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Banking

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CURRENT LEGISLATION

BANKING

PROPOSED AMENDMENT TO THE BANK MERGER ACT OF 1960

On June 11, 1965, the Senate passed and referred to the House Committee on Banking and Currency, Senate bill 1698, which is an amendment to the Bank Merger Act of 1960.[1] The first part of the amendment provides that when the appropriate federal banking agency approves a bank merger, consolidation, acquisition of assets or assumption of liability under the Bank Merger Act of 1960, it must immediately notify the United States Attorney General of this fact. The approved transaction may not be consummated until thirty days after the date of approval, but if an antitrust suit to enjoin the transaction is commenced within this thirty-day period, then the transaction may not be consummated until after the termination of this suit and then only to the extent that it is consistent with the final judgment. When a bank merger, consolidation, acquisition of assets or assumption of liability has been made pursuant to this procedure, no proceeding under the antitrust laws may thereafter be instituted concerning the approved transaction.

Abbreviated procedures are provided "when the agency finds that it must act immediately in order to prevent the probable failure of one of the banks" and "when an emergency exists requiring expeditious action." The Senate report[2] states that the "committee expects that these special procedures will be used only for the most serious emergencies," but does not give examples of what these emergencies might be. The committee is probably referring to situations where a bank's management is incompetent, where one of the banks is a problem bank with inadequate capital or unsound assets, or where several banks in a small town are compelled by an over-banked situation to resort to unsound competitive practices which may have an adverse effect upon the condition of the banks.[3]

The second part of the amendment provides that any bank merger, etc., involving an insured bank which has been consummated prior to the bill's enactment

> . . . pursuant to the then appropriate regulatory approval or approvals, State or Federal, and where the resulting bank has not been dissolved or divided or has not effected a sale or distribution of assets

[1] S. 1698, 89th Cong., 1st Sess. (1965); The Bank Merger Act of 1960 directs the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation to approve or disapprove bank mergers. 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (1964). In reaching their decision, the federal banking agencies are to consider banking and competitive factors. The agency which would have jurisdiction over the merged bank is the agency charged with the decision in any given case. The deciding agency is required to request advisory reports on the competitive factor from the other two agencies and the Attorney General.

[2] S. Rep. No. 299, 89th Cong., 1st Sess. 8 (1965).

[3] See Hearings on S. 1698 Before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess. 183 (1965).

> or has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this amendment, shall be exempt from the antitrust laws including the Sherman Antitrust Act . . . and the Clayton Act. . . .[4]

Senate bill 1698, as it was originally introduced in the Senate on April 5, 1965, by Senator Robertson, gave the federal banking agencies exclusive jurisdiction over bank mergers. It provided that their authority

> . . . shall be exclusive and plenary, and any banks participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws, including the Sherman Antitrust Act and the Clayton Act. . . .[5]

This bill would have limited the involvement of the Department of Justice in bank mergers to the advisory report on their competitive effect required by the Bank Merger Act of 1960. With respect to the Clayton Act, it would have made the law on bank mergers what many Congressmen and Senators thought it was after the enactment of the Bank Merger Act.

While the Committee was unable to agree that the Department of Justice and the antitrust laws should not play an important role in a proposed bank merger, it recognized the need for immediate clarifying legislation in the confused area of bank mergers and accepted S. 1698 in its present form as submitted by Senator Proxmire. The amendment now provides for a double veto of any proposed bank merger. The appropriate federal banking agency has the first veto under the Bank Merger Act. If the agency approves the merger, then the Attorney General may commence an antitrust suit within thirty days and challenge the merger in court.

I. The *Philadelphia* Decision

In 1963 the Supreme Court in *United States v. Philadelphia Nat'l Bank*[6] threw the law on bank mergers into considerable confusion when it decided that Section 7 of the Clayton Act applied to bank mergers, and that bank mergers approved by the appropriate federal banking agency under the Bank Merger Act of 1960 were not immune to the antitrust laws. Prior to this time it was widely believed that bank mergers were, in effect, not covered by Section 7 of the Clayton Act because they are invariably accomplished through asset acquisitions. When the 1950 Congress amended section 7 by including asset acquisitions within its coverage, the additional coverage was literally limited to "asset acquisitions by corporations subject to the Federal Trade Commission,"[7] and banks are not subject to the Federal Trade Commission. With this interpretation in mind, the 1960 Congress enacted the Bank Merger Act.

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4 111 Cong. Rec. 12829 (daily ed. June 11, 1965).
5 111 Cong. Rec. 6684, 6685 (daily ed. April 5, 1965).
6 374 U.S. 321 (1963).
7 Clayton Act § 7, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

The Bank Merger Act of 1960, which became Section 1828(c) of the Federal Deposit Insurance Act, provides that:

> No insured bank shall merge or consolidate with any other 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 Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).[8]

In granting or withholding its consent, the appropriate banking agency is to consider six banking factors[9] and

> . . . the effect of the transaction on competition (including any tendency toward a monopoly), and shall not approve the transaction unless, after considering all such factors, it finds the transaction to be in the public interest.[10]

With the expressed purpose of achieving uniform standards, the act requires the deciding agency before acting on a merger application to request a report on the competitive factors involved from the Attorney General and the other two federal banking agencies.[11]

As enacted into law, the Bank Merger Act of 1960 makes the "public interest" the controlling determination with regard to bank mergers. The federal banking agency which is to have jurisdiction over the resulting bank has the final judgment on allowing or disallowing the merger. While the agency is required to request opinions on the competitive factors from the Attorney General and the other two banking agencies, these opinions are merely advisory. The final determination is to be based on a balancing of the six banking factors against or with the competitive factors.

It is quite clear that the 1960 Congress intended bank mergers to be governed by a balancing of the banking and the competitive factors and did not want the competitive factor to control. The Senate report states:

> The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision.[12]

The Senate defeated an amendment introduced by Senator O'Mahoney which

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8 The Bank Merger Act, 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (1964).

9 The six factors are (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 the Federal Deposit Insurance Act. Ibid.

10 Ibid.

11 Ibid.

12 S. Rep. No. 196, 86th Cong., 1st Sess. 24 (1959).

would have made the competitive factor controlling and which would have provided for hearings and appeal by adversely affected parties and the Attorney General.[13] The Senate and House debates give a clear indication that the competitive factor not only should not be controlling, but also that the competitive factor may be outweighed by the banking factors in the prescribed public interest determination by the banking agency.[14]

These same debates indicate that Congress intended that the federal banking agency's decision on a proposed bank merger should control. The Senators and Congressmen speak of providing "effective control by the Federal banking agencies over all bank mergers under Federal jurisdiction,"[15] of not needing "procedures which would make litigation ensue in almost every case of a bank merger with respect to which the Attorney General disapproved,"[16] and of placing the "responsibility for acting on a proposed merger" in the agency which will supervise and examine the resulting bank.[17] The Senate report on S. 1698 states that at the time the Bank Merger Act was passed, "it was clearly expected that the decision of the responsible Federal banking authority . . . would be final and conclusive."[18]

The Supreme Court in the *Philadelphia* case decided that when the 1950 Congress amended Section 7 of the Clayton Act by adding "asset acquisitions by corporations subject to the Federal Trade Commission," it did not intend a literal interpretation. Supposedly, the 1950 Congress intended to bring all mergers of any type within the provisions of section 7 and intended the specific exemption for asset acquiring corporations not subject to the FTC's jurisdiction to apply only to asset acquisitions not accompanied by merger.[19] Having held that Section 7 of the Clayton Act applies to bank mergers, the Court went on to note that the Bank Merger Act confers no express immunity to antitrust laws, that the Bank Merger Act was predicated upon the uncertainty as to the scope of section 7 and that the committee reports and the Senate debate indicate that the act was not intended to affect the applicability of the antitrust laws to bank acquisitions.[20] The Supreme Court concluded by stating:

> [I]n holding as we do that the Bank Merger Act of 1960 does not preclude application of § 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force.[21]

It is true that the Bank Merger Act of 1960 does not confer express immunity from the antitrust laws on bank mergers, but when the act was

13 105 Cong. Rec. 7691, 7692 (1959) (remarks of Senator Robertson).

14 105 Cong. Rec. 8074, 8075-76 (1959) (remarks of Senator Robertson); 106 Cong. Rec. 7256, 7258-59, 9710, 9711-12 (1960) (remarks of Representative Brown, Representative Multer and Senator Fulbright).

15 105 Cong. Rec. 8074, 8077 (1959) (remarks of Senator Robertson); 106 Cong. Rec. 7256, 7257 (1960) (remarks of Representative Spense).

16 105 Cong. Rec. 8125, 8129 (1959) (remarks of Senator Javits).

17 106 Cong. Rec. 7256, 7257 (1960) (remarks of Representative Brown).

18 S. Rep. No. 299, supra note 2, at 7-8.

19 United States v. Philadelphia Nat'l Bank, supra note 6, at 342.

20 Id. at 350-52.

21 Id. at 354.

passed, there seemed to be little reason for such an exemption. The Senate report clearly states that the act "would not affect in any way the applicability of the Sherman Act to bank mergers or consolidations."[22] With reference to the Clayton Act, the report states that asset acquisitions were included within Section 7 of the Clayton Act in 1950 but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission. Banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of the act, were not affected.[23] As bank mergers are customarily, if not always, carried out by means of asset acquisition, they are exempt from Section 7 of the Clayton Act.[24] Since the Congress was certain that the Clayton Act was not applicable to bank mergers as they are invariably accomplished, there was no reason to include an express exemption as it had done in other acts. While the Supreme Court correctly states that the Congress of 1960 did not accurately anticipate the *Philadelphia* decision, this does not mean that it did not intend to immunize bank mergers. Senator Robertson, the act's sponsor, did say that the application of the antitrust laws to bank mergers was not altered by the Bank Merger Act,[25] but his understanding of their application in 1960 must be remembered.

In his *Philadelphia* dissent, Justice Harlan correctly points out that "the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy."[26] Justice Harlan also presents a sound objection to the majority holding that the 1950 Congress must have intended to include bank mergers within the scope of the amended Section 7 of the Clayton Act. Section 11 of the Clayton Act gives the Federal Reserve Board authority to enforce section 7 where applicable to banks. This section has remained unchanged since 1914. When Congress continued the Federal Reserve Board's section 11 authority while literally limiting the asset acquisition provision of section 7 in the 1950 amendment to corporations subject to Federal Trade Commission jurisdiction, it is certainly arguable that bank mergers were not included within the scope of the amended section 7.[27]

If the Supreme Court's conclusion that the Congress intended no Clayton Act immunity for bank mergers is accepted, then the decision is not surprising, for the federal banking agency decision under the Bank Merger Act is a decision on the "public interest." In *United States v. Radio Corp. of America*,[28] the Supreme Court held that the Federal Communications Commission's determination of public interest, convenience and necessity was not a binding adjudication on the antitrust issues involved because the statute under which the determination was made did not confer antitrust immunity

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[22] S. Rep. No. 196, supra note 12, at 3.
[23] Id. at 5.
[24] Id. at 1; see 106 Cong. Rec. 9710, 9711 (1960) (remarks of Senator Fulbright).
[25] 105 Cong. Rec. 8125, 8131 (1959) (remarks of Senator Robertson).
[26] United States v. Philadelphia Nat'l Bank, supra note 6, at 384.
[27] Id. at 395.
[28] 358 U.S. 334 (1959).

on the agency's decision. In *California v. Federal Power Comm'n*[29] and *United States v. El Paso Co.*,[30] a similar determination by the Federal Power Commission received similar treatment when the statute involved did not contain an express antitrust immunity. In his dissent to the *El Paso Co.* decision, Justice Harlan notes that "this case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulations in various fields."[31]

II. Ramifications of the *Philadelphia* Decision

Regardless of the correctness of the *Philadelphia* decision, it has created serious confusion on the subject of bank mergers. As of June 11, 1965, a total of 765 bank mergers had been approved during the five years since the enactment of the Bank Merger Act on May 13, 1960; bank mergers consummated during the ten years from 1950 to 1960 totaled 1,435.[32] Since there is no statute of limitations under Section 7 of the Clayton Act, all of these mergers, as well as all future mergers, could be subjected to an antitrust suit at the insistence of the Attorney General. However, it must be realized that principles of fairness and consideration of the problems of divestiture would most likely dissuade the Attorney General from bringing suits in most of these cases, especially those most remote as to date of merger.

The problems of divestiture are illustrated by the three-year-old merger of the First National Bank & Trust Company of Lexington and the Security Trust Company which has been ordered split by the Supreme Court.[33] The merged bank held 4,186 checking accounts and 4,051 savings accounts that neither of the banks held before the merger. The merged bank holds 15 loans which exceed $250,000. None of these loans can be assigned to the First National because its legal lending limit was $250,000, and the deposit structure which Security Trust will presumably have will not support a loan of this size. The merged bank has been designated trustee of 83 trust accounts, some of which are irrevocable: Can a federal court transplant trustees of trusts within the jurisdiction of state probate courts? Key management personnel are no longer with the merged bank. Stockholders of the merged bank may not want shares in two smaller banks. Depositors may withdraw accounts due to the air of illegality.[34]

There is little doubt that legislation such as S. 1698 is needed, but S. 1698 would not clear up all the confusion that presently exists in the law concerning bank mergers. The role that Section 11 of the Clayton Act should play with regard to both the Bank Merger Act of 1960 and the proposed amendment is uncertain. Section 11 gives the Federal Reserve Board the authority to enforce section 7 when applicable to banks. It provides for a full hearing with appeals to the circuit courts. This jurisdiction is not exclusive,[35] but once the Board assumes jurisdiction of a case, it would seem

[29] 369 U.S. 482 (1962).
[30] 376 U.S. 651 (1964).
[31] Id. at 663.
[32] S. Rep. No. 299, supra note 2, at 2-3.
[33] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).
[34] Hearings on S. 1698, supra note 3, at 56-57.
[35] United States v. W. T. Grant Co., 345 U.S. 629, 631 (1953).

that the Board should proceed to final judgment in accordance with the procedures of section 11. In footnote treatment in the *Philadelphia* decision, the Supreme Court expressed its belief that the Bank Merger Act of 1960

> . . . plainly supplanted . . . whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers.[36]

Since the Comptroller was the agency involved, the issue was not fully faced because there was no conflict between the Bank Merger Act and Section 11 of the Clayton Act. In *United States v. Manufacturers Hanover Trust*,[37] when the Federal Reserve Board was the agency approving a merger under the Bank Merger Act, the district court felt that, although the Board had not done so, it could have invoked jurisdiction under Section 11 of the Clayton Act. The court uses this as a basis for invoking the doctrine of primary jurisdiction.[38]

The 1960 Congress did not consider section 11 because it believed that section 7 did not apply to bank mergers; but whether section 11 will apply to bank mergers and, if it does, how it will apply under the new legislation, must be answered. It is doubtful that any Congress would intend one agency's determination under the Bank Merger Act to have a different or more conclusive effect than that of another, but this is what may happen under the present law and under S. 1698 as presently proposed. If the Federal Reserve Board were to invoke its section 11 authority while considering a bank merger and hold the required hearing prescribed in section 11, it could be argued that any antitrust attack on the competitive factors once the Board had approved the merger would have to follow the appeal procedures of section 11. This would mean that, instead of pursuing a de novo hearing in the district court, the Attorney General would have to appeal the Board's decision to the circuit court where the Board's factfinding, if supported by substantial evidence, would be conclusive. Until this possibility is handled legislatively, it would be best to follow the Supreme Court's suggestion and assume that any authority of the Federal Reserve Board over bank mergers under Section 11 of the Clayton Act has been supplanted by the Bank Merger Act. This solution will at least produce uniform procedure under the Bank Merger Act.

The Sherman Act was always considered applicable to bank mergers, but it is possible that no one ever thought that it would be used against them.[39] In any event, the Sherman Act has figured in S. 1698. The original version would have made the banking agency's determination conclusive on Sherman as well as Clayton Act issues, and the present bill treats them both as foreclosed after the thirty-day waiting period if no suit is brought within that time. In the House Committee hearings on S. 1698, Attorney General Katzenbach said the Department of Justice could cope with the thirty-day

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36 United States v. Philadelphia Nat'l Bank, supra note 6, at 344-45.

37 240 F. Supp. 867 (S.D.N.Y. 1965).

38 Id. at 878-86.

39 United States v. First Nat'l Bank & Trust Co., supra note 33, is the first Sherman Act decision.

limitation on the Clayton Act issues, but wished to retain Sherman Act authority. It is evident from his remarks that he felt the proposed immunity extended to future acts of the merged bank. His misunderstanding should have been corrected by Senator Proxmire's remarks later in the week that immunity does not extend to future acts.[40] The Attorney General's remarks would seem to indicate that the thirty-day waiting period will be sufficient. As to the Attorney General's right to institute Sherman and Clayton suits against future activities of the merged bank, there would seem to be little objection to S. 1698 on this score.

III. The Principal Issue

The principal issue in this area of the law is whether it is better to have bank mergers subject to the narrow rule of Section 7 of the Clayton Act or, alternatively, to have a group of banking experts decide whether or not a proposed bank merger is in the public interest. There is some attraction to the argument that the federal banking agencies have developed an expertise on banking and that through their constant communication and contact with the banking industry, they know banks and bankers and the necessities of the banking industry on a local and a national scale; that due to this special knowledge of a complex industry, they are eminently better qualified to make decisions on bank mergers with a view to what is best for the United States than is a judge whose knowledge in the area may be limited and whose hands are tied by narrow antitrust formulas designed to curb business monopolies. This is the train of thought that runs through the committee testimony of the federal banking agencies. There is also merit in the argument that the expanding American business world has a need for larger banks with larger lending limits which cannot be adequately satisfied through normal bank growth. It is rather certain that Section 7 of the Clayton Act will not allow mergers to answer this need: *Philadelphia* clearly states that the anticompetitive effects in one market (local) cannot be justified by procompetitive consequences in another (national).[41] The Senate report of the Bank Merger Act lists additional examples of public interest mergers which might not be allowed in certain circumstances under the rule of section 7:

> 1. Where there is a reasonable probability of the ultimate failure of the bank to be acquired.
> 2. Where because of inadequate management the acquired bank's future prospects are unfavorable.
> 3. Where the acquired bank has a problem with inadequate capital or unsound assets and its acquisition by another bank would be the best practical means of dealing with the problem.
> 4. Where the acquired bank has no adequate provision for management succession or its management is incompetent.
> 5. Where the acquired bank is an uneconomic unit or is too small to meet the needs of its community by providing loans of sufficient size or by providing needed banking facilities.

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[40] 23 Cong. Q. 1784 (1965).

[41] United States v. Philadelphia Nat'l Bank, supra note 6, at 370.

> 6. Where several banks in a small town 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 and the merger of the two or more banks would, therefore, be in the public interest.[42]

These are weighty considerations which find little place in a Clayton 7 determination. However, small bankers are justifiably concerned about their competitive situation should section 7 protection be removed.

The Independent Bankers Association of America has opposed all legislation that would exclude Section 7 of the Clayton Act from the consideration of bank mergers. It has pointed to the fact that while 765 mergers have been approved under the Bank Merger Act of 1960, only 31 have been denied;[43] that while the Department of Justice has submitted 470 unfavorable reports to the three federal banking agencies, it has initiated only seven antitrust suits;[44] that the availability of loans, the rates charged on loans and the rates paid on savings are governed by competition.[45] While some provision should be made for the small banker, it does not seem that the banking industry as a whole should be subject to the narrow confines of Section 7 of the Clayton Act. The Sherman Act should remain as a protection for small banking. If more protection is needed, Congress should develop a new test or procedure for considering the competitive factor in bank mergers which is not irrevocably tied to the case law under Section 7 of the Clayton Act.

The beneficial potential of banking agency expertise may not be realized under the Bank Merger Act setup. When the Senate Committee on Banking and Currency reported the Bank Merger Act of 1960 to the Senate, it gave particular attention to the fact that, in the interests of uniform standards, the act required the deciding agency to obtain the views of the other two banking agencies on the competitive factor. It said:

> The committee considers this provision essential to the maintenance of the dual system of banking. The Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation must review applications with the same attitude, and must give the same weight to the various banking and competitive factors. The Comptroller must not be more lenient in approving mergers, so as to attract merging State banks into the national banking system. The Board and the FDIC likewise must not be more lenient in approving mergers, so as to tempt national banks to leave the national banking system. The State banking system and the National banking system must develop and compete with each other on their own merits, without pressure in either direction from the administration . . . [of the Bank Merger Act].[46]

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[42] S. Rep. No. 196, supra note 12, at 19-20.
[43] Hearings on S. 1698, supra note 3, at 16.
[44] Id. at 166.
[45] Id. at 150.
[46] S. Rep. No. 196, supra note 12, at 23.

In the same report, four members of the Committee included among their supplemental views that:

> There is a pronounced tendency in American life for the regulatory bodies which are set up to protect the public to become influenced and largely controlled by the very groups which they were created to regulate. In this respect there is nothing sacrosanct about the bank regulatory agencies. We are not certain how much attention they will pay to the opinions of the Department of Justice. . . .[47]

It would appear that the uniform standards so necessary for the beneficial operation of the Bank Merger Act scheme have not been attained. In the two bank merger cases to reach final judgment,[48] the Comptroller approved a bank merger over the adverse reports of the other two banking agencies and the Attorney General.[49] If uniform standards are not obtainable under the three-agency approach and if each agency is going to favor an increase in its own position in the banking industry, the arguments based on desirable expertise must fall unless a workable administrative alternative can be developed.

IV. A Proposed Long-Term Solution

It is submitted that the need for uniform standards which will meet the needs of our growing economy without running the small banker out of business requires a unitary decisional board which will give the banking and competitive factors an honest, detached consideration. It is easier to suggest such a board than to suggest its composition. The board might be composed of a representative from each of the three federal banking agencies and the Department of Justice under the chairmanship of a banking expert who is not associated with any of the other agencies. The board would be directed by statute to consider the six banking factors of the Bank Merger Act plus the overall competitive effect of a proposed merger on the local and the national market. The statute should indicate that the congressional intent is to relieve bank mergers from the application of the Clayton Act while at the same time directing the board to give careful consideration to the local need for advantageous retail banking. The final decision would be a public interest determination in which no one factor and no single market could demand controlling weight.

Each member of the board except the chairman would be required to present a report on the proposed merger, and the board would be required to hold hearings. The board would also be required to report its findings and the basis for these findings. There would be no appeal from the board's decision.

Each member's report would be prepared by the agency which he represents. The board would consider any conflicts among the views of the three

[47] Id. at 26.

[48] United States v. First Nat'l Bank & Trust Co., supra note 33; United States v. Philadelphia Nat'l Bank, supra note 6.

[49] For a tabulation of bank merger approvals and disapprovals by the Comptroller and their conformity with the advisory reports, see generally Hearings on S. 1698, supra note 3, at 172 inserts.

banking agencies and the Department of Justice and attempt to achieve an intelligent compromise. Throughout the consideration of the proposed merger, the board would have before it the Department of Justice's views on any anticompetitive effect. This would be most helpful should the Department of Justice believe that there is a Sherman Act issue involved. It is believed that this procedure will be conducive to the development of uniform workable standards in the field of bank mergers. The effect of any interagency competition for new banks would be reduced. The narrow rule of Section 7 of the Clayton Act would be avoided, while the broader rule of the Sherman Act would still apply. The weakest point in this suggestion is that the board would be forced to develop a new antitrust criteria.

V. Senate Bill 1698: A Partial Solution

The second part of S. 1698 is an attempt to save the 2,200 bank mergers that have been consummated since the 1950 amendment of Section 7 of the Clayton Act from the difficult if not impossible problems of divestiture. It is submitted that such special legislation is an absolute necessity with regard to most of the banks affected. Equity requires that those banks which merged in the honest belief that all that was required was the appropriate agency approval should not be retroactively penalized. However, the equities may not be so decidedly in the favor of some of the more recent bank mergers which were consummated after the *Philadelphia* antitrust suit. Representative Todd has introduced six bills[50] with each bill asking relief for a single recent bank merger. It is Representative Todd's hope that a separate consideration of the equities in each case will result in fairer treatment for all six mergers and relieve some of the opposition to S. 1698.

Senate bill 1698 does not provide what the field of bank merger law requires. It has abandoned the original purpose of the Bank Merger Act of 1960, which was to leave the decision on bank mergers to the expertise of the federal banking agencies. It accepts the *Philadelphia* decision and allows Section 7 of the Clayton Act to have absolute and final control over proposed bank mergers. However, the bill will clear up the present confusion by providing a procedure which will give finality to an approved bank merger. It is submitted that this is sufficient reason to pass the bill, but bank merger legislation should not end with the enactment of S. 1698. Congress should devise a bill which will revest a group of expert banking administrators with a substantial voice in bank mergers and which will allow a merger that is needed and procompetitive in the national market even though it may tend to lessen competition in the local market.

The First Session of the 89th Congress ended before any proposed amendment to the Bank Merger Act of 1960 was presented to the House. If such a bill is presented during the Second Session commencing in January 1966, it is possible that it will be substantially different from S. 1698 as it passed the Senate. On October 19, 1965, the House subcommittee which was considering S. 1698, in a doubtfully legal session called without the approval of

[50] H.R. 10846-52, 89th Cong., 1st Sess. (1965); 111 Cong. Rec. 21717-18, 21726 (daily ed. Sept. 1, 1965).

the chairman, Representative Patman, approved a substitute bill submitted by Representative Ashley which would change the effect of Section 7 of the Clayton Act as applied to bank mergers by requiring the courts to decide whether a merger's possible anticompetitive effect is outweighed by its benefits to the local community and to the financial health of the merged banks.[51] The legality of this committee action is now before the House Rules Committee on the objection of Chairman Patman, who favors a bill which would continue to subject bank mergers to the full effect of Section 7 of the Clayton Act.[52]

The Ashley bill is commendable in so far as it attempts to relieve bank mergers from the case law under Section 7 of the Clayton Act, but it is submitted that the federal banking agencies or a federal banking board as outlined above—and not the courts—should be given the authority to approve or disapprove bank mergers on the basis of both banking and competitive factors. Expert banking administrators are better suited to this determination than is a judge. The Ashley bill would provide a starting point for discussion on additional legislation on bank mergers, but its passage by the House at this time would cause harmful delay in the enactment of legislation to relieve the present confusion on bank mergers, for it would no doubt necessitate long debate and committee hearings in the Senate. Prompt clarifying legislation is presently needed, and S. 1698 will meet this need.

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51 Wall Street Journal, Oct. 20, 1965, p. 5, col. 2.
52 Wall Street Journal, Oct. 9, 1965, p. 3, col. 2.