Paul|Weiss

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING
Unit 3601, Fortune Plaza Office Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2536 9933

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON
Brandywine Building
1000 N. West Street, Suite 1200
Wilmington, DC 19801
+1 302 655 4410

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# Interlocks Under Section 8 of the Clayton Act: Implications of the FTC's Investigation of Apple and Google

It was widely reported this week that Apple director Arthur Levinson stepped down from his position on Google's board of directors following the Federal Trade Commission's investigation into whether the companies had violated the prohibition on interlocking directorates in Section 8 of the Clayton Act.

This news serves as a useful reminder that the antitrust enforcement agencies monitor companies that share common board members and take enforcement actions when appropriate. It also highlights the need for companies to be vigilant in monitoring themselves for potential Section 8 issues, especially if they compete in rapidly evolving product markets—such as in high-technology industries—where a firm that is not a competitor today may become a competitor tomorrow.

## Background: Section 8 of the Clayton Act

Since its enactment in 1914, Section 8 of the Clayton Act has prohibited so-called "interlocking directorates," which occur when two competing corporations share one or more directors in common. The statute was subsequently amended in 1990 to encompass corporate officers in addition to directors. Section 8 now 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."[1]

It is well recognized that Congress intended Section 8 to serve a prophylactic purpose by removing the opportunity for interlocking directors or officers to enable competing corporations to coordinate their activities through either explicit collusion or the exchange of competitively sensitive information.[2] The statute does, however, contain several "safe harbors" that render it

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1 15 U.S.C. § 19(a)(1). For more information on Section 8, see our publication entitled "Prohibition on Interlocking Directorates May Prohibit a Firm From Appointing Its Agents to Serve As Directors of Competing Corporations," available at http://www.paulweiss.com/files/upload/13Nov07Adv.pdf

2 The Department of Justice and the Federal Trade Commission have the authority to enforce violations of Section 8, and private litigants also have a right of action. The principal remedy for a Section 8 violation is the removal of the interlock, although damages are potentially available to private plaintiffs.

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inapplicable under certain circumstances, such as when the size of the corporations, or the size and degree of the "competitive sales" between them, are below certain numerical thresholds.[3]

**The FTC's Investigation of Apple and Google**

The Federal Trade Commission's investigation into possible interlocking board memberships at Apple and Google was first reported earlier this year. Since that time, two individuals—each of whom served on the boards of directors of both companies—have resigned directorships. First, Google CEO and chairman Eric Schmidt resigned from Apple's board in August. Apple director Arthur Levinson then stepped down from Google's board on October 12.

After Levinson's resignation was announced, the Chairman of the Federal Trade Commission, Jon Leibowitz, issued a statement remarking that both companies "should be commended for recognizing that overlapping board members between competing companies raise serious antitrust issues and for their willingness to resolve [the FTC's] concerns without the need for litigation." Further, Chairman Leibowitz stated that the Federal Trade Commission "will continue to monitor companies that share board members and take enforcement actions where appropriate."[4]

Although the exact nature of the FTC's concerns have not been made public, one possible area of focus may have been the extent to which Apple and Google have become "competitors" within the meaning of Section 8. Indeed, Apple and Google are examples of two companies that once were not competitors, but have now become competitors by virtue of their rapidly proliferating product offerings in high-tech markets. For example, Google recently announced that it is developing an operating system for computers based on its existing Chrome web browser, which would compete with Apple's own Mac OS X operating system. Google has also developed software for mobile phones, while Apple offers applications for its own well-known iPhone.

Another area of focus in the investigation was apparently whether the revenue from the products in which Apple and Google compete fell within the "safe harbor" provisions in Section 8.[5] Apple and Google may have argued that, even if they are now "competitors" within the meaning of Section 8, they should be exempt from the statute because of the volume of competing sales was below the statutory thresholds.

**Implications of the FTC's Investigation**

The FTC's investigation—and the high-profile resignations of two directors—demonstrate that antitrust agencies will be vigilant about enforcing possible Section 8 violations, and they may even step up their enforcement of Section 8 consistent with the Obama Administration's stated intention of generally increasing antitrust scrutiny.

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3 *See* 15 U.S.C. § 19(a)(2). Section 8 also does not apply to banks, banking associations, or trust companies, 15 U.S.C. § 19(a)(1), although such entities are subject to the Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-08.

4 Statement of Federal Trade Commission Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board, October 12, 2009, available at http://www.ftc.gov/opa/2009/10/google.htm

5 Miguel Helft, *Google and Apple Eliminate Another Link Tie*, N.Y. TIMES, October 12, 2009.

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These events are also an important reminder that businesses should be sensitive to possible Section 8 issues, especially if they compete—like Apple and Google—in industries with rapidly evolving product offerings. Thus, companies that have not historically been competitors may start competing with one another as their respective product offerings evolve. Therefore, as products change and develop, companies should re-evaluate who their competitors are and consider whether new competition creates a Section 8 issue with respect to any overlapping board members.

In addition, although Section 8 contains several safe harbor provisions that limit its application, the question of whether any of these safe harbors apply in a given situation may be fairly complex. Any competing companies that have overlapping board members and believe they fall within the safe harbor provisions of the statute should regularly monitor their compliance with the relevant thresholds in order to ensure that, as market conditions change, they continue to come within the statutory exemption.[6]

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues discussed in this memorandum may be addressed to either of the following:


Robert A. Atkins (212) 373-3183
Jacqueline P. Rubin (212) 373-3056
Moses Silverman (212) 373-3355
Joseph J. Simons (202) 223-7370
Aidan Synnott (212) 373-3213
Andrew C. Finch (212) 373-3460
Samir K. Ranade (212) 373-3738


[6] Notably, Section 8 provides that a person who is validly serving as a director or officer of two corporations, who then comes within the terms of the statute because of a change in corporate circumstances, has a one-year period before the statute applies as to him or her. 15 U.S.C. § 19(b).