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FTC Focus: Interlocking Directorate Enforcement May Persist

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This article is part of a monthly column that considers the significance of recent Federal Trade Commission antitrust announcements. In this installment, we discuss what to expect from the Trump administration's approach to Section 8 of the Clayton Act.

A hallmark of the Biden administration's all-fronts antitrust enforcement effort was renewed attention to compliance with Section 8 of the Clayton Act and the makeup of corporate boards. Section 8 prohibits interlocking directorates, where directors or officers sit simultaneously on the boards of competing companies.

While practitioners generally predict that the Trump administration's FTC under Chair Andrew Ferguson will take a pro-business approach to antitrust enforcement, Section 8 may be an exception.

Section 8: A Prophylactic Rule Reinvigorated Under Biden

Section 8 of the Clayton Act, codified at Title 15 of the U.S. Code, Section 19, makes it per se unlawful for any individual to simultaneously serve as an officer or director of two corporations that are competitors, subject to certain thresholds and exceptions.

Section 8 only applies when the corporation has capital, surplus and undivided profits over $51.38 million. Further, Section 8 does not apply if:

- Either corporation's competitive sales are less than $5.138 million;
- Either corporation's competitive sales are less than 2% of that corporation's total sales; or
- Each corporation's competitive sales are less than 4% of each individual corporation's total sales, so that more than a de minimis level of competition is necessary for the prohibitions to apply.[1]

Finally, Section 8 grants a one-year grace period to individuals who were eligible to serve on a board at the time of election if a change in circumstances later created an illegal interlock.

Notably, Section 8 can raise particular compliance concerns for investment firms that may hold minority stakes in competing corporations or may invest through different subsidiaries. Violations may arise in both instances and, because of the per se nature of Section 8, the imposition of a firewall or other safeguards, which usually reduce antitrust risk, is ineffective.

Historically, stand-alone Section 8 enforcement is rare. However, during the Biden administration, the U.S. Department of Justice and FTC issued a series of letters to investment firms and opened investigations into potential Section 8 violations. These actions resulted in the resignation of multiple directors from corporate boards, and at least **one company**, Quantum Energy Partners, declining to exercise board appointment rights.[2]

The Biden Administration's Last Word on Section 8

In the final days of the Biden administration, the FTC and DOJ weighed in on Section 8 one last time by filing a **statement of interest** on Jan. 10 in Musk v. Altman. The lawsuit, brought by Elon Musk and other plaintiffs in the U.S. District Court for the Northern District of California, alleges that interlocking relationships between OpenAI and Microsoft violated Section 8. The plaintiffs argued that these ties facilitated the sharing of competitively sensitive information in the generative AI space.

The statement of interest, while taking no position on the facts, purported to clarify the proper standards for the Section 8 claims. The statement of interest asserts three key points.

Interlocks are not mooted by resignation.

The agencies argue that unwinding an interlock does not moot a Section 8 claim if there is a likelihood of recurrence or if the risk that competitively sensitive information is shared remains. This argument assumes that a violation has occurred, meaning that none of the exceptions or the one-year grace period apply.

Form does not trump substance.

Even nonvoting observer roles or indirect agency relationships can violate Section 8 if they allow access to competitively sensitive information or influence decision-making. Courts, the agencies argue, must not allow corporations to sidestep the law through formalistic distinctions.

Broader liability through unfair competition statutes.

The FTC also highlighted that interlocks can constitute unfair methods of competition under Section 5 of the FTC Act and, by extension, California's Unfair Competition Law.

The New Administration's Approach to Interlocking Directorates

While the consensus view is that the FTC and the DOJ's Antitrust Division may take a less rigorous approach to antitrust enforcement, Section 8 enforcement may be here to stay. Notably, Ferguson, then serving as an FTC commissioner, filed a concurring statement on Jan. 10 in support of the statement of interest in Musk v. Altman.[3] Ferguson agreed with the Section 8 analysis but noted that he would have excluded the argument that interlocking directorates are also unfair methods of competition under Section 5 of the FTC Act.

Ferguson's support is particularly notable because it signals endorsement of the function-over-form view of Section 8 liability. For example, under the deputization theory, Section 8 liability can attach when a company chooses a natural person to serve on a competitor's board as its agent.[4] Under this theory, both the company and the natural person violate Section 8 unless an exception applies.[5]

The deputization theory expands liability and raises particular concerns for investment firms where a firm may appoint two different individuals to competing boards. There, the appointing firm is treated as an interlocking director, even though different individuals actually hold the board seats.[6]

While the agencies have advanced this theory in enforcement actions, the U.S. Supreme Court has not addressed it, and there is not a clear majority view among the federal courts. In Square D Co. v. Schneider SA, the U.S. District Court for the Southern District of New York in 1991 accepted the theory because otherwise,

> If such a literal reading were adopted, it would be easy for a company to interlock with a competitor and yet evade § 8 liability simply by calling its agents on the competitors' board something other than either officers or directors. Such a result would exalt form over substance.

In another case, Pocahontas Supreme Coal Co. v. Bethlehem Steel, in 1987, the U.S. Court of Appeals for the Fourth Circuit acknowledged the theory, but without rejecting it as a matter of law, found it was not supported by the facts in that case.

Implications for Governance and Compliance

Ferguson's endorsement of a broader view of Section 8 liability may foreshadow a continued sharpened enforcement posture that businesses should not ignore. Board-level antitrust compliance continues to demand close attention. Understanding a few key takeaways can ensure compliance.

Proactive reviews of board appointments are essential.

Companies must evaluate potential interlocks for legal compliance. Companies should consider internal audits in addition to creating policies on observer and advisory roles.

Titles don't protect against liability.

The agencies make clear that even informal roles, such as board observers or designees, may trigger scrutiny if they functionally enable coordination between competitors.

Voluntary resignations are not a get-out-of-jail-free card.

Companies cannot rely on post hoc resignations to shield themselves from enforcement actions.

Conclusion

As the FTC under Ferguson appears poised to maintain a function-over-form interpretation of Section 8, companies should not assume a retreat from enforcement. Businesses must remain proactive in evaluating board composition, especially as informal roles and agency relationships fall within enforcement crosshairs under Section 8.

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[1] The monetary thresholds adjust annually.

[2] Press Release, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (March 9, 2023) (available at https://www.justice.gov/archives/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal); Press Release, FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Oct. 10, 2023) (available at https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information).

[3] Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Statement of Interest Supporting Elon Musk, Musk v. Altman, 4:24-cv-04722-YGR (N.D. Cal.) (available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/concurring-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-regarding).

[4] See Statement of Interest at 6.

[5] Id.

[6] See id. (citing TRW Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981)).

Related Professionals

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