CLIENT ALERT

Interlocking Directorates: DOJ Forces Resignations of Seven Directors in Multiple Enforcement Actions Under Section 8 of the Clayton Act

October 26, 2022

AUTHORS

William H. Rooney | Wesley R. Powell | Jeffrey B. Korn | Agathe M. Richard
Amy Orlov

On Wednesday, October 19, the Department of Justice Antitrust Division ("DOJ") announced that seven board directors across five U.S. companies had resigned from their board seats in response to DOJ's concerns that the directors' service on these corporate boards violated the prohibition on interlocking directorates under Section 8 of the Clayton Act ("Section 8").[1]

Section 8 prohibits simultaneous service as an officer or director of two or more competing corporations. More specifically, a "person" may not hold a board or officer position at two or more corporations (subject to certain exemptions pertaining to the size of the corporations' competitive sales) if: (1) each corporation is engaged in U.S. commerce; (2) the corporations are, "by virtue of their business and location of operation, competitors"; and (3) the combined capital, surplus, and undivided profits of each of the corporations exceeds $41,034,000.[2] The purpose of Section 8 is to prevent an

[1] *Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates*, DEPARTMENT OF JUSTICE (Oct. 19, 2022), here.

[2] 15 U.S.C. § 19(a)(1)(A)-(B); 15 U.S.C. § 19(a)(5); Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 87 Fed. Reg. 3540 (Jan. 24, 2022).

overlapping director at two companies from becoming a conduit through which competitors may exchange competitively sensitive information and/or coordinate on competitive business decisions.

In its October 19 press release, Assistant Attorney General Jonathan Kanter emphasized that "Section 8 is an important, but underenforced part of our antitrust laws" and that competitors that share corporate officers and directors "further concentrate[] power and create[] the opportunity to exchange competitively sensitive information and facilitate coordination – all to the detriment of the American public."[3] Given these concerns, Kanter indicated that DOJ will make enforcement of Section 8 a priority by "undertaking an extensive review of interlocking directorates across the entire economy."[4]

This enhanced enforcement agenda led DOJ to raise concerns that the seven resigning directors were simultaneously serving on competing boards in violation of Section 8. The press release identified five pairs of competing companies on which the directors served. The release further claimed that, in two instances, the interlocking director "represented" private equity firms and thus caused the private equity firm to be part of the interlock.[5]

Two additional directors who were representatives of a private equity firm served on the board of only one of the two competing companies. Those directors resigned from the board of that one company, along with the director, also a representative of the private equity firm, who served on the boards of both of the competing companies. The resignations of the two, single-company directors indicates that the DOJ continues to apply the so-called "deputization theory." Under that theory, Section 8 may prohibit two *different* individuals from the same investment firm from serving as officers or directors of two competing corporations, as the common director is viewed as the investment firm acting through the two "deputized" individuals. While the companies expressly denied admitting violations, the directors chose to resign rather than contest DOJ's allegations.[6]

This expanded and intensified interest by the U.S. antitrust agencies in investigating interlocking directorates that result from investment firms' holding positions in competing businesses follows prior agency statements raising concerns with respect to private equity investments in competitors.[7] The enforcement actions also serve as a reminder of the agencies' broader focus on all private equity transactional activities.

---

3 *Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates*, DEPARTMENT OF JUSTICE (Oct. 19, 2022), here.

4 *Id.*

5 *Id.*

6 Brian Koenig, *DOJ Forces Overlapping Board Members at 5 Cos. To Resign*, LAW360 (Oct. 19, 2022), here.

7 See, *e.g.*, Andrew Forman, Deputy Assistant Attorney General, DOJ Antitrust Division, Keynote Address at the ABA's Antitrust in Healthcare Conference: The Importance of Vigorous Antitrust Enforcement in Health Care (June 3, 2022), here ("we are very focused on potential Section 8 enforcement. To the extent that private equity investments in competitors leads to board interlocks in violation of Section 8, the division is committed to taking aggressive action.").

To ensure compliance with Section 8 of the Clayton Act, we recommend that investors, in particular private equity firms, that hold material positions in competing issuers consider the following:

- Board service on competing issuers should be regularly reviewed by antitrust counsel to monitor potential Section 8 violations and related reputational risks.
- Section 8 violations may arise not only as a result of a single overlapping individual, but also when different representatives of the same organization serve as officers or directors of competing corporations. Investors, in particular private equity firms, should consider this risk when investing in competing businesses, as Section 8 may impede their ability to designate board representatives on competing firms in the same industry and deprive them of critical governance rights with respect to significant investments.
- When assessing potential Section 8 violations, investment firms should also consider the growth of the businesses of their portfolio companies, which may jeopardize previous reliance on the *de minimis* safe harbors that protect competitive sales below certain thresholds.
- Even the appearance of an overlap may lead to an investigation by the U.S. antitrust agencies, which can be costly and distracting.
- The typical remedy for a Section 8 violation is for the offending board member to withdraw from the overlapping position. The withdrawal in some cases occurs voluntarily without any court order. In other cases, the agency may insist on a consent judgment that enjoins future interlocks and includes compliance obligations.
- Serving on boards of competing issuers may also raise antitrust risk under statutes other than Section 8. A public or private enforcer may assert that overlapping board members of competing corporations were a conduit by which the companies exchanged competitively sensitive information or coordinated competitive activities. Those claims could be brought under the broadly worded Section 5 of the FTC Act, which prohibits unfair methods of competition,[8] or Section 1 of the Sherman Act, which prohibits agreements in restraint of trade.[9]

Willkie's antitrust team would be happy to advise on any potential overlap of directors and officers affecting your company in light of this recent announcement.

[8] 15 U.S.C. § 45.
[9] 15 U.S.C. § 1.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

William H. Rooney
212 728 8259
wrooney@willkie.com

Wesley R. Powell
212 728 8264
wpowell@willkie.com

Jeffrey B. Korn
212 728 8842
jkorn@willkie.com

Agathe M. Richard
212 728 8190
arichard@willkie.com

Amy Orlov
202 303 1051
aorlov@willkie.com