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Recent Developments Signal Aggressive Stance on Antitrust Enforcement under the Biden Administration

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July 27, 2021 - Despite President Biden's historically moderate stance on antitrust issues, his administration has set the stage for a significant expansion of antitrust enforcement. He has done so principally by nominating a prominent antitrust critic to lead the Department of Justice Antitrust Division (DOJ), by appointing a rising star among antitrust progressives to lead the Federal Trade Commission (FTC), and by issuing an executive order spurring numerous federal agencies to resist corporate consolidation and crack down on a variety of practices seen as anticompetitive.

President Biden Nominates Kanter as DOJ Antitrust Chief

On July 20, 2021, seven months into his administration, President Biden nominated Jonathan Kanter for Assistant Attorney General in charge of the DOJ's Antitrust Division. Kanter is a well-known proponent of aggressive antitrust enforcement against Big Tech and has a history of representing companies in antitrust cases against Big Tech companies. Kanter is a former co-chair of the antitrust practice at Paul, Weiss, Rifkind, Wharton & Garrison and the founding partner of The Kanter Law Group, a boutique firm that advocates for strong antitrust policy. In a May 2016 New York Times op-ed, Kanter wrote that "Google is said to have followed the same playbook for years: introducing a free product into a competitive space, subsidizing that product with advertising revenue, and then closing off competition through discriminatory and exclusionary practices." He argued that Google, therefore, should be subject to close regulatory scrutiny and restrictions to prevent anticompetitive practices.

Lina Khan Appointed Chair of Federal Trade Commission

On June 15, 2021, the U.S. Senate confirmed Lina Khan's appointment to the FTC. Within hours of her confirmation, President Biden named her chair of the FTC. The 32-year-old graduate of Yale Law School and associate professor at Columbia Law School rose to prominence with her calls for progressive antitrust policy reforms and her vocal criticism of Big Tech. She previously served as counsel to the U.S. House of Representatives Judiciary Committee's

Subcommittee on Antitrust, Commercial, and Administrative Law, where she helped prepare the subcommittee's October 2020 report recommending legislation to break up large U.S. technology firms, among other things.

President Biden previously appointed Columbia law professor and longtime tech critic Tim Wu to the National Economic Council as the President's Special Assistant for Technology and Competition Policy.

President Biden's Executive Order on Competition

On July 9, 2021, President Biden issued Executive Order 14036, Promoting Competition in the American Economy, to encourage competition and limit corporate consolidation. The sweeping order includes 72 initiatives involving the DOJ, FTC, and over a dozen other federal agencies, with oversight and coordination by a newly established White House Competition Council. The order calls for heightened scrutiny across many industry sectors including telecommunications, transportation, healthcare, defense, alcoholic beverages, financial services, and particularly:

- **Labor markets.** The order pushes for increased labor market mobility by encouraging the FTC to ban or limit employee non-compete agreements, clamp down on unnecessary occupational licensing restrictions, and address improper data collection and surveillance practices.
- **High technology.** The order urges the FTC to address unfair competition in major internet marketplaces, directs the Treasury Department to report on the effects of entry into consumer finance markets by large technology firms and other non-banks, and identifies dominant internet platforms, network effects, the acquisition of nascent competitors, data aggregation, and user surveillance as worthy of closer antitrust scrutiny.
- **Pharmaceuticals.** The order directs the Food and Drug Administration to support state and tribal efforts to import cheaper drugs from Canada, directs the Department of Health and Human Services to lower prescription drug prices and enhance domestic pharmaceutical supply chains, and urges the FTC to limit "pay for delay" patent settlement agreements.
- **Food and agriculture.** The order directs the Department of Agriculture to report on the effect of retail concentration on competition in food industries and encourages the Department to use its rulemaking authority to enhance price discovery in livestock markets, reduce manufacturers' restrictions preventing farmers from repairing their own equipment, and protect whistleblowers.

In response to the executive order, on June 9, 2021, Acting Assistant Attorney General of the DOJ Antitrust Division Richard A. Powers and FTC Chair Khan released a statement announcing their intent to undertake a review of the Horizontal Merger Guidelines, which they characterized as deserving of "a hard look to determine whether they are overly permissive." The agencies' stated goal is to "ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands." The agencies last revised the Guidelines in August 2010.

Federal Trade Commission Policy Changes

At its first two commission meetings (on July 1 and July 21, 2021)—the first commission meetings made open to the public in over 20 years—the Commission initiated a top-to-bottom expansion of its enforcement efforts by adopting a number of policy changes, typically voting to approve them 3-to-2 along party lines. The most significant of these policy changes follow.

1. Rescind 2015 Statement of Enforcement Principles

On July 1, the Commission rescinded the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" adopted by the Commission in 2015. The 2015 Statement established consumer welfare as the basis for the FTC's evaluation of whether conduct violates the prohibition of "unfair methods of competition" under Section 5 of the FTC Act. The standard, which focuses on whether conduct results in higher prices, lower output, quality and innovation, and other measures of economic efficiency, was consistent with decades

of legal precedent. By rescinding the 2015 Statement, the FTC has laid the groundwork for establishing a much more expansive and amorphous standard for determining whether methods of competition are “unfair.” Chairperson Khan and other progressives have advocated for a broader analysis that would take into account the effects of suspect conduct on wealth inequality, wage stagnation, the exclusion of smaller competitors, data privacy and portability, and other issues not directly related to economic efficiency. The Commission indicated that withdrawing the 2015 Statement “is only the start of [its] efforts to clarify the meaning of Section 5 and apply it to today’s markets.” It stated that, in the coming months, the Commission “will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny” under Section 5.

2. Rescind 1995 Policy on Prior Merger Approval

Three weeks later, on July 21, the Commission rescinded its “1995 Policy Statement on Prior Approval and Prior Notice Provisions.” Prior to 1995, companies that had previously consummated a merger subject to an FTC consent order were required to obtain prior FTC approval for any later transaction in the same product and geographic market for which a violation was alleged, rather than employing the Hart-Scott-Rodino merger clearance process. As part of the 1995 policy statement, the Commission did away with that requirement, demanding prior approval only when a “credible risk” of an unlawful merger existed. The rescission of that policy enables the FTC to again condition deal approval on the inclusion of such prior notice and approval provisions in its consent orders. “By rescinding a policy that lacked logic and rigor, the Commission is making clear to the market that it will seek, depending on the facts and circumstances, appropriate fencing-in relief to prevent repeat offenses by firms that propose illegal mergers,” Democratic Commissioner Rohit Chopra stated. “Firms pursuing anti-competitive mergers—and the lawyers who assist them—should take note.”

3. Update Rulemaking Procedures

At its July 1 meeting, the Commission approved changes to the FTC’s Rules of Practice that streamline the Commission’s procedures for the issuance of Trade Regulation Rules under Section 18 of the FTC Act. These changes are intended to improve transparency, process, and opportunity to be heard in FTC rulemaking proceedings. Democratic Commissioner Rebecca Kelly Slaughter described the changes as reducing “self-imposed red tape” and expanding methods for reining in unlawful conduct. This comes after the U.S. Supreme Court, in recent months, effectively struck down the FTC’s ability to pursue restitution orders for wrongdoers in federal court, leaving the FTC to use its own administrative process instead. Under the revisions, a published staff report analyzing the rulemaking will no longer be required and the Commission Chair rather than the FTC’s chief administrative law judge will preside over rulemakings, shifting more rulemaking power to the chair of the Commission.

4. Authorize Investigations into Key Enforcement Priorities

At the same meeting, the Commission approved a series of resolutions that authorize agency staff to focus their investigative efforts on seven law enforcement priorities: technology platforms; health care; pharmaceuticals; business practices targeting workers and operators of small businesses; potential infractions related to COVID-19; mergers; and repeat offenders. The Commission directed staff to use compulsory process, such as subpoenas and civil investigative demands, to further its investigative efforts and authorized it to do so under the supervision of a single Commissioner, instead of all five.

5. Adopt Made in USA Labeling Rule

At its July 1 meeting, the Commission also adopted a final Made in USA Rule, which codifies the Commission’s longstanding enforcement policy statement on the subject and allows the agency to seek a broader range of remedies against marketers who make false, unqualified claims that their products are Made in the USA.

6. Approve “Right to Repair” Policy Statement

At its July 21 meeting, the FTC voted unanimously to focus enforcement efforts on rolling back manufacturers’ restrictions on the ability of third parties (including consumers, government entities and aftermarket repair businesses) to fix the manufacturers’ products. The FTC reported findings to Congress in May of widespread manufacturer restrictions that impede repairs, including restrictions that make it difficult to replace parts and limit the availability of parts, tools, and diagnostic software, or withhold them altogether.

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