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

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On March 27, 2023, the U.S. Department of Justice and U.S. Federal Trade Commission (together, the "Agencies") hosted international and state antitrust enforcers for panel discussions on current and emerging enforcement trends. Agency leaders Assistant Attorney General ("AAG") Jonathan Kanter and FTC Chair Lina M. Khan used the Summit to showcase their efforts to update the antitrust laws and expand their enforcement efforts in the "modern economy."

Three key themes emerged from the Summit:

- The Agencies believe case law based on economic theory developed in the 1970s must be updated, especially to account for application to modern economic structures.
- To set new precedent, the Agencies must aggressively challenge and litigate cases, even if they lose at trial.
- As part of their broader effort to expand enforcement, the Agencies are attempting to reinvigorate seldom-used enforcement tools, such as the Robinson-Patman Act and criminal enforcement of Sherman Act Section 2.

The Agencies are expected to bring merger challenges and conduct cases under novel theories of harm to develop new precedent.

During the Summit, federal, state, and international enforcers discussed their efforts to ensure competition in the "new" economy (which they described as being media and technology markets characterized by innovation, network effects, and so-called platform-based business models). Enforcers specifically celebrated the formation of technology and AI task forces, updated enforcement guidelines to reflect novel theories of harm, and recent enforcement actions against technology firms they consider dominant.

During these discussions, Agency leadership announced their intent to push courts to update judicial precedent by aggressively bringing enforcement actions under novel or seldom-used theories of harm. Chair Khan and AAG Kanter expressed concern that "stale" antitrust doctrine has been under-deterring anticompetitive conduct in the "new" and "old" economies alike and announced that aggressive test cases—even if they result in trial losses—were needed. Throughout panel presentations, Agency leadership specifically committed to bringing test cases challenging mergers and alleged monopolistic conduct.

- *Mergers and Acquisitions*: John Newman, Deputy Director of the FTC's Bureau of Competition, indicated that the FTC would continue to aggressively challenge acquisitions in what it views to be nascent digital markets. Newman specifically cited the FTC's challenge to Meta's acquisition of Within as a "success" in that

Related People

Jamie E. France

Jay P. Srinivasan

Rachel S. Brass

Stephen Weissman

Veronica H. Altabef

Logan Billman

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the FTC persuaded the court that its market definition and theory of harm were valid, despite ultimately losing on the merits.

- *Monopolization*: Deputy Assistant Attorney General Hetal Doshi indicated that DOJ would continue to criminally prosecute alleged monopolization and agreements to allocate labor markets. Doshi announced that DOJ was working to establish "indicia of criminality" that would elevate monopolization from a civil to a criminal offense and that DOJ would bring test cases to develop these indicia as appropriate. Chair Khan announced the FTC was focused on prosecuting "incumbent [technology firms who] resort to anticompetitive tactics to protect their moat and protect their dominance."

The Agencies are expected to attempt to reinvigorate enforcement efforts under seldomly used statutes.

Agency leadership also recommitted to using every "tool in the toolbox" to protect competition, including the Robinson-Patman Act and Clayton Act Sections 3 and 8. Chair Khan stated that a key pillar of her leadership approach was the continued full "activation" of all antitrust statutes at her disposal. Throughout the panel, the Agencies specifically identified three statutes they intend to enforce more aggressively.

Robinson-Patman Act: The Robinson-Patman Act (RPA), which prohibits price discrimination, was enacted to protect small businesses by preventing larger companies from using their purchasing power to obtain better prices. However, it has been seldom enforced since 1970 due to concerns it harmed consumers by punishing efficient firms. Current Democratic FTC leadership has repeatedly declared the non-enforcement of the RPA was an error, and the FTC has recently launched RPA investigations into multiple industries. Chair Khan also indicated that the FTC's next challenge under the RPA would be filed in "short order."

Clayton Act Section 3: Section 3 of the Clayton Act prohibits anticompetitive exclusive dealing arrangements, tying arrangements, and requirements contracts. Chair Khan committed to using Section 3 and Section 5 of the FTC Act to prosecute unfair selling and buying practices and highlighted the FTC's complaint against two companies (alleging the firms violated Section 3 by paying distributors to block generic pesticide products) as a framework for future enforcement actions.

Clayton Act Section 8: Section 8 of the Clayton Act prohibits interlocking directorates, where a person simultaneously serves as a director or officer of two competing corporations. The law is designed to prevent conflicts of interest and promote fair competition by ensuring that competing companies have independent leadership. AAG Kanter highlighted four recent enforcement actions under Section 8 and committed to enforcing the statute more broadly, especially against private equity firms.

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As the Agencies expand enforcement and bring novel challenges, companies and individuals should be cognizant that district and circuit courts ultimately determine whether conduct violates the antitrust laws and tend to favor adherence to precedent instead of embracing novel and untested theories of liability. As a recent string of Agency defeats at trial demonstrate, parties may ultimately succeed in vindicating their conduct through litigation in federal court.

The following Gibson Dunn lawyers prepared this client alert: Rachel Brass, Jay Srinivasan, Stephen Weissman, Jamie France, Caroline Ziser Smith, Veronica Altabef, Hadhy Ayaz, Logan Billman, Tiffany Mickel*, and Nick Rawlinson.

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

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whom you usually work, any member of the firm's Antitrust and Competition or Mergers and Acquisitions practice groups, or the following:

Antitrust and Competition Group: Jamie E. France – Washington, D.C. (+1 202-955-8218, jfrance@gibsondunn.com) Jay P. Srinivasan – Los Angeles (+1 213-229-7296, jsrinivasan@gibsondunn.com) Rachel S. Brass – Co-Chair, San Francisco (+1 415-393-8293, rbrass@gibsondunn.com) Stephen Weissman – Co-Chair, Washington, D.C. (+1 202-955-8678, sweissman@gibsondunn.com)

Mergers and Acquisitions Group: Robert B. Little – Co-Chair, Dallas (+1 214-698-3260, rlittle@gibsondunn.com) Saee Muzumdar – Co-Chair, New York (+1 212-351-3966, smuzumdar@gibsondunn.com)

**Tiffany Mickel is an associate in the Washington, D.C. office admitted only in Maryland and practicing under supervision of members of the District of Columbia Bar under D.C. App. R. 49.*

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