PE Hub

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OPINION

Antitrust focus on PE expands beyond just M&A

The DOJ has expanded its lens to examine investment firms' board representations on competing companies under Section 8 of the Clayton Act.

Recent months have seen continued politicization of private equity M&A activity, with legislators and federal antitrust agency leaders conveying a distrustful view of such transactions and private equity's incentives to compete and run a business in the same way as other owners. Beyond assessing private equity's antitrust issues solely from the point of view of merger law, DOJ has expanded its lens to examine investment firms' board representations on competing companies under Section 8 of the Clayton Act and questions around inappropriate information sharing between competitors that could arise from such "interlocking" directors.


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Q What is Section 8?
Section 8 prohibits individuals from serving as an officer or director of two competing corporations, with certain carve-outs based on company size and amount of "competitive sales" between the two companies. The statute's purpose is twofold: (1) preventing conflicts of interest, as well as (2) mitigating risks from exchanging competitively sensitive information or unlawfully coordinating business behavior via the interlocked officer or director – in the words of DOJ Antitrust Division head Jonathan Kanter, to "prevent collusion before it can occur." Notably, Section 8 is a "per se" statute, meaning these interlocks are unlawful regardless of their effect on competition.

Q Why the focus now?
For many years, Section 8 enforcement had been sporadic, typically arising out of information DOJ learned via its merger review program. Recently, researchers have highlighted the growing prevalence of interlocks across companies. A 2022 research paper by Stanford University academics studied over 2,000 life sciences companies and found that 10%-20% of their boards have interlocks; interlocked directors remain on boards longer than non-interlocked directors; and the number of interlocks more than doubled in the last decade. Accordingly, DOJ leaders are increasingly focused on deterring potential harms that could be caused by interlocks and information exchange or coordination between competing companies sharing common directors or officers.

Q What is DOJ doing about it?
In an April 2022 speech, Kanter announced DOJ would be "ramping up" its efforts to identify violations across the economy and "will not hesitate" to bring cases to break up interlocks. Beyond simply looking for interlocks to remove, DOJ is focused on investigating and taking action against competitors engaging in coordinated activities through common ownership or common board representation. Outside Section 8, investors also risk antitrust liability under Section 1 of the Sherman Act if they coordinate conduct between competing firms in which they have investments.

DOJ has made good on its promise to ramp up Section 8 enforcement. In October, DOJ announced that seven directors had resigned from the boards of five companies in response to DOJ concerns that their board service violated Section 8. Five of the seven resigning directors were affiliated with private investment firms. Shortly thereafter, in November, Bloomberg reported that Blackstone, Apollo Global Management, and KKR (and potentially others) received civil investigative demands (CIDs) from DOJ related to potential interlocks under Section 8.

The agency has also followed through

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on its promise to increase its efforts to detect interlocks. One recent example of a director's resignation indicates that DOJ staff is monitoring securities filings and looking for potential interlocks to challenge. In November 2020, Brookfield Asset Management made a $337 million investment in American Equity Investment Life Insurance Company (AEILIC), representing around 10% equity interest and entitling Brookfield to a seat on AEILIC's board. In May 2022, Brookfield acquired American National Group, another provider of life, health and property/casualty insurance. On December 8, a prospective buyer made an offer to acquire AEILIC, and a few weeks later, Brookfield disclosed in a securities filing that it intended to exercise its rights to nominate a director to AEILIC's board to assist in evaluating offers or strategic alternatives for the company. On January 13, Brookfield disclosed in subsequent securities filing that it had been contacted by DOJ regarding a potential board interlock under Section 8. Brookfield stated that it would fully cooperate with DOJ's requests, but to avoid a "distraction," elected not to exercise its director nomination rights.

Q **How should firms respond?**

Investors entitled to board seats in companies should be on notice of DOJ's reinvigorated Section 8 enforcement and potential Section 1 antitrust investigations and litigation related to information exchange and coordination. Certain investment groups have been examining their board representations and taking actions to ensure they are in compliance with Section 8. For example, in November, Thoma Bravo announced the resignation of two of its partners from the board of software company N-able as part of "Thoma Bravo's proactive efforts to comply with [Section 8]." In light of DOJ's recent actions and public statements, renewed attention to Section 8 compliance – as well as overarching antitrust compliance efforts on information exchange and competitor interaction – is a worthwhile investment for private equity companies and other firms investing in multiple companies in the same sector. ■

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