Prepared Statement of
the Federal Trade Commission

Before the
Subcommittee on Antitrust, Commercial and Administrative Law
Of the Judiciary Committee
United States House of Representatives

"Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies"

Washington, D.C.
November 13, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Joe Simons, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission regarding some of our current competition enforcement activities and policy priorities.[1]

For over 100 years, the FTC has worked to ensure that our nation's markets are open, vibrant, and working for American consumers. We accomplish these goals through targeted yet vigorous enforcement of the nation's antitrust and consumer protection laws, and by using our unique set of research and policy tools. Though the U.S. economy is always evolving, the FTC's structure, research capacity, and committed staff enable us to protect consumers and promote competition in an ever-changing marketplace. This testimony highlights a number of recent FTC competition enforcement matters, with notable victories in stopping anticompetitive mergers and conduct—including in digital markets that are of interest to this Committee and others. We also provide an update on some of our more significant policy initiatives, and briefly highlight some of our advocacy work, both here and abroad.

I. FTC Competition Enforcement

The Commission promotes competition through a rigorous, fact-intensive approach to law enforcement. The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers and their wallets, such as health care, pharmaceuticals, consumer products and services, technology, manufacturing, and energy. The FTC shares primary jurisdiction with the U.S. Department of Justice's Antitrust Division ("DOJ") (collectively, "the agencies") in enforcing the nation's antitrust laws.

[1] This written statement represents the views of the Federal Trade Commission. The oral presentation and responses to questions by Chairman Simons are his own, and do not necessarily reflect the views of the Commission or of any other Commissioner.

A. Maintaining Competition through Robust Merger Enforcement

One of the agencies' principal responsibilities is to prevent mergers that may substantially lessen competition. Under the Hart-Scott-Rodino ("HSR") Act, parties to certain mergers and acquisitions must notify the FTC and DOJ of their intent to merge, and must observe a statutory waiting period before consummating their transactions. In general, since FY 2013, these premerger filings have increased steadily; last year, for the second year in a row, we received just over 2,000 HSR filings.[2]

Most reported transactions do not raise significant competition concerns, and the agencies clear non-problematic transactions expeditiously. But when the evidence suggests that a proposed transaction is likely to harm competition, the Commission does not hesitate to intervene. In FY 2019, the FTC challenged 21 mergers. Most of these matters were resolved with the parties through consent decrees that preserved pre-merger levels of competition.

Over the past two years, the Commission has challenged seven mergers in court, and the agency's litigation staff compiled an impressive record of success so far. Of the five challenges that occurred in FY 2018, federal courts granted preliminary injunctions in two cases;[3] the parties abandoned their mergers in the face of our court challenge in two other cases;[4] and the

---

[2] The agencies received 2,100 HSR filings in FY 2018, a slight increase from FY 2017, where we received 2,052. Apart from these two years, the last time HSR filings exceeded 2,000 was in FY 2007.

[3] *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018) (granting preliminary injunction); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27 (D.D.C. 2018) (granting preliminary injunction). The agency also won a full administrative trial on the merits in the *Tronox* matter before an administrative law judge, before the parties ultimately settled with the agency. FTC Press Release, *FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger* (Apr. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used.

[4] J.M. Smucker Co. abandoned its planned acquisition of Conagra's Wesson cooking oil brand after the FTC filed suit in March 2018. FTC Press Release, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco Owner, J.M. Smucker Co.* (Mar. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil. CDK abandoned its plans to purchase rival software vendor Auto/Mate after the Commission initiated litigation in March 2018. *In re CDK Global & Auto/Mate*, Dkt. 9382 (Mar. 20, 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

Commission recently issued an opinion upholding an administrative law judge's initial decision finding liability in the fifth matter.[5] These cases raised competition issues all across the U.S. economy, implicating markets for specialized software, medical devices, industrial chemicals, and familiar consumer staples.

FY 2019 was no different, with the Commission continuing to initiate litigation when necessary to prevent anticompetitive harm. For instance, the Commission filed a motion for a preliminary injunction to block Evonik Industries AG's proposed $625 million acquisition of PeroxyChem Holding company.[6] The complaint alleges that the merger of the chemical companies would substantially reduce competition in both the Pacific Northwest and the Southern and Central United States for the production and sale of hydrogen peroxide, a commodity chemical that has a variety of end uses including bleaching pulp, de-inking recycled paper, and sterilizing food and beverage packaging. The FTC has asked the federal district court to enjoin the merger pending the outcome of an administrative trial, which is scheduled to begin January 22, 2020.

In September, the Commission issued an administrative complaint to block a merger between two of the "Big 4" largest title insurance underwriters in the nation, in order to preserve the beneficial competition that plays out in everyday real estate transactions across the United States. The complaint alleged that Fidelity National Financial, Inc.'s proposed $1.2 billion acquisition of Stewart Information Services would substantially lessen competition in state markets for title insurance underwriting for large commercial transactions, and in several local

[5] In December 2017, the FTC challenged the consummated merger of two manufacturers of prosthetic knees controlled by microprocessors. On November 1, 2019, after a full administrative trial, the Commission upheld the administrative complaint challenging the merger and ordered a divestiture of the acquired business. *In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378, Comm'n Op. (Nov. 6, 2019), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf.

[6] FTC Press Release, *FTC Challenges Proposed Merger of Two Hydrogen Peroxide Producers* (Aug. 2, 2019), https://www.ftc.gov/news-events/press-releases/2019/08/ftc-challenges-proposed-merger-two-hydrogen-peroxide-producers.

markets for title information services.[7] Although the Commission has required the divestiture of title plant assets in prior mergers involving Fidelity,[8] for the first time the Commission also alleged that the elimination of competition would likely harm customers seeking to purchase title insurance for large commercial transactions. The Commission authorized staff if necessary to seek preliminary relief to prevent the merger pending an administrative trial, which was scheduled to begin in February 2020. The parties abandoned the transaction after the Commission issued its complaint.[9]

One increasing challenge for the Commission in litigating competition cases is the need to hire testifying economic experts. Vigorous enforcement requires the right tools, and qualified experts are a critical resource in every FTC competition case where litigation appears likely. Over the last five years, our annual expert costs for competition matters have risen significantly. In FY 2014, the agency spent just $4.84 million on expert fees in competition cases. In FY 2018, we spent $15.84 million. For a small agency like the FTC, cost changes of this magnitude are challenging to absorb.

We are taking steps to manage these increasing expenses more aggressively, but long-term, structural changes in the economy likely mean that the cost of expert work will continue to grow.[10] Although the FTC has so far managed to allocate sufficient resources to fund the experts needed to support our cases, the agency is reaching the point where we will be unable to meet

---

[7] *In re Fidelity National Financial, Inc.*, Dkt. 9385 (Sept. 6, 2019), https://www.ftc.gov/enforcement/cases-proceedings/181-0127/fidelity-national-financialstewart-information-services.
[8] *See, e.g., In re Fidelity National Financial, Inc.*, Dkt. C-4425 (Dec. 24, 2013), https://www.ftc.gov/enforcement/cases-proceedings/131-0159/fidelity-national-financial-inc-lender-processing-services.
[9] FTC Press Release, *Statement of Bruce Hoffman, Director of FTC's Bureau of Competition, on Fidelity National Financial, Inc.'s Decision to Drop Proposed Acquisition of Stewart Information Services Corporation* (Sept. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/statement-bruce-hoffman-director-ftcs-bureau-competition-fidelity.
[10] Today, companies can create and store vast amounts of data about their operations. These richer datasets may enable our testifying experts to conduct higher quality empirical work, but their complexity also requires more review and analysis, and therefore much more time and effort by our experts and their support staff.

these needs without compromising our ability to fulfill other aspects of the mission. The Commission appreciates Congress's attention to our resource needs, including the need to continue to hire qualified outside experts to support effective antitrust enforcement.

B. Combatting Anticompetitive Conduct in Pharmaceutical Markets

The FTC maintains a robust program to identify and stop anticompetitive conduct, especially in the nation's critical markets for health care. We appreciate the bipartisan work of this Committee to enable the Commission to address conduct more effectively by drug companies that limits competition and keeps drug prices high.

For over 20 years, and on a bipartisan basis, the Commission has prioritized ending anticompetitive "reverse payment" agreements in pharmaceutical markets.[11] These agreements involve the branded drug supplier paying a generic firm to abandon its patent challenge and agree not to sell its lower-cost generic product for a period of time. The payment allows the branded company to ensure a period in which it can maintain higher market prices—increasing U.S. health care costs—without the threat of generic competition.

In 2013, the Commission won a critical victory in *FTC v. Actavis*[12] when the U.S. Supreme Court clarified that pay-for-delay arrangements can violate the antitrust laws. This year brought another important milestone in the Commission's long-running effort to combat anticompetitive reverse payment settlements: on the eve of trial, the defendants agreed to settle the original case that led to the Supreme Court's landmark *Actavis* decision. Although we are delighted with the progress on the reverse payment front, we recognize that the economic incentives to engage in this conduct remain in place today, necessitating continued antitrust

[11] *See generally* Fed. Trade Comm'n, Pay for Delay: When Drug Companies Agree Not to Compete, https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay (gathering materials related to the history of the FTC's efforts on this issue).
[12] *FTC v. Actavis*, 570 U.S. 756 (2013).

enforcement. For example, in March of this year, the Commission unanimously held that Impax Laboratories and Endo Pharmaceuticals had entered into a reverse payment arrangement that delayed generic entry of Opana ER, an extended release opioid used for pain relief.[13]

At the time of the *Actavis* decision, critics of our enforcement work warned that using antitrust enforcement to stop reverse payment arrangements would have dire consequences; they cautioned that settlement of pharmaceutical patent disputes would become difficult or impossible, and eventually would reduce generic firms' investment in new products. But post-*Actavis* data tell a different story.[14] The agency's sustained attack on reverse payment arrangements has not chilled patent litigation settlements under the Hatch-Waxman Act. Rather, the number of pharmaceutical patent litigation settlements reported to the FTC has actually *increased* dramatically since *Actavis* was decided.[15] What has changed is that pharmaceutical companies use far fewer anticompetitive reverse payments in their patent litigation settlements. Back in FY 2006-2007, just under half of all reported settlements included some form of reverse payment provision.[16] In FY 2016, that number fell to just one settlement out of 232 reported.[17] In

[13] FTC Press Release, *FTC Concludes that Impax Entered Into Illegal Pay-for-Delay Agreement* (March 25, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-concludes-impax-entered-illegal-pay-delay-agreement. Endo previously settled these allegations with the agency. FTC Press Release, *Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges; FTC Refiles Suits Against Generic Defendants* (Jan. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/endo-pharmaceuticals-inc-agrees-abandon-anticompetitive-pay-delay.

[14] For over 15 years, pharmaceutical companies have been required to report to us when they settle patent disputes so we can assess whether those settlements contain potentially problematic provisions. This information allows us to better track trends. These reporting requirements, which Congress included in the *Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, have been extraordinarily helpful in not only identifying potential enforcement matters, but also providing policymakers with greater transparency. Congress recently extended these reporting requirements to settlements involving biologics and biosimilars; this new information will be included in the FTC's annual reports beginning in FY 2019.

[15] In the three years before *Actavis*, the agency, on average, received 139 final settlements annually. In FY 2016, we received 232 final settlements. *See* Bradley S. Albert & Jamie Towey, *Then, now, and down the road: Trends in pharmaceutical patent settlements after* FTC v. Actavis (May 28, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent.

[16] *Id.*

[17] *Id.*

short, the FTC's efforts, though they continue to be very resource intensive, are helping to ensure that lower-cost generics come onto the market sooner, saving U.S. consumers billions of dollars.

In another matter involving pharmaceutical market competition, earlier this year the agency announced a settlement with Reckitt Benckiser, resolving allegations related to that firm's efforts to thwart generic competition to the company's Suboxone product, which is used to treat opioid addiction.[18] The FTC's complaint alleged that the company made knowingly false statements to the FDA, while engaging in a so-called "product hopping" scheme to shift existing patients away from the product about to face generic competition and onto another, more lucrative product that enjoyed patent protection and provided no legitimate incremental benefits. This is the first time the agency has brought a case under this theory.

To obtain FDA approval for a generic product, a generic pharmaceutical company must obtain samples of the corresponding brand product and conduct testing to verify that the generic version has the same therapeutic effect. Brand companies can use closed distribution systems and refuse to sell such samples to generics, thereby blocking the ability of companies to file a generic application. This conduct can occur in the context of FDA-mandated risk evaluation and mitigation strategies ("REMS") safety programs, which by law are not to be used to prevent competition, or via voluntary systems adopted by the brand company. The FTC supports legislative efforts to end this anticompetitive strategy while maintaining the FDA's ability to appropriately restrict the distribution of dangerous drugs.

The agency will continue to monitor this space carefully, and we will not hesitate to take vigorous action to protect the integrity of U.S. pharmaceutical markets where warranted.

---

[18] FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc.

C. Competition in Technology Markets

New technologies can offer real consumer benefits, but they can also raise complex and sometimes novel competition issues. We have prioritized efforts to monitor, study, and, where necessary, bring enforcement actions to maintain competition in technology markets. We are undertaking these efforts not only in connection with the technology platforms that are the focus of this Committee's ongoing investigation, but also with respect to technologies employed by companies throughout the economy that are changing and challenging competition. The FTC's Bureau of Competition this year announced a shift in internal resources to establish a Technology Enforcement Division,[19] a dedicated group that will monitor competition in U.S. technology markets and recommend enforcement action when warranted.

Recently, the FTC voted unanimously to initiate litigation in federal court against Surescripts.[20] The FTC's complaint alleges that Surescripts is a monopolist in two two-sided platform markets associated with electronically transmitted drug prescription information.[21] The complaint alleges that Surescripts structured its contracts to lock customers into exclusive arrangements, providing "loyalty" discounts that would make it unattractive for buyers to shift their business away to Surescripts' rivals. Through a web of exclusive arrangements and other exclusionary conduct, the complaint alleges, Surescripts was able to protect its dominant position in these markets, to the detriment of U.S. consumers.

---

[19] Patricia Galvin & Krisha Cerilli, *What's in a Name? Ask the Technology Enforcement Division* (Oct. 16, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division; *see also* FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology. This specialized group includes seasoned career attorneys with significant prior experience in complex markets, including markets for online advertising, social networking, mobile device markets, and technology platforms, and will include a technology fellow who will provide technical support to the division.

[20] FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[21] *Id.*

In another recent matter, the Commission ruled that 1-800 Contacts had unlawfully entered into agreements with rivals to restrict the scope of truthful, non-deceptive online advertising.[22] The conduct at issue involved agreements among competitors not to bid in auctions for certain keywords conducted by online search sites. The Commission found that consumers were deprived of information they could have used to compare and evaluate offerings from competing online sellers to obtain lower priced contacts. As the Commission learned through its earlier research program on advertising restrictions, agreements among competitors to restrict otherwise lawful advertising can blunt competitive rivalry and thereby reduce competitive pressure.[23] The FTC continues to monitor closely the behavior of participants in these and other critical technology markets.

As outlined in Commission testimony from last month,[24] current law provides the Commission with several potential avenues to counter anticompetitive conduct by large technology firms that seek to thwart nascent and potential threats by acquisition or other means. For instance, when evaluating mergers in dynamic markets, the Commission pays particularly close attention when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales. Last year, the FTC relied on Section 7 of the Clayton Act to challenge the merger of market leader CDK Global and its far smaller competitor, Auto/Mate, because Auto/Mate's outsized impact meant that the merger would dampen competition from a key emerging rival. According to the complaint, the transaction would have

---

[22] FTC Press Release, *FTC Commissioners Find That 1-800 Contacts Unlawfully Harmed Competition In On-Line Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers* (Nov. 14, 2018) https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed. Commissioner Noah Joshua Phillips dissented, and Commissioner Christine Wilson did not participate. This matter is currently on appeal.

[23] *See, e.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

[24] Prepared Statement of the Federal Trade Commission before the S. Comm. on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf.

reduced competition in the already-concentrated market for specialized platform business software used by U.S. franchise automotive dealers, known as dealer management systems.[25] The Commission also is mindful that this kind of dynamic analysis may be required when the relevant products involve data. For example, in 2014 the Commission moved to block Verisk Analytics, Inc.'s proposed acquisition of EagleView, alleging that the proposed transaction would result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by insurers to estimate repair costs for property damage claims.[26] Verisk had recently entered into direct competition with EagleView by developing its own library of high-resolution aerial images, and the elimination of the firms' ever-closer competition would likely lead to higher prices and reduced incentives to innovate.

The Commission has relied on a theory of potential competition to require relief in numerous pharmaceutical markets where one firm had a product on the market while the other merging firm had a product in development that would likely provide important competition in the near future.[27] The FDA must approve pharmaceutical products in specific stages, which provides a degree of transparency and predictability as to the timing of potential entry of a new drug. Moreover, the Commission's experience in pharmaceuticals markets allows us to project the likely procompetitive effect of a new drug.[28] Of course, there are always challenges to

---

[25] *In re CDK Global*, Dkt. 9382 (complaint filed Mar. 20, 2018). Shortly after the FTC issued its complaint, the parties abandoned their proposed transaction.

[26] FTC Press Release, *FTC Challenges Verisk Analytic, Inc.'s Proposed Acquisition of EagleView Technology Corporation* (Dec. 16, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition. The parties dropped their plans after the Commission issued its complaint.

[27] *See* Fed. Trade Comm'n, *Overview of Action in Pharmaceutical Products and Distribution* (August 2018), list of cases included in Potential Competition Mergers, at 60-67 and Innovation Market Mergers at 67-68, https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_august_2018.pdf.

[28] Fed. Trade Comm'n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* ii-iii (2011), http://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf (the first generic competitor's product is typically offered at a 20 to 30 percent discount to the brand product); Fed. Trade Comm., *Pay-For-Delay: How Drug Company Pay-offs Cost Consumers Billions* 8 (2010), http://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-

predicting future entry and convincing a court that entry is likely.[29] Future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question.[30]

In markets beyond the pharmaceutical arena, the Commission has applied a similar analysis where neither of the merging firms has a commercially available product, but both are among only a few likely entrants into a future market. For example, in the 2013 merger involving Nielsen and Arbitron, both companies were developing cross-platform measurement services to measure viewership across TV, the Internet, and other platforms. Both firms had developed plans, invested money, and reached out to customers to begin marketing beta versions of those products. Based on these independent efforts, customers believed that Nielsen and Arbitron eventually would compete directly to provide national syndicated cross-platform measurement services. The Commission concluded that each company could be considered a likely future entrant, and that eliminating the future offering of one firm would likely lessen competition.[31]

Under certain circumstances, the acquisition of an emerging or nascent competitor may constitute anticompetitive conduct that illegally maintains a monopoly position. In 2017, the FTC charged that Questcor illegally maintained its monopoly in the United States for a drug

---

cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf (subsequent generic entry creates greater price competition, with discounts of 85 percent or more off the price of the brand name drug).

[29] In *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015), the district court rejected the Commission's motion for a preliminary injunction to stop the merger of Steris Corporation, one of only two companies providing sterilization services to medical device firms in the United States, and Synergy Health plc, a British company with plans to expand into the United States with a new, possibly superior, sterilization technology. The court found that Synergy's entry was not probable if the merger did not occur, and allowed the merger to proceed. The Commission later dismissed its administrative complaint. *In re Steris Corp. and Synergy Health plc*, Dkt. No. 9365 (May 29, 2015).

[30] In a typical horizontal merger, competitive concerns arise from a merger that eliminates actual and direct competition between the merging parties. In a merger between an established incumbent and a potential entrant, the competitive concern arises from the elimination of the possibility of direct competition that does not currently exist, and will not be realized if the merger proceeds.

[31] *In re Nielsen Holdings, N.V. and Arbitron Inc.*, Dkt. C-4439 (Sept. 20, 2013), https://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter. The Commission approved the divestiture of Arbitron's cross-platform audience measurement services to comScore, Inc.

called Acthar that treated infantile spasms and other conditions. Outside of the United States, another drug, Synacthen, was sold in direct competition with Acthar. Questcor (later acquired by Mallinckrodt) bought the U.S. rights to Synacthen, outbidding several other companies for those development rights. The anticompetitive effects of this conduct were substantial because it deprived consumers of the chance that a competitor to an extraordinarily expensive lifesaving drug would emerge but for the acquisition, and, according to the complaint, Questcor had no legitimate business purpose for buying Synacthen other than eliminating a nascent competitor that threatened its Acthar monopoly. In the stipulated final order, Mallinckrodt agreed to pay $100 million in equitable monetary relief in addition to divesting the Synacthen assets.[32]

Given the importance of these markets to consumers and to the economy, the Commission is committed to vigorous enforcement of the antitrust laws to promote current and future competition in critical technology markets.

II. Competition Policy Work

Although the Commission primarily relies on targeted law enforcement to protect competition and consumers, we also have robust research and policy functions. We do independent research; we conduct public workshops; and we share our expertise on competition issues with interested policymakers through our active amicus and advocacy programs.

Critical self-evaluation is an important part of our research agenda. For instance, in 2017, the FTC released a large retrospective study of remedies associated with mergers completed from 2006 through 2012.[33] The findings of this study helped to refine agency best practices

[32] FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[33] *See* Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, January 2017, at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

related to the merger remedy process. The Commission's Bureau of Economics also has a longstanding program to perform retrospective studies of consummated mergers, which began in the early 1980s and recently has become considerably more active. Probably the most prominent of the FTC's retrospective studies so far is the hospital merger retrospective project, which played a crucial role in reinvigorating the agency's hospital merger enforcement efforts.[34] FTC economists also have completed a number of retrospective analyses of horizontal and vertical transactions in health care, oil-related markets, consumer products markets, and retailing.[35]

FTC studies also can inject competition considerations into broader policy questions of significant public interest. A recent example is the 2016 Patent Assertion Entity study,[36] which evaluated the business practices of patent assertion entities ("PAEs"), firms that acquire patents in order to attempt to generate revenue by licensing or suing accused infringers. The report provided several recommendations for patent litigation reforms.

The FTC continues to pursue important competition policy research. In November 2017, the Commission launched a project encouraging academic and industry research on the impact of certificates of public advantage ("COPAs") on prices, quality, access, and innovation in health

---

[34] *See* Joseph Farrell, Paul A. Pautler & Michael G. Vita, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. OF INDUS. ORG. 369 (2009).

[35] *See, e.g.*, Thomas Koch, Brett Wendling, & Nathan Wilson, *The Effects of Physician and Hospital Integration on Medicare Beneficiaries' Health Outcomes* (Bureau of Economics, Working Paper No. 337, July 2018); F. David Osinski & Jeremy Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/Ameristar* (Bureau of Economics, Working Paper, May 2018); Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (Bureau of Economics, Working Paper No. 333, Aug. 2017); Daniel J. Greenfield, Nicholas M. Kreisle, & Mark D. Williams, *Simulating a Homogeneous Product Merger: A Case Study on Model Fit and Performance* (Bureau of Economics, Working Paper No. 327, Oct. 2015); Daniel Hosken, Luke Olson, & Loren Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Bureau of Economics, Working Paper No. 313, Dec. 2012) – Published in the Journal of Economics and Management Strategy (Spring 2018). Research conducted by staff of the Bureau of Economics is available at https://www.ftc.gov/policy/reports/policy-reports/economics-research, and a full list of all completed FTC merger retrospectives is available at https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf.

[36] Fed. Trade Comm'n, Patent Assertion Entity Activity, An FTC Study (Oct. 2016) https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf

care services.[37] COPAs are state regulatory frameworks intended to replace health care provider competition and immunize mergers and collaborations from antitrust scrutiny. The Commission has been concerned about the impact of COPAs on consumers, and has undertaken a broad effort to gather additional evidence on their effects. In particular, the FTC has encouraged original empirical research. At the FTC's June 2019 workshop, current and former staff from the Bureau of Economics discussed preliminary results from three original empirical studies of the price effects of mergers approved in the 1990s.[38] Last month, the Commission issued 6(b) orders to five health insurance companies and two health systems to collect data and information to conduct a retrospective study of two COPAs to examine the effects on prices, quality, access, and innovation for healthcare services, as well as on health system employee wages.[39]

The FTC is in the process of concluding a prominent policy initiative: its *Hearings on Competition and Consumer Protection in the 21st Century*. This extensive series of public hearings was convened to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and competition policy. The current set of hearings was modeled after a similar effort in 1995 by former FTC Chairman Bob Pitofsky, which was the first step in establishing the FTC as a modern center for "competition R&D."

The FTC worked to feature a wide variety of perspectives in these hearings. We invited legal and economic academics and consultants, public interest groups, public advocacy groups,

---

[37] FTC Press Release, *FTC Staff Seeks Empirical Research and Public Comments Regarding Impact of Certificates of Public Advantage* (Nov. 1, 2017) https://www.ftc.gov/news-events/press-releases/2017/11/ftc-staff-seeks-empirical-research-public-comments-regarding.
[38] *See* A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets. (Jun. 18, 2019), at https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.
[39] FTC Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019) https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

and representatives of businesses and industries to our hearing sessions. By the conclusion of our final hearing on June 12, 2019, we had convened 14 sessions over 23 days, with thousands of people attending via webcast or in person. To date, we have received close to 950 unique comments on the covered topics. All the information related to the hearings—the transcripts, comments, presentations, and questions—is available on the FTC website. This large corpus of material on the critical issues facing modern competition and consumer protection policy has already created a valuable resource for future research by the agency, interested academics, practitioners, and policymakers.

At this stage, we are distilling the large volume of stakeholder input and generating further output, such as reports, statements, guidance, and speeches. As we have previously announced, we are prioritizing work involving platform competition, vertical mergers, and international initiatives.[40] This work will be forward-looking and will both support the Commission's enforcement mission and identify additional policy initiatives that may be important in shaping the future development of antitrust law. We expect to begin releasing some of this output soon.

Through these hearings, the Commission intends to help formulate an enduring approach to current questions about antitrust and consumer protection enforcement. We recognize that, in some areas of the law, some now question the policies that have served as the basis for what had long been a bipartisan consensus. Particularly with respect to certain antitrust issues where this consensus has been questioned, we believe these hearings were a valuable investment of our resources to determine whether adjustments are necessary.

[40] Prepared Remarks of Chairman Joseph Simons, 46th Conference on International Antitrust Law and Policy (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544082/simons_-_fordham_speech_on_hearings_output_9-13-19.pdf.

III. International Engagement – Competition

In support of its competition mission and domestic antitrust enforcement, the FTC engages in significant work with international counterparts and organizations. The FTC works regularly with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures. In FY 2019, the FTC cooperated on 36 merger and anticompetitive conduct investigations of mutual concern with counterpart agencies from 21 jurisdictions. Many of these matters involved cooperation with several agencies to achieve effective, sound, and consistent outcomes. For example, with respect to the recent merger of industrial gas suppliers Praxair, Inc. and Linde AG, Commission staff worked cooperatively with staff from the antitrust agencies of Argentina, Brazil, Canada, Chile, China, Colombia, the European Union, India, Korea, and Mexico to analyze the proposed transaction and potential remedies.

The U.S. antitrust agencies also promote convergence toward sound policy through bilateral engagement with foreign competition agencies and by playing a leadership role in multilateral competition organizations. In FY 2019 we held high-level bilateral meetings with colleagues from several competition authorities around the world, including those from Canada, the European Union, India, Japan, Korea, and Mexico. Consistent with our objectives of promoting sound practices and processes, our discussions covered timely issues, including digital platforms, vertical mergers, procedural fairness, and the antitrust treatment of the exercise of intellectual property rights. Fostering both cooperation and convergence, the FTC's technical assistance program conducted 29 missions in 19 jurisdictions in FY 2019, including the placement of resident advisors in the competition agencies of Brazil, the Philippines, and Ukraine. Pursuant to its authority under the US SAFE WEB ACT, the FTC also hosted

"International Fellows" from foreign competition agencies to work directly with FTC staff to gain first-hand understanding of and experience with the practices and approaches that the FTC uses in its enforcement, which they then bring back to their agencies. The FTC has hosted 87 competition officials from 31 jurisdictions since the program's inception in 2007 through the end of FY 2019.

The FTC plays a central role in key multilateral fora dedicated to promoting sound competition policy and enforcement around the world. The FTC serves on the Steering Group of the 139-member International Competition Network ("ICN") and is active in ICN working groups that draft recommendations. For example, the FTC led the development of the ICN Recommended Practices for Investigative Process—the most comprehensive consensus best practices for competition agencies on providing due process in antitrust investigations. We also lead the ICN's efforts to promote implementation of its many work products on key topics such as merger review, the analysis of dominant firm conduct, and the conduct of effective and fair investigations. We will have additional opportunities to showcase successful U.S. experience when the U.S. antitrust agencies jointly host the ICN's annual conference next year.

Finally, the FTC works with other U.S. government agencies to address in a coordinated and effective manner competition issues that implicate broader U.S. policy interests, such as the protection of intellectual property and non-discriminatory treatment of U.S. companies, internationally, *e.g.*, recently with China and Korea. In addition, the FTC worked with the Departments of Treasury, Justice, and State, among others, on developing G7, G20, and OECD ministerial statements to achieve outcomes that furthered U.S. policy and interests involving competition in the digital economy.

IV. Conclusion

The FTC remains committed to marshalling its resources efficiently in order to protect consumers and promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with this Subcommittee and Congress, and we would be happy to answer your questions.