

May 10, 2019

DOJ Focus on Officer and Director Interlocks

Section 8 of the Clayton Act prohibits the same person from serving as an officer or director of different “corporations” that are “competitors,” subject to limited exceptions.¹ The primary enforcers of that prohibition against so-called interlocks have been the U.S. Department of Justice (“DoJ”) and the Federal Trade Commission (“FTC”), which traditionally have required officers or directors to resign in order to resolve concerns about interlocks. Resignations of officers and directors can be disruptive and embarrassing.

In a recent speech, the Assistant Attorney General in charge of the DoJ’s Antitrust Division said the DoJ “is looking into ... the law governing interlocking directorates and bringing it forward to account for modern corporate structures,” including, for instance, “limited liability companies.”² The DoJ’s review of director and officer interlocks involving corporate structures other than traditional corporations is noteworthy because the express language of Section 8 only prohibits interlocks affecting “corporations,” and some commentators have taken the position that Section 8 only applies to interlocks affecting traditional corporations. For instance, the American Bar Association’s well-known *Antitrust Law Developments* treatise states that “Section 8 requires that the interlock be between corporations.”³ It is worth noting, however, that the FTC has taken the position that Section 5 of the Federal Trade Commission Act prohibits interlocks involving corporate entities other than traditional corporations.⁴

In his recent remarks, the Assistant Attorney General did not express a definitive view on the application of Section 8 to entities other than corporations, but instead concluded his commentary by noting that the DoJ was “thinking” about these issues. In light of the DoJ’s expression of interest in the topic, clients may consider proactively reviewing potential interlocks regardless of the corporate form of the entities that compete with one another.⁵

* * *

Copyright © Sullivan & Cromwell LLP 2019

New York Washington, D.C. Los Angeles Palo Alto London Paris Frankfurt Brussels
Tokyo Hong Kong Beijing Melbourne Sydney

www.sullcrom.com

ENDNOTES

¹ 15 U.S.C. § 19.

² Assistant Attorney General Makan Delrahim, *Remarks at the Fordham University School of Law at 2* (May 1, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law>.

³ 1 AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 448 (8th ed. 2017).

⁴ *E.g., In re Perpetual Fed. Savings & Loan Ass'n*, 90 F.T.C. 608, 657 (1977).

⁵ Applying Section 8 may require a detailed assessment of the underlying circumstances. One important consideration is that Section 8 may apply even if the interlock involves different individuals if those individuals hold their positions as a result of a connection to a common entity. That could be the case, for instance, when a holding company designates different individuals to serve on the boards of competing entities in which the holding company has interests. Both the DOJ and the FTC have endorsed this “deputization” construction of Section 8.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Steven L. Holley	+1-212-558-4737	holleys@sullcrom.com
Joseph B. Frumkin	+1-212-558-4101	frumkinj@sullcrom.com
Richard C. Pepperman II	+1-212-558-3493	peppermanr@sullcrom.com
Yvonne S. Quinn	+1-212-558-3736	quinny@sullcrom.com

Washington, D.C.

Renata B. Hesse	+1-202-956-7575	hesser@sullcrom.com
Joseph J. Matelis	+1-202-956-7610	matelisj@sullcrom.com
