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**Insights**

# ALL A-BOARD? NOT SO FAST: PRIVATE EQUITY AND FAMILY OFFICES SHOULD TAKE NOTE OF NEW THRESHOLDS FOR CLAYTON ACT PROHIBITION ON INTERLOCKING DIRECTORATES

Jan 15, 2026

The Federal Trade Commission ("FTC") recently announced revised thresholds ("2026 Thresholds") applicable to interlocking directorates under 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, by its terms, prohibits one person from simultaneously serving as an officer or director for competing corporations. 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 only to *de minimis* exceptions discussed below. If those exceptions are not met, then Section 8 imposes a strict liability standard that is much easier for the FTC and U.S. Department of Justice (collectively, the "Agencies") to meet relative to other types of antitrust claims, or as compared to similar prohibitions in other parts of the world.

Despite its specific wording applying the law to "one person" and "corporations," in recent years the Agencies have continuously expanded their view of how Section 8 applies. Expansions include the following:

- Interpreting "person" under the statute to include corporations, associations, or investment firms — not just individual natural persons. Under this interpretation, an investor may not avoid Section 8 liability by appointing two different representatives to the competitors' boards.

- Interpreting "serve as a director or officer" to include serving as a board observer without any voting rights

- Interpreting "corporations" to include limited liability companies and other forms of non-corporate entities

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Jurisdictional thresholds do restrict the application of Section 8. Effective January 16, 2026, competing corporations are subject to Section 8 only if each corporation's capital, surplus, and undivided profits exceed $54,402,000 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 minimis*. Under the 2026 Thresholds, Section 8 will not apply if: (i) one of the corporations has competitive sales[1] of less than $5,440,200; (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. 15 U.S.C. § 19 (a)(2).

Because the Agencies are actively engaged in Section 8 enforcement efforts—and because Section 8 enforcement actions are relatively easy for the Agencies to win given the de facto strict liability standard—it is important for companies and leaders to keep Section 8 in mind and ensure continuing compliance. This increased caution is particularly important for private equity firms, which have been frequent targets of recent investigations and actions. There are several steps that companies can proactively implement to lessen the likelihood of future investigations and/or liability.

To avoid inadvertent violations of Section 8, businesses should have a robust questionnaire seeking information about other officer or director positions held by not just the prospective board member but also others appointed by his or her organization. Further, every year existing officers and directors should be reviewed to ensure that they have not taken a new position with a competitor with sales that exceed the jurisdiction thresholds and *de minimis* exceptions.

Many private equity firms and family offices undertake a business strategy that involves industry-focused investments. For those investors, a careful legal review is critical to ensure they do not violate Section 8 if they negotiate the right to appoint directors, observers, or executives of companies that compete in even a single area of sales.

If you have any questions about these changes and their impact on your business, please reach out to BCLP's Antitrust, Competition & Trade 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).

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[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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