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The Intersection of Corporate Governance and Antitrust Law

By Michael W. Peregrine

A recent blog post from Federal Trade Commission staff serves to underscore the important interrelationship between certain types of governance arrangements and antitrust law. In this particular situation, the FTC is concerned with the potentially problematic connection between interlocking directorships with competitors and Section 8 of the Clayton Act.

At the same time, the FTC post also provides a "ping moment" about how governance structures can trigger other legal issues—not just antitrust. General counsel should coordinate with corporate strategists to assure that antitrust, and other legal issues, are addressed before a governance proposal "goes live" internally with the board, or externally in a transaction or similar corporate arrangement.

Interlocking director and officer arrangements have long been a popular means by which organizations seek to foster collaborative arrangements. Perhaps their most frequent use is as a "get to know each other" step; i.e., a limited governance connection intended as a prelude to other, more integrated arrangements.

U.S. Federal Trade Commission building in Washington, D.C. Photo: Diego M. Radzinschi/ALM

Interlocking director arrangements are also used in certain types of corporate restructurings, "spin-off" transactions and acquisitions—especially those involving less-than-a-control position, where the minority ownership stake is supplemented by cross officers and directors.

As many general counsel know, Section 8 of the Clayton Act not only prohibits a person from acting as an officer or director of two competitors, but also prohibits any one firm from appointing two different people to sit as its agents as officers or directors of competing companies. Unlike the merger rules—with which boards and executives are somewhat familiar—Section 8 is a strict liability provision, meaning violations are per se and do not depend on actual harm to competition.

The rationale for Section 8 is based on the premise that if organizations are competitors but share a common board member or officer, then the risk exists that they might compete less aggressively against each other, including by sharing competitively sensitive information through the interlocking officer/director.

The recent FTC staff blog post encourages corporate leaders to be more aware of Section 8's limitations in general, and particularly of the unexpected restructuring and acquisition circumstances that could lead to a potentially problematic interlock situation. The FTC post highlights Clayton Act risks arising from two particular types of transactions:

- **M&A Transactions**, when a company is acquiring or merging into a new business line. According to the FTC, the new business line may create an interlock if there are members of the acquiring or surviving board that also sit on the boards or serve as officers of a now-competing company. The FTC also suggests that private equity firms which acquire board seats across a diverse portfolio of companies may be particularly likely to encounter Section 8 issues via a merger or acquisition.
- **Spin-offs,** which can present Section 8 concerns where an officer or director retains roles with both the parent and the newly independent firm, if those two companies will compete in a line of business going forward.

The main theme of the FTC post is the need for officers, directors and in-house counsel to be aware of Section 8 when considering potential restructurings or acquisitions. In so doing, the author cleverly compares the value of Section 8 awareness with the practice of "mindfulness" (the quality or state of being conscious or aware of something). *Am I living in the now, what is my position in the world, am I currently violating the per se prohibition on interlocking directorates under Section 8 of the Clayton Act?*

In this regard, we're not worried about the general counsel's mindfulness, but rather that of executives, consultants and board members working to develop governance proposals. When it comes to Section 8 issues, are they 'living in the same world' as the general counsel, alert to the risk that certain kinds of governance arrangements may create certain kinds of fairly serious antitrust concerns? Or are they off in their own silo, comfortable in the false comfort that they understand corporate governance principles, and blind to the competitive implications of their proposals?

Ultimately, this is all about executive teamwork and trust. Corporate strategists should be urged not to "get ahead of the lawyers" when making governance proposals—for such proposals could "trip" many legal "wires". Antitrust is just one (and perhaps the most serious); there are others (e.g., tax, corporate law, regulations, ethics).

Just as the general counsel knows to consult with corporate strategists to understand the rationale for arrangements he/she is asked to draft, so should the strategists consult with the general counsel to understand the legal implications of governance arrangements they expect to propose, whether internally or externally.

Where the general counsel truly serves as a business partner to management, with a secure position within the executive leadership team, such necessary coordination should flow easily. If not, time for mindfulness training in the C-Suite!

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