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BLOG

FTC's New International Working Group Signals Closer Scrutiny of Pharmaceutical Mergers

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On March 16, 2021, acting Federal Trade Commission (FTC) Chairperson Rebecca Slaughter announced the formation of an international working group that will seek "to identify concrete and actionable steps to review and update the analysis of pharmaceutical mergers," specifically ensuring that the FTC and other regulatory bodies will utilize fresh approaches and "fully analyze the varied competitive concerns" that pharmaceutical mergers raise. The working group consists of Canadian, European Union and United Kingdom antitrust authorities, as well as the U.S. DOJ Antitrust Division and Offices of State Attorneys General. Commissioner Slaughter noted that the group "intend[s] to take an aggressive approach to tackling anticompetitive pharmaceutical mergers."

The announcement comes amidst a backdrop of nearly 600 pharmaceutical mergers and acquisitions within the last decade worth $1.6 trillion or more.[1] Moreover, President Biden campaigned on a pledge to lower the cost of prescription drugs and already has signed multiple executive orders expected to impact the price of prescription drugs.[2] Additionally, high-profile members of Congress, including Representative Katie Porter of California – who was cited in Commissioner Slaughter's Twitter thread announcing the initiative – have highlighted alleged shortcomings in innovation following previous pharmaceutical mergers.

Slaughter's Action Foreshadowed

In many ways, Commissioner Slaughter's approach is not surprising; she has signaled over the years her concern that the existing framework for analyzing pharmaceutical mergers does not capture all competitive consequences. While the FTC already has a history of challenging pharmaceutical mergers, it does not often block the mergers. Rather, the agency generally requires the merging companies to divest limited overlapping product lines. In fact, just last year, the FTC approved AbbVie Inc.'s acquisition of Allergan PLC so long as AbbVie divested three of Allergen's overlapping drugs to a Commission-approved buyer. Commissioner Slaughter, as she had done previously, dissented in that settlement decision citing concerns about whether the merger remedy adequately ensured continued innovation.

In her Dissenting Statement in connection with the FTC's settlement with Bristol-Myers Squibb and Celgene, Commissioner Slaughter noted that the current analytical framework that identifies product overlaps between the merging parties and requires divestitures of those products is not sufficient. Her disapproval stemmed from the high

pace of pharmaceutical mergers, the substantial increase in the cost of prescription drugs, and changes in pharmaceutical research and development, which she believes may hinder innovation. Suggesting a new framework, she advocated that the FTC and "researchers and industry experts [...] think carefully and creatively about these cases, and in particular, [...] study the effects of recently consummated mergers on drug research, development, and approval."

Her Dissenting Statement foreshadowed the FTC's announcement regarding the working group, which lists several potential questions to be considered. Some of the questions include:

- How can current theories of harm be expanded and refreshed?
- What is the full range of a pharmaceutical merger's effects on innovation?
- What evidence would be needed to challenge a transaction based on new or expanded theories of harm?
- What types of remedies would work in the cases to which those theories are applied?
- In merger review, how should regulators consider conduct such as price-fixing, reverse payments, and other regulatory abuses?
- What lessons have the FTC and other regulators learned about the scope of assets and characteristics of firms that make successful divestiture buyers?

Finally, Commissioner Slaughter stated that the new working group has no set timeline but stated that it is important to look at past enforcement actions, determine whether the regulators' actions were appropriate, and decide whether to update any protocols for scrutinizing pharmaceutical mergers. Commissioner Slaughter also foreshadowed that, should the working group function well, it could be expanded to focus on merger reviews of other industries and what the working group learns from this project could potentially be applied to other industries. [3]

Competition Regulators Back the FTC's Initiative

Other members of the group supported the move. Margarethe Vestager, Executive Vice President of the European Union in charge of competition policy, emphasized the European Commission's recent initiatives taken to scrutinize pharmaceutical mergers and expressed that she "warmly welcome[s] this initiative, which brings together some of our closest partners worldwide to take stock of the lessons learned in recent years and explore new ways to foster vibrant competition to the benefit of citizens." Matthew Boswell, the Canadian Commissioner of Competition, asserted that the working group will "ensure we are staying on top of emerging issues – with respect to mergers as well as any type of potentially anticompetitive conduct." Antitrust enforcers representing certain U.S. states also joined the working group, including the attorneys general of Pennsylvania, Wisconsin, California, and Virginia. Attorney General Mark Herring of Virginia declared that "Virginia and other states have a valuable role to play in antitrust enforcement and reviewing mergers, and [he] look[s] forward to sharing [his office's] insights with the state task force."

A More Aggressive FTC Under the Biden Administration?

Commissioner Slaughter's announcement coincides with several other public statements that she has made signaling a more aggressive enforcement approach under the Biden Administration. For example, Commissioner Slaughter recently testified before Congress that "[i]t's incumbent on the FTC to bring hard cases in all areas." [4] President Biden's recent nomination of Lina Khan, an advocate for stronger antitrust enforcement in the technology sector, to be a FTC Commissioner further underscores the administration's commitment to stronger antitrust enforcement across the board, not just in the pharmaceutical industry.

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[1] A Decade of Biopharma M&A and Outlook for 2020, PharmaIntelligence, 2-3, Mar. 2020, *available at* https://pharmaintelligence.informa.com/~/media/informa-shop-window/pharma/2020/files/whitepapers/ma-

whitepaper.pdf.

[2] Elena Moore, NPR, Trump's and Biden's Plans for Health Care, Oct. 16, 2020, *available at* https://www.npr.org/2020/10/16/921237845/trumps-and-biden-s-plans-for-health-care; Merle DeLancey, Jr., JDSupra, Feb. 17, 2021, *available at* https://www.jdsupra.com/legalnews/biden-administration-already-impacting-2691434/.

[3] Bryan Koenig, Law360, FTC Leads International 'Rethink' of Pharma Merger Reviews, Mar. 16, 2021, available at https://www.law360.com/competition/articles/1365434/ftc-leads-international-rethink-of-pharma-merger-reviews.

[4] Leah Nylen, Politico, 'I wish' FTC had sued Google in 2013, Biden's acting chair says, Mar. 18, 2021, *available at* https://www.politico.com/news/2021/03/18/ftc-google-overhaul-476999.

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