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TWISTERS: A WHIRLWIND YEAR OF M&A IN 2024 AND WHAT TO EXPECT IN 2025

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After two years of decreasing M&A activity, expectations were high that 2024 would be a bounce-back year for a recovering M&A market.

Through the first 11 months of the past year, these expectations were largely met as worldwide M&A activity totaled $2.7 trillion, an increase of 11% compared to the same period in 2023. However, this $2.7 trillion in value was only produced from roughly 44,000 announced transactions, a decrease of 18% compared to the same period in 2023, and an eight-year low in terms of deal volume. In other words, aggregate deal value increased while deal volume fell. This was because the market was buoyed by mega deals, with 28 deals exceeding $10 billion.

Much of this increase came from deals in the United States, where $1.6 trillion, or 59% of the deal value, originated, as well as Europe, where about $570 billion in deal value originated (reflecting an increase of 11% in European deal value as compared to 2023).

Additionally, after a slow start in the first quarter, M&A activity backed by private equity funds ("PE") finally picked up with PE deploying substantial levels of dry powder, resulting in an uptick for PE M&A activity through the first nine months of 2024. PE acquirers accounted for 24% of total M&A activity by deal value during the first nine months of 2024, up from 20% during the first nine months of 2023. The overall value of PE transactions reached $547.9 billion, an increase of 40% compared to the same period in 2023, reflecting not only the strongest first nine months for PE dealmaking in two years, but the fourth-largest opening period for PE M&A activity since records began in 1980.

Although the first 11 months of 2024 included a marked increase in M&A activity as compared to the same period in 2023, the year was nevertheless characterized by uncertainty in the market in the shadow of the 2024 presidential election, strict governmental regulations and enforcement, regulatory changes, and shifts in Delaware law and jurisprudence.

A Real Pain: Navigating the Updated HSR Form Requirements

In June 2023, the Federal Trade Commission

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("FTC"), in collaboration with the U.S. Department of Justice ("DOJ"), issued a Notice of Proposed Rulemaking setting forth the first major proposed changes to the HSR Form and Instructions since 1978. After a public notice and comment period, in which approximately 700 comments were submitted, the FTC and DOJ announced the extensive new set of rules (the "Final Rule"), which expands significantly, for all HSR filings, the scope of required information and documents, well beyond what is currently required under HSR guidelines.

Once implemented, the Final Rule is expected to increase the burden and expense associated with all transactions reportable under the HSR Act. The FTC itself has estimated that the changes brought about by the Final Rule will increase the time needed to prepare an HSR filing by 68 hours on average, and as much as 121 additional hours for buyers in a transaction involving overlapping business lines or parties in a supply relationship.

The key changes associated with the Final Rule are mostly targeted at transactions between parties that generate revenues in the same or similar business lines or that have an existing supply relationship, which the FTC estimates to be about 45% of all HSR filings.

Several of the most impactful changes of the Final Rule include:

1. **Expanded Document Collection**: The Final Rule expands the scope of documents that must be provided in connection with filing, including regularly prepared reports for the CEO, any documents (including drafts) shared with a member of the board of directors, and all transaction-related agreements (including among others, exhibits, schedules and side letters);

2. **Additional Responses and Information Disclosure**: The Final Rule requires filers to provide more robust disclosure, including descriptions of (i) the strategic rationale for the transaction, (ii) the business operations of the acquirer, and (iii) all products or services that compete with the transaction counterparty's products or services; and

3. **Additional Entity Disclosure**: The Final Rule broadens the requirements for both acquirers and targets to disclose the identities of minority shareholders, investment funds, additional entities that are involved in the transaction (*e.g.*, entities created to effectuate the transaction), limited partners, controlled entities, and officers and directors of certain related entities.

Many aspects of the Final Rule are expected to have a disproportionately burdensome impact upon PE funds, which have more complicated ownership and investment structures that will now need to be explained in depth in HSR filings. This does not come as a surprise, however,

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as the background section of the Final Rule indicates that many of the new informational requirements were motivated by the agencies' desire to more closely examine the role of PE investors in M&A transactions.

Practically speaking, PE funds are not the only entities that will feel the brunt of these rules. HSR filings are required for transactions where either party is engaged in U.S. commerce or an activity affecting U.S. commerce and certain size thresholds are met—in 2024, filings were required for many transactions valued at $119.5 million and greater. Given this threshold and the fact that U.S. activity continues to account for much of global M&A activity (59% of deal value in the first 11 months of 2024), these broad based changes associated with the Final Rule are expected to impact a substantial portion of M&A deals, greatly increasing the filing burden for both acquirers and targets.

Assuming no delays in connection with legal challenges or the change in administration, the Final Rule will come into effect on February 10, 2025. This means that any transactions that will require an HSR filing after the effective date of the Final Rule should provide sufficient flexibility in the text of the agreement to account for the increased burden associated with such filings, as the standard timeline (typically about 10 days to complete and submit an HSR submission) will likely be inadequate under the new regime.

One positive outcome for HSR filers that was announced in conjunction with the Final Rule was the reinstatement of the early terminations of HSR filings, which have been suspended by the FTC since February of 2021. With the reintroduction of early terminations, certain transactions will now once again be capable of receiving HSR clearance prior to the 30-day waiting period, thereby permitting faster deal timelines. This reinstatement will go into effect at the same time of the Final Rule, and will hopefully counteract some of the timing burdens imposed by the new HSR form, though it remains to be seen how impactful this will be in practice.

Challengers: Antitrust Scrutiny Intensifies

Throughout 2024, and more generally under the Biden administration, antitrust rulemaking and enforcement have taken on a broader scope with more intensive regulatory scrutiny. Under the direction of FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter, U.S. agencies have brought a historically high number of cases, challenging a considerable number of transactions as being anticompetitive. Anecdotally, these regulatory developments have chilled M&A by disincentivizing transactions or forcing parties to suffer through prolonged negotiations over regulatory risk allocation and procedural provisions and interim operating covenants.

This crackdown on M&A by the FTC and the DOJ reflects an interventionist approach that was less common under previous administrations. At the end of 2023, the DOJ and FTC also issued Final Merger Guidelines which articulated a policy more adverse to mergers than policies in place at the DOJ and FTC since 1982 and effectively created more opportunities for the regulatory agencies to investigate M&A activity.

One particularly radical change within the Final Merger Guidelines was the introduction of the concept of "dominance," whereby a merger will be deemed to be presumptively anticompetitive upon satisfaction of certain prescribed dominance factors, such as market share of one of the parties. Dominance is an established feature of European competition law, but has not previously been a feature of U.S. antitrust law, and finds no support in judicial decisions analyzing mergers.

Additionally, the Final Merger Guidelines took aim at vertical mergers, asserting (in a footnote) that there is "sufficient basis" to challenge any vertical merger where one of the parties has a market share of over 50%. This presumption of competition inherently captures transactions that otherwise would not have raised issues under previous guidelines.

Generally speaking, the Final Merger Guidelines focus more on the impact of a transaction upon the market than on the impact upon consumers (which had previously been a prevailing focus of the antitrust analysis). The Final Merger Guidelines, as compared to previous

guidelines, emphasize the potential for a transaction's harm upon rivals, which is also reflected in its consideration of a merger's potential impact upon competition for labor between employers.

It is worth noting that the Final Merger Guidelines are, as the name suggests, merely guidelines created by the FTC and DOJ. These do not have the force of law, and therefore, their adoption did not completely alter the legal landscape. However, these Final Merger Guidelines are the frameworks upon which the agencies analyze transactions, meaning that although a court is not obligated to comply with all of the guidelines, transactions will nevertheless be scrutinized using these rules, and then ultimately challenged by the FTC and DOJ if deemed in violation.

In practice, this means that merger agreements have generally become subject to a more searching review process, and as a result, parties have had to change their strategies accordingly. The risk of scrutiny and litigation brought by agencies has forced merging parties to plan for the possibility of an elongated period between signing and closing a transaction, and has materialized in the form of longer interim periods, greater flexibility in interim operating covenants, more expansive regulatory covenants to ensure cooperation among parties and regulatory termination fees in case of litigation or other challenges.

This past year specifically witnessed several notable transactions and companies that the FTC and DOJ approached under their new paradigm and which did not have clear paths to resolution. For example, in February, the FTC sued to block Kroger Company's $24.6 billion proposed acquisition of the Albertsons Companies, Inc., the largest proposed supermarket merger in U.S. history. Here, regulators alleged that the transaction was anticompetitive and, if consummated, would result in higher prices for consumers, even after the parties agreed to divest almost 600 stores in connection with the transaction, to mitigate anticompetitive concerns and ensure that there would not be any store closures. After a lengthy legal battle, including involvement by multiple state attorneys general in efforts to block the deal, a district court judge ultimately prohibited the transaction, deeming the combined entity as anticompetitive.

Another example of recent enforcement activity was the DOJ's challenge of JetBlue's proposed $3.8 billion acquisition of its low-cost rival, Spirit Airlines, Inc. The lawsuit, which was based upon the notion that a JetBlue-Spirit merger would eliminate cheaper options for consumers, resulting in higher fares, fewer airline seats and more limited routes, ultimately caused JetBlue to abandon the transaction. Ironically, the DOJ's suit and subsequent implosion of the merger, which Attorney General Merrick Garland referred to as a "victory for the Justice Department's work on behalf of American consumers" was followed in short order by Spirit filing for bankruptcy, which in turn, has reduced routes and options for consumers.

Most recently, the DOJ has called for the breakup of Google following a U.S. District Court decision in August ruling that Google had violated antitrust laws. While Google has not yet submitted its proposed remedies to fix its "monopoly," the DOJ has argued that Google should sell Chrome and share its search results and data with search engine rivals to level the playing field.

The election of Donald Trump and the installation of his appointees at the DOJ and FTC is widely expected to make the landscape of antitrust enforcement more pro-merger. However, the new administration is nevertheless expected to continue to focus on enforcement against purported monopolies within the tech industry.

It Ends With Us: Delaware Decisions and Amendments

It certainly was a momentous year for corporate jurisprudence in Delaware, with significant decisions in the Delaware Court of Chancery and Delaware Supreme Court that are likely to impact corporations and M&A activity for years to come.

Throughout 2024, several decisions came down that redefined our understanding of controlling stockholders and their obligations *vis a vis* the entities they control. In

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January, Chancellor McCormick issued a decision in *Tornetta v. Musk* finding that a holder of 21.9% of the voting power of a corporation was a controlling stockholder for purposes of a specific transaction and that, as such, the transaction should be analyzed under the more burdensome entire fairness standard. Vice Chancellor Laster has gone even further in lowering the bar for control, and has publicly supported the inference of stockholder control from smaller ownership stakes, arguing that DGCL § 203 establishes a rebuttable presumption of control from a 20% ownership stake. While the Chancery Court has not gone as far as to establish that rebuttable presumption, it is clear that courts are becoming more skeptical of shareholders who may wield power over companies. These cases may give rise to more expensive and lengthier litigation in take-private transactions in which shareholders with far less than majority ownership stand on both sides of the transaction.

Vice Chancellor Laster issued a separate decision focusing on controlling shareholders that same week in the Delaware Court of Chancery. In *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*, the Court grappled held that when controllers are altering the status quo of a corporation (such as through the exercise of voting power or sale of stock), the controller may owe fiduciary duties of good faith and care to not intentionally, or through grossly negligent action, harm the corporation or its minority stockholders. While this is a lower standard than is imposed on directors, who must act affirmatively to promote the best interests of the corporation, this decision nevertheless raises the bar of what is expected of controlling shareholders when acting in their capacity as stockholders. This, in turn, has given rise to questions about the extent to which controllers can vote their stakes in their own economic best interest.

The Delaware Supreme Court further expanded the application of the entire fairness standard in April, in the *In re. Match Group, Inc. Derivative Litigation* decision. Here, the Court held that the entire fairness standard of review is the presumptive standard for all transactions in which a controller stands on both sides and receives a non-ratable benefit, not only in full squeeze-out mergers. This means that in order for a defendant to get the benefit of the more deferential business judgment review in any controller transaction, they must comply with both prongs of the *MFW* standard established in *Kahn v. M & F Worldwide Corp*.—(1) independent special committee negotiation and (2) approval by a majority of the minority stockholders.

The *Match* decision went hand-in-hand with the Delaware Court of Chancery's February decision in *Palkon v. Maffei*, in which Vice Chancellor Laster determined that a controlled company's decision to reincorporate in Nevada would also be subject to the entire fairness standard. Although the defendants tried to argue that the decision to reincorporate in Nevada should be analyzed under the business judgment rule, the Court ruled that due to the fact that the controlling stockholder of the company was allegedly receiving non-ratable benefits (in the form of lower risk of liability) that were not shared by the common stockholders, the business judgment rule only would be applicable if the *MFW* protections had been in place.

Practically speaking, these recent cases are important to keep in mind for any Delaware corporations that are contemplating redomiciling in a state other than Delaware. With the courts lowering the bar for "controller" status, and the more ready application of entire fairness review in the absence of procedural protections, corporations must plan their redomiciliation transactions carefully.

Some recent decisions by the Delaware Court of Chancery also catalyzed a handful of amendments to the Delaware General Corporation Law ("DGCL"), which went into effect on August 1 and are widely referred to as the "market practice amendments" because they aimed in part to align statutory requirements with market practices that had evolved over decades of M&A transactions. For example, in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co*., the court held that certain stockholder rights agreements were facially invalid, as they constrained the power of the board of directors, in violation of DGCL § 141(a). These types of agreements were prevalent in the market. In response, DGCL § 122 was amended to authorize Delaware corporations to enter into

agreements on governance matters with stockholders for minimal consideration, so long as those agreements do not conflict with a corporation's certificate of incorporation or the DGCL.

Similarly, in *Crispo v. Musk*, the Delaware Court of Chancery suggested that "*Con Ed*" provisions that are commonly seen in merger agreements (and which explicitly provide that stockholders or a company, on behalf of its stockholders, may recover lost stockholder premium damages from a buyer in the event of the buyer's wrongful termination) are not enforceable. In response, DGCL § 261 was amended to authorize explicitly a merger agreement to specify penalties or consequences for breaches, including the requirement for a buyer to pay shareholders for lost premium damages. In practice, it is still very early to tell the practical effects of this amendment, but a vast majority of merger agreements entered into after August 1, 2024 have included some form of the Con Ed language, the permissibility of which is now codified in the DGCL.

One last example worth noting is *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, in which the Delaware Court of Chancery held that Activision's board was in violation of DGCL § 251 and did not properly approve of the parties' merger because, among other things, the agreement reviewed by the board was not finalized and did not include the agreement's disclosure schedules. The Court ruled that to comply with the DGCL, a company's board must approve of an essentially complete version of a merger agreement. DGCL § 147 then mitigated this burden somewhat and instead now only requires approval of an agreement that is in "substantially final form," meaning that all material terms are in the agreement or determinable through other information or materials presented to or known by the board. Additionally, DGCL § 268(b) now clarifies that disclosure schedules are not part of a merger agreement (unless specified otherwise) and, therefore, do not require board approval.

Hard Truths: Geopolitical Relations

Cross-border M&A activity was quite robust during the first 11 months of 2024, with a total deal value of $950 billion, which is a 13% increase compared to one year ago. Much of this growth is credited to the technology, industrials, energy and power sectors, which comprised 39% of all cross-border transactions through the first three quarters of 2024. During this period, Asia Pacific dealmaking totaled $654 billion, a 10% increase compared to one year ago. However, upon closer examination, much of these gains were centralized in Japan, which has accounted for $141 billion in deal volume through the first 11 months of 2024, approximately 22% of all Asian Pacific dealmaking and a nearly 60% increase since last year. By comparison, the remainder of Asia Pacific dealmaking (excluding Japan) totaled $512 billion through the first 11 months of 2024, after experiencing the slowest nine-month opening to a year since 2013, and reflecting a meager 2% increase in deal value compared to last year.

Asia Pacific dealmaking is likely to struggle into the future, in light of recent U.S. geopolitical regulations that are expected to create additional headwinds to M&A activity between the U.S. and China. The Department of Treasury recently released a rule, colloquially referred to as "reverse CFIUS," that becomes effective on January 2, and which imposes significant restrictions on U.S. outbound investment in certain Chinese companies. Specifically, these new rules impose either (i) a strict prohibition on, or (ii) an obligation to notify the Treasury Department upon engaging in certain types of transactions with China (and potentially other "countries of concern" in the future) related to semiconductors, microelectronics, quantum technologies, and artificial intelligence. It is worth noting that the rules provide some limited exceptions that eliminate the prohibition or notification requirements, including the acquisition of publicly traded securities and a complete buyout of ownership from the covered entity that would have otherwise triggered the application of the rules. Nevertheless, these "reverse CFIUS" rules, while not impacting all, or even most, outbound investment, are sure to drive up compliance and diligence costs and generally dampen the level of U.S. investment in China. Furthermore, it would not be surprising if President-elect Trump created additional obstacles to U.S.-China relations and

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M&A activity, in line with the promises he made on the campaign trail.

Despite the negative outlook in Chinese markets caused by the "reverse CFIUS" rules, Japan remains ripe for M&A activity and foreign investment. Commentators have pointed to Japan as an undervalued market, due to the significant depreciation of the Japanese yen and low interest rates as compared to the rest of the world, both of which are enticing to foreign investors. Additionally, recent corporate governance reforms within Japan, both from the Ministry of Economy, Trade and Industry ("METI") and Tokyo Stock Exchange ("TSE") have stimulated market activity that has attracted immense M&A interest.

For example, in late 2023, METI published the "Guidelines for Corporate Takeovers—Enhancing Corporate Value and Securing Shareholders' Interests," with the express objective of outlining best practices for public M&A transactions in Japan, and providing clear guidance to international buyers considering the acquisitions of Japanese listed companies. Specifically, these guidelines encourage boards to enhance corporate value and shareholders' interests by sincerely considering credible, bona fide takeover proposals. Additionally, TSE reform guidelines have pushed entities to unravel the high levels of cross-shareholding (whereby public Japanese entities have historically held significant percentages of other public entities to prevent hostile takeovers and shield the company from outside pressure) in the market. In the wake of these regulatory reforms, shareholder activist pressure upon the Japanese companies is acting as a catalyst to drive more M&A activity, which previously was not feasible or desired.

Analysts believe that 2024 will be a record year for Japanese M&A activity, with transactions including KKR's take private of Fuji Soft (a Japanese information technology company), Fortress Investment Group's acquisition of Joban Kosan (the holding company of popular Japanese resorts), and Bain's acquisition of Trancom (a Japanese logistics operator). Nevertheless, there is optimism that 2025 will produce even better results, with several desirable Japanese targets considering sale processes and carve-out transactions.

A Complete Unknown: Looking Ahead to 2025

As we look forward to 2025, there is optimism that M&A activity will pick up steam under the new administration. We expect to hear less anti-merger rhetoric coming out of Washington, which will help restore dealmaker confidence. On the campaign trail, President-elect Trump also frequently discussed the importance of investment in the U.S. and economic nationalism, to be achieved through, among other things, the imposition of tariffs on other nations' goods and favoring U.S. ownership over foreign ownership. We anticipate that the new administration will hold true to these promises, further promoting dealmaking in the U.S. and incentivizing inbound investments. This political backdrop, complemented by the expectation of continued interest rate cuts by the Federal Reserve in the coming year, is likely to catalyze transactions within the U.S. and motivate private equity sponsors in particular to put their dry powder to work.

This is certainly the consensus prediction, as reflected by the favorable reaction by the market to the election results. Only time will tell whether the upcoming year will see these seismic shifts, though it would be wise for M&A practitioners to sharpen their pencils and prepare for a busy 2025.

TRUMP 2.0 AND ANTITRUST

*At the close of 2024, **The M&A Lawyer** talked to Aimee DeFilippo and Michael Knight, partners in the Washington, D.C. office of Jones Day, about their expectations as to how antitrust enforcement could change upon the return of Donald Trump to the White House.*

***The M&A Lawyer**: The general consensus upon the election of Donald Trump was that the incoming administration will be much more merger-friendly than the Biden administration has been perceived to be. Would you agree that this is a fair assessment? Has the perception of the Biden years as being more strongly devoted to antitrust than the typical administration been borne out by the number of its antitrust enforcement actions? Or is the picture more nuanced?*

Aimee DeFilippo: I think the overall climate for mergers will improve with the Trump administration. Trump administration enforcers are likely to be less willing to closely scrutinize certain types of transactions that have been in the crosshairs of Biden antitrust enforcers (*e.g.*, private equity transactions) and less willing to pursue more novel theories of harm like we saw under Biden (*e.g.,* labor theories, bundling theories). That said, deals in some industries—like Big Tech and healthcare/pharmaceuticals—will likely continue to see scrutiny in the years ahead.

Importantly, I also expect we'll see a return to merger settlements. Under the Biden administration we saw a sharp turn away from divestitures and consent agreements, with the agencies expressing a preference for blocking mergers and acquisitions rather than accepting remedies. I think things will return to a more traditional approach of allowing merger remedies. That doesn't necessarily mean that divestitures will be as common as they were before, but in general the expectation is that Trump administration enforcers will, at a minimum, return to allowing divestitures to fix problematic aspects of a deal.

As for the Biden administration, I think the data show that the number of significant merger investigations and even the number of Second Requests issued did not dramatically increase under Biden, but we did see broader Second Requests covering a more expansive range of potential theories of harm. Under Trump, we should see a return to a more traditional approach focused on applying well-settled antitrust principles like looking at a transaction's impact on prices and innovation, and relying again on economics to inform the analysis.

Mike Knight: I think Aimee has it right here. Overall, I expect we will see greater emphasis on consumer welfare effects and more traditional theories of harm in analyzing transactions. This means a return to the fundamental antitrust questions that regulators were focused upon for most of the 40 years leading up to 2020: Will mergers lead to higher prices, lower quality of products or services supplied by the merging firms, or less innovation? Of course, that doesn't mean it will be open season for mergers and acquisitions. The FTC and DOJ will continue to be aggressive in enforcing against mergers they believe to be harmful to consumers. And that includes mergers in key segments of the economy such as technology and healthcare/pharmaceuticals.

So, I don't expect the guns to stop firing altogether, but rather that the agencies' collective sights will be more focused on specific types of matters that are more in line with traditional antitrust theory.

***MAL:** Are there any early actions that the new DOJ and FTC regimes could take upon assuming power that would be an indication of changing priorities and philosophies? For instance, could the upcoming HSR rules changes be delayed or even revoked?*

Knight: I think it is quite possible that the HSR rule changes could be effectively repealed and/or modified significantly. That would likely be done by the new Congress through the Congressional Review Act, rather than by the agencies themselves. And it would probably happen quickly, before the changes go into effect as scheduled on February 10. There are many who say that HSR rules could use some reform, but I suspect that most envision reforms that are less onerous than the current set of changes which, I should note, are themselves less onerous than the proposed rule changes released in 2023.

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DeFilippo: Another big question is what will happen to the 2023 Merger Guidelines. I know some in the antitrust bar expect these guidelines to be immediately rescinded given that those guidelines are considered to be a significant departure from the agencies' previous horizontal and vertical merger guidelines. That said, Commissioner Andrew Ferguson (the incoming FTC chairman) has stated publicly that while he would be open to revising the guidelines, he doesn't think we should get into a cycle of rescinding the guidelines upon every administration change, since doing so will make the guidelines look largely partisan in the eyes of courts. Overall though, I do think the guidelines are unlikely to survive fully intact in the Trump administration.

Knight: I agree with respect to the Merger Guidelines in that I do not foresee rescission, or even wholesale changes, but perhaps some modifications around the edges to the manner in which the Guidelines Statements 1-10 are applied. For example, I could see potential revisions around the levels of market concentration required for the agencies to initially presume anticompetitive harm. But I suspect that the basic Statements themselves will remain intact.

MAL*: Do we have a sense yet of where the incoming administration's priorities will lie, in terms of antitrust enforcement? Particular sectors or types of deals? Any areas that look like they will be more consistent with the outgoing administration?*

DeFilippo: As we previewed earlier, there's likely to be some continuity with Biden administration enforcers in certain key areas. For example, I think the healthcare scrutiny remains, particularly as it relates to PBMs and large insurers. As many have already pointed out, Big Tech will continue to be a focus area as well, both in terms of merger enforcement but also continued antitrust litigation by the agencies. I think the target on the back of private equity buyers, though, will lessen significantly. Since taking over as chair of the FTC, Lina Khan had really increased scrutiny of PE buyers as viable purchasers, questioning whether these buyers have the long-term best interests of the assets in mind or are just looking to take out costs and then flip the assets to another buyer at a profit. We saw this scrutiny quite a bit in the healthcare industry, and also a focus on whether PE buyers were engaging in serial acquisitions and "roll-up strategies." The scrutiny resulted in a lawsuit (still ongoing), a 6(b) study, and even some Congressional legislation targeting PE buyers of healthcare assets. The two Republican commissioners at the FTC have not signaled a particular skepticism of private equity, and in general I think the PE scrutiny will die down under Trump.

Other rhetoric we heard in the Biden administration—like a focus on standalone labor market theories to block an otherwise non-offensive transaction—should go away as well. But newer areas of focus may emerge under the Trump administration. ESG is one such area, given certain statements by Commissioner Ferguson expressing concerns about potential collusion in this area, and given that the first Trump administration opened an investigation—later dropped—into whether four auto companies illegally coordinated to limit auto emissions. ESG is also an area where the U.S. approach is starting to diverge from that of foreign jurisdictions (particularly the EU). In general, it will be interesting to see whether and how much the antitrust agencies in the Trump administration coordinate with—or clash with—foreign counterpart agencies on ESG or other issues.

Knight*:* Once again, I agree with Aimee, which I usually find to be an excellent policy. I do think it is important to note, however, that most merger enforcement activity at the antitrust agencies is a matter of "calling balls and strikes." What I mean by this is that, unlike other areas of enforcement, mergers are typically affirmatively presented to the agencies for review. The reviewing agency must then assess whether each given transaction before it presents a competitive threat or not. And these assessments must be made without knowing which other transactions may be presented in the future. In a setting such as this, where enforcers are essentially force-fed their cases, it can be difficult to fully plan future resource allocation with a specific industry in mind. If you try to hold back resources today to preserve them for an unknown future merger in a particular industry of interest, you risk seriously misallocating those resources and becoming a less effective enforcer overall.

Thus, while I suspect that it is correct that the new enforcers will have particular interests in specific industries, we should not expect drastic shifts in resource allocations to those specific industries. The effects are much more likely to be felt at the margins.

***MAL**: How do things look in terms of ongoing antitrust enforcement and litigation? Could the new regimes aim to wind down ongoing investigations and settle cases, for example?*

Knight: I do think we may see a greater willingness to settle certain ongoing/late-stage investigations or litigations, especially to the extent that they do not fit the policy agenda of the Trump administration. Perhaps the most famous example of this (albeit in a non-merger setting) was the [George W.] Bush administration's settlement of the Microsoft litigation initiated by the Clinton administration. As a rule of thumb, the agencies are less willing to settle once litigation has been initiated. But a change of administrations offers an exception to this rule.

DeFilippo: Thinking about ongoing merger litigation, the FTC has its pending case in the mattress industry (a vertical case). But that case has already been to trial, and both Commissioner Ferguson and Commissioner Holyoak voted to bring the complaint, so we should expect that one to continue through to a full decision.

***MAL**: Finally, what other possible federal antitrust enforcement trends or actions could M&A lawyers expect to see over the next four years?*

DeFilippo: In my view, it shouldn't take long for some of these changes to be felt. The announcement of nominees to head the agencies has already happened more quickly than it typically does, and with Republican control of the Senate, confirmations could happen quickly too.

Knight: I think we'll learn a lot relatively early on about the new agency heads and their enforcement priorities. Both incoming agency heads are antitrust thinkers, and I expect neither will be shy about making their thoughts, plans, and agendas known to the public quickly. I'll go back to what I stated earlier about a return of focus on consumer welfare as a "first principle" of antitrust enforcement. If I'm correct about that, then I suspect we'll see a somewhat friendlier enforcement environment, which may spur increased M&A activity. But beware. This will not be a return to Reagan era enforcement, and I expect the agencies to sink their teeth into plenty of matters.

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

DELAWARE COURT OF CHANCERY HOLDS STOCKHOLDER VOTE FOLLOWING POST-TRIAL DECISION CANNOT RETROACTIVELY RATIFY A TRANSACTION THAT FAILED ENTIRE FAIRNESS

By Alan Goudiss, Jeffrey D. Hoschander, Mallory T. Hoggatt, Susan Loeb, Jessie Donegan, and Emma Schaechter

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On December 2, 2024, Chancellor Kathaleen St. J. McCormick of the Delaware Court of Chancery denied a motion to revise the Court's post-trial decision to rescind a CEO compensation package based on a subsequent stockholder vote to "ratify" the package.[1] In *Tornetta v. Musk*, Chancellor McCormick held that (i) there is no procedural ground for reversing an adverse trial decision based on newly created evidence; (ii) ratification is an affirmative defense that cannot be first raised so late; (iii)

a stockholder vote alone cannot ratify a conflicted-controller transaction; and (iv) there were material misstatements in the proxy statement for the ratification vote.

In January 2024, the Court held in a stockholder derivative suit against the CEO and directors of a sustainable energy and electric vehicle company (the "Company") that a record-setting $55.8 billion stock option compensation package awarded to the CEO was subject to the entire fairness standard of review. The Court found that the CEO was a controlling stockholder for purposes of the compensation award transaction and neither the value nor the process were proven by defendants to have been entirely fair to stockholders.

Following the decision, the Company's board of directors appointed a special committee and determined to place the same compensation plan before the stockholders for a vote, describing stockholder ratification in the proxy statement, among other things, as a way to "extinguish claims for breach of fiduciary duty" and "cure" "any wrongs found by the Delaware Court in connection with [the award]." Stockholders voted to approve the proposal. Defendants then filed a motion to revise the post-trial opinion—contending the vote "had the effect of ratifying" the award—a request that the Court characterized as an attempt to "flip the entire outcome of the case."

The Court rejected defendants' ratification argument based on several fatal defects. First, the Court explained that there was no procedural mechanism to consider the vote at this late stage in the proceedings. Even though a court can reopen the trial record to consider "newly *discovered* evidence" under certain circumstances, the stockholder vote was "newly *created* evidence." The Court found untenable the possibility that "a stockholder vote can be deployed to reverse any form of judicial ruling" and noted that if a court were to "condone the practice of allowing defeated parties to create new facts for the purpose of revising judgments, lawsuits would become interminable."

The Court also held that stockholder ratification "is an affirmative defense" that can be "waived if not timely raised." Here, defendants raised the ratification defense six years after filing, one and a half years after trial, and five months after the post-trial opinion. The Court concluded that "[w]herever the outer boundary of non-prejudicial delay lies, Defendants crossed it."

Regardless, the Court held that "a stockholder vote standing alone cannot ratify a conflicted-controller transaction." As the Court explained, "the maximum effect of stockholder ratification in a conflicted-controller transaction is to shift the burden of proving entire fairness." To obtain the deferential treatment under a "business judgment review," a conflicted-controller transaction must instead follow the procedural framework outlined in *Kahn v. M & F Worldwide Corp.* ("*MFW*").[2] That is, the controller must "precommit" to and the company must implement the protections of "both an independent, adequately empowered special committee that fulfills its duty of care and an uncoerced, informed vote of a majority of the minority stockholders." The Court noted that "one does not '*MFW*' a vote. . .one '*MFW's*' a transaction" and held that defendants failed to put the "full suite of *MFW* protections" in place.

Moreover, the Court determined that the vote could not have a ratifying effect because it was not "fully informed." The Court found that the proxy made materially misleading statements about the effect of the vote, which contrary to the implications of the proxy cannot alone "cleanse a conflicted-controller transaction."

Separately, the Court granted plaintiff's attorneys' fee petition only in part. Plaintiff sought $5.6 billion. The Court noted that the "methodology for calculating this figure is sound" in light of the approach of Delaware courts in using a percentage of the value of the benefit arguably achieved and certain other factors. But the Court concluded that $5.6 billion is an unacceptable "windfall no matter the methodology used to justify it." Instead, the Court used the $2.3 billion value of the options award on the grant date and applied a "conservative 15%" to reach a fee of $345 million, which the Court described as "an appropriate sum to reward a total victory" in this case.

ENDNOTES:

[1]*Tornetta v. Musk*, *et. al*., C.A. No. 2018-0408-KSJM (Del. Ch. Dec. 2, 2024).

[2]88 A.3d 635 (Del. 2014).

HOW THE *MOELIS* DGCL AMENDMENTS MOVED DELAWARE AND CANADA (A LITTLE) CLOSER TOGETHER: WHAT U.S. PRIVATE EQUITY AND VENTURE CAPITAL SHOULD KNOW

By Neil Kravitz, Grant McGlaughlin, Brendan Sawatsky, Brad Schneider and Paul Blyschak

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2024 was an eventful year for stockholders under Delaware corporate law.

Perhaps most notably, on August 1, 2024, the Delaware General Corporation Law ("DGCL") was amended to abrogate various earlier Court of Chancery rulings that many U.S. lawyers considered inconsistent with market practice. Among these were amendments addressing the decision in *Moelis & Company*,[1] which held that relatively common stockholder agreement clauses granting investors broad "pre-approval" or "veto" rights were invalid under the DGCL for substantially restricting the board's ability to manage the corporation's business.

What U.S. private equity and venture capital investors in Canada will be interested to know is that the *Moelis* amendments move Delaware and Canadian corporate law closer together, although several significant differences still remain. Given that Canada is routinely among the largest foreign destinations for outbound U.S. investment, we explore these similarities and differences for the benefit of U.S. counsel.

Moelis and the Ensuing *Moelis* DGCL Amendments

At issue in *Moelis* were a set of clauses that had been considered "market-standard" for some time and that are regularly found in Delaware stockholder agreements.[2] These provisions required the prior written approval of the company's founder before the corporation could take various actions. In *Moelis* the court held these were invalid for conflicting with DGCL s.141(a), being the section of the DGCL that establishes the "board-centric framework" at the heart of Delaware corporate law.[3] Moreover, the Court of Chancery stated that even if written as "veto rights" rather than "pre-approval rights," the result would be the same as "the power to review is the power to decide."

Widespread concern immediately ensued. Practitioners worried the ruling would not only fundamentally disrupt established market practice but also prompt a wave of "copycat" stockholder litigation attacking many similar agreements out in the market. The Delaware General Assembly responded by passing legislation adding new section 122(18) to the DGCL. This permits corporations to take (or not take) actions identified in a stockholder agreement, including providing stockholders with consent or veto rights over such actions, provided they do not override any requirements imposed by the DGCL or the corporation's charter.[4] That said, the legislative commentary to s.122(18) expressly cautions that this section "does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders. . ."

The *Moelis* DGCL Amendments and Canadian Corporate Law Compared

So how have the *Moelis* DGCL amendments brought Delaware and Canadian corporate law closer together? Most significantly, Canadian federal and most provincial corporate statutes have expressly provided that the duties of directors to manage or supervise the management of

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the corporation's business is subject to the terms of any unanimous shareholder agreement ("USA").[5] The enforceability of the type of shareholder "pre-approval" and "veto" rights at issue in *Moelis* have therefore not raised similar controversy in Canada.

Where the *Moelis* DGCL amendments and Canadian corporate law diverge, however, is regarding the *transfer* of directors' duties. As mentioned, the legislative commentary to DGCL s.122(18) expressly cautions this section "does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders. . ." By contrast, Canadian federal and provincial corporate statutes expressly provide that, to the extent a USA restricts the powers of directors to manage the corporation's business, then: (1) the shareholder(s) granted such authority shall *assume* all the rights, duties and liabilities of the directors, and (2) the directors are *relieved* of such rights, duties and liabilities to the same extent.[6]

The *Moelis* DGCL amendments therefore create the possibility, depending on the circumstances, of fiduciary duties simultaneously lying at two different levels. First, at the level of the directors and, second, at the level of a controlling or majority shareholder. Canadian corporate law regarding USAs, by contrast, institutes an "either/or" structure where fiduciary duties, at least with respect to certain actions, will either lie with the directors or with one or more shareholders, depending on the circumstances, but not with both.

The twist in Canada is that because of a lack of judicial treatment of the issue, it is unclear exactly when that line will be crossed, *i.e.*, when a USA will be deemed to restrict the power of the directors to manage the corporation's business such that the rights, powers and liabilities of the directors transfer to the empowered shareholder. That said, because it is not unusual for Canadian courts to look to Delaware caselaw for guidance, particularly in M&A and corporate governance disputes, we at FASKEN have mused elsewhere that the *Moelis* decision could factor significantly into a Canadian court's reasoning on similar disputes in Canada.[7]

A related discrepancy between Delaware and Canadian corporate law that U.S. investors should appreciate relates to the ability to contract around directors' fiduciary duties and Delaware's greater allowance for private ordering. DGCL s.102(b)(7) permits a "charter provision to eliminate [a director's] monetary liability for breaches of the duty of care." DGCL s.122(17) allows for corporate opportunity waivers and thus the ability to circumscribe the reach of the duty of loyalty.[8]

Canadian corporate law leans heavily in the opposite direction. Canadian federal and provincial corporate statutes expressly provide that "no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with [corporate law] or relieves them from liability for a breach thereof."[9] The Supreme Court of Canada has also ruled that fiduciary duties in Canada are "pervaded" by a "strict ethic" and should be "strictly applied."[10]

The material exception to the foregoing are under the Alberta *Business Corporation Act* ("ABCA").[11] In 2022, the ABCA was amended to adopt, near verbatim, Delaware's corporate opportunity waiver under DGCL s.122(1).[12] The ABCA also expressly provides that, in deciding whether a particular course of action is in the corporation's best interests, a nominee director may give special, but not exclusive, consideration to the nominating shareholder's interests.[13]

Concluding Comments

Delaware and Canadian corporate law are similar in many respects, but also differ significantly on several key points. The *Moelis* DGCL amendments bring these similarities and dissimilarities into sharp focus. U.S. private equity and venture capital investors into Canada should appreciate these nuances, and structure and manage their investments accordingly. In particular, they should be mindful that, while Canadian corporate law allows stockholder "pre-approval" and "veto" rights of the sort blessed by the *Moelis* DGCL amendments, such clauses can in Canada have the result of transferring fiduciary duties to a stockholder, even in the case of a minority investment.

ENDNOTES:

[1]*See West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024).

[2]*See* C. Davis, A. Fabens, J. Lapitskaya and J. Robinson, "Delaware Court of Chancery Invalidates Consent Rights and Certain Designation-Related Rights in a Stockholder Agreement," *The M&A Lawyer*, Vol. 28, No. 3, March 2024, p. 1.

[3]DGCL s.141(a) reads: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

[4]DGCL s.122(18) reads, in part: "Notwithstanding § 141(a) of this title, make contracts with 1 or more current or prospective stockholders (or 1 or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, 1 or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation)."

[5]*See Canada Business Corporations Act*, RSC 1985, c C-44 (CBCA) at s.102(1): "Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation." *See also* (Ontario) *Business Corporations Act*, RSO 1990, c B.16 (OBCA) at s.115(1) and (Alberta) *Business Corporations Act*, RSA 2000, c B-9 (ABCA) at s.101(1).

[6]*See* CBCA s.146(5): "To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent." *See also* OBCA s.108(5) and ABCA s.146(7).

[7]*See* A. Marks, M.C. Valois, B. Schneider, B. Sawatsky, C. Ragas, G. Gujral and P. Blyschak, "When Might Shareholders Attract Fiduciary Duties Under a Shareholder Agreement? Guidance from Delaware Relevant to Private Equity and Venture Capital in Canada" (Oct. 23, 2024), available at www.fasken.com.

[8]DGCL s.122(17) reads: "Every corporation. . . shall have power to. . . [r]enounce. . . any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders."

[9]CBCA at s.122(3). See also OBCA s.134(3) and ABCA s.122(3).

[10]*Canadian Aero Service Ltd. v. O'Malley*, 1973 WL 143378 (Can. 1973).

[11]RSA 2000, c B-9. For further discussion, *see* S. Gingrich, B. Schneider, G. McGlaughlin. C. Rose and P. Blyschak, "Delaware's Corporate Opportunity Waiver Comes to Canada: Takeaways for U.S. Private Equity and Cross-Border M&A," *The M&A Lawyer*, Vol. 27, No. 9, October 2023.

[12]*See* ABCA s.16.1(1): "Subject to the regulations, a corporation may waive any interest or expectancy of the corporation in or to, or in being offered an opportunity to participate in, a specified business opportunity or specified classes or categories of business opportunities that are offered or presented to the corporation or one or more of its officers, directors or shareholders."

[13]*See* ABCA s.122(4): "In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director."

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"ONE TAPESTRY OF MERGER LAW"

By David Lawrence

David Lawrence is the policy director of the U.S. Department of Justice's Antitrust Division. The following is edited from remarks that he gave at the New York State Bar Association's William Howard Taft Lecture, in New York on December 19, 2024. Lawrence's remarks were a response to a speech given by Paul, Weiss, Rifkind, Wharton & Garrison LLP partner Andrew Finch, who spoke on the topic of "Law in a Time Capsule: Should the 1960s Merger Cases Be Affirmed Today?"

My favorite time capsule is a small aluminum canister currently about 240,000 miles from here. Neil Armstrong and Buzz Aldrin left that capsule behind after Apollo 11 landed along the Sea of Tranquility. It contains only a small silicon disk with printed messages of goodwill from the leaders of 73 countries.[1] I love that. The United States invited leaders all around the world to write messages of hope and human kindness to leave behind on the lunar surface for whomever might find them.

When you fly a time capsule to the moon, space is tight. But one country allowed itself multiple messages. The United States opened with statements from four presidents who had helped oversee the project—Dwight Eisenhower, John F. Kennedy, Lyndon Johnson and Richard Nixon. When you build the rocket, I guess you get those privileges.

I urge you to give the messages a read sometime. They are individually inspiring. But even more striking is the fact that four presidents from two political parties brought the Apollo project to fruition and have their efforts recorded there. In a democracy that necessarily undergoes regular leadership changes, it is a reminder that our greatest public accomplishments can, and often must, depend on years of bipartisan effort.

Now competition law is no moon landing, but we see this thread in the bipartisan antitrust revival now underway. For example, we investigated and filed the Google Search monopolization case in 2020, and won our trial in 2024. I have had the privilege to support that matter in two administrations, and as we drive ahead in the remedies phase [this month] will support a third administration responsible for the matter.

The recent history of enforcement against mergers that involve products and services rivals rely on to compete, sometimes called vertical mergers, is another example of a multi-administration antitrust accomplishment.

The challenges we faced litigating *AT&T/Time Warner* perfectly teed up the topic of today's discussion. To cut to the chase, my thesis is this—the holdings from the 1960s merger cases remain vibrant parts of the modern antitrust landscape and would therefore be affirmed today, even if some of their outdated economic analysis doesn't form a question presented for Supreme Court review.

In *AT&T/Time Warner*, we faced the challenge of determining how older legal analysis in '60s and '70s merger cases fit into the tapestry of modern antitrust law. The last merger case decided by the Supreme Court that didn't involve head-to-head competitors was *Ford Auto-lite* in 1972.[2] If you haven't read it lately, the economic analysis reads like it was written in a different language than we use today.

The court was dealing with this challenge, too. At one point, the judge asked the parties to submit their views as to the applicable legal framework in a standalone pre-trial submission. Andrew [Finch] had the wisdom not to rely on me to answer this question alone. He assigned our moderator today, Taylor Owings, to help me draft our trial statement on the burden of proof. And so, we undertook a project much like we are undertaking this morning. We pored through both the older precedents and the modern cases to find a way to give voice to binding case law in a way that rhymed with modern principles.

Ultimately, we found a reasonable way to fold together still-binding concepts from *Procter & Gamble* and *Philadelphia National Bank* with the modern burden-shifting framework created in *General Dynamics*. We borrowed the concept of burden-shifting from *Baker Hughes* and other structural presumption cases, but explained how it

should also apply when a plaintiff makes a "fact-specific" showing that the merger's effect may be to substantially lessen competition.[3]

Of course we lost that case on the facts, but the courts agreed with our approach to apply burden shifting for the burden of proof, even in a merger case with no structural presumption. The 2019 D.C. Circuit opinion quotes that pretrial statement alongside *Brown Shoe* in setting forth what is now widely accepted as the appropriate doctrinal path to evaluating a non-horizontal merger.[4] First, the court should examine plaintiff's fact-specific evidence that the merger may substantially lessen competition. Then it turns to examining other facts produced by defendants suggesting otherwise.

That opinion was then relied on to develop the 2020 Vertical Guidelines and 2023 Merger Guidelines.[5] A reminder to never cut corners on a pretrial filing.

And both the Trump administration and Biden administration filed friend of the court briefs as Steves and Sons pushed for the divestiture that was finally ordered by a court in the Jeld-Wen matter. This administration saw the project through to a safe landing.

Most importantly, last year [2023] the *Illumina* court upheld the Federal Trade Commission's bipartisan challenge to the Illumina/Grail merger. December 15, 2023, will not be remembered like the moon landing, but it was an historic day for antitrust law. It was the first time a federal court agreed with the government as to the anticompetitive risk of a merger involving rivals' complements in my lifetime. The Fifth Circuit did so by incorporating a sophisticated modern analysis of how the merger would risk foreclosing potential rivals within the framework established by longstanding precedent.[6] It won't surprise you that the court used the burden-shifting language from the AT&T D.C. Circuit opinion that I just mentioned.

The *Illumina* opinion now serves a similar role to my second favorite time capsule, which was actually accidental.

Probably the most important time capsule in history was never meant to be one. . .the Rosetta Stone, carved in three languages in 200 B.C. to set forth a Ptolemaic decree, came to serve as a time capsule from Ancient Egypt to the 19th Century. We all know why the Rosetta Stone was so important. Because it translated that decree into three languages, it contained the keys to translating long-lost ancient Egyptian writings into Greek and in turn the other world languages.

The *Illumina* opinion did much the same. Future litigants can now turn to that opinion to understand how *Ford Autolite*, *Brown Shoe* and an economic incentive and ability analysis should apply together within the modern burden-shifting framework of *General Dynamics* and *Baker Hughes*.

They don't fit perfectly, and it can require some translation, but the opinion underscores that we still have one tapestry of merger law that respects both past and present. And in so doing, it helps us undertake merger enforcement that better respects our obligations to the rule of law.

We aren't pretending that old cases are irrelevant or somehow expired. And we aren't pretending that modern market realities and economic understanding can be discarded either. We are engaged in an exercise of translation and synthesis between old language and new.

Five Key Translations for Modern Merger Review

In that spirit, I would like to spend the rest of my time focused on five critical translations between old holdings and new understandings in merger analysis: (1) translating the word "competition" in the Clayton Act; (2) translating the words "may be" in the Clayton Act; (3) translating the structural presumption into an analysis of anticompetitive effect; (4) the evaluation of procompetitive efficiencies as a rebuttal, and (5) translating *Procter & Gamble*'s prohibition on mergers that entrench power into a definition of competition that distinguishes exclusion form efficiency.

These translations reflect the result of bipartisan work across many administrations to ensure the division faith-

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fully applies longstanding law to modern market realities in a way that enables vigorous and effective enforcement.

Translating "Competition"

My first translation is of the word competition. The Clayton Act does not define the term competition, and many of the older Supreme Court merger cases vary in their expressions of what they think it means. Andrew [Finch] documented some of this well.

In the years since, however, the Supreme Court has settled on a conception of competition as the dynamic process of rivalry that drives firms to lower prices, improve quality, raise wages and increase innovation, among other benefits.

This was actually documented very nicely by FTC Commissioner Andrew Ferguson in his dissent from a recent Robinson-Patman Act case. I don't take any position on the case itself or the application of the analysis to Robinson Patman. But you should take a look at the doctrinal discussion around competition. It is the same kind of analysis we are undertaking today. He explains that modern precedents focus on "protecting the economic force" that drives productive firm behavior and benefits the public, the "competitive process."[7] He notes the holding of the Supreme Court in *Nynex v. Discon* that "plaintiff must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself,"[8] and he also points out the language of then-Judge Gorsuch in *Novell* that "the proper focus of section 2 isn't on protecting competitors but on protecting the process of competition. . ." to the benefit of its participants.[9] And both of those cases of course leverage that most cited line from *Brown Shoe* that the antitrust laws protect "competition, not competitors."

The roots of this economically coherent definition of competition are found in *Northern Pacific*,[10] where the Supreme Court acknowledged that the Sherman Act was aimed at preserving the "unrestrained interaction of competitive forces" that drives prices down and promotes increased quality and innovation, yielding the best allocation of our nation's resources while simultaneously preserving an environment conducive to our democracy. That passage is quoted in *Board of Regents*,[11] which was in turn referenced in the opening passage of *NCAA v. Alston*.[12]

Although the Sherman and Clayton Acts are different statutes, the Sherman Act approach to understanding competition as an economic process was translated into Clayton Act jurisprudence in *Brooke Group* and *Cargill*.

Thinking about the economic forces involved in the competitive process helps clarify what we are protecting when we protect competition. Would a merger make the merged firm a more forceful competitor by enabling it to offer better products and services? If so, that merger drives the competitive process.

On the other hand, what if the merger could sap the strength from opposing forces by raising their costs? Or what if it results in a cozy oligopoly where rivals pull punches and attack each other less forcefully? Those are harms to the competitive process as we have defined it.

We also have to remember it is the dynamic nature of the interaction of competitive forces that creates particularly significant benefits for society. As Joseph Schumpeter highlighted, competition is a "process of creative destruction."[13] This is always worth remembering. Static pricing incentives are one measure of competitive force, but if we narrow our focus to them we lose important longer-term effects. We need to preserve the incentives to invest and innovate that help firms gain strength and become more forceful competitors over time.

So that's our first translation. And it is critical to applying the earlier Clayton Act precedents.

Translating the Burden of Proof: Maybe It's "May Be"?

For my second translation, we cannot simply borrow from Sherman Act jurisprudence because it pertains to a difference in the statutory text between the Sherman and Clayton Acts. Whereas the Sherman Act prohibits contracts that are in restraint of trade, the Clayton Act prohibits mergers whose effect "may be" to substantially

lessen competition. Unless we are willing to read the word "may" out of the statute and to look for what the effect of the merger "is," we cannot simply import the Sherman Act rule of reason into the Clayton Act.

The legislative history underscores that Congress chose this more risk-averse language intentionally. At one point the bill would have applied only "where the effect is substantially to lessen competition."[14] But through a compromise between the House and Senate, the final bill replaced "is" with "may be."[15] When adopting this final language, Senator Chilton explained that this standard meant "where it is possible for the effect to be."[16]

That leads to one of *Brown Shoe*'s most important holdings. *Brown Shoe* explained that the Clayton Act standard is "concern[ed] with probabilities, not certainties" and it held that it therefore prohibits mergers with a "reasonable probability" of anticompetitive effect.[17]

This holding has hardly been in a time capsule. It has routinely been relied on by the federal courts, including in 1990 when the Supreme Court reminded us in *California v. American Stores* that this establishes a "relatively expansive definition of antitrust liability."[18] Although occasionally district courts are unsure of whether to apply a "more likely than not" type preponderance standard, the lion's share of courts interpret the words "may be" consistent with their original meaning.

Meanwhile, the Supreme Court has continued to opine on what "reasonable probability" means in other contexts, underscoring that it does not require a probability that is more likely than not, such that it collapses with a preponderance standard. For example, ineffective assistance of counsel claims also turn on whether there was a "reasonable probability" that attorney incompetence changed the result of the trial. In 1999's *Strickler v. Greene* the Supreme Court explicitly cautioned that when applying a reasonable probability standard "the adjective is important," so "[t]he question is not whether the [outcome] would [be] more likely than not.").[19] The question is whether the probability of the outcome is reasonable.

Our application of this standard has also evolved since *Brown Shoe*. Early cases stopped the analysis after identifying a reasonable probability of anticompetitive effect, such as through a structural presumption. But *General Dynamics* underscored that we must also consider whether "other pertinent factors. . .mandate a conclusion that no substantial lessening of competition is threatened by the acquisition."[20] This leads us to the modern burden-shifting analysis for mergers.

I sometimes hear it suggested that the Clayton Act should employ a symmetrical weighing of harms and benefits similar to the Sherman Act rule of reason. But this ignores how the Supreme Court's seminal cases set up the incipiency standard at both steps of the analysis. *Brown Shoe* asks us to look for a "reasonable probability"—evidence that the merger's effect "may be" to substantially lessen competition. Then, *General Dynamics* asks us to consider whether rebuttal evidence demonstrate no substantial lessening is "threatened."[21]

Both of these standards use probabilistic language. Ultimately, taking all the evidence into account, we ask if there is a threat to competition and whether there is a reasonable probability of that threat being realized. Applying the Clayton Act requires assessing risk, not merely balancing expected effects.

*Translating the **Philadelphia National Bank** Focus on Undue Concentration into an Economically Sound Structural Presumption of Harm to Competition*

Those first two translations are critical to a modern reading of the other Clayton Act cases from the 1960s, since they help clarify the statutory standard. Today, we assess the risk that the merger will materially harm the economic process of competition that drives businesses to better serve the public. My next three translations apply this lens to important early holdings.

Any litigator knows that most merger litigation in the modern federal courts turns on *Philadelphia National Bank*'s structural presumption. Everyone in this room will recall the Supreme Court's holding: "[a] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant

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increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence."[22]

In just the last decade, the structural presumption has been affirmed by the Third, Sixth, Eighth and Ninth Circuits, along with a slew of district court cases.[23] And in Sherman Act cases in the decades since, we continue to see reliance on share-based presumptions of market and monopoly power.

I don't think the Supreme Court would even get the chance to affirm the structural presumption. There is no circuit split to speak of so it's not clear how a litigant wishing to challenge it would even structure a cert. petition. If *PNB* has been in a time capsule, it's a time capsule that has been opened and reviewed favorably by the circuit courts regularly throughout the last 60 years.

That is not to say our understanding of the structural presumption has not evolved. We now recognize that it is fully consonant with an economic definition of competition because merger-induced increases in concentration can indicate a risk of both coordinated and unilateral effects.

As to coordinated effects, when a merger further concentrates a concentrated market, it raises the risk of oligopoly behavior. The change in structure can suggest the danger that competitors will pull their punches in the hopes all will compete less forcefully and can share in the higher prices that result. Indeed, this specific concern was repeated in *Brooke Group* in 1993. The Supreme Court explained that "it has long been settled" that excessive concentration portends oligopolistic price coordination.[24]

As to the elimination of head-to-head competition, when shares are high, diversion ratios and margins often are too, suggesting a risk that the merger will eliminate substantial head-to-head competition and result in unilateral effects. The structural presumption can therefore serve as a coarse proxy for the more in-depth merger simulations that use demand estimation and margin data to attempt to quantify unilateral effects.

For those of you who were hoping for a bruising battle with Andrew [Finch] and are disappointed by how much we agree on, you will find controversy here on one point. I noticed that he made a point to the effect that reliance on the structural presumption in merger review is an example of the structure-conduct-performance error that was rebutted by [Harold] Demsetz.

It is important to contrast which variables the Structure Conduct Performance ("SCP") paradigm and the structural paradigm correlate. The SCP debate was about whether there was a correlation between market structure and market performance generally. Demsetz argued that competition can lead to concentration as scale economies organically drive firms to win share. Since competition can drive concentration, he said, we can't assume that more concentration usually means less competition.[25]

But that doesn't give us a reason to ignore the implications of changes in market structure caused not by an efficient firm winning customers, but by a horizontal merger combining competitors. That's correlating a different variable. And the variable we are testing here—merger induced increases in concentration—correlates with modern competitive effects theories.

In fact, two dozen economists who have served as senior economists in both Republican and Democratic administrations recently wrote a paper in the Journal of Antitrust Enforcement that demonstrates this distinction. The main focus of their paper is their concern about the misuse of concentration measures as a basis for assessing market competitiveness. They worried that Demsetz's point was ignored by papers correlating concentration generally with competition generally as the SCP paradigm once did. But they distinguished relying on merger-induced concentration changes for a structural presumption. They explained that as to that separate question, "economic theory is consistent with the legal presumption that a merger is likely to have adverse competitive effects if it occurs in a concentrated market and makes that market more concentrated."[26]

Those 26 economists from multiple parties apply basic statistical principles distinguishing between the

variables being analyzed. I think it's the more persuasive account. And it's not just that the structural presumption remains strong as a theoretical economic principle. The empirical economic support has hardly been in a time capsule either. Many recent merger retrospectives link merger-induced concentration increases to observed post-merger anticompetitive effects such as increased prices and decreased product availability. Work by Bhattacharya et al., Hosken et al., Koch et al., Dafny et al. and many others suggests a strong empirical relationship between merger-induced changes in concentration and higher prices. Those studies cover a wide range of markets including consumer packaged goods,[27] grocery stores,[28] hospitals and health care providers,[29] health insurers[30] and other mergers in oligopoly markets.[31]

This modern economic work shows us that merger-induced changes in market structure are a reasonably reliable indicator that a merger will harm Americans in their pocketbooks. The empirical record in support of the structural presumption is stronger today than it has ever been.[32] Its continued economic support is recognized by a wide range of serious academics and drove the Canadian Parliament just last year [2023] to codify a structural presumption into their merger review regime.

So, we translate the structural presumption in *Philadelphia National Bank* into modern antitrust analysis by recognizing it is a sufficiently reliable indicator to demonstrate a *prima facie* case that a merger's effect "may be" to substantially lessen competition by eliminating head-to-head competition and enabling oligopoly coordination. The structural presumption demonstrates a reasonable probability of higher prices, lower quality, or diminished innovation.

All that's rebuttable of course. That's the second critical element of translating the structural presumption today. Under the *General Dynamics* framework for applying the incipiency standard that I mentioned earlier, the presumption of harm to competition we draw from an increase in concentration can be rebutted with further analysis of the impacts on competition.

*Translating **Procter & Gamble**'s Prohibition on Consideration of Possible Economies as a Defense to Illegality into a Modern Burden-Shifting Framework that Considers Efficiencies as a Rebuttal*

My last two translations focus on one of the more controversial of the '60s cases: *Procter & Gamble*. The puzzle of translating *Procter & Gamble* is a fascinating one. For those unfamiliar with the facts, Clorox, the largest manufacturer of household bleach, was bought by Procter & Gamble, which among other products was a leader in detergent sales.

In the Supreme Court's ancient Egyptian, this was a "product-extension" merger because it extended a product line that included other household cleaning products to also include bleach.[33] The Supreme Court noted that this would give the merged firm an advantage over rivals that don't sell the full range of products in things like marketing and distribution that can be done together.[34]

What's so fascinating about translating that case is that the economics has evolved so much since then. We now use the word "complements" broadly for products and services with positive impacts on one another's demand. And we would now say the efficiencies of joint marketing and distribution for detergent and bleach are "production complements."

Our understanding of the economics of mergers of complements has greatly expanded in the last 50 years. We now better understand both the benefits, and the potential competitive risks, of mergers of complements. Those are the two translations I'd like to unpack.

First: the analysis of efficiencies in mergers. Economics teaches us that mergers of complements can in some situations benefit competition. But *Procter & Gamble* refused to consider efficiencies altogether, holding that "possible economies cannot be used as a defense to illegality."

Based on that quote, many advocates of stronger merger enforcement pushed the division and FTC to remove the efficiencies rebuttal from the merger guidelines.

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But remember my first two points earlier about having an economic conception of the dynamic competitive process and employing a burden-shifting framework to evaluate rebuttal evidence. Procter says efficiencies cannot be a defense to illegality. But it does not say that procompetitive benefits are irrelevant rebuttal evidence in determining whether the merger is unlawful in the first place because of procompetitive effects of the transaction.

So, efficiencies are a rebuttal not a defense. They don't excuse a lessening of competition, they prevent it from happening in the first place.

Now, we must remember what we are rebutting for this to work. Efficiencies must benefit competition in the relevant market to rebut a lessening of competition. If our *prima facie* concern is that the merger will lead market participants to compete less forcefully, the cognizable efficiencies would need to show that the merger makes them a more forceful competitor. And we'd need to know that the same benefits couldn't be achieved via contract because although the Sherman Act would prohibit a contract causing the anticompetitive effects of the merger, it would generally not prohibit the parties from achieving the merger's efficiencies.

You can probably predict from this discussion how the 2023 Guidelines responded to the calls to eliminate the efficiencies defense. The agencies declined the invitation. Instead, they clarified from the outset of the document that the statutory focus on "competition" centers the agencies' review, and that procompetitive efficiencies can therefore be appropriately considered in rebuttal.

*Translating **Procter & Gamble**'s Concern with Entrenchment of Power into a Modern Framework that Distinguishes Efficiencies from Exclusion*

That brings me to my last translation of *Procter & Gamble*. Our continuing evolution on this final topic through multiple administrations is critically important to competition in big tech. In order to enable competition in markets with significant network effects, we must have a thoughtful approach to mergers by already-dominant firms that threaten to entrench their market power.

The original understanding of *Procter & Gamble*'s entrenchment holding was not particularly thoughtful. The case states that "raising entry barriers" around an already dominant position is anticompetitive for purposes of the Clayton Act.[35] Sounds a little like Sherman Act monopoly maintenance. But not all barriers to entry are anticompetitive. Being a really forceful and capable competitor can scare off other firms from even trying. Yet early applications of *Procter & Gamble* did not distinguish efficiencies from exclusionary entrenchment and the case was used for what some have called an "efficiencies offense."

That gave way to a second era of thinking about entrenchment in which the concern was rejected altogether. Beginning in the '70s and '80s, the U.S. agencies rejected the premise that we should be concerned with mergers that entrench power and purged any mention of the theory altogether.

But many barriers to entry are anticompetitive. Indeed, many lessen competition by keeping would-be entrants out of the market. For example, economics teaches us that when you control a rivals' complements, you can make it harder or less attractive for them to enter. Or when you annex a tool that enables multi-homing across platforms, you can shut down platform interoperability and stifle competition.[36] Exclusionary barriers to entry are the bane of dynamic markets. By definition, the higher the costs of entry for innovators and entrepreneurs, the lower their return on investment for innovation and ingenuity. In this way, exclusionary barriers to entry discourage innovation, reduce investment, and stifle dynamic competition.

Or to use the language of economic forces, conduct harms competition when it makes rivals or would-be rivals less forceful competitors by inhibiting their access to complements.

The second era of entrenchment therefore overcorrected. We see that in widespread concerns about

the dominance of today's big tech firms and the constraints they place on little tech's ability to invest, thrive, and grow. We now recognize that the same monopoly maintenance concerns that animate our ongoing Sherman Act cases also have relevance to a Clayton Act designed to prevent the tendency toward monopoly in its incipiency.

We are now in what I think of as the third era in the history of the Antitrust Division's approach to entrenchment theories in merger review.

In this modern era, the agencies are developing a more systematic and nuanced approach to entrenchment in the United States targeted at mergers that threaten exclusion harmful to competition. This third era began in the years following the release of the 2010 Horizontal Guidelines, which added a concern with mergers that "entrench. . .market power" without explaining further in the unifying theme sentence.[37]

In 2015, the Antitrust Division and Federal Communications Commission raised concerns with the merger of Comcast and Time Warner Cable. Although the companies did not overlap geographically, combined they owned about two thirds of the nation's broadband connections, and they would have a shared incentive to discourage future innovation. The merger was abandoned after both agencies expressed their concerns. Assistant Attorney General Bill Baer explained to a Chatham House conference in 2015 that the merger would further entrench these incumbents, threatening innovation.

Then in the last administration, we saw the U.S. articulate its first entrenchment theory in a legal pleading in decades. In challenging Visa's acquisition of payment technology provider Plaid, the Antitrust Division alleged that the merger would "raise . . . entry barriers . . . entrenching Visa's monopoly power."[38] Visa abandoned the merger shortly thereafter.[39]

The 2023 Merger Guidelines documented the U.S. agencies' evolution into this third era with the new Guidelines 6 and 9. These Guidelines use monopolization principles and cases that already distinguish exclusion and efficiency in the Sherman Act context to draw a similar line for entrenchment cases. And they explain how exclusionary entrenchment can arise in platform markets. As we now understand Procter in light of their teaching, the law distinguishes anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives.[40] The law distinguishes a merger that makes the merged firm a more forceful competitor from one that would weaken the forces of rivals.

This distinction that enables a discerning approach to entrenchment mergers is critically important as we take more seriously the need to deploy the Sherman Act to prohibit monopoly maintenance by dominant firms in Big Tech and other industries. Imagine if instead of building and tying Internet Explorer to Windows, Microsoft had just bought Netscape. What provision of the 1992 Merger Guidelines would have applied? The answer is none, because they didn't include an entrenchment section. If we take monopoly maintenance seriously but don't apply similar economic theories in merger review, our monopolization program may just push dominant firms into acquisitions that enable them to exclude rivals and preserve their power.

Conclusion

Let me conclude by taking a step way back. Why bother with this exercise? Why retrofit and translate 60-year-old cases into modern market realities?

We know why the Egyptologists celebrated the Rosetta Stone. They didn't care much about the details of the ancient decree written in three languages there. They cared about unlocking all of the history and culture that translating that decree enabled. But we have English language video and newspapers from the 1960s. So, we don't need this kind of translation for that.

We have a very different and more important reason. The rule of law. I have had the great fortune to serve as an advisor to six Assistant Attorneys General and Acting Assistant Attorneys General. Soon, I will serve a seventh and an eighth.

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They all have differences in perspectives, personalities, and priorities. But they have all had one thing in common. Their authority to bring to bear the powers of the Justice Department against private parties flows solely from their fidelity to the law. They share a profound obligation to understand the law as they find it and to apply it to the facts without fear or favor.

Brown Shoe, *Philadelphia National Bank* and *Procter & Gamble* are not the expired decrees of a forgotten government. They are the active mandates of a nation premised on the primacy of law over power and personal preference. What a gift that is.

ENDNOTES:

[1]NASA, Apollo 11 Goodwill Messages, Release No.: 69-83F (July 13, 1969), apollo-11-goodwill-messages.pdf.

[2]*Ford Motor Co. v. U. S.*, 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed. 2d 492, 1972 Trade Cas. (CCH) ¶ 73905 (1972).

[3]Joint Statement on the Burden of Proof at Trial, *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 164, 2018-1 Trade Cas. (CCH) ¶ 80407 (D.D.C. 2018), aff'd, 916 F.3d 1029, 2019-1 Trade Cas. (CCH) ¶ 80685 (D.C. Cir. 2019), https://www.justice.gov/atr/case-document/file/1043756/dl?inline.

[4]*United States v. AT&T, Inc.*, 916 F.3d 1029, 1032, 2019-1 Trade Cas. (CCH) ¶ 80685 (D.C. Cir. 2019).

[5]U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines at 11-12 (June 30, 2020), https://www.justice.gov/atr/page/file/1290686/dl (noting it is "incumbent upon the merging firms to provide substantiation for claims that they will benefit from the elimination of double marginalization"); U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines at 2 (December 18, 2023), https://www.justice.gov/atr/merger-guidelines [hereinafter "2023 Merger Guidelines"].

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[8]*NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510, 1998-2 Trade Cas. (CCH) ¶ 72362 (1998).

[9]*Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072, 2013-2 Trade Cas. (CCH) ¶ 78523 (10th Cir. 2013) (Gorsuch, J.).

[10]*Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958).

[11]*National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104, n.27, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 18 Ed. Law Rep. 50, 1984-2 Trade Cas. (CCH) ¶ 66139 (1984).

[12]*National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 70, 141 S. Ct. 2141, 210 L. Ed. 2d 314, 391 Ed. Law Rep. 45, 2021-1 Trade Cas. (CCH) ¶ 81685 (2021) ("In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces 'yield the best allocation' of the Nation's resources.") (citing *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104, n.27, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 18 Ed. Law Rep. 50, 1984-2 Trade Cas. (CCH) ¶ 66139 (1984)).

[13]Joseph A. Schumpeter (1942), Capitalism, Socialism, and Democracy: 82-84; see also Michael L. Katz & Howard A. Shelanski, Schumpeterian, Competition and Antitrust Policy in High-Tech Markets, 14 Competition 47 (2005).

[14]*See* Steven C. Salop, The Appropriate Decision Standard for Section 7 Cases, 53 U. Balt. L. Rev. 449, 460 n. 52 ("The language in the House bill was 'where the effect is to eliminate or substantially reduce competition.' ") (citing Earl W. Kintner, 3 The Legislative History of the Federal Antitrust Law And Related Statutes 2515 (Jeanette Morrison et al. eds., 1978) [hereinafter "Legislative History"].

[15]*See id.* (citing Legislative History at 2629).

[16]*Id. See also* U.S. Dep't of Justice, Deputy Assistant Attorney General Michael Kades Delivers Remarks at GCR Live: Law Leaders Global 2024, https://www.justice.gov/opa/speech/deputy-assittant-attorney-general-michael-kades-delivers-remarks-gcr-live-law-leaders#_edn5.

[17]*Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962).

[18]*California v. American Stores Co.*, 495 U.S. 271, 284, 110 S. Ct. 1853, 109 L. Ed. 2d 240, 1990-1 Trade Cas. (CCH) ¶ 69003 (1990).

[19]*Strickler v. Greene*, 527 U.S. 263, 264, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[20]*U. S. v. General Dynamics Corp.*, 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530, 1974-1 Trade Cas. (CCH) ¶ 74967 (1974).

[21]*Id.* (quoted in *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 990, 1990-1 Trade Cas. (CCH) ¶ 69084 (D.C. Cir. 1990)).

[22]*U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963).

[23]*See Federal Trade Commission v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 173, 2022-1 Trade Cas. (CCH) ¶ 82035 (3d Cir. 2022) ("The District Court correctly concluded that these numbers [showing that the market was highly concentrated and the merger would result in a significant increase in concentration] demonstrate the merger is presumptively anticompetitive."); *Federal Trade Commission v. Sanford Health*, 926 F.3d 959, 963-64, 2019-1 Trade Cas. (CCH) ¶ 80799 (8th Cir. 2019); *Federal Trade Commission v. Penn State Hershey Medical Center*, 838 F.3d 327, 347, 2016-2 Trade Cas. (CCH) ¶ 79767 (3d Cir. 2016) ("The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers."); *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 788, 2015-1 Trade Cas. (CCH) ¶ 79053 (9th Cir. 2015)("The extremely high HHI on its own establishes the prima facie case."); *ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559, 570, 2014-1 Trade Cas. (CCH) ¶ 78742 (6th Cir. 2014)(applying the structural presumption based on "the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated").

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[27]Vivek Bhattacharya, Gaston Illanes, & David Stillerman, Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, 2023), https://www.nber.org/papers/w31123 (studying 50 mergers in the consumer packaged goods industry and finding that these mergers raised prices by 1.5% and decreased quantities sold by 2.3%, on average).

[28]Daniel Hosken, Luke Olson, & Loren Smith, Do Retail Mergers Affect Competition? Evidence from Grocery Retailing, 27 J. Econ. & Mgmt. Strategy 3 (2018) (finding that the majority of grocery mergers in highly concentrated markets resulting in price increases of more than 2%).

[29]Thomas Koch & Shawn W. Ulrick, Price Effects of a Merger: Evidence from a Physicians' Market, 59 Econ. Inquiry 567 (2021) (concluding that a merger of orthopedic physicians' practices increased prices to some payors by 10% to 20% while prices in nearby areas not affected by the merger remained unchanged); Zack Cooper et al., The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured, 134 Q.J. Econ. 51 (2019) (examining 366 hospital mergers and finding that prices increased by over 6% when merging hospitals were geographically close); Elena Prager & Matt Schmitt, Employer Consolidation and Wages: Evidence from Hospitals, 111 Am. Econ. Rev. 397 (2021) (examining hospital mergers and finding reduced wage growth when merger significantly increases concentration).

[30]Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry, 102 Am. Econ. Rev. 1161 (2012) (examining healthcare mergers and finding the mean increase in local market HHI during the studied period raised premiums by roughly 7%).

[31]*See, e.g.*, John E. Kwoka, Jr., Mergers, Merger Control, And Remedies: A Retrospective Analysis Of U.S. Policy 110-11 (2015) (providing a meta-analysis of retrospective literature, finding that more than 80% of mergers resulted in price increases and the mean price increase was 5.88% across all studied transactions); Orley C. Ashenfelter, Daniel Hosken & Matthew C. Weinberg, Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers, 57 J.L. & Econ. S67 (2014) (reviewing prior retrospectives and concluding that mergers in oligopolistic markets can result in economically meaningful price increases, as 36 of the 49 studies found evidence of merger induced price increases); Orley Ashenfelter & Daniel Hosken, The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin, 53 J.L. & Econ. 417 (2010) (examining a set of mergers that were unchallenged by the government finding that the majority resulted in a significant increase in consumer prices in the short run).

[32]*See* Jonathan B. Baker & Joseph Farrell, Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement, 168 U. Pa. L. Rev. 1985, 1991 (2020) ("[O]ne important conclusion is straightforward . . . greater concentration can be expected to make coordination more likely, stronger, or more effective. Accordingly, our analysis supports a structural merger policy, by which mergers between rivals that increase concentration significantly in a concentrated market are presumed to harm competition."); Volker Nocke & Michael D. Whinston, Concentration Thresholds for Horizontal Mergers, 112 Am. Econ. Rev. 1915 (2022) (concluding that the 2010 Hori-

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[33]*F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 577, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967).

[34]*Id.*at 579.

[35]*Id.* at 578; see also *United States v. Anthem, Inc.*, 855 F.3d 345, 354, 2017-1 Trade Cas. (CCH) ¶ 79975 (D.C. Cir. 2017) (confirming that *Procter & Gamble* remains good law).

[36]Susan Athey & Fiona Scott Morton, Platform Annexation, 84 Antitrust L.J. 677 (2022).

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[38]Complaint ¶ 69, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), *available at* https://www.justice.gov/opa/press-release/file/1334726/dl.

[39]Press Release, U.S. Dep't of Justice, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[40]*See* 2023 Merger Guidelines at 18.

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FROM THE EDITOR

The Year That Was, The Year to Come

Happy new year, and welcome to 2025. Our issue kicks off with our annual M&A "year in review" feature, as always written by Sullivan & Cromwell's Frank Aquila and Melissa Sawyer.

Aquila and Sawyer survey a year which came close to fulfilling predictions of a recovery in M&A, with worldwide M&A activity (as of November 30, 2024) hitting $2.7 trillion, up 11% versus the same period in 2023. Yet at the same time, the number of deals fell by 18%, marking an eight-year low in terms of deal volume. "In other words, aggregate deal value increased while deal volume fell," as the authors note.

Assessing a number of trends and actions in the M&A sphere during last year, the authors dig into the soon-to-be-enacted new HSR rules. "Once implemented, the Final Rule is expected to increase the burden and expense associated with all transactions reportable under the HSR Act," Aquila and Sawyer note. "The FTC itself has estimated that the changes brought about by the Final Rule will increase the time needed to prepare an HSR filing by 68 hours on average, and as much as 121 additional hours for buyers in a transaction involving overlapping business lines or parties in a supply relationship."

What of 2025? As the new year approached, we spoke with Jones Day's Aimee DeFilippo and Mike Knight about what M&A lawyers could expect from the incoming Trump administration, new prospective chair of the Federal Trade Commission Andrew Ferguson, and new prospective DOJ antitrust head Gail Slater. There will be a measure of consistency (see Trump's statement upon nominating Slater that "Big Tech has run wild for years, stifling competition in our most innovative sector") but also expect some sharp breaks with Biden-era antitrust policy.

For one thing, "a big question is what will happen to the 2023 Merger Guidelines," DeFilippo said. While incoming FTC Chair Ferguson has said he'd be open to revising the guidelines, he's also not in favor of creating a cycle of rescinding guidelines upon every administration change. "Overall though, I do think the guidelines are unlikely to survive fully intact in the Trump administration." And as Knight says, "I suspect we'll see a somewhat friendlier enforcement environment, which may spur increased M&A activity. But beware. This will not be a return to Reagan era enforcement, and I expect the agencies to sink their teeth into plenty of matters."

Chris O'Leary

Managing Editor

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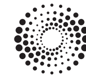

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