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Skadden, Arps, Slate, Meagher & Flom LLP
& Affiliates

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Ian G. John
New York
212.735.3495
ian.john@skadden.com

Karen Hoffman Lent
New York
212.735.3276
karen.lent@skadden.com

Sharis A. Pozen
Washington, D.C.
202.371.7555
sharis.pozen@skadden.com

Neal R. Stoll
New York
212.735.3660
neal.stoll@skadden.com

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1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

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Federal Trade Commission Settles Illegal Information Exchange Allegations With Bosley, Inc.

On April 8, 2013, the Federal Trade Commission (FTC) announced a proposed settlement with hair restoration company Bosley, Inc. to resolve allegations that Bosley illegally exchanged competitively sensitive, nonpublic business information with competitor HC (USA), Inc., commonly known as Hair Club. According to the FTC, these exchanges facilitated coordination and endangered competition in violation of Section 5 of the Federal Trade Commission Act, which broadly prohibits unfair competition.

In its complaint, the FTC alleged that "[f]or at least four years, Bosley's and Hair Club's chief executive officers ("CEOs") repeatedly exchanged … information regarding aspects of their firms' surgical hair transplantation business." The specific types of information allegedly exchanged included "detailed information about future product offerings, surgical hair transplantation price floors, discounting, forward-looking expansion and contraction plans, and operations and performance." The alleged effect of such exchanges was reduced uncertainty regarding competitor product offerings, price discounting, marketing plans and operating strategies, all of which the FTC alleged facilitated coordination and created the potential for reduced expansion and price fixing. The FTC concluded that Bosley's and Hair Club's information exchanges lacked any legitimate business justification.

The FTC announced that its decision to take enforcement action was driven by "the types of information involved, the level of detail, the direct nature of the communication, and the absence of any related pro-competitive impact." In addition, the FTC noted that Bosley "viewed these exchanges as business as usual" and had engaged in similar exchanges with other competitors, increasing the potential for harm.

Under the proposed settlement agreement, Bosley will be prohibited from "communicating any competitively sensitive, non-public information to any competitor," and from "requesting, encouraging, or facilitating the communication of competitively sensitive non-public information from any competitor." In addition, Bosley will be required to implement an antitrust compliance program to ensure ongoing compliance with U.S. antitrust laws, and to adhere to other customary notice provisions with respect to the terms of the settlement.

The proposed Bosley settlement highlights the continuing resurgence of enforcement actions under Section 5 of the FTC Act, which generally allows the FTC fairly broad discretion to challenge conduct the agency believes to be competitively unfair. It also is a sharp reminder that the U.S. antitrust agencies are watchful for the exchange of sensitive business information between rivals that may facilitate anticompetitive conduct. While an information exchange is not necessarily unlawful under the antitrust laws, Bosley affirms that "[c]ompetition may be unreasonably restrained whenever a competitor directly communicates, solicits, or facilitates exchange of competitively sensitive information with its rivals, particularly where such information is highly detailed, disaggregated and forward-looking." The case reinforces the need for corporations to maintain an effective antitrust compliance program as a preemptive means of minimiz-

ing conduct that could result in government enforcement or private litigation, which often follows government enforcement. Moreover, corporations should consult with antitrust counsel before exchanging competitively sensitive information with rivals.

Additional Partner Contacts in the Antitrust and Competition Group

Name	Office	Phone	Email
Clifford H. Aronson	New York	212.735.2644	clifford.aronson@skadden.com
Simon Baxter	Brussels	32.2.639.0310	simon.baxter@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
Alec Y. Chang	New York	212.735.4142	alec.chang@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Frederic Depoortere	Brussels	32.2.639.0334	frederic.depoortere@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Matthew P. Hendrickson	New York	212.735.2066	matthew.hendrickson@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
John H. Lyons	Washington, D.C.	202.371.7333	john.h.lyons@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Steven C. Sunshine	Washington, D.C.	202.371.7860	steven.sunshine@skadden.com
Ingrid Vandenborre	Brussels	32.2.639.0336	ingrid.vandenborre@skadden.com
James S. Venit	Brussels	32.2.639.0300	james.venit@skadden.com