During the recent 2017 Spring Meeting of the ABA Section of Antitrust Law in Washington, D.C., Crowell & Moring Antitrust Group attorneys attended many of the daily sessions and prepared summaries. We would like to thank the following attorneys for their contributions: Joon Cho, Leigh Colihan, Luke van Houwelingen, Justin Kingsolver, Robert Kornweiss, Jordan Ludwig, Martin Mackowski, Drake Morgan, Sima Namiri-Kalantari, Lauren Patterson, Angel Prado, Benjamin Wastler, Kate Watkins, and Katie Yablonka.
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AGENCY UPDATE WITH THE U.S. DEPARTMENT OF JUSTICE

Presented by the Federal Civil Enforcement Committee

The Spring Meeting would not be complete without hearing directly from the U.S. Department of Justice Antitrust Division’s senior officials about the latest in civil enforcement, cartel cases, and policy initiatives.

CHAIR:
• Shylah R. Alfonso, Perkins Coie LLP, Seattle, Wash.

MODERATOR:
• Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati PC, New York, N.Y.

SPEAKERS:
• Patricia A. Brink, Director of Civil Enforcement, U.S. Department of Justice, Antitrust Division, Washington, D.C.
• Marvin N. Price, Jr., Director of Criminal Enforcement, U.S. Department of Justice, Antitrust Division, Washington, D.C.
• W. Robert Majure, Economics Director of Enforcement, U.S. Department of Justice, Antitrust Division, Washington, D.C.
• Eric Mahr, Director of Litigation, U.S. Department of Justice, Antitrust Division, Washington, D.C.

SUMMARY:
• Patricia Brink and Marvin Price began with a general update regarding the Antitrust Division. Despite the current transition of leadership, it is business as usual at the Division. It recently has hired a number of new attorneys, and staff and is confident in executing its mission moving forward.

• Eric Mahr provided an update regarding the various cases that proceeded to litigation over the past year, including the Division’s successful suits to enjoin the Anthem/Cigna and Aetna/Humana mergers. Having tried six cases in the past year, the Division’s litigators are as ready as ever to enforce the law. In addition, as demonstrated by the recent John Deere case, the Division will vigorously pursue relevant evidence possessed by third parties, consistent with its rights to that evidence under the Federal Rules.

• Providing an update regarding criminal enforcement, Marvin Price noted the Division’s continuing trend in bringing actions against not just companies but individual executives. The Division believes prison sentences for individuals serve as the greatest deterrent against antitrust violations. In addition, as demonstrated by the recent obstruction charges in the Auto Parts case, the Division will hold individuals accountable for destruction of evidence—even where they do not personally destroy evidence but direct others to do so.

• Bob Majure noted that while recent court opinions do not appear to focus heavily on economic analysis, that analysis nevertheless is incorporated in the opinions because the economists work to ensure that it is interwoven with the factual record. The Division’s economists will continue to assess prior cases to inform their future work.
• Patricia Brink provided an update regarding civil enforcement. In the DIRECTV case, the Division filed a complaint alleging that the exchange of competitively sensitive information undermined the competitive process. Ms. Brink remarked that companies should be sure to train executives regarding permissible sharing of information with competitors. And the recent $11 million fine in the ValueAct case—the largest ever for an HSR violation—demonstrates that companies should pay close attention to whether they fall within the HSR’s investment-only exemption. The Antitrust Division will continue to strengthen its relationships with the FTC, state attorneys general, and international enforcement partners in order to vigorously enforce the antitrust laws.
AVOIDING E-DISCOVERY ACCIDENTS & RESPONDING TO INEVITABLE EMERGENCIES

Presented by the Civil Practice & Procedure Committee

The review and production of documents raise difficult ethical issues in the era of e-discovery. This session addressed these challenges including: outsourcing, inadvertent production, PII, candor concerning the existence of ESI, the duty to preserve, confidentiality, and, most importantly, what to do when the best laid plans inevitably go awry.

CHAIR AND MODERATOR:
- Elizabeth A. N. Haas, Foley & Lardner LLP, Milwaukee, Wis.

SPEAKERS:
- Tracy Greer, Senior Litigation Counsel for Electronic Discovery, U.S. Department of Justice, Antitrust Division, Washington, D.C.
- Ted Hassi, O’Melveny & Myers LLP, Washington, D.C.
- Jeane A. Thomas, Crowell & Moring LLP, Washington, D.C.

SUMMARY:
- Jeane Thomas started the panel by explaining the duty of competence, which includes understanding e-discovery technology. This is especially true in antitrust cases, where there are complex e-discovery issues and sophisticated parties. Attorneys also have the duty to supervise other lawyers and non-lawyers (e-discovery vendors) and will be held accountable if something goes awry. The type of ESI can vary by matter, by client, by business unit, and even by department within a client; accordingly, it is important for attorneys to actively engage with their clients and talk to witnesses early on. This includes the custodians that maintain relevant data, as well as the people who maintain the IT systems that retain the relevant information.

- Ms. Thomas also discussed the duty to preserve, which can arise when a party reasonably anticipates litigation or a government investigation. While there is technology that can be helpful for creating and instituting litigation hold notices, such technology does not replace the duty of lawyers to make sure custodians understand how to implement the hold notice and actually preserve the relevant information. Ms. Thomas further highlighted the concept of proportionality in discovery and application of Federal Rule of Civil Procedure 26(b)(1), as amended in 2015, to the duty to preserve. Attorneys will, however, need to see how courts interpret this concept going forward, particularly as it relates to preservation. The case law shows that courts are holding counsel accountable for monitoring compliance with preservation duties; attorneys cannot turn a blind eye to mistakes, cannot simply rely on the assertions of the client, and must verify that the technology is in fact doing what the attorney is being told it does.

- Ted Hassi then discussed the “Four C’s” to keep in mind during the meet and confer process: (1) candor, (2) cooperation (e.g., search terms), (3) clarity, and (4) completeness (in answers at the meet and confer,
as well as in discovery responses). He explained that preparing for the meet and confer is key. It is important to understand who the custodians are, what will be preserved, where it is preserved, what clients can and cannot produce, and the reasonable amount of time required for production. With respect to written discovery, Mr. Hassi highlighted that courts no longer accept boilerplate objections, and parties have to be clear what they are not producing and, more importantly, do their diligence as to why they are not producing it.

- Kim-An Hernandez discussed the level of attorney supervision required for the e-discovery process. Lawyers must be actively and extensively involved in the discovery process, doing their own QC checks and taking a role in every aspect of collection. Attorneys must make sure the process is well-documented and that what is being done by others is nonetheless being done properly. Remote or foreign reviewers similarly require supervision. Ms. Hernandez opined that not all Technology Assisted Review (TAR) platforms are equal, and the duty of competence requires that lawyers know the differences between various platforms. Using tools such as TAR does not absolve lawyers of their responsibilities if something goes wrong.

- Ms. Hernandez also discussed inadvertent production of privileged documents. Again, courts do not excuse lawyers for relying on vendors. Ms. Hernandez further cautioned attorneys to not overlook metadata when conducting a privilege review.

- Tracy Greer explained that the Antitrust Division has taken note of proportionality with respect to preservation and is encouraging counsel to have discussions early on. She opined that the complications related to preservation are multiplying. Ms. Greer cautioned that the preservation obligation also applies to lawyers engaged in an investigation. Ms. Greer also discussed a case where companies in civil and criminal contexts may go beyond preservation mistakes and commit obstruction of justice, citing an example of an IT director who was recently sentenced to 15 months in prison.

- Ms. Greer described that preparation is essential, especially in government investigations, where there is an asymmetry of information. The DOJ, as well as the FTC, have detailed production specifications that change all the time. Attorneys need to make sure they understand and can comply with the production specifications.

- Ms. Greer opined that the DOJ has changed from the mindset of needing to gather everything relevant, to what is necessary to make the decision at hand; this goal requires active negotiation about what is actually needed. The Antitrust Division’s TAR/predictive coding initiative is anticipated to result in smaller and richer productions and to save respondents money. To the extent a party uses technology in their production, it is a best practice (and in some cases required) to disclose what kind of technology has been used.
CONSUMER PROTECTION YEAR IN REVIEW 2016

Presented by the Advertising Disputes & Litigation and Consumer Protection Committees

The panel presented on another active year in consumer protection enforcement. Regulators and self-regulators dealt with cutting-edge issues, including native advertising, endorsements, consumer reviews used for claim substantiation, the use of the term “natural,” consumer privacy, and more.

CHAIR AND MODERATOR:
• Terri J. Seligman, Frankfurt Kurnit Klein & Selz PC, New York, N.Y.

SPEAKERS:
• Laura Brett, Assistant Director, National Advertising Division of the Advertising Self-Regulatory Council, New York, N.Y.
• Lesley Fair, Senior Attorney, Federal Trade Commission, Washington, D.C.
• Kathleen McGee, Chief, Bureau of Internet and Technology, Office of the Attorney General, New York, N.Y.
• Kevin J. O’Connor, Godfrey & Kahn SC, Madison, Wisc.

SUMMARY:
• Ms. Fair summarized some of the key areas of FTC interest during 2016. First, the FTC was active in cases dealing with advertising substantiation. Many of these cases involved advertising claims related to new cell phone apps dealing with healthcare, including the accuracy of apps purporting to measure blood pressure and blood alcohol content. Ms. Fair also noted that 2016 saw an increase in enforcement for false “Made in the USA” advertisements. The FTC reached a historic settlement of $10 billion with Volkswagen regarding advertisement claims concerning the level of emissions from VW and Audi diesel cars. Relatedly, Ms. Fair emphasized the need for clear and conspicuous disclosures relating to endorsements and sponsorships on social media and other websites. Disclosures that are cursory or send viewers through hoops to reach them may not suffice.

• FTC cases related to privacy and data security: Ms. Fair discussed cases where companies ignored consumers’ express stated desire not to be tracked, emphasizing the need for companies to honor customer opt-outs. In a similar vein, the FTC also pursued cases where companies failed to adequately protect consumers’ data. Ms. Fair recommended three new FTC publications on the subject: (1) Start With Security, (2) Protecting Personal Information, and (3) Data Breach Response.

• Third, the FTC continued to pursue cases involving financial deception, including tech support scams and claims against companies who misled consumers about the level of income they could earn. Of particular note, the FTC received a $1.3 billion judgment in a case involving an online payday lending scheme. This judgment represents the largest the FTC has ever received in a litigated case.

• Ms. McGee then presented regarding the New York State AG’s enforcement efforts in 2016. Like the FTC, the NY AG pursued issues related to privacy and data security. With regards to issues of privacy, Ms. McGee indicated that companies may not be aware of certain tracking cookies hidden on their websites and should take extra care to ensure that they do or risk unknowingly violating statutes such as COPPA.
2016 was a record year for notifications to the NY AG’s office regarding data breaches. The most common causes of these data breaches were third-party intrusions, but company negligence was a close second. Ms. McGee underscored the need for careful attention to data security—stating that companies should obtain the least amount of sensitive information as necessary and should not retain that information for any longer than necessary. Ms. McGee also highlighted a settlement with two large daily fantasy sports websites for misrepresenting the likelihood of success for casual players. Finally, Ms. McGee noted that a lengthy investigation into the ticket industry resulted in a report concluding that bots were being used to purchase tickets from retail websites in seconds. This practice is now a criminal offense in New York State. The NY AG will continue to take a broad approach to consumer protection in relation to technology.

- Ms. Brett discussed consumer protection issues from the National Advertising Division’s (NAD) perspective. The NAD, a unit of the Advertising Self-Regulatory Council, is a leading private organization that provides an alternative for companies seeking to privately resolve disputes over advertising. One of the most significant issues at the NAD in 2016 was native advertising. Ms. Brett advised companies to follow FTC guidelines for required disclosures and stressed the need for clarity that a native advertisement is an advertisement before following a link. While 2016 saw an improvement in native advertising disclosures, there is still a long way to go. The NAD is also focused on affiliate marketing and what constitutes a paid endorsement versus pure user-generated content. As with native advertisements, affiliate marketers and a paid endorser should add disclosures to ensure transparency. On a different front, the NAD dealt with advertisements for new technologies. Companies must be careful not to overstate the benefit of new products and make broader claims vis-à-vis their competitors’ products.

- Mr. O’Connor concluded by discussing disruptive technologies and the FTC’s Sharing Economy Report. He stated that disruptive technologies, which are commonly internet or smartphone based, can present existential threats to existing business models while at the same time creating regulatory and enforcement challenges. He also discussed how private litigation is challenging disruptive technologies’ business models, citing several lawsuits against Uber as an example.

- Finally, Ms. Seligman asked a question of the panel about the need for concrete consumer harm in pursuing cases. Ms. McGee stated that requiring such harm is better policy. This enables regulators to explain why what a company did was wrong. Ms. Fair added that from a staff perspective, the staff assumes they will have to explain where the consumer injury is. The FTC’s Acting Chairman, Maureen Ohlhausen, has also instructed that consumer harm should be highlighted by the staff.
BACK TO THE FUTURE: HOSPITAL MERGER ENFORCEMENT

Presented by the Health Care & Pharmaceuticals and State Enforcement Committee

Until 2016, the FTC had not lost a challenge to a provider merger since 1999. Although the agency lost two challenges in lower courts, both decisions were overturned on appeal. This panel examined the FTC’s hospital merger enforcement program since the Evanston/Northwestern merger, including what the recent cases in Harrisburg, PA, Chicago, IL, and Huntington, WV mean for the future of FTC enforcement.

CHAIR:
- Amy D. Paul-Ritchie, Ropes & Gray LLP, Washington, D.C.

MODERATOR:
- Leigh L. Oliver, Hogan Lovells US LLP, Washington, D.C.

SPEAKERS:
- Christi J. Braun, Managing Counsel, Vanderbilt University Medical Center, Nashville, Tenn.
- Kenneth W. Field, Jones Day, Washington, D.C.
- Subbu Ramanarayanan, NERA Economic Consulting, New York, N.Y.
- Mark Seidman, Deputy Assistant Director, Mergers IV Division, Bureau of Competition, Federal Trade Commission, Washington, D.C.

SUMMARY:

- With respect to the relevant product market, the panel agreed that general acute care (GAC) cluster markets are here to stay, though they may vary by case based on which services the merging hospitals provide, and if the competitive dynamics vary significantly by service line.

- Mr. Ramanarayanan then discussed the relevant geographic market determination, explaining the recent shift—reflected in court opinions—from reliance on patient flow data using the Elzinga-Hogarty test to reliance on the hypothetical monopolist test looking at the payer as the major buyer. Ms. Braun criticized the shift as ignoring commercial realities of how patients seek care and view other hospitals as substitutes. Mr. Seidman noted that patient flow data provides information on what is happening; looking at the payer perspective tells you why, because the critical factor is what is needed to market a network and whether a destination hospital is a substitute in the payer’s network.

- When evaluating competitive effects, economists on both sides have been using a two-stage model of competition to look at price effects, first assessing the underlying bilateral negotiations between payers and hospitals to build a network, and then, once the network is set, looking at patient choice among hospitals that are in their networks. Mr. Seidman thought that the evolution to value-based contracting should not distract from the two-stage bargaining model, even though the model is based on fee-for-service arrangements, because both types of contracting involve negotiation on fees. The FTC looks at what is changing with a merger, and whether the merger will change incentives and the way the price is negotiated.
Mr. Seidman explained that efficiencies are an integral part of both the Horizontal Merger Guidelines and any FTC investigation. The cases that get the most attention are those that the FTC litigates, where they have made the determination that the efficiencies do not outweigh the harm. In reality, the FTC takes cost efficiencies and quality improvements very seriously, particularly when a high-quality hospital purchases a hospital which scores low on quality metrics. He emphasized that the FTC focuses on the incremental benefit of efficiencies. Ms. Braun criticized the recent court treatment of clinical and financial integration, explaining that courts disregarded information about the importance and difficulties of being clinically and financially integrated. Mr. Fields agreed with Ms. Braun that courts seemed overly ready to find that integration benefits could be achieved through contract.

The panel noted that the failing/flailing firm defense is rarely accepted by the FTC in hospital merger cases, though the requirements of the defense have not changed. Mr. Seidman noted that many companies trip up on the second prong requirement that there not be a viable alternative purchaser that poses less anticompetitive risk.

With respect to whether Certificates of Public Advantage (COPA) impact the review process, Mr. Field noted that the states passing COPA legislation were going through a very detailed process requiring significant review and briefing. Mr. Seidman was skeptical about the ability of regulation to replace competition, and stated that the FTC opposes COPA as unnecessary and has the impact of isolating an anticompetitive transaction from review.
CONTINENTAL DIVIDE: DIFFERING APPROACHES TO LOYALTY INCENTIVES

Presented by the Distribution & Franchising Committee

Panelists from Europe and the U.S. offered a comparative review of recent developments with respect to loyalty incentives. In particular, the panel took a deeper look at the recent *Eisai v. Sanofi* and *ZF Meritor v. Eaton* cases in the 3rd Circuit and the *Intel* appeals in Europe, as well as economic justifications for and the effects of loyalty incentives.

CHAIR:
- Joy K. Fuyuno, Director of Competition Law for Asia, Microsoft Corporation, Singapore

MODERATOR:
- Subrata Bhattacharjee, Borden Ladner Gervais LLP, Toronto

SPEAKERS:
- Jacquelyn MacLennan, White & Case LLP, Brussels
- Jorge Padilla, Compass Lexecon, Madrid
- Cecilio Medero Villarejo, Deputy Director-General for Antitrust, European Commission, Brussels

SUMMARY:

EU Approach to Loyalty Incentives and the *Intel* Appeal:

- Cecilio Medero Villarejo introduced a discussion of the EU approach to exclusionary discounts by noting that Article 102 of the Treaty on the Function of the European Union, which is the counterpart of Section 2 of the Sherman Act, governs the EU approach to exclusionary discounts and rebates. He explained that as a general principle, the European Commission (EC) requires that the efficiency gain facilitated by loyalty incentives must outweigh harms identified by the Commission and must demonstrate that they do not eliminate all competition in the relevant market. This is what is known as the efficient-competitive test. Types of loyalty incentives include “fidelity rebates” and “exclusionary discounts.”

- Mr. Medero Villarejo described the loyalty incentives at issue in the recent *Intel* case. First, Intel gave rebates to manufacturers if they bought all or almost all chips from Intel. Second, Intel gave exclusive rebates to HP, Acer, and Lenovo conditioned on certain restrictions, including their postponing, canceling, or restricting distribution of CPU-based products. The EC determined that these loyalty incentives deprived customers of choice and harmed competition and that both of the restrictions were illegal. The General Court upheld Commission’s decision and dismissed Intel’s appeal in its entirety.

- The court also held that in the case of fidelity rebates there is no need to prove anticompetitive effects because they are presumed anticompetitive. The burden then shifts to the defendant to prove that the rebates are justified on efficiency grounds. In this case, an anticompetitive effects analysis was unnecessary because Intel did not provide evidence of procompetitive benefits. Mr. Medero Villarejo opined that this standard is appropriate, particularly in light of the European Commission’s limited resources to conduct anticompetitive effects analysis in every case, and that therefore it is best to presume that loyalty incentives are anticompetitive and shift the burden of proof to defendants.
• Jacquelyn MacLennan then provided her view on Advocate General Nils Wahl’s opinion on the Intel case and the potential consequences for European commerce if Advocate General Wahl’s opinion is followed by the European Court of Justice (ECJ). Ms. MacLennan outlined the October 2016 opinion of Advocate General Wahl, in which he recommended that the ECJ remand the case so that the General Court can conduct an effects-based analysis analogous to the type of approach adopted by American courts. Advocate General Wahl stated that loyalty incentives are not inherently anticompetitive and that it was necessary to evaluate the circumstances of the case to determine whether the defendant abused a dominant position in the marketplace. According to Ms. MacLennan, the movement away from a formalistic approach to loyalty incentives could have a ripple effect on national competition agencies in the EU, and we could see the EU aligning its approach to that of the United States.

U.S. Approach to Loyalty Incentives:

• Joy Fuyuno provided the framework for analysis of loyalty incentives in the United States. Although specific Supreme Court guidance is absent, rule of reason analysis is applied as a general rule. In Trinko, the Supreme Court advised that the cost of false positives counsels against an undue expansion of Section 2 liability.

• Ms. Fuyuno outlined two modes of analysis that courts use for loyalty incentives. First, where price discounts are the clearly predominant mechanism of exclusion, courts employ a test for predatory pricing. Under the Brooke Group price-cost test, any rebate or discount is legal unless pricing is below cost. On the other hand, courts may also apply the exclusive dealing standard to non-price vertical restraints. This approach balances procompetitive benefits and anticompetitive effects. Ms. Fuyuno then contrasted two recent Third Circuit cases with different outcomes under this standard: ZF Meritor and Eisai.

An Economic Perspective on Fidelity Discounts:

• Jorge Padilla presented an economic perspective on loyalty incentives by asking whether (1) a more restrictive approach should be adopted with respect to loyalty incentives, and (2) whether economic analysis should be conducted to assess competitive effects. Mr. Padilla opined that loyalty incentives should not be treated more harshly, and that economic analysis should be conducted. He observed that the “consensus of the court” is the opposite of his prescription.

• Mr. Padilla acknowledged that fidelity discounts can indeed produce anticompetitive effects, but that they often also produce procompetitive benefits, including lower prices for customers, particularly when competitors are able to replicate the same discount offering or when they produce economies of scale.
LENIENTY AT 25: MORE JURISDICTIONS, BUT MORE EFFECTIVE?

Presented by the International Cartel Task Force

Over the past 25 years, leniency programs have been wildly successful at generating cartel cases globally. As programs have proliferated, the costs and risks of applying for leniency have increased significantly. There are reports that applications in some jurisdictions are down. The panel examined the origins of leniency, assessed its continued viability, and discussed proposals for change.

CHAIR AND MODERATOR:
- Thomas Mueller, WilmerHale, Washington, D.C.

SPEAKERS:
- Frank Montag, Freshfields Bruckhaus Deringer LLP, Brussels
- Barbara Rosenberg, Barbosa Müssnich e Aragão, São Paulo
- Gary R. Spratling, Gibson Dunn & Crutcher LLP, San Francisco, Cal.

SUMMARY:
- Gary Spratling opened with a brief history of the leniency movement. The then-revolutionary program faced strong resistance from mainstream academic thought as well as from other departments of DOJ and career prosecutors even within the Antitrust Division. But anchored by the cornerstones of severe sanctions and agency transparency, as well as the prominence of the Vitamix cartel, jurisdictions worldwide noticed DOJ’s success and implemented leniency programs of their own.

- DOJ Attorney Ann O’Brien explained that three factors drive DOJ’s leniency program’s ongoing success: (1) severe sanctions, (2) agency transparency, and (3) heightened fear of detection. She emphasized that DOJ is the global leniency leader and that leniency remains DOJ’s most effective tool for detection and prosecution of cartels.

- The panelists then discussed the following challenges to the ongoing efficacy of leniency:

- Reporting in Multiple Jurisdictions: That dozens of jurisdictions have leniency programs begets two problems for potential applicants: (1) skyrocketing costs, and (2) developing a global strategy to mitigate cross-jurisdiction conflicts. Regarding costs, Mr. Spratling explained that given the tens of millions of documents that are often reviewed and translated, business disruption, internal company interviews, and written company statements, the cumulative reporting costs across jurisdictions can sometimes be greater than the leniency benefit. Regarding global strategy, a key issue is the physical impossibility of meeting with several jurisdictions’ enforcers at the same time. Ms. O’Brien noted in response that DOJ will attempt to coordinate timetables with foreign enforcers and that they encourage applicants to relay timing concerns to DOJ.

- Early Disclosure Requirement in Select Jurisdictions: That several jurisdictions require leniency applicants to make early written disclosures, such as Brazil, has two implications: (1) applicants report to those...
jurisdictions last, and (2) applicants may forego reporting altogether because doing so could cause enormous damage in follow-on civil litigation, particularly in the United States where such disclosures can be discoverable.

- Transparency: Ms. O’Brien from DOJ and defense bar panelists agreed that transparency and predictability were paramount to leniency’s efficacy. Mr. Spratling and Mr. Montag noted that a recent revision to DOJ’s leniency FAQ 6 appears to narrow immunity for other crimes arising from the same conduct. Ms. O’Brien disagreed. She explained that the purpose of DOJ’s revision of FAQ 6 to grant immunity to crimes “integral to” the violation simply clarifies the scope of coverage and emphases that the Antitrust Division cannot stop prosecutions from other divisions of DOJ. The defense bar panelists also expressed concern about DOJ’s discretion to prosecute current employees in “Type B” leniency applications. Ms. O’Brien explained that DOJ’s practice is to extend immunity coverage to nearly all employees who cooperate. The situations where DOJ does not extend immunity are almost always instances where the individual is not cooperating or there is other conduct involved—it is almost never about culpability vis-à-vis the antitrust violation.

- The panelists closed by generally expressing enthusiasm for the leniency program. Suggestions for change included: (1) greater agency use of proportionality in document requests and interviews, (2) increased soft cooperation to lower the number of agencies investigating identical conduct, and (3) broadened scope of immunity to provide some protection for damages in civil follow-on litigation.
PHARMACEUTICAL MERGERS AND INNOVATION—INCENTIVIZING V. SUPPRESSING DEVELOPMENT

Presented by the Health Care & Pharmaceuticals Committee

Pharma mergers continue at a breakneck pace. In each case, critical issues are actual and potential competition, including the parties’ ability to innovate. The panel evaluated if and when agencies would block pharma mergers on innovation grounds, explored the analysis of innovation in branded and generic mergers, and discussed at what point there are too few large companies.

CHAIR AND MODERATOR:
- Patrick C. English, Latham & Watkins LLP, Washington, D.C.

SPEAKERS:
- Susan A. Creighton, Wilson Sonsini Goodrich & Rosati PC, Washington, D.C.
- David M. Emanuelson, Senior Corporate Counsel, Antitrust Americas, Novartis International AG, New York, N.Y.
- Jon Leibowitz, Davis Polk & Wardwell LLP, Washington, D.C.
- Daniel K. Zach, Deputy Assistant Director, Mergers I, Federal Trade Commission, Washington, D.C.

SUMMARY:
- All panelists distinguished between theories of harm in which existing or identifiable future markets were at issue and theories of harm regarding research and development efforts not clearly tied to particular products. Mr. Zach stressed that the key to the latter theories lay in whether, in the absence of a merger, the results of merging firms’ ostensibly competing development efforts would capture substantial revenues from one another.

- Given the speculative nature of research and development in its early stages, Mr. Zach explained that a competitive assessment of such innovation efforts requires the agency to determine the specifics of the products in development and the likelihood of whether they would ever reach the market at all. This, in turn, requires a careful review of evidence such as corporate documents, trial results, and interviews with third parties such as doctors and technical experts. The FTC would intervene where there is strong evidence that the firms’ products would ultimately compete directly and that their merger would change the incentives of one or both firms to engage or continue to engage in vigorous research and development efforts.

- All panelists pointed to the FTC’s 2003–2004 investigation into Genzyme’s acquisition of Novazyme as providing the leading guidance on how to assess a merger’s impact on early-stage research and development competition. Ms. Creighton, formerly of the FTC, noted the case suggested that innovation market analysis not tied to actual potential competition or future competition theories was appropriate only where very few companies were engaged in similar efforts, and that a competitive effects assessment must be more closely tied to particular theories of harm than in traditional horizontal merger cases.
• The panelists took particular note of the significant potential benefits of combining the technical know-how associated with ostensibly competing efforts. Ms. Creighton noted that this calls for a careful balancing of the benefits and negatives associated with combining those efforts. Ms. Creighton stated that in some cases going from two to one competing development efforts may in reality make going from zero to one—that is, ultimately developing a valuable product at all—more likely. Particularly in cases where there is no existing treatment for the disease the parties’ efforts seek to remedy, Ms. Creighton opined that this may act as a thumb on the scales of the FTC’s assessment.

• Mr. Leibowitz advised that parties can best improve their chances of FTC approval where the buyer is committed to meaningfully increase spending on the target’s currently underfunded research and development efforts. Mr. Leibowitz noted, however, that such a commitment should both be supported by strong evidence in the form of business plans and should tie the spending to something merger specific. In particular, Mr. Leibowitz suggested having compelling answers to inevitable FTC staff questions as to why licensing arrangements could not achieve the same results, and why other outside funding would not be an option for the target.
ANTITRUST IN LATIN AMERICA: QUO VADIS?

Presented by the International Committee

The rapidly evolving and maturing Latin American antitrust regimes must be taken into account by every international company and competition practitioner. This panel of senior agency officials discussed recent developments in Argentina, Brazil, Chile, and Mexico, with an eye to identifying and minimizing antitrust risks, and their predictions for competition enforcement and policy in Latin America.

CHAIR AND MODERATOR:

• Krisztian Katona, Counsel for International Antitrust, Federal Trade Commission, Washington, D.C.

SPEAKERS:

• Gilvandro Araújo, Commissioner, Conselho Administrativo de Defesa Económica (CADE), Brasilia
• Esteban M. Greco, President, Comisión Nacional de Defensa de la Competencia (CNDC), Buenos Aires
• Felipe Irarrázabal, National Economic Prosecutor, Fiscalía Nacional Económica (FNE), Santiago
• Carlos Mena Labarthe, Chief Prosecutor, Comisión Federal de Competencia Económica (COFECE), Mexico City

SUMMARY:

• Mr. Greco opened with a brief update. He stated that this was an exciting time for competition law in Latin America and in Argentina in particular. There are, however, major challenges facing Argentina’s competition law: (1) improving practices within the existing legal framework and (2) changing the legal framework where updates are needed. He pointed to major steps in 2016, including the restructuring of the CNDC resulting in its own structural directions for mergers for the first time. There were additional developments as well: reforming guidelines for establishing fines, promoting and facilitating private actions, and proposing a specialized court for judicial review of mergers.

• Mr. Irarrázabal discussed key developments in competition law in Chile. There are now severe sanctions: fines have increased up to 30 percent, especially for cartel activities. Additionally, a new merger system is in place and will be introduced in June 2017. The structure of damages compensation has also changed. And finally, the Chilean agency has developed an emphasis on market studies.

• Mr. Mena Labarthe discussed the impact of the 2014 competition law. He stated that Mexico made a strategic plan to focus on industries that have the most impact, including agroindustry, transport, and the health industry. Mexico’s competition authorities have focused specifically on abuse of dominance, cartels, and market investigations.

• Mr. Araújo examined the first five years since a new competition law took effect in Brazil. He stated that the most important point was the increase in leniency agreements. Settlement agreements and the amount of fines and pecuniary contributions have also increased in the past five years. The average time for merger review has also dropped.
- On the topic of cartels, Mr. Mena Labarthe pointed to the increase in the number of dawn raids and leniency applications as a welcome sign of improvement in Mexico. He also spoke of Mexico’s first criminal antitrust investigation and the revoking of a leniency program as two major milestones. Mr. Irarrázabal also discussed leniency programs and emphasized that Chilean law is strict on confidentiality, especially for leniency programs. Mr. Araujo stated that Brazil’s new guidelines recently won an international award for the most innovative soft law. With these guidelines, Brazil’s antitrust agency can show more transparency and clarity.

- On merger control, there have been significant reforms in Brazil, Chile, and Argentina. Greco discussed how Argentina faced major problems of delay in merger review; hundreds of cases had more than three years of review on average. But reforms, new tools, and updated guidelines have streamlined the process. The merger review process is much faster today.

- In terms of challenges, political independence of the antitrust agency was discussed as a universal theme. Mr. Greco admitted that Argentina was a case of what not to do in terms of agency’s political independence. After studying various models, the agency has included changes to bolster its independence in the proposed new legislation.

- Cooperation was touted as a major issue. The panelists all agreed that regional cooperation between the antitrust agencies was essential. The panelists announced that Argentina, Brazil, Chile, and Mexico will create a new strategic alliance. They will also invite Colombia and Peru to join the regional cooperation that will meet once a year to share information on cases and bring new matters.

- In concluding remarks, Mr. Mena Labarthe stated that anti-cartel and corruption cases will be Mexico’s main focus. Mr. Irarrázabal stated that certainty was crucial for Chile. Antitrust law is liquid, but the agency must strive to apply the law in a manner that brings certainty to the private sector. Mr. Greco agreed with Mr. Irarrázabal that certainty is essential, and this cannot happen without regional cooperation between the neighboring states.
CLEARING THE DEAL IN 30 DAYS

Presented by the Economics, Federal Civil Enforcement, and Mergers & Acquisitions Committees

Your client wants merger clearance in 30 days. What kinds of analyses are most persuasive to agency attorneys and economists to make that happen? What are the most effective analyses to invest in and prepare for in the pre-filing stage and the first 30 days? Do complex economics merely hurt the cause? This panel of experts, which included current or former agency attorneys and an economist, provided first-hand advice on these questions.

CHAIR AND MODERATOR:
• Joanna Tsai, Charles River Associates, Washington, D.C.

SPEAKERS:
• Logan M. Breed, Hogan Lovells US LLP, Washington, D.C.
• Patricia A. Brink, Director of Civil Enforcement, U.S. Department of Justice, Antitrust Division, Washington, D.C.
• Deborah A. Garza, Covington & Burling LLP, Washington, D.C.
• Sharis A. Pozen, Vice President of Global Competition & Antitrust, General Electric, Washington, D.C.

SUMMARY:
• Ms. Tsai began the discussion by acknowledging that while most mergers are cleared within the first 30 days, others are not. Ms. Tsai asked the panel to explain and distinguish the outcome between these two scenarios.

• Ms. Brink prefaced the conversation by providing recent key statistics. Over a five year average, only four percent of all HSR filings triggered initial investigations, and 45 percent of initial investigations resulted in Second Requests. Of all Second Requests, approximately one-half resulted in a merger challenge. Thus, as a whole, Ms. Brink noted that the vast majority of deals were cleared within 30 days.

• Ms. Pozen commented that to maximize the chances that a merger is cleared within 30 days, it is always best for business executives to involve antitrust counsel early on in the M&A process. Involving antitrust counsel from the outset helps to identify, address, and potentially resolve any antitrust concerns before the merging parties file their HSR. Deborah Garza added that preparation also includes thinking through possible advocacy points and, perhaps, remedy options should either the FTC or DOJ raise competitive concerns.

• Mr. Breed noted that 4(c) and 4(d) documents are among the most important documents in determining whether a proposed transaction falls within the 4 percent of deals that will be investigated. In particular, what do the documents say about competition and are the merging parties listed among the top competitors to each other?

• The panel also discussed whether it was worthwhile to retain economists on a matter within the first 30 days of an investigation. The panel appeared divided on this issue. On the one hand, hiring an economist may signal the existence of competitive concerns; on the other, having an outside economist engage with an agency economist can be helpful in resolving issues that may otherwise lead to a second request. The
panel agreed, however, that the most effective analyses are those that show that the merging parties are not a competitive constraint to one another—e.g., win/loss data listing firms other than the merging parties.

- Careful planning will maximize the likelihood that a merger will be cleared within 30 days, even if it is initially part of that four percent of deals that draw an initial investigation.
JOINT DEFENSE GROUP ETHICS DEBATE

Presented by the Civil Practice & Procedure Committee

Joint defense and common interest agreements are both common and commonly misunderstood by clients and lawyers alike. What are the effects of breakup fees? When will an agreement not protect privilege? What are terms subject to negotiations? When do ethical considerations require companies or individuals to withdraw, or not participate in the first place? The panel addressed these questions and others.

CHAIR:
• Kenneth R. O’Rourke, O’Melveny & Myers LLP, Los Angeles, Cal.

MODERATOR:
• Tiffany Rider, Skadden Arps Slate Meagher & Flom LLP, Washington, D.C.

SPEAKERS:
• Eric P. Enson, Jones Day, Los Angeles, Cal.
• Craig Lerner, Antonin Scalia Law School, George Mason University, Arlington, Va.
• Amy B. Manning, McGuireWoods LLP, Chicago, Ill.

SUMMARY:

• This panel took the form of a debate and discussion about the joint defense and common interest privilege, key issues that arise with joint defense agreements, and best practices for addressing those issues.

• The purpose of the common interest privilege is to encourage free discussion between parties with a truly common legal interest. The key to the privilege is that the common interest be a legal, not a commercial one. The common interest will apply to communications (1) made by parties with a common legal interest, (2) to further that joint interest, and (3) are intended to be kept confidential.

• The first topic the panel addressed was whether a joint defense group should invite an amnesty applicant in a criminal investigation to join its joint defense agreement. The panelists agreed that it was critical that the applicant be transparent about its intent to be the amnesty applicant. One factor that favors allowing the applicant to join the JDA is that it will share a common interest in narrowing the scope of a follow-on civil case, which will often be much broader than the underlying government investigation. But a serious, potentially overriding concern is that inclusion of the applicant could make it much more difficult for the group to prove the interest is common. And that is the single biggest factor in courts’ assessment of whether to uphold the privilege.

• The group generally agreed that it was a best practice to reduce any joint defense agreement to writing, though written agreements are generally not required to establish a common interest exists. In particular, placing the agreement in writing can help provide clarity on thorny issues that arise with conflicts—i.e., through express language that no attorney-client relationships are created for other firms in the group—and when and how parties can or must withdraw from the JDA.
The panel returned to the issue of what kind of interest will support the assertion of a common interest privilege in the context of side agreements to an agreement to merge. The most common reason courts refuse to find a common interest exists is because the asserted common interest is only commercial. But unpacking the difference between commercial and legal interests is not easy. The panel hypothesized that, based on the case law, courts would and should refuse to compel disclosure of a side agreement between merging parties that identifies the type of remedial divestiture to which they might agree if necessary to succeed in potential litigation challenging the merger.

The panel also addressed several other issues that arise with JDAs. Courts typically find that attorneys in a joint defense group have a duty of confidentiality to companies or individuals in the group other than their own clients. This significantly restricts participating attorneys’ ability to use information obtained through the group for any purpose other than the joint defense without violating that duty or the JDA itself. In addition, panelists suggested it was a best practice to define the scope of the joint defense and common interest as narrowly as practicable given the needs of the litigation, to avoid conflicting the attorneys involved from representing their clients in unrelated litigation between two of the parties to the JDA.
WHAT BREXIT MEANS FOR COMPETITION LAW AND PRACTICE

Presented by the Corporate Counseling & International Committees with the International Task Force

As the U.K. marches towards exit from the EU, stakeholders need to understand the likely implications for antitrust policy and enforcement and to anticipate practicing in the new regime. This panel explored the world before and after Brexit, described the risks and opportunities, and highlighted the key areas of concern to businesses and policy makers.

CHAIR AND MODERATOR:
- Matthew Hall, McGuireWoods LLP, Brussels

SPEAKERS:
- Alison Jones, King’s College London, London
- Philip Lowe, FTI Consulting, Inc., Brussels
- Sheldon Mills, Senior Director, Mergers, Competition and Markets Authority, London
- James R. Modrall, Norton Rose Fulbright LLP, Brussels

SUMMARY:

The panelists discussed the following areas in which the Brexit is likely to effect change in competition law and policy:

- **Merger Control**: The panelists spoke most on merger control, likely because change is nearly certain in this space. Principally, Brexit will eliminate “one-stop shop” merger notifications; many companies post-Brexit must notify both the U.K.’s Competition and Market Authority (CMA) and the European Commission (EC). Mr. Mills explained that CMA expects a 50 percent increase in applications and will need a substantial funding increase. And while CMA and the EC have worked well together for decades, CMA may clash with EU authorities on market definition issues. Principally, CMA may determine that a market may only be U.K.-wide and not EEA-wide. And while U.K. merger control is more lax than U.S. merger control, this could result in a more critical look by CMA on certain mergers.

  Further, Brexit reignited a debate in the U.K. about government influence on merger control. Specifically, the government wants more say as it relates to foreign-owned businesses in infrastructure and other strategically important industries. On this point, Mr. Lowe was quick to note that although commentators treat this as a Brexit issue, in reality, countries around the world are concerned about foreign direct investment by state-owned companies.

- **Block Exemptions**: Mr. Mondrall suggested that the U.K. should extend block exemptions to give certainty to business. Mr. Lowe concurred that at least certain block exemptions are likely to continue.

- **Abuse of Dominance**: The panelists noted that EU case law is overly rigid and expect that the U.K. might soften their stance. Mr. Mills noted that, unlike Brussels, the U.K. conducts a lot of economic analysis and adjudicates more on the merits/facts rather than by object. For example, there is hope that the U.K. will adopt U.S. style policies relating to rebates and resale price maintenance. Mr. Lowe noted that, in a post-Brexit EU, there is concern that the EC will run amok without British influence.
• Cartel Enforcement: Mr. Mills explained that Brexit provides CMA an opportunity to develop enforcement policies and that there is a lot of work to do. Prof. Jones likewise opined that we can expect to see more EU/U.K. parallel enforcement. CMA is likely to follow DOJ, FTC, and Canadian authorities in many instances.

• Follow-on Competition Litigation: Many stakeholders are concerned that Brexit will decrease the number of follow-on lawsuits in U.K. courts. Current suits are often based on violation of EU law, which claimants use in court to prove liability. Post-Brexit, however, the panelists doubt it would be politically acceptable to continue assuming liability in the U.K. based on an EU decision. But, claimants prefer U.K. courts for independent reasons: English-language litigation, a well-regarded judiciary, and predictability. Panelists had difficulty opining on whether other EU jurisdictions, such as Germany and the Netherlands, would assume the U.K.’s current role in follow-on cases.
HERDING CARTEL CASES—RECONCILING AND RESOLVING MULTIPLE PROCEEDINGS

Presented by the Cartel & Criminal Practice Committee and the International Cartel Task Force

Parallel civil and criminal antitrust proceedings raise challenging case management issues, particularly in the cartel context, where cases are often before regulators and courts in multiple jurisdictions. Issues may include discovery stays, access to leniency materials, witness interviews, and cooperation by settling defendants. The panel explored best practices to minimize conflict, while reconciling the interests of plaintiffs, government enforcers, and defendants.

CHAIR AND MODERATOR:
• Fiona A. Schaeffer, Milbank Tweed Hadley & McCloy LLP, New York, N.Y.

SPEAKERS:
• Michael D. Hausfeld, Hausfeld, Washington, D.C.
• The Honorable Susan Y. Illston, Senior District Judge, U.S. District Court for the Northern District of California, San Francisco, Cal.
• Lisa M. Phelan, Chief, National Criminal Enforcement Section, U.S. Department of Justice, Antitrust Division, Washington, D.C.
• Ian Simmons, O’Melveny & Myers LLP, Washington, D.C.

SUMMARY:
• The panel was structured around a hypothetical international price-fixing case, with each of the panelists providing insight into the various stages of investigation, litigation, and resolution on both the criminal and civil fronts.

• Ms. Phelan began by discussing how if a company or companies face simultaneous international searches or raids, it is very likely that these were coordinated among the various competition authorities. It is also possible that the agencies are dealing with the same amnesty applicant who has applied for amnesty in both jurisdictions.

• The panel then discussed the filing of private lawsuits once news of the investigation is publicized. They addressed how in the United States, such an announcement will likely produce immediate civil filings. This contrasts with Europe, where there is a tendency to wait for an EC decision. As for working with a leniency applicant at these early stages, Mr. Hausfeld noted that sometimes a leniency applicant will call plaintiffs’ counsel in an effort to cooperate early in these civil suits. Ms. Phelan remarked that the DOJ will not reveal the identity of the amnesty applicant under any circumstances. But in many instances, the applicant reveals itself to take advantage of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which provides certain incentives for cooperators.

• The filing of civil lawsuits at the early stages of a criminal investigation can complicate matters. Ms. Phelan remarked that years ago, civil cases would typically not be filed until an indictment and, by that point, the investigation was very far along. But now, where civil cases are filed at the first hint of a raid or
grand jury subpoena, DOJ frequently tries to intervene to stay discovery while the investigation is being conducted. Ms. Phelan stated that DOJ will usually need six months or more before they feel comfortable having civil discovery proceed. Mr. Hausfeld added that in some cases, non-amnesty applicants may try to obtain a reduction in exposure by cooperating with private plaintiffs. This creates additional complications.

- The panel then addressed the merits of a motion requiring a leniency applicant to start cooperating under ACPERA. Judge Illston noted that she has not seen such a motion and would be surprised to because amnesty applicants must demonstrate that their cooperation was timely, and a failure to cooperate will undercut these claims. Mr. Simmons added that ACPERA obligations are up to the applicant, and each needs to assess when and how to discharge those obligations.

- Moving to issues of civil discovery, the panel addressed the frequent early requests in cartel cases to produce all documents previously produced to the DOJ and other competition authorities, produce financial and sales data, and take depositions of certain employees. The panel generally agreed that such broad requests were inappropriate when a government investigation was still in its early stages—particularly depositions. But panelists suggested that some information can be made available without interfering with the investigation. Judge Illston said that she hopes the parties can work together to find a middle ground between producing nothing and producing everything. Documents such as organizational charts and sales figures can likely be produced and depositions of non-defendants may also be allowed. Ms. Phelan generally agreed, and stated that while DOJ is troubled by requests asking for all grand jury material, they may not object to certain narrower categories of documents.

- Ms. Phelan and Judge Illston then discussed joint interviews of witnesses with other competition authorities. Ms. Phelan indicated that she prefers not to conduct joint interviews, although she has done back-to-back interviews with other agencies. If the foreign agencies are viewed as part of the same prosecution team, the defendants may be entitled to seek discovery from these foreign agencies as well. Judge Illston agreed, and noted that prosecutors are obligated to turn over Brady, Jencks, and Giglio material, which can be onerous and interfere with a trial schedule, particularly if they involve a foreign agency.

- The panel then broadly addressed non-U.S. civil damages actions. In Europe, there is a complicated mix of jurisdictional and discovery questions. Mr. Hausfeld noted that, on balance, there have been more of these cases brought in the U.K. than other European nations.

- The panel then turned to global resolution of civil and criminal claims. There was discussion among the panelists about whether criminal actions should be first settled in the United States. Mr. Simmons stated it may not be the best choice to first settle with the DOJ, but that usually happens because companies are so engrossed with DOJ. Ms. Phelan agreed that it was best to deal with DOJ first because of its broad reach—they look to prosecute companies and executives all over the world who may be culpable. Judge Illston was asked what role a court can play in giving peace to defendants, and she stated that settling these cases is very thorny because there is a lot going on around the world. As a district judge, she can give hard trial dates, make space in her calendar for individuals and companies to obtain their resolutions, and can appoint a settlement master to facilitate resolution.
STRATEGICALLY FIXING A MERGER

Presented by the Mergers & Acquisitions and Trial Practice Committees

Experienced private practitioners and government enforcers will discuss and provide insight to the strategic considerations of whether, when, and how to propose and make fixes to challenged mergers. How do the size and complexity of transactions relate to the fix? How do you manage your client’s expectations? These issues and more were explored from deal formation through litigation.

CHAIR AND MODERATOR:
- Gerald A. Stein, Attorney, Bureau of Competition, Federal Trade Commission, New York, N.Y.

SPEAKERS:
- Dorothy B. Fountain, Chief Legal Advisor, Antitrust Division, U.S. Department of Justice, Washington, D.C.
- John M. Majoras, Jones Day, Washington, D.C.
- Michael L. Weiner, Dechert LLP, New York, N.Y.
- Christine L. White, Vice President, Legal Affairs, Northwell Health, New York, N.Y.

SUMMARY:
- Christine White opened by stressing that wherever a remedy might ultimately need to be considered in a transaction, it is important for both in-house and outside counsel to develop, as early as possible, a thorough understanding not only of the transaction and potential antitrust pitfalls, but also of the client’s broader strategy. This will allow counsel to meaningfully support the business team in its negotiations and to provide clear rules with respect to communications and gun-jumping. Providing such clarity from day one will prevent problems from arising and inspire confidence in the process.

- The panelists advised that fixes should be proposed in a time and manner that allows agency staff to meaningfully assess the way the fix would address competition concerns. In concrete terms, staff is unlikely to have a clear view of their main concerns and, therefore, of what an effective remedy would be until they have analyzed information provided pursuant to a second request. For similar reasons, John Majoras suggested that it is unnecessary to strain to craft a remedy addressing all of the agency’s initial concerns when further investigation might prove many of those concerns unfounded. Most importantly, the panel cautioned strongly against eleventh-hour remedy proposals, with Dorothy Fountain explaining that such proposals would serve only to prolong agency review because, in her view, the agencies will not accept proposed fixes at face value and will instead require more time to analyze them.

- The panel advised approaching the agencies with fixes sufficiently developed to address concerns with certainty, but with enough flexibility to react to issues that arise. Mr. Majoras stressed that developing a suitable proposal called for a thorough and time-consuming process resulting in a level of concrete detail like a term sheet, but the panelists also urged approaching the agencies prior to reaching a final, signed deal. Indeed, Ms. Fountain advised against getting too far out in front of the agency review; even when the parties approach the agency with a remedy in hand does the agency may still have unresolved concerns.
The panelists remarked at the centrality of the divestiture buyer in advocating and litigating a proposed fix. They therefore recommended that parties should ensure divestiture buyers have antitrust counsel and be able to demonstrate their ability and incentive to compete vigorously and effectively. Mr. Majoras stressed that a proposed fix essentially involved litigating a second case within a case, with all the witnesses, trial preparation, and timing considerations that entails.

Finally, the panelists took note that the dearth of appellate precedents regarding litigated fixes has resulted in a lack of clear standards governing certain issues, such as the necessary timing of a remedy transaction and how its effects should be litigated with respect to every relevant market alleged. Ms. Fountain remarked that one of the few areas in which case law provides crystallized guidance was trial courts’ continuing endorsement of the agencies’ preferred standard for the sufficiency of a remedy: that a fix should maintain the “competitive intensity” that existed prior to the merger.
CHAIR’S SHOWCASE: PROMOTING COMPETITION/PROTECTING CONSUMERS: IN SYNC OR AT ODDS?

Consumer welfare is the centerpiece of competition policy, which is based on the premise that free markets best serve consumers’ interests. Consumer protection policy restrains trade that is perceived to threaten public welfare. Are the policies complements or substitutes? How should one account for the other? Which authorities should reconcile them? What arguments will influence the decisions? The panelists addressed these questions and others.

CHAIR:
- William C. MacLeod, Kelley Drye & Warren LLP, Washington, D.C.

MODERATOR:
- Leslie C. Overton, Alston & Bird LLP, Washington, D.C.

SPEAKERS:
- Timothy J. Muris, Kirkland & Ellis LLP, Washington, D.C.
- Richard Parker, O’Melveny & Myers LLP, Washington, D.C.

SUMMARY:
- The panel began by discussing shifting views towards advertising: in the 1970s, advertising was thought to manipulate consumer demand, while today, advertising is viewed as fundamental to competition. Mr. Muris explained that this transition is simply the result of good economics, which has revealed that advertising is a powerful tool for the elimination of ignorance, and therefore the lowering of prices. Mr. Fingleton opined that there are complementarities between advertising and competition, but Ms. Scott Morton noted that providing customers with more information is less useful in markets lacking rational consumer switching.

- The panel also discussed how to advise clients regarding restrictions on marketing, referencing recent cases brought against hospitals for their agreements not to advertise in each other’s territories. Mr. MacLeod noted that advertising is so fundamental to the terms and conditions of transactions that it is approaching the role of prices. Mr. Parker agreed, explaining that there are very few instances in which a business can limit advertising without raising antitrust problems. Perhaps the one area in which it is possible to do so is in the context of standard-setting organizations, but the standards must be true, and the process must not be polluted.

- The panel also discussed whether there is Section 2 exposure for false advertising. Mr. Parker believes that although the Lanham Act may provide a remedy, Section 2 will not. Ms. Overton stated that due to the new administration, the answer to this question is unclear, but the inquiry will remain highly fact-dependent. Ms. Scott Morton added that if false advertising included exclusionary behavior, it may implicate Section 2.
• The discussion then turned to whether trade associations may refuse to refer customers to horizontal competitors who have not met the standards established by the association. Mr. Muris believes that a case on these grounds would look like an advertising-substantiation case, in which a court would engage in a balancing test regarding Type 1 and Type 2 errors, assessing the benefits and costs of the allegedly excluded competitor. Mr. Parker suggested that expert testimony regarding the dangerousness or inferiority of the excluded business practice would be critical.

• The panel then discussed whether competition and/or the agencies can stop fraud. Mr. Muris noted that a primary reason for the FTC’s existence is to stop fraud by providing default rules, such as the mail-order rule establishing the reasonable time for delivery of a good.

• Finally, the panel discussed the growing importance of the internet and data in competition. One open question is whether a court should be able to order an entity to release data regarding customers’ purchasing history. Another issue deserving attention is whether the tracking of consumer behavior, and particularly adjusting prices based on consumer purchasing history, raises privacy and consumer-protection concerns.
ANTITRUST ENFORCEMENT PRIORITIES FOR THE NEW ADMINISTRATION

Presented by the Legislation Committee

What do we know about President Trump’s antitrust enforcement priorities three months into the new administration? What can we expect from the Agencies in the years ahead? The experienced panelists discussed early indications of the Administration’s legislative and enforcement priorities against the backdrop of the recommendations contained in the Section’s 2017 Presidential Transition Report.

CHAIR:
• Samantha H. Knox, Davis Polk & Wardwell LLP, Menlo Park, Cal.

MODERATOR:
• Roxane C. Busey, Baker & McKenzie, Chicago, Ill.

SPEAKERS:
• Leah Brannon, Cleary Gottlieb Steen & Hamilton LLP, Washington, D.C., Co-Chair of Antitrust Section Presidential Task Force
• Theodore Voorhees Jr., Covington & Burling LLP, Washington, D.C., Co-Chair of Antitrust Section Presidential Task Force
• Peter Levitas, Arnold & Porter Kaye Scholer LLP, Former Deputy Director of the Bureau of Competition at the Federal Trade Commission

SUMMARY:

The panelists shared their forward-looking recommendations and opinions using select portions of the Section’s 2017 Presidential Transition Report. The key topics were:

• Budget: Former FTC Chairman Bill Kovacic and Ted Voorhees warned that even moderate budget cuts to FTC or DOJ—lean agencies by international standards—could weaken agency performance. They opined that budget cuts will first hurt development of transparency efforts, such as written guidance and advisory speeches. Though seen as “soft” tasks, guidance efforts and speeches are important both domestically and internationally.

• Mergers: The panel expects the new administration to continue with the current framework for merger control. They recommended that the agencies (1) increase transparency, (2) evaluate effectiveness of policies, and (3) align DOJ and FTC processes. Panelists noted that a version of the SMARTER Act, which will bring FTC processes closer to DOJ processes, is likely to pass this year. The FTC’s jurisdiction to try merger cases through an internal administrative process will likely meet resistance and is less likely to pass, but converging injunction standards is more likely. Panelists also discussed acting FTC Chairman Maureen Ohlhausen’s desire to lower Second Request compliance costs. But Prof. Kovacic doubts costs will be lowered and explained that previous agency leaders have expressed this goal but eventually hit a brick wall.
• Healthcare: Mr. Levitas was confident that healthcare will be a continued agency focus. He noted that budget cuts aren’t likely to affect healthcare-related efforts. Areas of focus include reverse payments in the wake of Actavis, product hopping, and prescription drug prices. Prof. Kovacic was careful to explain that agencies might investigate drug prices the way that gas prices are often investigated, but that bringing (much less winning) an antitrust case based on high drug prices alone is a near impossibility.

• Monopolization: The panelists agreed that agencies remain unlikely to litigate a large-scale monopoly case in the new administration, noting that good cases are hard to find. Instead, the Section’s Report has asked agencies to look at vertical issues such as two-sided markets, contracts referencing rivals, and tying/bundling.

• Cartels: The new administration is expected to continue previous administrations’ effective cartel enforcement. The panelists noted that business would benefit from further agency guidance on volume of commerce calculations. The defense bar has also called for further guidance in wake of a perceived narrowing of the leniency FAQ. Although DOJ’s Brent Snyder says that DOJ’s policies haven’t changed, leading leniency practitioners stress that specifics are of the essence given leniency’s sensitive nature.
BENCHMARKING: LEGITIMATE CORPORATE COMMUNICATION OR POTENTIAL COLLUSION?

Presented by the Corporate Counseling Committee

The atmosphere is cautious following recent enforcement actions across the globe; yet benchmarking remains a common and often worthwhile practice. The panelists discussed how to maximize the legitimate commercial gains while minimizing the antitrust risk.

CHAIR AND MODERATOR:
- **Mary N. Lehner**, Freshfields Bruckhaus Deringer U.S. LLP, Washington, D.C.

SPEAKERS:
- **Norman R. Armstrong**, King & Spalding LLP, Washington, D.C.
- **Mika Clark**, Antitrust Counsel, United Airlines, Chicago, Ill.
- **Rani Habash**, Dechert LLP, Washington, D.C.
- **Aimee L. Imundo**, Executive Counsel, Competition Law & Compliance, General Electric, Washington, D.C.

SUMMARY:

- Mary Lehner began by defining “benchmarking.” This information-sharing methodology occurs when entities exchange information about their practices, methods, or performance with their competitors, allowing each entity to assess its strength and weaknesses. Without proper limits to this information sharing, companies can run afoul of Section 1 of the Sherman Act, as well as EU competition law’s Article 101.

- Norman Armstrong remarked that courts and agencies agree that there are certain procompetitive benefits to benchmarking. It can allow buyers and market participants to make more efficient decisions, especially when done openly and without the intent to fix prices. He discussed the courts’ application of a “rule of reason” analysis to determine legitimacy of information exchanges, assessing factors including (1) industry structure and concentration, (2) intent behind the information-sharing, (3) public availability of information, and (4) frequency of the exchange.

- Rani Habash noted the lack of bright-line rules relating to benchmarking, and cautioned that the case law suggests that the clearer the procompetitive purpose and the less sensitive the information, the more likely that the information exchange will pass judicial muster. The case law demonstrates that disaggregation of data—using averages instead of ranges, for example—can minimize some of the antitrust risk. Intuitively, markets with fewer competitors are inherently more suspect for antitrust enforcers investigating this type of activity.

- Mr. Habash described specific agency guidance of interest to certain industries and business units. Most recently, in 2016, the agencies issued “Antitrust Guidance for Human Resources Professionals,” which advised companies engaging in employment-related information exchanges to: (1) use a neutral third-party manager to process the data (i.e. trade association or consultant), (2) gather only backward-looking
information, (3) aggregate data to de-identify it, and (4) collect from enough sources to protect the information from being de-identifiable.

- Mika Clark discussed how benchmarking typically arises for in-house counsel. Although prototypically an issue with trade associations, in her experience, benchmarking issues surface frequently. These types of issues come up in joint venture talks and alliance discussions. Furthermore, nearly every unit of her business wants to benchmark to improve performance, whether that arises in revenue strategy, HR, airport operations, or elsewhere.

- Aimee L. Imundo underscored the international implications of benchmarking practices, which evoke more aggressive scrutiny in foreign jurisdictions, especially in the EU. European regulators are far more aggressive on the information-exchange front. On the cartel front, although U.S. antitrust laws require proof of an “agreement” to qualify as a cartel, EU law allows proof of a “concerted practice” to suffice for cartel status; even unilateral information sharing has elicited enforcement actions in the EU.

- Ms. Imundo then gave three pieces of “best practices” advice. First, she advised that when confronting these issues, it’s important to remember the global implications. Compliance with U.S. antitrust law is not enough. Second, trade association activity should be closely monitored, as this area is ripe for problematic information-exchange issues. Finally, she recommended that when asked about benchmarking issues, ask the business units to consider benchmarking against non-competitors. Much of this information can be gathered elsewhere and achieve the business unit’s goals with fewer competitive issues.
FCC, FTC, EU, AND THE INTERNET OF THINGS

Presented by the Consumer Protection and Media & Technology Committees

Some have estimated that by 2020, 50 billion devices will be connected to the internet. Privacy, technology, and competition issues will be paramount in the full development of this Internet of Things. This panel featured a primer on the promises of IoT and a round table discussion with policy leaders from the FTC and FCC on the regulatory challenges presented.

CHAIR:

MODERATOR:
- Owen M. Kendler, Chief, Litigation III Section, Antitrust Division, U.S. Department of Justice

SPEAKERS:
- Kim Hart, Axios, Washington, D.C.
- The Honorable Terrell McSweeny, Commissioner, Federal Trade Commission, Washington, D.C.
- Jonathan Sallet, Attorney, Washington, D.C.
- Rob Mahini, Senior Policy Counsel, Google Inc.

SUMMARY:

- Kim Hart opened with an overview of the industry and developments in Internet of Things (IoT). Today, most homes have eight connected devices and some estimate that number could increase to 400 by 2020. Hart predicts that the most growth for IoT will stem from connecting home devices to the internet. The biggest hurdle for IoT is consumer trust and adoption.

- Jonathan Sallet then segued into talking about the economic policies surrounding IoT. Mr. Sallet warned that IoT created many questions with relatively few answers. He said that the common definition of IoT is ubiquitous and, as a result, the relevant product market is very broad. He cautioned that in the world of IoT, there may be more vertical relationships, which could raise many questions by the Department of Justice. Vertical relationships increase efficiency, but the DOJ has been increasingly wary about vertical integrations, especially in highly compacted markets.

- IoT devices collect a plethora of user information. And the Honorable Terrell McSweeny wants to make sure consumers understand the context within which they are sharing information and how the information is being used. She pointed to the FTC’s recent case against Vizio as an example for the types of privacy cases the agency plans on bringing in this space. Rob Mahini suggested a harms-based approach when deciding whether consumer consent is required. If a manufacturer is doing something that could harm the consumer, then notice and affirmative consent should be required.

- All panelists agreed that privacy and security are two primary concerns for consumers. Ms. Hart acknowledged that consumers do not fully understand the effects from using IoT devices. Consumers know they are using the device and getting the right outcome, but they cannot see what information they
are sharing and how their information is being used. IoT devices can paint a very complete picture of someone’s daily routine and consumers do not fully comprehend those “coupling factors.”

• When asked why there are so many regulators in this space, all panelists agreed that one agency cannot be responsible for regulating IoT devices. Mr. Sallet remarked that IoT is not one thing, and therefore, it is hard to imagine how a single agency could devise a comprehensive set of rules. Ms. McSweeny agreed, saying there is not a one-size-fits-all answer to the privacy and security concerns. The correct solution is partnership and coordination among all agencies.

• The panel closed with remarks on the application of Section 5’s reasonableness standard to IoT. The definition of reasonableness will have to adapt as the technology advances; therefore, the definition must be flexible. Mr. Sallet explained that this space is dynamic, and the government cannot specify what it does not know.
JOINT VENTURES—KEEPING COMPETITOR COLLABORATIONS COMPLIANT

Presented by the Civil Practice & Procedure Committee

Joint ventures are critical components of the pharma, technology, telecom, and energy industries, among others. JVs can take many forms and raise questions regarding partial ownership, information sharing, efficiencies analysis, non-compete terms, and potential competition. This panel explored these issues and identified third rails and areas of sensitivity for counseling attorneys.

CHAIR AND MODERATOR:
- Richard H. Cunningham, Gibson Dunn & Crutcher LLP, Denver, Colo.

SPEAKERS:
- Craig G. Falls, Dechert LLP, Washington, D.C.
- Wolfgang Heckenberger, Chief Counsel Competition, Siemens AG, Munich
- Amanda P. Reeves, Latham & Watkins LLP, Washington, D.C.
- Shelley Webb, Senior Litigation Counsel, Intel Corp., Santa Clara, Cal.

SUMMARY:

- Amanda Reeves first laid out the basic legal framework for analyzing joint venture collaboration. She explained that the first step is to determine whether the collaboration is actually a single entity, in which case it would be outside of the scope of Sherman Act Section 1 scrutiny. The second step is to identify the business activity undertaken by the joint venture and ask, but for the joint venture, how would the collaborating companies otherwise be participating in the relevant market? The third level of analysis extends to the activities and side agreements between the collaborating companies that are outside the scope of the core function of the joint venture, which are addressed by the ancillary restraints doctrine.

- Craig Falls provided further insights on the contrast between merger analysis and rule of reason analysis with respect to joint ventures. Clayton Act Section 7 merger standards apply when the transaction completely eliminates competition between the parties, and to partial acquisitions in certain circumstances. A Sherman Act Section 1 analysis applies to joint ventures where the parties remain competitors and in that instance a court will apply the rule of reason, requiring a determination of whether there is a “less restrictive alternative” to achieve the alleged efficiencies produced by the joint venture.

- Shelley Webb introduced the concept of ancillary restraints. Under the ancillary restraints doctrine, the restraint must be reasonably related to, and reasonably necessary to achieve, procompetitive benefits in order for the restraint to earn rule of reason analysis. One common challenge for courts is the confusion between core conduct and ancillary restraints.

- Wolfgang Heckenberger compared the joint venture analysis in the U.S. to that applied in the EU. He explained that the EU legal regime is quite similar to the U.S. approach to joint ventures, but noted that the EU has issued clear guidance on ancillary restraints, and has specifically addressed non-compete provisions, non-solicitation clauses, and supply and licensing agreements.
Ms. Webb remarked that collaboration is very common in the technology sector and provided several procompetitive reasons for this, including: (1) sharing the high costs of research and development; (2) combination of complementary capabilities; (3) achievement of economies of scale and scope; (4) development of a platform or two-side services; and (5) development of technology standards that ensure technology operability. Nonetheless, she advised that companies, however, should be cautious about the entanglements that joint ventures entail, and the risks that arise from those entanglements.

Ms. Reeves provided a list of the agency guidelines governing joint ventures, including the Competitor Collaborations Guidelines, the Healthcare Guidelines, the Merger Guidelines, and the IP Guidelines. She noted, however, that most of the landmark cases occurred after the issuance of these guidelines, which limits their utility. Mr. Falls took issue with the agency guidelines because they adopt a per se illegal approach to joint ventures, invite speculative judgment by persons who do not recognize commercial realities, and remain silent with respect to single-entity analysis.

Mr. Heckenberger explained information-sharing issues in joint venture negotiations. According to Mr. Heckenberger, it is advisable to use a need-to-know approach to information sharing and to create “clean teams” of employees who have access to joint venture partners’ sensitive information. If and when joint venture negotiations collapse, the members of these “clean teams” would be allowed to enjoy approximately two years of paid leave away from their respective companies.

Ms. Webb suggested that companies sign confidentiality agreements at the outset of joint venture negotiations, limit the number of people who have access to sensitive information, and return or destroy sensitive information as soon as negotiations are completed, while keeping a detailed record of such activity throughout the process. She further advised that companies should establish policies and procedures concerning information sharing, employee training procedures to ensure those policies are implemented, and appropriate information technology firewalls prior to any joint venture negotiations.

Ms. Webb stated that non-compete provisions in joint ventures generally are lawful if they are reasonably necessary to accomplish the legitimate business purpose of a joint venture and reasonably tailored to achieving that purpose. These provisions typically take the form of restrictions on competing against the products of the joint venture itself or its partners or against solicitation of each other’s employees. Ms. Webb recommended that companies narrow the scope of the non-compete provisions, tailor them to a business justification, and set reasonable time limits for their duration.

With regard to the agencies’ oversight of partial ownership, Ms. Reeves noted that the FTC has provided guidance on this topic and that partial ownership receives particular scrutiny in concentrated industries. Mr. Heckenberger believes that there is a gap in the EU merger control regime when it comes to minority share holdings, as evidenced by the Facebook-WhatsApp case and the EU’s inability to order Ryan Air to divest its 30% share in Aer Lingus, despite its anticompetitive effects.
UNFAIR METHODS OF COMPETITION AROUND THE WORLD

Presented by the International Task Force

In 2015, the U.S. FTC issued its long-awaited Section 5 (Unfair Methods of Competition) Policy Statement. Since then, several foreign agencies, including China’s SAIC, have proposed revisions to their unfair competition laws. This panel of experts discussed the guiding principles and proposed revisions.

CHAIR AND MODERATOR:
• James J. O’Connell, Covington & Burling LLP, Washington, D.C.

SPEAKERS:
• Kala Anandarajah, Rajah & Tann Singapore LLP, Singapore
• Hwang Lee, Korea University School of Law, Seoul
• Yong Huang, Chief Executive Officer, University of International Business and Economics (UIBE), Beijing
• Joshua D. Wright, Antonin Scalia Law School, George Mason University, Arlington, Va.

SUMMARY:
• Professor Joshua D. Wright began by discussing Section 5 of the FTC Act. He believes that the definition of “unfair” in Section 5 is vague and ambiguous. Prof. Wright provided the two options for defining an unfair method of competition: (1) fairness in the competitive process, ex-ante, and (2) ex-post fairness, where the competitive process happened and we can use unfairness authority to redistribute and change bargaining outcomes. Mr. Wright opined that he was quite pleased that the Commission adopted the ex-ante approach under the rule of reason, but he noted that the FTC’s 2015 Statement has implications to settlements entered into prior to the Statement’s existence.

• Prof. Wright does not believe that N-Data, Bosch, and Google survive the 2015 Statement. He explained how the FTC responds to those, as well as the FTC’s Qualcomm complaint, matter to the rest of the world’s enforcement of unfair competition. He opined that the benefit of having a Statement is to constrain Commissioners and their staff from adopting interpretations that are outside of agreed-upon bounds of the Sherman Act. He believes that courts will have something to say about the boundaries of Section 5, and opined that getting the courts involved in the tethering of rule of reason concepts to unfair methods is a benefit.

• Professor Hwang Lee explained that the difference between the abuse of market dominance and unfair trade practices has been a hotly debated topic for lawyers in Korea and Japan. The current unfairness jurisdiction in Korea and Japan prohibits various unfair competition that has more than a substantial impact on competition (the theory and practice developed in Japan has heavily influenced Korea and many Asian jurisdictions). The unfairness jurisdiction has a vague standard; there is a political influence of Confucianism that emphasizes the concepts of fairness, equality of people, and the balance of distribution of wealth—but does not directly relate to economic efficiency. One of the biggest differences between abuse of market dominance and unfair trade practices is that one does not need to have or obtain market power/dominance to engage in unfair trade practices, as long as it has relative power to disadvantage other parties in the transaction.
• Prof. Lee described the two main standards, indicating that they were close to what is provided by Section 5 of the FTC Act: (1) Type 1 Conduct is conduct that tends to restrict competition and violates fairness, but does not require strong evidence of anticompetitive effect, and (2) Type 2 Conduct is an unfair term of trade or an unfair competitive means. Prof. Lee explained that Type 1 Conduct will disappear or be incorporated in traditional abuse of dominance. Type 2 Conduct does not have to do directly with efficiency or consumer welfare, but rather, is something that harms or tends to harm fair competition. Prof. Lee opined that the KFTC and Korean courts might not want to sacrifice too much efficiency in the name of fairness and that this is a difficult balance.

• Kala Anandarajah explained that Southeast Asia has seen its competition laws evolve over the last dozen years or so. She opined that she cannot see how objectivity gets factored into unfairness analysis. In Singapore, there are no specific prohibitions against unfair methods of competition; they look to net economic benefit, which requires a weighing the balance of probabilities. The idea is to protect consumer welfare—not just at the consumer/individual level—in order to maximize total welfare in the country. Ms. Anandarajah provided a high-level overview of unfair competition law in Indonesia, Thailand, Vietnam, Laos, and Myanmar. She noted that the differences in each of these countries cautions that attorneys cannot apply one set of principles around the world, and corporations need to look at each specific jurisdiction. She concluded that in Southeast Asia, the principles are getting more complex and that some of these jurisdictions are involved in active antitrust enforcement.

• Yong Huang explained that the State Administration for Industry & Commerce (SAIC), a purely administrative body with no right to draft or interpret law, has the ability to enforce China’s anti-unfair competition laws. There are more than 1,600 bodies doing the enforcement. Mr. Yong described the recent amendments/articles being introduced, including a highly controversial article that would give SAIC the ability to interpret, not just enforce the laws. Based on his personal observations, scholars and enforcers in China paid attention to the 2015 Statement. He also noted that at least one case has used Section 5 of the FTC Act.
VIEW FROM THE BENCH ON MERGER CASES

Presented by the Federal Civil Enforcement, Mergers & Acquisitions, and Trial Practice Committees

Significant merger cases have gone to trial over the last several years. This panel featured judges who have presided over some of these challenging and rigorously contested cases. The judges discussed lessons and observations from the trials.

CHAIR AND MODERATOR:
- Douglas C. Ross, Davis Wright Tremaine LLP, Seattle, Wash.

SPEAKERS:
- The Honorable William H. Orrick III, Judge, U.S. District Court, Northern District of California, San Francisco, Cal.
- The Honorable Dan A. Polster, Judge, U.S. District Court, Northern District of Ohio, Cleveland, Ohio
- The Honorable Emmet G. Sullivan, Judge, U.S. District Court, District of Columbia, Washington, D.C.

SUMMARY:

- Judge Sullivan opened with thoughts on the 2015 GE-Electrolux and the 2016 Staples-Office Depot merger cases. He began by discussing the delicate balancing act of protecting competitively sensitive information against the public’s right to information in a public trial. He further discussed his desire to be actively involved in these cases—having issued over 100 pretrial orders. He remarked that there was a lack of a meaningful opportunity to appeal in merger cases given the frequently short timing constraints.

- Judge Sullivan provided guidance for lawyers in a merger case. He found the use of graphics helpful during trial. He also emphasized the importance of themes in such cases. For example, he lauded the Government’s use of the proverbial Ms. Smith living on fixed income who would be subjected to steep increases in appliance prices in the GE-Electrolux merger case. As another example, Judge Sullivan cited Staples and Office Depot’s imagery of two penguins sharing space on melting ice. He stated that these were effective uses of themes and that he has not forgotten the arguments.

- Judge Orrick spoke about the 2012 Bazaarvoice merger case. He recalled premerger documents that raised antitrust issues, referring to emails where the two companies were discussed as a duopoly, for example. He stated that it was not helpful that the defendants tried to walk away from such evidence during the trial because it caused credibility problems. He suggested that parties should embrace such evidence and deal with it head-on. Judge Orrick also discussed the problem of clients who think of themselves as the master of the universe. When an executive taking the stand comes across as such, it does not work well for the fact-finder who is trying to get to the truth. He ended by emphasizing the importance of expert testimony and being able to explain the critical issues of the case in plain English.

- Judge Polster then discussed the 2015 Steris-Synergy litigation. He stated that the key issue in the trial was whether the actual entry fee was a violation. At trial, he mainly focused on whether Synergy would enter the market. He determined that the metrics from the documents did not support its entry and concluded the merger did not have any effect.
• On the issue of accelerated schedule, Judge Sullivan stated that the accelerated process of merger cases was the nature of the beast and that it could not be controlled. He suggested that a presiding judge in a merger case may consider referring the case to another judge to explore settlement opportunities for the parties. The judges also discussed their varying approaches to trial times.

• In dealing with complicated economic evidence, Judge Sullivan stated that he prefers to actively ask many questions to the experts. His approach is to ask questions if he does not understand the issue. But he cautioned against trying to assess his views based on his questions during trial. Judge Orrick, on the other hand, stated that he does not ask many questions, preferring to spend more time before the testimony reading the statements. Judge Polster stated that he is also an active questioner with witnesses. He also agreed with Judge Sullivan that attorneys should not read into the judge’s questions.

• On the issue of what attorneys can do to help explain complicated concepts, Judge Sullivan reiterated his point about the helpful use of graphics. He stated that the best expert is the one who can break down the concept and speak to the fact-finder in terms he or she can understand. He also pointed to demeanor of the witness as being equally important as the testimony itself in establishing credibility. He suggested that the attorneys should help humanize the expert. Judge Polster stated that the most credible expert is the one who is willing to admit that he or she does not know everything. He recommended that the expert would be more persuasive and credible if he or she can admit that a different test could yield different results. Judge Sullivan stated that Brown Shoe is still good precedent and that judges have to be innovative about determining how to apply the cases. Judge Orrick stated that judges still look for wisdom from cases that may be dated. He suggested that the Merger Guidelines are also helpful. Judge Polster opined that it is equally plausible that a forty-year old precedent is still established because it was well-written. If the parties believed the law needed to be changed, they would have brought cases to the Supreme Court to change the law. He stated that if the cases are not coming up, then the Supreme Court must have gotten it right forty years ago.

• When asked about Supreme Court’s antitrust rulings that are decades old, all three judges agreed that the date of the cases does not pose any problems. Judge Sullivan stated that Brown Shoe is still good precedent and that judges have to be innovative about determining how to apply the cases. Judge Orrick stated that judges still look for wisdom from cases that may be dated. He suggested that the Merger Guidelines are also helpful. Judge Polster opined that it is equally plausible that a forty-year old precedent is still established because it was well-written. If the parties believed the law needed to be changed, they would have brought cases to the Supreme Court to change the law. He stated that if the cases are not coming up, then the Supreme Court must have gotten it right forty years ago.

• For concluding remarks, Judge Sullivan emphasized the importance of collegiality and decorum between opposing counsel. He stated that it is difficult when opposing attorneys do not get along. He also pointed to paralegals and staff members as the unsung heroes. Judge Orrick also agreed; attorneys should remember to be their best selves when dealing with courtroom staff. He stated that if attorneys are not kind to his staff, he will likely hear about it. He also reiterated the importance of presenting a clear theme to the judge. Judge Polster closed by asking attorneys to think from the judge’s perspective. He asked to be mindful of the judge’s time; attorneys should be effective and efficient.
HOT TOPICS

Antitrust and consumer protection policy, enforcement, and litigation change every day with vital issues constantly surfacing. This panel looked at how the past year has set the stage for the new issues of today and trends of tomorrow.

CO-CHAIRS:
- Paul H. Friedman, Dechert LLP, Washington, D.C.
- Margaret A. Ward, Jones Day, Palo Alto, Cal.

SPEAKERS:
- Thomas O. Barnett, Covington & Burling, former Assistant Attorney General in charge of DOJ Antitrust Division
- Deborah L. Feinstein, former Director of FTC Bureau of Competition
- Renata B. Hesse, Sullivan & Cromwell, former Acting Assistant Attorney General in charge of DOJ Antitrust Division

SUMMARY:

- Mergers: Ms. Hesse explained that when trying merger cases before a generalist judge, it is important to explain concepts in plain English and not use antitrust jargon. The credibility of experts is also extremely important, so experts should have the humility to admit when they do not have an answer that advances their party’s position. Mr. Barnett agreed and noted that use of antitrust jargon is more appropriate in presenting cases to the agencies because they have the experience and expertise to understand it. Ms. Feinstein opined that it is important to have documents, testimony from customers, and solid economic analysis to bring a strong case.

- Remedies: Ms. Feinstein explained the FTC’s recent study regarding merger remedies, noting that the two main takeaways were that it would be harder to convince the agencies to accept a divestiture of something less than a standalone business, and that parties should expect the remedy process to take longer because the agencies will do significant diligence to maximize the chance of a divestiture buyer’s success. Ms. Feinstein also stated that the standard in assessing remedies is whether they replaced any lost competition, which Mr. Barnett noted was encouraging because some previous statements by others indicated that the remedy must improve competition. Ms. Hesse noted that the current approach to remedies resulted not from any philosophical differences in the front office, but from an evolution of learning regarding what works and what does not.

- Merger Review Process: Mr. Barnett observed that the agencies increasingly have been focusing on litigation preparedness during the investigation phase and that they might consider whether the proper balance is being struck. Ms. Hesse noted that when cases proceed to litigation, parties request incredibly compressed trial schedules, so the agencies necessarily must begin preparing for litigation during the investigation phase. Ms. Feinstein opined that the parties ultimately control the timing in merger reviews and they often extend the process by, for example, asking the agencies to take a month to consider a proposed remedy that they already indicated would be insufficient.
• Cartels: Mr. Barnett stated that the decision to seek leniency is a very big one with tremendous consequences for parties, and that it may be problematic if there is any reason to question the unambiguous message that neither a company nor any individual associated with the company will be prosecuted when leniency is sought. Ms. Hesse explained that recent changes to the DOJ’s FAQs regarding leniency have not significantly changed the way DOJ views the issue, as individuals including former employees who provide valuable information will continue to receive protection whether through the leniency process or a subsequent non-prosecution agreement.

• Transitions and the Future: Ms. Hesse explained that she does not worry much about transitions because while there may be some differences at the margins, there will not be a fundamental change to the principled way the agencies enforce the antitrust laws. Mr. Barnett agreed, noting, for example, that when the DOJ’s Section 2 guidance was pulled, not much changed with respect to actual antitrust enforcement. Ms. Feinstein stated that past actions at the FTC were the best predictor of what might happen in the future; noting that the relatively few split decisions at the Commission demonstrated that there generally is a consensus. The panelists agreed that mergers involving two-sided markets and big data are the main issues that the agencies and parties will likely have to tackle in the near future.
PRACTICE, ETHICS AND PRIVILEGE AFTER THE YATES MEMO

Presented by the Compliance & Ethics Committee

The Yates memo went public in September of 2015, strengthening DOJ policies concerning corporate executive accountability for criminal corporate conduct. Do the policies test an attorney’s duty of loyalty, confidentiality, or candor toward third parties? The Panel discussed the impact of the Yates policy changes on ethical considerations in antitrust counseling and compliance.

CHAIR AND MODERATOR:
• F. Joseph Gormley, Gormley Jarashow Bowman LLC, Annapolis, Md.

SPEAKERS:
• Frank Aquino, Vice President & General Counsel, EA Engineering, Science, and Technology Inc., Hunt Valley, Md.
• David Hankey, Gohn Hankey Stichel & Berlage LLP, Annapolis, Md.
• Dean Hoffman, DB U.S. Holding Corp., Tarrytown, N.Y.
• Mary Strimel, McDermott Will & Emery, Washington, D.C.

SUMMARY:
• The panel began by summarizing how the Yates memo has placed increased pressure on corporate cooperators by requiring them to disclose all facts relevant to individuals responsible for wrongdoings in order to receive cooperation credit. This requirement was intended to further a policy of holding individuals accountable for corporate misconduct.

• The panel then discussed how the directives of the Yates memo have affected Upjohn warnings in practice. There was a general consensus that a more cautious approach is warranted and corporate counsel should make the distinction between company and individual representation clearly and early. Mr. Hankey suggested that the Yates memo has rendered a basic Upjohn warning insufficient and it is now incumbent on corporate counsel to notify the witness that there is a possibility that the government may target individuals and, if necessary, inform them that they may want to consider retaining individual counsel. To be especially cautious, Mr. Hankey reads an Upjohn warning from a sheet, which he subsequently has the employee sign.

• For international companies, Mr. Hoffman emphasized that foreign ownership and a lack of familiarity with U.S. agencies and their procedures complicates matters in this area. If the witness in an investigation is foreign, corporate counsel must be even more careful in explaining the corporate-individual distinction with respect to representation. Corporate counsel must be further mindful of different rules in other nations relating to in-house attorney-client privilege as well.

• The panel then addressed retaining individual counsel for employees who may become targets. The panelists agreed that the safest path is to retain counsel for individuals as soon as possible, even if this slows down an investigation. Further, if it is questionable whether an individual needs independent counsel, it is better to err on the side of caution and retain counsel for those individuals. The panel discussed how retention of individual counsel need not interfere with placing an amnesty marker in an
antitrust case, which typically requires companies to move very quickly. That is because the standard for initially placing down a marker is minimal and does not require detailed information at the outset. Finally, Ms. Strimel noted that in her prior experience at DOJ, she has not seen the retention of counsel for individuals viewed negatively. To the contrary, skilled antitrust counsel can facilitate the development of the facts at an early stage.

- In a similar vein, the panel cautioned that companies should not attempt to exercise too heavy a hand in attaching conditions to paying for an individual’s representation. Put another way, the company’s payment should not depend on the scope or type of cooperation. Such conditions may be discoverable in a criminal case and can impeach a witness’s credibility. On the other hand, the company may have some latitude in helping to select individual counsel. The panelists concurred that the company has a valid role in determining whether they will pay for certain lawyers as individual counsel.

- With respect to joint defense communications between company counsel and individual counsel, Ms. Strimel noted that the DOJ does not have a policy of asking the company to waive the privilege. But it is an open issue of whether the Yates memo’s directive for complete disclosure effectively requires disclosure of information obtained in interviews with these individuals. The consensus of the panel was that the Yates memo moved the needle, and companies are going to have form conclusions about what may be privileged material.

- The panelists then discussed the frequent request at company interviews for witnesses to maintain the confidentiality of an investigation. It was agreed that standard admonitions urging confidentiality are not obstructive, but it would be problematic if a company tried to thwart an individual from approaching DOJ. Further, if a company imposes stringent conditions such as keeping one’s job on remaining silent, this can also be problematic. One panelist suggested framing the issue as emphasizing the importance of not speaking to others about the investigation.

- Once an individual has counsel, all of the panelists concurred that it was unwise to speak with that individual about the investigation without counsel present. This applies even if the individual approaches the company without his or her lawyer present.

- Finally, the panelists discussed the retention of employees who may be responsible for corporate wrongdoing. This issue can get complicated, as the company frequently does not want these individuals in a position to commit further wrongdoing or to influence potential witnesses who may report up to these individuals. On the other hand, the responsible individuals are frequently essential to the company’s cooperation. The panel agreed that paid administrative leave may be the best solution for treatment of such individuals.
REPRESENTING NON-PARTY WITNESSES IN MERGER INVESTIGATIONS AND LITIGATION

Presented by the Federal Civil Enforcement Committee

Regardless of whether supporting, opposing, or neutral to a proposed transaction, one thing non-party witnesses in merger investigations and litigation have in common is the unexpected expense and management distraction that occurs. This panel discussed the role of non-party witnesses in recent merger challenges and provided practical tips if your client “gets the call.”

CHAIR:
- Amanda L. Wait, Hunton & Williams LLP, Washington, D.C.

MODERATOR:

SPEAKERS:
- Eric J. Mahr, Director of Litigation, U.S. Department of Justice, Antitrust Division, Washington, D.C.
- Tara L. Reinhart, Skadden Arps Slate Meagher & Flom LLP, Washington, D.C.
- Paula W. Render, Jones Day, Chicago, Ill.

SUMMARY:
- William Stallings, previously with the DOJ, began by explaining the overall purpose of third-party involvement in merger investigations: the agencies often seek information from market participants—such as customers and competitors—that can help inform the agency’s analysis as to whether a competitive concern exists in a proposed merger. He further noted that once an investigation morphs into litigation, third-party information can be especially helpful to both the government and the merging parties. The involvement of third parties has taken on new significance, highlighted by the FTC v. Staples litigation from last year, in which over 200 third parties were subpoenaed.

- Amanda Wait acknowledged that clients are often leery of stepping into an investigation or litigation as a non-party and especially when sharing sensitive business information may be required. Ms. Wait asked the panel whether it is wise to cooperate with the DOJ or FTC, considering the potential costs involved. The panelists agreed that it is prudent for clients to call antitrust counsel before cooperating so that counsel can assist with both navigating the process and developing a plan of engagement with the agencies. Some issues that should be addressed before having discussions with the DOJ or FTC are: what is the non-party’s position about the merger, in favor or against? How might the merger impact the non-party’s business?

- Eric Mahr noted that the process by which third parties first become involved is with a call from agency-attorneys asking for voluntary cooperation. This is often a voluntary request to participate in an interview with staff attorneys who are in search of, or want to validate, facts for their competitive analysis of the investigation. As the investigation progresses, a more formal request for information may be made in the form of subpoenas for documents and testimony. As a general matter, parties that cooperate often
receive narrower and more tailored subpoenas that minimize burden because the third party can explain what documents or information they do and do not have before the subpoenas are ever issued.

- Tara Reinhart, former Chief Trial Counsel at the Federal Trade Commission, noted that some third parties may want to cooperate, but only in an impartial manner. In such cases, Mr. Mahr said, the government is happy to provide “cover”—to issue friendly subpoenas as a means to provide a basis for the third party to cooperate without seeming as though it was doing so voluntarily. This may be especially helpful for customers which will have ongoing commercial relationships with the merging parties.

- Finally, there was a discussion about the use of declarations. The DOJ does not use declarations widely, whereas the FTC uses them with some frequency. As part of its affirmative case, the FTC in Staples used a number of declarations in support of its argument at trial. These declarations from various industry participants were drafted with the assistance of FTC attorneys. Ms. Reinhart defended the practice, noting that declarations are an important part of building a case, especially for merger cases that involve complex legal, factual, and procedural issues. She further highlighted the fact that these declarations are a deeply collaborative process between the FTC and the third party and that any final product is a true reflection of the facts. Moreover, Ms. Wait noted that not every declaration is used in a litigation context and, instead, may be used as factual support to close an investigation. Importantly, declarations can be very helpful in minimizing involvement of business executives, especially where the alternative is a deposition.
AGENCY UPDATE WITH THE FTC BUREAU DIRECTORS

Presented by the Federal Civil Enforcement Committee

During this annual session, the Federal Trade Commission Directors of the Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics spoke about the latest in antitrust and consumer protection enforcement and policy initiatives.

CHAIR:
• Carla A. R. Hine, McDermott Will and Emery, Washington, D.C.

MODERATOR:
• Bernard A. Nigro Jr., Fried Frank Harris Shriver & Jacobson LLP, Washington, D.C.

SPEAKERS:
• Abbott B. Lipsky, JR., Acting Director, Bureau of Competition, Federal Trade Commission, Washington, D.C.
• Ginger Zhe Jin, Director, Bureau of Economics, Federal Trade Commission, Washington, D.C.

SUMMARY:

• Many questions were raised regarding potential changes in direction under the new administration, and the panelists repeatedly stressed continuity because economic analysis is at the root of the FTC’s work. Ms. Zhe Jin noted that the same principles would continue to be applied in the Bureau of Economics and that changes, if any, would occur primarily in the interaction between the Bureaus and with the outside world. Mr. Lipsky emphasized that antitrust enforcement is constrained by well-developed legal doctrine. He largely dismissed speculation regarding the consideration of public-interest factors, noting that it would be hard to see how the fundamental intellectual and analytical alignment underlying antitrust could be altered to better foster employment or economic growth. Mr. Pahl suggested that any changes would relate to greater focus on fraud cases and those with strong evidence of consumer injury, as well as greater emphasis on providing guidance to the business community prior to suing.

• Asked about bills seeking to limit the authority of the Consumer Financial Protection Bureau (CFPB), Mr. Pahl made clear that while there are many aspects of the CFPB’s work that the FTC could do well if Congress were to transfer those parts of its authority to the FTC, the FTC was not asking for such a transfer.

• Ms. Zhe Jin recommended parties continue following what had essentially become well-known best practices with respect to the submission of economic evidence. In particular, she encouraged the practice of providing economic white papers where parties’ arguments differed from academic consensus or were specific to the case, and she urged that both the underlying data and the resulting analysis be included wherever they support a white paper.
• The panelists noted the FTC’s continuing efforts to adapt their understanding to the evolving modern economy. Mr. Lipsky stressed that the Commission pays careful attention to commercial realities, and that it should resist the temptation to move automatically from the proposition that a given anticompetitive activity is possible to the proposition that the FTC should intervene to prevent such activities from occurring. Mr. Pahl remarked that the FTC’s traditional approach to technological issues is fundamentally sound, and that it would continue to use institutional capabilities such as workshops, report writing, and the Bureau of Consumer Protection’s Office of Technology to keep up to date.

• The panelists agreed that providing guidance to businesses had long been an important part of the FTC’s work and would continue, with an emphasis on particular subjects of uncertainty. Mr. Pahl noted the FTC’s responsiveness to requests by the business community for guidance in areas such as used cars and green guides, as well as a pilot project to provide better guidance in closing statements on what companies should and should not do in the area of data security. He also noted increasing efforts by the Bureau to reach small businesses and have them embrace FTC guidance. Mr. Lipsky speculated that one area where the Bureau of Competition may wish to provide greater guidance might be a revamp of the unilateral conduct report developed at the end of the George W. Bush administration. He noted the added benefit that a clearer understanding of the bounds of Section 2 law on monopolization might help clarify the scope of the FTC’s authority under Section 5 on unfair methods of competition, which he noted remains a contentious question.
HSR EXEMPTIONS: RUNNING OUT OF GAS?

Presented by the Mergers & Acquisitions and Transportation & Energy Industries

FTC and DOJ have revisited a number of HSR exemption interpretations and sought penalties from investors relying on others. What can be learned from the ValueAct and Third Point settlements? What was the rationale for revisiting the investment rental property and warehouse exemptions? Are exemptions especially vulnerable in energy or any other sectors? The panelists explored these questions and others.

CHAIR:
- Karen Kazmerzak, Sidley Austin LLP, Washington, D.C.

MODERATOR:

SPEAKERS:
- Kay Lynn Brumbaugh, Andrews Kurth Kenyon LLP, Dallas, Tex.
- Steven J. Kaiser, Cleary Gottlieb Steen & Hamilton LLP, Washington, D.C.
- Kara Kuritz, Attorney Advisor, Legal Policy Section, U.S. Department of Justice, Antitrust Division, Washington, D.C.
- Kathryn E. Walsh, Deputy Assistant Director, Premerger Notification Office, Federal Trade Commission, Washington, D.C.

SUMMARY:
- Ms. Walsh opened the panel by describing the Premerger Notification Office (PNO) resources available to help a potential filer determine whether an HSR filing is necessary and how to complete the filing, including e-mail guidance, information interpretations, blog posts, tip sheets, a style sheet, and updated instructions. She also explained that filings received Monday to Friday are included in the “merger screening package” circulated the following Wednesday—meaning that early termination could be granted by that Friday. She noted that some filings experienced delays associated with failed wire transfers, and suggested contacting Theresa Kingsberry in the PNO with any questions in that regard.

- In 2015, the PNO narrowed the Investment Rental Property Exemption under 16 C.F.R. § 802.5, which exempts acquisitions of investment rental property assets. To qualify for the exemption, the property must be held solely for rental or investment purposes. The key question is whether the buyer is behaving like a landlord (exemption applies) or whether the buyer is participating or profiting from the business being conducted on the property (does not apply).

- The PNO has recently clarified that the “warehouse exemption” under 16 C.F.R. § 802.2(h) no longer applies to oil and gas storage facilities after a determination that the usage of the exemption had strayed from the original intent of “warehouse.”

- The panel addressed the “investment exemption” under 16 C.F.R. § 802.9, which recently tripped up ValueAct. The exemption, which applies if the acquiring person will hold less than 10% of an issuer’s outstanding voting securities “solely for the purpose of investment,” is a very fact-driven determination
that looks at whether the acquirer gains control or intends to influence. If the buyer is not a competitor and has no intent to acquire control, they can take advantage of the exemption. Ms. Walsh noted that the PNO guidance provides examples of behavior inconsistent with the intention of the exemption.

- With respect to exemptions for foreign transactions, Mr. Kaiser explained the interplay of 16 C.F.R. §§ 802.51, 802.4, and 802.50. Section 802.51 exempts transactions involving foreign issuers with low or no US sales. If the company is based in the United States, it would no longer qualify for the § 802.51 exemption because it is a U.S. issuer, but the look-through exemption of § 802.4 may permit the application of § 802.50, which exempts the acquisition of foreign assets under a set threshold. Determining the applicability of § 802.4 determines looking both at the value of the U.S. assets and sales from foreign assets.
STANDARD-ESSENTIAL PATENTS AND PATENT-ASSERTION ENTITIES: INTERNATIONAL DEVELOPMENTS

Presented by the International Task Force

Investigations and litigation involving standard-essential patents and patent-assertion entities continue to be hot topics in jurisdictions around the world. This panel of experts discussed the latest trends and theories, international reactions to the U.S. FTC’s report, and provided practical guidance on litigating and defending such actions.

CHAIR:
• Koren W. Wong-Ervin, Global Antitrust Institute, George Mason University, Arlington, Va.

MODERATOR:
• Abbott B. Lipsky, Jr., Latham & Watkins LLP, Washington, D.C.

SPEAKERS:
• Donald J. Rosenberg, Executive Vice President, General Counsel and Corporate Secretary, Qualcomm Technologies Incorporated, San Diego, Cal.
• Justice G.P. Mittal, Competition Commission of India, New Delhi

SUMMARY:

• The panelists began by discussing the recent updates to the IP Guidelines. Suzanne Munck provided a high-level summary and stated that the FTC will continue to look at cases based on their specific facts, rather than applying the Guidelines broadly. Specifically, courts and agencies have been assessing market power as a fact-specific inquiry, and will continue to take the approach that IP is generally pro-competitive. Koren Wong-Ervin was pleased that the new Guidelines did not provide special rules for SEPs in the US, and supported the notion that a fact-specific inquiry will always be needed when assessing IP/antitrust cases. Donald Rosenberg stated that the very existence of fair, reasonable and non-discriminatory (known as “FRAND”) terms should eliminate the idea that a firm will have market power, and also noted that because each SEP owner is dependent on others for pricing, this is an additional constraint on an SEP owner that tries to act unilaterally.

• The second topic presented was about the global debate of FRAND royalty terms: should the royalty base be on a product level or a component level? Justice Mittal stated that India has been clear in a string of cases starting with the Ericsson/Micromax dispute—and including the Intex dispute—that terms should be based on the price of the end device, not by component. Ms. Wong-Ervin supports this view and pointed to two recent studies suggesting that not only are 80% of SEPs read at a system/device level, but that if rates are applied on a device level, consumers typically receive the products at lower prices. Mr. Rosenberg added that he believes the component vs. device debate is largely a “red herring,” because ultimately you can get to the same rate both ways; he believes the debate is driven by commercial interests and industrial policy.
• Injunctive relief was the next topic, and Justice Mittal started by explaining that it is only granted on a case-by-case basis in India. Proving “irreparable loss and injury” is often difficult, but he believes an important fact would be a history of non-payment for the license. Mr. Rosenberg stated that the likelihood in the U.S. of getting injunctive relief against an infringer is a pipe dream, and was frustrated that patentees’ often-unsatisfying recourse against infringers is to go through potentially years of litigation while the infringer can continue to infringe, and their worst-case scenario would be to just pay what they already owed the patentee from the beginning.

• The panel then discussed the topic of extra-jurisdictional remedies. Mr. Rosenberg felt strongly that because patent rights are territorial in nature, the idea that one country can regulate rights in another country should be “dead on arrival,” especially with the growing number of competition authorities with differing approaches. Ms. Munck believes that in some situations that deal with global licenses, such extra-jurisdictional remedies can be appropriate, but that each case has to be carefully considered and competition authorities have to pay particular attention to how consumers are impacted in various jurisdictions.

• Ms. Munck concluded with a brief summary of the FTC’s recently-released PAE study, sharing some of the findings, expressing some concern over what seems to be an influx of behavior that mirrors nuisance litigation, and mentioning that the FTC made several recommendations based on the findings. As with the IP Guidelines, Ms. Wong-Ervin was pleased that the agencies did not call for special rules for PAE activity, but disagreed with the FTC’s decision to offer recommendations, noting that the study had too small of a sample size.
Antitrust cases comprise a small percentage of the federal docket, but consume enormous amounts of judicial attention and court resources in motion practice, during discovery, and at trial. What techniques do federal judges use to cope with the special challenges presented by antitrust cases, and what can advocates do to maximize their effectiveness in the antitrust courtroom? The panel of judges provided their perspective on these questions.

CHAIR AND MODERATOR:
- Christopher B. Hockett, Davis Polk & Wardwell LLP, Menlo Park, Cal.

SPEAKERS:
- The Honorable Denise L. Cote, Judge, U.S. District Court, Southern District of New York, New York, N.Y.
- The Honorable Paul Friedman, Judge, U.S. District Court, District of District of Columbia, Washington, D.C.

SUMMARY:
- Judge Cote discussed the challenges that generalist federal judges face in complex antitrust litigation. She noted that while she is not an antitrust expert, she genuinely enjoys the intellectual exercise of antitrust lawyers educating her relating to complex economic and market issues.

- Judge Cote also discussed her philosophy of managing discovery herself without delegating to magistrate judges or special discovery masters. Making decisions about the scope and limitations of discovery can save litigants significant time and money, and she enjoys getting to know the issues in the case earlier on in the proceedings.

- Judge Friedman discussed the conflict between Judge Douglas Ginsburg (who believes that antitrust cases should be assigned only to specialist judges) and Judge Diane Wood (who believes that generalist judges should decide antitrust cases). He emphasized the complexity of the issues he confronts in antitrust cases.

- Judge Friedman specifically discussed the challenges of multiple expert witnesses in an antitrust trial, and suggested that lawyers streamline that duplicity in order to save time and costs. He also cited an instance where he had each side provide short summaries of each of their multiple expert reports prior to a hearing in order to better understand what each would testify to. Judge Friedman found that exercise to be very helpful. He also noted the bitter disagreements that can arise between antitrust litigants, stating that if both sides can agree to something, he will accept almost anything the parties agree to.

- Judge Baylson noted that any antitrust case filed could lead to a jury trial. One danger, he suggested, of suggesting that specialist judges should decide antitrust cases is that we move further away from that reality of needing to educate a lay jury. Having a generalist judge ensures that our system does not move away from that jury system.
• Judge Baylson also noted that when considering class certification on price-fixing class actions, he typically orders discovery because he notes that evidence of “agreement” is almost always necessary to move past that step.
ENFORCERS’ ROUNDTABLE

This concluding annual panel featured an in-depth conversation with leading competition authorities about their enforcement priorities and the transactions, investigations and cases that are making headlines.

CHAIR:
- William C. MacLeod, Kelley Drye & Warren LLP, Washington, D.C.

QUESTIONER:
- Margaret A. Ward, Jones Day, Palo Alto, Cal.

SPEAKERS:
- Brent Snyder, Acting Assistant Attorney General, DOJ Antitrust Division, Washington, D.C.
- The Honorable Maureen K. Ohlhausen, Acting Chairman, Federal Trade Commission
- Victor J. Domen, Chair, Multistate Antitrust Task Force, National Association of Attorneys General, Nashville, Tenn.
- Alejandra Palacios Prieto, President, Comision Federal de Competencia Economica, (COFECE), Mexico City
- Margrethe Vestager, Commissioner for Competition, European Commission, Brussels

SUMMARY:

- Brent Snyder noted his excitement about President Trump’s appointment of Makan Delrahim, a former Deputy Assistant Attorney General at DOJ Antitrust, to head the Antitrust Division. The Division has tried, and prevailed in, five trials in recent months, which gave the Division the trial experience necessary to assert the Division’s credibility in negotiating with parties. Mr. Snyder also discussed the Division’s recent revision of its Leniency Program FAQs, which he stressed was merely a reiteration of the 1993 leniency program guidance and did not indicate a policy shift.

- Maureen Ohlhausen noted the FTC’s top enforcement priority was policing the healthcare industry, including merger and conduct investigations relating to hospitals and pharmaceutical companies. She forecasted a renewed emphasis on consumer protection issues in the data and privacy space, like the FTC’s recent activity relating to the Ashley Madison data breach and the Vizio settlement. Ms. Ohlhausen further discussed her recent announcement of an “Economic Liberty Task Force,” which will investigate abuse of process and government overregulation. She indicated one of her top priorities would be to examine the patchwork of occupational licensing requirements across the country, with almost 1100 occupations currently licensed in at least one state but not in others.

- Margrethe Vestager discussed antitrust law as fundamental to the very existence of the European Union, noting it was written into the EU’s founding documents. EU antitrust law, especially its focus on cartels, is modeled after US antitrust law. 2016 saw the largest ever cartel fines in Europe, totaling almost 4 billion euros, which she described as necessary to demonstrate the seriousness of the crimes and to serve as an actual deterrent. She defended the agency’s recent focus on state aid issues, noting last year’s Apple issue in Ireland and the ongoing Amazon issue in Luxembourg, as natural exercises of EU competition authorities. She predicted that “big data” will likely be a focus of the European competition authorities in the next decade.
• Vic Domen noted that his task force enables understaffed and under-resourced state attorneys general to collaborate about enforcement priorities. These state officials, he noted, are the front-line consumer protection authorities nationwide. He stated that if federal antitrust enforcement drops off during this administration, state AGs will step up to fill that void, including in the criminal enforcement space.

• Lastly, Alejandra Palacios Prieto described the Mexican competition authority’s recent changes, including enacting new competition laws, asserting investigative authority, and issuing COFECE’s first criminal complaint. This year, COFECE will issue guidance relating to legal privilege in antitrust cases and will work towards more efficient merger review.