REFLECTIONS ON AN ACTIVE YEAR IN MERGER ENFORCEMENT
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Keynote Remarks of Commissioner Terrell McSweeny

Good afternoon. I am honored to be here. I would like to thank Global Competition Review and the conference's steering committee for the invitation to speak today. As always, the views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

Many of today's panels offer insights into merger enforcement, policy, strategy, and remedies. There is no shortage of fascinating antitrust topics – and I want to thank all of the panelists for thoughtful and thorough discussions of them. Today I'm going to focus my remarks on the relatively active 2015 the FTC had in merger enforcement.

Deal activity in 2015 was incredibly robust, with global M&A activity surpassing $5 trillion for the first time ever.[1] Merger activity in 2016 so far shows no signs of slowing down.

The Commission challenged six mergers in court in 2015. Four remain in active litigation today, involving three separate hospital mergers and Staples' proposed acquisition of Office Depot. I cannot comment on these pending cases, but today I will discuss the FTC's win in *Sysco*, its loss in *Steris*, and some takeaways from both cases. I also will remark on the Commission's merger enforcement and advocacy efforts generally in health care markets, and touch upon some of the unique issues presented in that industry.

I. Takeaways from the *Sysco* and *Steris* Litigations

Approximately one year ago, the FTC, joined by a number of states, challenged the proposed $8 billion merger of Sysco and US Foods. As you know, the district court enjoined the merger, with the parties abandoning the transaction shortly thereafter. The FTC's approach to litigating *Sysco* and Judge Mehta's opinion provide three key takeaways generally applicable to agency merger investigations and litigation.

[1] Fidelia Liu, "Global M&A Volume Surpasses $5tr for First Time on Record," Dealogic (Dec. 29, 2015), http://www.dealogic.com/media/market-insights/ma-statshot/.

First, while sophisticated economic models can be valuable tools, antitrust enforcers have many other tools at our disposal. An inability to run a regression does not imply an inability to identify potential consumer harm. The FTC's case in *Sysco* involved standard market definition and concentration analyses, company documents and admissions, customer complaints, and declarations.

The FTC's economic expert, Dr. Israel, also performed and submitted merger simulation and local event study analyses. The pricing data available to the Commission in *Sysco* were limited, however, which in turn, restricted the type of economic modeling that Dr. Israel could perform. This fact was not lost on Judge Mehta, who commented in his opinion that the pricing evidence was "far weaker" than that put forth in the 1997 *Staples* case and *Whole Foods*[2] – previous merger challenges in which the FTC had robust store-level pricing data with which to work. Judge Mehta also noted that the empirical studies put forth both by the FTC and the defendants were "imperfect."[3] He found, however, that Dr. Israel's economic analysis was "more consistent with the *business realities* of the food distribution market" when "evaluated against the record as a whole."[4]

Ultimately, Judge Mehta determined that the merging parties did not convincingly rebut the FTC's *prima facie* case, which synthesized complimentary forms of evidence into a clear narrative. He therefore concluded, "based on *all the evidence presented*," that the merger "would eliminate head-to-head competition between the number one and number two competitors in the market for national customers" and was therefore "likely to lead to unilateral anticompetitive effects in that market."[5]

Even in this age of big data, sufficiently reliable data are frequently unavailable, and certain features of a market may limit the feasibility of useful economic modeling. In those cases, therefore, it is important not to ignore the wide array of other types of economic evidence regarding likely competitive effects.

Second, I was encouraged that the district court in *Sysco* reaffirmed the long-standing and widely accepted role that market concentration presumption plays in merger analysis. The

[2] *FTC v. Sysco*, 113 F. Supp. 3d 1, 71 (D.D.C. 2015).

[3] *Id*. at 64.

[4] *Id*. at 37 (emphasis added).

[5] *Id.* at 65 (emphasis added).

Horizontal Merger Guidelines establish a presumption of market power for mergers that cause a significant increase in concentration and result in highly concentrated markets.[6] But the presumption is only the beginning of a more extensive analysis. The Commission considers competitive effects, the feasibility of entry, expansion, repositioning, and claims of efficiencies and failing firm to identify instances in which application of the presumption might be misplaced.

In his opinion, Judge Mehta explained, "the FTC can establish its *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels."[7] While the FTC certainly did not rest on the presumption in *Sysco*, the court's clear statement reaffirms the continuing significance of the presumption, and its role in suggesting the likelihood of anticompetitive harm.

Third, the agencies and the courts continue to be appropriately skeptical of the merging parties' claimed efficiencies where the evidence demonstrates that the efficiencies are speculative, not merger-specific, and unlikely to be passed on to consumers. That does not mean that the FTC does consider efficiencies during the court of a merger investigation. On the contrary, the Commission carefully evaluates the parties' claimed efficiencies. The FTC has closed investigations based on presentation of merger-specific, cognizable efficiencies – especially where the competitive effects are small.

In *Sysco*, Judge Mehta again reaffirmed that the court has a role to "undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[8] He concluded that Sysco and US Foods failed to show that their claimed projected savings were merger-specific, verifiable, and beneficial to customers post-merger. The *Sysco* opinion represents yet another in a line of cases holding that where concentration levels are high, the defendants must present "proof of extraordinary efficiencies" to rebut the government's *prima facie* case.[9]

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[6] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010).

[7] *Sysco*, 113 F. Supp. 3d at 52.

[8] *Id*. at 82.

[9] *Id*. at 81. *See also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *St. Alphonsus Med'l Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).

Of course, the FTC did not prevail in all of its merger challenges in 2015. The Commission challenged the merger between the second and third largest sterilization companies in the world, Steris and Synergy, alleging that the merger would have prevented Synergy's planned introduction of an innovative, competitive alternative to Steris' large-volume, gamma radiation sterilization services.[10] Unfortunately, last September, the district court judge denied the FTC's request for injunctive relief, finding that Synergy would not have entered the United States with x-ray sterilization services within a reasonable amount of time to compete against Steris.[11] The Commission subsequently dismissed the administrative action.[12] While I disagreed with the district court judge's ruling, this matter nevertheless provides a concrete example of the Commission's willingness to take innovation and quality competition seriously, by focusing on the future effects of a transaction. I do not expect the Commission to shy away from potential competition theories in upcoming cases.

II. Merger Challenges, Remedy Issues, and Advocacy in the Health Care Industry

I'm going to turn from *Sysco* and *Steris* to a series of merger challenges brought at the end of last year in the health care industry.

Health care transactions represented over half of the Commission's merger enforcement efforts in 2015.[13] Late last year, the Commission sued to block three hospital mergers in Huntington, West Virginia; Harrisburg, Pennsylvania; and the North Shore area of Chicago. These three cases remain in litigation so I cannot discuss them, but I would like to comment on health care provider transactions more generally and share some observations about them.

First, competition in hospital markets matters. Multiple studies show that competition in hospital markets leads to lower prices and better quality of care for patients. For example, my former FTC colleague Marty Gaynor and other academics published a study last December demonstrating that hospital prices are "positively associated with indicators of hospital market

[10] Compl., *FTC v. Steris Corp.*, No. 1:15-cv-0108 (N.D. Ohio filed June 4, 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

[11] *FTC v. Steris Corp.*, No. 1:15-cv-1080, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015).

[12] Order Returning Matter to Adjudication and Dismissing Compl. (Oct. 30, 2015), https://www.ftc.gov/system/files/documents/cases/151030sterissynergyorder.pdf.

[13] *See* https://www.ftc.gov/industry/health-care.

power."[14] After controlling for factors such as labor costs, hospital size, Medicare population, and tax status, Gaynor et al. estimated that monopoly hospitals have roughly 15% higher prices than markets with four or more hospitals. Likewise, markets with only two or three hospitals have prices that are over 6% and over 4% higher, respectively, than those markets with four or more hospitals.[15] While this is only one study, it is consistent with previous academic research in this area, and consistent with the FTC's experiences reviewing and challenging these kinds of transactions.

Second, competition enforcement is not in conflict with the Affordable Care Act. We have heard time and time again that the Affordable Care Act (ACA) is one of the driving forces of this consolidation. And I, along with many of my FTC colleagues, have been clear in our views that the goals of competition enforcement are not in conflict with the goals of the ACA. Indeed, the ACA is a market-based approach to health care reform. We should applaud collaboration or integrated care that benefits patients by elevating quality of care or making patient care more efficient. But, we also should be cautious of those collaborations that lead to increased market power or other anticompetitive concerns. I believe competition is – and will remain – vital to achieving innovation and containing costs.

Third, conduct remedies, such as rate protection agreements, are generally inadequate to restore competition to premerger levels in provider markets. Behavioral remedies in the hospital merger context are not new – the district court in the *Butterworth* case in the mid-1990s accepted the defendants' "community commitments" and allowed the transaction to proceed.[16] And, in *Evanston*, the Commission itself instituted a conduct remedy given the "highly unusual" factual circumstances at play – primarily, the length of time that had transpired between consummation of the merger and completion of the litigation.[17]

But the FTC's more recent experience and study suggests that even if the merging parties abide by the terms of conduct relief – an uncertainty on its own – the relief at best only delays

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[14] Zack Cooper, Stuart Craig, Martin Gaynor, and John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, Nat'l Bureau of Economic Research Working Paper 21815 (Dec. 2015), http://www.nber.org/papers/w21815.pdf.

[15] *Id*. at 3.

[16] *FTC v. Butterworth*, 946 F. Supp. 1285, 1298-99 (W.D. Mich. 1996).

[17] Opinion of the Comm'n, *Evanston Northwestern Healthcare Corp.*, Docket No. 9315 at 89 (Aug. 6, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf.

the merged firm's exercise of market power. The market power gained in the transaction does not dissipate during the period of the conduct remedy, and this market power could be available for exploitation – likely resulting in direct and immediate cost increases to health plans and their members. The judge in the *Partners* case last year explained that conduct remedies are "temporary and limited in scope – like putting a band-aid on a gaping wound that will only continue to bleed (perhaps even more profusely) once the band-aid is taken off."[18]

It seems impractical to draft longer behavioral commitments because of the difficulties in accurately predicting future market or industry changes that the commitment may need to address. Any restrictions or freezes on hospital margins or prices actually may reduce the merged firm's incentives to reduce costs and operate efficiently, or may reduce innovations in quality of care.

Even setting all of that aside, from a practical standpoint, the analysis of cost, price, and margin information requires substantial experience and constant monitoring, which may be expensive to come by for government agencies or courts with limited resources. Additionally, the necessary data is under control of the "regulated" party, i.e., the hospital. Effective price regulation is very difficult, and even more so in the absence of a competitive market.

Pricing and other commitments also may be easier to circumvent than structural remedies or may be loaded with so many caveats that they are rendered effectively useless. For example, consider a commitment that requires the merged firm to keep its hospital chargemaster (i.e., a list of prices) constant for some period of years. What if a health plan's payments are based on prices for specified services negotiated with the hospital, and not based on some percentage of the provider's chargemaster? In that case, the health plan's rates could increase even while the commitment is in place. For all of these reasons, I remain skeptical that conduct remedies are effective in replacing competition lost by an anticompetitive hospital merger.

While on the topic of competition in health care markets, I would be remiss if I didn't mention the ways in which the Commission uses its advocacy tools to advance competition. The FTC has a long history of submitting comments on health care-related legislative and regulatory proposals. For example, the FTC and Antitrust Division recently submitted joint comments to government personnel in Virginia and South Carolina regarding Certificate of Need ("CON")

[18] *Massachusetts v. Partners Healthcare Sys.*, 2015 WL 500995, at **1-2 (Sup. Ct. of Mass. Jan. 30, 2015).

laws.[19] CON laws can create barriers to entry, limit consumer choice, and impede innovation. Incumbent health care providers in a market also may use CON laws to thwart or delay entry by other competitors. Moreover, the evidence to date does not suggest that CON laws have been generally successful in achieving their original goal of improving quality or controlling costs.[20] CON laws also may deny consumers the benefit of an effective structural remedy following consummation of an anticompetitive merger – as demonstrated recently in the FTC's *Phoebe Putney* case.

FTC staff also recently submitted comments in two states pertaining to Certificates of Public Advantage ("COPAs").[21] COPAs and related legislation granting broad antitrust immunity are unnecessary to encourage procompetitive collaborations among hospitals and other health care providers. Indeed, efforts to shield potentially anticompetitive conduct from federal antitrust enforcement are likely to harm consumers.

The Commission will continue to be active in advocating against CON laws, COPAs, and other regulatory barriers to competitive health care markets. I hope that state and local governments seriously consider the competitive consequences of these types of regulatory regimes and their potential effect on consumers.

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[19] Joint Statement of the FTC and the Antitrust Div. of the U.S. Dept. of Justice ("DOJ") to the Virginia Certificate of Public Need Work Group (Oct. 26, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn1.pdf; Joint Statement of the FTC and the DOJ on Certificate-of-Need Laws and South Carolina House Bill 3250 (Jan. 11, 2016), https://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 [hereinafter "SC CON Comment"].

[20] *See* SC CON Comment at 10-15.

[21] FTC Staff Comment to the Virginia Dept. of Health Regarding Virginia's Rules and Regulations Governing Cooperative Agmts. (Sept. 17, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-virginia-department-health-regarding-virginias-rules-regulations-governing/151015virginiadoh.pdf; FTC Staff Comment to the Tennessee Dept. of Health Regarding the Implementation of Laws Relative to Cooperation Agmts. and the Granting of Certifications of Public Advantage (Sept. 24, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-tennessee-department-health-regarding-implementation-laws-relative-cooperative/151015tennesseedoh.pdf.

III. Conclusion

As you can tell, 2015 was a busy and largely successful year for the FTC – and I'm confident that 2016 will be as well. Thank you again for having me today. I'm happy to take your questions.