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Putting Boards on Notice: FTC Announces First Section 8 Enforcement Action Since the 1980s

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On August 16, the U.S. Federal Trade Commission (“FTC”) announced a consent order resolving allegations surrounding natural gas producer EQT Corporation’s (“EQT”) proposed acquisition of certain natural gas assets from private equity firm Quantum Energy Partners (“Quantum”). The FTC alleged that the proposed acquisition would result in an illegal interlocking directorate in violation of Section 8 of the Clayton Act and, in combination with a pre-existing joint venture, an unfair method of competition in violation of Section 5 of the FTC Act due to the potential for anticompetitive information exchange. In a statement accompanying the complaint and consent order, FTC Chair Lina Khan called the action “notable” because “it signals a return to the Commission’s prior approach of seeking binding prospective relief through consent orders” and “expands upon the remedies previously sought” for alleged violations of Section 8.¹ The consent order delivers what the FTC describes as “ground-breaking structural relief,” including an agreement to prospectively prohibit the alleged interlock, dissolve a pre-existing joint venture, and obtain FTC prior approval over certain future director and officer appointments to other industry competitors.²

What is an Interlocking Directorate?

Section 8 of the Clayton Act prohibits interlocking directorates, which occur when a person simultaneously serves as an officer or director of two competing corporations, subject to limited exceptions based on the size of the corporations and the scope of competitive sales.³ Interlocking directorates are a *per se* violation of the antitrust laws due to the perceived risk that such a structure facilitates the exchange of competitively sensitive information and undue coordination. In other words, an offending interlock is deemed unlawful without considering factors such as market shares or actual effect on competition.

¹ Statement of Chair Lina M. Khan, Joined by Comm’r Rebecca Kelly Slaughter and Comm’r Alvaro Bedoya, In the Matter of EQT Corporation, Commission File No. 221-0212 (Aug. 16, 2023),

https://www.ftc.gov/system/files/ftc_gov/pdf/2210212qeteqtkhanstatement_0.pdf.

² Press Release, Fed. Trade Comm’n, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Aug. 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt>.

³ 15 U.S.C. §§ 19(a)(1)–(2).

The EQT/Quantum complaint and consent order is significant because it marks the FTC's first formal Section 8 enforcement in nearly 40 years. For many years, the FTC and DOJ addressed Section 8 violations by dismissing actions or closing investigations without formal challenges or consent orders after the corporations resolved the interlock.⁴ Over the last year, the DOJ has sought to reactivate Section 8 – which Assistant Attorney General Jonathan Kanter described as “an important, but under enforced, part of our antitrust laws” – by undertaking a broad review of potentially unlawful interlocks.⁵ The DOJ's enforcement efforts thus far have resulted in 15 directors resigning from 11 boards across a wide range of industries.⁶

The FTC's Expansion of Section 8 Remedies in the Quantum-EQT Enforcement Action

Under the transaction agreement, EQT proposed to acquire THQ Appalachia I, LLC (“Tug Hill”) and THQ-XcL Holdings I, LLC (“XcL Mainstream”) from Quantum for approximately \$2.6 billion in cash and 55 million shares of EQT stock, which would have made Quantum one of EQT's largest

shareholders. The proposed transaction also required EQT to “take all necessary action to facilitate” the appointment of Quantum's CEO, or another Quantum-designated director, to EQT's board. Roughly two months after the transaction was announced, EQT publicly announced that Quantum had informed it that, out of an abundance of caution and to ensure compliance with Section 8, it no longer sought to appoint its CEO or another designee to EQT's board, but reserved the right to do so in the future.⁷

Nevertheless, the FTC alleges in the EQT/Quantum complaint that the proposed transaction would have created an unlawful interlocking directorate because EQT (the nation's largest producer of natural gas) allegedly competes directly with Quantum's remaining portfolio companies that produce and sell natural gas in the Appalachian Basin.⁸ As noted above, the FTC's consent order goes beyond prohibiting the alleged interlock – the typical remedy sought in Section 8 investigations – by prohibiting, absent FTC prior approval, any Quantum-affiliated individual from serving on the board of any of the top 7 natural gas producers in the

⁴ For example, in 2009, Apple announced the resignation of Google's then-CEO Eric Schmidt from its board during the FTC's investigation into potential unlawful interlocks between Apple and Google. See Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board (Aug. 3, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding-announcement-google-ceo-eric>. In the merger context, the DOJ announced in 2016 that the restructuring of a \$1.5 billion transaction between Tullett Prebon Group Ltd. (“Tullett Prebon”) and ICAP plc resolved its Section 8 concerns. The revised agreement provided that ICAP would not own any part of Tullett Prebon and would have no right to nominate a member of Tullett Prebon's board. See Press Release, Dep't of Justice, Antitrust Div., Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (July 14, 2016), <https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses-concerns>.

⁵ Press Release, Dep't of Just., Antitrust Div., Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

⁶ Press Release, Dep't of Just., Antitrust Div., Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates (Aug. 16, 2023), <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing>.

⁷ EQT Corporation, Form 8-K (Nov. 1, 2022).

⁸ Complaint, *In the Matter of EQT Corp.*, FTC File No. 221-0212, ¶¶ 1, 3, https://www.ftc.gov/system/files/ftc_gov/pdf/2220212eqtquantumcomplaint.pdf.

Appalachian Basin for as long as Quantum holds EQT shares.⁹

Although Section 8 refers to simultaneous board (or officer) service by a “person,” the EQT/Quantum complaint reaffirms the agencies’ position that an entity qualifies as a “person” and therefore may violate Section 8 by designating two different individuals to serve on the boards of competing corporations. The complaint alleges that the appointment of a Quantum-designated director to EQT’s board, even if that individual had no connection to an EQT competitor, would create an illegal interlock because the individual would be an agent of Quantum and under its control.¹⁰

Further, while Section 8 on its face applies only to interlocks among “corporations,” the agencies take the position that the statute applies equally to all modern corporate forms. Chair Khan expressly stated that the FTC’s action “makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations.”

This enforcement action is also notable because it involved a potential *future* interlock. Quantum’s designee had not been appointed to EQT’s board, and Quantum had already stated that it would not immediately seek the EQT board seat, in part to ensure compliance with Section 8. Yet, the FTC was willing to find liability because the unlawful interlock *could* happen in the future, highlighting that antitrust risk may arise merely from the right to appoint.

Standalone Section 5 Enforcement

The FTC separately alleges that the information exchange facilitated by the proposed transaction and a separate, pre-existing joint venture, The Mineral Company (“TMC”), between Quantum and EQT constitutes an unfair method of competition in violation of Section 5 of the FTC Act.¹¹

According to the FTC, the proposed transaction would have given Quantum control over approximately 11% of EQT’s stock, making it one of EQT’s largest shareholders. The FTC alleges that this shareholder position would have given Quantum the opportunity to communicate directly with EQT about competitively sensitive information and direct or otherwise influence EQT’s competitive actions or strategies. Further, by joining EQT’s board, the complaint alleges that the (not-yet-appointed) Quantum-designated director would have both access to EQT’s competitively sensitive information and the opportunity to divulge competitively sensitive information from the competing companies that Quantum manages or controls.

The complaint also alleges that TMC, a separate joint venture formed by Quantum and EQT in 2020 dedicated to purchasing Appalachian Basin mineral rights for exclusive use by EQT, violated Section 5 by creating additional opportunities for sharing competitively sensitive business information. According to the FTC, Quantum and EQT could inform each other about their future plans for the acquisition of mineral rights through the joint venture. Notably, the Commission makes no allegation that improper information sharing actually occurred.

⁹ Decision and Order, *In the Matter of EQT Corp.*, FTC File No. 221-0212, § III (Consent Order), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212EQTQuantumProposedOrder.pdf.

¹⁰ Complaint, *In the Matter of EQT Corp.*, FTC File No. 221-0212, ¶ 39, https://www.ftc.gov/system/files/ftc_gov/pdf/2220212eqtquantumcomplaint.pdf.

¹¹ Complaint, *In the Matter of EQT Corp.*, FTC File No. 221-0212, ¶¶ 42–46, https://www.ftc.gov/system/files/ftc_gov/pdf/2220212eqtquantumcomplaint.pdf.

To resolve these concerns, the consent order requires Quantum to divest the EQT shares and unwind TMC and any related non-compete provisions.¹²

The FTC has not challenged a transaction as a “standalone” violation of Section 5 in decades. As Chair Khan wrote in her statement, this action “should remind market participants that transactions that might not strictly violate Section 7 can still pose a risk to competition that the FTC has a statutory obligation to address.”¹³

Increasing State Interest in Interlocking Directorates

On the same day that the FTC announced the complaint and consent order, a consent judgment adopting the terms of the FTC’s consent order was entered as part of a settlement agreement between EQT, Quantum, and the Commonwealth of Pennsylvania.¹⁴ This state action suggests that state attorneys general are becoming increasingly interested in interlocking directorate enforcement.

Key Considerations

The FTC’s enforcement action in EQT/Quantum serves as additional evidence that the agencies are looking “beyond price” as they assess the potential for merger-related harms. The consent order represents at least four means of expanding the FTC’s enforcement efforts:

- First, the FTC is willing to find liability based on speculation that something improper may happen in the future, such

as an information exchange that has not yet occurred or a board seat that has not yet been taken.

- Second, the FTC continues to push for stronger remedies – including both prospective (e.g., an expanded role for prior approvals) and retrospective (e.g., unwinding a prior joint venture) relief – in an effort to increase punishment, deterrence, and detection of potentially anticompetitive conduct.
- Third, the FTC is making increasingly-broad use of its statutory authority, as it did here to bring Clayton Act Section 8 and FTC Act Section 5 allegations in an M&A context, even where it alleged no wrongdoing under the statute typically relied upon to challenge M&A deals (Clayton Act Section 7).
- Fourth, the FTC is reviewing minority shareholder positions more generally for their potential to facilitate the exchange of competitively sensitive information and improperly influence competitive strategies, even when the shareholder does not have control of a board seat or other governance rights.

More than ever, it is important to assess antitrust risk early and with a broad perspective to identify potential risks and mitigate them in advance through protections and protocols.

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¹² Decision and Order, *In the Matter of EQT Corp.*, FTC File No. 221-0212, §§ IV, XI (Consent Order), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212EQTQuantumProposedOrder.pdf.

¹³ Statement of Chair Lina M. Khan, Joined by Comm’r Rebecca Kelly Slaughter and Comm’r Alvaro Bedoya, In the

Matter of EQT Corporation, Commission File No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212qetqtkhanstatement_0.pdf.

¹⁴ Final Consent Judgment, *Pennsylvania v. EQT Corp.*, No. 2:23-cv-1483 (W.D. Pa. Aug. 16, 2023).

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