THIRD SUPPLEMENT TO MEMORANDUM 2024-32

Antitrust Law: Status Update (Public Comment, Presentations, and Additional Material)

This supplement provides (1) public comments and slides from three of the panelists presenting at the Commission's August 15, 2024 meeting, (2) an update from Dan Robbins on behalf of the Uniform Law Commission (ULC) on the ULC's Draft Uniform Antitrust Pre-Merger Notification Act, and (3) additional materials. The updates from the ULC, comments, and slides are attached as Exhibits.

Exhibits ***Exhibit page***

PUBLIC COMMENT AND PRESENTATIONS

The staff has received a number of public comments relating to the Antitrust Study. The most recent comments are attached as Exhibits to this memorandum.

If the staff receives additional public comments, the comments will be provided in another supplemental memorandum.

Western States Petroleum Association

This comment was submitted by Roxane Polidora and Lee Brand from Pillsbury Winthrop Shaw Pittman LLP on behalf of the Western States Petroleum Association. According to its website:

> Western States Petroleum Association (WSPA) is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington.
>
> …WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially,

> economically and environmentally responsible. We believe the best way to achieve this goal is through a better understanding of the relevant issues by government leaders, the media and the general public. Toward that end, WSPA works to disseminate accurate information on industry issues and to provide a forum for the exchange of ideas on petroleum matters.

This comment suggests the Commission request a supplemental expert report on the intersection of antitrust law with collaborations among competitors on environmental, social, and governance matters. Roxane Polidora and Lee Brand[1] will be panelists at the August 15, 2024 Commission meeting and also submitted slides in support of their presentation.

California Nurses Association/National Nurses United

These slides were submitted by Carmen Comsti, on behalf of the California Nurses Association/National Nurses United. Carmen Comsti will be a panelist at the August 15, 2024 Commission meeting and her presentation relates to consolidation in the hospital industry.

International Center for Law & Economics

These slides were submitted by Geoffrey Manne on behalf of the International Center for Law & Economics (ICLE). Geoffrey Manne will be a panelist at the August 15, 2024 Commission meeting, and the presentation relates to competition and concentration.

According to ICLE's website, its "mission is to promote the use of law & economics methodologies to inform public policy debates."[2]

UPDATE FROM ULC: ANTITRUST PRE-MERGER NOTIFICATION ACT

The staff received the following email on August 12, 2024 from Dan Robbins, Immediate Past President and Commissioner of the ULC and Chair of the ULC's Study Commission on Antitrust, relating to its draft Uniform Act on Antitrust Pre-Merger Notification.

> I write with an update on the Uniform Law Commission's (ULC) Antitrust Pre-merger Notification Act (the Act.)
>
> On July 18, the American Bar Association's Antitrust Section wrote the ULC expressing its support for the Act. A copy of the letter in support is attached. The ABA's Antitrust Section is a strong and active section. The membership is balanced and includes many enforcers and company lawyers.

[1] Their biographies can be found in the Second Supplement to Memorandum 24-32 at p. 16.
[2] https://laweconcenter.org/about/

> The ULC is comprised of gubernatorial and legislative appointees from all the states. Each state has its own delegation and its own commission. In California, that commission is the California Commission on Uniform State Laws (CCUSL).
>
> Each summer the ULC convenes all the states to its annual meeting to discuss and vote on each proposed uniform act. The ULC annual meeting occurred this summer in Boston. The Act was read over the course of several days during the legislative session. On July 19, the CCUSL met and unanimously approved the Act. On July 24, the states, including California, overwhelmingly approved the Act by a vote of 45-1. Only Alabama voted against the Act.
>
> The approved Act now goes to the ULC legislative style committee, chaired by commissioner Diane Boyer-Vine of California. Once appropriately styled for the states, the Act will be sent out for enactment in the 2025 legislative cycle.

Dan Robbins provided the letter from the American Bar Association referenced above and the latest version of the Act, which are both attached as Exhibits. He will provide further public comment at the August 15, 2024 Commission meeting.

ADDITIONAL MATERIAL

Competition Law Journal

This submission is from the California Lawyers Association. The Spring 2023 edition of the Competition Law Journal speaks broadly to the Antitrust Study. According to its website,

> *Competition* is a semi-annual law journal published by the Antitrust and Unfair Competition Law Section. The journal includes scholarly and practice-oriented articles relating to current issues and developments in the areas of antitrust, unfair competition, and trade regulation. *Competition* invites articles from attorneys, judges, economists, academics, and others who have an interest in antitrust, unfair competition, and trade regulation issues. A free annual subscription is a benefit of Section membership.

The Spring 2023 edition is particularly relevant to the Antitrust Study. According to the Message from the Editor:

> In this edition of *Competition,* we showcase articles from an impressive line-up of antitrust thought leaders who share their views on the topics the California Law Review Commission (CLRC) is currently studying. Broadly, the CLRC is evaluating whether the Cartwright Act should be revised: to outlaw monopolies by single companies; in the context of technology companies; or in any other fashion.

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Staff Counsel

Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Center, 22nd Floor | San Francisco, CA 94111-5998 | tel 415.983.1000 | fax 415.983.1200

August 12, 2024

Via Email

California Law Revision Commission
c/o Sharon Reilly, Executive Director
sreilly@clrc.ca.gov

Re: *Antitrust Law – Study B-750* – Comment on Behalf of WSPA

Dear Commissioners and Staff:

We write as counsel for Western States Petroleum Association ("WSPA"), a non-profit trade association headquartered in Sacramento, California. WSPA represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in California, as well as Arizona, Nevada, Oregon, and Washington. Founded in 1907, WSPA is the oldest petroleum trade association in the United States and is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are environmentally, socially, and economically responsible.

WSPA is grateful for the opportunity to provide comments on the Commission's work with respect to California's antitrust laws, Study B-750. WSPA writes to suggest that the Commission request a supplemental expert report on the intersection of antitrust law with collaborations among competitors on environmental, social, and governance matters, often referred to collectively as ESG. Like artificial intelligence, on which the Commission recently requested a supplemental report, ESG is an emerging issue that is important to consider in the context of the Commission's antitrust study but that has not been meaningfully addressed by the original set of working group expert reports.

The intersection of antitrust and ESG is an important subject to WSPA because its members are committed to both fair competition and the shared responsibility of achieving a sustainable and reliable energy future. However, ESG-focused partnerships have faced significant but inconsistent attention from lawmakers and enforcers across the country, creating uncertainty that is chilling procompetitive collaboration. Accordingly, WSPA believes that California and this Commission can play a leadership role in this space by commissioning a supplemental expert report and then holding a further meeting for public discussion. This process would in turn inform any proposed changes to antitrust enforcement policy to more fairly and transparently assess collaborations among competitors aimed at yielding meaningful environmental benefits for consumers.

The remainder of this submission provides (1) background on WSPA and its interest in the intersection of antitrust and ESG, (2) a summary of the scrutiny that ESG-focused collaboration has faced from both the federal government and the states, and (3) a list of potential policy reforms for further study in the proposed supplemental expert report on antitrust and ESG.

I. Background on WSPA

WSPA believes the most effective way to achieve policies that are environmentally, socially, and economically responsible is by providing government leaders, the media and the general public with a better understanding of the relevant issues. Toward that end, WSPA works to disseminate accurate information on industry issues and to provide a forum for the exchange of ideas on petroleum matters.

WSPA also believes that, working together, we can rise to the challenge of a changing climate. The way the world produces and consumes energy is evolving and WSPA members are on the cutting edge of those changes. These members bring deep engineering and institutional knowledge from decades of creating innovative energy solutions. And they are currently investing in and developing the diverse energy sources and technologies of the future.

WSPA has identified certain principles as the basis for sound climate policy solutions.[1] These include the following, which are particularly germane to WSPA's suggestion herein that the Commission request a supplemental expert report:

- ***Scientific and Economic Analysis*** — Climate policy solutions should be rooted in rigorous economic and scientific analysis of policy solutions. Scientific and research data gathered for policy decisions should be transparent and publicly available and should consider how an evolving energy mix will affect employment and communities.[2]

- ***Technology/Fuel Neutral*** — Climate policies should be technology and fuel neutral but connected to the pursuit of climate related objectives. Policymakers should maintain optionality in designing programs and a focus on reliably delivering energy in a low-carbon future.

- ***Market-based Approaches*** — Market-based approaches outperform command and control measures from an environmental and economic perspective. If a state is going to pursue climate policy, market-based approaches can help balance the need to achieve greenhouse gas emission targets while reducing the economic impact on families, consumers, and the economy.

---

1 *See* WSPA, https://www.wspa.org/issue/climate-change/.

2 WSPA similarly believes that any proposed revisions to California's antitrust laws should be rooted in a thorough analysis of the costs and benefits of such changes to California's economy. For a more detailed discussion on this subject, WSPA refers the Commission to the April 25, 2024 and June 18, 2024 submissions of the California Chamber of Commerce.

II. Antitrust Scrutiny of Environmental Collaborations

In recent years, many institutions have seen increasing stakeholder demand for commitments on various environmental, social and governance matters. A multicompany initiative to pursue an environmental goal, however, is currently treated no differently under state and federal antitrust law than any other collaboration among competitors.[3] While some government officials on the left have suggested that state and federal antitrust laws leave plenty of room for permissible collaboration focused on ESG matters like sustainability, others on the right have strenuously challenged such collaborations as anticompetitive and illegal. These conflicting political and legal positions have put ESG collaborations on uncertain footing and in some cases led to large-scale withdrawals from significant multiparty initiatives.

A. Federal Activity

At the federal level, enforcers and legislators across the political spectrum have recognized that there is no antitrust carveout for ESG initiatives, although there is no consensus regarding when ESG collaborations run afoul of antitrust laws. In September 2019, for example, it was widely reported that the U.S. Department of Justice ("DOJ") had opened an antitrust inquiry into a deal between California and the four major automakers to reduce automobile emissions beyond federal standards on the basis that the agreement could limit consumer choice.[4] In response to criticism at the time that this inquiry was politically motivated, President Trump's appointee at the helm of the DOJ's Antitrust Division, Assistant Attorney General Makan Delrahim, wrote in *USA Today* that, "when it comes to antitrust, politically popular ends should not justify turning a blind eye to the competition laws."[5] Yet the automaker inquiry closed in January 2020 without any finding of wrongdoing by the automakers.[6]

In December 2022, President Biden's appointee as Federal Trade Commission ("FTC") Chair, Lina Khan, took to the *Wall Street Journal* to respond to hearing "would-be merging parties make all sorts of commitments to be better corporate citizens if only we would back off from a lawsuit." Echoing former AAG Delrahim, Chair Khan wrote: "The antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social

---

3 *See generally* Working Group 3 Report on Concerted Action; Working Group 6 Report on Enforcement and Exemptions.

4 Hiroko Tabuchi and Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. Times, Sept. 6, 2019, https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.

5 Makan Delrahim, Opinion, *DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion*, USA Today, Sept. 12, 2019, https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

6 DOJ Off. of the Inspector Gen., DOJ OIG Releases Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation (July 22, 2024), https://oig.justice.gov/news/doj-oig-releases-preliminary-review-allegations-concerning-antitrust-divisions-handling (also finding no "evidence that the Antitrust Division sought to misuse the enforcement process based on political considerations").

benefit."[7] In April 2024, speaking alongside current Assistant Attorney General Jonathan Kanter, Khan reiterated that "there is no environmental, social, and governance (ESG) exemption to the antitrust laws," and suggested that "[i]f there is interest or desire in the business community for those types of rules or exemptions, I really encourage you all to engage with Congress on that." At the same time, AAG Kanter rejected the proposition that antitrust laws were an "impediment to progress with respect to any industry including the importance of sustainability" and opined that "companies shouldn't use antitrust as an excuse to shirk their responsibilities to promote progress across a wide range of issues, whether it is AI safety and security or environmental sustainability." Khan agreed, stating that "[i]f firms are really committed to solving some of these problems, they should take the boldness of being market leaders," and that "there is nothing that our agencies are doing that is inhibiting that."[8]

In Congress, a partisan divide has made federal legislative action to address the intersection of antitrust law and ESG initiatives highly unlikely. Parallel June 2024 House Judiciary Committee reports from the Republican majority and Democratic minority reflect the intense political debate that has formed around this intersection. The majority report, titled "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social and Governance (ESG) Investing," explains that "the Committee has been investigating apparent collusion between left-wing activists and major financial institutions to impose radical environmental, social, and governance (ESG) goals upon the American people," and cautions that such "collusion not only violates fundamental free market principles, it also threatens to raise costs and reduce choice for millions of American consumers."[9] The report "focuses primarily upon the collusive conduct of Climate Action 100+," and alleges that "members of the climate cartel are colluding toward a common goal: the 'decarbonization' of American industry, which necessarily reduces output and increases prices for American consumers."[10] It also credits "[t]he Committee's aggressive oversight" for the withdrawal of dozens of members from Climate Action 100+, including "BlackRock, State Street, and J.P. Morgan Asset Management—three of the world's largest asset managers."[11]

In sharp contrast, the minority report, titled "Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil," argues that "the legal

---

7 Lina Khan, Opinion, *ESG Won't Stop the FTC*, Wall Street Journal, Dec. 21, 2022, https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135.

8 American Bar Association, *Enforcers' Roundtable*, The Antitrust Source, June 2024, https://www.americanbar.org/groups/antitrust_law/resources/source/2024-june/enforcers-roundtable/.

9 Staff of H. Comm. on the Judiciary, 118th Cong., Climate Control: Exposing the Decarbonization Collusion in Environmental, Social and Governance (ESG) Investing, at i (June 11, 2024), https://judiciary.house.gov/media/press-releases/new-report-reveals-evidence-esg-collusion-among-left-wing-activists-and-major ("Majority Report").

10 *Id*. at ii. Climate Action 100+ describes itself as "an investor-led initiative to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change in order to mitigate financial risk and to maximize the long-term value of assets." Climate Action 100+, https://www.climateaction100.org/about/.

11 Majority Report at iv.

theory underpinning the Republican investigation is a total sham" and that "[t]here is no theory of antitrust law that prevents private investors from working together to capture the risks associated with climate change."[12] The report further claims that "[t]he Majority did not find evidence of wrongdoing," that the investigation's "purpose was to use the Committee as a cudgel, and to bully investors into withdrawing from ESG partnerships," and that the "investigation is an abuse of the Committee's oversight authority."[13]

B. State Activity

At the state level, a similar partisan divide has emerged among attorneys general. On the right, Republican state attorneys general have argued that collusion among competitors to address climate change is illegal and harmful to consumers. For example, in March 2022, former Arizona Attorney General Mark Brnovich, wrote in the *Wall Street Journal* to criticize Climate Action 100+ and similar groups for "their coordinated efforts to choke off investment in energy" and for "pushing climate goals at shareholder meetings and voting against directors and proposals that don't comport with the[ir] agenda, even if other decisions may benefit investors." Citing his "responsibility to protect consumers from artificial restrictions on production," AG Brnovich announced that he had "launched an investigation into this potentially unlawful market manipulation."[14]

Similar activity among Republican state attorneys general has continued since, including:

- An August 2022 letter from 19 attorneys general to asset manager BlackRock citing "antitrust concerns" based on its participation in the Net Zero Managers Alliance ("NZAM") and "coordinated conduct with other financial institutions to impose net-zero" emissions standards, actions which "appear to intentionally restrain and harm the competitiveness of the energy markets";[15]

- October 2022 civil investigative demands served by 19 attorneys general on six major American banks—Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase,

---

[12] Minority Staff of H. Comm. on the Judiciary, 118th Cong., Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil, at 1 (June 11, 2024), https://docs.house.gov/meetings/JU/JU05/20240612/117415/HHRG-118-JU05-20240612-SD032-U32.pdf.

[13] *Id*. at 1, 4.

[14] Mark Brnovich, Opinion, *ESG May Be an Antitrust Violation*, Wall Street Journal, Mar. 6, 2022, https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807.

[15] Letter from Mark Brnovich et al., State Attorneys General, at 5 (Aug. 4, 2022), https://www.azag.gov/media/interest/ag-brnovich-letter-blackrock-inc-re-esg-concerns.

Morgan Stanley, and Wells Fargo—regarding their involvement with the United Nations' Net-Zero Banking Alliance ("NZBA");[16]

- A January 2023 letter from 21 attorneys general to proxy advisory firms Institutional Shareholder Services, Inc. and Glass Lewis & Co. challenging pledges to recommend votes on company directors and proposals based on net zero emissions goals and other climate commitments;[17]

- A March 2023 letter from 21 attorneys general to over 50 U.S. asset managers criticizing commitments "to use client assets to change portfolio company behavior so that it aligns with the Environmental, Social, and Governance (ESG) goal of achieving net zero by 2050," and specifically noting "concerns that horizontal agreements related to voting and engagement through organizations such as Climate Action 100+ and [the Net Zero Asset Managers Initiative] unreasonably restrain and harm competition";[18]

- A May 2023 letter from 23 attorneys general to members of the Net Zero Insurance Alliance ("NZIA") expressing "serious concerns about" the requirements of NZIA's member protocol "[u]nder our nation's antitrust laws and their state equivalents" and requesting additional information;[19] and

- A September 2023 letter from 22 attorneys general to signatories of the Net Zero Financial Service Providers Alliance ("NZFSPA") expressing concern that "joint commitments under the NZFSPA may run afoul of United States antitrust law and its state equivalents," and requesting additional information regarding NZFSPA commitments.[20]

On the left, Democratic state attorneys general have criticized the actions of their Republican counterparts as politically motivated and lacking rigorous antitrust analysis. For example, in a November 2022 letter to the Senate Committee on Banking, Housing, and Urban Affairs and the

---

[16] Press Release, Arizona Attorney General, *General Brnovich Joins Investigation into Six Major Banks Over ESG Investing* (Oct. 19, 2022) https://www.azag.gov/press-release/general-brnovich-joins-investigation-six-major-banks-over-esg-investing ("NZBA is an agreement between major banking institutions to support the climate agenda by choosing not to work with companies engaged in fossil fuel-related activities. This means some farmers, oil leasing companies, and other businesses will be unable to get a loan because of the alliance. The states want the banks to identify global climate initiatives they are affiliated with and explain why.").

[17] Letter from Sean D. Reyes et al., State Attorneys General (Jan. 14, 2023), https://attorneygeneral.utah.gov/wp-content/uploads/2023/01/2023-01-17-Utah-Texas-Letter-to-Glass-Lewis-ISS.pdf.

[18] Letter from Austin Knudsen et al., State Attorneys General, at 1, 6 (Mar. 30, 2023), https://attorneygeneral.utah.gov/wp-content/uploads/2023/03/2023-03-30-Asset-Manager-letter-Press-FINAL.pdf.

[19] Letter from Sean D. Reyes et al., State Attorneys General, at 4, 7-8 (May 15, 2023), https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf.

[20] Letter from Jonathan Skrmetti et al., State Attorneys General, at 1, 5-6 (Sept. 13, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-37-letter.pdf.

House Committee on Financial Services, 17 attorneys general, including California's Rob Bonta, took issue with the August 2022 BlackRock letter. In relevant part, the response dismissed the initial letter's antitrust concerns as "unsupported," pointing out that "[a]n expression of general recommendations or a statement in favor of or against certain policies does not, without more, constitute a violation of the Sherman Act," and that the NZAM's "commitment page simply makes a broad recommendation that each manager can elect to follow (or not) consistent with their clients' preferences." [21]

Similarly, in February 2023, shortly after taking office, current Arizona Attorney General Kris Mayes announced the state's exit from the multistate bank investigation that former AG Brnovich had joined four months earlier. AG Mayes decried the prior effort as a "politicized investigation[] into the environmental sustainability efforts of major financial institutions," adding that "she believes it is not the place of government to tell corporations and their investors that they cannot invest in sustainable technologies and practices or improve their governance processes."[22]

In January 2024, Amy McFarlane, Deputy Bureau Chief of the New York Attorney General's Antitrust Bureau, opined at a legal conference that the "Sherman Act has been, to my view, weaponized by the Republican AGs to scare firms away from sustainability goals." Ms. McFarlane further urged "very, very careful counseling of trade associations" in this space and recognized open questions as to both the level of collaboration allowed under existing antitrust law and whether an exemption should be created because "sustainability goals are so socially important that antitrust law should have extra flexibility in this space."[23]

In April 2024, Colorado Attorney General Phil Weiser published prepared remarks delivered at a law school symposium in which he called out the September 2023 letter to NZFSPA signatories as "attack[ing] the Net Zero self-regulatory program based on so little evidence that the program advanced an anticompetitive scheme." AG Weiser also noted longstanding antitrust guidance acknowledging the procompetitive potential for consumer collaborations, citing specifically to the DOJ and FTC's joint April 2000 "Antitrust Guidelines for Collaborations Among Competitors." Nevertheless, Weiser also acknowledged that his fellow state attorneys general "are powerful antitrust enforcers" and that even "the mere threat of antitrust enforcement can shape the direction of individual businesses and whole industries."[24]

---

[21] Letter from Karl A. Racine et al., State Attorneys General, at 6 (Nov. 21, 2022), https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf.

[22] Press Release, Arizona Attorney General, *Arizona Attorney General Kris Mayes Announces Exit from Investigation into ESG Investment Practices* (Feb. 13, 2023), https://www.azag.gov/press-release/arizona-attorney-general-kris-mayes-announces-exit-investigation-esg-investment.

[23] Khushita Vasant and Ilana Kowarski, *US antitrust laws being 'weaponized' by Republicans to scare firms away from ESG goals, New York enforcer says*, MLex, Jan. 18, 2024, https://mlexmarketinsight.com/news/insight/us-antitrust-laws-being-weaponized-by-republicans-to-scare-firms-away-from-esg-goals-new-york-enforcer.

[24] Phil Weiser, *Prepared remarks: The Rule of Law and Antitrust, at New York University Law School* (Apr. 20, 2024), https://coag.gov/blog-post/rule-of-law-antitrust-4-20-24/; *see also* FTC and DOJ, Antitrust Guidelines for

Speaking again in June 2024, Deputy Bureau Chief McFarlane expanded on the current state of the law in this area, suggesting that at least with regard to "bread-and-butter" standard-setting activity, antitrust counselors could "come up with frameworks for their clients where they're not going to be violating the antitrust laws, but they can engage in this behavior that's overall procompetitive and pro social." Reiterating the need for "very clear guardrails" from counsel, she also pointed to the April 2000 joint agency guidance on competitor collaborations, as well as a more recent March 2020 joint agency statement on COVID-related collaborations. McFarlane also noted that she did not see the zero alliance memberships challenged by Republicans as per se illegal under the antitrust laws but acknowledged the remaining "huge consideration" of litigation risk from potential rule-of-reason challenges to such collaborations, which would ask courts to weigh whether the procompetitive effects of such collaborations outweigh their anticompetitive harms.[25]

III. Areas for Further Study in California

The current level of government scrutiny is giving private actors significant pause about participating in sustainability and other ESG-focused collaborations, even where such collaboration may have strong procompetitive justifications. In addition to the departures from Climate Action 100+ mentioned above, the attorney general letters have also significantly impacted net zero alliances. For example, within two months of the May 2023 NZIA letter, that alliance had shrunk from 30 to 12 members and had dropped requirements for members to set or publish greenhouse gas emission-reduction targets.[26]

Academic studies have also recognized that private-sector firms are increasingly citing antitrust scrutiny, and a lack of clear guidance regarding permissible behavior, as chilling the willingness to take on sustainability challenges. To fill this vacuum at the intersection of antitrust and ESG, foreign regulators and academic scholars have identified various policy proposals.[27] While California cannot directly change the antitrust law or policy of the federal government or fellow states, it remains a powerful and influential antitrust enforcer. Accordingly, WSPA has

---

Collaborations Among Competitors (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[25] Chris May, *ESG standard-setting can be pro-competitive, pro-social, New York antitrust enforcer says*, MLex, June 21, 2024, https://mlexmarketinsight.com/news/insight/esg-standard-setting-can-be-pro-competitive-pro-social-new-york-antitrust-enforcer-says; *see also* FTC and DOJ, Joint Antitrust Statement Regarding COVID-19 (Mar. 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[26] Tommy Reggiori Wilkes, *UN climate alliance scraps emissions rules for insurers after exodus*, Thomson Reuters, July 6, 2023, https://www.reuters.com/sustainability/un-climate-alliance-scraps-emissions-rules-insurers-2023-07-05/.

[27] Denise Hearn, Cynthia Hanawalt, and Lisa Sachs, *Antitrust and Sustainability: A Landscape Analysis*, Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law, at 7-9 (2023), https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis.

identified three categories of antitrust policy changes that it believes merit further study in a supplemental expert report to the Commission.

Formal Guidance. At the federal level, formal guidance on competitor collaborations was last published by the DOJ and FTC in April 2000, over two decades ago, and does not include any discussion of how to account for sustainability or environmental factors.[28] This stands in sharp contrast to Europe, where in 2023 both the European Union and the United Kingdom adopted revised guidelines on horizontal cooperation agreements generally and sustainability agreements in particular.[29] Given the absence of recent federal guidance, it may be valuable for California to issue its own guidance statement on sustainability collaborations. At a minimum, this could include strong policy statements on the validity of sustainability collaborations under existing antitrust law, such as the EU's statement that "[w]here a cooperation agreement between competitors . . . pursues a sustainability objective, this must be taken into account for the purpose of determining whether the agreement restricts competition,"[30] or the UK's statement that "ensuring environmental sustainability is a major public concern" and that it is important that "competition law does not impede legitimate collaboration" in this area.[31] Incorporating concrete, modern examples of procompetitive sustainability collaborations into the guidance could also provide meaningful clarity for private actors.

Ad Hoc Consultation. In their recent guidance documents, both the EU and UK have included policies to encourage potential sustainability collaborators to seek direct, collaboration-specific input from government enforcers. California should consider providing similar encouragement, either within a broader guidance document or as a standalone policy. This could take the form of either private consultation meetings, which may be more attractive where confidentiality concerns are at play, or formal legal opinions of the type the California Attorney General currently provides on a variety of subjects to state and local officials and agencies, which would help develop a body of guidance for others contemplating analogous collaborations. California could also consider a consultation program patterned on the one implemented by federal

---

[28] FTC and DOJ, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[29] Denise Hearn, Cynthia Hanawalt, and Chloe Field, *Recommendations to Update the FTC and DOJ's Guidelines for Collaborations Among Competitors*, Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law, at 14-15 (2024), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-recommendations-guidelines-collaborations-among-competitors.pdf.

[30] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, § 533 (July 21, 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01).

[31] UK Competition & Markets Authority, Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, at 3 (Oct. 12, 2023) https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.

enforcers in March 2020 to address COVID-related collaborations, which offered "expeditious guidance about how to ensure their efforts comply with the federal antitrust laws."[32]

Limited Safe Harbors. The EU and UK have also created limited safe harbors for sustainability collaborations. In the UK, this includes protection from financial penalties for those who seek and follow informal government guidance, even if their collaboration agreement is later found to impermissibly limit competition. The EU provides a soft safe harbor for sustainability agreements that are related to the U.N.'s Sustainable Development Goals and meet other specified conditions, including a consumer cost-benefit analysis. Limited safe harbors of this type should also be considered as a potential component of California antitrust law, although any such safe harbor should narrowly define the types of collaborations qualifying as sustainability-related, including by requiring concrete sustainability outcomes, and carefully consider other specific requirements to combat the "greenwashing" of collaborations that remain fundamentally anticompetitive.[33]

* * *

WSPA believes that both climate and antitrust policies should be rooted in rigorous and transparent economic analysis. The Commission's study of California antitrust law provides a unique opportunity to conduct that kind of expert analysis and consider clear and modern standards to assess when the environmental impact of a collaboration among competitors makes it soundly procompetitive, taking into account that the state of California and its consumers expect both carbon reduction efforts and affordable and reliable energy. Moreover, clear guidelines in this area would be hugely beneficial to WSPA members and other private sector actors, who seek both to compete robustly and to practice environmental responsibility but are currently subject to the significant uncertainty created by contradictory messaging from government enforcers and lawmakers.

Very truly yours,

Roxane Polidora

Lee Brand

---

[32] FTC and DOJ, Joint Antitrust Statement Regarding COVID-19 (Mar. 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[33] Denise Hearn, Cynthia Hanawalt, and Chloe Field, *Recommendations to Update the FTC and DOJ's Guidelines for Collaborations Among Competitors*, Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law, 14, 24, 27-28, 38 (2024), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-recommendations-guidelines-collaborations-among-competitors.pdf.

Western States Petroleum Association

Public Comment Regarding Antitrust and ESG

California Law Revision Commission

Antitrust Law - Study B-750

August 15, 2024

WSPA

pillsbury

WSPA's Recommendation

- **WHAT:**
  - Supplemental expert report on the intersection of antitrust and ESG
  - Further public consideration of antitrust changes to fairly and transparently assess collaborations aimed at yielding meaningful environmental benefits
- **WHY:**
  - WSPA is committed to both fair competition and the shared responsibility of achieving a sustainable and reliable energy future
  - ESG-focused partnerships have been targeted by lawmakers and enforcers across the country, chilling procompetitive collaboration
  - Opportunity for California to play a leadership role in this space

WSPA pillsbury

Background on WSPA

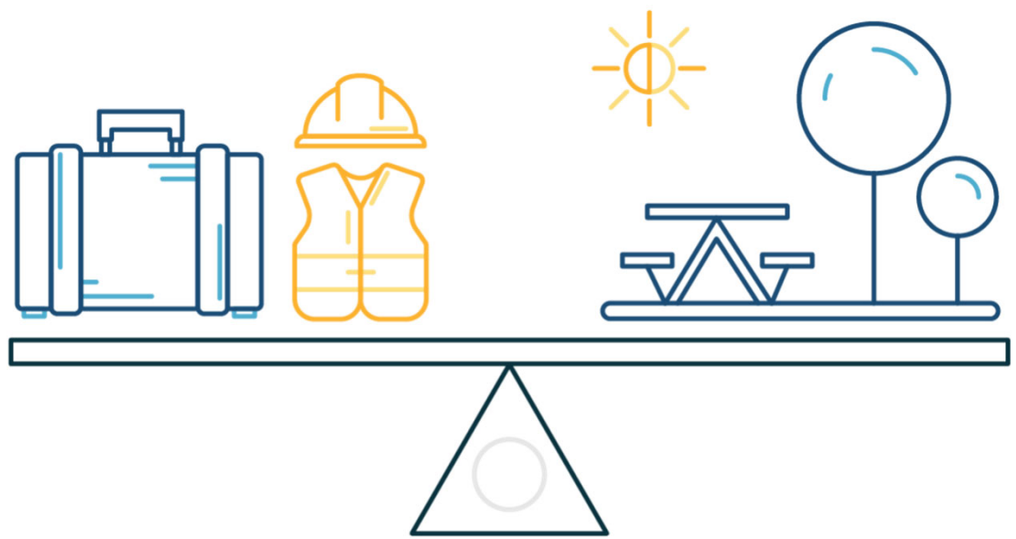
- Founded in 1907 and headquartered in Sacramento
- Represents the bulk of the petroleum industry in California, as well as Arizona, Nevada, Oregon, and Washington

WSPA pillsbury

EX 13

Background on WSPA

- Dedicated to reliable access to petroleum products through policies that are environmentally and socially as well as economically responsible
  - **Scientific and Economic Analysis**
  - **Technology/Fuel Neutral**
  - **Market-based Approaches**



WSPA pillsbury

Antitrust Scrutiny of ESG

Political consensus there is no special protection for sustainability collaborations under antitrust law

"when it comes to antitrust, politically popular ends should not justify turning a blind eye to the competition laws"

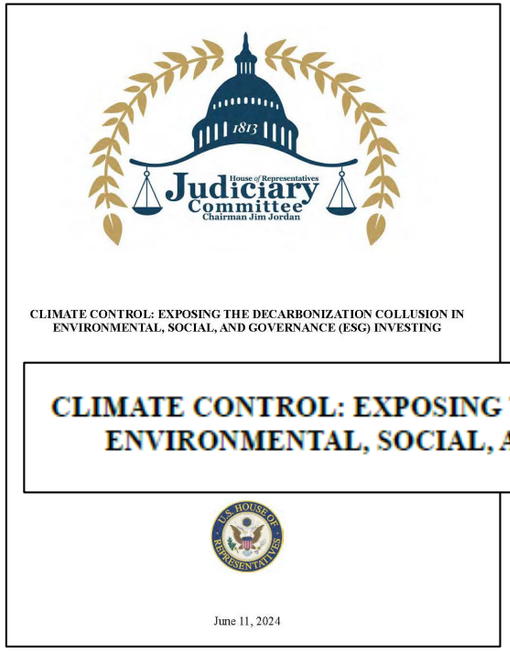
— *Assistant AG Makan Delrahim (Trump Administration)*

"antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit"

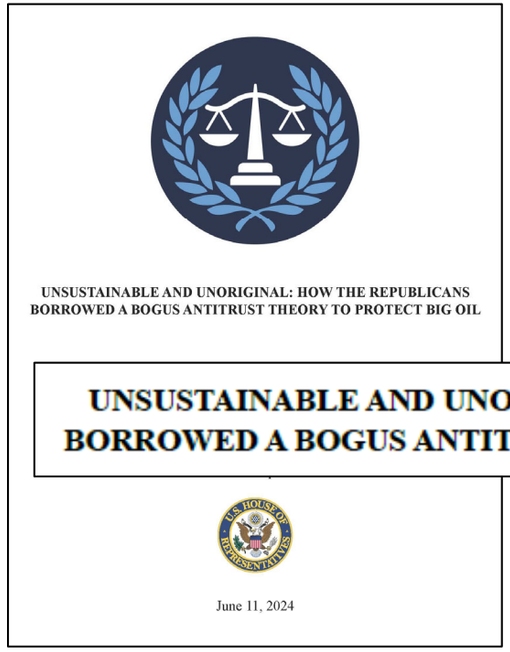
— *FTC Chair Lina Khan (Biden Administration)*

Antitrust Scrutiny of ESG

No political consensus on when sustainability collaborations violate antitrust law



June 11, 2024
Majority Report



June 11, 2024
Minority Report

EX 16

Antitrust Scrutiny of ESG

No political consensus on when sustainability collaborations violate antitrust law

"ESG may be an antitrust violation. I'm investigating a coordinated effort to allocate markets."

— *Former Arizona AG Mark Brnovich (Republican)*

"[M]y predecessor's administration spent time and resources launching politicized investigations into the environmental sustainability efforts of major financial institutions . . . . Arizona is not going to stand in the way of corporations' efforts to move in the right direction."

— *Current Arizona AG Kris Mayes (Democrat)*

Antitrust Scrutiny of ESG

Private actors face uncertain enforcement environment

"the mere threat of antitrust enforcement can shape the direction of individual businesses and whole industries"

— *Colorado AG Phil Weiser*

"what it's really going to come down to is very, very careful counseling of trade associations"

— *New York AG's Deputy Antitrust Bureau Chief Amy McFarlane*

WSPA pillsbury

Areas for Further Study

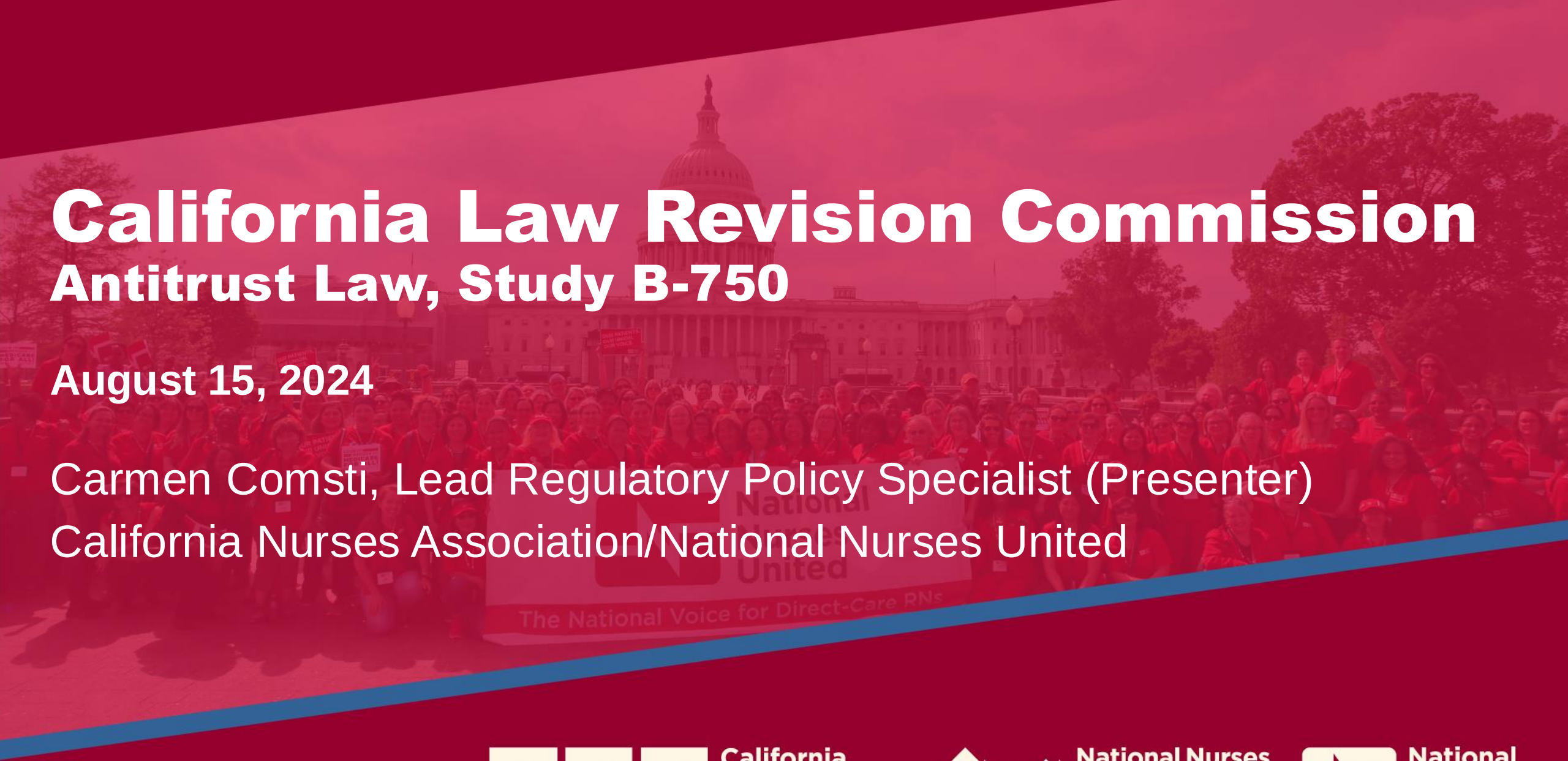
- **FORMAL GUIDANCE:**
  - Federal guidance on competitor collaborations is decades old and does not address sustainability
  - Policy statements and/or concrete examples regarding procompetitive aspects of sustainability collaborations could provide clarity in California and a model for other enforcers

Areas for Further Study

- **AD HOC CONSULTATION:**
  - Priority review for sustainability collaborations
  - Private consultations where confidentiality at issue
  - Formal legal opinions to develop body of guidance

Areas for Further Study

- **LIMITED SAFE HARBORS:**
  - Potential protection for those who seek and follow guidance on sustainability collaborations or more broadly for those meeting specific requirements
  - What constitutes sustainability must be narrowly defined and concrete to combat potential “greenwashing”



California Law Revision Commission
Antitrust Law, Study B-750

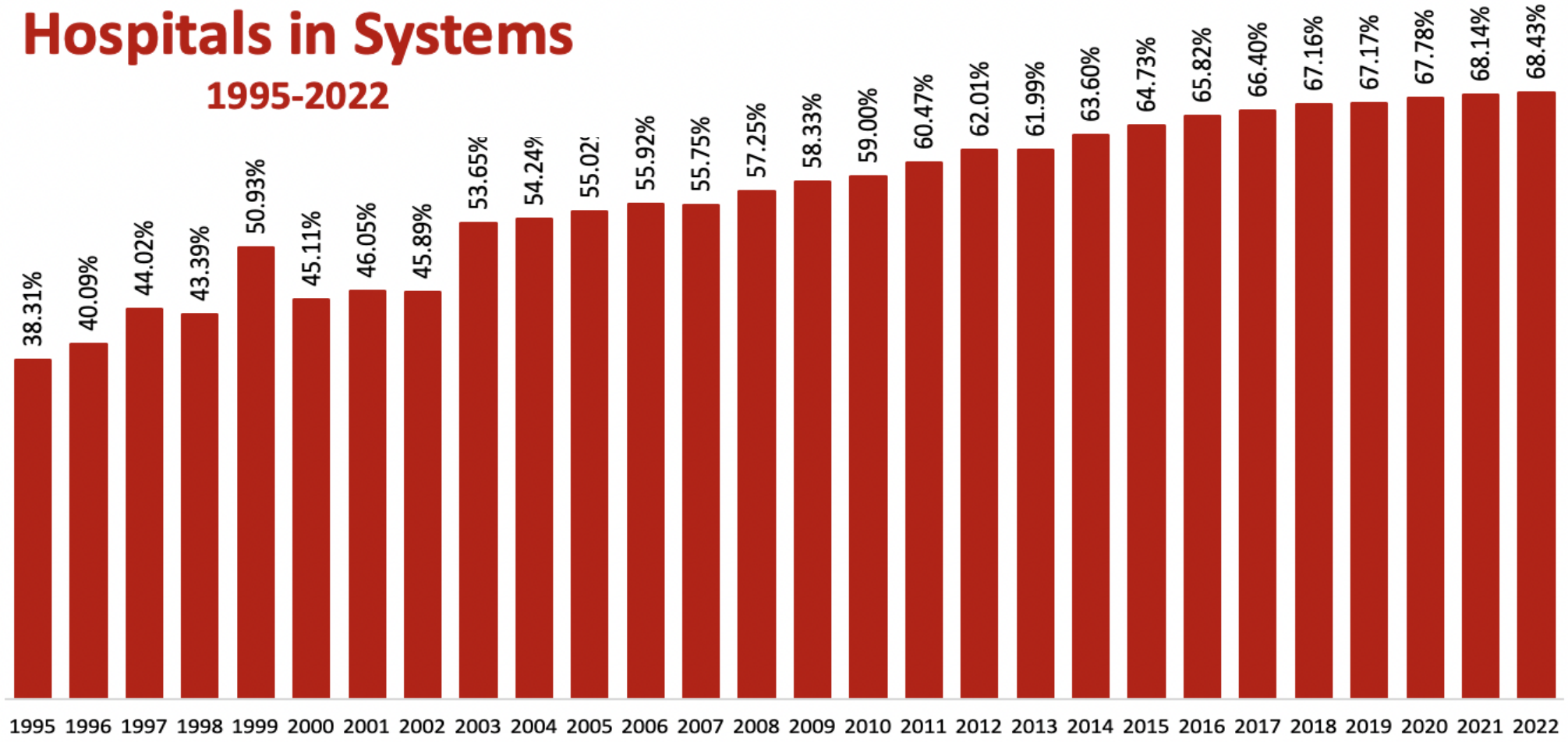
August 15, 2024

Carmen Comsti, Lead Regulatory Policy Specialist (Presenter)
California Nurses Association/National Nurses United

California Nurses Association
National Nurses Organizing Committee
National Nurses United

EX 22

HEALTH CARE CONSOLIDATION



Source: Analyzing data from the American Hospital Association (1996 to 2023)

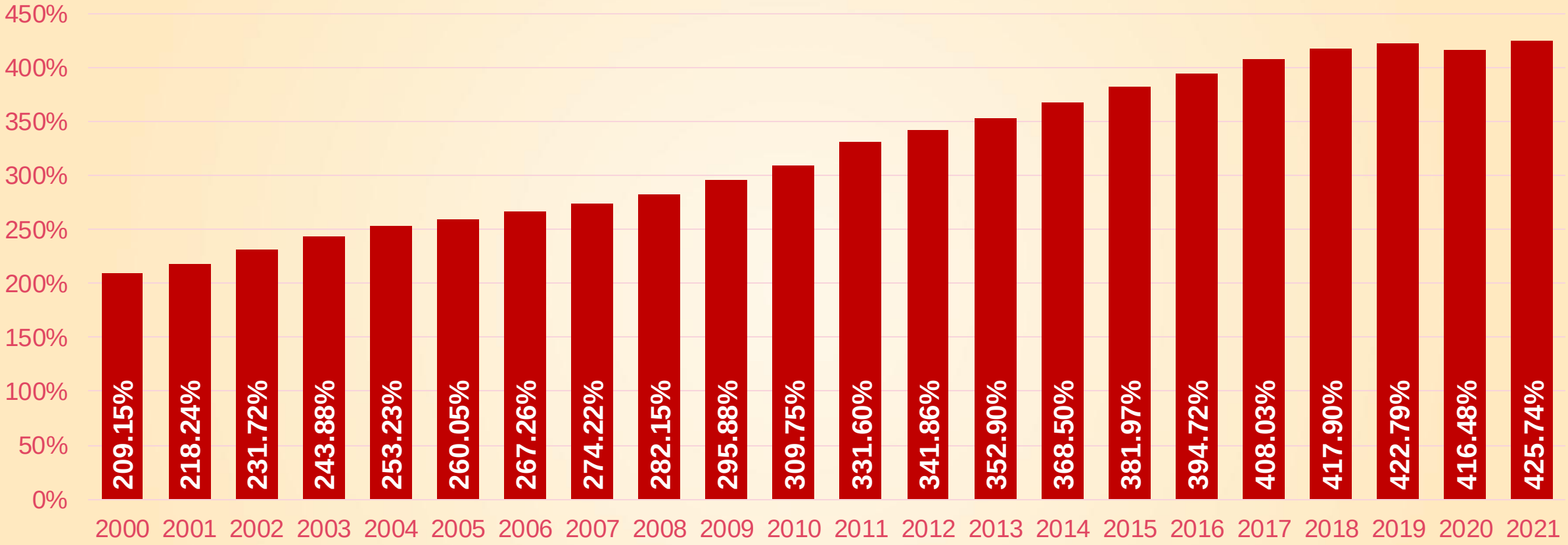
EX 23

90% of metropolitan areas in this country now have highly concentrated hospital markets

Source:
Health Affairs (2017)

National Nurses United

U.S. HOSPITALS' AVERAGE CHARGE-TO-COST RATIO, 2000–2021



On average, U.S. hospitals currently charge $425 for every $100 in total costs →

Charge-to-cost ratio of 425%

EX 24

Source: NNU (analyzing CMS data)

Consolidation & Harm to Patients

Rising Charge-to-Cost Ratios: Leads to rising health care insurance premiums, out-of-pocket costs, medical debt, etc.

Medical Redlining: A firm's systematic avoidance of low-income areas and areas with higher populations of people of color.

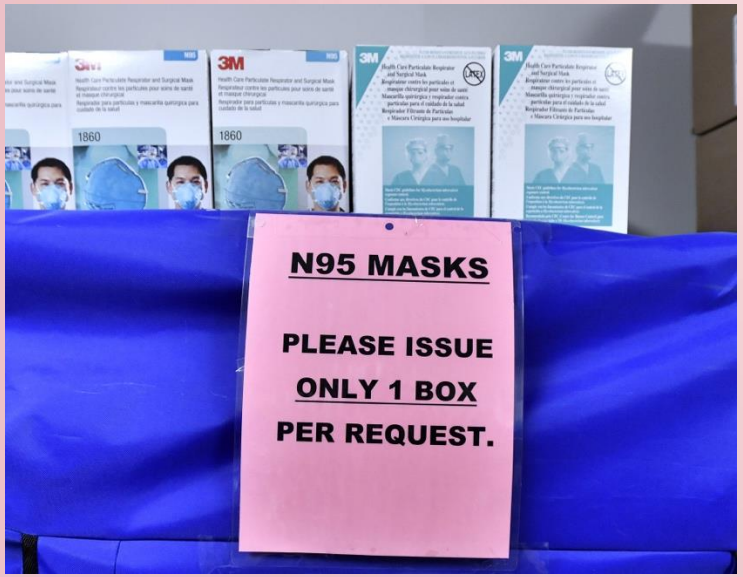
Health Care Financialization & Service Closures: Closure of necessary, but low-return health care services (e.g., labor & delivery, trauma, etc.)

Payer-Mix Discrimination & Anticompetitive Insurer Contracts: Preference for privately insured patients over public program enrollees through "anti-tiering", "anti-steering" and other anticompetitive contracts with commercial insurers.

EX 25

National Nurses United

Consolidation & Harm to Workers



Worse Job Quality & Working Conditions: Increased employer power may lead to exploitation or abuse of workers

Reduced Wages: Local labor market concentration depresses wages by 4 to 5% relative to a fully competitive benchmark *(Arnold 2021)*

Reduced Staffing and Hiring: 10% increase in labor market concentration associated with 3.2% fewer new hires. *(Marinescu et al. 2021)*

Diluted Union Density and Worker Bargaining Power: High health care labor market concentration associated with lower wages and less workers bargaining power. *(Prager & Schmitt 2021)*

Restrictive Contractual Covenants: Imposition of exploitative employment contracts like noncompetes, NDAs, and “stay or pay” contracts *(See FTC Noncompete Rule)*

MARKET CONCENTRATION & HEALTH CARE SERVICE CLOSURES


sanjoseinside

NEWS OPINION INVESTIGATIVE REPORTS THE FLY SPORTS REAL ESTATE PEOP

NEWS

Nurses Protest San Jose Regional Medical Center's Planned Closure of Labor, Delivery Unit

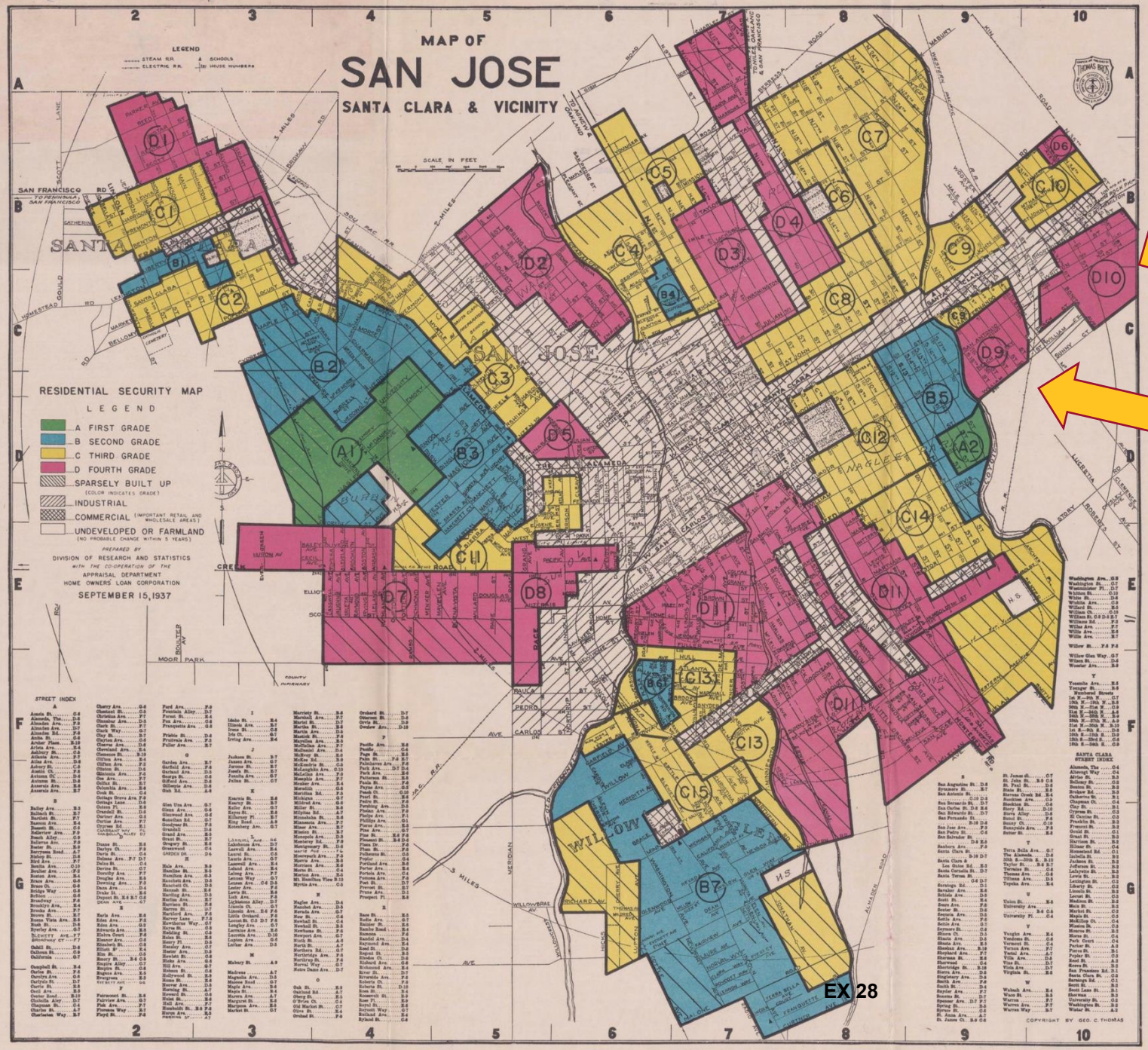
By Amani Hamed / May 12, 2020

Nurses and parents rallied outside HCA's Regional Medical Center a few days before Mothers Day to protect the closure of the labor and delivery unit. (Photo by Amani Hamed)

EX 27

Example:

San Jose Regional Medical Center

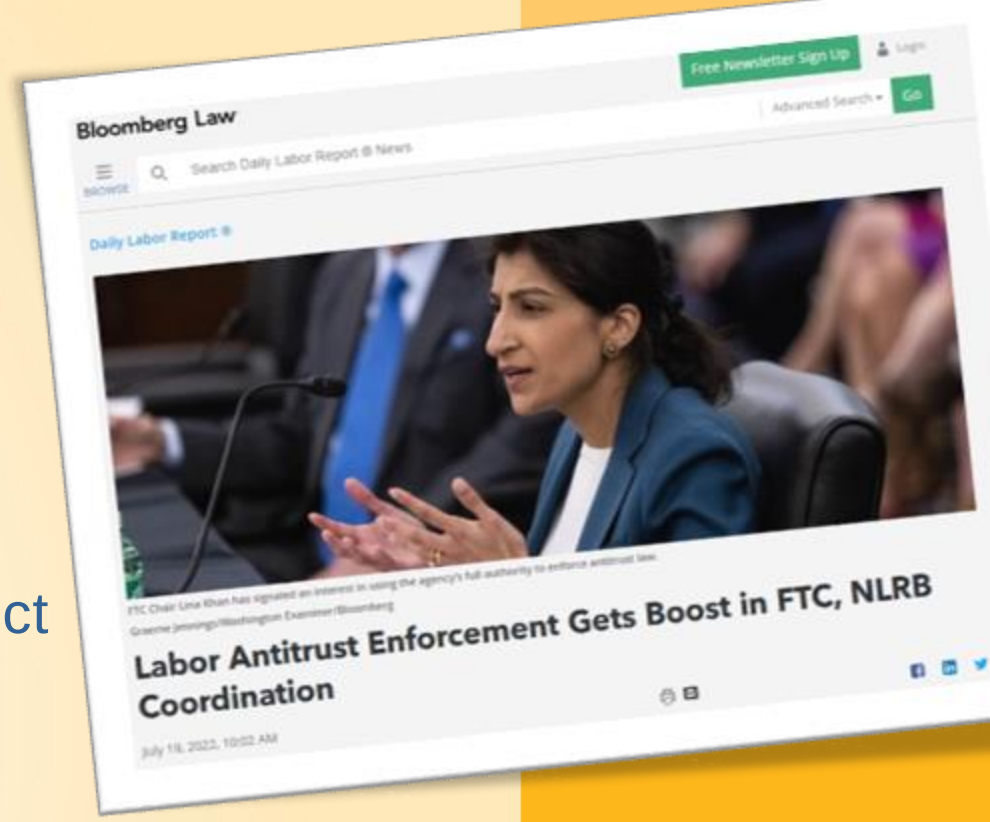


EX 28

Where a large portion of San Jose Regional Medical Center patients live

National Nurses United

LABOR MARKET IMPACT STANDARD



Labor Monopsony & Worker Bargaining Power: Limit employer concentration/conduct that harms worker bargaining power (e.g., *FTC v. Kroger/Albertsons*).

Reduction Wage Growth: Review monopolist first conduct that reduces wages or slows wage growth as anticompetitive (e.g., FTC Merger Guideline 10).

Job Quality & Short Staffing: Worsening benefits, working conditions, and staffing/hiring levels as indicators of substantially lessening competition (e.g., FTC Merger Guideline 10).

Workforce Stability: Monitor market impact on worker turnover, retention, training, staffing, hiring, job quality, etc. (e.g., Office of Health Care Affordability).

Past Labor Violations & Practices: Analysis of employer concentration and impact on workforce.

National Nurses United

PUBLIC INTEREST STANDARD

Impact on People in the Economy: Including impact on workers, families, disadvantaged communities, children, etc.

Impact on Small Business, Producers & Government Participants: Barriers to entry, market exclusion, impact on government services and costs, harm to upstream suppliers, market closures, etc.

Non-Price Impacts on Consumers and the Public: Racial and income inequality; economic diversity; consumer safety; environmental harm; quality, access, and diversity of goods and services; vertical conglomeration; etc.

Conglomeration and Consolidation as Presumptively Anticompetitive: Market dominance and consolidation should establish a rebuttable presumption of anticompetitiveness.

EX 30

STRENGTHENING ENFORCEMENT

Broaden prohibited conduct & standards for harm

- Express single-firm conduct standard
- Recognize indirect injury / proximate cause under Cartwright Act and/or UCL
- Standard on labor market harm, public interest harm, abuse of dominance
- Standard on non-price / non-wage and non-output impact on workers and consumers

Shift Burdens of Proof onto Firms Instead of Workers & Consumers

- *Per se* violations under Cartwright Act
- Express rebuttable presumptions of anti-competitiveness / standing

Expand Attorney General & Agency Enforcement

- Expand AG & agency authority to accept, investigate, and issue complaints and citations
- Expand AG & agency merger review and blocking authority
- Add reporting requirements

National Nurses United

Key Sources:

- American Hospital Association (2023), "2023 AHA Hospital Statistics Database," AHA Data & Insights, https://www.ahadata.com/aha-hospital-statistics.
- Arnold D (Oct. 2021), "Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes," working paper.
- Arnold, D (2019), "Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes," doi: 10.2139/ssrn.3476369.
- Federal Trade Commission and U.S. Department of Justice, "Merger Guidelines" (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.
- Fulton B (2017), "Health Care Market Concentration Trends In The United States: Evidence And Policy Responses," *Health Affairs*, https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0556#.
- Marinescu I et al (2021), "Wages, Hires, and Labor Market Concentration," *J Econ Behav & Org*.
- National Nurses United (Nov 2020). "Fleecing Patients: Hospitals Charge Patients More Than Four Times the Cost of Care." https://www.nationalnursesunited.org/sites/default/files/nnu/graphics/documents/1120_CostChargeRatios_Report_FINAL_PP.pdf.
- Prager E, Schmitt M (Feb 2021), "Employer Consolidation and Wages: Evidence from Hospitals," *American Economic Review*, 111: 397-427, https://www.jstor.org/stable/27027692.

International Center for Law & Economics

Geoffrey A. Manne
President, ICLE

Before the California Law Revision Commission, Project on Antitrust Law – Study B-750

August 15, 2024

Understanding Concentration and Competition

Implications for California's Antitrust Policy

EX 33

Agenda

Concentration concerns and misconceptions

Is concentration rising?

Implications for antitrust policy

Labor market considerations

Entertainment industry consolidation

EX 34

Overview of Concentration Concerns

- **Common fears**

  Reduced competition

  Consumer harm

  Wage suppression

Overview of Concentration Concerns

- ***Concentration and Competition in California* Expert Report**

  "Reduced Competition is on the front pages, as concerns over rising concentration, extraordinary profits accruing to the top slice of corporations, higher prices, lower quality, and less innovation, and widening income and wealth inequality have galvanized attention."

  "High concentration reduces competitive intensity as the result of the dominance of a single firm, or just a few firms with weak incentives to compete and strong incentives to coordinate. Most experts agree that competition lowers prices to consumers."

Overview of Concentration Concerns

- **Common fears**

  Reduced competition

  Consumer harm

  Wage suppression

- **But the picture is more complex**

  Concentration ≠ lack of competition

  Increased concentration may benefit consumers if it results from:

    Heightened productivity

    Competitive pressures favoring efficient producers

  Labor markets are much more complicated & the picture is even less clear

Agenda

Concentration concerns and misconceptions

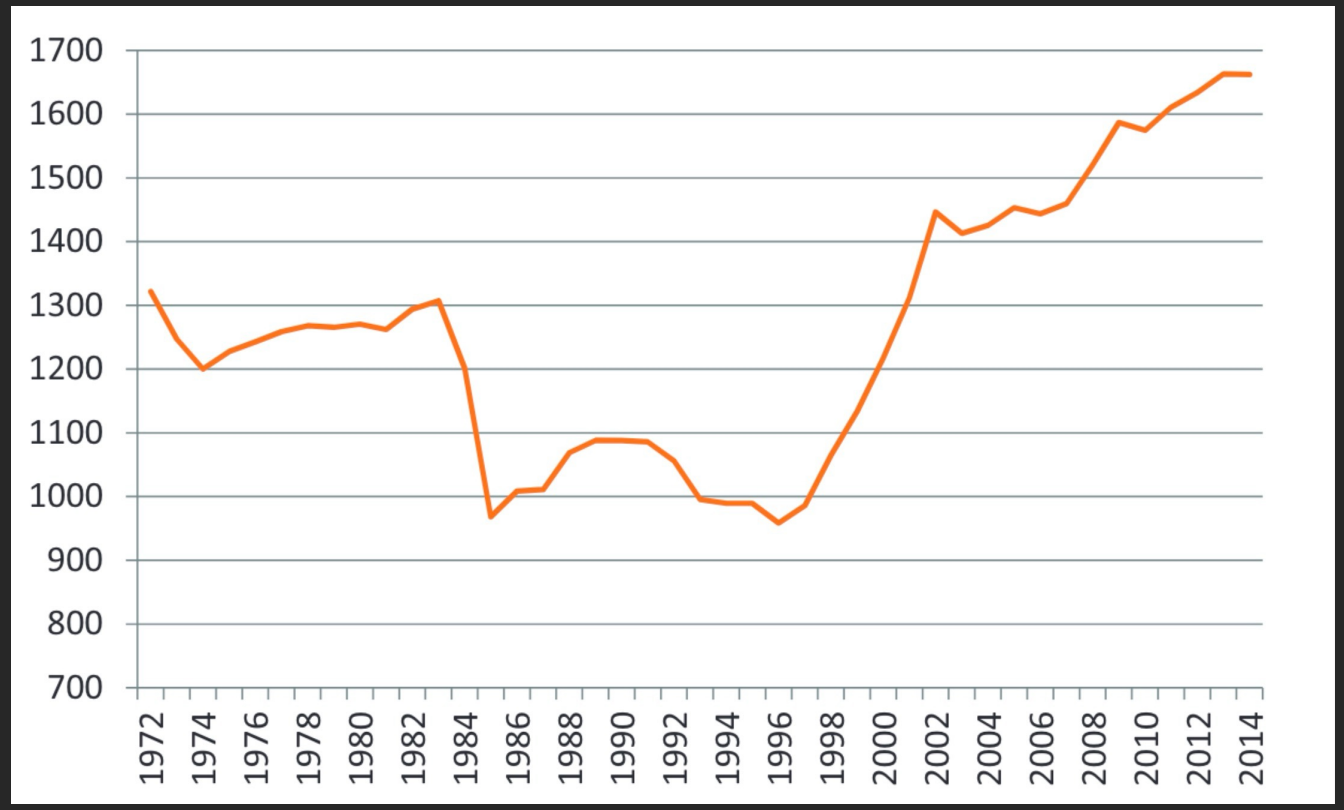
Is concentration rising?

Implications for antitrust policy

Labor market considerations

Entertainment industry consolidation

EX 38

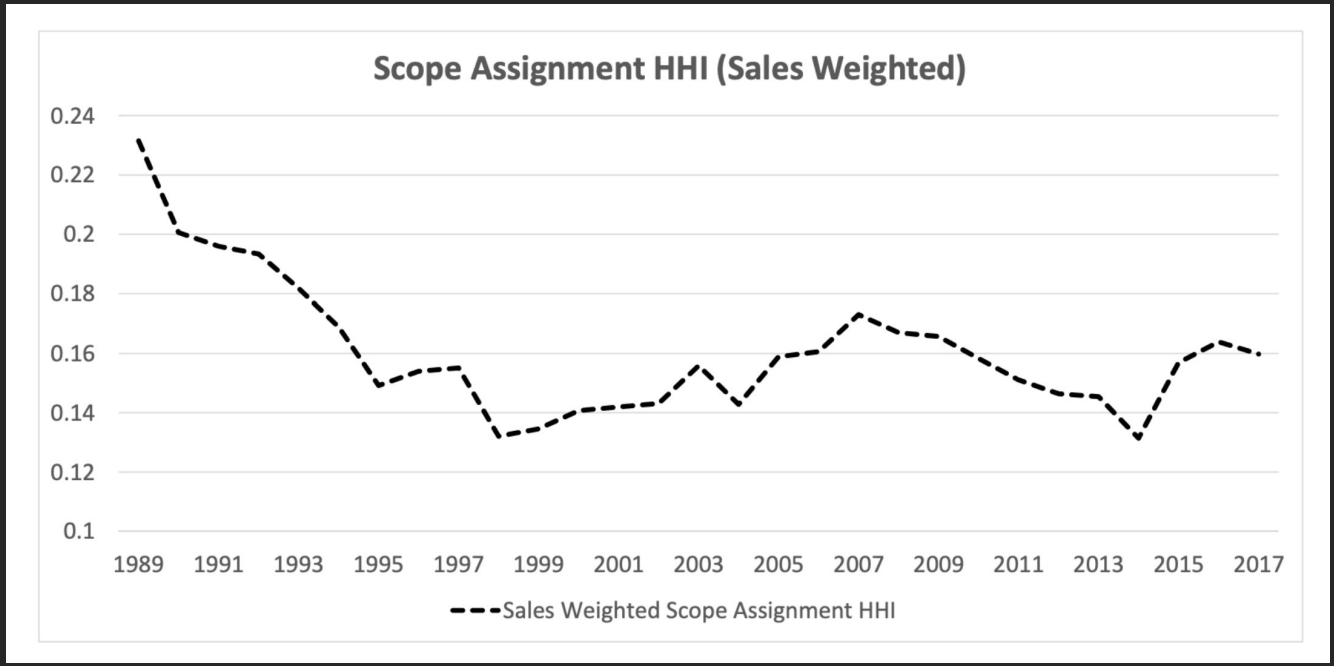


Is Concentration Rising?

- **Conventional wisdom says yes**

  Grullon, Larkin, and Michaely (2019): Average HHI at the 3-digit NAICS level for publicly-traded firms has increased

EX 39

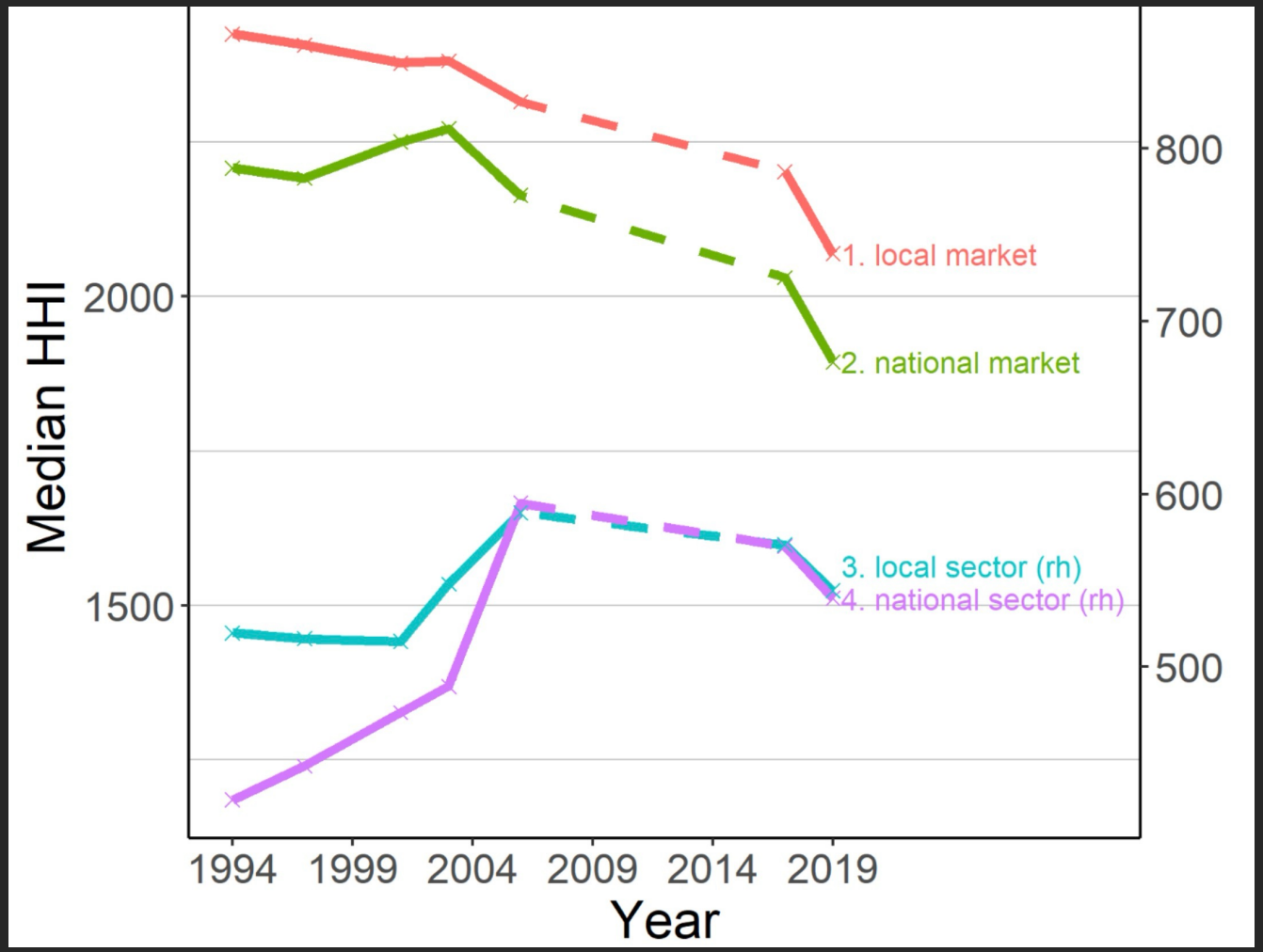


Is Concentration Rising?

- **But maybe not**

  Hoberg and Phillips (2022) account for increasing "scope" of businesses (firms not limited to single NAICS code). They find a falling average HHI.

EX 40



EX 41

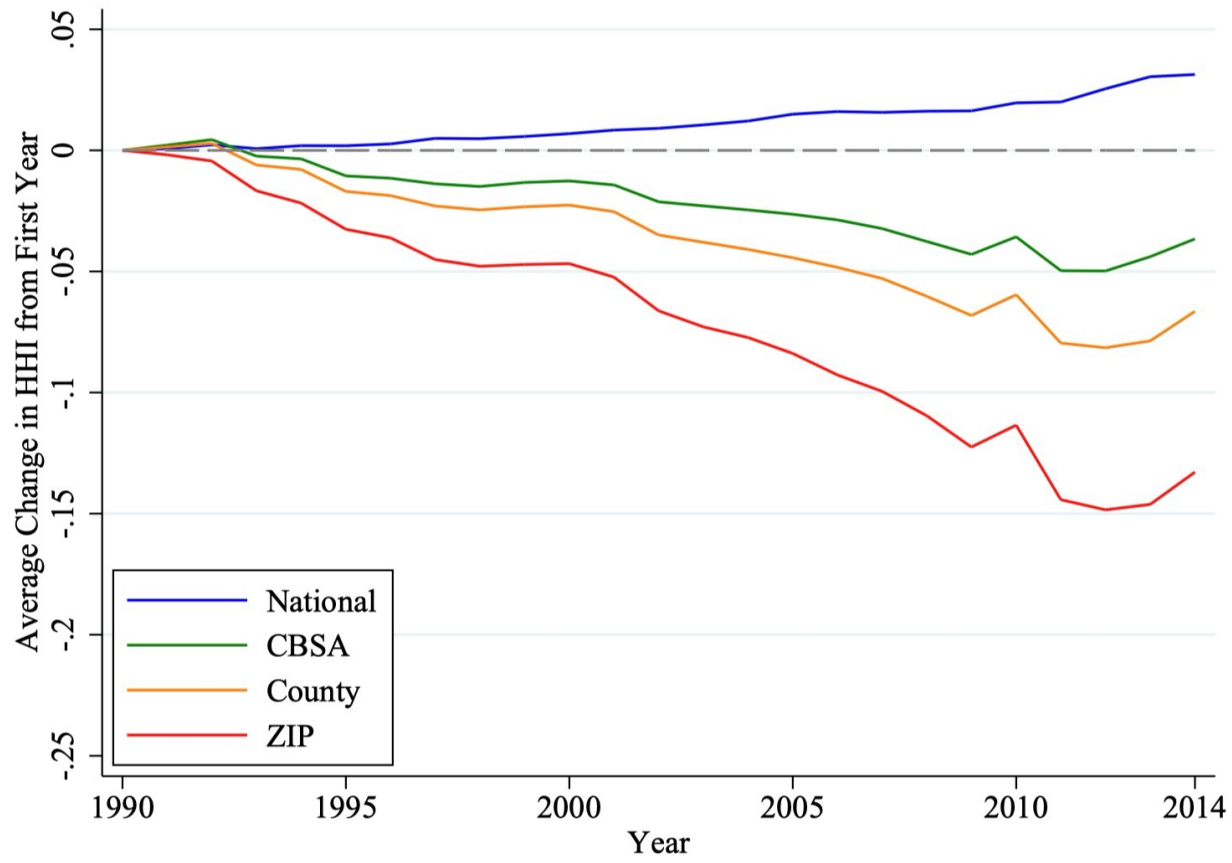
Is Concentration Rising?

- **But maybe not**

  Benkard, Yurukoglu, and Zhang (2021): Consumption-based product markets. Broken into 457 product-market categories and 29 locations. Product "markets" are then aggregated into "sectors."

  "We find no evidence that [concentration] has been getting worse over time in any broad-based way."

Figure 1: Diverging economy-wide national and local concentration trends

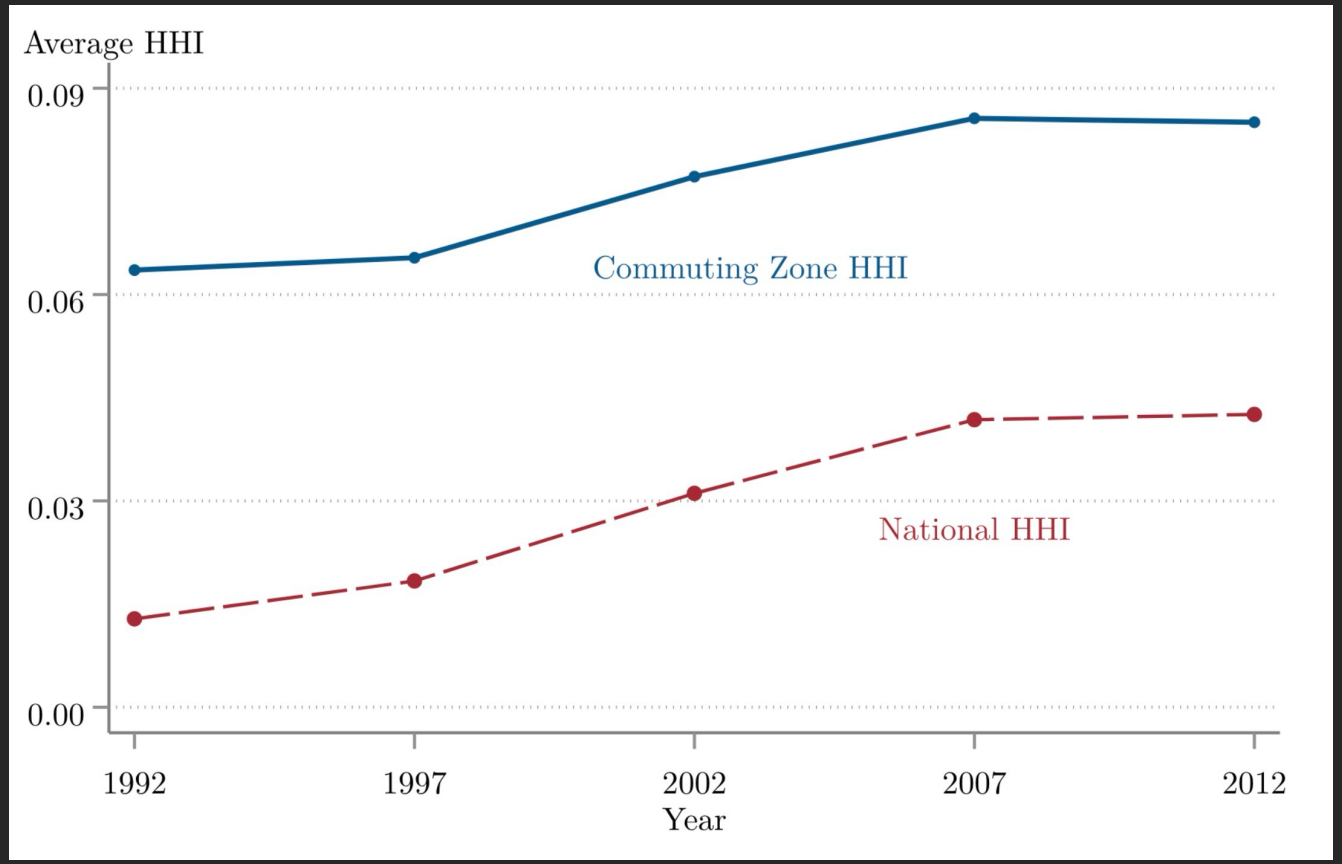


EX 42

Is Concentration Rising?

- **Not if we look at *local* markets**

  Rossi-Hansberg, Sarte, and Trachter (2021): Diverging trends in national and local concentration. As we move to smaller geographic regions, concentration goes from rising over time to falling over time.

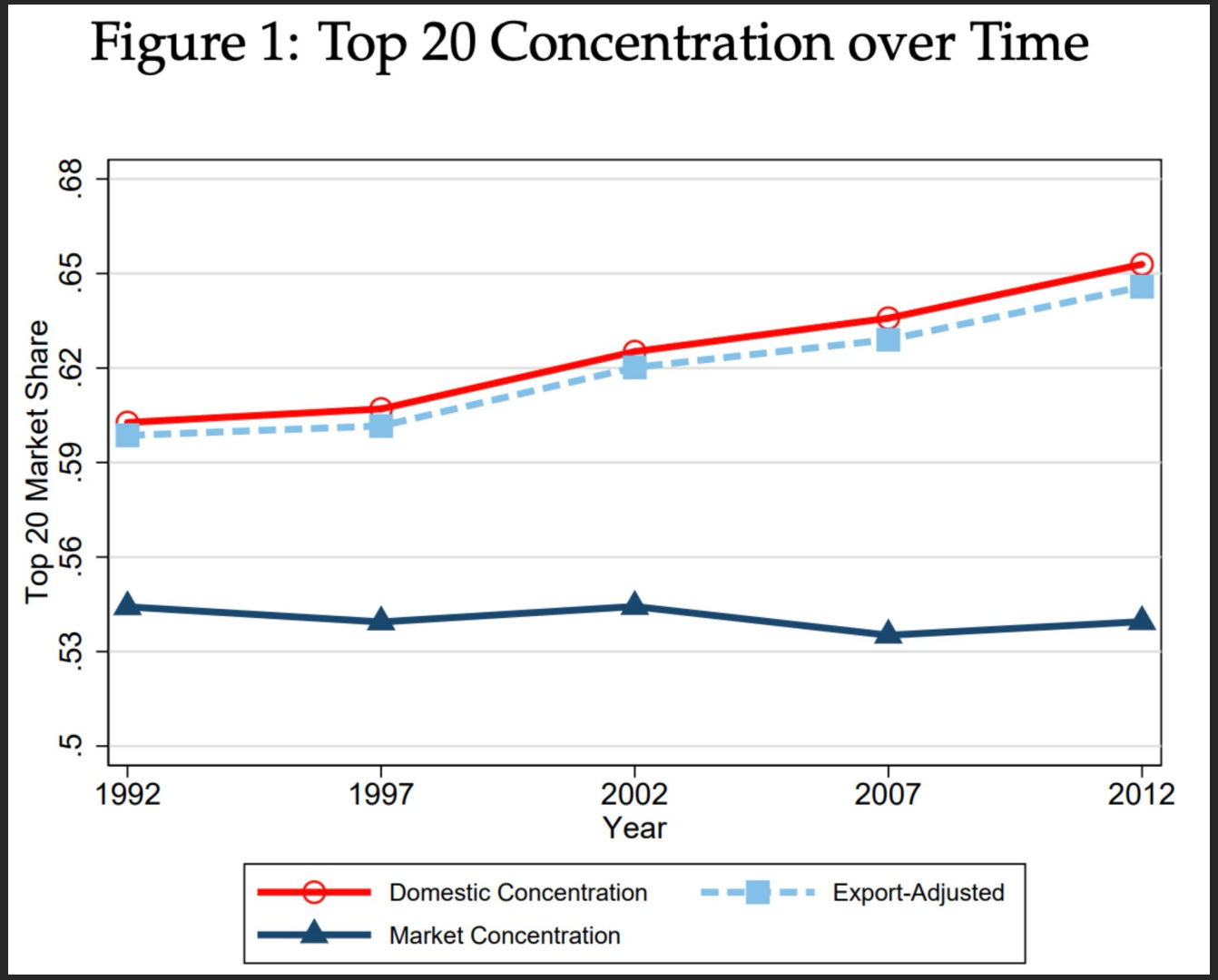


Is Concentration Rising?

- **But it's not perfectly clear**

  Smith and Ocampo (2022): Product-level revenue for U.S. retail stores (1992- 2012). They find rising concentration at both the local and national levels (in retail).

EX 43



EX 44

Is Concentration Rising?

- **Then again…**

  Amiti and Heise (2021): Census of Manufacturers data plus transaction-level import data. They measure concentration for all firms selling in the U.S., regardless of where the firm is located. That line is completely flat from 1992-2012.

Profits, wages, and concentration

- **Markups are increasing…**

  De Loecker, Eeckhout and Unger (2020): Commonly accepted results find large markups and increased market power.

- **…But not by as much as many suggest**

  Traina (2018): The claimed markups are mismeasured and for public firms only. Adjusted data show modest firm-level markups and declining aggregate markups.

- **And profits are lower than historically**

  Karabarbounis and Neiman (2018): Profits have increased recently because of low interest rates, but they are lower today than in the '60s and '70s.

- **And lower wages aren't caused by increased concentration**

  Rinz (2018); Lipsius (2019): Wages decrease in concentrated markets, but local concentration has been decreasing.

Carl Shapiro on recent trends (Shapiro and Yurukoglu (2024))

- **Concentration trends**

  Modest increases in (national) concentration

  NAICS-based measures are too broad to be informative about market power

  Falling concentration in narrower product markets

- **Price effects from merger retrospectives**

  Evidence is mixed across industries

    Consumer packaged goods: 1.5% average price increase

    Some industries (e.g., cement): stable prices despite consolidation

    Exception: hospital mergers often lead to significant price increases

- **Industry-specific findings**

  Cement: 50% reduction in plants but stable prices due to efficiency gains

  Auto industry: falling markups despite quality improvements

  Wholesaling: rising markups but falling prices due to scale economies

Agenda

Concentration concerns and misconceptions

Is concentration rising?

Implications for antitrust policy

Labor market considerations

Entertainment industry consolidation

Summarizing the Implications of the Concentration Literature

- **Diversity of findings in concentration literature**

  Varied results across different studies

- **Challenges in measuring concentration**

  Market definition issues

  Data source variability

    Some studies show rising concentration even at local level using different data

  Public vs private firms

- **Limitations of national concentration data**

  Inadequate for local market analysis

- **Methodological debates**

  Different approaches to measuring market concentration

Interpreting Concentration Data in the Antitrust Context

- **Limitations of concentration as an indicator of competition**

  Concentration says nothing about the amount of competition, so it has no direct normative implication

  Concentration data may not fully capture competitive dynamics

  Other factors influence competition levels

- **Importance of market definition**

  Accurate market definition is crucial for interpreting antitrust implications of concentration data

  Mismatch between empirical data and antitrust-relevant markets

- **Locus of competition**

  Competition often occurs at the local level

- **Dynamic competition considerations**

  Competition is not static and evolves over time

  Need to consider potential future competition

- **Efficiency considerations**

  High concentration can lead to efficiencies (and vice versa)

Concentration from beneficial *sources*

- **Technical innovation or scale economies**

  Ganapati (2021):

  > *"[C]oncentration increases do not correlate to price hikes and correspond to increased output. This implies that oligopolies are related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. My data suggest that increases in market concentration are strongly correlated with innovations in productivity."*
  >
  > *"Productive industries (with growing oligopolists) expand real output and hold down prices, raising consumer welfare, while maintaining or reducing their workforces, lowering labor's share of output."*

EX 50

Concentration from beneficial *sources*

- **Technology adoption by the most productive firms**

  Hsieh and Rossi-Hansberg (2023):

  > *"US firms in service industries increasingly operate in more local markets. Employment, sales, and spending on fixed costs have increased rapidly in these industries. These changes have favored top firms, leading to increasing national concentration. Top firms in service industries have grown by expanding into new local markets, predominantly small and mid-sized US cities. Market concentration at the local level has decreased in all US cities, particularly in cities that were initially small. These facts are consistent with the availability of new fixed-cost-intensive technologies that yield lower marginal costs in service sectors. The entry of top service firms into new local markets has led to substantial unmeasured productivity growth, particularly in small markets."*

Concentration from beneficial *sources*

- **Expansion of more efficient firms**

  Rossi-Hansberg, Sarte, and Trachter (2021):

  > *"Put another way, large firms have materially contributed to the observed decline in local concentration. Among industries with diverging trends, large firms have become bigger but the associated geographic expansion of these firms, through the opening of more plants in new local markets, has lowered local concentration thus suggesting increased local competition."*

Concentration Is a Flawed Measure of Competition

Syverson (2019):

> *"Perhaps the deepest conceptual problem with concentration as a measure of market power is that it is an outcome, not an immutable core determinant of how competitive an industry or market is. The nature and intensity of industry competition combine with other supply and demand primitives to determine equilibrium concentration. However, the conditions of competition drive concentration, not vice versa.*
>
> *"As a result, concentration is worse than just a noisy barometer of market power. Instead, we cannot even generally know which way the barometer is oriented. Even if researchers agree on a definition of the market, concentration can be associated with either less or more competition."*

Concentration Is a Flawed Measure of Competition

Syverson (2019):

> *"While I would not call for a blanket ban on the practice of using concentration to measure market power, caution about the practice is well warranted. There were good reasons for industrial organization to choose to forgo it (particularly, again, for cross-industry comparisons). Simply put, the relationship between concentration and markups, prices, or profits is a relationship between market outcomes. These can be uninformative or, worse, misleading about the causal effect of competition."*

Weak antitrust enforcement isn't the cause of increased concentration

Autor, Dorn, Katz, Patterson, and Van Reenen (2020):

> *"An alternative perspective on the rise of [large firms and increased concentration] is that they reflect a diminution of competition, due to weaker U.S. antitrust enforcement. Our findings on the similarity of [concentration] trends in the United States and Europe, where antitrust authorities have acted more aggressively on large firms, combined with the fact that the concentrating sectors appear to be growing more productive and innovative, suggests that this is unlikely to be the primary explanation, although it may be important in some industries."*

Error Costs

- **The CWS Expert Report's view:**

  "Today, there is a widely shared view among antitrust scholars and practitioners that… the excessive concern about the risk of false positives ought to be corrected."

- **The SFC Expert Report's view:**

  "[T]he risk of under-enforcement of the antitrust laws is greater than the risk of over-enforcement."

- **But there's no rigorous basis for this**

  Anticompetitive conduct erroneously excused may be subsequently corrected, either by another enforcer, a private litigant, another jurisdiction, or, sometimes, competition.

  Procompetitive conduct that doesn't occur because it's prohibited or deterred by legal action has no constituency and no visible evidence on which to base a case for revision.

- **Especially not in California**

  Particularly in California—where so much of the state's economic success is built on industries characterized by large companies with substantial procompetitive economies of scale and network effects, novel business models, and immense technological innovation—the risk of erroneous condemnation is substantial, and the potential costs significant.

Agenda

Concentration concerns and misconceptions

Is concentration rising?

Implications for antitrust policy

Labor market considerations

Entertainment industry consolidation

EX 57

Labor Market Considerations

- **Monopoly vs Monopsony**
  Mirror image?
- **Monopsony in labor markets**
  Single buyer of labor
  Market power over wages
- **Challenges in analysis**
  Complex market dynamics
  Disconnect between labor economics and antitrust
  Data limitations
- **Recent actions by regulators**
  Previous actions
  Current policy changes

Labor Market Considerations

- **The literature**

  Widely disparate estimates of labor monopsony power based on direct evidence
- **Labor market models don't match antitrust reality**

  "Search model," e.g., has assumptions that don't align with antitrust
- **Results may not reflect monopsony power**

  Wage markdowns may reflect monopsony power or it may reflect non-labor factors like investment

  Lower wages may reflect rapid productivity growth rather than slower wage growth (Kirov & Traina (2022))
- **Data limitations**

  Most comprehensive data shows declining concentration in labor markets—but industry codes don't align with antitrust markets

  Online vacancy data misses employment & jobs not posted online (or at all)

  Governmental data finds an average HHI roughly 1/10 as large as vacancy data
- **Labor market dynamics**

  Worker mobility—what's the geographic market?

  Worker heterogeneity and wage/benefits/other attributes of pay

Conceptual problems of addressing labor market power under antitrust law

- **Conceptual challenges warrant careful consideration by enforcers, scholars, and the courts**

  Different places in the supply chain—how aggregate or offset effects upstream and downstream?

  Must look at output markets (but reverse isn't true):

  > *A merger that creates monopsony power will necessarily reduce the prices and quantity purchased of inputs like labor and materials. But this same effect (reduced prices and quantities for inputs) would also be observed if the merger is efficiency enhancing.*
  >
  > *Decisionmakers can't simply look at the quantity of inputs purchased in the monopsony case as the flip side of the quantity sold in the monopoly case.*

  Monopsony "harms" or merger "efficiencies"?

  Relevant market for labor is much more difficult to identify, as are substitute employers

  Labor markets aren't spot markets and employment contracts are more complicated than most purchase agreements

  Human capital development: mutual investment over time

Labor market power hasn't reduced wages

Berger, Herkenhoff, and Mongey (2022):

> *"Labor market power has not contributed to the declining labor share. Despite the backdrop of stable national concentration, we… find that [local labor-market concentration] has declined over the last 35 years. Most local labor markets are more competitive than they were in the 1970s."*

Agenda

Concentration concerns and misconceptions

Is concentration rising?

Implications for antitrust policy

Labor market considerations

Entertainment industry consolidation

EX 62

Is Entertainment Industry Consolidation a Pressing Problem?

- **Rapid changes in the industry**

  Shift from traditional TV/film to streaming

  More content than ever

  Monetization of content remains a problem
- **Consolidation trends**

  Major mergers and acquisitions—and there will doubtless be more
- **Counterarguments for increased competition**

  Massive investment in the production and *licensing of content*

  Indie producers thrive (and are themselves consolidating)

  Increased diversity of content

  Very limited pricing power

  Strong unions

Is Entertainment Industry Consolidation a Pressing Problem?

What we're witnessing is not the consolidation of power, but rather the natural evolution of a dynamic and innovative industry.

As the industry evolves, it will find a new equilibrium where content creation, distribution, and monetization are balanced to reflect consumers' changing preferences and habits.

There will inevitably be growing pains along the way.

The vast changes in the media marketplace in such a short timeframe should caution against bold predictions about market power.

While business challenges exist, they require room for experimentation and innovation, not heavy-handed antitrust intervention based on speculative fears.

Ticketmaster/Live Nation Case Study

- **Expert Report:**

  "Live Nation and Ticketmaster—A failure of merger enforcement and remedies"

  "Live Nation-Ticketmaster is a textbook example of the perils of lax merger enforcement in a highly concentrated market."

- **Reality:**

  Ticketmaster issues present regardless of the merger

  In 14 years, market share hasn't increased & TM hasn't stopped new competition (e.g., StubHub & SeatGeek)

  Taylor Swift "fiasco" unrelated to market power or merger

  Live Nation artist investment $9.6 billion in 2022 (vs. record label annual A&R spending of $5.8 billion)

  The primary source of artist revenue has shifted from recorded music to concert tickets

  Prices are determined by numerous elements of the distribution chain

  Some levels of the distribution chain—arenas and superstar artists, especially—are less competitive than ticketing

  Secondary markets suggest the absence of market power

Ticketmaster/Live Nation Case Study

- Irving Azoff (former Ticketmaster CEO) (2023):

  "The biggest issue is that demand sometimes exceeds supply for many artists. More people want to see Taylor Swift, Beyoncé, Adele, or Garth [Brooks] than there are tickets for sale. There's not a congressional hearing in the world that fixes the reality that demand exceeds supply. There's nothing that Ticketmaster, the building, the promoter, or the artists can do to fix that."

Ticketmaster/Live Nation Case Study

- Fuller (2023):

  "The facts are simple and inarguable. Taylor Swift is playing 52 shows in venues with approximately 2.5 million seats available. As these shows are already being held in football stadiums, the only way to provide more seats is for Swift to add more shows, something Garth Brooks does routinely.

  "Math is both simple and brutal. For Swift's North American tour there are only 2.5 million seats…. Only one thing brings more seats: adding shows. Only one person can decide to add more shows: Taylor Swift."

Conclusion: Avoid the "Europeanization" of California's Antitrust Law

- **Europe's economic performance is unenviable**

  "In 2010 US GDP per capita was 47 percent larger than the EU while in 2021 this gap increased to 82 percent. If the current trend of GDP per capita carries forward, in 2035, the average GDP per capita in the US will be $96,000 while the average EU GDP per capita will be $60,000." (Erixon (2023))

- **California's recent record in the tech sector is already concerning**

  "[California's] GDP fell 2.1% through 2022, the second-biggest drop of any state over that period, driven by a massive deceleration across the information sector" (Politano 2024)

  "[T]he Golden State has been bleeding tech jobs over the last year and a half… Since the beginning of COVID, California has added a sum total of only 6k jobs in the tech industry—compared to roughly 570k across the rest of the United States." (Id.)

Summary

Claims that increased concentration justify expanding antitrust in California are unsupported

Consolidation is often the result of beneficial forces

Labor market problems are often overstated and difficult to address with antitrust

Fears around entertainment industry consolidation are misguided

The “Europeanization” of California's antitrust law will harm its most important sectors

AS APPROVED

Uniform Antitrust Pre-Merger Notification Act*

Uniform Law Commission

September 5 – 7, 2024 Style Committee Meeting

**The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.*

July 31, 2024

Antitrust Pre-Merger Notification Act

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

Dan Robbins	California, *Chair*
Steven L. Willborn	Nebraska, *Vice Chair*
Levi J. Benton	Texas
William H. Clark Jr.	Pennsylvania
Parrell D. Grossman	North Dakota
Jess O. Hale	Tennessee
Lyle W. Hillyard	Utah
Ryan Leonard	Oklahoma
Kimberly A. Lowe	Minnesota
John J. McAvoy	District of Columbia
Cory J. Skolnick	Kentucky
Nora Winkelman	Pennsylvania, *Division Chair*
Timothy J. Berg	Arizona, *President*

Other Participants

Daniel A. Crane	Michigan, *Reporter*
Deborah A. Garza	Virginia, *American Bar Association Advisor*
Sohan Dasgupta	District of Columbia, *American Bar Association Section Advisor*
Emilio Varanini	California, *American Bar Association Section Advisor*
Diane Boyer-Vine	California, *Style Liaison*
Tim Schnabel	Illinois, *Executive Director*

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

Antitrust Pre-Merger Notification Act

Table of Contents

Antitrust Pre-Merger Notification Act

Prefatory Note

Since 1976, the federal Hart-Scott-Rodino Act ("HSR"), 15 U.S.C. Section 18a, has required companies proposing to engage in most significant mergers or acquisitions to file a notice with the two federal antitrust agencies—the Federal Trade Commission and the Justice Department's Antitrust Division—at least 30 days (or, in the case of acquisitions out of bankruptcy or cash tender offers, 15 days) prior to closing. The HSR filing includes both a form detailing information, such as the corporate structure of the parties, and additional documentary material, such as presentations about the merger to the company's board of directors. In 2023, the Federal Trade Commission proposed new regulations increasing the amount of material required to be submitted in the form and additional documentary material. As of this writing, the regulations have not been finalized.

The HSR filing allows the federal antitrust agencies to scrutinize mergers before they are consummated. Prior to HSR, the agencies often learned of a merger after it had already closed, and then spent months or years investigating the transaction. If the agencies ultimately decided to challenge the merger's legality through a lawsuit, the only possible remedy was to unscramble a deal often years after it had closed, and the businesses had become integrated. This was not an optimal situation for the agencies, the businesses, or the public. HSR shifted most merger reviews to the pre-merger phase, allowing earlier and more efficient engagement between the agencies and the merger parties.

State Attorneys General ("AGs") also have a legal right to challenge anticompetitive mergers, both under the federal Clayton Act and their own state antitrust laws. *See California v. American Stores Co.*, 495 U.S. 271 (1990). States often play an important role in merger investigations and challenges, either in parallel with the federal agencies, or on their own. However, the AGs do not have access to the HSR filings. Further, HSR's strict confidentiality provisions prohibit the federal agencies from sharing HSR filings with the AGs. Most AGs have the right to subpoena HSR filings under their state laws, but that requires that they first become aware that an HSR filing of interest has been made, and then go through a cumbersome and time-consuming process to issue a subpoena and wait for compliance. In some cases, the merging parties voluntarily waive the HSR's confidentiality restrictions to allow AGs to obtain access to filing materials, however that process can take some time to negotiate. As a result, by the time most AGs obtain access to HSR filings, the federal agencies and parties are often far along in the process of investigation and negotiation. This puts the AGs at a significant disadvantage in the process of merger review. It also creates additional costs and uncertainties for the merging parties because federal approval does not foreclose a later state challenge. For example, in the *American Stores* case noted above, California sued to block a merger that the Federal Trade Commission had already approved.

In response to these shortcomings, some states have considered legislation that would create a state-specific pre-merger notification requirement for all transactions in every sector. However, some of these proposals would impose obligations additional to the HSR obligations on merging parties and potentially move state antitrust review out of sync with federal antitrust

review. For example, a proposed bill in New York would have imposed a 60-day waiting period to close the deal, in contrast to HSR's 30-day waiting period. It also would have dramatically lowered the filing threshold by an order of magnitude for all transactions in every sector, which would have significantly increased the burden on both businesses and the AG's office. A similar bill was introduced in Maryland in 2023. The business community has reacted with alarm to the prospect of burdensome and idiosyncratic state-specific pre-merger notification provisions that apply to all transactions in every sector. Both bills failed to pass. A new antitrust bill including new merger regulations was introduced in New York in May of 2024 and new merger rules have been proposed in California by stakeholders in an antitrust review process being run by the California Law Revision Commission.

The Antitrust Pre-Merger Notification Act is intended to address the concerns of both the AGs and business communities by creating a simple, non-burdensome mechanism for AGs to receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality obligations. Under the act, covered persons—defined as persons who have their principal place of business or at least a specified threshold of annual revenues in the state—must provide their HSR filing (both the basic form and, under certain enumerated circumstances, the additional documentary material) to the AG contemporaneously with their federal filing. The material filed with the AG is subject to essentially the same confidentiality protections applicable to the federal agencies, except that an AG that receives HSR materials may share them with any other AG whose state has also adopted the act. The anticipated effect is to facilitate early information sharing and coordination among state AGs and the federal agencies, subject to confidentiality obligations and without imposing any significant burden on either the merging parties or the AGs. It is also anticipated that the AGs may facilitate information exchange and coordination by establishing a secure central database or repository for HSR filings accessible to AGs whose states have adopted the act.

As of the time of this writing, there is a robust national debate concerning the past and future of antitrust policy, including whether there should be a significant invigoration of anti-merger enforcement. This proposal takes no side in that debate. By providing AGs earlier, confidential access to HSR filings, it is not intended to suggest any view on the merits of the mergers they may review or how they should wield their investigatory and litigation powers. Nor is the goal of minimizing the burden on business meant to suggest any view on the optimal level of merger activity or regulatory review of mergers. Rather, this act is animated by a spirit of good government—of respecting the role of the states in the merger review process, of the need for confidentiality, and of advancing the efficiency of the process for the benefit of all parties involved.

Similarly, this act is not intended to supplant existing sector specific pre-merger reporting requirements that many states have in certain areas such as health care and the act is not intended to limit a state's ability to challenge mergers under the HSR thresholds.

Uniform Antitrust Pre-Merger Notification Act

Section 1. Title

This [act] may be cited as the Uniform Antitrust Pre-Merger Notification Act.

Section 2. Definitions

In this [act]:

(1) "Additional documentary material" means the additional documentary material filed with a Hart-Scott-Rodino form.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Filing threshold" means the minimum size of a transaction that requires the transaction to be reported under the Hart-Scott-Rodino Act and is in effect when a person files a pre-merger notification.

(4) "Hart-Scott-Rodino Act" means Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. Section 18a[, as amended].

(5) "Hart-Scott-Rodino form" means the form filed with a pre-merger notification, excluding additional documentary material.

(6) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) "Pre-merger notification" means a notification filed under the Hart-Scott-Rodino Act with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the

jurisdiction of the United States.

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law in paragraph (4). A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase ", as amended". A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Section 3. Filing Requirement

(a) A person filing a pre-merger notification shall file contemporaneously a complete electronic copy of the Hart-Scott-Rodino form with the Attorney General if:

(1) the person has its principal place of business in this state; or

(2) the person or a person it controls directly or indirectly had annual net sales in this state of the goods or services involved in the transaction of at least 20 percent of the filing threshold.

(b) A person that files a form under subsection (a)(1) shall include with the filing a complete electronic copy of the additional documentary material.

(c) On request of the Attorney General, a person that filed a form under subsection (a)(2) shall provide a complete electronic copy of the additional documentary material to the Attorney General not later than [seven] days after receipt of the request.

(d) The Attorney General may not charge a fee connected with filing or providing the form or additional documentary material under this section.

Comment

The goals of the filing requirement are (a) to ensure that the Hart-Scott-Rodino form and the additional documentary material are filed with one state and (b) to provide notice through the form alone to every state that might have a significant interest in the proposed merger. Subsection (a)(1) is directed to the first goal; subsection (a)(2) to the second goal.

The Section uses a well-established criterion to determine when a person has a filing obligation in a state. Where a company has its principal place of business is a well-understood concept from federal diversity jurisdiction. In the Supreme Court's unanimous decision in *Hertz*

Corp. v. Friend, 559 U.S. 77, 92-93 (2010), it described the term as follows:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Annual net sales from income and expense statements is a widely utilized measure of economic activity borrowed from the HSR regulations. As noted in the definitions, the filing threshold refers to the minimum size of transaction threshold for determining reportability under the Hart-Scott-Rodino Act that the Federal Trade Commission adjusts annually by rule pursuant to Section 7A(a)(2) of the Clayton Act, as amended by the Hart-Scott-Rodino Act. For reference, in 2024 the minimum size of transaction threshold promulgated by the FTC was $119.5 million. Hence, for illustrative purposes, a party that made a Hart-Scott-Rodino pre-merger notification in 2024 and did not have its principal place of business in a state that enacted this act would need to determine whether its 2023 annual net sales in the state were at least 20% of $119.5 million. If so, the party would be obligated to make a filing in the state pursuant to Subsection (a)(2). To the extent that both the acquiring and acquired persons are required to report a transaction under the Hart-Scott-Rodino Act, both persons might be required to file with the same state AG if both persons fell within the coverage of this act.

The reference in subsection (a)(2) to the annual net sales in the state being those of "goods or services involved in the transaction" is intended to limit the filing obligation under subsection (a)(2) to circumstances where the filing party's economic activity in the state is in the same business category as assets involved in the acquisition. Consistent with the requirements of federal law concerning reporting by corporate parents of the activities of entities they control directly or indirectly (see, for example, 16 C.F.R. 801(a)(1)), the obligation under subsection (a)(2) is triggered if the reporting party controls entities that have the requisite sales in the state. For example, if a holding company was the reporting party under HSR, and that company owned a subsidiary that had the requisite amount of sales in the state of the goods or services involved in the transaction, the reporting requirement under subsection (a)(2) would be triggered. However, if the parent company or its subsidiaries had the requisite amount of sales in the state, but those were not in the same goods or services as those involved in the transaction, there would be no reporting requirement under subsection (a)(2).

Subsection (b) obligates a person that has its principal place of business in a state to provide both the HSR form and the additional documentary material to the state's AG contemporaneously with the HSR filing. In other states where the party meets the annual net sales threshold, the person need only provide the basic HSR form with their initial filing, although the AG may then request the additional documentary material under Subsection (c). The reason for this structure is to prevent AGs from being inundated with voluminous additional

documentary material that they have no interest in reviewing. To the extent an AG does not receive the additional documentary material with the initial filing but is interested in reviewing that material sooner than the time allowed for a party to submit that material upon receipt of a request, the AG may request that material from the AG of the party's state of principal place of business under Section 6 (assuming that that state has also passed this act).

The spirit of this act is to facilitate more timely and efficient state AG receipt of materials relating to potentially interesting mergers without imposing significant additional burdens on the business community. Accordingly, Subsection (d) prohibits the charging of fees for simply making available to the AG information that the AG already could procure by subpoena, for which it could not charge the company a fee. Although reviewing merger filings requires resources, this act is not designed to impose additional costs on AG offices. To the contrary, by facilitating quick and efficient receipt of HSR files, the act will save the AG time and resources previously consumed in bargaining with merging parties over HSR waivers or subpoenaing HSR files. Further, the confidentiality provisions of this act are designed to facilitate information sharing and collaboration among the AGs and the federal antitrust agencies, and among the AGs themselves. More efficient inter-agency collaboration should reduce duplication of effort and allow existing resources to be deployed more efficiently in merger review.

Separately from a filing fee, some state statutes permit the AG to recover investigatory costs from investigation subjects in certain contexts. Subsection (d) is not meant to affect the operation of those statutes. To the extent that an AG seeks recovery of investigation costs (as opposed to a filing fee) pursuant to a separate statute, Subsection (d) does not bar such fee recovery.

It is expected that the information being provided pursuant to this act will be used for and retained in connection with an investigation of the transaction. It is further expected that states availing themselves of the act will cooperate with merging parties in working out a mode of filing that parallels any federal process for filing the HSR notice and documents.

Finally, it is expected that if there is an investigation in connection with the transaction notified under the act, such an investigation will begin promptly upon receipt of all the information provided under the act consistent with the act's goals of enhanced efficiency and reduced cost and uncertainty. Unreasonable delay will also adversely affect the state's ability to challenge a transaction. For example, see *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023).

Section 4. Confidentiality

(a) Except as provided in subsection (c) or Section 5, the Attorney General may not make public or disclose:

(1) a Hart-Scott-Rodino form filed under Section 3;

(2) the additional documentary material filed or provided under Section 3;

(3) a Hart-Scott-Rodino form or additional documentary material provided by the attorney general of another state;

(4) that the form or the additional documentary material were filed or provided under Section 3, or provided by the attorney general of another state; or

(5) the merger proposed in the form.

(b) The Hart-Scott-Rodino form, additional documentary material, and other information listed in subsection (a) are exempt from disclosure under [cite to state's freedom of information act].

(c) Subject to a protective order entered by an agency, court, or judicial officer, the Attorney General may disclose the Hart-Scott-Rodino form, additional documentary material, or other information listed in subsection (a) in an administrative proceeding or judicial action if the proposed merger is relevant to the proceeding or action.

(d) This [act] does not:

(1) limit any other confidentiality or information-security obligation of the Attorney General;

(2) preclude the Attorney General from sharing information with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency; or

(3) preclude the Attorney General from sharing information with the attorney general of any other state that has enacted the Uniform Antitrust Pre-Merger Notification Act or a substantively equivalent act. The other state's act must include confidentiality provisions that are at least as protective as the provisions of the Uniform Antitrust Pre-Merger Notification Act.

Legislative Note: *A state's Freedom of Information Act may need to be amended consistent with this Act.*

Comment

Confidentiality is highly important for this act and the entire HSR filing process. The HSR materials contain confidential and valuable information. Improper disclosure could jeopardize the transaction and harm competition, but in addition it could pose securities law problems and allow unfair competition, or even facilitate collusion. These protections mirror protections that are imposed on the federal agencies which also receive the information.

This Section ensures that AGs use the HSR materials only for legitimate investigatory and law enforcement purposes, and do not disclose any HSR material except for those permissible purposes. The fact that an HSR filing has been made is included in the covered confidentiality obligations. In other words, an AG may not disclose even the fact that two parties are proposing to merge (other than in an administrative proceeding or judicial action) if that information has become known only through compliance with this act. Section 5 is not meant to prevent AGs from publicly disclosing information that is already in the public domain.

To the extent that confidential material needs to be disclosed in a judicial document such as a complaint, it is customary practice for any confidential material to be redacted in the public version of the document, with the unredacted version filed under seal. It is anticipated that state AGs will continue to follow that practice, even as to complaints filed before a court has had an opportunity to implement a protective order.

Subsection (d)(1) is intended to preserve any other confidentiality or information-security obligations, whatever their source, in addition to those set forth in this act. Subsections (d)(2-3) are intended to allow AGs to communicate freely with their federal and state counterparts concerning merger review in circumstances where both the states and federal agencies have access to the same confidential information. The term information in these subsections is intended to include economic and legal analysis that is commonly used in merger analysis. For example, one AG may wish to share an economic analysis of relevant data with federal and state counterparts to enhance efficiency and reduce wasteful duplication.

Section 5. Reciprocity

(a) The Attorney General may disclose a Hart-Scott-Rodino form and additional documentary material filed or provided under Section 3 to the attorney general of another state that enacts the Uniform Antitrust Pre-Merger Notification Act or a substantively equivalent act. The other state's act must include confidentiality provisions that are at least as protective as the provisions of the Uniform Antitrust Pre-Merger Notification Act.

(b) At least two business days before making a disclosure under subsection (a), the

Attorney General shall give notice of the disclosure to the person filing or providing the form or additional documentary material under Section 3.

Comment

This Section does not require the Hart-Scott-Rodino form or additional documentary material to be delivered individually to each AG. It is hoped that an AG, or the AGs collectively, may establish a secure central electronic database of the materials that can be shared only with AGs entitled to receive the materials. The establishment of a secure central database would not conflict with the confidentiality provisions of this act.

Section 5(b) is intended to allow a party to challenge the disclosure where appropriate.

Section 6. Civil Penalty

The Attorney General may [impose][seek the imposition] on a person that fails to comply with Section 3(a), (b), or (c) [of] a civil penalty of not more than $[10,000] per day of noncompliance. A civil penalty imposed under this section is subject to existing procedural requirements applicable to the Attorney General, including the requirements of due process.

Comment

The sanctions provision is intended to incentivize compliance with the statute without being disproportionately punitive. A $10,000 per day fine is intended to serve as a limit rather than an automatic penalty. In determining whether any fine should be levied and its amount, the AG in the first instance, and then any reviewing court, should consider factors such as: (1) whether the non-compliance was intentional, negligent, accidental, or excusable; (2) whether the non-compliance materially impaired the AG's ability to engage in merger review; and (3) whether other states have, or are likely to, impose sanctions for violations of their laws with respect to the same transaction. The provision for monetary sanctions is not meant to prevent a court of competent jurisdiction from ordering such equitable relief as the court may deem appropriate.

It should be kept in mind that, while both the acquiring and acquired party to a transaction may have Hart-Scott-Rodino filing obligations, and both may also have filing obligations under this act, in some circumstances (such as a hostile takeover) the parties may file their Hart-Scott-Rodino notifications at different times, and therefore make their notifications under this act at different times.

Section 7. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of

uniformity of the law among jurisdictions that enact it.

Section 8. Transitional Provision

This [act] applies only to a pre-merger notification filed on or after [the effective date of this [act]].

Section 9. Effective Date

This [act] takes effect …

AMERICAN BAR ASSOCIATION
Antitrust Law Section

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550
antitrust@americanbar.org
www.ambar.org/antitrust

July 18, 2024

President Tim Berg
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Re: **Proposed Uniform Law on State Premerger Notification**

Dear President Berg:

I am writing on behalf of the American Bar Association, Antitrust Law Section, as the Chair-Elect. The Council of the Section, its governing body, has voted to support the proposed Uniform Law on State Premerger Notification that is being presented at the Uniform Law Commission's Annual Meeting in Boston, Massachusetts from July 19, 2024 to July 25, 2024 for final consideration. Thank you for the opportunity to have two of our members serve as American Bar Association advisers to the Drafting Committee.

Respectfully,

Steven J. Cernak
2023-24 Chair-elect, ABA Antitrust Law Section

Cc: Dan Robbins, Chairman ULC Drafting Committee
Emilio Varanini – via email

California Lawyers Association
Antitrust and Unfair Competition Law Section

Competition, Spring 2023, Vol. 33, No. 1