

## Enforcement of “Interlocking Directorates” Accelerates With DOJ-Announced Resignations and FTC Consent Agreement

***Companies should take a proactive approach as US antitrust agencies continue to enforce Section 8 of the Clayton Act.***

The Federal Trade Commission (FTC) and the US Department of Justice (DOJ) Antitrust Division (the Division) have concurrent authority to enforce Section 8 of the Clayton Act.<sup>1</sup> Both US antitrust agencies have recently prioritized that law.<sup>2</sup> Last year, we previewed the Division’s investigation of private equity (PE) sponsors in connection with potential interlocking directorates among portfolio companies.<sup>3</sup>

Since then, the Division has announced 15 board seat resignations from 11 companies, including a set of respective directors at Pinterest and Nextdoor.<sup>4</sup> On the same day, the FTC announced its first enforcement action under Section 8 in over 40 years. That action, however, diverges from the Division’s enforcement practice to date during the Biden administration. While the Division has relied on informal, voluntary resignations to address its concerns, the FTC consent order reflects a likely return to more formal enforcement procedures that US antitrust agencies pursued over 40 years ago.

We summarize these recent developments below and provide a refresher on the framework applicable to director and officer interlocks. Both the FTC and DOJ are now on the books enforcing Section 8 during the Biden administration. Whether we will continue to observe distinct enforcement approaches remains to be seen. For companies, the practical reality remains the same: Proactive engagement is critical to ensure compliance, and companies should be prepared to answer questions from either agency.

### Section 8 Refresher

Section 8 of the Clayton Act prohibits a board-appointed officer or director from serving on the board or on the management of a competing corporation.<sup>5</sup> There are three primary conditions for an interlock as a matter of the statutory text:

1. A “person” must serve on the board or as an officer of two corporations.
2. The two corporations must be actual, horizontal competitors.
3. Each of the two corporations must have a net worth of over \$45,257,000 (as adjusted for annual inflation).

Section 8 is a per se statute, which means the degree of competitive overlap or the likelihood of anticompetitive effects is not relevant to determining a technical interlock. The proof is in the pudding, however, and whether two corporations overlap presents challenges of market definition.<sup>6</sup> At least one court has indicated a relaxed standard for determining whether two corporations compete for the purposes of this law.<sup>7</sup>

Even if an interlock exists, a de minimis exception applies if<sup>8</sup>:

- either corporation's competitive sales are less than \$4,535,700 (as adjusted for inflation);
- either corporation's competitive sales are less than 2% of its total sales; or
- each corporation's competitive sales are less than 4% of its total sales.

"Total sales" refers to the corporation's gross revenue for all products and services sold by the corporation during its last completed fiscal year. "Competitive sales" are limited to the products and services sold by "one corporation in competition with the other."

## Recent Developments

### DOJ Enforcement in Pinterest/Nextdoor

The Pinterest/Nextdoor enforcement action illustrates the Division's continued resolution of potentially interlocking directorates through voluntary resignations.<sup>9</sup> In all 15 of the Division's publicly announced interlocking directorate resignations during the Biden administration, the parties have resigned a board seat (or declined to exercise board appointment rights) without the directors or the company admitting to liability.<sup>10</sup> In contrast to earlier Section 8 press releases, in which the Division previewed a potential area of competitive overlap, the Division's most recent press release lacks similar detail on the perceived interlock, but states a clear position that the companies are "[c]ompetitors sharing ... directors in violation of Section 8."<sup>11</sup> The Division reiterated that "[e]nforcement involving interlocking directorates will continue to be one of the top priorities of the Antitrust Division."<sup>12</sup>

### FTC Consent Order in EQT/Quantum

Since the early 1990s, the FTC has relied exclusively on informal enforcement measures, such as voluntary compliance and voluntary divestiture of potentially interlocking directorates, to resolve Section 8 concerns.<sup>13</sup> The FTC's consent order in *EQT/Quantum* signals a departure from this recent historical enforcement practice and a return to a prosecutorial approach last pursued in the 1970s and 1980s. During that period, the FTC pursued more formal and prospective prohibitions on interlocking directorates, including following voluntary resignations of interlocks.<sup>14</sup> Moreover, the *EQT/Quantum* consent arose in connection with a transaction-specific investigation, highlighting that companies must consider not only stand-alone Section 8 compliance, but also whether transaction agreements or transaction structures implicate Section 8.<sup>15</sup>

## Conclusion

Renewed Section 8 enforcement has percolated since the beginning of the Biden administration. Recent developments suggest that Section 8 is here to stay and remains an important enforcement priority for both the Division and the FTC. For companies and directors, Section 8 risks extend beyond ordinary compliance to transaction-specific considerations that should be evaluated in diligence and

properly structured to mitigate risks. Companies and directors must take a proactive approach to Section 8 to properly calibrate risks and be prepared to respond to questions from either agency.

Latham & Watkins will continue to report on the focus of antitrust enforcement agencies on Section 8 issues and other developments in this area.

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## Endnotes

- <sup>1</sup> 15 U.S.C. § 21(a) (authorizing the FTC to enforce compliance with the Clayton Act); 28 C.F.R. § 0.40 (granting DOJ the general enforcement power for federal antitrust laws).
- <sup>2</sup> See Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice (DOJ), Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>; FTC, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act at 14, n.16 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).
- <sup>3</sup> Latham & Watkins Client Alert, *DOJ Investigating "Interlocking Directorates" in PE Industry* (Oct. 5, 2022) (updated Mar. 22, 2023), <https://www.lw.com/en/offices/admin/upload/SiteAttachments/Alert-3018.pdf>.
- <sup>4</sup> Press Release, DOJ, Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates (Pinterest/Nextdoor Press Release) (Aug. 16, 2023), <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.
- <sup>5</sup> See 15 U.S.C. § 19(a).
- <sup>6</sup> See generally Joshua Holian, Katherine Rocco, Charlie Beller & Ethan Hoffman, *21st Century Section 8 Enforcement: Legislative Origins and the 1990 Amendments*, Antitrust Magazine Online (Apr. 2023) at 11, [https://www.americanbar.org/groups/antitrust\\_law/resources/source/2023-april/21st-century-section-8-enforcement/?login](https://www.americanbar.org/groups/antitrust_law/resources/source/2023-april/21st-century-section-8-enforcement/?login) (discussing Section 8 market definition cases).
- <sup>7</sup> *TRW, Inc. v. FTC*, 647 F.2d 942, 946–47 (9th Cir. 1981).
- <sup>8</sup> 15 U.S.C. § 19(a)(2).
- <sup>9</sup> Press Release, DOJ, Resignations Reflect Antitrust Division's Efforts to Reinvigorate Enforcement and Deter Violations of Section 8 of the Clayton Act (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially> (“[S]even directors have resigned from corporate board positions in response to concerns by the Antitrust Division that their roles violated the Clayton Act’s prohibition on interlocking directorates.”).
- <sup>10</sup> See Pinterest/Nextdoor Press Release, *supra* note 4.
- <sup>11</sup> See Press Release, DOJ, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>; Nextdoor had identified Pinterest as among the companies with which it broadly competed for “internet products, services, content, and online advertising” in a historical securities filing. See 2022 10-K filing, Nextdoor Holdings, Inc., Annual Report (Form 10-K) 11 (March 15, 2022).
- <sup>12</sup> See Pinterest/Nextdoor Press Release, *supra* note 4.
- <sup>13</sup> Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya at 5, *In the Matter of EQT Corp.*, No. 221-0212 (F.T.C. Aug. 16, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2210212qetqtkhanstatement\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2210212qetqtkhanstatement_0.pdf) (“Historically, the antitrust agencies addressed Section 8 violations by dismissing actions or closing investigations after firms ended the offending interlock.”).
- <sup>14</sup> *Id.*
- <sup>15</sup> See generally Agreement Containing Consent Order, *In the Matter of QEP Partners, LP et al.*, No. 221-0212 (2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2210212eqtquantumacco.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtquantumacco.pdf).