



U.S. DEPARTMENT OF JUSTICE

Antitrust Division

BANK MERGERS AND ANTITRUST

Addressed by

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The banking industry is absolutely critical to our nation's economic well-being, and that is why its financial soundness and competitive structure are of such importance. American consumers and businesses rely on the availability of credit. And experience has shown that where there are competing sources of credit, the price of that credit is lower and its availability is better. Moreover, the rivalry that exists also brings consumers the benefits of greater innovation and better quality financial services.

Antitrust policy plays the role of ensuring that competition flourishes. And in my view, the bank merger program of the Department of Justice has successfully prevented anticompetitive effects from bank mergers, ensuring that competitive options are preserved while at the same time permitting most of the efficiencies associated with those mergers. Unlike our sister agencies which also address competitive issues, we are not a regulator, but a law enforcement agency. We intervene only when we believe it is necessary to ensure that markets remain competitive.

The Division has been extraordinarily active in this area, dealing with the current merger wave involving a large number of very large bank mergers. During Fiscal Year 1995, the Division screened almost 1,900 bank mergers, and issued 1,169 competitive factor reports, and so far in 1996 we have screened 1,187 mergers and issued 876 competitive factor reports. In 1995, we required divestitures in five cases, and so far in 1996, in seven cases. I believe our influence in bank mergers is much greater than

these numbers suggest, however, because our clearly articulated bank screens deter many bank mergers that would contravene the antitrust laws. And I promise you we will continue to be vigilant watchdogs in the bank merger area.

I'd like to talk about two major areas--a recent reorganization of our merger work, and how we look at bank mergers generally.

First, about the realignment. A few months ago, we began planning how we would handle the increasing merger load. We took a hard look at the number of people we had to do the work, and the amount of work both flooding in and expected to flood in--from banks, to telecommunications, to high technology industries, to electric utilities, to name a few. We concluded that we needed to harness our merger resources--consolidate them and dedicate them to merger work, so that we would be able to have approximately one-third of the Division's lawyers available for merger work. So we decided to devote two sections--Litigation II and the Merger Task Force--entirely to mergers and to increase the number of lawyers assigned to those sections. And to have a smaller section handle the criminal work in D.C.--Litigation I. That meant we had to reassign some of the work Litigation I had been doing in the merger area; the reassignment that is relevant here is the banking work. So now, Bob Kramer, the Chief of the Litigation II Section is responsible for bank mergers, replacing Tony Nanni, who is managing Litigation I's criminal matters. What does this mean? Business as usual. There is no plan to

change the way we look at bank mergers; no shifts in policy or in practices.

We've made great strides in clarifying our policies and are proud of that effort. For example, the Bank Merger Screening Guidelines, issued jointly last year by the Division, The Federal Reserve Board and the Office of the Comptroller of the Currency, clarify the agencies' processes and, in a single document, set out the ground rules for the agencies' review of mergers.

In practice, these Screening Guidelines have ensured that bank merger applications come to us with the information necessary for us to review them and reach an initial assessment of a merger's likely competitive effects. The Division has also been willing to meet with parties before they file an application in order to discuss the likely impact of our screening process on a specific transaction. The Guidelines and our openness to advance consultation with the parties have enabled us to identify potential areas of concern and have allowed us and the other agencies to begin an examination and analysis of the competition issues and possible resolutions as early as possible.

In addition, we have sought to make it clear that these screens are not hard and fast rules or bright lines. Rather, they are meant to open the discussion and dialogue. It does not follow that we will challenge a proposed merger merely because it fails the tests in the screens. The screening materials should inform the industry of the factors we will be examining and the issues that are important to our evaluation. Indeed, less than

one percent of all applications raise any significant antitrust concern under the screening procedures. The primary effect of our Screening Guidelines is to allow proposed transactions that raise no significant antitrust issues to proceed promptly.

Cooperation among the agencies has also produced a wide range of other benefits. For example, the lines of communication and dialogue among the agencies has improved substantially. To the extent the agencies are aware of each others' concerns, the parties can be more comfortable that the investigations are proceeding on parallel tracks, thereby minimizing the potential for divergent decisions. Each agency also provides its own experience and perspective and often may pursue issues related, but not identical, to those of other agencies. The communities in which bank mergers occur should be reassured that a variety and range of concerns are being investigated and addressed.

In that connection, the participation of State Attorneys General in joint investigations with the Division has proven to be extremely helpful and productive. The State Attorneys General are able to bring to the investigations knowledge of local market conditions and concerns, as well as knowledge of local businesses and their needs. I believe this knowledge has allowed our investigations to proceed more effectively and has resulted in decisions and resolutions which better address local issues.

The Antitrust Division reviews bank mergers within the same analytic framework (our Merger Guidelines of April 2, 1992) that we use for mergers in other industries. Within this framework we

have relied on our experience with numerous banking transactions to develop certain factual conclusions that guide our analysis. In the banking industry, in particular, we have emphasized the availability of banking services, including loans and credit, to small and medium-sized businesses.

Our investigations have suggested that for their credit needs other than commercial banks, small and medium-sized businesses have few alternatives available to them. Small businesses tend to have credit needs that do not attract banks located in other regions and tend to rely on and value their relationships with their local commercial bankers. Medium-sized businesses may be able to access lenders and providers from larger areas, but still tend not to have the access to national capital markets that may be available to larger corporations.

Given that small businesses tend to bank locally, we have focused our analysis for small business banking services primarily within defined local areas such as RMAs (Ranally Metropolitan Areas) or counties as an approximation of the geographic scope of competition. Once we have identified a relevant geographic market we will use the deposits of commercial banks in the areas as the best initial proxy to measure the competitive significance of the merging banks. A thrift's deposits are excluded in our first review, but then added if our investigation discloses that the thrift is, in fact, making commercial loans. Although we use the same methodology for our analysis of lending to medium-sized businesses, the effective

area of competition by banks for such loans and services tends to be larger than for small businesses because of the greater ability of banks to secure and service those loans over greater distances.

I would like to stress that our focus on business banking services does not mean that we are ignoring the potential effects of bank mergers on retail consumers. We have found that retail consumers have banking alternatives available to them that most business customers do not--such as thrifts and credit unions. Although these factors may diminish potential anticompetitive effects, we have and will continue to screen and investigate for any significant loss of competition in the retail area as well.

Whenever we conduct detailed investigations, we seek to learn as much as we can about competition for banking services in the relevant markets. We specifically take into account, for example, the actual level of commercial loan activity by the market participants. I should add a note of caution on this point--that the loan data may not substitute for the deposit data. The deposit data historically have been more reliable and loan data have not necessarily reflected lending capability or the full competitive significance of a commercial bank in the market.

We treat all of the issues raised about the future of the industry seriously. But the focus of the Merger Guidelines is not what may happen in a market in five or ten years, but what is happening today and over a short two-year time horizon. Since

our review is fact driven, I think it is fair to say that when we see major changes in the market, those changes will be reflected in our analysis. This is because antitrust merger analysis is flexible and easily adapts to a dynamic market. Over time, we will continue to evaluate market changes and our internal review process, as appropriate, will reflect industry conditions.

As you know, there are studies showing that concentration has an effect in the banking industry. As a result, we will likely take a hard look at certain increasingly concentrating regions and markets, especially where a merger would leave a metropolitan area with one or two dominant firms and a fringe of small independent banks which may not be able to compete significantly for small and medium-sized business loans. In these markets, as in our typical investigations, there are not bright line tests. Instead, I anticipate that we will consider a number of factors, none alone being determinative, in evaluating potential competitive effects. These factors include: deposit concentration figures, branch networks, entry and the ability of small firms to expand quickly.

Further, we are increasingly evaluating the potential effects of bank mergers on middle market banking customers. Such customers have banking needs that are different from small businesses, such as significantly higher capital needs and access to more sophisticated cash management services. Similarly, banks

that can offer services to small businesses may not be able to offer the necessary services to middle market businesses, in part because of regulatory and in-house lending limits. The critical issue that we examine, and which based on a factual investigation may result in different conclusions in different matters, is the geographic scope of competition, including the ability of firms to compete effectively through LPOs (loan production offices).

Though I'm sure this is something you know, I'd like to emphasize today that in the few cases each year where we conclude that divestitures are required, we try to create solutions that both resolve our concerns and ensure that the merging parties obtain the efficiencies of the deal. Fleet's acquisition of Shawmut, Wells Fargo's acquisition of First Interstate, U.S. Bancorp's acquisition of Bank One and CoreState's acquisition of Meridian all proceeded to closing after we negotiated appropriate divestitures that solved competitive concerns with discrete local markets. Each of those matters was coordinated with the states who provided us with valuable information about local market

conditions and effective relief alternatives.¹ Moreover, in the First Interstate transaction, we took care during the phase when the transaction was subject to competing tender offers not to favor one party over the other. We will continue an even-handed approach so that our review procedures do not provide any unnecessary advantage to either side.

One final point concerning divestitures is that when we construct a network of branch offices to find an appropriate fix to potential competitive concerns, we will look beyond the amount of assets to be divested to the quality and location of the branches that are included in the divestiture package. Because our primary focus has been competition for small business loans, we investigate in some detail the characteristics of the parties' branches in those markets, including their deposit and loan make-up, locations and ease of access for businesses. Our goal is to determine and evaluate each branch's overall current use by, and

¹ Fleet Financial Group's acquisition of Shawmut National Corp. raised antitrust concerns in 14 geographic markets in four states; the parties agreed to divest 64 offices holding about \$3 billion in deposits. This was the second largest divestiture in a single market (Hartford, CT) with \$1.6 billion in deposits.

Wells Fargo & Company's acquisition of First Interstate Bancorp was conditional on the divestitures in 30 markets of 61 offices with deposits of \$2.5 billion.

U.S. Bancorp's proposed merger with West One Bancorp raised competitive concerns in ten geographic markets in Oregon and Washington; the merging parties agreed to divest 27 offices (six in Washington and 21 in Oregon), holding \$514 million in deposits.

CoreStates Financial Corp's acquisition of Meridian Bancorp Inc. raised antitrust concerns in two Eastern Pennsylvania markets; the parties agreed to divest 11 branch offices with deposits of about \$444 million.

potential attractiveness to, area businesses. We have requested some parties, for example, to provide photographs of the branches. We also obtain significant additional information during our interviews of other participants in the market.

We also spend considerable time evaluating the viability and overall effectiveness of branch networks proposed for divestitures in a market. The issue we address is whether a purchaser of the network would be an effective business banking competitor in the area. The factors we consider include the number and location of branches as well as the needed mix of deposits, banking services and personnel. The result is not based solely on concentration figures. We may argue strongly for particular branches or branch locations to be included in the divestiture package. We also require that parties divest the entire relationship for each customer associated with each branch, including deposits, loans and other related services. The final package is intended to reflect the commercial realities of the markets involved, as well as to give the purchaser of the divested branches a strong presence in the market.

We think that everybody benefits from our policy of working with the other federal agencies, state officials and the merging banks: the governmental agencies get the needed information more quickly, the merging banks are more likely to receive uniform treatment from the various governmental agencies involved without the expense and uncertainty of litigation, and consumers of banking services are more adequately protected from competitive

harm. In sum, bank merger policy in the '90s is a win-win situation for all.