

FTC's Non-Compete Rule and the Healthcare Employer

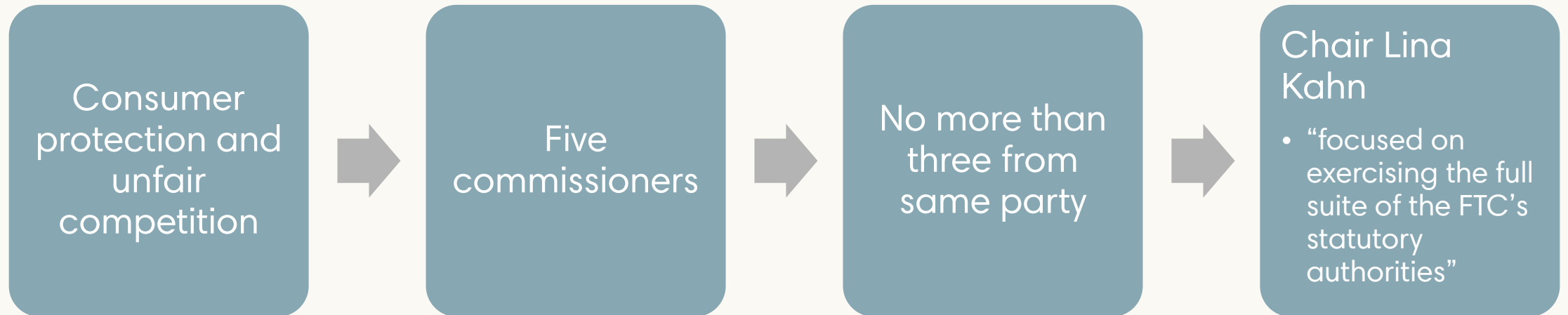
BRAD CAVE AND MARK WILETSKY

First, some housekeeping

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Federal Trade Commission????



Non-Compete Rule Basics

Unfair method of competition to:

- enter into or attempt to enter into a non-competes clause
- enforce or attempt to enforce a non-competes clause
- represent that a worker is subject to a non-competes clause

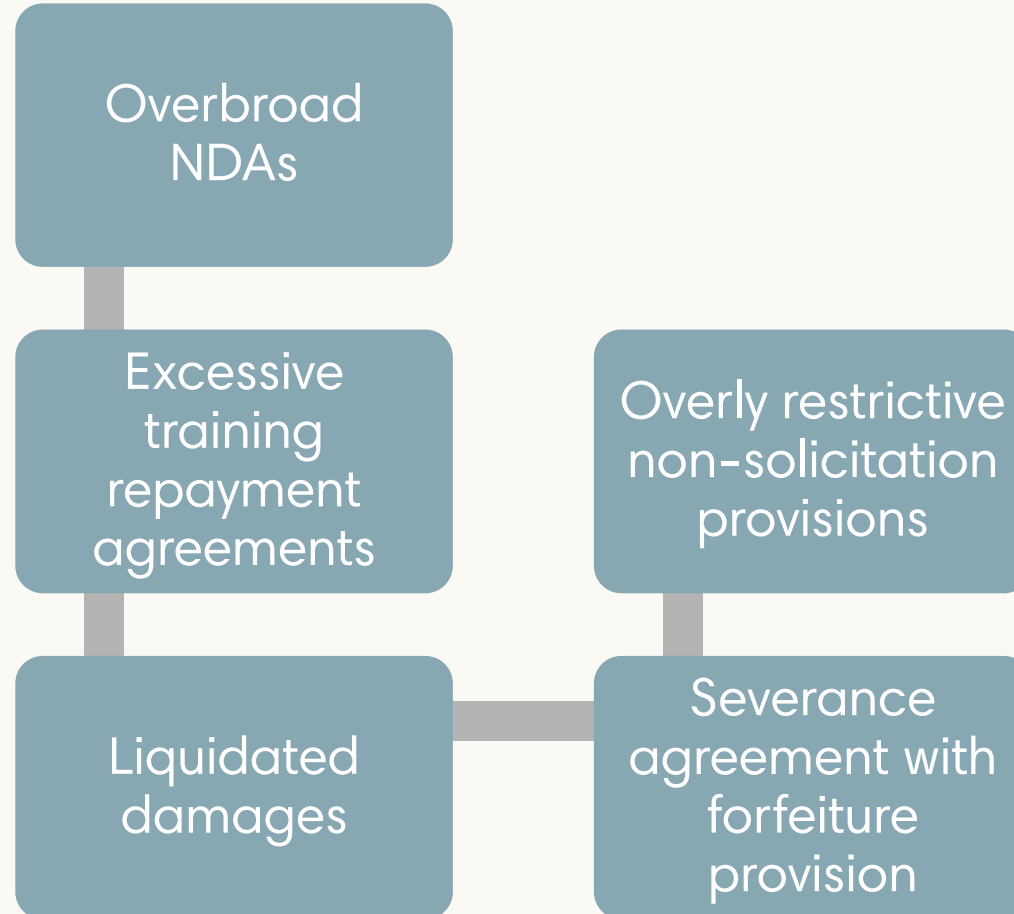
Non-Compete Rule Basics – What's a Non-Compete?

Term or condition of employment by policy or agreement

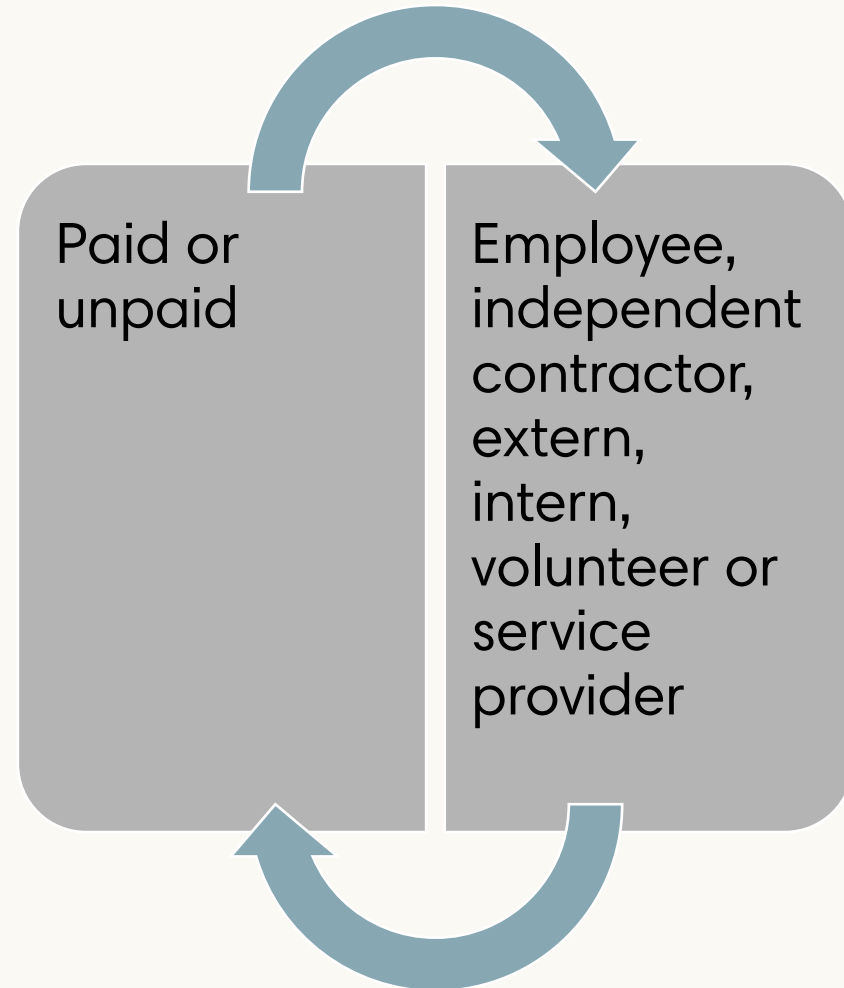
Prohibits, penalizes or functions to prevent a worker from:

- Seeking or accepting any work after employment
- Operating any business after employment

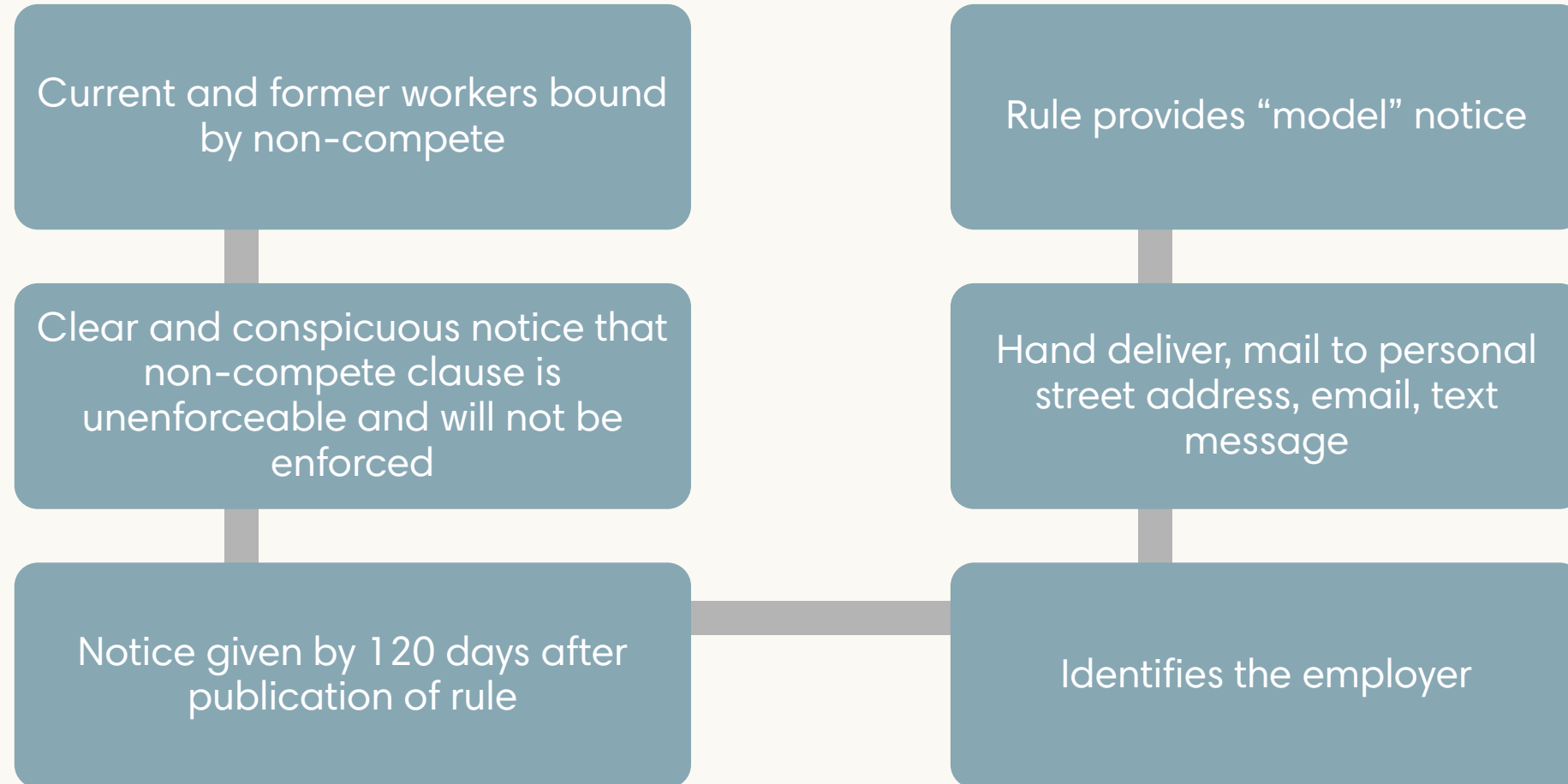
Not Just Contract Terms – Functional Non-Competes



Non-Compete Rule Basics – Covered Workers



Non-Compete Rule Basics - Notice



Senior Executive Exception

Holds a policy-making position

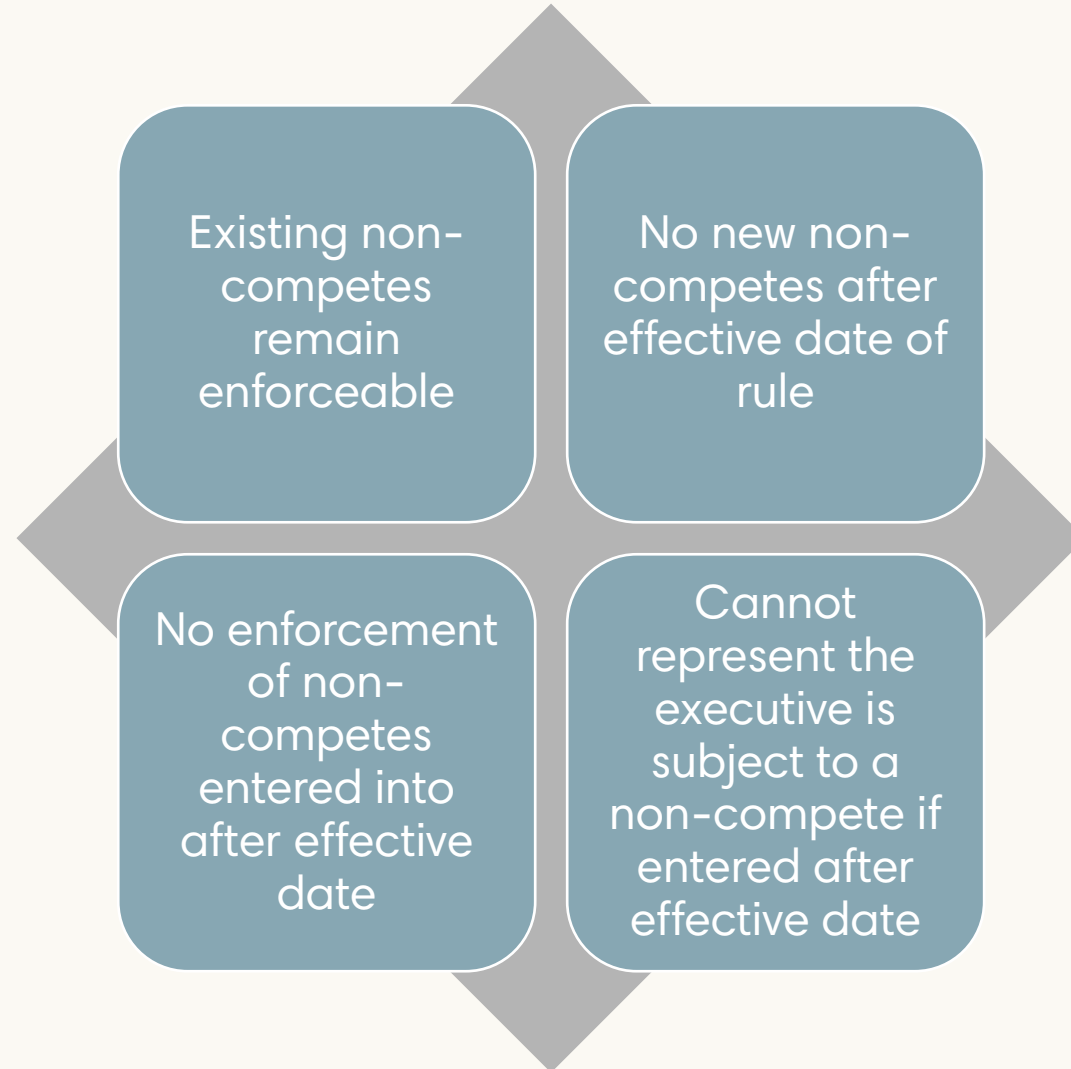
Officer with final authority to make policy decisions to control significant aspects of business; not just advising or influencing policy

Not an officer of a subsidiary or affiliate of a business entity unless they have policy-making authority for the parent entity

Officer – president, VP, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, or a person performing corresponding functions

Annual comp above \$151,164, not including benefits

Senior Executive Exception



What Entities Are Covered?

Very broad (and
ambiguous)
definitions



“Person” – any
natural person,
partnership,
corporation,
association “or other
legal entity” within
FTC’s jurisdiction
“including any
person acting under
color or authority of
State law.”



To the extent of the
jurisdiction under
FTC Act

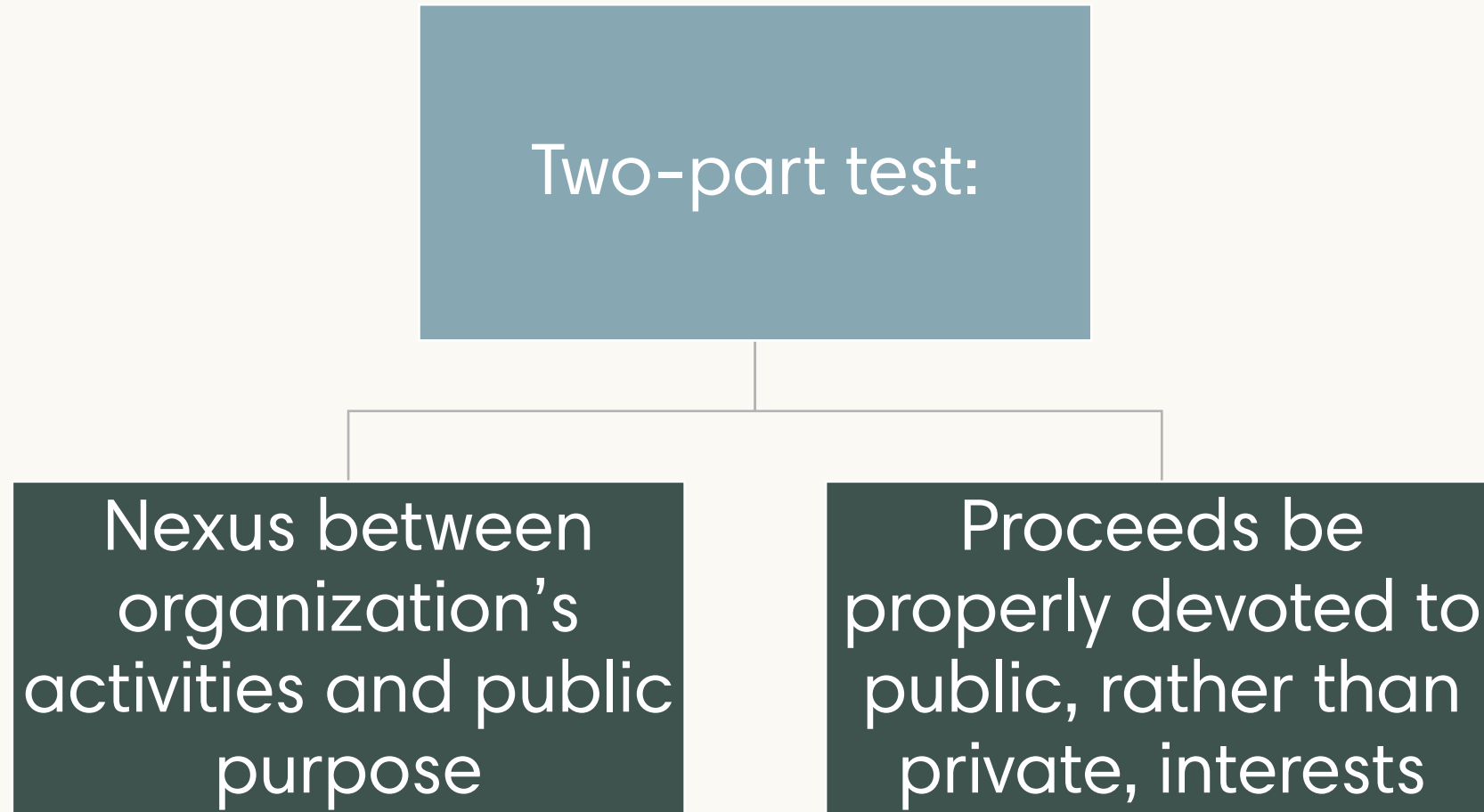
Non-Profit Coverage

Non-profits not excluded

FTC Act: corporation covered if “organized to carry on business for its own profit or that of its members”

U.S. Supreme Court: FTC Act applies to non-profit association that provided “substantial economic benefits to for-profit members”

Non-Profit Coverage



Non-Profit Coverage – Examples

- Non-profit entity consisting of hospital and 100-physician group and non-profit physician association subject to FTC Act because the non-profit entities negotiated payor contracts for the for-profit physician practices
- For-profit affiliate controls non-profit entity

Public Entity Coverage

FTC declined to clarify when public entities are subject to its jurisdiction

Contends that some public hospitals will be subject to rule

“State action doctrine” may protect public entities’ ability to use non-competes

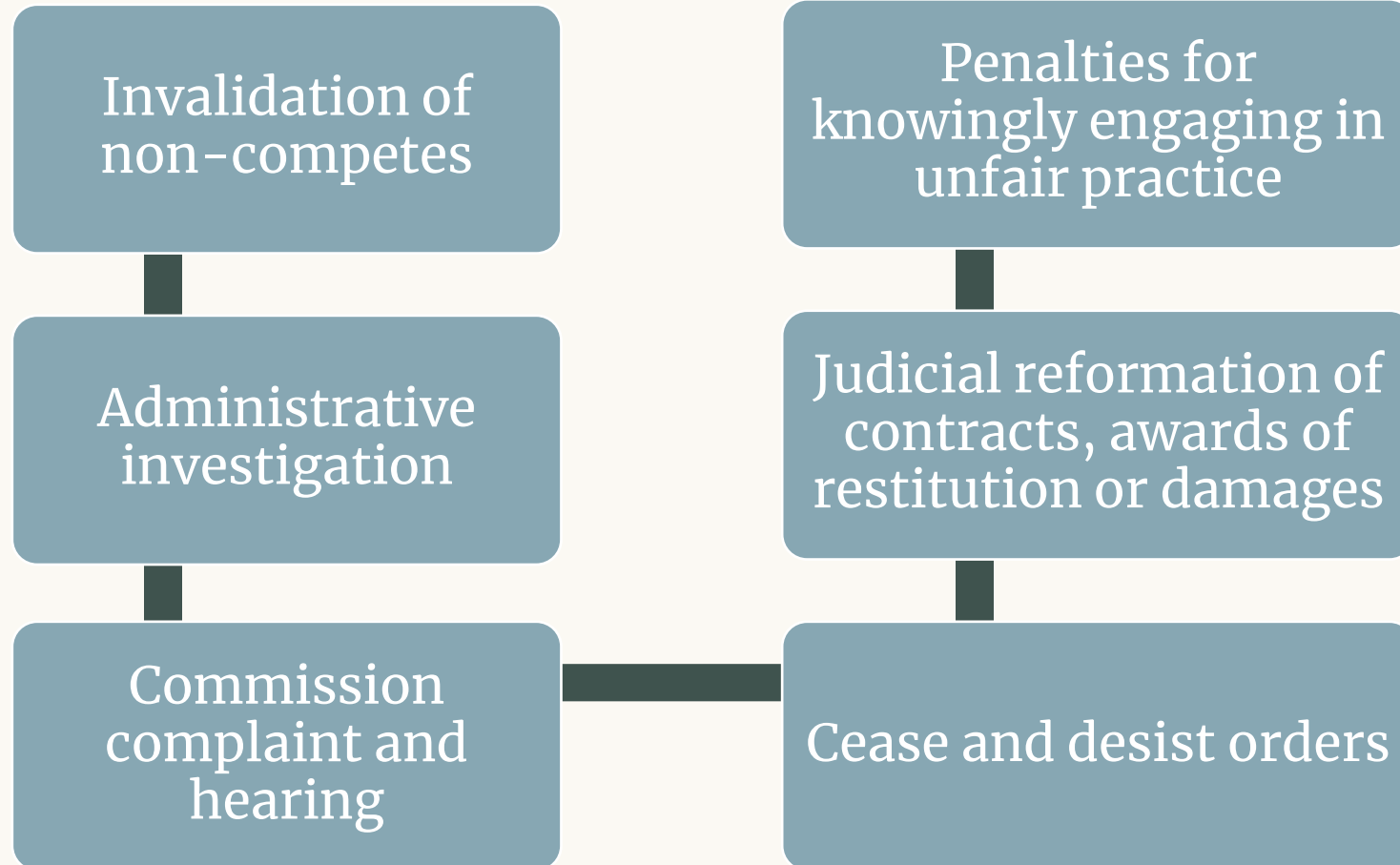
Exceptions

Sale of business
entity or a
person's
ownership
interest in entity

Causes of action
based on non-
competes arising
prior to effective
date

Good faith belief
the rule does not
apply to your
entity

Enforcement



What next?



Thank you – any questions?



BRAD CAVE
PARTNER | [VIEW BIO](#)
307.778.4210



MARK WILETSKY
PARTNER | [VIEW BIO](#)
303.473.2864