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Trump Administration Likely to Continue Biden Administration's Efforts to Identify and Remediate Interlocking Directorates

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During the Biden Administration, the Department of Justice and the Federal Trade Commission were **active** in identifying and achieving remediation of interlocks that may violate Section 8 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

The antitrust agencies' effort to identify and break interlocks is not likely to be shelved in the second Trump administration. Notably, at the tail end of the Biden Administration, the **FTC and DOJ took the position** that the prohibitions of Section 8 and Section 5 are not limited to corporate interlocks involving officers and directors but also apply to *board observers* (The Court did not adopt any position on application of Section 8 to board observers in its disposition and response to the pleadings in this matter)*.* Firms and individuals should recognize this position was adopted by two of the three current FTC Commissioners–**Chairman Andrew Ferguson and Commissioner Melissa Holyoak**. The position of FTC Commissioner Mark Meador, is unknown. Rebecca Kelly Slaughter and Alvaro Bedoya, the two FTC Commissioners that President Trump has purportedly fired, also supported this position. Slaughter and Bedoya are contesting their firing, but are presently not sitting as Commissioners. Also, **the revised reporting rules** for transactions subject to the Hart-Scott-Rodino Act include a requirement that filing parties identify certain officers and directors. One purpose of this reporting requirement is to identify interlocks that may impact competition, including interlocks that are not prohibited by Section 8.

The Prohibition on Interlocking Directors And Officers

Section 8 of the Clayton Act prohibits one person from simultaneously serving as an *officer* or *director* of two *corporations* if: (1) each of the "interlocked" corporations has combined capital, surplus, and undivided profits of more than $10,000,000; (2) each corporation is engaged in whole or in part in commerce; and (3) the corporations are "**by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws**." The purpose of the prohibition is to "**avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors.**"

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps "are too small to have competitive significance in the vast majority of situations." A corporate interlock does not **violate the statute** if:

1. the competitive sales of either corporation are less than $1,000,000; or
2. the competitive sales of either corporation are less than 2 percent of that corporation's total sales; or
3. the competitive sales of each corporation are less than 4 percent of that corporation's total sales.

Determining whether an interlock falls within the *de minimis* exceptions is a legally complex and highly factual undertaking, and should be evaluated with counsel familiar with the statute and its enforcement.

Section 5 of the FTC Act prohibits "unfair methods of competition." Section 5 **prohibits** "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." Although the text of Section 8 suggests a relatively narrow prohibition–it prohibits only "*a person*" from serving as a *director* or *board-appointed officer* of *corporations* that are *competitors*–according to the Commission, Section 5 **prohibits**, among other things, "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act's" prohibition on interlocking directorates. Although there is substantial likelihood that the current FTC leadership will revise the Biden administration's policy statement on the scope of Section 5, the position articulated in the joint statement of interest (discussed below) suggests it is unlikely that the Commission will adopt a different position with respect to horizontal interlocks.

The DOJ and the FTC Have Adopted the Position that Board Observers Are and Should Be Subject to the Same Prohibitions as Directors and Officers

In the joint DOJ and FTC "statement of interest" filed in ***Elon Musk v. Samuel Altman***, the agencies argued that "section 8 bars relationships that create an interlock regardless of form." The agencies argued:

"[A]n individual cannot evade liability by serving as an 'observer' on a competitor's board .... [A] company or individual cannot use an indirect means to a prohibited end, such as by asking another person to serve as a board observer to obtain entry to a meeting that is otherwise off limits due to Section 8's ban on interlocks. Such misdirection would undermine Section 8's intent to impose a clear ban on direct involvement in the management of a competitor."

Corporations Should Consider Broader Disclosure Requirements for Board Service and Officer Appointments

While the remedy for violating Section 8 is limited to a break of the interlock, an interlock can support the requirements of an agreement for a violation of Section 1 of the Sherman Act (agreements in restraint of trade) or create a factual inference of an ability to collude or coordinate towards anticompetitive behavior. Violations of Section 1 of the Sherman Act can result in substantial private damages or criminal fines.

Section 8 is usually "enforced" by proper board and officer selection screening, not by government enforcement action or private actions. Because the interlocked company is also subject to liability for violating Section 8 and Section 5, director and officer selection efforts should adopt board relationship disclosures that include board observer positions, and companies may wish to adopt guidelines that expand prohibitions on persons serving as directors (or officers) of competing companies to include prohibitions on board observer status at competing companies.