equity plan that are not otherwise a party to the stockholders agreements will be subject to drag-along rights.

When terminating the seller's stockholder agreements or equity plans, consider the interaction of termination provisions and the survival of drag-along provisions, although recent case law helpfully suggests that the terms of an exercised drag-along provision will survive the closing.

Be mindful of all corporate formalities that may be required under the seller's certificate of incorporation and bylaws. In addition, if the seller's organizational documents do not include a forum selection clause, the seller may consider amending these documents to include Delaware as the exclusive forum for stockholder lawsuits to avoid a minority stockholder attempting to bring its lawsuit in a forum that the stockholder thinks will be favorable to the stockholder's cause.

Generally, the seller's board of directors and advisors should also be careful to document in board minutes the board's process, its reasons for acting, its consideration of alternatives, and its understanding of its fiduciary duties and any conflicts of interest, and all parties should be mindful of other communications that could undermine the efforts of the board to create clear evidence of its intent. In some circumstances, where practicable, it may be helpful to have an independent board committee negotiate a transaction or obtain disinterested stockholder approval of the transaction. In such circumstances, the use of a drag-along provision may not advance the aims of such procedural protections.

ENDNOTES:

[1]*In re Trados Inc. Shareholder Litigation*, 73 A.3d 17 (Del. Ch. 2013).

[2]*In re Good Tech. Corp. Stockholder Litig.* (Del. Ch. May 12, 2017).

[3]*Halpin v. Riverstone Nat'l, Inc.*, C.A. No. 9796-VCG (Del. Ch. Feb. 26, 2015).

[4]*See* https://www.wsgr.com/en/insights/delaware-supreme-court-enforces-waiver-of-statutory-appraisal-rights.html.

THE DOJ IS LOCKED ONTO HEIGHTENED ANTITRUST ENFORCEMENT: ASSA ABLOY/ SPECTRUM BRANDS

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On September 15, the U.S. Department of Justice's Antitrust Division ("DOJ") filed an antitrust lawsuit[1] to block ASSA ABLOY AB's ("ASSA ABLOY") proposed $4.3 billion acquisition of Spectrum Brands Holdings, Inc.'s Hardware and Home Improvement business ("Spectrum HHI").

In its complaint,[2] the DOJ described ASSA ABLOY (whose brands include August, EMTEK, Sure-Loc, Valli & Valli, and Yale) and Spectrum HHI (whose brands include Baldwin Estate, Baldwin Reserve, Baldwin Prestige, and Kwikset) as two of the three largest producers of residential door hardware in the concentrated $2.4 billion U.S. industry. The DOJ has alleged that the proposed transaction is likely to substantially lessen competition in violation of Section 7 of the Clayton Act in at least two relevant markets: (1) premium mechanical door hardware and (2) smart locks.

The DOJ has adopted three main arguments to support its case: (1) the transaction would give the combined company high market shares (65% of premium mechanical door hardware and 50% of smart locks) and would significantly increase concentration, lead-

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ing to highly concentrated markets, thereby presumptively violating the Clayton Act; (2) the transaction would eliminate head-to-head competition between ASSA ABLOY and Spectrum HHI, allowing the combined company to raise prices, lower its quality of services and products, and reduce innovation; and (3) the transaction would increase the likelihood of anticompetitive coordination by creating a duopoly in which the two large players have an increased ability to analyze and plan for each other's conduct.

ASSA ABLOY's offer to divest portions of its business failed to resolve the DOJ's concerns with the deal. The DOJ asserted that "the touchstone of any appropriate antitrust remedy is the immediate, durable, and complete preservation of competition." According to the DOJ, ASSA ABLOY's proposed sale of an "incomplete package of assets," which would involve a complex carveout and potential ongoing entanglements between the company and a potential divestiture buyer, failed to meet these exacting standards. Interestingly, the DOJ has also argued that the mere fact that the parties negotiated and agreed to offer a divestiture remedy, if needed to satisfy the DOJ, was a concession that the transaction would harm competition.

This challenge highlights some key trends in antitrust enforcement under the Biden Administration. The DOJ remains keenly focused on innovation theories of harm across industries. The DOJ may seize upon the parties' contractual negotiations around regulatory matters—specifically the extent of agreed-upon divestiture remedies—as evidence that a transaction would harm competition. Investigations are taking longer, and merging parties may need to agree to longer transaction timelines up front or be prepared to extend merger agreements in the event of a protracted investigation or litigation.

Innovation Concerns Remain Sector Agnostic

One of the DOJ's key concerns is the transaction's potential impact on innovation. The complaint emphasizes that the defendants' respective investments into research and development, and the resulting introduction of new smart locks, was directly spurred by the competition that exists between the parties today. Some of the elements of innovation that have come about due to competition include digital features like fingerprint-enabled and Wi-Fi smart locks, as well as core features like size, appearance, and pricing. Given the growth of the digital economy (including the Internet of Things and other connected products), the antitrust agencies are likely to continue to consider innovation theories of harm more frequently across many sectors.

Divestiture Obligations as Evidence of Anticompetitive Effect

Given the "massive competition problem[s]" associated with the transaction, the DOJ was reluctant to consider the parties' proposed structural remedies, deeming such a corporate restructuring to be "hazardous" and "inadequate." This rejection of ASSA ABLOY's proposal to divest aligns with the DOJ's previously announced policy preference for suing to block deals, rather than accepting "risky" piecemeal settlement offers.[3]

In addition, the DOJ repeatedly invoked in its complaint the parties'—fairly standard—contractual commitment to divest assets in order to secure antitrust clearance as "evidence" that the parties were "keenly aware that their proposed deal presented serious anticompetitive issues." The DOJ has alleged that the parties carefully negotiated which firm would bear the "inevitable" risk of antitrust enforcement and has criticized ASSA ABLOY's reluctance to divest any meaningful part of its business, suggesting that it was looking to "have its cake and eat it too" by appeasing antitrust enforcers without putting any of its key assets at risk. The use of the parties' merger agreement as evidence of anticompetitive effect has historically been unusual and fails to acknowledge that divestiture obligations often reflect merging parties' relative

bargaining leverage and risk tolerance, to the exclusion of a transaction's competitive effects.

Protracted Investigations May Mean Longer Transaction Timelines

The DOJ filed the lawsuit over a year after the parties announced the transaction on September 8, 2021. The parties announced this summer that they extended their agreement to June 30, 2023, suggesting they would prefer to accommodate a litigation timeline over abandoning the transaction. Investigation timelines of a year or more are meaningfully longer than under previous presidential administrations and are becoming increasingly common. Parties should be prepared to accommodate protracted antitrust review in their merger agreements or to extend transaction timelines if it becomes clear the agency will conduct an in-depth investigation.

Key Takeaways from the DOJ's Challenge of the Transaction

Much of the DOJ's focus on the ASSA ABLOY/ Spectrum transaction is not novel, but rather is an indication that the DOJ is holding firm on its commitment to aggressively enforce the antitrust laws. Merging parties should be cognizant of several points that are now becoming running themes of U.S. merger enforcement:

- The agencies will look at the impact of a merger on innovation, irrespective of the industry in which the transaction occurs.
- Merging parties' negotiations may be relevant to the agency's assessment of the transaction's impact on competition.
- Merger investigations can take up to a year, and with litigation, significantly longer, which should be accounted for in merger agreements.

ENDNOTES:

[1] https://www.justice.gov/opa/pr/justice-department-sues-block-assa-abloy-s-proposed-acquisition-spectrum-brands-hardware-and.

[2] https://www.justice.gov/opa/press-release/file/1535131/download.

[3] https://www.reuters.com/business/us-justice-antitrust-chief-says-hell-seek-stop-deals-not-settle-2022-01-25/.

BOARDS AND M&A: PLAYING, AND WINNING, THE GAME OF REGULATORY RISK

By Brandon Van Dyke, Clifford H. Aronson, David P. Wales, Frederic Depoortere and Kyle J. Hatton

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- With increasingly aggressive antitrust and foreign investment reviews, directors need to be fully informed about the risks of deals from the beginning of negotiations.
- Boards should insist that management and its advisers conduct a deep analysis of the regulatory risks and map out a variety of possible outcomes and responses.
- Because merger reviews are lasting longer and taking surprising turns, boards need to ensure that managements plan for the unexpected and negotiate terms that protect the parties and the value of the deal.

Boards are regularly called upon to guide management teams in answering the age-old strategic question: build or buy? But the already complex business calcu-

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