

# M&A ACADEMY

## Antitrust and HSR Considerations in M&A Transactions

**Speakers:**

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# Presenters



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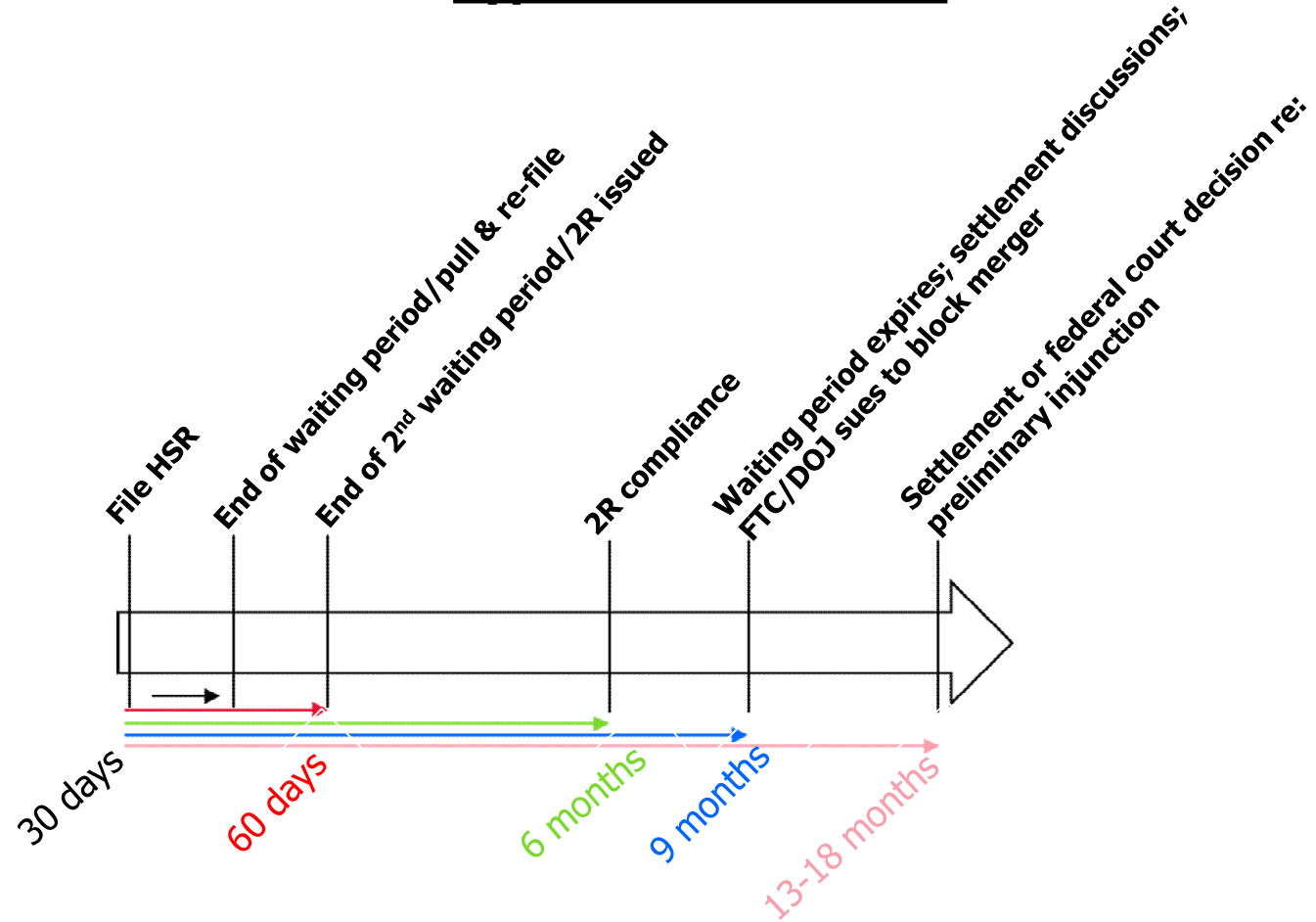
**Damos Anderson**  
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# Pre-Signing Antitrust Checklist

- ✓ Substantive risks and timeline
  - ✓ Consider horizontal, vertical, entrenchment, platform, other
  - ✓ Reactions of industry participants (customers, competitors, suppliers, employees)
  - ✓ Antitrust climate
  - ✓ Contract strategies
- ✓ Documents, Documents, Documents!!!
  - ✓ What needs to be filed; how gov't uses them
  - ✓ Information exchanges: clean teams, data rooms and employee census
  - ✓ Gun-jumping
- ✓ Reportability: HSR, non-US, FDI, other regulatory

# HSR 101: Process and Timeline

## Typical HSR Timeline



# HSR 101: Process and Timeline

- Requires parties to notify FTC and DOJ of certain M&A transactions and observe a 30-day waiting period (which can be prolonged) prior to closing
- Applies to acquisitions of assets, voting securities, economic control of partnership or LLC, and certain licensing arrangements
- Deal value exceeds \$119.5M and merging parties satisfy certain annual sales and total asset thresholds
- There are numerous exemptions (*e.g.*, non-US assets with insufficient US sales; size-of-person test not met; minority acquisitions of LLCs and LPs)
- Signed transaction agreement, term sheet, or LOI required
- Each side of the transaction submits filing to both FTC and DOJ

# HSR 101: Process and Timeline

- Filing contains financial/structural information along with “4(c) and 4(d) documents”
  - 4(c)/(d): final versions of documents (including emails) that are (i) prepared for the transaction; (ii) reviewed by an officer or director; and (iii) discuss market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, or synergies
- Either FTC or DOJ may investigate transaction
- FTC or DOJ may issue Second Request for information, extending investigation often for months; Buyer may “pull & refile” to avoid a Second Request
- FTC/DOJ must sue to block deal
- New HSR Rules with additional disclosures and burdens on the horizon

# Second Requests

- Massive subpoena issued by FTC/DOJ prior to expiration of 30-day waiting period
- Burdens have increased substantially under Biden administration; usually takes 3-4 months to comply
  - More custodians; upwards of 50+ on many deals
  - More documents and data going back beyond 3 years
    - Use of AI for documents and economists for data commonplace
  - More challenges to compliance (albeit with limited success in court)
  - Less willingness to give relief to parties; fewer timing agreements
- **Emphasis on document preservation**

# How Do Authorities Assess Whether M&A Deal Violates Antitrust Laws?

- M&A that may cause harm to customers due to a substantial lessening of competition
- FTC/DOJ typically focus on “horizontal” and “vertical” mergers
  - Horizontal mergers are mergers between actual or potential competitors; FTC/DOJ will investigate whether deal will limit choice; result in higher prices; or dampen innovation
    - Structural presumption: Generally, 30%+ market share
  - Vertical mergers are mergers between suppliers and customers; FTC/DOJ will investigate whether the combined company will foreclose rivals’ access to suppliers or customers
    - Structural presumption: Generally, one party has 50%+ market share (as supplier or customer)
- FTC/DOJ must establish relevant geographic and product market and identify market shares, which can be quite narrow



# New Merger Guidelines

- Intended to be used by courts to determine which deals are presumptively unlawful, thus shifting burden to merging parties to prove deal is not anticompetitive
  - Most horizontal mergers presumptively unlawful with combined 30%+ market share
  - Vertical mergers have “inference” of unlawfulness if one party has a 50%+ market
  - Entrenchment of dominant position
  - Platform mergers
  - Potential competition
  - Labor
- To be seen whether courts will defer to the new Guidelines

# Tougher Enforcement or Empty Rhetoric?

## THE WALL STREET JOURNAL.

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### *Antitrust Regulation by Intimidation*

Lina Khan's new merger guidelines won't convince judges, but they scare companies into inaction.

## Bloomberg

### **The New M&A Rules That Would Delay Million-Dollar Deals**

- New filing rules seek data on prior mergers, labor impacts
- New requirements could add 2-3 months to deal-review timetable

## FINANCIAL TIMES

### US antitrust has reached a turning point

Big cases against Amazon, Google and others come as conditions favour a new approach to enforcement

## The New York Times

### *Biden's Antitrust Team Isn't Backing Down From a Fight on Deals*

New guidelines show that despite legal setbacks, top competition officials intend to maintain a tough approach to takeovers and technology giants.

## The Washington Post

*Democracy Dies in Darkness*

### Economic Reality and Antitrust Theory Paralyze M&A

## The New York Times

### *Biden Administration Unveils Tougher Guidelines on Mergers*

The proposed road map for regulatory reviews, last updated in 2020, includes a focus on tech platforms for the first time.

## THE WALL STREET JOURNAL.

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### **Antitrust Cops Hatch New Plan to Stop Big Mergers**

Draft guidelines target deals involving technology platforms, private-equity practices and harm to workers

# Litigating Risky Cases for Favorable Precedent (or Chilling Effect?)

“



“I am committed to bringing difficult cases, and as I have mentioned, the Antitrust Division is building a team of litigators that are ready for the challenge.”

**Jonathan Kanter**  
DOJ AAG

“

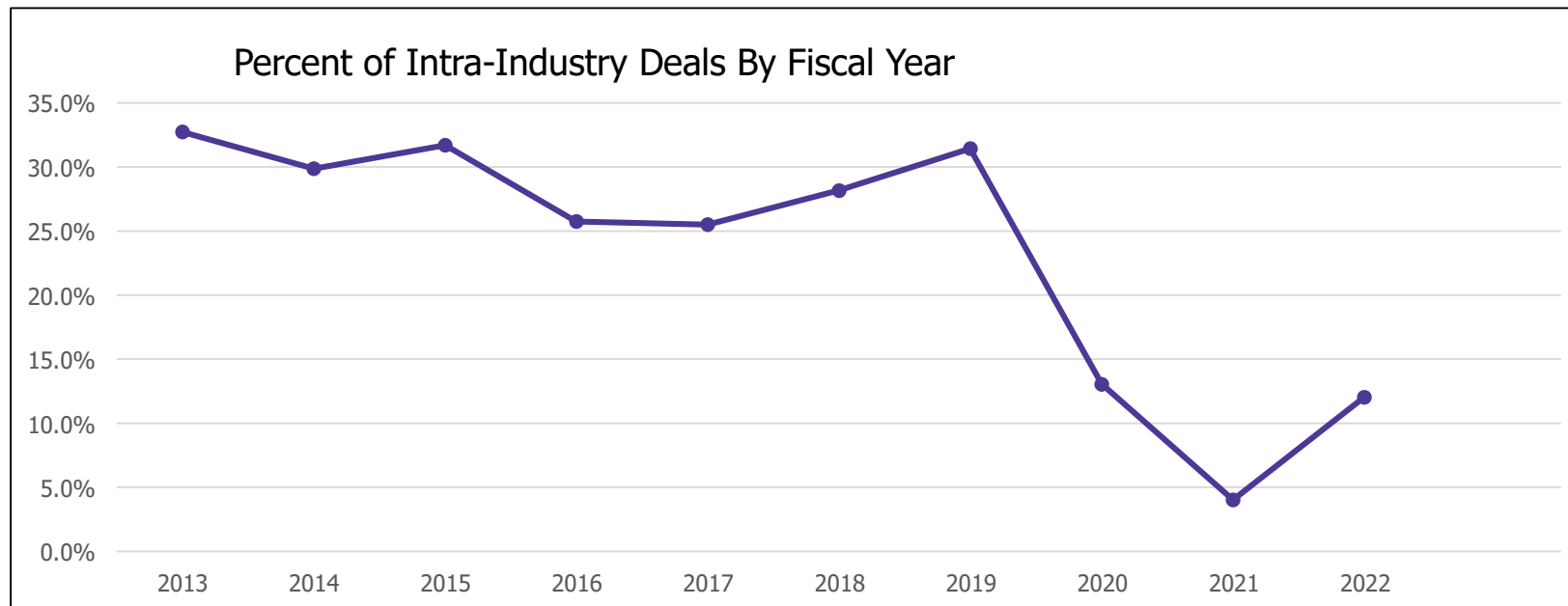


“If you’re not really pushing the courts to engage with how these statutes apply in the new economy, you get doctrine that is stale.”

**Lina Khan**  
FTC Chair

# Some Indications of “Chilling Effect” on M&A During Biden Admin.

Substantially lower percentage of “intra-industry” deals under Biden (7.8%) than Trump (25.2%) or Obama 2<sup>nd</sup> Term (29.8%)



# HSR Filing Volume Trending Closer to 2019 Levels

Month	Number of HSR Filings	% Change (2 Years Ago)	% Change (4 Years Ago)
March (2023)	122	(62%)	(21%)
April (2023)	120	(55%)	(26%)
May (2023)	144	(56%)	(24%)
June (2023)	159	(46%)	(1%)
July (2023)	144	(58%)	(15%)
August (2023)	167	(55%)	(3%)
September (2023)	144	(60%)	(9%)
October (2023)	157	(65%)	4%
November (2023)	204	(66%)	(1%)
December (2023)	160	(43%)	(2%)
January (2024)	170	(19%)	13%
February (2024)	135	(56%)	(7%)

# Biden Admin: Same Frequency of Deals Investigated, Issued Second Requests, and Challenged

- Less than 10% of deals investigated; ~1.7% received Second Requests (both below Trump and Obama averages)
  - However, transactions above \$1 B are 3x more likely to be investigated and 6x more likely to receive a second request than transactions below \$300 M.
  - Pharmaceuticals and hospital transactions have a higher likelihood of receiving a second request
- Additionally, the Second Request rate for deals between companies in same industry (22.4%) in first 2 years of Biden more than double that of the intra-industry Section Request rate during the Trump (10.7%) and Obama second term (10.4%) administrations
- Once a Second Request is issued:
  - Settlements are out: no DOJ settlements since late 2021
  - **Almost 50% are now abandoned;** new trend likely resulting from virtually no pre-litigation settlements
  - About 25% close without restructuring or litigation
  - About 25% are litigated or re-structured to avoid litigation
- Biden Administration Litigation Record:
  - Four wins, Six Losses
  - However, 64% of litigations have ended in win or deal abandonment (similar to past administrations)

# Contract Strategies: Risk Allocation Options (Non-Exhaustive)

- Buyer duty to agree to remedy and to litigate; Buyer controls defense strategy
- Buyer duty to agree to remedy and to litigate or pay RBF; Buyer controls defense strategy
- Buyer duty to agree to remedy up to a cap, but not duty to litigate and Buyer must pay RBF if no antitrust approval by drop dead date (long timeline)
  - Divestiture cap may be based on Material Adverse Effect or a specified amount of assets, i.e., assets valued at \$x, or assets generating sales or EBITDA of \$y
- Buyer agrees to divest up to a cap AND pay RBF if agency finds divestiture insufficient by drop dead date; Buyer controls defense strategy
- No duty to litigate or agree to remedy; joint control of defense strategy

# Document Creation – 4(c)/(d)

- All studies, surveys, analyses and reports
- That were prepared by or for any officers or directors
- In connection with the proposed acquisition
- Addressing market shares, competition, competitors, markets, and/or potential for sales growth or expansion into product or geographic markets or synergies/efficiencies



# Document Creation – 4(c)/(d)

- Ordinary course documents of Seller if used by Buyer
  - Be careful what is put in dataroom
- Cannot redact content specific to other deals from 4(c)/(d) documents other than board minutes
- Board minutes may need to be submitted, but non-deal content can be redacted
- 4(c)/(d) documents for prior iteration of the deal if used to analyze new iteration of same deal are 4(c)/(d)
- Proposed HSR Rules will vastly expand scope of 4(c)/(d)

# How the Government Uses Documents: US vs. Bertelsmann

In evaluating a potential acquisition of Simon & Schuster, a Bertelsmann board presentation characterized the U.S. publishing industry as an “oligopoly” of Penguin Random House and “only 4 further large publishers.”

As a senior Penguin Random House executive remarked to a colleague: “I would not want to be a big author at Simon & Schuster now . . .” The colleague responded, “I agree. Especially when the price tag [for acquiring Simon & Schuster] is going to be so high.”

When Simon & Schuster announced that it was up for sale in March 2020, its current CEO wrote to one of its best-selling authors: “I’m pretty sure that the Department of Justice wouldn’t allow Penguin Random House to buy us, but that’s assuming we still have a Department of Justice.” That same month, the Chairman of Bertelsmann, Penguin Random House’s parent, acknowledged that Penguin Random House posed greater “antitrust risks” than any other potential buyer of Simon & Schuster. As a consequence of that risk, Bertelsmann understood that it would have to pay a significant premium over other bidders to acquire Simon & Schuster.

# Buzzwords to Avoid

- ✗ Bargaining/negotiating leverage
- ✗ Describing target's data, tools or services as "must haves" or "necessities" or "essential"
- ✗ Competitive moat or barriers to entry
- ✗ Roll-up or consolidation strategy
- ✗ Eliminate competitive/pricing pressure
- ✗ Dominant/dominate or monopolize
- ✗ References to market shares or market power

# Do's and Don'ts When Preparing Documents

## Do's

- ✓ Focus on pro-competitive rationales, e.g., lower prices, increased quality and investment, and outcomes that are positive for customers and employees
- ✓ When possible, include all competitors when describing the competitive landscape or identify portion of competitors as "select competitors"
- ✓ Replace "market" with "segment"
- ✓ Have counsel review documents in draft form whenever possible
- ✓ Create separate documents (i.e., different pdfs or ppts) for each acquisition target

## Don'ts

- ✗ Avoid language that suggests plans to accomplish any of the following:
  - ✗ Increase bargaining leverage with customers
  - ✗ Ability to raise prices to customers or disadvantage or foreclose competitors
  - ✗ Reverse or slow any increases in compensation/benefits
- ✗ Avoid hyperbole, jokes about competition, sarcasm or other unprofessional language
- ✗ Whenever possible, avoid using personal communication tools (e.g., text messages) to discuss business
- ✗ Avoid unnecessary or unsubstantiated references to market shares, market definition or market power

# Clean Teams and Gun Jumping

- Gun Jumping: Taking steps to commence a reportable transaction prior to antitrust approval/clearance, such as intermingling assets or exerting influence over target (e.g., consent over ordinary course of business customer contracts)
  - “Springing rights” to avoid gun jumping – strategies abound
- Information Exchanges
  - Exchanges of competitively sensitive information (e.g., future product-specific pricing, bidding, employee-specific compensation, etc.)
  - Clean team – what’s market?
    - Buy-side antitrust counsel review of summaries
    - Cool-off period (6-12 months)
    - Excluding only participation in or direct supervision over day-to-day competitive decision making

# Employment Considerations

- Heightened interest in labor competition by FTC/DOJ
  - DOJ recently stated that antitrust compliance programs must include training for human resources professionals on issues such as wage-fixing and no-poach agreements in order to be considered “effective.”
- Does M&A counterparty compete for employees? If so, some restrictions may be needed with respect to the exchange of position-specific or employee-specific compensation information
- Numerous strategies abound:
  - Request full employee census via clean team; designate someone not directly responsible for hiring/compensation decisions to review
  - Request anonymized data showing specific salaries but not position or employee name
  - Request aggregated comp data or compensation “ranges” for certain departments

# New HSR Filing Rules on Horizon

- New Rules will go into effect likely 2024, with potentially exorbitant time/cost burdens including:
  - expansion of document requirements, including “4(c)/(d)” and ordinary course
  - inability to file on short-form non-binding LOI
  - disclosure of labor information
  - disclosure of all officers/directors/partners going back 2 years and third parties on which those persons served going back 2 years
  - disclosure of customer contact details if product overlap or actual/potential supply relationship between M&A parties

# International Antitrust - Mergers

## 1. Triggering Event

- Acquisition of sole or joint control via:
  - Shares (typically >50%)
  - Assets (with market presence and to which turnover can be attributed)
  - Contracts (a.k.a. negative control rights)
- Minority shareholding jurisdictions
- Formation of joint ventures

## 2. Thresholds

- Turnover thresholds (concept of undertaking concerned depends on control & jurisdiction)
- Asset thresholds
- Market share jurisdictions and “effects” statutes



# International Antitrust - Mergers

- EU captures essentially large deals because of thresholds / but reviews JVs between large companies even when JV itself has little or no business in the EU
  - EU filing covers 27 MS + Iceland, Liechtenstein, Norway
  - There is a referral system between MS and EC
- Germany has low thresholds + minority shareholdings
- Austria has combined threshold + minority shareholdings
- China requires approx. USD 113.5 M in local sales and can considerably affect timetable
- Brazil looks at buying & selling group

# Biography



**David R. Brenneman**

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David R. Brenneman represents clients on the antitrust aspects of mergers and acquisitions (M&A), joint ventures, and other business combinations and collaborations. David has talents in a wide range of industries, including life sciences, publishing, technology, telecommunications, energy information services, metals, and financial services. David has defended several high-profile transactions before the US Department of Justice (DOJ) Antitrust Division, US Federal Trade Commission (FTC), and the European Commission. David has coordinated Hart-Scott-Rodino (HSR) notifications and other merger control filings around the world for hundreds of multimillion- and multibillion-dollar transactions and has guided clients through dozens of DOJ and FTC investigations and second requests.

# Biography



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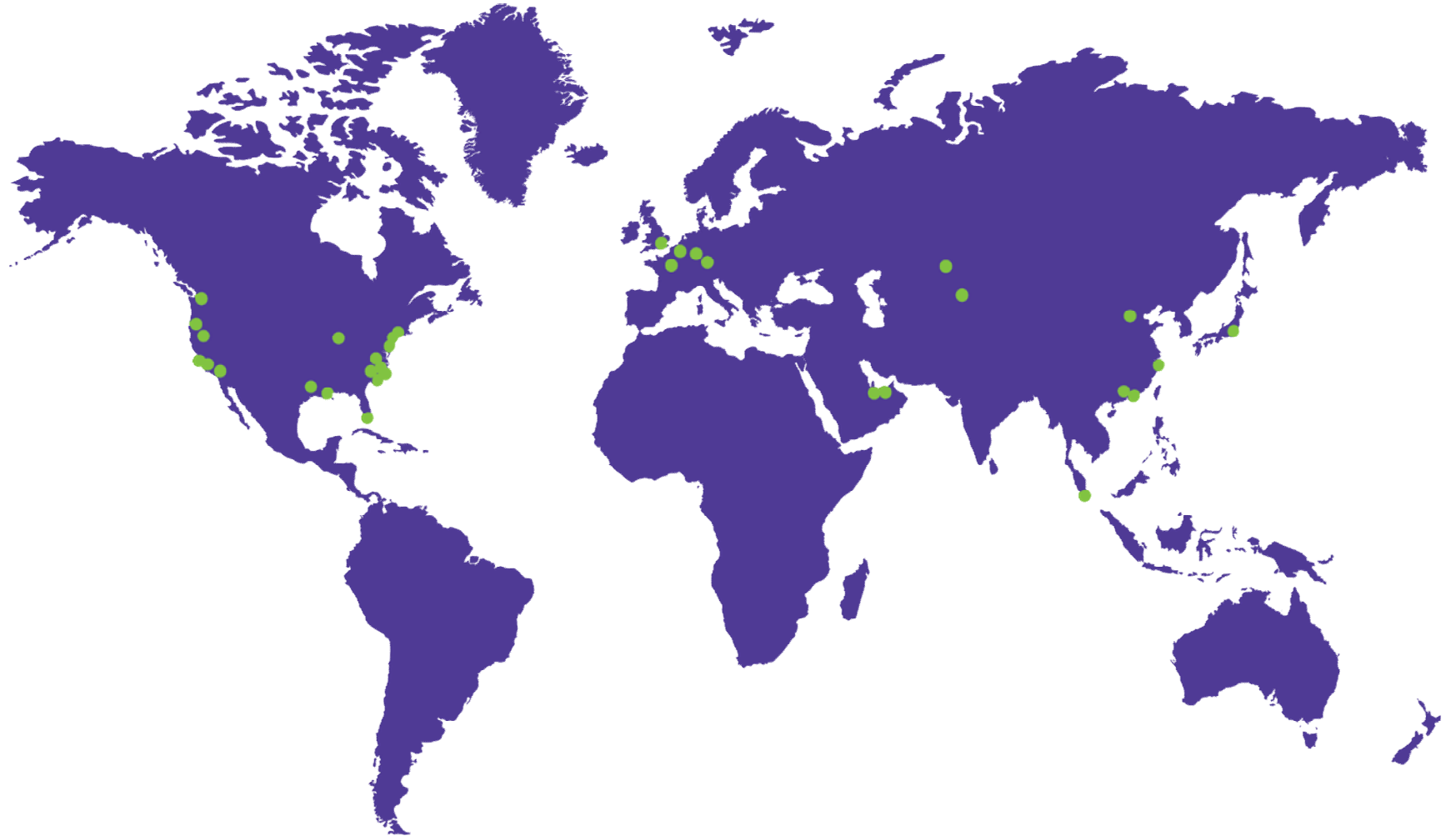
Damos Anderson focuses his practice on a range of antitrust transactions and litigation in addition to other complex civil litigation. His current work involves merger review, Hart-Scott-Rodino (HSR) filings, private equity transactions, and private and government litigation and compliance. Damos has experience assessing HSR reportability, preparing HSR forms, and managing filing preparation as well as handling substantive antitrust analysis of competitor transactions, second request responses, and general antitrust counseling matters.

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