NAVIGATING VERTICAL MERGERS IN HEALTHCARE THROUGH A SHIFTING ENFORCEMENT LANDSCAPE

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I. INTRODUCTION

Vertical integration has become increasingly attractive in the healthcare industry as a means to reduce escalating healthcare costs through integrating different elements of healthcare delivery models and to capture value in the face of uncertainty about how the healthcare industry will generate revenue from services and assets in the future. Over the last few years, significant vertical integration has included players at all levels of the healthcare distribution chain: Providers, payors, pharmacy benefits management ("PBM") companies, and others. For example, two of the largest recent transactions have been the 2018 combinations of two of the top five national health insurers, Cigna Corp. ("Cigna") and Aetna Inc. ("Aetna"), with two of the top five PBMs, Express Scripts Holding Co. ("Express Scripts") and CVS Health Corp. ("CVS"), respectively.

At the same time that vertical mergers have become more commonplace in healthcare, the way in which such deals are evaluated in the U.S. has begun to shift. Both the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have voiced interest in a sharper focus on vertical merger enforcement. Recent years have brought the first vertical merger challenge litigated to judgment in nearly forty years; Congressional interest in prominent deals; and statements from U.S. agencies (1) re-examining what remedies are appropriate where competitive issues are present; (2) considering revision of the Non-Horizontal Merger Guidelines; and (3) contemplating an overhaul for how merger cases are tried in federal courts.

At first blush, the combined effect of recent events in U.S. vertical merger enforcement may appear to be seismic change, but closer examination of clearances and litigation by the U.S. federal agencies demonstrate that — even in the already concentrated healthcare industry — vertical mergers are still typically considered procompetitive, and they will continue to pass antitrust muster, particularly when the parties observe best practices for cost-effective navigation of transactions to closing, some of which are outlined in this article.

II. U.S. AGENCIES' HISTORICAL APPROACH TO VERTICAL MERGER ENFORCEMENT

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect of the transaction "may be substantially to lessen competition, or to tend to create a monopoly."[3] The DOJ and FTC are the two federal agencies principally charged with merger review.[4] These agencies review both horizontal and vertical mergers.[5]

Since vertical mergers do not involve firms that operate in the same market, they do not increase concentration in any relevant market, and accordingly, they have been viewed as generally less likely to give rise to competitive concerns. Instead, vertical combinations typically generate efficiencies, including cost reductions, and the potential for such efficiencies has traditionally been persuasive at the agencies.[6]

The FTC and DOJ have historically relied upon several theories of harm for how a vertical merger could potentially violate Section 7:

- *Foreclosure*: A vertical merger could result in "input foreclosure," where an upstream merger partner either refuses to supply critical inputs to downstream rivals or supplies them only on disadvantageous terms that favor its own integrated downstream business unit.[7] Alternatively, the merger may result in "customer foreclosure," whereby the downstream firm refuses to purchase products from competitors of the upstream supplier, cutting off an important route to market for the upstream company's competitors.

- *Barriers to entry*: A vertical merger could create post-merger market conditions that could hinder or prevent entry from other firms because of the need to enter at both levels of the market. Alternatively, the merger may reduce the potential for the merging firms to enter one another's market, thereby eliminating a source of possible competition.

- *Anticompetitive information exchanges*: Theoretically, a merger could generate access to competitively sensitive business information of an upstream or downstream rival that was not previously available. The integrated firm might use that information to make it harder for the rival firm to compete, which could reduce competition in the market in which the merged firm competes with the rival. Alternatively, the firms could use that information to facilitate coordination between them on pricing and market strategies.

III. RECENT TRENDS IN VERTICAL MERGER REMEDIES

Although vertical merger enforcement in line with the above principles has long been an aspect of U.S. merger control, it has assumed a higher profile in recent years. Indeed, U.S. antitrust agencies have taken on more investigations of significant vertical transactions over the past two years, among them, AT&T Inc. ("AT&T") and Time Warner Inc. ("Time Warner"), CVS and Aetna, Cigna and Express Scripts, and Staples Inc. ("Staples") and Essendant Inc. ("Essendant"). In addition, U.S. government officials have recently made several public statements that signify a change in how and to what extent they will scrutinize these deals.

3 15 U.S.C. § 18.

4 Because the DOJ and FTC have concurrent merger enforcement jurisdiction, it is not always clear whether a transaction will be assigned to the DOJ or the FTC. This is especially true in the context of vertical mergers of healthcare entities because both agencies have expertise in healthcare transactions.

5 Vertical mergers are those in which the merging parties are not current competitors but rather operate at different levels of the distribution chain. By contrast, horizontal mergers are between firms that operate in the same market and therefore eliminate a competitor or potential competitor.

6 See K. Wong-Irvin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ABA Antitrust Source, February 2019, for a summary of the economic literature on procompetitive aspects of vertical transaction and economic retrospectives on the actual impact of past transactions.

7 The latter version in which the upstream firm supplies only on disadvantageous terms that favor its own integrated downstream business unit is also known as "raising rivals' costs" ("RRC").

A. Hostility Toward Behavioral Remedies

When a transaction raises competition concerns, there are two basic types of remedies available to achieve clearance: structural and behavioral. Structural remedies restructure the merger transaction by requiring asset divestitures or similar relief. Behavioral remedies are conditions for clearance that impact the company's future and ongoing business functions. For example, if the competitive concern with a transaction is that competitors would be denied access to an essential input or would be foreclosed from a significant aspect of the market, a potential solution could be for the merging firms to permit competitors to access that input, or permit access to key elements of distribution.

The FTC and DOJ historically maintained that behavioral remedies can be effective for handling competition concerns in the context of vertical mergers, and the agencies routinely cleared transactions conditioned on these remedies.[8] More recently, however, both the DOJ and FTC have remarked that behavioral remedies should be used sparingly to avoid remedies that look like regulatory schemes in need of monitoring.

Specifically, since his confirmation in late 2017, Makan Delrahim, current chief of the DOJ's Antitrust Division, has consistently emphasized that the DOJ is a law enforcement agency, not a regulatory agency. According to AAG Delrahim, behavioral remedies require the agencies to regulate the market "through complex decrees that ignore the profit-maximizing incentives of private actors."[9] AAG Delrahim has said such remedies are "overly intrusive and unduly burdensome for both businesses and government."[10] By contrast, AAG Delrahim has underscored that structural remedies like divesting the source of anticompetitive harm substantially eliminate the risk of harm.[11] In 2018, the FTC echoed AAG Delrahim's statements when Bruce Hoffman, director of the FTC's Bureau of Competition, described the FTC's role as an antitrust enforcer, not the "price police."[12]

B. Congressional Interest in Significant Transactions

Although Congress plays no direct role in antitrust enforcement, it is becoming increasingly common for it to scrutinize significant merger transactions. For example, in September 2015, the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust ("Subcommittee") held a hearing on health insurer mergers and their effect on competition.[13] Specifically, the Subcommittee examined the then-proposed *Aetna-Humana* and *Anthem-Cigna* horizontal mergers, both of which were later abandoned after being blocked by the DOJ and federal courts.

Similarly, the Subcommittee also held a hearing to evaluate the later-approved *Aetna-CVS* vertical merger in February 2018.[14] Questions from the Subcommittee focused primarily on two concerns: (1) whether, in a concentrated marketplace like healthcare, dominant businesses have the ability and incentive to use their dominance to exclude competitors; and (2) whether the proposed merger was necessary to accomplish the goals expressed by Aetna and CVS.[15]

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8 See, e.g. *U.S. v. Google Inc. and ITA Software, Inc.*, Case 1:11-cv-00688 (2011)(available at https://www.justice.gov/atr/case-document/file/497636/download); *U.S. v. Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Case 1:11-cv-00106 (2011)(available at https://www.justice.gov/atr/case-document/file/492196/download).

9 Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, Washington, D.C. (Nov. 16, 2017), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar (last visited Apr. 9, 2019).

10 *Id.*

11 Assistant Attorney General Makan Delrahim Delivers Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation, Washington, D.C. (Apr. 26, 2018), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second (last visited Apr. 9, 2019).

12 Remarks of Then-Acting Director, Bureau of Competition, D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Credit Suisse 2018 Washington Perspectives Conference, Washington, D.C. (Jan. 10, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (last visited Apr. 9, 2019).

13 Healthy Competition? An Examination of the Proposed Health Insurance Mergers and the Consequent Impact on Competition, A Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary House of Representatives (Sept. 29, 2015), available at http://src.bna.com/vyg (last visited Apr. 9, 2019).

14 Competition in the Pharmaceutical Supply Chain: the Proposed Merger of CVS Health and Aetna, A Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary House of Representatives (Feb. 27, 2018), available at https://judiciary.house.gov/hearing/competition-pharmaceutical-supply-chain-proposed-merger-cvs-health-aetna/; https://judiciary.house.gov/hearing/competition-pharmaceutical-supply-chain-proposed-merger-cvs-health-aetna/ (last visited Apr. 9, 2019).

15 *Id.*

Additional Congressional hearings remain a possibility for future vertical transactions. And though the antitrust agencies make independent decisions, any Congressional hearings may impact how the agencies' approach to scrutinized transactions either by manifesting congressional pressure or by piloting arguments earlier in the clearance process.

C. Revision of the Non-Horizontal Merger Guidelines

The DOJ and FTC maintain two guidance documents relating to merger enforcement — the Horizontal and Non-Horizontal Merger Guidelines.[16] The Non-Horizontal Merger Guidelines have not been updated since 1984, and the U.S. antitrust enforcement agencies have recently acknowledged that they no longer use them.[17] Consequently, prominent antitrust experts called for the guidelines to either be updated or withdrawn.[18]

The FTC responded to this rallying cry by voicing support for soft guidance through closing statements and commentary rather than through formal guidelines.[19] FTC Chairman, Joseph Simons, stated that a revision of the Non-Horizontal Merger Guidelines would present difficulties because analysis of vertical deals is more complex than analysis of horizontal deals.[20] Moreover, Chairman Simons emphasized that any revised guidelines would need bipartisan support "so that they last and they're not reversed."[21] By contrast, AAG Delrahim recently confirmed that the DOJ has been working since 2018 on as-yet-unpublished revisions to the guidelines without input from the FTC.[22] AAG Delrahim noted, however, that "a joint product would only be better because it would pull from the experience of the two agencies."[23]

D. Move to Two-Phase Merger Trials

In the wake of the DOJ's failed challenge to the proposed merger of AT&T and Time Warner, AAG Delrahim revealed that the DOJ is contemplating seeking two-phase trials in some merger actions.[24] Under a two-phase trial rubric, federal courts would first evaluate whether a merger violates the law and then consider remedies offered by the merging companies.[25] AGG Delrahim indicated that such a move would focus the courts on the question of whether the government has proved that a proposed deal is illegal before considering whether a remedy proposed by the merging entities resolves competitive concerns.[26] Further, and in accordance with these ideas, AAG Delrahim cautioned companies that they should expect the DOJ to focus on potential post-litigation remedies during vertical merger investigations.[27]

It is likely that a two-phase trial would reinforce AAG Delrahim's preference of avoiding behavioral remedies by leaving the question of the adequacy of a remedy proposed by the parties until after a trial on the merits of the government's case, although it remains to be seen whether the DOJ will be successful in convincing a court to manage a merger challenge in this fashion. Notably, and as discussed below, the remedy proposed by the merging parties in *AT&T-Time Warner* was important to the trial court's and appellate court's decisions, coming after the DOJ failed in its effort to exclude testimony concerning the companies' proposed remedy.

16 Note however that neither set of guidelines is a statement of law.

17 Bryan Koenig, DOJ Vertical Merger Guidelines Called "Badly Out of Date," LAW360.COM, Nov. 1, 2018 available at https://www.law360.com/articles/1098243 (last visited Apr. 9, 2019).

18 *Id.*

19 Remarks of FTC Commissioner Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Keynote Address at the GCR Live, South Miami Beach, FL (Feb. 1, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf (last visited Apr. 9, 2019).

20 Matthew Perlman, FTC, DOJ May Team Up on Vertical Merger Guidelines, LAW360.COM, Mar. 29, 2019 available at https://www.law360.com/articles/1144678/ftc-doj-may-team-up-on-vertical-merger-guidelines (last visited Apr. 9, 2019).

21 *Id.*

22 *Id.*

23 *Id.*

24 Kelcee Griffis, "AT&T-Time Warner Trial Sets Poor Example, Delrahim Says," LAW360.COM, Mar. 20, 2019 available at https://www.law360.com/articles/1141075/at-t-time-warner-trial-sets-poor-example-delrahim-says (last visited Apr. 9, 2019).

25 *Id.*

26 *Id.*

27 Jenna Ebersole, "DOJ Considering Seeking Two-Phase Merger Trials After AT&T-Time Warner, Delrahim Says," MLex Market Insight, Mar. 20, 2019.

E. Recent Agency Enforcement

Perhaps even more than their recent public statements, the FTC's and DOJ's reviews of several recent proposed vertical deals, including some in the healthcare industry, illuminate how the agencies might approach these transactions moving forward.

1. AT&T-Time Warner

On February 26, 2019, the DOJ ended its challenge to the proposed merger of AT&T and Time Warner when the D.C. Circuit Court of Appeals upheld the district court's decision that the transaction did not violate antitrust laws.[28] *AT&T-Time Warner* was the first vertical merger challenge litigated to judgment in nearly forty years — showcasing the agencies' renewed interest in vertical merger enforcement and shift away from behavioral remedies. The DOJ sued to block the transaction on the basis of vertical foreclosure concerns. According to the DOJ's complaint, the merger would substantially lessen competition in the video programming and distribution market nationwide by enabling AT&T to control Time Warner's "must have" programming content to "hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks."[29] The DOJ further alleged that the merged entity "would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers."[30]

The district court ruled in favor of the merging parties, pointing out the DOJ's concession that the merger would also result in hundreds of millions of dollars in annual cost savings to AT&T customers and that "no competitor will be eliminated by the merger's proposed vertical integration."[31]

The appellate court likewise declined to enjoin the deal, but it did not rule out the potential for successful challenges to vertical mergers in the future. Rather, the court abstained from speaking definitively on the proper legal standard for evaluating vertical mergers and instead invoked the deferential "clearly erroneous" standard of review to hold that the district court had not clearly erred in its fact-intensive finding that the DOJ failed to meet its threshold burden of showing that the proposed merger would likely increase the bargaining leverage of Time Warner's networks.[32] Like the district court, the D.C. Circuit focused in large part on Time Warner's self-imposed behavioral remedy — specifically its irrevocable offers to engage in "baseball style" arbitration — finding that since programming blackouts were contractually no longer possible, Time Warner could not have increased bargaining leverage.[33]

2. Cigna-Express Scripts

On September 17, 2018, the DOJ cleared insurer Cigna's $67 billion acquisition of PBM company Express Scripts with no conditions. In its closing statement, the DOJ explained that it had analyzed whether the merger would "(1) substantially lessen competition in the sale of PBM services or (2) raise the cost of PBM services to Cigna's health insurance rivals."[34] The DOJ found the horizontal overlap in the parties' PBM business caused no competitive concern because it noted that "Cigna's PBM business nationwide is small" and the market still includes two other large PBMs, CVS Caremark and Optum, as well as several smaller ones.[35] As to the possibility that the combined company might raise the cost of PBM services for Cigna's health insurance rivals, the DOJ concluded that this was unlikely "due to competition from vertically-integrated and other PBMs" and the fact that the newly-combined Cigna-Express Scripts would allow Optum to continue to compete for PBM customers that purchase medical insurance from Cigna.[36]

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28 *United States of America v. AT&T Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

29 Complaint, *United States of America v. AT&T Inc.*, Case No. 1:17-cv-02511 (D.D.C. filed Nov. 20, 2017).

30 *Id.*

31 *United States of America v. AT&T Inc.*, 310 F. Supp. 161, 164 (D.D.C. 2018).

32 *AT&T Inc.*, 916 F.3d at 1038-43, *supra* note 29.

33 *Id.*

34 Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger (Sept. 17, 2018), available at https://www.justice.gov/atr/closing-statement (last visited Apr. 9, 2019).

35 *Id.*

36 *Id.*

But here, the DOJ's sign-off came only after costly investigation. The DOJ issued a second request for information. At minimum, a second request extends the initial 30-day review period under the Hart-Scott-Rodino Act, and depending on the number of topics and custodians at issue, a second request can cause impose substantial time and cost burdens while delaying the parties' ability to close the transaction. In the context of *Cigna-Express Scripts*, the investigation took six months and reportedly included review of over two million documents and interviews with over 100 industry participants.

3. Aetna-CVS

On October 10, 2018, the DOJ and five states conditionally approved the $69 billion merger of Aetna and CVS. Consistent with *Cigna-Express Scripts*, the DOJ approved the *CVS-Aetna* deal only after a costly second request. In contrast with *Cigna-Express Scripts*, however, the merger approval was contingent on the sale of Aetna's nationwide Medicare Part D prescription drug plan business.[37] Without this divestiture, the DOJ and the five state attorneys general would have challenged the transaction based on concerns relating to a horizontal aspect of the merger. Specifically, the agencies were concerned that the combination of Aetna's and CVS's Medicare Part D individual prescription drug plans could lead to increased prices, inferior customer service, and decreased innovation in that market.[38]

With respect to the vertical aspects of the merger, the DOJ stated it had "thoroughly considered whether the merger would raise the cost of (i) CVS/Caremark's PBM services or (ii) retail pharmacy services to Aetna's health insurance rivals," and "after a careful analysis, the [Antitrust] Division determined that the merger [was] unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies."[39] Accordingly, the DOJ concluded that no remedy beyond the divestiture of the individual PDP business was required.[40]

Interestingly, the transaction was also reviewed by state insurance and other regulators, which viewed it differently. Two such regulators, in California and New York, demanded that the combined company refrain from raising premiums to pay for the acquisition. The California Department of Managed Health Care further required CVS-Aetna to keep premium increases "to a minimum" for five years (but did not define a threshold for maximum premium hikes). New York's Department of Financial Services also required CVS-Aetna to maintain its New York provider networks' access to the same percentage of independent pharmacies before and after the merger for a period of three years. The company was also required to submit annual reports detaling the pharmacy rebates Aetna receives and the amount returned to customers.

4. Staples-Essendant

On January 28, 2019, the FTC announced that it had accepted a consent order clearing the acquisition of Essendant, the largest wholesale distributor of office products in the U.S., by Staples, the largest retailer of office products in the world. Despite the antitrust agencies' recent resistance to behavioral remedies, this acquisition was cleared by the FTC with a behavioral remedy, namely a firewall to limit Staples' access to commercially sensitive information of Essendant's office supply customers, which compete with Staples.[41]

Somewhat remarkably, the FTC commissioners were split three to two along party lines in voting on whether to allow the merger. The majority, consisting of the FTC's Republican members, Joseph Simons, Noah Phillips, and Christine Wilson, found no evidence to support "any claims of likely anticompetitive harm other than the one for which remedy has been obtained."[42] Commissioner Wilson specifically noted that while some competitive harm is possible as a result of vertical integration, "integrating operations at different levels of production often yields

37 Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018), available at https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d (last visited Apr. 9, 2019).

38 Complaint, *United States of America v. CVS Health Corp.*, Case No. 1:18-cv-02340 (D.D.C. filed Oct. 10, 2018).

39 United States v. CVS and Aetna Questions and Answers for the General Public (Oct. 10, 2018), available at https://www.justice.gov/opa/press-release/file/1099806/download (last visited Apr. 9, 2019).

40 *Id.* Note that the post-closing integration has been held up while the divestiture remedy proceeds through judicial review under the Tunney Act.

41 FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc. (Jan. 28, 2019), available at https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply (last visited Apr. 9, 2019).

42 Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180, (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf (last visited Apr. 9, 2019).

clear economic benefits," and urged the agency to act only when the "theory and the facts both point to a potential diminution in competition."[43] The dissenting Democratic commissioners, Rebecca Slaughter and Rohit Chopra, doubted that the merger was in the public interest, even with the majority's behavioral remedy. Commissioner Slaughter expressed concern about the FTC's enforcement of vertical mergers generally, noting that "the current approach to vertical integration has led to substantial underenforcement."[44]

IV. KEY TAKEAWAYS FOR FUTURE CONSOLIDATION IN HEALTHCARE

Despite numerous recent changes in the vertical merger enforcement landscape, large vertical transactions continue to succeed. As a result, the trend toward vertical integration in healthcare will likely continue as entities are encouraged by recent clearances. But healthcare companies throughout the distribution chain should anticipate that U.S. antitrust agencies will continue to challenge vertical transactions.

When considering a vertical transaction, therefore, the merging entities should contemplate whether the proposal includes any horizontal overlap or would implicate any of the FTC's and DOJ's traditional theories of economic harm for vertical mergers. But the parties should also consider the possibility of unconventional theories of economic harm, particularly until the DOJ makes an update to the Non-Horizontal Merger Guidelines. In addition, the parties should anticipate that the agencies' in-depth investigations of significant vertical transactions will continue, including exploration of potential post-litigation remedies and possibly concurrent Congressional hearings and/or investigations by state insurance and antitrust regulators. Such investigations could result in significant costs and delay to parties' ability to close transactions.

To navigate a transaction successfully to closing, parties to vertical deals might consider the following:

- The parties should evaluate and document the potential transaction's procompetitive effects and enhanced efficiencies early in the process, and these benefits should form an integral part of the parties' decision to undertake the transaction. Notably, creating clear documentation to support the benefits of the intended combination early in the process will provide a good basis for presenting a cognizable efficiencies case.

- Depending on the size and complexity of the deal, it may be prudent for the parties to hire an economist to analyze the proposed transaction. Having such an assessment in hand will better position the parties to quickly respond to government economists throughout the investigation and, if necessary, defend against challenge.

- In the event that the parties identify potential competition issues, they should consider whether the issues can be remedied through limited divestitures. The FTC's recent consents and public statements suggest that it may be willing to agree to behavioral remedies in the right circumstances,[45] but these cases appear to be limited to implementing firewalls to restrict the flow of competitive information. Moreover, the DOJ has maintained its hostility to behavioral remedies, leaving parties with the choice of litigating or abandoning their transaction.

- Finally, don't forget state antitrust, insurance, and other regulators. Competition is an important aspect of many agency investigations, and may be coupled with a particular focus on the impact of a transaction on a state or narrower regional population.

43 Statement of Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180, (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf (last visited Apr. 9, 2019).

44 Statement of Commissioner Rebecca Kelly Slaughter Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180, (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf (last visited Apr. 9, 2019).

45 In addition to Staples-Essendant, the FTC also entered into a consent order permitting Northrop Grumman to acquire Orbital ATK contingent on the use of a firewall to protect competitively sensitive information from improper use or disclosure. See FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc. (June 5, 2018), available at https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket (last visited Apr. 9, 2019).

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