

FTC Enforces Section 8 of the Clayton Antitrust Act



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It has been over 40 years since the Federal Trade Commission (“FTC”) has enforced Section 8 of the Clayton Act. Section 8 prohibits interlocking directorates among competing businesses, specifically referring to boards of directors of corporations. Such interlocking directorates are deemed illegal even if there has been no competitive harm, and are therefore considered “per se illegal.”

Recently the FTC announced a proposed consent order with two competitors in the natural gas production and sales market, EQT Corporation (“EQT”) and Quantum Energy Partners, LP, a noncorporate entity (“Quantum”). EQT and Quantum had proposed that EQT would acquire certain assets and properties of Quantum, and Quantum would receive 55 million shares of EQT’s stock and a seat on EQT’s board of directors. The consent order requires Quantum to release any rights to EQT’s stock and to a seat on Quantum’s board of directors, and EQT to surrender any rights to the assets and properties that Quantum agreed to transfer to EQT. The consent order also provides that they abide by certain other restrictions in dealing with other that might reduce competition in their market.

This enforcement effort is consistent with several recent pronouncements by the FTC that it was ramping up

enforcement of Section 8. Indeed, FTC chair Lina Kahn, joined by Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, has issued a statement providing that “[o]ver the past year, our colleagues at the Antitrust Division have sought to reactivate Section 8 and effectively put market participants back on notice. Today’s complaint and consent order build on that effort, marking the Commission’s first formal Section 8 enforcement in nearly 40 years.”

Quantum is a limited partnership. As Section 8 specifically mentions only “corporations” by its express terms, the FTC’s application of Section 8 to entities other than corporations is a significant extension of Section 8. Chairperson Kahn’s statement also explains that the proposed order “puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes.”

While the FTC has made its position clear, it is likely that some noncorporate defendant will challenge the FTC’s position in court and such court might limit or overrule the FTC’s extension of Section 8 to noncorporate entities. Nevertheless, businesses should examine their existing relationships and proposed transactions to identify any possible circumstances or terms that violate Section 8 of the Clayton Act.

For more information or legal assistance on related matters, contact Lippes Mathias securities practice team co-leader Michael E. Storck at 716-853-5100 or mstorck@lippes.com.

The FTC’s press release on this matter can be found [here](#).