

The Antitrust Onslaught and Approaches by Which to Manage the Risk

ACC St. Louis Corporate Counsel Institute

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Speakers

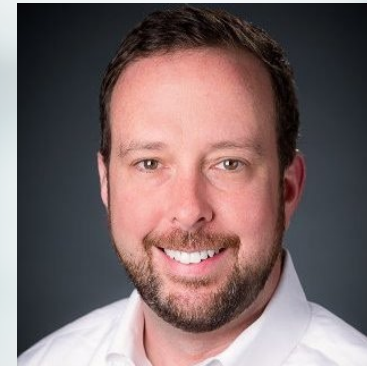


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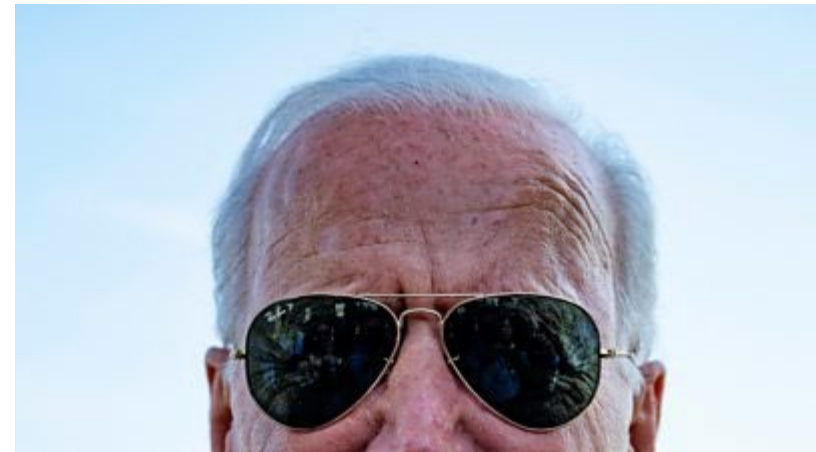
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Topics

- **Antitrust Enforcement: President Biden and the Federal Antitrust Agencies**
- **Scanning for Risk: Civil Enforcement**
- **Scanning for Risk: Criminal Liability**
- **M&A Strategy Update**
- **Questions**

Antitrust Enforcement: President Biden and the Federal Antitrust Agencies

- President Biden called for a “whole-of-government approach ... to address overconcentration, monopolization, and unfair competition” with a focus on healthcare, transportation, food and agriculture, technology, banking/finance and labor (across all sectors)
- Creation of joint agency cooperation/task forces
 - USDA—food and agriculture
 - HHS—healthcare
 - DOL—labor practices
 - DOT—airline industry



Antitrust Enforcement: President Biden and the Federal Antitrust Agencies

- **DOJ: “The era of lax enforcement is over”**
- **FTC: “[L]ife and death consequences” to not enforce an expanded view of the antitrust laws**
- **Numerous public workshops to engage the public about antitrust expansion**
- **State of the Union: “Pass the bipartisan legislation to strengthen antitrust enforcement”**
- **More ongoing investigations than ever at DOJ and FTC**

Unprecedented Upheaval and Policy Shifts in Antitrust Guidance and Enforcement

- **FTC rescinds vertical merger guidelines**
- **FTC issues expansive new Section 5 policy statement**
- **DOJ withdraws three key healthcare antitrust guidelines**
 - Some guidance had been in place for 30+ years
- **Novel theories in merger blocking lawsuits**
- **Corporate compliance enforcement**
- **Pricing compliance enforcement**
- **Uptick in criminal prosecution and enforcement**
 - First criminal attempted monopolization case in 40+ years



Civil Risk: Antitrust and Labor

- **FTC adopts an expansive interpretation of Section 5 of the FTC Act, which prohibits “unfair methods of competition in or affecting commerce.”**
- “I know it when I see it”: the FTC approach as to what constitutes unfair methods of competition under Section 5 of the FTC Act
- Enforcing Section 5 without proof of harm, but rather based on history
- FTC non-compete enforcement action and subsequent proposed a rule effectively banning non-competes against workers
 - First enforcement actions ever against noncompetes



Civil Risk: Proposed Noncompete Ban

- **Proposed FTC Non-Compete Rule will ban employers from:**
 - Entering into, or attempting to enter into, a non-compete clause with a (worker includes independent contractors and unpaid laborers);
 - Maintaining a non-compete clause with a worker; or
 - Representing to a worker that the worker is subject to a non-compete clause unless there is a good faith basis for believing the non-compete is enforceable
 - Retroactive obligation to nullify existing agreements



A Valentine's Day “Noisy exit”

- **FTC Chair Christine Wilson (R) WSJ Op-Ed Announces Her Resignation From the Commission**
 - “...disregard for the rule of law and due process ...and I refuse to give their endeavor any further hint of legitimacy”
 - “abuses of government power”
 - “concerns about the honesty and integrity... . staffers’ discomfort...[with senior staff’s] dishonesty and subterfuge... .”

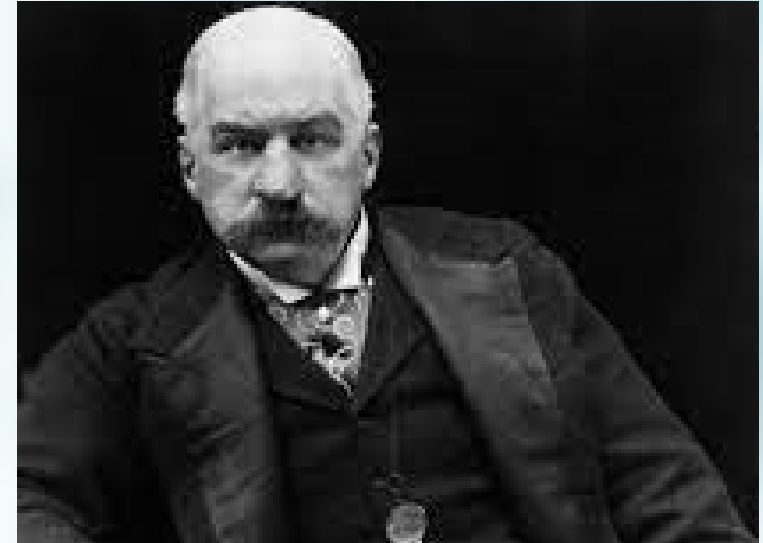


Ask the GC!

- **Need to expand compliance to involve HR**
- **Review potential exposure to noncompete ban**
 - Trend is already moving away from efficacy and viability of noncompetes
- **Look to strengthen NDAs, non-solicitation, trade secret agreements/provisions**

Civil Risk: Interlocking Directorates

- **Interlocking what?**
 - Section 8 of the Clayton Act
 - *Per se* illegal to have competing companies with overlapping board members
 - Concerns with facilitating collusion and Section 1 Sherman Act liability
 - **Since November 2022 DOJ has identified *nineteen* companies that have been in violation of the law**
 - March 2023: AAG Kanter states that there are *sixteen* active Section 8 investigations



Ask the GC!

- **Board governance for your own organization is important**
- **Monitor boards on which your officers and directors serve**
 - Particularly important with private equity ownership
- **While the penalties are not bad, the PR hit can be embarrassing**
 - Grace period to address interlock (typically a resignation)
 - No civil penalties

Civil Risk: Price Discrimination



- **What in the world is the Robinson-Patman Act?**
 - Selling the same product to two competing dealers at a different price=price discrimination
 - Lots of complicated defenses (volume discounts is not one of them)
 - Treble damages for private litigants (disgruntled/disfavored distributor/reseller)
 - Also applies to buyers and brokers
- **FTC price discrimination investigations—first ones in more than twenty years**
 - Soft drinks
 - Alcohol
 - DOJ has no interest as the law and federal enforcement is “economically unwise”

Ask the GC!

- **Pricing strategy and compliance is now more important than ever, especially in the consumer products sector (does not apply to services)**
- **Legal pricing audits to assess your pricing variances across distribution channels and geographies is a good way to assess an organization's risk profile**
- **Pricing strategy can be managed to minimize risk**

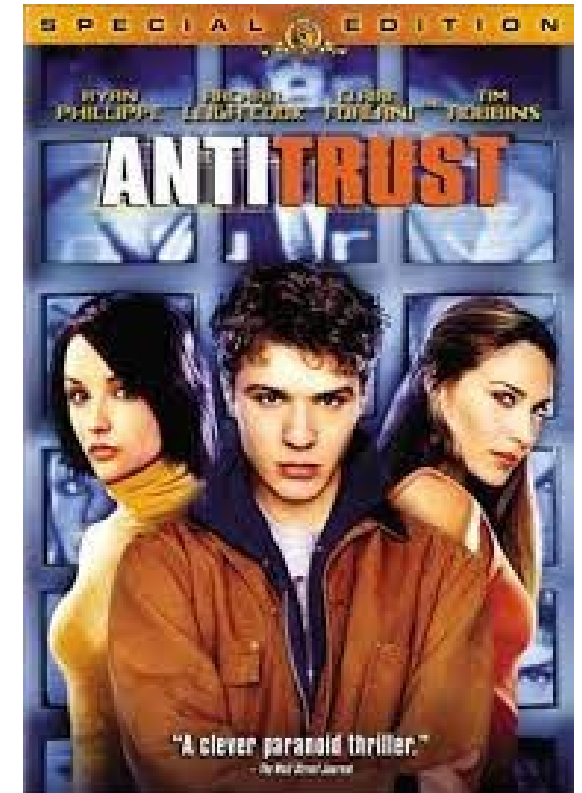
Criminal Risk: New theories being tested...but any success?

- **DOJ has had mixed success in criminal wage-fixing and no poach cases**
 - Lost multiple trials in 2022, but also secured two plea deals
 - March 2023: new indictment for criminal wage fixing for nurses in the Las Vegas market
 - March 2023: DOJ loses trial in Maine regarding criminal wage fixing in home health space
 - April 2023: DOJ loses motion for judgment of acquittal regarding six aerospace executives on criminal no poach
 - One case going to trial sometime this year in the healthcare space
 - Still no signs of slowing down this new area of prosecution



Criminal Risk: New theories being tested...but any success?

- **Going to jail...for trying to monopolize?**
 - Asphalt supplier called another supplier for a “strategic partnership”
 - Defendant suggested that he take highway crack-sealing business in Montana and Wyoming, the competitor could take Nebraska and South Dakota.
 - Competitor called the authorities; DOJ indicted defendant for criminal attempted monopolization under Section 2 of the Sherman Act
 - Penalty includes up to \$1 million in fines and up to 10 years in prison
 - Defendant pled guilty
 - Three years of probation, with six months of home detention, and fined \$27,000



Ask the GC!

- **Training. Training. Training. Antitrust compliance training is more important than ever—does not matter what market share an organization has in a relevant market**
- **An effective compliance program not only includes training, but also periodic antitrust audits that give GCs invaluable info for risk management**
 - Per DOJ: it is a key mitigating factor in corporate liability
 - Audits in particular can help identify inappropriate competitor contact(s), which can then be proactively addressed before an investigation/indictment

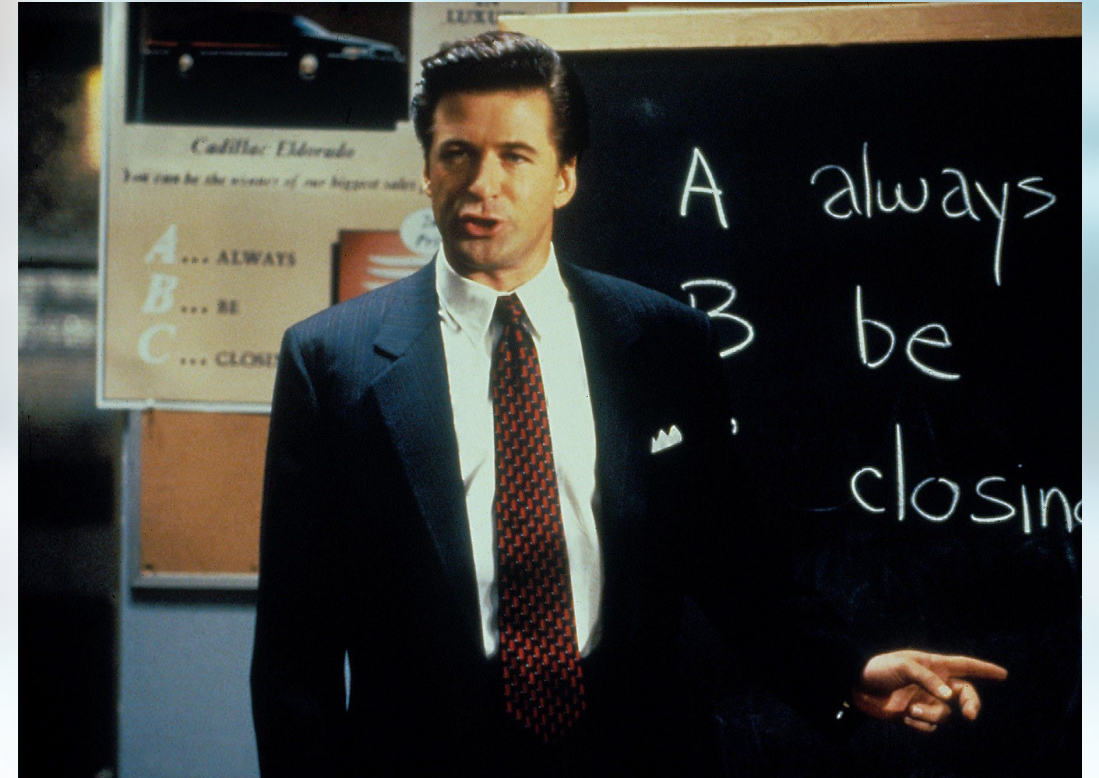
M&A Strategy Update

- **We have already seen significant changes in the FTC's merger review practices in several areas:**
 - More investigation of labor market issues in mergers, such as the effect of a hospital merger on salaries of health care workers
 - More investigation of relationships other than traditional horizontal competition, such as vertical relationships and information markets
 - More emphasis on potential competition



M&A Strategy Update

- No new guidelines have been announced yet, but
 - On March 31, FTC Chair Lina Kahn said that the agencies will release draft guidelines for public comment “in short order”
 - On February 3, Bureau of Competition (BC) Director Holly Vedova said that
 - “We are hoping to release guidelines for public comment in the coming months”
 - “I think it is fair to say that many of the general principles that are already guiding our BC merger enforcement efforts are likely to be reflected in the new guidelines”



M&A Strategy Update

- **Merger Filing Fee Modernization Act required FTC to create new tiers for HSR filing fees. First restructuring since 2001**
- **New Tiers:**
 - \$111.4 MM to \$161.5 MM ----> \$30,000
 - \$161.5 MM to \$500 MM -----> \$100,000
 - \$500 MM to \$1 B -----> \$250,000
 - \$1 B to \$2 B -----> \$400,000
 - \$2 B to \$5 B -----> \$800,000
 - Over \$5 B -----> \$2,250,000



M&A Strategy Update

- Fees for smallest deals decrease; huge increase for largest deals, up by 800%
- Bill's sponsors and FTC argued filing fees had not kept pace with inflation or increase in merger activity
 - A recent estimate by the Congressional Budget Office suggests that the revised HSR filing fees will “increase filing fees by \$1.4 billion over the 2023-2027 period”
 - Expect enforcement to ramp up as this new funding comes online in 2023

M&A Strategy Update

- **Delays in HSR review still common**
 - Staff requests late in 30-day waiting period to “pull and refile”
- **More transactions are receiving Second Requests**
- **Agency asking for timing agreement extensions**
- **PE acquisitions are receiving greater scrutiny from enforcers**
 - Special scrutiny in roll-up acquisitions
 - Be mindful of onerous consent agreement terms

M&A Update—don't forget the state enforcers!

State premerger notification laws are expanding:



- State legislatures are increasingly enacting “mini-HSR” laws requiring premerger notification for transactions (mostly health care) but that may change
- The laws typically have much *lower* reporting thresholds than the federal premerger notification statute, the HSR Act, to allow for review of smaller transactions
- Many of these statutes apply to *any* health care transaction over a specified size—not just transactions involving non-profit health care entities
- At least one state (Oregon), asks parties to submit notification as far as 180 days before closing
- Some statutes require state regulators to make a “public interest determination”—it’s not simply about notice
- State premerger notification is largely public—unlike the federal HSR process which is almost entirely confidential

Ask the GC!

- **Get antitrust counsel on potential deals earlier to assess risks, even for nonreportable cases**
 - Deals below HSR threshold can still be investigated or challenged
- **If it reportable, make sure you spend the time and resources for a robust 4(c) sweep**
 - Not doing so could bounce the filing or require a corrective filing
- **Deals below HSR threshold could still require state notifications**
 - Be mindful of states that are impacted
 - Be mindful of confidentiality issues with submissions
 - Work with government relations/legal to monitor state law changes



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