Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act

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Section 8 of the Clayton Act prohibits directorship and management interlocks between competing corporations. When determining whether corporations are competitors within the meaning of Section 8, the courts have historically applied qualitative criteria rather than quantitative market definition analysis. In the Section 7 merger context, however, the courts have increasingly relied on quantitative analysis and have become more and more skeptical of the accuracy of qualitative analysis.

In the context of interlocks, an inaccurate definition of competitors can create problems from both corporate governance and competition policy perspectives. By examining the benefits, costs, and difficulties of implementing quantitative analysis to determine whether interlocking corporations compete, this paper explores the most realistic ways in which quantitative market definition analysis could be introduced and applied in the Section 8 context. The greater precision that generally accompanies quantitative analysis illustrates that it is theoretically a preferable method for defining competitors under Section 8, but because interlocks involve lower stakes than mergers and because quantitative market definition analysis is costly, quantitative analysis is not a viable option if conducted comprehensively. "Quick-look" quantitative analysis is a practical alternative.

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Introduction

A management interlock occurs when two corporations share a board director or officer, a practice which may confer upon corporations benefits such as expertise, legitimacy, and cooptation of risk, but which may also raise antitrust concerns because of its potential to facilitate collusion between corporations. To stem preemptively this potential problem, Section 8 of the Clayton Act ("Section 8")[1] proscribes interlocks between competitors: An individual may not simultaneously serve as a director or officer for competing corporations. The statute is a per se rule in that no anticompetitive effect need be shown to trigger the proscription.

In determining whether corporations compete within the meaning of Section 8, the courts historically have not applied quantitative market definition analysis typically applied in Clayton Act Section 7 ("Section 7")[2] merger cases, relying instead on qualitative analysis that may or may not correspond to economic reality. As a result, Section 8's proscription of interlocking directorates may in some instances be too broad, restricting corporations that do

1 Clayton Act of 1914 § 8, 15 U.S.C. § 19 (2000).
2 *Id.* § 7, 15 U.S.C. § 18 (2000).

not meaningfully compete, and in other instances be too narrow, permitting interlocks between corporations that do meaningfully compete. Recent papers have critiqued qualitative market definition approaches in the Section 7 context,[3] but there is a void in the antitrust literature with respect to the definition of competitors under Section 8.[4]

Imprecise application of Section 8 creates problems from both corporate governance and competition policy perspectives. From a corporate governance perspective, the current application of Section 8 is problematic to the extent that it interferes unduly with selection of executive talent and deprives non-competing corporations of the numerous innocuous (not anticompetitive) benefits that interlocks confer. Conversely, from a competition policy standpoint, the current application of Section 8 is problematic to the extent that it does not reach all interlocks between corporations that compete meaningfully, such that the statute's intent to prevent collusion is not fully realized.[5] In light of these policy considerations, is rigorous economic analysis of the type found in Section 7 merger cases also justified with respect to Section 8 interlocking directorate cases? By examining the benefits, costs, and difficulties of implementing quantitative analysis to determine whether interlocking corporations compete, this paper explores the most realistic ways in which quantitative market definition analysis could be introduced and applied in the Section 8 context.

Theoretically, by examining more precise evidence—such as the cross-elasticity of demand between alleged competitors—the courts might avoid unnecessary interference with corporate directorship determinations while still preventing interlocks between actual competitors. The application of rigorous

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3 *See, e.g.*, Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Enforcement: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 611-12 (2005) (noting that although it may be "easier to 'discover' . . . relevant markets by inferences from business language than it is to deduce it from rigorous economic analysis," the identified market may not be economically accurate).

4 Although the antitrust literature discusses at length the definition of competitors with respect to the differences between "actual" and "potential" competitors and between "direct" and "indirect" competitors, *see, e.g.*, 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1302, at 326-32 (2d ed. 2003), little attention has been paid to how the determination of "actual" competitors is or should be made. Those publications that do mention the definition of competitors in the Section 8 context discuss the definition only briefly, noting simply that the jurisprudence is not well developed in this area. *See, e.g.*, WILLIAM A. HANCOCK, CORPORATE COUNSEL'S ANTITRUST DESKBOOK § 10:18 (2006).

5 The extent to which interlocks between actual competitors actually facilitate collusion is an interesting question which itself remains open to debate, but one that this paper does not address at length. *See* Mark S. Mizruchi, *What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates*, 22 ANN. REV. SOC 271, 273 (1996); Donald Palmer, *Broken Ties: Interlocking Directorates and Intercorporate Coordination*, 28 ADMIN. SCI. Q. 40, 40 (1983) (discussing "the relative likelihood that different types of interlock ties facilitate relationships of formal coordination"); Edward J. Zajac, *Interlocking Directorates as an Interorganizational Strategy: A Test of Critical Assumptions*, 31 ACAD. MGMT. J. 428, 436 (1988) ("comparing the incidence of interlocks in allegedly collusive industries with that in a control group of firms" and concluding "that the incidence of interlocking among competitively interdependent firms is no greater than that predictable by chance").

economic analysis need not alter the per se nature of Section 8. Nor does rigorous economic analysis imply that the proscription of interlocking directorates should apply only to those corporations for which a merger would be illegal under Section 7. In 1990, Congress considered but ultimately rejected the adoption of a complete Section 7 standard in Section 8 cases, yet failed to meaningfully consider the middle-ground position here explored: Market definition analysis could be applied only to the extent necessary to determine whether corporations actually compete, rather than to establish competitive harm.[6]

Realistically, however, market definition analysis is not a viable option in the Section 8 context if conducted comprehensively. Whether to permit an interlock is most often a lower-stakes inquiry than whether to permit a horizontal merger. Because market definition analysis is expensive, quantitative analysis may be cost-justified to a corporation only in those rare instances in which the corporation has already litigated the market definition issue, or where, for some reason, directorship selection becomes exceedingly difficult. A potential solution would be for Section 8 jurisprudence to incorporate "quick-look" market definition analysis that does not reach the level of detail found in the Section 7 context. A second problem with applying market definition analysis to Section 8 is the need to develop a quantitative standard for competitors that is unique to and suitable for Section 8 litigation. This may require an examination of the anticompetitive effects of interlocks—a dilemma which indicates a tension in the design and application of Section 8.

Part I of this Article examines the interplay between the scope of "competitors" under Section 8 and the innocuous benefits of interlocks which flow to corporations, beginning with an intuitive dialogue and concluding with a brief review of the relevant empirical work that supports this dialogue. This Part makes several simplifying assumptions—such as a delineable boundary between competitors and non-competitors—that are relaxed in later Parts. Part II examines the current qualitative approach to defining competitors under Section 8, as contrasted with the market definition approach applied in Section 7 cases. Part III explicates the failings of the current Section 8 definition of competitors and discusses the manner in which an alternate definition might be formulated. Part IV explores the procedural and practical aspects of how refinements to the definition could be implemented, most notably discussing burden-shifting, Section 8 remedies, and litigation costs. In doing so, this Part also reviews the de minimis exemptions added to Section 8 in 1990. Part V summarizes and concludes.

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6 Instead, Congress enacted a safe harbor provision that provided de minimis exemptions, but did not revise or clarify the definition of competitors. *See infra* text accompanying notes 128-137.

I. The Effects on Corporations of an Imprecise Definition of "Competitors"

Section 8 of the Clayton Act provides that "[n]o person shall, at the same time, serve as a director or officer in any two corporations . . . that 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 antitrust laws . . . ."[7] In other words, Section 8 prohibits competing corporations from interlocking. According to the Columbia Law Review in 1954, "[s]ince there is *no substantial justification for the existence of interlocks*, their major function[] being to facilitate covert coordination of corporate action . . . it is not objectionable that antitrust developments have led to an absolute ban on" interlocks between competitors.[8] Over the past three decades, however, research on interlocks has expounded numerous innocuous benefits, invalidating this conclusion.[9] The results of this research draw attention to the importance of carefully tailoring any prohibition against interlocks. If the definition of competitors is too broad under Section 8 jurisprudence, corporations will be unable to reap the benefits of interlocks even where there is no real threat of collusive behavior. On the other hand, if the definition of competitors is too narrow under current Section 8 jurisprudence, the statute will not fully achieve its purpose of preventing the facilitation of collusion between interlocking corporations that actually compete.

A. *Harms from Interlocks*

"The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law."[10] This was the sentiment of the Wilson administration—as well as Louis Brandeis—on the topic of interlocking directorates during the time surrounding the passage of the Clayton Act in 1914.[11] The concern over interlocks is simple: "[W]hen an individual simultaneously serves as an officer or director of two competing companies, he or she stumbles into a prime opportunity for collusion—for example, coordination of pricing, marketing, or production plans of the two

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7 15 U.S.C. § 19 (a)(1)(B) (2000) (noting an exception for "banks, banking associations, and trust companies"); *see also* Bankamerica Corp. v. United States, 462 U.S. 122 (1983).

8 Note, *Recent Developments: Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations*, 54 COLUM. L. REV. 130, 131 (1954) (emphasis added).

9 This research has been driven primarily not by legal academia but by the social sciences. For an overview of the social science research, see Mizruchi, *supra* note 5.

10 Peter C. Dooley, *The Interlocking Directorate*, 59 AM. ECON. REV. 314, 314 (1969) (quoting an economic adviser of President Wilson).

11 *Id.*; *see* Louis D. Brandeis, *Interlocking Directorates*, 57 ANNALS AM. ACAD. POL. & SOC. SCI. 45 (1915).

companies."[12] Interestingly, however, whether interlocks between competitors in fact cause meaningfully higher levels of collusions remains debatable to this day.[13]

Interlocks potentially create problems beyond the opportunity and temptation to collude. These problems center around the classic principal-agent dilemma. For instance, "top managers [may] seek to maintain their control by selecting and retaining board members with experience on other, passive boards and excluding individuals with experience on more active boards."[14] Additionally, "mutual interlocks [may be] an indication of and a contributor to CEO entrenchment, and . . . higher compensation and lower turnover [may] follow from this entrenchment."[15] Indeed, where a CEO is "reciprocally interlocked with another CEO—the current CEO of firm A serves as a director of firm B and the current CEO of firm B serves as a director of firm A," it has been shown that executive compensation is higher.[16] If managers are acting in their own self-interest rather than in the interest of the corporation's shareholders, interlocks can be problematic.[17] But to the extent that this self-serving behavior occurs, or that there exist any other drawbacks to interlocks outside the realm of competition policy, it makes sense to address these problems not through the antitrust laws but through other areas of the law, most notably corporate law.

B. *Benefits of Interlocks*

Interlocks are far from all bad. The most general justification for permitting interlocks is that interference with the free selection of board directors is harmful to the corporation.

> The market for directors or other high-level executive talent is, in a sense, like any other market. Candidates for executive positions offer their services in the market-place to the consumers of talent—the corporations . . . . The most prevalent defense of interlocks is that they make available to the employing

12 Gale T. Miller, *Interlocking Directorates and the Antitrust Laws*, 26 COLO. LAW. 53 (1997).

13 *See* Mizruchi, *supra* note 5, at 273 ("It is legitimate to ask whether interlocks between competitors actually facilitate collusion.").

14 James D. Westphal & Edward J. Zajac, *Director Reputation, CEO-board Power, and the Dynamics of Board Interlocks*, 41 ADMIN. SCI. Q. 507 (1996).

15 Eliezer M. Fich & Lawrence J. White, *CEO Compensation and Turnover: The Effects of Mutually Interlocked Boards*, 38 WAKE FOREST L. REV. 935, 935 (2003) (noting that another possibility is that "the mutual interlocks are an indication of the strengthening of an important and valuable strategic alliance for the company, and the higher CEO compensation and lower turnover are the CEO's reward for arranging the alliance").

16 Kevin F. Hallock, *Reciprocally Interlocking Boards of Directors and Executive Compensation*, 32 J. FIN. & QUANT. ANAL. 331, 331 (1997).

17 *See* Melvin A. Eisenberg, *The Structure of Corporate Law*, 89 COLUM. L. REV. 1461 (1989). *See also* Nathan Hershey & Christine M. Jarzab, *Fiduciary Duties of Interlocking Directors Within a Non-Profit Health System*, 38 J. HEALTH L. 449, 449 (2005).

> companies the best men available. Any restriction on interlocking directorates, or other interlocks, however slight, restricts the freedom of choice of the buying corporations.[18]

Hence, it is most efficient to intervene in the market for executive-talent "only to the extent necessary to achieve clearly defined objectives."[19] Because corporations are consumers in this context, an undue market restriction on executive talent in a sense runs afoul of an underlying purpose of the antitrust laws: to enhance consumer freedom of choice through the promotion of competition.[20]

The extent to which an over-inclusive definition of competitors under Section 8 would actually harm a corporation in this manner depends upon the depth of the pool of qualified executive talent. Assuming a sufficiently deep pool, a slight restriction in freedom might not meaningfully constrain the corporation's choice of executive talent. In reality, however, the pool of executive talent is in some instances quite shallow.[21] This problem may be particularly acute in an era when director liability has expanded, deterring qualified individuals from serving on boards and further diminishing the pool.[22] An over-inclusive definition may not harm all corporations equally. In some instances, large and highly-diversified corporations that compete with numerous other firms may suffer more[23] than small and specialized

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18 Arthur H. Travers, Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819, 834 (1968).

19 *Id.* at 863.

20 *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 936 (1987) ("Antitrust is rooted in a preference for pluralism, freedom of trade, access to markets, and freedom of choice."); John A. Powers, *The Stifling of Competition by the Antitrust Laws: The Irony of the Health Care Industry*, 15 J.L. & HEALTH 223, 226 (2000-01) ("[A]ntitrust laws are also generally thought to ensure greater freedom of choice in the market, promoting increased quality, service, safety, durability, and immediate cost"); Travers, *supra* note 18, at 863.

21 *See* Mizruchi, *supra* note 5, at 277 (noting that in a study of Dutch companies "the vast majority of new director appointments were drawn from a relatively small number of persons with high levels of experience and expertise" (citing Frans N. Stokman et al., *Interlocks in the Netherlands: Stability and Careers in the Period 1960-1980*, 10 SOC. NETWORKS 183 (1988))) .

22 Rowland writes that "fears of liability could prevent the audit committee from fulfilling its corporate governance role as an active monitor of the financial reporting process by reducing the committee's ability to find qualified members" and "increased exposure to liability, especially for . . . negligent conduct, might deter some of the most capable people from serving on audit committees." Gregory S. Rowland, Note, *Earnings Management, the SEC, and Corporate Governance: Director Liability Arising from the Audit Committee Report*, 102 COLUM. L. REV. 168, 201-02 (2002). *See also* Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1244 (2002) (noting that enhanced director liability "may have the perverse effect of discouraging board service by the well-qualified, especially for corporations facing significant business challenges").

23 As Rep. Moorhead stated:

> Numerous authorities on corporate governance agree that the board of directors of a corporation should be composed primarily of outside directors. Because many minor competitive overlaps disqualify candidates already sitting on the boards, it is often very difficult for a diversified company to find suitable outside directors from a very severely reduced pool of candidates.

corporations, which may be relatively unaffected. Specialized corporations may be able to select with ease an alternative candidate with similar qualifications without running into a Section 8 problem. Conversely, diversified companies may have great difficulty.[24]

Beyond the general value in retaining freedom of choice in the talent market, certain benefits are obtainable only through the selection of a candidate that serves for another corporation. Interlocks do not benefit corporations merely by enabling anticompetitive practices that lead to supracompetitive profits: Potential innocuous benefits to the corporation of interlocks include monitoring, cooptation, legitimacy, and expertise.

Corporations may employ an interlock as a device to monitor the behavior of other firms and reap informational advantages.[25] While monitoring could be harmful in some instances—theft of trade secrets or use of confidential business strategies are examples—such practices are generally already legally prohibited, and are more prevalent where the interlocking corporations are competitors. Monitoring can act as an innocuous learning function for non-competing companies.

Corporations may also co-opt sources of supply dependency through an interlock, such that business transactions are less risky. That is, an interlock can help ensure that a corporation has a steady and reliable stream of resources necessary for its business operations. For instance, non-financial firms may "co-opt financial institutions and thus secure their access to capital—the most generalized and critical resource."[26] Again, while this corporate benefit also has the potential to be exploited for anticompetitive or improper objectives, it is not intrinsically anticompetitive.

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136 CONG. REC. H2284 (daily ed. May 15, 1990) (statement of Rep. Moorhead). The de minimis exemptions to Section 8 have helped to resolve this problem with respect to small competitive overlaps, but one can see how an overly-restrictive application of Section 8 could operate in much the same way. *See infra* text accompanying notes 128-137.

24 In some instances, however, the converse could hold true: The narrowing effect might harm specialized companies more than diversified companies. Consider a situation in which a company's high degree of specialization has already made the pool very shallow. This company could be critically affected even though the narrowing effect results in the prohibition of only a few qualified individuals. The narrowing effect may meanwhile result in a larger number of prohibited candidates with respect to diversified companies, but if the diversified company originally had a larger pool of qualified candidates, it might nevertheless fare better than the specialized company.

25 Mizruchi, *supra* note 5, at 275.

26 R. Jack Richardson, *Directorship Interlocks and Corporate Profitability*, 32 ADMIN. SCI. Q. 367, 369 (1987) (citations omitted). Because it is unlikely that non-financial and financial firms would ever be mistaken as competitors, the risk of over-inclusive application of Section 8 is unlikely to be a concern in this instance. It is possible, however, that a firm could coopt resource uncertainty by interlocking with a firm that could be mistaken as a competitor. For example, a manufacturer of plastic pens might interlock with a manufacturer of plastic mechanical pencils that has a vertically-integrated supply chain. The pen manufacturer could coopt uncertainty with respect to a crucial resource—plastics—by interlocking with the mechanical pencil manufacturer. The interlock may help the downstream firm to secure a steady supply of plastics.

Furthermore, interlocks benefit corporations in ways in which it is difficult to imagine any accompanying anticompetitive result. For instance, interlocks may provide corporations with the legitimacy and prestige necessary to acquire crucial financial resources. "By appointing individuals with ties to other important organizations, the firm signals to potential investors that it is a legitimate enterprise worthy of support."[27] Additionally, individuals with ties to other corporations may have actual expertise gained through this experience that translates to serving as an effective director of another corporation. Therefore, an individual who currently serves as a director or manager of another corporation may simply be more qualified for a similar directorship position than an individual without this experience. Interlocks in some sense provide the best of both worlds with respect to inside and outside directors: An interlocked director has the ability to perform the monitoring function of an outside director, while—like an inside director—providing a high level of expertise[28] (albeit not the firm-specific expertise that an internal manager can provide[29]).

C. *Interaction Between the Definition of "Competitors" and Innocuous Benefits*

Directorship and management expertise—and the legitimacy that accompanies this expertise—is arguably of greatest value where the expertise is industry-specific. Those with industry-specific expertise, however, may be likely to serve for an actual competitor. Thus, a corporation might be unable to take advantage of industry-specific expertise without violating Section 8, even supposing an economically accurate definition of competitor. In other words, if the benefit of management expertise exists only between actual competitors, the current application of Section 8 may not be as problematic as it would at first appear.

Nevertheless, to the extent that general management expertise is valuable and connotes legitimacy, or that industry-specific expertise is not limited to officers and directors of competing corporations, it makes sense to tailor more carefully Section 8's definition of competing firms. In fact, there is little reason to believe that transferable expertise exists only between competitors. For example, directors that serve for corporations that are upstream or downstream in the supply chain of a second corporation seem likely to have expertise that is

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27 Mizruchi, *supra* note 5, at 276.

28 *See generally* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002) (discussing monitoring and expertise benefits).

29 *See* April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 277 (1998) (finding "support [for] the position that internal managers contribute 'valuable specific information about the organization's activities.'" (quoting Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 314 (1983))).

transferable to the second corporation.[30] Indeed, "it is common practice to invite members of vertically interdependent organizations (i.e., suppliers and commercial customers) onto the board . . . ."[31] In this instance, an imprecise definition of competitors under Section 8 might not prevent such vertical interlocks because suppliers or vendors probably will not be mistaken as competitors.

But interlocks between corporations that are "nearly" competitors also seem likely to confer benefits of expertise and legitimacy. Consider a situation in which a manufacturer of office pens wishes to interlock with a manufacturer of luxury pens sold exclusively in jewelry stores. A director on the board of the luxury pen corporation will almost certainly carry some level of prestige and expertise to the office pen corporation,[32] yet these corporations may not actually be competitors.[33] In fact, the expertise benefits of interlocking would seem to become stronger as similarities between corporations grow and corporations come closer to being true competitors.[34] As interlocking corporations become more similar, there also is a greater likelihood that an imprecise application of Section 8 will result in erroneous prohibition of the interlock. Therefore, assuming that expertise benefits are indeed strongest where corporations are "nearly" competitors, an overly-broad Section 8 definition of competitors would significantly impede corporations from selecting premium executive talent.

D. *Empirical Analysis of Interlocks*

Research has shown that interlocks, in some instances, are positively correlated with corporate profitability. These findings remain hotly debated, however, and some studies have even shown a negative correlation.[35] One source of this confusion focuses upon "ambiguity in causal ordering. That is,

30 Vertical agreements may also raise antitrust concerns, particularly where the agreement restricts the upstream firm's sales to competitors of the downstream firm, or where the agreement restricts the downstream firm's purchases from competitors of the upstream firm. Section 8 does not apply, however, to vertical interlocks between non-competitors, making this concern largely irrelevant in this context.

31 Barry Baysinger & Henry Butler, *Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition*, 1 J. L. ECON. & ORG. 101, 108 (1985).

32 For instance, the director may have transferable knowledge with respect to manufacturing process or distribution channels. Additionally, there may be prestige benefits which flow to the office pen company.

33 This is not a far-fetched hypothetical. *See infra* text accompanying note 96.

34 No such relationship would seem to exist within the context of cooptation, however. *See supra* note 26.

35 Pamela R. Haunschild & Christine M. Beckman, *When Do Interlocks Matter?*, 43 ADMIN. SCI. Q. 815, 815 (1998).

interlocking directorates can be both a cause and a result of profitability."[36] For instance, interlocks can be a result of improved corporate profitability because outside directors may prefer to serve on the board of a well-performing corporation.[37]

Additionally, it may be difficult to distinguish whether positive correlations are attributable to innocuous benefits or to undetected anticompetitive behavior. Several studies have shown virtually no relationship between profitability and interlocks between competitors.[38] And because "[t]here [has been] little evidence that such interlocks are effective [for restricting competition], or more importantly, whether interlocks are necessary to reduce competition . . . . research on the anticompetitive effects of interlocks has virtually disappeared."[39]

A further problem is the difficulty of isolating which innocuous benefits are the sources of improved profitability. If cooptation is the primary source of enhanced profitability, then an overbroad definition of competitors might not be so problematic. This is because cooptation generally occurs between interlocking corporations in clearly different industries,[40] such that the interlocked corporations remain unlikely to be mistaken as competitors. Thus, an overbroad definition would still probably not preclude such interlocks.

On the other hand, if legitimacy or expertise is the primary source of enhanced profitability, then an overbroad definition of competitors may be costly. This is because legitimacy and expertise benefits often exist between interlocking corporations in the same industry, such that the interlocked corporations are more likely to be mistaken as competitors. Unfortunately, the legitimacy and expertise "model is difficult to test, and its predictions are closely related to those of the resource dependence [or cooptation] model."[41] Nevertheless, "[t]he existing literature on board appointments certainly implies . . . that the quest for legitimacy underlies the formation of many interlocks."[42]

In sum, the empirical literature is mixed on the costs and benefits of interlocks, but it is not far-fetched to say that some benefits may come to firms that carefully choose their interlocking board members.

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36 *Id.* ("Despite numerous studies on interlocks and their influence, the issue of whether interlocks affect the firms involved remains the subject of much debate, as research has produced mixed and contradictory results.").

37 Mizruchi, *supra* note 5, at 276.

38 *Id.* at 273-74 (citing RONALD S. BURT, CORPORATE PROFITS AND COOPTATION (1983) and JOHANNES M. PENNINGS, INTERLOCKING DIRECTORATES (1980)).

39 *Id.* at 274.

40 *See* Richardson, *supra* note 26, at 367 (discussing the prevalence of interlocks between financial and non-financial corporations).

41 Mizruchi, *supra* note 5, at 277.

42 *Id.*

II. Section 8 Jurisprudence on the Definition of "Competitors"

Section 8 imparts little guidance on the definition of competitors. The statute simply states that "[n]o person shall, at the same time, serve as a director or officer in any two corporations . . . that 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 antitrust laws . . . ."[43] Safe harbor provisions added in 1990 provide de minimis exemptions termed in percentages of competitive sales.[44] Because Section 8 cases were (and continue to be) litigated rarely,[45] ambiguity surrounding the definition has lingered.

A. *Section 7 Market Definition*

The manner in which courts have defined competitors in the Section 7 merger context is an essential point of comparison to Section 8. In contrast to Section 8, Section 7 case law is well-developed. In Section 7 cases, the courts define the relevant product market through market definition analysis prior to reaching the question of anticompetitive harm. "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.'"[46] Qualitative analysis has been employed in Section 7 cases, particularly to determine whether "sub-markets" exist,[47] but most modern courts recognize that the "submarket" distinction is illusory.[48] Quantitative measures such as cross-elasticity of

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43 15 U.S.C. § 19 (a)(1)(B) (2000).

44 Antitrust Amendments Act of 1990, Pub. L. No. 101-588, 104 Stat. 2879 (1990) (codified as amended at 15 U.S.C. § 19 (a)(2)(B)-(C) (2000)). For a discussion of the de minimis exemptions, see *infra* text accompanying notes 128-137.

45 *See* Linda R. Blumkin, *Interlocking Directorate Statute Is Modernized*, INSIGHTS, Mar. 1991, at 22 (citing *Increasing Sherman Act Criminal Penalties and Amending Clayton Act Interlocking Directorates: Hearing on H.R. 29 Before the Subcomm. on Economic and Commercial Law of the H. Comm. on Judiciary*, 101st Cong. 40 (1989) (statement of Michael Boudin, Acting Assistant Att'y Gen., Antitrust Div., United States Dep't of Justice)).

46 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (citation omitted).

47 The Court in *Brown Shoe Co. v. United States* noted:

> [W]ell-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes . . . . [and the] boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

48 "The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market." Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004). *See also* F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 n.6 (D.D.C. 2004).

demand, SSNIP analysis, and simulation models have become the bedrock of Section 7 market definition analysis.[49]

"[C]ross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."[50] For instance, "[i]f a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them—that the products compete in the same market."[51]

The DOJ and FTC Horizontal Merger Guidelines promulgate a variant on cross-elasticity analysis: examination of responses to "small but significant and nontransitory increase[s] in price" ("SSNIP analysis").[52] If a "small but significant and nontransitory increase in price" of one good leads to a change in the demand for a second good, the two goods, in some sense, compete.

Intricate merger simulation models are sometimes used in the Section 7 context as well. "Merger simulation models may allow more precise estimations of likely competitive effects and . . . lessen the impact of[] the arbitrariness inherent in defining the relevant market. For example, some merger simulation methods compensate for potential errors in market definition."[53]

Despite the increasing reliance on quantitative analysis, it appears that qualitative analysis will remain an important element of merger cases. For instance, in *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, the defendant argued that the plaintiff's "proposed market definitions [should] fail as a matter of law because [the plaintiff's expert] did not calculate cross-elasticity of demand for any of the proposed markets in his expert reports."[54] The court rejected the "assert[ion] that a relevant market cannot be defined without the use of economic criteria through a formal study of cross-elasticity of demand."[55] According to the court, a "plaintiff may, through sufficient evidence of other indicia of market definition, define a relevant market without economic study of cross-elasticity of demand,

49 *See Brown Shoe*, 370 U.S. at 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

50 United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

51 *Id.*

52 F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 718 (D.C. Cir. 2001) (citing U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.11 (1997 rev. ed.)). *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1120 (N.D. Cal. 2004) ("Merely demonstrating that the merging parties' products are differentiated is not sufficient. Instead, a plaintiff must demonstrate product differentiation sufficient to sustain a small but significant and non-transitory price increase."). For a more detailed examination of SSNIP analysis, see Michael L. Katz & Carl Shapiro, *Critical Loss: Let's Tell the Whole Story*, 17 ANTITRUST 49 (2003).

53 *Oracle*, 331 F. Supp. 2d at 1122.

54 311 F. Supp. 2d 1048, 1081 (D. Colo. 2004).

55 *Id.* at 1082.

especially when economic analysis of cross-elasticity of demand is infeasible based on pricing data."[56]

Although market definition and competitive effect analysis are legally distinct steps, they are highly interconnected and the line between the two may easily become blurred.[57] This is because a quantitative measure such as cross-elasticity of demand can itself reveal the potential extent of anticompetitive harm.[58] Simulation models in particular blur the distinction between relevant market and competitive effect,[59] with some models obviating the need to delineate relevant markets at all.[60]

B. *Early Section 8 Jurisprudence*

The "first judicial construction" of Section 8 occurred in *United States v. Sears, Roebuck & Co.*, where the court addressed directly the question of whether Section 7 methodology also applied to Section 8.[61] In that case, the defendant argued that "the 'so that' clause of § 8 required a showing that a hypothetical merger between the two firms would violate Clayton Act § 7"[62] which prohibits mergers between firms where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[63] "The district court rejected this test" and in doing so "adopted a per se rule

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56 The plaintiff in the case:

> argue[d] that market definition can and must be proven through other practical indicia besides cross-elasticity of demand because calculations of cross-elasticity of demand are difficult when analyzing the entertainment industry. Specifically, [plaintiff's expert] claim[ed] that calculating cross-elasticity of demand in this case was not possible because price shifts above 5% over an extended period of time are necessary in order to accurately measure cross-elasticity of demand.

Id. at 1082 (citation omitted).

57 *See* James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 698 (1995) ("Indeed, numerous courts, as well as the antitrust enforcement agencies, accept the notion that market definition analysis should be linked to the ultimate goal of preventing the unlawful exercise of market power.").

58 *See* RICHARD A. POSNER, ANTITRUST LAW 147 (2d ed. 2001) ("If we knew what would happen if a group of sellers raised their prices . . . it would be redundant to ask whether the group constituted an economically meaningful market.").

59 For example, as described in *United States v. Oracle Corp.*, one such model uses a set of 'inside goods' and a set of 'outside goods.' The model contains a parameter, beta, that controls for the substitutability among the inside goods and another parameter, epsilon, that controls for the substitutability between the inside and outside goods." 331 F. Supp. 2d 1098, 1122 (N.D. Cal. 2004) (citations omitted).

60 Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO. MASON L. REV. 363 (1997).

61 5 AREEDA & HOVENKAMP, *supra* note 4, ¶ 1302(a), at 326 (citing United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953)). *See also* U.S. v. W. T. Grant Co., 345 U.S. 629, 630 (1953) ("For the first time since the enactment of the Clayton Act in 1914 the [Supreme] Court is called upon to consider § 8's prohibitions against interlocking corporate directorates.").

62 *Sears*, 111 F. Supp. at 616.

63 15 U.S.C. § 18 (2000).

requiring only a showing that two firms are or have been competitors . . . ."[64] In other words, like price-fixing, no anticompetitive effect need be shown for the act to be deemed illegal.[65] In deciding *Sears*, the court's interpretation of the legislative intent behind Section 8 was a driving force: "[A] fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[66]

Importantly, however, the defendants in Sears "*conceded* that they [were] competitors in the sale of the seven categories of items at retail in commerce as the term is used in the Clayton Act."[67] Read correctly, Sears does *not* stand for the proposition that market definition analysis cannot be applied to Section 8 to determine whether corporations are competitors, but merely that applying market definition analysis antecedent to anticompetitive effects analysis is inappropriate. In other words, the court held that anticompetitive effect was irrelevant, but did not address the appropriateness of applying market definition analysis to define competitors.

If market definition analysis applies merely to determine whether corporations compete (i.e. not to establish anticompetitive harm) it is hard to see how this alters the per se nature of Section 8.[68] This subtlety began to erode in *Protectoseal Co. v. Barancik*, in which the Seventh Circuit stated that it did "not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under § 7."[69] One way of interpreting *Protectoseal* is that it did nothing more

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64 5 AREEDA & HOVENKAMP, *supra* note 4, ¶ 1302(a), at 326. In *Sears*, the court notes that:

> This conclusion is compelled because of the futility of trying to decide whether a given hypothetical merger would violate the pertinent sections of the antitrust laws. Such a decision would involve a consideration of many factors . . . . [which] can be applied only in an actual case and not in a hypothetical situation. . . . This difficulty suggests that the merger test would result in complete nullification of the law prohibiting interlocking directorates in all but the rawest situation . . . .

Sears, 111 F. Supp. at 617 (citations omitted).

65 *See, e.g.*, U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927) (interpreting the Sherman Act to include a per se restriction on price-fixing); *see also* 15 U.S.C. § 1 (2000) (Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

66 *Sears*, 111 F. Supp. at 616.

67 *Id.* at 620 (emphasis added). "The defendants . . . admit that Sears and Goodrich are competitors in the sale of . . . seven categories of items in 97 communities located in 31 states of the United States . . . ." *Id.* at 615.

68 Here it is important to note a crucial difference between the per se illegality of price-fixing and of interlocking directorates between competitors. The existence of price-fixing itself provides essentially conclusive evidence that the colluding corporations are competitors, rendering market definition unnecessary unless it is being used to establish anticompetitive effect (which is not required for per se rules). *See Trenton Potteries*, 273 U.S. 392. In the Section 8 context, however, an interlocking directorate in and of itself does not necessarily indicate that the interlocking corporations are competitors. *See* Zajac, *supra* note 5, at 436.

69 484 F.2d 585, 589 (7th Cir. 1973).

than echo the opinion in *Sears*.[70] But it arguably did more than this. The *Protectoseal* court did not distinguish whether it was referring to evidence pertaining to relevant market or to evidence pertaining to competitive effect. Thus, one could read *Protectoseal* as holding that Section 8 does not require quantitative market analysis to determine whether two firms are competitors, or as holding that Section 8 does not require quantitative market analysis to determine anticompetitive effect. The court did note, however, that Section 8's "reference to competition 'between them,' which apparently contemplates a horizontal market relationship between the companies, implies that a market-wide analysis of competition is unnecessary . . . ."[71] Because market definition analysis requires market-wide analysis, *Protectoseal* perhaps stands for the proposition that Section 7 market definition analysis need not be applied in Section 8 cases at all. Overall, the *Protectoseal* court appeared more than satisfied that the defendants were "ostensible"[72] competitors, indicating that the court favored an intuitive approach rather than a market definitional approach to defining competitors.

C. *Qualitative vs. Quantitative in Section 8 Cases*

The court in *TRW, Inc., v. Federal Trade Commission* apparently interpreted *Protectoseal* to stand for the proposition that Section 7 market definition analysis need not be applied in Section 8 cases at all. Unlike in *Sears*, the defendants in *TRW* refuted the FTC's assertion that they were competitors, and "argue[d] that the question should be judged by the standards of cross-elasticity of demand and reasonable interchangeability of use commonly employed in defining markets for purposes of the Sherman Act and Section 7 of the Clayton Act."[73] Citing the prophylactic nature of Section 8 noted in *Sears,* the court held that the FTC was "right in asserting that this purpose would not be well served by requiring proof of high cross-elasticity of demand between competing products or low-friction interchangeability of use."[74] Instead of cross-elasticity analysis, the court focused on three qualitative factors in holding that the defendants were competitors within the meaning of Section 8: "(1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products

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70 *See* 5 AREEDA & HOVENKAMP, *supra* note 4, ¶ 1302(a), at 326.

71 *Protectoseal*, 484 F.2d at 589.

72 *Id.* at 588.

73 647 F.2d 942, 946 (9th Cir. 1981).

74 *Id.* at 947. The FTC had argued that "'competitors' are companies that vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each." *Id.* at 946.

can be said to have distinctive customers."[75] Notably, the court did not directly address what would have happened if the defendants themselves produced evidence of low cross-elasticity; it only concluded that the plaintiff did not need to produce evidence of high cross-elasticity. In other words, it is unclear how the court would have handled the production of evidence of low cross-elasticity that rebutted the plaintiff's assertion that the companies competed.

Although the *TRW* court stated that "[n]o reported decision of which we are aware has directly addressed the question" of "[t]he meaning of 'competitors' for purposes of section 8,"[76] a district court had actually endorsed explicitly the use of cross-elasticity analysis less than one month prior to the *TRW* decision. In *American Bakeries Co. v. Gourmet Bakers, Inc.*, the court noted that, "[d]espite what one commentator has termed a 'paucity of Section 8 case law,' there are clear antitrust guidelines for determining whether corporations compete. For example, the 'relevant market test' may be applied . . . ."[77] According to the *American Bakeries* court:

> The presence of actual competitiveness . . . is determined by two tests:
>
> (1) Can the two products (the defendant's and the substitute) be said to compete because they are reasonably interchangeable with respect to the uses to which they can be put?
>
> (2) Are the two products actually competitive because there is a high cross-elasticity of demand on the part of customers?[78]

Because evidence of cross-elasticity was not submitted, the *American Bakeries* court examined interchangeability in holding that the corporations in question were not competitors.[79] Although the analysis in *American Bakeries* was ultimately qualitative,[80] the case reflects a general acceptance of cross-elasticity as appropriate evidence in Section 8 cases.

Nevertheless, in *In re Borg-Warner Corp.*,[81] the FTC reiterated the position taken in *TRW*. The opinion did note that "[i]n resolving the competition issue it is appropriate by way of 'analogy' to draw on concepts applied under Section 7 of the Clayton Act."[82] Even so, the FTC concluded that, "[s]ince there is no competitive effects test under Section 8, there is no

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75 *Id.* at 947.

76 *Id.* at 946.

77 515 F. Supp. 977, 980 (D. Md. 1981).

78 *Id.* at 980 (citing 2 VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 13.03 at 13-37). "Basically, the two tests pose the same question: Are the defendant's products interchangeable with a suggested substitute? In the first test, interchangeability is gauged by product uses; in the second, by consumer response." *Id.*

79 *Id.* at 981-82.

80 *Id.* at 981 ("The same inspection that discloses the lack of physical similarities between the parties' respective product groups also discloses the lack of similarities of use.").

81 101 F.T.C. 863 (1983), *rev'd on other grounds*, 746 F.2d 108 (2d Cir. 1984).

82 101 F.T.C. at 905.

need for a precise definition of the metes and bounds of the relevant market under that statute."[83]

What accounts for the hostility toward quantitative analysis found in *TRW* and *Borg-Warner*? According to the *TRW* court:

> [M]arket definition for [Section 7] purposes, for which these tests were designed, is used to establish 'the locus of competition, within which the anticompetitive effects' of a merger or practice are to be judged. Section 8, on the other hand, does not require that such a 'locus' be established. Only two alleged 'competitors' are involved and proof that the interlock has an actual anticompetitive effect is not required.[84]

The *TRW* court also objected to quantitative analysis on practical grounds. While conceding that applying cross-elasticity analysis to define competitors "may yield realistic results in well-established industries," the *TRW* court asserted that this analysis is inappropriate in small or developing industries.[85] According to the court:

> Although measuring cross-elasticities of demand is always difficult, it must be particularly so in a developing industry such as the one involved here where the market is still small, where product variation among firms is just beginning, and where customer needs are far from standardized. Cross-elasticity of demand in such industries may be immeasurable, but this does not mean that competitors are nonexistent. In addition, we have not been provided with a means of determining when cross-elasticity of demand between two products becomes so small that they cannot be characterized as competitive. The problem, again, is particularly acute in developing industries.[86]

The only recent Section 8 case relevant to the competitive relationship between interlocking corporations, *Paladin Associates, Inc. v. Montana Power Co.*, cited both to *TRW* and to *American Bakeries*, but failed to specifically enunciate a standard for defining competition.[87] Nevertheless, the *Paladin* court's brief discussion of competitive scope is revealing:

> There [was] nothing conspiratorial or improper about [the defendant's] activities. First, section 8 of the Clayton Act precludes interlocking directorates between corporate competitors. Accordingly, to establish a violation of section 8, a plaintiff must prove the corporations, on whose boards the director sits, actually compete with each other. *Northridge is a marketing company whose relevant product is natural gas. In contrast, Entech is a holding company whose primary interest is coal.*[88]

83 *Id.* "Analysis of the level of competition in specific submarkets is appropriate under Section 7, where the focus is not merely on the existence of competition, but also on the impact on competition of the challenged mergers." *Id.*

84 647 F.2d 942, 946 (9th Cir. 1981).

85 *Id.* at 947.

86 *Id.* at 947 n.7.

87 97 F. Supp. 2d 1013 (D. Mont. 2000).

88 *Id.* at 1031 (emphasis added).

Although *Paladin* neither endorsed nor rejected the application of quantitative market definition analysis in the Section 8 context, it is clear that the court felt that an intuitive approach was sufficient.

III. Toward a Socially Optimal Definition of "Competitors"

Recent Section 7 merger cases illustrate the manner in which qualitative analysis may lead to faulty determinations of competitive scope in antitrust cases. Taking a cue from these cases, current Section 8 jurisprudence may in some instances be too broad, restricting corporations that do not meaningfully compete, and in other instances be too narrow, permitting interlocks between corporations that do meaningfully compete. A critical flaw in the current Section 8 interpretation of competitors is its failure to recognize that competition is a question of degree, rather than an all-or-nothing matter. A precise quantitative standard specifically developed to effectuate the purpose of Section 8 is theoretically superior to a qualitative standard, but determining the appropriate standard is a difficult task. Because both the anticompetive harms and efficiency benefits differ between interlocks and mergers, the wholesale adoption of the Section 7 standard would make little sense.

A. *Lessons from Section 7 Merger Cases*

F.T.C. v. Staples, Inc.,[89] a Section 7 merger case, is paradigmatic of how an intuitive determination of competitive scope may be overbroad. In *Staples*, the court found that office supplies sold by office supply superstores constituted a product market separate from identical products that were sold in other types of stores.[90] In making this determination, the court noted that there was low cross-elasticity of demand between consumable office supplies sold by superstores and those sold by other retailers.[91] "Despite the high degree of functional interchangeability between consumable office supplies sold by the office superstores and other retailers of office supplies," the court found that "even where Staples and Office Depot charge higher prices, certain consumers do not go elsewhere for their supplies."[92] The *Staples* court further noted that "office superstore prices are affected primarily by other office superstores and not by non-superstore competitors . . . ."[93] Applying a qualitative standard—a standard focused on characteristics such as consumer perception and production techniques—office supply superstores would appear to be competitors of other office supply retailers, but *Staples* reveals that this would

89 970 F. Supp. 1066 (D.D.C. 1997).

90 *Id.* at 1076-78.

91 *Id.* at 1078.

92 *Id.* (noting that consumers would be unlikely to switch from Staples to alternatives such as Best Buy).

93 *Id.* at 1077.

be a faulty determination under the Section 7 standard.[94] Similarly, in *U.S. v. Gillette Company*, the court found that premium pens and base pens constituted separate product markets.[95] Qualitative factors—even perfect functional interchangeability—do not necessarily imply that products compete meaningfully;[96] a high cross-elasticity must be shown to establish that consumers are in fact willing to substitute one product for the other. *Staples* and *Gillette* exemplify the manner in which a purely intuitive approach toward defining competitors can be overbroad.

While *Staples* illustrates that ostensibly competing corporations may not actually compete meaningfully, the converse may also hold true: High cross-elasticity of demand may exist between two products that intuitively seem not to compete. As the court noted in *U.S. v. Oracle Corp.*, "[j]udicial experience cautions against the use of qualitative factors to define narrow markets."[97] Interestingly, this assertion directly contravenes the argument found in the *TRW* decision, where the court contended that qualitative analysis was better than quantitative analysis in precisely those instances in which the market is narrow.[98] According to the *Oracle* court, "[w]hen Oracle cross-examined plaintiffs' expert witnesses, both admitted that they 'did not even attempt to calculate diversion ratios, or cross-elasticities, or any other economically meaningful measurement of whether the products of Oracle and PeopleSoft are uniquely close substitutes for each other.'"[99] The court specifically noted "the

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94 As noted in *Staples*:

> The Court recognizes that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products.

Id. at 1075.

95 The court wrote:

> [P]laintiff has met its burden and demonstrates that a separate market for fountain pens in the $50 to $400 range exists. The determination of what constitutes the relevant product . . . must exclude those items to which "only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."

828 F. Supp. 78, 81 (D.D.C. 1993) (quoting Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n. 31 (1953)). *But see* U.S. v. Joseph Schlitz Brewing Co., 253 F. Supp. 129, 133 (N.D. Cal. 1966) (holding that premium and nonpremium beer did not constitute separate lines of commerce).

96 For a detailed discussion of functional equivalence and its proper role—or lack thereof—in merger cases, see generally James A. Keyte, *Premium Fountain Pens and Gift Boxed Chocolates: Market Definition and Differentiated Products*, 8 ANTITRUST 19 (1993) (discussing *Gillette*, 828 F. Supp. 78 (D.D.C. 1993) and Pennsylvania v. Russell Stover Candies, 1993-1 Trade Cas. ¶ 70,224 (E.D. Pa. 1993)).

97 331 F. Supp. 2d 1098, 1118-19 (N.D. Cal. 2004) (noting that a "laundry list of factors . . . creates the danger of narrowing the market by factors that have little economic basis").

98 *See supra* text accompanying note 86.

99 331 F. Supp. 2d at 1172 (citation omitted). "Oracle contends that plaintiffs have offered 'no econometric calculations in trying to prove localization.' Oracle argues that proving localization requires 'extensive econometric analysis,' such as diversion ratios, price-cost margins and the like, of which plaintiffs have offered none." *Id.* (citation omitted).

evidence [plaintiff's witness] marshalled was circumstantial and highly qualitative."[100] Ultimately, the court held for the defendant, finding insufficient evidence to support the plaintiff's depiction of the relevant market.[101]

> [T]he court cannot delineate product boundaries in multi-billion dollar merger suits based upon the mere notion that there is 'something different' about the merging products and all others, especially when that 'something different' cannot be expressed in terms to make a judgment of the court have meaning. More is required.[102]

Oracle exemplifies the manner in which a purely intuitive approach toward defining competitors can be too narrow.

A crucial failing of the current Section 8 interpretation of competitors is that it fails to recognize that competition is a question of degree, rather than an all-or-nothing matter. In the Section 7 context, the *Staples* court did "acknowledge that there [was], in fact, a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another."[103] "In the Section 8 context, "suppose, for example, an individual served on the boards of both a soft-drink company and a large milk cooperative."[104] There may be a broad market for beverage products, such that milk and soft drinks compete at some level, but this does not imply that the two corporations are competitors. Applying the qualitative factors set forth in *TRW*, it is unclear what the outcome of this case would be. The sensible approach would be to examine the extent to which consumers actually substitute between milk and soft drinks.

B. *Developing an Optimal Threshold in Section 8 Cases*

While examining the extent to which consumers substitute between products is a useful method for exploring competitive relationships, the level of cross-elasticity at which corporations should be deemed to be competitors under an antitrust statute is somewhat arbitrary. In the Section 7 context, a court assumes that:

> a five to ten percent price increase on the identified test product in the hands of a hypothetical monopolist, and examines whether, in such circumstances, there would be a sufficient diversion or loss of sales to producers of another product to make that price increase unprofitable. If so, the market is too narrowly delineated. The market is appropriately defined when the price increase would be profitable to the hypothetical monopolist.[105]

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100 *Id.* at 1158.

101 *Id.* at 1158-59 ("The equivocal and vague evidence presented by plaintiffs at trial does not permit the court to exclude mid-market vendors, outsourcing or best of breed solutions from any product market that includes ERP software.").

102 *Id.*

103 F.T.C. v. Staples, 970 F. Supp. 1066, 1075 (D.D.C. 1997)

104 JOHN J. MILES, 1 HEALTH CARE AND ANTITRUST LAW § 6:12 (2005).

105 *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 121 n.7 (citations omitted).

Satisfying the "five to ten percent" test is, of course, not a requirement intrinsic to being a competitor; the standard is rooted in the end-result of preventing of anticompetitive harm and could be modified to result in a broader or narrower market in which to examine competitive effects of a merger.[106] Cross-elasticity does not so much tell us *whether or not* a firm is a competitor, but rather *the extent to which* a firm is a competitor; the higher the cross-elasticity, the greater the potential for anticompetitive harm.[107]

Given this more fluid notion of what constitutes a competitive relationship, it is instructive to revisit the implications of an imprecise definition of competitors under Section 8. Part I of this paper explained the problems that accompany an imprecise definition of competitors under the assumption that competitors and non-competitors could be clearly delineated. Where there is no clear delineation—but rather a continuum of competitive relationships—it is more difficult to determine what the ideal Section 8 prohibition should be. The Section 7 standard is most likely inappropriate in the Section 8 context because the competitive effects of mergers differ from those of interlocking directorates, both in type and in magnitude. The anticompetitive effect of a merger is likely to be much greater than the anticompetitive effect of an interlock; increased industry concentration accompanying mergers gives rise to both unilateral and coordinated price effects,[108] while an interlock merely increases the probability that coordinated price effects might occur. The benefits of mergers also differ significantly from those of interlocks.[109] Therefore, simply adopting the standard for competitive scope under Section 7 is an unacceptable solution.

Hence, developing an appropriate definition of competitors under Section 8 must involve a balancing of the harms and benefits of interlocks. As the cross-elasticity between the products of two firms increases, the potential for anticompetitive harm accompanying an interlock between the firms would seem to increase; firms are less likely to fix prices of products between which consumers do not substitute meaningfully, and more likely to fix prices of products between which consumers do substitute meaningfully. The all-

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106 A test that results in a narrow market implies that only firms with relatively high cross-elasticity of demand are considered competitors, while a test that results in a broad market implies that firms with lower cross-elasticity may also be considered competitors.

107 *See* POSNER, *supra* note 58, at 147-48 (noting that "[i]f we knew what would happen if a group of sellers raised their prices . . . it would be redundant to ask whether the group constituted an economically meaningful market" because this alone would evince the extent of the anticompetitive harm, if any).

108 For a discussion of unilateral and coordinated price effects of mergers, see David S. Shotlander, *Slotting Fees and Merger Efficiencies: Can Fewer Competitors Yield a Lower Price?*, 13 GEO. MASON L. REV. 1273, 1289 (2006).

109 *Compare* Craig W. Conrath & Nicholas A. Widnell, *Efficiency Claims in Merger Analysis, Hostility or Humility*, 7 GEO. MASON L. REV. 685, 692 (1999) ("The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers."), *with supra* text accompanying notes 18-34.

important question remains, however, whether interlocks are a necessary or important instrument for collusion.[110] The analysis is even less clear regarding the benefits of interlocks. With respect to legitimacy and expertise, the benefits of interlocks would seem to increase as firms and products become more similar, implying a positive correlation between cross-elasticity and interlock benefits.[111] On the other hand, benefits such as cooptation of risk may bear little relationship to cross-elasticity.[112]

How is the optimal definition of competition related to consumer and producer welfare concerns? In terms of total social welfare, the optimal definition of competitors under Section 8 would maximize the net benefit of interlocks: interlock benefits minus interlock harms. This would occur when the marginal benefit of adjusting the cross-elasticity standard equaled the marginal harm. Importantly, however, Section 8 was meant to benefit consumers, and the socially optimal definition of competitors is unlikely to be equivalent to the optimal definition in terms of consumer welfare. Congress did not pass Section 8 with the benefits of interlocks in mind, nor did Congress intend to prohibit interlocks only where the potential of anticompetitive harm was significant.[113]

Moreover, *Sears* made it clear that anticompetitive effect analysis has no place in Section 8 cases.[114] Even under a qualitative approach, however, any Section 8 definition of competitors embodies a level of potential anticompetitive harm that is unacceptable. If all potential anticompetitive harm is to be avoided, the definition of competitors must be incredibly expansive. As the definition of competitors narrows, the potential for anticompetitive harm increases. Qualitative analysis does not obviate the need to define the scope of competitors and hence the acceptable level of potential anticompetitive harm. Even though Section 8 was designed to be a per se statute, anticompetitive harm must be at least generally considered when establishing a definition of competitors uniform to all cases. Qualitative analysis obscures but does not resolve the need to examine potential anticompetitive harm in this manner.

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110 Mizruchi, *supra* note 5, at 274.

111 *See supra* text accompanying note 34.

112 *See supra* note 26.

113 One potential solution, consistent with the intent of Section 8, would be to implement a quantitative standard which weighs consumer welfare more heavily than producer surplus. Ultimately, the exact level of cross-elasticity that should be necessary to constitute competition between corporations is a policy decision rooted in the objectives of Section 8. But whatever the courts or Congress interpret this objective to be, it is theoretically superior to examine the actual economic conditions which underlie the inquiry, rather than rely on qualitative factors—such as consumer perception and manufacturing process—to approximate these conditions.

114 United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953).

IV. Practicalities of an Optimal Definition of "Competitors"

Although revising the current interpretation of competitors under Section 8 is theoretically optimal, practical difficulties accompany the application of a quantitative standard in Section 8 jurisprudence. Paramount among these considerations is the prohibitive litigation cost associated with quantitative analysis. Assuming that practical complications are surmountable, the manner of implementation remains of great importance. Potential instruments of change include congressional amendment, doctrinal evolution, and creation of pertinent agency guidelines.

A. *Practicalities of Implementation*

1. Burden-shifting

If the definition of competitors under Section 8 is revised—be it through judicial evolution, agency guidelines, or congressional amendment—how should market definition analysis be implemented in antitrust litigation? If a court were to impute an *Oracle* approach to an interlock case, the plaintiff would have to produce evidence such as high cross-elasticity to establish that the defendants were actually competitors within the meaning of the Section 8, an approach explicitly rejected in *TRW*.[115]

However, because qualitative analysis appears here to stay in Section 7 merger cases,[116] let alone in Section 8 interlock cases, a moderate position that incorporates burden-shifting to the defendant may be the most realistic option for modernizing the application of Section 8.[117] Consider an approach where a plaintiff can satisfy the burden of defining the relevant market through qualitative economic evidence, but defendants could produce quantitative evidence (such as low cross-elasticity) to rebut the plaintiff's qualitative evidence. If the defendant produces this evidence, the plaintiff could still be given the opportunity to substantiate that the quantitative evidence is—for the particular industry in question—inaccurate and inferior to qualitative evidence.[118] This approach would align with the approach taken in *American*

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115 *See supra* text accompanying note 74.

116 *See supra* text accompanying notes 54-56.

117 For an examination of market definition burdens in the Section 7 context as a point of comparison, see M. Howard Morse, *Product Market Definition in the Pharmaceutical Industry*, 71 ANTITRUST L.J. 633, 656 (2003) ("The burden of establishing the relevant market falls on the government or private plaintiff in federal court and on the FTC staff supporting an administrative complaint . . . . '[A]ny gap in the evidence is a flaw in the plaintiff's case—not defendants'.'" (quoting U.S. v. Sungard Data Sys. Inc., 172 F. Supp. 2d 172, 185 (D.D.C. 2001) (citations omitted)).

118 The *TRW* court came to the conclusion that cross-elasticity was inappropriate for the industry in question. *See supra* text accompanying note 86. The suggestion here is for the plaintiffs to

Bakeries, and would not necessarily contravene the holding in *TRW* because the court did not address explicitly the possibility of the defendant producing quantitative evidence in this manner.

2. Litigation Costs

Litigation is costly, especially when detailed economic analysis is involved. Generally, the question of whether to permit an interlock is a lower-stakes inquiry than whether to permit a horizontal merger. The relative costs and benefits of applying market definition analysis to interlock cases raise significant uncertainties about whether refining the definition of competitors under Section 8 is a worthwhile endeavor.

The increase in cost accompanying quantitative analysis may be particularly burdensome to the FTC, the agency that most frequently enforces Section 8;[119] the FTC may have to engage in expensive and time-consuming analysis to enjoin an interlock. Agency burden was a crucial factor in Congress's determination not to amend Section 8 to incorporate the complete Section 7 standard,[120] and even absent a requirement of anticompetitive effect, the cost of quantitative market definition remains a valid concern.

Expense may not be as great of a concern for the FTC as it would first appear, however. Section 8 cases rarely reach the courts because corporations often agree to consent orders with the FTC. For instance, a corporation might agree to replace a director or divest a portion of its competitive holdings to ameliorate the alleged Section 8 violation.[121]

Assuming a Section 8 case makes it to court, because the suit was a private action or because a consent order with the FTC could not be reached, the defendant corporation might still opt not to produce quantitative evidence. The remedies in Section 8 cases are generally quite limited—usually one of the interlocking corporations must simply remove the director in question from its board.[122] Where a corporation could select with ease an alternative director who more clearly complies with Section 8, a corporation would be likely to forgo costly economic analysis and litigation. Additionally, a corporation would be unlikely to engage in economic analysis where the corporation believes that economic analysis would not in fact provide robust evidence in its favor, or

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present specific countervailing economic evidence to establish why the plaintiff's evidence is inaccurate in light of the size or development of the industry in question.

119 *See* William C. MacLeod, *Interlocks at the Federal Trade Commission: Room for Reason in a 'Per Se' Statute?*, 53 ANTITRUST L.J. 1077, 1077 (1985) (noting that the FTC "recently has been the most visible government agency dealing with Section 8 of the Clayton Act against interlocking directorates").

120 *See infra* text accompanying note 137.

121 *See* In re Shell Oil Co., FTC File No. 971-0026 (1997) ("The purpose of the divestiture of either Texaco's interest in Colonial or Shell's interest in Plantation is to prevent an interlock or common owner in both of these pipeline systems . . . .").

122 *See, e.g.*, SCM Corp. v. FTC, 565 F.2d 807, 812 (2d Cir. 1977).

where a corporation is actually using an interlocking directorate to collude. Conversely, where it proves exceedingly difficult for a corporation to select a suitable alternative director, or where a corporation believes that economic analysis would cut clearly in its favor, a corporation would be more likely to engage in costly litigation.[123]

Additionally, litigation might be cost-justified in those rare instances where a corporation has already litigated a market definition issue,[124] or where a corporation is litigating a Section 7 market definition issue concurrently with a Section 8 issue. For instance, should interlocking corporations be sued under Section 7 to enjoin a merger between the corporations, as well as under Section 8 to remove a director, the corporations may be able to use quantitative evidence gained from the merger issue to support the claim that the companies are not competitors within the meaning of Section 8.

Largely, however, market definition analysis of the breed found in Section 7 cases is impractical in the Section 8 context; the increase in the accuracy of Section 8 is not worth the cost in most cases.[125] Nevertheless, a "quick-look" version of market definition analysis could be a viable alternative. Even if it is not practical in Section 8 cases to ascertain cross-elasticity as accurately as possible (as in high-stakes merger cases), the extent to which consumers actually substitute between products remains the right inquiry when defining competitors.

A realistic solution would be for courts to constrain litigation efforts with respect to the determination of whether interlocking corporations compete.[126] "For example, the number of testifying experts could be limited."[127] In fact, *TRW* analysis is essentially quick-look market definition analysis that lacks quantitative analysis. There is little reason, however, that Section 7 quick-look analysis could not also incorporate elements of quantitative analysis in the burden-shifting framework. For example, a party might be permitted to produce only one expert witness to testify with respect to the cross-elasticity of demand between the corporations in question; the opposing party would then be permitted one expert witness to rebut the testimony.

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123 For instance, highly-diversified interlocking corporations that are confident that they are not actually competitors are most likely to engage in quantitative analysis. *See supra* text accompanying note 23.

124 For instance, should Staples wish to interlock with a non-office supply superstore that happens to sell office supplies, much of the quantitative legwork would already have been done. *See supra* text accompanying note 91.

125 For a discussion of the costs and benefits of error-reduction in litigation, see Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994).

126 *See* Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 202 (1996).

127 *Id.*

B. *Avenues of Change*

1. Congressional Amendment

Well before *Staples* and *Oracle*, Congress recognized that Section 8 was in some instances overly restrictive in that it restricted companies that did not meaningfully compete. In an attempt to remedy this problem, Congress amended Section 8 in 1990 to include safe harbor provisions.[128] These safe harbors permit simultaneous directorships under certain de minimis conditions, including when "the competitive sales of either corporation are less than 2 per centum of that corporation's total sales; or the competitive sales of each corporation are less than 4 per centum of that corporation's total sales."[129] "The intent of the [committee in the de minimis exemption was] to preclude from the prohibition against interlocking directors competitive overlaps which are too small to have competitive significance in the vast majority of situations."[130] That is, Congress intended "to avoid application [of Section 8] when no potential for competitive harm exists."[131]

Although Congress did not engage in a detailed examination of the benefits of interlocks, it did recognize the value in non-interference in the market for executive talent, noting that "[t]he absence of a realistic de minimis exception for very small competitive overlaps has discouraged qualified persons from serving as directors when no potential for competitive harm exists."[132] Although in this sense the amendment of Section 8 to include de minimis exemptions was a step in the right direction, the amendment failed to address the problematic manner in which the courts have defined competitors.

There was, however, extensive congressional discussion of adopting the complete Section 7 standard for Section 8 cases (i.e., replete with competitive effect analysis). A version of H.R. 29 was proposed "which would [have][133]

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128 Antitrust Amendments Act of 1990, Pub. L. No. 101-588, 104 Stat. 2879 (1990) (codified as amended at 15 U.S.C. § 19 (a)(2)(B)-(C) (2000)) (amending Section 8).

129 *Id.* at 2897.

> In calculating whether any of these de minimis safe harbors apply, corporations subject to the act would be required to aggregate all products and services in competition with another corporation for comparison with total sales. In a case where a single corporate entity is involved, total sales will be based on total corporate sales.

S. REP. NO. 101-286, at 6 (1990).

130 *Id.* at 5-6.

131 *Id.* at 2.

> While the fundamental purpose of section 8 is still valid . . . a number of proposals have been made in recent years to reform this section to make it more consistent with modern economic and competitive considerations. . . . [T]hese proposals . . . recognized a need for Congress to reconsider the class of corporations covered by the section and whether there should be exceptions for competitively insignificant overlaps.

Id. at 3.

132 *Id.* at 3.

133 The original transcript reads "be."

permitted an interlock if the two competing corporations would be allowed to merge under the standard set forth in section 7 of the Clayton Act."[134] This would essentially have been the standard that was rejected explicitly in *Robinson.*[135]

Congress did not adopt this provision of the proposed legislation, correctly noting several policy concerns. First, "the interlock prohibition would effectively be nullified in all but the most egregious situations."[136] Secondly, "[s]uch a standard would require a complete competitive analysis, covering relevant market definition, entry barreirs [sic], 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 . . . ."[137] Interestingly, while there was extensive congressional discussion of adopting the complete Section 7 standard, there was little discussion of adopting a partial Section 7 standard, which would include only market definition analysis and not competitive effect analysis.

The intent behind Congress's addition of de minimis exemptions to Section 8 was to avoid hampering directorship determinations where no potential for competitive harm exists.[138] An overly broad definition of competitors, however, generates this very predicament. Recent enhancements in director liability can only have exacerbated the situation, as it becomes more difficult to recruit directors when they are likely to be liable for more corporate problems.[139] There are two ways in which Congress could amend Section 8 to resolve this problem. First, Congress could amend Section 8 to incorporate a quantitative definition of competitors. Alternatively, Congress could add another de minimis exemption based not on percentage of competitive sales, but on the extent of competition between products; firms whose products had sufficiently low cross-elasticity would be exempt even if those products fell outside the 1990 safe harbor.

2. Doctrinal Evolution

What do recent Section 7 merger cases imply for modern Section 8 interlocking directorate cases? If courts follow a *Clear Channel* approach,[140] the prospects are dim for the introduction of quantitative analysis in Section 8

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134 H.R. REP. NO. 101-483, at 3 (1990).

135 *See supra* text accompanying note 74.

136 H.R. REP. NO. 101-483, at 7 (noting that the "Merger Guidelines . . . often work to permit mergers of direct market rivals with up to a 35-40 percent marketshare").

137 *Id.* at 7. "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 . . . . We favor bright line tests for prophylactic rules." *Id.* at 6.

138 *See supra* text accompanying note 132.

139 *See supra* text accompanying note 22.

140 *See supra* text accompanying notes 54-56.

cases. On the other hand, if a court adjudicating a Section 8 claim recognizes the importance of quantitative economic analysis, as in *Oracle*, and appreciates subtleties in defining competitive scope as in *Staples*, one would expect greater receptivity to quantitative evidence for the purpose of determining whether corporations compete.[141]

The addition of the 1990 de minimis exemptions to Section 8 permits one possible avenue for courts to move away from the unfriendly treatment of quantitative evidence exemplified in *TRW*. Because the de minimis exemptions are based on percentage of "competitive sales,"[142] quantitative market definition could be applied to determine whether sales are competitive, rather than to determine whether corporations are competitors more generally. "[I]t is unclear how much analysis will be necessary to determine whether and the extent to which the corporations' sales are competitive in making [the de minimis] calculations. Potentially, this could require analysis similar to that necessary to define relevant markets . . . ."[143] Given that the intention of the safe harbors was to prevent the application of Section 8 where no potential for anticompetitive harm exists, this seems like it would be a sensible approach. But it is clear that Congress did not specifically intend this interpretation: "It is not the intention of the committee to alter the way in which the courts have determined whether products or services sold by one corporation are in competition with products or services sold by another corporation."[144]

Even supposing a willingness of the courts to move in this direction, such a transformation in Section 8 policy seems unlikely to occur in the near-term because of the infrequency of Section 8 litigation.[145] A corporation could accelerate the development of Section 8 jurisprudence by interlocking in a manner specifically intended to test the courts' receptiveness to economic analysis and the FTC's desire to pursue the case. An example of an ideal test case would be a scenario in which Staples interlocked with a non-office supply superstore whose sales of office supplies exceeded the de minimis exemption. Because remedies for violations of Section 8 are quite limited,[146] this may be a

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141 *Clear Channel* and *Oracle* starkly oppose one another with respect to the treatment of quantitative evidence. For a recent middle-ground case that incorporates both quantitative and qualitative factors, see *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485 (2d Cir. 2004).

142 15 U.S.C. § 19 (a)(2)(B)-(C) (2000).

143 MILES, *supra* note 104, at § 6:12. Miles dismisses this possibility on grounds that obscure the distinction between market definition analysis and competitive effects analysis: "It seems unlikely that, under a prophylactic statute such as § 8, courts will require refined, complex economic analysis. Assuming its requirements are met and its exceptions inapplicable, § 8 is a 'per se' statute in the sense that no effect on competition need be shown." *Id.*

144 S. REP. NO. 101-286, at 6 (1990).

145 Blumkin, *supra* note 45, at 22.

146 *See* Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1561 (10th Cir. 1984) ("The [plaintiff] has not shown that interlocking directorships have this kind of 'pernicious effect on competition and lack of any redeeming virtue.' We agree with the trial court that the [plaintiff] has not made out a case for damages under section 8 of the Clayton Act. . . . [T]he [plaintiff] offers only

less risky option than it first appears. Nevertheless, the dearth of Section 8 cases ultimately suggests that corporations are not testing the outer bounds of Section 8, perhaps because of litigation costs.[147]

Finally, it is unclear how courts would determine the appropriate quantitative threshold for defining competitors under Section 8. Simply importing the Section 7 market definition standard into Section 8 would be inappropriate because the benefits and costs of interlocks and mergers differ.[148] On the other hand, judicial examination of anticompetitive effects to develop a standard unique to Section 8 would seem to run directly afoul of the per se nature of the statute.

3. Agency Guidelines

Because changes in Section 8 policy seem unlikely to occur in the near-term through the judiciary or Congress, the most practical solution might be for the DOJ and FTC to issue guidelines for interlocking directorates as it has done for horizontal mergers.[149] The agency guidelines could explicitly endorse the use of quantitative analysis to define competitors in the Section 8 context. In developing these guidelines, the agencies could consider the anticompetitive effects of interlocks. The guidelines themselves, however, must carefully specify that quantitative analysis may be applied in Section 8 cases only to evince whether corporations compete, and may not be applied antecedent to competitive effects analysis. Regardless of the agencies' stance on whether quantitative market definition should be used in Section 8 cases, guidelines on interlocks would help to clarify what is clearly an underdeveloped body of antitrust law.

V. Conclusion

A wholly qualitative approach to Section 8 cases may result in an inaccurate application of the statute—a predicament that is problematic from both corporate governance and competition perspectives. The greater precision that generally accompanies quantitative analysis makes this approach a theoretically preferable method for defining competitors under Section 8. At minimum, parties should be given an opportunity to rebut qualitative analysis

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speculation on possible ill effects of interlocking directorships and no evidence of injury caused by a possible violation." (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

147 There is a free rider problem here; many corporations may benefit from a shift in Section 8 jurisprudence, but each corporation has incentive to let another corporation bear the initial litigation cost necessary to stimulate this shift. Furthermore, corporations for which Section 8 is potentially under-inclusive would obviously have little incentive to engage in this behavior. For a discussion of litigation costs, see *supra* text accompanying notes 119-126.

148 *See supra* text accompanying notes 108-109.

149 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52.

with quantitative analysis. In practice, however, the high costs of quantitative market definition analysis imply that "quick-look" quantitative analysis is most suitable to Section 8 cases, which typically involve lower stakes than Section 7 merger cases. The most sensible means of developing and implementing a revised Section 8 standard is through agency guidelines.

If crafted carefully, a quantitative standard in Section 8 cases need not change Section 8's prophylactic intent or per se nature. On the contrary, incorporation of quantitative analysis is a crucial step toward enabling corporations to capture the benefits of management interlocks where no potential for anticompetitive harm exists, while preventing corporations from interlocking where there is true risk of anticompetitive harm.