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Family Office Insights

Federal Trade Commission (FTC) Enforcement of Interlocking Directorates: What Family Offices Should Know

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For many family offices, direct private equity and venture capital investments have become an increasingly important component of an alternative investment strategy.

It is common in private equity and venture capital investments for significant investors to be granted a seat on the portfolio company's board of directors, or to have the right to nominate a "board observer" to attend the company's board meetings. While such rights are customary in the venture capital and private equity markets, recent enforcement activity by the FTC underscores a regulatory risk that equity investors and their portfolio companies should carefully consider, particularly when investments are concentrated in a single industry or involve companies with overlapping customer bases.

Understanding Section 8 of the Clayton Act

Section 8 of the Clayton Act (15 U.S.C. § 19) prohibits any person from serving simultaneously as a director or officer of two competing corporations, unless a statutory exemption applies. The goal of Section 8 is to prevent the sharing of competitively sensitive information, and to reduce the risk of coordination between companies that should be acting as independent market competitors. Currently, Section 8 applies to corporations with capital, surplus and undivided profits exceeding US$51,380,000. The statute does not apply if the competitive sales of either corporation are less than US$5,138,000, or if those sales are less than 2% of one corporation's total sales or 4% of each corporation's total sales. "Competitive sales" include all products and services sold in competition with the other entity. The law also includes a one-year grace period, if two companies become competitors after a board appointment is made, the interlocking director may continue to serve for up to a year while the issue is resolved.

Traditionally, Section 8 was viewed as applying to direct interlocks, where the same individual sits on the boards of two competitors. However, enforcement agencies have recently emphasized that "indirect" interlocks; for example, where different individuals serve on the boards of competitors but act on behalf of the same investment fund or parent company, may also raise Section 8 concerns. Recent statements by senior Department of Justice (DOJ) and FTC officials have emphasized that Section 8 enforcement is a key priority area, with the agencies conducting proactive sweeps to identify potential interlocks, including those involving private equity and common ownership structures. In addition, the FTC and the DOJ have broadened their scrutiny to include board observer rights and other arrangements that could facilitate the exchange of competitively sensitive information.

While such roles may not always create a technical interlock under Section 8, they can still raise concerns under the Sherman or FTC Acts if they permit access to competitors' sensitive information.

The agencies' recent focus follows a series of resignations in 2023 and 2024 across multiple industries, including technology, healthcare and private equity, reflecting a shift toward resolving potential violations before formal complaints are issued. Both agencies have also made clear that Section 8 applies not only to corporations, but also to non-corporate entities such as partnerships and limited liability companies. This expansion aligns with the agencies' position that the statutory reference to "corporations" encompasses a wide range of organizational forms engaged in commercial competition, even if not formally incorporated.

The FTC's Recent Action in Sevita Health

The FTC's recent action involving Sevita Health highlights its renewed focus on this area. In October 2024, the FTC announced that three individuals resigned from the boards of both Sevita Health and Beacon Specialized Living Services, Inc., two companies providing residential and supportive services to individuals with intellectual and developmental disabilities. The FTC found that the two companies were competitors and that the overlapping board memberships created an unlawful interlock under Section 8. Notably, the FTC did not issue a complaint or require a consent order, the matter was resolved voluntarily through the directors' resignations. In its announcement, the FTC praised both companies for their cooperation, and reminded all organizations to review their board structures regularly to avoid similar interlocks. This enforcement action is consistent with the FTC and DOJ's recent emphasis on proactive compliance. The agencies have signaled that they will continue to investigate both formal and informal interlocks, including observer arrangements and that voluntary resignations will remain the preferred method of resolution, but only if companies identify and remediate the issue promptly.

Implications for Family Offices

For family offices that pursue equity investment strategies, especially in highly specialized or concentrated industries, the Sevita Health action serves as a timely reminder that Section 8 compliance should be part of regular governance and investment diligence. A family office that holds multiple investments in competing or adjacent companies may inadvertently create interlocks through overlapping board representation, nominee directors or observer roles. Even if the same designee is not serving on multiple overlapping boards, regulators may view "deputized" representation by different individuals from the same family office as creating an impermissible interlock under Section 8.

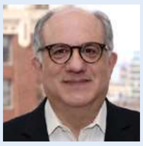
Next Steps and Compliance Considerations

In light of the FTC's renewed enforcement activity, family offices with active alternative investment programs should regularly review the board and board observer appointments of their designees to disclose any potential board interlocks, as well as their portfolio companies should be undertaking the same evaluation. This review should also be part of a family office's due diligence process when it makes a new investment, if it will be granted the right to designate a board member or appoint a board observer. Even without the existence of a technical "interlock", family office board designees and observers should be careful to prevent the sharing of competitively sensitive information between potentially competitive entities, whether technically "interlocked" as, even if a Clayton Act Section 8 exemption applies, there could still be risk under other antitrust laws, including the Sherman and FTC Acts.

Conclusion

Family offices operating in increasingly sophisticated investment environments should recognize that antitrust compliance extends beyond merger review and price-fixing concerns. Board representation, long viewed as a governance right tied to a meaningful investment, now carries heightened regulatory scrutiny. As the FTC and DOJ continue to focus on interlocking directorates, routine diligence and governance reviews can help family offices avoid inadvertent violations, safeguard reputational integrity and ensure continued flexibility in deploying capital across sectors.

Contacts



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