

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

Date: 11/8/85 Number: 317021CA Due By:
Subject: Economic Policy Council/Domestic Policy Council Meeting --
Wednesday, November 13, 1985 -- 1:00 P.M. -- Roosevelt Room

ALL CABINET MEMBERS	Action	FYI		Action	FYI
Vice President	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CEA	<input checked="" type="checkbox"/>	<input type="checkbox"/>
State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CEQ	<input type="checkbox"/>	<input type="checkbox"/>
Treasury	<input checked="" type="checkbox"/>	<input type="checkbox"/>	OSTP	<input type="checkbox"/>	<input type="checkbox"/>
Defense	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Interior	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Agriculture	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Commerce	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Labor	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McFarlane	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HHS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Svahn	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HUD	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Chew (For WH Staffing)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Transportation	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Energy	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Hicks	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Chief of Staff	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Education	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
OMB	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
CIA	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
UN	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
USTR	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
GSA	<input type="checkbox"/>	<input type="checkbox"/>	Executive Secretary for:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
EPA	<input type="checkbox"/>	<input type="checkbox"/>	DPC	<input checked="" type="checkbox"/>	<input type="checkbox"/>
NASA	<input type="checkbox"/>	<input type="checkbox"/>	EPC	<input type="checkbox"/>	<input type="checkbox"/>
OPM	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
VA	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
SBA	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

There will be a joint meeting of the Economic Policy Council and the Domestic Policy Council on Wednesday, November 13, at 1:00 P.M. in the Roosevelt Room.

The agenda and background paper are attached.

RETURN TO:

☒ Alfred H. Kingon
Cabinet Secretary
456-2823
(Ground Floor, West Wing)

☐ Don Clarey
☐ Rick Davis
☐ Ed Stucky

Associate Director
Office of Cabinet Affairs

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THE WHITE HOUSE
WASHINGTON

November 8, 1985

MEMORANDUM FOR THE DOMESTIC AND ECONOMIC POLICY COUNCILS

FROM: RALPH C. BLED SOE *RCB*
EUGENE J. McALLISTER *EM*

SUBJECT: Agenda and Paper for the November 13 Meeting

The agenda and paper for the November 13 meeting of the Domestic and Economic Policy Councils are attached. The meeting is scheduled for 1:00 p.m. in the Roosevelt Room.

The single agenda item will be a review of the proposals of the Working Group on Antitrust Review. The Working Group has studied several areas of antitrust law: (1) remedies, including treble damage reform; (2) mergers and Section 7 of the Clayton Act; (3) an antitrust exemption as alternative relief for industries injured by imports; (4) prohibitions on interlocking directorates; and (5) jurisdiction in foreign commerce cases. A paper describing these issues, offering policy options, and outlining the Working Group's recommendations is attached.

Attachment

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THE DOMESTIC AND ECONOMIC POLICY COUNCILS

November 13, 1985

1:00 p.m.

Roosevelt Room

AGENDA

1. Report of the Working Group on Antitrust Review

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MEMORANDUM FOR THE DOMESTIC POLICY COUNCIL AND
THE ECONOMIC POLICY COUNCIL

FROM: THE WORKING GROUP ON ANTITRUST REVIEW

SUBJECT: PROPOSED CHANGES IN THE ANTITRUST LAWS

The Working Group on Antitrust Review has completed its study of several areas of antitrust law: (i) remedies, including treble-damage reform; (ii) mergers and section 7 of the Clayton Act; (iii) an antitrust exemption as alternative relief for industries injured by imports; (iv) prohibitions on interlocking directorates; and (v) jurisdiction in foreign commerce cases. Submitted below for the Councils' consideration are the findings of the Working Group, including various options for reform legislation that the Administration may wish to propose.

I. REMEDIES - TREBLE-DAMAGE REFORM

The Working Group has considered the need for reform of antitrust remedies and has developed a proposal for modification of the treble-damage rule in private antitrust damage cases.

Background

Antitrust remedies serve two basic purposes. First, they deter and punish violations of the antitrust laws. Second, they encourage those who have been injured by antitrust violations to detect such violations and obtain compensation for their losses. The adequacy of existing remedies to these purposes and the possibility of their having unintended side effects are increasingly matters of legitimate concern.

The antitrust laws contain a panoply of public and private remedies for antitrust violations. Public remedies include criminal felony sanctions, injunctions against anticompetitive conduct, and recoupment of damages sustained by the government. Private plaintiffs may seek treble damages for injuries sustained by reason of antitrust violations, as well as injunctive relief against threatened loss or harm. In 1976,

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Congress created the newest antitrust remedy--damage actions by state attorneys general as parens patriae on behalf of natural persons residing in their states.

Discussion

Private Remedies

Private antitrust remedies have been examined to evaluate their adequacy and to identify possible anticompetitive side effects. Such remedies should help deter clearly anticompetitive cartel activity. They also should protect, and provide fair compensation to, parties who may be injured by antitrust violations. At the same time, they should not deter procompetitive conduct or be overly subject to abuse.

Treble Damages

With few exceptions, plaintiffs' recoveries in all private antitrust actions, including parens actions, are automatically trebled. Trebling is intended to provide potential plaintiffs with additional incentives to complement public enforcement with private actions, and to help deter anticompetitive conduct. When suits are brought by the victims of overcharges caused by horizontal price fixing or bid rigging, trebling is entirely appropriate. Overdeterrence is not a significant problem, because generally such conduct is unambiguously anticompetitive and cannot be overdeterred.

Where potentially procompetitive practices such as aggressive low pricing or innovative distributional practices are involved, however, trebling can have serious anticompetitive side effects. Trebling can cause firms to shy away from such conduct, even though it may have significant economic benefits. Moreover, such practices often are challenged by competitors or potential competitors with commercial or financial motives that diverge substantially from the public interest. Competitors may use the threat of treble damages to cause a successful rival to abandon or restrict conduct that enhances efficiency and lowers prices to consumers. Spurious litigation to inhibit procompetitive practices imposes high costs on defendants and, ultimately, on the economy and consumers.

In recent years, the courts, Congress, and legal and economic scholars have come to recognize the serious nature of these problems. A general modification of the automatic, nearly universal trebling rule in antitrust cases is warranted. The Working Group proposes to modify that rule by continuing to award treble damages only to persons who have paid higher

prices to the defendant (or, as sellers, received lower prices from the defendant) because of antitrust violations, while limiting recovery by other plaintiffs to full compensation--actual damages plus prejudgment interest, costs, and attorneys' fees. This proposal would increase somewhat deterrence of cartel behavior, while significantly eliminating deterrence of business conduct that may benefit consumers and the economy generally.

Claim Reduction

Under current law, all defendants found liable for damages in antitrust cases are jointly and severally responsible for the plaintiff's entire, trebled recovery. Should the plaintiff settle with any liable or potentially liable party, the plaintiff's remaining claim is reduced only by the amount the plaintiff receives for that settlement. Thus, nonsettling defendants can see their liability magnified if the plaintiff settles with other defendants, particularly those responsible for a major portion of the plaintiff's damages. This "whipsaw" effect is unfair and can force defendants to abandon their factual claims and legal defenses, whatever their merits.

The Working Group proposes to address this problem by reducing the plaintiff's recovery by the fair share of damages allocable to any person the plaintiff releases from liability, rather than merely by the amount of that person's settlement with the plaintiff. This proposal should alleviate the whipsaw problem while minimizing complication of damage litigation and possible adverse effects on deterrence.

Defendants' Attorneys' Fees

Existing antitrust remedies provide attorneys' fees to prevailing private plaintiffs but, with few exceptions, deny such awards to prevailing defendants. These provisions have both incentive and compensatory purposes. The resulting imbalance, however, gives private plaintiffs, whose cases are not always meritorious, a decided tactical advantage. Defendants that face substantial litigation costs, even if they prevail, may be pressured to settle with the plaintiff for something less than those costs.

The Working Group proposes to address the problem by providing for the award of attorneys' fees to prevailing defendants where private plaintiffs' claims are "frivolous, unreasonable, without foundation, or in bad faith." After extensive debate, Congress adopted this standard recently in a defendants' attorneys' fees provision in the National Cooperative Research Act (NCRA), and its general applicability should have positive

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effects across-the-board. There is a strong public interest in preventing groundless antitrust actions that may harm the economy by deterring procompetitive conduct. Therefore, the legislative history of this proposal should clearly state that this provision for defendants' attorneys' fees is to be given a broader interpretation than comparable provisions applied to private actions in general (e.g., Rule 11, Federal Rules of Civil Procedure). The legislative history of the NCRA is clear on this point, and would serve as the model.

Public Remedies

A violation of the Sherman Act is a felony for which a corporation may be fined up to \$1,000,000, and an individual may be fined up to \$250,000 and sentenced to a maximum of three years in jail, or both. These statutory penalties are sufficient, but courts often refuse to impose substantial fines or jail sentences despite the recommendations of the Department of Justice. The Department intends to consult closely with the newly-formed United States Sentencing Commission to remedy this problem.

The Clayton Act currently provides for the recovery of antitrust damages by the United States, but limits this recovery to actual damages in all cases. The Working Group's treble-damage proposal would provide for the trebling of government damages whenever the government is suing for the recovery of overcharges or underpayments, as would be the case in private litigation under this proposal. Deterrence of hard core cartel behavior affecting the public treasury would thereby be increased substantially.

The Equal Access to Justice Act provides for the possible award of attorneys' fees under common law principles to any defendants in government antitrust cases, and to defendants, meeting certain size requirements under a special statutory standard. The Working Group concluded that these provisions are adequate, and would not be affected by its other proposals.

Recommendation:

The Working Group recommends by consensus that the Administration propose legislation to amend the Clayton Act that would:

(i) treble only damages caused by antitrust overcharges or underpayments, in both private and government damage cases, and provide automatic prejudgment interest on actual damages in all antitrust cases;

(ii) provide an affirmative defense in all antitrust cases that would reduce the plaintiff's claim for damages by the share of those damages fairly allocable to any person released from liability; and

(iii) provide attorneys' fees to prevailing defendants where the plaintiff's conduct is frivolous, unreasonable, without foundation, or in bad faith.

Advantages

- ° Restricting trebling to overcharges would continue to deter clearly anticompetitive conduct, while avoiding deterrence of procompetitive practices.
- ° Competitors would be less able to use the threat of treble damages to restrain competition.
- ° When damages are not trebled, actual damages plus prejudgment interest would provide full compensation for injured parties.
- ° Claim reduction would reduce undue pressure on defendants to settle early or risk increased liability.
- ° A defendants' attorneys' fees provision would discourage the filing of groundless suits.
- ° Trebling damages in certain government damage cases will help deter cartel activity that adversely affects the public treasury.

II. MERGERS AND SECTION 7 OF THE CLAYTON ACT

Merger law and enforcement policy has been a primary focus of the Working Group. The Administration needs to decide whether it should propose the revision of statutory antitrust law governing mergers, and, if so, what form any such proposal should take.

Background

The Department of Commerce has proposed the repeal of section 7 of the Clayton Act, the primary antitrust law relating to mergers. This proposal also would amend the Sherman Act and the Federal Trade Commission Act to provide that only mergers conferring "monopoly power" would be unlawful.

Section 7 prohibits a merger or acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." Under the Reagan Administration, the Department of Justice has published Merger Guidelines explaining the principles of merger analysis, and enforced section 7 in accord with those Guidelines. Of some 10,000 merger transactions reported to the Department during the past 5 years, 26 have been challenged by the Department; 13 of these cases have been resolved by consent decrees. (The FTC follows the same principles and has a similar enforcement record.) We don't know how many mergers were not proposed because of the existence of section 7.

The Issue

The Working Group reached a consensus that mergers in general can have important, procompetitive, efficiency-enhancing effects. In some circumstances, however, mergers can have serious anticompetitive effects, and those mergers should be prevented before they occur.

The issues therefore are what legal and economic standard should be used to test proposed mergers, and whether or how to change existing statutes to incorporate that standard. The Working Group was unable to reach a consensus on these issues because of basically differing views on the arguments on both sides.

Arguments for Repeal of Section 7

Inappropriate restraints on mergers impose costs upon society by forcing U.S. industries, and ultimately the public, to forego the benefits of mergers that are efficiency enhancing. At the same, government and private litigation involving section 7 of the Clayton Act imposes heavy costs on both government and private parties. In the face of stiff international competition, firms that are frustrated in achieving efficiencies by outmoded merger laws call for protectionism. Protectionist policies inevitably raise consumer prices and invite retaliatory trade restraints. Repeal of section 7 would allow U.S. firms to compete more successfully in domestic and world markets, thus enhancing our balance of trade and preserving jobs for U.S. workers. Consumers will also benefit from lower prices made possible through improved efficiency.

The non-binding character of the Guidelines has important implications in private litigation under section 7. In such

suits, federal courts can refuse--and in two recent instances have refused--to follow the Guidelines and have blocked mergers approved by the Antitrust Division and the FTC under the Guidelines. ^{1/}

Moreover, future Administrations may attempt to return to the overly-restrictive policies that are permitted under the incipency standard and try to convince the courts to follow their lead. In view of the fact that antitrust enforcement policies and judicial doctrine have substantially changed, there is a very significant chance that this could occur.

If Clayton Act § 7 were repealed, pre-merger screening under the Hart-Scott-Rodino Act would continue. The new standard proposed by Commerce would only raise the threshold of illegality that would have to be satisfied before a pending merger or acquisition could be blocked.

Arguments Against Repeal of Section 7

There is no question that most mergers have procompetitive, efficiency-enhancing effects. No merger should be prevented unless there is a real likelihood of substantial competitive harm. The real issue, however, is whether section 7, as interpreted and enforced today, accurately distinguishes harmful from beneficial mergers.

The Department of Justice Merger Guidelines represent the substantial efforts of this Administration systematically to identify the few mergers whose costs to the consuming public exceed their private benefits to other parties. Merger analysis is much broader and more refined than once was the case, and takes full consideration of foreign competition, entry conditions, and efficiencies. Current merger enforcement policy identifies and proscribes those few mergers that are likely to harm consumers and the economy generally. The overwhelming majority of mergers do not raise questions under the Guidelines and go forward without delay.

Some mergers that fall short of conferring "monopoly power", the standard advocated in connection with repealing section 7, would be quite detrimental to the economy. A monopoly power standard, defined by the courts to require a market share of at least 65%-70%, would not prevent mergers that create "market

^{1/} In a case currently before the Supreme Court, the United States has taken the position that competitors rarely, if ever, should have standing to challenge mergers.

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power" that could be exercised by one firm or by several firms acting collusively. Detection problems and the inability of the other antitrust laws to reach tacit agreements make those laws a poor substitute for preventing anticompetitive mergers in appropriate cases.

A return to the restrictive merger policies of the past is very unlikely. In recent years, the Supreme Court has handed down a number of decisions basing antitrust analysis on sound economic thinking, and those decisions have had a profound effect on the law. More recent Supreme Court precedent makes clear that "incipiency" now refers to probable adverse effects on competition, not just possibilities. Moreover, a new merger statute could throw the business and legal communities into great uncertainty.

The "Codification" Alternative

As an alternative to repeal, section 7 could be amended to incorporate the Administration's policy on mergers, as set forth in the Merger Guidelines. Codifying the Guidelines would reinforce and preserve the current interpretation and application of merger law and alleviate concern about a possible return to overly-restrictive policies.

The Working Group developed a "codification alternative" which should be sufficient to this task. It should be noted, however, that the Guidelines themselves are some 30 pages long; thus any reasonable codification of the Guidelines will have to rely on lengthy legislative history, which is always beyond the control of any one side of a legislative controversy.

Legislative Context

A House Subcommittee recently reported a bill (H.R. 2735) to establish a more restrictive merger standard than is reflected in the Merger Guidelines. If codification is proposed and rejected, litigants may argue that Congress rejected the Administration's policies as reflected in the Guidelines.

More importantly, a section 7 proposal may prejudice important treble damage reform if opposition in fact is substantial and may lead to rejection of the Administration's antitrust reform package.

Options

1. Propose legislation to repeal section 7 of the Clayton Act and to substitute a monopoly power standard for mergers in the Sherman Act.

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2. Propose legislation to codify the policies of the Department of Justice's Merger Guidelines into section 7 of the Clayton Act.
3. Endorse current merger enforcement policy under the Guidelines without proposing legislative action.

Option 1: Propose legislation to repeal section 7 of the Clayton Act and to substitute a monopoly power standard for mergers in the Sherman Act.

Advantages

- ° Section 7 is based on outmoded economic theory and may deter efficiency-enhancing mergers. Only mergers that create monopoly power raise a sufficient threat of competitive harm to warrant prohibition.
- ° Overly-restrictive merger law imposes high costs and raises the cry for protectionism.
- ° Collusive behavior is adequately addressed by other antitrust laws.
- ° The Guidelines are not binding on the courts in private litigation.
- ° Courts and enforcement agencies may attempt to return to overly restrictive policies.

Disadvantages

- ° Current section 7 law as reflected in more recent judicial decisions and merger policy prohibits only harmful mergers and does not threaten efficiency-enhancing mergers.
- ° A return to the legally and economically rejected policies of the past is unlikely.
- ° A monopoly power standard would permit mergers that result in significant anticompetitive harm.
- ° New statutory language could create substantial uncertainty, and proposing such language risks enactment of provisions that would restrain beneficial mergers.
- ° Repealing section 7 is a highly controversial proposal that could prejudice important antitrust treble-damage reform.

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Option 2: Propose legislation to codify the policies of the Department of Justice's Merger Guidelines into section 7 of the Clayton Act.

Advantages

- ° Ensures that the sound legal and economic theory in current enforcement policy will be followed in all future actions.
- ° Makes current Reagan Administration merger policy law.

Disadvantages

- ° New statutory language could create substantial uncertainty and proposing such language risks enactment of provisions that restrain beneficial mergers.
- ° If codification is proposed and rejected, litigants may argue that Congress rejected the Administration's policies as reflected in the Guidelines.
- ° May detract attention from important antitrust treble-damage reform, but less so than a proposal for repeal.

Option 3: Endorse current merger enforcement policy under the Guidelines without legislative action.

Advantages

- ° Current section 7 law as reflected in more recent judicial decisions and merger policy prohibits only harmful mergers and does not threaten efficiency-enhancing mergers.
- ° A return to the legally and economically rejected policies of the past is unlikely.
- ° Promotes certainty in enforcement by supporting the sophisticated analysis based on existing statutory language.
- ° Avoids prejudice to important treble-damage reform.

Disadvantages

- ° The Guidelines are not binding on the courts in private litigation.

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° Courts and enforcement agencies may attempt to return to overly restrictive policies.

III. IMPORT RELIEF UNDER SECTIONS 201-203
OF THE TRADE ACT OF 1974

The Working Group considered a proposal by the Department of Commerce for a new form of relief under the Trade Act of 1974 for industries found to be injured by imports. This proposal would give the President the authority to exempt most mergers and acquisitions among the members of an injured industry from the antitrust laws, for a maximum period of 5 years. Under the proposal as refined by the Working Group, most mergers and acquisitions occurring during that period would be entirely protected by exemption certificates issued by the Department of Justice. Only mergers or acquisitions creating monopoly power or otherwise creating sufficient market power to raise prices substantially would be prohibited. Antitrust exemption relief would be available only as an alternative: protectionist relief could not be obtained concurrently, nor for a period of 10 years thereafter.

Background

Sections 201-203 of the Trade Act of 1974 authorize the President to provide import relief if the International Trade Commission (ITC) finds that an increase in imports is the substantial cause of actual or threatened injury to a domestic industry. Import relief includes protectionist measures (tariffs, duties, quotas, and orderly marketing agreements) and/or trade adjustment assistance.

Discussion

Protectionist measures are costly and invite retaliation by trading partners. Duties increase the price of imported goods, while restrictive measures increase the price of domestic substitutes. Trade adjustment assistance provides only limited relief to displaced workers and domestic businesses. Effective alternatives to protectionist measures are in full accord with the Administration's policy and clearly in the national interest. Antitrust exemption relief can be structured to be such an alternative without harming consumers or domestic business.

Antitrust exemption relief for mergers and other acquisitions should take full account of foreign competition and the efficiencies that such transactions can produce to meet that

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competition in industries that have been substantially injured by imports. In the face of the vigorous foreign competition necessary to elicit a finding of injury under section 201, the threat of collusion resulting from a domestic merger or other acquisition is sufficiently small to justify a more liberal standard than that normally applied. Moreover, amending the Trade Act to facilitate mergers and acquisitions that actually enhance the competitiveness of domestic firms would provide a desirable option to costly and dangerous protectionism.

It is possible that new optional relief under sections 201-203 would stimulate use or attempted use of those sections and continued pressure for protectionist measures. Although hard to quantify, the Working Group believes that the Councils should consider this possibility in evaluating this proposal.

Recommendation:

The Working Group recommends by consensus that the Administration propose antitrust exemptions for mergers and acquisitions in industries injured by imports as alternative relief under sections 201-203 of the Trade Act of 1974.

Advantages

- ° Provides an alternative to costly protectionist measures that invite retaliation by our trading partners.
- ° May facilitate procompetitive domestic industry responses to import competition.

Disadvantages

- ° Could stimulate additional interest in and attempted use of sections 201-203 of the Trade Act to obtain protectionist measures.
- ° Unless correctly structured and administered, an antitrust exemption could harm consumers, businesses, and injured industries by reducing competition among domestic firms.

IV. PROHIBITIONS ON INTERLOCKING DIRECTORATES

The Working Group considered indications that the election of well-qualified corporate directors is being hindered by the absolute prohibition in section 8 of the Clayton Act on common

directors serving two or more direct competitors, any one of which has capital, surplus, and undivided profits of more than \$1 million.

Background

Section 8's prohibition of interlocks between competing corporations is absolute. There is no standard in the statute that measures the likelihood that any such interlock would or would not be anticompetitive. Under a strict reading of the statute, interlocks between competitors are forbidden even if the competition between them is de minimis. The Department of Justice has received reports that this strict rule causes much frustration, as able potential directors of diversified companies are repeatedly disqualified after discovery of insignificant competitive overlaps.

Discussion

Any possible competitive risks presented by interlocks between competing corporations are insignificant or non-existent in many instances. Where the competitive overlap is but a very small part of each corporation's business, active consideration of the details of the overlapping business by either board is most unlikely. Where the competitive overlap affects a very small part of any relevant market, the overlap is no cause for concern about harm to competition. And there is little reason for concern where a competitive overlap involves commercial activities that are very small in absolute dollar amounts.

Section 8 should be amended to exempt interlocks where competitive overlaps are de minimis. This could be done by defining several "safe harbors" based on the firms' sales of competing products (i) as a percentage of the firms' overall business, (ii) as a percentage of the total sales in any affected market, or (iii) in absolute dollar amount. Corporate counsel would know with reasonable certainty whether a proposed interlock fell into one of these safe harbors.

Other amendments to section 8 also appear appropriate. The \$1 million capital, surplus, and undivided profits jurisdictional threshold, established in 1914 and never changed, should be very substantially increased. In order to prevent this threshold from becoming outdated again, it also could be appropriately indexed. Finally, an interlock between two firms should be covered only where both firms, rather than either firm, exceed the jurisdictional size threshold.

Increasing the jurisdictional threshold from \$1 million to \$10 million by itself would decrease the number of

publicly-traded companies covered from approximately 5,200 to approximately 3,400. This is a poor measure of the effects of the proposal, however. Of much greater significance is the fact that both parties to the interlock, not just one, would have to exceed this threshold.

The Councils should be aware of two other possible amendments to section 8 if legislative attention is directed to interlocks. These amendments would extend the section's coverage to interlocks involving all corporate "management officials", rather than just directors, and to interlocks between banks and their non-bank competitors, currently excepted from the statute under the Supreme Court's interpretation. Although empirical data is unavailable, these amendments could expand the section's coverage substantially. They may well be proposed in connection with any omnibus antitrust bill, however, regardless of whether the Administration makes any proposal to amend section 8.

Recommendation:

The Working Group recommends by consensus that the Administration propose amendments to section 8 of the Clayton Act to exempt de minimis interlocks that fall into safe harbors, increase to \$10 million and index the current \$1 million jurisdictional size threshold, and require each interlocked corporation to exceed that threshold before an interlock would be prohibited.

Advantages

- Exempts unwarranted prohibitions on interlocks, thereby facilitating the election of well-qualified corporate directors.
- Brings the current jurisdictional threshold up to date and limits coverage to interlocks among larger firms.

Disadvantages

- May stimulate further amendments expanding section 8 to cover management official and bank/non-bank interlocks.

V. JURISDICTION IN FOREIGN COMMERCE CASES

Background

The reach of the Sherman Act to private suits which challenge activities in international commerce has been criticized

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severely by the United States' trading partners as failing to take adequate account of their competing regulatory and commercial interests. A recent decision in the Laker case has caused considerable concern among other governments that the United States is turning away from principles of comity as a consideration which may limit the potential reach and conflicts caused by "effects" test jurisdiction under the antitrust laws in the international commerce area.

Discussion

The Working Group reached a consensus that the antitrust laws should be amended to instruct courts to dismiss private antitrust cases when the exercise of jurisdiction would be unreasonable in light of the following exclusive factors: (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad; (2) the nationality of the parties and the principal place of business of corporations; (3) the presence or absence of a purpose to affect United States consumers or competitors; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; and (6) the degree of conflict with foreign law.

Such an amendment would preserve ample antitrust jurisdiction to deter anticompetitive conduct affecting U.S. commerce. It would also allay foreign governments' concerns that the United States is turning away from accepted principles of comity in exercising jurisdiction. At the same time, it would avoid the problems which caused the Administration to object earlier this year to S. 397, a proposal by Senator DeConcini to revise the antitrust laws' application to foreign commerce, i.e., bald balancing of the United States' interests against those of foreign governments and an invitation to the courts to make foreign relations determinations.

The Working Group was unable to reach agreement, however, on whether this amendment should also empower the President to compel dismissal of a private antitrust action which he determined would interfere with the conduct of foreign relations of the United States.

The Justice Department believes that the Executive Branch should have this authority. Moreover, Justice believes that termination for foreign affairs reasons is not a proper judicial function, so such authority must be lodged with the Executive Branch if it is to exist at all. Justice believes that such authority should be used very sparingly. While

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Justice also recognizes that such authority could generate pressures from foreign governments, statutory procedural hurdles and a strongly expressed reluctance by the President to use the authority would alleviate these pressures.

The State Department believes that the unprecedented authority to terminate a private case for purely political foreign relations reasons, unrelated to considerations of international comity, is undesirable and unnecessary. It would create foreign affairs pressures in every private action involving a foreign defendant. Moreover, the foreign relations of the United States would suffer more from refusals by the Executive to exercise a dismissal power than from the rare case in which a court refuses to dismiss a case which the Executive wants to have closed. The foreign relations problems caused by private antitrust cases which the proposed power is intended to serve will, in any event, be substantially reduced by the dismissal power given the courts and by the proposed reforms relating to antitrust remedies. If the Executive believes that a case should be dismissed, it may present concrete and authoritative views on the reasonableness of jurisdiction in light of the international factors the courts are instructed to consider. The State Department also believes that such authority could create the appearance that rights of private parties under the United States' legal system are open to political manipulation.

The Working Group recognized that a Presidential power to compel dismissal of a private litigant's case would raise substantial Constitutional issues such as separation of powers, due process, and the "taking" of property within the meaning of the Fifth Amendment.

Options

1. Propose that the Clayton Act be amended to require courts to dismiss private suits when, in light of specified, exclusive factors, the exercise of jurisdiction would be unreasonable.
2. Propose that the Clayton Act be amended as in Option 1, but also empower the President to compel the dismissal of a private case because of overriding foreign policy considerations.

Option 1: Propose that the Clayton Act be amended to require courts to dismiss private suits, when, in light of specified, exclusive factors, the exercise of jurisdiction would be unreasonable.

Advantages

- Mitigates the international relations problems of private antitrust suits in foreign commerce.
- Preserves adequate jurisdiction to deter anticompetitive conduct in foreign commerce.

Disadvantages

- Would not permit the dismissal of a private case which, though reasonable under the listed factors, unduly interfered with U.S. foreign relations.

Option 2:

Propose that the Clayton Act be amended as in Option 1, but also empower the President to compel the dismissal of a private case because of overriding foreign policy considerations.

Advantages

- Preserves adequate jurisdiction to deter anticompetitive conduct in foreign commerce (as above).
- Permits the Executive to compel dismissal of a private case which, though reasonable under the listed factors, unduly interfered with U.S. foreign relations.

Disadvantages

- Refusal by the President to exercise his power in a case involving a foreign defendant will cause foreign relations difficulties with the government concerned.
- Enactment of such authority would give the appearance that the ability of private litigants to pursue their legal remedies in the United States courts is subject to political manipulation.
- Will create foreign political pressures in cases which would not otherwise have generated them.
- This proposal would raise substantial Constitutional issues.