The matter of expansion of the Giannini banks on the West Coast has been the subject of bank supervisory agency concern for a great many years. In fact in the early nineteen twenties, shortly after the admission of Bank of Italy to membership in the Federal Reserve System, there were numerous disputes between the Board and the Bank respecting such expansion. Without discussing in detail the many similar occasions which arose over the years, suffice it for present purposes to point out that on February 14, 1942, the Board, in a letter to Transamerica Corporation, stated the unanimous position of the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation as follows:

> "The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal Bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly or any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group." N. T. & S.

(A copy of the Board's letter of February 14, 1942, is attached hereto marked No. 1.)

This position was restated in the Board's letter to A. P. Giannini, under date of November 13, 1942, as follows:

> "It is our understanding that the position of the Comptroller of the Currency in this matter, referred to above, remains the same. We are advised that the Federal Deposit Insurance Corporation has indicated its unwillingness under

existing circumstances to insure any newly organized State nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System. As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including the organization of new State banks, the acquisition of control of existing State banks, or the conversion of national banks to State banks, and the establishment of branches thereof. In addition, where the change or conversion from one jurisdiction to another is for the purpose of avoiding proper restrictions or requirements of other Governmental agencies, the Board does not propose to be used as a means of avoiding such restrictions or requirements, considered by the Board to be justified under existing circumstances."

(A copy of the Board's letter of November 13, 1942, is attached hereto marked No. 2.)

Notwithstanding this policy of the federal bank supervisory agencies the Transamerica group continued to expand by the acquisition of individual unit banks, the separate existence of which was continued by the holding company. From 1940 through 1949 Transamerica acquired the majority stock in approximately 35 banks located principally in California and Oregon. Applications to branch most of these banks into the Bank of America N. T. & S. A. and the First National Bank of Portland in California and Oregon, respectively, have been on file with the Comptroller of the Currency for several years. Because of the policy heretofore stated, however, the Comptroller's office consistently refused to permit the branching of these banks.

Some time during 1943 the Board was advised that the Antitrust Division of the Department of Justice was conducting an investigation for the purpose of determining whether or not the Transamerica domination of the commercial banking business in the western area was in violation of the Sherman Antitrust Act. The Board's files were made available for the use of the Department in conducting this inquiry.

In 1944, because of its vital interest in this matter, the Board explored the extent to which it had any statutory authority for dealing with the bank expansion activities of Transamerica. The Board's General Attorney, Mr. Dreibelbis, submitted a memorandum to the Board in which he outlined the possibility of the Board commencing an administrative proceeding under Section 11 of the Clayton Act.

(A copy of this memorandum is attached hereto marked No. 3.)

Mr. Dreibelbis consulted with Mr. Berge of the Antitrust Division of the Department of Justice to ascertain whether Mr. Berge agreed with his conclusion that the Board had authority under the Clayton Act to enforce Section 7 of that Act in the banking field. Mr. Dreibelbis was advised that Mr. Berge did so agree and was given a copy of a memorandum prepared by an attorney on the staff of the Antitrust Division which so stated.

(A copy of this memorandum is attached hereto marked No. 4.)

Around October 1945, and because of the continued expansion activities of Transamerica in the banking field, the Board requested a

meeting with the then Attorney General, Mr. Tom Clark. For the purpose of affording background material for such a conference the Attorney General addressed a letter to the Chairman of the Reserve Board under date of October 31, 1945, in which many of the results of the Department's antitrust investigation respecting Transamerica were listed. In addition, the letter also pointed out as follows:

> "The difficulty with the case at this time lies in the fact that we have not been able to develop substantial evidence either that the Transamerica Corporation achieved its present dominating position in the commercial banking field through illegal trade practices as those terms are defined in court decisions interpreting the Sherman Act, or that it abused its dominant position once it was achieved. In the absence of complete monopoly, evidence of one or both of these types of abuse is essential to make a case under the Sherman Act."

(A copy of the Attorney General's letter of October 31, 1945, is attached hereto marked No. 5.)

Following receipt of this letter there were two or three luncheon meetings with the Attorney General at which were present representatives of the Comptroller's office, the Federal Deposit Insurance Corporation, the Board, and the Antitrust Division of the Department. At these conferences every phase of the Transamerica problem was discussed at great length, it being the unanimous opinion of all present that it was desirable in the public interest that some means be devised whereby the further banking expansion of the Transamerica group be halted. In view of the then conclusion of the Antitrust Division that there appeared little likelihood of success of an antitrust action against Transamerica, attention was turned to the subject of drafting legislation

which might have the effect of preventing future banking expansion by Transamerica. A great deal of time and attention by the Board and its staff was thereafter directed towards the drafting of such legislation and various bills were introduced in the Congress, one of which (S. 829) was unanimously recommended by the Senate Banking and Currency Committee on June 19, 1947. This bill, however, did not get to the Senate floor for a vote. Hearings have only recently been concluded on a similar bill introduced in the early days of the present session of Congress.

On June 10, 1946, the Supreme Court decided the case of American Tobacco Company v. United States. That case seemed to hold that proof of abusive tactics was not an indispensable element of proof in an antitrust case, and this decision naturally revived the Board's interest in the possibility of such a suit. Not wishing to commence an administrative proceeding under the Clayton Act if the Department of Justice still had in contemplation the possible institution of a Sherman Act case, the Board, under date of February 26, 1947, addressed a letter to the Attorney General in which inquiry was made as to whether the Department had considered the effect of the Tobacco decision upon the possibility of such an action.

(A copy of the Board's letter of February 26, 1947, is attached hereto marked No. 6.)

Shortly after this letter was acknowledged the Attorney General indicated to then Chairman Eccles of the Board that he had asked Secretary Snyder to give him the benefit of the Secretary's views on this matter.

Under date of April 15, 1947, Chairman Eccles sent a letter to Secretary Snyder urging his early consideration of the Attorney General's request.

(A copy of the Board's letter of April 15, 1947, is attached hereto marked No. 7.)

The Board heard nothing further from the Attorney General or from Mr. Snyder in respect to this matter. Accordingly, in the latter part of 1947, it asked Mr. Townsend, Assistant General Counsel, to prepare a memorandum outlining what if any legal action the Board might take with respect to Transamerica's continued acquisitions of independent banking institutions in the five States of California, Oregon, Nevada, Arizona and Washington.

Under date of October 31, 1947, Mr. Townsend submitted a memorandum to the Board in which he reviewed the Transamerica matter and recommended that the Board conduct an investigation for the purpose of determining whether or not, considering the Board's lack of subpoena power, it was possible to assemble the kind of evidence which it would be necessary to produce in order to support a Section 11 proceeding under the Clayton Act.

(A copy of Mr. Townsend's memorandum of October 31, 1947, is attached hereto marked No. 8.)

On the basis of the memorandum submitted to the Board by Mr. Townsend, the Board directed the Legal Division to undertake an investigation of the kind recommended by Mr. Townsend. On November 7, 1947, the Board by letter notified the Attorney General, the Chairman of the

Federal Deposit Insurance Corporation, and the Comptroller of the Currency of its action directing that this investigation be undertaken.

(Copies of these letters are attached hereto marked No. 9, No. 10 and No. 11.)

On November 10, 1947, the Comptroller by letter acknowledged the Board's letter of November 7th in which he pointed out that there were presently pending before him applications by the Bank of America to branch a number of the Transamerica-owned banks in California.

(A copy of the Comptroller's letter of November 10, 1947, is attached hereto marked No. 12.)

On November 24, 1947, the Board replied to the Comptroller's letter of November 10th and specifically requested the Comptroller to defer action on such applications.

(A copy of the Board's letter of November 24, 1947, is attached hereto marked No. 13.)

On November 28, 1947, the Comptroller acknowledged receipt of the Board's letter and informed the Board that he would withhold action on the applications until the Board had decided what action, if any, it proposed taking against Transamerica Corporation.

(A copy of the Comptroller's letter of November 28, 1947, together with its enclosures, is attached hereto marked No. 14.)

Around the middle of May 1948 Mr. Townsend reported to the Board the results of his investigation. On the basis of that report the

Board concluded that there was just cause for the issuance of a complaint under Section 11 of the Clayton Act against Transamerica Corporation and that adequate proof of the alleged violations could be gotten into the record of the administrative proceeding without the need for compulsory process. Thereafter Mr. Townsend, after consulting with members of the staff of the Federal Trade Commission and the Antitrust Division of the Department of Justice, drafted the Board's complaint, which was formally issued on June 24, 1948.

(A copy of the Board's complaint is attached hereto marked No. 15.)

On the day the complaint was issued the Board formally notified the Attorney General, the Chairman of the Federal Deposit Insurance Corporation and the Comptroller of the Currency of the fact of the issuance of the complaint.

(Copies of these letters are attached hereto marked No. 16, No. 17 and No. 18.)

On August 30, 1948, the Comptroller, in a letter to the Board dealing with various matters which had been the subject of correspondence between the two agencies, again took occasion to point out that he was withholding action on the applications of the Bank of America to branch the Transamerica-owned banks which were involved in the Board's Clayton Act proceeding. Among other things, he stated:

"Since receipt of your advice of the intention of the Board to institute Clayton Act proceedings against Transamerica Corporation we have consistently refused to grant

applications which fall into the first class, i.e., applications for branching Transamerica-owned banks into the Bank of America system. We have followed this policy in order that no question might be raised as to possible interference with the Board's action."

(A copy of the Comptroller's letter of August 30, 1948, is attached hereto marked No. 19.)

The hearings under the Board's complaint were scheduled to commence on October 12, 1948. However, on Friday, October 8, 1948, Transamerica Corporation filed a suit in the District Court of the United States for the District of Columbia to enjoin the holding of the hearings. The matter was argued before Justice Morris on October 20, 1948, and on November 3, 1948, Justice Morris dismissed Transamerica's complaint.

(A copy of Justice Morris' opinion is attached hereto marked No. 20.)

No appeal was taken from this decision. There followed several motions filed with the Board by Transamerica, and the disposition of these motions prevented the actual taking of evidence in the case until February 2, 1949, when the hearings were commenced at the Board's offices in Washington, D. C. At the request of Transamerica the hearings were moved to San Francisco in April 1949, and they have been continuing there with several interruptions until the present time. After the conclusion of the Board's case and upon motion of the Board's Solicitor, the Board's original complaint was amended on July 19, 1949, to include three additional banks which Transamerica had acquired since the filing of the Board's original complaint.

(A copy of the Board's amended and supplemental complaint is attached hereto marked No. 21.)

The Board understands that there are but several weeks more of testimony expected to be taken in San Francisco at which time the hearings will again be returned to Washington where it is expected that they will shortly be concluded.

Needless to say, the carrying on of the investigation preliminary to the issuance of the complaint, the many procedural matters that preceded the actual taking of testimony, and the extensive hearings held both here and in San Francisco have involved the expenditure of very substantial sums of money. In addition, the Board has been deprived during virtually all of the time devoted to the hearings of the advice and counsel of Governor Evans who has been acting as Hearing Officer in the case. At all times the Board felt that it could rely upon the assurances of the Comptroller that action upon the applications to branch those banks named in the complaint would be deferred until the Board had decided the Transamerica case. Taking all of these considerations into account, and particularly having in mind the important issue of the public interest which is at stake in these proceedings, the Board cannot but hope that no final action by the Comptroller respecting these branch applications will be taken which will have the effect of nullifying a substantial portion of the Board's present Clayton Act case against Transamerica Corporation.

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NO. 1

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON

February 14, 1942

Transamerica Corporation,
San Francisco, California.,

Gentlemen:

The Board has recently received through the Federal Reserve Bank of San Francisco a copy of a letter from a member bank, control of which was recently acquired by your Corporation, stating that the member bank has under consideration the establishment of several branch banks and that the letter is written for the purpose of securing the necessary approval from the Federal Reserve Board. The member bank's letter set forth certain facts with respect to proposed branches at two locations and stated that the letter would be supplemented by such formal applications as Federal Reserve regulations may require.

The Board gave careful consideration to the information submitted and to other pertinent information in its files and reached the conclusion that it should not approve the establishment of the proposed branches on the basis of the information now before it. The Federal Reserve Bank of San Francisco was requested to advise the member bank accordingly.

Should your Corporation have any plans for the further expansion of its interests in banks, either directly or indirectly, through the mechanism of extending loans to others for the purpose of acquiring bank stock, or in any other manner, you are requested to advise the Board through the Federal Reserve Bank of San Francisco before any such plans are consummated.

The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal Bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group.

Please see that all persons in the Transamerica group who may be concerned with this policy are advised accordingly.

Very truly yours,

Chester Morrill,

Secretary.

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BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

Office of the Chairman
November 13, 1942.

Dear A. P.:

This is in reply to your letter of August 17, 1942, with reference to the action of the Board of Governors in denying the application for the establishment of branches at Temple City and Alhambra by the First Trust and Savings Bank of Pasadena, which is controlled by Transamerica Corporation through the ownership of a majority of the capital stock. Your letter was acknowledged by Mr. Clayton under date of August 21, 1942, immediately after I had left Washington for a few weeks' trip to the West.

Since returning to Washington, a great many pressing matters, including war financing, have taken up my entire time. Consequently, I have only recently had an opportunity to consider with Governor McKee, to whom you referred in your letter, and the other Members of the Board and some of its staff certain statements and charges contained in your letter, with which we cannot possibly agree.

For some time prior to January, 1942, the Comptroller of the Currency had repeatedly refused to approve expansion in the number of branches of important national banks in the Transamerica Corporation group. Shortly before that date, Transamerica Corporation obtained control of the First Trust and Savings Bank of Pasadena. In January, 1942, that bank wrote a letter to the Federal Reserve Bank of San Francisco, stating, among other things, that it had "under consideration the establishment of several branch banks," Temple City and Alhambra being mentioned specifically.

In view of previous discussions and understandings, the Board was surprised to learn of these plans for expansion. On February 14, 1942, it requested of the Federal Reserve Bank that the First Trust and Savings Bank of Pasadena be advised, before it took any further steps to consummate its plans, that the Board had given careful consideration to the information submitted and to other pertinent information in its files and had reached the conclusion that it should not approve the establishment of the proposed branches on the basis of the information before it. The Board also considered it desirable to inform Transamerica Corporation directly of the action on the Pasadena application and to express again to its management the Board's views in the matter of expansion. Accordingly, on the same date it addressed a letter to the Corporation in which it was stated:

"Should your Corporation have any plans for the further expansion of its interests in banks, either directly or indirectly, through the mechanism of extending loans to others for the purpose of acquiring bank stock, or in any other manner, you are requested to advise the Board through the Federal Reserve Bank of San Francisco before any such plans are consummated.

"The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group.

"Please see that all persons in the Transamerica group who may be concerned with this policy are advised accordingly."

Nevertheless, the First Trust and Savings Bank of Pasadena thereafter continued its plans and on February 28, 1942, entered into a contract to assume deposits and take over assets of the Temple City National Bank, with a view to operating a branch at that location. On June 10, 1942, the bank filed a formal application for the establishment of branches at Temple City and Alhambra. On July 10, 1942, the Board declined this application and requested that the bank and Transamerica Corporation be advised accordingly.

It is our understanding that the position of the Comptroller of the Currency in this matter, referred to above, remains the same. We are advised that the Federal Deposit Insurance Corporation has indicated its unwillingness under existing circumstances to insure any newly organized State nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System. As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including the organization of new State banks, the acquisition of control of existing State banks, or the conversion of national banks to State banks, and the establishment of branches thereof. In addition, where the change or conversion from one jurisdiction to another is for the purpose of avoiding proper restrictions or requirements of other Governmental agencies, the Board does not propose to be used as a means of avoiding such restrictions or requirements, considered by the Board to be justified under existing circumstances.

The foregoing will indicate some of the more important considerations underlying the Board's position in this matter. In view of our previous discussions with representatives of your organizations, it is felt unnecessary to go into further detail. However, as you well know, whenever you or any of your associates feel that you have a just grievance to take up with the Board, or that you have some additional information to assist the Board in its deliberations, you are always welcome to call in person for a more complete and frank discussion than is practicable through correspondence.

Sincerely yours,

(signed) M. S. Eccles,
Chairman.

Mr. A. P. Giannini,
Chairman of the Board,
Transamerica Corporation,
San Francisco, California.

JBD 7/26/44 #3

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RESPONSIBILITIES AND POWERS OF BOARD UNDER THE CLAYTON ACT

Express Provisions of Section 11

The first paragraph of section 11 reads as follows:

"Authority to enforce compliance with sections 3, 4, 7, and 8 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows:" (Underscoring supplied)

Historically, I find no evidence that the Board has ever assumed any responsibility for the enforcement of any section of the Clayton Act other than section 8 which applies to interlocking directorates and officers of banks. Exclusive authority for the enforcement of section 8 was later vested in the Board by special provisions contained in an amendment of the section and the Board's Regulation L was issued under this authority. Aside from this authorization, however, there is the authority already noted in section 11 which deals expressly with the enforcement of all four sections.

It may be argued that the later inclusion of the special authority in section 8 was a recognition that the Board's authority is limited to section 8 and section 8 only. However, no change was made in the language of section 11 and the general grant of authority, in its original language, remains in the law. Moreover, it has been amended from time to time by the inclusion of other agencies. This would seem to be especially significant because, if it had been intended that the Board's responsibility

should not extend beyond section 8, the exclusive authority vested under section 8 would be sufficient.

Sections 3 and 4 deal with certain fair trade practices and are designed generally to prevent unfair discrimination in prices of commodities between different purchasers and agreements not to use the goods of competitors. It is difficult to see how the business of banks could be involved in these sections. However, this does not necessarily follow in the case of section 7.

Section 7 of Clayton Act

The pertinent portion of section 7 reads as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any ot them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying-on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Note that the first paragraph deals with one corporation acquiring the stock of another corporation where the effect may be substantially to lessen competition between the two corporations or tend to create a monopoly of any line of commerce. The second paragraph deals with a corporation acquiring the stock of two or more corporations engaged in commerce where the effect may be to lessen competition between such corporations, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. This paragraph is aimed directly at holding companies.

Board's Responsibility to Enforce Compliance of Section 7 Where Applicable to Banking Business

As already mentioned, I do not find any evidence that the Board has ever assumed that it had any responsibility to enforce section 7. This does not gainsay the fact that section 11 says literally that authority to enforce compliance with section 7 by persons respectively subject thereto is vested in the Board where applicable to banks. It may be argued that the language "persons respectively subject thereto" read in the light of the subsequent language vesting authority in the Board "where applicable to banks, banking associations, and trust companies" means that the Board can only enforce compliance by banks, banking associations, and trust companies. This argument, however, is not supported by the one case I have so far discovered on the point.

In Fruit Growers Express Incorporated vs. Federal Trade Commission, 274 Fed. 205, it appears that the Commission brought an action under section 3 against the Fruit Growers Express which was not a common carrier but furnished

refrigerator cars to common carriers under an exclusive contract which was the subject of the Commission's complaint. The Circuit Court of Appeals dismissed the case saying:

> "Authority to enforce compliance with section 3 of the Clayton Act is vested by section 11 thereof in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce. If respondent had jurisdiction, it was by virtue of this section.
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> * * * * *
>
> "2. The words 'where applicable to common carriers,' in section 11 of the Clayton Act, must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction."

This case is somewhat weakened as a conclusive authority because of the fact that the Supreme Court granted a writ of certiorari, which indicated a desire, for one reason or another, to review the decision, and subsequently the case was dismissed by agreement without the Supreme Court having acted. Nevertheless, the logic of the opinion seems sound. Moreover, again it must be noted that whereas section 11 vests powers in the Board where section 7 is applicable to banks, banks generally, under other provisions of law, cannot acquire stocks anyhow. This would seem to support the argument that the jurisdiction of the Board attaches where the offense involves the business of banking rather than only when a bank is the offender.

The Supreme Court Opinion in the Insurance Cases

Section 7 of the Clayton Act deals with the acquisition of the stock of corporations "engaged in commerce". There is a difference between

"engaging in commerce" and the conduct of a business "affecting commerce" to such an extent as to subject it to the exercise of Federal power under the Commerce Clause. This, I assume, is the principal reason why the questions herein presented have not, so far as I have been able to find, been raised before.

Already, the courts have held that the business of banking, as conducted by Bank of America N. T. & S. A., affected commerce within the meaning of the National Labor Relations Act and that Bank of America N. T. & S. A., accordingly, is subject thereto.

More important, however, are the recent Supreme Court decisions in the insurance cases. I refer to the case of United States vs. South-Eastern Underwriters Association, 64 Supreme Court Reporter 1162, decided on June 5, 1944.

The South-Eastern case was brought under the Sherman Anti-Trust Act. Many years prior the Supreme Court had held that "the business of insurance is not commerce". The court, however, in the South-Eastern case pointed out the following with respect to the business of insurance:

> "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word 'commerce' as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings 'commerce' may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: businesses in which persons bought and sold, bargained and contracted. And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate 'Commerce among the several States' does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.

"The modern insurance business holds a commanding position in the trade and commerce of our nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

"This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office--the risks it insures, the premiums it charges, the investments it makes, the losses it pays--concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state."

After reviewing, at length, the business of insurance as conducted in this country, the court held that it was commerce and in summation said:

"No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."

So it is that the Supreme Court, after having adopted a contrary view for many years, has now held that the business of insurance is "commerce". That it would likewise so hold with respect to the business of banking seems more than probable. In fact, it is hard to see how it could hold otherwise without upsetting the insurance decision.

If banks, or particular banks, do "engage in commerce" the acquisition of their stocks under circumstances falling within the scope of section 7 would constitute a violation of that section; and, under the authority of Fruit Growers Express Incorporated vs. Federal Trade Commission, supra, the Board would have authority to proceed under section 11.

Powers Which the Board Would Have with Respect to Violations of Section 7

The view that the Board has responsibilities and powers under section 7 carries with it very far-reaching implications. This is illustrated by the following passages taken from section 11:

> "Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. (Underscoring supplied)

* * * * *

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. * * * The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive.

* * * * *

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited."

Board's Authority to Broaden Scope of Agreement Required of Bank Holding Companies As an Incident to Granting a General Voting Permit under Section 5144 U.S.R.S.

Section 5144, in providing for the issuance of voting permits by the Board, says inter alia:

"The Board of Governors of the Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require." (Underscoring supplied)

The Federal Communications Commission has regulatory powers with respect to radio broadcasting. The statute vesting powers in the Commission authorizes it to act "from time to time, as public convenience, interest, or necessity requires." (Underscoring supplied) The Board will recall the litigation between the broadcasting chains and the Commission growing out of regulations issued by the Commission aimed at monopolistic practices.

This litigation reached the Supreme Court and was decided May 10, 1943. National Broadcasting Company, Inc., et al. vs. United States, et al., 319 U. S. 190.

The Communications Act provides that the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in

violation of the anti-trust laws. It was argued that this was a limitation upon the Commission's authority to act in advance of a violation and conviction; that the Commission's regulations constituted an ultra vires attempt to enforce the anti-trust laws, the enforcement of which was in the province of the Attorney General and the courts and not in the Commission; that the regulations were arbitrary and capricious; and that the delegation of legislative authority on so vague a standard as the "public interest"was unconstitutional.

There follows a few passages from the Supreme Court opinion on these points:

> "That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the 'public interest, convenience, or necessity.' A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the 'public interest,' merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.
>
> "Alternatively, it is urged that the Regulations constitute an <u>ultra vires</u> attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is in the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:
>
> "'The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing

that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the net work practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.' (Report, pp. 46, 83, 83 n. 3.)

"We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

"The Regulations are assailed as 'arbitrary and capricious.' If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in Board of Trade v. United States, 314 U. S. 534, 548, is relevant here: 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

* * * * *

"Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in New York Central Securities Corp. v. United States, 287 U. S. 12, 24-25, the claim is made that the standard of 'public interest' governing the exercise of the powers delegated to the Commission by Congress is so

> vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, 'It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.'"

This case points to the authority of the Board if, indeed, it does not point to a duty to exercise, in the light of the purposes of the Clayton Act, such powers as it has in issuing or withholding voting permits. In fact, it could be argued that, by virtue of being expressly named in the Clayton Act as an enforcement agency, its responsibility to so act is greater than was the Commission's in the case of the Sherman Anti-Trust Act.

Conclusion

This memorandum suggests an authority upon the part of the Board (1) expressly to enforce section 7 of the Clayton Act against any corporation and particularly a holding company acquiring the stock of banks in violation of section 7, and (2) broadening the agreement required of "holding company affiliates" as an incident to obtaining a voting permit so as to include the objectives of section 7. The implications of both are extremely broad and far-reaching. There is good reason, however, why even if never considered before they should be seriously considered now. This is true because of the two very recent decisions of the Supreme Court which have been cited.

The question of whether banks "engage in commerce" within the meaning of the Commerce Clause of the Constitution is an extremely touchy one to banks. The issue has never been met head-on nor expressly decided by the Supreme Court. Historically, the Board has never proceeded under

section 7 of the Clayton Act. For all of these reasons, and for the further reason that such an opinion would have persuasive authority in court, it might be advisable to explore the questions raised with the Attorney General with a view possibly of obtaining an opinion with respect to the Board's authority and responsibility.

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MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL BERGE

You have asked me (1) whether Section 7 of the Clayton Act applies to banks, and (2) if Section 7 does apply to banks what is the Federal Reserve Board's authority under Section 7 in regard to banks that are acquired by holding companies, and can the Board proceed under Section 11 against such holding companies.

For the purposes of this memorandum I should like to restate the questions thus: (1) does Section 7 of the Clayton Act apply to banks, and, if so, can the Federal Reserve Board proceed under Section 11 against bank holding companies; (2) the scope of the Federal Reserve Board's authority under Section 11.

I conclude that Section 7 does apply to banks and that under Section 11 the Federal Reserve Board has authority to proceed against bank holding companies. I leave for future consideration, pending a discussion between us, the scope of the Board's authority under Section 11.

Section 7 of the Clayton Act, in general, provides that no corporation engaged in commerce shall acquire stock of another corporation engaged in commerce nor shall any corporation acquire stock of two or more corporations engaged in commerce where the effect of such acquisition may be to substantially lessen competition, restrain commerce, or tend to create a monopoly. Other provisions of Section 7 qualify these prohibitions by exempting from their operation stock purchased for investment, formation of subsidiaries for the actual carrying on of business and ownership of stock by common carriers in branch or feeder lines.

The question here presented could involve the issues of whether Section 7 of the Clayton Act is intended to include banks within the scope of its prohibitions since banking is regulated by other legislation[1] which may be deemed exclusive regulation and whether if Section 7 is otherwise applicable the business of banking is in interstate commerce.

This Section, as its terms plainly suggest, was intended for the protection of the public against the evils which flow from the lessening of competition. There is nothing in the wording of the Section itself which would suggest legislative intention to exclude banks from its operations. On the other hand, there are express references in Section 7 to some situations where the legislature did not intend the prohibitions to apply. Certainly within the four corners of the Section it can be argued that the express mention of exclusions impliedly includes all other situations. Furthermore, I find nothing in other banking legislation which would exclude the application of Section 7 to banking.

I have been unable to find any cases where the Federal Reserve Board has attempted to enforce Section 7. However, the Interstate Commerce Commission has assumed responsibility to enforce the prohibitions of Section 7 in their application to railroads. In Pennsylvania Railroad v. Interstate Commerce Commission, 66 Fed. (2d) 37, (C.C.A. 3, 1933) (affirmed 291 U. S. 651 by an equally divided court), a petition was instituted by the Pennsylvania Railroad (under the authority of Section 11 of the Clayton Act) to set aside an order of the Interstate Commerce

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1. See page , infra, for reference to Section 8 of the Clayton Act.

Commission requiring petitioners to divest themselves of shares of capital stock of two other railroads which the Commission found was held in violation of Section 7. The Circuit Court of Appeals reversed the order of the Commission holding that there was not substantial evidence to sustain the Commission's findings. Questions of whether Section 7 of the Clayton Act applies to railroads, and, if Section 7 does apply to railroads, the scope of the Interstate Commerce Commission's authority were not raised. It was assumed by the parties and the Court that the prohibitions of Section 7 applied to railroads (and that Section 11 was the measure of the Commission's authority to enforce the requirements of Section 7).

I find nothing in the legislative history that the prohibitions of Section 7 were not intended to apply to banks. However, the Congressional debates on Section 11 establish, in my opinion, that Congress intended Section 7 to apply to banks and vested jurisdiction in the Federal Reserve Board under Section 11 to proceed to enforce Section 7 where applicable to banks, banking associations, and trust companies.

I have not gone into the question of whether banks can acquire stock. The opinion of Mr. Dreibelbis, General Attorney for the Board of Governors of the Federal Reserve System, concludes that particular banks or the business of banking must be considered commerce within the holding of the Southwestern Underwriters Association case and that the acquisition of bank stocks under circumstances falling within the scope of Section 7 would constitute a violation of that Section. I agree with this conclusion but I think it is appropriate to point out here that an analysis

of the cases instituted by the Department, the Federal Trade Commission, and the Interstate Commerce Commission to enforce the prohibitions of Section 7 indicates that "the courts have been unwilling to adopt a construction of the language used in Section 7 which warrants an injunction against acquisition of stock in another corporation by one engaged in interstate commerce without affirmative showing of a probable effect to restrain commerce, create a monopoly or other injurious effect upon public interest." United States v. Republic Steel Corp., 11 Fed. Supp. 117 (N.D. Ohio 1935). The Supreme Court, in International Shoe Company v. Federal Trade Commission, 280 U.S. 291 (1930), held:

> "Mere acquisition by one corporation of stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree ***; that is to say, to such a degree as will injuriously affect the public."

In other words, the Supreme Court has approved the test of reasonableness in cases arising under Section 7 of the Clayton Act and has rejected the argument that the possession of the power regardless of its use is not enough to establish a violation of Section 7.

Section 11 of the Act provides that authority to enforce compliance with Sections 2, 3, 7, and 8 of the Act is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act; the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; the Civil Aeronautics Board where applicable

to air carriers and foreign air carriers subject to the Civil Aeronautics Act; the Board of Governors of the Federal Reserve System where applicable to banks, banking associations and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce. Section 2 applies to discriminations in price in interstate commerce between different purchasers of commodities. Section 3 prohibits tying clauses and conditions in the sale, in interstate commerce, of goods, wares, and merchandise which tend to create a monopoly and substantially lessen competition. Section 7 is here under discussion. Section 8 prohibits common directorates in banks and banking institutions of more than a designated size, and in corporations engaged in interstate commerce with a capital surplus and undivided profits in excess of a designated sum, except in common carriers.

The legislative history makes it clear that Congress intended the Federal Reserve Board to enforce compliance with Section 7 where applicable to banks, banking associations, and trust companies.

Senator Culberson, Manager of the Senate conferees, stated:

> "We included Sections 2, 3, 7, and 8 because their enforcement is given to these commissions; and we wanted to make this remedy clearly cumulative and not exclusive." (51 Cong. Rec. 15943)

The conference report stated that Section 11:

> "Vests jurisdiction in the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission to enforce the provisions of Sections 2, 3, 7, and 8 of this Act." (51 Cong. Rec. 16268)

Congressman Floyd, House Manager of the conferees, stated:

> "There are several other remedies provided in this bill. Under Section 11 the violation of Sections 2, 3, 7, and 8 may be enforced, respectively, by the Trade Commission, by the Interstate Commerce Commission, or by the Federal Reserve Board. The manner in which the enforcement may be made by any party complaining or by the commission or board taking the initiative is fully detailed in the bill. The party injured can make his complaint to the proper tribunal, and the proper administrative board or commission provided for by Congress can investigate and make an order for the party to desist, and if he refuses to obey the order, the party complaining can go into court and have the Federal court issue an order for him to desist, and for the violation of that order the offender may be punished for contempt.
>
> "This remedy is not exclusive; it is cumulative. It is supplementary to other remedies granted, and it does not exclude the remedies that exist under the Sherman law, because under the provisions of the bill that is carefully guarded. It is an additional remedy; it is not an exclusive remedy, and it takes no remedy away from any person." (51 Cong. Rec. 16319)

It might be argued that the use of the term "respectively" by Congressman Floyd might indicate that the Federal Reserve Board was limited in its administration of the provisions of Section 8. This construction, however, would preclude administration of Sections 2, 3, or 7 by the Interstate Commerce Commission since common carriers are not expressly dealt with in these sections. And, of course, subsequent amendments to Section 11 to include Federal Communications Commission and the Civil Aeronautics Board would be rendered meaningless by such construction.

In Fruit Growers' Express, Inc. v. Federal Trade Commission, 274 Fed. 205 (1921), which involved a petition filed in the Circuit Court of Appeals under Section 11 of the Clayton Act to obtain a review of an order to cease and desist issued by the Federal Trade Commission charging the petitioner, a corporation engaged in the business of leasing refrigerator cars to railroads, with violating Section 3 in its contractual arrangements with the railroads, the Court stated:

> "Authority to enforce compliance with Section 3 of the Clayton Act is vested by Section 11 thereof in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce."

And the court held that the Federal Trade Commission was without jurisdiction because the action complained of involved common carriers, jurisdiction over which was solely in the Interstate Commerce Commission. The Court did not hold that Section 3 was not applicable to railroads. The Government petitioned for a writ of certiorari which was granted (257 U. S. 657) but subsequently dismissed (261 U. S. 629) on the representation of the Government that Fruit Growers' Express, Inc. had disposed of its business. One of the questions presented by the writ was whether or not the Federal Trade Commission had jurisdiction of the company and its contracts by reason of the exclusive dealing provisions. In the argument construing Section 11 to support the Federal Trade Commission's jurisdiction, the Government contended that the

> "character of the commerce or business of the vendor or lessor of commodities, or of the corporation acquiring the stock or appointing the directors, determines what Commission or Board has jurisdiction to prevent violations of the Act."

This argument does not shake the authority of the lower court's decision that authority to enforce compliance with Section 3 is vested by Section 11 in the Federal Reserve Board where applicable to banks, banking associations, and trust companies. It would seem that the Government simply was urging that if a corporation does a common carrier business (or a banking business) and also engages in the sale of commodities in interstate commerce, its merchandising business is within the jurisdiction of the Federal Trade Commission.

I conclude that Section 7 does not exclude banks, banking associations or trust companies from its prohibitions and that the Federal Reserve Board can proceed under Section 11 against bank holding companies.

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OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

October 31, 1945

Honorable Marriner S. Eccles
Chairman, Board of Governors
of the Federal Reserve System
Washington, D. C.

My dear Mr. Chairman:

I desire to set out briefly the status of the Government's investigation of the Transamerica Corporation, for the purpose of affording background for our conference on the matter. The date of such conference will be set at a time mutually satisfactory to the interested government agencies.

The Department's investigation to date discloses that the Transamerica Corporation, a holding company, controls 35 banks in the States of California, Nevada, Arizona, Oregon and Washington, the largest of which is the Bank of America; that many of these 35 banks have numerous branches; that these banks control approximately 40% of the banking offices and approximately 36% of the commercial banking deposits in the five-state area; that the Transamerica-controlled banks control approximately 80% of deposits in the State of Nevada and 61% of the commercial banking offices; in California, 42% of the deposits and 49% of the commercial banking offices; in Oregon, 39% of the deposits and 13% of the commercial banking offices; and in Washington, 5% of the deposits and 4% of the commercial banking offices. In many counties within this five-state area the percentage control of deposits and commercial banking offices is much greater. In California, for example, there are thirteen counties in which the Transamerica Corporation controls 100% of the commercial banking facilities. This expansion program has been effected over a period of approximately twenty years. In many instances the holding company financed the acquisitions by borrowing funds from its banking subsidiaries, using the assets of the purchased bank as security for the loan.

Apparently there has been a desire on the part of Transamerica Corporation to build good will among the banks in the five-state area by offering very liberal terms in its purchases. In many cases the price paid exceeded the book value of a bank's assets. Frequently the personnel of acquired banks was put on the pay roll of Transamerica and the ranking officials were either retained or liberally pensioned.

In addition, the investigation discloses that the Transamerica Corporation controls two investment banking companies, several insurance companies, several metal fabrication companies, and a large real estate company of particular significance in the State of California.

An antitrust suit might be based upon a charge of conspiracy between the holding company and its banking subsidiaries to monopolize a substantial part of the commercial banking and credit facilities in the five-state area. The difficulty with the case at this time lies in the fact that we have not been able to develop substantial evidence either that the Transamerica Corporation achieved its present dominating position in the commercial banking field through illegal trade practices as those terms are defined in court decisions interpreting the Sherman Act, or that it abused its dominant position once it was achieved. In the absence of complete monopoly, evidence of one or both of these types of abuse is essential to make a case under the Sherman Act. We have a few illustrations indicating the use of coercive tactics by Transamerica in the acquisition of independent banks, such as creating a run on a bank through collection by agents of Transamerica of passbooks which were presented for payment over the counter in a single day, thus causing large withdrawals; threats to establish a branch in an area already adequately served by independent banking interests, one of which the Transamerica Corporation desired to buy; promotion of internal dissension in the management of the desired bank, coupled with the purchase of a sufficient amount of stock to place the purchaser in a strong bargaining position with the stockholders owning substantial interests. There are many rumors that such practices were followed regularly in acquiring independent banks. It has been impossible, however, to pin down a sufficient number of them to make a prima facie case on the theory suggested. It is possible that such testimony could be secured through grand jury proceedings. In view of the experience of the agents of the Federal Bureau of Investigation, however, this appears somewhat doubtful.

If sufficient evidence could be secured to support either abuses in achieving its present position or abuse of the position once achieved, there apparently would be no difficulty in proving restraints on commercial competition. Certainly the commerce of acquired banks and of independent banks which might and probably would have been organized except for fear of being assimilated by the Transamerica group, would be restrained. In addition, borrowers conducting interstate commercial enterprises are deprived of competitive sources of banking facilities. The commerce of enterprises competing with commercial businesses owned by the Transamerica Corporation in situations where the former must secure their financial requirements from Transamerica banks, is restrained, since such independent enterprises must reveal their confidential operations in securing credit from the Transamerica banks.

If a case of attempt to monopolize commercial banking facilities could be developed, it is suggested that relief might take the form of requiring the holding company to dispose of all interest in and control over subsidiary banks owned by it, including the stock of its largest subsidiary, the Bank of America. Since the Bank of America, through its branches, comprises approximately 90% of the commercial banking interests of the Transamerica Corporation, it would appear that effective competition in the commercial banking field in the five-state area would require some type of reorganization of the Bank of America which would provide for the creation of several distinct and competing units to be carved out of the existing Bank of America organization. Whether divestiture should be sought of some of the non-banking enterprises owned by the Bank of America, such as insurance companies, real estate companies, etc., would depend upon the development of the data which is at the present time inconclusive and fragmentary.

I trust this brief description of the status of our investigation will afford a basis for discussion at the coming conference.

Sincerely yours,

(signed) Tom C. Clark

Attorney General

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February 26, 1947

CONFIDENTIAL

Honorable Tom C. Clark,
Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

It has been well over a year since the luncheon meetings in your office of representatives of the Treasury Department, Federal Deposit Insurance Corporation, the Board of Governors and your Antitrust Division respecting Transamerica Corporation. Since that time various proposals for legislation to tighten existing controls over bank holding companies generally have been considered and discussed by the Board and on April 30, 1946, a bill dealing with this subject was introduced by then Chairman Spence of the House Banking and Currency Committee. However, the pressure of war and reconversion matters prevented consideration of this legislation by the 79th Congress. It is expected that a similar bill will be introduced in the present Congress and we hope that it will receive early and favorable consideration.

Meanwhile, however, the problem of how to deal effectively with the Transamerica situation has continued to trouble and concern the Board. Legislation alone will not solve the problem, unless it be of the "death sentence" variety; and the Board is convinced that the passage of such a bill is neither desirable nor possible. The most that may be expected of legislation is to curb the future expansion of a bank holding company which, like Transamerica, has followed a consistent policy of monopolistic growth.

In your letter to me of October 31, 1945, you reviewed the factual situation respecting Transamerica as disclosed by the investigation of your Antitrust Division. Your letter points out that at that time Transamerica

> "controls 35 banks in the States of California, Nevada, Arizona, Oregon and Washington, the largest of which is the Bank of America; that many of these 35 banks have numerous branches; that these banks control approximately 40% of the banking offices and

approximately 36% of the commercial banking deposits in the five-state area; that the Transamerica-controlled banks control approximately 80% of deposits in the State of Nevada and 61% of the commercial banking offices; in California, 42% of the deposits and 49% of the commercial banking offices; in Oregon, 39% of the deposits and 13% of the commercial banking offices; and in Washington, 5% of the deposits and 4% of the commercial banking offices. In many counties within this five-state area the percentage control of deposits and commercial banking offices is much greater. In California, for example, there are thirteen counties in which the Transamerica Corporation controls 100% of the commercial banking facilities. This expansion program has been effected over a period of approximately twenty years. In many instances the holding company financed the acquisitions by borrowing funds from its banking subsidiaries, using the assets of the purchased bank as security for the loan."

Since your letter was written, Transamerica has further increased its dominating position in the five-state area mentioned above by the acquisition of other banks and by the growth of those already owned by it. In addition, its portfolio of nonbanking interests has increased.

Both in your letter and in our contemporary meetings you expressed the opinion that, while the statistical data referred to above might be sufficient to justify the Department in commencing some kind of antitrust proceeding against Transamerica and its affiliated organizations, nevertheless the lack of proof of any sustained policy of abuse of power, either in attaining its dominant position or in perpetuating it, made the outcome of such a suit decidely dubious.

Counsel for the Board have recently called to the Board's attention the decision of the Supreme Court in American Tobacco Company v. United States, decided on June 10, 1946. The effect of that decision seems to eliminate the need in certain cases for the kind or extent of proof which had previously been thought necessary in antitrust proceedings. I am wondering, therefore, if your Department has considered whether the decision in the Tobacco case might not lessen to a considerable extent the doubt which heretofore it has entertained as to the ultimate success of an antitrust proceeding against Transamerica.

I would appreciate receiving your present opinion in the matter, for the Board is again considering the Transamerica situation in the light of the Board's over-all responsibility in the banking field generally and in particular its responsibility under section 7 of the Clayton Act.

Sincerely yours,

M. S. Eccles,
Chairman.

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April 15, 1947.

Honorable John W. Snyder,
Secretary of the Treasury,
Washington, D. C.

Dear John:

For almost two years the Board has been closely following an investigation by the Department of Justice into the Transamerica situation. The Antitrust Division has made use of certain of the Board's files in connection with this investigation, and I have had one or two talks with Tom Clark about the matter. At one of those talks and in a letter which he sent me in October 1945 he pointed out that, while the statistical picture respecting Transamerica might justify a proceeding under the antitrust laws, nevertheless he felt there was not sufficient evidence available to demonstrate an abuse of power by Transamerica either in attaining its dominant position or in perpetuating it. Hence, he felt at that time that ultimate success in a legal proceeding against Transamerica was very doubtful.

On February 26th last I wrote Tom asking whether his Department had considered the recent decision of the Supreme Court in the American Tobacco case in relation to the Transamerica matter, in particular inquiring whether the effect of that decision might not eliminate the need for the type of proof to which he had referred in our earlier discussions. I talked with him again about a week ago and he told me that he had asked you to consider the entire matter and to give him the benefit of your views.

While I know how extremely busy you are, I nevertheless hope that you will be able to give this subject your early consideration. The Board is very anxious to obtain a decision from Justice on this subject just as soon as possible so that it may determine its own future course of action in dealing with this vexing problem. I do not know whether Tom sent you a copy of my letter of February 26th. A copy is enclosed herewith. If there is any other information touching this matter which we can supply you, please let me know.

Sincerely yours,

M. S. Eccles,
Chairman.

Enclosure

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October 31, 1947.

Board of Governors

Mr. Townsend

This memorandum is submitted in response to Chairman Eccles' recent request that I prepare for Board consideration a brief analysis of the over-all Transamerica situation, together with any suggestions which I may have for dealing with the problem.

Statistically, the situation is this: As of December 31, 1946, Transamerica controlled 41 banks having 578 branches with deposits of $6,585,000,000 and served 379 towns. Its total banking offices comprised 40 per cent of all the banking offices in the five-State area of Arizona, California, Nevada, Oregon and Washington. Its deposits comprised 38 per cent of all the deposits in that area. These percentages would be considerably higher if we eliminated the States of Arizona and Washington where the Transamerica controlled banking offices and deposits are relatively small.

This situation may be compared with that which existed in 1933 when Transamerica controlled only 7 banks having 429 branches with deposits of $878,861,000 and served 242 towns. Since that time Transamerica has acquired 56 independent banks by direct purchase, and 73 more by absorption into its various controlled banks. In addition, it has received permission to establish 79 de novo branches.

The fact of this startling increase in banking offices and controlled deposits is not surprising, for the expansion policy of the Transamerica management has been common knowledge among the bank supervisory agencies for many years. Indeed, there seems to have been a period between 1939 and 1944 when those agencies were united in their opinion that Transamerica should be discouraged by every means from continuing such expansion. That no effective method has yet been devised for preventing this expansion may, however, be surprising to those who realize the extent to which it has caused genuine alarm among the banking agencies over this period.

We have been aware, of course, that the Antitrust Division of the Justice Department has had the Transamerica situation under review for some time. In fact the Board supplied much of the background material for this investigation. However, indications give little promise that any action will be taken by Justice in the near future. Almost two years ago we were advised by the Attorney General that his Department felt that, while its investigation had developed a good statistical case of monopoly against Transamerica, nevertheless it was felt that there was insufficient provable evidence of abuse of power to justify commencement of such an action at that

time. Later on, following the decision of the Supreme Court in the American Tobacco Case the Chairman wrote the Attorney General and inquired if his Department had considered whether the decision in that case might not have eliminated proof of abuse of power as an indispensable element of proof in such a case as the one against Transamerica appeared to be. In reply the Attorney General advised that the Department was studying the matter and later advised that he had requested the Secretary of the Treasury to consider the entire matter and to advise him of his views. Immediately upon receipt of this information the Chairman wrote the Secretary asking that he expedite action upon the Attorney General's request. That, I believe, is the last that has been heard in the matter.

Meanwhile, the Transamerica banking acquisitions have been proceeding apace. In 1945 it bought 5 banks having deposits of 44 millions. In 1946 it bought 5 banks with deposits of 31 millions. Already in 1947 it has acquired 3 banks with deposits of 15 millions. In addition, in 1945 two de novo branches of the Transamerica banks were established with the approval of the Comptroller. Last year 7 approvals were obtained and, since the first of this year, the Comptroller has granted 10 such approvals. The likelihood that bank holding company legislation might shortly be passed no doubt has accelerated the Transamerica expansion program. In fact it now appears to be racing against time. (Incidentally, it is understood that the Transamerica acquisition of shares of the Citizens of Los Angeles has been stepped up to a considerable degree during the year.)

In the light of this over-all situation there are a number of pertinent considerations which the Board might wish to discuss.

The first is that the proposed bank holding company legislation does not purport to deal with banks which a bank holding company already owns, except, of course, in a supervisory manner. Hence that legislation, if passed, will not help solve the problem of whether or not Transamerica should be permitted to keep all of the banks which it now owns.

The second is that any ultimate official action looking to the divorcement of Transamerica from some or all of its non-branched institutions might well be prevented if Transamerica should obtain approval to branch them. The Board has known for some time that Transamerica had made application to branch most if not all of these banks.

A third consideration is that the Comptroller, in passing upon such applications, might not feel justified in refusing them solely on the ground that the Transamerica banking empire is already too large, particularly as the Attorney General has failed to take action against Transamerica on that ground and the Board has asserted no official position or interest in the matter.

The questions which these considerations pose, therefore, are whether the Board now possesses any power for dealing with the monopolistic aspects of this situation, and, if so, what steps are necessary to be taken in order for it to exercise such power.

The answer to the first question is that the Board does have the direct power as well as the duty to carry out certain aspects of the national policy against restraint of trade and monopolies. Under Section 11 of the Clayton Act the Board is authorized to require a company to divest itself of the stocks of any banks which that company might have acquired if the Board finds, after hearing, that the effect of such acquisitions may be to substantially lessen competition between the banks so acquired and those already owned by such company, or if such acquisitions tend to create a banking monopoly.

It is true, of course, that the Board has never exercised the power just referred to, notwithstanding the fact that it has been on the statute books since the passage of the Clayton Act in 1914. Nevertheless, there can be no doubt that Congress intended the Board to have primary responsibility for enforcing this phase of national policy in the banking field. That the Department of Justice shares this view is attested by the fact that only recently a representative from that Department discussed with the writer the extent to which the Board had considered this responsibility in relation to a somewhat substantial banking acquisition which occurred in the Philadelphia District.

Whether the Board should commence a Clayton Act proceeding against Transamerica is, of course, basically a matter of policy for Board determination. Before it can decide that question, however, it must first determine the facts known to be provable in such a proceeding, and decide whether those facts constitute just cause for issuing the complaint. As the Board is aware, it does not possess the power of subpoena -- hence, in considering this question the fact must be faced that all evidence necessary to establish a case would have to be produced without resort to compulsory process. Examination of the voluminous files and reports of the Board, together with an appraisal of such voluntary testimony as may be available both here and in the West, would in the writer's judgment consume a period from two to three months. However, when it is considered that the Board has repeatedly stressed, both before the Attorney General and the Congress, that the size of the Transamerica banking group has assumed dangerous if not monopolistic proportions, it is the writer's view that the Board should exhaust the full reach of its powers for dealing with the problem. It is my recommendation that the Board direct such an investigation to be undertaken.

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#9

November 7, 1947.

PERSONAL AND CONFIDENTIAL

Honorable Tom C. Clark,
Attorney General,
Washington, D. C.

Dear Tom:

At a recent meeting the Board received and considered a report from its Legal Division discussing Transamerica Corporation and its group of controlled banks. In that report Counsel for the Board advised that, in his opinion, the present combined statistical data respecting these banks raises serious questions as to the Board's responsibilities under Section 11 of the Clayton Act. That section, as you know, places upon the Board primary responsibility for effectuating certain aspects of the federal anti-monopoly policy. It was Counsel's recommendation that the Board investigate the entire Transamerica situation in the light of these statutory provisions to determine what action, if any, the Board should take thereunder.

This is to advise you that at its meeting of October 31st last the Board unanimously adopted a resolution directing that an investigation be undertaken under the direction of its Legal Division to ascertain whether there is just cause for the Board to institute the statutory proceeding contemplated by Section 11 of the Clayton Act looking to the entry of an order requiring Transamerica Corporation to divest itself of the stocks of any or all of the banks which it now owns, with the exception of that of Bank of America National Trust and Savings Association.

Sincerely yours,

M. S. Eccles,
Chairman.

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#10

November 7, 1947.

PERSONAL AND CONFIDENTIAL

Honorable Maple T. Harl, Chairman,
Federal Deposit Insurance Corporation,
Washington, D. C.

Dear Maple:

At a recent meeting the Board received and considered a report from its Legal Division discussing Transamerica Corporation and its group of controlled banks. In that report Counsel for the Board advised that, in his opinion, the present combined statistical data respecting these banks raises serious questions as to the Board's responsibilities under Section 11 of the Clayton Act. That section, as you know, places upon the Board primary responsibility for effectuating certain aspects of the federal anti-monopoly policy. It was Counsel's recommendation that the Board investigate the entire Transamerica situation in the light of these statutory provisions to determine what action, if any, the Board should take thereunder.

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Sincerely yours,

M. S. Eccles,
Chairman.