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Spring Enforcers Summit 2022: DOJ and FTC Double Down on New Era of Enforcement

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Previewing much of what is to come at the ABA Antitrust Section Spring Meeting, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) held a Spring Enforcers Summit (the “Summit”) on April 4, 2022. The Summit comes as newly appointed leaders at the FTC and DOJ have explicitly articulated their goal of implementing a once-in-a-generation shift in the U.S. antitrust landscape in light of their clear skepticism of transactions generally and in favor of significantly more stringent antitrust enforcement. Key developments discussed at the Summit include:

- The Revision of the Merger Guidelines and Protecting Nascent Competition
- Continued Skepticism about Behavioral Remedies in Non-Horizontal Mergers
- DOJ “More Committed than Ever” to Litigating Anticompetitive Transactions
- Heightened DOJ Scrutiny of Prohibition on Interlocking Directorates
- More Onerous Conditions for Corporate Applicants under DOJ’s Updated Leniency Policy

THE REVISION OF THE MERGER GUIDELINES AND PROTECTING NASCENT COMPETITION

On January 18, 2022, the FTC and DOJ announced that they were “soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today’s modern markets.”¹ During the Summit, FTC Chair Lina M. Khan and DOJ Assistant Attorney General Jonathan Kanter reiterated their commitment to reconsidering antitrust enforcement frameworks to match market realities in view of alleged mounting evidence of high concentration across industries.

A recurring theme at the Summit was the agencies’ concern regarding transactions in which large firms acquire nascent threats to their business, and how to better identify and stop such transactions. Gwendolyn Cooley, Chair of the National Association of Attorneys General’s Multistate Antitrust Task Force, commented that these kinds of transactions often cause anticompetitive harm but may be hard for regulators to challenge under the current antitrust framework. We expect the topic of “nascent competition” to remain squarely in the antitrust agencies’ focus for the coming years. Companies may expect to see new merger review guidance that explicitly provides for consideration of “nascent competition” concerns, which will likely be issued jointly by the DOJ and FTC, later in 2022.

What is clear is that the agencies are attempting to establish a “neo-Brandeisian” antitrust regime to replace the post-Chicago School framework for merger review. While the agencies are rewriting guidelines, giving speeches and bringing cases that leave no doubt as to their intention, what is not clear is how the judiciary will react to the attempt to overturn a half century of litigated precedent.

CONTINUED SKEPTICISM ABOUT BEHAVIORAL REMEDIES IN NON-HORIZONTAL MERGERS

Several antitrust authority representatives, including from outside the United States, questioned the effectiveness and appropriateness of using “behavioral” remedies for vertical transactions. Behavioral remedies seek to protect competition by prohibiting a newly merged firm from engaging in certain future conduct or requiring it to provide intellectual property licenses. Last accepted by the FTC in its approval of the *Northrop Grumman/Orbital ATK* vertical deal in 2018, we believe current FTC and DOJ leadership will now flat-out refuse most behavioral solutions to vertical competition concerns.² More generally, market participants must remain on the lookout for a more aggressive stance to vertical mergers by DOJ and FTC, as evidenced by DOJ’s litigation against the *United Health/Change* transaction and FTC’s challenge of three vertical mergers since Chair Khan’s appointment.³ However, the government has not prevailed in any litigated attempt to block a vertical merger in nearly half a century. The government’s last litigated attempt to stop a vertical merger, the *AT&T/Time Warner* transaction, left little doubt as to the Court’s view of the established precedent in vertical acquisitions and the government’s burden to mount a successful challenge.

DOJ “MORE COMMITTED THAN EVER” TO LITIGATING ANTICOMPETITIVE DEALS

Referencing DOJ’s recent threat to sue to block the now abandoned merger between shipping equipment companies Cargotec and Konecranes—even after both companies had offered to divest part of their businesses—AAG Kanter stated that his agency would rather reject a settlement and litigate than let the public bear the risk that divestitures fail. AAG Kanter stressed that DOJ is “[m]ore committed than ever to litigate” and is investing additional resources in its litigation capabilities. Notably, the *Cargotec/Konecranes* deal had already been cleared by the European Commission and several non-U.S. regulators. Although historically the European Commission has been perceived as somewhat more willing to block deals than the U.S. agencies, those days are clearly over. For those considering and advising on the transactions that may catch the agencies’ eye, be prepared to litigate.

HEIGHTENED DOJ SCRUTINY OF PROHIBITION ON INTERLOCKING DIRECTORATES

Potentially signaling a change in enforcement priorities, AAG Kanter announced that DOJ will “not hesitate” to bring cases under Section 8 of the Clayton Act, which prohibits interlocking directorates between competing corporations (with limited exceptions). Historically, when DOJ concluded that directorships improperly overlap, it notified the firm and gave it a chance to avoid litigation or to convince the enforcers that the interlock is lawful. AAG Kanter’s statement suggests an increased appetite to litigate these matters, although we believe most companies will continue to voluntarily break up interlocking directorates if notified to do so by DOJ or FTC.

MORE ONEROUS CONDITIONS FOR CORPORATE APPLICANTS UNDER DOJ’S UPDATED LENIENCY POLICY

AAG Kanter also announced updates to DOJ’s Leniency Policy.⁴ Under DOJ’s Leniency Policy, an organization that reports its participation in illegal antitrust activity—such as a price-fixing cartel—before DOJ has begun an investigation, will not be charged criminally for the illegal activity (subject to certain conditions). The updated policy announced today now requires a corporate applicant to “promptly” self-report after discovering its wrongful conduct and to use “best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity.”⁵ These additional conditions may increase legal uncertainty for companies considering self-reporting.

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The Spring Enforcers Summit only amplified the agencies’ recent statements and actions indicating their skepticism of transactions and commitment to a new era of antitrust enforcement. In this current environment, companies contemplating a transaction need to consider heightened antitrust scrutiny as a deal risk and should negotiate a transaction agreement that carefully allocates that risk. Additionally, while many practitioners may continue to believe

and counsel clients that the agencies ultimately will stick to well-settled and litigated precedent when considering whether and how to challenge a transaction, we believe the views expressed at the Summit make even more clear that the agencies are looking to create new precedent altogether. Whether the agencies will be successful at this endeavor remains to be seen as the courts begin to consider whether to move beyond the well-established precedent when evaluating merger transactions.

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¹ Press Release, Dep't of Justice and FTC, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.

² Press Release, FTC, *FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.* (June 5, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket-motor-supplier-orbital-atk-inc>.

³ Press Release, Dep't of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (Feb. 24, 2022), <https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare>; Press Release, FTC, *FTC Sues to Block \$40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger>; Press Release, FTC, *FTC Sues to Block Lockheed Martin Corporation's \$4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.* (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne>; Press Release, FTC, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (March 30, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illumina-proposed-acquisition-cancer-detection-test-maker-grail>.

⁴ Press Release, Dep't of Justice, *Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions* (April 4, 2022), <https://www.justice.gov/opa/pr/antitrust-division-updates-its-leniency-policy-and-issues-revised-plain-language-answers>.

⁵ U.S. Dep't of Justice, *Justice Manual* § 7-3.000 (2022).