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Recent FTC Announcements Shed Light on Competition Enforcement Agenda

- Recent FTC documents outline several areas of particular focus for the Commission's enforcement agenda, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership.

- Firms within the areas of FTC focus may receive investigative demands, and investigations could lead to the FTC seeking to promulgate industry-wide rules.

A recent memo from Chair Lina Khan to the Federal Trade Commission (FTC) Staff and Commissioners and a series of investigatory resolutions recently approved by the FTC shed some light on the Commission's enforcement agenda. Taken together, these documents outline several areas of particular focus, including: mergers, single-firm conduct, common ownership and interlocking directorates, and private equity ownership.

In her memo, Chair Khan said that the FTC would seek to use its "full set of tools and authorities—including rulemaking and research in addition to adjudication," and would take a "holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers." She also wrote that the Commission's focus would be "on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans."

Areas of Focus

Mergers

With respect to mergers, Chair Khan wrote in her memo that the FTC "needs to address rampant consolidation and the dominance that it has enabled across markets" and needs "to find ways to deter unlawful transactions." She said that the "rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives." She wrote that she is seeking to identify "ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers." The FTC has noted the burden of an increase in merger filings several times in recent months. Earlier this year (before Chair Khan joined the FTC) the Commission suspended the practice of granting early terminations of the waiting period required for deals notified under the HSR Act, and this suspension remains in effect. More recently, the FTC has been sending warning letters to parties when it does not finish merger reviews within the statutory timeline. Apart from investigations of individual proposed mergers, in July the FTC authorized an investigation into consummated mergers, acquisitions or transactions.

Chair Khan also wrote that revising merger guidelines will be a "key project" and described prior guidelines as representing "a somewhat narrow and outdated framework for assessing mergers." Indeed, following the issuance of President Biden's Executive Order on Competition in the American Economy in early July – which called for the FTC and Department of Justice (DOJ) to review the then-existing horizontal and vertical guidelines – the agencies said that they would examine whether the merger guidelines should be updated "to reflect a rigorous analytical approach consistent with applicable law." The FTC recently rescinded the Vertical Merger Guidelines, though, at least for now, they remain in place at the DOJ. In her memo, Chair Khan said that "revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work."

Dominant-Firm Conduct and Market Power Abuses

Chair Khan also outlined a focus on conduct by "dominant" firms and "power asymmetries and the unlawful practices those imbalances enable." While she did not posit a metric to determine if a firm is "dominant," the memo did suggest a focus on firms acting as "gatekeepers." In particular, Chair Khan wrote, "gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power." She also wrote that "[b]usiness models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse."

She wrote that the FTC should be "especially attentive to next-generation technologies, innovations, and nascent industries across sectors," and that "[t]imely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term." Chair Khan also urged "taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices" and that "market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms." She specifically pointed to "non-competes, repair restrictions, and exclusionary clauses."

Relatedly, the FTC has broadly authorized Staff to "investigate whether any persons, partnerships, corporations, or others have monopolized or are monopolizing, have attempted to monopolize or are attempting to monopolize, or have conspired or are conspiring to monopolize." According to the FTC, "digital markets" will be a focus. The FTC also authorized staff to investigate "unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . relating to abuse of intellectual property." The press release accompanying this resolution specifically mentioned the effect of alleged "abuse of intellectual property rights" on competition in "pharmaceuticals, technology and gasoline refining."

Private Equity

In her memo, Chair Khan also wrote about what she termed "extractive business models." She asserted that "the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations," and that "[e]vidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority."

In addition to Chair Khan, others at the FTC have taken a skeptical view of private equity. For example, Commissioner Chopra – who may soon leave the Commission to become head of the Consumer Financial Protection Bureau – dissented from the FTC's acceptance of a proposed consent order which involved, among other things, a divestiture to a private equity sponsored purchaser. He wrote that he believed there are "special considerations with financial buyers" and that "private equity participation is . . . associated with . . . firm behavior that can reduce long-term competition, including opportunistic asset sales."

This view of private equity can be seen to contrast with a view taken by the DOJ in the prior administration that private equity may support competition in certain instances, for example by funding a divestiture buyer in a merger remedy. In September 2020, the DOJ published a Mergers Remedy Manual which recognized that "in some cases a private equity purchaser may be [a] preferred" purchaser of divestiture assets. At the very least, according to the manual, the DOJ Antitrust Division "will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms."

Common Ownership and Interlocking Directorates

In its recent set of resolutions, the FTC authorized staff to investigate "whether any persons, partnerships, corporations, or others simultaneously have served, or are serving, as an officer or director of two or more competing corporations or partnerships or simultaneously have had, or have, financial interests of any kind in two or more competing corporations or partnerships."

With respect to interlocking directorates, Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, "[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that are . . . by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." The law has certain safe harbor exceptions based on the magnitude of the "competitive sales" of the corporations – i.e., "all products and services sold by one corporation in competition with the other." Section 8 does not prohibit interlocking directorates below these thresholds. Section 8 has been interpreted to cover both "direct" interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion "indirect" interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been "deputized" to act on behalf of the same third entity (e.g., a private equity fund).

Earlier this year, the DOJ expressed concerns that interlocking directorates between two companies involved in promoting and selling tickets to live entertainment and sports events violated Section 8 of the Clayton Act. Here, according to the DOJ, two individuals served as directors of one company; and, at the same time, one of the individuals served as a director and the other individual served as an officer of another company involved in the same business as the first. The two individuals resigned their positions on the Board of the first company in order to address the DOJ's concerns.

Common ownership – specifically, whether a firm's simultaneous ownership of the stock of competing firms can have competitive effects – has been the subject of academic debate for several years. It also featured as a topic at one of former Chairman Simons' Hearings on Competition and Consumer Protection in the 21st Century.

Other Areas of Focus

In addition to the compulsory process resolutions discussed above, the FTC also authorized an investigation into unfair or anticompetitive acts or practices affecting children and an investigation into unfair or anticompetitive acts or practices affecting armed forces service members and veterans. Algorithmic and biometric bias, deceptive and manipulative conduct in the internet, and repair restrictions are also the subjects of authorized investigations. Earlier resolutions authorized investigations into "healthcare markets, including those regarding pharmaceuticals, pharmacies, pharmacy benefit managers, medical devices, hospitals, or other healthcare facilities or services"; "markets with participants that provide technology platform services, including platforms that connect users, buyers, sellers, or other market actors"; and unfair or deceptive acts or practices "targeting current or prospective workers or small business operators."

Significance

The authorizations of compulsory process contained in the FTC's recent investigatory resolutions will allow the Commission's Staff, over the signature of any one Commissioner, to compel companies to produce documents and provide testimony pursuant to civil investigative demands (CIDs). In the near term, companies within the target areas of focus could receive CIDs (and indeed some may already have). It should also be noted that, while we would expect these priorities to receive near-term attention, the investigations have been authorized for a period of ten years.

Beyond the possibility of receiving compulsory process from the FTC, companies in the targeted areas may be affected by future FTC rulemaking. While the outcome of any individual investigation of course remains to be seen, Chair Khan's reference to rulemaking in her memo – and her prior support of the FTC engaging in rulemaking – suggests that in the future the FTC may seek to promulgate industry-wide rules governing certain conduct and industries under investigation. If the FTC does indeed promulgate such rules, they would be enforceable by Commission action, and violators could face FTC-imposed fines. For example, while interlocking directorates have historically been an enforcement focus, they are typically resolved by having the parties resign a position to get rid of the interlock. While no such rule has yet been proposed, if the FTC does promulgate a rule against interlocking directorates, this may signal a desire by the FTC to assess fines in those situations.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

Charles F. (Rick) Rule
+1 202-223-7320
rrule@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1 212-373-3852
btannenbaum@paulweiss.com

Jared P. Nagley
+1 212-373-3114
jnagley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.