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STAY ABOVE BOARD: NEW THRESHOLDS APPLICABLE TO CLAYTON ACT PROHIBITION ON INTERLOCKING DIRECTORATES

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The Federal Trade Commission recently announced revised thresholds ("2023 Thresholds") applicable to Section 8 of the Clayton Act, 15 U.S.C. § 19. The thresholds are adjusted annually based on changes in gross national product.

Section 8 prohibits one person from serving as an officer or director for competing companies. It is intended to protect against competitors sharing competitively sensitive information and coordinating their businesses through the shared officer/director. Because Section 8 is broadly worded, it applies even if the interlocked businesses compete in just one product or service line, subject to *de minimus* exceptions, discussed below.

The Department of Justice ("DOJ") has been active in investigating potential violations recently, particularly in the private equity area, so it is increasingly important for investors and corporate leaders to keep Section 8 in mind and ensure continuing compliance. As detailed in our prior alert on DOJ's recent enforcement in this area, it is equally important to remember that DOJ interprets "persons" under the statute to include corporations, associations, or investment firms — not just individual people. Therefore, all business entities must consider whether nominating a director or appointing an officer might create an interlock.

Pursuant to the 2023 Thresholds, effective January 20, 2023, competing corporations are subject to Section 8 if each corporation's capital, surplus, and undivided profits exceed $45,257,000 in aggregate.

Section 8 carves out three exceptions to its otherwise broad prohibition against simultaneous service as an officer or director for two competing corporations. In general, the three exceptions apply when the competitive overlap between the corporations is *de minimus*. Under the 2023 Thresholds, the three exceptions are as follows:

(i) one of the corporations has competitive sales[1] of less than $4,525,700;

(ii) competitive sales of either corporation are less than 2% of the corporation's total sales;[2] or

(iii) the competitive sales of *each* corporation are less than 4% of the corporation's total sales.

If you have any questions about these changes and their impact to your business, please reach out to BCLP's Antitrust & Competition team for further guidance.

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[1] Competitive sales means the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year. 15 U.S.C. 19 (a)(2)(C).

[2] "Total sales" is defined as the "gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year." *Id.*

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