INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT: DRIVING A 100-YEAR-OLD STATUTE PAST ITS LIMITS?

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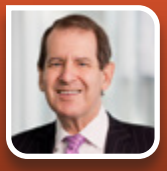


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INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT: DRIVING A 100-YEAR-OLD STATUTE PAST ITS LIMITS?

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The U.S. Department of Justice and Federal Trade Commission have recently announced an aggressive approach to enforcing Section 8 of the Clayton Act, which (with some exceptions) absolutely prohibits director or officer interlocks between competing corporations. This article describes Section 8's statutory text and considers the harms to competition Section 8 seeks to prevent; outlines the U.S. agencies expanded approach to enforcement; describes how the statute's boundaries may be tested and some recurring unsettled issues; and contributes a few thoughts regarding the future of Section 8 enforcement. Although a more aggressive approach to Section 8 enforcement can bring benefits in some circumstances, it is important that the agencies respect the limits of the statute and do not overreach.

The Biden Administration's whole-of-government approach to competition has led to increased emphasis on several types of antitrust cases that the Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") had emphasized in recent decades. Those include cases under the Clayton Act Section 8's absolute prohibition of interlocking directors or officers among competitors in certain circumstances. In a speech in April 2022, Assistant Attorney General for the Antitrust Division ("AAG") Jonathan Kanter stated: "[W]e 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. . . . 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."[2]

The DOJ subsequently announced that seven individuals had resigned from the boards of five companies "in response to concerns by the Antitrust Division that their roles violated [Section 8]'s prohibition on interlocking directorates."[3] The DOJ affirmed that this "is the first in a broader review of potentially unlawful interlocking directorates."[4] Shortly thereafter, the FTC claimed authority to challenge interlocks "not covered by the literal language of [Section 8 of] the Clayton Act" under Section 5 of the Federal Trade Commission Act."[5] Before this, the Commission had passed a resolution allowing the FTC's use of compulsory process (i.e. ability to request companies to produce information) to investigate common officers and directors of competing corporations.[6] Congressional leadership has opined on this issue with Senate Judiciary Committee Chair Richard Durbin (D-IL) stating that the DOJ's and the FTC's "increased emphasis on combatting interlocking directorates is long overdue after decades of lax enforcement in this area."[7] And most recently in March 2023, the DOJ announced that "five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to the Antitrust Division's enforcement efforts around Section 8 . . . bring[ing] the number of interlocks unwound or prevented as a result of the division's recent efforts to at least thirteen directors from ten boards."[8]

We describe Section 8's statutory text and explain the competitive harms that Section 8 seeks to prevent; the antitrust agencies' recent expanded approach to Section 8 enforcement; how the antitrust agencies' Section 8 enforcement program may test the statute's boundaries; and contribute a few thoughts regarding the future of Section 8 enforcement.

I. THE TEXT OF SECTION 8

Section 8, which was part of the original Clayton Act, has been in effect for over a century,[9] and prohibits a "person" from serving as a director or board-appointed officer of two or more "corporations" if (i) the corporations are "by virtue of their business and location of operation, competitors . . .;" and (ii) certain dollar thresholds are met, (iii) subject to certain de minimis exemptions.[10]

Section 8 is a prophylactic statute that is intended to prevent collusion or information exchanges that can lessen competitive robustness before they occur.[11] Unlike other antitrust statutes, Section 8 does not require *actual* anticompetitive behavior or effects. Instead, it is designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through

2 Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

3 Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

4 See *id.*

5 15 U.S.C. § 45(a)(1). Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

6 Fed. Trade Comm'n, File No. 211 0161, Resolution Directing Use of Compulsory Process Regarding Common Directors and Officers and Common Ownership (Sept. 2, 2021), https://www.ftc.gov/system/files/attachments/press-releases/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable/omnibus_resolutions_p859900.pdf.

7 Letter from U.S. Senator D. Durbin to Jonathan Kanter, AAG, DOJ, and Lina Khan, Chair, FTC, re Interlocking Directorates in the Life Sciences Industry (Feb. 13,2023), https://www.durbin.senate.gov/imo/media/doc/letter_from_chair_durbin_to_doj_and_ftc.pdf.

8 Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

9 *Antitrust Act*, 1914, ch. 323, § 8, 38 Stat. 730, 732-33 (codified as amended at 15 U.S.C. § 19).

10 15 U.S.C. §§ 19(a)(1) and (2).

11 Jonathan Kanter, *supra* note 2.

interlocking directorates."[12] Louis Brandeis, then advisor to President Woodrow Wilson in 1914, defined interlocking directorates as "the root of many evils."[13]

The DOJ, the FTC, and private parties[14] can enforce Section 8. The principal remedy is eliminating the interlock. Though damages are in theory available to private plaintiffs (although not the antitrust agencies), no court has ever awarded damages. Section 8 allows a one-year grace period for a person to resign from one interlocking position where the interlock was lawful when established but became a Section 8 violation because of changes over time (e.g. exceeding a *de minimis* exemption or new competition between subject corporations).[15]

Director or officer interlocks are exempted from Section 8 under limited circumstances: (1) the "competitive sales" of *either* corporation are less than $4,525,700;[16] (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. Section 8 defines "competitive sales" as the "gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year."[17] Whether these exceptions apply will sometimes turn on how the antitrust agency assesses competition, as discussed below.

II. THE AGENCIES' ENHANCED ENFORCEMENT APPROACH

Consistent with their aggressive posture towards many types of conduct, the antitrust agencies are seeking greatly to expand Section 8 enforcement. In recent decades, most of the agencies' Section 8 cases had arisen from information discovered during unrelated investigations, especially merger reviews. AAG Kanter has said that "[f]or too long, our Section 8 enforcement has essentially been limited to our merger review process."[18] But this has changed. The DOJ's recent Section 8 enforcement actions appear to have resulted not from a merger review or another investigation of a separate potential antitrust violation, but rather from dedicated efforts to scour publicly-available information, such as securities filings and other corporate public statements, in search of possible Section 8 violations.

As the antitrust agencies become more aggressive in enforcing Section 8, they may increasingly rely on expansive and untested interpretations of the statute, stretching the bounds of Congress's intent and making it more difficult for companies to predict the course of enforcement and avoid agency challenges.

The FTC's suggestion that it may use its Section 5 authority to challenge interlocks that are outside Section 8's scope brings even more uncertainty.[19] The FTC has given some examples of where it might use Section 5 — including interlocks involving banks, which Section 8 exempts,[20] or the *TRW* case, where the Ninth Circuit endorsed the FTC's broad notion of when companies with an interlocking director or officer compete with one another, based on industry and consumer recognition, similar production techniques or distinct costumers, going beyond a determination based on typical standards like cross-elasticity of demand or reasonable interchangeability between products that the companies offer,[21] and where the FTC Administrative Law Judge observed that Section 5 "may reach interlocking . . . between potential competitors."[22]

12 See *SCM Corp. v. Fed. Trade Comm'n*, 565 F.2d 807, 811 (2d Cir. 1977) (quoting *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)).

13 Louis D. Brandeis, Chapter III, Other People's Money (1914), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-iii.

14 See, e.g. *Cia. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 412-13 (1st Cir. 1985) (competitor of interlocked corporations).

15 15 U.S.C. § 19(b).

16 This Section 8 threshold is adjusted annually. The 2023 threshold is available at https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-announces-2023-update-size-transaction-thresholds-premerger-notification-filings-interlocking.

17 15 U.S.C. § 19(a)(2).

18 Jonathan Kanter, *supra* note 2.

19 Fed. Trade Comm'n, Policy Statement, *supra* note 5.

20 *Id.* at 15, citing *In re Perpetual Fed. Savings & Loan Ass'n*, 90 F.T.C. 608, 657 (1977).

21 *Id.* at 15, citing *TRW, Inc. v. FTC.*, 647 F.2d 942, 947 (9th Cir. 1981).

22 *TRW Inc.*, 93 F.T.C. 325, 379, n.12 (1979).

III. TESTING SECTION 8'S STATUTORY BOUNDS

Notwithstanding its superficial relative simplicity, Section 8 presents many important and unresolved questions of interpretation. The current antitrust agencies may well press the bounds of Section 8 to try to bring more enforcement actions. Opportunities to do so are particularly ripe because the courts have relatively few opportunities to adjudicate even recurring issues of Section 8 interpretation. Perhaps because Section 8 enforcement has historically not been terribly active and where interlocks have been challenged parties have typically agreed to unwind rather than litigate, Section 8, has in practice, "primarily been enforced by counsel to corporations" and "there has been very little litigation."[23] This jurisprudential lacuna is likely to give the agencies substantial latitude to challenge interlocks that Section 8, properly construed, may not in fact prohibit.

We outline below some of the recurring issues of Section 8 construction that remain unresolved and that may well be implicated by the agencies' aggressive approach.

A. Who Exactly Does Section 8 Cover?

1. A Single Person or Designees of a Single Firm?

Even the most basic building block of Section 8 — the prohibition on a "person" serving on the board of competing corporations — is fraught with uncertainty. Does "person" mean "individual," such that two separate designees of the same corporation could serve on competing boards without violating the statute? Or does "person" refer to the *firm* that has designated the two *individuals*, so that Section 8 captures the interlock? The antitrust agencies have long taken the latter position based on a "deputization" theory, whereby each individual director or officer is understood to be acting as a "deputy" of the firm with which he or she is associated.[24] For instance, in fall 2022, the DOJ challenged under Section 8 memberships on competing boards of five individuals who had been designated by the same investment firm.[25] Additionally, in March 2023, the DOJ announced it had raised concerns about *potential* interlocks, i.e., when a firm designates directors for one company and has (unused) board designation rights for a competitor of that company. DOJ is clearly pursuing a "deputization" theory, condemning interlocks involving different individuals that have been designated by a single *firm* and not requiring that the interlock involves a single *individual*. For instance, the DOJ announced that, in response to its investigation, two individuals appointed by an investment firm had resigned from the board of a domestic air freight service provider following the investment firm's proposed acquisition of an alleged competitor.[26] And in January 2023, a subsidiary of an investment firm announced it would no longer exercise its director appointment right for an insurance company given DOJ's concerns regarding the subsidiary appointment of directors and officers for another insurance company that was allegedly competing with the first insurance company.[27] But no court has ever addressed whether Section 8 actually prohibits purported interlocks involving different individuals based on a deputization theory.[28] And there are serious questions whether Congress intended for Section 8 to apply in this situation. In fact, the House Report regarding the Interlocking Directorate Act of 1990 distinguished between "direct" (same individual) and "indirect" (different individuals) interlocks, stating: "Generally interlocks fit into one of two categories: direct or indirect. Section 8 only regulates direct interlocks."[29]

Considering DOJ's recent challenges, investment firms seem to be a particular target of expansive agency applications of the deputization theory, since they frequently designate or employ board members for companies in which they hold interests that may com-

23 American Bar Association, INTERLOCKING DIRECTORATES HANDBOOK (2011), Chapter I., I.B.

24 See, e.g. U.S. v. CommScope, Inc., 72 Fed. Reg. 72,376 (DOJ Dec. 6, 2007); FTC Advisory Opinion, *United Auto Workers*, 97 F.T.C. 933 (1981); *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211, 215 (4th Cir.1987); *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366–67 (S.D.N.Y. 1991).

25 Press Release, U.S. Dep't of Justice, *supra* note 3 (two directors appointed by investment firm Thoma Bravo resigned from the board of Solarwind Corp. where a third director appointed by the same firm was a member of the boards of Solarwind Corp. and alleged rival Dynatrace, Inc.); Press Release, U.S. Dep't of Justice, *supra* note 8 (two separate directors appointed by Thoma Bravo resigned from the board of N-able Inc., a competitor to SolarWinds Corp. and Dynatrace, Inc.).

26 Press Release, U.S. Dep't of Justice, *supra* note 8 (two directors appointed by Apollo Global Management, Inc. ("Apollo") resigned from the board of Sun Country Airlines Holdings, Inc. ("Sun Country") after Apollo announced its proposed acquisition of Sun Country's alleged rival Atlas Air Worldwide Holdings, Inc.).

27 *Id.* (Brookfield Asset Management Inc. ("BAM") wholly owned subsidiary Brookfield Asset Management Reinsurance Partners Ltd. ("BAMRP") announced it would no longer exercise its right to appoint a director in American Equity Investment Life Holding Company, an insurance company, following DOJ's Section 8 concerns over BAMRP fully owning and appointing directors at alleged rival American National).

28 See, e.g. *U.S. v. Cleveland Trust Co.*, 392 F. Supp. 699, 710-12 (N.D. Ohio 1974) (observing that whether a corporation may be deemed to sit on board of directors of another corporation through a "deputy" is "entirely unsettled"), aff'd mem., 513 F.2d 633 (6th Cir. 1975).

29 H.R. REP. NO. 101-483, at 4 n.8 (1990).

pete with one another. In practice, these designees may represent very different entities within the investment firm complex (often as a fiduciary to diverging investors with varied investment objectives). Such situations seemingly will typically not present the same grounds for concerns about potential anticompetitive effects that underly Section 8's absolute prohibition: "The purposes of § 8 are to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors."[30]

2. Corporations v. Other Business Structures

Section 8 prohibits interlocks between "two corporations." Under a plain reading of that term, the same person could lawfully serve on the board of competing entities, if at least one of them is an unincorporated entity such as an LLC or a partnership. The Supreme Court in *BankAmerica Corp. v. United States* said that Congress deliberately chose statutory language that "selectively regulates interlocks with respect to . . . different classes of business organizations,"[31] suggesting that only corporations are captured. Other antitrust laws also distinguish corporations from unincorporated entities. For instance, the implementing regulations of the Hart-Scott-Rodino ("HSR") Act[32] differentiate between corporations and other entities, and provide different types of HSR treatment for the different types of entities.[33] But no court has squarely addressed the corporation versus other business entity question in the Section 8 context.

An aggressive DOJ or FTC may attempt to challenge under Section 8 interlocks involving non-corporate entities, such as LLCs. Former AAG Makam Delrahim has suggested that possibility, stating that "[i]t is not clear from our review of the legislative history that Congress intended to limit the application of Section 8 solely to corporations . . . whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too. We are thinking about how to bring this thinking to Section 8 as well."[34] All the entities that were relevant to the DOJ challenges announced in October 2022 were corporations, however.

B. What is "Competition" and What Does it Mean to "Compete"?

1. What Does it Mean to Compete?

Section 8 captures interlocks between corporations that are in competition with each other, but precisely what constitutes "competition" remains a gray area.[35] Some courts have determined that companies compete for purposes of Section 8 if they would be deemed in the same antitrust market for purposes of the Sherman and Clayton Acts more generally, which determination accounts for cross-elasticity of demand and reasonable product interchangeability.[36] Other courts consider factors that might result in a broader notion of competition in certain circumstances such as (1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products can be said to have distinctive customers.[37] That antitrust agencies may be relying in the first instance on publicly-available information, such as securities filings, to identify candidate illegal interlocks between competing companies, may sometimes result in false positives (although subjects of Section 8 investigations are free to try to convince the agency that the subject companies are not in fact competitors). Given their aggressive posture — and the likelihood that they will not have to defend their Section 8 challenges in court — we expect the agencies may take an expansive view of when subject companies compete with

30 *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991).

31 *BankAmerica Corp. v. United States*, 462 U.S. 122, 127-28 (1983).

32 *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18a.

33 E.g. 16 CFR § 801.1(b)(2) contains different definitions of "control" depending on whether the entity at issue is a corporation or an unincorporated entity; 16 CFR §§ 801.40 and 801.50 provide different reportability tests for the formation of "joint ventures and other corporations" and "unincorporated entities," respectively; and 16 C.F.R. 801.1(f)(1)(ii) defines "non-corporate interests" as interests in unincorporated entities that "include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, *limited liability companies*, cooperatives and business trusts" (emphasis added).

34 Makan Delrahim, Former Assistant Attorney General, U.S. Dep't of Justice, Remarks at Fordham University School of Law (May 1, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law.

35 ". . . that the elimination of competition by agreement between [the corporations] would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19(a)(1)(B). Section 8 does not cover vertical interlocks. See *Paramount Pictures*, 1966 U.S. Dist. LEXIS 10596, at *12-13; *TRW, Inc.*, 93 F.T.C. 325, 379 (1979), aff'd in part & rev'd in part, 647 F.2d 942 (9th Cir. 1981).

36 See, e.g. *American Bakeries Co. v. Gourmet Bakers*, 515 F. Supp. 977, 980-81 (D. Md. 1981); *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686, 703-04 (N.D. Cal. 1976).

37 *TRW, Inc. v. FTC.*, 647 F.2d 942, 948 (9th Cir. 1981).

one another. One question is whether the agencies might try to apply Section 8 to circumstances beyond current product or service competition, such as future or innovation competition.

2. Parents and Subsidiaries

Section 8 does not apply to an interlock between a parent and its wholly-owned subsidiary because a parent and its subsidiary cannot conspire under *Copperweld*'s "single-entity" doctrine.[38] Whether non-fully owned subsidiaries also benefit from the *Copperweld* doctrine is not completely settled. The predominate view is that "single entity" doctrine applies to parents and their 51 percent-owned affiliates.[39] According to the Supreme Court, the "key" to the analysis is whether the concerted action involves "separate decisionmakers . . . pursuing separate economic interests."[40] On this basis, the position that, at least in most circumstances, majority ownership is sufficient to make a parent and its majority owned subsidiary — or sister corporations under common majority ownership — incapable of conspiring with one another seems correct.

Nonetheless, it is conceivable that an aggressive antitrust agency may contend that only interlocks involving wholly-owned subsidiaries benefit from *Copperweld* and seek to apply Section 8 to interlocks involving parents and non-wholly-owned subsidiaries or sister corporations that are under common majority — but not complete — ownership. Private equity firms should be particularly sensitive to this possibility insofar as they may appoint personnel to boards of majority — but not wholly-owned — firm portfolio companies that may compete with each other.

3. Competing Through Subsidiaries

It is unsettled whether Section 8 applies to interlocks between corporations that are not themselves competitors but have subsidiaries that compete (or where one corporation competes with the subsidiary of the other). Courts have taken divergent views. The Ninth Circuit has suggested that Section 8 may apply in some such circumstances based on its determination that the legality of such an interlock depends on "the extent of control exercised by the parent over the subsidiary's business."[41] The Second Circuit, however, has held that Section 8 does not prohibit interlocking directorships between parent companies whose subsidiaries are competitors.[42] The DOJ and the FTC have, in the past, obtained consent decrees based on alleged interlocks between corporations that compete only through a subsidiary,[43] and likely will continue to take the position that Section 8 reaches that circumstance.

IV. A FEW THOUGHTS ON THE FUTURE OF SECTION 8 ENFORCEMENT

There may be legitimate grounds for concern that the agencies have historically taken an overly passive approach to Section 8 enforcement and belief that a more aggressive approach can further Congress's intention that Section 8 serve a prophylactic purpose to prevent collusion or information exchanges among competitors that can harm competition.[44] There is an appreciable danger, however, that the antitrust agencies will seek to apply Section 8 beyond its bounds, and that businesses may face undue uncertainty and difficulty complying with the statute in the real world, particularly given the many important unsettled questions of Section 8 construction. And the antitrust agencies will often not face the same level of discipline for their enforcement decisions from operating in the shadow of likely judicial review that they face in the typical merger or conduct investigation setting, since enforcement targets will often choose simply to unwind the challenged interlock rather than go to the expense and burden of litigating.

There are important reasons why the agencies should not overreach, however. Given that Section 8 is an absolute liability statute, many interlocks do not raise even a remote danger of real harm to competition (e.g. when the relevant market is unconcentrated). Scarce agency resources may be better spent on enforcing against mergers or other collusive or unilateral conduct that is more likely actually to harm competition

38 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-74 (1984) (holding that a parent and its wholly owned subsidiary are not separate entities capable of conspiring in violation of § 1 of the Sherman Act).

39 See, e.g. *Direct Media Corp. v. Camden Telephone and Telegraph Co., Inc. and TDS*, 989 F. Supp. 1211, 1217 (S.D. Ga 1997).

40 *American Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010).

41 *United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 450 (9th Cir. 1981) (finding Section 8 violation where one of the interlocked corporations competed with the other's subsidiary).

42 K*ennecott Copper Corp. v. Curtiss-Wright Corp*, 584 F.2d 1195, 1205 (2d Cir. 1978)

43 See, e.g. *United States v. Bam*, 1976 U.S. Dist. LEXIS 16805, at *6-7 (D. Conn. 1976); *United States v. Cooper*, 1976 U.S. Dist. LEXIS 14453 (S.D. Tex. 1976).

44 *SCM Corp. v. Fed. Trade Comm'n, supra* note 12.

and consumers. Moreover, individual directors and officers often bring crucial and unique perspective and expertise to their companies, enabling the firms to innovate, enter or expand their presence in a market, lower their costs, more ably address customer needs, or bring other benefits to markets that badly need more or better suppliers. An overly expansive Section 8 enforcement approach threatens to keep a director with special skills or expertise from benefiting more than one company in an industry or chill companies from realizing these advantages even when Section 8 does not actually prohibit a proposed interlock. We worry that it may ultimately be competition and consumers that bear the harm from an overly expansive Section 8 enforcement approach.

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