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21st Century Section 8 Enforcement: Legislative Origins and the 1990 Amendments

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Over a century ago, President Woodrow Wilson admonished Congress to address interlocking directorates.[1] Louis Brandeis shared Wilson's sentiment:

> [I]nterlocking directorates, and all that term implies, must be effectually prohibited before the freedom of American business can be regained. The prohibition will not be an innovation. It will merely give full legal sanction to the fundamental law of morals and of human nature: that 'No man can serve two masters.'[2]

Congress responded to these perceived threats to competition in 1914 when it enacted Section 8 of the Clayton Antitrust Act. Though it fell short of Wilson's expansive proposal,[3] Section 8 endowed federal antitrust law with a prohibition against interlocking directorates between direct competitors.

Given these historical origins, it should come as little surprise that Section 8 features prominently in the current Neo-Brandeisian enforcement agenda. Early in his tenure, Jonathan Kanter, Assistant Attorney General ("AAG") of the Department of Justice ("DOJ") Antitrust Division ("Division"), signaled his intent to more vigorously enforce Section 8, promising "the [DOJ] will not hesitate to bring Section 8 cases to break up interlocking directorates."[4] AAG Kanter's promise materialized a few months later when the Division announced the resignations of seven directors for "potentially illegal interlocking directorates"; relief DOJ claimed "reflect[ed] the Antitrust Division's efforts to reinvigorate enforcement and deter violations of Section 8 of the Clayton Act."[5]

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1 H.R. Rep. No. 63-627, at 18 (1914).

2 Louis D. Brandeis, *Interlocking Directorates*, in Other People's Money and How the Bankers Use It 56 (1914).

3 President Wilson had "call[ed] for legislation that would cover horizontal, vertical, indirect, and management interlocking relationships." Richard P. Murphy, *Keys to Unlock the Interlocks: Dealing with Interlocking Directorates*, 11 U. Mich. J. L. Reform 361, 362-63 (1978); *see also* Bankamerica Corp. v. United States, 462 U.S. 122, 127 (1983) ("President Wilson called for legislation that would, among other things, ban all kinds of interlocks.").

4 Assistant Attorney General Jonathan Kanter, 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 ("One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur by imposing a bright-line rule against interlocking directorates.").

5 Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates ("DOJ Section 8 Press Release") (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

What does this new era of Section 8 enforcement mean for companies, investors, and antitrust practitioners?[6] Section 8's undisputed prophylactic purpose may lead some to advocate for aggressive enforcement in an effort to remedy potential or nascent interlocks, deter violations of other antitrust laws, or proscribe conduct that is not otherwise unlawful.[7] In effect, Section 8 could serve as the proverbial "Big Stick"[8] for Neo-Brandeisian efforts to reinvigorate a "tough-on-crime" public perception of federal antitrust law enforcement. But a prophylactic purpose is not a statutory blank check. Indeed, a review of Section 8's origins, evolution, and text—most recently expressed in its 1990 amendment—shows that Section 8 serves a relatively discrete and circumscribed role. Whereas other federal antitrust laws delegate broad authority to law enforcers (and the federal courts) to interpret vague statutory text, Section 8 provides a detailed prohibition with express exceptions.

[T]he rule of law demands that Section 8 be interpreted and enforced according to "the plain language and plain meaning of the statute" and the sparse, yet highly relevant, court precedent interpreting the statute.

Section 8's textual constraints animate its legal purpose and effect. Like most statutes, Section 8 contains words susceptible to varying interpretation, and the absence of extensive judicial precedent leaves some ambiguity unresolved.[9] Nevertheless, the statute's plain language manifests a degree of precision and explicit congressional instruction that is noticeably absent from many other federal antitrust laws. If "antitrust is about rule of law," as AAG Kanter has vigorously advocated, statutory construction and enforcement must "start with the language of the statute . . . looking at the words Congress used to describe what the laws says . . . and then . . . court precedent, and . . . the plain language and plain meaning of the statute."[10]

This article highlights some important open legal questions in the contemporary enforcement of Section 8 and endeavors to situate these against the statute's text, history, and judicial precedent. "Looking at the words Congress used," Section 8 (particularly following the 1990 amendments) rejects an unbounded prohibition on interlocking directorates. While plainly prophylactic, Section 8 is limited by its text. Section 8's indisputable ties to ambitious, Wilsonian-era antitrust policy may explain its resurgent importance in an era of Neo-Brandeisian enforcement, but the rule of law demands that Section 8 be interpreted and enforced according to "the plain language and plain meaning of the statute" and the sparse, yet highly relevant, court precedent interpreting the statute.

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[6] The DOJ has expressed a particular focus on the private equity industry. Deputy Assistant Attorney General Andrew Forman, The Importance of Vigorous Antitrust Enforcement in Health Care, Keynote at the ABA's Antitrust in Healthcare Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust ("[W]e 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 aggressive action.").

[7] *See, e.g.,* DOJ Section 8 Press Release, *supra* note 5 ("Congress made interlocking directorates a *per se* violation of the antitrust laws for good reason . . . by eliminating the opportunity to coordinate—explicitly or implicitly—through interlocking directorates, Section 8 is also intended to prevent other violations of the antitrust laws before they occur."). For example, in Square D Co. v. Schneider S.A., the court rejected the defendants' literal reading (that Section 8 did not apply to a person's agents) and explained that "[i]f 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, contrary to the intent of Congress in enacting the antitrust laws." 760 F. Supp. 362, 366 (S.D.N.Y. 1991).

[8] President Theodore Roosevelt, Speech at Minnesota State Fair (1901) ("A good many of you are probably acquainted with the old proverb: 'Speak softly and carry a big stick'—you will go far.").

[9] *See* Robert F. Booth Tr. v. Crowley, 687 F.3d 314, 319 (7th Cir. 2012) ("When the Antitrust Division or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the enforcers that the interlock is lawful)."); Victor H. Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 Yale L.J. 1266, 1271 (1950) ("In Section 8 matters, the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations.").

[10] Jonathan Kanter, *Whither "Neo-Brandeisian" Antitrust Enforcement: A Candid Conversation with Jonathan Kanter,* YouTube, Dec. 8, 2022, (10:40–11:00), https://www.youtube.com/watch?v=Yz3FZamCEJQ&t=653s.

Historical Background

Section 8 of the Clayton Antitrust Act of 1914: A Prophylactic Prohibition. Leading up to the Clayton Act's passage, two congressional committees documented the consolidation of corporate interests in the banking, railroad, and steel industries.[11] Interlocking directorates, the committees reported, contributed to this consolidation and the exercise of corporate control by a limited set of individuals.[12] As part of a progressive policy response to the perceived inadequacies of the Sherman Act, and in specific response to the Pujo and Stanley Committee Reports, President Wilson lobbied Congress to address horizontal, vertical, indirect, and management interlocking relationships as part of the Clayton Act.[13]

What eventually emerged as Section 8 of the Clayton Act proved narrower than President Wilson's initial wish list, which would have barred all potentially problematic interlocks.[14] Section 8 as enacted covered only director interlocks among direct competitors.[15] Nevertheless, Section 8 exhibited a clear prophylactic rule against directorate interlocks among competitors. By enacting this prohibition, Congress sought "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directors."[16]

Over the next seventy years, Congress amended the statute on a few occasions to address technical questions, such as the scope of prohibitions on banking institutions.[17] It was not until the 1980s, however, that Congress revisited Section 8's substantive scope and its increasing impact on corporate governance.

Antitrust Amendments of 1990: Clarifying Section 8's Limits and Exceptions

Calls for Section 8 reform captured Congress's attention in the 1980s. Corporate counsel reported difficulty in navigating Section 8's strict prohibition and noted adverse effects on the recruitment and retention of the most qualified outside directors. According to the congressional testimony of corporate counsel, Section 8's outdated jurisdictional threshold combined with rejection by federal enforcers of an implicit *de minimis* exception negatively impacted the market for corporate

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[11] Report of the Committee Appointed Pursuant to House Resolutions 429 and 504 to Investigate the Concentration of Control of Money and Credit, H.R. REP NO. 62-1593 (1913) ("Pujo Committee Report"); Report on Investigation of United States Steel Corporation, H.R. REP. NO. 62-1127 (1912) ("Stanley Committee Report").

[12] Pujo Committee Report at 56, 130, 140; Stanley Committee Report at 116.

[13] *See* Murphy, *supra* note 3.

[14] *See* Kramer, *supra* note 9, at 1267 ("[Section 8] fell pitifully short of [Wilson's] objectives.").

[15] Murphy *supra* note 3 at 363 (noting that Section 8, as enacted by the 63rd Congress, "covered only interlocking directorates between direct competitors"). Congress later amended Section 8 to include officers, in addition to directors. Antitrust Amendments Act of 1990, Pub. L. 101-588, 104 Stat. 2879 (codified at 15 U.S.C. § 19).

[16] United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953); *see also* Square D Co., 760 F. Supp. at 366 ("The purposes of § 8 are to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors."); *id.* (noting that Section 8 is "prophylactic and remedial").

[17] In 1916, 1920, and 1928 Congress amended a now-eliminated section on banking interlocks involving a Federal Reserve bank. Pub. L. 65-75, 39 Stat. 121 (1916); 66 Pub. L. 66-225, 41 Stat. 626 (1920); Pub. L. 70-120, 45 Stat. 253 (1928). In 1929, Congress amended a now-eliminated proviso about mutual savings banks. Pub. L. 70-1008, 45 Stat. 1536 (1929). In 1935, Congress amended the Section 8 paragraphs relating to banks. Pub. L. 74-305, § 329, 49 Stat. 717. This amendment created exceptions by which a private banker, director, officer or employee of any member bank of the Federal Reserve System (or any branch thereof) could also serve as director, officer, or employee of a bank or other entity organized under the National Bank Act.

Section 8's enforcement and interpretation by federal courts in the early 1980s raised further issues for companies: Section 8 as originally enacted had no express de minimis exception, so even a small competitive overlap could, in theory, trigger liability.

governance.[18] In testimony before Congress, AAG Douglas Ginsburg observed an irony caused by overbroad interpretation and enforcement of Section 8. If all competitive overlaps fall within Section 8, a highly-qualified board candidate could easily be forced to choose between a smaller firm and a larger firm with a potential competitive overlap, and there would be a structural bias towards the larger firm.[19] After all, why sit on the board of an automobile OEM if you could sit on the board of General Motors?

Section 8's enforcement and interpretation by federal courts in the early 1980s raised further issues for companies: Section 8 as originally enacted had no express *de minimis* exception, so even a small competitive overlap could, in theory, trigger liability. Over time, some courts had read an implied *de minimis* exception to provide relief from overzealous enforcement and to navigate edge cases;[20] however, this protection evaporated in 1981 when the Ninth Circuit rejected an implied *de minimis* exception.[21] The Federal Trade Commission ("FTC"), too, later rejected the existence of such an implied exception under the original statute.[22] These decisions undermined corporations' ability to rely on an implicit shelter for overlaps involving an insignificant amount of commerce and motivated petitions for reform.[23]

To address these concerns, Senator Strom Thurmond introduced the Interlocking Directorate Act of 1986 (S. 2163), which proposed to increase the jurisdictional threshold and add express *de minimis* exceptions. The American Bar Association ("ABA"), DOJ, and business community all testified in support of these changes. Specifically, the ABA recommended that the jurisdictional threshold be increased to $10 million and the statute exempt insignificant competition (less than $25 million annually or less than 10% aggregate market share).[24] James Halverson, the Chairman of the ABA Section of Antitrust Law at the time, advocated for the ABA's recommendations by highlighting major economic and legal developments since the statute's enactment in 1914. Specifically, corporate governance and management had evolved: no longer was it common for

[18] *The Interlocking Directorate Act of 1986: Hearing on S. 2163 Before the S. Comm. on the Judiciary*, 99th Cong. 45 (1986) (testimony of Richard W. Pogue) ("[Section 8's] regulatory burdens are especially severe for corporations such as holding companies or companies with a number of subsidiaries or divisions that are engaged in a large variety of different business throughout the country. A mechanical application of Section 8 that embraces the ultimate reach of theories of 'competition' makes it almost impossible for such companies to attract and retain able Directors with experience and judgment.").

[19] *Id.* at 14 (testimony of AAG Douglas Ginsburg) ("Currently, the proscription operates to prevent a person from sitting on the board of a large firm and of a small firm simultaneously if they meet the competitive overlap criterion. That will almost always put the potential director to an election which will end up favoring the large firm. If he has to choose to sit on one board or the other, it will tend to be the larger firm.").

[20] Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., 1966 U.S. Dist. LEXIS 10596, *23-24 ("*De minimis* competition is not encompassed by the proscription of § 8.").

[21] TRW, Inc. v. FTC, 647 F.2d 942, 948 (9th Cir. 1981) ("The statute contains nothing that suggests a requirement of some substantial quantum of competition.").

[22] *See* Borg-Warner Corp., 101 F.T.C. 863, 1983 WL 486332, at *54 (1983) ("Although consideration of the level of commerce affected is appropriate in determining the scope of any order issued for violations of this Section, we hold that there is no *de minimis* defense to a Section 8 violation.").

[23] *The Interlocking Directorate Act of 1986*, Statement at Hearing on S. 2163 Before the S. Comm. on the Judiciary, 99th Cong. 63 (1986) (statement of Martin A. Coyle) ("For many years, antitrust counselors advised their corporate clients that there was a *de minimis* exception to section 8."); *id.* at 39 (statement of Richard W. Pogue) ("[U]ntil the 1981 decision in *TRW* in the Ninth Circuit, several courts had indicated that section 8 was not intended by Congress to deal with trivial or *de minimis* situations. And everyone in the field had relied on those earlier opinions.").

[24] *See id.* at 38 (statement of James T. Halverson, Chairman, American Bar Association Section of Antitrust Law). The ABA also proposed indexing the statute's fixed values to the Consumer Price Index. *Id.*

one person to "control[] corporate destinies by personal force."[25] Indeed, "while boards of directors have ultimate decision making power," Halverson reasoned, "lower level employees in fact make the day-to-day pricing, product development and marketing decisions, thus making collusion through interlocking directors unlikely."[26] Moreover, developments in the state common law of corporations and federal securities law now offered meaningful protections against conflicts of interest and breaches of fiduciary duty, reducing the prophylactic necessity of Section 8.[27] In further support for S. 2163, AAG Ginsburg reaffirmed DOJ's position that "interlocking directorates be limited and that they be tolerated only in circumstances where they pose no threat to competition," but voiced agreement that Section 8's unintended impact on the market for corporate governance required legislative reform.[28]

Senate Bill 2163 rolled over into Senate Bill 1068. Under the leadership of then-Senator Biden, the Senate Judiciary Committee's favorable report of S. 1068 revealed that Congress perceived a critical policy goal in amending Section 8: retaining a plain prohibition while reversing the harm caused by overenforcement (and misinterpretation of the statute's scope).

> All of the [Section 8] proposals sought to retain the basic ban on individuals serving on boards of competing corporations. However, they also recognized a need for Congress to reconsider the class of corporations covered by the section and whether there should be exceptions for competitively insignificant overlaps. The absence of a realistic de minimis exception for very small competitive overlaps has discouraged qualified persons from serving as directors when no potential for competitive harm exists.[29]

Like its predecessor, S. 1068 was not enacted; but it was reintroduced in 1989 as S. 994. The animus for reform remained unchanged. Congress and the federal antitrust agencies once again supported increasing the jurisdictional threshold and adding express *de minimis* exceptions.[30] In addition, the Department of Commerce weighed in to report "an impairment of corporations being readily able to find capable and willing directors."[31]

Meanwhile, the U.S. House of Representatives considered its own Section 8 companion reform bill, which largely reached the same policy conclusions as the preceding Senate versions. Acting AAG Michael Boudin testified about the nature of broad, prophylactic rules, noting that their boundaries must be precise and accurate to avoid undermining the very objectives they seek to protect:

> The prohibition in section 8 is relatively clear and unambiguous. Clarity in a statute is to be admired, of course, but a very broad prophylactic provision that requires no showing of actual or likely anticompetitive effects can come to prohibit conduct that in fact does not threaten the harm with which the statute

[25] *Id.* at 28.

[26] *Id.* at 29.

[27] *Id.* at 28-29.

[28] Douglas Ginsburg, *The Interlocking Directorate Act of 1986*, Statement at Hearing on S. 2163 Before the S. Comm. on the Judiciary, 99th Cong. 8 (1986) ("[S]ection 8's prohibition of interlocks involving *de minimis* overlaps is serving no public purpose whatever, but is causing unnecessary frustration and hardship to private enterprise.").

[29] S. Rep. No. 100-89, at 2 (1987).

[30] *Bills to Amend the Sherman and Clayton Acts: Hearing on S. 994, S. 995, S. 996 before the S. Comm. on the Judiciary*, 101st Cong. 7-8, 48 (1989).

[31] *Id.* at 8.

is concerned. This is exactly what has happened to section 8. It is what current proposals to improve the statute are designed to correct.[32]

In Boudin's view, an uncalibrated Section 8 caused "extremely capable and willing director candidates . . . [to be] disqualified after counsel's discovery of a *de minimis* competitive overlap."[33] Jeffrey Zuckerman, director of the FTC's Bureau of Competition, agreed and warned that "[b]arring interlocks when there is no serious threat to competition simply denies some firms the opportunity to benefit from the experience and wisdom of certain individuals, without offering any countervailing benefit to society."[34]

In the end, Congress balanced Section 8's prophylactic purpose with countervailing policy considerations flowing from the realities of modern corporate governance; the latter having been ill-served by the prior enforcement regime.

Although the *de minimis* exception and jurisdictional thresholds primarily drove Section 8 reform in the 1980s, Congress took the opportunity to reassess other aspects of the law. For example, Congress extended Section 8 to board-appointed officers.[35] This change was consistent with the ABA's observations about competitive decision-making within the modern corporation—board members have less day-to-day control of firms than they had in 1914; adding board-appointed "officers" to Section 8 recognized modern corporate realities. FTC Commissioner Terry Calvani agreed, testifying that "interlocks covered by the statute should include not only directors, but officers who participate in deciding competitive strategy."[36] Importantly, the definition of "officer" was limited to those appointed by the board of directors, reiterating Congress's limited view of Section 8.[37]

In the end, Congress balanced Section 8's prophylactic purpose with countervailing policy considerations flowing from the realities of modern corporate governance; the latter having been ill-served by the prior enforcement regime. The Antitrust Amendments Act of 1990 ("1990 Amendments") (1) increased the jurisdictional threshold to $10 million (as adjusted for inflation), (2) created three express *de minimis* exceptions in cases of insignificant competitive overlap, (3) expanded coverage to include officers elected or chosen by the board of directors, and (4) provided for annual indexation of the monetary thresholds to gross national product.[38] To date, the 1990 Amendments remain Congress's last word on interlocking directorates.[39] While it has been more than three decades since the 1990 Amendments, there remain a number of important unanswered questions of law regarding Section 8's application.

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[32] Michael Boudin, *The Interlocking Directorate Act of 1989*, Statement at Hearing on H.R. 29 Before the H. Comm. on the Judiciary, 99th Cong. 19 (1989).

[33] *Id.* at 20.

[34] *Id.* at 26 (statement of Jeffrey Zuckerman).

[35] The FTC had advocated for the addition of officers, arguing that "[c]orporate officers are especially likely to be aware of and able to make or influence decisions of competitive significance, and so they should come within the ambit of an interlock restriction." *Id.*

[36] Terry Calvani, *Bills to Amend the Sherman and Clayton Acts,* Statement at Hearing on S. 994, S. 995, S. 996 before the S. Comm. on the Judiciary, 101st Cong. 53 (1989).

[37] *See* 15 U.S.C. § 19(a)(4).

[38] Pub. L. 101-588, 104 Stat. 2879, § 2 (1990). The 1990 Amendments also removed the phrase "shall have been theretofore" from the clause defining "competitors."

[39] In 1993, Congress changed the date by which the FTC must annually publish the indexed monetary thresholds from October 30 to January 31. Pub. L. 103-203, 107 Stat. 2368.

Section 8's Operation: Conditions and Exceptions

Under Section 8, *per se* liability attaches unless a *de minimis* exception applies.

1. Substantive Conditions
   a. **Interlock**: A person must be a director or board-appointed officer of two corporations.
   b. **Competitors**: The corporations must be horizontal competitors.
   c. **Net Worth (Jurisdictional Threshold)**: Each corporations' net worth exceeds $10 million (as adjusted).

2. *De Minimis* Exceptions
   a. Competitive sales (either corporation) less than $1 million (as adjusted)
   b. Competitive sales (either corporation) less than 2% of total sales
   c. Competitive sales (each corporation) less than 4% of total sales[40]

Despite the superficial simplicity, construing Section 8 triggers typical questions of statutory construction. Is a corporation a "person" if it appoints its agent to serve as a director or officer? Does the term "director" include representatives that participate in board meetings but are not appointed to the board (i.e., board observers)? How does one determine whether firms are "competitors" sufficient to trigger an interlock? The Supreme Court has dealt with Section 8 on few occasions, and much of the statute has received little, if any, treatment by lower courts.[41] We highlight below a few important legal questions that are likely to receive attention as part of twenty-first century Section 8 enforcement. For each, we profile whether and how the 1990 Amendments help to resolve open legal questions.

Key Section 8 Legal Questions

Corporate Liability and Deputization. Section 8 prohibits a "person" (including corporations and associations) from serving on the boards of competing corporations.[42] When a natural person triggers an interlock, generally, the interlocking director and the corporations hosting the interlock are subject to suit.[43]

What about when a corporation deputizes an agent to represent its interests as a director or officer at another corporation? Under the so-called "deputization" theory, a corporation qualifies as a "person" under Section 8 when it appoints an agent to act on its behalf, and may therefore itself

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[40] Under Section 8, the term "'competitive sales' means the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year." 15 U.S.C. § 19(a)(2). The term "'total sales' means the gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year." *Id.*

[41] The Supreme Court has reviewed only two Section 8 cases. In 1953, the Court affirmed a district court's decision to dismiss the DOJ's Section 8 claims after the interlocking directors voluntary resigned. United States v. W. T. Grant Co., 345 U.S. 629, 631 (1953). Thirty years later, the Court ruled that Section 8 did not apply to bank-nonbank interlocks. Bankamerica Corp. v. United States, 462 U.S. 122 (1983).

[42] 15 U.S.C. § 12(a) ("The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States.").

[43] *See, e.g.*, W. T. Grant Co., 345 U.S. at 630 (noting the Government brought an action against one individual and three pairs of corporations for which he served as director); *Bankamerica*, 462 U.S. at 124 ("United States brought [actions] against 10 corporations and 5 individuals").

trigger an interlock as opposed to merely hosting an interlocking natural person.[44] It matters not whether different natural persons serve on competing boards—if the entity that has nominated the representatives is the same, a "person" serves "at the same time . . . as a director or officer" of two corporations for purposes of Section 8.[45]

The DOJ and FTC have long advocated for such a deputization theory.[46] As early as the 1970s, DOJ alleged that a corporation could violate Section 8 by deputizing its agents to sit on competing corporate boards.[47] Courts, too, have generally recognized deputization, often pointing to the general prophylactic purpose of the statute for support.[48] The 1990 Amendments did not address the issue, suggesting that Congress implicitly ratified prior judicial precedent that uniformly endorsed a deputization theory.

Even if a Section 8 "person" includes deputies, a threshold factual question remains: who qualifies as an agent?

Even if a Section 8 "person" includes deputies, a threshold factual question remains: who qualifies as an agent?[49] To answer this question, courts turn to general principles of agency law. Thus, individuals that have a business relationship with a firm, such as an officer, director or employee, will likely be deemed agents.[50] On the other hand, informal ties to a business entity are insufficient to establish an agency relationship.[51] In short, even if one accepts that deputization can trigger Section 8 liability, there remain significant factual questions regarding whether a person is acting in a representative capacity.[52]

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[44] *See* TRW, Inc. v. FTC, 647 F.2d 942, 949 (9th Cir. 1981) ("[S]ection 8 prohibits corporations from choosing, and natural persons from serving as, directors in violation of section 8's substantive requirements."); Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC, 317 F. Supp. 2d 301, 327 (S.D.N.Y. 2003); Square D Co. v. Schneider S.A., 760 F. Supp. 362, 367 (S.D.N.Y. 1991) ("[A] cause of action under § 8 is stated where a company attempts to place on the Board of a competitor individuals who are agents of, and have an employment or business relationship with, such company."); *see also* Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 217 (4th Cir. 1987) (recognizing but not ruling on the deputization theory).

[45] Reading Int'l, Inc. v. Oaktree Cap. Mgmt. LLC, 317 F. Supp. 2d 301, 329 (S.D.N.Y. 2003).

[46] The FTC has advocated for a general theory of deputization, but sought limited application to labor unions. *See* Advisory Opinion, 97 F.T.C. 933, *6–7 (May 1, 1981) ("[W]e believe that a corporation or association may violate Section 8 of the Clayton Act if it has representatives or deputies serving simultaneously on the boards of two competing corporations. However, we do not believe Section 8 was intended to reach interlocking directorates formed through 'representatives' of a common labor union."). The DOJ has consistently advocated a deputization theory, and secured a consent decree against a labor union that had representatives on the boards of competing airlines. *See* Final Judgment, United States v. Int'l Assoc. of Machinists and Aerospace Workers et al., No. 94-069 (D.D.C. June 14, 1994), https://www.justice.gov/atr/case-document/file/628436/download.

[47] United States v. Cleveland Tr. Co., 392 F. Supp. 699, 711 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975) (declining to address the deputization theory).

[48] *Id.* at 331 ("To hold otherwise," it reasoned, "would be to allow corporations (and individuals) to evade antitrust liability simply by designating agents to serve their bidding on the boards of competing businesses.").

[49] Establishing agency relationships is especially challenging in the context of non-controlling investments. For example, private equity sponsors often appoint fund representatives to portfolio companies' boards. Such representatives likely serve as agents of a sponsor-managed fund. But what happens if a fund representative, given industry expertise, is asked to serve on the board of another company in a personal capacity (i.e., not affiliated with a sponsor fund)? Strictly speaking, there is no formal agency relationship. For that particular board representation, the person is not representing the private equity sponsor or the fund.

[50] *See supra* note 44.

[51] *Cleveland Trust*, 39 2 F. Supp. at 710 ("[I]nformal links . . . are clearly not sufficient to demonstrate a continued principal-agent relationship."). In *Cleveland Trust*, an interlocking director retired from his position with Company A, though he continued to serve on the board Company B. The DOJ argued that, despite his retirement, he continued to act as Company A's agent because he "continue[d] to retain close contact with many of Company A's present personnel." The court disagreed, holding that this attenuated relationship failed to establish agency.

[52] *See id.* at 712 ("[T]he issue of deputization is a question of fact to be settled case by case.").

Board Observers and Members of Advisory Boards

Section 8 proscribed only director interlocks in its original form, though, as discussed above, Congress extended the statute in 1990 to cover board-appointed officers. Identification of a board-appointed officer or director is a relatively straightforward exercise that can rely on corporate bylaws. Less conventional governance rights, such as board observers or members of an advisory board pose a trickier question. Are such representatives "directors" for purposes of Section 8? Some think so, or at least that they implicate the prophylactic concerns of Section 8.[53]

The plain meaning and legislative history of "director" suggests a more limited scope that would not include peripheral board representatives. For one, the meaning of "director" has not meaningfully changed since 1914. Today, like a century ago, a director is "a person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers."[54] In federal securities law, Congress defined "advisory board" as a "board, whether elected or appointed, *which is distinct* from the board of directors or board of trustees."[55] It is thus difficult to rationalize how peripheral board representatives could fall within the plain and well-defined meaning of director in corporate law and parallel federal statutes that inform the meaning of director as applied to Section 8.

Section 8's legislative history also supports construing the term "director" as only a voting member of a corporation's governing board. A significant impetus for enacting Section 8 (and the Clayton Act more generally) was *control* of entire segments of business, e.g., banking, railroads, steel manufacturing, by a limited set of individuals. While access to competitively sensitive information may implicate the prophylactic concerns of Section 8, it does not implicate corporate control. The power to direct a business resides with voting board members, not observers and passive participants in board meetings. Moreover, the 1990 Amendments added board-appointed "officer" alongside "director," expanding director liability to include some management interlocks (a position originally advocated by President Wilson). In doing so, Congress declined to extend liability to other non-director board representatives despite concerns raised at the time of the Amendments that information sharing concerns could extend well beyond appointed directors and board-appointed management.

"Corporation" and Non-Incorporated Entities

Section 8 applies when two "corporations" compete for sales and share an officer or director. No court has addressed whether Section 8 applies to non-incorporated business entities that may have directors or officers similar to a corporation. Contextual clues within the Clayton Act suggest that "corporations" means only legally incorporated entities. Section 1 of the Clayton Act defines "persons" as "corporations and associations."[56] In contrast, Section 8 uses "person" and "corpo-

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[53] *See* Statement of Commissioner Rohit Chopra, *In re Altria Group, Inc.*, No. 1910075 (Apr. 2, 2020). Commissioner Chopra argued that Section 5 provided a vehicle for challenging interlocks involving board observers. *Id.* at 4 (reasoning that interlocks involving board observers "undermine[] a key purpose of Section 8 of the Clayton Act's prohibition on interlocking directorates and [are] therefore unlawful under Section 5 of the FTC Act"); *id.* at 4 n. 11 ("If the FTC is unwilling to pursue board overlaps like these through enforcement actions, the agency should consider a Section 5 competition rulemaking.").

[54] *Director*, Black's Law Dictionary (11th ed. 2019); *see also Directors*, Black's Law Dictionary (2d ed. 1910) ("Persons appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company.").

[55] 15 U.S.C. § 80a-2 (emphasis added).

[56] *Id.* § 12(a).

S. 995 sought to close the so-called "partnership loophole," which created a perceived avoidance mechanism to the HSR Act's premerger notification regime. Although S. 995 did not pass, this history confirms that Congress confronted the interplay between unincorporated entities and the antitrust laws.

rations" separately, suggesting that associations are intentionally excluded.[57] Given the prevalence in modern commerce of unincorporated entities such as limited liability companies ("LLC"), the question arises whether Section 8's prohibition extends to common unincorporated business associations.[58]

The scope of "corporation" presents a classic purpose-versus-text problem. While it is difficult to justify the coverage of the term "corporation" to entities that are not, in fact, incorporated, Section 8's prophylactic purpose theoretically supports application to now common forms of unincorporated business associations.[59] To resolve this tension between text and purpose, history is instructive. While the original Clayton Act pre-dated the widespread use of LLCs, by the time of the 1990 Amendments, unincorporated entities were no longer unfamiliar vehicles for doing business (even at a scale above the statutory thresholds). Congress could have modified Section 8's language to apply to unincorporated business organizations, but it did not.[60]

Parallel legislative developments are illuminating on this point. Congress considered Section 8 reform (S. 994) together with S. 995, which would have amended the Hart-Scott-Rodino Act ("HSR Act"). S. 995 sought to close the so-called "partnership loophole," which created a perceived avoidance mechanism to the HSR Act's premerger notification regime.[61] Although S. 995 did not pass, this history confirms that Congress confronted the interplay between unincorporated entities and the antitrust laws, including the ways in which unincorporated legal forms could avoid the substantive coverage of federal antitrust laws. Against this backdrop, Congress took no action to expand the definition of corporation in Section 8 to encompass unincorporated business entities.

Defining "Competitors"

Section 8 applies to interlocks involving corporations that are "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."[62] Whether corporations are, in fact, "competitors" is a critical determination because Section 8 is not concerned with interlocks that do not implicate direct competition.

Section 8's assessment of competition hinges on an "agreement" between the parties, eliciting Section 1 of the Sherman Act, which preceded the Clayton Act. While parties have sought to tether the scope of Section 8 competition to Section 7 of the Clayton Act, courts have rejected

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[57] *Id.* § 19(a)(1).

[58] AAG Makan Delrahim highlighted this issue in remarks he delivered at Fordham University School of Law in 2019. Makan Delrahim, Remarks at Fordham University School of Law (May 1, 2019) ("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 [DOJ] believe[s] the harm can be the same regardless of the forms of the entities.")

[59] *Id.* ("[W]hether 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.").

[60] Robert Lande, Assistant Professor, University of Baltimore School of Law, *The Interlocking Directorate Act of 1989*, Statement at Hearing on H.R. 29 Before the H. Comm. on the Judiciary, 99th Cong. 97 (1989) ("Even the Bill's very first paragraph is inadequate . . . H.R. 29 only applies to 'corporations;' partnerships are exempt even though there is no sound reason for such an exemption and modern partnerships can, of course, be multi-billion dollar entities.").

[61] *Bills to Amend the Sherman and Clayton Acts*: *Hearing on S. 994, S. 995, S. 996 before the S. Comm. on the Judiciary*, 101st Cong. 143 (1989) (summarizing the goal, addressing the partnership loophole: "the intent of the premerger notification program was not to favor certain transactions effected by means of a partnership . . . a similar provision was approved by the Senate last Congress").

[62] 15 U.S.C. § 19(a)(1)(B).

such arguments.[63] After all, there is nothing in the plain language of the statute suggesting that a merger-specific standard would be relevant; indeed, the reference to an agreement violating "any of the antitrust laws" indicates, if anything, that Congress expressly disavowed a connection between Section 8 and any specific antitrust law. Instead, courts have borrowed generally applicable market definition methodologies to define "competitors."[64] This analysis includes both quantitative or qualitative methods. For example, the Ninth Circuit in the now-(in)famous *TRW* case relied on *Brown Shoe*-like factors to assess whether two businesses are competitors, broadly understood.[65]

Despite judicial coalescence around a definition of "competitors" that relies on generally applicable methods of market definition, Congress nearly incorporated a Section 7 merger standard in 1990. A predecessor to the final law, H.R. 29, if adopted, would have revised Section 8 to apply when firms were "competitors, so that a merger, acquisition or combination involving such corporations would substantially lessen competition or tend to create a monopoly."[66] Both the business community and the FTC supported the proposed change.[67] As the Director of the Bureau of Competition argued at the time, "interlocks should not be illegal per se, but should be illegal only when they will tend to lessen competition."[68] Nevertheless, Congress rejected this proposed change.

Whether firms are "competitors" for purposes of Section 8 thus remains tied to whether "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." Under established case law, ordinary principles of market definition govern the scope of competitors for purposes of Section 8, and the 1990 Amendments make clear that Section 8 does not include an effects-based test as a predicate to determining liability.[69]

Potential or Nascent Competition

Should Section 8's prophylactic purpose extend to potential or nascent competition? Under existing precedent, no: a prospective or nascent interlock is not illegal.[70] So too historical interlocks,

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[63] Protectoseal Co. v. Barancik, 484 F.2d 585, 589 (7th Cir. 1973) ("We do not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under § 7."); United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 617 (S.D.N.Y. 1953) (rejecting Sears's argument that "elimination of competition by agreement" meant only a merger between the two companies, incorporating Section 7 analysis into Section 8); *see also* S. Rep. No. 100-89, at 6 (1987) (confirming judicial repudiation of Section 7 standard).

[64] Am. Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 981 (D. Md. 1981) (relying on traditional market definition methodologies of reasonable interchangeability and cross-elasticity of demand to determine whether firms were competitors for purposes of Section 8).

[65] *See* TRW, Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981). In *TRW*, the FTC issued a cease and desist order to remedy a perceived interlocking directorate involving Addressograph-Multigraph Corp. ("A-M"). After A-M settled, TRW and Shepard challenged the FTC's order in the Ninth Circuit, arguing that TRW and A-M were not actual competitors, and thus did not trigger a board interlock. The petitioners asked the court to use empirical economic evidence because, as the FTC conceded, "TRW and A-M did not make common sales to the same purchasers." *Id*. at 946. But, "in the eyes of the Commission, 'competitors' [were] companies that vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each." *Id*.

[66] Interlocking Directorate Act of 1989, H.R. 29, 101st Cong. (as introduced on Jan. 3, 1989).

[67] R. Allan Leedy, Jr., Tektronix, Inc., *The Interlocking Directorate Act of 1986*, Statement at Hearing on S. 2163 Before the S. Comm. on the Judiciary, 99th Cong. 101 (1986); Jeffrey Zuckerman, *The Interlocking Directorate Act of 1989*, Statement at Hearing on H.R. 29 Before the H. Comm. on the Judiciary, 101st Cong. 26 (1989).

[68] *See* Zuckerman, *supra* note 67.

[69] *See* Protectoseal Co. v. Barancik, 484 F.2d 585, 589 (7th Cir. 1973); Am. Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 980 (D. Md. 1981); United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 617 (S.D.N.Y. 1953).

[70] Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., 1966 U.S. Dist. LEXIS 10596, *26 (rejecting the idea that Section 8 applies "to corporations which are not or have not been competitors, but may be competitors in the future.").

although the government may seek injunctive relief if it can establish a likelihood of recurrent violation.[71] To establish liability, however, plaintiff must show "a present ability to resume any competition which may have ceased."[72]

Section 8's strict liability standard combined with the dynamic nature of competition could result in a nascent interlock flipping quickly from legal to illegal.

Section 8's strict liability standard combined with the dynamic nature of competition could result in a nascent interlock flipping quickly from legal to illegal. From its inception, however, Section 8 has provided a one-year grace period to provide firms with flexibility to cure a violation.[73] This grace period reinforces that Section 8 does not apply to potential competition. A statutory cure period is premised on the idea that an identifiable event triggers the cure period; otherwise, there would be no means to identify whether a party had in fact availed itself of the statutory cure period or triggered liability following the statutory grace period. The existence of a cure period further reinforces that however prophylactic in purpose, Congress promulgated in Section 8 an administrable rule that parties and corporate counsel could follow in good faith. Enforcing Section 8 to attack potential interlocks that implicate nascent competition would eviscerate the benefits of a clear *per se* rule and would undermine the self-regulatory scheme Congress endorsed in Section 8.

Copperweld Immunity

Although *Copperweld* and its progeny emerged in the Section 1 context,[74] the intra-enterprise conspiracy doctrine has significant relevance to Section 8. Consider the key language: Section 8 applies to corporations that are "competitors, so that the elimination of competition by *agreement* between them would constitute a violation of any of the antitrust laws."[75] If a single economic unit cannot "agree" under Section 1, it follows that it cannot be a "competitor" under Section 8.[76]

Copperweld's application will not always be easy, especially when applied to complex investment structures. For example, if a private equity sponsor manages multiple funds, should those funds be treated as separate "persons" under Section 8? And does *Copperweld* or some other control test determine whether individual investments should be consolidated into a single economic unit such that competition cannot exist among fund investments?

Consider a simplified scenario—a private equity sponsor manages Fund A and Fund B. Limited partners own 95% of each fund, with the remaining 5% owned by the sponsor. Fund A invests in Company X, and Fund B invests in a competitor, Company Y.

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[71] United States v. Cleveland Tr. Co., 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975). In *Cleveland Trust*, one of the defendants divested its competing business, extinguishing the competition among defendant companies. The court rejected the government's request for injunctive relief because it was no longer possible for an agreement between defendant companies to eliminate any competition among them, as required by Section 8, and any future competition was merely "conjectural." *Id.* at 710.

[72] *Paramount Pictures*, U.S. Dist. LEXIS 10596, at *27.

[73] 15 U.S.C. § 19(b).

[74] In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court held "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984). In *American Needle*, the Supreme Court clarified that *Copperweld* "immunity" involved "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010). Under *Copperweld* and *American Needle*, "[t]he question is whether the agreement joins together 'independent centers of decisionmaking.'" *Id.* at 196 (quoting *Copperweld*, 467 U.S. at 769).

[75] 15 U.S.C. § 19(a)(1)(B) (emphasis added).

[76] Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 618 (9th Cir. 1979) (applying pre-*Copperweld* intra-enterprise conspiracy doctrine to Section 8: "Because the [defendant companies] operated as a single economic entity and not as competitors, the presence of common directors on the boards of the three controlling corporations . . . does not violate section 8 of the Clayton Act.").

Under *Copperweld*, the first question is whether Fund A and Fund B are separate persons or a single economic unit? While limited partners own 95% of each fund, the private equity sponsor manages the fund investments, so there is an argument that both funds are members of a single economic unit. The answer to this question impacts Section 8's application to an interlock between Company X and Company Y.

1. If Fund A and Fund B are separate legal persons, then each could appoint board members without the sponsor being responsible for an unlawful interlock—the board members are agents of the funds, not the sponsor.
2. If Fund A and Fund B are a unit, through common management (not ownership), then Section 8 may apply to the sponsor.

More questions follow, particularly surrounding the relationship between the funds and their investments. Under the second scenario, if the funds hold majority stakes in both Company X and Company Y, should those companies be treated as a single economic unit, incapable of reaching an agreement in violation of the antitrust laws? More iterations abound given the complexity of modern investment structures.

Indirect Interlocks

An indirect interlock occurs when two companies share a director but the competition exists at the subsidiary level for at least one firm. There is some controversy about whether this arrangement runs afoul of Section 8, as the default rule is "[a] parent corporation is not a competitor of another corporation merely because its subsidiary is."[77]

Courts generally agree that a "control test" governs indirect interlocks.[78] Whether "the business of a subsidiary is to be attributed to a parent in determining if the parent competes with another corporation with which it is interlocked, turns upon the extent of the control exercised by the parent over the subsidiary's business."[79] So in a case where "no one from [the parent companies] ever told [the subsidiary] how to run its business," there is no illegal interlock.[80]

While the DOJ supported a control test during the hearings leading up to the 1990 Amendments,[81] the FTC argued for a bright-line rule "that would always ascribe the activities of a subsidiary to its parent."[82] Despite the inter-agency debate, Congress did not explicitly clarify its view of indirect interlocks in the 1990 Amendments. At the time, though, courts had reached some

[77] United States v. Crocker Nat. Corp., 656 F.2d 428, 450 (9th Cir. 1981), *rev'd on other grounds*, Bankamerica Corp. v. United States, 462 U.S. 122 (1983); *see also* Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., 1966 U.S. Dist. LEXIS 10596, *24 ("Subsidiary or parent corporations of those corporations in which there is an allegedly infringing interlocking directorate are not to be considered in determining whether competition exists between the directed corporations.").

[78] *See, e.g.*, *Crocker*, 656 F.2d at 450; Square D Co. v. Schneider S.A., 760 F. Supp. 362, 367 (S.D.N.Y. 1991) ("[C]ompetition with a subsidiary may be properly deemed to a parent corporation where the parent closely controls or dictates the policies of its subsidiary."); United States v. Cleveland Tr. Co., 392 F. Supp. 699, 712 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975) ("[C]ompetition between subsidiaries may be imputed to the parents for purposes of section 8, 'where the major policies of the subsidiaries are dictated by the parents.'").

[79] *Crocker*, 656 F.2d at 450; *see also id.* ("If the parent substantially controls the policies of its subsidiary, it may fairly be said, in the language of the competing corporations provision of Section 8, that the 'business and location' of the parent include the business and location of the subsidiary.").

[80] Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1205 (2d Cir. 1978).

[81] Michael Boudin, *The Interlocking Directorate Act of 1989,* Written Answers at Hearing on H.R. 29 Before the H. Comm. on the Judiciary, 99th Cong. 40 (1986) ("Whether a subsidiary's activities are attributable to the parent for purposes of section 8 depends on the amount of control that the parent in fact exercises over the subsidiary.").

[82] *Id.* at 46 (written answers of Jeffrey Zuckerman, Director, Bureau of Competition, Federal Trade Commission).

[Q]uestions nevertheless remain regarding what significance Section 8 liability should have on the application of other antitrust statutes. Does an interlock support an inference of unlawful conspiracy? What risks follow a determination of Section 8 liability?

consensus around a control test, which supports the position that Congress implicitly endorsed control as the appropriate criterion for navigating indirect interlocks.

Relationship with Other Antitrust Laws

Congress enacted the Clayton Act to invigorate and broaden the scope of the Sherman Act.[83] Section 8 targets "incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directors."[84] As a prophylactic statute, questions nevertheless remain regarding what significance Section 8 liability should have on the application of other antitrust statutes. Does an interlock support an inference of unlawful conspiracy?[85] What risks follow a determination of Section 8 liability?

Section 1: Section 8 seeks to prevent situations in which collusive activity may occur, whereas Section 1 liability requires proof of an agreement in restraint of trade. Congress, in passing Section 8, sought to create a buffer zone to preempt a violation of Section 1. For this reason alone, Section 8 liability does not serve as any meaningful evidence of an unlawful restraint of trade.

Section 5: More uncertain is Section 8's relationship with Section 5 of the FTC Act. On several occasions, the FTC has concluded that an illegal Section 8 interlock automatically violates Section 5.[86] The FTC has also used Section 5 to extend Section 8's reach to scenarios expressly excluded by Section 8's plain terms.[87] Recently, the FTC issued a new Section 5 policy statement and provided, as example of an enforcement scenario, "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."[88] According to some, Section 5 thus remains an independent authority to challenge interlocks that the FTC recognizes are not prohibited by Section 8. As with other aspects of Section 5, the Commission's authority remains untested.[89] But the text and history of both statutes undermine a broad prophylactic reading of Section 5 that would provide the Commission a blank check to target any board relationship it perceives to raise competition concerns. Importantly, the Clayton Act and Federal Trade Commission Act were considered in parallel in 1914, and both were designed to supplement the Sherman Act. If Congress desired a more robust prohibition of interlocking directorates, it could have enacted one when it passed Section 8 in the same year as Section 5. Paradoxically, an expansive reading of

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83 United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953) ("Section 8 was but one of a series of measures . . . intended to strengthen the Sherman Act.").

84 *Id.*

85 Technically, no: an interlock "may indicate an opportunity to conspire, but affiliation does not by itself necessarily imply conspiracy to restrain trade." *See* Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1561 (10th Cir. 1984).

86 Kraftco Corp., 89 F.T.C. 46 (1977); Borg-Warner Corp., 101 F.T.C. 863 (1983).

87 Matter of Perpetual Fed. Sav. & Loan Ass'n, 90 F.T.C. 608 (1977) (finding unlawful a bank-nonbank interlock under Section 5 of the FTC Act); ABA Section of Antitrust Law, Antitrust Law Developments (9th ed. 2022) ("[T]he FTC has applied Section 5 of the FTC Act to enforce the 'spirit and policy' of Section 8 and reach interlocks that Section 8, by its terms, may not prohibit."); *see also* Debbie Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, *Have a plan to comply with the bar on horizontal interlocks* (Jan. 23, 2017), https://www.ftc.gov/enforcement/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks.

88 *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, No. P221202 (Nov. 10, 2022).

89 Courts are generally skeptical of claims under Section 5 that exceed the prohibitions found in the Sherman and Clayton acts. *See, e.g.,* E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 142 (2d Cir. 1984) (expressing skepticism about the FTC's ability to prosecute non-collusive and non-predatory conduct under the "vague general term 'unfair methods of competition'", noting that "[a] test based solely upon restraint of competition, even if qualified by the requirement that the conduct be 'analogous' to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system.").

Section 5 as applied to interlocking directorates would conflict both with the text and any "spirit" that may be embodied in Section 8.[90] From its origins, Section 8 has been a precise and limited prohibition. The 1990 Amendments reaffirmed its circumscribed role. Consequently, whatever the general scope of the FTC's Section 5 authority, it appears at its nadir next to Section 8's 1990 Amendments.

Conclusion

The 1914 Congress enacted Section 8 to address the perceived threat posed by the consolidation of corporate power in the hands of a limited number of individuals. A plain rule prohibiting interlocking directorates served antitrust policy well for half a century but proved incompatible with modern corporate governance. In response, Congress amended Section 8 in 1990 to enshrine express limitations. While Section 8's Wilsonian-Brandeisian origin story is important to understanding its prophylactic purpose, Congress reached important policy tradeoffs in its 1990 Amendments that must guide twenty-first century enforcement. While many unanswered questions remain, the rule of law requires that companies, courts, and enforcers "start with the language of the statute . . . and then . . . look to court precedent, and . . . the plain language and plain meaning of the statute." The legislative history of the 1990 Amendments provides critical context and meaning to interpret the scope of "the words Congress used to describe what the laws says."[91] ●

[90] Grand Union Co. v. F.T.C., 300 F.2d 92, 95 (2d Cir. 1962) ("The Commission claims that the very purpose of § 5 is to . . . to bolster other antitrust statutes by outlawing acts which violate their 'spirit,' but not their letter.").

[91] Kanter, *supra* note 10.