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EXECUTIVE ORDER SIGNALS NEW ERA IN ANTITRUST ENFORCEMENT AND MERGER REVIEW

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Last month, President Biden issued a voluminous "Executive Order on Promoting Competition in the American Economy" ("the Order").[1] The Order is built on the premise that "excessive" corporate consolidation over the past several decades has weakened competition and widened inequality in the U.S., a premise disputed by a number of economists and business leaders. Billed as an effort to "reverse these dangerous trends," the Order outlines 72 discrete initiatives across the federal government coordinated by a new White House Competition Council. It singles out labor markets as well as the agricultural, healthcare, and tech sectors for particular scrutiny.

The Order expands on an executive order issued in the waning days of the Obama Administration. The "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy" (the "Obama Order")[2] broadly encouraged all federal agencies to independently identify actions they could take to detect anticompetitive behavior and promote competition via rulemaking and regulation under the terms of their respective authorizing statutes. The Trump Administration reversed course: its appointees nixed their agencies' efforts to implement the Obama Order, including proposed rules related to airline baggage and change fees, meatpacking, and cable and satellite set-top boxes.

The Biden Order takes a granular regulatory approach, setting forth specific proposals by industry and agency. It encourages increased DOJ and FTC enforcement and harnesses industry-specific statutes and regulatory tools across more than a dozen agencies to achieve its goals—the most comprehensive "whole-of-government" approach to competition policy since the 1970s. Business leaders were quick to criticize the Order's direc-

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tives as " 'Government knows best' " "solutions in search of a problem," challenging the Order's presumption that the economy is over-concentrated and additional regulation is the solution.[3]

The Order calls on the DOJ and FTC to "vigorously" enforce traditional antitrust law, particularly in labor markets, as well as in the agricultural, healthcare (pharmaceutical, hospital, insurance), and tech industries. It notes that tech in particular is prone to "serial mergers, the acquisition of nascent competitors, the aggregation of data, . . . and the presence of network effects." To address these issues, the Order encourages revision of the horizontal and vertical merger guidelines—including those used specifically for hospital and bank mergers. The Fact Sheet[4] accompanying the Order calls for the DOJ, Federal Reserve, FDIC, and Comptroller of the Currency to update their guidelines on banking mergers to provide "more robust scrutiny" and "underscores" to the DOJ and FTC that "hospital mergers can be harmful to patients." It also reminds them "that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge," opening the door to retrospective merger investigations. Outside the merger context, the Order embraces renewed use of FTC rulemaking to achieve specific goals, including bans or limits on employee non-compete agreements, "unnecessary" occupational licensing restrictions, and prohibitions on pharmaceutical reverse payment patent settlements.

The Order argues, however, that the DOJ and FTC alone cannot address "overconcentration, monopolization, and unfair competition in the American economy." It therefore includes competition-related directives for more than a dozen additional federal agencies. Several of those initiatives arguably replace competition on the merits with regulation, others eliminate existing government regulation, and others seem designed to support outcomes that might have naturally resulted from competition anyway. For example, the Order directs the Department of Health and Human Services ("HHS") to "standardize" benefit options in the national Health Insurance Marketplace to better enable consumers to compare insurance plan costs, eliminating competition on the types or quality of benefits offered

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to consumers. Likewise, the Order encourages the FTC to ban reverse payment patent settlements in the pharmaceutical industry through rulemaking, a practice the Supreme Court itself has acknowledged could have pro-competitive benefits.

Other key initiatives include:

- Directing the Food and Drug Administration to work with states and tribes to import prescription drugs from Canada;
- Directing HHS to issue rules allowing hearing aids to be sold over-the-counter;
- Directing the Department of Transportation to consider rules requiring the disclosure of airline fees and refunds of relevant fees for sub-par service;
- Encouraging the Surface Transportation Board to require railroad track owners to provide rights of way to passenger rail carriers; and
- Encouraging the Consumer Financial Protection Bureau to issue a new rule to facilitate the portability of consumer financial transaction data so consumers can more easily change financial institutions.

If implemented as drafted, the Order would significantly expand federal intervention across the economy. It does not impose new requirements on businesses directly, so its impact will depend on the affected agencies' response—in speed and scope—and on the inevitable litigation to follow. In an apparent attempt to head off challenges to presidential authority, the Order "encourages" rather than "directs" independent agencies like the FTC and the Federal Communications Commission to implement certain initiatives. Coming in the early days of the Biden Administration and coinciding with the appointment of new agency heads, that encouragement has already found a receptive audience.

Within hours of the Order's publication, DOJ and FTC leadership endorsed a more "rigorous analytical approach" to M&A writ large, issuing a press release stating that the existing merger guidelines "deserve a hard look to determine whether they are overly permissive."[5] And in the weeks since the Order, the agencies have implemented additional merger policy changes. First on the chopping block was the FTC's 15-year-old policy statement limiting the use of "prior notice" and "prior approval" provisions in merger settlements: in a July 21 party-line vote, the Commission scrapped its Clinton-era policy not to require companies who had settled prior mergers with the FTC to provide notice or receive approval (beyond the typical HSR process) before consummating additional transactions.[6]

Key leaders at the FTC have also publicly admonished companies for proposing transactions "that should not make it out of the boardroom" given the FTC's past enforcement history and speculated on "how to send a message to the markets" that arguably problematic deals should not reach the agency at all. The White House press secretary similarly praised the DOJ's challenge—and the parties' abandonment—of the proposed Aon and Willis Towers Watson merger, citing the DOJ's effort as "what the president was talking about when he called for more robust enforcement of the antitrust laws."[7] Future agency targets likely include the new Vertical Merger Guidelines (the first such guidelines issued in 35 years) adopted in 2020—over the objections of the FTC's two Democratic Commissioners who are now in the majority and claim the guidelines are too business-friendly.[8]

The FTC's policy changes have drawn objections from that body's two Republican Commissioners. One characterized the Biden-era FTC as "bulldoz[ing] through . . . guardrails" and creating uncertainty in the business community that will "chill procompetitive deals and hurt consumers."[9] Her colleague echoed that charge, adding that, like the Commission's "allegedly temporary" suspension of early termination grants under the HSR rules in February 2021, rescission of the "prior approval" rule "amounts to a gratuitous tax on normal market operations."[10] Their protests, however, have drawn little reaction from the Commission's majority.

Other agencies name-checked in the Executive Order also have answered the call to arms, initiating agency actions and issuing statements of support, including:

- A Department of Transportation proposed rulemaking on refunding airline checked baggage and Wi-Fi fees when service is delayed or sub-par;
- Execution of a Memorandum of Understanding between the Federal Maritime Commission and DOJ to enhance competition among ocean carriers;
- A statement by a newly-appointed Republican FCC Commissioner praising the President's "vociferous commitment to capitalism and competition";
- The USDA's announcement of a new $500 million investment in expanded meat and poultry processing capacity to "level the playing field" for small farmers and ranchers; and
- A proposal by the Department of Health & Human Services to increase penalties for hospitals that fail to comply with existing price transparency rules.

While it will take time for these processes to play out, the Order signals a potential sea-change underway in the federal government's approach to antitrust enforcement. Companies should expect downstream impacts in the form of more rulemakings, more (and longer) merger and conduct investigations, and more merger challenges as agencies work to implement the Order's directives.

This pro-enforcement agenda faces headwinds, however. Litigating nontraditional theories of harm will be an uphill battle against established court precedent—particularly if those theories are not backed by the economics. The agencies may also meet resistance from legislators responding to business constituents as well as the established views of agency staff, who are responsible for conducting investigations. And while there have been some bipartisan suggestions to increase the antitrust agencies' funding and staffing, unless or until their resources expand, the agencies will be forced to prioritize among their enforcement goals.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[2]The White House, Executive Order—Steps

to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy (April 15, 2016), at https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[3]*See, e.g.*, National Association of Manufacturers, Manufacturers on Biden EO: Some Actions Are Solutions in Search of a Problem That Doesn't Exist (July 9, 2021), at https://www.nam.org/manufacturers-on-biden-eo-some-actions-are-solutions-in-search-of-a-problem-that-doesnt-exist-14545/; U.S. Chamber of Commerce, U.S. Chamber Believes Executive Order on Competition Fails to Advocate for Market-Based Competition, Instead Follows a 'Government Knows Best' Approach (July 9, 2021), at https://www.uschamber.com/press-release/us-chamber-believes-executive-order-competition-fails-advocate-market-based.

[4]The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[5]Statement of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division and FTC Chair Lina Khan on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), at https://www.justice.gov/opa/pr/statement-acting-assistant-attorney-general-richard-powers-antitrust-division-and-ftc-chair.

[6]The FTC's "prior approval" policy was adopted in 1995 after the Commission spent eight-plus years in litigating an already-abandoned transaction in order to impose a prior approval order on the parties—a requirement it had not pursued in another similar merger abandoned before reaching litigation, resulting in public criticism that the FTC was using prior approval provisions vindictively against parties who opted to defend their proposed mergers in court. The 1995 policy limited the use of prior approval terms to occasions where there was a credible risk that the company would attempt the same or similar merger again or an otherwise unreportable anti-competitive merger.

[7]Press Briefing by Press Secretary Jen Psaki (July 27, 2021), at https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/27/press-briefing-by-press-secretary-jen-psaki-july-27-2021/.

[8]Following the confirmation of Chair Khan, the FTC has committed to monthly Commission meetings to publicly discuss policy changes; to date, these meetings have announced changes in several non-merger antitrust rules/policies, including: the repeal of a 2015 Policy Statement limiting the types of conduct the FTC pursues under Section 5 of the FTC Act; authorization of investigative subpoenas by a single (rather than multiple) commissioners; and streamlined procedures to seek financial penalties for defrauded customers.

[9]Oral Remarks of Commissioner Christine S. Wilson (July 21, 2021), at https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[10]Dissenting Statement of Commissioner Noah Joshua Phillips (July 21, 2021), at https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf. (*see also* elsewhere this issue).

A POISON PILL IS NOT AN AUTOMATIC WEAPON

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Four decades after their creation, stockholder rights plans, or "poison pills," remain one of the most powerful defensive measures available to public corporations. Following a two-decade decline in rights plan adoptions, widespread adoption accelerated at the onset of the coronavirus (COVID-19) pandemic. This increase is attributable to the unprecedented global market volatility and sharp stock price declines witnessed at the beginning of the pandemic, which arguably rendered companies vulnerable to opportunistic exploitation of their depressed market valuations. To counteract such exposure, many companies adopted pills—so-called "crisis pills"—on a "clear day" to preempt potential exploitative behavior.

In early 2020, The Williams Companies, Inc. ("Williams"), the supplier of almost one-third of the United States' natural gas volumes, suffered significant downward pressure to, and fluctuations in, its trading price caused by the pandemic's onset and global energy market turbulence. In response to this market dislocation, the board of directors of Williams adopted a crisis pill in March 2020 designed to impose a one-year "moratorium" on stockholder activism, insulate the sitting board and management during the uncertainty of the pandemic, and facilitate the monitoring of Williams' stock trading patterns to curb rapid stealth stock accumulations, or "lightning strike attacks."[1] Williams' pill contained four elements—a 5% ownership trigger, inclusion of synthetic equity interests as beneficial ownership, an expansive "wolf-pack" provision with aggregation functions, and a narrow passive investor exemption[2]—which formed an unprecedented combination of preclusive features that deviated from market norms. The novel pill attracted adverse market and stockholder reaction and invited legal challenge. On February 26, 2021, the Delaware Court of Chancery issued an opinion determining that Williams' pill is unenforceable and permanently enjoining its operation.[3]

As discussed below, the observed market adoption of preemptive crisis pills and the *Williams* decision offer a number of practical takeaways and guidance for the adoption of rights plans and the continuing role of rights plans in the public corporation's defensive toolkit.

Background

Poison pills, as they are colloquially known, were originally developed to defend against coercive two-tiered tender offers, commonly initiated by corporate raiders in the 1980s. Original pills essentially operated as a dilution mechanism designed to make acquisitions more costly for, and less attractive to, corporate raiders by causing a target corporation to distribute to its stockholders (other than a bidder if already a stockholder) dormant rights to purchase, at a discounted price, stock in the target (or its successor). Upon the occurrence of a triggering event (such as the bidder's acquisition of a specified threshold of target securities), the rights become exercisable, potentially imposing substantial dilution on the bidder. The risk of triggering the rights deters unsolicited actions by the bidder, encouraging the bidder to

engage the target board and request that it redeem the rights or amend the plan to exempt the bidder from the pill's operations.[4] In negotiating such redemption or amendment, the target board's bargaining power substantially increases, allowing it to negotiate higher takeover premiums for target stockholders.

Today's poison pills still rely on these general mechanics, but the animating purposes and specific provisions have evolved in response to legal and market developments. For example, certain modern pills are concerned with hostile activists and creeping control acquisitions, and are designed to target the attack devices employed by activist investors, such as lightning strike attacks, opportunistic use of derivatives and synthetic equity interests, and wolf-pack and similar "group" formations intended to change or influence control. Other modern pills have also been re-purposed and re-tooled to achieve unique corporate objectives, such as the protection of net operating losses ("NOLs") or compliance with specific industry regulatory schemes.

Notwithstanding certain advantages of poison pills, market sentiment has increasingly discouraged their usage, particularly as proxy advisory services and institutional investors have gained influence in public company corporate governance. Detractors of poison pills highlight the potential of pills to damage long-term value of stock, as pills may prevent a hostile takeover at a premium price or cause a chilling effect on potential suitors and entrench and perpetuate control by underperforming directors and management. Additionally, poison pills can attract negative recommendations from proxy advisory services, as well as litigation and challenges that may bring adverse consequences to the business. In response to the growing market opposition to poison pills, most large public companies disassembled their pills during the last two decades,[5] and instead keep a pill "on the shelf" for quick adoption should a specific threat emerge.

Crisis Pills

The rapid global spread of the coronavirus outbreak during February 2020 shocked markets and created substantial global economic downturns in March 2020.[6] Citing sharply declining stock prices, substantial market volatility, business disruptions and other recent pandemic-induced events, at least 55 public reporting companies adopted poison pills from February 2020 through the end of May 2020, including 43 pills adopted in March and April.[7]

Based on a review of the adopting press releases for such pills, almost 75% of the pills adopted from February through May 2020 were "traditional" pills (*i.e.*, not NOL, regulatory protection or special purpose pills). These crisis pills had a term of one year or less, enabling quick adoption by boards without stockholder approval. Almost 90% of the crisis pills had triggers set at or in excess of 10% (with 61% fixed at 10%)—only a few outliers, including the Williams' pill, had a trigger of around 5%. Most crisis pills were not adopted in the face of a specific threat and adopting press releases generally cited hypothetical harms that could result from certain pandemic-attributable events.

During the second half of 2020, stock prices rebounded following promising reports of coronavirus treatments, vaccinations and recovery initiatives. At the same time, pill adoption rates declined, with only 14 traditional pills adopted during the second half of 2020,[8] as compared to 41 crisis pills adopted earlier in the year. Based on

their adopting releases, most of these traditional pills were adopted in the absence of a specific threat, and their justifications, if any, were framed generally as protective measures.

By June 30, 2021, only four COVID-19 crisis pills remained in force.[9] The four were extended by their respective boards, with two extended by a year and the other two extended three years. One of the four companies publicly justified extension by citing general pandemic-related concerns.

Judicial Review of Pills

Since the Delaware Supreme Court validated the first rights plan in *Moran v. Household International*,[10] it has become well established under Delaware law that challenges to poison pills are to be analyzed under the two-step inquiry established in *Unocal*.[11] First, the board must show that its good faith and reasonable investigation established the grounds for concluding that a legitimate threat to the corporate enterprise existed. The reasonableness is materially enhanced by the approval of a board comprised of outside independent directors.

Second, the board must show that its response was reasonable in relation to the threat posed. The court would determine whether the board's response was coercive or preclusive and, if neither, whether it fell within a range of reasonableness. A coercive response crams down a management-sponsored alternative on stockholders.[12] A defensive measure is preclusive if it makes a bidder's ability to wage a successful proxy contest and gain control realistically unattainable.[13] A coercive or preclusive response is disproportionate and unreasonable *per se* under *Unocal*.

Poison pills adopted on a "clear day," when no specific threat has emerged, are analyzed under the business judgment rule.[14] Absent bad faith, entrenchment or breach of fiduciary duty, courts will presume that the directors, in making a business decision, acted on an informed basis, in good faith and in honest belief that the actions taken were in the best interests of the corporation. Application of the presumption does not eliminate directors' burdens under *Unocal* to justify using "clear day"-adopted defenses in the heat of battle.

Since *Moran*, poison pills have virtually eliminated the coercive tactics employed by corporate raiders, and their usage is now well established in Delaware corporate jurisprudence.[15] However, Delaware caselaw establishes limits to the use of poison pills. Some cases suggest that a poison pill cannot be used to favor a particular change in control over a hostile bid offering comparable value.[16] Additionally, Delaware law establishes the scope of the board's authority to adopt a pill. The Delaware courts have stricken down "dead hand" and "no hand" features restricting the redemption of pills by a subsequently elected board of directors.[17]

The Williams Cos.

The Delaware Court of Chancery held Williams' crisis pill unenforceable because the directors breached their fiduciary duties under *Unocal* when adopting the pill. The court found that the Williams board's process in adopting the pill was satisfactory (although there was room for improvement). Under the first inquiry of *Unocal*, the court rejected Williams' concern of stockholder activism in general and hypothetical risks of short-term activism and disruption as illegitimate corporate objectives for adopting the pill, but assumed, for purpose of analysis, that gap-filling federal disclosure laws to detect lightning strikes while stock prices were undervalued could

serve as a legitimate corporate purpose. Ultimately, the court determined that Williams' preemptory crisis pill was not proportional to this gap-filling purpose.

Takeaways

The observed market adoption of preemptive crisis pills and the *Williams* decision highlight several important considerations and procedures for directors when designing and evaluating poison pills in the context of their fiduciary duties.

First, all companies that adopted pills or prepared shelf pills in the face of the pandemic (or otherwise) should revisit and, if necessary, refresh, their pills. They should ensure that the initial justifications relied upon at the time of adoption remain relevant to maintain such pills, and future periodic reviews should be conducted to consider the maintenance of the pill. Further, companies should ensure that the scope of their pills is not overbroad and will constitute an objectively reasonable response to an articulable purpose or threat.

Second, the *Williams* decision serves as a timely reminder of best practices for adopting and maintaining poison pills. Companies must ensure that there is adequate review and understanding of the plan by all directors as well as independent deliberation and discussion of the plan and material features prior to approval—preferably, over multiple meetings and with the benefit of review and understanding of pertinent documents. The records of the board's process should be memorialized and the specific rationale, purposes and/or threat(s) to which the board is reacting should be prudently recorded. These records should establish that the board has considered how the plan's features, including its trigger threshold and aggregation functions, compare with the stated purpose and/or threat(s) that the board is addressing. Considerations based on judicial precedents, market terms, and company-specific considerations (such as the company's ownership structure) and whether there are alternative features or responses should also be memorialized. The records should reflect how the plan and each of its features is tailored to the identified rationale and/or threat(s). The foregoing will help ensure a demonstrable record is created for any judicial review.

The records surrounding these matters should be carefully documented and maintained. Potential red flags lurk even in minor details such as including the length of time allotted for specific items in board agendas. The *Williams* court specifically noted how much time the agenda provided for specific items and compared the fact that one agenda assigned 40 minutes to the rights plan and 20 minutes to the discussion of whether to hold an annual stockholder meeting virtually. Boards of directors, management and their advisors should also be mindful when preparing e-mails, texts and other notes, with the understanding that these materials may be discoverable in litigation. In further support of its decision to enjoin the Williams' pill, the court cited e-mails between the company and its counsel regarding the threat of activism in advance of the pill adoption and certain of the CFO's notes.

Third, in *Williams*, the court applied *Unocal* (rather than the business judgment rule) to review the *Williams* preemptive crisis pill because the board acted with the purpose of insulating itself and management from stockholder influence during a time of uncertainty. The court found Williams' pill was an anti-activist pill and did not uphold it because, among other things, the 5% threshold was too low to justify the prevention of

a third party from acquiring control without paying a premium and because the testimony of the directors focused on proactively shutting down *all* outside influence by stockholders, rather than addressing a possible change of control. Boards should carefully determine whether adopting a novel pill or a pill with several novel features is justified by the facts and circumstances.

Fourth, companies should carefully consider with their advisors whether it is most appropriate to adopt a poison pill on a "clear day" as opposed to in response to a specific threat. Certain benefits may remain in adopting a pill on a "clear day" because this context may minimize the risk that the directors' motives will be characterized as entrenchment, but this option must be weighed against preparing a package of shelf crisis pills with different features (for example, a defensive pill, a NOL pill, etc.) so that the appropriate pill can be quickly tailored and adopted in anticipation of the next unforeseen event or threat. Advance consideration and drafting should help ensure a sound board process and mitigate some of the process issues raised in *Williams* especially because, as a practical matter, the board's attention and time will be stretched incredibly thin in the time of an unforeseen crisis or threat.

Fifth, Delaware courts will carefully scrutinize wolf-pack provisions that potentially discourage legitimate interaction among stockholders. If a company's board determines that a wolf-pack provision is necessary and proportionate in response to a threat the company faces, it should be sure that the provision is drafted clearly and narrowly to address the risk considered and thereby minimize litigation risk.

Sixth, when responding to an actual hostile takeover attempt or an aggressive activist accumulating stock, litigation moves much faster and the plaintiffs (which typically include the hostile actor and its supporters) are more aggressive. In such a scenario, it is advisable to rely on a pill with litigation-tested terms on key features such as beneficial ownership, trigger threshold, and group activities—so that there is no doubt that the pill will withstand scrutiny.

Finally, the observed history of poison pills demonstrates that these defensive tools will undoubtedly continue to evolve. It is critical for companies to have a proactive process in place to identify and analyze material developments in this arena and to respond accordingly to such developments.

This article is presented for informational purposes only and it is not intended to be construed or used as general legal advice nor as a solicitation of any type.

ENDNOTES:

[1]*The Williams Cos. S'holder Litig.*, Consolidated C.A. No. 2020-0707-KSJM (Del. Ch. Feb. 26, 2021). The *Williams* litigation was previously discussed in S. Arcano et al., Delaware Court Enjoins an "Extreme" Stockholder Rights Plan, *The M&A Lawyer*, Vol. 25, Issue 4 (April 2021).

[2]Rights Agreement dated as of March 20, 2020 between The Williams Companies, Inc. and Computershare Trust Company, N.A., attached as Exhibit 4.1 to the Form 8-K filed by The Williams Companies, Inc. on March 20, 2020, *available at* https://www.sec.gov/Archives/edgar/data/107263/000119312520080810/d878306dex41.htm.

[3]*The Williams Cos. S'holder Litig.*, Consolidated C.A. No. 2020-0707-KSJM (Del. Ch. Feb. 26, 2021).

[4]Alternatively, the bidder could challenge the pill through litigation or launch a proxy contest to

replace the board.

[5]According to FactSet's Takeover Defense Trend Analysis, 299 companies listed in the S&P 500 (or approximately 60%) had a poison pill in place at year end of 2000. *See* FactSet's Takeover Defense Trend Analysis of Poison Pills in Force Year-Over-Year from 1998 to 2020 (retrieved July 12, 2021). Only 65 companies, or 13.2%, on the S&P 500 had a poison pill in force at 2010-year end, while six companies, or 1.2%, on the S&P 500 had a poison pill in force at 2019-year end. *See id.*

[6]After reaching an all-time high in mid-February 2020, the S&P 500 dropped 10% six trading days later and declined by more than 30% for the year by March 3rd, 2020. A. Otani, "Covid-19 Is a Puzzle that Wall Street Can't Solve", WSJ (updated June 26, 2020), *available at* https://www.wsj.com/articles/covid-19-is-a-puzzle-that-wall-street-cant-solve-11593163804.

[7]FactSet Universal Screening, Public Reporting Companies, Jan. 1, 2020 through Dec. 31, 2020 (retrieved June 30, 2021). Almost 66% of all pills adopted/renewed in 2020 were adopted from February through May 2020. References throughout this article to number of pills adopted and related metrics are based on search results generated from FactSet's Universal Screening application, which covers the activism/governance profiles of public reporting companies, using search filters for U.S. public reporting companies with poison pills adopted or renewed from January 1, 2020 through December 31, 2020. *See* FactSet, https://my.apps.factset.com.

[8]*See id.*

[9]*Id.* As of June 30, 2021, 15 of the 18 traditional pills adopted from June through December 2020 remain in force.

[10]*Moran v. Household Intern., Inc.*, 500 A.2d 1346, Fed. Sec. L. Rep. (CCH) P 92371 (Del. 1985).

[11]*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, Fed. Sec. L. Rep. (CCH) P 92046, Fed. Sec. L. Rep. (CCH) P 92077 (Del. 1985); *see Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, Fed. Sec. L. Rep. (CCH) P 98,519 (Del. 1995).

[12]*Unitrin*, 651 A.2d at 1387-89.

[13]*Id.* The Delaware Supreme Court has rejected claims that pill triggers are preclusive. *See Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 601-04 (Del. 2010) (rejecting claim that 4.99% pill trigger is preclusive); *cf. Moran*, 500 A.2d at 1355 (rejecting claim that 20% pill trigger "fundamentally restricts" proxy contests, even if proxy efforts deterred from forming, because an insurgent's ownership percentage is not outcome-determinative).

[14]*See Moran*, 500 A.2d at 1350, 1356.

[15]*See, e.g., Account v. Hilton Hotels Corp.*, 780 A.2d 245 (Del. 2001) *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

[16]*See, e.g., Grand Metropolitan Public Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049, Fed. Sec. L. Rep. (CCH) P 94104 (Del. Ch. 1988); *City Capital Associates Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, Fed. Sec. L. Rep. (CCH) P 94084 (Del. Ch. 1988) (rejected by, Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, Fed. Sec. L. Rep. (CCH) P 94938 (Del. 1989)).

[17]*See, e.g., Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998); *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. July 24, 1998; revised July 27, 28 & Aug. 4, 1998).

DELAWARE COURT OF CHANCERY FINDS NO MAE

By Andrew G. Gordon, Jaren Janghorbani, Laura C. Turano and Krishna Veeraraghavan

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In *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*,[1]

the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, held that a dramatic 50-plus-percent reduction in the Medicare reimbursement rate for target's sole product (a cardiac medical device) did not constitute a "Material Adverse Effect" ("MAE") under the merger agreement. The court held, among other things, that the buyer failed to show that any material adverse effect on the target was "durationally significant" (as is required to establish an MAE in the M&A context in Delaware), and, further, such effects did not constitute an MAE under the agreement because of the specifics of the definition. The court ordered the buyer to close the transaction and, in a rare, if not first, imposition of such a remedy in this context, awarded prejudgment interest (which remedy was uncontested by the parties). While the failure to find an MAE is not surprising given the history of jurisprudence in this area and the court's specific factual findings in this case, the decision provides some helpful insight into the court's MAE interpretation.

Background

Bardy Diagnostics, Inc.'s sole product line is a patch used to detect heart arrhythmias and related services. After extensive due diligence, in January 2021, Hill-Rom, Inc. agreed to acquire Bardy for $350 million plus contingent earnout consideration linked to the patch's revenue for 2021 and 2022. Although Hill-Rom believed that Bardy had significant growth potential, Hill-Rom did not expect to turn a profit for several years after closing a transaction.

One of Bardy's largest sources of revenue is through Medicare reimbursements for the patch, which had historically been set at about $365 per patch. Two weeks following signing of the transaction with Hill-Rom, however, the private entity authorized by Medicare to set the reimbursement rate for the patch reduced the rate by approximately 86% for the two jurisdictions in which Bardy operated. Hill-Rom then refused to close on the transaction, arguing that Bardy had suffered an MAE. By April 2021, the reimbursement rate was increased to about $133 per patch, though still less than half of the historic rate.

Following the rate reductions, Bardy continued to grow, with new patch enrollments and orders for the first quarter of 2021 increasing 85% year-over-year. Despite the growth, however, its revenue declined approximately 11% between the last quarter of 2020 and the first quarter of 2021, though its first quarter 2021 revenue was still up 56% year-over-year.

Takeaways

The court held that Hill-Rom failed to show that Bardy suffered an MAE under the agreement. The agreement defined an MAE as "any fact, event, circumstance, change, effect or condition that, individually or in the aggregate, has had or would reasonably be expected to have a material adverse effect on" Bardy's business, except for certain carve-outs, including for any change in "Health Care Law" to the extent it had a "materially disproportionate impact on [Bardy] as compared to other similarly situated companies operating in the same industries or locations. . . ." Based on the particular facts of the case and the specific language of the MAE definition, the court held that any material adverse effects were not durationally significant (which is an element needed to establish an MAE in the merger context under Delaware law) and that such effects caused by the reimbursement rate reduction did not constitute an MAE because (i) they fell within the carve-out to the MAE definition for changes to "Law" and

(ii) did not have a disproportionate impact on Bardy as compared to the only other similarly situated company. The opinion provided some insights into MAE analysis as follows:

Whether an effect is sufficiently "durationally significant" to constitute an MAE may turn on a company's unique characteristics and the broader business dynamics in which it operates. Delaware courts, including the court in *Bardy*, have declined to proscribe specific time periods when assessing whether an effect is "durationally significant," and look instead at the context of the transaction at hand. Importantly, Hill-Rom's own internal projections estimated that Bardy would not turn a profit in the first several years after its acquisition and, further, that Hill-Rom had acknowledged that five or more years was durationally significant. Given these facts and the likelihood that Medicare would raise the reimbursement rate in the next two years, the court concluded that the rate reductions were not durationally significant.

MAE analysis continues to be based on a close parsing of the exact language chosen by the parties and the court's observations on how that language may differ from common market practice. The court in *Bardy* closely examined the exact words chosen by the parties in the MAE definition, including the following:

- The parties' choice to define a material adverse effect by reference to Bardy's "Business" (*i.e.*, its operations) rather than the broader "financial condition." Bardy relied on this distinction to argue that the effect of the rate reduction was financial, rather than operational, and therefore did not constitute an MAE. The court acknowledged that the exclusion of this phrase made the MAE definition more seller-friendly and narrow than what it observed to be the usual base MAE provision, but found that the "commercialization activities" included in the Business definition encompassed the effect of the rate reductions.
- The exceptions to the carve-outs, which excluded any matters to the extent of its materially disproportionate impact on Bardy as compared to other "*similarly situated companies operating in the same industries or locations*. . . ." (emphasis added). Again, the court noted that this formulation was more target-friendly than other MAE provisions interpreted by Delaware courts insofar as it could only look to "similarly situated companies" as opposed to companies "operat[ing] in the [same] industry." The court looked to operational scale (*i.e.*, revenue), developmental maturity and product portfolio (*i.e.*, relative product mix and sophistication) in identifying such companies, and found that only one company was "similarly situated" to Bardy. The rate reductions had similar effects to that company as to Bardy, and therefore Bardy did not suffer a disproportionate impact from the rate reduction.

A Delaware court may be willing to look at post-termination developments in its MAE analysis. Prior Delaware MAE decisions have considered whether an MAE was reasonably likely as of the date of the buyer's purported termination, which, in the case of *Bardy*, was February 2021 (after the first approximately 86% reimbursement rate reduction, but before the second adjustment in April 2021, which increased the reimbursement rate to $133). The MAE analysis in *Bardy*, however, focused on post-termination

events, as it addressed whether the April rate gave rise to an MAE.

Good faith efforts by the buyer to counteract the effects of the alleged MAE may figure into the court's MAE analysis. At the outset of the *Bardy* opinion, the court stressed Hill-Rom's complete good faith and that it encouraged Bardy's lobbying efforts to undo the reimbursement rate reductions and stood ready to close should the rates be restored to historic levels. Although the court noted that these actions did not excuse a breach of contract and did not ultimately trump the contractual analysis, the court's acknowledgement of Hill-Rom's efforts in this regard is perhaps noteworthy for future terminating buyers.

Finally, in addition to specific performance to compel closing, Bardy also sought prejudgment interest (running from the date closing should have occurred in February 2021) as well as additional compensatory damages. The court granted Bardy's request for prejudgment interest, which Hill-Rom did not contest, but denied Bardy's request for additional compensatory damages. Parties may wish to consider defining in more detail their intention regarding damages in the event of litigation or any compelled closing, such as their agreement surrounding the payment of prejudgment interest.

This article is not intended to provide legal advice, and no legal or business decision should be based on its content.

ENDNOTES:

[1]*Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, C.A. No. 2021-0175-JRS. *See*: https://courts.delaware.gov/Opinions/Download.aspx?id=322060.

SEC INITIATES FIRST ENFORCEMENT PROCEEDING OF THE SPAC BOOM AGAINST SPAC, SPONSOR, MERGER TARGET AND CEOs

By Harris Fischman, Geoffrey R. Chepiga, Gregory F. Laufer, Lorin L. Reisner, Susanna M. Buergel, and Audra J. Soloway

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On July 13, 2021, the SEC charged a SPAC, its sponsor, its proposed merger target and both the SPAC's and target's CEOs with making false and misleading statements about the target company's technology and ability to obtain essential licenses.[1] The charges represent the SEC's first enforcement action against a SPAC since the "SPAC boom" took off late last year. In the past several months, the SEC has focused on SPACs in its investor releases,[2] disclosure guidance,[3] accounting guidance,[4] and staff statements but, in that time, had not brought charges against any SPACs before now.[5] The charges allege that the SPAC's inadequate due diligence on the target led it to make misleading public disclosures, an issue the SEC's Chair said reflects the "risks inherent to SPAC transactions" and the misaligned "incentives" between SPACs and their investors. The charges illustrate the SEC's heightened interest in

SPACs and confirm the importance of SPAC sponsors, directors and officers taking appropriate steps to mitigate litigation and regulatory risk.[6]

The Enforcement Proceeding

Stable Road Acquisition Corp., a SPAC, completed its initial public offering in November 2019, with an 18-month window to complete a business combination. The SPAC's CEO was also one of three managing members of the SPAC's sponsor, SRC-NI Holdings, LLC. On October 7, 2020, the SPAC announced a merger with Momentus, Inc. ("Momentus"), an early-stage space transportation company. On the same day, the SPAC raised $175 million of capital by entering into subscription agreements with private investment in public equity ("PIPE") investors in exchange for shares in the merged company after the business combination was approved.

Before the proposed business combination closed, the SEC brought charges against several entities and individuals associated with both the SPAC and Momentus. The SEC charged Momentus and its CEO with scienter-based fraud under Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act. The SEC alleged that Momentus claimed that its propulsion technology had been successfully tested in space, when in reality its sole in-space test suggested that the technology lacked commercial potential. The SEC also alleged that Momentus misled investors about its CEO's ability to obtain essential licenses by downplaying known national security concerns about him.

The SEC also charged the SPAC, its sponsor, and its CEO with violations under Section 17(a)(2) and (3) of the Securities Act and Sections 13(a) and 14(a) of the Exchange Act. The SEC alleged principally that the SPAC issued misleading disclosures because it "did not perform reasonable due diligence" on the target. Although the SPAC retained a space technology consulting firm to investigate the target, it did so only one month before the merger announcement, and it did not instruct the consulting firm to evaluate the target's one in-space test. The SEC also accused the SPAC of executing the merger agreement despite never receiving an adequate response to its repeated questions about documents indicating national security concerns with Momentus' CEO. Accordingly, the SEC alleged that several statements in the SPAC's investor presentations and public filings, including financial projections and statements that the target had "successfully tested" its technology, were materially misleading. The SEC also alleged that the SPAC's CEO caused the SPAC's violations and that the CEO's actions were attributable to the SPAC's sponsor because he served as the sponsor's managing member and his actions were taken on behalf of and for the benefit of the sponsor.

The SEC announced its charges against the SPAC, its sponsor, its CEO, and Momentus in an administrative order filed on July 13, 2021 (the "Order").[7] The SEC also filed a complaint against Momentus' CEO on the same date in the United States District Court for the District of Columbia.[8] The parties settled on a "no admit, no deny" basis, except Momentus' CEO, against whom the litigation is currently proceeding in United States District Court for the District of Columbia. As part of the settlement, the SPAC, its CEO, and Momentus agreed to pay civil penalties. The SPAC and Momentus also agreed to offer every PIPE investor the right to terminate its subscription agreement, and the SPAC's sponsor agreed to forgo 250,000 founder shares that it would have otherwise been entitled to upon shareholder approval

of the business combination. Momentus also agreed to retain an "Independent Compliance Consultant" to review its ethics and compliance programs and issue a written report to the SEC with its findings and recommendations.

In the SEC's press release announcing the charges, SEC Chair Gary Gensler explained that the case illustrated the risk "inherent" in SPAC transactions of misaligned incentives between the parties to a SPAC transaction and SPAC investors:

> This case illustrates risks inherent to SPAC transactions, as those who stand to earn significant profits from a SPAC merger may conduct inadequate due diligence and mislead investors. . . . Stable Road, a SPAC, and its merger target, Momentus, both misled the investing public. The fact that Momentus lied to Stable Road does not absolve Stable Road of its failure to undertake adequate due diligence to protect shareholders. Today's actions will prevent the wrongdoers from benefitting at the expense of investors and help to better align the incentives of parties to a SPAC transaction with those of investors relying on truthful information to make investment decisions.[9]

Implications

As the last several months of SEC commentary, guidance and public statements have shown, the SEC is acutely focused on SPACs. This case further highlights SEC scrutiny of SPACs and related parties, and serves as a reminder that SPACs and their sponsors and directors—and even merger targets—should take affirmative steps to mitigate litigation and regulatory exposure. SPACs and their sponsors and directors should engage in robust and well-documented due diligence on merger targets, and ensure their efforts conform with appropriate M&A disclosure practices. We expect the SEC, and the private plaintiffs' bar, to continue carefully scrutinizing public statements and filings associated with SPAC transactions—including public statements and filings for the hundreds of recently launched SPACs still looking for a merger target.

This article is not intended to provide legal advice, and no legal or business decision should be based on its content.

ENDNOTES:

[1]*See In the matter of Momentus, Inc.*, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Sec. Act. Rel. No. 10955, Exchange Act Rel. No. 92391, Admin. Proc. File No. 3-20393 (July 13, 2021), https://www.sec.gov/litigation/admin/2021/33-10955.pdf.

[2]What You Need to Know About SPACs, SEC Investor Bulletin (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin.

[3]Special Purpose Acquisition Companies, SEC Div. of Corp. Fin. Disclosure Guidance: Topic No. 11 (Dec. 22, 2020), https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies.

[4]John Coates, Acting Director, Division of Corporate Finance & Paul Munter, Acting Chief Accountant, Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs"), Public Statement (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs.

[5]John Coates, Acting Director, Division of Corporate Finance, SPACs, IPOs and Liability Risk under the Securities Laws, Public Statement (Apr. 8, 2021), https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws.

[6]*See* https://www.paulweiss.com/practices/litigation/securities-litigation/publications/what-spa

c-sponsors-directors-and-officers-can-do-to-mitigate-their-litigation-exposure?id=39540.

[7]*See In the matter of Momentus, Inc.*, Sec. Act. Rel. No. 10955, at 6.

[8]Complaint, *Sec. Exch. Comm'n v. Kokorich*, Case No. 1:21-CV-1869 (D.D.C. July 13, 2021), https://www.sec.gov/litigation/complaints/2021/comp-pr2021-124.pdf.

[9]Press Release, Sec. Exch. Comm'n, SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination, Release No. 2021-124 (July 13, 2021), https://www.sec.gov/news/press-release/2021-124.

ON THE RETURN OF PRIOR APPROVALS

By Noah Joshua Phillips

The following is edited from the July 21, 2021, Dissenting Statement of FTC Commissioner Noah Joshua Phillips, regarding the Commission's withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases.

Over two decades ago, a bipartisan Commission announced we would no longer require prior approval for or prior notice of future transactions as a routine matter in merger consents.[1] Today, a partisan majority will rescind that policy, with the minimum notice required by law, virtually no public input, and no analysis or guidance.

It is bad government and bad policy. I dissent.

The remarks issued by Commissioner Wilson ably recount the expensive and pointless litigation and unfair outcomes for businesses that led the Commission to adopt the policy in 1995.[2] And I share the concerns she raises about exacerbating enforcement disparities with the Department of Justice and—once again, for the second time in a month—leaving the business community without clarity as to how we will exercise our authority.

The Majority's Decision Will Weaken Enforcement by Making Consents More Difficult

Congress enacted the Hart-Scott-Rodino Act of 1976 ("HSR Act") to protect the public from anticompetitive mergers and acquisitions before they occur.[3] Giving regulators an early look at transactions and the time to resolve them before asking skeptical courts to unwind them—and businesses the ability to plan in advance—HSR is a "win-win" for regulators and businesses. In the hopes, presumably, of taxing mergers generally, today the majority elects to tax those parties that attempt to resolve matters with the agency. That, and other things we have seen lately, suggest their willingness to abrogate the HSR Act.[4] That is a mistake.

Mergers and acquisitions are a constant feature of American markets, one way that they evolve over time. The Commission reviews transactions for their impact upon competition; and, judged from that perspective, the overwhelming bulk noticed to the agencies are not problematic,[5] and go unchallenged. Some we block.[6] Others, consistent with the congressional design of the HSR Act, we resolve through consents, for example by compelling the divestiture of the part of the company that raises the competitive concern.

For six decades before the HSR Act, the Commission challenged mergers and acquisitions that proved to be anticompetitive after the fact. It sought divestitures, but courts were often leery of "unscrambling the eggs."[7] The Commission adopted a policy of (when it could) requiring parties to give prior notice and get Commission approval for future acquisitions in the market covered by the consent order.[8] The HSR Act achieved economy-wide much of what the Commission had

been trying to get on an ad hoc basis (prior notice and a fighting chance to prevent anticompetitive effects), but in the years following its passage the agency continued its policy of imposing special restrictions on firms that sought to resolve competitive concerns before merging. It fought a long, expensive, unfair, and ultimately pointless battle to make sure that Coca-Cola could not merge without government permission, while Pepsi was free to do so.[9] That embarrassing episode, and the recognition that the pre-merger notification regime under the HSR Act substantially accomplished prior notice and immeasurably strengthened merger enforcement, led the Commission in 1995 to give companies legal clarity and reduce burdens on those that enter into merger consents.

Today, the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent.[10] While the agency has once again repealed a policy without offering guidance as to what will replace it, this will deter consents. Meaning, companies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement. As consent negotiations become more difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less.[11]

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

A blanket policy of routinely requiring prior approval will impose significant costs on companies that enter into merger consents. The government would be competitively handicapping those companies for an undetermined duration,[12] preventing them from competing on a level playing field against rivals. (For example, making Coke unable to do what Pepsi can.) A company under an FTC order may have to bid higher—for instance, diverting resources from research and development, incurring debt, or lowering salaries—to compensate the seller for the uncertainty and the longer lead time required to obtain prior approval. Companies under an FTC order may not even be considered in a bidding process for a company considering a sale. There will be less competition, for companies.[13]

Such costs are defensible under certain circumstances.[14] The point of a consent is to protect the competition that existed before a transaction takes place and permit the non-problematic aspects of the deal to proceed. Parties to consents should not be able to buy back divested assets,[15] or reattempt the same transaction under similar market conditions. Our current policy protects against this, saving the Commission resources, in time and money, of re-litigating issues in the same market. The Commission retains discretion to include prior approval or prior notice provisions where we determine there is credible risk that the companies may engage in another anticompetitive transaction in the same market or fly under the HSR Act radar.[16] We exercise that discretion today and include such provisions, as necessary.

Because the point of the Clayton Act and the HSR Act is to deter anticompetitive mergers, not all mergers. What the majority wants to do today is impose costs on all companies that enter into consents. By definition, those are companies seeking to remediate problems with their merger. This is precisely what Congress intended with the passage of the HSR Act. Yes, we might deter some bad deals. Between the HSR Act and the current policy, however, we already have processes in place that alert us to those deals and enable us to

stop or remediate them.[17] But attempting to flip the burden of proof for all deals will also deter procompetitive and competitively neutral transactions. Like our (allegedly temporary) suspension of early termination, it amounts to a gratuitous tax on normal market operations. Ultimately, American consumers will have to pick up the cost.

Conclusion

Our agency has nearly half a century of experience enforcing the HSR Act. We should draw upon that experience to stop the bad mergers and, yes, let the good ones through. Failure to do so will hinder normal market operations and weaken our enforcement efforts, both to the detriment of the American public.

ENDNOTES:

[1]Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995) [hereinafter "1995 Policy"].

[2]Commissioner Christine S. Wilson, Oral Remarks at the Open Commission Meeting on July 21, 2021, at 8 (July 21, 2021).

[3]Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18a.

[4]*See e.g.*, FTC Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[5]By way of example, approximately 97% of HSR reportable transactions in FY 2019 proceeded without a Second Request. Fed. Trade Comm'n and U.S. Dep't. of Justice Antitrust Division, Hart-Scott-Rodino Annual Report: Fiscal Year 2019, available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competitiondepartment-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[6]In FY 2020, for example, the Commission brought a record-setting 27 merger enforcement actions, the highest number in a single year since 2001. *See* FED. TRADE COMM'N, ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2020 AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2021 AND 2022 46 (2021), https://www.ftc.gov/system/ files/documents/reports/fy-2021-22-performance-plan-fy-2020-performance-report/fy22-app-apr.pdf.

[7]*See e.g.*, William J. Baer, Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act (Oct. 31, 1996), *available at* https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodinoact.

[8]Twelve years before Congress passed the HSR Act and established the premerger notification program, the Commission discussed the appropriateness of limiting future acquisitions by a respondent found to have attempted an unlawful acquisition in the past. *See* Ekco Products Co., 65 F.T.C. 1163, 1201 (1964) (The ALJ noted there is "no legal requirement that the Commission be notified of corporate mergers or acquisitions either before or after consummation. Annual Report of the Federal Trade Commission for the fiscal year ended January 30, 1957, p. 22.").

[9]Coke is better, obvi; but the government should treat them the same. *See* The Coca-Cola Co., 117 F.T.C. 795 (June 13, 1994), Commissioners Azcuenaga & Starek recused; order modified, 119 F.T.C. 724 (May 17, 1995); appeal dismissed per stipulation, Coca-Cola Enters. v. FTC, No. 94-1595 and consolidated case Nos. 94-1596, 95-1086, 951087, 1995 U.S. App. LEXIS 15183 (D.C. Cir. May 18, 1995).

[10]*See* 1995 Policy (prior approval provisions in consent orders "usually [have] a duration of 10 years.").

[11]The Commission routinely cites HSR filings as a justification for additional funding from Congress. Acting Chairwoman Rebecca Kelly Slaughter, Opening Statement Before the House Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee

(Mar. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1588336/p180101_opening_statement_of_ftc_acting_c hairwoman_slaughter.pdf. Where we are deliberately making the HSR process less efficient, Congress should take notice.

[12]The majority has yet to announce the scope and content of their new policy, including the length of prior approval provisions.

[13]Scholars have long recognized the positive competitive effects of the competition for companies, the "market for corporate control." Henry G. Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110, 112 (1965); *see also* Blanaid Clarke, The Market for Corporate Control: New Insights from the Financial Crisis in Ireland, 36 SEATTLE U.L. REV. 577, 578 ("Like much of Manne's work, Mergers and the Market for Corporate Control has been described quite correctly as 'groundbreaking,' 'revolutionary,' and 'pioneering.' Roberta Romano argued that the article marked the 'intellectual origin of what would become the new paradigm for corporate law.' " (quoting Daniel Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, Manne, Mergers and the Market for Corporate Control, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, After the Revolution in Corporate Law, 55 J. LEGAL EDUC. 342, 343 (2005)).

[14]Special Committee to Study the Role of the Federal Trade Commission, Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L. J. 43, 92 (1989) ("A firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal practices. . .Orders in excess of five years can be justified only when there is a significant chance that the firm would otherwise engage in illegal activity not subject to the Hart-Scott-Rodino reporting requirements.") (internal citations omitted).

[15]This is the limited context for which the Department of Justice Antitrust Division requires prior approval. See Dept. of Justice Antitrust Division, Merger Remedies Manual, at 31 (Sept. 2020).

[16]1995 Policy.

[17]Over the past 10 years, the DOJ and FTC have prevailed in almost 80% of litigated merger challenges. *See* Carl Shapiro & Howard Shelanski, Judicial Response to the 2010 Horizontal Merger Guidelines, 58 REV. INDUS. ORG. 51, 54-56 (2021).

FROM THE EDITOR

The Early 2020s: Back to the 1970s?

On July 9, President Biden signed an executive order, "Promoting Competition in the American Economy" that, among many things, creates a White House Competition Counsel to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization and unfair competition." The stated goal is to attempt to counter "federal government inaction [which] has contributed [to] excessive market concentration." In his remarks, President Biden claimed that earlier administrations had allowed "bad mergers" to go forward.

Writing in this issue, Jones Day's Michael Gleason and Lauren Miller Forbes note that "the Biden Order takes a granular regulatory approach, setting forth specific proposals by industry and agency. It encourages increased DOJ and FTC enforcement and harnesses industry-specific statutes and regulatory tools across more than a dozen agencies to achieve its goals—the most comprehensive 'whole-of-government' approach to competition policy since the 1970s."

For example, the Order calls on the DOJ and FTC to "vigorously" enforce traditional antitrust law, particularly in labor markets and in the agricultural, healthcare (pharmaceutical, hospital, insurance), and tech industries, the authors write. "It notes that tech in particular is prone to 'serial mergers, the acquisition of nascent competitors, the aggregation of data . . . and the presence of network effects.' " The Order also encourages the revision of the horizontal and vertical merger guidelines, including those used specifically for hospital and bank mergers.

As the authors write, "within hours of the Order's publication, DOJ and FTC leadership endorsed a more 'rigorous analytical approach' to M&A writ large, issuing a press release stating that the existing merger guidelines 'deserve a hard look to determine whether they are overly permissive.' And in the weeks since the Order, the agencies have implemented additional merger policy changes."

A prime example: the sudden reversal in late July of the FTC's 15-year-old policy statement limiting the use of prior notice and prior approval provisions in merger settlements. In a party-line vote, the FTC scrapped its policy to not to require companies who had settled prior mergers with the FTC to provide notice or receive approval, beyond the typical HSR process, before consummating further deals.

In his rebuttal (reprinted in this issue), Commissioner Phillips claimed that "the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent . . . companies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement. As consent negotiations become more difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less."

Chris O'Leary

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