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USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES – Contribution from the United States

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Using market studies to tackle emerging competition issues

- Contribution from the United States –

1. Introduction

1. Market studies, which can include empirical studies, hearings, and workshops, provide the U.S. Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ") (collectively, the "Agencies") with invaluable tools for their policy and enforcement efforts. While the Agencies' primary focus is the enforcement of competition laws, policy research bolsters the Agencies' enforcement efforts. Thus, the Agencies complement their enforcement activities by engaging in research and development through workshops and empirical studies that then form the basis for other policy work, including advocacy filings, *amicus curiae* briefs, statements of interest, public reports and guidelines.[1]

2. Hearings and workshops (collectively "workshops") provide the Agencies with a public forum to gather information about market conditions and evolving issues. They allow the Agencies to test theories, learn from non-government attorneys, discuss current studies by academics, and hear comments from the public about the identified issues. Workshops often serve as a basis to issue reports; they can also identify the need for more information that, depending on the circumstances, can be gathered through market studies.

3. Market studies provide the Agencies with a process to develop a deeper understanding of sectors and business practices. These studies allow the Agencies to gather information and documents outside the enforcement context, and they can play a key role in identifying and analyzing emerging competition trends and issues. They provide the information necessary to help the Agencies develop a real-time understanding of business practices that they can share with other federal government agencies, state and local governments, marketplace participants, and other stakeholders, all while maintaining the confidentiality of the information they obtained from private industry. And along with workshops and public comments, studies lay the groundwork for policy recommendations.

4. As part of its market studies portfolio, the FTC engages in retrospective studies of consummated mergers.[2] Retrospective studies use data from before and after mergers to allow the FTC to analyze how completed mergers affected some aspect of premerger competition, such as prices, quality, consumer choice, and innovation. Merger retrospectives also analyze the tools that agency economists use prospectively to distinguish mergers that are likely to harm consumers from those that are not.

[1] *See, e.g.*, FTC Press Release, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers*, (Jun. 30, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers. The new Vertical Merger Guidelines are available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[2] FTC Merger Retrospectives Program, https://www.ftc.gov/policy/studies/merger-retrospectives. *See also* FTC Press Release, *FTC's Bureau of Economics to Expand Merger Retrospective Program* (Sept. 17, 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program.

5. Workshops, market studies, and merger retrospectives provide the Agencies with a deeper understanding of industries and how emerging issues and innovation may affect competition.

2. Non-enforcement Tool – Information Gathering

6. The Agencies have a variety of ways to gather information for market studies. Both Agencies frequently hold workshops and may use information voluntarily supplied by firms. Additionally, the FTC has the authority to use compulsory process for market studies. The Agencies also may supplement their information gathering with data obtained from other government agencies or public and commercial sources.

7. Workshops are a useful tool for learning about specified markets or policy topics from experts and stakeholders. The workshops themselves and related public comment process provide opportunities for FTC and DOJ staff and leadership to listen to interested persons and outside experts representing a broad and diverse range of viewpoints. When the Agencies organize a workshop, they solicit a range of viewpoints on the subjects at issue and invite business representatives, academics, and policy-makers from other federal and state agencies. Panelists may include attorneys, academics, economists, business people, government decision-makers, and consumers. The record from a workshop is made public and includes videos, transcripts, presentations, and written public comments.

8. Workshops stimulate thoughtful internal and external evaluation of the Agencies' near- and long-term law enforcement and policy agendas. Workshops can seek to identify areas for enforcement and policy guidance, including changes to the Agencies' investigation and law enforcement processes, as well as areas that warrant additional study.

9. Some workshops cover a wide variety of related subjects and extend over a series of days. For example, the FTC's "Hearings on Competition and Consumer Protection in the 21st Century,"[3] ("21st Century Hearings") was an extensive series of public hearings exploring whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. The 21st Century Hearings included a variety of topics including: Concentration and Competitiveness in the U.S. Economy;[4] Mergers and Monopsony or Buyer Power;[5] Digital and Technology-based Platform Businesses;[6] the FTC's Role in a Changing World;[7] and Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law.[8]

[3] Hearings On Competition and Consumer Protection in the 21st Century (Sept. 13, 2018-June 12, 2019), [hereinafter 21st Century Hearings], https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[4] 21st Century Hearings (Sept. 13, 2018), https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-1-competition-consumer-protection-21st-century.

[5] 21st Century Hearings (Sept. 21, 2018), https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-2-competition-consumer-protection-21st-century.

[6] 21st Century Hearings (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.

[7] 21st Century Hearings (Mar. 25-26, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century.

[8] 21st Century Hearings (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

These hearings also considered topics relating to exclusionary conduct and acquisitions of nascent competitors in digital market places, as well as topics relating to labor markets, data (including privacy, big data, and data security), intellectual property policy, and algorithms, artificial intelligence and predictive analytics.[9]

10. The 21st Century Hearings transpired over 23 days and included over 390 panelists. The FTC also received over 900 germane, non-duplicative public comments on a substantial set of questions and topics. The 21st Century Hearings led to an ongoing FTC market study, with the FTC using its authority to compel documents relevant to competitive conditions in the technology sector. For the purposes of this report, this study, described below, is referred to as the "Technology and Platform Company 6(b) Study."[10]

11. Another example of a public workshop is the FTC's "A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets" ("FTC's COPA Workshop").[11] This public workshop assessed the impact of certificates of public advantage ("COPAs") on prices, quality, access, and innovation for healthcare services, and it is part of a broader COPA Assessment Project announced in November 2017. COPAs are regulatory regimes adopted by state governments intended to displace competition among healthcare providers and immunize mergers and collaborations from antitrust scrutiny. States are increasingly using COPAs to allow certain hospital mergers to proceed despite clear antitrust concerns, with the assumption that state regulatory oversight will mitigate the effects resulting from the elimination of competition and allow the hospitals to achieve certain efficiencies. The FTC used the workshop to develop a deeper understanding of the actual benefits and harms associated with COPAs and to help advance the agency's policy and enforcement strategies.

12. The FTC's COPA Workshop included academics, health policy experts, healthcare industry stakeholders, state regulators and law enforcers, and staff from the FTC's Bureau of Economics. The panelists discussed research regarding the effects of COPAs, as well as practical experiences with these regulatory regimes. The FTC's COPA Workshop led to two, long-term FTC retrospective studies for which the FTC is using its authority to compel documents. For the purposes of this report, these studies described below are referred to as the "COPA 6(b) Studies."[12]

[9] 21st Century Hearings (Sept. 13, 2018-June 12, 2019), https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[10] FTC Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[11] FTC Press Release, *FTC to Hold Workshop on Certificates of Public Advantage in Healthcare Markets* (Apr. 12, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-hold-workshop-certificates-public-advantage-healthcare; *see also* https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage.

[12] FTC Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

13. DOJ and the FTC jointly held a workshop to solicit public dialogue on the then-draft Vertical Merger Guidelines[13] released on January 10, 2020. The workshop allowed for a dynamic discussion about the proposed Guidelines to complement written public comments that were submitted to the agencies about the draft Guidelines. The agencies selected panelists for the workshop from those who filed public comments and indicated their interest and availability to participate. The Agencies issued the new Vertical Merger Guidelines on June 30, 2020, outlining how the Agencies will evaluate the likely competitive impact of vertical mergers and whether those mergers comply with U.S. antitrust law.[14]

14. In February 2020, DOJ co-hosted a Workshop on Venture Capital Investment and Antitrust Law with Stanford University to explore the intersection between venture capital and antitrust law.[15] The workshop covered trends in venture capital investment from the 1990s through the present, with a focus on what antitrust enforcers can learn from investors about how to identify nascent competitors in markets dominated by technology platforms. The workshop also addressed proposed solutions to concerns that competitive alternatives to the market-leading platforms are not attractive investment opportunities.

15. DOJ also recently held a workshop on Competition in the Licensing of Public Performance Rights in the Music Industry.[16] The workshop brought together music publishers, songwriters, licensees, and other industry stakeholders to discuss the role of the consent decrees in *United States v. American Society of Composers, Authors and Publishers*, and *United States v. Broadcast Music, Inc.*, in the competitive landscape of music licensing and distribution.[17] DOJ sought to understand the implications of continued enforcement of the consent decrees for antitrust law enforcement and policy as music distribution continues to evolve through technological innovation.

16. In May 2019, DOJ held a workshop on Competition in Television and Digital Advertising to explore industry dynamics in media advertising and the implications for antitrust enforcement and policy, including merger enforcement.[18] The workshop covered the different types of television and online advertising, and highlighted, among other developments in the industry, the role of online and mobile advertising networks. Panelists discussed a range of topics, including how each type of advertising may fit into an advertising campaign, how inventory is priced, the economics of advertising, developments

[13] FTC Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment*, https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment (the draft Guidelines describe how the Federal antitrust agencies review vertical mergers to evaluate whether they violate antitrust law).

[14] FTC Press Release, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (June 30, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

[15] U.S. Dep't of Justice, *Public Workshop on Venture Capital and Antitrust* (Feb. 12, 2020), https://www.justice.gov/atr/event/public-workshop-venture-capital-and-antitrust.

[16] U.S. Dep't of Justice, *Public Workshop on Competition in Licensing Music Public Performance Rights* (July 28-29, 2020), https://www.justice.gov/atr/event/public-workshop-competition-licensing-music-public-performance-rights.

[17] *United States v. Am. Soc'y of Composers, Authors, and Publ'rs*, 1941 WL 307855, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); *United States v. Broadcast Music, Inc.*, 1941 WL 307851, 1940-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wisc. 1941).

[18] U.S. Dep't of Justice, *Public Workshop on Competition in Television and Digital Advertising* (May 2-3, 2019), https://www.justice.gov/atr/event/public-workshop-competition-television-and-digital-advertising.

in advertising technologies, the effects from changes in consumer behavior, and the competitive dynamics of media advertising in general in light of the rise of digital advertising.

17. During the fall of 2019, DOJ and FTC jointly held a public workshop to discuss the role of antitrust in labor markets in promoting robust competition for the American worker.[19] The first day of the workshop, hosted by DOJ, covered a variety of labor competition issues, including, among other topics:

- Approaches to labor market definition;
- The role of employer collaboration and contractual arrangements between employers on competition for workers;
- Labor monopsony in merger enforcement;
- Antitrust exemptions for union activity and collective bargaining; and
- Anticompetitive no-poach and wage-fixing agreements.

The FTC hosted the second day of the workshop to examine whether there is sufficient legal basis and empirical economic support to use the Commission's rulemaking authority to restrict the use of non-compete clauses in employment contracts. Non-compete clauses are covenants in employment contracts that limit the ability of an employee to join or start a competing firm after a job separation. At the workshop, legal scholars, economists, and policy experts reviewed the current state of the law and economic literature on non-compete clauses in labor contracts, and whether potential harms to workers can and should be addressed through the FTC's rulemaking, law enforcement, or advocacy authority.

3. Non-enforcement Tool – 6(b) Studies

18. Workshop presentations sometimes uncover areas where further empirical research would aid the Agencies in their analysis of competition within a certain industry or subject matter. When the public interest warrants, the FTC has the power to issue a resolution authorizing the use of a 6(b) Order.[20] Section 6(b) of the FTC Act empowers the FTC to require an entity to file "annual or special . . . reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals."[21] A recipient of a 6(b) Order has a set period of time in which to submit its response or file a petition to the Commission to quash or limit the 6(b) Order.[22] If a party receiving a 6(b) Order fails to respond, the Commission may issue a Notice of Default that it can enforce in federal court.[23] The Commission's 6(b) authority enables it to conduct wide-ranging studies that do not have a specific law enforcement purpose. Section 6(f) of the FTC Act authorizes

[19] U.S. Dep't of Justice, *Public Workshop on Competition in Labor Markets* (Sept. 23, 2019), https://www.justice.gov/atr/event/public-workshop-competition-labor-markets; FTC Press Release, *FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts* (Dec. 5, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts.

[20] 15 U.S.C. § 46(b); 16 C.F.R. § 2.7(a), (d).

[21] 15 U.S.C. § 46(b).

[22] 16 C.F.R. § 2.10.

[23] 16 C.F.R. § 2.13.

the Commission to "make public from time to time" portions of the information that it obtains, where disclosure would serve the public interest.[24]

19. One example of an ongoing study that arose out of a workshop is the Technology and Platform Company 6(b) Study.[25] The FTC issued 6(b) Orders on February 11, 2020 to study the acquisition strategies of the largest technology firms – Alphabet, Amazon, Apple, Facebook and Microsoft. All of the acquisitions being studied were not reportable to the antitrust agencies under the Hart-Scott-Rodino ("HSR") Act.[26] The Commission plans to use the information obtained in this study to examine trends in acquisitions and the structure of deals, including whether acquisitions not subject to HSR notification might have raised competitive concerns, whether and to what effect these companies are making acquisitions of nascent or potential competitors, and the nature and extent of other agreements that may restrict competition.

20. Another example of a market study is the FTC's Merger Retrospective Program.[27] Merger retrospectives quantify changes in market outcomes, such as prices, product variety, quality, innovation, consumer welfare, firm efficiency, and profits, after changes in market structure that result from consummated mergers. The FTC's Bureau of Economics has undertaken retrospectives for a range of consummated mergers for over 35 years.[28]

21. FTC retrospective research has been and will continue to be conducted with at least two goals in mind. The first goal is to understand whether the Agencies' threshold for bringing an enforcement action in a merger case has been too high, thus allowing too many potentially harmful mergers to go through.[29] The second goal of the Merger Retrospective Program has been to assess the performance of tools that agency economists use to predict the effects of proposed mergers prospectively. For example, a retrospective study may assess how accurately a pricing pressure index or a merger simulation model predicted a post-merger price change, or how well demand models, which are typically inputs into these predictions, perform at predicting customer substitution (diversion) when a merger eliminates one of the choices that had been available to buyers in the pre-merger world.

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[24] 15 U.S.C. § 46(f). Recent examples of reports based upon compulsory process include: FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016), https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study; FED. TRADE COMM'N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT (2011), https://www.ftc.gov/reports/authorized-generic-drugs-short-term-effects-long-term-impact-report-federal-trade-commission.

[25] FTC Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[26] 15 U.S.C. § 18a.

[27] *See,* FTC Merger Retrospective Program, https://www.ftc.gov/policy/studies/merger-retrospectives.

[28] A list of downloadable retrospectives conducted by the FTC's Bureau of Economics is available at https://www.ftc.gov/policy/studies/merger-retrospectives/bureau-of-economics.

[29] Dennis Carlton, *Why We Need to Measure the Effect of Merger Policy and How To Do It,* working paper (2009) http://economics.mit.edu/files/4149 (discusses the importance of merger retrospectives for trying to understand where the enforcement margin should be set, as well as some of the methodological challenges that retrospectives face).

22. Two examples of ongoing merger retrospectives arose out of the Certificate of Public Advantage in Healthcare Markets ("COPA") Workshop.[30] The FTC began these merger retrospective studies when it issued 6(b) Orders on October 21, 2019 for the COPA 6(b) Studies. The Orders require information that will allow the agency to study the effects of COPAs on prices, quality, access, and innovation of healthcare services as well as to study the impact of hospital consolidation on employee wages.[31] The COPA 6(b) Studies are gathering information on two transactions involving health care systems that were allowed to proceed under state regulatory authority despite antitrust concerns, with the intention of publicly reporting the findings.[32] One COPA transaction involved the Mountain States Health Alliance and Wellmont Health System, which were the two largest hospital systems in the border area of Northeast Tennessee and Southwest Virginia at the time they merged in 2018. The transaction not only caused higher concentration for the provision of inpatient hospital services, but also for outpatient services as well as some specialty physician practices.[33]

23. The second COPA transaction that the FTC is studying is Cabell Huntington Hospital's acquisition of St. Mary's Medical Center, which prior to their merger, were the only two hospitals in Huntington, West Virginia. The Commission expressed continued concern about the lost competition from this merger in both inpatient hospital services and outpatient surgical services, but dropped its challenge of the merger in light of the state regulatory action.[34] To study these transactions, the FTC has sent special orders to obtain information from five large health insurers (Aetna, Anthem, BCBS of Tennessee, Cigna and United) in addition to the two merged systems. The orders seek information that will allow assessment of the transactions' effects on prices, quality, innovation, access to care, and labor markets. The FTC anticipates continuing to gather this data over several years in order to be able to assess post-merger outcomes.

24. The FTC also used its 6(b) authority to conduct a study of the remedies imposed in merger cases. In 2015, the FTC began a study into the effectiveness of its orders in merger cases where it required divestiture or another type of remedy. The study focused on 89 merger orders that were issued by the Commission between 2006 and 2012, and included

[30] State governments are increasingly using COPAs, which are regulatory regimes intended to displace competition among healthcare providers. States have enacted COPAs, precluding antitrust scrutiny of mergers and collaborations, with the assumption that regulatory oversight can mitigate the effects of lost competition and may allow hospitals to achieve certain efficiencies. *See* FTC Press Release, *FTC to Hold Workshop on Certificates of Public Advantage in Healthcare Markets* (April 12, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-hold-workshop-certificates-public-advantage-healthcare.

[31] FTC Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019) https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

[32] *Id.*

[33] *See* Federal Trade Commission Staff Submission to the Southwest Virginia Health Authority and Virginia Department of Health Regarding Cooperative Agreement Application of Mountain States Health Alliance and Wellmont Health System, (Sept. 30, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/submission-ftc-staff-southwest-virginia-health-authority-virginia-department-health-regarding/160930wellmontswvastaffcomment.pdf.

[34] *See* Statement of the Federal Trade Commission In the Matter of Cabell Huntington Hospital, Inc., Docket No. 9366 (July 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

special orders issued to over 200 market participants. The resulting report[35] concluded that the majority of the Commission's merger orders were effective in maintaining or restoring competition lost due to a merger. The study also revealed areas where improvements could be made, and changes were made in the Commission's practices related to designing, drafting, and implementing merger remedies.

25. An example of a past workshop that led to compulsory process and public reports is the FTC's Patent Assertion Entity Activity: An FTC Study ("PAE Report").[36] The PAE Report summarized a market study conducted between 2013 and 2016, and it followed two workshops investigating patent assertion entity ("PAE") activity.[37] The FTC studied whether PAEs imposed an unnecessary tax upon industry or, alternatively, whether PAEs provided needed assistance to innovators licensing or otherwise monetizing their patents.

26. The FTC also may undertake a market study following a request from legislators to study a certain topic, as with the FTC's Authorized Generic Drugs: Short-Term Effects and Long-Term Impact Report ("AG Report").[38] An authorized generic ("AG") is a generic drug marketed under the same regulatory approval used by the branded drug. The incremental competition provided by the introduction of an AG can decrease the revenues of other generic entrants and may alter the incentives of a generic drug maker to challenge patents. The AG Report focused on two effects: (1) whether AGs offer consumers a short-term benefit by lowering prices during the 180-day exclusivity period; and (2) whether AGs deter future generic patent challenges, resulting in a long-term harm of reducing the availability of lower-priced generic products.[39]

4. Strengths and Limitations of Market Studies

27. Market studies gather information that allows the Agencies to perform analyses as appropriate to the needs of each particular study. Overall, market studies provide the Agencies with stakeholder, academic, industry, and consumer feedback. Studies also serve as a means to educate stakeholders, policymakers, and consumers. They may allow the Agencies to closely examine data of industries or the impact of a specific law or regulation

[35] THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[36] FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016) [hereinafter PAE REPORT], https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study.

[37] The Antitrust Agencies held the first workshop over several days in 2008 and 2010; the FTC summarized the record in its 2011 *Evolving IP Marketplace* report. FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 2 (2011), https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition. In December 2012, the Antitrust Agencies conducted a second joint workshop. *See* FTC Press Release, *Federal Trade Commission, Department of Justice to Hold Workshop on Patent Assertion Entity Activities* (Dec. 7, 2012), https://www.ftc.gov/news-events/press-releases/2012/12/federal-trade-commission-department-justice-hold-workshop-patent.

[38] FED. TRADE COMM'N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT (2011) [hereinafter AG REPORT], https://www.ftc.gov/reports/authorized-generic-drugs-short-term-effects-long-term-impact-report-federal-trade-commission.

[39] *Id.* at 4.

on the market. Market studies also allow the Agencies to perform empirical research in support of policy recommendations and educate the Agencies on evolving trends.

28. There are certain limitations of market studies, however. They can only provide information relevant to a snapshot in time. Requiring private industry to provide the government confidential information can be burdensome to companies both in terms of time and cost of compliance. Finally, conducting market studies – in particular, the collection and review of information – is extremely resource intensive for the Agencies.

5. When Market Studies are Considered to be the Appropriate Tool to Use

29. The Agencies have a variety of analytical tools and approaches they can use for market studies. Determining whether a study is appropriate depends on the needs of the Agencies. Market studies may be appropriate when competition issues seem to be changing in evolving sectors or when innovation is dramatically changing the competition landscape. Market studies may be a useful tool when competition enforcement needs to be informed by research to learn from past wins and losses. Finally, market studies can provide the unique value of educating federal, state, and international competition authorities.

30. Which tools to use depends upon what the Agencies need to learn. For example, when the Agencies need to gather non-public information, one useful tool is the FTC's 6(b) authority.[40] This tool can be particularly helpful when empirical comparisons of markets are necessary. The FTC also may be required to use 6(b) authority if Congress has posed specific questions to the FTC and the only way to answer those questions is through a 6(b) market study.[41] Some market studies, however, may depend on a combination of sources: workshop participants, including industry executives, economists, analysts, and government officials; public comments; and publicly available data and reports.

[40] When reporting the results of their analysis, the Antitrust Agencies take care not to divulge confidential business information received from the firms under study.

[41] *See* FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES iii-iv (2005), https://www.ftc.gov/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report (Congress requested the FTC investigate whether potential conflicts of interest regarding the managers' ownership of mail-order pharmacies would have an impact on competition and prescription drug prices).