



U.S. DEPARTMENT OF JUSTICE

Antitrust Division

**CONSOLIDATION IN THE BANKING INDUSTRY:
AN ANTITRUST PERSPECTIVE**

Address by

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I am honored to participate in this panel, and welcome the opportunity to share with you the Antitrust Division's perspective -- or at least my thinking -- on bank consolidation. As you might expect, I will focus on antitrust issues and the Division's bank merger review program.

At the outset, I would like to try to dispel the notion that the Antitrust Division is a traditional regulatory agency or that the antitrust laws are regulatory in format. We do not seek to set rules in order to regulate any industry. Rather, we are a law enforcement agency and we view our role more like that of a baseball umpire. We call the balls and strikes, but we don't set the rules. Our function is to stay out of the way as much as possible in order to let the game unfold on its own.

Having said that, I am not suggesting that antitrust policy does not have an important role to play in the banking industry. Our mission is to ensure that markets remain competitive. Experience has shown, in particular, that when there are multiple and competing sources of credit and financial services, prices for these products tend to be lower while quality and innovation are higher. Banking is clearly an industry whose financial soundness and competitive structure are essential to the fulfillment of our nation's economic potential. Although technology may change the economic role of banks, I believe that a healthy competitive banking industry remains critical to the success of American business.

Two and a half years ago, when I took over responsibility for banking matters at the Division, I had two broad goals: first, to improve the Division's working relationship with the bank regulatory agencies --particularly the Federal Reserve Bank and the Office of the Comptroller of the Currency--as well as with the various State Attorneys General; and, second, to streamline and clarify the Division's review

process in order to respond expeditiously and efficiently in all proposed transactions and to avoid confusion concerning our enforcement intentions. These two goals share a common purpose--to coordinate government review as much as possible so that those transactions that are anticompetitive will be challenged while consolidations that offer efficiencies or are otherwise lawful may proceed as quickly as possible.

The success of these two initiatives is best illustrated by the Bank Merger Screening Guidelines that were issued jointly last year by the Antitrust Division, the Federal Reserve Bank and the Office of the Comptroller of the Currency. These Guidelines are a significant clarification of the agencies' review process and for the first time in a single document set out the ground rules by which the federal agencies will review bank mergers.

In practice, these Screening Guidelines have ensured that bank merger applications come to us with 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 small and medium-sized businesses have few alternatives and options other than commercial banks 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 arenas, but still tend not to have the access to national capital markets that may be available to larger corporations. At least to date, we believe that small and medium-sized businesses will be most affected by the potential loss of competition that bank mergers present.

Given that small businesses tend to bank locally, we have focused our competition analysis for small business banking services primarily within defined local areas such as RMA's (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 area 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 supersede entirely the deposit data. The deposit data historically have been more reliable and loan data do not necessarily reflect lending capacity or the full competitive significance of a commercial bank in the market.

The future of banking and the future delivery of banking services is a hot topic for speculation and prognostication. Clearly, the issue of how electronic banking will affect the industry is in the forefront of discussion. In some communities, non-bank institutions that traditionally have been weak competitors or have not engaged in commercial lending have also become more active in those areas. Similarly, parties

have suggested that some banks are providing loans to small businesses from areas outside of the local markets within which those businesses operate.

This market evolution has given rise to arguments that the Division should change its bank merger program. My response is that antitrust merger analysis is sufficiently flexible and robust that it can readily account for any change in market dynamics that may occur in any industry. We have great confidence in the soundness of the principles that we use to examine potential anticompetitive effects from industry consolidation. We will continue to evaluate our review process and tailor it, as appropriate, to reflect industry conditions. Given the time frame within which we frequently operate, I would encourage parties to begin discussions with us as soon as possible to permit full consideration of these views.

The success of our program, in part, is reflected in the fact that our goal of preventing anticompetitive mergers has been reached without litigation and without the need to use compulsory process to obtain information. Instead, we have been able to enter into constructive dialogue in the context of clearly articulated standards. We do not measure our success by the number of cases filed or mergers restructured. We believe the public benefits if banks and their advisors feel they have clear guidance and if we permit lawful transactions to proceed with minimal delay.

The divestitures we have required, for example, show that we are mindful of both the potential pro-competitive and anticompetitive aspects of a merger. When bank mergers present concerns in certain markets, we try to reach resolutions tailored to the offending portions of the transaction. Fleet's acquisition of Shawmut, Wells

Fargo's acquisition of First Interstate and CoreState's acquisition of Meridian all proceeded to closing after we negotiated appropriate divestitures that solved competitive concerns within discrete local markets. 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. Our approach is to be as even-handed as possible 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 is 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 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 divestiture 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 of branches, the 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.

Overall, I believe that the Division's bank merger program has been a great success. In the past 12 months, we reviewed 1,874 transactions. Of those, seven were restructured. All were disposed of within the time provided by statute. We have been -- and will continue to be -- aggressive in our mission to preserve competition as well as efficient in our handling of all transactions with the overriding goal of permitting the market to operate on its own as much as possible.