Skadden

The Informed Board

Summer 2021

The world is returning to work. An environmental activist fund won a quarter of Exxon's board seats. World leaders announced plans for a minimum corporate tax.

This issue of *The Informed Board* provides insights for directors about these events. Plus, a look at the disruptive effects — and enormous benefits — that could flow from widespread adoption of blockchain technology in financial services, and a reminder about an old antitrust law that could be revived and used against tech companies.

Four Questions on Directors' Minds as the World Returns to Work

The extent to which employers can require vaccinations and testing will shape the reopening process. Employers also worry about potential COVID-related liabilities.

- Employers will likely be allowed to require vaccinations and/or testing in most cases.
- Most employees can be required to return to work.
- Workers' compensation and new shield laws offer employers some protection from liability if employees contract COVID-19 at work.
- State laws and circumstances vary widely, and exceptions to the employment laws mean there are few cut-and-dried answers.

Your company is ready to recall employees to the office and plants. What can you do to protect them and your company's operations from new COVID-19 outbreaks?

These questions are front of mind for boards and managements as the world returns to something closer to normal. Here's a rough roadmap to some of the most common issues businesses face.

The answers come with several important caveats: Laws vary by state, so the legality of measures and requirements will depend on the locale, as well as the particular circumstances. With little established law in the area, evolving medical knowledge and changing health advisories, companies will need to revisit the issues regularly to stay abreast of new developments.

1 Can you require all employees to be vaccinated and require proof?

On December 16, 2020, the federal Equal Employment Opportunity Commission (the EEOC) issued guidance implying that employers are permitted to require employees to be vaccinated before returning to work, subject to several exceptions. Many states and local jurisdictions follow federal law and guidance. Some provide greater protections for employees.

The EEOC sidestepped the issue of whether employers can mandate vaccines that have received only "emergency use authorization" from the Food & Drug Administration — the present status of all three vaccines approved in the U.S. (from Pfizer, Moderna and Johnson & Johnson). Any company considering mandatory vaccination policies should consider the risk that the vaccine does not receive final approval. If an employee suffers significant side effects from a required vaccination, the employee may seek to hold the employer responsible. In that event, the employer will be on firmer ground if the required vaccine receives full approval.

Even with fully approved vaccines, employers may have to accommodate employees or potential employees who are unable to receive the vaccine due to a disability or sincerely held religious belief.

Once employers can mandate vaccinations, they may also require proof of vaccination. However, under the Americans With Disabilities Act (ADA), this information should be treated as a "medical record" and must be maintained separately from personnel records. In addition, employers should avoid asking questions that may lead to inadvertent disclosure of other sensitive medical information.

2 Can you require all employees to show proof of a negative test or submit to regular tests on the job?

Generally yes, provided that any mandatory medical test is "job related and consistent with business necessity," as required under the ADA. Employers may choose to administer or require tests because an individual with the virus will pose a direct threat to the health of others. The EEOC guidance says such testing may be administered before employees are first permitted to reenter the workplace and/or periodically thereafter. Employers must proceed cautiously with any testing program, however, so as not to violate the restrictions imposed by the ADA and the safety requirements of the Occupational Health and Safety Administration.

Given the effectiveness of the vaccines, some employers may choose to test only unvaccinated employees.

All testing must be conducted in a nondiscriminatory manner. Note that employers may be legally required to pay nonexempt employees on an hourly basis for the time spent undergoing mandatory testing.

3 If someone contracts COVID-19 in the office upon returning, what potential liability does an employer have?

If COVID-19 is treated as a protected occupational disease or injury under workers' compensation statutes, most tort claims against employers would be barred by workers' compensation statutes. Typically, there is a high threshold to bring a work-related injury suit outside a state's workers comp regime. In New York, for example, the employer must have committed an intentional tort or fraudulent concealment.

Some states are considering or have already taken steps to create a rebuttable presumption that an employee who has been working contracted COVID-19 while at the workplace, which would bring the claim under the workers' compensation regime and bar other actions.

Similarly, family members of employees who contract COVID-19 would have difficulty showing causation. For example, in May, a federal judge in California dismissed a suit brought by a spouse against her husband's employer for her COVID-19 infection. The court held that the state's workers' compensation law barred her claims, and that the employer's duty to provide a safe work environment did not extend to nonemployees.

It is possible that a customer might assert an attenuated claim against a business if the customer can prove he or she caught the virus on its premises. But, again, it would be difficult for a plaintiff to prove that the illness was caused by interaction with the business.

Finally, some states have passed shield laws in order to protect businesses from liability unless plaintiffs can show a heightened level of fault, such as "actual malice" or "deliberate" wrongdoing.

4 If an employee is not comfortable coming back to the office, can you fire them?

Generally speaking, an employer can terminate employees who refuse to return to the office. However, any such policy must be applied evenhandedly to prevent allegations of discrimination based on protected characteristics, such as disability under the ADA or religious beliefs. For example, if the employee has an underlying medical condition, the employer may be required to make accommodations under disability laws or the federal Family and Medical Leave Act.

Employers should also consider any employment or collective bargaining agreements that may impose limitations on an employer's ability to fire an employee or could impose significant costs for doing so.

One final twist to be aware of: If a number of employees collectively agree not to go to the office because of safety concerns, the activity could be considered a "concerted activity" or as going "on strike" under the National Labor Relations Act, even if the employees are not represented by a union. This means that the activity could be protected by federal labor laws.

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What the Exxon Mobil Shareholder Votes Mean

The election of three directors nominated by a climate-focused activist fund and shareholder support for detailed lobbying disclosures highlight the ESG forces boards now face.

- Large mutual fund managers, public pension funds and proxy advisory firms supported activist board nominees.
- The outcome may embolden other ESG activist funds.

In one of the most high-profile and expensive proxy fights in recent years, Engine No. 1, a relatively small activist hedge fund, won three of 12 board seats at Exxon Mobil's annual meeting last month, based on preliminary voting results. In addition, two shareholder-sponsored measures requesting fuller disclosures about the company's lobbying won support.

This contest, which focused on Exxon's shift away from fossil fuels, has been much remarked upon — and for good reason:

- This was the first time that a board election truly turned on environmental, social and governance (ESG) issues.
- Engine No. 1 held only a 0.02% stake — a relatively low ownership percentage for a successful proxy fight.
- Engine No. 1 was successful notwithstanding the outsized retail ownership at Exxon (reported to be 40%), a shareholder base that usually supports management.
- Vanguard, Blackrock and State Street all supported the election of at least two of Engine No. 1's candidates, as did a number of large state public pension funds, including the California State Teachers' Retirement System (CalSTRS), the California Public Employees' Retirement System (CalPERS) and the New York State Common Retirement Fund.
- Institutional Shareholder Services supported three of Engine No. 1's four candidates and Glass Lewis, another proxy adviser, recommended in favor of two of the four candidates. Pensions & Investment Research Consultants supported all four Engine No. 1 nominees.

Three Votes Against Management at Exxon Mobil*

3 out of 12

Three of activist Engine No. 1's nominees elected to 12-member board

55.6% ☑
44.4% ☒

Majority of shareholders supported proposal requesting an annual report describing lobbying policies generally, listing recipients and amounts

– Submitted by United Steelworkers

63.8% ☑
36.2% ☒

Majority of shareholders supported proposal requesting an annual report on alignment of lobbying activities with Paris Climate Agreement goals

– Submitted by BNP Paribas Asset Management

* Updated preliminary results to June 2

Sources: Exxon Mobil 2021 Proxy Statement, June 2, 2021 Form 8-K and June 2, 2021 press release (updated preliminary results)

- Given Engine No. 1's small stake and enormous fees paid in the proxy fight (reported to be $30 million), many commentators have questioned the economics of this fight for Engine No. 1.
- This may well be a portent of things to come, encouraging the formation of more activist funds focusing on ESG issues and emboldening existing ESG funds. Just prior to the fight, Exxon named Jeff Ubben, the founder of the prominent traditional activist fund ValueAct who now runs a social impact fund, to its board.
- The rise in the importance of ESG considerations among investors, including institutional investors that have traditionally supported management, provides activist shareholders new campaign themes that could have a significant impact on corporations.
- In addition to Engine No. 1's board win, two shareholder proposals won majority support. One calls for an annual report on lobbying generally, while the second requests a report describing how the company's lobbying efforts align with the goal of limiting global warming. The board had recommended a vote against both measures.
- Engine No. 1's victory underscores the need for shareholder engagement and for boards to stay alert to the ever-evolving themes and concerns of shareholders, especially on ESG topics and other political hot buttons.

While some may view the Exxon/Engine No. 1 fight as *sui generis*, the Securities and Exchange Commission has been taking steps to emphasize the increasing importance of ESG disclosure by public companies. In March, the commission established a Climate and ESG Task Force, initially focused on identifying "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules" and it is seeking public comment on the standardization of ESG disclosures.

Clearly, ESG and the related disclosure around it is a topic that is here to stay, and boards should closely monitor developments in this area, on both the shareholder and regulatory fronts.

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Is Tax Competition Dead?

The G7's support for OECD-backed tax reforms could mark a big step toward a more consistent, revamped global tax scheme — depending on the details and whether it is actually adopted.

- Winners could be higher-tax rate countries seeking to collect more revenue from multinationals.
- Losers could include companies that currently earn substantial income in lower-tax jurisdictions.
- The agreement may put pressure on the Biden administration to align its corporate tax reform proposals with the OECD's, including by reducing planned tax hikes.
- Many significant details remain to be resolved, including the scope of the rules, tax rates and mechanisms to mitigate double taxation.

The G7's unanimous support for a proposed agreement to forge more uniform global corporate tax principles, including a minimum rate, drew wide coverage in the business press when it was announced June 5. The agreement has been billed as heralding a global convergence of corporate tax regimes.

What will it mean for multinational corporations, the U.S. corporate tax system and the Biden administration's proposals to raise corporate tax rates? It is too soon to tell, but here's a quick guide to what the agreement might and might not do and the obstacles to adopting it.

What exactly did the finance ministers agree on?

Despite the fanfare, this was simply an agreement to reach an agreement — with a goal of further agreement at the G20 summit on July 9-10. Many questions, large and small, remain.

While the G7 supported a global minimum tax, its communiqué referenced a minimum rate of "at least" 15%, suggesting continuing disagreement about the precise rate. And little detail was offered about the mechanisms to allocate more income to jurisdictions where products and services are ultimately consumed.

Was the announcement significant?

Yes, in several ways, even though it is incomplete. It signals a move toward a more uniform, global structure for corporate tax, and a consensus that governments should attempt to curb tax competition.

- The U.S. is actively leading the discussion and appeared, for the first time, to fully subscribe to the two-pronged conceptual scheme the Organisation for Economic Co-operation and Development has been discussing for years.

The OECD framework consists of rules to require companies to recognize more income in end markets ("Pillar One") and to pay minimum tax rates ("Pillar Two"). Pillar One addresses the concerns of countries that argue that technology companies are making profits from their citizens without paying enough tax in the jurisdiction. Pillar Two targets tax competition between countries.

- The 15% minimum rate in the G7 statement suggests a consensus for a level higher than the rates in effect today in several jurisdictions (including Ireland), but significantly lower than the Biden administration's proposed 21% minimum rate for foreign income of U.S. companies.
- The minimum rate would be applied on a country-by-country basis, so companies could not offset high taxes in one market with lower taxes in another.

What the G7 Ministers Said

"We strongly support the efforts underway through the G20/OECD Inclusive Framework to address the tax challenges arising from globalisation and the digitalisation of the economy and to adopt a global minimum tax. We commit to reaching an equitable solution on the allocation of taxing rights, with market countries awarded taxing rights on at least 20% of profit exceeding a 10% margin for the largest and most profitable multinational enterprises. We will provide for appropriate coordination between the application of the new international tax rules and the removal of all Digital Services Taxes, and other relevant similar measures, on all companies. We also commit to a global minimum tax of at least 15% on a country by country basis. We agree on the importance of progressing agreement in parallel on both Pillars and look forward to reaching an agreement at the July meeting of G20 Finance Ministers and Central Bank Governors."

– G7 Finance Ministers & Central Bank Governors Communiqué, June 5, paragraph 16

What will this mean for the foreign income of U.S. companies?

That is not yet clear. The 2017 tax reforms that lowered the basic statutory corporate tax rate to 21% added provisions to collect more tax on foreign subsidiary income (primarily through a provision known by its acronym GILTI), albeit at more favorable rates. There is no sign the Biden administration will abandon that structure; to the contrary, it has proposed tightening rules and raising rates for foreign income.

If the U.S. adopts the Pillar One approach, that could cause U.S. companies to recognize more income in higher-tax countries. Absent coordination mechanisms, they could also face double taxation. At the same time, the Biden proposals include new restrictions on foreign tax credits. The bottom line is that many U.S. multinationals may see higher global tax rates.

Will this affect the Biden administration's proposed rate increases?

The administration proposed to raise the basic statutory rate for corporations from 21% to 28% and the minimum tax on foreign income from 10.5% to 21%, as well as to deny deductions for payments made to low-tax affiliates.

If other countries set their rates at or not far above the 15% minimum, a 28%/21% structure could place

U.S. companies at a significant competitive disadvantage. That could put pressure on the White House to compromise on rates. The 28% proposal already faces significant opposition in the U.S. Senate. But coming down from the 28%/21% rates would cut into the revenue increases that the administration has been relying on to fund major spending programs.

Does the G7's scheme have implications for the digital services taxes (DSTs) some countries recently imposed?

Pillar One is supposed to substitute for the DSTs that have been proliferating, and which mainly affect large U.S.-based technology companies. The G7 communique stated that an agreement would "provide for appropriate coordination between the application of the new international tax rules and the removal of all Digital Services Taxes."

The U.S. and the technology companies have complained that the DSTs single out a particular industry and home country. It remains to be seen if the final Pillar One scheme addresses or reinforces these concerns.

What are the odds the G7/OECD structure will be adopted?

Inevitably, there would be winners and losers, both companies and countries. Lower-tax jurisdictions may lose investment and tax revenue as their rate advantage is removed. And shifting the site of income recognition is a zero-sum game that will benefit some countries at the cost of others. Hence, there is likely to be opposition and significant negotiation over the scope of these rules and the relevant applicable rates.

In the U.S., some Republicans have voiced objections to the G7 arrangement, saying it cedes taxing authority to other countries and discourages investment and growth by raising business tax rates.

The EU is a question mark. Any EU-wide directive would require unanimity, which is unlikely. And doubts remain regarding the ability of EU member states to implement these changes unilaterally.

But many believe that unanimity is not needed to make the system work as long as there is agreement among a critical mass of jurisdictions that host enough major multinationals. If those headquarter jurisdictions adopt rules taxing the income earned by low-tax subsidiaries or deny deductions for payments made to low-tax affiliates, those "sticks" could eliminate the advantages of booking income in lower-tax countries.

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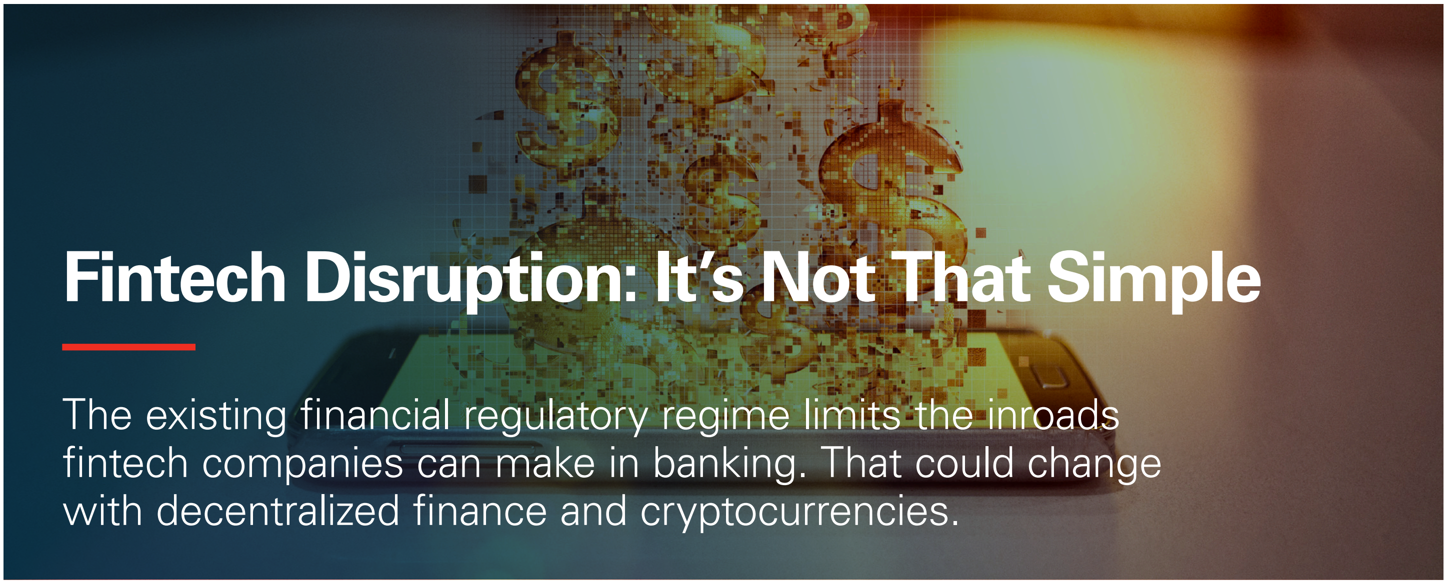

Fintech Disruption: It's Not That Simple

The existing financial regulatory regime limits the inroads fintech companies can make in banking. That could change with decentralized finance and cryptocurrencies.

- Financial technology companies have driven innovation in the ways consumer financial services are delivered.
- But regulatory and structural considerations mean that fintech companies still depend on traditional banks for key functions.
- The rise of blockchain-based decentralized finance and cryptocurrencies challenge the status quo.

The rise of fintech disruption

Technology companies enable our communication, facilitate our social interaction, provide our entertainment, help us get around and shape our buying habits. The past decade has also seen rapid technology-driven innovation in consumer financial services: peer-to-peer payments; new methods to spend in-person and online; online borrowing for a home, car, education or general spending; decentralized finance; and digital investment, retirement planning and insurance services.

Forty percent of U.S. financial decision-makers report having at least one fintech account, according to McKinsey. This penetration of technology poses a risk of major disruption to traditional financial services firms. According to PwC, almost 90% of global financial services firms fear losing revenue to fintech challengers.

For many technology companies, expansion into financial services offers not only the prospect of new revenue streams but a valuable window into a consumer's interests and behaviors.

Regulatory and structural obstacles for tech companies seeking to offer bank-like services

The existing bank regulatory regime creates significant barriers for technology companies looking to challenge traditional banks. In the United States and Europe, the core function of holding customer deposits may be performed only by bank. In addition, access to traditional payments systems and cards networks is generally limited to banks.

But banks are subject to a comprehensive and ongoing regulatory regime affecting virtually every

73 million

Blockchain wallet users worldwide, May 2021

Source: Statistica

Cross-border payments and settlements

Leading use of blockchain technology

Source: International Data Corporation

239 totaling $3 billion

Q1 2021 venture investments in cryptocurrency and blockchain startups

Source: PitchBook

48%

Projected compound annual growth rate in blockchain spending 2020-2024

Source: International Data Corporation

aspect of operations. That is hard to square with the fast-moving, trial-and-error, higher-risk-appetite approach common at young technology companies. And, in most cases, owning a bank is not even an option. For example, U.S. law generally prohibits a bank from being owned by, or affiliated with, any company that is engaged in non-financial activities. This is based on the long-standing U.S. policy to keep banks separate from general commerce.

To avoid these regulatory constraints, many U.S. fintech companies offer consumers banking services indirectly by collaborating with banks. These partnerships often take the form of "white label" arrangements where the branding, user interface and customer experience is driven by the technology company, but the underlying financial "plumbing" of the bank account resides with a bank. If you read the fine print, you will often see that, behind the fintech brand, the deposit and lending products are being provided by a bank unaffiliated with the brand. This allows the technology company to gain many benefits of the customer relationship without subjecting itself to the regulatory restrictions imposed on banks. But it means that ultimate control of the relationship and some portion of the economics belong to the unaffiliated bank.

More recently, a few fintech companies have taken the plunge and formed or acquired their own banks. Doing so entails significant time and investment and the uncertainty of the regulatory approval process. Other fintech companies have sought to form or acquire quasi-bank entities, such as industrial banks, industrial loan companies, trust companies and other limited-purpose charters. These can engage in certain types of banking activities, including some forms of deposit-taking, but the parent does not face the wide-reaching regulatory implications it would owning a full-fledged bank.

Blockchain technology could displace the status quo

The blockchain technology underlying cryptocurrencies can support a broad range of decentralized finance (DeFi) services that could upend the central function that traditional, regulated banks play. It could lead to widespread disintermediation of financial institutions.

DeFi encompasses a wide range of services traditionally provided by financial institutions, including decentralized exchanges (DEXes); decentralized borrowing and lending applications (DApps); yield farming; and liquidity mining. Using DeFi applications and the cryptocurrencies that run through them, users can engage in financial transactions that would otherwise require a trusted central party, such as a financial institution. For example, lenders and borrowers can transact business through decentralized pools that are cross-border and, to date, unregulated.

As a result, participants can hold and exchange value outside the plumbing of the traditional bank-centric payments system. This has the potential to be cheaper, faster and more efficient. It can also be anonymous — which can be appealing to participants, but worrying to policy makers, regulators and law enforcement.

Established financial institutions are keenly aware of both the upside and the potential threat from DeFi. A research paper by ING Bank cites advantages to DeFi, including flexibility, speed of transactions, accessibility, interoperability, borderlessness and transparency. Those could make DeFi a rival to traditional banking, but could also spur innovation by traditional financial institutions, the authors said.

Today there are still practical barriers to DeFi transactions and cryptocurrencies penetrating the mainstream economy. DeFi transactions provide high yields because they remain highly risky and unregulated. Cryptocurrencies still require, in almost all cases, a traditional bank or payment source as an entry or exit ramp. For example, if you run a restaurant, you might allow diners to pay with cryptocurrency using a mobile app, but you would still need to exchange the cryptocurrency into traditional fiat currency in order to pay your employees and suppliers, who are unlikely to accept cryptocurrency at present. The current need to exchange cryptocurrency remains a sticking point in the evolution of payments away from the traditional banking system.

Governments are struggling to adapt their regulatory regimes to the rise of cryptocurrencies and other blockchain technology. The regulation of cryptocurrencies and DeFi more broadly will determine the role played by banks and other traditional financial institutions.

What to watch

With technology developments and innovation, the boundaries between traditional banks and fintech companies will continue to blur and evolve. Here are key things to watch:

- The shape of continued partnerships and collaboration between technology companies and banks
- Increased willingness of fintech companies to pursue bank and quasi-bank charters
- Potentially explosive growth of DeFi and cryptocurrency that would erode the historical position of banks as the structural center of payments flow
- Continued efforts by governments and regulators to interpret, adapt and expand traditional regulatory regimes to encompass DeFi and cryptocurrencies.

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Interlocking Boards: The Antitrust Risk You May Never Have Heard Of

A mostly forgotten statute barring competitors from having representatives on each other's boards could be used by regulators if pressure builds for antitrust enforcement in the tech industries.

- Tech companies are particularly vulnerable to interlocking board issues because their businesses can evolve rapidly and their competitors change.
- Acquisitions and spin-offs can create inadvertent interlocks.
- Companies should periodically review the boards on which their directors and officers serve.

For the past decade, there has been mounting bipartisan pressure for more aggressive antitrust enforcement in the U.S., especially against large technology companies. Last year, the Republican-led Department of Justice (DOJ) and the Federal Trade Commission (FTC) sued both Google and Facebook for alleged abuses of monopoly power. Congress conducted an antitrust investigation of major technology companies, and sweeping legislation has been proposed to strengthen policing of mergers and conduct by dominant firms. The Biden administration is widely expected to continue this more aggressive approach to antitrust.

Most of the discussion has focused on mergers and the use that major tech companies make of the power they have acquired. But a more obscure law prohibiting interlocking directorates could be an appealing tool for regulators, particularly in the tech sector. Regulators have invoked the once-dormant law several times in the last dozen years, so directors and their companies should be aware of its strictures and the circumstances that might bring it into play.

The mere risk of anticompetitive harm triggers the ban

Since 1914, Section 8 of the Clayton Act has prohibited interlocking directorates — when competing corporations are represented on each other's boards. In 1990, the act was amended to add officers, thereby barring anyone from serving as a director *or officer* of any two competitors, defined as businesses where "the elimination of competition by agreement between them would constitute a violation of the antitrust laws." There are exemptions and safe harbors, including one based on the degree of overlap in the businesses, so minor competition at the fringes of core businesses may not trigger the law. But the definitions are broad enough to potentially encompass many companies in the same industry, even in the absence of direct competition.

Unlike most other antitrust provisions, Section 8 does not require any actual anticompetitive behavior. It is enough that companies *could* violate the law by reaching an anticompetitive agreement. If the potential to violate the act exists, the companies are prohibited from sharing directors or naming directors or officers to the other's board. As one court said, the law was designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."

Section 8 was revived in the last two administrations

It has been more than 40 years since the federal government has filed suit under Section 8, but the law was invoked by both the Obama and Trump administrations.

One case drew a great deal of attention: an FTC investigation of Apple's and Google's boards in 2009. Up to that point, Apple was primarily a maker of computers and phones and Google was a search engine, so they were not seen as direct competitors, and they shared two directors, Google CEO Eric E. Schmidt and Apple Chairman Arthur Levinson. However, by the late 2000s, as Google prepared to launch its Android mobile operating system, the two companies arguably were on the verge of becoming competitors. Ultimately, Mr. Schmidt resigned from Apple's board and Mr. Levinson from Google's without the FTC formally initiating action.

In 2016, during the Obama administration, the DOJ challenged a transaction in which Tullet Prebon, an electronic trading platform, was to acquire a business line of ICAP, a competitor, in exchange for stock that would have given ICAP a 19.9% stake in Tullet Prebon and the right to nominate one member of its board. After the DOJ voiced concerns that the transaction would give ICAP a director on the board of a competitor, the transaction was restructured so ICAP would receive no stake in Tullet Prebon or board representation.

Section 8 also received attention under the Trump administration. In 2018, the head of the DOJ Antitrust Division raised concerns about cable operator Comcast appointing executives of its NBC Universal broadcast subsidiary to the board of Hulu, a video streaming service in which Comcast held a 30% stake. As streaming was increasingly seen as competing with cable, having representatives on Hulu's board potentially ran afoul of Section 8. (Disney's purchase of Comcast's Hulu stake in 2019 ultimately rendered the issue moot.) In a 2019 blog posting titled "Interlocking Mindfulness," the head of the FTC's competition bureau stressed that businesses generally should be mindful of the law.

Where Section 8 may bite

Section 8 does not carry the monetary penalties that other antitrust statutes do, but the fact that the government need not show any anticompetitive action makes it an easy tool to reach for as pressure mounts to enforce antitrust laws more vigorously. And it can force companies to remove directors and deal with the associated public fallout.

Tech companies may be particularly vulnerable to Section 8 for a number of reasons:

- Who is and is not a competitor can change rapidly with evolving technology and shifting business strategies and product lines. Simply adding new functionality to an existing product can generate competition with new companies, potentially creating an interlock issue.
- Tech companies regularly invest in startups and engage in M&A activity that can involve competitors, thereby inadvertently creating interlocks.
- Companies may share investors such as venture capitalists whose stakes are not large enough to trigger other antitrust laws, yet Section 8 could apply if they are represented on the boards.
- Among early-stage companies, it is common to have multiple venture capital investors, each of whom may hold stakes in other companies that are potential competitors.

Best practices

In the current pro-enforcement environment, businesses should be on the lookout for possible Section 8 issues, especially in the tech industry. A short list of best practices:

- Periodically review the other boards on which your company's directors or executives sit for potential Section 8 issues.
- Be alert to changes in your business or at other companies with which your company has an interlock and may compete.
- Consider interlock issues when conducting M&A. Acquiring a new business often expands the acquirer's list of competitors.
- In spin-offs, be on the lookout for potential Section 8 issues if some directors will sit on the boards of both the former parent and the newly independent company.
- When selecting new directors, consider whether they are being chosen for expertise gained as a director of a company that might be viewed as a competitor or could become one.

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