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INTERLOCKING DIRECTORATES — PRESENT ANTI-TRUST ENFORCEMENT INTEREST PLACED IN PROPER ANALYTICAL PERSPECTIVE

JAMES T. HALVERSON*

I. INTRODUCTION

IT IS not the purpose of this article to reappraise whether there ought to be legislation such as section 8 of the Clayton Act1, prohibiting, on a per se basis, horizontal director interlocks. The relevance of the per se application of that statute2 to today's corporate realities has been questioned3 and may indeed be a subject deserving of analysis, but on the assumption that congressional modification of the per se operation of section 8 is unlikely, this article considers whether the extension of section 8 to reach indirect and/or vertical interlocks is warranted.

II. THE INTERLOCK CONTROVERSY

Different types of corporate interlocks and their effects on competition are perhaps the least understood relationships in the history of antitrust law enforcement. This is not to say that no thought or scholarship has been devoted to the subject. It is known that interlocks of various types exist between firms which compete with one

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   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 in 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 eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

Id.

2. See note 26 and accompanying text infra.

3. See note 25 infra.

(393)
another, firms which are suppliers and customers of one another in particular markets, and firms which finance competitors. Over the years, many surveys have been taken and a number of articles have been written on the subject, but despite this attention, efforts to understand the actual effects of these relationships and their impact, if any, on competition have been largely unsuccessful.4

In fact, a survey of the literature quickly reveals that much of the discussion on interlocking relationships is intuitive and predicated on what is considered to be common-sense observation or the self-evident conclusions of an analysis of the structure of organizations with management interlocks. The critics of interlocks object to these relationships on four broad grounds: first, they are believed to have serious antitrust (anticompetitive) implications;5 second, they are thought to involve directors in conflicts of interest;6 third, they may diminish

4. The Temporary National Economic Committee on the Concentration of Economic Power commenced an investigation of the effects of interlocking arrangements in 1938, but the study fell short of its objective presumably because of the redirection of economic effort during World War II. See S. Doc. No. 35, 77th Cong., 1st Sess. (1941). An important study by the Federal Trade Commission (FTC), which was issued in 1951, summarized many of the theories and assumptions which underlie the notion that interlocks of all types adversely affect competition. See Federal Trade Commission, Report on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1951) [hereinafter cited as FTC Report]. The report did not, however, purport to demonstrate actual instances of competitive abuses. The report did document widespread existence of interlocks, many of which were vertical and indirect interlocking directorates. See id. A vertical interlock is one existing between two companies who occupy a vertical market relationship with respect to each other, e.g., customer-supplier. See text accompanying notes 35–45 infra. An example of an indirect interlock is where two competitors are interlocked through a financial institution, because one or more directors of each competitor is also a director of the financial institution. See text accompanying notes 46 & 47 infra. Section 8 of the Clayton Act only reaches direct interlocking directorates between competitors. 15 U.S.C. § 19 (1970). This proscribed relationship is often referred to as a horizontal interlock. See American Bar Association, Antitrust Law Developments 103 (1975) [hereinafter cited as Antitrust Developments].

A later congressional report noted that “as of this time, there are virtually no factual analyses of how interlocking business organizations deal with particular transactions and the social and economic impact of such transactions.” Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Interlocks in Corporate Management 6 (Comm. Print 1965) [hereinafter cited as Interlocks in Corporate Management]. Nevertheless, the scope of the report was limited to analysis of the frequency with which the interlocking directorate device appeared in the structure of corporate management. Id. at 229. This survey, like so many which preceded it, did not attempt to analyze effects on particular transactions or behavioral characteristics in corporate operations resulting from management interlocks. Id. See also Subcomms. on Intergovernmental Relations, and Budgeting, Management, and Expenditure of the Senate Comm. on Government Operations, Disclosure of Corporate Ownership, S. Doc. No. 93–62, 93d Cong., 2d Sess. (1974) [hereinafter cited as Disclosure of Corporate Ownership].

5. Interlocks in Corporate Management, supra note 4, at 7.

the opportunities for advancement by young managers; and fourth, they debase the quality of business management by spreading the interlocked director's attention to so many matters that he is unable to serve effectively on any board. Whether or not corporate interlocks tend to create the three latter undesirable effects is an issue which this article is not intended to address. Rather, it is from the standpoint of antitrust enforcement policy that this article approaches the interlocking directorate debate. It is important, therefore, to examine the actual or potential anticompetitive implications of interlocking directorates and to explore why there appear to be many unanswered questions in this area which cannot be resolved without a better understanding of the facts than is presently available from published studies.

A. Laws Affecting Interlocking Arrangements

Federal legislation dealing with corporate interlocks is a tapestry of inconsistent provisions governing a variety of intercorporate relationships. In some regulated industries, certain types of horizontal interlocks may be prohibited by an appropriate federal agency. In other industries, horizontal and vertical interlocks may be proscribed.

7. In his address to Congress urging the passage of strict interlock legislation, President Wilson predicted the following advantage that would be gained from such legislation:

- It will open the field of industrial development and organization to scores of men who have been obliged to serve when their abilities entitled them to direct.
- It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.


8. Interlocks in Corporate Management, supra note 4, at 8.


Under section 8 of the Clayton Act, interlocking directorates and interlocking officers of banks are forbidden in certain instances unless permitted by the Board of Governors of the Federal Reserve System.\textsuperscript{11} The interlock legislation which affects the greatest number of corporations, however, is embodied in the proscription in section 8 of the Clayton Act of interlocking directorates between competing corporations if one of the corporations has capital, surplus, and undivided profits aggregating more than $1 million and if the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.\textsuperscript{12}

B. Historical Debate over Interlocks

Section 8 was enacted in 1914 as part of President Wilson's package to deal with what Justice Brandeis had described earlier in a series of articles as "the money trust" or the "inner group."\textsuperscript{13} These Board. Section 409 of the Federal Aviation Program, 49 U.S.C. § 1379(a) (1970) (replaced the Civil Aeronautics Act of June 23, 1938, ch. 601, § 408(a), 52 Stat. 1001). The SEC has cognizance of certain horizontal interlocks between investment companies, and certain vertical links between investment companies and investment advisers, banks and securities underwriters. Section 10 of the Investment Company Act, 15 U.S.C. § 80a-10 (1970). Section 10 of the Clayton Act prohibits common carriers from having any dealings with a firm which has specifically identified employees on the common carrier board, unless the firm has made the most favorable offer on a competitive bid basis. 15 U.S.C. § 20 (1970); see Interlocks in Corporate Management, supra note 4, at 11.


12. For the pertinent language of section 8, see note 1 supra.

13. See 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. Public concern about corporate interlocks has, in the past, tended to be cyclical. In the early part of the 20th century, the abuses of the large trusts and the complex network of intercorporate relationships convinced many observers that there was a core group made up of a handful of financiers and industrialists who controlled a vast portion of the economic wealth of the nation. Congressional investigations in 1887, 1912, and 1913 uncovered evidence that interlocking corporate managements were widespread and had, in some instances, been used as a vehicle for inside dealings for personal gain, for exclusive or preferential treatment of favored suppliers or customers, and had given rise to serious conflicts of interest among interlocking directors. See Pacific Railway Commission, S. Exec. Doc. No. 51, 50th Cong., 1st Sess. (1887) [hereinafter cited as Pettisson Report]; Investigation of United States Steel Corp., H.R. Rep. No. 1127, 62d Cong., 1st Sess. (1912) [hereinafter cited as Stanley Report]; House Comm. on Banking and Currency, Investigation of Concentration of Control of Money and Credit, H.R. Rep. No. 1593, 62d Cong., 3d Sess. (1913) (Pujo Report) [hereinafter cited as Investigation of Concentration]. Publication of the congressional reports on these investigations, capped by the series of Brandeis articles and the public speeches of President Wilson, generated public antipathy for interlocks which led, in 1914, to the enactment of section 8 of the Clayton Act, forbidding certain bank interlocks and horizontal interlocks between competing nonbanking corporations. 15 U.S.C. § 19 (1970).

While the history of the period between 1912 and 1915 reflects intense public awareness about the problems of interlocking directorates, since that time there have

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labels were pinned on a group of individuals who were suspected of controlling a vast amount of the nation's capital resources. The alleged anticompetitive designs of the "money trust" were thought to be implemented through the means of the interlock. President Wilson thought this group might have the power and potential to destroy genuine economic freedom, while Justice Brandeis attempted to focus public attention more specifically on the competitive abuses as well as the conflicts of interest problems which had been identified as the fruits of widespread interlocking directorates.

There was some evidence in earlier congressional investigations tending to support the arguments of President Wilson and Justice Brandeis. For example, the Pettison Report disclosed significant abuses in railroad construction, lease, and repair contracts, allegedly attributable to four Central Pacific Railroad Company directors who also controlled the corporations which were parties to the contracts with the Central Pacific. Subsequent reports, of the Pujo Committee and the Stanley Committee, revealed further instances in which anticompetitive practices were implemented through the vehicle of interlocking directorates. These reports provided the impetus for the advocates of reform and made important contributions to the development and passage of section 8 of the Clayton Act over 60 years ago.

been other periods in which interlocking directorates have come under close scrutiny, notably in the late 1940's and early 1950's when the FTC and the Department of Justice stepped up their respective enforcement activities. See, e.g., United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953); Union Bag & Paper Corp., 52 F.T.C. 1278 (1956).

14. See Brandeis, supra note 13, Dec. 6, 1913, at 13-15, where the author concluded that the practice of interlocking directorates "is the most potent instrument of the Money Trust." Id. at 13.


17. Pettison Report, supra note 13, vol. 1, at 143.

18. See note 13 supra.

19. Id.

20. The Stanley Report noted:
This record is replete with instances of the pernicious effect sometimes upon the Steel Corporation itself, and more often upon the public generally, of this interlocking of directorates.

The enormous sum paid for the properties of the Lake Superior Consolidated Iron Mines and the manifestly excessive sum for the Troy Steel Products Co., with rebates on purchases of supplies by the International Harvester Co. and the American Tin Can Co. at greatly reduced rates; the complicated web of agreements in restraint of competition, low costs in sliding-scale contracts, and the huge sums paid Mr. H. C. Frick and others in the absorption of the Union-Sharon Steel Co.; the inordinate sums paid to promoters and underwriters are concrete instances of abuses directly traceable to this community of interest between a few powerful individuals in control of a number of great corporations.

21. See note 12, supra.
In his message to Congress on the subject of trusts and monopolies, President Wilson had asked for a law which would

"effectually 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."22

It is apparent that President Wilson wanted legislation which would cover vertical as well as horizontal interlocking relationships, that he was concerned with interlocks between banks and other types of corporations, and that he objected to interlocks which were established by directors and those which were created by other corporate employees as well. Despite the efforts of the President to promote a statutory design which would deal broadly with the alleged interlocks abuses uncovered in these early studies, the legislation which emerged from Congress was more limited in scope than he had envisioned. Section 8 of the Clayton Act only covered director interlocks between competitors,23 and thus fell far short of the objective President Wilson had in mind.24

III. EFFECTIVENESS OF SECTION 8

The version of section 8 which finally became the law in 1914 has been the target of sharp criticism ever since its enactment.25 Law enforcement authorities quickly discovered that, despite its per se

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24. At least one commentator has suggested that the reason President Wilson approved this watered-down version of section 8 is that he had redirected the thrust of his antitrust program to the establishment of the FTC. Travers, Interlocks in Corporate Management and the Antitrust Laws, 46 Texas L. Rev. 819, 831–32 (1968). Professor Travers noted:

Many persons who understood the interlock problem and who might otherwise have worked to amend the Clayton bill may have felt that a bitter struggle to broaden the coverage of the Clayton bill would be unduly costly since the commission could handle any interlock not covered as an "unfair method of competition."

Id. at 831–32.
character,26 section 8 was so fraught with loopholes and so easily evaded that it was hardly worth the allocation of resources required to enforce it.27 Instead of prosecuting violations, a technique of "jawboning" directors into dissolving illegal horizontal interlocks was found to be effective.28 Apparently, however, this technique lacked the accompanying deterrent impact that formal prosecution possessed.29

26. See United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953). In Sears, the Government had brought a section 8 action, because a Sears director also sat on the board of B. F. Goodrich Co. Id. at 615. Sears contended that the enforcement of section 8 required a finding that a hypothetical merger between the interlocked corporations would violate section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). 111 F. Supp. at 616. The court rejected this argument and held that if any potential agreement between the interlocked corporations would be a per se violation of any of the antitrust laws, then the directorate interlock was prohibited by section 8. Id. at 621.

27. Former FTC Chairman Mead's testimony in 1951 before the House Subcommittee on the Study of Monopoly Power illustrates this problem: [S]everal years ago the board of directors of General Steel Castings contained the president and two vice-presidents of American Steel Foundries, all of whom were also directors of the latter company and also contained the chairman of the board and the president of Baldwin Locomotive, both of whom were also directors of that company. When the Department of Justice questioned these interlocking directorates, the directors from American Steel Foundries and Baldwin withdrew from the General Steel Castings board. There is a catch. Their place was taken by two vice-presidents of Baldwin Locomotive, but since none of these officials was a director in any of these companies but General Steel Castings, the new arrangement satisfied the requirements of Section 8 of the Clayton Act. There is no reason to believe that the closeness of the executive and policymaking ties between the three companies was in any way reduced by the change.

Hearings on Monopoly Power, supra note 25, at 28.

From 1914 to 1965, the FTC had only filed a total of 13 complaints under section 8 of the Clayton Act. Dooley, The Interlocking Directorates, 59 Am. Econ. Rev. 314, 319 n.9 (1969).

28. In 1947 the Justice Department announced that it had conducted a survey of interlocking directorates in which it found about 1,500 persons who were on the board of more than one firm, and that most of the directors who were illegally interlocked resigned without contest. Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L.J. 1266, 1270-71 (1950).

29. Among the resignations attributed to the Justice Department's announcement in 1947, three reportedly were submitted by directors on the board of General Electric Co. who were also directors of competing corporations. Id. at 1271. On November 26, 1973, the FTC accepted a consent order with General Electric Co. which prohibited interlocking directorates with Chrysler Corp. General Electric Co., 3 Trade Reg. Rep. ¶ 20,436 (FTC 1973). One director had resigned from Chrysler's board upon receiving notice of the FTC's intention to issue a complaint; however, the FTC was of the view that there should be a clear understanding of the corporate responsibility to prevent illegal interlocks. Id. at 20,328. Accordingly, General Electric was ordered to require, for a period of 5 years, directors and candidate directors to submit to General Electric a list of principal products manufactured by other firms of which they are directors. Id. See also Chrysler Corp., 3 Trade Reg. Rep. ¶ 20,479 (FTC 1974). Similar, though not identical, reporting requirements had previously been ordered in other cases. See Aluminum Co. of America, 82 F.T.C. 1819 (1973); Aluminum Co. of America, 82 F.T.C. 1814 (1973).

By imposing these reporting requirements in these recent orders, the FTC has broadened the responsibility of corporations to screen the people they allow to sit on their corporate boards and to police against the establishment of illegal inter-
In addition to these enforcement problems, the staff of the Federal Trade Commission (FTC) published a study in 1951, which, like many previous and subsequent studies, revealed that interlocks of various types were prevalent in several important industries, had been so for many years, and all but a few probably could not be reached by section 8 enforcement.\textsuperscript{30} The FTC's survey, sharing a format typical of many interlock studies, tallied up, for example, 18 competing manufacturers of engines directly or indirectly linked, 6 farm machinery manufacturers indirectly interlocked, and 10 of the 18 largest machine tool producers linked directly with competitors.\textsuperscript{31} The central point of the FTC study was that interlocks of several types were numerous across the economy's industrial and financial landscapes.\textsuperscript{32} This conclusion only served to emphasize the lack of effectiveness of section 8.

A. Potential Effects of Interlocking Arrangements

More controversial than the number of interlocks uncovered were the conclusions in the FTC report with respect to the anticompetitive "fundamental tendencies"\textsuperscript{33} of the different kinds of interlocks which


31. \textit{Id.} at 31.
32. \textit{See generally \textit{Interlocks in Corporate Management}, \textit{supra} note 4, at 228-29.
33. In summary, these tendencies were:
(2) Interlocking relations between companies in the same or in closely related industries, but not in competition with each other, may forestall the development of competition which otherwise would come from normal expansion of the list of products which they manufacture. (3) Interlocking relations between companies that face similar problems, for example, the large integrated oil companies, or between companies in an industry and financial institutions that are broadly interested in that industry or in related industries, may give rise to communities of interest and create a united front against any who threaten habitual relationships or established preeminence. (4) Vertical interlocks may reach back to companies from which important supplies come and thereby evoke preferential treatment in the distribution of materials in short supply. (5) Vertical interlocks may reach forward to companies that consume or distribute the products of another and thus create preferential access to market outlets. (6) Interlocking relations between manufacturing corporations and financial institutions, especially banks and insurance companies and a withholding of credit and capital
are not covered by section 8.\textsuperscript{34} Although director interlocks between competitors can be held unlawful per se under section 8,\textsuperscript{35} vertical, i.e., supplier-customer,\textsuperscript{36} interlocks can also involve a potential for anticompetitive abuse. These interlocks, however, escape the reach of section 8.\textsuperscript{37} Vertical arrangements may lead to a kind of vertical integration which, if abused, can be leveraged against nonintegrated producers or may lead to tie-in sales,\textsuperscript{38} understandings on exclusive dealing,\textsuperscript{39} or reciprocity\textsuperscript{40} resulting in the foreclosure of competing suppliers for sales to the interlocked firms. Similarly, during a period in which there is a shortage of an essential resource, interlocked firms may find it easier to obtain supplies not available to competing firms. Thus, a type of unfair favoritism, arising out of no more than the close relationship among corporate directors, may, under certain conditions, have important anticompetitive implications. It is important to note, however, that although these potential problems have been identified, no empirical study has been made to determine whether they actually occur.\textsuperscript{41}

There are, of course, contrasting opinions about the importance of vertical interlocks. These opinions range from the notion that vertical integration in any form cannot injure the competitive process and that, therefore, vertical interlocks which have the effect of tending to integrate the relations of two firms should be left alone,\textsuperscript{42} to the more realistic view that some vertical interlocking situations may have anticompetitive potential and should be evaluated on a case-by-case basis.\textsuperscript{43} One observer who subscribes to the latter view opposes an outright prohibition on vertical interlocks, but does suggest that a system of competitive bidding should be employed when either of the

\begin{flushright}
\textsuperscript{7} Interlocking relations may give expression to an underlying ownership interest and may involve nothing more than a desire to protect an investment.
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FTC REPORT, supra note 4, at 23.

It should be noted that this study compiled no hard evidence of actual abuse in these situations but relied, instead, on the so-called "common-sense" approach to interlocks, an analytical technique later adopted in INTERLOCKS IN CORPORATE MANAGEMENT, supra note 4, at 6.

34. For the relevant language of section 8, see note 1 supra. See also note 4 and text accompanying notes 23 & 24 supra.
35. See note 26 and accompanying text supra.
36. See note 4 supra.
37. Id.
38. For a discussion of tie-in sales, see ANTITRUST DEVELOPMENTS, supra note 4, at 38-43.
39. For a discussion of exclusive dealing agreements, see id. at 43-46.
40. For a discussion of reciprocity arrangements, see id. at 28-30.
41. See Travers, supra note 24, at 853.
42. See Kessler & Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1, 24-26 (1959).
43. See id. at 103; Travers, supra note 24, at 860-61, 864.
interlocked firms account for a critical share of the relevant market.\(^{44}\) Still, all of the theories about the potential effects of vertical interlocking arrangements share a common weakness — there is an absence of hard evidence on the actual impact of vertical interlocks to support the conclusions offered.\(^ {45}\)

The same is true with respect to interlocking relationships between competitors through a financial institution.\(^ {46}\) This relationship may be defined as an indirect interlock.\(^ {47}\) In 1951, the FTC found:

\begin{quote}
[1] Interlocking relations between manufacturing corporations and financial institutions, notably the commercial banks, constituted the most important series of interlocking relationships found and also gave rise to the most extensive and apparently significant of the networks of indirect interlocking relations.\(^ {48}\)
\end{quote}

The possibility cannot be dismissed that the representation of competitors on the same bank boards could lead to exchanges of information between competitors, possible anticompetitive cooperative activities, or to the development of communities of interest strong enough to handicap nonrepresented companies dependent upon those banks for essential services. Similarly, the FTC has questioned whether links between competing firms created by indirect interlocks through banks may lead to exchanges of competitively sensitive information or provide artificial stimuli for anticompetitive mergers, joint ventures, and other transfers of corporate power.\(^ {49}\)

B. Should All Vertical and Indirect Interlocks Be Per Se Unlawful?

The potential for the abuse of vertical and indirect interlocking situations exists, but the critical question is: What, if anything, should be done about this potential? Is there a need for new legislation broadening the scope of section 8 to make all vertical and indirect interlocks

\(^{44}\) Travers, supra note 24, at 860-61, 864. This bidding system is already statutorily required for purchases by common carriers where the supplier is vertically interlocked with the common carrier. Clayton Act § 10, 15 U.S.C. § 20 (1970).

\(^{45}\) See Travers, supra note 24, at 853.

\(^{46}\) The potential conflicts of interest problems in this area should not be overlooked. See M. Mace, supra note 6, at 133-44. Professor Mace concluded, primarily on conflict of interest grounds, "that representatives at investment banking firms should not serve as members of corporate boards of directors." Id. at 203.

\(^{47}\) See note 4 supra. In contrast, an interlock between a bank and a commercial corporation to which the bank has extended credit or acts as a depository for the firm's accounts may, in the absence of similar relationships with the firm's competitors, be viewed as a vertical interlock. See INTERLOCKS IN CORPORATE MANAGEMENT, supra note 4, at 9-10.

\(^{48}\) FTC Report, supra note 4, at 27.

\(^{49}\) See Hearings on Corporate Disclosure, supra note 25.
illegal per se? Is section 8 currently broad enough to include certain indirect interlocking arrangements? Can interlocks which fall through the cracks in section 8 but which restrain trade or constitute unfair methods of competition be dealt with by enforcement actions under other provisions of the antitrust laws?

As mentioned earlier, whether these types of interlocking situations should be illegal per se may depend, in part, upon how one resolves issues unrelated to antitrust. But from an antitrust viewpoint, several factors lead the author to believe that, in the absence of a showing of actual anticompetitive effects, a legislated per se restriction of all vertical and indirect interlocks is unwarranted.

In recent years, prosecutors have become more imaginative in their enforcement of section 8 and in the types of remedies imposed to cure section 8 violations. In United States v. Cleveland Trust Co., the Justice Department relied on a theory of "deputization," with a principal objective being to focus the court’s scrutiny on the lawfulness of the defendant bank’s action in placing its personnel on the boards of directors of competing companies. The court recognized this to be a novel theory of section 8 application, first, because it involved the question of whether a corporation may ever be deemed a director within the meaning of the statute and, second, because it involved

50. The FTC has concluded that section 8 of the Clayton Act is deficient in the following respects:
(1) interlocks formed by officers, directors, employees, or substantial stockholders of one corporation serving as directors of competing corporations are not covered; (2) director interlocks between potential competitors, i.e., those firms which might be competitors, were it not for the existence of the interlocks, are not covered; (3) vertical director interlocks between customers and suppliers, particularly borrowers and lenders, are not covered; and (4) indirect horizontal director interlocks between competing corporations formed by directors serving simultaneously on the boards of third corporations are not limited by the act.

FTC Report, supra note 4, at 13-16. It should be noted that section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), may, under certain circumstances, reach these situations, but it is unlikely that the Sherman Act would apply unless the interlock was marked by some conspiracy, combination, or agreement to restrain trade. See Antitrust Developments, supra note 4, at 102 n.236, citing United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

51. See text accompanying notes 5-8 supra.


53. 1974-2 Trade Cas. ¶ 75,278, at 97,847.

54. Id.

55. Id. The court did not resolve this issue on the Government's motion for summary judgment. Id. at 97,848. In support of the deputization theory, the Government relied on decisions holding that under section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(p)(b) (1970), a corporation may be deemed to sit on the board of directors of another corporation through a deputy. 1974-2 Trade Cas. ¶ 75,278, at 97,847, citing Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970), and Marquette Cement Mfg. Co.
resolution of the issue of whether section 8 applies to directorships in two parent companies where one of the parents is in competition, both directly and through one of its own wholly owned subsidiaries, with a wholly owned subsidiary of the other. The consent decree settling the case appears to have adopted the Justice Department's innovative theories as it prohibits the defendant from employing an individual who is a director of a corporation or a subsidiary engaged in particular industries if at the same time an officer or employee of the defendant is already a director of another corporation or subsidiary competing in one of those industries.

Moreover, recent decisions of the United States Supreme Court make it clear that section 5 of the Federal Trade Commission Act can reach most, if not all, interlocking arrangements, irrespective of their legal status under section 8, if it can be shown that they injure competition or consumers or, if it can be proven that if they are not cured, there is a strong possibility that they will lead to outright violations of the antitrust laws. With few exceptions, therefore, it would appear that the FTC has the power to deal with specific instances in which vertical and indirect interlocks are found to be anticompetitive.

56. 1974–2 Trade Cas. ¶ 75,278, at 97,847. The court noted that the case law on this issue was not definitive. Id., citing Kramer, supra note 28, at 1268 n.11 (suggesting that section 8 might apply where the major policies of the subsidiaries are dictated by the parents). The court stated that the question of parent control was a factual issue which could not be decided on motion for summary judgment. 1974–2 Trade Cas. ¶ 75,278, at 97,847–48.
58. 15 U.S.C. § 45(a) (1970). Section 5 provides in pertinent part:
(1) Unfair methods of competition in commerce, or deceptive acts or practices in commerce, are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Id.
59. See FTC v. Brown Shoe Co., 384 U.S. 316 (1966). In Brown Shoe, the Supreme Court found in the legislative history of section 5 the congressional intent to confer upon the FTC the power "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws." Id. at 322 (emphasis added); see FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1964); FTC v. Motion Picture Advertising Co., 344 U.S. 392 (1953); FTC v. Cement Institute, 333 U.S. 683 (1948); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934).
or are found to serve as vehicles for promotion of anticompetitive activities. 60

Some opponents of an expanded application of the interlock restriction argue that there is now a shortage of qualified directors to sit on corporate boards and this situation would only be exacerbated by a blanket prohibition of all vertical and indirect interlocks. 61 There are also contrary arguments to the effect that this is an "elitist" view and wholly without merit. 62 The arguments on both sides are unconvincing.

First of all, it is undoubtedly true that an outside director can be an important advisor to management, bringing experience and a different perspective to the corporate decisionmaking process. Still, it is not clear that the talents of a prospective outside director would necessarily be withheld from management if he is not seated on the company's board. In one instance, a company president, approached by an investment banker who wanted to be nominated to sit on the company's board so that he could do a better job for the company, reportedly responded to the banker with the question: "In what ways could you do a better job than we are now paying you to do?" 63

It is, of course, impossible to generalize accurately about the value of an outside director on a corporate board. In some companies the board or directors may only serve to rubberstamp management decisions or enhance the company's image; 64 in others, the board may make important inputs to the company's decisionmaking processes. Similarly, one individual outside director may vigorously attempt to solve company problems, while another outside director may seek only the prestige of being on a corporate board or the opportunity to generate new business for his own firm. 65 Of course, a working inside director may be more valuable to the company and its stockholders than the outside director.

In any event, whether or not there is a shortage of key director talent and regardless of the value placed on outside director input into

60. Since section 5 of the Federal Trade Commission Act specifically exempts banks from its coverage, to the extent that a challenged bank interlock practice is found to be a banking function, there may be limits on the FTC's power to issue an order against such practice. 15 U.S.C. § 45(a) (6) (1970); see note 58 supra for the pertinent text of section 5(a) (6). Similarly, the insurance business is exempt from federal antitrust law to the extent that such business is regulated by the several states. Sections 1-5 of the McCarran-Ferguson Act, 13 U.S.C. §§ 1011-1015 (1970). In spite of these exemptions, there is no apparent reason why the FTC could not challenge the director and any nonexempt commercial corporations with which the exempt firms are interlocked.


62. See generally Travers, supra note 24, at 835-38.

63. M. Mace, supra note 6, at 152.

64. Id. at 107.

65. Id. at 105-06.
corporate processes, the issue is whether the antitrust laws should intervene to prohibit the seating of outside directors who may be in vertical or indirect interlocking situations. If a vertical or indirect interlock is causing identifiable anticompetitive effects, its existence cannot be justified by a talent shortage. It must be dissolved. Conversely, if a vertical or indirect interlock is not demonstrably anticompetitive, it would, from an antitrust law standpoint, be acceptable even if qualified directors could be found in abundance.

IV. FTC ACTIVITIES RESPECTING INTERLOCKS

As FTC Chairman Engman noted in his recent congressional statement,66 the recent publication of Disclosure of Corporate Ownership67 and the publication of the Securities and Exchange Commission's Institutional Investor Study Report68 have highlighted the importance of knowing more about the effects of interlocking arrangements. As one would expect in our complex business community, these publications have shown that, apart from interlocking directorates and other personnel relationships, large financial institutions and major corporations are intertwined in a variety of business relationships.69 In some cases, the same commercial bank that is represented on a company's board of directors is also a substantial creditor of the company; serves as a depository of its commercial accounts; manages its employee pension funds; and, through its trust department, is a major holder of the company's stock. Some commercial banks may even share these various business relationships with companies which are competitors in particular markets. Under these circumstances, the institutional interlock may increase the economic leverage of financial institutions in the decisionmaking process of competing firms.70

While there is the strong possibility that a number of the above-described corporate interlocks could be the bases for anticompetitive activities, there are no analytical models from which to draw conclusions; nor has hard evidence of anticompetitive effects of these relationships been produced in the last 50 years.71 Yet, recent studies

68. H.R. Doc. No. 64, 92d Cong., 1st Sess. (1971). This study was based primarily on data gathered from questionnaires and interviews and investigated the purchase, sale, and holding of securities by all types of institutional investors in order to measure the impact of such activities upon the securities market and upon the public interest. Id. pt. 1, at 7.
69. See, e.g., Disclosure of Corporate Ownership, supra note 4, at 385–91.
70. Id. at 387–89.
71. See notes 4, 33, 41 & 45 and accompanying text supra.
have shown that these types of interlocks exist in large numbers,\textsuperscript{72} and common sense does suggest that under certain business pressures and circumstances, these interlocking arrangements could lead to abuses. One cannot, therefore, simply assume that these intercorporate affiliations have no significant effect on corporate conduct.\textsuperscript{73}

The degree to which commercial banks and other financial institutions are able to and actually do influence individual or industry-wide corporate decisions, and the implications of such influence, are issues which, according to Chairman Engman,\textsuperscript{74} the FTC's Bureau of Competition has been examining in detail. In addition, the FTC staff is reviewing interlocking personnel relationships between financial institutions and energy companies and between competing energy companies in conjunction with an analysis of other business relationships.\textsuperscript{75} One objective of its inquiry will be to determine whether or not indirect or vertical interlocks lead to reciprocal dealing and tying arrangements.\textsuperscript{76} The study also involves an examination of the following aspects of the energy industries: borrowing-financial relationships; the holding of debt; the deposits of commercial accounts; and the holding and voting of stock in energy companies.\textsuperscript{77} An effort will be made to ascertain the role of linked personnel in bringing about these other relationships.\textsuperscript{78} Indirect and vertical interlocks between energy companies and financial institutions will be considered in order to determine whether they lead to discrimination in financing and borrowing patterns.\textsuperscript{79} Additionally, an effort will be made to determine the functions of linked personnel and their role in particular business transactions.\textsuperscript{80} The study group will also attempt to ascertain whether linked financial institutions play any significant role in bringing about mergers, acquisitions, joint ventures, and corporate takeovers.\textsuperscript{81}

\textsuperscript{72} See, e.g., Dooley, supra note 27, at 315. Professor Dooley's study showed that the number of interlocking directorates of the top 200 nonfinancial and the 50 largest financial corporations has increased slightly from 1935 to 1965. \textit{Id.} The study also indicated that one out of eight interlocks surveyed involved companies within the same five digit SIC product class. \textit{Id.} at 319 n.8. From that observation, Professor Dooley reached the dubious conclusion that these interlocks also involved companies which were competitors. \textit{Id.} at 319.


\textsuperscript{74} See \textit{Hearings on Corporate Disclosure}, supra note 25, at 897-912.


\textsuperscript{76} Halverson, supra note 75; see notes 38 & 40 supra.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.
Further, the issue of whether or not institutional interlocks lead to exchanges of information between competitors or access to information contained in credit files of noninterlocked competitors will be examined.82 This undertaking, if published, should provide a detailed analysis of the actual, as distinguished from the speculative, effects of direct and indirect interlocking relationships in at least one significant sector of the economy.

Finally, the findings in the publication of Disclosure of Corporate Ownership83 suggest that the Government does not require sufficient corporate disclosure to enable it to comprehend and evaluate the implications of corporate ownership and control or to monitor existing prohibitions on interlocking directorates.84

At the present time, interlock information is difficult for private companies, as well as the Government, to obtain with any degree of reliability. The corporate counsel evaluating a prospective director, or the government researcher, at present, must prepare a base list of possible interlocks. Corporate counsel may usually ask questions directly of the prospective director, but since federal agencies' records seldom contain the information from which to compile such a list, enforcement authorities must rely on trade journals, newspapers, and business publications for such information. An alternative approach involves the examination of public sources such as Standard & Poor's Register of Corporations, Directors, and Executives or Dun & Bradstreet Million Dollar Directory. These sources, however, do not agree in many instances as to the composition of corporate boards and do not link directors of certain companies to enough of the companies' product lines. While the files of the Securities and Exchange Commission are another source of public data, the examination of individual files and the cross-referencing of personnel lists are both time-consuming and inefficient.

The second step in the interlock search involves a detailed analysis of the business operations of the interlocked corporations to determine if such corporations are competitors within the meaning of section 8 of the Clayton Act. As noted, those public sources presently available are vague, inconsistent, and lack sufficient detail to make possible a thorough determination of the extent to which the interlocked corporations compete with one another.

82. Id.
84. Id. at 9-11.
For these reasons, the FTC staff is considering a proposal to require a simple annual interlock and ownership report,\textsuperscript{85} pursuant to section 6(b) of the FTC Act.\textsuperscript{86} The FTC staff believes that the required submission of such annual reports could alleviate the deficiencies in present investigatory procedures; place the burden of monitoring interlocks on the corporations themselves at minimal cost to each corporation; and, in general, provide an efficient, detailed, one-step investigatory procedure.\textsuperscript{87} Such a reporting requirement could provide a method of consistent and continuing interlock review by corporate counsel, as well as by enforcement authorities. Assuming that the reporting form is kept simple, the reporting requirement could establish, for the first time, one public source for corporate counsel to check when screening the other relationships of an individual being considered for a directorship. It appears that the FTC staff proposal is presently under consideration by the FTC. If this procedure is proposed by the FTC, it is hoped that the FTC would, prior to implementation, seek comments specifically from those affected to ensure that the formalities involved conform to the FTC staff's stated intention of creating a simple form which imposes as little burden as possible on corporations, while, at the same time, ensuring that the final product will be useful to the private sector and Government alike.

V. Conclusion

Absent as yet unavailable in-depth factual studies, the antitrust laws applicable to interlocking directorates appear to be appropriately interpreted by the courts and to have adequate breadth to allow for non-per se law enforcement when particular fact situations, involving other than horizontal interlocks, demand action.

\textsuperscript{85} See Hearings on Corporate Disclosure, supra note 25; Halverson, supra note 75.
\textsuperscript{87} See Halverson, supra note 75.