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Antitrust Agency Enforcement Round-Up

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After having been shut down as of October 1 for all but ongoing litigation and time-sensitive matters because of the federal budget impasse, the Federal Trade Commission ("FTC" or the "Commission") and the Antitrust Division of the Department of Justice ("Antitrust Division") opened up for ordinary course business on November 13, 2025.

Merger Enforcement Updates

The FTC required divestiture to address anticompetitive concerns associated with **Boeing's** proposed acquisition of **Spirit AeroSystems**, the largest independent manufacturer of aerostructures, critical inputs to all commercial and military aircraft. The FTC alleged that Boeing's acquisition of Spirit would give Boeing the ability and incentive to foreclose competition from the only competing manufacturer of large commercial aircraft (Airbus) and from Boeing's competitors of fixed-wing military aircraft (Lockheed Martin and Northrup Grumman) and rotary-wing military aircraft (Lockheed Martin and Bell Textron) by denying or degrading their access to Spirit's aerostructures. The FTC also alleged that the acquisition could give Boeing access to proprietary competitively sensitive information of, or relating to, its competitors, which it could exploit to its own advantage. To address its concerns in the market for commercial aircraft, the FTC required Boeing to divest to Airbus the Spirit business operations that primarily supply Airbus with aerostructures, and to divest another Spirit aerostructure business to Composites Technology Research Malaysia. To address its concerns in the market for military aircraft, the FTC required Boeing to supply Spirit aerostructures to Boeing's rivals on a non-discriminatory basis and not favor its own business, and to protect its competitors' competitively sensitive information from improper use or disclosure. *Structural relief in vertical merger matters that raise competitive concerns should be considered likely; non-discrimination requirements and information firewalls are not likely sufficient to address anticompetitive concerns, especially outside the military and defense sector.*

The FTC provisionally cleared **Valvoline Inc.**'s proposed acquisition of approximately 200 quick-lube oil change outlets from private equity firm **Greenbriar Equity Fund V., L.P.**, subject to the divestiture of 45 such shops in 25 local markets to Main Street Auto LLC, an automotive aftermarket services company with approximately 100 locations throughout the Southern United States. The FTC alleged that the transaction, as proposed, would likely lead to higher priced and lower-quality oil changes. *Notably, the Commission alleged harm in markets where the post-merger Herfindahl-Hirschman Index ("HHI") (2200) was below the HHI concentration threshold for presumptive (but rebuttable) anticompetitive effects in the 2010 Horizontal Merger Guidelines (2500), but above the threshold in the 2023 Merger Guidelines (1800); the Trump Administration is signaling that it will enforce closer to the merger policies of the Biden Administration (and the Reagan and Bush Administrations in 1982 and 1992) than the looser standards adopted by the Obama Administration in the 2010 Horizontal Merger Guidelines.*

The FTC's March 2025 complaint (amended in April), which sought a preliminary injunction of **GTCR LLC's** attempted acquisition of **Surmodics, Inc.**, pending an FTC administrative trial, was rejected in November after a district court trial in late summer. The FTC had alleged that the combination of **Biocat Inc.**, (majority owned by GTCR) and **Surmodics** would lead to a substantial lessening of competition, and

the elimination of head-to-head competition, in the market for hydrophilic coatings, "critical inputs into lifesaving medical devices." During discovery, the parties had proposed a fix that would, in their estimation, address the competitive concerns of the FTC. The FTC rejected it as insufficient and the parties proposed their "fix" to the court as part of their defense of the acquisition. "Litigating the fix" has become a standard component of most merger trials. Here, as in other recent or highly publicized matters (*e.g.*, *FTC v. Tempur Sealy*, 768 F. Supp. 3d 787 (S.D. Texas, 2025); *FTC v. Microsoft*, 681 F. Supp. 3d 1069 (N.D. Ca. 2023), *aff'd*, 136 F.4th 954 (9th Cir. 2025), *U.S. v. United Health Group*, 630 F. Supp 3d 118 (D.D.C. 2022); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020), *U.S. v. AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)), the district court accepted the fix as sufficient to address the competitive concerns arising from the merger. *FTC Chair Andrew Ferguson had recently identified the direct proposal of fixes to the court, after a complaint has been filed, as "a real problem [the Commission] need[s] to address," and bad for the merger investigation and clearance "system." He promised "some FTC action on this in the future." See* Bryan Koenig, *FTC Chair Pledges Action Against Late Merger Fixes*, Law360 (Sept. 16, 2025).

Non-Merger Developments: FTC Loses its Seven-Year Monopolization Case Against Meta, Antitrust Division Proposes an Expansive Definition of Competitively Sensitive Information in Proposing to Settle an Illegal Information Sharing Matter & Court Requires Forfeiture and Restitution in a Criminal Wage Fixing Matter

A district court ruled against the FTC in the FTC's seven-year monopolization investigation and litigation against **Meta.** In its December 2020 complaint (dismissed for failure to state a claim (*FTC v. Facebook*, 560 F. Supp. 3d 1 (D.D.C., 2021)), and its August 2021 amended complaint the FTC alleged that Meta (then Facebook) was engaged in a systematic strategy — including through its acquisitions of Instagram and WhatsApp — to eliminate threats to its monopoly in a market for personal social networking. The FTC's amended complaint survived Meta's motion to dismiss and motion for summary judgment (*FTC v. Facebook*, 581 F. Supp. 3d 34 (D.D.C. 2022); *FTC v. Meta Platforms*, 775 F. Supp. 3d 16 (D.D.C. 2024)) and went to trial in the Spring of 2025.

In its merits opinion, the district court rejected the FTC's proposed market definition – which focused on users' interaction with family and friends, and which was limited to Facebook and Instagram, SnapChat and MeWe — as inconsistent with how users *presently* interacted with Facebook's and Instagram's platforms. The district court identified a market for social media apps, as evidenced by users common behavior across individual platforms. That market included Tiktok, and also plausibly included Youtube, as well as the participants in the FTC's proposed market for personal social networking. Evaluating the FTC's evidence of harm in a market for social apps, the court determined that the evidence did not show that Meta had monopoly power. With no showing of monopoly power, the FTC's claim of a systematic campaign to maintain monopoly power failed. *FTC v. Meta Platforms*, 2025 WL 3458822 (D.D.C., Dec. 2, 2025).

The FTC has not yet indicated whether it intends to appeal the district court decision. However, an appeal would face a significant hurdle, given appellate courts tend to defer to the district court's findings of fact. Here, the district court made extensive findings of fact that undercut the FTC's proposed market definition and identification of the participants in that market. An appellate court cannot easily re-evaluate that evidence. The FTC may have made a tactical mistake in choosing to file in district court rather than within its own administrative process. The statutory language allowing the FTC to file in district court restricts the FTC to situations where it can show an ongoing violation of law. The decision allowed, and according to the district court, required, the district court to evaluate the competitive dynamics of the relevant market in the present, and not at the time of Facebook's acquisitions of Instagram and WhatsApp. *The district court opinion finding significant changes in user behavior in the years since the acquisitions and since the FTC filed it complaints, is consistent with the position of acquisitive companies – that acquisitions of smaller market participants or new market*

entrants is not intended to build a so-called moat around an existing market but an attempt to expand functionality of an existing product, thereby, at least potentially, broadening the use of the product and expanding rather than contracting the number of competitive alternatives.

The Antitrust Division moved to settle its August 2024 complaint against **Realpage, Inc.**, and adopted a very broad, effects-based definition of competitively sensitive information in the proposed settlement. The complaint alleged that RealPage's use of a pricing algorithm to recommend apartment rental rates and other lease terms to competing landlords was an unlawful sharing of competitors' pricing information and a series of vertical agreements between Realpage and individual landlords to align pricing and other rental terms of horizontal competitors through the use of a common pricing algorithm. The Antitrust Division also alleged that the conduct illegally monopolized (or, in the alternative, attempted to monopolize) the commercial revenue management software market through the "amass[ing] of a massive reservoir of competitively sensitive data from competing landlords" that unlawfully excluded rivals from the relevant market unless they too entered into similar illegal agreements.

The proposed settlement would, among other things, require Realpage to: (i) stop using competitors' nonpublic, competitively sensitive information to determine rental prices; (ii) stop using active lease data for purposes of training algorithmic models; (iii) remove or redesign its algorithmic models that limited price decreases or aligned pricing between competing users of its pricing software; (iv) cease conducting market surveys to collect competitively sensitive information; and (v) cooperate in the government's lawsuit against property management companies that have used its software. *Antitrust compliance programs based around specific categories of data – price, non-price terms related to price, output and capacity utilization –focused on relatively current pricing or non-price information may need to be updated to account for the Antitrust Division's continuing move towards an effects based analysis of what constitutes competitively sensitive information. Note too that the proposed consent order in the Boeing/Spirit matter discussed above limited Boeing's access to Nonpublic Information – "all confidential and proprietary nonpublic information (information that is not generally known or otherwise publicly available)" – to specific firewalled employees. This is also a broader definition of competitively sensitive information than may be included in corporate antitrust compliance programs.*

Pricing in housing markets is of interest to the FTC too. The Commission recently obtained significant monetary relief from Greystar, the largest multi-family rental property manager in the U.S., for engaging in deceptive advertising practices with respect to monthly rent costs. (Greystar was also a defendant in the Antitrust Division's litigation against Realpage; Greystar settled with the Department of Justice in August 2025.) In a statement accompanying the settlement, FTC Chair Ferguson indicated he had directed FTC staff to begin a rulemaking process to define unfair and deceptive fees in rental housing.

A federal district court sentenced an individual previously convicted of conspiracy to fix the wages of home healthcare nurses and fraud in the sale of his home healthcare staffing company to 40 months in custody, $550,000 in criminal fines, $2.5 million in criminal restitution, and forfeiture of $10.5 million obtained in the fraudulent sale of a home healthcare company. The seller had concealed the government's antitrust investigation from the buyer during the sale of the home healthcare company. The conviction in April was the Antitrust Division's first criminal conviction, at trial, for wage-fixing.

Resignation of FTC Commissioner Melissa Holyoak

FTC Commissioner Melissa Holyoak left the Commission upon her appointment as interim United States Attorney for the District of Utah by Attorney General Pam Bondi on November 17. Prior to her confirmation as an FTC Commissioner, Holyoak had served as Utah's Solicitor General. This leaves the Commission with only two Commissioners. The Commission's Rules of Practice allow the Commission to function with only two, or even one, Commissioners. However, this Rule (16 C.F.R. §4.14(b)) has never been tested in court, and might be viewed as inconsistent with

the structure of a multi-member Commission. Ryan Baasch, Special Assistant to the President for Economic Policy, National Economic Council ("NEC") is reported to be President Trump's choice to replace former Commissioner Holyoak. Baasch focuses on AI regulation and related issues, space commercialization, and telecommunications issues in his White House position. Prior to joining the NEC, he was at the Texas Attorney General's office, where he helped lead the office's cases against major technology companies.