THE PECULIAR CASE OF HORIZONTAL DIRECTORS

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CPI ANTITRUST CHRONICLE MARCH 2023

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Directors wield increasing influence in corporate America, making pivotal decisions regarding corporate affairs and management. A robust literature recognizes directors' important role and examines their incentives and performance. In particular, scholars have worried that "busy directors" — those who serve on multiple corporate boards — may face time constraints that affect their performance. Director service on multiple boards leads to what has been termed as "director interlocks," or the connection between different companies sharing the same director. While existing literature has dealt with the concept of director interlocks, little attention has been paid to the prevalence of what I term as "horizonal directors": directors who serve on multiple corporate boards within the same industry. Horizontal directors stand at a unique intersection of antitrust law and corporate governance. Antitrust laws are meant to prevent competitors from colluding at the expense of consumers, while corporate governance is mostly focused on increasing shareholder welfare. Horizontal directors strain this subtle distinction between consumers and shareholders to its fullest extent. These directors may leverage their position to enable companies to coordinate or collude at the consumers' expense. Yet, the same horizontal directors may confer benefits to the shareholders of these companies, from providing industry specific expertise and connections to allowing companies to increase profits by demanding higher prices from consumers and therefore helping company performance, and improving shareholder value. This article provides a short overview of horizontal directors from corporate and antitrust perspectives and concludes with a discussion of recent FTC and DOJ enforcement showing the increased attention to the topic by both regulators and academics.

I. INTRODUCTION

In March 2023, the Department of Justice announced that five board directors at three companies stepped down after the antitrust division asked them about their "interlocking" directors.[2] This enforcement action reflects a new emphasis of the DOJ — horizontal directors. Indeed, the DOJ has not stopped there: In a speech earlier that month, antitrust chief Jonathan Kanter said that the department has seventeen active investigations into possible overlapping board violations.[3]

These DOJ enforcement actions underscore a significant concern for both antitrust law and corporate governance — the service of directors on more than one company in the *same* industry. In prior work, I have termed these directors "horizontal directors."[4] Horizontal directors are significant because they stand at a unique intersection of antitrust law and corporate governance. Antitrust laws are meant to prevent competitors from colluding at the expense of consumers, while corporate governance is mostly focused on increasing shareholder welfare. Since shareholders and consumers are often at odds, horizontal directors strain this subtle distinction to its fullest. On the one hand, they may enable competing companies in the same industry to coordinate or collude at the expense of consumers. Yet, companies may benefit from the industry expertise that these directors each bring to the table. Moreover, the same coordination that is a concern from antitrust law perspective may actually benefit the shareholders of these companies, allowing them to increase profits by having consumers pay more, therefore helping company performance and improving shareholder value.

Up until recently, regulators and academics have not focused on horizontal directors. The DOJ's actions reflect a much-needed attention to the horizontal aspect of director interlocks. This attention is particularly important not only in light of the specific prohibition on directors from serving on the boards of two competitors, but also against a backdrop of increased attention to market concentration and consumer welfare in the U.S. One layer of increased attention has revolved around the traditional question of market concentration in merger decisions. A second layer involves recent research into common ownership by institutional investors. This emerging literature has sparked a vivid academic and public debate regarding the effects of shareholder concentration on antitrust policy. Prominent scholars have raised concerns regarding the incentives of companies to compete where major institutional shareholders hold large equity positions in all competitors.

Yet, the board — a middle layer between market consolidation and common ownership — has, up until recently, been left underexplored from an antitrust perspective. Horizontal directors can have a similar, yet overlooked, anticompetitive effect on the market. In fact, horizontal directors could provide a much simpler route for collusion or unlawful coordination.

Importantly, horizontal directors are not merely an isolated outlier. In prior work, I have empirically documented a troubling reality: hundreds of busy directors serve on multiple companies operating within the same industry. Horizontal directors are still prevalent among U.S. public companies. There were 1,888 directors that served on the board of more than one company within the same industry in 2019. On a more granular level, there were 412 directors (10.8 percent of directors serving on more than one board) who served on at least two companies in the same industry per four-digit SIC code. Similarly, there were 250 directors (9.2 percent of the directors serving on more than one board) that served on at least two companies' boards within the same NAICS code.

Table 1. Number & Percentage of Busy Directors Sharing SIC/NAICS Within Boards Served

# of boards	SIC/ NAICS	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
2	SIC	140 (5%)	149 (5%)	180 (6%)	183 (6%)	195 (7%)	208 (8%)	209 (8%)	170 (7%)	169 (7%)	184 (7%)
	NAICS	104 (4%)	120 (4%)	144 (5%)	155 (5%)	165 (6%)	159 (5%)	147 (5%)	143 (6%)	151 (6%)	156 (6%)
3	SIC	101 (9%)	103 (9%)	123 (11%)	139 (12%)	129 (11%)	148 (13%)	150 (13%)	146 (14%)	154 (15%)	129 (14%)
	NAICS	80 (7%)	81 (7%)	99 (9%)	118 (10%)	115 (10%)	129 (11%)	132 (12%)	121 (12%)	123 (12%)	107 (12%)

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

3 Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy, Dep't of Justice (Mar. 2, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

4 Yaron Nili, *Horizontal Directors*, 114 N.W. L. Rev. 1179 (2020).

4	SIC	45 (14%)	43 (15%)	53 (18%)	70 (21%)	68 (19%)	85 (25%)	102 (29%)	73 (23%)	77 (23%)	67 (21%)
	NAICS	36 (11%)	40 (14%)	41 (14%)	57 (17%)	65 (18%)	62 (17%)	56 (17%)	65 (21%)	65 (20%)	63 (20%)
5	SIC	21 (24%)	19 (21%)	28 (29%)	28 (33%)	31 (31%)	24 (32%)	26 (39%)	38 (48%)	29 (38%)	22 (35%)
	NAICS	14 (16%)	14 (16%)	28 (29%)	23 (27%)	23 (23%)	19 (26%)	24 (36%)	35 (44%)	23 (30%)	14 (23%)
6	SIC	13 (36%)	8 (35%)	9 (53%)	8 (38%)	13 (59%)	9 (56%)	10 (77%)	7 (78%)	7 (58%)	9 (90%)
	NAICS	13 (36%)	10 (43%)	7 (41%)	5 (24%)	11 (50%)	7 (44%)	8 (62%)	5 (56%)	6 (50%)	9 (90%)
7+	SIC	1 (25%)	0 (0%)	5 (62%)	7 (78%)	6 (67%)	4 (44%)	2 (40%)	2 (67%)	3 (60%)	1 (25%)
	NAICS	1 (25%)	0 (0%)	5 (62%)	6 (67%)	5 (56%)	3 (33%)	2 (40%)	2 (67%)	3 (60%)	1 (25%)
Total	SIC	321 (7.4%)	322 (7.5%)	398 (9.2%)	435 (9.5%)	442 (9.7%)	478 (10.5%)	499 (11.3%)	436 (11.1%)	449 (11.2%)	412 (10.8%)
	NAICS	248 (5.7%)	265 (6.2%)	324 (7.5%)	364 (8%)	384 (8.4%)	379 (8.3%)	369 (8.4%)	371 (9.5%)	371(9.2%)	350 (9.2%)

Table 2 below further shows that horizontal directors as a percent of busy and total directors steadily increased over the last decade with a merely a slight decline seen in the last two years. For example, in 2010, 7.4 percent of all horizontal directors that sat on at least two boards were within the same SIC classification. This number increased by 7 percent on average each year from 2010 to 2016 but decreased by 2 percent in both 2018 and 2019. A similar trend was observed under the NAICS classification with an average increase in that metric of 8 percent each year with a decline of 3 percent in the last two years of the sample.

Table 2. Time Trend of Horizontal Directors

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
% of Industry-Horizontal Directors out of All Directors	16.9	17.1	17.6	18.2	18.2	17.8	17.3	19.7	19.5	18.8
% of Industry-Horizontal Directors out of Busy Directors	46.3	47.7	48.7	49.7	49.8	49.1	49.7	50.2	50.2	49.6
% of SIC-Horizontal Directors out of All Directors	2.7	2.7	3.3	3.5	3.5	3.8	3.9	4.4	4.3	4.2
% of SIC-Horizontal Directors out of Busy Directors	7.4	7.6	9.1	9.6	9.7	10.6	10.9	11.2	11	10.8
% of NAICS-Horizontal Directors out of All Directors	2.1	2.2	2.7	2.9	3.1	3	2.9	3.7	3.6	3.6
% of NAICS-Horizontal Directors out of Busy Directors	5.7	6.2	7.4	8	8.4	8.4	8.4	9.5	9.3	9.2

More recently, a group of Stanford researchers in the legal and medical fields evaluated overlaps in board membership of 2,241 public life science companies since 2000.[5] The study revealed results consistent with my own research. The study highlighted a network of potentially illegal interlocked boards within the life science industry, finding that "at any given time, 10-20 percent of board members [of biotech companies] are interlocked," with tenures 50 percent longer than non-interlocked directors.[6]

II. THE REGULATORY FRAMEWORK

The prevalence of horizontal directors is particularly striking against a regulatory framework that restricts it. Horizontal directorships are subject to both regulatory and market restrictions. Although antitrust, corporate, and securities laws do not explicitly ban horizontal directorships, regulatory and market restrictions provide an outer limit on horizontal directors' service. Antitrust laws prohibit directors from serving on boards of *competing* companies. Fiduciary duties, shareholder advisory firms, stock exchange rules, institutional investors' voting policies, and companies' policies add an additional layer of potential restrictions to horizontal directorships. I briefly detail these restrictions next.

A. Antitrust: Section 8 of the Clayton Act and Section 5 of the FTC Act

Section 8 of the Clayton Act prohibits an individual or entity from serving on the board of two competing companies. The purpose behind Section 8 is to ensure that companies are not engaging in anticompetitive behavior through a common director or officer. Horizontal directors that serve

5 Mark A. Lemley, Manjunath Anoop, Nathan Kahrobai & Ishan Kumar, *Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards* (October 19, 2022). https://ssrn.com/abstract=4253144 or http://dx.doi.org/10.2139/ssrn.4253144.

6 *Id.*

on boards of companies within the same industry risk violating Section 8. Therefore, determining whether horizontal directorships violate antitrust law depends on whether the two companies are considered "competitors."

Section 8's "competition" requirement is broad. Companies are "competitors" in the traditional sense, that is, if they "produce the same line of products in the same region and compete for the same business."[7] Companies are also deemed "competitors" if they sell "reasonably interchangeable products within the same geographic area,"[8] or "vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each."[9] Courts, in its application of "competitor" have focused "not only on the degree of actual interchangeability of use between the products of alleged competitors, but also on evidence concerning (1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products can be said to have distinctive customers."[10]

In addition to Section 8 of the Clayton Act, the government can prohibit horizontal directors under Section 5 of the Federal Trade Commission Act ("FTC Act") as an unfair practice or method of competition. Section 5 gives the FTC broad power to pursue per se violations and practices that violate the spirit of the Clayton Act. The FTC views its grant of power as the ability to "[p]lug the loopholes in section 8."[11]

B. Fiduciary Duty Law

Directors are agents of the corporation-principal, and therefore, owe fiduciary duties of care and loyalty to the corporation. Interlocking directors serve on two or more boards at the same time and owe concurrent fiduciary duties to each company. Since interlocking directors owe concurrent fiduciary duties, there is a heightened risk that they may violate their fiduciary duties. Said differently, if a director serves on the boards of Company A and Company B and, as a director of Company A, learns information that may impact Company B, questions arise as to whether that director can satisfy their fiduciary duties to both companies.

The potential conflicting loyalties that horizontal directors face is not uncommon. Delaware has well-developed case law interpreting allegations of duty of loyalty violations. Loyalty conflicts typically occur in the parent-subsidiary setting. Delaware courts have held that dual-seated directors, that is, directors who serve on the parent and the subsidiary's board, are not *per se*, or automatically, conflicted.[12] However, the Delaware court has found dual-seated directors to be conflicted if they violate the duty of good faith and fair dealing and there is an "absence of any attempt to structure [the] transaction on an arm's length basis."[13]

C. Interlocking Director Committee Limitations

The New York Stock Exchange ("NYSE") and the NASDAQ Stock Market create additional restrictions for horizontal directors. The NYSE and NASDAQ require that a majority of a company's board be independent. Director independence can depend on the director's or their family member's service in other companies. The NYSE standards, for instance, state that a director is not independent if the "director or an immediate family member, is, or has been with[in] the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee."[14] Because of these broad standards, a horizontal director serving on multiple boards risks losing their independence.

7 Dan A. Bailey, *Interlocking Directorates: A Sleeping Bear Awakens?*, https://baileycav.com/site/assets/files/1451/interlocking_directorates_-_a_sleeping_bear_awakens.pdf [https://perma.cc/7EJV-8ETB] (discussing *Protectoseal Co. v. Barancik*, 484 F.2d 585 (7th Cir. 1973)); see also *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686, 703–04 (N.D. Cal. 1976) ("sales in the same product and geographic market").

8 1 Earl W. Kintner et al., 5 Federal Antitrust Law § 42.11 (2019) (citing Am. *Bakeries Co. v. Gourmet Bakers, Inc.*, 515 F. Supp. 977, 980 (D. Md. 1981)).

9 *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 946 (9th Cir. 1981).

10 *Id.*

11 94 CONG. REC. A112 (1948).

12 See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

13 *Id.* at 710.

14 N.Y.S.E. Listed Company Manual (CCH) § 303A.02(b)(iv).

D. Proxy Advisory Firms, Investors and Companies

Glass Lewis and Institutional Shareholder Services, Inc. ("ISS") exert tremendous influence over corporate governance practices and board policies. Both proxy advisory firms have adopted policies that require companies to comply with certain practices to obtain the advisory firm's support. Since Glass Lewis and ISS support is crucial, the board tends to follow the firms' guidelines.

Glass Lewis and ISS have adopted polices limiting directors from serving on too many public company boards. These policies likely increase the pressure on firms to reduce the number of overlapping directors, including horizontal directors. Even though these policies only serve as an outer limit on extreme cases, they still have an impact. As the next section will demonstrate, the ratio of horizontal directors dramatically increases as they serve on more boards. Thus, even modestly limiting the number of boards a director can serve has a strong impact on horizontal directorships.

Finally, large institutional investors have adopted their own guidelines calling for limits on director service on other boards and companies themselves, at times, place limits on the service of their directors on other company boards.

III. HORIZONTAL DIRECTORS: CONTRASTING THE LAW WITH THE DATA

Antitrust law prohibits horizontal directorships in competing corporations. Yet, despite this prohibition, a significant number of directors serve on boards in the same industry, even narrowly defined. While industry measures, even as narrow as the NAICS and SIC classifications, are only a crude proxy for the potential of two companies to compete, it is nevertheless more likely that two companies operating in the same space will be considered competitors. This is especially true under the wide definition of competition that has been applied to Section 8. How can one explain this disparity?

There are several key factors that could explain the rise of horizontal directors against this regulatory backdrop. First, it could indeed be that horizontal directors do not serve on boards of competitors at all and therefore are not in violation of Section 8. Recent DOJ enforcement actions show this to not be the case, and recent studies focusing on specific industries (like the study focusing on the pharmaceuticals industry) further bring such premise into question.

Second, historically, the FTC and the DOJ have not brought Section 8 enforcement actions in court, but instead have relied on sporadic self-policing and behind-the-scenes actions to pressure violators. Indeed, by the FTC's own admission, the most frequent remedy is a board member's resignation of her own accord upon announcement of an investigation. Only recently, we have seen an uptick in DOJ attention to the topic and that may lead to more pronounced results in both the near and longer future.

The lack of clarity regarding what "counts" as competition and the discretionary power given to the FTC in applying the "competition" requirement regarding horizontal directors may also contribute to the low enforcement rates of Section 8 against horizontal directors. Current antitrust regulation focuses on direct competition, and while direct competition can be obvious, oftentimes it is not. Where the market in which a company is situated is unclear, the concept of competition could be problematic for directors serving on multiple companies' boards. As companies like Apple, Google, and Amazon increasingly expand into new markets, some argue that the current antitrust framework fails to account for the realities that currently exist with technology companies. In fact, critics argue that companies such as Facebook and Amazon limit competition even where, for instance, the target of an M&A transaction does not directly compete with the acquirer.

In sum, Section 8 lacks a bright-line-rule understanding of the "competitors" prerequisite. Additionally, the enforcement of Section 8 involves discretion, negotiations, and amicability, as well as a lack of publicity. The lack of a clear and public enforcement process adds a layer of difficulty in projecting FTC/DOJ enforcement and in deterring companies from violating Section 8 *ex ante*. Even if Section 8 were uniformly and diligently enforced, it does not regulate horizontal directorships involving two companies that operate in the same industry or SIC unless they are considered direct competitors. But, horizontal directorships that fall outside of Section 8's scope may still raise significant antitrust and corporate governance concerns.

IV. ZERO SUM PROPOSITION?

The prevalence of horizontal directors indicates that while other governance mechanisms — including state law, exchange rules, and shareholders' guidelines — may limit some instances of horizontal directorships beyond the scope of Section 8, they are far from an effective constraint on the pervasiveness of horizontal directors.

The policy implications that stem from the prominence of horizontal directors within public firms are twofold. First, legislative and regulatory reforms to Section 8 could help address the anticompetitive ramifications of horizontal directors. Second, to address horizontal directorships that do not fall within Section 8's terms but may still present corporate governance concerns, I argue that an improved disclosure regime may be warranted.

If directors serve competitor companies, even under a broader definition of competition, they may facilitate coordination to the detriment of consumers. Indeed, the intent of Section 8 was to "nip in the bud incipient violations of the antitrust laws."[15] Yet, the current regulatory framework is both over- and underinclusive. On the one hand, the Clayton Act prohibits horizontal directors among competitors. On the other, it does not provide any regulation of horizontal directors of noncompetitors. In addition, the enforcement and interpretation of Section 8's competition requirement are not uniform.

Legislative and regulatory reforms must not only address the issues raised by the current formulation of the Clayton Act but should also address the greater governance ecosystem of horizontal directors.

Indeed, some level of collaboration between companies within the same industry can be beneficial to consumers; therefore, antitrust laws only target efforts that lead to anticompetitive outcomes or collusion. Horizontal directors may provide value to the company and investors, such as contributing to the diffusion of beneficial corporate governance practices, networking and expertise. By sitting on boards of multiple companies in the same industry, horizontal directors gain intimate knowledge that can be a valuable asset to a director's ability to advise and monitor the management team. However, the presence of horizontal directors also presents concerns, such as an increased risk of antitrust collaboration, an increased risk of systemic governance risk, and decreased director independence. Furthermore, horizontal directors may facilitate anticompetitive practices that could further insulate management from market pressures which may lead to a loss of shareholder value in the long term.

Importantly, horizontal directors are not necessarily a zero-sum proposition. Companies could still tap the valuable aspects of horizontal directors while at the same time minimizing the concerns that they may present.

First, legislation that targets higher risk companies will be more effective at mitigating antitrust risks and will be easier to enforce uniformly, which will mitigate some of the current Section 8 underenforcement concerns. Some industries are more likely to have horizontal directors, and some of these horizontal-director-saturated industries also exhibit strong levels of industry concentration. Focusing the prohibition of horizontal directors on concentrated industries might strike a desired balance, allowing companies to enjoy the benefits these directors provide while prohibiting their presence in cases where the costs to competition are more likely to outweigh these benefits. For instance, Section 8 could be revised to exempt from the prohibition industries with an HHI that is below a certain threshold. Aggressively enforcing Section 8 for that subset of public companies would reduce significant antitrust risk.

Second, regulators could consider an ex ante design to Section 8 of the Clayton Act that would allow directors to apply for a waiver before accepting a horizontal directorship. By obtaining an *ex ante* "no action" wavier, companies would be more certain about nominating potential directors. Furthermore, companies would be able to justify the nomination of directors that would technically violate the Act. Giving the FTC a veto right ex ante would also reduce the need for costly ex post enforcement and may lead to more consistent enforcement.

In fact, a similar arrangement is already employed in the context of interlocking bank directorships. The Federal Reserve's (the "Fed") Regulation L is similar to the Clayton Act in that it prohibits an officer or director from serving more than one of any bank's holding companies with over $10 billion in assets from serving as an officer or director. However, Regulation L allows the Fed to grant waivers when it determines that an interlock would not substantially lessen competition.

Third, and as previously mentioned, horizontal directors toe the line between antitrust and corporate governance, and a comprehensive reform should highlight the benefits of these directors as well as address the corporate governance risks. Many companies currently keep disclosures to the bare minimum required. Thus, it is often difficult to even identify the industry of the other boards on which horizontal directors serve. Regardless of whether shareholders see horizontal directors as positively or negatively impacting the company, improved transparency via more comprehensive disclosures would enable shareholders to more effectively participate in corporate governance by making more informed director nominations and board recommendations.

Finally, state law and fiduciary law can also evolve to increase restrictions to mitigate the concerns that arise from the prominence of horizontal directors. Additionally, tightening judicial review of noncompete agreements, corporate opportunity waivers, and board fiduciary duties

15 *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

may position common law jurisprudence to more effectively address potential governance issues that stem from the presence of horizontal directors. For example, courts may examine corporate opportunity waivers more skeptically where a horizontal director is involved and where the opportunity is given to a horizontal company. The common law route can provide the flexibility and adaptability that regulatory intervention often lacks.

V. CONCLUSION

In many ways, horizontal directors epitomize the push and pull of our corporate governance system. We depend upon directors to provide investors and companies with a myriad of functions. Directors are expected to monitor management, to provide expertise and networking, and to make the corporation's most important decisions. Yet, we lean on outsiders to serve as directors, and we allow, and even encourage, their service on other boards.

Yet, it remains unclear how we should view horizontal directorships against the backdrop of increased industry concentration and vivid discourse regarding horizontal mergers and horizontal shareholdings. These questions are especially pertinent given the overwhelming number of directors who serve on boards within the same industry.

With the rise in importance of the board as an institution, and with the emergence of contemporary antitrust discourse regarding horizontal ties between companies through common shareholders, future research into horizontal directorships is still needed. Regulators and legislators should also reevaluate the current regulatory framework governing horizontal directors in light of recent findings. Investors, too, should direct their attention to the issue of horizontal directorship. Understanding that not all companies are created equal, investors may be better situated than regulators to account for the rise in horizontal directorships and offer market-based solutions to the inherent tension that these directors present.