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MESSAGES FROM THE U.S. ANTITRUST ENFORCERS AT THE ABA ANTITRUST SPRING MEETING

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In late March in Washington, D.C., the American Bar Association Section of Antitrust Law held its annual Spring Meeting. Antitrust lawyers from around the world—including top antitrust and competition law enforcement officials from the U.S. and abroad—convened to ruminate on all things antitrust. Enforcer comments during Spring Meeting panels and roundtables provide useful insights to the private bar and their clients about enforcers' priorities and concerns.

All three current Federal Trade Commission ("FTC") commissioners, including FTC Chair Lina Khan, and several FTC attorneys participated on panels during this year's Spring Meeting. Additionally, Joseph Kanter, Assistant Attorney General for the U.S. Department of Justice Antitrust Division ("DOJ"), and several DOJ attorneys also spoke on panels. The antitrust chiefs of the New York, Washington, and Washington, D.C. state attorneys general also contributed to Spring Meeting programming. These federal and state enforcers spoke on a number of topics over the course of the meeting, many of which touch on M&A.

1. Aggressive Enforcement is Here to Stay

Neither the DOJ nor the FTC participants revealed any radical changes to the agencies' aggressive enforcement strategy. Leaders from the agencies reiterated claims that there has been systematic underenforcement of the antitrust laws in the U.S. over the past several decades, resulting in industry consolidation and anticompetitive conduct, ultimately harming the public. One Deputy Assistant Attorney General ("DAAG") from the DOJ even disputed that the DOJ's enforcement is "aggressive," instead describing it as "just enforcement." That same DAAG went on to discount the risks of overenforcement, claiming that the adversarial process during investigations and enforcement actions serve as a "check" to ensure overenforcement does not curb growth and innovation.

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That "check" has resulted in a number of recent losses for the DOJ and the FTC. Undeterred, however, the enforcer panelists attempted to reframe those losses as wins. They credited their aggressive merger enforcement strategy with successfully deterring numerous anticompetitive mergers; according to AAG Kanter, "many more" deals have been silently abandoned by parties in light of the enforcers' aggressive posture. Per one DAAG, "If you only bring cases you are sure of winning, you will underenforce, and you will under-deter." They similarly hailed their court losses for establishing or reinvigorating particular legal theories. Chair Khan and Commissioner Rebecca Slaughter characterized their failed attempt to block Meta's acquisition of Within Unlimited, for example, as "an important programmatic win," claiming the judge's opinion provided a "roadmap" for future enforcement by recognizing that the legal theory of harm to prospective future competition is "alive and well."

DOJ and FTC participants at the Spring Meeting also provided some hints regarding the likely contents of the long-awaited revised merger guidelines, all reflecting their aggressive merger enforcement strategy. DOJ and FTC participants signaled that the new merger guidelines will touch on divisive antitrust topics such as nonhorizontal mergers (*i.e.*, M&A in the vertical supply chain, conglomerate mergers, and complementary mergers), potential competition, nascent markets, serial acquisitions, private equity ("PE") acquisitions, and monopsony (buy-side monopolization), including in labor markets. DOJ participants in particular noted that the enforcers' work on the guidelines has focused on impacts to certain stakeholders, including workers and small businesses. AAG Kanter's comments also showed a preference for direct evidence of anticompetitive conduct over indirect evidence of market power, suggesting the new merger guidelines will diminish the significance of market-based economic tests and models.

2. Process Matters

Spring Meeting participants from both the DOJ and the FTC indicated that their agencies are dedicating further resources to investigating compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). They announced that there are several open (non-public) investigations into HSR Act violations, ranging from failing to file at all, omitting required Item 4 documents from the

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filing, and "gun jumping" (allegations that the companies took steps to integrate their operations before the transaction closed).

During one session, the FTC Bureau of Competition Director highlighted the possible consequences of violating the HSR Act, noting that the FTC could reject filings, issue a Second Request, or require that the parties make a corrective filing.[1] The HSR Act also permits the enforcers to seek significant penalties for violations of the HSR Act—at the moment, up to $50,120 per day in violation, which can add up quickly.

Commissioner Slaughter also signaled that the enforcers' "temporary suspension" of "early termination" of the HSR waiting period for non-problematic transactions may be indefinite.[2] Despite public comment by the FTC (of which Commissioner Slaughter was then Acting Chairwoman) in February 2021 that it expected "this temporary suspension will be brief," Commissioner Slaughter relayed to 2023 Spring Meeting attendees, "It isn't our job to be a service agency for merger attorneys, as much as I love all of you. It is our job to protect competition in markets and the American people we serve."

Finally, DOJ participants revealed that they are working with the FTC to ensure that the enforcers' investigations are not harmed by the use of increasingly popular third-party ephemeral messaging platforms like WhatsApp, Signal, and Telegram. Both the DOJ and FTC participants cautioned that failing to preserve records relevant to enforcers' investigations from these platforms could prompt spoliation penalties.

3. To Remedy (with a Catch) or Not to Remedy

Under AAG Kanter's leadership, the DOJ has not entered into any formal merger settlements allowing parties to "fix" arguably problematic transactions through divestiture or behavioral remedies. However, one DAAG was quick to emphasize that such consent decrees are not "off limits" at the DOJ. Instead, he claimed the bar is just "extremely high"—citing past alleged examples of failed divestitures that have made DOJ doubtful of such settlements' efficacy, despite plenty of evidence, including an FTC report, that such remedies are typically successful. Because the Clayton Act bars transactions that *may* harm competition, any remedies must "eliminate the possibility" of harm, not just probable harms. Choosing his words carefully, that DAAG also denied rumors that the DOJ is pushing companies to fix anticompetitive issues before filing HSR to avoid publicly endorsing settlements that allow otherwise problematic transactions to close, despite earlier comments in 2022 by DOJ officials that merging parties bear the responsibility for formulating solutions to competitive problems rather than asking the government to "work with us to figure out how to fix this." By contrast, AAG Kanter refused to address these "shadow" settlements without specific examples.

The FTC under Chair Khan has taken a different approach. Unlike the DOJ, the FTC has continued to routinely reach consent decrees in merger cases—however, these consents come with strings attached. FTC representatives at the Spring Meeting highlighted the agency's now-routine use of "prior notice" and "prior approval" requirements in its consent decrees. These provisions effectively provide the FTC veto power over any future transactions in the relevant market(s) for a minimum of 10 years. Additionally, the FTC's consent orders now typically require divestiture buyers to obtain prior approval from the FTC for any sale of the divestiture assets for a three-year period—seven if the later acquiror is a competitor.

4. Private Equity Gets a Warning Flag

Private equity was a trending topic at this year's Spring Meeting, and DOJ and FTC participants aired a number of concerns about transactions involving PE buyers. While one FTC panelist clarified that the enforcers' concerns are focused on certain *practices* used by PE buyers, not PE itself, he also decried the "debt-fueled, strip-and-flip" business model of certain PE firms. He claimed that this business model, which prioritizes short-term returns, undermines the long-term health of acquired companies and impacts their ability to compete.[3]

His attitude was echoed by representatives from the DOJ. One DOJ panelist commented that PE's business model means portfolio companies are unlikely to be "mavericks" that upset the status quo with respect to pricing, service levels, quality, and/or innovation, but provided no evidence for that assertion. That DOJ participant also suggested that PE firms that follow a "strip-and-flip" business model are not adequate divestiture buyers because they cannot replicate the competition that would be lost as a result of a transaction.[4]

"Serial acquisitions" by private equity firms, in which they make a number of acquisitions in the same industry, were also of particular concern to DOJ and FTC participants. Speaking in the context of health care, one FTC participant noted that "serial acquisitions" are often not reportable under the HSR Act, but claimed there is evidence that they have resulted in higher prices, lower wages, and lower quality of services. AAG Kanter revealed that the DOJ plans to use the Clayton Act's prohibition on transactions that "tend to create a monopoly" (which Kanter characterized as often ignored) to challenge such serial acquisitions.

Finally, DOJ participants noted that private equity is a focus of the agency's reinvigoration of Section 8 of the Clayton Act, which prohibits "interlocking directorates." The DOJ has taken the position, which is not settled by the courts, that Section 8 bars a PE firm from appointing agents or representatives to the boards of competing companies, even where those appointees are different people. AAG Kanter noted that approximately 15 directors have stepped down from boards in response to DOJ inquiries, and the DOJ has approximately 20 open investigations into additional violations.[5] Some of these alleged violations of Section 8 involve PE firms.

5. Federalism at Work

The state enforcer participants at the Spring Meeting issued a warning not to forget that the states also have merger enforcement goals. The Washington state antitrust chief noted that some states already have premerger notification laws that apply to certain industries (*e.g.*, health care) and parties (*e.g.*, utility companies), and a growing number of states, including Washington, Nevada, Massachusetts, Oregon, and California, have passed additional so-called "mini-HSR" state pre-merger notification filings to fill perceived gaps in the HSR Act.[6]

New York's antitrust chief also noted that like the federal enforcers, state enforcers are not limited to pre-merger challenges. She pointed to a recent case against a ski operator that purchased a competitor and shut down the competing ski hill. The state heard about the transaction through consumer complaints and news coverage post-closing.

Ultimately, the advice from the state enforcer participants was to "come early and often" when interacting with state enforcers in a merger investigation. They expect to receive the same facts, evidence, and advocacy at the same time that they are presented to their federal counterparts—while still expecting parties to address issues that may be of more concern to a state enforcer than a federal one (historically, *e.g.*, hospitals, physicians).

Finally, the state enforcer participants addressed their ability to remedy concerns with a proposed merger. First, they offered a reminder that states have the ability to seek remedies even if a deal is cleared by the DOJ or FTC, or to seek remedies on top of any remedies agreed to by the DOJ or FTC. Second, unlike the federal enforcers, who have resisted behavioral remedies for the past few years, state enforcers may be more willing to agree to behavioral remedies, *e.g.*, rate protection or price caps. Washington's antitrust chief pointed out that the burden is lower on the states to monitor compliance with these types of remedies because certain industries are already subject to state regulatory oversight.

Key Takeaways

- Antitrust enforcers know that what they say at the Spring Meeting will be analyzed by the private bar and their clients. It is no surprise, therefore, that federal and state enforcer participants' carefully crafted statements did not reveal any major shifts in their enforcement strategies. Still, what they chose to share about their enforcement strategies is useful for merging parties trying to predict how antitrust enforcers might evaluate their transaction.

- Do not expect the DOJ's and the FTC's recent losses to have any chilling effect on their merger enforcement strategy. Over the course of the Spring Meeting, DOJ and FTC participants touted their aggressive approach to enforcement and listed a number of enforcement goals, many of which relate to M&A. And they attempted to recast those losses as creating "good law" for their future enforcement. In practice, however, resources are limited, and the DOJ and the FTC will have to prioritize these goals. With respect to merger enforcement, you can bet PE transactions will be a focus, as well as mergers involving potential competition, monopsony, nascent competition, and serial acquisition theories of harm.

- Both DOJ and FTC participants highlighted the importance of HSR filings. Merging parties should make sure to consult HSR counsel early, especially if there are questions about whether a transaction is reportable. A thorough sweep for 4(c) and (d) documents also should be conducted. Discovery of a 4(c) or (d) document that was not included in the filing in, *e.g.*, a Second Request response, could have a dramatic effect on timing, especially if the document raises new concerns.

- If merging parties issue a legal hold in response to a merger investigation, make sure that it covers any ephemeral messaging platforms, and do not be surprised if DOJ and FTC attorneys ask about the use of such platforms, especially if none are included in documentary productions.

- It is more difficult than ever to predict which agency will review a merger. However, if the DOJ receives clearance to review, merging parties may want to consider remedying potential concerns upfront because the DOJ has said that post-investigation settlements will be harder to obtain, except in limited circumstances. If the FTC gets clearance, a post-investigation remedy may be more workable, but merging parties should think about how "prior notice" and "prior approval" provisions could affect their long-term M&A strategies.

- If one of the merging parties is a PE firm, expect the DOJ or the FTC to ask questions regarding the business' other acquisitions in

the space and/or if the space is already consolidated. Additionally, PE firms should be prepared to discuss their investment strategy for the acquiring fund and their plans for the acquired company, in addition to the usual inquiries of a significant merger investigation.

- Finally, if a transaction involves local markets, do not be surprised if state enforcers express interest in investigating the transaction. You should work with your antitrust counsel to develop a strategy for responding to the state enforcers' requests and addressing their specific concerns. However, unlike the DOJ and the FTC, the state enforcers may be amenable to a behavioral remedy.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect the views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]True to its word, the FTC filed a complaint against New Orleans-area hospitals for failing to comply with the HSR Act on April 20, 2023. Complaint, *FTC v. La. Children's Med. Ctr.*, No. 1:23-cv-01103 (D.D.C. Apr. 20, 2023).

[2]*See* Jones Day Alert, *Antitrust Agencies Suspend Early Termination of HSR Waiting Period* (Feb. 2021), https://www.jonesday.com/en/insights/2021/02/antitrust-agencies-suspend-early-termination-of-hsr-waiting-period.

[3]*See generally* Michael A. Gleason, Aimee E. DeFilippo, Jeremy P. Morrison & Ryan C. Thomas, *U.S. Antitrust Agencies Take Aim at Private Equity*, The M&A Lawyer, July-Aug. 2022, at 1.

[4]The DOJ raised concerns with UnitedHealth Group Inc.'s proposed PE divestiture buyer in its challenge to UnitedHealth Group's acquisition of Change Healthcare Inc., which a federal judge rejected in September of last year. *See United States v. UnitedHealth Group Incorporated*, 2022 WL 4365867 (D.D.C. 2022), dismissed, 2023 WL 2717667 (D.C. Cir. 2023). Additionally, it was revealed in opening arguments on April 24, 2023 in the DOJ's challenge to Assa Abloy's acquisition of Spectrum Brands' hardware and home improvement business that the DOJ gave Assa Abloy three requirements for a divestiture, one of which was that the buyer not be a PE firm. *See* Bryan Koenig, *DOJ Told Assa Abloy: No Private Equity Buyers*, Law360 (Apr. 24, 2023), https://www.law360.com/articles/1600512/doj-told-assa-abloy-no-private-equity-buyers.

[5]*See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal; Press Release, U.S. Dep't of Just., Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

[6]*See generally* Michael A. Gleason & Charlie Stewart, *Proposed Legislation in New York Would Enact the First General, State-Level Premerger Reporting Regime*, The M&A Lawyer, Mar. 2022, at 1. The Washington antitrust chief also highlighted the Oregon state premerger notification law applicable to the healthcare industry, which requires state healthcare regulators to conduct a public interest *and* competition review for all healthcare transactions and permits the regulators to set and enforce cost growth targets. *See* ORS § 415.500-501 (2023). That law does not require merging parties to notify state antitrust enforcers, and per the Washington antitrust chief, this has resulted in delayed or omitted notifications to state enforcers.