CADWALADER

Quorum
Insights Into Corporate Governance, M&A and Securities Law

Antitrust Agency Enforcement Round-Up: September/October 2025

By **Bilal Sayyed**
Counsel | Antitrust

The Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC" or the "Commission") have been shut down as of October 1 for all but ongoing litigation and time-sensitive matters because of the federal budget impasse; prior to the shutdown, the FTC announced a few interesting enforcement actions that we believe attempt to advance the law towards a more aggressive interpretation of Section 5 of the FTC Act and Section 7 of the Clayton Act.

A. Hart-Scott-Rodino Act / Merger Notification Filings and Antitrust Investigations Status During Government Shutdown

The premerger notification offices of both the FTC and the DOJ are open and accepting Hart-Scott-Rodino merger notification filings; the statutory deadlines for review of those filings – generally 30 days – has not been tolled by the budget impasse. However, parties to transactions likely will find some delays in the review of their new merger notification filings as the agency staff will be pulled off of furloughed status to work on time-sensitive matters. Existing merger investigations continue, but at a substantially reduced pace, unless the parties have informed the staff that they expect to close the transaction consistent with the HSR Act's statutory review deadlines regardless of the status of the agencies' investigations.

Non-merger investigations do not have any statutory review periods, so such investigations are significantly slowed. The agency leadership can determine that certain investigations are essential and call staff back from furlough to continue to work during the shutdown. This may happen, for example, if the statute of limitations on bringing an antitrust claim is about to run out, or if a delay in bringing an enforcement action will result in significant additional harm to the public.

B. FTC Challenge to Partnership Agreement That Allegedly Dismantles Competitor

The FTC seeks to enjoin a "partnership agreement" between **Zillow Inc.** and **Redfin Corporation** that, in exchange for a $100 million payment and future compensation, "dismantle[d] Redfin as a competitor in the market for internet listing services" and facilitated the transfer of certain of Redfin's assets – business contracts, customer relationships and personnel – to Zillow. Zillow and Redfin also agreed for Redfin to serve "as an exclusive syndicator of Zillow listings" in exchange for additional compensation. The FTC alleges a violation of both Section 1 of the Sherman Act (an illegal agreement in restraint of trade) and of Section 7 of the Clayton Act (an anticompetitive acquisition of assets). *FTC Sues Zillow and Redfin Over Illegal Agreement to Suppress Rental Advertising Competition* (Sept. 30, 2025).

The FTC is arguing that "employees" of Redfin are "assets" of Redfin. If it is successful in making this argument, it will allow for the development of case law and Commission practice that the Commission (or DOJ) can use to challenge so-called "acqui-hire" transactions (especially in, but not limited to, the tech space) as anticompetitive and subject to challenge under either or both Section 1 and Section 7. Commentators have suggested that the antitrust labor exemption may preclude a Sherman Act Section 1 (restraint of trade) or Section 7 (anti-merger) challenge to acqui-hires, although there is no case law supporting this point. 15 U.S.C. § 17 holds that human labor is not a "commodity or article of commerce."

(This was intended to protect union activity from challenge under the Sherman Act as an agreement in restraint of trade.) The partnership agreement is also especially vulnerable to a Section 1 claim because it does not clearly integrate the companies by "pool[ing] capital or resources or shar[ing] risks" but, as pled by the FTC, looks like a market allocation agreement.

Acqui-hires are not subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Act. Thus, the acquisition of personnel and non-exclusive rights to intellectual property can effectuate, in practice, the acquisition of a company without pre-closing antitrust review. The antitrust agencies are very concerned about this practice and are looking to develop a basis for requiring such transactions to fall under the reporting requirements of the HSR Act. The challenge to the **Zillow/Redfin** transaction provides the opportunity for the Commission to develop this area for future enforcement actions.

C. Interlocking Directorate Enforcement

Section 8 of the Clayton Act prohibits individuals from simultaneously serving as directors or officers at two competing companies. The Biden Administration was active in investigating and remedying such interlocks. The Trump Administration is continuing this enforcement priority. In September, the FTC announced the resignation of three (unnamed) board members of Sevita Health. Each of the resigning individuals served as a director of both Sevita Health and Beacon Specialized Living Services. Both companies offer residential services for individuals with intellectual and developmental disabilities. In announcing the resignations, the FTC encouraged companies to proactively audit board memberships, particularly when private equity investors or new stockholders obtain new board seats. *Three Directors Resign from Sevita Board of Directors in Response to the FTC's Ongoing Enforcement Efforts Against Interlocking Directorates* (Sept. 15, 2025).

Interlocked companies – not only the directors or officers who violate Section 8 – are also liable for violations of Section 8. Although the penalty for violating Section 8 is to break the interlock, shareholders of one or both interlocked companies have, acting as private plaintiffs, filed "derivative" suits challenging the interlocked board's failure to comply with Section 8. Some have been settled by the affected companies for modest financial settlements.

With the antitrust agencies' continued interest in unwinding interlocks, it is good practice for compliance departments to audit the board and officer positions of their directors and senior officers annually to avoid falling into a violation through inattention. Interlocks that at one time were exempt from the prohibition – because of the *de minimis* exceptions – can develop as one or both interlocked companies expand into new markets or achieve greater sales in existing markets. Notably, the definition of "competitors" used in Section 8 matters is interpreted more broadly than in merger matters. Merger challenges under Section 7 of the Clayton Act tend to define antitrust markets narrowly; review of interlocks under Section 8 of the Clayton Act tends to define antitrust markets with less precision and into broader categories. Additionally, the FTC and the DOJ recently have taken the position that "board observers" fall within the prohibitions of Section 8.

For more guidance on the FTC and DOJ efforts to enforce the prohibition against interlocked boards, *see* *FTC & DOJ: Board Observers Are Subject to the Antitrust Laws' Prohibition on Interlocking Directorates* (Jan. 2025); *Trump Administration Likely to Continue Biden Administration's Efforts to Identify and Remediate Interlocking Directorates* (*Competition Close-Up*, Jun. 2025); and *The Biden Administration's Extensive Review of Interlocking Directorates Across the Entire Economy May Put Your Board Representation at Risk* (May 2024).

D. Challenge to Non-Compete Agreement

The Commission has acceded to the vacatur of the Non-Compete Clause Rule (as held in *Ryan LLC v. Federal Trade Commission*, 746 F. Supp. 3d 369 (2024) and, consistent with the FTC's request, two appellate courts have dismissed the Commission's earlier challenges to decisions preventing enforcement of the Non-

Compete Clause Rule. Notwithstanding the Commission's dismissal of its appeals of the unfavorable decisions, FTC Chairman Andrew Ferguson indicated that the Commission will "protect American workers by . . . patrolling . . . markets for specific anticompetitive conduct that hurts American . . . workers and taking bad actors to court." Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, Ryan LLC v. FTC, at 3 (Sept. 5, 2025).

Consistent with this continuing interest, in September 2025 the FTC:

1. Challenged Gateway Services' use of employee non-compete agreements across its pet cremation business, alleging that the company's requirement that all employees (except those in California) agree to a 12-month, post-employment covenant not to compete was an unfair method of competition and is prohibited by Section 5 of the FTC Act. The Commission's proposed Order addressing its complaint prohibits Gateway from entering into, maintaining, or enforcing (or threatening to enforce) certain non-compete agreements and, among other things, prohibits Gateway from preventing certain employees from "soliciting current or prospective customers" except with respect to those current or prospective customers with whom the employee had direct contact with or personally provided service in the last 12 months of his or her employment. *The Commission's enforcement action in this matter parallels the perspective of the Biden Administration's challenge to non-compete agreements under a very expansive interpretation of FTC Act Section 5's prohibition on unfair methods of competition.*

2. Encouraged "members of the public including current and former employers restricted by noncompete agreements, and employers facing hiring difficulties due to a rival's noncompete agreements . . . to share information" with the FTC to "*uproot the worst offenders and restore fairness to the American labor market*" (emphasis added). Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements (Sept. 4, 2025). In support, the Commission released an extensive request for information on the use of non-competes "to understand which specific employers continue to impose noncompete agreements." Request for Information Regarding Employer Noncompete Agreements (Sept. 4, 2025). (Responses to the request are due no later than November 3, 2025, and are not affected by the government shutdown.)

3. Issued warning letters to "several large healthcare employers and staffing firms urging them to conduct a comprehensive review of their employment agreements – including any non-competes or other restrictive agreements – to ensure they are appropriately tailored and comply with the law." FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies (Sept. 10, 2025).

4. Announced a workshop by the FTC's Labor Task Force to "highlight the negative impact of non-compete agreements on American workers and put businesses on notice of [the Commission's] enforcement priorities." FTC Announces Workshop on Noncompete Agreement (Sept. 17, 2025). The workshop was originally scheduled for October 8 but likely will be rescheduled when the government is reopened.

We suggest that employers using non-compete agreements review the scope and breadth of those agreements to confirm that they are consistent with applicable law, including the Commission's interpretation of Section 5 of the FTC Act, which prohibits the use of unfair methods of competition.

See The Federal Trade Commission "Strongly Encourage[s] All Employers . . . to Review Their Contracts Closely, to Ensure That Any Restrictions on Employee Mobility Are in Full Compliance with the Law" for a more detailed discussion of the Gateway Services enforcement action and the analysis which the FTC Commissioners are applying to evaluate the legality of employee non-compete agreements.