Keys to Unlock the Interlocks: Dealing with Interlocking Directorates

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The use of interlocking directorates\(^1\) by American industrial and commercial corporations is widespread.\(^2\) Section 8\(^3\) of the Clayton Act has been interpreted as prohibiting only interlocks between directly competing firms.\(^4\) There are other kinds of interlocks with substantial anticompetitive effects, however, that have essentially escaped any regulation under the antitrust laws.\(^5\) This article will examine whether the deleterious effects of unregulated interlocks should be a source of concern. It will conclude that these interlocks should not remain unregulated because they are presumptively anticompetitive, produce problems that section 8

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\(^{1}\) An interlocking directorate exists where one person sits on the boards of directors of at least two corporations.

\(^{2}\) *See* notes 40-47 and accompanying text *infra*.


\(^{4}\) Such an interpretation leaves a variety of interlocks outside of the ban. For example, indirect interlocks, interlocks between indirect competitors, and vertical interlocks have all been permitted. *See* notes 28-39 and accompanying text *infra*. The fourth paragraph of section 8 provides in relevant part:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce... if such corporations are or shall have been theretofore, 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 provisions of any of the antitrust laws.

The first three paragraphs of the section deal with horizontal interlocks between member Federal Reserve banks and other banks, banking associations, savings banks, or trust companies.

Section 8 is enforced by both the Justice Department through civil actions in the courts (injunctive decree) and the FTC through its own administrative proceedings (cease and desist order). In both instances, defendants are usually given an opportunity to settle either through a consent decree (Justice Department) or a consent order (FTC). In addition, private parties may bring suit under section 8 for treble damages and injunctive relief.

From 1914 to 1965, the Department of Justice initiated a total of ten cases to enforce section 8. The Department did not undertake a systematic program of enforcement with respect to interlocks until after World War II, and the first cases to reach the courts were not filed until 1952, thirty-eight years after the enactment of the section. During the same period, the FTC filed thirteen complaints under section 8. Only one resulted in a cease and desist order; the rest were dismissed when the directors resigned from one of the interlocked corporations. *Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management* 57, 227 (Comm. Print 1965) [hereinafter cited as *Staff Report*].

There is a similar paucity of private section 8 cases. Prior to 1974, there were only nine such suits. *See* Note, *Private Enforcement of Section 8's Prohibition of Interlocking Directorates*, 54 B.U.L. Rev. 659, 660 n.11 (1974).

\(^{5}\) This article will refer to the interlocks not reached by a traditional reading of section 8 as unregulated interlocks. These interlocks have been challenged only recently. *See* notes 93-189 and accompanying text *infra*. 361
was designed to address, and conflict with the basic goals of the antitrust laws. The article will then discuss presently available methods of reaching these interlocks, particularly the Justice Department’s attempts to read section 8 more broadly than it has traditionally been read and the Federal Trade Commission’s efforts to challenge interlocks through section 5 of the Federal Trade Commission Act. In addition, the article will examine proposed legislation that takes a stricter approach toward interlocks.

I. Traditional Scope of Section 8

Section 8 was passed in 1914 amidst a climate of reform. By the early 1900’s the use of interlocking directorates along with other business practices had become a subject of increased public concern. Louis D. Brandeis in a series of articles in Harper’s Weekly attacked interlocks from both political and economic perspectives. At the same time, Congressional investigations disclosed instances of anticompetitive practices that were implemented through interlocking directorates. This concern was manifested in an address by President Wilson to Congress calling for legislation that would cover horizontal, vertical, indirect, and manage-
ment interlocking relationships. Nevertheless, the congressional response, embodied in section 8, covered only interlocking directorates between direct competitors.

Section 8's fourth paragraph, known as the industrial corporations' provision, contains four requirements that interlocked corporations must meet to come under the section. First, one of the interlocked corporations must have "capital, surplus, and undivided profits aggregating more than $1,000,000." Second, the interlocked corporations must be engaged in commerce. Third, the challenged interlocks must be between two or more corporations "other than banks, banking associations, trust companies, and common carriers." Fourth, the interlocked corporations must be or have been competitors, so that the elimination of competition by agreement would violate one of the antitrust laws.

Controversy over the scope of section 8 in the past centered on the fourth requirement of competition. United States v. Sears, Roebuck and Co. provided the first judicial construction, which has been accepted in subsequent cases. The Sears court adopted a per se test of illegality: if an agreement between the interlocked firms to cease competition would violate any of the antitrust laws, then the interlock is illegal per se. In Sears, B. F. Goodrich Company and Sears shared a common director and also competed with each other in the sale of various items at the retail level. An agreement between them to eliminate competition, such as price-fixing, would surely violate the law. Therefore, the interlock violated section 8.

Direct interlocks between directly competing corporations, which are subject to the per se ban of section 8, present significant potential anticompetitive effects. The interlocks tend to unite the boards of direc-

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10 President Wilson wanted a law that would:
[Effectively prohibit and prevent such interlockings of the personnel of the directorates of great corporations... as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business.

12 Id.
13 Id.
14 Id. This requirement is known as the "other than" clause. See notes 107-17 and accompanying text infra.
17 Id. at 620-21.
18 Id. at 615.
19 Id. at 621.
tors of the competing companies, thus reducing the independence of the management of the firms. The possibility of exchanges of competitive information is increased, creating incentives for anticompetitive conduct and reconciliation of conflicting interests. Furthermore, the interlocks provide a ready means for accomplishing such conduct by joining competing management in the board room.

The *per se* ban on direct interlocks is a sound policy. Other types of interlocks, however, can have equally significant anticompetitive effects. Nevertheless, these other interlocks are not covered under the present narrow reading of section 8 which limits the applicability of the section to direct interlocks between directly competing corporations.

In enacting section 8, Congress was concerned with the anticompetitive effects of all interlocks, not just those of direct interlocks between direct competitors. It was troubled with the concentration of economic power in the board rooms of these interlocked corporations and sought to preserve competition and economic opportunity as well as to prevent the directors of large corporations from being placed in positions of conflicting responsibilities. The specific prohibition of direct interlocks did not mean that Congress was unconcerned with other kinds of interlocks; rather, it was this kind of interlock which presented the most immediate and obvious dangers. Furthermore, when the Clayton Act was written, Congress had no prior experience with legislation dealing with interlocking directorates. Consequently, Congress might have been reluctant to push too far too fast. A narrow interpretation of section 8, therefore, is

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22 See notes 64-85 and accompanying text infra.
23 This is also how Sen. Floyd Haskell, chairman of the Senate Interior Special Subcommittee on Integrated Oil Operations, views the purpose of section 8. After releasing a report on the petroleum industry, see Special Subcomm. on Integrated Oil Companies, Senate Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess., The Structure of the U.S. Petroleum Industry (Comm. Print 1976), he criticized the extensive number of interlocking directorates involving oil companies apparently permitted under section 8 and said, "[T]here is no doubt in my mind that these [the interlocks] are contrary to the intent of section 8..." [1976] Antitrust & Trade Reg. Rep. A-14 (July 20, 1976).
24 Such congressional concern is illustrated in the House Report that accompanied H.R. 15657 (the proposed Clayton Act). Section 8 was described as follows:

> The importance of the legislation...cannot be overestimated. The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions...[T]he only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts..."

25 See 51 Cong. Rec. 11539 (1914). "What we are trying to do is to preserve each one [corporation] as an independent unit in business, so that they will act in their affairs without any regard to the interests of the others..." Id. (remarks of Sen. Cummins); FTC Report, supra note 20, at 5, 17.
26 See FTC Report, supra note 20, at 13.
both contrary to congressional intent and unwarranted in light of the
dangers of unregulated interlocks that have become apparent over time.\textsuperscript{27}

II. UNREGULATED \textbf{INTERLOCKS}

\textit{A. Extent of Unregulated Interlocks}

A variety of different kinds of interlocks have been untouched by
section 8. These traditionally unregulated interlocks fall into seven cate-
gories.\textsuperscript{28}

1. \textit{Management Interlocks Between Directly Competing Corporations}
   — Section 8 clearly prohibits competing corporations from sharing one or
   more common directors. The section has not reached the management
   interlock, however, where an officer of firm A sits on the board of
   competing firm B. For example, a vice-president of a machinery manufac-
turer is not prohibited from sitting on the board of a competitor.\textsuperscript{29}

2. \textit{Indirect Interlocks Between Directly Competing Corporations} — An
   indirect interlock exists if the competing firms A and B each have one of
   their directors serving on the board of firm C which does not compete
   with A or B.\textsuperscript{30} An example of this interlock is the board of a large mer-
   chandizing chain which includes a director from each of two electrical
   machinery manufacturers.\textsuperscript{31}

3. \textit{Direct Interlocks Between Indirectly Competing Corporations} — Here,
   the corporations are directly interlocked but compete indirectly
   through their subsidiaries. This occurs where firms D and E share a
   common director and D competes with firm F, a subsidiary of E. The
   same kind of interlock exists if D and E each have subsidiaries and the
   subsidiaries, not the parents, compete.\textsuperscript{32}

4. \textit{Direct Interlocks Between Potential Competitors} — These interlocks
   occur if a director or directors are shared by firms that are not currently
   competitors but could easily become so. For example, firm G specializes
   in flat and plate glass production while firm H manufactures glass con-
   tainers. Both firms are in the glass manufacturing industry but neither one
   competes with the other. Because of the relative ease in switching be-
   tween product lines, the firms are, however, potential competitors.\textsuperscript{33} Yet,
   an interlock between the two is allowed.

\textsuperscript{27} See notes 64-85 and accompanying text infra.

\textsuperscript{28} This grouping is not meant to be exhaustive. There are many other forms of interlocking
directorates not covered by section 8, but these can be analyzed as variants of the basic
seven categories listed. For example, there are indirect interlocks between potential cus-
tomers, management interlocks between indirectly competing corporations, vertical man-
agement interlocks, etc. The farther removed the interlock is from one of the basic inter-
locks listed in the text, the less dangerous are its potential anticompetitive effects.

\textsuperscript{29} See FTC \textit{REPORT, supra} note 20, at 14; \textit{STAFF REPORT, supra} note 4, at 26.

\textsuperscript{30} See FTC \textit{REPORT, supra} note 20, at 15; \textit{Travers, supra} note 21, at 848-49.

\textsuperscript{31} See \textit{STAFF REPORT, supra} note 4, at 125, 140.

\textsuperscript{32} See Kramer, \textit{Interlocking Directorates and the Clayton Act After 35 Years}, 59 \textit{Yale L.J.} 1266, 1268n.11 (1950).

\textsuperscript{33} See FTC \textit{REPORT, supra} note 20, at 25, 441-45; \textit{STAFF REPORT, supra} note 4, at 26.
5. **Vertical Interlocks** — A vertical interlock exists when directors are shared by corporations with a supplier-customer relationship. One example of such an interlock is the sharing of a common director by firm I, a large steel producer, and firm J, an even larger automotive manufacturer.34 Another vertical interlock exists when J interlocks with firm K, a rubber and tire producer.35

6. **Deputization Interlocks** — Here, an outside corporation, not an individual, is the common director of two firms. If corporation X has one of its directors on the board of firm L and another on the board of M, a competitor of L, then X, through its deputies who sit on the boards of competing machine tool manufacturers, is itself the common director of the companies.36

7. **Institutional Interlocks** — These interlocks exist when major financial institutions share common directors with the leading corporations in a particular industry.37 In the petroleum industry, for example, the leading oil companies have numerous interlocks with commercial banks and insurance companies.38 Another example is the electrical machinery industry, where the four largest firms are interlocked with financial institutions.39

The prevalence of these different interlocks is evident from the composition of the boards of large corporations. Sitting on the board of American Telephone and Telegraph are directors from four oil companies (Exxon, Texaco, Mobil and Continental), three large merchandizing competitors (Marcor, J.C. Penny, and Federated Department Stores), four huge food producers (Kraft Co., General Foods, Campbell Soup, and Del Monte), the first and third largest automotive manufacturers (General Motors and Chrysler) (all of which are indirect interlocks between directly competing corporations); the number one steel producer (U.S. Steel) and at least six major steel customers (GM, Chrysler, Deere, Caterpillar, Boeing, and Kohler Co.) (vertical interlocks); and seven of the ten largest banks (Citicorp, Chase Manhattan, Manufacturers Hanover, Chemical, Bankers Trust, Continental Illinois, and Western Bancorporation) (which together with the oil companies constitute an institutional interlock).40 Other cor-

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34 See Staff Report, supra note 4, at 119-20.
35 Id. at 122.
37 The institutional interlock can be viewed as the third tier of interlocking relationships between commercial corporations and financial institutions (notably commercial banks). In a sense it is the combination of the vertical and indirect interlocks. The first tier is a single bank interlocked with a single corporation, which can be analyzed as a vertical interlock. The second tier exists when the directors of several competing firms all sit on a single bank's board. At this stage, not only are there vertical interlocks but there is also an indirect interlock among the competing corporations. The final tier (institutional interlock) exists when the leading competitors in an industry are interlocked with several of the major commercial banks.
38 See note 42 and accompanying text infra.
39 FTC Report, supra note 20, at 25.
porate boards exhibit similar patterns. IBM's board, for example, illustrates both vertical interlocks (two large steel producers and seven steel customers) and institutional interlocks (five large energy companies and ten major banks plus five insurance companies).\footnote{Id.}

The major oil companies are extensively interlocked with the leading banks, thus creating vertical, indirect, and institutional interlocks. A recent report found four oil companies (Standard of California, Continental, Getty, and Union Oil) represented on the board of Bank of America (the nation's largest bank), four (Exxon, Mobil, Continental, and Atlantic Richfield) on the board of Chase Manhattan (second largest), three (Mobil, Phillips, and Shell) on the board of First National City Bank (third largest), three (Exxon, Atlantic Richfield, and Cities Service) on the board of Morgan Guaranty Trust Co. (fifth largest) and three (Mobil, Exxon, and Texaco) on the board of Chemical Bank of New York (sixth largest).\footnote{Hearings on Corporate Disclosure Before the Subcomm. on Budgeting, Management, and Expenditures, and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, Part 2, S. Doc. No.62, 93d Cong., 2d Sess. 1010-11 (1974) (A. McDonalD, INTERLOCKING OIL: BIG OIL TIES WITH OTHER CORPORATIONS (1974)). A 1976 study discovered similar extensive interlocks. See THE STRUCTURE OF THE U.S. PETROLEUM INDUSTRY, supra note 23, at 113-338.}

Two major studies have reported the extent of interlocking directorates. The FTC's investigation\footnote{See FTC REPORT, supra note 20.} of the 1,000 largest manufacturing corporations focused on the interlocking relationships among these corporations, and between them and 330 non-manufacturing corporations. The FTC found that a substantial variety of interlocks existed, most of which were outside the scope of section 8. It concluded that the extent of the interlocks creates a strong probability that competition is reduced.\footnote{Id. at 36.} The staff of the House Antitrust Subcommittee conducted the second study,\footnote{See STAFF REPORT, supra note 4.} which looked at interlocking management relations in a selected sample of corporations.\footnote{This sample consisted of 74 companies selected from three categories: industrial and commercial, banking, and insurance. Id. at 111.} The study revealed the same extensive array of interlocks shown by the FTC study and the staff also reached the same conclusion: competition is likely to be impaired by the interlocks.\footnote{Id. at 230.}

B. Effect of Unregulated Interlocks

1. Suggested Beneficial Effects — A number of arguments have advanced supposed benefits that interlocks provide.\footnote{For an illustration of arguments in defense of interlocks, see STAFF REPORT, supra note 4, at 6-7; Travers, supra note 21, at 834; Wilson, Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act, 45 ANTITRUST L.J. 317, 329-30 (1976).} One proposition is
that the interlocks enable corporations to inject "dynamism" into their boards by obtaining outside directors with diverse backgrounds and experience gained in directing other firms. Second, the number of top executives who can fill director seats is limited. Interlocks allow these executives to serve several corporations, thus easing the talent shortage. Additional restrictions on interlocks would limit this already small talent pool and increase the difficulty of attracting highly qualified directors. This would force many corporations to settle for "second best" directors, thus causing an overall decline in the quality of corporate leadership.

The practice of extensive interlocks, however, may actually decrease the quality of management, rather than increase it. A director serving on the boards of several corporations may be too busy to serve any of them effectively.\(^49\) Some have questioned whether the pool of top executives is so limited that restrictions on interlocks would pose any harm.\(^50\) Further, the practice of extensive interlocks may actually restrict the size of the management pool.\(^51\) Extensive interlocks foreclose opportunities for younger executives to gain experience as directors, experience which they need to become qualified directors, the very directors whose limited number "requires" the existence of interlocks.

2. Potential Deleterious Effects — Opponents of interlocking directorates rely on three main arguments. First, they allege that extensive interlocks decrease the quality of management and actually restrict the size of the management pool.\(^52\) Second, interlocks may entangle the shared directors in conflict of interest problems because their loyalty is divided between two or more corporations.\(^53\) Third, an extensive array of interlocks has potentially serious anticompetitive implications.\(^54\)

To date, however, no empirical studies have ascertained that the unregulated interlocks actually produce deleterious effects.\(^55\) While both the FTC\(^56\) and Antitrust Subcommittee\(^57\) reports documented the existence and extent of interlocks, neither attempted to study their economic ef-


\(^{50}\) Travers, supra note 21, at 836.

\(^{51}\) STAFF REPORT, supra note 4, at 8.

\(^{52}\) See text accompanying notes 49-51 supra.

\(^{53}\) For example, a director sitting on the boards of a supplier and customer (vertical interlock) cannot, in good conscience, recommend that either company take steps that might better its position at the expense of the other. If he does, he violates his duty of loyalty to one company, and if he abstains from voting on such a policy he deprives the other of his best judgment. Hence, whenever a director serves on the boards of two or more companies that have interests related to each other, he would tend to harmonize those interests as much as possible. See STAFF REPORT, supra note 4, at 7-8; FTC REPORT, supra note 20, at 20-21.

\(^{54}\) This article will concentrate on this third criticism since the antitrust laws are primarily, but not exclusively, concerned with effect on competition.

\(^{55}\) Conversely, it should be noted that no studies have shown that the interlocks produce any beneficial effects. See note 58 infra.

\(^{56}\) FTC REPORT, supra note 20.

\(^{57}\) STAFF REPORT, supra note 4.
fecteds.\textsuperscript{58} Despite the absence of empirical evidence in this area,\textsuperscript{59} both the FTC\textsuperscript{60} and the staff of the Antitrust Subcommittee\textsuperscript{61} nevertheless concluded that the vast array of unregulated interlocks generated anticompetitive effects. The Subcommittee staff warned that it would be naive to think otherwise, arguing that "conclusions supported by common sense, practical observation, and abstract reasoning should not lightly be disregarded in the absence of convincing evidence that there is error."\textsuperscript{62}

This conclusion of anticompetitive effects is also supported by an analysis of the structural relationships produced by the extensive interlocks among leading American corporations. These deleterious effects can justifiably be presumed because they logically follow from the business arrangements that those interlocks create.\textsuperscript{63} A close look at the relationships established by unregulated interlocks illustrates their strong potential for producing anticompetitive consequences.

\textit{Management Interlocks Between Directly Competing Corporations} — When officers of firm A sit on the board of a competing firm B, the two firms can be as closely linked as if the two shared common directors. The dangers inherent in this management interlock are the same as those found in direct interlocks between directly competing corporations.\textsuperscript{64} Both tend to unify the boards of competing firms, thus decreasing management independence, increasing the possibility of competitive information being exchanged, and creating incentives for anticompetitive behavior.

\textit{Indirect Interlocks Between Directly Competing Corporations} — The potential anticompetitive effects here are similar to those inherent in direct and management interlocks. The competing corporations are still interlocked, albeit indirectly, and the dangers of the exchange of information and anticompetitive conduct exist.\textsuperscript{65} These dangers increase when

\textsuperscript{58} In particular, the \textit{Staff Report} noted:
\"[T]here is a dearth of objective, factual information on the social and economic effects, as embodied in actual business transactions, of decisions made by linked corporate managements. There is virtually no reliable current information available that will demonstrate either acceptable or undesirable effects that have resulted from the fact that common management personnel participated in, or influenced, particular business transactions.\textit{Staff Report}, supra note 4, at 229. Nonetheless, such a study was deemed outside the scope of the report. "No attempt has been made to study the social or economic effects of these interlocks . . . ." \textit{Id.}\textsuperscript{59}

\textsuperscript{59} See notes 55-58 and accompanying text supra.

\textsuperscript{59} FTC \textit{Report}, supra note 20, at 36.

\textsuperscript{60} \textit{Staff Report}, supra note 4, at 230.

\textsuperscript{61} \textit{Id.}\textsuperscript{62}

\textsuperscript{62} The Antitrust Subcommittee staff concluded that certain of these effects "would seem to be self-evident from an analysis of merely the structure of the organizations that have common management members . . . ." \textit{Staff Report}, supra note 4, at 6.

\textsuperscript{63} See note 21 and accompanying text supra. Indeed, the dangers of management interlocks may be greater since the interlocked officers are involved in the daily decisions of their corporation. \textit{See Staff Report}, supra note 4, at 230.

\textsuperscript{64} See Halverson, \textit{Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective}, \textit{21 Vill. L. Rev.} 393, 402 (1976); Turner, supra note 40, at 337.
competing firms A and B each have directors on the board of a major supplier or customer of their industry. Business discussed by this board is likely to be intimately related to the business of A and B and such discussion between A and B's directors could produce effects similar to those of a direct interlock between the two.\(^{66}\) In either case, competition is likely to be affected.\(^{67}\)

**Direct Interlocks Between Indirectly Competing Corporations** — Whether firm D competes with a subsidiary of firm E or both D and E have subsidiaries that compete, the dangers arising from the interlock of D and E are proportional to the degree of control that the parents have over their subsidiaries. If the subsidiaries' major policies and operations are dictated by their parents, an interlock between the parents could serve to stifle competition just as if the parents competed directly.\(^{68}\) With such close parental control, the potential anticompetitive effects of this interlock are similar to those caused by direct interlocks between directly competing firms.\(^{69}\) On the other hand, if the subsidiaries are autonomous or otherwise insulated from their parents' boards and formulate their own policies, then the severity of any anticompetitive effects of a parental interlock is lessened.

**Direct Interlocks Between Potential Competitors** — Modern technology permits flexibility in production in many industries, making it easier for a firm specializing in one area of production to switch to a parallel line of products. This relative ease in changing production lines makes potential competitors out of firms not currently making the same products.\(^{70}\) Interlocks between potential competitors may forestall such companies from invading one another's field, even though technological advances have increased the opportunities for doing so.\(^{71}\) Specialization among manufacturing firms, accompanied by mutual forebearance that protects each from invasion of its market by others, limits the number of competitors who produce a particular product. Such forebearance may be heightened by these interlocks.\(^{72}\)

**Vertical Interlocks** — The interlocking of a supplier, firm I and a customer, firm J, is usually motivated by a desire to facilitate transactions between them.\(^{73}\) The tendency of the interlocked firms to deal with each

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\(^{66}\) FTC REPORT, supra note 20, at 15.

\(^{67}\) See Smith, Interlocking Directorates Among the "Fortune 500", 3 ANTITRUST L. & ECON. REV. 47, 52 (Summer, 1970). The author concluded, "[I]n view of the recent findings of behavioral scientists in the area of 'interpersonal interaction,' it would be most extraordinary if these lengthy and elaborate chains of indirect interlocks were not having an adverse effect on the vigor of competition among our larger corporate organizations." Id.

\(^{68}\) See Kramer, supra note 32, at 1268 n.11.

\(^{69}\) See note 21 and accompanying text supra.

\(^{70}\) See text accompanying note 33 supra for an example of glass manufacturers specializing in different products but having the capability to produce each other's line. Similarly, textile machinery appears to possess a convertibility that would permit active competition between textile manufacturers not currently producing the same products. FTC REPORT, supra note 20, at 24.

\(^{71}\) A pattern of direct and indirect interlocks, combined with the practice of buying and selling to one another, may contribute to the limiting of potential competition among chemical producers. FTC REPORT, supra note 20, at 24-25.

\(^{72}\) Id. at 14, 24.

\(^{73}\) Travers, supra note 21, at 851.
other creates the danger that the competitors of I and J will be foreclosed from dealing with the firm linked to their rival, thus reducing the competition between I and J and their respective competitors.\footnote{Halverson, supra note 65, at 401.} I and J might obtain an additional advantage over their competitors in that the interlock could give I preferential access to market outlets while J receives easier access to suppliers.\footnote{Id. at 401.} In other words, vertical interlocks are inconsistent with arm’s-length dealings which prevent favoritism and assure access for other companies.\footnote{FTC REPORT, supra note 20, at 15.}

**Deputization Interlocks** — Here, the directors of outside corporation X sit on the boards of competing firms L and M. These directors owe primary allegiance to X, and the danger is that X might use them to dampen competition between L and M.\footnote{Travers, supra note 21, at 850.} For example, if firm X was a bank that had made substantial loans to L and M, it would be to X’s advantage to try to restrict competition in an effort to benefit L and M.\footnote{See Smith, supra note 67, at 52.} Similarly, if the bank, through its trust department, were a large stockholder of L and M, it would be in the bank’s interest to prevent vigorous competition between the two.\footnote{See Dooley, The Interlocking Directorate, 59 AM. ECON. REV. 314, 318 (1969).}

**Institutional Interlocks** — Interlocks between major financial institutions and the leading firms in a particular industry produce problems associated with both vertical and indirect horizontal interlocks.\footnote{See note 37 supra.} But institutional interlocks also create additional problems of their own. These interlocks might foster the development of communities of interest strong enough that firms in the industry not so interlocked are handicapped in obtaining full financial services.\footnote{FTC REPORT, supra note 20, at 15; Halverson, supra note 65, at 402; Turner, supra note 40, at 337.}

The more capital intensive an industry is, the more severe such a handicap would be. The oil industry, for example, is very capital intensive.\footnote{See Moore, The Petroleum Industry, THE STRUCTURE OF AMERICAN INDUSTRY 120-25 (4th ed. W. Adams ed. 1971).} A new firm wishing to enter the industry or even an existing one

\begin{itemize}
\item Institutional interlocks may have other anticompetitive effects.
\item There is a concern that representation of competitors on the same bank boards, for example, may lead to exchanges of information between competitors, collusive activity, and possible communities of interest strong enough to provide a substantial handicap to non-represented companies ... In addition it is not inconceivable that links between competing corporations created by the institutional interlock could provide a stimulus and a source of available capital for anticompetitive mergers, acquisitions, joint ventures and other transfers and combinations of corporate power.
\end{itemize}
wishing to expand requires enormous amounts of capital. The major commercial banks capable of funding such activity are already extensively interlocked with the leading companies in the industry. It may not be in the best interests of these banks to fund such activity due to the relations they have established with industry leaders through the interlocks. Even if the banks were neutral with respect to such entry, the interlocked oil companies could establish preferential access to credit so that little credit would be left for their noninterlocked competitors.

The dangers of the seven kinds of unregulated interlocks do not end with each interlock's individual anticompetitive effects. Another consequence of these interlocks is the resulting concentration of economic power in the board rooms of interlocked corporations. Preventing such a concentration is a goal not only of section 8, but of all antitrust laws, for both economic and social reasons. With respect to economic concerns, microeconomic theory shows what anticompetitive conduct can be expected from such a concentration and how the economic inefficiencies caused by the concentration can be remedied through competition. However, antitrust policy is more than just an "economic engineering project." It has long been recognized that a high degree of independence in our economic system also serves social and political purposes. Judge Hand, in the famous Alcoa decision, explained that there are more than just economic reasons for opposing concentrated economic power, and these are "based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."

The problems posed by the unregulated interlocks concern all our antitrust laws and not merely section 8. Their anticompetitive effects clearly are contrary to the congressional intent behind section 8 and conflict with the primary economic goal of increased competition. In addition, the extensive array of unregulated interlocks is inconsistent with social and political aims: in many instances the interlocks produce concentrations of economic power that offend fundamental social policies.

83 See text accompanying note 42 supra.
85 See Hearings on Corporate Disclosure, supra note 42, at 901. In 1974, the FTC authorized an investigation of whether the oil companies received preferential treatment from the banks they are interlocked with. The FTC also probed into whether these companies influenced bank credit policies to encourage or inhibit various alternative energy sources. [1976] Antitrust & Trade Reg. Rep. A-16.
86 See note 24 and accompanying text supra.
90 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).
91 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
92 Id. at 428. A.D. Neale, a British observer of our antitrust laws, suggests that this opposition to concentrated economic power is in part due to "American distrust of all
III. How to Reach the Unregulated Interlocks

Unregulated interlocks can be reached in three ways: through a broader reading of section 8, through the application of section 5 of the Federal Trade Commission Act, and through new legislation.

A. Broader Reading of Section 8

Section 8 has traditionally been employed against direct interlocks between directly competing corporations. Both the potential anticompetitive effects of unregulated interlocks and the overall purpose of section 8 support a broader application of the section to cover certain interlocks that previously have been thought to be outside its reach. A more expansive reading will have the most success with respect to deputization interlocks, through a broader reading of "director" to include both individuals and corporations, and direct interlocks between indirect competitors, through a broader reading of "competitors" to include firms that compete with each other through their subsidiaries. It is less certain whether a more restrictive reading of the "other than" clause, which effectively exempts certain financial institutions, will be successful.

1. Expansion of "Director": Applicability of Section 8 to Deputization Interlocks — A deputization interlock exists where an outside corporation, through its deputies, serves as the common director of two competing firms. Under this approach, the outside corporation itself violates section 8's prohibition against interlocking directorates.

Such was the government's allegation in United States v. Cleveland Trust Co. In that case the defendant was the Cleveland Trust Company, the nation's sixteenth largest bank. Karch, chairman of Cleveland's board, sat on the board of Warner and Swasey Company, (W&S). Shaw, defendant's executive vice president, sat on the boards of Pneumodynamics Corporation, (Pneumo) and White Consolidated Industries, Inc., (White). All three companies competed in the manufacturing of complex machine tools. While the three firms had no common individual director, the government argued that the bank was a common corporate director through representation by its "deputies" Karch and Shaw.

The court recognized that this was an innovative application of section 8 and that such an application raised the question whether a corporation...
may be deemed a director within the meaning of the section. The court, noting that this issue had never been judicially decided, left the question unanswered in denying the Government's motion for summary judgment.

Section 8 provides that "no person at the same time shall be a director" of two or more competing firms. A corporation may be a "person" for the purposes of section 8. Furthermore, a corporation, as well as an individual director, is subject to section 8 prohibitions. It follows that a corporation could indeed be considered a director within the meaning of section 8. Consequently, the inquiry focuses on whether the shared directors of such a corporation are "deputies." The mere showing that an outside corporation has its officers or directors on the boards of competing firms would be insufficient to justify application of the deputization theory. There must be something to indicate that a "deputy" or "agent" relationship exists between the outside corporation and its interlocked personnel, because the theory of deputization rests on the premise that the outside firm is acting through these individuals.

The Government's notion of deputization in Cleveland Trust was largely predicated on Karch's and Shaw's being important officers of the bank and subject to its direction. The court recognized the importance of such an association and pointed out that the question whether there actually was a "deputy" relationship required a full trial for determination. Analogous cases dealing with the theory of deputization have held that the issue "is a question of fact to be settled case by case."

In applying section 8 to deputization interlocks, the critical test is whether there is a deputy relationship between the outside corporation and the interlocked personnel. If one is found to exist, then the corporation should be considered a director and subjected to section 8's prohibi-

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98 Id. at 711.
99 Id. The case was settled by a consent decree which seems to endorse the Government's theory. The decree prohibits Cleveland Trust from hiring any individual who is a director of a manufacturer of certain machine tools, if at the same time an officer of the defendant is a director in any of the other competing tool manufacturers. [1975-2 TRADE CASES (CCH) ¶ 60,611, at 67,684.
102 SCM Corp. v. FTC, 568 F.2d 807 (2d Cir. 1977). Defendant argued that only individuals violated section 8 and a corporation was not prohibited from having a director who also sat on the board of a competitor. The court rejected the argument and stated such an interpretation would undermine section 8. Id. at 810-12.
105 Id. at 712.
tion against interlocks.

2. Restriction of the "Other Than" Clause: Applicability of Section 8 to Bank-Competing Nonbank Interlocks — The industrial corporations' provision of section 8 applies only to interlocks between two or more corporations "other than banks, banking associations, trust companies, and common carriers."\(^{107}\) Traditionally, this has been interpreted to mean that section 8 applies only if neither corporation falls within the classification.\(^{108}\) Recently, the Government has challenged this notion. In United States v. Crocker National Corp.,\(^{109}\) the Government alleged that interlocks between commercial banks and insurance companies violated section 8.\(^{110}\) It was stipulated that the interlocked companies competed in certain mortgage and real estate loans.\(^{111}\) Essentially, the Government argued that the "other than" clause requires that only one interlocked corporation be an industrial one; only if both corporations are banks would the interlock be exempt from the industrial corporations' provision. Noting that banks were specifically dealt with in the first three paragraphs of section 8, the Government contended that the "other than" clause was intended to render the fourth paragraph of section 8 inapplicable only where both corporations are banks. Any other interpretation would leave a "gaping loophole" that would allow interlocks between banks and competing nonbanks, because the first three paragraphs of section 8 deal with interlocks between banks and the fourth would then be restricted to interlocks between nonbanks.\(^{112}\)

The court did not accept the Government's argument and held that a normal reading of the "other than" clause "compels the conclusion that the statute applies only to two corporations, neither of which is a bank."\(^{113}\) In addition to its "plain reading" of the section, the court further buttressed its position by referring to past administrative interpretations\(^{114}\) and the legislative history of section 8.\(^{115}\)

The court's decision effectively creates a loophole for interlocks between banks and competing nonbanks and its logic is far from compelling.


\(^{108}\) FTC REPORT, supra note 20, at 10; STAFF REPORT, supra note 4, at 25.


\(^{110}\) Id. at 689. Specifically, two bank-insurance company interlocks were challenged. The first was between the Crocker National Bank (fourteenth largest bank) and the Metropolitan Life Insurance Co. (second largest insurance company), the Equitable Life Assurance Society of the United States (third largest), and the Mutual Life Insurance Co. of N.Y. (eleventh largest). The second was between the Bank of America (largest bank) and the Prudential Insurance Co. of America (largest insurance company). Id. at 687.

\(^{111}\) Id. at 688.

\(^{112}\) Id. at 689.

\(^{113}\) Id.

\(^{114}\) Id. at 690-92.

\(^{115}\) Id. at 694-702.
Interlocks between banks and nonbanks clearly violate the policy of section 8.\textsuperscript{116} In addition, there is no legislative history indicating that Congress intended to immunize these interlocks, especially when such immunity runs counter to the general prohibitions against interlocks among competitors.\textsuperscript{117}

3. Expansion of "Competitor": Applicability of Section 8 to Direct Interlocks Between IndirectlyCompeting Firms — Interlocks between indirect competitors have gone unregulated because section 8 traditionally has been limited to prohibiting interlocks between firms that compete directly rather than through their subsidiaries. However, an interlock between parent corporations that maintain control over their subsidiaries can stifle competition as if the parents themselves competed directly.\textsuperscript{118} Use of section 8 to challenge these interlocks fits within the purpose of the section because, given sufficient parental control, the interlocked firms are effectively in direct competition.

The Government has relied upon such a theory in two recent cases. In Cleveland Trust,\textsuperscript{119} the Justice Department charged Cleveland Trust with sitting, through its deputies, on the boards of three competing tool manufacturers, Pneumo, White, and W & S.\textsuperscript{120} It did not allege that the three directly competed with each other.\textsuperscript{121} Rather, both Pneumo and W & S competed indirectly with White via its subsidiaries.\textsuperscript{122} The Government argued that section 8 applied to interlocking directorates when one of the interlocked parents competes with a wholly owned subsidiary of the other, either directly or through its own subsidiary.\textsuperscript{123} The court did not decide the issue but implied that the applicability of section 8 depends on the degree of control that the parents exercise over their subsidiaries.\textsuperscript{124}

In United States v. Crocker National Corp.,\textsuperscript{125} the Government chal-
lenged interlocks involving banks that were wholly owned subsidiaries. The Government not only attacked bank-insurance company interlocks, but also challenged interlocks between the banks’ parent companies, otherwise known as bank holding companies, and insurance companies. The Government argued that the bank holding companies competed, through their subsidiary banks, with the insurance companies; therefore, the interlocks between them violated section 8. The court held that such interlocks are not prohibited because the exemption of the subsidiary banks from the industrial corporations’ provision of section 8 should extend to their parents. The court deliberately did not decide the broader question of section 8’s applicability to direct interlocks between indirect competitors but implied that it supported such applicability.

The most limited purpose that can be attributed to section 8 is prevention of the anticompetitive effects caused by interlocks among competitors. If a parent exercises sufficient control over its subsidiary’s policies and operations, then an interlock between the parent and the subsidiary’s competitor presents the same problems as if the parent itself directly competed with its interlocked partner. Use of section 8 against such interlocks merely fulfills that section’s purpose.

The key issue in applying section 8 is the degree of control that the parent has over its subsidiary. Due to the complexity of ascertaining the degree of control which exists, such a determination must be made on a case by case basis. A high degree of control warrants the application of the section, whereas if the subsidiary is autonomous, an interlock between one of its competitors and its parent is less likely to produce any anticompetitive effects.

B. Section 5 of the Federal Trade Commission Act (FTCA)

Section 5 prohibits “unfair methods of competition” and “unfair or
deceptive acts or practices" in or affecting commerce. The FTC is authorized to use section 5 to prohibit practices contrary to the spirit of the antitrust laws, even if they do not actually violate the letter of the law. The unregulated interlocks can be presumed to have the anticompetitive consequences with which Congress was concerned in passing section 8, yet traditionally they have been treated as outside the reach of the section. The FTC has used section 5 to effectuate the purpose of other provisions of the Clayton Act in instances where the spirit, if not the letter, of those provisions was violated. Similar use of the section in regard to section 8, then, should be viewed neither as a radical use of section 5 nor as an unwarranted expansion of section 8.

The use of section 5 in challenging interlocks requires that the interlocks be treated as unfair methods of competition. This raises two issues: first, defining unfair methods of competition, and second, determining whether unregulated interlocks come within that definition.

In enacting section 5, Congress deliberately did not define unfair methods of competition. Initially, the Supreme Court held that the courts, not the FTC, would determine which actions were unfair methods of competition. The Court later retreated from this position by deferring to the FTC's determination of which practices were covered, holding that Congress did not intend to confine "unfair competition" to fixed categories. It is now recognized that the FTC has broad powers to declare trade practices unfair. The FTC is authorized to use section 5 to stop acts in their incipiency which, if allowed to reach fruition, would violate the antitrust laws. It can also prohibit acts that conflict with the general spirit and policy of the antitrust laws, even though these practices might not violate the actual letter of the law.

Recently, the Court in FTC v. Sperry & Hutchinson Co. held that the parent companies contended they did not have enough control to attribute the banks' policies to them. 422 F. Supp. 686, 704 (N.D. Cal. 1976).

132 15 U.S.C. § 45(a)(1) (Supp. V. 1975). When the FTC believes a person is engaging in an unfair method of competition, it issues a complaint and initiates its own administrative proceedings. Should the conduct be judged unlawful, the Commission is authorized to issue an order requiring the discontinuance of the practice. Violation of the final cease and desist order results in penalties of up to $10,000 for each day of the violation.

Only the FTC is empowered to enforce section 5; there can be no enforcement by private litigants. In challenging interlocks with section 8 rather than with section 5, the Justice Department and private parties, as well as the FTC, can contest the interlocks. See note 4 supra.

133 See notes 140-45 and accompanying text infra.

134 See text accompanying notes 7-10, 23-27, and 64-85 supra.

135 See text accompanying notes 16-20 supra.

136 See notes 149-57 and accompanying text infra.


142 405 U.S. 233 (1972).
FTC has the power in determining whether a practice is unfair, to consider public values beyond those encompassed in either the letter or the spirit of the antitrust laws.\(^{143}\) Although the Court did not specify the values that the FTC should consider, it did note certain criteria that the FTC has looked to in the past in deciding whether a practice should be prohibited as unfair.\(^{144}\) These standards include whether the conduct offends public policy, whether it is immoral, unethical, oppressive, or unscrupulous, and whether it causes substantial injury to consumers, competitors, or other businessmen.\(^{145}\)

Given the FTC's broad powers and standards, the unregulated interlocks clearly fall within the spectrum of activities that can be considered unfair methods of competition. In addition, treatment of these interlocks in this manner is supported both by congressional intent in enacting section 5 and by the relation of the section to other provisions of the Clayton Act.

The drafters of section 5 considered incorporating specific language concerning interlocking directorates into the section.\(^{146}\) Although Congress later decided not to define explicitly which practices were unfair methods of competition, it clearly intended that section 5 reach interlocks.\(^{147}\) Indeed, it has been suggested that section 8 was not written more broadly because of the belief that the other interlocks would be covered under section 5.\(^{148}\)

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\(^{142}\) Id. at 244. The Commission determined that Sperry & Hutchinson's activities preventing independent promoters from dealing in its stamps violated section 5, but the Fifth Circuit reversed on the grounds that the Commission failed to show that the defendant's conduct violated either the letter or spirit of the antitrust laws. Id. at 234-35. The Court held that unfair methods of competition are not limited to such activities. Id. at 243-44. However, because the Commission did not consider these independent public values, the Court remanded the case to the Fifth Circuit with instructions that it be remanded to the FTC for further proceedings. Id. at 247-50. Concerning the public values beyond those encompassed in the antitrust laws, see Speigal, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1976) (practice is unfair when it offends established policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers). See also National Candy Co. v. FTC, 104 F.2d 999, 1006 (7th Cir. 1939) (a violation of public policy is an injury to the public, and it is in the public interest to prevent the use of a method of competition that is contrary to an established public policy even if injury to competitors is not alleged or proved).

\(^{144}\) 405 U.S. 233, 244 n.5. (1972). See FTC Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8,355 (1964).

\(^{145}\) 405 U.S. 233, 244 n.5 (1972).

\(^{146}\) 51 CONG. REC. 11106 (1914) (remarks of Sen. Newlands, chairman of the Senate Committee on Interstate Commerce that inserted the essential language of section 5).

\(^{147}\) The Senate Committee on Interstate Commerce stated:

The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better. . . . The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates . . .

S. REP. NO. 597, 63d Cong., 2d Sess. 13 (1914) (emphasis added).

\(^{148}\) Travers, supra note 21, at 831-32.
Use of section 5 to deal with interlocks outside the literal language of section 8 would be consistent with the way section 5 has been used to effectuate the policies of other provisions of the antitrust laws. Section 2(d) of the Clayton Act 149 forbids a seller from making an allowance for services rendered him by a buyer unless it is made available to the latter’s competitors on proportionately equal terms; the section does not mention the buyers’ liability. In *Grand Union v. FTC*, 150 Grand Union was charged with knowingly inducing and receiving from sellers special benefits that were not proportionately made available to its competitors. The court upheld the Commission’s decision that Grand Union’s conduct as a buyer violated section 5, notwithstanding the silence of section 2(d) on this issue. The court found the basic policy behind section 2(d) to be the prevention of abuses of buying power. Even though Grand Union did not violate the literal language of section 2(d), the court held that its conduct was inconsistent with that section’s purpose. 151 The court stated that activities running counter to the public policies declared in the Sherman and Clayton Acts are unfair methods of competition. 152 Thus, it was proper to treat Grand Union’s conduct as an unfair method of competition.

Similarly, section 5 has been used to prohibit practices that, while not actually in violation of section 3 of the Clayton Act, 153 are clearly contrary to the spirit of the section. Section 3 deals with, *inter alia*, exclusive dealing contracts. In *FTC v. Brown Shoe Co., Inc.*, 154 the court upheld the Commission’s finding that the contracts of Brown Shoe, a shoe manufacturer, with independent shoe retailers constituted unfair methods of competition. The FTC had charged that these contracts served to foreclose Brown Shoe’s competitors from access to these retailers. 155 Although a section 3 violation requires proof that the contracts’ effect may be to substantially lessen competition, the Court declared that no such proof was necessary to establish a section 5 violation. 156 The Court held that when a practice is contrary to the spirit of the law, the FTC has the authority to declare it an unfair method of competition even though it does not actually violate the literal language of the statute. 157

The FTC, however, has only recently begun to utilize section 5 in

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150 300 F.2d 92 (2d Cir. 1962).
151 *Id.* at 99.
152 *Id.* at 98.
155 These contracts provided that if the shoe retailers restricted their purchases of shoes to buying from Brown Shoe, then Brown Shoe would give them special treatment and benefits that it did not give to other shoe retailers. *Id.* at 317.
156 *Id.* at 322.
157 *Id.* at 321. The Court found the policy behind section 3 to be the prohibition of contracts that restricted the freedom of purchasers to buy in an open market. See L. G. Balfour Co. v. FTC, 442 F.2d 1, 8, 20 (7th Cir. 1971), where the FTC charged that defendant’s exclusive dealing contracts were unfair methods of competition. For these to be illegal under section 3, a likelihood of market foreclosure must be shown. The court held that no such evidence is necessary under section 5 and that the FTC is empowered to use the section to prohibit practices which run counter to the basic policies of the antitrust laws. See
challenging interlocks. In its initial complaints, the FTC used the section in conjunction with section 8. Most of these complaints ended in consent orders, and the issue of whether the interlocks violated section 5 did not reach the Commission until the Kraftco case. The FTC’s complaint in Kraftco charged that the interlock between Kraftco Corp. and SCM Corp., competitors in the sale of margarine, edible oils and barbecue sauce, violated sections 5 and 8. Shortly after the complaint was issued, Bond, the common director, and Kraftco agreed to consent orders. SCM answered the complaint and argued, inter alia, that section 8 prohibits only individuals from being joint directors in competing corporations and does not forbid the corporations themselves from having common directors. The Commission rejected SCM’s argument and ruled that corporations, as well as individuals, are liable for section 8 violations. The Commission further found that even if section 8 is not applicable to corporations, section 5 nonetheless applies and in this case prohibits SCM’s practice of sharing a common director. It stated that section 5 extends to practices that offend the spirit as well as the letter of the antitrust laws and that use of the section in the present case merely implements the purpose of section 8. The Commission also noted that section 5 had already been used to effectuate the purposes of other provisions of the Clayton Act, and stated that the legislative history of section 5 indicates Congress fully contemplated the application of the section to interlocks.

also Fashion Originators’ Guild of America v. FTC, 312 U.S. 457 (1941) (defendant’s combination held to be prohibited by section 5 because it violates the policies of both the Sherman and Clayton Acts).

The following consent orders ended FTC action against interlocks in which all of the complaints alleged both section 5 and section 8 violations: 82 F.T.C. 1814 (1973) (interlocks between metal companies prohibited); 83 F.T.C. 1204 (1974) (interlock between Chrysler and General Electric prohibited; the two competed in the air conditioning market); 84 F.T.C. 429 (1974) (interlock between safety helmet manufacturers prohibited); 86 F.T.C. 196 (1975) (interlocks among energy competitors prohibited); 89 F.T.C. 91 (1977) (interlocks between data communications terminal manufacturers prohibited).

In re Kraftco Corp., 89 F.T.C. 46, 60 (1977), aff’d, SCM Corp. v. FTC, 568 F.2d 807 (2d Cir. 1977).

See 87 F.T.C. 809, 811 (1976) (Bond’s consent order); 88 F.T.C. 362, 364 (1976) (Kraftco’s consent order).


Id. at 62-63. The Commission based its decision both on policy reasons underlying the prohibitions of section 8 and on section 11 of the Clayton Act (15 U.S.C. § 21 (1970)) which provides for the enforcement of section 8 and leaves no doubt that the FTC has the power “to remedy a violation of section 8 by entering an order to cease and desist against corporations.” Id. SCM appealed the decision and the Second Circuit upheld the Commission’s ruling. SCM Corp. v. FTC, 568 F.2d 807 (2d Cir. 1977). See note 102 supra.


The Commission declared:

Assuming arguendo that illegally interlocked corporations must be allowed to escape liability through the allegedly porous wording of section 8, no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of the section in such a case does no more than effectuate the clear purpose of the Clayton Act. Id. at 63-64. (Emphasis added).

Id. See text accompanying notes 149-57 supra.

Id. See text accompanying notes 146-48 supra.
In Kraftco, the challenged interlock violated both section 8 and section 5. Although the finding of illegality under section 5 was not essential to the Commission's holding, Kraftco is important because it recognizes that section 5 applies to interlocks. Thus, Kraftco lays the foundation for the section's use in challenging interlocks in the absence of a concurrent violation of section 8.

In re Perpetual Federal Savings and Loan Ass'n 167 was the first case in which the FTC raised a section 5 attack against an interlock falling outside the literal language of section 8. The defendant savings and loan association competed with its interlocked commercial banks in the solicitation and maintenance of savings accounts and in the financing of real estate loans. 168 Finding that the interlocks violate section 5, 169 the Commission observed that the acts clearly violate the policy of section 8, 170 even though such activity may be outside the literal prohibition of that section. 171 Furthermore, the Commission noted the absence of evidence indicating that Congress intended to immunize such interlocks. 172

The Perpetual case 173 authorizes the use of section 5 against horizontal interlocks between competitors that are not covered by section 8. Under the Perpetual reasoning, bank-insurance company interlocks like those in Crocker 174 can be challenged under section 5 regardless of whether they are prohibited by the literal language of section 8: both Perpetual and Crocker involved interlocks between banks and competing nonbanks. Furthermore, Perpetual appears to put management interlocks between directly competing corporations 175 within the reach of section 5. The Commission in Perpetual stressed the "unmistakable" congressional intent to outlaw interlocks between competitors. 176 A management interlock brings together two competitors just as effectively as an interlock between a bank and a competing nonbank. Both are outside the literal language of section 8, but both clearly violate the section's policy.

It is not clear how far the Perpetual rationale can be extended with

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168 Id. at 21,287. See also Comment, Interlocks in Management Between Savings and Loan Associations and Commercial Banks Under the Antitrust Laws and the Federal Trade Commission Act, 65 Geo. L.J. 1263, 1267-68 (1977); 5 Trade Reg. Rep. (CCH) ¶ 50,119; supra note 123.
169 Id. at 21,285. The final cease and desist order applied only to Perpetual because the banks are outside FTC jurisdiction. 15 U.S.C. § 45(a)(2) (Supp. V 1975). However, the Commission found that this "fact does not affect the Commission's ability to adjudicate the legality of Perpetual's interlocks and to issue an order against Perpetual. It is not necessary to join in the suit all parties to an illegal arrangement," Id. at 21,286, n.7.
170 Id. at 21,288. The Commission noted that Congress, at a minimum, unmistakably intended to outlaw interlocks between substantial competitors. Id.
171 Id. at 21,290. The Commission referred to the Crocker decision in which the district court held that section 8 did not reach bank-competitive nonbank interlocks. The court deliberately withheld opinion as to the legality of such interlocks under section 5. See text accompanying note 113 supra.
172 Id. at 21,290.
175 See text accompanying note 64 supra.
regard to other interlocks not prohibited by the letter of section 8.\textsuperscript{177} Of the remaining unregulated interlocks, the indirect interlock between directly competing corporations\textsuperscript{178} involves anticompetitive effects similar to those which provoked the congressional concern noted in \textit{Perpetual}.\textsuperscript{179} The indirect interlock brings competitors together, albeit indirectly, as does the direct interlock which was the focus of congressional activity. Consequently, the \textit{Perpetual} rationale supports the application of section 5 to indirect interlocks between direct competitors. At the same time, this application of section 5 would also serve as a means for indirectly attacking institutional interlocks\textsuperscript{180} because these interlocks are analytically a combination of vertical and indirect interlocks.\textsuperscript{181} Applicability of the section to the other unregulated interlocks is less certain, although the \textit{Perpetual} rationale appears to support a broad utilization of section 5.

Another important question is whether the FTC should treat all currently unregulated interlocks as \textit{per se} illegal under section 5, as it treated interlocks between banks and competing nonbanks in \textit{Perpetual}.\textsuperscript{182} In adopting a \textit{per se} rule, thus eliminating the need to examine anticompetitive effects in individual cases, the probability and severity of anticompetitive consequences likely to be caused by a particular class of interlocks must be balanced against their beneficial effects, if any.\textsuperscript{183} A \textit{per se} approach is justified only when the former clearly outweighs the latter.

Management interlocks between directly competing corporations should be treated as \textit{per se} violations, because, except for the formal titles of the person serving as director, they are indistinguishable from the interlocks presently prohibited by section 8.\textsuperscript{184} All the anticompetitive effects produced by direct interlocks between directly competing corporations\textsuperscript{185} can be caused as easily by management interlocks.\textsuperscript{186} Since the established \textit{per se} approach to direct interlocks is warranted, the treatment of management interlocks in the same manner is justified.

The indirect interlock between directly competing corporations, however, should not be subject to a \textit{per se} rule under section 5. Even though logic and common sense support the conclusion that such interlocks have anticompetitive effects,\textsuperscript{187} there is a lack of empirical evidence on this
question.\textsuperscript{188} The absence of such evidence indicates that a strict \textit{per se} approach to indirect interlocks may be too harsh. Because the indirect interlock lacks the structural similarity to direct interlocks that management interlocks have, a \textit{per se} rule is not justified. Therefore, a notion of presumptive illegality should be employed.\textsuperscript{189} In responding to a section 5 complaint, the interlocked firms would have the opportunity to rebut this presumption by establishing that the interlock is not anticompetitive.

\textit{C. New Legislation}

The third way to reach the unregulated interlocks is through new legislation. The most extreme plan is to extend section 8's \textit{per se} prohibition of direct interlocks between direct competitors to include all of the unregulated interlocks. Proposed legislation\textsuperscript{190} of this kind is currently before Congress. H.R. 7337 prohibits interlocks, including management interlocks, where two companies are actual or potential competitors, where one of the companies is an actual or potential customer, supplier, or source of credit or capital, and where one of the companies is a holding company. The bill also prohibits deputization interlocks.\textsuperscript{191}

Such a broad \textit{per se} approach is not justified at this time. Legislated \textit{per se} rules condemn certain conduct without examining the effects in an individual case. Even though the presumption that these interlocks produce anticompetitive effects is sound, it alone, in the absence of empirical evidence, may not warrant such a sweeping \textit{per se} rule. In support of this view, the staff of the House Antitrust Subcommittee proposed a "model" bill which takes a broad \textit{per se} approach toward interlocks, but they did not recommend passage of the bill until more specific information on the

\textsuperscript{188} See text accompanying notes 55-58 supra.
\textsuperscript{189} One commentator has suggested that a rule of presumptive illegality be applied to vertically imposed exclusive territory arrangements. Baker, \textit{Vertical Restraints In Times of Change: From White to Schwinn To Where?}, 44 \textit{ANTITRUST L.J.} 537 (1975).
\textsuperscript{190} H.R. 7337, 95th Cong., 1st Sess. (introduced May 23, 1977). The bill has been referred to the House Judiciary Committee but there has been no report on its status.
\textsuperscript{191} The pertinent section of H.R. 7337 states:

\texttt{SEC. 8. (a) It shall be unlawful, unless specific approval for such relationship has been granted by the Attorney General of the United States, upon due showing, in the form and manner prescribed by the Attorney General, that such relationship in consideration of all relevant factors accords to the maximum extent practicable with the objectives of the antitrust laws —}

\texttt{(1) for any natural person who is a director, officer, or employee with management functions of any person engaged in commerce, at the same time to hold the position of director, officer, or employee with management functions, or to have a representative or nominee who represents such person as a director, officer, or employee with management functions, in any other person (a) who is an actual or potential competitor, or (b) who is an actual or potential customer, or supplier, or source of credit or capital, or (c) whose principal business in purpose or in fact is the holding of stock in, or control of, any other person in commerce;

(2) for any person engaged in commerce knowingly to have a director, officer, or employee with management functions who, at the same time, holds the position of director, officer, or employee with management functions, or who has a representative or nominee who represents such person as a director, officer, or employee}
economic consequences of interlocks has been gathered.\textsuperscript{192} H.R. 7337 is the latest in a series of identical bills, all of which have taken a broad \textit{per se} approach in dealing with interlocks.\textsuperscript{193} None of these bills has ever been reported out of committee, and such a bill has little chance of passage. Political reality, together with the absence of empirical evidence, dictate that the legislation be more limited in scope.

A more moderate approach would be to regulate only interlocks between the largest corporations. Because the anticompetitive effects are most severe in interlocks among these corporations, some commentators have suggested that these interlocks should be the center of congressional activity.\textsuperscript{194} Legislation that would prohibit interlocks among large corporations\textsuperscript{195} would eliminate the interlocking relationships not presently reached by section 8 and would provide some of the benefits of a \textit{per se} rule while avoiding the costs of a comprehensive ban. Interlocks among corporations not meeting the size requirements would still be subject to both Justice Department and FTC action.

A less ambitious proposal would be to extend section 8's \textit{per se} prohibition only to include management interlocks between directly competing corporations.\textsuperscript{196} As previously noted,\textsuperscript{197} the tendency of management interlocks to have anticompetitive effects is equal to that of direct interlocks between direct competitors. Because the structure and effects of these interlocks are virtually identical, treatment of one on a \textit{per se} basis warrants the same treatment for the other. Under this scheme, the other types of interlocks would be dealt with by section 8 of the Clayton Act and section 5 of the FTCA. If Congress takes any action at all concerning interlocks, it should at least extend section 8 in this manner. At this time, however, no legislation concerning interlocks is likely to be enacted.

with management functions, in any other person (a) who is an actual or potential competitor, or (b) who is an actual or potential customer, or supplier, or source of credit or capital, or (c) whose principal business in purpose or in fact is the holding of stock in, or control of, any other person in commerce;

(3) for any person to be a representative or nominee of any person who is a director, officer, or employee with management functions of any person engaged in commerce so that such director, officer, or employee with management functions may hold the position of director, officer, or employee with management functions, in any other person (a) who is an actual or potential competitor, or (b) who is an actual or potential customer, or supplier, or source of credit or capital, or (c) whose principal business in purpose or in fact is the holding of stock in, or control of, any other person in commerce.

\textsuperscript{192} See \textsc{staff report}, supra note 4, at 231-32.


\textsuperscript{194} See \textsc{kramer}, supra note 32, at 1274; Turner, supra note 40, at 338-39.

\textsuperscript{195} For example, the ban could apply to those with sales or assets over 500 million dollars. This figure would bring the 372 largest industrial corporations, ranked by sales, under the statute's coverage. To cover the top 500 firms, the figure would have to be lowered to 300 million dollars. \textsc{fortune}, May 1977, at 364-89. The exact figure need not be 500 million; it can be any amount that would exclude all but the leading industrial corporations.

\textsuperscript{196} See \textsc{travers}, supra note 21, at 846-48.

\textsuperscript{197} See text accompanying note 64 supra.
IV. Conclusion

Section 8 of the Clayton Act was enacted in order to prevent the use of interlocking directorates to reduce competition. However, several kinds of interlocks traditionally not covered by section 8 have serious potential for anticompetitive abuse. While no empirical studies have been undertaken to analyze the economic consequences of these interlocks, logic and common sense lead to the presumption that they are anticompetitive. As conventionally applied, then, section 8 has failed to fulfill its purpose.

Unregulated interlocks can be challenged in three ways. Moving away from the narrow interpretation traditionally given to section 8 has the greatest chance of success in dealing with deputization interlocks and direct interlocks between indirect competitors. A second approach is to use section 5 of the Federal Trade Commission Act to attack these interlocks. In Perpetual, the FTC was successful in its application of the section to interlocks that are between direct competitors and outside the scope of section 8. The effectiveness of this approach depends upon how far the Perpetual rationale is taken. At a minimum, the decision indicates that management interlocks and indirect interlocks between direct competitors are within the section’s scope.

The third method is to enact new legislation concerning interlocks. In the absence of empirical evidence, the best proposal would create a limited per se ban on interlocks among corporations over a certain size. This would avoid the cost of a sweeping per se ban while taking into account that interlocks between corporate giants pose the greatest concern. However, enactment in the near future of any legislation regulating interlocking directorates is not likely. The practical result is that any action taken against the unregulated interlocks will have to be through section 8 of the Clayton Act and section 5 of the Federal Trade Commission Act.

—Richard P. Murphy