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Panel 1

US/EU, A Transatlantic Gap?

Pharmaceutical Pricing and Markets: A United States Enforcer's Perspective.

Webinar, 30 June 2020

*Interview with Noah Joshua Phillips (Federal Trade Commission) by Eric Stock (Gibson Dunn)**

Noah Joshua Phillips *(Commissioner, Federal Trade Commission), has been interviewed by* ***Eric Stock*** *(Partner, Gibson Dunn) in anticipation of the* ***Antitrust in Life Sciences*** *webinar, to be held on 30 June 2020. This webinar was originally a conference that would take place on 23 March 2020. However, due to the COVID-19 outbreak, it has been transformed into a webinar.*

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Eric Stock: **The FTC recently entered into a settlement with Reckitt Benckiser that constituted its first enforcement action relating to alleged product hopping. What did you find notable about the conduct that occurred in that case and how does that fit into the commission's theory of liability for product hopping?**

Noah Joshua Phillips: The Reckitt settlement is an example of the FTC's dedication to attacking anticompetitive conduct in the health care industry, including the Commission's pioneering work on pay-for-delay settlements, the latest chapter of which being our unanimous decision in Impax Laboratories. Like the payment at issue in Impax, the anticompetitive conduct by Reckitt was directed at thwarting generic entry and extending the branded drug's monopoly. That remains an ongoing problem in pharmaceutical markets, on which we're focused.

The Reckitt scheme is noteworthy for involving two anticompetitive strategies based on unsupported safety claims. First, the "product hop", in which Reckitt introduced a new oral film version of the branded drug and worked to shift patients to this product, based on false assertions about safety, before it faced generic competition in the older tablet version. Second, Reckitt presented the same unfounded safety claims to the FDA in a citizen petition requesting that the agency reject any generic applications for the tablet. Again, the purpose was to forestall generic competition and preserve Reckitt's monopoly.

Product hopping is a practice the FTC will continue to scrutinize, and you also see it getting bipartisan attention from lawmakers, like Senators Cornyn and Blumenthal. Watch this space.

The pricing of pharmaceuticals has been a hot button political issue for several years now. Is the Commission's merger enforcement policy influenced by these concerns? Has there been any recent change in the Commission's views or priorities in connection with the review of horizontal mergers in the pharmaceutical industry?

Americans are rightfully concerned about the rising costs of health care, including—but not limited to—the price of pharmaceutical drugs. The story behind this trend is a complex one, but anticompetitive mergers and conduct are part of the puzzle. Our enforcement work in the healthcare industry, which has reshaped the law and continues unabated, helps maintain competitive markets for pharmaceuticals, as well as other critical products and services.

One recent change is how we approach divestiture remedies when a firm with a drug on the market seeks to merge with a firm that has a competing drug in the pipeline. Although we have always placed the burden of ensuring an effective remedy on the merging firms, based on our studies of the efficacy of remedies we've moved generally to requiring divestiture of the on-market drug, rather than the pipeline drug.

We're also watching carefully the very interesting academic work on "killer acquisitions", the phenomenon of pharmaceutical companies acquiring and discontinuing pipeline drugs that would have competed against the acquirer's products. Protecting potential and nascent competition, in general, has long been one of our aims, and we take it seriously.

Recently, we sued to block the acquisition of PacBio, an innovative and nascent competitor in gene sequencing, by Illumina, the monopolist whose dominance PacBio threatened. Having said that, we need to keep in mind that the antitrust laws require us, the enforcers, to prove that mergers lessen competition. To do that, we have to (and should have to) prove that the facts of the case violate the law. While Americans are understandably concerned about high drug prices, it is not enough to block a merger based only on speculation about vaguely articulated harms, without reference to any evidence that a merger is likely to bring them about. Trying to do so—or pretending we can—is not a recipe either for good policy or a viable antitrust case.

The Commission recently released its first new Vertical Merger Guidelines in decades, and they include at least one example where the Commission suggests that enforcement may be appropriate in connection with a vertical merger in the pharmaceutical industry. Does the Commission frequently see vertical competitive issues arising in the pharmaceutical industry and, if so, in what contexts?

There is broad consensus that the old Vertical Merger Guidelines are outdated and of little use, so I approve of this effort by the FTC and DOJ to update and improve them, and I look forward to reviewing the public comments and thinking through the issues they raise.

As for the example you mentioned, I would not read it as singling out pharmaceutical markets, because we see vertical integration occurring across the healthcare industry, and in many other industries as well. The key competitive concern with vertical mergers is that they may allow the combined firm to weaken or remove the competitive constraints it faces by raising its rivals' costs or foreclosing its rivals entirely. At the same time, economic theory and empirical evidence indicate that vertical mergers often generate procompetitive benefits that factor into the antitrust analysis, for example the elimination of double-marginalization. The lower prices that may result can "hurt" rivals in the downstream market, but ultimately work to benefit consumers. Any new guidance on vertical mergers should acknowledge the procompetitive potential and distinguish situations where competition and consumers are harmed from ones where only rivals suffer.

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