

Private Equity: Do You Have Seats on Boards of Companies in the Same Industry?

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Last week, the U.S. Department of Justice (DOJ) sent letters to multiple public companies, investors and individuals advising of concerns of “interlocking directorates” and stating that it may bring lawsuits for violations of Section 8 of the Clayton Antitrust Act (15 U.S.C. § 19) (Section 8). Section 8 prohibits “interlocking directorates.” An “interlocking directorate” occurs when the same individual or entity sits on the board of two competitors. Direct interlocking directorates are easy to identify and occur when the same individual sits on the board of two competing companies within the same industry. Indirect interlocking directorates occur when the same entity appoints two different individuals to sit on the board of two competing companies.

Many private equity firms target investments in companies within a particular industry. They are able to build on an understanding of a particular industry and relationships with key individuals. These industry ties are sought in merger filings made pursuant to the Hart Scott Rodino Act of 1976 (the HSR Act) as part of the affiliate and associate overlap analysis.

Traditionally, the DOJ and Federal Trade Commission (FTC) have enforced Section 8 prohibitions in the context of HSR Act filings. Last week’s actions by the DOJ were the result of proactive searches for violations of Section 8 prohibitions outside the merger review context and indicate the DOJ is expanding its efforts to identify and take actions against interlocking directorates. The goal of these prohibitions is to ensure that competitively sensitive information (such as pricing, key suppliers, key customers and key employees) is not being shared among competitors resulting in anticompetitive effects through coordination of competitive activities within a given industry.

Parties are strictly liable for Section 8 violations. The DOJ does not have to prove actual competitive harm resulting from an interlocking directorate. The remedy is injunctive relief, but if a private plaintiff builds on a finding, private plaintiffs may obtain monetary damages for Section 8 violations. There are “safe harbor” exceptions if (1) the corporation has less than \$41,034,000 in total capital, surplus, and undivided profits or (2) (a) the competitive sales of either corporation are less than \$4,103,400, (b) the competitive sales of either corporation are less than two percent of the corporation’s total sales or (c) the competitive sales of each corporation are less than four percent of the corporation’s total sales.

If you have further questions about this target of enforcement or to review your compliance with Section 8, please contact the following attorneys from Benesch’s [Corporate and Securities Practice Group](#):

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