

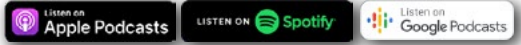
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# Committed Capital

BITE-SIZED TAKES ON PE HOT TOPICS

## COMMITTED CAPITAL PODCAST SERIES

### DOJ's Stepped-Up Enforcement Against Interlocking Directorates



FEBRUARY 9, 2023

Dechert's Private Equity and Antitrust/Competition practices presented "DOJ's Stepped-Up Enforcement Against Interlocking Directorates," a bite-size episode of the firm's Committed Capital Sidecar Podcast Series. Philadelphia-based corporate partner Stephen Leitzell and Washington-based antitrust partner James Fishkin discussed the Department of Justice's recent focus on enforcement of Section 8 of the Clayton Act, which prohibits the same person from serving as a director or officer of two competing corporations.

## HIGHLIGHTS FROM THE EPISODE

### Why is DOJ ramping up enforcement of Section 8 violations?

As part of its broader efforts to increase enforcement of the antitrust laws, DOJ announced on April 4, 2022, that it was "ramping up" enforcement of Section 8. On October 19, 2022, DOJ announced that seven board members from five companies who were on the boards of competing companies resigned in response to an investigation. At the same time, DOJ said that its announcement is the first of its review of potential unlawful interlocking directorates.

### What does Section 8 prohibit?

Congress enacted Section 8 to "nip in the bud incipient violations of the antitrust laws" by prohibiting interlocking directors and officers who may facilitate coordination and collusion among competitors by sharing competitively sensitive information. Section 8 specifically prohibits the same "person" from serving at the same time as a director or officer of two competing "corporations." Although the statute references corporations, DOJ takes the position that it covers LLCs and LLPs. Competing corporations are broadly defined to include any two corporations that compete by virtue of their businesses and locations. A person also includes a single firm that appoints two different people as directors or officers of competing corporations. Section 8 is a strict liability statute. Unlike detailed analysis in merger matters, the government does not need to show any harm to competition.

### Are there exemptions and exceptions to Section 8?

Banks, banking associations and trust companies are exempt from Section 8. There are also *de minimis* exceptions. Each corporation must have capital, surplus and undivided profits aggregating more than US\$45,257,000 in 2023 (adjusted annually). Additional exceptions exist if the competitive sales of either corporation are (a) less than US\$4,525,700 in 2023 (adjusted annually), (b) the competitive sales of either corporation are less than two percent of that corporation's total sales, or (c) the competitive sales of each corporation are less than four percent of that corporation's total sales.

### What are the penalties for a Section 8 violation?

A person who is eligible to serve as a director or officer of two corporations at the time of their appointment has one year to resign from the date the appointment becomes unlawful. There are no civil or criminal penalties, although violations of Section 8 can lead to more serious violations of other antitrust laws, including Section 1 of the Sherman Act.

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