



2022 CLE Weeks

2023 Antitrust Outlook: Recent Enforcement Trends and What Lies Ahead

Elizabeth A. N. Haas
Kate E. Gehl



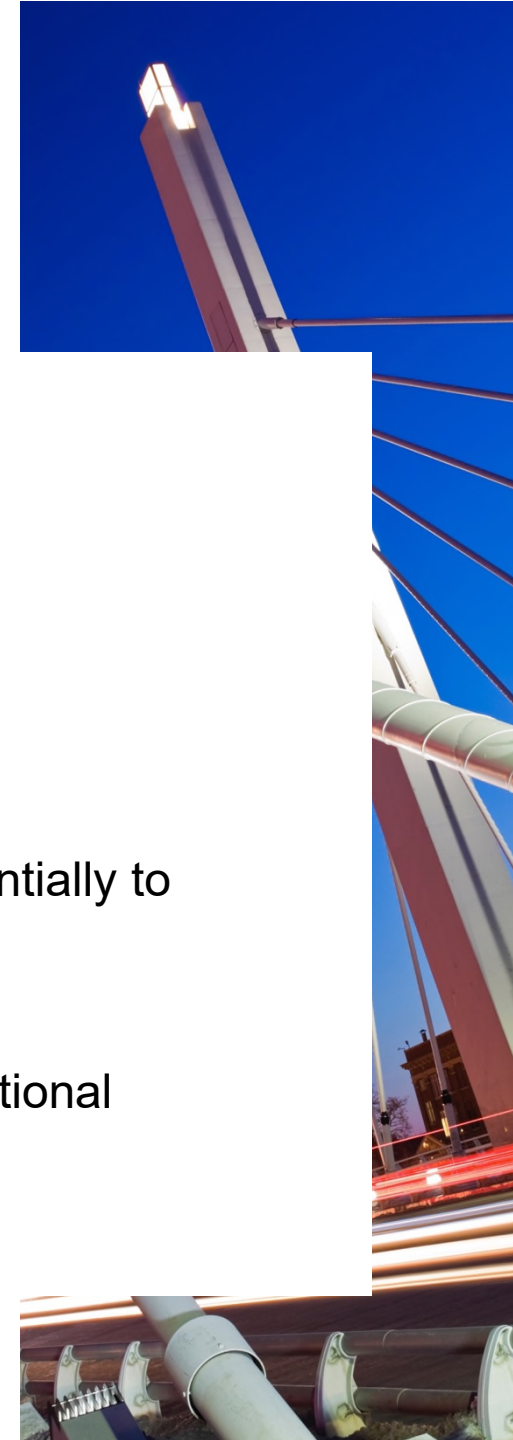
Agenda

- Antitrust Overview
- Today's Antitrust Enforcement Environment
- Antitrust Hot Topics & What Lies Ahead
 - Section 5 of the FTC Act
 - Labor
 - Criminal Monopolization
 - Procurement
 - Merger Review
 - Interlocking Directorates
 - Supply Chain Disruption
 - Leniency Program
 - ESG and Antitrust



U.S. Antitrust Law Overview

- Section 1 of Sherman Act
 - Prohibits agreements that unreasonably restrain trade
- Section 2 of Sherman Act
 - Prohibits monopolies, attempts to monopolize, and conspiracies to monopolize
- Section 5 of the FTC Act
 - Prohibits “unfair” methods of competition
- Section 7 of the Clayton Act
 - Prohibits mergers or acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”
- Robinson-Patman Act
 - Prohibits price discrimination and discrimination in the payment or provision of promotional services
- State antitrust laws



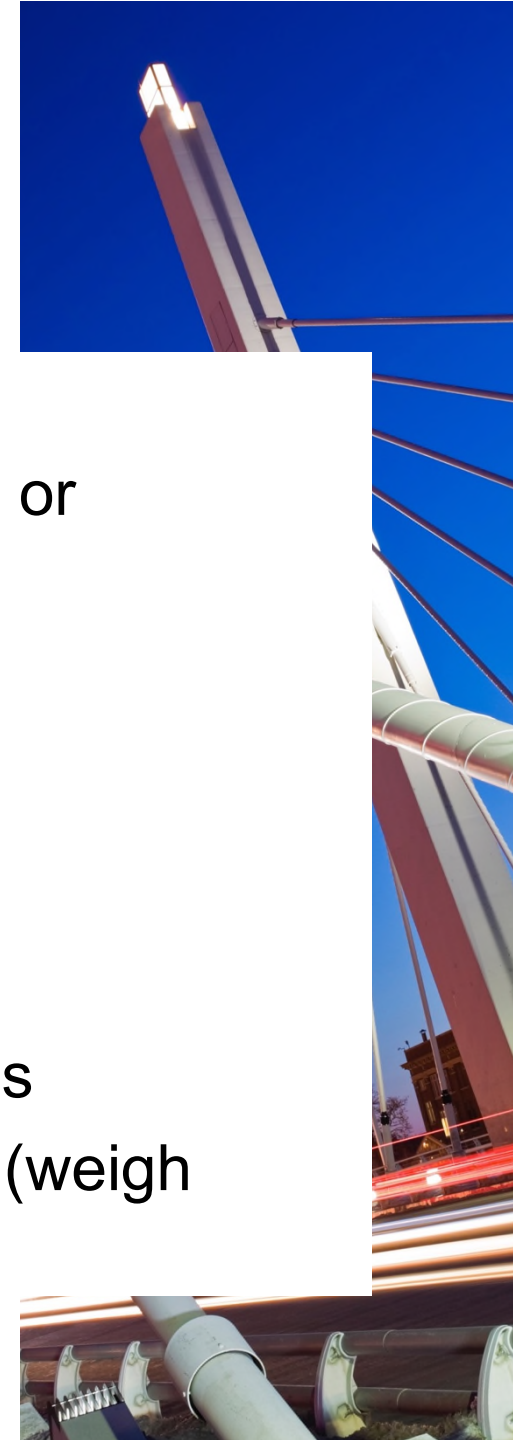
U.S. Antitrust Law Overview

- Criminal and civil enforcement actions from DOJ Antitrust Division
- Civil enforcement actions from the Federal Trade Commission
- State Attorneys General enforcement actions
- Private party litigation
- Fines, penalties, and treble damages
- Attorneys' fees
- Reputational harm
- Time, burden, and expense to litigate is significant



The Sherman Act – Section 1 (Agreements)

- Prohibits agreements that unreasonably restrain trade
- Certain conduct viewed as “naked” restraint of trade that is *per se* or automatically unlawful
- *Per se* violations include agreements with competitors to:
 - Fix prices
 - Rig bids
 - Allocate products / services / territories
 - Fix wages or refrain from hiring each other’s employees
- Unsuccessful conspiracies can still be considered *per se* violations
- Other types of agreements are analyzed under the rule of reason (weigh procompetitive benefits with anticompetitive effects)



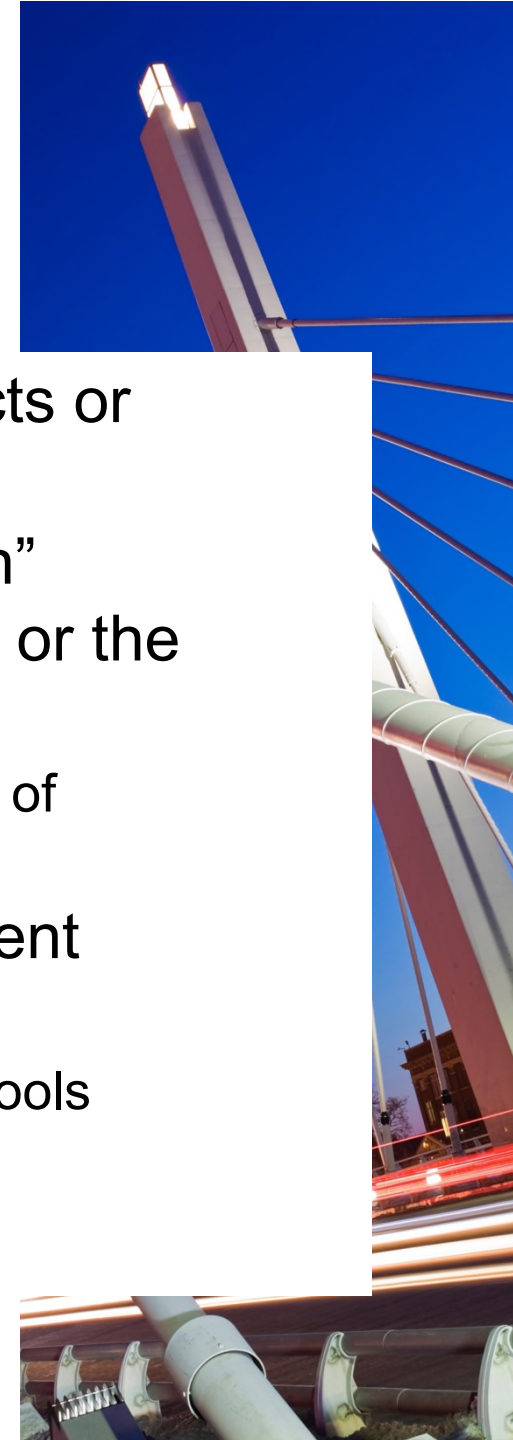
The Sherman Act – Section 2 (Unilateral Conduct)

- Monopolization or Attempt to Monopolize
 - Monopolization
 - Possession of monopoly power in a relevant antitrust market
 - Acquired or maintained that monopoly position through **anticompetitive or predatory means** (i.e., not by superior business acumen, historical accident, or luck)
 - Attempt to Monopolize
 - Specific anticompetitive intent
 - Predatory or exclusionary act
 - Dangerous probability of success (i.e., that defendant may gain a monopoly)



Section 5 of the FTC Act

- Prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce
- Historically, as a matter of practice, “unfair methods of competition” included any conduct that would violate the Sherman Antitrust Act or the Clayton Act
 - The FTC’s interpretation of Section 5 and what constitutes an “unfair method of competition” has recently expanded beyond these historic boundaries
- Under the FTC Act, the FTC has both investigatory and enforcement authority
 - FTC uses subpoenas or civil investigative demands (CIDs) as investigatory tools
 - FTC enforces Section 5 by:
 - Bringing actions for injunctive relief in federal court; or
 - Using its administrative process and adjudicative proceedings



The Clayton Act and Hart-Scott-Rodino Act

- FTC and DOJ review mergers through the Clayton Act and Hart-Scott-Rodino (HSR) Act
- Section 7 of the Clayton Act prohibits mergers or acquisitions that “may” tend to lessen competition or create a monopoly
- HSR requires 30-day waiting period (extendable by DOJ/FTC) for all transactions valued above \$101 million
 - Threshold changes every year based on inflation
 - Valuation rules are complicated – consult counsel whenever close
 - Joint ventures, formation of new entities, acquisition of greater interests all may trigger HSR
- Note that enforcers have broad powers to investigate and challenge non-reportable deals or consummated deals



The Current Era of Antitrust Enforcement

- President Biden’s July 2021 Executive Order 14036, titled “Promoting Competition in the American Economy”
 - Adopted a “whole-of-government effort” to promote competition in the U.S. economy
 - Generated a flurry of enforcement activity in its wake
- New Leadership and Social Developments Converge
 - Jonathan Kanter (DOJ - Assistant AG for Antitrust)
 - Lina Khan (Chair of the FTC)
 - Alvaro Bedoya (FTC Commissioner)



Aggressive Government Antitrust Enforcement Environment

- DOJ Antitrust Division continues active and aggressive enforcement efforts with mixed results
- With an increased budget to buttress its aggressive enforcement policy, the DOJ has been on a hiring spree, particularly of attorneys from the antitrust plaintiffs' bar and those with trial experience
- DOJ Statistics from 2020-2021
 - Filed 45 criminal cases against 25 companies and 51 individuals
 - Average prison term of 15 months
 - Total criminal fines and penalties of \$680 million
 - Fines collected are at historic lows



Aggressive Government Antitrust Enforcement Environment

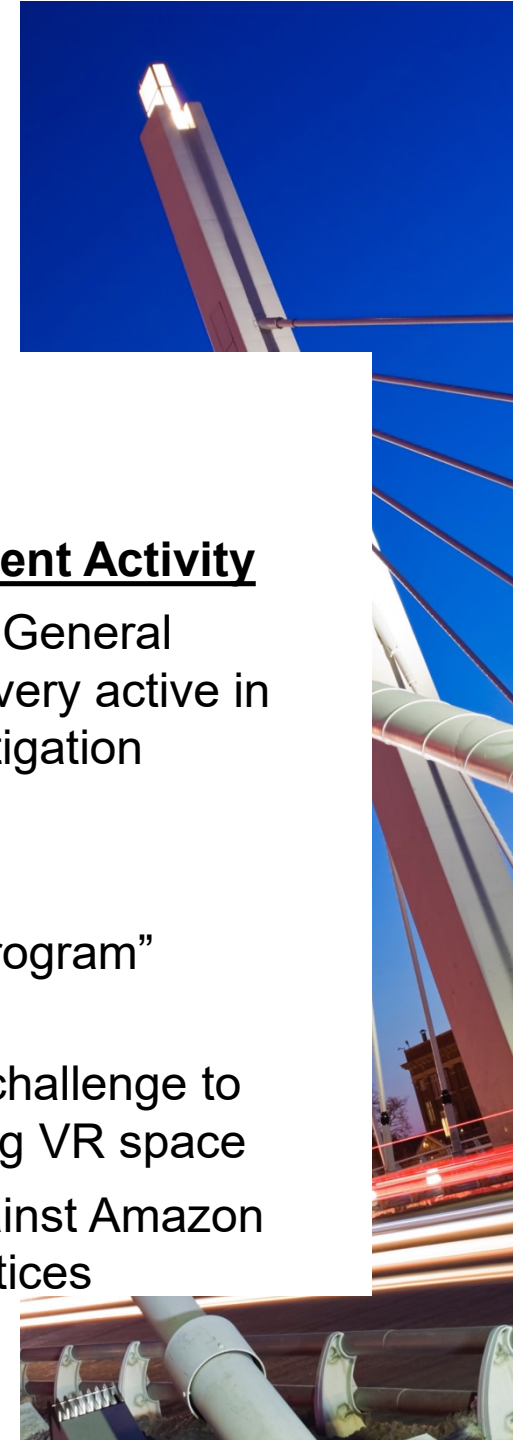
- FTC and State Attorneys General also remain active in enforcing the antitrust laws

Examples of FTC Enforcement Activity

- FTC's challenge to Illumina's vertical acquisition of GRAIL
- Successfully blocked two other vertical mergers
 - Nvidia/Arm Ltd.
 - Lockheed Martin/Aerojet Rocketdyne
- FTC aggressively scrutinizing health system mergers
 - Utah (HCA/Steward Health)
 - New Jersey (RWJBarnabas Health/Saint Peter's)

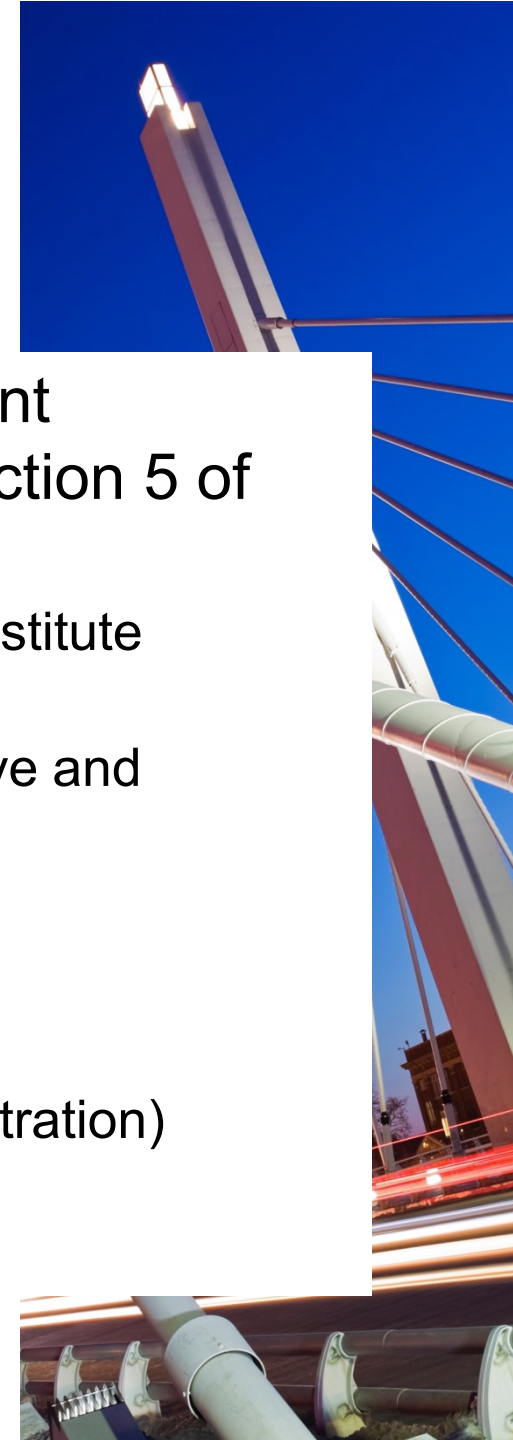
Examples of State AG Enforcement Activity

- National Association of Attorneys General Multistate Antitrust Task Force is very active in coordinating multistate antitrust litigation efforts
- Generic drug antitrust litigation
- Pesticide manufacturer "loyalty program" antitrust challenge
- Dozens of States support FTC's challenge to Meta's Within deal in the emerging VR space
- Washington AG leads charge against Amazon for certain online retail sales practices



2022 – Year In Review: FTC’s Expansion of Power Under Section 5

- On November 10, 2022, the FTC released a new “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act”
 - Reflects significant expansion of the scope of what the FTC considers to constitute “unfair methods of competition” prohibited by Section 5 of the FTC Act
 - Takes position that Section 5 reaches methods of competition that are abusive and restrictive
 - Even if the conduct does not otherwise violate the Sherman or Clayton Acts
 - Even if the conduct does not actually harm competition or consumers
- “Method of competition” = conduct by an actor in the marketplace
 - NOT conditions in the marketplace (i.e., high barriers to entry or high concentration)
 - Effect on competition can be direct or indirect
- “Unfair” = conduct that goes beyond competition on the merits



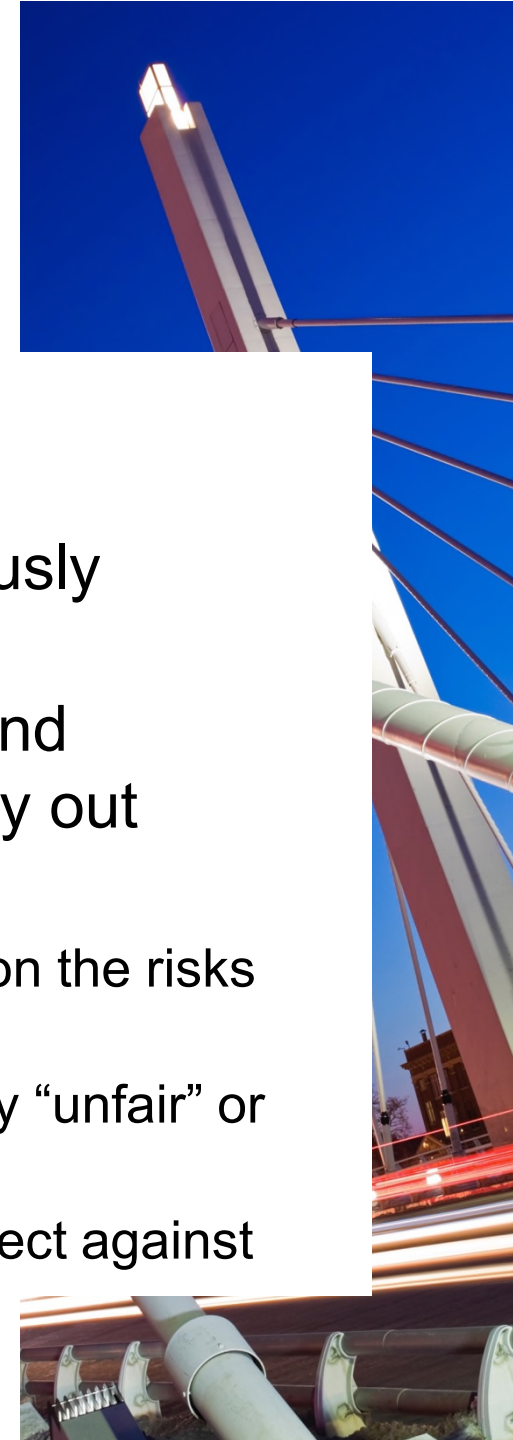
2022 – Year In Review: FTC’s Expansion of Power Under Section 5

- Includes 20 non-exhaustive categories of conduct that the FTC considers “unfair methods of competition”
 - Invitations to collude
 - Practices that facilitate tacit coordination
 - A series of mergers, acquisitions, or joint ventures that individually do not “substantially lessen competition” but have an aggregate unfair effect
 - Loyalty rebates, tying, bundling, or exclusive dealing arrangements that have the tendency to ripen into antitrust violations due to industry conditions or a company’s position within the industry
 - Interlocking directorates not covered by the literal language of the Clayton Act



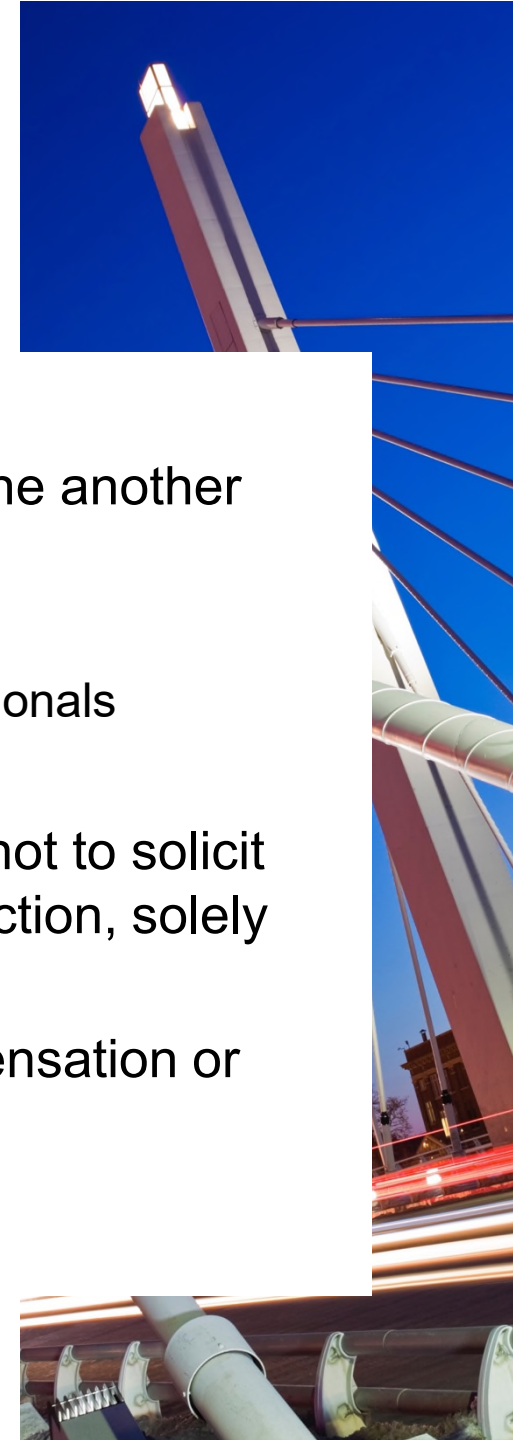
2023 Outlook: FTC's Expansion of Power Under Section 5

- The Policy Statement is a deliberate move to expand the FTC's enforcement authority
- Expect to see increased FTC activity aimed at conduct not previously challenged under the antitrust laws
- Ultimately, courts will decide if the Policy Statement reflects a sound interpretation of the FTC's authority, which could take years to play out
- In the meantime, companies should consider:
 - Expanded antitrust training for employees to ensure training educates them on the risks in this area
 - Compliance reviews or audits of high-risk areas of the business for potentially “unfair” or anticompetitive conduct
 - Confirmation that any applicable standard-setting bodies have rules that protect against fraudulent or inequitable conduct by participants



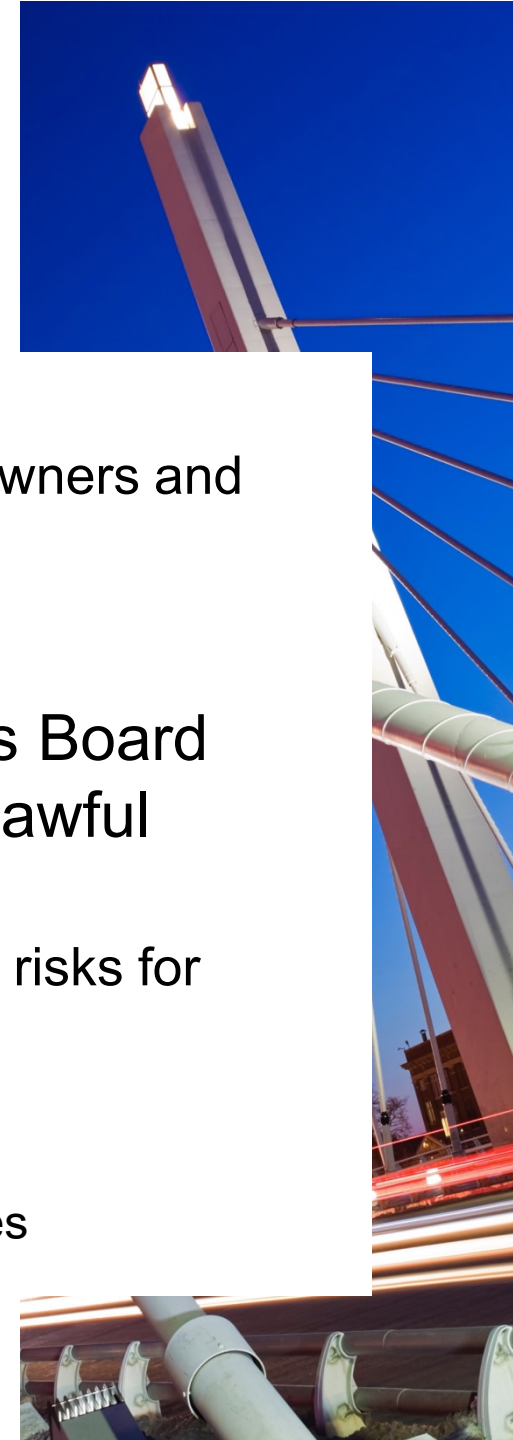
2022 – Year in Review: Antitrust in Labor Markets

- “Naked” No-Poach, No-Hire, and Wage-Fixing Agreements
 - Rival employers are not permitted to agree to refrain from competing with one another for talent
 - Early civil enforcement activity in the tech sector beginning in 2011
 - In October 2016, DOJ and FTC released formal antitrust guidance for HR professionals
 - DOJ criminal prosecution of these types of agreements between competitors
 - Standalone or naked “**no-poach**” agreements, where two companies agree not to solicit or hire one another’s employees separate and apart from a legitimate transaction, solely to avoid competing for talent, are *per se* illegal
 - Similarly, “**wage-fixing**” agreements, where two companies agree on compensation or benefits for employees, are *per se* illegal



2022 – Year In Review: Antitrust in Labor Markets

- DOJ has prosecuted six criminal antitrust labor cases
 - Alleging wage-fixing and no-poach conspiracies, including charges against owners and managers
 - DOJ lost at early trials but obtained its first “win” in October with a guilty plea
- DOJ, FTC, Department of Labor, and the National Labor Relations Board recently formalized efforts to share information about potential unlawful activities
 - While not legally binding, the Memoranda of Understanding create additional risks for companies who engage with these agencies:
 - Possibility of additional investigations
 - Expedited information and document sharing
 - New mechanism for agencies to educate each other about labor and antitrust issues



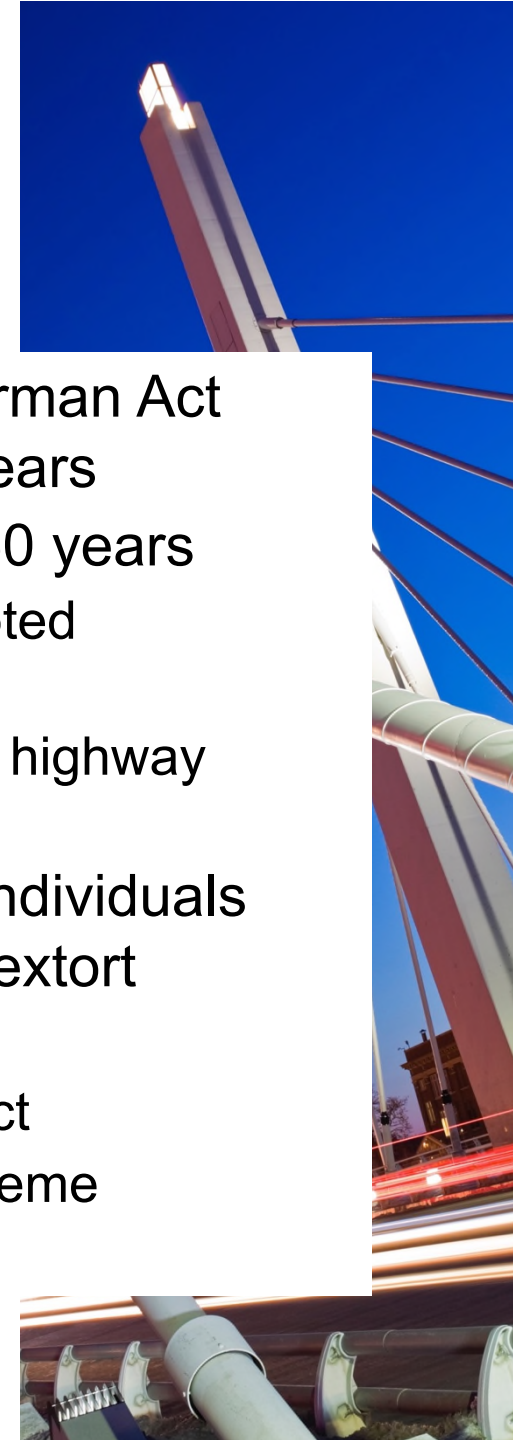
2023 Outlook: Antitrust in Labor Markets

- Expect DOJ to continue aggressive criminal enforcement of the antitrust laws in labor market cases across all types of industries
 - DOJ’s aggressive stance on these issues suggests it may target not simply standalone or “naked” no poach agreements but also those that are ancillary to a separate collaboration
- Private litigation challenging these types of restrictions in franchise and other agreements is generally trending in the right direction for defendant employers
 - However, questions linger over class certification, standard of evaluation, and single entity theory
- Consult antitrust counsel when using these types of ancillary provisions in other agreements to ensure reasonably necessary and narrowly tailored



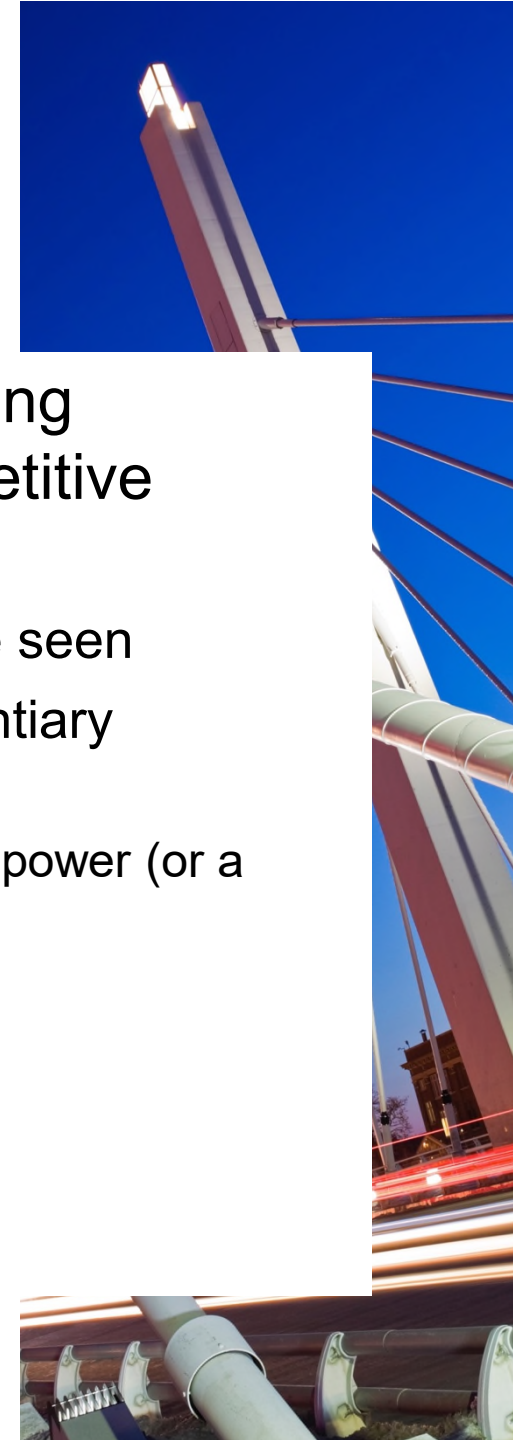
2022 – Year In Review: Criminal Monopolization

- Earlier this year, DOJ announced plans to enforce Section 2 of the Sherman Act through criminal prosecutions, a shift from the prevailing policy for 40 years
- In October 2022, DOJ brought its first criminal monopolization case in 50 years
 - Secured a criminal guilty plea under Section 2 of the Sherman Act for attempted monopolization against President of Montana paving and asphalt contractor
 - President proposed to a competitor that they agree to allocate the market for highway crack-sealing services, and the competitor rejected the offer (and told DOJ)
- On December 6, 2022, DOJ unsealed criminal indictment charging 12 individuals in conspiracy to monopolize the transgrante forwarding industry and extort competitors near the U.S.-Mexico border
 - Alleges criminal violations of both Section 1 and Section 2 of the Sherman Act
 - Alleges the defendants implemented a price-fixing and market allocation scheme
 - Alleges defendants monopolized market through violence and threats



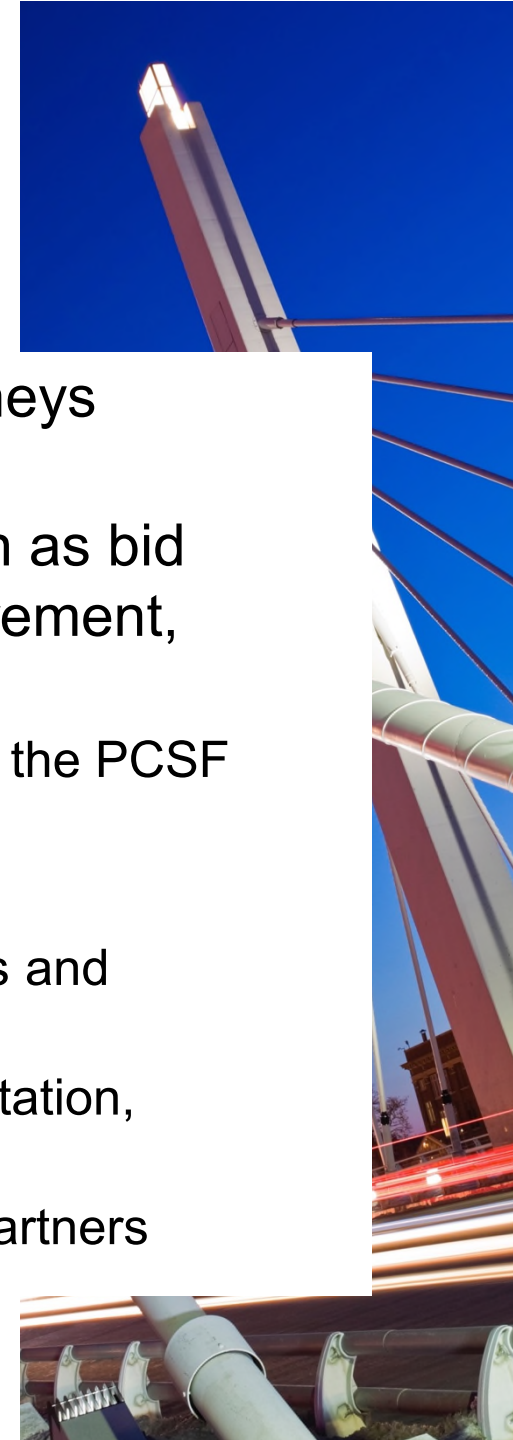
2023 Outlook: Criminal Monopolization

- DOJ's use of Section 2 appears to open another path to prosecuting *attempted* but not consummated agreements and other anticompetitive conduct that does not squarely fall within Section 1
 - Whether DOJ can prove criminal monopolization claims at trial remains to be seen
 - Section 2 presents challenges that limit its application and create high evidentiary burden
 - Requires proof that attempt to collude resulted in securing or preserving monopoly power (or a dangerous probability of achieving the same) in defined market
- Regardless of these challenges, expect to see DOJ use its recent successes to buttress additional Section 2 criminal prosecutions



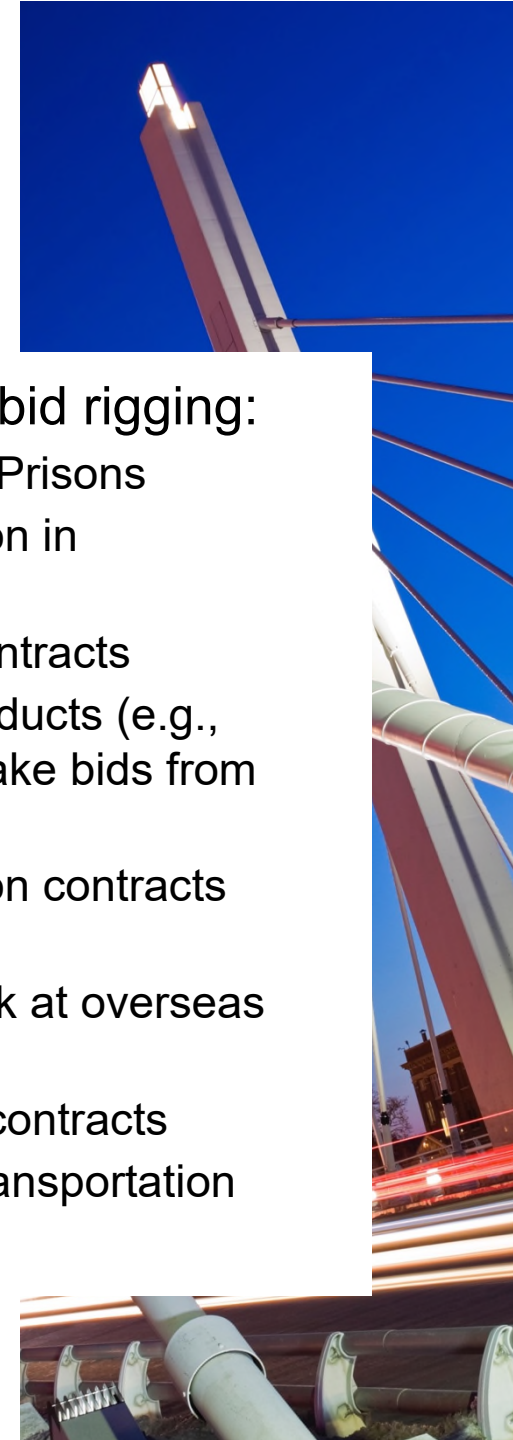
2022 – Year In Review: Procurement Collusion Force (PCSF)

- Formed in 2019 and brings together DOJ Antitrust Division, State Attorneys General, FBI, Federal Trade Commission, and other agencies
- Goal is to detect, investigate, prosecute, and deter antitrust crimes such as bid rigging and related fraudulent schemes in the grant, government procurement, and program funding areas
 - DOJ was already devoting significant resources to public procurement crimes so the PCSF represents an intensified, all-hands approach to enforcement
- Since PCSF's inception in 2019:
 - Opened more than 60 criminal investigations and prosecuted over 30 companies and individuals
 - Prosecuted anticompetitive crimes in construction, defense contracting, transportation, poultry, aerospace, and health care
 - Announced last month an expansion to include four new national enforcement partners (Offices of Inspector General for DOE, DOI, DOT, and EPA)



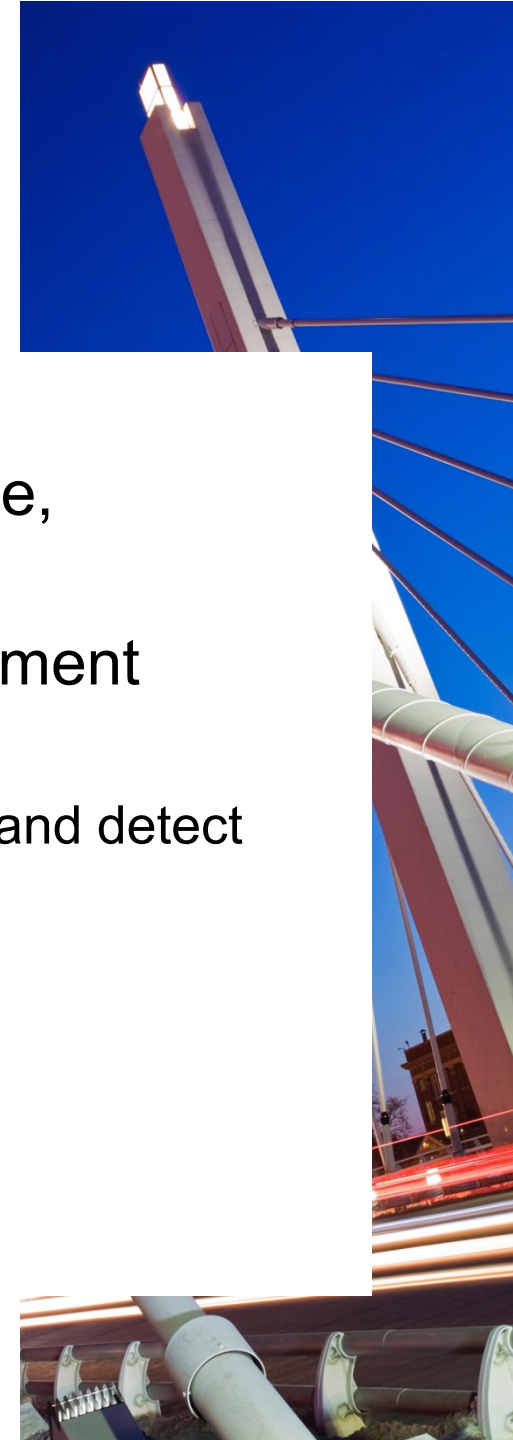
2022 – Year In Review: Procurement Collusion Strike Force (PCSF)

- Several recent investigations and prosecution of cases of government contract bid rigging:
 - Former contractor at food supply company conspired to submit low bids to U.S. Bureau of Prisons
 - Caltrans employee pled guilty to conspiring with two contractors to suppress bid competition in exchange for cash and gifts
 - Construction company owner pleads guilty to bid rigging and bribery related to Caltrans contracts
 - Indictment against three contractors accused of rigging bids for U.S. Army promotional products (e.g., sharing bids to predesignate a winner, submitting bids on each other’s behalf, submitting fake bids from shell companies)
 - Indictment of contractors who submitted predetermined losing bids for concrete construction contracts with local governments in Minnesota
 - Foreign nationals indicted for rigging bids and fixing prices for repair and maintenance work at overseas U.S. military installations
 - Indictment of military contractor for rigging bids to give false impression of competition on contracts
 - Guilty verdict for rigging bids for aluminum structure projects for North Carolina Dep’t of Transportation
 - Insulation contracting firm sentenced for rigging bids related to public and private entities



2023 Outlook: Procurement Collusion Strike Force (PCSF)

- Individual liability to remain a top priority
- PCSF will target collusion at every level of government: local, state, federal, and international
- Compliance will continue to be critical for companies with procurement contracts with every level of government:
 - Ensure company has an up-to-date and robust compliance protocol to deter and detect unlawful conduct
 - Engage in active monitoring and training of employees



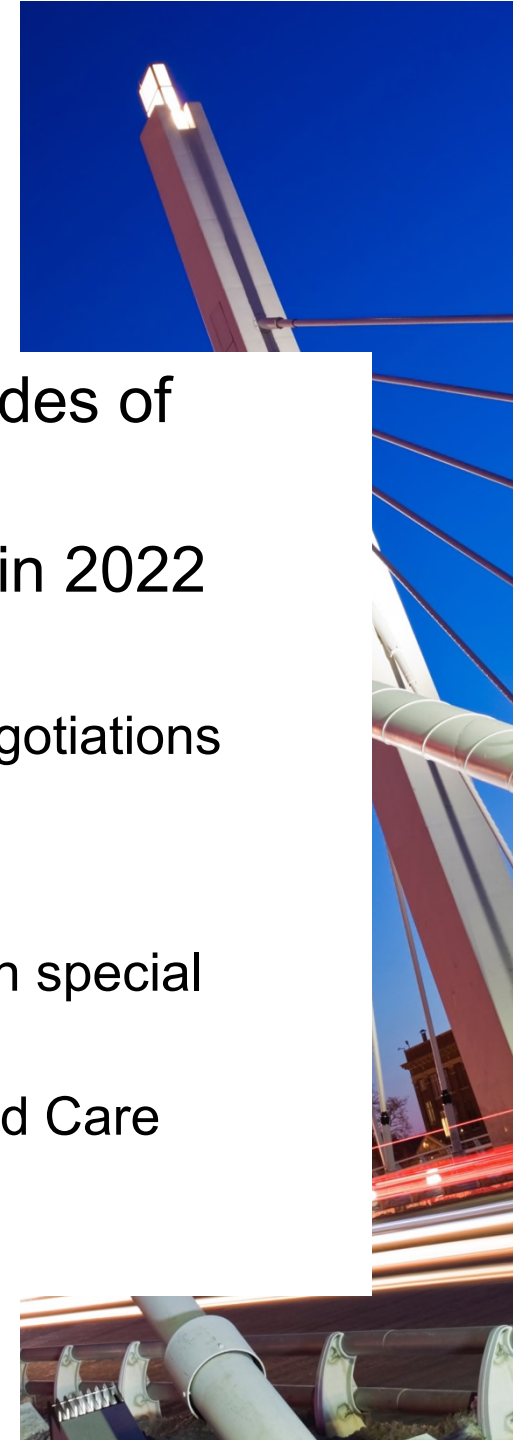
2022 – Year In Review: Enhanced Merger Review

- In the wake of Biden Executive Order, 2022 saw the following:
 - Increased scrutiny of mergers especially in the hospital and technology sectors
 - Expanded scope of merger investigations by focusing on a broader range of market realities (e.g., impact on labor markets, cross-market effects, and involvement of investment firms; non-compete provisions; ESG issues)
 - DOJ and FTC revising the Horizontal and Vertical Merger Guidelines
 - After VMG withdrawal in 2021, received thousands of public comments
- Antitrust enforcers have ended well-established programs like early termination and changed their approach to remedial measures in merger cases
 - Close scrutiny and general skepticism of settlement proposals



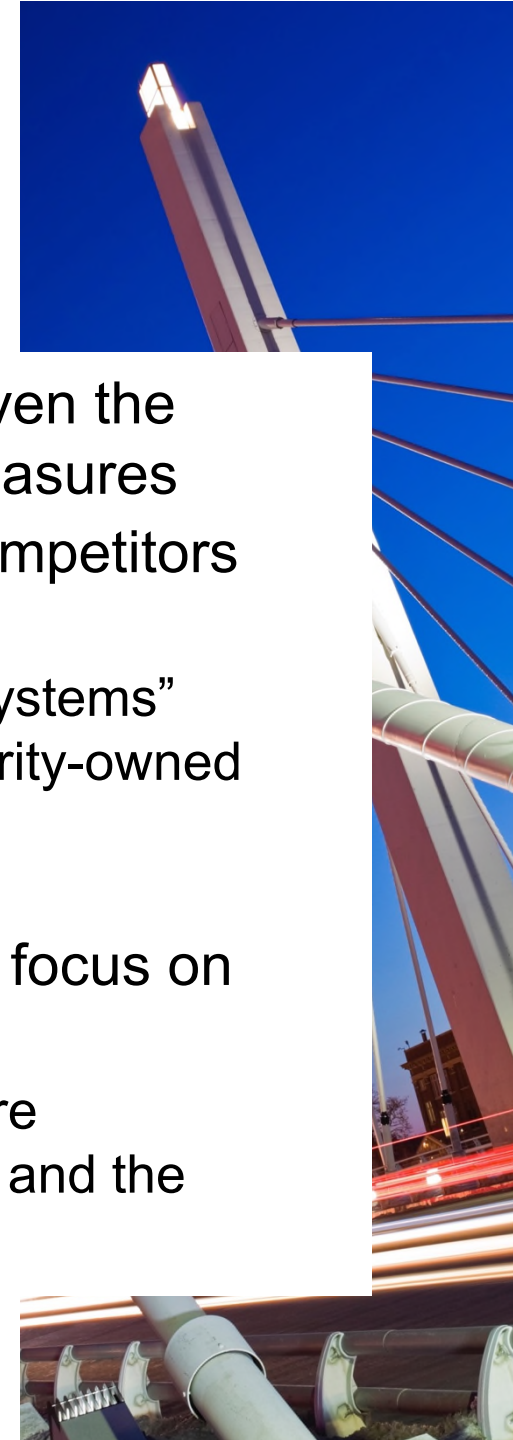
2022 – Year In Review: Enhanced Merger Review

- DOJ faced several setbacks in persuading courts to reverse decades of business-friendly precedent favoring M&A transactions
- Despite these losses, DOJ touted its merger enforcement results in 2022
 - Several companies abandoned deals in the face of government lawsuits
 - DOJ extracted greater concessions than the companies initially offered in negotiations by litigating the merger
- State AGs continued their active role in reviewing transactions
 - Sought to and initially succeeded in temporarily blocking Albertson’s \$4 billion special dividend as a result of proposed merger with Kroger
 - Rhode Island successfully blocks merger of health care systems Lifespan and Care New England



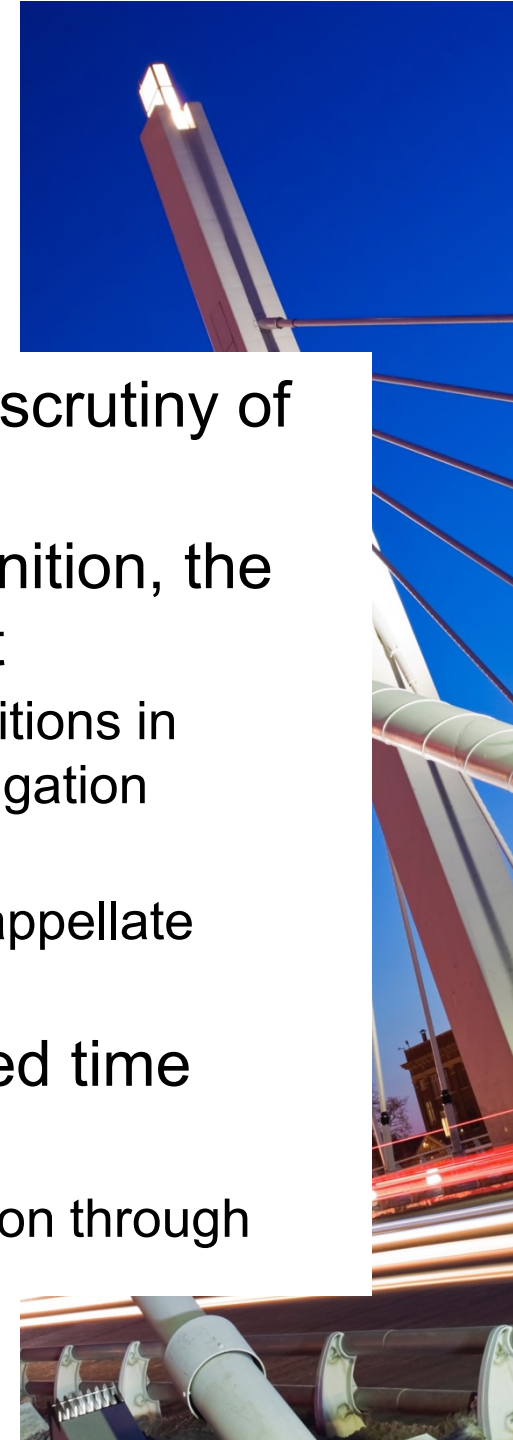
2023 Outlook: Enhanced Merger Review

- Expect continued merger scrutiny in 2023 but with less predictability, given the agencies' use of novel theories and change in approach to remedial measures
- Expect a shift away from consumer welfare standard with a focus on competitors or “rivalry”
 - Agencies will evaluate impact of a transaction on the parties' “business ecosystems” which include workers; consumers; customer choice; sellers; small and minority-owned businesses; local, rural, and low-income communities; privacy; quality; entrepreneurship; and innovation
- Expect a change in the types of merger challenges, including more of a focus on vertical and consummated transactions
 - Proposed revisions to the merger guidelines – likely public by early 2023 – are expected to reflect far more skepticism of consent decrees, vertical mergers, and the efficiencies that flow from any given deal



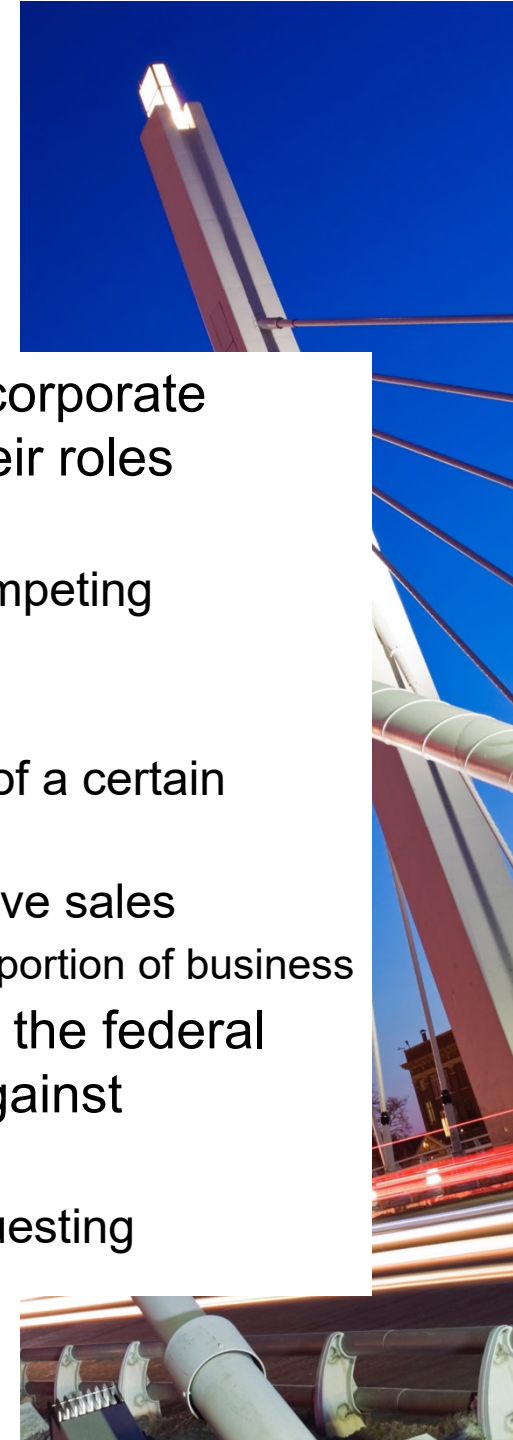
2023 Outlook: Enhanced Merger Review

- Obstacles expected for tech mergers in 2023 given the increased scrutiny of tech deals and the innovation impacts of those deals
- By using more novel theories of competitive harm and market definition, the agencies may struggle to convince courts to break from precedent
 - Companies pursuing deals may be emboldened to take more aggressive positions in litigation or be more likely to take cases to trial in the wake of DOJ's recent litigation losses
 - However, if DOJ appeals any of these losses, there is an opportunity for the appellate courts to clarify key points on law
- Changes to merger review process and scope means the increased time and expense associated with merger review is here to stay
 - Companies will want to evaluate the efficiencies and synergies for a transaction through prism likely to be applied by agencies



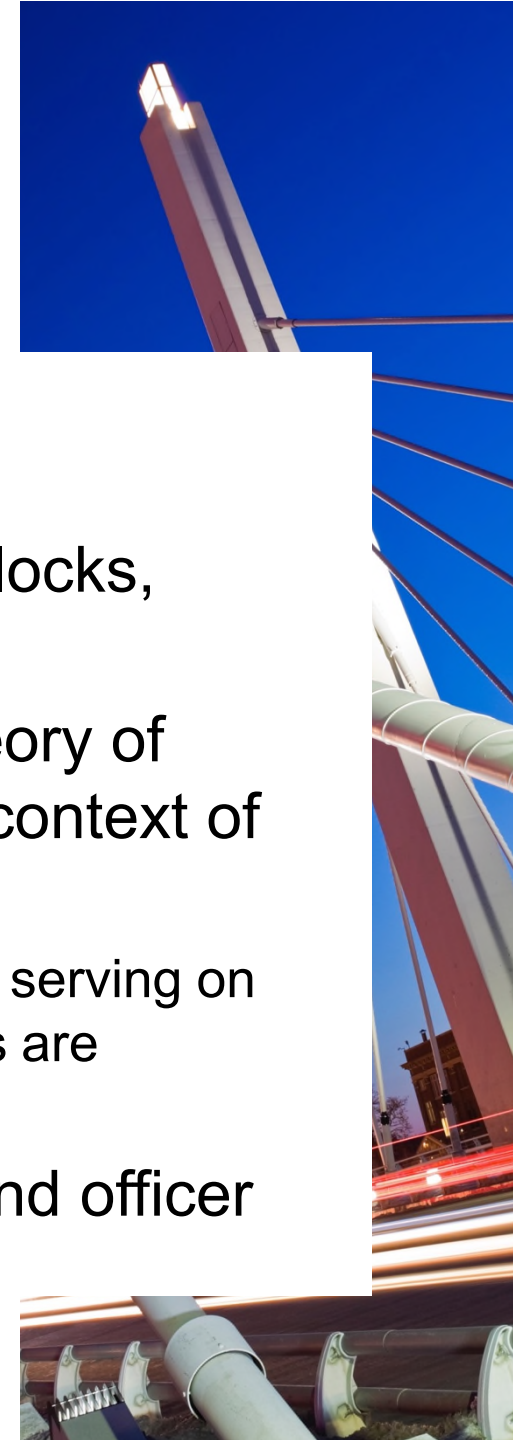
2022 – Year in Review: Interlocking Directorates

- On October 19, 2022, the DOJ announced that seven directors resigned from corporate board positions from five companies after the DOJ expressed concerns that their roles violated Section 8 of the Clayton Act
 - Section 8 broadly prohibits individuals from serving as an officer or director of two competing corporations (i.e., interlocking directorates)
 - Section 8 is a strict liability statute (i.e., *per se* illegal)
 - Section 8 only applies when a corporation has capital, surplus, and undivided profits of a certain threshold (today, that threshold is \$41.03 million)
 - Section 8 includes three safe harbor exceptions, which focus on the parties' competitive sales
 - At a high level, interlocks will not be prohibited if the two corporations only compete for small portion of business
- This announcement came after various statements from the DOJ and FTC that the federal agencies were likely to be more aggressive in pursuing enforcement actions against interlocking directorates
 - DOJ has also begun sending warning letters and CIDs to entities and individuals requesting information about their directorates



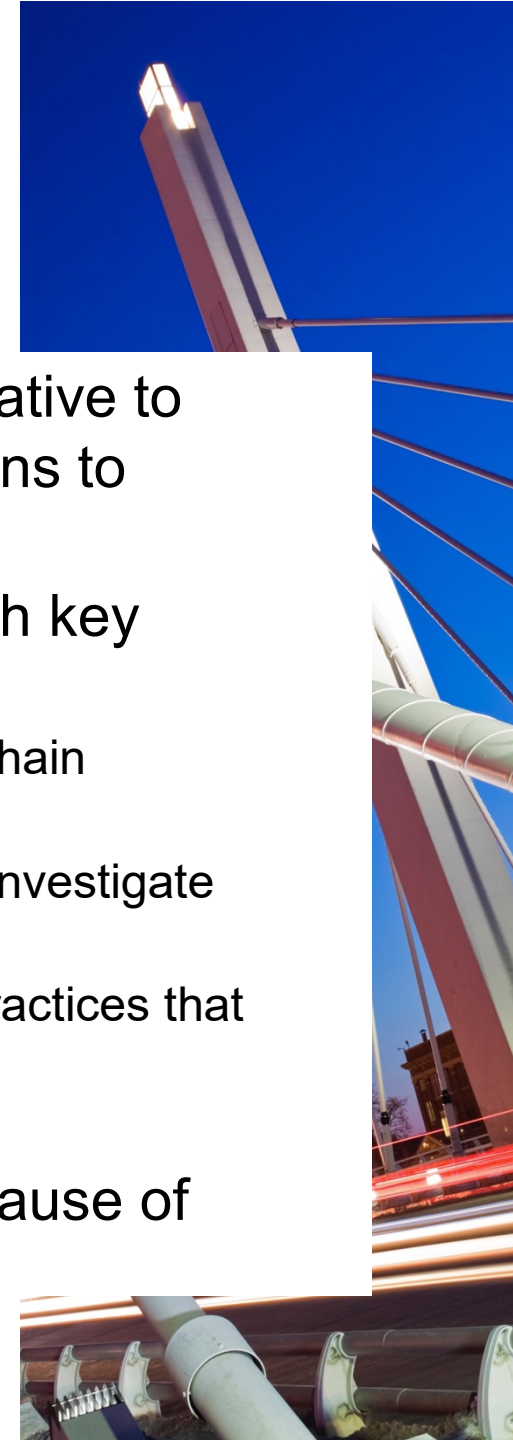
2023 Outlook: Interlocking Directorates

- Historically, interlocks caught enforcers' attention in the context of investigations into other antitrust matters
- We expect the agencies will continue to proactively seek out interlocks, independent of compliance matters
- Agencies may attempt to rely on an “agency” or “deputization” theory of Section 8 to take aim at interlocking directorates that arise in the context of private equity investments
 - Under this theory, a legal entity can violate Section 8 if it has representatives serving on the boards of two competing corporations, even if the entity's representatives are themselves different individuals
- Corporations should consider conducting reviews of their board and officer relationships to identify any interlocks that may pose problems



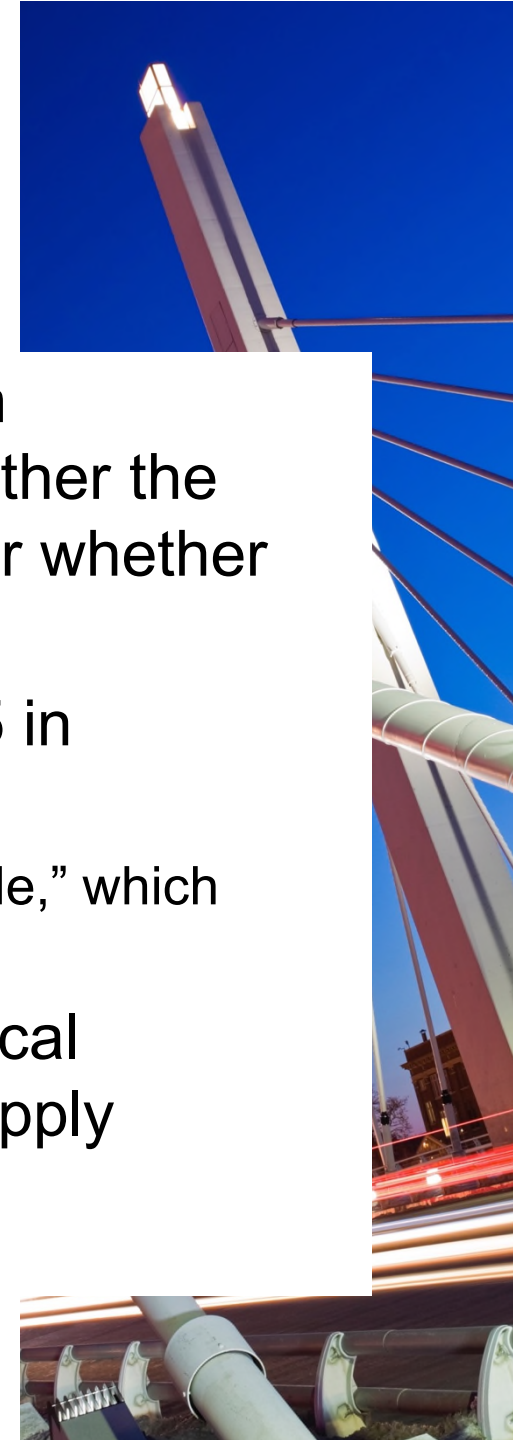
2022 – Year in Review: Supply Chain Disruption

- In February 2022, the DOJ and FBI announced a new enforcement initiative to investigate and prosecute companies that exploit supply chain disruptions to overcharge consumers and collude with competitors
- Federal agencies launched targeted inquiries into specific industries with key roles in the supply chain or those prone to inflation
 - FTC issued Section 6(b) Orders to various entities to explore causes behind supply chain disruptions
 - DOJ announced strengthened partnership with the Federal Maritime Commission to investigate antitrust violations in ocean shipping industry
 - FTC launched investigation into infant formula shortages, including anticompetitive practices that may have contributed to the shortage
 - Enforcement actions ramped up in meat and poultry processing industries
- Federal agencies are focused on supply chain consolidation as a root cause of supply disruption



2023 Outlook: Supply Chain Disruption

- DOJ likely to continue to focus its investigations on industries with significant price increases for goods or services to determine whether the sudden rise in price is attributable to legitimate economic forces or whether inflation is being used as a cover for price-fixing
- Expect the FTC to step up its enforcement efforts under Section 5 in certain industries affected by supply chain disruptions
 - May try to use Section 5 to challenge “price signaling” or “invitations to collude,” which typically are not actionable under Section 1 of the Sherman Act
- Expect the antitrust enforcers to be more willing to challenge vertical transactions in industries where supply disruption is present or supply consolidation is occurring



2022 – Year in Review

DOJ Update to Leniency Program

- On April 4, 2022, the DOJ released updated guidance on its Leniency Program
 - The Leniency Program protects companies and employees who cooperate with the government from prosecution for their involvement in cartel activities if certain conditions met
 - To receive leniency, applicants must provide “satisfactory cooperation” to civil plaintiffs as well
- What did the changes accomplish?
 - Clarified that applicants must “promptly” self-report potential violations to be eligible for leniency
 - A company can conduct a preliminary investigation before self-reporting, but waiting to self-report until after the DOJ opens an investigation is too late
 - Failure to investigate upon discovery of a potential violation is grounds for exclusion
 - Lack of knowledge that the conduct could be criminal is no excuse
 - Made clear that:
 - Applicants must present a defined, conduct-specific restitution plan to receive a conditional leniency letter
 - Applicants must implement appropriately tailored measures to prevent recidivism

2023 Outlook: DOJ Update to Leniency Program

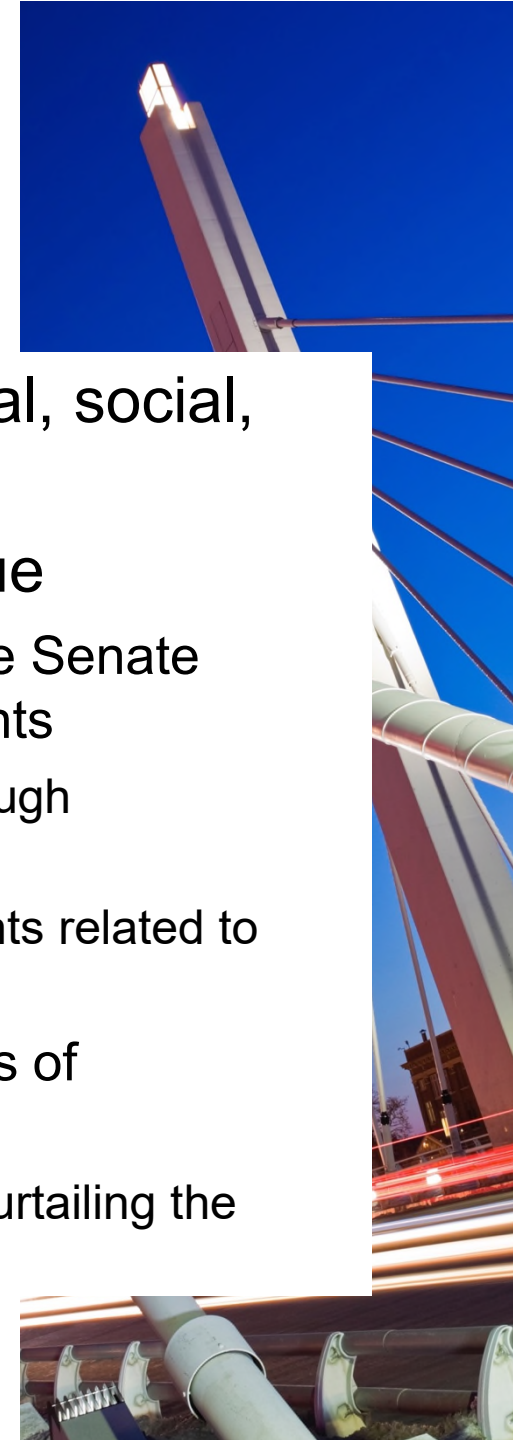
- Although the updated guidance was meant to provide more transparency, some critics argue these updates have provided far less certainty that an applicant will receive amnesty
 - DOJ reserves the right not to grant amnesty if it discovers the individual or company self-reporting did not do so “promptly”
- The program has been considered the DOJ’s primary source of new investigations, but this perceived uncertainty may cause leniency applications to decline
- Expect to see less leniency protection for individuals (e.g., senior company executives of the leniency applicant)
- Effective antitrust compliance programs that include measures not only to prevent violations, but also to timely detect and report violations remain a company’s best chance at avoiding prosecution



2022 – Year in Review

ESG and Antitrust?

- Are there really antitrust implications stemming from environmental, social, and governance (ESG) initiatives?
- A few recent developments in this space have prompted a dialogue
 - September 2022 remarks by AAG Kanter and Commissioner Khan before the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights
 - Senators asked about the antitrust implications of ESG coordination, including through collective net zero climate commitments and an agreement to restrict supply
 - Enforcers recognized that no exemption from the antitrust laws exists for agreements related to ESG
 - November 2022 Senate law firm letters warning firms to inform clients of risks of participating in climate cartels and other “ill-advised ESG schemes”
 - Suggested upcoming investigations into allegedly collusive agreements aimed at curtailing the use of coal, oil, and gas



2023 Outlook: ESG and Antitrust?

- No indication the Biden administration is preparing to launch antitrust investigations into ESG activities
- Before undertaking ESG initiatives involving competitors, companies should seek antitrust guidance to assess potential antitrust risks and employ appropriate safeguards
- Expect that the agencies and courts will apply the standard antitrust analysis to ESG competitor collaboration efforts
- Expect that ESG commitments in a merger agreement – however laudable – will not save a transaction from antitrust scrutiny





FOLEY & LARDNER LLP



Elizabeth A. N. Haas
Chair, Antitrust Practice Group
414-297-5083
ehaas@foley.com



Kate E. Gehl
414-297-5279
kgehl@foley.com

About Foley

Foley & Lardner LLP is a preeminent law firm that stands at the nexus of the energy, health care and life sciences, innovative technology, and manufacturing sectors. We look beyond the law to focus on the constantly evolving demands facing our clients and act as trusted business advisors to deliver creative, practical, and effective solutions. Our 1,100 lawyers across 25 offices worldwide partner on the full range of engagements from corporate counsel to IP work and litigation support, providing our clients with a one-team solution to all their needs. For nearly two centuries, Foley has maintained its commitment to the highest level of innovative legal services and to the stewardship of our people, firm, clients, and the communities we serve.



[FOLEY.COM](https://www.foley.com)

ATTORNEY ADVERTISEMENT. The contents of this document, current at the date of publication, are for reference purposes only and do not constitute legal advice. Where previous cases are included, prior results do not guarantee a similar outcome. Images of people may not be Foley personnel.

© 2022 Foley & Lardner LLP

