

**Prepared Statement of
the Federal Trade Commission**

**Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

“Oversight of the Enforcement of the Antitrust Laws”

**Washington, D.C.
May 15, 2015**

Chairman Marino, Ranking Member Johnson, 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.¹

Last year, the Federal Trade Commission celebrated its centennial, a milestone that provided an opportunity to reflect on the policies and people that have contributed to the agency's successes and to consider what challenges lie ahead. 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 tackled the complex competition issues of the day, guiding antitrust policy from a time of horses and buggies to our modern interconnected, global economy. As the Commission enters its second century, it does so buoyed by recent federal court victories that affirm the FTC's role as a champion of the national policy of fair and vigorous competition to benefit consumers.

As the members of this Subcommittee know, 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. 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."² The FTC's special role in enforcing these laws and studying emerging trends in markets has contributed to a culture of competition that is central to economic growth and opportunity.

¹ 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.

² *North Carolina St. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) ("*N.C. Dental*").

I. The FTC's Competition Enforcement Work

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, as will be addressed below, 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.

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Premerger filings under the Hart-Scott-Rodino Act rose 25 percent in FY 2014 as compared to FY 2013.³ The vast majority of those reported transactions—over 96% in each of the last five years—are allowed to proceed without further inquiry, and only a small fraction of proposed or consummated mergers require additional investigation to determine whether they are likely to violate Section 7 of the Clayton Act. During FY 2014, the Commission challenged 17 mergers after the evidence showed that they would likely be anticompetitive,⁴ and through the first half of FY 2015, the Commission initiated 11 additional merger enforcement actions, including our pending preliminary injunction action to block the proposed merger between Sysco Corporation and US Foods.⁵

³ In FY 2014, the Agencies received notice of 1,618 transactions in which a Second Request could have been issued, compared with 1,326 in FY 2013.

⁴ During FY 2014, the Commission accepted 13 negotiated settlements resulting in final orders requiring divestitures, and three transactions were abandoned as a result of antitrust concerns raised during the investigations. In one additional matter, a proposed merger involving class ring manufacturers Jostens and American Achievement Corp., the Commission authorized an administrative complaint and initiated proceedings to obtain a preliminary injunction in federal district court to enjoin the acquisition pending resolution of the Commission's administrative litigation; the parties abandoned their plans after the Commission issued its complaint. Data on the FTC's competition workload is available on its website at <https://www.ftc.gov/competition-enforcement-database>.

⁵ From October 2014 through March 2015, the Commission accepted for comment nine proposed consent orders requiring divestitures, and authorized administrative complaints and related preliminary injunction actions to block two proposed mergers. As discussed further below, in one of these mergers, Verisk Analytics' proposed acquisition

The Commission also maintains a robust program to identify and stop anticompetitive business conduct.⁶ For example, recent enforcement actions have challenged allegedly exclusionary tactics to maintain a monopoly position,⁷ eliminated allegedly unreasonable provisions in trade association ethical codes that prevented competition among members,⁸ and stopped an allegedly illegal invitation-to-collude between two resellers of internet barcodes.⁹ In addition to stopping anticompetitive conduct, these actions also provide guidance to other businesses to help them comply with antitrust standards.

A. Recent Appellate Victories

Before addressing enforcement efforts in specific sectors of the economy, the FTC has recently obtained several important rulings from the Supreme Court and federal courts of appeals upholding its decisions on key aspects of antitrust doctrine. Of particular note is the

of Eagle View Technology, the parties abandoned their merger plans after the Commission issued its complaint. *See* FTC News Release, Statement of FTC Bureau of Competition Director Deborah Feinstein on Verisk's Decision to Drop its Proposed Acquisition of EagleView Technology Corporation (Dec. 17, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/12/statement-ftc-bureau-competition-director-deborah-feinstein>. The remaining challenge to block the proposed Sysco-US Foods merger is pending.

⁶ During FY 2014, the FTC entered into six consent agreements resolving competitive concerns in conduct investigations, issued one administrative complaint, and filed one permanent injunction action in federal court. Since October 1, 2014, the Commission has issued two additional administrative complaints and one proposed stipulated order in federal court.

⁷ 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), *available at* <https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>. Commissioners Ohlhausen and Wright voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Ohlhausen, *Cardinal Health, Inc.*, File No. 101-006 (Apr. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf; Dissenting Statement of Commissioner Wright, *Cardinal Health, Inc.*, File No. 101-006 (Apr. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.

⁸ FTC News Release, To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition (Dec. 23, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/12/settle-ftc-charges-two-trade-associations-agree-eliminate-rules>.

⁹ FTC News Release, Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude (Jul. 21, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited>.

Commission's win before the Supreme Court in *N.C. Dental*.¹⁰ The Supreme Court agreed with the Commission 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."¹¹ The *N.C. Dental* decision is just the most recent example of the Commission's longstanding effort, which also includes the 2013 Supreme Court ruling in the Commission's favor in *FTC v. Phoebe Putney*,¹² seeking to clarify the scope of the state action doctrine. The *N.C. Dental* decision is particularly important because occupational licensing requirements govern a substantial and growing segment of the US economy,¹³ and incumbents can use that power to keep new forms of competition out of the market.

The Commission earned another significant appellate win last month when the Eleventh Circuit affirmed the Commission's decision and order in a monopolization case involving *McWane, Inc.*¹⁴ There, the Eleventh Circuit upheld the Commission's ruling that a monopolist's exclusive dealing practices violated the antitrust laws because they prevented would-be market entrants from becoming meaningful competitors in the market for domestic pipe fittings, resulting in higher prices for municipalities and other waterworks customers.

The Commission also recently achieved two important appellate wins in health care provider merger challenges. In the first, the Sixth Circuit Court of Appeals issued the first

¹⁰ *N.C. Dental*, 135 S. Ct. at 1117.

¹¹ *N.C. Dental*, 135 S. Ct. at 1114.

¹² *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 2003 (2013).

¹³ See, e.g., Morris M. Kleiner, *Reforming Occupational Licensing Policies*, The Hamilton Project, Discussion Paper 2015-1, at 5 (March 2015), available at http://www.brookings.edu/~media/research/files/papers/2015/03/11-hamilton-project-expanding-jobs/thp_kleinerdiscpaper_final.pdf.

¹⁴ *McWane, Inc. v. FTC*, No. 14-11363, 2015 U.S. App. LEXIS 6111 (11th Cir. Apr. 15, 2015).

appellate decision involving a hospital merger in over 15 years when it upheld the Commission's decision requiring ProMedica Health System to divest its rival, St. Luke's Hospital, because the merger would have given ProMedica the leverage to demand higher rates from health plans.¹⁵ The court concluded that the size and competitive significance of ProMedica, combined with St. Luke's location in the affluent southwestern Toledo suburbs, would have made ProMedica virtually indispensable to health plans post-merger.

In the second, the FTC achieved a significant victory when the Ninth Circuit Court of Appeals affirmed the district court's decision in *St. Luke's* that Idaho's dominant healthcare system's acquisition of the state's largest independent physician practice group violated the antitrust laws.¹⁶ The Ninth Circuit agreed with the trial court's determination that the deal would have given the combined entity the power to demand higher rates in the market for adult primary care services in Nampa, Idaho, the state's second-largest city. The court did not find St. Luke's quality-based efficiencies defense adequate to rebut a prima facie case that a merger would be anticompetitive.

This testimony now highlights important Commission efforts to promote competition in key sectors of the American economy.

B. Promoting Competition in Health Care Markets

The high cost of health care is a serious concern for most Americans. Health care consolidation can threaten to undermine efforts to control these costs, and it is critical that the Commission act to preserve and promote competition in health care markets. Competition

¹⁵ *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

¹⁶ *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

encourages market participants to deliver cost-effective, high-quality care and to pursue innovation to further these goals.

1. Preventing Anticompetitive Health Care Mergers

The FTC devotes significant resources to preventing mergers that threaten to raise prices or undermine cost-containment efforts in a variety of health care markets, including in both health care provider and pharmaceutical markets.¹⁷

The Commission monitors an increasing number of mergers involving health care providers, including deals involving hospitals, physicians, clinics, and surgery centers, and intervenes when they pose a threat to competition. In addition to the *ProMedica* and *St. Luke's* cases discussed above, in recent years the Commission has successfully challenged a number of hospital mergers,¹⁸ as well as mergers involving surgery centers,¹⁹ psychiatric hospitals,²⁰ and dialysis clinics.²¹

¹⁷ For a summary of FTC enforcement actions relating to health care, see Overview of FTC Antitrust Actions in Health Care Services and Products (March 2013), available at <https://www.ftc.gov/system/files/attachments/competition-policy-guidance/hcupdaterev.pdf>, and Overview of FTC Antitrust Actions in Pharmaceutical Services and Products (March 2013), available at <https://www.ftc.gov/system/files/attachments/competition-policy-guidance/rxupdaterev.pdf>.

¹⁸ *Cnty. Health Sys.*, No. C-4427 (F.T.C. Jan. 22, 2014) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/131-0202-c-4427/community-health-systems-health-management-associates>; *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *Inova Health Sys.*, Dkt. No. 9326 (F.T.C. June 17, 2008) (order dismissing complaint), available at www.ftc.gov/sites/default/files/documents/cases/2008/06/080617orderdismisscmpt.pdf.

¹⁹ *H.I.G. Bayside Debt*, No. C-4494 (F.T.C. Dec. 24, 2014) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0183-c-4494/hig-bayside-debt-et-al>; *Reading Health Sys.*, Dkt. No. 9353 (F.T.C. Dec. 7, 2012) (order dismissing complaint), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210155/reading-health-system-surgical-institute-reading-matter>.

²⁰ *Universal Health Servs.*, No. C-4372 (F.T.C. Oct. 5, 2012) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210157/universal-health-services-alan-b-miller>.

²¹ *Fresenius Med. Care AG*, No. C-4348 (F.T.C. Feb. 28, 2012) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/1110170/fresenius-medical-care-ag-co-kga-matter>.

Ongoing health care reform efforts rely heavily on a market-based system, and antitrust enforcement aimed at preventing health care providers from accumulating market power or engaging in anticompetitive conduct is therefore critical to ensuring that competition drives health care firms to contain costs, improve quality of care, and innovate. These efforts are especially important in light of recent research showing that health care providers with significant market power may be able to negotiate higher than competitive payment rates, often without offsetting improvements in quality.²²

The antitrust laws are not a barrier to bona fide efforts to improve care through integration or other means. Antitrust allows providers to engage in a wide variety of legitimate collaborations, including mergers, so long as the conduct is unlikely to harm consumer welfare through higher costs or reduced quality. The antitrust enforcement agencies have consistently maintained that bona fide efforts to coordinate health care do not raise antitrust issues so long as those efforts do not result in the accumulation of market power, and that collaborations to reduce costs and improve the quality of health care may be formed through contractual arrangements well short of a merger.²³

Merger activity in the pharmaceutical sector has also increased significantly in recent years, and the Commission continues to review carefully mergers between pharmaceutical manufacturers to prevent firms from acquiring market power that would allow them to raise prices on crucial medications. In the last two years alone, the Commission has taken action in 13

²² See, e.g., Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, Robert Wood Johnson Found., The Synthesis Project (June 2012), available at <http://www.rwjf.org/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html>.

²³ U.S. Dep't of Justice & FTC, *Statements of Enforcement Policy in Health Care* (1996), available at https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf

pharmaceutical mergers, ordering divestitures to preserve competition in the sale of 44 pharmaceutical products used to treat a variety of conditions, such as hypertension, diabetes, and cancer, as well as widely-used generic medications such as oral contraceptives and antibiotics.

The Commission remains attentive to mergers involving competing medical device manufacturers. For example, the Commission required medical technology company Medtronic, Inc. to divest the drug-coated balloon catheter business of Covidien in order to complete its \$42.9 billion acquisition.²⁴ According to the complaint, at the time of the merger, C.R. Bard was the only company supplying U.S. customers with drug-coated balloon catheters indicated for the femoropopliteal artery, an artery located above the knee. Medtronic and Covidien were the only companies with products in clinical trials, making them the most likely potential entrants. To preserve competition in the future for these important medical products, Medtronic agreed to divest Covidien's business to an FTC-approved buyer that has the industry and regulatory experience to obtain FDA approval for a new product.

2. Combating Efforts to Stifle Generic Competition

A top priority for the Commission over the past 15 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. The Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,²⁵ which held that these agreements were properly subject to antitrust scrutiny, was as an important victory for consumers and a vindication of basic antitrust and free market principles. With it, the Commission achieved one of its top competition priorities: overturning the so-called "scope-of-

²⁴ *Medtronic, Inc.*, No. C-4503 (F.T.C. Jan. 21, 2015) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0187/medtronic-inc-covidien-plc-matter>.

²⁵ *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

the-patent” test, which had been adopted by some courts and virtually immunized pay-for-delay settlements from antitrust scrutiny.

Because of the *Actavis* decision, we are in a much stronger position to protect consumers from anticompetitive drug-patent settlements that result in higher drug costs.²⁶ The Commission has continued to pursue pay-for-delay cases, including *Actavis* and *FTC v. Cephalon*,²⁷ with trial in the latter scheduled to begin on June 1, 2015, in federal district court in Philadelphia. We also continue to pursue additional pay-for-delay investigations, and review pharmaceutical patent settlements that companies are required to file with the FTC and DOJ following the 2003 Medicare Modernization Act.

In addition to this enforcement work, we monitor pending pay-for-delay cases for potential amicus opportunities in private litigation where our experience and expertise could prove helpful to the courts deciding those matters. For example, we recently filed an amicus brief with the Third Circuit helping to clarify that patent litigation settlements containing a “no-authorized-generic” commitment, in which the brand-name drug firm agrees not to launch its own authorized generic when the first generic company begins to compete, raise the same issues addressed by the Supreme Court in *Actavis*.²⁸ Even though no cash payments are involved, the companies still share profits by agreeing to avoid competing, which can result in delayed generic entry and harm to consumers.

²⁶ FTC, *Pay For Delay: How Drug Company Pay-Offs Cost Consumers Billions* (Jan. 2010), available at <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

²⁷ *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008), available at <http://www2.ftc.gov/os/caselist/0610182/080213complaint.pdf>.

²⁸ FTC, Brief as Amicus Curiae, *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 14-1243 (3d Cir. Apr. 28, 2014), available at https://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf.

In addition to pay-for-delay, the Commission continues to review other strategies adopted by branded pharmaceutical companies that may have the effect of delaying or preventing generic entry. For example, we continue to be very concerned about potential abuses by branded pharmaceutical companies of safety protocols known as REMS—risk evaluation and mitigation strategies—to impede generic competition. REMS are a program implemented by a drug’s manufacturer to provide safety measures for high-risk medicines. They can include special training for pharmacies and prescribers, the creation of patient registries, and tight controls on dispensing the drugs. The concern is that branded firms may use REMS-mandated distribution restrictions to inappropriately limit access to product samples generic drug developers need for bioequivalence testing, a predicate for FDA approval of generic drugs.

Another type of life cycle management strategy we are monitoring is so-called product hopping, where a brand introduces new, patented 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 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.²⁹

3. Stopping Exclusionary Conduct by Health Care Firms with Market Power

The Commission recently announced a settlement with Cardinal Health, Inc. over charges that it illegally monopolized 25 local markets for the sale and distribution of low-energy radiopharmaceuticals.³⁰ The Commission’s complaint alleges that for several years, Cardinal was

²⁹ FTC, Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott PLC*, Civ. A. No. 12-3824 (E.D. Pa. Nov. 21, 2012), available at http://www.ftc.gov/sites/default/files/documents/amicus_briefs/mylan-pharmaceuticals-inc-et-al.v.warner-chilcott-public-limited-company-et-al/121127doryxamicusbrief.pdf.

³⁰ FTC News Release, *Cardinal Health Agrees to Pay \$26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospital and Clinics* (Apr. 20, 2015), available at

the largest operator of radiopharmacies in the United States and the sole operator in 25 metropolitan areas, and that it used that position to obtain exclusive rights to heart perfusion agents (HPAs), which are used to diagnose a range of medical conditions including heart disease. The Commission charged that, as a result of various tactics (including threatening to cancel purchases), Cardinal obtained *de facto* exclusive distribution rights from the two manufacturers with the only HPAs available on the market and prevented numerous potential competing radiopharmacies from buying these key inputs. The stipulated order, signed by a federal judge in New York last month, enjoins future misconduct and requires Cardinal to disgorge \$26.8 million in ill-gotten gains due to inflated prices it charged to hospitals and clinics.³¹ The money has been deposited in a fund for distribution to injured customers.

C. Maintaining Competition in Consumer Products and Services

The Commission continues to take action to preserve competition in economic sectors with the most direct impact on consumers' pocketbooks by promoting competition for everyday consumer products and services. The Commission seeks to preserve competition and ensure that anticompetitive mergers or conduct will not lead to higher prices or fewer options for basic household purchases.

Earlier this year, the Commission ordered the largest divestiture ever in a supermarket merger, requiring Albertsons and Safeway to sell 168 supermarkets in 130 local markets in Arizona, California, Montana, Nevada, Oregon, Texas, Washington, and Wyoming to settle

<https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>. Commissioners Ohlhausen and Wright voted against accepting the proposed consent agreement. *See supra* note 7.

³¹ *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y.) (final order & stipulated permanent injunction, filed Apr. 23, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150415cardinalorder.pdf>.

charges that their \$9.2 billion merger would likely be anticompetitive.³² According to the complaint, Albertsons and Safeway compete vigorously on the basis of price, quality, product variety, and services, and without the remedy, the acquisition would likely lessen supermarket competition to the detriment of consumers in 130 markets by removing a direct supermarket competitor. The Commission has also challenged a number of other supermarket transactions in recent years, including Bi-Lo Holdings' 2014 acquisition of 154 supermarkets from Delhaize Group, where the Commission required Bi-Lo to divest a number of supermarkets in Florida, Georgia, and South Carolina to FTC-approved buyers to resolve competitive concerns.³³

Last year, the Commission authorized federal court litigation to stop a proposed \$500 million merger between the two leading sellers of high school and college class rings, Jostens and American Achievement Corp.³⁴ We alleged that the transaction would have eliminated significant head-to-head competition between the companies, two of the three leading sellers of class rings, allowing the merged company to raise prices and reducing incentives to maintain product quality. The parties abandoned the transaction in response to the FTC's challenge.³⁵

The Commission also challenged Service Corporation International's \$1.4 billion acquisition of Stewart Enterprises, contending that the transaction would reduce competition for

³² *Cerberus Institutional Partners*, No. C-4504 (F.T.C. Jan. 27, 2015) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0108/cerberus-institutional-partners-v-lp-ab-acquisition-llc>.

³³ See *Bi-Lo Holdings, LLC*, No. C-4440 (F.T.C. Feb. 25, 2014) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/131-0162/bi-lo-holdings-llc>. See also *AB Acquisition LLC*, No. C-4424 (F.T.C. Dec. 23, 2013) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/131-0227/ab-acquisition-llc-matter>.

³⁴ *Visant Corp.*, Dkt. No. 9362 (F.T.C. Apr. 17, 2014) (administrative complaint), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0033/visantjostensamerican-achievement-matter>.

³⁵ *Visant Corp.*, Dkt. No. 9362 (F.T.C. May 7, 2014) (order dismissing complaint), available at <https://www.ftc.gov/system/files/documents/cases/140507vaisantjostensorder.pdf>.

funeral and cemetery services in a number of markets.³⁶ To resolve those concerns, the merging parties agreed to divest 53 funeral homes and 38 cemeteries to preserve competition in 59 local communities. The FTC charged that the proposed deal would enable the merged firm unilaterally to raise prices charged to consumers in these local markets and would substantially increase the risk of collusion between SCI and the few remaining competitors in the affected local areas. The order also requires divestitures where the deal would likely affect competition related to specific ethnic and religious populations to ensure consumers in these communities will continue to have access to competitive funeral and cemetery services.

Finally, the FTC is currently before the federal district court here in Washington on a motion for a preliminary injunction to prevent the merger of Sysco Corporation and US Foods.³⁷ The Commission alleges that the proposed acquisition violates Clayton Act Section 7 by significantly reducing competition for broadline foodservice distribution services supplied to a wide range of customers, including restaurants, hospitals, hotels, and schools. Sysco and US Foods are, by far, the largest broadline foodservice distributors in the United States and combined would possess an alleged 75% share of sales to national customers. Moreover, the merging parties are the only broadline distributors with national coverage, operating numerous distribution centers throughout the country. The companies compete vigorously on the basis of price, selection, and service to meet the needs of customers with foodservice locations dispersed nationwide or across multiple regions of the country. The Commission's complaint alleges that the proposed acquisition would likely harm competition in the national market as well as 32 local

³⁶ *Service Corp. Int'l*, No. C-4423 (F.T.C. Dec. 23, 2013) (consent order), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/131-0163/service-corporation-international-stewart-enterprises-inc>.

³⁷ *FTC. v. Sysco Corp.*, No. 1:15-cv-00256 (D.D.C.) (complaint filed Feb. 20, 2015), *available at* <https://www.ftc.gov/system/files/documents/cases/150220syscouscfmplt.pdf>. Commissioners Ohlhausen and Wright voted against filing the complaint in this matter.

markets, resulting in higher prices and diminished service. The Commission is joined in this action by the state attorneys general from 11 states and the District of Columbia.

D. Promoting Competition in Manufacturing and Technology Markets

Manufacturing and technology sectors also continued as high priorities for the FTC, including a number of recent enforcement actions to maintain competition in these crucial sectors of the economy. For example, in April 2014, the Commission successfully concluded its litigation challenging Ardagh Group's \$1.7 billion acquisition of rival glass container manufacturer Saint-Gobain Container.³⁸ The transaction would have combined the second and third largest manufacturers of glass containers for beer and spirits, and resulted in higher prices for those products. In settlement of the charges, the Commission finalized a consent order requiring Ardagh to divest six glass manufacturing plants and related assets to a single buyer to create a strong, independent third competitor to replace the competition that would have been lost had the merger proceeded unchallenged.

In May 2014, the FTC issued a consent order to remedy competitive concerns arising from CoreLogic's \$661 million proposed acquisition of DataQuick information systems.³⁹ The consent order requires CoreLogic to license its RealtyTrac assessor and recorder bulk data to preserve competition that would have been lost in this information market critical to the real estate industry. The FTC also took action to preserve competition in the market for title plants,

³⁸ *Ardagh Group, Inc.*, Dkt. No. 9356 (F.T.C. July 1, 2013) (administrative complaint), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/131-0087/ardagh-group-sa-saint-gobain-containers-inc-compagnie-de>. Prior to trial, the companies agreed to settle the charges with divestitures. *See Ardagh Group, Inc.*, Dkt. No. 9356 (F.T.C. June 18, 2014) (decision & order), *available at* https://www.ftc.gov/system/files/documents/cases/140618ardaghdo_0.pdf. Commissioner Wright voted against accepting the proposed consent agreement. *See* Dissenting Statement of Commissioner Wright, *available at* https://www.ftc.gov/system/files/documents/public_statements/568821/140411ardaghstmt.pdf.

³⁹ *CoreLogic Inc.*, No. C-4458 (F.T.C. May 21, 2014) (consent order), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/131-0199/corelogic-inc-matter>.

databases of real property title information used by real estate title insurers to verify proper title and to facilitate the real estate lending process. The Commission's consent order requires Fidelity National Financial and Lender Processing Services to divest a copy of LPS's title plants covering certain local Oregon markets as well as an ownership interest in a joint title plant serving the Portland, Oregon metropolitan area.

In December 2014, the Commission challenged Verisk Analytics, Inc.'s proposed \$650 million acquisition of EagleView Technology Corp., alleging that the transaction would likely reduce competition and result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to estimate repair costs for property damage claims.⁴⁰ EagleView, the self-proclaimed "industry standard" in rooftop aerial measurement products, controlled about 90% of the relevant market, serving most of the largest insurance carriers. Meanwhile, Verisk owned the dominant software platform used by insurers to estimate rooftop property damage claims. Verisk had recently entered the market with measurement programs of its own and had succeeded in winning significant customers away from EagleView by providing a lower-cost alternative. Customers viewed the merging parties as the two closest substitutes for these products. After the Commission filed its complaint, the parties abandoned the transaction.⁴¹

E. Preserving Competition in Energy Markets

Few issues are more important to consumers and businesses than the prices they pay for gasoline to run their vehicles and energy to heat and light their homes and businesses.

⁴⁰ *Verisk Analytics, Inc.*, Dkt. No. 9363 (F.T.C. Dec. 16, 2014) (administrative complaint), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/141-0085/veriskeagleview-matter>.

⁴¹ *Verisk Analytics, Inc.*, Dkt. No. 9363 (F.T.C. Dec. 19, 2014) (order dismissing complaint), *available at* <https://www.ftc.gov/system/files/documents/cases/141219veriskeaglevieworder.pdf>.

Accordingly, the FTC works to maintain competition in energy industries, invoking all the powers at its disposal—including monitoring industry activities, investigating possible antitrust violations, prosecuting cases, and conducting studies—to protect consumers from anticompetitive conduct in the industry.⁴²

Mergers can significantly affect competition in energy markets, and the Commission’s review of proposed mergers among energy firms is essential to preserving competition in these markets. For example, the Commission recently challenged a proposed acquisition involving two energy companies supplying gasoline in Hawaii. In an administrative complaint issued with a negotiated settlement of charges, the Commission alleged that Par Petroleum’s acquisition of Mid Pac Petroleum would likely have substantially lessened competition in the bulk supply of Hawaii-grade gasoline blendstock—which is gasoline before it is blended with ethanol to make finished gasoline.⁴³

Additionally, the FTC continues to monitor daily retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. This daily monitoring serves as an early-warning system to alert our experts to unusual pricing activity, and provides useful information to assist in investigations of potentially anticompetitive conduct. We also use the data generated by the monitoring project in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.⁴⁴

⁴² Information regarding FTC oil and gas industry initiatives is available at <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/oil-and-gas>.

⁴³ *Par Petroleum Corp.*, FTC File No. 141 0171 (F.T.C. Mar. 18, 2015) (proposed consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0171/par-petroleum-mid-pac-petroleum>. Commissioner Wright voted against accepting the proposed consent agreement. See Dissenting Statement of Commissioner Wright, available at <https://www.ftc.gov/system/files/documents/cases/150318parpetroleumwrightstatement.pdf>.

⁴⁴ For example, a 2011 report by the staff of the Commission’s Bureau of Economics concludes that while a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what Americans pay at the pump. See FTC, Bureau of Economics, *Gasoline Price Changes and the Petroleum Industry*:

II. FTC Competition Research and Advocacy

Although law enforcement is the primary tool used by the Commission to promote competition and protect consumers, the policy tools of research and advocacy help us stay current with emerging trends in our dynamic economy, study business developments, and offer a framework to consider appropriate policy responses. In particular, the agency's research efforts, enhanced by its ability to obtain information under Section 6(b) of the FTC Act when conducting a study, ensure that the Commission has the data and information needed to make sound decisions, track market developments, and determine future priorities. It also allows the agency to play a vital role in the development of relevant legal standards and policies.

The Commission has two 6(b) studies underway. The first, which began last May, is a study of patent assertion entities (PAEs). Staff is now in the final stages of assessing the information collected, and the study should provide a better understanding of how PAE organization and activity may affect innovation and competition.⁴⁵

Separately, the Commission has proposed to conduct a 6(b) study of its merger remedies,⁴⁶ to evaluate the effectiveness of Commission-ordered divestitures. It will enhance a similar study that the agency conducted in the 1990s, which led to important improvements to

An Update (2011), available at <http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf>. See also Matthew Chesnes, FTC, Bureau of Economics, *The Impact of Outages on Prices and Investment in the U.S. Oil Refining Industry*, Bureau of Economics Working Paper No. 332 (2014), available at <https://www.ftc.gov/reports/impact-outages-prices-investment-us-oil-refining-industry>.

⁴⁵ 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), available at <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-announces-second-federal-register-notice-revised-proposed>.

⁴⁶ FTC News Release, FTC Proposes to Study Merger Remedies (Jan. 9, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

the Commission's orders.⁴⁷ This study is in its preliminary stages, and we will soon seek OMB approval to collect data and information related to approximately 90 merger orders issued between 2006 and 2012. The Commission is committed to understanding and enhancing the effectiveness of its orders, and this study is a part of that ongoing effort.

Hosting workshops on emerging business practices and technologies is another example of how the Commission advances its competition mission. The FTC convenes fellow regulators and enforcement partners, as well as industry representatives, consumer advocates, and academics for lively, informative, and often groundbreaking discussions of the policy and enforcement challenges posed by current issues.

For example, in February 2014, the FTC hosted a workshop to examine emerging competition issues involving the introduction of biosimilars and interchangeable biologic drugs.⁴⁸ In particular, participants discussed how naming conventions may affect the development of biosimilar competition, with some raising concerns that the use of distinct non-proprietary names for biosimilars is unlikely to have a significant impact on drug safety but may well reduce competition. Additionally, earlier this year, the Commission, along with the Antitrust Division, held a two-day workshop examining emerging health care competition issues, including those raised by the regulation of health care professionals, innovations in health care delivery, advances in health care technology, the measurement of health care quality, and price transparency.⁴⁹

⁴⁷ FTC, *A Study of the Commission's Divestiture Process* (1999), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>.

⁴⁸ FTC News Release, *FTC to Host Workshop on the Competitive Impacts of State Regulations and Naming Conventions Concerning Follow-on Biologics* (Nov. 8, 2013), available at <https://www.ftc.gov/news-events/press-releases/2013/11/ftc-host-workshop-competitive-impacts-state-regulations-naming>.

⁴⁹ Information about the "Examining Health Care Competition" workshop is available on our website at <https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition>.

To address issues created by the proliferation of online and mobile peer-to-peer business platforms in certain sectors of the economy, next month the Commission will host a workshop on the “Sharing Economy.” Peer-to-peer platforms enable suppliers and consumers to connect and do business and have spawned new business models in industries that have been subject to regulation, such as passenger transportation and public accommodation. As more entrepreneurs use technology to interact directly with consumers, we want to understand the competition, consumer protection, and economic issues created by the arrival of these new business models, as well as their interactions with existing regulatory frameworks.

The FTC also engages in advocacy, providing comments to state legislatures, state and federal agencies, and other policymakers. Advocacy is particularly effective in addressing market restraints imposed by government, often for reasons unrelated to competition and without due consideration of their impact on consumers. For instance, the FTC has been active in encouraging the removal of unnecessary scope-of-practice restrictions that prevent health care professionals from being able to take full advantage of their training and expertise.⁵⁰ Enabling professionals to practice to the full extent of their training and competence may reduce the price and increase the availability of professional services. FTC staff also submitted comments on legislative proposals in Missouri and New Jersey to expand prohibitions on direct-to-consumer auto sales by manufacturers.⁵¹ The comments note that existing laws in those states protect

⁵⁰ See FTC, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses* (Mar. 2014), available at <https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>.

⁵¹ FTC News Release, *FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers* (May 16, 2014), available at <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), available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-staff-urges-michigan-legislature-repeal-ban-direct-consumer>.

independent dealers by mandating a single method of distributing automobiles, and that protection is likely harming both competition and consumers.

III. Conclusion

Thank you for this opportunity to share highlights of the Commission's recent work to promote competition and protect consumers. The Commission looks forward to continuing to work with the Subcommittee to ensure that our antitrust laws and policies are sound and that they benefit consumers without unduly burdening businesses.