ANTITRUST MERGER ENFORCEMENT
IN THE RETAIL SECTOR

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Gearing Up For Change in Antitrust Merger Enforcement

“Litigation readiness” was the unofficial theme of antitrust enforcement at the Antitrust Division of the US Department of Justice and the Federal Trade Commission over the past eight years. Although determining whether this “litigation readiness” actually resulted in the two antitrust enforcement agencies’ bringing more merger cases than we might have otherwise seen is a complicated question, the practical effect was that deal review took longer, faced increased scrutiny, involved more non-parties, was more expensive and faced more uncertainty than in prior administrations. These effects were evident in the recent number of large-scale, high-profile litigated deals involving retail and consumer products companies, including the FTC’s challenges to the proposed mergers of Staples/Office Depot, Sysco/US Foods and Dollar Tree/Family Dollar, and the Antitrust Division’s challenge to the proposed acquisition of GE’s appliances business by Electrolux.

Looking forward, President Trump has provided some insight through his public statements regarding the future of antitrust policy. For example, he has indicated a willingness to use the federal antitrust laws to prevent the proposed tie-up between AT&T and Time Warner and to revisit (and potentially break up) Comcast’s 2011 acquisition of NBC Universal.

Despite Trump’s ambiguous rhetoric, his antitrust advisers for the transition suggest a merger antitrust climate that likely will be generally less interventionist than the Obama administration. Hunton & Williams partner David Higbee is advising the President with respect to the Antitrust Division transition. Mr. Higbee is a veteran of the George W. Bush Department of Justice where he served as the chief of staff and deputy assistant attorney general in the Antitrust Division from 2004 to 2005. Mr. Higbee is currently the vice chair of Hunton & Williams’ competition practice and the managing partner of the firm’s Washington, DC, office. Joshua Wright, a former FTC commissioner and current professor at Antonin Scalia Law School at George Mason University, has also been reported as working on the antitrust transition. Together, these advisers suggest a more market-oriented approach to antitrust enforcement.

Already Senator Jeff Sessions, President Trump’s nominee for Attorney General has indicated in Senate hearings that he thinks merger remedies should be based solely on applicable competitive concerns rather than remedies that are not directly related to antitrust problems. Senator Sessions stated that he has “no hesitation to enforce antitrust laws,” but emphasized that he thinks “certain mergers should not occur” and that “there will not be political influence in that process.”
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which will now have exclusive ownership of those brands. The Antitrust Division’s review spanned 10 months as the parties sought regulatory clearance before the deal was finalized. The Antitrust Division also sought commitments from the merging companies aimed at protecting small and independent brewers. The merging parties agreed to a prohibition on forcing smaller beer distributors into exclusive distribution contracts that limited the selling or promotion of rival brands. US approval also came with an extension of InBev’s requirement to inform the Antitrust Division of any future acquisitions even if they do not meet the threshold requirements of the Hart-Scott-Rodino Act.

Staples/Office Depot: In 2016, the FTC successfully blocked a merger of Staples and Office Depot for a second time. The two office supply megastores had previously attempted to merge in the 1990s and had been prevented by a successful challenge by the FTC. This time around, the FTC’s suit alleged harm to competition in the sale of consumable office supplies (excluding ink and toner) to large business customers with more than $500,000 in annual sales. Judge Emmet Sullivan for the US District Court for the District of Columbia rejected Staples’ defense that the exclusion of ink and toner was fatal to the FTC’s case because it is subject to significantly different competitive dynamics than other consumable office supplies.
supplies. The merging parties decided not to put on a defense, hedging on the judge’s apparent skepticism of many of the FTC’s initial arguments. This failure to present evidence was admonished by the judge who noted in his opinion that Staples’ positions were hard to justify absent supporting expert testimony. The judge also rejected Staples’ position that Amazon’s developing office supply business was not yet sufficient to vigorously compete with the two established market players or that future entry would take the place of any lost competition due to barriers to entry. After the decision was entered, the parties abandoned the transaction and Staples paid a $250 million termination fee to Office Depot.

**Ahold/Delhaize:** Koninklijke Ahold and the Delhaize Group merged in large-scale joining of five different supermarket brands. The FTC reviewed the deal in the United States and allowed closing by agreeing to an 81-store divestiture. The remedy sought to resolve competitive concerns in 46 local markets in seven states. The deal also included an asset maintenance order and appointment of a monitor trustee. Numerous buyers for the divestiture assets were identified including Albertson’s, Big Y Foods, Publix, Shop ’n Save and Weis Markets. In recent retail investigations, including Dollar Tree/Family Dollar, the FTC has unveiled a more detailed and quantitative approach based on a measure referred to as a GUPPI (Gross Upward Pricing Pressure Index) analysis. Here though, the FTC seems to have relied on a more traditional approach, as the analysis of the consent order references only HHIs and consideration of entry and expansion of existing competitors. While most of the divestitures were in fairly concentrated local markets, one store included in the package was in a market in which at least six competitors would remain after the acquisition (which is generally considered unconcentrated), raising questions about the FTC’s threshold for competitive concerns.

**Walgreens/Rite Aid:** Retail drugstores Walgreens and Rite Aid announced in October 2015 a $17.2 billion transaction to merge, but closing is still pending the outcome of the FTC’s lengthy review. The parties reported receipts of Second Requests from the FTC seeking more information on the deal in December 2015 and now, well over a year later, the FTC’s
approval is still pending. Walgreen’s CEO has implied on earnings calls that the parties have been actively engaged in discussions with the FTC during the review and the proposed remedies are likely to involve multiple regions of the country. The original merger agreement allowed for the divestiture of up to 1,000 retail pharmacy locations. The parties have already identified a potential buyer in Fred’s Inc. which has agreed to purchase 865 stores for $950 million, subject to regulatory approval for the deal.

**Bass Pro Shop/Cabela's:** The two retailers of outdoor lifestyle products sought to merge in a deal worth $5.5 billion. The parties pulled and refiled their HSR filings in order to address concerns raised by the FTC, but reported receiving Second Requests at the end of December 2016. The parties have announced that they expect a delay of a few more months before reaching a final deal with the FTC.

**Sherwin-Williams/valspar:** After announcing their proposed deal in March 2016, the two paint and coating manufacturing companies announced that they received Second Requests in May 2016. The value of the required divestiture package may be a sticking point between the merging parties and the FTC. According to the merger agreement, if the value of the divestiture package exceeds $650 million, then the purchase price for valspar drops from $113 per share to $105 per share. This merger clause limiting divestitures shows one way that parties can adapt to the increased scrutiny of the antitrust regulators and provide for some level of flexibility in negotiating a resolution. Despite the hurdle of obtaining clearance, the companies have recently announced that they are optimistic the deal will close in Q1 of 2017.