laws are flexible enough to meet the challenges of this or any era. Once again, the Commission's competition work over the past year reflects the best of that tradition, through rigorous fact-development, economic research documenting the potential for consumer harm, and advocacy for the development of antitrust principles that promote market forces and enhance consumer welfare. Some traditions never get old.