

Insights

FTC LOWERS INTERLOCKING DIRECTORATE THRESHOLDS FOR 2021

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SUMMARY

Along with the HSR filing thresholds, the Federal Trade Commission recently lowered the interlocking directorate thresholds under Section 8 of the Clayton Act.

Section 8 prohibits, with certain exceptions, one person from serving as an officer or director of two competing corporations (the “interlocking directorate”) if certain thresholds are met. Section 8 also applies where two different individuals represent the same company but serve on competitors’ boards. The underlying goal of Section 8 is to protect against anticompetitive information sharing and coordination.

If the thresholds are met and no exceptions apply, the existence of a prohibited interlock is a *per se* violation—meaning the violation is automatic and no defense may be offered. A Section 8 enforcement action may be brought by the federal antitrust agencies, but there is also a private right of action for Section 8 claims. Companies and individuals should, therefore, keep Section 8 considerations in mind when considering the appointment or undertaking of an officer or director position, and in evaluating current positions.

Under the updated thresholds (effective January 21, 2021), an individual cannot serve as officer or director of any two corporations if:

1. the “capital, surplus, and undivided profits” of each corporation exceeds **\$37,382,000**; and
2. the corporations are competitors “by virtue of their business and location of operation.”

Section 8 does provide three exceptions to this general rule. Even where the above elements are satisfied, an interlock is allowed if:

1. the competitive sales of either corporation are less than **\$3,738,200**;
2. the competitive sales of either corporation are less than 2% of the corporation’s total sales; or

3. the competitive sales of each corporation are less than 4% of that corporation's total sales.

For more information about the revised thresholds or interlocking directorates law in general, please contact the authors.

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