The Antitrust Review of the Americas **2016**

Published by Global Competition Review
in association with

Cooley LLP

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

United States: Technology Mergers

Jacqueline Grise, Tanisha James and Howard Morse
Cooley LLP

Flying 'High' on the antitrust enforcement radar

The pace of strategic deal-making has electrified corporate America over the past year and has kept antitrust enforcers on their toes in analysing the potential competitive effects of these deals. In FY 2014, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) reviewed 1,663 HSR reportable transactions, a 25 per cent increase over the previous year and the highest volume of reportable deals since 2008.[1] Overall, the surge in M&A activity continues to be driven by a mammoth wave of high-tech and pharmaceutical deals, many of which have garnered significant antitrust scrutiny.

Combinations in high-tech industries – those that employ the most advanced, cutting-edge technology – continue to fly high on the antitrust enforcement radar of the DOJ and the FTC. Recent statistics reveal that high-tech deals, including pharmaceuticals, medical devices and other transformative technologies, have commanded vast agency resources and outsized enforcement, as compared to other industries.

Throughout FY 2014 and the first half of calendar year 2015, the FTC challenged 29 mergers, including 15 transactions involving high-tech markets, accounting for over half of all FTC merger enforcement actions during that time.[2] Chairwoman Edith Ramirez recently emphasised the evolving role the FTC has played in taking on antitrust issues in technologically advanced industries, stating that:

> *Throughout its history, the FTC has tackled the complex competition issues of the day, guiding antitrust policy from a time of horses and buggies to our modern interconnected, global economy.*[3]

She specifically highlighted the FTC's sharp focus in enforcing antitrust laws against pharmaceutical mergers:

> *The FTC devotes significant resources to prevent mergers that threaten to raise prices or undermine cost-containment efforts in... pharmaceutical markets... In the last two years alone, the Commission has taken action in 13 pharmaceutical mergers, ordering divestitures to preserve competition in the sale of 44 pharmaceutical products used to treat a variety of conditions, such as hypertension, diabetes, and cancer, as well as widely-used generic medications such as oral contraceptives and antibiotics.*[4]

During FY 2014, the DOJ challenged, restructured, or caused the abandonment of 20 proposed transactions.[5] Notable in the technology arena, in July 2014 the DOJ concluded its enforcement action and settlement with Bazaarvoice after prevailing in its courtroom challenge against the company's consummated acquisition of its closest rival, PowerReviews. Ultimately, the DOJ forced a remedy that included not only the divestiture of PowerReviews to Viewpoints, but also ancillary provisions that were far greater than merely the set of assets that Bazaarvoice acquired when it bought PowerReviews, amply illustrating that the DOJ's reach for divestitures can go beyond the scope of what the acquiring party purchased from the target.[6]

In the first half of 2015, the DOJ caused the abandonment of numerous proposed mergers in high-tech and related industries, including: the proposed mega-merger of Comcast and Time Warner; Applied Materials' proposed acquisition of Tokyo Electron; and Embarcadero Technologies, Inc's proposed acquisition of CA Technologies' ERwin data modelling business.[7]

The spotlight on antitrust in the technology arena continues to fuel debate regarding whether antitrust law is adequately equipped to take on the analytical nuances that often accompany the assessment of high-tech deals; the role that antitrust enforcers should play in preserving competition in this area; and the appropriateness of the remedies that are sometimes imposed. Despite the debate, it is clear that the government is not abandoning the field.

One FTC Commissioner recently staked out a position on the issue, stating:

> *It is sometimes said that antitrust and competition enforcers can't keep pace with the change in high-tech markets, that our time-tested tools and doctrines developed to deal with trusts and monopolies in smokestack industries are not supple enough to deal with the dynamic economy of the 21st century. I disagree. Modern antitrust law and enforcers are not only up to the challenge – they play a vital role in promoting innovative, open and competitive markets.*[8]

The DOJ has equally acknowledged that technology deals raise distinct issues under antitrust laws, noting:

> *[W]hile the rapid pace of change in technology markets can sometimes minimize the potential for the accumulation or misuse of market power, other common attributes of high-tech markets counsel careful scrutiny.*[9]

Understanding the unique issues that attract antitrust scrutiny and drive enforcement in the technology arena – from the importance of intellectual property and innovation competition, to network effects and Food and Drug Administration (FDA) regulations, as well as the viability of potential licensing and divestiture remedies that may be idiosyncratic to high-tech markets – are essential to achieving successful merger clearance in close cases.

Numerous high-tech deals abandoned in face of antitrust scrutiny – chalked up as 'wins' for antitrust enforcers

The FTC and DOJ often enforce the antitrust laws against deals that they believe are likely to substantially reduce competition through negotiated settlements, and in rare cases the drama plays out in courtroom litigation. But there is another possible outcome that delivers a win to the agency. In the face of tough antitrust scrutiny, parties sometimes choose to back down from a proposed deal. This past year saw a strong trend in deals that met their demise by way of

abandonment, in several cases even after the parties offered substantial remedies that failed to alleviate the agencies' antitrust concerns.

Perhaps one of most widely publicised mergers to meet its end through mutual abandonment was the proposed US$45 billion transaction between Comcast and Time Warner Cable. While the blockbuster deal would have created the largest pay-TV operator in the US, the parties did not overlap geographically in the pay-TV market. Despite the lack of geographic overlap in pay-TV subscribers, Comcast anticipated potential concerns from the DOJ and FCC and attempted to address them through an upfront divestiture commitment. Comcast proposed to acquire Time Warner Cable's approximately 11 million managed subscribers and contemporaneously divest approximately 3 million subscribers to a third-party, for a net increase of 8 million subscribers. According to Comcast, its post-transaction subscriber base would have been approximately 30 million, representing less than 30 per cent of the total number of multichannel video programming subscribers in the US.[10]

Ultimately, the DOJ's concerns were not focused on shares of pay-TV subscribers, but rather on the combined firm's projected 50–60 per cent share of broadband connections. The DOJ was concerned that post-merger the combined firm might have the incentive and ability to negatively impact emerging competition in new video products and services in the nascent and growing market for those products. Neither the upfront divestiture commitment negotiated between the parties, nor the additional remedies that the merging parties discussed with the DOJ were sufficient to address the DOJ (and FCC) concerns. In April 2015, Comcast and Time Warner abandoned the transaction after the DOJ expressed significant concerns that the merger would make Comcast the 'gatekeeper for Internet-based services that rely on broadband connection to reach consumers'.[11]

Just days after Comcast and Time Warner scrapped their deal, Applied Materials and Tokyo Electron – both producers of semiconductor manufacturing equipment – decided to throw in the towel on their deal, which had been announced in September 2013 and had been under review by the DOJ for 580 days. DOJ staff had informed the companies that their proposed US$29 billion merger – which would have combined the number one and number three firms in the industry – raised significant competitive concerns and that the divestiture scenario they offered was not sufficient to remedy the agency's concerns. According to a senior DOJ official, 'The semiconductor industry is critically important to the American economy, and the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors.'[12] The emphasis on 'equipment for next-generation semiconductors' is a clear nod to concerns over innovation competition and forward-looking effects on new product development, which are increasingly hot button issues in technology mergers. In this case, the proposed remedy was likely inadequate because the DOJ did not view a buyer of the divestiture assets as capable of keeping up with technological advances, or the composition of assets included in the divestiture package may have fallen short.

Embarcadero Technologies, Inc also decided to terminate its proposed acquisition of CA Inc's ERwin data modeling product suite after the DOJ raised significant concerns about the transaction. Data modeling software is used to view and streamline enterprise data, centralise data management and reduce data redundancies. According to the agency's press release, Embarcadero's 'ER Studio products and CA's ERwin have been particularly close competitors.'[13] The DOJ asserted that Embarcadero's acquisition of CA's ERwin product 'would have eliminated a vigorous competitor that has competed to provide expanded functionality and more affordable pricing in recent years.'[14] Focus on 'expanded functionality' in the press release reflects the agency's ongoing interest in preserving technology competition not only in terms of price, but also in innovation to add new product features.[15]

FTC enforcement has led transactions to be abandoned as well, most recently the *Sysco/US Foods* deal after a successful courtroom challenge, but also other deals in the high-tech space. For example, this past year the FTC filed an administrative complaint challenging Verisk Analytics, Inc's proposed US$650 million acquisition of EagleView Technology Corporation, alleging that the proposed transaction would likely result in 'a virtual monopoly in the US market for rooftop aerial measurement products' used by the insurance industry to estimate repair costs for property damage claims.[16] The agency alleged that EagleView had a 90 per cent share of the relevant market. Verisk, on the other hand, was alleged to own the 'dominant software platform' used by insurers to estimate property damage claims.[17]

According to the FTC's complaint, Verisk had recently entered the rooftop aerial measurement market with several products of its own. Within two years of its entry, Verisk had competed against and won significant business away from EagleView by providing a lower-cost alternative. The complaint goes on to allege that the two companies were viewed by customers as the closest substitutes to each other, with other providers offering inferior products.[18] The *Verisk/EagleView* matter highlights how quickly technology markets can change following recent entry, and if the new entrant is one of the merging parties, the agencies are likely to hone in on that issue. After the FTC filed its complaint, the parties decided to walk away from the deal.

Technology under development: a central issue in life sciences mergers

All signals indicate that the FTC is continuing its role as aggressive antitrust watchdog, standing guard over mergers in the life sciences industries, including mergers involving pioneer drugs and medical devices under development.

In order to move forward with its US$16 billion acquisition of GlaxoSmithKline's portfolio of cancer-treatment drugs, Novartis agreed to divest assets related to BRAF and MEK inhibitor drugs to Array BioPharma. At the time that the transaction was announced, the FTC alleged that Novartis and GSK were two of a small number of companies with either a BRAF or MEK inhibitor currently on the market or in development, and two of only three companies marketing or developing a BRAF/MEK combination product to treat melanoma.

Without a remedy, the FTC alleged that the transaction would eliminate likely future competition between GSK and Novartis in the markets for BRAF and MEK inhibitors because Novartis likely would have obtained FDA approval for and launched its LGX818 and MEK162 products in the near future in direct competition with GSK's combination offering for treating metastatic melanoma patients. The FTC also asserted that the transaction would likely reduce the development of BRAF and MEK inhibitors to treat other types of cancer because GSK and Novartis were each currently developing their respective BRAF and MEK inhibitors for several of the same indications in addition to treating melanoma.

The FTC also raised concerns about the elimination of future competition in connection with Medtronic, Inc's proposed

US$42.9 billion acquisition of Covidien. Medtronic said the acquisition would expand its product portfolio and allow it to better compete with Johnson & Johnson, the largest medical device company. But the FTC concluded that the US market for drug-coated balloon catheters was highly concentrated with only one current supplier, CR Bard, Inc, and that Medtronic and Covidien were the only likely near-term new entrants to this market. To resolve the FTC's concerns, Medtronic agreed to divest Covidien's drug-coated balloon catheter assets to The Spectranetics Corporation, a manufacturer of a range of devices treating peripheral and coronary arterial disease, which proved to be an acceptable buyer of the divestiture assets owing to the company's experience in successfully obtaining FDA approval for complex medical devices.

Strong trend in pre-litigation settlement for pharma deals continues

Historically, nearly all FTC challenges to pharmaceutical industry mergers have been resolved, most often with the merging parties agreeing to divest or license a few drugs to address FTC concerns. In 2011, the FTC suffered a significant loss in the first-ever appellate antitrust decision dealing with a pharmaceutical industry merger. In *FTC v Lundbeck, Inc*, the Eighth Circuit affirmed the district court's ruling that the FTC failed to prove that the two drugs at issue, Indocin and NeoProfen, were in the same relevant market, even though both drugs were used to treat the same clinical indication, a serious and potentially deadly congenital heart defect affecting premature babies.[19] The district court was swayed by testimony from doctors that they prescribed the drugs based on their effectiveness and side-effect profile without paying attention to price, indicating a low cross-elasticity of demand between the drugs.

The *Lundbeck* decision demonstrates that, even with the 'more flexible' merger analysis framework set forth in the 2010 DOJ/FTC Horizontal Merger Guidelines, market definition can remain central in antitrust enforcement before the district courts. Despite the FTC's loss, parties continue to settle merger challenges in the pharmaceutical industry by agreeing to divestitures or other remedies. *Lundbeck* highlights the litigation risk that the FTC faces relating to market definition in the industry, but it does not appear to have dramatically moved the needle when it comes to leverage at the negotiating table. In part, this is because large pharmaceutical deals often combine firms that sell a broad portfolio of drugs, where the vast majority of the parties' products do not raise competitive concerns. Rather than hold up a multibillion-dollar deal pending lengthy litigation proceedings, parties often agree to divestitures in order to close quickly. This trend continued throughout FY 2014 and the first half of FY 2015, with consent decrees in 13 pharmaceutical and life science transactions.[20]

Indeed, in a recent statement, the Director of the FTC Bureau of Competition acknowledged the important role of settlements as an enforcement weapon:

> *While our litigated challenges grab headlines, most agency antitrust enforcement occurs through challenges settled by a consent order. By sheer numbers, consent orders remain an important tool in the FTC's enforcement arsenal.*[21]

Enforcement against deals threatening elimination of competition in branded/generic tie-ups

Recent merger enforcement in the pharmaceutical industry has targeted transactions that the FTC alleged may substantially lessen competition by putting branded drugs and their generic equivalents into the hands of the same company.

The FTC challenged Valeant Pharmaceuticals International, Inc's US$475 million acquisition of Precision Dermatology, Inc, alleging a relevant market that included both the branded and generic single-agent topical tretinoin products. This enforcement action is significant in that it varies from the FTC's typical position regarding competition among branded and generic products. Most often, the FTC takes the view that once multiple generic suppliers enter a market, they tend to compete only against each other, and – while a branded drug manufacturer may choose to lower its price to compete against generic equivalents – the branded drug usually ceases to provide any competitive constraint on the prices for generic versions.[22]

In this case, the FTC asserted that the merger would have eliminated competition in the market for branded and generic single-agent topical tretinoins for the treatment of acne, and in a separate market for generic Retin-A. According to the complaint, dermatologists who were interviewed indicated that while generics contain the same molecule as the branded products, prescribing a branded product allows the doctor to know exactly which delivery vehicle their patients are using, increasing their ability to treat irritations that may break out on the patient's skin. According to the FTC:

> *Unlike pharmaceutical markets in which the branded product no longer competes with generics once multiple generics enter, branded versions of single-agent topical tretinoins continue to compete with each other and their generic versions. Although generics contain the same molecule as the brands, many dermatologists believe that prescribing a branded product allows them to know precisely which delivery vehicles their patients are using, and hence what might be the cause of any skin irritation that may arise. As a result, even years after generic entry into this market, many dermatologists still prescribe branded tretinoins, and Valeant and Precision continue to invest in promotion and marketing of their branded products.*[23]

With respect to branded and generic single-agent topical tretinoins, the FTC concluded that the proposed transaction would likely result in unilateral anti-competitive effects. Evidence assimilated during the investigation allegedly indicated that Valeant and Precision were close rivals in branded tretinoin products in terms of pricing and promotion. While generic tretinoins provided some competitive constraint on the branded products' pricing, the FTC took the position that there was sufficient direct competition between the parties' branded tretinoins that Valeant would probably have an incentive to increase the price of branded single-agent topical tretinoins. The FTC further found that because managed care organisations often incentivise the use of generic tretinoin over branded tretinoin, competition between Precision's and Valeant's branded products has benefitted consumers mainly in the form of promotional couponing, concluding that the proposed transaction was likely to allow Valeant to effectively raise prices by reducing its promotional spending for Tretin-X.

Interestingly, the FTC found that although generic Retin-A products are part of the larger single-agent topical tretinoin market, generic Retin-A products compete very closely with each other and thus constitute a narrower separate relevant market and concluded that the merger would have given Valeant a near monopoly in four out of five versions of generic Retin-A, and a duopoly in the remaining version.

Valeant's acquisition of Precision Dermatology is emblematic of the granular fact-specific analysis the FTC conducts in pharmaceutical merger review, and that the boundaries of market definition

can turn on important pricing and promotional evidence in the hands of the merging parties.

Can the FTC tell the future? – Predicting future competitive effects in generic pharma markets

In analysing the potential competitive effects of a generic drug merger, the agencies often assess whether a proposed transaction may substantially reduce competition by eliminating a future competitor whose impending entry may affect competition, focusing on both time to entry and future price competition. In explaining this theory of competitive harm, one FTC official recently stated:

> *For many years, the Commission has been concerned about the elimination of a future competitor in markets for generic pharmaceuticals, either where one firm has an FDA-approved generic product and the other firm is working to introduce another generic version, or where the merging firms are two of only a limited number of likely entrants. In either scenario, the competitive concern is that the acquisition would likely delay the introduction of a generic version and thereby deprive consumers of the increased competition and likely price reductions that would have occurred.*[24]

The FTC's typical position is that the number of suppliers in generic pharmaceutical markets is critical, focusing on evidence that prices generally decrease as the number of competing generic suppliers increase, not only from 1 to 2 and 2 to 3, but also 3 to 4. In many previous FTC enforcement actions, the agency has indicated that:

> *Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the prices of the generic pharmaceutical products at issue continue to decrease with new entry even after a number of suppliers have entered these generic markets. Further, customers generally believe that having at least four suppliers in a generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.*[25]

The presence of four generic suppliers appears to be a bright-line minimum for the FTC, absent extraordinary circumstances. Deals that result in the elimination of competition where there are fewer players, or are teetering on the edge of that number if other market conditions are present, are highly likely to face a challenge. Over the past year there have been numerous instances of FTC enforcement against generic pharmaceutical mergers based on concerns relating to the likelihood of future generic product development and entry by one or both of the merging parties, including several prominent matters that included interesting variations from the FTC's fairly routine enforcement pattern.

Following a close review by the FTC of Impax's proposed US$700 million acquisition of CorePharma LLC, the companies agreed to divest CorePharma's rights and assets to generic pilocarpine tablets and generic ursodiol tablets, which are used to treat dry mouth and biliary cirrhosis and gall bladder diseases, respectively. According to the FTC complaint, there were only two suppliers in the market for generic pilocarpine tablets and Impax and CorePharma were the only likely new entrants in the near future, so enforcement in that market was not surprising.

There were already four existing suppliers in the market for generic ursodiol tablets, including Impax. At the time of the merger, CorePharma was one of a limited number of firms likely to enter the generic ursodiol market in the near future. While the merger would not have reduced the number of current generic suppliers below four, it is especially striking that the FTC still insisted on a divestiture of CorePharma's pre-market generic ursodiol assets. In describing the structure and dynamics of the ursodiol market, the FTC emphasised that the industry recently experienced supply shortages. The FTC has sought and obtained divestitures in other matters that involved shortages where there were already four generic market participants, which is a key issue that the FTC focuses on owing to a concern that shortages can diminish competition among current suppliers and result in higher prices.[26]

To complete its US$4 billion acquisition of Ranbaxy Laboratories Ltd, Sun Pharmaceuticals agreed to divest Ranbaxy's interests in generic minocycline tablets and capsules, which are used to treat a wide array of bacterial infections, including pneumonia and urinary tract infections. According to the FTC's complaint, the proposed merger would likely have harmed future competition by reducing the number of suppliers for three different dosage strengths (50mg, 75mg and 100mg) of generic minocycline tablets. Ranbaxy was one of three firms currently supplying tablets, while Sun was one of only a limited number of firms with minocycline tablets in development and an ANDA under review by the FDA.

While there was no overlap in capsules, the FTC required the sale of capsule assets to the divestiture buyer, Torrent. The agency took the view that, by including the capsules in addition to the tablets, it would allow Torrent to obtain regulatory approval to qualify a new ingredient supplier for its minocycline tablets as quickly as Ranbaxy would have in the absence of the deal. According to the FTC, Torrent should be able to establish the current ingredient supplier of the minocycline capsules as the supplier for its minocycline tablets through a less time-intensive regulatory process if Torrent controls both products and uses the same supplier for both. Moreover, the order required Sun and Ranbaxy to manufacture and supply generic minocycline tablets and capsules to Torrent following the divestiture to allow Torrent to enter the markets quickly while it works to establish its manufacturing source and seeks the necessary FDA approvals.

Based on enforcement trends of the past year, saying that 'the past is prologue' for pharmaceutical and life sciences mergers portends that the FTC will examine life sciences mergers under a microscope and will challenge acquisitions involving actual or potential competitors in narrowly drawn markets.

Divestitures continue to cure anti-competitive technology deals, but are they working?

Merger remedies approved by the FTC typically take the form of consent orders. These negotiated settlements aim to address the potential harm to competition that would have resulted from the merger. Given the frequency with which these settlements are issued and the impact of some of the remedies imposed, the FTC has announced it plans to study the effectiveness of its favoured remedial vehicle. The study will update and expand upon the FTC's previous study on divestitures from the 1990s and allow the FTC to assess whether its orders are working as intended (ie, to promote and preserve competition).[27]

The study will cover the 92 orders issued by the FTC from 2006–2012, with about one-third of those orders relating to pharmaceutical, life sciences and other high-tech transactions. The study's results will inform the FTC's remedy policy going forward. The FTC noted it 'immediately implemented various modifications to its divestiture process' partially in response to the results of its

earlier study.[28] The modifications included reducing the time allowed to complete the divestiture and requiring upfront buyers more often. Some modifications have focused principally on remedial orders in the pharma and high-technology industries. For example, the FTC noted that technology transfers can be especially difficult because the buyer may lack familiarity with the technology and require technical assistance from the seller. Thus, the FTC increased its use of monitors to supervise the transfer of rights and assets, including technologies and other intangibles.[29]

The authors gratefully acknowledge the contributions of our colleague Julia Renehan in preparing this chapter.

Notes

1 Hart-Scott-Rodino Annual Reports for fiscal years ended 2013, 2012, 2011, 2010, 2009, 2008, available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

2 *In re Prestige Brands Holdings, Inc*, FTC No. C-4487 (final order issued 14 October 2014); *In re Novartis AG and GlaxoSmithKline*, FTC No. C-4498 (final order issued 20 January 2015); *In re Eli Lilly and Company*, FTC No. C-4500 (final order issued 4 March 2015); *In re Valeant Pharmaceuticals International, Inc*, FTC No. C-4477 (final order issued 21 August 2014); *In re Akorn, Inc*, FTC No. C-4479 (final order issued 19 September 2014); *In re Actavis PLC,* FTC No. C-4474 (final order issued 5 September 2014); *In re Sun Pharmaceuticals Industries, Ltd.*, FTC No. C-4506 (final order issued 20 March 2015); In *re Novartis AG*, FTC No.C-4510 (final order issued 8 April 2015); *In re Impax Laboratories, Inc*, FTC No. C-4511 (complaint filed 6 March 2015); *In re Medtronic, Inc and Covidien plc*, FTC No. C-4503 (final order issued 21 January 2015); *In re Verisk Analytics, Inc,* FTC No. C-9363 (complaint issued 16 December 2014); *In re Nielsen Holdings N.V.*, FTC No. C-4439 (final order issued 28 February 2014); *In re Akorn, Inc*, FTC No. C-4452 (final order issued 20 June 2014); *In re Endo Health Solutions Inc*, FTC No. C-4430 (final order issued 21 March 2014); *In re Thermo Fisher Scientific Inc*, FTC No. C-4431 (final order issued 2 April 2014).

3 Prepared Statement of the Federal Trade Commission, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, 'Oversight of the Enforcement of the Antitrust Laws,' pg. 1.

4 Id at 7–8.

5 DOJ, 'Division Update Spring 2015' (spring 2015), available at www.justice.gov/atr/division-update/2015/division-update-spring-2015.

6 Press Release, 'Justice Department and Bazaarvoice, Inc. Agree on Remedy to Address Bazaarvoice's Illegal Acquisition of PowerReviews' (24 April 2014), available at www.justice.gov/atr/public/press_releases/2014/305389.htm; see also press release, 'Bazaarvoice Enters Into Letter of Intent with Viewpoints to Divest PowerReviews Business' (8 April 2014), available at www.bazaarvoice.com/about/newsroom/press-releases/Bazaarvoice-Enters-Into-Letter-of-Intent-with-Viewpoints-to-Divest-PowerReviews-Business.html.

7 Press release, 'Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns' (24 April 2015), available at www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; press release, 'Applied Materials Inc and Tokyo Electron Ltd Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy' (27 April 2015), available at www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; press release, 'Embarcadero Technologies and CA Inc. Terminate Proposed Transfer of CA Inc's ERwin Data Modeler' (5 November 2014), available at www.justice.gov/opa/pr/embarcadero-technologies-and-ca-inc-terminate-proposed-transfer-ca-incs-erwin-data-modeler.

8 Terrell McSweeny, 'The Role of Antitrust Enforcers in Dynamic High-Tech Markets' (27 January 2015).

9 See Renata B Hesse, 'At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement' (22 January 2014); see also Julie Brill, 'Merger Enforcement in High-Tech Markets' (28 January 2013); Joshua D Wright, 'Evidence-Based Antitrust Enforcement in the Technology Sector' (23 February 2013).

10 Press release, 'Time Warner Cable to Merge with Comcast Corporation to Create a World-Class Technology and Media Company' (13 February 2015), available at http://corporate.comcast.com/news-information/news-feed/time-warner-cable-to-merge-with-comcast-corporation.

11 Press release, 'Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns' (24 April 2014), available at www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

12 Press release, 'Applied Materials Inc and Tokyo Electron Ltd Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy' (27 April 2015), available at www.justice.gov/atr/public/press_releases/2015/313505.htm.

13 Press Release, Dep't of Justice, Embarcadero Technologies and CA Inc Terminate Proposed Transfer of CA Inc's Erwin Data Modeler (5 November 2014), available at www.justice.gov/atr/public/press_releases/2014/309752.htm.

14 Id.

15 Id.

16 Press Release, Federal Trade Comm'n, FTC Challenges Verisk Analytics, Inc's Proposed Acquisition of EagleView Technology Corporation (16 December 2014), available at https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition.

17 Id.

18 Complaint, *In re Verisk Analytics, Inc et al*, No. 9363 (16 December 2014), available at https://www.ftc.gov/enforcement/cases-proceedings/141-0085/veriskeagleview-matter.

19 *FTC v Lundbeck, Inc*, 650 F.3d 1236 (8th Cir. 2011).

20 *In re Impax Laboratories, Inc, et al* (6 March 2015); *In re Eli Lilly & Co. and Novartis AG* (4 March 2015); *In re Schering-Plough Corp and Merck & Co, Inc* (11 February 2015); *In re Sun Pharmaceutical Industries, Ltd et al* (30 January 2015); *In re Medtronic, Inc and Covidien plc* (21 January 2015); *In re Novartis AG (GlaxoSmithKline)* (26 November 2015); *In re Prestige Brand Holdings, Inc and Insight Pharmaceuticals Corp.* (28 August 2014); *In re Akorn, Inc.* (4 August 2014); *In re Valeant Pharmaceuticals International, Inc. and Precision Dermatology, Inc* (3 July 2014); *In re Actavis PLC and Forest Laboratories, Inc* (30 June 2014); *In re Akorn, Inc and Hi-Tech Pharmacal Co, Inc* (14 April 2014); *In re Endo Health Solutions Inc, et al.* (31 January 2014); *In re Thermo Fisher Scientific Inc* (31 January 2014).

21 Deborah L Feinstein, Director, Bureau of Competition, Director's Report Spring 2015 (17 April 2015) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/637441/bc_directors_report_-_spring_2015.pdf).

22 Whether the FTC includes a branded drug and its generic equivalent in the same product market depends on several factors, including: the number of generic competitors (the fewer generic competitors, the

more likely that the branded drug acts as a price constraint on the generic); and whether the branded-drug supplier chooses to reduce its price to compete against the generic equivalents.

23 Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Valeant Pharmaceuticals International, Inc. and Precision Dermatology, Inc, File No. 141-0101 (3 July 2014).

24 Id.

25 See, eg, Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Sun Pharmaceutical Industries Ltd, Ranbaxy Laboratories Ltd, and Daiichi Sankyo Co, Ltd*, File No. 141-0134 (30 January 2015) ('Customers and competitors have confirmed that the price of generic pharmaceutical products decreases with new entry even after several other suppliers have entered the market. Further, customers generally believe that having at least four suppliers in each generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.'); Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Akorn Enterprises, Inc and Hi-Tech Pharmacal Co*, Inc, File No. 131-0221, Docket No. C-4452 (14 August 2014) ('In pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases'); Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Akorn, Inc, File No. 141-0162 (4 August 2014) ('Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing').

26 In *Mylan/Agila*, the FTC expressed concern that supply disruptions caused by 'recent manufacturing problems' experienced by some suppliers led to price increases, and was an additional justification for enforcement. FTC, Analysis of Agreement Containing Consent Orders to Aid Public Comment – In re *Mylan Inc, Agilia Specialties Global Pte Limited, Agilia Specialties Private Limited*, and *Strides Arcolab Limited*, FTC No. 131- 0112 (26 September 2013), available at ww.ftc.gov/sites/default/files/documents/cases/130926mylananalysis.pdf.

27 Federal Trade Commission, Agency Information Collection Activities; Proposed Collection; Comment Request, 80 Fed. Reg. 2423 (16 January 2015); Press Release, Federal Trade Commission, FTC Proposes to Study Merger Remedies (9 January 2015), available at https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies. The deadline for submitting comments closed on 17 March 2015.

28 80 Fed. Reg. 2425.

29 FTC, A Study of the Commission's Divestiture Process, Prepared by the Staff of the Bureau of Competition of the FTC (1999), available at https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

Jacqueline Grise
Cooley LLP

Jacqueline Grise is a partner in the antitrust and competition practice group and is resident in the Washington, DC office.

Ms Grise's practice focuses on the defence of corporate clients in connection with domestic and international mergers and acquisitions, as well as antitrust counselling and other non-merger matters. She regularly represents clients before the FTC, the DOJ and numerous foreign antitrust enforcement agencies. Ms Grise has extensive experience counselling clients through the HSR merger review process, including advocating before the agencies, responding to second requests and coordinating antitrust defence strategies in countries around the world. Her clients span a broad range of industries, including an array of high-tech industries; digital health and e-health; health care and pharmaceuticals; consumer and food products; computer and data storage; music recording and publishing; book and magazine publishing; industrial equipment; automotive parts; retail, including internet sales and distribution; and aerospace and defence.

Ms Grise was ranked among the top 40 antitrust lawyers worldwide under the age of 40 by *Global Competition Review* (May 2008). She is also recognised as a leading practitioner by *Chambers USA*, *Euromoney's Guide to the World's Leading Competition & Antitrust Lawyers* and *Washington DC Super Lawyers*' Top 50 Women.

Ms Grise currently serves as a member of the co-chair of the ABA Antitrust Section's 2015 antitrust Merger Workshop and is a member of the Section's Content Delivery Task Force.

Tanisha James
Cooley LLP

Tanisha James is a senior associate in Cooley LLP's antitrust and competition practice group and is resident in the New York office.

Ms James represents corporate clients in connection with domestic and international mergers and acquisitions, as well as antitrust counseling and other non-merger matters. She represents clients before the Federal Trade Commission, the Department of Justice and foreign competition enforcement agencies. Ms James has experience counselling clients in matters involving mergers, acquisitions, joint ventures, civil and criminal investigations, and restraint of trade. Her clients span a broad range of industries, including an array of high-tech industries such as health care and pharmaceuticals, computer and data storage, book and magazine publishing, e-learning and education, as well as fashion, sports, automotives and sectors involving natural resources.

Ms James has been recognised as a 'Rising Star' in antitrust by Super Lawyers and was named to the Lawyers of Color inaugural Hot List.

Ms James is a member of the American Bar Association Antitrust Section and is currently serving as a vice chair of the unilateral conduct committee.

Cooley LLP

1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
United States
Tel: +1 202 842 7800

Jacqueline Grise
jgrise@cooley.com

Tanisha James
tjames@cooley.com

Howard Morse
hmorse@cooley.com

www.cooley.com

Clients partner with Cooley on transformative deals, complex IP and regulatory matters, and high-stakes litigation, where innovation meets the law.

Cooley has 850 lawyers across 12 offices in the United States, China and Europe.

Cooley's antitrust and competition team is recognised as one of the top-tier practices in the area of antitrust by *Chambers USA*, *The Legal 500* and *Global Competition Review*. Providing a full range of counselling, agency representation, litigation and arbitration services, we handle all aspects of antitrust and competition matters for companies, from emerging companies to Fortune 500 corporations, in virtually every sector of the economy including computer hardware, software, e-commerce, social media, pharmaceuticals, medical devices, biotech, clean tech, telecommunications, aerospace, automotive, defence, oilfield services, industrial manufacturing, consumer products and financial services. We provide expert, practical and timely representation that enables our clients to manage antitrust risk while accomplishing their business objectives.

Our antitrust and competition team is comprised of 40 lawyers in major business and technology centres in the United States as well as the United Kingdom and China, and includes two former assistant directors of the Federal Trade Commission (FTC) Bureau of Competition and a former acting associate attorney general of the Department of Justice (DOJ) responsible for overseeing the Antitrust Division, as well as former FTC and DOJ staff attorneys.

Howard Morse
Cooley LLP

Howard Morse, a partner in Cooley LLP's Washington, DC office, chairs the firm's antitrust and competition practice group.

Mr Morse represents businesses before the Federal Trade Commission, the Department of Justice and state attorneys general, in investigations involving mergers, acquisitions and joint ventures, as well as restraint of trade cases. He also counsels clients on antitrust issues and represents companies in private antitrust litigation.

Mr Morse has been at the forefront of applying antitrust law to the high-tech sector and the intersection of antitrust and intellectual property law, including issues related to innovation markets, standard setting, patent pools and the settlement of patent litigation. His clients include companies in the pharmaceutical, biotech and medical device, as well as the computer hardware, software, social media and 3D-printing industries.

Mr Morse served for 10 years at the FTC, where he was assistant director of the Bureau of Competition and received the FTC's Award for Superior Service for 'furthering the Commission's Merger Enforcement Program' and for 'advancing the antitrust mission of the Federal Trade Commission in innovation markets and high technology industries'.

Mr Morse has been recognised as a leading antitrust lawyer by *Best Lawyers in America*, *Chambers USA*, *Who's Who Legal: Competition Lawyers & Economists* and *Super Lawyers*, among others.

Mr Morse is a member of the American Bar Association long range planning committee; he has previously served on the Section's council and chaired its computer industry, federal civil enforcement and intellectual property committees.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

THE ANTITRUST REVIEW OF THE AMERICAS 2016 ISSN 1468-7054