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FTC & DOJ: Board Observers Are Subject to the Antitrust Laws' Prohibition on Interlocking Directorates

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The Department of Justice and the Federal Trade Commission have been active recently in identifying and achieving remediation of interlocks that may violate Section 8 of the Clayton Act[1] and / or Section 5 of the Federal Trade Commission Act.[2] In a recent joint DOJ and FTC "statement of interest[3]," the agencies argue that the prohibitions of Section 8 and Section 5 apply to *board observers* and not only officers and directors. Firms and individuals should recognize this position was adopted by a unanimous commission, including President-elect Trump's designee for FTC Chairman (and current Commissioner), Andrew Ferguson, and Republican-appointed Commissioner Melissa Holyoak.[4]

The antitrust agencies' efforts to identify and break interlocks, broadly defined, are not going to be shelved in the second Trump administration. Notably, the revised reporting rules for transactions subject to the Hart-Scott-Rodino Act include a requirement that filing parties identify certain officers and directors.[5] One purpose of this reporting requirement is to identify interlocks that may impact competition, including interlocks that are not prohibited by Section 8.

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1 See Bilal Sayyed, The Biden Administration's "Extensive Review of Interlocking Directorates Across the Entire Economy" May Put Your Board Representation at Risk (May 3, 2024). The DOJ just recently required two directors, who served on the boards of both Epic Games, Inc. and Tencent Holdings Ltd., to resign from Epic's board. See Department of Justice, Antitrust Division Continues to Focus on Interlocking Directorates that Violate Section 8 of the Clayton Act (Dec. 18, 2024).

2 Section 5 of the FTC Act prohibits "unfair methods of competition." 15 U.S.C. 45(a)(1).

3 Statement of Interest of the United States and Federal Trade Commission, Elon Musk v. Samuel Altman, Case No. 4:24-cv-04722-YGR (N.D. Cal.) (Jan. 10, 2024).

4 See Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Statement of Interest Supporting Elon Musk, Musk v. Altman (FTC Matter No. 2323044) (Jan. 8, 2025).

5 See Bilal Sayyed, FTC Substantially Expands HSR Merger Notification Form's Information and Documentary Requirements (Quorum Newsletter, October 2024). The revised information and documents necessary to complete the premerger notification form will go into effect on February 10, 2025, absent the Trump administration pausing such regulations, or a vote by the Congress to repeal the requirements, pursuant to the Congressional Review Act. The Chamber of Commerce has initiated litigation challenging the authority of the Commission to promulgate the final rules. Complaint for Declaratory and Injunctive Relief, Chamber of Commerce et. al. v. Federal Trade Commission and Lina Khan, Civ. Act. No. 6:25-cv-009 (E.D. Texas, Tyler Division) (Jan. 10, 2025). Affected parties may wish to file in support of the Chamber; no briefing schedule has yet been set.

The Prohibition on Interlocking Directors And Officers

Section 8 of the Clayton Act prohibits one person from simultaneously serving as an *officer* or *director* of two *corporations* if: (1) each of the "interlocked" corporations has combined capital, surplus, and undivided profits of more than $10,000,000[6]; (2) each corporation is engaged in whole or in part in commerce; and (3) the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps "are too small to have competitive significance in the vast majority of situations."[7] The purpose of the prohibition is to "avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors."[8] While the remedy for an illegal interlock is merely to break the interlock, the loss of board representation can be a significant hurdle to protecting an investment in the company.

Section 5 of the FTC Act prohibits "unfair methods of competition."[9] Section 5 prohibits "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit."[10] Although the text of Section 8 suggests a relatively narrow prohibition – it prohibits only "*a person*" from serving as a *director* or *board-appointed officer* of *corporations* that are *competitors* – according to the Commission, Section 5 prohibits, among other things, "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act's"

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6 15 U.S.C. §19. The $10,000,000 threshold is adjusted annually and is presently $48,559,000. It will soon be adjusted upward to $51,380,000. See Client & Friends Memo, *FTC Announces 2025 Thresholds for Merger Control Filings Under HSR Act and Interlocking Directorates Under the Clayton Act* (Jan. 13, 2025).

7 S. REP. NO. 101-286, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4100, 4103-04. A corporate interlock does not violate the statute if (1) the competitive sales of either corporation are less than $1,000,000; or (2) the competitive sales of either corporation are less than 2 percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales. 15 U.S.C. §19. Determining whether an interlock falls within the *de minimis* exceptions is a legally complex and highly factual undertaking, and should be evaluated with counsel familiar with the statute and its enforcement. The $1,000,000 threshold is adjusted annually and is presently $4,855,900, and will soon be adjusted upward to $5,138,000. See Client & Friends Memo, *FTC Announces 2025 Thresholds for Merger Control Filings Under HSR Act and Interlocking Directorates Under the Clayton Act* (Jan. 13, 2025).

8 United Auto Workers Advisory Opinion, 97 F.T.C. 933 (May 1, 1981).

9 15 U.S.C. 45(a)(1).

10 Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) at 8. The scope of Section 5's prohibition "reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions." Conduct that is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature" or "that is otherwise restrictive or exclusionary" may be unfair. To be an unfair method of competition, that conduct must also "negatively affect competitive conditions" "whether by affecting consumers, workers, or other market participants."

prohibition on interlocking directorates.[11] Although there is substantial likelihood that the incoming FTC majority will revise the Biden administration's policy statement on the scope of Section 5, the position articulated in the joint statement of interest (discussed below) suggests it is unlikely that the Commission will adopt a different position with respect to horizontal interlocks.

The Position of the DOJ, and a Unanimous Federal Trade Commission, Is that Board Observers Are and Should Be Subject to the Same Prohibitions as Directors and Officers

In the joint DOJ and FTC "statement of interest" filed in *Elon Musk v. Samuel Altman*[12], the agencies argue that "section 8 bars relationships that create an interlock regardless of form." The agencies argue:

> *"[A]n individual cannot evade liability by serving as an 'observer' on a competitor's board. ... [A] company or individual cannot use an indirect means to a prohibited end, such as by asking another person to serve as a board observer to obtain entry to a meeting that is otherwise off limits due to Section 8's ban on interlocks. Such misdirection would undermine Section 8's intent to impose a clear ban on direct involvement in the management of a competitor."*

During the first Trump administration, current FTC Commissioner Rebecca Slaughter, and then-FTC Commissioner Chopra argued that Section 5's prohibition on unfair methods of competition reaches interlocks that are defined to include board observer positions. According to Slaughter and Chopra:

> *"Typically, a board observer is like a regular member of a board of directors, but without a formal vote. While they don't have a vote, they certainly have a say. Like regular board members, board observers often participate in confidential discussions about strategy. Board observers can advocate for a preferred outcome. Board observers can even get access to key data. … I have reason to believe this arrangement undermines a key purpose of Section 8 of the Clayton Act's prohibition on interlocking directorates and [is] therefore unlawful under Section 5 of the FTC Act."*[13]

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[11] *Id.* at 15.

[12] Statement of Interest of the United States and Federal Trade Commission, Elon Musk v. Samuel Altman, Case No. 4:24-cv-04722-YGR (N.D. Cal.) (Jan. 10, 2024).

[13] Statement of Commissioner Rohit Chopra Joined By Commissioner Rebecca Kelly Slaughter, In the Matter of Altria Group, Inc., and JUUL Labs, Inc. (Apr. 2, 2020) at 4-5. As indicated at note 1, the proposed changes to the information required to complete the Hart-Scott-Rodino Merger Notification Form include the identification of board observer positions.

Potential Effect of the U.S. Government's Position

The Statement of Interest adopts the position on board observers on behalf of both the United States and the Commission with respect to the reach of Section 8. This position was adopted by a unanimous commission, including chair-designee Andrew Ferguson and his Commissioner colleague Melissa Holyoak.

The antitrust agencies' efforts to identify and break interlocks, broadly defined, is not likely to dissipate in the second Trump administration, and the position of the United States and the Commission, if adopted by the court, may trigger an expansion of derivative litigation by plaintiff shareholders of the interlocked companies. Even without adoption by the court, the antitrust agencies have articulated an enforcement principle that they are likely to continue to advance beyond the district court.

While the remedy for violating Section 8 is limited to a break of the interlock, an interlock can support the requirements of an agreement for a violation of Section 1 of the Sherman Act (agreements in restraint of trade) or create a factual inference of an ability to collude or coordinate towards anticompetitive behavior. Violations of Section 1 of the Sherman Act can result in substantial private damages or criminal fines.

Section 8 is usually "enforced" by proper board and officer selection screening, not by government enforcement action or private actions. Because the interlocked company is also subject to liability for violating Section 8 and Section 5, director and officer selection efforts should adopt board relationship disclosures that include board observer positions, and companies may wish to adopt guidelines that expand prohibitions on persons serving as directors (or officers) of competing companies to include prohibitions on board observer status at competing companies.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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