

**Prepared Statement of  
the Federal Trade Commission**

**Before the  
United States Senate  
Committee on the Judiciary  
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

**“Oversight of the Enforcement of the Antitrust Laws”**

**Washington, D.C.  
March 9, 2016**

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission and discuss some of our current competition enforcement activities and priorities.<sup>1</sup>

As members of this Subcommittee know, competitive markets are the foundation of our economy. Years of experience have proven that competitive markets work better than anything else to bring consumers lower prices, greater innovation, and choice among products and services. Effective antitrust enforcement helps ensure that our markets function well and benefit both consumers and businesses alike. As the Supreme Court recently declared in upholding the Commission's decision in *North Carolina State Board of Dental Examiners v. FTC*, “[f]ederal antitrust law is a central safeguard for the Nation’s free market structures.”<sup>2</sup>

For over 100 years, the FTC has worked to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints. Throughout its history, the FTC has fulfilled its mission of protecting American consumers through robust enforcement of the antitrust laws. Those efforts stop anticompetitive mergers and end anticompetitive conduct in crucial sectors of the economy. Moreover, in important areas of competition policy, the FTC has used its unique authority to study industry trends, identify threats to consumer welfare, and advocate for pro-consumer policies to federal, state, and local policymakers so that federal antitrust enforcement can continue to work for the benefit of consumers.

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<sup>1</sup> This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

<sup>2</sup> *North Carolina St. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (“*N.C. Dental*”).

This testimony highlights a number of recent FTC enforcement matters, including notable successes stopping anticompetitive mergers and conduct, as well as competition research and advocacy both domestically and abroad.

## **I. FTC Competition Enforcement**

The Commission seeks to promote competition through a thorough, 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 pocketbooks, such as health care, consumer products and services, technology, manufacturing, and energy. The agency shares primary jurisdiction with the Department of Justice in enforcing the nation's antitrust laws.

### **a. Maintaining Competition through Robust Merger Enforcement**

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Premerger filings under the Hart-Scott-Rodino Act have increased over the past two years, up 32 percent in FY 2015 as compared to FY 2013, and have more than doubled since the depths of the recession.<sup>3</sup> The vast majority of those reported transactions—over 96% in each of the last five years—are cleared during the initial HSR waiting period, meaning only a small fraction of proposed or consummated mergers require additional investigation to determine whether they violate Section 7 of the Clayton Act. During calendar year 2015, the Commission challenged 27 mergers after the evidence showed that they would likely be anticompetitive.

While most of these enforcement actions resulted in negotiated settlements that are designed to preserve competition in the affected markets, the Commission filed suit to block six

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<sup>3</sup> In FY 2015, the Agencies received notice of 1,801 transactions, compared with 1,326 in FY 2013 and 716 in FY 2009.

transactions, four of which are currently pending.<sup>4</sup> This high level of active merger litigation confirms that the Commission will go to court if necessary to prevent mergers that are likely to reduce competition and result in higher prices, reduced quality, or less innovation. Notably, in several of these cases, the merging parties offered potential fixes that the Commission rejected as inadequate to preserve competition.

For example, last June, the FTC, along with 11 states and the District of Columbia,<sup>5</sup> secured a significant victory by successfully blocking the proposed merger between Sysco and US Foods, the two largest broadline foodservice distributors in the United States.<sup>6</sup> Following a two-week trial, a federal district court in Washington, DC, found that the proposed acquisition was likely to violate Section 7 of the Clayton Act and would have substantially lessened competition in broadline foodservice distribution markets, both nationwide and in 32 local markets around the country, leading to higher prices and diminished quality.<sup>7</sup> Although the parties proposed a potential remedy, the court, like the Commission, rejected it. The parties subsequently abandoned the deal, preserving the robust competition between the parties that benefits foodservice customers, including restaurants, hotels, hospitals, and schools.

The FTC is currently litigating before the federal district court in Washington, DC, seeking a preliminary injunction to prevent Staples Inc.'s \$6.3 billion merger with Office Depot, Inc. The Commission alleges that the transaction violates Clayton Act Section 7 by significantly reducing competition in the sale of consumable office supplies, such as pens, folders, and paper,

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<sup>4</sup> During 2015, the Commission entered into 18 consent agreements requiring divestitures. In addition, three transactions were abandoned as a result of antitrust concerns raised during our investigation. Complete data on the FTC's competition workload is available on its website at <https://www.ftc.gov/competition-enforcement-database>.

<sup>5</sup> The following states joined the suit: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia.

<sup>6</sup> Commissioner Ohlhausen voted against filing the complaint in this matter.

<sup>7</sup> *FTC v. Sysco Corp.*, 83 F. Supp. 3d 271 (D.D.C. 2015).

sold to large business customers for their own use.<sup>8</sup> The complaint notes that in competing for contracts, both Staples and Office Depot can provide the low prices, nationwide distribution, and combination of services and features that many large business customers require, such as consistent and reliable nationwide delivery and IT systems that can interface with their procurement systems for centralized purchasing and billing. According to the complaint, regional and local office supply vendors, or online sellers like Amazon Business, cannot meet those needs.

The Commission also continues to devote significant resources to stopping anticompetitive healthcare provider consolidation, with three challenges to proposed hospital mergers—in Huntington, West Virginia; Harrisburg, Pennsylvania; and the North Shore area of Chicago—currently underway.<sup>9</sup> In these cases, the Commission alleges that the mergers are likely to reduce competition by leaving health insurers with few alternative providers to include in their networks, increasing the bargaining leverage of the merged hospitals, and resulting in higher healthcare costs and lower quality service in local communities.

This current trio of challenges follows two recent victories in federal appellate cases involving FTC challenges to healthcare provider mergers. In the first, the Sixth Circuit Court of Appeals issued the first appellate decision considering a hospital merger in over 15 years when it upheld the Commission’s decision requiring ProMedica Health System, the largest hospital system in the Toledo, Ohio area, to divest its rival, St. Luke’s Hospital. The appellate court

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<sup>8</sup> FTC News Release, *FTC Challenges Proposed Merger of Staples, Inc. and Office Depot, Inc.* (Dec. 7, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-staples-inc-office-depot-inc>.

<sup>9</sup> *See* Cabell Huntington Hosp., Dkt. 9366 (complaint filed Nov. 6, 2015); Penn State Hershey Medical Center, Dkt. 9368 (complaint filed Dec. 8, 2015); *FTC v. Penn State Hershey Medical Center*, No. 1:15-cv-2362 (M.D. Pa.) (preliminary injunction action); *Advocate Health Care Network*, Dkt. 9369 (complaint filed Dec. 18, 2015); *FTC v. Advocate Health Care Network*, No. 1:15-cv-11473 (N.D. Ill.) (preliminary injunction action).

found the Commission’s analysis of the merger to be “comprehensive, carefully reasoned, and supported by substantial evidence in the record.”<sup>10</sup> In the second, the Ninth Circuit employed a similar analysis to affirm a lower court decision blocking the merger of Idaho’s dominant health system and the largest group of primary care physicians located in Nampa, a community outside of Boise.<sup>11</sup>

The pharmaceutical sector has also experienced significant merger activity in recent years, and the Commission continues to carefully review mergers between pharmaceutical manufacturers and require divestitures where necessary to maintain competition. In the last two years alone, the Commission has taken action in 17 pharmaceutical industry mergers, ordering divestitures in the sale of dozens of both branded and generic drugs used to treat a variety of conditions, such as hypertension, cirrhosis, and bipolar disorder.<sup>12</sup>

### **b. Stopping Anticompetitive Conduct**

The Commission also maintains a robust program to identify and stop anticompetitive conduct. For example, recent enforcement actions have challenged exclusionary tactics to maintain a monopoly position,<sup>13</sup> stopped the two leading suppliers of propane exchange tanks

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<sup>10</sup> ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 573 (6th Cir. 2014).

<sup>11</sup> St. Alphonsus Med. Center-Nampa Inc. v. St. Luke’s Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015).

<sup>12</sup> In addition to the cases discussed above, in 2015 the Commission also challenged Steris Corporation’s \$1.9 billion acquisition of Synergy Health. The Commission alleged that the transaction would likely harm competition by eliminating emerging competition from Synergy, a potential entrant in the United States with an innovative x-ray sterilization technique that would challenge the two incumbents, Steris and a third party, which together served 85 percent of the market. A federal district court in Ohio found, however, that Synergy was unlikely to have entered the U.S. contract sterilization market by building new x-ray facilities within a reasonable period of time. *FTC v. Steris Corp.*, --- F. Supp. 3d ---, Case No. 1:15-cv-80 (N.D. Ohio Sept. 24, 2015). Although the Commission still had reason to believe the acquisition was anticompetitive, it dismissed the administrative complaint, concluding that further adjudication was not in the public interest. *FTC News Release, FTC Dismisses Complaint against Steris and Synergy* (Oct. 30, 2015), <https://www.ftc.gov/news-events/press-releases/2015/10/ftc-dismisses-complaint-against-steris-synergy>.

<sup>13</sup> Opinion of the Commission, *McWane, Inc.*, Docket No. 9351 (Feb. 6, 2014), [https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf), *aff’d*, 783 F.3d 814 (11th Cir. 2015).

from allegedly colluding to push a key customer to accept a reduction in fill levels,<sup>14</sup> eliminated allegedly unreasonable provisions in trade association ethical codes that prevented competition among members,<sup>15</sup> and challenged allegedly illegal invitations to collude.<sup>16</sup>

Last year, the FTC achieved a notable victory in a conduct matter at the Supreme Court in *North Carolina Board of Dental Examiners*, the Commission's third Supreme Court win in three years. There, the Court affirmed a Commission administrative decision and ruled that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state action antitrust immunity."<sup>17</sup> The decision seeks to ensure that the board's regulatory decisions reflect the policies of the state rather than the private economic interests of its members. The Court's ruling is particularly significant because occupational licenses, which are often regulated by boards controlled by market participants, are required for a significant and growing number of occupations.<sup>18</sup>

In addition to stopping harmful behavior, enforcement actions directed at anticompetitive conduct also provide guidance to other businesses to help them comply with antitrust standards.

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<sup>14</sup> FTC News Release, Blue Rhino, AmeriGas Settle FTC Charges of Restraining Competition (Oct. 31, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/blue-rhino-amerigas-settle-ftc-charges-restraining-competition>. Commissioner Ohlhausen voted against filing the complaint in this matter.

<sup>15</sup> FTC News Release, To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition (Dec. 23, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/settle-ftc-charges-two-trade-associations-agree-eliminate-rules>; FTC News Release, In Settlement with FTC, National Association of Animal Breeders Agrees to Eliminate Rules that Limit Competition Among its Members (Sept. 24, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/settlement-ftc-national-association-animal-breeders-agrees>.

<sup>16</sup> FTC News Release, Marketer of Rug Accessory Settles FTC Charges of Invitation to Collude with Competitor (Oct. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/10/marketer-rug-accessory-settles-ftc-charges-invitation-collude>; FTC News Release, Commercial Trucking Services Company Settles FTC Charges of Invitation to Collude (Dec. 14, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/commercial-trucking-services-company-settles-ftc-charges>.

<sup>17</sup> *N.C. Dental*, 135 S.Ct. at 1114.

<sup>18</sup> See, e.g., The White House, Occupational Licensing: A Framework for Policymakers 3 (July 2015), [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

Last fall, in response to questions from state officials about the impact of *N.C. Dental*, FTC staff issued guidance addressing antitrust compliance for state boards responsible for regulating occupations.<sup>19</sup> The guidance explains when a state regulatory board would require active supervision to invoke the state action defense and the factors that are relevant to determining whether the active supervision requirement is satisfied. It also clarifies that even without antitrust immunity, many routine activities of regulatory boards are unlikely to violate the antitrust laws.

Last year the Commission also issued an important statement regarding the scope of the FTC’s competition authority related to unfair methods of competition. In this Statement of Enforcement Principles, a bipartisan majority of the Commission affirmed that the Commission will use its standalone authority under Section 5 of the FTC Act to promote consumer welfare, evaluating whether the conduct in question harms competition or the competitive process and taking into account any procompetitive justifications or efficiencies.<sup>20</sup>

#### **i. Stopping Anticompetitive Conduct in Pharmaceutical Markets**

Protecting American consumers from anticompetitive conduct by pharmaceutical companies continues to be one of the Commission’s most important responsibilities. The Commission is committed to enforcing the antitrust laws in pharmaceutical markets to promote competition and prevent conduct that is likely to harm consumer welfare.

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<sup>19</sup> FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 2015), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf).

<sup>20</sup> Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015); Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/735381/150813commissionstatementsection5.pdf](https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf). Commissioner Ohlhausen voted against the issuance of the Statement of Enforcement Principles. Her dissenting statement is available at <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.



## 1. Combatting Efforts to Stifle Generic Competition

A top priority for the Commission for nearly 20 years has been stopping anticompetitive reverse-payment settlements of patent litigation in which the brand-name drug firm pays its potential generic rival to abandon a patent challenge and delay entering the market with a lower cost, generic product. Following the Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,<sup>21</sup> the Commission is in a much stronger position to protect consumers from these anticompetitive agreements that result in higher drug costs. Last June, seven years after the FTC filed its complaint and one week before trial was set to commence in *FTC v. Cephalon*,<sup>22</sup> Cephalon's parent, Teva Pharmaceuticals, agreed to stop using certain types of anticompetitive patent settlements and agreed to pay up to \$1.2 billion in ill-gotten gains into a fund to reimburse drug wholesalers, pharmacies, insurers, and others who overpaid for the blockbuster sleep disorder drug Provigil due to Cephalon's conduct. This landmark settlement represents the first monetary relief the Commission has obtained for purchasers harmed by reverse-payment agreements, and it will also help deter Teva, the world's largest generic company, from entering into illegal reverse-payment settlements in the future.<sup>23</sup>

The Commission has also filed a new case involving reverse-payment settlements,<sup>24</sup> and continues to prosecute the *Actavis* case, which the Supreme Court remanded to the district court for further proceedings following its determination that the FTC could proceed with its case.

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<sup>21</sup> *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).

<sup>22</sup> *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf>.

<sup>23</sup> FTC News Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

<sup>24</sup> *FTC v. AbbVie, Inc.*, No. 14-5151 (E.D. Pa. complaint filed Sept. 8, 2014). Commissioner Ohlhausen voted against filing the complaint in this matter.

We are beginning to see positive signs following the *Actavis* decision. The number of potential pay-for-delay deals in pharmaceutical patent settlement agreements declined in FY 2014, the first full fiscal year after the *Actavis* decision, as compared to FY 2013, based on a review of filings made with the FTC and the Department of Justice pursuant to the Medicare Modernization Act.<sup>25</sup> Moreover, more patent disputes were settled without reverse payments than in prior years—80 percent of the MMA filings for FY 2014 did not involve any compensation paid by the branded company to the generic company.<sup>26</sup> Although it is too early to tell if these figures represent a more permanent decline in pay-for-delay activity, the numbers are encouraging. At the same time, the data also shows a need for the FTC to continue to investigate and challenge agreements that delay generic drugs and impose substantial costs on consumers, employers, and taxpayers.

In addition to enforcement work, the Commission monitors private pay-for-delay cases and files amicus briefs where the agency's experience and expertise could prove helpful to the courts. For example, both the First and Third Circuits recently adopted the FTC's position as amicus in ruling that patent litigation settlements that do not involve cash but instead contain a promise by the brand-name drug firm not to launch its own authorized generic raise the same

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<sup>25</sup> From FY 2005 to FY 2012, potential pay-for-delay agreements contained in MMA filings increased steadily, from three in FY 2005 to 40 in FY 2012. But since early 2013, this trend seems to have reversed. For example, in FY 2014, 21 such reverse-payment agreements were filed with the Commission—a nearly 50% decline from the FY 2012 peak of 40—while the overall number of patent settlements has increased.

<sup>26</sup> FTC News Release, *FTC Report on Drug Patent Settlements Shows Potential Pay-for-Delay Deals Decreased Substantially in the First Year Since Supreme Court's Actavis Decision* (Jan. 13, 2016), <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-report-drug-patent-settlements-shows-potential-pay-delay>.

competitive concerns addressed by the Supreme Court in *Actavis*.<sup>27</sup>

The Commission also continues to review other strategies adopted by pharmaceutical companies that may have the effect of delaying or preventing generic entry. For example, we continue to be concerned about potential abuses by branded pharmaceutical companies of Food and Drug Administration (FDA) safety protocols known as REMS—risk evaluation and mitigation strategies—to impede generic competition. REMS programs are implemented by a drug’s manufacturer to provide safety measures for handling and distributing high-risk medicines. The concern is that branded firms may use FDA-mandated REMS distribution restrictions or other closed distribution systems to deny generic drug makers the samples they need to conduct bioequivalence tests, which they must do before they can enter the market. As we urged in two amicus briefs in separate private actions, this conduct undermines the careful balance created by the Hatch-Waxman Act to encourage generic entry, and may violate the antitrust laws.<sup>28</sup>

Another type of life cycle management strategy we are monitoring is “product hopping,” where a brand introduces new products with minor or no substantive improvements in the hopes of preventing substitution to lower-priced generics. The Commission has noted that the potential for anticompetitive product design is particularly acute in the pharmaceutical industry, in part

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<sup>27</sup> King Drug Co. of Florence Inc. v. Smithkline Beecham Corp., 791 F.3d 388 (3d Cir. 2015); see FTC Brief as Amicus Curiae, In re Lamictal Direct Purchaser Antitrust Litig., No. 14-1243 (3d Cir. Apr. 28, 2014), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf); In re Loestrin 24 FE Antitrust Litig., --- F. 3d. ---, 2016 WL 698077 (1st Cir. Feb 22, 2016); FTC, Brief as Amicus Curiae, In re Loestrin 24 FE Antitrust Litig., No. 14-2071 (1st Cir. June 16, 2015), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/american-sales-co.et-al.plaintiffs-appellants-v.warner-chilcott-co.llc-et-al.defendants-appellees/1506warner-chilcottamicusbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/american-sales-co.et-al.plaintiffs-appellants-v.warner-chilcott-co.llc-et-al.defendants-appellees/1506warner-chilcottamicusbrief.pdf).

<sup>28</sup> FTC Brief as Amicus Curiae, Mylan v. Celgene, Case No. 2:14-CV-2094 (D.N.J. June 17, 2014), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/mylan-pharmaceuticals-inc.v.celgene-corporation/140617celgeneamicusbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/mylan-pharmaceuticals-inc.v.celgene-corporation/140617celgeneamicusbrief.pdf); FTC Brief as Amicus Curiae, Actelion Pharms Ltd. v. Apotex Inc., Case No. 1:12-cv-05743 (D.N.J. Mar. 11, 2013), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2013/03/actelion-pharmaceuticals-ltd-et-al-v-apotex-inc>.

because it may be a profitable strategy even if consumers do not prefer the reformulated version of the product or if it lacks any real medical benefit.<sup>29</sup>

## **2. Stopping Other Efforts to Eliminate Competition in Pharmaceutical Markets**

FTC work in pharmaceutical markets are not limited to efforts by branded drug companies to delay generic competition. Last August, the Commission charged two pharmaceutical companies with entering into an unlawful agreement not to compete in the sale of generic versions of Kapvay, a prescription drug used to treat ADHD.<sup>30</sup> By eliminating that competition, the agreement deprived consumers of the lower prices that typically result from generic competition. The companies abandoned their agreement shortly after learning of the FTC's investigation and are under an FTC order to prevent the conduct from recurring.

We have also taken action against unilateral conduct that excludes new rivals and keeps drug prices high. For example, in April 2015, we charged Cardinal Health with illegally monopolizing 25 local markets for the sale of low-energy radiopharmaceuticals by coercing the two radiopharmaceutical manufacturers not to supply new facilities that might compete with Cardinal to perform common diagnostic tests such as heart stress tests. To settle the FTC charges, Cardinal agreed to stop its coercive tactics, and paid \$26.8 million in ill-gotten gains into a fund to reimburse hospitals and clinics that overpaid for radiopharmaceuticals.<sup>31</sup>

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<sup>29</sup> FTC Brief as Amicus Curiae, Mylan Pharms., Inc. v. Warner Chilcott PLC, Civ. A. No. 12-3824 (3d. Cir. Sept. 30, 2015), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/mylan-pharmaceuticals-inc.v.warner-chilcott-plc-et-al./151001mylanamicusbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/mylan-pharmaceuticals-inc.v.warner-chilcott-plc-et-al./151001mylanamicusbrief.pdf). Commissioner Ohlhausen voted against the filing of this brief.

<sup>30</sup> FTC News Release, Pharmaceutical Companies Settle FTC Charges of an Illegal Agreement not to Compete, which Resulted in Higher Prices for Generic Version of ADHD Drug (Aug. 18, 2015).

<sup>31</sup> FTC News Release, Cardinal Health Agrees to Pay \$25.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics (Apr. 20, 2015), <https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>. Commissioner Ohlhausen voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Ohlhausen, Cardinal Health, Inc., File. No. 101-006 (Apr. 17, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/637761/150420cardinalhealthohlhausen.pdf](https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf).

## II. FTC Competition Research and Advocacy

Although law enforcement is the primary tool the Commission uses to promote competition and protect consumers, we also study emerging trends and business developments, and advocate for policies that impose the fewest unnecessary restrictions on competition. The agency's research efforts are enhanced by the ability, when conducting a formal study, to compel the production of information under Section 6(b) of the FTC Act, which ensures that the Commission has the data and information needed to make sound decisions, track market developments, and determine future priorities.

The Commission currently has two studies underway. The first is a study of patent assertion entities (PAEs). PAEs are firms with a business model based on buying patents and then attempting to generate revenue by licensing, or litigating against, businesses that are alleged to be using the patented technology. Our study is designed to develop a better and more complete understanding of the PAE business model. The FTC now is drafting a report to describe its findings, which will contribute to the discussion of the legal and policy responses to PAE activity currently under consideration.<sup>32</sup>

The Commission is conducting another study to evaluate the effectiveness of the Commission's orders in past merger cases where it has required a divestiture or other remedy.<sup>33</sup> This effort will expand on a similar remedy study conducted in the 1990s that led to important

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<sup>32</sup> FTC News Release, FTC Announces Second Federal Register Notice with Revised Proposed Information Requests for Its Patent Assertion Entity Study; OMB Clearance Requested (May 13, 2014), <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-announces-second-federal-register-notice-revised-proposed>.

<sup>33</sup> FTC News Release, FTC Proposes to Study Merger Remedies (Jan. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

improvements to the Commission's orders.<sup>34</sup> The new study is broader, covering 90 orders entered between 2006 and 2012, and will benefit from information collected from customers and significant competitors. We expect the study to provide insight into whether the Commission's orders have created viable competitors that maintained competition in markets that otherwise would have been affected by the merger at issue.

Hosting workshops on emerging business practices and technologies is another way that the Commission advances its competition mission, keeps current with industry developments, and explores legal and policy approaches that may affect competition. At these events, the FTC convenes industry representatives, consumer advocates, academics, fellow enforcement partners and regulators for lively, informative, and often groundbreaking discussions of the policy and enforcement challenges posed by emerging business trends.

For example, in recognition of the proliferation of online and mobile peer-to-peer business platforms, last summer the Commission hosted a workshop on the emerging "Sharing Economy."<sup>35</sup> Peer-to-peer platforms allow suppliers and consumers to connect and do business in a way that has spawned new business models in industries that historically have been subject to regulation, such as passenger transportation and public accommodation. As more entrepreneurs use technology to interact directly with consumers, the Commission seeks to better understand the competition, consumer protection, and economic issues created by the proliferation of these new business models, as well as the extent to which they may fit within, or challenge, existing regulatory frameworks.

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<sup>34</sup> Fed. Trade Com'n, A Study of the Commission's Divestiture Process (1999), <https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>.

<sup>35</sup> The workshop homepage can be accessed at the following address: <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.

The FTC also engages in competition advocacy, providing comments to state legislatures, state and federal agencies, and other policymakers. Competition advocacy is particularly effective in addressing market restraints imposed by governments themselves, especially when the underlying policy justifications for these restraints may not be adequately substantiated, and when these restraints impose unnecessary burdens on competition to the detriment of consumers.

For example, the Commission has long used advocacy to promote competition in healthcare provider markets. Commission staff recently submitted comments in a handful of states pertaining to so-called “certificates of public advantage,” which purport to grant antitrust immunity to healthcare providers that engage in certain collaborations or merge.<sup>36</sup> Because procompetitive collaborations and combinations are already permissible under the antitrust laws, the main effect of these laws is to immunize conduct and mergers that would *not* generate efficiencies and are likely to result in consumer harm.

The FTC has also provided comments to state policymakers suggesting that they closely examine the purported health and safety justifications behind scope-of-practice restrictions that prevent certain health care professionals, such as advanced practice nurses or dental hygienists, from being able to take full advantage of their training and expertise.<sup>37</sup> As Commission staff has pointed out, enabling healthcare professionals to fully utilize their skills may reduce the price and increase the availability of professional services, especially in underserved communities.

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<sup>36</sup> See, e.g., FTC News Release, In Comments Submitted to Virginia and Tennessee Health Departments FTC Staff Offers Assistance in Evaluating Proposed Hospital Cooperation Agreements (Oct. 15, 2015), <https://www.ftc.gov/news-events/press-releases/2015/10/comments-submitted-virginia-tennessee-health-departments-ftc>; FTC News Release, FTC Staff Expresses Concern that New York’s Certificate of Public Advantage Regulations Can Harm Competition (Apr. 24, 2015), <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-staff-expresses-concern-new-yorks-certificate-public>.

<sup>37</sup> See Fed. Trade Comm’n, Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses (Mar. 2014), <https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicy.pdf>.

In addition to healthcare advocacy, FTC staff recently submitted comments on legislative proposals in Missouri, New Jersey, and Michigan concerning prohibitions on direct-to-consumer auto sales by manufacturers.<sup>38</sup> The comments noted that existing laws in those states insulate independent dealers from competition by mandating a single method of distributing automobiles, which may harm competition by suppressing innovation in distribution models that may appeal to both manufacturers and consumers.

### **III. International Cooperation**

With the globalization of business and antitrust enforcement, the Commission's international efforts are critical to the FTC's competition mission, and to American consumers and businesses. The FTC's active international program builds on our strong relations with counterparts around the world and enables us to promote sound and consistent outcomes in cross-border cases and convergence toward best practices in antitrust law enforcement and policy.

In FY 2015, FTC staff cooperated with counterpart agencies in 35 separate enforcement matters. As the breadth and depth of our cooperation increases, we continue to expand our tools to promote effective cooperation. Notably, in September 2015, the FTC and the Department of Justice signed an antitrust memorandum of understanding with the Korea Fair Trade Commission that will facilitate closer coordination on enforcement and policy matters. This follows recent MOUs with the Chinese and Indian competition agencies, increasing our network

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<sup>38</sup> FTC News Release, FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers (May 16, 2014), <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions>. *See also* FTC News Release, FTC Staff Urges Michigan Legislature to Repeal Ban on Direct-to-Consumer Sale of Motor Vehicles by Auto Manufacturers (May 11, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-staff-urges-michigan-legislature-repeal-ban-direct-consumer>.



of cooperation agreements to 16.<sup>39</sup> Cooperating on individual investigations not only minimizes the risk of conflicting outcomes, but also provides an opportunity to promote sound policy with key counterparts.

In addition to promoting convergence toward sound, economically-based substantive competition policy and enforcement, the FTC plays a lead role in advocating fair and transparent enforcement procedures. Most recently, the FTC co-led a multi-year initiative in the International Competition Network (ICN) that resulted in guidance on investigative processes, adopted by the ICN's 130 member agencies. The guidance represents the most comprehensive agency-led effort to articulate best practices on providing due process in antitrust investigations. We are now working to promote its implementation, including through our international technical assistance program. Moreover, through our "International Fellows" program, officials from foreign competition agencies work directly with our staff and learn our investigative procedures, which they can bring back to their home agencies.

Finally, the FTC and Department of Justice work with our colleagues in other U.S. government agencies as appropriate to address various international competition issues, including those implicating the intersection of antitrust and intellectual property. We also continue to play a lead role in the negotiation of competition chapters of trade agreements such as the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership.

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<sup>39</sup> The United States has bilateral competition cooperation agreements in place with the following: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000), and the competition enforcement agencies of Chile (2011) and Colombia (2014). We have also entered into memoranda of understanding with the Russian Federal Antimonopoly Service (2009), the three Chinese antitrust agencies (2011), the Indian competition authorities (2012), and the Korea Fair Trade Commission (2015). We also rely on important multilateral cooperation instruments, the Recommendation of the Organization for Economic Cooperation and Development on International Competition Cooperation as well as the ICN Framework (updated in 2014) and the ICN Framework for Merger Review (2012).

#### **IV. Conclusion**

Competitive markets are the foundation of our economy, and effective antitrust enforcement helps ensure that those markets function well and benefit both consumers and businesses alike. Thank you for this opportunity to share highlights of the Commission's recent enforcement, research, and advocacy work to promote competition and protect consumers.