

## **Biz Board Overlap A Low-Hanging Fruit Ripe For More Cases**

By **Bryan Koenig**

*Law360 (January 11, 2023, 12:05 PM EST)* -- When the U.S. Department of Justice announced the pressured resignations of seven board members across 10 companies based on what's likely its most-aggressive-ever enforcement against overlap among competing companies' directors, the antitrust enforcer made clear it wasn't done.

"The Antitrust Division is undertaking an extensive review of interlocking directorates across the entire economy and will enforce the law," the head of the division, Assistant Attorney General Jonathan Kanter, said in the Oct. 19 announcement, referring to potential violations of Section 8 of the Clayton Act, a law whose enforcement the agency said it has actively been trying to "reinvigorate."

Companies and the antitrust bar are already reacting to that reinvigoration, adapting to an often overlooked area of potential enforcement. Interlocking directorates are relatively cheap and easy to investigate, and companies often consider enforcement actions not worth fighting. The more significant threat to possible violators is that investigations could lead to other kinds of conduct cases if overlapping board members are found to have shared, or facilitated the sharing, of competitively sensitive information between competitors.

Violations "can be established quite quickly and definitively," said Lisa Phelan, global co-chair of Morrison Foerster LLP's antitrust practice and a former chief of the Antitrust Division's National Criminal Enforcement Section. "It's pretty low cost for DOJ to establish."

According to antitrust professionals, interlocking directorates in violation of Section 8 can be defined broadly and include not just individuals serving on multiple corporate boards of potential competitors, including competitors for labor, but also different individuals nevertheless representing the same private equity firm with stakes in multiple companies in the same industry.

According to Jan Rybnicek, a former Federal Trade Commission attorney adviser and now partner at Freshfields Bruckhaus Deringer LLP, the DOJ appears to be taking "a more expansive view of who competitors are."

"That's something companies should be on guard about," he said.

Alleged violations can only be addressed with injunctive relief requiring separation. When they are faced with a DOJ pressure campaign, Phelan said, "most companies are going to proactively choose to remedy" through resignations.

Fighting a government enforcement action, which can be brought either by the DOJ or the FTC, often isn't worth it, according to antitrust professionals.

"At the end of the day, the main action is to have the person resign," said Rybnicek.

The October announcement of "interlocks" found between five different corporate pairings of companies that compete too closely to share board members under Section 8 itself followed months of hints from the DOJ that more such enforcement was coming.

"We are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur by imposing a bright-line rule against interlocking directorates," Kanter said in early April. "For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates."

When the enforcement itself was announced, Kanter pointed out that under Section 8, interlocking directorates are considered a "per se," or automatic, antitrust violation, an easier, lower bar for challenges than most U.S. competition laws.

The Biden administration has broadly tried to rewrite the rules of antitrust enforcement with a highly aggressive campaign of not-always-successful enforcement actions and regulatory moves to discourage and challenge anticompetitive conduct and mergers to address what enforcers contend has been decades of underenforcement.

Section 8 enforcement, Rybnicek said, "fits within the theme of revitalizing potentially underused provisions of the antitrust laws."

However, the Biden-era focus on Section 8 is not unique. Kanter's Trump-era predecessor, Makan Delrahim, also made enforcement against interlocking directorates a priority, stating for instance in May 2019 that the division "regularly encounters potential Section 8 violations and it is top-of-mind when reviewing transactions that involve interlocking directorates."

What appears to be new is the scale of the October announcement, which outlined resignations from corporate boards that spanned several weeks.

"It's definitely much bigger than past enforcement," Phelan said.

Also relatively new, according to observers, is the expansion of Section 8 enforcement and investigations beyond simply merger reviews.

"Now they've made clear, they're looking broadly beyond ongoing investigations," Phelan said.

Section 8 probes could have further ramifications for companies if they uncover the kind of collusive conduct barred by Section 1 of the Sherman Act's prohibition on agreements that unreasonably restrain trade, such as through price-fixing or market allocation. Section 1 violations can bring civil and criminal penalties, including fines and prison time.

Maria A. Raptis, a Skadden Arps Slate Meagher & Flom LLP antitrust partner, said Section 8 was meant to prevent board members from facilitating just such information sharing.

"It stands to reason that where DOJ believes a Section 8 violation has occurred, they're also going to be looking for signs" of Section 1 violations, she said.

Nevertheless, Raptis said she thinks it will be "rare, usually, perhaps even highly unlikely" for the DOJ to find Section 1 violations, given how sophisticated U.S. companies have gotten at their antitrust compliance. "But I think they are using their investigative authority to make sure interlocks have not led to Section 1 violations," she said.

Even without an expansion into Section 1 enforcement, the DOJ is already using its interlocking directorates enforcement to target another area of major Biden administration interest: **private equity firms**.

Among the concerns raised in the October enforcement announcement was the overlap between SolarWinds Corp. and Dynatrace Inc. According to the DOJ, both companies provide application performance monitoring software. The companies had three overlapping board members, according to the DOJ, which said one person represented private equity firm Thoma Bravo LP on both boards and two other members of SolarWinds' board also represented Thoma Bravo. All three stepped down from SolarWinds' board, the DOJ said at the time.

"The DOJ and the FTC have made it clear they're going to be scrutinizing private equity transactions and private equity holdings closely," Rybnicek said.

As enforcers look for more areas of potential overlap, they may find a great deal of it. Shortly after the DOJ announced the latest round of resignations, researchers at Stanford University found **considerable overlap** in life sciences companies.

The researchers found that "at any given time, 10-20% of board members are interlocked," and that "the number of interlocks has more than doubled in the last two decades," according to an analysis posted on the Social Science Research Network.

"Interlocking directorates are particularly prevalent in oncology, neurology, immunology, and respiratory disease," the study said.

Stanford Law School professor and study author Mark A. Lemley told Law360 in an interview his team is now working on an expanded analysis looking at wider swaths of the economy for potential interlocks. Lemley cautioned, however, that the data, expected soon, will not be as granular as the life sciences analysis, where publicly traded companies need to expressly say they're competing because they're vying for approval to treat the same medical conditions.

Lemley said the expanded analysis is looking at both publicly traded companies and venture capital.

Already, Lemley said that both the DOJ and the FTC have come calling for the life sciences data. He doesn't think enforcers are done examining interlocking directorates, which he asserted have often gone ignored by the corporate world.

"We might expect to see kind of a flurry of enforcement letters and anticipatory resignations ... as this comes to light," said Lemley, who also predicted that renewed enforcement efforts could drive a wave of awareness, and response, among companies who share board members and potentially the same competitive spaces.

Lemley said that the data indicates that past bursts of enforcement have driven some change at the time, although he asserted that past enforcement has been relatively minimal.

"The problem is pervasive. The problem is a widespread problem," Lemley said. So far, he said, "[we] haven't seen widespread enforcement to match that."

--Additional reporting by Adam Lidgett. Editing by Brian Baresch.

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