ONE FIRM WORLDWIDE®

JONES DAY

ANTITRUST 2022: WHAT'S CHANGED, WHAT'S NOT?

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October 27, 2022

" All I did was Google 'Antitrust'."

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POLLING INSTRUCTIONS

- Option 1:
  - Use your phone to download the **Poll Everywhere** app from the iTunes Store; once loaded, click "Open"
  - To join, enter the user name **jonesdaycle**, and click Join. (You will be asked to enter a screen name. This does not need to be your name.)
  - Click Update to enter the poll
  - Enter **jonesdaycle** as your username
  - Vote for the "correct" answer when the time comes
- Option 2:
  - On your phone, text **JONESDAYCLE** (all caps) to **22333** once to join
  - Enter the letter of the "correct" answer when the time comes

OUR OVERLY AMBITIOUS AGENDA

- Antitrust Landscape
- Robinson-Patman Revival?
- Right to Repair
- One Good Patent
- A Tough Labor Market

ANTITRUST LANDSCAPE

Biden Taps Tech Antitrust Advocate Lina Khan for FTC, in Yet Another Bad Omen for Silicon Valley
Politico
March 22, 2021

Biden Names Tech Foe Jonathan Kanter as DOJ Antitrust Chief
Bloomberg
July 20, 2021

Biden Could Remake American Society by Reviving Antitrust Enforcement
Los Angeles Times
April 9, 2021

Bipartisan Antitrust Bill Targets Tech Companies
CNN
June 19, 2021

Antitrust Should be Used to Fight Inflation
The American Prospect
February 2, 2022

New FTC Commissioner Calls for "A Return to Fairness" in Antitrust Enforcement
StarTrbune
September 22, 2022

AGGRESSIVE ANTITRUST ENFORCEMENT UNDER BIDEN ADMINISTRATION

- DOJ and FTC leadership brings **aggressive, pro-enforcement approach**: FTC Chair **Lina Khan** and DOJ Antitrust Assistant Attorney General **Jonathan Kanter**
- In July 2021, President issued sweeping **executive order** to increase competition and combat "excessive" corporate consolidation
- Pressure for **increased enforcement of existing antitrust laws**, with focus on merger control and monopolization
  - Growing "big is bad" sentiment within Congress and Administration bringing **heightened scrutiny of large companies and concentrated sectors**
  - Enhanced focus on tech, telecom, agriculture, & healthcare/pharma
  - Bipartisan support to **increase agency budgets**
- Momentum to pass **new antitrust legislation** to broaden and strengthen antitrust laws

BIDEN ADMINISTRATION RATCHETS UP ANTITRUST RHETORIC

BRIEFING ROOM

Readout of the Second Meeting of the White House Competition Council

JANUARY 24, 2022 · STATEMENTS AND RELEASES

"Capitalism without competition isn't capitalism; it's exploitation. Without healthy competition, big players can change and charge whatever they want and treat you however they want."

"Agencies with merger oversight authority have ramped up their efforts to challenge or block mergers that are bad for the American economy and for families' pocketbooks."

"[I]n too many industries, a handful of giant companies dominate — dominate the entire market."

GOOD NEWS

Biden's Antitrust Batters Strike Out
Wall Street Journal
October 18, 2022

DOJ & FTC Still Must Prove their Case in Court: Track Record Is Poor (So Far)

- Two criminal price fixing trials (chickens)
- Two criminal wage fixing trials
- Illumina + Grail merger
- UnitedHealthcare + Change merger
- US Sugar + Imperial Sugar merger
- Booze Allen + EverWatch merger

STATE AGs REMAIN ACTIVE IN ANTITRUST

- State Attorneys General continuing to actively pursue antitrust investigations and enforcement
  - Examples: Facebook, Amazon, Syngenta, Corteva, Tyson Foods, Generic Drug Litigation
- In September 2021, 32 state AGs sent a letter to Congress expressing support for six legislative proposals aimed at expanding antitrust laws
  - The letter noted several existing impediments to states' efforts to protect consumers: changing technology, decreased competition in concentrated sectors, and judicial skepticism toward robust antitrust enforcement

ROBINSON-PATMAN REVIVAL?

NEW LIFE FOR . . . THE ROBINSON-PATMAN ACT?

- Government enforcement of RPA: Virtually non-existent historically
- **July 2021** Executive Order aimed at encouraging competition in U.S.: referenced RPA
- **Nov. 2021**: FTC unanimously votes to begin 6(b) study on supply chain disruptions
  - National Grocers Association: Study "will shine a light on what our members already know: that **dominant grocery power buyers are using their size to demand better terms, better prices, and better products from suppliers, leaving their competitors and American consumers to pay the bill**. These actions leave independent grocers short-handed on key products their customers need and force small, independent grocers and their customers to bear a disproportionate burden of surging food price inflation during supply chain crunches."

NEW LIFE FOR . . . THE ROBINSON-PATMAN ACT?

- FTC **June 2022** Enforcement Policy Statement
  - "Paying or accepting rebates or fees [to PBMs/other intermediaries] in exchange for excluding lower-cost drugs may violate Section 2(c) of the [RPA]."
- **September 2022**: FTC Commissioner Bedoya calls for a **retreat from "efficiency"** and a return to **"fairness"**:
  - "Certain laws that were clearly passed under what you would call a fairness mandate–laws like Robinson-Patman–directly spell out specific legal prohibitions. * * * We should enforce them."
  - Exs.: independent pharmacy (insurance required captive pharmacy to dispense cancer medicine); independent SD grocer (supplies cut (esp. during Pandemic) and prices less favorable than big box stores) – claims **efficiency** focus to blame

PRICE DISCRIMINATION (ROBINSON-PATMAN ACT): ELEMENTS OF A CLAIM UNDER § 2(a)

1. A difference in price
2. Between two competing buyers who make actual purchases
3. In interstate commerce
4. Of commodities
5. Of like grade and quality
6. At about the same time
7. From the same seller
8. Where such price discrimination may substantially injure competition.

PRICE DISCRIMINATION (ROBINSON-PATMAN ACT): DEFENSES AND DOCTRINES

- **Functional (Practical) Availability** – discount is both known and practically available to competing reseller customers
- **Meeting Competition** – in good faith; meet but not beat
- **Functional Discounts** – can sell at different prices to wholesalers and direct-buying retailers where lower price is "reasonable" (meaning it "accords due recognition and reimbursement for actual marketing functions")
- **Cost Justification** – differential must "make only due allowances for differences in the cost of manufacture, sale or delivery"
- **Changing Conditions** – differential is "in response to changing conditions affecting the market for or the marketability of the goods concerned, such as … actual or imminent deterioration of the goods, obsolescence, … distress sales … or sales … in discontinuance of business in the goods sold."

DISCRIMINATION IN PROMOTIONAL ALLOWANCES AND SERVICES

GENERAL RULE

Must provide all competing reseller customers – regardless of whether they buy directly from you – **proportionally equal** promotional allowances and services, unless a defense/exception applies.

DEFENSES

- Functional Availability
- Meeting Competition

POP QUIZ NO. 1

- WidgetWorld is approached by a potential new customer (Newco) for a particular type of widget, currently sold by only one of WidgetWorld's other customers (A).
- Newco is a convenience store; A is a general merchandise retailer (e.g., big box store, warehouse/club store).
- Newco wants WidgetWorld to sell the widgets to it at 40% off of A's shelf price (i.e., retail price)
- Newco tells WidgetWorld that it asks for, and obtains, these terms from each of its product suppliers.
- Can WidgetWorld sell widgets to Newco at that price?

POP QUIZ NO. 1 -- WHAT'S THE RIGHT ANSWER?

Can WidgetWorld sell to Newco at that price?

A. Yes, because Newco does not compete with A.

B. No, because a retail competitor's price cannot lawfully be used as a benchmark for pricing to Newco.

C. Yes, depending on the relationship between (i) WidgetWorld's wholesale price to A and (ii) 40% off A's retail shelf price.

D. Yes, because WidgetWorld is meeting competition by providing that price.

E. No, because WidgetWorld did not make that price available to all competing reseller customers.

POP QUIZ NO. 2

- Whipz manufactures two sizes of whipped cream: 10 oz and 20 oz.
- It sells the 20 oz size only to value/discount (e.g., "dollar") stores. It sells the 10 oz size to all others, regardless of whether they buy directly from Whipz or through a distributor of their choosing.
- A grocery store complains that it wants to purchase the 20 oz whipped cream for resale. Whipz refuses to sell the 20 oz size, so the grocery store continues to buy the 10 oz size while nearby value/discount stores continue to buy the 20 oz size for resale.
- Does this scenario raise any potential risk under the Robinson-Patman Act?

POP QUIZ NO. 2 -- WHAT'S THE RIGHT ANSWER?

Does this scenario raise any potential risk under the Robinson-Patman Act?

A. No, because a refusal to sell cannot violate the RPA.

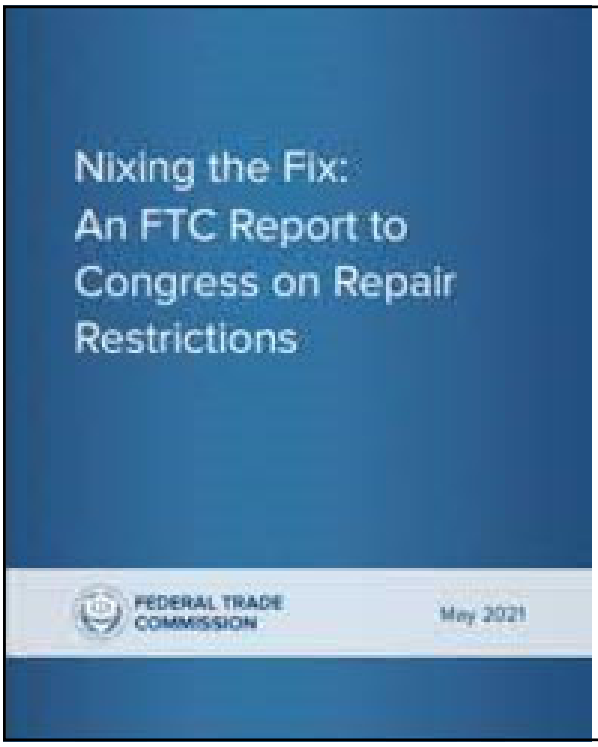
B. No, because package size is not a promotional allowance or service.

C. Yes, because Whipz is not providing a promotional allowance or service on proportionally equal terms.

D. Yes, depending on the price per ounce of the 10 oz and 20 oz packages, and whether the grocery store buys directly from Whipz.

E. No, for reasons A and B.

RIGHT TO REPAIR



GROWING FOCUS ON RIGHT TO REPAIR

- FTC Report to Congress on Repair Restrictions
- Biden Executive Order
- FTC Policy Statement
- FTC Individual Commissioner Statements
- FTC Omnibus Resolution

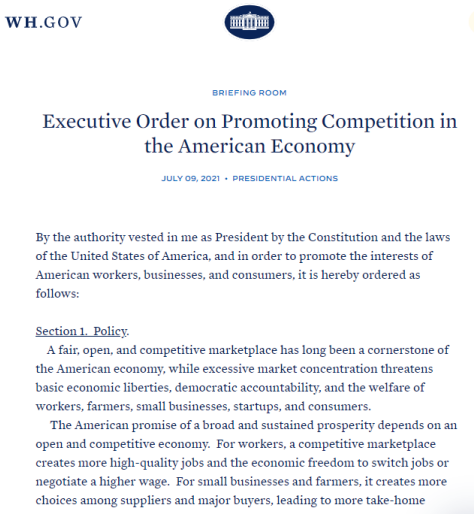
FTC RIGHT TO REPAIR REPORT PREVIEWS THEORIES OF HARM AND AGENCY VIEW (READ: SKEPTICISM) TOWARD DEFENSES

- Enforcement through Magnuson-Moss Warranty Act ("MMWA"), Section 5 of FTC Act, antitrust laws, and FTC rulemaking (more on each shortly); leverage antitrust and consumer protection laws
- Concerning antitrust, the report outlines several potential issues, including conduct by a manufacturer that:
  - unlawfully ties availability of parts to purchase of its repair service;
  - refuses to provide consumers / aftermarket service providers with key inputs (parts, manuals, diagnostic software and tools);
  - limits availability of parts via explicit or de facto exclusive dealing contracts with preferred service providers;
  - makes products difficult to disassemble to maintain market position / exclude aftermarket competitors
  - anticompetitively asserts patent rights and trademark enforcement to restrict repairs not authorized by OEMs;
  - uses embedded software that forces consumers to have maintenance and repair performed by manufacturer's authorized service networks (e.g., through software locks)

*See *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, May 2021.

EXECUTIVE ORDER CALLS OUT RIGHT TO REPAIR ENFORCEMENT

- In July 2021, President Biden signed a sweeping **executive order** to promote competition, including:
  - Affirming the policy of antitrust enforcement to combat abuses of market power in "**repair markets**"
  - Encouraging FTC to enact **rules** addressing "unfair anticompetitive **restrictions on third-party repair** or **self-repair.**"



WH.GOV

BRIEFING ROOM

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. Policy.

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home

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FTC'S NEW RESOLUTION TO INVESTIGATE REPAIR RESTRICTIONS

- In September 2021, FTC voted 3-2 to approve new compulsory process resolutions in eight enforcement areas, including **repair restrictions,** making it **easier to start investigations and issue subpoenas**

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS REGARDING REPAIR RESTRICTIONS

File No. 212 3126

Nature and Scope of Investigation:

To investigate whether any persons, partnerships, or corporations have engaged or are engaging in unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices, in or affecting commerce, related to any repair restrictions, including but not limited to restrictions related to any hardware and any software, imposed by manufacturers or sellers in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, or any statutes or rules enforced by the Commission; and to determine the appropriate remedy, including whether injunctive and monetary relief would be in the public interest.

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LEGAL FRAMEWORK: KEY STATUTES

Magnuson-Moss Warranty Act ("MMWA")	Prohibits a warrantor from conditioning a warranty on the consumer using any article or service identified by brand, unless provided without charge
Sherman Act § 1 - Tying	Prohibits firm with market power from tying the sale of one product only on condition that the customer also purchase a second product, if effect is to harm competition
Sherman Act § 2 - Monopolization	Prohibits willful acquisition or maintenance of monopoly power by certain exclusionary conduct
FTC Act § 5	Prohibits "unfair" methods of competition and "deceptive" acts

FTC IS LIKELY TO PRIORITIZE TECHNOLOGY AND SOFTWARE

- "[C]hanges in **technology** and **more prevalent use of software** has created fresh opportunities for companies to limit independent repair." –FTC Chair Khan
- Potential violations on FTC's radar:
  1. Product designs that complicate or prevent repair
  2. Limiting the availability of **diagnostic software**, manuals, and tools
  3. Limiting the availability of **telematics information**
  4. Asserting **patent rights** and **enforcement of trademarks** in an unlawful, overbroad manner
  5. Disparaging non-OEM parts and independent repair
  6. Using unjustified **software locks**, **digital rights management**, and **technical protection** measures
  7. Imposing restrictive **end user license agreements**

FTC TAKES ACTION—HARLEY-DAVIDSON, WEBER, AND WESTINGHOUSE CONSENT DECREES

- MMWA
  - Requires warrantors to disclose warranty terms clearly and in one document, and
  - Prohibits voiding warranties unless certain brand products or services are used (unless provided for free)
- According to the FTC's complaints, all three companies were imposing illegal warranty terms that voided customers' warranties if they used third-party parts or unauthorized third-party repair services
- Consent decrees required specific, corrective language in the warranties and multi-year reporting obligations
- Under these consent decrees, if the companies further violate the Warranty Act, the FTC can seek substantial civil penalties per violation

POP QUIZ NO. 3

- In-house counsel for Hybrid Revolution, an Arizona E-car company, is reviewing a potential change to its written limited warranty that customers receive with all new E-car purchases.
- Currently, the warranty itself is silent on whether a customer must use an authorized repair shop for all maintenance and repairs in the warranty period to avoid voiding the warranty, although the FAQ page on Hybrid Revolution's website states that using an independent repair shop does not automatically void a warranty. The warranty does contain a "How to Get Service" provision that includes contact information for Hybrid Revolution-authorized repair shops.
- The head of the warranty department is against any changes to the warranty language, as she does not want to confuse customers; in the past, any changes in the warranty language has substantially increased calls to customer support, increasing wait times materially.
- Should in-house counsel add language to the warranty clearly stating that a warranty is not void because a non-authorized repair shop completed a previous repair?

POP QUIZ NO. 3 -- WHAT'S THE RIGHT ANSWER?

Should in-house counsel add language to the warranty clearly stating that a warranty is not void because a non-authorized repair shop completed a previous repair?

A. **Probably not—**Hybrid Revolution does not void warranties simply because a customer uses a non-authorized repair shop for a repair, so it isn't violating the MMWA.

B. **Probably—**While Hybrid Revolution does not void warranties for use of non-authorized repair shops, it does not provide this information in its written warranty, and the warranty may imply to consumers that authorized repairs are required.

C. **No—**The MMWA does not apply to consumer goods.

D. **No,** if Hybrid Revolution is not violating Arizona law.

ONE GOOD PATENT

INTELLECTUAL PROPERTY AND ANTITRUST LAW CONFLICT

- "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."
  - U.S. Dept. of Justice and Fed. Trade Comm'n, *Antitrust Guidelines with Respect to the Licensing of Intellectual Property,* § 1.0 (2017).
- "[V]alid patents authorize their owners to exclude competition and charge monopoly prices."
  - *Mayor and City Council of Baltimore v. AbbVie Inc.*, 42 F.4th 709, 711-12 (7th Cir. 2022)
- "There is an obvious tension between the patent laws and antitrust laws. One body of law creates and protects monopoly power while the other seeks to proscribe it."
  - *United States v. Westinghouse Electric Corp.*, 648 F.2d 642 (9th Cir. 1981).

RECONCILING ANTITRUST AND IP LAW

- Antitrust violations involving IP almost always =
  - Exceeding the scope of its IP rights, ***or***
  - Attempting to exercise a right it does not possess
- Examples
  - Agreements (licenses) that restrict competition beyond IP rights
  - Acquiring cumulative IP rights that together confer market power
  - Sham litigation—knowingly enforcing rights that do not exist or are not infringed

PATENT THICKETS

- "The patent laws do not set a cap on the number of patents any one person can hold—in general, or pertaining to a single subject."
  - *Mayor and City Council of Baltimore v. AbbVie Inc.*, 42 F.4th 709, 711-12 (7th Cir. 2022)
- The "problem" (per a bipartisan coalition of US Senators)
  - "[D]rug companies and other large companies sometimes artificially extend the period in which they can charge high prices by filing many patents on nearly the same invention, creating a so-called patent thicket of dozens of patents on a single drug. Those thickets make any challenge to the patents, or to the drug companies' pricing of the covered drug, nearly impossible. Because of the exorbitant cost of taking on each of the patents in these patent thickets, generic manufacturers are impeded from entering the market, hurting competition and raising prices for American consumers."
    - https://www.leahy.senate.gov/press/leahy-and-cornyn-lead-letter-asking-patent-office-to-address-anti-competitive-patent-thickets

POP QUIZ NO. 4

- Last week EV-StartUp, a tech-market darling, launched its first EV battery, joining the race to supply electric vehicle manufacturers and winning a contract to supply an OEM that had purchased batteries from the industry's early leader, EV-Leader.
- EV-Leader promptly sued EV-SU, alleging EV-SU's new battery infringed 47 patents in EV-Leader's ever-growing EV battery patent portfolio.
- EV-SU's CEO firmly believes EV-SU's batteries are superior to EV-Leader's batteries, and that EV-Leader has been obtaining "weak" patents on modest improvements to its second-rate technology, solely to create a "patent thicket" to impede competition.
- In fact, in a recent proceeding before the US Patent and Trademark Office, another EV battery maker challenged 7 EV-Leader patents stemming from the same applications as the 47 patents asserted against EVB-SU, and the PTO declared 5 to be invalid.
- EV-SU's CEO instructs his lawyers to defend against EV-Leader's lawsuit by arguing that EV-Leader's 47 patents are weak and by counterclaiming that EV-Leader's assertion of those 47 weak patents is an attempt to monopolize the EV battery market.
- Can EV-SU prevail against EV-Leader?

POP QUIZ NO. 4 – WHAT'S THE RIGHT ANSWER?

Can EV-SU prevail against EV-Leader?

A. Yes, because EV-Leader has obtained an unreasonable number of weak patents that will foreclose competition from better EV battery technology and thereby injure consumers.

B. Yes, because some of EV-Leader's patents have been shown to be invalid, and it is at least probable that some, if not all, of the 47 patents asserted against EV-SU (all of which stem from the same application) could be invalid.

C. No, unless EV-SU at least demonstrates that each of the 47 EV-Leader patents is invalid, unenforceable, or not infringed by its new battery.

D. No, unless EV-SU demonstrates that most of the 47 EV-Leader patents are invalid, unenforceable, or not infringed by EV-SU's new battery.

A TOUGH LABOR MARKET

LABOR MARKETS: UNDER THE MICROSCOPE

- October 2016: DOJ/FTC issue Antitrust Guidance for HR Professionals
  - **Warning**: Agreements to fix compensation/benefits or not to solicit or hire others' employees subject to **criminal** prosecution/**per se** illegality
- Late 2020 – Early 2021: First criminal indictments
- April 2022: DOJ loses first criminal wage-fixing (physical therapist staffing company (TX)) and no poach (national healthcare provider (CO)) cases
- June 2022: jet engine manufacturer and executives from outsourced engineering providers move to dismiss, claiming vertical agreement that "further[ed] a legitimate customer-supplier business collaboration"
- July 2022: Reached $85 million **civil** settlement with poultry processors that allegedly shared information about plant workers' wages/benefits, and data consulting company that helped with information exchange

LABOR MARKETS: UNDER THE MICROSCOPE

- August 2022: First criminal win?
  - Healthcare staffing company (VDA) indicated intent to change plea to guilty to charge of conspiring with another company not to poach each other's nurses and to fix their wages; ***but*** will litigate all sentencing
  - Dispute over elements at change-of-plea hearing → additional briefing ordered; new change-of-plea and sentencing hearing scheduled for Jan. 6, 2023
- **Keys under federal law**:
  - Naked agreement on compensation/not to compete, or ancillary to legitimate collaboration?
  - Narrowly tailored in time and scope?

POP QUIZ NO. 5

- WeKnowTaxes, Inc. ("WKT") has been losing an unusually high number of accountants to other companies, including but not limited to tax preparation companies. It believes it is no longer offering competitive wages/benefits.
- To determine whether that's the case, it convinces the national trade association to which it belongs to conduct a survey of accountant wages and benefits.
- The trade association surveys all its members, seeking information about current wages and benefits provided to accountants at different levels of experience.
- It publishes and disseminates the results, stating, e.g., wage highs, lows and averages, by experience level, company type, and region. Some results are based on hundreds of responses, others on only a handful.
- WKT and other companies that were offering less than the average all increase their compensation packages to reflect the average.
- Does this survey and/or WKT's response to it raise any antitrust concern?

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POP QUIZ NO. 5 -- WHAT'S THE RIGHT ANSWER?

Does this survey and/or the response to it raise any antitrust concern?

A. Yes, due to the format of the survey results that were disseminated.

B. No, because the companies *increased* compensation packages as a result of the survey.

C. No, because WKT and the other companies that changed their compensation as a result of the survey did not agree with one another to do so.

D. Yes, because wages and compensation may not be the subject of benchmarking surveys because the information is too competitively sensitive.

E. No, for reasons B and C.

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QUESTIONS?


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