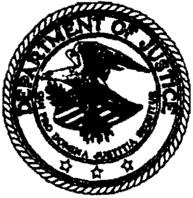

Department of Justice

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STATEMENT

BY

ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

before the

DOMESTIC FINANCE SUBCOMMITTEE OF THE HOUSE COMMITTEE ON BANKING AND CURRENCY

ON

S. 1698, a Bank Merger Bill

Wednesday, August 18, 1965, 10 a.m.

I appear today to express the strong opposition of the Department of Justice to S. 1698, now pending before this committee.

S. 1698 would grant immunity from the antitrust laws to past bank mergers already challenged by the Department, including mergers found by the courts to be illegal and anti-competitive. I can see no justification for legalizing mergers already found to be illegal.

This measure also would exempt other already consummated bank mergers from the antitrust laws and would limit the Department's authority to attack any future bank merger--provisions which we regard as equally unjustified.

The central impact of this bill is that it would immunize six consummated mergers challenged by the Department and now pending in the courts. Two of these already have been found unlawful.

I do not believe that any evidence has been presented to this Committee which would lead it to take a different view of the facts than that taken by the courts, namely that the mergers are anti-competitive. Yet this Committee is being asked, in considering this forgiveness legislation, to act as a super appellate body and reverse the judgments made by the courts, including the Supreme Court, after hearing the evidence.

The only reasons advanced for so reversing the courts and for blocking cases now in court, are, first, the difficulties in unscrambling merged assets, and second, the asserted inequity of applying the antitrust laws to banks at all. But the very parties which are the beneficiaries of this bill are banks which merged well aware of probable antitrust prosecution and who evaded preliminary injunctions either by accelerating their mergers or by arguing to a court that the preliminary injunction was not required because divestiture would be adequate final relief.

I believe I can demonstrate that the effect of this bill would not be to give relief to the banking industry. It would, rather, only give special dispensation to those banks which are parties to our pending cases.

Apart from two bank holding company cases, and an indirect acquisition not covered by the Bank Merger Act of 1960, the Department has, since 1960, brought only 8 bank merger cases attacking mergers approved by a regulatory authority. During that period, over 700 merger applications were approved by banking agencies. This record demonstrates that the Department has been circumspect in its exercise of its enforcement authority and has given due regard to the factors which may often justify banking mergers.

Since there is no reason for the industry as a whole to seek protection against assertedly disruptive and inequitable antitrust enforcement--and indeed since the bill makes no pretense at barring future enforcement--the purpose of the bill is revealed.

Fairly stated, this is a private bill for relief of the parties to the six pending suits.

I.

The proper discharge of banking functions is indispensable to a healthy national economy. Access to credit on competitive terms is critical to the survival and growth of commercial and industrial enterprises. Unduly high banking charges, or abnormal disparity between the rates at which large and small borrowers can obtain funds will inhibit industrial growth and prevent the emergence of innovating competitors. Undue concentration in banking can lead to inflated charges and discriminatory rates. It may fairly be said that, because of the central role of banks in relation to other businesses, the traditional antitrust goal of prevention of undue concentration is as important in banking as in any other field.

I say this in full recognition of the fact that banks are, to some extent, formally regulated. Extensive governmental supervision of banking exists primarily to prevent financially unsound practices. This regulation, however, is far less comprehensive than the regulation of public utilities, for example, which warrants displacement of the antitrust laws. Congress has granted exemptions from the antitrust laws in the transportation industry and for certain public utilities, but only when those industries have been subject to comprehensive regulation of their activities and charges. No similar public control is imposed on the charges for services rendered by banks. Nor are banks under a specific duty not to discriminate in their services. In the absence of such comprehensive regulation, the protection of the antitrust laws against undue concentration and anti-competitive practices in banking must be retained.

S. 1698, in the form in which it passed the Senate, does not propose a total repeal of the antitrust laws for bank mergers. But it takes a giant stride in that direction. This measure singles out banking for preferred treatment as though the goals, accomplishments, and protections of the antitrust laws are irrelevant to banking:

--For future bank mergers, the bill proposes to establish a special procedure for institution of antitrust actions, the most significant feature being a thirty-day cut-off on the institution of suit.

--In the case of consummated but unchallenged mergers, the bill proposes to override the antitrust laws completely.

--And, as I have already noted, this repeal of the antitrust laws is applied to cases already brought, even to provide forgiveness--a literal pardon--where the Government has proved, in court, and secured a final judgment, that particular mergers violated the law.

Let me set out our reasons in detail for our opposition to each of these three aspects of S. 1698.

II.

Our major objection to the thirty-day cut-off procedure is that no convincing reason exists for according special treatment to banking. I have already discussed the important role antitrust can play in maintaining a healthy banking industry; in this respect banking cannot and should not be distinguished from other industries for which no such special procedure is here proposed.

There is no doubt that divestiture of bank assets some years after the merger has been accomplished creates serious problems. This is, of course, the principal reason why the Department has followed the invariable practice of trying to block questioned mergers by securing a preliminary injunction. But these are not problems peculiar to banks. The Antitrust Division has encountered divestiture problems of equal difficulty in many merger cases involving industrial corporations. Hence, it is inappropriate--indeed, unfair--to favor banking.

I recognize it can be argued that a deadline for filing suit might not unduly hamper the Department because we already have effective pre-merger notification in the case of banks (because of our responsibility to make a report on the competitive effects pursuant to the Bank Merger Act of 1960). This argument also can be made because the bill would make a preliminary injunction automatic in bank merger cases whenever the Government brings suit.

Pre-merger notification and preliminary injunction upon suit would contribute to effective enforcement. This does not, however, make the case for applying such procedure on an ad hoc industry basis. To the contrary, it argues against piecemeal treatment. Were the Department to recommend legislation, for example, to require pre-merger notification of all types of business subject to the antitrust laws, the questions of whether there should be a cut-off on the Department's right to sue, and, if so, how long the period should be, involve a variety of considerations. It is one thing to impose a cut-off of thirty days where the number of cases to be considered is small. It would be quite another if the Department, because of general pre-merger notification legislation, had to review large numbers of cases. It is, therefore, our conclusion that it is inappropriate and unwise to accord special treatment only to bank mergers.

III.

S. 1698 makes no change in the substantive antitrust law applicable to any future mergers. Thus, the plain consequence of its retroactive exemptions is to immunize past mergers which would have no immunity if they took place in the future. The Department of Justice is unable to see any justification for this distinction between past and future mergers.

Presumably the proponents of the bill are moved by a desire to lift a cloud of uncertainty from consummated mergers; to redress alleged inequitable application of the antitrust laws to mergers consummated at a time when the state of the law may have been uncertain; and to avoid the difficulties of unscrambling a merged bank.

To deal with these arguments I should like to review the record of the Department's activities in bank merger cases, to demonstrate that there is no basis for any fears that our application of the antitrust laws to bank mergers is either disruptive or frivolous.

As I have noted, in the past five years, over 700 merger applications have been approved by banking authorities, yet the Department brought only eight bank merger cases. The cases are as follows:

Philadelphia National Bank
First National Bank and Trust Company of Lexington
Continental Illinois National Bank and Trust Company of Chicago
Manufacturers-Hanover
Crocker-Citizens
Calument National Bank of Hammond, Indiana
Third National Bank in Nashville
Mercantile Trust Company of St. Louis

Each of these suits was brought under both Section I of the Sherman Act and Section 7 of the Clayton Act, except for Lexington Bank, which was brought under the Sherman Act only. Even though a good argument can be made that banks merging before the Philadelphia Bank decision had reason to doubt that bank asset acquisitions were subject to Section 7 of the Clayton Act, there would have been no basis for believing that the Sherman Act did not apply.

Since the Philadelphia Bank decision, banks which decided to merge have done so in full knowledge that both the Clayton Act and the Sherman Act apply. Three of the eight cases brought by the Department -- Crocker-Citizens, and the cases in Nashville and St. Louis -- involved mergers that were consummated after the Philadelphia Bank decision.

Nor was tne Department alone in its judgment of the antitrust issues: in most instances where the Department instituted suit, its views on competitive effects of the merger were supported by one or both of the banking agencies making reports to the agency which gave approval.

Nor has the Department instituted suits which surprised or were otherwise inequitable to the merging parties. Uniformly, the Department has

sought divestiture only where the merger took place immediately after or before suit. (In the Crocker-Citizens case, the Department alleged that the earlier merger between Crocker and Anglo in 1956 constituted a violation of the antitrust laws, but it did not request relief with respect to that acquisition or intervening acquisitions.)

Moreover, the Department has always brought suit within days after approval by the relevant banking agency was made public, and in each instance the Department sought to obtain a preliminary injunction, blocking the merger pending determination of the case on its merits.

In the Philadelphia case the banks agreed not to consummate the merger pending determination of its legality. In the Hammond, Indiana case, the banks withdrew their application for permission to merge after the Government instituted suit seeking a preliminary injunction. In the Manufacturers-Hanover and Lexington cases, the Government moved as promptly as possible to seek preliminary injunctions but the banks so accelerated the transactions that they were finally merged only within the hour before suit was brought. Nevertheless, in Lexington, Judge Ford entered orders requiring the banks to keep separate books and accounts so as to facilitate divestiture.

In Manufacturers-Hanover, Continental Illinois, Lexington, Nashville, Crocker-Citizens and St. Louis, the banks argued strenuously against granting preliminary injunctions -- which would have avoided all problems of unscrambling. In each instance, indeed, they themselves assured the court that if they lost on the merits, the Government would be entitled to divestiture as a matter of law and that divestiture was a feasible remedy.

Thus, it is clear that these mergers were consummated in the face of litigation challenging their legality and with the knowledge that should the Government prevail on the merits, divestiture would be the appropriate relief.

This record of enforcement cannot, in any way, justify so unusual a step as a retroactive repeal of the antitrust laws. Turning to the specific repealer for consummated mergers which the Department has not challenged, this record makes it clear that there is no need for any such immunity. Only eight cases have been brought. Absent exceptional circumstances, past mergers against which no action was taken will remain undisturbed. For example, no banks involved in any past bank merger need fear suit now under section 7 unless it made misrepresentations to the Government.

The Department must, of course, remain free, in a section 7 proceeding against a future acquisition, to cite past acquisitions as evidence of a pattern of unlawful conduct. In an appropriate Sherman Act proceeding involving a series of acquisitions or other unlawful conduct, the Department must, likewise, remain free to seek a divestiture which may affect earlier acquired assets, to restore competitive conditions. But the Department believes that this is wholly appropriate and that any bill which sought to limit future antitrust actions in these respects would fundamentally impair antitrust enforcement.

IV.

Our most serious objection is to that part of the bill which totally exempts from the antitrust laws all mergers or other acquisitions consummated before enactment of the bill wherever "the resulting bank has not been dissolved or divided or has not effected a sale or distribution of assets . . . pursuant to a final judgment under the antitrust laws."

This provision would wipe out all pending antitrust litigation against particular mergers, even where District Courts and, indeed, the Supreme Court, already have ruled the merger to be illegal and have found, on the facts, that it would adversely affect competition.

Here we have the prospect of forgiveness of an adjudicated violation. There is no basis for such exceptional relief, such special legislation. I have already described the background of the pending cases, and have pointed out that three of them involved mergers consummated after the Philadelphia Bank decision, when there was no uncertainty whatever as to the applicability of section 7 of the Clayton Act. In all cases there would have been no basis for assuming that the Sherman Act did not apply.

If such special legislation is justified because of the difficulties in unscrambling merged companies, the review of the record also serves to indicate the banks' awareness of the possibility of divestiture. Their very resistance to a preliminary injunction was based on the concession that ultimate divestiture was an adequate form of relief.

Even if the circumstances had been different, even if the eventual legal outcome were wholly unanticipated at the time of the merger, this is not so unique as to warrant special legislative treatment. It is commonplace for businessmen and others to make major decisions on the basis of expectations concerning legality that later turns out to be ill-founded. This occurs in the tax laws and in other regulatory statutes as well as in the administration of the antitrust laws. It also frequently occurs in such private law areas as contract and secured transactions.

We recognize the difficulties of divestiture. It may be true that it is often impossible to restore the situation that existed before the merger. But this is true in all mergers, not solely in banking.

More importantly, antitrust does not need to restore precisely the previous condition in order to be useful. Granting the difficulties of recreating the pre-merger situation, antitrust relief can significantly rectify the anti-competitive effects of the merger. To forgive an adjudicated violation--or to immunize a past merger because perfect relief may be elusive--rewards the violator and underestimates the curative power of the law.

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I therefore believe that the Congress should consider retroactive immunization of unlawful transactions only in the most compelling circumstances. I believe that no such circumstances exist which would warrant the immunity that S. 1698 would give. I respectfully urge the Committee to weigh and consider carefully the adverse effects of this bill upon enforcement of the antitrust laws and therefore to withhold approval of such special legislation.