

The first quarter of 2023 saw the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, “antitrust agencies”) taking unprecedented enforcement actions and updating longstanding policy guidelines in an effort to shift the goalposts on antitrust enforcement in the US. These efforts stem from President Joe Biden’s July 2021 [Executive Order](#), Promoting Competition in the American Economy, which called on the antitrust agencies to focus and enhance enforcement efforts in key markets, such as labor markets, agricultural markets, healthcare markets, and the tech sector. What has followed is a string of government and private actions that have placed a brighter spotlight on the need for companies to understand the limits antitrust law places on their business activities. Recent statements from the antitrust agencies further emphasize the government’s intent to expand the agencies’ enforcement capabilities. Below are highlights of the actions taken by US antitrust enforcers in the first three months of 2023. These actions provide a roadmap for how companies can strengthen their antitrust compliance programs to avoid unnecessary risks and remain compliant with the law.

## Labor Markets

Companies should ensure that their existing antitrust compliance programs adequately address labor market issues, including non-compete agreements, no-poach agreements, and wage-fixing agreements. Antitrust agencies stepped up enforcement of such agreements in 2022 and have continued their efforts in 2023. This is the area where the antitrust agencies have proposed the most sweeping changes in the past three months, so companies should pay close attention to ensure continued compliance.

**Non-compete agreements** are agreements between a company and an employee that restrict the employee from competing for certain customers within a certain industry or geographic area for a set duration of time after leaving the company. Agreements that are reasonable in duration and scope and that are otherwise narrowly tailored to protect a company’s reasonable business interests have long been viewed as permissible.

**No-poach agreements** are agreements between two or more companies not to compete for each other’s employees. Agreements not to solicit another company’s employees are often permissible when made in connection with the sale of a business or a legitimate business collaboration.

**Wage-fixing agreements** are agreements between two or more competitors to set the wages of their employees. Such agreements are akin to price-fixing agreements and are illegal under federal antitrust law.

## Proposed Rule Banning Non-compete Agreements

In January, the FTC [announced](#) its intent to issue a new rule that would make it illegal for an employer to enter a non-compete agreement, maintain a non-compete agreement or represent to a worker that they are subject to a non-compete agreement. This prohibition would extend to existing non-compete agreements and would apply to employees, independent contractors and any person who works for an employer, regardless of pay. Recently, FTC Chair Lina Khan defended the proposed rule, stating that non-compete agreements impede business innovation and entry. President Biden also stated in his second [State of the Union Address](#) on February 7, 2023, that non-compete agreements should be banned. The proposed rule would contravene decades of law by making such agreements inherently illegal. Companies should also be mindful of similar proposed bans being considered by various state legislatures. Companies should evaluate existing employment agreements to determine how a change in the law could impact their ability to protect trade secrets and business-confidential information moving forward.

## Civil Lawsuits

The FTC filed lawsuits against [three companies and two individuals](#) for their use of non-compete agreements in the security guard and glass container markets. The lawsuits are the first time the FTC sued to halt the use of existing non-compete restrictions. The FTC concurrently announced settlements with each company involved. The settlements required the companies to rescind all existing non-compete agreements and barred them from entering into future agreements. Of note, the lawsuits did not turn on whether the non-compete agreements were reasonable in scope or duration. Instead, the FTC focused on the agreements’ collective impact on the market and/or the impact on low-wage employees.

## Criminal Lawsuits

The DOJ has charged several executives for anticompetitive no-poach and wage-fixing behavior. In March, a grand jury [indicted](#) a Las Vegas executive for his alleged role in a conspiracy to fix wages of nurses at three different home health agencies from 2016 to 2019. This case follows three other cases that charged [four home health operators](#), a [dialysis provider and its former CEO](#), and the [former owner and clinical director](#) of a physical therapist staffing company of anticompetitive labor market behavior. The other cases, which were the first of their kind, all resulted in not-guilty verdicts at trial.

Despite these losses, the DOJ was able to obtain court holdings that no-poach and wage-fixing agreements can be prosecuted criminally under Section 1 of the Sherman Act and are subject to the same range of potential fines and prison sentences as hardcore price-fixing. The DOJ has signaled it will continue to pursue such cases, with the DOJ Acting Director of Criminal Enforcement Emma Burnham and the Chief of DOJ's Criminal II Section James Fredericks reiterating last month that companies should expect an increase in criminal labor cases over the next year. DOJ Antitrust Division's Assistant Attorney General (AAG) Jonathan Kanter similarly stated that antitrust crimes focused on workers are just as important and actionable as those focused on consumers.

## Information Exchanges

Companies need to assess their participation in information exchanges with competitors. In February, the DOJ formally withdrew from [three policy guidelines](#) regarding circumstances under which the antitrust agencies would not challenge information exchanges as anticompetitive under federal law.<sup>1</sup> In announcing the withdrawal, AAG Kanter said that the move would "ensure that [DOJ's] enforcement efforts reflect modern market realities."

Under the policy guidelines, the exchange of competitively sensitive information, such as price and cost information, was considered permissible if companies used (a) a survey managed by a third-party, (b) information more than three months old, and (c) aggregated data from at least five providers.

It is likely that the DOJ will engage in a case-by-case analysis of information exchanges moving forward. Enforcement actions will help inform what means of information exchanges are permissible. Companies should also be aware that the FTC has not withdrawn from the policy statements. The 2000 joint FTC and DOJ [Antitrust Guidelines for Collaborations Among Competitors](#) are also still in effect. Those guidelines indicate that an independent third-party entity can lessen the likelihood of anticompetitive effects arising from information sharing between competitors.

## Guidance for Corporate Compliance

Companies should also assess their compliance programs to ensure they comport with DOJ guidance. In March, the DOJ updated its [guidance](#) on how it will evaluate the effectiveness of a company's corporate compliance program. The guidance builds on the DOJ's 2020 and 2019 compliance guidelines and serves as a roadmap to prosecutors and prudent companies. The guidance seeks to provide "additional context to the multifactor analysis of a company's compliance program," and in so doing, provides useful guidance for companies that wish to bring their programs in line with best practices.

In its original 2017 guidance, the DOJ provided only examples of topics and sample questions used to evaluate whether a corporate compliance program deserved credit in a corporate settlement. The original compliance guideline did not instruct prosecutors as to the most important elements of a strong program, but simply provided relevant factors.

The original guidance was updated in 2019 and titled, "Evaluation of Corporate Compliance Programs" (2019 Guidance). The 2019 Guidance was twice the length of the original guidance and utilized a more instructive approach. The 2020 update (2020 Guidance) made minor revisions to the 2019 Guidance, but largely remained the same. The revisions were primarily designed to provide further detail and clarity on what an effective compliance program should look like.

The guidance evaluates compliance programs through three fundamental questions:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation's compliance program work in practice?

Factors prosecutors evaluate include, in part, the compliance program's policies and procedures, training, reporting structures, and third-party management; how the corporation has invested in and improved its corporate compliance program and internal control systems; and in what ways the program allows for investigation and remediation of misconduct. The updated guidance added new factors, including consideration of compensation structures and electronic device procedures and policies.

## Interlocking Directorates

An interlocking directorate is where an individual or legal entity sits on the boards of two or more competitors. Interlocks can be direct or indirect. An example of an indirect interlock is where a private equity firm appoints different representatives to sit on the boards of competitors. Such conduct can potentially violate Section 8 of the Clayton Act.

Companies should be aware that the DOJ has begun to enforce standalone interlocking directorate violations. Standalone interlock challenges were historically rare. Such violations were primarily enforced in the context of pre-merger notification filings under the Hart-Scott-Rodino Antitrust Act of 1976, as amended (the HSR Act). Beginning in the fall of 2022, however, the DOJ began investigating potential interlocking directorate violations. The investigations resulted in the removal of 15 interlocking directors. The DOJ currently has approximately 20 additional investigations pending, many of which involve private equity firms.

<sup>1</sup> Although these policy statements centered on the healthcare industry, companies across all industries have relied upon these policies to guide their information exchange activities.

AAG Kanter recently stated that companies should expect interlocking directorates to remain a high priority this year, as such challenges are “probably the most effective way to deconcentrate the United States economy today.”

## Other Possible Areas of Focus in the Coming Year

### Criminal Enforcement of Section 2

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization and conspiracy to monopolize. Section 2 violations may result in civil penalties and criminal penalties of up to 10 years in prison.

Last month, DOJ officials indicated that the agency intends to bring more criminal monopolization cases this coming year. Last year, the DOJ brought two Section 2 criminal cases for the first time since the 1970s. AAG Kanter indicated that the DOJ would not hesitate to pursue additional cases, so long as they are supported by fact and the law. The DOJ has yet to provide guidance regarding what types of monopolization conduct could lead to criminal charges. However, Assistant Chief of the DOJ’s San Francisco office Jacklin Lem has indicated that the DOJ would focus criminal charges on offenses where there is clear criminal intent and no procompetitive benefit.

### Rejection of Structural and Conduct Remedies

Structural and conduct remedies are remedies used for mergers or acquisitions that raise possible anticompetitive concern. Structural remedies involve partial or full divestiture, while conduct remedies can include firewalls or temporary supply agreements.

The agencies have signaled that they are less willing to consider structural or conduct remedies for possible anticompetitive mergers moving forward. FTC Chair Lina Khan stated that certain remedies have not adequately addressed anticompetitive behavior in certain past circumstances. This position was echoed by DOJ Deputy Assistant Attorney General Hetal Doshi, who stated that “the idea that a divestiture is going to cure the underlying [antitrust] violation...can’t be based on our hopes and aspirations of what we hope will happen” after the deal and divestiture closes. These statements follow the FTC’s refusal to accept conduct remedies in Illumina, Inc.’s proposed vertical acquisition of GRAIL, Inc. last year.

## Contacts

### Christopher H. Gordon

Partner, Washington DC  
T +1 202 626 6284  
E christopher.gordon@squirepb.com

### Kaitlin E. Rittgers

Associate, Washington DC  
T +1 202 457 5526  
E kaitlin.rittgers@squirepb.com

