Interlocking Directorates and Officers – Section 8 of the Clayton Act

The Federal Trade Commission has announced revised thresholds for interlocking directorates required under Section 8 of the Clayton Act (15 U.S.C. § 19(a)(5)). The revised thresholds take effect **January 25, 2011**.

Background

Section 8 of the Clayton Act specifically prohibits, with certain exceptions, a person from serving as a director or officer of two competing corporations if the two thresholds detailed below are met.

Basic Provisions

Section 8 prohibits individuals from serving as directors or board elected or appointed officers of two competing corporations (other than banks, banking associations, and trust companies) where:

- Each corporation has capital, surplus and undivided profits in excess of $26,867,000 (amount adjusted annually) and is engaged in interstate commerce; and
- Competitive sales of the corporations exceed the *de minimis* standards described below.

Safe Harbors

Interlocking directorates or officers will not violate Section 8 if:

- Competitive sales of either corporation are less than $2,686,700 (amount adjusted annually);
- Competitive sales of either corporation are less than 2 percent of its total sales; or
- Competitive sales of each corporation are less that 4 percent of its total sales.

Competitive sales are defined as the gross revenues for all products and services sold by one corporation in competition with the other during its most recent fiscal year. Total sales are gross revenues for all products and services sold in the corporation's most recent fiscal year.

Remedies

The principal remedy sought by federal enforcement agencies in Section 8 cases is to seek elimination of the interlock through securing resignation of the interlocked director. The government may seek this result informally or through an action seeking injunctive relief. Private plaintiffs also may bring suits (including class actions) for treble damages and attorneys fees. Although Section 8 nominally is a criminal statute, criminal enforcement is extremely unlikely.

Important Considerations

1. Section 8 does not apply to interlocks between parents and wholly-owned or controlled subsidiaries or interlocks between suppliers and distributors.

2. The interlock need not involve the *same* individual. A Section 8 violation may arise when a parent company designates different persons to sit on the boards of competing companies if those individuals' service on the board is in their capacity as agents of the parent company.

3. Jurisdictional limits and safe harbor provisions often render Section 8 inapplicable to start-ups, private foundations and not-for-profit entities.

    - If revenues grow to exceed the jurisdictional threshold (most commonly in the case of start-ups), a prohibited interlock may be created.
    - If a change in the business of one or both of the corporations creates a prohibited interlock after a director or officer has been elected or chosen, the individual may serve in both capacities until the earlier of expiration of one of his or her terms or for one year following the event which created the situation.

4. Even interlocking directorates that do not violate Section 8 may create conflicts of interest that may violate other laws.

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The question of whether any of safe harbors apply in a given situation may be complex. If you have any questions regarding these changes, please feel free to contact:

Cary Armistead (617) 951-7832

Mark Popofsky (202) 508-4624