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by the United States****5 December 2017**

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## United States

### 1. Introduction

1. In the United States, business conduct may be deemed anticompetitive by courts interpreting the federal antitrust laws. Cases are brought by federal competition enforcement agencies – the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (“the Agencies”) – and by states and private parties.

2. This paper will discuss presumptions, safe harbors, and the *per se* rule in U.S. antitrust law. In the United States, presumptions in competition law are based on common law as established by courts deciding multiple cases over time, and include both substantive and procedural presumptions. It is important to note that before applying any presumption, plaintiffs must establish certain factual predicates, according to evidentiary standards that are heightened at each step of the litigation process.<sup>1</sup>

3. Under U.S. competition law, some types of conduct are recognized as anticompetitive and thus unlawful, while for other types of conduct an inquiry into their effects is necessary.<sup>2</sup> As discussed below, the former approach is reflected in the *per se* rule of illegality that applies to naked price fixing, while cases under the second approach sometimes employ presumptions of competitive harm that are rebuttable with evidence that, on balance, the practice increases economic efficiency and renders markets more, rather than less, competitive.

4. U.S. courts rely on three methods of analysis to determine whether conduct is anticompetitive and thus illegal. In general, these methods fall along a spectrum based on the level of proof that a plaintiff (either a government agency or a private party) must show to establish that conduct is anticompetitive, and therefore illegal. These methods of analysis are *per se* illegal; an abbreviated rule of reason; and the full rule of reason. The form of analysis used by a court depends largely on the type of conduct at issue. In addition, for mergers, courts have over time developed a set of procedural assumptions and a burden-shifting framework to determine whether a merger violates the Clayton Act.

5. Under the *per se* method of analysis, U.S. courts categorically deem certain types of conduct an unreasonable restraint of trade; thus they are illegal. Once a court concludes the *per se* rule applies, parties are not permitted to provide justifications for their conduct that could result in a finding of no violation (i.e., parties may not submit defenses for their actions). Courts have adopted a rule of *per se* illegality when judicial experience with a particular type of conduct has shown that in nearly all cases, those restraints serve no

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<sup>1</sup> Under standard rules of pleading applied in federal courts, the burden of coming forward with evidence increases as the case proceeds from motion to dismiss to motion for summary judgment to finding of liability.

<sup>2</sup> In addition, there are a number of express and implied exemptions and immunities to the federal antitrust laws. See U.S. Submission on the Regulated Conduct Defense DAF/COMP/WP2/WD (2011)5.

purpose other than their tendency to eliminate competition, such that extensive inquiry into the restraint's effect is unnecessary.<sup>3</sup>

6. Over time, new economic learning has led to the recognition that firms may have efficiency justifications for what may otherwise appear to be anticompetitive behavior. This evolution in economic learning has led to a narrowing of the set of restraints that courts treat as illegal *per se*.

7. Rule of reason analysis is used by U.S. courts for a broader range of conduct and is usually a detailed economic analysis. In rule of reason analysis, a court typically conducts a detailed factual inquiry into an agreement's overall competitive effect. As the U.S. Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement, the conduct, and market circumstances.<sup>4</sup>

8. For certain conduct that is similar to what courts have condemned as *per se* unlawful, courts may undertake an abbreviated rule of reason analysis that entails the application of a rebuttable presumption of competitive harm. If no justifications are established, the plaintiff does not need to offer additional evidence of competitive harm, as they would in a full rule-of-reason analysis, for a court to find the conduct illegal.

9. To provide guidance to courts and businesses subject to the antitrust laws, the Agencies have published guidelines for different types of conduct and for horizontal mergers; these guidelines describe how the Agencies analyze conduct and mergers when determining whether to bring an enforcement action.<sup>5</sup> Some of these guidelines include certain "safety zones" that describe conditions under which the Agencies will not challenge conduct under the federal competition laws, absent extraordinary circumstances. Safety zones are similar to safe harbors but are not preclusive: conduct within a safety zone may still be challenged.

10. In general, more precise competition rules and safety zones, whether formulated by courts or in agency guidelines, can greatly reduce administrative costs, facilitate compliance with the law, make enforcement more predictable and efficient, and promote conduct likely to be procompetitive or competitively benign. This is important because uncertainty may chill procompetitive conduct. On the other hand, more precise rules may raise the danger of explicitly prohibiting some procompetitive conduct or permitting some anticompetitive conduct.

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<sup>3</sup> "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States*, 356 U. S. 1, 5 (1958).

<sup>4</sup> See *Chicago Board of Trade V. United States*, 246 U.S. 231 (1918); see also *California Dental Ass'n v. FTC*, 526 U.S. 756, 774-775 (1999); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986); *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104-13 (1984).

<sup>5</sup> See Fed. Trade Comm'n & U.S. Dep't of Justice, *Horizontal Merger Guidelines* (2010), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

### 1.1. *Per Se* Analysis

11. Section 1 of the Sherman Act proscribes “[e]very contract, combination . . . or conspiracy . . . in restraint of commerce.”<sup>6</sup> The U.S. Supreme Court has held that Section 1 prohibits only *unreasonable* restraints.<sup>7</sup> The type of analysis a court uses to determine if a restraint violates Section 1 depends on the type of restraint.

12. Certain “types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit” that they do not warrant the time and expense required for particularized inquiry into their effects and are instead condemned as unlawful *per se* without inquiry into their effects or potential justifications.<sup>8</sup> Such *per se* condemnation is appropriate “[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.”<sup>9</sup> In this way, the “*per se* approach permits categorical judgments with respect to certain business practices,”<sup>10</sup> and thus the “*per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.”<sup>11</sup> *Per se* illegal practices include price-fixing, bid-rigging, and customer and market allocation agreements among competitors unrelated to any efficiency-enhancing integration of activity by those competitors. These types of agreements among competitors rarely, if ever, have procompetitive justifications, so a plaintiff only need prove that the agreement exists to establish a competition law violation.

13. Treatment of vertical restraints under U.S. law has evolved over time, from a *per se* approach for all vertical restraints,<sup>12</sup> to a strict divide between *per se* illegal vertical price restraints and rule of reason treatment for non-price vertical restraints,<sup>13</sup> to rule of

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<sup>6</sup> 15 U.S.C. § 1.

<sup>7</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>8</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); Fed. Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1 (2000).

<sup>9</sup> *Khan*, 522 U.S. at 10;

<sup>10</sup> *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985).

<sup>11</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (“[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (recognizing that “[j]oint ventures and other cooperative arrangements” are not usually treated as “price-fixing schemes[] where the agreement on price is necessary to market the product at all”).

<sup>12</sup> *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (vertical price restraints such as resale price maintenance subject to *per se* liability); *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (manufacturer-imposed exclusive territories for distributors and franchised retailers subject to *per se* liability).

<sup>13</sup> *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason analysis, overturning *Schwinn*).

reason treatment for all vertical restraints except minimum resale price maintenance,<sup>14</sup> to the current approach in which all vertical restraints other than tying are evaluated under the rule of reason. In 2007, the Supreme Court overruled previous precedent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), to analyze minimum resale price maintenance under the rule of reason after viewing economic evidence of the potential for benefits to consumers due to enhanced interbrand competition. The Supreme Court held that manufacturer-imposed minimum resale prices may lead retailers to compete efficiently for customer sales in ways other than cutting the retail price.<sup>15</sup>

## 2. Abbreviated Rule of Reason – Rebuttable Presumption of Unreasonableness.

14. More recently, courts have applied a rebuttable presumption of unreasonableness to certain types of behavior that are sufficiently similar to agreements that have been condemned as *per se* unlawful. In such cases, the court will consider procompetitive justifications in deciding whether the initial presumption was rebutted.

15. For instance, an absolute ban on competitive bidding by a professional association does not require “an elaborate industry analysis” to demonstrate the anticompetitive nature of horizontal agreements among competitors to refuse to discuss prices.<sup>16</sup> Nor does a horizontal agreement among competitors to withhold a valued service,<sup>17</sup> or a plan by an association of college athletic competitors to limit the number of games that could be televised.<sup>18</sup> In each of these cases, courts have applied what has come to be called abbreviated or “quick look” analysis under the rule of reason.<sup>19</sup>

16. As with any rule of reason analysis, once the plaintiff has established a prima facie case the defendant bears the burden of establishing that the suspect conduct has a procompetitive justification by presenting “facts peculiar to the business, the history of the restraint, and the reasons why it was imposed” in order to assess the competitive effect of the restraint.<sup>20</sup>

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<sup>14</sup> See *State Oil v. Khan*, 522 U.S. 3 (1997) (vertical maximum price restraints subject to rule of reason analysis).

<sup>15</sup> See U.S. Submission on Resale Price Maintenance (DAF/COMP/WD(2008)63).

<sup>16</sup> *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

<sup>17</sup> *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

<sup>18</sup> *National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.* 468 U.S. 85, 99-100.

<sup>19</sup> The FTC has applied an abbreviated analysis under the FTC Act in cases challenging certain horizontal price agreements, including “inherently suspect” conduct. See *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 33 (D.C. Cir. 2005) (agreement among recording joint venture partners not to discount recordings made outside of the joint venture); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008) (agreement among physician groups on fees for physician services).

<sup>20</sup> *Nat’l Soc. of Professional Engineers*, 435 U.S. at 692.

### 3. Presumptions under U.S. Merger Law

17. In the United States, mergers are generally challenged under Section 7 of the Clayton Act, which prohibits acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”<sup>21</sup> U.S. federal courts generally follow a burden-shifting approach.<sup>22</sup> First, the plaintiff must establish its prima facie case, including the definition of a relevant product and geographic market.<sup>23</sup> At this stage, defendants can demonstrate that plaintiff’s product market, geographic market, or both, are inaccurate and thus that the plaintiff has failed to establish a prima facie case. If the plaintiff can show that the merger would produce a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, that creates “a presumption that the merger will substantially lessen competition.”<sup>24</sup> Once the plaintiff has made such a showing, it “establish[es] a prima facie case of anticompetitive effect.”<sup>25</sup>

18. To rebut the presumption, defendants must produce evidence that shows that the market-share statistics give an inaccurate account of the merger’s probable effects on competition in the relevant market.<sup>26</sup> Evidence on a variety of factors can rebut a prima facie case.<sup>27</sup> For example, defendants may produce evidence concerning the “ease of entry into the market, the trend of the market either toward or away from concentration,” the “continuation of active price competition,” or “unique economic circumstances that undermine the predictive value of the government’s statistics.”<sup>28</sup> But the “more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.”<sup>29</sup>

19. If the defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effect shifts to the plaintiff, and merges with the ultimate burden of persuasion, which remains with the plaintiff at all times.<sup>30</sup> The ultimate burden on the plaintiff is to prove a Section 7 violation by a preponderance of the evidence.<sup>31</sup>

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<sup>21</sup> 15 U.S.C. §18.

<sup>22</sup> See *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); *FTC v. Sysco Corp.* 113 F. Supp. 3d 1, 24 (D.D.C. 2015); *United States v. Aetna Inc.*, 1:16-cv-01494 (D.D.C. Jan. 23, 2017); *United States v. Anthem*, 855 F.3d 345, 349-50 (D.C. Cir. 2017).

<sup>23</sup> *Olin*, 986 F.2d at 1305; *Chi. Bridge & Iron*, 534 F.3d at 423,

<sup>24</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (internal quotation marks and alterations omitted).

<sup>25</sup> *Baker Hughes*, 908 F.2d at 983.

<sup>26</sup> *Heinz*, 246 F.3d at 715.

<sup>27</sup> *Baker Hughes*, 908 F.2d at 984.

<sup>28</sup> *Heinz*, 246 F.3d at 715 n.7 (internal quotation marks omitted); see also *Baker Hughes*, 908 F.2d at 985–86 (listing additional factors that can rebut the government’s prima facie case).

<sup>29</sup> *Baker Hughes*, 908 F.2d at 991.

<sup>30</sup> *Heinz*, 246 F.3d at 715 (internal quotation marks and alterations omitted).

<sup>31</sup> *H&R Block*, 833 F. Supp. 2d at 49 (internal quotation marks omitted).

20. The Agencies also rely on the analysis set out in the Horizontal Merger Guidelines.<sup>32</sup> The Guidelines “outline the principal analytical techniques, practices, and the enforcement policy” of the Agencies. Using the analysis contained in the Guidelines, the Agencies make decisions about which mergers to challenge; whether to order a remedy to resolve the competitive concerns and restore competition that would otherwise be lost in the merger; or whether to seek a court injunction to block a merger. The Horizontal Merger Guidelines are not binding on courts, but courts have relied on the framework contained in the Guidelines to assist in determining whether a horizontal merger violates Section 7 under the burden-shifting framework described above.

21. The Guidelines set out market concentration thresholds to identify mergers that may require more in-depth agency review to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration.<sup>33</sup> The Agencies calculate the Herfindahl-Hirschman Index (HHI) as a measure of market concentration, as one way to identify some mergers that are unlikely to raise competitive concerns.<sup>34</sup> While these thresholds do not create a presumption of liability, they reflect the collective experience of the agencies in enforcing merger standards, and are intended to provide helpful information to businesses considering a merger.<sup>35</sup>

#### 4. Safe Harbors and Safety Zones

22. Safe harbors are “rules that preclude a finding of a competition infringement and/or make it unnecessary to assess market circumstances in order to find a conduct lawful if certain pre-determined conditions are met.”<sup>36</sup> By this definition, U.S. competition guidelines do not set out “safe harbors,” nor do they contain circumstances or rules that preclude a finding of competitive infringement. Instead, the Agencies have issued guidelines that contain “safety zones.” Although similar to safe harbors, safety zones do not have preclusive effect. Conduct that falls within a safety zone is not exempt from the antitrust laws, nor does the existence of a safety zone preclude a finding of competitive infringement. Thus, safety zones are not true safe harbors.

23. Safety zones contained in various U.S. guidelines set out conditions for which the agencies will not challenge conduct under the competition laws, absent extraordinary circumstances. However, if competitive conditions warrant, conduct falling within a safety zone can be legally challenged. Additionally, safety zones do not define the limits

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<sup>32</sup> U.S. Dep’t of Justice, Merger Guidelines (1968), available at <http://www.justice.gov/atr/hmerger/11247.pdf>.

<sup>33</sup> Id.

<sup>34</sup> HMG 5.3.

<sup>35</sup> In 2010, the Agencies released revised Horizontal Merger Guidelines, which contained higher HHI threshold levels for moderately concentrated and highly concentrated markets than prior versions of the Guidelines to better reflect the Agencies’ practice. See FTC News Release, “Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/08/federal-trade-commission-and-us-department-justice-issue-revised>.

<sup>36</sup> See Roundtable on “Safe Harbours and Legal Presumptions in Competition Law,” COMP/2017.224.

of conduct that is permissible. Conduct falling outside of safety zones will not necessarily be challenged.

24. Competition law analysis is inherently fact-intensive. Safety zones require the consideration of only a few factors that are relatively easy to apply. These factors provide the agencies with a high degree of confidence that the conduct falling within the safety zone is unlikely to raise substantial competitive concerns. Safety zones and the guidelines that describe them also provide transparency to firms about how the competition laws may be applied to their conduct and how the Agencies perform their analysis of such conduct. This helps firms to engage in agreements and transactions that are not likely to run afoul of the competition laws.

25. The appendix to this paper contains a list of the guidelines that have been issued by the Agencies. These guidelines contain safety zones for specific types of conduct and industries. For example, as discussed previously, the Horizontal Merger Guidelines set out threshold HHI levels below which the Agencies rarely conduct an in-depth investigation or challenge a transaction. Similarly, the Antitrust Guidelines for Collaborations Among Competitors lay out antitrust safety zones for collaborations among competitors, including research and development joint ventures. For example, absent extraordinary circumstances the Agencies do not challenge a competitor collaboration “when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.”<sup>37</sup> As another example, the Statements of Antitrust Enforcement Policy in Health Care (“Health Care Statements”) are guidelines that lay out safety zones for some conduct within the health care industry that the Agencies will not challenge under the competition laws, absent extraordinary circumstances. The Health Care Statements include safety zones for physician network joint ventures, hospital mergers, high-tech joint ventures, specialized service joint ventures, collective provision of information, joint purchasing arrangements, and multi-provider networks.

26. In addition, Section 8 of the Clayton Act,<sup>38</sup> as amended by the Antitrust Amendments Act of 1990, provides a statutory safe harbour -- minimum thresholds under which certain director and officer interlocks between competing business corporations are allowed. Specifically, Section 8’s prohibitions do not apply to interlocks for which (1) the competitive sales of either corporation are less than an inflation-adjusted multiple of \$1 million, (2) the competitive sales of either corporation are less than 2 percent of that corporation’s total sales,<sup>39</sup> or (3) the competitive sales of each corporation are less than 4 percent of that corporation’s total sales.<sup>40</sup> This removes from the coverage of interlock prohibitions arrangements that pose little risk of significant antitrust injury.

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<sup>37</sup> See Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000) at § 4.2, available at [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

<sup>38</sup> 15 U.S.C. § 19.

<sup>39</sup> 15 U.S.C. § 19(a)(2).

<sup>40</sup> Id.



27. Outside of these thresholds, Section 8 prohibits a person from serving as a director or an officer, elected or chosen by the board, of two or more corporations if the corporations are “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”<sup>41</sup> Competitor corporations are covered by Section 8 if the combined capital, surplus, and undivided profits of each of the corporations exceeds an inflation-adjusted multiple of \$10 million.

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<sup>41</sup> 15 U.S.C. § 19(a)(1)(B).

## APPENDIX

### U.S. Competition Guidelines Containing Presumptions and Safety Zones

- [Horizontal Merger Guidelines](#) – outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission with respect to horizontal mergers under the federal antitrust laws. These Guidelines include general standards for levels of change in relevant market concentration for which the agencies ordinarily require no further investigative analysis, thus allowing the mergers to proceed unchallenged.
- [Antitrust Guidelines for Collaborations Among Competitors](#) – lay out antitrust safety zones for collaborations among competitors, including research and development joint ventures.
- [Statements of Antitrust Enforcement Policy in Health Care](#) – lay out safety zones for some conduct for which the agencies will not challenge under the competition laws, absent extraordinary circumstances. Statements include safety zones for physician network joint ventures, hospital mergers, high-tech joint ventures, specialized service joint ventures, collective provision of information, joint purchasing arrangements, and multi-provider networks.
- [Enforcement Policy Statement Regarding Accountable Care Organizations Participating In the Medicare Shared Savings Program](#) – clarifies the US competition agencies' competition law enforcement policy regarding collaborations among independent healthcare providers that seek to become Accountable Care Organizations in the Medicare Shared Savings Program.
- [Antitrust Guidelines for the Licensing of Intellectual Property](#) – state the antitrust enforcement policy of the US competition agencies with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how. Goal is to help companies predict whether the agencies will challenge a practice as anticompetitive. Each case is evaluated in light of its own facts.
- [Antitrust Guidelines for International Enforcement and Cooperation](#) – describe what connections to the United States are sufficient for the agencies to investigate or bring enforcement actions challenging conduct occurring abroad or involving or affecting foreign commerce. These guidelines also describe the agencies' consideration of international comity concerns and the role of foreign government involvement in determining whether to open an investigation or bring an enforcement action.