DEPARTMENT OF JUSTICE

ANTITRUST AND BANKING

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
Comptroller of the Currency's
Conference on Antitrust and Banking

[not delivered in person
due to the government shut-down]

Hyatt Regency Capitol Hill
Washington, DC

November 16, 1995

When Gene Ludwig invited me to participate in this conference on Antitrust and Banking, I accepted with enthusiasm. Banking is important. It has been, and will continue to be, an industry whose financial soundness and competitive structure are essential to the fulfillment of our nation's economic potential. American consumers and businesses rely on the availability of credit. And experience clearly indicates that where there are multiple competing sources of credit, prices of financial services tend to be lower. Moreover, where rivalry exists, consumers and businesses also benefit from better quality and greater innovation in financial services.

The economic role of banks, however, is the subject of change. Non-bank rivals provide some services that used to be the exclusive domain of banks, and technology changes the manner in which various financial services are offered to the public. Both the outcome of these changes and the manner in which they will be implemented are unclear. But I firmly believe that the financial health of the new banking industry, whatever its precise form, will remain critical to the well-being of our economy.

Antitrust policy has had, and will continue to play, an important role in banking. Over the past decades, various forms of direct governmental regulation of banking have been discarded in favor of greater reliance on market forces. As a result, the antitrust laws have come to play a more important role in preserving price, quality and service rivalry. The most prominent area of antitrust application to your industry, of course, relates to bank mergers. Indeed, the

Supreme Court recognized the importance of antitrust policy with regard to bank mergers by noting that:

> "if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs in our credit economy will be affected. ..." United States v. Philadelphia National Bank, 374 U.S. 321, at 372 (1963).

In my opinion, the bank merger program developed over the years by the Department of Justice, in cooperation with bank regulatory agencies, has successfully effectuated Congress' desire to prevent anticompetitive bank mergers. Competitive options have been preserved without sacrificing the efficiencies associated with such mergers.

The success of our program today is illustrated by the fact that the Congressional goals have been attained with relatively little litigation. The legal standards have been articulated with sufficient clarity that most bank merger agreements do not pose significant risks to competition, and for those that do, a productive dialogue develops early in the process to address those issues. A case in point is our recent action on the massive Fleet/Shawmut merger, where the parties agreed to divest 64 offices, and we were able to clear the balance of the transaction expeditiously.

The Department of Justice has a wealth of experience with bank mergers. Some of the most important Supreme Court decisions interpreting Section 7 of the Clayton Act involved bank mergers.[1] Under the banking statutes, the Attorney General is the sole enforcer, at the federal level, of Section 7 of the Clayton Act with respect to bank mergers and bank holding company acquisitions. Unlike other industries, we do not share jurisdiction over bank mergers with our sister federal antitrust agency, the Federal Trade Commission. We have devoted much time over the past three decades to the subject, and we continue to devote significant resources to banking issues, so that our antitrust merger policies will be firmly based on the economic realities of a changing industry.

It has become fashionable to speak of banking as an industry characterized by a "recent" wave of mergers. According to Fortune magazine, the assets involved in bank mergers to date in 1995 exceed $57 billion.[2] The previous record was $24 billion in 1991. But any emphasis on the "recentness" of the phenomenon would be somewhat misleading.

In fact, U.S. banking has experienced considerable consolidation over the last fifteen years in terms of the number of banks. The

[1] See e.g., United States v. Philadelphia National Bank, 374 U.S. 321 (1963); United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350 (1970); United States v. Marine Bancorporation, 418 U.S. 602 (1974); and United States v. Connecticut National Bank, 418 U.S. 656 (1974).

[2] Fortune, p.151, November 27, 1995.

number of U.S. commercial banks decreased by some 25% over the 1980-1993 period. Much of this shrinkage was the result of bank mergers and holding company acquisitions.[3] The consolidation seems to have begun, in earnest, in 1985. In that year, there were over 14,000 banks in the U.S. There has been a relatively steady decline in the ensuing decade to the point that the current number is somewhat below 11,000.

While there has been some increase in the trend toward consolidation over the past 15 years, the perception that we are in the midst of a "new" bank merger wave is probably due to the number of very <u>large</u> bank mergers that have been announced during the past year. While the number of bank mergers screened by the Department of Justice during our 1995 fiscal year was about the same as the number screened in the two prior years,[4] there was a very substantial increase in the size of the banks merging.

To the extent that these larger mergers involve banking systems that compete with each other in multiple markets, increased demands have been and will be placed on the Department's antitrust

---

[3] "Banking Industry Consolidation: Post Changes and Implications", Daniel E. Nolle, Comptroller of the Currency, Economic and Policy Analysis Working Paper 95-1 (April, 1995).

[4] Total bank mergers screened by the Department in Fiscal Years 1993, 1994 and 1995 were 1,873, 1,927 and 1,897 respectively. In FYs 1989, 1990, 1991 and 1992, the numbers were 1,524, 1,626, 1,598 and 1,539 respectively. Total bank merger competitive reports prepared by the Department for the banking agencies in FYs 1993, 1994 and 1995 were 1,114, 1,231 and 1,169 respectively. In FYs 1989, 1990, 1991 and 1992, the corresponding numbers were 775, 860, 815 and 927.

enforcement resources. I can assure you, however, that we are up to the challenge. The Department of Justice will continue to review bank mergers carefully in order to protect the public against a lessening of competition. That is our statutory mandate, and we intend to discharge that responsibility, hopefully with both energy and wisdom.

During this Administration, we have continued to be extremely active when bank mergers present competitive problems. Thus, we have insisted on divestiture in some fourteen bank merger cases, an average of almost five cases a year.[5] (Our influence, however, is probably much greater than those numbers might indicate since it is not unreasonable to assume that our clearly articulated bank merger screens deter many bank mergers that would contravene the antitrust laws.) We plan to continue what we believe is a vigorous, but intelligent, antitrust enforcement with respect to bank mergers.

Our bank merger enforcement efforts in recent years have been fact-driven. Because our investigations have revealed that individual consumers and large businesses often have alternative providers of many banking services, our investigations often concentrate on a bank merger's potential impact on small and medium-size business borrowers. Under current economic conditions, this class of customer has few, if any, alternatives to commercial banks for certain types of credit, and they tend to operate in localized markets. It is the task of

[5] In FY 93, 94 and 95, the Department obtained divestitures in 6, 3 and 5 cases respectively. In FY 89, 90, 91 and 92, the Department sued or obtained divestitures in 1, 1, 4 and 3 cases respectively, an average of 2.25 cases per year.

antitrust policy to preserve adequate competition in commercial lending for the benefit of that very important segment of the business community. Our focus on small- and medium-size business borrowers does not mean that we are unconcerned with the effects of bank mergers on consumers in a situation where a merger reduces their options substantially, but we have found that generally has not been the case, at least to date.

During FY 95, the Department reviewed 1,897 bank mergers, of which some 1,200 required competition analysis. Because of the clear guidance that we have provided the industry, we found only five instances in which the proposed merger raised serious competitive concerns. And, in each of these five cases, we were able to negotiate divestitures that eliminated antitrust concerns, while permitting the rest of the transaction to go forward, without having to resort to litigation.

The largest divestiture in FY 95 involved the acquisition of Casco Northern Bank by KeyCorp, a Maine holding company. We concluded that the acquisition as proposed would imperil competition in ten Maine communities. The parties met our concerns, however, by agreeing to divest eleven specified branches that possessed over $250 million in deposits. This result was achieved in a cooperative effort with the Attorney General for the State of Maine and reflected our efforts to provide both banking customers and the banking industry with an efficient and effective resolution of competitive issues raised by particular bank mergers.

Since the beginning of the new fiscal year in October, the Department has secured major divestitures in two large bank merger cases. The first involved the proposed acquisition of Shawmut National Corporation by Fleet Financial Group. Our analysis of this proposed merger of two of the largest New England banking systems revealed that it would raise antitrust concerns in 14 geographic markets in four states. After extensive negotiations, the parties agreed to divest to various buyers 64 offices holding about $3 billion in deposits. The divestiture was the second largest ever in the bank merger context, and the largest in a single market (Hartford, Conn., $1.6 billion in deposits). This divestiture satisfied our antitrust concerns, as we informed the Federal Reserve Board in a recent letter. Our investigation of this merger was closely coordinated with the states of Connecticut and Massachusetts, who provided us important information about local market conditions and effective relief alternatives.

The second recent enforcement effort involves U.S. Bancorp's proposed merger with West One Corp. That proposed merger raised competitive concerns in ten geographic markets in Oregon and Washington. The merging parties, however, agreed to satisfy the Department's competitive concerns by agreeing to divest 27 offices (six in Washington and twenty-one in Oregon), holding $614 million in deposits in the markets of concern. Here too, we coordinated our enforcement efforts with state officials.

The conditional divestitures obtained in these two recent cases reflects a continuation of the Department's willingness to differentiate between the harmful and benign portions of multimarket bank mergers. When bank mergers only raise competitive risks in some of the affected markets, we do not try to block the entire transaction where appropriate, lesser relief is available. We are quite content to excise the harmful parts of a merger while allowing the rest of the transaction to go forward. By so acting, we allow the parties to realize efficiencies not dependent on the elimination of substantial competition.

The great majority of bank mergers do not cause antitrust concerns, and the Antitrust Division is quite cognizant of that fact. We have on staff some fifty highly-trained economists. As a result, we are familiar with the types of efficiencies that may be produced by bank mergers. To the extent that a bank merger allows the merging firms to achieve significant economies of scale or scope, consumers may benefit from lower costs and/or improved services, and our competitive analysis takes into account such factors.

At the same time, it would be incorrect to conclude that we are susceptible to general assertions of efficiencies attributable to mergers. For, we are just as fact-driven with respect to efficiency claims as we are with respect to potential antitrust harm. On both types of issues we carefully review the economic facts relevant to the individual bank merger before us, rather than rely just on general economic theory. If you want to impress us with an efficiency argument, you will need specific evidence that not only supports the claimed efficiency, but also indicates that the efficiency is dependent on the merger. Efficiencies that can be attained by means other than the merger will not influence our analysis.

The fact that we are an active law enforcement agency does not mean that we measure our success with respect to bank mergers by the number of law suits that we file or the number of deals that are changed at our insistence. Rather, we have striven to provide the banking community with clear guidance as to how we will view bank mergers so that it can act with reasonable certainty that its conduct will not violate antitrust policy. The fact that bank mergers must pass muster with the banking authorities, as well as the Department of Justice, has heightened our desire to make the process as transparent as possible.

Since I have taken office as Assistant Attorney General, we have built on the efforts of my predecessors to reduce the differences in the way the Department and the Federal Reserve Board and the Comptroller analyze bank mergers. To that end, we have developed a bank merger screening approach that makes it clear to the industry how the three agencies will approach a bank merger. The agencies have prepared what amount to work sheets that enable prospective merger partners to anticipate what parts of their contemplated merger will attract the interest of the bank regulators and the Department of Justice. Ultimately, our review of bank mergers is governed by the 1992 Merger Guidelines that we apply throughout our merger program. With the screens we have developed, along with the Guidelines, the parties know in advance how the agencies are likely to define markets, measure any increase in market concentration occasioned by the contemplated merger, and analyze competitive effects.

When a proposed merger does not result in an HHI concentration ratio above 1,800 with an increase in the neighborhood of 200 points, it generally will not raise antitrust concerns, and the parties can proceed secure in that knowledge. We have taken great pains, however, to make it clear that a bank merger that does not pass muster under an 1,800/200 test is not presumed to be illegal. The 1,800/200 test is designed to identify quickly those mergers that will not cause antitrust concerns. The fact that a proposed bank merger does not find a safe harbor under the 1,800/200 measure merely means that a more fact specific investigation under the Guidelines must be undertaken. And, the screening materials developed by the agencies inform the industry of the types of issues that are relevant to the fact-specific full investigation that is applied to mergers that are not sheltered under the initial screening test.

While the development of the screening approach did not produce a single agency method of analysis, our differences have been reduced and clarified. The differences that remain with respect to geographic and product market definition, and inclusion of thrifts as market participants, have been clearly articulated for the industry. Beyond this cooperation in developing the bank merger screens, the staffs of the various agencies meet frequently with one another to discuss both general and specific bank merger issues. Moreover, the

Federal Reserve Board now generally awaits the completion of our investigation before reaching its decisions. As a result, the possibility of divergent opinions among the three agencies has been reduced. As I have noted earlier, we also have established a policy of cooperating with state antitrust officials in bank merger investigations in an effort to develop a consistent law enforcement approach to bank mergers.

Our efforts to provide clear guidance to the banking community is not limited to our cooperation with other governmental entities. We are willing to meet with private parties prior to the filing of a bank merger application in order to discuss the issues that are relevant to our competitive analysis. We think that everybody benefits from our policy of working with the other federal agencies, state officials and the merging banks. This type of cooperation results in win-win situations; 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. As I said earlier, we do not measure success by the number of law suits that we file, but by the degree to which bank merger activity is channeled away from competitive harm.

The bank merger policy of the Department of Justice will continue to be based on a reasoned application of law to the facts of specific bank mergers. The process is an open one, where you have a meaningful opportunity to participate. We shall continue to protect the public's interest in competition, while reducing the burden to the banking industry of antitrust compliance.

In my view, antitrust enforcement in the banking industry has been a significant success story. We have been able to screen a large number of mergers efficiently, focus our efforts on the few that merit concern, work cooperatively with federal bank regulatory officials, state enforcement agencies and the merging parties, and preserve competition by obtaining appropriate divestitures while allowing most transactions to be effectuated. We welcome your suggestions to improve our efforts still further and look forward to continuing the dialogue.