Interlocking Directorates: What’s on the Horizon

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Section 8 of the Clayton Act has not been a particularly hot source of antitrust enforcement activity, nor of antitrust articles, in years. Interlocking directorates have been forbidden under the antitrust laws for more than 100 years, but despite a small number of high-profile investigations, no individual or company has had to pay damages or been fined for an interlock. And the law has not changed much over that time. Several decades ago, a Second Circuit panel noted that “the [Federal Trade] Commission has found little occasion, and perhaps little incentive, to take action” against interlocks.1 The same could be said for the Department of Justice.

But change may be coming. In particular, the leaders of the DOJ’s Antitrust Division have confirmed that the Division is looking in new directions. In May, Assistant Attorney General Makan Delrahim stated that an “area that the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures.”2 A few months earlier, at the end of last year, Deputy Assistant Attorney General Andrew Finch stated that the Antitrust Division is “looking at . . . interlocking directorate issues more closely” and that “another issue [the Division] is thinking about” is “whether Section 8 applies to corporate entities created after the statute was passed in 1914, such as limited liability corporations.”3 And last fall, AAG Delrahim testified before a Senate committee that, upon the expiration of the last of the DOJ and FCC restrictions imposed in 2011 on Comcast and NBCUniversal following their merger, the Division will “examine carefully” whether Comcast’s appointment of three senior NBCU executives to Hulu’s board poses competitive concerns, including under Section 8.4

We should be clear that no new enforcement actions have been filed. No limited liability company has been found liable under Section 8. And no damages have been awarded. But the recent comments suggest this stasis may not last much longer. The government is signaling that it is prepared to break new ground, and antitrust enforcers are thinking about pursuing interlocks involving entities structured with a corporate form that did not exist when the Clayton Act was passed.

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1 Schechtman v. Wolfson, 244 F.2d 537, 539 (2d Cir. 1957).
A Brief Overview of the History of Interlocks

“An interlocking directorate occurs when a person sits on two or more boards of directors.”5 In many circumstances, this is perfectly legal. Director interlocks are illegal only where two companies are fairly large and compete directly with one another.

The principal statute governing interlocks is Section 8 of the Clayton Act; there are other statutes restricting interlocks in various regulated industries, e.g., the Public Utility Holding Company Act of 1935,6 the Federal Power Act,7 the Investment Company Act of 1940,8 the Federal Alcohol Administration Act,9 the Communications Act of 1934,10 and the Depository Institutions Management Interlocks Act.11 Congress has also turned its attention to interlocks in specific situations, including the passage of the Panama Canal Act of 1912.12

Section 8 provides:

No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are (A) engaged in whole or in part in commerce; and (B) 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; if each of the corporations has capital, surplus, and undivided profits aggregating more than [an amount adjusted annually].13

The statute also provides for a one-year grace period, upon development of a prohibited interlock, during which a director who was eligible at the time of appointment may resign with no violation.14

In addition, the FTC has interpreted Section 5 of the FTC Act15 to enforce the “spirit and policy” of Section 8.16 Occasionally, private parties have also challenged interlocks as facilitating a conspiracy in violation of Section 1 of the Sherman Act.17 Finally, the government has alleged Section 8 violations as part of its allegations that a merger violates Section 7 of the Clayton Act.18

6 15 U.S.C. § 79q(c) (prohibiting public utility holding companies from having any director who is also an officer or director of “any bank, trust company, investment banker, or banking association or firm”).
7 16 U.S.C. § 825d(b) (“[I]t shall be unlawful for any person to hold the position of officer or director of more than one public utility . . . .”).
8 15 U.S.C. § 80a-10(c) (“No registered investment company shall have a majority of its board of directors consisting of persons who are officers, directors, or employees of any one bank . . . .”).
9 27 U.S.C. § 208 (“[I]t shall be unlawful for any individual to take office . . . . as an officer or director of any company, if his doing so would make him an officer or director of more than one company engaged in business as a distiller, rectifier, or blender of distilled spirits.”).
10 47 U.S.C. § 212 (“It shall be unlawful for any person to hold the position of officer or director of more than one carrier subject to this chapter . . . .”).
Courts have identified two primary reasons for the prohibition on interlocking directorates: “to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors.” The idea is that, where competitors’ boards include the same individual, or different people nominated by the same firm, the common person could serve as a conduit for the exchange of competitively sensitive information between the two competitors or could influence the two companies not to compete as aggressively against one another as they otherwise would. “[T]he continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at.”

For these reasons, at the time of the Clayton Act’s passage, “[i]nterlocks between large corporations were seen in the public debate as per se antagonistic to the public interest.” As one court explained, Congress prohibited interlocks to “nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.”

Both the DOJ and FTC take the position that violations of Section 8 are per se violations, meaning that “parties cannot justify violations . . . based on a lack of competitive injury.” Enforcement actions can be brought by both federal agencies, state attorneys general, and private parties. Private parties, sometimes customers, sometimes competitors of interlocked corporations, and sometimes other third parties, such as investors, do sue. Section 8 provides for a private treble damages remedy, although damages have never been awarded on the basis of a Section 8 violation.

Section 8 applies not only to individuals but to firms. So, there is a violation if one firm appoints two different individuals to sit as its agents on the boards of two competing companies. As one court found, “Section 8 would be a formalism if it merely prohibited the same person from being officially named as a director of competing corporations.” This makes sense; otherwise, a corporation “without fear of sanction could have the concededly prohibited interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member.”

There are limitations on Section 8’s reach; it applies only where two corporations are engaged in commerce, the two corporations compete horizontally with each other, and one “person” (individual or entity) serves as an officer or a director of the two corporations. Also, each corporation must have capital, surplus, and undivided profits aggregating to $36,564,000 or more (as of August 2019).

19 Square D, 760 F. Supp. at 366.
22 Sears, Roebuck & Co., 111 F. Supp. at 616.
23 See Finch, supra note 3, at 14; Rosch, supra note 5, at 17–18.
26 See Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).
27 See Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1573 (10th Cir. 1984) (finding that a private plaintiff can obtain an injunction without proving an interlock’s anticompetitive effects, but dismissing treble damages claim absent proof of injury).
29 SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977).
February 2019; the numbers are adjusted annually), the “competitive” sales of the interlocked firms must total at least $3,656,400 each (adjusted annually), the competitive sales must total at least 2 percent of each firm’s total sales, and the competitive sales must total at least 4 percent of either firm’s total sales. Oddly—this is a good indication of the relatively sparse litigation over Section 8 issues, and therefore the dearth of published opinions—it remains an open question whether those figures include competitive sales outside of the United States.

The federal antitrust enforcement agencies do investigate, and sometimes sue, based on interlocks. Often, the result of such investigations is a consent judgment whereby the interlocked director agrees to resign from one or both boards, thereby resolving the interlock. The government may also obtain an injunction to eliminate the interlock and restructure a transaction, but as in any antitrust case, the agency must show a “cognizable danger of a recurrent violation.” This can present pitfalls; there is at least one decision finding that, following a sale of assets where there is no longer a risk of a recurring interlock, there is no basis to award an injunction. As with private plaintiffs, the government has never obtained a fine in a Section 8 case.

**Applying Section 8**

Despite Section 8’s apparently broad reach, there are several types of interlocks held by courts not to be covered at all:

- Those between potential competitors that do not yet actually compete with each other;
- Vertical interlocks, i.e., those between suppliers and customers;
- Interlocks between banks, and interlocks between banks and competing non-banks; and
- Interlocks between sports leagues.

There is one question that the circuits have not entirely resolved: the extent to which Section 8 applies to corporations that do not compete but whose subsidiaries do compete. Specifically, the Second Circuit held in *Kennecott Copper Corp. v. Curtiss-Wright Corp.* that Section 8 does not apply to companies whose subsidiaries are competitors, except possibly where the parent com-
pany “closely controls and dictates the policies of its subsidiary.”\textsuperscript{41} Subsequently, the Ninth Circuit explicitly considered that holding and determined that \textit{Kennecott Copper Corp.} does not stand for the notion that a subsidiary's activities can never be considered, but rather only that “[a] parent corporation is not a competitor of another corporation merely because its subsidiary is.”\textsuperscript{42}

Finally, at least one court has found that entities that constitute a single enterprise under \textit{Copperweld} cannot violate Section 8 by having directors in common.\textsuperscript{43}

**Lessons from Recent Enforcement Actions**

Enforcement actions relating to interlocking board memberships are relatively rare, but there are some notable examples from the last few years.

**Apple and Google (2009).** In 2009, the FTC investigated interlocking board memberships at Apple and Google, resulting in resignations of executives who served on the boards of both companies. On August 3, 2009, Apple announced that Eric E. Schmidt, CEO of Google, a member of the boards of both Google and Apple, was stepping down from the Apple board. On October 12, 2009, Google announced that Arthur D. Levinson, also a member of the boards of both Google and Apple, was stepping down from Google's board.\textsuperscript{44} Neither the FTC nor the companies disclosed what specific concerns prompted the investigations. At the time, the companies were increasingly shifting from offering complementary products and services to competing directly.\textsuperscript{45} Google had just released the Android operating system for mobile phones, competing directly with Apple's iPhone and iOS operating system. In 2009, Android was nowhere near the leading mobile operating system that it is today, but major phone makers had announced plans to offer Android-powered mobile phones. Apple and Google had also become competitors in the web browser and media distribution markets.

Following the announcement of Levinson's resignation from the Google board, FTC Chairman Jon Leibowitz issued a statement commending the companies “for recognizing that overlapping board members between competing companies raise serious antitrust issues and for their willingness to resolve our concerns without the need for litigation” and stating that the FTC “will continue to monitor companies that share board members and take enforcement actions where appropriate.”\textsuperscript{46} The FTC did not take any further action or issue any additional statements on the matter, at least in the public record.

**Tullett Prebon and ICAP (2016).** In November 2015, Tullett Prebon Group Ltd., a securities broker, announced a planned acquisition of ICAP plc’s voice-brokerage business.\textsuperscript{47} ICAP would hold a 19.9 percent interest in Tullett Prebon and have the right to appoint a member of the Tullett

\textsuperscript{41} \textit{Kennecott Copper Corp.} v. Curtiss-Wright Corp., 584 F.2d 1195, 1205 (2d Cir. 1978).


\textsuperscript{43} \textit{See generally} HealthAmerica Pa., Inc. v. Susquehanna Health Sys., 278 F. Supp. 2d 423, 434–37, 440–41 (M.D. Pa. 2003).


\textsuperscript{46} Statement of FTC Chairman Leibowitz, \textit{supra} note 44.

Prebon board.\textsuperscript{48} Tullett Prebon and ICAP would continue to offer competing electronic-brokerage services after the transaction. Tullett Prebon announced that ICAP’s former chief operating officer would be appointed to Tullett Prebon’s board and that ICAP would appoint another non-executive director to the board. The DOJ investigated, and on July 14, 2016, announced that Tullett Prebon and ICAP had restructured the transaction to address the DOJ’s concerns that the transaction would violate the rule against interlocking directorates.\textsuperscript{49} Under the restructured terms, ICAP does not own any part of Tullett Prebon and does not have any right to appoint a member of Tullett Prebon’s board.

\textbf{Red Ventures and Bankrate (2017).} The Red Ventures case shows that interlocking directorates may be a significant factor in finding a Section 7 violation. In July 2017, Red Ventures announced a planned acquisition of Bankrate.\textsuperscript{50} Both are marketing businesses focused on connecting consumers to service providers in a variety of industries. Bankrate operated Caring.com, which connected senior living facilities with potential customers. Red Ventures did not have a competing service—but two of its largest shareholders did. General Atlantic and Silver Lake Partners jointly owned Caring.com’s closest competitor, APlaceforMom.com (APFM). They also held a combined 34 percent stake and two of seven seats on the Red Ventures board and approval rights over two other board seats. Thus, had the transaction gone forward as planned, the owners of APFM would have held two of seven seats on the board of the parent company of its closest competitor. The FTC determined that this would increase the likelihood of, or facilitate, coordinated interaction between APFM and Caring.com in the market for third-party paid referral services for senior living facilities. The FTC required divestiture of Caring.com as a result.\textsuperscript{51}

\textbf{Key Points for Identifying Potential Section 8 Issues as Part of the HSR Analysis}

M&A-focused antitrust practitioners should take particular note of the Tullett Prebon and Red Ventures matters because the investigations of interlocking directorates arose from proposed transactions. Interlocking directorate issues could arise even from transactions that, on their face, do not otherwise suggest direct antitrust risk. For example, when a company enters a new industry or market segment through acquisition, it is likely to be viewed as non-problematic from a Section 7 perspective. But if a current director sits on the board of a competitor to the new business line, there could still be an issue, subject to the one-year statutory grace period.\textsuperscript{52} Thus, M&A practitioners should always investigate interlocking directorate issues in transactions involving


\textsuperscript{52} Section 7, as amended by the Hart-Scott-Rodino Act (HSR), requires parties to transactions meeting certain size thresholds to provide advance notification to FTC and DOJ and observe a waiting period before closing.

companies that could meet the jurisdictional thresholds. Even if an interlock does not cross the relevant thresholds at the time of the transaction, the issue should be flagged and subject to monitoring or restructuring as the businesses develop.

As a practical matter, this likely means that M&A practitioners will need to gather and analyze information not otherwise required for HSR notification or analysis of competitive issues in the underlying transaction. Even a thorough investigation of HSR “associates” is unlikely to reveal all relevant interlock issues.

Also relevant to M&A practitioners is that the question of Section 8’s application to LLCs remains unresolved.\textsuperscript{54} Strictly speaking, Section 8 applies only to corporate directors—not LLC managers or equivalent positions—and LLCs are treated differently from corporations for the purpose of many procedural and technical aspects\textsuperscript{55} of the HSR regulations. AAG Delrahim noted, however, that while “courts have not directly addressed” the application of Section to LLCs, the DOJ “believe[s] the harm [to competition from an interlock] can be the same regardless of the forms of the entities.”\textsuperscript{56} Thus, if an LLC acquires another company and that results in an LLC member or manager holding a directorship (or equivalent position) with a competitor, that could raise concerns at the DOJ or FTC even if it is technically not a Section 8 issue. Indeed, Section 7 gives the agencies authority to challenge transactions where the effect “may be substantially to lessen competition,” and there is nothing to say that concerns about interlocking management would not inform the analysis.

**Recent Comments from DOJ Leadership**

It is worth quoting at length from AAG Delrahim’s May 1, 2019 address:

> A different, related area that the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures. Section 8 of the Clayton Act generally prohibits a person from simultaneously serving as an officer or director of competing corporations that meet a size threshold unless certain de minimis exceptions apply.

> This prohibition addresses the concern that a director or officer could exchange competitively sensitive information and coordinate business decisions between competitors. For officers and directors who find themselves in violation of Section 8, the statute provides them a one-year grace period to resign from their positions. The Division regularly encounters potential Section 8 violations and it is top-of-mind when reviewing transactions that involve interlocking directorates.

> The use of the term “corporation” in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as limited liability companies or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional “corporation.” To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities.

> Of course, we are familiar with the arguments both for and against interpreting the statute to apply to LLCs. It is not clear from our review of the legislative history that Congress intended to limit the appli-

\textsuperscript{54} The DOJ’s review of the Tullett Prebon-ICAP transaction, which involved non-U.S. companies, suggests that the DOJ has determined there is no ambiguity with respect to Section 8’s application to foreign corporations. DOJ Tullett Prebon Press Release, supra note 49.

\textsuperscript{55} For example, a person “controls” a corporation by holding 50% or more of the voting securities or by having the contractual right to appoint 50% or more of the directors. 16 C.F.R. 801.1(b)(1)(i); 16 C.F.R. 801.1(b)(2). A person “controls” an unincorporated entity by having the right to 50% or more of the profits or assets upon dissolution. 16 C.F.R. 801.1(b)(1)(ii).

\textsuperscript{56} Delrahim, supra note 2, at 4.
cation of Section 8 solely to corporations. Moreover, whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too. We are thinking about how to bring this thinking to Section 8 as well. 57

On December 13, 2018, Deputy Assistant Attorney General Finch offered more of the Division’s perspective:

- The Antitrust Division is “looking at . . . interlocking directorate issues more closely,”
- The competitive risks of interlocks are “especially important in concentrated markets,”
- “As today’s tech platforms start competing against traditional industries and each other in new ways, this can create Section 8 . . . issues. Changes in technology and business strategy can cause two companies to become competitors in markets where they previously did not compete,” and
- “Changes in technology and business strategy can cause two companies to become competitors in markets where they previously did not compete.” 58

Finally, before these two statements, in October 2018 Senate testimony, AAG Delrahim was asked to react to the then-recent appointment of three senior NBCUniversal executives to Hulu’s board of directors. Those appointments were made shortly after the expiration of the final DOJ and FCC restrictions imposed in 2011 on Comcast and NBCUniversal following their merger. (Comcast had obtained clearance to merge with NBCUniversal only by agreeing to relinquish management rights arising from its minority stake in Hulu, among other concessions.) Delrahim responded by confirming that the Antitrust Division will “examine carefully” whether those appointments pose competitive concerns—including Section 8 issues. 59 That may not sound like much on its own, and in fact the competitive concerns specific to those board appointments are mooted by the announcement this May that Comcast will sell its interest in Hulu to Disney, with Comcast relinquishing its board seats and giving full operational control of Hulu to Disney immediately. 60 Even so, Delrahim’s comment sparked interest because it suggested that the Division is focusing attention on interlocks—a suggestion that would soon be confirmed by the subsequent statements by DAAG Finch and AAG Delrahim.

The FTC has chimed in as well. In a blog post dated June 26, 2019, the Bureau of Competition offered a reminder that “there are unexpected restructuring and acquisition circumstances through which companies and their boards can wake up one morning to find themselves in a potentially problematic interlock situation.” 61

Practice Pointers

Despite the recent commentary suggesting that new enforcement activity is coming, at the time of writing, no actions have been filed. But readers should be aware that the senior leaders at the

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57 Id. at 4.

58 Finch, supra note 3.

59 Delrahim, supra note 4.


DOJ and FTC are thinking about the competitive harm caused by interlocks and that Section 8 is currently a live concern for U.S. antitrust enforcers.

Moreover, the recent comments suggest agreement at the federal enforcement agencies that interlocks between limited liability companies and other forms of corporate organizations that did not exist in 1914 pose the same threat of competitive harm as those between corporations. That raises other questions, too. What about limited partnerships that are large enough to meet the statutory thresholds? Or private equity firms with board appointment rights at portfolio companies that compete with each other?

We will not speculate about where the law and its enforcement will go next. But we do offer the following suggestions to practitioners:

- At any company large enough to meet the thresholds, ensure that corporate compliance policies include an antitrust component that sets out the Section 8 rules;
- Check each year for Section 8 compliance by surveying all directors and officers about service on other boards and tracking responses;
- Be aware of subsidiaries and affiliates’ businesses, and as the firm moves into new markets, whether by acquisition or organic product development, look for any new interlocks that arise as a result;
- Engage key employees in tracking new entrants into the firm’s product markets (think of the Apple-Google interlock, discussed above) to avoid missing an existing interlock with a company that has only recently become a competitor;
- In any transaction where board seats may change, include a Section 8 compliance check in the closing checklist; and
- Be aware that, even where there is no technical Section 8 violation, conflicts may arise from dual board service, potentially implicating some of the other statutes discussed above.