

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Joe Simons, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission regarding our current competition enforcement activities and policy priorities¹.

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

I. FTC Competition Enforcement

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

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

A. Maintaining Competition through Robust Merger Enforcement

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

decision supporting the Commission's administrative complaint in the fifth matter. These cases raised competition issues all across the U.S. economy, implicating markets for specialized software, medical devices, industrial chemicals, and familiar consumer staples.

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title plant assets in prior mergers involving Fidelity. For the first time the Commission also alleged that the elimination of competition would likely harm customers seeking to purchase title insurance for large commercial transactions. The Commission authorized staff if necessary to seek preliminary relief to prevent the merger pending the administrative trial, which was scheduled to begin February 2020. The parties have since abandoned the transaction.⁸

In June the FTC won an appeal in the Eighth Circuit, successfully defending the agency's prior victory in blocking an anticompetitive merger among health care providers. This case represents the agency's fifth straight appellate victory involving health care provider consolidations, after a successful FTC challenge to another provider merger upheld by the Ninth Circuit,¹⁰ as well as three hospital merger successes at the Third Circuit,¹¹ Sixth Circuit,¹² and Seventh Circuit.¹³ This string of recent appellate victories across multiple circuits solidified in case law the agency's analytical approach to these mergers, strengthening our ability to block anticompetitive mergers among health care providers.

The current state of the case law reflects the culmination of a lengthy effort by the FTC to protect U.S. health care consumers, using the full panoply of the agency's powers. For many years, the FTC has strategically pursued the systematic development of law and economics supporting vigorous antitrust enforcement in health care markets. Back in the 1990s the antitrust agencies lost a series of court challenges to hospital mergers. In response, the FTC launched a

⁷ See, e.g., *In re Fidelity National Financial, Inc.*, Dkt. C-4425 (Dec. 24, 2013) <https://www.ftc.gov/enforcement/cases-proceedings/130159/fidelity-national-financial-inc-lender-processing-services>

⁸ FTC Press Release, Statement of Bruce Hoffman, Director of FTC's Bureau of Competition, on Fidelity National Financial, Inc.'s Decision to Drop Proposed Acquisition of Stewart Information Services Corp. (Sept. 10, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/statement-bruce-hoffman-director-ftcs-bureau-competition-fidelity>.

⁹ *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019), 2019 WL 2454218 (June 13, 2019).

¹⁰ *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 774 (9th Cir. 2015).

¹¹ *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327 (3rd Cir. 2016).

¹² *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

¹³ *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016).

merger retrospective study that provided detailed empirical support to discredit the prevailing economic methodology that courts had relied upon in ruling against agencies in these cases¹⁴. Through a persistent, long-term approach to this problem, backed by the FTC's unique research capabilities, we eventually moved courts to embrace an empirically grounded, modern economic approach to analyzing the competitive effects of these transactions. His important work continues to pay dividends today.

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

We are taking steps to manage these increasing expenses more aggressively, but long

B. Combatting Anticompetitive Conduct in Pharmaceutical Markets

The FTC maintains a robust program to identify and stop anticompetitive conduct, especially in the nation's critical markets for health care. For over 20 years, and on a bipartisan basis, the Commission has prioritized ending anticompetitive reverse payment agreements in pharmaceutical markets.¹⁶ These so-called reverse payment agreements involve the branded drug supplier paying a generic firm to abandon its patent challenge and agree not to sell its lowest generic product for a period of time. The payment allows the branded company to secure a period in which it can maintain higher market prices—increasing U.S. health care costs—without threat of generic competition.

In 2013, the Commission won a critical victory in *FTC v. Actavis*.¹⁷

At the time of the Actavis decision, critics of our enforcement

addition.²³ The FTCs complaint alleged that the company made knowingly false statements to the FDA, while engaging in a so-called “product hopping” scheme to shift existing patients away from the product about to face generic competition and onto another

markets for online advertising, social networking, mobile device markets, and technology platforms and will include a technology fellow who will provide technical support to the task force. The TTF will be dedicated to monitoring competition in U.S. technology markets taking enforcement action when warranted.

II. Competition Policy Work

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

Critical self-evaluation is an important part of our research agenda. For instance, in 2017, the FTC released a large retrospective study of remedies associated with mergers completed from 2006 through 2012.²⁸ The findings of this study helped to refine agency practices related to the merger remedy process. The Commission's Bureau of Economics also has a longstanding program to perform retrospective studies of consummated mergers that began in the early 1980s but that recently has become considerably more active. Probably the most prominent of the FTC's retrospective studies so far is the hospital merger retrospective project, which, as discussed above, played a crucial role in reinvigorating the agency's hospital merger enforcement efforts.²⁹ FTC economists also have completed a number of retrospective analyses of horizontal and vertical transactions in health care-related markets, consumer products markets, and retailing.³⁰

²⁸ See Fed Trade Comm'n, The FTC's Merger Remedies 2006-2012, A Report of the Bureau of Competition and Economics, January 2017, https://www.ftc.gov/system/files/documents/reports/ftc_mergerremedies20062012-report_bureau_of_competition_economics/p143100_ftc_merger_remedies_20062012.pdf

²⁹ See Farrell, Joseph, Paul Rautler, and Michael G. Vita, "Economics at the FTC: retrospective merger analysis with a focus on hospitals" 35 REV. OF INDUS. ORG. 369 (2009)

³⁰ See, e.g. Thomas Koch, Brett Wendling, & Nathan Wilson, "The Effects of Physician and Hospital Integration on Medicare Beneficiaries' Health Outcomes" (Bureau of Economics, Working Paper No. 337, July 2018) (P) 2.6n 0.241 0 Du 201

FTC studies also can inject competition considerations into broader policy questions of significant public interest. A recent example is the 2016 Patent Assertion Entity³¹ study, which evaluated the business practices of patent assertion entities (“PAEs”), firms that acquire patents in order to attempt to generate revenue by licensing or suing accused infringers. The report provided several recommendations for patent litigation reforms.

The FTC continues to pursue important competition policy research. In November 2017, the Commission launched a project encouraging academic and industry research on the impact of certificates of public advantage (“COPAs”) on prices, quality, access, and innovation in health care services.³² COPAs are state regulatory frameworks intended to replace health care provider competition and immunize mergers and collaborations from antitrust scrutiny. The Commission has been concerned about the impact of COPAs on consumers and has undertaken a broad effort to gather additional evidence on their effects. In particular, the FTC has encouraged original empirical research. At the FTC’s June 2019 workshop, current and former staff from the Bureau of Economics discussed preliminary results from three original empirical studies of the price effects of mergers approved in the 1990s.³³

Osinski & Jeremy Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/American* (Bureau of Economics, Working Paper, May 2018); Thomas Koch & Shawn W. Ulficke, *Price Effects of a Merger: Evidence from a Physicians’ Market* (Bureau of Economics, Working Paper No. 333, April 2017); Daniel J. Greenfield, Nicholas M. Kreisle, & Mark D. Williams, *Simulating a Homogeneous Product Merger: A Case Study on Model Fit and Performance* (Bureau of Economics, Working Paper No. 327), Oct.

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

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

At this stage, we are distilling the large volume of stakeholder input and generating further output, such as reports, statements, guidance, and speeches. This work will be forward-looking and will both support the Commission’s enforcement mission and identify additional policy initiatives that may be important in shaping the future development of antitrust law. We expect to begin releasing some of this work in the late fall or winter of 2019.

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

III. International Engagement – Competition

In support of its competition mission and domestic antitrust enforcement, the FTC engages in significant work with international counterparts and organizations. The FTC works regularly with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures. During the most recent

meetings with colleagues from several competition authorities around the world, including those from Canada, the European Union, Japan, Korea, and Mexico. Consistent with our objectives of promoting sound practices and processes, our discussions covered timely issues, including digital platforms, vertical mergers, procedural fairness, and the antitrust treatment of the exercise of intellectual property rights.

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

The FTC works with other U.S. government agencies to address in a coordinated and effective manner competition issues that implicate broader U.S. policy interests, such as the protection of intellectual property and nondiscriminatory treatment of U.S. companies. For example, the FTC has been part of the interagency group that addressed investigative procedure issues under the Korea-U.S. free trade agreement, and worked with the Departments of Treasury, Justice, and State, among others, on developing G7 and G20 statements to achieve outcomes that furthered U.S. policy and interests involving competition in the digital economy.

IV. Conclusion

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