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Transition to the Biden Administration: Antitrust Enforcement in the Near Term

President-elect Biden has yet to name the officials who will oversee antitrust enforcement in his administration. Therefore, the focus of the administration's substantive agenda remains to be seen. However, the staffs of the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) will continue their work as the agencies transition to new leadership. Indeed, the agencies and their career staff can be expected to continue to investigate and prosecute pending cases and receive and review merger filings. Nevertheless, there are certain ways in which the trajectory and pace of the agencies' work might be impacted by the departure of political appointees from the current administration; and because the FTC and DOJ have different leadership structures, the change in presidential administration will impact each agency differently.

In this, our first in a series examining expectations for antitrust enforcement in the Biden administration, we address several important issues pertinent to the agencies' structure and work in the near term. Subsequent memoranda will discuss the agencies' likely substantive policy agendas which, because "personnel is policy" in Washington, will become much clearer once new leadership is named.

Antitrust Division of the U.S. Department of Justice

The DOJ Antitrust Division is run by a single Assistant Attorney General (AAG) who must be Senate-confirmed. The AAG is assisted by a Principal Deputy AAG (PDAAG) and several Deputy AAGs (DAAG) who are not Senate-confirmed. During the period before an AAG is confirmed, one DAAG will serve as Acting AAG. The Acting AAG has responsibilities and powers identical to those of the Senate-confirmed AAG, which include determining which investigations to undertake and when to take a formal action.

The current AAG is a Republican and he has indicated that he will step down around the time of the inauguration. If he does indeed resign, the most senior career official at the DOJ would likely become the Acting AAG. The incoming administration would then likely appoint a new DAAG to be Acting AAG to run the Antitrust Division until the new AAG is confirmed. Because the Acting AAG may, unlike an individual FTC commissioner, undertake official agency actions unilaterally, the DOJ's antitrust enforcement actions would not be subject to potential stalemate as could be the case at the FTC.

The timing of the Senate confirmation process can vary based upon a multitude of factors. The following chart sets out the time from nomination to confirmation for the last four DOJ Antitrust Division AAGs (not including AAGs who were confirmed to the position after serving as Acting AAG):

| <u>Antitrust AAG</u> | <u>Nominated/Confirmed</u> |
|-------------------------------|---|
| Makan Delrahim (2017-present) | Nominated: April 6, 2017 Confirmed: September 27, 2017 |
| Bill Baer (2012-2017) | Nominated: February 2, 2012 Confirmed: December 30, 2012 |
| Christine Varney (2009-2011) | Nominated: February 23, 2009 Confirmed: April 20, 2009 |
| Charles James (2001-2003) | Nominated: February 15, 2001 Confirmed: June 14, 2001 |

These four AAGs were all nominated within the first 100 days of the administration. The confirmation process for these nominees took between two and ten months.

Federal Trade Commission

The FTC is run by five commissioners who require Senate confirmation. The party affiliation of the commissioners is customarily oriented three-to-two in favor of the President's party. Additionally, the President designates one commissioner as Chairman. The commissioners serve staggered seven-year terms and must vote both to initiate investigations and to determine whether to commence a formal action such as administrative proceedings or the filing of a complaint in federal court. Each FTC bureau is headed by a director who is nominated by the Chairman and voted on (somewhat perfunctorily) by the five commissioners. The bureau chiefs oversee the career staff who run specific reviews and investigations.

It is somewhat common for commissioners to step down prior to serving a complete term. If this were to happen after President-elect Biden assumes office, the political party valence of the Commission could change. The current Chairman is a Republican, and there are two other Republican commissioners and two Democratic commissioners. The Chairman's term extends through September 26, 2024. However, if he or one other of the Republican commissioners steps down after Inauguration Day, then-President Biden would be able to appoint a third Democrat. President-elect Biden can designate the appointee or any incumbent commissioner as Chairman. In this scenario, the FTC would likely have fewer than five commissioners for several months while the nominee goes through the confirmation process.

The FTC has experienced prolonged periods of commissioner vacancies in the past; indeed, at certain times in 2017, the FTC had as few as two commissioners. Because an action by the FTC requires only the vote of a majority of incumbent commissioners, the FTC remains able to act during these periods. However, an evenly-split Commission may mean that certain investigations are not initiated and that certain actions in ongoing investigations are delayed (such as issuance of compulsory process, settlement or commencement of post-investigation litigation). Nevertheless, the day-to-day work of the FTC – that is, actions not requiring a Commission vote – can be expected to continue.

Alternatively, if neither the Chairman nor another Republican commissioner steps down prior to the expiration of their respective terms, Republicans would keep a three-to-two majority until 2023. (One Democratic commissioner's term expired in 2019¹ and the other's term will expire in 2022; the Republican commissioners' terms will expire in 2023, 2024 and 2025.) This perhaps unlikely scenario could result in the two federal antitrust agencies pursuing different

¹ Commissioner Rohit Chopra's term expired September 26, 2019 but he is able to continue to serve until the Senate confirms a replacement.

enforcement agendas and could have significant practical consequences for companies depending on which agency happens to investigate a company's conduct or proposed merger.

Conclusion

A change in presidential administrations can be a challenging time for businesses given potential regulatory uncertainty. While the antitrust agencies strive to continue their enforcement work as usual, it is prudent to understand the processes likely to unfold at the agencies as they transition to a new administration and to consider how this may impact the substance and timing of potential mergers or other initiatives that may have antitrust implications.

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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:

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