

Clients & Friends Memo

COVID-19 Update: Antitrust Enforcement Remains Robust Despite COVID-19

May 7, 2020

Many clients have asked about the state of federal antitrust enforcement during the current pandemic. We can tell you this: the Agencies are taking longer to clear or challenge deals, but the level of antitrust enforcement, for both merger and conduct cases, remains robust despite the investigating staff operating from home offices and kitchen tables.

Our progressive-minded friends at the American Antitrust Institute and the leaders of the FTC and DOJ have been locked in a public feud over the level of rigor in the Trump Administration's antitrust enforcement programs generally. We come down squarely on the side of the FTC/DOJ that the AAI has cherry-picked and manipulated data to support its assertion that enforcement productivity is down. Instead, we see evidence that enforcement during the current regime is comparable to previous Democratic and Republican administrations for the past several decades. Moreover, and despite a call by some progressive FTC Commissioners and Congressional leaders for a COVID-19 moratorium on most mergers, the FTC and DOJ continue apace at investigating and clearing deals and investigating civil and criminal conduct for antitrust violations.

To make the point that enforcement remains robust, we thought it would be useful to collect reports about all enforcement actions from March 1, 2020 to date. The reports below that contain a link are linked to official FTC or DOJ press releases, except for the final category on merger-related action from the Hill, which are linked to media sources. Other reports without a link were drawn from various media sources.

Merger Enforcement

- AbbVie/Allergan deal cleared with conditions. AbbVie announced on May 5 that the FTC accepted a proposed consent order requiring divestitures.
- [Cengage and McGraw-Hill terminated their merger agreement in response to DOJ concerns](#) (May 4).
- [Bankrupt dairy company Dean Foods and the Dairy Farmers of America reached an agreement with DOJ allowing the parties to merge with conditions](#) (May 1). The companies must divest Dean dairy plants in Illinois, Wisconsin and Massachusetts.
- [DOJ closed its investigation into Prairie Farms' proposed acquisition of fluid milk processing plants from Dean Foods in the South and Midwest](#) (May 1). DOJ concluded that the plants at issue likely would be shut down if not purchased by Prairie Farms due to Dean's distressed financial condition and the lack of alternate operators who could buy the plants in time.
- Willis Towers Watson's CEO on April 30 downplayed the pandemic's impact on the regulatory approval process for its acquisition by Aon. The deal would combine the world's second- and third-largest insurance brokers by sales.
- Stryker CEO on April 30 stated that the companies expect to close their merger at the end of October. The parties are in the market to divest their STAR ankle reconstructive-joint business and toe-joint products to address FTC concerns. The FTC reportedly still is reviewing the companies' products and services for additional overlapping products.
- As of late April, DOJ's review of Anheuser-Busch's proposed acquisition of Craft Brew Alliance reportedly is limited to potential effects in Hawaii, where Kona is a leading brand and one of Hawaii's largest craft breweries.
- Eldorado entered into a definitive agreement on April 23 to divest two casino properties to Twin River to address FTC concerns regarding its acquisition of Caesars Entertainment.
- [FTC approved a final order settling charges that FXI Holdings, Inc./Innocor, Inc. merger was anticompetitive](#) (April 21). The polyurethane foam producers will divest certain plants in order to preserve competition in three regional markets for the low-density conventional polyurethane that is used in home furnishings.
- Thermo Fisher Scientific and Qiagen received a Second Request from the FTC on April 20 regarding their proposed deal.
- Morgan Stanley/E*Trade deal cleared. Morgan Stanley told investors during its quarterly earnings call on April 16.
- Press reports indicate that DOJ is evaluating Liberty Media's potential acquisition of iHeartMedia, prompting a group of consumer and artist advocacy organizations to send a letter

to DOJ opposing the deal on April 15. DOJ reportedly is looking at competition for advertisements between the two parties.

- Brazil's Administrative Council for Economic Defense, or CADE, approved the International Airlines Group/Air Europa deal on April 13. CADE stated that the transaction also has been approved by DOJ, but the approval date has not been disclosed.
- Under pressure from the FTC and European enforcers, Johnson & Johnson abandoned its acquisition of TachoSil Fibrin Sealant Patch from Takeda Pharmaceuticals on April 10. [The FTC then closed its investigation of the proposed acquisition](#) (April 10).
- [FTC approved final order imposing conditions on Compassion First/National Veterinary Associates deal](#) (April 10). The parties must divest three clinics in order to preserve competition in three local geographic markets for various specialty and emergency veterinary services.
- [FTC imposed conditions on Össur HF's acquisition of College Park Industries, Inc.](#) (April 7). The conditions aim to remedy competition loss in the U.S. market for myoelectric devices.
- Constellation Brands announced on April 3 that the FTC is vetting potential buyers for divestiture assets related to Constellation's sale of more than 30 wine and spirits brands to E. & J. Gallo.
- Novartis announced on April 2 its mutual agreement with Aurobindo Pharma USA Inc. to terminate the agreement to sell Aurobindo its Sandoz US generic oral solids and dermatology business because FTC approval was not obtained within anticipated timelines.
- [DOJ required divestitures in UTC/Raytheon merger to address vertical and horizontal concerns](#) (March 26). Divestitures will preserve competition in the U.S. for military airborne radios, military GPS systems and reconnaissance components.
- [FTC approved Danaher Corporation's acquisition of GE Biopharma with conditions](#) (March 19). Danaher agreed to divest 10 products in markets where the company competed head-to-head with GE's biopharma business.
- [DOJ won historic arbitration of Novelis Inc./Aleris Corporation merger dispute](#) (March 9). DOJ succeeded in its first attempt to resolve a key dispute in a merger challenge through arbitration. Novelis must divest assets in order to consummate transaction with Aleris.
- There also have been 125 early terminations since March 1, with 89 being granted since the FTC resumed issuing early terminations on March 30 after a brief pause of about two weeks due to COVID-19.

Litigation

- The FTC asked a Fifth Circuit panel on May 4 to unfreeze the FC's enforcement action targeting Louisiana Real Estate Appraisers Board fee rules, arguing that the board must first go through the FTC administrative process. The FTC is appealing a lower court's ruling that paused its in-house administrative examination of the fee rules, which the agency says are illegally restraining trade.
- [Former VieVu parent Safariland reached an agreement with the FTC to settle charges that it entered into anticompetitive agreements with body-worn camera systems seller Axon](#) (April 17). The settlement is part of the FTC's larger case challenging Axon's consummated acquisition of former competitor VieVu.
- The FTC filed an amended complaint on April 14 in a case accusing Vyera Pharmaceuticals and two of its owners of illegally preventing generic competition for the drug Daraprim. The case was originally filed by the FTC and New York. [The amended complaint adds six additional states as plaintiffs.](#)
- On April 13, the FTC pushed back timing in its administrative court in four deals: Altria-Juul, Axon-VieVu, Jefferson Health-Einstein and Peabody-Arch Coal. The challenges have been stayed an additional 45 days due to the COVID-19 crisis and comes after previous extensions in each case. The FTC's effort to block the Peabody/Arch Coal joint venture in federal court also will be extended by three weeks.
- Related to the FTC's efforts to unwind Axon's acquisition of police body camera rival VieVu in its administrative court, on April 8, Axon's challenge to the constitutionality of the FTC's administrative court proceedings was dismissed. Axon asked the Ninth Circuit for an expedited briefing and hearing on its challenge on April 17, and filed a brief on May 1 stating that it should be allowed to challenge the constitutionality of the FTC's merger review process and administrative court prior to the administrative court ruling.
- [DOJ agreed to civil settlement with last known Korean oil company accused in military bid rigging conspiracy that targeted Defense Department fuel supply contracts for U.S. military bases in South Korea](#) (April 8). Five other companies previously settled charges that the companies' scheme violated antitrust law and defrauded American taxpayers.
- [A Delaware federal judge denied DOJ's request to block the merger of Sabre Corporation and Farelogix, Inc. on April 7](#) (April 8). DOJ filed a protective notice to appeal on April 9, and the deal was blocked by the United Kingdom's Competition & Markets Authority on April 9. The parties abandoned the deal on May 1, leading [DOJ to consider whether to move to vacate the district court decision approving the merger](#) (May 1).
- [DOJ announced final judgment in the T-Mobile/Sprint transaction](#) (April 1). The federal district court order gives effect to the settlement that the DOJ and numerous states reached with the

merging parties and Dish Network to allow the deal to proceed, subject to substantial divestitures and other remedies.

- DOJ filed a statement of interest on March 21 asking the district judge to grant Fortress Investment Group's motion to dismiss the claims by Apple and Intel challenging Fortress' allegedly illegal patent-licensing business. DOJ stepped in because of its "particular interest" in the intersection between antitrust and intellectual property law. Apple and Intel filed a brief on April 14 rebutting the DOJ's opposition to their antitrust claims, and DOJ filed a reply brief on April 23.

Criminal Enforcement

- [Florida Cancer Specialists and Research Institute, a leading cancer treatment center, agreed to pay \\$100 million and enter a deferred prosecution agreement to resolve market allocation charge by DOJ](#) (April 30).
- In-home health care services companies reportedly are facing scrutiny from DOJ relating to potential anticompetitive conduct involving no-poach agreements and other potential anticompetitive conduct. The investigation began last year by DOJ staff in San Francisco.
- Fair Isaac Corp. disclosed that it was notified on March 13 that DOJ has opened a civil investigation into potential exclusionary conduct by FICO (March 15).
- [Two commercial flooring executives pleaded guilty to rigging bids](#) (March 9). These were the fourth and fifth guilty pleas in the government's continuing investigation.
- [A fugitive for nearly five years, a former automotive parts executive was extradited to the U.S. and pleaded guilty to antitrust conspiracy](#) (March 3).
- [Pharmaceutical company Sandoz Inc. agreed to pay a \\$195 million criminal penalty, the largest for a domestic antitrust case, to settle charges for conspiring to allocate customers, rig bids and fix prices for generic drugs](#) (March 2). This is the third pharmaceutical company to admit to criminal charges in DOJ's ongoing investigation.

Business Review Letters

- [AmerisourceBergen received expedited approval to collaborate with other medical supply wholesalers and the federal government to distribute critical medicine and other supplies to communities fighting the COVID-19 pandemic](#) (April 20).
- [DOJ stated it will not challenge a proposal by the Association of Independent Commercial Producers to operate an online platform for advertisers to solicit bids from companies that provide production services for commercial advertisements](#) (April 16).
- [Project Airbridge medical supplies distributors received expedited approval for collaborative efforts to expedite and increase manufacturing, sourcing and distribution of personal protective equipment \(PPE\) and coronavirus-treatment-related medication](#) (April 4).

Joint Actions

- [DOJ and FTC issued a joint statement announcing they are closely monitoring employer collusion to disadvantage workers in the wake of COVID-19](#) (April 13).
- [DOJ and FTC issued guidance for businesses seeking to collaborate on COVID-19 response and set forth expedited review procedures for such collaborations](#) (March 24).
- [DOJ and FTC issued a joint letter raising concerns that a proposed California law would disadvantage small brewers](#) (March 23).

Merger-Related Actions from The Hill

- Antitrust Subcommittee Chairman David N. Cicilline (RI-01) led House lawmakers on May 5 in urging that the next COVID-19 relief package include language prohibiting corporate mergers that do not involve the purchase of a severely distressed company. [The letter sent to Speaker Nancy Pelosi and Republican Leader Kevin McCarthy was signed by eleven additional House representatives.](#)
- Senator Elizabeth Warren (D-Mass) and Representative Alexandria Ocasio-Cortez (D-NY-14) announced on April 28 plans to introduce the [Pandemic Anti-Monopoly Act](#) to impose a moratorium on mergers and acquisitions involving large companies until the FTC unanimously determines that small businesses, workers and consumers are no longer under severe financial distress. The Act also would pause all waiting periods and deadlines imposed on antitrust agencies during the moratorium.
- FTC member Rohit Chopra has expressed support for Cicilline's proposal, whereas his fellow [FTC commissioner Noah Phillips harshly criticized both Cicilline's proposal and the proposed Pandemic Anti-Monopoly Act](#) in an essay for the *Truth on the Market* blog.
- [Fifteen senators, led by Amy Klobuchar \(D-Minn\), ranking member of the Senate antitrust committee, on May 1 sent a letter to the heads of the FTC and DOJ](#) urging the agencies to remain vigilant against anticompetitive mergers and conduct as the country continues to suffer the effects of the COVID-19 pandemic. The letter also asks the agencies questions relating to the effect of COVID-19 on their enforcement abilities, how they are accounting for economic uncertainty during their reviews, whether they have been able to meet HSR deadlines, and if they will commit to conducting retrospective reviews of mergers that were allowed to proceed during the pandemic.

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If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

Joel Mitnick	+1 212 504 6555	joel.mitnick@cwt.com
Ngoc Hulbig	+1 704 348 5282	ngoc.hulbig@cwt.com