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Antitrust Division Actively Seeking to Break up Corporate Interlocks

The Department of Justice's Antitrust Division ("DOJ") indicated in April that it was "ramping up efforts" to enforce Section 8 of the Clayton Act ("Section 8"), a statute prohibiting officers and directors from simultaneously serving with competing companies. DOJ announced initial results of those efforts in a [press release](#) yesterday, noting that directors of several companies had resigned as a result of its inquiries. DOJ's release says that the interlocks were only "alleged" and is careful not to state that the resigning directors and associated companies had actually violated the statute.

Section 8 prohibits competing companies from sharing officers and directors. The statute is intended to foreclose opportunities for competitors to collude illegally. There are certain *de minimis* safe harbors for interlocked companies whose competing sales are less than \$4.1 million (as of 2022) or where the competing sales make up only a minimal percentage of total sales, as well as a one-year "grace" period to resolve a violation created by changed circumstances. No damages have ever been awarded under the statute, and there are no fines or penalties. Removal of the interlock typically remedies the situation, and director resignations from one board seem to have resolved the matters in DOJ's release.

DOJ appears to have established an internal task force dedicated to enforcing Section 8. Several companies have recently received civil investigative demands probing interlocks with extensive document and interrogatory requests. We expect more press releases and consent decrees to be forthcoming.

Private equity sponsors are a particular enforcement target. Perhaps the most striking aspect of DOJ's release is the treatment of PE firm Thoma Bravo and its investments in Dynatrace and Solarwinds. In that instance, three Thoma Bravo directors resigned from Solarwinds even though only one was also a director at Dynatrace. In Solarwinds' [Form 8-K](#) announcing the resignations, Thoma Bravo itself was deemed to be interlocked and Thoma Bravo as an institution announced its resignation from Solarwinds. This theory of corporate deputization, which focuses on the firm rather than specific individual interlocks at portfolio company boards, raises particular concerns for sponsors with multiple investments in one industry.

Companies should take the present opportunity to review their board memberships for potential competitor interlocks in light of DOJ's enforcement priorities.

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