



Alert

Antitrust, Franchise & Consumer Law
Client Service Group

To: Our Clients and Friends

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Federal Trade Commission Increases Interlocking Directorates Thresholds

On January 21, 2011 the Federal Trade Commission announced the 2011 interlocking directorates thresholds under Section 8 of the Clayton Act.

The purpose of Section 8 is to prevent a "person" from serving as an officer or director of corporations that compete with one another in the marketplace, unless that competition is very limited. It also reaches situations in which two different individuals represent the same corporation and serve on competitors' boards. So, for example, a venture capital firm may violate the law by having a representative serve on the boards of two competitors in which it has an interest.

Section 8 prohibits a "person" from serving as an officer or director in any two corporations if

- (1) the "capital, surplus, and undivided profits" of each corporation exceeds \$26,867,000 (the new threshold for 2011); and
- (2) the corporations are competitors "by virtue of their business and location of operation."

Interlocks are allowed where any of the following are true:

- (1) The competitive sales of either corporation are less than \$2,686,700 (threshold for 2011);
- (2) The competitive sales of either corporation are less than 2% of the corporation's total sales; or
- (3) The competitive sales of each corporation are less than 4% of that corporation's total sales.

Interpretive issues usually relate to whether the two interlocked companies truly compete with one another and if so, to what extent. But if a violation is established, the existence of an interlock prohibited by Section 8 is a per se offense -- no defenses may be offered. There is a private right of action for a Section 8 claim, and the federal antitrust agencies also enforce it. It is important to be aware of Section 8, particularly for entities such as venture capital firms that may have portfolio companies that compete with one another.

For more information about interlocking directorates law, please contact Becky Nelson (314.259.2412), Perry Johnson (314.259.2308) or Dan Schwartz (202.508.6025).

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