

# Report from Washington

## ABA Antitrust Spring Meeting in Review

April 17, 2024

On April 10-12, 2024, key members of the global antitrust bar convened in Washington, D.C. for the 72<sup>nd</sup> annual ABA Antitrust Spring Meeting. Participants typically include senior representatives from the FTC, DOJ, and international antitrust authorities, and 2024 was no exception. This Report highlights some of the key takeaways.

- **FTC and DOJ remain skeptical of merger remedies, particularly behavioral remedies.** The agencies continue to express skepticism of merger remedies. Ryan Danks, the DOJ Antitrust Division’s Director of Civil Enforcement, explained: “We shouldn’t normalize the idea that two companies will do a deal that they know is harmful to competition, and then come to the agencies and expect us to spend the time and resources necessary to try to minimize the harm. . . . That’s not our jobs.” For most mergers involving remedies, Danks suggested companies “find a different deal to do.” This sentiment was echoed by Rahul Rao, FTC Deputy Director of the Bureau of Competition, who explained that “the burden is not on [the agencies]” to “fix...the parties’ transactions for them.” Rao also noted that the Amgen/Horizon remedy was “very narrowly tailored” and that the agencies “continue to be very, very skeptical of behavioral remedies,” particularly when a divestiture buyer has ongoing business entanglements with any of the merging parties (*e.g.* supplier and licensing agreements).
- **New HSR weeks away.** DOJ Deputy Assistant Attorney General Andrew Forman indicated that a revamped HSR filing form is “weeks, as opposed to months” away (though he acknowledged the FTC leads the charge and ultimately drives timing). The new form could require disclosures of past antitrust violations, labor law violations, additional ordinary course business documents, and a wider scope for internal communications about a proposed transaction. While it remains to be seen what the final form contains, Forman also stated that the new HSR form will contain “material” changes and will be less burdensome than the form proposed last year.
- **New FTC forthcoming non-compete rule also soon-to-be-released.** Hannah Garden-Monheit, Director of the FTC’s Office of Policy Planning, stated that staff are moving to “swiftly” finalize a new agency rule banning employers from instituting coercive non-compete provisions in employment contracts. Commentators widely predict that it will be challenged on administrative and constitutional grounds, with state antitrust officials indicating unease over the rule. For example, Paula Blizzard, Head of California’s antitrust bureau, expressed federalism concerns, stating: “We don’t want a federal version [of the non-compete rule] that weakens California’s noncompetes and the California State Legislature’s priorities.”
- **Continued scrutiny of Private Equity transactions.** The agencies have indicated concerns with private equity acquisitions, particularly in the healthcare industry. Henry Liu, Director of the FTC’s Bureau of Competition, stated that the agency is “hyper-focused” on private-equity owned healthcare facilities given

reports that they tend to “have higher costs and lower quality of care.” Other DOJ and FTC officials, including DOJ Health Care Counsel and Acting Deputy Director of Civil Enforcement Katrina Rouse and FTC Deputy Assistant Director Jordan Andrew, urged private equity buyers, should they want to mitigate antitrust concerns, to alert regulators to instances of previous healthcare acquisitions which have demonstrably reduced prices or improved quality of services provided.

- **Concern regarding an array of issues arising in the antitrust investigation process.** Officials from the DOJ, the FTC, and state regulators, including the DOJ Antitrust Division’s Deputy Director of Civil Enforcement Suzanne Morris, FTC attorney Richard Mosier, and Chief of New York’s antitrust bureau Elinor Hoffman, reiterated that it is in the parties’ interests to be transparent and readily cooperate with agencies in the course of an investigation. In particular, they expressed disapproval of providing “thin” sets of documents in HSR filings (with Mosier saying that parties with deficient documents, particularly respecting Item 4, risk “having that HSR and perhaps prior HSRs scrutinized”), stonewalling officials and failing to be forthcoming during investigations, and not promptly providing information-sharing waivers for federal and state agencies. Other notable updates include the DOJ’s continued focus on completeness of companies’ responses during regulatory investigations, and willingness to bring obstruction of justice charges against defendants and attorneys for failing to preserve self-deleting messages or documents that are responsive to subpoenas and other investigative requests.
- **Non-price factors are important in assessing whether a transaction may harm competition.** The agencies continue to emphasize the importance of non-price aspects of competition such as labor, innovation, advertising, and product design in assessing the impact of a particular transaction. Per Henry Liu, Director of the FTC’s Bureau of Competition, these non-price considerations are especially relevant in investigations concerning emerging markets and technologies, stating that there is no blanket immunity for “markets and technology markets that are zero-price.” Relatedly, FTC Chair Lina Khan, in a discussion about pharmaceutical mergers and drug research, noted that the agency will scrutinize proposed buyers and any history of anti-competitive conduct, warning companies that “the bottom line is don’t sell to the monopolist.” Jonathan Kanter, DOJ Assistant Attorney General, also quipped about the role of intuition in assessing market competition, stating that “most companies know — and know in their heart of hearts — whether a merger is going to reduce competition or not.”
- **Shifting perspectives on the importance of defining product markets.** FTC and state officials emphasized that every antitrust case does not necessarily need a well-defined product and geographic market established through empirical or economic analyses. Emily Blackburn, an FTC attorney, stated that “[i]f we see direct evidence of substantial competition or market power being exercised, that’s important real-world evidence that there’s a market in which that competition is occurring, in which that power is being exercised.” Henry Liu, Director of the FTC’s Bureau of Competition, noted that technical market definitions can be overemphasized and that the FTC is “prioritizing direct indicators of competition between the merging parties over potentially superfluous and unnecessary fights about market definition.”

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