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Welcome to Competition Close-Up

June 27, 2025

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Welcome to Competition Close-Up

June 27, 2025

We're excited to announce our first edition of Competition Close-Up, Cadwalader's new quarterly outlook on the latest antitrust litigation, merger clearance and regulatory issues impacting global businesses.

In our first issue, **Philip Iovieno**, **Kristen McAhren**, **Bilal Sayyed** and **Abigail Kingsley** explore recent litigation trends related to the Robinson-Patman Act; a challenge to overturn century-old antitrust exemptions for professional baseball; evolving DOJ and FTC trends under the Trump administration and more. We also share the latest news about our team, including industry recognition and thought leadership activity.

We hope you enjoy our newsletter and look forward to hearing from you!

Minor League Players Strike Out with First Circuit Wage-Fixing Appeal

June 27, 2025

By Kristen McAhren
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Minor League Baseball players lost their First Circuit appeal, ending their bid to overturn century-old Supreme Court precedent establishing baseball as exempt from the antitrust laws. While the players hoped to upend longstanding precedent, the First Circuit's decision was not based on interpretation of substantive law, but the players' failure to preserve their appeal rights. *See Concepcion v. Office of the Commissioner of Baseball*, Case No. 23-1558, -- Slip Op. -- (First Cir. May 19, 2025); *Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs*, 259 U.S. 200 (1922).

The players challenged Major League Baseball under Section 1 of the Sherman Act. The players alleged the MLB is an illegal cartel artificially holding down pay for minor league players in Puerto Rico. The players hoped to overturn a longstanding (and anachronistic) quirk of antitrust law that has held the business of baseball is one of "purely state affairs." *See Fed. Baseball*, 259 U.S. at 209 (challenging a conspiracy to buy up or destroy a rival baseball league). This characterization by Justice Oliver Wendell Holmes places the sport outside the reach of the antitrust laws which prohibits restraints of trade ***among*** the several states. No other sport has a similar exception which the Court has affirmed as a question for Congress to correct. *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957) (finding that Football was not entitled to the same exemption); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953) (reaffirming *Fed. Baseball* and noting that any changes to its holding should come from Congress); *Flood v. Kuhn*, 407 U.S. 258, 285 (1972) (denying a challenge to baseball's reserve clause which at the time allowed teams nearly unchecked control over which team a player was on and how much they were paid and reiterating any "loophole" was for Congress to close). In 1998, Congress passed the Curt Flood Act—named posthumously for the center fielder—and finally limited the antitrust exception. However, it did so only with respect to the rights and obligations between major league players and owners. The exception remains intact for minor league players and for other issues of competition such as the number of major and minor league teams, broadcast rights, and merchandising. Curt Flood Act of 1998, Pub. L. No. 105-297, § 2, 112 Stat.

The District Court referred the League's motion to dismiss to a magistrate judge for proposed findings and recommendations. Magistrate judges play a large role in the federal judiciary and are perceived as vital to the timely and effective disposition of cases. They are particularly common in complex cases such as antitrust. Pursuant to 28 U.S. Code § 636(c), district courts may refer matters to a magistrate judge for proposed findings and recommendations which the district court may then accept, reject, or modify, in whole or in part, upon the filing of written objections. While the district court's review of the magistrate's report and recommendation (R&R) is *de novo*, as a practical matter many R&Rs are accepted.

In this case, the magistrate judge recommended dismissal of the players' complaint, based solely on issues of law. The R&R stated that failure to file specific objections would be a waiver of the right to appellate review. The players' did not object to the R&R, which was then nevertheless reviewed *sua sponte* by the district court and accepted on a finding that it was well reasoned and free of plain error. Before the First Circuit, the players' argued that any objections to the R&R to the district court would have been "futile" and a "waste of time" for both the parties and the court, because the dismissal was based solely on issues of law to which the district court was bound and therefore could not reject or modify. They sought to invoke an equitable doctrine that excuses the waiver of the right to appeal under the circumstances and in light of the importance of the legal question at issue. The First Circuit disagreed, emphasizing in particular that waiver should not be excused in circumstances where important issues of statutory interpretation require adequate briefs at all levels.

The fate of this latest attempt to attack baseball's longstanding antitrust exemption is a reminder to practitioners and clients that while some acts in litigation may appear to be futile and waste time or money, they can be crucial at preserving rights down the line.

Spotlight on Success

June 27, 2025

We are proud to report that:

- Cadwalader has once again earned top rankings in the *Chambers USA Guide 2025*, including recognition in the **Antitrust: Mainly Plaintiff – New York** category. Practice co-chair Phil Iovieno was individually recognized and **Mark Singer** was recognized in the Up and Coming category. Clients describe **Phil Iovieno** as *"an exceptional lawyer,"* and praise the broader practice, noting: *"The team do a fantastic job of understanding the industries in which their clients operate."* These endorsements underscore the group's abilities as trusted antitrust counsel.
- Earlier this month, **Phil Iovieno** spoke at **IMN's Litigation Finance Forum**. Phil's panel, "Client Issues: Key Factors Shaping Law Firm Portfolios and the Strategic Use of Litigation Funding," covered the increase in larger law firms entering the fray and getting deals done, how litigation funding can be used to drive increased profits and grow a practice, how companies are leveraging their legal claims or pending litigation to secure immediate capital, and more.
- **Nicholas Gravante**, **Phil Iovieno**, and **Lawrence Brandman** have each been named to the ***2025 Lawdragon 500 Leading Plaintiff Financial Lawyers*** guide. This distinction highlights the team's tireless advocacy on behalf of clients in complex financial disputes. Reflecting the group's diversity and experience across areas of law that intersect with antitrust, **Brian Wallach** was also recognized in the inaugural ***2025 Lawdragon Global IP Lawyers Guide*** for his work in Litigation, IP, and Trade Secrets. Brian along with **Phil Iovieno**, **Kristen McAhren**, **Bilal Sayyed**, and **Mark Singer** were also recognized among the ***2025 Lawdragon 500 Leading Global Antitrust & Competition Lawyers***.

Stay tuned for more wins and upcoming speaking engagements.

Trump Administration Reverses the Biden Administration's Anti-Merger Policy and Returns to Merger Settlements; Proposed Budget and Personnel Cuts Likely Require a Period Of Retrenchment and Triage in Merger Enforcement

June 27, 2025

By Bilal Sayyed
Counsel

The current leadership of the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("Antitrust Division" or "DOJ") (collectively, "antitrust agencies") have signaled an intention to reject the anti-merger policies of the previous administration. Recent guidance from both antitrust agencies suggests that while mergers and other transactions between significant competitors and certain vertical transactions are likely to undergo a thorough review, most transactions that raise substantive concerns are likely to be allowed to close after the merging parties agree to divestitures or other conditions sufficient to address the potential for competitive harm.   With the Commission presently operating with only three Commissioners, all of the same political party, there is unlikely to be an intra-Commission challenge to the change in merger policy.

Merger Remedies Are No Longer Disfavored and Merger Process Will Not Be Used to Deter Mergers

In a **statement** accompanying the Commission's clearance of Synopsis Inc.'s acquisition of ANSYS Inc. (subject to a divestiture, discussed below), FTC Chairman Andrew Ferguson, joined by Commissioners Melissa Holyoak and Mark Meador, commented that "mergers and acquisitions are a critical way in which capital fuels innovation" and "the Commission must not reflexively oppose mergers and acquisitions." Rather, they noted, "when a merger would not violate the antitrust laws, the Commission must get out of the way quickly to avoid bogging down innovation and interfering with the forces of a free and competitive market." The Commissioners further commented that where a transaction raises competitive concerns, "a settlement may be the best way to protect competition" because it "can temper the potentially over-inclusive effects of an injunction blocking an entire merger" by "permit[ting] the procompetitive aspects [of the transaction] to proceed." "Settlement [also] maximizes the Commission's finite resources."

Chairman Ferguson's statement indicates a strong preference for divestiture, so-called structural relief. According to Ferguson, structural relief will generally require "the sale of a standalone or discrete business. . . with all tangible and intangible assets necessary (1) to make that line of business viable, (2) to give the divestiture buyer the incentive and ability to compete vigorously against the merged firm, and (3) to eliminate to the extent possible any ongoing entanglements between the divested business and the merged firm." Further, "the divestiture buyer [must have] the resources and experience necessary to make that standalone business competitive in the market." Where such conditions are not met, the Commission leadership suggests they will support litigation to block a transaction; this is consistent with the standard prior to the Biden Administration. With respect to non-structural relief, the Commissioners noted that "behavioral remedies [will be] treated with substantial caution" and "are disfavored." **Statement of Chairman Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador, In the Matter of Synopsys, Inc./Ansys, Inc.** (May 28, 2025).

While the disfavoring of behavioral remedies might suggest that vertical or non-horizontal transactions will be subject to a harder line when they raise competitive concerns—a continuation of the Biden Administration policy—the Trump Administration may not view vertical transactions with the same skepticism as the Biden Administration. This position is reflected in the more positive treatment of efficiencies and other procompetitive benefits associated with non-horizontal transactions in the **2020 Vertical Merger Guidelines**, promulgated by the antitrust agencies during the first Trump Administration, but subsequently rescinded by the Biden Administration.

Bill Rinner, Deputy Assistant Attorney General for Antitrust, made similar points on behalf of the Antitrust Division in a **recent speech** on merger policy. Rinner commented that "competition and economic growth . . . rely on a healthy dealmaking environment" and, in contrast to the previous administration, the Antitrust Division will "accelerate merger reviews and increase the rate and speed of early termination." Rinner promised no more "scarlet letters"—notice to companies who have otherwise obtained clearance through the Hart-Scott-Rodino merger review process that the Antitrust Division (or the FTC) might come back later and force an unwinding of their transaction. He indicated that the Antitrust Division would implement a "fair and predictable" merger review process, and not "over deter[ ] lawful transactions" by abusing the merger clearance and "Second Request" process.

Notwithstanding the Administration's retention of the Biden Administration's **2023 Merger Guidelines**, Rinner made clear that the market share (30%) and concentration thresholds (1800) in the guidelines *do not require a challenge to all mergers in concentrated industries*. In fact, "the vast majority of mergers do not give rise to competitive concerns" and "for those that do, remedies may be available that adequately mitigate potential harm." Those remedies are likely to be structural, according to Rinner: divestitures to up-front buyers, with the ability and incentive to operate the divested assets in a competitively effective manner. Purchasers of to-be-divested assets will be subject to a "rigorous" assessment of their capabilities to operate the assets. Rinner indicated that the Antitrust Division would operate in a transparent manner and noted that the Antitrust Division would not continue the "shadow decree" process implemented by the Biden Administration DOJ to avoid the judicial oversight required by the **Antitrust Procedures and Penalties Act** ("Tunney Act") (15 U.S.C. §16(e)) when the DOJ accepts a settlement in an antitrust matter. ***Remarks of Deputy Assistant Attorney General Bill Rinner Regarding Merger Review and Enforcement (June 4, 2025)***.

Rinner also noted that under certain conditions, behavioral or conduct remedies may be sufficient to address the Antitrust Division's competitive concerns. The position reflected in the September 2020 **Antitrust Division Merger Remedies Manual**, although rescinded without replacement by the Biden Administration in 2022, is likely instructive:

Stand-alone conduct relief is appropriate only when the parties prove that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.

Additional Remedies Guidance

Although the Antitrust Division has not indicated a new remedies policy statement is forthcoming, FTC Chairman Ferguson's statement in the Synopsys/ANSYS matter indicated the Commission would issue a remedies policy statement "in due course." The FTC's most current comprehensive **remedy guidance**, by its Bureau of Competition, is from January 2012, and predates the learning from the 2017 study of its **Merger Remedies 2006-2012**. While the agencies have not previously issued a joint policy statement on remedies in merger matters, joint DOJ/FTC statements on antitrust and merger policy are common. However, they often require substantial compromise because of differences across the two agencies and within the multi-member Commission. If the agencies wish to proceed with a joint statement, it may be easier to achieve because of the current vacancies on the Commission.

Private Equity Firms Are Likely No Longer Disfavored Acquirers of To-Be-Divested Assets

Although unstated by FTC and DOJ officials, the Antitrust Division and the FTC are likely to return to the position of the agencies prior to the Biden Administration that private equity firms are often appropriate buyers of to-be-divested assets. However, as with all divestiture buyers, a private equity buyer will be evaluated on a case-by-case basis to determine whether the buyer has: (1) the financial capability to acquire and operate the assets; (2) the ability to maintain or restore competition in the market, with the assets to be acquired; (3) the acumen, experience and incentive to operate the assets competitively in the market(s) where harm from the merger was identified; and (4) without the acquisition itself raising competitive concerns.

Recent Merger Settlements Illustrate the Return to Predictive, Neutral Merger Policies

The FTC's acceptance of a divestiture remedy in the *Synopsys/ANSYS* transaction, and the DOJ's acceptance of a divestiture remedy in the *Keysight Technologies/Spirent Communications* transaction are further indications of the return to merger-neutral policies.

<u>Synopsys/ANSYS</u>

The FTC's **Administrative Complaint** alleges that Synopsys Inc.'s acquisition of ANSYS, Inc., would have eliminated "substantial head-to-head competition" in the markets for optical software tools, photonic software tools for designing and simulating photonic devices, and register transfer level power consumption analysis tools. Rather than seek a preliminary injunction to block the transaction pending an administrative trial, the Commission provisionally accepted a divestiture sufficient to address the concerns articulated in its administrative complaint. The FTC's proposed **Decision and Order** (subject to public comment and final approval by the Commission) requires divestiture of relevant products, assets and facilities of each of Synopsis and ANSYS to an up-front, pre-approved buyer (Keysight Technologies) within 10 days of the closing of the transaction. The divestiture obligation is subject to an **Order to Maintain Assets** and allows the FTC to appoint a **divestiture monitor and trustee** to sell the assets in the event the parties fail to comply with the divestiture requirement. In support of Keysight's ability to immediately compete in the relevant markets, the combined company is required to provide it a limited amount of technological support for a short period, post-acquisition. Additionally, with some exceptions, the combined entity may not enforce non-compete or non-solicit

agreements with respect to its employees who may seek employment at Keysight and is subject to a three-year prohibition on soliciting employees who, pursuant to the divestiture, move to Keysight. The contemporaneous filing of an administrative complaint and proposed settlement marks a return to the approach prior to the Biden Administration (although the Biden Administration occasionally accepted a settlement in lieu of, or during, litigation).

The FTC's investigation of the Synopsys/ANSYS transaction took almost 18 months. The transaction was cleared earlier by the **European Commission** (January 9, 2025, same relief), Israeli Competition Authority (Oct. 9, 2024, unconditional clearance), the **Japan Fair Trade Commission** (March 13, 2025, unconditional clearance), the **Korea Fair Trade Commission** (March 21, 2025, same relief), and the **United Kingdom's Competition and Markets Authority** ("CMA") (March 5, 2025, same relief). China's State Administration for Market Regulation ("SAMR") is the only major competition authority that has not cleared the transaction; it is likely that the friction between the United States and China with respect to trade policy is a contributing factor to the delay.

Do not expect the FTC to be so significantly out of step with the clearance timeline in other jurisdictions during the remainder of the current administration. The long path to clearance in this transaction reflects, in part, the previous administration's use of the merger review process to delay clearance of transactions in the hope that they would be abandoned, or that some intervening event would cause the transaction to crater, rather than accept a settlement.

Keysight Technologies/Spirent Communications

The DOJ **alleged** that Keysight Technologies proposed acquisition of Spirent Communications would eliminate competition in the markets for high speed ethernet testing equipment, network security testing equipment, and radio frequency channel emulators. To address the DOJ's concerns, the parties agreed to divest Spirent's businesses operating in those markets to Viavi. (In early 2024, Viavi had bid to acquire all of Spirent, but Keysight outbid them.) Contemporaneously with its filing of a complaint setting forth its allegations, the DOJ filed a proposed **Final Judgment** to bind the combined entity to the terms of the agreed upon divestiture.

The settlement requires the combined entity to effectuate the divestiture to Viavi within 10 days of the later of its receipt of all regulatory approvals for the proposed transaction or the court's entering of the proposed **Asset Preservation and Hold Separate Stipulation and Order**. The settlement also requires the combined entity to provide transition services to Viavi (or any other buyer, if the assets are not divested to Viavi) for a short period, restricts its ability to enforce non-compete and nondisclosure agreements with respect to any employees who move to Viavi as part of the divestiture (or are hired within 180 days of the divestiture), imposes on it a one year non-solicit provision with respect to rehiring any employees hired by Viavi within 90 days of the divestiture (unless those employees are terminated by Viavi, or Viavi agrees), and requires appointment of a divestiture trustee to sell the to-be-divested assets if Keysight fails to divest them to Viavi. The proposed final judgment is subject to public comment and court approval, pursuant to the Tunney Act. This is a return to the general practice prior to the Biden Administration, although in non-complicated matters, the Antitrust Division had occasionally accepted "fix-it-firsts" not subject to the Tunney Act procedures.

The transaction was previously cleared by the **United Kingdom's CMA** in March 2025 without conditions (pursuant to an exception for *de minimis* effects) and is still subject to clearance by China's SAMR.

The Antitrust Agencies Face Significant Budgetary Limitations That May Impact Merger Review and Enforcement Efforts

Pressures may prevent the administration from adopting an aggressive anti-merger enforcement policy and litigation docket, if desired. President Trump's Fiscal Year 2026 Budget Request proposes **a 15% cut** to the **FTC's budget** and number of personnel (as compared to Fiscal Year 2024). Although the President's budget proposes a substantial increase to the **Antitrust Division's budget**, the increase is, as proposed, obligated to "other services from non-federal sources" (which are likely expert witness fees and related fees for its existing monopolization trial docket), it also proposes a **10% cut** in Antitrust Division personnel (as compared to Fiscal Year 2024). Antitrust merger (and non-merger) litigation is expensive—expert fees for testifying economists routinely run into the $5 to $10 million range and can be significantly more for complex cases—and requires a large number of litigating attorneys and support staff.

The FTC and the DOJ have a substantial docket of monopolization and unfair method of competition cases (***FTC v. Meta***, ***FTC v. Amazon***, ***In the Matter of CareMark et al.***, ***FTC v. Syngenta***, ***FTC v. Deere and Company***, ***U.S. v. Google*** (search), ***U.S. v. Google*** (ad-tech), ***U.S. v. Apple***, ***U.S. v. Live Nation/TicketMaster***, and ***U.S. v. Visa***) and one Robinson Patman Act price discrimination case (***FTC v. Southern Glazer's***) in active litigation. Only two—the Google cases—have gone to trial; the other matters are in the pre-trial phase. It is unlikely either agency has the personnel to take on significant merger litigation until many of these trials are concluded or otherwise resolved.

The merger enforcement policy of the current administration will be significantly different than the policy of the Biden administration. It will not be an impediment to deal-making.

Trump Administration Likely to Continue Biden Administration's Efforts to Identify and Remediate Interlocking Directorates

June 27, 2025

By Bilal Sayyed
Counsel

During the Biden Administration, the Department of Justice and the Federal Trade Commission were **active** in identifying and achieving remediation of interlocks that may violate Section 8 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

The antitrust agencies' effort to identify and break interlocks is not likely to be shelved in the second Trump administration. Notably, at the tail end of the Biden Administration, the **FTC and DOJ took the position** that the prohibitions of Section 8 and Section 5 are not limited to corporate interlocks involving officers and directors but also apply to *board observers* (The Court did not adopt any position on application of Section 8 to board observers in its disposition and response to the pleadings in this matter). Firms and individuals should recognize this position was adopted by two of the three current FTC Commissioners–**Chairman Andrew Ferguson and Commissioner Melissa Holyoak**. The position of FTC Commissioner Mark Meador, is unknown. Rebecca Kelly Slaughter and Alvaro Bedoya, the two FTC Commissioners that President Trump has purportedly fired, also supported this position. Slaughter and Bedoya are contesting their firing, but are presently not sitting as Commissioners. Also, **the revised reporting rules** for transactions subject to the Hart-Scott-Rodino Act include a requirement that filing parties identify certain officers and directors. One purpose of this reporting requirement is to identify interlocks that may impact competition, including interlocks that are not prohibited by Section 8.

The Prohibition on Interlocking Directors And Officers

Section 8 of the Clayton Act prohibits one person from simultaneously serving as an *officer* or *director* of two *corporations* if: (1) each of the "interlocked" corporations has combined capital, surplus, and undivided profits of more than $10,000,000; (2) each corporation is engaged in whole or in part in commerce; and (3) 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**." The purpose of the prohibition is to "**avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors.**"

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps "are too small to have competitive significance in the vast majority of situations." A corporate interlock does not **violate the statute** if:

1. the competitive sales of either corporation are less than $1,000,000; or
2. the competitive sales of either corporation are less than 2 percent of that corporation's total sales; or
3. the competitive sales of each corporation are less than 4 percent of that corporation's total sales.

Determining whether an interlock falls within the *de minimis* exceptions is a legally complex and highly factual undertaking, and should be evaluated with counsel familiar with the statute and its enforcement.

Section 5 of the FTC Act prohibits "unfair methods of competition." Section 5 **prohibits** "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." Although the text of Section 8 suggests a relatively narrow prohibition–it prohibits only "*a person*" from serving as a *director* or *board-appointed officer* of *corporations* that are *competitors*–according to the Commission, Section 5 **prohibits**, among other things, "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act's" prohibition on interlocking directorates. Although there is substantial likelihood that the current FTC leadership will revise the Biden administration's policy statement on the scope of Section 5, the position articulated in the joint statement of interest (discussed below) suggests it is unlikely that the Commission will adopt a different position with respect to horizontal interlocks.

The DOJ and the FTC Have Adopted the Position that Board Observers Are and Should Be Subject to the Same Prohibitions as Directors and Officers

In the joint DOJ and FTC "statement of interest" filed in ***Elon Musk v. Samuel Altman***, the agencies argued that "section 8 bars relationships that create an interlock regardless of form." The agencies argued:

"[A]n individual cannot evade liability by serving as an 'observer' on a competitor's board .... [A] company or individual cannot use an indirect means to a prohibited end, such as by asking another person to serve as a board observer to obtain entry to a meeting that is otherwise off limits due to Section 8's ban on interlocks. Such misdirection would undermine Section 8's intent to impose a clear ban on direct involvement in the management of a competitor."

Corporations Should Consider Broader Disclosure Requirements for Board Service and Officer Appointments

While the remedy for violating Section 8 is limited to a break of the interlock, an interlock can support the requirements of an agreement for a violation of Section 1 of the Sherman Act (agreements in restraint of trade) or create a factual inference of an ability to collude or coordinate towards anticompetitive behavior. Violations of Section 1 of the Sherman Act can result in substantial private damages or criminal fines.

Section 8 is usually "enforced" by proper board and officer selection screening, not by government enforcement action or private actions. Because the interlocked company is also subject to liability for violating Section 8 and Section 5, director and officer selection efforts should adopt board relationship disclosures that include board observer positions, and companies may wish to adopt guidelines that expand prohibitions on persons serving as directors (or officers) of competing companies to include prohibitions on board observer status at competing companies.

Nine Elements of an Effective Antitrust Compliance Program

June 27, 2025

By Bilal Sayyed
Counsel

The **Department of Justice** ("Department" or "DOJ") considers the "adequacy and effectiveness of [a] corporation's compliance program" as a factor in "conducting an investigation of a corporation, determining whether to bring charges, and [in] negotiating plea or other agreements." The Antitrust Division ("Division") provides guidance on its **Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations** ("Antitrust Compliance Programs"). While "even an effective antitrust compliance program may not deter every violation" the **guidance** notes that "*an effective compliance program should enable a company to swiftly detect and address*" potential antitrust issues. The Division's guidance draws heavily on the framework articulated in the Criminal Division's guidance on the evaluation of **corporate compliance programs** and the **principles** in the Department of Justice Manual, Principles of Federal Prosecution of Business Organizations.

The guidance is relevant to the investigation, evaluation, and settlement of **civil antitrust matters**. The Division will consider the company's **compliance program**: (i) when making charging decisions; and (ii) when making sentencing recommendations, assessing the program at the time of the violation and improvements after the identification of the offense. When making charging decisions, the **compliance program** is evaluated in accordance with certain fundamental questions:

(1) Is it well designed?

(2) Is the program being applied earnestly and in good faith; that is, is it adequately resourced and empowered to function effectively?

(3) Does it work in practice?

The Nine Elements

The Division's guidance identifies nine elements of an effective compliance program.

1. **Design, Format and Comprehensiveness:** In considering the design, format and comprehensiveness of an **antitrust compliance program**, the Division considers: (i) the format of the antitrust compliance program, and how it fits into the company's broader compliance program; (ii) how the program is implemented and how often it is updated; (iii) who has the responsibility for integrating antitrust policies and procedures into the company's business practices; (iv) what guidance is provided to those employees most likely to identify potential antitrust violations; (v) the mechanisms the company has put in place to manage and preserve communications, including electronic communications; (vi) whether the company has clear guidelines on the use of "ephemeral messaging" or "non-company methods of communication;" and (vii) the guidance the company provides to employees about document destruction and obstruction of justice.

2. **Culture of Compliance:** The Division will **examine** "the extent to which corporate management—both senior leadership and managers at all levels—has clearly articulated and conducted themselves in accordance with the company's commitment to good corporate citizenship." Specific factors in evaluating the culture of compliance include (but are not limited to): (i) the company's leadership's efforts – through their words and actions—to convey the importance of antitrust compliance to company employees; (ii) how, and how often, the company measures the effectiveness of its compliance program; (iii) whether and how the company's commitment to compliance is reflected in its hiring practices and design of incentives (including compensation incentives); and (iv) the role and expertise of the board of directors with respect to compliance.

3. **Responsibility for the Compliance Program:** "Those with **operational responsibility** for the [compliance] program must have sufficient qualifications, autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program." The Division will consider, among other factors: (i) whether there is a chief compliance officer or executive within the company responsible for antitrust compliance; (ii) how the compliance function compares with other functions in the company, in terms of stature, experience, compensation, rank or title, resources, and access to key-decision makers; (iii) whether compliance personnel are dedicated to compliance responsibilities

or have additional non-compliance responsibilities within the company and, if so, what proportion of their time is dedicated to compliance responsibilities; (iv) whether compliance personnel report to senior leadership of the company, including the board of directors, and the format of such reporting; and (v) who reviews the effectiveness of the compliance function, and the review process for such evaluation.

4. **Risk Assessment:** "An effective antitrust compliance program should be appropriately [designed and] tailored to account for antitrust risk." **Factors** relevant to the Division's evaluation of the compliance programs risk assessment include whether: (i) the antitrust compliance program is tailored to the company's lines of business, the industry, and consistent with industry best practices; (ii) the company collects information or metrics that will help detect antitrust violations; (iii) the company's risk assessment is current and subject to periodic review; and (iv) the company's program addresses its use of technology to conduct business, including new technologies such as artificial intelligence and algorithmic revenue management software, how the company mitigates any risk associated with its use of such tools and technology, and whether compliance personnel are involved in the deployment of new technologies, so as to assess the risks such technologies may raise.

5. **Training and Communication:** "An effective **antitrust compliance program** includes adequate training and communication so that employees understand their antitrust compliance obligations." Consideration will be given to, among other factors, whether: (i) the company has mechanisms in place to ensure that employees follow the compliance policy; (ii) employees certify that they have read the compliance policy; (iii) antitrust policies and principles are included in a company Code of Conduct; (iv) training is required before attending trade shows or trade association meetings; (v) employees and senior leadership receive antitrust compliance training, how often such training occurs, including whether attendance at such training is recorded and preserved; and (vi) training is revised and updated, and what factors help determine when and how such training is revised.

6. **Periodic Review, Monitoring and Auditing:** "An **effective compliance program** includes monitoring and auditing functions to ensure that employees follow the compliance program." The Division will consider, among other similar factors: (i) the methods the company uses to evaluate the effectiveness of the compliance program; (ii) the frequency of evaluation, and whether the company has revised its compliance program in response to any prior antitrust violations or compliance failures; (iii) the monitoring and auditing mechanisms the company has in place to detect violations, such as routine or unannounced audits of documents and communications; (iv) whether the company uses analytic or statistical tools to identify potential antitrust violations; and (v) how monitoring and auditing influence changes to the compliance program.

7. **Confidential Reporting Structure and Investigation Process:** "An **effective compliance program** includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation." The Division will consider, among other similar and related factors, whether: (i) the company has a publicized system in place for employees to report or seek guidance about potentially illegal conduct; (ii) there are positive or negative incentives for reporting antitrust violations; (iii) supervisors or employees have a duty to report potential antitrust violations, and the disciplinary measures the company has in place for those who fail to report such conduct; (iv) the company has mechanisms to allow for confidential or anonymous reporting; and (v) the company's use of non-disclosure agreements or other restrictions deter whistleblowers from reporting violations.

8. **Incentives and Discipline:** "[R]elevant to an **antitrust compliance program's effectiveness** are the 'systems of incentives and discipline that ensure the compliance program are well-integrated into the company's operations and workforce.'" The Division will consider and evaluate: (i) the incentives, if any, the company provides to promote compliance; (ii) whether the company has considered the implications for antitrust compliance of its incentives, compensation structure and rewards; (iii) whether the company has taken specific actions in response to compliance violation—*e.g.*, promotions denied, compensation clawed back; (iv) the disciplinary measures the company has in place for those who engage in illegal antitrust conduct or who fail to take reasonable steps to prevent or detect violations; (v) the employment status of culpable executives; and (vi) whether antitrust violations are disciplined in the same manner as other types of misconduct.

9. **Remediation and Role of the Compliance Program in the Discovery of the Violation:** The **Division's prosecutors** are instructed to "assess whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following [an] antitrust violation" and "should also consider what modifications and revisions the company has implemented to help prevent similar violations from reoccurring, and what methods the company will use to evaluate the effectiveness of its antitrust compliance program going forward." In evaluating the company's remediation efforts, the Division will consider, among other things: (i) whether the company has conducted a "root-cause" analysis of the antitrust misconduct; (ii) what

controls of the existing antitrust compliance program failed; (iii) whether the company revised its antitrust compliance program as a result of the antitrust violation and any lessons learned; (iv) what role the senior leadership of the company played in addressing the antitrust violation, identifying and disciplining employees and supervisors, and revising the compliance program to better detect the conduct that resulted in the antitrust violation; and (v) whether the company reported the antitrust violation to the government before learning of the government's investigation, and how long after learning of the conduct did the company report it to the government.

The Critical Importance of an Antitrust Compliance Program

When a decision is made to charge a company with a violation, the Division's prosecutors may recommend a sentencing reduction based on an evaluation of the effectiveness of a company's **compliance program**. Where a company does not have an adequate compliance program, a prosecutor may recommend a corporate defendant face probation, and will also consider whether a monitor should be put in place to implement a compliance program. Creation of or improvements to an antitrust compliance program, the incorporation of disciplinary procedures for violations, and the demonstration of efforts to ensure future compliance and a change in corporate culture may result in reduction of criminal fines.

The development, maintenance and implementation of, and allocation of sufficient resources to an antitrust compliance program is a critical component of a company's protection from the bad acts of its employees. An antitrust compliance program may not deter or identify, in a timely manner, all antitrust violations. However, significant and reasonable efforts to comply with the law and develop a culture of compliance, and of improvement and evaluation of compliance efforts, are a relatively low-cost method of protecting the corporation from criminal liability. Compliance officers, senior company officials and board members, working with inside and outside counsel, should consider improvements to their corporate compliance programs based on the guidance from the Antitrust Division.

New HSR Premerger Notification Filing Requirements Add Substantial Time and Cost to the HSR Filing Process

June 27, 2025

By Bilal Sayyed
Counsel

The information and documentary materials ("filing requirements") necessary to complete the Hart-Scott-Rodino Antitrust Improvements Act Notification for Certain Mergers and Acquisitions ("Form") were significantly expanded earlier this year. The new filing requirements fall most heavily on transactions that combine current or future competitors, or where the parties to the transaction have a significant supply relationship. For such transactions, it may be necessary to ***anticipate a 3–5 week process to submit an HSR Form and receive confirmation that the filing is in compliance with the new filing requirements***. And, in a significant change to long-standing practice, parties to a negotiated transaction may ***no longer file on a "bare-bones" letter of intent***.

The new Form's filing requirements may also substantially change the merger review and negotiation process, frontloading discussion and "admissions" with respect to market definition and the transaction's potential competitive effects. By significantly expanding on the information and documents required for the Form, the Federal Trade Commission and Department of Justice may intend to force merging parties towards a more European-style approach to merger review: pre-filing negotiation of compliance with the Form's new information and documentary requirements, and early settlement discussions as an alternative to the 4–12 month fact-finding process associated with very broad "Second Request" compliance and negotiation of a possible settlement.

The new filing requirements expand the reporting requirements for all transactions, but the burdens do not fall equally on filing parties, with acquired persons having fewer new filing requirements than acquiring persons. The Commission has also taken steps to minimize or limit the increased burden for certain categories of transactions, with transactions more likely to raise competitive concerns having greater information and document requirements:

Select 801.30 Transactions: Parties to transactions that: (i) ***do not*** (a) **confer control** of an entity or (b) grant (or contemplate granting) the right to serve as, appoint, veto, or approve board members (or members of a similar body) of any entity within the acquired person (or the general partner or management company of any entity within the acquired person) and (ii) ***are*** acquisitions of shares from a party other than the issuer of the shares, ***have only limited new filing requirements***.

No Overlap/No Supply Relationship Transactions: Parties to transactions that ***are not the combination*** of: (i) present or future competitors; or (ii) firms with an existing significant supply relationship, ***have significant new filing requirements.***

Overlap/Supply Relationship Transactions: Parties to transactions that ***are the combination*** of: (i) present or future competitors; or (ii) firms with an existing significant supply relationship, ***have substantial new filing requirements.***

Not all new requirements apply to each type of transaction and each party to a transaction.

The new and modified document requests include:

1. Expansion of the existing "Item 4(c)" document request to include all "studies, surveys, analyses, and reports" prepared by or for the ***Supervisory Deal Team Lead*** for the "purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets."
2. **Requirement** that the filing parties produce "all regularly prepared plans and reports" that analyze "market shares, competition, competitors, or markets" for overlap products (including products known to be in development by the target) that were provided to the Chief Executive Officer or Board of Directors within one year of the date of the HSR filing;
3. Corporate organization chart, if it exists;
4. Agreements negotiated as part of the transaction, including agreements not to compete (or solicit), and certain other agreements between the parties not associated with the transaction;
5. A transaction diagram, if it exists;

6. Translation of documents (or information) that are in a language other than English;
7. Narrowing of what constitutes a “draft” document for purposes of identifying “final” documents to be produced with the filing.

The new and modified information requests include identification of:

1. limited partners, where such person (i) currently holds (or will hold as a result of the transaction) 5% or more, but less than 50% of the non-corporate interests of the limited partnership, **and** (ii) has, or will have, the right to serve as, nominate, appoint, veto, or approve board members (or individuals with similar responsibilities), of any entity within the filing person, or of the general partner or management company of any entity within the filing person;
2. officers and directors who also serve as an officer or director of another entity that derives revenue in the same NAICS code as the target;
3. overlapping products or services, and sales data (or data measuring use) and customer information for each overlapping product or service;
4. significant supply, licensing, and purchase relationships between the parties, or with competitors to the parties, including sales and purchase data, and identification of top customers or suppliers;
5. acquisitions, within five years prior to the date of HSR filing, of 50% or more of the voting securities or non-corporate interests (or all or substantially all of the assets) of an entity that, prior to its acquisition, earned revenue in one or more “overlap” products;
6. broader minority ownership interests than previously required;
7. broader geographic market information than was previously required (for certain transactions);
8. subsidies from foreign entities or “governments of concern”;
9. existing or pending defense and intelligence contracts; and
10. whether the transaction will be notified to non-U.S. competition agencies.

The new narrative requirements include identification of:

1. strategic rationale for the transaction;
2. “principal categories of products and services” of the filing person, including products known to be in development and that compete with the products or services of the other filing person;
3. supply and purchase relationships between the parties to the transaction and to businesses that compete with one or both filing persons; and
4. ownership structure of the filing person.

Summary Chart of New Filing Requirements, By Transaction Type and Filing Person

	Select 801.30		No Overlap / No Supply Relationship Transaction		Overlap / Supply Relationship Transaction	
	Acquiring Person	Acquired Person	Acquiring Person	Acquired Person	Acquiring Person	Acquired Person
Translation of Documents	✓	✓	✓	✓	✓	✓
Identification of Additional Minority Interest Holders	✓	✓	✓	✓	✓	✓
Organization of Controlled Entities	✗	✗	✓	✓	✓	✓
Description of Ownership Structures	✓	✗	✓	✗	✓	✗
Organizational Chart (if one exists)	✓	✗	✓	✗	✓	✗
Identification of Certain Officers and Directors	✓	✗	✓	✗	✓	✗
Description of Business of the Acquiring Person	✓	✗	✓	✗	✓	✗
Transactions Subject to International Antitrust Notification	✓	✗	✓	✗	✓	✗
Transaction Rationale	✗	✗	✓	✓	✓	✓
Transaction Diagram (if one exists)	✗	✗	✓	✗	✓	✗
Competition Documents from Supervisory Deal Team Lead	✓	✗	✓	✓	✓	✓
Plans and Reports	✗	✗	✗	✗	✓	✓
Transaction Agreements	✗	✗	✓	✓	✓	✓
Other Agreements Between the Parties	✓	✗	✓	✗	✓	✓
Overlap Description	✗	✗	✓	✓	✓	✓
Supply Relationships Description	✗	✗	✗	✗	✓	✓
Geographic Market Information	✓	✓	✗	✗	✓	✓
Minority-Held Entity Identification to Overlaps	✓	✓	✗	✗	✓	✓
Prior Acquisitions	✓	✓	✗	✗	✓	✓
Subsidies from Foreign Entities or Governments of Concern	✓	✓	✓	✓	✓	✓
Defense or Intelligence Contracts	✗	✗	✗	✗	✓	✓

Planning for Complex Filings

For many transactions—approximately 50%, based on prior filing statistics—the new information and document requirements will require a substantial or significant increase in the time and effort necessary to prepare an HSR filing. To help minimize the impact, parties can collect, maintain, and update certain information—such as minority ownership positions, geographic locations of operations, officer and board positions, relevant contracts and subsidy information, prior acquisitions, and ordinary course plans and reports—on a regular basis or substantially earlier in the transaction negotiation process.

The most significant items to manage are likely to be the collection and review of documents that analyze, or that relate to the analysis of, the competitive impact of the transaction. The new filing requirements are a significant expansion of the previous policy that such documents, to be included in the filing, be prepared by or for an officer or director of the filing person. The new filing requirements include a new, additional, category of documents—documents (including emails) that analyze, or that relate to the analysis of, the competitive impact of the transaction that may have been produced by or for a significantly lower-ranking employee—the Supervisory Deal Team Lead—of the filing person.

The new narrative responses may also slow the preparation, certification and submission of the Form. Filing parties may find that agency staff disagree with the parties' identification and description of their products, including overlap products (or services).

Although the narrative description of products (or services) is not, on its face, a market definition exercise, it will likely devolve to that. Market definition is often the most important factor in an antitrust analysis. The requirement to define

overlap products looks very much like an effort by the agencies to “lock-in” a market definition at the start of the merger review period, not after an investigation. Disagreements on the description of products (or services) may, at times, lead the agency staff to reject the parties’ merger notification filing as non-compliant.

For transactions that may raise competitive concerns, the notification process may begin to look substantially more like the process in Europe, where “second-phase” investigations are often accompanied by settlements worked out in the “filing-phase” discussions. Transactions where the parties have a horizontal overlap or where they have a significant supply/purchase relationship with each other or with competitors to the other, are likely to be significantly harder to get on file quickly, and may also be more likely to be challenged because of admissions in the parties’ filing document.

2025 Thresholds for Merger Control Filings under HSR Act & Exemptions for Interlocking Directorates

June 27, 2025

By Bilal Sayyed
Counsel

Under the Hart-Scott-Rodino Act, parties involved in proposed mergers, acquisitions of voting securities, unincorporated interests or assets, or other business combinations (*e.g.*, joint ventures, exclusive license deals) ("transactions") that meet certain thresholds must report the proposed transaction to the FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ") unless an exemption applies. The parties to a proposed transaction that requires notification under the HSR Act must observe a statutorily prescribed waiting period (generally thirty days) before closing.

Current HSR Filing Thresholds

Under the current thresholds, transactions valued at **$126.4 million or less** are not reportable under the HSR Act. A transaction is reportable under the HSR Act if it meets the following criteria, and no exemption exists:

Size-of-Transaction Test	The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of **$505.8 million**; *or* The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of **$126.4 million** but not more than **$505.8 million**, <u>and</u> the Size-of-Person thresholds below are met.
Size-of-Person Test	One party (including the party's ultimate parent entity and its controlled subsidiaries) has at least **$252.9 million** in total assets or annual sales, and the other has at least **$25.3 million** in total assets or annual sales.

The current filing thresholds are as follows:

Original Threshold	**2025 Revised Threshold**
$10 million	$25.3 million
$50 million	$126.4 million
$100 million	$252.9 million
$110 million	$278.2 million
$200 million	$505.8 million
$500 million	$1.264 billion

$1 billion	$2.529 billion

The filing fees for reportable transactions and the six filing fee tiers have also been updated, as follows:

Filing Fee	Size of Transaction under the Act
$30,000	For transactions valued at more than $126.4 million but less than $179.4 million
$105,000	For transactions valued at $179.4 million or greater but less than $555.5 million
$265,000	For transactions valued at $555.5 million or greater but less than $1.111 billion
$425,000	For transactions valued at $1.111 billion or greater but less than $2.222 billion
$850,000	For transactions valued at $2.222 billion or greater but less than $5.555 billion
$2,390,000	For transactions valued at $5.555 billion or more

Current Thresholds for Section 8's Prohibition on Interlocking Directorates

Section 8 of the Clayton Act prohibits one person from simultaneously serving as an officer or director of two corporations if: (1) each of the "interlocked" corporations has combined capital, surplus, and undivided profits of more than **$51,380,000**; (2) each corporation is engaged in whole or in part in commerce; and (3) 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." 15 U.S.C. § 19(a)(1)(B).

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps "are too small to have competitive significance in the vast majority of situations." S. Rep. No. 101-286, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4100, 4103-04. A corporate interlock does not violate the statute if: (1) the competitive sales of either corporation are less than **$5,138,000**; (2) the competitive sales of either corporation are less than 2 percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales.