Arnold & Porter

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

ACC NCR Advanced Topics for In-House Lawyers

Session Four: Antitrust 2.0 – New Administration, New Priorities

Antitrust Overview & Purpose

- The fundamental goal of antitrust is to preserve and protect competition by prohibiting practices or transactions that unreasonably restrain competition
- But:

  "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight, and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."

  —Judge Learned Hand, *United States v. Alcoa* (1945)

Overview of US Antitrust Law

US Antitrust Laws

Category	Description	Primary Concern	Analytical Framework	Examples of Conduct
Horizontal Agreements *Sherman § 1*	• Agreements among competitors that unreasonably restrain trade	• Ensuring competition among competitors	• "Naked" agreements are *per se* unlawful • Other agreements analyzed under R*ule of Reason*	• Price-fixing • Bid rigging • Agreements not to compete • Group boycotts • Competitor interactions/ information sharing
Vertical Agreements *Sherman § 1*	• Agreements between suppliers and customers that unreasonably restrain trade	• Preventing foreclosure of competition at various levels of the supply chain	• *Rule of Reason*	• Resale price maintenance • Suggested pricing/minimum advertised pricing • Territorial or customer restrictions • Exclusive dealing • Tying
Unilateral Conduct *Sherman § 2*	• Monopolization or attempted monopolization	• Preventing leveraging of market power to foreclose competitors	• *Rule of Reason*	• Refusals to deal • Predatory pricing • Price squeezing • Bundling/tying practices • Product hopping
M&A	• Mergers/acquisitions • Joint ventures	• Preserving competition after transaction closes	• Hart-Scott-Rodino Review • "Substantial Likelihood"	• Acquisitions, divestitures, etc. • Joint ventures • Exclusive licenses

US Antitrust Statutes

- Sherman Act, Sections 1 & 2
  - Section 1: Contracts, combinations and conspiracies in restraint of trade (15 USC 1)
  - Section 2: Monopolization and attempts to monopolize (15 USC 2)
- FTC Act, 15 USC 45
  - “Unfair methods of competition”
- Clayton Act (15 USC 18) & Hart-Scott-Rodino Act (15 USC 18a)
  - Mergers
- Robinson-Patman Act (15 USC 13a)
  - Price discrimination
- State laws

Sherman Act § 1

- Prohibits any agreement that unreasonably lessens competition, including:
  - Fixing terms and conditions such as prices, discounts, rebates, etc.
  - Allocation of markets/territories/customers
  - Limiting production or sale of a product
  - Group boycotts (agreements not to do business with customers or suppliers) also are often held illegal
  - Agreement need not to formal or in writing
  - Can be inferred from parallel conduct

Antitrust Legal Analysis—Per Se Violations vs. Rule of Reason

- Per Se Rule: Conduct that always or almost always restricts competition and reduces output is unlawful without further analysis
  - Applies to most horizonal agreements, e.g., price-fixing, bid rigging, market allocation
  - Can be prosecuted criminally
- Rule of Reason: Does the anticompetitive effect substantially outweigh the pro-competitive benefits and is the restraint reasonably necessary to achieve those benefits?
  - Applies to all other restraints
  - Only subject to civil enforcement

Sherman Act § 1—Watch Outs

- Horizontal price fixing
  - Communications with competitors
  - Can arise in conversations with customers re: competitors
- "Hub and Spoke" conspiracy
  - Supplier or customer acts as conduit for agreement
    - E.g., communications with customers concerning prices paid or charged by other customers
  - Question: Are we moderating an agreement on prices or asking someone else to do so?

Sherman Act § 1—Watch Outs (cont'd)

- Vertical price fixing
  - Also called "resale price maintenance" or "RPM"
  - Setting price floor on retail prices can be unlawful
- But
  - Conditioning money on a maximum resale price (price ceiling) may raise antitrust issues
  - Conditioning money on a minimum advertised price may raise antitrust issues
- Dual distribution
  - Customers/distributors can also be horizontal competitors

Sherman Act § 2—Monopolization & Attempted Monopolization

- Unlawful monopolization requires:
  - High market share (50+ percent) ***plus*** exclusionary conduct
- Unlawful attempted monopolization requires:
  - High market share (35-50+ percent) ***plus*** exclusionary conduct ***plus*** intent
- Exclusionary conduct includes:
  - Predatory pricing, disparagement, refusals to deal, patent acquisitions, vertical restraints, unfounded patent infringement suits
- Also prohibits "tying," bundling, exclusive dealing (Clayton Act § 3)

Clayton Act § 2—The Robinson-Patman Act

- Prohibits price and nonprice discrimination
- Defenses
  - Meeting competition
  - Cost justification
- Note: § 2(f) prohibits buyer inducement of seller discrimination
- Buyer liability is derivative
  - No violation absent seller violation
  - All seller defenses apply

Clayton Act § 7 & Hart-Scott-Rodino Act—Merger Review

- Transactions unlawful when they substantially lessen competition
- HSR Act requires advance notice for transactions valued at greater than $94 MM (changes annually)
  - Covers various types of transactions—voting securities, noncorporate interests, assets, joint ventures
- DOJ and FTC have co-extensive jurisdiction
  - Generally specialized by industry
  - Disputes over which agency will review can occur in high-profile cases

More Than 130 Other Countries Have Competition Laws

Antitrust Enforcement

Who Enforces the Antitrust Laws?

- Federal Trade Commission (civil)
- US Department of Justice (criminal and civil)
- State Attorneys General (criminal and civil)
- Private plaintiffs frequently follow governmental activity (civil)
  - Competitors
  - Direct and indirect suppliers
  - Direct and indirect purchasers

Why Antitrust Compliance Matters

Why Antitrust Compliance Is Important

1

PREVENT AND DETECT MISCONDUCT

2

PROTECT YOUR COMPANY'S REPUTATION

3

REDUCE RISK OF LITIGATION

4

IT'S THE RIGHT THING TO DO

5

THE FEDS ARE WATCHING

Statutory Penalties

- "Hard Core" per se violations are prosecuted as felonies
  - Individuals: 10 years in prison and up to $1 million per violation
  - Corporations: $100 million per violation or "twice the gross gain or twice the gross loss" resulting from the violation
- DOJ and FTC seek only injunctive relief for non-hardcore violations
  - No provision for civil fines
- Private Actions
  - 3x plaintiff's actual injury ("treble damages") with no upper limit
  - Plus, attorneys' fees and costs
  - Injunctive relief

Notable Criminal Prosecutions

Foreign Currency Exchange

- $2.5 billion in criminal fines
- Citicorp paid $925 million; Barclays paid $650 million; JP Morgan Chase paid $550 million; RBS paid $395 million

Auto Parts

- 46 corporations convicted and $2.9 billion in fines
- 65 executives charged
- Executives sentenced to terms ranging from 1–2 years.
- Enforcement in 15 different countries

Canned Tuna

- Resulted from a merger filing
- Bumble Bee CEO convicted and imprisoned for 40 months
- Starkist sentenced to $100 million criminal fine

Notable Civil Matters

- DOJ civil litigation resulted in injunctive relief against Microsoft
- Microsoft a defendant in related civil litigation throughout US, with settlements reportedly exceeding $4 billion
- DOJ sued Visa and MasterCard challenging rules that prohibited member banks from issuing Amex and Discover cards; judgment upheld on appeal
- Follow-on lawsuits by Amex and Discover
  - Amex settles for $4 billion
  - Discover settles for $2.75 billion
- Conwood sues UST alleging UST trade program and field practices substantially foreclosed Conwood
  - Jury verdict against UST
  - Trebled award of $1 billion upheld on appeal

Recent Developments

"The time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs…"

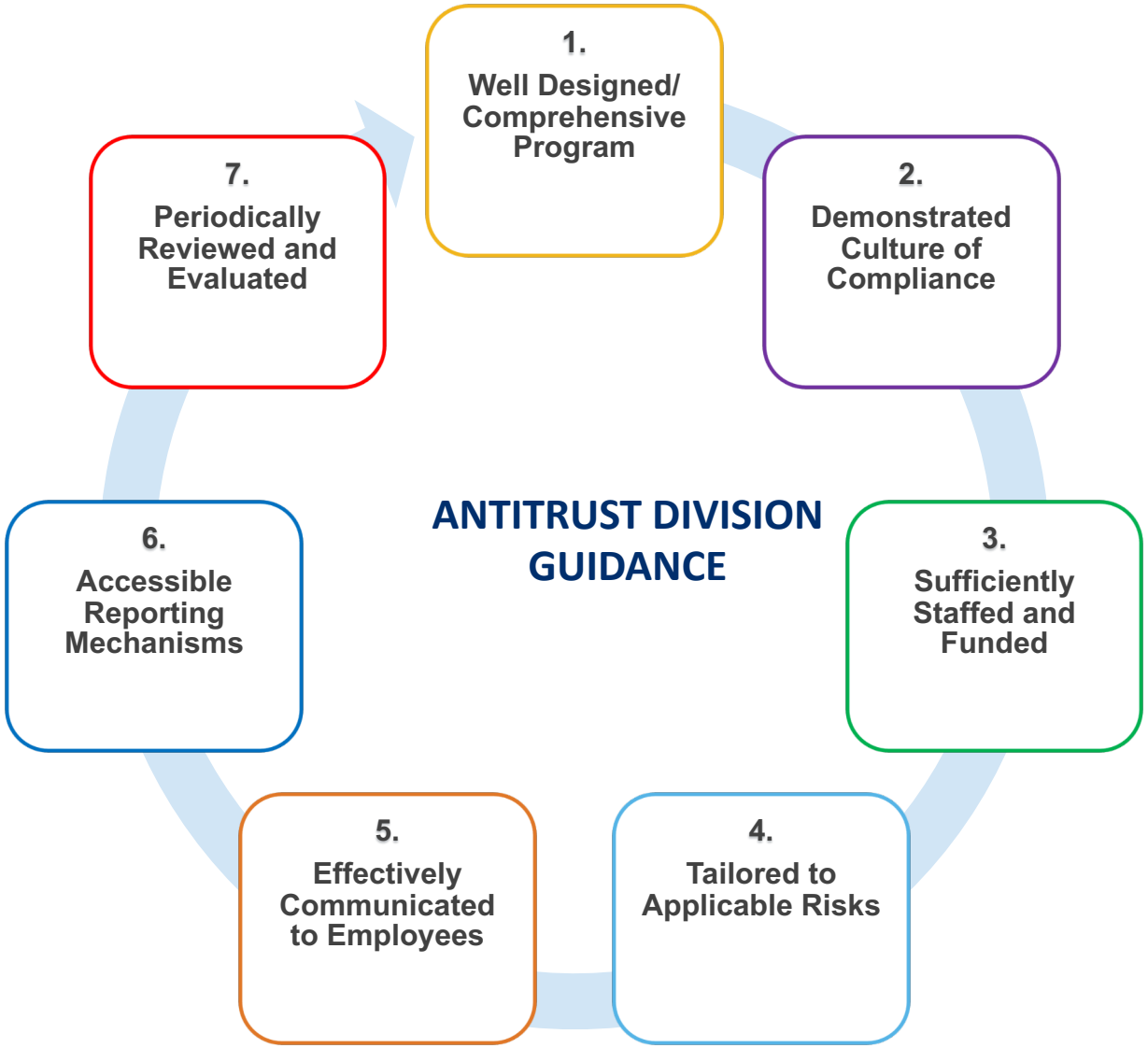
–*Makan Delrahim*, July 11, 2019

Recent Developments (cont'd)

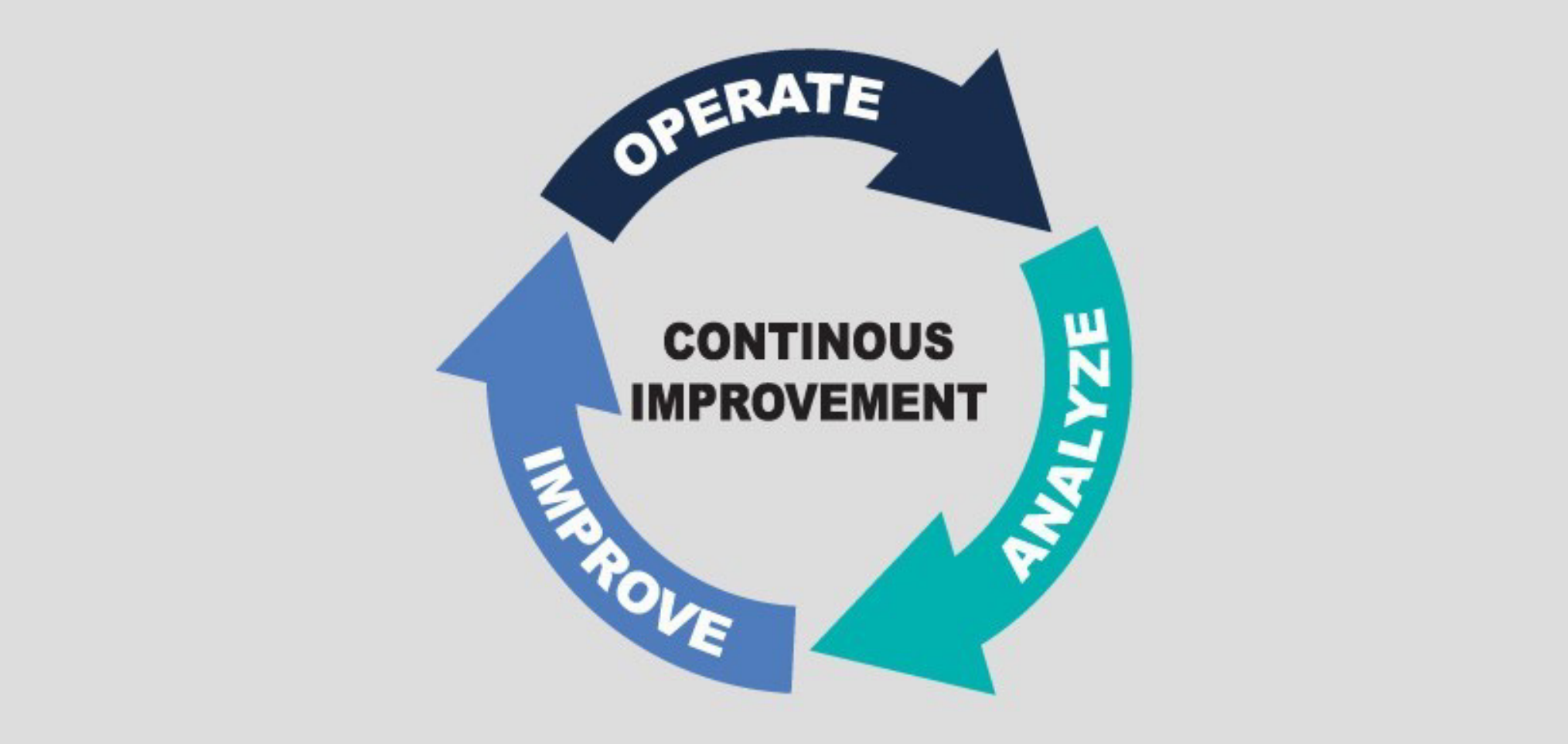
THE DOJ IS NOW FOCUSING ON ANTITRUST COMPLIANCE PROGRAMS

NOVEMBER 2018	DAG Rod Rosenstein states that DOJ's corporate enforcement policies "*encourage companies to implement improved compliance programs*"
APRIL 2019	DOJ Criminal Division publishes new guidance for prosecutors to use when evaluating corporate compliance programs
JULY 2019	DOJ announces that the DOJ Antitrust Division will evaluate antitrust compliance programs in charging and sentencing phases and publishes guidance

Essential Elements of an Effective Program



Essential Elements

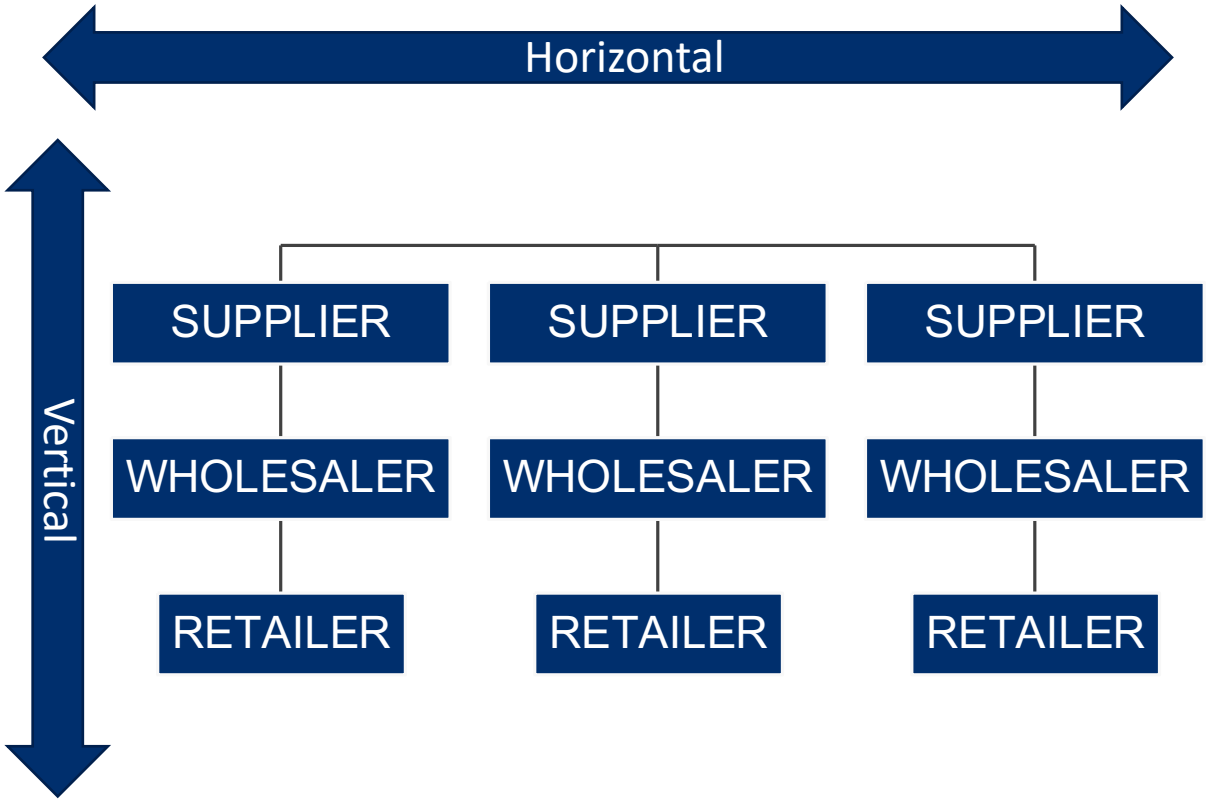


Common Challenges

1. **"I can't get executive buy-in"**
   - Company executives often don't know what they don't know
   - Bring in someone to present on the antitrust laws and executive culpability for company actions
2. **"I can't get enough headcount/budget to get this done"**
   - Seek implementation guidance and support from outside counsel
   - Start small
   - See No. 1 above!
3. **"There's no way we can get tailored training to all of our employees"**
   - Develop issue-specific resources
   - Post online/deliver to workgroups/make available on demand via intranet—one issue at a time
4. **"We have too many compliance initiatives already!"**
   - Incorporate antitrust compliance into existing governance policies and procedures
   - Start with higher-risk areas and workgroups

Antitrust Issue Spotting

Key Issue: Vertical or Horizontal?



Nuances

- "Hub and Spoke" conspiracy—e.g., an agreement among wholesalers coordinated by their supplier—is treated as horizontal
  - Example: *US v. Apple*
    (Apple coordinated conspiracy among book publishers to raise prices)
- Firms can be in a horizontal relationship for some purposes and not others
  - Example: *US v. Adobe*
    (Google and Intel compete to hire engineers, even if not for sales)
- "Dual Distribution"—sell to and compete with distributors—is treated as vertical
  - Example: Technology vendor that sells direct to large accounts and through distributors for smaller accounts.

Why Horizontal vs. Vertical Matters

- Antitrust laws mostly concerned with ensuring competition amongst competitors
- "Naked" horizontal agreements prosecuted criminally
- Some horizontal agreements condemned as illegal per se
- Vertical agreements analyzed under the "rule of reason"
- ***Exceptions***
  - Resale price maintenance is rule of reason under federal law but illegal per se under some state laws
  - Some horizontal agreements get rule of reason treatment if "ancillary" to a procompetitive agreement (e.g., a noncompete ancillary to a joint venture agreement)

Spotting Potential Criminal/Per Se Agreements

- ***Every agreement with a competitor deserves close scrutiny***
- Criminal/per se treatment of "price fixing" covers more than just "prices"
  - "Price fixing" includes agreements on "list prices," rebates, discounting, shipping terms, promotional terms, credit terms, other terms, and terms and conditions (e.g., limitations of liability)
  - Any agreement affecting price treated as price fixing, including on output and product features
  - Submitting a "courtesy bid" (no intention of winning) at request of another bidder treated as price fixing
- Agreements not to compete include agreements on customers, territories, products
- Group boycotts (competing suppliers agreeing not to deal with a customer) treated as per se illegal (but not criminal) when the customer is a competitor and the good not supplied is essential for competition
- A restraint will not be treated as ancillary to a legitimate collaboration if it is overbroad
- ***Reminder***: Resale price maintenance (setting the price that your distributor must charge) remains illegal per se under some state law, even if rule of reason under federal law

Conduct that Raises Risks When Your Share Is High

- When share is >35 percent, conduct potentially raises risks of attempted monopolization/monopolization
- Conduct to look out for:
  - *Exclusive dealing*: Requiring suppliers or customers not to deal with your competitors (or setting prices that are higher if they deal with your competitors)
  - *Tying*: Conditioning the sale of one product where your share is high on the purchase of another product where you face more competition
  - *Bundled pricing*: Conditioning favorable pricing on purchasing multiple products
  - *Loyalty incentives*: Pricing dependent upon purchasing incremental volume (e.g., a lower price on units 100–200 than charged on the first 100 units)
  - *Refusals to deal*: Courts hostile to claims, but consider litigation risks

Market Definition Is Critical in an Antitrust Case

Antitrust Markets

- Besides per se violations, most analyses begin with a market definition
  - Market definition provides a framework for analyzing market shares, entry barriers, identifying competitors, analyzing past effects, predicting future effects, etc.
- All antitrust markets have two elements

Product Market	Geographic Market
What alternative products customers will choose if prices increase by about 5–10%	Where can customers obtain alternative products if prices increase by about 5–10% • Will consumers go that far to purchase? • Do suppliers supply to this area? • Are there geographical boundaries?

Mergers & Acquisitions

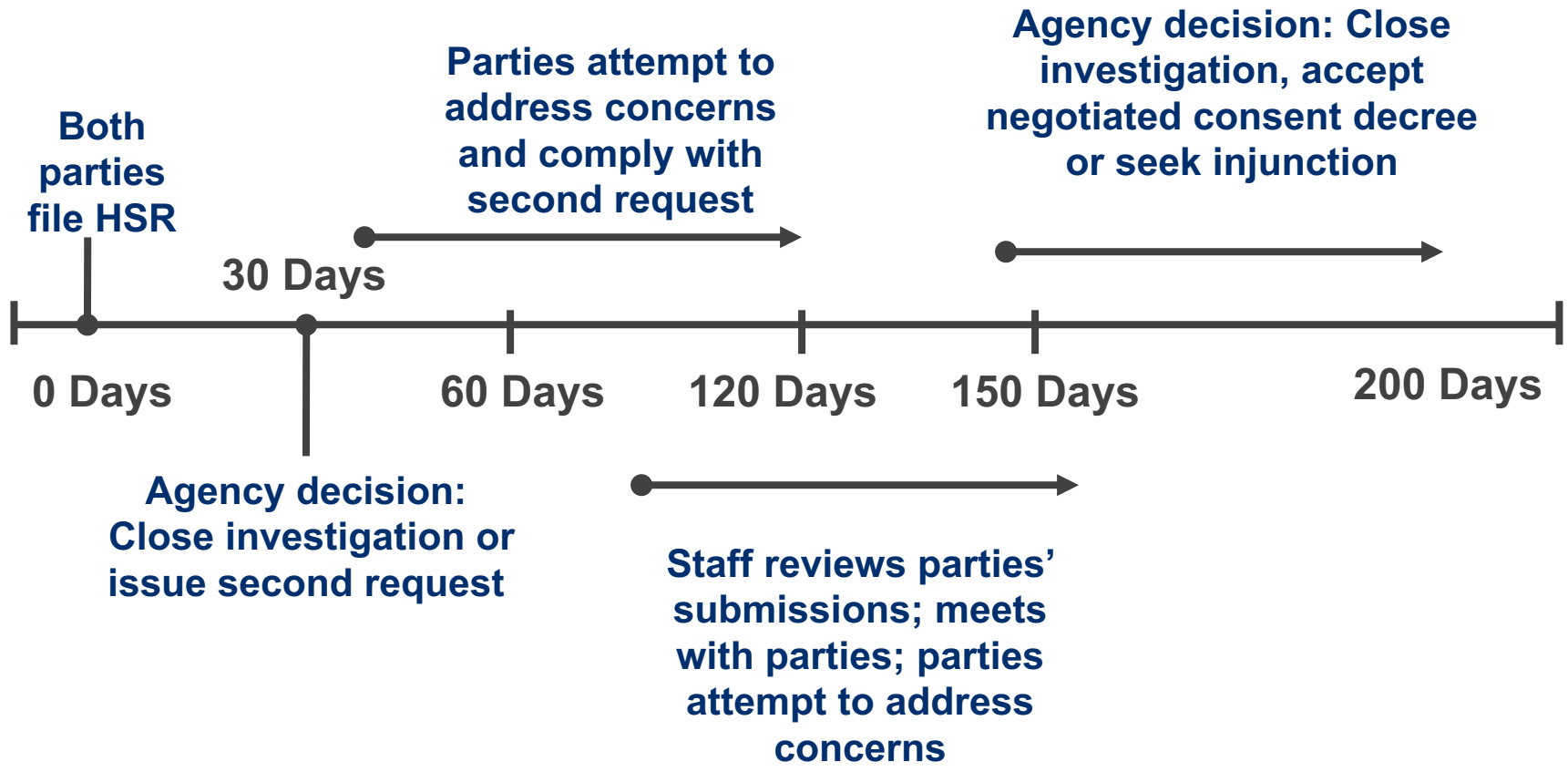
US Merger Review Process

- Transactions unlawful when they “substantially lessen competition”
- HSR Act requires advance notice for transactions valued at greater than $94 MM (changes annually)
  - Covers various types of transactions—voting securities, noncorporate interests, assets, joint ventures
- HSR filing can be made at any time; waiting periods must be observed
- 30-day initial review period from date both parties file
  - Except for all cash tender offers—15 days
- DOJ and FTC have co-extensive jurisdiction
  - Generally specialized by industry
  - Disputes over which agency will review can occur in high-profile cases

US Merger Review Process (cont'd)

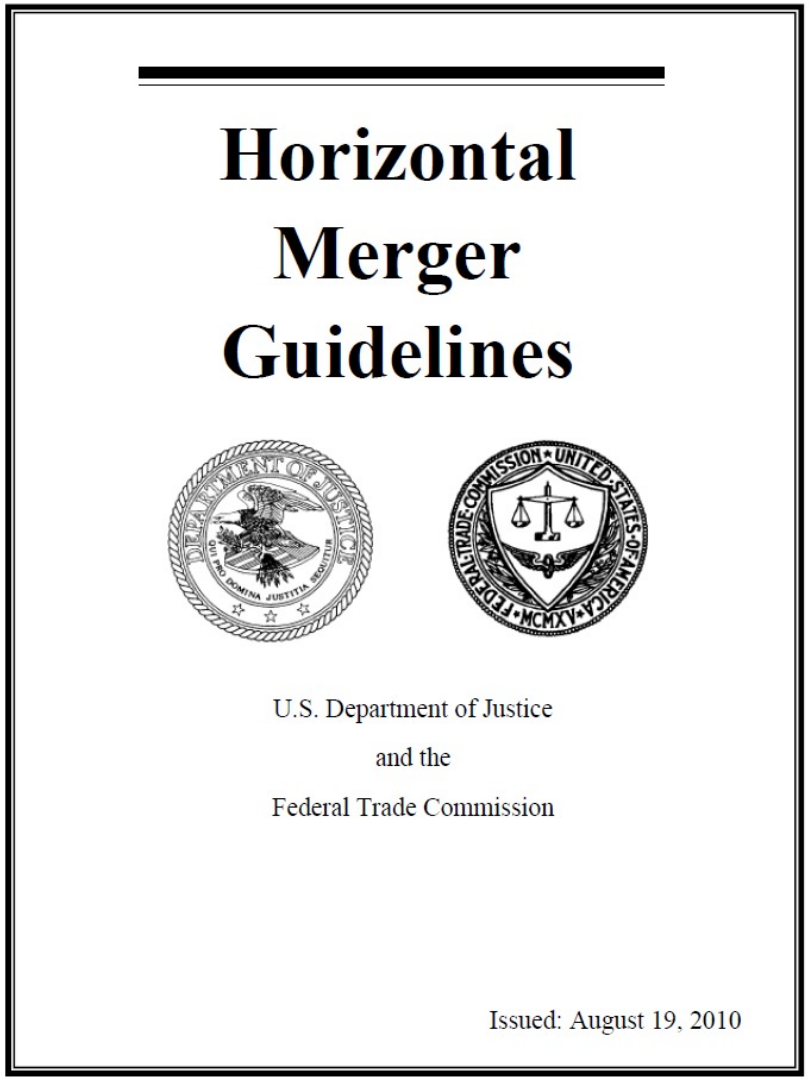
- Reviewing agency can extend waiting period and request more information by issuing a "second request"
  - Very burdensome and time consuming (document, data and interrogatory requests)
  - Can stall planned closing and affect deal financing
- If second request issued:
  - Agency has 30 days after both parties substantially comply with second request
  - But the parties typically agree to give more time
- Agency options:
  - Close investigation
  - Enter into a consent decree
  - Seek injunction in district court
  - FTC can also file an administrative complaint
- Process extends if injunction sought or administrative complaint filed

Sample US Timeline through Agency Decision



US Substantive Review—Merger Guidelines

- Horizontal Merger Guidelines
  - Revised in 2010 to conform with current agency practices
- Importance of market definition remains focus for courts
- Key issues
  - Competitive effects
  - Concentration
  - Entry
  - Efficiencies



Mergers & Acquisitions—Substantive Analysis

Basic Theories of Harm for Mergers

Horizontal Mergers	Vertical Mergers
Unilateral Effects • Eliminating close competitors allows price increase without significant loss of sales **Coordinated Effects** • Limited number of remaining competitors will engage in coordination (tacit or explicit)	**Foreclosure** **Eliminating entry** **Information sharing**

US Substantive Review—Concentration

- Measured by HHI: Summing the squares of shares of all market participants
  - Maximum HHI is 10,000
  - HHI of 10 companies with 10 percent share = 1000
  - HHI thresholds changed in 2010 Merger Guideline
  - There are safe harbors
  - Number of competitors is probably more important
- Concentration is just a first step and can be rebutted
  - Industry dynamics that suggest anticompetitive effects unlikely
    - Extreme version: “Failing firm” defense
  - New entry is “timely, likely and sufficient” to deter or counteract potential anticompetitive effects
  - Countervailing buyer power

US Substantive Review—Entry

- Must be more than theoretical
  - *Would* entry likely occur NOT *could* entry likely occur
- Is it
  - Timely
  - Likely
  - Sufficient

US Substantive Merger Review—Efficiencies

- Not all claimed efficiencies are recognized
  - Must be “merger specific”
    - Efficiencies obtainable without the merger (e.g., by contract or JV) do not count
    - Scale efficiencies that could be gained by growing the business do not count
  - Substantiated and not speculative (e.g., reductions in marginal cost easier to show than R&D synergies)
  - Efficiencies resulting from reductions in output or service are not recognized
- Must be sufficient to reverse the potential anticompetitive effects
  - More important in close cases
  - An efficiencies argument can also be important in structuring divestitures or other relief

Hot Topic: Recent Surge in Merger Filings

- FTC Premerger Notification Office drowning in "tidal wave" of recent merger filings
  - Cannot keep up with statutory timelines
  - Has started sending standard form letters

> Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk. Any inaction by the Commission before the expiration of the waiting period should not be construed as a determination regarding the lawfulness of the transaction. Indeed, no such determination could be made unless and until the Commission completes its investigation. The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions—before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses.
>
> Accordingly, even if the parties consummate the above-referenced transaction, the Commission may still take further action as the public interest may require, which may include any and all available legal actions and seeking any and all appropriate remedies.

HSR Transactions by Month

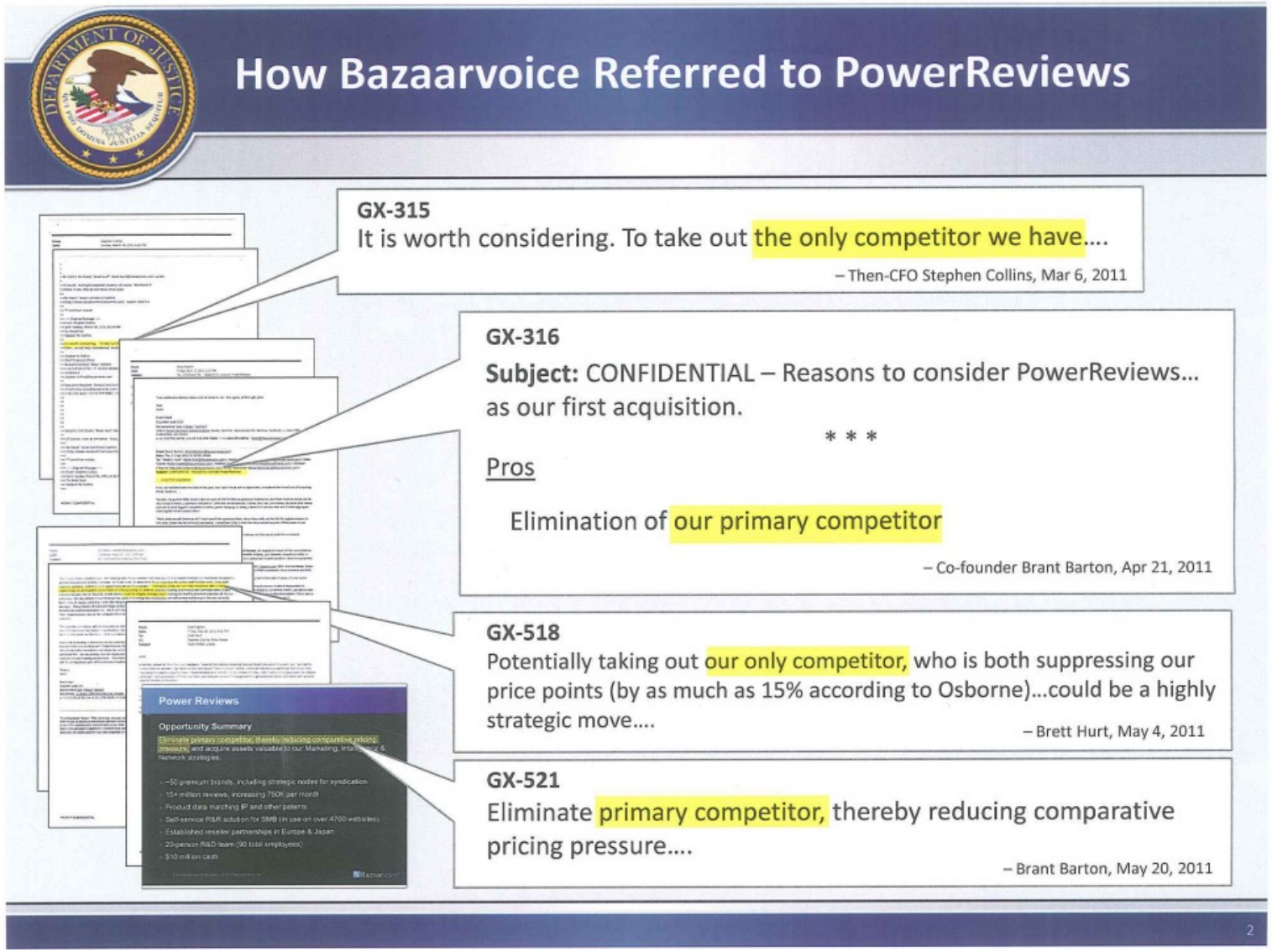
July 2021	343
June 2021	295
May 2021	326
April 2021	266
March 2021	323
February 2021	304
January 2021	210
December 2020	192
November 2020	424
October 2020	233
September 2020	177
August 2020	182
July 2020	112
June 2020	111
May 2020	73
April 2020	79

Documents & Communications

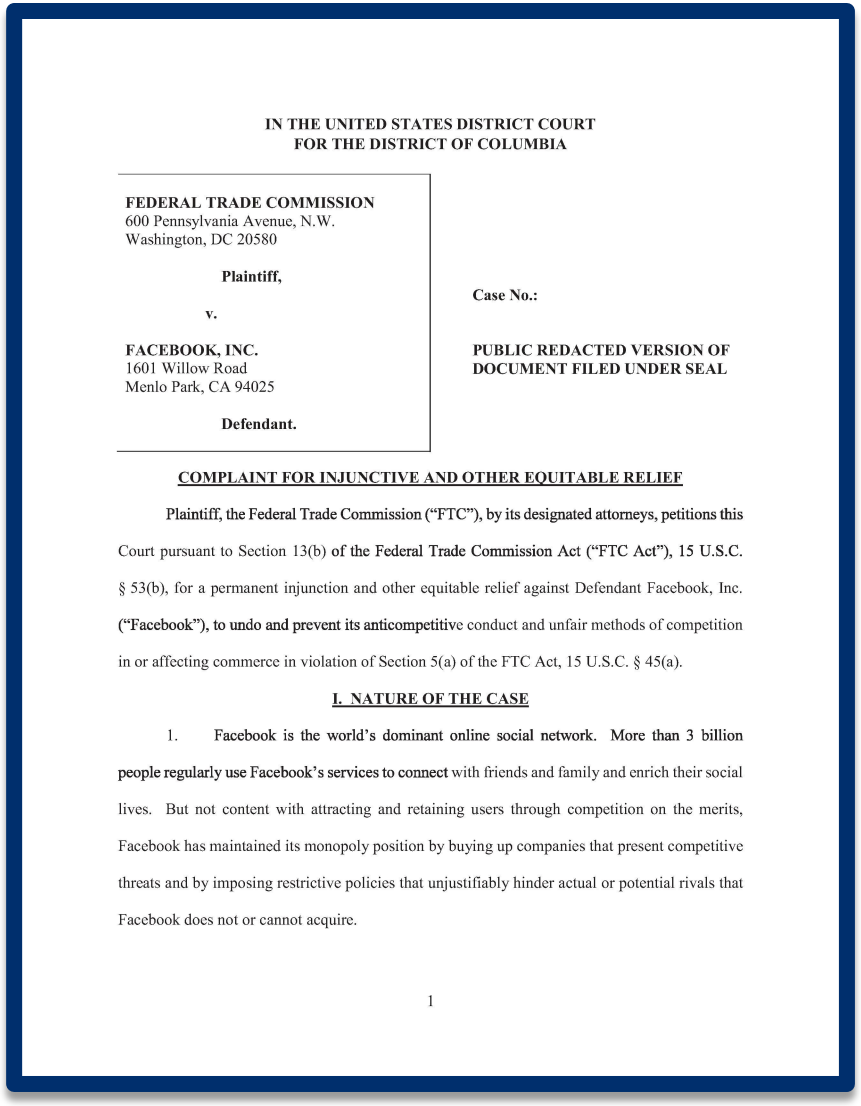
Importance of Internal Documents

- Internal documents are vitally important in antitrust cases
- Documents should:
  - Avoid ambiguous/speculative language
  - Accurately reflect pro-competitive rationales
  - Be clearly marked as “drafts” if they have not yet been finalized, particularly if they have yet to be subject to legal review

How Documents Are Used



How Documents Are Used (cont'd)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Plaintiff,

v.

FACEBOOK, INC.
1601 Willow Road
Menlo Park, CA 94025

Defendant.

Case No.:

PUBLIC REDACTED VERSION OF
DOCUMENT FILED UNDER SEAL

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), by its designated attorneys, petitions this Court pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for a permanent injunction and other equitable relief against Defendant Facebook, Inc. ("Facebook"), to undo and prevent its anticompetitive conduct and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

I. NATURE OF THE CASE

1. Facebook is the world's dominant online social network. More than 3 billion people regularly use Facebook's services to connect with friends and family and enrich their social lives. But not content with attracting and retaining users through competition on the merits, Facebook has maintained its monopoly position by buying up companies that present competitive threats and by imposing restrictive policies that unjustifiably hinder actual or potential rivals that Facebook does not or cannot acquire.

1

"It is better to buy than to compete"

"If [Instagram and Path] grow to a large scale they could be very disruptive to us"

"We can likely always just buy any competitive startups"

Documents—the Dos

- #1 Rule: **Be truthful and accurate**

- Stick to the facts—state when expressing opinions or reporting rumor
- Note the source of information, especially competitive intel
- Write to ensure that your message cannot be misconstrued
  - Innuendo, jokes, sarcasm, vague language all invite confusion

Documents—the Don’ts

- **Avoid colorful “intent” words**
  - E.g., “dominance,” “crush,” “stifle,” “drive out,” or “cut off”
- **Avoid words that connote cooperation with competitors**
  - E.g., “price leadership,” “rational pricing behavior”
- **Don’t boast unnecessarily or exaggerate**
  - E.g., “No need to worry about competing products when setting price strategies” or “We’ll lock-up the market” when you mean “our new product performs better and is cheaper”
- **Avoid characterizing price or competition loosely**
  - E.g., “stabilize,” “predatory, “below cost,” “signal”
- **Don’t write down advice from lawyer without asking a lawyer**
  - A bell should go off if they write: “The lawyer said . . . ”
- **Avoid “guilt complex” words**
  - E.g., “don’t put it in writing,” “for your eyes only,” “delete after reading”

Pre-Merger Information Sharing and Coordination

- Information sharing can raise risks
- Most sensitive information
  - Prices
  - Costs
  - Profitability
  - Strategic and marketing plans
  - Product development plans
  - Customers
- Limit who has information
- Planning okay; coordinated action is not

Hot Topics: Information Exchange, Benchmarking, Trade Associations

Information Exchange/Benchmarking

- Antitrust risks in competitor communications
  - Could be seen as evidence of an illegal agreement to coordinate prices or other commercial terms
  - Exchange itself could be challenged as an illegal agreement if the exchange results in less competition
    - Example: Preview price increases
    - Example: Disclose confidential cost or profit information (because knowledge of your costs may affect how competitors price)

Challenges to "Signaling"

- Important to vet any disclosure of competitively sensitive information (e.g., future pricing, capacity utilization, etc.)—*including* in public forums like analyst calls
  - Is there a legitimate business justification for the disclosure ***other than*** signaling competitors in the hope that they follow or providing information to competitors that you expect will lead them to change the way they compete?
- FTC consent decrees
  - *In re Valassis* (FTC): CEO said Valassis would aggressively defend existing customers but would not bid for new customers below $6 (substantially above current prices) and said that Valassis would be looking for "concrete evidence" of "reciprocity" from its main competitor, or else it would resume a price war
  - *In re U-Haul* (FTC)
    - Public invitation: CEO said on analyst call that U-Haul was "show[ing] rate leadership" and competitors should not "throw money away" by cutting prices.
    - Private communication: CEO directed regional managers to raise prices and then privately speak to counterparts at a competitor to make sure they knew of the increase

Guidelines for Benchmarking

- Important not to obtain competitive information directly from competitors
- Do not use customers, distributors, suppliers, or other third parties as means to "channel" information to or from competitors
  - OK to obtain public competitive information from customers, distributors, or other noncompetitors; such third parties may not be used to funnel nonpublic information between competitors
  - Generally OK to receive information from a customer or distributor for the good faith purpose of meeting a competitor's price or terms
  - To avoid doubt, clearly label sources when recording or using competitive information (e.g., public source, internal estimate)
- Avoid competitively sensitive information or aggregate
  - Historical vs. current information
  - Aggregated vs. competitor-identifiable information
- ***Trade secrets and industrial espionage laws raise distinct issues***

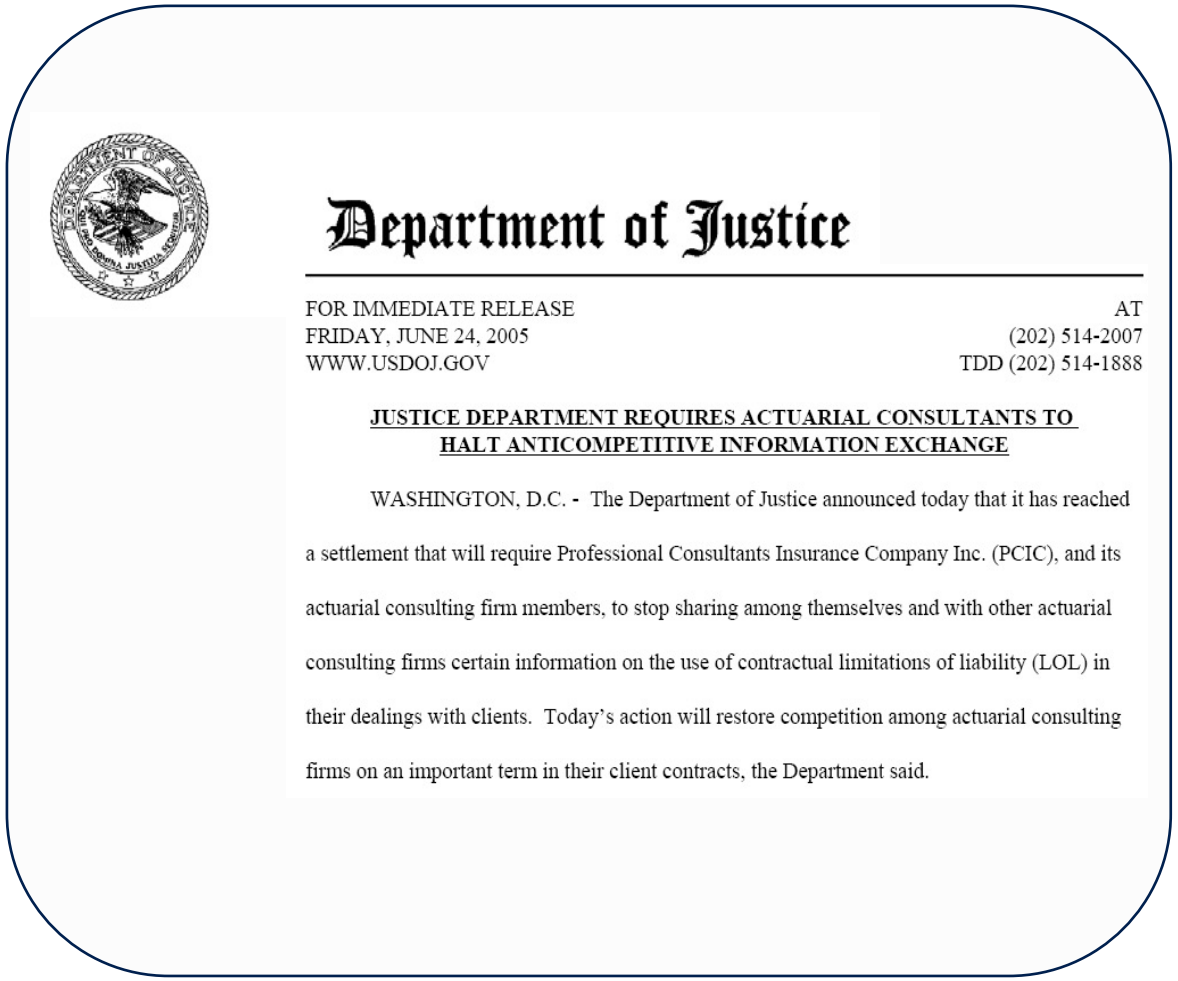
High-Risk vs. Low-Risk Info Exchange/Benchmarking

- The most competitively sensitive areas:
  - Future or nonpublic price and other terms or conditions of sale that are a basis of competition
  - Costs, profits or profit margins
  - Prospective bidding plans, detailed information about pending bids, or customer-specific information
  - Commercial and marketing strategies and decisions (e.g., “strike zones,” target customers, intentions to bid or not, etc.)
  - Nonpublic information regarding product or service offerings
- Lower-risk areas for info exchange/benchmarking
  - Publicly accessible information
  - Internal business issues that do not affect the customer or competition
    - Legal/accounting issues (e.g., accounting methods used; interpretation of a regulation that does not involve customer terms/requirements)
    - Operational issues (e.g., organizational structure, headcount, locations)
    - IT systems (noncustomer facing technology issues)

DOJ/FTC "Safe Harbor" for Information Exchanges

- Requirements set out in 1996 DOJ/FTC Healthcare Guidelines
  - Price data collection is managed by "third party"
  - Price data is more than three months old
  - All data shared with competitors is aggregated
    - At least five data providers for each data point
    - No individual provider accounts for more than 25 percent
- Note: Guidelines don't expressly address nonprice information
  - Information that has the same competitive sensitivity as price (output, margins, etc.) should be treated the same
  - Different rules could apply to information that is not competitively sensitive (e.g., IT issues or accounting issues)

Real World Antitrust Risks: *US* v. *PCIC*



Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 24, 2005
WWW.USDOJ.GOV

AT
(202) 514-2007
TDD (202) 514-1888

JUSTICE DEPARTMENT REQUIRES ACTUARIAL CONSULTANTS TO HALT ANTICOMPETITIVE INFORMATION EXCHANGE

WASHINGTON, D.C. - The Department of Justice announced today that it has reached a settlement that will require Professional Consultants Insurance Company Inc. (PCIC), and its actuarial consulting firm members, to stop sharing among themselves and with other actuarial consulting firms certain information on the use of contractual limitations of liability (LOL) in their dealings with clients. Today's action will restore competition among actuarial consulting firms on an important term in their client contracts, the Department said.

- DOJ complaint alleged anticompetitive communications among competitors
  - Sharing sample limitation of liability contract language among firms
  - Encouraging competitor firms to adopt LOL clauses
  - Expressing displeasure to a competitor that the competitor had offered a contract w/o LOL; and
  - Labeling implementation of LOL as a "best practice" in a presentation at a profession-wide meeting

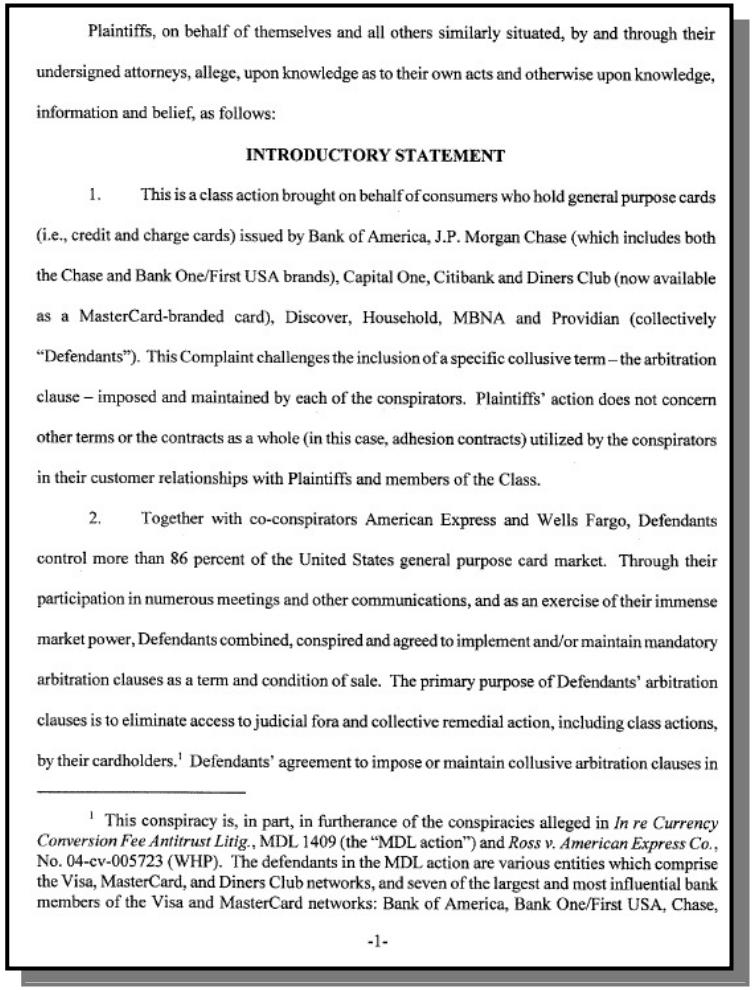
Real World Risks: Credit Card Class Action on Arbitration Provisions

Did Credit-Card Issuers Collude to Force Arbitration?

By CARRICK MOLLENKAMP Staff Reporter of THE WALL STREET JOURNAL
September 1, 2005; Page C1

Many of the largest US credit-card companies require customers to sign away their ability to take disputes to court and instead settle disagreements in arbitration.

Now that practice itself is under attack in court. A lawsuit filed recently in federal court in New York City alleges the credit-card companies held secret meetings where they colluded to promote arbitration, in violation of federal antitrust laws.



Plaintiffs, on behalf of themselves and all others similarly situated, by and through their undersigned attorneys, allege, upon knowledge as to their own acts and otherwise upon knowledge, information and belief, as follows:

INTRODUCTORY STATEMENT

1. This is a class action brought on behalf of consumers who hold general purpose cards (i.e., credit and charge cards) issued by Bank of America, J.P. Morgan Chase (which includes both the Chase and Bank One/First USA brands), Capital One, Citibank and Diners Club (now available as a MasterCard-branded card), Discover, Household, MBNA and Providian (collectively "Defendants"). This Complaint challenges the inclusion of a specific collusive term – the arbitration clause – imposed and maintained by each of the conspirators. Plaintiffs' action does not concern other terms or the contracts as a whole (in this case, adhesion contracts) utilized by the conspirators in their customer relationships with Plaintiffs and members of the Class.

2. Together with co-conspirators American Express and Wells Fargo, Defendants control more than 86 percent of the United States general purpose card market. Through their participation in numerous meetings and other communications, and as an exercise of their immense market power, Defendants combined, conspired and agreed to implement and/or maintain mandatory arbitration clauses as a term and condition of sale. The primary purpose of Defendants' arbitration clauses is to eliminate access to judicial fora and collective remedial action, including class actions, by their cardholders.[1] Defendants' agreement to impose or maintain collusive arbitration clauses in

[1] This conspiracy is, in part, in furtherance of the conspiracies alleged in *In re Currency Conversion Fee Antitrust Litig.*, MDL 1409 (the "MDL action") and *Ross v. American Express Co.*, No. 04-cv-005723 (WHP). The defendants in the MDL action are various entities which comprise the Visa, MasterCard, and Diners Club networks, and seven of the largest and most influential bank members of the Visa and MasterCard networks: Bank of America, Bank One/First USA, Chase,

-1-

Trade Association Antitrust Risks

- Trade association activity poses several risks
  - A gathering of competitors, ripe for claims of collusion
  - Formalized information exchange programs (industry statistics, etc.)
  - Trade association rules may themselves be anticompetitive—association rules/policies/standards are treated as the product of an agreement among members
- Long history of government and private enforcement based on trade association activity
  - *Superior Court Trial Lawyer's Ass'n*: Price fixing through trade association
  - *Allied Tube & Conduit*: Fire safety standards that exclude competitor
  - *National Soc'y of Prof. Engineers*: Ethical rule against competitive bidding
  - *California Dental Association*: Ban on advertising
- Recent federal enforcer focus on trade association rules
  - *In re Music Teachers National Association*: "Code of Ethics" that prohibits "poaching" students from other members
  - *In re American Guild of Organists*: "Code of Ethics" that prohibits accepting employment without approval of the incumbent musician

Trade Associations, Lobbying and Antitrust

- *Noerr-Pennington doctrine*: First Amendment-protected activity (e.g., lobbying) exempt from antitrust laws
- Applies
  - To federal, state and local government entities
  - To legislatures, agencies/executive and litigation
  - To joint efforts—no "conspiracy" exception
  - Regardless of anticompetitive motive for lobbying
  - Even if government action is later found to be improper
- But *only* attempts to petition the government are protected
  - Agreeing to implement conduct that you hope the government will require *before the government acts* is not protected
  - Agreeing to act in hope of preventing government action is not protected

Best Practices for Trade Association Participation

- Legal counsel should advise prior to any activity
- Agenda should be prepared in advance and participants should stick to it
- Advisable to have attorney present so no improper topics are discussed
- No “private meetings” or “off the record” conversations
- Never discuss
  - Current or future prices, costs or plans
  - Nonpublic information
  - Other competitively sensitive information
- If improper topics are raised, shift back to appropriate topics immediately
  - If discussion continues, leave immediately and make known that you are leaving (so departure noted in minutes)
  - Consult with legal counsel after leaving

A Tool Kit for Meetings

- If a speaker strays into an inappropriate topic . . .
  - “We can’t talk about that. Let’s return to . . .”
- If the speaker resists or continues . . .
  - “Joe, let’s cover that topic another time, after we have some guidance from the lawyers.”
- If the speaker still insists . . .
  - “Joe, I’m sorry, but I will have to get legal guidance before we can continue.”
- You may need to shut down the meeting

Hot Topics: Tech & Digital Platforms

Overview

- Technology markets and digital platform companies subject to increasing antitrust scrutiny
- FTC & DOJ increasing focus on—and directing additional resources towards—investigations in technology markets
- State AGs launching independent investigations
- Legislature and political candidates expressing a range of views—some demanding aggressive enforcement and/or “breaking up” companies

US Enforcer Activity—FTC

- “Clearance Agreement”
- FTC Technology Task Force
- FTC hearings on *Competition and Consumer Protection in the 21st Century*
- FTC preparing “big tech” guidance
- Commissioner viewpoints
- Facebook antitrust investigation & litigation

US Enforcer Activity—DOJ

- “Clearance Agreement”
- DOJ review of online platform practices
- DOJ workshop on *Competition in Television & Digital Ads*
- DOJ investigation into Google & litigation
- Investigations into Amazon, Apple, Facebook
- Jonathan Kanter to head Antitrust Division

US Enforcer Activity—State AGs

- Urged FTC to broaden analyses
- Formed “Tech Industry Working Group”
- State attorney generals investigating Google
  - Independent of federal authorities
  - Reportedly focused on digital advertising
  - Bipartisan coalition
  - Also discussing Facebook

US Political Pressure

- Congressional investigations
- Campaign promises
- Legislative proposals
  - Competition and Antitrust Law Enforcement Reform Act
    - Sweeping antitrust reform introduced Feb. 2021
  - Open App Markets Act
    - App store competition act introduced Aug. 2021
- Executive order on promoting competition
  - Encourages cooperation between numerous agencies to increase antitrust enforcement

Big Data & Privacy

- What is “big data”?
- Traditional antitrust assessment
  - Data as an input
  - Vertical issues
  - Impact on entry
- Data and privacy—beyond traditional antitrust analysis?

Platform Markets

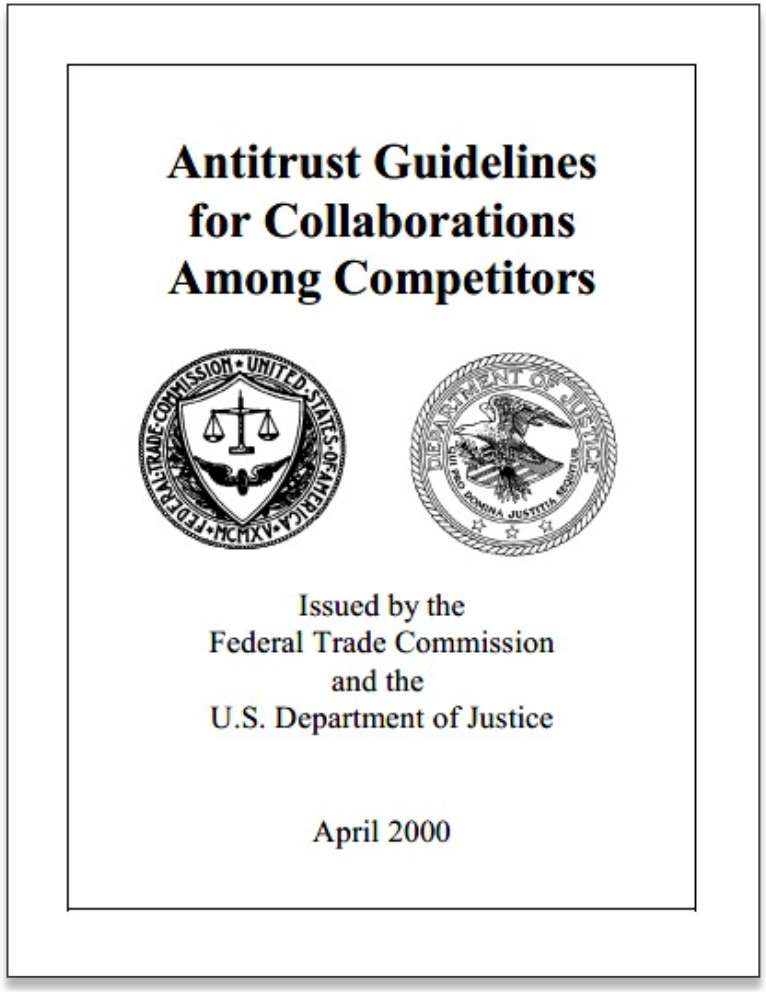
- Much of the recent media focus has been on so-called “digital platforms”
- There is an open debate about whether platforms like Facebook, Amazon, and others are “two-sided markets”
- Amex Decision | *Ohio v. American Express* (US 2018)
  - Transactional platforms with strong network effects are “two-sided markets”
  - Arguments must account for both sides of the market and cross-platform effects
  - Requires a more complex explanation of harm from plaintiffs/government
  - Potentially allows shifting burden/costs to the group with lower elasticity of demand
    - High merchant costs not enough to show harm—must consider benefits to cardholders
- Unclear how digital platforms will be analyzed

End Users & Platforms

- Long-standing *Illinois Brick* doctrine says “indirect purchasers” do not have standing to sue for antitrust harm
- In *Apple v. Pepper* (2019), the Supreme Court addressed this rule with regards to the iOS AppStore
- By concluding that iPhone users can sue Apple directly, Court potentially opens platforms up to more antitrust litigation/damages

Hot Topics: Joint Ventures

DOJ/FTC Collaboration Guidelines



- Outlines analytical framework for enforcement
- Goal to provide guidance and avoid deterrence of procompetitive collaborations

Compliance in Joint Venture Formation

- Check for HSR filings
- Define the business purpose
  - Increased efficiency vs. output/price harms
- Consider the market impact
  - Does this effectively eliminate a competitor from the market?
- If procompetitive justification and integration exists, is a restraint:
  - Reasonably related to the purpose?
  - Reasonably necessary to achieve the objectives?

Analyzing JVs as Mergers

- JVs that completely eliminate competition between the parties are analyzed as mergers
  - Analyzed under Section 7 of the Clayton Act, which governs mergers
    - Unilateral effects: Elimination of close competitors allows price increase without significant losses to competitors
    - Coordinated effects: Limited number of remaining competitors will engage in coordination (tacit or explicit)
  - Market share safety zone
    - Agencies generally do not challenge a competitor collaboration where the collaboration and the participants combine for less than 20 percent of each relevant market
- Elimination of potential competition may be a concern
  - High share, few companies with ability to enter, difficult entry conditions
  - Acquired entity is significant
- Also potential for foreclosure concerns if the JV will be vertically integrated

Collaborations Short of a Merger

- Production joint venture
  - Typically output enhancing
- R&D collaborations
  - Promotes innovation
- Joint purchasing
  - DOJ guidance on “antitrust safety zone”
    - Purchases are <35 percent of total sales of the product/service
    - Cost is <20 percent of total revenue from JV member sales
    - Other mitigation: Voluntary participation, negotiations conducted by nonmember, firewalls
- Marketing JVs
  - More risky

Analysis Where Parties Still Compete

- Remember: “Naked” restraints on competition per se unlawful
  - E.g., market allocation with no integration
- Economic integration shifts to balancing test: Rule of reason
  - Is it just integration solely on competitive decisions, such as pricing, production volumes or customer sales?
  - Or a combination of capital, technology or other complementary assets?
- Procompetitive benefits will weigh against potential harms
  - Increased output, economies of scale, better R&D, etc.

Hot Topics: Employee Non-Solicit/ No-Poach Agreements

A Word on No-Poach Agreements

- *Antitrust Guidance for Human Resources Professionals* issued jointly by the DOJ and FTC on October 20, 2016
- DOJ officials have described employers as horizontal competitors for employees
- DOJ has filed several criminal cases against companies and individuals beginning in 2020
- States actively pursuing franchises currently
- Private plaintiffs have brought successful no-poach cases
  - *In re High-Tech Employee Antitrust Litigation* (2011)—tech companies agreed not to cold call the others' employees, to notify prior to making offers to others' employees and not to outbid each other for employees
- Focus on enforcement reiterated in 2021 Executive Order

When Is a No-Poach Agreement Lawful?

- Guidance references “naked” no-poach agreements, meaning those that are not reasonably necessary to any separate, legitimate business collaboration between employers
- Less clarity on what constitutes a legitimate, ancillary agreement
  - Where one party gets access to confidential information about another’s employees through a legitimate JV or other collaborative business arrangement
- Some guidance from “Conduct Not Prohibited” provisions of consent decrees: Ok if in written form and reasonably necessary for:
  - Employment and severance agreements with employees
  - Mergers or acquisitions, including diligence
  - Contracts with consultants, auditors, outsourcing vendors, recruiting agencies, or temporary employee providers
  - Settlement of legal disputes
  - Contracts with suppliers or distributors
- ***A challenging area of high enforcer focus—best to consult antitrust counsel***