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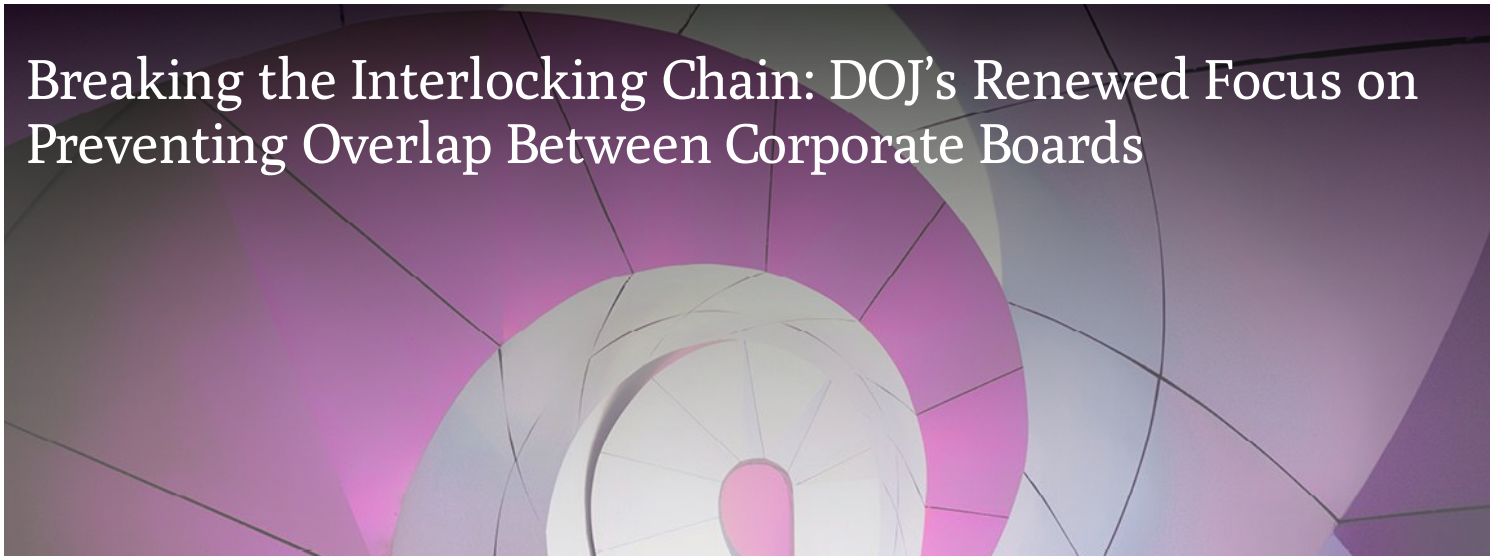
BLOG

Breaking the Interlocking Chain: DOJ's Renewed Focus on Preventing Overlap Between Corporate Boards



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In a recent press release, the Antitrust Division of the United States Department of Justice (DOJ) announced that seven directors resigned from corporate board positions in response to the DOJ's concerns that their roles violated Section 8 of the Clayton Act's prohibition on interlocking directorates. The resignations follow the DOJ's correspondence in late September to a number of public companies, in which it raised concerns based on statements in public filings that existing officers or directors of the company were serving as officers or directors of another company that may be considered a competitor. The resignations, which involve ten companies representing five pairs of competitors, signal the DOJ's renewed focus on enforcement of Section 8 and highlight the importance of monitoring whether officers and directors hold board seats or management positions at competing corporations.

Section 8 of the Clayton Act prohibits a person from serving as an officer or a director of two *competing* corporations because of the *potential* for resulting anticompetitive effects, including facilitating collusion (e.g., price fixing, market division) and exchanging competitively sensitive information. Section 8's prohibition on interlocks applies not only to companies in direct competition with one another but also to companies that indirectly compete, and between wholly owned subsidiaries.

The DOJ now appears poised to increase enforcement of Section 8 across the economy. In the release, Assistant Attorney General Jonathan Kanter of the DOJ's Antitrust Division stated 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 … . The Antitrust Division is undertaking an extensive review of interlocking directorates across the entire economy and will enforce the law.

Although Section 8 is broad, it does provide several exceptions that businesses can avail themselves of with the advice of counsel. Specifically, Section 8 (a) provides a one-year grace period following an intervening event that creates an interlock (e.g., when an interlock is created by a merger or acquisition) and (b) provides a de minimis exception for competitors with sales below certain thresholds. In addition, co-controlled entities generally are not subject to Section 8.

If a company identifies a potential Section 8 violation, it may be able to avoid DOJ enforcement through proactive remedies, such as (1) eliminating the interlock through the resignation of the violating person or (2) in the event that interlock is created through a merger or acquisition, restructuring the transaction to alter a potential ownership

interest. For example, in August 2016, a long-time executive of Alphabet Inc. proactively stepped down from the board of directors at Uber Technologies Inc. to avoid potential DOJ enforcement, as the two companies began competing in mapping technology, ridesharing, and self-driving vehicles.

Interlocks require careful attention in the private equity context, where a private equity firm may have minority investments in many different businesses, as evidenced by the recent director resignations involving SolarWinds Corp. and Dynatrace, Inc. in response to the DOJ's investigation. According to the DOJ, SolarWinds and Dynatrace compete in the application performance monitoring software market and had one director that simultaneously served on the board of both companies on behalf of the private equity firm Thoma Bravo. The press release indicates that the DOJ believed that Thoma Bravo effectively served on the board of both companies through its appointed directors. Ultimately, all three Thoma Bravo–appointed board members stepped down from the SolarWinds board in response to the DOJ's concerns.

The resignations involving Thoma Bravo highlight the DOJ's stated intent to increase enforcement of private equity interlocks. In June 2022, the DOJ declared its intent to increase enforcement of potential interlock violations involving private equity transactions in the healthcare industry, a topic that we previously discussed and is consistent with the DOJ's heightened scrutiny of private equity generally.

TAKEAWAY

Overall, these recent enforcement actions and subsequent resignations demonstrate the DOJ's renewed commitment to enforcing Section 8's prohibition on interlocks between competing companies, particularly in the private equity sector. As businesses grow either by acquisition or expansion into new product or geographic markets or take on new investors, companies and private equity firms need to monitor on a regular basis whether their officers or directors also serve as officers or on the board of a competitor. If so, companies and private equity firms may need to consider proactively addressing an interlock to avoid DOJ enforcement.

Law Clerk Michael Kreamer also contributed to this blog post.

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