Director's Report
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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

[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]

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Litigated

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-

After more than four years of litigation, the Commission was able to obtain a complete remedy in the

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

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.

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

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[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

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

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

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 [illegible]

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 Amnea 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

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 63.tfe0.001 t8 -0(o)-4(f)10 c fD86(t)112(v)8(o)-4(WTD [m)9(aj8 -0o8

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

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

sellers may represent the kind of competitive constraint that benefits consumers and prevent 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]

consistent with the Supreme Court's ruling in Actavis.[55] We will also

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.

[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

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 justifi [illegible]

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,[71] the proposed transaction does not materially change and meets certain other technical criteria. This procedure has been used informally for 30 years. The new interim tule(a)6(h04 Tc 0.004 Tw -37.49 -14.9

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