

August 17, 2023

# Federal Trade Commission Expands Scope of Clayton Act's Prohibition on Interlocking Directorates

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## The FTC's Recent Consent Order Signals that It Will Seek to Apply Section 8 of the Clayton Act to Businesses that Are Not Corporations

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In a May 2019 memorandum to clients (available [here](#)), we noted the U.S. Department of Justice's interest in whether the prohibition on interlocking directorates in Section 8 of the Clayton Act involving competing "corporations" also applied to corporate structures that are not corporations, such as limited liability companies.<sup>1</sup> In that memorandum, we also noted that the Federal Trade Commission had previously taken the position (in a 1977 administrative action) that Section 5 of the Clayton Act prohibits interlocks involving corporate entities other than traditional corporations. Similarly, in a November 18, 2022 memorandum to clients (available [here](#)), we noted that the FTC's new "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (the "Policy Statement") points to "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act" as an example of "[c]onduct that violates the spirit of the antitrust laws" subject to potential enforcement under Section 5.<sup>2</sup> In that memorandum, we predicted that the Policy Statement signaled that the FTC intended to focus on interlocking directorates that may not be technically covered by Section 8 (such as an interlock between a corporation and a competing LLC).

Yesterday, the Federal Trade Commission issued a press release stating that it had approved a consent order (available [here](#)) to resolve FTC concerns about a proposed transaction. The consent order provides that the merging parties will treat certain LPs and an LLC "as if the structures of their business associations satisfy the 'corporation' and 'board of directors' requirements under Section 8 of the Clayton Act, such that ordinary prohibitions would apply as to interlocking directors and officers between them and other entities."<sup>3</sup> The complaint also alleges that the proposed interlock provided for in the parties' original agreement would have violated Section 5 of the Federal Trade Commission Act.<sup>4</sup>

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In a separate statement (available [here](#)), FTC Chair Khan, joined by Commissioners Slaughter and Bedoya, stated that, in their view, Section 8 of the Clayton Act applies to limited partnerships and limited liability corporations:

The proposed order also puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes. Firms in the modern economy utilize a variety of corporate forms and structures to engage in commerce, and industry actors have become increasingly sophisticated at corporate organization and venture formation. This is especially true in the private equity and financial sectors, with various limited liability vehicles, limited partnerships, and structured funds intricately entangled through a web of corporate and fiduciary relationships.... Section 8's specific prohibition of interlocks among competitor "corporations" pre-dates the development of other commonly used corporate structures, such as limited liability companies. Accordingly, we must update our application of the law to match the realities of how firms do business in the modern economy. Today's action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations.<sup>5</sup>

Although it is uncertain whether courts would reach that same conclusion, clients should consider proactively reviewing their potential interlocks, regardless of the corporate form of the entities that compete with one another, in light of the FTC's pronouncements. Parties to potential mergers and acquisitions may want to review such interlocks given that the FTC's concern played a part in an 11-month delay for a transaction originally announced in September 2022.

Chair Khan's statement is also notable because it singles out the private equity industry for scrutiny under Section 8. The application of Section 8 to private equity funds raises a number of difficult questions, including those related to employees who sit on the boards of two or more portfolio companies within the same fund complex or independent directors appointed by the same activist fund advisors at different companies. Private equity funds facing such issues may want to seek the advice of antitrust counsel in light of the FTC's stance.

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ENDNOTES

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- 1 See 15 U.S.C. § 19.
- 2 Policy Statement at 13-14.
- 3 *In re QEP Partners et al.*, Fed. Trade Comm'n, File No. 221-0212, at 4.
- 4 The Respondents in this matter did not admit any allegations in the FTC's draft complaint other than the jurisdictional facts. *Id.* at 2. The complaint is available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2220212eqtquantumcomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2220212eqtquantumcomplaint.pdf).
- 5 Fed. Trade Comm'n, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya In the Matter of EQT Corporation Commission File No. 221-0212*, at 5 (Aug. 16, 2023).

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