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DOJ Expresses Concerns About Interlocking Directorates

- The DOJ expressed concerns that interlocking directorates between two companies involved in promoting and selling tickets to live entertainment and sports events violated Section 8 of the Clayton Act.

- Companies should be aware of and evaluate the prohibitions of Section 8 not just when naming new officers and directors but also as a company's business evolves, because companies who are not currently competitors may become competitors and competitive lines of business may grow to exceed the thresholds set by the law.

On June 21, the United States Department of Justice (DOJ) announced that it "expressed concerns" that the service of a director and officer of Endeavor Group Holdings Inc. on the board of directors of Live Nation Entertainment Inc. "created an illegal interlocking directorate." The two individuals subsequently resigned their positions as Live Nation directors, according to the DOJ. This announcement serves as an important reminder of the restrictions the antitrust laws place on interlocking directorates.

Section 8 of the Clayton Act, 15 USC §19, states that, if the corporations are above a certain size, "[n]o person shall, at the same time, serve as a director or [board-appointed] officer in any two corporations . . . that 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." The law has certain safe harbor exceptions based on the magnitude of the "competitive sales" of the corporations – i.e., "all products and services sold by one corporation in competition with the other." Section 8 does not prohibit interlocking directorates below these thresholds. The law also provides for a one-year grace period such that a person who was not initially prohibited from serving as an officer or director may continue to serve until one year after the corporations become competitors and the competitive sales exceed the relevant threshold. Section 8 has been interpreted to cover both "direct" interlocks – i.e., when the same individual serves as a director or officer of competing corporations – and on occasion "indirect" interlocks – i.e., where different individuals serve as directors or officers of competing corporations, but both have been "deputized" to act on behalf of the same third entity (e.g., a private equity fund).

In its announcement, the DOJ said "[b]oth Live Nation and Endeavor, through its wholly owned and minority owned subsidiaries, promote and sell tickets and VIP packages that include tickets, lodging and travel accommodations, to live music, sporting and other entertainment events" and that "[b]ased on U.S. revenues, the interlock did not qualify for any of the Section 8 safe harbors."

The DOJ noted that the prohibition on interlocking directorates applies "regardless of whether any anticompetitive conduct actually occurs." It said that "interlocking directorates can restrict competition by providing a conduit for the exchange of competitively sensitive information and by facilitating coordination between competing companies. By eliminating the opportunity to coordinate – explicitly or implicitly – through interlocking directorates, Section 8 prevents violations of the antitrust laws before they occur." The former head of the Antitrust Division of the DOJ, Makan Delrahim, said in 2019 that the "Division regularly encounters potential Section 8 violations and it is top-of-mind when reviewing transactions that involve

interlocking directorates." However, the DOJ and Federal Trade Commission (FTC) have issued public statements in only a handful of matters involving Section 8 issues. These have in general been resolved with board resignations or deal restructurings.

Both the DOJ and FTC monitor companies for potential interlock issues and may take action to undo appointments which violate Section 8. Companies should be aware of and evaluate the prohibitions of Section 8 not just when naming new officers and directors, but also as a company's business evolves: companies who are not currently competitors may become competitors and competitive lines of business may grow to exceed the thresholds set by the law.

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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 addressed in this memorandum should be directed to:

Joseph J. Bial
+1 202-223-7318
jbial@paulweiss.com

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

Jacqueline P. Rubin
+1 202-373-3056
jrubin@paulweiss.com

Charles F. "Rick" Rule
+1 202-223-7320
rrule@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Daniel J. Howley
+1 202-223-7372
dhowley@paulweiss.com

Jared P. Nagley
+1 212-373-3114
jnagley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.