

## Revised 2024 jurisdictional thresholds for interlocking directorates

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The Federal Trade Commission has announced revised thresholds for Section 8 of the Clayton Act. Under the new thresholds, a person may not serve as a director or officer of two competing corporations if each corporation has (1) aggregate capital, surplus, and undivided profits of more than \$48.559 million and (2) competitive sales of at least \$4.8559 million, and more than a certain percent of the corporation's total sales.

Under Section 8 of the Clayton Act, no person may simultaneously serve as a director of any two competing corporations (other than banks, banking associations, and trust companies) if each corporation has capital, surplus, and undivided profits aggregating more than \$10 million as adjusted based on change in the gross national product. The Federal Trade Commission (FTC) announcement indicates that the \$10 million as-adjusted value for 2024 is \$48.559 million (up from \$45.257 million in 2023).

This restriction does **not** apply, however, if competitive sales of the corporations are below a certain level, where "competitive sales" are defined as the "gross revenues for all products and services sold by one corporation in competition with the other," determined based on the annual gross revenues of the corporation's last completed fiscal year. Specifically it is not a violation to have this board overlap if:

- the competitive sales of **either** corporation are less than \$1 million as adjusted, with the as-adjusted value now set at \$4.8559 million (up from \$4.5257 million in 2023); or
- the competitive sales of **either** corporation are less than two percent of its total sales; or
- the competitive sales of **each** corporation are less than four percent of that corporation's total sales.

The updated dollar thresholds will take effect when they are published in the Federal Register this month. The FTC is required to revise these thresholds annually.

The Department of Justice (DOJ) has traditionally enforced Section 8's prohibition on interlocking directorates and current DOJ leadership has emphasized that Section 8 enforcement is a priority. The result is a number of instances where directors have resigned to resolve DOJ concerns. In addition, the FTC has also recently begun to prioritize Section 8 enforcement. In 2023, the Commission (1) brought an enforcement action applying the prohibition to non-corporate entities (even though the statute refers only to corporations), (2) assessed potential Section 8 violations in merger reviews (including questions about interlocking directorates in information requests sent to the transacting parties), and (3) alleged that an interlock may separately be a violation of Section 5 of the FTC Act's prohibition on "unfair methods of competition."<sup>1</sup>

In summary, the relevant jurisdictional thresholds for the restriction on board overlap to apply are below:

Threshold	Original amount	2024 adjusted thresholds
Aggregate capital, surplus, and undivided profits of each corporation	More than \$10 million	More than \$48.559 million
<b><i>De minimis</i> exemptions (The restriction on overlapping board participation does not apply if any of the below conditions are met.)</b>		
Amount of <b>either</b> corporation's competitive sales	Less than \$1 million	Less than \$4.8559 million
Percent of competitive sales of <b>either</b> corporation	Less than 2%	N/A
Percent of competitive sales of <b>each</b> corporation	Less than 4%	N/A

## FTC also updates civil penalty amounts

The FTC has also [updated the civil penalty amounts under its jurisdiction](#), pursuant to an annual requirement under the Federal Civil Penalties Inflation Adjustment Act Improvements Act (FCPIAA) of 2015.

Among other changes, the maximum civil penalties for the following were increased from \$50,120 to \$51,744, effective as of January 10, 2024:

- Premerger filing notification violations under the Hart-Scott-Rodino Improvements Act;
- Violation of a final Commission order regarding unfair or deceptive acts or practices;
- Civil actions for recovery of penalties for knowing violations of rules respecting unfair or deceptive acts or practices; and
- Civil actions for recovery of penalties for knowing violations of cease and desist orders respecting unfair or deceptive acts or practices.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**D. Jarrett Arp**

+1 202 962 7150  
jarrett.arp@davispolk.com

**Arthur J. Burke**

+1 212 450 4352  
+1 650 752 2005  
arthur.burke@davispolk.com

**Ronan P. Harty**

+1 212 450 4870  
ronan.harty@davispolk.com

**Suzanne Munck af Rosenschold**

+1 202 962 7146  
suzanne.munck@davispolk.com

**Ilana M. Rice**

+1 202 962 7139  
ilana.rice@davispolk.com

**Howard Shelanski**

+1 202 962 7060  
howard.shelanski@davispolk.com

**Caroline Ziser Smith**

+1 650 752 2009  
caroline.zisersmith@davispolk.com

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<sup>1</sup> *FTC challenges director interlock involving non-corporate entity*, Davis Polk & Wardwell LLP (August 23, 2023), <https://www.davispolk.com/insights/client-update/ftc-challenges-director-interlock-involving-non-corporate-entity>.