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## FTC and DOJ Announce New Enforcement Actions Against Interlocking Directorates

On August 16, 2023, the US Federal Trade Commission (“FTC”) brought its first enforcement action under Section 8 of the Clayton Act in 40 years.<sup>1</sup> At the same time, the US Department of Justice’s Antitrust Division (“DOJ” and with the FTC, “Agencies”) continued its recently reinvigorated Section 8 enforcement campaign, announcing that two Pinterest Inc. directors resigned from the board of Nextdoor Holdings Inc.<sup>2</sup> These developments reinforce the Agencies’ commitment to enforcing Section 8’s *per se* prohibition against interlocking directorates and further illustrate the Agencies’ broader emphasis on investigating the competitive impact of companies holding non-controlling interests in competitors. It also underscores the importance of businesses seeking legal counsel to evaluate and mitigate antitrust risk associated with board composition.

### DOJ’S CONTINUED SECTION 8 ENFORCEMENT CAMPAIGN

Section 8 of the Clayton Act prohibits directors and officers of a company from serving simultaneously on the board of a competitor. There are certain *de minimis* exceptions to this prohibition based on the size of the companies and the amount of “competitive sales.”<sup>3</sup>

The Pinterest-Nextdoor action reflects an expansive approach to the definition of “competitor.” While both are social media companies, broadly defined, their businesses are quite distinct. Nextdoor connects neighbors to discuss local matters, while Pinterest is a global platform on which people post and receive inspiration for recipes, arts and crafts, and the like. Treating these companies as “competitors” for Section 8 purposes highlights the breadth of the agencies’ enforcement priorities.

The DOJ has aggressively enforced Section 8 in the past year with 15 resignations from 11 boards.<sup>4</sup> In October 2022, Assistant Attorney General Jonathan Kanter noted that “Section 8 is an important, but underenforced, part of our antitrust laws. Congress made interlocking directorates a *per se* violation of the antitrust laws for good reason.”<sup>5</sup> Kanter accused interlocking directorates of “[concentrating] power” and



enabling companies to share information which could “facilitate coordination – all to the detriment of the economy and the American public.”<sup>6</sup> For these reasons, Kanter lauded Section 8’s potential to stop antitrust violations before they take place.<sup>7</sup>

DOJ’s enforcement focus on Section 8 has continued unabated in 2023. In March 2023, AAG Kanter promised that “Enforcement of Section 8 will continue to be a focus for the division just as Congress intended.”<sup>8</sup> In announcing the Pinterest-Nextdoor action, Deputy Assistant Attorney General Andrew Forman declared, “Enforcement involving interlocking directorates will continue to be one of the top priorities of the Antitrust Division.”<sup>9</sup>

### FTC PUTTING DOWN ITS OWN MARKER

The FTC, also on August 16, took aggressive Section 8 action in regulating a deal in which EQT acquired Quantum’s Tug Hill, the 11th largest Appalachian Basin natural gas producer, and the Quantum entity that transports and processes Tug Hill’s production. Through the transaction, Quantum would have acquired a large minority position in EQT and an EQT board seat.

The FTC issued a consent order that it characterized as “ground-breaking structural relief.”<sup>10</sup> The consent prevented Quantum from gaining an EQT board seat, the typical Section 8 remedy. However, the agency’s imposed conditions went further, requiring Quantum to divest all EQT shares, unwind a joint venture, and accept additional restraints and information exchange restrictions.<sup>11</sup>

### FOCUS ON MINORITY HOLDINGS

As the EQT consent order shows, the agencies’ suspicion of coordination and information sharing goes beyond interlocking directorates. Section 8 enforcement is just one piece of a larger effort to scrutinize minority interests that could enable competitor firms to influence one another, coordinate, or share confidential information.

This effort is reflected in other recent agency actions, including the draft merger guidelines, which propose extensive review of deals that create or enhance certain minority interests.<sup>12</sup> Likewise, the proposed updating of the Hart-Scott-Rodino filing process would require transacting firms to provide extensive information about minority holdings, and identify current board members and any other directorships they hold.<sup>13</sup> All of these developments also reveal the agencies’ particular scrutiny of private equity firms, which will disproportionately feel the burden imposed by these rules.

### CONCLUSION

The agencies’ continued push to combat interlocking directorates and other minority interests, and close scrutiny of private equity will have an ongoing effect. Companies should stay in close contact with legal counsel, both to ensure compliance with changing regulations and to develop proactive solutions that are commensurate with the current antitrust regulatory environment.



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<sup>1</sup> "FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal" (Aug. 16, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

<sup>2</sup> "Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates" (Aug. 16, 2023), available at <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.

<sup>3</sup> "Revised Jurisdictional Thresholds for Section 8 of the Clayton Act for 2023" (Jan. 23, 2023), available at <https://www.ftc.gov/legal-library/browse/federal-register-notices/revised-jurisdictional-thresholds-section-8-clayton-act-2023>.

<sup>4</sup> "Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates" (Aug. 16, 2023), available at <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.

<sup>5</sup> "Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates" (Oct. 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

<sup>6</sup> "Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates" (Oct. 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

<sup>7</sup> "Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates" (Oct. 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

<sup>8</sup> "Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates" (Mar. 9, 2023), available at <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>.

<sup>9</sup> "Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates" (Aug. 16, 2023), available at <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.

<sup>10</sup> "FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal" (Aug. 16, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

<sup>11</sup> "FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal" (Aug. 16, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

<sup>12</sup> "FTC and DOJ Announce New Draft Merger Guidelines" (Aug. 14, 2023), available at <https://www.kslaw.com/news-and-insights/ftc-and-doj-announce-new-draft-merger-guidelines>.

<sup>13</sup> "FTC and DOJ jointly announced proposed changes to the HSR premerger notification form" (July 10, 2023), available at <https://www.kslaw.com/news-and-insights/ftc-and-doj-jointly-announced-proposed-changes-to-the-hsr-premerger-notification-form>.