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**Antitrust Law Primer:**  
**How To Collaborate  
With Competitors**

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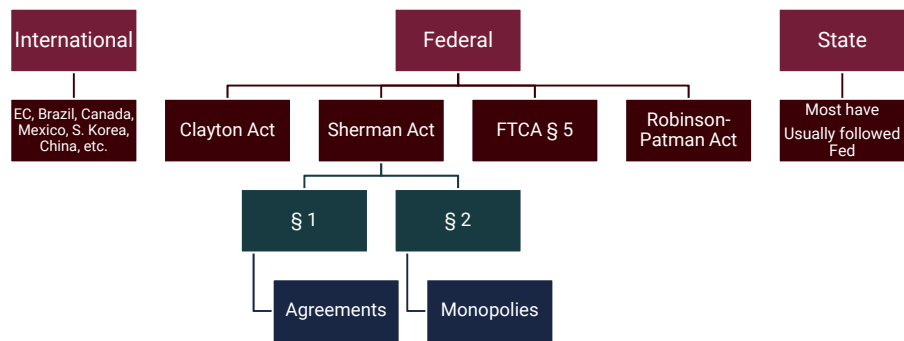
## Today's Topics

- Basic antitrust principles
  - Note: M&A outside scope of webinar
- Overarching policies regarding competitor collaborations
- Professional associations
- Joint ventures

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## Antitrust Laws



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## Basic Antitrust Principles

- Antitrust laws protect competition
- Antitrust laws prohibit agreements that unreasonably restrain trade
  - *Per se* violations
  - “Rule of reason”
- Antitrust laws prohibit monopolization
- Antitrust violations/lawsuits can be expensive
  - Criminal
  - Civil

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## FTC's Statements

- “In order to compete in modern markets, competitors sometimes need to collaborate.”
- “Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.”
- “In today's marketplace, competitors interact in many ways, through trade associations, professional groups, joint ventures, standard-setting organizations, and other industry groups. **Such dealings often are not only competitively benign but procompetitive.**”
- However: “there are antitrust risks when competitors interact to such a degree that they are no longer acting independently, or when collaborating gives competitors the ability to wield market power together.”

Source: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors>

## Overarching Policies Regarding Competitor Collaborations

- Compete – don't conspire
- Formal vs. informal collaboration
- Consider how the collaboration will look from the outside
- Antitrust compliance programs
- Antitrust training
- Antitrust monitoring
- Develop a pro-competition culture



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## Trade Associations

- Formation
- Membership
- Exclusive benefits
- Participation
- Do NOT discuss
  - Prices – price inputs, supply, advertising restrictions, etc.
  - Bids
  - Market division
  - Customer allocation
  - Group boycotts
- Focus on, and adhere to, pro-competitive purposes

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## Standard-Setting Associations

- Same considerations as other trade associations
- Additional common considerations
  - Availability of standards
  - Inclusivity of standards
  - Voluntary standards
  - Enforcement of standards
  - Information sharing and exchanges
  - Codes of ethics
- Again: focus on, and adhere to, pro-competitive purposes



## Joint Ventures

## Preliminary Issues

- JVs can result in a *de facto* merger
  - Mergers can raise various antitrust issues (gun jumping, HSR reporting, etc.)
  - Again, outside scope of this webinar
- Labels are not dispositive
  - Example: pure market allocation scheme will be viewed as a per se antitrust violation even if parties call it a “joint venture”
- Good practice to involve antitrust counsel *before* a JV is signed and clearly document any discussions about such a collaboration

## Usually, Rule of Reason Applies

- FTC: “Enforcers must ask: what is the purpose and effect of dealings among competitors? Do they restrict competition or promote efficiency?”
- Rule of reason even applies to restraints on competition that would normally constitute a per se violation, if the restraint is reasonably necessary to achieve the pro-competitive benefits of the JV
  - Sometimes referred to as ancillary restraints
  - Examples: pricing provisions; non-competes
- Generally, the party challenging the JV has the burden to show anti-competitive effects

## Possible Pro-Competitive Features of JVs

- Common examples:
  - Developing new products
  - Achieving economies of scale or other measurable efficiencies (which may lower consumer cost)
  - Expanding into new markets
  - Bringing new products to market faster than otherwise possible
- DOJ/FTC joint statement regarding collaborations to address COVID-19: “Joint Ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services.”
- Consider identifying and documenting pro-competitive reasons for a JV

## Evaluation of Anti-Competitive Effects

- Market power (of JV itself or of JV participants)
- Duration of JV (generally, shorter is better)
- Type of JV
  - Example: sales/marketing JVs more likely to attract inquiry than a research/development JV
- Sharing of competitively sensitive information
- Restraints on ability of JV participants to compete (is JV non-exclusive?)
- Ability of JV to operate independently of its participants

## Considerations for Information Sharing

- Improper sharing can occur *before* or *after* JV is signed – so protocols should address both periods
- Limit information shared with competitor to that which is reasonably necessary to achieve purposes of the JV
  - Consider involving antitrust counsel if JV requires sharing of competitively sensitive information (e.g., current pricing information)
- Limit pool of persons who receive information to those who reasonably need it
  - Clean rooms and firewalls
  - If possible, prevent access to persons with power to make competitive decisions (e.g., pricing)
- Be careful in how confidential information is referenced in the contract

## Safe Harbors

- Absent “extraordinary circumstances,” DOJ/FTC will not challenge collaborations that:
  - Market shares of collaboration and its participants collectively account for no more than 20% of the relevant market
  - R+D collaborations: 3+ independently controlled research efforts (in addition to the JV) have the necessary assets, characteristics, and incentive to provide “close substitute” R+D activity
- If certain conditions met, joint purchasing arrangements by health care providers may also fall into a safe harbor
- These harbors do not apply to or authorize per se antitrust violations, however



## Non-Compete Provisions

- Commonly included in JVs – and often with good reason
- Typically reviewed under rule of reason
- Still, a non-compete should be (1) **reasonably related** to achieving the pro-competitive reasons for the JV; and (2) **narrowly tailored** in terms of scope and duration
- Potential factors indicating **overbroad** non-compete
  - Scope of restriction exceeds scope of collaboration (e.g., different product)
  - Restriction stays in place well after collaboration ends

## No-Poaching Agreements

- “Naked” restrictions – per se illegal
  - DOJ recently brought first criminal case based on a no-poach restriction
- Ancillary restrictions – can be lawful under rule of reason analysis, but should be as narrow as possible
  - Example: if certain essential employees are participating in JV, limit restriction to those employees and only for duration of the collaboration
- No-solicit restrictions may be preferable to no-poach

# Questions?

## Thank you for attending

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