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DISCONNECTING COMPANIES: DOJ AND FTC PUSH FOR BROADER INTERLOCKING DIRECTORATE LIABILITY

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On January 10, 2025, the Department of Justice and the Federal Trade Commission filed a statement of interest in *Musk v. Altman*, signaling a late push by the government to expand the scope of liability for interlocking directorates in the context of a bitter legal dispute over the future of AI.

The agencies filed their statement of interest in response to Plaintiff Elon Musk's motion for preliminary injunction. Musk's lawsuit names Samuel Altman and OpenAI, among others, as defendants in the United States District Court for the Northern District of California. In his preliminary injunction motion, Musk asserts that he is likely to succeed on the merits of his claim that OpenAI and Microsoft "had interlocking boards under Section 8 of the Clayton Act." Musk alleges that two individuals, Reid Hoffman and Deannah Templeton, illegally served on both OpenAI and Microsoft's boards.

Section 8 of the Clayton Act, 15 U.S.C. § 19, provides that "[n]o person shall, at the same time, serve as a director or officer in any two corporations . . . that are . . . competitors such that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." This is commonly referred to as a prohibition on "interlocking directorates." The law also provides for exemptions where the parties' size is too small or the amounts of competitive sales between them is too low, with the thresholds adjusted annually for inflation (discussed in more detail below). Outside of these exemptions, however, the government need not prove any anticompetitive effect from the overlap; the mere existence of the interlock is a *per se* violation. Generally, private plaintiffs do not bring Section 8 claims because the statute does not provide for damages.

In the statement of interest, the agencies advocate for the expansion of interlocking directorate liability in three ways.

First, and most significantly, the agencies take the view that the exchange of competitive information might prevent a case from becoming moot even after a director in question resigns. Historically, the agencies allowed Section 8 cases to be resolved by resignation or withdrawal of the nomination of the alleged interlocking director. In this statement of interest, however, the agencies now argue that "ending an interlocking directorate, e.g., by having a person resign from a corporate board, is not sufficient, *on its own*, to moot a claim under Section 8 of the Clayton Act." The agencies continue that "if a plaintiff properly pleads a likelihood of recurrence *or* an ongoing harm through the wrongful retention of competitively sensitive information obtained through the alleged interlocks, Section 8 claims are not moot." However, the agencies do not cite a single case supporting this conclusion.

Second, the agencies argue that even an "observer" on a board may be considered a "director" for purposes of the statute. While some courts have previously taken an expansive reading of Section 8—in light of its prophylactic purpose and not wanting to elevate form over substance—the agencies cite only to decades-old trial court decisions. For example, the agencies cite a 1991 district court case for the proposition that "courts have refused to read the statute so rigidly that a company can evade Section 8 liability through tactics that elevate form over substance, e.g., 'by calling its agents on the competitors' board something other than either officers or directors.'" Based on this, the agencies argue that the court should look at case-specific facts to see if the observer was allowed to participate in a meeting that would otherwise be off limits due to Section 8. Similarly, the agencies argue that an entity violates Section 8 by appointing an agent to serve on its competitor's board, rather than one of its own officers/directors. In other words, the agencies argue, an interlock need not involve the same appointee but can be different agents representing the same principal. This is of particular import to private equity clients; there have been previous government enforcement actions on this basis in regard to investment firms appointing representatives to the boards of other companies.

Third, the FTC continues to expand on its view that Section 5 of the FTC Act fills in any gaps Section 8 may have left open. Although this has been the FTC's view since 1977—including in past enforcement actions—the agencies rely on Supreme Court precedent holding that the FTC's enforcement power under Section 5 of the FTC Act is broad and designed to supplement other antitrust statutes, without any specific reference to Section 8. Under the statement's rationale, the interlock of two LLCs or other legal entities could be a violation of Section 5 of the FTC Act, even though Section 8 of the Clayton Act specifically refers to corporations.

The discussion of the FTC's Section 5 powers is especially unusual in this private litigation as only the FTC can enforce Section 5. Indeed, Musk does not assert a claim under Section 5 of the FTC Act. The statement of interest explains that its discussion of Section 5 is relevant because California courts look to decisions interpreting Section 5 in construing California's Unfair Competition Law (UCL). But, incoming FTC Chair Andrew Ferguson disagreed. Commissioner Ferguson filed a concurring statement, joined by Republican-appointed Commissioner Melissa Holyoak, noting that "were [he] the brief writer, [he] would not have included the argument regarding Section 5 of the Federal Trade Commission Act." That is because "[t]he district court's decision on the UCL claim . . . cannot affect our enforcement of Section 5, and we have no direct interest in the outcome of that claim. Nor does the Section 5 argument presented in the statement necessarily correctly describe the law." This differing view on Section 5 by the incoming Chair is noteworthy because, as discussed above, the statement of interest fails to cite any precedent expressly holding that Section 5 of the FTC Act supplements Section 8 of the Clayton Act to reach beyond corporations.

This statement of interest comes as the FTC has recently increased the thresholds for when Section 8 of the Clayton Act is triggered. As noted above, Section 8's exemptions are indexed to inflation. The new thresholds say that Section 8 of the Clayton Act is triggered "if each of the corporations has capital, surplus, and undivided profits aggregating more than" $51,380,000 in the previous completed fiscal year. However, the ban on interlocking directorates does not apply under the new thresholds if "the competitive sales of either corporation are less than" $5,138,000 in the previous completed fiscal year.

Overall, the agencies' statement of interest asks the court to expand the scope of the prohibition against interlocks. Companies—and potential board members themselves—should be mindful of these expansive enforcement principles and review their current and future board members' affiliations carefully so as not to become the subject of an investigation or enforcement proceeding by the FTC or the DOJ.

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