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THE REGULATORY HISTORY OF BUSINESS COMBINATIONS

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Abstract

This paper examines the legal and accounting history of business combinations. The economic development of guidelines governing current combinations is traced through legislation, court precedents, political events, recording methods, and accounting pronouncements. This examination indicates that the consistently applied accounting principles have been the only unchanged environmental factor during the current round of business combinations. Although the accuracy of the accounting principles in describing economic events cannot be claimed as a harbinger of merger activity, the consistency of those rules would seem, at least, to be a stimulant to merger activity.

INTRODUCTION

Business combinations are occurring at a rate unprecedented in American history. Banking aggregations seem to be leading the current wave of merger mania, but other industries are also experiencing important coalitions. The impact of this movement will have long lasting effects on the economy, and various experts predict a multitude of possible implications.

Periods of industrial concentrations are not a new phenomenon in American economic history. The technological advances in communication at the turn of this century led to the first major wave of business combinations. Two more waves occurred after World War I and II, when synergies of scale were realized. The current period of business combinations, however, has not yet been attributed to a common theme. Relaxation of regulation, refinements in the financial markets, and the development of global corporations are just a few of the explanations offered.

To better understand the reasons for today's merger mania an appreciation of the current regulatory climate is necessary. The remainder of this article traces the regulations affecting the legal and recording options available to corporations throughout American history. The evolution and variability of the legal environment is first noted and then the development of a consistent set of accounting regulations is traced.

LEGAL REGULATORY HISTORY

The legal system in the United States is rooted firmly in the English Common Law System. Any explanation of a legal problem that started before the turn of the century in the United States must examine the development of its English counterpart, and the examination of English Common Law must continue until a significant body of precedents has been formulated within the United States. The legal time line (see Appendix) depicted shows the development of English Common Law regarding business combinations through 1892. By this time business combination legislation had begun in earnest in the United States, and the direction of

precedent separates for the two legal systems.

Development of Competition in England

During the Middle Ages, commerce in England occurred mostly at annual harvest fairs where agricultural and household products were exchanged. Laws were first enacted to prevent various forms of wholesaling, including forestalling, which concerns buying products before they reached market; engrossing, which is the purchase with intent to resell; and regrating, which is the buying and selling of a product in the same market. These acts were deemed illegal because of the implied possibility of cornering a local market, and of eliminating competition, and because of the general intolerance of middlemen. English land, at this time, was held by the aristocracy, whose principle income was derived from the production and sale of agricultural products. The ruling class had no incentive to share profits with a market distribution system, and they also attempted to protect the interests of their wards from perceived manipulations.

The courts upheld these laws, forcing the producer to compete against equals, and soon the right of free competition became a cornerstone of English Common Law (Armentano 1982). In 1415 the right of competition had become so basic that a dyer's agreement not to practice his trade in a specific town was found to be in restraint of trade and was set aside.

As commerce grew in England and some port towns became collection points of imported items the inability of original importers to directly deal with ultimate consumers became apparent. Regrating laws were rewritten to allow wholesaling as long as the buyer did not resell his merchandise in the original market.

Relaxation of the regrating laws, growth of commerce, and centralization of trade continued during the sixteenth century in England. The crown quickly took advantage of these opportunities to extract complete control of certain goods. Royal grants were made which allowed favored individuals to become the exclusive agents in the destination of a specific commodity. In 1602, Queen Elizabeth's grant of a playing card monopoly was found to be in restraint of trade and therefore illegal. Finally, in 1624, all crown grants were struck down by an Act of Parliament and the precedent was set for the continued growth and centralization of commerce under the old rules of free competition.

In 1690, another barrier restricting competition was struck down in the English courts when a cloth worker was accused by the Cloth Workers Guild of practicing his trade without serving his required period of apprenticeship. The courts decided the cloth worker was not bound by the guild's requirements and that occupations that were easily learned and had low entry-level costs were therefore opened to unlimited competition.

During the eighteenth century English law began to reverse itself on the issue of free and unlimited competition. In 1772 the wholesaling laws were repealed in their entirety, and finally, in 1844 Parliament prohibited the courts from prosecuting cases under the precedents set by the old laws. This enabled parties to establish practices which might be in restraint of trade if all parties involved agreed to abide by the agreement. The courts did not find monopolies legal, but neither was any action taken to strike down these illegal restraints of trade if no participating party complained.

The Mogul Steamship Company case illustrates this "laissez faire" attitude of English Common Law. Mogul, a tea shipper, was ruined by the concerted actions of several other shippers

who conspired to undercut Mogul in price whenever he shipped from China. The courts found that, although the actions of the conspirators were not binding upon each other because of the agreement's illegality, Mogul was not entitled to damages because of the same illegality. English courts had arrived at the conclusion that business practices and public welfare were not to be regarded as an integrated whole.

Early American Developments

During this stage of development of English Common Law, the laws of the United States were evolving in a different direction. The outcome of the Cloth Workers Guild Case in 1690 accurately reflected the practices in effect in the English colonies. Colonists were free to become whatever they desired as soon as their passage was paid, and labor shortages required a quick technical education of anyone with ability.

The dynamic growth and concentration occurring in English commerce bypassed the colonies until after the revolution, when the abrupt break from colonial rule required that the United States develop its own commercial independence. Yet, because of the balanced political power of the agrarian south, the United States' legal system did not develop a "laissez faire" attitude toward business to the same degree as Britain. Instead, a confrontational attitude resulted that has dominated the relationship between business and government ever since.

Jackson's election in 1832 best illustrates the continued distrust felt by the agrarian and frontier interests of those favoring centralized commercial power. A very important plank in Jackson's election campaign was an emphatic statement against renewing the charter of the Second Bank of the United States. Not only was this a states' rights issue, but such a statement also expressed an intense disfavor of the lack of competition. Jackson saw no reason to centralize or limit the financial interests, as he was sure that such an act would also centralize and limit other types of commerce.

The English Common Law tradition against the restraint of trade was also firmly implanted in the United States' judicial system. American courts found the original efforts of union organization illegal as a restraint of trade, and found grain monopoly agreements illegal and therefore unenforceable. The grain monopoly case in 1875 pointed out the same weakness in the United States' legal system as would become apparent in England under the Mogul Steamship Company case. Monopoly agreements were illegal and therefore unenforceable, but no legal provision existed to make conspiring parties cease their restraint of trade practices. Therefore, when telegraph lines were completed, making effective management of far-flung entities possible, the first merger wave occurred in the United States (Chandler 1977).

Congress and some individual states took actions during the remainder of the century which would finally remedy the legal void. In 1887, Congress passed the Interstate Commerce Act empowering the federal government with authority in the area of commerce for the first time, and therefore laid the foundation for legislative redress to restraints of trade. The individual states, however, did not act in a uniform manner on the same issue. New Jersey, a highly industrialized state, enacted a trust law in 1888 allowing corporations to buy stock in one another, thus paving the way for mergers (Pusateri 1984), and a year later Kansas was the first of many agricultural states to enact an anti-combination statement forbidding corporate growth by acquisition.

Beginnings of Federal Involvement

In 1890, the federal government

enacted the Sherman Act in an attempt to bring some uniformity to the various states' statutes. The Sherman Act declared combinations resulting in restraint of trade illegal and provided penalties for parties found to be participating in such agreements. The law was not specific as to what constituted a restraint of trade, and it therefore fell to the courts to define this crucial concept.

The first test of the Sherman Act by the Supreme Court was the Knight Case in 1895. The Sugar Trust was organized into an amalgamated company in 1890, and when it acquired four of the five remaining refineries, the government moved to cancel the sale. Despite the ideal case against the near monopoly, the court found that the provisions of the Sherman Act did not apply to manufacturing, only to trade. Since refining sugar was a manufacturing process, the Sherman Act was not applicable.

This near repudiation of the Sherman Act severely curtailed government prosecution for the next nine years. In 1900, Congress tried to pass an amendment granting itself the power to regulate manufacturing, but it was decided that other remedies should be attempted first. In 1903, the Bureau of Corporations was established to study corporate regulations more closely, and the Elkins Act was passed to regulate an area of commerce still under federal jurisdiction -- rail trade.

Roosevelt's election in 1901, followed by Taft's administration in 1909, consisted of eleven-and-a-half years of "trust-busting". Both presidents actively pursued attempts to regulate the areas of commerce left to them by the decisions of the Supreme Court. The Northern Securities Company Case in 1904 established that holding companies were subject to the Sherman Act's provisions; the National Meat Packing Case in 1905 extended the definition of interstate commerce, and the Standard Oil Company Case and the American Tobacco Company Case in 1911 established more precise definitions of unreasonable restraints of trade.

The court's definitions of unfair practices reflected a growing national sentiment against business combinations. Woodrow Wilson, first as Governor of New Jersey and then as President, captured this sentiment and effectively used it to pass the basic anti-trust law in effect today. As governor of New Jersey, Wilson passed seven corporation laws, known as the "Seven Sister Laws," which radically changed New Jersey from a haven for aggressive large corporations to the leader in manufacturing regulation. Upon his election to the presidency in 1913, Wilson continued his anti-trust campaign and successfully passed legislature establishing the Federal Trade Commission (FTC) and enacting the Clayton Act. These two actions provided the legal definitions and the agency arm that strengthened federal regulation of business combinations.

Section Seven of the Clayton Act prohibits any corporation from acquiring the stock of any other corporation if the subsequent combination lessens competition or creates a monopoly. This provision did not block asset acquisitions, but prevented the formation of holding companies, and it therefore marked the beginning of the campaign against potential, rather than actual, trade restrictions.

The government's case against the United States Steel Corporation (U.S. Steel) in 1920 was principally based upon the fact that U.S. Steel was a giant corporation and therefore had the potential power to violate the Sherman Act. In this instance, the potential actions of a corporation, due to its size and market share, were dismissed. The Supreme Court indicated that actual violation needed to occur to show legal intention to violate free competition (Blackford 1986).

From 1920 to 1950, legislative and judicial actions against trusts were much more repressed. The Radio Company Act of 1927 reaffirmed Congress's disdain of business combinations, but first the Depression and then World War II hindered aggressive actions against the ailing and essential manufacturing companies. In 1950, Congress re-entered active pursuit against business combinations and enacted the Keller-Kefauver Antimerger Act. This Act amended Section Seven of the Clayton Act and closed the asset acquisition loophole previously available. With this action, the federal government became the determinative body of ascertaining the legality of business combinations.

Developments During the Current Period of Combinations

The definition of illegal mergers was soon expanded to include not only the traditionally restrained horizontal combinations but others as well. The Brown Shoe Company-G. R. Winney Company merger in 1956 was found illegal, and divestiture was ordered in 1962. In this case the Supreme Court found that the vertical combination of a shoe manufacturer, and a chain of retailers had the potential to cause restraint of trade because of monopolistic tendencies. The Continental Can and Alcoa cases of 1964 both blocked mergers of companies producing different, and not perfectly interchangeable, products. In both instances, the Supreme Court found that the merged parties might be future competitors, and merger at the present time would have the effect of reducing future competition.

The Von's Grocery case in 1966 provided another indication of the government's and the court's desire to prevent economic concentration. Two Los Angeles grocery chains, comprising 7.5 percent of the total grocery sales in the local market, merged. The courts found, from structural percentages alone, that the combination might reduce competition and ordered the merger blocked. The area of supposition and uncertainty was further extended in the Procter-Clorox case of 1967. In this instance, the Supreme Court found that evidence of anticompetitive effects were not necessary for a merger to be blocked under the Clayton Act, but that only probable or possible circumstances needed to be illustrated by the government for a combination to be halted.

The recent American Telephone and Telegraph consent decree again represents the government's desire to prevent or even reverse economic concentration. The near monopoly position of the quasi-public utility corporation providing telephone service has been regionalized and separated from its traditional supplier.

Only future developments will enable us to assess the economic wisdom of the government's anti-trust policies. At present, a participant in the economic environment must understand the rules and intentions within which business combinations must be transacted.

ACCOUNTING PRACTICES

Controversies in accounting for business combinations started much later than the controversies involving the legal process of business mergers. The basic reason for the lack of a dispute in the financial recording of business combinations was the lack of options available. Until the 19th century, business combinations were merely treated as any other purchase transaction by the dominant party and, in fact, accounting textbooks printed in the early twentieth century only presented the purchase method for recording business combinations (Dickinson 1918 and Newlove 1926). The acquired assets were incorporated on the surviving entity's balance sheet at the fair market value of the assets given up and/or the liabilities incurred.

During a "purchase" transaction, individual assets acquired are valued at their fair market values as long as the exchange price equals the combined total fair market value of net assets acquired. An exchange price less than the combined fair market value of individual assets less liabilities causes the acquired assets to be recorded at a value less than fair market, i.e., at a proportionate amount of their fair market value. An exchange value which is more than the combined fair market value of the individual acquired assets less liabilities causes the difference to be recognized as goodwill.

Evolution of the Pooling Method

The late 19th century saw the evolution of a second form of recording business combinations; mergers occurred which involved no dominant party, but rather, two entities combining to form a new corporation with equal participation by both parties. Accountants could not determine which entity's records should be restated, so, upon direction of a federal court, the records of both entities were pooled into one set of financial statements (Andrews 1979). The book values of both companies were simply combined in this "pooling of interests" method of accounting for a business combination.

The appearance of the new option with which to record a business combination did not immediately cause a controversy in the financial community. However, the primary concerns of accountants at this time centered on the current valuation of assets, and these cases were pursued for their usefulness in establishing current value theories rather than formally establishing the pooling method as a viable alternative when recording business combinations. It was not until the early 1940s that the Federal Power Commission required that the pooling method specifically be used in certain instances (Rayburn 1984).

Accounting for "Purchased Goodwill"

The authoritative accounting body, the Committee on Accounting Procedures (CAP), issued a statement in 1944 which further confused the matter. Accounting Research Bulletin (ARB) No. 24 allowed the goodwill accumulated in a purchase method business combination to be written off against owners' equity. This allowed future income statements to be bypassed when excess values were expensed, and negated one big difference between the purchase and pooling methods.

The Securities and Exchange Commission (SEC) showed their displeasure with ARB No. 24 by issuing Accounting Series Releases (ASR) No. 50 just one year later. ASR No. 50 required that any write-off of goodwill be made to retained earnings rather than any other equity account, but also stated that it was preferable to make periodic changes to income when amortizing such intangible assets.

Finally, in 1950, CAP directly addressed the business combination dilemma and attempted to establish guidelines for the use of the two business combination accounting methods. ARB No. 40 provided four qualitative tests (continuity of ownership, similarity of size, continuity of management, and similarity of business) to determine whether a combination qualified as a pooling of interests, and the pronouncement dictated that failure of any of the four requirements must result in the combination being recorded as a purchase transaction. These guide-lines were clearly and explicitly stated but, with the loophole left open by ARB No. 24, businesses could obtain similar results with either accounting method.

During 1953, ARB No. 43 closed the loophole left by ARB No. 24, and the method of accounting became the area of contention. ARB No. 43 required that goodwill should not be written off immediately or over time

directly to any owner's equity account. It advocated that the term of existence of an intangible asset should be determined and its value amortized over that period. This action clearly differentiated all aspects of accounting for business combinations, and made the distinction between alternatives critical. The accounting options were no longer open to management, and desired effects could no longer be manipulated on financial statements.

Differentiating Purchases from Poolings

When the effects of ARB No.43 were ascertained and the options previously open to accountants eliminated, the dogmatic approach of accounting for combinations established in ARB No. 40 was criticized. The size criterion was most often the target of blatant manipulation, and soon CAP was compelled to restate the criterion in ARB No. 48. This pronouncement, issued in 1957, reiterated three of the four tests established earlier regarding continuity of ownership, management, and business activity, but succumbed to pressure and relaxed the equal size qualification.

The SEC again indicated its displeasure of the accounting guidelines when Andrew Barr, the SEC's chief accountant, gave a speech before the 1958 Annual Meeting of the American Institute of Certified Public Accountants. Mr. Barr expressed his concern that the latitude left in accounting for business combinations might once again open the door for current value accounting, and since the SEC was still under the impression that such flexible accounting practices contributed to the stock market crash of 1929, he indicated that such guidelines were unacceptable (Barr 1959).

The weakness and indecision shown by CAP in issuing ARB No. 48 was one of many factors which eventually lead to the decision by the American Institute of Certified Public Accountants (AICPA) to replace CAP with the Accounting Principles Board (APB). Before it was replaced, CAP issued a final pronouncement outlining the procedures that should be used when consolidating financial statements and described the instances when such consolidations should take place. Although ARB No. 51 did not directly discuss the issue of accounting for business combinations, it did establish guidelines for the procedures that must be followed when purchase or pooling transactions occur.

The APB was constructed to replace CAP, with direct instructions to provide either broad concepts and principles or to conduct an indepth examination of a specific area of interest. One of the first projects targeted for reexamination was business combinations.

Arthur Wyatt's examination of business combinations was published in 1963 in Accounting Research Study (ARS) No. 5. The study examined past results and concluded that accounting for business combinations was not currently satisfactory. As a remedy, more rigid guidelines were proposed, and another alternative, "fair value pooling," was offered. This option combined some aspects of both purchase and pooling. Assets would be revalued to their fair market value, but no goodwill would be capitalized. Although Wyatt's conclusions were widely accepted, the APB took no immediate new action on the topic of business combinations. APB Opinion No. 6 merely confirmed ARB No. 48's authority, and the matter remained unsettled until 1970.

Finally, in 1970 the APB issued APB Opinion No. 16, which clearly dictated guidelines for choosing between the purchase and pooling methods of accounting for business combinations. Twelve complex tests were outlined, and the opinion required that all 12 be met before a combination could be considered a pooling of interests. The guidelines broke with prior attempts to

require the accountant to differentiate between economic events and allowed him/her to base the determination on strict pronouncement rulings. The opinion attempted to establish clear and reliable rules to govern accounting for business combinations.

Current Developments

Since APB Opinion No. 16's adoption, the AICPA has abolished the APB, and the independent Financial Accounting Standards Board (FASB) has been created to provide accounting pronouncements. During the first 13 years of the FASB's existence, three statements, two interpretations, and a technical bulletin have been issued which amend APB Opinion No. 16. However, of 173 citations in force in the current text guidelines concerning business combinations, APB Opinion No. 16 accounts for 126 (or 73 percent) of these. Clearly APB Opinion No. 16 provides most of the current framework concerning the business combination process.

FASB Statements No. 10, 38, and 79, Interpretations No. 4, 9, and 25, and Technical Bulletins 81-2, 85-5, and 85-6 cover complex issues that have evolved during the current period of merger activity. These pronouncements do not establish new precedents, but rather, deal with the recording intricacies that occur when regulated or specialized industries are involved in business combinations.

CONCLUSION

Legal regulation of business combinations certainly has not been as aggressively pursued during the last five years as it was in the 1950s and 60s but, as the AT&T Case illustrates, federal authorities are not tolerant of monopolistic industrial concentrations. The scrutiny under which the recent proposed aviation mergers are being studied would also seem to support the fact that federal encouragement is hardly positive with regard to unlimited business combinations.

Despite the less than enthusiastic response of the federal regulators, mergers are occurring in record numbers. The acquisition of competitors or entry into new markets is being pursued at an unprecedented rate. Businesses are purchasing research and development by buying entire small corporations in mass, and the stock of other corporations is being obtained in stock-swaps in order to gain title to advantageous tax credits. Business combinations are continuing in record numbers.

The sole constant on the regulatory horizon is the basic accounting treatment. Since 1970, when APB Opinion No. 16 was issued, no new accounting guidelines have been promulgated that change the basic recording of business combination. Although it certainly cannot be claimed that the consistent accounting regulations are a cause of merger activity, consideration must be given to the possibility that the concurrence of a stable record keeping process with a subdued legal regulatory environment allows businesses to follow the aggressive course of action which they are currently pursuing.

Mergers and their effects on the business environment are an important area of study. Economists must proceed with the examination of the possible effects that industrial concentrations will have on the American economy, and they should realize that the regulatory environment is an important factor in the merger model. Legal and transactional regulation both need to be included in any models, and this review hopefully provides some insights into the timing and the effects of those regulatory environments.

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APPENDIX

Time Line

	Legal Time Line	Accounting Time Line
	English Common Law	
1266	Forestalling, Engrossing, and Regrating Laws	
1415	Dyer's Case	
1552	Regrating Restriction Law	
1602	Queen's Monopoly Case	
1624	Statute of Monopolies	
1690	Cloth Worker's Guild Case	
1772	Repeal of Forestalling, Engrossing, and Regrating Laws	
1844	Prohibition of Prosecution of Old Restraint of Trade Laws	
1892	Mogul Steamship Company Case	
	United States Law	
1832	Jackson's Election with Plank Advocating Nonrenewal of the Charter of the Second Bank of the United States	
1835	New York State Union Conspiracy Case	
1875	Illinois Grain Monopoly Case	
1887	Interstate Commerce Act	
1888	New Jersey Trust Law	
1889	Kansas Anti-Combination Law	
1890	Sherman Act	
1895	Knight Act	
1897		Smyth & Ames Case
1903	Bureau of Corporations Elkins Act	

	Legal	Accounting
1904	Northern Securities Company Case	
1905	National Meat Packing Case	
1911	Standard Oil Company Case American Tobacco Company Case	
1913	New Jersey "Seven Sisters" Law	
1914	Clayton Act Federal Trade Commission Established	
1920	United States Steel Corporation Case	Dickinson Text
1927	Radio Company Act	
1928		Wildman and Powell Assay
1943		Federal Power Commission Case
1944		ARB No. 24
1945		ASR No. 50
1950	Antimerger Act	ARB No. 40
1953		ARB No. 43
1957		ARB No. 48
1959		ARB No. 51
1962	Brown Shoe Case	
1963		ARS No. 5
1964	Continental Can & Alcoa Cases	
1965		APB No. 6
1966	Von's Grocery Case	
1967	Procter Gamble & Clorox Cases	
1970		APB No. 16
1975		SFAS No. 10
1976		FASB Interpretation No. 9
1978		FASB Interpretation No. 25
1980	AT&T Case	SFAS No. 38
1981		FASB Technical Bulletin 81-2
1984		SFAS No. 79
1985		FASB Technical Bulletin 85-6