

FTC Prohibits Interlocking Directorate and Enforces Standalone Violation of Section 5 of the FTC Act

For the first time in 40 years, the Federal Trade Commission (“FTC”) has enforced Section 8 of the Clayton Act, which prohibits interlocking directorates. In the same matter, the FTC also asserted an alleged standalone violation of Section 5 of the FTC Act, which prohibits unfair methods of competition, for the first time in decades.

On August 16, 2023, the FTC approved a consent order settling charges that a proposed transaction between private equity firm Quantum Energy Partners (“Quantum”) and natural gas producer EQT Corporation (“EQT”, and together, “the entities”) violated the antitrust laws.¹ The proposed transaction would have given Quantum the right to appoint an EQT board member in connection with EQT’s \$5.2 billion cash-and-stock acquisition of two Quantum entities. Quantum would have also received 55 million shares of EQT stock, in addition to the cash consideration.² The FTC charged that Quantum and EQT are competitors in the production and sale of natural gas in the Appalachian Basin.³ The FTC alleged that:

- the board appointment right violated Section 8’s *per se* prohibition on directors and officers serving simultaneously on the board of directors of competitors;
- the potential for the entities to exchange competitively-significant, non-public information or influence competitive decision-making violated Section 5’s prohibition on unfair methods of competition; and

¹ Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, QEP Partners/EQT Corporation, FTC Matter No. 221-0212 (Aug. 16, 2023), at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/2210212qetqtkhanstatement_0.pdf (“Commissioners’ Statement”); Complaint ¶¶ 3, QEP Partners/EQT Corporation, FTC Matter No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2220212egtquantumcomplaint.pdf (“Complaint”); see also Agreement Containing Consent Order, QEP Partners/EQT Corporation, FTC Matter No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212egtquantumacco.pdf (“Consent Agreement”).

² Under the proposed transaction, EQT, the nation’s largest natural gas producer, would acquire Quantum’s THQ Appalachia I, LLC, which is the eleventh largest Appalachian Basin natural gas producer. EQT would also acquire Quantum’s THQ-XcL Holdings I, LLC, a transporting and processing entity. Quantum would have become one of EQT’s largest shareholders, controlling approximately 11% of its stock, and designated a board member, likely Quantum’s CEO and Investment Committee chairman. See Press Release, “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-egt?utm_source=govdelivery (“Press Release”); Complaint ¶¶ 2–3, 16–17.

³ Commissioners’ Statement, *supra* note 1, at 1; Complaint, *supra* note 1, ¶ 38; see also Analysis of Agreement Containing Consent Order to Aid Public Comment, QEP Partners/EQT Corporation, FTC Matter No. 221-0212 (Aug. 16, 2023), at 3, https://www.ftc.gov/system/files/ftc_gov/pdf/2210212egtquantumaapc.pdf (“Analysis”).

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- a preexisting joint venture between the entities independently violated Section 5.⁴

The consent order attempts to remedy the FTC's concerns – and allows the acquisitions to proceed – by prohibiting Quantum from appointing any individual to the EQT board, obligating Quantum to divest EQT shares received from the acquisitions, and ordering the unwinding of the preexisting joint venture, among other requirements.⁵

I. Alleged Section 8 Violation

The FTC charged that the proposed transaction would include a board interlock between competitors, a *per se* violation of Section 8,⁶ which prohibits the same person from serving as a director or officer of two competing companies whose combined sales exceed certain thresholds, subject to *de minimis* exemptions.⁷ The FTC also views Section 8 as prohibiting a company from appointing any individual to a competitor's board. A Section 8 violation does not require any showing of harm to competition.⁸ Here, the settlement prohibits Quantum from appointing any person to EQT's board and, to limit future possible issues, requires EQT to obtain prior approval before appointing anyone to the boards of the seven largest Appalachian Basin natural gas producers, a vast majority of the market.⁹ Quantum may not solicit proxies or otherwise influence EQT's board or management.¹⁰ Additionally, EQT may not designate any person to serve in Quantum managerial roles.¹¹

II. Alleged Section 5 Violations

The FTC also charged that the proposed transaction would violate Section 5's prohibition on unfair methods of competition.¹² The FTC alleged that Quantum, with a board seat and as one of EQT's largest shareholders, would be able to influence EQT's competitive decision-making and access its competitively-sensitive information.¹³ In addition to prohibiting any Quantum designee from serving on EQT's board, the settlement requires Quantum to sell the EQT shares it will receive from the acquisition and prevents Quantum from acquiring any additional EQT shares without FTC approval.¹⁴ If Quantum does not sell its shares by a certain date, the shares will be liquidated by a trustee.¹⁵ Prior to Quantum selling the shares, they will be held in a voting trust and voted by the trustee *pro rata* based on the votes of all other EQT shareholders. Quantum and EQT also may not enter into noncompete agreements other than those in

⁴ Complaint, *supra* note 1, ¶¶ 47–48.

⁵ Commissioners' Statement, *supra* note 1, at 1, 7.

⁶ 15 U.S. Code § 19 (2020) (Section 8 of the Clayton Act states that “no person shall, at the same time, serve as a director or officer in any two corporations . . . that are (a) engaged in whole or in part in commerce; and (b) 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[.]”).

⁷ *Id.*; see [here](#) for our previous memorandum discussing the relevant Section 8 thresholds.

⁸ Commissioners' Statement, *supra* note 1, at 2.

⁹ Analysis, *supra* note 3, at 4–5.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 4.

¹² 15 U.S. Code § 45 (2020).

¹³ Commissioners' Statement, *supra* note 1, at 7.

¹⁴ Analysis, *supra* note 3, at 4–5.

¹⁵ *Id.* at 5.

connection with and ancillary to the sale of a business or assets and must design, maintain, and operate antitrust compliance programs.¹⁶

Additionally, the consent order also requires Quantum and EQT to unwind their pre-existing joint venture: The Mineral Company, which purchases mineral rights in the Appalachian Basin.¹⁷ The FTC characterized the joint venture as an example of a culture among natural gas producers in which a “tight-knit set of players rife with entanglements and a history of suspicious ventures and information exchange” engage in “signaling” to other market participants.¹⁸ It expressed concern that the joint venture allows for easy access to confidential, competitive business information, such as expansion plans, potential exploration activities, and the pace of mineral rights acquisitions, and noted it had “reason to believe” the entities already used the joint venture for such purposes.¹⁹ The FTC charged that the joint venture violated Section 5 and ordered the entities to unwind the joint venture.²⁰

III. Conclusion

This settlement gives a clear indication of the extent to which the FTC will actively enforce Section 8 and standalone Section 5 violations. While historically the FTC would dismiss or close an investigation after firms ended the board interlock at issue, the FTC noted in this case that “informal statements [we]re not producing an adequate level of compliance.”²¹ The FTC stated that this settlement “puts industry actors” on notice of its intention to enforce Section 8 and to seek relief using consent orders.²² The consent order also expands the historical approach of eliminating the specific interlock, by adopting a prior approval requirement for potential future director appointments that might violate Section 8. The FTC also took the opportunity to clarify that, despite referring to “corporations,” Section 8 also applies to limited liability companies and limited partnerships.²³ Frequent, non-corporate acquirers, such as private equity firms, may face additional scrutiny as they attempt to appoint their executives and partners to the boards of portfolio companies.

This settlement is the first example of the FTC implementing its November 10, 2022 policy statement announcing an expansion of Section 5 enforcement that departs from past FTC efforts.²⁴ See [here](#) for our previous memorandum on the announcement. The policy statement introduced significant uncertainty about the circumstances where commonplace business practices would be found to violate Section 5 and which, if any, justifications would be considered.²⁵ This settlement provides some insight into the FTC’s views on what constitutes a Section 5 violation. But, while the FTC has argued that Congress intended courts to defer to the FTC on expert agency decisions, it is

¹⁶ *Id.*

¹⁷ Complaint, *supra* note 1, ¶ 4; Commissioners’ Statement, *supra* note 1, at 5; Analysis, *supra* note 3, at 5.

¹⁸ Commissioners’ Statement, *supra* note 1, at 1; Analysis, *supra* note 3, at 4.

¹⁹ Commissioners’ Statement, *supra* note 1, at 7; Complaint, *supra* note 1, ¶ 4.

²⁰ Analysis, *supra* note 3, at 3; Complaint, *supra* note 1, ¶ 49; Commissioners’ Statement, *supra* note 1, at 2.

²¹ Commissioners’ Statement, *supra* note 1, at 3.

²² *Id.* at 4.

²³ *Id.* at 5 (“Section 8’s specific prohibition of interlocks among competitor ‘corporations’ pre-dates the development of other commonly used corporate structures, such as limited liability companies. Accordingly, [the FTC] must update [its] application of the law to match the realities of how firms do business in the modern economy. Today’s action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations.”).

²⁴ Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Fed. Trade Comm’n (Nov. 10, 2022), at 1 https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

²⁵ *Id.* at 10.

unclear if the judiciary will agree with that position in light of recent efforts to restrain federal administrative agency powers.²⁶

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Lauren Rackow (counsel) at 212.701.3725 or lrackow@cahill.com; or Ryan M. Maloney (associate) at 212.701.3269 or ryan.maloney@cahill.com; or email publicationscommittee@cahill.com.

²⁶ *Id.* at 7; see, e.g., *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2599 (2022); *Sec. & Exch. Comm'n v. Cochran*, 142 S. Ct. 2707 (2023); *Axon Enter., Inc. v. Fed. Trade Comm'n*, 142 S. Ct. 895 (2023).

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