DOJ Antitrust Division Ramping Up Enforcement Efforts Against Interlocking Directorates

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In April 2022, Assistant Attorney General Jonathan Kanter of the Department of Justice's Antitrust Division (DOJ) previewed the DOJ's intent to more aggressively enforce the prohibition on interlocking directorates under Section 8 of the Clayton Act, 15 U.S.C. § 19. During a speech to antitrust enforcers at an annual spring summit, AAG Kanter stated, "For too long, [DOJ] Section 8 enforcement has essentially been limited to our merger review process." AAG Kanter indicated that, going forward, the DOJ would be "ramping up efforts to identify violations across the broader economy" and that it "will not hesitate to bring Section 8 cases to break up interlocking directorates." The DOJ is now making good on that promise.

On October 19, 2022, the DOJ announced that seven directors had resigned from the boards of five companies in response to the DOJ's concerns that their roles violated Section 8. Although the Obama and Trump administrations increased Section 8 scrutiny under their watch, this announcement reflects a departure in scope and approach from the DOJ's past practices with respect to Section 8 enforcement. Historically, the DOJ has sought to enforce Section 8 when the interlock is discovered in the context of an unrelated antitrust investigation — most often, as AAG Kanter acknowledged, in connection with merger enforcement. By contrast, this latest round of resignations appears to be the result of targeted investigations by the DOJ into potential interlocks based on publicly available information and filings, independent of merger review or an ongoing antitrust investigation. It appears that more investigations are coming and that DOJ will continue to act aggressively, since the DOJ made a point to note that its October 19 announcement was only "the first in a broader review of potentially unlawful interlocking directorates" and "enforcement of Section 8 will continue to be a priority for the Antitrust Division."

What Is Section 8?

Section 8 of the Clayton Act prohibits any "person" from simultaneously serving as a director or officer of two competing corporations. Critically, Section 8 does not require any showing of anticompetitive harm to establish a violation — the existence of overlapping board membership or directorship is *per se* unlawful, unless certain safe harbors apply.

The DOJ has taken the position that Section 8's prohibition is not limited to natural persons, but rather that companies and associations also may violate Section 8 by appointing representatives as board members or directors of competing corporations. Known as the "deputization theory," this policy brings within the ambit of Section 8 situations where, for example, a private equity firm acquires a minority stake in a competitor of an existing portfolio company and then seeks to appoint representatives of the firm as directors to both competitors' boards. Case law on the "deputization theory" is sparse, but at least one court has held that Section 8 may be violated where directors are acting as instrumentalities of a firm rather than in their own individual capacities.

Section 8 does offer safe harbors designed to remove from its scope interlocks involving corporations with de minimis competitive overlap. Interlocking directorates are exempted from the law's prohibitions if:

1. The competitive sales of either corporation are less than $4,103,400 (as adjusted);
2. The competitive sales of *either* corporation are less than two percent of that corporation's total sales; or
3. The competitive sales of each corporation are less than four percent of that corporation's total sales.

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The statutory remedy for Section 8 violations is injunctive relief. In practice, as with the DOJ's most recent enforcement efforts, the typical resolution is that the director or officer resigns from the position that creates the interlock and the DOJ closes its investigation. Due to AAG Kanter's strong reluctance to enter into consent decrees — especially conduct decrees that in the Section 8 context would require the parties to agree not to appoint overlapping officers or directors going forward for a number of years — it seems unlikely the current DOJ leadership will seek consent decrees in most Section 8 cases.

Takeaways From the DOJ's Recent Enforcement

AAG Kanter is "walking the walk" after pledging to increase Section 8 enforcement and announcing that the agency's efforts resulted in a number of board resignations. Companies should consider reviewing the business relationships of their directors and officers for potential interlocks. If they have not already, they also should consider implementing procedures to preemptively assess potential interlocks upon the appointment of a new director or officer. Even though Section 8 violations have never resulted in monetary damages, investigations by the DOJ can be costly and expose the company to unwelcome scrutiny.

In this initial round of enforcement, the DOJ appears to have set its sights on tech-related firms. The DOJ also signaled that the "deputization theory" is alive and well by criticizing two PE firms for having a representative sit on the boards of two allegedly competing companies. It is not surprising that the DOJ's initial focus has been on tech companies and PE firms, as both have faced a rising tide of antitrust scrutiny in recent years. We anticipate, however, that the DOJ will expand its Section 8 enforcement to other industries and examine all manner of entities, from corporations to PE firms to LLCs.

Though it has not happened yet, the DOJ's determination to increase Section 8 enforcement also may prod the Federal Trade Commission (FTC) into action. Like the DOJ, the FTC has the authority to enforce Section 8 and has done so in the past. More recently, in a policy statement issued on November 10, 2022, regarding the scope of Section 5 of the Federal Trade Commission Act, the FTC also reaffirmed its belief that it has even broader authority to challenge interlocks. Specifically, the FTC stated that, under Section 5, it can challenge "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act." There is a dearth of precedent on this issue, and thus the precise contours of this purportedly broader authority are not well-defined. However, the FTC could argue, for example, that Section 5 gives it the right to pursue enforcement where a safe harbor applies under Section 8. It remains to be seen whether the FTC will match the DOJ's renewed focus on Section 8.