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THE INDOCTRINATION OF COMPETITIVE BIDDING INTO THE FIELD OF ISSUING SECURITIES

By GEORGE B. WHEALEN

Today, there exists two methods by which the issuers of securities, such as bonds, debentures, and equipment trusts sell their issues. One method is by private negotiation, the other is by opening the sale of such newly issued securities to public competitive bidding. In the early history of issuing securities the predominant method of selling these issues was by private negotiation. This was a satisfactory transfer until out of these private negotiations there evolved several huge monopolies in the underwriting field. That is, several investment bankers would handle virtually all of the underwriting of issues in major industries such as railroads and public utilities. It might here be explained that to underwrite an issue of securities is to take charge of the distribution and sale of such securities to the public. The underwriter guarantees to purchase all of the securities with the expectation of selling them to private investors. He is the "middle man" in the transferring of securities from the issuer to the public. Realizing the injury to the public interest that these monopolies brought about, different legislative bodies and governmental commissions have enacted and enforced rules requiring competitive bidding in certain types of industries, namely those industries which greatly affect public interests. As a result, most underwriting of security issues today is handled by public competitive bidding. As evidence of this fact, between January, 1941, and January, 1951, out of a total of 803 debt issues sold during that period, 548 (68 per cent) have been sold competitively.[1]

The problem of compulsory competitive bidding in different fields should arouse the general interest for two important reasons. First, stripped of its formalities, the basic problem presented is, should the government dictate to a company how and to whom this company should sell its securities. Or, should we let the company sell securities to whoever it chooses. In other words, how much control should the government have a right to exert on its private citizens? It comes down to the right to trade freely versus the degree of public interest at stake in such sales. Secondly, the amounts involved in the sale of securities in dollars and cents are huge. Between January, 1941, and January, 1951, the aggregate amount of debt issues underwritten alone was valued at 17.8 billion dollars.[2] That ours is a nation of credit is well exemplified by that figure since basically all a debt issue represents is a long-term loan made by its issuer.

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[1] "A Decade of Competitive and Negotiated Debt Financing," Halsey, Stuart & Co., Inc., p. 1.
[2] *Ibid.*

Thus it appears that the principles of free enterprise, as well as a good part of our nation's finances, are directly related to the problem of compulsory competitive bidding.

A Brief History of the Growth of Competitive Bidding

As was stated, years ago most sales of securities by the issuer were carried out through private negotiations with the company and the underwriter, or private investor. The first evidence of compulsory competitive bidding by statute was in Massachusetts in 1870. A state law[3] was passed requiring that all stocks of gas and electric companies shall be sold through competitive bidding, if not taken by shareholders pursuant to their preemptive rights. In 1918, this requirement was extended to bonds.[4]

During the same period the American Company and its predecessor, the American Bell Telephone Company, on their own volition invited competitive bids for their long-term debts.[5] Then in 1906 they changed their policy and entered into private negotiations for such sales. One of the principal underwriters was J. P. Morgan & Co.[6] which, as will be shown, was one of the monopolistic underwriters that the government commissions have aimed to control by their compulsory competitive bidding laws.

In 1918 and again in 1929 the Indiana Public Service Commission required certain public utility companies to sell their issues of securities at public auction.[7]

The problem first attained the serious consideration of a Federal Commission, the Interstate Commerce Commission, in 1924 in the Chicago Union Station Bond Issue case.[8] In that case the above mentioned corporation, pursuant to the Interstate Commerce Act, ruling section 20a (2) and (3),[9]

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[3]Mass. Gen. L. C. 164, secs. 18-19; 5 Ann. L. Mass. C. 164, 18-19.

[4]Mass. Gen. L. C. 164, sec. 15; 5 Ann. L. Mass. C. 164, sec. 15.

[5]F. C. C. Report of the Investigation of the Telephone Industry in United States, pursuant to Pub. Res. No. 8, H. R. Doc. No. 340, 74th Cong.; 76th Cong., 1st Sess. 593 (1939).

[6]*Ibid.*

[7]Re Citizens Gas Co., Public Utility Reports, C. 354 (1928).

[8]Chicago Union Station Co., First Mortgage Bonds Issue for Construction of Passenger Station at Chicago, Illinois, 86 I. C. C. 529 (1924).

[9]Sec. 20a of Interstate Commerce Act: "(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . unless and until, and then only to the extent that, upon application by the carrier and after investigation by the commission of the purpose and uses of the proposed issue and the proceeds thereof, . . . the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within the corporate purposes and compatible with public interest, which is necessary or appropriate or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

"(3) The commission shall have power by its order to grant or deny the application as made or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary and appropriate in the premises, and may, applied for permission to sell an issue of securities which were privately negotiated to Kuhn Loeb and Company. In an order granting this permission, the commission stated that it knew of no good reason why applicant in selling securities should deal with a single financial house. But they allowed the sale, for they felt that it was set at a fair price, even though made through private negotiation. Finally, in 1927, this same commission established a rule requiring all equipment trust issues to be underwritten only after competitive bidding.[10] The commissioners felt that with the great growth of the security market, the best method of obtaining wide distribution of the issue would be through competitive bidding. Also, they felt that this method would do the job cheaper than by private negotiation. The commission based their authority to enact such a rule under section 20a (2) and (3) of the Interstate Commerce Act.[11] The language in these subsections was considered broad enough to confer such powers on them, i. e., to compel as a general rule public bidding in any group of issues sold by common carriers.

In 1935, Congress in passing the Public Utility Holding Company Act[12] conferred upon the Securities and Exchange Commission authority over public utility holding companies similar to the authority the Interstate Commerce Commission had over common carriers. In passing the act Congress directed particular attention to the evils which could result when a special relationship exists between parties who enter into a transaction in which there is an absence of arms length bargaining.[13] The commissioners would carefully study the underwriting of issues sold by companies under their control. They would use their discretion in accepting and rejecting different sales, always keeping in mind what is best for public interest. But, nevertheless, these monopolies continued in the underwriting field. In 1938, the S. E. C. enacted rule U-12F-2.[14] It prohibited the paying of underwriters' fees unless paid to those awarded issues by open competition. An exception to the rule was that it did not apply to those underwriters awarded 5 per cent or less of the total offering.[15] This exception was the undoing of the spirit of the rule.

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from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by particular purposes, uses, and extent to which, or the conditions under which, any securities so therefore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section." 63 Stats. 487 (1949); 49 U. S. C., sec. 20a (2) (3) (1950).

[10]In re Western Maryland Equipment Trust, 111 I. C. C. 434 (1927).

[11]See note 9, *supra*.

[12]49 Stats. 803 (1935), 15 U. S. C., secs. 79-79z (1950).

[13]Statement of the S. E. C. upon promulgation under the Public Utility Holding Company Act of 1935, of rule U-50 requiring competitive bidding of registered public utility holding companies and their subsidiaries.

[14]Fed. Register, vol. 3.3 (Dec., 1938).

[15]*Ibid.*

The monopolistic houses organized bidding groups[16] and managed them. Thus, they could privately negotiate and underwrite a whole issue and afterwards split it up among the members of the bidding group which they managed (each member receiving less than 5 per cent of the total issue). This newly developed situation necessitated longer and costlier investigations[17] by the S. E. C. than previous to the enactment of rule U-12F-2. In 1940, the S. E. C. made an extensive and lengthy investigation into the matter, which included many public hearings and a final public conference.[18] Advocates of both competitive bidding and private negotiation presented their arguments in this conference. From this investigation the commission concluded that the public interest demanded the adoption of public bidding for all securities requiring its approval.[19] Accordingly, on April 7, 1941, it adopted rule U-50[20] and rescinded rule U-12F-2.[21] The rule required competitive bidding for the sale of securities issued by all companies that came under the Public Utility Holding Company Act of 1935, i. e., all registered public utility holding companies. In the promulgation statement[22] the commission stated that it could control no other companies under this rule.

Meanwhile, during the period of this investigation and legislation by the S. E. C., other federal control commissions were passing similar acts controlling the issuing of securities of companies under their jurisdiction by compulsory competitive bidding.[23]

By 1943 all of the governmental agencies, with the exception of one, had enacted similar rules requiring public bidding of issues sold by companies under their jurisdiction. The one exception was the Interstate Commerce Commission, the same agency that pioneered in compelling competitive bidding.[24] In 1943, the controversy as to whether or not this commission should compel public bidding for issues sold by railroads grew to one of major importance. This was evidenced in the Pennsylvania Railroad case.[25] This railroad applied to the commission for an order permitting the sale of

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[16]Common term for a number of underwriters joining together for the purpose of bidding as a body, for a certain issue put up for sale. Each member underwrites a part of the issue.

[17]In Matter of Consumers Power Co., 6 S. E. C. 444, 457 (1939); Holding Company Act Release No. 2654, March 28, 1941.

[18]A transcript of the conference is available at the S. E. C. office in Washington. It might be interesting to note that the representation of those active in utility holding company management was weak. Only two persons with any background in such management appeared at the conference. One advocated competitive bidding, the other opposed it.

[19]See note 13, *supra.*

[20]17 Code Fed. Reg., sec. 250.50 (1949).

[21]See note 14, *supra.*

[22]See note 13, *supra.*

[23]For example, the Federal Power Commission (1939), 2 Fed. Power Comm'n Rep. 350.

[24]See note 8, *supra.*

[25]Otis & Co. v. Pennsylvania Railroad Co. et al., 61 F. Supp. 905 (1945), affirmed 155 F. 2d 522 (1946).

certain securities to Kuhn Loeb & Company, investment bankers. The sale was privately negotiated. Permission was granted. In a dissenting opinion, Commissioner Eastman stated that he felt the underwriters had a monopoly on handling these issues and that they played the part of "jobbers," distributing the issues to other investment bankers instead of acting as retailers. This controversy came to a head and was decided in ex parte 158.[26] The hearing was concluded on May 8, 1944, and out of it came an I. C. C. order[27] requiring competitive bidding for all sales of issues by companies (common carriers) under its control. In the opinion of the hearing the commission emphasized that there were four main factors that should be kept in mind in deciding the controversy. How will compulsory competitive bidding affect: (1) the prices involved in the transaction, (2) distribution of the securities, (3) the loss of investment banker's advice and services given to the issuing companies, and (4) the loss of the protection that these investment bankers would give to these companies?[28]

More recently, the Railroad Commission of the State of California conducted a hearing on the question of requiring compulsory competitive bidding by the companies under its control, i. e., public carriers and utilities. They answered the question in the affirmative and adopted a rule requiring public bidding.[29]

At present the question is fairly well settled. Industries which most affect public interest, such as public utilities, electric companies, and railroads are compelled to offer their newly issued securities for sale by competitive bidding. One major field stands uncontrolled by any government agency in this respect. This is the field of industrials, including those industries which produce and process goods as differentiated from those industries giving a public service. These industries do little or no selling of their securities by competitive bidding.

Given a brief history of this gradual change over from private negotiating to competitive bidding, for what reasons did these government agencies enforce such a change? Why did public bidding encounter so much opposition, both by companies issuing the securities and by many underwriters?

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[26]Ex Parte 158, In re Competitive Bidding in Sale of Securities, 257 I. C. C. 129 (1944).

[27]*Ibid.*

[28]See note 26, *supra.*

[29]Before the Railroad Commission of the State of California, Decision No. 38614, June 15, 1946. It should be noted at this point that there is a close uniformity in the procedure and results attained by the different commissions (both state and federal) in adopting competitive bidding rules. All of them are granted authority under similar provisions (such as I. C. A., sec. 20a, (2) and (3), note 9, *supra*) from similar acts. They use basically the same reasons for the necessity of enacting the rules. And, finally, the rules adopted by each commission are almost identical. They contain about the same exceptions. The rule usually specifies that it doesn't affect: (1) Preemptive right of present security holders; (2) Issues totaling less than one million dollars; (3) Short term securities, and (4) Securities issued for purpose of reorganization, liquidation, merger, etc.

Arguments Favoring Competitive Bidding

These governmental agencies were, in most cases, delegated one basic responsibility. They must control and regulate the management of the companies under their jurisdiction as will best suit the public interest. What many company managers fail to realize, when arguing against such measures as compulsory public bidding, is that the regulatory commission is primarily interested in what will satisfy the public as a whole and not what will best satisfy the company.[30] What measures would reduce the expense to the consumer? One thing that obviously would produce this result would be to cut down the expenses of the company that serves him. The commissioners had thrust upon them a multitude of statistical evidence conclusively proving that the issuers of securities would obtain a much higher price for their issues if they asked for public bids from underwriters. The virtue of this method of obtaining an underwriter to handle the issue lies in the fact that the issuer has available to it the highest bid in each instance. This fact was established on the evidence that the "spreads" obtained selling competitively were much lower than those obtained through private negotiation. The "spread" or gross profit to the underwriters on each issue has been computed as the difference between the price the underwriter paid the issuer and the initial offering price to the public, i. e., the price that the underwriter hopes that he will get for the securities. The offering price of an issue is usually based upon what the prevailing market price of similar securities is at the time of issuing. That price would normally be the same regardless of the method used to bring the issue to the public. So, if it could be shown that the gross profit of the underwriter decreased after the use of competitive bidding, this would be strong evidence that the underwriter, receiving less gross profit or spread, is paying a higher price for the issue than he would have paid under private negotiation. One of many examples proving that this actually happened may be found in the following figures: The underwriting "spreads" for utility debt issues ran from 1.325 per 100 before Rule U-50[31] was passed in April, 1941, compelling competitive bidding, to .43 per 100 in 1950.[32] This and other evidence has aided the commissions in concluding that competitive bidding has resulted in a lowered cost of raising capital.

Another attribute of public bidding worthy of note is that it affords the management and directors of the issuing company more protection against charges by stockholders for injury caused the company by using poor judgment. In private negotiation the management leaves itself open to charges of

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[30]See note 7, *supra.*
[31]See note 20, *supra.*
[32]See note 1, *supra,* at 11.

negligence in setting the selling price and its terms. In competitive bidding management is assured of getting the best price if it accepts the highest bid.[33]

Another benefit brought about by competitive bidding is that it simplifies the commission's job in deciding what is a fair price for each sale of an issue. This fact has been greatly disputed. But one must appreciate the extensive investigations a commission had to make into the suitability of the selling price of privately negotiated issues before it could allow the sale to be effective. A price set by fair competitive bidding should be representative of the best price that a company could get for the securities it issues.

Arguments Against Private Negotiation

Is the fact that there are obvious benefits to competitive bidding as a method in obtaining an underwriter to handle the issued securities the only reason that the railroads, utilities, and other companies are ordered not to privately negotiate with underwriters? No. Conversely, there is the added reason that the lawmakers and commissioners feel that private negotiation is injurious to the public interest.

Through years of private negotiating, different companies become accustomed to dealing with the same writers exclusively. In itself this is not an evil, for the basic capitalistic principle is that every man should have the right to deal with whom he pleases. But out of continued dealing with the same underwriters there evolved an evil that had to be destroyed in companies that directly served the public. This evil could be best described as appearing in the form of a monopoly in the underwriting field. For example, two underwriting firms,[34] and their affiliates were the only underwriters for virtually all of the railroads in the nation. These railroads failed or refused to investigate the possibilities of other avenues of financing. These underwriters could effectively name their price. At least they had no fear of losing their account to another company because of the offer of a higher price. And until the I. C. C. finally made an absolute requirement for competitive bidding, even the courts tolerated these policies. It was stated "the manner in which the defendant corporation floated the bond issue has been in use almost since 'Iron Horse Days'—it is apparently a matter of corporate policy pursued by the railroads generally."[35] But ironically enough this was used as a reason for allowing such monopoly to continue. To make matters worse, these underwriters had close connections with certain directors in some of the railroads. These connections made it difficult at best for underwriters to deal at arms

[33]But see Otis & Co. v. Pennsylvania Railroad Co. et al., 61 F. Supp. 905, 910 (1945).

[34]The two firms were Morgan Stanley & Co., and Kuhn Loeb & Co. Ex Parte 158, In re Competitive Bidding in Sale of Securities, 257 I. C. C. 129 (1944).

[35]See note 25, *supra*.

length when negotiating to handle issues. In the statement by the S. E. C. upon promulgation of rule U-50[36] the commission emphasized another form of underwriting monopoly which was obtaining the same injurious result as the above mentioned monopoly. This monopoly was found in the public utility holding companies. It has been developed to where control is exercised through a maze of intercorporate relationships impossible to be understood by the ordinary man.[37] It is enough to say, for the purposes of this comment, that through this maze of intercorporate relationships the controlling interest of a corporation may be vested in one who owns a fraction of a percent of the corporation's stock. Unfortunately this control often vested in the same underwriters who privately negotiated with that corporation. The unhealthiness of this situation is clear. But whether or not the investment banker controlled the corporation he was dealing with, the facts proved that these public utilities continually negotiated with these same underwriters.[38] Not only has this resulted in a failure to seek the views of anyone other than the customary writer, it has also resulted in an undue acquiescence by the managers of the utility companies in the views of the underwriter.[39]

Arguments Against Competitive Bidding With Rebuttals

The arguments raised in opposition to the adoption of rules which compel competitive bidding are many. Most of these arguments have been presented time and again before federal commissions and other governmental agencies which consider the question, what limitations to put on the issuing of securities. One argument strongly relied upon by those advocating private negotiations is that forcing the issuers to offer securities to open bidding is imposing upon them an unnecessary restraint of free enterprise. They argued that the managers of these companies should have the freedom to deal as thy think best and use competitive bidding only when they deem it necessary. Commissioner Healy of the S. E. C. best answered this argument as follows:

> "Ours is a system of free enterprise. And, when practices are allowed to develop which eliminate or suppress competition, the very fundamentals of that system are endangered. The liberating influence of our competitive bidding rule (U-50) will foster free enterprise and competitive bidding in a field which has long been characterized by concentration of the management and underwriting of new securities in the hands of fewer firms."[40]

Another point emphasized in opposition to competitive bidding is that it will lead to overpricing of the offering or market price of the issues. That

[36]See note 13, *supra.*
[37]Spoken by Sam Rayburn, 79 Cong. Rec. 10318.
[38]See note 13, *supra.*
[39]See note 13, *supra.*
[40]Spoken in an address on August 28, 1941, before the National Association of Railroad and Utilities Commissioners.

is, granted that the issuer may get a higher price by the underwriters who handle his securities, this price will force a resulting higher price at which the securities will be offered to the public. They claim that many evils will arise because of this; evils such as sluggish or delayed distribution, high pressure salesmanship, sale of securities to investors above the fair market price, and as a result, many dissatisfied investors. All of this will injure the credit and reputation of the company and the securities issued by it.[41] And also, if the underwriter is awarded the issue because of an outrageously high bid he may be stuck with a "sticky issue," one which he could only sell to the public with little or no profit. In answer, overpricing and underpricing of the offering price has occurred under both systems of selling securities and will continue so long as values are not susceptible of absolute determination.[42] There are other factors which enter into the determination of the offering price, for example, the solvency of the issuing corporation and the terms of the issue.[43] Even if the above claim of the adversaries to competitive bidding were well founded, if such overbidding resulted in great hardship and little profit to the underwriter, these self-inflicted penalties would curb these tendencies. Overbidding is self-correcting.

Competitive bidding will deprive the issuer of financial aid in times of stress and advice of by one who understands that company's financial structure best, since it will break up the special relationship between the company and that investment banker with whom he has dealt with in the past. In answer to the former purported loss, deprivation of financial aid, the question has been asked, if such benefit ever existed, why then, did many of the railroads have to turn to the R. F. C. for financial help during the depression?[44] Why couldn't the investment bankers, who had their accounts with the railroads, have given sufficient aid? Obviously, this is asking too much of these underwriters, but it is evidence to prove the point that in times of stress the close relationship has not been shown to be very advantageous. As for the latter purported loss, expert financial advice, there are admittedly some good grounds for the companies wanting such advice from those with whom it deals in putting out issues of securities. In the opinion of the Chicago Union Station Bond Issue case (1924)[45] the commissioners stated, "The railroads want advice with intimate knowledge of their affairs—a knowledge that can

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[41]See note 26, *supra*.

[42]*Ibid.*

[43]See note 29, *supra*.

[44]During the 8-month period from the organization of the R. F. C. of February 2, 1932, to September 30, 1932, the corporation authorized loans to 53 railroads totaling $264,366,933 (including $16,529,586 to seven railroad receivers.) The World Almanac for 1933, published by New York World Telegram, p. 153.

[45]See note 8, *supra*.

only be gained by regular banking relations." One thing that those who present this argument have neglected to mention is that there is a good possibility that such advice coming from the investment banker who will handle the underwriting may be conditioned more by the prospect of such banker's profits than by the issuer's needs and interests.

Another claim made in opposition to competitive bidding is that the small underwriter will be injured by it. A valid rebuttal for this argument is that if the big investment bankers had any intention of cutting out the smaller man they would have done so long before this controversy arose.

A big argument put forth by those advocating private negotiations was that if the issuer had to depend upon public competitive bidding in order to find an underwriter, he could easily be dissatisfied with the results. One case that has been referred to is the Chicago Union Station Bond Issue of 1940.[46] In that case the applicant was ordered to put its issues up to competitive bidding. It did so and only received one bid. It rejected this bid as being too low and privately negotiated the issue and received a higher price. This is an example of what might occasionally happen as the result of putting issues up to competitive bidding. But in the last decade this type of thing has been the rare exception (found in less than 1 per cent of sales made) and not the trend. As for the issuer having to accept an irresponsible bidder because his bid was highest, the following claim is made by Halsey Stuart & Co., investment bankers:

> "Another line of argument opposing competitive bidding was that this method of sale would lead to irresponsible bidding. The ten year record fails to disclose rejection of any bids on such grounds. We know of no instance in which bidders after being awarded an issue, have failed to honor such commitment by making payment and accepting delivery."[47]

These and other less important arguments represent the basis of the case against competitive bidding. Some were proven to be completely unfounded, others to show merit. But the commissioners, looking at their arguments as a whole, decided that they were not strong enough to defeat the value of competitive bidding.

Conclusion: The Possibility of Extending Compulsory Competitive Bidding to Other Fields

It is not likely that compulsory competitive bidding will be extended to any new field of industry in the near future. As stated before, industrials are about the only major field unaffected by such requirements. Companies in this field which are vested with a public interest because of public owner-

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[46]Chicago Union Station Co. Securities (1940), 239 I. C. C. 325.
[47]See note 1, *supra*, at 22.

ship of their securities or because of the public nature of the services which they render should consider the benefits of public bidding. Most of the arguments favoring this method of handling securities that have been presented in this comment apply to many of the big industrial companies. But few of them have departed from their customary procedure of privately negotiating for underwriting services. Doubtless, there are many good reasons why these companies continue to follow this policy. For instance, a young and rapidly expanding corporation could have been financed through the diligence of one investment banker. He is a big factor in the success of that corporation's stable financial structure. There is no reason why the managers of this corporation should turn away from such a valuable service. But, on the other hand, there are just as likely to be situations similar to those underwriting monopolies which do more harm than good to public interest.

Whether or not there should be compulsory competitive bidding is not so much a question of its merit as it is of enforcement. At present there is no governmental commission that could enact and enforce a competitive bidding rule in the field of industrials.[48] But the Department of Justice has recently attempted to remedy the alleged underwriting monopoly in all fields generally. It instigated a suit,[49] in progress at this writing, against 17 investment banking houses and the Investment Bankers' Association for violation of sections (1) and (2) of the Sherman Anti-Trust Act.[50] The government "alleges a conspiracy to restrain and monopolize the securities business of the United States by restricting, controlling, and fixing the channels and methods, the prices, terms and conditions upon which security issues are merchandised."[51] The claim is that the defendants have formed a "syndicate" whereby they refuse to compete against each other in the merchandising of issues. Instead, one or two of the defendant companies will manage the underwriting of an issue, and, for a manager's fee (usually a percentage of the gross "spread"), will share the issue with the other defendant companies. As a result the issuers are allegedly coerced into dealing with the managing company at its price since other defendants, composed of the biggest investment bankers in the field, refuse to negotiate or offer a bid with such issuer.

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[48] It has been suggested that the states individually might order competitive bidding as a requirement for incorporation in a state that has no such preincorporation requirement.

[49] United States v. H. S. Morgan et al., doing business as Morgan Stanley & Co. Civil 43-757. See *ante*, note 51.

[50] The text of the act may be found in 15 U. S. C. A., secs. 1-7 (1951): "The purpose of the Sherman Anti-Trust Act is the preservation of a system of free competitive enterprise and the protection of the public against the evils incident to the monopolies and contracts or combinations tending directly toward unreasonable suppression or restraints of interstate trade or commerce." (58 C. J. S. 972.) "The act should be liberally construed having in mind its benefit and purposes for the public good." (United States v. Klearflax Linen Looms, 63 F. Supp. 32 (1945).)

[51] "The Federal Anti-Trust Laws," Commerce Clearing House, Inc. (Based on material compiled in the Anti-Trust Division of the United States Department of Justice, Jan. 15, 1949.)

This governmental attack is a novel approach to the problem in two respects. First, the problem formerly had been remedied by controls on the issuer, not the underwriter. Secondly, there had been no necessity to apply anti-trust law previously. But even though the approach used in this suit is fundamentally different, the end that it seeks is basically the same, i. e., to break up underwriting monopolies.

The Department of Justice, in this suit, prays that, among other things, each defendant be enjoined (1) from occupying a dual function of advisor to and underwriter for the same issuer; (2) from interfering with the rights of issuers and investors in freely choosing their methods, and (3) from participating in buying groups to merchandise any securities in which another defendant is a participant.

It is difficult to predict what will result from this suit. The remedy sought is injunctive in nature. As mentioned, there are at present no governmental agencies which have the power to control either underwriters or industrial companies directly in matters concerning the method of sale of securities. If the court in this case gives injunctive relief, ostensibly the only method of enforcement would be to hold defendants in contempt of court for any future violation of such injunctive order. Practically speaking, such a result would put a great burden on the court, a duty to scrutinize closely every transaction made by each of the defendants.

Perhaps the government hopes to place this job of enforcement in the hands of another governmental agency, which could possibly, in time, compel competitive bidding. The Department of Justice in its complaint informed the court that competitive bidding affects the "syndicate" because of "a substantially narrower spread (obtained by competitive bidding) than the spread they get through their negotiated sale transaction, and the management fee of the 'syndicate' manager is similarly lowered or eliminated."

This case represents the latest approach to the problem. It may lead to the extension of compulsory competitive bidding or some other method of regulatory control for the purpose of eliminating remaining underwriting monopolies which have proven harmful to public interest.