Skadden

Interlocking Boards: The Antitrust Risk You May Never Have Heard Of

A mostly forgotten statute barring competitors from having representatives on each other's boards could be used by regulators if pressure builds for antitrust enforcement in the tech industries.

- Tech companies are particularly vulnerable to interlocking board issues because their businesses can evolve rapidly and their competitors change.
- Acquisitions and spin-offs can create inadvertent interlocks.
- Companies should periodically review the boards on which their directors and officers serve.

For the past decade, there has been mounting bipartisan pressure for more aggressive antitrust enforcement in the U.S., especially against large technology companies. Last year, the Republican-led Department of Justice (DOJ) and the Federal Trade Commission (FTC) sued both Google and Facebook for alleged abuses of monopoly power. Congress conducted an antitrust investigation of major technology companies, and sweeping legislation has been proposed to strengthen policing of mergers and conduct by dominant firms. The Biden administration is widely expected to continue this more aggressive approach to antitrust.

Most of the discussion has focused on mergers and the use that major tech companies make of the power they have acquired. But a more obscure law prohibiting interlocking directorates could be an appealing tool for regulators, particularly in the tech sector. Regulators have invoked the once-dormant law several times in the last dozen years, so directors and their companies should be aware of its strictures and the circumstances that might bring it into play.

The mere risk of anticompetitive harm triggers the ban

Since 1914, Section 8 of the Clayton Act has prohibited interlocking directorates — when competing corporations are represented on each other's boards. In 1990, the act was amended to add officers, thereby barring anyone from serving as a director *or officer* of any two competitors, defined as businesses where "the elimination of competition by agreement between them would constitute a violation of the antitrust laws." There are exemptions and safe harbors, including one based on the degree of overlap in the businesses, so minor competition at the fringes of core businesses may not trigger the law. But the definitions are broad enough to potentially encompass many companies in the same industry, even in the absence of direct competition.

Unlike most other antitrust provisions, Section 8 does not require any actual anticompetitive behavior. It is enough that companies *could* violate the law by reaching an anticompetitive agreement. If the potential to violate the act exists, the companies are prohibited from sharing directors or naming directors or officers to the other's board. As one court said, the law was designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."

Section 8 was revived in the last two administrations

It has been more than 40 years since the federal government has filed suit under Section 8, but the law was invoked by both the Obama and Trump administrations.

One case drew a great deal of attention: an FTC investigation of Apple's and Google's boards in 2009. Up to that point, Apple was primarily a maker of computers and phones and Google was a search engine, so they were not seen as direct competitors, and they shared two directors, Google CEO Eric E. Schmidt and Apple Chairman Arthur Levinson. However, by the late 2000s, as Google prepared to launch its Android mobile operating system, the two companies arguably were on the verge of becoming competitors. Ultimately, Mr. Schmidt resigned from Apple's board and Mr. Levinson from Google's without the FTC formally initiating action.

In 2016, during the Obama administration, the DOJ challenged a transaction in which Tullet Prebon, an electronic trading platform, was to acquire a business line of ICAP, a competitor, in exchange for stock that would have given ICAP a 19.9% stake in Tullet Prebon and the right to nominate one member of its board. After the DOJ voiced concerns that the transaction would give ICAP a director on the board of a competitor, the transaction was restructured so ICAP would receive no stake in Tullet Prebon or board representation.

Section 8 also received attention under the Trump administration. In 2018, the head of the DOJ Antitrust Division raised concerns about cable operator Comcast appointing executives of its NBC Universal broadcast subsidiary to the board of Hulu, a video streaming service in which Comcast held a 30% stake. As streaming was increasingly seen as competing with cable, having representatives on Hulu's board potentially ran afoul of Section 8. (Disney's purchase of Comcast's Hulu stake in 2019 ultimately rendered the issue moot.) In a 2019 blog posting titled "Interlocking Mindfulness," the head of the FTC's competition bureau stressed that businesses generally should be mindful of the law.

Where Section 8 may bite

Section 8 does not carry the monetary penalties that other antitrust statutes do, but the fact that the government need not show any anticompetitive action makes it an easy tool to reach for as pressure mounts to enforce antitrust laws more vigorously. And it can force companies to remove directors and deal with the associated public fallout.

Tech companies may be particularly vulnerable to Section 8 for a number of reasons:

- Who is and is not a competitor can change rapidly with evolving technology and shifting business strategies and product lines. Simply adding new functionality to an existing product can generate competition with new companies, potentially creating an interlock issue.
- Tech companies regularly invest in startups and engage in M&A activity that can involve competitors, thereby inadvertently creating interlocks.
- Companies may share investors such as venture capitalists whose stakes are not large enough to trigger other antitrust laws, yet Section 8 could apply if they are represented on the boards.
- Among early-stage companies, it is common to have multiple venture capital investors, each of whom may hold stakes in other companies that are potential competitors.

Best practices

In the current pro-enforcement environment, businesses should be on the lookout for possible Section 8 issues, especially in the tech industry. A short list of best practices:

- Periodically review the other boards on which your company's directors or executives sit for potential Section 8 issues.
- Be alert to changes in your business or at other companies with which your company has an interlock and may compete.
- Consider interlock issues when conducting M&A. Acquiring a new business often expands the acquirer's list of competitors.
- In spin-offs, be on the lookout for potential Section 8 issues if some directors will sit on the boards of both the former parent and the newly independent company.
- When selecting new directors, consider whether they are being chosen for expertise gained as a director of a company that might be viewed as a competitor or could become one.

Authors

David Wales / Washington, D.C.

Maria Raptis / New York

This article is from Skadden's *The Informed Board.*

View past editions / You can find all *Informed Board* articles here.

One Manhattan West / New York, NY 10001 / 212.735.3000