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U.S. Department of Justice and Federal Trade Commission Host Antitrust Enforcers Summit

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On April 4, 2022, the U.S. Federal Trade Commission and U.S. Department of Justice (together, the "Agencies") hosted international and state antitrust enforcers for panel discussions on current and emerging enforcement trends. U.S. agency leaders Assistant Attorney General ("AAG") Jonathan Kanter and FTC Chair Lina M. Khan used the Summit to help showcase their policy objectives and enforcement priorities as part of President Biden's efforts to harness antitrust as a tool to pursue his administration's broader agenda.

A few key themes emerged from the Summit:

- The Agencies plan to substantively reform their approach to evaluating and challenging mergers in digital platform markets, markets where non-price competition is the predominant form of competition, and non-horizontal markets.
- The Agencies will continue their efforts to expand the reach of antitrust enforcement—including through the adoption of novel theories of harm and seldom used enforcement tools, such as challenging allegedly unfair methods of competition on a standalone basis under Section 5 of the FTC Act and criminally prosecuting alleged monopolization under Section 2 of the Sherman Act.

The Agencies are expected to substantively revise the Merger Guidelines

Throughout the Summit, state and international enforcers (together, the "enforcers") celebrated merger control as the most important tool for preserving competition. Yet some enforcers bemoaned that the Agencies' current Horizontal and Vertical Merger Guidelines inadequately prevent competitive harms in myriad industries. Noting the Agencies' efforts to revise the current Merger Guidelines, enforcers discussed the current state of merger enforcement and identified areas where revisions may be appropriate. Among those concerns are:

- *Structural Presumptions*: Enforcers recognized that structural presumptions based on market shares are an essential starting place for merger analyses, but expressed concern that market share analysis alone does not necessarily paint an accurate picture of harm in dynamic markets, digital markets, and non-price markets.
- *Digital and No-Marginal Cost Products*: Enforcers expressed concern that traditional approaches to defining relevant markets and analyzing competitive effects do not apply to markets defined by non-price or negative price competition. For example, enforcers are particularly concerned with digital platforms that provide consumer facing services for "free" but monetize the service by selling advertisements. Enforcers suggested that the revised Guidelines could address this blind spot by adopting new economic tools, such as defining non-price markets

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through the “Small But Significant and non-Transitory Increase in Attention Costs” test. Enforces also suggested that the Agencies should place increased emphasis on ordinary course business documents.

- *Non-Horizontal Mergers*: Enforcers emphasized that antitrust should take a broad view of potential merger harms, including harms that may come from mergers that are neither strictly horizontal nor vertical, but are instead “non-horizontal” (i.e., conglomerate mergers, cross-market mergers, private equity acquisitions, and partial mergers). While the Agencies currently recognize that a broad range of non-horizontal transactions may be anticompetitive if they would enable a party to expand its monopoly power, or exclude rivals, through bundling, tying, and price discrimination, the enforcers suggested the Merger Guidelines could discuss these theories of harm in greater detail. Enforcers also suggested that the revised Merger Guidelines should provide a framework for analyzing transactions that might diminish or eliminate nascent competition, which often evade neat categorization into existing paradigms of vertical and horizontal harm.
- *Remedies and Divestitures*: International and local enforcers expressed agreement with the Agencies – and in particular AAG Kanter – that behavioral merger remedies inadequately address anticompetitive harms, and called on the Guidelines to expressly disfavor behavioral remedies.

While the precise scope, content, and timing of the revised Merger Guidelines remain unknown, signals from the Agencies suggest that they may substantially expand on and depart from the prior Guidelines, particularly with respect to issues surrounding digital platforms, non-price markets, non-horizontal mergers, and remedies. Ultimately, we expect that the regulatory environment for M&A transactions will continue to be unpredictable at best and at times more challenging than in the past; we expect the Agencies to probe novel or searching theories of harm during merger investigations.

The Agencies recommit to invigorating non-merger enforcement

In the non-merger context, the Agencies’ leadership signaled their intent to bring aggressive enforcement actions under novel legal and economic theories. For instance, the DOJ reiterated its commitment to criminally prosecute antitrust violations involving agreements in labor markets. DOJ staff celebrated recent court decisions that declined to dismiss indictments for employment-related violations under Section 1 of the Sherman Act and emphasized that labor market prosecutions will remain a priority. As the Agencies expand antitrust enforcement in labor markets, they also have been increasing their efforts to investigate whether a proposed transaction effects competition for workers.

AAG Kanter also reiterated that the DOJ will begin efforts to bring criminal charges for violations of Section 2 of the Sherman Act based on unilateral conduct of dominant firms. Not only is criminal prosecution for Section 2 violations unprecedented in the modern era, the DOJ historically has analyzed Section 2 cases under the rule of reason, which is an in-depth factual analysis unlike the “*per se*” rule, and prosecuted them only on a civil basis, reserving criminal enforcement for the most hardcore *per se* violations, such as agreements between competitors to fix prices or allocate markets. The DOJ has not prosecuted a Section 2 case criminally since 1981, and has brought only a handful of *civil* Section 2 cases in the past twenty years. Given the Supreme Court’s guidance that *per se* treatment should be used only for restraints with “manifestly anticompetitive effects” that “lack any redeeming virtue,” and per se treatment of single-firm conduct is rare, efforts to revive criminal Section 2 enforcement will likely face significant headwinds in the courts.

The DOJ and FTC further signaled increased civil enforcement actions, especially against interlocking directors involving competitors under Section 8 of the Clayton Act. And the FTC committed to challenging anticompetitive conduct that falls short of a Sherman Act violation under Section 5 of the FTC Act. Likewise, the FTC suggested it may regulate markets through its substantive rule-making authority. Previous workshops suggest that

the FTC intends to target worker misclassification and other labor-related practices.

Concurrent with the Summit, the DOJ announced updates to its leniency program that foreshadow an era of criminal enforcement in which leniency applicants will face additional eligibility hurdles and heightened scrutiny. Under the revised policy, the DOJ will no longer grant leniency to companies that fail to promptly report cartel violations and will condition leniency on swift remediation of historic violations. These revisions to the DOJ's leniency program create divergences from major international leniency programs that do not include these eligibility requirements.

In addition to a number of other changes, including with respect to civil litigation and Type B leniency, the leniency program's frequently asked questions ("FAQs") added compliance officers, alongside board members and legal counsel, as "authoritative representative[s] of the applicant for legal matters." As a result, when any of these individuals discover collusive conduct, it will be attributed to the company and used to determine whether leniency was promptly sought.

Additionally, the FAQs do not define the meaning of "prompt." Rather, the DOJ will base its determination of promptness on "the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant." Importantly, it imposes on the applicant the "burden to prove that its self-reporting was prompt."

The changes to the leniency program may create uncertainty as to leniency eligibility when companies make the determination whether to self-report. The drafting of the FAQs would have benefited from a consultation process with the private bar and the business community as is common in other jurisdictions.

While the Agencies' expanded use of the federal antitrust laws, both through potential criminal enforcement (the mechanics of which remain unclear) and broader civil enforcement through Section 5 of the FTC Act, indicates novel challenges are likely, Article III courts ultimately determine whether conduct violates the antitrust laws. Where an Agency challenge departs from precedent and modern antitrust principles, parties should be prepared to vindicate their conduct through litigation before district and circuit courts, which tend to favor adherence to precedent instead of embracing novel and untested theories of liability.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following:

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