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New Dose of Antitrust Scrutiny for Pharmaceutical Mergers

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On March 16, 2021, FTC Acting Chair Rebecca Kelly Slaughter announced the launch of a multi-jurisdictional Working Group to update the approach to analyzing pharmaceutical mergers. The Working Group includes the FTC, the DOJ Antitrust Division, antitrust enforcers in Canada, the UK and the EU, plus several states attorneys general. This announcement appears grounded in a view that a progressive "rethink" of the approach to pharmaceutical merger review is necessary amid the "high volume of pharmaceutical mergers in recent years" and "skyrocketing drug prices."

Slaughter explained her view that the FTC's historical approach to pharmaceutical mergers focuses too much on analyzing overlaps in the merging parties' products and pipeline products, and not enough on other adverse outcomes such as a reduction in innovation. The Working Group will consider topics addressing all aspects of pharmaceutical merger reviews, including expanding or introducing new theories of harm (and the requisite evidence and potential remedies associated with those new theories), the characteristics of successful divestiture buyers, and how the antitrust authorities should consider other unrelated conduct by parties in merger review, such as price fixing, reverse payments and other regulatory abuses.

The Working Group will also undertake a review of completed mergers and left open the possibility of commencing enforcement action against these consummated transactions. Slaughter said, "where we see the need for ex-post action, I [would] like to see us use the opportunity to take it."

The launch of the Working Group is a clear signal that there will be even more scrutiny of already closely reviewed pharmaceutical mergers going forward. While the timeline for the Working Group's work is not yet known, we expect to see some output in the second half of 2021. In the meantime, pharmaceutical companies should expect to see the U.S. and ex-U.S. antitrust authorities continue to cooperate in enforcement and to

assert new theories of harm, such as reduced innovation even outside areas of direct overlap. Similarly, antitrust enforcers may look to reframe what must be included in acceptable remedial packages.

While it is too soon to predict whether there will be material changes in outcomes or consent decrees in pharmaceutical mergers, industry participants should prepare for the length and depth of focus of these investigations to expand. Also, although this the Working Group is focused squarely on the pharmaceutical industry, it is possible that similar "rethinks" of approaches to merger review in other high-profile industries, such as technology, may be in the pipeline.

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