

Interlocking Directorates in the Antitrust Crosshairs

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The Federal Trade Commission's (FTC) recent multipronged challenge to EQT Corporation's acquisition from the Quantum Energy Partners private equity investment group "marks the FTC's first case in 40 years that enforces Section 8 of the Clayton Act" and preempts a proposed board of directors interlock.^[1] On the same date, the Department of Justice (DOJ), Antitrust Division, announced the resignation of two Pinterest directors from the board of Nextdoor in response to the DOJ's ongoing enforcement initiative to put an end to interlocking directorates.^[2]

Almost a year ago, EQT and Quantum entered into a purchase agreement, whereby EQT would acquire two Quantum entities — Tug Hill, a natural gas producer, and XcL Midstream, a natural gas gatherer and processor — in exchange for cash and up to 55 million shares of EQT. Additionally, EQT agreed to take all necessary action to include an individual chosen by Quantum (likely Quantum's CEO) in a slate of director nominees for EQT's board. In 2020, separate from the purchase agreement, Quantum and EQT also formed a joint venture, The Mineral Company (TMC). According to the FTC, the companies purchase mineral rights in the Appalachian Basin through TMC. Quantum's investment in TMC aside, Quantum would continue to have other unrelated investments in the natural gas industry.

Interlocking Boards

Section 8 of the Clayton Act is a strict liability statute. It bars an individual from serving on the boards of two corporations if each corporation has "capital, surplus, and undivided profits of more than \$45,257,000," is engaged in commerce, and the two corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."^[3] The principal exceptions to Section 8's prohibition apply if the competitive sales of either corporation are less than \$4,525,700; less than 2% of either corporation's total sales; or the competitive sales of each corporation are less than 4% of that corporation's total sales. When competition between the boards at issue arises after the overlapping board member has been seated, the corporations must remedy the interlock within 12 months.

The DOJ and FTC have both previously and publicly expressed an intent to enforce Section 8 more vigorously. For example, prior to the DOJ's Nextdoor/Pinterest announcement, in March 2023, the DOJ announced five resignations from four corporate boards in response to its enforcement efforts.^[4] In October 2022, the DOJ announced that seven directors had resigned from corporate boards in response to the agency's concerns that their roles violated Section 8.^[5]

The EQT Challenge

Although ultimately the acquisition of the two Quantum entities has been allowed to proceed, the FTC identified several potential theories of harm from certain elements of the proposed transaction and from the pre-existing relationship between EQT and Quantum in the form of TMC. The key factor underlying the FTC's concerns is that Quantum is not exiting the market as a result of the reported transaction.

With Quantum continuing as an industry player, the FTC's consent decree seeks to cut off opportunities for Quantum to access competitively sensitive information or influence decision making of EQT. The FTC found that two agreements could facilitate anticompetitive information exchanges in violation of the FTC Act. Specifically, the FTC objected to: (1) the purchase agreement's provisions that EQT would "take all necessary action to facilitate" the appointment of a Quantum-selected director, and that Quantum receive consideration in the form of EQT shares; and (2) the pre-existing TMC joint venture.

The consent decree requires Quantum to forgo its right to an EQT board seat and prohibits EQT representatives from serving in management of any Quantum-related entity. Quantum must sell its shares of EQT and, until sold, hold them in a voting trust. Quantum and EQT will also be required to unwind their joint venture, TMC.

Conclusion

Without a doubt, both the FTC and the DOJ have made plain their intent to act against interlocking directors. The agencies' recently proposed changes to the information that parties submit with their Hart-Scott-Rodino premerger notification will further arm the FTC and the DOJ with easy access to information regarding potentially interlocking directors and preexisting arrangements that could be entirely unrelated to the transaction under review. For example, the proposed new "HSR Form" would require parties to:

- Identify the existing and prospective officers, directors, and board observers (or in the case of unincorporated entities, individuals exercising similar functions) of the acquired company and all companies controlled by the buyer for the prior two years; and for each individual, identify any other companies for which those individuals would serve or have served during the prior two years as officers, directors, or board observers;
- Provide all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within the year prior to the date of filing, including but not limited to, licensing agreements, supply agreements, noncompetition or nonsolicitation agreements, purchase agreements, distribution agreements, or franchise agreements; and
- Describe any noncompete or nonsolicitation agreements applicable to employees or business units related to overlapping products or services.

At a minimum, operating companies should remain vigilant in their board selection, and parties to reportable transactions should cover the items above and other topics added in the proposed HSR filing changes as part of due diligence. The parties will need to be prepared to address or remedy potentially problematic issues and for any delays this may have on the transaction. Joint venture participants, private equity groups investing in multiple companies in the same industry, and sellers that will remain in the market post-closing should be particularly alert.

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

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

[3] 15 U.S. Code § 19.

[4] Antitrust Division Continues to Focus on Competitors Sharing Company Directors in Violation of Section 8 of the Clayton Act, available at <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>.

[5] Resignations Reflect Antitrust Division's Efforts to Reinvigorate Enforcement and Deter Violations of Section 8 of the Clayton Act, available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

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