# Update

## Clients Should Review Their Corporate Governance Compliance Guidelines in Light of Threatened Enforcement Action Against Interlocking Directorates

In the government's ongoing efforts to increase antitrust enforcement, Assistant Attorney General ("AAG") Jonathan Kanter, head of the Department of Justice's Antitrust Division ("DOJ"), opened up another front for clients to address as they work through their antitrust compliance plans: enforcement of Section 8 of the Clayton Act's prohibition on interlocking directorates.

The purpose of Section 8 is to prevent anticompetitive information exchanges and possible collusion that may occur when a person simultaneously serves as an officer or director of two competing corporations. Generally, Section 8 applies only if certain financial thresholds are triggered and no exceptions apply. Violation of the interlocking directorate rule, barring any exceptions, is a per se violation that can be enforced by the antitrust regulators as well as by private litigation.

Under the 2022 thresholds, an individual is prohibited from servicing as an officer or director of any two corporations if (1) capital, surplus, and undivided profits of each corporation aggregates in excess of $ 41,034,000 and (2) the corporations are competitors because of their business and location of operation. [1] Clayton Act Section 8(a)(2)(A) also outlines three exceptions to the interlock rule: (1) the competitive sales of either corporation are less than $4,103,400, (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. Section 8 contains a one-year grace period for the individual to resign from one of the positions.

Even where Section 8 does not apply, companies may face risk under Section 1 of the Sherman Act when their officers, directors, or employees work with two or more competing firms. To ensure compliance with Section 1, companies may need to implement information firewalls or other safeguards to limit the potential for anticompetitive effects that may result from company personnel having dual roles at competing firms. Unlike Section 8 of the Clayton Act, there is no grace period under Section 1 of the Sherman Act. Also, unlike in Section 8 cases, private plaintiffs in cases brought under Section 1 are frequently awarded treble damages.

Earlier this year AAG Kanter expressed the DOJ's desire to be much more vigilant in enforcing the "bright line rule" under Section 8 of the Clayton Act.[2] "We are ramping up efforts to identify

1 Clayton Act Section 8(a)(1); see also https://www.federalregister.gov/documents/2022/01/24/2022-01215/revised-jurisdictional-thresholds-for-section-8-of-the-clayton-act

2 Jonathan Kanter, Opening Remarks, at 2022 Spring Antitrust Enforces Summit, available at: https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers


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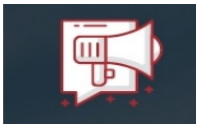

violations across the broader economy," claimed Kanter, "and we will not hesitate to bring Section 8 cases to break up interlocking directorates." [3]

This new enforcement focus is particularly important for clients engaged in frequent acquisitions and spinoffs—including private equity and health care firms—since these transactions can result in competitor interlocks. These companies should have good corporate governance controls with respect to placement of individuals as officers or directors of other entities in order to avoid an improper interlocking directorate. The Polsinelli Antitrust team can assist clients with a review of their corporate governance and organization charts to ensure antitrust compliance.

3 *Id.*