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Axinn Antitrust Insight: U.S. Department of Justice Forces Interlocking Board Members to Resign

October 21, 2022

PRACTICE AREAS

Antitrust

Axinn Update

On October 19, 2022, the U.S. Department of Justice ("DOJ") announced what may be its most proactive enforcement in recent memory of Section 8 of the Clayton Act, which prohibits a "person" from serving as an officer or director of two competitors. In a press release, DOJ's Antitrust Division stated that seven directors had resigned from boards across five different companies in response to DOJ's concerns that their roles created "potentially illegal interlocking directorates" in violation of Section 8. Because a "person" broadly includes individuals, corporations, and other entities, these "interlocks" arose not only where specific individuals sat on the boards of two competitors but also where an investor had appointed *different* individuals across competitors' boards.

The Division's Announcement Follows Several Months of Signaling That it Intends to "Reinvigorate" Section 8 Enforcement

In April, the head of the Division, AAG Jonathan Kanter, noted the Division's effort to "ramp[] up enforcement efforts to identify interlocking directorates across the broader economy," including outside the context of the "merger review process." Then, in June, DAAG Andrew Forman said that private equity investments, in particular, are in the Division's crosshairs: "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 an aggressive action."

In the Division's October 19 press release, AAG Kanter emphasized that "Congress made interlocking directorates a *per se* [i.e., automatic] violation of the antitrust laws for good reason," going on to note that "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 press release also warned that "[c]ompanies, officers, and board members should expect that enforcement of Section 8 will continue

to be a priority for the Antitrust Division," and that the announcement is only the "first" in the Division's "extensive review of interlocking directorates across the entire economy."

While Section 8 Itself is Not New, Its Vigorous Enforcement Is

A 2017 Federal Trade Commission blog post noted "[t]he Commission has generally relied on self-policing to prevent Section 8 violations." And, until recently, Section 8 primarily arose in the context of transactions reviewed under the Hart-Scott-Rodino Antitrust Act ("HSR"). Here, however, the Division appears to be charting new enforcement territory, proactively looking for Section 8 violations as part of an overall effort to use all of the statutory "tools at [its] disposal," and out of a concern that interlocking directorates present "the opportunity to coordinate – explicitly or implicitly." While Section 8 itself has no statutory damages remedy, interlocking directors can be used as evidence of an opportunity to collude or exchange competitively sensitive information in violation of Section 1 of the Sherman Act with its treble damage remedy.

Key Takeaways

For individuals considering board positions and for companies contemplating mergers or other collaborations, Section 8 should be top of mind and potential interlocks should be vetted as part of any diligence process. Likewise, with DOJ's independent focus on Section 8 likely to continue, now is the time to review existing board memberships and appointment policies for risks of Section 8 enforcement. This is an especially important action item for private equity firms with portfolio investments across multiple actual or potential competitors.

Please contact any of Axinn's Antitrust partners to discuss any questions about potential interlocking boards of directors and DOJ's enforcement efforts in this area.