



FEDERAL TRADE COMMISSION

[File No. 201 0014]

Stryker and Wright Medical; Analysis of Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; correction.

SUMMARY: The Federal Trade Commission published a document in the *Federal Register* of November 9, 2020, concerning the proposed consent agreement in the Matter of Stryker and Wright Medical. That document did not contain the Statement of Commissioner Rohit Chopra regarding this matter. This document corrects the omission.

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SUPPLEMENTARY INFORMATION:

Correction

In the *Federal Register* of November 9, 2020, in FR Doc.2020-24813, on page 71343, in the first column, after the signature of April J. Tabor, Acting Secretary, add the following:

Statement of Commissioner Rohit Chopra

Independent monitors and watchdogs are shadow regulators that promise to impartially report to the government. These individuals are typically paid by companies engaged in alleged wrongdoing as part of a settlement. Monitors typically have relevant expertise in an industry and are often former government officials.

In this matter, the Federal Trade Commission is resolving allegations that the merger between Stryker and Wright is unlawful by requiring divestitures and other provisions that will be overseen by an independent monitor. I write separately to detail

some of my ongoing concerns regarding the lack of adequate protections against independent monitor conflicts of interest in FTC orders.

Monitor Independence

Over the last twenty years, there has been substantial concern about whether auditors and other third parties are truly independent, or whether they are influenced by seeking additional fees for future business.¹ When it comes to monitors of settlements, an independent monitor ideally believes its primary responsibilities are to the government agency that relies on their work to ensure compliance with a settlement or order.

Unfortunately, they are not always so independent, given potential incentives for their firms to seek additional business with companies subject to monitoring. For example, in the FTC's investigation of Facebook for compliance with its privacy obligations under a 2012 Commission order, the FTC alleged major violations of the order even though PriceWaterhouseCoopers (PwC) was supposedly providing an independent assessment of the company's compliance.² In fact, I am unable to identify any recent case where a monitor has identified a material order violation that led to a subsequent penalty action.

The Commission's practice is to have the party alleged to have engaged in a law violation propose a monitor, subject to Commission approval. The party is also responsible for paying the monitor's fees, which can be substantial.

¹ Ken Brown & Ianthe Jeanne Dugan, *Arthur Anderson's Fall From Grace Is a Sad Tale of Greed and Miscues*, WALL ST. J. (June 7, 2002), <https://www.wsj.com/articles/SB1023409436545200>; Ben Protess & Jessica Silver-Greenberg, *New York Regulator Moves to Suspend Promontory Financial*, N.Y. TIMES: DEALBOOK/ BUSINESS & POL'Y (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/business/dealbook/new-york-regulator-moves-to-suspend-promontory-financial.html>; Jeff Horwitz, *US to fire monitor overseeing formerly for-profit colleges*, THE SEATTLE TIMES (Mar. 14, 2016), <https://www.seattletimes.com/business/trouble-remains-following-failed-for-profit-schools-revival-3/>.

² See Nitasha Tiku, *Facebook's 2017 Privacy Audit Didn't Catch Cambridge Analytica*, WIRED (Apr. 19, 2018), <https://www.wired.com/story/facebooks-2017-privacy-audit-didnt-catch-cambridge-analytica/>; see also Dissenting Statement of Commissioner Rohit Chopra In re Facebook, Inc., Comm'n File No. 1823109 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

In this matter, the Commission has appointed a monitor who is an employee of a French-based global advisory business, Mazars, which provides consulting, accounting, tax, and other services.³ The agency's order requires the monitor to simply self-report any potential conflicts of interest. While this is better than nothing, it is not adequate, particularly when the monitor is employed by a large firm that offers a wide array of consulting and compliance-related services to companies like the targets in this matter. For example, will the monitor need to self-report a conflict when other units of Mazars bid for business with the merged entity? Many of these questions are unclear.

Protecting the Public from Conflicts of Interest

The Commission should strengthen the conflict-of-interest and transparency provisions in our orders related to monitors across the FTC's mission by exploring whether to:

- Require monitors and their employers to agree to non-solicit provisions for a period of time after the completion of a monitoring engagement.⁴
- Publish certain work products of monitors that detail their activities to ensure order compliance.⁵
- Create open application processes for potential monitors to detail their qualifications, as the Commission pursued in the Herbalife matter.⁶

³ Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Stryker / Wright Medical*, File No. 191-0039; see also *About Us*, MAZARS (last visited Nov. 2, 2020), <https://mazarsusa.com/about/>.

⁴ See Statement of Commissioner Rohit Chopra Regarding Miniclip and the COPPA Safe Harbors, Comm'n File No. 1923129, (May 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1575579/192_3129_miniclip_-_statement_of_cmr_chopra.pdf.

⁵ See Statement of Commissioner Rohit Chopra In the Matter of Uber Technologies Inc., Comm'n File No. 1523054, (Oct. 26, 2018), https://www.ftc.gov/system/files/documents/public_statements/1418195/152_3054_c-4662_uber_technologies_chopra_statement.pdf.

⁶ See *In the Matter of Federal Trade Commission, Plaintiff, v. Herbalife International of America, Inc., Applications for Compliance Auditors*, (Aug. 31, 2016), <https://www.ftc.gov/public-statements/2016/08/applications-herbalife-independent-compliance-auditor>.

- Require monitors to attest, under penalty of perjury, that they hold no financial interests in the industry of the companies subject to monitoring.

I am skeptical that the Commission can truly remedy anticompetitive harm with complex settlements that require independent monitors. While many monitors certainly provide independent advice and analysis, it is critical that their actions are never distorted by any real or perceived conflicts of interest.

Dated: November 20, 2020.

April J. Tabor,

Acting Secretary.

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