

## DON'T FORGET ABOUT CLAYTON ACT THRESHOLDS FOR YOUR DIRECTORS AND OFFICERS

Jul 31, 2025

### WHAT HAPPENED

Recent enforcement actions and media coverage have increased scrutiny on director interlocks under the Clayton Act, which prohibits individuals serving at the same time as directors or officers of companies that compete.

### TAKEAWAYS

The Trump Administration has not brought any Section 8 enforcement actions, but FTC Chair Andrew Ferguson, along with Republican FTC Commissioner Melissa Holyoak, did file a [concurring statement](#) on January 10, 2025 in support of the FTC's Statement of Interest in private litigation discussed below. That Statement of Interest signaled the FTC's intent to enforce Section 8 robustly and with wide application. Such actions may be brought alongside merger reviews, tech industry conduct scrutiny and price-fixing cases. This would build upon the Biden administration's significant interest in Section 8.

Public and private companies should evaluate and address existing interlocks before facing enforcement scrutiny.

- Public companies should review D&O questionnaires to ensure they elicit relevant information to analyze potential interlocks.
- D&O questionnaires should be resubmitted annually to capture any change in circumstances that might trigger a Section 8 issue.
- Companies with financial sponsors – whether public or private – should diligence whether other portfolio companies of the sponsor operate competing lines of business.
- Governance guidelines should be reviewed to ensure directors notify the company before accepting another directorship to allow an appropriate review of potential interlocks.
- Companies should educate directors and officers about the prohibition.

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### PROHIBITION AGAINST DIRECTOR INTERLOCKS

Section 8 prohibits one person from serving as an officer or director for competing companies. It has also been interpreted to prevent one financial actor, for example a private equity firm, from appointing directors on the boards of two 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.

Pursuant to [2025 Threshold Updates](#), competing corporations are subject to Section 8 if each corporation's capital, surplus, and undivided profits exceed \$51,380,000 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 2025 Threshold Updates, the three exceptions are:

- One of the corporations has competitive sales of less than \$5,138,000.
  - "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."
- Competitive sales of either corporation are less than 2% of the corporation's total sales.
  - "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."
- The competitive sales of *each* corporation are less than 4% of the corporation's total sales.

A one-year grace period is available for individuals serving as directors or officers who were eligible at the time of election due to certain subsequent changes in circumstances.

### RECENT SCRUTINY

DOJ and the FTC showed significant interest in enforcing Section 8 of the Clayton Act. While the Trump administration has not brought a Section 8 case yet, it has taken aggressive actions with respect to merger reviews, tech industry scrutiny and price-fixing cases. Further, media and academic papers have focused recent attention on Section 8.

### FTC Enforcement

In its first Clayton Act case in 40 years, the FTC approved a [2023 Consent Order](#) that prohibits a natural gas company from, among other things, occupying a board seat on its competitor, requires the company to divest its stock of the competitor, prevents anticompetitive information exchange and unwinds a separate anticompetitive joint venture between the two entities.

## **DOJ Focus on Private Equity**

DOJ takes the position that indirect interlocks are problematic, such as where different individuals represent the same PE firm on boards of competitors.

As discussed in our [October 31, 2022 post](#), DOJ announced the resignations of seven directors from five corporate boards following what DOJ called the “first in a broader review of potentially unlawful interlocking directorates.”

In [March 2023](#), DOJ announced that five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to enforcement efforts.

## **DOJ/FTC Statement of Interest**

As discussed in our [Jan. 17, 2025 post](#), shortly before the new administration took office, DOJ and the FTC filed a [statement of interest](#) in *Musk v. Altman*, signalling a late push by the government to expand the scope of liability for interlocking directorates in the context of a bitter legal dispute over the future of AI.

## **June 2025 Academic Study**

In June 2025, a group of Stanford and Yale professors published ["Anticompetitive Directors,"](#) an academic study reporting widespread Clayton Act violations. The abstract states that:

“[W]e find evidence that individual board members sit simultaneously on the boards of competitors throughout the economy, in industries ranging from information technology (IT) to health care—despite such “interlocking directorates” being illegal under antitrust law. To our knowledge, ours is the first empirical study to document this pattern within private, not just public, firms. It is also the first to demonstrate that many of these individuals are also senior directors at private equity, venture capital, and other firms investing in the competing firms on whose boards they sit. Moreover, because we rely on a proprietary data set used by investment firms themselves, our findings provide grounds for confidence that these directors are sitting on actual competitors, rather than just adjacent firms.”

## **Media Coverage**

In January 2025, a [Forbes article](#) focused on Section 8 enforcement activity.

## RELATED CAPABILITIES

- Securities & Corporate Governance
- Antitrust & Competition

## MEET THE TEAM



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