

DEPARTMENT OF JUSTICE  
WASHINGTON

September 10, 1917.

The Honorable  
The Secretary of the Treasury.

Sir:

I have the honor to acknowledge the receipt of your letter of the August 3rd. enclosing a letter of the 2nd instant from the Governor of the Federal Reserve Board to you and requesting my opinion upon the question propounded by him, as to whether State banks joining the Federal Reserve System become subject to the provisions of the Clayton Act (approved October 15, 1914; 38 Stat. 730; amended by Act of May 15, 1916) relating to interlocking directorates.

The pertinent provisions of the Clayton Act are found in Section 8, as follows:

..... no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits, aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States .....

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No bank, banking association or trust company, organized or operating under the laws of the United States, in any city . . . . of more than two hundred thousand inhabitants . . . . shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place.

The prohibitions of this section relate to banks which are "organized or operating under the laws of the United States". Obviously, the section does not apply to State banks merely as State banks, but applies to them, if at all, only in consequence of membership in the Federal Reserve System.

The Federal Reserve System embraces (1) National banks, whose membership is compulsory, and (2) banks organized under the "laws of any State or of the United States", which are eligible for membership under conditions prescribed in Section 9 of the Federal Reserve Act (approved December 23, 1913; 38 Stat. 251) Besides banks organized under State laws and doing business in the States (hereinafter called State banks), the latter class includes (a) banks organized under State laws but having offices and receiving deposits in the District of Columbia, as described in Section 713 of the Code of the District of Columbia, and (b) banks and trust companies, other than National banks, organized under the laws of the United States, i. e., banks and trust companies organized under Sub-chapters 4 and 11 of Chapter 18 of the Code of the District of Columbia (31 Stat. 1189).

National banks and banks and trust companies organized under the Code of the District of Columbia are clearly within the prohibitions of Section 8 of the Clayton Act. They are not only organized under the laws of the United States but of necessity operate under those laws as the laws of their existence.

Banks organized under State laws and carrying on business in the District of Columbia also fall within the prohibitions of Section 8 as "banks operating under the laws of the United States"; for, in carrying on business in the District, over which Congress exercises exclusive legislation, they are not only subject generally to the

laws of the United States in force within the District, but by specific enactment they are required to make reports to the Comptroller of the Currency and are subject to be examined and taken possession of by him as provided with respect to National banks. (Act of June 25, 1906,, amending Sections 713 and 714, Code D. C.; 34 Stat. 458).

State banks which join the Federal Reserve System do not, however, operate under the laws of the United States as the laws of their existence, nor in territory over which the United States exercises exclusive legislation. These banks have merely voluntarily accepted the terms and provisions of the Federal Reserve Act (including regulations made pursuant thereto) in becoming members of the Federal Reserve System, from which they are at liberty to withdraw. Yet, since upon being admitted they become subject to the terms and provisions of the Federal Reserve Act, they may also be aptly described as "operating under the laws of the United States". Accordingly, Section 8 of the Clayton Act standing alone might reasonably be construed to include State member banks within its prohibitions.

Section 8 of the Clayton Act must be considered, however, in the light of the provisions of Section 9 of the Federal Reserve Act relating to membership of State banks.

Unlike National banks, State banks are not compelled, but in effect are invited to join the Federal Reserve System. In Section 9 as originally enacted Congress specified the provisions of law to which State banks must conform as conditions of membership, including in the specification certain provisions of preexisting law. The conditions of membership for State banks having thus been specified it could be argued not without reason that if Congress had intended by Section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done.

But, whatever the original intention of Congress may have been in this respect, the present intention seems plainly to appear from the following provisions of Section 9 of the Federal Reserve Act as amended and reenacted by the Act of June 21, 1917, after the passage of the Clayton Act:

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Banks becoming members of the Federal Reserve System under authority of this section shall be subject to the provisions of this section, and to those of this Act which relate specifically to member banks, but shall not be subject to examination under the provisions of the first two paragraphs of section fifty-two hundred and forty of the Revised Statutes as amended by section twenty-one of this Act. Subject to the provisions of this Act and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal Reserve System shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created and shall be entitled to all privileges of member banks.

As thus amended, State member banks are made "subject to the provisions of this section and to those of this Act which relate specifically to member banks". Accordingly, they would appear not to be subject to the prohibitions of Section 8 of the Clayton Act under the rule of construction embodied in the maxim, "The express mention of one thing impliedly excludes all others".

The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that State member banks shall retain their "full charter and statutory rights" as State banks, "subject to the provisions of this Act and to the regulations of the board made pursuant thereto". Since the rights existing under State laws as to selection of directors seem clearly among the "charter and statutory rights" thus retained in full by State member banks, they must be held free in that regard from the restrictions imposed by Section 8 of the Clayton Act.

Respectfully,

(Signed) JOHN W. DAVIS.

Acting Attorney General.