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RECENT TRENDS IN US ANTITRUST ENFORCEMENT

May 18, 2023

Preliminary Note

- Comments during this presentation are based upon:
  - Publicly available information;
  - General observations and experience; and
  - ***Not*** on any specific client case information.

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Agenda

Topics to be discussed today include

Current antitrust enforcement climate

DOJ's renewed focus on monopolization, including criminal enforcement

Increased scrutiny on information sharing

Enforcement in labor markets

Enforcement of Section 8 of Clayton Act (interlocking directorates)

Revival of the Robinson-Patman Act (price discrimination)

CURRENT ANTITRUST ENFORCEMENT CLIMATE

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The Beginning: President Biden's Executive Order

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy.

Articulated the administration's "whole-of-government" approach to address overconcentration, monopolization, and unfair competition in the American economy.

Focused on labor, agriculture, health care, and technology.

Executive Order's Initiatives for FTC and DOJ

- Called on DOJ and FTC to "enforce the antitrust laws vigorously."
- Encouraged DOJ and FTC to review the horizontal and vertical merger guidelines and consider whether to revisit those guidelines.
- Encouraged FTC to exercise its statutory rulemaking authority to "curtail the unfair use of non-compete clauses or agreements."
- Encouraged DOJ and FTC to consider revising the Antitrust Guidance for Human Resources Professionals to "better protect workers from wage collusion."

FTC and DOJ Leadership

Leaders of FTC and DOJ were hand-picked by administration to further its aggressive policies and initiatives on antitrust enforcement.

FTC Chair
Lina Khan

Former legal advisor to FTC Commissioner Rohit Chopra (now head of CFPB) and part of New Brandeis or "hipster antitrust" movement

DOJ AAG
Jonathan Kanter

Former Paul Weiss partner but also staunch advocate for increased antitrust enforcement and vocal critic of market power of "big tech"

Consistent with Executive Order, both leaders have implemented aggressive enforcement agendas in part by withdrawing prior guidance on antitrust enforcement.

FTC's Withdrawal of Policy Statements and Guidance

Withdrawn – 2020 Vertical Merger Guidelines

- Guidelines include "unsound economic theories that are unsupported by the law or market realities."
- Going forward, FTC will work with DOJ (which has not yet withdrawn guidance) to update guidance to better reflect market realities.

Withdrawn – 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

- 2015 Statement established principles to guide agency's exercise of "standalone" authority under Section 5, which essentially subjected standalone Section 5 claims to review under rule of reason.
- 2015 Statement "largely writes the FTC's standalone authority out of existence."
- FTC issued new guidance in 2022 that established expansive interpretation of "unfair methods of competition" in Section 5.

INCREASED SCRUTINY ON INFORMATION SHARING

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DOJ's Withdrawal of Policy Statements and Guidance

Withdrawn – policy statements on antitrust enforcement in health care.

- DOJ and FTC Antitrust Enforcement Policy Statements in the Health Care Area (Sept. 15, 1993)
- Statements of Antitrust Enforcement Policy in Health Care (Aug. 1, 1996)
- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (Oct. 20, 2011)

Companies in health care and other industries long relied on this guidance, most notably for practices involving information sharing, such as benchmarking.

DOJ's Withdrawal of Guidance on Information Sharing

- Many companies benefit from information sharing.
  - Companies gather competitive information for a variety of legitimate business reasons, including market surveys and benchmarking analysis.
  - Exchange of competitively sensitive information alone is not per se illegal.
  - Information exchanges can be per se illegal where there is, e.g., an unlawful agreement to fix prices, rig bids, or allocate markets.
  - Information exchanges are otherwise analyzed under the rule of reason.
- The withdrawn guidance provided safe harbors or a "safety zone" for sharing information.
- Policy statements related to the healthcare industry, but were understood to apply broadly to other industries.

Prior Guidance Recognized Safety Zone that Allowed Companies to Assemble and Provide Competitively Sensitive Information and to Participate in Surveys for Prices

Companies were able to "safely" engage in information exchanges if they met three conditions:

- Data or information collection was managed by a third party.
- Information collected was more than three months old.
- Data that was reported (e.g., price or cost) was based on information from at least five different sources. It had to be aggregated in a way that would make it impossible for one to track specific information to a particular party.

This guidance is no longer valid.

DOJ's Stated Reasons for Withdrawal

Guidance no longer reflects market realities or DOJ's current enforcement priorities.

Withdrawal is best course of action for promoting competition and transparency.

Guidance is overly permissive on certain subjects, such as information sharing, and no longer serve their intended purposes of providing encompassing guidance to the public.

Focus on advent of AI and ability of competitors to instantly sift through large amounts of data and concern that "speed bumps" that were embedded in antitrust safety zones provided in the guidance may no longer be enough.

Going Forward

The withdrawal of DOJ's guidance does not fundamentally change the law.

- Unless there are explicit agreements to limit competition, which are per se illegal, the rule of reason standard applies to information exchanges.
- As of now, there is no complete ban on market surveys or benchmarking.

There is more uncertainty.

- There are no "safety zones" for information sharing.
- DOJ has said it has no current plans to replace the guidance.
- Prior guidance adopting the information sharing "safety zones" remains operative. E.g., DOJ/FTC Antitrust Guidance for HR Professionals at 5 (2016).

There may be increased scrutiny of information sharing practices.

ENFORCEMENT OF SECTION 8 OF CLAYTON ACT (INTERLOCKING DIRECTORATES)

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Section 8 of the Clayton Act – Prohibition on Interlocking Directorates

Section 8 of Clayton Act prohibits any "person" from serving simultaneously as a director or officer of two competing corporations.	• Rationale is that these interlocking directorates have the potential to result in anticompetitive effects, such as allowing competitors to coordinate business decisions and exchange competitively sensitive information. • Violation of Section 8 is a per se violation – does not require any showing of anticompetitive harm to establish a violation.
DOJ's position is that Section 8's prohibition is not limited to natural persons serving simultaneously as a director or officer of two competing corporations.	• Liability might exist where two different agents of one corporation serve as officers or directors of two competing corporations. • In that case, the agents can be considered deputies of the corporation and treated as the same "person" (the corporation).
Limited safe harbors and exceptions to Section 8's prohibitions.	• For example, contains *de minimis* exceptions: (1) where competitive sales of either corporation are under a dollar threshold (currently $4,525,700, but adjusted annually); (2) where competitive sales are less than 2 percent of either corporation's total sales, or (3) where each corporation's competitive sales are less than 4 percent of its total sales.

DOJ's Renewed Focus on Section 8

In April 2022, DOJ announced its intent to enforce Section 8 more aggressively.

- "For too long our Section 8 enforcement has been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates." – AAG Jonathan Kanter

DOJ has followed through on this promise and enforced Section 8 outside of the merger context.

- **October 2022** – DOJ announced that seven directors had resigned from the boards of five companies due to potential Section 8 violations.
- **March 2023** – DOJ announced that five more directors resigned from four corporate boards and one company declined to exercise board appointment rights due to potential Section 8 violations.

Given increased scrutiny, companies should consider assessing whether Section 8's prohibition on interlocks may apply to them and implementing procedures to assess potential interlocks upon the appointment of a new director or officer.

RENEWED DOJ FOCUS ON MONOPOLIZATION

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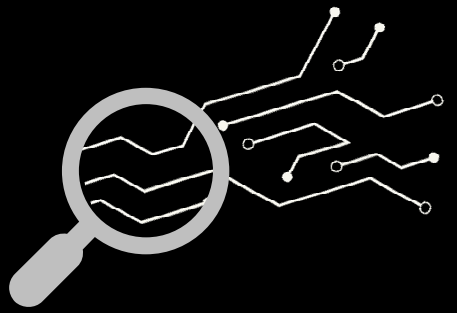
DOJ Focus on Monopolization – "Big Tech"



Historically, FTC frequently pursued enforcement actions involving alleged unlawful monopolization (e.g., Qualcomm, Meta), but DOJ was much less active in this area.

Until recently, DOJ had not brought a significant monopolization action since its famous case against Microsoft in the 1990s.

In 2020, DOJ sued Google for allegedly monopolizing search and search advertising.

In January 2023, DOJ sued Google for also allegedly monopolizing different markets—i.e., multiple digital advertising technology products.

- Consistent with Executive Order's call for scrutiny of "dominant Internet platforms [that] use their power to exclude market entrants, to extract monopoly profits."
- "The Department's landmark action against Google underscores our commitment to fighting the abuse of market power." – AAG Vanita Gupta

DOJ Focus on Monopolization – Criminal Enforcement

Although Section 2 makes monopolization a felony, DOJ had refrained from pursuing Section 2 criminal prosecutions for the last 45 years.

In April 2022, DOJ announced intent to investigate and pursue criminal actions against individuals and companies for violating Section 2 of Sherman Act.

- "[I]f the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law." – AAG Jonathan Kanter

Since then, DOJ has brought two criminal actions against individuals under Section 2: *United States v. Zito* and *United States v. Martinez*.

While both cases involved unusual facts that led to criminal charges, they show DOJ's willingness to pursue criminal actions under Section 2 in certain cases.

ENFORCEMENT IN LABOR MARKETS

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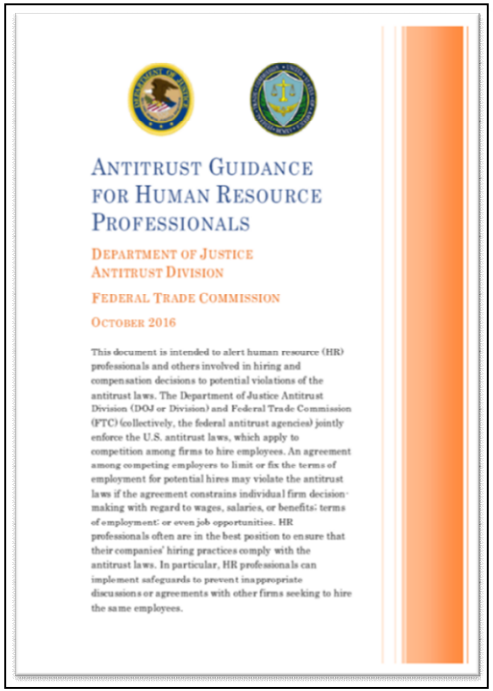
Antitrust Guidance for HR Professionals (Oct. 2016)

Jointly issued by the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ)

- "[I]ntended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."
- Addresses conduct that can result in criminal antitrust or civil liability
- First time announcement
  - "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. 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 regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

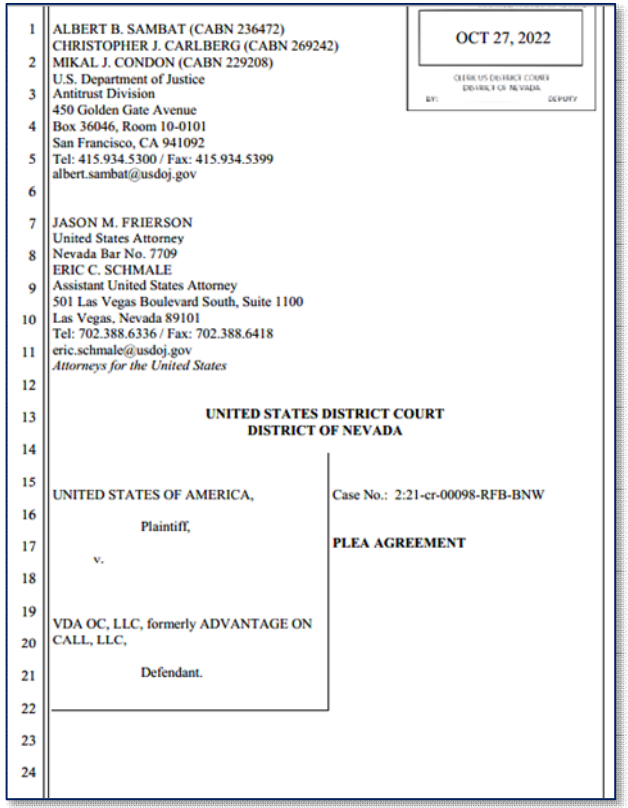
https://www.justice.gov/atr/file/903511/download

Potential Legal Avenues

Criminal Prosecution	• Against individuals, the company, or both
Civil Enforcement	• Against individuals, the company, or both
Private Litigation	• Subject to treble damages • Joint and several liability • Injunctive relief • Attorneys' fees and interest
Potential Plaintiffs	• Department of Justice • Federal Trade Commission • State Attorneys General • Private Parties – Class Actions – Employee Suits

DOJ Criminal Enforcement of "No Poach" and "Wage-Fixing" Agreements

- One negotiated plea agreement
  - Contract healthcare staffing nurses assigned to the Clark County School District during October 21, 2016 until July 1, 2017
  - Conspiracy to (1) allocate nurses with a competitor by not recruiting or hiring each other's nurses, and (2) fix the wages of those nurses by refraining from raising wages of those nurses.
  - Unique case factors
  - Sentence: $62,000 fine, $72,000 in restitution, $400 special assessment
    - *US v. VDA OC, LLC* (D. Nev. Oct. 27, 2022)
  - Regional Manager, Pretrial Diversion resulting in 180 hours of community service and dismissal of indictment
    - *US v. Ryan Hee* (D. Nev. Jan. 23, 2023)



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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,
v.
VDA OC, LLC, formerly ADVANTAGE ON CALL, LLC,
Defendant.

Case No.: 2:21-cr-00098-RFB-BNW

PLEA AGREEMENT

DOJ Criminal Enforcement of "No Poach" and "Wage-Fixing" Agreements

- Four DOJ cases proceeded to trial
- Sherman Act count results

Case Name	Date	Allegation	Result
United States v. Jindal (E.D. Tex.)	April 14, 2022	Two individuals accused of conspiring with competitor to fix wages for physical therapists and their assistants	Jury Acquittal
United States v. Davita (D. Colo.)	April 15, 2022	Davita and former CEO accused of conspiring with competitors not to hire each other's senior-level employees	Jury Acquittal
United States v. Manahe (D. Me.)	March 22, 2023	Four operators of home-health agencies accused of conspiring to fix wages for caretakers	Jury Acquittal
United States v. Patel (D. Conn.)	April 28, 2023	Individuals accused of conspiring to allocate employees in aerospace industry	Court grants Motion for Judgment of Acquittal (Rule 29)

DOJ Criminal Enforcement of "No Poach" and "Wage-Fixing" Agreements

Active area of litigation

- Whether no-poach and wage-fixing agreements are per se unlawful, and thus unreasonable, restraint of interstate trade and commerce under Section 1
- DOJ's position is that naked agreements are per se unlawful
- Continued subject of litigation
- Fact-specific inquiry based on recent cases

DOJ Continued Enforcement

"We very much think that these [labor market] cases are worthy. And so we are going to continue to bring them."

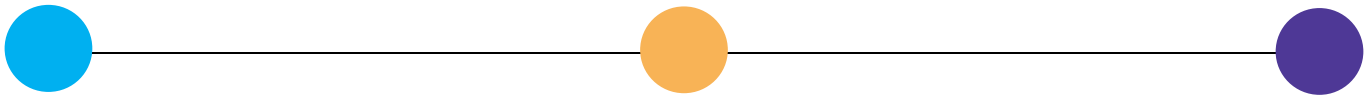
– **Deputy Assistant Attorney General Manish Kumar**

Agency Update with the U.S. Department of Justice, Antitrust Division, American Bar Association Antitrust Law Section's 71st Antitrust Law Spring Meeting (March 29, 2023)

https://www.justice.gov/opa/video/agency-update-us-department-justice-antitrust-division-aba-annual-antitrust-spring-meeting

FTC's Proposed Noncompete Rule – Background

- FTC has also been hyper focused on antitrust enforcement in labor markets, particularly with respect to the use of noncompetes with employees.



January 2020
FTC held public workshop focused on whether there is legal basis and empirical support for rule restricting use of noncompetes.

July 2021
Executive Order encouraged FTC to use statutory rulemaking authority to "curtail the unfair use of non-compete clauses or agreements."

January 2023
FTC's first-ever enforcement actions over noncompetes.

- In January 2023, FTC proposed rule that would ban employers from imposing noncompetes on their workers.

FTC's Proposed Rule

Text of proposed rule:

- *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 an enforceable non-compete clause.

Proposed rule would:

- Ban noncompetes with "workers"
  - Broad definition of "workers": any person "who works, whether paid or unpaid, for an employer."
- Require recission of existing noncompetes, with notice to workers.

Only exception in connection with sale of business, for noncompetes applicable to "substantial owners," defined to mean those owning more than 25% of business.

Application of FTC's Rule

Rule would apply nationally to the full extent of FTC jurisdiction.

- FTC lacks jurisdiction over "banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921."
- FTC lacks jurisdiction over most nonprofit organizations.

No penalties or private causes of action specified in rule, but FTC may explore fines and rule could be incorporated automatically into state "Little FTC Acts."

- Twenty states have Little FTC Acts that explicitly incorporate and require deference to FTC interpretations of "unfair methods of competition"
- Those state statutes permit civil penalties, and most permit private rights of action, several with treble damages.

Next Steps on FTC's Proposed Rule

Comment period ended on April 19.

Possible next steps by the agency:

- Reopen the comment period
- Issue a new proposed rule
- Terminate its rulemaking, or
- Move on to a final rule

FTC will likely pass rule in some form, but rule will face several potential legal challenges, including that the agency lacks authority to engage in "unfair methods of competition" rulemaking.

REVIVAL OF THE ROBINSON-PATMAN ACT

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Robinson-Patman Act (1936)

- Prohibits unfair practices that prevent smaller retailers from competing with larger competitors.
  - Price discrimination by sellers (i.e., sellers charging competing buyers different prices for the same goods)

FTC's June 2022 Policy Statement

FTC identified Robinson-Patman Act as a potential enforcement tool.

- Potential legal authority that may apply to rebates and fees paid by pharmaceutical drug manufacturers to PBMs and other intermediaries to steer patients to high-cost drugs in lieu of lower-cost alternatives.
- "[P]aying or accepting rebates or fees in exchange for excluding lower-cost drugs may violate Section 2(c) of the Robinson-Patman Act, which prohibits payments to agents, representatives, and intermediaries who represent another party's interests in connection with the purchase of sale of goods."

FTC views the relationship between drug manufactures and PBMs as "commercial bribery," which the Robinson-Patman Act prohibits.

Commissioner Bedoya's September 2022 Statement

Commissioner Bedoya highlighted the importance of the Robinson-Patman Act in preventing price discrimination among large retailers in all industries.

> He stated when Congress passed the Robinson-Patman Act in 1936, the intent was to ban "unfair practices" like "secret discounts" and secret rebates."

> "Certain laws that were clearly passed under what you could call a fairness mandate – laws like Robinson-Patman – directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them."

FTC's investigation of Coca-Cola and PepsiCo (2023)

FTC opened an investigation into Coca-Cola and PepsiCo for price discrimination in the soft drink market under the Robinson-Patman Act.

There are reports that the FTC is contacting large retailers to gather data on pricing, rebates, promotions, and discounts.

This demonstrates FTC's renewed and continued interest in and reliance on the Robinson-Patman Act to bring price discrimination cases.

QUESTIONS?

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Biography

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Brendan is the deputy practice group leader of the firm's global antitrust practice and leads the firm's Philadelphia antitrust practice. Brendan represents market-leading US and international companies in complex, high-stakes antitrust lawsuits. These disputes often involve alleged price fixing, market allocation, exclusive dealing, monopolization, group boycotts, price discrimination, tying, bundling, standards development, and other alleged violations of federal and state antitrust law.

Biography

William T. McEnroe
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Will represents US and international clients in a variety of high-stakes complex commercial matters with a focus on antitrust, commercial, and white collar litigation and investigations. Will frequently helps clients defend against allegations of price fixing, monopolization, unfair competition, False Claims Act violations, and commercial disputes. Will also counsels businesses on antitrust and litigation risks, advises on risk management strategies, and leads antitrust compliance and training seminars.

Biography

Mark L. Krotoski
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Mark is a Litigation Partner in the Antitrust Practice Group and former Assistant Chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, supervising international criminal antitrust cartel investigations and successfully leading trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives.

- His experience includes handling every phase of the cartel enforcement process.
- In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.
- Mark represents and advises clients on antitrust cartel investigations; white collar and government investigations; cybersecurity and privacy matters; trade secret; fraud matters.

Biography

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Jordy focuses her practice on antitrust matters, including government antitrust investigations, antitrust litigation, and mergers and acquisitions. Prior to joining Morgan Lewis, Jordy served as an enforcement attorney at the Federal Trade Commission (FTC). At the FTC, she was part of the Health Care Division of the Bureau of Competition, where she investigated and litigated antitrust matters in the pharmaceutical industry and health information technology industry.

Biography

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Pat assists clients in antitrust matters, with a focus on antitrust litigation and government antitrust investigations. Pat previously served as an enforcement attorney at the Federal Trade Commission (FTC), where he was part of the Health Care Division of the Bureau of Competition. While at the FTC, Pat investigated and litigated antitrust matters primarily in the pharmaceutical industry and health information technology industry.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
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Miami
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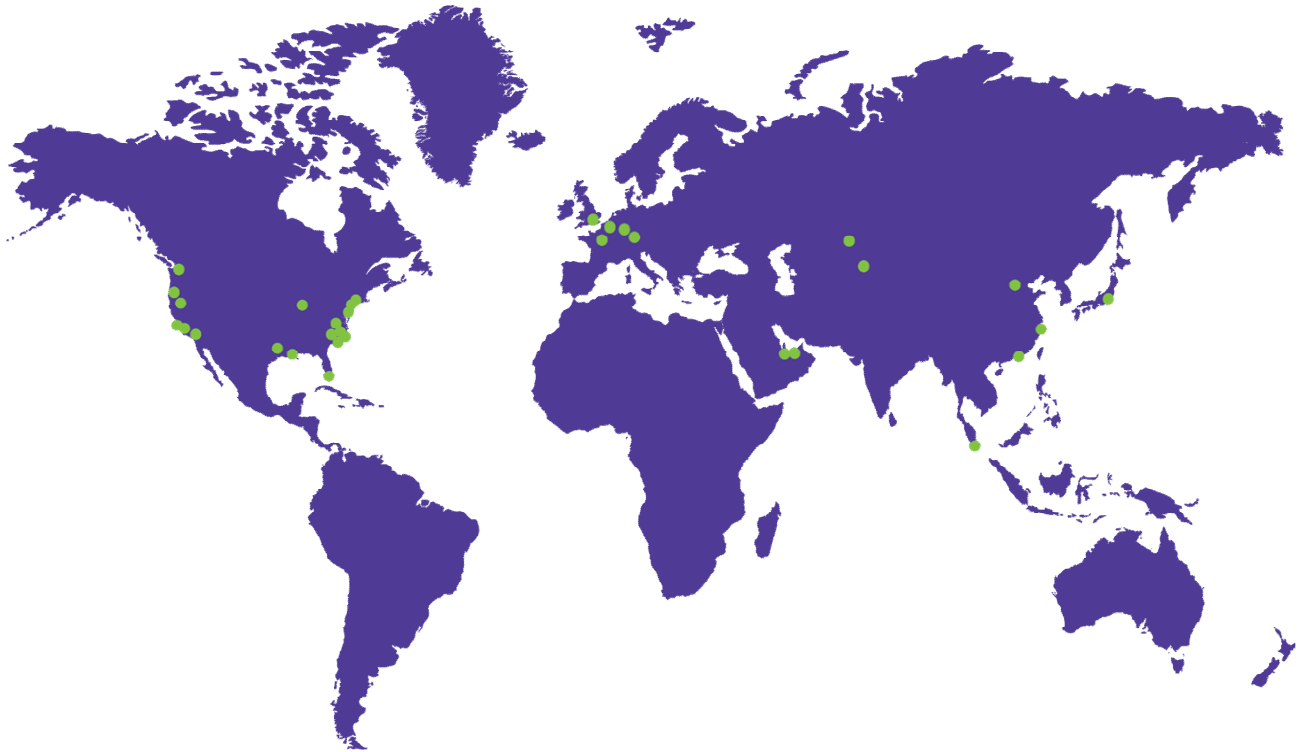

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