UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya
In the Matter of EQT Corporation
Commission File No. 221-0212

August 16, 2023

In September 2022, the nation's largest natural gas producer, EQT Corporation ("EQT"), proposed to acquire certain natural gas assets from private equity firm, Quantum Energy Partners, LP ("Quantum"). EQT agreed to offer $2.6 billion in cash, up to 55 million shares of EQT stock, and a seat on EQT's Board of Directors. Quantum has a host of investments and operations across the oil and gas industry, and both companies and their affiliates compete head-to-head in the production of natural gas in the Appalachian Basin. The proposed transaction would make Quantum one of EQT's largest shareholders and secure Quantum a seat on the board of its direct competitor. After conducting a thorough investigation, the Commission determined it had reason to believe this deal was illegal.

Today, the Commission announces a settlement of charges that the proposed transaction would result in an illegal interlocking directorate in violation of Section 8 of the Clayton Act and an unfair method of competition in violation of Section 5 of FTC Act due to the potential for exchange of confidential and competitively significant information . Specifically, Quantum's anticipated position as one of EQT's largest shareholders and EQT's obligation to facilitate the appointment of a Quantum designee to the EQT board raise concerns that the firms could exchange non-public sensitive business information and participate in or influence each other's strategic decisions.

The potential risks to competition posed by this transaction are particularly concerning given the dense and tangled web of co-investments, joint operations, and other methods of coordination between and among natural gas producers and investors in the Appalachian Basin. The sector is characterized by a tight-knit set of players rife with entanglements and a history of suspicious ventures and information exchange. Along these lines, the Commission's complaint separately charges that a pre-existing joint venture between EQT and Quantum relating to mineral rights acquisitions constitutes an additional unfair method of competition in violation of the FTC Act.

The proposed consent order lays out several terms to remedy these concerns. The order prohibits Quantum from occupying an EQT Board seat and requires it to divest the EQT shares, imposing a structural remedy to address concerns about the influence and information access that arise from Quantum's sizable EQT shareholder position. The order additionally limits both

current and future entanglements between the firms and reduces opportunities for exchanging confidential and competitively significant information between the firms, including by requiring EQT and Quantum to unwind their existing joint venture and any noncompete provisions.

I. Revitalizing Section 8

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[.]"[1] It was designed to prevent "control of great aggregations of money, capital, and property through the medium of common directors."[2] Lawmakers recognized that interlocking directorates could facilitate undue coordination, influence, or other means of dampening competition. Congress adopted an incipiency approach, seeking to eliminate the very structure that would facilitate these violations by "removing the opportunity or temptation to such violations through interlocking directorates."[3] Interlocking directorates that violate Section 8 are *per se* illegal.[4] Beyond requiring that the interlocked companies be "competitors" whereby the "elimination of competition" between them would violate the antitrust laws, Section 8 does not require any type of showing of harm to competition.[5]

Legislative efforts to address corporate interlocks were catalyzed by congressional reports in 1887, 1912, and 1913 that showed firms had used interlocks to win personal favors or exclusive treatment of suppliers or customers.[6] One of the most vocal opponents of board

[1] 15 U.S.C. § 19.

[2] INTERLOCKS IN CORPORATE MANAGEMENT, 1965 STAFF REPORT TO ANTITRUST SUBCOMM., 89TH CONG., 1ST SESS., 12 (1965).

[3] *See U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953) ("[W]hat Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.").

[4] Michael Blaisdell, Fed. Trade. Comm'n, Interlocking Mindfulness (June 26, 2019), https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness.

[5] *In re Borg-Warner Corp., et al.* 101 F.T.C. 863, 925 (1983) (The "role of competition analysis in Section 8 is not to measure market power or to assess competitive effects; it is to establish a nexus of competitive interests between corporations sufficient to warrant concern over collusion or other outright market division should interlocked directors seek to share or exchange information.").

[6] *See* PACIFIC RAILWAY COMMISSION, S. EXEC. DOC. NO. 51, 50TH CONG., 1ST SESS. (1887); INVESTIGATION OF UNITED STATES STEEL CORP., H.R. REP. NO. 1127, 62D CONG., 1ST SESS. (1912); HOUSE COMM. ON BANKING AND CURRENCY, INVESTIGATION OF CONCENTRATION OF CONTROL OF MONEY AND CREDIT, H.R. REP. NO. 1593, 62D CONG., 3RD SESS. (1913). Congress recognized that the concentration of control via interlocking directorships "tended to suppress competition or to foster joint action against third party competitors" and concluded that because

interlocks was Louis Brandeis. Shortly before his appointment to the Supreme Court in 1916, Brandeis authored several books and articles that highlighted the need for addressing interlocking directorates.[7] He believed that having influential individuals serve on the same corporate boards intrinsically and inevitably created a host of risks, including conflicts of interest, collusion, and improper exchange of competitively sensitive information. In his view, the prohibition on interlocking directorates "merely g[a]ve full legal sanction to the fundamental law of morals and of human nature: that 'No man can serve two masters.'" [8]

Though Section 8 has a clear purpose, it has rarely been enforced in the over 100 years since its passage, and even less so in the past four decades.[9] Historically, the antitrust agencies addressed Section 8 violations by dismissing actions or closing investigations after firms ended the offending interlock.[10] However, the Commission eventually recognized that "informal settlements [we]re not producing an adequate level of compliance" and that "this policy did not accomplish what Congress set out to do."[11] Throughout the 1970s and 80s, the FTC challenged

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of "such [joint] control, the healthy competition of the free enterprise system had been stifled or eliminated." *Sears*, 111 F. Supp. at 616.

[7] *See* L. Brandeis, *Breaking the Money Trusts,* HARPER'S WEEKLY, Nov. 22, 1913, at 10; *id,* Nov. 29, 1913, at 9; *id,* Dec. 6, 1913, at 13; *id,* Dec. 13, 1913, at *10;id,* Dec. 20, 1913, at 10; *id,* Dec. 27, 1913, at 18; *id,* Jan. 3, 1914, at 11; *id,* Jan. 10, 1914, at 18; *id,* Jan. 17, 1914, at 18.

[8] L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914). As Brandeis observed: "The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency; for it removes incentive and destroys soundness of judgment. It is undemocratic, for it rejects the platform: 'A fair field and no favors,'—substituting the pull of privilege for the push of manhood." *Id*.

[9] According to one commentary, Section 8 enforcement has been "punctuated by a few bursts of mild activity and then followed by long periods of benign neglect." J. Randolph Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 ANTITRUST L.J. 317, 317 (1976); *see* ABA SECTION OF ANTITRUST LAW, INTERLOCKING DIRECTORATES: HANDBOOK ON SECTION 8 OF THE CLAYTON ACT 4 (2011) ("This sleepy enforcement effort has been noted by the courts. . . .") (citing *Bankamerica Corp. v. U.S.*, 462 U.S. 122, 130-31 (1983)).

[10] From the effective date of the Clayton Act through 1965, when the Senate Judiciary Committee issued a report on corporate interlocks, the Commission filed only thirteen complaints challenging interlocking directorates. Of those cases, twelve were dismissed when the directors involved resigned on the directorships, and only one resulted in a consent order. During the same period, the Department of Justice brought only ten cases to enforce Section 8. A. H. Travers Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX L. REV. 819, 821 n.8 (1968) (citing STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT 227 (1965)); *see* Vern Countryman, *The Federal Trade Commission and the Courts*, 17 Wash. L. Rev. 1, 30 (1942); G.H. Montague, *The Commission's Jurisdiction Over Practice in Restraint of Trade*, 8 GEO. WASH. L. REV. 365, 375 (1940).

[11] *In re Kraftco Corp.*, 89 F.T.C. 46 (1977).

interlocking directorates under Section 8 on multiple occasions and entered consent orders in every one of those cases, even where the interlocks had been terminated.[12] In the wake of these actions, the defense bar and industry groups began lobbying Congress for Section 8 reform, resulting in the Antitrust Amendments Act of 1990.[13] This law narrowed the types of interlocks that would be covered under Section 8. The years since have seen an overall decline in Section 8 enforcement.[14] We worry that this has over time led to under-deterrence and that corporate actors are not sufficiently appreciative of Section 8's prohibitions.

Over the past year, our colleagues at the Antitrust Division have sought to reactivate Section 8 and effectively put market participants back on notice.[15] Today's complaint and consent order build on that effort, marking the Commission's first formal Section 8 enforcement in nearly 40 years.[16] This action is notable not just because it signals a return to the Commission's prior approach of seeking binding prospective relief through consent orders, but also because it expands upon the remedies previously sought. Notably, the proposed order includes a prior approval provision that prohibits Quantum from taking a seat on the boards of

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[12] *See In re Kraftco Corp.*, 88 F.T.C. 362 (1976); *In re Kraftco Corp.*, 89 F.T.C. 46 (1977); *In re TRW Inc., et al.*, 90 F.T.C. 144 (1977); *In re Int'l Bus. Machines Corp.*, 89 F.T.C. 91 (1977); *In re Midland-Ross Corp.*, 96 F.T.C. 863 (1980); *In re Borg-Warner Corp.*, 101 F.T.C. 863 (1983); *In re Hughes Tool Co.*, 103 F.T.C. 17 (1984); *In re Big Three Indus., Inc.*, 103 F.T.C. 24 (1984).

[13] PUB. L. 101-588, 104 STAT. 2879, § 2 (1990) (increasing the statute's jurisdictional threshold and creating three *de minimis* exceptions in cases of relatively insignificant competitive overlap).

[14] *See Robert F. Booth Tr. v. Crowley*, 687 F.3d 314, 319–20 (7th Cir. 2012) ("Actually, the chance of suit by the United States or the FTC is not even 1%. The national government rarely sues under § 8. *Borg–Warner Corp. v. FTC,* 746 F.2d 108 (2d Cir.1984), which began in 1978, may be the most recent contested case. When the Antitrust Division or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the enforcers that the interlock is lawful)."); Debbie Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, Have a Plan to Comply with the Bar on Horizontal Interlocks (Jan. 23, 2017), https://www.ftc.gov/enforcement/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks ("The Commission has generally relied on self-policing to prevent Section 8 violations, and as a result, litigated Section 8 cases are rare (with none construing the 1990 amendments). In recent Section 8 investigations, once staff raised concerns, an individual agreed to step down from one company in order to eliminate the interlock."); *cf.* Press Release, U.S. Dep't of Justice, Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (Jul. 14, 2016), https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses-concerns; Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Commscope's Acquisition of Andrew Corporation (Dec. 6, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/228330.htm.

[15] *See, e.g.,* Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal; Press Release, U.S. Dep't of Justice, 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.

[16] *See In re Hughes Tool Co.*, 130 F.T.C. 17 (1984); *In re Big Three Indus., Inc.*, 103 F.T.C. 24 (1984).

any of the top seven natural gas producers in the Appalachian Basin, accounting for a substantial majority of the market.

The proposed order also puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes. Firms in the modern economy utilize a variety of corporate forms and structures to engage in commerce, and industry actors have become increasingly sophisticated at corporate organization and venture formation. This is especially true in the private equity and financial sectors, with various limited liability vehicles, limited partnerships, and structured funds intricately entangled through a web of corporate and fiduciary relationships. Indeed, Quantum uses a limited liability structure when setting up its portfolio companies, and Quantum itself is a limited partnership. 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.[17] Accordingly, we must update our application of the law to match the realities of how firms do business in the modern economy.[18] Today's action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations.

II. Standalone Section 5 Enforcement

The Commission's complaint charges that the proposed transaction would facilitate the exchange of confidential, competitively sensitive information in violation of Section 5 of the FTC Act. Specifically, Quantum's anticipated position as one of EQT's largest shareholders and EQT's obligation to facilitate the appointment of a Quantum designee to the EQT board raise concerns that Quantum or EQT could have access to one another's competitively significant, non-public information and could participate in, or have influence over, competitive decision-making at each firm. In addition to these concerns, a pre-existing joint venture between EQT and Quantum, The Mineral Company ("TMC"), may also facilitate the improper exchange of competitively sensitive business information regarding the acquisition of mineral rights within the Appalachian Basin.

[17] Holian et al, *21st Century Section 8 Enforcement: Legislative Origins and the 1990 Amendments*, American Bar Association, Antitrust Magazine Online (April 2023).

[18] *See* Makan Delrahim, AAG., Antitrust Div., U.S. Dep't of Justice, Remarks at Fordham University School of Law (May 1, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law ("Moreover, whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too.").

In November 2022, the Commission issued a policy statement outlining the scope of Section 5 of the FTC Act.[19] As the policy statement explains, Congress enacted Section 5 to create a new prohibition broader than, and different from, the Sherman Act. The text of the statute, which prohibits "unfair methods of competition," distinguishes the FTC's authority from authority granted in the Sherman and Clayton Acts. Lawmakers also made clear that Section 5 was designed to extend beyond the reach of the other antitrust laws.[20] And the Supreme Court has repeatedly made clear that Section 5 prohibits not just those practices that violate the Sherman Act or Clayton Act.[21]

Through the late 1970s, the FTC frequently brought Section 5 cases against conduct that would not necessarily run afoul of the Sherman or Clayton Acts. We now call these "standalone" Section 5 cases. They included invitations to collude;[22] price discrimination claims against buyers not covered by the Clayton Act;[23] de facto bundling;[24] exclusive dealing;[25] and many

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

[20] Section 5 of the FTC Act expands these protections to encompass "conduct that violates the spirit of the antitrust laws," including "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act." Section 5 Policy Statement at 13, 15; *see In re Borg-Warner Corp. et al.*, 101 F.T.C. 863 (June 23, 1983); *In re* T*RW, Inc.*, 93 F.T.C. 325 (1979); *In re Perpetual Fed. Sav. & Loan Assoc.,* 90 F.T.C. 608 (1977).

[21] *See, e.g., FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws"); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair."); *FTC v. Texaco, Inc.*, 393 U.S. 223, 262 (1968) (holding that "[i]n large measure the task of defining 'unfair methods of competition' was left to the [FTC]. . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations"); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (holding that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts").

[22] *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5).

[23] *Alterman Foods v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. FTC*, 450 F.2d 733 (5th Cir. 1971); *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Am. News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

[24] *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act. . ." and that "there are many unfair methods of competition that do not assume the proportions of antitrust violations").

[25] *FTC v. Mot. Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (noting that "Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,]. . . as well as to condemn as 'unfair methods of competition' existing violations of them").

other practices.[26] The Commission also initiated multiple actions challenging mergers or series of acquisitions on the basis of Section 5 violations, separate and aside from Sherman or Clayton Act liability.[27] In the 1980s, however, the Commission backed away from bringing standalone Section 5 cases. In 2015, the Commission effectively collapsed the distinction between Section 5 and the other antitrust statutes. Today's action represents the first time in decades that the Commission has challenged a deal as a standalone violation of Section 5. It 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.

Quantum's position on EQT's board of directors and its role as one of EQT's largest shareholders would provide Quantum with the ability to sway or influence EQT's competitive decision-making and to access EQT's competitively sensitive information. The Commission's complaint alleges these risks are particularly serious given certain past actions by the parties, as well as the natural gas industry's history of encouraging the exchange of competitively sensitive information and public signaling to competitors. The complaint alleges that the two firms' TMC joint venture separately violates Section 5 of the FTC Act as it creates additional opportunities for sharing competitively sensitive business information. Further, there is reason to believe that EQT and Quantum already may use TMC as a vehicle for information exchange for the purchase of mineral rights and in connection with EQT's future drilling plans. This information is forward-looking, non-public, and competitively sensitive, and its exchange among rivals, coupled with the noncompete agreements in place within the joint venture, harms competition.

The proposed order is designed to remedy these concerns. The order prohibits Quantum from occupying an EQT Board seat and requires it to divest the EQT shares, which would structurally eliminate key mechanisms for undue influence and information exchange. The order also limits both current and future entanglements between the firms and reduces opportunities for exchanging confidential and competitively significant information between the firms, including by requiring EQT and Quantum to unwind their existing joint venture and any noncompete provisions.

Many thanks to the FTC team for their diligent work on this matter. We will be collecting comments on our proposed order for 30 days and look forward to reviewing this public input.

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[26] *Atl. Refin. Co.*, 381 U.S. 357.

[27] *See, e.g.*, *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972); *In re Dean Foods Co.*, 70 F.T.C. 1146 (1966); *In re Nat'l Tea Co.*, 69 F.T.C. 226 (1966); *In re Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *In re Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956).