Clients&FriendsMemo

The Biden Administration's "Extensive Review of Interlocking Directorates Across the Entire Economy" May Put Your Board Representation At Risk

May 3, 2024

The identification, investigation and removal of persons who serve as directors or officers of two competing companies (*i.e.*, "horizontal interlocks") is a significant component of the Biden Administration's antitrust enforcement agenda. The Department of Justice ("DOJ") has moved more aggressively to break interlocks, but the Federal Trade Commission's ("FTC's") expansive view of its authority under Section 5 of the Federal Trade Commission Act supports its efforts to prohibit a much broader class of interlocks. While the courts may be skeptical of the FTC's expansive view of its authority, the FTC has not yet been forced to go to court to validate its reading of the law.

* * * * *

Section 8 of the Clayton Act prohibits a person from serving as a director or officer of two (or more) competing corporations, where the corporations have capital, surplus and aggregated profits greater than $10 million (as presently adjusted to $48,559,000), and do not fall within certain *de minimis* exceptions.[1] It is a *per se* statute, and it is not a defense to a charge of violating the statute that a plaintiff cannot show anticompetitive harm from the interlock. While the remedy for an illegal interlock is merely to break the interlock, the loss of board representation can be a significant hurdle to protecting an investment in the company.

While many are aware that the DOJ is aggressively investigating horizontal interlocks, the FTC is considering using, and is using its authority to prohibit "unfair methods of competition" to challenge a significantly broader array of interlocks. This is likely one of the next frontiers in the Administration's efforts to undo what it sees as forty years of underenforcement of the antitrust laws.

---

[1] 15 U.S.C. §19; Client & Friends Memo, *FTC Announces 2024 Thresholds for Merger Control Filings Under HSR Act and Interlocking Directorates Under the Clayton Act* (Jan. 23, 2024). Section 8 includes a carve-out for interlocks involving banks, banking associations and trust companies; for restrictions related to such entities, see the Depository Institutions Management Interlocks Act. 12 U.S.C. §§3201-08. There are other statutes, specific to certain industries, that also regulate interlocks, including some that prohibit non-horizontal interlocks. 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.

The Department of Justice Is Aggressively Investigating Horizontal Interlocks

The DOJ's enforcement against horizontal interlocks has, to date, resulted in the unwinding or prevention of interlocks involving at least two dozen companies.[2]

> *Section 8 [of the Clayton Act] is an important, but underenforced, part of our antitrust laws. Congress made interlocking directorates a per se violation of the antitrust laws for good reason. Competitors sharing officers or directors further concentrates power and creates the opportunity to exchange competitively sensitive information and facilitate coordination – all to the detriment of the economy and the American public. … The Antitrust Division is undertaking an extensive review of interlocking directorates across the entire economy and will enforce the law.*[3]

Health care markets[4], technology markets, and private equity firms[5] are a significant focus of their efforts. Energy markets are likely another area of interest.[6] DOJ has also challenged horizontal interlocks, preemptively – prior to a person (or entity) actually being elected or appointed to the board – including in mergers and acquisitions.[7]

---

[2] See Department of Justice, *Two Warner Bros. Discovery Directors Resign After Justice Department Expresses Antitrust Concerns* (Apr. 1, 2024); Department of Justice, *Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates* (Aug. 16, 2023); Department of Justice, *Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates* (Mar. 9, 2023); Department of Justice, *Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates* (Oct. 19, 2022); Department of Justice, *Endeavor Executives Resign From Live Nation Board of Directors after Justice Department Expresses Antitrust Concerns* (Jun. 21, 2021).

[3] Remarks of Assistant Attorney General Jonathan Kanter, at press conference announcing resignation of directors from the board of directors of five companies. Department of Justice, *Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates* (Oct. 19, 2022).

[4] *Remarks of Deputy Assistant Attorney General Andrew J. Forman, at the Capitol Forum Health Care Competition Conference* (Oct. 26, 2023).

[5] *See* Department of Justice, *Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates* (Mar. 9, 2023); Department of Justice, *Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates* (Oct. 19, 2022).

[6] The Antitrust Division, DOJ, and the FTC recently commented on the potential competitive impact of partial ownership stakes, director rights, and other corporate governance rights in providing some level of control or influence over an entity by investment companies. See Reply Comment of the U.S. Department of Justice, Antitrust Division and the Federal Trade Commission, Federal Power Act Section 203 Blanket Authorizations for Investment Companies, before the Federal Energy Regulatory Commission (Docket No. AD24-6-000) (Apr. 25, 2024) at 7-9.

[7] Department of Justice, *Tullett Prebon and ICAP Restructure Transaction After Justice Department Expresses Concerns About Interlocking Directorates* (Jul. 14, 2016); Competitive Impact Statement, U.S. v. CommScope, Inc. & Andrew Corporation, Case No. 1:07-cv-02200 (D.D.C. Dec. 6, 2007).

The FTC's Interpretation of its Authority to Prohibit Unfair Methods of Competition Reaches Interlocks Outside the Scope of Section 8

Section 5 of the FTC Act prohibits "unfair methods of competition."[8] 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."[9] 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.[10]

The Administration's Expansive View of Interlocks That May Be Anti-Competitive or an Unfair Method of Competition

Through their enforcement actions and public pronouncements by political appointees, the DOJ and FTC have articulated an expansive view of what interlocks may be anticompetitive.

- **Non-Horizontal Interlocks:** Section 8 is limited to interlocks between competitors. The Biden Administration's concern that the antitrust agencies have overlooked the likelihood of competitive harm from mergers involving one or more future competitors, firms operating upstream and downstream of each other, and from vertical integration by contract or merger more generally suggests a concern with *non-horizontal interlocks*. The 2023 Merger Guidelines set out a marker for such a theory of harm, treating various corporate governance rights as consistent with the "incentive and ability" analysis of the competitive effects of a non-horizontal acquisition, or an acquisition of a minority position in a firm.

> Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority interest may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition. . . . [Additionally] *specific governance rights, such as the right to*

[8] 15 U.S.C. 45(a)(1).

[9] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) at 8. The scope of Section 5's prohibition "reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions." Conduct that is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature" or "that is otherwise restrictive or exclusionary" may be unfair. To be an unfair method of competition, that conduct must also "negatively affect competitive conditions" "whether by affecting consumers, workers, or other market participants."

[10] *Id.* at 15.

> *appoint members to the board of directors,* influence capital budgets, determine investment return thresholds, or select particular managers, can create such influence. . . .[11]

A future application of Section 5's prohibition of unfair methods of competition is likely to be a challenge to an interlock between firms in a non-horizontal relationship: (i) firms operating in adjacent markets where there is a possibility of future competition between the firms; or (ii) firms operating in an upstream / downstream relationship where one firm is a significant and important supplier to one or more competitors of the other interlocked firm. On the right facts, the FTC will see the potential for significant harm from the interlock and move to break it.

- **Horizontal Interlocks That Meet the De-Minimis Exception of Section 8:** Section 8 does not reach interlocks where (i) the competitive sales of either corporation are less than $1,000,000 (as presently adjusted to $4,855,900); or (ii) the competitive sales of either corporation are less than 2 percent of that corporation's total sales, or (iii) the competitive sales of each corporation are less than 4 percent of each corporation's total sales. However, these de-minimis thresholds do not apply to challenges under Section 5. The FTC's interest in protecting "nascent" competition from small firms, firms expanding into new markets, or in markets that are just developing suggests that it is likely the FTC will rely on Section 5 to investigate and prohibit interlocks that could stifle such competition.

- **Interlocks Involving Board Observers:** Section 8's prohibitions are clearly limited to serving as a director or board-appointed officer of two competing entities. But FTC Commissioner Rebecca Slaughter (and past FTC Commissioner Rohit Chopra, currently serving as the Director of the Consumer Financial Protection Bureau) have argued that Section 5's prohibition on unfair methods of competition reaches interlocks that are defined to include board observer positions. According to Slaughter and Chopra:

> "Typically, a board observer is like a regular member of a board of directors, but without a formal vote. While they don't have a vote, they certainly have a say. Like regular board members, board observers often participate in confidential discussions about strategy. Board observers can advocate for a preferred outcome. Board observers can even get access to key data. … I have reason to believe this arrangement undermines a key purpose of Section 8 of the Clayton Act's prohibition

[11] U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, MERGER GUIDELINES (2023) at 28. *See also* the Commission's opinion in TRW Inc., 93 F.T.C. 325, 379, n. 12 (1979), *aff'd in part & rev'd in part*, 647 F.2d 942 (9th Cir. 1981) ("Of course, Section 5 of the FTC Act may reach interlocks involving firms in a buyer/seller relationship or between potential competitors.").

on interlocking directorates and [is] therefore unlawful under Section 5 of the FTC Act."[12]

- **Interlocks Involving Non-Corporate Entities:** The Commission has recently challenged private equity firm Quantum Energy Partners' investment in EQT Corporation, restricting QEP from taking a board seat at EQT.[13] There, the Commission recognized that "Section 8's specific prohibition of interlocks among competitor 'corporations' pre-dates the development of other commonly used corporate structures, such as limited liability companies [and] we must update our application of the law to match the realities of how firms do business in the modern economy. [This] action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations."[14] The Department of Justice has also suggested that Section 8, notwithstanding its text, may also be applicable to horizontal interlocks among corporate and non-corporate entities.[15]

- **Broad Reading of "Competitors":** Consistent with some case law, and some legislative comments, the Department and the FTC define competitors to include firms that produce a similar class of products, but not necessarily products that operate as substitutes. For example, according to the FTC:

> *Section 8 applies to "competitors" in the sense that "the elimination of competition by agreement between them" would violate the antitrust laws. But courts have rejected the argument that this is the same as the market definition analysis found in other antitrust cases. … [E]specially in emerging industries, competition in the Section 8 sense can encompass more than an assessment of the cross-elasticity of demand for existing products.* ***In a developing industry in which product variation is just beginning and customer needs are not yet standardized,***

---

[12] Statement of Commissioner Rohit Chopra Joined By Commissioner Rebecca Kelly Slaughter, In the Matter of Altria Group, Inc., and JUUL Labs, Inc. (Apr. 2, 2020) at 4-5. As indicated at note 1, the proposed changes to the information required to complete the Hart-Scott-Rodino Merger Notification Form include the identification of board observer positions.

[13] Complaint and Decision and Order, In the Matter of QEP Partners LP, Quantum Energy Partners VI, LP, Q-TH Appalachia (VI) Investment Partners, and EQT Corporation, FTC Docket No. C-4799 (Oct. 10, 2023). See also Decision and Order, In the Matter of TC Group, LLC, FTC Docket No. C-4183 (Jan. 2007) (order settling concerns that the acquisition of Kinder Morgan, Inc. (KMI) by KMI management and private equity funds managed and controlled by The Carlyle Group (Carlyle) and Riverstone Holdings LLC (Riverstone) would threaten competition between KMI and Magellan Midstream Partners by requiring Carlyle's and Riverstone's interest in Magellan become a passive investment, and by requiring the investment firms to: (i) remove all of their representatives from the Magellan Board of Managers and its boards of directors, (ii) cede control of Magellan to its other principal investor, Madison Dearborn Partners, and (iii) not influence nor attempt to influence the management or operation of Magellan).

[14] Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation (Aug. 16, 2023) at 5.

[15] Remarks of Assistant Attorney General Makan Delrahim, Fordham University School of Law (May 1, 2019).

> ***it is unlikely that two companies will produce products nearly equivalent in their ability to satisfy the needs of a range of customers. Nonetheless, these companies compete. Their competition consists of the struggle to obtain the patronage of the same prospective customers,*** *accompanied by representations of a willingness to modify their respective products. Competition also consists of efforts to make a sale, even if neither succeeds in persuading the buyer to purchase*.[16]

The Commission's position is not entirely consistent with the law or the statute, but the courts, in considering whether a person or corporation has violated Section 8, have not usually evaluated whether the interlocked corporations are competitors. This is an area where the Commission, especially, is looking to extend the law, and to diminish the "safe-harbors" of Section 8's *de minimis* exemptions.

- **Present Service May Not Be Required:** The Department has enforced Section 8 against firms (or persons) who do not presently "serve" as a director or officer of competing corporations, but who have the future right to a board seat, that would, if exercised, create an interlock. In doing so, the Department has acted to prohibit or prevent a potential interlock from coming to fruition.[17]

- **Two Individuals/Same Entity?:** The agencies read "person" to include different individuals associated with the same entity.[18] On that basis, the Department recently forced the resignation of certain individuals associated with investment firm Thoma Bravo from the board of SolarWind and forced the resignation of another individual, also associated with Thoma Bravo, from the board of Solar Wind's purported competitor N-able.

---

[16] Federal Trade Commission, Have a Plan to Comply With The Bar on Horizontal Interlocks (Jan. 23, 2017).

[17] A similar issue has come up in proxy fights, where the company that is the target of a takeover or director nomination battle alleges that the takeover or a person's future ascension to the board of the target raises Section 8 concerns. Courts have generally avoided finding a violation based on the speculation of a future interlock. See, e.g., *Charming Shoppes v. Crescendo Partners II*, 557 F. Supp. 2d 621 (E.D. Pa. 2008) (rejecting violation because "Section 8 was not created as a vehicle for courts to sit in judgment of competitors in a proxy contest"); *Square D Company v. Schneider S.A.*, 760 F. Supp. 362 (S.D.N.Y. 1991) (finding that "Section 8 would not be implicated where a competitor seeks the election of an agent whose only purpose is to consummate a takeover."); *Burnup & Sims v. Posner*, 688 F. Supp. 1532, 1534 (S.D. Fla. 1988) (holding that a target of a corporate takeover did not have standing to bring a Section 8 claim where the acquiring firm intended to seek total control of the target).

[18] One court has adopted this reading of Section 8. See *Reading International, Inc. v. Oaktree Cap. Mgmt. LLC*, 317 F. Supp. 2d 301, 326, 331 (S.D.N.Y. 2003) ("Under plaintiffs' theory, when a parent company designates different persons to sit on the boards of competing subsidiaries, these persons are treated as deputies of the same principal so that they are the same person for §8 interlock purposes." "[S]ection 8 ... prohibits the conduct alleged here.").

Changes to Merger Notification Filings Are Likely to Highlight Board Representations

Proposed changes to the information provided with a Hart-Scott-Rodino merger notification filing will, if adopted, provide both agencies with significant information on the board and officer positions of the parties to an acquisition, merger or joint venture.[19] Future challenges to otherwise hard-to-identify interlocks is one purpose behind the proposed changes, as the agencies are concerned about "under-deterrence" and that corporate actors are not sufficiently appreciative of Section 8's prohibitions."[20]

Conclusion

Efforts to reinvigorate and expand enforcement of the law's prohibition of interlocking directorates may be the Administration's most significant antitrust initiative and most likely policy shift that will carry over to future administrations and have a longer-term effect on corporate and investor behavior. Investors and firms should consider carefully whether their board representations, or their board representatives, put their investments or operations at risk of significant disruption, and, if vulnerable to an interlock challenge, consider whether alternative representation or relationships can minimize risk of disruption.

* * *

If you have any questions, please feel free to contact the following Cadwalader attorney.

Bilal Sayyed +1 202 862 2417 bilal.sayyed@cwt.com

[19] Federal Trade Commission, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178, 89-90 (Jun. 29, 2023). ("The proposed Officers, Directors, and Board Observers [of the proposed Hart-Scott-Rodino Form] would require the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). This information would allow the Agencies to know of existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships under both Sections 7 and 8 of the Clayton Act.")

[20] Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation (Aug. 16, 2023) at 4.