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Medtronic and Covidien's Blockbuster Medical Products Merger Clears FTC Antitrust Review with Divestiture

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The **Federal Trade Commission ("FTC") last week green-lighted Medtronic, Inc.**'s ("Medtronic") $42.9 billion **acquisition of Covidien plc** ("Covidien") after Medtronic agreed to a settlement that requires Medtronic to divest its drug-coated balloon catheter products to Spectranetics, a Colorado-based medical technology company.

The Commission's analysis of the proposed transaction focused upon the fact that Medtronic and Covidien had similar drug-coated balloon catheter products indicated for the femoropopliteal artery in the clinical-trial stage of development before final submission for FDA approval. For both, FDA approval appeared likely and C.R. Bard, Inc., currently the only supplier, would face competition from two new capable suppliers. The FTC alleged that the merger would only result in one additional supplier in the market rather than both Medtronic and Covidien, and thus prices would be higher than they would otherwise be were three suppliers actively competing. The divestiture of Covidien's pre-approval product aims to ensure primarily that three suppliers compete, rather than two, and that the third supplier, Spectranetics, can access the market in a timely manner.

There are two aspects of the settlement worth noting. First, the Commission's analysis of the national and international effects of the acquisition necessarily required coordination with other competition agencies around the world. Second, the Commission continues to analyze relevant products that have not yet been introduced into the market. The Commission looked over the horizon to see two apparent new entrants and took steps to ensure that even after the merger there would still be two new competitors for the incumbent monopolist.

Increasingly, the Commission is coordinating its efforts with international competition agencies when proposed acquisitions are likely to have a significant, worldwide impact. Here, both Medtronic's and Covidien's sales have grown over the past several years, in large part due to the international launch of several high-profile products, including insulin pumps, surgical equipment, and post-use syringe disposal systems. The Commission worked with its sister agencies in Canada, China, Japan, Mexico, and the European Union to determine the international effects that this blockbuster merger may have abroad. This cooperation and coordination are increasingly par for the course as more acquisitions have global implications – and they must be considered for those going through the HSR process.

The Commission also positioned this settlement as another example of its enforcement efforts across

all aspects of healthcare. In the last five years alone the agency has pursued several high-profile hospital acquisitions, several reverse payment settlement complaints, and extensive divestiture remedies in pharmaceutical mergers. As the agency noted in its press release, the settlement with Medtronic and Covidien “is part of the Commission’s ongoing effort to protect U.S. consumers from higher healthcare-related costs.” It is clear from the efforts here that the Commission is willing to look across the health care spectrum as part of its enforcement emphasis in this area.

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