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"The Wheel Is Come Full Circle": FTC Investigations of the Supply Chain and Gasoline

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The FTC recently launched a wide-ranging investigation into supply chain disruptions and consumer price increases amidst the uneven recovery from the COVID-19 pandemic. The investigation, expected to start with subpoenas to large retailers and consumer goods companies, and possibly to reach others in the supply chain, including oil and gasoline companies, will scrutinize players at various levels of the supply chain for potential anticompetitive behavior.

As explained further below, companies in these and related industries should prepare now for an FTC investigation, by: (1) taking stock of their industry position, including key allies, threats, and opportunities; (2) conducting a risk assessment specific to their company, including their operations and documents; and (3) strategizing about how to best present themselves and their business activities to the agency, including their posture regarding cooperation.

The FTC's Investigation

Under Section 6(b) of the FTC Act, the FTC has broad authority to investigate companies and industries without needing a connection to a particular law enforcement purpose. The FTC investigative orders function like civil investigative demands. Although the applicable terminology differs slightly—FTC parlance refers to "6(b) studies" and the orders may require a recipient to file a "special report"—companies receiving investigative orders should not treat them as similar to CIDs, because they are frequently used as stalking horses for enforcement.

In early November, the FTC noticed the potential supply chain investigation for discussion during a later public meeting of the Commission. Then, in mid-November, the President requested that the FTC examine behavior potentially affecting the price of gasoline. During its November 18 public meeting, the FTC delayed the launch of the supply chain investigation to consider further the scope of companies and industries targeted. Two commissioners also wrote to the President requesting that he provide the basis for his concerns about the price of gasoline.. This week, the FTC approved the supply chain investigation by a unanimous vote, issuing Section 6(b) orders to large retailers, wholesalers, and consumer good suppliers. It is not known if or when the FTC will add the gasoline industry to its investigation.

Parallels between the Supply Chain and Recent Technology Investigations

The FTC investigation echoes past analogues and implicates past outcomes. In 2020, the FTC began a Section 6(b) retrospective study of mergers and acquisitions by large technology companies over the previous decade. The FTC's technology transactions Section 6(b) study came amidst widespread public and political discussion regarding potentially anticompetitive conduct in that industry, akin to public and political discussion regarding supply chain issues. About ten months later, an FTC enforcement action against one of the technology investigation targets followed and featured allegations about past illegal mergers. Similarly, over a decade ago, the FTC faced pressure from lawmakers to investigate gasoline prices and responded with a massive investigation of the entire industry.

The tech investigation also provides a warning for companies who do not initially receive a Section 6(b) demand from the FTC. There, the FTC subsequently issued additional rounds of Section 6(b) orders to technology companies. In December 2020, the FTC gathered information about the privacy practices of nine social media and video streaming companies and this year, the FTC sought information about the collection and use of personal data by internet service providers.

Gasoline Prices: Parallels between the Past and the Present

On November 17, President Biden wrote to FTC Chair Khan requesting that she investigate whether anticompetitive conduct is contributing to excessive gasoline prices. The President stated that "gasoline prices at the pump remain high, even though oil and gas companies' costs are declining." He explained that he wanted to "call [her] attention to mounting evidence of anti-consumer behavior by oil and gas companies." This letter continues a public exchange of letters among high-ranking officials in the White House and the FTC Chair. In August, the White House Director of the National Economic Council observed to Chair Khan that "gas prices tend to rise more quickly to adjust to spikes in oil prices than they fall when the price of oil declines." At the time, Chair Khan responded, "I am especially interested in ways that large national chains may 'restore' higher prices through collusive practices, and I will direct our staff to investigate any signs of this type of conduct."

The visible focus on gasoline prices and potentially anticompetitive behavior in oil and gas recalls an investigation that dates back nearly two decades. In 2005 and 2006, Congress directed the FTC to investigate whether anticompetitive conduct in connection with various levels of the gasoline supply chain caused high gasoline prices. The FTC opened a massive investigation using Section 6(b) and other sources of investigative authority, issuing hundreds of civil investigative demands to refiners, pipeline owners and operators, terminal owners, petroleum marketers, and retailers and took numerous depositions of industry players. Although the FTC did not ultimately take enforcement action, it published its findings in a report to Congress. It also shared information and coordinated with the Commodity Futures Trading Commission (CFTC) on multiple investigations pursuant to a Memorandum of Understanding between the two agencies.

As with the investigation nearly twenty years ago, the White House exchange with the FTC Chair is high-profile pressure on the agency to investigate gasoline prices and potentially anticompetitive conduct in the supply chain. While FTC action in response remains to be seen, the result of earlier pressure on the FTC to investigate gasoline prices is known: the FTC launched a massive investigation with hundreds of civil investigative demands and numerous other investigations, drawing significant resources of companies, while sharing information it collected with the CFTC and other agencies.

Preparing for the Wheel to Come Full Circle

The parallels between the supply chain disruption Section 6(b) study and the technology Section 6(b) study, and between the anticipated gasoline investigation and the previous one, suggests the FTC will undertake significant investigative and enforcement efforts. Companies in affected industries should begin preparing now. Companies should take at least the following steps.

First, companies should take stock of their industry position. They should evaluate their relative size and strength in the industry, where they fall within the supply chain and distribution system, and their potential allies and enemies in the industry. These inquiries are key for companies to evaluate the threats and opportunities that FTC investigative activity poses, including whether they are likely to be a target, a complaining victim, or a witness. That understanding can help shape strategy.

Second, companies should conduct a risk assessment specific to their company. They should evaluate their operations and the antitrust risks associated with them, including risks that may have arisen in the new antitrust environment. The current U.S. antitrust regulators are focused on new and expansive theories of liability, including with respect to vertical relationships in industries, vertically-integrated companies, and nascent competition. Companies also should evaluate internal documents, perhaps by sampling or auditing important business strategy documents.

Third, companies should strategize about how they will present themselves and their business activities to the FTC. They should develop evidence regarding the benefits of their products and services to consumers and the procompetitive rationales of their business relationships. In addition, they should consider the posture of their engagement with the FTC, including to what extent they will cooperate with or resist information and document requests.

The previous FTC investigations demonstrate that companies face significant risks from current and pending FTC investigative activity. But numerous companies have navigated those risks successfully. With advance planning and competent counsel, companies can prepare adequately to navigate the current risks in the new antitrust environment.

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