Bloomberg Law

2026



Sharp Outlooks Into an Uncertain Future

- Litigation
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Introduction

Bloomberg Law 2026: Sharp Outlooks Into an Uncertain Future

Every year, Bloomberg Law asks its legal analysts to identify the key developments, data trends, and hot-button issues that they are noticing in the legal market today, follow them into the future, and predict what will happen in these areas in the year ahead.

But 2025 was not like every year. Seemingly from week to week, old paradigms buckled and new norms took hold, leaving the legal industry uncertain. With lawyers scrambling to make sense of the present, the task of predicting the future has become a thornier challenge than ever.

If legal prognosticating has seldom been more difficult, that also makes it all the more important. With so many areas of the law going through so many dynamic changes, lawyers need to know which areas deserve the most attention—and which ones can be regarded as more flash than consequence—as the new year begins.

It is through this real-world lens that Bloomberg Law has approached this latest installment of its annual outlook series, which takes a sharp, focused look ahead to what 2026 has in store for professionals in the legal industry.

This year's iteration features deep dives into trends across four broad themes: Litigation, Executive Orders & Authority, Corporations & Transactions, and Artificial Intelligence.

Our **Litigation** analyses examine developments inside and outside the courtroom that will shape the course of law in the year ahead. Topics include:

- What's next for the beleaguered Delaware court system amid rapid changes in corporate law
- Whether force majeure will be embraced as a survival strategy by businesses hard-hit by government actions on immigration
- Why intellectual property lawyers are exploring the International Trade Court as an alternative to traditional litigation
- What the cannabis industry can expect when the Supreme Court addresses gun ownership for drug users

Our **Executive Orders & Authority** analyses explore the most consequential changes in federal oversight and where they will lead lawyers in the year ahead. Topics include:

- Why the major questions doctrine will fade as a courtroom check on executive power
- Why a controversial drug discount program will be more vulnerable than ever in 2026
- What recent court cases signal about the survival of the National Labor Relations Board
- Why discovery will be a crucial battleground in Administrative Procedure Act lawsuits

Our **Corporations & Transactions** analyses focus on the trends and forces shaping key markets of interest in the year ahead. Topics include:

- How the SEC plans to set up a legal framework for cryptocurrency
- Why dealmakers are poised for a breakout year in M&A—especially across international borders
- Whether mergers among digital asset treasuries will create a new era of DAT lawsuits
- Where the conflict over debanking will lead the banking and crypto industries

Our **Artificial Intelligence** analyses address the most compelling challenges that generative AI will bring to legal professionals in the year ahead. Topics include:

- Why states are shifting from privacy regulation to AI regulation
- Why corporate legal departments will struggle to gauge the ROI of AI

Join Bloomberg Law's analysts as they preview the themes and trends that they will be keeping an eye on in 2026.



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Delaware on Edge Amid Corporate Law Inflection Point

Michael Maugans
Legal Analyst

The last two years in Delaware corporate law have been characterized by significant **upheaval**, and now the state's high court is in the unenviable position of determining Delaware's legal future. In 2026, the Delaware Supreme Court will likely issue opinions in two cases (***Musk*** and ***Rutledge***) that could fundamentally alter or undermine over a century's worth of corporate law precedent.

At the heart of these cases lies a common denominator: backlash to the Court of Chancery and its recent opinions that critics **argue** unfairly target controlling stockholders. The cases will test whether the state's high court believes Chancery crossed the proverbial Rubicon in its decisions, perhaps therefore justifying the legislative blowback that followed.

Despite unexpectedly having to contend with forces that transcend corporate law, including the anti-Delaware bullhorn of the world's wealthiest individual and a trend of larger companies reincorporating outside of Delaware, the Delaware Supreme Court will likely operate as a rational actor. In its desire to maintain an independent judiciary, the court in *Rutledge* will strike down Senate Bill 21 on the grounds that it unconstitutionally subsumes Chancery's equitable jurisdiction.

Relatedly, in the case that arguably kickstarted the current climate in Delaware, the high court will affirm Chancery's holding that Musk controls Tesla, but will ultimately soften the remedy from complete rescission to a less extreme equitable remedy.

Tornetta v. Musk and 'Control'

If the ongoing turmoil in Delaware can be traced to a singular event, it was the **invalidation** of Elon Musk's $56 billion compensation package from Tesla. In early 2024, Chancellor Kathaleen McCormick **ruled** that Musk, despite owning a minority share of 22% in Tesla, was a controlling stockholder of the company

and thus the negotiation of the bonus package was subject to the plaintiff-friendly entire fairness standard, rather than the de facto business judgment treatment.

As it stands under Delaware **law**, a controlling stockholder is defined as an entity that owns more than 50% voting shares; or, a minority shareholder can be a controller if they exert "actual control" over the corporation's business and affairs. The crux of this appeal is that question of control; namely, whether Musk is a controlling stockholder despite his relatively low 22% share, and what standard of review applies to the negotiation of his compensation package.

In a case like *Musk*, the appellate court will review mixed questions of law and fact (such as whether "transaction-specific" control is sufficient to warrant controller status). In other words, did Musk's actions, combined with his nearly one-quarter voting stake in Tesla, constitute control for purposes of applying entire fairness rather than the board-deferential business judgment standard?

SB 21 and Rutledge Question Scope of Chancery's Power

In March, responding to Chancery decisions like *Musk* that some saw as hostile to controlling stockholders, the Delaware legislature enacted **Senate Bill 21**, which among other changes provided a so-called "safe harbor" for corporate transactions involving controllers. *Rutledge v. Clearway Energy Group* challenges that bill, and the outcome of the case will inform the future of Delaware corporate law.

The first question **certified** to the Delaware Supreme Court was whether SB 21 violated the Delaware constitutional provision delegating jurisdiction to determine equitable issues to the Chancery. Among other things, the amendments actually define what constitutes a controlling stockholder.

The determination of control, like that in *Musk*, has historically been a common law analysis conducted by the judiciary. But fears among Delaware lawmakers that such Chancery opinions would drive large corporations away from doing business in the state caused the legislature to delineate a baseline level of control of no less than 33.33%—thus purporting to take that determination away from the Delaware judiciary.

The perks this bill provides to controllers are demonstrable. Even though SB 21 isn't retroactive, *if* the bill was applied to the *Musk* case for example, Musk would *not* be considered a controller. Since Musk owned only 22% of Tesla stock at the time of the lawsuit, under SB 21 a tribunal would not be permitted to engage in further fact finding with respect to Musk's control of Tesla.

What Will the Delaware Supreme Court Do?

Considering the higher level of deference owed to the trial court's factual findings, the Delaware Supreme Court will affirm the finding that Musk's actions constituted control of Tesla and thus warranted entire fairness treatment. However, in an effort to strike a balance, the court will impose a remedy less harsh than McCormick's complete rescission of the package, perhaps ***quantum meruit***. Apart from the merits, it's certainly also possible that the court will first stay this case pending the outcome of Rutledge, as both cases involve elements and definitions of control.

Rutledge is where the rational actor prediction will be tested. Since the issues presented deal directly with the scope of Chancery's equitable jurisdiction, the court will see SB 21 as a salvo against the concept of an independent Delaware judiciary. The Delaware Supreme Court will strike down the safe harbor provisions of SB 21 pertaining to controlling stockholders in order to preserve its jurisdiction.

What Does This Mean for Practitioners?

If the Delaware Supreme Court upholds SB 21 as well as Chancery's determination with respect to Musk's control, the state's corporate law will more or less remain at the status quo. The legislative response of SB 21 might have shaken Chancery enough that it will approach its analysis of controlled transactions more narrowly going forward, but there has been nothing in their decisions leading to these appeals that would indicate such a pivot. The Delaware Supreme Court's first priority will be returning the state's judicial system to equilibrium.

ITC Proceedings to Gain Traction in IP Enforcement

Travis Yuille
Legal Analyst

Enforcing intellectual property rights against foreign infringers has historically been a challenge. Elusive and often unknown parties operating abroad frustrate traditional litigation with due process, service, and jurisdictional thorns. Yet, litigation in federal district court remains the most common approach for IP holders seeking relief from foreign defendants, largely due to the availability of ex parte temporary restraining orders in plaintiff-friendly venues.

Next year, however, will see an increase in the number of complaints filed in another venue: the International Trade Commission. There are two main reasons for this: (1) broader applicability of the Tariff Act's domestic industry requirement following a court **ruling** in March and (2) uncertainty in the top jurisdiction regarding the constitutionality of ex parte injunctive relief in these cases.

Enforcing IP Through the ITC

Traditional patent infringement litigation in district court can take up to five years if a case goes to trial, and offers the plaintiff damages, lost profits, and injunctive relief. The ITC provides IP owners with an alternative path to protect their property from infringing imports, with limited remedies. ITC proceedings are resolved by an administrative law judge, typically within 18 months, and relief consists primarily of exclusion orders blocking imports of the defendant's products.

Complaints in the ITC are brought under **Section 337** of the Tariff Act, which covers all forms of intellectual property. In addition to proving infringement, ITC plaintiffs must satisfy an additional "domestic industry" element by demonstrating significant domestic investments in manufacturing, labor or capital, research and development, or licensing.

Historically, the ITC has been underutilized by IP owners. According to the Commission's own **statistics**, only 28 cases were filed in fiscal year 2025, and 50 in FY 2024. The over 13,000 federal cases **filed** under the patent, copyright, or trademark Nature of Suit in 2025 thus far dwarf the ITC's figures.

Federal Circuit Opens Door for More ITC Proceedings

In the past, the ITC has excluded from the "domestic industry" analysis expenses relating to warehousing, marketing, and distribution for products fully manufactured abroad, drawing a distinction between mere importers and truly "domestic" activity. In March of this year, however, the US Court of Appeals for the Federal Circuit clarified the scope of the domestic industry requirement in ***Lashify, Inc. v. ITC***.

Lashify, a US company that sells and distributes eyelash extensions, satisfied the domestic industry prong of Section 337 by demonstrating its investment in sales, marketing, and warehousing, the court said. Such activity constituted "capital or labor" under the law, even if Lashify's products were wholly foreign made, it said.

The *Lashify* decision will open up ITC proceedings for direct-to-consumer businesses that were previously excluded due to their product-sourcing practices. The number of these business is **projected to grow** by 14.5% next year, according to the International Trade Administration. Many of these businesses rely on foreign manufacturing and face steep competition in the online space, so trademark and design patent enforcement through the ITC will likely increase in the coming years.

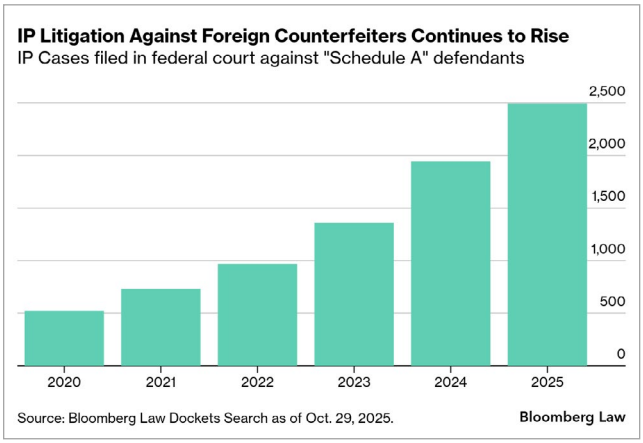
Skeptical Judges Push Back on Schedule A Cases

Shifting attitudes towards certain plaintiff-friendly procedural mechanisms in the Seventh Circuit may also push plaintiffs into the arms of the ITC.

When dealing with foreign infringers, identifying the infringing individual or company is itself a challenge. Often, plaintiffs may only know the online storefronts where the infringing sales are taking place.

A common practice in these instances is for plaintiffs to file an infringement case in federal court against unknown, unassociated "Schedule A" defendants and to immediately seek an ex parte temporary restraining order to freeze the assets of the infringing storefront. Plaintiffs argue—often successfully—that a TRO before service of process is necessary because defendants would simply shift operations to another alias if they knew a lawsuit was pending.

If it works, the Schedule A pipeline can be even faster and more cost effective than the ITC, which makes it the first choice for most IP owners. A **Bloomberg Law dockets search** as of Oct. 29 reveals a steady increase in patent, copyright, and trademark cases filed over the last few years against Schedule A defendants as the popularity of this practice grows.



The Northern District of Illinois has become the unofficial home for these types of cases due to its past willingness to grant plaintiff TROs. This year, 86% of Schedule A cases were filed there, according to the **Bloomberg Law dockets search**.

In an August opinion, however, Judge John F. Kness of the US District Court for the Northern District of Illinois, Eastern Division, expressed **concern** that without proper service, such a form of relief may violate the defendants' right to due process. If courts adopt stricter standards for granting ex parte TROs, then stopping foreign infringers will get considerably more challenging.

Last year, Judge Jeremy C. Daniel of the same court **dismissed** a similar case, but for joinder reasons. Raising his concerns sua sponte, Daniel held that without evidence linking each unrelated defendants' actions, joinder based on the plaintiff's "hub and spoke" conspiracy was improper.

If the wariness that the judges have expressed gains traction, then plaintiffs will have to file separate cases against each infringer with no guarantee of an asset freeze before the defendants pack up shop and leave. Increased litigation costs and uncertainty might leave the ITC as the only meaningful option.

ITC as an Alternative for Schedule A Plaintiffs

Unlike traditional infringement litigation, personal jurisdiction isn't required for ITC proceedings. Instead, it exerts in *rem* jurisdiction over the accused imported products. ITC complainants therefore don't face the same due process challenges associated with a **rule 12(b)** motion to dismiss for lack of jurisdiction, and service of process procedures are generally more flexible.

If an IP owner's primary concern is preventing the sale of counterfeit goods, the ITC provides a faster and more cost-effective way to obtain relief. The *Lashify* decision, as well as uncertainty with Schedule A litigation in the Seventh Circuit, could push plaintiffs to the ITC in 2026.

Floods, Fires, and ICE—Where Force Majeure May Go Next

Gary Almeter,
Legal Analyst

Farm bankruptcies tied to immigration enforcement are setting the stage for a new wave of litigation over the extent to which "acts of government" can excuse nonperformance.

The sharp rise in agricultural bankruptcies in 2025 will force bankruptcy courts to wrestle with **force majeure**, a conventional contract clause that will see renewed relevance in the light of 2026. The upheaval caused by immigration enforcement, visa suspensions, and regulatory audits has thinned the labor supply upon which agriculture relies, leaving farms unable to harvest crops and honor contracts. The litigation that results will test whether government-induced labor shortages—in agriculture and beyond—would qualify as a force majeure event, thereby **excusing non-performance** and limiting liability.

Through mid-October, **Chapter 12 bankruptcy** filings, the bankruptcy chapter reserved for family farms and fisheries, surged nearly 50% from the **same period in 2024**. This uptick is sharpest in states where agriculture depends heavily on undocumented labor. But it's being felt everywhere, as **roughly 4 out of 10** farm workers nationwide lack legal work authorization.

What begins as a workforce crisis becomes a contract crisis and then a bankruptcy issue. Growers short on workers fail to meet delivery schedules, performance becomes an impossibility, buyers claim breach, lenders tighten credit, and Chapter 12 petitions follow. Chapter 12 filings will **continue to rise** as seasonal volatility and enforcement cycles converge.

From Labor Shortage to Litigation

The forthcoming bankruptcy skirmishes will not be simply about how—or whether—the debtor might reorganize. They will also be about how—or whether—the debtor might use force majeure to fend off plaintiffs.

Traditionally, the doctrine covers fires, floods, and natural disasters. But force majeure has steadily widened to include political and regulatory disruptions. Cases testing whether executive actions prompting immigration enforcement are "acts of government" sufficient to discharge contractual duties will further expand the doctrine.

Under **11 U.S.C. §365**, a debtor may reject burdensome contracts and convert them into unsecured claims. But rejection alone does not eliminate liability. Creditors can still assert breach damages under **11 U.S.C. §502(b)**. A well-drafted force majeure clause will blunt those 502 claims by demonstrating that the breach was both unavoidable and unforeseeable. Section 365 provides the mechanism for debtors to exit unfavorable contracts, and force majeure provides the cover that allows them to reach that exit.

The closest court precedent for immigration-related force majeure arguments may be a **Covid-era case** in which an Illinois federal bankruptcy court held that a state shutdown excused the non-payment of rent under a lease's force majeure clause. Government-heightened immigration enforcement is not necessarily the same type of action as a state order directly barring operations, but it does exert a similar economic effect on farms through a longer causal chain.

This causal chain will be at the heart of much 2026 bankruptcy litigation. Creditors—and creditors' creditors—**will argue** that the labor shortage was foreseeable. Debtors will argue that it was both **sudden and governmentally** induced. Any outcome will hinge on the scope and specificity of the parties' force majeure clause language and whether government actions or labor shortages were enumerated. From there, courts will consider the **factual evidence** linking labor enforcement to performance failure.

The Expanding Edges of 'Governmental Action'

For decades, US courts have policed force majeure narrowly. To prevail, a debtor must show the event was (1) enumerated, (2) beyond its control, (3) unforeseeable at contracting, and (4) the direct cause of nonperformance. These standards, from ***In re Old Carco LLC*** and similar cases, are standard across jurisdictions.

But as executive policymaking stretches and reaches deeper into labor markets, the definition of "governmental action" will expand accordingly, and farm bankruptcies will demonstrate how indirect regulation like ICE audits, visa program freezes, and compliance raids can cripple institutions without a single explicit prohibition. Bankruptcy courts, accustomed to parsing complex causation, may become the forum that formalizes this evolution.

Expect creditor **objections to Section 365 rejections** to increasingly invoke foreseeability and mitigation. And expect debtors to use force majeure to narrow damages and justify rejection. The likely result will be a patchwork of rulings that collectively enhances and expands the doctrine's elasticity.

Parallel industries like construction, hospitality, and **logistics** should watch these developments closely. Their success relies on the same migrant ecosystem, and a judicial shift recognizing immigration enforcement-related **impossibility** could ripple across supply and service agreements nationwide.

What Lawyers Should Do Now

For restructuring lawyers, 2026 will test the precision of contract drafting as much as litigation strategy as force majeure moves from boilerplate to battleground. Counsel representing distressed clients should audit contract portfolios now and identify clauses that list "governmental action," "labor shortages," or "immigration enforcement" as qualifying force majeure events. They should also note those that don't. Where such clauses are silent, litigation risk increases.

In pending bankruptcies, debtors should meticulously document causation, including workforce data and ICE correspondence. This can transform a sympathetic narrative into a legally sufficient record. Meanwhile, creditors should prepare to invite courts to more thoroughly scrutinize debtors' mitigation efforts, including debtors' efforts to hire alternate crews, use H-2A labor, or investigated subcontractors. This will raise the evidentiary bar.

How This Plays Out in 2026

The doctrine that traditionally protects against floods and fires will soon be wielded to protect against administrative swings. For restructuring and commercial lawyers alike, 2026 will be the year when force majeure evolves into active litigation strategy.

By late 2026, a series of rulings from bankruptcy courts will likely expand the recognized scope of "governmental action" within force majeure clauses. The shift will be incremental rather than revolutionary, but its effect will be lasting, and government policy will join weather and war among the accepted triggers for excused performance.

Courts' treatment of a "governmental action" provision in a force majeure clause will broaden in proportion to broadening executive power. Contract lawyers will respond with far more granular drafting. Expect drafters to spell out immigration enforcement, visa suspensions, and regulatory audits as specific events, and for counterparties to define tighter mitigation and notice requirements.

And courts? The next year will see bankruptcy courts try to fashion some jurisprudence from the shock of executive action. In so doing, they will reshape the economics of labor and the contours of impossibility. For lawyers in bankruptcy, commercial, and restructuring practices, the expansion of force majeure will redefine what it means to plan for the unforeseeable.

Cannabis May Find Unexpected Ally in SCOTUS Next Year

Meghan Thompson
Legal Analyst

The US cannabis industry is approaching a financial breaking point. The conflict between federal law and state law on the drug's legality has left even the industry's largest operators buried under **debt**, haunted by their **tax bills**, and grappling with **falling prices**. If something doesn't change for cannabis at the federal level in 2026, many of its top players won't survive another year.

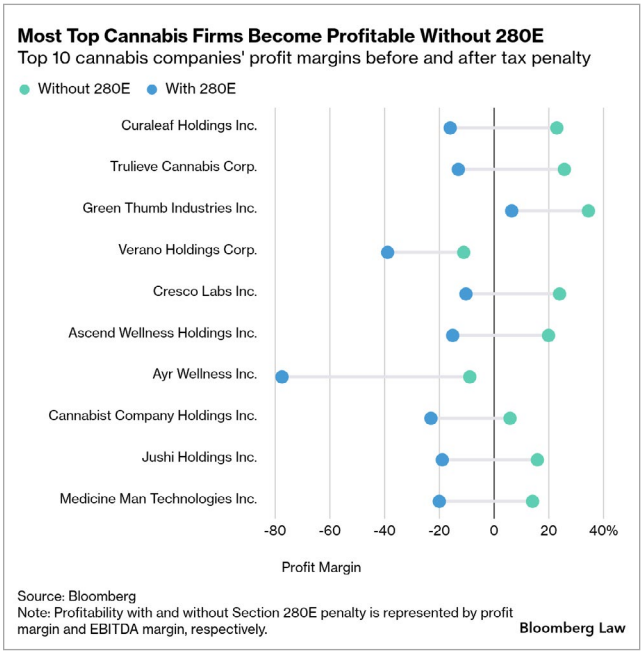
The next big push for cannabis reform may not come from Congress or the federal government, but from the US Supreme Court. The court agreed in October to hear a **Second Amendment challenge** to a federal ban on gun possession for cannabis users, and a ruling on the issue next year could thrust rescheduling efforts back in the spotlight.

Federal Reform Is Critical to Industry's Survival

Moving cannabis from Schedule I to the less restricted Schedule III of the federal Controlled Substances Act would alleviate the industry's most crippling financial constraint: **Section 280E** of the Internal Revenue Code. Section 280E prohibits companies that "traffic" in Schedule I or Schedule II substances from deducting ordinary business expenses, resulting in an effective tax rate of roughly 70% or more for cannabis companies.

A Schedule III classification would provide state-legal companies with much-needed financial relief, rekindle **investor interest**, and unlock the door to profitability that Schedule I keeps locked shut.

Of the top 10 US cannabis operators by revenue in 2024, only one reported a profit—despite generating a combined $718 million in revenue the same year. Without the Section 280E penalty, profitability margins for seven of these companies would turn from red to black virtually overnight.



Meanwhile, multistate operators owe about **$6 billion in debt** maturing in 2026, according to industry research firm Whitney Economics. Without access to traditional banking or bankruptcy protections, some will be forced to sell assets to stay solvent (like **Ayr Wellness** is doing now).

Although rescheduling wouldn't **legalize cannabis** or open **interstate commerce**, relief from Section 280E could suffice to keep many operators afloat through next year.

Supreme Court Could Be Rescheduling's Silver Bullet

The Supreme Court's decision to hear a cannabis-related case couldn't have come at a better time for the industry. The high court's ruling in ***US v. Hemani***, on appeal from the Fifth Circuit, may trigger the most significant shift in federal cannabis law since the drug was placed in Schedule I in 1970. However, the case isn't about the state-legal industry at all, but rather the Second Amendment rights of cannabis users.

Under **18 U.S.C. § 922(g)(3)**, anyone who is an "unlawful user" of a controlled substance, including all cannabis users under federal law, is barred from owning firearms—regardless of state legality. Since the Supreme Court established a **new constitutional test** for federal gun restrictions in 2022's ***N.Y. State Rifle & Pistol Ass'n v. Bruen***, at least five circuit courts and more at the district level have heard new constitutional challenges to Section 922(g)(3) as applied to cannabis users.

The Third, Fifth, Seventh, Eighth, Tenth, and Eleventh circuits have each ruled that Section 922(g)(3) may be unconstitutional as applied to the defendants, either directly or by remanding for further fact-finding regarding the defendants' state of intoxication at the time of the offense. Notably, none have held that a blanket gun ban for cannabis users is facially constitutional; each post-Bruen decision has required some individual assessment.

In *Hemani*, the Fifth Circuit relied on its decision in ***US v. Connelly***, which requires the government to prove intoxication at the time of firearm possession. As in *Connelly*, the appeals court held that Section 922(g)(3) was unconstitutional as applied. The Justice Department urged the Supreme Court to hear *Hemani* over four other similar cases with cert petitions asking the same question.

The question before the court now is whether Section 922(g)(3) is unconstitutional as applied to the defendant. The *Bruen* test requires firearm restrictions to align with the country's history of gun regulation. Multiple lower courts have already found that there's no sufficient historical analogue to Section 922(g)(3)—the closest prohibits carrying a firearm while drunk, and it doesn't ban ownership entirely.

Absent a stronger analogue, the Supreme Court is likely to affirm the Fifth Circuit's decision vacating the defendant's conviction. Such a ruling could effectively narrow Section 922(g)(3)'s constitutionality to defendants who were actively intoxicated or belong to a particular class of drug users who present a comparable historical danger.

Congress or the Department of Justice would need to align the statute with the ruling to avoid a flood of new appeals in cases involving cannabis users. This scenario may intensify pressure on the White House to push rescheduling forward and presents an opportunity to align the proposal with Second Amendment protections.

High Court Ruling Puts Pressure on Trump

Hemani will lay bare the widening gap between federal cannabis law and reality. Nearly **one in five** Americans use cannabis, and roughly **one in three** own a gun—those who do both are committing a federal felony.

Forty states have legalized cannabis for either medical or adult use, yet many Americans don't realize that federal law requires them to choose between using it and owning a gun. With renewed attention on this paradox, the Trump administration could be motivated to finish what the Biden administration started by moving cannabis to Schedule III.

The fate of rescheduling—and, by extension, the industry's short-term viability—now rests with the administrator of the Drug Enforcement Administration, Terrance Cole, who is expected to follow the White House's lead. While President Donald Trump expressed support for rescheduling on the campaign trail, his administration's statements about cannabis so far have been inconsistent.

The Supreme Court's conservative majority could ironically prove to be the US cannabis industry's most unexpected ally. The court's ruling in *Hemani* might build enough momentum to advance rescheduling in 2026, leading to the financial boon that the industry needs to stay afloat.



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Tussle Over Drug Discounts to Tip Pharma's Way in 2026

Brian Forst
Legal Analyst

After years of setbacks in state legislatures and federal courts, drugmakers opposing growth in the **340B Drug Pricing Program** have found new openings that will likely begin to arrest the program's expansion. Recent district court rulings" and a new Trump administration initiative could force hospitals and clinics that rely on drug discount revenue to accept more financial and operational risks.

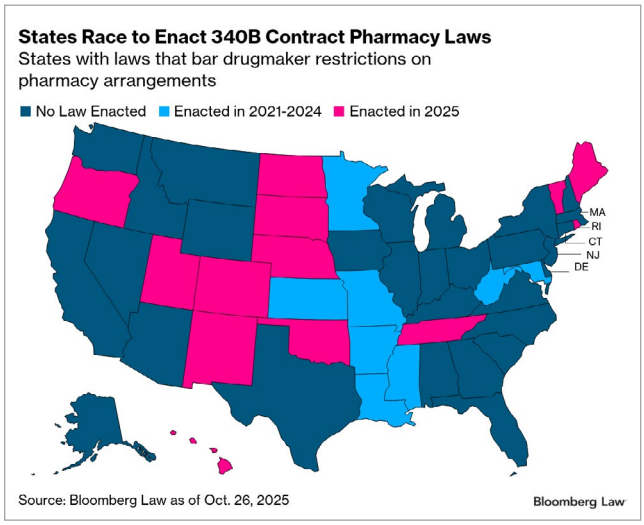
Enacted by Congress in 1992 and administered by HHS's Health Resources and Services Administration (HRSA), the 340B program requires drugmakers to offer deep discounts on drugs to covered entities, which include hospitals and clinics that serve a disproportionate share of low-income and uninsured patients.

The program has seen considerable growth in recent years, in part due to a 2010 **policy change** that allowed covered entities, who often don't have their own in-house pharmacies, to contract with an unlimited number of outside retail pharmacies to dispense discounted drugs to their patients.

Beginning in 2020, drugmakers responded by restricting the practice, alleging that it leads to covered entities receiving both Medicaid drug rebates and 340B discounts, as well as discounts going to patients who are ineligible under federal law.

In response, states in 2021 began **enacting laws** barring drugmakers' limitations on the delivery of 340B discounted drugs to contract pharmacies. Drugmakers sued, primarily arguing that the federal **340B statute** preempts the state laws. Bloomberg Law data show that **more than 60 lawsuits** have been filed by drugmakers since states started passing the laws.

Prior to late 2024, federal courts ruled in favor of the states, leading in 2025 to a **predicted surge** in state contract pharmacy access laws. There are now 21 states with similar statutes, up from eight states in 2024.



Drugmakers' Court Wins on Contract Pharmacies

These court rulings against drugmakers have found that state laws on contract pharmacies were not preempted by the 340B statute.

But this is changing.

In December, drugmakers got their first **win** when a federal district court in West Virginia issued a preliminary injunction against the state's contract pharmacy access law.

The court found that drugmakers are likely to succeed on the merits regarding several provisions of the law.

First, it examined a provision of West Virginia's law that had not been addressed by prior courts. In addition to barring drugmaker restrictions on delivery of drugs to contract pharmacies, the law prohibits drugmakers from requiring pharmacy claims data as a condition for 340B discounts. The court agreed with drugmakers that this added provision hampers their ability to conduct audits of covered entities.

The court reasoned that by barring access to claims data, the state was creating an obstacle to two federal purposes of the program: to provide discounts to covered entities and to prohibit fraud in the form of duplicate discounts.

The court also ruled that the law's enforcement provisions, which allow the state to investigate complaints and impose civil penalties against drugmakers for violations, likely conflict with Congress's intent to centralize enforcement with the federal government, citing **Supreme Court precedent** in a different case on the 340B program. And in a key finding, the court said that the West Virginia law regulates the pricing of 340B-covered drugs, not their delivery, breaking with previous courts, including the Eighth Circuit when it upheld Arkansas's law.

West Virginia **appealed** the decision to the Fourth Circuit, which heard oral arguments in September.

But regardless of the outcome of the appeal, the ruling is proving influential. In late October, a federal district court in Oklahoma cited its reasoning in blocking that state's law. An appeal of that decision would go to the Tenth Circuit. The rising tide of litigation against these state laws will increase the opportunities for more courts to side with drugmakers in the year ahead, likely forcing other circuit courts, and ultimately perhaps the Supreme Court, to weigh in.

Trump Administrative Rebate Pilot: A Major Shift

In addition to drugmakers' court win on contract pharmacies, another front opened in 340B battle that will lay the groundwork in 2026 for a fundamental shift in how covered entities receive discounts: a limited **340B Rebate Model Pilot Program** launched by HHS in August in response to **litigation** over drugmakers' attempts to create one themselves.

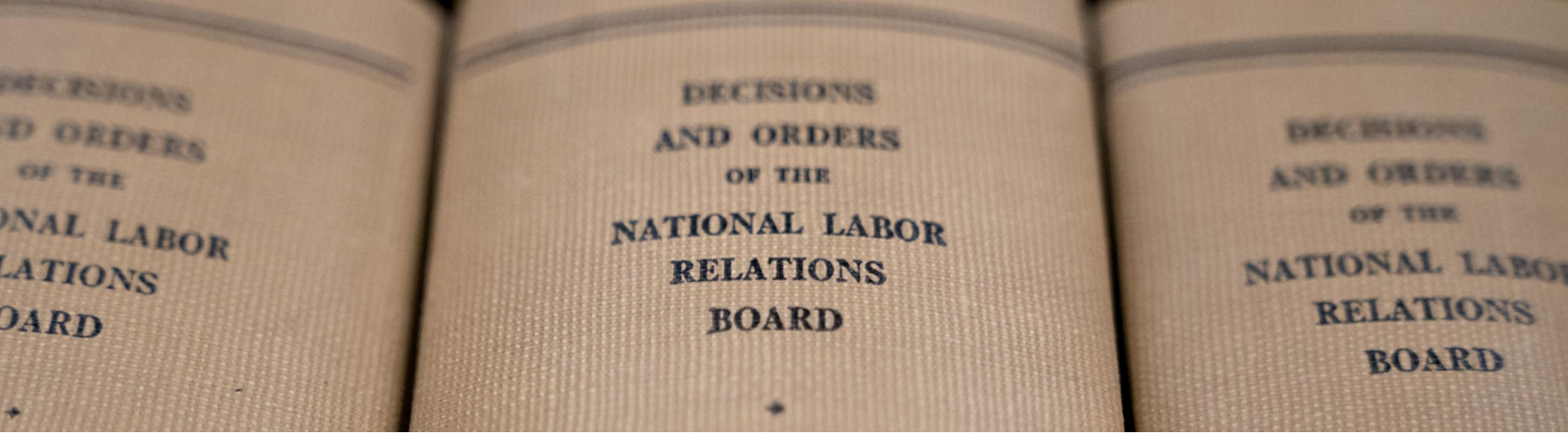
The program will test the option for drugmakers to provide their 340B discounts to covered entities in the form of a rebate upon receiving claims data, rather than up front, as has been standard practice under the program for decades. Drugmakers say they need the claims data to verify patient eligibility and prevent duplicate discounts, including for drugs subject to the **Medicare Drug Price Negotiation Program** in 2026.

Hospitals and other covered entities who will pay full price for 340B drugs first and submit data later **say** they can't afford to float the significant funds while waiting for drugmakers to issue discounts, and that gathering the data is an administrative burden on their already-thin margins, which will reduce the program savings they can devote to supporting patients.

The pilot program is voluntary for drugmakers and limited initially to the drugs selected for the first year of the negotiation program. HRSA has approved eight drugmakers' plans to participate, beginning Jan. 1, 2026. The agency has left open the door to expanding it to other drugs in the future after evaluating the pilot.

Navigating Changes

Between the increasing likelihood of a circuit split over contract pharmacy laws and a major regulatory shift in how drugmakers offer discounts, 2026 is set to be a crucial year for both the health care and pharmaceutical industries. Lawyers on both sides will need to be prepared for new rebate compliance procedures and a potential shift in litigation. But if current developments and trends hold, then it's the covered entities under the 340B program, not the drugmakers, that will face the biggest new financial and operational challenges in 2026.



The NLRB's Labor Law Enforcement Days May Be Numbered

William Welkowitz
Legal Analyst

In the 10 months since the beginning of the second Trump administration, the National Labor Relations Board has gone from being the working enforcement authority on federal labor law to being a non-functioning body to potentially being declared unconstitutional and permanently unable to legally enforce the provisions of the National Labor Relations Act.

Previous analyses on the **fortunes of the NLRB** have pointed out that the board has certain protections from challenges to its authority, while also **pointing to the danger** posed by a certain **case**, brought by Elon Musk's **SpaceX Corp.** that is making its way through the federal courts. But events and developments this year have created doubts about the strength of those protections.

The Musk case, along with the current Supreme Court's greater willingness to overturn long-standing precedent—particularly when it comes to the powers of the administrative state—suggests that there is a strong possibility that the Supreme Court could rule in 2026 that the NLRB structure itself is unconstitutional.

Danger Spots For the NLRB

Within a week after the start of his second term, President Trump **removed** a member of the NLRB from her position, reducing the board's membership to two and leaving it without a legally functioning quorum. (Another member's term has since expired, leaving the current membership at one). Since then, Trump has placed two people up for nomination to the NLRB, both of whom are expected to be confirmed by the Senate before the end of the year. This would finally give the board a quorum and allow it to legally make rulings again under the NLRA.

But that authority could be short-lived, depending on the outcome of the SpaceX case, which constitutionally challenges the NLRB's authority to enforce the NLRA. Most recently, the **Fifth Circuit** upheld an injunction issued by a district court, which prevents the NLRB from ruling on any unfair labor practice charge originating from within its jurisdiction.

Elon Musk and SpaceX, as well as **other companies** that have joined his lawsuit or have filed separate lawsuits on the issue, make several arguments attacking both the processes and structure of the NLRB. There are two arguments in particular that challenge the board's very existence.

First, they argue that the NLRB's administrative law judges, who have the initial opportunity to adjudicate cases brought before the agency, are making decisions on private rights without a jury trial, in violation of the **Seventh Amendment**. This argument seems most likely to turn on how the courts ultimately interpret the Seventh Amendment's meaning of "suits at common law."

Second, they argue that the NLRB simultaneously exercises executive, legislative, and judicial authority, in violation of the Fifth Amendment's **due process clause**. This argument hinges on a determination of what type of power the board wields and whether its procedures actually violate due process.

These lawsuits also argue that the removal protections for individual board members and administrative law judges violate **Article II** by restricting the president's ability to remove appointed members of executive agencies at will. This was partially the basis for the Fifth Circuit's decision upholding the district court's injunction. However, the **Sixth Circuit** refused to grant such an injunction in a similar case, stating that the employer had failed to show any harm caused by the removal protections.

Removal-Based Cases Could Be an Indicator

Simultaneously, the NLRB's power and authority could also be hindered by the outcome of a case currently **scheduled for argument** before the US Supreme Court, which challenges the removal protections granted to board members of an agency with a similar structure to the NLRB. Here, the Trump administration is looking to overturn the long-standing precedent of ***Humphrey's Executor v. US***, which states that presidents can't remove commissioners of multi-member, bipartisan independent agencies for purely political or policy disagreements.

The outcome of this case will have both a direct and indirect impact on the NLRB's power. Such a ruling would not only destroy the independent nature associated with the NLRB and other agencies with similar characteristics; it would also show the extent of the animus the Supreme Court's majority has towards the administrative adjudication system, increasing the possibility that the majority would be open to accepting SpaceX's arguments on the NLRB's structure.

If the Supreme Court overturns *Humphrey's Executor* and rules that the president can't be prevented from removing the commissioner at will, it will have a direct impact on NLRB members' job security. Specifically, a **parallel case** being argued in the federal courts involving NLRB board member Gwynne Wilcox challenging her firing by President Trump under almost identical circumstances would almost certainly have the same outcome. However, this outcome is not a foregone conclusion, as the court has recently **refused** to allow President Trump to fire Federal Reserve Governor Lisa Cook in another similar case.

Could States and Localities Fill the Potential Void?

Allowing federal district courts to assert jurisdiction over controversies involving the NLRA would seem to be the most logical outcome if the NLRB were ruled unconstitutional. However, the statute's enforcement provisions make it unclear as to whether such an arrangement would be lawful. Alternatively, some states and localities are taking measures into their own hands.

In September, New York Governor Kathy Hochul **signed into law** a provision granting the state's administrative apparatus the authority to hear and rule on private-sector labor law cases if the NLRB is in an extended period where it is non-functioning. In October, California Governor Gavin Newsom **followed suit**. **Massachusetts** is considering similar legislative action, and the government of **Allegheny County** in Pennsylvania is also considering taking action to allow local jurisdiction over labor law matters.

Immediately after the New York bill was signed into law, acting NLRB General Counsel William Cowen announced that the board would be **filing suit** to stop the implementation of the law, claiming preemption over labor law enforcement under the Supremacy Clause and US Supreme Court precedent. However, if the Supreme Court declares the NLRB unconstitutional, the preemption argument vanishes, leaving the state and local legislation intact.

Depending on the administrative structure and processes of the state and local agencies being empowered by these pieces of legislation, those laws could still face challenges under the same legal arguments that the NLRB is currently facing. However, the states passing these laws are more likely to legislatively account for such arguments, should the dismantling on the NLRB come to pass.

Discovery Orders to Infuse Light Into APA Challenges

Ashley Skladany
Legal Analyst

Last year saw the **demise** of judicial deference to agencies' statutory interpretations. This year, **limits** on nationwide injunctions and **emergency** Supreme Court rulings have hampered judges' ability to enjoin executive action. In 2026, look for the tug of war between the executive branch and the lower federal courts to extend into a typically more mundane arena: discovery.

In suits that are filed under the Administrative Procedure Act, discovery is the exception, and plaintiffs face a high bar to obtain it. **But in 2026, district courts may increasingly allow APA plaintiffs to take discovery, including discovery of agency deliberative materials covered by a broad, but non-absolute, form of executive privilege.**

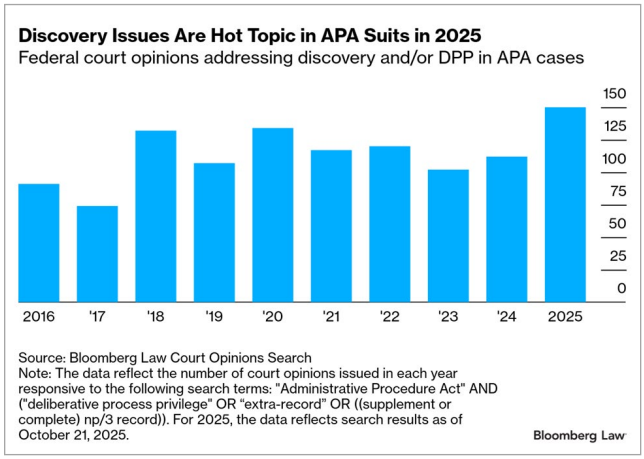
District courts are facing a cascade of what they've described as atypical APA suits challenging agency implementation of executive orders, as well as mounting **tensions** with a high court demonstrably willing to intervene to block preliminary relief orders. But matters of discovery, at least, remain largely within judges' locus of control.

In the year ahead, discovery orders in APA cases may reflect embattled district courts' heightened sense of obligation to create transparency and to ensure that a fully developed factual record supports their merits decisions for appellate—and possibly Supreme Court—review.

Old Problem, New Era

The evidence a court considers when **evaluating** agency action under the APA is ordinarily confined to the "whole record": the universe of material considered by the agency decision maker. To take discovery, APA plaintiffs must either overcome a **presumption** that that record—as designated by the agency—already includes what it should, or make a showing of **bad faith**.

Data suggests courts are grappling with APA plaintiffs' requests for discovery with increasing frequency. According to the results of a search of Bloomberg Law's court opinions, terms related to evidence and discovery in APA suits—including "**deliberative process privilege**", a privilege often invoked to justify omitting materials from the record—have appeared in 150 court opinions in 2025 as of Oct. 21. That's more opinions mentioning these terms than in each of the preceding nine full years.



This year marks the first time in at least a decade that the annual total has risen in two consecutive years, suggesting that courts are poised to issue an even greater number of opinions on these matters in 2026 than in 2025.

Not Your Average APA Cases

In the world of APA litigation, 2026 is shaping up to be a contentious year, given the volume of APA claims being filed and the nature of the contested agency actions.

As of mid-October, plaintiffs in 2025 have filed 158 APA suits challenging agency actions implementing executive orders, according to Bloomberg Law's **Executive Orders Tracker**. Overwhelmingly, the challenged actions—like grant terminations, reductions in force, and personal data disclosures—didn't follow public-facing **rulemaking** or any other decision making process resulting in a readily-defined, contemporaneous "record."

As multiple **courts** have **observed**, these are **not typical** APA cases. Some courts have granted plaintiffs **limited discovery**—including **written**

and **deposition** discovery—to fill in the gaps. And some have hinted that the usual presumption that the agency's record is complete may **frustrate** judicial review where the challenged action is not the product of **ordinary processes**.

APA challenges to actions with such ill-defined contours will continue to proliferate, as agencies **move away** from—or **disclaim** any obligation to follow—public rulemaking procedures. In a new era of agency action, courts may increasingly find ordinary presumptions ill-suited to extraordinary times.

Peering Into the Process

Two Northern District of California cases suggest that the atypical nature of recent APA challenges may also impact courts' approach to DPP—a **qualified** privilege that can be overcome by a showing of need.

In ***AFGE v. Trump***, involving a challenge to agency RIFs, the district court **ordered** production of agency RIF plans, over the government's DPP assertion. The court found that DPP might not even apply, but if it did, the privilege was overcome by the need for accurate fact-finding—highlighting, in the court's words, the case's "significant public importance" and the lack of transparency to the public or affected federal employees.

The Ninth Circuit **denied** the government's mandamus petition in mid-September. (However, it has **stayed** the production order while the government seeks rehearing.)

In ***National TPS Alliance v. Noem***, involving a challenge to the revocation of Temporary Protected Status for certain foreign nationals, the district court **ordered** production of agency communications from numerous custodians, which the court found relevant to plaintiffs' "credibly-alleged" claims that the agency's stated reason for the decision was pretextual.

Here the court found DPP did apply but was overcome. It noted the seriousness of the issues at stake and the "anomalous process" by which the challenged decisions were made, and found that "society has a strong interest in accurate fact finding where the propriety of government decision making is at issue."

When litigants seek material covered by DPP, courts will have to **balance** competing interests. And where the stakes are high, courts may find the scales tipped in favor of disclosure. In the year ahead, we may see courts increasingly inclined to order disclosure of DPP material, or at least to closely scrutinize agencies' use of the privilege.

Out of the Shadows

District courts may perceive their dominion over the factual record in APA cases as especially important in light of the Supreme Court's use of its "shadow docket" to halt preliminary injunctive relief orders—as it did in both ***AFGE v. Trump*** and ***National TPS Alliance v. Noem***.

In ordering discovery, some courts have **stressed** the preliminary nature of shadow docket decisions and the **absence** of full records supporting them, suggesting that the high court's decisions are, in the judges' view, underscoring the importance of a fully developed record.

A Separation of Powers Issue?

One June shadow docket decision halting a discovery order in a **FOIA** case demonstrates the high court's willingness to enter the fray when discovery against the executive is at issue.

In **US DOGE Service v. Citizens for Responsibility and Ethics in Washington (CREW)**, a six-justice majority found that a discovery order against DOGE raised "separation of powers concerns" and counseled "judicial deference and restraint" regarding discovery into internal executive branch communications.

Although the *CREW* majority's concerns may derive from DOGE's status as an entity within the Executive Office of the President, its framing of the issue in separation of powers terms could shape future disputes about discovery against the executive branch more generally.

Foreign Affairs Will Derail Major Questions Doctrine

Erin Webb
Legal Analyst

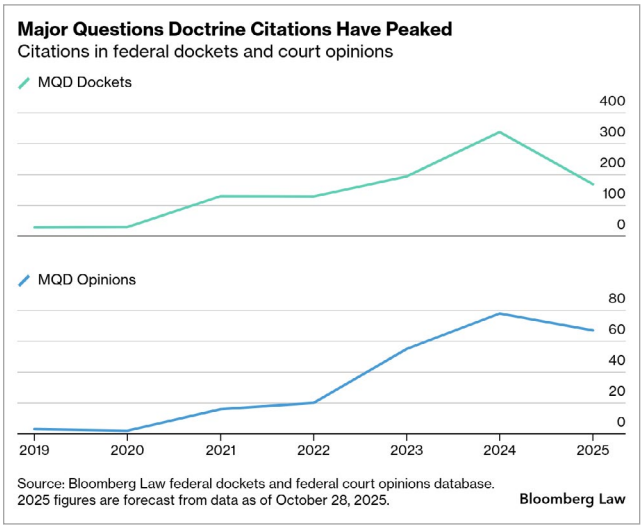
The major questions doctrine's heyday is past. Due to the executive branch's increasing reliance on foreign policy and national security powers as rationales for action, and the emerging view that those topics are immune from major questions scrutiny, the doctrine is likely to fade into the background for at least the next several years.

The doctrine **states** that in cases of "vast economic or political significance," the executive branch must show "clear congressional authorization" for any action it takes that's "unheralded" and "transformative"—i.e., not the subject of previous exercises of power under the relevant statute.

If it can't do so, the action's subject to overturn by the courts. While the doctrine has been **recently popular**, it's falling out of favor and will continue to do so over the next year.

Major Questions Citations Are Down

Major questions doctrine citations in federal court filings and in court decisions had climbed every year since 2020, peaking in 2024.



Yet 2025 is on track to have fewer court filings and opinions citations than last year, and this downturn will likely continue next year, based on executive policy and hints in jurisprudence.

Does the Doctrine Apply in International Contexts?

A US Supreme Court concurrence from late last term sheds light on what could be a new limitation on the major questions doctrine. In ***FCC v. Consumers Research***, Justice Brett Kavanaugh said that the major questions doctrine doesn't apply to foreign policy or national security questions. The doctrine doesn't "translate to those contexts because of the nature of Presidential decision making in response to ever-changing national security threats and diplomatic challenges," Kavanaugh said.

Foreign policy and national security fall under what's known as the "**Youngstown category 2**" presidential power, Kavanaugh said. This means that they're independent constitutional **powers** that don't rely on delegation from Congress by statute.

When these powers are at play, the usual major questions presumptions are flipped, Kavanaugh said. Courts should assume that Congress intends to give the president "substantial authority and flexibility" to protect Americans, and that Congress must specify any limits on the powers, he said.

Fifth Circuit Judge Andrew Oldham cited Kavanaugh's concurrence in his dissent in ***W.M.M. v. Trump***, a Fifth Circuit case challenging President Donald Trump's declaration of an enemy incursion under the **Alien Enemies Act**. Courts "have afforded the President extensive deference in making fact-intensive determinations involving sensitive issues of national security," Oldham said.

The majority decision in ***W.M.M. v. Trump***, which upheld the district court's preliminary injunction on the ground that Trump hadn't sufficiently identified an "invasion" or "predatory incursion" under the AEA for purposes of deporting Venezuelan nationals, was **vacated** on Sept. 30 in anticipation of rehearing en banc, currently scheduled for January. It remains to be seen whether Kavanaugh's view will have greater influence on rehearing.

While Kavanaugh's concurring opinion isn't binding law, it may be an important portent of precedent to come—as Justice Neil Gorsuch's dissent in ***Gundy***, his concurrence in ***NFIB***, and the per curiam opinion in ***Alabama Association of Realtors*** foreshadowed the court's embrace of the major questions doctrine in ***West Virginia v. EPA***.

Are Tariffs Foreign Policy?

The Federal Circuit, however, recently took a different view of whether foreign policy or national security makes an executive decision immune to a major questions challenge. In ***V.O.S. Selections v. Trump***, that court heard an appeal of a Court of International Trade ruling that five Trump executive orders exceeded his tariff powers under the **International Emergency Economic Powers Act**. In its opinion, the Federal Circuit said that the power asserted in the executive orders had run afoul of the doctrine.

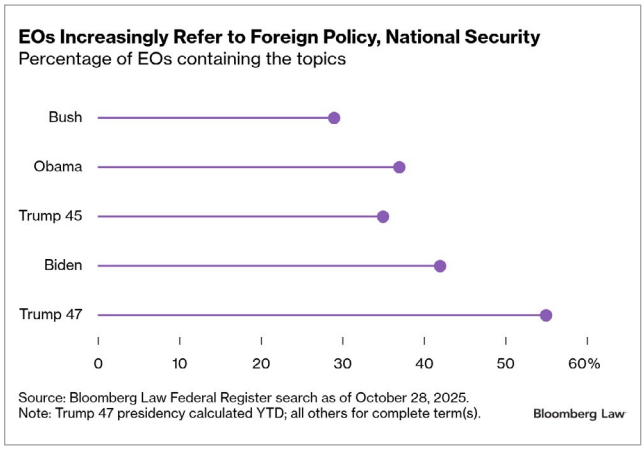
The court found that the tariffs power question was one of "vast economic and political significance" and that the tariffs at issue implicated the doctrine because they were both "unheralded" and "transformative." Finding no clear congressional authorization for the tariffs, the court upheld the lower court's summary judgment ruling. In a footnote, the Federal Circuit joined three fellow circuits in holding that the president isn't exempt from a major questions inquiry. The only circuit to hold that he is exempt, the Ninth, did so in a decision that's now **in question**.

The dissent cited Kavanaugh's concurrence in *FCC*.

Because it's the **home** for many executive action challenges, the Federal Circuit's ruling could hold a lot of sway. It may also point to future splits between the appeal court's view and those that side with Kavanaugh's concurrence.

Trump's EOs Reference Potentially Exempt Ground

The majority of Trump's executive orders so far this year refer to foreign policy or national security—a first for any president's executive orders in the past 25 years.



Trump's second term is, of course, only beginning. But as of Oct. 28, he's issued 213 executive orders—a generous sample size. That's more than President Joe Biden **issued** during his entire four-year term (170). Trump's current nine-month executive order count hasn't yet passed his own four-year total from his **first term** (383); President Barack Obama's eight-year **total** of 289; or President George Bush's eight-year **total** of 300, but it's certainly on track to do so.

Citations to the major questions doctrine are noticeably down. If Trump continues to lean on foreign policy and national security as justifications for his executive orders, it could give courts a reason to shun major questions doctrine challenges to his executive orders and to the agency actions that carry them out. Additionally, Justice Kavanaugh thinks that courts should decline to apply the doctrine in those contexts. It's possible that additional justices will join him in the near future. All these factors will contribute to sidelining major questions arguments in the coming year.



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North American Companies to Break M&A Records in 2026

Emily Rouleau
Legal Analyst

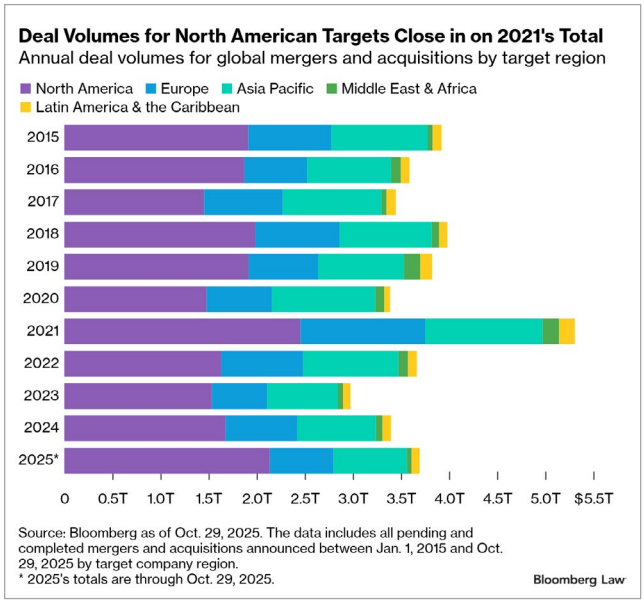
After a **cautious start** to 2025, the M&A market took off in the third quarter. Quarterly deal volumes for global mergers and acquisitions hit **heights** at the end of Q3 ($1.33 trillion) not seen since Q4 2021 ($1.39 trillion).

Moreover, Q3 2025 deal volumes for target companies located in North America ($822.26 billion) exceeded all other quarterly volumes in the last 10 years, beating Q2 2021's mark ($703.05 billion) from that **record-breaking year** by more than $100 billion. The upward trajectory for this target region shows few signs of slowing down, despite **political tensions** in the US and a lengthy US **government shutdown**.

Next year, deal volumes for North American target companies will exceed this year's volumes and will also surpass 2021's annual total of $2.46 trillion. Furthermore, buyers in the Middle East and Africa will do more deals with North American target companies, increasing the deal volumes for these cross-border transactions.

North American Targets Are Hot Commodities

By the end of October, deal volumes for transactions involving North American target companies ($2.14 trillion) had already surpassed all annual totals for this region since 2015 except for 2021's record-breaking $2.46 trillion.

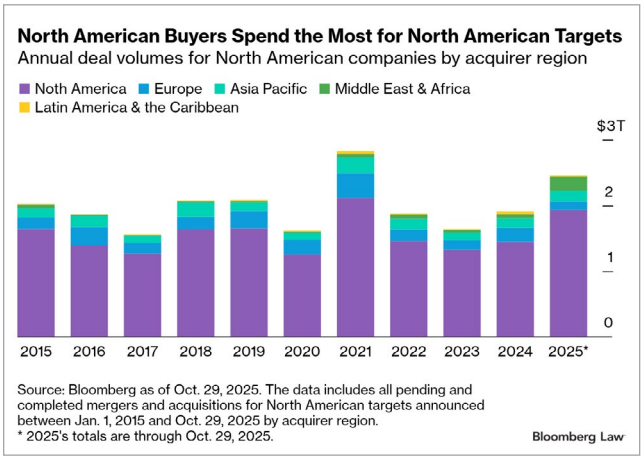


Deal volumes with North American targets for 2025 through Q3 were valued at $1.87 trillion—which exceeds the *annual* totals for these types of deals for 2022–2024. (2021 exceeded all these years but is considered to be an **outlier** in terms of deal volume.)

The popularity of North American targets will continue in 2026, and deal volumes for these targets will likely increase, especially given deal activity in the **technology industry**. For example, in September, **Nvidia Corp. announced** that it will invest $100 billion in OpenAI in order to build data centers, and there are no signs that the AI boom will fade soon.

Buyer Regions for North American Targets

Since 2015, North American buyers have spent more money than other buyer regions on North American target companies, and this trend is likely to hold fast for 2025.



It seems likely that the deal volumes for M&A transactions between North American buyers and North American companies will increase in 2026 for the following reasons:

- As of Oct. 29, the year-to-date deal volume was already the second highest since 2015 (only 2021's annual total was higher).
- Q3 2025 had the highest single quarter deal volume for these deals in the last 10 years. If the typical Q4 surge in deals happens, Q4's deal volume could exceed Q3's deal volume.

The Middle East and Africa Will Acquire or Invest More

Buyers located in the Middle East and Africa stand out from the other regions for their dramatic increase in spending on North American target companies this year, spending $135.09 billion in Q3. This is the highest quarter since 2015, and is more than triple that of the next-highest quarterly deal volume: $40.35 billion in Q3 2015.

2025's year-to-date total ($213.31 billion as of Oct. 29) is also more than triple that of 2024, which falls in second place with $64.45 billion worth of deals.



In 2026, expect the Middle East and Africa to increase their spending on or investing in North American target companies. Despite geopolitical tensions and **outright conflicts** over the last several years, there's a lot of **money being spent**, and that will continue next year.

Sovereign wealth funds will to continue to invest in North American companies. The technology industry will likely drive more deals from buyers from the Middle East and Africa, as countries in this region seek to increase their involvement with funding and operating **AI data centers and infrastructure**.



Get Ready for Fights Over Crypto Treasury Mergers

Benjamin Cooper
Legal Analyst

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Legal Analyst

This has been the year of the digital asset treasury. The Trump administration's crypto-friendly approach and resulting spike in digital asset prices has encouraged **enthusiasm** for investing in companies that own large quantities of digital assets.

The trend of forming digital asset treasuries has reached critical mass this year, and 2026 will be the year of litigation over digital asset treasury mergers.

'Pots of Crypto' and the Temptation to Merge

Digital asset treasuries are companies that hold a significant amount of digital assets—usually cryptocurrencies like Bitcoin or Ether—and that raise capital or issue debt to purchase more digital assets. Many are chasing a premium that the stock market had, for most of 2025, given to DATs.

The US stock market will pay "$2 for $1 worth of crypto," Bloomberg columnist Matt Levine **said** in July. "If you have a pot of crypto, you should merge it with a small US public company," Levine said.

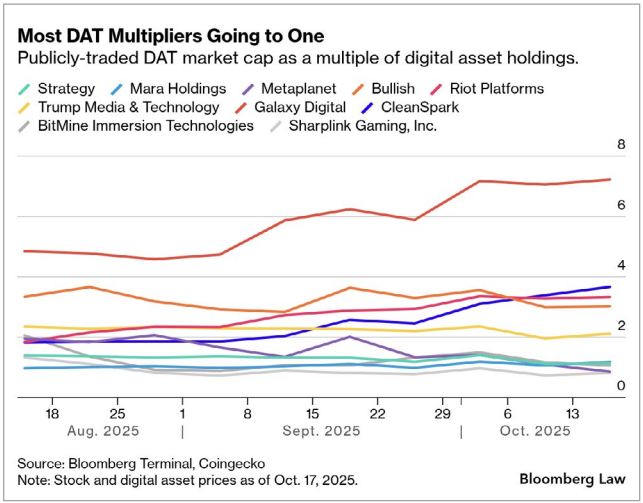
Some DATs like **Strategy** are or were companies that offered a product or service and pivoted to primarily holding digital assets. Other DATs like **Hut 8 Corp.** are cryptocurrency miners holding on to a large supply of digital assets. Still others have been incorporated (or formed through special purpose acquisition companies) for the sole purpose of acquiring a pile of digital assets to hoard. Over 80 DATs have been created in 2025 **as of October**.

Top Ten Bitcoin Treasuries by Value of Holdings

Company	Bitcoin Held	Held Bitcoin Value
Strategy	640,418	$72.3B
MARA Holdings	53,250	6.0B
Twenty-One Capital	43,514	4.9B
Metaplanet	30,823	3.5B
Bitcoin Standard Treasury Company	30,021	3.4B
Bullish	24,000	2.7B
Riot Platforms	19,287	2.2B
Trump Media & Technology Group	18,430	2.1B
Galaxy Digital Holdings	17,102	1.9B
CleanSpark	13,011	1.5B

Source: Coingecko, Bloomberg Terminal
Note: Bitcoin holdings and pricing as of Oct. 21, 2025.
Bloomberg Law

While top Bitcoin treasury Strategy once was valued at twice the $72.3 billion in Bitcoin it held, that **premium has now fallen**, and the premium for DATs that aren't also involved in **crypto mining** (or associated with President Donald Trump like Trump Media & Technology Group) have been reverting to the value of the underlying assets.



As the premium over assets the stock market will pay for DAT shares declines, DATs will be **tempted to merge**. While DATs are still being formed—**Ripple Labs Inc.** is **fundraising** $1 billion through a SPAC for a DAT holding its XRP token, and the memecoin firm linked to Trump is **getting in** on the wave—the market is trending towards a declining DAT premium, and consolidation has already begun. Medical device maker **Semler Scientific**, which in May 2024 **purchased** $40 million of Bitcoin, signed off on being **acquired** by **Strive Inc.** on Sept. 22 of this year.

With DAT Mergers Come Lawyers and Vulnerability

Valuation and volatility will be the two primary drivers for DAT litigation.

Valuation

Mergers and acquisitions attract investor lawsuits, and DAT mergers provide investor plaintiffs with a ready-made controversy: How much should the acquiring firm pay?

- The price including the highest premium of the two firms to the underlying digital assets, where shareholders in the acquirer will argue that the acquirer overpaid?
- The price of the lower of the two premiums to the underlying digital assets, or some other lower amount relative to the market price of the digital assets, where shareholders in the acquired DAT will argue that the board could have gotten a better offer?

Since the price can't satisfy everyone, lawsuits are almost inevitable.

Volatility

Another potential cause for DAT litigation is their volatility: The fluctuation in value to market values even below the value of the held crypto make the valuation disparity higher. Many of the **DATs** created this year celebrated an initial spike that was quickly followed by a decline.

In early October, most major tokens **dropped precipitously** after Trump announced 100% tariffs on China. At the same time, **crypto traders** saw a record of $19 billion in liquidations. **Metaplanet Inc.**'s **drop in mNAV** (the ratio of assets minus debt to market capitalization) to below the value of the owned bitcoin is a cautionary tale of how the volatility of the market can quickly affect the performance of a DAT.

Less than a month after Strive's acquisition of Semler, a Semler shareholder **filed a lawsuit** challenging the merger. The Oct. 15 **complaint** challenges the amount and valuation of Strive stock that will be swapped for Semler stock as the price of Strive stock has noticeably declined since the announcement of the merger (Strive stock was at $4.10 at the time of the merger announcement, and **83 cents on Oct. 17**). The valuation of goodwill—essentially the premium of Semler's stock price over the value of the Bitcoin it holds—is key to the complaint; the drop in Strive's stock price potentially eliminates any benefit of buying Semler versus buying its underlying Bitcoin.

The question of what's an equitable price for a DAT merger will likely not get resolved via the courts any time soon. Expect challenges to other DAT mergers on similar grounds next year as shareholders dispute stock and goodwill valuations.



Predictions to Make Crypto Regulation Less Cryptic

Preston Brewer
Legal Analyst

A transformation is happening at the SEC. It's a "new day" at the agency, **according to** Chair Paul Atkins, and the traditional emphasis on investor protection is yielding to the goals of reducing regulation and promoting innovation.

This is particularly true for crypto. Once the federal government shutdown is resolved, expect the SEC to move faster next year than it has since the 2008 financial crisis to create a crypto-friendly legal framework.

The Innovation Commission

Under Atkins, who's even started **calling** the agency the "Securities and Innovation Commission," the agency has **pulled back** from crypto-related litigation, abandoning nearly all crypto-enforcement actions the Commission started under former Chair Gary Gensler in favor of those focused on insider trading and offering fraud.

Shortly after the Trump administration took over, the SEC replaced its crypto enforcement unit with a smaller, cyber-related fraud team. It also **initiated** "Crypto 2.0" with a Crypto Task Force led by "Crypto Mom" SEC Commissioner Hester Peirce. She promised the group would "help to draw clear regulatory lines" and "provide realistic paths to registration for both crypto assets and market intermediaries."

Crypto Rules Planned, Gensler Proposals Removed

In September, the SEC **issued** its latest **Regulatory Flexibility Agenda** for Spring 2025, and, unsurprisingly, it's crypto-heavy. This agenda is telling for the agency's revised priorities.

Fourteen Gensler-era proposed rules are now **withdrawn**, reflecting a hard-turn away from the prior Commission's priorities like ESG, now discarded under Atkins. The new agenda puts forth 18 rules labeled as "proposed rule stage" with fully one-third of those pertaining to crypto.

Proposed SEC Rulemaking Designed to Accommodate Crypto

Proposed Rulemaking	Description	RIN
Crypto Assets	Rules relating to the offer and sale of crypto assets, potentially to include certain exemptions and safe harbors, to help clarify the regulatory framework for crypto assets and provide greater certainty to the market.	3235-AN38
Updating the Exempt Offering Pathways	Rule amendments to facilitate capital formation and simplify the pathways for raising capital for, and investor access to, private businesses.	3235-AN42
Amendments to the Custody Rules	Amendments and/or new rules to improve and modernize the Investment Adviser/Company regulations around the custody of advisory client and fund assets, including to address in each case crypto assets.	3235-AN46
Transfer Agents	Updates to modernize the SEC's existing regulatory regime for transfer agents, including rules relating to crypto assets and the use of distributed ledger technology by transfer agents.	3235-AL55
Amendments to Broker-Dealer Financial Responsibility and Recordkeeping and Reporting Rules	Amendments to Rules 15c3-1 and 15c3-3 and other broker-dealer financial responsibility rules, as well as Rules 17a-3 and 17a-4, to address the application of these rules to crypto assets.	3235-AN48
Crypto Market Structure Amendments	Amendments the Exchange Act Rules to account for the trading of crypto assets on ATSs and national securities exchanges.	3235-AN49

Source: Spring 2025 Regulatory Flexibility Agenda, Federal Register. Bloomberg Law

The agency has yet to provide specific rule amendments for these proposals so we don't know what they will say. The government shutdown may delay official rule amendments. However, after analyzing public statements made by Atkins, here are five predictions about how the Commission may change its treatment of crypto:

Prediction 1: Most Tokens Aren't 'Securities.'

Analysis: Atkins has **said** that very few crypto tokens are securities and that the agency will examine the token as a whole—its characteristics and how it's being sold—to determine whether it's a security.

Adoption odds: Likely to highly likely. This is a foundational stance by this Commission rather than a rule proposal. It reflects this Commission's desire to allow crypto's legal operation.

Prediction 2: Accommodation for Tokenizing Assets.

Analysis: Tokenizing assets **includes** allowing so-called super-apps that vertically **integrate** trading, staking, and lending of tokenized assets "under a single regulatory umbrella." Atkins is so keen on getting this going that in September he **talked** about having an "innovation exemption" rolled out by December to permit crypto firms to *immediately* launch products.

The intent is for tokenized securities and non-security tokens to have clear regulatory relief paths under one unified regime with super-apps that consolidate custody and trading so brokers can offer multiple services under one license. This could help with interagency (SEC and Commodity Futures Trading Commission) cooperation where products fall under both their remits.

Public exchanges would eventually have crypto asset securities and non-security crypto assets **traded** side-by-side. A unified regulatory framework for both SEC and CFTC rules would avoid the shortcomings of the current system which can require multiple licenses and dual compliance frameworks owing to duplicative regulations.

Adoption Odds: Likely to some degree but working out the details of trading these assets on public exchanges may take additional time. The shutdown will delay this proposal's introduction.

Prediction 3: Regulatory Safe Harbors Coming Soon.

Analysis: Atkins **wants** clearer rules and lighter compliance burdens for digital assets. To that end, the chair seeks to create regulatory safe harbors for the offer and sale of crypto assets. The three Republican commissioners are in agreement on this goal, which is enough for adoption without additional votes.



Adoption Odds: Highly likely. This is a key point of demarcation from the prior SEC regime and an important goal of both the crypto industry and the administration. Expect a strong push to establish these new regulatory pathways.

Prediction 4: Protection for Crypto Self-Custody.

Analysis: Custody is a significant issue for crypto under existing rules, and Atkins has **emphasized** that the agency needs to show flexibility and ditch archaic rules. The chair is against forcing crypto holders to use an intermediary if the blockchain system on which the asset resides permits direct transactions.

Adoption Odds: Likely. Atkins is trying to **remedy** the custody problem via Project Crypto. He wants crypto holders to have the right to self-custody and also afford them "maximum choice" in custody arrangements and where crypto assets are traded.

Prediction 5: Market Activities to Move 'On-Chain.'

Analysis: The SEC's Project Crypto includes an effort to push exchanges to move some activities onto a blockchain (a public, digital ledger), known as "on-chain." It **means** getting exchanges to embrace using a blockchain in asset issuance, trading, and settlement.

Adoption Odds: Likely—but getting exchanges and other stakeholders on-board with this effort could take considerable time and effort, and initial results may prove short of Atkins' ultimate goals.

Even Moving Fast, New Rule Adoption Will Take Time

Actual adoption of far-reaching new rules may take time and compromise. The proposed rules identified in the SEC's regulatory agenda still need official rule amendments, and the SEC may delay or withdraw them at any time.

The government shutdown and the ambition of these six crypto proposed rules make official issuance of proposed rules unlikely until Q2 2026 or later, and actual final rule adoption perhaps not until 2027 or later after public review and comment.



Debanking EOs Will Pit Prudence Against Compliance

Benjamin Cooper
Legal Analyst

Bank regulator enforcement actions have traditionally focused on "unsafe and unsound" practices. For bank regulators, this standard means that a bank has risked its business (and, if big enough, the stability of the US financial system) by not following best practices for balancing its business risk and for avoiding entanglement with crimes such as money laundering.

Under the Trump administration, federal banking regulators have **a new focus**: "debanking," which is the practice of banks denying or terminating business with customers based on the customers beliefs, politics, or line of business.

As regulators engage in their anti-debanking effort in 2026, banks will have to walk a fine line between traditional safety and soundness and denying business to some at the risk of a debanking investigation.

A Short History of Debanking

Concern about debanking originated with "Operation Chokepoint," an Obama administration effort in 2014 to induce banks into dropping high-risk customers. The operation was **believed to target** payday lenders, coin dealers, and gun dealers because they were thought to be "high-risk" businesses. There were allegations that this label was based more on their being in industries disfavored by the administration than their particular risk profile.

A 2015 Federal Deposit Insurance Corporation Inspector General investigation into FDIC practices found no intentional targeting; instead the FDIC "created a perception" that banks shouldn't deal with the targeted businesses, the **investigation report** said. Similar to Operation Chokepoint, the New York Department of Financial Services in 2017

encouraged insurers to discontinue business with the National Rifle Association, leading to a Supreme Court ruling that the NYDFS had to face a First Amendment discrimination suit (still pending) from the gun rights organization.

During the Biden administration, a number of individuals connected to the digital assets industry alleged that they or their businesses had banking relationships refused or ended due to an "Operation Chokepoint 2.0" against crypto. The digital assets industry made significant campaign contributions to the 2024 presidential campaign of Donald Trump, who also claims to have been debanked.

Trump and Regulators Step In

Almost immediately after he was sworn in, Trump signed Executive Order 14178, to protect and promote "fair and open access to banking services." The order also established a working group on digital currency to come up with a framework "governing the issuance and operation of digital assets."

This was followed in August by Executive Order 14331, which required bank regulators and the Small Business Administration to:

- End the use of "reputation risk" as a separate factor in evaluating a financial institution.
- Amend any regulations that might lead to debanking.
- Review the regulated institutions for past debanking actions and conduct enforcement actions against them.

The Federal Reserve, Office of the Comptroller of the Currency, FDIC, and National Credit Union Administration have removed reputation risk from their guidance (changes to rules are pending). The SBA requires all its lenders to report potentially debanked clients by Dec. 5; the OCC and Consumer Financial Protection Bureau are also investigating.

Current Pitfall: Risky Client or Discrimination Charge?

Prior to Trump's debanking order, banks were already claiming that debanking was related to risk management, especially money laundering risk. It's true that many "red flags" for money laundering, like the movement of money to or from one large account from many smaller accounts, can be common non-criminal events in crypto businesses.

The failure and FDIC takeover of Silvergate Bank in 2023 has been attributed in part to an over-concentration of the bank's business with crypto customers who withdrew their deposits when the market slumped.

A balance can be struck, however, between anti-money laundering risk (especially now that FinCEN has recalibrated reporting guidelines), business risk, and doing business with customers that raise concerns like the digital asset industry.

But will that balance meet the demands of Trump administration-favored parties, such as pardoned federal felons who want banks to ignore their convictions? How risky must a person or business who may have the ear of the administration be in order for a bank to be sure that they can safely (i.e. they won't be investigated) refuse to do business with them?

What to Do About 2029?

Calculations about customers who straddle compliance issues between risk management and debanking must also take into account that there will be a new administration in 2029, and it may have different views on what bank risk should look like.

Just as current banking regulators are looking askance at bank actions that banks claim they took to comply with Biden-era rules, the next administration (especially if there is a change in parties or an intervening financial crisis) may try to penalize banks for being too accommodating to Trump administration priorities. A Davis Wright Tremaine analysis looking at banks' current defenses against debanking enforcement, points out that estoppel defenses are unlikely and some other legal challenges are "practically impossible."

It's also unclear how far back the current debanking investigations by regulators will go. Any real deep dives into Biden administration era bank actions, however, will set a precedent that debanking compliance failures—including failures of risk management in favor of avoiding debanking—today may be the subject of enforcement by another administration.



Artificial Intelligence

As States Fail to Pass Consumer Privacy Laws, AI Rules 33

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As States Fail to Pass Consumer Privacy Laws, AI Rules

Mary Ashley Salvino
Legal Analyst

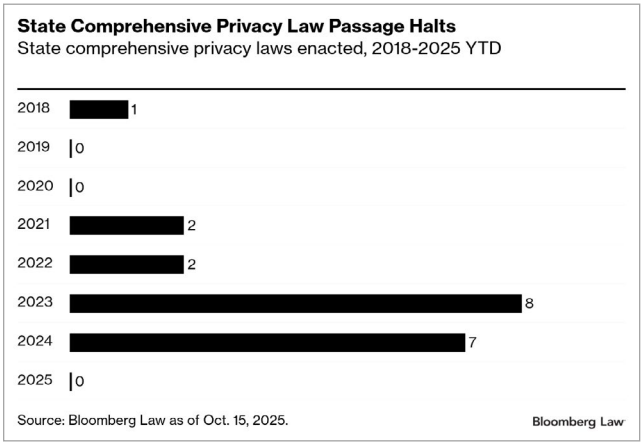
States passed numerous AI and child online privacy laws in 2025, yet not one state has passed new comprehensive privacy state legislation this year. It's no surprise that state legislatures are responding to the buzz surrounding artificial intelligence by enacting related regulation, and AI is likely a big reason why enacting new state privacy legislation was overlooked this year.

Plenty of states amended existing consumer privacy statutes this year—and will continue to do so next year while the lull in new state comprehensive consumer privacy laws persists. Look also for more state AI and child online privacy laws in 2026 and beyond.

State Comprehensive Consumer Privacy Wave Halts

2025 has been an outlier year for the state consumer privacy patchwork. Passage of new state comprehensive consumer privacy laws has slowed to a halt following a rapid surge in recent years.

Eight such laws were enacted in 2023, and seven were in 2024, so it was logical to expect 2025 to see further legislative activity on this front.



In 2018, California became the first state to pass a comprehensive data privacy law, the California Consumer Privacy Act. No state followed suit in 2019 or in 2020 (the pandemic may be partly to blame). Over the next few years, adoption of these laws picked up somewhat: 2021 and 2022 each saw the passage of two state privacy enactments. After the recent wave of legislation, the number of states with comprehensive consumer privacy enactments now stands at 20.

The influx has hit a wall in 2025, as proposed measures from over a dozen states have failed to become law. Instead, states have shifted their focus to artificial intelligence legislation, a shift that will continue in 2026.

New AI State Laws Take Center Stage

In the absence of comprehensive federal AI legislation, US states are taking the lead on AI and enacting such laws—much like they did with privacy laws.

Since AI burst onto the scene a couple years ago, it's no surprise that state AI enactments have dominated much of the state legislative agenda. State legislation that passed this year includes the following AI-adjacent or sector-specific laws:

- California's AI Transparency Act and the state's Transparency in Foundation Model AI Act.
- Texas's Responsible AI Governance Act (prohibiting companies from developing AI systems that cause certain harms).
- Pennsylvania's criminal deepfake law.
- Montana's AI law (regulating the use of AI in government).
- Texas's Responsible AI Governance Act (prohibiting companies from developing AI systems that intentionally encourage people to harm themselves, impair a person's constitutional rights, or unlawfully discriminate against a protected class).

In 2024, Colorado became the first jurisdiction in the US to pass comprehensive legislation regulating artificial intelligence. However, the Colorado

Artificial Intelligence Act's implementation has been delayed until June 2026, which might mirror the struggle states are having in getting comprehensive privacy legislation over the finish line. However, it is clear that states are passing AI related legislation in droves and that this trend will continue into 2026.

Child Online Privacy Patchwork Grew, Amidst Chaos

This year has seen more state child online privacy and safety laws—despite court challenges that even further muddled the patchwork of these laws.

At least seven states enacted state child online privacy and safety laws this year, with privacy obligations including requiring covered entities to establish high default-level privacy and safety settings for minors and to conduct data protection impact assessments for new features likely to be accessed by minors.

Next year will likely continue this trend as states have become more adept at writing privacy laws and amending existing privacy legislation to withstand First Amendment scrutiny and age-verification court challenges.

States Amending, Not Enacting Privacy Laws

Even though there were no new comprehensive privacy laws this year, several states passed major amendments to their privacy statutes.

Connecticut, for example, recently expanded its 2022 privacy law (for a second time) to include new prohibitions on selling sensitive data and targeted advertising for minors; enhanced rights for consumers regarding profiling decisions; a new right for consumers to contest profiling outcomes; and new obligations for controllers to conduct impact assessments.

Montana, Virginia, and Oregon also amended their privacy laws in the following ways to address common themes:

- Adding additional protections for **minors' personal data**.
- Adding new safeguards for the **protection of health and reproductive data**.
- Refining the **applicability data threshold** for the privacy statutes.

Election Year Placed Focus on Federal Privacy Efforts

Another possible factor for the pause in state comprehensive privacy enactments was the 2024 presidential election. The administration shift from President Joe Biden to President Donald Trump may have further snarled up the already complicated state and federal privacy landscape, due to policy and ideological differences. The continued absence of a national data privacy standard further compounds the situation because the uncertainty at the federal level doesn't give the states a clear privacy mandate to emulate.

The state comprehensive privacy laws that have been passed to date have created a vexing patchwork of state privacy laws that companies and legal practitioners must navigate. While there was a lull this year in comprehensive privacy legislation, more laws will be forthcoming in the next few years—albeit at a slower rate than in previous years—and these nuances will continue to grow as more states enact comprehensive privacy laws.

- With assistance from Jeffrey Florian.



Why AI Return on Investment in Legal Will Lag in 2026

Janet Chanchal
Legal Analyst

Most in-house attorneys say their organizations are already using generative AI, according to a recent Bloomberg Law **survey**. Yet despite growing enthusiasm for and investment in AI, measurable returns remain to be **seen**.

Across in-house teams, generative AI tools are being piloted for a variety of different legal workflow enhancements, while vendors are embedding AI capabilities into existing platforms. But implementation alone doesn't equal transformation. Valuable ROI depends on deep, consistent adoption and strong data foundations.

In 2026, the gap between investment and impact will reflect uneven usage of GenAI tools and uneven adoption across legal departments, combined with underdeveloped data infrastructure rather than technological shortcomings. Thus, legal departments will focus less on proving AI's value and more on building the systems, consistency, and confidence needed to measure it accurately.

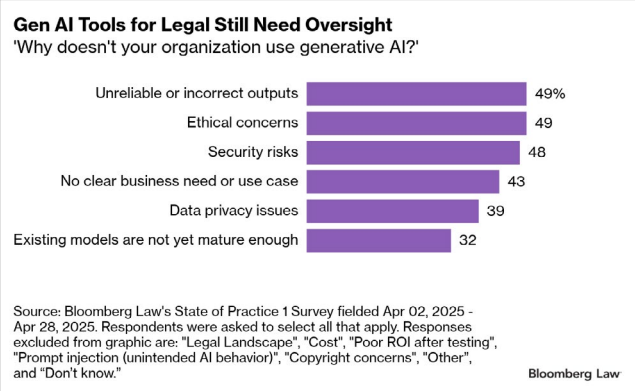
AI in Pilot Mode

AI adoption within corporate legal teams remains fragmented. Many departments are still in pilot mode, testing tools in isolated practice areas or with small user groups. While these pilots highlight potential efficiencies, few have been implemented organization-wide. Until AI becomes embedded in everyday workflows, the data volume and quality needed to assess ROI will remain limited.

Only 23% of in-house lawyers who responded to Bloomberg Law's most recent State of Practice survey use AI tools daily, while 27% haven't used them in the past six months. This uneven engagement suggests that adoption is still surface-level rather than systemic, resulting in scattered performance gains that are difficult to quantify or translate into meaningful metrics.

Among in-house professionals who reported using AI at least a few times a month, one-third say it saves them less than 30 minutes a day, while 22% report time savings of 30 minutes to an hour. These marginal efficiency gains underscore a deeper challenge: Expectations for AI's transformative potential remain out of sync with its current stage of maturity for legal practice.

For organizations that haven't yet adopted generative AI as of late April of this year, both **in-house and law firm attorneys** said that the top reasons include: unreliable or incorrect outputs (49%), ethical concerns (49%), security risks (48%), and the lack of a clear business need (43%). Another 32% point to the immaturity of existing AI models as a limiting factor.



Together, these findings highlight a fundamental truth that despite rapid innovation, generative AI tools for legal practice still require significant oversight, which often offsets the efficiency gains they promise.

Executives frequently anticipate measurable results within a single budget cycle. Yet those expectations are rarely grounded in realistic timelines or well-defined success metrics. Without a consensus on what AI is meant to achieve—whether faster contracting, lower legal spend, or fewer escalations—departments end up with inconsistent AI adoption and unclear ROI benchmarks.

Adoption, after all, isn't a one-time rollout; it's an evolving process that depends on culture, trust, and workflow integration. Until AI becomes universally embedded across teams and practice areas, its measurable impact on legal departments will remain limited.

The Hidden Prerequisite: Data Readiness

Even with widespread adoption across legal teams, AI's ROI can't be accurately measured without strong data foundations. Most corporate legal departments weren't designed for quantitative analysis. Many still rely on manual reporting, fragmented systems, and inconsistent metrics for tracking matters, turnaround times, and **outside counsel spend**.

Without clean, unified baselines, comparing performance before and after AI implementation becomes nearly impossible. The result is that AI's impact often appears weaker than it truly is.

Throughout 2026, legal departments will continue investing heavily in data quality, standardization, and integration. They will focus on cleaning legacy datasets, establishing consistent taxonomies, and connecting disparate systems to create a single source of truth. These foundational efforts may postpone short-term ROI but are critical for building long-term credibility and measurable outcomes.

Effective AI strategies in legal operations depend on structured, **high-quality data** that enables continuous measurement. Until that structure is in place, ROI will remain more aspirational than demonstrable.

2026: The Year of Foundations, Not Payoffs

The coming year will be about creating the conditions for future value rather than about capturing it immediately. Legal operations teams should concentrate on four key areas:

- Measuring adoption by tracking usage, frequency, and workflow integration.
- Building baselines for matter volume, turnaround time, and spend.
- Integrating data across matter management, document, and billing systems.
- Aligning metrics with enterprise goals such as risk mitigation and decision support.

These initiatives won't generate dramatic ROI figures in 2026, but they will produce something more critical: a credible framework for long-term measurement.

Rethinking ROI

Traditional ROI measures like hours saved or costs reduced tell only part of the story. The real impact of **AI lies in how it changes legal's role in the business**. AI improves risk detection, enhances decision-making, and creates capacity for strategic work. These results are harder to quantify but ultimately more valuable.

In 2026, **forward-looking legal departments** will begin transitioning from measuring "efficiency saved" to "value created." This includes risk avoidance, better decision accuracy, and the redeployment of talent to higher-value activities. Once adoption and data readiness mature, these strategic outcomes will form the basis of measurable ROI.

Looking Ahead

2026 will be a foundational year, more about building than boasting. Legal departments will refine adoption strategies, strengthen data infrastructure, and align leadership expectations around realistic timelines for achieving any measurable ROI. These efforts may not deliver immediate payoffs, but they'll lay the groundwork for long-term, demonstrable success.

After 2026, the focus will shift from experimentation to evidence. Departments that have invested in consistent workflows and clean data will finally be positioned to quantify AI's impact, translating early enthusiasm into verifiable efficiency, savings, and strategic value.



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