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Directors Resign After Department of Justice Raises Antitrust Concerns

Client Alert | June 25, 2021

On June 21, 2021, the U.S. Department of Justice's Antitrust Division ("DOJ") announced that two officers of Endeavor Group Holdings Inc. have resigned their positions on the board of directors of Live Nation Entertainment Inc. in the wake of concerns expressed by DOJ that the two companies formed an illegal interlocking directorate under the antitrust laws. The announcement is a reminder that companies must continue to be mindful of potential antitrust concerns when their current or prospective directors or officers serve in similar roles at other entities.

Background

Common ownership issues frequently arise in the context of interlocking directorates: competing firms that share common officers or directors. An interlocking directorate raises antitrust concerns because of the perceived risk that the officer or director may serve as the conduit for an anticompetitive agreement or information exchange. An antitrust investigation into a potential interlock may force the resignation of key officers or directors, delay the closing of a proposed transaction, or trigger consumer class actions alleging collusion. As such, it is important to be aware of applicable statutes in this area and implement appropriate measures to detect problematic interlocks before they create potential antitrust concerns.

Clayton Act, Section 8

Section 8 of the Clayton Act (15 U.S.C. § 19) is the primary vehicle by which the U.S. antitrust agencies police interlocking directorates.[1] In general, the statute prohibits one person from being an officer (defined as an "officer elected or chosen by the Board of Directors") or director at two companies that are "by virtue of their business and location of operation, competitors." Section 8 broadly defines "competitors" to include any two corporations where "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." Section 8 is broad and potentially applies where two competing companies have an officer or director in common, subject to certain exceptions.

There are three potential safe harbors from Section 8 liability:

1) The competitive sales of <u>either</u> company are less than 2% of that company's total sales;

2) The competitive sales of <u>each</u> company are less than 4% of that company's total sales; or

3) The competitive sales of <u>either</u> company are less than $3,782,300 as of January 21, 2021.

While there are no penalties or fines imposed due to a Section 8 violation, the statute requires that the parties eliminate the interlock if a violation is found to have occurred.

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Enforcement and Compliance

While enforcement actions such as the one against Endeavor and Live Nation are relatively rare, companies need to continually evaluate Section 8 concerns both for existing officers and directors as well as when vetting potential officers or director candidates.

In practice, determining whether a potential interlock exists and whether any safe harbors may apply requires a careful analysis of the products or markets in which the two firms compete. Rightly or wrongly, the antitrust agencies in the past have taken a broad view when determining whether two companies compete for purposes of Section 8, sometimes not limited by well-established market definition analysis.

Section 8 issues can also arise if a growing corporate subsidiary or acquisition may bring it into new arenas of competition and create potential overlaps that fall outside of Section 8 safe harbors. Where an interlock exists but is within Section 8 safe harbors, counsel should monitor the situation periodically to confirm the safe harbor continues to apply.

Finally, other antitrust statutes, particularly Section 1 of the Sherman Act (which prohibits agreements that unreasonably restrain trade), continue to apply even if the interlock is within the Section 8 safe harbors. A sound compliance plan will therefore also establish procedures to prevent sharing of competitively sensitive information and avoid situations that could create the appearance of potential competition concerns.

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[1] A separate statute, the Depository Institution Management Interlocks Act, governs director interlocks between unaffiliated depository institutions (FDIC-insured banks, thrifts, credit unions, and trust companies), between unaffiliated depository institution holding companies (bank and thrift holding companies), and between their nonbank affiliates.

The following Gibson Dunn attorneys assisted in preparing this client update: Elizabeth Ising, Stephen Weissman, Cassandra Tillinghast and Chris Wilson.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition or Securities Regulation and Corporate Governance practice groups, or the following:

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