



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 11 | Issue 2

2024

Antitrust, Labor Markets, and Issue-Spotting DEI Initiatives

Francesca Pisano

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/ecgar>



Part of the [Business Organizations Law Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Francesca Pisano, *Antitrust, Labor Markets, and Issue-Spotting DEI Initiatives*, 11 Emory Corp. Governance & Accountability Rev. 138 (2024).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol11/iss2/2>

This Article is brought to you for free and open access by the Emory Corporate Governance and Accountability Review at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Corporate Governance and Accountability Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

ANTITRUST, LABOR MARKETS, AND ISSUE-SPOTTING DEI INITIATIVES

Francesca Pisano*

TABLE OF CONTENTS

I. RECENT ANTITRUST ENFORCEMENT IN THE LABOR MARKET	139
A. <i>Merger Enforcement</i>	140
B. <i>Criminal Enforcement</i>	142
C. <i>Civil Conduct Enforcement</i>	144
II. COMPLIANCE CASE STUDIES: DEI INITIATIVES	146
A. <i>Industry Benchmarking to Address Pay Inequity</i>	147
B. <i>Avoiding the Appearance of No-Poach Agreements in Efforts to Retain Diverse Workers</i>	148
C. <i>Diverse Pipelines for Boards of Directors</i>	149
III. CONCLUSION	150

Three years after President Biden’s pledge to dedicate a “whole-of-government” approach to increasing competition,¹ public attention to antitrust issues remains high. The leadership at the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) have both articulated aggressive and progressive enforcement priorities. One area of intense antitrust scrutiny is competition in labor markets.

This Article offers a brief overview of antitrust enforcement efforts focused on labor and employment issues. Companies compete against each other to hire and retain employees, not just to offer products or services. Antitrust enforcement in this space has been wide-ranging, from review of mergers and acquisitions, to the DOJ’s criminal enforcement efforts, to a range of civil conduct investigations and challenges.² And despite mixed results in court, the FTC and DOJ have both indicated that antitrust enforcement in labor markets will remain an enforcement priority.³

* Thank you to Jennifer Chang and Mili Nadipalli for their invaluable research and drafting assistance.

¹ Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).

² See *infra* Section I.

³ William E. Kovacic, *Antitrust, Transformation, and Enduring Policy Change*, 49 J. CORP. L. 321, 321-23, 339-41 (2024).

At the same time, there has been increased attention to corporate diversity, equity, and inclusion (DEI) initiatives, especially following the Supreme Court's June 2023 ruling regarding certain race-conscious admissions programs.⁴ In particular, one U.S. Senator wrote a letter to the FTC Chair Lina Khan, suggesting that colleges might be violating antitrust laws by "coordinating admissions policies" following the Supreme Court's decision.⁵ This echoes similar concerns voiced by some leaders regarding whether companies' collaborative efforts to address environmental, social, and governance ("ESG") issues might constitute antitrust violations.⁶ In light of this potential scrutiny, this Article concludes by assessing and managing potential antitrust risk in several corporate DEI efforts.

I. RECENT ANTITRUST ENFORCEMENT IN THE LABOR MARKET

Enforcers' focus on labor market competition began in earnest in 2016,⁷ although the DOJ had previously challenged non-solicitation agreements among high-tech companies in 2010.⁸ The FTC and DOJ issued guidance for human resource professionals, warning that agreements with other companies to set salaries or other compensation terms ("wage-fixing") or agreements not to solicit or hire each other's employees ("no-poaching") could be antitrust violations and that such violations could be prosecuted as criminal violations of the antitrust laws.⁹ Further, the DOJ and FTC noted that "firms that compete to hire or retain employees are competitors in the employment marketplace, *regardless of whether the firms make the same products or compete to provide the same*

⁴ See Julian Mark & Eli Tan, *Affirmative Action Ruling Puts Target on Corporate Diversity Programs*, WASH. POST: BUS. (June 29, 2023, 6:00 PM), <https://www.washingtonpost.com/business/2023/06/29/affirmative-action-business-diversity/>; Tina Opie & Ella F. Washington, *Why Companies Can — and Should — Recommit to DEI in the Wake of the SCOTUS Decision*, HARV. BUS. REV. (July 27, 2023), <https://hbr.org/2023/07/why-companies-can-and-should-recommit-to-dei-in-the-wake-of-the-scotus-decision>. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

⁵ Letter from J.D. Vance, U.S. Sen., to Lina M. Khan, Chair, Fed. Trade Comm'n (Aug. 10, 2023), <https://freebeacon.com/wp-content/uploads/2023/08/Sen.-Vance-Letter-To-FTC-8.10.23.pdf>.

⁶ Press Release, H.R. Judiciary Comm., *Judiciary Republicans: Woke Companies Pursuing ESG Policies May Violate Antitrust Law* (Dec. 6, 2022), <https://judiciary.house.gov/media/press-releases/judiciary-republicans-woke-companies-pursuing-esg-policies-may-violate>.

⁷ ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS* 1, 3-4 (2016), <https://www.justice.gov/atr/file/903511/download>.

⁸ Press Release, Off. of Pub. Affs., U.S. Dep't of Just., *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

⁹ ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 7.

services.”¹⁰ Since this 2016 announcement—and especially during the Biden administration—the DOJ and FTC have prioritized a cross-disciplinary enforcement effort, including merger enforcement, criminal enforcement, and civil enforcement.

A. Merger Enforcement

The DOJ and FTC share responsibility for antitrust review of proposed transactions, including mergers, acquisitions, and joint ventures.¹¹ The agencies scrutinize—and potentially challenge—transactions that “may... substantially... lessen competition, or tend to create a monopoly.”¹² Leadership at both agencies have publicly pledged that they will focus on labor issues in merger reviews, including scrutinizing transactions that may lead to substantially less competition for labor.¹³

Although the FTC and DOJ have not yet challenged a merger solely on the grounds that it might reduce competition to hire employees, several recent enforcement actions show agency attention to the issue. In the FTC’s unsuccessful 2022 challenge to the Meta/Within Unlimited transaction, the FTC alleged that the transaction would result in “less incentive to attract and keep employees” and “less pressure to compete for the most talented app developers.”¹⁴ However, the FTC ultimately focused its claims on a relevant product market defined around “VR Dedicated Fitness Apps”¹⁵ – not the employment of app developers. That same year, in the FTC’s challenge to a Rhode Island hospital merger focused on concentration in the market for inpatient care, Chair Khan and Commissioner Rebecca Slaughter noted that they would also have challenged the transaction on the grounds that it would “substantially lessen competition in a relevant labor market” for skilled healthcare professionals, although the challenge ultimately focused on inpatient care.¹⁶

¹⁰ *Id.* at 2 (emphasis added)

¹¹ *See id.* at 1.

¹² *See* 15 U.S.C. § 18.

¹³ *See, e.g.*, Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks at White House Roundtable on the State of Labor Market Competition in the U.S. Economy (Mar. 7, 2022), [https://www.ftc.gov/system/files/ftc_gov/pdf/Opening Remarks of Chair Lina M. Khan at WH Labor Roundtable.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Opening%20Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20WH%20Labor%20Roundtable.pdf).

¹⁴ Amended Complaint at 1, 2, 4, *FTC v. Meta Platforms, Inc.*, No. 22-CV-04325 (N.D. Cal. Oct. 7, 2022), ECF No. 101-1, https://www.ftc.gov/system/files/ftc_gov/pdf/221_0040_amended_complaint_-_usdc_-_10.07.22.pdf.

¹⁵ *Id.* at 2.

¹⁶ FED. TRADE COMM’N, CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER AND CHAIR LINA M. KHAN REGARDING FTC AND STATE OF RHODE ISLAND V. LIFESPAN CORPORATION AND CARE

Earlier, in a 2020 letter to Texas state regulators, the FTC detailed its opposition to a hospital merger, in part due to concerns that the transaction would “depress wage growth for registered nurses.”¹⁷ The FTC purported to have “analyzed the likely competitive effects of the proposed [] merger in the labor market for registered nurses” by evaluating labor concentration in the “commuting zone for nursing labor.”¹⁸ The FTC asserted that based on U.S. Department of Agriculture “commuting zones” and American Hospital Association data, the combined company would employ a 92.6% share of registered nurses in the commuting zone.¹⁹ While it is not clear whether a challenge based on such an analysis would have prevailed in court,²⁰ the letter sheds light on how the FTC may assess concentration in labor markets in future transactions.²¹

Ultimately, it is likely that the DOJ and FTC both will continue to focus on this issue in merger reviews. The recently adopted Merger Guidelines explicitly note that the authorities will evaluate mergers for the “risk that the merger may substantially lessen competition for [] labor.”²² Further, in the FTC’s recently proposed revisions to the Hart-Scott-Rodino notification form (required for transactions of a certain size), a new “Labor Markets” section would require

NEW ENGLAND HEALTH SYSTEM 1 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan_cne_redacted.pdf. *But see* FED. TRADE COMM’N, CONCURRING STATEMENT OF COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON REGARDING LIFESPAN CORPORATION AND CARE NEW ENGLAND HEALTH SYSTEM (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110031wilsonphillipslifespancestatement.pdf. Then-FTC Commissioners Phillips and Wilson issued a separate concurring statement, noting that while they supported challenging mergers on such grounds in theory, they did not believe that the evidence supported bringing such a challenge in the current case. *Id.*

¹⁷ FED. TRADE COMM’N, FEDERAL TRADE COMMISSION STAFF SUBMISSION TO TEXAS HEALTH AND HUMAN SERVICES COMMISSION REGARDING THE CERTIFICATE OF PUBLIC ADVANTAGE APPLICATIONS OF HENDRICK HEALTH SYSTEM AND SHANNON HEALTH SYSTEM 5, 36, 63 (2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhscopacomment.pdf; Letter from Ian Conner et al., Directors, Fed. Trade Comm’n, to Phil Wilson, Exec. Comm’r, Texas Health & Hum. Servs. Comm’n (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhscopacomment.pdf.

¹⁸ FED. TRADE COMM’N, *supra* note 17, at 36, 63.

¹⁹ *Id.* at 36-37.

²⁰ See Samantha Liss, *FTC Urges Texas Regulators to Block Merger Under COPA*, HEALTHCARE DIVE (Sept. 15, 2020), <https://www.healthcaredive.com/news/ftc-urges-texas-regulators-to-block-merger-under-copa/585228/> (explaining that Texas “lawmakers ushered in a law last year that immunizes such deals from federal oversight in exchange for state oversight, including rate review”).

²¹ See generally FED. TRADE COMM’N, *supra* note 17.

²² U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES 26 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

filing parties to “provide certain information about its workers in order to screen for potential labor market effects arising from the transaction,” including information related to employee occupational classification data and commuting zone information.²³ While these new rules have not yet been enacted (and may be revised prior to enactment),²⁴ it is clear that the agencies are continuing to sharpen their tools to evaluate a proposed transaction’s impact on labor and employment.

B. Criminal Enforcement

The DOJ has also garnered a string of high-profile criminal indictments for alleged antitrust violations in various labor markets but has faced less success securing convictions at trial. The DOJ has been pursuing “naked” no-poach and wage-fixing agreements, those that allegedly are not associated with any other legitimate transaction or collaboration among employers, as *per se* unlawful violations of Section 1 of the Sherman Act,²⁵ which prohibits agreements “in restraint of trade.”²⁶

Interestingly, while several of these suits have survived early legal challenges, securing a conviction following trial has proven elusive, underscoring the heavy burden the DOJ must meet for a criminal conviction (and perhaps juries’ unwillingness to view labor market collusion the same as price fixing).²⁷ This is illustrated in the DOJ’s challenge to an alleged no-poach agreement in the aerospace industry in *US v. Patel*. In early 2022, the DOJ alleged that an aerospace company executive, along with several suppliers of engineering services, engaged in an eight-year conspiracy to restrict the hiring and recruiting of engineers.²⁸ Defendants sought to dismiss the case, arguing

²³ Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178-01, 42197-98 (June 29, 2023) (to be codified at 16 C.F.R. pts. 801, 803).

²⁴ *See id.*

²⁵ ANTITRUST DIV., U.S. DEP’T OF JUST., FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT PERSONNEL 4 (2023), <https://www.justice.gov/atr/page/file/1091651/download>; ANTITRUST DIV., U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 7, at 3.

²⁶ 15 U.S.C. § 1.

²⁷ *See, e.g.,* Verdict, *United States v. DaVita Inc.*, No. 21-cr-00229-RBJ (D. Col. Apr. 15, 2022) (acquitting defendant); Jury Verdict Form, *United States v. Manaha*, No. 2:22-cr-00013-JAW (D. Me. Mar. 22, 2023) (acquitting defendant); *see also* United States’ Motion to Dismiss, *United States v. Surgical Care Affiliates, LLC*, No. 3-21-cr-00011-L (N.D. Tex. filed Nov. 13, 2023) (filing by the United States requesting the court dismiss an indictment of “two counts of conspiracy to restrain trade in violation of 15 U.S.C. § 1”).

²⁸ *See* Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy (Dec. 9, 2021), <https://www.justice.gov/opa/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy>.

that such no-poach agreements should be more properly evaluated under the rule of reason, rather than being treated as *per se* illegal.²⁹ The district court rejected this argument at the pleading stage, agreeing with the DOJ that no-poach conspiracies may be subject to *per se* treatment and that the indictment adequately alleged a *per se* violation.³⁰ Following the presentation of the government's case at trial, however, the court granted a motion to acquit all defendants without a jury verdict.³¹ The court noted that the evidence showed many exceptions to the alleged no-hire agreement, and as such, the DOJ had failed to present sufficient evidence of a market allocation under the *per se* rule.³² Juries have also acquitted defendants in several labor market cases.³³

Despite high-profile setbacks, the DOJ appears undeterred.³⁴ The DOJ secured a 2023 indictment for alleged wage-fixing.³⁵ And the DOJ's recent statements show a continued view that naked no-poach agreements should be prosecuted as *per se* illegal. In a recent amicus brief, the DOJ argued that no-hire restrictions between and among McDonald's franchises and company-owned stores should be viewed as *per se* illegal.³⁶ The DOJ further asserted that it was the burden of the employer to prove that no-hire provisions were ancillary to the underlying franchise agreement.³⁷ While this brief shows the DOJ's commitment to pursuing these types of restrictions as *per se* antitrust violations, it is not clear how the DOJ's view will translate to its criminal cases, as the DOJ carries the burden to prove every element beyond a reasonable doubt—in other words, that the restraint is “naked” rather than ancillary.³⁸ However, the area is likely to remain a focus in the coming years, as Assistant Attorney General Jonathan Kanter reaffirmed that the DOJ's Antitrust Division is “committed to

²⁹ Ruling & Order on Defendants' Joint Motion to Dismiss at *6, *United States v. Patel*, No. 3:21-cr-220, 2022 WL 17404509 (D. Conn. Dec. 2, 2022).

³⁰ *Id.* at *11.

³¹ Order on Defendants' Motions for Judgment of Acquittal at 2-4, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Apr. 28, 2023).

³² *Id.* at 9, 17, 18.

³³ *See, e.g.*, Jury Verdict Form, *United States v. Manahe*, No. 2:22-cr-00013-JAW, 2023 WL 3034835 (D. Me. Mar. 22, 2023) (discussing the acquittal of managers of home health care agencies alleged to have fixed wages and agreed not to poach each other's employees); Verdict, *United States v. DaVita Inc.*, No. 21-cr-00229-RBJ (D. Col. Apr. 15, 2022) (discussing acquittal of firm and one of its executives alleged to have agreed with competitors not to poach senior level employees).

³⁴ Kovacic, *supra* note 3, at 340 (“In all matters, the DOJ and FTC leadership have sought to increase the appetite of their agencies for risk-taking and their willingness to lose a larger number of cases to reset doctrinal boundaries and change business attitudes.”).

³⁵ Indictment, *United States v. Lopez*, No. 23-cr-55-CDS-DJA (D. Nev. Mar. 15, 2023).

³⁶ Brief for the United States & the Fed. Trade Comm'n as Amici Curiae in Support of Neither Party at 17-20, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. Nov. 18, 2022) (Nos. 22-2333 & 22-2334).

³⁷ *Id.* at 10-11, 13.

³⁸ *See id.* at 21.

protecting workers from the harms that result when they face too little competition for their labor.”³⁹

C. Civil Conduct Enforcement

The FTC and DOJ have also pursued civil enforcement initiatives in labor markets, utilizing a full range of antitrust laws and proposed rulemaking to push forward policy initiatives in this area. The DOJ has brought several civil challenges to wage-related conduct under Section 1 of the Sherman Act.⁴⁰ In 2022, the DOJ alleged that poultry processing companies artificially suppressed compensation in poultry processing labor markets, by sharing wage- and benefit-related benchmarking information through a third-party consultant.⁴¹ And in 2023, the DOJ alleged that Activision Blizzard and several e-sports teams illegally suppressed wages of e-sports players.⁴² The DOJ alleged that Activision set a particular threshold for e-sports players’ wages, which “minimized the risk that one team would substantially outbid another for a player.”⁴³ Both matters were settled, and poultry processor defendants agreed to pay penalties of \$84.8 million collectively.⁴⁴

The FTC has also prioritized efforts in this space, in particular, utilizing FTC Act Section 5, which prohibits “unfair methods of competition.”⁴⁵ The FTC recently announced challenges and simultaneous settlements with several companies, alleging that the companies’ use of employee non-compete clauses violated Section 5, leading to “lower wages and salaries, reduced benefits, and

³⁹ Jonathan Kanter, Assistant Att’y Gen., U.S. Dep’t of Just., Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust>.

⁴⁰ Eduardo Porter, *A New Legal Tactic to Protect Worker’s Pay*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/wages-antitrust-law-us.html>.

⁴¹ Complaint, United States v. Cargill Meat Sols. Corp., No. 1:22-cv-01821-ELH (D. Md. July 25, 2022), <https://www.justice.gov/media/1238931/dl?inline>.

⁴² Complaint, United States v. Activision Blizzard, Inc., No. 1:23-cv-00895 (D.D.C. Apr. 3, 2023), <https://www.justice.gov/media/1284331/dl>.

⁴³ *Id.* ¶ 8.

⁴⁴ Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>; Final Judgement, United States v. Activision Blizzard, Inc., No. 1:23-cv-00895 (D.D.C. July 7, 2023), <https://www.justice.gov/d9/2023-12/418387.pdf>.

⁴⁵ FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 1 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

less favorable working conditions.”⁴⁶ The FTC is also engaging in rule-making, which purports to set out that the vast majority of employee non-compete clauses are unfair methods of competition, in violation of Section 5.⁴⁷ The proposed rule appears to include almost all employee non-compete clauses, with only very limited exceptions,⁴⁸ but the final version of the rule has not yet been released.⁴⁹

Finally, another recent initiative at the DOJ and FTC with ramifications for businesses’ employment and leadership is renewed enforcement of Section 8 of the Clayton Act. Section 8 prohibits, subject to certain thresholds and exceptions, simultaneous service as an officer or director on two competing companies (known as interlocking directorates).⁵⁰ The DOJ pledged in 2022 that it was stepping up its enforcement efforts in this area,⁵¹ later announcing that fifteen directors had resigned across eleven boards in response to the DOJ’s investigations.⁵² The FTC, as well, required a proposed transaction to be

⁴⁶ Press Release, Fed. Trade Comm’n, *FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers* (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.

⁴⁷ FED. TRADE COMM’N, *FACT SHEET: FTC PROPOSES RULE TO BAN NONCOMPETE CLAUSES, WHICH HURT WORKERS AND HARM COMPETITION* (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.

⁴⁸ *See id.* at 2.

⁴⁹ Press Release, Fed. Trade Comm’n, *FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19* (Mar. 6, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19>.

⁵⁰ 15 U.S.C.A. § 19.

⁵¹ Jonathan Kanter, Assistant Att’y Gen., U.S. Dep’t of Just., *Opening Remarks at 2022 Spring Enforcers Summit* (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

⁵² Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., *Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department’s Ongoing Enforcement Efforts Against Interlocking Directorates* (Aug. 16, 2023), <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>; *see also* Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates* (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>; Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., *Justice Department’s Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates* (Mar. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>.

restructured to mitigate concerns about interlocking directorates.⁵³ Both agencies have pledged to continue enforcement efforts in this area.⁵⁴

II. COMPLIANCE CASE STUDIES: DEI INITIATIVES

With enforcement scrutiny likely to continue, companies would be well advised to ensure that employees of all levels are sensitive to these enforcement risks and receive targeted compliance training.⁵⁵ In particular, companies should be alert for potential areas of risk in DEI initiatives—especially efforts that bring together competing employers for collaborative or industry-wide initiatives.

Altruistic motivations are no defense for antitrust violations, as both Chair Khan and AAG Jonathan Kanter underscored in recent discussions regarding antitrust risk in the ESG space.⁵⁶ This was echoed more recently by DOJ Principal Deputy Assistant Attorney General Doha Mekki, who underscored that considerations such as “green initiatives” or motivations such as increasing board or management diversity were unlikely to be persuasive to the DOJ in antitrust enforcement.⁵⁷ Indeed, some have already flagged corporate ESG activities as potential antitrust violations,⁵⁸ and one U.S. Senator has suggested

⁵³ See Press Release, Fed. Trade Comm’n, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Aug. 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>; see also FED. TRADE COMM’N, STATEMENT OF CHAIR LINA M. KHAN JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER AND COMMISSIONER ALVARO BEDOYA IN THE MATTER OF EQT CORPORATION (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf; Complaint, *In re* EQT Corp., File No. 221-0212 (F.T.C. Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2220212eqtquantumcomplaint.pdf.

⁵⁴ FED. TRADE COMM’N, STATEMENT OF CHAIR LINA M. KHAN JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER AND COMMISSIONER ALVARO IN THE MATTER OF EQT CORPORATION 3-4 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf; Kanter, *supra* note 51.

⁵⁵ A DOJ official recently noted: “If you aren’t engaging human resources professionals in antitrust trainings... I think that raises a genuine question about whether your compliance strategy is actually well designed and likely to be effective at preventing harms and potential antitrust violations.” Chris May, *HR Decision-Makers Need Antitrust Training, Guidance, US DOJ Official Says*, MLEX (Dec. 14, 2023, 9:59 PM), <https://mlexmarketinsight.com/news/insight/hr-decision-makers-need-antitrust-training-guidance-us-doj-official-says>.

⁵⁶ *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Competition Pol’y, Antitrust, and Consumer Rts.*, 117th Cong. (2022) (statements of Jonathan Kanter, Assistant Attorney General for the Antitrust Division of the DOJ and Lina Khan, Chair of the FTC).

⁵⁷ Lauren Hirsch, *On the Ground of Biden’s Antitrust Agenda*, N.Y. TIMES: DEALBOOK (Feb. 17, 2024), <https://perma.cc/2KUX-F88Z>.

⁵⁸ See, e.g., *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Competition Pol’y, Antitrust, and Consumer Rts.*, 117th Cong. (2022) (statements of Jonathan Kanter, Assistant Attorney General for the Antitrust Division of the DOJ and Lina Khan, Chair of the FTC).

that colleges could be illegally “coordinating” in response to the Supreme Court’s recent decision regarding affirmative action.⁵⁹ Antitrust should not be a barrier to effective DEI initiatives, but careful planning and recognition of potential pitfalls can help companies achieve DEI goals while minimizing risk.

A. *Industry Benchmarking to Address Pay Inequity*

In an effort to ameliorate pay inequity, some have focused on pay transparency as a method to combat wage gaps.⁶⁰ However, antitrust risks can arise when competing employers exchange confidential information, including wage and salary details.

The DOJ and FTC both recently withdrew existing “safe harbor” guidelines for benchmarking and information sharing.⁶¹ Previously, the DOJ and FTC guidance offered a safe harbor for such information exchanges where (1) the exchange is “managed by a third party;” (2) the information exchanged is relatively old; (3) the information is aggregated to protect the identity of the underlying sources; and (4) a sufficient number of sources are aggregated to prevent competitors from linking particular data to an individual source.⁶² However, as noted, this guidance is now withdrawn, with the DOJ in particular noting that it was “outdated” and failed to reflect “market realit[y].”⁶³

Companies should be aware that sharing confidential information with competing employers—even in a DEI context—can give rise to antitrust risk. Indeed, as the DOJ’s poultry processing case shows, the authorities are alert to how exchanges of this type can potentially impact salary competition.⁶⁴

⁵⁹ Vance, *supra* note 5.

⁶⁰ See, e.g., *Pay Transparency Tools to Close the Gender Wage Gap*, OECD, <https://www.oecd-ilibrary.org/sites/29b1582a-en/index.html?itemId=/content/component/29b1582a-en>; Klause Heeke, *Wage Transparency, What It Means for Gender Equality, and How Legal Teams Can Influence the Corporate Approach*, DELOITTE (June 2, 2023), <https://www.deloitte.com/global/en/services/legal/blogs/wage-transparency-for-gender-equality.html>; Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html>.

⁶¹ Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>.

⁶² U.S. DEP’T OF JUST. & FED. TRADE. COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 44-45 (1996), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

⁶³ Doha Mekki, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Just., Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0#_ftnref12.

⁶⁴ See *id.*; Off. of Pub. Affs., U.S. Dep’t of Just., *supra* note 44.

Companies should work with antitrust counsel both in determining the level of detail they will provide in any information exchange, the mechanisms of the exchange to protect against any unnecessary risk, and ensuring any employees—involved in the exchange or the use of data coming out of the exchange—are sensitized to proper (and improper) uses of the data and how to manage antitrust risks in this area.

B. Avoiding the Appearance of No-Poach Agreements in Efforts to Retain Diverse Workers

To the extent that companies are engaging in collective or industry-wide initiatives in an effort to increase the retention of diverse or underrepresented employees,⁶⁵ companies should be alert for potential risk areas related to labor market competition. Companies—and their employees active in these initiatives—should be aware that other employers can be viewed as “competitors” in a labor market, even if not operating in the same industry.⁶⁶

The mere fact that companies are working together in a trade association or DEI-focused working group does not immunize the activities from antitrust risk. In the past, the DOJ and FTC have not hesitated to challenge associations and trade groups, when they believe the organizations have rules which might restrict competition among the members. For example, in 2019 the DOJ alleged that the National Association for College Admission Counseling had promulgated membership rules restricting competition among member colleges.⁶⁷ Among the restrictions, the DOJ challenged included rules that were intended to *protect* low-income students, but the DOJ alleged these rules reduced competition among the member schools for applicants and potential transfer students.⁶⁸

Industry associations and working groups can present a particular risk for the occurrence—or even just the *appearance*—of antitrust violations. Companies should ensure that employees attending these meetings, even if only focused on DEI or employee retention efforts, are well counseled in managing antitrust risk in the trade association context.

⁶⁵ See generally Justin Dean et al., *The Real Reason Diversity Is Lacking at the Top*, BOS. CONSULTING GRP. (Nov. 19, 2020), <https://www.bcg.com/publications/2020/why-is-diversity-lacking-at-top-of-corporations>.

⁶⁶ ANTITRUST DIV., U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 7.

⁶⁷ Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Files Antitrust Case and Simultaneous Settlement Requiring Elimination of Anticompetitive College Recruiting Restraints (Dec. 12, 2019), <https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-elimination>.

⁶⁸ See *id.*

C. Diverse Pipelines for Boards of Directors

Finally, ensuring diverse leadership at the executive and board levels is a noted priority for many companies, especially in light of state legislative and NASDAQ-led efforts to increase board diversity.⁶⁹ Whether a company is seeking to diversify its board to achieve its diversity priorities or in response to a new legal requirement, remaining mindful of antitrust risks associated with interlocking directorates remains important.

This is particularly the case in light of the DOJ's and FTC's stated focus on investigating interlocking directorates that may violate Section 8 of the Clayton Act.⁷⁰ As discussed above, the DOJ has touted a number of resignations stemming from its investigations in this space, publicly announcing a total of fifteen resignations across eleven boards, including the most recent resignations stemming from an investigation into interlocks between Pinterest and Nextdoor.⁷¹

Increased enforcement attention to interlocking directorates underscores the importance of ensuring that board recruitment efforts include antitrust-focused compliance considerations. Risks associated with interlocking directorates may be particularly acute for diverse directors facing "overboarding" issues (that is, sitting on multiple boards at the same time)⁷² or in industries where specialized knowledge or experience might be needed.⁷³ Increased antitrust risk in this space demonstrates the importance of both building and maintaining a robust

⁶⁹ See Gabrielle Hunter, Comment, *United We Stand, Divided We Fall: A Survey of Current Public and Private Initiatives Addressing Board Diversity & a Proposed SEC Diversity Disclosure to Help Increase Board Diversity*, 10 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 280, 281-97 (2023); see also *All. for Fair Bd. Recruitment v. Sec. Exch. Comm'n*, 85 F.4th 226 (5th Cir. 2023) (affirming the SEC's approval order and concluding that (1) petitioners' constitutional claims did not apply to Nasdaq, a private entity, (2) the SEC did not exceed the agency's authority under the Exchange Act, and (3) the SEC's approval order was not arbitrary and capricious).

⁷⁰ Kanter, *supra* note 51.

⁷¹ See sources cited *supra* note 52.

⁷² *Governance explainer: Overboarding*, INST. OF DIRS.: GOVERNANCE HUB (Aug. 21, 2023), <https://www.iod.com/resources/blog/governance/governance-explainer-overboarding/>; Maddy Beaudry, *Female Directors Falling Overboard*, MEDIUM (Apr. 19, 2016), <https://medium.com/queens-business-review/female-directors-falling-overboard-e109964ea91a>.

⁷³ Mark A. Lemley et al., *Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards 2* (Stanford L. Sch., John M. Olin Program in L. & Econ., Working Paper No. 578, 2022), <https://law.stanford.edu/publications/analysis-of-over-2200-life-science-companies-reveals-a-network-of-potentially-illegal-interlocked-boards/> ("Within a market, interlocked directorates may form for a variety of reasons, including relationships between individuals (past personal interactions in society or business), and necessity (a limited supply of qualified individuals).").

and thoughtful recruitment pipeline to achieve diversity goals,⁷⁴ as well as ensuring ongoing compliance and monitoring potential risks associated with interlocking directorates.

III. CONCLUSION

Active antitrust enforcement is likely to continue in the future—especially with a focus on labor competition. With the FTC and DOJ investigations focusing in on the issue across M&A review, criminal prosecution, and civil enforcement, companies would be well-advised to consult antitrust counsel to ensure that antitrust compliance risks are well-managed. This is particularly the case in DEI activities, especially those that involve contact between companies that could be viewed as competitors, and in light of antitrust attention paid to other social initiatives, including ESG activities, in the recent past.

⁷⁴ Celia Huber & Sara Slayton O'Rourke, *How to Accelerate Gender Diversity on Boards*, MCKINSEY & CO. (Jan. 16, 2017), <https://www.mckinsey.com/featured-insights/leadership/how-to-accelerate-gender-diversity-on-boards>.