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ANTITRUST AT SCALE

A BRIEFING SERIES FOR TECHNOLOGY LEGAL AND BUSINESS STRATEGISTS

Fall 2026

ANTITRUST AT SCALE

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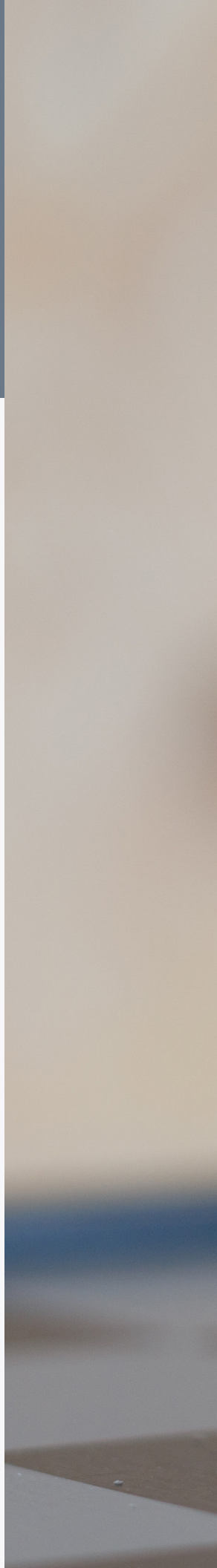
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ANTITRUST AT SCALE:
FALL 2026

2026 has delivered more consequential antitrust developments than any comparable period in two decades. Courts and regulators on both sides of the Atlantic have issued rulings that redefine algorithmic liability and raise important questions around the scope of legal privilege. Enforcers in the United States, European Union, United Kingdom, and beyond are pressing coordinated enforcement against AI bundling and platform dominance. Legislators and enforcers are rewriting merger notification rules while the European Commission has overhauled its merger guidelines for the first time in 20 years. Remedy orders, from US federal courts to Commission or national authority decisions, could reshape how billions of users access digital material. Executive Order 14405, issued by the Trump administration in May, is also directing financial regulators to remove barriers that have protected incumbent banks and financial institutions, potentially opening new competitive pathways for fintechs and digital-asset providers while raising fresh antitrust and compliance questions. These are not distant regulatory signals; they are live compliance obligations, deal risks, and litigation exposures that now require attention and action.

HOW TO READ THIS BRIEFING:

Each of the nine issues that follow is a self-contained abstract covering developments across the US, EU, and UK. Start with the "Issues at a Glance" table to identify your highest priorities, then read each abstract's "What To Do Now" bullets for immediate action steps. The briefing is designed for selective reading: pick the issues closest to your business model and return to the rest as you find time.

KEY AUDIENCES:

Connectivity & Media Platforms: Large-scale operators of cable, satellite, or streaming infrastructure.

Enterprise Technology & IT Services: Companies providing hardware, software, managed services, or outsourcing solutions.

Cybersecurity & Infrastructure Software: Firms delivering network security, cloud security, or endpoint protection.

Payments & Financial Technology: Platforms operating payment rails, merchant services, or financial infrastructure.

Data Aggregation & Software Platforms: Companies that aggregate, process, or intermediate critical data flows.

ISSUE #1: PRICING ALGORITHMS UNDER SCRUTINY – COLLUSION RISK

Criminal antitrust prosecution now extends to companies deploying algorithmic pricing tools that pool competitor data.

SETTING THE STAGE

Using pricing algorithms (prescriptive AI systems that automate pricing for sellers in marketplaces) does not in and of itself violate any antitrust law. But in November 2025, the DOJ secured a substantial algorithmic-collusion settlement, private antitrust litigation over several commercially available algorithmic pricing tools continues to proliferate, and at least 12 states have opened enforcement actions or enacted legislation. Meanwhile, the UK Competition and Markets Authority ("CMA") opened an investigation in February 2026 into suspected information-sharing among major hotel chains via a shared data services provider—underscoring that algorithmic coordination is drawing enforcement attention on both sides of the Atlantic. The European Commission has publicly said that it has at least one case on this topic in its enforcement pipeline.

WHY IT'S CRITICAL

Two federal appellate courts addressed algorithmic price-fixing claims within 11 months. For a deeper dive on these decisions, read our prior Legal Update. Both rulings anchored liability to the same factual question: does the algorithm pool non-public competitor information? If yes, the claim survives. If the tool operates on each client's data independently, no antitrust theory holds. That bright line creates clarity at the extremes but leaves significant gray-zone exposure for tools that blend proprietary analytics with market-wide data inputs. EU enforcers are taking a consistent approach: in March 2026, the Commission's acting Director General of DG COMP confirmed a "large-scale exercise underway" on pricing algorithms, emphasizing that the EU's legal framework permits pursuit of algorithmic collusion cases without demonstrating a formal "agreement"—it suffices to show concerted practices or information exchange. In addition, the Commission has made clear that it is actively using AI and algorithmic tools to detect collusion.

WHAT'S NEW?

- The Third Circuit reversed dismissal in *Cornish-Adebiyi v. Caesars* (July 29, 2026), holding that casino-hotels feeding confidential pricing data into shared software stated a plausible conspiracy claim.
- DOJ DAAG Daniel Glad declared on May 14, 2026 that "software cannot launder collusion," signaling criminal Sherman Act prosecution for algorithm-facilitated coordination.
- A nine-state bipartisan coalition finalized a $7 million settlement with a national property manager (Jan. 2025), and Connecticut's surveillance-pricing disclosure law takes effect October 2026.
- In March 2026, the CMA issued new guidance about complying with consumer law when using autonomous AI agents ("agentic AI"). This makes clear that firms will be deemed entirely responsible for how their AI operates. Importantly, it is no defense to say that responsibility lies with a third-party vendor. A similar approach will be used in antitrust cases across Europe.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Audit every third-party pricing tool for data-pooling architecture; require vendor certifications of data isolation, and review all agreements to determine how your data will be used, including any pooling.
- Map state disclosure obligations under enacted and pending legislation in New York, Connecticut, and California.
- Review third-party pricing software vendor practices—particularly whether the provider has access to data from multiple competitors and whether the same pricing logic is applied across clients—and consider contractual protections restricting information sharing.
- Brief your board on the DOJ's new $1 million whistleblower reward program for cartel tips (effective January 2026).

ISSUE #2: THE ACQUI-HIRE TRAP – ENFORCERS TARGET AI TALENT DEALS

Competition enforcers are examining whether AI talent acquisitions constitute reportable transactions requiring clearance.

SETTING THE STAGE

The largest technology companies have spent billions recruiting entire AI research teams from smaller firms, called acqui-hires. These transactions typically involve hiring founders, licensing intellectual property on a nonexclusive basis, and paying "signing bonuses" to key employees. But because no voting securities or productive assets change hands, the deals often fall below the relevant transaction notification thresholds and, the parties argue, do not require clearance by competition enforcers. Enforcers, however, are beginning to take note.

WHY IT'S CRITICAL

The European Commission and the UK Competition and Markets Authority ("CMA") gave significant attention to the Microsoft/Inflection transaction, where Microsoft hired almost all of Inflection's employees—including the CEO—together with taking a nonexclusive license to Inflection's IP. Although the Commission did not end up adopting a decision due to technical rules on jurisdiction, in the UK, the CMA formally cleared the hiring arrangements on the basis of merger rules. More broadly, the scrutiny of the EC and CMA in these circumstances sent an important warning about the antitrust risks of acqui-hires. DG Competition is actively monitoring whether transfers of highly skilled AI employees amount to concentrations under EU merger rules, particularly where the transaction effectively absorbs all assets necessary to transfer the target's market position to the acquirer. The CMA has made clear that talent acquisitions might continue to qualify as a "relevant merger situation" under UK law.

US enforcers have not yet taken action, but the Chair of the Federal Trade Commission ("FTC") and then-head of the Department of Justice Antitrust Division have said that they are closely monitoring acqui-hires. The FTC Chair has publicly stated that acqui-hires can neutralize nascent competitive threats and should be subject to premerger review.

Because of this increased scrutiny and enforcers' attempts to adapt old rules for these new deals, companies structuring talent deals face the possibility of a retroactive challenge or an involuntary unwinding. In addition, the risk of behavioral rules being applied remains.

WHAT'S NEW?

- FTC Chair Andrew Ferguson confirmed in a January 16, 2026 interview that the FTC is examining whether acqui-hires are reportable under HSR or structured to evade notification requirements.
- US senators are on the watch and have called AI talent deals "de facto mergers" and urged FTC enforcement action.
- The European Commission's Draft Merger Guidelines (April 30, 2026) adopt a forward-looking approach to market definition, enabling closer scrutiny of talent acquisitions that may eliminate nascent competitors under the Significant Impediment to Effective Competition (SIEC) framework.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Structure AI talent deals with antitrust counsel involved from the term-sheet stage; document independent business justifications.
- Assess whether any pending or recent hires trigger "acqui-hire" indicators (team-level hiring, concurrent IP licenses, break fees).
- For EU exposure, assess whether talent deals could be characterized as concentrations even without asset transfers—the Commission will examine whether the transaction effectively absorbs the target's competitive position, and may coordinate with Member State authorities on referrals for transactions below EU turnover thresholds.

ISSUE #3: EUROPE REACHES OUT – ENFORCEMENT OF THE DMA AND ITS UK ANALOGUE

EU and UK enforcement of digital markets regulations is taking shape and becoming more concrete.

SETTING THE STAGE

The European Commission published its first statutory review of the Digital Markets Act ("DMA") on May 3, 2026, confirming that the enforcement framework will tighten rather than relax. The Commission has issued 56 formal interoperability requests to one mobile platform alone, and none have resulted in a working technical solution. Specification decisions for search data-sharing and mobile AI interoperability were adopted on July 27, 2026, triggering compliance requirements.

WHY IT'S CRITICAL

The new rules in Europe are now beginning to bite, with comprehensive compliance obligations and a fine structure that escalates from 4% of global turnover for initial violations to 20% for repeated non-compliance. Moreover, initial challenges to the validity of the new regime are now likely to decrease, after a series of rulings which upheld the legal framework of the DMA. Separately, the Commission adopted new Guidelines on exclusionary abuses of dominance under Article 102 TFEU on September 3, 2026, providing a modernized framework for enforcement against conduct such as refusal to supply. In the UK, cloud and AI-enabled business software have been identified as focus topics.

WHAT'S NEW?

- The European Commission's first DMA statutory review (May 3, 2026) recommended expanding gatekeeper obligations rather than softening them, particularly for AI-integrated services. The first fining decision in July 2026 confirmed that the penalty phase of the new regime is now operational.
- The European General Court ruled on July 8, 2026 that gatekeepers must comply first and challenge later, establishing a sequencing principle that eliminates pre-enforcement legal challenges to DMA obligations.
- US enforcers and policymakers have repeatedly expressed their displeasure with the DMA and suggested that it could be considered in connection with trade talks between the US and EU.
- In the UK, the CMA has imposed formal conduct requirements on a search platform (including a publisher conduct requirement), is consulting on parallel steering requirements for two major mobile platforms, and has secured commitments from both platforms on app store review, ranking, and data use—with first compliance data expected by end of September 2026. It has also secured voluntary commitments from two major cloud providers.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Review compliance reports for gaps; engage technical teams on interoperability request responses.
- Model financial exposure under 4% and 20% fine scenarios; present risk assessments to the audit committee this quarter.
- Coordinate US and EU counsel to align DMA interoperability responses with ongoing US data-sharing remedies.
- For UK exposure, monitor CMA compliance reporting deadlines and prepare for the first annual interoperability transparency reports expected by end of September 2026.

ISSUE #4: THE AI BUNDLING FRONT – MULTIJURISDICTIONAL PROBES INTO COMPETITION

Regulators on three continents are probing whether bundling AI tools with dominant software platforms forecloses competition.

SETTING THE STAGE

Competition authorities in the United Kingdom, European Union, United States, and Italy opened or expanded formal investigations into AI-integrated software bundling during the first half of 2026. The core theory is consistent across jurisdictions: a dominant provider of operating systems, productivity suites, or cloud infrastructure may foreclose rivals by tying Copilot tools to existing enterprise products. Estimated enterprise cost increases of 15-25% from bundling and tier elimination are accelerating regulatory interest.

WHY IT'S CRITICAL

The United Kingdom's Competition and Markets Authority ("CMA") opened a Strategic Market Status investigation on March 31, 2026, covering productivity software and operating systems. If this goes further, it could ultimately result in potential penalties reaching 10% of worldwide turnover. In the United States, the Federal Trade Commission ("FTC") broadened its probe via civil investigative demands to six or more competitors in February 2026 and confirmed scope in June 2026. The European Union designated a cloud platform for gatekeeper investigation in June 2026. In the European Union, regulators can act under both Article 102 TFEU (abuse of dominance)—recently boosted by the European Commission's new September 2026 Guidelines on exclusionary conduct—and the Digital Markets Act, which prohibits designated gatekeepers from unfairly bundling, which forces ecosystem lock-in or self-preferencing their own integrated AI tools. No jurisdiction has yet reached findings, meaning compliance obligations remain fluid. Competition authorities are also flagging AI agents as the next critical chokepoint: the French Autorité de la concurrence's July 2026 opinion identifies risks including disintermediation, self-preferencing by vertically integrated operators, and lock-in through proprietary standards.

WHAT'S NEW?

- The CMA opened an SMS investigation into business software bundling on March 31, 2026, covering operating systems, productivity tools, database software, and Copilot integrations. If designation follows, the CMA could require changes to, for example, licensing practices.
- The FTC issued CIDs to six or more competitors on February 13, 2026, and confirmed on June 1, 2026 that scope includes cloud bundling, identity services, and Copilot products.
- In June 2026, the European Commission ordered Meta to restore WhatsApp access for rival AI assistants, finding a potential abuse of dominance by blocking the WhatsApp for Business API—following interim measures imposed by the Italian AGCM in December 2025.
- The European Commission, also in June 2026, notified Amazon and Microsoft that AWS and Azure may be designated as DMA gatekeepers for cloud computing—deemed an "important gateway between businesses and their customers"—despite not meeting quantitative thresholds. The key concern seems to focus on a perception that cloud dominance (such as Azure or AWS) or mobile operating systems could be leveraged to make switching to competing standalone AI models prohibitively difficult or expensive.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Document interoperability and customer choice in product design decisions; retain records showing independent competitive justification for bundled features.
- Prepare for regulator information requests by centralizing pricing, licensing, and bundling documentation in a single compliance repository.
- Evaluate unbundled pricing alternatives for Copilot features to reduce regulatory exposure across all active jurisdictions.
- Engage compliance teams on AI agent deployment—design for interoperability and data portability, avoid proprietary protocol lock-in, and monitor dependencies on vertically integrated platform providers.

ISSUE #5: YOUR AI MODEL'S TESTIMONY – COURTS SPLIT ON DISCLOSURE PROTECTIONS

Courts are deciding whether your employees' communications with AI models qualify for attorney-client privilege or work-product protection.

SETTING THE STAGE

Five courts issued rulings on AI privilege and work-product questions in the first six months of 2026. The decisions reveal a fragmented but discernible framework: privilege depends on who directed the AI query, whether counsel was involved, and whether the platform maintained confidentiality. One decision used a CEO's conversations with a personal AI model as affirmative evidence against the company in a post-trial ruling. Legal professional privilege under EU law does not currently cover in-house lawyers (with a patchwork of different rules in Member States), and, while still largely untested, AI-generated outputs are unlikely to qualify as privileged legal advice in Europe unless they form part of a genuine consultation with EEA-qualified external counsel.

WHY IT'S CRITICAL

If your employees use consumer AI services for legal questions without counsel's direction, those conversations may become discoverable. Similar concerns apply in Europe: EU legal professional privilege extends only to communications with EEA-qualified external counsel, and UK courts have recently made clear that they consider uploading data to open source or public AI platforms as disclosure to a third party, thereby removing any privilege protection that might otherwise be available.

WHAT'S NEW?

- Judge Jed Rakoff of the S.D.N.Y. ruled in *United States v. Heppner* (Feb. 17, 2026) that AI prompts are not privileged because the defendant used a consumer chatbot without counsel direction, constituting third-party disclosure.
- The Texas Business Court protected AI conversations as work product in *Tate Group Automotive v. Legacy Automotive Capital* (June 3, 2026), and a New York court quashed AI-prompt subpoenas in *Assini v. Hayward* (June 4, 2026).
- In *Fortis Advisors v. Krafton* (Del. Ch., March 2026), the court used a CEO's unprotected AI conversations as evidence against the company in a post-trial decision.
- On May 18, 2026, Magistrate Judge Thomas O. Farrish of the US District Court for the District of Connecticut ordered the plaintiff in *Conservation Law Foundation v. Shell Oil* to produce the generative AI prompts that its expert witness used in preparing her expert report. This appears to be the first federal court decision requiring an expert witness to disclose AI prompts as part of discoverable methodology for the expert's opinions.
- On August 3, 2026, the President of the EU General Court issued a judgment addressing the scope of legal privilege under EU law. In particular, the Court decided that the Commission could compel a business to provide documents that were privileged under the laws of third countries, such as the United States. This judgment is now under appeal.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- If you don't have one already, issue—and enforce—a policy requiring all legal-related AI use to flow through designated enterprise platforms with confidentiality protections. Prohibit "do-it-yourself" legal research.
- Audit executive AI usage for litigation-sensitive topics; add AI usage to standard preservation and litigation-hold protocols.
- Train deal teams on the Krafton risk: consumer AI conversations about transaction terms can become opposing evidence.
- Establish internal protocols for expert AI use; develop clear guidelines governing when and how retained experts may use generative AI tools in connection with litigation; and propose protective-order language addressing the treatment of AI prompts and logs.
- Maintain separate document management protocols for EU proceedings—documents protected by US attorney-client privilege may be fully discoverable by the Commission.

ISSUE #6: THE APP STORE AT THE HIGH COURT – PLATFORM FEE STRUCTURES

The Supreme Court will decide whether a platform's fee structure for third-party payments violates a prior injunction.

SETTING THE STAGE

In *Epic Games v. Apple*, the Ninth Circuit affirmed a contempt finding in December 2025, holding that a mobile platform's 27% commission on external payment links "effectively defeated the purpose" of a 2021 injunction requiring alternative payment options. The platform exhausted intermediate remedies: rehearing was denied in March 2026, and Justice Elena Kagan denied an emergency stay on May 6, 2026. The platform filed a certiorari petition on May 21, 2026, and the Supreme Court granted review for its October 2026 term.

WHY IT'S CRITICAL

This is the first Supreme Court case to address app store commission structures directly. A ruling affirming the contempt finding would establish that injunctions requiring "alternative payment" options cannot be satisfied by imposing commission rates that eliminate the competitive benefit. A parallel government enforcement action remains active, with media reports that the platform made multiple settlement offers during 2026. The Supreme Court's forthcoming decision will need to be comprehended by virtually all app marketplaces in the United States. Meanwhile, in the European Union, regulators have made clear their support for alternative app marketplaces, and have intervened aggressively with vigor when they suspect the largest tech firms are giving users no option but to use proprietary in-app payment systems. Significant fines have been imposed, and this looks set to remain as an enforcement priority going forward.

WHAT'S NEW?

- The Supreme Court granted certiorari for its October 2026 term after Justice Kagan denied an emergency stay application on May 6, 2026.
- The platform filed its certiorari petition on May 21, 2026, framing two questions of national importance regarding injunction interpretation and commission structures for external payment links.
- Bloomberg reported that the platform made multiple settlement offers in 2026 in a parallel DOJ enforcement action filed in March 2024, which remains in active discovery.
- In July 2026, the General Court dismissed Apple's challenges to its DMA gatekeeper designation, rejecting Apple's argument that its App Store differs from other app stores. The court held that app store classification is "technology neutral" and that all app stores perform the same function of connecting developers with end users—requiring Apple to continue complying with DMA obligations and opening its ecosystem to rivals.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Model revenue impact under scenarios where platform commissions on external payments drop; adjust app monetization strategies accordingly.
- Evaluate direct payment infrastructure investments that position your business to benefit from any ordered fee reductions.
- For EU operations, audit DMA compliance against the General Court's confirmation that gatekeeper obligations apply regardless of claimed technical distinctions between app store models.

ISSUE #7: MERGER CLEARANCE ZIGZAGS – NEW FILING OBLIGATIONS

A proliferation of different rules in the United States and European Union is leading to new and parallel merger clearance filing obligations.

SETTING THE STAGE

A US federal court vacated the Federal Trade Commission's ("FTC") 2024 HSR premerger notification rule in February 2026. This rule changed the types of information transacting parties had to include in their HSR premerger notification forms to collect more information. With the rule vacated, the HSR premerger notification requirements reverted to the pre-2024 status. At the same time, states have enacted or advanced their own premerger notification statutes, with triggering thresholds as low as $26.78 million in in-state sales.

Meanwhile, in Europe, the European Commission has undertaken the broadest review of its merger assessment framework in over two decades, publishing Draft Merger Guidelines in April 2026 to address transformational changes in the economy and to capture new market realities shaped by digital platforms, data-driven business models, and ecosystem dynamics.

WHY IT'S CRITICAL

The US federal filing landscape reverted to a simpler form, but state obligations multiplied. A multistate deal now requires simultaneous filings to three or more attorneys general, with no harmonized waiting period.

The European Union is likely expanding the theories of harm it will consider in merger clearance.

WHAT'S NEW?

- Since March 2026, the old pre-2025 premerger notification form is in effect. States are also requiring premerger notifications.
- The DOJ and FTC issued a Joint RFI on March 25, 2026 seeking public comment on potential new rulemaking, signaling a second attempt regardless of the pending appeal.
- The European Commission's Draft Merger Guidelines (April 30, 2026) removed the 2008 safe harbor for vertical and conglomerate mergers and introduced "dynamic foreclosure incentives" as a theory of harm for transactions where viability depends on scale, data, or network effects. On September 9, 2026, the General Court upheld the Commission's prohibition of a non-horizontal merger in the digital sector, even though the market share increment was minimal, emphasizing that the Commission is entitled to take new forms of competition concerns into account in its merger reviews, such as those which may arise in digital markets.
- On September 3, 2026, the UK Competition and Markets Authority ("CMA") published updated merger assessment guidelines with expanded treatment of merger efficiencies, particularly dynamic efficiencies. Notably, the revised guidance recognizes that efficiency benefits may extend beyond cost savings to encompass quality, innovation, and other non-price dimensions of competition—an approach especially relevant in sectors characterized by rapid technological change, where a deal's value may lie primarily in longer-term competitive benefits rather than near-term cost reductions.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Map every state where your acquisition targets have $26.78 million or more in annual sales; build state-filing triggers into your M&A playbook.
- Update HSR compliance procedures to the revived pre-2025 form, but be prepared for sudden changes.
- For EU and UK filings, revisit efficiency arguments in light of the Commission's revised merger guidelines and the CMA's expanded dynamic efficiencies framework—both now give greater weight to non-price benefits.

ISSUE #8: ANTITRUST IN THE BOARDROOM – SECTION 8 RISK

The DOJ's investigation of Andreessen Horowitz shows that Section 8 reaches board seats and observer rights across competing portfolio companies.

SETTING THE STAGE

An *Inc.* article by Georgia Fearn reports that the Department of Justice ("DOJ") is investigating Andreessen Horowitz over two board seats at competing data companies. This inquiry is a concrete escalation of enforcement against VC governance practices, placing investor representatives on portfolio-company boards squarely within renewed scrutiny of interlocking directorates.

Section 8 of the Clayton Act is a strict-liability, *per se* prohibition: once its statutory elements are met, an interlock can be unlawful without proof of an actual agreement, price effect, anticompetitive effects, or completed competitive harm. The analysis still turns on the statute's thresholds and exceptions, but the central screening question is whether the relevant corporations compete and whether a person or common sponsor-linked designee participates in their governance.

The risk extends beyond formal director titles. The DOJ and Federal Trade Commission ("FTC") scrutinize board observer arrangements under Section 8 and Section 5 when observers receive competitively sensitive information, and they target "indirect" interlocks in which different individuals serve competing companies for the same PE or VC sponsor. For venture firms, the relevant perimeter is the entire portfolio network, not a single fund or board appointment in isolation.

WHY IT'S CRITICAL

For VC firms, the exposure is immediate: board and observer rights create risk even when the investor is not an operating competitor and accepted the seats for ordinary oversight. A DOJ inquiry can force rapid governance changes—resignation, recusal, or restriction of information rights—before any finding of collusion or measurable harm.

The practical problem is network visibility. Firms must identify overlapping companies, director and observer appointments, alternates, affiliates, and sponsor-linked representatives, then assess competition and information flows at the time of appointment and as markets evolve. Confidentiality provisions are affirmatively insufficient to cure a prohibited interlock; the governance relationship itself must be addressed.

WHAT'S NEW?

- Georgia Fearn's Inc. article reports the DOJ is investigating Andreessen Horowitz over two board seats at competing data companies, placing VC governance squarely at the center of Section 8 enforcement.
- The DOJ and FTC have already forced resignations and taken binding action: the FTC's Sevita Health resolution (Sept. 15, 2025) secured three director resignations, while the DOJ required two directors serving on the Epic Games and Tencent Holdings boards to resign (Dec. 18, 2024).
- The DOJ and FTC's January 10, 2025 joint statement of interest in *Musk v. Altman* argued that board observer rights are subject to antitrust prohibitions under Section 8 and Section 5 of the FTC Act.
- More than a dozen voluntary director resignations secured by the DOJ and FTC since 2022 show an enforcement trend toward early intervention against structural overlaps, before proof of competitive effects. The FTC's 2026 Section 8 threshold update identifies a $54.4 million threshold.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Inventory every portfolio-wide director, officer, observer, alternate, and sponsor-linked roles; flag any appointment involving competing data, software, or other portfolio companies.
- Pre-clear each new seat and material change in observer rights under Section 8's thresholds, exceptions, and competition analysis; reassess the position periodically as portfolio markets change.
- Narrow observer information rights immediately, with explicit exclusions for competitively sensitive information, mandatory recusal protocols, and escalation to antitrust counsel; never treat an NDA as a substitute for Section 8 analysis.
- Document the business rationale and governance safeguards for overlapping appointments; maintain a rapid-response plan and implement resignation, recusal, or restructuring immediately when the DOJ or another agency raises an interlock concern.

ISSUE #9: COMPETITION (DE)REGULATION IN THE FINTECH ERA – A CHANGING COMPETITIVE LANDSCAPE

Executive Order 14405 and related agency initiatives are removing regulatory and structural barriers to entry for fintechs, digital-asset providers, and other challengers to incumbent financial institutions.

SETTING THE STAGE

Since taking office, the Trump Administration has pursued policies to increase competition in traditional financial-services markets by opening them to digital-asset businesses—including cryptocurrency and stablecoin providers—and other fintechs. That effort culminated in Executive Order 14405 (May 19, 2026), which directs the CFPB, SEC, CFTC, and other federal financial regulators to "remove overly burdensome and fragmented regulations and supervisory practices that form barriers to entry and primarily benefit incumbent financial services." The mandate reaches crypto exchanges; digital-asset clearing and custody; stablecoin activities; securities, commodities, brokerage, and derivatives businesses; and blockchain-based services.

WHY IT'S CRITICAL

Most consequential is the order's directive for the Federal Reserve to evaluate access to Federal Reserve payment accounts and payment services by uninsured depository institutions and fintechs, including digital assets and other novel financial activities. Direct or limited access would fundamentally restructure competitive dynamics—not merely reduce commercial reliance on traditional banks and bank-controlled payment processing networks—by exposing incumbent banks and payment processors to new competition from fintechs and potential joint ventures between traditional banking institutions and fintechs. This shift creates direct antitrust stakes in payment access, partnerships, and incumbent responses. Implementation is proceeding in real time: the CFTC and SEC solicited public comments on deregulation to stimulate competition in financial services markets, and received a range of proposals from industry stakeholders and other interested parties.

WHAT'S NEW?

- On June 16, 2026, the CFTC issued a Request for Information to Facilitate Innovation and Competition for Fintech Firms, seeking public comment on potential deregulation mandated by Executive Order 14405. More than 20 responses published on Regulations.gov advocate varying levels of regulatory oversight for decentralized-finance protocols and blockchain technology.
- On August 21, after soliciting public comment, the SEC proposed a new "Crypto Assets" regulation featuring a tailored offering regime for certain investment contracts involving cryptocurrency assets, Securities Act registration exemptions, and a conditional safe harbor from the term "investment contract" under existing SEC rules.
- The CFPB's personal financial data rights rule would require more open exchange of banking data across consumers' accounts, credit cards, digital wallets, and mobile payment apps. It was scheduled to take effect for the largest US financial institutions on April 1, 2026, but a federal court in Kentucky enjoined enforcement after finding that the rule exceeded the CFPB's authority; it remains stayed pending the outcome of an appeal to the Sixth Circuit.

WHAT TO DO NOW: BUSINESS & LEGAL STRATEGY

- Track agency rulemaking, proposed regulations, and related litigation; identify and pursue advocacy opportunities with the agencies shaping this framework.
- Pursue partnerships with fintechs for services traditionally provided by banks and incumbent payment processors, including for businesses that rely on the financial-services network.
- Incumbent financial services providers must affirmatively vet each response to new entrants—pricing, access, partnerships, and data practices—for antitrust compliance, not merely assess it; obtain antitrust counsel's guidance before implementation to mitigate litigation or investigation risk.







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