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FTC Issues Report Confirming the Effectiveness of Its Own Merger Remedies

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February 10, 2017 — On February 3, 2017, the Federal Trade Commission released a report called "The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics." The report summarizes the findings of a study conducted by the Commission staff examining all 89 merger consent orders issued by the Commission between 2006 and 2012 to determine their effectiveness in maintaining or restoring competition to pre-merger levels.

The report's main conclusion is that the Commission's consent orders are generally effective, but the statistics suggest that close to 20% of the orders reviewed using a case study approach failed to maintain or restore competition to pre-merger levels.

The report's main conclusion is that the Commission's consent orders designed to eliminate the potential anticompetitive effects of certain mergers are generally effective at protecting competition and/or restoring competition to pre-merger levels within two to three years. According to the report, of the 50 orders examined as part of the study's case study component, "more than 80%" maintained or restored competition to pre-merger levels. Yet that same statistic suggests that around 20% of the orders in the study's case study component were unsuccessful in maintaining or restoring pre-merger levels of competition, which is perhaps the most noteworthy finding in the report. Additionally, although the study assessed the effectiveness of all orders during the selected period of 2006 through 2012, that period notably did not include two more recent orders involving buyers of divested assets that went into bankruptcy within a year — a 2013 consent decree that allowed Hertz to buy rival car rental company Dollar Thrifty and a 2015 order that allowed Albertsons to acquire competing supermarket chain Safeway.

Among the Commission's additional conclusions were that divestitures of ongoing businesses succeeded more often than divestitures of limited asset packages in horizontal mergers, and that orders involving pharmaceutical products still in development were successful 100% of the time.

The Commission used a variety of methodologies to assess all 89 merger orders during the relevant period.

To conduct the study, Commission staff examined all 89 merger orders issued by the Commission between 2006 and 2012, including those requiring divestitures. All 89 orders were consent orders and the vast majority addressed horizontal concerns (only four involved vertical mergers). For purposes of the study, the 89 orders were divided into three groups as follows:

- First, staff examined 50 orders using a case study method and supplemented their findings by interviewing additional market participants and reviewing seven years of relevant sales data, which they required significant competitors to submit.
- Second, staff evaluated 15 orders affecting supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities by examining responses to voluntary questionnaires submitted by Commission-approved buyers.
- Third, staff evaluated 24 orders affecting the pharmaceutical industry by analyzing internal information and publicly available data.

The Commission provided only a vague description of its standard of success and perhaps did not consider prices before and after the relevant mergers in deciding whether its remedial orders were successful.

Although the report asserts that most of the Commission's orders during the relevant period were successful, the report only vaguely describes the standard for success employed by the staff in conducting significant portions of the study. In describing the methodology for assessing orders involving horizontal mergers with a structural remedy included in the first part of the study, for instance, the report states only that "the focus was the competitive significance of the buyer of the divested assets (i.e., the new competitor created by the Commission's order). The principal question was whether the buyer maintained the competition that existed in the market before the merger." The report fails to explain what it means by "maintain[ing] competition," and, although the Commission appears to have taken a totality-of-the-circumstances approach, the study did not appear to focus on — or necessarily consider — whether prices had increased after the relevant merger was completed.

The Commission was more specific about its standard of success in the portion of the study reviewing 24 orders involving the pharmaceutical industry. According to the report, for products that were already on the market, the divestiture of those products "was considered successful if the buyer sold the product in the market post-divestiture." Similarly, for products in development, "the divestiture was considered successful if all assets relating to those products were successfully transferred." Accordingly, for that portion of the study, it appears that the Commission did not consider post-merger prices charged, market penetration of the divestiture buyer, or profitability of the buyer in its analysis.

The report identifies a series of best practices for respondents, buyers, and Commission staff to consider going forward.

Although the report's main conclusions were positive, the report identifies certain areas of concern raised by buyers over the course of the study that the Commission plans to address going forward. These areas of concern included issues relating to defining the scope of a limited asset package, the adequacy of resources available for buyers to conduct due diligence, and the transfer of back-office functions from respondents to buyers. The report includes a section on best practices with respect to each of these areas to guide respondents, buyers, and Commission staff as to how to handle these aspects of the merger remedy process in the future. According to the report, the best practices described "do not reflect significant changes to the Commission's current practice, but rather further refine the Commission's approach to remedies and the remedy process."

Many of the best practices identified by the Commission focus on improving communication and the exchange of resources between buyers, respondents, and Commission staff. For instance, with respect to back-office functions, the Commission notes that respondents should "explain to staff and the buyer all back-office functions related to all relevant products, as well as all necessary personnel and documentation; ensure that the proposed buyer can conduct adequate due diligence to understand what back-office functions will be needed and the complexities involved in the transfer of such functions; make its information technology employees available to discuss and plan the transfer of the back-office functions with the buyer; and provide back-office functions to the buyer as needed on a transitional basis for a period sufficient to allow the buyer to transition all services, at no more than respondent's cost." Along similar lines, the Commission notes that buyers should: "explain to staff the scope of back-office functions it will need to support the asset package and how it will provide or obtain these functions and at what cost; and explain the length of time it will need transition services and its options if the transition takes longer than expected."

The timing of the study was likely influenced by several factors.

This is not the first study of its kind. The Commission conducted a similar study in 1999, which evaluated merger orders requiring divestiture from 1990 through 1994, and concluded at that time that "most divestitures appear to have created viable competitors" in the relevant markets. The Commission initiated the study giving rise to the current report in 2015 following sharp criticism of the Commission's orders from economist John Kwoka, a professor at Northeastern University, and others, who claimed that the Commission's merger remedies, which are designed to maintain or restore competition despite a merger, do not work. Kwoka and others maintain that the Commission should block more deals outright rather than permit transactions conditioned on partial divestitures or conduct remedies intended to eliminate or minimize adverse effects on competition.

The report was released a week before outgoing Commission Chairwoman Edith Ramirez's last day as a commissioner on February 10, 2017. Maureen Ohlhausen, who has been a commissioner since April 2012, was named Acting Commission Chairwoman on January 25, 2017.

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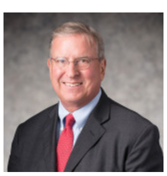

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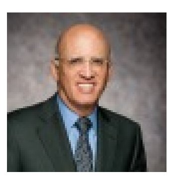

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