July 19, 2016

U.S. Justice Department Requires Restructuring of Transaction Involving Foreign Entities to Address Section 8 Interlocking Directorates Concern

On July 14, 2016, the United States Department of Justice announced that it had concerns that a transaction involving two foreign electronic trading platforms would have, as originally structured, violated Section 8 of the Clayton Act. The parties restructured the transaction to address those concerns.[1]

Section 8 of the Clayton Act generally prohibits the same "person" from simultaneously serving "as a director or [board-appointed] officer in any two corporations . . . that are . . . competitors" unless certain highly technical safe-harbor criteria are met.[2] Section 8 covers both "direct" interlocks – *i.e.*, when the same individual serves as a director or officer of competing corporations – and "indirect" interlocks – *i.e.*, where different individuals serve as directors or officers of competing corporations, but both act on behalf of the same third entity (*e.g.*, a private equity fund). As the Department of Justice noted, the purpose of Section 8 is "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[3]

According to the Department of Justice, the transaction, as originally structured, would have resulted in an interlock between two competitors: one entity would have had a right to nominate a member of the competing entity's board of directors. "[T]he department had serious concerns that [the] ability to nominate a . . . board member would create an interlocking directorate in violation of Section 8 of the Clayton Act." Under the original transaction structure, the nominating entity would have also owned nearly 20 percent of the other entity. The transaction was restructured to eliminate both the ownership interest and the right to nominate a director.

This enforcement action is notable because it appears that both entities involved were non-U.S. companies, which, while operating in the U.S., were both headquartered in the United Kingdom. Thus, even entities organized outside of the United States must be wary of Section 8's prohibitions if they operate in the U.S. The action also serves as an important reminder that Section 8 may apply even where the potential interlock may be indirect: there is no indication here that the director him- or herself would

[1] Press Release, U.S. Dep't of Justice, July 14, 2016.

[2] 15 U.S.C. § 19.

[3] *U.S.* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

© 2016 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

have served on *both* entities' boards. Rather, the concern appears to have arisen out of the ability of one entity to appoint a member of a competitor's board. As the Department of Justice noted in its statement: "Robust competition depends on competitors being actually independent of each other – that's what Section 8 requires. . . . As originally proposed, this deal would have violated that core principle – creating a cozy relationship among competitors."

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
212-373-3183
ratkins@paulweiss.com

Craig A. Benson
202-223-7343
cbenson@paulweiss.com

Jay Cohen
212-373-3163
jaycohen@paulweiss.com

Andrew C. Finch
212-373-3460
afinch@paulweiss.com

Kenneth A. Gallo
202-223-7356
kgallo@paulweiss.com

William B. Michael
212-373-3648
wmichael@paulweiss.com

Jacqueline P. Rubin
212-373-3056
jrubin@paulweiss.com

Moses Silverman
212-373-3355
msilverman@paulweiss.com

Joseph J. Simons
202-223-7370
jsimons@paulweiss.com

Aidan Synnott
212-373-3213
asynnott@paulweiss.com

Staff Attorney Mark R. Laramie contributed to this client alert.