IN THE MATTER OF

PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9083. Complaint, May 13, 1976 — Final order, Dec. 6, 1977

This order, among other things, requires a Washington, D.C. savings and loan association to cease having as directors individuals who simultaneously serve, or may serve, as directors for the American Security and Trust Co., National Bank of Washington, Union First Bank of Washington, or any other competitive financial institution.

Appearances

For the Commission: *Roger J. McClure, Peter L. Feldman* and *Alan Proctor.*

For the respondent: *Samuel Scrivener, Jr., Scrivener, Parker, Scrivener & Clarke, Edward F. Howrey, A. Duncan Whitaker, John DeQ. Briggs, III* and *Raymond A. Jacobsen, Jr., Howrey & Simon,* all of Washington, D. C.

COMPLAINT

The Federal Trade Commission having reason to believe that the above-named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definitions apply in this complaint:

(a) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1-4 dwelling units.

(b) "Savings deposits" are deposits on which the "passbook" rate of interest or a lesser rate of interest is paid.

PAR. 2. Respondent Perpetual Federal Savings & Loan Association ("Perpetual") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 500 11th St., N.W., Washington, D.C. Perpetual has capital, surplus and undivided profits aggregating more than $71 million. [2]

PAR. 3. American Security and Trust Company ("American Security") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 15th and Pennsylvania Ave., N.W.,

Washington, D.C. American Security has capital, surplus and undivided profits aggregating more than $89 million.

PAR. 4. National Bank of Washington ("National Bank") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 619 14th St., N.W., Washington, D.C. National Bank has capital, surplus and undivided profits aggregating more than $42 million.

PAR. 5. Joseph B. Danzansky is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1972 and of National Bank since 1969.

PAR. 6. Lloyd H. Elliott is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1972 and of American Security since 1968.

PAR. 7. George M. Elsey is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1973 and of American Security since 1971.

PAR. 8. William S. Harps is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1970 and of National Bank since 1971.

PAR. 9. Thornton W. Owen is chairman of the board of directors and chief executive officer of Perpetual, and is a member of the board of directors of American Security. He has been a director of Perpetual since 1939 and of American Security since 1947. Effective April 20, 1976, his status on the board of directors of American Security changed to that of director emeritus. [3]

PAR. 10. Jean H. Sisco is a member of the boards of directors of both Perpetual and National Bank. She has been a director of Perpetual since at least 1975 and of National Bank since April 1976.

PAR. 11. The business of Perpetual encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of April 30, 1975, Perpetual had savings deposits of more than $646 million and residential loans of more than $517 million. As of October 31, 1975, Perpetual had savings deposits of more than $676 million and residential loans of more than $568 million. Perpetual conducts its business at numerous locations, including 9 offices in the Washington, D.C., metropolitan area.

PAR. 12. The business of American Security encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of June 30, 1975, American Security had savings deposits of more than $188 million and residential loans of more than $77 million. As of

December 31, 1975, American Security had savings deposits of more than $189 million and residential loans of more than $79 million. American Security conducts its business at numerous locations, including 30 offices in the Washington, D.C., metropolitan area.

PAR. 13. The business of National Bank encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of June 30, 1975, National Bank had savings deposits of more than $96 million and residential loans of more than $39 million. As of December 31, 1975, National Bank had savings deposits of more than $101 million and residential loans of more than $42 million. National Bank conducts its business at numerous locations, including 24 offices in the Washington, D.C., metropolitan area. [4]

PAR. 14. (a) By the nature of their businesses and the locations of their operations as hereinabove described, Perpetual and American Security are competitors of each other, and Perpetual and National Bank are competitors of each other.

(b) The elimination, by agreement or otherwise, of competition between Perpetual and American Security or between Perpetual and National Bank would constitute a violation of the antitrust laws.

PAR. 15. (a) The boards of directors referred to in Paragraphs Five, Six, Seven, Eight, Nine and Ten hereof are elected, hold meetings, and perform their functions in the District of Columbia.

(b) Perpetual, American Security, and National Bank conduct their business, as hereinabove described, in the District of Columbia and in various States of the United States.

(c) Perpetual, American Security, and National Bank engage in "commerce" and conduct their business, including activities involving their boards of directors, so as to have an effect upon "commerce," as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 16. Joseph P. Danzansky's simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 17. Lloyd H. Elliott's simultaneous membership on the boards of directors of both Perpetual and American Security is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual. [5]

PAR. 18. George M. Elsey's simultaneous membership on the boards of directors of both Perpetual and American Security is an

unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 19. William S. Harps' simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 20. Thornton W. Owen's simultaneous membership on the boards of directors of both Perpetual and American Security is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 21. Jean H. Sisco's simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

MARCH 28, 1977

I

PRELIMINARY STATEMENT

The Commission's complaint in this proceeding issued on May 13, 1976. It charges Perpetual Federal Savings & Loan Association (hereafter "Perpetual") with having six directors who are also directors on one of the boards of two competing banks, and that each such simultaneous board membership is an unfair act, practice, or method of competition violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

[2] On June 4, 1976, complaint counsel moved to amend the complaint to allege that one additional director of Perpetual was also a director of one additional competing bank. By an order filed June 29, 1976, the complaint was amended to allege that seven of the directors of Perpetual are interlocked with three competing banks.

Perpetual's answer, filed July 19, 1976, generally admits the basic allegations of the amended complaint, except that it denies that it competes with the banks or that the interlocking directorates violate the Federal Trade Commission Act. Further, the answer asserts several affirmative defenses: (1) the complaint fails to state a claim

upon which relief can be granted; (2) the interlocking directorates do not constitute an unfair method of competition or an unfair or deceptive act or practice; (3) the fact that certain of its directors are directors of banks is not a corporate act; (4) the corporate respondent is improperly charged on the basis of the allegations with respect to which only relief against individuals is provided by Section 8 of the Clayton Act, 15 U.S.C. 19; (5) the Commission lacks jurisdiction because the banks and respondent are not competitors; (6) the Federal Home Loan Bank Board has plenary and exclusive authority over respondent, which is a federally chartered and insured savings and loan association; (7) the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Federal Reserve System have primary jurisdiction over the banks; and (8) banks are specifically excluded from the provisions of Section 5 of the Federal Trade Commission Act.

A prehearing conference was held on June 28, 1976, and a briefing schedule was established for disposing of the proceeding by summary decision. On August 16, 1976, a stipulation of facts was filed. On September 24, 1976, complaint counsel filed a motion for summary decision and proposed findings. On October 28, 1976, an informal prehearing conference was held, and, respondent having retained new trial counsel, a new briefing schedule was adopted. On December 13, 1976, respondent answered complaint counsel's motion and cross-motion for summary decision. An additional stipulation of facts was filed on December 14, 1976, and on December 15, 1976, pursuant to a joint motion, respondent's amended and supplemental answer was filed. The stipulation states that on April 20, 1976, one of respondent's directors became a director emeritus of a bank in accordance with the policy of the bank that directors retire at age 72 but are eligible to be elected directors emeriti annually until the age of 80. [3] The stipulation further states that two directors had resigned from respondent's board and that two of the directors had resigned from the boards of the banks. On January 31, 1977, the National Savings and Loan League filed an *amicus* brief and supporting affidavit. On February 28, 1977, responses to the *amicus* brief were filed by counsel.

By order dated December 1, 1976, an invitation was offered to the Federal Home Loan Bank Board to file an *amicus* brief addressed to the jurisdictional issues raised by the pleadings in this proceeding. By a response dated January 25, 1977, the Board admitted that it "has a substantial and direct interest in the jurisdictional issues" in this proceeding, but has decided not to file an *amicus* brief "at this early stage of the FTC proceedings" and "reserves the right to seek

leave to file an *amicus* brief when the case comes before the full Commission."

On the basis of the stipulation of facts, affidavits and exhibits submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact:[1]

II

Findings of Fact

[4] 1. Respondent Perpetual Federal Savings & Loan Association is a corporation organized and existing under and by virtue of the laws of the United States of America. Perpetual is a "corporation" as that term is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and as that term is used in other sections of that Act. Perpetual is not a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and is not a "bank," "banking association" or "trust company" as those terms are used in Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19, 21, and is not a "savings bank" as that term is used in Section 8 of the Clayton Act. It maintains its principal place of business at 500 11th St., N.W., Washington, D.C. Perpetual has capital, surplus and undivided profits aggregating more than $71 million. (Ans., ¶ 2; Stip., ¶¶ 7 & 8.)

2. American Security and Trust Company ("American Security") is a corporation organized and existing under and by virtue of the laws of the United States of America. American Security is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 15th and Pennsylvania Ave., N.W., Washington, D.C. American Security has capital, surplus and undivided profits aggregating more than $89 million. (Ans., ¶ 3; Stip., ¶ 9.)

3. National Bank of Washington ("National Bank") is a corporation organized and existing under and by virtue of the laws of the United States of America. National Bank is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 619 14th St., N.W.,

[1] The following abbreviations are used throughout this initial decision:
"Stip." - Stipulation of August 16, 1976, with paragraph references.
"Stip. II" - Stipulation of December 13, 1976, with paragraph references.
"Ans." - Perpetual's Amended and Supplemental Answer to the Complaint, with paragraph references.
Complaint Counsel's "Reply Memo" - Complaint Counsel's Memorandum in Reply to Respondent's Answer and in Answer to Respondent's Cross-Motion for Summary Decision, Appendices A–D.
Respondent's "Cross-Motion" - Cross-Motion of Respondent Perpetual Federal Savings & Loan Association for Summary Decision Dismissing Complaint and Memorandum in Support Thereof, Together with Answer of Respondent to Complaint Counsel's Motion for Summary Decision.

Washington, D.C. National Bank has capital, surplus and undivided profits aggregating more than $42 million. (Ans., ¶ 4; Stip., ¶ 9.)

4. Union First National Bank of Washington ("Union First") is a corporation organized and existing under and by virtue of the laws of the United States of America. Union First is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 740 15th St., N.W., Washington, D.C. Union First has capital, [5] surplus and undivided profits aggregating more than $37 million. Union First was formed in December 1975 by the merger of Union Trust Company of the District of Columbia ("Union Trust") and First National Bank of Washington ("First National"). (Ans. ¶ 5; Stip., ¶ 9.)

5. Joseph B. Danzansky is and has been a member of the board of directors of National Bank since 1972. He was a director of Perpetual from 1972 until on or about September 16, 1976. (Ans. ¶ 5; Stip., ¶ 20.)

6. Lloyd H. Elliott is and has been a member of the board of directors of American Security, since 1968. He was a director of Perpetual from 1972 until on or about September 16, 1974. (Ans., ¶ 7; Stip., ¶ 20.)

7. George M. Elsey is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1973 and of American Security since 1971. (Ans., ¶ 8.)

8. William S. Harps is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1970 and of National Bank since 1971. (Ans. ¶ 9.)

9 Thomas J. Owen is president of Perpetual and the son of Thornton W. Owen. He also is and has been a member of the board of directors of Perpetual since 1972. He was a director of Union First or Union Trust from 1971 until on or about September 16, 1976. (Ans., ¶ 10; Stip., ¶ 20.)

10. Thornton W. Owen is chairman of the board of directors and chief executive officer of Perpetual, and was a member of the board of directors of American Security from 1947 until April 20, 1976. He has been a director of Perpetual since 1939. Effective April 20, 1976, his status with American Security changed to that of director emeritus in accordance with the policy of that bank that directors retire from its board of directors effective at the annual meeting following their 72nd birthday. Individuals who thus retire from the board are eligible, at the option of the board, to be elected directors emeriti annually by the board until the age of 80; they are not elected by the bank corporation or by its shareholders. Mr. Thornton W. Owen's position as a director emeritus with American Security is solely honorary in nature. The bylaws and charter of American

Security do not give a director emeritus any official vote in the management of the company or provide a director emeritus with any rights, duties or responsibilities. [6] A director emeritus is not entitled to vote at meetings of the board of directors. As director emeritus of American Security, Mr. Owen may attend the meetings of the board of directors, and does attend from time to time. While he may speak at the meetings, Mr. Owen, as director emeritus, does not normally participate in discussions at the meetings, but his role is essentially that of an observer. At the board meetings, documents are available for review by each director and director emeritus. These documents include a folder containing financial reports of the company for the past month and year to date, as well as reports from committees of the bank, together with action taken by those committees in the past month. Mr. Owen may view these reports at the meeting but does not take them from the meeting. (Ans. ¶ 11; Stip. II, ¶ 19.)

11. Jean H. Sisco is and has been a member of the board of directors of Perpetual since at least May 13, 1975. She has been a director of National Bank from April 1976 until on or about September 16, 1976. (Ans., ¶ 12.)

12. "Residential loan" means a loan secured by a mortgage or other lien on non-farm property containing 1–4 dwelling units. (Stip., ¶ 1.)

13. "Savings" means a savings account or savings deposit account maintained by a financial institution. "Savings" includes all savings accounts offered by Perpetual and all savings deposit accounts offered by American Security, National Bank, and Union First. (Stip., ¶ 1.)

14. The business of Perpetual includes solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, it had savings of more than $682 million (or more than 97 percent of its total liabilities) and residential loans of more than $565 million (or more than 73 percent of its total assets). Perpetual conducts its business at numerous locations, including 5 offices in Washington, D.C., and 4 offices in the suburbs of Washington, D.C., in the State of Maryland. Perpetual has applied to the Federal Home Loan Bank Board for, and has received, permission to open a tenth office at 19th and K Sts., N.W., Washington, D.C. Perpetual is the largest savings and loan association in the metropolitan Washington, D.C., area. (Ans., ¶ 13; Stip., ¶¶ 12–14.)

[7] 15. The business of American Security includes the solicitation and maintenance of savings, and the solicitation and financing of

residential loans. As of December 31, 1975, American Security had savings of more than $189 million (or more than 18 percent of its total liabilities) and residential loans of more than $79 million (or more than 7 percent of its total assets). American Security is the second largest bank in Washington, D.C., and has 30 offices in the city. (Stip., ¶¶ 12, 13 & 16.)

16. The business of National Bank includes the solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, National Bank had savings of more than $101 million (or more than 19 percent of its total liabilities) and residential loans of more than $42 million (or more than 7 percent of its total assets). National Bank is the third largest bank in Washington, D.C., and has 25 offices in the city. (Stip., ¶¶ 12, 13 & 15.)

17. The business of Union First includes the solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, Union First had savings of more than $88 million (or more than 19 percent of its total liabilities) and residential loans of more than $68 million (or more than 14 percent of its total assets). Union First was formed in December 1975, by the merger of Union Trust and First National. Union First is the fourth largest bank in Washington, D.C., and has 19 offices in the city. (Stip., ¶¶ 12, 13 & 17.)

18. Perpetual solicits and maintains savings in the form of savings accounts. (Stip., ¶ 12(a)(i).) American Security, National Bank and Union First solicit and maintain savings in the form of savings deposits. (Stip., ¶ 12(a)(ii).) Perpetual, American Security, National Bank, and Union First attract savings through advertising, the convenience of office locations, hours of operation, and the rates of return paid on savings. (Stip., ¶ 12(a)(iv).) Savings accounts maintained by Perpetual and savings deposit accounts maintained by American Security, National Bank and Union First totalled the following amounts on December 31, 1975 (Stip., ¶ 12(a)(iii)):

Perpetual $682,314,000
American Security 189,685,000
National Bank 101,508,000
Union First 88,444,000

[8] 19. Perpetual, American Security, National Bank and Union First solicit and make residential loans. Each institution maintains a loan department which arranges residential loans and negotiates the terms of these loans, including, but not limited to, interest rate, maturity, and percentage of property value financed. Perpetual,

American Security, National Bank and Union First arrange loans with substantially the same terms. (Stip., ¶ 12(b).)

20. The average dollar amount of the residential loans made by Perpetual and the three banks is approximately the same. For example, during various recent periods in zip code 20007, Perpetual made 91 loans for an average of $54,468.13; American Security made 25 loans for an average of $48,400; National Bank made 12 loans for an average of $67,000; and Union First made 13 loans for an average of $70,384.62. In metropolitan Washington, during the same period of time, Perpetual's average residential loan for 274 loans was for $42,072.59, American Security's for 225 loans was for $46,715.55, National Bank's for 112 loans was for $64,205.36, and Union First's for 129 loans was for $64,844.96. (Complaint Counsel's Reply Memo, App. C.)

21. In addition to residential loans and savings, Perpetual, American Security, National Bank, and Union First offer any one or more of the following financial services or products which assist them in their competition for savings and residential loans, including:

(a) Mortgage refinancing;
(b) Christmas savings plan;
(c) Retirement Plan for the self-employed (Keogh);
(d) Individual retirement plan (IRA);
(e) Federal payroll and social security allotment;
(f) Payroll savings;
(g) Passbook loans;
(h) Money orders up to $250;
(i) Save-by-mail;
(j) Note collections;
(k) Travelers checks;
(l) Telephone transfer;
(m) Home improvement loan;
(n) Safe deposit boxes;
(o) U.S. savings bonds issued and redeemed;
(p) Acceptance of payments of utility bills;
(q) Drive-up window;
(r) After hours depository; and
(s) Check cashing service (Stip., ¶ 12(c-d)).

[9] 22. Perpetual does not provide, but is authorized to provide at its option, the following financial services provided by American Security, National Bank and Union First:

(a) Savings deposits;
(b) Time Savings; and
(c) Certificates of deposit larger than $100,000. (Stip., ¶¶ 6(b), 12(d).)

23. In an application for a branch to be located at 19th and K Sts., N.W., dated February 2, 1976, the President of Perpetual stated:

> Recently, commercial banks in the area have been increasing their service capacity by extending their working hours, through manned walk-up teller windows and twenty-four hour banking machines. The result of these installations together with greater numbers of branch offices has given the *commercial banks a distinct marketing advantage over competing thrift institutions* in the area. (Stip. App. at p. 36.) (Emphasis added.)

24. The boards of directors of Perpetual, American Security, National Bank, and Union First are elected, hold meetings, and perform their functions in the District of Columbia. (Ans., ¶ 18; Stip., ¶ 10.)

25. Perpetual, American Security, National Bank, and Union First conduct their business, as hereinabove described, in the District of Columbia and in various States of the United States. (Ans., ¶ 18; Stip., ¶¶ 9, 10, 12.)

26. Perpetual, American Security, National Bank, and Union First engage in "commerce" and conduct their business, including activities involving their boards of directors, in or affecting "commerce," as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. (Ans., ¶ 18; Stip., ¶¶ 9, 10, 12.)

27. Perpetual, American Security, National Bank, and Union First are governed by their respective boards of directors. Each board has the ultimate decision on matters affecting its institution. Such matters include, but are not limited to, selection of officers to manage and operate the institution, establishment of earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection of and application for additional branch facilities. (Stip., ¶ 18.) **[10]**

III

Discussion

MERITS

There is no genuine issue as to the truth of these material facts: (1)

Seven of the eleven members of the board of directors of Perpetual simultaneously served on one of the boards of three banks;[2] and (2) Perpetual, the largest savings and loan association in Washington, D.C., and the three banks (the second, third and fourth largest in the city) engage in the same business of attracting savings and making residential loans, amounting to approximately one and three-quarters billion dollars.[3] These facts, without more, constitute a violation of Section 5(a)(1) of the Federal Trade Commission Act.[4] Congress gave the Commission power under Section 5: "to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." *FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948). Interlocking directors among these competing firms inherently create risks of anticompetitive effects; this unfair practice must cease in the public interest.

Savings and loan association ("S&L")/bank interlocks among competing firms are an unfair trade practice in violation of Section 5 for two reasons: (1) the practice violates the policy of Section 8 of the Clayton Act,[5] [11] and (2) it amounts to an incipient violation of the Sherman Act.[6] Such violations of the central policy of the antitrust laws clearly violate Section 5. *FTC* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 321 (1966).

Policy of Section 8

The policy of Section 8 can be seen from reading the words of the statute pertaining to competing corporations. With the exception of certain banking organizations and common carriers, it flatly prohibits interlocking directors among large competing corporations: "[N]o person at any time shall be a director in any two or more corporations . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors. . . ."[7] There is no need to assess the nature of the

[2] Findings 5–11.

[3] Findings 14–23.

[4] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 15 U.S.C. 45(a)(1).

[5] "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, . . . 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. . . ." 15 U.S.C. 19.

[6] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 15 U.S.C. 1.

[7] The provision in Section 8 dealing with banks provides:

"No private banker or director, officer or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer or employee of any other bank, banking

(Continued)

industry or to look at mitigating circumstances.[8] It is a *per se* statute. Congress had reasons for being so strict.

[12] The Clayton Act's provisions regulating interlocking directorates grew out of the reports of two Congressional investigations of interlocking directorates. See *Investigation of United States Steel Corp.,* H.R. Rep. No. 1127, 62d Cong., 2d Sess. (1912) (Report of the Stanley Committee); *Investigation of Concentration of Control of Money and Credit,* H.R. Rep. No. 1593, 62d Cong., 3d Sess. (1913) (Report of Pujo Committee). In the Pujo Committee Report, the policy for prohibiting common directors between competing financial institutions was explained, *Id.* at p. 140:

> As the first and foremost step in applying a remedy and also for reasons that seem to us conclusive, independently of that consideration, *we recommend that interlocking directorates in potentially competing financial institutions be abolished and prohibited so far as lies in the power of Congress to bring about that result.* . . . When we find, as in a number of instances, the same man or director in half a dozen or more banks and trust companies all located in the same section of the same city, doing the same class of business and with a like set of associates similarly situated, all belonging to the same group and representing the same class of interests, all further pretense of competition is useless. . . . If banks serving the same field are to be permitted to have common directors, genuine competition will be rendered impossible. Besides, this practice gives to such common directors the unfair advantage of knowing the affairs of borrowers in various banks, and thus affords endless opportunities for oppression. (Emphasis added.)

And both the Senate Report and House Report on Section 8 show the spirit of the statute applicable here. Simultaneously discussing the significance of both the banking and competing corporation interlock proscriptions contained in the statute, the reports state:

> The importance of the legislation embodied in Section [8] of this bill can not 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.* From an economic point [13] of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as effective and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the

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association, savings bank, or trust company. . . ."

Congress was even more concerned about interlocks between these financial institutions and proscribed interlocking officers and employees as well as directors between such institutions.

[8] "[Section 8] establishes rather simple objective criteria for judging the legality of an interlock. . . . [A] marketwide analysis of competition is unnecessary . . . ." *Protectoseal Co.* v. *Barancik,* 484 F.2d 585, 589 (7th Cir. 1973) (Stevens, J.).

entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally. [S. Rep. No. 698, 63d Cong., 2d Sess. 16 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. 19-20 (1914).] (Emphasis added.)

The purposes of Congress in passing Section 8 are unmistakably clear. In a leading case under the statute, *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953), Judge Weinfeld said, at p. 616, that:

Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen the Sherman Act, which, through the years, had not proved entirely effective. Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of events should have been in active and unrestrained competition. Instead, and because of such control, the healthy competition of the free enterprise system had been stifled or eliminated. *Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They tended to suppress competition or to foster joint action against third party competitors.* The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, *what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through* [14] *interlocking directorates. The legislation was essentially preventative.* (Emphasis added.)[9]

The fears of Congress as to the undesirable effects of interlocking directors have been established by empirical evidence. After analyzing the effects of interlocking directors among the 1,000 largest manufacturing corporations and some 330 non-manufacturing corporations, the Federal Trade Commission in 1950 found that:

An individual who is a member of more than one board of directors cannot divide his personality into unrelated segments. When sitting on one board he necessarily continues to know what he has found out on other boards, what he has recommended to those boards, and what action those boards have taken. He would be derelict to his responsibility if in two different boards of directors he supported policies each of which would tend to defeat the course of action he had recommended or seen adopted in the other company. Hence, wherever an individual serves on the boards of two or more companies that have interests related to each other, his duty as a director is necessarily to harmonize those interests so far as possible. If he cannot do so he can fulfill his duty to both companies only by withdrawing from further participation in

[9] Respondent acknowledges that Congress responded, in part, to the writings of Brandeis by enacting Section 8 of the Clayton Act. Cross-motion memo, p. 140. Brandeis summarized Section 8 as follows:

"The practice of interlocking directorates is the root of many evils. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency, for it removes incentives and destroys soundness of judgment." [*Other People's Money*, Brandeis, 51 (1932).]

the business at hand. A director of two competing corporations cannot in good conscience recommend that either shall undertake a type of competition which is likely to injure the other. . . . Thus the inherent tendency of interlocking directorates between [15] companies . . . that have relations to each other as competitors, is to blunt the edge of rivalry between corporations, to seek out ways of compromising opposing interests, and to develop alliances where the interest of one of the corporations is jeopardized by third parties.

Insofar as the idea of meticulous stewardship by boards of directors has been relaxed in practice, the effect of relaxation has necessarily been to strengthen these tendencies. Governmental investigations and private law suits have revealed impressive cases in which directors have regarded themselves as spokesmen of special interests other than those of the owners of the corporation on whose board they sit. When a director of one corporation views himself as a representative of another corporation and seeks to serve the interest of the latter even at the expense of the interest of the former, his directorship has an obvious tendency to destroy the independence of the former concern . . . [*Report of the Federal Trade Commission on Interlocking Directorates,* H.R. Doc. No. 652, 81st Cong., 2d Sess. pp. 20-21 (1951).]

Relating his experience from a "special review," Chairman of the Board of Governers, Federal Reserve Board, Arthur F. Burns recently advocated banning interlocking directors among competing financial institutions, including banks and savings and loan associations, engaged in the business of receiving deposits:

Interlocking directorates are not necessarily harmful. They can benefit the corporations involved and the public they serve by facilitating the free interchange of advice, ideas, and experiences among directors of the varied backgrounds that are necessary to maintain high standards of performance by boards of directors.

However, interlocking relationships between institutions that compete for the funds of the public involve a risk of abuse that the Board believes outweighs the reasonable expectation of benefits that might flow from such relationships.[10]

[16] As evidenced by the statute, its legislative history, and experience, it is clear that S&L/bank interlocks among competing firms violate the policy of Section 8 of the Clayton Act. The "broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *FTC* v. *Brown Shoe, Inc.,* 384 U.S. 316, 321 (1966).[11]

Incipient Violation of the Sherman Act

The director interlock between competitors may lead to trade restraints in violation of Section 1 of the Sherman Act. The relationship creates a means by which *per se* illegal agreements

[10] Letter to Senator Proxmire, dated Sept. 28, 1976, respondent's Cross-motion, Exhibit H.

[11] Since there is nothing to show that Congress intentionally excluded S&L/bank interlocks from Section 8, *infra,* no Congressional policy is upset here. *Grand Union Co.* v. *FTC,* 300 F.2d 92, 98-99 (2d Cir. 1962).

between competitors may be reached involving price fixing and division of markets. Furthermore, the relationship creates an incentive for such illegal agreements because the joint director is now interested in increasing the profits of both firms and one way to do that is to eliminate competition between them. Even if competition is not reduced by formal agreement, such an interlock will surely increase the exchange of competitive information between the interlocked competitors. The exchange of competitive information between competitors under certain circumstances has been held to be *per se* illegal under the Sherman law. *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969).

The kind of information which may be exchanged through the interlocking directors, and the matters concerning which agreement may be reached by the arrangement, are indicated by the subjects decided by the boards of the competing financial institution involved here: Perpetual, American Security, National Bank and Union First are governed by their respective boards of directors. Each board has the ultimate decision on matters affecting its institution. Such matters include selection of officers to manage the institution, setting the earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection [17] of and application for additional branch facilities. (Finding 27.) The exchange of information concerning such competitive information and agreements resulting therefrom would clearly violate the Sherman Act. The fact that this may not yet have happened is immaterial. *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 620 (S.D.N.Y. 1953):

> While the government does not charge that any such agreement has here been made or is contemplated, a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation. The fact that this has not happened up to the present does not mean that it may not happen hereafter.

The interlocks here build an unlawful bridge, regardless of whether illegal trafficking has yet occurred.

The Federal Trade Commission was designed to stop conduct which conflicts with the policy of the Sherman Act even though that conduct does not violate the Sherman Act. *FTC* v. *Cement Institute,* 333 U.S. 683, 691–92, 694 (1948). It was one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and through it violations of the Sherman Act might be stopped in their incipiency. *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457, 466 (1941). The S&L/bank director interlocks here, among

financial firms competing for deposits and in making residential loans, are unfair because they so easily may lead to the exchange of competitive information and agreements to harmonize competitive discord, which, once they occur, would amount to trade restraints violating the Sherman Act.

Violations of Public Values

The Federal Trade Commission has the power to hold a practice unfair and a violation of Section 5 by looking at public values not included in the antitrust laws. Just that question was before the Court in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1971).[12] The Court remanded the case to the Commission because there was no indication in the Commission's opinion that S&H's conduct was unfair in its effect on competitors "because of considerations other than those at the root of the antitrust laws," nor was there any discussion of damage to consumers. *Id.* at 247. The Court articulated [18] a refined test for determining when such effects will be "unfair" and a violation of Section 5, *Id.* at 244:

> . . . [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

The Court pointed out that the Commission has described the following factors to be considered in this determination, *Id.* at pp. 244–45, n.5:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).". . . "The wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers." (Emphasis is by the Court.)

The Court made it clear that this "public values" test could be used to proscribe both unfair competitive practices, and practices unfair in their effect upon consumers, *Id.* at 239:

> . . .[D]oes § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or

[12] The lower court had found S&H's conduct did not violate the letter or spirit of the antitrust laws, and the Commission did not appeal that question. *Id.* at 239.

the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.

[19] Complaint counsel argue that Perpetual's interlocking directors violate the public values test of *S&H,* citing comments of Justice Brandeis,[13] President Wilson,[14] and the Pujo Committee,[15] pointing out the potential conflicts of interest and elimination of competition which can occur through the practice.

In my opinion, the public values test of *S&H* is applicable only when a practice may be unfair even though it is not within the letter or spirit of the antitrust laws. If the practice violates the policy codified by the antitrust laws, the established concept of those laws, as defined by the statutory history and language and the cases interpreting the concept, should be the test of the practice rather than the more ethereal public values argument proposed by complaint counsel. The legislature, the courts, and the regulatory agencies have studied interlocking directors for more than sixty years. No moral suppositions are necessary. The public will has already been announced and defined in the statutes and cases.

There Are No Genuine Issues of Material Facts

Respondent contends that complaint counsel's motion for summary decision cannot be decided because there remain genuine issues of material fact, such as: (1) whether there is competition between Perpetual and the banks; (2) whether that competition is substantial; and (3) whether there has been any injury to competition resulting from the challenged director interlocks.

[20] The stipulation and documents introduced by complaint counsel show that Perpetual competes with each of the three banks in attracting savings and making residential loans. (Findings 18-23.) The evidence shifts to respondent Perpetual the burden of coming forward with facts to dispute the inferences raised by such evidence. *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 289-90 (1968). While Perpetual asserts that it does not compete with the banks, it has not adduced "any significant probative evidence" tending to support that assertion. *Id.* at p. 290. Of course, on summary decision the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United*

[13] L. Brandeis, *Other People's Money,* p. 51 (1932).
[14] *Id.* at 223.
[15] H. R. Rep. No. 1593, 62d Cong., 3d Sess, 140 (1913).

States v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962). But if those facts support only one conclusion, there is no need for a trial.

In response to facts showing competition between Perpetual and the banks in soliciting savings and making residential loans, respondent relies on the argument that banks are primarily interested in making commercial loans involving higher rates of interest, shorter terms, and larger amounts. In an affidavit of its chief executive officer, respondent asserts that the average amount of "mortgage loans" made by American Security and National Bank was approximately six times as large as the average loan made by respondent. When the amount is determined for the average *residential* mortgage loan by banks, however (as different from the average amount for *commercial* mortgage loans), the average loan by both respondent and the banks is about the same. (Finding 20.)

Respondent contends that whatever competition exists between the banks and savings and loans is not substantial. One proof offered in this regard is that commercial banks use only part of their resources to make residential loans. "The fact that this volume . . . may represent but a small percentage . . . does not militate against the undesirability of directorates common to both corporations." *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 620 (S.D.N.Y. 1953).

Further, the amounts here involved show the public interest. Respondent's savings deposits at the end of 1975 amounted to more than $680 million; the three banks' savings deposits totalled $378 million. Perpetual's residential loans [21] exceeded $565 million; the three banks' residential loans totalled $189 million. (Findings 14-17.) These amounts are not insubstantial.[16]

Respondent also argues that, as a matter of law, savings and loan associations do not compete with banks, relying on merger cases which hold that the relevant product market in which to test the impact of the merger of two banks should not include savings and loan associations. *United States* v. *Connecticut National Bank,* 418 U.S. 656 (1974); *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350 (1970). It is clear, however, that those cases limit the relevant market to the "cluster of services" offered by banks only as a matter of the facts developed on those records. *United States* v. *Connnecticut National Bank,* 418 U.S. 656 at 663-64, n.3. When the challenged acquisition involved a bank and a savings and loan association, the relevant market was drawn to include the competi-

[16] The requirement in Section 8 of the Clayton Act that one of the two interlocked corporations have capital, surplus and undivided profits totalling more than $1,000,000 is a protection against *de minimis* cases rather than a requirement for showing effect on competition. *United States* v. *Sears, Roebuck & Co.,* 111 F.Supp. 614, 621 (S.D.N.Y. 1953).

tion by both financial institutions. *Fort Worth National Corp.* v. *Federal Savings & Loan Insurance Corp.*, 469 F.2d 47 (5th Cir. 1972).

While there is no direct evidence in this record of adverse effect on competition or consumers from the interlocked directorates—no agreement to fix rates of return on savings or interest on residential loans, no cooperation in reducing services supplied by the competing financial institutions—direct evidence of detrimental impact on competition is not required for the Commission to find a practice unfair.[17] Such proof was required in early cases involving the Commission's resort to Section 5 to challenge practices covered by the Clayton Act but technically outside the statute.[18] But those [22] cases have been rejected by the Supreme Court. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1971). The law is now best summarized in *FTC* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 320–22 (1966):

> [T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic practices of the Sherman and Clayton Acts even though such practices may not actually violate these laws. The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, unless faithless to their contractual obligations with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away the freedom of purchasers to buy in an open market. Brown nevertheless contends that the commission had no power to declare the franchise program unfair without proof that its effect 'may be substantially to lessen competition or tend to create a monopoly' which of course would have to be proved if the Government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element, must be made for . . . our cases hold that the Commission has power under § 5 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.

The interlocks in this proceeding violate the policy of Section 8 of the Clayton Act and constitute incipient violations of Section 1 of the Sherman Act. The kind of agreements and transfers of information between competitors which could result from the interlocking directors may eliminate competition through price fixing or territorial allocation, constituting *per se* violations of Section 1 of the Sherman Act, without regard to the amount of commerce affected. *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 621 (S.D.N.Y.

[17] Where a violation of Section 8 of the Clayton Act is alleged, no such proof would be required. *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 589 (7th Cir. 1973).

[18] Howrey, *Utilization by the FTC of Section 5 of the FTC Act as an Antitrust Law*, 5 Antitrust Bull., 161, 166 (1960).

1953). Proof of injury to competition or consumers is therefore unnecessary to holding that the interlocks here violate Section 5 of the Federal Trade Commission Act, and this matter may be concluded upon summary decision without a trial. [23]

JURISDICTION

The Federal Trade Commission has jurisdiction to prevent Perpetual from engaging in director interlocks with the three competing banks. That jurisdiction springs from Section 5 of the Federal Trade Commission Act, and Congress did not intend an exemption to Section 5 by granting the Federal Home Loan Bank Board ("FHLBB" or "Board") jurisdiction over Perpetual. The Commission and the FHLBB share concurrent jurisdiction over Perpetual and its interlocks.[19] The FHLBB has neither exclusive nor primary jurisdiction in this matter.[20]

The Statutes

Section 5(a)(2) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(6) provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." Perpetual admits that it is such a corporation. (Ans., ¶ 2.) Perpetual argues, however, that Congress has given exclusive jurisdiction to the FHLBB over the interlocking directorates between banks and S&Ls.

[24] The FHLBB was created in 1933 when Congress passed the Home Owners Loan Act (HOLA), 12 U.S.C. 1461, *et seq.*, which gave the Board authority to charter and supervise federal S&Ls.[21] Pursuant to the statute, the Board is empowered to prescribe rules and regulations providing for the "organization, incorporation, examination, operation and regulation" of federal savings and loan

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[19] The FHLBB has acknowledged that the FTC has jurisdiction over some practices of S&Ls. In a policy statement, the FHLBB stated that it would discourage S&Ls from participating in lease arrangements which it believed could violate Section 5 of the FTC Act. 41 F.R. 2806 (1976).

[20] While the issues of primary or exclusive jurisdiction usually involve a federal court and an administrative agency, the doctrines have been applied where two agencies are involved. *American Airlines, Inc.* v. *Airline Pilots Ass'n*, 91 F.Supp. 629 (E.D.N.Y. 1950); *In re Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957).

[21] The Board derives authority from acts other than HOLA. For example, the Federal Home Loan Bank Act, 12 U.S.C. 1421-49, established Federal Home Loan Banks and gave the FHLBB authority to issue rules and regulations governing the operations of such banks. The Federal Home Loan Mortgage Corporation Act, 12 U.S.C. 1451-59, created the Federal Home Loan Mortgage Corporation, under the direction of the FHLBB, to supplement the Federal National Mortgage Association. See 1970 U.S. Code Cong. & Ad. News, pp. 3488, 3495. The National Housing Act, as amended, 12 U.S.C. 1701, *et seq.*, created the Federal Savings and Loan Insurance Corporation ("FSLIC") under the FHLBB, providing for insurance of savings and loan accounts, and giving the Board, through FSLIC, authority to regulate savings and loan holding companies. See 12 C.F.R. 561, *et seq.*

associations, 12 U.S.C. 1464(a). The Board regulates S&Ls' entry into the market, 12 U.S.C. 1432 and 1464(a), and their mergers, 12 U.S.C. 1464(d)(11). And under 12 U.S.C. 1464(d), the Board is empowered to bring proceedings to enforce compliance with law, and conditions it may impose.[22] The substantive law violations which the Board can regulate include (A) violations of "a law, rule, regulation, or charter or other condition imposed in writing by the Board;" (B) engaging in an "unsafe or unsound practice;"[23] (C) violations or practices which constitute a breach of fiduciary duty by a director or an officer in which the Board determines "that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced." The grounds [25] for appointment of a conservator or receiver for an association under the statute include: (1) insolvency, (2) dissipation of assets or earnings, (3) an unsafe or unsound condition to transact business, (4) willful violation of a cease and desist order, (5) concealment of books, papers, records or assets from inspection by a Board examiner.

The substantive violations aimed at by § 1464(d) indicate that Congress intended by the statute to promote the growth of a safe and sound thrift industry.[24] The purpose for the Board's authorization to regulate federal savings and loan associations is: "to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes . . ." 12 U.S.C. 1464(a). The Board's primary regulatory authority, then, is to prevent savings and loan associations from engaging in unsafe and unsound financial practices.[25] Thus, the Board's regulatory authority and the Commission's enforcement powers are complementary in controlling the financial practices and anticompetitive conduct of S&Ls.

When the FHLBB was created in 1933, Congress did not amend the Federal Trade Commission Act to exempt S&Ls.[26] Congress did amend the FTC Act after passing the Civil Aeronautics Act, so that air carriers would be exempt from Section 5. (Act of June 23, 1938,

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[22] The means of compliance provided therein include cease and desist proceedings, temporary cease and desist orders, court suits for injunctions, suspension or removal of directors or officers, and appointment of conservators or receivers.

[23] This phrase connotes risk of financial loss to the S&L, its shareholders, or the agencies insuring the S&L. See statement of Chairman of FHLBB, 112 Cong. Rec. 25008 (1966).

[24] *Cf., Hearings on H.R. 4980 Before the House Comm. on Banking and Currency,* 73d Cong., 1st Sess. 12 (April 21, 1933); H.R. Rep. No. 1922, 73d Cong., 2d Sess. 4 (1934); 78 Cong. Rec. 11192 (1934).

[25] The National Housing Act also shows Congress' intent that the Board prevent unsafe financial practices, *e.g.,* 12 U.S.C. 1726(b) and (c).

[26] While federal savings and loan associations were not created until 1933, the first S&L in this country was established in 1831, and these thrift institutions were in existence when the Federal Trade Commission Act was passed. *Amicus* Brief of the National Savings and Loan League, p. 5. Thus, Congress could have excluded S&Ls from Commission jurisdiction under Section 5 just as banks were exempted, if that had been the legislative intent.

Pub. Law No. 706, 52 Stat. 1028.) Similarly, the Clayton Act was amended after creation of the Civil Aeronautics Board and the Federal Communications Commission (Act of June 19, 1934, Pub. Law No. 416, 48 Stat. 1102), so that those two agencies, and not the Commission, would enforce the Act against the industries they regulate.

[26] Nothing in the statutes creating or supporting the FHLBB indicates any legislative intent to grant S&L/bank interlocks an implied exemption from Section 5 of the Federal Trade Commission Act.[27] There is nothing in the statutes which would even require the FHLBB to consider the antitrust laws in its regulatory decisions. See *Otter Tail Co.* v. *United States,* 410 U.S. 366, 373 (1973); *California* v. *Federal Power Commission,* 369 U.S. 582, 589 (1962).

The statutes show that the Federal Trade Commission and the Federal Home Loan Bank Board have concurrent jurisdiction over the activities of savings and loan associations, including S&L/banking director interlocks. [27]

Legislative History re Interlocks

The legislative history of the debates on the Federal Trade Commission and Clayton Acts shows that Congress intended that the Commission should have jurisdiction to challenge anticompetitive interlocking directorates as unfair methods of competition.[28]

Since the subject of interlocking directorates was specifically addressed in Section 8 of the Clayton Act, respondent argues that Congress must have intended an exemption for such practices from the broader prohibition against "unfair" practices in the Federal Trade Commission Act. During the debates on the Clayton Act, statements of the legislators made it clear that the Act was directed at particularly offensive practices which had already been found to restrain competition. The legislators wanted to prohibit these practices by proscribing them with specific statutory language. They

[27] Section 5(d)(1) of HOLA, 12 U.S.C. 1464(d)(1), vests the Board with enforcement powers against savings and loan associations. The provision states that:

> "[t]he Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules or regulations made hereunder, or any other law or regulation, or in any other action, suit, or proceeding to which it is a party or which it is interested . . . the board is authorized to act in its own name and through its attorneys."

Respondent contends that the phrase "or any other law" could give the power to the Board to enforce any law, and it could, therefore, prohibit unfair methods of competition. I read the thrust of that statute as authorizing FHLBB to go to court directly, rather than through the Department of Justice. Compare Section 5(m) of the FTC Act, 15 U.S.C. 45(m) added by the Trans-Alaska Pipeline Act. In any event, it is not the specific direction to regulate which would imply an exemption to the antitrust laws. *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726 (1973).

[28] These statutes should be read *in pari materia. United States* v. *American Building Maintenance Industries,* 422 U.S. 271, 277 (1975); *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320-22 (1966).

clearly did not intend that the Clayton Act would restrict the authority of the Commission under Section 5.[29]

The debates on the Federal Trade Commission Act also show that Congress did not intend any exemption for particular unfair practices. Congress explicitly considered, and rejected the proposed specification of "unfair methods of competition" by enumerating the particular practices to which that phrase was intended to apply. *FTC* v. *Sperry & Hutchinson Co.,* 405 233, 240 (1972).[30]

[28] Scattered statements by legislators during the debates on the Federal Trade Commission and Clayton Acts expressed their own opinion that Section 5 would not cover interlocking directorates, among other specific practices. 51 Cong. Rec. 11102-03 (1914); 51 Cong. Rec. 14216 (1914). Other legislators felt that Section 5 did cover interlocking directors. 51 Cong. Rec. 8978, 11103, 11106, 11537, 12147, 12980, 15829, 15998-99 (1914). These various opinions show the difficulty in judging legislation solely by casual statements from the debates in Congress.[31] Context is lost. Meaning is obscured. Mr. Justice Jackson admonished in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 395–96 (1951):

> Resort to legislative history is only justified when the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, . . . as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

Here, a committee report reflects the Congressional will. The Report of the Senate Interstate Commerce Committee, the [29] committee which inserted the essential language of Section 5, stated the meaning of the phrase "unfair competition," S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914):

> One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful . . . .
>
> The committee gave careful consideration to the question as to whether it would

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[29] 51 Cong. Rec. 12030, 14215, 14226-27, 14257-59, 15999, 16001 (1914).

[30] "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." H.R. Rep. No. 1142, 63d Cong., 2d Sess., 18-19 (1914). Also see Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914).

[31] In 1914, a few legislators expressed doubt that interlocking directors were a "method of competition" within the meaning of Section 5. 51 Cong. Rec. 12980 (1914); 51 Cong. Rec. 14227 (1914); 51 Cong. Rec. 14216 (1914). The majority of Congress did not have this worry over semantics since price fixing and boycotts were obviously meant to be covered by the act and, like interlocks, are more precisely described as methods of not competing. *Fash. Org. Guild* v. *FTC,* 312 U.S. 457 (1941); *Safeway Stores, Inc.* v. *FTC,* 366 F.2d 795 (9th Cir. 1966), *cert. denied,* 386 U.S. 932 (1967). It is the unfair effect on competitors, as well as consumers, which was prohibited by the statute. *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 243 (1972).

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 . . . *interlocking directorates* . . . intended to restrain substantial competition. (Emphasis added.)

Respondent cites proposed amendments to Section 5 which would have specifically proscribed interlocking directorates which were rejected by the House, 51 Cong. Rec. 9050-51 (1914), and reintroduced and rejected by the Senate. *Id.* at 12991-93. These attempts, however, show concern of Congress that interlocks be controlled, not that interlocks were beyond the Commission's power. The proposed amendments were rejected because Congress wanted the Commission to have broad power. In *FTC* v. *Cement Institute,* 333 U.S. 683 (1948), the Supreme Court analyzed the legislative history of the FTC Act and concluded at p. 693:

All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.

[30] The legislative history of the Federal Trade Commission Act and the Clayton Act thus shows that Section 5 covers interlocking directors. See in re *Kraftco Corp.,* [89 F.T.C. 46] Vol. 3, CCH Trade Reg. Rep. ¶ 21,263 (Final Order issued January 11, 1977).

No Implied Exemption

The Federal Trade Commission Act applies here unless Congress has indicated, by express statutory language or a clear statement of its intent, that respondent's conduct is exempt. There is no express exemption here.[32] Rather, the issue is whether Congress, by creating the pervasive regulation of savings and loan associations by the FHLBB, exempted by implication the operation of the Federal Trade Commission Act.[33] There is judicial disfavor for implied exemptions to the strong national policy expressed in the antitrust[34] laws: "Repeals of the antitrust laws by implication from a regulatory

[32] Compare 49 U.S.C. 5(11) (ICC); 49 U.S.C. 1384 (CAB).

[33] Respondent argues that the Federal Trade Commission Act was not intended to cover financial institutions and that it need not show, therefore, that Congress impliedly exempted them from FTC jurisdiction by creating the FHLBB. I find, however, that the Federal Trade Commission Act does cover S&Ls, *supra.*

[34] While the Federal Trade Commission Act *procedurally* may not be an antitrust law for purposes of private civil suits, *New Jersey Wood Finishing Co.* v. *Minnesota Min. & Mfg. Co.,* 332 F.2d 346, 350 (3d Cir. 1964), *aff'd,* 381 U.S. 311 (1965), it certainly is *substantively* an antitrust law, since incipient violations of the Sherman or Clayton

(Continued)

statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963).

[31] The courts have held that the regulation of the federal S&Ls by the FHLBB is sufficiently pervasive to preempt inconsistent state law, *e.g., Myers* v. *Beverly Hills Federal Savings and Loan Association,* 499 F.2d 1145 (9th Cir. 1974); *Rettig* v. *Arlington Heights Federal Savings and Loan Association,* 405 F. Supp. 819 (N.D. Ill. 1975); *People* v. *Coast Federal Savings and Loan Association,* 98 F. Supp. 311 (S.D. Cal. 1951). But the "pervasiveness" of the regulatory scheme needed for exemption here would probably have to be tantamount to the regulation of public utilities. *Cf. Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 688 (1975); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963). Furthermore, in *Philadelphia National Bank,* the Supreme Court held that the regulation by federal bank regulatory agencies—the agencies most closely related to the FHLBB—is not sufficiently pervasive to displace the antitrust laws. 374 U.S. at 352:

> [B]ank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the baking industry is limited and largely indirect, . . . banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.

Federal regulation of S&Ls is therefore not sufficiently pervasive for an implied exemption to the antitrust laws, and the courts have so held. *Central Savings and Loan Ass'n* v. *Federal Home Loan Bank Board,* 422 F.2d 504, 509 (8th Cir. 1970); *Kinee* v. *Abraham Lincoln Federal Savings and Loan Ass'n,* 365 F. Supp. 975, 982 (E.D. Pa. 1973).

An implied exemption to the antitrust laws will be found when Congress specifically provides that the regulatory agency should control a particular practice, even though that practice violates the antitrust laws. When Congress knows that the practice violates the antitrust laws, it must intend the [32] practice to continue under the close supervision of the regulatory agency when it specifically provides that the agency should control the practice, even though no

Acts violate the FTC Act, *FTC* v. *Brown Shoe Co., Inc.,* 384 U.S. 316, 321 (1966). *Cf.* 15 U.S.C. 1802, in which the FTC Act is defined as an "antitrust law" in the Newspaper Preservation Act.

express antitrust exemption is provided. *Gordon* v. *NYSE,* 422 U.S. 659, 681-82, 685, 689 (1975); *United States* v. *NASD,* 422 U.S. 694, 721, 727, 729, 734 (1975). The implied intent to create an exemption from the antitrust laws could be found here by the Congressional direction that the FHLBB should regulate the practice of S&L/bank director interlocks. However, no such statute exists.[35]

Respondent argues that the FHLBB has already regulated S&L/bank director interlocks, and this Commission proceeding could result in conflicting requirements showing a "clear repugnancy between the antitrust laws and the regulatory system." *United States* v. *NASD,* 422 U.S. 694, 719-20 (1975).

[33] On August 18, 1976, the FHLBB issued guidelines on the subject of director interlocks. 12 C.F.R. 563.33; 41 F. R. 35811, 35821-22 (Aug. 24, 1976).[36] The guidelines, which became effective September 30, 1976, provide, *inter alia,* that:

> The following guidelines are recommended for composition of the board of directors of an insured institution:
>
> * * * * * * *
>
> (5)(i) No Director of an insured institution should be a director of any other financial institution . . . other than a commercial bank. . . .
>
> (ii) Not more than one-third of the directors of an insured institution should be directors of a commercial bank. . . .
>
> (iii) Not more than one director of an insured institution should be a director of the same commercial bank. . . .[37]

Respondent argues that these guidelines work an implied repeal of the Federal Trade Commission Act. Such an exemption will be implied if necessary to allow "the federal agency entrusted with regulation in the public interest [to] carry out that responsibility free from the disruption of conflicting judgments," *United States* v. *NASD,* 422 U.S. 694, 734 (1975). [34] In analyzing the impact of

[35] Congress did empower the FHLBB to regulate interlocking directors of savings and loan *holding* companies. In the Savings and Loan Holding Company Amendments of 1967, 12 U.S.C. 1730a, Congress regulated the activities of S&L holding companies and gave the FHLBB specific authority over, *inter alia,* interlocking directorates. The Act makes it unlawful "except with prior approval of the [Federal Savings and Loan Insurance] Corporation" for any director, officer or 25 percent stockholder of an S&L holding company to serve as a director, officer or employee of another non-owned S&L holding company or S&L. 12 U.S.C. 1730(a)(i)(2). Under a savings clause, Congress provided that any such regulation by the FHLBB would *not* constitute a defense to a suit brought under the antitrust laws. 12 U.S.C. 1730(a)(1). This is the only statute in the regulatory scheme of the FHLBB which provides specific authority regarding director interlocks.

[36] Exhibit B to respondent's cross-motion.

[37] After these guidelines were announced, Mr. Joseph B. Danzansky and Dr. Lloyd H. Elliot resigned as directors of Perpetual. Mrs. Jean H. Sisco resigned as a director of the National Bank, and Mr. Thomas J. Owen resigned as a director of Union First. Stip. II, ¶ 20. By letter of October 1, 1976, the FHLBB's Acting General Counsel informed Perpetual that Perpetual was now in compliance with the director-interlock guidelines. Exhibit C to Perpetual's cross-motion.

Commission action on the regulatory authority of the FHLBB, the "proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963). Using this analysis, the courts have held that when an agency regulation does not mandate the conduct which is alleged to be a violation of the antitrust laws, there are no inconsistent and duplicative standards in allowing the antitrust challenge. *Cantor* v. *Detroit Edison Co.,* 44 U.S.L.W. 5357, 5361-62 (1976); *Kinee* v. *Abraham Lincoln Federal Savings & Loan Ass'n,* 365 F.Supp. 975, 981-82 (E.D. Pa. 1973).

The FHLBB guidelines, which were issued under its general supervisory authority,[38] do not require Perpetual to engage in S&L/bank interlocks. They merely recommend that such conduct may be permitted in certain circumstances.[39] The allegations of the Commission's complaint do not challenge all S&L/bank director interlocks engaged in by Perpetual but only those involving competing banks. Thus, Perpetual directors could also be directors of non-competing banks,[40] thereby avoiding challenge by the Commission and also following the recommendation of the FHLBB. Section 5 of the FTC Act and the guidelines promulgated by the FHLBB can in this way be reconciled.

[35] There is no indication of Congressional intent to provide an exemption for S&L/bank director interlocks from Section 5 of the FTC Act by the regulatory scheme of the FHLBB.

Respondent's Other Arguments

Respondent argues that the intent of Congress not to prohibit interlocks between banks and non-banks is indicated by legislative conduct since the passage of the Clayton and Federal Trade

[38] Under Section 5 of HOLA the FHLBB is vested with authority to make rules and regulations "to provide for the organization, incorporation, examination, operation, and regulation" of federal S&Ls. 12 U.S.C. 1464(a). Under NHA the Board has rulemaking authority to make "such bylaws, rules and regulations as it may prescribe for carrying out the purposes of this subchapter." 12 U.S.C. 1725(a).

[39] The savings and loan associations need not comply with these guidelines if they comply with disclosure regulations. 12 C.F.R. 563.45(a) and (b)(3); 41 F.R. 35824 (1976). "When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973).

[40] Interlocking directors are quite common between S&Ls and banks. *Amicus* Brief of National Savings and Loan League, pp. 5, 7. The qualifications for S&L directors have been described as calling for "successful businessmen [with] knowledge of business and finance in general and, more specifically, of real estate values, construction costs and lending operations." *Id.,* at p. 4 of attached affidavit. While a director of a bank might well fit that description, the record does not show that a director of a *competing* bank would be better qualified than a director of a non-competing bank to be a director of an S&L.

Commission Acts. Respondent points to several statutes specifically regulating director and officer interlocks in certain industries.[41] These statutes are clear evidence of Congressional intent to have a particular regulatory agency supervise the interlocks in a specific industry. This is the kind of proof of legislative intent that may create an implied exemption from the antitrust laws. *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 681-82, 685, 689 (1975), *supra.* Here, however, Congress has not specified that the FHLBB regulate S&L/bank interlocks. Respondent also points to statements in staff reports to Congressional committees which have stated in studies of Section 8 that it does not prohibit interlocks between banking organizations and other types of corporations.[42] " '[T]he views of a subsequent [36] Congress form a hazardous basis for inferring the intent of an earlier one.' " *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-49 (1963).[43] And the fact that this case is the first Commission challenge of an interlock solely under Section 5 is not proof of lack of power to do so.[44] *United States* v. *E. I. duPont deNemours & Co.,* 353 U.S. 586, 590 (1957); *United States* v. *Morton Salt Co.,* 338 U.S. 632, 647-48 (1950).

United States v. *Crocker National Corp.,* 1976-2 Trade Cases ¶ 61,044 (N.D. Cal. 1976)(appeal pending), decided, *inter alia,* that an interlocking directorate between a bank and an insurance company is exempt from the prohibition of Section 8 of the Clayton Act. The district court found the exemption in the fourth paragraph of Section 8: "[N]o person at the same time shall be a director in any two or more corporations . . . other than banks. . . ." The court held that "a normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank." *Id.* at p. 69,660. With all respect to the court, my reading of the statute leads

[41] *E.g.,* 49 U.S.C. 1379 (air carriers); 27 U.S.C. 208 (liquor companies); 47 U.S.C. 212 (telephone and telegraph companies).

[42] *E.g.* Staff Report to the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, Report on Interlocks in Corporate Management, 89th Cong., 1st Sess., 25 (1965). There is even greater evidence that subsequent Congresses deem that the Federal Trade Commission has jurisdiction over unfair or deceptive acts or practices by savings and loan associations and other financial institutions. H.R. Rep. No. 93-1606, 93d Cong., 2d Sess., 31 (1974); H.R. Rep. 93-1606, 93d Cong. 1st Sess., 29-31, 35-36 (1974).

[43] The passage and later repeal of Section 8A of the Clayton Act, Act of June 16, 1933, Pub. Law No. 66, Ch. 89, § 33, 48 Stat. 194, implies no legislative intent concerning S&L/bank interlocks, as argued by respondent. That statute supplemented the Clayton Act and was directed at vertical (noncompeting) interlocks by banks with firms in a business in which S&Ls have not been allowed to participate. Other amendments to Section 8 giving exemptions to noncompeting banks, cited by respondent, do not change the policy and thrust of that Act. Act of May 15, 1916, Ch. 120, 39 Stat. 121; Act of March 2, 1929, Ch. 581, 45 Stat. 1536.

[44] Respondent also cites the statement in Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1950) at p. 10, that [the industrial corporations provision of Section 8] "governs corporations engaged in commerce which are neither banks, banking associations, trust companies nor common carriers." That statement clearly did not focus on the problems of bank/non-bank interlocks, and, further, it is not binding. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963).

to a different conclusion. [37] The exemption for corporations "other than banks," to my mind, relates back to the first paragraph of Section 8 prohibiting interlocks between two or more banks. That paragraph provides that:

> *No* private banker or *director,* officer or employee *of any member bank* of the Federal Reserve System or any branch thereof *shall be at the same time a director,* officer, or employee *of any other bank,* banking association, savings bank, or trust company . . . except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof. . . . (Emphasis added.)

Since the first paragraph of Section 8 refers to Federal Reserve Board supervision of interlocks *between two banks,* the exclusion for banks in the fourth paragraph is consistent only if it means interlocks between two banks. The district court in *Crocker* recognized that its reading of the statute left bank/non-bank interlocks unregulated. The court failed to follow the presumption against construing a statute so as to render it ineffective. *FTC* v. *Retail Credit Co.,* 515 F.2d 988, 994 (D.C. Cir. 1975); *United States* v. *Blasius,* 397 F.2d 203, 207, n.9 (2d Cir. 1968), *cert. dismissed,* 393 U.S. 1008. The court focused on a single "member of a sentence" in the statute, failing to defer to "the provisions of the whole law and to its object and policy." *FTC* v. *Tuttle,* 244 F.2d 605, 613–14 (2d Cir. 1957), *cert. denied,* 354 U.S. 925.[45] When Section 8 of the Clayton Act is read as an integrated whole, *FTC* v. *Retail Credit Co.,* 515 F.2d 988, 995 (D.C. Cir. 1975), it does not speak of any legislative intent to create an exemption for S&L/bank interlocks.

[38] Since the plain meaning of the statute creates no exemption for S&L/bank interlocks, there was no need to consider the legislative history. *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). The court in *Crocker* went on, however, to examine bits and pieces of the legislative history of the statute, hoping to find support. This was unnecessary and unreliable. *United States* v. *Sears, Roebuck & Co.,* 111 F.Supp. 614, 619 (S.D.N.Y. 1953). For support of its views, the court also relied on the "hazardous basis" of the subsequent views of congressmen,[46] *supra. United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963). And the court relied on the administrative interpretation of the statute. Administrative interpretation of a statute, or the failure to bring action under it for many years, does not change the legislative intent, *supra. United States* v. *E. I. duPont*

[45] See also, *NLRB* v. *Lion Oil Co.,* 352 U.S. 282, 288 (1957); *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956); *United States* v. *American Trucking Ass'ns, Inc.,* 310 U.S. 534, 542–43 (1940). See also, *FTC* v. *Bowman,* 248 F.2d 456 (7th Cir. 1957), which followed the *Tuttle* case.

[46] Some of the legislative history relied on refers to vertical interlocks allowing representatives of banks to sit on the boards of debtor corporations, which is an irrelevant consideration to the issue here.

deNemours & Co., 353 U.S. 586, 590 (1957); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-48 (1950).[47]

Respondent argues that, because the FTC lacks jurisdiction over banks in Section 5, the attempt to stop S&L/bank director interlocks by proceeding against only the S&L is in derogation of the statute. Since two parties are involved in the relationship, respondent argues that the Commission cannot sue only one of them. Respondent finds further support for this argument in the holding in *Crocker* that interlocking directors between industrial corporations are prohibited by Section 8 of the Clayton Act only when neither is a bank. The court there, however, specifically reserved the question of whether a director interlock between an industrial corporation and a bank violates Section 5 of the FTC Act. *Id.*, at p. 69,671, n.23. Furthermore, the Supreme Court on numerous occasions has held contracts illegal under the antitrust laws even though only one party to the contract was joined in the suit. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *United States* v. *Schine Theaters*, 334 U.S. 110 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *Univis Lens Co.*, 316 U.S. 241 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 [39] U.S. 436 (1940); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930). The Commission can exercise its discretion in choosing to proceed against only Perpetual. *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958).

Respondent also argues that Section 8 of the Clayton Act is directed at individuals and not corporations, and that the complaint here is improperly addressed to it. This complaint is under Section 5 of the FTC Act which is not restricted to individuals, but even Section 8 is "properly construed to prohibit corporations as well as individuals from effecting interlocking directorates." In re *Kraftco Corp.*, Vol. 3 CCH Trade Reg. Rep. ¶ 21,263, at p. 21,169 (Final Order issued January 11, 1977 [89 F.T.C. at 63]). And respondent's argument that the directorates here are the individual acts of the directors, and not corporate acts, is without merit. "[T]he corporation surely has sufficient interest in the legality of its directors' tenure" to be responsible for the legality of practice. *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 588 (7th Cir. 1973).

[47] The court also relied on a 1970 statement by Mr. Arthur Burns, Chairman of the Federal Reserve Board, as supporting interlocking directorates. *Id.*, at p. 9. Mr. Burns' current view of bank/S&L interlocks, *supra*, is clearly no support for an exemption here.

Primary Jurisdiction

Primary jurisdiction is a doctrine which is applied when a regulatory agency's determination of issues of fact will be material aid to resolution of an antitrust suit. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 305–06 (1973). The doctrine differs from exclusive jurisdiction in that it calls for suspension of the antitrust claims pending the agency determination, rather than dismissal. Primary jurisdiction:

comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views. [*United States* v. *Western Pacific Railroad Co.,* 352 U.S. 59, 64 (1956).]

The issues to be resolved in this case have nothing to do with the special competence of the FHLBB to regulate the savings and loan industry. It is irrelevant here whether Perpetual has violated statutes enforced by that agency. The issue in this case is whether Perpetual has violated Section 5 of the Federal Trade Commission Act by engaging in director interlocks with three competing banks. Resolution of the issue involves an [40] analysis of the history and language of the FTC Act and other antitrust provisions. It is the FTC and not the FHLBB which should perform this function. A determination of the legality of the interlocks under the statutes administered by the FHLBB would not be of "material aid" to the Commission, *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. at 302. Congress has directed the FHLBB to prevent unsafe financial practices by S&Ls. That finding by the FHLBB would have no effect on the issue of whether the practice violates the FTC Act. Deferring to the FHLBB for findings of fact would not obviate the necessity to litigate the antitrust issues. Therefore, the doctrine of primary jurisdiction need not be invoked. *Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.,* 489 F.2d 203, 211 (9th Cir. 1973).[48]

Furthermore, the FHLBB has already acted by issuing guidelines on August 18, 1976, regarding S&L/bank director interlocks. 41 F.R. 35811 (August 24, 1976).[49] Once the regulatory agency has acted with respect to the practice at which the antitrust challenge has been directed, the doctrine of primary jurisdiction no longer applies.

[48] Since part of the competitive impact of the S&L/bank interlocks could be on the banking business, FHLBB's expertise in S&Ls is not applicable. *Foremost International Tours, Inc.,* v. *Quantas Airways Ltd.,* 525 F.2d 281, 285 (9th Cir. 1975), *cert. denied.*

[49] The guidelines were issued three months after the complaint in this proceeding, and the FHLBB considered the Commission proceeding when it adopted the guidelines. See *Federal Home Loan Bank Board News,* at p. 4 (Aug. 20, 1976).

United States v. *Philadelphia National Bank,* 374 U.S. 321, 353 (1963). [41]

PREJUDGMENT

Respondent argues that a Commission policy statement dated August 3, 1976, 41 F.R. 35573–74, concerning S&L/bank interlocks is evidence that the Commission has prejudged the merits of this proceeding.

The statement clearly indicates that it is intended "to provide general guidance and information;" that it "may be superceded or amended by subsequent Commission action without prior notice;" and that "the Commission has made no determination on the merits that Perpetual . . . has actually violated the law." The statement does not create any present obligation for the directors to resign. *Courshon* v. *FTC,* (D.D.C. January 28, 1977), BNA Antitrust & Trade Reg. Rep. #800.

The statement merely explains the reasons why individual interlocked directors were not named as respondents in this proceeding and announces a grace period before any individual director of a savings and loan association would be charged with a violation, in order to avoid disrupting the orderly management of S&Ls by a mass resignation of directors. This statement was not an indication of prejudgment of the issues in this proceeding. *FTC* v. *Cement Institute,* 333 U.S. 583, 701 (1948).

IV

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over Perpetual and the subject matter of this proceeding.
2. This proceeding is in the public interest.
3. By the nature of their businesses and the locations of their operations as hereinabove described, Perpetual and American Security are competitors of each other; Perpetual and National Bank are competitors of each other; and Perpetual and Union First are competitors of each other.
4. The elimination, by agreement or otherwise, of competition between Perpetual and American Security, between Perpetual and National Bank, or between Perpetual and Union First would constitute a violation of the antitrust laws.
5. Each of the four interlocks listed in paragraphs 5, 6, 9 and 11 of the findings was an unfair act, practice and method of competition in or affecting commerce and therefore constitutes a violation of

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

[42] 6. Each of the interlocks listed in findings 7, 8 and 10 is an unfair act, practice and method of competition in or affecting commerce and therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

7. An order to cease and desist against Perpetual is appropriate, supported by the findings of fact and is necessary for the protection of the public interest.

Accordingly, complaint counsel's Motion For Summary Decision is granted.[50]

V

ORDER

Respondent's main objection to the order proposed by complaint counsel, which I adopt almost verbatim, is that paragraph III of the order prohibits Perpetual from having interlocks with competitors through directors, officers or affiliated persons.[51] Respondent objects that the order is too broad and that there has been no proof of a violation by an officer or affiliated person.

The basis for proposing an order prohibiting officer interlocks is that officers have even a greater potential for anticompetitive transfer of information and agreements [43] than directors. Since the officer has more knowledge of the day-to-day affairs of the company, and because his remuneration is often based on the success of the company, there is a greater incentive to fix rates, allocate markets and restrain competition with competitors.[52] While there is no proof of such activity on this record, the "fact that this has not happened up to the present does not mean that it may not happen hereafter."[53] Furthermore, two of the interlocked directors of

[50] Respondent's cross-motion is denied. All other pending motions are denied, except to the extent that they are granted by the necessary effect of this opinion and order. The affidavits and exhibits submitted by the parties to the extent not adopted by this decision, are rejected as unreliable or immaterial.

[51] The basis for extending the order to "affiliated" persons is that the chairman of the board of Perpetual is the father of the president, and Jean H. Sisco, who resigned as director of National Bank on September 16, 1976, is married to and resides with Joseph J. Sisco, who became a director of National Bank on February 10, 1977. (The facts concerning the latter relationship were established by a letter from counsel to National Bank. While an affidavit of one of the Siscos would be better evidence, the letter is reliable enough. *Dallas County* v. *Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).)

Thornton W. Owen is also now a director emeritus of a competing bank. Thus the definition of "director" in the order includes such directors. The potential for anticompetitive exchange of information between competitors exists whether the director can vote or sits only as an advisor in the closed director meetings.

[52] "The operating official of a particular concern is likely to be the most aggressive in using his directorships in other related concerns to establish a close harmony of interest with those enterprises." *Report of the FTC on Interlocking Directorates, supra*, at p. 22.

[53] *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 620 (S.D.N.Y. 1953) (Weinfeld, J.). The respondent relies on this case but cites language not used by the court. Cross-motion at p. 158.

Perpetual, Thornton W. Owen and Thomas J. Owen, are also officers of Perpetual. If they remained officers but resigned as directors of Perpetual and remained as directors of the competing banks, they might evade the Commission Order merely prohibiting interlocking directors, but the possibility for anticompetitive exchange of information and illegal agreements would remain. The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952). Having been caught violating the Act, respondent "must expect some fencing in." *FTC* v. *National Lead Co.,* 352 U.S. 419, 431 (1957).

Perpetual, the largest savings and loan association in Washington, D.C., has had seven of its eleven[54] directors on the boards of three of the four largest competing banks in the city. The resignation of four of the directors came only after the complaint in this proceeding was issued and the FHLBB issued its guidelines.[55] Perpetual's disregard for possible conflicts in interest and anticompetitive agreements and exchange of information which might occur through this arrangement indicates that a broad order should issue. The relief in the order is reasonably related to the unlawful practice proven in this proceeding. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946). [44]

I

It is ordered, That the following definitions shall apply in this order:

(a) "Business organization" means any person, partnership, corporation (as that term is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44) or other business entity.

(b) "Demand deposits" are deposits which are withdrawable on demand and on which no interest is paid.

(c) "Director" includes voting members of boards of directors, non-voting members of boards of directors, advisory directors, and emeriti directors.

(d) "Financial services" means all services and related products presently or hereafter offered, sold, leased, or otherwise provided by savings and loan associations, banks, insurance companies, mutual savings banks and other financial institutions or business organizations including, but not limited to the solicitation and maintenance of demand, savings and time deposits or accounts; residential loans; other mortgage loans and all other types of loans; financial

[54] "The more numerous the interlocks, the stronger is the presumption that they create unity of action." *Report of the FTC on Interlocking Directorates, supra,* at p. 18.

[55] The resignations do not make this case moot. *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632 (1953).

counseling; tax preparation; personal trust services; retirement accounts; and direct deposit services.

(e) "Affiliated person" means the spouse, father, mother, son, daughter, brother, sister or any person who has the same home or business office as that person. The definitions of "parent" and "sister" contained in definitions I(g) and I(j) of this order are not applicable to this definition of "affiliated person." [45]

(f) "Officer" includes, but is not limited to, any person considered to be an officer by the business organization, any person with managerial responsibility in the business organization, or any person who is a member of any managerial or operating committee of the business organization.

(g) "Parent" of a business organization means any other business organization which owns or controls 50 percent or more of the voting stock of such business organization.

(h) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1–4 dwelling units.

(i) "Savings" includes all savings accounts, savings deposits, passbook savings accounts, and savings deposit accounts offered by any business organization.

(j) "Sister" of a business organization means any business organization of which more than 50 percent of the voting stock is held by the same business organization which owns or controls 50 percent or more of the voting of the subject business organization.

(k) "Subsidiary" of a business organization means any business 50 percent or more of the voting stock of which is owned or controlled directly or indirectly, by such business organization.

(l) "Time deposits" are all deposits, including certificates of deposit, that are not demand deposits or savings.

II

It is further ordered, That for purposes of this order, a business organization, including Perpetual Federal Savings and Loan Association ("Perpetual") and any business organization which shares a common director or officer with Perpetual, shall be deemed to be engaged in the provision of financial services, if any parent, subsidiary, or sister of such business organization is so engaged. [46]

III

It is further ordered, That upon this order's becoming final respondent Perpetual, its successors and assigns, do forthwith cease

and desist from having, and in the future shall not have any individual to serve as a director or officer who either:

(a) is or would be at the same time a director or officer of Perpetual, and who is a director, officer, or affiliated person of a director or officer of American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other organization engaged in the provision of financial services, so long as Perpetual and either American Security, National Bank, Union First or such other business organization are in competition; or

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

IV

It is further ordered, That within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, Perpetual shall obtain a written statement from each officer and each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing: [47]

(a) the name and home mailing address of each director, officer or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each business organization in which each such person or his or her affiliated person then serves as a director or officer, or has been nominated as a director.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph III(a) hereof due to any error or omission contained in any written statement received pursuant to this paragraph.

V

It is further ordered, That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, Perpetual shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as

part of the reports of compliance required by this paragraph. Nothing in this paragraph shall relieve Perpetual of its obligation to comply with Paragraphs II, III, and IV of this order once it is no longer required to submit reports of compliance to the Commission. [48]

VI

It is further ordered, That in the event that the process of review required by Paragraph IV hereof discloses the existence of competition between Perpetual and any other business organization, Perpetual shall not permit the service as director or officer of any person who remains, or who has an affiliated person who remains, as an officer, director, or nominee for director of that business organization. Perpetual shall be allowed a reasonable period of time, but in no event longer than ninety days from the date of such disclosure, within which to take any legal or other steps necessary to secure compliance with this order, including requiring any Perpetual director or officer to resign from Perpetual or such other business organization forthwith or, in the case of a nominee, to forthwith remove his or her name from nomination.

VII

It is further ordered, That the provisions of Paragraphs III through VI hereof shall not apply where the interlocked business organization is Perpetual's (1) parent, (2) sister, or (3) subsidiary. [49]

VIII

It is further ordered, That Perpetual shall give the Commission at least thirty (30) days prior notice of any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a parent, sister or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Dissenting Opinion of Commissioner Collier

I concur in the majority's conclusion that these interlocking directorates must be measured by the standard of Section 5 of the FTC Act which prohibits, among other things, unfair methods of competition. I dissent, however, from the Commission's holding that a violation has been proved and I would remand the case for further hearings.

The majority holds that a director interlock between competing

corporations constitutes a *per se* violation of Section 5. This rule is consistent with the standard of liability for such arrangements that is embodied in Section 8 of the Clayton Act. By its terms, however, Section 8 does not reach the instant transaction.

It is now familiar doctrine that the potential reach of Section 5 may exceed the limitations of the Sherman and Clayton Acts. *E.g., FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321–22 (1966); *Grand Union Co.* v. *FTC*, 300 F.2d 92 (2d Cir. 1962). "[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[1] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). In my view, however, the Commission's invocation of a *per se* rule of Section 5 liability for director interlocks is an unwise exercise of this extremely broad grant of statutory authority.[2]

[2] This case involves the discovery of neither a new form of business conduct nor familiar conduct in the context of new circumstances. Compare *FTC* v. *Sperry & Hutchinson, supra,* at 240–44. Even more importantly, the majority's rule is not based on independent evidence or other facts indicating that director interlocks between companies that compete to any extent are likely to cause consumer injury. Rather, the majority's interpretation of Section 5 relies heavily upon the policies underlying Section 8 of the Clayton Act. One difficulty with that approach is that the Congress which enacted this provision apparently did not regard these policies as absolute, as it did not include within the coverage of Section 8 the class of interlock that this case represents.

Another difficulty with the majority's decision to establish a rule of *per se* illegality is that this approach ignores the recent teaching of *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (June 23, 1977):

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are

[1] Although this statement immediately follows a discussion of the Wheeler-Lea Amendment, 52 Stat. 111, to the FTC Act, its context makes clear its application to "unfair methods of competition."

[2] Further sources of Commission liberty in assessing business conduct are found in the general and established doctrines of judicial deference on review of administrative agency decisions. For example, under 5 U.S.C. 556 and 706, Commission findings of fact are affirmed if supported by substantial evidence on the whole record; and, under the doctrine of *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the Commission's interpretations of its own statute are entitled to great weight.

not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials, *see Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958); *United States* v. *Topco Associates,* 405 U.S. 596, 609–10 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law. 433 U.S. at 50 n. 16.

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack. . .any redeeming virtue" (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should be classified as *per se* violations of the Sherman Act. [Quoting from *White Motor Co.* v. *U.S.,* 372 U.S. 253 (1963).]

[3] It seems to me that these admonitions directed at courts in Sherman Act cases are no less salient when applied to the Commission in cases arising under Section 5. Certainly the Commission's authority to ignore this counsel is not a reason to do so.

It is, of course, arguable that the Commission enjoys a relative advantage over federal courts in fashioning *per se* rules. Our more frequent exposure to antitrust issues and varying factual situations, as well as our reservoir of economic analysts, equip us well to consider the adoption of such rules. Our authority to conduct broad investigations into business practices[3] and to initiate rulemaking proceedings[4] certainly complement this potential for enlightened lawmaking in the public interest.[5]

With regard to the class of transactions covered by the *per se* rule of this case, however, we can claim none of these advantages. Our prior experience with director interlocks has been acquired in the *per se* context of Section 8. We therefore know little of the effects of these arrangements and even less of their consequences when employed by financial institutions. At most, we have gained some experience in framing remedial orders.[6]

In the absence of a factual foundation for inferring public injury and in cases such as this one that are outside the terms of a statutory *per se* rule, I would turn for policy guidance to the controlling standard of Section 7 of the Clayton Act. In my view, arrangements such as the one before us should be declared unlawful if their effects "may be substantially to lessen competition. . .in any line of

[3] 15 U.S.C. 46.

[4] *National Petroleum Refiners Ass'n.* v. *FTC,* 482 F.2d 672 (1973), *cert. denied,* 415 U.S. 951 (1974).

[5] 15 U.S.C. 45.

[6] *See, e.g.,* our recent orders in *Addressograph-Multigraph,* Dkt. 9084 [*TRW, Inc., et al.,* 90 F.T.C. 144]; *Kane-Miller Corp., et al.,* Dkt. 9034 [88 F.T.C. 279]; *International Business Machines Corp.,* Dkt. C-2864 [89 F.T.C. 91]; and *Kraftco Corp.,* Dkt. 9035 [89 F.T.C. 46].

commerce in any section of the country. . ." While the antitrust [4] laws are not without anomalies,[7] I would not employ our discretion to proliferate new ones. And it is at least anomalous to me that a showing of competitive injury should be required for illegality when two corporations become one but not when they share a director. That this result is commanded in situations covered by Section 8 is no reason to extend the anomaly to situations that are not.

While it might be argued in response that the social cost of limiting the supply of eligible directors is less than that of prohibiting mergers that cannot be expected to cause discernible injury to competition, I know of no basis for such a conclusion.[8] Moreover, there is every reason to suppose that the presence of an interlocked director poses less threat to competition than does a permanent and complete union of the firms.

Because anticompetitive effects were neither alleged or proved in this case, I would amend the complaint and remand the case for further proceedings.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The principal issue presented in this proceeding is whether a savings and loan association is engaged in an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by having on its board of directors individuals who serve simultaneously as directors of competing commercial banks. We hold that such conduct violates Section 5.

The complaint in this matter, issued May 13, 1976, as amended on June 29, 1976, charged respondent Perpetual Federal Savings & Loan Association ("Perpetual") with having violated Section 5 by virtue of its having had on its board of directors seven individuals, each of whom served simultaneously at some point as a director of one of three commercial banks in Washington, D.C. The complaint alleged that each of the banks competed with Perpetual so that the elimination, by agreement or otherwise, of competition between Perpetual and each bank would constitute a violation of the

[7] For recent examples, see the diverse treatment of price and non-price vertical restrictions in the majority's opinion in *GTE Sylvania, supra*, n. 17 and accompanying text, as well as Justice White's comment on this distinction, n. 10 and accompanying text. See also the Third Circuit's decision in *U.S.* v. *U.S. Gypsum Co.*, 550 F.2d 115, 120–127 (1977), *cert. granted*, October 3, 1977, No. 76–1560, allowing, as a defense to a horizontal price-fixing allegation, the argument that communications concerning prices were necessary to avoid violations of the Robinson-Patman Act. See generally R. Bork & W. Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 Colum. L. Rev. 363 (1965). Compare R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L. J. 775, 830 (1965).

[8] One might, however, infer the low costs of regulating directorships from both the relatively modest compensation of directors and from the readiness with which corporate respondents have usually been prepared to settle Section 8 cases.

antitrust laws. After the filing of a stipulation of facts, complaint counsel moved for summary decision, and respondent filed a cross-motion for summary decision. In addition to the filings of the parties, the National Savings & Loan League filed an *amicus* brief. On March 28, 1977, Administrative Law Judge ("ALJ") James P. Timony entered an initial decision sustaining the complaint, accompanied by a thoughtful, well-reasoned opinion, and recommended entry of an order to cease and desist. Respondent has appealed from the ALJ's decision. The National Savings and Loan League and the United States League of Savings Associations have filed *amicus curiae* briefs urging reversal.

[2] Judge Timony found that Perpetual and the banks competed with one another in, *inter alia,* the solicitation and maintenance of savings and the solicitation and financing of residential loans (ID 18–23).[1] He concluded that the interlocks were unfair methods of competition in violation of Section 5 of the FTC Act (ID pp. 41–42) on the ground that they violated the policy of Section 8 of the Clayton Act (ID p. 16) and constituted incipient violations of Section 1 of the Sherman Act (ID p. 17).[2]

The ALJ's order directed Perpetual to cease and desist from having as a director or officer anyone who simultaneously serves as a director, officer, or "affiliated person"[3] of a director or officer of any of the three banks named in the complaint, "or any other organization engaged in the provision of [3] financial services,[4] so long as Perpetual and [the banks] or such other business organization are in competition;" or who fails to submit a required statement listing all business organizations in which such person (or his affiliated person) is a director or officer, and the products or services produced or sold by such businesses (ID pp. 46–47).

Perpetual's contentions on appeal fall into three major categories: that its interlocks do not violate Section 5; that the FTC lacks jurisdiction over the subject matter of the proceeding; and that, in

[1] The following abbreviations are used throughout this opinion:
ID – Initial Decision, with paragraph references to Findings of Fact
ID p. – Initial Decision, with page references
RAB – Respondent's Appeal Brief
RRB – Respondent's Reply Brief

[2] The ALJ rejected complaint counsel's contention that Perpetual's interlocks violated Section 5 for the additional reason that they contravened other "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws", *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244 (1972)(ID p. 19).

[3] The order defines "affiliated person" as the spouse, father, mother, son, daughter, brother, or sister of any person who has the same home or business office as that person. Order Correcting Clerical Error, June 14, 1977.

[4] The order defines "financial services" as "all services and related products presently or hereafter offered, sold, leased, or otherwise provided by savings and loan associations, banks, insurance companies, mutual savings banks and other financial institutions or business organizations including, but not limited to the solicitation and maintenance of demand, savings and time deposits or accounts; residential loans; other mortgage loans and all other types of loans; financial counseling; tax preparation; personal trust services; retirement accounts; and direct deposit services" (ID p. 44).

the event a violation over which the Commission has jurisdiction is found, the order issued by the ALJ is impermissibly broad.[5]

FACTS

Perpetual is the largest federal savings and loan association ("S&L") in the metropolitan Washington, D.C., area. It has capital, surplus, and undivided profits exceeding $71 million (ID 1). As of December 31, 1975, [4] it had savings amounting to more than $682 million and residential loans[6] of more than $565 million. Perpetual had, at the time the initial decision was issued, 9 offices, and had received permission to open a tenth (ID 14).

The three banks involved in this case, American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), and Union First National Bank of Washington ("Union First"), are all commercial banks in Washington, D.C.[7] American Security has capital, surplus and undivided profits aggregating more than $89 million, and is the second largest bank in Washington, D.C., with 30 offices in the city (ID 2, 15). As of December 31, 1975, it had savings of more than $189 million and residential loans of more than $79 million (ID 15). National Bank has capital, surplus and undivided profits aggregating more than $42 million, and is the third largest bank in Washington, D.C., with 25 offices in the city (ID 3, 16). As of December 31, 1975, it had savings of more than $101 million, and residential loans of more than $42 million (ID 16). Union First has capital, surplus and undivided profits aggregating more than $37 million, and is the fourth largest bank in Washington, D.C., with 19 offices in the city (ID 4, 17). As of December 31, 1975, it had savings of more than $88 million, and residential loans of more than $68 million (ID 17).

At the time the amended complaint herein issued, Perpetual had on its board one director who served [5] simultaneously as a director of American Security[8] (ID 7), three directors who served simulta-

[5] Respondent also argues that the Commission has prejudged the case. This contention is dealt with, and rejected, *infra*.

[6] Residential loans are defined as loans secured by a mortgage or other lien on non-farm property containing 1-4 dwelling units (ID 12).

[7] All three are "banks" within the meaning of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the FTC Act, 15 U.S.C. 45. (ID 2-4) While the banks are beyond the Commission's jurisdiction, that 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. *See* cases cited at ID pp. 38-39.

[8] Another Perpetual director, Thornton W. Owen, who is chairman of the board and chief executive officer of Perpetual, was also a director of American Security from 1947 until April 20, 1976, at which time his status with American Security changed to that of a director emeritus. Directors emeriti have no voice in management, although they may attend and speak at board meetings, and are entitled to receive certain documents which are made available to the board (ID 10). Their role is largely honorary in nature.

Another director of American Security had served simultaneously on Perpetual's board for some time prior to the issuance of the complaint (ID 6).

neously as directors of National Bank (ID 5, 8, 11), and one director, its president, who served simultaneously as a director of Union First (ID 9).

On August 18, 1976, subsequent to the issuance of the complaint in this proceeding, the Federal Home Loan Bank Board, which exercises certain regulatory authority over S&L's such as Perpetual, issued guidelines on the subject of director interlocks. 12 C.F.R. 563.33 (1977). These guidelines, which became effective September 30, 1976, provide, *inter alia,* that:

> The following guidelines are recommended for composition of the board of directors of an insured institution:
>
> * * * * * * *
>
> (5)(i) No director of an insured institution should be a director of any other financial institution or holding company affiliate thereof, other than a commercial bank or trust company.
>
> (ii) Not more than one-third of the directors of an insured institution should be directors of a commercial bank, trust company, or holding company affiliate of such a bank or company. [6]
>
> (iii) Not more than one director of an insured institution should be a director of the same commercial bank, trust company, or holding company affiliate of such a bank or company.[9]

After these guidelines were announced, two directors resigned from Perpetual's board, and two other Perpetual directors resigned from bank boards on which they served (ID p. 33 n. 37). However, Perpetual remains interlocked with American Security and National Bank.

Perpetual and the three banks are governed by their respective boards of directors, each of which has the ultimate decisionmaking authority regarding matters affecting its institution. Such matters include, but are not limited to, selection of officers to manage the institution, establishment of earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection of and application for additional branch facilities (ID 27).

Perpetual, American Security, National Bank and Union First are all engaged and compete in the solicitation and maintenance of savings, either in the form of savings accounts or savings deposit accounts, and the financing of residential loans in the Washington, D.C., area (ID 14–19). While these particular financial services may

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[9] These "recommended guidelines" have no prohibitory force or effect. While they will be used in the future as "conditions of insurance" for newly insured federal S&L's, which might strongly encourage compliance by such institutions, that would not apply to a long-established institution such as Perpetual. *See* 41 F.R. 35,812 (1976). The only effect on Perpetual of non-compliance with these guidelines would be to deny it one of several exemptions to certain disclosure requirements which otherwise apply to insured institutions. *See* 12 C.F.R. 536.45(a), (b)(3) (1977).

not represent as large a share of the banks' business as they do of Perpetual's, they remain a substantial portion of the banks' activities. For example, residential loans amount to more than 14 percent of the total assets of Union First, and more than 7 percent of the total assets of American Security and National Bank. Savings constitute more than 19 percent of the total [7] liabilities of National Bank and Union First, and more than 18 percent of the total liabilities of American Security (ID 15-17). These multi-million dollar figures could in no way be termed *de minimis* amounts.[10] In addition, the average dollar amounts of the residential loans made by Perpetual and the three banks are roughly the same (ID 20).

In short, Perpetual and the three banks are clearly substantial competitors, and the elimination of competition by agreement between Perpetual and any of the banks would violate the antitrust laws. Since there is no genuine issue of material fact as to the existence and substantiality of this competition, it was appropriate for the ALJ to decide the matter on a motion for summary decision.[11]

S&L/Bank Interlocks as an Unfair Method of Competition

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. L. Brandeis, *Other People's Money* 51 (1914).

It is beyond cavil that if conduct "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." [8] *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 463 (1941). *See also, e.g., FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *FTC* v. *Cement Institute*, 333 U.S. 683, 691 (1948). Section 5 has been applied in this manner to declare interlocking directorates to be unfair methods of competition. *Kraftco Corp.*, 89 F.T.C. 46, 63-64 (1977). Since Perpetual's interlocks violate the policy of Section 8 of the Clayton Act, as will be shown, they violate Section 5.

Section 8 of the Clayton Act, 15 U.S.C. 19, clearly enunciates a strong Congressional policy disfavoring interlocking directorates.

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[10] "The fact that this volume . . . may represent but a small percentage . . . does not militate against the undesirability of directorates common to both corporations." *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 620 (S.D.N.Y. 1953). See also *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 587 (7th Cir. 1973); *Kraftco Corp.*, 89 F.T.C. 46, 65 (1977).

[11] Perpetual and the three banks all engage in "commerce" and conduct their business, including the activities of their boards of directors, in or affecting "commerce," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44 (ID 26).

The so-called "industrial corporations" paragraph contains the following absolute prohibition:

> [N]o 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 (emphasis added).

Other provisions of Section 8 deal specifically with interlocks between certain types of financial institutions. The statute outlaws these interlocks as well, but authorizes the Federal Reserve Board, which exercises general supervisory power over banking, to permit certain interlocks by regulation:

> No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch [9] thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof. . . .[12]

[10] The last clause was specifically inserted to conform with the then-recently enacted Federal Reserve Act, and cannot be taken as general Congressional approval of interlocks between competing financial institutions. *See* S. Rep. No. 698, 63d Cong., 2d Sess. 15 (1914).

Congress enacted the Clayton Act and the Federal Trade Commission Act in response to the perceived shortcomings of the Sherman

[12] The statute further provides that the foregoing prohibition on interlocks does not apply to the following:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601 to 604a of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Act, as interpreted by the courts, in abating what were seen as unhealthy concentrations of economic and political power. One of the practices which was singled out for particular concern was the interlocking directorate. This concern was highlighted in Congressional reports. See *Investigation of United States Steel Corp.*, H.R. Rep. No. 1127, 62d Cong., 2d Sess. 209 (1912) ("Stanley Report"); *Concentration of Control of Money and Credit,* H.R. Rep. No. 1593, 62d Cong., 3d Sess. 138–42 (1913) ("Pujo Report"). The Pujo Report focused on the practice involved in this proceeding:

> As the first and foremost step in applying a remedy, and also for reasons that seem to us conclusive, independently of that consideration, *we recommend that interlocking directorates in potentially competing financial institutions be abolished and prohibited,* so far as lies in the power of Congress to bring about that result . . . .[13] *Id.* at 140 (emphasis added).

That Congress, in enacting Section 8, intended to outlaw interlocks between substantial competitors is unmistakable. The House and Senate reports on the Clayton Act both elaborated on the need for such legislation:

> The importance of the legislation embodied in section [8] of this bill can not be overestimated. The concentration of wealth, money, and property [11] 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. From an economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the 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, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally.
>
> As the president has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination 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. S. Rep. No. 698, 63d Cong., 2d Sess. 16 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. 19–20 (1914).

[13] The Pujo Committee would have permitted a national bank director to serve as a director of one trust company "because of the different character of business that may be transacted by the latter." *Id.*

[12] Judge Weinfeld has aptly described the origins of Section 8 and the policy which underlies the statute:

Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of events should have been in active and unrestrained competition. Instead, and because of such control, the healthy competition of the free enterprise system had been stifled or eliminated. Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by §8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative. *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953) (footnotes omitted).

It is also clear that Congress contemplated interlocks among the practices comprehended by Section 5 of the FTC Act. Throughout the debate over the Trade Commission bill there was a split between those who would enumerate a set of forbidden practices, and those who would enact a flexible general prohibition and leave to the expert judgment of the Commission the definition of the practices to be held unlawful. The latter view prevailed; however, the Congressional committee reports shed light on the types of practices Congress considered to be "unfair methods of competition" when it established the FTC. The Senate committee wrote: [13]

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,* and holding companies intended to restrain substantial competition. S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (emphasis added).

These authorities leave no doubt that director interlocks between competitors are the evil at which Section 8 of the Clayton Act is directed. Section 5 of the FTC Act incorporates that policy. This conclusion is buttressed by the evidence that interlocking directorates were among the practices Congress specifically intended Section 5 to reach.

Perpetual vigorously contends that its interlocks do not violate the policy of Section 8 because Section 8 expressly permits such interlocks. Moreover, respondent argues that to apply Section 5 to the instant interlock would upset "specific" (RAB 15), "carefully selective" (RRB 4) Congressional policies regarding interlocks. However, we find no support for the assertion that these "carefully

selective" policies, if such they be, are intended to permit Perpetual's interlocks. What emerges from the mosaic of federal anti-interlock statutes, foremost among which is Section 8, is a clear antipathy toward interlocking directorates. An examination of these statutes, summarized in respondent's brief (RRB App. A), reveals a general prohibition against horizontal interlocks except to the extent expressly permitted by statute or expressly made subject to federal regulation.

It is true that Congress "compartmentalized" Section 8, in creating separate prohibitions for bank/bank interlocks, vertical interlocks involving common carriers, and horizontal interlocks between industrial corporations. *See, e.g.,* S. Rep. No. 698, 63d Cong., 2d Sess. 14 (1914). However, we find no evidence that Congress considered and evaluated various types of interlocks, condemning some, authorizing others, and that the type of horizontal interlock [14] involved in this case was one which Congress intended to be lawful under Section 8 and outside the scope of Section 5.[14]

The only reported case considering the legality under Section 8 of bank/non-bank interlocks, *United States* v. *Crocker National Corp.,* 422 F. Supp. 686 (N.D. Cal. 1976), *appeal and cross-appeal pending,* Nos. 76-3614 and 76-3615 (9th Cir.), held that interlocks between banks and insurance companies which allegedly competed in certain lending activities did not violate Section 8. Of course, the court intimated no opinion as to the legality of such interlocks under Section 5. *Id.* at 703 n.23. Nowhere in the *Crocker* opinion, nor in any of the authorities cited by respondent or *amici curiae,* is there any indication that Congress carefully considered interlocks between banks and [15] *competing* non-banks, and made a conscious decision to immunize such arrangements while generally condemning other horizontal interlocks.[15]

[14] Respondent and the *amici* have cited several authorities, including subsequent amendments to Section 8, remarks in Congressional debates, unsuccessful legislation in subsequent Congresses, committee staff reports in subsequent Congresses, and a 1950 report of this Commission, for the proposition that bank/non-bank interlocks are not prohibited by Section 8. Insofar as such authorities purport to interpret the intent of Congress they are not entitled to great weight. *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-49 (1963). Similarly, the remarks in debate of individual legislators are not always reliable indicators of what Congress intended. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 395-96 (1951) (Jackson, J., *concurring*); *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 619 (S.D.N.Y. 1953). But, more importantly, none of these authorities compel the conclusion that Perpetual's interlocks do not violate *Section 5.* If it were shown that Congress considered bank/non-bank interlocks and declared them to be an exception to the policy against horizontal interlocks, that might be sufficient to demonstrate that these interlocks fall beyond the reach of Section 5. However, neither respondent nor the *amici* have pointed to any such authority, and we have found none.

[15] Nor do we ascribe any significance to the brief existence of Section 8A of the Clayton Act, which was added by the Banking Act of 1933, ch. 89, §§32, 33, 48 Stat. 194-95, and then repealed by the Banking Act of 1935, ch. 614, §329, 48 Stat. 717-18. Section 8A prohibited director, officer or employee interlocks between banks and corporations (other than mutual savings banks) which made loans "secured by stock or bond collateral." Although Perpetual contends that the enactment and repeal of Section 8A lead to the conclusion that Congress recognized that the original Section 8 never reached bank/non-bank interlocks, that it enacted Section 8A to bridge that statutory gap, and that the repeal of Section 8A restored the prior situation, again legalizing such interlocks, these conclusions

(Continued)

In view of the strong evidence that interlocks between competitors such as those herein contravene the policy of Section 8,[16] and in the absence of [16] a clear Congressional intention to permit such interlocks, we hold that Perpetual's interlocks violate Section 5.[17]

Perpetual also argues that the ALJ erred in holding its interlocks unlawful in the absence of a showing of actual or probable injury to competition or consumers. However, Section 8 of the Clayton Act is a *per se* statute; by its terms it declares certain interlocks unlawful irrespective of any showing of competitive effect, because of their inherent anticompetitive tendencies. *Protectoseal Co.* v. *Barancik,* 484 F.2d 585 (7th Cir. 1973). Where Section 5 is employed to adopt the policy of a *per se* statute, the *per se* standard remains applicable. *Grand Union Co.* v. *FTC,* 300 F.2d 92 (2d Cir. 1962). Congress had ample empirical evidence of the dangerous effects of horizontal interlocks on competition when it enacted Section 8 and Section 5. Accordingly, we hold that evidence of an adverse effect on competition is not necessary to find a violation of Section 5 in this case.[18] [17]

JURISDICTION OF THE FEDERAL TRADE COMMISSION

Perpetual urges that we are barred from acting against its interlocks because the Federal Home Loan Bank Board ("FHLBB" or "Board") has either exclusive or primary jurisdiction over the practice. However, the ALJ found that our jurisdiction is not ousted under either theory advanced by respondent, and we agree.

are unwarranted. The enactment and repeal of Section 8A took place against the backdrop of Congressional concern about the diversion of bank funds into speculative securities, reasons wholly removed from the competitive concerns embodied in the policy of Section 8. Since neither the passage nor the repeal of Section 8A expressed any Congressional intent to authorize the type of interlocks presented in this case, they do not affect our holding that such interlocks violate Section 5.

[16] Our view as to the undesirability of interlocks between institutions which compete for the funds of the public are concurred in by Chairman Burns of the Federal Reserve Board. Letter from Arthur F. Burns to Hon. William Proxmire, Sept. 28, 1976, Exhibit H to Respondent's Memorandum in Support of Cross-Motion for Summary Decision and in Opposition to Complaint Counsel's Motion for Summary Decision.

[17] In view of our holding that Perpetual's interlocks violate Section 5 because they violate the policy of Section 8 of the Clayton Act, we find it unnecessary to reach the alternative ground for the ALJ's Initial Decision, that such interlocks constitute incipient violations of Section 1 of the Sherman Act. Similarly, we do not address complaint counsel's additional contention that these interlocks constitute unreasonable restraints of the competitive process, applying the rationale of *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972). We intimate no views as to the applicability of either of these legal theories to the practice involved in this case.

[18] This case does not present the question of whether an exception to the *per se* rule might obtain in circumstances where, but for the director interlocks, an S&L (or bank) would be unable to commence or continue its operations. We note that the Federal Reserve Board has created an exception from Section 8 for certain banks in low income areas. 12 C.F.R. 212.3(g), 212.103 (1977). *Cf. United States* v. *Jerrold Electronics Corp.,* 187 F.Supp. 545, 557 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

Unlike banks, savings and loan associations are not excepted from the jurisdiction of the FTC.[19] Moreover, while federally-insured savings and loan associations are extensively regulated by the FHLBB, nowhere in the regulatory statutes is there an express exemption from the antitrust laws[20] for interlocking directorates involving savings and loan associations.[21] Therefore, if the FTC is to be ousted from jurisdiction over Perpetual's interlocks, it must be under the doctrine of "implied immunity."

It is axiomatic that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963). *See also Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 597 (1976); *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 682 (1975); *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 719-20 (1975); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372 (1973); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963). Moreover, the Supreme Court **[18]** "has consistently refused to find that regulation gave rise to an implied antitrust exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Cantor* v. *Detroit Edison Co., supra,* at 597 (quoting *Silver* v. *New York Stock Exchange, supra,* at 357). An examination of the statutory scheme for the regulation of savings and loan associations reveals no legislative intention to displace the operation of the antitrust laws nor a "plain repugnancy" between the antitrust and regulatory schemes, nor does it suggest that an antitrust exemption is necessary to make the regulatory scheme work.

The Home Owners' Loan Act (HOLA), enacted in 1933, empowered the FHLBB to charter and supervise federal savings and loan associations. The Board is authorized to prescribe rules and regulations providing for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). In addition the HOLA gives the Board authority to regulate S&L mergers, and the chartering of new

[19] Perpetual is a "corporation" within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44, and is not a "bank" within the meaning of Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2) (ID 1). When the FHLBB was created in 1933, Congress did not amend the FTC Act to exempt S&L's, as it did in 1938, upon the creation of the Civil Aeronautics Board, to exempt air carriers.

[20] The FTC Act when applied to unfair methods of competition is certainly an "antitrust law" in its substantive effect.

[21] Compare, *e.g.,* 49 U.S.C. 1379(a), authorizing the Civil Aeronautics Board to permit interlocking directorates among carriers subject to its jurisdiction, and 49 U.S.C. 1384, the concomitant statute affording antitrust immunity for transactions approved by the CAB.

S&L's. 12 U.S.C. 1464(d)(11), (e). Under 12 U.S.C. 1464(d), the Board is empowered to enforce the HOLA and to bring proceedings concerning

(1) violations of "a law, rule, regulation, or charter or other condition imposed in writing by the Board in connection with the granting of any application or other request by the association, or written agreement entered into with the Board" (12 U.S.C. 1464(d)(2)(A));

(2) "unsafe and unsound practices" engaged in by S&L's (*id.*); or

(3) acts by officers or directors of S&L's which amount to violations of law, rule, regulation or a cease and desist order, or unsafe or unsound practices, or other acts, omissions, or practices which constitute a breach of fiduciary duty where the Board determines [19]

"that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced," and that the violation, practice or breach of duty involves personal dishonesty (12 U.S.C. 1464 (d)(4)(A)).

If one of the above violations is found, the Board may issue a cease and desist order, seek a court injunction, and, in the case of violations by directors or officers, it may order their removal from office.[22] 12 U.S.C. 1464(d)(2)–(4).

In enacting the HOLA Congress was concerned with the maintenance and growth of a safe and sound local thrift industry to provide for the financing of homes. 12 U.S.C. 1464(a) recites:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized. . .to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

There is no provision in the HOLA containing any specific directive relating to interlocking directorates.[23] A review of both the statutory

[22] Under specified conditions, the Board may appoint conservators or receivers for S&L's. 12 U.S.C. 1464(d)(6).

[23] *Cf.* the National Housing Act, 12 U.S.C. 1730a(i), which expressly prohibits officers or directors of savings and loan holding companies from serving simultaneously as officers, directors or employees of federally-insured S&L's or other savings and loan holding companies without prior approval of the Federal Savings & Loan Insurance Corporation. Even under the National Housing Act, there is a saving clause declaring that nothing contained therein (other than approved mergers) shall constitute a defense to a violation of the antitrust laws. 12 U.S.C. 1730a(l).

language and the legislative history of the FHLBB regulatory scheme reveals no [20] indication that Congress intended to preempt the anti-trust laws (and the FTC Act) with regard to interlocking directorates involving S&L's, nor any suggestion that the two schemes are incompatible.

In addition to the assertedly pervasive nature of S&L regulation, respondent and the *amici* place primary reliance on a single phrase in 12 U.S.C. 1464(d)(1). That section reads, in pertinent part:

> *The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of* any provision of this section or rules and regulations made hereunder, *or any other law or regulation,* or in any other action, suit, or proceeding to which it is a party or in which it is interested, and in the administration of conservatorships and receiverships, *the Board is authorized to act in its own name and through its own attorneys* (emphasis added).

Perpetual urges that the language "or any other law" empowers the Board to enforce virtually any law which, if violated, would affect the operation of a savings and loan association (RAB 31). While this language could be interpreted as giving the Board a broad mandate to regulate the affairs of S&L's, it does not support the conclusion that the FHLBB has exclusive authority to regulate S&L interlocks.[24] Congress' intent to create such exclusive authority and to carve out an exception to the FTC's jurisdiction would have to be much clearer for us to reach such a conclusion.[25]

[21] *Reich* v. *Webb,* 336 F.2d 153 (9th Cir. 1964), *cert. denied,* 380 U.S. 915 (1965), properly gave the phrase "or any other law" a broad reading in order to extend to the Board the power to enforce common law fiduciary duties of S&L directors and officers. 336 F.2d at 158. There the court found that to do so was consistent with the Congressional purpose to guard against unsafe and unsound practices. Here, we find in Section 1464(d)(1) no Congressional intent to override the antitrust laws, and thus no implied authority on the part of the Board to permit Perpetual's interlocks if such interlocks violate Section 5 of the FTC Act.[26]

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[24] Indeed, to accept respondent's argument would be to grant the FHLBB exclusive power to enforce the entire United States Code with respect to savings and loan associations. It is doubtful that Congress intended such a result.

[25] Once again, the example of the Federal Aviation Act is instructive. When Congress wanted to exempt air carriers from the FTC's jurisdiction it did so explicitly in Section 5(a)(2) of the FTC Act, and 49 U.S.C. 1381 authorizes the Civil Aeronautics Board to order air carriers to cease and desist from "unfair or deceptive practices or unfair methods of competition." No similar statutory provisions exist with respect to S&L's.

[26] Similarly, the cases cited by respondent referring to the Board's "cradle to grave" regulation of S&L's are inapposite since all deal with the question of federal preemption vis-a-vis *state* regulation, rather than the reconciliation of two *federal* statutory schemes. *See, e.g., Meyers* v. *Beverly Hills Federal Savings & Loan Ass'n,* 499 F.2d 1145 (9th Cir. 1974); *Smith* v. *Jaques,* Civil 75-939, (D. Ore. Dec. 1, 1976); *Rettig* v. *Arlington Heights Federal Savings & Loan Ass'n,* 405 F. Supp. 819 (N.D. Ill. 1975); *People* v. *Coast Federal Savings & Loan Ass'n,* 98 F.Supp. 311 (S.D. Cal. 1951).

[22] Those courts which have considered the question whether the S&L regulatory scheme displaces federal antitrust law have uniformly held that it does not. *Central Savings & Loan Association* v. *Federal Home Loan Bank Board,* 422 F.2d 504, 509 (8th Cir. 1970); *Wolfson* v. *Artisans Savings Bank,* 428 F. Supp. 1315, 1323 (D. Del. 1977); *Kinee* v. *Abraham Lincoln Federal Savings & Loan Association,* 365 F.Supp. 975, 981–82 (E.D. Pa. 1973). The *Wolfson* and *Kinee* cases both involved alleged conspiracies among mortgage lenders to require the prepayment by mortgagors of insurance, taxes, and other charges, and to refuse to pay interest on such funds while held in escrow. S&L defendants in each case claimed that FHLBB regulations permitted the practice of not paying interest on these escrow funds, and that therefore the antitrust laws were impliedly repealed with respect to such practices. The *Wolfson* court held:

> Home Federal has not shown any clear repugnancy between the antitrust laws and the system of FHLBB regulation implicated in this lawsuit. It appears that the FHLBB regulatory scheme for federal savings and loan associations does not concern itself at all with attempting to affect, either positively or negatively, the competitive conditions in the banking field. Indeed, subjecting member associations to the antitrust laws may further the object of the Home Owners' Loan Act of providing for the sound and economical financing of homes by encouraging federal savings and loan associations to vie energetically with other financial institutions for home mortgage business. The mere fact that the FHLBB permits some of the challenged practices does not make those practices a matter of federal policy. I find no implied repeal of the Sherman and Clayton Acts in the context of this case. 428 F.Supp. at 1322–23.

Had the FHLBB *required* S&L's not to pay interest, a "clear repugnancy" may have been found. Similarly, while here the Board's recently promulgated guidelines recommend that S&L's have no more than two directors who are also bank directors (and hence impliedly permit such interlocks), they do not *require* that [23] S&L's have two bank directors on their boards, nor that such bank directors be directors of *competing* banks.[27] Thus, there is no "plain repugnancy" between the two statutes; the goals of each can be harmonized.

This is the teaching of *Silver* v. *New York Stock Exchange, supra,* where the Court held that "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." 373 U.S. at 357. Thus, in cases where Congress, in enacting a regulatory statute, either was aware of a practice which otherwise would violate the antitrust laws and expressly authorized a regulatory agency to supervise the practice, or created a regulatory scheme which, as to

[27] In addition, for established S&L's such as Perpetual, it does not appear that the Board's guidelines have any more than advisory effect. *See* note 9, *supra.*

certain practices, was inherently inconsistent with antitrust principles, implied repeal has been held necessary to make the regulatory act work. *Gordon* v. *New York Stock Exchange, supra; United States* v. *National Association of Securities Dealers, supra; Pan American World Airways* v. *United States,* 371 U.S. 296 (1963). On the other hand, where the two can be reconciled, the antitrust laws have been given full force and effect. *Otter Tail Power Co.* v. *United States, supra; Silver* v. *New York Stock Exchange, supra.*

The key inquiry to be made is whether implied immunity is necessary to make the S&L regulatory scheme work. There is no indication that subjecting S&L's to Section 5 to the extent that it bars interlocking directorates with competing banks will interfere with the Board's supervision over S&L's, or subject Perpetual to inconsistent regulation. There being no showing here that Congress intended interlocking directorates of savings and loan associations to be exempt from the antitrust laws, nor that such an exemption is necessary to make the HOLA work, we hold that the FTC has jurisdiction to declare S&L/bank interlocks unfair methods of competition in violation of Section 5.

Alternatively, Perpetual argues that even if the FHLBB's jurisdiction over its interlocks is not exclusive, the doctrine of primary jurisdiction requires [24] us to defer to the Board's expertise in considering this issue.[28] Unlike the doctrine of implied immunity, discussed *supra,* invocation of primary jurisdiction would simply require a *postponement,* rather than an ouster of FTC jurisdiction. *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 353–54 (1963). Since the FHLBB has already had the opportunity to issue guidelines on the question of S&L/bank interlocks, and provide the Commission with guidance as to its interpretation of the HOLA in this regard, there is no longer any need to defer consideration of the antitrust issues.

Moreover, this is not a case where the HOLA or any of its provisions are incompatible with the maintenance of an antitrust action, *supra,* nor one in which the Board's action would be of "material aid" to the Commission in determining whether bank/S&L interlocks are unfair methods of competition. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302 (1973). Nor would the tests of *Nader* v. *Allegheny Airlines, Inc.,* 426 U.S. 290, 303–06

[28] The doctrine of primary jurisdiction is concerned with "whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." Davis, *Administrative Law Text* 373 (3d ed. 1972). It is far from clear that primary jurisdiction, or the policies underlying the doctrine, apply between agencies in circumstances such as are presented in this case. However, for purposes of analysis, we assume, *arguendo,* the applicability of the doctrine.

(1976), require us to defer further to the Board. It would not be necessary to secure uniformity or consistency in the regulated industry, since there is no necessary inconsistency between Section 5 and the FHLBB statutes and guidelines, there are no factual questions uniquely within the Board's expertise, and the "reasonableness" of the interlocks is not in issue.

THE ALJ'S ORDER

Judge Timony's order would require Perpetual to cease and desist from having any director or officer who either:

(a) is or would be at the same time a director or officer of Perpetual, and who is a director, officer, or affiliated person of a director or officer of American Security [25] and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other organization engaged in the provision of financial services, so long as Perpetual and either American Security, National Bank, Union First or such other business organization are in competition; or

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

The Commission has wide latitude in fashioning a remedy, subject to the constraint that the remedy chosen must have a reasonable relation to the unlawful practices found to exist. *E.g., FTC* v. *Colgate-Palmolive Co.* 380 U.S. 374, 394-95 (1965); *FTC* v. *National Lead Co.,* 352 U.S. 419, 429 (1957); *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 613 (1946). We reject respondent's argument that any order should be limited to prohibit only director interlocks between Perpetual and commercial banks with which it allegedly competes in the solicitation of savings deposits and the financing of residential loans. The order properly can prohibit interlocks between Perpetual and competing institutions offering services and products other than simply those involved in the specific interlocks found herein. *FTC* v. *Colgate-Palmolive Co., supra.* The scope of the order is consistent with that issued in prior interlock cases, *e.g., Kraftco Corp.,* 89 F.T.C. 46 (1977). Having violated the law, respondent "must expect some fencing in." *FTC* v. *National Lead Co., supra,* at 431.

However, we feel that some portions of Judge Timony's order can be more narrowly tailored. Specifically, we do not find it necessary under the facts of this case to prohibit officer interlocks, nor is the extension of the ban to "affiliated persons," who are defined as close relatives of an officer or director sharing a home or business address with such person, necessary to effective relief in this case.

Thus, our order bars a person from serving simultaneously as a director of Perpetual and a director of any other corporation, so long as such corporation is engaged in the provision of any financial service[29] in competition with Perpetual.

[26] We do not consider the requirement in the order that Perpetual obtain from directors or nominees for the board a list of products and services produced and sold by other businesses on whose boards they serve to be unduly burdensome. Rather, it sets up a convenient method by which Perpetual can ensure its own compliance with the order. *Kraftco Corp., supra,* at 66–67. However, as in *Kraftco,* we will impose this requirement only for a period of five years; thereafter, Perpetual will be responsible for establishing its own means of ensuring compliance with the order and with Section 5.[30]

PREJUDGMENT

Respondent's allegation that the Commission prejudged the issues in this case through its issuance of a Statement of Policy, 41 F.R. 35573 (1976), during the pendency of this proceeding, is rejected. The Statement of Policy (a) describes the *Perpetual* complaint; (b) states that the Commission, in issuing the Statement, "has made no determination on the merits that Perpetual or any other person or corporation has actually violated the law . . ."; (c) notes the Commission's usual practice of naming individual directors in interlock complaints (from which it departed in the *Perpetual* complaint); (d) states that "[w]hile the reach of Section 8 of the Clayton Act to interlocks between banks and other corporations such as savings and loans may not be clear, no similar express statutory provision is contained in Section 5 of the FTC Act," a truism; and (e) warns that after January 1, 1977, individual S&L directors will be named as respondents in complaints "which may from time to time issue challenging allegedly unlawful interlocks of this nature . . . ." No "disinterested reader," *Texaco Inc.* v. *FTC,* 336 F.2d 754, 760 (D.C. Cir. 1964), *rev'd per curiam on other grounds,* 381 U.S. 739 (1965), of this Statement of Policy could reasonably conclude that the Commission had therein prejudged the issues in this case. [27]

CONCLUSION

The concern which Congress felt in 1914, when it enacted the FTC

[29] We have also amended the definition of "financial services" in Judge Timony's order to include only the services provided now or in the future by Perpetual.

[30] The ALJ's order has also been modified in a number of respects for purposes of clarification and to eliminate certain redundancies.

and Clayton Acts, with concentration of wealth and power in the hands of a few remains a central one. It is particularly pressing in the sensitive financial sector of our economy. Interlocking directorates among competitors by their very nature create the potential for anticompetitive conduct, and thus have long been condemned by the law. To permit interlocking directorates among financial institutions who compete for the funds of the public, and in the making of loans in our credit-dominated society, would be to create potential conflicts of interest which could have seriously adverse effects on competition. In such circumstances, it is clear that Perpetual's interlocks with competing commercial banks constitute unfair methods of competition condemned by Section 5 of the FTC Act.

Except for the modifications of Judge Timony's order indicated above, the initial decision is affirmed, with such additional findings of fact and conclusions of law as may be contained herein.

Final Order

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–49, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

I

It is ordered, That the following definitions shall apply in this order:

[2] (a) "Director" includes voting members of boards of directors, non-voting members of boards of directors, advisory directors, and directors emeriti.

(b) "Financial services" means any financial service presently or hereafter offered by Perpetual including, but not limited to solicitation and maintenance of demand, savings or time deposits or

accounts; residential loans; other mortgage loans; any other type of loans; retirement accounts; or direct deposit services.

(c) "Parent" of a corporation means any other corporation which owns or controls 50 percent or more of the voting stock of such corporation.

(d) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1-4 dwelling units.

(e) "Savings" includes all savings accounts, savings deposits, passbook savings accounts, and savings deposit accounts offered by any business organization.

(f) "Sister" corporations are corporations sharing a common parent.

(g) "Subsidiary" of a corporation is any corporation of which the subject corporation is a parent.

(h) "Time deposits" are all deposits, including certificates of deposits, that are not demand deposits or savings.

II

It is further ordered, That for purposes of this order, a corporation, including Perpetual Federal Savings and Loan Association ("Perpetual") and any corporation which shares a common director with Perpetual, shall be deemed to be engaged in the provision of a financial service, if any parent, subsidiary, or sister of such corporation is so engaged. [3]

III

It is further ordered, That upon this order's becoming final respondent Perpetual, its successors and assigns, do forthwith cease and desist from having, and in the future shall not have any individual serve as a director who either:

(a) is or would be at the same time a director of Perpetual and a director of American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other corporation, so long as such corporation is engaged in the provision of any financial service in competition with Perpetual;

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

IV

It is further ordered, That within thirty (30) days of the date of service of this order and prior to each election of directors or to the

solicitation of proxies for such election, whichever is earlier, hereafter, Perpetual shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation in which each such person then serves as a director or has been nominated as a director.

The requirements of this Paragraph shall not apply to elections of directors occurring after five (5) years from the effective date of this order.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph III(a) hereof.

V

It is further ordered, That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, Perpetual shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Expiration of the obligations imposed by this paragraph shall not excuse Perpetual's obligation to comply with Paragraph III of this order.

VI

It is further ordered, That the provisions of Paragraphs III through V hereof shall not apply where the interlocked corporation is Perpetual's (1) parent, (2) sister, or (3) subsidiary.

VII

It is further ordered, That Perpetual shall give the Commission at least thirty (30) days prior notice of any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of

a successor corporation, the creation or dissolution of a parent, sister or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Commissioner Collier dissenting.