

**REFLECTIONS ON AN ACTIVE YEAR IN MERGER ENFORCEMENT**  
**GCR Live 5<sup>th</sup> Annual Antitrust Law Leaders Forum**  
**Miami, Florida**  
**February 5, 2016**  
**Keynote Remarks of Commissioner Terrell McSweeney**

Good afternoon. I am honored to be here. I would like to thank Global Competition Review and the conference's steering committee for the invitation to speak today. As always, the views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

Many of today's panels offer insights into merger enforcement, policy, strategy, and remedies. There is no shortage of fascinating antitrust topics – and I want to thank all of the panelists for thoughtful and thorough discussions of them. Today I'm going to focus my remarks on the relatively active 2015 the FTC had in merger enforcement.

Deal activity in 2015 was incredibly robust, with global M&A activity surpassing \$5 trillion for the first time ever.<sup>1</sup> Merger activity in 2016 so far shows no signs of slowing down.

The Commission challenged six mergers in court in 2015. Four remain in active litigation today, involving three separate hospital mergers and Staples' proposed acquisition of Office Depot. I cannot comment on these pending cases, but today I will discuss the FTC's win in *Sysco*, its loss in *Steris*, and some takeaways from both cases. I also will remark on the Commission's merger enforcement and advocacy efforts generally in health care markets, and touch upon some of the unique issues presented in that industry.

I. Takeaways from the *Sysco* and *Steris* Litigations

Approximately one year ago, the FTC, joined by a number of states, challenged the proposed \$8 billion merger of Sysco and US Foods. As you know, the district court enjoined the merger, with the parties abandoning the transaction shortly thereafter. The FTC's approach to litigating *Sysco* and Judge Mehta's opinion provide three key takeaways generally applicable to agency merger investigations and litigation.

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<sup>1</sup> Fidelia Liu, "Global M&A Volume Surpasses \$5tr for First Time on Record," Dealogic (Dec. 29, 2015), <http://www.dealogic.com/media/market-insights/ma-statshot/>.







power.”<sup>14</sup> After controlling for factors such as labor costs, hospital size, Medicare population, and tax status, Gaynor et al. estimated that monopoly hospitals have roughly 15% higher prices

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laws.<sup>19</sup> CON laws can create barriers to entry, limit consumer choice, and impede innovation. Incumbent health care providers in a market also may use CON laws to thwart or delay entry by other competitors. Moreover, the evidence to date does not suggest that CON laws have been generally successful in achieving their original goal of improving quality or controlling costs.<sup>20</sup> CON laws also may deny consumers the benefit of an effective structural remedy following consummation of an anticompetitive merger – as demonstrated recently in the FTC’s *Phoebe Putney* case.

FTC staff also recently submitted comments in two states pertaining to Certificates of Public Advantage (“COPAs”).<sup>21</sup> COPAs and related legislation granting broad antitrust immunity are unnecessary to encourage procompetitive collaborations among hospitals and other health care providers. Indeed, efforts to shield potentially anticompetitive conduct from federal antitrust enforcement are likely to harm consumers.

The Commission will continue to be active in advocating against CON laws, COPAs, and other regulatory barriers to competitive health care markets. I hope that state and local governments seriously consider the competitive consequences of these types of regulatory regimes and their potential effect on consumers.

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<sup>19</sup> Joint Statement of the FTC and the Antitrust Div. of the U.S. Dept. of Justice (“DOJ”) to the Virginia Certificate of Public Need Work Group (Oct. 26, 2015), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva\\_copn1.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn1.pdf); Joint Statement of the FTC and the DOJ on Certificate-of-Need Laws and South Carolina House Bill 3250 (Jan. 11, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj\\_sclaw.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj_sclaw.pdf) [hereinafter “SC CON Comment”].

<sup>20</sup> See SC CON Comment at 10-15.

<sup>21</sup> FTC Staff Comment to the Virginia Dept. of Health Regarding Virginia’s Rules and Regulations Governing Cooperative Agmts. (Sept. 17, 2015), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-)

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### III. Conclusion

As you can tell, 2015 was a busy and largely successful year for the FTC – and I’m confident that 2016 will be as well. Thank you again for having me today. I’m happy to take your questions.