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FEDERAL CONTROL OF COMMERCIAL BANK MERGERS

Benjamin J. Klebaner†

Prompted by the merger of 1,503 banks with over $30 billion in resources during the previous decade, Congress enacted legislation in 1960 restricting bank acquisitions. In addition to considering the major issues raised by the divergent approaches of the Senate and House bills of 1956 and how they were resolved, this article reviews hitherto existing federal control of bank mergers and bank holding company growth for the purpose of understanding the economic issues involved in the application of the 1960 law. The focus is on federal policy toward the preservation of a competitive banking structure.²

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No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the [Federal Deposit Insurance] Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

2. The author acknowledges with gratitude the numerous helpful suggestions of Professor Fritz Machlup, whose Ford Foundation-sponsored Faculty Research Seminar on Industrial Organization and Economic Theory at Johns Hopkins University during the summer of 1958 furnished the occasion for the writing of the first draft of this paper. Government documents cited frequently are indicated by Roman numerals as follows:

I. Hearings on Current Antitrust Problems Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 84th Cong., 1st Sess., Part 1, May 10, 11, 12, 13, 16, 17, 18; Part 3, June 7, 8, 10, 13, 14, 15, 17 (1955).


I. Background of the 1960 Law

In 1951 1 1/2 per cent of the banks had over 54 per cent of the total assets of all American banks; this was "alarming, almost shocking" to Representative Patman. Congressman Celler fears the present merger trend will, unless stopped by law, restructure our banks along the British and German pattern, where a few giants control the financial industry. From the fact that the hundred largest banks controlled 48 per cent of the deposits of all commercial banks, Celler found "an alarming concentration of financial power in the hands of a few banks" and considered this "trend toward monolithic banks" a matter of grave national concern. Arguing that the agencies which control the nation's credit necessarily control its industry and ultimately its politics, Senator Douglas suggested

IV. Hearings on Bank Mergers Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 84th Cong., 1st Sess. July 5, 6 (1955).
VI. Hearings on Legislation Affecting Corporate Mergers Before the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 2d Sess., May 23, 24, 25, 28, 31 and June 2 (1956).
VII. Hearings on Regulation of Bank Mergers Before a Subcommittee of the Committee on Banking and Currency, 84th Cong., 2d Sess., June 12, 18 (1956).
XI. Hearings on Premerger Notification Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957).

3. Hearings on the Control and Regulation of Bank Holding Companies and H.R. 2674 Before the House Committee on Banking and Currency, 84th Cong., 1st Sess. 22 (1955). Senator Sparkman called the increase in bank mergers in 1955 over 1953 "shocking." VI at 12. The Federal Reserve Board sounded no alarm in 1930 when it announced that as of mid-1929 one per cent of the nation's banks had half the resources. 16 FED. RESERVE BULL. 30 (1930).

4. I at 446; 101 Cong. Rec. 3913 (1955); 103 Cong. Rec. 6150 (1957). See also Celler's comments in VI at 121 and IX at 5. Compare Senator Robertson's comments, XIV at 8. Celler did not mention that in 1940 the share of the one hundred largest banks was 57.6% of all commercial bank deposits and at the end of 1960 their share was 46%.
checking the concentration of banking and rolling it back if possible. The Small Business Committee of the House of Representatives attributed the declining position of small business partly to the “disappearance of banks.”

Such expressions of concern are by no means universal. “Stern and aggressive competition” characterizes banking today, in the view of the American Bankers Association: “In no other regulated industry does competition exist in numbers and in intensity to the degree it exists in the banking industry.” Former Comptroller of the Currency Gidney confirmed that “everywhere there is healthy banking competition, possibly the keenest and most effective we have ever had.” Competition in banking is generally “quite keen,” and legislation which would hinder bank mergers should be opposed, according to Professor Nadler’s group.

It is usually agreed that “the economic and social premises of the Sherman Act in respect of other businesses are not fully accepted by the Congress, the States or the public as the only considerations applicable to deposit banking,” as Professor Berle has pointed out. Legislation and regulation compel standards of behavior which competition may not breach. As suppliers of the media of exchange used for the bulk of business transactions, banks are restrained from practices inimical to their solvency. Bank failures are far more grave in their consequences than insolvency of other businesses. Hence the legal restraints on entry and price competition for funds. The dangers of a fractional reserve arrangement, whereby most assets are not one hundred per cent liquid, have led to regulation of the minimum quality of banks’ earning assets.

The prolonged impasse in Congress preceding the passage of the 1960 Bank Merger Act reflected basic differences concerning the weight to be accorded to competitive considerations in assessing bank mergers. It is a thesis of this article that the preservation of competition in those areas where it is permitted is a matter of vital public concern despite commercial banking’s status as regulated industry.

As early as 1913 the Pujo Committee had recommended the restriction and control of national bank mergers in the public interest. By em-

7. VII at 99; XII at 70; XIV at 113. See also IV at 41. The American Bankers Association told the Senate Judiciary Committee that “probably no industry has more excessive or intensive competition amongst their members. . . .” VI at 35.
8. XIV at 6, 43. See also 92 COMPTROLLER ANN. REP. 10-11 (1955); II at 710.
powering the Comptroller of the Currency to prohibit consolidations
where an "undue concentration of control" threatened, they believed the
"rapid disappearance of competition" could be checked. The Clayton
Antitrust Act of 1914 placed acquisitions of bank stock under the jurisdic-
tion of the Federal Reserve Board. In practice this affected only
bank holding companies.

In the controversy over branch banking, fear of financial concentra-
tion and monopoly was one of the strong arguments used. Member
banks were finally granted very limited branch banking privileges in
1927, but neither this act nor the 1918 act providing for the first time
a simplified means to consolidate national banks made any reference to
competitive criteria.

In 1945, when Congress considered amending the merger provisions
of the 1914 law to include asset acquisitions, the Federal Reserve wanted
sizeable banks to prove that the proposed merger "would be consistent
with the public interest"; one of the criteria suggested was "that the ac-
quision would not substantially lessen competition, restrain trade, or
tend to create a monopoly." In 1947 however, the Board of Governors
announced that it was not primarily interested in scrutinizing proposed
acquisitions by banks, as state and other federal agencies already had the
power to supervise mergers. Rather the Board sought power to control
"unbridled expansion" of bank holding companies. The 1947 merger
bill (unlike the 1945 one) had no provision for Federal Reserve authority
over bank asset consolidation, and the Federal Reserve Board made no
specific request for such power. The 1950 amendment to section 7 of the
Clayton Act, which extended the 1914 ban on stock acquisitions threaten-
ing competition to asset acquisitions as well, did not include banks.

13. Chapman and Westerfield, Branch Banking 72, 74 (1942); Chapman,
Concentration of Banking 111 (1934). Strong arguments against branch banking on
antitrust grounds were presented by two California bankers in Hearings on the Consoli-
dation of National Banking Associations Before a Subcommittee of the Senate Commit-
15. 40 Stat. 1043 (1918).
16. Hearings on the Amendment of Sections 7 and 11 of the Clayton Act Before Subcommit-
tee No. 3 of the House Committee on the Judiciary, 79th Cong., 1st Sess. 337-
38, 362 (1945). The 1945 bill had such a public interest provision only for sizeable
corporations subject to the Federal Trade Commission's jurisdiction. The Final Report
38-39 (1941), proposed legislation covering asset acquisitions but did not specifically in-
clude banks.
17. Hearings on Amending Sections 7 and 11 of the Clayton Act Before Subcommit-
tee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 60 (1947).
Bank holding company legislation was requested by the Board of Governors in the
omission has been explained on the ground that it "became impracticable to include" banks as the bill underwent successive revisions over the years.18

Earlier in 1950 the capital gains tax obstacle to national bank mergers was removed by the "two-way street" law allowing a national bank to be merged directly into a state bank without the necessity of the Comptroller's approval in those (thirty-one) states where state banks may merge with national banks without the consent of state authorities.19 Mergers were also facilitated by legislation enacted in 1952. Stockholders of a national bank who dissented to the absorption of another bank lost the right to receive the cash value of their shares.20

Concern for the preservation of competition in banking was demonstrated in 1956 by the enactment of the Bank Holding Company Act.21 Section 1842(c) of that act, "Factors governing determination of application for approval," has the following to say with respect to competition:

In determining whether or not to approve any acquisition or merger or consolidation under this section, the [Federal Reserve] Board shall take into consideration the following factors: . . . (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent

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18. STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES 7 (Comm. Print 1952). Judge Barnes argued that Congress had not intended to create this antitrust exemption for banks. VII at 77.
of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.\textsuperscript{22}

Separate bills to regulate bank mergers were also passed in 1956, but the two houses were unable to compromise their differences until 1960. The House simply included banks in the 1950 Celler-Kefauver Act's ban on asset acquisitions, the effect of which "may be substantially to lessen competition or to tend to create a monopoly."\textsuperscript{23} This antitrust test contrasted with a Senate amendment to the Federal Deposit Insurance Act passed several months later which proposed a public utility type of test: the federal agencies were to consider whether the effect of a bank merger "may be to lessen competition unduly or to tend unduly to create a monopoly," in addition to the six banking criteria already spelled out in the branch approval section of the act.\textsuperscript{24} This was again adopted by the Senate in 1957 as part of the proposed Financial Institutions Act,\textsuperscript{25} and in 1959 as a separate bill.\textsuperscript{26}

In supporting the House bill, the Department of Justice firmly opposed special antitrust treatment for any particular industry: each industry obviously differs and the "peculiar nature" of banking would be recognized in applying the general standards; further, public policy demands as much competition in banking as in industry generally.\textsuperscript{27} The Department feared that the establishment of a weaker standard for banking would lead to efforts to spread the same standard to industry generally. The courts would take years to interpret the "unduly" test. Meanwhile, the banks and agencies would be without a guide. Senators Douglas, Monroney, and Clark joined in warning that the courts might decide in the end that "unduly" is a relative term, outside the bounds of legal definition, and give limitless discretion to the banking agencies.\textsuperscript{28}

The Senate version was drafted jointly by the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Board of

\textsuperscript{23} The text of H.R. 5984 is printed in 102 Cong. Rec. 2108-09 (1956). It passed the House of Representatives on February 6, 1956. 102 Cong. Rec. 2110 (1956).
\textsuperscript{24} S. 3911 passed the Senate on July 25, 1956. The text is in 102 Cong. Rec. 14,373 (1956).
\textsuperscript{25} The Senate passed the Financial Institutions Act of 1957 on March 21, 1957. 103 Cong. Rec. 4140 (1957).
\textsuperscript{26} S. 1062 was passed May 14, 1959. 105 Cong. Rec. 8144 (1959).
\textsuperscript{27} IV at 11, 15; VII at 71 (Barnes); X at 131, 32 (Hansen); IX at 1014; XI at 16, 18 (Brownell). See also VI at 120 (Rep. Celler); VII at 110 (FTC Chairman Gwynne).
\textsuperscript{28} See VII at 62 (Barnes); X at 1175 (Harding of the Independent Bankers Association); S. Rep. No. 121, 85th Cong., 1st Sess. 102 (1957) (Douglas, et al.). Senator O'Mahoney urged support of the Clayton test because of the need to "definitely and rigidly establish certain landmarks which cannot be set aside by the discretionary control of a few men who may change overnight." VI at 60.
Governors of the Federal Reserve. Support also came from such organizations as the American Bankers Association and the Chamber of Commerce of the United States, chiefly on the ground that banking differs fundamentally from industries subject to Federal Trade Commission jurisdiction. Senator Robertson described banks as "quasi-public utilities," while Fulbright spoke to his Senate colleagues of the desirability of regulating banks as "quasi-utilities and monopolies. . . ." The FDIC, in describing banking as "probably the most supervised and regulated industry" in the country, said that banking agencies ought not to be bound by precedents established in unregulated industries not comparable to banking. Merger transactions duly consummated pursuant to the authority of the Interstate Commerce Commission, the Federal Communications Commission and the Federal Power Commission are excluded from the scope of the Clayton Act. Analogous treatment should be extended to banking, it was argued. Application of Clayton Act standards to banking was believed to run counter to the policy of careful regulation of the industry. The federal banking agencies insisted that banking factors must be weighed alongside competitive factors in determining the legality of mergers. A rule of reason approach would allow the banking system to function properly, according to Gidney.

The "unduly" test was intended to permit mergers in the public interest which might substantially lessen competition. To illustrate, Senator Fulbright cited five situations where bank mergers would serve the national welfare despite the fact that competition might be substantially lessened:

1. where the acquired bank's future prospects are unfavorable because of inadequate management or lack of provision for management succession;
2. where the acquired bank has inadequate capital or unsound assets;

29. VII at 45-46; X at 985-86; XII at 1, 69, 122. See also VII at 4; XII at 23.
30. 102 CONG. REC. 14,347 (1956).
32. XIV at 84; XII at 48; XI at 216. For the public utility argument see also: statements by the American Bankers Association, IX at 100, XI at 252; XIV at 113-16; the New York County Lawyers Association, IV at 36; McCloy of the Chase Manhattan, IV at 19. Comptroller Gidney also stressed the undesirability of precedents of non-regulated industries. XI at 194.
33. IX at 14; XIV at 12-13 (Gidney); IX at 206; VI at 50 (Board of Governors).
34. VI at 79-81. Similarly, Roth of Franklin National, VI at 94.
35. VII at 10 (Fulbright); VII at 32 (Comptroller's Office); VII at 48; X at 710 (FDIC); IV at 51; IX at 2175 (Board of Governors). See also IV at 38 (N.Y. Chamber of Commerce).
(3) where the acquired bank is an uneconomic unit or is too small to meet the needs of the community by providing loans of sufficient size or necessary banking facilities;

(4) where there is a reasonable probability of the ultimate failure of the bank to be acquired; or

(5) where several banks in a small community are compelled by an "overbanked" situation to resort to unsound competitive practices which may eventually have an adverse effect upon the condition of such banks.\(^8\)

The FDIC also feared that the adoption of the Clayton test would seriously hamper its rescue operations: the conditions under which the International Shoe\(^7\) precedent permitted failing firms to merge were too restrictive. The agency considered action desirable when a bank is merely heading towards insolvency rather than on the brink of disaster.\(^3\) The Antitrust Division retorted that it had not prosecuted mergers where management inadequacy, obsolete plant or a failing market made the prospect of survival dim, and that it would consider carefully the banking agency's view of a "bank's chances to prosper."\(^9\) The FDIC then pointed to the 1955 assumption of the deposits of the Frontier Trust Company, the larger of the two banks in Fort Fairfield, Maine, by the Northern National Bank of Presque Isle as an example, recognized by the Department of Justice itself, of an action not permitted by the International Shoe doctrine.\(^0\)

It is easy to exaggerate the differences between supporters of the antitrust test and of the public utility test. Fulbright's committee aimed to "put a real inhibition on bank mergers." In the absence of such exceptional circumstances as the five enumerated above, the banking agencies were instructed to apply the "unduly" test "rigorously to preserve competition in the banking fields."\(^{41}\) A basic purpose of the Senate bill, in the words of the Committee on Banking and Currency, was "to promote competition as an indispensable element in a sound banking system."\(^{42}\)

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36. VIII at 6. An earlier version is in VII at 10. Actual cases from the files of the Federal Reserve are printed in VI at 454. See also XII at 72 (American Bankers Association).  
38. XII at 59; XI at 219; IV at 61-62. The sale of an insolvent concern may not be exempt if there is a "reasonable possibility" that it can stay in business. Note, Section 7 of the Clayton Act: A Legislative History, 52 COLUM. L. REV. 765, 780 (1952).  
40. VI at 93; XII at 59. See also Connor, Section 7 of the Clayton Act: The "Failing Company" Myth, 49 GEO. L.J. 84, 98 (1960).  
41. 103 CONG. REC. 4132 (1957). See VIII at 6 for a similar statement by Senator Fulbright.  
42. XIII at 23. Independently, the Senate Judiciary Committee said much the
COMMERCIAL BANK MERGERS

According to the FDIC, the bill would "prevent those mergers which result in greater banking concentration, a lessening of competition, and provide little or no benefit to the public."43 The House Judiciary Committee, sponsoring the Clayton approach, agreed that in the type of cases enumerated by Fulbright the merger should be allowed.44 In 1955 the three federal agencies were willing to accept the "substantially" test provided an escape clause was inserted which would enable them to continue to approve mergers in the public interest.45

In sponsoring the 1960 bill46 which became law, the House Banking Committee expressed "concern for the maintenance of vigorous competition in the banking system. . . ."47 The measure finally enacted in 1960 includes that committee's proposal to require the federal banking agency responsible for passing on a merger to consider, in addition to six important banking factors,48 "the effect of the transaction on competition (including any tendency toward monopoly)."49 Moreover, the agency "shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."50

The suggestion to enact Clayton standards plus a list of specific exempted situations was rejected on the grounds that it was impossible to anticipate every situation where a merger would benefit the public. Con-

43. XIV at 83-84.
44. V at 5-6; XII at 98-99; XIV at 128 (Celler). A similar stand was taken by the Independent Bankers Association. XIV at 174, 178. Douglas, Monroney and Clark were prepared to modify the "substantially" test by allowing mergers which would prevent the "probable failure" of a bank. S. Rep. No. 121, 85th Cong., 1st Sess. 102 (1957). In 1960 the Antitrust Division of the Department of Justice was prepared "to try to meet the problem of specialized banking needs by applying the general Clayton Act standard and carving out particular exceptions. . . ." XIV at 170.
45. IV at 52, 63, 64, 75; XV at 5. The device of using "substantially" language in the bill and then qualifying it in the accompanying report was strongly condemned by the Federal Reserve (XI at 241) and the FDIC (XI at 220-21) in pressing for the "unduly" test in 1957. The Comptroller of the Currency called the proposed exceptions "inadequate and too restrictive." XIV at 57.
46. Senate 1062 (1960).
47. XV at 5.
48. The six banking factors to be considered are as follows:
(1) The financial history and condition of each of the banks involved,
(2) the adequacy of its capital structure,
(3) its future earnings prospects,
(4) the general character of its management,
(5) the convenience and needs of the community to be served, and
(6) whether or not its corporate powers are consistent with the purposes of this Act.

With minor changes in language, these are the very same factors the FDIC has had to consider in approving branch applications.
50. Ibid.
gress at the same time turned down the "unduly" approach, which would resolve doubts in favor of bank mergers. Proponents have the burden of proving that a bank merger is in the public interest, according to the House Report on the bill.\(^\text{51}\) Representative Celler was satisfied that the 1960 test is stronger than the Senate's original "unduly" criterion.\(^\text{52}\) On the other hand, Senator Fulbright interpreted the new wording to express nothing more than what the Senate intended by "unduly"; no one factor is to control, and all seven must be weighed and a beneficial result must appear before a merger can be approved.\(^\text{53}\)

Perhaps as significant as the argument involving the criterion for approving a merger was the disagreement whether to grant the Department of Justice concurrent jurisdiction with the federal agencies over competitive standards for bank asset acquisitions. The Clayton Act of 1914 gave the Attorney General concurrent jurisdiction with the Board of Governors over bank stock acquisitions,\(^\text{54}\) an arrangement undisturbed by the Bank Holding Company Act of 1956.\(^\text{55}\) Cooperation in this area between the Board and the Attorney General had been most commendable, according to the House Committee on Banking and Currency.\(^\text{56}\) The 1956 House bill would have given the Attorney General authority to deal with asset acquisitions as well.\(^\text{57}\) In 1955 the Board of Governors proposed to give the Attorney General the decisive veto; further, if the responsible supervisory agency did not consult with him, the Attorney General would retain full power to proceed against mergers despite their approval by the appropriate agency.\(^\text{58}\)

The Independent Bankers Association, made up mainly of small banks, supported the Attorney General's position. Some Congressmen endorsed the view that the Antitrust Division was best qualified to decide questions of competition and monopoly.\(^\text{59}\) The other side argued that the federal agencies are expert in banking matters and should be given power over mergers comparable to the Interstate Commerce Commission's: the Department of Justice cannot challenge an ICC-approved merger under the Clayton Act. However, the 1950 amendment to the Clayton Act did give the Attorney General "the right to intervene and

\(^{51}\) XV at 11-12.

\(^{52}\) 106 Cong. Rec. 7258 (1960).

\(^{53}\) Id. at 9712.


\(^{56}\) XV at 13.

\(^{57}\) I at 2173.

\(^{58}\) XII at 66.

\(^{59}\) VII at 72, 74, 82, 85; X at 131, 134 (Antitrust Division); XI at 255-57; XII at 120-21 (Independent Bankers Association); VIII at 10, 11; XII at 102-05. In 1960 the Justice Department unsuccessfully proposed a public hearing with opportunity for court review in cases where it differed from a banking agency. XIV at 169.
COMMERCIAL BANK MERGERS appear” in proceedings when agencies like the ICC and the CAB issue a complaint under section 7.60

In 1956 the Board of Governors shifted its attitude and joined the two other federal banking agencies in support of the Senate bill. Under Senate versions prior to 1959 an agency could request an opinion at its discretion from the Antitrust Division of the Department of Justice. The 1960 law requires an agency to obtain an opinion on the competitive aspects of each merger from the Attorney General. However, the final decision rests with the Comptroller if the resulting institution is to be a national bank, the FDIC if an insured nonmember bank, and the Board of Governors for a state member bank. Each agency now has exclusive jurisdiction over mergers within its sphere, but must consult with the other two on all applications, for the sake of uniformity of enforcement standards regarding the competitive factors provision of the 1960 law.61

FDIC opposition to the 1956 House bill stemmed in part from the occasional need for speedy action. The 1960 law allows the Attorney General only ten days to file his opinion in case of an emergency. In order to prevent a probable failure, an agency can even act without getting a prior report from the Attorney General.62

One reason for the Comptroller’s opposition to the Clayton approach was that giving the Board of Governors sole power among the federal agencies over asset acquisitions would create an unjustifiable imbalance among the federal agencies.63 The state supervisory authorities were concerned with the protection of the dual banking system and of states’ rights. Although no merger of state-chartered banks could be considered by a federal agency until approved by the state, the state authorities preferred no additional legislation in this area. When federal regulation was imminent, the state authorities sought to insure parity of treatment of state and national banks, (and to remove any incentive to convert to national charters) by empowering the FDIC to pass on national bank acquisitions after the Comptroller had given his approval,

60. X at 23; IX at 206-07; IV at 64; VI at 27; X at 1043-44 (American Bankers Association); IX at 100, 583 (Association of Reserve City Bankers); IV at 38; X at 1206 (U. S. Chamber of Commerce); XII at 23 (Comptroller of the Currency); XII at 51; XI at 216 (FDIC).

H.R. 6405, introduced by Rep. Celler on May 23, 1955 but not passed by the House, would have used the Clayton test with the added proviso of exclusive jurisdiction in the Federal banking agencies. Ordinarily this administrative procedure was linked with the “unduly” test.


62. XII at 59; XI at 220-21.

63. II at 730.
just as it would pass on state banks. They also approved consultation with the Attorney General, a procedure some state supervisors follow.64

II. FEDERAL REGULATION OF COMMERCIAL BANK Mergers

BEFORE 1960

The largest single merger in American banking history, the 1955 formation of the Chase Manhattan Bank, did not require federal approval. Until 1960 insured banks needed federal consent to merge or consolidate with an insured state bank only if the aggregate capital or surplus of the resulting or assuming bank would be less than the aggregate capital or surplus, respectively, of all the merging or consolidating banks. Under such circumstances, if the assuming or resulting insured state bank was to be a member of the Federal Reserve System (except a District bank), written permission was required from the Board of Governors; if it was to be a nonmember insured bank (except a District bank), written permission was needed from the FDIC; and if it was to be a District or national bank, permission was required from the Comptroller of the Currency.65 Permission from the Comptroller was also required for the consolidation of two national banks or for the merger of a national bank or state bank into a national bank.66 Mergers coming within the provisions of the Bank Holding Company Act of 1956 could not be carried out without prior approval of the Board of Governors of the Federal Reserve.67

In passing on bank mergers before May 13, 1960 the agencies claimed to consider competitive factors despite the absence of any specific statutory provisions.68 The FDIC weighed the congressional policy to-

64. XIV at 188-89, 194. For earlier statements, see VI at 148, 152; VII at 109; IX at 582; X at 1054. In 1959 the state supervisors were undecided as between the Board of Governors of the Federal Reserve and the FDIC for the final review agency. XII at 76. The American Bankers Association wanted the responsible Federal agency to consult with the state banking authority when the continuing bank was state-chartered. X at 1176. Assurances were given that the federal agencies would continue to work very closely with the states. VII at 16-17; cited with approval VIII at 7. The House bill left no banks outside of federal jurisdiction but the Senate excluded uninsured banks on the ground that no significant anti-competitive consequences are to be feared from a category which has less than ⅓⅔% of all commercial bank assets. VIII at 7; X at 723, 1396.


Federal approval by the FDIC was also required by this section before an insured bank could merge or consolidate with any uninsured bank or institution or convert into a noninsured bank or institution. National bank deposit assumption cases required the Comptroller’s approval only when the capital or surplus was reduced.


68. I at 2184.
ward competition embodied in the 1950 amendment to the Clayton Act with respect to the convenience and needs of the relevant community.\textsuperscript{69} The Board of Governors of the Federal Reserve viewed its responsibilities as including the approval of only those mergers which are in the public interest. The Federal Reserve Banks were instructed to consider the factors of tendency to monopoly or “undesirable competitive advantage in relation to other banks in the area involved,” in transmitting to the Board merger and branch applications from their districts. The Board informally disapproved mergers many times for competitive reasons.\textsuperscript{70}

Likewise the Comptroller, though not required to do so by any statute before 1960, would not sanction a national bank merger that lessened competition unduly.\textsuperscript{71} In addition to numerous banking factors,\textsuperscript{72} the Comptroller surveyed competitive aspects such as the relevant commercial banking market structure and available alternative financial institutions.\textsuperscript{73} Lending policies of the merging banks, common borrowers, characteristics of the deposits, branch distribution, trust activities and charges for loans and services were all considered. A probable lessening of competition would be weighed against any positive banking factors in reaching a decision. One of the most important questions the Comptroller had to answer was the effect of a merger on the availability of credit to worthy applicants. In the opinion of recent-Comptroller Gidney, the mergers he approved have not tended to diminish availability, and he is convinced they have made for more rather than less competition.\textsuperscript{74}

Not a single merger was disapproved for competitive reasons by Comptroller Delano or his successor Gidney from 1950 through 1954.\textsuperscript{75} During the next five years, competitive factors were involved in nine

\textsuperscript{69} 105 Cong. Rec. 8076 (1959); XIV at 73.
\textsuperscript{70} XIV at 73; X at 27; I at 2170; II at 686, 696; XII at 66; New York Times, Dec. 7, 1958, pt. 3, p. 5.
\textsuperscript{71} XII at 43-45; I at 450, 452-53, 473, 493; VI at 66; XI at 123. The Comptroller suggested that before 1959 he had used the “substantially” criterion in considering merger applications. Compare XII at 36. In 1960 acting Antitrust Division head Bicks pointed out that Comptroller Gidney claimed the use of the Clayton test while opposing its incorporation in the proposed merger bill. XIV at 169.
\textsuperscript{72} The banking factors used by the Comptroller were very similar to the factors enumerated in the 1960 Bank Merger Act. See note 48 \textit{supra}.
\textsuperscript{73} The “balance” of the prevailing banking market structure is still of great importance to the Comptroller. See text following note 92 \textit{infra}.
\textsuperscript{74} VII at 13-14, 18; XI at 203-04; I at 479. On one occasion the Comptroller explained that while the “level” of competition was unchanged in cases where his office approved mergers, the “form of competition may have changed somewhat.” I at 468. The Comptroller informed the rapidly growing Franklin National Bank on Long Island that additional mergers would not be in the public interest as unhealthy speculation in that bank’s stock had been stimulated by previous mergers and rumors of new acquisitions. VI at 104; New York Times, Nov. 24, 1955, p. 47. The ban on further mergers was lifted within two years. New York Times, Sept. 12, 1957, p. 45.
\textsuperscript{75} XIV at 62.
formal and thirteen informal disapprovals. Many informal refusals were for reasons other than competition.

The federal banking agencies have been criticized for considering "the need for competition a mere headache" and being concerned more "with the financial . . . soundness of banks than their competitive position." Senators Douglas, Monroney and Clark accused these agencies of lacking faith in the need for competition. In the view of these men the record of merger disapprovals "could hardly be called vigorous." From 1950 through 1959 the Comptroller's office approved 817 mergers. Representative Celler told the 1957 convention of the Independent Bankers Association that Gidney's "normal procedure is to rubber-stamp as a matter of routine, any monopolistic proposal that may be presented." In defense of the Comptroller, Senator Robertson suggested that the absence of specific statutory authorization and the possibility that a bank might take out a state charter prevented Gidney from taking a strong stand against mergers before 1960.

The Antitrust Division of the Department of Justice investigated proposed bank mergers on three occasions in 1955 and 1956. Following a negative reaction to a requested merger clearance, the Marine Midland Trust Company of Central New York gave up the idea of acquiring the Auburn Trust Company. After a letter from the Department of Justice indicating an antitrust problem, New York State Banking Superintendent Mooney disapproved the acquisition by the Manufacturers and Traders Trust Company of the only medium sized Buffalo bank. Had the merger been permitted, two banks would have controlled ninety-eight per cent of Buffalo's bank assets. In the third case, the Comptroller held up approval of the acquisition of the People's Savings Bank by the Michigan National Bank, the only other bank in Port Huron (population 36,000) after being informed that an antitrust investigation was in progress. In 1960 the Michigan Supreme Court ordered divesture of the stock. The Comptroller was in liaison with the Department of Justice

76. XII at 36. Compare XI at 172, 209; VII at 28.  
77. IV at 77.  
79. XIII at 25-26. (Proxmire and Muskie here replaced Monroney). See also 102 Cong. Rec. 14,348 (1956) (Douglas) and a similar stand by O'Mahoney at 14,354. See also 103 Cong. Rec. 6151 (1957).  
80. III at 115. In one place Celler said he was not singling out Gidney; his remarks applied to preceding Comptrollers as well. X at 1479. For other criticisms of the Comptroller see III at 36-37 (Democratic members of House Judiciary Committee); X at 1144, 1355 (Denver National Bank Director Brody).  
81. XIII at 15.  
82. IX at 1015.  
83. XII at 44.  
The Antitrust Division's finding that the Chemical-New York Trust Company merger "may substantially lessen competition and tend to create a monopoly" did not prevent New York's Superintendent of Banking, who had not requested the opinion, from approving this combination. The two largest New Haven banks dropped the idea of a merger in 1959 after the Department of Justice informed them of plans for a suit under the Sherman Act. A number of proposed mergers have been dropped after Department of Justice conferences with the banks involved.

III. Assessing the Competitive Consequences of Mergers

The federal agencies passing on commercial bank mergers under the 1960 law must consider seven factors. The six banking factors listed earlier do not call for explanation. Undoubtedly most of the controversy and litigation will center around the seventh factor: "the effect of the transaction on competition (including any tendency toward monopoly)." A similar situation exists under the 1956 Bank Holding Company Act: the Board of Governors must consider, in addition to banking factors, whether a bank acquisition or merger would "expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking."

It must be noted that an exception to the emphasis on competitive factors seems to exist with regard to the Comptroller's serious concern over the preservation of "balanced" banking structures. In the first written opinion handed down by any Comptroller of the Currency, the merger of New York City's second largest bank was recently disapproved, but not on antitrust grounds. Noting that the merger would neither substantially lessen competition nor result in a tendency toward monopoly, the Comptroller elicited:

There has been a considerable overemphasis placed upon an
alleged lack of competition in banking, and an alleged concentration in banking. To the contrary, banking is highly competitive. It is diffuse rather than concentrated, and the smaller institutions by and large are growing at a faster rate than are the largest banks. We find no reason for concern over the future of competition in banking.

The merger was disapproved on the grounds that joining the First National City Bank with the National Bank of Westchester "would cause an unreasonable distortion and dislocation in the present and future banking structure in Westchester County not consistent with the public interest according to the standards set forth in the Federal banking laws, particularly the so-called Bank Merger Act."

To illuminate the competitive factors pertinent to commercial banking the only precedents thus far available are the Transamerica litigation under the Clayton Act, the opinions of the Board of Governors under the 1956 law, and the brief statements accompanying the numerous merger approvals under the 1960 law. Our interest is in the light these opinions throw on certain broad issues of public policy as they exist within the ideal of preservation of a competitive commercial banking structure: substitutes, the relevant geographic market, and new entry.

Substitutes. Using its 1914 powers for the first (and only) time, the Reserve Board issued a complaint against Transamerica Corporation on June 24, 1948. The bank holding company sought in reply to demonstrate the overwhelming importance to commercial banks of competition from suppliers of substitute services. Competition between banking offices, Neil Jacoby testified, is but "a minor factor in the level of competitive behavior that we get in banking."

94. Ibid.
95. Ibid. The First National City Bank operates 85 branches in New York City, 3 in Nassau County, 79 foreign branches, and has received approval to establish 2 branches in Westchester County. National Bank of Westchester has 26 branches, all in Westchester. With regard to a balanced structure, the Comptroller held as follows: Should this merger be approved, the banking structure in Westchester County would consist of County Trust Company with 41 branches, The First National City Bank with 27 branches, 7 much smaller commercial banks with a total of 33 branches, and three branches of other New York City banks. Of the five largest New York City competitors of The First National City Bank, two would have one branch each in Westchester, with the other three having none. Such an unbalanced banking structure is our major cause for concern in connection with this merger.

97. Hearings Before the Board of Governors of the Federal Reserve System in the Matter of Transamerica Corporation, 8520 (ms. Board of Governors) [hereinafter cited as Transamerica Hearings]. See also id. at 8969, 8989, 9320. See generally Transamerica
alternative financial institutions, he believed, had been instrumental in the
significant long-period decline in loans as a percentage of all commercial
bank assets. Even a nation-wide banking monopoly with power to pre-
vent the entry of new banks would not possess a high degree of market
control over the amount and price of credit, Jacoby claimed.

Over 70 per cent of the almost 134,000 offices conducting one or
more commercial bank functions belonged to insurance companies or the
telegraph company. Alternatives do indeed exist for many commercial
bank services: savings deposits, various types of loans (e.g., real estate,
term, agricultural, consumer), the collection of commercial instruments,
the acceptance of drafts, the issuance of letters of credit, the sale of
domestic and foreign exchange, securities transactions, safety deposit box
rentals, trust services and others. With respect to many of these services
the non-commercial bank sources, principally life insurance companies,
savings and loan associations, various consumer lending agencies, govern-
ment lending agencies and private individuals do offer some competition.
However, these sources depend on the commercial banks in the conduct
of their own business, and most of them secure additional credit from
the banks.

The Reserve Board, not impressed with Jacoby's Transamerica as-
sertions, specified that the handling of the money-payment mechanism
and the creation of money were two functions "unique to commercial
banks." 8 In a third role, that of supplying over 90 per cent of all short
term business credit exclusive of trade credit, "commercial banks occupy
a preeminent position." 9 It is generally agreed that the loan function,
the activity for which commercial banks are best suited, is their most
characteristic role. 10

Commercial banking is a line of commerce suffi-
ciently distinct to warrant considering it separately, rather than conglom-
erating it with other types of financial institutions, in the reasonable view
of the Board of Governors.

Almost non-existent in Transamerica's territory, mutual savings
banks are particularly important in New England. They were taken in-
to account in two cases where the Board of Governors authorized a hold-
ing company to acquire a commercial bank. New Hampshire Bank-
shares obtained control of 22½ per cent of the total commercial bank
deposits in Portsmouth by buying one of the city's three commercial
banks. The inclusion of the two offices of another bank in the trading

Findings as to the Facts, Conclusions, and Order, 38 Fed. Reserve Bull. 382 (1952)
[hereinafter cited as Transamerica Decision].

98. Transamerica Decision at 382.
99. Id. at 390.
100. ROBINSON, MANAGEMENT OF BANK FUNDS 94-95 (1951); ALHADEFF, MONOP-
OLY AND COMPETITION IN BANKING 19 (1954); Transamerica Hearings at 8476.
area (a five mile radius) reduced the share to 17 per cent. Allowing for
savings banks in the area reduced Bankshare's share to only 9 per cent
of the total deposits of the trading area but the acquisition was never-
theless approved.101 The Board also noted the active competition of sav-
ings banks with commercial banks in certain fields in the Baystate case.102
The Board refused, however, to include savings and loan accounts in com-
puting the market share of First Bank Stock Corporation's banks in the
St. Paul area.103 It is clear that in its past administration of the 1956
Act the Board has considered the "banking field" to embrace only savings
banks and trust companies and no other financial institutions.

If Senator Robertson's interpretation of the 1960 law is correct, the
federal agencies will have to consider competition from other financial
institutions which merging banks face. Several 1960 merger opinions
cited not only savings banks but also savings and loan associations, and
in one case (Berks County [Pennsylvania] Trust Company merger) fi-
nance and small loan companies were considered.104

Relevant Market. Dean Jacoby sought to persuade the Board that
the relevant market area in commercial banking is not confined to the
locality where the bank has its office. Money is very mobile, and its
mobility is enhanced by the National Banking and the Federal Reserve
Acts. Large firms upon becoming dissatisfied shift their banking
business to other areas, and the system of correspondent relationships
makes the credit and services of other regions available in deficit areas.
The Board agreed with Jacoby that options were available to very
large firms, but argued (correctly) that the average banking customer
did not have such alternatives with respect to distant banks.105 In
1949, 75 per cent of the American communities with banking offices
had only one bank. Slightly over half the nation's banks were in
one bank towns.106 Evidence that Transamerica had gained exclusive
control in thirty-one communities where previously two or more banks
had been located was considered "largely irrelevant" by the Board

102. Id. at 14. For more recent decisions see 46 FED. RESERVE BULL. 744, 1229,
1231 (1960).
103. 46 FED. RESERVE BULL. 492-93 (1960).
104. 106 CONG. REC. 9713 (1960); 1960 FDIC ANN. REP. 113 (1961); 98 COMPTROLLER
105. Transamerica Hearings at 8552, 8557-58. Dr. Emanuel Goldenweiser, economist
for the Board, argued that there was no national market for "current business credit."
Transamerica Hearings at 11,947. See also Counsel Townsend, Conference Between
Governor of the Federal Reserve System and Representative of Transamerica Corpora-
tion 44-45 (ms. Board of Governors, Dec. 11, 1951); Transamerica Decision at 383.
Senator Douglas has stressed local concentration in a Senate speech. See 103 CONG. REC.
3706 (1957).
106. ALHADEFF, op. cit. supra note 100, at 46, 51.
COMMERCIAL BANK MERGERS

of Governors. They defined the relevant market area as the five western states in which Transamerica then owned banks.\textsuperscript{107} In this "area," Transamerica controlled 41 per cent of the commercial banking offices, 39 per cent of the deposits, and 50 per cent of the bank loans by 1948 and intended to expand further. Based on these facts, the Board found an unlawful tendency to monopoly. In upsetting this verdict, the Court of Appeals for the Third Circuit pointed out that the Board had not demonstrated that the five states were in fact "a single area of effective competition among commercial banks." The Board itself had said that the locality was the true competitive banking area. Nor had the Board made the necessary findings with respect to the "competitive effect of Transamerica's bank acquisitions in the communities in which the banks operate."\textsuperscript{108}

In connection with the application by the First National City Bank of New York for permission to form a bank holding company which would buy the County Trust Company of Westchester, the Comptroller compared First National City with all others doing a nation-wide business, defined for this purpose as all banks with over $500 million in assets. Under this comparison, First National City was found to have a 7.5 per cent share of the total assets of such banks.\textsuperscript{109} The Federal Reserve Bank of New York used as a base of comparison the resources of all central reserve and reserve city banks; this study gave the First National City a share of less than 6 per cent.\textsuperscript{110} The Board of Governors chose instead to cite the bank's 19.5 per cent share of total commercial bank deposits in New York City, which would rise to 20.3 per cent of the combined New York City-Westchester total if the holding company was formed. Although the Board prohibited the formation on the

\textsuperscript{107} Transamerica Hearings at 8461. Yet the Board of Governors' findings included a table showing the number of Transamerica-controlled one bank towns in each of the five western states. The total was 204 at the end of 1947, and 157 of these stemmed from acquisitions. Transamerica Decision at 385, 390. Counsel for the Board stated that Transamerica had all the banking offices in twenty-eight counties—over 25\% of the total number of counties in which Transamerica did business. Transamerica Hearings at 4100. Transamerica pointed out, however, that these California counties represented less than 11\% of the state's population. Transamerica Hearings at 4147. The Board's findings make no reference to this point. The evidence does not support Counsel Townsend's argument that the power resulting from Transamerica's control in the many one bank towns "has been effectively used for strengthening its control in the competitive towns." Transamerica Hearings at 4109.


\textsuperscript{109} I at 473.

\textsuperscript{110} In the Matter of First New York Corporation 382 (N.Y.F.R.B. 1958).
ground of diminution of actual and potential competition, it did recognize that the significance of deposit concentration depends on the size of the community. Many localities can support but few banks; not so New York City or Westchester. The Board pointed out that "control by a holding company of 20 per cent of the total commercial bank deposits in . . . the financial center of the country, or nearly 50 per cent in Westchester County, may present a far greater question of consistency with the public interest than would a considerably higher concentration in another community." Three years later the Comptroller of the Currency found it necessary to disapprove a merger of the above two banks under the 1960 Bank Merger Law, not on antitrust grounds, but for the reason that the merger would not be "consistent with the public interest" due to the resulting imbalance of the relevant banking structure.

A primary market area was defined in the Firstamerica decision as the territory from which about 75 per cent of an office's deposits derive. The Board found 14 such overlapping areas in Metropolitan Los Angeles involving 23 of the 27 First Western Bank's offices and 29 of California Bank's 64 metropolitan branches. The overlapping areas originated 47.6 per cent and 26.6 per cent of the respective banks' total Los Angeles deposits. Measured by dollar volume, the merger would eliminate a not insignificant amount of actual competition. Potential competition was also at stake, inasmuch as both banks had applications pending for new branches in the area. In the metropolitan area, where 45 banks have

111. The Board noted that Westchesterites keep many millions in deposits with the City Bank, while New Yorkers have extensive deposits in County Trust. Commuters enjoy these available alternatives. More competition between the two banks would tend to develop, the Board reasoned, as the two areas further integrate their economies. 44 Fed. Reserve Bull. 913 (1958). Governor Robertson cited a similar "foreclosure of substantial potential competition" in a recent dissent. 47 Fed. Reserve Bull. 763 (1961). A unanimous Board denied Bank of Ohio's application to acquire a small local bank, citing not only the elimination of substantial actual competition, but also that the acquisition "would deprive the area of the benefits of intensified banking competition that could develop from a more aggressive policy on the part of, or expansion by, the Hilliard Bank." 47 Fed. Reserve Bull. 415 (1961).


112. 44 Fed. Reserve Bull. 912 (1958). It was argued that since two-thirds of First National City Bank's deposits represented its operations on a national and international level, they should not be included in determining its size. 44 Fed. Reserve Bull. 911, 928 (1958). In disapproving a holding company which would link Bankers Trust Company with County Trust Company, New York's Superintendent of Banking defined Westchester as a banking market separate and distinct from New York City. 107 Cong. Rec. A2392 (1961).

113. Treasury Department; Comptroller of the Currency's Decision, Dec. 19, 1961. See textual discussion of this decision following note 92 supra.

their head office, California Bank's share of deposits came to 12.5 per cent and First Western's to 2.8 per cent. The Bank of America had 41 per cent and Security First National 27 per cent of deposits in this market, while the merged First Western would have 15.3 per cent. In appraising the effects of the merger on competition the Board also took into account that California's loans were primarily commercial while First Western's were primarily real estate and installment. Concluding that the merger of California and First Western would affect a relatively small proportion of deposits and that a relatively large number of alternative bank resources would remain, the Board of Governors approved Firstamerica Corporation's acquisition of California Bank. The Antitrust Division of the Department of Justice differed, and filed its first suit against a commercial bank merger on March 30, 1959 charging a violation of the Sherman and Clayton Acts. Under a court approved agreement Firstamerica (now called Western Bancorporation) had to dispose of 65 offices with $500 million in deposits to form a new, independent state-wide bank. Accordingly, early in 1962 the First Western Bank and Trust Company was sold to the newly formed Trans-World Bancorporation.

In three 1960 cases where the Attorney General opposed a merger on competitive grounds the responsible federal agency disagreed over the definition of the relevant market. The Federal Deposit Insurance Corporation had concluded that the Reading-Berks County banks faced severe competition from Philadelphia and that the Prince George and Montgomery County banks in Maryland reckoned with "intense competition from nearby District of Columbia." The Comptroller reasoned that a merger which resulted in Louisville's two largest banks having 64.3 per cent of the city's banking assets would have a "beneficial effect" on regional competition: Nashville, Cincinnati and Indianapolis all had banks larger than any in Kentucky.

Entry. Account must also be taken of ease of entry in assessing the competitive situation in a given industry. Free and easy entry ordinarily suffices to assure effective competition, as Jacoby testified in the Transamerica hearings. A test of market occupancy which considers only rivalry from other financial institutions and from outside the region while ignoring the potential competition from new entrants is a defective

115. Ibid.
120. 98 COMPTROLLER ANN. REP. 91 (1961).
121. Transamerica Hearings at 8579, 8583, 8623-24.
test. According to Ray Westerfield, entry into banking is still “altogether too free.”122 This eminent authority has taken the dubious position before the Board that the number of newcomers is excessive, government regulation notwithstanding. One reason for the fallibility of his position is that the number of banking offices in the United States has increased only 20 per cent in the two decades since 1940, despite an over 30 per cent increase in population and a doubling of the real gross national product.

In the Transamerica decision, the Board of Governors (Powell dissenting) developed the concept that a holding company might pre-empt a promising location not currently profitable. Moreover the mere size of the holding company might discourage and prevent entry.123 In 1958, the Board denied Northwest Bancorporation’s application to acquire a proposed new bank in Rochester, Minnesota on just such grounds.124 Northwest already owned one of the three banks in the city, with about 30 per cent of the total deposits; a second bank, belonging to another bank holding company, had 37½ per cent. On the other hand, a unanimous Board approved the acquisition by First Wisconsin Bankshares Corporation of a proposed new bank in Wauwatosa, a residential suburb of Milwaukee. The holding company enjoyed a “dominant position in Milwaukee and its vicinity,” with 33 per cent of the offices and 43 per cent of the deposits in that county.125 The new bank was felt to be a “very considerable convenience to the area” as no new office had been opened in Wauwatosa since 1920 despite a large population increase and a substantial gain in business. Others had recently expressed interest in opening a new bank, but the Board felt that denial of First Wisconsin’s application would “tend to discourage initiative in providing needed banking facilities.”126

Effect on Competition. Wisconsin Bankshares Corporation was not allowed to acquire the stock of a proposed new bank to be located in a large new Milwaukee shopping center which had no bank at the time. Bankshares owned three out of the eight banking offices within a three mile radius of the center. In the city of Milwaukee as well as in the particular neighborhood, Bankshares is in a strong competitive position. Just outside the shopping center, less than half a mile from the site of the rejected bank, a small bank was relocating its office; the Board of Governors feared the relocating bank’s prospects would be adversely af-

122. Id. at 9343.
123. Transamerica Decision at 390, 397.
126. Ibid.
COMMERCIAL BANK MERGERS

fected by the proposed acquisition. Similarly, the First Bank Stock Corporation's application for a new bank in a St. Paul, Minnesota shopping center was denied because the nearest bank was within three and a half miles of the proposed location. In the view of the Board majority, the growth and competitive strength of the nearby three year old small state bank would probably be adversely affected. In the Greater St. Paul area as well as in the vicinity of the shopping center, the holding company's banks control over 50 per cent of the deposits of individuals, partnerships and corporations. A new bank was subsequently opened on the contested site by the Minnesota Mining and Manufacturing Company. First Bank Stock then applied for the addition of this bank to its system. The Board denied the application on the ground that the acquisition would eliminate actual and potential competition between the new bank and First Bank Stock's three existing subsidiaries in the area.

The Board denied Marine Corporation's initial application to acquire the Wisconsin State Bank, the largest and fastest growing independent in the latter's primary service area. According to the Board, the acquisition would have tended to "increase further the existing and already increasing competition disadvantage" of the smaller banks in relation to the Wisconsin Bank; and this disadvantage would not be "fully offset by an increase in the competition which the [Wisconsin] bank may be in a position to give the larger banks." Three months later, however, a majority voted to approve the acquisition. As part of the Marine system Wisconsin "would be in an improved position to serve those accounts that would not look to the smaller banks for service." The Board also cited the "substantial growth" enjoyed by the smaller banks in recent years and the absence of "evidence that holding company competition in the area has been overly restrictive." Certain studies have indeed indicated that in most cases the absorption of a bank by an outside institution does not affect adversely the growth or earnings of a remaining independent bank.

A difference of opinion has existed between the Comptroller of the Currency and the New York authorities over the weight to be given to the impact of a merger on the competitive position of other banks in the community where the acquired bank is located. When the State Bank of Albany informally requested approval of a merger with the Second Na-

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128. Id. at 1061-64.
131. Id. at 1180.
132. Ibid.
tional Bank of Cooperstown, State Superintendent Mooney informed the Albany bank of his disposition to disapprove the merger on the ground that it would place the remaining independent, the First National of Cooperstown, at a competitive disadvantage. Superintendent Mooney felt that competition would inevitably be substantially lessened in the Cooperstown community. Comptroller Gidney later permitted the National Commercial Bank of Albany to acquire the Second National despite Mooney's protestations. 134

Six mergers were allowed in 1960 in spite of the Attorney General's fear of adverse consequences to smaller competitors and consequent tendency toward monopoly. 135 In seven instances where mergers were approved in 1960 he expressed misgivings that the approvals would lead to further mergers. Thus the purchase by Evansville's largest bank of the smallest bank in that Indiana community might "trigger a chain reaction" whereby only three banks of the present six would remain. 136 The Board of Governors did refuse to allow United California Bank of Los Angeles to merge with the First National Bank of La Verne, California, the only remaining unit bank in an area where three giants (including United) controlled almost 90 per cent of total deposits. 137 "Consummation of the merger here proposed could only strengthen the present concentration of banking resources under the control of these three banks, give further impetus to the merger trend in these [La Verne-Pomona and metropolitan Los Angeles] areas, and thereby tend to discourage the formation of new unit banks." 138 In another case, the Board recognized that the merger between California Bank and First Western Bank would be likely to strengthen the position of subsidiary banks belonging to the resulting holding company (Firstamerica) in the ten states other than California where it would own banks, but the Board expected no substantial lessening of competition. 139

The Comptroller of the Currency recommended approval of the First National City application because the resulting holding company would

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137. United, 35%; Bank of America, 40%; Security First, 14%.
138. 45 FED. RESERVE BULL. 141 (1959). The California Superintendent of Banks also favored a merger between First Western Bank and the California Bank: this would create another statewide bank which would offer "true competition" with the Bank of America. The proposed merger, he stated, would "increase competition on a statewide basis, and not have any material effect on the operation of unit banks in California." Firstamerica Hearings 171 (ms. Board of Governors, 1959).
COMMERCIAL BANK MERGERS

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The Reserve Board, however, anticipated that granting First National City's application would stimulate the formation of other bank holding companies in the New York area; independent Westchester banks had already been approached by large New York city banks. While additional mergers "might sharpen and intensify rivalry between a few large banking organizations [it] would not tend to preserve competition in the banking fields in the sense of maintaining a relatively large number of independent alternative sources of banking services." In their dissent, Governors Vardaman and Mills argued that the preservation of competition called for by the 1956 Bank Holding Company Act referred to the "vigor and intensity of competition, rather than to the mere number of institutions." Public policy should be concerned with the quality of competition but in an industry such as banking where few firms can exist in most markets, emphasis on the number of alternatives clearly seems appropriate.

IV. BANKING VS. COMPETITIVE CONSIDERATIONS

In interpreting the 1956 Bank Holding Company Act the Board has sought more specific congressional guidance on a number of matters, including the weight to give the impact of a proposed transaction on the "current competitive performance of banks in the area," regardless of their number or affiliation with bank holding companies. The Board also needs to know how much weight to attach to the long-run impact of holding company acquisitions on the number of alternative banking sources, especially independent banks.

The 1956 Act instructs the Board to weigh banking and competitive factors in deciding where the public interest lies. Thus, in approving Baystate Corporation's acquisition of Union Trust Company for the purpose of merging it with an existing subsidiary, Springfield (Massachusetts) National Bank, the Board cited the ability of the merged insti-

142. Id. at 919.
143. Id. at 779-80.
144. Problems arising in these areas are revealed in two recent Board decisions. See 45 Fed. Reserve Bull. 891 (1959); 46 Fed. Reserve Bull. 16 (1960).
145. The banking factors are enumerated in note 91 supra.
146. The fifth (and the competitive) factor is "whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking." 70 Stat. 134 (1956), 12 U.S.C. § 1842(c) (1958).
tutions to make the extensive loans needed by the larger Springfield firms. Three of the seven members of the Board of Governors felt, however, that the elimination of one of the four large banks in Springfield was too high a price to pay for stronger local competition between two dominant banks in the field of large business loans.\textsuperscript{147} The Comptroller has agreed with the Board majority, as exampled by his citation of the enhanced capability of the Franklin and Meadowbrook National Banks to compete in service and lending ability with the larger New York City Banks, in approving the numerous mergers of these Nassau County institutions.\textsuperscript{148}

Although a "not insignificant" amount of existing and potential competition between the second and fourth largest banks in Milwaukee would be eliminated, the Board approved the formation of a new holding company to acquire these banks. The three governors in the majority argued that banks belonging to the Bank Stock Corporation of Milwaukee might secure needed additional capital more readily than if they were independent, and customers of the smaller of the two banks might get improved service.\textsuperscript{149} Governors Balderston and Robertson (the latter having taken the same stand in the Firstamerica case) dissented on the grounds that the favorable factors did not sufficiently outweigh the unfavorable effects on competition.\textsuperscript{150} Robertson, joined by Governor Szymczak, again dissented on January 25, 1961 when the Board permitted Bank Stock to acquire the Bank of Commerce in Milwaukee.\textsuperscript{151} “Set in the framework of a situation where four-fifths of all banking in the area is already controlled by three holding companies, any increase, however slight, in the strength of any of the three becomes far more significant.”\textsuperscript{152} With respect to this acquisition, the Attorney General filed suit on March 2, 1961 charging a violation of the Clayton Act.\textsuperscript{153}

The acquisition of the Fillmore State Bank, the only other bank in a Utah county where the First Security Corporation already owned one banking office, was approved by the Board of Governors with but one dissenting vote. As the corporation already had another office sixty miles away, it would control three of the seven most accessible offices in the area served by Fillmore. Considerations counteracting these adverse elements, in the view of the Board, were: (a) the negligible overlap of banking business between the two offices in the county (note that

\textsuperscript{148} 92 Comptroller Ann. Rep. 7-8 (1955); I at 474.
\textsuperscript{150} Id. at 144.
\textsuperscript{152} Id. at 163.
potential competition was not mentioned), and (b) the problem of management succession which faced the Fillmore Bank. The succession factor also loomed large in the Board's unanimous approval of Northwest Bancorporation's purchase of Eveleth, Minnesota's First National Bank. The relevant market area was delimited to include two nearby towns, all in the Mesabi Iron Range, with five banks owned by four separate interests. The acquisition reduced the interests to three, and Northwest Bancorporation-controlled banks increased their share of deposits from one-third to almost half the total in the three towns. The Board felt that these admittedly adverse factors were counterbalanced by the possibility that the Eveleth bank might otherwise have been liquidated, leaving the town with no competition.

The 1960 Bank Merger Act likewise requires the three federal agencies to weigh banking and competitive factors. Besides taking "into consideration the effect of the transaction on competition (including any tendency toward monopoly), . . . [the appropriate agency] shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest." Competitive considerations are not necessarily decisive. The Attorney General filed adverse opinions of varying degrees of dissent in about one-third of the 94 cases approved in 1960 by the federal agencies under the new law. In such instances the agencies either differed with the Justice Department's assessment of the competitive impact of the merger, or they felt the adverse effects of the merger were counterbalanced by banking considerations—such as management succession problems and the need to improve services to customers.

Approval by the appropriate agency under the 1960 law does not immunize an acquisition of assets by a bank from a Department of Justice prosecution under the Sherman Act. On February 25, 1961 the Department attacked the combination of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank, the second and third largest in the Philadelphia area, as a violation of both section 1 of the Sherman Act and section 7 of the Clayton Act. Four days later the merger of

155. Id. at 147-49.
157. Of 48 merger applications pending before the federal agencies on September 22, 1961, the Department of Justice rendered an adverse opinion in 26 cases, raised no objection in 10, and had not yet reported on 12. 107 Cong. Rec. 20,144 (Sept. 26, 1961).
158. For the power of the Attorney General under the Sherman Act, see XIII at 9. An ICC or CAB approval of a carrier merger exempts such a merger from Sherman Act prosecution by the Attorney General.
the First National Bank and Trust Company of Lexington and the Security Trust Company (also in that Kentucky city) was alleged to constitute a violation of sections 1 and 2 of the Sherman Act.\textsuperscript{160} In August, Comptroller approval of the second and fourth largest Chicago banks also resulted in a suit involving both Sherman and Clayton Act charges.\textsuperscript{161} This litigation was a mutually agreed on exception to an understanding reached early in April 1961 between Comptroller Gidney and the Department of Justice.\textsuperscript{162} Under the terms of the agreement, which were to have been reviewed by the end of September) the Comptroller deferred his final approval of any merger against which the Department of Justice would feel impelled to bring an antitrust suit.

Similar agreements had been sought but not obtained from the other two federal banking agencies. Thus the Reserve Board voted (3-2) to approve the Boston merger of State Street Trust Company with Rockland-Atlas despite an adverse report from the Department of Justice on the competitive aspects of the proposed merger.\textsuperscript{163} Following a like situation involving Board approval of the Manufacturers-Hanover Bank merger, the Department of Justice filed suit.\textsuperscript{164}

V. BANK MERGERS AND THE PUBLIC INTEREST

The vital role commercial banks play in financing business means that the availability of a number of independent sources to which business and particularly the small enterprise can turn for funds is not a matter of indifference. In 1940, some 75 per cent of the bank loan credit used by business was extended to companies with less than $5 million in assets.\textsuperscript{165} To this day a majority of banks are small businesses making most of their loans to small concerns.\textsuperscript{166} In the fourteen metropolitan areas with 1950 population between 97,000 and 105,000 an average of only nine separate banks existed in each area in 1959; there were an average of twenty-one in the case of the nine areas with population from 557,000 to 727,000.\textsuperscript{167}

\textsuperscript{160.} United States v. First National Bank & Trust Co. of Lexington, Civil No. Lex. 1424, D. Ky., March 1, 1961. In this case the defendant, after the merger, would have 94% of all the trust accounts handled by commercial banks in the Lexington area.


\textsuperscript{162.} The Gidney agreement is reported in the N.Y. Times, April 7, 1961, p. 41.

\textsuperscript{163.} The Chicago exception is reported in the N.Y. Times, Aug. 22, 1961, p. 37.


\textsuperscript{165.} N.Y. Times, Sept. 9, 1961, p. 1.

\textsuperscript{166.} Jacoby & Saulnier, Business Finance and Banking 8 (1947).


\textsuperscript{160.} 1959 FDIC ANN. REP. 124-25 (1960).
Although in most mergers the bank losing its identity continues as a branch office, an independent source of credit has nevertheless disappeared if the bank was bought by an institution located in the same market area. In addition, and unlike the situation in non-regulated industries, permission is required before new entry can occur. Where a bank is not economically viable, merger is the alternative to extinction and offers no dilemma for public policy. However, where a bank is capable of generating sufficient profits to permit it to retain and attract adequate capital funds, a merger which may well enhance the income potential of the bank, and possibly also its ability to improve certain of its services, nevertheless raises the problem of diminished competition. The significance of competition in commercial banking lies not so much in reducing charges as in providing borrowers with options. In turn, the existence of alternative sources of bank credit bears on the competitiveness of other sectors of the economy. To the extent that the preservation of a commercial banking structure with a maximum feasible number of independent sources of loans and banking services is vital for the interests of small business, these interests are adversely affected by a more permissive approach to the elimination of independent sources by the merger route. Such would be the case even if available alternative types of financial institutions were fairly close substitutes for commercial banks.

Between proponents of an antitrust test and advocates of a public utility test for bank mergers the fundamental issue in dispute is the desirable degree of competition in commercial banking. Recognition of the three federal regulatory agencies' special qualifications to judge banking factors in a merger proposal does not imply a similar acknowledgement of these agencies' expertise in the antitrust field. Opposition to granting the Antitrust Division of the Department of Justice power to review bank mergers after they have been approved by the federal agencies was ultimately rooted in the conviction that in cases where consideration of the impact of a merger on competition might lead to a denial of an application, banking considerations should take precedence. The suits instituted by the Department of Justice in 1961 should help in clarifying "the relative importance of competition in deciding whether a proposed merger would promote the public interest." The advocates of an economy organized on a basis of decentralized decision making hope for an outcome where competition will be given more than just one-seventh of the weight when the seven factors to be considered in a bank merger are assessed.

A program of promoting competition in banking must include more

than merely bank merger policy. The chartering authorities must wel-
come the opportunity for other banks to open rival branches where banks
have been turned into branches as a result of merger. New banks should
be authorized where feasible. Regulation of bank activities could be
more permissive without a corresponding derogation of safety. The re-
cent liberalization of Regulation Q (maximum interest rates payable by
member banks on time deposits) is a case in point.

Now that prior approval of the relevant federal agency is required
before any merger of insured banks may take place, the agencies' attitude
toward the factor of competition in assessing the public interest will be
revealed more clearly than hitherto. With regard to railroad acquisitions
the Supreme Court affirmed recently that the Interstate Commerce Com-
mission is not so bound by the antitrust laws that it must permit them to
overbear what it finds to be in "the public interest."169 If the commercial
banking industry argues successfully for a similar interpretation of the
1960 merger law, it may then face a long-run prospect of unwanted pub-
lic utility-type regulation.