



## **Quorum - December 2025**

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### **Table of Contents:**

- **Delaware Court of Chancery Sustains Caremark Claims in Shareholder Derivative Action**
- **The SEC Says It Will Not Review No Action Requests for Certain Shareholder Proposals and Approves Exxon Mobil's Retail Investor Voting Program**
- **Thumbs Up for Upjohn: Sixth Circuit Upholds Privilege for Internal Investigations**
- **Antitrust Agency Enforcement Round-Up**

## Delaware Court of Chancery Sustains Caremark Claims in Shareholder Derivative Action



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In a recent decision, *Brewer v. Turner, et al.*,<sup>[1]</sup> Chancellor Kathaleen McCormick largely denied Regions Financial Corporation's ("Regions")<sup>[2]</sup> motion to dismiss a shareholder derivative action, which sought to recover \$191 million Regions paid pursuant to a Consent Order, that found Regions utilized unlawful overdraft fee practices. Plaintiff principally alleged that the individual defendants "failed to timely establish a system of oversight to monitor compliance and allowed Regions' overdraft policies" to persist unlawfully.<sup>[3]</sup> Most notably, the court determined that a draft whistleblower complaint penned by Regions' former deputy general counsel qualified as a "red flag." The decision is a good reminder for companies not to neglect detailed whistleblower complaints, especially from high-level employees with legal compliance duties. To avoid potential *Caremark* liability, a board that receives a "red flag" – information putting directors on notice of misconduct and illegality or insufficiency of internal controls – should take affirmative steps to promptly end those practices.

### **Background**

The Consumer Financial Protection Bureau ("CFPB") has enforcement power under the Consumer Financial Protection Act of 2010, which bars deceptive overdraft practices by banks. In 2018, Regions created a working group to evaluate its overdraft practices. In 2019, the Regions board received a draft whistleblower complaint from its former deputy general counsel. The whistleblower complaint alleged, *inter alia*, that Regions terminated him for identifying Regions' unlawful overdraft practice. In particular, the whistleblower complaint laid out Regions' "history of violating laws and regulations related to overdraft fees,"<sup>[4]</sup> asserted that the author attempted to persuade Regions to cease charging the unlawful overdraft fees as early as March 2019, and indicated that Regions executives intentionally avoided addressing the unlawful overdraft practices due to concerns that doing so could impact revenue. Regions and the former deputy general counsel reached a confidential settlement. In response to the whistleblower complaint, Regions retained a law firm to review its overdraft practices. In December 2019, the law firm wrote a memorandum to the Audit Committee of Regions' board of directors setting forth its conclusions.

In September 2020, the CFPB served a Civil Investigative Demand on Regions with respect to its overdraft practices. Regions thereafter stipulated to a Consent Order, which was entered on September 28, 2022.<sup>[5]</sup> In a summary of its investigative findings, the CFPB said that Regions ran afoul of the Consumer Financial Protection Act of 2010 and other statutes and regulations by utilizing deceptive "unintelligible and manipulative processes" to charge consumers over a hundred million dollars in overdraft fees to accounts with adequate funds. As part of its settlement with the CFPB, Regions paid a \$50 million monetary penalty and approximately \$141 million to affected customers.

In October 2022, plaintiff lodged a books and records demand on Regions pursuant to Section 220 of the Delaware General Corporation Law. In response, Regions produced nearly 20,000 pages of documents. In December 2023, plaintiff, who held Regions stock continuously since 1999, brought a derivative action on behalf of Regions and Regions Bank. Plaintiff asserted claims for breach of fiduciary duty under *Caremark* and *Massey* against the director defendants and claims for breach of fiduciary duty against the officer defendants. Defendants moved to dismiss the

complaint under (i) Rule 23.1 for failure to plead demand futility and (ii) Rule 12(b)(6) for failure to state a claim.

### The Court of Chancery's Decision

As to demand futility, the court applied the test from *United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021).[6] Plaintiff alleged that nine of the 14 demand board members (who sat on the board when the complaint was filed) face a substantial likelihood of liability from the asserted claims, and therefore, demand was futile.[7]

The court focused its analysis on plaintiff's *Caremark* claims, which it viewed as the strongest. As the court reminded readers and the parties, *Caremark* claims seek "to hold directors accountable for a corporate trauma" where the directors knew or should have known about the risk leading to the trauma. To state a *Caremark* director oversight liability cause of action, a plaintiff must allege particularized facts demonstrating (1) that "the directors utterly failed to implement any reporting or information system or controls" or (2) "having implemented such a system or controls, consciously failed to monitor or oversee its obligations thus disabling themselves from being informed of risks or problems requiring their attention [*i.e.*, the red flags theory]."[8] "In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations." [9] The court focused its analysis on plaintiff's red flags theory of *Caremark* liability because it found that both the documentary evidence and the complaint demonstrated that Regions had an information system regarding its overdraft policies and procedures.

Plaintiff alleged that Regions unlawfully charged overdraft fees on transactions that had an adequate balance at the time of authorization but then later settled with an inadequate balance. Plaintiff also alleged the board ignored clear warnings that Regions' overdraft policies were unlawful. Strikingly, the court characterized the whistleblower complaint as the "most powerful red flag." [10] Despite the fact that the whistleblower complaint's author also accused Regions of employment discrimination and Regions characterized him as someone who "creates problems," the court viewed the whistleblower complaint as credible and exhaustive, placing particular emphasis on the whistleblower's role at Regions as an in-house attorney. Furthermore, the whistleblower complaint, *inter alia*, pointed out that charging overdraft fees "on an authorized signature-based point-of-sale transaction that settles into a negative balance" violated the Federal Trade Commission Act. [11] According to the court, "[g]iven its contents, it is reasonably conceivable that the . . . [c]omplaint alerted the Board to the illegal nature of Regions' overdraft fee practice." [12] In the court's estimation, "had the Board cut off illegal overdraft practices when it received the [whistleblower] [c]omplaint, then Regions could have mitigated the damages paid under or avoided the 2022 Consent Order altogether." [13]

As to whether the board failed to act in good faith in response to the red flag, the court reasoned that while "[h]iring counsel to advise regulatory risk is a good thing," "[m]erely hiring an attorney in response to a red flag, therefore, does not provide the absolute Defendants seek." [14] The court rejected defendants' argument that the board responded to the red flags but just not on plaintiff's preferred timeline. According to the court: "Consciously delaying actions that a Board knows to be illegal supports an inference of bad faith." [15]

The court held that plaintiff sufficiently alleged that nine of 14 board members faced a substantial likelihood of liability for ignoring red flags about Regions' overdraft practices between 2018 and 2021. [16] As a consequence, the court maintained that demand was excused as futile, stating that it is "reasonably conceivable that [the relevant board members] are incapable of impartially considering a demand to pursue Plaintiff's *Caremark* claims." [17] The court held that four directors who had left the board before the complaint was filed but after the whistleblower complaint came to light could also face *Caremark* liability. However, the court granted defendants' motion to dismiss as to the directors who

(i) left the board before receiving the whistleblower complaint and (ii) joined the board after the alleged wrongdoing ended.

### Takeaways

The court's decision largely to deny defendants' motion to dismiss is consistent with a recent trend in Delaware with respect to *Caremark* claims. Although *Caremark* claims are typically understood as “the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,”<sup>[18]</sup> Delaware courts—in the last couple of years—have sustained *Caremark* claims at the pleading stage in numerous cases.<sup>[19]</sup>

Still, it is notable that the court found a whistleblower complaint to be a red flag at the pleading stage, particularly where the director defendants engaged counsel to review the claims in the letter. While the court observed that defendants made “good points” in arguing that the whistleblower complaint's author had an axe to grind (i.e., the whistleblowing claims “were mixed in with unusual allegations of reverse gender discrimination”<sup>[20]</sup>), it ultimately concluded that plaintiff's red flags theory was successful because the whistleblower letter came from former in-house counsel. Moreover, it is noteworthy that the court viewed the board's delay—terminating its practices nearly two years after the law firm's report—in acting on the whistleblower complaint as exemplifying bad faith. In previous *Caremark* cases, courts have declared that a board's response to red flags ought not to be second-guessed.<sup>[21]</sup> This decision demonstrates that there are limits to that principle.

Companies should take note that unreasonable delay in responding to red flags and ending unlawful practices can potentially expose directors and officers to *Caremark* liability. And merely hiring attorneys will also not cut it; a board should take care to proactively follow-up on the attorneys' findings and take steps to address them.

<sup>[1]</sup> C.A. No. 2023-1284-KSJM, 2025 WL 2769895 (Del. Ch. Sept. 29, 2025).

<sup>[2]</sup> Regions, a Delaware corporation headquartered in Alabama, operates Regions Bank (an Alabama state-chartered commercial bank). *Id.* at \*2.

<sup>[3]</sup> C.A. No. 2023-1284-KSJM, 2023 WL 9037945 (Del. Ch. Sept. 29, 2025) (Verified Stockholder Derivative Complaint).

<sup>[4]</sup> C.A. No. 2023-1284-KSJM, 2025 WL 2769895, at \*4 (Del. Ch. Sept. 29, 2025).

<sup>[5]</sup> According to plaintiff, the 2022 CFPB Consent Order was not Regions' first time being fined and ordered by the CFPB to alter its overdraft practices. *See* C.A. No. 2023-1284-KSJM, 2023 WL 9037945 (Del. Ch. Sept. 29, 2025) (Verified Stockholder Derivative Complaint).

<sup>[6]</sup> “[C]ourts should ask the following three questions on a director-by-director basis when evaluating allegations of demand futility: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct . . .” *Zuckerberg*, 262 A.3d at 1059. “If the answer to any of the questions is ‘yes’ for at least half of the members of the demand board, then demand is excused as futile.” *Id.*

<sup>[7]</sup> The demand futility analysis centered around whether plaintiff stated a claim under Rule 12(b)(6) against the demand board members. *See, e.g., Grabski v. Andreessen, et al.*, C.A. No. 2023-0464-KSJM, 2024 WL 390890, at \*7 (Del. Ch. 2024) (“Because showing that a defendant faces a substantial likelihood of liability from a claim requires that the claim be legally viable, as to the Director Defendants, the Rule 23.1 analysis effectively folds into the Rule 12(b)(6) analysis.”).

<sup>[8]</sup> *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

[9] *Id.*

[10] C.A. No. 2023-1284-KSJM, 2025 WL 2769895, \*12 (Del. Ch. Sept. 29, 2025).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at \*13.

[15] *Id.*

[16] The court did not address plaintiff's *Massey* theory in its demand futility analysis.

[17] *Id.* at \*14.

[18] *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) (internal quotations and citations omitted).

[19] *See, e.g., In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343, 380 (Del. Ch. 2023) ("It is enough to hold that the complaint's allegations support a claim against Fairhurst for breach of the duty of oversight."); *Guiliano v. Grenfell-Gardner*, C.A. No. 2021-0452-KSJM, 2025 WL 2502176, at \*11 (Del. Ch. 2025) ("Plaintiff adequately alleges at least a red-flags claim against Grenfell-Gardner and Richardson. Just as it is reasonably conceivable that he Board failed to receive notice of red flags, it is reasonably conceivable that Grenfell-Gardner and Richardson were aware of the red flags and failed to report them to the Board.").

[20] C.A. No. 2023-1284-KSJM, 2025 WL 2769895, at \*14 (Del. Ch. Sept. 29, 2025).

[21] *See, e.g., Clem v. Skinner*, 2024 WL 668523, at \*8 (Del. Ch. 2024) ("Claims that quibble with the timing or success of corrective action necessarily fail."); *id.* ("Because bad faith is the touchstone of *Caremark* liability, the court's role is not to second-guess a board's response to a red flag.").

## The SEC Says It Will Not Review No Action Requests for Certain Shareholder Proposals and Approves Exxon Mobil's Retail Investor Voting Program



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On November 17, 2025, the SEC's Division of Corporation Finance (the "[Division](#)") [announced](#) how it will handle requests relating to shareholder proposals under Rule 14a-8. During the 2025-2026 proxy season (until September 30, 2026), the Division will not respond to requests for no action relief received from companies and will not express a view on a company's reliance on any basis for exclusion of a shareholder proposal under Rule 14a-8, other than no-action requests to exclude a shareholder proposal under Rule 14a-8(i)(1). The Division stated that the shift is due to resource limitations following the government shutdown and the high volume of registration statements and other filings that require prompt attention. The Division also noted that there is an extensive body of guidance from the SEC and its staff that remains available to both companies and proponents of shareholder proposals.

Notwithstanding the change, companies must still comply with Rule 14a-8(j), which requires companies to provide notice to the SEC (with a copy to the proponent) of any planned exclusion at least eighty days before the filing of the definitive proxy statement. As a result of the change in policy, the Division noted that the requirement under Rule 14a-8(j) is "informational only." For companies that desire to receive some indication of a response for a proposal sought to be excluded, the company may, as part of its notice, include an unqualified representation stating that the company has a reasonable basis to exclude the proposal. In this situation, the Division will issue a letter stating that "based solely on the company's or counsel's representation" it has no objection to the exclusion.

As part of the statement, the Division reaffirmed that prior responses to no-action requests do not bind the staff and reflect informal views, which can cut both ways. "The absence of a prior staff response indicating that the staff agreed that there was some basis to exclude a particular type of proposal does not mean that companies cannot form a reasonable basis to exclude the proposal. Likewise, a prior staff response indicating that the staff was unable to concur with a company's view that a proposal may be excluded does not mean that companies cannot form a reasonable basis to exclude the same or a similar proposal."

The announcement makes clear that the SEC will continue to consider no-action requests that rely on Rule 14a-8(i)(1), which permits a company to exclude a shareholder proposal "if the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." SEC Chairman Paul S. Atkins noted in a recent [speech](#) that Rule 14a-8 provides a mechanism for shareholders to bring forward proposals that could properly be brought before a shareholder meeting under state law, which is particularly relevant for precatory proposals. In his speech, Chairman Atkins also referred to note 1 to Rule 14a-8(i)(1) which provides that the SEC "will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise."

Following this announcement from the Division, SEC Commissioner Caroline A. Crenshaw released a [statement](#) expressing concern that the new approach will shift influence toward issuers and away from shareholders, warning that companies may rely on unsupported claims of a reasonable basis for exclusion and receive a no-objection letter without staff review. She cautioned that this could reduce oversight of company decisions to exclude proposals and weaken the role

of shareholders in the proxy process and cautioned that the statement was “an act of hostility toward shareholders.” Commissioner Crenshaw’s statement highlights the wider debate surrounding shareholder participation.

The SEC recently weighed in on another company proposal with the potential to have a major impact on shareholder participation. In September 2025, the SEC granted [no-action relief](#) for Exxon Mobil’s new voting program designed for retail investors.

Under Exxon’s program, retail investors may opt in to give a standing instruction to vote in line with the board’s recommendations. This can apply to (i) all items or (ii) all items other than contested director elections and major transactions that require shareholder approval. The program is open to all retail investors, including both registered owners and beneficial owners, at no cost. However, the program is not available to investment advisers under the Investment Advisers Act of 1940. Shareholders who enroll will receive an annual reminder of their selection, along with notice that they may cancel the instruction at any time. Participants will continue to receive all proxy materials for upcoming meetings and may override the standing instruction by voting directly. Exxon will also describe the program in its proxy materials and on its website.

Exxon sought assurance that the program would not lead to enforcement under Exchange Act Rules 14a-4(d)(2) and 14a-4(d)(3). These rules generally prevent a proxy from granting authority to vote at more than one meeting. Exxon argued that its program complies with the rules because each standing voting instruction is renewed when the shareholder receives the annual reminder or reviews the proxy materials.

Notwithstanding the SEC’s grant of no-action relief, the program has drawn significant opposition. Two shareholder advocacy groups argued in letters to the SEC that the standing instruction conflicts with the plain terms of Rule 14a-4(d)(2) and (d)(3), thus reducing informed voting and weakening investor engagement. Similarly, a shareholder class-action suit was filed arguing that the program violated several Exchange Act rules because the materials do not identify the matters to be voted on, do not allow contemporaneous choice on each item, seek authority for more than one meeting and are potentially misleading solicitation materials, and does not provide investors key information.

Taken together, the recent SEC announcement as to Rule 14a-8 proposals and the Exxon no-action letter, reflect an important moment in the proxy landscape. The distance the Division is taking from shareholder proposal review and the SEC’s decision to permit standing voting instructions may be indicative of a broader shift in how authority over the proxy process is being allocated among companies, shareholders and the SEC staff. Notably, the outcome of Exxon’s shareholder litigation could impact adoption of similar programs.

## Thumbs Up for Upjohn: Sixth Circuit Upholds Privilege for Internal Investigations



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On October 3, 2025, in *In re FirstEnergy Corp.*, the U.S. Court of Appeals for the Sixth Circuit vacated a district court order that, if permitted to stand, would have required wholesale production of materials generated in an internal investigation, led by outside counsel, into a company's involvement in an alleged bribery scheme. [1] The Court held that the attorney-client privilege and work product doctrine protected disclosure of investigative materials directed by legal counsel, even though the company later relied on the investigation to make business decisions. *FirstEnergy* reaffirms the continued vitality of the Supreme Court's 45-year-old *Upjohn* decision upholding privilege and work product protections for counsel-led internal investigations, where legal advice is sought and future litigation reasonably anticipated.[2]

### Background

In late 2016, FirstEnergy, a struggling Ohio-based utility company, allegedly participated in a scheme to bribe a member of the Ohio House of Representatives with millions in campaign contributions to advance legislation that would give FirstEnergy a \$1.3 billion bailout. In July 2020, federal authorities charged the representative with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and subpoenaed FirstEnergy. The criminal complaint against the representative described an unnamed company (understood to be FirstEnergy) funding the bribery scheme. Upon the news, FirstEnergy's stock dropped 45%, and the company and its board each hired law firms to conduct an internal investigation into the alleged malfeasance. Regulatory investigations ensued, as well as a raft of civil lawsuits asserting securities and civil RICO claims. [3]

Among these lawsuits, two shareholders filed class actions in the Southern District of Ohio against FirstEnergy on behalf of all shareholders that bought stock during the alleged bribery scheme, claiming fraud in violation of federal securities laws. Amid discovery, the plaintiffs moved to compel the production of all previously withheld documents related to the law firms' internal investigations.[4] Plaintiffs also demanded that the Court order FirstEnergy's witnesses to "answer all questions (past and future) related to the internal investigation[s]." The Court agreed, finding that the internal investigations were not protected by attorney-client privilege or the work-product doctrine and ordering FirstEnergy to produce all previously withheld files.[5] After the district court denied FirstEnergy's motion to certify the order for interlocutory review, the company sought mandamus relief from the Sixth Circuit, contending that the attorney-client privilege and work product doctrine barred disclosure of the investigative materials at issue.[6]

### Decision

In a per curiam decision, Sixth Circuit Judges Sutton, Batchelder, and Nalbandian granted the company's mandamus petition in full and vacated the district court's order requiring production of internal investigation materials.

As an initial matter, the Court held that the attorney-client privilege and work product doctrine applied to protect the investigative materials from disclosure. Following the framework established in *Upjohn Co. v. United States*, the Court noted that an animating purpose of the board in hiring outside counsel was to secure legal advice through counsel's investigation into the company's potential criminal and civil liability.[7] Likewise, after the DOJ unsealed its criminal

complaint and subpoenaed the company, the company and its board reasonably and correctly anticipated that they would face government investigations, civil litigation, and regulatory proceedings, as well as federal securities law claims.<sup>[8]</sup> Those expectations directly prompted the internal investigations, triggering work product protection.<sup>[9]</sup>

In so holding, the Court rejected the district court's assessment that a business (not legal) purpose drove the investigations, because the company later relied on the fruits of the investigations to make business decisions related to human resources and public relations.<sup>[10]</sup> The Court observed that companies regularly consult their attorneys about various business problems—compensation plans, proposed sales, potential bankruptcy, or employee termination decisions. Such adjacent business purposes, however, do not transform legal advice into business advice.<sup>[11]</sup> In the context of the high-stakes criminal and civil allegations FirstEnergy faced, it would be rare for a company *not* to have a tangential business purpose for legal advice.<sup>[12]</sup> Instead, what matters when evaluating privilege is whether the company sought legal advice—and “FirstEnergy showed that it primarily sought and received legal advice from its attorneys throughout the investigations.”<sup>[13]</sup>

The Court further held that the district court's order requiring production of privileged investigative materials met the “lofty standard” required for mandamus relief.<sup>[14]</sup> The Court emphasized that the district court's error was clear and beyond the bounds of its discretion.<sup>[15]</sup> In the Court's view, there was no way to affirm the district court's ruling without abandoning nearly half a century of jurisprudence, flowing from *Upjohn*, establishing strong attorney-client privilege and work product protections in investigative settings. To rule otherwise would discourage full and frank communication between companies and their attorneys when investigating potential wrongdoing—a result the Sixth Circuit could not countenance.<sup>[16]</sup>

### Takeaways

*FirstEnergy* is a clear win for robust attorney-client privilege and work product protections in internal investigation settings. The decision reaffirms that companies facing potential criminal and civil liability can seek legal advice through confidential internal investigations, conducted by outside counsel, without undue risk of disclosure in follow-up civil litigation.

The Court was particularly sensitive to the high-stakes context, as FirstEnergy faced a “bet-the-company setting demanding apex legal advice” with criminal investigations, multiple regulatory proceedings, and numerous civil lawsuits all converging at once. The Court noted that undermining privilege in such circumstances would discourage companies from investigating their own potential wrongdoing, which would undermine sound corporate governance and compliance.

Crucially, under *FirstEnergy*, a company's subsequent reliance on investigative findings in making business decisions does not destroy the privilege or open up the investigative findings to disclosure. The district court sought to pierce the privilege by pointing out that FirstEnergy made business decisions based on the investigations, such as public relations messaging and employment decisions. The Sixth Circuit firmly rejected this reasoning, emphasizing that what matters is whether the company *sought* legal advice, not what it later *did* with that advice.

Nonetheless, *FirstEnergy* does not provide companies a blank check to cloak any internal investigation of any kind under a veneer of privilege. Rather, the record must show that legal advice was actually sought through the investigation, and potential litigation was truly and reasonably anticipated. In this regard, context matters and a court will pay “acute attention to the circumstances” surrounding the internal investigation, particularly the imminence of potential litigation. The Court also noted favorably that the FirstEnergy attorneys conducting the investigations met frequently with directors to discuss their investigative findings, legal analyses, and assessments of potential criminal and civil liability. Given the substantial exposure that would result from unanticipated disclosure, companies

should consult with competent outside counsel before embarking on internal investigations to ensure that all appropriate safeguards and processes are instituted at the outset.

[1] *In re FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025).

[2] *Id.* at 438-39.

[3] *Id.*

[4] *Id.* at 435-36.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 436-37. The court explained that *Upjohn* “sets the framework” holding that attorney-client privilege applies when a company seeks legal advice to assess risks of criminal and civil liability. *Id.* at 436. The court noted that “[w]hat was true for *Upjohn* is true for *FirstEnergy*. As with *Upjohn*, *FirstEnergy* and its board hired lawyers to secure legal advice” through internal investigations into the company's potential criminal and civil wrongdoing.” *Id.* Thus, as in *Upjohn*, these “communications—including outside counsels’ analyses about what acts occurred, whether those acts were illegal, and what criminal and civil consequences might ensue—all involved requested legal advice.” *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)).

[8] *Id.* at 437.

[9] *Id.*

[10] *Id.* at 438.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 438.

[14] *Id.* at 440 (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

[15] *Id.* at 441.

[16] *Id.*

## 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.4<sup>th</sup> 954 (9<sup>th</sup> 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 its 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.