STATEMENT

of

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Concerning

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Mr. Chairman, and members of the Committee, it is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to discuss our enforcement program with respect to mergers involving the banking industry.

Free-market competition is the engine that has made the American economy the envy of the world. In particular, our nation's economic vitality depends upon the financial soundness and competitive structure of the banking industry, for it is the credit provided by that industry to American consumers and businesses that helps the free-market engine run smoothly. Experience has shown that where there are competing sources of credit, the price of credit is lower and its availability is greater. That rivalry also brings consumers the benefits of greater innovation and better quality financial services.

Today's hearing is most certainly timely, as this is a time when significant changes are occurring in the banking and financial services industries. While we have seen a large number of bank mergers over the past decade as bank regulatory structures on the geographic area in which a bank may operate have loosened, I think it is apparent to all that we are now beginning to see banks involved in mergers of a different size and scope than we have seen in the recent past.

With respect to size, transactions such as the recently announced proposed merger between NationsBank and Bank of America dwarf the size of previous bank mergers. I think it is entirely possible that we will see other large bank mergers proposed in the future as well. Not only are we likely to see transactions between large banks in the future, but we are also likely to see more and more of an entirely new type of merger transaction, the merger between a large bank and a large financial services company. A current example of this type of transaction is the proposed merger between Citicorp and Travelers Group.

Congress, banking regulators and antitrust authorities all must ask what are the implications of this changing landscape. From an antitrust perspective, will these transactions require a change in focus of bank merger review? How should these transactions be analyzed from an antitrust perspective? Are transactions of these types likely to limit consumer options such that prices will rise and quality of products and services will decline? All of these questions, and many others, need to be considered with an eye to ensuring that the changing landscape will not result in large institutions with market power that would enable them to force customers to pay higher fees and lending rates, receive lower rates for deposits, and receive lower service quality.

Today I would like to describe how the Antitrust Division analyzes bank mergers generally, briefly outlining both the regulatory structure under which we conduct our review and the analytical approach that we take. I will also briefly describe some recent instances where we have required divestitures that are designed to remedy the competitive concerns that exist with the merger, while allowing the merged firm to realize efficiencies associated with the parts of the transaction that do not raise competitive concerns. The analytical approach that we use, applied to the facts presented in particular mergers, will, I believe, continue to preserve competition as the banking and financial services industries head into the 21st century.

Regulatory Structure

The Antitrust Division is the antitrust enforcement agency that reviews acquisitions and mergers among depository institutions.[(1)] The Department typically receives notice of approximately 1,000 mergers per year that propose to combine assets of depository institutions. We have established a special unit within the Antitrust Division that focuses entirely on bank mergers. Of those 1,000 merger notifications, approximately 100 each year initially present issues that require an in-depth competitive analysis. Thus far in FY 1998, we have required remedies to preserve competition in ten instances, already equaling the number of matters in which remedies were required to preserve competition in FY 1997.

Generally speaking, the Division's review of mergers involving depository institutions does not take place under the Hart-Scott-Rodino premerger notification regime but instead under the bank regulatory statutes. Under these statutes, authority to approve or disapprove mergers rests with one of four bank regulatory agencies.[2] The bank merger statutes require that the bank regulatory agencies consider competitive effects of a transaction along with other factors such as convenience and needs in their decision process. Bank-bank mergers require a competitive factors report from DOJ. For both bank-bank mergers and transactions involving the merger of bank holding companies, DOJ is afforded a 30-day post approval waiting period in which to file suit before the transaction receives antitrust immunity. Filing of a suit by DOJ triggers an automatic stay. One overall effect of this regulatory structure is that the Division's competitive concerns are usually addressed by the Division reaching an agreement with the parties for some type of remedy, and litigation is rare.[3]

Screening Guidelines

A significant advance in the bank merger competitive review process was achieved in 1994 with the development by the Division, the FRB and the OCC of the Bank Merger Screening Guidelines, which clarify each agency's processes and, in a single document, set out the ground rules for each agency's review of mergers.

In practice, the Screening Guidelines have ensured that bank merger applications come to the Division with the information necessary for us to review them and reach an initial assessment of a merger's likely competitive effects. The Guidelines have allowed us and the other agencies to begin an examination and analysis of the competition issues and possible resolutions at an early stage.

The screening guidelines indicate that we will look first at market concentration and the change in that concentration as a result of the merger to make a first cut with respect to potential competitive concerns. If either the market concentration is low or the resulting increase in concentration in the market is low, that will end our inquiry. If the proposed merger fails the market concentration tests in the screens, it does not necessarily mean that a competitive problem exists. Instead, if the proposed bank merger fails the screens, then the Department does an in-depth factual analysis to determine the likely competitive effects of the merger on consumers in the affected markets.

Analytical Approach of the Antitrust Division

The Antitrust Division's review of proposed bank mergers applies the same methodology that we use in other industries--that of the Horizontal Merger Guidelines[4] to analyze the likely effect of the merger on competition to supply each product sold by each merging firm in each geographic area in which the product is sold. The objective of the analysis, of course, is to assess whether the merger could create or facilitate the exercise of market power, where market power is defined as the ability of firms to increase price or reduce quality from competitive levels. The Division will thus analyze the merger's impact on the range of products and services provided by banks in particular geographic areas. These include deposit, loan, and investment and trust services sold to retail consumers; deposit, loan, and various other services, including cash management services, sold to businesses; and correspondent services, such as check clearing and foreign exchange services, sold to other banks.

In each investigation we conduct, we look for the choices consumers will have if, after a merger, there are price increases. If you are getting a small business loan from a commercial bank, for instance for working capital, and if the merged bank tries to raise its prices, what choices do you have? If the small business has sufficient reasonable alternatives available to it besides the merged bank, we would not be concerned from an antitrust perspective. On the other hand, if there were not sufficient reasonable alternatives available, we would be concerned about the merger.

Historically, we have generally found that bank mergers are less likely to threaten to reduce competition in products and services provided to retail consumers, as opposed to business consumers, because retail consumers typically have local banking alternatives available to them, such as other banks, thrifts and credit unions, sufficient to prevent the creation or exercise of market power. However, where we have found such competitive concerns, targeted divestitures have protected retail consumers. Of course, we will continue to screen and investigate during our bank merger reviews for any significant loss of competition in the retail area.

To the extent that our investigations have resulted in a determination that competitive concerns exist, it has most often been with respect to the availability of banking services, including loans and credit, to small and medium-sized businesses. Such small and medium-sized businesses may have few alternatives available to them for some of their credit needs.

For example, small businesses tend to have some types of credit needs--such as lines of credit for business startup and working capital purposes--that may attract neither in-region thrifts or credit unions nor banks located in other regions. These businesses tend to have to rely on local commercial bankers for such credit needs. Thus, a merger between two of only a few local commercial banks in a particular market could raise competitive concerns.

Recent DOJ Enforcement Efforts

Our law enforcement objective with respect to bank mergers--like that of all mergers--is to prevent the anticompetitive effects of a particular merger, thereby ensuring that competition is preserved. With respect to bank mergers, we are typically able to accomplish this objective through targeted divestitures while at the same time permitting those parts of the merger that do not have anticompetitive effects (and indeed may generate efficiencies) to go forward. In some instances, particularly in urban areas, requiring a network of branches to be divested (along with associated deposits and loans) helps ensure that a viable, long-term competitor can replace the competition lost via the merger of competitors.

In December 1997, we secured a major divestiture in the proposed acquisition of Barnett Banks by NationsBank. NationsBank agreed to divest approximately 124 branches in fifteen areas of Florida with total deposits of approximately $4.1 billion. That is the largest bank divestiture ever in a single state and overall is second only to the divestitures required in the 1992 BankAmerica/Security Pacific transaction. The Division's investigation was conducted jointly with the Florida Attorney General's Office, which provided us with important information about local market conditions and effective relief alternatives.

Similarly, working closely with the Pennsylvania Attorney General's Office, the Division announced on April 10 that First Union and CoreStates Financial would be required to divest 32 CoreStates branch offices with total deposits of approximately $1.1 billion before they could go forward with their proposed merger. The branch offices required to be divested are located in the city of Philadelphia and in the contiguous counties of Delaware and Montgomery and in the Lehigh Valley. The divestiture that we required is already producing benefits to competition in the Philadelphia area. Those 32 branches were sold to Sovereign Bancorp, a Pennsylvania based bank. Sovereign Bancorp simultaneously purchased an additional 63 branches from First Union/CoreStates, thereby greatly enhancing its competitive stature in the city of Philadelphia and throughout the entire eastern Pennsylvania region.

Most recently, on May 4, we announced that Banc One had agreed to the divestiture of 25 branch offices with total deposits of $614 million in four Louisiana banking markets in order for its acquisition of First Commerce to go forward.

I think it is helpful to note that according to the Federal Reserve Board, which keeps such data, while banking consolidation has led to higher nationwide shares, as measured by assets, of the largest institutions in the past fifteen years, concentration in local geographic markets has remained roughly constant. This is due to a variety of factors, including antitrust enforcement by the banking agencies and the Antitrust Division, new entry into banking markets, and the fact that a number of these bank mergers did not involve competitors serving the same market and thus did not affect local market concentration.

I should emphasize that, as in other industries, we will take whatever action is necessary--and insist on whatever remedy is necessary--to prevent anticompetitive mergers. The bank mergers that have in recent years presented competitive problems, though, have been susceptible to the type of targeted divestitures that I have described, and I believe the relief we have obtained has successfully preserved competition in affected markets.

Looking to the future, the fact that some future bank-bank mergers may involve significantly larger banks is not likely to require a change to the analytical approach used by the Department to review bank mergers. We will continue to analyze the merger's impact on competition to supply each product and service provided by the merging banks in the relevant geographic areas. To the extent that there are not likely to be sufficient alternatives to the merging bank available to consumers (whether retail or business), we will not hesitate to seek necessary remedies to preserve competition. I will note, of course, on a purely factual basis that, other things being equal, the larger the shares of the merging parties with respect to certain products or services in relevant geographic areas, the more competitive concerns the merger may present.

With respect to bank-nonbank mergers, the mergers that we have reviewed to date generally have not raised serious competitive issues. However, as the financial services field continues to undergo rapid change, we will examine each market involved in such mergers closely to see if any mergers of this type may adversely affect competition and consumers.

Conclusion

I would like to conclude my remarks by emphasizing that the Antitrust Division's focus in reviewing a bank merger--and, indeed, any merger--is on whether the merger will hurt consumers by raising prices, reducing quality, or limiting innovation. Our job is to see that businesses and individuals, as consumers of credit and other banking products and services, are not harmed by consolidation within the banking industry. While we will not stand in the way of mergers that are competitively neutral or even beneficial for competition and consumers, we will continue to ensure that the competition that benefits us all is not sacrificed by mergers in the banking industry. As financial service modernization goes forward and we see mergers of larger size and scope, the Antitrust Division will continue to apply forward-looking competitive analysis to each and every merger.

1. The term "depository institution" refers generally to commercial banks, bank holding companies, savings banks, savings and loan associations, savings and loan holding companies, and credit unions.

2. The responsible agency is determined by the type of resulting institution, with the Federal Reserve Board and the Comptroller of the Currency most often involved in the larger banking transactions.

3. Acquisitions by bank holding companies of non-banking activities, while requiring FRB approval, are not subject to the antitrust immunity and automatic stay provisions. Under current law, these non-banking activities are defined by the FRB but must be closely related to banking. Further, acquisitions of financial services companies through a bank's operating subsidiary ("op sub"), instead of through the holding company, do not require OCC approval under the Bank Merger Act and accordingly are subject to HSR filing requirements.

4. U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶13,104 (April 2, 1992), *as amended*, April 8, 1997.