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Five Takeaways From the 2025 ABA Antitrust Spring Meeting

Client Advisories

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April 11, 2025 — Last week, the Antitrust Section of the American Bar Association (ABA) convened for three days in Washington, DC, for its 73rd annual Spring Meeting, the largest gathering of antitrust professionals in the world. This client alert flags five important takeaways from the panel discussions and papers presented at the conference.

1. Expect at least some continuity in federal enforcement in the United States

Coming on the heels of the change in administration in the White House, the focus of much of the conference was the enforcement priorities of the new administration and how practitioners expect the Department of Justice and the Federal Trade Commission to pursue those priorities in the foreseeable future. It is clear from the agencies' public statements that the Trump administration will not rescind the 2023 Merger Review Guidelines or the recently revised Hart-Scott-Rodino (HSR) Filing Rules, despite their genesis in the Biden administration. The Merger Review Guidelines formalize heightened antitrust scrutiny of mergers and acquisitions, and the HSR Filing Rules significantly expand the information that transacting parties must disclose to the agencies to initiate a merger review under the HSR Act. In keeping with these policies, the comments of various DOJ and FTC staff attorney panelists made clear that antitrust enforcement is an administration priority. However, the extent to which the White House politicizes antitrust enforcement remains an open question. Perhaps foreshadowing this possibility, the Trump administration, in an unprecedented and arresting move, prohibited its political appointees from holding ABA leadership positions or participating in ABA events. Consequently, the DOJ and FTC leadership did not address or otherwise participate in the Spring Meeting, historically a defining element of the event. In a public letter addressed to FTC staff members, FTC Chair Andrew Ferguson cited the "ABA's long history of leftist advocacy and its recent attacks on the Trump-Vance Administration's governing agenda."

2. Expect aggressive enforcement by other authorities

Numerous state attorneys general made it clear that they will continue to prioritize antitrust enforcement in the coming years. Representatives from the antitrust units of California, Colorado, the District of Columbia, Florida, Nevada, New Jersey, New York, North Carolina, Maryland, Minnesota and Pennsylvania discussed their achievements from the past year, including their challenge to the now-abandoned merger of Kroger and Albertsons, valued at $24.6 billion. FTC et al. v. The Kroger Co. and Albertsons Cos. Inc., No. 3:24-cv-00347 (D. Or. filed Feb. 26, 2024). Various state attorneys

general highlighted their intention of continuing to bring enforcement actions under state antitrust laws, in part to continue to develop precedents interpreting those laws, separate and apart from the federal case law under the Sherman Act and the Clayton Act. Panelists from the European Union (EU) highlighted recent victories for authorities in enforcing EU competition laws, which include a decision from the European Court of Justice (ECJ) in favor of the German antitrust authority (Bundeskartellamt) in Case C-252/21, Meta v. Bundeskartellamt, Judgement (July 4, 2023). In that matter, the ECJ found that Meta's violations of the EU General Data Protection Regulation constituted unlawful anticompetitive conduct. In addition, panelists representing private antitrust plaintiffs emphasized that they would continue to pursue new cases aggressively in a variety of industries, from agricultural products to AI models.

3. FTC and DOJ remain focused on labor market and unlawful monopolization theories of harm

Panelists expect labor markets to remain an important enforcement target in the United States, building on the FTC's successful challenge to the merger of Kroger and Albertsons based primarily on alleged labor market effects. In that matter, the FTC asserted that Kroger and Albertsons are the two largest unionized grocery store operators in the United States and their merger would reduce competition significantly in the labor market for unionized grocery store workers. Although monopsony power in the labor market was already used as a viable theory of harm by the agency as early as November 2022 in the Penguin-Random House merger challenge, this is the first time "union workers" was asserted by the federal regulators to be a relevant market separate from "non-union workers."

Panelists noted that the FTC and the DOJ also continue to pursue unlawful monopolization (Sherman Act § 2) theories of harm in a series of cases against Big Tech giants Apple, Google, Amazon and Meta. A common theme that runs throughout these cases is a focus on exclusionary conduct that allegedly illegally maintains a monopoly. For example, in U.S. v. Google, 747 F. Supp. 3d 1 (D.D.C. 2024), the DOJ and the FTC alleged exclusionary agreements that Google entered into with third parties that guaranteed Google as the default search engine. Likewise in U.S. v. Apple, No. 2:24-cv-04055 (D.N.J. Mar. 21, 2024), the DOJ alleged a "closed ecosystem" created by Apple that precluded interoperability and foreclosed potential entrants to the market. These cases have the potential to define the new competitive landscape in the tech industry, with the DOJ seeking to break up Google's unlawful monopoly in the online search market by requiring, in a proposal filed on March 7, that Google divest its Chrome browser.

4. Expect algorithmic pricing and surveillance pricing issues to remain in the antitrust spotlight

The antitrust risk presented by algorithmic pricing software has been the antitrust topic du jour for quite some time, and the Spring Meeting confirmed that it will remain so. The software has raised antitrust concerns because it pools nonpublic competitively sensitive information from multiple competitors and recommends individualized prices to those competitors based on its assessment of the pooled information. As former Acting FTC Chair Maureen Ohlhausen has written, and reiterated as a panelist, "Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price? If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either." As panelists reported, algorithmic pricing software has attracted antitrust scrutiny in several industries, including rental units in large residential apartment buildings, hotel rooms, health care, and poultry and beef production. In the past year, civil antitrust cases have been brought by federal and state enforcers, a handful of cities have banned the software, and legislation limiting its use has been pursued at the federal, state and local levels.

In another panel, FTC staff attorneys discussed the preliminary findings of an agency study on "surveillance pricing," in which a seller engages in price discrimination using an algorithm that assesses data on customer characteristics. The FTC summarized its preliminary findings that such practices are becoming more mainstream by noting, "Prices are increasingly multi-dimensional. Instead of a price being a static feature of a good, the same good may have different prices in different places or for different people or audience segments based on data gathered and used from various sources." The FTC staffers indicated that their full findings would be released later this year. So far, the FTC has stated that it is only seeking to better understand these practices and is not making any judgments on how such practices may

or may not raise antitrust concerns. Nevertheless, surveillance pricing will undoubtedly continue to garner public attention and agency scrutiny.

5. Pointers for submitting HSR filings under the revised HSR Filing Rules

Panelists shared a number of pointers based on experience submitting HSR filings to the FTC since its revised HSR Filing Rules went into effect on Feb. 10. The revised rules overhaul the prior HSR form and impose significantly expanded disclosure requirements on transacting parties, as discussed in a previous client alert.

The revised rules expand the scope of responsive business documents (comprised of transaction-related documents and certain plans and reports) that must be submitted with the filing by including documents prepared by or for the "supervisory deal team lead." Panelists noted that in some transactions, the designated individual may change as the deal progresses. Therefore, transacting parties should not only involve antitrust counsel in deal preparations as early as possible to identify the supervisory deal team lead but also consider putting a tracking system in place to identify the documents prepared by and for these individuals.

In addition to expanding the scope of responsive business documents, the revised rules require expanded narrative descriptions of transaction rationales, competitive overlaps and supply relationships. Panelists noted that both factors make it more time-consuming for transacting parties to carefully review responsive documents to ensure that they are consistent with these descriptions and are not drafted in a way that may appear to undermine them. As always, the earlier antitrust counsel becomes involved in a transaction, the more prepared the deal team can be in order to avoid drafting documents that may be misinterpreted by reviewing agencies and trigger unwarranted scrutiny of the transaction.

Panelists also reported that agency staff members have generally been accommodating when unexpected issues related to the new HSR form have arisen. However, they also reported that the number of HSR filings has recently fallen significantly, with only 319 submitted in February and March of this year.

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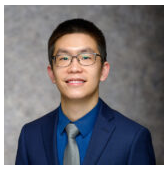

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