

Complaint

90 F.T.C.

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

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.).

