Antitrust Alert

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DOJ Antitrust Targets Directors Serving on Boards of Competing Companies

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Key Points

- Seven directors have resigned from the boards of five companies in response to U.S. DOJ concerns that their positions potentially violated Section 8 of the Clayton Act, 15 U.S.C. § 19, which prohibits a person from simultaneously serving as a director or officer of two competing corporations where the companies satisfy certain asset and revenue thresholds.
- Assistant Attorney General of the DOJ Antitrust Division Jonathan Kanter highlighted that "[t]he Antitrust Division is undertaking an extensive review of interlocking directorates across the entire economy" and that enforcement against interlocking directorates will continue to be a priority.

Seven Directors Resigned from Five Boards of Companies

In response to the Antitrust Division's concerns related to interlocking directorates pursuant to Section 8 of the Clayton Act, three directors resigned from the board of directors of Solarwinds Corp., and one director resigned from the board of each of Definitive Healthcare Corp., Redwire Corp., CTS Corp. and Udemy Corp.

Notably the companies involved all are publicly traded corporations and three of the five involved individuals represented investment companies. The reason that the Department of Justice (DOJ) demanded that each of the individuals resign was because the same individual or another individual from his company simultaneously served on the board of a company that allegedly competed with the company whose board the individual was resigning from. As detailed below, the individuals resigning from Definitive Healthcare Corp., Redwire Corp., CTS Corp. and Udemy Corp all served on the boards of alleged competitors. While only one of the three directors that resigned from Solarwinds was on the board of an alleged competitor, all three of the directors that resigned from Solarwinds' board were representatives of investment firm Thoma Bravo. Additionally, the director resigning from Udemy had served as the representative of investment firm Prosus, and the director that resigned from Definitive was from investment firm 22C Capital. The alleged interlocking directorates occurred between the following corporations:

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Definitive Healthcare Corp. and ZoomInfo Technologies Inc. – Go-to-market information and intelligence platforms used by third-party sales, marketing, operations and recruiting teams across the United States.

Maxar Technologies Inc. and Redwire Corp. – Providers of space infrastructure and communication services and products.

Littelfuse Inc. and CTS Corp. – Manufacturers of transportation components and technologies, including sensors and switches for use in passenger and commercial vehicles.

Skillsoft Corp. and Udemy Inc. – Providers of online corporate education services.

Solarwinds Corp. and Dynatrace, Inc. – Providers of Application Performance Monitoring software.

Each of the individuals was allowed to remain on the board of the alleged competitor company.

DOJ's Focus on Section 8 Enforcement

Historically, the federal antitrust agencies have brought relatively few proceedings to enforce Section 8. However, at a 2022 Spring Enforcers Summit in April, Kanter announced the DOJ's Antitrust Division's intent to reinvigorate Section 8 enforcement. "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. 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."

In the DOJ October 19 press release, Kanter reiterated that "Section 8 is an important, but underenforced, part of our antitrust laws. Congress made interlocking directorates a per se violation of the antitrust laws for good reason. Competitors sharing officers or directors further concentrates power and creates the opportunity to exchange competitively sensitive information and facilitate coordination – all to the detriment of the economy and the American public."

Background on Section 8 of the Clayton Act

Section 8 of the Clayton Act, 15 U.S.C. § 19, prohibits a person from simultaneously serving as an officer or director of two competing corporations where the companies satisfy certain asset and revenue thresholds. The basic statutory prohibition is as follows:

No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are (A) engaged in whole or in part in commerce; and (B) 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 prohibits a "person" from simultaneously serving as a director or board-appointed officer of two or more competing corporations, assuming certain jurisdictional thresholds are satisfied and that no de minimis safe harbors apply.

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The basic jurisdictional threshold for Section 8 to apply requires that: (i) a "person" serves as an officer (elected or chosen by the board of directors) and/or director of competing "corporations;" (ii) both corporations engage in interstate commerce or U.S. commerce with foreign countries; and (iii) both corporations, in the aggregate, have "capital, surplus, and undivided profits" (i.e., net-worth as demonstrated by the assets shown on a corporation's balance sheet) of more than $41,034,000 (adjusted annually). The sparse case law related to Section 8 has not definitively determined the definition of a "person" or tested the language of Section 8 related to "corporations" as opposed to non-corporate entities.

Even if two companies are competitors, Section 8 would not apply if a de minimis safe harbor exception applies. Competing companies may qualify for a de minimis safe harbor exception to Section 8 liability if the competitive sales, meaning "the gross revenues for all products and services sold by one corporation in competition with the other," in the last completed fiscal year are:

- Of either corporation, less than $4,103,400 (adjusted annually for inflation).
- Of either corporation, less than two percent of that entity's total sales.
- Of each corporation, less than four percent of that entity's total sales.

If none of these safe harbors apply and the companies are competitors in a relevant antitrust market, the interlock is illegal per se, meaning it is prohibited regardless of whether the interlock has actually harmed competition. The general fix for such a violation is for a person to resign from the board of one of the companies that created the alleged interlock, as was done here. Persons on potentially competing boards and the companies involved, however, also could be subject to allegations of improper exchange of competitively sensitive information, which could contribute to allegations of violating Section 1 of the Sherman Act, which could have significantly greater consequences.

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