

## **Becoming Antitrust Aware in 2024: Top Five Recommendations for the New Year**

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A new year means resolutions which are often centered around self-improvement measures like weight loss, exercise plans, and other health improvement measures. Companies can also benefit from resolutions. Increasing antitrust awareness is not usually on the resolution list but here we offer some ideas for companies as they embark on a new year.

### **Treat antitrust as a priority in 2024.**

As antitrust lawyers, our viewpoint may be biased, and we certainly appreciate that most companies already have a lengthy list of priorities for their in-house and outside legal teams. Given that all companies, regardless of their size, are subject to the antitrust laws, and given the high stakes involved (including criminal penalties and treble damages awards), antitrust certainly deserves to be on the priority list. One relatively easy way to get the ball rolling is to put fresh eyes on your company's antitrust policy. When was the last time it was updated? What type of trainings does your company use to teach the concepts contained in the policy? The training doesn't need to be – and shouldn't be – boring or esoteric. Instead, trainings should be engaging and tailored to the specific antitrust risks that workgroups may face. For example, the sales team will need different antitrust training than those working on supply chain or environmental, social, and governance (ESG) initiatives. Ask your antitrust lawyer to create easy-to-follow, lively online trainings that can be viewed on demand. And if your company doesn't have an antitrust policy, we suggest that creating one be moved to the top (or near top) of the legal department's to-do list in 2024.

### **Understand the current antitrust enforcement priorities.**

2024 will be a significant year for antitrust. It's an election year, which means 2024 may be the Biden Administration's last year to execute on plans that have been in the works since President Biden issued Executive Order 14036, "[Promoting Competition in the American Economy](#)," in July 2021. Some of the Administration's more dramatic plans include significant [revisions to the Hart-Scott-Rodino \(HSR\) premerger notification process](#). While we don't expect all the FTC and DOJ's

sweeping proposals to make it into the HSR final rule, we do expect some changes to be made, and they will likely mean significant additional burdens for filing parties. We also expect to see the [FTC's new rule on non-compete agreements](#). The FTC's proposal would ban most non-compete agreements, and some states have already enacted their own prohibitions on non-compete agreements.

## **If your company engages in M&A, be aware of the new Merger Guidelines.**

The [newest Merger Guidelines](#), addressing both horizontal and vertical mergers, were unveiled in December 2023. One of the most significant changes announced in the 2023 Merger Guidelines are the decreased levels of concentration that will trigger a rebuttable presumption of illegality. Under the new Guidelines, a market share of greater than 30% and a concentration increase of 100 points will be enough to trigger that rebuttable presumption. That is not to say the presumption is the death knell for a transaction, but it does mean that the government enforcement will be aggressive. Also be aware that the 2023 Guidelines introduce new topics, such as labor markets. Early analysis and planning will be critical, requiring involvement of skilled antitrust counsel.

## **Understand that application of the antitrust laws is constantly evolving.**

The language of the core U.S. antitrust laws – the Sherman Act, the Clayton Act, and the FTC Act, hasn't changed, but the application of these laws is always evolving. For example, the antitrust enforcers and private plaintiffs are increasingly focused on labor issues, such as “no poach” agreements and wage fixing. Antitrust enforcers are also focused on private equity, as evidenced by the FTC's recent [lawsuit against Welsh, Carson, Anderson, and Stowe](#) and some of the changes contained in the proposed revisions to the HSR Rules. Technology is also a significant factor that provokes interesting questions that don't have answers, at least not currently. For example, do pricing algorithms lead to price fixing? How will antitrust enforcers deal with artificial intelligence?

## **Pay attention to state antitrust enforcers.**

The federal regulators at the Department of Justice and Federal Trade Commission may get most of the attention, but we must never forget that states have their own antitrust laws and their own antitrust enforcers, who have the power to investigate and bring legal action. Often, the state regulators work collaboratively with their federal counterparts, but the state regulators are free to go their own way, such as those targeting various ESG initiatives. Also bear in mind that states are increasingly blazing new trails, such as bans on non-competes. Thirteen states have also enacted “mini” HSR premerger notification statutes for health care deals. It's always prudent to check the laws of the state or states where business is conducted to determine if there are any state-specific antitrust considerations.

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National Law Review, Volume XIV, Number 18

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