American Bar Association

Section of Antitrust Law

PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT

JANUARY 2017

I. INTRODUCTION

The Section of Antitrust Law of the American Bar Association (the "Section") is pleased to offer its views regarding the current state of federal antitrust and consumer protection enforcement and its recommendations for ways the new administration might consider further strengthening policy and enforcement to deal with new challenges on the horizon. The views and recommendations contained in this Report are those of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and unless otherwise noted, should not be construed as representing the policy of the American Bar Association.

This will be the eighth sequential Presidential Transition Report prepared by the Section. Section Chairs, Roxann E. Henry (2015-16) and William MacLeod (2016-17), appointed this Presidential Transition Task Force of 20 lawyers, professors, and economists in May 2016.[1] The membership of the Task Force mirrors the deep expertise, diversity of viewpoint and breadth of experience of the Section's 6,900 members. The Task Force includes attorneys in private practice representing defendants and plaintiffs; a member of the federal judiciary; and antitrust law and economics scholars from the nation's leading universities. More than half of the members have served in senior leadership positions in the Antitrust Division of the Department of Justice (the "Division") or the Federal Trade Commission (the "FTC") (collectively, the "Agencies"), including several former Assistant Attorneys General and Commissioners. Members of the Task Force have served in every Administration extending back more than four decades. Task Force members have also made significant contributions to the body of scholarly literature in the fields of competition and consumer protection law, and have been active in the international competition community, including as advisors to foreign competition authorities and the International Competition Network (ICN).

The Task Force Members represent a diverse range of political, ideological, and professional views, and the Report is the result of an often vibrant and spirited debate among the members. In keeping with the strong philosophy favoring action by consensus that animates all Section reports and publications, all Members worked hard to accommodate one another's perspectives, with the result that some of the findings and conclusions offered herein would not have been written in exactly the same way by any individual member writing alone. This being said, the Report has been endorsed by all Task Force members and was approved by the Section's Council.

II. EXECUTIVE SUMMARY

Antitrust figured prominently in the 2016 Election: for the first time in recent memory, both major parties prominently featured their respective viewpoints on competition and consumer protection policy. Campaign commentary included sharp criticism of an alleged absence of vigor and overall ineffectiveness in current patterns of antitrust enforcement, with comments calling for

[1] The 2016 Presidential Transition Task Force was co-chaired by Theodore Voorhees and Leah Brannon. Samantha Knox served as the Reporter and Organizer of the Task Force. The Task Force members included Roxane Busey, Mary Ellen Callahan, Dennis Carlton, Michael A. Carrier, Paul T. Denis, Douglas H. Ginsburg, Louis Kaplow, Donald C. Klawiter, William Kovacic, Jon Leibowitz, Abbott B. Lipsky, Jr., A. Douglas Melamed, Fiona Scott Morton, James H. Mutchnik, Richard Parker, Lydia Parnes, James Rill, and Joel Winston. Megan Browdie served as the Young Lawyer Representative to the Task Force. The views and conclusions of Task Force Members that are reflected in this Report have been provided in their individual capacities and should not be attributed in any way to their law firms, clients or academic institutions, as applicable.

sharp, even radical reorientation of enforcement policy, especially in the review of proposed mergers and treatment of large industrial firms. As will be seen in this Report, the Section does not share these views about the current state of antitrust enforcement policy. To the contrary, although dynamic market forces will always pose challenges for government enforcement policy, and enforcement efforts must adapt to meet those challenges, the Section's view is that the Nation's system of competition enforcement has been in good hands, that an arc of continuous improvement and advancement can be discerned that stretches back over many years and multiple administrations, and that enforcement policy should remain firmly tethered to its statutory basis.

This Report is divided into four sections. First, the Report focuses on the current state of antitrust and consumer protection enforcement under the stewardship of the Agencies. This section reviews cartel, civil, merger, and consumer protection enforcement, with an emphasis on issues that are likely to present the most significant challenges over the next four years. In its second section, the Report addresses some of the most important and challenging doctrinal questions facing the Agencies and courts today. Section three of the Report discusses some of the unique competition issues that will be facing two key industrial sectors: healthcare and financial services. Finally, the last section of the Report discusses challenges facing the Administration, the Agencies, and U.S. firms in the international arena as competition enforcement regimes proliferate and continue to evolve throughout the world.

A. Enforcement Matters

The Agencies have a broad range of policy tools at their disposal and for the most part have been making good use of them. Agency guidance plays an important role in ensuring that markets function efficiently and competitively. The Section encourages the Agencies to continue providing this guidance in written form, including formal guidance documents, agency reports, closing statements, speeches by top agency officials, and the like. Written guidance from the Agencies is especially important in connection with novel market conditions and forms of behavior as well as in circumstances where there has been a shift in the Agencies' enforcement policies and priorities. Further guidance is particularly needed on vertical issues arising in the context of mergers, resale price maintenance, state action, and intellectual property ("IP"). The Section encourages the Agencies to continue to use litigation as a policy tool to clarify important issues. The Agencies should continue to review and comment on legislation and regulations that affect competition policy, agency jurisdiction, and the abilities of agencies to effectuate their missions.

The Section commends the Division for the continued success of its cartel enforcement program, and encourages the Division to build on this success by providing increased transparency and ongoing practical guidance on its Corporate and Individual Leniency Programs, and promoting the adoption of similar leniency programs throughout the world. This initiative could alleviate our concern that the sentencing and fining processes in international cartel investigations have grown too complex to understand, and encourages the Division to closely examine its policies and procedures for "volume of commerce" (VOC) determinations.

Also needed is further guidance in the wake of the Yates Memorandum. The Section commends the Division for recognizing the importance of corporate compliance measures in several recent sentencing proceedings, and encourages the Division to pursue an open dialogue with the bar and business community about model "robust" compliance programs and effective detection and screening techniques. The Division should also consider exploring proactive methods of cartel detection in partnership with federal, state, and local law enforcement agencies.

The Section commends the Agencies' recent focus on litigating cases and being "trial ready." To enhance this facet of enforcement, we propose that the Agencies form a working group to identify procedural and structural measures that could improve antitrust litigation in federal court. Potential reforms might include structuring trials by issue (instead of by party) and greater use of court-appointed experts.

In the merger enforcement area, the Section focuses on the need for increased transparency, including in merger trials, and increased utilization of closing statements for merger investigations not resulting in agency action. The Section also recommends that the Agencies make greater use of merger retrospectives to evaluate the effectiveness of merger policy, tools, and remedies. These studies should focus on both price and output effects, and should evaluate the efficacy of tools and models used to evaluate mergers. Finally, the Section reiterates the need for process symmetry between the Division and the FTC in merger enforcement litigation.

In consumer protection, law enforcement and the regulatory landscapes have changed significantly over the last four years. This Report notes numerous initiatives of the FTC, as well as actions of the Consumer Financial Protection Bureau (CFPB) and the Federal Communications Commission (FCC), that have enhanced protection of the nation's consumers. However, the overlapping jurisdictions of the FTC, CFPB, and FCC give rise to risks of inconsistent regulatory approaches that cause confusion and complicate compliance, particularly with respect to privacy protection. Such inconsistencies could undermine the objectives the Agencies seek to advance.

The Section urges the FTC, FCC, and CFPB to take action to address these risks, including by supporting repeal of the common carrier exception in the FTCA and by adopting consistent privacy protection frameworks. The Section urges the FTC and CFPB to adopt reforms to enhance the transparency and fairness of the enforcement process, including dedicating resources to cases involving significant consumer harm, using civil investigative demands more judiciously, adopting internal guidelines for staff in communicating with investigation targets, reducing burdens of "boilerplate" order provisions, tailoring monetary relief to the injury caused and the defendant's culpability, and providing targets with the opportunity to meet with decision makers. Finally, the Section notes the need for additional guidance and harmonization on topics relating to abusive and unfair practices (CFPB's and FTC's respective standards), data security, monetary remedies, advertising interpretation, and "clear and conspicuous" disclosure requirements.

B. Legal Doctrine

The Agencies will play a pivotal role in shaping legal doctrine over the next four years. The Report identifies needs in key substantive areas—better delineation of problematic exclusionary conduct that may have adverse market effects—where the Agencies can reduce legal uncertainty and avoid conflicts by offering sound policy leadership.

With respect to exclusionary conduct, the Section sees three areas that could benefit from further Agency attention and guidance. First, two-sided markets are increasingly important in today's economy, but have received relatively little attention in recent court decisions and Agency statements. Second, there is need for further clarification concerning the legal analysis of contracts that reference rivals. Third, further guidance would be helpful in assessing the potential anticompetitive and procompetitive effects of tying and bundling arrangements, particularly in light of recent conflicting decisions issued by the Third and Ninth Circuits.

With regard to patent matters, the Section recommends that the Agencies gather and analyze further evidence related to activity that may have competitive significance—for example with respect to patent assertion entities and potential holdups and holdouts—and share their assessments of competitive effects with the public and other government agencies. The Section also encourages the Agencies to consider the multinational implications of actions that alter patent rights and remedies.

C. Industry-Specific Issues

In certain industries, unique challenges and complexities arise when analyzing questions of competition law. The Obama Administration focused a large portion of its antitrust enforcement efforts on the healthcare and financial sectors. The Report addresses some of the key issues in these sectors facing the incoming Administration.

With respect to the financial sector, when evaluating proposals for new or revised regulations that will be administered by other agencies, the Section encourages the Agencies to consider the adverse effect that regulations might have on competition, particularly with respect to the burdens the regulations may impose on smaller firms. As for mergers of financial institutions, the Section believes that the Agencies should not alter their legal standards in order to benefit equity holders of banks. Finally, further clarification is needed regarding the Division's treatment of cases involving alleged interference with financial benchmarks and in particular the implications for enforcement policy and sentencing where the underlying misconduct could be seen as fraud or anticompetitive behavior or a combination of the two offenses.

With respect to the healthcare industry, the Section encourages the Agencies to provide further guidance on their merger analysis, including the theories of harm and potential benefits resulting from vertical integrations, exclusive contracts, merger-specific efficiencies, and the competitive impact of electronic healthcare records, and regulatory policies at the state and federal levels. The Section also encourages the FTC to articulate and apply a rule-of-reason enforcement policy with respect to reverse payment settlements and to assess the implications for competition and consumer protection of discouraging purchases or refusing to deal in pharmaceutical markets.

D. International Matters

The global expansion of competition law regimes has dramatically increased the complexity and cost of compliance for U.S. businesses. The Section commends the Agencies for working to address these challenges through formal and informal cooperation, communication, and consensus-building efforts. However, there is much work yet to be done. Now, more than ever, it is important for the United States to speak with one voice in international antitrust matters. The Section encourages the Agencies to work more closely with each other and with the Administration to develop and communicate a unified global antitrust policy. To accomplish this goal, the Administration may wish to consider how the Executive Branch could facilitate more extensive coordination between the Agencies and better respond to pressing international competition law matters. The Section commends the Agencies for their efforts to promote comity through deference to foreign authorities' enforcement actions. That said, where appropriate legal grounds exist, and where consistent with U.S. policy, the Agencies should not hesitate to intervene in foreign enforcement proceedings where it appears that U.S. firms are being subjected to rules or policies that are antithetical to U.S. antitrust law, particularly where serious due process concerns are at stake. Finally, in the wake of recent federal appellate decisions opining that the Federal Trade and Antitrust Improvements Act (FTAIA) is a substantive element of a Sherman Act claim, the Section recommends that the Agencies clarify that the FTAIA places a jurisdictional limit on Sherman Act enforcement.

III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports,[2] speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.[3]

Furthermore, uncertainty as to the boundaries of antitrust laws may chill potentially procompetitive conduct or enable potentially anticompetitive behavior to continue unchecked. Businesses may be less willing to engage in novel business activities that could benefit consumers.[4] Moreover, agency guidance and enforcement not only define the boundaries of how the Agencies view and enforce the law, but may also impact how courts rule in litigation.

Guidance also ensures a place for the U.S. perspective on the international stage. Because so many foreign antitrust authorities look to the Agencies for leadership and study U.S. enforcement decisions and cases, clearly articulated guidance helps achieve uniformity across jurisdictions. Moreover, an international presence and influence as to antitrust policy is particularly critical in an era in which some foreign competition agencies use the pretense of antitrust enforcement as a cover to mask decisions that are actually based on industrial policy or protectionism.

Speeches, while not binding on the Agencies or as long-lasting as more formal agency documents, can give advance notice of enforcement priorities and the views of agency leadership regarding how best to analyze certain forms of conduct. For instance, in her first speech as Acting Assistant Attorney General, Renata Hesse offered important insights into the use of bargaining models in analyzing vertical mergers and the Division's skepticism of procompetitive claims in horizontal mergers.[5] Indeed, for changes in agency thinking, an agency speech or other non-enforcement

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[2] *See, e.g.*, FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY 8-13 (2016) (hereinafter FTC PAE STUDY), *available at* www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study.

[3] The recent guidance issued by the Division and the FTC communicating the decision to treat wage-fixing and no-poaching agreements as criminal violations going forward provides an excellent example of this. *See* DEP'T OF JUSTICE, ANTITRUST DIV., FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), *available at* www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

[4] *Cf.* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (discussing how mistaken inferences of conduct can chill potentially procompetitive business activity).

[5] *See* Renata Hesse, Acting Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., And Never the Twain Shall Meet?: Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at the 2016 Global Antitrust Enforcement Symposium 15 (Sept. 20, 2016), *available at*
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guidance can be the fairer approach, at least in the first instance, than initially embarking on litigation.

Business review letters from the Division and advisory opinions from the FTC serve as another avenue for providing guidance on novel conduct. More important, by setting forth the respective agency's reasoning for how it views proposed conduct, these documents in effect make a policy statement as to what characteristics of the conduct are considered to be beneficial or harmful for consumers.

2. Inter-Agency Coordination

The Section commends the coordination between the Agencies, especially when issuing guidance. Inter-agency coordination will ensure that the benefits that result from issuing guidance, discussed above, are fully recognized. With respect to enforcement, greater coordination will not only make the Agencies more effective but also help achieve uniformity within the United States and provide a consistent message internationally.

The Section believes that the necessary level of coordination can be accomplished in a variety of ways. For example, joint workshops provide a useful and convenient opportunity to clarify enforcement community thinking. To be most effective, such workshops should ideally be linked to some internal implementation mechanism coordinated between both agencies. Annual joint agency statements at key antitrust bar events, such as the ABA Enforcers' Roundtable or the Global Antitrust Enforcement Symposium, discussing the themes and goals of the Agencies going forward provide other meaningful opportunities for clarifying agency policies and intentions in a coordinated way.

3. Litigation as a Policy Tool

The Section recommends using litigation on important antitrust issues as a complement to public guidance and policy development. Litigation serves a critically important role in developing the law. Therefore, it is important for agencies to litigate their own cases (as opposed to leaving it to "private attorneys general"[6] to challenge potential antitrust violations).

Private litigation does not always protect consumers and it often results in damage recovery for past practices, rather than injunctive relief that would stop the consumer harm from occurring. To further the antitrust laws' core tenet of benefiting consumers, it is important for the Agencies to be seen as a leader in taking cases to court. Litigating cases also tests the current boundaries of the antitrust laws in a way that guidance alone cannot. In short, the primary benefit of a litigated decision with respect to shaping antitrust policy is that its outcome is an analysis and balancing of

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www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

[6] *See, e.g.*, Hawaii v. Standard Oil, 405 U.S. 251, 262 (1972) ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'").

opposing arguments, such that the decision explains both what conduct is deemed legal and what is deemed illegal.[7]

The Section notes that there have been some recent expressions of concern that the Agencies may have become risk averse to litigation, especially with respect to conduct cases.[8] While the Section lacks the information to agree or disagree, we believe the Agencies should demonstrate a willingness to take intelligent risks if the payoff enhances consumer welfare and moves the law in the proper direction. Even losing a case can have a beneficial effect on antitrust policy, for example, by contributing to a better understanding of the boundaries of what is considered acceptable competitive conduct.

4. Specific Areas Where Guidance Could Be Useful

There are a number of areas within competition law where additional guidance could be especially helpful. As economic and commercial realities develop, so too must application of the antitrust laws in these areas. Several important, illustrative areas of antitrust law that could benefit from additional guidance are discussed below.

a. Vertical Issues

Non-horizontal merger enforcement is one particular area that would benefit from agency guidance, given the recent increase in industry consolidation and vertical mergers. These mergers have attracted considerable attention recently.[9] The last such guidelines were issued in 1984, and there have been substantial changes in antitrust policy and the application of modern economics thinking since then.[10] The 2010 Horizontal Merger Guidelines do not address vertical or

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[7] *See* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidance*, 21 GEO. MASON L. REV. 1287, 1311 (2014).

[8] *See, e.g.*, ORG. FOR ECON. COOPERATION AND DEV., COMPETITION COMMITTEE, COMMITMENT DECISIONS IN ANTITRUST CASES: NOTE BY THE UNITED STATES 7 (2016), *available at* www.justice.gov/atr/file/873491/download (citing a total of only six civil non-merger cases with litigated outcomes between January 1, 2011 and April 30, 2016).

[9] *See also* Peter Navarro, Senior Economic Advisor, Trump Campaign, Statement on Monopoly Power of New Media Conglomerates, Oct. 23, 2016, *available at* https://www.donaldjtrump.com/press-releases/statement-on-monopoly-power-of-new-media-conglomerates ("AT&T, the original and abusive "Ma Bell" telephone monopoly, is now trying to buy Time Warner . . . . Donald Trump would never approve such a deal because it concentrates too much power in the hands of the too and powerful few."); Ryan Knutson, *Trump Says He Would Block AT&T-Time Warner Deal*, THE WALL STREET JOURNAL, Oct. 22, 2016, *available at* http://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214; S. Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event 6 (June 29, 2016), *available at* www.warren.senate.gov /files/documents/2016-6-29_Warren_Antitrust_Speech.pdf (advocating for increased scrutiny of vertical mergers and for a revision of the non-horizontal merger guidelines).

[10] *See* U.S. DEP'T OF JUSTICE, Press Release, *Department of Justice and Federal Trade Commission Issued Revised Horizontal Merger Guidelines: 2010 Guidelines More Accurately Represent Agencies' Merger Review Process*, August 19, 2010, *available at* https://www.justice.gov/opa /pr/department-justice-and-federal-trade-commission-issue-revised-horizontal-merger–guidelines (describing "several important ways" in which new guidelines differed from previous guidelines).

conglomerate mergers. The uncertainty in thinking about non-horizontal mergers becomes particularly apparent when one compares Acting Assistant Attorney General Renata Hesse's recent comment, noted previously, that "the Antitrust Division and the FTC have become *justifiably more skeptical* about the promise of procompetitive benefits of mergers,"[11] with the 1984 Guidelines' statement that "substantial economies are afforded by vertical integration [and thus] the [agencies] will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger."[12]

Another important vertical issue, resale price maintenance (RPM), historically received a fair amount of attention through litigated cases. However, despite being the subject of two important Supreme Court cases that have ushered in the use of rule of reason analysis to this practice,[13] RPM is an area of federal antitrust law that has received little apparent attention in recent years.[14] Recognizing that the current state of RPM law in both minimum and maximum price contexts requires sophisticated balancing of pro- and anti-competitive tendencies, the dearth of guidance from the Agencies in the form of either guidelines or litigated cases leaves open important questions in an area of law that can have a direct and substantial impact on consumers. For example, it would be beneficial for the Agencies to provide guidance on how they think about balancing asserted quality and service benefits that can flow from maintaining minimum prices for certain types of products against the potential that RPM reduces competition to the detriment of consumers. Perhaps equally important, the Agencies should provide guidance on how they would analyze the vigor of interbrand competition in markets where some producers have restricted intrabrand competition among distributors of their products.

b. Intellectual Property

Much valuable work could be devoted to providing guidance at the intersection of antitrust and intellectual property laws. The Agencies' efforts in updating the Antitrust Guidelines for Intellectual Property are timely, especially in light of recently issued IP guidelines by several foreign jurisdictions (some of which diverge from generally accepted antitrust principles in the United States). For example, China has issued two separate sets of IP guidelines that conflict in several important areas with each other and with the position of other antitrust agencies, including in the United States.[15] As noted previously, guidelines from the Division and FTC are critical for

[11] Hesse, *supra* note 5, at 15 (emphasis added).

[12] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, NON-HORIZONTAL MERGER GUIDELINES § 4.24 (1984), *available at* www.justice.gov/atr/non-horizontal-merger-guidelines.

[13] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881 (2007); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997).

[14] The last government action against RPM was brought almost 20 years ago and the last speech by an agency head was in 2009. *See* United States v. Ixtlera de Santa Catarina, 1996 WL 925857 (E.D. Pa. 1996); Christine Varney, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009), *available at* www.justice.gov/atr/speech/antitrust-federalism-enhancing-federalstate-cooperation.

[15] *Compare*, Anti-Monopoly Guideline on Abuse of Intellectual Property Rights (promulgated in draft form by the Anti-Monopoly Comm'n of the State Council, Nat'l Dev. and Reform Comm'n, Dec. 31, 2015)(China), *available at* http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/IPR%20Guideline%20%28draft%29%2020151231-EN.pdf *with*
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providing clarity in the international arena, and may help to achieve international conformity on important cross-border antitrust issues.

The Agencies have issued policy statements regarding Standard Essential Patents (SEPs), such as the joint statement issued by the Division and the Patent and Trademark Office on remedies for SEP violations subject to Fair, Reasonable and Non-Discriminatory (FRAND) commitments.[16] These have been helpful, although certain aspects of those reports raise issues that merit additional analysis regarding the legal rights of the parties involved. The Section applauds the FTC's recent 6(b) Study on patent assertion entities that recommends, among other things, litigation reforms that lower the costs and burdens of defending an infringement suit but preserve the patent system's beneficial role in promoting innovation and consumer welfare.[17] The Section encourages the Agencies to continue undertaking studies of competitive issues in the IP arena designed to provide guidance where the potential exists for competitive harm. Likewise, clarification of enforcement policy for the intersection between IP and antitrust would be welcome where uncertainty remains concerning the agencies' views of the boundaries their policies.

A further discussion of antitrust policy as it relates to IP issues is contained in Section IV-B infra.

c. State Action Doctrine

To its credit, the FTC has secured important decisions limiting the scope of the state action doctrine in two recent cases before the Supreme Court, *Phoebe Putney*[18] and *North Carolina Dental Board*.[19] In the aftermath of *North Carolina Dental Board* and in response to the request for advice from state officials and others as to what constitutes antitrust compliance for state regulatory occupations, the FTC staff provided guidance on two issues: (1) When does a state regulatory board require active supervision by the state to invoke the state action defense? and (2) What factors are relevant to determining whether the active supervision requirement is satisfied?[20]

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Provisions on Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (promulgated on Apr. 7, 2015 by the State Admin. for Indus. and Commerce) (China), *available at* http://www.linklaters.com/pdfs/mkt/beijing/19848090.pdf.

[16] U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Jan. 8, 2013), *available at* www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf. The Section notes that the proposed revisions to the IP Licensing Guidelines do not include a discussion of SEPs.

[17] FTC PAE STUDY, *supra* note 2. This study is the FTC's "first use of its Section 6(b) authority to investigate transactions in the [IP] marketplace." *Id.* at 14.

[18] FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003 (2013).

[19] FTC v. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. 1101 (2015).

[20] FED. TRADE COMM'N, FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS (Oct. 2015), *available at* www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf. At least two states, California and Oklahoma, have also issued guidance. *See* California Attorney General Opinion No. 15-402 (Sept. 10, 2015), Oklahoma Executive Order 2015-33 (July 17,
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While the above Guidance clarified some of the issues raised by the Supreme Court's ruling on what constitutes active supervision, the approach taken by the FTC seems to be a statement of best practices and a safe harbor for state supervision of licensing boards. The factors articulated may be viewed as relevant by the FTC staff in interpreting the "constant requirements" of active supervision as set forth in *North Carolina Dental Board* and other Supreme Court precedents.[21]

There continues to be confusion about the Supreme Court's ruling in *North Carolina Dental Board* and, at least with respect to licensing boards, concern by members of such boards about their potential antitrust exposure as individuals. A variety of cases alleging antitrust violations have been brought.[22] As the FTC Staff Guidance notes, some cases raise issues that are unlikely to be found to have an anticompetitive effect on competition, as opposed to individual competitors. The agencies have filed amicus briefs in at least two recent federal cases and have at least one pending investigation in this area.[23]

5. Legislation, Regulation, and Executive Action

The Agencies have long advocated against efforts by regulators to limit the application of the antitrust laws. The Section encourages the Agencies to continue to review and comment on federal legislation and regulations that affect competition policy, agency jurisdiction, and procedures,[24] or the ability of agencies to effectuate their missions (including agency budgets).

The Agencies should also continue to be vigilant in monitoring state actions and regulations that may be anticompetitive or designed to protect incumbent firms from competition. The Agencies should continue to provide their expert input with respect to state laws that: (1) involve

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2015); Letter from E. Scott Pruitt, Att'y Gen. of Okla., to All Boards and Commissions with Active Market Participant Majorities (Aug. 17, 2015).

[21] *See* Comm'r Maureen K. Ohlhausen, Reflections on the Supreme Court's *North Carolina Dental* Decision and the FTC's Campaign to Rein in State Action Immunity, Remarks before the Heritage Foundation (Mar. 31, 2015), *available at* www.ftc.gov/system/files/documents /public_statements/634091/150403hertiagedental.pdf; *State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116-17.

[22] *See, e.g.*, Teladoc v. Texas Medical Board, No. 1-15-CV-343, 112 F. Supp. 3d 529 (W.D. Tex. 2015) (granting motion for preliminary injunction against anticompetitive rulemaking by self-interested licensing board); Robb v. Conn. Bd. of Veterinary Med., 157 F. Supp. 3d 130 (D. Conn. 2016) (motion to dismiss granted in antitrust suit by veterinarian over his vaccination procedures); Axcess Med. Clinic v. Miss. Bd. of Med. Licensure, No. 3:15-cv-307 (S.D. Miss. 2015) (suit brought challenging board's finding of unauthorized practice of medicine by non-physician owners of pain management practice) (subsequently dismissed); Henry et al. v. N.C. Acupuncture Licensing Bd. et al., No. 1:15-cv-831 (M.D.N.C. 2015) (suit by physical therapists and patients regarding cease and desist letter from the board regarding dry needling services).

[23] Brief for Amicus United States of America, Solarcity v. Salt River Project Agricultural Improvement and Power District, No. 15-17302 (9th Cir. Jun. 7, 2016); Brief for the United States and Fed. T. Comm'n, Teladoc, No. 16-50017 n.1 (5th Cir. Sept. 9, 2016) (disclosing parallel FTC investigation).

[24] For example, the SMARTER Act would: (1) create identical standards for the FTC and Division for obtaining a preliminary injunction against a proposed merger or acquisition; and (2) eliminate the FTC's ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. H.R. 2745, 114th Cong. (2016).

occupational licensing;[25] (2) add unnecessary new barriers to entry to platform and sharing companies, like Uber or AirBnB;[26] (3) place anachronistic distribution requirements on innovative, vertically integrated companies (e.g., laws to exclude car manufacturers from operating in states without physical dealer locations);[27] and (4) circumvent the antitrust laws in the healthcare area, including, but not limited to, Certificate of Public Advantage (COPA) laws and Certificate of Need (CON) laws.[28]

To effectively and efficiently perform their antitrust and consumer protection missions, the Agencies must receive sufficient funding to attract and retain competent staff, conduct investigations, and engage in all the other enforcement activities on which consumer welfare depends. Given that the U.S. economy and population are projected to grow, it is plausible that the Agencies would need more resources to enable them to continue to effectively carry out their role in protecting consumers, but as always in the competition for appropriations, a compelling argument must be articulated. We encourage the Agencies to advocate for the resources they require, and to ensure that the quality of their work is not undermined by the quantity of demands placed upon them.

Finally, the Section notes that, on April 15, 2016, President Obama issued an Executive Order (E.O.) requiring executive agencies to "identify specific actions that they can take in their areas of responsibility to build upon efforts to detect [competitive] abuses . . . [and] address undue burdens on competition."[29] This E.O. opens opportunities for the Agencies to ensure that sound competition policy is appropriately and effectively recognized and utilized by executive agencies and departments. The Division and FTC should participate in the antitrust reviews. Their

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[25] *E.g.*, *Competition and the Potential Costs and Benefits of Professional Licensure, before the H. Comm. on Small Bus.*, 113th Cong. (2014) (statement of Andrew Gavil, Dir. Office of Policy Planning, Fed. Trade Comm'n) (providing an overview of the FTC's advocacy efforts in the area of occupational licensing).

[26] *E.g.*, Workshop Transcript, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (June 9, 2015), *available at* www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_transcript.pdf (examining competition, consumer protection, and economic issues arising in the sharing economy).

[27] *E.g.*, Workshop Transcript, Auto Distribution: Current Issues and Future Trends (Jan. 19, 2016), *available at* https://www.ftc.gov/system/files/documents/public_events/895193/auto_distribution_transcript.pdf (including a discussion of restrictions on manufacturers' ability to engage in direct selling and new technological developments affecting distribution, among other topics).

[28] *E.g.*, FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST DIV., JOINT STATEMENT ON CERTIFICATE-OF-NEED LAWS AND SOUTH CAROLINA HOUSE BILL 3250 (2016), *available at* www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj-sclaw.pdf (advocating for repeal of South Carolina's CON law). The FTC has also submitted comments in opposition to New York, Virginia, Tennessee, West Virginia, and Alabama COPA laws. *See, e.g.*, Comment by the FTC regarding Certificate of Public Advantage Applications Filed pursuant to New York Public Health Law, 10 NYCRR, Subpart 83-1 (Apr. 22, 2015), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf.

[29] Exec. Order 13,725, 81 Fed. Reg. 23,417 (Apr. 15, 2016), *available at* www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

advocacy would enhance the regulatory impact analyses that agencies are already required to undertake. In light of this mandate, the Administration may also consider whether a public competitive impact analysis should be undertaken in connection with proposed regulations.[30]

B. Cartel Enforcement

1. Introduction

Over the past two decades, the Division has transformed cartel enforcement for the better. The Division's enforcement efforts have had unparalleled success, an accomplishment that has had dramatic global implications. Today, more than 120 countries have cartel enforcement regimes; bid-rigging, market allocation and price-fixing are now criminal offenses in more than 20 of these jurisdictions. From the lysine and citric acid cases that first raised the specter of parallel enforcement actions, and the nine-digit fines and substantial jail sentences, to the more recent, sprawling automotive parts investigations, prosecution and defense of international cartel investigations have grown increasingly complex in the United States and in jurisdictions around the world.

Over the last decade, the Division has collected more than $11 billion in criminal fines and penalties; 98% of these fines were collected in connection with prosecution of international cartels.[31] The average corporate fine has also increased over the last decade. Until 1994, the largest corporate fine imposed for a single Sherman Act violation was $6 million.[32] Today, fines of $10 million or more are commonplace, including fines in excess of $100 million.[33] More than sanctions, these amounts represent a fraction of the value to consumers of this enforcement activity.

The Section commends the Division on its remarkable successes, and offers several recommendations to ensure that the criminal enforcement program remains vibrant and effectively deters future violations.

2. Corporate and Individual Leniency Policies

The Division adopted the current version of its Corporate and Individual Leniency Policies in 1993, and these policies remain the mainstay of the Division's anti-cartel enforcement efforts.[34]

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[30] Such requirement would be similar to the regulatory impact analysis that is already required of executive agencies undertaking new regulatory initiatives. *See* Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003).

[31] U.S. Dep't of Justice, Congressional Submission FY 2017 Performance Budget 4, *available at* www.justice.gov/jmd/file/821001/download.

[32] *Id.*

[33] U.S. Dep't of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Sept. 12, 2016), *available at* www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

[34] *See, e.g.*, Scott Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Remarks at the 24th Annual (….continued)

These policies work because they are transparent and because the Division promotes them widely and implements them carefully and consistently.[35] The Section encourages the Division to maintain these efforts, seek out opportunities to promote the Leniency Policies, and clarify any uncertainties through public statements. Practical guidance in the form of a "case study" addressing requirements or expectations for securing first-in conditional leniency (e.g., timing, document productions, proffers, and employee interviews) and unconditional leniency (e.g., full or partial restitution) would further the bar's and the business community's understanding of the Leniency Programs and what applicants should expect when seeking conditional and, ultimately, unconditional leniency. The Section encourages the Division to continue its efforts to increase transparency and provide information about its operations.

The Division has played, and continues to play, a leading role in developing cartel prosecution processes, including the development and operation of its own leniency programs for corporations and individuals. The Section commends the Division for making these developments transparent to the world through its prosecutions, speeches, policy statements, and model agreements.[36] The Division also takes seriously its emissary responsibilities by having its most senior and experienced prosecutors attend antitrust conferences, such as the International Cartel Workshop, the Organisation for Economic Co-operation and Development (OECD), and the ICN. The Division also meets formally and informally with prosecutors and enforcers the world over. Leniency has become the hallmark of nearly every cartel enforcement regime around the world; more than 50 countries have adopted leniency programs.[37] We encourage the Division to remain engaged with these activities and events in order to promote the adoption and operation of transparent (and ultimately mutually beneficial) leniency programs throughout the world.

3. Sentencing Complexities

A concern is spreading among the members of the antitrust defense bar that sentencing and fining processes for cartel prosecutions here and abroad are becoming too complex to understand. The ranges of imposed sentences and fines are so broad that it is unclear as to how such outcomes were determined. Transparent and fair outcomes following cartel investigations are important for the companies and individuals that find themselves in such matters. If the resolution (i.e., jail time to be served and the fines to be paid) cannot be understood or is perceived to be unfair, companies and individuals may choose not to cooperate. In the past, the Division has consistently provided guidance and transparency with respect to its sentencing policies and procedures, including the interpretation and implementation of the Sentencing Guidelines.[38] The Section

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Nat'l Institute on White Collar Crime (Feb. 25, 2010), *available at* www.justice.gov/atr /file/518241/download.

[35] *Id.*

[36] *See, e.g.*, Scott Hammond, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Cornerstones of an Effective Leniency Program, Presented before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* www.justice.gov/atr/speech/cornerstones-effective-leniency-program.

[37] *See, e.g.*, Hammond, *supra* note 35.

[38] For example, the Division recently released updated annotated versions of the model corporate and individual plea agreements; the Section commends the Division for continuing to offer such practical and helpful guidance. *See* U.S. Dep't of Justice, Antitrust Div., Model Annotated Corporate Plea
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encourages the Division to reexamine the fundamental building blocks of the sentencing process, including, most importantly, the volume of commerce (VOC) determinations in domestic and international cartel cases. VOC determinations can present highly troubling risks of "double counting" and unfair sentencing outcomes in international cartel cases. These risks are heightened in cases involving component products and in cases where enforcers in different jurisdictions adopt differing approaches to calculating the relevant VOC. The Section encourages the Division to adopt measures for treating VOC determinations consistently across its cases and to promote greater coordination and consistency among enforcers making VOC determinations in international cartel cases. If, upon a closer review, the Division identifies gaps in its prior guidance, the Section encourages the Division to issue general statements of enforcement policy about VOC determinations or any other factor in the sentencing process.[39]

4. Individual Responsibility

The Division has always focused considerable attention on the role of individual executives in antitrust enforcement and over the years has developed an aggressive and increasingly well-calibrated record of incarceration of the executives who most heavily participated in and personally directed the illegal conduct. The United States is sending twice as many individuals to prison for cartel offenses as it did in the 1990s.[40] During this period, average prison terms have grown to two years.[41] The Division has been especially successful at building cases against foreign executives in international cartel cases. To date, nearly 90 foreign defendants have served or have been sentenced to serve prison sentences in the U.S. for antitrust violations.[42]

In the wake of the Yates Memo,[43] the Division has intensified its focus on holding individuals accountable.[44] In relevant part, the Yates Memo requires the cooperating corporation to provide

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Agreement (Aug. 29, 2016), *available at* https://www.justice.gov/atr/file/889021/download; U.S. Dep't of Justice, Antitrust Div., Model Annotated Individual Plea Agreement (Aug. 29, 2016), *available at* https://www.justice.gov/atr/file/888481/download. *See also* United States v. Kabaya Indus. Co., Ltd. d/b/a KYB Corp., NO. 1:15-cr-98 (S.D. Ohio 2015); Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders, Address at Fordham University School of Law (Oct. 15, 1999), *available at* https://www.justice.gov/atr/speech/transparency-enforcement-maximizes-cooperation-antitrust-offenders; Hammond, *supra* note 35.

[39] In the 2012 Presidential Transition Report, the Section recommended that "given the rapidly expanding state of global cartel enforcement, consideration might be given to whether it would be worthwhile for the Division to coordinate with foreign jurisdictions on how VOC calculations are handled in order to create a uniform approach and more effectively allocate VOC among relevant jurisdictions." The Section renews this recommendation.

[40] U.S. Dep't of Justice, Antitrust Div., Division Update Spring 2015, *available at* www.justice.gov/atr/division-update/2015/criminal-program-update.

[41] U.S. Dep't of Justice, Antitrust Div., Division Update Spring 2016, Criminal Enforcement Trends Charts, *available at* www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[42] FY 2017 Performance Budget, *supra* note 32.

[43] *See* Memorandum of Deputy Att'y Gen. Sally Quinn Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), *available at* www.justice.gov/dag/file/769036/download.

all information against its own culpable executives in order to obtain corporate credit in plea (and potentially leniency) negotiations. The Yates Memo provides that the Department will not release executives as part of a cooperation deal with a corporation or resolve matters with the corporation until the Department has a clear plan to resolve actions against the individuals. Finally, the Yates Memo instructs the Department to pursue prosecution of executives in both civil and criminal cases.

The Section encourages the Division to provide clear and transparent guidance as to how the Yates Memo will affect Division enforcement and prosecution efforts. Specifically, further guidance is needed on the definition and identification of the "highest ranking, most culpable employee," and how and when the Division will negotiate "carve-in" and "carve-out" determinations. The Section also urges the Division to provide explicit guidance addressing when, if ever, individuals would be charged in civil antitrust enforcement actions and explain the rationale for that practice.

5. Compliance Programs and Sentencing Credit

The Section commends the Division's recognition of companies' compliance efforts in recent public statements and sentencing proceedings.[45] To date, the Division has offered sentencing benefits to corporate defendants that implemented more robust antitrust cartel compliance measures after their prior misconduct had been discovered.[46] The Section applauds this development and believes that it brings the Division closer in line with the provisions of the United States Sentencing Guidelines.[47] The Section encourages the Division to expand its review of compliance programs in place prior to the occurrence of the misconduct, and to consider providing appropriate credit for robust compliance programs. Such recognition would reward companies that go well beyond adopting corporate statements and conducting online training, and encourage more companies to engage in sample audits of behavior, review trade association travel and agendas, document investigative and disciplinary procedures, monitor email traffic for competitor contacts, and adopt a "tone at the top" that deters competitor misconduct. The Section respectfully suggests that the opportunity to earn sentencing credit for robust compliance programs would be a very attractive "carrot" that would foster compliance well beyond individual enforcement actions.[48]

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[44] *See, e.g.*, Brent Snyder, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Individual Accountability for Antitrust Crimes, Remarks at the Yale Global Antitrust Enforcement Conference (Feb. 19, 2016), *available at* www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

[45] *See, e.g.*, Brent Snyder, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the Sixth Annual Chicago Forum on Int'l Antitrust, (Jun. 8, 2015) *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[46] United States v. Kayaba Indus. Co., Ltd. d/b/a/ KYB Corp., No. 1:15-cr-98 (S.D. Ohio 2015).

[47] U.S. Sentencing Guidelines Manual §§ 8B2.1, 8D1.4 (U.S. Sentencing Comm'n 2013).

[48] *Cf.* Brent Snyder, Deputy Ass't Att'y Gen., Compliance Is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce and United States Council of International

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As a way to proceed, the Section recommends that the Division pursue an open dialogue with the bar and business community regarding adoption of "robust" and effective compliance methods and improved detection and screening techniques. A first step might be a Division-hosted roundtable discussion that compares and contrasts what works and what does not work, what is "exemplary" vs. ordinary, and what could be scored positively under the United States Sentencing Guidelines and by the Division. Another step could be a request for comments from the antitrust bar and business community in order to develop antitrust-specific minimum compliance guidelines and identify those exemplary compliance measures which could support a reduction in sentencing upon the detection of offense.

6. Cartel Detection

Cartels are among the greatest threats to a competitive economy, and effective cartel enforcement in the United States is one of the most important missions of modern antitrust law.[49] The Division's successes in pursuing this mission have depended in large part on the contributions of leniency applicants and other informants.[50] To expand on the success of its program, the Section encourages the Division to be more proactive in identifying possible cartels. Such activity might include the examination of empirical evidence to see where cartel pricing may exist, intersected with or supplemented by examination of settings particularly conducive to collusion. Detection would be enhanced through greater outreach to industry trade groups, large buyers, or others that may be in a position to observe suspicious activity. What, if any, enforcement action would then be appropriate will depend on the magnitude of possible overcharges, the nature and extent of preliminary indications that illegal activity may be taking place, and the feasibility of focused follow-on activity (rather than fishing expeditions) that might identify whether, in fact, serious violations have occurred.

The Division's outreach and education efforts with federal, state and local law enforcement agencies and state attorneys general have been helpful. These "on-the-ground" agencies are well-suited to detect cartels and to learn about potential antitrust misconduct, for example, in association with local procurements. In the past, the Division's close relationships with these local agencies generated many long-standing and important prosecutions successes, such as with the school milk and school bus conspiracies.[51] Military procurement cartel cases were also built in cooperation with Department of Defense Inspector Generals and related investigators.[52]

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Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), *available at* www.justice.gov/atr/file/517796/download.

[49] *See*, *e.g.*, Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Global Antitrust Enforcement, Speech at Georgetown Law Center Global Antitrust Enforcement Symposium (Sept. 26, 2007), https://www.justice.gov/atr/speech/global-antitrust-enforcement; ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 247 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[50] *See, e.g.*, Hammond, *supra* note 35.

[51] *See* R. Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 REV. OF INDUS. ORG. 413 (1996); Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Dean Foods Company (Mar. 29, 2011), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-dean-foods-company; Press Release, U.S. Dep't of Justice, Five School Bus Owners Indicted for Bid-Rigging and Fraud Conspiracies at Puerto Rico Public School Bus Auction (May 21, 2015), *available*

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7. Prohibitions on Leniency Disclosures

The Section commends the Division on its realistic and balanced view regarding the demands on public and even private companies to make appropriate constituent (e.g., employee, shareholder, and auditor) disclosures about antitrust events, including the application for, and the receipt of, conditional leniency or the service of a grand jury subpoena at the outset of an investigation. The Division recognizes that its immediate investigative interests must be balanced against the obligations of its investigative subjects and targets to serve the important public interest of keeping constituents, including actual and prospective shareholders, informed of material developments.[53] By contrast, leniency programs in other jurisdictions like the European Commission go further in restricting a cooperating company's ability to disclose the existence and content of a leniency application, and statements submitted may not be used for any other purpose other than the Commission's own cartel proceedings.[54] The Section believes that confidentiality restrictions imposed by other competition authorities deprive U.S. firms of the opportunity to satisfy investor or other constituent needs for material information, and may conflict with U.S. securities law requirements. The Section encourages the Division to provide private or public consultative guidance to these other jurisdictions regarding confidentiality restrictions (whether outright bans or prior-consent requirements) in leniency programs that would force a company to choose between the benefits of the program and the need to inform constituents of material developments.

C. Civil Enforcement and Litigation

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at https://www.justice.gov/opa/pr/five-school-bus-owners-indicted-bid-rigging-and-fraud-conspiracies-puerto-rico-public-school; Anne K. Bingham, Ass't Att'y Gen., and Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement, Presentation before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995), *available at* https://www.justice.gov/atr/speech/criminal-antitrust-enforcement-joint-address-aag-anne-k-bingaman-and-daag-gary-rspratling.

[52] Press Release, U.S. Dep't of Justice, Navy Civilian Engineer Pleads Guilty to Attempted Espionage (June 15, 2015), *available at* https://www.justice.gov/opa/pr/navy-civilian-engineer-pleads-guilty-attempted-espionage; Press Release, U.S. Dep't of Justice, Former U.S. Navy Contractor Pleads Guilty to False Statement Charges (Feb. 23, 2016), *available at* https://www.justice.gov/usao-mdpa/pr/former-us-navy-contractor-pleads-guilty-false-statement-charges; Scott D. Hammond, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Detecting and Deterring Cartel Activity through Effective Leniency Program, Speech Before the International Workshop on Cartels (Nov. 21-22, 2000), *available at* https://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-program.

[53] Scott Hammond, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Cartel Enforcement Roundtable (Nov. 16, 2005), *available at* https://www.justice.gov/atr/speech/update-antitrust-divisions-criminal-enforcement-program.

[54] *See* European Commission, Competition, Cartels, http://ec.europa.eu/competition/cartels/leniency/leniency.html.

Antitrust litigation is notoriously complex—a daunting exercise for the litigants and the courts. The typical case involves substantial testimony from economists and other experts, esoteric theories, hypothetical constructs, and predictions about the future, all before a judge who may never have encountered such a case before. The stakes can be extraordinarily high, with billions of dollars and the structures of industries riding on the decisions. The quality of court decisions regarding mergers and other antitrust cases is central to the Agencies' work, valuable to businesses seeking to better understand what types of conduct are lawful, and critical to the economy that depends on the right outcomes. Accordingly, improvements in the quality of adjudication could yield substantial payoffs.

The Section proposes that the Agencies launch a joint project to identify and recommend potential improvements in the conduct of antitrust civil litigation in the federal courts. We recommend that the Agencies convene a working group that includes their most experienced litigators, members of the private bar, economic consultants, and federal judges to formulate proposals regarding the conduct of complex antitrust adjudication. Involvement of these stakeholders in the formulation of the proposals will enhance their credibility as balanced enhancements to the litigation process and increase the likelihood of their adoption and success. The Agencies could use the recommendations from the working group to suggest alternative modes of proceeding in future cases. Lessons learned from these experiences could enable more informed decisions about the efficacy of the techniques implemented, what refinements or supplements may be warranted, and which innovations should be implemented more broadly.

The Section notes that the Agencies are in a unique position both to convene such a working group and to foster the implementation of new approaches to litigation. For example, if a particular proposal were to be endorsed, the Agencies could announce, in advance, their intention to recommend it to judges in the next set of cases they bring. This approach would avoid the concern that the Agencies were proposing procedural suggestions opportunistically.

Topics that may merit exploration and discussion include the sequencing of presentations at trial and increased use of court-appointed experts.[55] With respect to the first possible topic, the working group might explore alternative trial structures, including the organization of trial presentations by issue, rather than by party (e.g., where the plaintiff or government presents its entire case, followed by defendant). Similarly, experts' appearances could be broken up and sequenced so that testimony addressing a particular question might be followed immediately by the opposing expert's testimony on the same topic, with rebuttal right after that. Another emerging concept that has faced some resistance but nevertheless warrants experimentation and further study involves having experts appear side by side so that questions may be put to both experts simultaneously and to allow for direct exchanges between the experts.[56]

[55] While the Section provides these two topics by way of example, and recommends that these and other issues be the subject of further exploration and discussion, the Section has not considered the merits of these proposals and does not take a position on their adoption.

[56] Other jurisdictions have experimented with a form of this approach, sometimes referred to by supporters and critics alike as "hot tubbing." CIVIL JUSTICE COUNCIL, CONCURRENT EXPERT EVIDENCE AND 'HOT-TUBBING' IN ENGLISH LITIGATION SINCE THE 'JACKSON REFORMS': A LEGAL AND EMPIRICAL STUDY (July 2016); Steven Rares, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues*, 95 J. INTELL. AND INDUST. PROP. SOC'Y OF AUSTRALIA AND NEW ZEALAND 28 (2013). Some commentators have advocated for its adoption in the United States. *See* Scott Welch, *From Witness Box to the Hot Tub: How the "Hot Tub" Approach to Expert Witnesses Might Relax an American*
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With respect to the second possible topic, the working group might explore ways in which the parties and the court could make greater use of court-appointed experts.[57] A court-appointed expert might supplement parties' experts, either operating independently or acting after the two sides' expert reports have been submitted. A court-appointed expert might also be used to aid in the conduct of trial. For example, if the two parties' experts were to testify side by side, a court-appointed expert might help to question them or join the group in the discussion, offering opinions in addition to posing queries.[58] Court-appointed experts might also assist in the structuring of litigation. Court-appointed experts might be able to identify an issue that, if addressed early, may more quickly and efficiently resolve a dispute or narrow disagreement. Before trial, they might distinguish issues on which the contesting experts largely agree and focus the trial on areas where disagreement remains. After trial, they might articulate significant areas of remaining disagreement and provide a common template for addressing them in post-trial briefings.

The Section, in proposing that the working group convened by the Agencies consider these and other topics, is motivated in part by positive reports on the use of related techniques in other legal systems. For example, in Australia, Canada, and New Zealand, the courts sometimes have experts appear together,[59] and arbitration is often successful with a more informal and interactive approach. These other models may help generate ideas and give reason to believe that alternatives exist that may be superior.

D. Mergers

Antitrust merger enforcement should remain a major focus of the Agencies. While there is broad support for the basic framework of U.S. antitrust merger analysis, concerns exist with the level of transparency into how that framework is being applied by the Agencies, the effectiveness of merger policy and the tools used to apply it, and the impact of procedural differences between merger litigation conducted by the Division and the FTC. The Section recommends that the Agencies address concerns about transparency and effectiveness through more detailed use of Competitive Impact Statements and Aids to Analysis of Public Comment, increased utilization of closing statements, and public presentation of detailed merger retrospective studies. To address concerns over procedural differences between the two federal enforcement agencies in merger litigation, the Section recommends that the Administration endorse legislation that would require the FTC to invoke Section 15 of the Clayton Act, 15 U.S.C. § 25, to challenge unconsummated mergers in federal court.

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Finder of Fact, 5 J. INT'L COMM. L. AND TECH. 154 (2010) ("The Australian concurrent evidence procedure, informally known as "hot tubbing," may provide an excellent opportunity for a court to more thoroughly understand the issues between, and testimony of, expert witnesses.").

[57] *See* J. Gregory Sidak, *Court-Appointed Neutral Economic Experts*, 9(2) J. COMPETITION L. & ECON., 359-394 (2013) (arguing that "wider use of Rule 706 would assist the judge and jury and would facilitate the prompt settlement of intellectual property, antitrust, securities, contract, business tort, and other complex disputes.").

[58] Garry Downes, *Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?*, 15 J. JUDICIAL ADMIN. 185 (2006).

[59] *See* Rares, *supra* note 57.

1. Increased Transparency

While the Agencies traditionally have maintained a shared commitment to providing transparency in their approach to merger enforcement, the Section believes that there would be substantial public benefit if the Agencies were to provide even greater transparency into their thinking about merger enforcement practices and standards. Transparency increases public confidence in merger enforcement decisions, enables more rigorous assessment of the effectiveness of merger policy, and contributes to general deterrence of transactions the Agencies believe to be anticompetitive by enabling merging parties and their counsel to self-police against more clearly revealed standards (thus also conserving agency resources). By increasing transparency in U.S. merger enforcement, the Agencies will also be modeling best practices that can be adopted by enforcement authorities around the world—authorities that play an increasingly significant role in multi-jurisdictional merger review.

Litigated merger cases present great opportunities for transparency, as the Agencies must prove their cases in court, but there are ways in which the merger litigation process might be improved to increase transparency. The Section recommends that the Agencies, while protecting legitimate interests in the confidentiality of commercially and competitively sensitive business information, should encourage the courts (1) to conduct merger trials in open court, and (2) to require public versions of expert reports so that analytical models, empirical methods, and their application can be evaluated.

The inclusion of more detailed discussions of analytical models and empirical methods in some Division Competitive Impact Statements and FTC Aids to Analysis of Public Comment has fostered greater transparency into the thinking behind settled merger investigations. More often than not, however, those important documents merely reiterate points made in the complaint without offering greater insight into the foundations for those allegations. The Section recommends that the Agencies further enhance transparency by making greater use of Competitive Impact Statements and Aids to Analysis of Public Comment to reveal the foundations both for complaint allegations and remedies accepted.

Increased utilization of closing statements for those merger investigations not resulting in agency action is perhaps the greatest source of incremental transparency in that public knowledge of those matters is the weakest. After averaging over three closing statements per year in investigations of Hart-Scott-Rodino (HSR) reportable transactions closed between 2011 and 2013, the Agencies have issued only three closing statements in total for investigations of HSR reportable transactions closed between 2014 and the present, and none this year.[60] The Section recommends that the Agencies commit to issuing more frequent closing statements in most Hart-Scott-Rodino reportable second request investigations not resulting in a contested complaint or consent order, particularly to clarify important considerations of enforcement policy or implementation. Over time, the Agencies should consider issuing closing statements in all Hart-Scott-Rodino reportable second request investigations. In the past four fiscal years, the Agencies have commenced fewer than fifty second request investigations per year, more than half of which resulted in contested complaints or consent orders, so this suggestion would require issuing only

[60] The Section calculated the above-referenced data as of October 17, 2016. *See* Press Releases, Antitrust Div., Dep't of Justice, *available at* www.justice.gov/justice-news?keys=&component=376&topic=All&date[value][month]=&date[value][year]=&items_per_page=25 and Press Releases, Fed. Trade Comm'n Press Releases, *available at* www.ftc.gov/news-events/press-releases.

fewer than twenty-five closing statements per year.[61] By way of comparison, the European Commission issued the equivalent of closing statements in roughly seventy transactions per year over the past four calendar years.[62]

Finally, the Section recommends that retrospective analysis of past enforcement decisions—challenges brought, transactions remedied by consent, and those cleared without agency action—should be performed and the results published with greater frequency in order to enhance transparency. As discussed in more detail *infra*, transparency would be enhanced by the Agencies presenting retrospectives in open workshops that include detailed presentation and discussion of the methods and models employed in past enforcement decisions and how those methods and models were implemented.

2. Evaluating the Effectiveness of Enforcement Policy, Tools and Remedies

Despite broad consensus in the antitrust community in support of the basic framework of antitrust merger analysis, questions have been raised about the effectiveness of merger policy, linking merger policy to various measures of industry concentration regarded as indicators of declining competition.[63] The Section recommends that the Agencies utilize retrospective analysis of past merger enforcement decisions to lead a detailed examination of how well merger policy has worked and whether the tools being used to evaluate and remedy mergers are adequate.

There is growing literature on the effect of past mergers. Most merger retrospective studies focus on price effects, but interpretation of the results of those studies may be confounded by quality effects arising from the merger under study or other efficiencies that benefit consumers. For this reason, it is the combination of higher prices and reduced output that is required to conclude that a merger was anti-competitive.[64] The Section encourages the Agencies to support and undertake merger retrospective studies with price and output effects as part of the study.

Price and output are not the only factors that should be studied to assess a merger's effect. Particularly given the increased emphasis in recent enforcement decisions on the innovation effects of mergers, the Section recommends that post-merger effects on new product introductions, research and development, and other measures of innovation should also be analyzed as part of merger retrospective studies. The impact of mergers and merger enforcement on the behavior of firms in the industry should also be part of the Agencies' merger retrospective studies, particularly whether enforcement in an industry might deter future efficient mergers that might otherwise go forward. In sum, the Section recommends that the Agencies undertake merger

[61] *See* FED. TRADE COMM'N AND DEP'T OF JUSTICE, HART-SCOTT-RODINO ANN. REP. APP'X A (FY 2015), *available at* www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf.

[62] *See* EUROPEAN COMMISSION MERGER STATISTICS 2016, *available at* http://ec.europa.eu/competition/mergers/statistics.pdf.

[63] *See* COUNCIL OF ECON. ADVISERS, ISSUES, BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 9 (Updated May 2016), *available at* www.whitehouse.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

[64] *See* Dennis W. Carlton, *Why We Need to Measure the Effect of Merger Policy and How to Do It*, 5 COMPETITION POL'Y INT'L 1 (2009).

retrospectives that take into account not just the effect of mergers on price, but also the effects of mergers on output, product innovation, and future merger activity.

In order to assess the adequacy of the tools used to evaluate mergers, there also needs to be an assessment of the accuracy of those tools in predicting merger outcomes. The Section recommends that the Agencies develop a clear record for each merger of what tools and models were used along with the models' associated assumptions and predictions. With this record in place, the Agencies could then revisit those analyses post-merger in order to determine which models and assumptions worked best. For example, the Agencies could examine how well econometric merger simulation models do in predicting post-merger prices, output, and market shares and which assumptions (e.g., assumed efficiencies, assumed strategies employed by the firms, the instability or imprecision of the parameters estimated in the demand system, or the failure to account for new product introductions) in retrospect were ones that were shown later to be false. The Agencies could also examine whether static merger simulation models were more useful than crude analysis where price is assumed to be a function of market concentration. Similarly, the Agencies could determine the performance of gross upward pricing pressure indices (GUPPIs) compared to market shares or static simulation models.

Problematic mergers can be remedied by a variety of means, including structural solutions—divestitures handled either prior or subsequent to the merger being remedied—and behavioral solutions, though the latter are more controversial. Appropriately, the Agencies regularly question the efficacy of merger remedies,[65] and occasionally review them retrospectively. Maintaining confidence in merger remedies should remain a priority of the Agencies. The Section recommends another retrospective study of the effectiveness of the various remedies used. Among other issues, we recommend considering divestitures to "upfront buyers," divestitures handled by the parties or third-party trustees post-merger, and behavioral remedies, in order to make sure that remedies are appropriate to the transaction and effective at preserving competition.[66] When the remedies involve behavioral restrictions on information sharing and require monitoring by the Agencies, the Section endorses evaluation of the effectiveness of such remedies on an ongoing basis.

3. Process Symmetry Between Division and FTC in Merger Enforcement Litigation

The Section has previously identified the need for greater process symmetry in the standards for the grant of a preliminary injunction motion in merger challenges brought by the Division and the FTC.[67] The Section recommended administrative action or amendment of Section 13(b) of the

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[65] *See* Renata Hesse, Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, And Never the Twain Shall Meet?: Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at the 2016 Global Antitrust Enforcement Symposium 15 (Sept. 20, 2016), *available at* www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-heese-antitrust-division-delivers-opening.

[66] *See id.*; *see also* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at the Tenth Annual Global Antitrust Enforcement Symposium 8-9 (Sept. 20, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/985423/ramirez__global_antitrust_enforcement_symposium_keynote_remarks_9-20-16.pdf.

[67] *See* AM. BAR ASS'N, SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2012 at 9-10 (Feb. 2013) [hereinafter 2012 PRESIDENTIAL (….continued)

FTC Act to ensure that it is applied consistently with traditional equitable standards for injunctive relief applicable to the Division, noting that the outcome of challenges to proposed mergers should depend on the merits of the proposed transaction and the competitive issues it raises, not on procedural differences depending on which Agency happens to draw the case.[68] The Section did not, however, address the issue of merger challenges through administrative proceedings under Part 3 of the Commission's Rule of Practice, another procedural difference from DOJ enforcement practice regarded by some as potentially outcome determinative.

Since the Section published its recommendation, the SMARTER Act was introduced in Congress and passed the House of Representatives to harmonize preliminary injunction standards and require the FTC to resolve challenges to unconsummated mergers in federal court, consistent with the 2007 recommendation of the Antitrust Modernization Commission.[69] Accordingly, the Section recommends that the Administration support legislation that would require the FTC to invoke Section 15 of the Clayton Act, 15 U.S.C. § 25, to challenge unconsummated mergers in federal court, a recommendation that is consistent with the 2007 recommendation of the Antitrust Modernization Commission. In making this recommendation, the Section neither endorses nor opposes the approach to these issues taken in the SMARTER Act.

E. Consumer Protection

1. Introduction

For decades, the FTC has been the nation's premier consumer protection agency. Since the publication of the ABA Report in 1969,[70] in which the Agency was criticized for its passivity and neglect, the FTC has been a vigorous and effective agency, boasting an aggressive enforcement program to stop unfair or deceptive acts or practices.[71] In the 1980s, the FTC promulgated three seminal documents—the Deception,[72] Unfairness,[73] and Advertising Substantiation[74] Policy

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TRANSITION REPORT], *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_presidential_201302.authcheckdam.pdf.

[68] *Id.*

[69] *See* The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745 114th Cong. (as passed by the House, March 23, 2016), *available at* www.congress.gov/bill/114th-congress/house-bill/2745; ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 131-32, 138-41 (Apr. 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[70] AM. BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter Kirkpatrick Report]. The Kirkpatrick Report was commissioned by President Nixon in response to a scathing critique of the FTC by a Ralph Nader-sponsored group of law students. *See* E. COX, R. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969).

[71] *See* Fed. Trade Comm'n, Strategic Plan for Fiscal Years 2014 to 2018 10 (April 30, 2014), *available at* www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf.

[72] Fed. Trade Comm'n, FTC Policy Statement on Deception (Oct. 14, 1983), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

Statements—that ever since have defined the parameters under which the agency exercises its enforcement authority. In particular, the Deception and Unfairness Policy Statements have served to focus the FTC's actions on practices that are, or are likely to be, harmful to consumers.[75]

The Section has long recognized the FTC's key role in protecting consumers from harm, noting in both its 2008 and 2012 Transition Reports that the FTC's consumer protection mission has exceeded its competition mission in resources,[76] activity, and public attention. This remains true today.[77] While the Section has recommendations for improvement, the Section acknowledges and applauds the impressive contributions of the FTC's consumer protection mission to consumer welfare and a competitive economy.[78] Indeed, for over 30 years, FTC enforcement efforts have

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[73] Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[74] Fed. Trade Comm'n, FTC Policy Statement Regarding Advertising Substantiation (Mar. 11, 1983), *available at* https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation.

[75] The Deception Statement defines deception as a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, in a material way (i.e., in a way that is likely to cause consumer injury). The Unfairness Statement defines an unfair act or practice as one that causes, or is likely to cause, substantial consumer injury that is not reasonably avoidable by consumers and is not outweighed by benefits to consumers and competition. In 1984, Congress enshrined the unfairness definition into the FTC Act as Section 5(n), 15 U.S.C. § 45(n). The Deception Statement's focus on "consumers acting reasonably" and the Unfairness Statement's requirement that the injury from the practice not be reasonably avoidable by consumers recognize the role that consumers themselves play in avoiding harm.

[76] *See* PRESIDENTIAL TRANSITION REPORT, *supra* note 68, at 21 n.48 (February 2013).

[77] The FTC reportedly allotted $165,879,000, and $175,043,000, to its consumer protection mission in FY 2015 and 2016, respectively. The allotments exceeded those for competition, which were $127,121,000 and $134,163,000, respectively. *See* Fed. Trade Comm'n, Congressional Budget Justification Summary for FY 2016 38, *available at* www.ftc.gov/system/files/documents/reports/fy-2016-congressional-budget-justification/2016-cbj.pdf.

[78] For example, the FTC recently settled one of the largest actions brought to date against charity fraud. Between March 2016 and May 2016, the FTC settled charges against four sham charities that claimed to help cancer patients, but instead spent $187 million of donors' money on their operators, families and friends, and fundraisers. Under the settlement, the sham charities were permanently dissolved and their assets liquidated, and a multimillion dollar penalty issued. *See* Press Releases, Fed. Trade Comm'n, *FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits* (Mar. 30, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/03/ftc-states-settle-claims-against-two-entities-claiming-be-cancer. 2015 was also a record year of debt collection enforcement, with twelve cases brought against fifty-two defendants and nine settlements reaching nearly $94 million in judgments. *See* Fed. Trade Comm'n, Annual Highlights 2015, Enforcement, *available at* www.ftc.ogv/reports/annual-highlights-2015. The FTC also continues to target deceptive health claims, settling a complaint in July 2016 against the marketers of a powdered drink mix touted as enabling opiate-addicted consumers to overcome addiction and withdrawal. The terms of the settlement require the company to discontinue all deceptive claims, and to pay $235,000 as redress or disgorgement. *See* Press Release, Fed. Trade Comm'n, *Sellers of At-Home Treatment for Opioid Withdrawal and Addiction Barred from Making Deceptive Claims* (July 6, 2015), (….continued)

protected consumers from a wide variety of fraudulent, misleading, and unfair practices and have returned many hundreds of millions of dollars to victims injured by these practice.

The FTC, however, is no longer the proverbial primary "cop on the consumer protection beat." The past four years have witnessed considerable change in the consumer protection law enforcement and regulatory landscape, with both the CFPB and the FCC playing increasingly important roles in consumer protection enforcement; the three agencies have overlapping jurisdiction. Accordingly, the Report includes recommendations for those agencies as well.

2. Overlapping Privacy Jurisdiction

The overlapping jurisdiction of the FTC, the FCC, and the CFPB presents the very real possibility of inconsistent approaches, nowhere more noticeably than in the privacy arena. This was underscored most recently when the FCC adopted its 2015 Open Internet Order and reclassified the provision of Internet broadband access as a "telecommunications service" under Title II of the Telecommunications Act.[79] The provision of broadband service by Internet service providers (ISPs) is now deemed a common carrier service. As such, it is exempt from the FTC's jurisdiction pursuant to the common carrier exemption in the FTC Act. Further, the Court of Appeals for the Ninth Circuit recently held in *FTC v. AT&T Mobility*,[80] that common carriers are exempt from the FTC's jurisdiction even in their provision of non-common carrier services.[81] However, the FCC's authority over non-common carrier services is limited, leaving a potential regulatory gap for non-common carrier services offered by common carriers. Thus, similar activities engaged in by different entities, one of which has common carrier status, may be regulated differently. Over the years, the FTC has urged Congress to repeal the common carrier exemption.[82] The Section believes that this exemption is outdated and urges the FTC and the FCC to support its repeal.

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available at www.ftc.gov/news-events/press-releases/2016/07/sellers-home-treatment-opioid-withdrawal-addiction-barred-making.

[79] Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (hereinafter 2015 Open Internet Order).

[80] FTC v. AT&T Mobility, No. 15-16585, 2016 WL 4501685 (9th Cir. Aug. 29, 2016).

[81] The FTC Act specifically exempts "common carriers subject to the Acts to regulate commerce" from the Commission's jurisdiction. 15 U.S.C. § 45(a)(2). The Commission has taken the position that common carriers are exempt from its jurisdiction only to the extent that they are engaged in common carrier activities (an "activity-based exemption"). However, the Ninth Circuit held that common carriers are entitled to that exemption by virtue of their status (a "status-based exemption"). *AT&T Mobility*, 2016 WL 4501685, at *4. In October 2016, the FTC petitioned the Ninth Circuit for a rehearing en banc, challenging the dismissal of the agency's suit under Section 5. Petition for Rehearing En Banc, *AT&T Mobility*, 2016 WL 4501685 (filed Oct. 13, 2016).

[82] *See Oversight of the Fed. Trade Comm'n Before the S. Comm. on Commerce, Science, and Transp.*, 114 Cong. 25 (2016) (Statement of the FTC), *available at* www.ftc.gov/system/files/documents/public_statements/986433/commission_testimony_oversight_senate_09272016.pdf; Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, 100 is the New 30: Recommendations for the FTC's Next 100 Years, Address at the GCR Antitrust Law Leaders' Forum 2014 12-14 (Feb. 7, 2014), *available at* www.ftc.gov/system/files/documents/public_statements/100-new-30-recommendations-ftcs-next-100-years/140207gcrantitrust-mko.pdf; *Consumer Online Privacy: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 111th Cong. 24-26 (2010) (Statement of the FTC), *available at*
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The potential for inconsistent regulatory approaches is significant, as witnessed by the FCC's recently adopted Privacy Rules.[83] The FCC's rules take a different approach from the FTC in determining what data is considered sensitive and, therefore, subject to enhanced consent. The FTC has required affirmative or opt-in consent only for uses of certain sensitive types of data including financial, health, precise geolocation and children's data, for example. The FCC's approach, on the other hand, largely treats as sensitive other types of data that the FTC has not historically considered sensitive, namely web browsing data and application usage history, and requires opt-in consent for the use of such data. Thus, non-broadband providers subject to FTC authority may collect and use web browsing and application usage data while broadband providers are subject to different requirements for such data. The Section believes these inconsistent approaches warrant ongoing attention and urges the agencies to consider whether these differing approaches have a detrimental effect on competition and consumer welfare.

The overlapping privacy jurisdiction and related inconsistent approaches to privacy enforcement also create confusion among other nation-states when U.S. privacy law is relevant, for example, as part of cross-border data transfers. The European Union's (EU) data protection law prohibits companies from transferring the personal data of EU data subjects to countries outside of the European Economic Area (EEA) unless those countries have "adequate" privacy laws.[84] Adequacy is often correlated to an umbrella privacy law that mirrors the EU approach; the United States, however, takes a sectoral approach to privacy. Until October 2015, U.S. companies that certified to the EU-U.S. Safe Harbor Framework could rely on that Framework as a valid legal basis for transferring the data of EU data subjects to the United States.[85] Based in part on its negative perception of the U.S. sectoral approach to privacy, the European Court of Justice issued a decision in 2015 finding that the EU-U.S. Safe Harbor insufficiently protected EU residents'

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www.ftc.gov/os/testimony/100727consumerprivacy.pdf; H.R. 3402, *The Calling Card Consumer Protection Act: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce*, 110th Cong. 12-13 (2008), *available at* www.ftc.gov/os/2008/09/P074406prepaidcc.pdf.

[83] *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 ed. Reg. 23360 (Proposed Apr. 20, 2016), *available at* www.gpo.gov/fdsys/pkg/FR-2016-04-20/pdf/2016-08458.pdf.

[84] Council Directive 95/46 of the European Parliament and of the Council of Oct. 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EU).

[85] Under the US-EU Safe Harbor, transfer of personal data from the EU to a U.S. organization was lawful if the U.S. organization receiving the data has unambiguously and publicly disclosed its commitment to comply with the "Safe Harbor Privacy Principles" as set out in the Commission Decision 2000/520, 2000 O.J. (L215) 7 (EC), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A32000 D0520%3AEN%3AHTML. The FTC has brought enforcement actions against companies who have falsely claimed that they were certified members of the Safe Harbor Framework when their certifications had lapsed or they had never applied for membership in the program at all. Press Release, Fed. Trade Comm'n, *Thirteen Companies Agree to Settle Charges They Falsely Claimed To Comply with International Safe Harbor Framework* (Aug. 17, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/08/thirteen-companies-agree-settle-ftc-charges-they-falsely-claimed.

personal data.[86] Following this decision, the EU and the United States negotiated the Privacy Shield, a new legal basis for U.S. companies to rely on when transferring personal data from the EEA to the United States. The Privacy Shield has already attracted critics, however, and some commentators worry that the inconsistent privacy enforcement frameworks among the FTC, the FCC, and the CFPB may weaken the Privacy Shield's effectiveness.[87] Reducing the ability for U.S. companies to transfer personal data effectively and appropriately could impact the U.S.'s competitive posture. Although the Section is not advocating for an umbrella privacy law at this time, it does observe that the inconsistent privacy approaches pose a risk of harm to U.S. companies and competition internationally. More consistency among the regulatory approaches would likely yield reduced compliance costs and promote competitiveness with resulting benefit to consumers.[88]

3. Enforcement

Although the FTC has many tools at its disposal to foster compliance with the law, it is, at its core, an enforcement agency. The Section recommends that the FTC adopt a number of reforms to help it deploy its limited enforcement resources in a manner that enhances the impact of its actions while, at the same time, treating target companies in a way that is fair and proportionate to the alleged offenses. Where appropriate, the Report includes parallel recommendations relating to the CFPB and the FCC.

The Section recommends that the FTC adopt reforms to enhance the transparency and fairness of the enforcement process. Government investigations and enforcement actions are inherently different from private disputes. They are not contests between equals—federal agencies have enormous advantages in terms of resources and power. Businesses, especially smaller companies and their principals, simply cannot afford in many cases to take on the risks and costs of defending themselves during an investigation or when confronted with a complaint and order. Unless they are careful in how they use their leverage, the agencies may cause unintended damage to companies and the marketplace without corresponding benefits to consumers or competition. It is critical that the process be fair and transparent.

Case selection: The FTC and CFPB have broad prosecutorial discretion in choosing targets for their law enforcement actions. The Section recommends that the agencies focus their limited enforcement resources on cases involving significant consumer harm. This has not always been the case. Recently, for example, the CFPB has brought actions for technical violations of certain statutes against very small companies, in many cases where the challenged practices—and even the companies themselves—had ceased. The consumer injury in those cases appeared to be

[86] Maximillian Schrems v. Data Prot. Comm'r, Case C-362/14, *available at* curia.europa.eu/juris/document.jsf?docid=169195&doclary=en.

[87] *See, e.g.*, Nancy Libin *The FCC's Privacy Problem*, THE HILL, Sept. 22, 2016, *available at* http://thehill.com/blogs/congress-blog/technology/297199-the-fccs-privacy-problem.

[88] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 9 (2012), *available at* https://www.ftc.gov /sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

minimal, and it was not otherwise apparent what public policy goals the cases served.[89] From time to time, the FTC also has prosecuted small companies for minor violations.[90] The agencies should recognize the enormous impact their law enforcement actions can have, especially on small businesses that, as a result, often lose the assets, customers, business partners, and financing they need to survive.

Civil Investigative Demands: FTC investigations (like those of the CFPB) often begin with the issuance of civil investigative demands (CIDs). The Section recommends that the agencies use this powerful tool judiciously to avoid unnecessary costs to companies and individuals who receive them.

The FTC has broad, but not unfettered, authority to conduct investigations and compel the production of documents and information. The Section recognizes that CIDs must be written broadly enough to ensure that the documents and information necessary to carry out the investigation are produced, especially when the agency is unfamiliar with how the company compiles and maintains its records. Nevertheless, there has been a trend in recent years toward generic and overly-broad CIDs that are not tailored to the nature of the business or the practices at issue. The result in many cases has been that companies have incurred astronomical costs in responding. While the agency staff is willing to some extent to negotiate narrower terms and/or extend production deadlines, small companies and individuals in particular may end up facing resource demands they cannot afford. Just the legal fees alone that targets incur in negotiating the terms of the CID and making the production can be prohibitive. This problem has been exacerbated by the FTC's and CFPB's adoption of specific electronic submission standards that require formats that frequently are different from those used by the company in the ordinary course of business. As a result, the company may be forced to hire third-party contractors—at substantial cost—to transfer the records into the required format.

Although a company can file a petition to quash or limit a CID, these petitions are made public—which imposes considerable reputational costs on a company—and are rarely granted. Rather than casting a net designed to bring in every possible fish, the Agencies should, in the first

[89] *See, e.g.*, In the Matter of Presto Auto Loans, Inc., File NO. 2016-CFPB-0021 (Sept. 20, 2016), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFFPB-0021_Document_001_09202016.pdf.

[90] *See, e.g.*, Nomi Techs., Inc., Docket No. C-4538, 2015 WL 5304114 (F.T.C. Aug. 28, 2015). The dissenting statements of Commissioners Ohlhausen and Wright criticized the majority's decision to bring the case despite the technical nature of the violations and the absence of evidence of consumer harm. *See id* at *5, *8. In 1997, the FTC published its Compliance Assistance and Civil Penalty Leniency Policies for Small Entities, which establish a "variety of mechanisms available for small business to obtain" compliance advice and describe the "FTC's approach to reducing or waiving civil penalties for small entities in various mitigating circumstances." 62 Fed. Reg. 16809 (Apr. 8, 1997). Although the Policies only apply to civil penalties and not to other remedies the FTC can pursue, they evidence the importance of the FTC carefully considering the impact of its actions on small businesses. The FTC recently reaffirmed the Policies in announcing dramatic increases in the maximum civil penalties it can seek for violations of various laws and rules enforced by the FTC. Adjustment of Civil Monetary Penalty Amounts, 81 Fed. Reg. 42476 (June 30, 2016).

instance, issue CIDs that are more narrowly focused, with the option of following up with additional CIDs should that be necessary. [91]

Information sharing in investigations: The extent to which FTC staff is willing to reveal to an investigational target the practices about which they have concerns and the legal theories underlying those concerns varies widely from case to case. In some cases, the staff has encouraged open discussions at an early stage of the investigation so that the company understands the nature of, and theories underlying, the investigation and has an opportunity to provide countervailing evidence or arguments before decisions are made. In other cases, the company only finds out what the matter is about when confronted with a proposed complaint and order that has been authorized by the Director of the Bureau of Consumer Protection (BCP). Even at this point, the company may not be told what the real basis for the charges is, and the proposed pleadings may not make it clear. In these cases, the company is at a severe disadvantage and is forced to decide how to respond based on incomplete information. The need for greater transparency begins with the resolution issued by the Commission authorizing the use of compulsory process. The resolution ostensibly is designed to give the CID recipient notice of the nature of the investigation. In practice, the "omnibus" resolutions the FTC commonly uses are broad and generic and provide little guidance or any real boundaries on the scope of the investigation.

In litigation, where pleadings precede discovery, parties have access to the basis for information demands. That context is fundamental to the process whereby parties invoke and courts apply the balancing test of relevance and burden that governs discovery under the Federal Rules of Civil Procedure. Subjects of government investigations should also have the information necessary to understand demands that can impose significant costs and consequences. The Section recommends that the FTC adopt internal guidelines for staff on communicating with investigational targets about the contemplated law enforcement action. Absent compelling circumstances indicating otherwise, staff should be as transparent as possible, as early as possible in the process, and should encourage a dialogue on the substantive issues. This is not only fairer to the company, but is likely to result in enforcement recommendations that are more thoughtful and better supported. This will also help focus the investigation (and remediation) more effectively, avoiding the broad CID requests and responses addressed above.

The Section recommends that the CFPB adopt similar guidelines. The CFPB often uses its Notice of Opportunity to Respond and Advise (NORA) process to notify companies in general terms of the allegations against them. As is the case with the FTC's consent authority process, however, the NORA notification takes place after staff and their supervisors have conducted extensive and expensive investigation, after they have concluded that the case should be prosecuted, but before respondents have understood the nature of the concerns. These decisions are rarely reversed. In addition, sending a NORA is discretionary with CFPB staff. In some recent cases, CFPB staff has not only declined to provide NORAs, but never even notified the companies of their interest in the matter before serving them with Notices of Charges that it had filed in its administrative tribunal and issuing a press release. By doing so, the staff deprived the companies of the opportunity to provide information that might have caused the staff to reconsider its decision to

[91] Some recent CIDs have sought all information that might possibly relate to violations of virtually every consumer protection law that might apply. Although the FTC does not need "reason to believe" a specific violation has occurred before commencing an investigation, it should minimize the use of these types of fishing expeditions.

file the cases in the first instance and the opportunity to avoid the costs of unnecessary demands, as well as the opportunity to settle the charges pre-filing and pre-press release.[92]

Order Provisions: One manifestation of the burden of contesting FTC investigations is in the consent orders that the FTC imposes on alleged violators. Resource-constrained companies and individuals without a realistic recourse to litigation may have to accept orders that impose burdens unnecessary to achieve legitimate remedial purposes. The burdens can be unduly harsh, raising competitors' costs and even threatening companies' existence. Moreover, they can acquire the mantle of precedent over time, making it very difficult for a company to argue for treatment different from that accorded to others. Accordingly, the Section recommends that the FTC consider:

- *Reducing the burden of standard "boilerplate" order provisions*: FTC orders contain a number of administrative provisions that are, more or less, the same in every order. For example, since 1996—the past 20 years—the FTC has required companies signing administrative orders to agree to an order duration of 20 years (longer, if there are subsequent violations) and federal court orders that last in perpetuity.[93] This can create a severe burden on the companies involved, given the breadth and vagueness of "fencing in" order provisions[94] as well as burdensome affirmative obligations.[95] Especially in areas where technology is rapidly evolving, order provisions that make sense when they are entered may no longer be appropriate in 10 years, let alone 20 years later, and may serve to chill innovative and useful corporate practices. Although FTC rules allow for a petition to modify an order based on

[92] An executive order issued by President Clinton in 1996 [Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996)] requires federal agencies that conduct or otherwise participate in federal civil litigation on behalf of the U.S. government, before filing cases in court or administratively, to make a reasonable effort to notify all parties about the nature of the dispute and to attempt to achieve a settlement. There are several, narrow exceptions to this requirement, including cases involving forfeiture or bankruptcy, when the assets or defendants themselves are subject to dissipation or flight, or when "exigent circumstances make providing the notice impracticable or such notice would otherwise defeat the purpose of the litigation," such as in cases seeking a temporary restraining order or preliminary injunction. *Id.*

[93] *See* Press Release, Fed. Trade Comm'n, FTC Rule Incorporating Sunset Policy for Existing Administrative Orders in Consumer Protection and Antitrust Cases (Nov. 20, 1995), *available at* www.ftc.gov/news-events/press-releases/1995/11/ftc-rule-incorporating-sunset-policy-existing-administrative. The Commission justified keeping federal court orders unlimited because "many of these orders are against defendants involved in hard-core fraud." *Id.* As explained in the text, the FTC now files most of its cases in federal court, including non-fraud cases.

[94] Most orders include "fencing-in" relief that extends beyond prohibiting the violations alleged in the complaint to reach purportedly related practices. For instance, the Commission typically will seek against a company that is alleged to have made unsubstantiated claims about the efficacy of a particular dietary supplement for treating or preventing a specific health condition an order that requires scientific substantiation for any claim about the health benefits, efficacy, or performance of any food, drug, or dietary supplement. *E.g.*, POM Wonderful v. FTC, 777 F.3d 478, 505 (D.C. Cir. 2015). The company under order is often left guessing, at the peril of civil penalties or a contempt citation for an order violation, at which implied claims the FTC will find in future advertising and what substantiation for those claims it will deem sufficient.

[95] For example, data security orders typically require expensive biennial security audits. *E.g.*, In the Matter of Snapchat, Inc., Docket No. C-4501, 2014 WL 1993567, at *14 (F.T.C. May 8, 2014).

"changed conditions of law or fact" or "that the public interest so requires,"[96] in practice the standard for an order modification is very high and the process is often protracted and costly. CFPB orders typically sunset after five years. The Section recommends that the FTC adopt a comparable sunset period for both administrative and district court orders, at least where there are no extenuating circumstances (such as fraud or recidivism) justifying a longer duration.

Similarly, FTC administrative and federal court orders include provisions (the so-called "Scofflaw" provisions) that require the respondent/defendant to distribute the order to various individuals, keep records, report changes such as asset sales, mergers or bankruptcy, and file compliance reports.[97] Some of these provisions last for the duration of the order, while others sunset after various numbers of years ranging from three to twenty, depending on the case.[98] The federal court boilerplate traditionally has imposed additional Scofflaw provisions beyond those in administrative orders that, for example, give the FTC the right to gather information in various ways. Some of these additional provisions are burdensome and intrusive. For example, one federal court order's Scofflaw provision permits the FTC to contact the defendant directly, and not through counsel, about order-related matters (although counsel may be present during FTC "interviews"). Provisions such as these were drafted originally to ensure sufficient oversight of defendants that were engaged in fraud. The FTC increasingly has filed cases, including routine non-fraud cases, in federal court, however. But, rather than ameliorating the harsh federal court Scofflaw provisions, the FTC has imported them into some administrative orders.[99] The Section recommends that the FTC reconsider this approach so that burdensome Scofflaw provisions are not imposed on respondents or defendants engaged in legitimate businesses.

- *Seeking monetary relief that corresponds more closely to the nature of the violations, the extent of consumer injury, and the culpability of the respondent/defendant*: The FTC has increasingly sought strong monetary relief—civil penalties, restitution,

[96] FTC Rule of Practice § 2.51, 16 C.F.R. § 2.51 (2016).

[97] A recent addition to the CFPB's boilerplate requires defendants, before transferring or selling any of their "operations" to a third party, to notify the purchaser of the existence of the CFPB order, *and* obtain the purchaser's written agreement to comply with the order. *See, e.g.*, In the Matter of TMX Finance LLC, File No. 2016-CFPB-0022 (Sept. 26, 2016). Although the term "operations" is undefined, this provision apparently is designed to avoid the long-standing rule that an asset purchaser is not a "successor or assign" under an order unless the sale was designed to evade the order or the purchaser simply continued the seller's business unchanged. As a result of the CFPB's new policy, companies under order, for the duration of that order, likely cannot sell assets even to bona fide purchasers for anything close to their real value, if at all. This is unfairly punitive, and the Section recommends that the CFPB eliminate this provision from its orders.

[98] It is not clear why these time periods vary from case to case and provision to provision, but in some instances it may depend on the relative knowledge and negotiating skill of the company's counsel. Having a shorter overall sunset in all orders could remove the inconsistency by making it unnecessary to have separate sunsets for each provision.

[99] *See, e.g.,* In the Matter of Practice Fusion, Inc., Docket No. C-4591, 2016 WL 3345406 (F.T.C. Aug. 16, 2016), *available at* www.ftc.gov/system/files/documents/cases/160816practicefusiondo.pdf.

> and/or disgorgement—in ordinary Section 5 cases. Historically, the FTC sought restitution or disgorgement mainly in cases of fraud or blatant deception with tangible consumer injury, and tied the amount sought to the injury or unjust enrichment that could be traced to the violations. It now appears, however, that the FTC demands monetary relief in virtually all cases, even where the violations were unintentional and marginal and the injury slight or nonexistent. Moreover, staff in consent negotiations commonly seek the maximum possible relief regardless of the facts of the case or any mitigating circumstances, and without consideration of litigation risk. For example, in recent civil penalty cases, staff have pursued the defendant's gross revenues without consideration of the statutorily imposed civil penalty factors that take into account, among other things, the defendant's degree of culpability and the nature and seriousness of the violations.[100]

Although the Section believes that the FTC has reason to raise the cost of violating the law in appropriate cases, the Section recommends that those efforts be tempered by considerations of equity and proportionality, as well as the constraints imposed by the statutes and case law. Monetary relief in non-fraud cases should not be punitive or threaten a company's ability to compete. In evaluating the deterrent effect of an order, the Commission should take into account the enormous damage an FTC action can cause a defendant, beyond any monetary judgment. In an age of instant and comprehensive information, whenever interested parties, such as licensing bodies, or prospective finance sources or vendors, search for information about individuals or companies, those named in FTC cases can be indefinitely branded as wrongdoers, even when the alleged violations were never proven in court or may have been inadvertent or minor. Seeing the agency's increased focus on extending liability to third parties for assisting violators, finance sources, vendors, and others may be very reluctant to provide the money or services to those facing FTC actions or under an order.

Meeting Decision Makers: The FTC has well-established "due process" norms that give targets facing possible enforcement the opportunity to meet with division and Bureau managers before a complaint recommendation is forwarded to the Commission, and then with Commissioners before the complaint is issued or filed.[101] This process generally works well, but could be improved by encouraging transparency earlier in the investigation.

The CFPB, on the other hand, does not appear to have any comparable process. With some exceptions, the Assistant Director of Enforcement and his superiors have been unwilling to meet with many companies they are deciding to prosecute. This can have serious disadvantages: companies cannot know that their concerns have been heard (which in some cases may make them less willing to settle), and the decision makers are denied information that would better

[100] For example, the press release issued by the FTC announcing a settlement with Consumer Education Group notes that the civil penalty (most of which was suspended due to inability to pay) "is equivalent to the revenue defendants obtained through their illegal acts." *See* Press Release, Fed. Trade Comm'n, Sales Lead Generators Fined and Barred from Violating FTC's Telemarketing Sales Rule (Nov. 1, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/11/sales-lead-generators-fined-barred-violating-ftcs-telemarketing. The CFPB also has insisted on civil monetary penalties in every case. That agency, unlike the FTC, has unrestricted civil penalty authority in cases alleging unfair or deceptive acts or practices. 15 U.S.C. § 5565(c).

[101] An exception is for fraud cases in which the Commission may seek ex parte relief.

inform their decisions. The Section recommends that the CFPB adopt standard internal appeal procedures like those of the FTC.

While the FCC has procedural due process measures that resemble those of the FTC, there are some important differences in the authority delegated to staff. In particular, the Enforcement Bureau has delegated authority to propose forfeitures only up to a maximum amount of $100,000.[102] The FCC must vote to approve any forfeiture above $100,000. However, the Enforcement Bureau has delegated authority to resolve investigations via consent agreements involving any amount of money, even in matters that involved an earlier, FCC-voted proposed forfeiture. Thus, the Bureau has significant authority to undertake enforcement actions and shape enforcement policy on its own, without Commission involvement. The Section recommends that the FCC consider reducing the delegated authority of the Enforcement Bureau and requiring Commission votes on any consent agreements involving payments that exceed the Bureau's delegated authority for proposed forfeitures.

4. Guidance

In addition to law enforcement and rulemaking, one of the principal ways the FTC and other agencies that enforce federal consumer protection laws encourage compliance is by providing guidance on their legal interpretations and expectations as applied to specific industries or practices. The FTC has broad (but not unlimited) discretion in choosing strategies for fostering compliance, including bringing individual enforcement actions even when the violative practices are common throughout an industry.[103] In many situations, however, guidance may be more effective and efficient than enforcement in fostering compliance. It also may be fairer to the individual defendants, who can suffer catastrophic damage from being the subject of government law enforcement simply because they happened to be selected among many other possible targets. This is especially true when the law is unclear and the practices at issue are long-standing or widespread.

Although enforcement actions are a good means of providing guidance, their usefulness for this purpose is often limited by the information they reveal. Businesses carefully scrutinize complaints and orders to glean insights into the agencies' thinking.[104] In some cases, however, the pleadings are not sufficiently clear or detailed in identifying the alleged illegal conduct to serve

[102] 47 C.F.R. § 0.311.

[103] *E.g.*, FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967); *but see* Johnson Products Co. v. FTC, 549 F.2d 35, 41 (7th Cir. 1977) (FTC may not issue orders that "would arbitrarily destroy one of many violators in the market," *citing* L.G. Balfour Co. v. FTC, 442 F.2d 1, 24 (7th Cir. 1971)).

[104] The FTC and CFPB have taken somewhat different positions on whether an order establishes standards for lawful versus unlawful conduct that apply beyond the individual case at issue. The FTC stresses that its orders often contain fencing-in relief that may go beyond what the law requires and may not be required of other companies. *See* Letter from Joel Winston, Fed. Trade Comm'n to Jonathan L. Kempner, Mortgage Bankers Assoc. (June 17, 2004), *available at* www.ftc.gov/system/files/documents/advisory_opinions/letter-mortgage-bankers-association-regarding-ftc-settlementfairbanks/040617staffopl trtomba.pdf. CFPB Director Richard Cordray, on the other hand, recently asserted that it would be "'compliance malpractice' for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly." *See* Richard Cordray, Speech at the Consumer Bankers Assoc. (Mar. 9, 2016), *available at* www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/.

this purpose, and businesses are left to "read the tea leaves" as to how the agencies might view their particular practices.

The agencies have issued useful guidance in many areas and in many forms, including enforcement policy statements, advisory opinions, informal staff opinion letters, warning letters, studies, reports, bulletins, speeches, testimony, and business education materials.[105] Topics run the gamut from advertising testimonials and endorsements, to "native advertising," to motor vehicle financing under the Equal Credit Opportunity Act. The Section recommends that the agencies provide further guidance on four substantive issues:

a. The Meaning of "Abusive"

The CFPB's abusiveness authority[106] has been applied in an inconsistent manner, and it is often difficult to discern why the CFPB has challenged a particular practice as abusive, as opposed to (or in addition to) unfair or deceptive. The agency has resisted providing additional guidance on this term beyond the statutory definition. The Section encourages the CFPB to provide a policy statement on abusive acts or practices, similar to those issued by the FTC on unfairness[107] and deception[108] in the 1980s, which have proven extremely useful.

b. Monetary Remedies

The FTC in many cases has not clearly articulated its rationale for the type or amount of monetary relief it demands, and in some cases where the rationale was evident, the legal theory behind it was questionable. For example, as noted earlier, FTC staff have demanded civil penalties in rule violation cases based on the defendant's gross revenues, a disgorgement measure, rather than the statutorily-imposed civil penalty factors. In the interests of greater transparency, the Section recommends that the FTC issue a policy statement setting forth the theories on which it relies to justify its demands for monetary relief.

The CFPB has taken an even more aggressive approach in seeking fines under Dodd-Frank and other statutory authorities. Understanding the ways in which the CFPB is analyzing the purported harm would be useful for companies to integrate compliance in their operations, and gauge the potential risks.

c. Advertising Interpretation and Disclosures

The agencies have pursued failure to disclose theories and imposed "clear and conspicuous" disclosure requirements with increasing vigor in recent years. This has created considerable uncertainty for businesses in determining what information is sufficiently important (e.g.,

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[105] Note, however, that the Dodd-Frank Act transferred the FTC's authority to "prescribe rules [or] issue guidelines" to the CFPB in areas of overlapping jurisdiction. 12 U.S.C. § 5581(b)(5). The FTC generally has interpreted this transfer to apply only to formal types of guidance (such as agency-issued industry guides), rather than, for example, staff opinion letters or other less formal guidance.

[106] Section 1031 of the Dodd-Frank Act prohibits unfair, deceptive, or abusive acts or practices. 12 U.S.C. § 5531.

[107] *See* FTC Policy Statement on Unfairness, *supra* note 74.

[108] *See* FTC Policy Statement on Deception, *supra* note 73.

material and necessary to prevent unfairness or deception) that it must be disclosed and where the disclosures must appear (e.g., in advertising or at point of sale). The different opinions on claim interpretation and disclosure clarity at the Commission in *POM Wonderful* were not reconciled in the decision of the D.C. Circuit, leaving additional uncertainty as to whether and what kind of substantiation is needed for a claim, what claims trigger a disclosure, and how much information should be disclosed.

Especially in the case of short-form broadcast advertising, there simply is not sufficient space to include all of the information the agencies have deemed necessary in forms of advertising. The need for qualifying information is especially important to establish when the cost of the qualification is the loss of other information or the loss of the advertisement itself. In any medium, increasing the amount of information that must be disclosed can obscure the most important messages, thus creating a tension with the "clear and conspicuous" objectives of the disclosure.

Moreover, there is uncertainty on how the "clear and conspicuous" standard will be applied in particular fact situations. While some uncertainty is inevitable given the fact-specific nature of deception, the Section recommends that the agencies look for additional opportunities to clarify their expectations in specific areas through guidance and give businesses an opportunity to come into compliance before the agencies start bringing enforcement actions.[109] The Section encourages the Commission to explore each element of disclosure policy—from the representation that would trigger a disclosure to the clarity and prominence of the disclosure—and how the factors vary across media.

IV. LEGAL DOCTRINE

A. Monopoly

The Section does not support the aggressive view, espoused recently by certain politicians and administration economists, that competition has declined in the United States as a result of the increasing concentration in key industries, which itself is attributed to the reluctance of the Agencies to challenge and the failure of courts to block more mergers.[110] Evidence offered in support of the criticism has been vague and anecdotal at best, but the evidence available to

[109] For example, the FTC has brought twenty-five or so cases in the past few years against auto dealers alleging the failure to adequately disclose in advertising certain material conditions, qualifications, and restrictions on the advertised offer. *See generally* Letter from Malini Mithal, Acting Assoc. Dir., Div. of Fin. Practices, FTC to Paul Sanford, Ass't Dir., Supervision Examinations, CFPB (May 27, 2016), *available at* https://www.ftc.gov/system/files/documents/reports/ftc-enforcement-activities-related-compliance-regulation-z-truth-lending-act-regulation-m-consumer/160606cfpbrpttila.pdf?utm_source =govdelivery (summarizing recent FTC enforcement actions against auto dealers). In most cases, the disclosures appeared in the fine print at the bottom of a print ad or on the last screen of a television ad, consistent with how auto manufacturers and dealers have been advertising for decades. Without questioning the merits of these cases, given the uncertainty about the agency's disclosure standards and the severe impact on the dealers that were unlucky enough to have been singled out, this may have been a situation where clearer guidance could have been issued before beginning enforcement.

[110] Marc Jarsulic, Ethan Gurwitz, Kate Bah, and Andy Green, Center for American Progress, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY (June 2016); S. Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016), *available at* www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

analysts outside the Agencies does not permit the kind of analysis that the Agencies themselves can conduct with the information obtained in the course of law enforcement. The Agencies are in a unique position to add empirical evidence to the debate. The Section applauds the Agency officials who have addressed the criticism. We believe a more systematic response would contribute a great deal to public confidence in antitrust enforcement. For example, as we noted above, the Agencies should address this question in their merger retrospective studies. Likewise, the Section recommends that the Agencies use their authority to identify and assess conduct that may generate adverse economic consequences in the United States. Such an assessment should precede any conclusion[111] that a marked reorientation of enforcement emphasis or new legal rules are needed.

It has always been an important responsibility of the Agencies to preserve competition and to ensure that anticompetitive exclusion is deterred in order to preclude firms from achieving dominant market positions by anticompetitive means. Both actual collusion and exclusion are harmful to consumers. Thus, the Agencies should identify and attack conduct that achieves, enhances, or maintains market power by disadvantaging competitors other than by means of efficiency-based competition.

Vigorous enforcement of the competition laws must be balanced with the need to encourage truly competitive conduct that benefits consumers and achieves cognizable efficiencies. With this in mind, the Section respectfully suggests that there are three particularly salient matters that deserve close attention and are ripe for close enforcement attention, competition advocacy, and Agency guidance in coming years: (1) two-sided markets, (2) contracts referencing rivals (CRRs), and (3) tying and bundling.

1. Two-Sided Markets

Two-sided or multi-sided markets are increasingly important in the economy, and raise complicated and unique antitrust issues.[112] To date, these complex issues have not received sufficient attention. The Section therefore recommends that the Agencies take steps to provide greater guidance and clarity, including by issuing statements of enforcement policy and through bringing enforcement actions.

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[111] Comm'r Terrell McSweeny, U.S. Fed. Trade Comm'n, Making Antitrust Work for the 21st Century, Keynote Remarks at Washington Center for Equitable Growth (Oct. 6, 2016), *available at* https://www.ftc.gov/system/files/documents/ public_statements /988713/mcsweeny_-_keynote_remarks_ at_equitable_growth_10-6-16.pdf; Renata Hesse, Acting Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., And Never the Twain Shall Meet?: Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at the 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), *available at* www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening; Edith Ramirez, Chairwoman, U.S. Fed. Trade Comm'n, Keynote Remarks at the 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), *available at* https://www.ftc.gov/public-statements/2016/09/keynote-remarks-ftc-chairwoman-edith-ramirez; Comm'r Maureen K. Ohlhausen, U.S. Fed. Trade Comm'n, Does the U.S. Economy Lack Competition, And If So What To Do About It?, Remarks at Hogan Lovells, Hong Kong (June 1, 2016), *available at* https://www. ftc.gov/system/files/documents/public_statements/952273/160601doesuseconomylackcomp.pdf.

[112] *See* David S. Evans, *Attention Rivalry Among Online Platforms*, 9 J. COMPETITION L. & ECON. 313 (2013).

A two-sided market is one in which one firm (often called a platform) receives revenues from separate groups that are dependent on each other in some way. For example, a newspaper charges readers for subscriptions and also charges advertisers for advertisements. The newspaper may charge more for advertisements if it has more subscribers, and so the two sides are dependent on each other. As this example demonstrates, there is a close relationship between two-sided markets and markets involving complementary goods. The Section recommends that the Agencies clarify whether two-sided markets require special antitrust analysis or are a general case of complementary products.

Industries characterized by two-sided or multi-sided markets cannot be fully understood without a clear understanding of the interaction between the multiple sides. This impacts multiple parts of the antitrust analysis, including:

- **Analysis of constraints on the exercise of market power.** While a firm may be able to exercise market power on one side of a two-sided market even if the second side is competitive, the competitive nature of the second side may also constrain the first. For example, the publisher of the only local newspaper in a community might be reluctant or unable profitably to exercise market power over readers (e.g., by charging high prices or reducing the quality of distribution) if doing so will reduce readership and thus the amount the publisher can charge advertisers that are able to choose between the newspaper and other forms of local advertising such as radio. Because the price increases could cause both lost sales to readers and lost revenues from advertisers, the two-sided nature of the market could preclude or limit the exercise of market power on either side.

- **Analysis of competitive effects.** Conversely, conduct that might appear anticompetitive if one focuses entirely on one side of the market might seem benign or procompetitive when both sides of the market are taken into account. For example, a newspaper might charge a price below marginal cost in order to generate increased readership and thus more advertising revenue. The price might appear predatory if the antitrust analysis focuses solely on the reader market. However, if the other side of the market is taken into account, the conduct might appear to be an efficient mans of defraying fixed costs.[113]

The recent decision in *United States v. American Express*[114] illustrates both the increasing importance of two-sided markets and the need for clarification of the applicable legal standards and appropriate modes of legal and economic analysis. The court appears to take the position that, in a vertical restriction case involving a two-sided market, the lawfulness of the allegedly anticompetitive conduct depends on the effect of the conduct on the defendant's customers on both sides of the market.[115] The Section recommends that the Agencies encourage courts to examine the effect of the conduct on both sides of the market *as a whole* instead of the effects just on the defendant's customers.

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[113] Similar issues can arise with non-price conduct. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).

[114] 838 F.3d 179 (2d Cir. 2016).

[115] 838 F.3d at 206.

2. Contracts Referencing Rivals (CRRs)

CRRs contain terms that refer to or depend on information about rivals, e.g., their sales, prices or offers. They include provisions such as: (1) "most favored nation" provisions (MFNs), in which one party promises to trade with the other on terms as good as, or sometimes better than, the terms on which it trades with other trading partners; (2) loyalty or "market share" discounts, in which the price paid by the buyer depends in part on the percentage of its purchases from the seller; (3) exclusive dealing and exclusive distributorship agreements, which require one party to deal exclusively with the other for certain products or services; and (4) rights of first refusal, by which one party promises that the other will have a chance to meet or beat any offer the promisor receives from another party.

CRRs are ubiquitous and can have procompetitive or anticompetitive effects depending on the context.[116] They often promote increased output and other efficiencies, such as risk-sharing or aligning incentives in the distribution chain. For example, an MFN can facilitate efficiency-enhancing transactions where one party is concerned that, because of changing circumstances or its lack of information about the market, it might wind up being disadvantaged compared to rivals. A right of first refusal can provide similar benefits. A loyalty discount can align incentives between suppliers and distributors in times of unforeseen demand shifts, when quantity discounts would not provide suitable incentives if demand increases or decreases materially, and can shift some of the risk of falling demand from the distributor to the supplier.

CRRs may also have anticompetitive effects. MFNs can deter price cuts and raise entry barriers by in effect imposing a tax on lower prices offered to other or new trading partners. Loyalty discounts can deter purchasers from dealing with rival suppliers if doing so would push the percentage purchased from the firm offering the loyalty discount below certain thresholds and they can exclude rivals that are able to serve only a small part of the buyer's needs. Exclusive dealing and, less commonly, exclusive distributorship agreements can exclude rivals by restricting their access to customers and input suppliers. And right of first refusal provisions can diminish competition by deterring rival sellers from trying to sell to the potential customer who is subject to that form of contractual restriction.

The Agencies have been instrumental in conceptualizing the competitive impact of CRRs and bringing them to the forefront of antitrust dialogue.[117] But, while economic analysis of CRRs has advanced, the appropriate legal analysis remains unclear, in part because of problems administering standards implied by some economic analyses. For example, the kind of discount attribution test favored by some economists for loyalty discounts raises difficult factual issues

[116] *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts (June 3, 2013), *available at* www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf.

[117] *See, e.g.*, Fiona Scott-Morton, Deputy Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Contracts that Reference Rivals, Address at the Georgetown University Law Center: Antitrust Seminar (April 5, 2012), *available at* https://www.justice.gov/atr/file/518971/download.

with which courts have had little experience.[118] Judicial decisions, particularly those regarding loyalty discounts, have been inconsistent.[119]

The Section recommends that the Agencies look for opportunities to advance the evolution of legal doctrine applicable to CRRs through enforcement actions, amicus briefs, and perhaps agency guidelines. Greater clarity about the legal rules would benefit businesses in assessing the risk associated with a particular provision, as well as reduce judicial errors and litigation costs.

The recent case involving Apple's e-book pricing model highlights the need for further guidance relating to CRRs.[120] In the Apple e-books matter, the Division alleged that Apple facilitated an illegal horizontal price-fixing agreement among the publishers of e-books. Further guidance is needed to clarify how similar CRRs would be analyzed in a vertical context (absent evidence of horizontal collusion).

3. Tying and Bundling

A tying arrangement is an agreement by a party to sell one product on the condition that the buyer also purchase a separate product. Tying can be challenged as an act of exclusion under Section 2 of the Sherman Act, as well as under Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Early decisions held tying arrangements to be per se illegal.[121] More recent decisions suggest that judicial disapproval of tying arrangements is dissipating.[122] The Supreme Court in *Illinois Tool Works v. Independent Ink Inc.* clearly indicated that tying arrangements are not always or almost always anticompetitive.[123] In addition, in *United States v. Microsoft*,[124] the D.C. Circuit declined to apply the per se rule to the tying of an operating system and a web browser, reasoning that platform software tying arrangements may have procompetitive efficiencies.

Other courts and commentators have observed that tying frequently has procompetitive effects, including: (1) enhanced ability to assure product quality; (2) achieving economies through joint production, distribution, or marketing; (3) undermining collusion by enabling secret price-cutting; (4) precluding excessive markups by sellers of complementary products; and (5) avoiding double marginalization.[125]

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[118] Benjamin Klein & Andres Lerner, *The Economics of Alternative Antitrust Standards for Loyalty Contracts*, ANTITRUST L.J. (forthcoming 2016).

[119] *Compare* Allied Orthopedic Appliance v. Tyco Health Care Group LP, 592 F.3d 991 (9th Cir. 2009), with Virgin Atl. Airways v. British Airways, 257 F.3d 256 (2d Cir. 2001).

[120] United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).

[121] *E.g.*, Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

[122] Illinois Tool Works v. Independent Ink Inc., 547 U.S. 28 (2006).

[123] *Id*. at 45 ("Many tying arrangements…are fully consistent with a free, competitive market.").

[124] 253 F.3d 34 (D.C. Cir. 2001).

[125] *See, e.g.*, Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1200 (9th Cir. 2012) ("Like other vertical restraints, tying arrangements may promote rather than injure competition."); David Evans &
(….continued)

Although less numerous, some commentators and decisions have continued to find potential anticompetitive effects in tying arrangements, including: (1) raising prices to consumers; (2) limiting consumer choices; and (3) excluding or impairing rivals by raising their costs, thereby triggering higher prices and facilitating anticompetitive price discrimination.[126]

Bundling, like tying, is a practice that, in different market contexts, can be either procompetitive or anticompetitive. Bundled discounts are awarded to customers who make a designated number of purchases across multiple product lines. Bundled discounts offered by large firms with numerous product lines may impair competition in circumstances where the bundled discount cannot be matched by smaller firms lacking broad product lines, regardless of whether the smaller firm is the more efficient producer of a particular product.[127] On the other hand, bundling can result in a real discount, reducing market prices and increasing competition, and can help generate economies of scope and scale.

The Third and Ninth Circuits disagree on the proper antitrust test for bundled discounts. The Ninth Circuit applies predatory pricing standards (though without the recoupment feature).[128] The Third Circuit rejects predatory pricing tests and condemns bundled discounts that "foreclose the opportunities of rivals" in an "unnecessarily restrictive way."[129] When different rules apply to conduct depending on where it occurs, the potential for erroneous enforcement is unacceptably high. The Section suggests that bundling is another area ripe for an Agency enforcement policy statement to identify and distinguish the circumstances where the practice produces procompetitive or anticompetitive effects.

In light of the countervailing considerations that tying and bundling cases present, this is an area in which the Agencies should proceed carefully, concentrating on practices they believe to be truly anticompetitive, while considering the efficiency justification both as a matter of prosecutorial discretion and as presented in court. Such prudential enforcement activity would be very helpful in drawing the line between what is procompetitive and what is not.

(continued….)

Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005).

[126] *See, e.g.*, Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 271-72 (6th Cir. 2015) (a tying arrangement may be anticompetitive if it "tends to force more efficient competitors out of the tied product market"); Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. __, 31-32 (forthcoming 2017), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2632&context=facpub.

[127] *See* Daniel A. Crane & Graciela Miralles, *Toward a Unified Theory of Exclusionary Vertical Restraints*, 84 S. CAL. L. REV. 605, 646 (2011) ("[A] contract or contractual provision should be deemed to foreclose some share of the market only when it prevents an equally efficient competitor from profitably offering its own set of contractual terms that the customer reasonably might chose in lieu of the defendant's terms for some increment of the market's output."); Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101, 134-36 (2015).

[128] Cascade Health Sol'ns v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008).

[129] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

B. Antitrust and Intellectual Property

1. Patent-Related Antitrust Issues

The Section recommends that the Agencies study patent-related antitrust issues, in particular those related to phenomena sometimes called "holdup" and "holdout." It is generally accepted that the ownership of a patent by itself is not presumed to create a presumption of market power, and that the proper assertion of a valid patent is not an antitrust violation. By the same token, improper assertions of patent rights, like those involving other assets, can raise questions of competitive significance. "Patent holdup" occurs, for example, when an SEP holder that has made a commitment to license its patents on FRAND terms instead uses the essential nature of its patent ("standard-lock-in") to charge an unjustifiably higher royalty than would have been possible before its patent was included in the standard."[130] Supracompetitive compensation can lead to deadweight loss from revenue raising, deter commercialization of patented technologies, reduce follow-on invention, exacerbate strategic uses of patents to raise rivals' costs, and induce costly overinvestment in patents to be used for those purposes or defensively. Subcompetitive compensation can reduce returns to investment in patentable inventions, and the prospect thereof could reduce such investment in innovation, or standard-setting, or both.

Holdout refers to the situations in which an implementer either delays or refuses to take a license or engages in bad-faith challenges to patent validity or in which a patent holder delays, or refuses to offer, or engages in bad-faith negotiation regarding, a license to the entire portfolio of patents, or any subset thereof, held by the patent holder or any commonly controlled entity for which the implementer seeks a license or conceals or fails to disclose the entire portfolio of patents held by the patent holder or any commonly controlled entity.[131] Both holdup and holdout can arise with respect to technologies included in, or necessary as a practical matter to implement, public standards and patented technologies that are not included in standards.

The holdup issue raises a number of questions. One is whether patent holders that assert SEP patents are able to obtain supracompetitive royalties from users in an individual case or whether implementers of patented technologies can force patent holders to accept less than competitive royalties.[132] Another, very different question is whether the costs incurred by technology users for using patented standards technology have in the aggregate been excessive, e.g., would harm the product market or restrict output. Empirical studies on the subject require data, most of which is available only in aggregated form, which has obvious limitations. A finding that aggregate costs to technology users are not excessive could mean that patent holdup has not in the aggregate deterred the use of patented standards technologies or follow-on inventions, but such a finding would not itself demonstrate the absence of adverse effects from holdup. Aggregated data would not disclose problematic holdup if, for example, (1) relatively few patents were asserted in the

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[130] Douglas H. Ginsburg et al., *The Troubling Use of Antitrust to Regulate FRAND Licensing*, 10 COMPETITION POL'Y INT'L ANTITRUST CHRON. 1 (2015); *see also*, J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 GEO. L.J. ONLINE 48, 61 & n.49 (2015).

[131] Sidak, *supra* note 131 at 61 & n.49; ANNE LAYNE-FARRAR, PATENT HOLDUP AND ROYALTY STACKING THEORY AND EVIDENCE: WHERE DO WE STAND AFTER 15 YEARS OF HISTORY? (2014), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282014%2984&doclanguage=en.

[132] *See, e.g.*, William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 384 (2016).

period studied and the percentage of patents being asserted increases over time or (2) excessive royalties when patents are asserted have distorted the use of, or follow-on invention based on, the asserted patents or created perverse incentives for over-patenting. Careful analysis of the context is important, because neither holdup nor excessive pricing, without more, violates the antitrust laws.

There is no consensus about the factual significance and likelihood of the phenomena known as holdup and holdout, and the disagreements about these factual issues have important ramifications for patent policy and antitrust policy regarding patents. The Section concurs in the statements of ranking enforcement officials that high or low returns standing alone do not form the basis for a finding of an antitrust violation in the absence of evidence of unlawful exclusionary conduct.[133] It is the exclusionary conduct that raises the unresolved questions. We therefore recommend that the Agencies gather reliable and credible information on—and propose a framework for evaluating—holdup and holdout, and the circumstances in which either may be anticompetitive. The Agencies are particularly well-suited to gather evidence and assess competitive implications of such practices, which could then inform policymaking, advocacy, and potential cases. The Agencies' perspectives could contribute valuable insights to the larger antitrust community.

2. International Issues Related to Intellectual Property

In addition to patent issues, international topics are significant, most notably in the context of the multinational implications of agency actions and the effect of decisions by agencies such as the International Trade Commission (ITC).

a. Multinational Effects

Worldwide portfolio licensing remedies pose significant comity concerns, especially when such remedies are not consistent with other jurisdictions' policies.[134] The United States, for example, does not regulate price; instead, because of a concern about innovation incentives, the United States protects the right of IP holders to set the prices of their products.[135] In contrast, several foreign countries have "excessive pricing" prohibitions and some foreign competition authorities have applied them to IP rights.

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[133] *See, e.g.*, Bill Baer, Ass't Att'y Gen., U.S. Dep't of Justice, Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks at the 19th Annual Int'l Bar Association Competition Conference (Sept. 11, 2015); Edith Ramirez, Chairwoman, U.S. Fed. Trade Comm'n, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective, 8th Annual Global Antitrust Enforcement Symposium (Sept. 10, 2014).

[134] *See, e.g.*, Christine A. Varney, Ass't Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference (Feb. 15, 2010) (encouraging antitrust agencies to "endeavor to make our remedial decisions with our eyes open to their consequences beyond our shores, taking steps to minimize their extraterritorial effects; let us keep our eyes open to what our sister agencies have already done in particular cases, so that we do not unnecessarily diverge from their decisions").

[135] *See supra* note 134.

While the FTC and some foreign agencies have threatened to impose extra-jurisdictional remedies in some instances, other foreign jurisdictions have appropriately refrained from imposing remedies with extraterritorial effects. For example, the antitrust agencies in Europe and China typically have limited their remedies to domestic conduct pertaining to domestic patents. In April 2014, for example, the European Commission's Directorate-General for Competition (DG Competition) entered into a settlement with Samsung[136] and issued a decision against Motorola Mobility[137] essentially prohibiting both companies from seeking injunctive relief against willing licensees of standard essential patents except under certain limited circumstances. DG Competition specifically limited its remedy to conduct occurring in the European Economic Area (EEA), and only to patents granted in the EEA. Likewise, in a 2015 penalty decision against Qualcomm for allegedly abusing a dominant position by charging unreasonably high royalties, bundling SEP and non-SEP licenses without justification, and imposing other unreasonable conditions on the sale of baseband chips (such as requiring a waiver of the licensee's right to challenge the agreement), China's National Development and Reform Commission (NDRC) limited remedies to conduct related to Chinese patents being licensed for use in China only.[138] In contrast, in the *Rambus* matter,[139] the FTC's cease and desist order applied to the company's enforcement of its patents everywhere in the world. In light of the significant comity concerns presented by extraterritorial remedies involving patents, the Section recommends that the Agencies refrain from seeking such remedies.

Some foreign competition authorities have also considered imposing broad requirements that IP holders share their IP with others, including competitors. The United States strongly disfavors such requirements, while some Asian competition agencies have argued in favor of sanctioning refusals to license and making licensing compulsory.[140] The Agencies also recognize that practices such as tying and bundling, discriminatory licensing, cross-licensing, and grantbacks can be procompetitive, and thus call for an effects-based analysis. In contrast, some Asian

[136] Press Release, European Comm'n, Antitrust: Commission Accepts Legally Binding Commitments by Samsung Electronics on Standard Essential Patent Injunctions (April 29, 2014) (IP/14/1490).

[137] Case AT.39985-Motorola-Enforcement of GPRS standard essential patents, Comm'n Decision, 2014 O.J. (C 344) 06.

[138] NDRC Administrative Sanction Decision No. 1 [2015] (Mar. 2, 2015), *available at* http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html. Specifically, the NDRC approved the "rectification plan" submitted by Qualcomm, under which the company agreed: (1) not to bundle Chinese SEPs and non-SEPs and to provide patent lists during negotiations; (2) to charge royalties of not more than 5% for Chinese 3G SEPs and 3.5% for Chinese 4G SEPs using a royalty base of 65% of the net selling price of the device; (3) not to condition the sale of baseband chips on signing a licensing agreement with terms that NDRC found to be unreasonable (e.g., a no-challenge clause); and (4) to provide existing licensees with an opportunity to elect to take the new terms for sales of branded devices for use in China.

[139] Final Order in the Matter of Rambus Incorporated, File No. 011-0017, Dkt. No. 9302 (F.T.C. 2007), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2007/02/070205finalorder.pdf. The cease and desist order was ultimately overturned by the United States Court of Appeals for the District of Columbia Circuit on other grounds. Rambus v. FTC, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009).

[140] *See, e.g.*, Chinese Antimonopoly and Anti-unfair Competition Enforcement Bureau of State Administration for Industry & Commerce, Antitrust Guideline on Intellectual Property Rights Abuses 16, *available at* http://www.saic.gov.cn/fldyfbzdjz/gzdt/201601/W020160108580399473419.pdf.

competition agencies appear to apply presumptions that such licensing conduct is anticompetitive. To protect the ability of U.S. businesses to innovate and compete, the Agencies may wish to consider whether the concerns warrant an adjustment in U.S. policy or an international dialogue that might reconcile these conflicting policies.

b. International Trade Commission

In addition to multinational implications, issues arise from the differences between the standards that federal courts apply for injunctions and the United States International Trade Commission's (ITC) applies for exclusionary remedies. The U.S. Supreme Court's decision in *eBay Inc. v. MercExchange*,[141] held that a district court must apply the same standards required in all other injunction cases. After *eBay*, a district court must consider and weigh whether: the plaintiff will suffer irreparable harm; money damages are inadequate to compensate the plaintiff; the balance of hardships weigh in the plaintiff's favor; and the public interest would not be disserved by the issuance of an injunction. Because the only relief available before the ITC is injunctive in nature, complainants' primary remedy is an exclusion order excluding the importation of infringing goods,[142] rather than money damages which are not available there. With its own statutory scheme that lays out a test for exclusion orders, the ITC does not follow the *eBay* test. For that reason, it is possible that patent holders who appear before the ITC could obtain exclusion orders when they would not be entitled to injunctions, or vice versa.[143] This divergence in standards could result in different outcomes for similar conduct depending on the tribunal addressing that conduct, and thus could have a significant impact on litigants' choice of tribunals.

The possibility that SEP owners might attempt to avoid district courts and obtain bargaining power in royalty negotiations by seeking exclusion orders at the ITC raises issues for the appropriate analysis of patent holdup disputes. If the ITC were to issue exclusion orders to SEP owners under circumstances in which injunctions would not be appropriate under the *eBay* standard, the inconsistency could induce SEP owners to strategically use the ITC in an effort to achieve settlements of patent disputes on terms that might require payment of supracompetitive royalties. Though it is not clear how likely this is or whether the risk has led to supracompetitive prices in the past, this dynamic could lead to holdup by SEP owners and unconscionably higher royalties.[144] We recognize that Congress has already established by statute standards and factors that the ITC should weigh for determining when the ITC should grant an exclusion order, but suggest that the Agencies consider offering guidance to the ITC about potential SEP holdup and holdout.

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[141] 547 U.S. 388 (2006).

[142] 19 U.S.C. § 1337(d)-(f).

[143] *E.g.*, Colleen V. Chien & Mark A. Lemley, *Patent Holdup, The ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 16 (2012).

[144] Whether the threat of an exclusion order is likely to lead to inflated royalties depends in part on the likelihood of an exclusion order being granted, and thus far the ITC has granted only one exclusion order on an SEP, which was disapproved by the USTR. *See* U.S. Trade Representative Exec. Office of the President, Disapproval of the U.S. International Trade Commission's Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794 (2013), *available at* https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF (hereinafter USTR 2013 Veto Letter to ITC).

The Section believes that analysis of these issues could also yield valuable information for the Office of the United States Trade Representative (USTR) in exercising its review function to overturn what it considers to be inappropriate ITC orders. For example, can litigants be counted on to seek intervention in appropriate cases? If not, does the USTR have adequate mechanisms to ensure review when appropriate? We believe scrutiny on questions like these would be worthwhile.

3. Patent Acquisitions and Dispositions

The Agencies should look at purchases and sales of patents as they would other assets, to evaluate their impact on competition.

It is generally accepted that the ownership of a patent by itself is not presumed to create a presumption of market power. By the same token, acquisitions and dispositions of intellectual property, like those involving other assets, can raise questions of competitive significance. Reflecting the complexity of the setting, the Agencies should recognize the potential harms and benefits from the creation and exploitation of large patent portfolios. In some circumstances, such collections "can be used offensively, and can be valuable primarily because of their size rather than the validity of each patent in the portfolio."[145] At the same time, the Agencies should take into account, as they do in other asset acquisitions, the potentially significant efficiencies from such acquisitions. In particular, they should recognize the potential benefits of aggregating complementary patents in solving the Cournot complements problem.[146]

Combining substitute patents (i.e., patents covering competing products or methods to accomplish the same objective) may raise Clayton Act issues applicable to horizontal mergers. Despite this, resolution of the competitive implications of a particular combination is often made difficult by uncertainty about the validity and scope of patents, and thus, about their competitive significance. The Agencies should use merger retrospectives to shed light on these issues.

The Agencies should also consider harm to competition that could result from disaggregating complementary patents. Disaggregating such patents could lead to a double marginalization problem that results in increased costs for technology users, and could be a strategic device for raising costs for firms that compete with one or more of the patent holders.[147] Enforcement actions based on the Sherman Act could be warranted depending on factors including contract terms (e.g., requiring the targeting of product market rivals of the original owner) and the increased likelihood that the disposition of the patents will lead to higher aggregate prices for technology users without evident procompetitive justification.

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[145] Michael A. Carrier, *Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take*, at 2-3, CPI ANTITRUST CHRON. (Jan. 2013), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2013/04/03/paew-0034.pdf.

[146] *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2157-58 (2013).

[147] *See id.* at 2158-61, 2178-80.

4. Standard Development Organizations

Standard Development Organizations (SDOs) present multiple antitrust issues, including the role the Agencies should play and Sherman Act Section 1 considerations.

a. General Agency Practice

As a starting point, the Section recommends that the Agencies continue their scrutiny of SDOs. While such organizations promise significant procompetitive benefits in the form of interoperability, innovation, and enhanced consumer choice, they are also capable of having anticompetitive effects in the form of boycotts, the exercise of monopsony power, and holdup. Holdup concerns could arise from, for example, (1) the avoidance of FRAND or royalty-stacking obligations through transfer, tying, and bundling,[148] (2) inadequate measures to prevent patent holders from exercising market power, and (3) enabling implementers to compel subcompetitive royalty rates as a condition of including the patented technologies in the standard. On the other hand, conduct such as tying and bundling may be procompetitive or benign. There are numerous procompetitive reasons for portfolio licensing, including reducing transaction costs and providing implementers with freedom to operate.

While the guidance supplied by the Agencies as to whether certain SDO and other joint conduct may violate the antitrust laws has been instructive and should be continued, the Agencies should be careful when utilizing the business review letter process to emphasize that this form of guidance is highly fact-specific to the matter at hand. As the Division has recognized, it is unlikely that there is a "one-size-fits-all" template for analyzing SDO policies regarding IP rights. Because SDOs "vary widely in size, formality, organization and scope,"[149] decisions regarding specific rules are ordinarily best left to individual SDOs and their members to decide.

b. Sherman Act Section 1 Considerations

Some contend that, under certain circumstances, SDO patent policies could violate the antitrust laws.[150] The argument is that, first, such policies could enable even patent holders that agreed to comply with the patent policies to exercise market power *ex post* through, for example, inadequate measures to prevent the exercise of such market power. Second, they could enable technology users to exercise market power *ex ante* by, for example, requiring patent holders to agree to subcompetitive royalty rates as a condition of inclusion of their patented technologies in the standard. There is no case law that directly supports such contentions.

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[148] For a critique of the royalty-stacking theory, see Alexander Galetovic & Kirti Gupta, *Royalty Stacking and Standard Essential Patents: Theory and Evidence from the World Mobile Wireless Industry* (June 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2790347.

[149] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33-34 n.5, 48 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

[150] *See, e.g.*, Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). Seeking an injunction against a willing licensee also could potentially violate § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act.

Standard-setting may confer market power, and in these settings, the Agencies could study the extent to which a FRAND declaration limits the potential market power derived from a patent's inclusion in a standard. Some empirical research suggests that standardization does not confer market power, but rather serves to "crown [existing] winners."[151] Other research and cases show that standardization has conferred market power.[152] In those instances in which an SDO creates market power in the technology market for an SEP holder, the Agencies should consider whether there may be circumstances in which the SDO might be in violation of Section 1 if it fails to take reasonable steps to prevent the exercise of that market power, such as a suitably defined and enforced FRAND policy or whatever effective alternative the SDO chooses.

As the Agencies have recognized, SDOs generally have leeway to set their own policies. While the Section acknowledges that it is a contested issue and there are strongly held opposing viewpoints, some of us believe that in appropriate cases SDO policies (or the lack thereof) can form the basis for a Section 1 claim. One example is provided by FRAND and royalty-stacking obligations, which are generally a matter of contract law, but which could conceivably form the basis of a Section 1 claim if SDOs do not implement policies that would prevent such obligations from being evaded through transfer of FRAND-encumbered patents.[153]

There are a variety of possible alternatives to existing FRAND policies that SDOs might consider. These include requiring SDO members to use a certain type of arbitration when parties cannot agree on a FRAND rate and addressing the circumstances under which SDO members could seek injunctions or exclusion orders for infringement of FRAND-encumbered patents.

5. Competition Advocacy

The Agencies have done an effective job informing the PTO, USTR, Congress, ITC, and others of their competition concerns in the SEP area. In particular, the USTR disapproved an exclusion order from the ITC concerning an SEP, a decision that reflected arguments made by the Agencies.[154] Those efforts should be continued but are likely insufficient on their own to achieve competitive outcomes. If informed parties benefit from the status quo, competition advocacy alone will not be able to change their behavior. The Agencies could analyze the incentives that drive the remaining anticompetitive behavior, and consider what they could do to change those incentives. For example, the Agencies could (1) litigate cases that raise significant antitrust

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[151] *See, e.g.*, Anne Layne-Farrar & A. Jorge Padilla, *Assessing the Link Between Standards and Patents*, *in* INNOVATIONS IN ORGANIZATIONAL IT SPECIFICATION AND STANDARDS DEVELOPMENT 19, 24-26 (Kai Jacobs ed., 2012).

[152] *See, e.g.*, Rudi Bekkers et al., *Declared Essential Patents* (Hoover Institution, IP2, Working Paper No. 16003, 2016); M. Rysman & T. Simcoe, *Patents and the Performance of Voluntary Standard Setting Organizations*, 54 MGMT. SCI. 11, 1920-34 (2008); David Yoffie et al., *Qualcomm Incorporated 2009*, Harvard Business School case study 9-710-433 (2011); *see also, e.g.*, Rambus v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[153] Note that any such liability must be consistent with the Standards Development Organization Advancement Act of 2004 (SDOAA), which extends the protections provided by the National Cooperative Research and Production Act of 1993 to SDOs. The SDOAA provides that the rule of reason applies to SDOs while they are engaged in standards development activities and limits liability to actual, as opposed to treble, damages so long as they properly notify the Agencies. 15 U.S.C. §§ 4301-4306 (2016).

[154] *See* USTR 2013 Veto Letter to ITC, *supra* note 144.

concerns; or (2) file amicus briefs in private cases when the issues are important to obtaining procompetitive outcomes.

In the context of SDO patent policies, the Agencies have contributed to the public policy discussion and offered guidance to particular SDOs through the business review letter process. We encourage the agencies to continue reminding practitioners that general guidance does not define the limits of the law, and that the availability of guidance is not a signal that pre-approval is required or preferred before SDOs, or other entities in other areas, adopt new policies.

V. INDUSTRY-SPECIFIC ISSUES

A. Financial Sector

1. Interaction of Competition and Regulation

Financial markets are heavily regulated by a variety of government agencies such as the Federal Reserve (including the CFPB), SEC, and CFTC. Though government agencies in charge of competition policy have to work within the existing regulations and are in some circumstances constrained by legal precedents from using the antitrust laws to constrain industry behavior in a regulated industry, they can sometimes influence the content of the regulations and their adjudication.[155] The principle that competition is desirable applies to many features of financial markets and it is a very valuable application of agency resources to explain the positive and negative competitive consequences of various regulations.[156] As a general matter, regulations impose disproportionate burdens on small firms compared to large firms and therefore one can expect that regulations will favor large financial firms over small ones and will discourage entry of financial firms at a small scale.[157] The Agencies should make sure that the cost to the competitive process of those consequences should be considered as various regulatory bodies contemplate any regulatory change and evaluate current regulations.

2. Banking

By conventional competition benchmarks, the commercial banking sector in the U.S. is not highly concentrated nationally, although concentration has increased recently.[158] Given the generally modest national concentration in banking, despite the large size of some individual firms, calls for breaking up large national banks to promote competition[159] do not appear to be justified by the

[155] *See, e.g.*, Credit Suisse v. Billings, 551 U.S. 264 (2007).

[156] *See, e.g.*, OECD, Competition and Financial Markets Key Findings (2009).

[157] *See, e.g.*, Daniel K. Tarullo, Member, Board of Governors of the Fed. Reserve Sys., Statement before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Sept. 9, 2014) (noting the Federal Reserve was "cognizant that regulatory compliance can impose a disproportionate burden on smaller financial institutions" and tried to work with smaller institutions to try to minimize this burden when implementing the Dodd-Frank Act).

[158] For example, based on assets held, the four-firm concentration ratio of commercial banks in the United States was below 45% in 2014. *See, e.g.*, Steven Schaeffer, *Five Biggest U.S. Banks Control Nearly Half Industry's $15 Trillion in Assets*, FORBES (Dec. 3, 2014) (reporting data from SNL Financial).

[159] *See, e.g.*, Sen. Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program (June 29, 2016).

current state of knowledge about competition and efficiency in banking. However, some studies have found that when measured at a local level, banking is concentrated in certain areas.[160] Local concentration in banking can affect the availability of credit to borrowers (especially small firms) as well as the rates paid to depositors.[161] Usual merger analysis would identify such harms and those must be considered in evaluating any merger. The Section is aware of no support for the proposition that competition policy as applied to banking should give any special consideration to stockholders or debt holders of banks (excluding depositors).[162] Mergers that would enrich stockholders or debt holders but harm consumers deserve no special treatment or exception when applied to banking. Similarly, the prohibition of entry of new banking entities that could take advantage of certain scale or scope efficiencies in order to protect the profitability of existing banks is not justified from the viewpoint of competition policy. Claims that competition policy should yield to other objectives—for example, the difficulty of regulating new entities—should be evaluated relative to less costly alternatives—for example, a requirement that the new entity post sufficient financial capital to satisfy legitimate regulatory concerns. In that way, legitimate regulatory concerns can be separated from protectionist efforts to restrain competition to the detriment of consumers. An evaluation of whether current or proposed regulations needlessly distort competition would be appropriate.

3. Setting Benchmark Prices

Several recent cases have focused on the collective activity of firms that claim to set a rate or pricing benchmark for such things as interest rates, gold prices, aluminum prices, foreign exchange, and the like.[163] If the process turns out to be flawed either because of poor design or because the participants do something other than what they claim, the benchmark's value is affected. Although the courts in recent cases have provided some guidance, the Agencies should provide further guidance as to whether and under what circumstances such conduct is actionable

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[160] Brian Akins et al., *Bank Competition and Financial Stability: Evidence from the Financial Crisis*, 51 J. OF FIN. AND QUANTITATIVE ANALYSIS 1 (2016).

[161] BOARD OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON THE AVAILABILITY OF CREDIT TO SMALL BUSINESS (2012); Ben R. Craig & Valeriya Dinger, *Bank Mergers and the Dynamics of Deposit Interest Rates*, 36 J. OF FIN. SERVS. RESEARCH 111-33 (2009); Charles Kahn et al., *Bank Consolidation and the Dynamics of Consumer Loan Interest Rates*, 78 J. OF BUS. 99-133 (2005).

[162] *See, e.g.*, Washington Mut. Sav. Bank v. Federal Deposit Ins. Corp., 482 F.2d 459 (9th Cir. 1973) (holding that all bank merger applications are subjected to traditional antitrust analysis and if violation is discerned, balancing of banking factors and anticompetitive effects is made, but FDIC, in weighing these interests, may not apply competitive standard more stringent than antitrust laws.); Robert E. Litan, Deputy Asst. Att'y Gen., Dept. of Justice, Antitrust Div., Antitrust Assessment of Bank Mergers, (Apr. 6, 1994) ("The Division uses the same standards to assess the competitive impacts of all mergers, whether or not they involve banks.").

[163] See, e.g., Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016) (U.S. dollar London Interbank Offered Rate); In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151 (2d Cir. 2016) (the "Midwest Premium" for aluminum); In re London Silver Fixing, Ltd., Antitrust Litigation, No. 14-MD-2573 (VEC), 2016 WL 5794777 (S.D.N.Y. Oct. 3, 2016) (the silver "Fix Price"); In re Commodity Exchange, Inc. Gold Futures and Options Trading Litigation, No. 14-MD-2548 (VEC), 2016 WL 5794776 (S.D.N.Y. Oct. 3, 2016) (the gold "Fix Price"); Alaska Electrical Pension Fund v. Bank of America Corp., No. 14-CV-7126, 2016 WL 1241533 (JMF) (S.D.N.Y. Mar. 28, 2016) (U.S. dollar ISDAfix); In re Foreign Exchange Benchmark Rates Antitrust Litigation , 74 F. Supp. 3d 581 (S.D.N.Y. 2015) (benchmark rates in the Foreign Exchange market).

and, if it is, whether it is appropriate to treat those cases as fraud, breach of contract, or antitrust cases.

4. *Creation of Markets*

Exchanges create organized markets and are often regulated by sector-specific agencies like the SEC or CFTC. In many unregulated sectors, entities also may collaborate to create de facto markets, though not organized. The creation of markets, whether organized formally or not, requires collective action among participants. Information is often exchanged and certain rules on participation might be specified. A joint venture that collects information can misuse that information to exclude others from getting it. At the same time, rules limiting participation or conduct of participants can be desirable in order to prevent free riding, thereby enabling the markets to exist.[164] Liquidity is a key attribute of many markets and rules that enhance liquidity at the expense of broad participation can be desirable. Forcing access to certain clearing functions of exchanges can be a form of free riding. The Division should remain vigilant that the creation and operation of financial services markets remain open, transparent, and accessible for all market participants. Experience has shown that transparent market exchanges drive procompetitive benefits and efficiencies, often leading to reduced prices and expanded output of market-made transactions.[165]

B. Healthcare Industry

1. *Antitrust Enforcement by the FTC and Division Following Healthcare Reform*

The healthcare industry is one of the largest sectors in the U.S. economy, accounting for approximately one-fifth of GDP.[166] Parts of the public as well as the private U.S. healthcare system are based on principles of competition, and therefore the system only functions as well as the markets that support it.[167] This point also applies to the operation of the Affordable Care Act (ACA), which requires competition in healthcare markets to be cost effective. However, as suggested by the ACA and recognized by the FTC and the Division, some forms of cooperation between providers and others may be beneficial and not necessarily in violation of the antitrust laws.[168]

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[164] *See, e.g.*, Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918) (members of Board of Trade were restricted from trading off the exchange; the restriction forced more trading on the exchange, thereby promoting its success).

[165] *See, e.g.*, *id.*

[166] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, "BRIEFING NOTE, OECD HEALTH STATISTICS 2014: HOW DOES THE UNITED STATES COMPARE? 3 (2014), *available at* www.oecd.org/unitedstates/Briefing-Note-UNITED-STATES-2014.pdf.

[167] MARTIN GAYNOR, EFFICIENCIES ANALYSIS: FALSE DICHOTOMIES, MODELING AND APPLICATIONS TO HEALTH CARE (Aug. 3, 2014).

[168] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at Antitrust in Healthcare Conference (hereinafter "Keynote Address") (May 12, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/950143/160519antitrusthealthcarekeynote.pdf ("[P]rocompetitive collaborations are already permissible under the antitrust laws.").

In response to the ACA and the perceived tension between the ACA's encouragement of cooperation and the antitrust laws, the FTC and Division developed a Policy Statement[169] that provides a framework for analyzing networks, which at its core recognizes the continued relevance and importance of competition in healthcare reform. The Statement applies to accountable care organizations (ACOs) that serve both Medicare beneficiaries and commercially insured patients. It does not apply to mergers, which are evaluated under the Horizontal Merger Guidelines.[170] However, as recently acknowledged, the FTC has not filed a single enforcement action against an ACO.[171] Its principal focus has been on mergers.

The Section recommends that the Agencies continue to challenge mergers, acquisitions and other transactions in the healthcare industry where such challenges are based on sound economic principles and focused on transactions that raise antitrust concerns. While some have argued that the goals of healthcare reform and antitrust are in conflict,[172] for the reasons noted above, they are not. Effective competition in healthcare remains critical to the performance of this important sector. The Section urges the Agencies to continue to reiterate that reform does not displace competition in the healthcare industry, that antitrust enforcement is fully compatible with healthcare reform, and that mergers or conduct that reduce competition cannot be justified by measures to improve quality and lower costs that can be achieved by other means.[173]

2. Agency Challenges to Healthcare Mergers

The FTC has had some notable recent success in challenging a physician merger in *St. Luke's* and healthcare provider mergers that raise competitive issues. The Section recommends that the FTC continue to challenge mergers that it believes substantially harm competition, despite the litigation risk, because of the important role competition plays in restraining the rise of national healthcare costs. As noted above, some challenges will fail, but an occasional failure does not diminish the value of litigation. Even cases that the Agencies lose help to clarify the law and demonstrate the Agencies' willingness to bring difficult cases in an effort to further develop the law. And losses in lower courts should be assessed and appealed if the decisions appear unsound. The Section encourages the FTC to appeal hospital merger decisions as it did in *Penn State*

[169] Fed. Trade Comm'n & Dep't of Justice, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011).

[170] The Statement provides a rule of reason analysis for ACOs that are financially or clinically integrated, *id.* at 4, and a "safety zone" for networks that enjoy 30% or less for each service provided by two or more of the ACO providers, *id.* at 7. It also sets forth the conduct that may be suspect for ACOs with high PSA shares. *See id.* at 10-11.

[171] Julie Brill, Comm'r, Fed. Trade Comm'n, A Common Goal: The U.S. Federal Trade Commission's Health Care Enforcement Program and Its Implications for ACOs, Sixth Annual Accountable Care Organization Summit Preconference (June 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/673881/150617aco-summit.pdf.

[172] *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., No. 1:15-cv-2362, 2016 WL 2622372 (M.D. Pa. May 9, 2016) (denying FTC's motion for preliminary injunction), *rev'd*, 838 F.3d 327 (3d Cir. 2016).

[173] St. Alphonsus Med. Ctr. Nampa v. St. Luke's Health Sys., 778 F.3d 775 (9th Cir. 2015); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

Hershey Medical Center[174] and *Advocate NorthShore*,[175] when the agency feels the court did not follow sound precedent for analyzing the competitive effects of a merger.

The Division's recent challenges to two health insurance mergers highlight the importance of careful competitive analysis of these markets.[176] The Section notes with interest the relevant markets pleaded in these complaints and the alleged monopsony effect of the mergers that would lower prices paid to providers. While previously relied upon,[177] this theory could be further expanded and explained by the Division to observers and practitioners in speeches, economic models and the like.

3. Work Product from Healthcare Workshops and Areas of Study

In an effort to keep abreast of developments in this rapidly changing industry, the FTC in conjunction with the Division and the Centers for Medicare & Medicaid Services (CMS), has held extensive workshops with industry leaders in 2014 and 2015.[178] The Section commends the Agencies for this joint endeavor and encourages them to continue to hold more joint workshops in the future on issues where clarity is needed, or new evidence is available that can guide policy. Medicare policies, including its payment rules, can influence provider consolidation and other aspects of market competition,[179] and the Section encourages FTC and Division lawyers and economists to play a more active role in influencing Medicare policies and rules so as to take into account the effect on competition and antitrust issues beyond ACOs.[180]

Although these workshops have provided material suitable for policy development and analysis, there have been no revisions to the Policy Statements issued in 1996; few, if any, speeches by government officials outlining some of the enforcement policies coming forth from these workshops; and few enforcement actions based on the theories of harm discussed during the

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[174] *Penn State Hershey*, 2016 WL 2622372.

[175] FTC v. Advocate Health Care, No. 15 C 11473, 2016 WL 4063481 (N.D. Ill. June 14, 2016) (denying FTC's motion for preliminary injunction), *rev'd*, 842 F.3d 460 (7th Cir. 2016).

[176] United States v. Aetna, Inc., No. 1:16-cv-01494 (D.D.C. filed July 21, 2016); *United States v. Anthem, Inc.*, No. 1:16-CV-01493 (D.D.C. filed July 21, 2016).

[177] *See* United States v. Aetna, Inc. (N.D. Tex. 1999) ("Aetna's acquisition of Prudential will also consolidate its purchasing power over physicians' services in Houston and Dallas, enabling the merged entity to unduly reduce the rates paid for those services."). *See also* Marius Schwartz, Econ. Dir. of Enf't, Antitrust Div., U.S. Dep't of Justice, Buyer Power Concerns and the Aetna-Prudential Merger, 5th Annual Health Care Antitrust Forum, Northwestern University School of Law (Oct. 20, 1999).

[178] Fed. Trade Comm'n, Examining Health Care Competition Workshops (Feb. 2014 and Mar. 2015). The materials and presentations are available at https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition.

[179] *See, e.g.*, Fed. Trade Comm'n, Comments on Centers for Medicare & Medicaid Services' Proposed Changes in Contracting for Medicare Part D (March 11, 2014).

[180] James Landman, Director at Inst. for Population Health Improvement, & Joe Miller, General Counsel for America's Health Ins. Plans, Remarks on Trends in Provider Consolidation, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 25, 2015) (citing Medicare payment rules).

workshop. At a minimum the Section encourages the Agencies to consider providing more detailed, focused guidance on:

(1) The anticompetitive use of contracting devices by dominant hospital providers as evidenced in the Division's suit against United Regional Health Care System[181] challenging exclusive contracts, and the recent case brought by the Division against Carolinas HealthCare System challenging steering restrictions.[182] What are the principles that cause the Division to choose these cases for enforcement?

(2) The various theories of harm and potential benefits that can result from the vertical integration of hospitals and physicians,[183] insurers and physicians, and cross market consolidation of providers;[184] and

(3) The broader implications of the recent FTC victories in St. Luke's, ProMedica Health System[185] and Penn State Hershey Medical Center, including a better understanding of cognizable, merger specific efficiencies[186] and how efficiencies can be achieved by contract rather than merger or consolidation.[187]

The Section also encourages the FTC to continue its research and analysis, particularly with respect to the:

(4) Competitive impact of electronic health records and whether they deter patients from switching to alternative providers.

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[181] United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. 2011).

[182] United States v. Charlotte-Mecklenburg Hosp. Auth., No. 3:16-cv-00311-RJC-DCK (W.D.N.C. 2016). *See also* Fiona Scott Morton, Theodore Nierenberg Prof. of Econ. At Yale U. Sch. of Management, Healthcare Contracting, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 24, 2015).

[183] Lawton Robert Burns, Dir. of Wharton Ctr. for Health Mgmt. & Econ. at U. Penn., Physician-Hospital Consolidation, Payer-Provider Consolidation & Payer-Provider Consolidation, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 25, 2015).

[184] Leemore Dafny, Dir. of Health Enter. Mgmt. at Kellogg Sch. of Mgmt. at Nw. U., Effects of Cross-Market Combinations: Theory and Evidence from Hospital Markets, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 25, 2015). *See also* Leemore Dafny, Kate Ho & Robin S. Lee, *The Price Effects of Cross-Market Hospital Mergers* (Nw. Inst. For Policy Research, Working Paper 16-05, 2016).

[185] ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014).

[186] James Landman, Dir. of Inst. for Population Health Improvement, & Joe Miller, Gen. Counsel for America's Health Ins. Plans, Remarks on Trends in Provider Consolidation, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 25, 2015).

[187] Kenneth Kizer, Dir. of Inst. For Population Health Improvement, U. Cal. Davis Health Sys., & Joe Miller, General Counsel for America's Health Ins. Plans, Remarks on Trends in Provider Consolidation, at Antitrust Division of the Department of Justice's Public Workshop: Examining Health Care Competition (Feb. 25, 2015).

4. Reverse-Payment Settlements in the Pharmaceutical Industry

In the past two decades, the FTC has paid particular attention to settlements by which brand-name drug companies pay generic firms to settle patent litigation and delay entering the market. In its 2013 decision in *FTC v. Actavis*, the Supreme Court, though it rejected the FTC's proposal to apply a "quick look" analysis, held that these agreements could have "significant anticompetitive effects" and violate the antitrust laws under the rule of reason.[188] In the three years since the decision, courts have begun to flesh out the *Actavis* framework.

The issue that has received the most attention is whether the term "payment" is limited to cash or whether it extends to other types of consideration. The overwhelming majority of courts—including two federal courts of appeals—that has analyzed the issue has held that payment is broader than cash.[189] These decisions are consistent with the emphasis of substance over form in antitrust. Other issues that the Agencies may confront in the years ahead include the antitrust analysis the courts should apply, the role of the patent merits, causation, pleading requirements, and the role of state law.

For the past two decades, the FTC has played a crucial role in litigating reverse-payment settlement cases, filing amicus briefs, collecting settlements filed under the 2003 Medicare Modernization Act, and raising awareness of these issues. With jurisprudence accumulating in the wake of Actavis, the Section encourages the FTC to provide much-needed guidance to businesses, consumers, and the courts.

5. "Product Hopping"

Another issue that has arisen in the pharmaceutical industry is "product hopping," which occurs when a brand-name drug company switches from one version of a drug to another. Most reformulations, especially those made when a generic is not about to enter the market, do not raise anticompetitive concerns. But some may. By reformulating a drug and switching the prescription base to the new product, a brand firm can avoid regulatory regimes designed to encourage generic entry, namely the Hatch-Waxman Act and state drug product selection laws.

The courts have tended to distinguish between "hard switches," viewed as anticompetitive because the brand removes the original drug from the market, and "soft switches," viewed as not concerning because the original remains on the market. Some recent scholarship has contended

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[188] 133 S. Ct. 2223, 2237-38 (2013).

[189] *In re* Loestrin Antitrust Litig., 814 F.3d 538, 549 (1st Cir. 2016); King Drug Company of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 403 (3d Cir. 2015); *In re* Opana ER Antitrust Litig., 162 F. Supp. 3d 704, 717 (N.D. Ill. 2016); *In re* Actos End Payor Antitrust Litig., 2015 WL 5610752, at *13 (S.D.N.Y. Sept. 22, 2015); *In re* Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 242 (D. Conn. 2015); United Food & Commercial Workers Local 1776 & Participating. Employers Health & Welfare Fund v. Teikoku Pharma USA, 74 F. Supp. 3d 1052 1069-70 (N.D. Cal. 2014); *In re* Effexor XR Antitrust Litig., 2014 WL 4988410, at *20-22 (D. N.J. Oct. 6, 2014), *appeal docketed and consolidated with In re* Lipitor Antitrust Litig., 46 F. Supp. 3d 523, 544 (D.N.J. 2014) *Lipitor*, No. 15-1184 (3d Cir. July 8, 2015); *Time Ins. Co. v. AstraZeneca AB*, 52 F. Supp. 3d 705, 709-10 (E.D. Pa. 2014); *In re* Lipitor Antitrust Litig., 46 F. Supp. 3d 523, 544 (D.N.J. 2014), *appeal docketed and consolidated with In re* Effexor XR Antitrust Litig., No. 14-4202 (3d Cir. July 8, 2015); *In re* Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 751 (E.D. Pa. 2014); *In re* Wellbutrin XL Antitrust Litig., No. 08-cv-02431 (E.D. Pa. Jan. 17, 2014); *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 392 (D. Mass. 2013).

that this distinction should not be accorded dispositive significance, and has argued that both types of behavior could conceivably not make economic sense absent its impairment of generic competition.[190] Other scholarship has argued that neither type of conduct should violate the antitrust laws given the risks involved with asking courts to second-guess the value of innovation.[191]

The Section recommends that the FTC continue to follow developments in this area and to share its analysis of the nuances and consequences of product hopping and any nuances and consequences of adjudicating these cases. The Section also recommends that the FTC share its views through amicus curiae briefs in these cases as appropriate.

6. Pharmaceutical Samples

One practice that has recently received attention and that could have an effect on the development of generic drugs is brand firms' refusal to provide samples to generic manufacturers that request them. Under the Food and Drug Administration Amendments Act of 2007 (FDAAA), the FDA may require the use of Risk Evaluation and Mitigation Strategies (REMS) if needed to ensure that a drug's benefits outweigh its risks.[192] Nearly 40 percent of new drugs are subject to REMS restrictions, with many of these including distribution restrictions.[193]

Although REMS programs serve important purposes, Congress was concerned that they could delay generic entry, and thus made clear that holders of REMS-covered products would not be able to use REMS to "block or delay approval" of an Abbreviated New Drug Application (ANDA).[194] A central element of the Hatch-Waxman Act was a generic manufacturer's ability to rely on the brand's clinical studies if it could show that its drug was bioequivalent to the brand's drug. Bioequivalence can be established by testing samples of the brand drug, which (absent REMS) generics can acquire from distributors or wholesalers.[195] The challenge is that when an REMS program prevents distributors and wholesalers from selling the drug, and the brand refuses to sell to the generic, the generic lacks access to the samples needed for testing and may not be able to demonstrate bioequivalence in order to obtain an ANDA.[196]

Generally, a firm does not have a duty to deal with its competitors. But the REMS restrictions imposed by the FDA can raise complex questions of market access. The interplay of competition and the regulatory regime calls for close scrutiny. The FTC has participated as amicus curiae in

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[190] Michael A. Carrier & Steve Shadowen, *Product Hopping: A New Framework*, 92 NOTRE DAME L. REV. 167 (2016).

[191] Dennis Carlton, Frederick Flyer & Yoad Shefi, *Does the FTC's Theory of Product-Hopping Promote Competition?*, 12 J. OF COMP. LAW & ECON. 495-506 (2016).

[192] 21 U.S.C. § 355-1(a)(1).

[193] Darren S. Tucker, Gregory F. Wells & Margaret E. Sheer, *REMS: The Next Pharmaceutical Enforcement Priority?*, 28 ANTITRUST 74, 74 (2014).

[194] 21 U.S.C. § 355-1(f)(8).

[195] Lauren Battaglia, *Risky Conduct with Risk Mitigation Strategies? The Potential Antitrust Issues Associated with REMS*, ANTITRUST HEALTH CARE CHRON., Mar. 2013, at 26, 28.

[196] *See generally* HOVENKAMP ET AL., IP AND ANTITRUST, Chap. 15 (2015 Supp.).

cases raising this issue,[197] and the competitive effects of distribution systems in the industry remain the subject of studies outside REMS settings.[198] The Section also recommends that the FTC monitor and comment on potential legislative and regulatory approaches to the issue that might be viable complements or alternatives to antitrust enforcement.

VI. INTERNATIONAL

A. Establishing U.S. Focus and Leadership in International Antitrust Policy

1. Dramatic Recent Growth in Global Antitrust Enforcement

A dramatic expansion in active competition law enforcement that began in the 1980s now encompasses more than 130 jurisdictions and virtually every significant transaction, business enterprise, and economic sector worldwide. This global expansion of antitrust rules undoubtedly did much to enhance competition, most obviously by increasing the scope of business activity subject to legal limitations on "hard-core" cartel conduct. Such hard-core cartel prohibitions are among the most analytically sound and widely-supported policies characteristic of free-market economies. Limitations on anticompetitive structural transactions as well as on unilateral conduct by monopolists or "dominant" firms also are based upon persuasive policy rationales and enjoy broad support, although design and implementation of the latter prohibitions involve a variety of significant challenges.

On the broadest level, global acceptance of the idea of free markets and the appropriate role of legal proscriptions on anticompetitive business conduct has been revolutionary in scope—and may constitute a fundamental reorientation of microeconomic policy thinking with the long-run potential to provide significant economic benefits for all participants in the global economy. But the jurisdiction-by-jurisdiction process that produced this worldwide antitrust expansion also created numerous and conflicting variations in nearly every aspect of competition law—including substance, procedure, remedy, institutional framework, and many other key characteristics of antitrust enforcement and compliance.

This huge antitrust expansion dramatically increased the cost and complexity of compliance. While industries, companies and business activities operate increasingly across borders, enforcement is still primarily national (with important supranational and subnational enforcement regimes as well—e.g., the EU and Mercosur, EU Member States, states of the U.S., autonomous regions of Spain, provinces and other subordinate jurisdictions in China, etc.). There are numerous and still-expanding opportunities for friction, complexity, and inefficiency capable of adversely affecting the economy, the business community, and consumers inside and outside the U.S. Costs can arise from inapt substantive standards (including intermixture and confusion within many competition laws of both economic and other policy goals), lack of transparency,

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[197] *See, e.g.,* Mylan Pharmaceuticals, Inc. v. Warner Chilcott Pub. Lim Co., No. 15-2236, 2016 WL 5403626 (3d Cir. Sept. 28, 2015).

[198] For discussion of antitrust concerns raised by restricted distribution systems outside the REMS setting, see Michael A. Carrier, Nicole Levidow, & Aaron S. Kesselheim, *Using Antitrust Law to Challenge Turing's Daraprim Price Increase*, 31 BERKELEY TECH. L. J. (forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724604.

inadequate procedural protections, inexperienced decision makers, and institutions struggling to deal with the complexities of antitrust law, economics and procedure essential to effective antitrust enforcement. Moreover, the near-universal practice of applying local antitrust rules to any conduct that results in adverse local competitive effects—regardless of the nationality or location of the parties or of the offending conduct—assures that businesses must deal constantly with the complex interactions of numerous and to some extent conflicting provisions of competition laws of a multitude of jurisdictions, regardless of where their operations are located.

The potential that such costs and frictions would arise as antitrust expanded globally was anticipated early on by the antitrust enforcement community (agency officials, scholars, members of the antitrust bar, the business community, and others). Solutions were sought through a variety of institutions and processes. Existing frameworks for international coordination to identify and minimize these costs and complexities (primarily the ICN, created in 2001, and the Competition Committee of the OECD, whose institutional pedigree traces back to the Marshall Plan, as well as a broad web of both ad hoc and formalized bilateral interagency relationships) offer some scope for discussion and reform. These networks of bilateral and multilateral relationships have been active for decades. Over time, this interaction has consistently encouraged the broader adoption of enforcement modalities of, such as criminal procedures and remedies, leniency programs, surreptitious surveillance and other sophisticated investigation techniques, as well as systems of private redress, including possibilities for collective actions similar to class actions. But harmonization and/or amelioration of conflicting elements of international enforcement remains challenging, and many conflicts remain to be resolved.

The Agencies have contributed enormously to the progress of competition law and procedure, and we believe they can improve the effectiveness of their efforts. From at least the early 1980s, the Division generally included international matters within the portfolio of a specific Deputy Assistant Attorney General ("DAAG"), eventually making this the sole responsibility of an "international" DAAG. But that dedicated position no longer exists. By contrast, the FTC has assembled and maintained a well-staffed, experienced and focused International Division. There has long been a Foreign Commerce Section at the Division, but it is much smaller and appears to be active at a more technical level in recent years, relative to the FTC International Division. In the meantime, the international antitrust enforcement landscape has rapidly grown more complex, suggesting that restoring the position of the International DAAG would give the Division a clearer voice and facilitate more coordination in the Agencies' approach to this critical area.

There is no self-evident formula for strengthening current international antitrust assistance and reform efforts by the United States. One option that should be considered is to establish a transparent, formal, and consistent process for coordinating the two federal enforcement agencies' efforts in the field of international antitrust policy. The agencies should be encouraged to:

(1) Develop a mechanism to coordinate their efforts to monitor global developments;

(2) Anticipate the adverse effects of flawed foreign legislation;

(3) Identify ill-advised and conflicting mandates embodied in underlying substantive law, inadequate procedural protections, institutional arrangements, and other troublesome features of international competition-law regimes that adversely affect U.S. consumers and businesses, the U.S. economy, and the world economy; and

(4) Identify or open appropriate channels to engage the Executive Branch when necessary to resolve elevated disputes.[199]

B. Clarify the Jurisdictional Character of the FTAIA

Congress adopted the Foreign Trade and Antitrust Improvements Act (FTAIA) in response to concerns from U.S. businesses that strict application of U.S. antitrust law to their foreign conduct would disadvantage them in competition against non-U.S. companies. Although the law has been criticized for its lack of clarity, it was clear in the legislative history and to those involved in consideration of these proposals that the FTAIA was intended to create a jurisdictional limit, rather than an additional substantive element of a Sherman Act violation.[200] Other potential bases for limiting the reach of U.S. antitrust law—substantive law and comity—were explicitly excluded from the FTAIA's intended scope. Although its precedential force is subject to debate, the Supreme Court accepted the jurisdictional character of the FTAIA in its first decision construing the law.[201]

More recently, however, several federal appellate courts have opined that FTAIA is substantive, not jurisdictional.[202] This evolution emerged adventitiously from a civil rights decision, *Arbaugh v. Y & H Corp*.[203] In that context, the Court adopted the simple rule that limitations placed on statutory rights would be regarded as substantive unless specifically declared jurisdictional by the Congress. The Court did not, however, consider whether its opinion would or should have retroactive effect on the FTAIA's specific limitations on antitrust law.

Classifying the FTAIA as substantive shifts the question of extraterritorial reach from the early pleading stage to merits discovery, later pleading stages, and/or trial. Eliminating the possibility of early dismissal of antitrust claims against foreign parties and conduct subjects defendants to the well-recognized expense, burden, and delay characteristic of U.S. antitrust litigation, even with regard to claims falling outside U.S. jurisdiction.[204]

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[199] There is some history of successful attempts to escalate pressing current international antitrust enforcement frictions up through the Executive Branch: leading examples include the merger of Boeing with McDonnell-Douglas and addressing recent and serious due process issues in Asian jurisdictions. These tend to be ad hoc interventions, where essential, to address enterprise-threatening problems that agency-to-agency contacts have failed to resolve. There appears to be no formal mechanism to invoke Executive Branch assistance outside of crisis-generating events.

[200] *See, e.g.*, Abbott B. Lipsky, Jr. & Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, ANTITRUST SOURCE at 7-9 (2013), *available at* www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf.

[201] *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004).

[202] *E.g.*, Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).

[203] 546 U.S. 500 (2006).

[204] *See, e.g.*, Lipsky & Wilmot, *supra* note 203, at 1-2.

In prior litigation, including as recently as 2011, the Agencies have taken the position that the FTAIA is a jurisdictional limit.[205] The Section urges the Administration and the Agencies to continue to help clarify that the FTAIA is a jurisdictional statute by means of advocacy, legal positions taken in agency cases and *amicus* briefs submitted to courts presiding in private and/or state antitrust cases, and/or through legislation if appropriate. Congress's intent is abundantly clear to those familiar with the history of the policy debate and the legislative record of the FTAIA. The foreign reach of U.S. antitrust is a critical policy question that is better settled by direct confrontation of the key issues, rather than by requiring a search for "magic words" in prior legislation.

Parties should not be forced to engage in discovery and merits defense of claims where it can be determined at the outset that the impugned conduct lacks the defined material nexus with U.S. economic interests specified in the FTAIA. A substantive construction of FTAIA is contrary to these bedrock considerations, while a jurisdictional construction supports them.

C. Encourage Direct Agency Intercession in Foreign Agency Proceedings

1. Background

U.S. agencies characteristically engage in a great deal of substantive analysis—concerning the law, theoretical and empirical economics, and antitrust policy—in connection with matters that they investigate. It is an increasingly frequent pattern in international antitrust enforcement that similar transactions and conduct arise in many jurisdictions—and fall to be considered by antitrust agencies in a variety of jurisdictions—at about the same time. Multinational merger enforcement is an obvious example, but the same should be said of matters involving cartels, joint ventures, intellectual property activity, and dominant-firm conduct.

It is widely appreciated that the U.S. agencies are often in direct communication with foreign counterparts where investigations involve similar parties, industries, or competitive practices. It appears that such discussions can improve case outcomes—by clarifying the economic theory of a case, by improving the accuracy of the factual conclusions underlying a decision, or by harmonizing remedies adopted in different jurisdictions and thereby reducing their collective burden on parties involved in cases of cross-border conduct.

2. The Agencies Should Enhance Efforts to Communicate with Foreign Counterparts on Issues Affecting U.S. Industries and Firms

The Agencies should demonstrate an increased willingness to communicate directly with foreign antitrust agencies considering matters involving U.S. industries and firms. Where appropriate legal grounds exist, and where otherwise consistent with U.S. policy, the Agencies should actively seek to intercede in foreign enforcement proceedings involving U.S. firms. Where there are existing bilateral channels, they should be used for this purpose, but the agencies should not hesitate to explore new channels, as may be feasible and appropriate in particular circumstances. This is particularly important for cases where basic procedural standards are materially deficient, or where foreign agency actions (or proposed actions) are contrary to sound substantive law, to

[205] *See, e.g.*, Br. for the United States of America at 6-7, United States v. AU Optronics Corp., et al., No. CR-09-0110 (N.D. Cal. Apr. 8, 2011).

consensus notions of territoriality, or to other practices that enjoy broad consensus support among antitrust enforcement authorities in numerous jurisdictions.

D. Engage in a Critical Self-Assessment of U.S. Antitrust Procedures

The international antitrust community has engaged in extensive critical examination of a wide variety of topics in antitrust enforcement, including substantive law, institutional design, and many other aspects of competition law. Recently there has been a surge of interest in the question of antitrust procedure—which procedures best support accurate, impartial, and efficient antitrust decisions? On May 22, 2015, the Section issued a Report on Best Practices for Antitrust Procedure, covering all main phases of government antitrust proceedings: investigation, alleging infringement, conducting proceedings to assess and render judgment upon such allegations and formulation of remedies for infringements, including the process of appeal and review.[206] The ICN recently adopted Guidance regarding Investigative Procedure, covering issues of this character that arise in the pre-complaint investigation phase of government antitrust investigations.

VII. CONCLUSION

The ABA Section of Antitrust Law is grateful for the opportunity to present this Report to the Administration. The Section looks forward to working closely with the Division and the FTC over the next four years, and stands ready to be of service to the Administration and the Agencies in the critical task of promoting and preserving free and open competition in the Nation's economy.

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[206] AM. BAR ASSOC. SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE (2015), *available at* http://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.