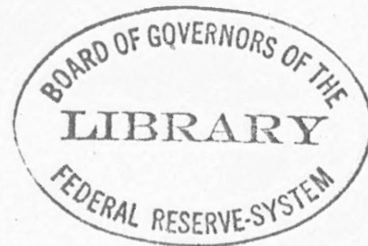
BOARD OF GOVERNORS OF THE
LIBRARY
FEDERAL RESERVE SYSTEM

STATEMENT BY GOVERNOR J. L. ROBERTSON

OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

BEFORE THE SENATE BANKING AND CURRENCY COMMITTEE

MARCH 18, 1959

Mr. Chairman and Members of the Committee:

The views of the Board of Governors regarding bank merger legislation have been expressed on a number of occasions before Committees of Congress over the past several years. They were summarized as recently as February 27, 1959, in a letter to this Committee, reporting on the bill S. 1062. However, the Board welcomes this opportunity to restate and clarify its position on this important subject.

The Problem. - At the outset, it is desirable to have clearly in mind the problem which all pending merger bills are designed to meet. Essentially the problem stems from the large number of bank mergers in recent years and the belief in many quarters that this trend is inconsistent with the preservation of a proper degree of competition in the banking field. From a total of 100 bank mergers in 1952 the number grew to a peak of 231 in 1955. Since that year the number has gradually decreased, with 189 in 1956, 162 in 1957, and 154 in 1958. However, the number is still sufficiently great to give cause for concern.

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Under present law, practically all mergers in which the resulting bank is a national bank are subject to the prior approval of the Comptroller of the Currency. However, a great many bank mergers do not now require the approval of any Federal supervisory agency, even though the banks involved are otherwise subject to Federal regulation.

Section 18(c) of the Federal Deposit Insurance Act presently provides that a bank merger must have the prior approval of the Comptroller, the Board of Governors, or the Federal Deposit Insurance Corporation, depending upon whether the resulting bank would be a national bank, a State member bank, or a nonmember insured bank, but only if the capital stock or surplus of the resulting bank will be less than the aggregate capital stock or the aggregate surplus, respectively, of the merging institutions. Since bank mergers frequently do not involve any diminution of such capital funds, there have been numerous instances in which this statute has not been applicable.

Of the 231 bank mergers in 1955, 68 were cases in which the resulting bank was a State member bank; yet only 38 were subject to the Board's approval under section 18(c). A similar situation has prevailed in subsequent years. Last year, 45 of the 154 mergers were cases in which the resulting bank was a State member bank; only 21 were subject to the Board's approval.

It is true that branches established by a State member bank, including those established as the result of a merger, must have the prior approval of the Board. However, the impact upon competition of the establishment of branches in such cases may often be much less than that of the merger itself; and the Board has no authority with respect to the merger itself unless the case falls within the limited scope of section 18(c) of the Federal Deposit Insurance Act.

Although the Sherman Act legally applies to bank mergers, that Act has never been utilized in this field. Section 7 of the Clayton Act covers only acquisitions of bank stocks and since bank mergers rarely, if ever, involve stock acquisitions, they are beyond the scope of that Act.

Thus, there is presently a gap in the coverage of bank mergers by Federal law. It is that gap which pending bills on the subject would attempt to fill.

The Board is in complete accord with the objective of all of the pending bills. It believes that there is a clear need for legislation that would prevent bank mergers that would so lessen competition as to be incompatible with the public interest. Differences of views exist only as to the best means of accomplishing this objective.

Pending Bills. - The bill now before this Committee, S. 1062, would meet the problem by amending a provision of Federal law that now deals with bank mergers - section 18(c) of the Federal Deposit

Insurance Act. That section would be expanded to require all mergers of insured banks to have the prior approval of the appropriate Federal bank supervisory agency and to impose upon the supervisory agency an explicit requirement that it consider the competitive effect of each bank merger as well as other relevant factors.

Other pending bills, both in the Senate and the House, would seek to meet the problem by bringing acquisitions of bank assets, and therefore bank mergers, within the coverage of section 7 of the Clayton Act. Some of these bills would, in addition, require prior notification to be given to the Attorney General and the Board with respect to all bank mergers involving banks with combined capital, surplus, and undivided profits of more than $10 million, subject to certain exceptions.

In recent years, the Board has consistently expressed the view that the most effective approach to the problem would be through an amendment to the banking laws which would require prior approval of all bank mergers by the appropriate Federal bank supervisory agencies. The bill S. 1062 reflects this approach. The Board favors this approach rather than an amendment to the Clayton Act because of (1) the desirability of preventing mergers of insured banks without the advance approval of the appropriate Federal bank supervisory agency, (2) the greater enforcement problems resulting from coverage of bank mergers by the antitrust laws, and (3) the need for more flexible standards than the standard prescribed by the Clayton Act.

Desirability of Advance Approval. - The Board is convinced that it would be desirable, as contemplated by S. 1062, to require advance approval for every bank merger, irrespective of diminution of capital or surplus, by the Comptroller of the Currency if the resulting bank would be a national bank, by the Board if it would be a State member bank, and by the FDIC if it would be a nonmember insured bank. Such advance approval would afford opportunity to consider all aspects of the public interest and, at the same time, would avoid the difficulties arising from after-the-fact consideration of the question whether a consummated bank merger is consistent with the public interest.

By contrast, expansion of the Clayton Act to prohibit all bank mergers that may tend substantially to lessen competition would place upon the Government the burden of taking the initiative to restrain or undo any merger deemed to violate the law. Under a bill like S. 1062, the burden would be on the banks in every case to obtain approval of a proposed merger; and if the proposal was found to be contrary to the public interest, for competitive or other reasons, the merger would never take place.

Enforcement. - The Federal banking agencies are believed to be qualified by experience to determine whether a proposed merger should be approved as being in the public interest. An advance approval bill like S. 1062 would simply expand the present

authority of these agencies with respect to bank mergers and would present no new enforcement problems.

On the other hand, extension of section 7 of the Clayton Act to cover bank mergers would give rise to all of the multitude of problems inherent in attempting to undo a merger that has already taken place. Practical and legal difficulties would be involved in unscrambling the assets and liabilities of constituent banks after a merger has occurred, particularly if a considerable period of time has elapsed. These difficulties would be far greater than those involved in requiring divestment of stock illegally acquired under the Clayton Act. Moreover, the very nature of the banking business would make it well nigh impossible to restore the status quo. For example, in attempting to bring about a break-up of a consolidated bank into two banks again, it would be enormously difficult, if not impossible, to sort out loans and deposits as between the two original banks, particularly where there had been numerous transactions in customers' accounts after the merger.

In addition to these problems, coverage of bank mergers by the Clayton Act would substantially add to the Board's responsibilities in the antitrust field. At present, the Board has enforcement authority under the Clayton Act where banks are involved, but that authority is limited to stock acquisitions, and its significance has been considerably lessened by the fact that under the Bank

Holding Company Act the Board must pass in advance upon acquisitions of bank stock by bank holding companies. However, an extension of the Clayton Act to cover acquisitions of bank assets would impose upon the Board enforcement responsibility with respect to every bank merger, even though it may already have been considered and approved by one or more other bank supervisory agencies.

The principal responsibilities and functions of the Federal Reserve System lie in the fields of monetary and credit regulation and bank supervision. The prosecuting functions incident to the enforcement of the antitrust laws are of a character quite different from the administrative functions normally exercised by the Board in passing in advance upon particular transactions in the bank supervisory field. In brief, enforcement of the antitrust laws and bank supervision represent different spheres of governmental operation, despite the fact that both may involve questions of possible adverse effects upon competition.

The Board feels, therefore, that the enforcement of section 7 of the Clayton Act, whether with respect to acquisitions of bank stock or acquisitions of bank assets, is a function that should not be vested in the Board. This is another of the reasons for which the Board favors the approach of requiring advance approval of bank mergers by the bank supervisory agencies, as contemplated by S. 1062, rather than coverage of bank mergers under section 7 of the Clayton Act.

Standards. - In the field of bank supervision, it is well recognized that many factors must be considered in determining whether a particular banking transaction will be consistent with the public interest. This is reflected in provisions of existing Federal statutes.

In admitting banks to deposit insurance, the Federal Deposit Insurance Corporation is required to consider the financial history and condition of the applying bank, the adequacy of its capital structure, its future earnings prospects, the character of its managment, the convenience and needs of the community, and whether the bank's corporate powers are consistent with the purposes of the deposit insurance law. The Federal Reserve Act requires the Board to consider similar factors in admitting banks to membership and in passing on branches of State member banks. In passing upon branches and mergers coming within its jurisdiction, the Board also considers the effect of the proposed transaction upon banking competition, a factor that cannot be ignored if the Board is to discharge its supervisory responsibilities properly and in the public interest. The Bank Holding Company Act of 1956 specifically requires the Board, in passing upon holding company applications, to consider the financial history and condition of the holding company and the banks involved, their prospects, the character of their management, the convenience and needs of the community, and whether or not the proposed transaction would be consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

The approach to regulation of bank mergers followed by the bill S. 1062 is entirely consistent with these provisions of present law. It would expressly require the appropriate Federal bank supervisory agency to consider whether each proposed bank merger would unduly lessen competition, along with such factors as the financial condition, prospects, and management of the banks involved, and the needs of the community. Thus, in passing on bank mergers the supervisory agencies would be enabled to consider all aspects of the public interest, including the effect of the proposed merger upon banking competition.

By contrast, under pending bills that would bring bank mergers under the Clayton Act, the sole test would be whether a particular merger would substantially lessen competition or tend to create a monopoly, to the exclusion of other considerations that might have an equally important bearing upon sound banking and the public interest. Thus, every bank merger that would result in a substantial lessening of competition would be made unlawful, no matter how desirable the merger might be in order to improve the financial condition or quality of management of the banks involved or to protect the community against the growth of unsound banking practices. There may well be instances in which the over-all public interest would be clearly served by a bank merger even though it would lessen competition.

For example, a bank may be an uneconomic unit, too small to provide the banking services needed by its community; or a bank may be one of a number of banks in an over-banked community where excessive competition for business may lead to unsound banking practices. In such situations, the public interest might actually be promoted by the merger of two banks, even though a lessening of competition might result.

Banking, perhaps more than any other type of business, directly affects credit conditions and the basic economy of the country. Accordingly, there is a need to maintain strong competition in the banking field in order to make certain that business and the public will have access to adequate alternative sources of banking services. But there is also a need, of at least equal importance, for the maintenance of sound, strong, and efficient banks that will be able to meet the credit and financial requirements of growing communities. Both of these needs must be considered in determining whether a particular bank merger will be in the public interest.

It should be emphasized here that the Board's position with respect to standards is not based upon any semantic distinction between the words "substantially" and "unduly", although obviously the word "substantially" carries only a quantitative connotation, whereas "unduly" implies a broader meaning. The point of the matter is that, in passing upon a bank merger, its effect upon competition

should be one, but not the only, factor to be considered. The supervisory agency having jurisdiction over a merger should be required to weigh, pro and con, all factors affecting the public interest - financial condition, management, and needs of the community, as well as competitive effect. Admittedly, the effect of a bank merger as lessening competition is always an important factor and should be carefully weighed; but, in determining whether any such merger would be inconsistent with the public interest, the test should be whether competition would be lessened to such a degree as to outweigh whatever favorable factors may be present in the particular situation.

In the interest of maintaining uniform policies as far as possible, but without disrupting the established pattern of distribution of jurisdiction, the Board believes that the Federal bank supervisory agency authorized to pass upon a particular merger should be required to seek the views of the other two agencies regarding competitive effects. In addition, they should be authorized to request the views of the Attorney General as to the competitive or possible monopolistic aspects of any transactions. Provisions of this kind are contained in S. 1062.

Conclusion. - For the reasons heretofore stated, it is the Board's belief that the preferable approach to this problem is through legislation that would (1) require the prior approval of

bank mergers by the appropriate Federal bank supervisory agencies, (2) require the supervisory agency in each case to consider the financial condition, management, and prospects of the banks involved, the needs of the community, and the competitive effects of the proposed transaction, and (3) require the agency having jurisdiction to seek the views of the other two Federal bank supervisory agencies regarding the competitive aspects of the proposed merger and authorize that agency to obtain the views of the Attorney General with respect to that question.

Such an approach would be followed by S. 1062, which the Board endorses. In the Board's opinion, enactment of that bill would provide appropriate safeguards against the unwise diminution of competition and the development of monopolistic tendencies in the banking field and, at the same time, following the pattern of present law, enable the Federal bank supervisory agencies to consider all factors that must be taken into account in determining whether a proposed bank merger is in the public interest.