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## The Antitrust Re-Awakening: And It's Coming For You...

**Michigan Health Care Law Section Annual  
Meeting – September 19, 2023**



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# RESOURCE BOOKLET

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*“Knowing is not enough; we must apply.  
Willing is not enough; we must do.”*

— Goethe

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## If you would like:

- further information or have questions
- assistance with creating or revising your Patient Safety and Quality Improvement PSWP Program, and/or Policies or Procedures, assistance training your staff with regard to implementing, operating, or maintaining compliance with legal requirements to preserve PSWP privilege, or
- legal assistance communicating with legal counsel on existing matters with regard to their part in asserting, proving, and preserving the PSWP privilege
- A wide variety of other compliance, risk management, crisis management, program development and evaluation, independent investigation, compliance program development, evaluation, and training, and others
- A speaker, presenter, or trainer (existing program topics, or custom topics)

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## - RESOURCE -

# DOJ Withdraws Health Care Antitrust Guidance, Highlights Information Sharing Concerns

by Practical Law Antitrust

Law stated as of 03 Feb 2023 • USA (National/Federal)

On February 3, 2023, the Antitrust Division of the Department of Justice announced that it had withdrawn three policy statements that had provided guidance on its enforcement approach in the health care industry. The DOJ highlighted concerns that the guidance was overly permissive relating to information sharing in particular.

The Antitrust Division of the Department of Justice announced on February 3, 2023, that it had withdrawn three policy statements that provided guidance on the DOJ's approach to antitrust enforcement relating to the health care industry:

- [Antitrust Enforcement Policy Statements in the Health Care Area](#) (1993).
- [Statements of Antitrust Enforcement Policy in Health Care](#) (1996) (the 1996 Policy Statements).
- [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#) (2011).

All three policy statements were issued jointly with the Federal Trade Commission, which has not announced a similar intention to withdraw the guidance.

Although the guidance is not binding on the antitrust agencies, counsel frequently rely on the policy statements to advise health care entities, particularly the 1996 Policy Statements, which provide safe harbors for various business activities. Antitrust counsel have also looked to Statement 6 from the 1996 Policy Statements, which provides safe harbors for information exchanges, as guidance for structuring information exchanges even outside the health care context.

The DOJ's [press release](#) announcing the withdrawal of the guidance noted in particular that the guidance is overly permissive on information sharing. This is a signal that health care entities and others should exercise particular caution in reviewing any information exchanges involving competitors and ensure that employees are trained in antitrust compliance relating to information sharing.

Generally, counsel should be cautious in relying on FTC or DOJ antitrust guidance that predates the Biden administration and instead look to more recent policy statements by agency officials and enforcement actions. The FTC and DOJ have withdrawn or announced planned updates to a number of other pieces of guidance in recent years, including that:

- The FTC (but not the DOJ) withdrew from the [Vertical Mergers Guidelines](#) in 2021.
- The DOJ withdrew its [Merger Remedies Manual](#) in 2022.
- The [DOJ Antitrust Division Manual](#) has been undergoing revisions since March 2022.
- Updated horizontal and vertical [Merger Guidelines](#) are expected to be released shortly for public comment.

For additional Practical Law resources on these issues, see:

- [Health Care Competition Toolkit](#).
- [Practice Note, Information Exchanges Among Competitors \(Non-Merger\)](#).
- [Information Sharing Decision Tree \(Antitrust\)](#).
- [FTC and DOJ Antitrust Guidance and Resources Checklist](#).

## - TOOL KIT -

# Health Care Competition Toolkit

by Practical Law - Antitrust  
**Maintained • USA (National/Federal)**

This Toolkit includes resources that help attorneys litigate and counsel on antitrust issues relating to health care competition, including resources on healthcare mergers, pharmaceutical mergers, and pay-for-delay agreements.

Health care competition is a top enforcement priority for state and federal antitrust authorities and is also frequently the subject of private litigation, particularly with respect to pharmaceutical companies' reverse payment settlement agreements (also known as pay-for-delay agreements).

Antitrust attorneys who litigate or counsel on health care matters should stay abreast of decisions regarding:

- Health care mergers, including:
  - health care providers; and
  - health care insurers
- Pharmaceutical mergers.
- Pay-for-delay settlements.
- Other anticompetitive or possibly anticompetitive health care conduct, including:
  - **exclusive dealing;**
  - **monopolization;**
  - most favored nation clauses (MFN);
  - refusals to deal; and
  - price fixing.

The Health Care Competition Toolkit provides several continuously maintained resources to guide counsel in litigating and counseling on health care matters. This Toolkit also includes resources on the substantive antitrust laws that are relevant to health care competition.

## **Practice Notes: Overview**

- FTC Act Section 5: Overview

## **Practice Notes**

- Antitrust Analysis of Health Care Collaborations and Joint Ventures
- Antitrust Analysis of Vertical Health Care Mergers
- Antitrust COVID-19 Agency Guidance and Procedural Changes
- Antitrust for Health Care Non-Profits
- Antitrust Issues in Joint Purchasing and Group Purchasing Organizations
- Competitor Collaborations in the US
- Concerted Refusals to Deal
- Contracts that Reference Rivals
- Exclusive Dealing Arrangements
- Failing Firm Defense
- Health Care Competition: Pharmaceutical Supply Chain and REMS Antitrust Issues
- Health Care Competition: Pharmaceuticals
- Health Care Competition: Providers and Insurers
- Most Favored Nation Clauses
- Reverse Payment Settlement Agreements
- State Action Immunity (Antitrust)
- Tying Arrangements
- Unilateral Refusals to Deal
- Vertical Non-Price Restraints
- What's Market: Health Care Provider Merger Enforcement Actions
- What's Market: Pharmaceutical Merger Enforcement Actions

## **Checklists**

- Actavis Case Tracker
- Actavis Litigation Settlement Chart
- Antitrust Considerations for Joint Purchasing and Group Purchasing Organizations Checklist
- DOJ Generic Drug Cartel Investigation Chart
- FTC and DOJ Antitrust Guidance and Resources Checklist
- FTC Antitrust Enforcement Actions Chart (Non-Merger)
- Joint Venture Antitrust Compliance Checklist
- Physician Joint Ventures Antitrust Flowchart

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## - RESOURCE -

# How Antitrust Agencies Analyze M&A

by Lee Van Voorhis, Womble Bond Dickinson, and Vadim Brusser, [Weil, Gotshal & Manges LLP](#), with [Practical Law - Antitrust Maintained](#) • USA (National/Federal)

In July 2023, the DOJ and FTC proposed new merger guidelines. We will update this resource when the guidelines go into effect. For more, see [Legal Update, Key Takeaways: Antitrust Agencies Release Draft Revised Merger Guidelines](#).

A Practice Note providing an overview of how the US federal antitrust agencies analyze mergers, acquisitions, and joint ventures. This Note discusses the agencies' approach to analyzing transactions involving competitors under the 2010 Horizontal Merger Guidelines, such as defining the relevant product and geographic market, measuring market concentration under the Herfindahl-Hirschman Index, and examining competitive effects, entry, and efficiencies, and the failing firm defense. This Note also looks briefly at non-horizontal mergers, such as vertical mergers.

Section 7 of the **Clayton Antitrust Act** (Clayton Act) prohibits mergers, acquisitions, and certain **joint ventures** that have the effect of substantially lessening competition in any line of commerce or activity affecting commerce in any part of the US ([15 U.S.C. § 18](#)). Details of mergers and acquisitions that meet statutory reporting requirements must be filed, before closing, with both the **Federal Trade Commission** (FTC) and the **Antitrust Division** of the **Department of Justice** (DOJ) under the **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (HSR Act). For details of notification requirements and processes, see [Practice Note, Hart-Scott-Rodino Act: Overview](#).

After receipt of an HSR filing, either the DOJ or FTC (largely depending on their respective experience) assesses the transaction to determine whether it raises any substantive competition concerns (see [Practice Note, Predicting the Investigating Agency for Merger Review](#)). Where the agency identifies these concerns and they cannot be resolved by settlements with the parties, the government can seek a preliminary injunction in federal district court to block completion of the transaction (see [Practice Note, Preliminary Injunctions in FTC and DOJ Merger Challenges](#)). In one instance, the DOJ resolved a civil antitrust lawsuit challenging a proposed merger using arbitration (see [Legal Update, DOJ Wins Novel Arbitration over Market Definition in Novelis/Aleris Merger Challenge](#)).

This Practice Note outlines the substantive principles observed by both US antitrust agencies in evaluating whether a transaction is likely to substantially lessen competition. It focuses on the most common type of transaction: horizontal mergers between companies operating at the same level in a line of commerce. It also discusses the [2010 Horizontal](#)

[Merger Guidelines](#) (2010 Guidelines), noting changes from the prior guidelines. Lastly, this Practice Note briefly considers the agencies' approach to non-horizontal mergers.

The antitrust agencies use published guidelines as a general framework to evaluate transactions. However, as the 2010 Guidelines specifically note, there are nuances to applying these guidelines to the facts in a particular industry and there are continuing developments in antitrust law and economic theory. Therefore, antitrust counsel should always be consulted to obtain a clear understanding of how the agencies may approach a particular transaction.

## **Horizontal Mergers**

On August 19, 2010, the agencies released the 2010 Guidelines, which summarize the analytical framework that both agencies use for their analysis of mergers. The 2010 Guidelines have substantial changes from the 1992 Horizontal Merger Guidelines (which were revised slightly in 1997), as summarized in this Note. In July 2023, the DOJ and the FTC proposed draft revised merger guidelines for public comment. They are not yet in effect. (See [Legal Update, Key Takeaways: Antitrust Agencies Release Draft Revised Merger Guidelines.](#))

In general, the government's investigation seeks to determine whether a proposed merger results in a substantial lessening of competition in the markets where the merging firms compete. The agencies use various principles and tools set out in the 2010 Guidelines to analyze the industry and marketplace conditions to assess whether anticompetitive effects are likely.

Compared to the 1992 Guidelines, the 2010 Guidelines de-emphasize the importance of market definition in the agencies' analysis and reject strict adherence to any specific method or process. While the agencies highlight that the merger review process is flexible and fact specific, generally the 2010 Guidelines:

- Explain the range of analytical tools and methodologies that the agencies use for merger analysis.
- Identify the categories of evidence that may be considered as part of the analysis.
- Increase the extent to which economic analysis is used as part of the process for assessing potential competitive effects.

The 2010 Guidelines explain that the agencies are focused on whether the proposed transaction results in harm to competition, rather than being limited to a specific type of analysis. As a result, compared to the 1992 Guidelines, the 2010 Guidelines offer less predictability regarding which analytical methodology is applied and the likely outcome of an investigation.

The agencies stated that their intent in issuing the 2010 Guidelines was to capture the analysis already in use. Therefore, as specifically noted in the 2010 Guidelines, the agencies continue to:

- Identify the relevant product and geographic markets.
- Calculate market shares and concentration.
- Evaluate the closeness of competition between the merging parties.
- Evaluate ease of new entry or expansion into the market.
- Estimate likely efficiencies.

## **Market Definition**

The 2010 Guidelines state that market definition is no longer the necessary first step of the merger analysis. Instead, the agencies use market definition principles to:

- Specify the line of commerce and section of the country in which competitive concerns may arise.
- Identify market participants.
- Measure market share to the extent the measurements illuminate the competitive effects of a horizontal merger.
- Analyze the substitutes available to customers.

For more information on how the agencies analyze relevant markets under the 2010 Guidelines, see [Practice Note, Analyzing a Relevant Market in Horizontal Mergers](#).

Although the agencies normally identify relevant markets, they may conclude that a merger raises competitive concerns without defining a precise relevant market if there is evidence that the merger is likely to result in anticompetitive effects.

## **Product Market**

The primary market definition principle used to assess the parameters of a relevant market is the hypothetical monopolist test. For each product, the agencies assess the likely customer reaction to a small but significant and non-transitory increase in price (SSNIP).

Most often, the hypothetical SSNIP used is a five percent price increase, although it could be higher or lower depending on the industry. If customers are likely to switch to a next best substitute product and defeat the price increase, then that substitute product is included in the market. The 1992 Guidelines sought to define the narrowest possible product market.

Similarly, the 2010 Guidelines confirm that the agencies consider the closeness of competition among potential substitutes as part of the analysis during this stage. For more information on how to apply the hypothetical monopolist test to determine the product market, see [Practice Note, Analyzing a Relevant Market in Horizontal Mergers: The Hypothetical Monopolist Test for Product Market Definition](#).

## **Geographic Market**

Similarly, the definition of the relevant geographic market focuses on customers' likely response to a hypothetical 5% price increase. If consumers switch to suppliers located in other geographic areas, then the market is expanded to include those geographic areas. For more information on how to apply the hypothetical monopolist test to determine the geographic market, see [Practice Note, Analyzing a Relevant Market in Horizontal Mergers: The Hypothetical Monopolist Test for Geographic Market Definition](#).

## Market Shares and Concentration

Once the agencies have determined the relevant product market and geographic market, they identify all of the participants in the market (including the merging parties) and their market shares. The agencies then use the market shares to assess market concentration before and after the proposed acquisition.

Concentration levels are measured using the **Herfindahl-Hirschman Index** (HHI), which is calculated by summing the squares of the market shares of each market participant. For example, a market that has four competitors with market shares of 30%, 25%, 25%, and 20% would have an HHI of 2,550 ( $900 + 625 + 625 + 400$ ). Mathematically, the HHI takes into account the number, relative size, and distribution of the firms in a market. As a result, the HHI is low when the market has a large number of competitors of relatively equal size, and reaches the maximum of 10,000 when there is only a single firm in the market. For more guidance on calculating HHI, see [Practice Note, How to conduct an HHI analysis](#). For a spreadsheet that counsel may use to calculate pre- and post-merger HHIs as well as the change in HHI, see [Calculating Antitrust HHIs Spreadsheet](#).

The HHI thresholds under the 2010 Guidelines are as follows:

- A post-merger increase in HHI of less than 100 points:
  - indicates the acquisition is unlikely to have adverse competitive effects; and
  - ordinarily requires no further analysis.
- A post-merger HHI below 1,500 indicates:
  - an unconcentrated market; and
  - that the transaction is not likely to have adverse competitive effects and ordinarily requires no further analysis.
- A post-merger HHI between 1,500 and 2,500 and increase in HHI of over 100 points indicates:
  - a moderately concentrated market; and
  - that the transaction potentially raises significant competitive concerns and often warrants scrutiny.
- A post-merger HHI over 2,500 and increase in HHI between 100 and 200 points indicates:
  - a highly concentrated market; and
  - that the transaction potentially raises significant competitive concerns and often warrants scrutiny.
- A post-merger HHI over 2,500 and increase in HHI of over 200 points means there is a rebuttable presumption that the merger likely enhances market power.

The 2010 Guidelines note, however, that the HHI thresholds are not applied as rigid screens and that other competitive factors are examined to determine whether increased concentration at any level will lead to adverse competitive effects. In addition, although the HHI thresholds have increased, the revised treatment of market definition principles may result in narrower relevant markets, and therefore, higher concentration levels.

## Competitive Effects

Merger analysis focuses on whether the merger substantially lessens competition such that it might result in higher prices, reduced output, or other harm to customers. The 2010 Guidelines specify two types of potential competitive effects:

- **Unilateral effects.** The agencies consider whether the merger allows the merged firm to unilaterally raise prices or reduce output in a way that harms customers. The 2010 Guidelines provide an expanded discussion of the unilateral effects theory, including a discussion of the impact on:
  - pricing of differentiated products;
  - bargaining and auctions;
  - capacity and output for homogeneous products; and
  - innovation and product variety (see [Practice Note, Economic Tools for Evaluating Competitive Harm in Horizontal Mergers: Economic Methods to Evaluate Unilateral Effects](#)).
- **Coordinated interaction.** The agencies also consider whether the merger increases opportunities for coordinated interaction or collusion among the merged firm and its competitors that may result in increased prices or reduced output to the detriment of customers. In assessing the likelihood of coordinated interaction, the agencies analyze whether the post-transaction market conditions would increase the companies' ability to reach terms of coordination, detect deviations from those terms, and punish such deviators (see [Practice Note, Economic Tools for Evaluating Competitive Harm in Horizontal Mergers: Coordinated Effects](#)). Market characteristics such as product or firm homogeneity, transparency of price information, frequent sales, and previous collusive behavior are viewed as conducive to coordinated interaction. The DOJ has noted it is especially wary of a proposed merger in an industry with a history of coordination or collusion where one of the merging parties has engaged in an anticompetitive information exchange (see [Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023 \(Feb. 2, 2023\)](#)). The 2010 Guidelines note that coordinated effects can include concerns about conduct that is not otherwise in violation of the antitrust laws.

## Powerful Buyers

The 2010 Guidelines discuss how powerful buyers impact merger analysis, including a recognition that these buyers can help constrain competitive effects (see [Practice Note, Monopsonies and Buyer Power](#)). Merging parties sometimes make this argument and the Guidelines recognize its validity. However, the agencies also note that a merger still may enhance market power to the detriment of powerful buyers or other customers.

## **Entry Analysis**

A proposed merger does not harm competition if other firms can enter the market easily and effectively. The 2010 Guidelines explain that the agencies evaluate whether other firms would enter the market, either through wholly new entry or product or geographic expansion, in response to a price increase by the merged firm. The agencies credit entry that is:

- **Timely.** Entry is considered timely if an entrant can quickly achieve a significant impact on price in the relevant market. The 2010 Guidelines do not reference a specific time frame. However, in practice the agencies typically consider entry as timely if the entrant takes two years or less to plan entry, enter, and achieve significant market impact.
- **Likely.** Entry is considered likely if a potential entrant would be profitable, taking into consideration all costs, the likely output level, and the likely price.
- **Sufficient.** Entry is not considered sufficient if it would not replace the competition lost by the merger. For example, the new product may not be a close enough substitute, or the new entrant may not be able to offer the same quality or breadth of product offering as the merged firm.

## **Efficiencies**

The 2010 Guidelines note that the agencies evaluate the transaction's efficiency enhancing potential. Where the risks of anticompetitive effects are low or can be difficult for the agency to prove in court, the presence of efficiencies may outweigh any possible harm. However, efficiencies alone cannot save an otherwise anticompetitive transaction. The agencies consider efficiencies in their merger analysis that are:

- **Merger-specific.** These efficiencies are likely to be accomplished only through the proposed merger and are not likely to be accomplished by the companies absent the merger.
- **Cognizable.** Cognizable efficiencies are those that can be verified with respect to likelihood and magnitude, and do not result from an anticompetitive reduction of output or service.

(See [Practice Note, Making Effective Merger Efficiencies Arguments.](#))

## **Failing Firm Defense**

The agencies do not consider a proposed merger to be anticompetitive if the merging parties can show that one of the firms would exit the market absent the merger. Though (and perhaps because) the failing firm defense is absolute, it has a high burden of proof. A company making a failing firm argument to the agencies must have substantial proof that the firm cannot:

- Meet its imminent financial obligations.
- Reorganize under Chapter 11.

- Find a buyer who will keep the assets productive in the relevant market and poses a less severe threat to competition.

(See [Practice Note, Failing Firm Defense](#).)

This test is rarely met.

## **Partial Acquisitions**

The 2010 Guidelines discuss how the agencies evaluate acquisitions of partial interests in competing firms. The agencies focus on whether the acquisition:

- Gives the acquiror the ability to influence the target company's competitive conduct.
- Reduces the acquiring firm's incentives to compete.
- Gives the acquiror access to the target's competitively sensitive information.

For more information on antitrust issues involving partial acquisitions, see [Practice Note, Antitrust Issues for Financial Investors](#). For more information on competitively sensitive information exchanges, see [Practice Note, Information Exchange and Integration Planning in M&A: Antitrust](#).

## **Potential Competition**

Mergers between potential competitors can have anticompetitive consequences. Where one of the merging companies is developing a product that, absent the merger, would compete with the other merging party's product, the merger could eliminate the potential for future competition. Consequently, assuming there are few if any similarly situated potential competitors, the merger could have the anticompetitive effect of precluding competition that may have resulted in lower prices in the future.

A merger could also be anticompetitive if one of the merging firms was widely perceived in the industry as a potential competitor such that its presence was a constraining factor on prices in the industry.

For more on how the agencies evaluate potential competition, see [Practice Note, Potential Competition in Merger Analysis](#).

## **Non-Horizontal Mergers**

The antitrust agencies also analyze non-horizontal mergers that could harm competition, including:

- Vertical mergers, meaning those involving firms that operate at different levels of an industry (see [Vertical Mergers](#)).
- Diagonal mergers, meaning those that combine firms or assets at different stages of competing supply chains (see [Diagonal Mergers](#)).
- Vertical aspects of horizontal mergers.

The antitrust agencies issued joint Vertical Merger Guidelines on June 30, 2020 (see [FTC and DOJ, Vertical Merger Guidelines, June 30, 2020](#)). This followed the DOJ's withdrawal of

the Non-Horizontal Merger Guidelines on January 10, 2020, which were used by the agencies to analyze potential anticompetitive effects from these types of mergers and were originally part of the 1984 Merger Guidelines issued by the DOJ.

In September 2021, however, the FTC voted to withdraw its approval of the Vertical Merger Guidelines. Among other reasons, the Commissioners voting in favor of withdrawal argued:

- The FTC substantially underenforces vertical mergers.
- The guidelines overstate the benefits of vertical mergers.
- There should be a single set of guidelines for horizontal and vertical mergers.
- The agencies require a richer set of qualitative and quantitative data in merger review.

The Vertical Guidelines remain in place at the DOJ. (See [Legal Update, FTC Withdraws Approval of Vertical Merger Guidelines](#).)

For more on vertical merger analysis, see [Practice Note, Vertical Mergers](#).

## Vertical Mergers

Mergers that combine companies at different levels in the manufacturing or distribution chain (vertical mergers), can sometimes result in diminished competition (see [Practice Note, Vertical Mergers](#)). Though currently only approved by the DOJ, the 2020 Vertical Merger Guidelines discuss the common competitive concerns with vertical mergers, including:

- **Unilateral effects.** A vertical merger can reduce competition where it allows the merged company to profitably use its control of the related product or weaken or remove a competitive constraint from one or more of its actual or potential competitors in a relevant market. This can arise where, as a result of merging with a supplier or distributor, the merged firm may be able to engage in:
  - foreclosure, meaning that the merged company refuses to supply competitors with particular essential inputs or distribution channels post-merger; or
  - raising rivals' costs, meaning the merger increases the merged company's incentive or ability to raise its competitors' costs either by increasing price or lowering the quality of the inputs or channels.

(See [Practice Note, Vertical Mergers: Foreclosure and Raising Rivals' Costs](#).)

- **Competitively sensitive information.** A vertical merger can allow the merged firm access to and control of competitively sensitive business information about its upstream or downstream competitors that it did not have access to pre-merger (see [Practice Note, Information Exchange and Integration Planning in M&A: Antitrust](#)). This may result in:

- the merged company's downstream competitor, that was a premerger customer of the upstream firm, gaining access to its competitors' sensitive business information;
- the merged company's ability to access its competitor's competitively sensitive information and using it to determine its response to the competitor's actions. For example, the merged company may be able to preempt or react quickly to the competitor's business actions and may deter competitors from taking procompetitive actions; or
- competitors refraining from doing business with the merged company rather than risk allowing the company to use their competitively sensitive information.

(See [Practice Note, Vertical Mergers: Access to Competitively Sensitive Information.](#))

- **Coordinated effects.** A vertical merger may also decrease competition where it enables or encourages coordination among competitors that harms customers. The agencies are more likely to challenge a merger because of coordinated effects where the market is particularly vulnerable to collusion. For example, vertical mergers could enable coordinated interaction where they:
  - give companies increased opportunities to monitor pricing. For example, if manufacturers are engaged in collusion, acquiring retail outlets could enable manufacturers to better track pricing to detect and punish deviant firms; or
  - eliminate a maverick firm (that is, an important buyer that could tempt the manufacturers to deviate from a collusive agreement).

(See [Practice Note, Vertical Mergers: Coordinated Effects.](#))

## **Vertical Merger Challenges**

The agencies are increasingly challenging vertical mergers in court, and there have been a number of recent, high-profile vertical merger challenges by both agencies, including in:

- December 2022, by the FTC to block Microsoft Corp.'s acquisition of Activision Blizzard, Inc. After the Ninth Circuit affirmed the district court's denial of the FTC's motion for a preliminary injunction, the FTC withdrew its administrative complaint. (See [Legal Update, Key Findings from the District Court's Decision Allowing the Microsoft/Activision Merger to Proceed](#) and [What's Market, In the Matter of Microsoft Corp. and Activision Blizzard, Inc. \(litigated case\)](#).)
- February 2022, by the DOJ to block UnitedHealth Group's acquisition of Change Healthcare. The district court sided with the parties, and the DOJ dropped its appeal. (See [Legal Update, Key Findings from the D.D.C. Decision Allowing the UnitedHealth/Change Healthcare Merger to Proceed](#) and [What's Market, U.S.](#))

[and State of Minnesota and State of New York v. UnitedHealth Group Incorporated and Change Healthcare Inc. \(litigated case\).](#)

- January 2022, by the FTC to block Lockheed Martin Corporation's proposed acquisition of Aerojet Rocketdyne Holdings, Inc. The parties later abandoned the transaction (see [What's Market, In the Matter of Lockheed Martin Corporation and Aerojet Rocketdyne Holdings, Inc. \(litigated case\)](#)).
- December 2021, by the FTC to block Nvidia Corporation's proposed acquisition of Arm Ltd. The parties later abandoned the transaction (see [What's Market, In the Matter of Nvidia Corporation, Softbank Group Corporation, and Arm Ltd. \(litigated case\)](#)).
- March 2021, by the FTC to block Illumina's proposed acquisition of Grail. The parties later closed the transaction; however, in April 2023, the FTC ordered it unwound. Illumina has appealed to the US Court of Appeals for the Fifth Circuit. (See [Legal Update, Key Takeaways from the FTC's Decision Unwinding the Illumina/GRAIL Acquisition](#) and [What's Market, In the Matter of Illumina, Inc. and GRAIL, Inc. \(ongoing litigation\)](#).)
- November 2017, by the DOJ to block AT&T/DirecTV's acquisition of Time Warner Inc. In February 2019, the US Court of Appeals for the DC Circuit affirmed the US District Court for the District of Columbia's denial of a permanent injunction to block the deal (see [Legal Update, Key Findings from the AT&T/Time Warner DC Circuit Opinion](#) and [What's Market, U.S. v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc. \(litigated case\)](#)).

For a chart of vertical merger enforcement actions brought by the FTC and DOJ since 2008, see [Vertical Merger Enforcement Actions Chart](#). For detailed summaries of federal merger enforcement actions, visit Practical Law's What's Market Federal Merger Enforcement Actions database. Practical Law also launched a new What's Market Analytics for the Federal Merger Enforcement Actions Database in 2022, which allows users to quickly see trends and analyze data for federal merger enforcement dating back to 2008. The Analytics tool is available for subscriptions that include access to the Practical Law Dynamic Tool Set.

## **Diagonal Mergers**

A diagonal merger combines companies or assets at different stages of competing supply chains. For example, assume the largest manufacturer of high-end laptop computers with premium wireless capability intends to acquire a target company that manufactures a component that enhances the wireless capabilities of low-end laptop computers. The target's component increases competition between low-end laptops with the component and high-end laptops that already provide premium wireless capability without the component. However, the acquisition does not change the functionality of the buyer's products because:

- The target's technology is not compatible with the buyer's products.
- Redesigning the buyer's products to incorporate the acquired technology would not lower its marginal costs or improve the wireless capabilities of its laptops.

(See, for example, [Vertical Merger Guidelines](#), at 9.)

When evaluating a diagonal merger, the agencies consider the merged company would have the ability and incentive to decrease competition in the relevant market by increasing the price, lowering the quality, or decreasing supply of the related product.

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## - RESOURCE -

# Human Resources and Antitrust

by Practical Law Antitrust  
Maintained • USA (National/Federal)

A Practice Note providing an overview of the antitrust issues that human resources (HR) professionals should be familiar with, including risks arising from non-solicitation (also known as no-poach or no-hire) and wage-fixing agreements and sharing competitively sensitive information. This Note also discusses the applicable antitrust laws and provides a list of dos and don'ts for HR professionals to consult when making decisions with potential antitrust implications.

Organizations compete to hire and retain employees just as they compete in other areas of their businesses. Healthy competition in the employment marketplace can lead to:

- Higher wages.
- Better benefits.
- Improved goods and services.

The antitrust laws work to protect and promote competition in the human resources marketplace. The **Federal Trade Commission** (FTC) and **Antitrust Division** of the **Department of Justice** (DOJ) have stated that employers may violate the antitrust laws by:

- Agreeing to limit or fix terms of employment for new hires (which may be known as non-solicitation, no-hire, or no-poach agreements).
- Fixing employee wages.
- Sharing sensitive employee information with competitors.

This Practice Note discusses the types of agreements and actions that may violate the federal antitrust laws and steps employers and their HR departments can take to ensure compliance with the antitrust laws.

## Applicable Law

Agreements among competitors can be challenged under:

- **Section 1 of the Sherman Act (15 U.S.C. § 1)** ([Section 1](#)). [Section 1](#) prohibits agreements that unreasonably restrain trade.
- **Section 5 of the FTC Act (15 U.S.C. § 45)** ([Section 5](#)). Section 5 broadly prohibits unfair methods of competition. Only the FTC may bring claims under Section 5.

Courts evaluate [Section 1](#) claims either as anticompetitive on their face (**per se** illegal) or by balancing the procompetitive benefits against the anticompetitive harms (the **rule of reason**). Naked no-poach and wage-fixing agreements (those with no legitimate business justification) may be per se, or automatically, illegal and subject to criminal prosecution. Evidence of an illegal agreement may include evidence of discussions or parallel conduct, such as two employers maintaining artificially depressed wages.

For more on:

- [Section 1](#) generally, see [Practice Note, Section 1 of the Sherman Act: Overview](#).
- The rule of reason and per se rule, see [Practice Notes, Antitrust Rule of Reason](#) and [Antitrust Per Se Standard](#).
- Section 5 claims, see [Practice Note, FTC Act Section 5: Overview](#).

## Enforcement

The DOJ, FTC, state attorneys general, and private plaintiffs enforce the antitrust laws. In addition to civil enforcement actions, the DOJ may bring criminal charges for naked no-poach or wage-fixing agreements.

In the HR context, private plaintiffs with standing to bring suit include employees or other parties that were injured by an anticompetitive agreement or the sharing of sensitive information. Private plaintiffs can sue for three times their actual damages.

In 2016, the FTC and DOJ published guidelines for human resources professionals and others who hire or set compensation for employees. The [Antitrust Guidance for Human Resource Professionals](#) discusses how the antitrust laws apply to the employment marketplace. For more on the guidance, see [Legal Update, FTC and DOJ Issue Antitrust Compliance Guidelines for HR Professionals](#).

Enforcement of labor-related antitrust violations is expected to increase pursuant to a 2021 Executive Order on Promoting Competition in the American Economy, which in part targets agreements that limit worker mobility. For instance, in March 2022, the Antitrust Division of the DOJ and Department of Labor signed a Memorandum of Understanding (MOU) announcing measures that will strengthen the agencies' promotion of competitive labor markets, including coordination on:

- Information sharing.
- Enforcement activity, strategy, and training.

The MOU also enables the agencies to refer potentially illegal conduct to the other for enforcement.

(See [Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor, March 10, 2022](#).)

## Antitrust Issues and Employment-Related Agreements

The most serious HR-related antitrust issue is an illegal agreement not to compete. These illegal agreements can result in criminal charges and high fines, both for the organization and the individuals involved. Antitrust violations may arise related to:

- Non-solicitation, or no-poach agreements (see [Non-Solicitation Agreements](#)).
- Wage fixing (see [Wage-Fixing Agreements](#)).

Agreements affecting employment terms may violate the antitrust laws whether they are formal, written agreements or informal, handshake deals. For example:

- The DOJ charged Lucasfilm Ltd. and Pixar with entering and maintaining an agreement not to solicit each other's employees, evidenced by a written agreement among executives at the companies (see [Complaint, United States v. Lucasfilm Ltd. \(filed Dec. 21, 2010\)](#)).
- In *United States v. eBay, Inc.*, the DOJ charged eBay and Intuit, Inc. with entering and maintaining a handshake deal not to hire each other's employees (see [Complaint, United States v. eBay, Inc. \(filed Nov. 16, 2012\)](#)).

It can be difficult to prove the existence of an agreement in court. For example, an agreement was not found even where the evidence included:

- A recruiter's statement affirming the existence of a no-poach agreement.
- A manager's statement that the companies do not hire each other's employees.

([Frost v. LG Elecs., Inc., 801 Fed. Appx. 496 \(9th Cir. 2020\)](#).)

Nonetheless, HR employees and others responsible for hiring and compensation practices should avoid even the appearance of engaging in a no-poach or wage-fixing agreement, given the legal and operational risks involved.

Companies may compete for employees even if they are in different industries. For example, the DOJ's case against eBay and Intuit involved entering and maintaining an agreement not to hire each other's employees, as both companies hire computer engineers and scientists, even though they are not competitors in the services and products they offer (see [Complaint, United States v. eBay, Inc. \(filed Nov. 16, 2012\)](#)).

### Non-Solicitation Agreements

Non-solicitation (also called no-poach or no-hire) agreements can help firms achieve business goals without being concerned about losing their employees to poaching. These agreements, which are horizontal agreements with other firms in the same or similar industries or those hiring employees with similar skills, arise in various contexts. For example, firms entering a joint venture or other collaboration may use a non-solicitation agreement to prevent one firm from using the collaboration as an opportunity to recruit or poach the other's employees.

Under the right circumstances, no-poach agreements do not raise antitrust concerns and can be procompetitive. To be lawful, a no-poach agreement must be secondary to a separate, legitimate business arrangement. This includes no-poach agreements that are:

- Reasonably necessary for a merger or acquisition, investment, or divestiture, including relating to due diligence.
- Ancillary to a legitimate collaborative project with a competing firm.
- Used unilaterally to restrict a firm's recruiting practices, including in contracts with consultants, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees, or contract workers.
- Incorporated in the settlement of a legal dispute.
- Reasonably necessary for contracts with resellers or original equipment manufacturers.
- Reasonably necessary for the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects, and the shared use of facilities.

The agreement should always be reasonable in scope, including geographic, job function, product group, and time period limitations (see [United States v. Adobe Sys., Inc., 2011 WL 10883994 at \\*2 \(D.D.C. Mar. 18, 2011\)](#), [United States v. eBay, Inc., 2014 WL 5364751 at \\*2 \(N.D. Cal. Sept. 2, 2014\)](#), and [United States v. Lucasfilm, Ltd., 2011 WL 2636850 at \\*2 \(D.D.C. June 3, 2011\)](#)).

Beyond these contexts, no-poach agreements between competitors can be criminal antitrust violations. No-poach provisions may violate antitrust laws if they constrain an employer's decision-making regarding:

- Wages or salaries.
- Benefits.
- Employment terms.
- Job opportunities.

The DOJ actively pursues no-poach cases. For example:

- In 2018, the DOJ charged rail equipment supplier companies with entering and maintaining no-poach agreements ([Complaint, United States v. Knorr-Bremse, Knorr-Bremse, No. 1:18-cv-00747-CKK \(D.D.C. Apr. 3, 2018\)](#)). The DOJ alleged an agreement between two defendants beginning in 2014, even though the firms merged in 2016. The DOJ did not seek criminal penalties only because the alleged agreements were entered into before the DOJ issued its Antitrust Guidance for HR Professionals. (See [Competitive Impact Statement, p. 12, United States v. Knorr-Bremse, No. 1:18-cv-00747 \(D.D.C. Apr. 3, 2018\)](#).)

- In July 2021, the DOJ brought:
  - its first criminal charges in a no-poach case, charging an outpatient medical care provider and its successor with violating [Section 1](#) by agreeing with competitors not to solicit each other's employees (see [Superseding Indictment, United States v. Surgical Care Affiliates, LLC \(filed July 8, 2021\)](#)); and
  - criminal charges against Surgical Care's co-conspirator, DaVita Inc., and its former CEO for participation in the conspiracy with Surgical Care and another competitor (see [Indictment, United States v. Thiry \(filed July 24, 2021\)](#) and [Nov. 3, 2021](#)). In January 2022, the US District Court for the District of Colorado denied the defendants' motion to dismiss for failure to state a claim, holding that the complaint alleged a horizontal market allocation agreement that could be found to be a per se violation of the Sherman Act. ([2022 WL 266759 \(D. Colo. Jan. 28, 2022\)](#).) The jury ultimately found DaVita and its former CEO not guilty.
- In December 2021, the DOJ filed:
  - a criminal complaint against six aerospace outsourcing executives and managers, charging them with conspiring to limit hiring and recruiting of engineers and other skilled laborers, affecting thousands of workers (see [Indictment, United States v. Patel \(filed Dec. 15, 2021\)](#)). In April 2023, the defendants were found not guilty ([United States v. Patel, 2023 WL 3143911 \(D. Conn. Apr. 28, 2023\)](#)); and
  - a statement of interest in *In re Outpatient Medical Center Employee Antitrust Litigation*, urging the US District Court for the Northern District of Illinois to reject motions to dismiss a complaint alleging that Surgical Care Affiliates and United Surgical Partners International, Inc., and later DaVita Inc., agreed to not compete for each other's senior employees ([In re Outpatient Med. Ctr. Emp. Antitrust Litig., No. 1:21-cv-00305 \(N.D. Ill. filed Dec. 9, 2021\)](#)). The court later denied the motion to dismiss, finding that the plaintiffs sufficiently alleged that the agreements at issue were per se unreasonable under the Sherman Act ([2022 WL 4465929 \(N.D. Ill. Sept. 26, 2022\)](#)).
- In January 2022, a federal grand jury indicted four home health care agency managers with conspiring to fix wages and not hire each other's workers in the Personal Support Specialist industry, in violation of [Section 1 \(DOJ: Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges \(Jan. 28, 2022\)\)](#). In March 2023, the defendants were found not guilty. ([United States v. Manahe, No. 2:22-cr-00013 \(D. Me. Mar. 22, 2023\)](#).)

- In October 2022, the DOJ obtained its first guilty plea in a criminal no-poach case in *United States v. Hee*. In *Hee*, health care staffing company VDA OC LLC pleaded guilty to conspiring to allocate and fix wages of school nurses. VDA was sentenced to pay a criminal fine of \$62,000 and \$72,000 in restitution to affected nurses. ([DOJ Press Release, Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses.](#))

Private parties may also pursue no-poach [Section 1](#) claims. For example, in *In re High-Tech Employee Antitrust Litigation*, employees from high-tech companies including Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar alleged that their employers engaged in a conspiracy to:

- Fix and suppress compensation.
- Restrict employee mobility.

The United States District Court for the Northern District of California found that the employee plaintiffs submitted sufficient evidence to support finding a conspiracy, including evidence of six ongoing bilateral agreements between the companies, and ultimately approved a \$415 million class action settlement ([2015 WL 5159441 \(N.D. Cal. Sept. 2, 2015\)](#)). The next year, a group of animators brought a similar class action based on no-poach allegations and obtained a settlement for \$169 million (see [In re Animation Workers Antitrust Litig.](#), [2016 WL 6841655 \(N.D. Cal. Nov. 11, 2016\)](#)).

For more on no-poach agreements, see [Practice Note, Non-Solicitation and No-Poach Agreements](#).

### **No-Poach Agreements and Franchises**

No-poach agreements among franchises may also violate [Section 1](#). However, though naked no-poach agreements between competitors may be per se illegal and prosecuted criminally, the law is less clear when the no-poach agreements are between franchisees. The DOJ has stated that the legality of franchise no-poach agreements hinges on whether they are between the franchisor and franchisee or between franchisees, with the latter raising red flags as a horizontal agreement. For more on no-poach in the franchise context, see [Practice Note, Franchising and Antitrust, No-Poach Provisions](#).

### **Wage-Fixing Agreements**

Wage-fixing agreements occur when a company or individual agrees with individuals at a competing company on wage or salary levels, whether at a specific amount or within a set range.

The DOJ has been active in criminally perusing wage-fixing agreements. For example:

- In December 2020, the DOJ criminally charged the owner of a physical therapist staffing company with conspiring to fix the rates paid to therapists ([United States v. Jindal](#), No. 4:20-cr-00358-ALM-KPJ (E.D. Texas Dec. 9, 2020)). The DOJ alleged that the defendants and co-conspirators:

- provided and received non-public rates for therapists;
- communicated about and agreed to rate decreases; and
- paid therapists non-competitive rates.

As evidence of the agreements, the DOJ relied heavily on text messages between the parties. The DOJ also charged the defendant with obstructing an FTC investigation into his conduct through false testimony and misleading documents. In November 2021, a judge in the US District Court for the Eastern District of Texas denied the defendants' motions to dismiss, holding that wage-fixing is a per se violation of the Sherman Act that can be prosecuted criminally. Jindal was found not guilty of wage fixing, but guilty of obstruction (see [DOJ: Former Health Care Staffing Executive Convicted of Obstructing FTC Investigation into Wage-Fixing Allegations \(Apr. 14, 2022\)](#)).

- In March 2021, a federal grand jury indicted a health care staffing company and its former manager with conspiring with a competitor to allocate employees and fix wages, in violation of [Section 1 \(United States v. Hee, No. 2:21-CR-00098 \(D. Nev. filed Mar. 30, 2021\)\)](#). The health care staffing company, VDA OC LLC, pleaded guilty to conspiring to allocate and fix wages of school nurses. VDA was sentenced to pay a criminal fine of \$62,000 and \$72,000 in restitution to affected nurses.
- In January 2022, a federal grand jury indicted four home health care agency managers with conspiring to fix wages and not hire each other's workers in the Personal Support Specialist industry, in violation of [Section 1 \(DOJ: Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges \(Jan. 28, 2022\)\)](#). In March 2023, the defendants were found not guilty. (*United States v. Manage*, No. 2:22-cr-00013 (D. Me. Mar. 22, 2023).)
- In March 2023, a federal grand jury indicted a health care staffing executive on charges that it fixed wages for Las Vegas nurses in violation of the Sherman Act (see [DOJ: Health Care Staffing Executive Indicted for Fixing Wages of Nurses \(March 16, 2023\)](#)).

The FTC actively challenges restrictive provisions in codes of ethics or by-laws limiting competition, instituting price schedules, and prohibiting customer solicitation (see [Legal Update, FTC Settles Charges that Two Professional Associations Restricted Competition Through By-laws](#)). For example, in *In the Matter of American Guild of Organists*, the FTC alleged that the respondent American Guild of Organists, Inc. restrained competition by maintaining:

- A provision in its code of ethics prohibiting its members from soliciting work.
- A compensation schedule that limits price competition.

([In the Matter of American Guild of Organists \(May 26, 2017\)](#).)

## Antitrust Issues Related to Information Sharing

Organizations often collect competitive intelligence and engage in benchmarking activities to help them make better business decisions, including collecting industry information on employee compensation and benefits. Exchanging information on wages, salaries, terms of employment, or benefits with other organizations must be handled carefully.

While not per se illegal and not by itself subject to criminal prosecution, an information exchange can:

- Be seen as evidence of an implicit agreement to fix wages or other employment terms.
- Lead to serious antitrust penalties if the information sharing has anticompetitive effects.

An explicit or implicit agreement between competitors is not required to establish an antitrust violation. For example, in *United States v. Utah Society for Healthcare Human Resources Administration (USHHRA)*, the DOJ alleged that the defendants, a group of hospitals, used telephone calls, written surveys, and communications made at meetings of the USHHRA professional association and the Utah Hospital Association, a trade association, to exchange information related to:

- Overall budgets and nursing budgets.
- Registered nurse (RN) entry wages.

The DOJ alleged that the purpose of the information exchange was to limit the amount and frequency of RN entry wage increases in the local market. The final judgment prohibited the USHHRA from exchanging information regarding nurse compensation levels and required it to maintain an antitrust compliance program. ([\*United States v. Utah Society for Healthcare Human Resources Administration, No. 94C282G \(D. Utah, Mar. 14, 1994\).\*](#))

In 2022, the DOJ filed a complaint against Cargill Meat Solutions, two of its competitors, Sanderson Farms, Inc. and Wayne Farms, LLC, and a consulting firm acting as information broker alleging that the parties violated Section 1 of the Sherman Act by exchanging employee compensation information. In addition to a final judgment prohibiting compensation-related information sharing or using competitively sensitive information, Cargill, Sanderson, and Wayne agreed to pay \$84.8 million to resolve the allegations. ([\*United States v. Cargill Meat Solutions Corporation, No. 1:22-cv-01821 \(D. Md. filed July 25, 2022\).\*](#))

Not all information exchanges raise red flags. HR professionals may lawfully collect information on competitors' employee practices to be able to, for example, benchmark their offerings related to compensation packages, provided that they follow safeguards, including that the information exchange:

- Is made through a neutral third party (for example, a government agency or trade association) (see [Standard Document, Competitive Intelligence Policy for Third Parties](#)).

- Includes relatively old information (more than three months). Exchanging information on future compensation levels will likely be considered anticompetitive.
- Uses aggregated information to protect the sources' identities.

Under the now-withdrawn [Statements of Antitrust Enforcement Policy in Health Care](#), information exchanges were considered sufficiently aggregated to protect a source's identity where they included five or more sources with one individual providing no more than 25% of the data. This type of aggregation may be a useful benchmark for counsel even though the statements were withdrawn.

Employees themselves may freely discuss wages, benefits, or terms and conditions of employment, as protected by **Section 7** of the **National Labor Relations Act**.

Before issuing or participating in a survey of compensation levels, counsel may advise contacting the DOJ for a business review letter or the FTC for an advisory opinion for guidance (see [Practice Note, Seeking DOJ Business Review Letters and FTC Advisory Opinions](#)).

For more details on managing information exchanges under the antitrust laws, see [Practice Note, Information Exchanges Among Competitors \(Non-Merger\)](#). For more on how to avoid antitrust violations when affiliated with a trade association, see [Standard Document, Antitrust Warnings for Trade Association Meetings](#).

## Dos and Don'ts

To ensure that conduct related to a competitor is lawful, the following guidance should be provided to HR professionals or anyone responsible for setting compensation or hiring within an organization:

- Do not discuss with employees of competitors:
  - current or future wages, salaries, benefits, or other compensation terms and policies;
  - complaints or commentary about compensation levels in your industry;
  - intentions not to hire each other's employees or candidates;
  - intentions not to compete as aggressively for employees; or
  - any other competitively sensitive or nonpublic information.
- Do not agree with any other company to take any common action.
- Do not pose as a job applicant or outside research firm, misrepresent yourself or your role, or use any other form of deception to obtain information from competitors.
- Only share and collect information for benchmarking that is historical or aggregated, or managed by a third party, and always supervised by counsel. Information exchanges during due diligence may also be lawful.

- Seek counsel's guidance before:
  - participating in an information exchange or benchmarking initiative with other companies; or
  - attending a trade association, trade show, or other conference where compensation or hiring practices may be discussed.
- Immediately alert the legal department if:
  - an employee of another company suggests illegal activity, or conduct that you are unsure about; or
  - you receive another company's competitively sensitive information, such as wage or benefit data, either intentionally or inadvertently.
- Do not use any competitor's information that is marked as confidential, proprietary, secret, or that otherwise indicates it is meant to be kept confidential without consulting the legal department.
- If a third party offers to share a competitor's compensation information or other competitive intelligence with you, seek guidance from the legal department.

For more on how to approach antitrust issues as a HR professional, see [Antitrust Training for Human Resources Professionals: Presentation Materials](#). For a comprehensive list of dos and don'ts to help navigate antitrust concerns, see [Standard Document, Antitrust Guidelines: Dos and Don'ts](#). For more guidance on collecting competitive intelligence, see [Standard Document, Competitive Intelligence Policy](#).

## - RESOURCE -

# Antitrust for Health Care Non-Profits

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A Practice Note providing an overview of how the antitrust laws apply to non-profit health care entities, including non-profit hospitals and health care providers, insurers, associations, and trade associations. This Note discusses antitrust agency enforcement actions and cases brought under Section 5 of the Federal Trade Commission (FTC) Act, Sections 1 and 2 of the Sherman Act, and the Clayton Act. It also discusses the application of the Hart-Scott-Rodino (HSR) Act and the Robinson-Patman Act to non-profit entities and provides practical tips for counsel advising non-profit health care entities.

Health care continues to be a major focus of US antitrust enforcement and litigation. Although the US antitrust laws generally apply to both for-profit and non-profit entities, non-profit health care entities face certain unique considerations. Non-profit health care entities and their counsel should understand how the antitrust laws apply to them and ensure that compliance measures are in place to prevent violations.

For a discussion of antitrust issues that all health care providers and insurers should consider, see [Practice Note, Health Care Competition: Providers and Insurers](#).

## Definition of Non-Profit Entity

A non-profit entity is one that is organized for a non-profit or charitable purpose and may be exempt under tax laws. These include:

- A not-for-profit corporation (NPC), which is formed when it files articles of incorporation with the relevant state agency
- An unincorporated non-profit association (UNA), which is an unincorporated group of at least two or more members joined by mutual consent for a common non-profit purpose.

Not all non-profit entities are tax-exempt organizations under the Internal Revenue Code (IRC). A non-profit may apply for federal tax-exempt status if it qualifies under one of the provisions of [Section 501\(c\) of the IRC](#) (see [Practice Note, Forming and Organizing a Non-Profit Corporation: 501\(c\)\(3\) Public Charity](#)).

## **Sherman Act and Non-Profit Entities**

The Supreme Court has confirmed that the Sherman Act applies to non-profit entities based on the statute's broad language (see, for example, *NCAA v. Alston*, 141 S. Ct. 2141, 2159 (2021); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984); and *Am. Soc'y of Mech. Eng'r, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982)).

### **Exception for Non-Commercial Activities**

A narrow exception exists for non-commercial activities, which are not subject to the Sherman Act (see *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787-88 (1975)). Whether a non-profit entity is subject to the Sherman Act therefore depends on whether the transaction at issue is commercial in nature (*Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998)).

Courts evaluate whether a transaction is commercial or non-commercial based on the nature of the conduct in light of the totality of the circumstances (*United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 666 (3d Cir. 1993)). Some courts focus on whether there has been an exchange of money for services (*Bronx Legal Servs. v. Legal Servs. for New York City*, 2003 WL 145558, at \*3 (S.D.N.Y. Jan. 17, 2003), *aff'd*, 78 F. App'x 781 (2d Cir. 2003)).

Non-commercial activities that courts have found to be exempt from the Sherman Act include:

- Soliciting charitable donations (*Dedication & Everlasting Love to Animals v. Humane Society of U.S., Inc.*, 50 F.3d 710, 712 (9th Cir. 1995)).
- Political fundraising (*Freedom Watch Inc. v. Judicial Watch, Inc.*, 289 F. Supp. 3d 1270 (S.D. Fla. 2018)).
- Determining medical school admissions criteria (*Pierce v. Yale Univ.*, 2019 WL 162029, at \*6 (D.D.C. Jan. 10, 2019)).

The exception for non-commercial activity is narrow. Non-commercial activity that has a commercial motive and commercial activity that has a non-commercial motive are both subject to the Sherman Act (see, for example, *Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Coll. & Secondary Sch., Inc.*, 432 F.2d 650 (D.C. Cir. 1970)). Courts are likely to consider any activity implicating the exchange of health care services for payment to be commercial activity subject to the Sherman Act (see *Brown Univ.*, 5 F.3d at 666).

### **Non-Profit Enforcement Under the Sherman Act**

A health care entity's status as a non-profit does not affect the type of claims it may face from plaintiffs under the Sherman Act, the likelihood that it will be challenged, or the remedies that may be imposed.

A non-profit entity's conduct under the Sherman Act can be challenged by:

- The **Antitrust Division** of the **Department of Justice** (DOJ), which is the federal agency authorized to enforce the Sherman Act.

- State attorneys general, including as *parens patriae* on behalf of their residents (see [Practice Note, US Antitrust Laws: Overview: Box: Sanctions and Remedies](#)).
- Private plaintiffs if they have standing (see [Practice Note, Antitrust Standing of Private Plaintiffs](#)).

The DOJ generally enforces Section 2 of the Sherman Act civilly but may also bring criminal charges for Section 1 violations (see [Practice Note, Criminal Antitrust Enforcement in the US](#)).

The FTC does not technically enforce the Sherman Act, but it can challenge conduct that violates the Sherman Act under **Section 5 of the Federal Trade Commission (FTC) Act** or it can refer investigations to the DOJ. The FTC has limited power to bring enforcement actions under Section 5 to challenge anticompetitive conduct by legitimate non-profit entities (see [Limits on FTC Jurisdiction Over Non-Profits Under Section 5](#)).

### **Non-Profit Challenges Under Section 1 of the Sherman Act**

Section 1 of the Sherman Act ([15 U.S.C. § 1](#)) prohibits any contract, combination, or conspiracy that restrains trade. In determining whether a party has violated Section 1, courts determine whether there is an agreement and, if so, whether the agreement unreasonably restrains trade (see [Practice Note, Section 1 of the Sherman Act: Overview](#)).

The DOJ, private parties, and state attorneys general may challenge any non-profit entity's conduct that falls within the scope of Section 1. The DOJ regularly brings enforcement actions under Section 1 against non-profit entities in the health care field, including:

- Hospitals, health care systems, and health and dental insurers.
- Associations, such as those whose members consist of competing physicians.
- Academic institutions and universities, including medical schools and university hospitals (see [Practice Note, Antitrust for Non-Profits: Academic Institutions and Universities](#)).

The DOJ, private plaintiffs, and state attorneys general have challenged non-profit hospital and health care entity conduct under Section 1, including for:

- Using most favored nation clauses (MFNs) (see [Most Favored Nation Clauses](#)).
- Engaging in concerted refusals to deal or group boycotts (see [Group Boycotts](#)).
- Price-fixing (see [Price-Fixing](#)).
- Agreements not to compete (see [Agreements Not to Compete](#)).
- Using anti-steering provisions to prevent health insurers from using incentives or restrictions to steer patients to competing providers (see [Anti-Steering Provisions](#)).
- Agreements to unreasonably restrain trade (see [Agreements Restraining Trade](#)).

In some circumstances, state agencies and state-funded institutions can also be subject to antitrust liability (see [State Agencies and Publicly Funded Institutions](#)).

### **Most Favored Nation Clauses**

Both private plaintiffs and the DOJ have challenged non-profit health care insurers' use of MFNs, an agreement provision in which a supplier agrees to treat a particular customer no worse than all other customers, under Section 1 of the Sherman Act. This includes the use of MFNs by non-profit:

- Health insurers (see [United States v. Blue Cross Blue Shield of Mich., 809 F. Supp. 2d 665 \(E.D. Mich. 2011\)](#); [Complaint, United States v. Medical Mutual of Ohio, No. 1:98-cv-2172 \(N.D. Ohio Sept. 23, 1998\)](#) (1998 WL 35231058); and [Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951 \(10th Cir. 1990\)](#)).
- Dental insurers (see [Complaint, United States v. Delta Dental of Rhode Island, No. CA-96-113-ML \(D.R.I. Feb. 29, 1996\)](#) and [Complaint, United States v. Oregon Dental Service, No. C95 1211 \(N.D. Cal. Apr. 10, 1995\)](#)).

The use of MFNs by health insurers in provider participation agreements has attracted considerable antitrust scrutiny from government enforcers and private plaintiffs, as well as attention from state legislatures. Health insurer MFNs require that the rates that the health insurer pays the provider for its services be at least as low as the rates paid by any other health insurer. If the provider negotiates a lower rate with another health insurer, it must offer the lower rate to the insurer with the MFN. MFNs in this context may cause anticompetitive harm by:

- Preventing hospitals from offering lower rates to competing insurers because the same low rate must then be offered to the insurer with the MFN.
- Inhibiting competitive entry and market expansion from other health insurance plans, which cannot effectively compete on rates as a result of the MFN.

For more on MFNs the antitrust agencies have challenged in the health care context, see [Practice Note, Health Care Competition: Providers and Insurers: Most Favored Nation Clauses](#). For more on MFNs generally, see [Practice Note, Most Favored Nation Clauses](#).

### **Group Boycotts**

The DOJ and private plaintiffs have brought enforcement actions under Section 1 of the Sherman Act alleging that non-profit health care associations and other entities have engaged in concerted refusals to deal or group boycotts (see [Practice Note, Concerted Refusals to Deal](#)).

The DOJ has challenged group boycotts in the health care context under Section 1, including a non-profit:

- Orthopedic society that allegedly conspired with several individual physicians and a sports medicine institute to raise fees for orthopedic services

(see [Complaint, United States v. Idaho Orthopaedic Soc'y, No. 10-268 \(D. Idaho May 28, 2010\) \(2010 WL 2724187\)](#)).

- Health care association that, by using a registry program, allegedly set prices and other terms hospitals in Arizona paid for temporary nursing services and decreased wages below competitive levels ([Complaint, United States v. Ariz. Hosp. & Healthcare Ass'n, No. CV07-1030-PHX \(D. Ariz. May 22, 2007\) \(2007 WL 1741161\)](#)).

For example, in 2010, the DOJ alleged that Idaho Orthopaedic Society, a non-profit corporation, several individual physicians, and a sports medicine institute formed two conspiracies to raise fees for orthopedic services in the Boise, Idaho, area, including by:

- Engaging in a group boycott by refusing to treat injured workers, hoping to force those patients' insurers to increase fees for orthopedic services.
- Threatening to terminate their insurer contracts to obtain better terms.

(See [Complaint, United States v. Idaho Orthopaedic Soc'y, No. 10-268 \(D. Idaho May 28, 2010\) \(2010 WL 2724187\)](#).)

The DOJ's settlement prevented the defendants from refusing to provide care to patients and agreeing with competitors on fees and other payer contract terms (see [Final Judgment, United States v. Idaho Orthopaedic Soc'y, No. 10-268 \(D. Idaho Aug. 30, 2010\)](#)). Private plaintiffs have also alleged that non-profit health care entities have engaged in group boycotts in violation of Section 1. For example, the Northern District of New York dismissed a plaintiff ambulatory surgical care facility's claim that a non-profit community hospital engaged in an illegal group boycott (see [Rome Ambulatory Surgical Center, LLC v. Rome Mem. Hosp., Inc., 349 F. Supp. 2d 389 \(N.D.N.Y. 2004\)](#)). The plaintiff alleged that the hospital's inducement of health care payers to enter into exclusive contracts and a tacit conspiracy to eliminate its facility from the market was an illegal group boycott.

In *PharmacyChecker.com, LLC v. National Association of Boards of Pharmacy*, the Southern District of New York found that plaintiff had plausibly alleged that the defendants, including Partnership for Safe Medicines, Inc. (PSM), a non-profit entity, engaged in a group boycott in violation of Section 1 of the Sherman Act ([2021 WL 1199363 \(S.D.N.Y. March 30, 2021\)](#)). The plaintiff alleged that the defendants attempted to prevent it from competing in the global markets for online pharmacy verification and comparative drug price information, including by adding the plaintiff's website to a list of not recommended sites, by running targeted ads against it, and by describing the plaintiff's website as not safe or malicious. See also [National Institute of First Assisting, Inc. v. Association of Operating Room Nurses, Inc., 2020 WL 8189230 \(D. Col. Nov. 25, 2020\)](#).

In *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, the District Court of the District of Kansas denied a motion for summary judgment by the defendants, managed care organization insurers and for-profit and non-profit hospitals, on the issue of whether they had acted in concert to boycott the plaintiff from obtaining in-network managed care contracts in violation of Section 1 ([527 F. Supp. 2d 1257, 1296-1308 \(D. Kan. 2007\)](#)). The court found that there was sufficient evidence for a reasonable jury to find that the

defendants acted in concert to boycott the plaintiff by preventing it from obtaining in-network managed care contracts.

For more on group boycotts, see [Practice Note, Concerted Refusals to Deal](#).

### Price-Fixing

The DOJ has brought suit under Section 1 of the Sherman Act against non-profit health care entities for engaging in price-fixing, including a non-profit:

- Health care system that operated a hospital, an association of competing physicians, and an entity the hospital and association jointly owned for allegedly conspiring to obtain higher priced terms and conditions from managed care health plans in the relevant market (see [Complaint, United States v. Health Care Partners, Inc., No. 395-CV-01946RNC \(D. Conn. Sept. 13, 1995\)](#)).
- Hospital and nursing home trade association and hospital operators for allegedly conspiring not to contract with the Indian Health Service (IHS), a US agency, at potentially lower rates than the hospitals' private rates, resulting in higher fixed charges to IHS for medical and surgical services (see [Complaint, United States v. North Dakota Hosp. Ass'n, No. A2-83-131 \(D.N.D. Aug. 25, 1983\)](#)).

Private parties and state attorneys general have also challenged non-profit hospital and health care entity conduct under Section 1, including for alleged price-fixing by:

- A non-profit health insurer (see [Ratio v. Med. Serv. of D.C. \(Blue Shield\), 718 F.2d 1260 \(4th Cir. 1983\)](#) and [Addino v. Genesee Valley Medical Care, Inc., 593 F. Supp. 892 \(W.D.N.Y. 1984\)](#)).
- A non-profit foundation whose members were licensed physicians (see [Arizona v. Maricopa County Medical Society, 457 U.S. 332 \(1982\)](#)).
- Two non-profit hospitals (see [New York v. St. Francis Hosp., 94 F. Supp. 2d 399 \(S.D.N.Y. 2000\)](#)).
- A non-profit health organization that comprised two health systems and the organization's network of physicians and hospitals in Central Pennsylvania (see [HealthAmerica Pennsylvania, Inc. v. Susquehanna Health System, Inc., 278 F. Supp. 2d 423, 438 \(M.D. Pa. 2003\)](#)).
- A non-profit association of medical colleges and a non-profit corporation that runs the annual matching program for fourth-year medical students to residency programs (see [Jung v. Ass'n of Medical Colleges, 300 F. Supp. 2d 119 \(D.D.C. 2004\)](#)).

Non-profit hospitals, physician organizations, and other health care providers that are not under a common parent should be cautious about jointly negotiating contracts with insurers

to avoid price-fixing or other Section 1 claims (see [Box, Insurance Organization Contracting by Non-Profits](#)).

For more on price-fixing in the health care industry, see [Practice Note, Health Care Competition: Providers and Insurers: Price-Fixing and Other Collusive Behavior](#). For more on price-fixing generally, see [Practice Note, Section 1 of the Sherman Act: Overview](#).

### **Agreements Not to Compete**

The DOJ has challenged non-profit hospital and health care associations' agreements not to compete in violation of Section 1 of the Sherman Act. For example, the DOJ has challenged:

- Agreements between two non-profit hospitals allocating markets for competing health care services under Section 1 of the Sherman Act (see, for example, [Complaint, United States v. Charleston Area Med. Center, No. 2:16-cv-03664 \(S.D. W. Va. Apr. 14, 2016\) \(2016 WL 1620458\)](#) and [Complaint, United States v. Bluefield Regional Med. Ctr., Inc., No. 1:05-0234 \(S.D. W. Va. Mar. 21, 2005\)](#)).
- Non-profit hospitals agreeing not to market in each other's territories (see [Complaint, United States v. Hillsdale Community Health Ctr., No. 2:15-cv-12311 \(E.D. Mich. June 25, 2015\)](#)).
- A non-profit hospital's agreement preventing entry of a new competitor in the cardiac surgery market under Section 1 of the Sherman Act (see [Complaint, United States v. Charleston Area Med. Ctr., No. 2:06-cv-0091 \(S.D. W. Va. Feb. 6, 2006\)](#)).
- A non-profit association's use of published guidelines that allegedly restricted competition among its members, directors of family practice residency programs, by preventing them from recruiting current family practice residents from other residencies (see [Complaint, United States v. Association of Family Practice Residency Dir., No. 96-0575-cv-W-2 \(W.D. Mo. May 28, 1996\)](#)).
- A non-profit association that negotiated on behalf of its members, competing OB-GYNs, with managed care plans and agreed to develop a minimum fee schedule that resulted in substantially higher OB/GYN fees than those managed care plans were paying under individual contracts in the relevant market (see [Complaint, United States v. Woman's Hosp. Found., No. 96-389-BM2 \(M.D. La. Apr. 23, 1996\)](#)).

The New York State Attorney General also challenged an alleged agreement under Section 1 between two non-profit hospitals to divide the market for health care services in Poughkeepsie, New York (see [New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 414-16 \(S.D.N.Y. 2000\)](#)).

For more on agreements not to compete, see [Practice Note, Section 1 of the Sherman Act: Overview: Non-Price Horizontal Restraints](#). For more on agreements not to compete in the

health care context, see [Practice Note, Health Care Competition: Providers and Insurers: Agreements Not to Compete.](#)

### **Anti-Steering Provisions**

The DOJ has challenged a non-profit health care system's use of anti-steering provisions in an exclusive agreement with a health insurer under Section 1 of the Sherman Act.

In 2016, the DOJ filed suit against Atrium Health, formerly Carolinas Health Care System, alleging that steering restrictions in its contracts with health insurers unreasonably restrained trade in violation of Section 1. The DOJ alleged in its [complaint](#) that Atrium maintained anticompetitive steering provisions in contracts with health insurers that prevented the insurers from steering customers towards more innovative or cost-effective health care services ([Complaint, United States v. Charlotte-Mecklenburg Hosp. Auth. d/b/a Carolinas Healthcare Sys., No. 3:16-cv-00311 \(W.D.N.C. Nov. 15, 2018\).](#)

On November 15, 2018, the DOJ announced it [settled](#) charges with Atrium. The settlement prohibited Atrium from enforcing, seeking, or obtaining any contract provision that prohibits, prevents, or penalizes steering through:

- Tiered networks, which allow insurers to place lower cost, higher quality health care services in high tiers for which patients pay lower out-of-pocket costs.
- Narrow-network insurance plans, which allow a consumer to pay lower out-of-pocket costs in exchange for choosing from a smaller network of health care providers.

(See [Legal Update, DOJ and Atrium Health Settle Anticompetitive Steering Charges.](#))

In 2018, the California Attorney General also challenged the use of anti-steering provisions by Sutter Health, a large non-profit health system, under the Cartwright Act (California's antitrust law), alleging anticompetitive conduct. For more on that case and the use of anti-steering provisions in the health care industry, see [Practice Note, Health Care Competition: Providers and Insurers: Anti-Steering and All-or-Nothing Provisions.](#)

### **Agreements Restraining Trade**

The DOJ has challenged a non-profit health care system and non-profit hospital's use of a partial acquisition agreement under Section 1 of the Sherman Act, alleging it was an unreasonable restraint of trade.

In August 2020, the DOJ filed suit to enjoin Geisinger Health's partial (30%) acquisition of Evangelical Community Hospital for \$100 million, alleging that their agreement created substantial financial entanglements between the close competitors and reduced both hospitals' incentives to compete aggressively (Complaint, [United States v. Geisinger Health and Evangelical Community Hosp., No. 4:20-cv-01383-MWB \(M.D. Pa. August 5, 2020\).](#)

Geisinger is the largest health care system in Central Pennsylvania and provides hospital and physician services. Evangelical the largest independent community hospital in a six-county region in Central Pennsylvania. The DOJ alleged in its [complaint](#) that Geisinger and Evangelical had market power in the sale of inpatient general acute-care services in a six-county area. The DOJ also alleged that the acquisition would:

- Substantially reduce head-to-head competition between the parties, as Geisinger would:
  - control how the \$100 million was spent, thereby influencing its competitor's strategic decision making;
  - have the right of first offer and first refusal for some transactions and joint ventures, decreasing Evangelical's ability to partner with other entities; and
  - have little incentive to expand its offerings to attract Evangelical's customers, as it would negatively impact Geisinger's holdings in Evangelical.
- Create incentives for Geisinger to raise prices to commercial insurers and other purchasers of inpatient GAC services. In response to any price increase by Geisinger, Geisinger would be able to partially recover lost profits since many would switch to Evangelical. This would:
  - improve its leverage in negotiations with insurers; and
  - enable it to set higher prices for patients without insurance.

For more on this case and the parties' settlement, see [Legal Update, DOJ, Geisinger Health Reach Settlement Over Partial Acquisition of Evangelical Community Hospital.](#)

### **State Agencies and Publicly Funded Institutions**

The DOJ has taken the position that state agencies and publicly funded institutions, including non-profit entities, are not automatically exempt from antitrust liability as state actors. The DOJ argues that when state agencies are engaged in anticompetitive conduct, courts instead should inquire whether the conduct represents state policy under the state action doctrine ([DOJ Statement of Interest, Seaman v. Duke Univ., No. 1:15-cv-00462 \(M.D.N.C. Mar. 7, 2019\)](#)).

The DOJ submitted a statement of interest in *Seaman v. Duke University*, addressing the proper application of the state action defense to liability and the standard for judging the legality of Duke University's alleged no-poach agreements under Section 1 of the Sherman Act. Duke University and the other defendants, including the University of North Carolina system, are all non-profit academic institutions. The DOJ argued that state agencies are not automatically exempt from the antitrust laws under the state action doctrine. The DOJ argued that Duke was not a sovereign entity, such as a state legislature or court acting legislatively, and not automatically exempt under the state action doctrine. Duke was also not acting as a regulator but as a participant in the labor market in deciding to enter into the no-poach agreement.

For more on state action immunity, see [Practice Note, State Action Immunity \(Antitrust\)](#). For more on no-poach agreements, see [Practice Note, Non-Solicitation and No-Poach Agreements](#).

## **Section 2 of the Sherman Act**

The DOJ, state attorneys general, and private plaintiffs have brought enforcement actions against non-profit health care entities for violations of Section 2 of the Sherman Act, which prohibits conduct that unlawfully monopolizes trade ([15 U.S.C. § 2](#)). In particular, Section 2 prohibits:

- Unilateral (or single-firm) conduct, including monopolization and attempted monopolization.
- Combined (or coordinated) conduct. This conduct includes conspiracy to monopolize.

(See [Practice Note, Section 2 of the Sherman Act: Overview](#).)

Monopolization claims under Section 2 of the Sherman Act can arise if the non-profit entity:

- Has monopoly power.
- Engages in conduct aimed at unlawfully excluding competition.

For example, in 2011, the DOJ and the State of Texas brought suit against a non-profit hospital, alleging that its contracts with commercial health insurers violated Section 2 by preventing the insurers from contracting with the hospital's competitors. The complaint alleged that the contracts allowed the hospital to maintain its monopoly for inpatient general acute care services and outpatient surgical services ([Complaint, United States v. United Regional Health Care System, No. 7:11-cv-00030 \(N.D. Tex. Feb. 25, 2011\)](#)).

Similarly, the DOJ brought an enforcement action against non-profit corporation Dentsply International, Inc. for entering into restrictive dealing agreements in violation of Section 2 of the Sherman Act ([\(Complaint, United States v. Dentsply Int'l, Inc., No. 99-005 \(D. Del. Jan. 5, 1999\)\)](#)). The DOJ alleged that Dentsply had entered into agreements to deny competing manufacturers of artificial teeth access to independent distributors to maintain its monopoly power. The DOJ alleged that Dentsply's actions prevented its competitors from distributing their products efficiently and deterred new entry in the market for prefabricated artificial teeth.

## **State Antitrust Law Claims**

Private plaintiffs alleging that non-profit entities have violated the federal antitrust laws also occasionally bring state law claims, which may provide a basis for relief.

Most state antitrust laws are interpreted in tandem with federal antitrust laws. For example, in *Talone v. American Osteopathic Association*, osteopathic physicians sued the American Osteopathic Association, alleging unlawful tying of board certification and professional association membership in violation of Section 1 of the Sherman Act as well as Section 3 of the New Jersey Antitrust Act ([N.J.S.A. 56:9-3](#)) and the New Jersey Consumer Fraud Act ([2017 WL 2539394 \(D.N.J. June 12, 2017\)\)](#). The court denied the association's motion to dismiss federal and state antitrust law claims.

A few states, such as California, have state antitrust laws that do not always follow federal antitrust law and may be more restrictive. For a survey of how each state's antitrust laws relate to federal antitrust law, see [Resale Price Maintenance Under State Laws Chart](#).

## Limits on FTC Jurisdiction Over Non-Profits Under Section 5

The FTC has more limited jurisdiction over non-profit entities than the DOJ. The FTC investigates and challenges deceptive and anticompetitive conduct under Section 5 of the FTC Act ([15 U.S.C. § 45](#)), which prohibits unfair methods of competition (see [Practice Note, FTC Act Section 5: Overview](#)).

Section 5 grants the FTC jurisdiction over persons, partnerships, and corporations ([15 U.S.C. § 45\(a\)\(2\)](#)). The definition of "corporation" in Section 4 of the FTC Act includes entities, whether incorporated or unincorporated, organized to carry on business for their own profit or that of their members ([15 U.S.C. § 44](#)). The FTC therefore does not have jurisdiction to bring claims against non-profit entities under Section 5 of the FTC Act. The FTC can enforce the Clayton Act and has the authority to challenge mergers involving non-profit entities under Section 7 (see [Non-Profit M&A Under the Clayton Act](#)).

In practice, this means that the FTC can challenge non-profit mergers but may not be able to challenge anticompetitive conduct of non-profit entities, including certain health care providers, such as hospitals organized as non-profits. Where it does not have jurisdiction, the FTC may instead refer matters to the DOJ for investigation.

The FTC also may bring an enforcement action against a non-profit entity under Section 5 where the entity:

- Uses its charitable assets for the personal benefit of individuals associated with the organization.
- Primarily benefits private pecuniary interests.
- Has a tax-exempt status that is a sham.

(*Cal. Dental Ass'n v. FTC*, [128 F.3d 720, 725 \(9th Cir. 1997\)](#), judgment vacated on other grounds, [526 U.S. 756, 765-69 \(1999\)](#).)

For example, in *California Dental Association*, the US Supreme Court found that a non-profit trade association engaged in activities for its members' financial benefit where it provided them with access to insurance and financing for their real estate, equipment, cars, and patients' bills and lobbied, litigated, and conducted marketing and public relations campaigns for their benefit ([526 U.S. 756, 765-69 \(1999\)](#)).

The FTC focuses on whether an entity's activities meet any of the criteria set out in *California Dental*, regardless of the entity's legal status as a non-profit, in determining whether it has oversight under Section 5. For example, in *North Texas Specialty Physicians v. FTC*, the US Court of Appeals for the Fifth Circuit found that the FTC had jurisdiction under Section 5 over a non-profit association of physicians, noting that the FTC correctly stated that antitrust liability does not depend on an entity's legal structure ([528 F.3d 346, 356 \(5th Cir. 2008\)](#)).

The FTC has brought administrative complaints under Section 5 against numerous non-profit entities based on these criteria, such as non-profit:

- Trade associations (see, for example, [Complaint, \*In re Nat'l Ass'n of Animal Breeders, Inc.\*, No. C-4623 \(F.T.C. Sept. 26, 2017\)](#) and [Complaint, \*In re Prof'l Lighting & Sign Management Cos. of Am., Inc.\*, No. C-4507 \(F.T.C. Feb. 5, 2015\)](#)).
- Professional associations, including medical and physicians associations (see, for example, [Complaint, \*In re N. Tex. Specialty Physicians\*, No. 9312 \(F.T.C. Sept. 16, 2003\)](#) and [American Medical Association](#), [94 F.T.C. 701 \(1979\)](#), [order amended](#), [99 F.T.C. 440 \(1982\)](#) and [100 F.T.C. 572 \(1982\)](#)).
- Cooperatives, including cooperatives of pharmacies and ophthalmologists (see, for example, [Complaint, \*In re Cooperativa de Farmacias Puertorriqueñas\*, No. C-4374 \(F.T.C. Nov. 6, 2012\)](#) and [Complaint, \*In re Cooperativa de Médicos Oftalmólogos de Puerto Rico\*, No. C-4603 \(F.T.C. Feb. 27, 2017\)](#)).

The agency has also brought actions against sham non-profits under Section 5 (see, for example, [Complaint, \*FTC v. Cancer Fund of Am., Inc.\*, No. 2:15-cv-00884-NW \(D. Ariz. May 18, 2015\)](#)).

For a list of FTC non-merger antitrust enforcement actions since 2009, including against non-profit entities, see [FTC Antitrust Enforcement Actions Chart \(Non-Merger\)](#). For more on the FTC's enforcement actions against trade associations, see [Practice Note, Competitor Collaborations in the US: FTC Trade Association Enforcement](#).

### **Non-Profit Conduct Challenged Under Section 5**

The FTC has challenged various types of conduct by non-profit entities under Section 5, including:

- Price-fixing, which the FTC challenges only as a civil violation (see [N. Texas Specialty Physicians v. FTC](#), [528 F.3d 346, 356 \(5th Cir. 2008\)](#)).
- Use of agreements not to compete, such as non-solicitation provisions (see, for example, [Complaint, \*In re Prof'l Lighting & Sign Management Cos. of Am., Inc.\*, No. C-4507 \(F.T.C. Feb. 5, 2015\)](#)).
- Refusals to deal (see, for example, [Complaint, \*In re Cooperativa de Farmacias Puertorriqueñas\*, No. C-4374 \(F.T.C. Nov. 6, 2012\)](#) and [Practice Notes, Unilateral Refusals to Deal](#) and [Concerted Refusals to Deal](#)).

### **Legislative Efforts to Expand FTC's Jurisdiction Over Non-Profits**

There have been efforts to expand the FTC's jurisdiction over non-profits legislatively. For example, in May of 2016, the FTC publicly supported [H.R. 5255](#), a bill to amend the FTC Act to provide the FTC with more expansive jurisdiction over non-profit organizations

(see [Statement of Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act \(June 19, 2013\)](#)). This bill was reintroduced as [H.R. 3918](#) on June 15, 2021.

## Clayton Act Enforcement

The Clayton Act applies to non-profit entities ([15 U.S.C. §§ 12 to 27](#)). The Clayton Act prohibits:

- Price discrimination that may substantially lessen competition (Section 3 of the Clayton Act) ([15 U.S.C. § 14](#)).
- Exclusive dealing and tying arrangements that may tend to lessen competition (Section 3 of the Clayton Act) (see [Practice Notes, Exclusive Dealing Arrangements](#) and [Tying Arrangements](#)).
- Mergers and acquisitions where the effect may substantially lessen competition under Section 7 ([15 U.S.C. § 18](#)) (see [Non-Profit M&A Under the Clayton Act](#)).
- Any person from simultaneously being a director of two or more competing corporations under certain circumstances under Section 8 ([15 U.S.C. § 19](#)) (see [Interlocking Directorates and Non-Profit Entities](#)).

For more information on the Clayton Act generally, see [Practice Note, US Antitrust Laws: Overview: Clayton Act](#).

## Non-Profit M&A Under the Clayton Act

Both antitrust agencies can challenge mergers and acquisitions by non-profit entities under Section 7 of the Clayton Act ([15 U.S.C. § 18](#)). Section 7 provides that the federal antitrust agencies may challenge mergers or acquisitions if the effect of the transaction is to substantially lessen competition or to create a monopoly (see [Practice Note, How Antitrust Agencies Analyze M&A](#)).

The limitations on the FTC's jurisdiction over non-profit entities do not apply when challenging mergers under Section 7 of the Clayton Act (see, for example, [FTC v. Univ. Health, Inc.](#), [938 F.2d 1206, 1222 \(11th Cir. 1991\)](#)). Courts have interpreted the Clayton Act's language as granting the FTC jurisdiction to challenge non-profit hospital mergers and a non-profit hospital's acquisition of the assets of another non-profit hospital ([FTC v. Freeman Hosp.](#), [69 F.3d 260, 267 \(8th Cir. 1995\)](#); [Univ. Health, Inc.](#), [938 F.2d at 1222](#); [United States v. Rockford Memorial Corp.](#), [898 F.2d 1278 \(7th Cir. 1990\)](#)).

These courts found that the FTC's authority to bring a challenge under Section 7 is not defined by the FTC Act but by Section 11 of the Clayton Act ([15 U.S.C. § 21](#)). Section 11 provides that the FTC enforces Section 7 for all entities not regulated by another agency specified there. None of the other listed agencies regulates non-profit hospitals. Section 7 of the Clayton Act therefore grants the FTC jurisdiction to review acquisitions by non-profit hospitals (see [Univ. Health, Inc.](#), [938 F.2d at 1214-15](#)).

A federal district court in the Fourth Circuit held that the merger of two non-profit hospitals was not subject to the Clayton Act but allowed the DOJ's claims to proceed under Section 1 of the Sherman Act (see *United States v. Carilion Health System*, 707 F. Supp. 840, 841 n.1 (W.D. Va. 1989), aff'd on other grounds, 892 F.2d 1042 (4th Cir. 1989)).

The FTC has brought merger challenges against non-profit hospitals that include claims under both the Clayton Act and Section 5 of the FTC Act, but the issue of whether the FTC had jurisdiction under Section 5 was not litigated or addressed (see *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012)).

A private plaintiff's complaint in federal court alleging that a merger of two non-profit entities operating hospitals violated Section 7 of the Clayton Act was dismissed for lack of standing (see *Marion HealthCare, LLC v. Southern Illinois Hospital Services*, 2022 WL 2317303 (S.D. Ill. June 28, 2022)).

For further discussion of antitrust issues relating to health care M&A, see [Practice Note, Health Care Competition: Providers and Insurers](#).

## Non-Profit Status in Merger Review

Courts have generally rejected the argument that non-profit entities are exempt from the antitrust laws because they have different incentives than for-profit entities (see *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984); *Univ. Health, Inc.*, 938 F.2d at 1224; *Rockford Memorial Corp.*, 898 F.2d at 1285).

However, some courts and the FTC have examined the role that merging hospitals' non-profit status should play in determining the merger's likely effect on competition.

Several courts have found that a merging hospital's non-profit status alone was not sufficient to rebut the government's *prima facie* case that the merger would substantially reduce competition (see, for example, *Rockford Memorial Corp.*, 898 F.2d at 1285 and *Univ. Health, Inc.*, 938 F.2d at 1214). For example, in *Rockford Memorial Corp.*, Judge Posner of the US Court of Appeals for the Seventh Circuit stated that he was aware of no evidence that non-profit suppliers of goods or services are more likely to compete vigorously than for-profit suppliers.

Other courts have given weight to the argument that non-profit hospitals operate differently from for-profit hospitals (*United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121, 145-46 (E.D.N.Y. 1997); *United States v. Mercy Health Services*, 902 F. Supp. 968, 989 (N.D. Iowa 1995)). These courts have considered as evidence:

- The non-profit hospitals' motives for the merger, such as to lower health care costs and improve the quality of care (see *FTC v. Butterworth*, 946 F. Supp. 1285, 1296-97 (W.D. Mich. 1996)).
- The combined entities' board composition, including whether there was anything inherent in the combined entities' board structure or the hospitals' non-profit status to stop anticompetitive behavior (*Mercy Health Services*, 902 F. Supp. at 989; *Long Island Jewish Medical Center*, 983 F. Supp. at 146), such as whether:

- the presence of prominent community and business leaders on the board of each hospital could bring accountability to price structuring (*Butterworth*, 946 F. Supp. at 1297); and
- the combined entity's board would insist that the savings achieved through the merger be used to reduce hospital charges (*United States v. Carilion Health System*, 707 F. Supp. 840, 847 (W.D. Va. 1989)).
- Whether charitable non-profit hospitals generally charge lower rates than for-profit hospitals (*Carilion Health System*, 707 F. Supp. at 846).

However, the more recent trend is that courts reviewing mergers involving non-profit hospitals have not focused on the non-profit entity's status or have rejected arguments that a hospital's non-profit status is significant to merger analysis (see *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022); *FTC v. Thomas Jefferson University, et al.*, 505 F. Supp. 3d 522 (E.D. Pa. 2020); *FTC v. Penn State Hershey Medical Center*, 185 F. Supp. 3d 552 (M.D. Pa. 2016); *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. ProMedica Health System, Inc.*, 749 F.3d 559, 570 (6th Cir. 2014); *FTC v. OSF Healthcare System*, 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012)).

### **State Attorneys General and Merger Review**

State attorneys general actively review health care mergers and acquisitions for antitrust or other concerns, often coordinating with the DOJ or FTC. Merging parties may need to manage simultaneous investigations by a state attorney general and a federal antitrust agency. In general:

- State attorneys general may be more open to behavioral remedies than the DOJ or FTC, particularly if the federal antitrust agency opts not to challenge a transaction.
- States may look more favorably on the merger of non-profit organizations, even if there are antitrust concerns, if the alternative is the acquisition of a non-profit by a for-profit organization.
- States may consider non-antitrust issues as part of the same investigation while the DOJ or FTC focus exclusively on antitrust concerns.

In some states, certificate of public advantage (COPA) laws may designate the state department of health as the final decision maker for hospital mergers. Some states, such as Connecticut and Washington, have prior notice requirements for mergers involving hospitals, hospital systems, and provider organizations (see Washington State, Healthcare Transactions Notification Requirement and Connecticut, An Act Concerning Notice of Acquisitions, Joint Ventures, Affiliations of Group Medical Practices and Hospital Admissions, Medical Foundations, and Certificates of Need, P.A. 14-168(c) (2014)). Some

states have prior notice and approval requirements for transactions involving health care entities, such as California, Hawaii, Nebraska, New Jersey, Rhode Island, Vermont, and Wisconsin.

For a checklist of strategic and practical considerations in managing a state merger review, see [State Merger Review Checklist](#).

## Interlocking Directorates and Non-Profit Entities

Section 8 applies to interlocking directorates among corporations and associations, including non-profit entities ([15 U.S.C. § 12\(a\)](#)). However, the Clayton Act does not define the term "corporation," and Section 8 therefore does not apply to non-corporate entities, such as partnerships. Courts have not addressed the issue of whether Section 8 applies to limited liability companies (LLCs) (see [Practice Note, Interlocking Directorates: Application to Other Entities](#)).

At least one court has examined an interlock under Section 8 that involved a non-profit entity's board. For example, in *HealthAmerica Pennsylvania, Inc. v. Susquehanna Health System, Inc.*, the court found no unlawful interlock between the boards of Susquehanna Regional Healthcare Alliance (Alliance), a non-profit organization that comprised two health systems, and Alliance's two member hospitals ([278 F. Supp. 2d 423, 441-442 \(M.D. Pa. 2003\)](#)). The court found that because the hospitals and Alliance all functioned as a single legal entity and were not competitors, the interlock did not violate Section 8 ([278 F. Supp. 2d at 434-37, 440-41](#)).

## HSR Act Applicability

The US antitrust agencies also enforce the [Hart-Scott-Rodino Antitrust Improvements Act of 1976](#) (HSR Act) (Clayton Act Section 7A) (see [Practice Note, Hart-Scott-Rodino Act: Overview](#)). The HSR Act applies to acquisitions by an acquiring person (also known as an acquiring ultimate parent entity or UPE) of assets or voting securities, which includes acquisitions of non-profit entities ([16 C.F.R. § 801.2\(a\)](#)).

For example, an acquiring UPE may acquire a non-profit entity by obtaining:

- Control of the entity's board of directors by acquiring the contractual power presently to designate 50 percent or more of the directors.
- Beneficial ownership, such as the right to vote the entity's stock, the right to an increase in its value, and the risk of a loss in its value (see [Practice Note, HSR Act Violations: Avoidance of the HSR Act: Box: Beneficial Ownership](#)).

The HSR Act does not exempt the consolidation of two non-profit entities. However, it does exempt the formation of a corporate or non-corporate entity that meets the definition of a non-profit entity in either:

- [IRC § 501\(c\)](#):
  - (1) to (4), such as entities organized solely for charitable, scientific, and educational purposes that are not substantially dedicated to lobbying;
  - (6) to (15), such as business leagues, chambers of commerce, and boards of trade; or
  - (17) to (19), such as organizations of war veterans.
- [IRC § 501\(d\)](#), such as certain religious organizations.

([16 C.F.R. § 802.40](#).)

For example, formations of non-profit hospitals, which are generally exempt under [IRC § 501\(c\)\(3\)](#), may be exempt under the HSR Act. However, the exemption does not apply to a consolidation of two non-profit health care systems affiliating under a new entity (see [FTC Premerger Notification Office Tip Sheet: Analysis of Not-for-Profit Combinations Under the HSR Act and Rules \(Oct. 26, 2018\)](#)). For more information on how to determine whether a formation is reportable under the HSR Act, see [Practice Note, Determining HSR Reportability of an Entity Formation](#).

## Robinson-Patman Act Applicability

Section 2(a) of the Robinson-Patman Act ([15 U.S.C. § 13\(a\)](#)) prohibits sellers from charging different prices to competing buyers for the same or similar products (see [Practice Note, Robinson-Patman Act: Overview](#)). While the federal antitrust agencies no longer actively enforce the Robinson-Patman Act, private parties continue to sue under its provisions. The Non-Profit Institutions Act (NPIA) exempts the purchase of supplies for non-profit institutions' own use from liability under the Robinson-Patman Act ([15 U.S.C. § 13\(c\)](#)). This includes purchases of supplies for their own use by:

- Schools, colleges, and universities.
- Public libraries.
- Churches.
- Hospitals.
- Non-profit charitable institutions.

The Supreme Court has interpreted the NPIA to allow hospitals to purchase supplies for their own use where that use is part of and promotes the intended institutional operation of the hospital and the care of its patients ([Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1 \(1976\)](#)). In *Abbott Laboratories*, commercial pharmacies sued drug manufacturers, alleging that they had violated the Robinson-Patman Act by selling drugs to hospitals with an on-site pharmacy at lower prices than those charged to commercial pharmacies. The Court considered whether certain categories of use were for the hospitals' own use. The Court found that use by hospital inpatients, patients admitted to a hospital's emergency facility, and outpatients for use on the premises were all within the hospital's own use. However, the Court found that hospitals' sales to walk-in prescription buyers and

prescription refills for former patients were not within the hospital's own use and therefore did not fall within the Robinson-Patman Act exemption.

Courts have held that non-profit entities may have broad institutional functions that can satisfy the own-use provision. For example, in *De Modena v. Kaiser Foundation Health Plan, Inc.*, the US Court of Appeals for the Ninth Circuit held that all drug purchases by HMOs for resale to its members qualify as own use under the NPIA and were exempt under the Robinson-Patman Act ([743 F.2d 1388, 1393 \(9th Cir. 1984\)](#)). Following *Abbott*, other courts have found that the NPIA applies to non-profit entities other than hospitals whose purchases were for their own use and therefore exempt from Robinson-Patman liability. For example, the Ninth Circuit found that:

- A private non-profit medical clinic's purchase of discounted vaccines from GSK was exempt from the Robinson-Patman Act where its vaccine sales and marketing program conformed to its intended institutional operation, which was to take any action necessary to control communicable diseases ([Vaccine Center, LLC v. GlaxoSmithKline LLC, 672 F. App'x 733 \(9th Cir. 2017\)](#)).
- The sale of bowling lanes and related equipment to the Utah State Building Board, an agency of the state of Utah, was exempt under the Robinson-Patman Act as the purchase of supplies by a non-profit university for its own use ([Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 \(9th Cir. 1967\)](#)).

The FTC has issued several advisory opinions on the scope of the NPIA. Examples of conduct that the FTC found to fall within the scope of the NPIA and be exempt from the Robinson-Patman Act include:

- A non-profit physicians group's sale of discounted pharmaceuticals and medical devices to an affiliated non-profit hospital (see [FTC Staff Advisory Letter, Doylestown Health \(Sept. 2, 2021\)](#)).
- A non-profit hospital's sale of discounted pharmaceutical products to employees and retirees (and their dependents) of its affiliated medical practice (see [FTC Staff Advisory Letter, Crouse Health Hospital \(Oct. 20, 2017\)](#)).
- A non-profit hospital's sale of discounted pharmaceutical products to employees of two of its affiliates (see [FTC Staff Advisory Letter, Yakima Valley Memorial Hospital \(Aug. 16, 2010\)](#)).
- A non-profit hospital's transfer of pharmaceuticals at cost to a non-profit institution providing free medical care (see [FTC Staff Advisory Letter, Dunlap Memorial Hospital \(Jan. 6, 2004\)](#)).
- The operation of a group-purchasing organization-based prescription drug program for the benefit of a group of non-profit schools, colleges, and universities (see [FTC Staff Advisory Letter, Quest Analytics Group \(Mar. 7, 2014\)](#)).

- A non-profit corporation offering post-acute health services' sale of discounted pharmaceutical products to its in-home hospice patients (see [FTC Staff Advisory Letter, Community CarePartners, Inc. \(July 2, 2010\)](#)).
- An HMO's purchase and use of discounted pharmaceuticals to provide health care services to those individuals covered under health benefits plans offered by self-insured employers (see [FTC Staff Advisory Letter, Kaiser Foundation Health Plan, Inc. \(Feb. 14, 2008\)](#)).

## **Recommendations for Counsel**

Counsel advising non-profit health care providers should:

- Carefully approach any joint negotiations with insurers involving other providers that are not under the same parent to avoid price-fixing claims. The FTC and DOJ hold non-profit hospital systems not under a common parent and non-profit physician organizations to high standards of clinical and financial integration to allow single signature contracting with insurance organizations rather than the use of the burdensome messenger model (see [Box, Insurance Organization Contracting by Non-Profits](#)).
- Consider regular antitrust training for senior executives and any employees involved in contract negotiations and marketing. For antitrust training and compliance materials, see [Antitrust Compliance Toolkit](#).

Counsel advising merging or affiliating non-profit health care entities should:

- Have an early meeting with the relevant state attorney general and the DOJ or FTC in a transaction involving a health care provider to determine:
  - whether the government may approve the transaction with no conditions;
  - any obstacles that may be cleared through negotiation, divestiture, or other methods;
  - how to limit discovery or information requests;
  - whether and to what degree the federal agency will coordinate with the attorney general; and
  - potential closing timelines.

(See [State Merger Review Checklist](#).)

- Consider that attorneys general of some states prefer that non-profit health care organizations merge or affiliate with other non-profit organizations rather than with for-profit organizations. An attorney general may allow the merger or affiliation of non-profit organizations even where there are antitrust concerns rather than allow a for-profit organization to be the merger or affiliation partner. However, the federal agencies do not consider this factor in deciding whether to bring an enforcement action.

## **Insurance Organization Contracting by Non-Profits**

Non-profit hospital systems not under a common parent and non-profit physician organizations frequently contract with insurance organizations by either:

- Single signature contracting, which requires a sufficiently integrated single provider network to undertake joint contract negotiations on behalf of otherwise independent organizations and individuals. Integration must be:
  - clinical;
  - financial; and
  - strategically aligned.
- Using the messenger model.

The 1996 Statement of Antitrust Enforcement Policy in Health Care (Health Care Statement) described the messenger model, which permitted competing health care providers that were not integrated to assist with contracting between providers and payers and avoid anticompetitive agreements among competing network providers. The DOJ withdrew from the Health Care Statement in February 2023, stating that it was outdated and no longer reflected the DOJ's current views. The FTC also similarly withdrew from the Health Care Statement in July 2023, stating it was outdated and no longer reflected market realities in the health care sector. Both the FTC and DOJ indicated that they would take a case-by-case enforcement approach informed by recent enforcement actions and advocacy in health care. The DOJ stated that there is no plan to issue any replacement guidance. Messenger models can operate in different ways if they are not used to facilitate an agreement among competitors on prices or related terms. For example, under a messenger model, a network provider may use an agent or third party to:

- Convey information to purchasers obtained from individual providers about prices or related terms they are willing to accept.
- Convey all contract offers made by purchasers to providers, allowing each provider to make an independent unilateral decision to accept or reject the offers.
- Accept contract offers on behalf of individual providers.
- Help providers understand the contracts offered, for example, by providing information about its non-financial terms, such as by comparing offered terms to other contracts agreed to by network participants.

(See [1996 Statements of Antitrust Enforcement Policy in Health Care \(Health Care Statement\)](#), at 4.C.)

The withdrawal by both agencies means that companies should be cautious about relying on the messenger model until there is more clarity on either agency's current approach to these issues.

The single signature contracting model is much less complex than the messenger model if the necessary integration standards can be satisfied. For additional discussion of antitrust issues raised by provider collaborations, see [Practice Note, Health Care Competition: Providers and Insurers: Provider Collaborations.](#)



## - CHECKLIST -

# FTC and DOJ Antitrust Guidance and Resources Checklist

by Practical Law Antitrust  
Maintained • USA (National/Federal)

A Checklist containing links to government resources that may be useful to counsel when providing antitrust advice. This Checklist includes the most relevant antitrust statutes and regulations, operational documents, and guidance from the Antitrust Division of the Department of Justice (DOJ) and Federal Trade Commission (FTC) on mergers and acquisitions, collaboration among competitors, the Hart-Scott-Rodino Act, the Robinson Patman Act, and criminal and cartel behavior.

The **Antitrust Division** of the **Department of Justice** (DOJ) and **Federal Trade Commission** (FTC) provide helpful antitrust resources and statutes for practitioners to use. This Checklist includes links to many of those resources and statutes and to Practical Law's discussions of those topics. For additional resources, see the DOJ's [website](#) and FTC's [website](#).

## Statutes and Regulations

- Section 1 of the Sherman Act (restraints of trade) ([15 U.S.C. § 1](#); see [Practice Note, Section 1 of the Sherman Act: Overview](#)).
- Section 2 of the Sherman Act (monopolizing trade) ([15 U.S.C. § 2](#); see [Practice Note, Section 2 of the Sherman Act: Overview](#)).
- Section 5 of the Federal Trade Commission Act (unfair competition) ([15 U.S.C. § 45](#); see [Practice Note, FTC Act Section 5: Overview](#)).
- Section 7 of the Clayton Act (mergers and acquisitions) ([15 U.S.C. § 18](#); see [Practice Note, Section 7 of the Clayton Act: Overview](#)).
- Hart-Scott-Rodino Antitrust Improvements Act of 1976 (premerger notification) (Section 7A of the Clayton Act) ([15 U.S.C. § 18a](#); see [Practice Note, Hart-Scott-Rodino Act: Overview](#)).
- Section 8 of the Clayton Act (interlocking directorate) ([15 U.S.C. § 19](#); see [Practice Note, Interlocking Directorates](#)).
- Robinson-Patman Act (price discrimination) ([15 U.S.C. § 13](#); see [Practice Note, Robinson-Patman Act: Overview](#)).

- Foreign Trade Antitrust Improvements Act (FTAIA) ([15 U.S.C. § 6a](#); see [Practice Note, Foreign Trade Antitrust Improvements Act \(FTAIA\)](#)).
- Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) ([15 U.S.C. §§ 1311 to 1314](#); see [Practice Note, Criminal Antitrust Enforcement in the US: Potential Criminal Penalties](#)).

## Agency Operational Documents

### DOJ

- [DOJ Antitrust Division Manual](#) (under revision).
- [DOJ Operations and Statistics](#).
- [DOJ Organizational Chart](#).
- [DOJ Leadership, Section, and Office Directory](#).

### FTC

- [FTC Organization, Procedures, and Rules of Practice](#).
- [FTC Commissioners](#).
- [FTC Organization Chart](#).
- [FTC Contact Information](#), including link to [FTC Organization Directory](#) (May 2022).

## Agency Guidelines and Policy Statements

- [Antitrust Guidelines for Collaborations Among Competitors](#) (DOJ and FTC 2000) (see [Practice Note, Competitor Collaborations in the US](#)).
- [Antitrust Guidelines for the Licensing of Intellectual Property](#) (DOJ and FTC 2017) (see [Practice Note, Antitrust Issues in Intellectual Property Licensing: Overview](#)).
- Withdrawn - [Statements of Antitrust Enforcement Policy in Health Care](#) (DOJ and FTC 1996). The DOJ withdrew from these policy statements on February 3, 2023. The FTC withdrew on July 14, 2023. (See [Practice Notes, Health Care Competition: Pharmaceuticals](#) and [Health Care Competition: Providers and Insurers](#)).
- [FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants](#) (FTC 2015) (see [Practice Note, State Action Immunity \(Antitrust\)](#)).
- [Antitrust Guidance for Human Resource Professionals](#) (DOJ and FTC 2016) (see [Standard Document, Antitrust Training for Human Resources Professionals: Presentation Materials](#)).
- [Price Discrimination: Robinson-Patman Violations](#) (FTC) (see [Practice Note, Robinson-Patman Act: Overview](#)).

- [Antitrust Guidelines for International Enforcement and Cooperation](#) (DOJ and FTC 2017) (see [Legal Update, DOJ and FTC Issue Updated Antitrust Guidelines for International Enforcement and Cooperation](#)).

## **Merger Enforcement**

- [Horizontal Merger Guidelines](#) (DOJ and FTC 2010) (see [Practice Note, How Antitrust Agencies Analyze M&A: Horizontal Mergers](#)).
- [Commentary on the Horizontal Merger Guidelines](#) (DOJ and FTC 2006).
- Partially withdrawn - [Vertical Merger Guidelines](#) (DOJ and FTC 2020) (see [Practice Note, Vertical Mergers](#)). The FTC withdrew its approval of the Vertical Merger Guidelines in September 2021.

## **Merger Remedies**

- [Negotiating Merger Remedies](#) (FTC 2012).
- Withdrawn - [Antitrust Division Merger Remedies Manual](#) (DOJ 2020 – withdrawn 2022).

(See [Practice Note, Merger Remedies](#).)

## **Voluntary Submissions**

- [DOJ Model Voluntary Request Letter](#) (2018).
- [DOJ Frequently Asked Questions: Voluntary Requests and Timing Agreements](#) (2018).
- [FTC Guidance for Voluntary Submissions](#).

## **Timing Agreements**

- [FTC Model Timing Agreement](#) (2019).
- [DOJ Frequently Asked Questions: Voluntary Requests and Timing Agreements](#) (2018). The DOJ's 2018 Model Timing Agreement itself is no longer available; however, the press release announcing it and the accompanying FAQs is available at [DOJ: Merger Review, Reviewed \(Sept. 25, 2018\)](#).

(See [Standard Documents, Second Request Model Timing Agreement \(DOJ\)](#) and [Second Request Model Timing Agreement \(FTC\)](#).)

## **Model Second Requests**

- [DOJ Model Second Request](#) (2015).
- [FTC Model Second Request](#) (2015).

(See [Practice Note, Second Requests in Merger Investigations](#).)

## **Confidentiality in Merger Investigations**

- [15 U.S.C. § 18a\(g\)](#) (HSR Act submissions).

## **Compulsory Submissions**

- [15 U.S.C. §§ 1313](#) and [1314](#) and [5 U.S.C. § 552](#) (to the DOJ).
- [15 U.S.C. § 57b-2](#); [16 C.F.R. §§ 4.10\(a\)\(2\)](#) and [4.11](#); [5 U.S.C. § 552](#) (to the FTC).

## **Voluntary Submissions**

- [5 U.S.C. § 552\(b\)\(4\) and \(7\)](#); [28 C.F.R. §§ 16.7](#) and [16.23](#) (to the DOJ).
- [15 U.S.C. §§ 46\(f\)](#) and [57b-2](#) and [16 C.F.R. §§ 4.10](#) to [4.12](#) (to the FTC).

For more on these statutory provisions and confidentiality generally, see [Confidentiality of Agency Submissions in Merger Investigations Chart](#) and [Practice Note, Confidentiality in Merger Investigations: Disclosures to Other Agencies](#).

## **HSR Materials**

- [FTC Premerger Notification Office Contact Information](#).
- [HSR Form](#). For a standard document counsel may use to prepare an HSR form, including Practical Law's automated document powered by Contract Express, see [Standard Document, Hart-Scott-Rodino \(HSR\) Form](#).
- [HSR Form Instructions](#) (see [Preparing the HSR Form Toolkit](#)).
- [HSR Form Style Sheet](#).
- HSR regulations:
  - [coverage \(16 C.F.R. §§ 801.1 to 801.90\)](#);
  - [exemptions \(16 C.F.R. §§ 802.1 to 802.80\)](#); and
  - [transmittal \(16 C.F.R. §§ 803.1 to 803.90\)](#).
- [HSR Formal Interpretations](#).
- [HSR Informal Interpretations](#).
- [Early Termination Notices](#).
- [Current HSR Thresholds](#).
- [HSR Filing Fees](#).
- [Annual HSR Reports](#).
- [Additional HSR Resources](#).

For a collection of Practical Law's HSR resources, see [Hart-Scott-Rodino Act Toolkit](#).

## **Criminal Materials**

- [Antitrust Division Leniency Policy and Procedures](#) (DOJ 2022).
- [Frequently Asked Questions About the Antitrust Division's Leniency Program](#) (DOJ 2022).
- [Model Corporate Conditional Leniency Letter](#) (DOJ 2022).
- [Model Individual Conditional Leniency Letter](#) (DOJ 2022).
- [Model Dual Investigations Conditional Leniency Letter](#) (DOJ 2022).

- [Model Dual Investigations Acknowledgement Form](#) (DOJ 2022).
- To make an application or to request a leniency marker, contact the Division at Antitrust.Leniency@usdoj.gov or 202-307-0719. The DOJ's directory is [here](#).

(See [Practice Notes, Criminal Antitrust Enforcement in the US](#) and [Leniency Program for Antitrust Violations](#).)



## - CHECKLIST -

# Antitrust Audit Checklist

by Thomas F. Bush, Freeborn & Peters LLP, with [Practical Law Antitrust Maintained](#) • USA (National/Federal)

A Checklist summarizing the key issues and items to be examined in an antitrust audit conducted as part of a company's antitrust compliance program. It discusses antitrust audits in connection with cartel detection, participation in trade associations, pricing decisions, joint ventures, information exchanges, relationships with customers and suppliers, and intellectual property.

An effective antitrust compliance program should include regular audits to determine whether employees may be engaged in illegal activities and, where necessary, to correct practices that are illegal or that carry unnecessary risk. The audits should be unannounced and include a review of documents and e-mails and interviews of employees. Counsel should conduct the audits in a manner that preserves the attorney-client privilege. If the audit covers multiple jurisdictions, counsel should consider any relevant privacy or data protection laws and regulations.

Increasingly, companies are using technology to assist in monitoring and auditing company activities. Artificial intelligence and continuous learning tools can spot trends in data, documents, and business activities. Effective auditing and monitoring will consider the resources available to the company and the relevant technology platforms, including those outside the company system, such as social media and some text and instant message applications.

This Checklist outlines the key issues and items to examine in an antitrust audit. It should serve only as a starting point for planning an audit. A company should tailor its audit to its own business and its own particular legal risks.

## Cartels

**Cartel** offenses (agreements among competitors to fix prices, allocate markets, restrain output, rig bids, and so on) are the most serious form of antitrust violations. These offenses are subject to criminal penalties, including large fines for the company and both fines and imprisonment for the employees involved in making or carrying out the illegal agreement. The detection of cartel offenses should be the primary focus of an antitrust audit.

For an example of the types of fines and penalties associated with a cartel investigation, see [DOJ Auto Parts Cartel Investigation Chart](#). For additional resources on cartels and criminal antitrust enforcement, see [Cartels Toolkit](#) and [Practice Note, Criminal Antitrust Enforcement in the US](#).

## **Cartel Red Flags**

The following circumstances often suggest the operation of a cartel. Counsel should investigate any of these circumstances immediately and thoroughly:

- Stability in price levels or success in achieving list prices in the face of changes in market conditions.
- Unusually tight patterns of price leadership in the industry, where a market leader sets the price of a product or service and other companies quickly match that price.
- Unusual stability in market shares over time.
- Unusual stability in customers or geographic footprint over time, such as always seeming to win business from specific customers or in specific regions but not others.
- A general reluctance in the industry to bid aggressively for the business of existing customers of competitors.
- Unexplained possession of competitors' price announcements or other sensitive documents and information of competitors.
- Significant transactions with competitors, particularly at the end of accounting periods.
- Meetings outside the US at which competitors are present.
- An increase in customer complaints about price increases.
- Public statements by competitors about price discipline (efforts to keep prices at or near a target price) in the industry.

## **Trade Association Meetings**

Because trade association meetings provide an opportunity to meet with representatives of competitors, they often serve as forums for cartel agreements. For any meeting that includes company employees and employees of competitors, an audit should look for the following:

- The absence of an agenda circulated in advance of the meeting, or an agenda with overly vague topics.
- The absence of minutes or another record of the meeting.
- The attendance of employees who are not reasonably needed for the stated purpose of the meeting.
- The absence of counsel.

- Contact with a competitor at the meetings, including an informal contact, without a record created at the same time as the contact.
- A discussion at the meeting of pricing, capacity, output, or other sensitive topics.
- Industry-wide price moves occurring soon before or after the meeting.

For more on antitrust risks associated with trade associations, see [Trade Associations](#).

## Pricing Decisions

To confirm that the company sets its prices independently, auditors should understand how each business unit goes about setting and changing prices. In particular, an audit should determine the following:

- The factors considered in determining when to change prices.
- The factors considered in determining the amount of price changes.
- The process for announcing price changes, including the method and timing of announcements.
- How competitors' actions, including anticipated actions, influence the timing and amount of price changes.
- Whether the industry displays any patterns of price leadership.
- How information is obtained about competitors' prices and price moves.
- How the process of changing prices and implementing the changes is documented.
- Where the company has actual or potential contacts with competitors (for example, in joint ventures or transactions in related goods and services) and the possible influence of these contacts on pricing decisions.

For more on antitrust issues relating to pricing decisions, see [Practice Note, Pricing Strategies and Antitrust](#).

## Other Collaborations with Competitors

The application of antitrust laws to relationships with competitors outside of the cartel context is complex. The goal of an antitrust audit concerning these issues is to identify practices that may raise antitrust risks and to enable counsel to investigate those practices for compliance with the antitrust laws. For more information on collaborations with competitors, see [Practice Note, Competitor Collaborations in the US](#).

The following are practices typically investigated in an antitrust audit. While none of these practices are necessarily illegal, counsel should examine the purpose and impact of such practices for antitrust compliance.

## Trade Associations

In addition to their potential for facilitating a cartel (see [Trade Association Meetings](#)), trade associations have been linked with a range of other antitrust law violations. For each association in which the company participates, counsel should examine the following issues:

- **Membership restrictions.** Are any applicants denied membership? What impact does the denial have on the applicant's ability to compete?
- **Certifications.** Are special certifications granted to any members, or to any products and services of its members? What impact does granting or denying certification have on competition?
- **Codes of conduct.** Does the association require or encourage members to engage in or to refrain from activities that involve aspects of their competitive behavior? These aspects can include:
  - prices;
  - production levels;
  - capacity levels;
  - bidding practices; or
  - customer selection.
- **Boycotts.** Does the association require or recommend that members refrain from doing business with certain customers or refrain from certain types of transactions (see [Boycotts](#))?
- **Standardization.** Has the association attempted to adopt or modify industry standards for product specifications or contract forms?
- **Lobbying.** Are the association's lobbying activities restricted to good faith efforts to influence a legislative body, a government agency, or a court?

(See [Participating in a Trade Association Checklist](#) and [Standard Document, Antitrust Warnings for Trade Association Meetings](#)). For more on trade associations generally, see [Practice Note, Competitor Collaborations in the US: Trade Associations](#).

## Joint Ventures

The audit should identify and examine all situations where the company collaborates with an existing or potential competitor on some function, such as production, purchasing, sales, research and development, or network operations (see [Practice Note, Competitor Collaborations in the US: Joint Ventures](#)). The examination must address the following issues:

- **Impact.** The audit should analyze the extent to which the collaboration:
  - creates efficiencies or other procompetitive benefits; and
  - impacts competition between the competitors.

- **Ancillary restraints.** Auditors should determine whether the collaborators have agreed not to compete with the joint venture or to restrict competition between the collaborators in any other ways.
- **Operating rules.** To minimize antitrust risks, the company may have set up special operating rules and procedures for the joint venture, with the assistance of the law department. The auditors should determine whether these operating rules exist and whether the company is following them.

## Information Exchanges

The audit should examine any practices of exchanging business information with competitors (see [Practice Note, Information Exchanges Among Competitors \(Non-Merger\)](#)). Look particularly for exchanges of competitively sensitive information, including:

- Prices, costs, and margins.
- Capacity levels.
- Details on specific transactions.
- Future sales and marketing plans.
- Wage or other employee benefit information.

These exchanges can arise in the following situations:

- Surveys conducted by trade publications or consultants.
- Trade associations compiling information from their members and disseminating the information.
- Direct communications with competitors.
- Indirect communications through customers.

## Boycotts

Auditors should investigate whether the company has entered into any agreement or understanding with competitors, whether written or unwritten, involving any of the following:

- Not to do business with particular customers or suppliers.
- To restrict business to particular customers or suppliers.
- To do business with any category of customers or suppliers only on certain terms.

(See [Practice Note, Concerted Refusals to Deal](#).)

## Interlocking Directors and Officers

To avoid violating antitrust rules on interlocking directors and board-appointed officers, auditors should ask the following:

- Do any directors or board-appointed officers of the company or an affiliate also serve as directors or board-appointed officers of other corporations (other than subsidiaries and affiliates of the company)?

- If so, do any of these other companies compete with the company or an affiliate in any market?

If the answers to both questions are affirmative for any person, then counsel must investigate:

- Whether that person presents a risk of violating antitrust rules.
- Whether the fact that the person serves as a director or officer for two competing companies would support negative inferences in the event of a cartel investigation or private litigation.

(See [Practice Note, Interlocking Directorates](#).)

## Relationships with Customers and Suppliers

Courts analyze the antitrust implications of **vertical relationships** (those between customers and suppliers) under the **rule of reason** test. The rule of reason condemns a practice as illegal only if the facts and circumstances show that its overall impact is harmful to competition (see [Practice Note, Antitrust Rule of Reason](#)). Counsel should investigate the following practices in an antitrust audit to ensure their legality under the rule of reason.

### Restrictions on Resellers of the Company's Products

A company's relationships with independent wholesalers and retailers can give rise to antitrust concerns, particularly where the company attempts to restrict the behavior of resellers. Auditors should identify the following types of restrictions and ensure compliance with antitrust laws:

- **Minimum resale prices.** These types of restrictions require careful analysis because some state laws differ from the federal law applicable to **resale price maintenance** and treat them as **per se unlawful** (see [Practice Note, Vertical Price Restraints: Resale Price Maintenance Agreements](#)). Minimum resale pricing restrictions can be made in writing or by oral agreement.
- **Recommended resale prices.** These can raise antitrust issues when the reseller faces an express or implied threat of termination, or other sanction, for charging prices below the recommended levels. For further guidance on recommended resale prices, see [Practice Note, Vertical Price Restraints: Unilateral Pricing Strategies](#).
- **Territorial or customer restrictions.** These agreements involve restrictions on the resale of the company's products through means other than pricing (see [Practice Note, Vertical Non-Price Restraints: Territorial or Customer Restrictions](#)).

None of these types of restrictions on customers is necessarily illegal, but they can be antitrust violations in particular circumstances. For more information, see [Practice Notes, Vertical Price Restraints](#) and [Vertical Non-Price Restraints](#)).

## **Red Flags for Resale Restraints**

In examining the types of resale restrictions identified above, the audit should look particularly for the following situations, which may suggest an underlying antitrust violation:

- A dominant reseller of the company's product demands restrictions on the prices, territories, or customers of other resellers.
- A group of competing resellers collectively demand restrictions on the prices, territories, or customers for resale.
- One or more resellers complain about the pricing or competitive practices of other resellers.
- The company threatens termination or other sanctions against a reseller for failing to comply with recommended resale prices.

## **Other Issues with Customers and Suppliers**

Resale restrictions are not the only vertical restraints that can violate the antitrust laws. For any customer, whether or not a reseller, or any supplier, the audit should identify and investigate instances where the following practices may have occurred:

- **Tying.** Does the company refuse to sell one of its products or services unless the customer also agrees to purchase a different product or service, either from the company or an affiliate? For more information on **tying**, see [Practice Note, Tying Arrangements](#).
- **Reciprocal dealing.** Does the company refuse to sell one of its products or services unless the customer sells back a different product or service, either to the company or an affiliate?
- **Price discrimination.** Does the company charge one customer a lower price for a product that it charged another customer at about the same time for a comparable product? (This is a concern only with goods, not services.) For more information on price discrimination, see [Practice Note, Robinson-Patman Act: Overview](#).
- **Discrimination in advertising or promotional support.** Does the company offer advertising allowances and other forms of support for the resale of its products on terms not proportionally equal for all customers (see [Practice Note, Robinson-Patman Act: Advertising and Promotional Allowances and Services](#))?
- **Fictitious brokerage.** Does the company engage in any sales transactions involving purported brokerage or commission payments that in actuality are a kickback or a secret discriminatory discount (see [Practice Note, Robinson-Patman Act: Overview: Dummy Brokerage and Commercial Bribery](#))? Look in particular for transactions where the:

- seller makes a payment to the buyer or to an agent of the buyer;
  - buyer makes a payment to an employee or agent of the seller, rather than directly to the seller;
  - seller gives a discount purportedly to reflect a savings of commission or brokerage; or
  - seller grants a discount only on the condition that the broker or sales agent agrees to reduce its normal charges.
- **Exclusivity terms.** Does the company prohibit any customers from purchasing goods or services from a competitor of the seller (see [Practice Note, Exclusive Dealing Arrangements](#))?
  - **Boycotts.** Do any groups of customers or suppliers request that the company not deal with their competitors (see [Practice Note, Concerted Refusals to Deal](#))?

## Patents

Patents and patent licenses frequently raise complex antitrust issues. Although a patent confers a right to exclude competition for the patented invention, antitrust issues arise with arrangements that have the purpose or effect of limiting competition beyond the scope of the patent.

For more information on antitrust risks that may arise in connection with patents generally, see Practice Notes:

- [Antitrust Issues in Intellectual Property Licensing: Overview](#).
- [Antitrust Issues in Unilateral Refusals to License Intellectual Property](#).
- [Antitrust Risks in Standard-Setting Organizations](#).
- [Patent and Technological Tying in the US](#).
- [Antitrust Issues in Patent Pools and Cross-Licenses](#).

## Basic Licensing Terms

Look for patent license agreements that include provisions of the following types which, depending on the circumstances, could be antitrust violations:

- **Product ties.** The licensee must purchase a product or service as a condition of receiving the license.
- **Bundled licenses.** The licensee must take a license to a second patent, which it does not need or want, as a condition to a patent license that it desires.
- **Exclusivity terms.** The licensee is prohibited from selling or developing competing products, or using or developing competing technology.

- **Grant-backs.** The licensee must grant the licensor all rights to improvements in the patented technology.

## Cross-licensing Agreements

The audit should examine any agreement in which two or more patent holders grant licenses to each other. Auditors should look in particular for the following:

- **Cartel-like arrangements.** Cross-licenses among competitors can be effectively the same as a cartel. For example, two competitors with rival patents may each grant the other exclusive licenses in separate territories, thereby dividing markets among themselves for both patents.
- **Future patents.** A commitment by the parties to license future patents in the same field as the existing patents can discourage competition for new developments.

## Patent Pools

The legality of any patent pool (two or more companies cross-licensing patents in a particular technology) depends on the specific facts of the pool arrangement. The following red flags call for careful analysis of any pool:

- The inclusion of rival or substitute patents in the pool.
- Grants of exclusive licenses to the pool.
- High collective market shares for the pool's participants.
- Resale price restrictions.
- Exclusive territory or customer terms.

## Product Specification Standards

The audit should examine any product specification standards that may increase the demand for a license of the company's patents.

## Monopolization Issues

### Monopoly Power

A claim of **monopolization** is an issue only for a firm that either possesses **monopoly power** or has a dangerous probability of success if it attempts to achieve monopoly power. Except in clear cases, the issue of monopoly power cannot be determined conclusively in advance of litigation. For more on monopolization generally, see [Practice Note, Section 2 of the Sherman Act: Overview](#).

An audit must identify whether the company may be found to possess sufficient monopoly power to face a claim of monopolization. For this task, two factors should be considered initially:

- **Market share.** Generally, the company does not face the risk of a monopolization charge unless its market share is already at least 50% or may reach 50% in the near future.

- **Market definition.** The market shares that the company uses for its own planning purposes may not be the same as the markets that are defined for an antitrust challenge. The auditors should consider whether a narrower set of products or geographic boundaries may define the range of the competition effectively facing the company. For further guidance on defining a market see [Practice Note, Market Definition Under the Sherman Act](#).

If consideration of these factors indicates a potential finding of monopoly power, then further analysis of the monopoly power issue may be warranted. For more information on monopoly power, see [Practice Note, Section 2 of the Sherman Act: Overview: Possession of Monopoly Power](#).

## **Exclusionary Practices**

If there is a chance the company could be found to possess monopoly power, or the ability to achieve it, then an investigation of conduct and practices becomes necessary. The mere possession of monopoly power is not illegal. To violate antitrust laws, a company must use an exclusionary practice to obtain, attempt to obtain, or maintain monopoly power.

Determining whether a practice is exclusionary depends on the particular facts. In addition, the legal standards for finding a practice exclusionary are often unclear (see [Practice Note, Section 2 of the Sherman Act: Overview: Willful Acquisition or Maintenance of Monopoly Power](#)).

The goal of an audit is to identify any practice where a claim of exclusionary conduct is a reasonable possibility. To that end, the audit should investigate any of the following situations:

- Sales below cost, after including any discounts, on single products or bundles of products.
- Refusals to deal with customers or suppliers who also deal with competitors.
- Exclusive deals with customers or suppliers that foreclose substantial volumes of business from competitors.
- Refusals to deal with competitors on goods or services that they may require for effective competition.
- Tying and reciprocal dealing arrangements (see [Other Issues with Customers and Suppliers](#)).
- Complaints from competitors about allegedly unfair practices.

For additional considerations for companies with monopoly power, see [Antitrust Considerations for Companies with Monopoly Power Checklist](#).

## **Effectiveness of the Compliance Program**

The audit should assess whether employees have sufficient understanding of the application of the antitrust laws to their particular areas of responsibility and whether the

compliance team is monitoring their activities adequately. This assessment should be made particularly for employees with the following responsibilities:

- Sales and marketing.
- Setting and changing prices.
- Authorizing discounts from list prices.
- Competitive bidding.
- Determining production levels.
- Maintaining relationships with wholesalers and retailers.
- Attending trade association meetings.
- Collaborating with competitors.
- Licensing patents.

Where the audit uncovers practices or activities that violate the antitrust laws or unreasonably expose the company to antitrust risk, the practice should be stopped and the following questions should be asked:

- Is the activity or practice adequately described in the compliance manual?
- Should compliance training materials address the activity or practice better?
- Did the employees involved in the activity or practice have an adequate understanding of the antitrust risks?
- Did employees make proper use of reporting channels?
- If the matter was reported, was there appropriate investigation, disciplinary action, and follow up?

For more information on compliance materials and programs, see the following resources:

- [Antitrust Compliance Toolkit](#).
- [Practice Note, Antitrust Compliance Programs](#).
- [Standard Document, Antitrust Compliance Manual](#).
- [Standard Document, Antitrust Compliance Training for Dealings with Competitors: Presentation Materials](#).



## - CHECKLIST -

# Antitrust Due Diligence Checklist

by Practical Law Antitrust  
Maintained • USA (National/Federal)

A Checklist for counsel to use to evaluate antitrust issues that may affect the target or seller when performing due diligence in a merger or acquisition. This Checklist helps counsel determine if the target or seller has engaged in antitrust violations that may expose the buyer or acquiror to risks, determine where premerger notification filings may be required, safeguard information exchanges during due diligence to avoid gun-jumping, and decide on next steps in light of the risks discovered.

## Consider Scope of Due Diligence

- Consider which of the target's (or seller's) entities to include in the diligence request, including which entities could have antitrust liability or business activities that affect the acquisition. For example, the diligence request could include:
  - all entities in the target's (or seller's) corporate group, including all subsidiaries and assets being acquired and the target's parent and its subsidiaries not being acquired (the Checklist that follows refers to the target as Company X and assumes the diligence request includes all of its business activities and its entire corporate group); or
  - only the entity or division being acquired, rather than the whole corporate group.
- If Company X has assets or does business in more than one jurisdiction, consider the scope of references to antitrust laws in the due diligence request, including whether it should encompass:
  - all antitrust laws (US or non-US) that govern Company X's conduct or the conduct of individuals relating to anticompetitive agreements or practices, such as cartels, resale pricing, terms of trading and joint ventures, dominant or monopoly market positions, and the control of acquisitions or mergers (the following Checklist assumes that Company X has assets or does business in more than one jurisdiction and that antitrust law refers to antitrust laws worldwide); or

- the antitrust laws of a specific country. This may be relevant if the due diligence questions (especially those relating to premerger filings) are being sent to subsidiaries in each individual country. In this case, the diligence request can refer to a specific subsidiary and counsel can send supplemental requests after completing more general preliminary due diligence.

## **Review Antitrust Compliance Procedures**

- Obtain Company X's antitrust compliance manual, guidelines, or written policy and any reports of audits or internal investigations to the extent not privileged.
- Assess Company X's antitrust compliance program, including:
  - which of Company X's employees or groups of employees have received compliance materials;
  - the extent and frequency of any employee compliance training;
  - the extent of regular antitrust audits or review of Company X's compliance with its antitrust compliance policy and the antitrust laws; and
  - to the extent not privileged, whether any antitrust audits or internal investigations had uncovered any potentially material antitrust liabilities.

For more information about antitrust compliance training, see [Practice Note, Antitrust Compliance Programs](#).

## **Obtain Information About Antitrust Investigations**

- Obtain information about any:
  - decisions or judgments of any antitrust authority, governmental authority, agency, or court that found an antitrust law violation relating to any of Company X's business activities;
  - actual or potential investigation by any antitrust authority, governmental authority, agency, or court relating to Company X's business activities or any allegation that Company X infringed or is infringing the antitrust laws of any jurisdiction;
  - formal or informal complaints that Company X has received or expects to receive from any third-party customer, competitor, or supplier alleging that Company X has infringed or is infringing the antitrust laws of any jurisdiction; and

- notifications or applications Company X has made to any antitrust authority in any jurisdiction relating to whether any of its agreements or business practices comply with antitrust laws.
- Obtain copies of any correspondence:
  - between Company X and any antitrust authority, governmental authority, agency, or court relating to any investigation into its business activities (whether ongoing or complete) or any allegation that Company X has infringed or is infringing the antitrust laws of any jurisdiction;
  - between Company X and any third party alleging that Company X has infringed or is infringing the antitrust laws of any jurisdiction; and
  - that Company X has received alleging that any provision of any of its contracts or terms of business are unenforceable because Company X is infringing the antitrust laws of any jurisdiction.
- Obtain copies of any agreements relating to Company X's business activities that Company X believes may contain provisions that infringe the antitrust laws of any jurisdiction.

For more information about antitrust investigations and lawsuits, see [Practice Notes, DOJ and FTC Antitrust Investigations](#) and [US Antitrust Laws: Overview](#).

## **Review Trade Association Participation**

- Obtain the name, subject, frequency of meetings, and attendees of any trade association or other industry meetings where Company X's employees represent Company X.
- Obtain information about any complaints, investigations, or other actual or pending governmental action relating to an infringement of the antitrust laws in any jurisdiction connected with the actions of any trade or industry association or meeting where Company X is or has been a member or participant.
- Obtain details of any actions of any trade or industry association or meeting where Company X is or has been a member or participant that may violate the antitrust laws of any jurisdiction.

For more information about trade associations, see [Practice Note, Competitor Collaborations in the US: Trade Associations](#) and [Participating in a Trade Association Checklist](#).

## **Obtain Information to Assess Need for Premerger Filings**

- Obtain information to assess where premerger filings must be made, including:
  - Company X's sales by country, based on the location of the customer; and
  - Company X's assets by country.

## **Review Commercial Contracts for Antitrust Risk**

- When reviewing Company X's agreements for antitrust issues, consider whether the buyer or acquiror and Company X are competitors, including whether they manufacture or sell goods or services of the same or a similar nature.
- Consider whether the agreement is vertical (involving distribution, wholesale, or retail), supply (involving end products or raw materials), or horizontal (a joint venture, co-supply, or co-manufacturing agreement).
- Consider the provisions of the agreement, including:
  - its duration;
  - whether it contains a non-competition provision and, if so, whether and for how long the duration extends beyond the term of the agreement;
  - whether any of its obligations are exclusive and whether the parties are restricted from obtaining the goods or services that are the subject of the agreement from, or restricted from entering into any similar agreement with, any third party;
  - if no obligations are exclusive, whether a party must purchase a quantity of products defined as a percentage of its total requirements;
  - whether there are any minimum purchasing obligations; and
  - whether it provides for price levels, discounts, or other rebates to be set by reference to the volumes of purchases or sales.
- Determine whether any agreement contains restrictions on:
  - the prices any party may charge to third parties for the products or services or the way a party sets its prices;
  - the levels or types of discounts or other terms that any party may offer or make available to a third party;

- the customers or types of customers to whom the products or services can be sold or with whom any party may deal;
  - the geographic areas where a party may obtain or sell products or services, or any limitations on any imports or exports outside any territory;
  - the way in which any party may use any products or services, whether acquired under the agreement or not;
  - the quantities of products or levels of service that a party may manufacture or sell; or
  - sub-contracting.
- Determine whether the agreement requires the parties to exchange information relating to customers, prices, terms of business, or other competitively sensitive or confidential business information.
  - Determine whether any technology or intellectual property (know-how) is involved and, if so:
    - who owns the technology or intellectual property;
    - whether it is being licensed for exclusive use; and
    - whether any licensed know-how is subject to restrictions, including geographic restrictions.

For more information about how to identify antitrust law issues in commercial contracts, see [Practice Notes, Vertical Price Restraints](#) and [Contracts That Reference Rivals](#), and [Antitrust Considerations for Distribution and Dealer Agreements Checklist](#).

For corporate due diligence requests requiring disclosure of material contracts to be reviewed for antitrust issues, see [Private Mergers and Acquisitions Due Diligence Checklist](#) and [Public Mergers and Acquisitions Due Diligence Checklist](#).

## **Set Up Safeguards for Exchanging Competitively Sensitive Information**

- Ensure that any information provided in response to due diligence does not run afoul of the antitrust laws by requiring that counsel approve any exchange of competitively sensitive information, particularly current or forward-looking information on:
  - customers;
  - prices;
  - costs;
  - product innovation;
  - marketing plans; and
  - strategic plans.

- Counsel for the producing party should implement safeguards to ensure that, where possible, competitively sensitive information necessary to conduct due diligence is limited to information that is:
  - historical;
  - redacted; or
  - aggregated.
- Counsel for the obtaining party should ensure that competitively sensitive information obtained from the other merging party and necessary to conduct due diligence is shared only:
  - on a need-to-know basis;
  - with individuals not involved in making day-to-day decisions regarding price, such as sales or marketing personnel; and
  - using a non-disclosure agreement.

For more information on counseling clients on information exchanges in a merger to avoid violating antitrust laws, see [Avoiding Gun-Jumping in Corporate Transactions Checklist](#) and [Practice Note, Information Exchange and Integration Planning in M&A: Antitrust](#).

## Evaluate Antitrust Risks and Filing Requirements After Completing Due Diligence

- Evaluate the level of antitrust liability the buyer may be exposed to in the acquisition. Based on this information, the buyer may want counsel to:
  - adjust the purchase price;
  - negotiate contractual provisions to allocate the risk of future liability, such as indemnification provisions; or
  - in rare cases, abandon the acquisition if it is unwilling to accept the level of risk.
- Determine whether antitrust premerger filings are required that may affect the closing timetable in:
  - the US (see [Practice Note, Determining Hart-Scott-Rodino Applicability](#)); and
  - outside of the US (for up-to-date information on worldwide premerger filing requirements, see [Quick Compare Chart, Merger Control](#)).
- Perform a preliminary antitrust risk-assessment of the transaction to determine the likelihood that the government may investigate the transaction (see [Practice Note, Corporate Transactions and Merger Control Overview: Preliminary Substantive Assessment](#)).

- Consider whether the merger or purchase agreement, and related disclosure schedules, should include provisions allocating antitrust risk, known as antitrust risk-shifting provisions (see [Practice Note, Antitrust Risk-Shifting Provisions: Overview](#)), such as those requiring the parties to:
  - cooperate to submit premerger antitrust filings by a certain date; and
  - obtain required antitrust approvals before closing.

(See [Antitrust Review of an M&A Agreement Checklist](#) and [Reviewing Antitrust-Related Disclosure Schedules Checklist](#).)



## - CHECKLIST -

# Antitrust Review of an M&A Agreement Checklist

by Practical Law Antitrust  
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A Checklist to assist counsel reviewing an M&A agreement for antitrust purposes. This Checklist discusses issues antitrust counsel should look for when drafting purchase or merger agreements alongside corporate attorneys, including when reviewing representations and warranties, drafting a general efforts provision, reviewing interim covenants, closing conditions and termination rights, and allocating fees.

## Preliminary Assumptions

This Checklist assumes that counsel has:

- Performed a preliminary risk-assessment of the transaction and determined the likelihood that the government will investigate the transaction (see [Practice Note, Corporate Transactions and Merger Control Overview: Preliminary Substantive Assessment](#)) and considered the client's willingness:
  - to divest assets or businesses to obtain antitrust clearance (see [Practice Notes, Merger Remedies](#)); or
  - to litigate an antitrust challenge and, if so, until when (for example, until a decision on the merits, or only until a certain date, such as the drop-dead date).
- Determined where antitrust premerger filings are required that may affect the closing timetable (for up-to-date information on worldwide premerger filing requirements, see [Quick Compare Chart, Merger Control](#) and [Practice Note, Merger Review Timeline \(US\)](#)).

## Review Representations and Warranties

- Review the draft representations and warranties section of the M&A agreement relating to governmental approvals and consents to be sure it states that the parties will obtain:

- clearance under the **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (HSR Act), if counsel has determined it is or may be required (see [Practice Note, Determining Hart-Scott-Rodino Applicability](#)); or
- any other antitrust approvals required for closing, including those identified in a disclosure schedule (see [Reviewing Antitrust-Related Disclosure Schedules Checklist](#)).
- Determine whether to include additional provisions, if applicable, such as:
  - a seller or target representation that it does not own a non-controlling voting interest in any entity, called a secondary acquisition, that requires the buyer to submit an additional HSR Act filing ([16 C.F.R. § 801.4](#) and see [Standard Clause, Purchase Agreement: No Secondary Acquisitions Representation](#)); or
  - a buyer representation that it, its controlled entities, and its associates do not have an interest of 5% or more in any of the target's competitors, since disclosure of those interests on the HSR form may impact the agencies' review of the competitive effects of the transaction (see [Standard Clause, Purchase Agreement: Interest in Competitors Provision](#)).

## Review Interim Covenants

- Ensure the interim covenants do not permit or prohibit activities that would amount to a transfer of beneficial ownership in violation of the antitrust laws (see [Practice Note, Gun-Jumping Antitrust Enforcement: Beneficial Ownership](#)).
- Ensure interim covenants do not allow or require the buyer to do any of the following before closing:
  - take possession of the target's assets, including inventory or equity;
  - operate the target's business; or
  - approve the target's ordinary course of business contracts, routine business activities, or business decisions, including customer proposals, prices, discounts, quotations or terms of contracts, licensing strategies, or hiring or personnel decisions.
- Ensure the interim covenants include a provision that the target must continue to operate its business in the ordinary course consistent with past practice until closing.

(See [Practice Note, Gun-Jumping Antitrust Enforcement: Reviewing Interim Covenants](#) and [Standard Clause, Purchase Agreement: No Control of Target's Business Interim Covenant](#).)

## Review General Efforts Provision

- Ensure the governmental approvals covenant outlines the following, based on the client's risk tolerance and willingness to respond to a governmental enforcement action:
  - the parties' effort obligation to obtain any required governmental consents, whether reasonable best efforts, best efforts, commercially reasonable efforts, or some other standard (see [Practice Note, Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts, and Commercially Reasonable Efforts](#));
  - the parties' obligation to cooperate to determine antitrust strategy and obtain antitrust approval (see [Standard Clause, Purchase Agreement: Antitrust Cooperation Provision](#)), including whether one party controls antitrust strategy (see [Standard Clause, Purchase Agreement: Antitrust Strategy Control Provision](#));
  - whether the parties want to request early termination of the HSR waiting period, if available (the antitrust agencies have temporarily suspended grants of early termination under the HSR Act on more than one occasion, including as of February 4, 2021 (see [Legal Update, DOJ, FTC Temporarily Suspend HSR Early Termination](#))) (see [Standard Clause, Purchase Agreement: HSR Early Termination Provision](#));
  - the deadline for submission of any required HSR filing or filings under any other antitrust laws;
  - whether the parties agree to comply with a Request for Additional Information and Documentary Material (a **Second Request**) under the HSR Act or any other antitrust laws (see [Practice Note, Second Requests in Merger Investigations](#) and [Standard Clause, Purchase Agreement: Second Request Compliance Covenant](#));
  - whether the parties agree to pull-and-refile their HSR form to avoid a Second Request (see [Standard Clause, Purchase Agreement: Pull-and-Refile Provision](#));
  - how competitively sensitive information shared during due diligence and integration planning will be treated (see [Standard Clause, Purchase Agreement: Competitively Sensitive Information Provision](#));

- the parties' obligation to contest and resist any action or proceeding that would prohibit or prevent the transaction;
  - the buyer's obligation to divest its or the target's assets or businesses to resolve an antitrust challenge (see [Standard Clause, Purchase Agreement: Limits on Potential Divestitures](#)); and
  - whether the seller wants the buyer to represent that it and its associates will not enter into any post-signing agreements or make any acquisitions that would impact antitrust review (see [Standard Clause, Purchase Agreement: Post-Signing Limitations Provision](#)).
- In a transaction where antitrust approvals are required in multiple jurisdictions, consider a fencing provision allowing the parties to close the transaction outside of a jurisdiction with a non-material outstanding antitrust approval, such as where:
    - at least one approval may take significantly longer than others to obtain and is not material; and
    - the parties want to close at least portions of the transaction quickly (see [Standard Clause, Purchase Agreement: Antitrust Approval Fencing \(Carve-Out\) Provision](#)).

(See [Practice Note, Antitrust Risk-Shifting Provisions: Overview](#).)

## Consider Divestiture and Litigation Obligations

- Consider the client's risk tolerance for the divestiture and litigation obligation provisions they want to include in the governmental efforts covenant, including:
  - a **hell or high water** (HOHW) provision, requiring the buyer to do everything possible to get antitrust approval, including making any required divestitures and defending against any governmental order that would prevent the closing through litigation (see [Standard Clause, Purchase Agreement: Hell or High Water Clause](#)); or
  - for a buyer accepting some but not all of the antitrust risk, provisions limiting the buyer's obligation to divest assets or businesses or to litigate.
- Where there is antitrust risk, and the client is willing to make divestitures, consider:
  - which divestitures are more likely to resolve any antitrust issues; and

- which key assets the buyer is unwilling to divest (commonly referred to as crown jewels).
- Consider the following divestiture limitations based on the client's antitrust risk tolerance and willingness to make divestitures:
  - specifying assets to be divested, such as a certain plant or facility;
  - capping divestitures, either by dollar value or some other measure of value, such as revenues generated in the previous year;
  - divesting only non-material assets;
  - divesting only those assets that would have a materially adverse effect, or would not cause a **Material Adverse Effect** (MAE); or
  - divesting only those assets that would not cause a burdensome effect (see [Standard Clause, Purchase Agreement: Limits on Potential Divestitures](#)).

For recent examples of the use of divestiture limitations provisions in purchase agreements, see [Practice Note, What's Market, Antitrust Divestiture Limitations](#). For recent examples of the use of litigation obligation provisions in purchase agreements, see [Practice Note, What's Market: Antitrust Litigation Obligations](#).

## Review Non-Competition Provisions

- Review any non-competition provisions or associated agreements to ensure they are narrowly tailored to further a legitimate business justification, such as preventing misuse of trade secrets, and are:
  - not against public policy;
  - not more restrictive than is required to protect the client; and
  - reasonable in geographic scope, duration, and scope of restricted activities.

(See [Standard Clause, Purchase Agreement: Non-compete and Non-solicit Provision: Drafting Note: Non-Competition](#).)

## Allocate Payment of Antitrust Filing Fees

- Determine which party will pay the HSR or other antitrust law filing fees for the transaction (see [What's Market: HSR Act Filing Fee Allocation](#)).
- Determine which party will pay any additional filing fees that may be required under the HSR Act as the result of multiple filings, such as where:
  - one party has more than one ultimate parent entity; or

- a seller or target company's shareholder is acquiring equity or assets as consideration, known as a back-end acquisition (see [Standard Clause, Purchase Agreement: Additional HSR Fee Allocation](#)).

## Consider Carve-Outs to Material Adverse Effect Definition

- Consider any proposed antitrust carve-outs to the MAE or **Material Adverse Change** (MAC) closing condition that would prevent the buyer from terminating the agreement based on a material change or event relating to antitrust approvals.
- Consider defining the MAE not to include any actions required to be taken under the agreement to obtain any required antitrust approval (see [Standard Clause, Purchase Agreement: Antitrust Carve-Out to MAE Closing Condition](#)).

## Review Antitrust-Related Closing Conditions

- Review the parties' closing conditions to ensure they include the following:
  - that the applicable waiting period and any extensions under the HSR Act or other applicable antitrust laws have expired or terminated before closing (see [Standard Clause, Purchase Agreement: Hart-Scott-Rodino Act Closing Condition](#));
  - that all required governmental approvals were obtained and in full force and effect before closing (see, for example, [Standard Clause, Purchase Agreement: Canadian Competition Act Closing Condition \(US Style\)](#)); and
  - that no governmental authority issued or entered any order or law preventing, prohibiting, or making the acquisition illegal (see [Standard Clause, Purchase Agreement: No Legal Restraint Closing Condition \(No Law or Order Under Antitrust Law\)](#)).
- Consider whether the antitrust approval closing conditions are mutual, or whether the buyer will have the right to determine whether to close over a failure to obtain approval in a material jurisdiction, and potentially face monetary or other penalties, particularly in a transaction where the parties did not agree to a fencing provision.
- Consider whether to include a provision that addresses receipt of an FTC or DOJ preclosing warning letter. On August 3, 2021, the FTC announced that it had begun sending standard form letters to some merging parties alerting them that the FTC staff had not been able to complete their investigation within the HSR waiting period and that the parties closed at their own risk while the investigation remained open (an FTC Warning Letter). Since that date, some merging parties have included provisions stating that receipt of an FTC Warning Letter, alone, did not cause failure of antitrust-related, or of any,

closing conditions (see [Article, FTC Warning Letter Antitrust Risk-Shifting Provisions](#)).

## Review Termination Section

- Review the termination section of the agreement to ensure it specifies:
  - a drop-dead date, meaning the date the parties may terminate the agreement if the transaction has not closed, as well as any extensions to that date if antitrust approvals have not been obtained, including because of a US federal government shutdown (see [Standard Clauses, Purchase Agreement: Drop-Dead Date Extension for Antitrust Approval](#) and [Purchase Agreement: Drop-Dead Date Extension for Government Shutdown Preventing HSR Approval](#)); and
  - whether the agreement may be terminated because of a law or final non-appealable order preventing or restraining the transaction.
- Consider whether to include a termination fee payable by the buyer if the antitrust authorities do not approve the transaction, known as a reverse break-up fee, particularly if buyer does not agree to take on any (or enough of the) antitrust risk (see [Standard Clause, Purchase Agreement: Reverse Break-Up Fee for Antitrust Failure](#) and [Practice Note, Reverse Break-Up Fees and Specific Performance: Reverse Break-Up Fee for Regulatory Failure and Fiduciary Out](#)). Typically, reverse break-up fees for antitrust-related failure average about 4% of transaction value, though the average was higher in 2022 (more than 5%) (for an analysis of antitrust-related reverse break-up fees in recent transactions, see [Article, Antitrust-Related Reverse Break-Up Fees in 2022](#)).

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## - CHECKLIST -

# Antitrust Review of Commercial Contracts Checklist

by Practical Law Antitrust  
Maintained • USA (National/Federal)

A Checklist providing guidance on reviewing commercial contracts for antitrust risks and considerations. This Checklist covers risks relating to pricing, including loyalty or bundled discounts, resale price maintenance, and most favored nation provisions. It also addresses risks relating to non-price provisions, including exclusive dealing and distributorships, territorial or customer restrictions, tying, and steering.

## Consider Provisions Affecting the Price Retailers May Charge or Advertise

These types of provisions may raise antitrust risk. Common examples include:

- **Resale price maintenance (RPM).** Terms that limit the price dealers can charge when reselling the product. Counsel should evaluate, among other things:
  - the supplier's reasons for including the RPM provision;
  - the extent to which the industry uses RPM;
  - who initiated the RPM provision;
  - whether either party to the agreement has market power;
  - whether the supplier also distributes its products;
  - relevant state and foreign RPM laws; and
  - alternatives to RPM.

(See [Practice Note, Vertical Price Restraints: Resale Price Maintenance Agreements, Entering into a Minimum Resale Price Maintenance Agreement Checklist](#), and [Resale Price Maintenance Under State Laws Chart](#).)

- **Advertising programs.** Programs in which the supplier restricts the minimum price at which a dealer may advertise the product (MAP programs). Successful challenges to MAP programs are rare and often involve alleged horizontal conspiracies to implement MAP programs, rather than challenges to a MAP program itself. (See [Practice Note, Vertical Price Restraints: Advertising Programs](#).)

## Evaluate Provisions Regarding the Prices Retailers or Distributors Pay

Analyze provisions in the contract that relate to the pricing that retailers or distributors pay the supplier, including in connection with:

- **Price discrimination.** Pricing, terms of sale, or marketing support that treats (or induces the supplier to treat) similarly situated customers differently. There are several defenses to price discrimination to keep in mind, including:
  - meeting competition;
  - functional availability;
  - changing conditions; and
  - cost justification.

(See [Practice Note, Robinson-Patman Act: Overview](#).)

- **Most favored nation clauses (MFNs).** Clauses where a supplier agrees to treat a customer at least as well as its other customers. While in most cases MFNs can be procompetitive or benign, consider factors that may increase antitrust risk, including those that:
  - lead to tacit or explicit collusion on price, for example, in situations where a large number of competitors adopt similar MFNs;
  - increase the likelihood of direct or indirect information exchange among competitors;
  - discourage price competition; or
  - raise rivals' costs, for example, if a dominant manufacturer requires its input suppliers to sell to the manufacturer's rivals at the same or higher price.

(See [Practice Note, Most Favored Nation Clauses and Standard Clause, General Contract Clauses: Most Favored Customer](#).)

- **Rebates and price adjustments.** Includes direct-to-consumer rebates, pass-through arrangements, and wholesale price adjustments. Consider that, where dealers remain free to set their own prices, these provisions generally do not raise significant antitrust risk. (See [Practice Note, Vertical Price Restraints: Rebates and Price Adjustments](#).)
- **Meet-or-release.** Where a customer that is offered a better price for a product gives the supplier an opportunity to meet the better price or release the customer from the contract. Remember that meet-or-release provisions can raise antitrust risk if they facilitate the exchange of competitively sensitive information, such as pricing. They may also raise price discrimination risks,

discussed above. (See [Practice Note, Contracts That Reference Rivals: Meet-Or-Release Provisions.](#))

## Assess Provisions That May Limit Competitors' Access to Markets or Suppliers

Analyze provisions in the contract that may directly or indirectly limit competitors' access to markets or suppliers, including through:

- **Exclusive dealing.** Provisions requiring a customer to purchase all or almost all of a particular product or service from the supplier. Remember that exclusive dealing can harm competition if it forecloses rivals' access to inputs or distribution channels. These provisions typically harm competition only when the supplier has market power. Among other relevant factors, counsel should assess:
  - the percentage of the market foreclosed by the agreement;
  - the durability and terminability of the agreement;
  - where in the distribution chain the restraint is imposed;
  - whether there are other alternatives available to rivals; and
  - the prevalence of exclusive dealing in the industry.

(See [Practice Note, Exclusive Dealing Arrangements and Exclusive Dealing Antitrust Risk Factors Checklist.](#))

- **Loyalty discounts.** Where a supplier offers discounts based on the volume, percentage, or bundle of products a supplier sells a customer. Consider factors that may increase antitrust risk, including if:
  - a company has a substantial or dominant share of the relevant market;
  - the discount is conditioned on exclusivity or involves discounts or rebates for purchasing a range of products that single-product competitors cannot offer;
  - a company's loyalty program creates incentives that, as a practical matter, require customers to deal exclusively with the company and not its competitors;
  - the program ties up a necessary distribution channel in a particular market; or
  - the price of a product bundle, in whole or in part, could be alleged to be below-cost.

(See [Practice Note, Customer Loyalty Programs in the US.](#))

- **Tying.** Linking the sale of one product to the sale of another product. Because tying may be considered **per se** unlawful, counsel should closely analyze:

- whether from the customer standpoint, the company is offering one product or tying two together;
- the proportion of the two products' sales that are separate purchases;
- the market share of the tying product;
- customers' ability to buy the products separately; and
- if selling in an aftermarket, switching costs and transparency of pricing.

(See [Practice Note, Tying Arrangements](#).)

- **Retail preference.** Provisions where a supplier rewards a retailer for giving the supplier's brand or product preferential treatment. While they are generally procompetitive, counsel should consider that they may raise antitrust risk if they foreclose rivals from effective marketing opportunities. (See [Practice Note, Contracts That Reference Rivals: Retail Preference Programs](#).)
- **Non-discrimination (or anti-steering).** Provisions that prevent a customer from disfavoring one supplier's products over those of a rival supplier. These standard contracting provisions often do not raise significant competitive concerns. Counsel should consider that they may raise antitrust risk, however, when imposed by a dominant supplier or in certain two-sided markets.  
(See [Practice Note, Vertical Non-Price Restraints: Anti-Steering Provisions](#).)

## Check Provisions That Limit Where or to Whom the Parties May Sell

Analyze provisions that restrict the freedom of the parties and limit their ability to sell to specific geographies or customers, including:

- **Exclusive distributorships.** Provisions in which a supplier appoints a distributor or dealer to be its exclusive outlet in a particular region. Most are considered procompetitive, but counsel should assess the likely impact on competition, including based on:
  - the length and scope of the agreement;
  - the business justifications for it;
  - the parties' market shares; and
  - the prevalence of exclusive distributorships in the industry.

(See [Practice Note, Vertical Non-Price Restraints: Exclusive Distributorships and Antitrust Considerations for Distribution and Dealer Agreements Checklist](#).)

- **Territorial or customer restrictions.** Provisions where a supplier limits a retailer's or distributor's sales to a specific geographic territory or category of customer. They can have many procompetitive benefits, however, counsel should consider that they may harm competition, including where:
  - the supplier has market power; or
  - intrabrand competition (that is competition between retailers selling the same brand) is particularly important.

(See [Practice Note, Vertical Non-Price Restraints: Territorial or Customer Restrictions.](#))

## Evaluate Potential Exchanges of Information

Consider whether any terms in the contract contemplate the exchange of competitively sensitive information, such as current or future cost information. Information exchanges between competitors can occur in a variety of contexts, including as part of otherwise procompetitive business arrangements. Remember that they may however, harm competition if they, for example:

- Lead to a full-blown conspiracy;
- Facilitate coordination between the competitors; or
- Reduce uncertainty about a competitor's activities.

(See [Practice Note, Information Exchanges Among Competitors \(Non-Merger\).](#))

## Consider Provisions Involving Intellectual Property

Particular antitrust concerns may be raised by contracts involving intellectual property licensing, including relating to:

- **Standard Essential Patents.** (See [Practice Note, Antitrust Risks in Standard-Setting Organizations](#) and [Article, Expert Q&A on Standard-Essential Patents.](#))
- **Patent pools.** (See [Practice Note, Antitrust Issues in Patent Pools and Cross-Licenses.](#))
- **Tying.** (See [Practice Note, Patent and Technological Tying in the US.](#))

(See [Practice Note, Antitrust Issues in Intellectual Property Licensing: Overview.](#))

## Evaluate Whether the Company Has Monopoly Power

- Remember that dominant companies, or companies with large market shares, face heightened antitrust risk, for example, if their contracts lock up buyers or suppliers in a market, making it difficult for other competitors to succeed (see [Antitrust Considerations for Companies with Monopoly Power Checklist](#)).
- Consider that companies with high market shares should be especially cautious about the terms of their contracts due to the risk of **monopolization** claims. Conduct that may be lawful for a smaller firm, may be unlawful for a firm

with **monopoly power** (see Practice Note, Section 2 of the Sherman Act: Overview).

## Understand and Advise on Potential Antitrust Risks

### Ensure Any Competitive Restraints Have Business Justifications

For provisions that potentially raise antitrust risks:

- Understand and document the business justifications.
- Evaluate the procompetitive benefits.
- Discuss any potential anticompetitive effects.
- Evaluate any less restrictive alternatives.
- Identify potential complainants and consider mitigation options.

### Advise on Document Creation

Counsel business people to:

- Avoid discussing, including in emails and documents, any potential anticompetitive effects of the contract.
- Remove other unhelpful comments or language, such as there being:
  - a lack of meaningful competition in the market;
  - few significant competitors; or
  - high barriers to entry.
- Refrain from using antitrust buzzwords, such as market or dominance.
- Emphasize the procompetitive benefits and legitimate business justifications of the contract and relevant provisions in documents, emails, and other communications regarding the contract.

For more on document creation in the merger context, see [Standard Documents](#), [Antitrust Tips for Document Creation in Mergers: Presentation Materials](#) and [Memorandum: Document Creation in Preparation for a Transaction](#).

## **- CHECKLIST -**

# **Joint Venture Antitrust Compliance Checklist**

by Practical Law Antitrust

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A Checklist summarizing how to comply with antitrust law when forming a joint venture. This Checklist discusses how to draft joint venture formation documents and topics participants should not discuss outside the scope of the joint venture, such as present or future prices and costs. This Checklist also discusses how to implement the joint venture to prevent harm to competition.

Joint ventures between competitors often promote competition and benefit consumers by allowing companies to achieve together what neither could achieve alone. Firms can participate in joint ventures to:

- Expand into new markets.
- Spark innovation.
- Lower production costs.

However, joint venture agreements between competitors can run afoul of antitrust laws. For this reason, counsel should carefully evaluate any joint venture before its implementation. Parties should structure joint ventures in a way that limits the collaboration's ability to spill over into other areas outside the joint venture where the participants continue to compete. The following is an outline of issues for counsel to consider to avoid raising unnecessary antitrust concerns during and after formation of a joint venture. Counsel should also consider whether the joint venture formation must be reported under the HSR Act (see [Practice Note, Determining HSR Reportability of an Entity Formation](#)).

For more information on joint ventures generally, see [Practice Note, Competitor Collaborations in the US: Joint Ventures](#) and [Antitrust Joint Venture Toolkit](#). For a standard document counsel can use to advise a company on permissible and impermissible conduct under the antitrust laws in a joint venture meeting, see [Standard Document, Joint Venture Antitrust Compliance Guidelines](#).

## **Joint Venture Formation**

Formation documents should describe the joint venture's primary activities and core functions without including information that may raise antitrust concerns. Parties should not discuss or agree on terms that could impede competition in areas outside the scope of the joint venture, including:

- The individual companies' present or future:
  - prices, including costs and rebates;
  - bids;
  - costs;
  - capacity, including plans to add or reduce capacity;
  - production volume;
  - sales volume;
  - profits;
  - royalties;
  - terms of sale;
  - licensing terms;
  - new product introductions, including launch dates;
  - wage, salary, or employee benefit information;
  - strategic plans; or
  - customer lists.
- Coordinating prices or output outside the venture.
- Dividing customers or markets.
- Whether to deal with particular customers or suppliers outside the venture.

## **Prevent Harm to Competition**

- Consider ways to minimize the exchange of competitively sensitive information between the joint venture and the participants' competing businesses, particularly information about costs or current or future prices (see [Practice Note, Information Exchanges Among Competitors \(Non-Merger\)](#)).
- Counsel should suggest the parties use separate personnel to manage the pricing and marketing decisions for the joint venture.
- Where parties use separate personnel, relevant information should not be reported to the employees directly involved in making similar decisions for the participant's competing business.
- Review the joint venture documents carefully to ensure that the joint venture's conduct does not substantially harm competition in the market as a whole.
- Review any exclusivity requirements to ensure the participants continue to compete against each other and the joint venture, either through:
  - separate independent operations; or
  - membership in other joint ventures.

## **Joint Venture Implementation**

After formation of the joint venture, if the venture parties meet for the venture or any other reason, those meetings should have a pre-set agenda reviewed by counsel.



## - CHECKLIST -

# Identifying Competitors for Antitrust Checklist

by Practical Law Antitrust

Maintained • USA (National/Federal)

A Checklist that counsel may use to identify a company's competitors, an essential component of any antitrust analysis. It covers a company's actual, nascent, and potential competitors, a company's competitors in the market to acquire control of other companies, and its competitors in the hiring and retention of employees. It also addresses a company's competitors for purposes of Section 8 of the Clayton Act, which prohibits interlocking directorates, and under the Hart-Scott-Rodino (HSR) Act.

## Determine Which Companies' Products or Services Compete with the Client's Products or Services

- Look into which companies have products and services that are reasonably interchangeable with the client's products or services at both:
  - the product or service level; and
  - the geographic level.
- Evaluate:
  - the products' or services' uses, meaning whether they serve the same function; and
  - customers' likely responses to an increase in one of the company's prices and the potential effect on demand of the other product.
- Consider the areas or locations where sales are made by competitors, regardless of where the customer is located.
- Understand commercial realities from your client, including, for example, identifying which companies the client:
  - wins business from or loses business to, as discussed in win/loss reports or other sales and marketing documents;
  - competes against in any bidding;
  - positions itself against in marketing materials;
  - tracks internally in competitive intelligence reports; and
  - discusses as competitors in public filings and earnings calls.

For more on how to define a relevant market for antitrust purposes, see [Practice Note, Market Definition Under the Sherman Act](#). For a checklist to use to conduct a preliminary

overlap assessment in a merger to identify areas of potential antitrust concern, see [Preliminary Analysis of Merging Parties' Overlap Checklist](#).

## **Assess Whether Any Company (or the Client) Could Be Considered a Potential Competitor**

- Look at whether any companies (or the client) could compete in the future, including if they (or the client) are:
  - actively in the process of entering the market, for example with a product in development; or
  - not actively in the process of entering the relevant market, but could enter in response to changes in market dynamics, for example able to convert supply of another product to the product at issue.

For more on potential competition theories of harm in the merger context, see [Practice Note, Potential Competition in Merger Analysis](#).

## **Determine Whether Any Company (or the Client) Could Be Considered a Nascent Competitor**

- Examine whether any company (or the client), if only a small rival, could potentially become a significant competitor in the industry.

## **Consider Whether the Company Competes for the Same Pool of Employees**

- Consider, in the context of hiring, whether any companies:
  - offer the same products or services and therefore hire employees with similar skill sets; or
  - offer different products or services but nonetheless draw from the same pool of potential employees, for example if both employ the same types of computer scientists or engineers to make their respective products.

For more on labor-related antitrust issues, see [Practice Note, Human Resources and Antitrust](#).

## **Determine Whether Any Companies Compete in the Market for Corporate Control**

- Look at whether any companies compete to acquire control of other companies, for example, whether any companies have:

- sought to buy the same or similar targets;
- jointly bid, or considered jointly bidding, for the same or similar targets; or
- been a part-bidding consortia, or club deals, for a target.

For more on the antitrust risks financial investors may face, including in competitions for corporate control, see [Practice Note, Antitrust Issues for Financial Investors: Antitrust Risks in Joint Bidding](#).

## **Consider Whether the Company Would Be Considered a Competitor Sufficient to Trigger an Interlock Under Section 8 of the Clayton Act**

- Evaluate potential board or officer appointments.
- Calculate the companies' competitive sales to determine whether they exceed the de minimis exceptions of Section 8.
- Consider whether any other Section 8 exclusions might apply, such as if the interlock is between two banks.

For more on Section 8, including the exceptions and exclusions, see [Practice Note, Interlocking Directorates: Exceptions, Exclusions, and Limitations](#).

## **Determine Whether the Company Would Be Considered a Competitor for HSR Filing Purposes**

- Evaluate a potential merger or acquisition.
- Determine the **North American Industry Classification System** (NAICS) and **North American Product Classification System** (NAPCS) codes under which the company and the client will report revenues for Item 5 of the HSR filing overlap. For more on how to identify NAICS and NAPCS codes for Item 5 of the HSR Form, see [Practice Note, HSR Form: Item 5](#).
- If the company and the client overlap in any NAICS and NAPCS codes, consider if the overlapping code accurately reflects competition between the parties.
- Review potential Item 4(c) and 4(d) documents to determine if they identify the company as a competitor before submitting those documents with an HSR form. For more on Items 4(c) and 4(d), see [Practice Note, HSR Form: Item 4\(c\) and 4\(d\) Documents](#).

