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S&C memo

February 4, 2025

Antitrust Developments During the Presidential Transition

A Flurry of DOJ and FTC Activity During the Final Days of the Biden Administration Included New Enforcement Suits, Settlements, and Regulatory Actions That Will Continue to Play Out in the New Administration.

The transition of federal antitrust leadership is underway. Andrew Ferguson, an FTC Commissioner since 2023, assumed the Chairman role. And Gail Slater, a former advisor to Vice President JD Vance, is the nominee for Assistant Attorney General in charge of the DOJ Antitrust Division. Pending Ms. Slater's confirmation, Omeed Assefi has taken over leadership as interim head of the Division. As the new leadership assumes responsibility, they inherit a long list of new enforcement lawsuits and other regulatory actions that the prior leadership undertook shortly before the transition. These include (i) two new FTC enforcement actions under the long-dormant Robinson-Patman Act challenging favorable pricing and promotions that were provided to large retailers; (ii) an FTC action against Deere & Co. alleging monopolization of certain aftermarket repair services (commonly referred to as the "right to repair"); (iii) an amended complaint expanding DOJ's suit against RealPage Inc. alleging algorithmic price fixing to add the nation's largest landlords as defendants; (iv) new joint antitrust guidelines related to labor and employment practices; (v) a DOJ action alleging that KKR & Co. Inc. repeatedly failed to file required premerger notifications under the HSR Act; (vi) the approaching implementation of the new HSR Act premerger notification form; and (vii) a number of additional actions.

I. REVIVAL OF THE ROBINSON-PATMAN ACT (*SOUTHERN GLAZER'S* AND *PEPSI*)

The FTC filed two lawsuits alleging violations of the Robinson-Patman Act, 15 U.S.C. § 13 ("RPA"), by Southern Glazer's Wine and Spirits, LLC ("Southern Glazer's") and PepsiCo, Inc. ("Pepsi"). The lawsuits

mark the first time in twenty-five years that the FTC has brought a claim under the RPA, which prohibits suppliers of goods from "discriminat[ing]" in the prices and promotional allowances that they offer to their customers in certain circumstances.[1]

First, on December 12, 2024, the FTC filed an action in the U.S. District Court for the Central District of California against Southern Glazer's—the largest distributor of wine and spirits in the United States—alleging that Southern Glazer's violated Section 2(a) of the RPA by "selling wine and spirits to small, independent 'mom and pop' businesses at prices that are drastically higher than the prices Southern [Glazer's] charges large national and regional chains."[2] Section 2(a) makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be" to injure competition. 15 U.S.C. § 13(a). The FTC alleges that Southern Glazer's, through a variety of pricing mechanisms, "routinely charges small, independent retailers . . . more for the same bottles of certain wine and spirits than national and regional chains in the exact same geographic area," and by doing so harms the ability of the small businesses to compete with the larger chain stores.[3] Addressing two available defenses under Section 2(a), the FTC adds that such "price discrimination . . . is not justified by differences in Southern[] [Glazer's] cost of distributing products to the different retailers, nor does it reflect bona fide attempts to meet prices offered to chain retailers by competing distributors."[4]

Second, on January 17, 2025, the FTC filed an action in the U.S. District Court for the Southern District of New York against Pepsi, alleging that Pepsi violated Section 2(d) and (e) of the RPA.[5] Section 2(d) and (e) prohibit advertising and promotional allowances that are not available to other customers on "proportionally equal terms." 15 U.S.C. § 13(d), (e). Unlike price discrimination under Section 2(a), which requires a showing of competitive harm and is subject to exceptions including cost justification (*e.g.*, delivery efficiency), "the only escape Congress has provided for" Section 2(d) and (e) "is the permission to meet competition."[6] The FTC's complaint remains under seal. However, as described in its press release, the FTC alleges that Pepsi "provid[ed] its favored large, big box retailer customer with promotional payments and allowances" and "various advertising and promotional tools," "without making those benefits available to its competitors on a similar basis."[7] Although the FTC has not named the retailer, it has been publicly reported to be Walmart.[8]

These RPA enforcement actions were not unexpected. In addition to news reports that revealed the investigations preceding the suits, the FTC had signaled during recent years its interest in reviving the RPA.[9] The RPA had long been dormant after falling out of favor as allegedly being "excessively concerned with the protection of small business at the expense of more efficient rivals."[10] However, the RPA's focus on protecting small business aligns with the Biden Administration's concern about the aggregation of economic power. Consistent with this approach, in *Southern Glazer's*, the FTC's complaint describes the RPA as enacted to combat the fear that "a small clique of 'Goliath' chain corporations would undercut, impede, and eliminate competition from local, community-based businesses selling the same products."[11]

The vote to bring each complaint was 3 – 2, with both Republican commissioners dissenting. In *Southern Glazer's*, Commissioner Melissa Holyoak issued an 88-page dissent in which she took issue with the sufficiency of the majority's allegations concerning harm to small business competitors.[12] Although a line of cases has concluded that injury to disfavored customers due to the lower price received by the favored customer is sufficient to show harm under Section 2(a) of the RPA, Holyoak argued that this approach is out of step with modern antitrust, which at least in contexts outside the RPA requires a showing of harm to the competitive process, not merely to competitors.[13] In a separate dissent, then-Commissioner Ferguson reserved judgment on this issue, but endorsed a number of additional criticisms that Holyoak made of the FTC's *Southern Glazer's* complaint, including that potential defenses that the discounts were cost-justified and served to meet competition appeared plausible.[14]

The dissenters' criticisms in *Pepsi* were even more pointed. Commissioner Holyoak referred to *Pepsi* as "the worst case I have seen in my time at the Commission," and accused the majority of improperly framing a standard price discrimination case as a promotional payments case under Section (d) and (e), in order to avoid Section 2(a)'s harm requirement.[15] Commissioner Ferguson lamented the "gaping holes in the evidence that Commission staff collected in its limited investigation," including the absence of any evidence regarding promotions at competing stores.[16] Ferguson attributed these shortcomings to a rushed effort to bring the case ahead of the change in presidential administrations, characterizing the complaint as "a cynical attempt to tie the hands of the incoming Trump Administration."[17]

Whatever the path forward for the RPA, these dissents suggest the possibility for an adjustment relating to the *Pepsi* lawsuit once the Republican majority is in place at the FTC. Although Commissioner Ferguson wrote that there had been bipartisan agreement that enforcement of the RPA would be appropriate under certain circumstances going forward, the *Pepsi* complaint "un[did] much of that progress by turning the [RPA] into a political bludgeon."[18] Commissioner Ferguson further commented that it "deals a mighty blow to the prospect of bipartisan Commission support for renewed enforcement of the Robinson-Patman Act."[19]

II. THE "RIGHT TO REPAIR" (*DEERE & CO.*)

On January 15, 2025, the FTC and the States of Illinois and Minnesota filed an action in the U.S. District Court for the Northern District of Illinois against Deere & Company ("Deere"), alleging that Deere violated Section 5 of the FTC Act, Section 2 of the Sherman Act, and state law analogues by monopolizing the market for certain aftermarket repairs of Deere's agricultural equipment.[20] The FTC and plaintiff states allege that Deere has monopolized "repair services that require the use of a fully functional repair tool" by limiting access to Deere's Service Advisor repair tool to authorized dealers.[21] Given Deere's "increasingly sophisticated agricultural equipment," limiting Service Advisor to Deere's authorized dealers allegedly forces farmers to use Deere's authorized dealers for repairs, inflating repair costs and degrading the ability

to obtain timely repairs.[22] Doing so also increases the cost of spare parts for farmers, since authorized dealers predominantly use more expensive Deere-brand parts.[23]

The complaint alleges that competition in the upstream market for agricultural equipment does not constrain Deere's conduct in the repair tool market, because (i) Deere also has monopoly power in the markets for large tractors and combine harvesters, (ii) customers have high switching costs, and (iii) customers have limited ability to accurately assess the lifetime cost of a product (including repairs) at the time of initial purchase.[24] The FTC contends that a Customer Service Advisor tool made available to equipment owners and independent repair providers is inferior to and offers fewer capabilities compared to the full Service Advisor tool that Deere makes available to its authorized dealers.[25] The FTC and plaintiff states seek to require Deere to make the fully functional Service Advisor tool available to independent repair providers and equipment owners on reasonable, nondiscriminatory terms.[26]

The *Deere* action aligns with the "right to repair" movement, based on the concept that end users should be allowed to freely repair the products they own. In May 2021, the FTC submitted a report to Congress regarding anticompetitive practices related to repair markets.[27] And in July 2021, former President Biden signed an executive order that, among other priorities, called on the FTC to further police "unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment."[28] Right to repair has also been a topic of state legislative efforts. In 2023, Colorado became the first state to pass legislation requiring that manufacturers provide the necessary information and software for farmers to repair their own equipment.[29]

The FTC vote to file suit was 3 – 2, along party lines. Commissioner Ferguson, joined by Commissioner Holyoak, dissented. However, *Deere* may have more staying power than the vote count standing alone may suggest. Commissioner Ferguson criticized the suit as a partisan choice to bring suits at the end of the Biden Administration; argued that the evidentiary record was underdeveloped, particularly with respect to the form and function of the repair market; and characterized the suit as "imprudent" given ongoing settlement negotiations.[30] However, he also stated that he was "glad the [FTC] is taking up the cause of the farmer," and that his "vote today should not be understood as a vote against amending the complaint to allow States to join."[31] Accordingly, a complete change of course in *Deere* may be unlikely.

III. ALGORITHMIC PRICING (*REALPAGE*)

On January 7, 2025, the DOJ and ten state co-plaintiffs filed an amended complaint in their action against RealPage Inc. ("RealPage").[32] The amended complaint adds defendants consisting of the nation's largest landlords—Greystar Real Estate Partners LLC, Blackstone's LivCor LLC, Camden Property Trust, Cushman & Wakefield Inc. and Pinnacle Property Management Services LLC, Willow Bridge Property Company LLC, and Cortland Management LLC ("Cortland")—which together operate more than 1.3 million

rental units.[33] Concurrently with filing the amended complaint, DOJ announced a proposed consent decree that would resolve its claims against Cortland. Under the consent decree, Cortland would cooperate with DOJ in its investigation and litigation.[34]

The amended complaint closely tracks DOJ's original complaint against RealPage, filed on August 23, 2024. RealPage sells software that provides rental price recommendations to landlords based on a software algorithm that allegedly incorporates and combines non-public, competitively sensitive information provided by the landlords.[35] DOJ alleges that the software is designed to help landlords raise prices, including by using competitively sensitive information to construct elasticity estimates that allow extracting more money from renters ("hidden yield") and by using "guardrails" to favor price increases over decreases.[36] According to RealPage, DOJ alleges, "[o]ur tool [] ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions."[37]

DOJ alleges that RealPage and the landlords violate Section 1 of the Sherman Act (i) by sharing competitively sensitive information for use in competitor pricing, and (ii) through agreements with RealPage to use its software to price their rentals.[38] Although landlords can accept or reject RealPage's price recommendations, DOJ alleges that RealPage takes multiple steps to influence landlords to accept its recommendations, such as an "auto accept" feature making it more difficult to accept than decline recommendations.[39] RealPage allegedly promotes its software by telling landlords that "a rising tide raises all ships," and that a RealPage vice president described the benefit of its software as "there is greater good in everybody succeeding versus essentially trying to compete against one another."[40]

In addition, DOJ alleges that RealPage maintains a monopoly in violation of Section 2 of the Sherman Act in a market for commercial revenue management software, with an alleged market share of at least 80%.[41] DOJ alleges that RealPage's trove of competitively sensitive data excludes potential rivals, which cannot compete unless they similarly enter agreements with landlords to share competitively sensitive data.[42] RealPage's conduct allegedly "creates a self-reinforcing feedback loop of data and scale advantages."[43]

While the RealPage lawsuit is one of the first major government enforcement actions targeting pricing software, the DOJ and FTC previously have filed statements of interest in private antitrust litigation targeting algorithmic pricing, including a pending multi-district litigation against RealPage and various landlords and a class action against hotel groups that allegedly use a revenue platform to coordinate room prices.[44]

IV. NEW LABOR GUIDELINES

On January 16, 2025, the DOJ and FTC issued joint "Antitrust Guidelines for Business Activities Affecting Workers" (the "Labor Guidelines" or "2025 Guidelines") (available here). The 2025 Guidelines replace the 2016 Antitrust Guidance for Human Resource Professionals (the "2016 Guidance"), and explain how the agencies approach potential antitrust violations in the labor and employment context. The 2025 Guidelines,

like the 2016 Guidance, are based on the principle that the antitrust laws protect competition for labor in addition to competition for goods and services. The Labor Guidelines explain that companies can compete to hire employees in the labor market even if the companies sell different products or services.[45]

The 2025 Guidelines address and expand on the topics covered by the 2016 Guidance:

- **Wage-Fixing Agreements**: Agreements between different businesses about workers' wages or other terms of compensation continue to be subject to antitrust scrutiny, and may lead to criminal or civil liability. The 2025 Guidelines add that alignment on a range, ceiling, or benchmark for calculating wages may lead to liability, even if there is no agreement on a specific wage.[46]
- **No-Poach Agreements**: Agreements between businesses not to hire, solicit, or otherwise compete for workers continue to be prohibited regardless of their effects (*e.g.*, whether they actually result in lower wages). For example, businesses typically may not agree not to "cold call" one another's workers. The 2025 Guidelines also specifically address no-poach agreements in the franchise context, and state that agreements between franchisors and their franchisees not to compete for works may be per se unlawful, and that a franchisor may also violate the law by organizing or enforcing a no-poach agreement among franchisees.[47]
- **Exchange of Competitively Sensitive Compensation Information or Terms of Employment**: Sharing competitively sensitive information about terms and conditions of employment continues to be an antitrust concern. Whereas the 2016 Guidance had suggested that information exchanges managed by a neutral third party may be lawful subject to certain protections, the 2025 Guidelines have a more restrictive focus, and state that exchanging information through an algorithm or a third party's product can be unlawful if the exchanged information includes non-public information about compensation or terms of employment.[48]

In addition, the 2025 Guidelines cover a number of topics that are new since the 2016 Guidance:

- **Non-Compete Clauses**: Non-compete clauses can violate the antitrust laws where they unreasonably restrict workers from switching jobs or starting a new business. In August 2024, the U.S. District Court for the Norton District of Texas invalidated the FTC final rule that would have prohibited most non-compete clauses in employment agreements, and that ruling currently is on appeal. The 2025 Guidelines emphasize that, even absent the final rule, the FTC can continue to bring case-by-case enforcement actions.[49]
- **Other Restrictive Conditions**: Additional conditions may be unlawful where they prevent workers from moving to or starting a new business. The 2025 Guidelines describe the following examples: (i) non-disclosure agreements, particularly where they include broad language prohibiting disclosure of any information that is "usable in" or "relates to" an industry; (ii) broad non-solicitation agreements that prevent soliciting former clients or customers, depending on the facts or circumstances; (iii) requirements that a worker repay any training costs if they leave their employer; and (iv) exit fee and liquidated damages provisions that require workers to pay a financial penalty for leaving their employer.[50]
- **False earnings claims**: The 2025 Guidelines state that the agencies may take action against businesses that make false or misleading claims about potential earnings, including by advertising that workers will earn more in compensation than they actually will.[51]
- **Independent Contractors**: The 2025 Guidelines emphasize that the antitrust laws apply to conduct directed to independent contractors, not only employees. For example, it would be unlawful for two platform businesses to fix the compensation of independent contractors offering their services on the platforms.[52]

The FTC approved the guidelines by a 3 – 2 vote, with Commissioner Ferguson issuing a brief dissent in which Commission Holyoak joined. Commissioner Ferguson's dissent did not take issue substantively with the guidelines, but stated that "the lame-duck Biden-Harris FTC should not replace existing guidance mere days before they hand over the baton," and that doing so was a "senseless waste of Commission resources" since "[t]he Biden-Harris FTC has no future."[53] This criticism was a recurring theme of Commissioners Ferguson and Holyoak's dissents in the last days of the Biden Administration. Given their criticism of the process but not substance of the 2025 Guidelines, it is plausible that the 2025 Guidelines will remain in force.

v. HSR ACT VIOLATIONS (*KKR & CO.*)

On January 14, 2025, DOJ filed a civil complaint in U.S. District Court for the Southern District of New York against KKR & Co. Inc. and over a dozen of its investment funds (collectively, "KKR"). DOJ alleges that KKR failed to comply with premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") in connection with at least 16 transactions during 2021 and 2022.[54] The HSR Act requires that parties to certain mergers and acquisitions must provide pre-closing notice to the FTC, including submitting certain transaction-related documents under Item 4 of the HSR Act premerger notification form. Failure to comply with filing requirements can lead to fines of up to $53,088 per day.[55]

DOJ alleges that KKR omitted required Item 4 documents for 10 transactions, altered Item 4 documents prior to submission in eight transactions, and failed to provide required premerger notifications for two transactions. For example, for one transaction DOJ alleges that KKR omitted from its Item 4 documents an investment committee presentation that contained "detailed information about the competitive implications of the proposed transaction," including analysis of the "commercial benefits to KKR of acquiring" the target company and merging it with a competing company in KKR's portfolio.[56] The report was shared with officers and directors a few days before KKR made its HSR filing.[57] The complaint quotes a KKR employee as describing her approach to HSR compliance as "I've always been told less is more," accompanied by a smiley face emoticon.[58]

In another example, a KKR partner allegedly marked the "Competitive Behavior" section of an investment committee report "need to revise for HSR purposes" a month after the report had already been presented to the investment committee.[59] The deal team member then allegedly deleted the relevant section of the report before submitting it with the HSR filing.[60] DOJ also alleges that KKR failed to submit HSR filings for a transaction valued at $6.9 billion and another transaction valued between $376 and $919 million.[61]

DOJ calculates the maximum statutory penalty for KKR's violations as more than $650 million, calculated based on a "violation of the HSR Act for more than ten thousand days since early 2021," counting separately each of the 16 transactions.[62]

KKR filed a countersuit against the DOJ and FTC on the same day as DOJ's action. In its countersuit, KKR alleges that DOJ is seeking unprecedented penalties for "alleged pre-merger paperwork errors that were immaterial to antitrust clearance."[63] KKR claims that DOJ's action is motivated by a political agenda to "deter mergers" and that the agencies "have made no secret of their hostility towards mergers and acquisitions involving the private equity industry."[64] KKR seeks a declaratory judgment that it did not violate the HSR Act and that the penalties requested by DOJ are unconstitutionally excessive.[65]

The implications of DOJ's suit are particularly significant in light of forthcoming changes to the premerger notification form, addressed below, which will increase substantially the complexity of premerger filings.

VI. NEW HSR FORM

On November 12, 2024, the Federal Register published the FTC's final rule revising the requirements of the HSR Act premerger notification form and accompanying instructions. The final rule will go into effect on February 10, 2025. Although subject to a litigation challenge by the Chamber of Commerce, the 5 – 0 vote approving the revised form, together with the additional burdens that would be entailed in reversing notice and comment rulemaking, indicate that a significant near-term change by the antitrust agencies is unlikely. The new HSR form therefore appears here to stay, at least for the immediate future.

The final rule establishes three categories of transactions:

1. **Overlap Filings** (estimated by the FTC to be 45% of future HSR filings): Transactions "where the parties report at least one NAICS code overlap or have an existing overlap or supply relationship."
2. **No Reportable Overlaps** (47% of estimated filings): Transactions with "no reportable competitive overlaps (*e.g.*, where an investment fund is buying or selling a portfolio company with no NAICS or competitive overlap or supply relationship)."
3. **Select 801.30 Transactions** (8% of estimated filings): Executive compensation transactions and certain other transactions reportable under HSR Rule 801.30, in which the buyer is making open market purchases or acquiring voting securities or non-corporate interests from holders other than the issuer and will not acquire control of the target or board representation rights.

The new HSR form will impose significant new burdens on parties filing premerger notifications under the HSR Act, particularly parties to the estimated 92% of reportable transactions that will not qualify as "select" Rule 801.30 transactions.

The revised form requires the parties to submit narrative explanations regarding the transaction and participating parties. This includes:

- The parties must "identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees."[66]
- The parties must describe their "principal categories of products and services," including any "current or known planned product or service of the acquiring person that competes with (or could compete with) a current or known planned product or service of the target." The parties are instructed not to "exchange information for the purpose of answering this item." Where the parties self-identify

overlapping products (so-called "overlap filings"), they must provide (i) sales revenue, or alternative data for non-revenue products; (ii) a "description of all categories of customers" of the product or service, or details about a product still in development, and (iii) the top 10 customers within each customer category.[67]

- Filing parties must describe any supply relationships between the buyer and target, including the amount of revenue involved and the top 10 customers other than the transaction counterparty.[68]

The revised form also significantly expands the categories of documents that must be submitted as part of the premerger filing. These include:

- In addition to documents prepared by or for officers and directors, the parties must submit all studies, surveys, analyses, and reports prepared by or for the "supervisory deal team lead" that evaluate the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. The supervisory deal team lead is defined as the "individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer."[69]
- Parties to overlap transactions must submit "plans and reports" prepared within one year of the filing date that "analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target."[70] Filers should submit one year's worth of (a) "regularly prepared" annual, semi-annual, or quarterly plans or reports that were provided to the CEO, and (b) all plans and reports that were provided to the board of directors, not only those that are regularly prepared.
- All transaction-related agreements "including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements."[71]
- English language translations for any documents not in English included in the filing.[72]

The FTC vote approving the final rule was 5 – 0. In a concurring statement, then-Commissioner Ferguson stated that the final rule was the "culmination of [] negotiations," and that, although it is not the rule he would have written were he the "lone decision maker," "it is a lawful improvement over the status quo."[73] He further noted that "the [FTC] wisely accompanies the Final Rule with a lifting of the ban on early termination."[74]

VII. ADDITIONAL ACTIONS

The DOJ and FTC took a range of additional actions in the last weeks of the Biden Administration. These included:

- ***Grubhub Settlement***. On December 17, 2024, the FTC, together with the Illinois Attorney General, announced a proposed settlement with Grubhub Inc. ("Grubhub") to resolve allegations that Grubhub listed unaffiliated restaurants on its platform in order to build scale, hid the true cost of delivery from customers, and misled delivery drivers about potential earnings.[75] In addition to claims for unfair and deceptive practices under Section 5 of the FTC Act, the FTC alleged that listing unaffiliated restaurants on its platform and concealing delivery fees were unfair methods of competition because the practices were "deceptive and coercive" and "enable[d] Grubhub to gain customers, divert sales from rivals, grow its operations, and gain an unfair advantage over competing delivery services."[76] The settlement included a judgment of $140 million, which was largely suspended except for $25 million due to Grubhub's inability to pay the full amount, and Grubhub agreed to cease the relevant conduct.[77]

- ***AmexGBT/CWT Acquisition***. On January 10, 2025, DOJ filed suit in the Southern District of New York to enjoin the acquisition of CWT Holdings LLC ("CWT") by Global Business Travel Group Inc. ("Amex GBT"). DOJ alleges that Amex GBT and CWT are the largest and second-largest travel management companies, respectively, and offer various travel-related service and technologies for business customers. DOJ alleges that Amex GBT and CWT are direct competitors and operate in a highly concentrated space, where by one estimate the top three players have a combined 70% share. Trial currently is scheduled for September 2025.[78]

- ***Labor Exemption Policy Statement***. On January 14, 2025, the FTC issued a "Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability" (the "Policy Statement").[79] Under Section 6 of the Clayton Antitrust Act of 1914 and Section 1 of the Norris-LaGuardia Act of 1932, the labor exemption to the antitrust laws creates a shield from antitrust liability for workers that engage in protected bargaining and organizing activities.[80] The Policy Statement sets out the FTC's position that the labor exemption, which it is settled applies to employees, also applies to workers who are independent contractors. As a result, the FTC stated that it will not bring enforcement actions against protected labor organizing or bargaining activity by independent contractors. However, the FTC noted that the Policy Statement does not bind private plaintiffs or other enforcement agencies, which could pursue antitrust claims.

- ***PBM Study Interim Staff Report***. On January 14, 2025, the FTC published a second interim staff report regarding pharmacy benefit managers ("PBMs"). The report stems from an investigation that the FTC began in 2022 under Section 6(b) of the FTC Act regarding the impact of PBMs on prescription drug access and affordability.[81] The FTC staff's first interim report, published on July 9, 2024, concluded that vertical integration and concentration had provided the PBMs with significant pricing power, as well as the incentive and ability to prefer their own affiliated pharmacies to the detriment of smaller independent pharmacies, among other findings.[82] The second interim staff report found that the three largest PBMs imposed significant mark-ups on a number of specialty generic drugs, 22% reimbursed at rates of more than 1,000% of their estimated acquisition cost.[83] A relatively high portion of specialty generic drugs with the highest markups were dispensed by PBM affiliate pharmacies, relative to unaffiliated pharmacies.[84]

- ***Cigna/CVS CID Enforcement***. On January 17, 2025, then-Chair Lina Khan issued a statement that the FTC staff had filed petitions to enforce compliance with civil investigative demands ("CIDs") issued to The Cigna Group and CVS Health Corp. as part of "an investigation into the potentially unlawful pharmacy-related business practices of the healthcare conglomerates that own the three dominant pharmacy benefit managers."[85]

- ***Snap Referral***. On January 16, 2025, the FTC announced that it had referred to the DOJ a complaint against Snap, Inc. related to potential harms to children from an artificial intelligence ("AI") chatbot in the Snapchat application. The FTC stated that, in connection with a compliance review of a 2014 settlement, the FTC uncovered potentially unlawful activity. The FTC further stated that, "[a]lthough the [FTC] does not typically make public the fact that it has referred a complaint, we have determined that doing so here is in the public interest."[86]

- ***AI Partnerships Staff Report***. On January 17, 2025, the FTC issued a staff report regarding partnerships and investments involving generative AI between two leading AI developers (Anthropic PBC ("Anthropic") and OpenAI OpCo, LLC ("OpenAI")) and the three largest cloud service providers ("CSPs") (Alphabet, Inc., Amazon.com, Inc., and Microsoft Corp.). The staff report stems from a study under Section 6(b) of the FTC Act to understand how the partnerships (Microsoft-OpenAI, Amazon-Anthropic, and Google-Anthropic) may impact the development of AI technology. The staff report describes the partnerships as providing the CSP partners with significant equity in the AI partners; certain consultation, control, and exclusivity rights; and commitments that the AI partners will spend a large portion of CSP partner investments on the CSP partner's cloud services. The partnerships also allow sharing of resources, including intellectual property, engineering personnel, and discounted computing resources, and opportunities for product integration. The staff report identifies "certain areas to watch going forward": (i) the partnerships could affect access to inputs, such as by influencing a CSP partner to limit access to computing resources for non-partner AI developers, or by affecting the availability of engineering talent; (ii) the partnerships may make it more difficult for AI partners to change

CSPs, due to increased contractual and technical switching costs; and (iii) the partnerships may provide CSPs with access to technical and business information that other CSPs and AI developers do not have, which CSPs may then use to develop their own AI models and applications.[87]

VIII. OUTLOOK IN THE NEW ADMINISTRATION

The significant activity in the last weeks of the Biden Administration was consistent with the desire of the prior leadership's aggressive approach to antitrust enforcement. These actions also allowed the antitrust agencies to show progress on topics that had been identified as priorities but had nonetheless seen limited concrete action—particularly the RPA and the right to repair.

However, it remains to be seen to what extent these recent actions will have staying power. As described above, at one end of the spectrum, near-term changes to the new HSR form do not appear likely, absent developments in the Chamber of Commerce's litigation challenge. *Deere* and the new labor guidelines, which were the subject of 3 – 2 votes at the FTC, are closer to the line but may be less likely to be reversed than the vote counts may suggest, given the process-focused dissents. Conversely, the strongly worded dissents of then-Commissioner Ferguson and Commissioner Holyoak in *Pepsi* suggest that a change of course in that matter is possible, even if the door may remain open to bipartisan enforcement of the RPA in other circumstances. In each case, we will await additional developments following the full transition of leadership.

On January 30, 2025, DOJ filed the first significant antitrust enforcement action of the Trump Administration, challenging Hewlett Packard Enterprise Co.'s proposed $14 billion acquisition of Juniper Networks Inc. ("Juniper").[88] DOJ alleges that the companies are the second- and third-largest providers of enterprise-grade wireless networking solutions in the United States, behind the industry leader Cisco Systems, Inc.[89] DOJ highlights that Juniper is a rising player, particularly in the area of AI technology, and that competition from Juniper has spurred competitors to integrate AI into their own products.[90] DOJ's new action is consistent with the expectation that the technology sector is likely to continue to be a focus in the Trump Administration.

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ENDNOTES

1 *See In the Matter of McCormick & Co., Inc.*, No. 961-0050, 2000 WL 264190 (Mar. 8, 2000); 15 U.S.C. § 13(a).

2 Complaint ¶ 1, *FTC* v. *Southern Glazer's Wine and Spirits, LLC*, No. 24-cv-02684 (C.D. Cal. Dec. 12, 2024).

3 *Id.* ¶ 3.

4 *Id.* ¶ 5.

5 *FTC* v. *PepsiCo, Inc.*, No. 1:25-mc-00033 (S.D.N.Y. filed Jan. 17, 2025).

6 *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

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8 Amelia Lucas, *FTC Sues PepsiCo, Alleging Price Discrimination Is Raising Costs for Consumers*, CNBC (Jan. 17, 2025), https://www.cnbc.com/2025/01/17/ftc-sues-pepsico-over-price-discrimination.html.

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