The Federal Trade Commission and the U.S. DOJ Antitrust Division during the Biden Administration Have Significantly Ramped Up Antitrust Enforcement:

Non-Antitrust Lawyers Beware!

By Robert M. Langer and Michael A. Kurs

Introduction

The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice under the Biden Administration have collectively sought to move the proverbial antitrust needle into territory not heretofore a primary focus of antitrust enforcers.

While it is by no means certain that each of these initiatives will be embraced by the courts, non-antitrust lawyers should be cognizant of what the agencies are seeking to accomplish. Antitrust and non-antitrust lawyers alike should consider whether their clients' circumstances might warrant approaching one or another agency to invite their assistance on matters vexing a client, or whether their clients' conduct puts their clients at risk of unwanted antitrust scrutiny by the antitrust enforcement agencies or private antitrust litigants.

Federal Trade Commission

The genesis of the FTC's efforts to both recenter its enforcement priorities and fundamentally alter the current scope of its authority with respect to the "unfair methods of competition" component of Section 5(a)(1) of the Federal Trade Commission Act[1] is epitomized by a decision by a majority of the current FTC Commissioners in 2021 to rescind the 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" [hereinafter "2015 Statement"].[2] The 2015 Statement was deemed a constraint upon the FTC's authority to investigate and halt anticompetitive business behavior under Section 5. The 2015 Statement was thus withdrawn on July 1, 2021.[3] At the time of the withdrawal of the 2015 Statement, FTC Chair, Lina Khan, commented that the withdrawal of the 2015 Statement would be the first of additional intended actions by the FTC to clarify Section 5, including steps to assist the FTC to better exercise its authority to deliver clear guidance principles consistent with both Congressional directives and case law.[4]

The FTC's 2022 "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"

In November 2022, the FTC issued its revised "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" [hereinafter "2022 Policy Statement"].[5] The 2022 Policy Statement is far more robust than the 2015 Statement in that it seeks to expand the Commission's current unfair method of competition mission to potentially prohibit conduct that is almost certainly permissible under existing antitrust laws. The 2022 Policy Statement provides two criteria, which are weighed on a sliding scale, for evaluating whether a party's conduct constitutes an unfair method of competition. This framework evaluates whether a practice: (1) exhibits indicia of unfairness; and (2) constitutes conduct that "tends to negatively affect competitive conditions."

More specifically, the 2022 Policy Statement describes unfairness as follows:

- "The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.
- There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be

Image credit: May Lim/Getty Image

otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

- These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.
- The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue. Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other

market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent. *Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions. Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act,but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."*[6] [Emphasis added].

The FTC's Proposed Non-Compete Rule

The first tangible manifestation of the FTC's 2022 Policy Statement is the FTC's proposed non-compete trade regulation rule [hereinafter "Proposed Rule"].[7] If ultimately adopted, the Proposed Rule would have the force and effect of law. The import of the Proposed Rule is that it would fundamentally upend the enforcement of employee non-compete agreements throughout the country both prospectively and retrospectively, and, as importantly, preempt inconsistent state laws.

There are several key provisions of the FTC's Proposed Rule, including:

- Sec. 910.1(b)(1): *Non-compete clause* means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.
- Sec. 910.2(a): *Unfair methods of competition.* It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.
- Sec. 910.2(b)(1): *Rescission requirement.* To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.
- Sec. 910.4: *Relation to State laws.* This part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this part 910.[8]

Opposition to the 2022 Policy Statement and the Proposed Rule

As expected, the 2022 Policy Statement and the Proposed Rule have not been without controversy. Commissioner Christine Wilson, who has since resigned as an FTC Commissioner, authored two protracted dissents, the first to the 2022 Statement,[9] and the second,[10] to the Proposed Rule. Commissioner Wilson criticized the 2022 Policy Statement, labeling it a "dramatic expansion of the agency's purported authority,"[11] and noted in her dissent from the Proposed Rule that the Commission, in her view, lacked authority to issue trade regulation rules, *i.e.*, substantive regulations, with regard to unfair methods of competition.[12] Commissioner Wilson further condemned the 2022 Policy Statement as lacking clear or meaningful guidance for businesses aiming to comply the law, and instead sought to pinpoint "essentially any business conduct it finds distasteful."[13] Commissioner Wilson was also critical in that the 2022 Policy Statement did away with long-standing principles of antitrust such as the "rule of reason" framework, the consumer welfare standard, and the "vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct."[14]

Commissioner Wilson's dissent is an early signal that both the 2022 Statement and those initiatives by the FTC in furtherance of the 2022 Statement will be the subject of future and continuing competition discourse, and potentially protracted litigation.[15] Chair Khan's efforts also have triggered investigations of her leadership by three committees of the United States House of Representatives: its Oversight Committee, Judiciary Committee, and Energy and Commerce Committee.[16]

The use of non-competes in the employment realm faces challenges from others besides Chair Khan and the FTC. On May 30, 2023, following upon last year's interagency commitment with the FTC and DOJ to address restrictions on the exercise of employee rights, National Labor Relations Board General Counsel Jennifer Abruzzo issued a memo stating her position that "the proffer, maintenance, and enforcement [of] non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances."[17]

The Withdrawal of Several Important Guidance Documents by the Antitrust Division of the United States Department of Justice

The United States Department of Justice Antitrust Division announced on February 3, 2023, that it withdrew from three guidance documents, issued in 1993, 1996 and 2011. The reason given was that the guidance documents were deemed "obsolete."[18]

The FTC has since withdrawn the 1996 and 2011 guidance documents indicating in the future, "[i]n making its enforcement decisions, the Commission will rely on general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of health care products and services."[19] Although the FTC's July 14, 2023 announcement of its withdraw-

al from the 1996 and 2011 guidance documents is silent regarding the 1993 and the 1994 revised guidance document that it issued jointly with the Justice Department, we presume that the Commission does not intend to look to be bound by the older guidance.

The most significant aspect of the DOJ's and FTC's announced withdrawals is that each document provided certain "safety zones" for health care providers. Simply stated, if a company complied strictly with the requirements of the safety zone, one could rest assured that such conduct would not be challenged by the Antitrust Division. There were safety zones for, *e.g.*, joint purchasing, small market hospital mergers, and provider networks that involved substantial sharing of financial risk.

The greatest immediate impact, however, may be in the area of information exchanges. A widely utilized safety zone was Statement 6 of the 1996 "Statements of Antitrust Enforcement Policy in Health Care" regarding the sharing of competitively sensitive information, *e.g.*, wages and salaries. Over three decades, this safety zone in fact had become the standard methodology, not only in health care, but by businesses generally.[20]

The DOJ withdrew the safety zone over new developments in data analysis and machine learning, which the DOJ said could potentially be applied to aggregated data to harm competition in certain circumstances, even if the exchange satisfies the "safety zone" criteria.[21] It is still too early to predict where the agencies are headed, but some businesses may understandably be more reluctant to continue to participate in data gathering and data dissemination.[22]

Criminal Enforcement by the Antitrust Division of Section 2 of the Sherman Act

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, *shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court*.

(Emphasis added).

Jonathan Kanter, the current Assistant Attorney General who heads the U.S. Department of Justice Antitrust Division has stated the following:

> Congress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition…. The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm.[23]

In order to understand the significance of the Antitrust Division's criminal enforcement initiative in the area of single firm behavior, a leading scholar undertook an empirical study of Antitrust Division criminal monopolization cases between 1903 and 1977, since there had been no criminal Section 2 cases in almost half a century.[24] Below is a brief summary:

> [T]he Justice Department brought 175 criminal monopolization cases between 1903 and 1977, but that *only 20 of these involved unilateral exclusionary conduct* (as opposed to concerted cartel behavior), that *only 12 of these resulted in a finding of criminal liability, that only one case involving non-violent conduct resulted in a prison sentence, and that the total fines meted in these cased amounted to less than $9 million in 2022 dollars.* Thus, although there is historical precedent for bringing criminal monopolization cases, if the Justice Department carries through on its recent threats to begin bringing criminal monopolization cases again and it does so for non-violent unilateral conduct offenses and seeks significant penalties, it will be breaking new ground.[25]

(Emphasis added.)

Criminal antitrust enforcement for the past 50 years has focused exclusively on certain defined horizontal collusive competitor activities, *i.e.*, the narrow per se illegal categories — price fixing, bid rigging, and market allocation. Even though Section 2 of the Sherman Act is a criminal statute, it has been enforced civilly primarily because monopolization and attempted monopolization require a factual predicate unnecessary in per se cases, *i.e.*, defining a relevant product and geographic market. It remains to be seen how the federal courts will react to this initiative of the Antitrust Division once a criminal monopolization case actually goes to trial. If the heretofore failed attempts by the Antitrust Division to prosecute nonpoach cases criminally are any indication, the Antitrust Division may be in for some rough sledding.[26]

FTC Enforcement of the Robinson-Patman Act

The Federal Trade Commission (FTC) has announced its intention[27] to ramp up enforcement of the Robinson-Patman Act (RPA),[28] a Great Depression era anti-price discrimination law. Neither the FTC nor the DOJ has significantly enforced the RPA for several decades.

The RPA broadly forbids a seller of goods from engaging in price discrimination between two or more different purchasers. The rationale for the RPA was that preventing such price discrimination would enable smaller companies to better compete with larger businesses who often exacted substantial volume discounts when purchasing in very large quantities. Importantly, the RPA applies only in particular circumstances. First, the RPA applies only to sales of tangible commodities, not services. Second, it applies only to purchases of commodities of "like grade and quality." Third, RPA requires that at least one sale take place across state lines, and that both sales occur within the United States. Finally, the price discrimination must be such that it has the potential to substantially injure competition at the seller's level or the buyer's level. Primary-line discrimination occurs when one seller reduces its prices in a specific geo-

graphic market and causes injury to its own competitors in the same or in a different geographic market. Secondary-line violations occurs when favored customers of a seller are given a price advantage over competing purchasers. Most RPA cases are secondary-line claims.

Conduct that would otherwise fall within the scope of these RPA provisions may nevertheless be subject to certain defenses. Defenses include, for example, the following: 1) the price difference was justified by different demonstrably provable costs; and 2) the price difference was a concession to meet a competing seller's price. While not technically a defense, the U.S. Supreme Court has also recognized the existence of a "functional discount" when one competing purchaser performs functions that would otherwise be performed by the seller, *e.g.*, warehousing, etc., and as a consequence, the favored purchaser in essence is saving the seller some quantifiable amount of money it would otherwise expend itself.

The RPA also separately forbids certain discriminatory allowances (such as rebates and fees) or services furnished or paid to purchasers, requiring that a seller treat all competing purchasers in a proportionately equal manner. A seller must also allow all types of competing purchasers to receive the services and allowances or provide some other reasonable means of participation. Further, the cost justification defense does not apply in this situation.

The FTC's recent announcement follows President Biden's Executive Order "Promoting Competition in the American Economy," which, among other things, urged the FTC to enforce antitrust laws vigorously. It also comes on the heels of a bipartisan push from lawmakers urging the FTC to use the RPA against discriminatory conduct. A majority of the current FTC commissioners have voiced support for using the RPA to take action against unfair competition. Indeed, the FTC recently cited the RPA in a separate announcement urging action against certain rebating practices paid by drug manufactures to intermediaries in certain circumstances.[29] Perhaps the clearest indication of the FTC's commitment to ramp up RPA enforcement so far has been the FTC opening a preliminary investigation against Coca-Cola Co. and PepsiCo Inc. regarding potential price discrimination under the RPA.

Finally, in light of the reemergence of the FTC as an enforcer of RPA, it is possible that some state attorneys general and private litigants may attempt to enforce the state antitrust act analogues to RPA, particularly when the jurisdictional prerequisites of the RPA cannot be met. The Connecticut Antitrust Act analogue to the RPA, for example, differs in one quite significant respect from the RPA.[30] Under the RPA, the key language reads, "[W]here the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce…."[31] Unlike the RPA, the Connecticut analogue to the RPA does not contain the word "substantially."[32]

Criminal Enforcement Focused on Agreements to Limit or Fix the Terms of Employment

So far, the Justice Department's efforts to prosecute those involved in so called wage-fixing and no poach agreements criminally have broken some new legal ground. To date, however, trial results have proved uniformly unfavorable to the Justice Department, in that no jury has yet found any of the defendants criminally culpable. The groundwork for these cases dates back at least to October 2016 when the DOJ and FTC issued the "Antitrust Guidance for Human Resource Professionals." The document described its purpose as being to "alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws." According to the guidance: "An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regarding to wages, salaries, or benefits; terms of employment; or even job opportunities."[33] The 2016 guidance included the warning that "[g]oing forward, the DOJ intends to proceed criminally against naked wage fixing or no-poaching agreements."[34] A "no poaching agreement" involves an agreement with individual(s) at another company to refuse to solicit or hire that other company's employees.[35]

At the outset of 2021, the Department of Justice filed an indictment against Surgical Care Affiliates and a related entity accusing them of conspiring with other health care companies to suppress competition for senior level employees. That case has yet to go to trial. In November 2022, an individual defendant entered into a deferred prosecution agreement in an effort to avoid a criminal conviction for participating in agreements not to recruit or hire school nurses or raise their wages.[36] In a related prosecution in October 2022, VDA OC, LLC, (formerly known as Advantage On Call, LLC) pled guilty to conspiring to suppress wages of school nurses. A court sentenced the company to pay a criminal fine of $62,000 and $72,000 in restitution to victim nurses.[37]

In March 2023, a Maine jury found four home care agency managers not guilty of conspiring to refrain from hiring workers away from their competitors.[38] In April 2023, Federal District Court Judge for the District of Connecticut Victor Bolden granted a judgment for acquittal in a no-poach criminal case for each of the six defendants.[39]

With the DOJ's Assistant Attorney General Kanter having recently characterized its prosecutions as "righteous cases" of agreements that cause real harm, the risks associated with engaging in such agreements still ought not to be overlooked.[40] Even if the DOJ continues to suffer defeat in its criminal dockets, civil cases should not be as difficult to win. Also, criminal cases continue to be brought, including another indictment directed at conduct concerning fixing of nurses' wages returned in March of this year.[41]

Civil Employment Related Antitrust Enforcement Developments

The DOJ and FTC each has effectuated its current commitment to protecting workers rights through its civil enforcement activities. Most recently, on May 17, 2023, DOJ announced a consent decree against a poultry producer, the fourth in a ser-

vices of enforcement actions, targeting the sharing of compensation information about poultry processing plant workers' compensation. The consent decree calls for $5.8 million in restitution to workers harmed by the conduct.[42] In turn, the FTC has pursued covenant not to compete cases without waiting to adopt a non-compete regulation.[43] Relief obtained by the FTC has included orders to drop non-compete restrictions imposed on workers.[44]

Proposed Revisions to the DOJ/ FTC Merger Guidelines

On July 19, 2023, DOJ and the FTC released a draft of proposed revisions to their Merger Guidelines.[45] The last major revisions to the Horizontal Merger Guidelines were issued in 2010.[46] There is a 60-day public comment period regarding the 2023 draft Merger Guidelines that will conclude on September 18, 2023. In an announcement of their publication FTC Chair Lina M. Khan stated the following:

> "With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy. Informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs—these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books."[47]

The draft Merger Guidelines set out thirteen distinct guidelines that will inform the agencies and the parties about how proposed mergers and acquisitions will be analyzed. These thirteen guidelines are as follows:[48]

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

We anticipate that there will be significant adverse public comments regarding the draft Merger Guidelines, not only because of the somewhat opaque nature of the thirteen guidelines noted above, but also because the agencies propose to fundamentally alter the current metric to determine whether a market is "highly concentrated." The metric is known as the Herfindahl-Herschman Index ("HHI").[49] In 2010, highly concentrated meant an HHI of more than 2500.[50] The 2023 draft Merger Guidelines propose to reduce the highly concentrated HHI number to more than 1800.[51] The net effect of such a change would potentially dramatically either increase the number of mergers and acquisitions challenged, and/or reduce the number of mergers and acquisitions because of the heightened risk of challenge by one of the agencies.

Conclusion

Government agencies are, of course, not the only enforcers of antitrust and unfair competition laws. Thus, as government agencies endeavor to move the proverbial antitrust and competition needle into territory that had been their principal focus, private attorneys and private parties should not overlook the role they might be able to play in these rapidly developing areas of competition law, whether in the public policy or the litigation arena. The public and private interests at stake are far too vital to ignore the competition landscape as it continues to evolve. ■

Robert M. Langer is a Senior Counsel at Wiggin and Dana LLP and current Chair of the CBA's Antitrust & Trade Regulation Section; Michael A. Kurs is a Member of Pullman & Comley LLC and immediate past Chair of the CBA's Antitrust & Trade Regulation Section.

NOTES

1 Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

2 https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (The Commission's 2015 Statement sought to evaluate potentially anticompetitive conduct utilizing a traditional "rule of reason" framework to ensure that the act/practice at issue would not be enjoined if it posed little to no harm to competition or the competitive process. The 2015 Statement also obligated the FTC to evaluate whether the act/practice was within the four corners of conduct deemed violative of either the Sherman Act or the Clayton Act.)

3 https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

4 https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf

5 https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

6 *Id.* at 8-10.

7 88 FR 3482-3546; https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

8 *Id.* at 3535-36.

9 www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf

10 www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf

11 *See* note 9, *supra*, at 4.

12 *See* note 10, *supra* at 9-13. The 2022 Policy Statement and the Proposed Rule present the question whether the FTC possesses authority to adopt trade regulation rules with respect to unfair methods of competition. In 1973, the D.C. Circuit held in *Nat'l Petroleum Ref'rs Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) that the FTC did have the authority to implement substantive rules implicating competition pursuant Section 6(g) the FTC Act, 15 U.S.C. § 46(g). Shortly after, however, the Magnuson-Moss Act was enacted and expressly authorized the FTC to adopt substantive rules regarding unfair and deceptive acts and practices. *See* Pub. L. No. 93-637, 88 Stat. 2183 (1975), codified as Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B). The legislation, however, was unclear regarding the FTC's authority to adopt substantive competition rules. *See* 15 U.S.C. § 57a(a)(2). This may perhaps serve as evidence that Congress did not intend to authorize the FTC to make binding rules regarding unfair methods of competition.

13 *See* note 9, *supra*, at 2.

14 *Id.* at 3.

15 For a more extensive critique of the FTC's 2022 Policy Statement, *see* Daniel J. Gilman and Gus Hurwitz, "The FTC's UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason," (International Center for Law & Economics, November 16, 2022); https://laweconcenter.org/resources/the-ftcs-umc-policy-statement-untethered-from-consumer-welfare-and-the-rule-of-reason/

16 https://oversight.house.gov/wp-content/uploads/2023/06/FTC-Letter-Ethics-Due-Process-Rule-of-Law-1.pdf; https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-04-12-jdj-to-khan-ftc-subpoena-cover-letter.pdf; https://energycommerce.house.gov/posts/chair-rodgers-on-ftc-chair-khan-s-abuses-of-power-leadership-matters

17 https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national

18 Justice Department Withdraws Outdated Enforcement Policy Statements | OPA | Department of Justice. The 1993 Statements were revised in 1994. The 1996 guidance describes the 1994 guidance as superseding the 1993 statements, although the 1996 guidance describes having only revised the physician network joint ventures and multiprovider networks guidance and otherwise not having revised any of the other statements. https://www.justice.gov/atr/page/file/1197731/download, p. 3.

19 https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements?utm_source=govdelivery

20 The antitrust safety zone for exchanges of price and cost information among providers requires the following: (1) the survey is managed by a third-party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association); (2) the information provided by survey participants is based on data more than 3 months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

21 *See also* Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023 | OPA | Department of Justice (Feb. 2, 2023).

22 Needless to say, certain competitively sensitive information exchanges have always been deemed problematic. The recent suit against poultry processors to suppress workers' wages is just one of innumerable examples. Justice Department Files Proposed Amended Complaint and Consent Decree with Fourth Poultry Processor, Further Addressing Long-Running Conspiracy to Suppress Workers' Compensation | OPA | Department of Justice

23 *See* Executive Pleads Guilty to Criminal Attempted Monopolization | OPA | Department of Justice.

24 Daniel A. Crane, "Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136638# (University of Michigan Law & Economics Research Paper No 22-030).

25 *Id.* (Abridged abstract of article).

26 *See* discussion of no-poach and related labor restraint cases, infra, at portion of article captioned, "Criminal Enforcement Focused on Agreements to Limit or Fix the Terms of Employment."

27 https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition

28 Section 2 of the Clayton Act, 15 U.S.C. § 13(a), *et seq.*

29 FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs | Federal Trade Commission

30 Conn. Gen. Stat. § 35-45.

31 *See* note 28, *supra*.

32 The relevant portion of Conn. Gen. Stat. § 35-45 reads, "[W]here the effect of such discrimination may be to lessen competition or tend to create a monopoly in any line of commerce…" *See State v. Exxon Corp.*, 1987 WL 92054, *3 (Conn. Super. Ct. 1987).

33 https://www.justice.gov/atr/file/903511/download

34 *Id.* at 4.

35 *Id.* at 3.

36 https://www.troutman.com/images/content/3/3/331457/Hee-plea-agreement.pdf.

37 https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

38 *United States v. Manahe*, Docket No. 2:22-cr-00013 (D. Maine), Verdict, March 22, 2023.

39 *United States v. Patel*, Docket No. 3:21-cr-00220 (D. Conn.), Judgments of Acquittal, April 28, 2023.

40 https://www.forbes.com/sites/insider/2023/05/10/are-dojs-no-poach-prosecutions-getting-poached/?sh=5b5b7c811646

41 https://www.justice.gov/opa/pr/health-care-staffing-executive-indicted-fixing-wages-nurses

42 https://www.justice.gov/opa/pr/justice-department-files-proposed-amended-complaint-and-consent-decree-fourth-poultry

43 Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://www.ftc.gov/news-events/news/pressreleases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers; In the Matter of Prudential Security et al., Comm'n File No. 2210026 (2023); In the Matter of O-I Glass, Inc., Comm'n File No. 2110182 (2023); In the Matter of Ardagh Group, S.A et al., Comm'n File No. 2110182 (Feb. 21, 2023). 32 Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2022), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition

44 https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions

45 FTC and DOJ Seek Comment on Draft Merger Guidelines | Federal Trade Commission.

46 https://www.justice.gov/atr/horizontal-merger-guidelines-08192010

47 *See* note 45, *supra*.

48 *Id.*

49 The HHI is calculated by summing the squares of the individual firms' market shares. As an example, pre-merger a market includes three companies with a 20% market share, and four companies with a 10% market share. Squaring the pre-merger market shares equals an HHI of 1600, *i.e.*, 1200 (20% squared x 3) plus 400 (10% squared x 4). If one 20% company and one 10% company were to merge, the post-merger HHI would be 2000, *i.e.*, 900 (30% squared) plus 800 (20% squared x 2) plus 300 (10% squared by 3). Under the 2010 Merger Guidelines, the market would be deemed moderately concentrated, while under the 2023 proposed Merger Guidelines, the market would be deemed highly concentrated, and thus more likely to be challenged.

50 *See* note 46, *supra*, at Section 5.3.

51 *See* Draft FTC-DOJ Merger Guidelines for Public Comment (2023) at p. 7.