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DOJ Antitrust Division Head Promises Litigation to Break Up Director Interlocks

Client Alert | May 2, 2022

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The Department of Justice's Antitrust Division promised in a recent speech to increase enforcement of Section 8 of the Clayton Act, which prohibits competing corporations from sharing common directors or officers. The prevailing enforcement climate means that companies should have a compliance plan in place to discover potential director interlocks before they develop and monitor existing outside director positions to ensure they conform to existing Section 8 safe harbors.

Background

Jonathan Kanter, Assistant Attorney General for DOJ's Antitrust Division, stated in a April 2022 speech that "[f]or too long, our Section 8 enforcement has essentially been limited to our merger review process."[1] DOJ is "ramping up efforts to identify violations across the broader economy" and "will not hesitate to bring Section 8 cases to break up interlocking directorates."[2]

The agencies have periodically issued warnings on Section 8 compliance. In 2019, the FTC published a blog post, *Interlocking Mindfulness*, reminding companies of the need to avoid director interlocks, particularly where mergers or spin-offs are involved.[3] This followed a 2017 post advising that companies "[h]ave a plan to comply with the bar on horizontal interlocks".[4] Kanter's statements are a marked evolution from the FTC's 2017 guidance stating that the Commission "relie[s] on self-policing to prevent Section 8 violations,"[5] and indicate that DOJ may bring litigation to address potential interlocks.

Clayton Act, Section 8

Section 8 of the Clayton Act (15 U.S.C. § 19) prohibits one person from being an officer (defined as an "officer elected or chosen by the Board of Directors") or director at two companies that are "by virtue of their business and location of operation, competitors." "Person" has a broader meaning than a natural person, and includes a single firm.[6] Under this construction, a single firm could not appoint two different people as its agents to sit on the board or act as an officer of two competing corporations.

Section 8 broadly defines "competitors" to include any two corporations where "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." Section 8 is broad and potentially applies where two competing companies have an officer or director in common, subject to certain exceptions.

There are three potential safe harbors from Section 8 liability:

1. The competitive sales of ***either*** company are less than 2% of that company's total sales;
2. The competitive sales of ***each*** company are less than 4% of that company's total sales; or

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3. The competitive sales of ***either*** company are less than $4,103,400 as of 2022.

While there are no penalties or fines imposed due to a Section 8 violation, the statute requires that the parties eliminate the interlock if a violation is found to have occurred. There is a one-year grace period to cure violations that develop after the interlock has occurred (e.g., competitive sales surpassing *de minimis* thresholds), provided the interlock did not violate Section 8 when it first occurred.

An antitrust investigation into a potential interlock may force the resignation of key officers or directors, delay the closing of a proposed transaction, or trigger consumer class actions alleging collusion.

Section 8 Compliance in the Current Regulatory Environment

As noted in a previous Client Alert, the DOJ has taken action against suspected interlocks even before Kanter's April 2022 statements. Corporations should take proactive steps to detect interlocks before they occur and monitor existing ones to ensure they comply with current Section 8 safe harbors.

Corporations whose directors or officers are being considered for an outside position should first evaluate the position for potential Section 8 concerns. Where a corporation's director or officer holds an outside position at another firm subject to a safe harbor due either to a lack of competition or a *de minimis* overlap, counsel should reevaluate the relationship periodically to ensure marketplace developments do not cause the position to run afoul of Section 8. This can occur because of growing sales in existing overlaps or entry into new lines of business. These checks can be incorporated as part of existing director/officer independence analyses.

Corporations engaged in financial transactions, such as spin-offs where the parent's directors or officers may hold positions at the spin-off, should check whether the parent and the spin-off may compete in any line of business and evaluate potential Section 8 issues.

Private equity firms holding board seats or appointing leadership in multiple portfolio companies should evaluate carefully whether any could be considered "competitors" for Section 8 purposes.

Other antitrust statutes, particularly Section 1 of the Sherman Act (which prohibits agreements that unreasonably restrain trade), continue to apply even if the interlock is within Section 8 safe harbors. A sound compliance plan will therefore also establish procedures to prevent sharing of competitively sensitive information and avoid the appearance of potential competition concerns.

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[1] *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, April 4, 2022, available at: https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[2] *Id.*

[3] Michael E. Blaisdell, *Interlocking Mindfulness*, June 26, 2019, available at: https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness.

[4] Debbie Feinstein, *Have a plan to comply with the bar on horizontal interlocks*, Jan. 23, 2017, available at: https://www.ftc.gov/enforcement/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks.

[5] *Id.*

[6] *Interlocking Mindfulness* (Section 8 "prohibits not only a person from acting as officer or director of two competitors, but also any one **firm** from appointing two different people to sit as its agents as officers or directors of competing companies").

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition, Mergers and Acquisitions, Private Equity, or Securities Regulation and Corporate Governance practice groups, or the following practice leaders:

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