

Silicon Valley Association of General Counsel Roundtable: Tech, Tumult, and a New Administration

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Partner Susannah Torpey of Winston & Strawn's Technology Antitrust Group hosted a roundtable discussion for members of the Silicon Valley Association of General Counsel on July 28 titled "Tech, Tumult, and a New Administration."

The discussion reviewed the federal legislation being proposed against any company dominant in its space that engages in suspected monopolistic behavior, as well as potential reforms aimed specifically at the tech and health care industries. Winston attorneys also proposed action items that companies should consider when preparing for the coming changes.

Key takeaways from the roundtable include:

- The boundaries of collaborations with horizontal and vertical counterparties should be watched closely, particularly when it comes to requests from any third-party to refuse to deal with any other third-party and even within the context of legitimate alliances such as trade groups and joint ventures.
- There is continued innovation from the government and from private plaintiffs in developing novel antitrust theories of harm against companies that amass consumer data and use related algorithms in making business decisions, including that users should have meaningful choices amongst digital platforms and tech companies when it comes to the available terms and conditions related to data privacy.
- The change in administration and its new Executive Order on competition brings increased risk with the threat of greater enforcement, particularly with respect to criminal enforcement.
- But there are also more opportunities than before to shape the discussion, such as through comments to rule making and with more creative arguments considering a broader interpretation of harm to competition not just focused on the traditional consumer welfare standard.
- The administration is particularly focused on labor markets. While many companies thought there was no threat of criminal wage fixing and no poach cases during the Trump administration, indictments are now starting to come out and companies have announced cooperation with the Department of Justice such that more are likely on the horizon. The administration is also focusing on non-competes between employers and employees. To the extent

companies have not reviewed their agreements for overbreadth or did not take the threat of criminal enforcement seriously, they should do so now.

- The administration is reviewing its approach to the application of the antitrust laws to the use of intellectual property. We do not expect the guidance given to companies under the Trump administration to be completely revamped, but rather expect a more nuanced approach focused on abuses of market power flowing from assertions of IP that exceed the scope of granted rights.

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