

## A Q&A with Deborah Garza

Ben Remaly

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Two former heads of the Department of Justice's antitrust division launched their own antitrust boutique last week. *GCR USA* spoke to Rule Garza Howley co-founder Deborah Garza about what motivated her to come out of retirement and what concerns her about the direction the Biden Administration is taking antitrust.

### **What motivated you to form this new firm with Rick Rule?**

I had been retired since the beginning of the covid-19 pandemic and tapering down the year before. I had decided for personal reasons before covid to try to focus my energies in my 60s outside the field of antitrust. Covid made it more difficult than I had anticipated making that pivot, and I had started to step back into antitrust at a policy level. For example, I was active with the American Bar Association

antitrust section domestic comments committee and am an ABA representative on the uniform commercial law study committee. Antitrust is just very interesting at this moment and the issues are very important.

Then Rick [who was co-chair of the antitrust group at Paul Weiss Rifkind Wharton & Garrison] reached out a few weeks ago to tell me that he was contemplating forming a small antitrust advisory boutique and asked whether I would be a founding member. It wasn't anything I was even remotely considering before he called. But I was intrigued by the idea of founding a small, diverse firm specialised in antitrust. It's an exciting opportunity, but in a different way from Big Law. Rick and I have a long history of working together. We went to law school together, worked together at the Antitrust Division in the early 1980s and were in private practice together at Covington & Burling and Fried Frank Harris Shriver & Jacobson. I am expecting to have a lot of fun.

### **What type of work does the firm hope to do?**

Each one of us has experience with transactions, civil and criminal investigations, advice and litigation. While we obviously don't have a pool of associates or the same resources as a big law firm, we are very well-positioned given our collective experience to provide focused strategic advice in high stakes matters and to help clients manage complex transactions and investigations. Personally, I would be happy to work as a mediator/arbitrator or a compliance monitor in addition to advising clients on complex matters. In general, clients are confronting a much more complex antitrust environment today, and I think there's a role for our firm to play.

**It's unlikely that anyone would question the antitrust expertise of the firm. But leadership in the Biden administration has made it quite clear they want to move competition law in a different direction. Are you concerned that it may be difficult to advise clients on this new wave of thinking?**

You are certainly correct that the Biden administration has made competition policy and increased enforcement a priority. But I feel confident about advising clients. To some extent, there's nothing new under the sun in antitrust. A key part of the thinking of the Neo-Brandeisians is to limit the aggregation of economic power where it would lead to reduced innovation, even without immediate price or output effects, and to ensure that enforcement isn't missing threats of competitive harm. But the basic principles and economic tools are the same, and innovation effects and effects on labour and other input markets have been a matter of focus for many years. Good antitrust advice has always required counsel to appreciate the facts and potential theories of antitrust harm. It all comes down to the same question: does this transaction or conduct have an anticompetitive effect?

**What has stood out most to you about enforcement from this administration?**

One thing is the attempt to change the burden of proof and another is chair [Lina] Khan's recent statement that having to go to court to enforce the antitrust laws is "undemocratic" and that agency rulemaking is more democratic. I think she bases that statement on the idea that rulemaking will follow public hearings at which the FTC will hear from a broad group of stakeholders. But I worry about the politicisation of antitrust enforcement and about this notion that going into court is undemocratic. The latter comes at a time of a broader questioning of our institutions from the right as well, and that concerns me.

I also have a concern about what will result from an attempt to criminalise section 2 enforcement. The effort actually could end up hurting the criminal enforcement programme.

I don't necessarily think that any of these more extreme proposals will take hold. I don't know that we are going to see criminal section 2 cases brought. But I do think it's important to address the proposals because they raise significant issues.

The agencies also seem to be doing things that are purposely intended to raise the regulatory costs of transactions. They would probably respond that they just want to make sure they don't miss anticompetitive deals and that they want companies to think harder before they put deals together. But overly aggressive antitrust enforcement can impose a cost on our economy and consumers. While it's not as troubling an issue to me as the other things, it's still important.

**From your own experience leading one of these agencies, do you have a sense of how difficult it might be trying to accomplish the things you set out to do?**

The agencies have to contend with the facts before them and they bear the burden of proof in court. In some instances, they may be trying to push the boundaries of the law. That is always a challenge.

It will be interesting to see whether the DOJ continues to do what [former assistant attorney general] Makan [Delrahim] did during the Trump administration with early amicus positions in private litigation. I suspect we will continue to see that.

**Do you get the sense that the business community is thinking more about antitrust now?**

I hope they are. They should be if they don't want to be surprised or frustrated in their transactions. There was a time not too long ago when a lot of businesses might have said, "Well, gosh, if we're not a

two-to-one or a three-to-two [merger], we're okay." The message coming from the agencies is that's not necessarily the case. The agencies may also be worried about a five-to-four [merger] or are concerned about certain vertical transactions or the effect on labour markets. Early good antitrust counselling is important.

**For years, the American Bar Association has seemingly been the benchmark for where antitrust enforcement stands. The progressive antitrust community, which is now much better represented in the government, tends to describe the ABA as the Boogeyman. Do you get a sense that there's a bigger cultural divide in the antitrust world right now?**

Well, yes and no. I don't know how different it is now. It seems that what might previously have been considered the "left" has shifted to the centre. From my perspective, the ABA antitrust section, the Federalist Society and the American Antitrust Institute have tended to be good for a balanced discussion. The antitrust bar has tended to be able to look across the issues and find some common ground, to define what the issues are and identify the relevant data. I hope that will continue to be the case. Once you get to the political side of it, it becomes a little bit different. In politics, people may pay a little less attention to facts and data. Antitrust politics may be a little bit more divisive than what we see at the enforcement level.

We've been continuously over the last many, many decades trying to find the right answer to questions like how to use new economic tools or apply antitrust to the way markets are evolving. I personally have been part of that discussion with the Antitrust Modernization Commission from 2004 through 2007. We have a history in antitrust of periodically reevaluating where we are and what we're doing. I think that's healthy. I think that should continue.