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Annual Report on Competition Policy Developments in the United States

21-23 June 2017

This report is submitted by the United States to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21-23 June 2017.

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1. Introduction

1. This report describes federal antitrust developments in the United States for the period of October 1, 2015 through September 30, 2016 ("FY 2016").[1] It summarizes the competition enforcement and policy activities of both the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and the Federal Trade Commission ("Commission" or "FTC"). The two agencies are collectively referred to throughout this report as the "Antitrust Agencies" or the "Agencies." For additional information on the Agencies' activities in FY 2016, see the FTC's Annual Highlights 2016, *available at* link https://www.ftc.gov/reports/annual-highlights-2016, and the DOJ's Spring 2016 Division Update, *available at* https://www.justice.gov/atr/division-operations/division-update-spring-2017.

1.1. Senior Leadership Update

2. President Donald Trump designated Commissioner Maureen K. Ohlhausen to serve as Acting FTC Chairman in January 2017. In January 2017, Edith Ramirez, who served as FTC Chairwoman since March 2013, resigned.

3. On April 10, 2017 Mr. Andrew Finch was appointed to serve as the new Acting Assistant Attorney General. On April 6, 2017 Mr. Makan Delrahim was nominated to be the Assistant Attorney General. On January 20, 2017, Renata Hesse who had served as the Acting Assistant Attorney General since November 9, 2016, resigned.

2. Changes in law or policies

2.1. Changes in Antitrust Rules, Policies, or Guidelines

4. On January 13, 2017, the Department and the FTC issued an update to the Antitrust Guidelines for the Licensing of Intellectual Property to reflect intervening changes in statutes, case law, and enforcement policy. The update builds on the success of the 1995 Antitrust Guidelines for the Licensing of Intellectual Property, which guided enforcement decisions involving antitrust and intellectual property law, provided a model for foreign jurisdictions' policies, and aided business planning. The Agencies finalized the update after carefully reviewing and considering comments submitted by academics, private industries, law associations, and non-profit organizations during a 45-day comment period. The updated Guidelines reaffirm the Agencies' commitment to an economically grounded approach to antitrust analysis of IP licensing. In taking this approach, the Guidelines reflect the three core principles of the 1995 Guidelines: (1) standard antitrust analysis applies to conduct involving IP; (2) the Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner; and (3) IP licensing allows firms to combine complementary factors of production and generally is procompetitive. Applying these principles in a variety of scenarios, the Guidelines provide a useful and flexible framework to determine when competition may be harmed by conduct involving IP licensing. *See* https://www.justice.gov/atr/IPguidelines/download and https://www.justice.gov/atr/

[1] In some sections of the Report, e.g., the following section on Senior Leadership Update, more recent information is provided.

guidelines-and-policy-statements-0/2017-update-antitrust-guidelines-licensing-intellectual-property.

5. On January 13, 2017, the FTC and the Department issued revised Antitrust Guidelines for International Enforcement and Cooperation. These Guidelines update the 1995 Antitrust Enforcement Guidelines for International Operations and provide guidance for businesses engaged in international activities on questions that concern the agencies' international enforcement policy, as well as the agencies' related investigative tools and cooperation with foreign authorities. The revisions describe the current practices and methods of analysis the agencies employ when determining whether to initiate and how to conduct investigations of, or enforcement actions against, conduct with an international dimension. The Antitrust Guidelines for International Enforcement and Cooperation are different from the 1995 Guidelines in several important ways. In particular, they: (1) add a chapter on international cooperation, which addresses the agencies' investigative tools, confidentiality safeguards, the legal basis for cooperation, types of information exchanged and waivers of confidentiality, remedies, and special considerations in criminal investigations; (2) update the discussion of the application of U.S. antitrust law to conduct involving foreign commerce, the Foreign Trade Antitrust Improvements Act, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine, and petitioning of sovereigns, in light of developments in both the law and the Agencies' practice; and (3) provide revised illustrative examples focused on the types of issues most commonly encountered. *See* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-updated-international-antitrust and https://www.justice.gov/atr/internationalguidelines/download.

6. On October 20, 2016, the Department and the FTC issued, for the first time, Antitrust Guidance for Human Resource Professionals. This document explains that agreements among competing employers to limit wages, benefits, terms of employment, or job opportunities can violate the antitrust laws. The document gives practical information to human resource professionals about the antitrust laws, providing questions and answers explaining how these laws would apply to real-world scenarios. The Agencies also issued a quick-reference card for human resource professionals, which highlights situations that should raise red flags for these professionals. *See* https://www.justice.gov/atr/file/903511/download and https://www.justice.gov/atr/file/903506/download.

7. On August 26, 2016, the FTC approved final amendments to the Hart-Scott-Rodino ("HSR") Premerger Notification Rules that allow HSR filings to be submitted on DVD and streamline the instructions to the Premerger Notification Form. These updates make the process of submitting HSR filings easier, more efficient, and less burdensome. *See* https://www.ftc.gov/news-events/press-releases/2016/08/ftc-approves-updates-hart-scott-rodino-rules.

8. On January 21, 2016, the FTC revised the thresholds that determine whether companies are required to notify the Antitrust Agencies about a transaction under Section 7A of the Clayton Act. The FTC also revised the thresholds that trigger prohibitions on certain interlocking directorates under Section 8 of the Clayton Act. The Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), Section 7A of the Clayton Act, requires companies proposing a merger or acquisition to notify federal authorities if the size of the parties involved and the value of a transaction exceeds certain filing thresholds, absent an applicable exemption. The FTC revises the thresholds set forth in the HSR Act annually based on the change in gross national product. The Clayton Act

requires the FTC to revise the thresholds that trigger Section 8 of the Act's prohibition on companies having interlocking memberships on their corporate boards of directors. These thresholds are also adjusted annually, based on the change in gross national product. *See* https://www.ftc.gov/news-events/press-releases/2016/01/ftc-announces-new-clayton-act-monetary-thresholds-2016.

3. Enforcement of antitrust law and policies: actions against anticompetitive practices

3.1. Staffing and Enforcement Statistics

3.1.1. FTC

9. During FY 2016, the FTC employed approximately 554 staff and spent approximately $135.7 million in furtherance of its Maintaining Competition mission.

10. During FY 2016, 1,832 proposed mergers and acquisitions were reported for review under the HSR Act, a 4.5 percent increase from the number of HSR transactions reported during FY 2015. The Commission staff issued requests for additional information ("second requests") in 25 transactions. The Commission challenged 22 mergers, 16 of which were settled with consent orders, one in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation, and five in which the Commission initiated administrative litigation. In the cases in which the Commission issued an administrative complaint, the Commission also voted to seek a preliminary injunction in federal district court to enjoin the acquisition pending resolution of the Commission's administrative litigation.

11. During FY 2016, the FTC staff opened 25 non-merger initial phase investigations. The Commission brought six non-merger enforcement actions, four of which were resolved by a consent order, and one by permanent injunction action in federal court.

12. During FY 2016, the Commission filed *amicus curiae* briefs in eight cases, all before federal appeals courts. The Commission also submitted 24 advocacy filings. *See* http://www.ftc.gov/policy/advocacy.

3.1.2. DOJ

13. At the end of FY 2016, the Division had 703 employees: 328 attorneys, 50 economists, 167 paralegals, and 158 other professional staff. For FY 2016, the Division received an appropriation of $165.0 million.

14. In FY 2016, the Division opened 23 grand jury investigations and 21 preliminary inquiries (a total of 44 criminal investigations). The Division filed 51 criminal cases, charging 19 corporations and 52 individuals. The Division obtained more than $399 million in criminal fines and penalties against 17 corporations and 31 individuals. The courts sentenced 22 individuals to serve time in jail with an average sentence nearly one year (11 months).

15. During FY 2016, the Division issued second requests in 65 mergers and challenged 15 of them in court; 10 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announcement by the Division that it would otherwise challenge the transaction. In addition, the Division screened a total of 559 bank mergers. The Division opened 77 civil investigations (merger and non-merger), and

issued 458 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints.

3.2. Antitrust Cases in the Courts

3.2.1. United States Supreme Court

16. **In the Matter of McWane, Inc., and Star Pipe Products, Ltd.** On March 21, 2016, the U.S. Supreme Court denied certiorari in McWane Inc. v. FTC. The Court declined to review an April 2015 decision of the U.S. Court of Appeals for the Eleventh Circuit upholding a Commission decision and cease and desist order against McWane for unlawfully maintaining its monopoly in the market for domestically manufactured ductile iron pipefittings. The Commission's ruled that McWane unlawfully maintained its monopoly by implementing policies that prevented its distributors from buying domestic pipe fittings from competitor Star Pipe Products Ltd. and foreclosing Star Pipe from achieving the sales necessary to compete effectively, and with no countervailing procompetitive justification. *See* https://www.ftc.gov/news-events/press-releases/2016/03/statement-ftc-chairwoman-edith-ramirez-us-supreme-courts-decision.

3.2.2. U.S. Court of Appeals Decisions

17. On April 28, 2017, the U.S. Court of Appeals for the D.C. Circuit affirmed the decision by the U.S. District Court for the District of Columbia to block health insurer Anthem, Inc.'s $54 billion acquisition of Cigna Corp. *United States v. Anthem*, No. 17-5024 (D.C. Cir. 2017). The Division sued to block the merger in July 2016. The Division's suit alleged that the merger would substantially reduce competition for millions of consumers who receive commercial health insurance coverage from national employers throughout the United States in at least 35 metropolitan areas. The complaint also alleged that the elimination of Cigna threatened competition among commercial insurers for the purchase of healthcare services from hospitals, physicians and other healthcare providers. Following a trial that ran from November 21, 2016 to January 3, 2017, the district court found that the merger was likely to substantially lessen competition in the market for the sale of health insurance to national accounts based in fourteen states, and in the sale of health insurance to large employers in Richmond, Virginia. Anthem abandoned its planned acquisition on May 11, 2017. *See* https://www.justice.gov/opa/pr/dc-circuit-affirms-decision-blocking-anthem-s-acquisition-cigna; https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna and https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

18. On September 20, 2016, the U.S. Court of Appeals for the Second Circuit decided *In re: Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), vacating a district court judgment which ordered Chinese corporate defendants to pay damages to U.S. purchasers for fixing the price of Vitamin C exported to the United States in violation of U.S. antitrust law. The appeal presented the question of what laws and standards control when U.S. antitrust laws are violated by foreign companies that claim to be acting at the express direction or mandate of a foreign government. The Second Circuit concluded that, in consideration of principles of international comity, the district court should have abstained from adjudicating the U.S. purchasers' private antitrust claims because the Chinese government filed a formal statement asserting that Chinese law required defendants to fix prices of Vitamin C sold abroad, and because defendants could not

simultaneously comply with Chinese law and U.S. antitrust law. On April 3, 2017, Plaintiffs filed a petition for *writ of certiorari* with the United States Supreme Court.

19. On August 10, 2016, the U.S. Court of Appeals for the Second Circuit decided *MacDermid Printing Solutions LLC v. Cortron Corp.*, 833 F.3d 172 (2d Cir. 2016), holding that MacDermid's failure to prove a patent settlement agreement indirectly harmed competition under Section 1 of the Sherman Act. DuPont has the dominant share of the market for thermal flexographic processors used to make plates for printing commercial packaging. MacDermid is its only competitor in this market. MacDermid outsourced its research and development for new processors by contracting with Cortron. DuPont then sued Cortron for patent infringement. Cortron settled the patent lawsuit, agreeing to stop making processors, to stop providing service and technical support for MacDermid's processors, and to give DuPont all the technical information it had relating to MacDermid's processors. After DuPont publicly announced the settlement, Cortron ceased operations. MacDermid then sued Cortron.

20. The Second Circuit reversed the district court's finding of liability under Section 1 because MacDermid had not proven direct or indirect harm to competition. It had no direct proof of harm to consumers from higher prices, reduced output, or lower quality. Proving harm indirectly required MacDermid to show: (1) that the conspirators had sufficient market power to cause an adverse effect, and (2) "some other ground for believing that the challenged behavior" harmed competition. The court found that MacDermid did not make the second required showing for several reasons: a) the settlement of this patent lawsuit was not inherently anticompetitive because Cortron and DuPont did not compete for customers; b) the relevant inter-brand market was a duopoly was not, standing alone, a basis to believe that the settlement harmed competition; and c) the thermal processor purchasers were sophisticated and unlikely to be tricked into thinking that a viable supplier no longer existed. *Id.* at 185-87.

21. On December 2, 2016, the U.S. Court of Appeals for the Fifth Circuit decided *Retractable Technologies, Inc. v. Becton Dickson & Co.,* 842 F.3d 883 (5th Cir. 2016), awarding defendant Becton Dickson judgment as a matter of law on Retractable Technologies's Section 2 attempted monopolization claim. This claim was based on Becton Dickson's infringement of Retractable Technologies' patent for retractable syringes, Becton Dickson's false advertising, and its alleged tainting of the market for retractable syringes. The court held that "patent infringement is not an injury cognizable under the Sherman Act" because, "[b]y definition patent infringement invades the patentee's monopoly rights, causes competing products to enter the market, and thereby increases competition." *Id.* at 893.

22. The court also explained that there is a high bar for an antitrust claim based on false advertising. The court found that the facts showed no harm to competition caused by the false advertising to the sophisticated customers who purchased syringes. The court also rejected Retractable Technologies' claim of tainting the market, because, among other things, doing so would have undermined Becton Dickson's alleged goal of introducing improved safety syringes after the patents expired by destroying the market it was attempting to monopolize.

23. On May 23, 2016, the U.S. Court of Appeals for the Second Circuit decided *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017), holding that purchasers of various financial instruments adequately alleged antitrust injury in their complaint against LIBOR-setting banks for conspiring to depress the LIBOR rate. The Second Circuit vacated the district court's judgment dismissing

complaints consolidated in multi-district litigation and remanded the case back to the district court to determine whether the plaintiffs are efficient enforcers of the antitrust laws.

24. The Second Circuit held that the purchasers plausibly alleged a per se antitrust horizontal price-fixing violation by the LIBOR-setting banks. The court rejected the district court's reliance on the cooperative nature of the LIBOR-setting process because "the crucial allegation is that the Banks circumvented the LIBOR-setting rules, and that joint process thus turned into collusion." The court also rejected the banks' alternative argument on appeal that the plaintiffs' inadequately alleged a conspiracy holding that they need only "plausibly suggest an inference of conspiracy" in the complaint. *Id.* at 782. Parallelism in the banks' actions were accompanied by plus factors that plausibly suggested a conspiracy, including showing a common motive to conspire, in the form of increased profits and the projection of financial soundness, as well as a high number of inter-firm communications some of which showed knowledge of other banks' confidential individual submissions in advance.

25. Having alleged per se horizontal price fixing, the court held that plaintiffs need not separately plead harm to competition because a consumer who pays a higher price on account of horizontal price fixing suffers antitrust injury.

26. On February 22, 2016, the U.S. Court of Appeals for the First Circuit decided *In re Loestrin 24 FE Antitrust Litigation*, 814 F.3d 538 (1st Cir. 2016), holding, that non-monetary reverse payments made by a patent owner to generic pharmaceutical manufacturers to settle pharmaceutical patent litigation were subject to antitrust scrutiny under *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

27. In *Actavis*, the U.S. Supreme Court held that antitrust challenges of agreements to settle pharmaceutical patent-related litigation involving reverse payments from the patent owner to the generic pharmaceutical manufacturer should be decided by assessing their competitive effects using a "rule of reason" analysis. In *In re Loestrin 24*, the provisions in the settlement agreement at issue included agreements by the generic pharmaceutical manufacturers to delay selling generic versions of the contraceptive pharmaceutical in exchange for exclusive rights from the patent owner for a limited period of time, co-promotion of a product, the exclusive rights to market other pharmaceuticals.

28. The First Circuit reasoned that the Supreme Court viewed reverse payments as problematic, not because money was being exchanged to settle a patent infringement lawsuit, but because they allow patent owners to eliminate the risk of competition from generic competitors. Limiting *Actavis* to cash payments would therefore subvert that principle by allowing branded (patent owner) pharmaceutical manufacturers and generic pharmaceutical manufacturers to agree to dampen competition through other, non-cash reverse payments. The First Circuit vacated the district court's judgment, which had held that *Actavis* applied only to monetary reverse payments, and remanded for the district court to determine whether the provisions of the settlement agreement constituted large and unjustified reverse payments under *Actavis*.

29. On November 21, 2016, the U.S. Court of Appeals for the First Circuit decided *In re Nexium (Esomeprazole) Antitrust Litigation*, 842 F.3d 34 (1st Circuit 2016), affirming the jury verdict and judgment in the first pharmaceutical patent settlement antitrust action tried to a jury since the U.S. Supreme Court's 2013 *Actavis decision*. The jury found that plaintiffs had proved an antitrust violation in the form of large and unjustified reverse payments from the patent owner, a brand name pharmaceutical manufacturer, to generic

pharmaceutical manufacturers to settle three patent infringement lawsuits. However, the jury also found that the plaintiffs had failed to show antitrust injury because the settlements did not prevent generic Nexium from entering the market earlier than it would have otherwise. As was the case in *In re Loestrin 24 FE Antitrust Litigation*, *supra*, the First Circuit held the improper reverse payments under *Actavis* may take the form of "non-monetary" advantages.

30. FTC and Commonwealth of Pennsylvania, Plaintiffs-Appellants v. Penn State Hershey Medical Center and PinnacleHealth System, Defendants-Appellees. On April 8, 2016, the FTC issued an administrative complaint and authorized staff to file a preliminary injunction to block Penn State Hershey Medical Center's proposed merger with PinnacleHealth System. The complaint alleged that combining the two health care providers would substantially reduce competition for general acute care inpatient hospital services sold to commercial health plans in four south-central Pennsylvania counties, leading to reduced quality and higher prices for employers and residents. On September 27, 2016, the United States Court of Appeals for the Third Circuit reversed the District Court decision, ruling that the district court should preliminarily enjoin the proposed merger pending the outcome of the FTC's administrative adjudication. The parties abandoned their proposed merger on October 17, 2016. *See* https://www.ftc.gov/enforcement/cases-proceedings/141-0191-d09368/penn-state-hershey-medical-center-ftc-commonwealth.

3.2.3. U.S. District Court Decisions

31. In *United States v. Aetna, et al*., No. 16-1494 (D.D.C. 2017), the D.C. District Court enjoined the proposed merger of Aetna and Humana. In blocking the transaction, the court ruled that the proposed merger was likely to substantially lessen competition in the sale of individual Medicare Advantage plans in 364 counties. The court ruled that the sale of Medicare Advantage was a relevant antitrust product market, meaning that competition among Medicare Advantage providers is protected by the antitrust laws. In addition, the court rejected Aetna and Humana's claim that their proposal to divest 290,000 Medicare Advantage customers to Molina Healthcare, a health insurer, would prevent the competitive harm that the merger would produce. The decision followed a 13-day trial in December 2016. On February 14, 2017, Aetna abandoned its planned acquisition of Humana. *See* https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana and https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

32. **FTC v. Staples/Office Depot.** On May 11, 2016, the U.S. District Court for the District of Columbia granted the Commission's request for a preliminary injunction in the proposed merger of Staples, Inc. and Office Depot, Inc. The FTC issued an administrative complaint and authorized staff to seek a preliminary injunction to enjoin the transaction pending the results of the administrative proceeding, charging that Staples, Inc.'s proposed $6.3 billion acquisition of Office Depot, Inc. would significantly reduce competition nationwide in the market for consumable office supplies sold to large business customers for their own use. The complaint alleged that in competing for contracts both Staples and Office Depot could provide the low prices, nationwide distribution, and combination of services and features that many large business customers require. The complaint further alleged that, by eliminating the competition between Staples and Office Depot, the transaction would lead to higher prices and reduced quality, and that entry or expansion into the market, by other office supply vendors, manufacturers, wholesalers, or online retailers, would not be timely, likely, or sufficient

to counteract the anticompetitive effects of the merger. On May 19, 2016, Staples and Office Depot abandoned their proposed merger after the district court granted the Commission's request for a preliminary injunction. The FTC dismissed the case from administrative adjudication. *See* https://www.ftc.gov/enforcement/cases-proceedings/1510065/ftc-v-staplesoffice-depot.

33. **FTC v. Advocate Health Care Network/NorthShore University HealthSystem.** On December 22, 2015, FTC staff issued an administrative complaint alleging that the proposed merger of Advocate Health Care Network and NorthShore University HealthSystem would create the largest hospital system in the North Shore area of Chicago. According to the complaint, the combined entity would operate a majority of the hospitals in the area and control more than 50 percent of the general acute care inpatient hospital services. The Commission also authorized staff to file for a preliminary injunction to maintain the status quo pending the administrative trial. In the federal court proceeding, the district court denied the motion for a preliminary injunction on June 20, 2016, but granted plaintiff's motion for a stay pending appeal. On October 31, 2016, the U.S. Court of Appeals for the Seventh Circuit reversed, and remanded the case to the district court for further proceedings. On March 7, 2017, the district court granted an injunction, and the parties abandoned their merger plans. On March 20, 2017, the Commission dismissed the administrative complaint. *See* https://www.ftc.gov/enforcement/cases-proceedings/1410231/ftc-v-advocate-health-care-network.

3.3. Statistics on Private and Government Cases Filed

34. According to the 2016 Annual Report of the Director of the Administrative Office of the U.S. Courts, 853 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2016, with many more filed in state courts. *See* Table C-2A of the report, *available at* http://www.uscourts.gov/statistics/table/c-2a/judicial-business/2016/09/30.

3.4. Significant Enforcement Actions

3.4.1. DOJ Criminal Enforcement

35. In FY 2016, the Division charged 52 individuals, including 10 auto parts executives and 15 real estate investors, with criminal antitrust offenses. Twenty-two individuals were sentenced to serve time in jail for an average of 11 months. The Division also obtained more than $399 million in criminal fines and penalties.

36. In FY 2016, an additional nine companies and 10 individuals were charged with participating in conspiracies to fix prices and rig bids in the Division's longstanding and ongoing investigation of auto parts. The auto parts cases involved over 50 different auto parts ranging from brake hoses to spark plugs to seatbelts. The Division continues to cooperate on this investigation with its counterparts in Japan, Korea, the European Union, Canada, and other jurisdictions. As of April 2017, the auto parts investigation has resulted in charges against 48 companies and 65 individuals. In total, 32 executives have pleaded guilty and been sentenced to an average of just over 15 months in jail. Additionally, 44 corporations have pleaded guilty or agreed to plead guilty and have agreed to pay more than $2.9 billion in criminal fines. *See* e.g., https://www.justice.gov/opa/pr/corning-international-kabushiki-kaisha-pay-665-million-

fixing-prices-automotive-parts and https://www.justice.gov/opa/pr/kiekert-ag-plead-guilty-bid-rigging-involving-auto-parts.

37. In FY 2016, the Division charged 16 individuals who engaged in bid rigging and fraud at real estate foreclosure auctions in northern California and in the southeastern United States. More than 125 individuals have been charged since the investigation began. *See* https://www.justice.gov/opa/pr/georgia-real-estate-investor-pleads-guilty-bid-rigging-and-bank-fraud-public-foreclosure; https://www.justice.gov/opa/pr/northern-california-real-estate-investor-convicted-rigging-bids-public-foreclosure-auctions; https://www.justice.gov/opa/pr/three-northern-california-real-estate-investors-sentenced-rigging-bids-public-foreclosure and https://www.justice.gov/opa/pr/georgia-real-estate-investor-pleads-guilty-bid-rigging-and-bank-fraud-public-foreclosure.

38. In FY 2016, the Division continued to investigate an international conspiracy to fix prices and rig bids for electrolytic capacitors. Electrolytic capacitors store and regulate electrical current in a variety of electronic products, including computers, televisions, car engines and airbag systems, home appliances and office equipment. In February 2017, Matsuo Electric Co. Limited and one of its executives agreed to plead guilty for their roles in this conspiracy. In addition to pleading guilty, Matsuo has agreed to pay a criminal fine and the executive has agreed to serve a prison term of one year and a day. Both have agreed to cooperate with the Division's ongoing investigation, which has led to criminal charges against six companies and 10 individuals. *See* https://www.justice.gov/opa/pr/corporation-and-its-executive-agree-plead-guilty-participating-capacitors-price-fixing.

39. In December 2016, the Division charged two former senior generic pharmaceutical executives for their roles in conspiracies to fix prices, rig bids and allocate customers for certain generic drugs, specifically an antibiotic, doxycycline hyclate, and glyburide, a medicine used to treat diabetes. The charges are the result of an ongoing investigation into the generic pharmaceutical industry. *See* https://www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer.

40. In March 2017, the former executive of an Israel-based defense contractor pleaded guilty for his role in multiple schemes to defraud the multi-billion dollar United States Foreign Military Financing program (FMF). The executive and others falsified bid documents to make it appear that certain FMF contracts had been competitively bid. The executive further caused false certifications to be made to the U.S. Department of Defense (DoD) stating that no commissions were being paid and no non-U.S. content was used in these contracts, when, in fact, he had arranged to receive commissions and to have services performed outside the United States, all in violation of the DoD's rules and regulations. The executive was charged in January 2016, and extradited from Bulgaria to the United States in October 2016. *See* https://www.justice.gov/opa/pr/israeli-executive-pleads-guilty-defrauding-foreign-military-financing-program.

41. The Division continued to prosecute collusion and fraud in the financial services industry. The Division's investigation into manipulation of the foreign exchange market resulted in pleas from two foreign currency exchange traders for participating in a price-fixing conspiracy of Central and Eastern European, Middle Eastern, and African currencies, and the indictment of three former traders for conspiring to manipulate the price of the U.S. dollar and euro exchanged in the foreign exchange spot market. Additionally, the Division's joint investigation with the Criminal Division into the manipulation of LIBOR resulted in a plea from a former derivatives trader for conspiring

to commit wire and bank fraud, and the indictment of two former traders for wire fraud and conspiring to commit wire and bank fraud. Trial is scheduled for January 2018. *See* https://www.justice.gov/opa/pr/former-rabobank-derivatives-trader-pleads-guilty-scheme-manipulate-libor-benchmark; https://www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy and https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy.

42. In FY 2016, the Division continued its ongoing investigation into a conspiracy involving price fixing, bid rigging, and market allocation in international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere. Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and off of an ocean-going vessel; examples include new and used cars and trucks and construction and agricultural equipment. Four companies (Wallenius Wilhelmsen Logistics AS, Kawasaki Kisen Kaisha Ltd., Nippon Yusen Kabushiki Kaisha, and Compañia Sud Americana de Vapores S.A.) have pled guilty, and have been sentenced to pay total fines of $234.9 million, and four corporate executives have pled guilty and been sentenced to an average of over 16 months in jail. *See* https://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids; https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks and http://www.justice.gov/atr/public/press_releases/2015/312415.htm.

3.4.2. DOJ Civil Non-Merger Enforcement

43. **Allegiance Health**. On June 25, 2015, the Division sued four Michigan hospital systems that for years unlawfully agreed to allocate territories for marketing, depriving consumers and physicians of important information about competing providers and other benefits of unfettered competition. Three of the systems – Hillsdale Community Health Center, Community Health Center of Branch County, Michigan, and ProMedica Health System Inc. – agreed to settle the charges. The Division continues to litigate against a fourth, W.A. Foote Memorial Hospital, doing business as Allegiance Health, to prohibit agreements that unlawfully allocate territories for marketing of competing healthcare services. The Division argued that Hillsdale curtailed this competition for years by entering into agreements with Allegiance, Branch and ProMedica to limit the marketing of competing healthcare services. According to the complaint, the defendants' agreements deprived patients and physicians of information needed to make informed healthcare decisions. The parties' cross-motions for summary judgment are fully briefed and oral argument took place on April 24, 2017. The trial against Allegiance is scheduled for October 2017. *See* https://www.justice.gov/opa/pr/justice-department-sues-four-michigan-hospital-systems-unlawfully-agreeing-limit-marketing and https://www.justice.gov/atr/division-operations/division-update-spring-2017/division-sues-companies-stop-conduct-subverts-competition-and-harms-consumers.

44. **Carolinas HealthCare System (CHS)**. On June 9, 2016, the Division and the state of North Carolina filed a civil lawsuit against CHS alleging that that CHS, with an approximately 50 percent share in the sale of acute inpatient hospital services to health insurers in the Charlotte area, uses its market power to restrict the major Charlotte insurers from offering health plans that encourage or "steer" patients to use medical providers that compete with CHS by offering quality services at lower prices. CHS's restrictions on steering reduce price and quality competition between CHS and its competitors. Because major Charlotte insurers cannot steer their patients to use services that are priced lower than those offered by CHS, its competitors do not have the

opportunity to obtain additional patient volume in exchange for their lower prices. This lessens the incentives of CHS's competitors to lower their prices and CHS, in turn, has little need to respond to price-cutting competition that otherwise would put downward pressure on its own rates. CHS also restricts insurers' efforts to provide accurate information to consumers about how the cost and quality of CHS's healthcare services compare to those of CHS's competitors. Trial will begin on November 5, 2018. *See* https://www.justice.gov/opa/pr/justice-department-and-north-carolina-sue-carolinas-healthcare-system-eliminate-unlawful.

45. **DIRECTV/AT&T**. On March 23, 2017, the Division reached a settlement that will prohibit DIRECTV and its parent corporation, AT&T, from illegally sharing confidential, forward-looking information with competitors. The Division filed suit on Nov. 2, 2016, alleging that DIRECTV was the ringleader of a series of unlawful information exchanges between DIRECTV and three of its competitors – Cox Communications Inc., Charter Communications Inc. and AT&T (before it acquired DIRECTV) – during the companies' negotiations to carry the SportsNet LA "Dodgers Channel." SportsNet LA holds the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. The settlement will ensure that when DIRECTV and AT&T negotiate with providers of video programming, including negotiations to telecast the Dodgers Channel, they will not illegally share competitively-sensitive information with their rivals. The settlement also requires the companies to monitor certain communications their programming executives have with their rivals, and to implement antitrust training and compliance programs. *See* https://www.justice.gov/opa/pr/justice-department-sues-directv-orchestrating-information-sharing-agreements-three and https://www.justice.gov/opa/pr/justice-department-settles-civil-antitrust-claim-against-att-and-directv-orchestrating

3.4.3. FTC Non-Merger Enforcement Actions

46. **In the Matter of 1-800 Contacts, Inc.** On August 8, 2016, the FTC filed an administrative complaint charging that 1-800 Contacts, the largest online retailer of contact lenses in the United States, unlawfully orchestrated a web of anticompetitive agreements with rival online contact lens sellers that suppress competition in certain online search advertising auctions and that restrict truthful and non-misleading internet advertising to consumers. According to the administrative complaint, 1-800 Contacts entered into bidding agreements with at least 14 competing online contact lens retailers that eliminate competition in auctions to place advertisements on the search results page generated by online search engines such as Google and Bing. The complaint alleged that these bidding agreements unreasonably restrain price competition in internet search auctions, and restrict truthful and non-misleading advertising to consumers, constituting an unfair method of competition in violation of federal law. The case is ongoing. *See* https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter.

47. **In the Matter of Fortiline, LLC.** Fortiline, LLC, a company that distributes ductile iron pipe, fittings, and accessories throughout much of the United States, agreed to settle charges that it violated Section 5 of the FTC Act by inviting a competitor to raise and fix prices. According to the administrative complaint filed by the FTC, on two occasions in 2010, Fortiline invited a competing firm, which mainly manufactures ductile iron pipe but also engaged in direct sales to contractors, to collude on pricing in North Carolina and most of Virginia. In some areas, Fortiline competes with this firm – identified in the complaint as "Manufacturer A" – by distributing ductile iron pipe ("DIP") products made by another DIP manufacturer, identified as "Manufacturer B." In

other areas, Fortiline distributes the product of Manufacturer A. The FTC's complaint alleged that on two occasions when Fortiline was competing with Manufacturer A, Fortiline communicated an invitation to collude on DIP pricing. The consent order prohibited Fortiline from entering into, attempting to enter into, or inviting any agreement with any competitor to raise or fix prices, divide markets, or allocate customers. The FTC approved the final order on September 27, 2016. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0000/fortiline-llc.

48. **In the Matter of Victrex plc, et al.** Invibio, the medical division of Victrex, agreed to settle charges that it used long-term supply contracts to exclude rivals and maintain its monopoly in implant-grade polyetheretherketone, known as PEEK, which is sold to medical device makers. The FTC's complaint alleged that two other companies, Solvay Specialty Polymers LLC and Evonik Corporation, entered the implant-grade PEEK market, but Invibio's anticompetitive tactics impeded them from effectively competing for customers. Through these exclusive contracting practices, the complaint alleges that Invibio has been able to maintain high prices for PEEK, despite entry from Solvay and Evonik; to prevent its customers from using more than one source of supply, despite their business preference to do so; and to impede Solvay and Evonik from developing into fully effective competitors. The consent order generally prohibits Invibio, Inc. and Invibio Limited, along with their corporate parent, Victrex plc, from entering into exclusive supply contracts and from preventing current customers from using an alternate source of PEEK in new products. In addition, the companies must allow current customers meeting certain conditions to modify existing contracts to eliminate the requirement that the customer purchase PEEK for existing products exclusively from Invibio. *See* https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter.

49. **In the Matter of Endo Pharmaceuticals and Impax Labs.** The FTC filed a complaint in federal district court alleging that Endo Pharmaceuticals Inc. and several other drug companies violated antitrust laws by using pay-for-delay settlements to block consumers' access to lower-cost generic versions of Opana ER and Lidoderm with an agreement not to market an authorized generic – often called a "no-AG commitment" – as a form of reverse payment. The complaint, filed in the U.S. District Court for the Eastern District of Pennsylvania, alleges that Endo paid the first generic companies that filed for FDA approval – Impax Laboratories, Inc. and Watson Laboratories, Inc. – to eliminate the risk of competition for Opana ER and Lidoderm, in violation of federal antitrust law. Opana ER is an extendedrelease opioid used to relieve moderate to severe pain. Lidoderm is a topical patch used to relieve pain associated with post-herpetic neuralgia, a complication of shingles. The FTC is seeking a court judgment declaring that the defendants' conduct violates the antitrust laws, ordering the companies to disgorge their ill-gotten gains, and permanently barring them from engaging in similar anticompetitive behavior in the future. Teikoko Pharma USA and Teikoku Seiyaku Co., Ltd. agreed to a stipulated order resolving FTC charges. In November 2016, the FTC voluntarily dismissed the complaint. On January 23, 2017, the FTC refiled charges related to the Lidoderm agreements in federal court in California, including a stipulated order resolving charges against Endo, and refiled charges related to the Opana ER agreement in FTC administrative proceedings. *See* https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs.

50. **In the Matter of Drug Testing Compliance Group, LLC.** Drug Testing Compliance Group, LLC, agreed to settle charges that it illegally invited one of its competitors to enter into a customer allocation agreement in violation of Section 5 of the

FTC Act. The settlement prohibits DTC Group from communicating with competitors about rates or prices (although it does not bar public posting of rates). The settlement also prohibits the company from soliciting, entering into, or maintaining an agreement with any competitor to divide markets, allocate customers, or fix prices, and from urging any competitor to raise, fix, or maintain prices, or to limit or reduce service. The FTC approved the final order on January 29, 2016. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0048/drug-testing-compliance-group-llc-matter.

51. **In the Matter of Step N Grip, LLC.** Step N Grip, LLC, which sells products online to keep rugs from curling at the edges, settled charges that it invited its closest competitor to fix and raise prices for their competing rug devices, in violation of Section 5 of the FTC Act. Under the settlement agreement, Step N Grip is required to stop communicating with its competitors about prices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices, and from urging any competitor to raise, fix, or maintain its price or rate levels or limit or reduce service. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0181/step-n-grip-llc-matter.

3.5. Advisory Letters from the FTC

52. Under its Rules, the Commission or its staff may offer industry guidance in the form of advisory opinions regarding proposed conduct in matters of significant public interest. These competition advisory opinions inform the public about the Commission's analysis in novel or important areas of antitrust law. In FY 2016, FTC staff issued no competition advisory opinions. For more information on the Commission's advisory letters, *See* http://www.ftc.gov/policy/advisory-opinions.

3.6. Business Reviews Conducted by the DOJ

53. Under the Department's business review procedure, a person may submit a proposed business action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued one business review letter in FY 2016. Business review letters can be found *at* http://www.justice.gov/atr/public/busreview/letters.html#page=page-0.

54. On December 13, 2016, the Department announced it would not challenge a proposal by Amadeus Group LLC and Mystic Logistics LLC to operate a pricing aggregation service that would allow subscribers to calculate costs and transportation options using a pricing algorithm for bulk commercial mailings. Although the aggregation and exchange of price and other competitive information can facilitate anticompetitive coordination among competitors, the Division found that there does not appear to be a substantial risk of that result in this case. *See* https://www.justice.gov/atr/response-amadeus-group-llc-and-mystic-logistics-llc-request-business-review.

4. Enforcement of antitrust laws and policies; mergers and concentrations

4.1. Enforcement of Pre-merger Notification Rules

55. On April 4, 2016, the Department filed a civil lawsuit against certain ValueAct Capital entities for violating the premerger notification and waiting period requirements. On November 17, 2014, Baker Hughes and Halliburton – two of the three largest providers of oilfield products and services in the world – announced their plan to merge in a deal valued at $35 billion. Thereafter, ValueAct, an activist investment firm, purchased over $2.5 billion of Halliburton and Baker Hughes voting shares without complying with premerger notification requirements. On July 12, 2016, ValueAct agreed to pay $11 million to resolve the lawsuit. As part of the settlement, ValueAct also agreed to injunctive relief designed to prevent future violations. *See* https://www.justice.gov/opa/pr/justice-department-obtains-record-fine-and-injunctive-relief-against-activist-investor.

56. On August 10, 2016, the Department, at the request of the FTC, filed a civil suit against Caledonia Investments plc for violating the premerger reporting and waiting requirements when it acquired voting securities of Bristow Group Inc. in February 2014. Under the terms of a settlement filed simultaneously with the complaint, Caledonia Investments agreed to pay a $480,000 civil penalty to resolve the lawsuit. *See* https://www.justice.gov/opa/pr/caledonia-investments-pay-480000-civil-penalty-violating-antitrust-premerger-notification.

57. On October 28, 2016, the Department, at the request of the FTC, filed a civil lawsuit against Fayez Sarofim for violating the premerger notification and waiting periods when he acquired voting securities of Kinder Morgan Inc., in 2001, 2006 and 2012, and Kemper Corporation in 2007. Under the terms of the settlement filed simultaneously with the complaint, Fayez Sarofim agreed to pay a $720,000 civil penalty to resolve the lawsuit. *See* https://www.justice.gov/opa/pr/fayez-sarofim-pay-720000-civil-penalty-violating-antitrust-premerger-notification.

58. **Investor Len Blavatnik.** On October 6, 2015, Investor Len Blavatnik agreed to pay $656,000 in civil penalties to resolve FTC allegations that he violated federal premerger reporting laws by failing to report voting shares that he acquired in a California technology start up called TangoMe, in August 2014. *See* https://www.ftc.gov/news-events/press-releases/2015/10/investor-len-blavatnik-pay-656000-settle-ftc-charges-he-violated.

4.2. Select Significant Merger Matters

4.2.1. FTC Merger Investigations and Challenges

59. **In the Matter of Teva/Allergan.** Teva Pharmaceutical Industries Ltd. agreed to sell the rights and assets related to 79 pharmaceutical products to settle FTC charges that its proposed $40.5 billion acquisition of Allergan plc's generic pharmaceutical business would be anticompetitive. The remedy required Teva to divest portions of the drug portfolio to eleven firms, and will preserve competition in U.S. pharmaceutical markets where Teva and Allergan compete now or would likely have competed in the future if not for the merger. The divested products included anesthetics, antibiotics, weight loss drugs, oral contraceptives, and treatments for a wide variety of diseases and conditions, including ADHD, allergies, arthritis, cancers, diabetes, high blood pressure, high

cholesterol, mental illnesses, opioid dependence, pain, Parkinson's disease, and respiratory, skin, and sleep disorders. In addition to the product divestitures, to address the anticompetitive effects likely to arise in markets for 15 pharmaceutical products where Teva supplies active pharmaceutical ingredients to current or future Allergan competitors, the FTC order additionally required Teva to offer these existing API customers the option of entering into long-term API supply contracts. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0196/teva-allergan-matter.

60. **In the Matter of Ball Corporation/Rexam PLC**. Ball Corporation agreed to sell to Ardagh Group S.A. eight U.S. aluminum can plants and associated assets in order to settle charges that its proposed $8.4 billion acquisition of Rexam PLC is likely anticompetitive. According to the complaint, the acquisition would have eliminated direct competition in the United States between Ball and Rexam, which are the first and second largest manufacturers of aluminum beverage cans in both the United States and the world. The complaint alleged that without a divestiture, it is likely that the proposed merger would have substantially lessened competition for standard 12-ounce aluminum cans in three regional U.S. markets – the South and Southeast, the Midwest, and the West. The complaint also alleged that the proposed merger would have substantially lessened competition for specialty aluminum cans nationwide. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0088/ball-corporation-rexam-plc-matter.

61. **In the Matter of Superior/Canexus**. The FTC filed an administrative complaint charging that the proposed $982 million merger of Canadian chemical suppliers Superior Plus Corp. and Canexus Corp. would violate the antitrust laws by significantly reducing competition in the North American market for sodium chlorate – a commodity chemical used to bleach wood pulp that is then processed into paper, tissue, diaper liners, and other products. Superior and Canexus are two of the three major producers of sodium chlorate in North America. If the merger had taken place, the new company and rival AkzoNobel would have controlled approximately 80 percent of the total sodium chlorate production capacity in North America. By combining more than half of all North American sodium chlorate production capacity in the merged Superior and Canexus, the acquisition was likely to lead to anticompetitive reductions in output and higher prices, the complaint alleged. Additionally, by removing Canexus as an independent sodium chlorate producer, with its large scale and low-costs, the acquisition would have also increased the likelihood of coordination in a market already vulnerable to such conduct, according to the complaint. The FTC also authorized staff to seek a temporary restraining order and a preliminary injunction in federal court to prevent the parties from consummating the merger and to maintain the status quo pending the administrative proceeding. The FTC and the Canadian Competition Bureau cooperated in this investigation. On June 30, 2016, the parties abandoned the planned merger and on August 3, 2016, the Commission issued an order dismissing the complaint. *See* https://www.ftc.gov/enforcement/cases-proceedings/161-0020/superiorcanexus-matter.

62. **In the Matter of Cabell Huntington Hospital/St. Mary's Medical Center**. On July 6, 2016, the FTC voted to dismiss without prejudice its administrative complaint challenging the proposed merger between Cabell Huntington Hospital and St. Mary's Medical Center, two hospitals located three miles apart in Huntington, West Virginia. The FTC's administrative complaint, issued in November 2015, alleged that the proposed merger would create a dominant firm with a near monopoly over general acute care inpatient hospital services and outpatient surgical services in the adjacent counties of Cabell, Wayne, and Lincoln, West Virginia and Lawrence County, Ohio likely leading to

higher prices and lower quality of care than would be the case without the acquisition. The Commission voted to dismiss the complaint in light of the passage in March 2016 of a new West Virginia law relating to certain "cooperative agreements" between hospitals in that state, and the West Virginia Health Care Authority's decision to approve a cooperative agreement between the hospitals, with which the West Virginia Attorney General concurred. Cooperative agreement laws seek to replace antitrust enforcement with state regulation and supervision of healthcare provider combinations. *See* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-dismisses-complaint-challenging-merger-cabell-huntington.

63. **In the Matter of Bedford Laboratories/Hikma Pharmaceuticals.** On March 31, 2016, the FTC approved a modified final order in which generic drug marketer Hikma Pharmaceuticals PLC agreed to divest its rights and interests in five generic injectable pharmaceuticals to settle charges that its $5 million acquisition of the rights to various drug products and related assets from Ben Venue Laboratories, Inc. would likely be anticompetitive. According to the complaint, without a remedy, Hikma's purchase of certain generic injectables would have likely harmed future competition in the U.S. markets for (1) Acyclovir sodium injection: an antiviral drug used to treat chicken pox, herpes, and other related infections, (2) Diltiazem hydrochloride injection: a calcium channel blocker and antihypertensive used to treat hypertension, angina, and arrhythmias, (3) Famotidine injection: a treatment for ulcers and gastroesophageal reflux disease, (4) Prochlorperazine edisylate injection: an antipsychotic drug used to treat schizophrenia and nausea, and (5) Valproate sodium injection: a treatment for epilepsy, seizures, bipolar disorder, anxiety, and migraine headaches. Hikma was required to divest the five generic injectable drug assets to Amphastar Pharmaceuticals, Inc., a California-based specialty pharmaceutical company that sells generic injectable and inhalation products. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0044/bedford-laboratorieshikma-pharmaceuticals.

64. **In the Matter of ArcLight Energy Partners Fund VI, L.P.** ArcLight Energy Partners Fund VI agreed to divest its ownership interest in four light petroleum product terminals in Pennsylvania to settle charges that ArcLight's acquisition of Gulf Oil Limited Partnership from its parent company, Cumberland Farms, Inc., would likely be anticompetitive in three Pennsylvania terminal markets: Altoona, where ArcLight would own the only terminal handling gasoline and one of two terminals handling distillates; Scranton, where ArcLight would own one of two terminals handling gasoline and distillates; and Harrisburg, where ArcLight would own one of two terminals handling gasoline and one of three terminals handling distillates. The FTC approved the final order on February 9, 2016. *See* https://www.ftc.gov/news-events/press-releases/2016/02/ftc-approves-final-order-preserving-competition-three.

65. **In the Matter of NXP Semiconductors N.V./Freescale Semiconductor Ltd.** On January 29, 2016, the FTC approved a final order settling charges that NXP Semiconductors N.V.'s $11.8 billion acquisition of Freescale Semiconductor Ltd. would likely harm competition in the worldwide market for RF power amplifiers. Under the order, first announced in November 2015, NXP is required to divest all its assets that are used primarily for manufacturing, research, and development of RF power amplifiers to the Chinese private equity firm Jianguang Asset Management Co. Ltd. *See* https://www.ftc.gov/news-events/press-releases/2016/01/ftc-approves-final-order-preserving-competition-worldwide-market.

66. **In the Matter of Keystone Orthopaedic Specialists, LLC/Orthopaedic Associates of Reading, Ltd.** On December 18, 2015, following a public comment period, the FTC approved a final order settling charges that a merger combining 76 percent of the orthopedists in Berks County, PA into Keystone Orthopaedic Specialists, LLC was likely anticompetitive and violated U.S. antitrust law. The complaint also named Orthopaedic Associates, one of the six practices that merged into Keystone in 2011. The practice and six of its associates split off from Keystone in 2014, and has become a major player in the market. *See* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-approves-final-order-settling-charges-merger-orthopedic.

67. **In the Matter of Steris/Synergy Health**. On May 29, 2015 FTC issued an administrative complaint charging that Steris Corporation's proposed $1.9 billion acquisition of Synergy Health plc would violate the antitrust laws by significantly reducing future competition in regional markets for sterilization of products using radiation, particularly gamma or x-ray radiation. The Commission also authorized agency staff to seek a temporary restraining order and preliminary injunction in federal court to maintain the status quo pending an administrative trial on the merits. According to the FTC, it is unlikely that new competitors in the market for contract radiation sterilization services would replicate the competition that would be eliminated by the merger. The Commission alleged that the challenged acquisition would eliminate likely future competition between Steris's gamma sterilization facilities and Synergy's planned x-ray sterilization facilities in the United States, thus depriving customers of an alternative sterilization service and additional competition. On September 25, 2015 the district court denied the FTC motion for a preliminary injunction. On October 30, 2015, the Commission dismissed the administrative complaint. *See* https://www.ftc.gov/enforcement/cases-proceedings/151-0032/sterissynergy-health-matter.

4.2.2. DOJ Public Merger Investigations and Challenges

68. **EnergySolutions/Waste Control Specialists.** On November 16, 2016 the Division filed a civil antitrust lawsuit seeking to block EnergySolutions' proposed $367 million acquisition of Waste Control Specialists – a transaction that would combine the two most significant competitors for the disposal of low level radioactive waste available to commercial customers in 35 states, the District of Columbia, and Puerto Rico. According to the lawsuit, the proposed transaction would deny commercial generators of low level radioactive waste – from universities and hospitals working on life-saving treatments to nuclear facilities producing 20 percent of the electricity in the United States – the benefits of vigorous competition. If consummated, the combined entity would be the only option for customers in nearly 40 states. Trial took place from April 24, 2017 to May 5, 2017. *See* https://www.justice.gov/opa/pr/justice-department-sues-block-energysolutions-acquisition-waste-control-specialists.

69. **Aetna/Humana**. On February 14, 2017, Aetna abandoned its planned acquisition of Humana, after deciding not to appeal the U.S. District Court for the District of Columbia's January 23, 2017, decision to block the $37 billion acquisition. In July 2016, the Division sued to block Aetna's proposed acquisition of Humana. The Division's suit alleged that a combined Aetna and Humana would substantially reduce competition for the sale of Medicare Advantage – a form of Medicare coverage provided by private insurers –and health insurance to individuals through the public exchanges. In blocking the transaction, the court ruled that the proposed merger was likely to substantially lessen competition in the sale of individual Medicare Advantage plans in 364 counties. The

court ruled that the sale of Medicare Advantage was a relevant antitrust product market, meaning that competition among Medicare Advantage providers is protected by the antitrust laws. In addition, the court rejected Aetna and Humana's claim that their proposal to divest 290,000 Medicare Advantage customers to Molina Healthcare, a health insurer, would prevent the competitive harm that the merger would produce. The decision followed a 13-day trial in December 2016. *See* https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana and https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

70. **Anthem/Cigna.** On April 28, 2017, the U.S. Court of Appeals for the D.C. Circuit affirmed the decision by the U.S. District Court for the District of Columbia to block health insurer Anthem, Inc.'s $54 billion acquisition of Cigna Corp. The Division sued to block the merger in July 2016. The Division's suit alleged that the merger would substantially reduce competition for millions of consumers who receive commercial health insurance coverage from national employers throughout the United States in at least 35 metropolitan areas. The complaint also alleged that the elimination of Cigna threatened competition among commercial insurers for the purchase of healthcare services from hospitals, physicians and other healthcare providers. Following a trial that ran from November 21, 2016 to January 3, 2017, the district court found that the merger was likely to substantially lessen competition in the market for the sale of health insurance to national accounts based in fourteen states, and in the sale of health insurance to large employers in Richmond, Virginia. This decision was affirmed by the court of appeals following oral argument on March 24, 2017. Anthem abandoned its planned acquisition on May 11, 2017. *See* https://www.justice.gov/opa/pr/dc-circuit-affirms-decision-blocking-anthem-s-acquisition-cigna; https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna and https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

71. **Anheuser-Busch InBev/SABMiller**. On July 20, 2016, the Division filed a civil antitrust lawsuit to block Anheuser-Busch InBev's proposed acquisition of SABMiller. At the same time, the Division filed a proposed settlement that, if approved by the court, will allow ABI to proceed with its $107 billion proposed acquisition of SABMiller. The settlement requires ABI to divest SABMiller's entire U.S. business – including SABMiller's ownership interest in MillerCoors, the right to brew and sell certain SABMiller beers in the United States, and the worldwide Miller beer brand rights. The settlement also prohibits ABI from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals, including high-end craft and import beers. Moreover, the settlement precludes ABI from acquiring beer distributors or brewers – including non-HSR reportable craft brewer acquisitions – without allowing for Division review of the acquisition's likely competitive effect. *See* https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.

72. **Precision Planting/Monsanto**. On August 31, 2016, the Division filed a civil antitrust lawsuit to block Deere & Company's proposed acquisition of Precision Planting LLC from Monsanto in order to preserve competition in the market for high-speed precision planting systems in the United States. The Antitrust Division's lawsuit alleged that the transaction would combine the only two significant U.S. providers of high-speed precision planting systems – technology that is designed to allow farmers to plant crops accurately at higher speeds. The acquisition would have denied farmers throughout the country the benefits of competition that has spurred innovation, improved quality and

lowered prices. The Division argued that Deere's proposed acquisition of the company it has described as its "number one competitor" would allow it to control nearly every method through which American farmers can acquire effective high-speed precision planting systems and provide it with the ability to set prices, output, quality and product features without the constraints of market competition. The parties abandoned their transaction on May 1, 2017. *See* https://www.justice.gov/opa/pr/deere-abandons-proposed-acquisition-precision-planting-monsanto and https://www.justice.gov/opa/pr/justice-department-sues-block-deere-s-acquisition-precision-planting.

73. **Lam Research Corporation/KLA-Tencor Corp.** On October 5, 2016, Lam Research Corp. and KLA-Tencor Corp. abandoned their plans to merge after the Division informed the companies that it had serious concerns that the proposed transaction would harm competition. The proposed merger would have combined a leading supplier of semiconductor fabrication equipment with a leading supplier of metrology and inspection equipment. Metrology and inspection technologies are growing increasingly important to the successful development of semiconductor fabrication equipment and process technology. KLA-Tencor's leading position in several metrology and inspection markets could have created the potential for Lam Research to foreclose its competitors by reducing their timely access to key KLA-Tencor equipment and related services. *See* https://www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.

74. **Faiveley/Wabtec.** On October 26, 2016, the Division filed a civil antitrust lawsuit to block Westinghouse Air Brake Technologies Corporation's (Wabtec) $1.8 billion acquisition of Faiveley Transport North America's (Faiveley). At the same time, the Division filed a settlement that would resolve its competitive concerns. The settlement includes a divestiture of Faiveley's entire U.S. freight car brakes business which develops, manufactures and sells freight car brake systems and components including: air brake control valves, hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices and brake cylinders. The divestiture also includes Faiveley's FTEN control valve, a freight car brake control valve under development that will be available for full commercialization after approval from the Association of American Railroads. The court entered the final judgment on April 10, 2017. *See* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-faiveley-transport-s-us-freight-car-brakes-business.

75. **Alaska Airlines/Virgin America.** On December 6, 2016, the Division sued to block the proposed $4 billion acquisition by Alaska Air Group Inc. of rival airline Virgin American Inc. At the same time, the Division filed a proposed settlement that, if approved by the court, would eliminate the competitive harm from the transaction. As proposed, the merger would have joined the nation's sixth- and ninth-largest airlines, respectively, to create the fifth-largest U.S. carrier. The Division's argued that a codeshare agreement, which allowed Alaska to market American Airlines flights on over 250 routes, created an incentive for Alaska to compete less aggressively on routes both carriers served and to forgo launching new service in competition with American. The complaint also alleged that the codeshare would make Alaska less likely than Virgin to launch service in direct competition with American. To address the transaction's likely competitive harm, the settlement will require Alaska to significantly reduce the scope of the codeshare agreement. Specifically, in order to reduce Alaska's overall dependence on the codeshare and limit Alaska's incentives to cooperate with American, the settlement prohibits Alaska and American from code sharing on routes where Virgin and American competed prior to the acquisition and on routes where Alaska would otherwise be likely

to launch new service in competition with American following the merger. *See* https://www.justice.gov/opa/pr/justice-department-requires-alaska-airlines-significantly-scale-back-codeshare-agreement.

76. **Cinemedia/Screenvision**. On December 20, 2016, the Division and the state of Connecticut filed a civil antitrust law suit challenging AMC Entertainment Holdings Inc.'s proposed $1.2 billion acquisition of Carmike Cinemas Inc. At the same time as the complaint, the Division filed a settlement that required AMC to divest theatres in 15 local markets, sell off most of its holdings and relinquish all of its governance rights in National Cinemedia LLC (NCM), and transfer 24 theatres with a total of 384 screens to the network of Screenvision LLC in order to complete the acquisition of Carmike. AMC and Carmike competed to attract moviegoers in local markets across the United States by providing affordable ticket prices and a superior viewing experience. Because AMC and Carmike were each other's most significant competitor in 15 local markets across the country, the proposed acquisition would likely have reduced price competition and the quality of the moviegoer's experience in each of these local markets. In addition, AMC's acquisition of Carmike would have lessened competition in the preshow services and cinema advertising markets, where NCM and Screenvision together serve over 80 percent of U.S. movie screens and compete to win exclusive contracts to provide preshow services to exhibitors. Under the terms of the proposed settlement, AMC must divest the majority of its equity interest in NCM such that it owns no more than 4.99 percent of the company, relinquish all of its NCM governance rights, and transfer 24 theatres comprising 384 screens to the Screenvision network. The court entered the final judgment on March 2, 2017. *See* https://www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order.

77. **Smiths Group/Morpho Detection International**. On March 30, 2017, the Division filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to block the proposed $710 million acquisition of Morpho Detection LLC from Safran S.A. At the same time, the Division filed a proposed settlement that, if approved by the court, will preserve competition in the market for global explosive trace detection ("ETD") devices. The proposed settlement requires Smiths Group plc to divest Morpho Detection LLC and Morpho Detection International LLC's global ETD business in order for Smiths to proceed with its proposed transaction. Smiths and Morpho are two of the leading providers of desktop ETD devices for both air passenger travel and air cargo screening at U.S. airports. Desktop ETD devices detect trace amounts of explosive residue or narcotics on hands, belongings, and cargo from a tiny sample swabbed from the object and placed inside the detector. Competition between Smiths and Morpho has resulted in lower prices, better service, and more innovative desktop ETD devices. The Division believes that the divestiture of Morpho's global ETD business, which also includes handheld and portal ETD devices, is necessary to ensure that the buyer of Morpho's global ETD business would be a viable competitor in the provision of desktop ETD devices. *See* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-morpho-s-explosive-trace-detection-business-smiths.

78. **Danone/WhiteWave**. On April 3, 2017, the Division filed a civil lawsuit to block Danone SA's $12.5 billion acquisition of the WhiteWave Foods Company. At the same time, the Division filed a settlement agreement that requires Danone S.A. to divest Danone's Stonyfield Farms business. According to the complaint, as a result of Danone's long-term strategic partnership and supply and licensing agreements with WhiteWave's primary competitor, CROPP Cooperative (CROPP), the proposed acquisition would have provided incentives and opportunities for cooperative behavior between the two leading

purchasers of raw organic milk in the northeast. Under the terms of the proposed settlement, which is subject to court approval, Danone must divest its Stonyfield Farms business to an independent buyer approved by the Division. The divestiture will sever Danone's and CROPP's strategic partnership, thereby eliminating the entanglements between CROPP and the merged firm. As a result, the divestiture will preserve competition for the purchase of raw organic milk from northeast dairy farmers and the sale of fluid organic milk to consumers. *See* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-danone-s-stonyfield-farms-business-order-danone.

79. **Dow/DuPont.** On June 15, 2017, the Division, along with offices of the state attorneys general representing Iowa, Mississippi, and Montana, filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to enjoin the proposed merger of Dow Chemical Company and E.I. DuPont, along with the proposed settlement that, if approved by the court, would resolve the Division's competitive concerns. According to the complaint, without the divestitures, the proposed merger likely would reduce competition between two of only a handful of chemical companies that manufacture certain types of crop protection chemicals and the only two U.S. producers of acid copolymers and ionomers, potentially harming U.S. farmers and consumers. Under the terms of the proposed settlement, DuPont must divest its Finesse herbicide and Rynaxypyr insecticide products to a buyer to be approved by the United States. The Division said that the divestiture of these products, would preserve competition in U.S. markets for broadleaf herbicides for winter wheat and insecticides for chewing pests. The proposed settlement further requires Dow to divest its U.S. acid copolymers and ionomers business to a buyer approved by the United States to remedy the merger's harm in the U.S. markets for acid copolymers and ionomers. *See* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics.

5. International antitrust cooperation and outreach

5.1. International Antitrust Cooperation Developments

80. In FY 2016, the Antitrust Agencies continued to play a leading role in promoting cooperation and convergence toward sound competition policies internationally, through building strong bilateral ties with major enforcement partners and participation in multilateral bodies such as the Competition Committee of the Organization for Economic Cooperation and Development ("OECD"), the International Competition Network ("ICN"), the United Nations Conference on Trade and Development ("UNCTAD"), and the Asia-Pacific Economic Cooperation ("APEC").

81. On April 13, 2016, the Department and FTC participated in high level bilateral meetings with officials responsible for China's three anti-monopoly agencies –National Development and Reform Commission (NDRC) Vice Minister Hu Zucai, Ministry of Commerce (MOFCOM) Assistant Minister Tong Daochi and State Administration for Industry and Commerce (SAIC) Vice Minister Wang Jiangping. The meetings allowed participating agencies to exchange information and views on antitrust developments and priorities, as well as discussing the role of competition enforcement and advocacy in promoting innovation. This was the third joint dialogue between the agencies since the Department and FTC signed an antitrust memorandum of understanding with the Chinese

antitrust agencies on July 27, 2011. *See* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-officials-meet-officials-responsible-chinese

82. On May 20, 2016, the heads of the Agencies met in Toronto with their counterparts from Canada's Competition Bureau and Mexico's Federal Commission on Economic Competition to discuss their ongoing antitrust enforcement priorities. The discussions covered a wide range of topics, including recent developments, effective agency litigation, disruptive innovation, cooperation between agencies and technical assistance. *See* https://www.justice.gov/opa/pr/officials-us-canada-and-mexico-participate-2016-trilateral-meeting-toronto-discuss-antitrust.

83. In May 2016, the Agencies signed an antitrust cooperation agreement with the Peru's National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI). The agreement includes mutual acknowledgment of the importance of antitrust cooperation, including information sharing and coordination of enforcement actions. The agreement also contains provisions for antitrust enforcement *coo*peration and coordination, consultations with respect to enforcement actions, and technical cooperation, and is subject to effective confidentiality protections. *See* https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-sign-cooperation-agreement-peru-s-antitrust.

84. On July 14, 2016, the heads of the Antitrust Agencies of the United States and Japan met in Washington, D.C. for the 35th Bilateral Competition Consultation, the longest-running annual consultation with any foreign antitrust agency. The discussions covered a wide range of topics, including recent enforcement developments, antitrust policy and enforcement involving intellectual property and technology and international enforcement cooperation. The purpose of the meeting is to reinforce ties of cooperation and share knowledge in light of the increasing internationalization of antitrust enforcement. *See* https://www.justice.gov/opa/pr/officials-us-and-japan-participate-35th-bilateral-meeting-washington-discuss-antitrust

85. In FY 2016, the Division cooperated with international partners on many civil non-merger, merger, and cartel investigations. With waivers from the parties, the Division was able to cooperate on merger matters with counterparts from fifteen jurisdictions. The Division's cooperation included 100s of hours in separate staff-to-staff and management level calls, as well as several days of in-person meetings. In total, the Division cooperated with international counterparts in 22 merger investigations in FY 2016. The Division also coordinated and cooperated with competition agencies in other jurisdictions in many ongoing international cartel investigations.

86. The FTC cooperated with foreign counterparts on 46 investigations with many competition agencies around the world. Two cases from the past year underscore the depth and breadth of our cooperation. In the *Staples/Office Depot* matter, Commission staff cooperated with staff from the antitrust agencies in Australia, Canada, and the European Union. The FTC and the Canadian Competition Bureau filed complaints to block the transaction in court on the same day. In *GSK/Novartis*, the FTC cooperated with antitrust agencies in Australia, Canada, the European Union, New Zealand, Pakistan and the Ukraine. Throughout the investigations, staff cooperated closely with counterparts, including on the analysis of the proposed transaction and potential remedies. This coordination led to compatible approaches and outcomes including that the FTC and the European Commission approved the same buyer of the divested oncology assets. Commission staff cooperation with non-U.S. counterparts also included extensive coordination on a number of non-public matters in which the Commission ultimately

closed its investigation without taking enforcement action or that resulted in abandonment of the transaction by the parties, some after second requests were issued.

87. During FY 2016, the Agencies continued to play leadership roles in the International Competition Network ("ICN") and served as ICN Steering Group Members. At the ICN's annual conference on April 26-29, 2016, in Singapore, the ICN adopted the Merger Remedies Guide presented by the Merger Working Group. The Guide details the overarching principles that are the basis of merger remedies and provides practical guidance on how these principles inform the design and implementation of merger remedies. The FTC and DOJ were active contributors to the development of the Guide. Following the conference, the FTC became co-chair of the Merger Working Group. *See* http://www.internationalcompetitionnetwork.org/uploads/library/doc1069.pdf

88. In FY 2016, the FTC continued serving as co-chair of the ICN's Agency Effectiveness Working Group ("AEWG"), together with the Finnish Competition and Consumer Authority and the Norwegian Competition Authority. The FTC co-led the development of reports on agency ethics and self-evaluation. The Working Group also presented new on-line training modules on setting up a new competition agency, project selection, dawn raids in cartel investigations, economic analytical tools, and state restraints. *See* https://www.ftc.gov/news-events/press-releases/2016/04/international-competition-network-marks-its-fifteenth-annual; http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx.

89. During FY 2016, the Division continued to co-chair the ICN Unilateral Conduct Working Group ("UCWG"), together with the United Kingdom's Competition and Markets Authority and the Australian Competition and Consumer Commission. As co-chair of the ICN Unilateral Conduct Working Group, the Division helped to finalize an Analytic Framework chapter for the Working Group Workbook that explores the basic questions an agency must address when formulating its unilateral conduct enforcement policies.

5.2. Outreach

90. In FY 2016, the Agencies continued to engage in technical cooperation on competition law and policy matters with their international counterparts. The FTC continued its robust technical assistance program in which it shares the agency's experience with competition agencies around the world, conducting 40 programs in 64 countries, including but not limited to Antigua, Argentina, Honduras, Indonesia, Philippines, Saudi Arabia, Ukraine, and Vietnam, along with regional programs for Africa, Central America, Southeast Asia, and Southeast Europe.

91. As part of its ongoing effort to build effective relationships, the FTC provides opportunities for staff from foreign agencies to spend several months working directly with FTC staff on investigations through its International Fellows and Interns program. In FY 2016, the FTC hosted international fellows and interns from six countries. These assignments provide valuable opportunities for participants to obtain a deeper understanding of their international partners' laws, policies, procedures, and challenges. This knowledge provides critical support for coordinated enforcement and promotes cooperation and convergence towards sound policy.

92. The Division's technical assistance programs provide support to countries developing competition laws, agencies, and enforcement systems, offering practical advice on a myriad of topics such as merger enforcement, remedies, and leniency

programs. In FY 2016, Division attorneys and economists traveled to Argentina, El Salvador, Honduras, Hungary, India, South Korea, Mexico, Peru, Poland, Ukraine and Vietnam. A total of 20 travelers participated in 18 different technical cooperation programs.

93. During the last year, the Division expanded its Visiting International Enforcers Program. The program is designed to increase mutual understanding and enhance relations with enforcement partners. This past year, as a part of this program, the Division hosted enforcers from the United Kingdom's Competition and Markets Authority (CMA), and the Directorate General for Competition at the European Commission (DG Comp); while sending a Division economist to the CMA and an attorney to DG Comp. For the first time, the Division's New York Office is participating in a secondment with the United Kingdom's Financial Conduct Authority by integrating a member of FCA staff into their office for six months.

6. Regulatory and Trade Policy Matters

6.1. Regulatory Policies

6.1.1. DOJ Activities: Federal and State Regulatory Matters

94. On April 12, 2017, in response to a state legislator's request for comment, the FTC and the Department issued a joint statement commenting on proposed legislation in Alaska that would repeal the state's certificate-of-need laws. Certificate-of-need laws require healthcare providers to obtain state authorization before making certain investments or providing certain services. The Department and the FTC urged Alaska to repeal its certificate-of-need laws because such laws create barriers to entry and expansion of competing services, limit consumer choice, and stifle innovation. See https://www.justice.gov/atr/case-document/335898.

95. On November 29, 2016, the Department responded to a state legislator's request and issued a statement addressing proposed Michigan legislation affecting the regulation of telehealth in that state. Among other things, the bill would provide for flexibility in how patients may provide consent for telehealth treatments and allow authorized health professionals to prescribe drugs that are non-controlled substances through telehealth services. The Department stated that the bill could encourage competitive benefits through further entry and innovation in the market and through greater access to services appropriately provided through telehealth. See https://www.justice.gov/atr/page/file/913876/download.

96. On June 10, 2016, the Department and the FTC submitted a joint statement regarding proposed North Carolina legislation that would allow websites to generate legal forms for consumers without constituting "the practice of law," which requires a state license. The statement recommended that North Carolina consider the competitive benefits of permitting websites to offer this type of interactive service and narrowly tailor its consumer protection restrictions to well-grounded concerns of consumer harm. The Department and the FTC pointed out that such web services may be more cost-effective for some consumers, exert downward price pressure on licensed lawyer services, and promote more efficient and convenient access to legal services. *See* https://www.justice.gov/atr/file/866666/download.

97. On November 28, 2016, the Department and the FTC submitted comments to the U.S. Federal Energy Regulatory Commission (FERC) regarding how FERC assesses market power in the agency's review of mergers and electricity sales rates under the Federal Power Act. The Agencies encouraged FERC to look beyond market share and concentration statistics in this analysis, which should ultimately be aimed at understanding the competitive effects of proposed transactions. Due to features specific to electricity markets, even firms with relatively small market shares may be able to exercise market power, and so other evidence should be considered in determining whether, for *exa*mple, a proposed combination of assets would enhance the ability and incentive of a firm to raise prices. *See* https://www.justice.gov/atr/page/file/913741/download.

98. On two occasions, on September 19, 2016 and November 22, 2016, the Division offered comments to the Federal Maritime Commission urging it to closely scrutinize anticompetitive "alliance" agreements between significant competitors in the market for ocean container shipping services. The Division raised a number of significant concerns that the agreements would facilitate collusion or otherwise enable anticompetitive conduct that goes beyond the scope of the Shipping Act. *See* https://www.justice.gov/atr/page/file/913521/download and https://www.justice.gov/atr/file/909131/download.

6.1.2. FTC Staff Activities: Federal and State Regulatory Matters

99. **Health Care.** On September 14, 2016, the Agencies filed a joint *amicus curiae* brief urging the U.S. Court of Appeals for the Fifth Circuit to dismiss an appeal by the Texas Medical Board of a district court decision holding that Board regulations restricting telehealth services may be challenged under federal antitrust laws. The brief argues that the Fifth Circuit lacks jurisdiction to hear the appeal. But even if that court has jurisdiction, the brief explains, the court should affirm the district court's order and reject the Board's argument that its rules are shielded from federal antitrust scrutiny by the "state action" doctrine. *See* https://www.ftc.gov/news-events/press-releases/2016/09/amicus-brief-filed-ftc-doj-urges-appeals-court-dismiss-appeal.

100. **Health Care.** On May 18, 2016, the Federal Trade Commission staff and the Department of Justice's Antitrust Division, in response to a request by Puerto Rico Representative Jose L. Báez Rivera, submitted a statement encouraging the Puerto Rico legislature to consider expanding the scope of practice for optometrists. Rep. Báez Rivera asked for the agencies' views on the possible competitive impact of Puerto Rico Senate Bill 991 (SB 991), which would permit optometrists in Puerto Rico to use and prescribe medications to diagnose and treat eye diseases. All states, the District of Columbia, and other U.S. territories currently grant licensed optometrists some authority to use and prescribe medications. The statement is limited to SB 991's proposed expansion of optometrists' authority to use and prescribe medications and its competitive effects. The statement describes the potential benefits to patients of enhanced competition among eye care providers, which may include improved access and lower prices. It recommends that the legislature "only maintain those restrictions necessary to ensure patient health and safety." *See* https://www.ftc.gov/news-events/press-releases/2016/05/federal-antitrust-agencies-submit-joint-statement-encouraging.

101. **Health Care.** On February 18, 2016, the Agencies, in response to a request by Massachusetts State Representative Bradley H. Jones, submitted a statement encouraging the Massachusetts legislature to consider expanding the services that optometrists can

provide to glaucoma patients. Specifically, Representative Jones asked the agencies for views on the possible competitive impact of Massachusetts House Bill 1973 (HB 1973), which would expand the scope of practice for optometrists in Massachusetts by permitting them to treat glaucoma and other optical diseases. *See* https://www.ftc.gov/news-events/press-releases/2016/02/federal-antitrust-agencies-submit-joint-statement-encouraging.

102. **Health Care.** On January 11, 2016, in response to a request by South Carolina Governor Nikki Haley, the Agencies submitted a statement regarding the competitive implications of certificate-of-need (CON) laws and South Carolina House Bill 3250 – a legislative proposal that ultimately would repeal South Carolina's CON laws. The statement explains that the Agencies historically have urged states to consider repeal or reform of their CON laws because they can prevent the efficient functioning of health care markets, and thus can harm consumers. As the statement describes, CON laws create barriers to expansion, limit consumer choice, and stifle innovation. They can also deny consumers the benefit of an effective remedy for antitrust violations and can facilitate anticompetitive agreements. In addition, incumbent providers seeking to thwart or delay entry by new competitors may use CON laws to that end. Arguments favoring CON laws have not been supported by evidence. *See* https://www.ftc.gov/news-events/press-releases/2016/01/agencies-submit-joint-statement-regarding-south-carolina.

103. **Energy.** On November 25, 2015, in response to comments that other parties filed concerning the Revenues White Paper, FTC staff submitted a comment in the New York State Public Service Commission's ("NY PSC's") Reforming the Energy Vision ("REV") proceeding regarding that agency's "Staff White Paper on Ratemaking and Utility Business Models" (Revenues White Paper). The REV proceeding seeks, among other things, to restructure New York State's electricity distribution system in the face of a number of key developments, such as technical advances in distributed energy resources, increased concerns about the environmental effects of power generation, and consumers' interest in customized electricity services. *See* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-staff-advises-new-york-state-public-service-commission.

104. **Health Care.** On November 19, 2015, FTC staff filed an *amicus curiae* brief in the U.S. Court of Appeals for the Third Circuit urging the court to reverse a district court ruling that an alleged reverse-payment settlement of patent litigation did not violate the antitrust laws, in part, because the FTC did not object to the proposed settlement when the companies submitted it to the agency. *See* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-amicus-brief-urges-appeals-court-reverse-district-court.

105. **Price Discrimination.** On November 5, 2015, the FTC filed an *amicus curiae* brief in the U.S. Court of Appeals for the Seventh Circuit urging the court to reverse a district court decision finding that the mere sale of large-sized packages to one merchant but not another could violate Section 2(e) of the Robinson-Patman Act. The Act is a federal antitrust statute that forbids companies from engaging in specified practices involving discriminatory pricing and product promotion in connection with products sold to merchants for resale. In August 2016 the U.S. Court of Appeals endorsed the FTC's arguments, finding that the relevant provisions must be narrowly construed so as to be consistent with the purposes of the Act and antitrust law as a whole. *See* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-amicus-brief-urges-appeals-court-reverse-decision-case.

106. **Health Care.** On November 3, 2015, FTC staff submitted written comments on the competitive impact of legislative proposals to modify the supervision requirements

imposed on Advanced Practice Registered Nurses ("APRNs") in South Carolina. The comments responded to a request from South Carolina State Representative Jenny A. Horne. According to the comment by staff of the FTC's Office of Policy Planning and its Bureaus of Competition and Economics, House Bill 3508 would impose more supervision requirements on most APRN categories, including nurse practitioners, certified nurse midwives, and clinical nurse specialists. House Bill 3078 would remove some supervision requirements, allowing APRNs to diagnose, order tests and therapeutics, and write prescriptions without a formal agreement with a particular supervising physician. *See* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-staff-south-carolina-should-consider-competitive-impact.

107. **Health Care.** On October 1, 2015, FTC staff filed an *amicus curiae* brief before the U.S. Court of Appeals for the Third Circuit explaining that the district court made significant analytical errors in ruling for defendants in a dispute involving allegations of pharmaceutical "product hopping." The brief explains that, in examining whether such conduct is unlawful, courts should account for the unique aspects of the pharmaceutical marketplace, including the nature of competition between branded pharmaceutical products and their generic counterparts. *See*https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-state-board-dental-examiners/141006tsbdecomment1.pdf
https://www.ftc.gov/news-events/press-releases/2015/10/ftc-files-amicus-brief-explaining-pharmaceutical-product-hopping

6.2. DOJ and FTC Trade Policy Activities

108. The Agencies are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Agencies participate in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative, and provide antitrust and other legal advice to U.S. trade agencies. In addition, the Division works with other Department components (including the Civil, Criminal, and Environmental and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole. The FTC also participates in certain interagency trade policy discussions that involve competition policy issues.

109. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. In FY16 the DOJ and the FTC participated in competition policy discussions and negotiations associated with the Trans-Pacific Partnership ("TPP") and the Transatlantic Trade and Investment Partnership ("TTIP").

7. New Studies Related to Antitrust Policy

7.1. Joint DOJ/FTC Conferences, Reports

110. **Defense Industry.** On April 12, 2016, the Agencies issued a joint statement reaffirming the importance of preserving competition in the defense industry. The statement describes the Antitrust Agencies' framework for analyzing defense industry mergers and acquisitions and emphasizes that the Agencies work closely with the Department of Defense, which is in a unique position to assess the impact of proposed defense industry consolidation. *See* https://www.ftc.gov/news-events/press-

releases/2016/04/ftc-doj-issue-joint-statement-preserving-competition-defense.

7.2. FTC Conferences, Reports, and Economic Working Papers

7.2.1. Conferences and Workshops

111. **Solar Energy.** On June 21, 2016, the FTC held a public workshop to explore competition and consumer protection issues that may arise when consumers generate their own electric power by installing home solar photovoltaic ("PV") panels – a practice known as solar distributed generation ("DG"). The workshop explored topics including, but not limited to, the current state of the solar power industry, anticipated technological advancements, and competition among solar DG firms, between solar DG firms and regulated utilities, and between solar generation and other power generation technologies. *See* https://www.ftc.gov/news-events/events-calendar/2016/06/something-new-under-sun-competition-consumer-protection-issues.

112. **Auto Distribution Workshop.** On January 19, 2016, the FTC held a public workshop to explore competition and related issues in the context of state regulation of motor vehicle distribution, and to promote more informed analysis of how these regulations affect businesses and consumers. The workshop, consisting of presentations and discussion, focused on the following topics: (1) regulation of dealer location; (2) laws relating to reimbursement for warranty services; (3) restrictions on manufacturers' ability to engage in direct sales to consumers; and (4) new developments affecting motor vehicle distribution, such as autonomous vehicles, connected cars, and the rise of subscription-based automobile sharing services. *See* https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends.

113. **Eighth Annual Microeconomics Conference.** On November 12-13, 2015, the FTC held its eighth annual conference on microeconomics, bringing together researchers from academia, government agencies, and other organizations to discuss economic issues in antitrust and consumer protection. *See* https://www.ftc.gov/news-events/events-calendar/2015/11/eighth-annual-federal-trade-commission-microeconomics-conference.

7.2.2. Reports

114. **Patent Settlements.** On January 13, 2016, the FTC issued a report on drug patent settlements. The report summarized data on patent settlements and showed that potential "pay-for-delay" deals decreased substantially in the first year since the Supreme Court's *Actavis* decision. *See* https://www.ftc.gov/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement-0.

7.2.3. Bureau of Economics Working Papers

115. The FTC's Bureau of Economics issued the following working papers during FY 2016. The papers are *available at* https://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers.

- Mass-Market Consumer Fraud: Who is Most Susceptible to Becoming a Victim?, September 2016
- Direct-to-Consumer Advertising and Online Search, August 2016
- You Can't Take it With You: Appliance Choices and *the Energy Eff*iciency Gap, July 2016

- Industrial Reorganization: Learning about Patient Substitution Patterns from Natural Experiments, May 2016
- The Determinants of Plant Exit: The Evolution of the U.S. Refining Industry, November 2015
- Simulating a Homogeneous Product Merger: A Case Study on Model Fit and Performance, October 2015

7.3. DOJ Economic Working Papers

7.3.1. DOJ Economic Analysis Group Discussion Papers

116. The DOJ Economic Analysis Group issued the following paper during FY 2016. The papers are *available at* https://www.justice.gov/atr/discussion-paper-after-2006.

- Danial Asmat, Collusion Along the Learning Curve: Theory and Evidence from the Semiconductor Industry, EAG 16-4, August 2016
- Russell Pittman, The Strange Career of Independent Voting Trusts in U.S. Rail Mergers, EAG 16-3, July 2016
- Nathan H. Miller, Marc Remer, Conor Ryan and Gloria Sheu, Upward Pricing Pressure as a Predictor of Merger Price Effects, EAG 16-2, March 2016
- Danial Asmat and Sharon Tennyson, Tort Liability and Settlement Failure: Evidence on Litigated Auto Insurance Claims, EAG 16-1, January 2016

7.3.2. Appendices

Department of Justice: Fiscal Year 2016 FTE[2] and Resources by Enforcement Activity

	FTE	Amount ($ in thousands)
Criminal Enforcement	276	$65,991
Civil Enforcement	413	$98,986
Total	689	$164,977

[2] An "FTE" or "full time equivalent" refers to one employee working full time for a full year. Because the number of employees fluctuates throughout the year through hiring, attrition, and varying schedules, an agency typically has more employees than FTEs (e.g., two employees working 20 hours per week for one full year equals one FTE).

Federal Trade Commission: Fiscal Year 2016 Competition Mission FTE and Dollars by Program, Bureau & Office		
	FTE	**Amount($ in thousands)**
Total Promoting Competition Mission	554	135,675
Premerger Notification	19	3,364
Merger & Joint Venture Enforcement	207	36,383
Merger & Joint Venture Compliance	11	1,949
Non-merger Enforcement	135	23,803
Bureau of Economics	14.1	2,425.4
Non-merger Compliance	2	348
Antitrust Policy Analysis	27	4,824
Other Direct	20	3,527
Bureau of Economics - Regional Offices	2.50.4	705.8195.7
Support	133146	61,47759,713