



SEVEN, EIGHT, LAY THEM STRAIGHT: SEVEN DIRECTORS RESIGN FROM CORPORATE BOARDS OVER SECTION 8 INTERLOCKING DIRECTORATE ISSUES

Understanding the rules around interlocking directorates should be a priority for companies and their counsel. Following months of foreshadowing tough enforcement by the U.S. antitrust agencies, the Department of Justice's Antitrust Division (the "Division") announced on October 19 that seven directors had resigned from the boards of five companies to resolve the Division's concerns regarding interlocking directorates, although no companies admitted liability.¹ The Clayton Act Section 8 ("Section 8") prohibits any "person" from serving as an officer or director of two competing companies.² The Division announcement is notable for several reasons: it evidences the fact that the Division is actively seeking to enforce Section 8; it highlights the Division's stance on how Section 8 relates to financial investors, particularly private equity firms; and it serves as a warning shot that more enforcement in this area is likely to come.

Historically, enforcement of Section 8 by the Federal Trade Commission ("FTC") and the Division has been limited, for the most part, to enforcement in the context of mergers.³ However, reports emerged last month that companies were receiving letters from the Division inquiring about interlocking directorates and warning that the Division may bring enforcement actions in this area.⁴ This is consistent with Assistant Attorney General Jonathan Kanter's statement from April 2022 that the

¹ Press Release, Dep't of Justice, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (Oct. 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

² 15 U.S.C. § 19.

³ Press Release, Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), available at <https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions>.

⁴ Stefania Palma and James Fontanella-Khan, *US antitrust warnings lead to corporate board resignations*, *Financial Times* (Oct. 19, 2022), available at <https://www.ft.com/content/879ac962-0a30-488e-a964-a83a9162ead4>.

Division was committed to using the "whole legislative toolbox" provided by Congress for antitrust enforcement, specifically calling out Section 8.⁵

PRIVATE EQUITY

The Division's announcements and actions over the last several months demonstrate stricter antitrust scrutiny for the private equity industry. The extent to which private equity is affected by this shift is clarified by the example of SolarWinds and Dynatrace, providers of Application Performance Monitoring software. One director, who is also the managing partner at private equity firm Thoma Bravo, served on the boards of both companies. He resigned from SolarWinds board on October 14 due to the Division's concerns, along with two other directors who represented Thoma Bravo as a partner and senior operating partner.⁶

WARNING SHOT

The Division's press release this week specifically notes that this action is "the first in a broader review of potentially unlawful interlocking directorates."⁷ Companies should review existing positions held by their directors and private equity firms should carefully evaluate director positions of their portfolio companies and consider implications for new board seats in the context of transactions.

The Division's announcement signals that they will look across industries to enforce Section 8. The industries involved in the announced resignations included: go-to-market information and intelligence platforms for third-party sales, marketing, operations, and recruiting teams; providers of space infrastructure and communications products and services; and manufacturers of components and technologies for use in transportation applications.

SECTION 8 OF THE CLAYTON ACT

Section 8 prohibits any "person" from serving as an officer or director of two competing companies.⁸ The statute does not further define what is meant by "competing companies," but there are minimum monetary thresholds (revised annually) to which Section 8 is applied. For example, in 2022, Section 8 applies to companies with capital, surplus, or profits exceeding \$41,034,000. At the same time, the statute outlines *de minimis* exceptions for companies that have limited competing sales. Violations of Section 8 are *per se* violations. To remedy an interlocking directorate, an interlocking board member must resign from at least one company's board.

CONCLUSION

While widespread U.S. antitrust legislative reforms have yet to pass Congress, U.S. competition agencies are leaning into aggressive antitrust enforcement with all tools in their arsenals. The first round of resignations serves as a warning to

⁵ Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, Dep't of Justice (Apr. 4, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

⁶ SolarWinds Corporation, Form 8-K (Oct. 14, 2022), available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001739942/000173994222000081/swi-20221014.htm>.

⁷ Press Release, Dep't of Justice, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (Oct. 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

⁸ 15 U.S.C. § 19.

companies, and financial investors in particular, to assess any potential Section 8 issues. Although the remedy for a Section 8 issue is only injunctive, antitrust agencies consider that this type of violation can indicate or give rise to other violations of antitrust law, such as the exchange of competitively-sensitive information or facilitate coordination among competitors, conduct that can have more severe financial implications.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Brian Concklin
Partner

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Leigh Oliver
Partner

T +1 202 912 5933
E leigh.oliver
@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Abigail Cessna
Associate

T +44 207006 3366
E abigail.cessna
@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

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