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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EBAY, INC. Defendant.	Case No. 12-CV-05869 EJD **DECLARATION OF JESSICA N. BUTLER-ARKOW IN SUPPORT OF UNITED STATES' OPPOSITION TO EBAY'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO FRCP 12(B)(6)**

I, Jessica N. Butler-Arkow, declare as follows:

1. I am an attorney in good standing with the bar of the United States District Court for the District of Columbia. I am employed as an attorney by the United States Department of Justice, Antitrust Division, and represent the plaintiff, United States of America. I make this declaration of my own personal knowledge and, if called as a witness, would testify to the matters set forth below.
2. Attached as Exhibit A is a true and correct copy of the testimony of Michael J. Boudin, former Assistant Attorney General in charge of the Antitrust Division, United States

Department of Justice, excerpted from *Increasing Sherman Act Crim. Penalties and Amending Clayton Act Interlocking Directorates: Hearing Before Subcomm. on Econ. and Comm. Law, House. Judiciary Comm.*, 101st Congress (1989). The exhibit consists of Mr. Boudin's complete testimony, which includes the prepared statement, answers to questions, and oral testimony. The exhibit is provided with the United States' Opposition brief because the hearing is not available through Lexis, Westlaw, or similar commonly-available sources.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2013, at Washington, D.C.

/s/ Jessica N. Butler-Arkow
Jessica N. Butler-Arkow

EXHIBIT A

INCREASING SHERMAN ACT CRIMINAL PENALTIES AND AMENDING CLAYTON ACT INTERLOCKING DIRECTORATES

HEARING

BEFORE THE

SUBCOMMITTEE ON
ECONOMIC AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H.R. 29

INTERLOCKING DIRECTORATE ACT OF 1989

JUNE 15, 1989

Serial No. 33

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

23-164 WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

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marks. We will have some questions after both of you have testified.

Mr. Boudin, we are glad to have you here and you are recognized, sir.

STATEMENT OF MICHAEL BOUDIN, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BOUDIN. Thank you. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to be here on behalf of the Department of Justice.

I have with me from the Department Howard Blumenthal and Ben Giliberti from the Antitrust Division and Linda Bruggeman from the Office of Legislative Affairs.

I know you have a busy morning, so I will be very brief.

On fines for Sherman Act violations, the present penalties are 3 years and a quarter million dollar maximum fine for individuals and a $1 million maximum fine for corporations. There is an alternative double the loss or gain provision for the fines.

In the case of individuals, prison sentences are our desired deterrent, but for corporations there is no alternative to a fine and we believe that the $1 million figure is too low and ought to be increased quite significantly.

With respect to interlocking directorates, we believe there is general support for some de minimis exceptions. The Department has endorsed the notion and has also been generally comfortable with the kind of approach involving mechanical safe harbor tests that is reflected in pending Senate legislation and has been used similarly in H.R. 29. We also endorse the increase from $1 million to $10 million for the jurisdictional threshold and the use of an indexing method.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you.

[Mr. Boudin's prepared statement follows:]

STATEMENT OF MICHAEL BOUDIN, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to appear before the Subcommittee today to present the views of the Department of Justice on proposed legislation to increase the maximum fines for criminal violations of the Sherman Act and to improve section 8 of the Clayton Act. The Department believes that prompt congressional consideration of legislation in each of these areas could improve the antitrust laws in a number of important respects.

INCREASING MAXIMUM SHERMAN ACT FINES

I would first like to address proposals to increase the maximum fines that may be imposed for criminal antitrust violations. These proposals are of great significance to the Department. Our number-one antitrust enforcement priority is to root out clearly anticompetitive antitrust violations through criminal prosecution. Examples of conduct that the Department prosecutes criminally are government procurement fraud, bid rigging, price fixing, and market allocation among competitors. These practices have no economic justification and serve only to raise prices paid by consumers. They are illegal per se--a fact well known in the business community. Certain jail sentences coupled with stiff criminal fines are the only appropriate way to deal with and deter this type of white-collar crime.

Nothwithstanding the Department's emphasis on criminal enforcement over the last decade or so, criminal antitrust violations continue to be a major problem. The Antitrust Division currently has over 150 ongoing grand jury investigations involving a wide range of industries and unlawful practices. Over 40 of these investigations are concerned with bid rigging and price fixing in connection with federal procurement. Our highest priority in this area has been the investigation and prosecution of bid rigging and price fixing on contracts let by the Department of Defense, including the Army Corps of Engineers. These cases involve procurement of military uniforms, gloves, dredging, moving and storage services for military personnel, and various medical products.

In addition to federal procurement, the Department's criminal enforcement program covers a wide range of other industries. For example, we have continued to prosecute bid rigging in the highway, airport, utility and electrical construction industries. During fiscal 1988, the Department initiated 10 criminal prosecutions involving the electrical construction industry, and has continuing investigations in that industry in nine states. Other industries where the Department has been particularly active in recent years include school milk, soft drinks, motion picture exhibition, waste disposal and public auctions.

The pervasiveness and persistence of criminal antitrust violations throughout the U.S. economy is strong evidence that antitrust penalties, at least historically, have either been set too low or have not been properly meted out. Congress last specifically addressed antitrust criminal penalties in 1974, when it passed the Antitrust Procedures and Penalties Act, making antitrust violations felonies subject to a $1 million maximum fine for corporations and for individual offenders a maximum of three years in prison and a $100,000 fine. Even assuming that antitrust fine levels were correctly set in 1974, 15 years of inflation has substantially eroded the punitive impact of these maximums. Moreover, in the Department's view, courts all too often have refused to impose significant jail terms on individual antitrust offenders.

Although the Sherman Act penalties themselves have not changed during the last 15 years, the maximum fines for antitrust violations effectively have been increased by other generally applicable legislation. The Criminal Fine Enforcement Act of 1984 and the Sentencing Reform Act of 1984, as amended by the Criminal Fines Improvements Act of 1987, raised fines for federal crimes across the board. With respect to antitrust violations, these laws effectively have raised maximum antitrust fines for individual offenders from $100,000 to $250,000. (The $1 million maximum in the Sherman Act is still the effective maximum-dollar fine for a corporate antitrust offender.) In addition, they have provided an alternative maximum fine for both individual and corporate antitrust offenders of twice the gross pecuniary gain or loss resulting from the violation, unless the imposition of such a fine would unduly complicate or prolong the sentencing process.

A second occurrence, of even greater significance to antitrust sentencing, was the promulgation by the United States Sentencing Commission of sentencing guidelines that courts are required to follow in sentencing antitrust offenders for crimes committed after November 1, 1987. Following a review of past sentences imposed in antitrust cases, the Sentencing Commission agreed with the Department of Justice that criminal antitrust sentences had been inadequate, and adopted an antitrust guideline intended to raise substantially both the fines and prison terms imposed for antitrust violations. With respect to fines, the Commission directed that organizational offenders pay fines of between 20 and 50 percent of their volume of commerce affected by the violation. Individual offenders are to be fined between 4 and 10 percent of their volume of commerce (or that of their principals) affected by the violation.

The substantial Sentencing Guidelines fines for antitrust offenses are, however, capped by the effective statutory maximums--in other words, if the full Guidelines fine would exceed the statutory maximum, it cannot be imposed. Thus, the question remains--is $1 million or twice the gross gain/loss an adequate deterrent to potential corporate offenders, and is $250,000 or twice the gross gain/loss an adequate maximum fine for an individual offender?

Although the Guidelines apply to crimes committed after November 1, 1987, antitrust conspiracies are covert in nature and require considerable time and effort to uncover. As a result, the Department is only now bringing its first antitrust cases under the Guidelines. Nevertheless, using non-Guidelines' experience as a proxy, we can safely predict that, with respect to corporate offenders, the current Sherman Act $1 million maximum fines will by no means always be sufficient to permit courts to impose an appropriate Guidelines sentence. While the same occasionally might be true for individual antitrust offenders, few individuals would have the ability to pay fines in excess of $250,000, and individuals should also be sentenced to terms of imprisonment. Fines, however, are the only effective sanction for organizations.

There is, of course, the "twice the gain, twice the loss" alternative maximum fine. The Department intends to use this alternative when it can. The major potential difficulty here is information. Gain or loss is not a necessary element of proof for per se antitrust crimes; harm is presumed given the nature of the violation. Thus, the Department traditionally has not investigated gain or loss or made factual damage presentations in its criminal cases. (The often highly-complex issue of the degree of economic injury resulting from an antitrust offense is generally litigated in what can be protracted civil litigation.) There are going to be cases where gain or loss can be readily computed, but these cases may turn out to be more the exception than the rule in criminal antitrust litigation.

The Sentencing Commission itself recognized this fact. It based sentences for antitrust violations on the volume of commerce involved in the offense rather than on gain or loss caused by the offense stating: "The offense levels are not based directly on the damage caused or the profit made by the defendant because damages are difficult and time consuming to establish." Background to Sentencing Guideline §2R1.1. Thus, computation of a twice-the-gross-gain/loss fine could often unduly complicate or prolong the sentencing process, and effectively be unavailable as an alternative to the statutory $1 million maximum.

For these reasons--to ensure the imposition of Guidelines fines for antitrust violations and really deter antitrust crime--the Department believes that Sherman Act maximum fines should be raised, at least for organizational offenders. Last year, Congress established a new maximum fine of $5 million for procurement fraud directed against the United States where the offense resulted in a gross gain or loss in excess of $500,000 or involved a conscious or reckless risk of serious personal injury. As I noted earlier, some of the Department's recent criminal antitrust prosecutions have been directed against just this type of government procurement fraud. Whether a similar maximum fine level would be appropriate for antitrust crimes generally, or whether the fine level should be somewhat higher or lower, is a question that the Department is currently considering. We will inform the Subcommittee of our specific recommendations in this regard as soon as possible.

IMPROVING SECTION 8 OF THE CLAYTON ACT

Let me turn now to proposals to improve the antitrust laws with respect to interlocking directorates among competing firms. Section 8 of the Clayton Act, enacted in 1914, prohibits a director of any firm that has capital, surplus, and undivided profits of more than $1 million from also serving as a director of any other firm if the firms are "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 the antitrust laws." Section 8 is a purely prophylactic statute: its prohibition applies without any showing that a director interlock either has had or is likely to have adverse effects on competition. In substance, an individual may not sit on the boards of competing corporations if either firm exceeds the $1 million size threshold.

The prohibition in section 8 is relatively clear and unambiguous. Clarity in a statute is to be admired, of course, but a very broad prophylactic provision that requires no showing of actual or likely anticompetitive effects can come to prohibit conduct that in fact does not threaten the harm with which the statute is concerned. This is exactly what has happened to section 8. It is what current proposals to improve the statute are designed to correct.

De Minimis Competitive Overlaps

The Department endorses legislation to correct the major problem in section 8--its apparent prohibition of interlocks between firms that technically may be viewed as competitors, but that actually compete only to a de minimis extent. Firms large enough to be covered by section 8 are often widely diversified, producing or selling a wide variety of products and services, including many that are generally unrelated to their primary lines. Strict interpretations of section 8 that do not recognize any de minimis exceptions to its prohibitions--and these are not unreasonable interpretations given section 8's current language--prevent an individual from serving as a director of two corporations engaged principally in different businesses whenever such corporations also happen to sell even minimal amounts of competing products.

While director interlocks between substantial competitors are a potential competitive concern, there is insufficient reason for the current, very broad and absolute prohibition of interlocks between corporations that are only incidental competitors. De minimis overlaps involving sales that are miniscule in absolute dollar amount, or as compared to the firms' overall business, do not present a plausible competitive threat that would warrant such a prohibition. Moreover, the Department has been informed over the last several years that the current prohibition is hindering the ability of firms to obtain the best directors they can: extremely capable and willing director candidates all too often are being disqualified after counsel's discovery of a de minimis competitive overlap. The problem may be particularly nettlesome when it comes to finding qualified outside directors, as likely candidates may sit on several other boards. In short, section 8's prohibition of interlocks involving de minimis competitive overlaps is not serving any public purpose, and in fact may be causing unnecessary frustration and hardship to the business community.

Over the last several years, Congress has considered a number of specific proposals to except from section 8 director interlocks where competitive overlaps between the interlocked firms are de minimis. S. 2163, introduced in the 99th Congress, would have created three "safe harbors" for de minimis overlaps. The first generally would have permitted interlocks among firms each of whose sales of any competing product were less than 5 percent of its total sales. The rationale of such an exception was the common-sense proposition that boards of directors focus their deliberations on businesses that generate substantial portions of their firms' revenues. The second safe harbor would have permitted interlocks where the total competitive overlap amounted to less than $1,000,000 of each firm's business. The rationale here was that interlocks involving such small amounts of commerce simply do not warrant a broad federal prophylactic prohibition. The third safe harbor in S. 2163 would have permitted interlocks among firms each of whose sales of any competing product were less than 3 percent of the relevant market. The rationale behind this third safe harbor was that harm caused by a director interlock between firms with such small market shares is inherently implausible, because buyers simply would turn to other sellers if the interlocked firms raised prices in concert.

A somewhat different, but generally similar approach to the *de minimis* overlap problem was enacted by the Senate during the 100th Congress as S. 1068. This bill also would have created three *de minimis* overlap exceptions. The first would have applied where the aggregate competitive sales of either interlocked corporation were less than $1 million. The second would have permitted a director interlock where the aggregate competitive sales of either firm were less than one percent of that firm's total sales. The third *de minimis* safe harbor in S. 1068 would have covered situations in which the aggregate competitive sales of *each* of the interlocked firms were less than 4 percent of that firm's total sales. S. 1068 as passed by the Senate has been reintroduced this Congress as S. 994.

Yet another proposal for *de minimis* competitive overlap exceptions in section 8 was introduced last year as H.R. 3954 and has been reintroduced this year as H.R. 29. This proposal is similar in many respects to S. 994. It too would establish a *de minimis* exception where the competitive sales of either corporation are less than $1 million, as well as exceptions based on competitive sales as percentages of either or both interlocked corporations' total sales. However, it adopts 3 percent and 5 percent, respectively, as the cut-offs for permissible interlocks based on competitive sales, as opposed to the comparable 1 percent and 4 percent figures in the Senate bill. (It is important to note, however, that H.R. 29 also would amend section 8 so as to prohibit interlocks only where a merger of the involved corporations "would substantially lessen competition or tend to create a monopoly," i.e., violate section 7 of the Clayton Act. This limitation on the reach of section 8 would narrow its coverage far more than would merely allowing interlocks in de minimis overlap situations.)

In sum, the Department continues to believe that section 8 would be much improved by de minimis competitive overlap exceptions to its broad prohibition on interlocking directorates among competitors. Explicit, numerical safe harbors would enable corporations and director candidates to know in advance whether an interlock would be illegal. Section 8 would continue to serve its competition-safeguarding purpose, and the business community would find it easier to place qualified individuals on their boards of directors.

Other Section 8 Improvements

The Department endorses other proposed improvements to section 8. Both S. 994 and H.R. 29 would update the section's jurisdictional size-of-firm threshold. In 1914, Congress limited the coverage of section 8 to interlocks between two or more corporations any one of which had capital, surplus, and undivided profits of more than $1,000,000. One million dollars today is not what it was 75 years ago; thus, section 8 has become considerably more restrictive than it was ever intended to be. The bills that have been introduced would correct this situation by raising the jurisdictional threshold to $10,000,000, and prevent that figure from becoming outdated again by indexing it to the Gross National Product. They also would free small businesses from federal oversight of the make-up of their boards by requiring both interlocked firms to exceed the jurisdictional threshold, rather than just one, as is currently required by section 8. These provisions too would substantially improve section 8, and the Department supports them.

Mr. Chairman, this concludes my prepared remarks. I would be happy to address any questions the Subcommittee may have.

Mr. BROOKS. I want to commend you on your language "by repealing section 10, we would rid the U.S. Code of some nearly incomprehensible verbiage, and thereby strike a major blow for the English language." It is a new high in literary lobbying.

Mr. Boudin, it seems clear that you don't oppose increasing criminal penalties for Sherman Act violations. But when will the Department specifically respond to my proposal to increase the fines to $10 million for corporations and $350,000 for individuals?

Mr. BOUDIN. We have a proposal for the $10 million increase as a result of the Senate bill circulating inside the administration and we are getting reactions to it right now. I will get the process of getting comments on the $350,000 proposal started very quickly. We will try to get back to you quite promptly.

I do not think there is a controversy about the desirability of a significant increase for corporations.

Mr. BROOKS. Mr. Zuckerman, Mr. Fish's bill, H.R. 29, would include officers as well as the board of directors in the ban on interlocking directorates. Yet the term "officer" is merely defined as a person elected or chosen by the board of directors.

Do you think that definition is as complete as what you advocate, which is extending the ban to "all personnel who participate in making decisions of competitive strategy"?

Mr. ZUCKERMAN. There may well be persons who are not officers and who are involved in deciding competitive strategy. I think the problem becomes a very practical one as to how to craft a complete definition. We think including officers is a desirable improvement over the current legislation. If there were other proposals, we would be happy to consider them, too.

Mr. BROOKS. Mr. Boudin, while the American Bar Association endorsed the general concept of modernizing section 8, it adopted a much more stringent safe harbor test than what appears in H.R. 29. The ABA test would require that either the annual competitive sales of the two corporations be $25 million or less for either corporation or that the total competitive sales of the two corporations constitute 10 percent or less of the relevant market for such sales.

How do you respond to this type of a standard?

Mr. BOUDIN. Let me make two comments. We are primarily interested in getting a workable de minimis standard. We are not locked into a particular set of numbers or a particular set of concepts, although we were comfortable with those that were considered in the Senate last year.

One concern I have about the statement you have just described from the American Bar Association is that the use of a standard that requires defining the relevant market with precision presents a fairly difficult equation in many cases. If one is looking for a straightforward and simple safe harbor, I do not think that a market coverage test is likely to achieve it.

Mr. BROOKS. Gentlemen, as drafted, H.R. 29 would prohibit interlocks only when a theoretical merger of the involved corporations would substantially lessen competition or tend to create a monopoly.

Wouldn't such a limitation restrict the interlock prohibition much more than the safe harbors in the proposed bill?

Mr. BOUDIN. I think it would restrict the application of the interlock statute and it would raise the same problem of administrability that concerns me in the ABA proposal.

I recognize why as a theoretical matter that approach would help to fine-tune the statute and focus it only on situations that appear to present a competitive danger, but in my own judgment, the price would be quite high, and I think too high.

Mr. BROOKS. Do you want to comment on that, Mr. Zuckerman?

Mr. ZUCKERMAN. I agree with Mr. Boudin that the effect of the standard in H.R. 29 would be to exempt interlocks that would be reached by almost any conceivable numerical threshold. On the other hand, I must respectfully disagree with respect to problems with its administrability. It is, of course, a standard that we use in enforcing section 7 of the Clayton Act. I am not claiming that it is easy to enforce section 7, but neither is it the most difficult thing the Government does. We have a lot of experience with it; the business community has a lot of experience with it; the courts have a lot of experience with it. We have a pretty good understanding of what the standard means and I think it could be enforced effectively. By having that standard, we would avoid prohibiting interlocks that do not pose any threat to competition.

Mr. BROOKS. I will submit several questions to each of you.

[Messrs. Boudin's and Zuckerman's submissions to Mr. Brooks' questions for the record follow:]

MR. BROOKS' QUESTIONS FOR THE RECORD
FOR MR. BOUDIN

Question: Since 1981, has the Department of Justice brought any enforcement actions in the area of interlocking directorates? Is section 8 enforcement still alive and well or has it been shunted aside as irrelevant?

Answer: Section 8 is basically a prophylactic statute, and is primarily self-enforcing. Thus, over the years the Department has seldom had occasion to challenge interlocks under section 8. We have brought no cases under section 8 since 1981. However, the Department continues to see a need for a statute that prohibits interlocks that could be harmful to competition.

The Department believes, however, that section 8 would be much improved by de minimis competitive overlap exceptions to its broad prohibition on interlocking directorates among competitors. Explicit, numerical safe harbors would maintain the commendable clarity of the existing statute, yet would enable the business community to more easily place qualified individuals on their boards of directors. Such improvements to section 8 would enable corporations and director candidates to know in advance whether an interlock would be illegal, while at the same time fully permitting section 8 to serve its competition-safeguarding purpose.

Question: A question raised by section 8 of the Clayton Act is whether the business activities of a subsidiary should always be attributed to the parent corporation for purposes of determining the existence of an unlawful interlock. What is your view?

Answer: Whether a subsidiary's activities are attributable to the parent for purposes of section 8 depends on the amount of control that the parent in fact exercises over the subsidiary. Where a parent, either through its board or through its management, effectively directs the operations of its subsidiary or the subsidiary's policies, attribution is made. United States v. Crocker Nat'l Corp., 656 F.2d 428, 450 (9th Cir. 1981), rev'd on other grounds sub nom. BankAmerica Corp. v. United States, 103 U.S. 2266

(1983). The Department believes this standard, while perhaps sometimes hard to apply, is appropriate.

<u>Question</u>: Isn't it true that there could be a situation involving very large corporations where the competitive overlap is less than $1 million of each corporation's business, but where that overlap amounted to a substantial market share in the relevant market? Shouldn't there be some type of market share limitation to ensure such a result would not occur?

<u>Answer</u>: The rationale underlying a <u>de minimis</u> exception where the competitive overlap is less than $1 million is that boards of directors tend to focus on the major elements of their firms' business, not on activities that contribute only a small amount of the firms' overall revenues. Moreover, it is also relatively unlikely that such a small dollar amount could represent a substantial market share of any significant relevant market. The question is the degree of risk here, and the benefits of <u>de minimus</u> exceptions that are clear to all concerned, and do not have other problems, such as enforceability or opportunity for evasion through interpretation. A market share test could create significant uncertainty.

In assessing risk, it must be remembered that section 8 is not the exclusive safeguard against anticompetitive behavior. Should any interlock, including one involving relatively small amounts of sales, turn out actually to restrain competition, other antitrust remedies--including criminal prosecution under the Sherman Act--are readily at hand.

<u>Question</u>: Does the Department agree with the view expressed by Mr. Zuckerman that section 10 dealing with common carrier interlocks should be repealed?

<u>Answer</u>: The Department supports repeal of section 10. On May 31, 1989, the Administration submitted to the Congress ICC Sunset legislation that includes a provision repealing section 10 of the Clayton Act. In support of the legislation, the Department of Transportation's section-by-section analysis

explained that section 10 was enacted out of concern that railroads and other common carriers were uniquely vulnerable to being plundered through business dealings with customers and suppliers that shared agents, officers or directors with the common carriers. Section 10's solution to this problem was to require that common carriers desiring to buy from or sell to companies that had agents, officers or directors in common undertake complex and costly competitive bidding procedures (see 49 C.F.R. § 1010) to guarantee fairness. On their face, these bidding requirements apply to transactions between common carriers and interlocked customers and suppliers regardless of the lack of potential for fraudulent dealing based on economic or business realities with respect to particular transactions.

Since its enactment, other more effective federal and state statutes have displaced the need for section 10 altogether. These particularized prohibitions on corporate double-dealing avoid the requirement of automatic competitive bidding and the regulatory burdens attendant thereon. These burdens needlessly complicate business transactions between carriers and those with whom they deal, and can inhibit competition by destroying incentives to achieve greater efficiency through vertical integration. On balance, the slight lingering benefits that may accompany section 10 do not justify the costs imposed on the carriers covered by this statute.

Question: Should a safe harbor provision to section 8 include a limitation on the combined market share for a competitive product of the two interlocking companies?

Answer: The rationale underlying a safe harbor based on competitive sales as a percentage of total sales is that, regardless of the market share such sales represent, boards of directors tend to focus on the major elements of their firms' business, not on activities that contribute only a small amount of the firm's overall revenues. The key question is the degree of risk presented by any given interlock, balanced against the benefits of exceptions that are clear to all concerned, and that do not have other problems, such as enforceability or opportunity for evasion through interpretation. A market share test could create significant uncertainty.

In assessing risk, it must be remembered that section 8 is not the exclusive safeguard against anticompetitive behavior. Should any interlock turn out actually to restrain competition, other antitrust remedies--including criminal prosecution under the Sherman Act--are readily at hand.

<u>Question</u>: Isn't it possible that an interlock of two very large companies could involve a product that is a small percentage of both companies' sales but which still represents a high share of the total market?

<u>Answer</u>: The rationale underlying a <u>de minimis</u> exception based on competitive sales as a percentage of total sales is that boards of directors tend to focus on the major elements of their firms' business, not on activities that contribute only a small amount of the firms' overall revenues. It is true, however, that such small percentages could be big in absolute terms or in terms of the relevant market. The question is the degree of risk here, and the benefits of exceptions that are clear to all concerned, and do not have other problems, such as enforceability or opportunity for evasion through interpretation. A market share test could create significant uncertainty.

In assessing risk, it must be remembered that section 8 is not the exclusive safeguard against anticompetitive behavior. Should any interlock, including those involving less than 4 percent of total sales, turn out actually to restrain competition, other antitrust remedies--including criminal prosecution under the Sherman Act--are readily at hand.

<u>Question</u>: In addition to raising the dollar threshold and creating specific safe harbors, H.R. 29 would add yet another exception--a section 7 merger standard. In that provision, no prohibited interlock would occur unless any merger of the interlocked corporations "would substantially lessen competition or tend to create a monopoly." Isn't it true that if a company met this test, it would be free of any interlock prohibitions?

<u>Answer</u>: Yes, but the Department does not recommend such a standard. We would note that this limitation on the reach of section 8 would narrow its coverage far more than would merely allowing interlocks in <u>de minimis</u> overlap situations. Such a standard would require a complete competitive analysis, covering relevant market definition, entry barriers, etc., before one could tell whether an interlock is permissible. This would introduce substantial uncertainty and require a great deal of effort on the part of the agencies to enforce a law that up till now has been largely self-policing. We would be most reluctant to expend such resources to determine whether an interlock should be challenged. An interlock does not pose the same degree of anticompetitive potential as a merger; it does not in and of itself necessarily eliminate competition between the firms involved. We favor bright line tests for a prophylactic rule.

<u>Question</u>: Some commentators have suggested that any prohibition against interlocking directorates should have clear, easily applied standards. Doesn't inclusion of the qualification that a merger of the interlocked firms "would lessen competition" or "tend to create a monopoly" take away from the desired clarity? Doesn't that section imply a complex analysis involving market share data and the ascertainment of the relevant product and geographic markets?

<u>Answer</u>: Such a standard would require a complete competitive analysis, covering relevant market definition, entry barriers, etc., before one could tell whether an interlock is permissible. This would introduce substantial uncertainty and require a great deal of effort on the part of the agencies to enforce a law that up till now has been largely self-policing. We would be most reluctant to expend such resources to determine whether an interlock should be challenged. An interlock does not pose the same degree of anticompetitive potential as a merger; it does not in and of itself necessarily eliminate competition between the firms involved. We favor bright line tests for a prophylactic rule.

Mr. BROOKS. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Zuckerman, I was waiting until you reached the last page of your testimony with respect to section 10, hoping that you would say what you said, "that we vigorously support the provision's repeal." I like that last sentence, "by repealing section 10, we would rid the U.S. Code of some nearly incomprehensible verbiage, and thereby strike a major blow for the English language."

Mr. Boudin, you weren't anywhere near as eloquent.

[Laughter.]

Mr. FISH. Could you give us your view with respect to the Department's position on section 10 as dealt with in H.R. 29?

Mr. BOUDIN. Congressman Fish, the reason I was not addressing the issue is that I recused myself when I went to the Department of Justice from matters involving the railroads. The Department of Justice will formulate a position and convey it to the committee but I will not be the person to do it.

Mr. FISH. So they have not formed an opinion?

Mr. BOUDIN. No, but it will be done promptly.

Mr. FISH. I think it is pretty clear that Government enforcement of section 8 has been sporadic and private section 8 litigation almost nonexistent.

Do the Department of Justice and the FTC largely depend on self-policing by corporations to enforce the interlock prohibition of section 8? Do either of you have the resources to conduct your own monitoring and enforcement process? And how do you know the extent to which self-policing is in fact taking place?

Mr. ZUCKERMAN. We largely do rely on self-policing generally in enforcing the antitrust laws, and specifically with respect to section 8.

We also rely upon receiving complaints from individuals. In addition, there are occasions when we notice something on our own initiative, whether in reviewing some materials that come to our attention either through the newspapers or in the course of an investigation or otherwise.

One problem with section 8 in terms of enforcement statistics is that as a result of some court decisions in the last 7 or 8 years, if we discover an interlock and then the individual involved resigns from one of the boards, it is extremely difficult, to say the least, to secure an order against that individual or that corporation under the standards established by the courts. Thus we may break up on interlock by initiating an investigation, but there would be no public record because we would not have brought an action. We would not have brought an action because we could not have secured an order at the end of it.

Mr. FISH. Mr. Boudin.

Mr. BOUDIN. We will pursue such cases if they are brought to our attention or if we discover them in the course of other matters, but they do not compare in practical importance to the criminal and merger enforcement program.

Mr. FISH. Would you expect to have more active enforcement by your two agencies if we set the limits as the bill does?

Mr. ZUCKERMAN. I doubt that setting the limits as the bill does would increase the number of violations, and therefore I doubt that there would be an increase in the number of enforcement actions.

Mr. BOUDIN. Mr. Fish, I think the practical problem of resources would remain for us, but I would add a personal footnote from my experience of 20 years in private practice. These director provisions do have a considerable measure of self-enforcement. The directors do not want to be found in violation. If the standards can be made clear, while we remain as a backstop for enforcement, this is the kind of provision that does have a considerable prospect of being enforced automatically.

Mr. FISH. Do you agree with Mr. Zuckerman with respect to the extension of the coverage in H.R. 29 of section 8 to corporate officers?

Mr. BOUDIN. We would be comfortable with that approach as long as officers were defined in a way that made it easily administrable.

Mr. FISH. Do you also agree with H.R. 29's inclusion of common carriers under section 8 interlock restrictions for the first time?

Mr. BOUDIN. I was unaware that the provision was going to do that. Common carriers have been subject to separate statutory coverage, and I would like to reserve judgment until I can go back and look at the language.

Mr. FISH. Thank you very much, Mr. Chairman.

Mr. BROOKS. Mr. Feighan.

Mr. FEIGHAN. Thank you, Mr. Chairman.

Mr. Zuckerman, I noted in your testimony you support the scheme in the legislation that establishes a $10 million threshold on the interlock prohibition and then an exemption based on a $1 million threshold. But you raised a cautionary note about keying that to an annual adjustment based on gross national product, raising a concern that uncertainty in the business community with respect to the future applicability of the affected restrictions might be the end result.

Can you explain your concern? Assessing the GNP every year is something that everyone is capable of doing and calculating on an annual basis. Presumably after a period of years we will revisit this and change the figures in any event.

Mr. ZUCKERMAN. The sort of thing that can come up is if someone is now on one board and going onto another would not create a prohibited interlock if both the thresholds and the companies' sales are changing, the legality of the interlock will depend upon the new threshold figure. Counting on these calculations to be made introduces an element of uncertainty to what has been a simpler test.

All I am suggesting is that there be some provision for each year that the bright line be stated clearly, as is included in H.R. 29. As Mr. Boudin noted, it is fairly common that general counsel of corporations when considering a new board member will look over what other boards they are a member of.

Mr. FEIGHAN. Mr. Boudin, even though we raised the criminal penalty for corporate violations to $10 million, are you satisfied that that is a sufficient penalty? Would you support an alternative limit that might be keyed to the size of the corporation or the economic gain that resulted from the violation?

Mr. BOUDIN. We would be glad to study that possibility. I do think that a $10 million figure would be quite high compared to most of the criminal penalties addressed to corporations, and so I am hesitant to say that more is needed without looking at it more carefully.

There is also a double the loss or gain fallback provision, and finally, corporations act only through individuals, and we have jail sentences for them.

So I am skeptical whether more is necessary but perfectly open to looking at it.

Mr. FEIGHAN. Thank you very much.

Thank you, Mr. Chairman.

Mr. BROOKS. Mr. Edwards.

Mr. EDWARDS. No questions, Mr. Chairman.

Mr. BROOKS. Thank you very much, gentlemen. Our final panel is comprised of Martin A. Coyle, James F. Ponsoldt, and J. Thomas Tidd.

Mr. Coyle is vice president, general counsel, and secretary of TRW, a company which has taken a strong interest in section 8 legislation the past few Congresses.

Mr. Ponsoldt is a professor at the University of Georgia Law School. He served in the Department of Justice during the Ford and Carter administrations.

Mr. Tidd is vice president of the Association of American Railroads. He will be testifying primarily on that aspect of the legislation dealing with interlocks as applied to railroads.

Gentlemen, we appreciate your joining us. Your written statements will be placed in the hearing record and we welcome your brief remarks. We will hear from you in the order of your introduction and then have some questions afterward.

Mr. Coyle, we will start with you.

STATEMENT OF MARTIN A. COYLE, VICE PRESIDENT, GENERAL COUNSEL, AND SECRETARY, TRW, INC.

Mr. COYLE. Thank you, Mr. Chairman.

I appreciate very much the opportunity to appear today before this distinguished subcommittee to express my very strong support for legislation to reform section 8.

I am speaking not only on behalf of TRW, but I am also appearing on behalf of the American Society of Corporate Secretaries as past national chairman of that organization. The society is a not-for-profit professional association which has approximately 3,200 members who represent more than 2,400 publicly-owned companies.

In 1986 I testified before the Senate Judiciary Committee in support of similar legislation. I believe today the need for such legislation has become even more acute.

U.S. corporations today, more than ever, have a critical need to retain the most highly qualified board of directors possible. The issues which must be dealt with by corporate management are more complex than ever. Public policy favors the presence of quali-

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 1989

Honorable Jack Brooks
Chairman
Subcommittee on Economic and Commercial Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During the Subcommittee's June 15, 1989, hearing on antitrust fines and interlocking directorates, Acting Assistant Attorney General Michael Boudin was asked to convey to the Subcommittee the Department's specific recommendations regarding increasing maximum fines for criminal antitrust violations, and its views on whether section 10 of the Clayton Act should be repealed and whether the exception in section 8 of that Act for interlocking directorates between common carriers subject to regulation under title 49 should be eliminated.

Fines for Criminal Antitrust Violations

The Department of Justice recommends increasing the Sherman Act maximum fine for organizations to $10 million. We do not object to an increase in the $250,000 maximum fine for individuals to $350,000.

The number one antitrust law enforcement priority of the Department of Justice is to deter the commission of per se antitrust violations through the criminal prosecution of conspiracies in restraint of trade. Criminal, per se antitrust violations--for example, price fixing, bid rigging and agreements among direct competitors to allocate customers or territories--harm the U.S. economy and American consumers with no likelihood of providing countervailing procompetitive benefits. Although the nature of criminal antitrust conduct is well settled in the law and such conduct is easily avoidable, criminal antitrust violations persist. The Antitrust Division has over 150 ongoing grand jury investigations at the present time; over 40 of these investigations involve price fixing and bid rigging in connection with federal procurement alone.

Sherman Act criminal penalties were last increased in 1974 to a maximum of three years imprisonment and a $100,000 fine for individuals and a $1 million fine for corporations. As part of the Criminal Fine Enforcement Act of 1984, Congress increased maximum felony fines for individual defendants generally, including those applicable to antitrust violators, to $250,000. (The Criminal Fine Enforcement Act made no effective change in the $1 million maximum fine for organizational defendants.) The 1984 legislation also provided for an alternative maximum fine for both individual and organizational defendants of twice the gain or twice the loss occasioned by the violation. This alternative fine, however, is not always easy to calculate and cannot be used if doing so would unduly prolong or complicate the sentencing process.

The persistence of criminal antitrust violations suggests strongly that current maximum antitrust fines for organizations need to be increased. The Sentencing Guidelines promulgated by the United States Sentencing Commission also clearly indicate the inadequacy of the $1 million maximum fine for organizations convicted of antitrust violations. The Guidelines provide for a fine of between 20 and 50 percent of the volume of commerce of the defendant that was affected by the violation. Thus, even the minimum Guideline fine will be unimposable on any organizational defendant whose affected volume of commerce exceeds $5 million, and the maximum Guideline fine will be unimposable where the defendant's affected volume of commerce exceeds $2 million. It is not unprecedented in a large, nationwide price-fixing conspiracy to have hundreds of millions of dollars of commerce affected overall and to have many companies exceed the $2 million to $5 million level. There have also been conspiracies of a more local nature where the amount of commerce affected has justified corporate fines in excess of $1 million.

For these reasons, the Department of Justice supports an increase in the maximum organizational fine for an antitrust violation to $10 million. This increase would reflect the increasirg general concern with white collar crime that has resulted in very substantial increases in the penalties for other such crimes in recent years. It also would take into account the fact that the $1 million maximum fine for Sherman Act violations--long considered serious enough and potentially lucrative enough to warrant very high maximum fines--has not been increased in 15 years. And it would increase the ability of the courts to impose the fines that are set forth in the new

Sentencing Guidelines. In short, there is a real need to increase maximum antitrust fines for organizations, and $10 million would be an appropriate figure.

With respect to fines for individuals, while the Guidelines fine of 4-10 percent of the affected volume of commerce could exceed the current maximum of $250,000 in some cases, relatively few individual defendants personally benefit from antitrust violations to this extent, and most do not have the resources to pay fines in excess of $250,000. Thus, the most effective deterrent to individuals is a sure and significant jail sentence. The Department will continue to press for such sentences, and the new Sentencing Guidelines hopefully will be effective in directing the courts to impose them. While the Department views jail sentences as the most effective deterrent to individuals that might consider violating the antitrust laws, we do not object to increasing the maximum individual fine to $350,000, or even higher.

Section 10 of the Clayton Act

The Department supports repeal of section 10 of the Clayton Act. On May 31, 1989, the Administration submitted to the Congress ICC Sunset legislation that includes a provision repealing section 10. In support of the legislation, the Department of Transportation's section-by-section analysis explained that section 10 was enacted out of concern that railroads and other common carriers were uniquely vulnerable to being plundered through business dealings with customers and suppliers that shared agents, officers or directors with the common carriers. Section 10's solution to this problem was to require that common carriers desiring to buy from or sell to companies that had agents, officers or directors in common undertake complex and costly competitive bidding procedures (see 49 C.F.R. § 1010) to guarantee fairness. On their face, these bidding requirements apply to transactions between common carriers and interlocked customers and suppliers regardless of the lack of potential for fraudulent dealing based on economic or business realities with respect to particular transactions.

Since its enactment, other more effective federal and state statutes have displaced the need for section 10 altogether. These particularized prohibitions on corporate double-dealing avoid the requirement of automatic competitive bidding and the regulatory burdens attendant thereon. These burdens needlessly complicate business transactions between carriers and those with whom they deal, and can inhibit competition by destroying incentives to achieve greater efficiency through vertical integration. On balance, the slight lingering benefits that may accompany section 10 do not justify the costs imposed on the carriers covered by this statute.

Section 8 of the Clayton Act--Common Carriers

The Administration's proposed ICC Sunset legislation also includes a provision amending section 8 of the Clayton Act, which generally proscribes interlocking directorates among competing firms. Currently, section 8 contains an exception for common carriers subject to regulation under title 49; such regulation encompasses various interlocking directorates among such carriers. Because the ICC Sunset bill would eliminate most title 49 regulation of surface transportation common carriers, and because remaining title 49 regulation of rail carriers of property is intended not to encompass interlocking directorates, the Administration's bill would eliminate the corresponding exception for common carriers in section 8. We therefore support legislation to eliminate the common carrier exception in section 8, but believe that such legislation also should eliminate the relevant interlock regulatory provisions in title 49 to avoid potential conflict and uncertainty.

* * *

I also enclose responses to the additional questions submitted to Mr. Boudin by the Subcommittee in your memorandum of June 30, 1989. I hope the Department's views on all of these issues will be helpful to the Subcommittee as it considers this legislation. If we can be of further assistance, please call on us.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

Enclosures

cc: Honorable Hamilton Fish, Jr.
House of Representatives
Washington, D.C. 20515