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FEDERAL RESERVE BOARD

WASHINGTON

September 9, 1916.

My dear Governor:

An opinion of this office has been requested on the question of the proper interpretation to be given to the language "private banker" as used in the Clayton Act.

This language has been variously construed by the courts. Generally speaking a private banker may be defined as a person or firm, not a corporation, engaged in the business of banking without having special privileges or authority from the State or from the United States. (In re Surety Guaranty & Trust Company 121 Fed. 73, 74; People v. Doty, 80 New York, 225, 228; Perkins v. Smith, 116 New York, 441, 448; 23 N. E. 21).

It is, therefore, necessary to determine what constitutes the business of banking.

Since the Clayton Act prohibits private bankers, individuals or firms engaged in the business of banking from serving as officers or directors of member banks the purpose of the Clayton Act should be considered in defining the banking business. That is to say, it should be first determined what class of individuals or firms did Congress intend to make ineligible to serve as officers or directors of member banks when it prohibited private bankers from serving in these capacities.

The purpose of the Clayton Act, as its title implies and the context shows, was to prevent unlawful restraints and monopolies. It is obvious that no restraint or monopoly could be created by common control of the business of a private banker and that of a member bank unless the private banker engages in one or more activities engaged in by the member bank. It is accordingly necessary to analyze the business engaged in generally by member banks. In the case of Mercantile Bank v. New

York, 121 U. S., 138, 156, it is said:

> "The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the Government, State and national, and municipal and other corporations."

In the case of Meadowcraft v. People, 163 Ill, 56, 65, a banker is defined as follows:

> "A banker is a dealer in capital - an intermediate party between the borrower and the lender - who borrows of one party and lends to another; and the business of banking is, among other things, the establishing of a common fund for lending money." Newark on Bank Deposits, Sec. 21; see also Curtis v. Leavitt, 15 New York 9, 167.

In the case of People v. Doty, 80 New York, 225, 228, a banker is defined as follows:

> "A banker is one who keeps a place for the traffic in money; who there receives it from others, and keeps it with his own; using the whole fund as his own, or remits it at request to other places; who repays it at the will and call of his customer; who furnishes money to others on the discount of their obligations, or on securities brought by them; and who buys and sells bills of exchange."

In the case of Oregon & W. Trust Inv. Co. v. Rathburn, 18 Fed. Cas. No. 10,555 (p. 765) it was held that where a corporation loaned only its own funds contributed by its shareholders, it was not engaged in the banking business, but as explained in the case of People

v. Doty, where it mingles the funds of others with its own and makes loans, it would be engaged in the business of banking.

Eliminating from consideration the issue of notes to circulate as money, which is now confined to national banks and Federal reserve banks, an analysis of the foregoing cases indicates that the banking business may be said to consist primarily of receiving on deposit the funds of others and of lending or investing such funds for the benefit of the bank or banker.

The fundamental distinction between the business of a banker and that of a broker appears to be that the banker receives the funds of others under an agreement to repay such funds upon the order of the depositor, subject to the conditions of deposit, with or without interest, and lends such funds for his own benefit. A broker, on the other hand, may receive the funds of others for investment but is not entitled to the profits arising therefrom since he receives a commission for acting as the agent or broker of the owner of the funds in making the investment. In other words, the relation between the depositor and banker is that of debtor and creditor while the relation between the customer and the broker is that of principal and agent.

While it is difficult to define in precise terms a private banker within the meaning of the Clayton Act, it is obvious that Congress intended to prohibit those individuals or firms whose business come into competition with member banks from serving as officers or directors of member banks, and since private bankers were not included in the Kern Amendment it would seem to follow that private bankers who engage in the business of banking are precluded from serving as directors of member banks whether or not their competition with member banks may be said to be substantial.

Section 3407 United States Revised Statutes, which deals with the subject of Internal Revenue, defines a bank in the following terms:

> "Every incorporated or other bank and every person, firm, or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

This language may be said to be applicable to the present case in so far as it enumerates the activities usually engaged in by banks or bankers. It will be observed that this statute contemplates the maintenance of a place of business for engaging in the activities enumerated, and it is clearly indicated by the context that a person, firm, or corporation must make it a practice to engage in such activities before such person, firm, or corporation shall be regarded as a bank or banker within the meaning of this Act.

In defining the work "banker" as used in the Clayton Act, where the element of competition with member banks must be taken into consideration, the question of whether or not an individual or firm makes it a practice to engage in any of the enumerated activities is of even greater importance than in the case of the Revenue Act referred to. If, therefore, this definition is to be taken as a guide in the present case, it should be modified to exclude the broker or agent who merely buys or sells stocks, bonds, or other securities on commission and to make it clear that bankers within the meaning of the Clayton Act are those who seek to earn their profits from the exercise of one or more banking activities rather than from commissions paid for acting as

broker or agent.

It is, of course, obvious that a broker may in some instances be called upon to engage in transactions which are engaged in by banks. He may find it necessary, as an incident of his business, to borrow money to the same extent as any other individual or firm, or he may be called upon to advance funds to consummate a brokerage contract. If he should make it a practice or a business to borrow money to lend to others he should probably be regarded as a private banker. Where advances are made by him, however, to cover marginal transactions as an incident only of the purchase or sale of securities on commission and he does not make it a practice to receive deposits or to borrow money to lend out at interest in other transactions, not incidental to the purchase or sale of securities on commission, he should not be treated as a private banker. In this view the definition quoted should be amended to read substantially as follows:

> "Every individual or firm, not a corporation, that has a place of business where credits are habitually opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where the profits of the business engaged in are derived to an appreciable extent from money loaned or advanced on stocks, bonds, bullion, bills of exchange, or promissory notes, or where it is customary to receive bills of exchange or promissory notes for discount, or stocks, bonds, bullion, bills of exchange, or promissory notes for purchase or sale other than on commission, shall be regarded as a private banker within the meaning of the Clayton Act, but this definition shall not include firms or individuals who do a business only of buying and selling stocks, bonds, or other securities on commission, or who receive funds only for the purpose of buying and selling such securities as the agent or broker for others."

Respectfully,

M. C. ELLIOTT.
Counsel.

Hon. W. P. G. Harding,
Governor.

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