# What Are Interlocking Directorates and Section 8?

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An Explanation of Why Two Directors Resigned from the Live Nation Board of Directors to Resolve Antitrust Concerns

Every year as part of the update of various regulatory thresholds, including the much more closely watched HSR thresholds, the Federal Trade Commission (FTC) revises the Clayton Act Section 8 thresholds, which prohibit a person from serving as a director or officer of two competing corporations (known as an interlocking directorate, interlocking boards or interlock). Currently, the Section 8 prohibition is triggered if each corporation has capital, surplus, and undivided profits aggregating more than $37,382,000 and each corporation's competitive sales are at least $3,738,200, unless they qualify for a safe harbor.

Earlier this week, the Department of Justice (DOJ) announced that two executives of Endeavor Group Holdings Inc. – Chief Executive Officer and Director Ariel Emanuel, and President Mark Shapiro – have resigned their positions on the Live Nation Entertainment Inc. Board of Directors after the DOJ expressed concerns that their positions on the Live Nation Board created an illegal interlocking directorate. According to the DOJ, Endeavor and Live Nation compete closely in many sports and entertainment markets, and the interlock did not qualify for any of the Section 8 safe harbors based on the companies' U.S. revenues. Both Live Nation and Endeavor, through their subsidiaries, promote and sell tickets and VIP packages that include tickets, lodging and travel accommodations, to live music, sporting and other entertainment events.

Section 8's bright-line prohibition is designed to prevent harm from competitors having overlapping directors or managers, regardless of whether any anticompetitive conduct actually occurs. The theory is that interlocking directorates can restrict competition by providing a conduit for the exchange of competitively sensitive information and by facilitating coordination between competing companies. Interlocking directorates create, at a minimum, the appearance of impropriety when the same individuals are involved with decision making at two rival companies. By reducing the opportunities to coordinate – explicitly or implicitly – through interlocking directorates, Section 8 attempts to prevent violations of the antitrust laws before they occur.

**Section 8 is a Bi-Partisan Concern**

It has been more than 40 years since there has been any actual litigation under Section 8, but the prohibition has been repeatedly invoked over the years, including by both the Obama and Trump administrations.

One case that drew a great deal of attention was the FTC's investigation of the Apple and Google boards in 2009. Up to that point, Apple and Google had not been seen as competitors, and Google CEO Eric E. Schmidt and Apple Chairman Arthur Levinson sat on both boards.

For years, Google and Apple had acted more as allies than competitors. Google, for instance, worked closely with Apple to design early versions of some its services, like Gmail and Google Maps, for Apple's iPhone. But the areas in which the companies were bumping up against each other as potential competitors had been increasing. Mobile phones, in particular, were looming large in the future of both Google and Apple. Much of Apple's fortunes was already tied to the success of the iPhone and Google, which had repeatedly said that one of its biggest strategic opportunities was an expansion of its online advertising empire into mobile phones, had a year earlier announced the launch of its Android mobile operating system.

Ultimately, Mr. Schmidt resigned from Apple's board and Mr. Levinson from Google's without the FTC formally initiating action.

In 2016, the DOJ challenged a transaction in which Tullet Prebon, an electronic trading platform, acquired a business line of ICAP, a competitor, in exchange for stock that would have given ICAP a 19.9% stake in Tullet Prebon and the right for ICAP to nominate one member of the Tuller Prebon board. Given that ICAP and Tullett Prebon would continue to compete after the transaction, the DOJ

expressed serious concerns that ICAP's ability to nominate a Tullett Prebon board member would create "a cozy relationship among competitors" that violated Section 8.

To address these concerns, the transaction was restructured so ICAP would receive no stake in Tullet Prebon or board representation and the transaction was allowed to close.

Section 8 also received attention under the Trump administration. In 2011, Comcast obtained merger clearance to acquire NBC Universal, however, the acquisition came with some significant regulatory restrictions, among them, Comcast agreed to relinquish management rights of the 30% stake in Hulu that Comcast was acquiring through NBC Universal. In September of 2018, the last of the restrictions set forth in the consent decree expired, and Comcast announced that it was appointing three of its executives to the board of Hulu. In 2018, the DOJ raised concerns about cable operator Comcast appointing three of its executives to the board of Hulu, a video streaming service in which Comcast held a 30% stake. The head of DOJ Antitrust Division publicly committed to looking into the matter, and remarked that "to the extent [the appointment] would raise [a Section 8 issue], [the DOJ] would actively enforce that," making clear that the Trump administration's antitrust leadership supported the continued enforcement of Section 8

In 2019, Disney purchased Comcast's stake in Hulu, which rendered the issue moot, and the issue has not come up again despite the launch of Disney+, Disney's own streaming service.

**Section 8 Can Sneak Up On You**

Section 8 does not carry the monetary penalties that most other antitrust statutes do, but the fact that the enforcers do not have to prove any anticompetitive conduct makes it an attractive tool to reach for as pressure mounts for more aggressive antitrust enforcement.

Tech and emerging companies may be particularly vulnerable to Section 8 for a number of reasons:

- Who is and is not a competitor can change rapidly with evolving technology and shifting business strategies and product lines. Collaborators and partners can become competitors practically overnight, potentially creating a Section 8 issue. And rapid revenue growth can result in companies quickly outgrowing any safe harbors.
- Companies that regularly engage in M&A activity should be aware of the potential to indirectly acquire an ownership stake in competitors.
- Ownership stakes that are not large enough to trigger other antitrust laws, may trigger Section 8 concerns if there is overlap on the boards.
- Among emerging companies, it is common to have multiple venture capital investors with rights to appoint board members, any of whom may hold stakes in other potential competitors that could potentially create Section 8 concerns.

**Practical Guidance to Avoid Section 8 Concerns**

In the current pro-enforcement environment, companies should take proactive steps to identify any possible Section 8 concerns before the regulators come calling. A short list of best practices:

- Be sure to address the antitrust laws in your corporate compliance policies to ensure that all board members, officers, and employees are well aware of the restrictions.
- Periodically review the other boards on which your company's directors or executives sit and flag any potential Section 8 issues.
- Be alert to changes in your business or at other companies with which your company has an interlock and may potentially compete.
- Consider interlock issues when conducting any transaction where board seats may shift. Acquiring a new business often expands the acquirer's list of competitors. Spin-offs and divestitures can create potential Section 8 issues if post-transaction some directors will sit on the boards of both the buyer and the seller.
- When selecting new directors, consider whether they are being chosen for expertise gained as a director of a company that might be viewed as a competitor or could become one.

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