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Interlocking Directorates — Not Just A Section 8 Issue

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We regularly receive queries from clients regarding the legality of director interlocks under Section 8 of the Clayton Act. Section 8, of course, prohibits certain types of interlocking directorates between competitors with the goal of preventing anti-competitive coordination between the two interlocking companies. But a different and perhaps equally important question clients should consider is the potential risk created by interlocking directors under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act. A company's ability to defend an interlock under Section 8 does not necessarily mean that the activities Section 8 was intended to forestall may not still occur — or appear to have occurred — and that may open the door for Sherman or FTC Act claims.

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Most companies are aware of Section 8's proscriptions and will seek legal advice as to whether the proposed director relationship runs afoul of the statute. There are numerous exceptions to the prohibition as well as some safe harbor thresholds that are set (and revised annually) by the Federal Trade Commission. Given the relative paucity of case law on the issue, determining whether a particular exception applies, or whether a specific relationship may run afoul of the section, can be challenging. Legal opinions evaluating interlocks under Section 8 are fact-intensive and too often provide little bright-line guidance.

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Therefore, companies sometimes proceed with an interlock based on advice that they, at a minimum, have good legal arguments that they have not violated the statute. In other words, the interlock is not an obvious violation, but still may be subject to challenge. This business decision also contemplates that the penalties associated with a finding of a Section 8 violation are less than severe — often requiring nothing more than abandonment of the interlock. In the end, a client may conclude that the benefit of having a particular individual serve on the board or in some other executive position outweighs any significant risk of a Section 8 violation or potential liability in the event a violation is found.

The problem with this risk-benefit analysis is that it ignores an additional risk. That risk is that the interlock results in the very thing occurring (or appearing to have occurred) that Section 8 is intended to prevent — a conspiracy in restraint of trade. Since Twombly, companies have been relatively safe from conspiracy allegations based solely on parallel conduct — particularly if the conduct is in each company's unilateral self-interest. But what happens if, in addition to this parallel conduct, the plaintiff is able to allege that there is an interlock between the two alleged conspirators?

This is not an unrealistic scenario for a number of reasons. First, clearance of an interlock under Section 8 is at times less than an object certainty. This is because courts disagree about critical issues like the definition of "competitor" or whether serving on the board of a holding company is the same as serving on the board of its competing subsidiary.

Second, an interlock may still pass muster under Section 8 even though the two companies involved are in fact competitors. For example, a single individual may serve on the board of one company and on the board of a second company that while not a direct competitor of the first, owns and controls a subsidiary that is a competitor. There also are competitive revenue thresholds that exempt minimal competitive overlap from Section 8's reach. (Section 1 has no such exemption.)

Third, even if the two companies are not direct competitors, they may be potential competitors. And fourth, while two companies may not be competitors at the time the interlock is formed, they may evolve into a state of competition or potential competition at some level. We saw this last scenario in the FTC's investigation of interlocks between Google Inc. and Apple Inc. and Google and Amazon.com Inc. and the more recent resignation of an Alphabet Inc. director from the Uber Technologies Inc. board. Relatedly, it is likely that prior to the U.S. Department of Justice actions alleging Section 1 conspiracies based on nonsolicitation agreements between certain tech companies, those companies had never viewed themselves as "competitors" in any market for purposes of a Section 1 violation.

Even if your interlock passes muster under Section 8, at least one federal court has held that compliance with Section 8 does not automatically confer immunity on activities otherwise reachable under Section 1. United States v. eBay Inc., 968 F.Supp.2d 1030, 1036-37 (N.D.Cal. 2013) Most courts are likely to agree. Nor, except in rare cases, will the interlock provide a sufficient unity of interest to qualify under Copperweld — which holds that companies with a unified interest (such as a corporation and its wholly owned subsidiary) are incapable of conspiring for purposes of Section 1. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

Back to our Section 1 scenario. In addition to alleging near contemporaneous activities such as price increases, the adoption of minimum resale pricing policies, or one company's decision not to enter the market of its interlocked competitor, the complaint also alleges: "During all time periods relevant to this complaint, Mr. Smith served on the board of directors of Defendant A, and on the board of company B, of which Defendant B is a wholly owned subsidiary. On information and belief, in his capacity as director of these two entities Mr. Smith had access to and the ability to influence strategic business plans of both defendants."

Is the fact of an interlock enough additional evidence of a conspiracy for the plaintiff to get past Twombly? Unlikely. But the interlock plus the usual attendant baggage — communications, access to information, and possible influence or control — are certainly a step in the right, or wrong, direction.

And so, any risk-benefit analysis of an interlocking directorate should consider not only Section 8 of the Clayton Act, but also whether it might raise potential Sherman or FTC Act issues — or even the appearance thereof. Companies with diverse portfolios need to be attentive to the potential risk, particularly given that many venture capital or investment banking groups tend to focus on particularly industries — increasing the risk of a competitive overlap. Similarly, companies in evolving industries should schedule periodic checks to insure they have not evolved into a competitive position vis-a-vis a company with whom they share a director or that any of their directors have taken on new potentially problematic board positions. (The FTC encourages regular consultation with employees knowledgeable about market participants: "Have a Plan to Comply with Bar on Horizontal Interlocks," FTC, Bureau of Competition, Jan. 23, 2017.)

Finally, should a company decide that the benefit is worth the risk, it would be well served to implement screens and policies that would enable it to rebut a claim that the interlocking director was the conduit through which the conspiracy was facilitated.

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