

FEDERAL RESERVE BANK OF RICHMOND

MONTHLY REVIEW

*Antitrust and the New Bank
Holding Company Act*

*Farm Financial and Credit
Conditions*



MARCH 1971

Antitrust and the New Bank Holding Company Act: Part II

The Bank Holding Company Act of 1956 was intended to accomplish three principal objectives: (1) to prevent bank holding companies from acquiring banks across state lines; (2) to control their expansion within the states in which they were permitted to acquire banks; and (3) to preserve the historical separation of power between the suppliers of money (the banks) and the users of money (commerce and industry).

The 1956 legislation achieved the first of these objectives in the following ways: All holding companies controlling 25 percent or more of the stock of each of two or more banks, or controlling in any manner the election of a majority of the directors of such banks, were required to register with the Board of Governors of the Federal Reserve System. Prior approval by the Board was required for the acquisition by a registered holding company of more than 5 percent of the stock of any additional bank. The Board was prohibited from permitting bank acquisitions by a registered company across state lines, thus confining future expansion by individual holding companies to the geographic borders of a single state.

As time passed, however, it became increasingly evident that the 1956 law was not adequate to achieve its other two principal goals. The provisions governing bank acquisitions within permissible geographic areas caused continual difficulties for the Board of Governors; and the exclusion of one-bank holding companies from coverage was to become a massive loophole in the statute permitting bank expansion into nonbanking areas.

These deficiencies were aggravated by growing concern over concentration in banking by means of bank mergers and consolidations throughout the 1950's and 1960's, and by a sudden, massive rush by major banks in 1968 to expand into new non-banking areas using the unregulated one-bank hold-

ing as a vehicle. The result was two lengthy, often bitter, legislative struggles to amend the Act. The first culminated in 1966 with amendments subjecting all regulated bank holding companies to stringent new antitrust standards. The second resulted in 1970 amendments broadening the scope of the law to include one-bank holding companies. The latter amendments also imposed rigorous new antitrust prohibitions upon extensions of credit by banks.

The events that led to the 1966 legislation and the effects of those changes are discussed in the present installment. The 1970 legislation and its impact will be reviewed in the final portion of this article to appear next month.

Bank Acquisitions Under the 1956 Standards As discussed last month, five "banking factors" were written into the 1956 Bank Holding Company Act to guide the Board of Governors in acting upon proposed bank acquisitions by holding companies and upon proposals to form new holding companies. These were (1) the financial history and condition of the applicant company and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether the proposed transaction would expand the size or extent of the holding company system beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. As shown in Table I, between 1957 and the end of 1966, the Board approved a total of 94 bank acquisitions and denied 17, a denial rate of 15.3 percent of all acquisition proposals presented. In addition, during these years the Board approved 21 applications to form new bank holding companies and denied 10, a denial rate of 32.2 percent.

As shown by Table II, total deposits of holding company banks increased from almost \$16 billion

at the end of 1958, representing 7.4 percent of total United States bank deposits, to just over \$41 billion at the end of 1966, or 11.6 percent of total deposits. During these years, as discussed last month, the Board repeatedly advised Congress of its difficulties in attempting to balance "convenience and needs" in the fourth statutory test with the "size or extent" test of the fifth factor. The Board's 1958 Report to the Senate Banking and Currency Committee stated, in part:

A more precise statement of the purposes of the statute . . . would materially facilitate administration of the act. It is recognized that this might be difficult to accomplish. The Board believes, however, that the Congress should be aware of [this problem] . . . in order that it may, if it wishes to do so, provide more specific guidance for the exercise of the Board's discretion under the act.¹

Congress took no direct action in response to the Board's request at this time. However, during this period a train of rapidly evolving events in the related area of bank mergers brought about a major change in the regulatory environment of the commercial banking industry. This change led directly to the incorporation of antitrust principles into bank holding company regulation and transformed the entire basis for approval of all forms of concentration among commercial banks. By 1966, when this change was made, a remarkable evolution of anti-trust doctrine applicable to corporate concentration generally furnished the more objective guidelines sought by the Board.

The Bank Merger Acts of 1960 and 1966 Commencing about 1950 large numbers of mergers and consolidations among banks began to attract increasing attention from Congress and the Federal bank supervisory agencies. A total of 1,601 independent banks disappeared between 1950 and 1960. Fully 1,503 of these banks with total resources exceeding \$25 billion vanished as a result of mergers.² Notwithstanding the substantial increase in the nation's deposits and credit needs and the chartering of 887 new banks during the decade, the total number of banks declined from 14,174 to 13,460, a net reduction of 714.

¹ Report of the Board of Governors of the Federal Reserve System to the Committee on Banking and Currency, United States Senate, 85th Cong., 2d Sess. (May 7, 1958), pp. 5-6.

² "Regulation of Bank Mergers," Report of the Committee on Banking and Currency, House of Representatives, 86th Cong., 2d Sess. on S. 1062, March 23, 1960, pp. 4-5; see also, *U. S. v. Philadelphia National Bank*, 374 U. S. 321, 326 (1963).

TABLE I
BANK HOLDING COMPANY APPROVALS AND
DENIALS BY BOARD OF GOVERNORS, 1957-1969

	Bank Holding Company Formations		Bank Acquisitions	
	Approved	Disapproved	Approved	Disapproved
1957	0	0	7	2
1958	1	3	4	1
1959	1	0	7	0
1960	0	0	13	1
1961	0	0	9	3
1962	5	2	16	3
1963	2	1	5	3
1964	4	1	6	0
1965	2	1	12	2
1966	6*	2	15	2
1967	10	1	16	2
1968	9	0	33	2
1969	21	0	66	3
Totals	61	11	209	24
Percent of Dis-approvals	15.2%		10.3%	

*In addition to the six new regulated holding companies created in 1966, five existing companies previously exempt from regulation due to special provisions in the original 1956 Act became regulated companies in 1966 as a result of Congressional removal of the special exemptions.

Source: Annual Reports, Board of Governors of the Federal Reserve System.

In these years, there were few regulatory constraints on concentration in the banking industry. Prior to 1960 the Federal bank supervisory authorities had no clear authority to consider competitive aspects of proposed bank mergers and consolidations. Existing requirements for prior Federal approval were a legal patchwork, and could be avoided entirely. A total of 440 bank mergers, consolidations, and assumptions of liabilities occurred during the years 1955-1958. Of these, 153 involving banks with total resources in excess of \$8.0 billion were completed without prior approval by any Federal agency.³ The courts also refused to permit the bank supervisory authorities to deny approval of a bank merger because competition between some of the branches of the merging banks would be lessened.⁴

³ "Regulation of Bank Mergers," Report of the Committee on Banking and Currency to accompany S. 1062, United States Senate, 86th Cong., 1st Sess., April 17, 1959, pp. 14-15.

⁴ *Old Kent Bank and Trust Co. v. Martin*, 281 F.2d 61 (D. C. Cir. 1960).

TABLE II

REGISTERED BANK HOLDING COMPANY GROWTH
1958-1970*

	Companies	Banking Offices		Total Deposits Millions of Dollars	Percent of Total U. S. Deposits
		Banks	Branches		
1958	49	418	848	15,998	7.4
1960	47	426	1,037	18,274	8.0
1962	49	442	1,215	21,203	8.1
1964	54	460	1,379	24,959	8.1
1966	65	561	1,802	41,081	11.6
1968	80	629	2,262	57,634	13.2
1969	97	723	2,674	62,574	14.3
1970**	109	884	NA	69,275	16.0

*Data as of December 31.

**Deposit data as of June 30; office data as of October 31.

Source: Board of Governors of the Federal Reserve System.

Similarly, antitrust enforcement was no deterrent to bank concentration throughout the 1950's. As discussed in Part I of this article, the *Transamerica* case in 1953 established that acquisitions of bank stock by other banks were subject to Section 7 of the Clayton Act; by implication, this made all forms of bank acquisitions, consolidations, and mergers subject to the broader antitrust prohibitions of the Sherman Act.⁵

Yet for a variety of reasons, the antitrust laws were ineffectual in halting concentration in banking before 1961. It was generally believed that Section 7 of the Clayton Act did not apply to most types of bank mergers. The Senate Report on the bill that became the 1960 Bank Merger Act expressly stated that "Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from Section 7 of the Clayton Act."⁶ The House Report was equally positive on this question:

Although the Sherman Act applies to asset acquisitions as well as to stock acquisitions, it has been of little use in controlling bank mergers. It has been used only once in court (in a proceeding initiated in March 1959) against a bank merger.⁷

The combination of 1,503 bank mergers in 10 years and the lack of statutory power for regulatory and antitrust authorities to control the merger trend

led to enactment of the Bank Merger Act of 1960.⁸ Taking the form of an amendment to Section 18(c) of the Federal Deposit Insurance Act, the Bank Merger Act required prior written consent for any insured bank to merge or consolidate with any other insured bank or to acquire the assets or assume the liabilities of any other insured bank. Unlike the Bank Holding Company Act, however, which placed all administrative control with the Board of Governors, the Bank Merger Act created a three-headed authority. Prior approval was required (1) by the Comptroller of the Currency if the acquiring, assuming, or resulting bank was to be a national bank; (2) by the Board of Governors if it was to be a State member bank; and (3) by the Federal Deposit Insurance Corporation if it was an insured nonmember bank.

Common standards to be used in passing upon proposed acquisitions were provided for all three agencies. These included

the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of [the] Act.⁹

The responsible agency also was required to take into consideration the effect of the transaction on

⁵ In April, 1959, a Report of the Senate Committee on Banking and Currency stated: "It is now generally accepted that these sections (Sections 1 and 2 of the Sherman Act) apply to bank mergers and consolidations by either stock or asset acquisitions (see *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, pp. 165-166 (3rd Cir. 1953))."

⁶ *Supra*, note 3, p. 1.

⁷ *Supra*, note 2, p. 9.

⁸ 74 Stat. 129 (May 13, 1960).

⁹ Compare the substantially similar standards of the 1956 Bank Holding Company Act, p. 3.

competition, and was prohibited from approving any transaction unless it was found to be in the public interest. The statute required each agency, "in the interests of uniform standards," to request a report on the competitive factors involved from the Attorney General and the other two banking agencies before acting on an application.

Nevertheless, the merger trend continued. In 1961, 133 banks with total resources of almost \$6 billion were absorbed following approvals by the banking agencies under the new law.¹⁰ A number of these approvals were granted despite reports of the Attorney General and one or more of the other banking agencies advising of substantial anticompetitive effects.¹¹ Two of these approvals led to extended litigation and because leading antitrust benchmarks with enduring influence not only upon merger law but upon bank holding company acquisitions of commercial banks as well.

The Philadelphia Bank Case On February 24, 1961, the Comptroller of the Currency approved the proposed merger of The Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank (Girard), the second and third largest, respectively, of 42 commercial banks with head offices in the Philadelphia metropolitan area. The two banks were direct competitors, and within the relevant four-county metropolitan area accounted for a combined total of approximately 36 percent of total bank assets, 36 percent of deposits, and 34 percent of loans. The Attorney General advised that the proposed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area. Nevertheless, the Comptroller approved the merger stating that

... since there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the overall effect upon competition would not be unfavorable.

The Comptroller also found that the consolidated bank

would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry.¹²

One day later the Department of Justice sued in Federal court, challenging the proposal under amended Section 7 of the Clayton Act. This statute had been amended in 1950 to read as indicated below, with the italicized phrases added in 1950 and the bracketed portions deleted. Both the added and the deleted portions were relevant to the issues presented in *Philadelphia Bank*:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country* the effect of such acquisition may be substantially to 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 to tend to create a monopoly [of any line of commerce].¹³

The Trial Court held that approval of the proposal by the Comptroller under the Bank Merger Act of 1960 did not prevent the Government from challenging it under the antitrust laws, but that amended Section 7 was not applicable to bank mergers because banks are not corporations "subject to the jurisdiction of the Federal Trade Commission." Nevertheless, realizing that the case was destined to go to the Supreme Court, and in order to present a decision on the merits for review, the Trial Court assumed Section 7 was applicable for purposes of deciding the case. It reasoned that if the proposal did not violate the narrower test of Section 7, designed to prevent incipient violations of the Sherman Act, it could not possibly constitute an unreasonable "restraint of trade" under the latter statute.

On this assumption, the court concluded that there was no reasonable probability that competition would be substantially lessened in the relevant four-county metropolitan area, although it agreed with the Government's contention that commercial banking was

¹⁰ *Annual Report of the Federal Deposit Insurance Corporation*, 1961, p. 11.

¹¹ *Annual Report of the Comptroller of the Currency*, 1961, pp. 41-42, 61-62; see also *U. S. v. Philadelphia National Bank*, 374 U. S. 334 (1963), pp. 332-333. Indeed, in the case of the consolidation of Security Trust Company, Lexington, Ky. with the First National Bank and Trust Company of Lexington, Ky., the Attorney General's report to the Comptroller advised that an investigation had been initiated to determine whether the consolidation would violate the Sherman Act.

¹² *U. S. v. Philadelphia National Bank*, 374 U. S. 321 (1963) at p. 333.

¹³ 38 Stat. 730 (1914) as amended 64 Stat. 1125 (1950). The Government's complaint in the *Philadelphia Bank* case also alleged an unlawful restraint of trade in violation of Section 1 of the Sherman Act. This issue was never reached in the decision of either the District or Supreme Court.

a "line of commerce" for purposes of Section 7. Finally, since it concluded that the proposed merger would not violate Section 7, it concluded that the transaction could not be a "restraint of trade" prohibited by Section 1 of the Sherman Act.¹⁴

On appeal, the Supreme Court reversed. It found that the proposed merger was neither an acquisition of stock nor an asset acquisition and concluded that "the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of Section 7 only asset acquisitions by such corporation when not accomplished by merger." In net effect, this construction subjected all bank mergers, consolidations, assumptions of liabilities, and acquisitions of assets (if substantially all the assets are acquired) to Section 7.

The tremendous impact of the decision was described by dissenting Justices Harlan and Stewart in these words:

The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy. As the present case illustrates, the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not satisfactory, a Section 7 suit may be commenced immediately. The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar to banking. And if such a suit were deemed to lie after a bank merger has been consummated, there would then be introduced into this field, for the first time to any significant extent, the threat of divestiture of assets and all the complexities and disruption attendant upon the use of that sanction. The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.¹⁵

This was only the threshold effect of *Philadelphia Bank*. In addition to taking away the shelter of the Bank Merger Act, the case announced sweeping new antitrust principles governing corporate mergers generally. The majority opinion said:

Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects

¹⁴ *U. S. v. Philadelphia National Bank and Girard Trust Corn Exchange Bank*, 201 F. Supp. 348 (D.D.C. 1962), reversed, 374 U. S. 321 (1963).

¹⁵ 374 U. S. at p. 385.

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in Section 7 to prevent undue concentration

The merger of [PNB and Girard] will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents the threat. Further, whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 50%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.¹⁶

Philadelphia Bank was an antitrust bombshell that first demolished the shelter—the Bank Merger Act—and then destroyed the challenged bank combination using new antitrust rules formulated in the Court's opinion. Moreover, it was only the opening salvo. A year later the follow-up *Lexington Bank*¹⁷ opinion sent shock waves throughout the banking industry and the Congress.

The Lexington Bank Case One week after beginning its antitrust proceeding against the PNB-Girard merger in late February, 1961, the Department of Justice sued under Sections 1 and 2 of the Sherman Act to dissolve the consolidation of the first and fourth largest banks in Fayette County, Kentucky, approved by the Comptroller of the Currency only three days after sanctioning the PNB-Girard merger. The two institutions accounted for a combined total of 52 percent of total deposits, 54 percent of total loans, and 53 percent of total assets of the six commercial banks in Fayette County. They also held 95 percent of all trust assets and accounted for 92 percent of all trust department earnings in the county.

The lower court and the Supreme Court agreed that commercial banking was the relevant product market in this Sherman Act proceeding, just as it was for Clayton Act purposes in *Philadelphia Bank*.¹⁸ They also agreed that Fayette County was the relevant geographical area. They parted company, however, over the legality of the merger.

¹⁶ 374 U. S. at pp. 364-365.

¹⁷ *U. S. v. First National Bank and Trust Company of Lexington*, 376 U. S. 665 (1964).

¹⁸ In a footnote the Court said: "In view of our disposition of the case we find it unnecessary to determine whether trust department services alone are another relevant market." 376 U. S. at p. 667, fn. 3.

While the lower court found no unreasonable restraint under Sherman Act standards, the Supreme Court concluded in a brief opinion:

There was here no “predatory” purpose. But we think it clear that significant competition will be eliminated by the consolidation

We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade

* * *

Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of Section 1 of the Sherman Act.¹⁹

There was no reference in the Court’s opinion to the particular conditions of the banking industry which caused Congress to write the five specific *nonantitrust* banking factors into the 1960 Bank Merger Act discussed earlier. These were simply ignored.

The failure of the Court in *Philadelphia Bank* and *Lexington Bank* to give weight to the banking factors of the Bank Merger Act, coupled with the vigorous enforcement campaign mounted by the Department of Justice against banking concentration, generated a movement in Congress to revise the Bank Merger Act to give complete antitrust exemption to any bank merger approved by one of the three banking agencies, as well as any bank merger predating the 1960 Bank Merger Act.

The atmosphere in which this momentous legislative battle was waged—against the backdrop of pending major bank merger antitrust cases brought by the Department of Justice in Illinois, Arizona, New York, California, Tennessee, and Missouri²⁰—was summed up in this paragraph from a contemporary newspaper account:

For a complex measure directly affecting so few people, the heat of battle seemed worthy of the Missouri Compromise, League of Nations membership and Prohibition repeal rolled into one. Secret letters circulated in the pockets of those involved. Conspiratorial Congressmen huddled “in the dark” to write legislation without telling their committee chairman. Liberals fought liberals, while the Attorney General wrestled inconclusively with himself.²¹

¹⁹ 376 U. S. at pp. 672-673.

²⁰ *U. S. v. Continental Illinois National Bank and Trust Company of Chicago*, filed August 29, 1961; *U. S. v. The Valley National Bank of Arizona*, filed December 28, 1962; *U. S. v. Manufacturers Hanover Trust Company*, filed September 8, 1961; *U. S. v. Crocker-Anglo National Bank*, filed September 8, 1963; *U. S. v. Third National Bank in Nashville*, filed September 10, 1964; *U. S. v. Mercantile Trust Company National Assn.*, filed July 7, 1965.

²¹ *The Wall Street Journal*, February 8, 1966, p. 16.

Finally, the adversaries agreed to a compromise. The new statute provides that a Federal banking agency may not approve a bank merger “which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States.” It further provides that an agency may not approve any merger that may substantially lessen competition, tend to create a monopoly, or be in restraint of trade unless it finds that the anticompetitive effects of the transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The “public interest” factors that must be considered are the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served.²² Prior approval by one of the banking agencies is required before any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank may occur.

Bank Holding Company Act Amendments

Throughout the fierce controversy over amending the Bank Merger Act, the Bank Holding Company Act was almost entirely ignored. No significant antitrust problems had arisen in connection with regulated holding company acquisitions. Only one holding company approval by the Board between 1956 and 1966 was challenged by the Department of Justice,²³ and this was settled prior to trial. Nevertheless, as previously indicated, the Board had on several occasions advised Congress of difficulties in accommodating the “convenience and needs” test to “size and extent” and preservation of competition factors.

Proposed amendments to the Bank Holding Company Act, however, were pending before the same committees of Congress with jurisdiction over the bank merger question. None of these proposals involved possible modification of the five banking factors in the Bank Holding Company Act of 1956. But when the 1966 amendments to the Bank Holding Company Act emerged from the Senate Banking and Currency Committee shortly after the Bank Merger Act was amended, the five banking factors

²² 80 Stat. 7, February 21, 1966.

²³ *U. S. v. Marshall and Ilsley Bank Stock Corporation*, filed March 7, 1961, settled by consent decree in 1969.

had been replaced with the identical test imposed upon bank mergers. Therefore, the novel statutory criteria for approving bank mergers were extended to include holding company organizations.

This change, though far-reaching, drew only one comment in the Senate Report on the 1966 Bank Holding Company Act amendments, as follows:

11. *Conforming standards in holding company cases with those in mergers.*—In the interests of uniform standards, the bill would amend section 3(c) of the Bank Holding Company Act to require the Board, in acting on applications for the formation or expansion of holding company systems, to take into account the same factors as are specified in the recently amended Bank Merger Act (Public Law 89-356) for consideration in passing on bank mergers.

* * *

19. *Application to holding company cases of same antitrust procedures as apply in merger cases.*—The Congress recently amended the Bank Merger Act to eliminate conflicts between that act and the antitrust laws that might otherwise require the unscrambling of a merger, under the antitrust laws, that had been approved under the Bank Merger Act. The bill would apply to bank holding company cases the same procedures as are now provided for this purpose in bank merger cases, in addition to establishing uniform standards.²⁴

Present Status of the Law The ink was barely dry on the 1966 Bank Merger and Bank Holding Company legislation when a new round of litigation erupted over its meaning. The Department of Justice took the position that paramount consideration must be given to competitive aspects of proposed transactions.²⁵ This interpretation was soon confirmed by a series of Supreme Court decisions commencing with the *First City Bank of Houston*²⁶ case in 1967, and culminating with the *Phillipsburg*²⁷ opinion in mid-1970.

At present, therefore, the banking agencies must follow a two-step process in acting upon merger and holding company applications. The first determination is whether the proposal will result in a monopolization or contribute to monopolization of the banking business in "any part" of the United States. If so, the application must be denied.²⁸ Assuming no such

adverse consequences, the agencies must determine whether the proposed transaction would substantially lessen competition, tend toward monopoly, or restrain trade "in any section of the country." If it will, it may not be approved unless the responsible agency finds that its anticompetitive aspects are "clearly outweighed in the public interest" by its probable effect "in meeting the convenience and needs of the community to be served."

If the Department of Justice disagrees with an agency's approval, it has 30 calendar days from the approval date to commence a court proceeding under the antitrust laws. If it does not act within that time, the merger or acquisition is thereafter permanently immunized from antitrust attack except under the monopolization provisions of Section 2 of the Sherman Act.²⁹

TABLE III

DEPARTMENT OF JUSTICE CASES FILED UNDER SECTION 7 OF THE CLAYTON ACT, 1966-1970

	Total Number, All Defendants	Number Against Bank Mergers and Holding Company Acquisitions	Bank Merger and Holding Company Cases as a Percent of Total
1966	13	4	30.7%
1967	10	3	30.0%
1968	24	10	41.6%
1969	20	9	45.0%
1970 *	8	3	37.5%
Entire Period:	75	29	38.6%

*Through June 30, 1970.

Source: Department of Justice.

If an antitrust proceeding is filed within the prescribed time, the Federal court must use identically the same standards as the agency used in its approval, unless monopolization or attempt to monopolize is charged. However, even though it must apply the same standards as the agency, the court is not bound by the agency's findings of fact. The case is tried as if there had been no prior administrative proceedings, although the court may take note of the agency's findings.

²⁴ Senate Report No. 1179, 89th Cong., 2d Sess. (1966), p. 2393.

²⁵ *Congressional Record*, March 8, 1966, p. A1310.

²⁶ *U. S. v. First City National Bank of Houston*, 386 U. S. 361 (1967).

²⁷ *U. S. v. Phillipsburg National Bank & Trust Co.*, 90 Sup. Ct. 2035 (1970). Sandwiched between *Houston* and *Phillipsburg* was the important ruling in *U. S. v. Third National Bank in Nashville*, 390 U. S. 171 (1968).

²⁸ Presumably the courts will read an exception into this absolute prohibition where a bank is failing and the only available purchaser is the sole competitor of the failing institution.

²⁹ Section 2 provides, in pertinent part, that:
Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor

26 Stat. 209 (1890).

Antitrust trials against bank merger and holding company acquisitions have accounted for a substantial proportion of the entire enforcement effort by the Department of Justice under Section 7 of the Clayton Act since the 1966 legislation, as indicated by Table III.

As indicated, 38.6 percent of *all* antitrust cases brought by the Department of Justice since 1966 against corporate acquisitions by all types of companies—industrial, commercial, and financial—have been directed against mergers and acquisitions of commercial banks. In part, this vigorous enforcement record reflects the fact that the three banking agencies apparently have not applied the uniform bank merger standards in a uniform manner. For example, during the period from the beginning of 1966 through July of 1968, the denial rate of the Board of Governors was almost 11 percent of total merger and holding company applications received,

with approximately the same rate for mergers, holding company formations, and holding company acquisitions. In contrast, less than 3 percent of bank merger applications were denied by the Federal Deposit Insurance Corporation, and less than 2 percent by the Comptroller of the Currency.³⁰ Of the 29 antitrust proceedings against bank mergers and holding company acquisitions during this period, only five were against transactions approved by the Board of Governors.

(Next month, the concluding installment will discuss the one-bank holding company question, the 1970 amendments to the Bank Holding Company Act, and the current issues regarding permissible expansion by bank holding companies into non-banking areas.)

William F. Upshaw

³⁰ Andrew F. Brimmer, "Market Structure, Public Convenience, and the Regulation of Bank Mergers," *Speech*, October 1, 1968.

FARM FINANCIAL AND CREDIT CONDITIONS

This study was made in December 1970 at the request of USDA's Agricultural Finance Branch and has since been updated. It is based on a sample survey of Fifth District bank agricultural specialists and on data from the U. S. Department of Agriculture, the Farm Credit Administration, and the Federal Deposit Insurance Corporation.

Results of a sample survey of bankers' opinions, combined with the most recent statistical data, provide the basis for this review of the financial and credit conditions of Fifth District farmers in 1970. Briefly, here are the highlights: Gross farm income was slightly larger than the improved level of 1969. Off-farm income rose further. Farm and family living costs also continued to climb. Spending for family living items showed a slight advance, but in general expenditures for capital items were down. Market values of farmland continued to rise, although farm real estate market activity was slower. Demand for farm credit remained strong, but not as strong as in 1969. Interest rates were higher. Bank loan funds generally were tight, although some slight improvement in the availability of loan funds seemed evident. Bankers' farm loan repayment experience was generally as good as, or better than, a year earlier.

Farm Income and Costs District farm income in 1970 showed some further slight gain over that in 1969, a year in which realized gross farm income hit an all-time high and realized net farm income reached its highest point since 1953. Most of 1970's improvement in gross farm income resulted from a 7% upturn in cash receipts from farm marketings. In view of the continued rise in farm production expenses, realized net farm income seems likely to have turned up only slightly, if at all. Farmers' earnings from nonfarm employment also continued to rise, however, providing some additional improvement to their income positions in 1970.

Bankers' opinions regarding farm income in 1970 varied widely. Three-fifths of those reporting looked for a further upturn in gross farm income from that in 1969. Half felt the increase would be small, and one-tenth anticipated that it would be considerable. In contrast, one-fourth foresaw a slight decline, and the remaining 15% expected little change.

Despite the slight increase in gross cash income from farming in the District as a whole in 1970, some communities doubtless experienced declines. Localities suffering from prolonged drought conditions and/or from the ravages of Southern corn leaf blight were especially hard hit. Corn farmers in the Carolinas and soybean producers in Maryland and Virginia were hurt badly. But, in the aggregate, gains from other farm enterprises offset the declines.

Livestock production, a growing money-maker for District farmers for many years, provided the basis for further improvement in farm income again in 1970. Supplies of poultry and eggs, the leading source of livestock income, were larger: broilers, around 5%; eggs, 4%; and turkeys, some 4%. Milk production was about 1% above that in 1969. Hog marketings were up around 10%. Market supplies of cattle and calves, however, were down by roughly the same percentage even though the beef cattle inventory at the beginning of 1970 was 6% over that of the previous year.

Livestock and livestock product price indexes were above year-earlier levels in all District states except North Carolina, where a decline of roughly 2% occurred. Although the gains recorded in the other states were not nearly as sharp as those in 1969, all the increases were larger than the national average and ranged from 2% in South Carolina and Maryland to 4% in Virginia. Farmers' cash receipts from sales of livestock and livestock products during 1970 were 3% above those in 1969. Gains were registered in all states and ranged from 1% in Maryland to 5% in South Carolina.

Many crop farmers will remember 1970 as a drought year or as the year of the corn blight. Obviously, the adverse growing conditions hurt many—some seriously. The dry weather and leaf blight dealt the corn crop a double blow and, as a result, production was 16% below 1969 and the smallest

since 1966. Output of soybeans, the other major money crop damaged by drought, was down some 13%. Although of less importance as income producers, the following crops were also significantly smaller: pecans, 34%; peaches, 12%; and sweet potatoes, 7%. A 10% cut in acreage was primarily responsible for the smaller crop of sweet potatoes, however.

But whether farmers remember 1970 as a poor year or as a good one will depend primarily on what combination of crops they produced. Those growing either flue-cured tobacco, peanuts, or cotton, or a combination of these major money crops, will almost surely count it a good year. Production of flue-cured tobacco, the chief income earner, was up 10% (with a 14% increase in North Carolina), and prices averaged only fractionally below the all-time high established in 1969. A record-breaking, good quality peanut crop, 30% larger than a year earlier, was harvested under generally ideal weather conditions. Prices throughout most of the marketing season averaged at the support level, roughly 3% higher than that in 1969. Cotton production was 23% greater than the small 1969 crop, with most of the increase in North Carolina. The Tar Heel crop was the largest since 1965 and reportedly one of the highest quality cotton crops in the Southeast. Cotton prices during the fall harvesting season were well above average support prices. Added to these pluses were the sharply higher prices received for soybeans, corn, and peaches which offset much of their reduced production. Prices of most District crops, in fact, held up well in 1970. With the exception of West Virginia, where prices averaged lower, average crop prices were up 2% in Virginia, 3% in Maryland, 4% in North Carolina, and 6% in South Carolina.

District farmers' cash receipts from crop marketings during 1970 were 11% larger than those in 1969. Increases among the District states varied substantially, however, ranging from about 1% in Maryland to 14% in South Carolina.

Farmers' costs continued to increase under persisting inflationary pressures in the general economy. Cost increases, however, were probably not as large as in the previous year. Compared with the better than 5% advance in 1969, average prices paid by farmers, including interest, taxes, and wage rates, rose slightly less than 5% during 1970. Some further rise in farm production costs also seems to have

resulted from the need to buy additional inputs. But survey data suggest that the volume of purchased inputs increased less in 1970 than in 1969.

Earnings from off-farm work, both by farm operators and by other farm family members, continued to trend upward in 1970. Respondents attribute this trend to some further industrial expansion in rural areas. The pace of this trend, which has done much to improve both the living standards and the creditworthiness of farmers, apparently tapered off in some localities as bankers in some areas reported a slight decline in off-farm income. This decline, noted by 10% of those replying, was said to have resulted both from unemployment and from work stoppages caused by strikes.

Farmers' Savings and Spending District farmers appear to have maintained their financial savings and reserves at about the same level as a year earlier. This situation can probably be attributed to a slight improvement in income and to a cutback in spending on capital goods.

Farmers, like their urban cousins, were again faced with a general increase in the cost of living in 1970. The farm family living index rose some 4% during the year, and farmers' total spending for family living items seems likely to have increased slightly. Our banker survey indicated that while this was generally the case, a good many farmers were considerably more resistant to the higher consumer prices in 1970 than in 1969. Thirty per cent of the respondents felt that farmers had reduced their spending for family living purposes slightly. This contrasts with only 15% who held this view in 1969.

Farmers generally held the line or cut back on capital expenditures in 1970. Reductions in capital outlays for machinery and equipment appear to have been significantly larger than those for facilities and other capital goods. Farmers' efforts to reduce this type spending were attributed not only to the high cost of capital items but also to the high cost and limited availability of credit.

Farmland values continued to increase, but the rate of advance among District states varied considerably. Farm real estate prices in the District as a whole rose nearly 10% during the year ended November 1, 1970, with most of the increase occurring during the eight months from March 1 to November 1. Market values recorded the slowest rate of gain in the Carolinas, South Carolina

registering a 7% increase and North Carolina 9%. Sharp advances of 12% occurred in both Virginia and Maryland, states where nonfarm factors continue to exert a strong influence on the price of farmland. Market prices in West Virginia, also under the influence of fairly strong nonfarm factors, rose 10%. The decline in prices of flue-cured tobacco land, first reported by North Carolina bankers in 1969, has continued. Where flue-cured tobacco allotments then sold for \$3,000 to \$4,000 per acre, they sold for \$2,500 to \$3,000 in 1970. This decline in land values continues to reflect the growing labor shortage in flue-cured tobacco areas.

Activity in the farm real estate market in 1970 appears to have been considerably slower than in other recent years. The number of farms on the market was said to be small, and some respondents noted that fewer people were looking for farmland. With the supply of farms on the market down and with money tight, declines in the purchase of farmland for farm enlargement were reported by 65% of the bankers surveyed. Farm rental and leasing arrangements, some running for three to five years, increased further. Use of available funds to purchase machinery and equipment rather than farmland was also noted. Where demand for land for farm enlargement was strong and land was available, some bankers indicated they were continuing to refer farmers to the Federal land banks for long-term financing.

The demand for farmland for nonfarm purposes remained fairly strong, although market activity was apparently slower than during the previous year. Only 40% of the responding bankers reported slight gains in such purchases, compared with 55% in 1969. In contrast, 30% of the respondents in 1970 noted a slight decrease from a year earlier, compared with 10% in 1969. Some of the decline in the purchase of farmland by nonfarm buyers was attributed to a slowdown in industrial expansion, but in a number of areas industrial development continued to be one of the prime reasons for increased activity. Other reasons for increased nonfarm purchases were: development of housing subdivisions, construction of interstate highways, purchase of lots for retirement homes, and expansion of airport facilities. As has been the case for many years, increased buying of farmland for nonfarm uses was associated with a significant increase in the price of farmland.

Farm Credit Situation Demand for farm credit remained strong in 1970, although apparently not

as strong as in 1969. The survey indicated that some farmers showed reluctance to borrow at the higher rates of interest. The number of farmers who borrowed from commercial banks fell slightly, but the average amount loaned per farm borrower again increased moderately. Bankers' farm loan repayment experience was about the same as, or somewhat better than, in 1969. The number of delinquencies was lower, and loan renewals were down slightly.

Bankers' lending policies in general were tight. Basically the same restrictive policies adopted by many in 1969 were reported by 65% of the 1970 respondents. The remaining 35% indicated that they adopted tighter policies during 1970. Bankers adhered to generally tight loan policies by charging higher rates of interest, confining their lending to long-established customers, and making mostly, or only, short- and intermediate-term farm loans.

Some 55% of the bankers surveyed noted that interest rates charged farmers in 1970 were higher than a year earlier. The remaining 45% indicated little change. The most common rate in 1970, as in 1969, was 8%. Rates ranged, however, from 7½% to 9% for short-term loans, from 7½% to 10% for intermediate-term loans, and from 7½% to 9½% for long-term loans. By comparison, rates on all types of farm loans in 1969 ran as low as 7%, and the highest rate charged on farm-mortgage loans was 8%.

Bank funds available for loans to farmers may have been fractionally larger in 1970 than in 1969. One-fifth of the reporting bankers stated that their supplies of loan funds were greater. Though this increase was partially offset by the 10% who indicated smaller supplies, the remaining 70% noted that the availability of funds for farm loans had been about the same as a year earlier. Where the latter situation was reported, these bankers often qualified their answers by saying funds were sufficient for their long-established customers. Ninety-five per cent of the reporting bankers said, however, that they had not turned down farm loan applications in 1970 because of lack of funds.

Comparison of the change in the volume of outstanding farm debt held by three of the principal institutional farm lenders during the year ended June 30, 1970 with that during the year ended June 30, 1969 indicates that overall demand for farm credit did remain strong in 1970 but not as strong as in 1969. For example: Farm real estate loans held by all insured commercial banks in mid-1970

totaled \$290.8 million, roughly 1% or \$1.7 million below a year earlier. This contrasts with a gain of 5% or \$14.4 million in bank held long-term farm debt during the year ended in mid-1969. By comparison, outstanding loans held by the Federal land banks on June 30, 1970 amounted to \$480.1 million, up around 12% or \$49.5 million during the 12-month period. This increase, however, was less than the gain of 16% or \$60.3 million recorded by the Federal land banks during the 12 months ending in mid-1969.

The volume of non-real-estate farm debt held by District banks during the year ending at midyear 1970 had increased faster, both in percentage and dollar terms, than during the previous 12-month period. The opposite was true in the case of the PCA's, although both the percentage and dollar increases in their volume of outstanding non-real-estate loans were far greater than those for banks during both 12-month periods. Non-real-estate farm debt outstanding at banks in mid-1970 amounted to \$339.1 million. This gain of 3.8% or \$12.5 million compared with an increase of 3.6% or \$11.5 million during the year ended in mid-1969. On the other hand, the amount of non-real-estate debt held by PCA's at midyear 1970 totaled \$383.0 million, some 15% or \$48.8 million above that outstanding at mid-year 1969. During the preceding 12 months, the gain in PCA loans amounted to 19% or \$52.6 million.

Farm Financial and Credit Outlook for 1971
Bankers indicated that some further slight improvement in farm income was probable in 1971. Under the assumption that weather during the growing and harvesting season would be average or better, 35% anticipated that farm income would increase slightly, 40% foresaw little or no change, while the remaining 25% looked for a slight decline. One reason given for a prospective decline in 1971 farm income was that a good many flue-cured tobacco growers had marketed 110% of their farm's poundage quota in 1970. Under the acreage-poundage program, any marketings in excess of the farm's quota in any one year will be deducted from the farm's poundage quota and acreage allotment the following year.

Farm costs may well rise further in 1971, according to 95% of our respondents. Many of these, however, believed that the rate of increase would be somewhat slower than in 1970.

On balance, it appears that the general debt and financial position of District farmers may be somewhat better in 1971 than in 1970. Favorable returns from farming in 1970 should enable farmers in many sections to pay off old debts and enter the new year with improved equity positions. Drought and the corn blight no doubt adversely affected the overall financial position of farmers in some areas, however. Forty-five per cent of the replying bankers expressed the belief that the debt and financial position of farmers in general would be better in

FARM DEBT: AMOUNT OUTSTANDING HELD BY SPECIFIED LENDERS, BY TYPE
United States and Fifth District by States, June 30, 1970 compared with June 30, 1969

State or Area	Farm-Mortgage Debt				Non-Real-Estate Farm Debt			
	All Insured Commercial Banks		Federal Land Banks		All Insured Commercial Banks		Production Credit Associations	
	Amount Outstanding 1970	Change from 1969	Amount Outstanding 1970	Change from 1969	Amount Outstanding 1970	Change from 1969	Amount Outstanding 1970	Change from 1969
	\$ Million	Per Cent	\$ Million	Per Cent	\$ Million	Per Cent	\$ Million	Per Cent
Maryland*	68.7	+1.8	60.6	+11.4	37.9	+ 8.3	38.1	+ 6.7
Virginia	83.6	-1.9	112.6	+11.7	108.5	+ 6.6	55.7	+10.2
West Virginia	33.0	+6.7	12.4	+ 1.1	19.4	+13.6	8.4	+ 2.2
North Carolina	77.4	-2.4	185.6	+10.4	128.5	- 1.2	186.4	+18.8
South Carolina	28.2	+4.0	108.9	+14.6	44.9	+ 5.1	94.5	+13.9
Fifth District	290.8	-0.6	480.1	+11.5	339.1	+ 3.8	383.0	+14.6
United States**	4,016.3	-1.1	6,993.9	+ 6.7	11,214.6	+ 6.3	5,358.7	+17.3

* Includes District of Columbia.

** States and other areas.

Note: Data may not add to totals because of rounding.

Sources: Federal Deposit Insurance Corporation and Farm Credit Administration.

1971 than in 1970. Two-fifths felt the situation would be about the same as in 1970, and the remaining 15% believed it would be worse.

Demand for farm credit in 1971 is expected to match or to exceed that of 1970. Two-fifths of the responding bankers felt that farm loan demand will remain at about the same level as in 1970. Fifty-five per cent, however, looked for a slight increase, while only 5% expected a slight decline. General inflationary trends and an anticipated increase in day-to-day operating expenses were the prime reasons behind the expectations that credit demands will be strong.

The expected levels of farmers' spending and investment in 1971 varied considerably. One-fifth of the participating bankers looked for farmers to increase their spending and investment slightly. Sixty-five per cent felt that spending and investment would remain roughly the same as in 1970, while only 15% looked for a decline. Larger expenditures by some farmers were expected because of the necessity of having to replace worn-out machinery and equipment. Spending for livestock feed is also expected to be greater because the drought- and blight-reduced corn crop will necessitate larger purchases of feed grain, probably at higher prices.

Bank funds available for loans to farmers in 1971 will likely be moderately larger than in 1970, according to survey responses. Funds for short- and intermediate-term farm loans will probably be more plentiful than funds for long-term loans. One-fourth of the responding bankers indicated that the availability of loan funds for all three major types of farm loans in the year ahead would likely be slightly above that in 1970. Three-fourths, or all of the remaining bankers, expected that funds available for short-term loans would be roughly the same as in 1970. By comparison, 70% felt that the availability of funds for both intermediate- and long-term farm loans would be about the same. Among the bankers reporting that funds available for farm-mortgage loans would remain at about the same level as in 1970, roughly one-fifth indicated either

that they made no long-term loans to farmers in 1970 or that they made very few such loans. They said that they were continuing to refer farm borrowers to the Federal land banks for this type financing. Developments in the general economy, competition for loan funds, and the level of the prime and discount rates will, of course, have a strong influence on the availability of loan funds for agricultural purposes.

Little change in bankers' present policies on farm loans, generally reported as already fairly restrictive, is indicated for 1971. Survey results showed that 85% of the bankers expected to adhere to about the same loan policies as in 1970.

Interest rates banks charge on farm loans in 1971 can be expected to remain high, although a little softening, mostly in short-term rates, is indicated by a tally of our survey. The most prevalent charge cited for all three types of farm loans was an 8% simple rate of interest. But quoted interest rates for 1971 varied substantially, ranging from 7% to 9% for short-term loans, from 7% to 10% for intermediate-term loans, and from 7% to 9½% for long-term loans. Tabulation of the answers to the question "What trends in interest rates on farm loans do you foresee?" brought these results: Three-fifths expected little change, 35% looked for a possible slight decline, and the remaining 5% anticipated a moderate increase. The upward adjustment would apply to farm-mortgage loans only and would probably amount to ¼ of 1%. Where a downward trend in interest rates was foreseen, the majority felt that the decline would range from ¼ to ½ percentage points and that the downward adjustment would be slightly greater in the shorter-term maturities. Generally, bankers who stated that interest rates on farm loans in 1971 might drop slightly held the view that any downward adjustment would be dependent upon the possibility of a further cut, or cuts, in the prime rate below the 7½% level in effect at the time of the survey.

Sada L. Clarke