

Antitrust and Competition Client Service Group

To: Our Clients and Friends

January 27, 2012

Federal Trade Commission Increases Interlocking Directorates Thresholds

On January 24, 2012 the Federal Trade Commission announced its annual revision of the interlocking directorates thresholds under Section 8 of the Clayton Act. The new thresholds are effective today, January 27, 2012.

The purpose of Section 8 is to prevent a “person” from serving as an officer or director of corporations that compete with one another in the marketplace, unless that competition is very limited. It also reaches situations in which two different individuals represent the same corporation and serve on competitors’ boards. So, for example, a venture capital firm may violate the law by having a representative serve on the boards of two competitors in which it has an interest.

Section 8 prohibits a “person” from serving as an officer or director in any two corporations if:

- (1) the “capital, surplus, and undivided profits” of each corporation exceeds \$27,784,000 (the new threshold for 2012); and
- (2) the corporations are competitors “by virtue of their business and location of operation.”

Interlocks are allowed where:

- (1) the competitive sales of either corporation are less than \$2,778,400 (the new threshold for 2012); or
- (2) the competitive sales of either corporation are less than 2% of the corporation’s total sales; or
- (3) the competitive sales of each corporation are less than 4% of that corporation’s total sales.

The existence of an interlock prohibited by Section 8 is a *per se* violation. No defenses may be offered if it is established. There is a private right of action for a Section 8 claim, and the federal antitrust

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agencies also enforce it. It is important to be aware of Section 8, particularly for entities such as venture capital firms that may have portfolio companies that compete with one another.

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