COMPANY COMPLIANCE WITH U.S. ANTITRUST LAW: POLICY-TRACKING IN A CHANGING LANDSCAPE

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President Biden began his presidency with an executive order seeking a whole-of-government approach to promote competition. In the past two years, U.S. antitrust agencies have responded by increasing antitrust scrutiny on companies, including shifting policies previously relied upon by compliance officers and sometimes withdrawing them altogether. In this article, we survey a number of these changes and offer guidance to companies to remain compliant against an evolving regulatory landscape. In particular, this article identifies three key types of agency policy signaling: new agency policy statements, the withdrawal of policy guidance, and rules that are proposed by not yet effective. This article encourages company compliance departments to ensure that their efforts are tailored to their firm- and industry-specific circumstances.

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I. INTRODUCTION

In July 2021, President Joe Biden issued an executive order promising a "whole-of-government" effort to promote competition. The Executive Order on Promoting Competition in the American Economy ("Competition EO") seeks to "address overconcentration, monopolization, and unfair competition."[2] Various federal agencies, and especially the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the U.S. Department of Justice ("DOJ"), responded with new policies and aggressive enforcement agendas. This has resulted in a number of policy changes through:

1. Policy statements suggesting that antitrust laws are going to be applied differently or that new types of conduct will be subject to antitrust scrutiny;
2. The withdrawal of policy guidance; and
3. New rules that are proposed but not yet effective.

Rapidly changing policies present a challenge for company legal departments. This article surveys a number of antitrust agency policy changes and the implication of those changes for compliance programs. Companies should continue to monitor policy changes as trends form, pronounced policies lead to concrete actions, and rules become effective and enforced.

II. ANTITRUST AGENCY POLICY STATEMENTS

A. Section 5 Policy Statement

Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce."[3] In a 2015 statement of enforcement principles, the Commission explained that, consistent with FTC precedent, it would adhere to several principles when deciding whether to bring an enforcement action under Section 5's "unfair methods of competition" ("UMC") prong.[4] First, "the Commission will be guided by…the promotion of consumer welfare."[5] Second, "the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[6] Third, "the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."[7] These three principles provided fairly clear guidance to companies: the FTC largely viewed Section 5's UMC prong as coextensive with the Sherman and Clayton Acts.

In the fall of 2021, the FTC withdrew the 2015 statement, reasoning that this previous guidance "contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence."[8] Notably, the withdrawal criticized the previous guidance's use of the rule of reason standard, where the rule of reason's "likelihood" threshold "abrogate[s] the Commission's statutory mandate to combat incipient wrongdoing before it becomes likely to harm consumers or competition."[9]

2 Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36989 (July 9, 2021).

3 Pub. L. No. 63-203, 38 Stat. 717; 15 U.S.C. § 45(a)(1).

4 Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

5 *Id.*

6 *Id.*

7 *Id.*

8 Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021) [hereinafter "2021 Withdrawal"], https://www.ftc.gov/legal-library/browse/statement-commission-withdrawal-statement-enforcement-principles-regarding-unfair-methods.

9 *Id.* at 6.

A year after withdrawing the 2015 statement, the FTC adopted on a 3-1 vote a policy statement explaining its new approach to UMC enforcement under Section 5.[10] According to the 2022 policy statement, Congress's mandate that the FTC prevent "unfair methods of competition" under Section 5 supports an enforcement authority that extends beyond the scope of the Sherman and Clayton Acts.[11] In a dissent, FTC Commissioner Christine Wilson heavily criticized the policy statement as repudiating the consumer welfare standard and providing unclear guidance to businesses seeking to comply with the law.[12] While lacking specific details on what would constitute violative conduct, the policy statement offers general descriptions of conduct the FTC may consider unfair methods of competition. In particular, it enumerates examples of incipient violations (e.g. conduct that has the "tendency to ripen into antitrust violations") and violations that offend the spirit of antitrust laws (e.g. conduct that results in direct evidence of antitrust harm).[13] The FTC has not brought many public enforcement actions under this new guidance yet, but is widely expected to bring more Section 5 UMC cases going forward. Company legal departments should continue to monitor Section 5 enforcement actions to ensure that training and compliance programs are properly adjusted to avoid FTC investigations and enforcement.

B. Policy Statement Regarding Rebates and Fees

In June 2022, the FTC issued a policy statement on the use of rebates and fees in the pharmaceutical industry.[14] It is a widespread practice for drug manufacturers to offer rebates and fees to intermediaries, like pharmacy benefit managers ("PBMs"). Using insulin as an example, the FTC discussed whether rebates and fees could "incentivize higher list prices for [drugs] and discourage coverage of lower-cost insulin products" by PBMs, insurance companies, and others involved in the prescription drug chain.[15] The Commission warned that "[e]xclusionary rebates that foreclose competition from less expensive alternatives" may constitute antitrust violations and vowed to "closely scrutinize the impact of rebates and fees on patients and payers to determine wither any [antitrust] provisions have been violated."[16]

While the policy statement specifically addressed the pharmaceutical industry, three months later, the Commission, along with 10 state attorneys general, initiated litigation using a similar theory of harm in a different industry, challenging pesticide manufacturers Syngenta and Corteva.[17] The complaint claims that exclusivity periods for crop-protection products, combined with post-exclusivity loyalty and rebate programs, exclude and marginalize generic manufacturers from competing in the traditional distribution channels and thus harm competition.[18] This action by the Commission demonstrates that the FTC is broadening its statutory toolkit, bringing an "unfair method of competition" claim under Section 5 of the FTC Act and an exclusive dealing claim under Section 3 of the Clayton Act, leaving the states to make claims under Sections 1 and 2 of the Sherman Act and under state laws.

The FTC continued to advance its position on the competitive impacts of rebates and bundling in a July 2023 amicus brief filed in the U.S. District Court for the Central District of California supporting Allied Medical Resources Corp. in its case against Medtronic Inc. ("Medtronic").[19] While the Commission did not take a stance on the allegations in the complaint, the FTC criticized as flawed the arguments put forth in defendant Medtronic's motion to dismiss. In particular, the FTC argued that Medtronic advanced arguments that adopted the wrong legal standard to assess Medtronic's alleged exclusive dealing and bundling arrangements.[20] According to the FTC, analysis of an exclusive dealing

10 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Fed. Trade Comm'n Act (Nov. 10, 2022) [hereinafter "2022 Section 5 Policy Statement"], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

11 2022 Section 5 Policy Statement at 1.

12 Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

13 2022 Section 5 Policy Statement at 12–16.

14 Fed. Trade Comm'n, Policy Statement Regarding Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022) [hereinafter "2022 Rebates and Fees Policy Statement"], https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf.

15 *Id.*

16 *Id.* at 6.

17 Complaint, *Fed. Trade Comm'n v. Syngenta*, No. 22-cv-828 (M.D.N.C. Sept. 29, 2022).

18 *Id.* at 2–4.

19 Amicus Brief on Behalf of the Fed. Trade Comm'n, *Applied Medical Resources Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268 (C.D. Cal., July 3, 2023).

20 *Id.* at 3–4.

arrangement should focus on its "practical effect" on competition, not formalistic distinctions, such as contract duration.[21] Similarly, customer complaints related to bundled discounts are not that prices are too low, since the discount by the defendant may be self-serving as to allow no consumer to receive a lower price.[22]

In the amicus filing and the Syngenta-Corteva action, the FTC applied the analytical framework of its policy statement regarding the pharmaceutical industry to other industries. This neatly illustrates the importance of staying abreast of all policy changes announced by the agencies.

C. DOJ and FTC Draft Merger Guidelines

On July 19, 2023, the FTC and DOJ released a draft update of the Merger Guidelines. The draft Guidelines describe how the agencies "review . . . mergers and acquisitions to determine compliance with federal antitrust laws."[23] These new merger guidelines follow criticism of the previous guidelines by the DOJ and FTC and their announcement of a joint inquiry in January 2022 to update the merger guidelines to strengthen enforcement.[24] The FTC's contemporaneous press release states as the first "core goal" for the Merger Guidelines that they "reflect the law as written by Congress and interpreted by the highest courts. The guidelines are built around statutory text and relevant case precedent."[25] If adopted, the Guidelines will have substantial implications for businesses contemplating transactions that may implicate the principles in the Guidelines, since they will affect the agencies' approach to merger reviews — including whether to open a formal investigation, issue a second request or challenge a merger.

The draft Merger Guidelines are lengthy and address a large number of topics that are consistent with current agency leadership's priorities as set forth in public statements and recent enforcement actions. The draft devotes special attention to potential competitive harm from vertical and conglomerate mergers, entrenchment of firms with dominant positions, potential competition, acquisitions of minority interests, labor markets, and transactions involving platforms. Two of these topics, related to potential competition and conglomerate effects, have been expressed in recent challenges brought by the FTC and DOJ against Meta Platforms Inc.'s ("Meta") acquisition of Within Unlimited Inc. ("Within") and Amgen Inc.'s ("Amgen") acquisition of Horizon Therapeutics plc ("Horizon").

In the horizontal merger context, the draft Guidelines both lower the concentration thresholds for a presumption of anticompetitive effects and strengthen the force of that presumption. Under the draft, for example, a market consisting of 10 companies each with a 10 percent market share is "concentrated," where previously it would have been considered "unconcentrated"; and a market consisting of five companies each with a 20 percent market share is "highly concentrated," where previously it would be only "moderately concentrated."[26] In this merger context, the draft also devotes substantial attention to harm based on elimination of potential competition. This includes both "actual potential competition" — where one of the merging parties has actual plans to enter a market — and "perceived potential competition" — where competition is disciplined by a perception that one or more merging parties might enter.[27] The perceived potential competition theory was at the heart of the FTC's recent unsuccessful challenge to the Meta/Within transaction.[28] The FTC alleged that Meta's acquisition would eliminate actual or perceived potential future or nascent competition between Meta and Within in the market for "VR dedicated fitness apps."[29] The court rejected the FTC's challenge, finding that "[n]ew entrants have not significantly deconcentrated the [VR fitness platform] market, nor do they suggest a

21 *Id.* at 8–10.

22 *Id.* at 16–18.

23 U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines, 1 (2023) [hereinafter "2023 Merger Guidelines"], https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

24 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

25 Press Release, Fed. Trae Comm'n, FTC and DOJ Seek Comment on Draft (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

26 2023 Merger Guidelines, 6–7.

27 *Id.* at 11–13.

28 On January 31, 2023 Judge Edward J. Davila of the U.S. District Court for the Northern District of California issued an order denying the FTC's request for a preliminary injunction to block Meta from acquiring Within Unlimited, a virtual reality startup that developed a subscription-based VR fitness app. Order Denying Plaintiff's Motion for Preliminary Injunction, *Fed. Trade Comm'n v. Meta*, No. 5:22-cv-04325 (N.D. Cal. Jan. 31, 2023).

29 *Id.*

trend towards such concentration."[30] Still, the FTC and DOJ have argued that these types of decisions have validated their potential competition theories as legitimate, and have thus included them in their draft Merger Guidelines.[31]

The draft Merger Guidelines also emphasize that "mergers should not entrench or extend a dominant position." The draft discusses a potential conglomerate concern that a "merger could enable the merged firm to extend a dominant position from one market into a related market," for example, by "leverag[ing] its position by tying, bundling, conditioning or otherwise linking sales of two products, excluding rival firms, and ultimately substantially lessening competition in the related market."[32] The FTC is currently pursuing a conglomerate theory in its challenge to the proposed Amgen/Horizon transaction. On May 16, 2023, the FTC filed a complaint in the Northern District of Illinois seeking a temporary restraining order and preliminary injunction against the closing of the transaction. Echoing positions announced in its earlier policy statement, the FTC alleges that a merged Amgen and Horizon *could* inflict anticompetitive harm on the pharmaceutical market via cross-market bundling and rebates.[33] Although both Amgen and Horizon develop and supply pharmaceuticals, the FTC alleges neither that they offer competing products nor that one party supplies inputs to the other.[34] Instead, the FTC alleges that Amgen would be able to leverage market power over Horizon's two blockbuster drugs — one for treating thyroid eye disease ("TED") and another for treating chronic refractory gout ("CRG") — by bundling them with counterparts in Amgen's existing portfolio.[35] The FTC posits that the proposed merger could enable the merged firm to offer customers, i.e. PBMs or insurers, discounts that are conditioned on the customer buying multiple drugs from the merged firm.[36] The FTC claims that such discounts could exclude from the market or marginalize future entrants with drugs to treat CRG or TED.[37] These actions mark the first time in over 40 years that a US antitrust agency has challenged a transaction based on a "conglomerate" theory of competitive harm — that is, concerns based on neither direct competition nor a supplier-purchaser relationship between the merging parties — which is now part of the draft Merger Guidelines.[38]

It remains to be seen whether the draft Merger Guidelines will be adopted in their current form and, if adopted, whether they will be persuasive to courts or stand the test of time. Regardless, company legal departments should pay close attention to the Guidelines, which illuminate not only how the agencies will review mergers, but also how the agencies are approaching issues that cut across conduct and merger matters, including market definition and market power.

D. Informal Policy Statements

In addition to their formal policy statements, Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan have talked openly about their policy goals and the tools they intend to employ to achieve those goals. In a March 2023 discussion between AAG Kanter and Chair Khan at the Enforcers Summit, Khan identified Section 3 of the Clayton Act (preventing exclusionary conduct, like exclusive dealing, tying, and required contracts) and the Robinson-Patman Act (prohibiting price discrimination) as key tools for enforcement.[39] AAG Kanter further noted that the DOJ has 20 outstanding investigations brought under Section 8 of the Clayton Act (prohibiting interlocking directorates) and has a record-breaking number of investigations under Section 2 of the Sherman Act (concerning monopolization).[40]

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30 See *id.*

31 Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

32 2023 Merger Guidelines, at 21.

33 Complaint for Temporary Restraining Order and Preliminary Injunction, *Fed. Trade Comm'n v. Amgen Inc.*, No. 23-cv-03053 [hereinafter "Amgen TRO Complaint"] (N.D. Ill. May 16, 2023).

34 *Id.*

35 *Id.* at 21–25.

36 *Id.*

37 *Id.* at 27–28.

38 See *U.S. v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980) (ruling against the DOJ in a case alleging a violation of based on the conglomerate theory of competitive harm).

39 Lina Khan, Chair, Fed. Trade Comm'n and Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just. Welcome and Interviews at 2023 Annual Antitrust Enforcers Summit (Mar. 27, 2023).

40 *Id.*

Similarly, in a December 2022 interview, the FTC's newest commissioner, Alvaro Bedoya, stated that he will be focused on "basic[]" issues that "have a disproportionate impact on society's most disadvantaged," such as groceries, prescriptions, and wages.[41] For example, Bedoya expressed a desire to focus on the effects of hospital and pharmaceutical mergers on consumers without health insurance or financial security.[42] Similar to Khan, he also advocated for reinvigorated enforcement of the Robinson-Patman Act. Bedoya also discussed his interest in the intersection of privacy, data, and antitrust law, and observed that if companies "come to the commission and seek to justify conduct [or mergers] that seem to limit competition, on privacy grounds, they're going to face a lot of questions."[43] These are all laws that have previously not been highly utilized by the antitrust agencies and that few compliance programs address.

III. GUIDANCE WITHDRAWAL

In addition to issuing new policy statements and signaling a more robust enforcement agenda, the DOJ and FTC have withdrawn previous guidance, sometimes without indicating plans for replacement. For example, on February 3, 2023, the DOJ formally withdrew three longstanding pieces of guidance on healthcare conduct, including participation in exchanges of price and cost information, that may have broader implications for treatment of information sharing agreements under U.S. antitrust law.[44] Those policy statements outlined a framework for a safety zone that allowed sharing potentially competitive sensitive information without incurring the risk of antitrust liability, which the agencies had extended beyond healthcare sectors. On July 14, 2023, the FTC withdrew two antitrust policy statements focused on healthcare.[45] These withdrawals removed various "safe harbors" for hospital mergers, group purchasing organizations, and joint ventures, as well as guidance regarding what constituted "reasonable" healthcare information exchanges.[46]

Contemporaneous with the DOJ's withdrawal of guidance in February, Deputy AAG Mekki gave a speech saying that the Agency "[did] not have immediate plans to replace [the guidance]" and that the withdrawals were influenced by the fact that both the healthcare industry and DOJ's understanding of healthcare economics had "evolved" since 1993.[47] With DOJ's withdrawal of the policy statements, companies inside and outside of the healthcare industry should be prepared to reevaluate existing and future projects that would fall under one of the former safety zones. Many activities that were previously within the safety zones remain unlikely to receive serious scrutiny from a U.S. antitrust agency, as agencies cannot unilaterally change underlying case law, but for company legal departments, evaluating the risk calculus associated with information sharing has become significantly more complicated.

IV. PROPOSED RULES

On January 5, 2023, the FTC announced a notice of proposed rulemaking that would ban employers from entering non-compete agreements with their employees.[48] Under proposed rule 16 C.F.R. § 910, it would be an unfair method of competition in violation of Section 5 of the FTC Act for an employer to enter, or attempt to enter, a non-compete agreement with paid or unpaid staff or independent contractors.[49] "The freedom to change jobs is core to economic liberty and to a competitive, thriving economy," FTC Chair Lina M. Khan said in a statement accompanying the publication of the proposed rule.[50] Highlighting the political significance of the FTC's action, President Biden quickly endorsed the proposal,

41 Josh Sisco, *The FTC's newest commissioner speaks*, Politico (Dec. 30, 2022), https://www.politico.com/news/2022/12/30/ftc-commissioner-alvaro-bedoya-interview-00075146.

42 *Id.*

43 *Id.*

44 Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

45 Press Release, Fed. Trade Comm'n Withdraws Health Care Enforcement Policy Statements (July 14, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements.

46 *Id.*

47 Doha Mekki, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0.

48 Press Release, FTC, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition [hereinafter "FTC Non-Compete Press Release"] (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

49 Notice of Proposed Rulemaking for Non-Compete Clause Rule, 88 Fed. R. 3482 [hereinafter "NPRM"] (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. § 910).

50 FTC Non-Compete Press Release.

describing it on Twitter as a "huge win for workers."[51] The proposed rule marks a significant step in the FTC's plans to use its rulemaking authority to sanction conduct it views as deleterious to workers and the economy. As written, it is also a radical departure from current federal antitrust law, which calls for an assessment of the competitive effects of the non-compete clause in a relevant market to determine whether it is unlawful.

There is significant debate about whether the FTC has the authority to enact rules under the UMC prong of Section 5. If the proposed rule is enacted, litigation about the FTC's statutory authority to engage in UMC rulemaking is certain,[52] with the U.S. Chamber of Commerce's CEO writing it "will oppose the proposed regulation with all the tools at our disposal, including litigation."[53]

Nonetheless, compliance officers would benefit from monitoring both federal- and state-level activity surrounding non-compete clauses in employment contracts. The FTC is not the only administrative agency that is scrutinizing non-compete clauses in employment contracts. In May 2023, the National Labor Relations Board's ("NLRB") general counsel issued a memorandum on non-competes, questioning the lawfulness of non-compete provisions in employment contracts and severance agreements in all but limited circumstances.[54] The memorandum notes that "[n]on-compete provisions are overbroad . . . [and] they reasonably tend to chill employees in the exercise of Section 7 rights" under the National Labor Relations Act, which protects employees' ability to self-organize, collectively bargain, and engage in other concerted activities.[55] The memorandum urges scrutiny of non-compete clauses that are not "narrowly tailored to address special circumstances justifying the infringement on employee rights," noting that the NLRB applies a similar standard to provisions in severance agreements.[56]

During the notice-and-comment period for the FTC's proposed rulemaking, twenty state attorneys general submitted a comment in support of the proposed rule.[57] In it, they supported the FTC's proposition that a federal rule limiting non-competes would promote fair competition, which would significantly benefit workers.[58] They identified the healthcare industry, as well as low- and middle-wage workers, in particular, as populations that would reap benefits from the proposed rulemaking, in addition to highlighting its potential to positively impact the U.S. economy as a whole.[59] Notably, the State AG signatories support a functional definition of non-compete clause, an expansive definition for "worker" that could include individuals with franchisee status, and no income threshold for covered workers, while urging the FTC to not impinge upon existing state protections.[60]

Consistent with the comments, an increasing number of state legislatures have passed or are contemplating antitrust legislation that would limit or prohibit the use of non-compete clauses in employment agreements. Four states — California, Minnesota, North Dakota, and Oklahoma — have complete bans on non-competes, over ten states including the District of Columbia limit the use ofnon-competes subject to a statutory earning threshold, and more than a dozen more states have bills pending that would limit or prohibit the use of non-compete clauses. The trend of states prohibiting employee non-competes appears poised to continue, with New York on the brink of passing into law a similar bill, which, if signed into law, would prohibit all employee non-competition agreements. The law would become effective 30 days after New York Governor Kathy Hochul signs it, and would make New York the fifth state to outright ban non-competes. It is quite possible that this trend may snowball, necessitating that many employers not only revamp their onboarding paperwork, but also review for potential enhancement the other means by which they protect their confidential information and goodwill.

This example again highlights the importance of tracking the FTC's policy statements and proposals. An FTC proposal is likely to have ripple effects across other federal agencies and states. Even if this proposed rule is not ultimately issued, the legal landscape for non-compete

51 President Joseph R. Biden (@POTUS), Twitter (Jan. 5, 2023, 2:48 PM), https://twitter.com/potus/status/1611087261243686912.

52 The Chamber's comment to the Commission's proposed non-compete rule alleges the FTC is not authorized under the FTC Act to issue binding regulations related to "unfair methods of competition." Chamber of Com. of the U.S., Comment Letter on Proposed Rule to Ban Non-Compete Clauses Under the FTC Act (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

53 Suzanne P. Clark, Opinion, *The Chamber of Commerce Will Fight the FTC*, Wall St. J., Jan. 22, 2023.

54 Press Release, N.L.R.B., NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

55 Memorandum from Jennifer A. Abruzzo, General Counsel N.L.R.B. to All Regional Directors, Officers-in-Charge, and Resident Officers [hereinafter "NLRB Memo"] (May 30, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583a87168.

56 NLRB Memo at 1–2.

57 Letter from State Attorneys General to Lina M. Khan, Chair, Fed. Trade Comm'n (Apr. 19, 2023), https://www.attorneygeneral.gov/wp-content/uploads/2023/04/2023.04.19-State-AGs-FTC-Comment-Final.pdf.

58 *Id.* at 2–6.

59 *Id.*

60 *Id.* at 12–15.

clauses has shifted. Companies should reevaluate non-compete and non-solicitation clauses contained in their contracts and continue to monitor developments outside the FTC on the issue, especially at the state level.

V. CONCLUSION

The past two years have brought big shifts in antitrust enforcement, but little clear guidance to companies seeking to comply with the law. Agency policy statements, formal and informal, lack the force of law, but can provide helpful insights into the evolving perspective of antitrust enforcement agencies. Company legal departments should carefully monitor policy statements and proposed rulemakings to ensure that antitrust compliance programs and trainings are properly calibrated for the current enforcement environment.

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