Statement
of
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before the
Subcommittee on Domestic Finance of the
House Committee on Banking and Currency
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The legislation now under consideration, S. 1698, proposes to amend the Federal Deposit Insurance Act -- specifically the section identified as the Bank Merger Act of 1960.

Developments in the field of bank mergers and bank competition received intensive study by Congress during the decade of the 1950's. In the course of the deliberations at that time, numerous legislative proposals were heard and voted upon. You have received extensive testimony in recent weeks setting forth the background of the Bank Merger Act, the interplay of the Sherman and Clayton antitrust laws, and the problems which have evolved from the concurrent administration of these laws.

Briefly, the Bank Merger Act of 1960 requires that before acting on a merger proposal, the appropriate Federal banking agency must consider seven factors, including the six so-called banking factors plus a seventh with respect to competition, and that it obtain reports on the competitive factor from the other two banking agencies and the Attorney General. The merger may be approved only after all seven factors are weighed by the banking agency and it is determined the proposal is in the public interest.

When the Bank Merger Act was enacted, belief was widespread that the antitrust laws could not be applied to the usual bank mergers.

Leading students of antitrust voiced the opinion that banking was practically an exempt industry.

We have studied the Bank Merger Act and its legislative history very carefully, as well as our responsibilities under it. It seems very clear that this legislation was enacted in recognition of the special nature of the banking industry and of its unique role in our economy and was intended to fill an important gap that existed prior to 1960 in Federal law governing bank mergers. Congress, after thorough consideration of all of the complex issues and circumstances involved in bank merger problems, carefully drafted specific standards and criteria to be applied by the Federal banking agencies in considering merger applications. These are the governmental agencies most familiar with the problems and demands of the banking system, and they have a continuing public responsibility in all areas of Federal banking supervision. It does not appear reasonable that Congress expected that all of these factors and considerations were to be subordinated by action of the Department of Justice and subject to veto on the competitive factor alone prescribed in the antitrust laws. Nevertheless, this is precisely what has developed.

Opinions of the Supreme Court have established that bank mergers are subject to the antitrust laws and that the courts, upon institution of suit by the Attorney General, have authority to set aside bank mergers which previously have been determined to be in the public interest by the banking agencies.

The antitrust laws make no provision for consideration of any economic or banking factors other than the effect of the transaction on competition. An example of the approach that has been taken in industrial

cases and which now could be applied to banking is the Bethlehem Steel Corporation - Youngstown Sheet and Tube case, in which the court said: "If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense." Also, the Supreme Court in the Philadelphia - Girard decision stated: "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended" Section 7 of the Clayton Act.

Contrast this solitary standard with the seven factors of the Bank Merger Act. The Act provides that the six banking factors as well as the competitive factor must be considered. The legislative history of the Bank Merger Act is replete with references to the fact that all seven factors are to be considered and that no one was controlling in determining whether the transaction is in the public interest.

Another difference between the antitrust laws and the Bank Merger Act that can lead to different conclusions on the same facts is the kind of competition that may be considered. The courts have found that for purposes of determining a violation of the Clayton Act, commercial banking is a "line of commerce." This means that when a merger of two commercial banks is considered by the Department of Justice, the analysis of competition is confined to that existing only among commercial banks. No consideration is, nor apparently can be, given to

the competition provided by the many other types of institutions which compete with commercial banks.

Nevertheless, the legislative history of the Bank Merger Act directs that: "All competition which the merging banks now face, and which the merged bank would face, must be taken into consideration by the banking agency. This includes both competition from other banks and trust companies and competition from other financial institutions which may provide the same or similar services. It includes competition for the public's funds in the form of deposits, savings accounts, and the like, and it includes competition in supplying the public's needs for funds in the way of personal loans, consumer credit, mortgages, business loans, and so on."

In analyzing commercial bank merger proposals, and in fulfilling the intent of Congress, the FDIC gives consideration to the competition provided by other institutions as well as by commercial banks. This is realistic in terms of the competitive climate in the financial community today. For example, a substantial percentage of commercial bank growth in recent years has been in time and savings deposits. In this field, commercial banks are in a very competitive market with savings and loan associations and mutual savings banks. To ignore these latter institutions is to ignore the facts.

Deserving of emphasis here is the fact that competitive factors are an important element in the analysis of mergers by the banking agencies. Merely because the effect on competition is not the only factor in determining whether a merger is in the public interest does not suggest that it is relegated to a secondary role. Sound banking competition is essential to the continued free growth of our free economy.

Regarding the competitive aspect of bank mergers, the Federal Deposit Insurance Corporation places great weight upon the advice of the Department of Justice. The close cooperation and understanding of the Antitrust Division has been most helpful. When questions have been raised by them, we have made available to them such factual information as we may have as well as our views concerning the competitive factors. No antitrust action has been instituted by the Attorney General subsequent to approval of a merger by the FDIC. While this may be chiefly attributed to the size of the banks involved, I also believe that the free, respectful exchange of views has been contributory.

Two different national policies as regards bank mergers now result from the antitrust laws and the Bank Merger Act. Each policy administered by the appropriate agency can lead to a different result. When the administration of one law results in approval of a bank merger, another governmental agency can veto the first action. This inherent conflict in policy as well as unsatisfactory procedure places the Federal government in an unfortunate position with respect to a fundamental part of our economy.

Congress recognized that banking had a unique status as a quasi-public business with responsibilities and implications for the nation's economy far beyond those normally found in business. This importance is manifest in the supervisory legislation pertaining to the industry and was acknowledged again when the Bank Merger Act was passed in 1960.

The Bank Merger Act requires that the particular problems of individual banks, the needs of the communities they serve, as well as

the competitive effects of the merger be considered by the banking agencies instead of the Justice Department. Consideration of these multiple factors assures the continued development and preservation of a free competitive banking system, responsive to the nation's continually changing demands. I do not believe these assurances can be made if bank mergers are considered only in the light of the effect on competition under the antitrust laws as currently interpreted.

However, I believe S. 1698 deserves your consideration because it may solve some of the current problems attending bank mergers.

Because of the uncertainties of the existing procedure requiring action by two Federal agencies on bank mergers, banks at least deserve legislation that would place a time limitation on the power of the Justice Department to bring suit after approval by a banking agency. A waiting period after approval of a merger by a Federal banking agency should be allowed to give the Attorney General opportunity to bring action. Upon expiration of such time, initiation of a subsequent antitrust action relating only to the particular transaction approved by the banking agency should be barred. Unless the Department of Justice could satisfy the court that there was adequate basis for obtaining a preliminary injunction preventing a merger, as now required, the mere bringing of the suit by the Attorney General should not prevent the consummation of the approved merger.

We are advised by the Bureau of the Budget that while there is no objection to the submission of this report, the Bureau has previously advised the Department of Justice that there was no objection from the standpoint of the Administration's program to the submission of that Department's adverse report on S. 1698.

Since receiving this advice, we have had a brief opportunity to review H.R. 11011 which was introduced into the House of Representatives this week. It appears to contain many of the clarifying elements of S. 1698, but because it provides for judicial review on the basis of the banking factors as well as the competitive factor, we believe it warrants careful consideration by this Subcommittee along with S. 1698.