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Statement of

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before the

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of the

Committee on Banking and Currency

of the

House of Representatives

on

S. 1698

and related bills

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Mr. Chairman, you have requested my views on S. 1698. While I am afraid they will add little to the testimony already presented by the many witnesses who have preceded me, my views can be simply stated. I am one of the majority of the Board of Governors who agree with Chairman Martin in supporting all of the provisions of S. 1698, principally because it would avoid uncertainty and unscrambling inimical to the public interest in an area of business with special characteristics. I am also one of the majority of the Board who agreed with Chairman Martin in supporting the original bill, for the reasons he outlined in his statement to the Senate Subcommittee on Financial Institutions last May. Although my observation may be an academic one at this point, I still feel strongly that the approval of bank mergers should rest exclusively in the hands of the bank supervisory authorities who, as your Committee pointed out in 1960, have a thorough knowledge of banks and the banking business. Those authorities should be charged, as they were in the Bank Merger Act of 1960, with considering the competitive factor--highly important though it is--as one of several factors in determining whether a merger is in the public interest. In short, on this latter point I believe that the structure of banking should be shaped by the bank supervisory authorities on the basis of broad considerations of public interest, not shaped by others looking solely toward a narrow competitive test.

As it now stands, however, and despite the emphasis of the legislative history in the adoption of the Bank Merger Act, the Sherman Act and the Clayton Act are construed as requiring the Attorney General to seek a court order to stop a merger that he believes will diminish competition to too great a degree, even though a bank supervisory agency has approved the merger as being in the public interest. Since responsibility for administering these laws--the Sherman Act, Clayton Act, and Bank Merger Act--is divided among the courts, the Attorney General, and the three banking agencies, conflicting decisions on bank merger cases are to be expected. This is particularly true since there is as yet little agreement in or out of Government on such basic questions as how the impact of a bank merger in a market is to be measured, or even how the relevant markets are to be defined.

The Congress should not be expected to supply specific criteria when there is no consensus as to what the guidelines should be. It is not surprising, therefore, that neither the antitrust laws nor the Bank Merger Act offers much help to bankers or their lawyers who are trying to discover whether the Government will approve a proposed merger. In 1960, the House Banking and Currency Committee decided against attempting to specify the "situations where a merger would benefit the public." The Committee report commented that "framing a standard to guide the supervisory agencies in weighing the effects of a proposed merger on competition" was "the most difficult task (it) faced in considering the bill." The report added that "out of the hearings one principle emerged, on which all witnesses seemed to agree, as a starting point: Some bank mergers are in the public interest, even though they lessen competition to a degree." The quotations are from pages 10 and 11 of the Committee report on the Bank Merger Act (H. Rept. 1416, 86th Cong., 2d sess.).

I agree wholeheartedly with the Committee report's conclusion that if the Clayton Act is interpreted as "banning mergers having a given effect on competition, regardless of the benefits flowing from the merger," the Clayton Act standard is not an appropriate test. The effect on competition should be only one factor, while often the most important, to be considered in reaching a balanced judgment as to whether a merger is in the public interest.

Although I am not very sanguine as to the feasibility of harmonizing decisions under the Bank Merger Act with the conflicting standards of the antitrust laws, at the least, as Chairman Martin pointed out to you, the time left open for contradictory positions to be taken can be limited, and is limited, by this bill. Meantime perhaps some ways of reconciling the statutory requirements may be found. Along this line the Comptroller of the Currency has presented an interesting argument to the Court in the Mercantile Trust-Security Trust merger case, to the effect that the Clayton Act may be read in harmony with the Bank Merger Act, "by the Court's taking into account the banking factors enumerated in the Bank Merger Act to determine if the effect of the merger upon competition, if adverse, is sufficiently adverse as to constitute a <u>substantial</u> lessening of competition under the antitrust laws. Nothing in the Philadelphia case or the Lexington case is contrary to the construction. . ." If responsibility is to remain divided there would seem to be room in the broad language of the statutes to find some such harmonious construction.

Where responsibility is divided, responsible officials should try all the harder to reconcile their differences, to the extent that this is compatible with the discharge of their respective duties. As Governor Mitchell pointed out in his testimony before this Subcommittee, the Board of Governors and the Attorney General have achieved substantial harmony on bank mergers. Only one merger approved by the Board has been challenged in court by the Attorney General. Profiting from that experience, we adopted a procedure under which a merger approved by the Board may not be consummated for seven days, so that a reasonable time will be allowed for filing an antitrust suit, if the Attorney General concludes that it is his duty to do so. Although the Board may find that its statutory mandate under the Bank Merger Act of 1960 requires approval of a merger in the face of an imminent suit by the Attorney General under his differing responsibilities in the enforcement of the antitrust laws, I am happy to say that this has not happened since the Manufacturers-Hanover merger. And, as Governor Mitchell also pointed out, we hope that as we gain better understanding of how to analyze the competitive effects of a bank merger the possibilities of conflict will steadily diminish.

An even clearer possibility for moving closer to harmonizing standards and decisions, of course, remains open also for the bank supervisory agencies themselves. Frequently my views are solicited on how best to attain and ensure this harmonization. For my part I do not view the matter as hopeless despite the deficiencies of the existing blueprint; past experience has shown it can be workable as well as the contrary. If, however, one were to move in the direction of what on the surface appears to be a more logical blueprint--a single Federal

Bank Supervisory Agency--I would suggest that the Federal Reserve System is the best locus of authority. This view reflects not simply institutional bias, which I cheerfully concede, but a very real conviction that the System not only can perform the job most efficiently and effectively but also that the supervisory job contributes to the System's effectiveness in other areas. My own bent rests more in the area of credit policy, balance of payments, etc., than in the area of bank supervision. Were the System to lose its supervisory authority, however, the net result, in my judgment, could only be some weakening in the effectiveness of monetary policy formulation and implementation. Eliminating the supervisory and regulatory contacts would not improve our monetary policy deliberations but instead would tend to insulate us from reality in formulating policy, and this could not help but be reflected in the implementation process as well. It could only lead to a weakening of the regional character of the System which I regard as a source of strength. I think it could make the administration of discount policy more difficult. The decentralization of the System itself lends considerable weight to assigning the task to the System, avoiding unnecessary and costly duplication.

I recognize that if the supervisory responsibility were to be centered in the System it would necessitate streamlining procedures and increasing delegation of authority by the Board while retaining those contacts and authorities essential to maximizing our own present and future contributions in the monetary field. In short, the only conclusion I can come to is that despite the added workload it would entail, all of the examining, supervisory and regulatory powers relating to banks should be placed in the Federal Reserve System.

Pending greater harmonizing of standards and decisions all around, however, the public is clearly entitled to protection against the harmful effects of breaking up a merged bank in those cases where Government officials disagree as to the relation of the merger to the public good. Although it is argued that divestiture is possible, at least in those instances where the bank has a number of branches, it is impossible to restore the situation that existed before a merger took place and the adverse public consequences of such divestiture must be avoided. I believe, therefore, that the provisions of S. 1698 that would prevent consummation of a merger pending final determination of an anti-trust suit are needed, notwithstanding the questions that have been raised as to whether it is fair to banks to subject their mergers to stricter antitrust controls than the mergers of other businesses. And in my view, immunity from divestiture for the bank mergers that have already taken place should also be granted on the same ground of clear and compelling public interest. I think it would be a mistake to decide this question on the basis of what is fair to the litigants on either side. The banks may or may not have been entitled to share the widely-held belief that their mergers could not be successfully attacked under the Sherman Act or the Clayton Act. Their lawyers who said they would assume the risk of a divestiture order may or may not deserve to lie in the bed they then made.

But this is not the aspect of divestiture that concerns me; what concerns me is that breaking up the merged bank will hurt innocent bystanders. Assets can be forcibly transferred but not customers. Borrowers would undoubtedly experience hardships. And breaking up an institution that performs highly specialized services for its customers, involving confidential and fiduciary relationships, creates more serious inequities in the community than those involved in requiring a corporation that makes paint to dispose of its interests in another corporation that manufactures automobiles. I doubt that we should ask the beneficiaries of a decedent's estate to pay the court costs and legal fees connected with court proceedings to appoint a new executor or trustee, simply because a bank's lawyers thought they could win a contest that turned against them in the end. I do not believe that this is sufficient cause to penalize the public.

From the institutional standpoint, I confess that I find it very difficult to visualize reconstituting the separate banks on a viable basis. And frankly I see no public interest to be served in attempting to do so. For example, from my own fair degree of familiarity with the financial environment of Chicago and New York I would be surprised to find that any real diminution of competition had followed the mergers being contested.

I hope, Mr. Chairman, that these considerations of public interest will lead your Subcommittee to favor the approach in S. 1698.