



MAYER | BROWN

2026 ANTITRUST SYMPOSIUM

A PIVOTAL TIME FOR RISK, STRATEGY, AND
ENFORCEMENT

MAYER BROWN'S NEW YORK OFFICE

MAY 7, 2026



OPENING REMARKS

BRITT MILLER



MAYER | BROWN

IN-HOUSE PANEL:
LESSONS FROM THE FRONT LINE

12:50 – 1:35 P.M.

TODAY'S PRESENTERS

MODERATOR



ERIN
CRAIG



RICHARD
EVONITZ



MEGAN
WEBSTER



MAYER | BROWN

WHEN SHARING BECOMES LIABILITY
ANTITRUST RISK IN DATA-DRIVEN
COLLABORATION

1:35 – 2:10 P.M.

TODAY'S PRESENTERS



KATHERINE
BLEICHER



DANIEL
FENSKE



DANIEL
STORINO



A G E N D A

01

**INFORMATION EXCHANGES:
BENCHMARKING
CONSIDERATIONS**

02

**ALGORITHMIC
PRICING/COLLUSION**

03

BEST PRACTICES

INFORMATION SHARING

There are many valid reasons for companies to share certain information with one another, either directly or through a third party

- Industry studies
- Benchmarking
- Joint ventures, trade associations, and other legitimate collaborations
- Transactions

The massive grey area is: When does the act of sharing information with competitors (or through third parties) cross the antitrust line?

LEGAL THEORIES RELATING TO INFORMATION SHARING

Two primary theories enforcers (gov't or private plaintiffs) use to allege that information sharing is anticompetitive:

– **Facilitate collusion** (“per se” illegal)

- Information sharing used as part of an existing conspiracy/agreement among competitors to fix prices or other blatantly illegal conduct
- E.g., conspirators rely on information sharing to monitor whether all are adhering to the agreement

– **Actual Competitive Effects from Sharing Information** (“rule of reason”)

- Here, the information sharing itself is the problem
- Enforcers must show anticompetitive effects (“softening competition”) outweigh procompetitive justifications (such as “benchmarking” efficiencies)



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INFORMATION EXCHANGES – U.S. DEVELOPMENTS

Since 1993, U.S. firms relied on DOJ/FTC “safety zone” guidelines from the Statements of Antitrust Enforcement Policy in Health Care permitting competitor information exchanges that met specific criteria:

01

Managed by a third party that sufficiently aggregated data to prevent identification of individual participants

02

Based on historical data at least three months old

03

Involved five or more participants, with no single participant representing more than 25% of the relevant market

- These guidelines became the de facto standard for structuring benchmarking and data-sharing arrangements across industries, not just health care
 - In 2023, DOJ withdrew these safe harbor protections, calling them “overly permissive” given changes in the market landscape



DOJ WITHDRAWS SAFE HARBORS

DOJ took issue with all prongs of the safe harbors

- *Third parties*: DOJ expressed concern that third-party intermediaries are often “part of the problem,” actively facilitating anticompetitive exchanges rather than serving as neutral aggregators
- *Historical data*: The three-month-old data requirement “means a lot less” given the analytical power of modern machine learning and AI
- *Aggregation*: Often insufficient in practice, as sophisticated participants can reverse-engineer individual competitors’ data from reports
- *Market concentration*: DOJ contends that anticompetitive harm can occur in markets with many competitors, not just concentrated ones
- DOJ has not issued replacement guidelines, leaving significant uncertainty
 - The DOJ and FTC issued a request for public comment on guidance for business collaborations. The comment period has been extended to May 21, 2026.
- Firms must now assess information-sharing arrangements on a case-by-case basis without a clear safe harbor to rely on



AGRI STATS: PRIVATE LITIGATION

Private plaintiffs alleged that major poultry processors used Agri Stats, a data benchmarking service, to: (1) facilitate a supply reduction conspiracy and (2) “soften” competition by sharing detailed cost and production data

- At summary judgment, the court dismissed all claims against Agri Stats itself, finding that its information-sharing service did not independently support a finding of conspiracy
- Key reasoning:
 - Each subscriber did not receive other participants’ individually identifiable confidential information through Agri Stats’ reports (except for when some defendants shared their individual reports outside the platform)
 - Agri Stats data sharing did not violate the “rule of reason” given: the nature of information exchanged, the age of the data (approximately 45 days old), and the absence of evidence that it revealed competitors’ future plans
- At trial of remaining defendants, jury found no conspiracy



AGRI STATS: DOJ ENFORCEMENT ACTION

Despite the private plaintiffs' losses, DOJ filed its own civil antitrust lawsuit against Agri Stats in September 2023

- DOJ alleges that Agri Stats facilitated improper information exchanges that allowed poultry processors to coordinate and raise prices, harming downstream purchasers and consumers
- DOJ's theory goes beyond the private case: it focuses on Agri Stats' role as a "hub" in a hub-and-spoke arrangement, alleging that the service itself is the mechanism that enables coordination even without direct competitor-to-competitor communication
- DOJ also highlighted Agri Stats' ancillary consulting services—such as one-on-one "education" sessions with individual processors—as evidence that the platform went beyond neutral data aggregation

The case is scheduled for trial May 18, but the parties have announced they are close to a settlement ***

RELATED DOJ INFORMATION-SHARING CASES

The Agri Stats litigation is not isolated—DOJ has pursued a pattern of enforcement actions targeting information exchanges facilitated by third-party platforms:

- Similar cases are now pending alleging that processors shared employee wage and compensation information through benchmarking services, raising the same antitrust theories in labor markets
- DOJ’s broader enforcement push reflects a view that data intermediaries can serve as the infrastructure for tacit coordination, even absent an explicit agreement among competitors
- Private plaintiff follow-on litigation has also surged, with cases alleging information exchanges in industries including real estate (rental pricing algorithms), health care, and agriculture
- These cases signal that both government enforcers and private plaintiffs are increasingly scrutinizing the role of data aggregators and benchmarking services

DOJ'S CURRENT FOCUS APPEARS TO BE:



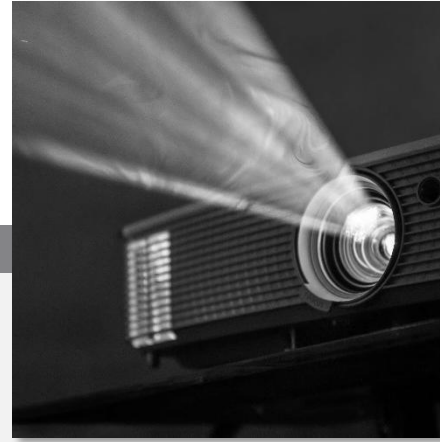
Nature of the information:

Can it be used to affect competitive decisions? (e.g., prices, costs, capacity, supply levels, future plans, age)



Intent:

While not dispositive, is there a legitimate, substantiated business purpose for the information sharing (e.g., genuine benchmarking, safety, regulatory compliance)?



Asymmetry:

Is the shared information available broadly to the marketplace, or only to one level of the supply chain (e.g., processors but not their customers)?



Reciprocity:

"Give to get" arrangements raise red flags—as a DOJ official stated, "I'll show you mine if you show me yours" is a problem"



Ancillary services:

Does the third-party facilitator go beyond data aggregation to provide one-on-one consulting, "education" sessions, or make competitive recommendations to individual participants?



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AI AND ALGORITHMS HIGH ON THE AGENDA

- In recent years, competition enforcers have shifted their attention to digital exchanges of information and, most recently, to the use of algorithms and AI.
- Authorities seem to view **pricing software** as just another way to collude.
 - If software is used to facilitate a price-fixing agreement, that will be seen as *per se* illegal
 - If software is used purely as an information exchange mechanism, that may be evaluated under **rule of reason** in the U.S.
- **A key risk area for many businesses has therefore become using software/ third-party products to price, trade, or set key commercial parameters.**
 - It is critical that compliance personnel understand the software used by business units to assess whether it relies on data from competing firms and to assess risks of continued use

WHAT AI DOES NOT CHANGE

- Enforcers must still show “an agreement” or “meeting of the minds”
- Unilateral, individual decisions are legal
- The “Bob” test:
 - *Everywhere the word ‘algorithm’ appears, please just insert the words ‘a guy named Bob.’ Is it ok for a guy named Bob to collect confidential price strategy information from all the participants in a market and then tell everybody how they should price? If it isn’t ok for a guy named Bob to do it, then it probably isn’t ok for an algorithm to do it, either.” – Former FTC Acting Chair Ohlhausen*

WHAT AI DOES CHANGE

- Speed/ease of gathering, assessing and acting on marketplace intelligence
 - *“The safety zones were written at a time when information was shared in manila envelopes and through fax machines. Today, data is shared, analyzed, and used in ways that would be unrecognizable decades ago. We must account for these changes as we consider how best to enforce the antitrust laws.”* – Doha Mekki, Principal Deputy Assistant Attorney General, USDOJ
- Potential for autonomous AI programs to raise prices, much like “smoke filled room” conspirators
- AI better at marketplace monitoring, including tracking adherence to agreements



PRIVATE LITIGATION: A MAJOR US RISK

- The availability of private enforcement and substantial damages make the US somewhat unique
- Private parties have recently brought a series of cases challenging algorithmic pricing/benchmarking
 - Hotels, casinos, mobile homes, financial services
- Private parties have also targeted revenue management software
 - Landlord rental pricing
- As US government increases attention on these information-sharing mechanisms, that drives private litigation interest

INCREASE IN GOVERNMENT ENFORCEMENT

- Government programs encourage **whistleblowing**, meaning that company employees are incentivized to report on their employers
- Both the FTC and the DOJ Antitrust Division have made algorithmic pricing issues a key priority
 - Agencies have filed statements of interest in civil cases, and DOJ brought its own suit in the housing rental space
 - Have said that a group of companies using the same pricing algorithm can be unlawful, even if they **don't always use** the prices the algorithm generates
 - DOJ has said even aggregating the data shared may not fully protect from liability
- State enforcement
 - States are focused here as well, and many joined the DOJ in its recent case in the multifamily housing industry, or filed their own suits
 - Some states take a more extreme view than federal government



US LEGISLATIVE DEVELOPMENTS

- In early 2024, federal legislators introduced two proposed pieces of legislation:
 - First aimed to make the use of third-party algorithmic pricing services in the housing rental industry an automatic (*per se*) antitrust violation
 - Second had the same goal, but would apply to other industries as well (not just the housing rental industry)
- State and local legislatures are active as well:
 - Effective Jan. 1, 2026, California bans software algorithms that “coerce” adoption of recommended prices
 - November 2025: New York state bans algorithmic rent-setting software
 - 2024/2025: Multiple cities ban rent-setting algorithms
 - San Francisco; Berkeley; Jersey City; Minneapolis; Providence, R.I.; San Diego; Seattle.





CASE SNAPSHOT: REVENUE MANAGEMENT

- “Revenue management” software used by apartment landlords, hotels, and others to assist in setting rents.
 - Some rely on non-public data from competing firms to make pricing recommendations
 - Acceptance rates of recommendations are often high
- Under sustained attack from antitrust regulators and private plaintiffs.
 - *In re: RealPage, Inc. Rental Software Antitrust Litigation* (M.D. Tenn.) (apartments)
 - *Duffy v. Yardi Systems* (W.D. Wash.) (apartments)
 - *Gibson v. Cendyn Group, et al.* (D. Nev.) (hotels)
 - *Cornish-Adebiyi v. Caesars, et al.* (D.N.J.) (hotels)



REVENUE MANAGEMENT: DIFFERENT APPROACHES

- No reliance on nonpublic competitor information: *no antitrust violation (Gibson, Cornish-Adebiyi)*
 - Ninth Circuit: Affirmed dismissal in *Gibson*, but decision narrow because did not consider horizontal allegations
 - Third Circuit: Decision pending in *Cornish-Adebiyi*
- Reliance on nonpublic competitor information: *potential antitrust violation under Rule of Reason (RealPage)*
- Reliance on non-public competitor information: *unlawful per se (Yardi)*
 - *Per se* theory in doubt after *Gibson*

REALPAGE DOJ SETTLEMENT: THE NEW STANDARD?

Prohibitions on Information Sharing

- **Ban on competitor data in pricing operations.** RealPage must cease using Nonpublic Data from competitors to generate pricing or occupancy recommendations
- **No disclosure of competitor data to licensees.** RealPage may not share competitor data with another competitor, regardless of form, aggregation, or anonymization
- **Elimination of Market Surveys.** No solicitation of Nonpublic Data through Market Surveys (e.g., call-arounds) for use in pricing or occupancy recommendations
- **Restrictions on User Groups.** Limitations on what can be discussed

Limitations on Revenue Management Software Use and Training

- **Independent decision-making preserved.** Software must allow users to freely reject or override recommendations, and may not incentivize acceptance of recommended prices
- **Symmetrical guardrails.** Same limits for, e.g., price increases as decreases
- **Strict limits on model training data.** Competitor data generally may not be used in Model Training, with narrow exception for stale (i.e., at least 12 months old) data
 - **Geographic-granularity restrictions.** Models trained on competitor data may not filter or identify geographic effects more specific than nationwide, with a limited statewide exception



AI/ALGORITHMIC SOFTWARE CASES: WHAT'S NEXT?

FINANCIAL SERVICES

E.g., Optimal Blue litigation on mortgage rate software

DYNAMIC PRICING MORE GENERALLY?

- Leisure (e.g., golf)
- Ticket prices
- Airlines

RISK SPECTRUM FOR AI & INFORMATION SHARING

- **Companies are free to gather public info and use it in making competitive decisions**
 - E.g., Airlines have long applied algorithms to a combination of public and internal data to maximize revenue
- **But, agreeing with competitors, including through the use of AI, to affect prices can violate the law**
 - DOJ criminally prosecuted competing sellers of posters on Ebay who agreed with one another to use an algorithm to automatically minimize price differences among them



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BEST PRACTICES – INFORMATION SHARING

- The withdrawal of safe harbors and aggressive DOJ enforcement mean that legacy information-sharing arrangements may now carry significant antitrust risk and should be revisited
- Companies should proactively reassess existing benchmarking and data-sharing programs, even those previously structured to comply with the old safety zones
- Critical questions to evaluate:
 - *What specific information is being shared, and could it influence competitive decision-making? (E.g., does it involve price, output, cost, wages, etc.)*
 - *How current is the data, and how granular is it? (E.g., how easy or difficult is it to de-anonymize the data; etc.)*
 - *Is the third-party aggregator truly independent, or does it provide ancillary advisory services?*
 - *Is the information shared symmetrically across market participants, including customers?*

BEST PRACTICES – INFORMATION SHARING

- Engage antitrust counsel early when designing or continuing any competitor information-sharing arrangement
- Update your current antitrust policies and protocols on information exchanges (and if you don't already have a policy, establish one)
 - Have clear guidelines on the types of information that can be shared and the circumstances under which they can be shared
 - Aggregate and anonymize data (may mitigate, but not eliminate, antitrust risk)
 - Make sure your employees are being trained on information-sharing guidance
- Document the legitimate purposes and procompetitive benefits of the information sharing



BEST PRACTICES – ALGORITHMIC PRICING

- Maintain and exercise independent decision-making
 - Keep human oversight to approve or override AI recommendations
 - Treat recommendations as just one data point
 - Ensure that final price decisions are made by human personnel—not directly automated by software/AI
- Avoid pricing algorithms that rely on non-public, competitively-sensitive data of competitors
- Vet the third-party vendors (*e.g.*, to ensure your data is kept separate from other companies, etc.)
- Tailor the algorithm/results to your company’s specific business needs



BEST PRACTICES – ALGORITHMIC PRICING

- Audit and monitor how the algorithmic tools are performing (*e.g.*, outputs, input data, acceptance rates, etc.)
- Do not discuss algorithmic pricing software with competitors
- Document procompetitive benefits on use of AI
- Consult with antitrust counsel before using algorithmic pricing software
 - Maintain an antitrust policy on use of AI
 - Provide training to employees on use of algorithmic pricing software



NETWORKING BREAK

2:10-2:20 P.M.



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REGIONAL SPOTLIGHT:
ASIA

2:20 – 2:50 P.M.

TODAY'S PRESENTERS

MODERATOR



MASAHISA
IKEDA



KANA
MORIMURA



WILLIAM
STALLINGS



MAYER | BROWN

HOW TO GET THE DEAL DONE

REMEDIES REIMAGINED:
STRUCTURAL, BEHAVIORAL, AND EVERYTHING IN
BETWEEN

2:50 – 3:25 P.M.



A G E N D A

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THE TRADITIONAL
PLAYERS

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NEW-ISH KIDS
ON THE BLOCK

03

BROADER
STRATEGY

04

KEY
TAKEAWAYS

TODAY'S PRESENTERS

MODERATOR



RACHEL
LAMORTE



ORAL
POTTINGER



WILLIAM
STALLINGS



L. KEVIN
SHERIDAN JR.



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How to Mitigate Risk
and Fix The Transaction

FEDERAL ANTITRUST TRANSACTION REVIEW

- Transactions meeting certain values must be reported to federal antitrust enforcers.
 - If the transaction value is greater than \$535.5 million; or
 - If (a) the transaction value is greater than \$133.9 million; (b) one party has net sales or total assets \$26.8 million or more; and (c) a second party has net sales or total assets \$267.8 million or more.
- The President sets policy priorities for transaction review and the President's appointees at the U.S. Department of Justice Antitrust Division and the U.S. Federal Trade Commission carry them out.



FEDERAL ENFORCER APPROACH TO TRANSACTIONS: POPULIST PRIORITIES WITH A PRO-BUSINESS SHIFT



AREAS OF CONTINUITY FROM BIDEN ERA

Antitrust enforcement seen as tool for advancing overall Administration policies

Aggressive enforcers in leadership posts

Agencies actively litigating cases, including ones brought by Biden

Continued desire to rein-in Big Tech

Labor/employment issues top-of-mind



BUT IMPORTANT DIVERGENCE

Dialing-down anti-business rhetoric

Greater recognition that antitrust should not impede business

Mergers clearing more easily

Remedies (including divestitures) back on the table, even after litigation begins

Private equity no longer disfavored

Traditional theories of harm

REMEDIES PENDULUM

- Biden antitrust agencies rarely allowed remedies
 - They wanted to block deals outright instead of fixing them
 - Fear of risk of an insufficient remedy
- Now Trump 2.0 has fully returned to using typical divestiture remedies
 - **HPE/Juniper:** divestiture and licensing remedy averted trial
- And even some atypical ones
 - **Omnicom/Interpublic (IPG):** Advertising agency merger in which FTC ordered a *behavioral* remedy
 - Parties agree to “refrain from entering into or maintaining any agreement or practice that would steer advertising dollars away from publishers based on their political or ideological viewpoint”



Hewlett Packard
Enterprise

JUNIPER[®]
NETWORKS

Omnicom + IPG

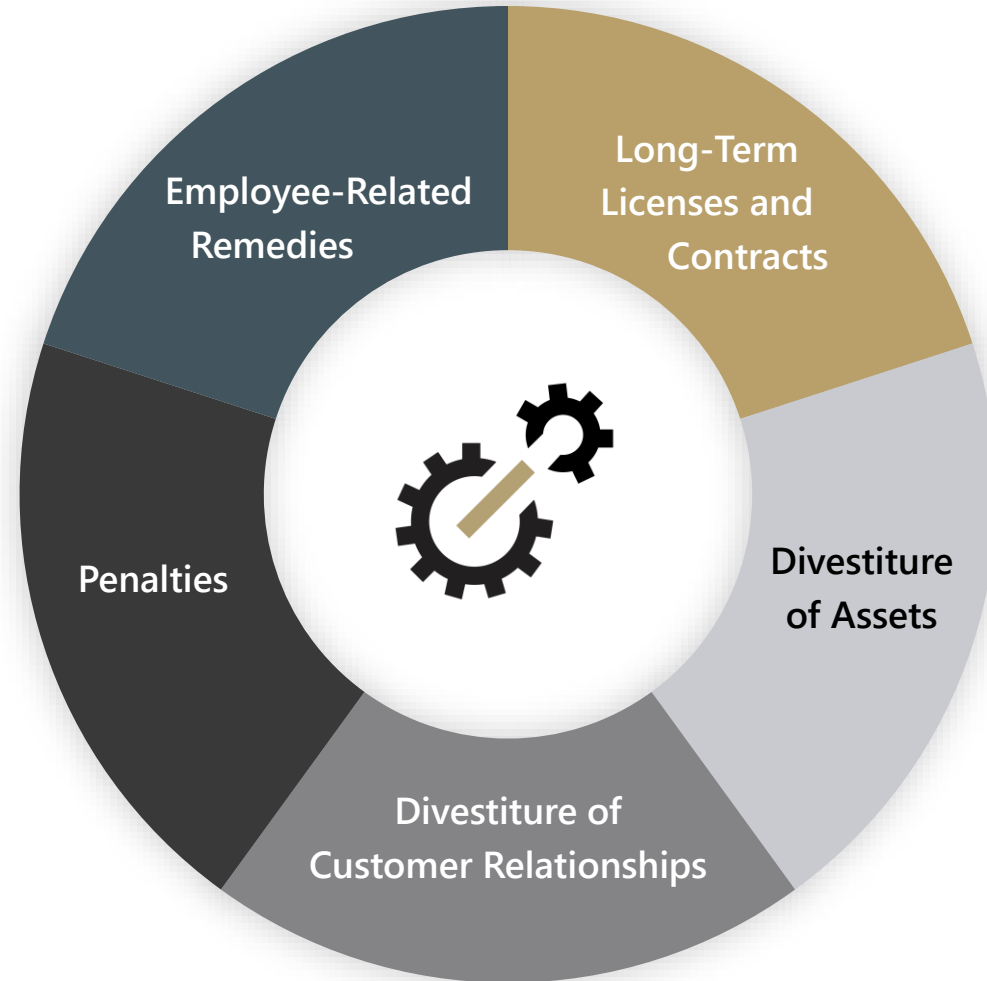
REMEDIES PENDULUM (CONTINUED)

- 365 Retail Markets LLC/Cantaloupe, Inc. (May 1, 2026):
 - Parties agree to divestiture, compulsory licensing to all comers; and monitoring;
 - 365 Retail must offer integrations between its software and hardware on reasonable and non-discriminatory terms to customers and third parties;
 - Commissioner Meador: “The proposed behavioral commitments therefore play a meaningful role in preventing the merged firm from leveraging its expanded control over hardware and software to deprive rivals of access to critical functionalities and data connections.”



cantaloupe

REMEDIES NUTS AND BOLTS





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How to Mitigate Risk
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THE RISE OF STATE ENFORCERS AND PRIVATE PLAINTIFFS

- State attorneys general are increasingly getting involved in transaction review and litigating transactions, due to local market and political factors.
 - Mini-HSRs mean that states now review transactions concurrently with federal enforcers
- Private plaintiffs are using injunctive actions to try to block or reshape deals—and succeeding.
- This has fundamentally changed deal risk assessment.

WHEN INTERESTS DIVERGE

1

NEXSTAR/ TEGNA

Federal enforcers cleared the transaction but state enforcers and private plaintiffs immediately moved to unwind.

2

LIVE NATION/ TICKETMASTER

Federal enforcers cleared the transaction but then sued to break up the combined company years later; federal enforcers and some state enforcers settled but others continued on and won.

3

JELD-WEN/ CMI

Federal enforcers cleared the transaction, but customer sued and won.

4

HPE/JUNIPER

Federal enforcers settled a transaction and states moved to intervene to challenge whether DOJ remedy was in the public interest.



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THE ROLE OF GOVERNMENT AFFAIRS

Importance of Government Affairs

Government affairs teams offer critical insight on political dynamics and stakeholder concerns affecting transactions.

Coordination and Best Practices

Effective coordination between legal and government affairs ensures consistent messaging and protects privilege.

Role Definition and Documentation

Clear roles, counsel-led strategy, and disciplined documentation protocols are essential to safeguard legal strategy.

Risks of Involvement

Involving government affairs can create risks like mixed messaging and possible waiver of privilege.

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HOW PARTIES CAN PROTECT THE DEAL DURING ANTITRUST REVIEW

Fix-It-First

Preemptive deal restructuring offers speed and control but risks execution challenges and less negotiation leverage.

Consent Decree

Accepting agency involvement ensures legal certainty through a structured consent decree agreement.

Litigating the Fix

Defending a remedy in court is time-consuming and carries risk but may preserve negotiation positions.



HOW CAN PARTIES PROTECT THEMSELVES AT THE OUTSET

- Up-front antitrust analysis informs assessment of deal risk, ***but there is never enough information to conclusively predict outcome of the government antitrust review***
- If deal fails to close because of antitrust (especially after a long antitrust review), both merging parties are exposed:
 - A-side suffers reputational, financial hit (with CEOs/GCs potentially replaced)
 - B-side usually suffers marketplace harm (customers leave, employee brain drain, lack of competitive momentum, etc.)
- Parties allocate that risk in deal terms to protect their interests

ANTITRUST RISK SHIFTING PROVISIONS

- **Drop-Dead Dates**

- Date by which the transacting parties need to obtain antitrust clearance
- Getting longer and longer (even as long as 2 years post-signing)

- **“Reverse” Break Fee**

- Payment from buyer to seller if deal fails due to antitrust
- “Market” is 3-5% of deal value, but amount is heavily negotiated and extremes can occur
- Google/Wiz: **\$3.2 billion** (10% of \$32B deal value)

- **Divestiture Commitments**

- Efforts to resolve antitrust issues (reasonable/best)
- Hell-or-High Water clauses
- Now common to put “Remedy Commitments” in non-public schedule (but must be disclosed to FTC/DOJ)

- **Duty to Litigate**

- E.g., A-side must litigate if suit to block deal

REMEDY EXECUTION ISSUES

UPFRONT BUYER CHALLENGES

Identifying and approving divestiture buyers before closing shifts execution risks to involved parties.

TRANSITIONAL SERVICE AGREEMENTS (TSAS)

TSAs bridge divestiture buyers to independence but may cause entanglement concerns.

FIREWALLS AND INFORMATION CONTROLS

Careful design and enforcement of firewalls ensure compliance while maintaining business operations.

COMPLIANCE AND MONITORING

Robust planning, clear accountability, and ongoing oversight are critical to successful remedy execution.



KEY TAKEAWAYS

1

EARLY REMEDY EVALUATION

Remedies should be assessed early and integrated as a core part of deal planning, not treated as a fallback option.

2

CONSIDERING NON-FEDERAL ACTORS

Counsel must factor in state attorneys general and private plaintiffs when evaluating legal risks and designing solutions.

3

CROSS-TEAM ALIGNMENT

Effective remedy strategies require coordination across legal, commercial, public relations, and government relations teams for consistency.

4

CREATIVE REMEDY DESIGN

Approach remedies as a design challenge needing creativity, realism, and understanding of regulations and business limits.



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**PRIVATE LITIGATION AND THE UPSURGE OF
LITIGATION FUNDING**

3:25 – 4:00 P.M.

TODAY'S PRESENTERS



BRITT
MILLER



MATTHEW
PROVANCE



MEGAN
STRIDE

KEY TAKEAWAYS

1

STAY AHEAD OF LEGISLATION

Track evolving TPLF rules to anticipate and maximize potential strategies for disclosure and other considerations.

2

MONITOR JUDICIAL DECISIONS

Watch judicial treatment of TPLF agreements—which jurisdictions require evidence tied to specific claims and which limit disclosure due to privilege protections.

3

PROTECT CONFIDENTIAL INFORMATION

Implement targeted protective orders to prevent funders from accessing proprietary information.

4

CONDUCT TARGETED DISCOVERY

Where available, act early to identify funders and TPLF terms affecting case administration.

5

ANTICIPATE POSSIBLE CROSS-BORDER ISSUES

Account for foreign funding restrictions and jurisdictional differences, including potential for forum shopping across U.S., EU, and UK.



NETWORKING BREAK

4:00-4:10 P.M.



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KEYNOTE CONVERSATION:
PUBLIC ENFORCEMENT PRIORITIES IN COMPLEX
MARKETS

4:10 – 4:55 P.M.

TODAY'S PRESENTERS

MODERATOR



JON
LEIBOWITZ



BRITT
MILLER



NETWORKING RECEPTION

PLEASE JOIN US DOWN THE HALL FOR
HORS D'OEUVRES & LIBATIONS

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