

October 4, 2023

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The Revitalization of Section 8 of the Clayton Act

As antitrust enforcers have become more active, they have also become more creative with the tools they use to enforce antitrust laws. This includes the Federal Trade Commission's ("FTC's") standalone Section 5 powers, updated HSR requirements, more stringent Merger Guidelines, the resuscitated Robinson-Patman Act, and the FTC's proposed ban on noncompete agreements. However, one lesser-known tool has become a clear priority for enforcers in the last year.

Section 8 of the Clayton Act prohibits any person from simultaneously serving as an officer or on the board of directors of competing corporations, subject to limited exceptions.¹ This proscription of interlocking directorates was designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."² Enforcers have interpreted "person" to extend beyond the definition of a natural person to prohibit any one firm from appointing two different people to sit as its agents as officers or directors of competing companies. This is a *per se* violation, meaning enforcers need not prove actual harm to competition.³ In the past, enforcers relied on companies to self-police compliance with Section 8, but that appears to be changing.

On September 6, 2022, the nation's largest natural gas producer, EQT Corporation ("EQT"), entered into a purchase agreement with THQ Appalachia, LLC ("Tug Hill") and THQ XcL Holdings I, LLC ("XcL Midstream") to acquire Tug Hill's upstream assets and XcL Midstream's gathering and processing assets for \$5.2 billion.⁴ Tug Hill and XcL Midstream were both backed by equity commitments from funds managed by Quantum Energy Partners ("Quantum"), an active investor in natural gas in the region. The FTC reviewed this acquisition because it viewed Quantum and EQT as direct competitors in the production and sale of natural gas in the Appalachian Basin.

The proposed acquisition would have made Quantum one of EQT's largest shareholders and given Quantum a seat on EQT's board of directors, which, according to the FTC, would have facilitated the exchange of confidential and competitively sensitive information and otherwise stifle competition.⁵ On August 16, 2023, the FTC voted 3-0 to issue a complaint and consent order delivering structural relief,

¹ 15 U.S.C. § 19.

² *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953); Debbie Feinstein, *Have a plan to comply with the bar on horizontal interlocks*, Federal Trade Commission (Jan. 23, 2017), <https://www.ftc.gov/enforcement/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks>.

³ Michael E. Blaisdell, *Interlocking Mindfulness*, Federal Trade Commission (June 26, 2019), <https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness>.

⁴ *EQT Announces Strategic Bolt-ON Acquisition and Doubles Share Repurchase Program to \$2 Billion*, EQT (Sept. 6, 2022), <https://ir.eqt.com/investor-relations/news/news-release-details/2022/EQT-Announces-Strategic-Bolt-On-Acquisition-and-Doubles-Share-Repurchase-Program-to-2-Billion/default.aspx>.

⁵ *FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal*, FTC (Aug. 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

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including prohibiting Quantum from occupying the EQT board seat. This was the FTC's first formal Section 8 case in 40 years.

This marked an inflection point in the revitalization of Section 8. In March 2022, Assistant Attorney General for the Department of Justice ("DOJ") Antitrust Division, Jonathan Kanter, gave a speech lauding the department's launch of the broadest enforcement program in the history of Section 8. At that time, he stated the DOJ had 17 active Section 8 investigations and caused more than 14 directors to resign from corporate boards.⁶ In March 2023, the DOJ announced five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to the DOJ's Section 8 enforcement efforts.⁷ On August 16, 2023, the same day the FTC issued its complaint and consent order in the Quantum/EQT matter, the DOJ announced that two directors of Pinterest, Inc. resigned from the Board of Directors of Nextdoor Holdings, Inc.⁸ It is clear that Section 8 enforcement has become a priority in the last year.

All companies and private equity firms should be aware of board composition and speak with counsel about possible Section 8 liability. As a refresher:

- Banks, banking associations, and trust companies are excepted from scrutiny under the statute.
- There is a one-year grace period for when interlocks were previously lawful but become unlawful.
- Only companies that are engaged in commerce, that are competitors by virtue of business and location, and that meet the annually adjusted financial thresholds trigger Section 8 scrutiny.

It is important to update current antitrust compliance programs to include specific Section 8 considerations and to speak with an attorney if you have any particular concerns. For more information, please contact your Kutak Rock attorney or a member of [Kutak Rock's antitrust team](#). You may also visit us at www.KutakRock.com.

⁶ Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy, Department of Justice (Mar. 2, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone>.

⁷ Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates, Department of Justice (Mar. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>.

⁸ Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates, Department of Justice (Aug. 16, 2023), <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.

