

Competition Matters

Competition Matters is a recurring newsletter for clients and friends of Cohen & Gresser analyzing in depth an issue of current focus and summarizing recent public developments in the antitrust and competition areas at the Federal Trade Commission and the Department of Justice. Our goal is to highlight issues of significant recent practice interest in an informative and readable manner.

C&G ANTITRUST IN-DEPTH

DOJ Increasing Focus on VC Firms and their AI Companies for Possible Clayton Act Section 8 Violations

As reported last month, the DOJ has been investigating venture capital firm Andreessen Horowitz for nearly a year over possible violations of Section 8 of the Clayton Act, which prohibits interlocking directorates.^[1] The DOJ has not commented publicly on the investigation, but apparently at issue is Andreessen Horowitz partners serving on the boards of competing AI companies. Specifically, Ben Horowitz, an Andreessen Horowitz co-founder, serves on the board of Databricks, while Martin Casado, an Andreessen Horowitz partner, serves on the board of Fivetran.^[2]

The investigation apparently began around the same time as the DOJ's review of Fivetran's acquisition of dbt Labs.

What is Section 8?

Section 8 of the Clayton Act prohibits a "person" from serving as a "director or officer in any two corporations (other than banks, banking associations, and trust companies)" that 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," provided that certain financial thresholds are met.^[3] The stated purpose of Section 8 is to prevent "violations of the antitrust laws before they occur,"^[4] such as by preventing the sharing of competitively sensitive information and the coordination of business decisions. Therefore, the statute does not require any evidence that the interlock results in harm to competition.^[5]

Section 8 violations can arise when a venture capital firm invests in, and its partners serve on the board of, companies in the same industry. These conflicts may not exist or be apparent when a venture capital firm initially backs different companies in the same industry, but the companies may eventually become competitors as they grow and expand into new product areas. If future events cause previously existing, lawful representations on two boards to create an unlawful interlock, there is a one-year grace period for the director or officer to resign.^[6]

As described above with the FTC's acceptance of the settlement in the Beretta interlocking directorates case, both the FTC and DOJ have recently been investigating Section 8 issues.

[1] See Josh Sisco, Natasha Mascarenhas and Sarah Frier, Andreessen Horowitz Focus of DOJ Probe Over Board Directors, Bloomberg, Aug. 17, 2026, <https://www.bloomberg.com/news/articles/2026-08-17/andreessen-horowitz-focus-of-doj-probe-over-board-directors>.

[2] Id.

[3] Section 8 applies only where each corporation has "capital, surplus, and undivided profits aggregating" more than \$54,402,000. Moreover, interlocks are exempt under Section 8 where (i) either corporation's "competitive sales," as defined in the statute, are less than \$5,440,200; (ii) either corporation's "competitive sales" are less than 2 percent of its total sales; or (iii) each corporation's "competitive sales" are less than 4 percent of its total sales. These thresholds are adjusted annually by the FTC. 15 U.S. Code § 19(a); Press Release, FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates, FTC, Jan. 14, 2026, <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-announces-annual-update-size-transaction-thresholds-premerger-notification-filings-interlocking>.

[4] Press Release, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates, U.S. Dep't of Justice, Oct. 19, 2022, <https://www.justice.gov/archives/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>. [hereinafter DOJ Oct. 19 Press Release].

[5] See Debbie Feinstein, Have a Plan to Comply With the Bar on Horizontal Interlocks, FTC, Jan. 23, 2017, <https://www.ftc.gov/enforcement/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks>.

[6] 15 U.S.C. § 19(b).

How broad is the definition of “person” under Section 8?

Traditional Section 8 enforcement involved one person sitting on the board of two competing companies. The text of the Clayton Act, though, is broader and in recent years the FTC and DOJ have expanded Section 8 enforcement. The Clayton Act defines “person” to include corporations.^[1] The agencies have interpreted “person” in Section 8 to include not only individual directors, but also corporate entities that are represented by natural persons as officers or directors.^[2] This interpretation means that a firm can be in violation of Section 8 if two different partners serve on competing boards.

The DOJ has already used this interpretation of “person” to increase scrutiny of private equity firms for Section 8 violations. For example, in 2022, the DOJ announced that seven directors had resigned from their positions on corporate boards after the DOJ contended that their service violated Section 8 of the Clayton Act.^[3] While the interlocks involved five different pairs of firms, the DOJ said that one of the seven directors represented technology-focused private equity firm Thoma Bravo on the boards of SolarWinds Corp. and Dynatrace, Inc., both of which provide Application Performance Monitoring software, and two others represented Thoma Bravo on the board of SolarWinds only.^[4]

Thus, not only did the DOJ contend that it was impermissible for a single individual to serve on both boards; it also apparently took the position that any Thoma Bravo representation on both boards constituted unlawful service by a “person,” and thus required all three Thoma Bravo representatives on the SolarWinds Board to resign.

Whether courts will agree with the agencies’ expanded definition of Clayton Act enforcement is unclear. However, the agencies’ interpretation of “person” is in line with at least one court’s interpretation, although that court held that liability attaches only when the “service [of the directors] on the boards is not in their individual capacities, but as the deputies” of the private equity firm, “acting as the puppets or instrumentalities of the corporation’s will.”^[1]

When are companies “competitors” under Section 8?

Section 8 is only concerned with interlocks where the companies are competitors, so the definition of competitors is essential to determining whether Section 8 applies. Case law has held that ordinary principles of market definition apply for purposes of Section 8.^[2] Courts have rejected a connection to Section 7’s definition of competition in the merger context.^[3] In 1990, Congress considered and ultimately rejected a proposed change to Section 8 that would have tied competition under Section 8 to Section 7’s merger standard. Under this proposed revision, section 8 would have applied when firms were “competitors, so that a merger, acquisition or combination involving such corporations would substantially lessen competition or tend to create a monopoly.”^[4] Since the revision failed, the case law standard holds.

What does this mean for VC companies?

With the news of the open investigation into Andreessen Horowitz, it appears that the DOJ may be bringing similar scrutiny to the venture capital industry that it had to the private equity industry.

This scrutiny may come as a surprise to VC firms, especially in the AI industry, where it is not uncommon to invest in rival companies. For example, several VC firms invested in both Anthropic and OpenAI – two of the largest direct competitors.^[5] While there is already some risk that investors in competing private companies could receive confidential business information, that risk grows when there are board seats involved.

VC firms should periodically review board memberships for potential conflicts. Companies that may not have been competitors at the time of an initial investment may become competitors as the companies evolve. Where VC firms invest in dozens, or hundreds, of companies, these conflicts may not be obvious at first glance.

[7] 15 U.S.C. § 12(a).

[8] See Michael E. Blaisdell, Interlocking Mindfulness, FTC, June 26, 2019, <https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness> (stating Section 8 prohibits “one firm from appointing two different people to sit as its agents as officers or directors of competing companies, subject to a few limited de minimis exemptions”).

[9] DOJ Oct. 19 Press Release.

[10] Id.

[11] Reading Int’l, Inc. v. Oaktree Cap. Mgmt. LLC, 317 F. Supp. 2d 301, 331 (S.D.N.Y. 2003).

[12] See Am. Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 980-81 (D. Md. 1981); TRW, Inc. v. F.T.C., 647 F.2d 942, 946 (9th Cir. 1981).

[13] See Protectoseal Co. v. Barancik, 484 F.2d 585, 588 (7th Cir. 1973); U. S. v. Sears, Roebuck & Co, 111 F. Supp. 614, 620 (S.D.N.Y. 1953).

[14] Interlocking Directorate Act of 1989, H.R. 29, 101st Cong. (as introduced on Jan. 3, 1989).

[15] Julie Bort, With AI, investor loyalty is (almost) dead: At least a dozen OpenAI VCs now also back Anthropic, TechCrunch, Feb. 23, 2026, <https://techcrunch.com/2026/02/23/with-ai-investor-loyalty-is-almost-dead-at-least-a-dozen-openai-vcs-now-also-back-anthropic/>.

Federal Trade Commission Round Up

FTC Resolves Corteva Enforcement Over Post-Patent Loyalty Program

On September 28th the FTC announced that it had accepted a settlement with pesticide manufacturing giant Corteva Inc. that dismantles Corteva's existing pesticides loyalty program, which had limited distributors' ability to do business with generic competitors seeking to enter the market. For a period of 10 years, the stipulated order prohibits Corteva from conditioning payments or other benefits to a distributor on that firm purchasing a high share of a given pesticide active ingredient from Corteva or similarly limiting its purchases of generic equivalents. The settlement resolves an enforcement action brought by the FTC and states in 2022, which alleges that Corteva implemented a post-patent loyalty program that paid distributors to block competitors from selling cheaper generic products to farmers. The FTC's complaint makes similar allegations as to Syngenta—another pesticide manufacturing giant—and its post-patent loyalty program. The FTC's settlement resolves only the claims against Corteva, and the litigation against Syngenta remains ongoing.

FTC Clarifies "Second Request" Process

On September 24th the FTC published in the Federal Register a modification to the "Second Request" process applicable to merger investigations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (set forth at 16 C.F.R. Parts 801 to 803). Prior to such modification, which is effective September 24th, the FTC's authorized representative was empowered to modify a Second Request, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if the authorized representative "determine[d] that a less burdensome request would be consistent with the needs of the investigation." The FTC modification clarifies that, in determining whether to modify the request or recommend a modification, the authorized representative may consider all relevant factors, including: (1) timing agreement negotiations; (2) the competitive issues involved; (3) the manner in which information and documents are maintained by the recipient; (4) the type of information available to the recipient; (5) the relative burdens to the recipient(s) of producing the requested information; and (6) whether a less burdensome request would be consistent with the needs of the FTC's investigation.

FTC Resolves Beretta/Ruger Interlocking Directorate Issue

On September 16th the FTC accepted a settlement from two of the largest firearm manufacturers, Beretta Holding S.A. (Beretta) and Sturm, Ruger & Co. Inc. (Ruger), prohibiting Beretta from appointing or nominating anyone to serve on Ruger's board of directors unless that person is independent of Beretta. The FTC's consent order settles allegations that Beretta and Ruger's proposed stock purchase deal would create an illegal interlocking directorate arrangement in violation of Section 8 of the Clayton Act, which generally prohibits directors and officers from serving simultaneously on the boards of competitors. Under their proposed deal, Beretta will increase Beretta's investment in Ruger to up to 25% of Ruger's outstanding shares. The proposed deal would have allowed Beretta to appoint two members of Ruger's board of directors, which the FTC alleged would create an illegal interlocking directorate arrangement.

The proposed consent order also requires, among other provisions, that Beretta:

- Provide advance written notice to the Commission at least 15 days before appointing, designating, nominating, electing or otherwise causing any person to become a member of the board of directors of Ruger; and
- Not hire or enter into any financial or other relationship with any independent director nominated by Beretta and appointed to the board of directors of Ruger that would: (1) involve violating the independent director's fiduciary duty or (2) involve the exchange of nonpublic information received about Ruger to Beretta, until such independent director has ceased serving on the board of directors of Ruger for a period of one year.

FTC Successfully Encourages Fairfield Medical Center to Find Alternative Buyer

On September 2nd, the FTC's Bureau of Competition issued a statement announcing Adena Health's acquisition of Fairfield Medical Center (FMC), which followed an earlier FTC investigation of an earlier attempt by a different acquirer—OhioHealth—to buy FMC which had raised serious competitive concerns by the FTC Staff. More specifically, FTC Staff were concerned that the proposed transaction by OhioHealth risked raising costs and reducing the quality of care for consumers in Ohio, with additional concerns regarding the thoroughness of FMC's process to identify potential buyers. In light of these concerns, FTC Staff had encouraged FMC to seek alternative potential buyers, which attracted interest from multiple potential buyers and ultimately resulted in the abandonment of the OhioHealth/FMC proposed transaction and FMC's partnership with Adena Health.

Department of Justice Antitrust Division Round Up

Court Grants Interoperability and Data-Sharing Requirements in Google Monopolization Case

On September 16th, DOJ announced that the Antitrust Division had obtained substantial relief in its monopolization case against Google in advertising technology markets, including requiring close integration between Google's products and products offered by rivals, including the open-source solutions offered by Prebid as well as further relief that will help to pry open these markets to competition.

According to DOJ's announcement, the court imposed interoperability and data-sharing requirements, anti-discrimination remedies, and prohibitions on Google's self-preferencing bidding behavior. In addition to prohibiting Google's past anticompetitive conduct, the court ordered the following relief:

- **Required Integrations with Prebid and Competing Publisher Ad Servers.** Google must create and support integrations between AdX and Prebid, and DFP and Prebid, which is an open-source industry standard for real-time bidding.
- **Data Sharing.** The court imposed meaningful data-sharing requirements on Google. Google will be required to allow publishers to access and export their own data from DFP and AdX, which will make it easier for publishers to switch ad tech providers.
- **AdWords Must Bid in Non-Discriminatory Fashion.** The court ordered that AdWords cannot bid preferentially into AdX or other Google ad tech tools because of Google's ownership of those tools. AdWords also cannot bid directly into DFP.
- **Monitor.** A monitor will be put in place to facilitate enforcement of Google's compliance with the Final Judgment. Google will be subject to the oversight of this monitor and a technical committee for six years, the length of the Final Judgment.

DOJ and Pinnacle Reach Proposed Settlement of Algorithmic Coordination Complaint

On September 4th DOJ announced that the Antitrust Division had filed a proposed settlement in its complaint against Pinnacle Property Management Services LLC, as part of its ongoing enforcement action against algorithmic coordination, the use of competitors' competitively sensitive data, and other anticompetitive practices in rental markets across the U.S. This was in conjunction with previous settlements in the same enforcement action against RealPage Inc. and four other large landlords, Cortland Management LLC, Greystar Management Services LLC, LivCor LLC, and Willow Bridge Property Company LLC.

DOJ, along with state co-plaintiffs, had filed a complaint alleging that Pinnacle, with five other co-defendant landlords, actively participated in a scheme to set their rents using each other's competitively sensitive information through pricing algorithms. According to the DOJ complaint, Pinnacle and other landlords shared competitively sensitive data to generate pricing recommendations using RealPage's algorithms, which also included anticompetitive rules that aligned their pricing. Pinnacle and other landlords also allegedly conferred on competitively sensitive topics, such as pricing strategies, rents, and selected parameters for RealPage's software.

If approved by the court following Tunney Act review, the proposed consent decree will require Pinnacle to:

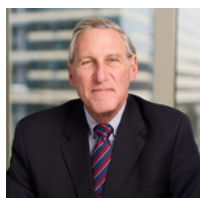
- Refrain from using any anticompetitive algorithm that generates pricing recommendations using its competitors' competitively sensitive data or that incorporates certain anticompetitive features;
- Refrain from sharing competitively sensitive information with competitors;
- Accept a court-appointed monitor if it uses a third-party pricing algorithm that is not certified pursuant to the terms of the consent decree;
- Refrain from attending or participating in RealPage-hosted meetings of competing landlords; and
- Cooperate with the United States' claims against other defendants.

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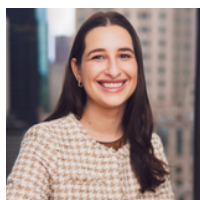
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Andrew Berg brings more than four decades of experience advising clients on complex antitrust, competition, and consumer protection matters. He has represented clients before the FTC, the Antitrust Division of the U.S. DOJ, state attorneys general, and in private litigation, offering strategic counsel on merger reviews, regulatory investigations, enforcement actions, and litigation. Andrew's practice focuses on antitrust and competition law, including merger control, competitor collaborations, monopolization, and pricing practices under the Sherman, Clayton, and Robinson-Patman Acts. He also advises on unfair and deceptive trade practices involving advertising, marketing, financial services, and data privacy, with extensive experience in regulatory compliance, investigations, and enforcement actions under the Federal Trade Commission Act and state analogues. His work spans both transactional and litigation contexts, including self-regulatory proceedings and Lanham Act disputes. Prior to joining Cohen & Gresser, Andrew served as Chair of the Global Antitrust Litigation & Competition Regulation Practice at Greenberg Traurig and held senior roles at several other prominent law firms. He also served as Senior Attorney Advisor to a Federal Trade Commissioner.

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