Navigating the Antitrust Landscape: Lessons from 2024, and What Lies Ahead Post-Election

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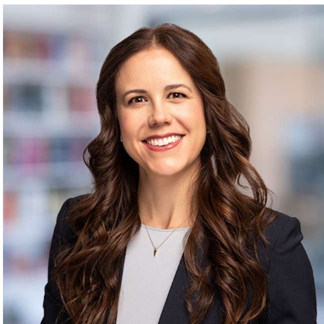
Presenters



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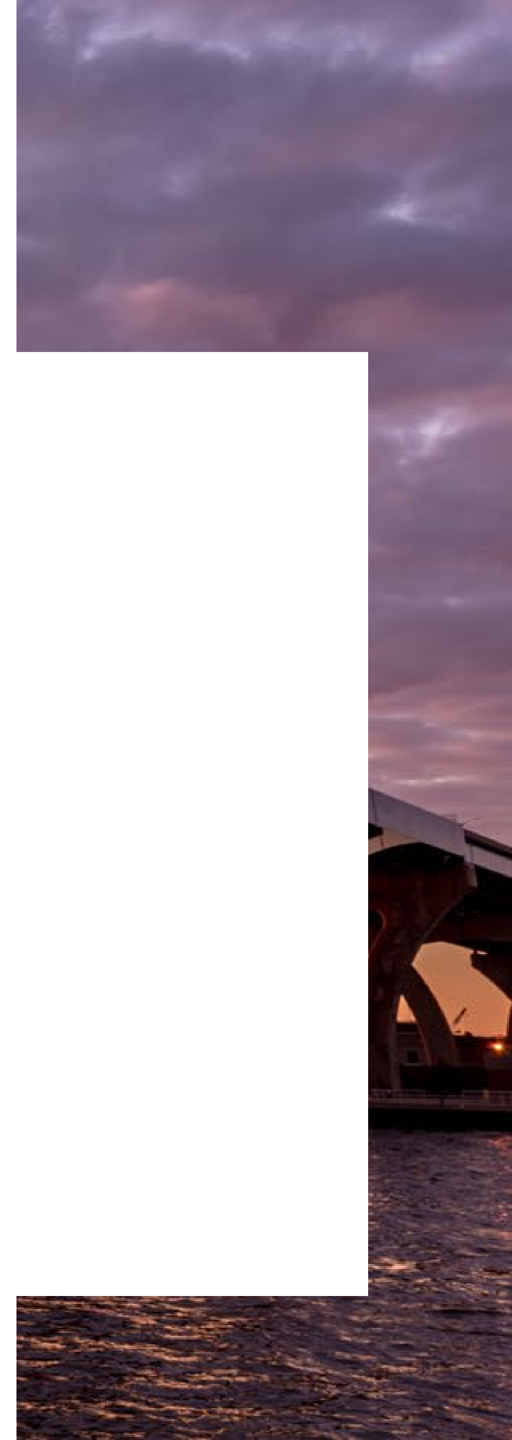
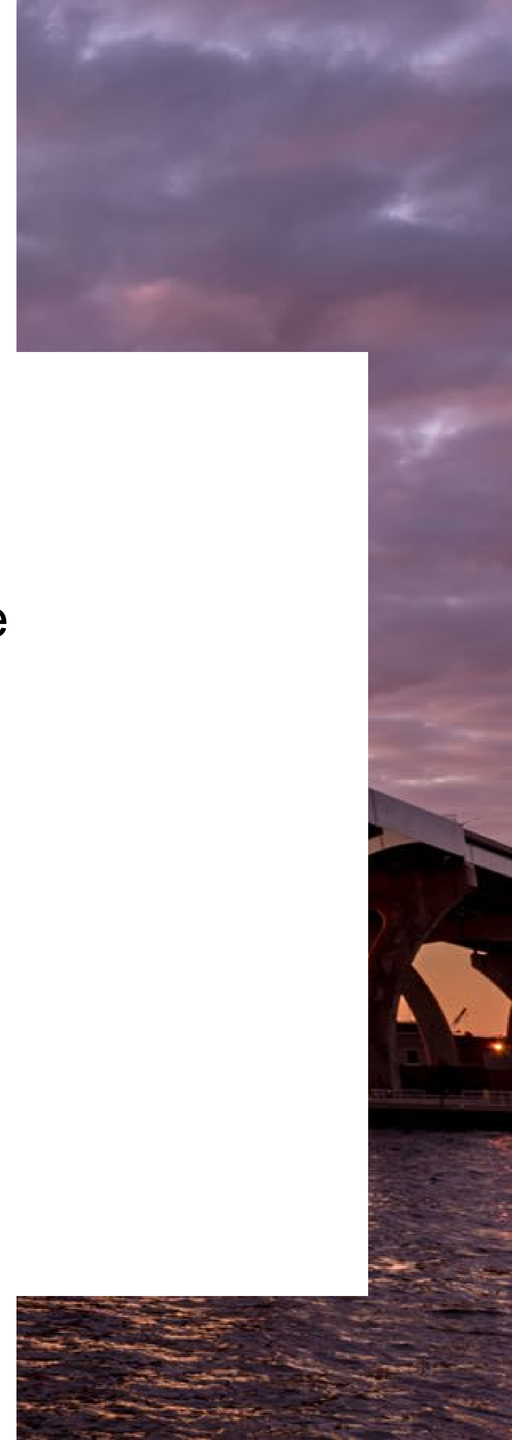
Agenda

- Antitrust Overview
- Today's Antitrust Enforcement Environment
- Antitrust Hot Topics & What Lies Ahead
- Best Practices for Reducing Antitrust Risk



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

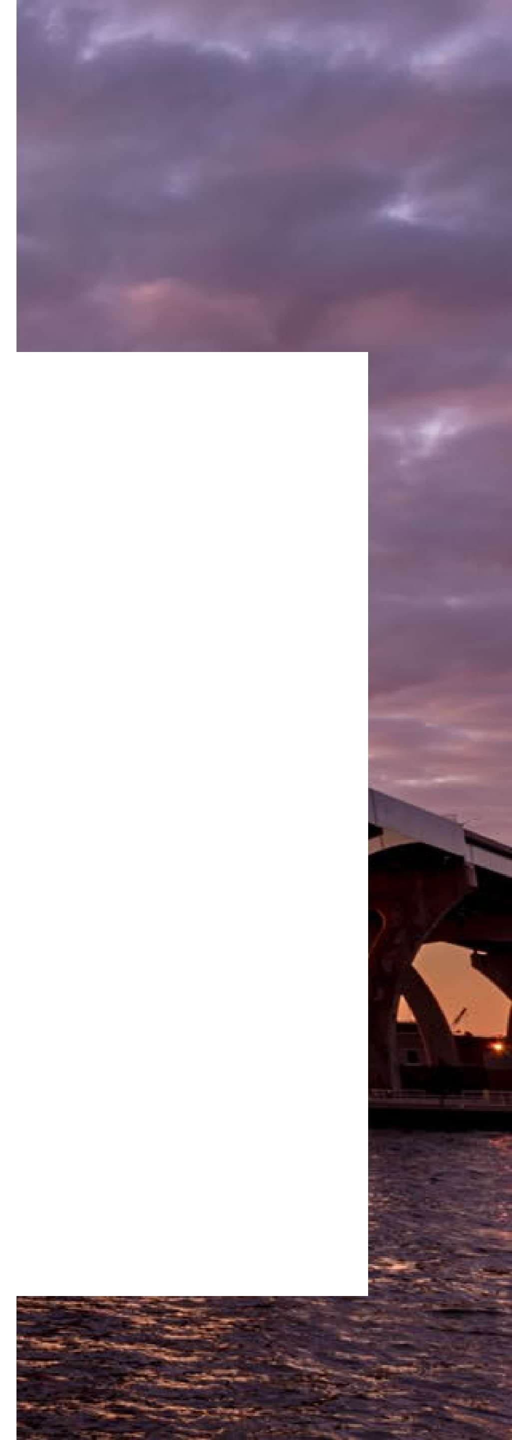
- Criminal and civil enforcement actions from DOJ Antitrust Division
- Civil enforcement actions from the Federal Trade Commission
- State Attorneys General enforcement actions
- Private party litigation
- Fines, penalties, and treble damages
- Attorneys' fees
- Reputational harm
- Time, burden, and 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 / customers
  - 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” was mostly limited to conduct that would violate the Sherman Antitrust Act or the Clayton Act
  - The FTC’s interpretation of Section 5 under the Biden Administration and what constitutes an “unfair method of competition” expanded beyond these more recent historic boundaries, but that may change with Trump Administration
- 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 $119.5 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
- Section 8 of the Clayton Act prohibits interlocking directorates, i.e., serving as an officer or director of two competing corporations

Robinson-Patman Act

- 1936 law designed to address price discrimination in the sale of like goods and products
  - "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. . . ." 15 U.S.C. § 13(a)
- A product of the Great Depression, Congress passed the RPA to prohibit suppliers from giving large scale purchasers more favorable pricing compared to "mom and pop"-type stores
- Resellers operating on the same functional level stand on equal competitive footing with regard to pricing and promotional support they receive from the same manufacturer for the resale of the same products
- "Prices" includes more than sticker price
- Rebates, loyalty programs, and volume discounts are within the scope of RPA

The Antitrust Enforcement Environment Under the Biden Administration

- The Biden Administration was heavily focused on antitrust and its role in ensuring a competitive economy. Antitrust leadership under Biden:
  - Took a “whole-of-government” approach to antitrust
  - Often criticized traditional modes of antitrust evaluation, were highly ideological, and at times were cast as anti-corporate
  - Often sought to use antitrust as a broad-based tool for advancing social justice and “democratizing” the economy
  - Invoked novel theories of analysis that assessed impact beyond economic harm (e.g., increased prices) to one rooted in social and political goals (job retention; unionization)

Expectations for Antitrust Enforcement Under the Trump Administration

- Criminal antitrust enforcement will still be a priority
  - Likely less focus on Section 2 monopolization cases
  - Prior Trump Assistant AG pursued wage-fixing/no-poach cases in labor markets, but recent losses may temper continued criminal enforcement
- Civil antitrust enforcement likely to see some changes
  - FTC Section 5 enforcement may return to historical parameters
  - May see meaningful shifts in FTC's consumer protection approach
  - Continued focus on Big Tech
- Merger review and enforcement may decrease, but expect targeted scrutiny of certain sectors (e.g., tech) to remain
  - May see the Trump administration more likely to accept remedies from the merging parties instead of "litigating the fix"
  - State attorneys general may step in to fill perceived gaps in the Trump Administration's enforcement efforts

2024 – Year in Review: Merger Guidelines

- At the end of last year, on December 18, 2023, the DOJ and FTC released new Merger Guidelines
  - President Biden issued a directive in his Executive Order on Promoting Competition in the American Economy to address concerns around market consolidation
- Key principles:
  - Represents a comprehensive approach to all types of mergers – no longer separate horizontal and vertical guidelines
  - Significantly lowers the Herfindahl-Hirschman Index (HHI) and market share thresholds that the agencies use to assess whether a merger of competitors is presumptively anticompetitive
  - Specifies a 30% combined share threshold to trigger a "structural presumption" that a merger is illegal

2024 – Year in Review: Merger Guidelines

- Addresses "dominant" firms, platform markets, minority investments, serial acquisitions, and acquisitions of nascent competitors
- Presents the agencies' approach to mergers in which the agencies will:
  - Challenge a vertical merger if it will allow foreclosure, where a combined firm will hold more than a 50% share in a market
  - Scrutinize where a firm engages in a "pattern or strategy of multiple acquisitions in the same or related business lines"
  - Challenge where merger may substantially lessen competition for "workers, creators, suppliers, and service providers"

2024 – Year in Review: HSR Updates

- On October 10, 2024, the FTC voted 5–0 to finalize the changes to the premerger notification form and the associated instructions and the premerger notification rules
- The Final Rule follows FTC's proposed rulemaking
- The new form requires additional information
- FTC claims "the agencies identified critical gaps in the information provided in the form that, over time, have impeded the detection of mergers that may violate the antitrust laws"
- FTC estimates it will require an additional 68 hours to complete an HSR filing (now need on average 105 hours to respond)
- Effective date is February 10, 2025
- The Commission also is introducing a new online portal for market participants, stakeholders, and the general public to directly submit comments on proposed transactions that may be under review by the FTC

2024 – Year in Review: Interlocking Directorates

- Section 8 of the Clayton Act broadly prohibits individuals from serving as an officer or director of two competing corporations, subject to certain exceptions based on the corporations' finances and the amount of business for which they compete
- Historically, the statute was rarely enforced, with the agencies addressing Section 8 violations by dismissing actions or closing investigations after the parties ended the offending interlock
- Last year, the FTC concluded its first Section 8 enforcement action in 40 years by approving a consent order barring a private equity firm from occupying a competitor's board seat
  - FTC took the view that Section 8 applied notwithstanding that the PE firm, as a limited partnership, was not a "corporation" covered by the statute
  - Chair Kahn noted that the action "puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes"
- DOJ this year also announced multiple board resignations arising from Section 8 concerns
- DOJ's Section 8 enforcement efforts to date have unwound or prevented interlocks involving at least two dozen companies

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2024 – Year in Review: Interlocking Directorates

- **May 2024:** FTC allows Exxon Mobil Corp.'s acquisition of oil producer Pioneer Natural Resources but bans former Pioneer CEO Scott Sheffield from serving on Exxon's board of directors
  - FTC alleged in a complaint that Sheffield's appointment to Exxon's board would be anticompetitive because he served on the board of an Exxon competitor
  - FTC asserted that "appointing Mr. Sheffield to the Exxon Board would facilitate a broad interlock among competitors in violation of **Section 5 of the FTC Act**"

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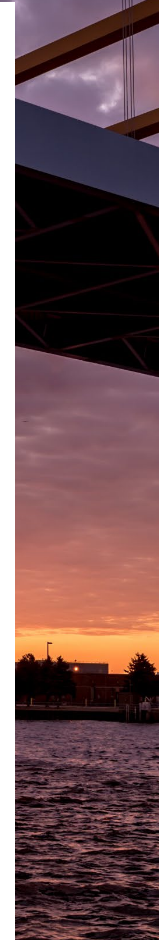

2024 – Year in Review: Interlocking Directorates

- **October 2024:** FTC issues a Final Rule modifying HSR Act premerger notification requirements. Among other things, the new rules require, in mergers where the parties' products or services overlap, the acquiring firm to:
  - (1) Identify current officers and directors (or equivalents) and any employees responsible for the development, marketing, or sale of overlapping products/services who have also served in those roles with the target; and
  - (2) For each officer and director, list all entities that generate revenue in any of the same industries as the target for which the individual serves as an officer or director
- As noted, the Final Rule will take effect on February 10, 2025

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2024 – Year in Review
Spotlight on Private Equity

- Private equity (“PE”) firms are increasingly being targeted by government antitrust enforcers and private plaintiffs
- **May 2024**: FTC and DOJ announce a public inquiry into serial acquisitions and “roll-ups,” i.e., growing through a series of small acquisitions, including transactions that fall below mandatory reporting thresholds
  - Follows statements in 2023 Merger Guidelines and Section 5 Policy Statement that federal agencies may view serial mergers and acquisitions as anticompetitive
- **October 2024**: FTC issues final HSR rule aimed at PE
  - Requires acquiring firm to disclose ownership structure and funds and master limited partnerships to provide org charts showing relationships between entities that are affiliates or associates
  - Requires target entities to disclose prior acquisitions with >$10M in sales/assets for 5-year period

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2024 – Year in Review
Spotlight on Private Equity

- Last year, FTC sued a PE firm and its portfolio company for allegedly executing an anticompetitive rollup scheme
- The plaintiffs' bar is also targeting PE firms, alleging that they are liable for the antitrust violations of their portfolio companies
  - Courts have denied PE firms' motions to dismiss on the ground that plaintiffs plausibly alleged the firm controlled and operated the portfolio company
  - Stretches the law of parental liability to reach conduct that PE firms undertake in the normal course of their business, e.g., making operational changes and maximizing revenue

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2024 – Year in Review: Information Sharing

- Last year, DOJ and FTC withdrew their *1996 Statements of Antitrust Policy in Health Care,* which established an "antitrust safety zone" for certain exchanges of price and cost information
  - The agencies opted instead for a "case-by-case enforcement approach"
- DOJ has described the withdrawn policy statements as "outdated" and "imprudent" but to date has neither replaced them with new guidance nor indicated an intent to do so
- The agencies have advised practitioners to look to case law, policy statements, and advisory opinions/business review letters in assessing the legality of information sharing between competitors
- Courts consider:
  1. The structure of the industry involved and
  2. The nature of the information exchanged. *Todd v. Exxon Corp*., 275 F.3d 191 (2d Cir. 2001)

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2024 – Year in Review: Information Sharing

- Since the withdrawal of the Health Care Statements, the agencies have filed or intervened in multiple lawsuits challenging information exchanges between competitors, especially in cases involving so-called "algorithmic price fixing"
- **September 2023**: The DOJ and several states file a Section 1 Sherman Act information sharing enforcement action against Agri Stats, Inc.
- **August 2024:** DOJ and state AGs bring Section 1 claims alleging a conspiracy between landlords and a software company, RealPage, Inc., to share competitively sensitive information through joint use of RealPage's rental pricing software
  - DOJ previously filed a statement of interest in a related case by private plaintiffs

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2024 – Year in Review: Information Sharing

- DOJ statements of interest and *amicus* briefs seek to make algorithmic pricing *per se* illegal
  - DOJ posits that an agreement among competitors to use certain pricing algorithms to generate “default” or “starting-point” prices is *per se* illegal even if there is no further agreement on final prices
    - DOJ argues that an algorithm provider’s “pitch” could constitute an invitation for collective action among competitors and that their subsequent use of the algorithm would demonstrate acceptance of that invitation
    - Under the government’s proposed standard, most algorithmic pricing arrangements could be interpreted as *per se* illegal

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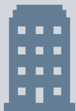
2024 – Year in Review: What Antitrust Means for Artificial Intelligence and Algorithmic Pricing

- Companies across numerous industries are increasingly using artificial intelligence (AI) to create innovations, compete with rivals, and enhance overall performance
  - Businesses are increasingly using algorithms to make decisions about pricing and other matters
  - Algorithms can sometimes incorporate competitor data
- At the same time, antitrust enforcers are finding new ways to apply antitrust laws to AI
- There has also been increased state and federal legislative activity relating to AI and pricing algorithms

2024 – Year in Review: What Antitrust Means for Artificial Intelligence and Algorithmic Pricing

DOJ, FTC and the competition authorities in the UK and EU released a joint statement emphasizing the risk of AI on competition, including risk of algorithms and consequent information sharing



Ongoing private civil lawsuits challenging use of pricing algorithms

RealPage

Hotel operators case

In August 2024, DOJ and several states filed civil lawsuit against RealPage

Reports of ongoing criminal investigations into use of pricing algorithms in various industries

2024 – Year in Review: FTC's Expansion of Power Under Section 5

- FTC enforces Section 5 of the FTC Act, which outlaws "unfair methods of competition"
- As previously noted, the FTC historically has only pursued theories that would violate Sherman and Clayton Acts as unfair methods of competition under Section 5. Under the Biden Administration, the FTC has pursued standalone Section 5 claims for conduct that might not violate other antitrust statutes
- 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 consumers

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2024 – Year in Review:
FTC’s Expansion of Power Under Section 5

- The Policy Statement was a deliberate move to expand the FTC’s enforcement authority
- 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

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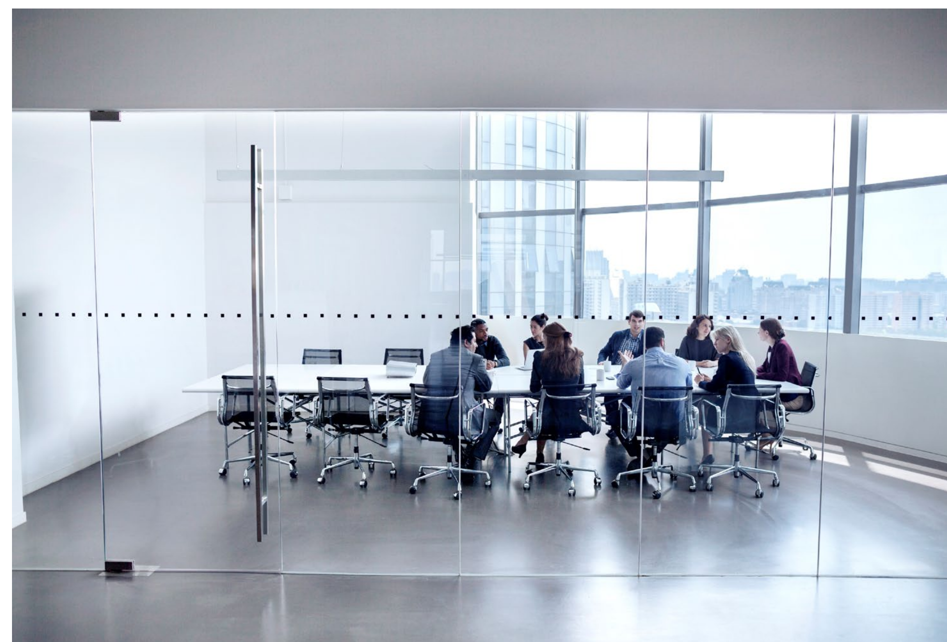
2024 – Year in Review: FTC's Expansion of Power Under Section 5

- In 2024, FTC continued to make greater use of Section 5, both in enforcement and rulemaking:
  - **April 2024:** FTC issues a final rule banning most non-competes as an "unfair method of competition" under Section 5
  - **May 2024**: FTC invokes Section 5 to address competition concerns arising from Exxon-Pioneer merger, barring Pioneer's former CEO from joining Exxon's board



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2024 – Year in Review: The FTC Noncompete Rule

- The FTC has sought to use rulemaking to prohibit noncompete agreements
  - On January 5, 2023, the FTC issued a notice of proposed rulemaking that would prohibit noncompete agreements and sought public comment
  - In April 2024, the FTC issued the final rule effectively banning the use of noncompete agreements nationwide
  - The FTC voted to approve the issuance of the rule 3–2
  - Under the rule, it is an "unfair method of competition" for a person to enter into a non-compete agreement (with some limited exceptions)
  - The FTC could pursue adjudication under Section 5(b) of the FTC Act or seek an injunction in federal court

2024 – Year in Review: Legal Challenges to the FTC Noncompete Rule

- Lawsuits filed in federal court immediately challenging the rule
  - Ryan LLC was first to file in ND Tex, hours after FTC vote
  - U.S. Chamber of Commerce filed next day after FTC vote in E.D. Tex.
    - Court stayed Chamber case on FTC's request; Ryan LLC was first to file
    - Court in N.D. Tex. granted Chamber's request to intervene in Ryan LLC
- Challenges raised host of constitutional, statutory, and administrative law issues, including:
  - Major questions doctrine – argues major questions with dramatic societal impact must be undertaken with "clear congressional authorization" for issues of "vast economic and political significance" rather than regulator's own initiative
  - Non-delegation doctrine – argues rule represents an unconstitutional delegation of legislative authority to grant the FTC rulemaking authority to define "unfair methods of competition"

2024 – Year in Review: Legal Challenges to the FTC Non-Compete Rule

- Challenged as constituting retroactive rulemaking permissible only with clear Congressional authorization
  - Arbitrary and capricious rulemaking in violation of APA
  - In the absence of Congressional authorization, argues should be states regulating
- Also challenge to FTC's rulemaking authority
  - Challengers argue Congress never gave the FTC substantive rulemaking authority and instead limited authority to writing regulations in specific contexts
    - Section 6(g) of FTC Act did not give statutory authority
  - FTC argues Congress specifically empowered the Commission to make rules and regulations aimed at preventing unfair methods of competition
    - Relies on Sections 5 and 6(g) of the FTC Act – grants authority "to make rules and regulations for the purpose of carrying out the provisions of this Act"

2024 – Year in Review: Legal Challenges to the FTC Non-Compete Rule

- After a preliminary injunction over the summer, on August 20, a Texas district court entered an order enjoining the FTC from enforcing the rule in *Ryan, LLC v. FTC* (rule previously to go into effect September 4, 2024)
  - FTC recently appealed that ruling to the Fifth Circuit
  - Two other district court challenges:
    - E.D. Pa. in *ATS Tree Services v. FTC* denied plaintiff's motion for a PI seeking a nationwide injunction staying the effective date of the rule
    - M.D. Fla. in *Properties of the Villages, Inc. v. FTC* found the rule exceeded the FTC's authority
      - FTC appealed ruling to Eleventh Circuit
  - Republican Commissioner Holyoak recently said, at a conference, that she did not think the Rule would survive on appeal.

2024 – Year in Review: Antitrust in Labor Markets

- **September 2024: The** FTC announced it was withdrawing from a Memorandum of Understanding on Labor Issues in Merger Investigations (MOU) with DOJ, the National Labor Relations Board (NLRB), and the Department of Labor (DOL)
  - FTC made this announcement one month after the agencies executed the MOU
  - The MOU sought to enhance interagency coordination on assessing the impact of mergers on labor markets. The MOU included information-sharing protocols, training and technical assistance by DOL and NLRB, and coordination meetings
  - In withdrawing, the FTC promised to “continue to closely scrutinize all issues related to mergers, including potential impacts on labor, in accordance with its merger guidelines”
- The FTC has continued to focus on the impacts on labor in its merger challenges this year, alleging in some cases that the merger would increase leverage over workers
  - The revised Merger Guidelines identified possible effects on labor as a reason to challenge a potential transaction
- The prior Trump administration also adopted labor as part of its antitrust approach. While we could see some retrenchment, antitrust and labor is likely here to stay

2024 – Year in Review: Renewed Enforcement of Robinson-Patman Act

- In 1977, DOJ issued a report stating it would cease Robinson-Patman enforcement, in part because the law did not promote the antitrust goals of competition and low prices
- Under the Biden Administration, the FTC took various steps to revive RPA enforcement
  - July 2021: Executive Order on Promoting Competition calls on FTC Chair to report on whether food industry practices may violate the RPA
  - FTC Commissioner Alvaro M. Bedoya made various remarks suggesting support for RPA enforcement efforts
  - In 2024, FTC continued to pursue a variety of investigations into food and beverage manufacturers and distributors
    - News reports from the Summer of 2024 suggested that FTC staff recommended the FTC file a lawsuit against large U.S. alcohol distributor over practices related to how it prices and sells wine and liquor
      - To date, no lawsuit has been filed

2024 – Year in Review: Renewed Enforcement of Robinson-Patman Act

- Private plaintiffs have also recently enjoyed RPA litigation success
  - May 20, 2024: Jury verdict upheld for nine plaintiff wholesalers and preliminary injunction entered against manufacturer and distributor for selling product at much lower prices to competitors (including large chain stores) without making similar offers to plaintiff wholesalers
  - Court ruled that even a *de minimis* loss in sales or customers is sufficient to demonstrate RPA competitive injury.

2024 – Year in Review:
Corporate Antitrust Compliance Programs

- **November 2024:** DOJ Antitrust Division updated its guidance on evaluation of companies' antitrust compliance programs in the context of criminal enforcement decisions
- Overarching message is that an hour of antitrust compliance training, once a year, may not be sufficient
  - Companies should thoughtfully design antirust compliance plans to be effective and appropriately tailored to company risk profile
  - Companies should continually assess their antitrust policies and programs

2024 – Year in Review: Corporate Antitrust Compliance Programs

- Key Updates
  - **Civil Antitrust Implications**
    - Guidance makes clear that civil DOJ enforcement agents will use similar rubric as criminal prosecutors when evaluating compliance programs
  - **Ephemeral messaging use and preservation**
    - DOJ is interested in what electronic communication channels (e.g., text, WhatsApp, etc.) the company and its employees use (or are allowed to use) for business purposes and what mechanisms the company has installed to manage and preserve this information
  - **AI, algorithmic software, and other technologies**
    - Companies' risk assessments should account for use of these evolving technologies
  - **Whistleblowing protections**
    - Program should include confidential reporting mechanisms and avoid policies that discourage whistleblowers

Best Practices to Reduce Antitrust Risk

- Companies should have effective antitrust compliance programs in place to deter and detect anticompetitive conduct
  - “Off the Shelf” programs will not cut it and training alone will not suffice
  - Need to adapt compliance program to fit the company’s risk profile and evolve the program over time
  - Companies should be updating policies based on periodic risk assessments, lessons learned, and changes to DOJ/FTC regulations and guidance, including addressing ephemeral messaging and AI/algorithmic pricing
  - Auditing and testing should be components of the compliance program
    - Could include review of documents or communications in high-risk areas for the company to help detect or deter problematic conduct

Best Practices to Reduce Antitrust Risk

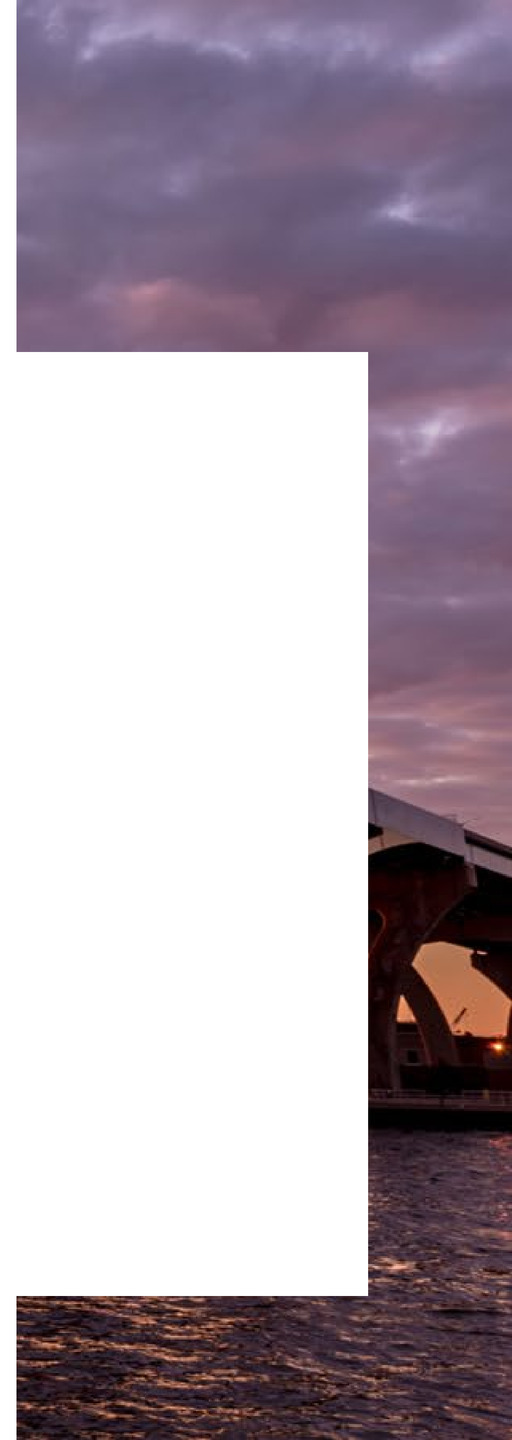
- Companies contemplating vertical or horizontal mergers should involve antitrust counsel early and recognize that such transactions may continue to garner a harder look and possibly an outright challenge even with the shift in Administrations, at least until new guidance may emerge
- In response to revived Robinson-Patman enforcement, companies should review pricing policies and programs to ensure continued RPA compliance
- Companies should avoid sharing common officers or directors with competitors and take steps to verify no such interlocks exist given the reactivation of Section 8 enforcement. This is true regardless of whether the companies are corporations or take some other corporate form

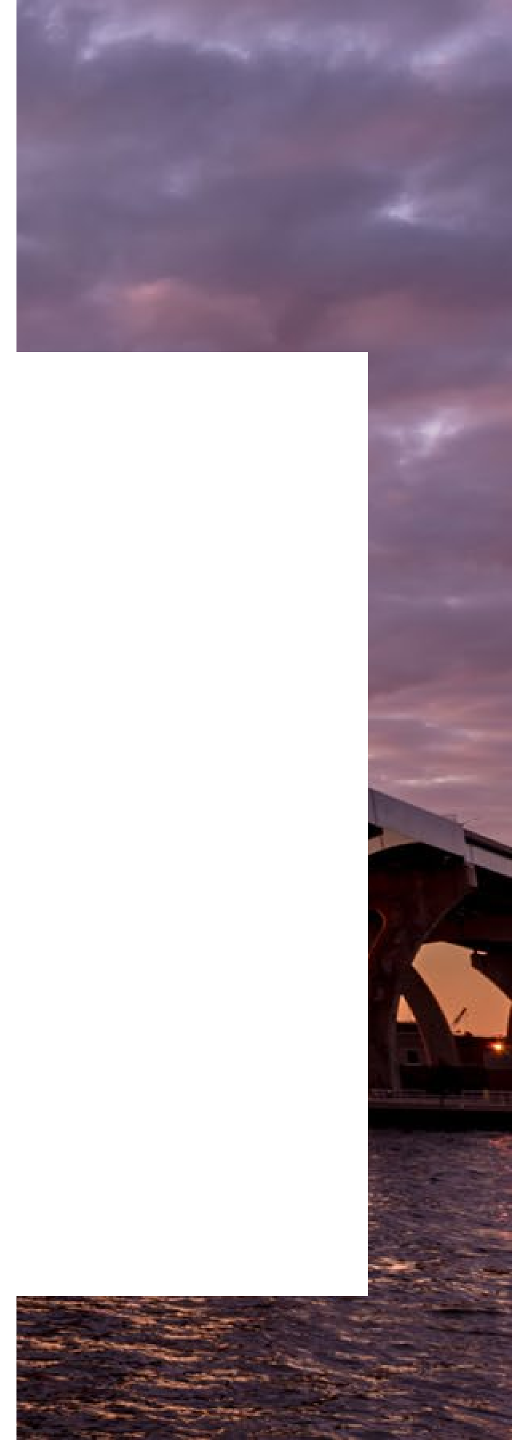
Best Practices to Reduce Antitrust Risk

- Companies should continue to review any noncompete agreements with counsel and watch the status of the appeal of the FTC's rule
- Review your agreements – non-solicit provisions are very common in a variety of agreements. If you have them, evaluate the necessity and scope of the restriction
- Companies should evaluate information exchanges and participation in industry surveys given the federal agencies' withdrawal from guidance and policy statements and include past instances of information sharing in their antitrust audits
- Companies should be mindful to ensure their AI practices do not unreasonably foreclose rivals, create unfair or coercive power asymmetries, facilitate collusion, or lead to unreasonably low standards of competition

Thank You

- Questions?





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