
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

EIGHTH EDITION

EDITOR
AIDAN SYNNOTT

LAW BUSINESS RESEARCH

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Eighth Edition

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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention.

Cartel enforcement remains robust, particularly by the European Union and the United States, although the number of new enforcement decisions adopted by the EU dropped significantly in 2015. Other jurisdictions, including Greece and France, also report a decrease in the magnitude of fines or numbers of decisions rendered in cartel actions. China, however, saw a slight increase. In 2015, Australia, Brazil, China, Cyprus, the European Union, Germany and the United States have opened, continued or settled enforcement actions against automotive parts cartels. Brazil, China, Germany, Spain, and Switzerland have each seen enforcement activity related to the distribution of automobiles. Additionally, several jurisdictions investigated food-related cartels in 2015, including dairy products (France and Spain), chocolate (Canada), eggs (Australia), poultry (France), bakeries (Finland), and sugarcane (Colombia).

In the area of restrictive agreements, several European jurisdictions (France, Germany, Italy and Sweden) moved against an online travel booking platform for its use of 'most-favoured nation' clauses with respect to the rates offered by hotels to the platform. However, as we see in the chapters that follow, the German authority did not accept the commitments made by the platform to the other jurisdictions, and required a more stringent remedy. These actions follow on a similar enforcement action in the United Kingdom in 2014. In addition, Brazil, France, and Sweden have examined taxi services. We also continue to see several examples of actions against manufacturer-imposed restrictions on retailer behaviour, particularly against resale price maintenance, including actions in Argentina (bleach), Colombia (rice), Switzerland (musical instruments), and the United Kingdom (refrigerator and bathroom suppliers). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the dearth of public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

Merger review and enforcement activity remains robust, and the chapters that follow note activity in many sectors, including in the telecommunications area in the United

States, Spain, Greece, France, Croatia and Finland. We also see several reports of merger investigations in the healthcare area, including activity in Australia, Spain and the United States. Several of the reports, including the reports from the United States, Belgium and Germany, note enforcement activities arising out of merger process violations, such as the failure to properly report transactions.

Many jurisdictions continue to develop their approach to implementation of competition laws enacted in recent years. Of particular interest is the essay entitled 'The Damages Directive, in search of a balance between public and private enforcement of the competition rules in Europe,' which discusses the implementation of the 2014 European Commission Damages Directive.

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

April 2016

Chapter 30

UNITED STATES

Aidan Synnott and Andrew C Finch¹

I OVERVIEW

The past year has been busy for both the antitrust division of the United States Department of Justice (DoJ) and Federal Trade Commission (FTC). The agencies investigated numerous mergers, settling several investigations with divestiture remedies and litigating others. The DoJ continued aggressively to pursue price-fixing investigations in several industries, including auto parts, liquid crystal displays, LIBOR, and foreign exchange markets; and bid-rigging investigations in real estate foreclosure auctions and ocean shipping.

The FTC has continued to focus attention on healthcare-related issues, including consolidation of healthcare providers. The FTC also adopted guidance on use of its authority under Section 5 of the Federal Trade Commission Act, which prohibits ‘unfair or deceptive acts or practices in or affecting commerce.’² Among other things, this short statement explains that the FTC will evaluate behaviour ‘under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications,’ and notes that ‘the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.’³

1 Aidan Synnott is a partner and co-chair of the antitrust group and Andrew C Finch is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank Mark R Laramie and Rosalia Martinez Real for their invaluable assistance in preparing this chapter.

2 15 U.S.C. Section 45.

3 FTC, Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

Continuing their engagement with non-United States enforcement authorities, both the DoJ and FTC participated in several meetings and conferences. The Assistant Attorney General in charge of the DoJ antitrust division and the Chairwoman of the FTC participated in a trilateral meeting with Canadian and Mexican counterparts,⁴ and the DoJ and FTC signed a memorandum of understanding with the Korea Fair Trade Commission 'to promote increased cooperation and communication among the competition agencies in both countries'.⁵ Further, both agencies participated in the annual meeting of the International Competition Network, at which the group 'adopted guidance on investigative process in competition cases and approved new work on international merger enforcement cooperation, legal theories in tying and bundling investigations and interaction with government procurement agencies'.⁶

II CARTELS

i Significant cases

LIBOR

The DoJ continued its investigation of the London Interbank Offered Rate (LIBOR) and other benchmark interest rates. In 2015, two additional banks (for a total of five) agreed to plead guilty to alleged LIBOR fixing.⁷ Further, the DoJ declared that one bank breached its 2012 non-prosecution agreement resolving the LIBOR investigation; and that bank agreed to plead guilty to a one-count felony charge of wire fraud and to pay a \$203 million criminal penalty.⁸ Earlier in the year, another bank agreed to pay \$775 million in criminal penalties to the DoJ,⁹ to continue cooperating with the DoJ investigation, and to retain a corporate monitor for a three-year term. The criminal penalties relating to LIBOR now exceed \$2.519 billion.¹⁰ Furthermore, the DoJ has sought to hold individuals holding corporate positions personally responsible. A federal jury in the Southern District of New York convicted two former Rabobank derivative traders of conspiracy to commit wire and

4 Press Release, U.S. Dep't of Justice, Officials from the U.S., Canada and Mexico Participate in Trilateral Meeting in Mexico City to Discuss Antitrust Enforcement (May 21, 2015), available at <http://www.justice.gov/opa/pr/officials-us-canada-and-mexico-participate-trilateral-meeting-mexico-city-discuss-antitrust>.

5 Press Release, U.S. Dep't of Justice, Department of Justice and Federal Trade Commission Sign Antitrust Memorandum of Understanding with Korea Fair Trade Commission (Sept. 8, 2015), available at <http://www.justice.gov/opa/pr/departments-justice-and-federal-trade-commission-sign-antitrust-memorandum-understanding-korea>.

6 Press Release, U.S. Dep't of Justice, International Competition Network Adopts Guidance on Investigative Process to Enhance Procedural Fairness in Competition Cases and Cooperation in International Merger Enforcement (May 1, 2015), available at <http://www.justice.gov/opa/pr/international-competition-network-adopts-guidance-investigative-process-enhance-procedural>.

7 Press Release, Five major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

8 Id. at 1.

9 See April 23, 2015 Press Release *supra* note 7.

10 Id. at 1, 3.

bank fraud and on substantive counts of wire fraud in November 2015; and these individuals are now awaiting sentencing.¹¹ As of the end of 2015, five former Rabobank employees have been convicted.¹²

Foreign exchange markets

Following settlements reached by several other agencies regarding alleged manipulation of the foreign currency exchange (FX) market, the DoJ entered into parent-level guilty plea agreements with five major banks.¹³ The DoJ alleged that traders used their exclusive electronic chats to manipulate the euro-dollar exchange rate by agreeing to withhold bids or offers for euros or dollars, so as to avoid moving the rate when it would be adverse to their positions.¹⁴ Each bank agreed to pay a criminal fine proportionate to its involvement, and the fines totaled more than \$2.5 billion. One bank further agreed that its FX conduct also violated its June 2012 non-prosecution agreement resolving the DoJ investigation on LIBOR manipulation, and agreed to pay an additional \$60 million criminal penalty.¹⁵

Online Wall Décor

A federal antitrust investigation conducted by the DoJ and the FBI uncovered agreements by certain e-commerce sellers of posters, prints and framed art to fix prices on certain posters sold in the United States through Amazon Marketplace.¹⁶ After charges were filed by the DoJ, an e-commerce executive agreed to plead guilty to charges that he conspired to fix the prices of wall posters sold online through Amazon Marketplace from September 2013 until or about January 2014 and pay a \$20,000 fine. The DoJ alleged that the executive wrote software code that instructed the system to set prices at agreed-upon levels.¹⁷ Charges against other individuals and entities remain pending.¹⁸

Auto Parts

The now six-year investigation into auto part price fixing initiated by the DoJ continued in 2015. As of the end of 2015, 38 companies and 58 executives have been charged and have

11 Press Release, Two Former Rabobank Traders Convicted for Manipulating U.S. Dollar, Yen LIBOR Interest Rates (November 5, 2015), available at www.justice.gov/opa/pr/two-former-rabobank-traders-convicted-manipulating-us-dollar-yen-libor-interest-rates.

12 Id. at 5.

13 Chiara Albanese, David Enrich and Katie Martin, *The Wall Street Journal* (Nov. 12, 2014), available at www.wsj.com/articles/banks-reach-settlement-in-foreign-exchange-rigging-probe-1415772504.

14 Id. at 7.

15 Id. at 7-8.

16 Press Release, Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution (April 6, 2015), available at www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.

17 Id. at 10.

18 Press Release, E-Commerce Exec and Online Retailer Charged with Price Fixing Wall Posters (December 4, 2015), available at www.justice.gov/opa/pr/e-commerce-exec-and-online-retailer-charged-price-fixing-wall-posters.

agreed to pay more than \$2.6 billion in criminal fines. Sanden Corp,¹⁹ Kayaba Industry Co Ltd dba KYB Corporation (KYB),²⁰ NGK Insulators Ltd,²¹ Yamada Manufacturing Co²² and INOAC Corp²³ are among the companies that pleaded guilty and agreed to pay fines ranging from \$2.5 to \$65.3 million. Further, Robert Bosch GmbH (Bosch), the world's largest independent parts supplier to the automotive industry, agreed to plead guilty and pay a fine.²⁴

In connection with DoJ's efforts to hold individuals responsible for anticompetitive practices, executives from T.RAD Co Ltd,²⁵ Mitsuba Corporation²⁶ and Takata Corp²⁷ were indicted in 2015. Executives from Hitachi Automotive Systems Ltd²⁸ and Toyota Gosei Co Ltd²⁹ agreed to plead guilty and were sentenced to serve a year and a day and 15 months in prison, respectively, and were each fined \$20,000.

-
- 19 Press Release, Sanden Corp. Agrees to Plead Guilty to price Fixing on Automobile Parts Installed in U.S. Cars (January 27, 2015), available at www.justice.gov/opa/pr/sanden-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars (hereinafter 'January 27, 2015 Press Release').
 - 20 Press Release, KYB Agrees to Plead Guilty and Pay \$62 Million Criminal Fine for Fixing Price of Shock Absorbers (September 16, 2015), available at www.justice.gov/opa/pr/kyb-agrees-plead-guilty-and-pay-62-million-criminal-fine-fixing-price-shock-absorbers.
 - 21 NGK Insulators Ltd to Pay \$65.3 Million for Fixing Prices on Auto parts, September 3, 2015.
 - 22 Press Release, Yamada Manufacturing Co. Agrees to Plead Guilty to Price Fixing and Bid Rigging on Automobile Parts Installed in U.S. Cars (April 28, 2015), available at www.justice.gov/opa/pr/ngk-insulators-ltd-pay-653-million-fixing-prices-auto-parts.
 - 23 Press Release, INOAC Corp. to Pay \$2.35 million for Fixing Prices on Auto Parts (November 19, 2015), available at www.justice.gov/opa/pr/inoac-corp-pay-23-5-million-fixing-prices-auto-parts.
 - 24 Press Release, Robert Bosch GmbH Agrees to Plead Guilty to Price Fixing and Bid Rigging on Automobile Parts Installed in U.S. Cars (March 31, 2015), available at www.justice.gov/opa/pr/robert-bosch-gmbh-agrees-plead-guilty-price-fixing-and-bid-rigging-automobile-parts-installed.
 - 25 Press Release, Former Automotive Parts Manufacturer Executive Indicted for Role in Conspiracy to Fix Prices (May 14, 2015), available at www.justice.gov/opa/pr/former-automotive-parts-manufacturer-executive-indicted-role-conspiracy-fix-prices.
 - 26 Press Release, Two Former Japanese Automobile Parts Manufacturer Executives Indicted for Roles in Conspiracy to Fix prices and for Obstruction of Justice (February 5, 2015), available at www.justice.gov/opa/pr/two-japanese-automobile-parts-manufacturer-executives-indicted-roles-conspiracy-fix-prices.
 - 27 Press Release, Executive of Japanese Automotive Parts Manufacturer Indicted for Role in Conspiracy to Fix Prices (January 22, 2015), available at www.justice.gov/opa/pr/executive-japanese-automotive-parts-manufacturer-indicted-role-conspiracy-fix-prices.
 - 28 Press Release, Hitachi Automotive Sales Executive Pleads Guilty to Participating in Auto Parts Price-Fixing Conspiracy (April 23, 2015), available at www.justice.gov/opa/pr/hitachi-automotive-sales-executive-pleads-guilty-participating-auto-parts-price-fixing.
 - 29 Press Release, Former Toyota Gosei Executive Agrees to Plead Guilty to price Fixing and Bid Rigging on Automobile Parts Installed in U.S. Cars (January 6, 2015), available at www.justice.gov/opa/pr/former-toyota-gosei-executive-agrees-plead-guilty-price.

Small-Sized Ball Bearings

In an ongoing investigation conducted by the Antitrust Division's Chicago Office and the FBI's Cincinnati Field Office of a price-fixing conspiracy involving small-sized ball bearings, Minebea Co agreed to plead guilty and pay a \$13.5 million criminal fine.³⁰

Bid rigging

Real estate foreclosure auctions

The investigation and prosecution of individuals and organisations for bid rigging and fraud in public foreclosure auctions continued in 2015 both in California³¹ and Georgia.³²

Charges brought by the Financial Fraud Enforcement Task Force (consisting of more than 20 federal agencies, 94 US attorney's offices and state and local partners) alleged that the defendants conspired among themselves and with others not to bid against one another, and to designate winning bidders for properties at public real estate foreclosure auctions.³³ The real estate properties bought at non-competitive prices were then awarded to the conspirators who submitted the highest bids at a second private auction.³⁴ Because the proceeds of the original real state auctions are used to pay off the mortgage and other debt attached to the property, with the remaining proceeds being paid to the homeowner, the conspirators paid and received money that otherwise would have gone to pay off the mortgage and other debt holders and, in some cases, the defaulting homeowner.³⁵ As of July 2015, 56 individuals had pleaded guilty to criminal charges as a result of the ongoing investigation in California. The collusion allegedly continued until approximately January 2011.³⁶

fixing-and-bid-rigging-automobile.

30 Press Release, Minebea Co. Ltd. Agrees to Plead Guilty and Pay a \$13.5 Million Criminal Fine for Price Fixing on Small Sized Ball Bearings (February 2, 2015), available at www.justice.gov/opa/pr/minebea-co-ltd-agrees-plead-guilty-and-pay-135-million-criminal-fine-price-fixing-small-sized.

31 Press Release, Two Northern California Real Estate Investigators Agree to Plead Guilty to Big Rigging and Fraud Conspiracies at Public Foreclosure Auctions (April 23, 2015), available at www.justice.gov/opa/pr/two-northern-california-real-estate-investors-agree-plead-guilty-bid-rigging-and-fraud-0.

32 Press Release, Georgia Real Estate Investors Admits to Bid Rigging and Mail Fraud Conspiracies at Home Foreclosure Auctions (October 27, 2015), available at www.fbi.gov/atlanta/press-releases/2015/georgia-real-estate-investor-admits-to-bid-rigging-and-mail-fraud-conspiracies-at-home-foreclosure-auctions.

33 Id. at 27.

34 Id. at 27-28.

35 Press Release, Georgia Real Estate Investors Pleads Guilty to Bid Rigging and Mail Fraud Conspiracies at Public Foreclosure Auctions (May 19, 2015), available at www.justice.gov/opa/pr/georgia-real-estate-investor-pleads-guilty-bid-rigging-and-fraud-conspiracies-public.

36 Press Release, Two Northern California Real Estate Investigators Agree to Plead Guilty to Big Rigging and Fraud Conspiracies at Public Foreclosure Auctions (July 8, 2015), available at www.justice.gov/opa/pr/two-northern-california-real-estate-investors-agree-plead-guilty-bid-rigging-and-fraud-0.

Ocean Shipping

The DoJ continued its investigation into an allegedly long-running conspiracy to fix prices, allocate customers and rig bids for international ocean shipping services for roll-on, roll-off cargo, such as cars, trucks and agricultural equipment, to and from the United States and elsewhere.³⁷ As of October 2015, seven executives have been charged in the investigation and four have pleaded guilty and been sentenced to prison.³⁸ Three corporations have agreed to plead guilty and to pay criminal fines totaling more than \$136 million. K-Line alone was sentenced to pay a criminal fine of \$67.7 million.³⁹

Public School Bus Auction

Five individuals were indicted for participating in bid rigging and fraud conspiracies at an auction for public school bus transportation contracts in Puerto Rico.⁴⁰ The bus owners allegedly conspired to defraud the Puerto Rico Department of Education and the Caguas municipality, among others, for the purpose of fraudulently obtaining contracts for school bus transportation services.⁴¹ This was the first case resulting from a federal antitrust investigation conducted by the Antitrust Division's Washington Criminal I Section, the US Attorney's Office of the District of Puerto Rico, the FBI's Puerto Rico Field Office and the US Department of Education Office of Inspector General, into price fixing and bid rigging among other anticompetitive conduct involving the bus transportation services industry in Puerto Rico.⁴²

Heir Location Services Firms

In December 2015, Brandenburger & Davis, one of a number of firms being investigated, and its CEO agreed to plead guilty to allocating customers with another heir location firm.⁴³ Heir location services firms identify people who may be entitled to an inheritance from the estate of a relative who died intestate in exchange for a contingency fee from the inheritances

37 Press Release, Ocean Shipping Executive Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (January 30, 2015), available at www.justice.gov/opa/pr/ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and-trucks.

38 Press Release, Three Ocean Shipping Executives Indicted for Fixing Prices and Rigging Bids (October 6, 2015), available at www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids.

39 Press Release, Fourth Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (March 26, 2015), available at www.justice.gov/opa/pr/fourth-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and-trucks.

40 Press Release, Five School Bus Owners Indicted for Bid-Rigging and Fraud Conspiracies at Puerto Rico Public School Bus Auction (May 21, 2015), available at www.justice.gov/opa/pr/five-school-bus-owners-indicted-bid-rigging-and-fraud-conspiracies-puerto-rico-public-school.

41 Id. at 36.

42 Id. at 36-37.

43 Press Release, First Charges Brought in Investigation of Collusion Among Heir Location Services Firms (December 23, 2015), available at www.justice.gov/opa/pr/first-charges-brought-investigation-collusion-among-heir-location-services-firms.

to be received. Brandenburger agreed to pay \$890,000 in criminal fines while the CEO agreed to submit to the court the determination of an appropriate criminal sentence.⁴⁴ According to the DoJ, the defendants' conspiracy had lasted for nearly a decade.⁴⁵

Municipal Bond Proceeds

Certain financial institutions, acting as 'providers,' offered investment agreement contracts to states, county and local governments and agencies as well as other not-for-profit entities throughout the United States.⁴⁶ These public entities conducted a competitive bidding process to determine a broker to invest money raised by means of municipal bonds for public projects.⁴⁷ According to the DoJ, certain financial institutions engaged in a conspiracy to rig the competitions.⁴⁸ The scheme resulted in various providers winning investment agreements and other municipal finance contracts at artificially determined prices. One bank executive was sentenced to 26 months in prison.⁴⁹

This antitrust investigation has resulted in convictions of or pleas by 17 individuals and one corporation.⁵⁰ On 4 June 2015 the Second Circuit upheld the convictions of three former bank executives who were found guilty by a New York jury in 2013 of manipulating the bidding process for municipal bond reinvestment agreements and other municipal finance contracts.⁵¹ According to the Second Circuit, the charges brought against the defendants were within the applicable statute of limitations for wire fraud offences.⁵²

Water treatment chemicals

An investigation carried on by DoJ of collusion to circumvent competitive bidding and independent pricing for liquid aluminum sulfate contracts resulted in its first guilty plea on October 2015.⁵³ According to the documents filed in court, the 15-year scheme involved an agreement between the co-conspirators not to disturb each other's 'historical business.'⁵⁴ They

44 Id. at 39.

45 Id. at 39-40.

46 Press Release, Former Bank of America Executive Sentenced to Serve 26 Months in Prison for Role in Conspiracy and Fraud Involving Investment Contracts for Municipal Bond Proceeds (May 18, 2015), available at www.justice.gov/opa/pr/former-bank-america-executive-sentence-d-serve-26-months-prison-role-conspiracy-and-fraud.

47 Id. at 42.

48 Id. at 42-43.

49 Id. at 42-45.

50 Id. at 42-48.

51 Yasmine Harik, Convictions upheld against former UBS executives in DoJ muni bonds case, Global Competition Review (June 8, 2015), available at www.globalcompetitionreview.com/news/article/38766/convictions-upheld-against-former-ubs-executives-doj-muni-bonds-case/.

52 Id. at 50.

53 Press Release, Former Executive Admits Guilt in Conspiracy Affecting Water Treatment Chemicals (October 27, 2015), available at www.justice.gov/opa/pr/former-executive-admits-guilt-conspiracy-affecting-water-treatment-chemicals.

54 Id. at 52.

regularly met to discuss their respective businesses and agreed to submit intentionally loosing bids to favor the intended winner of the business, to withdraw inadvertently winning bids, and to discuss prices to be quoted or bid to customers.⁵⁵

ii Trends, developments and strategies

The DoJ continued its efforts to obtain convictions and pleas by responsible individuals as well as corporations. DoJ believes such convictions and pleas are likely to have strong deterrence effects as the average number of individuals sentenced to jail and the average length of their sentences continue to increase.

In 2016, prosecution of e-commerce cartels may bring unique issues to the table. One pressing question may well be: will traditional forms of evidence of collusion suffice when the colluding parties use pricing algorithms or dynamic pricing models?

iii Outlook

DoJ investigations and criminal antitrust prosecutions will likely continue to increase in 2016, relying on the leniency model to bring to light and enforce antitrust laws against conspiracies that would otherwise continue undetected. Also, the investigation of criminal activity that transcends the US borders surely will create further incentives to develop and promote international cooperation. Aside from the developments in the international collusion investigations that have long been under the DoJ's focus, searches conducted by FBI together with UK law enforcement in the wall decor cartel investigation evidenced the progress of international enforcement coordination that will likely continue to develop in the immediate future.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Market allocation

In June 2015, the DoJ and the state of Michigan filed suit in Michigan against four hospital systems. The case alleged that the systems illegally made a 'gentlemen's agreement not to market services'.⁵⁶ Three of the four systems settled, but the fourth is litigating.⁵⁷ For its part, the FTC settled charges against a drug testing company that the Commission alleged invited a competitor to allocate customers.⁵⁸ The FTC brought its complaint under Section 5 of the FTC Act, authority that it commonly uses to police invitations to collude.⁵⁹

55 Id. at 52-53.

56 Compl., *United States v. Hillsdale Cmty. Health Center, et al*, No. 15-cv-12311 (E.D. Mich. June 25, 2015).

57 Press Release, U.S. Dep't of Justice, Justice Department Sues Four Michigan Hospital Systems for Unlawfully Agreeing to Limit Marketing for Competing Healthcare Services (June 25, 2015), available at <http://www.justice.gov/opa/pr/justice-department-sues-four-michigan-hospital-systems-unlawfully-agreeing-limit-marketing>.

58 See Decision & Order, *In the Matter of Drug Testing Compliance Group, LLC*, FTC File No. 151-0048 (Jan. 21, 2016).

59 15 U.S.C. Section 45.

E-Books

In 2012, after an investigation involving cooperation with the European Commission,⁶⁰ DoJ filed suit against Apple Inc. and the major book publishers over agreements respecting the pricing of e-books.⁶¹ DoJ claimed that, in response to Amazon.com's prevailing low prices for e-books, Apple and the publishers engaged in a *per se* illegal price-fixing scheme designed to raise prices. DoJ alleged that Apple and the publishers conspired to implement an 'agency' model whereby publishers and not retailers would set the retail prices for e-books.⁶² Prior to the implementation of the agency model, e-books were sold on a wholesale basis: retailers purchased material from publishers and independently set prices. DoJ alleged that this wholesale model fostered competition among retailers and had the ultimate effect of driving down the price of e-books.⁶³ In response to these low prices, according to the complaint, defendant publishers simultaneously entered into agency agreements with Apple pursuant to which they set the retail prices for their products and paid Apple a 30 per cent commission. The agreements also guaranteed that e-books sold through Apple were priced no higher than those sold through other outlets.⁶⁴ The government contended that this 'most favored nation' provision gave the publishers incentives to require that other retailers also agree to the agency model – if a retailer was allowed to set the price independently, it might set a low price, which, in turn, would lower the price Apple charged, reducing the amount the publisher earned from the substantial business conducted through Apple's platform.⁶⁵ This, the division alleged, had the anticompetitive effect of raising the price of e-books across the board.⁶⁶ The publishers all settled with the government.

After settling with the publishers,⁶⁷ in 2013, DoJ prevailed at trial in its case against Apple Inc. Following a bench trial that lasted several weeks, Judge Denise Cote of the Southern District of New York found that Apple conspired with e-book publishers 'to raise the retail price of e-books' in violation of Section 1 of the Sherman Act.⁶⁸ Judge Cote adopted

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- 60 Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, IP, Antitrust and Looking Back on the Last Four Years 6 (Feb. 8, 2013), available at <http://www.justice.gov/atr/public/speeches/292573.pdf>; Joseph F. Wayland, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, International Cooperation at the Antitrust Division 6-7 (Sept. 14, 2012), available at <http://www.justice.gov/atr/public/speeches/286979.pdf>.
 - 61 Complaint, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).
 - 62 *Id.* at 3-4.
 - 63 *Id.* at 9-10.
 - 64 *Id.* at 20-21.
 - 65 Competitive Impact Statement at 7 n.3, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).
 - 66 Complaint at 21, *U.S. v. Apple Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).
 - 67 See Synnott & Finch, *supra* note 4, at 351-52.
 - 68 *U.S. v. Apple Inc.*, 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013). The DoJ was joined in its suit by several states. Unlike the DoJ, which has sought only an injunction, the states seek damages from Apple and a separate damages trial is scheduled for 2014. See Scheduling Order at 2, *Texas, et al. v. Penguin Group (USA) Inc., et al.*, No. 12-cv-3394 (S.D.N.Y. Aug. 13, 2013).

DoJ's proposed remedy requiring that Apple end its agreements with publishers and that Apple submit to an antitrust monitor. In June 2015, the Second Circuit affirmed the district court's decision.⁶⁹

Professional Licensing Boards

In February 2015, the United States Supreme Court sided with the FTC when it held that the North Carolina State Board of Dental Examiners, a state agency which regulates the practice of dentistry, was not immune from federal antitrust laws (as state instrumentalities generally are) because the board was controlled by dentists who were themselves market participants in the markets the board regulates and were not actively supervised by the state.⁷⁰ The case arose out of the FTC's challenge to the board's decision to prohibit non-dentists from providing teeth-whitening services.⁷¹ When challenged, the board asserted that it was immune from antitrust challenge because it was a state actor. The Supreme Court held that in order for such immunity to apply, 'realistic assurances that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests' are required.⁷² Because the state did not actively supervise the board, these assurances were lacking.⁷³

Since its Supreme Court victory, the FTC has been active in its public statements in the area of professional licensing: Commissioner Ohlhausen recently testified before the Senate Judiciary Committee, stating that the FTC has 'seen many examples of restrictions that likely impede competition and hamper entry into professional and other services markets, and yet offer few, if any, significant consumer benefits'.⁷⁴

In addition, in early 2016, the FTC submitted a comment on a proposal in the Georgia state senate to 'expand the safety-net settings where Georgia dental hygienists may work without the direct supervision of a dentist'.⁷⁵ Under the proposal 'dental hygienists would no longer require direct supervision to screen patients for conditions warranting referral to a dentist.' According to the FTC staff, '[r]emoving the direct supervision requirements under these circumstances would likely enhance competition in the provision of preventive dental care services and thereby benefit Georgia consumers, particularly underserved populations with limited access to preventive care'.⁷⁶ In another set of comments on proposals in the South Carolina House of Representative regarding the regulation of advance practice registered

69 *U.S. v. Apple Inc.*, 731 F.3d 290 (2d Cir, 2015).

70 *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 13-534 (U.S. Supreme Court Feb. 25, 2015).

71 *Id.*

72 *Id.* at 10.

73 *Id.*

74 Stmt. of the Fed'l Trade Comm'n before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, License to Compete: Occupational Licensing and the State Action Doctrine (Feb. 2, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupational_licensing.pdf.

75 Letter to Hon. Valencia Seay, Georgia State Senate (Jan. 29, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-georgia-state-senator-valencia-seay-concerning-georgia-house-bill-684/160201gadentaladvocacy.pdf.

76 *Id.*

nurses, the FTC asserted that the removal of physician supervision requirements ‘may offer significant benefits to South Carolina healthcare consumers and third-party payors, absent well-founded health or safety concerns that would otherwise justify maintaining or enhancing them.’⁷⁷ The FTC also submitted comments regarding the regulation of advanced practice registered nurses in Missouri.⁷⁸

Professional Associations

In 2015, the FTC continued to take action regarding the rules and ethics codes of professional associations. In one action, involving the National Association of Animal Breeders, the FTC challenged ‘restrictions on [...] members’ advertising, and limit[s] on their ability to disseminate truthful, non-deceptive information about their products and the products of their competitors.’⁷⁹ The settlement with FTC requires the association to eliminate these rules and to implement an antitrust compliance programme.⁸⁰

‘Pay for delay’

The FTC has continued its enforcement efforts with respect to, and advocacy against, so-called ‘pay for delay’ settlements in which a brand-name drug manufacturer settles a patent infringement suit against a potential generic manufacturer by making a payment to the generic manufacturer as long as it remains out of the market for some period of time. As we previously noted,⁸¹ in 2013 the United States Supreme Court handed the FTC a significant victory in its enforcement efforts with respect to pay for delay settlements in the *FTC v. Actavis, Inc* when it ruled that these deals are subject to ‘rule of reason’ antitrust analysis which weighs the anti-competitive against any pro-competitive effects of the agreements.⁸² Lower courts have begun to flesh out the analytical framework for challenges to pay-for-delay arrangements. In *Federal Trade Commission v. Cephalon, Inc*, the court explained that, under the applicable rule of reason analysis, ‘[p]laintiffs must present evidence of a large reverse payment as part of their initial burden of demonstrating anticompetitive effects [...]; if [p]laintiffs meet this standard, the burden shifts to [d]efendants to justify the reverse payment as procompetitive; if that occurs, [p]laintiffs must then present sufficient evidence so as to raise a genuine

77 Letter to Hon. Henny A. Horne, South Carolina House of Representatives (Nov. 2, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-south-carolina-representative-jenny.horne-regarding-house-bill-3508-3078-advanced-practice-registered-nurse-regulations/151103scaprn.pdf.

78 Letter to Hon. Jeanne Kirkton, Missouri House of Representatives (April 21, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-representative-jeanne-kirkton-missouri-house-representatives-regarding-competitive/150422missourihouse.pdf.

79 Press Release, FTC, FTC Approves Final Order Requiring National Association of Animal Breeders to Eliminate Rules that Restrict Competition among Its Members (Nov. 6, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-approves-final-order-requiring-national-association-animal>.

80 Id.

81 Aidan Synnott & Andrew C Finch, United States, in *The Public Competition Enforcement Rev.* 370, 375-76 (2014).

82 *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2227 (2013).

dispute of material fact as to whether the reverse payment is unjustified or unexplained.⁸³ In May 2015, the FTC announced that it had settled the *Cephalon* case, securing \$1.2 billion to compensate purchasers and an agreement that Teva Pharmaceutical Industries, Ltd (which had acquired Cephalon) would not enter into pay-for-delay settlements.⁸⁴

In addition to its direct challenges, the FTC has also submitted amicus curiae briefs in pay for delay cases brought by plaintiffs seeking damages.⁸⁵ According to the FTC, ‘the number of settlements potentially involving pay for delay decreased significantly in the wake of the *Actavis* decision.’⁸⁶

Relatedly, the FTC settled allegations against two pharmaceutical companies alleging that they agreed not to compete in the sale of a generic drug.⁸⁷

Invitations to collude

In 2015, the FTC continued to investigate and settle complaints involving a so-called ‘invitation to collude’ – a scenario in which a firm attempts to induce a competitor into an anticompetitive agreement. Actual anticompetitive agreements are actionable under Section 1 of the Sherman Act,⁸⁸ but, absent an agreement, Section 1 does not apply. The FTC has taken the position that its powers under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition,⁸⁹ are broader than Section 1, and thus occasionally uses this authority to police invitations to collude where no agreement was actually reached. Relying on Section 5, the FTC brought (and settled) a complaint against a seller of rug accessories alleging that it invited a competitor to collude on prices.⁹⁰

83 Memorandum Opinion, *FTC v. Cephalon*, No. 08-cv-2141 (E.D. Pa. Jan. 28, 2015).

84 Press Release, FTC, FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics (May 28, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

85 See, e.g., Br. for Amicus Curiae Fed. Tr. Comm’n Supporting Plaintiffs-Appellants, *In re Effexor XR Antitrust Litig.*, No. 15-1184 (3d Cir. Nov. 17, 2015); Br. of Fed. Tr. Comm’n as Amicus Curiae in Support of Plaintiffs-Appellants, *American Sales Co. v. Warner Chilcott Co., LLC*, No. 14-2071 (1st Cir. June 16, 2015).

86 Agreements Filed With the Federal Trade Commission Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed In Fiscal Year 2014: A Report By the Bureau of Competition (Jan. 2016), available at <https://www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement/160113mmafy14rpt.pdf>.

87 Press Release, FTC, FTC Issues Final Orders Settling Charges of Illegal Agreement not to Compete (Oct. 30, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/10/ftc-issues-final-orders-settling-charges-illegal-agreement-not>.

88 15 U.S.C. Section 1.

89 15 U.S.C. Section 45.

90 Press Release, FTC, FTC Approves Final Order Requiring Marketer of Rug Accessory to Stop Efforts to Illegally Coordinate Prices with Competitor (Dec. 15, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-approves-final-order-requiring-marketer-rug-accessory-stop>.

Vertical restraints

Payment card acceptance rules

In February 2015, the DoJ prevailed in its antitrust challenge to certain ‘non-discrimination provisions’ in American Express’s merchant acceptance agreements. The court found after trial that the specific challenged rules had anticompetitive effects by, among other things, allowing American Express to charge *supra*-competitive rates to merchants and that American Express had failed adequately to prove countervailing pro-competitive justifications.⁹¹ American Express has appealed and, as of this writing, a decision by the Second Circuit Court of Appeals is pending.

Monopolisation

In 2013, FTC found that McWane, Inc, a pipe fittings manufacturer, illegally maintained a monopoly in the United States domestic pipe fittings market by entering into what the Commission, by a vote of 3-1, found was an exclusive dealing arrangement with distributors effectively requiring them to purchase fittings only from McWane and foreclosing opportunities for McWane’s competitors to access distribution channels.⁹² Notably, the Commission dismissed the remaining claims against McWane, which included allegations that McWane conspired with its competitors to raise the prices of pipe fittings; allegations that McWane engaged in unlawful information exchange; allegations that McWane’s agreement with its distributor prohibiting the distributor from producing its own pipe fittings was an unreasonable restraint of trade; allegations of conspiracy to monopolise; and allegations of attempted monopolisation.⁹³ In dismissing these counts, the Commission reversed the decision of its own administrative law judge who found that, in addition to exclusive dealing, McWane was liable for unreasonable restraint of trade, conspiracy to monopolise, and attempted monopolisation.⁹⁴ McWane appealed Commission’s decision on the exclusive dealing allegations, and in 2015, the United States Court of Appeals for the Eleventh Circuit upheld the FTC’s decision.⁹⁵

In April 2015, the FTC announced that it had recovered \$26.8 million from Cardinal Health, Inc in settlement of charges that had ‘illegally monopolized 25 local markets for the sale and distribution of low-energy radiopharmaceuticals and forced hospitals and clinics to pay inflated prices for these drugs’.⁹⁶

91 *U.S. v. American Express Co.*, No. 10-cv-04496, 2015 WL 728563 (Feb. 19, 2015 E.D.N.Y.).

92 Press Release, Federal Trade Commission, FTC Issues Opinion and Final Order Finding McWane, Inc. Unlawfully Maintained Its Monopoly in Domestic Pipe Fittings by Excluding Competitors (Feb. 6, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/02/ftc-issues-opinion-final-order-finding-mcwan-inc-unlawfully>.

93 *In the Matter of McWane, Inc. and Star Pipe Prods., Ltd.*, F.T.C. Docket No. 9351 (Jan. 30, 2014).

94 *Id.*

95 *McWane v. FTC*, No. 14-11363 (11th Cir. April 15, 2015).

96 Press Release, FTC, Cardinal Health Agrees to Pay \$26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics (April 20, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>.

ii Trends, developments and strategies

In the wake of the Supreme Court's decision in the North Carolina dental licensing case, the FTC has been quite active in the area of professional licensing, and we can expect that the agency will continue to examine this area for potential competitive concerns. We also note that the FTC continues to assert its authority to police so-called invitations to collude under Section 5 of the Act.

iii Outlook

We expect that the agencies will continue to actively pursue civil non-merger investigations of potential anticompetitive conduct. In addition, the FTC has announced that it will host a workshop examining the automobile distribution system in the United States, which operates under a system of state regulation.⁹⁷ Indeed the FTC has urged states to allow automobile manufacturers to sell directly to consumers rather than solely through dealers.⁹⁸

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Healthcare

Virginia Certificate of Public Need Work (COPN) programme

On 26 October 2015, the FTC and the DoJ issued a joint statement that recommended that the State of Virginia reform its laws regulating the building of hospitals and the process for delivering healthcare services.⁹⁹ The joint statement submitted to the Virginia Certificate of Public Need Work (COPN) Group recommends that the state consider whether its COPN programme best serves the needs of its citizens.¹⁰⁰

The agencies noted that, while CON laws were enacted with the goals of reducing healthcare costs and improving access to care, CON laws can prevent the efficient functioning of healthcare markets by creating barriers to entry and expansion, limiting consumer choice,

97 Press Release, FTC, FTC Announces Agenda and Panelists for Workshop Examining the U.S. Auto Distribution System (Jan. 6, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-announces-agenda-panelists-workshop-examining-us-auto>.

98 See Letter to Sen. Darwin Boohar, Michigan Senate (May 7, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf.

99 Concurring Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group (October 23, 2015), available at www.ftc.gov/system/files/documents/public_statements/836963/151026jbcconcurringstmtvacopn.pdf.

100 Press Release, Agencies Submit Joint Statement Regarding Virginia Certificate of Need Laws for Healthcare Facilities (October 26, 2015), available at www.ftc.gov/news-events/press-releases/2015/10/agencies-submit-joint-statement-regarding-virginia-certificate.

stifling innovation, allowing incumbent firms to thwart or delay entry by new competitors and denying consumers the benefit of an effective remedy following the consummation of an anticompetitive merger.¹⁰¹

Virginia's COPN programme requires healthcare providers to obtain a COPN from the State Health Commissioner before initiating certain projects regarding facilities, such as hospitals and others, and services, such as general acute care services, cardiac services, obstetrics, and organ transplantation.¹⁰² Thus, the State Health Commissioner may not issue a COPN unless Commissioner has determined that there is a public need for the project and may condition a COPN on the provision of a certain amount of charity care, care to those with special needs and health services in a medically underserved area.¹⁰³

The agencies asserted that the COPN process can be time-consuming and costly, delaying entry by at least many months and possibly deterring entry if an entrant decides that the process is too costly.¹⁰⁴ In addition to raising entry barriers, the agencies further argued that CON laws can reduce the ability of the market to respond to consumer demand for different treatment options, settings, or prices; and may remove or delay the competitive pressures that can spur the existing competitors to innovate, improve services, or introduce new services.¹⁰⁵

The agencies asserted that CON laws may harm competition because competitors may take advantage of the CON process to protect their competitive advantage. Arguments favoring CON laws have not been supported by the evidence and therefore the agencies argued that Virginia should consider repealing or cutting back its COPN laws.¹⁰⁶

New York State's Certificate of Public Advantage regulations

In a letter addressed to the New York State Department of Health, the FTC expressed concern about New York State's Certificate of Public Advantage regulations, which provide antitrust immunity to certain approved healthcare collaborations. According to the FTC, those protections are unnecessary because antitrust law already permits healthcare collaborations that benefit consumers.¹⁰⁷

101 Id. at 70.

102 Id. at 70, 72.

103 Id. at 70, 72-73.

104 Id. at 70, 72-74.

105 Id. at 70, 72-75.

106 Id. 70, 72-76. Also, Press Release, Department of Justice and Federal Trade Commission Support Reform of Virginia Laws that Curb Competition, Limit Consumer Choice, and Stifle Innovation for Healthcare Services (October 26, 2015), available at www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-support-reform-virginia-law-s-curb-competition. The FTC also expressed similar concerns about North Carolina's CON laws. See Press Release, FTC Staff Supports North Carolina Legislative Proposal to Limit Certificate of Need Rules for Healthcare Facilities (July 13, 2015), available at www.ftc.gov/news-events/press-releases/2015/07/ftc-staff-supports-north-carolina-legislative-proposal-limit.

107 Letter sent by the FTC in reference to the Certificate of Public Advantage Applications Filed Pursuant to New York Public Health Law, 10 NYCRR, Subpart 83-1 (April 22, 2015), available at www.ftc.gov/system/files/documents/advocacy_documents/ftc-

The letter states that, because procompetitive collaborations already are permissible under the antitrust laws, the main effect of the questioned regulations is to immunise conduct that would not generate efficiencies and therefore would not pass muster under the antitrust laws.¹⁰⁸ Therefore, allowing certain healthcare collaborations to obtain approval, and resulting antitrust immunity, is likely to lead to increased healthcare costs and decreased access to healthcare services for New York consumers.¹⁰⁹

Oregon Senate Bill 231A for healthcare collaborations

In a letter to a member of the Oregon State Senate, the FTC expressed concern about a broad antitrust exemption proposed in Oregon Senate Bill 231A. According to the FTC, the protection for healthcare collaborations is unnecessary because antitrust law already permits such efforts where they benefit consumers.¹¹⁰

According to the FTC, the broad antitrust exemption in Senate Bill 231A is based on misunderstandings about application of the antitrust laws to healthcare collaborations, and it is likely to lead to increased healthcare costs and decreased access to healthcare services for Oregon consumers.¹¹¹ The FTC asserted that, '[b]ecause procompetitive healthcare collaborations already are permissible under the antitrust laws, the main effect of SB 231A would be to immunize joint conduct that likely would restrain competition without generating countervailing efficiencies, and consequently would not pass muster under the antitrust laws.'¹¹²

Minnesota Government Data Practices Act

In response to the request for comments by Minnesota state legislators, the FTC submitted considerations on the possible competitive effects of an amendment to the Minnesota Government Data Practices Act (MGDPA). The revised MGDPA would treat the State's health plan contract terms as presumptively government records that the public can ask to see by making a freedom of information request.¹¹³

staff-comment-center-healthcare-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf.

108 Id. at 78.

109 Press Release, FTC Staff Expresses Concern that New York's Certificate of Public Advantage Regulations Can Harm Competition (April 25, 2015), available at www.ftc.gov/news-events/press-releases/2015/04/ftc-staff-expresses-concern-new-yorks-certificate-public.

110 Press Release, FTC Staff Expresses Concern that Antitrust Exemptions for Healthcare Collaborations in Oregon Senate Bill 231A Could Harm Competition (May 20, 2015), available at www.ftc.gov/news-events/press-releases/2015/05/ftc-staff-expresses-concern-antitrust-exemptions-healthcare.

111 Letter sent by the FTC in reference to the Request for Comment on Oregon Senate Bill 231A (May 18, 2015), available at www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-provide-federal/150519oregonstaffletter.pdf.

112 Id. at 81.

113 Letter sent by the FTC in reference to the Amendments to the Minnesota Government Data Practices Act Regarding Healthcare Contract Data (June 29, 2015), available at www.ftc.gov.

According to the FTC comment, disclosing the negotiated terms of health plan contracts may offer little benefit to healthcare consumers but could pose a substantial risk of reducing competition in healthcare markets.¹¹⁴ As an example, the amendments may lead to the disclosure of competitively sensitive price and cost information that could enable healthcare providers to see what terms health plans are offering their competitors and to use that information against the plans during negotiations.¹¹⁵ Those disclosures of price and cost information could also enable competing healthcare providers to agree in advance on terms that they each will offer to health plans, a concern that is heightened where Minnesota's healthcare markets already see reduced competition as a result of having fewer competing providers.¹¹⁶

Thus, the FTC urged the Minnesota legislature to strike a careful balance between beneficial disclosure of certain information that healthcare consumers would likely find to be most useful when they are choosing among competing healthcare providers and services and harmful disclosure of other information that could hurt consumers.¹¹⁷

ii Trends, developments and strategies

Both the DoJ and the FTC engaged in continued enforcement and advocacy efforts involving competition in the healthcare industry. The agencies reiterated their position on state regulations granting antitrust immunity: they are unnecessary to encourage procompetitive collaborations among healthcare providers.

iii Outlook

2015 was eventful in terms of the agencies' analysis of the proper role of competition in healthcare markets. For a long time, many federal and state regulators, judges, and academic commentators saw healthcare as a 'special' good to which normal economic forces did not apply.¹¹⁸ Nevertheless, the agencies' ongoing analysis of the role of competition in the healthcare industry suggests they believe that healthcare should be subject to the same competitive analysis as other industries.

gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-amendments-minnesota-government-data-practices-act-regarding-healthcare/150702minnhealthcare.pdf.

114 Id. at 84.

115 Id. at 84-85.

116 Id. at 84-86.

117 Press Release, FTC Staff Urges Minnesota Legislature to Weigh Benefits and Risks of Disclosing Terms of State Healthcare Services Contracts (July 2, 2015), available at www.ftc.gov/news-events/press-releases/2015/07/ftc-staff-urges-minnesota-legislature-weigh-benefits-risks.

118 Report prepared by the FTC and DoJ, Improving Healthcare: a dose of competition (2004), available at www.ftc.gov/sites/default/files/documents/reports/improving-healthcare-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf.

V MERGER REVIEW

2015 was another active year for the DoJ and FTC in merger review and enforcement. Both agencies investigated numerous proposed acquisitions and required divestitures or sued to enjoin several transactions. It is notable, given the agencies' recent record of success, the FTC lost one significant challenge this year. However, the agencies prevailed in their other litigated challenges. Other transactions were abandoned by the parties after the agencies expressed concern about potential anticompetitive effects.

i Significant cases

Litigated Merger Challenges

Sysco Corporation and US Foods, Inc.

In what is likely the highest profile recently litigated merger challenge, the FTC filed an administrative complaint¹¹⁹ and an action in federal court¹²⁰ seeking to enjoin the proposed merger of Sysco Corporation and US Foods, Inc. Both Sysco and US Foods provide 'broadline foodservice distribution services,' and the Commission alleges that the combined firm likely would raise prices and reduce service.¹²¹ In making this challenge, the FTC rejected a proposed remedy under which US Foods would sell 11 distribution centers to a third party, arguing that, even with these additional distribution centers, the third party 'would not approach the scale or competitiveness of US Foods today, and therefore would not restore the competition eliminated by this merger.'¹²² On June 23, 2015, the federal court granted the FTC's motion for preliminary injunction and the parties subsequently abandoned their merger. In granting the injunction, the court held 'that there is a reasonable probability that the proposed merger will substantially impair competition in the national customer and local broadline [foodservice distributor] markets.'¹²³ The main point of contention in this case was the proper definition of the market. In a lengthy and detailed opinion, the court agreed with the FTC that 'broadline foodservice distribution' is the proper relevant product market. In support of this holding, the court found 'that other modes of foodservice distribution are not functionally interchangeable with broadline foodservice distribution because they lacked 'product breadth and diversity' and scale.'¹²⁴

Steris Corporation and Synergy Health PLC

The FTC did not fare as well, however, in its challenge to Steris Corporation's acquisition of Synergy Health plc. In May 2015, the FTC initiated an administrative proceeding before the Commission and sought a preliminary injunction in federal court to block the deal. Steris and Synergy are both healthcare-product sterilisation companies, though they employ different sterilisation technologies that are used for different purposes. The FTC alleged that

119 Complaint, In the Matter of Sysco Corporation, et al., F.T.C. No. 141-0067 (Feb. 19, 2015).

120 *FTC v. Sysco Corp.*, No. 15-cv-00256 (D.D.C. Feb. 20, 2015).

121 Press Release, Federal Trade Commission, FTC Challenges Proposed Merger of Sysco and US Foods (Feb. 19, 2015), available at <http://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods>.

122 Id.

123 Order, *FTC v. Sysco Corp.*, No. 15-cv-00256 (D.D.C. June 23, 2015).

124 Id. at 23.

the merger would harm competition by eliminating Synergy as an ‘actual potential entrant’ that could have competed with Steris.¹²⁵ In a rare loss for the FTC, the court held that the FTC failed to prove that ‘absent the acquisition, the evidence show[ed] that Synergy probably would have entered the U.S. contract sterilization market by building one or more [...] facilities within a reasonable period of time.’¹²⁶ Following the Commission’s loss in federal court, the Commission dismissed its administrative complaint, as has become its standard practice.¹²⁷

Twin America LLC

In *United States v. Twin America, LLC*,¹²⁸ the DOJ and the New York Attorney General alleged that the formation and operation of defendants’ tour bus joint venture was anticompetitive and had the effect of raising prices for so-called ‘hop-on, hop-off’ bus tours in New York City. The agencies claimed that prior to the formation of the joint venture, the venturers were vigorous competitors but that, after formation, they used their combined market power to implement significant price increases for each of their brands.¹²⁹ The agencies alleged that the formation of the joint venture was, in effect, a merger to monopoly.¹³⁰ In March 2015, the agencies reached a settlement with defendants, requiring them to disgorge profits and to relinquish one of the venturers’ bus stop authorisations; the settlement was approved by the court in November 2015.¹³¹

United Continental Holdings Inc. Slot Acquisition

In November 2015, the DoJ filed suit to block United’s proposed acquisition of takeoff and landing slots at Newark Airport from Delta Air Lines. The DoJ alleges that United already has excess slots and that its acquisition of more slots would further entrench it at Newark by preventing competitors’ entry or expansion.¹³²

125 See Opinion, *FTC v. Steris Corp.*, No. 15-cv-1080 (N.D. Ohio Sept. 24, 2015) at 1-3.

126 *Id.* at 7.

127 Order Returning Matter to Adjudication and Dismissing Complaint, *In the Matter of Steris Corp. and Synergy Health PLC*, FTC Docket No. 9365 (Oct. 30, 2015).

128 No. 12-cv-08989 (S.D.N.Y. Dec. 11, 2012).

129 Compl. at 17, *United States v. Twin America, LLC*, No. 12-cv-08989 (S.D.N.Y. Dec. 11, 2012).

130 *Id.* at 15.

131 Final Judgment, *United States v. Twin America, LLC*, No. 12-cv-08989 (S.D.N.Y. Nov. 17, 2015).

132 See Compl., *United States v. United Continental Hldgs., Inc.*, No. 33-av-00001 (Nov. 10, 2015). Elsewhere in the travel industry, the DoJ elected not to challenge Expedia’s acquisition of Orbitz after concluding that the merger was not ‘likely to result in new charges being imposed directly on consumers;’ ‘that Orbitz is only a small source of bookings . . . and thus has had no impact in recent years on the commissions Expedia charges;’ and ‘that the online travel business is rapidly evolving.’ Press Release, U.S. Dep’t of Justice, Justice Department Will Not Challenge Expedia’s Acquisition of Orbitz (Sept. 16, 2015), available at <http://www.justice.gov/opa/pr/justice-department-will-not-challenge-expedias-acquisition-orbitz>.

Staples, Inc and Office Depot, Inc

In another pending agency challenge, the FTC is seeking to block the proposed merger of Staples, Inc and Office Depot, Inc, two retailers of office products. The FTC alleges a nationwide market for ‘the sale and distribution of consumable office supplies to large business-to business customers,’ and that the merger would increase market concentration beyond a level which is presumptively anticompetitive.¹³³

This is the second attempt by Staples and Office Depot to merge. When the two firms attempted to merge in 1997, the FTC was successful in stopping the deal, obtaining an injunction from a federal district court. At that time, the court found that the proper antitrust market was ‘the sale of consumable office supplies through office supply superstores’ in various local markets and that the merger was likely to increase concentration in these markets to presumptively anticompetitive levels.¹³⁴

Hospital mergers

In late 2015, in yet another in a series of challenges to hospital mergers, the FTC initiated an administrative proceeding to block the affiliation of two hospitals systems in the Chicago, Illinois area and sought an injunction preventing the consummation of the merger pending the outcome of the administrative proceeding.¹³⁵ The FTC charges that the merger would reduce competition, raise prices and harm consumers.¹³⁶ The FTC similarly challenged the mergers of hospitals in West Virginia¹³⁷ and Pennsylvania.¹³⁸ These proceedings are ongoing. The FTC also settled allegations that the merger of two orthopaedic practices in Pennsylvania violated the antitrust laws by combining 76 per cent of the orthopaedic practices in the relevant area, creating a dominant practice and reducing price competition.¹³⁹ The settlement requires that a group of physicians which split off from the merged group remain separate, and also requires the groups to seek FTC approval before offering a position ‘to an orthopaedist who has provided services in [the area] in the past year.’¹⁴⁰

- 133 Compl., *In the Matter of Staples, Inc. and Office Depot, Inc.*, FTC File No. 151-0065 (Dec. 7, 2015).
- 134 *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1080-1083 (D.D.C. 1997).
- 135 Press Release, FTC, FTC Challenges Proposed Merger of Two Chicago-area Hospital Systems (Dec. 18, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-two-chicago-area-hospital-systems>.
- 136 See Complaint, *In the Matter of Advocate Health Network, et al.*, FTC File No. 141-0231 (Dec. 17, 2015).
- 137 Press Release, FTC, FTC Challenges Proposed Merger of Two West Virginia Hospitals (Nov. 6, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-merger-two-west-virginia-hospitals>.
- 138 Press Release, FTC, FTC and Pennsylvania Office of Attorney General Challenge Penn State Hershey Medical Center’s Proposed Merger with PinnacleHealth System (Dec. 8, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-pennsylvania-office-attorney-general-challenge-penn-state>.
- 139 Complaint, *In the Matter of Keystone Orthopaedic Specialists, LLC and Orthopaedic Assocs. of Reading, Ltd.*, FTC File No. 141-0025 (Dec. 14, 2015).
- 140 Press Release, FTC, FTC Approves Final Order Settling Charges that Merger of Orthopedic Practices in Berks County, Pennsylvania Would Likely Harm Competition and Inflate

Abandoned Transactions

National CineMedia Inc and Screenvision LLC

In November 2014, the DoJ sued to block the acquisition of Screenvision LLC by National CineMedia Inc.¹⁴¹ According to the DoJ, the acquisition ‘would combine the only two significant cinema advertising networks in the United States, eliminating competition that has substantially benefitted movie theaters, advertisers and, ultimately, movie goers.’¹⁴² In the face of this challenge, the parties abandoned their proposed merger in early 2015.¹⁴³

Comcast Corporation and Time Warner Cable

In April 2015, Comcast Corporation announced that it had abandoned its proposed acquisition of Time Warner Cable Inc. According to the DoJ, the agency ‘had significant concerns that the merger would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers.’¹⁴⁴ The DoJ did not, however, challenge AT&T’s acquisition of DirecTV, ‘conclud[ing] that the combination of AT&T’s land-based internet and video business with DirecTV’s satellite-based video business does not pose a significant risk to competition.’¹⁴⁵

Applied Materials Inc and Tokyo Electron Ltd

Also in April 2015, Applied Materials and Tokyo Electron abandoned their proposed merger. According to the DoJ, the proposed merger ‘would have combined the two largest competitors with the necessary know-how, resources and ability to develop and supply

Prices (Dec. 18, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-approves-final-order-settling-charges-merger-orthopedic>.

141 *U.S. v. National CineMedia, Inc.*, No. 14-cv-8732 (S.D.N.Y. Nov. 3, 2014).

142 Press Release, U.S. Dep’t of Justice, Justice Department Files Antitrust Lawsuit to Stop National Cinemedia from Buying Screenvision (Nov. 3, 2014), available at http://www.justice.gov/atr/public/press_releases/2014/309656.htm.

143 Press Release, U.S. Dep’t of Justice, Justice Department Issues Statement on the Abandonment of the National Cinemedia/Screenvision Merger (March 16, 2015), available at <http://www.justice.gov/opa/pr/justice-department-issues-statement-abandonment-national-cinemediасcreenvision-merger>.

144 Press Release, U.S. Dep’t of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns (April 24, 2015), available at <http://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>.

145 Press Release, U.S. Dep’t of Justice, Justice Department Will Not Challenge AT&T’s Acquisition of DirecTV (July 21, 2015), available at <http://www.justice.gov/opa/pr/justice-department-will-not-challenge-atts-acquisition-directv>.

high-volume non-lithography semiconductor manufacturing equipment.¹⁴⁶ The parties had proposed a remedy to the DoJ, but the agency rejected it as insufficient to address the agency's concerns with the deal.¹⁴⁷

AB Electrolux and General Electric Company

In July 2015, the DoJ filed suit to block Electrolux's acquisition of General Electric's appliance business. The DoJ alleged that the 'proposed acquisition would create a duopoly in the supply of major cooking appliances to American home builders, property managers, and other contract-channel appliance purchasers,' which would eliminate competition between Electrolux and General Electric, increase market concentration and increase prices.¹⁴⁸ The case proceeded to trial, but, in the middle of trial, the acquisition was abandoned.¹⁴⁹

Chicken of the Sea and Bumble Bee

In late 2015, the DoJ announced its concern that the merger of Chicken of the Sea and Bumble Bee Foods 'would have combined the second and third largest sellers of shelf-stable tuna in the United States in a market long dominated by three major brands, as well as combined the first and second largest domestic sellers of other shelf-stable seafood products.'¹⁵⁰ In the face of these concerns, the parties abandoned the deal.¹⁵¹ Notably, in announcing its concerns, the DoJ stated that its investigation revealed 'that the market is not functioning competitively today, and further consolidation would only make things worse.'¹⁵² This merger investigation has turned into a DoJ criminal price-fixing investigation.¹⁵³

146 Press Release, U.S. Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (April 27, 2015), available at <http://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department>.

147 Id.

148 Compl., *U.S. v. AB Electrolux*, No. 15-cv-01039 (D.D.C. July 1, 2015).

149 Press Release, U.S. Dep't of Justice, Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial (Dec. 7, 2015), available at <http://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week>.

150 Press Release, U.S. Dep't of Justice, Chicken of the Sea and Bumble Bee Abandon Tuna Merger After Justice Department Expresses Serious Concerns (Dec. 3, 2015), available at <http://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious>.

151 Id.

152 Id.

153 See United States Notice of Motion and Motion to Intervene, *In re Packaged Seafood Prods.* Antitrust Litig., No. 15-md-02670 (S.D. Cal. Jan. 13, 2016) ('A federal grand jury empanelled in the Northern District of California is investigating potential violations of the Sherman Act, 15 U.S.C. Section 1, in the packaged seafood industry.')

Divestiture remedies

Pharmaceuticals and medical devices

2015 was another active year for pharmaceutical mergers, and the FTC, which generally takes responsibility for investigating mergers in this industry, was quite busy. The FTC required divestitures in a number of proposed deals, including in the merger between Endo International plc and Par Pharmaceuticals, Inc. (divestiture of ulcer and thyroid medications);¹⁵⁴ Mylan NV and Perrigo Company plc (seven various generic drugs);¹⁵⁵ Pfizer Inc and Hospira, Inc (four generic drugs);¹⁵⁶ Impax Laboratories Inc and CorePharma, LLC (two generic drugs);¹⁵⁷ Novartis AG and GlaxoSmithKline (cancer treatment drugs);¹⁵⁸ and Sun Pharmaceutical Industries and Ranbaxy Laboratories Ltd (generic minocycline tablets and capsules).¹⁵⁹ Similarly, in medical devices, the FTC required divestitures in the merger of Wright Medical Group, Inc and Tornier NV (certain joint replacement products);¹⁶⁰ Zimmer Holdings, Inc and Biomet Inc (knee and elbow implants, and bone cement).¹⁶¹

- 154 Press Release, FTC, FTC Approves Final Order Preserving Competition in the U.S. Markets for Generic Drugs to Treat Certain Types of Ulcers, and Thyroid Conditions (Nov. 18, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-approves-final-order-preserving-competition-us-markets>.
- 155 Press Release, FTC, FTC Requires Mylan to Sell Rights to Seven Generic Pharmaceuticals as a Condition of Acquiring Perrigo Company (Nov. 3, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-requires-mylan-sell-rights-seven-generic-pharmaceuticals>.
- 156 Press Release, FTC, FTC Approves Final Order Preserving Competition in U.S. Markets for an Inhalation Solution and Three Injectable Products (Oct. 19, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/10/ftc-approves-final-order-preserving-competition-us-market>.
- 157 Press Release, FTC, FTC Approves Final Order Preserving Competition in Generic Drug Market for Treating Dry Mouth and Biliary Cirrhosis (April 27, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-approves-final-order-preserving-competition-generic-drug>.
- 158 Press Release, FTC, FTC Approves Final Order Preserving Competition in Market for BRAF- and MEK-Inhibitor Oncology Drugs (April 8, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-approves-final-order-preserving-competition-market-braf-mek>.
- 159 Press Release, FTC, FTC Approves Final Order Preserving Competition for Generic Antibacterial Drug Minocycline (March 20, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-order-preserving-competition-generic>.
- 160 Press Release, FTC, FTC Approves Final Order Preserving Competition in U.S. Markets for Two Types of Orthopedic Devices (Nov. 17, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-approves-final-order-preserving-competition-us-markets-two>.
- 161 Press Release, FTC, FTC Requires Medical Device Company Zimmer Holdings, Inc. to Divest Assets as a Condition of Acquiring Biomet, Inc. (June 24, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/06/ftc-requires-medical-device-company-zimmer-holdings-inc-divest>.

Media and entertainment

The DoJ in 2015 reviewed several media-related transactions. The DoJ required certain television station divestitures in order to allow Gray Television, Inc to acquire Schurz Communications;¹⁶² certain radio station divestitures in order to allow Entercom Communications Corp to acquire Lincoln Financial Media Company;¹⁶³ and certain movie theater divestitures in order to allow AMC Entertainment Holdings Inc to acquire Starplex Cinemas.¹⁶⁴

Other

The DoJ required divestitures in several other proposed mergers, including: Waste Management's acquisition of Deffenbaugh Disposal (small container commercial waste service routes in Kansas and Arkansas);¹⁶⁵ General Electric Company's acquisition of Alstom SA subsidiary (aftermarket parts and service for GE gas turbines);¹⁶⁶ Cox Enterprises Inc's acquisition of Dealertrack Technologies Inc (automobile dealership inventory management solutions);¹⁶⁷ and Springleaf Holdings, Inc's acquisition of OneMain Financial Holdings, LLC (certain bank branches).¹⁶⁸

162 Press Release, U.S. Dep't of Justice, Gray Television Required to Divest Television Stations in South Bend, Indiana, and Wichita, Kansas, as Part of Schurz Communication Acquisition (Dec. 22, 2015), available at <http://www.justice.gov/opa/pr/gray-television-required-divest-television-stations-south-bend-indiana-and-wichita-kansas>.

163 Press Release, U.S. Dep't of Justice, Entercom Required to Divest Three Denver Radio Stations as Part of Lincoln Acquisition (July 14, 2015), available at <http://www.justice.gov/opa/pr/entercom-required-divest-three-denver-radio-stations-part-lincoln-acquisition>.

164 Press Release, U.S. Dep't of Justice, Justice Department Requires AMC Entertainment to Divest Two Movie Theaters in Order to Complete Acquisition of Starplex Cinemas, available at <http://www.justice.gov/opa/pr/justice-department-requires-amc-entertainment-divest-two-movie-theaters-order-complete>.

165 Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Waste Management's Acquisition of Deffenbaugh Disposal (March 13, 2015), available at <http://www.justice.gov/opa/pr/justice-department-requires-divestitures-waste-managements-acquisition-deffenbaugh-disposal>.

166 Press Release, U.S. Dep't of Justice, Justice Department Requires General Electric to Divest Aftermarket Business in Order to Complete Alstom Purchase (Sept. 8, 2015), available at <http://www.justice.gov/opa/pr/justice-department-requires-general-electric-divest-aftermarket-business-order-complete>.

167 Press Release, U.S. Dep't of Justice, Justice Department Requires Cox Automotive to Divest Inventory Management Solution in Order to Complete Acquisition of Dealertrack (Sept. 29, 2015), available at <http://www.justice.gov/opa/pr/justice-department-requires-cox-automotive-divest-inventory-management-solution-order>.

168 Press Release, U.S. Dep't of Justice, Justice Department Requires Springleaf to Divest 127 Branches in 11 States in Order to Complete Acquisition of OneMain Financial (Nov. 13, 2015) <http://www.justice.gov/opa/pr/justice-department-requires-springleaf-divest-127-branches-11-states-order-complete>.

The FTC similarly required divestitures in a number of deals, including: NXP Semiconductors NV's acquisition of Freescale Semiconductor Ltd (RF power amplifiers);¹⁶⁹ US Renal Care, Inc's acquisition of DSI Renal (certain outpatient dialysis clinics in Texas);¹⁷⁰ ArcLight Energy Partners' acquisition of Gulf Oil Limited Partnership;¹⁷¹ Dollar Tree Inc's acquisition of Family Dollar Stores, Inc (330 Family Dollar stores);¹⁷² the merger of ZF Friedrichshafen AG and TRW Automotive Holdings Corp (linkage and suspension business for heavy and light vehicles);¹⁷³ the merger of Holcim Ltd and Lafarge SA (various cement assets);¹⁷⁴ the merger of Reynolds American Inc and Lorillard Ind (divestiture of cigarette brands and manufacturing facilities);¹⁷⁵ the merger of Albertsons and Safeway Inc (divestiture of 168 supermarkets);¹⁷⁶ and Par Petroleum Corporation's acquisition of Mid Pac Petroleum, LLC (termination of storage and throughput rights at a Hawaii gasoline terminal).¹⁷⁷

Finally, the agencies continued to police compliance with the notification and waiting requirements imposed by the Hart-Scott-Rodino Antitrust Improvements Act. In 2015, the

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- 169 Press Release, FTC, FTC Approves Final Order Preserving Competition in Worldwide Market for RF Power Amplifiers (Jan. 29, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-approves-final-order-preserving-competition-worldwide-market>.
- 170 Press Release, FTC, FTC Requires Kidney Dialysis Chain U.S. Renal Care to Divest Assets as a Condition of Acquiring Competitor DSI Renal, available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-kidney-dialysis-chain-us-renal-care-divest-assets>.
- 171 Press Release, FTC, FTC Requires Energy Investor ArcLight Energy Partners Fund to Divest Assets as a Condition of Acquiring Gulf Oil Limited Partnership from Cumberland Farms, Inc., available at <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-energy-investor-arclight-energy-partners-fund-divest>.
- 172 Press Release, FTC, FTC Issues Final Order Preserving Competition for Deeply Discounted General Merchandise, available at <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-issues-final-order-preserving-competition-deeply-discounted>.
- 173 Press Release, FTC, FTC Approves Application from ZF Friedrichshafen AG and TRW Automotive Holdings Corp. to Divest TRW's Linkage and Suspension Business in North America and Europe, available at <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-approves-application-zf-friedrichshafen-ag-trw-automotive>.
- 174 Press Release, FTC, FTC Approves Application from Holcim LTD. and Lafarge S.A. to Divest Cement Assets (Aug. 4, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-approves-application-holcim-ltd-lafarge-sa-divest-cement>.
- 175 Press Release, FTC, FTC Approves Final Order Preserving Competition in U.S. Market for Cigarettes (July 31, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/07/ftc-approves-final-order-preserving-competition-us-market>.
- 176 Press Release, FTC, FTC Issues Final Order Preserving Supermarket Competition in 130 Local Markets (July 2, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/07/ftc-issues-final-order-preserving-supermarket-competition-130>.
- 177 Press Release, FTC, <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-approve-s-final-order-preserving-competition-bulk-volumes>, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-approves-final-order-preserving-competition-bulk-volumes>.

US agencies fined entities for failing properly to report certain acquisitions of voting securities that caused their holdings to increase above reportable thresholds.¹⁷⁸ The agencies also fined an entity for improperly invoking an ‘institutional investor’ exemption and failing to report and observe the waiting period for a conversion of an ownership interest in one entity to voting securities in another.¹⁷⁹ Relatedly, the United States Court of Appeals for the District of Columbia Circuit affirmed the Federal Trade Commission’s 2013 rule that, under the HSR Act, ‘transfers of patent rights within the pharmaceutical industry constitute reportable asset acquisitions if all commercially significant rights are transferred.’¹⁸⁰

ii Trends, developments and strategies

Merger enforcement remains robust and the agencies continue to focus on thorough investigation of the matters before them. The agencies say they will seek to tailor divestitures to address their competitive concerns, and will not shy from challenging transactions which are unable to be remedied by divestitures. With the exception of one case which the FTC lost, the agencies continue to find success when they litigate merger challenges.

International cooperation in merger investigation remains an important tool of the agencies, and indeed many US investigations in 2015 were conducted alongside investigations in other countries.

iii Outlook

2016 looks to be another active year for the agencies’ merger-related efforts, with several cases, including the FTC’s challenge to the *Staples/Office Depot* merger, scheduled for court and agency proceedings.

VI CONCLUSIONS

The sheer number of mergers the agencies have investigated in the past year is notable. We expect significant resources will remain devoted to merger enforcement. Additionally, developments in cartel investigations once again illustrate an important point: often investigations will start with one product but will branch out to additional products within an industry. We have seen this numerous times, for example in the auto parts investigations, and with investigations that began with cathode ray tubes and expanded to include liquid crystal displays. We can expect this trend to continue, and that the agencies will remain vigorous in pursuing their enforcement priorities.

178 See Paul, Weiss Client Memorandum, Recent Enforcement Actions Highlight Importance of Hart-Scott-Rodino Compliance When Acquiring Voting Securities (Oct. 8, 2015), available at <http://www.paulweiss.com/media/3185845/8oct15antitrust.pdf>.

179 Id.

180 *Pharm. Research & Mfrs. of Am. v. F.T.C.*, 790 F.3d 198, 200 (D.C. Cir. 2015).

Appendix 1

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He joined Paul, Weiss from the antitrust division of the US Department of Justice, where he served as counsel to the Assistant Attorney General. He is a member of the American Bar Association's Section of Antitrust Law and served as a vice-chair of the Section's Civil Practice and Procedure Committee.

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