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ABA Section of Antitrust Law

Corporate Counseling Committee
Monthly Antitrust Update Program
December 2016 Developments

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Introduction & Agenda

- Mergers Update – Mark Opashinov
- Cartels Update – Casey Halladay
- Canada Antitrust Developments – Janine MacNeil
- Other Antitrust Developments – Joshua Chad

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1) Mergers Update

- Mega-mergers and authorities' challenges continue:
  - Aetna/Humana - $37B
  - Cigna/Anthem - $48B
  - Boehringer Ingelheim/Sanofi - $13.5B
  - Abbott/St. Jude - $25B
  - McKesson/Change Healthcare - $3.4B
  - Microsoft/LinkedIn - $26B
  - AT&T/Time Warner - $108.7B

1A) Aetna/Humana

- Final arguments heard December 29, 2016 in DC before US District Judge John D. Bates, in a bench trial
- Judge Bates reserved judgment but promised his decision and reasons in a “timely manner” (likely later this month)

1A) Aetna/Humana (cont)

- DOJ contended that the proposed transaction would harm seniors in the private-market Medicare Advantage program in Florida, Georgia and Missouri
- A key issue is whether Medicare Advantage is a distinct antitrust market (per DOJ) or whether it also competes with the original Medicare program (per parties)

1A) Aetna/Humana (cont)

- DOJ argued that
  - the two programs are distinct because many seniors prefer Medicare Advantage due to its lower overall costs
  - point to parties' own treatment of the programs as distinct markets
- Parties countered that the two programs are alternatives to one another and seniors can and do switch between them

1A) Aetna/Humana (cont)

- Parties also contend that the government's Center for Medicare and Medicaid Services (CMS), which administers Medicare, will be an important post-merger constraint on the merged entity because
  - it sets reimbursement rates paid to providers and
  - those rates are the benchmark for Medicare Advantage insurers such as the parties

1B) Cigna/Anthem

- DOJ concurrently challenging Cigna/Anthem merger in a bifurcated trial
  - First phase hearing on national aspects of the proposed transaction ended December 13, 2016
  - Second phase hearing on regional aspects of the transaction ended January 4, 2016
- Discussed in some detail in the November update

1B) Cigna/Anthem (cont)

- The key issue: the merger's potential impact on the "national employer market"
- DOJ argued the transaction would harm large employers by reducing the number of large health insurers with national operations able to service such large employers

1B) Cigna/Anthem (cont)

- Whether the proper market for purposes of antitrust analysis is “national employer market” critical
- DOJ alleged that, for national accounts in almost three dozen local markets, the transaction is a 2 to 1 merger

1B) Cigna/Anthem (cont)

- The parties argued that as a result of their merger, the combined entity will be able to cut overhead costs and will acquire the scale necessary to negotiate better pricing from physician groups and hospitals – to the benefit of consumers and companies

1B) Cigna/Anthem (cont)

- Not previously discussed:
  - Ongoing discord between the companies revealed by unsealed records would seem to undermine the prospects of the material efficiencies claimed by the parties
    - Each party has accused the other of violating their merger agreement and Anthem has continued working on merger integration unilaterally
    - Records showed that Cigna CEO David Cordani had doubts about the benefits of the deal for his company
    - Anthem CEO Joseph Swedish has created a secret team for the planned integration because of Cigna's lack of cooperation

1B) Cigna/Anthem (cont)

- "How do you work on integration without talking to the person you're integrating with?" - Judge Jackson

1C) Challenges to Health Insurer Mergers

- For the outgoing Administration, the two challenges to mega-mergers in the healthcare sector can be seen as final effort to help shape the US health care market

1D) Boehringer Ingelheim/Sanofi Asset Swap

- In December 2015, Boehringer Ingelheim and Sanofi started exclusive negotiations to swap BI's worldwide €6.7 billion consumer health care business for Sanofi's worldwide €11.4 billion animal health care business
- In June 2016, the parties announced their definitive agreement to swap these businesses with an additional cash payment from BI to Sanofi of €4.7 billion

1D) Boehringer Ingelheim/Sanofi Asset Swap (cont)

- In its December 2016 complaint, FTC alleged that the proposed transaction, without a remedy, would have substantially lessened U.S. competition for the following five products:
  - Canine, Feline and Rabies vaccines
  - Products to prevent and control outbreaks of parasites in sheep and in cattle

1D) Boehringer Ingelheim/Sanofi Asset Swap (cont)

- FTC alleged that the transaction
  - would be a 4 to 3 merger in respect of the three companion animal (pet) product markets with high post-merger market shares of 41% (canine), 61% (feline) and 75% (rabies)
  - would see the two primary suppliers become one in the two parasite control markets (65% and 78% post-merger market shares in cattle and sheep products respectively)

1D) Boehringer Ingelheim/Sanofi Asset Swap (cont)

- Boehringer Ingelheim agreed to divestitures in all five product areas to address alleged anticompetitive issues
  - Eli Lilly (Elanco) to acquire the companion animal vaccines products
  - Bayer AG to acquire the parasite control products

1D) Boehringer Ingelheim/Sanofi Asset Swap (cont)

- In addition to the high post-merger shares, entry barriers were a critical factor
- FTC alleged:
  - *De novo* entry would require significant investment to develop products, obtain regulatory approvals, and effectively establish recognized brands
  - Entry would be unlikely because the required investment would be difficult to justify given the sales opportunities in the affected markets

1D) Boehringer Ingelheim/Sanofi Asset Swap (cont)

- Entry would also not be timely because drug development times and FDA or USDA approval requirements are lengthy
- no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the transaction

- Consent Agreement open for public comment until January 27, 2017

1E) Abbott/St. Jude

- In April 2016 Abbott Laboratories announced its planned $25 billion take-over of St. Jude Medical in a cash/share deal
- Initial public commentary saw little product overlap between the parties
  - Abbott industry leader in heart stents
  - St. Jude's pacemakers, heart valves and devices to treat atrial fibrillation seen as complementary to Abbot's cardiac products

1E) Abbott/St. Jude (cont)

- Nevertheless, FTC review of the transaction focused on three product areas:
  - vascular closure devices (used to close arterial holes resulting from vascular catheterization procedures)
  - steerable sheaths (used in the treatment of complex heart arrhythmias, such as atrial fibrillation)

1E) Abbott/St. Jude (cont)

  - lesion-assessing ablation catheters (used during ablation procedures to treat heart arrhythmias)
- In respect of vascular closure devices, the FTC alleged that the merger would combine the largest and second largest suppliers in the United States, eliminating the substantial price competition between them

1E) Abbott/St. Jude (cont)

- On steerable sheaths, the FTC alleged that the transaction would eliminate the competition that *would have* occurred between the parties in a market characterized by
  - St. Jude's position as the largest supplier in the US with a "near monopoly" and
  - Abbott's position as a recent entrant ready to compete head-to-head with St. Jude

1E) Abbott/St. Jude (cont)

- Lastly, the FTC alleged that if Abbott were to acquire Advanced Cardiac Therapeutics's lesion-assessing ablation catheter assets, it could eliminate potential competition in the U.S. market for such products since
  - ACT's lesion-assessing ablation catheter currently in development would compete directly with offerings from St. Jude and Biosense Webster

1E) Abbott/St. Jude (cont)

- It would thus be the third competitor in the highly-concentrated U.S. market for lesion-assessing ablation catheters
- Abbott's acquisition of the ACT assets would reduce the additional competition that would have resulted from an additional US supplier of lesion-assessing ablation catheters

1E) Abbott/St. Jude (cont)

- The Consent Agreement remedies the competitive concerns by
  - Divesting to Japanese company Terumo Corporation all of the vascular closure devices and steerable sheaths assets for ~$1.1 billion
  - Requiring Abbott to provide the FTC notice if it intends to acquire ACT's lesion-assessing ablation catheter assets
- The parties closed their deal January 4, 2017

1F) McKesson/Change Healthcare

- In June 2016 McKesson Corporation and Change Healthcare Holdings agreed to contribute assets to form a new entity focused on healthcare IT (with $3.4 billion in pro forma revenues)
- McKesson contributed a majority of its McKesson Technology Solutions assets and Change Healthcare contributed a majority of its assets – 70/30 ownership

1F) McKesson/Change Healthcare (cont)

- On August 31, 2016 DOJ issued a Second Request to the parties
- The parties announced on December 21, 2016 that DOJ has closed its investigation and terminated the HSR waiting period
- Parties expecting to close in H1 2017

1G) Microsoft/LinkedIn

- In the largest social network deal to date, valued at $26.2 billion, Microsoft agreed to buy LinkedIn in June 2016
- Following its months' long investigation, the European Commission conditionally approved Microsoft's acquisition of LinkedIn on December 6, 2016, following approvals in the US, Canada and elsewhere

1G) Microsoft/LinkedIn (cont)

- The deal has minimal overlap but, on the deal's announcement, EU Commissioner Margrethe Vestager stated that

  "the data purchased in the deal has a very long durability and might constitute a barrier for others, or if they can be replicated so that others stand a chance to enter the market"

- Salesforce.com also loudly and publicly denounced the deal on similar concerns

1G) Microsoft/LinkedIn (cont)

- The Commission found that the pre-installation of LinkedIn on MS Windows devices could have greatly enhanced LinkedIn's visibility and expand its user base to the detriment of its competitors

1G) Microsoft/LinkedIn (cont)

- To address the concerns identified by the EC in the "professional social network services market", Microsoft made commitments to:
  - Allow PC manufacturers/distributors not to install LinkedIn on Windows
  - Allow users to remove LinkedIn from Windows should PC manufacturers/ distributors decide to preinstall it

1G) Microsoft/LinkedIn (cont)

  - Allow competing professional social network service providers to maintain current levels of interoperability with the MS Office suite
  - Grant competing professional social network service providers access to "Microsoft Graph", a gateway for software developers
- These commitments last 5 years and will be overseen by a trustee
- Deal closed December 8, 2016

1H) AT&T/Time Warner

- As noted in prior updates, President-Elect Trump had publicly opposed this merger saying that it would put too much power in the hands of the media and vowed to block the deal
- However, since the election, Trump's transition team has assured the parties that the deal "will be scrutinized without prejudice"

1H) AT&T/Time Warner (cont)

- DOJ reviewing the merger and the FCC also likely to review
- AT&T is the 2nd largest wireless Internet provider and one of the largest broadband Internet providers
- It owns DirecTV (satellite TV)
- With Time Warner, AT&T would own CNN, HBO, Warner Bros. studios and other media assets

1H) AT&T/Time Warner (cont)

- Raising rivals' costs is a major concern
  - Owning Time Warner and its content could incent AT&T to raise prices to cable system rivals such as Comcast, Charter and Verizon and create a knock-on effect on consumer pricing
  - Because AT&T also owns DirectTV, it may be incented to charge higher license fees (or refusing licenses altogether) to online video services that compete with DirectTV

1H) AT&T/Time Warner (cont)

- AT&T could favor Time Warner content on its mobile network by letting such content stream without counting against the data caps applied to rival video services such as Netflix
  - FCC has indicated that that practice may violate net neutrality rules
  - Query the likelihood of this practice if net neutrality rules are revisited by a Trump-era FCC

1) Mergers Update - Takeaways

- Key Takeaways for Corporate Counsel:
  - The parties' ordinary course views of markets will be potentially very probative (Aetna/Humana)
  - Post-signing/pre-clearance words and deeds can matter (Cigna/Anthem)
  - Entry will be critical in highly-regulated industries (BI/Sanofi)
  - Potential competition concerns can be as problematic as actual/current competition concerns (Abbott/St. Jude)
  - Where post-merger behavior is the concern, behavioral commitments can win the day (Microsoft/LinkedIn)

2) Cartel Developments

A. Cartel Enforcement in 2016: Key Metrics

B. Update on US Enforcement

C. Update on International Enforcement

2A) Key Cartel Metrics

- Cartel Enforcement in 2016: Key Metrics
  - Worldwide: 20% YOY increase in total global cartel fines since 2015
  - USA: $387MM in 2016 fines (versus $2.85BB in 2015)
  - EU: €3.8BB in 2016 fines (€2.93BB from the medium/heavy truck inquiry alone) (versus €364MM in 2015)
  - South Korea: ~$765MM in 2016 fines (versus ~$490MM in 2015)
  - Brazil: ~$231 MM in 2016 fines (versus ~$189MM in 2015)

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2B) Update on US Cartel Enforcement

2B) Update on US Cartel Enforcement (cont)

- Something Fishy?
  - Dec 7, 2016: SVP Sales of Bumble Bee Foods pleads guilty to one count of price-fixing in N.D. Cal; agrees to pay criminal fine and cooperate in ongoing DOJ investigation
  - 1st charge in this investigation into packaged seafood products
  - Dec 21, 2016: SVP Marketing of Bumble Bee pleads guilty; agrees to pay criminal fine and cooperate
  - Cartel active 2011-2013; participants fixed prices, and negotiated prices and issued price announcements per their agreement

2B) Update on US Cartel Enforcement (cont)

- Co-conspirators unnamed; 3 leading canned tuna brands in US market are Chicken of the Sea (Thai Union), Starkist and Bumble Bee
- Interesting background – in Dec 2015, Thai Union abandoned its proposed $1.5BB purchase of Bumble Bee when DOJ expressed "*serious concerns*" with the transaction
  - AAG Baer: "[…] *the parties knew or should have known from the get go – that the market is not functioning competitively today, and further consolidation would only make things worse*"

2B) Update on US Cartel Enforcement (cont)

- Take a Pill (… if you can afford one)
  - Dec 14, 2016: 2 former senior executives of Heritage Pharmaceuticals (generic pharma company) charged on Information in E.D. Penn
  - 1st charges in this investigation into generics; no pleas announced to date
  - Charges cover two counts of conspiracy to fix prices, rig bids and allocate customers for doxycycline hyclate (antibiotic for multiple indications) and glyburide (treats diabetes)

2B) Update on US Cartel Enforcement (cont)

- Cartels active April 2013-December 2015 (doxycycline hyclate) and April 2014-December 2015 (glyburide)
- Part of broader DOJ inquiry into generic pharma industry; numerous subpoenas issued
  - Mylan and Sun Pharma have disclosed they have been contacted by DOJ about doxycycline hyclate
- Dec 15, 2016: 20 state AGs filed suit in D. Conn against Heritage Pharmaceuticals, Aurobindo Pharma, Mayne Pharma, and Mylan alleging a conspiracy to manipulate prices for doxycycline hyclate and for glyburide

2B) Update on US Cartel Enforcement (cont)

- No Excess (Prosecutorial) Capacity
  - Dec 15, 2016: 3 Japanese executives from 2 companies indicted for price-fixing in the sale of electrolytic capacitors in N.D. Cal
  - Electrolytic capacitors store and regulate electrical current in many products (*e.g.*, computers, televisions, car engines, home appliances, *etc.*)
  - Indictment suggests long-running cartel: one executive alleged to have conspired January 2003-January 2014
  - Ongoing DOJ investigation: 5 companies and 9 individuals have been charged to date

2B) Update on US Cartel Enforcement (cont)

- NEC TOKIN Corp. has already plead guilty and agreed to pay a $13.8 million fine
- Rubycon Corp. has already plead guilty and agreed to pay a $12 million fine
- Hitachi Chemical Co. Ltd. has already plead guilty and agreed to pay a $3.8 million fine
- Indictments also filed against Elna Co., Ltd. and Holy Stone Holdings Co., Ltd.

2B) Update on US Cartel Enforcement (cont)

- Foreclosing Competition at Foreclosure Auctions
  - Dec 15, 2016: 4 individuals convicted of conspiring to rig bids at public real estate foreclosure auctions in Alameda County, CA from May 2008-December 2010
  - Convictions follow 2-week jury trial; charges related to hundreds of properties sold at foreclosure auctions in Alameda County
  - Conspirators designated the winning bidders to obtain selected properties, negotiated payoffs amongst themselves for not competing, then held second (private) auctions, sometimes on the courthouse steps (!) to allocate properties
  - Investigation ongoing; > 50 convictions to date

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2C) Update on International Cartel Enforcement

2C) Update on International Cartel Enforcement (cont)

- Europe: An Interesting Cartel
  - Dec 7, 2016: Commission fines JPMorgan Chase (€337,196,000), Crédit Agricole (€114,654,000), and HSBC (€33,606,000) for colluding on Euro interest rate derivative pricing elements and exchanging sensitive information – total fines of ~ €485MM
  - Barclays, Deutsche Bank, RBS and Société Générale also participated in this cartel, but resolved their liability under the Settlement Procedure in Dec 2013 – total fines were ~ €825MM (with immunity for Barclays)
  - Cartel functioned Sept 2005-May 2008 and covered all of the EEA

2C) Update on International Cartel Enforcement (cont)

- Europe: An Energizing Cartel
  - Dec 12, 2006: Commission fines Sanyo (€97,149,000), Panasonic (€38,890,000), and SONY (€29,802,000) for coordinating prices and exchanging sensitive information in the sale of rechargeable lithium-ion batteries (*e.g.*, for laptops and mobile phones) – total fines of ~ €166MM
  - Samsung SDI received immunity, thereby avoiding a fine of €57,748,000
  - Cartel functioned Feb 2004-Nov 2007, with conduct occurring primarily in Asia and occasionally in Europe

2C) Update on International Cartel Enforcement (cont)

- Commission indicated that the parties:
  - Agreed on temporary price increases in 2004 and 2007 triggered by a temporary increase in the price of cobalt (key raw material input)
  - Exchanged commercially-sensitive information such as supply and demand forecasts, price forecasts or intentions concerning particular competitive bids organized by specific manufacturers of products such as phones, laptops or power tools

2C) Update on International Cartel Enforcement (cont)

- UK: Competition goes in the tank
  - Dec 19, 2016: CMA fines Franklin Hodge (£2,015,135), Galglass (£587,926) and KW Supplies (£22,248) for allocating customers, fixing prices and rigging bids for contracts for the sale of galvanized steel tanks used for water storage and fire sprinkler systems
  - It also found that these parties engaged in illegal information exchanges regarding their current and future pricing intentions, along with Balmoral Tanks (fined £130,000)
  - The information exchanges took place at a single meeting in July 2012; this meeting was secretly recorded by the CMA
  - A fourth party, CST Limited, received immunity for reporting the cartel to the CMA and cooperating with its investigation

3) Canada Antitrust Developments

1. Misleading Advertising: Voluntary claims under the microscope
2. Canada's Anti-Spam Legislation (CASL): Implied consent grandfathering to end and private right of action to begin
3. Mergers: Health businesses in the spotlight

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Canadian Misleading Advertising

3A) “Made in Canada” Claims

- The Competition Bureau’s *Enforcement Guidelines Relating to “Product of Canada” and “Made in Canada” Claims* protect consumers from deceptive and misleading labelling practices
- The “Made in Canada” test:
  - The last substantial transformation of the good occurred in Canada;
  - At least 51% of the total direct costs of producing or manufacturing the good have been incurred in Canada; and
  - The “Made in Canada” representation is accompanied by an appropriate qualifying statement, such as “Made in Canada with imported parts” or “Made in Canada with domestic and imported parts”
- The “Product of Canada” test:
  - The last substantial transformation of the good occurred in Canada; and
  - All or virtually all (at least 98%) of the total direct costs of producing or manufacturing the good have been incurred in Canada

3A) “Made in Canada” Claims (cont)

- Moose International Inc. (“Moose Knuckles”) makes premium winter jackets under the Moose Knuckles brand
- The Commissioner alleged the jackets were marketed as “Made in Canada” when significant manufacturing occurred in Vietnam and elsewhere in Asia
  - The Commissioner argued that Moose Knuckles’ representations offended the Bureau’s *Enforcement Guidelines Relating to “Product of Canada” and “Made in Canada” Claims*
- To the Bureau’s allegations, Moose Knuckles responded:
  - Over 51% of production costs were incurred in Canada
  - The Guidelines are not law
  - Moose Knuckles was duly diligent in working with the Bureau to comply with the Guidelines
    - The Bureau disagreed, responding that Moose Knuckles did not obtain approval before moving production to Vietnam

3A) "Made in Canada" Claims (cont)

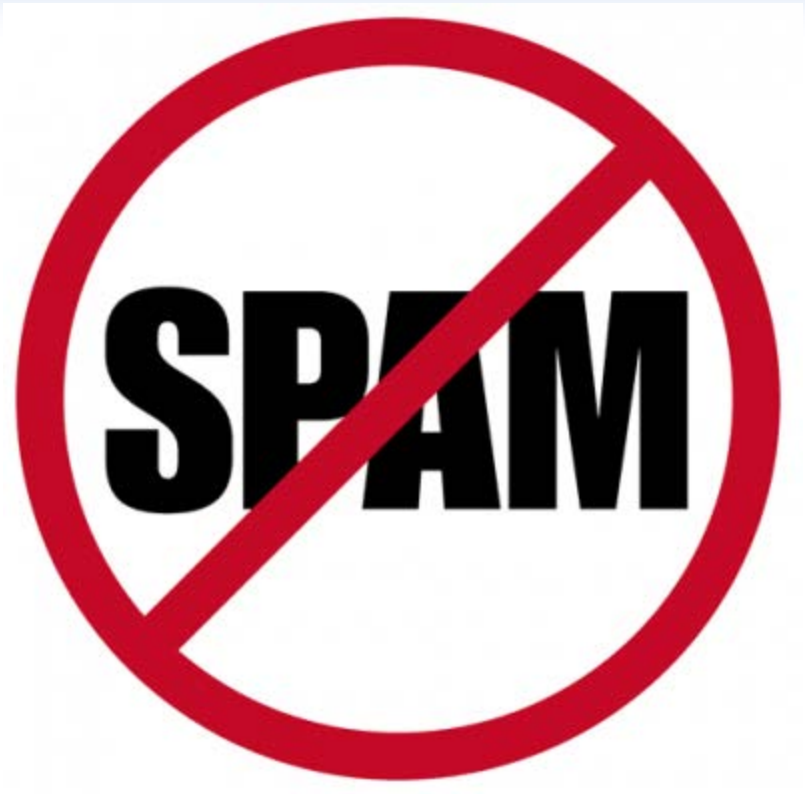
- The Bureau was seeking:
  - C$4M Administrative Monetary Penalty (AMP)
  - Reasonable restitution (amount undefined) for misled customers
  - An agreement prohibiting the company from engaging in such deceptive marketing practices
- In early December 2016, it was announced that Moose Knuckles had entered into a settlement agreement with the Bureau:
  - Moose Knuckles agreed to donate C$750,000 over 5 years to Canadian charities
  - In Canadian and worldwide representations, Moose Knuckles will make clear that certain jackets are made with Canadian and imported components
  - Operations will be added at Canadian factories
  - An internal compliance program will be implemented

3B) VW/Audi - Environmental Marketing Claims

- On December 19, 2016, the Bureau announced its participation in a Canadian class action settlement agreement VW reached with consumers of 2.0 liter DEVs
- If approved by the courts, the class action settlement provides for buyback and restitution payments of up to C$2.1 billion
- Bureau also reached a consent agreement with Volkswagen Group Canada Inc. and Audi Canada Inc. providing for an additional C$15 million AMP to resolve Bureau concerns that false or misleading environmental marketing claims were used to promote 2.0 liter DEVs

3B) VW/Audi - Environmental Marketing Claims (cont)

- Bureau analysis:
  - VW Canada and Audi Canada promoted vehicles sold or leased in Canada as having clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine sold in Canada
  - The vehicles passed emissions tests due to the installation of software altering the operation of the vehicle during testing that appeared to have the effect of reducing emissions in testing



Canada Anti-Spam Legislation (CASL)

3C) CASL

- Canada's Anti-Spam Legislation ("CASL") came into force on July 1, 2014
- The stated purpose of CASL is to encourage growth of electronic commerce and reduce the social and economic costs of unsolicited commercial electronic messages
- This is supposed to be achieved through a prohibition of damaging and deceptive spam, spyware, malicious code, botnets, and other related network threats
- CASL covers any electronic message that has a commercial purpose ("CEM") sent to any recipient in Canada (including from foreign senders)

3C) CASL (cont)

- Three governing bodies share responsibility for enforcing CASL:
  1) Canadian Radio-Television and Telecommunications Commission ("CRTC")
  2) Office of the Privacy Commissioner of Canada ("OPC")
  3) Competition Bureau
- Competition Bureau's Role:
  - Addressing false or misleading representations and deceptive marketing practice in the electronic marketplace, including
    - False or misleading sender or subject matter information; and
    - Locator information (i.e. URLs and metadata)
- The Competition Bureau may seek AMPs or criminal sanctions under the *Competition Act*

3D) Upcoming Legislative Changes

1) Implied Consent
   - Special transitional provision in CASL that provides a three-year window to rely on implied consent if an existing business or non-business relationship existed as of July 1, 2014
     - This means that any such relationship that includes CEM and existed prior to July 1, 2014 qualifies for implied consent
   - On July 1, 2017, these implied consents from pre-CASL relationships no longer apply unless:
     - Implied consents are renewed; or
     - Implied consents are converted to express consents

3D) Upcoming Legislative Changes (cont)

2) Private Right of Action
   - On July 1, 2017, individuals and organizations will be able to initiate a private action against those who contravene certain provisions of CASL
   - Private action must be brought no later than three years after the contravention became known to the applicant
   - Court may order compensation equal to:
     - The amount of loss or damages suffered; and
     - C$200 for each contravention, up to a maximum of C$1M per day of contravention

3E) Enforcement Actions under CASL

- CRTC released its first Enforcement Decision under CASL in Blackstone Learning Corp.:
  - Related to email messages advertising educational and training services in areas such as technical writing, grammar and stress management sent between July and September 2014
  - The messages were primarily sent to Canadian federal and provincial government employees
  - Blackstone received a Notice to Produce (NtP) on November 7, 2014 and requested a review of the NtP on December 4, after the deadline for production had passed
    - The Commission denied this request
  - Blackstone was issued a Notice of Violation on January 30, 2015 setting out an AMP of C$640,000

3E) Enforcement Actions under CASL (cont)

- CRTC Decision in Blackstone (cont):
  - CRTC Decision:
    - Reduced Blackstone's AMP from C$640,000 assessed in the Notice of Violation to C$50,000
    - Number of "violations" is based on the number of "campaigns", and not the number of individual messages sent
    - References to discounts and group rates were enough to conclude the messages were "commercial electronic messages" subject to CASL

3E) Enforcement Actions under CASL (cont)

- CRTC Decision in Blackstone (cont):
  - Principles in assessing AMPs:
    - Amount of penalty must be enough to promote changes in behavior
    - Volume of complaints received will be relevant to assessing the nature and scope of the violation(s)
    - Unaudited financial statements can be acceptable evidence of ability to pay
    - Lack of cooperation during an investigation may result in a higher penalty

3E) Enforcement Actions under CASL (cont)

- Rogers Media Inc. – C$200,000 fine for allegations that the company had sent promotional emails without a properly functioning “unsubscribe” option for a year
- Other notable businesses that have been subject to enforcement actions for sending emails without a clear and prominent “unsubscribe” mechanism under CASL include:
  - Plenty of Fish (2015) – C$48,000 fine
  - Porter Airlines (2015) – C$150,000 fine
- In December 2015, the CRTC served its first warrant under CASL to bring down a server located in Toronto that had been indentified in an international investigation as a command and control server for distribution of malware

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Mergers in Canada

3F) Bureau Merger-Related Activities

- In FY 2015-16, the Bureau concluded 221 merger matters, 7 of which involved issues that were resolved through a consent agreement
- The number of mergers designated as “complex” increased in 2015-16, up from 55 to 65, an increase of 18%
- The percentage of mergers designated as “complex” similarly increased in 2015-16, up from 24% to 33% of all merger cases that received a designation

3G) McKesson/Rexall

- McKesson Corporation announced its proposed acquisition of the healthcare businesses of Katz Group Canada Inc., including Rexall and ClaimSecure, in March 2016
- Bureau determined that a substantial lessening or prevention of competition was likely in the wholesale and retail sale of certain pharmacy products and services, including prescription and OTC pharmaceuticals
- Bureau's Analysis:
  - McKesson is the largest pharmaceutical products wholesaler in Canada
  - Rexall is one of the largest pharmaceutical products retailers in Canada and ClaimSecure is connected to 99% of licensed pharmacies in Canada

3G) McKesson/Rexall (cont)

- Bureau's Analysis (cont):
  - Unilateral Effects:
    - McKesson incented to disadvantage Rexall's retail rivals by supplying them with prescription, OTC pharmaceutical products under less favorable terms
    - Rexall incented to compete less aggressively on these products at retail as lost customers would likely switch to rival retailers also supplied by McKesson, on which merged entity would earn wholesale margin
    - Existing wholesale competition from other pharmaceutical distributors and retail competition from pharmacies supplied by wholesalers other than McKesson unlikely to be effective constraints on McKesson
  - Coordinated Effects:
    - Combined competitive intelligence (McKesson wholesale, ClaimSecure and Rexall) would enable the merged entity to alter the competitive dynamics of the retail markets in which Rexall competes, increasing the likelihood of coordination among retail pharmacies

3G) McKesson/Rexall (cont)

- On December 14, 2016, the Bureau announced it reached a consent agreement with McKesson requiring sale of Rexall retail pharmacies in 26 local markets in Alberta, B.C., the Northwest Territories, Ontario and Saskatchewan
- McKesson required to restrict the transmission of commercially sensitive information between its wholesale business, the Rexall retail business, and the ClaimSecure business to preserve retail competition

3H) Abbott/St. Jude

- Abbott Laboratories announced its proposed acquisition of St. Jude Medical, Inc. in April 2015
- Bureau determined that a substantial lessening of competition in the supply of vessel closure devices (VCDs) used in certain cardiovascular procedures would arise in Canada as a result of the acquisition
- Bureau's Analysis:
  - Canada is the relevant geographic market (due to medical devices regulatory requirements)
  - For certain procedures and patients, there are no alternatives to a VCD

3H) Abbott/St. Jude (cont)

- Bureau's Analysis (cont):
  - Abbott/St. Jude are the two largest suppliers of VCDs in Canada and each is the other's closest competitor in the supply of VCDs used for certain surgical procedures
  - Market entry requires specialized knowledge (R&D, clinical trials, licensing and registration, marketing network)
  - Market characterized by strong physician preferences and reluctance to switch to new products
- On December 28, 2016, the Bureau announced a consent agreement with Abbott requiring the sale of St. Jude's VCD business, including manufacturing assets, IP and customer contracts
- Commissioner approved Terumo Corporation as purchaser of the St. Jude VCD business

4) Other Antitrust Developments

4A) ITC to Consider Standing for Antitrust Claims

- US Steel had filed a complaint with the International Trade Commission based on alleged violation of section 337 of the *Tariff Act* by members of the Chinese steel industry
- Importation into the US of carbon and alloy steel products
  - US Steel claims trade secret misappropriation, false designation of origin and antitrust violations (alleged collusion among Chinese manufacturers to undercut prices of domestic manufacturers)
- On July 6, 2016, the residing administrative law judge granted a motion to dismiss antitrust violation claims due to US Steel failing to establish antitrust standing

4A) ITC to Consider Standing for Antitrust Claims (cont)

- On December 21, the ITC announced that it is reviewing the July 6 decision dismissing the antitrust claim:
  - Issue under consideration: Does US Steel have to prove predatory pricing and antitrust injury before the ITC under section 337 of the *Tariff Act* as it would in a civil court case?
- Submissions due in early 2017 and ITC may hold oral argument in March 2017
- Will be ITC's first significant antitrust-based ruling since the 1970s
- Domestic firms should monitor this decision as potentially providing a significant antitrust tool for US manufacturers to use against foreign competition

4B) *Retractable Technologies*

- U.S. Product market for safety syringes
- On December 2, a decision of the Fifth Circuit Court of Appeals overturned the jury verdict from Eastern District of Texas
- The jury had found that Becton Dickinson was liable under the *Sherman Act* for attempted monopolization in the market for safety syringes due to “deception damages” caused by misrepresentations

4B) *Retractable Technologies* (cont)

- The Fifth Circuit made a point of distinguishing merely unfair conduct as compared to anticompetitive conduct key consideration
- Court found that while false advertising may have hurt Retractable Technologies' bottom line, it did not threaten competition

4C) American Airlines Succeeds in Monopolization Case Against Sabre

- On December 21, a Federal jury in the Southern District of New York awarded American Airlines $5.1 million (trebled to $15.3 million) for unreasonably restraining trade through contractual provisions

4C) American Airlines Succeeds in Monopolization Case Against Sabre (cont)

- Sabre, an airline booking service, is alleged to have abused its dominance entering into an unfair contract with US Airways (now part of AA) in 2011 that had the effect of suppressing competition and maintaining Sabre's dominant position
  - Alleged to have forced airlines to pay unfair fees and sign unfair contracts
- Sabre announced that it would be appealing the decision

4D) CMA's First Director Disqualification for Breach of Competition Law

- CMA has increased its enforcement efforts as of late
- On December 1, the CMA accepted a 5 year disqualification undertaking from Daniel Aston, the former Managing director of Trod Ltd.
  - Mr. Aston will be disqualified from being a director of UK companies for 5 years, unless he receives leave from the court to do so
- Stems from August 2016 decision that Trod agreed not to undercut a competitor's prices for posters and frames on Amazon's UK website through the use of automated re-pricing software

4D) CMA's First Director Disqualification for Breach of Competition Law (cont)

- CMA has the power to apply to a court for a disqualification order of up to 15 years
  - The CMA had informed Mr. Aston that it was planning to launch proceedings against Mr. Aston if no undertaking was received
- First time power to disqualify directors has been used for a competition law breach
- CMA commented "we are absolutely prepared to use this power again"

4E) Pharma Pricing Enforcement in the UK – Pfizer & Flynn Pharma Fined

- On December 7, CMA announced that it had fined Pfizer and Flynn Pharma ~£90 million (~$110 million) for excessive prices charged to NHS for anti-epilepsy drug
- Flynn had de-branded the epilepsy drug, making it no longer subject to price regulation
- Prices charged rose by between 2,300% to 2,600%
- Pfizer and Flynn announced that they are appealing
- CMA told companies to reduce prices so that they are "profitable", but not "excessive and unfair"

4E) Pharma Pricing Enforcement in the UK – Actavis Fined

- On December 16, CMA accused Actavis UK of having charged the NHS excessive rates for tablets used to fight Addison's Disease and other issues connected with adrenal insufficiency
- Allegations of hiking prices for generic drug by more than 12,000% in some cases (10mg packs of drug costs from £0.70 in April 2008 to £88.00 per pack by March 2016)

4F) Medtronic Fined in China

- On December 8, it was reported that the NDRC had fined a Medtronic subsidiary in China $118.5 million Yuan ($17.2 million) for engaging in resale price maintenance in respect of cardiovascular and diabetes devices
  - Equates to ~4% of Medtronic's 2015 revenues for the products involved
- Follows raid in April 2016 where 40 NDRC officers raided Medtronic's offices in China
- Alleged violations include:
  - setting resale prices, fixing profit margins, imposing minimum bidding prices, and setting minimum resale prices to hospitals

4G) Australia – Agent Can Compete with Principals

- On December 13, a majority decision by the Australian High Court found that Flight Centre, a travel agency, acted illegally by taking steps to prevent airlines from undercutting its prices
- Overturns a 2015 decision of the Full Court of the Federal Court of Australia
- Between August 2005 to May 2009, Flight Centre sent emails to three airlines urging the airlines not to undercut Flight Centre's prices

4G) Australia – Agent Can Compete with Principals (cont)

- Flight Centre argued that it was an agent of the airlines and not a competitor
- Majority of High Court found that Flight Centre and the three airlines were in competition with each other as "suppliers in a market"
  - Where the agent exercises its own discretion in the pricing of the principal's goods or services and where agent is not required to act in interest of principal, then the principal and agent may be considered competitors
- Companies engaged in dual distribution models should take note:
  - Court has distinguished between a party's role as agent and its role as a competitor

4) Other Antitrust Developments - Takeaways

- Very high bar to bring antitrust claims based on false advertising (*Retractable Technologies)*
- Domestic manufacturers may get new tool against foreign competition under the *Tariff Act* (*US Steel*)
- CMA is revving up its enforcement activity, with a particular focus on pharma (*Pfizer*, *Actavis, Trod/Aston*)
- Australian High Court finds that an agent can compete with its principals (*Flight Centre*)

ABA SECTION OF ANTITRUST LAW

Promoting Competition
Protecting Consumers

Questions?

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