UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff, v. TEXAS COMMERCE BANCSHARES, INC. and TEXAS COMMERCE BANK-MIDLAND, N.A., Defendants.	)	No. 3-93CV0294-G
UNITED STATES OF AMERICA, Plaintiff, v. TEXAS COMMERCE BANCSHARES, INC. and TEXAS COMMERCE BANK-BEAUMONT, N.A., Defendants.	)	No. 3-93CV0368-D

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgments submitted for entry in these civil antitrust proceedings.

I.

NATURE AND PURPOSE OF THE PROCEEDINGS

On February 11, 1993, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of New First City Bank-Midland, N.A. ("New First City-Midland") by Texas Commerce Bank-Midland, N.A. would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 (the "Midland action"). On February 23, 1993, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of New First City Bank-Beaumont, N.A. ("New First City-Beaumont") by Texas Commerce Bank-Beaumont, N.A. would also violate Section 7 of the Clayton Act (the "Beaumont action").

New First City-Beaumont and New First City-Midland are two of the 20 bridge banks (collectively "New First City") established by the Federal Deposit Insurance Corporation ("FDIC") from the assets of the failed First City Bancorporation ("First City"), which the FDIC took control of on October 30, 1992. Texas Commerce Bank-Beaumont, N.A. and Texas Commerce Bank-Midland, N.A. are affiliates of defendant Texas Commerce Bancshares, Inc. (collectively "TCB"), a bank holding company based in Houston, Texas. TCB is in turn controlled by Chemical Banking Corp., New York, N.Y.

The complaints allege that the effect of the acquisitions may be substantially to lessen competition in the provision of business banking services in the Beaumont and Midland geographic markets. Business banking services offered to business customers include, either collectively or individually, transaction accounts (money deposited with a depository institution either at an interest rate or at no interest, in practice withdrawable on demand, and upon which third party drafts may be drawn by the depositor, i.e.,

checking accounts, whether interest-bearing or non-interest-bearing), and commercial loans (i.e., secured or unsecured loans to businesses, including but not limited to commercial operating loans, i.e., loans to businesses for operating or cash flow finance, including lines of credit, as well as equipment finance loans); and may also include loans to finance the purchase or improvement of commercial real property ("commercial mortgages"); cash and coin; cash management services (including lockbox, account reconciliation and controlled disbursement); and business expertise and advice offered to business customers.

Both TCB and New First City compete directly in offering a variety of business banking services to business customers in each of the geographic markets. The proposed acquisitions would result in substantial increases in concentration in markets that are already highly concentrated, in which it appears that the merger would likely result in anticompetitive effects, and for which regulatory and other market factors make it unlikely that effective entry will be sufficient or timely to prevent a substantial lessening of competition in the relevant markets.

The complaints allege that the proposed acquisitions would, in particular, adversely affect competition for medium-sized business customers purchasing business banking services in the Beaumont and Midland markets, and small businesses purchasing these services in Midland. The complaints seek, among other relief, to enjoin the proposed transactions and thereby to prevent their anticompetitive effects.

On February 11, 1993, the United States and TCB filed a Stipulation in the Midland action by which the parties consented to the entry of a proposed final judgment (the "Midland Judgment"). Under the Midland Judgment, as explained more fully below, defendants would be required to sell New First City-Midland's only bank office, retaining

only the trust business of that bank. (Under certain conditions, defendants might also retain that bank's indirect consumer loan business.)

On February 23, 1993, the United States and TCB filed a Stipulation in the Beaumont action by which the parties consented to the entry of a proposed final judgment (the "Beaumont Judgment"). Under the Beaumont Judgment, as explained more fully below, defendants would be required to sell at least two and as many as three of New First City-Beaumont's three branch offices and the loans and deposits of those offices, as well as all commercial loans of more than $500,000 and the deposits of those commercial loan customers. TCB will retain the remaining assets (including loans) and deposits of New First City-Beaumont's main office, including its trust business and the small business and consumer loans originated at that main office. The main office's real estate and improvements, and New First City-Beaumont's operations facilities and cash vault, will be made available to the purchaser of the divested branches.

Under the Bank Merger Act, 12 U.S.C. § 1828(c)(7)(A), the timely commencement of an antitrust action by the United States challenging a proposed bank merger creates an automatic stay of the transaction. In each of these actions, upon filing a Stipulation whereby the parties agreed to be bound by and seek the entry of the proposed Final Judgment, the United States moved to vacate the automatic stay so that the transaction could proceed, while the relief specified in the Judgments could be entered. In each action the Court vacated the automatic stay, permitting the FDIC to transfer the bridge banks promptly.

The United States and the defendants have stipulated that the proposed Final Judgments may be entered after compliance with the APPA, unless the government withdraws its consent. Entry of the proposed Final Judgments would terminate these

actions, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgments and to punish violations of the Judgments.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Proposed Transactions

On October 30, 1992, the FDIC took control of First City and its 20 affiliate banks in Texas, and reorganized them into 20 bridge banks. The New First City Banks of Beaumont and Midland, two of the 20 bridge banks, formerly operated in the State of Texas as First City Bank of Beaumont and First City Bank of Midland, respectively. After establishing the bridge banks, the FDIC solicited bids for the purchase of these banks pursuant to its congressional authority to arrange assisted transactions. See 12 U.S.C. § 1823(c).

Congress mandated that FDIC-assisted transactions be subject to antitrust review, both by the bank regulatory agencies whose approval is required and by the Department of Justice. See 12 U.S.C. §§ 1823(f)(7), 1828(c)(6), 1828(c)(7)(a). Congress also expressly provided that the United States can challenge assisted transactions that would violate Section 7 of the Clayton Act. 12 U.S.C. § 1828(c)(7)(a).

On January 26, 1993, the FDIC selected TCB as the winning bidder for the bridge banks in Beaumont and Midland, among others.[1] By the terms of TCB's winning bid,

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[1] TCB was also selected as the winning bidder for New First City Bank-Dallas, N.A.; New First City Bank-El Paso, N.A.; and New First City Bank-Houston, N.A. The United States has not challenged TCB's acquisition of the Dallas or Houston bridge banks. In response to the United States' intention to challenge TCB's acquisition of the El Paso bridge bank, TCB abandoned that transaction and assigned its right to acquire that bridge bank to Boatmen's Bancshares, Inc., of St. Louis, Missouri. The United States has concluded that Boatmen's is a competitively suitable purchaser for the El Paso bridge bank, and will not challenge that acquisition.

TCB would purchase the assets and assume the liabilities of the two bridge banks for a total of approximately $32 million.

TCB is the second largest bank holding company operating in the State of Texas, with total deposits of more than $15 billion, which represent nearly 10 percent of total commercial bank deposits in the State. Through its 16 banks, TCB operates approximately 110 offices or branches throughout Texas. First City was the fourth largest bank holding company in Texas, with nearly $7 billion in deposits statewide, which represented about four percent of total commercial bank deposits in the State. Through its 20 banks, First City operated approximately 113 offices and branches throughout the State of Texas.

In January 1993, TCB submitted to the Comptroller of the Currency its applications to purchase the assets and assume the deposits of New First City-Beaumont and New First City-Midland, among others. The applications were treated as emergency transactions for expedited review and, on February 8, 1993, the Comptroller approved TCB's application for the Midland acquisition. Under the Bank Merger Act,[2] the United States had five days from the date of its notice of the Comptroller's decision, or until

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[2] 12 U.S.C. §§ 1828(6) and (7)(a), provide in pertinent part that "[t]he responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. . . . [T]he transaction may not be consummated before the fifth calendar day after the date of approval by the agency. . . . Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented."

February 12, 1993, to prevent the proposed acquisition by filing a complaint with the Court. The United States timely filed the Midland action on February 11, 1993.

The Comptroller's review of the Beaumont transaction was delayed pending further public comment, relating primarily to TCB's performance under the Community Reinvestment Act, 12 U.S.C. §§ 2901-2906. On February 19, 1993, the Comptroller approved TCB's application for the Beaumont acquisition. The United States again had five days from the date of its notice of the Comptroller's decision, until February 23, 1993, to prevent the proposed acquisition by filing a complaint with the Court. The United States timely filed the Beaumont action on February 23, 1993.

B. The Government's Competitive Analysis

The United States filed its complaints because the proposed acquisitions would tend to reduce competition in the provision of business banking services in the Beaumont and Midland geographic markets. Medium-sized businesses in Beaumont, and both small and medium-sized businesses in Midland, are the customers that the United States believes are most likely to be adversely affected. The proposed acquisitions would eliminate one of only a few financial institutions serving these customers and would substantially increase the risk of anticompetitive conduct resulting in higher prices for business banking services.

The United States investigated and analyzed the proposed acquisitions under the framework outlined in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) ("Merger Guidelines"). Investigation by the United States shows that TCB and New First City compete in the provision of a wide range of banking services, including services to individual consumers and services to businesses in Texas. Business customers

generally have fewer alternatives for their banking needs than do individuals.[3] Therefore, in this as in other bank merger investigations, the government focused its analysis on two groups of commercial customers: small businesses (generally those with annual revenues of less than $5 million) and medium-sized or "middle market" businesses (those businesses with annual revenues of between approximately $5 million and approximately $100 million).[4]

Each of these groups of business customers have different borrowing needs, and have access to different types of suppliers, than do large corporations. While the largest businesses might be able to obtain operating finance from distant institutions or from the public debt securities markets, neither small businesses nor medium-sized businesses generally have these options. Small businesses and medium-sized businesses are therefore more likely to be adversely affected by a merger of two banks in the same geographic market than are large businesses.

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[3] Thrifts and credit unions typically compete with commercial banks for retail transaction and savings accounts, and for some consumer loans. The United States therefore typically focuses its bank merger investigations on business banking services; if a bank merger presents a likely adverse effect on competition, and the government obtains relief, that relief typically introduces a new bank competitor into the market, or strengthens an existing fringe competitor. Such relief is likely to prevent a substantial lessening of competition in consumer banking as well as in commercial banking. As discussed below, the United States believes that the proposed relief here likely will preserve competition in both consumer and commercial banking in the Beaumont and Midland areas.

[4] The government's demarcation between small and medium-sized businesses is based on an analysis of the facts in any given market. For example, the point of demarcation in Seattle, Washington, appeared to the government to be $10 million in sales, see Letter of James F. Rill to Alan Greenspan, March 12, 1992, regarding the proposed acquisition by BankAmerica Corp. of Security Pacific Corp ("BankAmerica Letter"), as compared to the $5 million approximation that the government considers is appropriate in these markets, based on its investigation. The common feature, however, is that all such customers were found to be locally limited.

In this investigation and in prior bank merger investigations, the government has learned that small businesses and medium-sized businesses rely on commercial banks for operating or working capital credit to meet short-term or seasonal funding needs. The purpose and characteristics of these loans generally make other credit products, including loans to finance equipment purchases, poor substitutes. While some operating loans are secured by real estate (as well as by the borrowers' other assets, if any), loans to purchase real estate generally are not substitutes for operating or cash flow finance loans, which generally take the form of lines of credit.

There are sound economic reasons that lead small and medium-sized businesses to tend to purchase business banking services (particularly commercial operating loans and transaction accounts) locally, and for banks to provide these products (particularly credit products) only to businesses located in their general area. Many small and medium-sized businesses also find that there are good reasons to obtain operating credit, transaction accounts and their primary cash management services, if any, from the same bank.

The United States concluded that, for business banking services in Texas, the relevant geographic markets were those defined by the Federal Reserve Bank of Dallas.[5] The government considered whether a larger Midland/Odessa market would be appropriate, but concluded that banks in Odessa do not and would not significantly constrain anticompetitive activity in Midland. The government also investigated whether a smaller or larger Beaumont market was appropriate, and found that, while banks in Beaumont might compete for customers in Orange, Beaumont customers were unlikely to

[5] The Federal Reserve Bank of Dallas defined the Beaumont market to be the Beaumont/Port Arthur Metropolitan Statistical Area ("MSA"), which consists of the greater part of Jefferson County and portions of Hardin and Orange Counties. The Midland market was defined as the Midland MSA, which essentially consists of Midland County.

consider Orange banks to be alternatives. The government also investigated whether Houston banks compete for Beaumont business customers, and learned that there did not appear to be banks in Houston (that were not themselves present in Beaumont) that were competing or likely would compete for the business of Beaumont commercial customers. The government therefore concluded that it was not appropriate to modify the bounds of the relevant geographic markets from those defined by the Federal Reserve Bank of Dallas for use in considering business banking services to small and medium-sized businesses.

The government then examined whether business banking customers turned or would turn to suppliers other than commercial banks as alternatives to obtaining business banking services from commercial banks. As in prior investigations,[6] it appeared that in the markets here at issue few other financial institutions offer substitutes for the business banking services currently provided by commercial banks in the relevant markets. Nor do such firms appear likely to start offering such substitutes within a reasonably short period of time. Commercial banks are the only firms that provide business banking services, as defined in the complaints, in the Beaumont and Midland markets. In both of these geographic markets, TCB and New First City are two of the largest of these few firms. TCB and New First City each offer a variety of business banking services, and compete directly with one another in these relevant geographic markets. A significant number of small and medium-sized business customers purchase both transaction

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[6] See BankAmerica Letter; Competitive Impact Statement, United States v. Society Corp. (N.D. Ohio Mar. 13, 1992) (No. 1:92CV0525); Competitive Impact Statement, United States v. Fleet/Norstar Financial Group, Inc. (D. Me. 1991) (No. 91-0221-P); Competitive Impact Statement, United States v. First Hawaiian, Inc. (D. Hawaii Mar. 7, 1990) (Civ. No. 90-00904 DAE).

accounts and commercial loans as well as other business banking services from TCB and New First City.

Thrift institutions--federal savings and loan associations ("FSLAs") and federal savings banks ("FSBs")--are limited by law in the extent to which they make commercial loans, and thrifts' ability to offer these services to businesses is substantially affected by capital requirements and their own capital positions.[7] The thrifts that had entered business banking and lending in the past decade have generally withdrawn from those markets, and managers of other thrifts have learned from the thrift industry's general lack of success in commercial banking.[8] Thrifts in the Beaumont and Midland markets do not currently provide business banking services to medium-sized businesses or, in most cases, to small businesses. Our investigation revealed that the above factors, coupled with other economic factors concerning the cost, scale and expertise involved in offering business banking services, make it unlikely that savings and loan associations in these markets would enter into the provision of such services either as uncommitted entrants (i.e., rapidly and without incurring significant sunk costs) or as committed entrants (i.e., within approximately two years and having incurred significant sunk costs).[9]

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[7] Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 14647(t), new, more significant capital requirements and other restrictions were placed upon the lending activities of thrift institutions.

[8] The thrifts in the geographic markets at issue in these actions have not entered, and generally are not expected to enter, business banking. The fact that some thrifts are carrying commercial loans on their balance sheets does not necessarily indicate that those thrifts are making new commercial loans or are actively seeking business customers. Some thrifts with commercial portfolios succeeded to those portfolios when they acquired assets and deposits of earlier failed institutions from the Resolution Trust Corporation or Federal Home Loan Bank Board.

[9] In assessing competition in business banking services, the Department's consistent approach since United States v. First Hawaiian, Inc. (D. Hawaii 1990), has been to

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Non-depository institutions may provide one or even a few of the services provided by commercial banks and certain thrift institutions. For example, investment or brokerage houses offer products that in certain circumstances substitute for products offered to consumers by commercial banks or thrift institutions. Non-depository institutions, however, do not provide certain important business banking services, such as transaction accounts for business customers, which are offered by commercial banks and some thrift institutions. Moreover, knowledgeable persons interviewed in this investigation did not indicate that those firms were active competitors to commercial banks in these Texas markets, at least for businesses with sales of less than $100 million. Thus, they are not included as suppliers of business banking services.[10]

The United States' investigation indicates that a substantial majority of business banking customers in each of the Beaumont and Midland markets are served by five or fewer firms. In Beaumont, New First City is the leading firm by a significant margin, and TCB appears to be second. In Midland, TCB and First City are second and third, respectively. Absent the divestitures proposed in the Judgments, the acquisition of New First City-Beaumont would create a firm nearly three times the size of its next largest

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[9] (...continued)
identify those thrifts that are current providers of business banking services in the geographic markets at issue, as well as those thrifts that are uncommitted entrants into those markets, and include those thrifts as competitors. Merger Guidelines § 1.3. The Department has at times adjusted estimates of their capacity to reflect the additional regulatory constraints that thrifts face. See United States v. Society Corp. (N.D. Ohio 1992). The Department generally recognizes that thrifts are full competitors in retail or consumer banking services.

[10] The government's investigations of bank mergers have indicated that credit unions generally are not current or potential competitors in business banking services. Credit unions offer services to individual consumers, but are not permitted to offer business banking services such as those provided to the business customers served by commercial banks. The investigation did not reveal any contrary evidence in these markets.

competitor (measured by deposits). The Midland acquisition would have resulted in two firms, NationsBank and TCB, having more than 70% of the market's commercial bank deposits between them. These concentrations of business, together with other relevant factors discussed below, indicated to the United States that these acquisitions would create a substantial possibility that one or a few firms in these markets could exercise market power, profitably raising price and restricting output.

Some banks in the Beaumont and Midland markets are part of statewide banks or of statewide or larger bank holding companies, and those banks may have some ability to shift loanable funds from one market to another. While those banks might therefore offer more loans or larger loans in a particular market than their deposits in that market alone would support, there are other constraints on the amount of out-of-market funds that a depository institution can use effectively to make loans in a market. In addition to risk considerations, an institution needs an effective means of delivering banking services, including loans, to customers. Among other things, it needs a network of branch offices, trained loan personnel familiar with the market, its economy and its businesses, and the technical capability to deliver at least basic cash management services to medium-sized businesses. Therefore, a bank's ability to draw on out-of-market funds does not by itself indicate that it will be able profitably to expand output, and the United States does not believe that such firms' holding company affiliations necessarily warrant attributing to those firms greater measures of capacity than their historical performance indicates is appropriate.[11]

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[11] As discussed below, the United States considered, in evaluating the competitive effects of the proposed acquisitions, the likelihood that incumbents would follow or undercut an anticompetitive price rise. In that analysis, the United States considered, among other things, trends in historical deposit and commercial loan volumes and shares.

Under the Merger Guidelines, when the Herfindahl-Hirschman Index ("HHI"),[12] a measure of market concentration, is over 1800, the market is considered highly concentrated. A merger that increases the HHI by more than 50 points potentially raises significant competitive concerns, depending upon an analysis of all other relevant factors. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets (i.e., in markets where the post-merger HHI exceeds 1000) potentially raise significant competitive concerns, depending upon an analysis of all other relevant factors. Merger Guidelines § 1.51.

In the Midland market, the HHI, calculated on the basis of total deposits of firms now offering business banking services, would increase by approximately 408 to 2450.[13] This and other investigations have indicated that commercial bank deposit concentration is a good early indicator of instances of competitive concern in business banking services

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[12] The HHI is a measure of market concentration calculated by squaring the market share of each firm in the market and then summing the resulting numbers. For example, for a market supplied by four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$). The HHI takes into account the relative sizes and distribution of firms in a market. It approaches zero when a market is supplied by a large number of firms of relatively equal size and reaches its maximum of 10,000 when a market is supplied by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparities in size among these firms increases. Merger Guidelines § 1.51.

[13] Bank deposit data are available, with some delay, for each bank and thrift branch. Other data, such as loan data, are not readily obtainable on a branch-by-branch basis, although such data are obtainable for some banks in Texas on a county-by-county basis. The United States therefore examines deposit concentration, together with whatever other relevant data it can obtain, in the course of bank merger investigations. In this investigation, the United States examined deposit data and estimates of commercial loans to businesses generally and to medium-sized businesses in particular. The loan estimates, while somewhat imprecise, nonetheless were consistent with and did not contradict the inferences drawn from deposit data.

arising from bank mergers.[14] In Midland, the government's investigation indicated that concentration in business banking services to medium-sized businesses likely would be significantly greater than indicated by the HHI figures above, because substantially fewer local commercial banks could provide the necessary credit or more sophisticated cash management service required by medium-sized businesses. For example, while seven local commercial banks could provide business banking services in Midland, only five had the capability to provide these services to medium-sized businesses. TCB and New First City were two of the largest of these few banks. Based on all available information, the government concluded that the markets for business banking services to medium-sized and small businesses in Midland would be highly concentrated, and concentration would increase substantially, as a result of these acquisitions. The government estimates the post-merger HHI in the market for medium-sized business banking services in Midland (measured by total deposits of those firms offering those services) at 3328, increasing by 599.

In the Beaumont market, the government's investigation revealed that there were relatively few local banks that could meet the credit needs and provide the necessary cash management services demanded by medium-sized local businesses, banking services currently provided by New First City and TCB. Smaller local banks either did not have the capability to extend loans in the necessary amounts to individual customers, or could not expand in sufficient amounts to prevent an anticompetitive price increase by the

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[14] The government's further investigation of markets with high deposit concentration not infrequently reveals more specific reasons for competitive concern. At the same time, some investigations prompted by high levels of deposit concentration reveal information that leads the government to conclude that, notwithstanding such concentration, adverse competitive effects are unlikely. In such instances (including some instances involving other New First City bridge banks), the Department of Justice takes no further action.

larger banks. Hence, HHI calculations that include all commercial banks in Beaumont would understate significantly the level of concentration for medium-sized businesses that are not active participants in these markets. The government found that the markets for business banking services to medium-sized customers were highly concentrated, and the merger would increase that concentration substantially, eliminating one of a few large competitors for such medium-sized businesses. The government estimates that, absent divestiture, the post-merger HHI in the market for medium-sized business banking services (measured by total deposits of those firms offering those services) would be 3368, increasing by 1197 as a result of the proposed acquisition.[15]

However, examination of concentration alone does not exhaust the issues for analysis of competitive impact. In conducting its analysis, the government carefully reviewed evidence of potential competitive effects, such as conditions that would make coordinated or unilateral price increases likely or unlikely to occur or succeed. The evidence we have gathered, together with our growing understanding of competition in business banking services gained in these and other investigations, raised concerns that--in the absence of adequate divestiture--the transactions could substantially lessen competition by creating an increased likelihood of supracompetitive pricing of business banking services by leading banks in these markets.

The government's investigation concluded that, without divestiture, these transactions would serve to facilitate coordinated behavior in the provision of business banking services by the leading banks in the Beaumont and Midland markets, particularly to medium-sized businesses in both markets and to small businesses in

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[15] The HHI for the Beaumont market, calculated on the basis of total deposits of firms now offering business banking services, would increase by 520 to 1698 if the proposed acquisition occurred and if there was no divestiture.

Midland. The acquisitions would reduce the number of leading banks in Beaumont from five to four, and in Midland from four to three. There appear to be opportunities in both markets for banks to monitor the movement of customers among competitors, and possibly to monitor pricing, thereby providing competitors with the ability to detect and punish firms that do not participate in coordinated activity. The past behavior and current plans of the remaining firms in these markets generally did not lead the government to find that those firms would be likely to act to defeat an anticompetitive price rise by the market leaders. The government also concluded that entry by outside firms or expansion by firms already operating within the market would not be likely, timely or of sufficient magnitude to remedy possible anticompetitive concerns.

The United States understands that there were additional bids above liquidation value for each of Beaumont and Midland bridge banks, and some of those bids would therefore constitute less anticompetitive alternatives to selling those bridge banks to TCB. For that reason, the United States does not believe that a successful "failing company" defense could be made out on these facts.[16] The United States has previously rejected the

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[16] The failing company defense, which has been recognized since International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291, 299-303 (1930), provides a defense for mergers that are otherwise anticompetitive that involve a failing or failed firm. To establish the defense, it is necessary to show:

> (1) the allegedly failing firm probably would be unable to meet its financial obligations in the near future; (2) it probably would not be able to reorganize successfully . . . .; (3) it has made unsuccessful good faith efforts to elicit reasonable alternative acquisition offers of an acquisition of the failing firm that would both keep the firm in the market and pose a less severe danger to competition than the proposed merger; and (4) absent the acquisition, the assets of the failing firm would exit the relevant market.

Merger Guidelines ¶ 5.1. The burden of establishing these elements, including the burden of showing the unavailability of a less anticompetitive alternative purchaser, rests on the merging parties. United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974);

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argument that the failing company defense is automatically applicable to any assisted transaction. Competitive Impact Statement, United States v. Fleet/Norstar, Inc., at 12-13.

For all the above reasons, the United States found that each of these markets is or would become highly concentrated as a result of these acquisitions; that the increase in concentration would be substantial; that the relevant market factors created a likelihood of anticompetitive effects; that entry and expansion were unlikely to offset the anticompetitive effects; and that failing firm defenses were inapplicable.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENTS

The risk to competition posed by these acquisitions would be substantially reduced by the structural relief provided in the proposed Final Judgments in each of the relevant markets through divestiture of commercial bank offices, branches, assets and deposits.

TCB is required, by Section IV of the respective proposed Final Judgments, within three months from the entry of judgment, to divest the following commercial bank offices:

1. In the Beaumont market, at least two and as many of three New First City branches, including all assets and deposits of those offices;[17] all commercial loans over $500,000, and the deposits of those loan customers. Approximately $100 million in deposits and approximately $38 million in outstanding commercial loans,

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[16] (...continued)
Citizen Publishing Co. v. United States, 394 U.S. 131, 138-39 (1969). TCB did not contend that the failing company defense was applicable in these markets.

[17] If the purchaser of the Beaumont divestiture package persuades the Department that divestiture of two branches is sufficient to permit that purchaser to operate as a viable competitor capable of providing business banking services to the full range of small and medium-sized businesses in the Beaumont market, the Final Judgment would require the divestiture of only two branches, the Central and Spindletop branches. Otherwise, all three branches (not including the main office) would be divested.

together with approximately $8 million in direct consumer loans, would be divested. In addition, the purchaser will have the right to acquire New First City's main office facility (without deposits or loans, other than those specified above) and its operations and cash vault facilities. TCB will be permitted to retain New First City's trust and indirect consumer loan businesses, wherever served.[18]

2. In the Midland market, New First City's main office, including all assets and deposits of that office; except that TCB will be permitted to retain New First City's trust business and, under certain circumstances, its indirect consumer loan business, wherever served.

To ensure that the divestitures are accomplished in such a way as to maintain competition, the proposed Final Judgments require that the offices be sold to firms determined by the government to be competitively suitable. The divestitures will bring about the entry of a new provider or make larger an existing, small provider of business banking services in each of these markets, thereby ensuring that competition is not substantially lessened by the acquisition.

All purchasers must demonstrate to the satisfaction of the United States that they have a good faith intention to operate the divested branches and offices as banking offices that offer business banking services to small and medium-sized businesses. The proposed Final Judgments also requires that TCB preserve the assets of the divested banking offices and businesses until purchased by a buyer. If TCB fails to sell the branches within three months of the entry date of the proposed Final Judgments, TCB shall file with the court and notify plaintiff within thirty days of the date the purchase contracts were

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[18] Direct consumer loans are loans originated by the bank's personnel directly to consumers. Indirect consumer loans are loans originated by others (especially by automobile dealers) and sold to the bank.

required to be entered into by TCB. The United States can then proceed under the terms of Section V of the proposed Final Judgments to appoint a trustee to accomplish the branch divestitures.

It is the intent and belief of the United States that the proposed relief will prevent a reduction of competition in the markets for banking services in Beaumont and Midland, including in particular the markets for business banking services to medium-sized businesses in both markets and for small businesses in Midland. This relief should establish or strengthen new bank competitors in these markets, which are anticipated to provide a full range of banking services to customers, small businesses and medium-sized businesses. Such full service banks with broad bases of commercial and retail business are likely to ensure that a viable competitor will replace the competition that otherwise might be lost in those markets.

The United States and TCB have stipulated that the proposed Final Judgments may be entered by the Court at any time after compliance with the APPA. The proposed Final Judgments constitute no admission by any party as to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed Final Judgments is conditioned upon a determination by the Court that the proposed Final Judgments are in the public interest.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs

and reasonable attorneys fees.[19] Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgments have no prima facie effect in any private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgments within which any person may submit to the United States written comments regarding the proposed Final Judgments. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and response(s) of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001.

The proposed Final Judgments provide that the Court retains jurisdiction over these actions, and any party may apply to the Court for any order necessary or appropriate for their modification, interpretation or enforcement.

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[19] The Bank Merger Act, 12 U.S.C.§ 1828, however, prevents the filing of an antitrust suit (other than a suit under § 2 of the Sherman Act) later than five days after the Comptroller's orders of February 8 and February 19, 1993, regarding the Midland and Beaumont acquisitions, respectively.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENTS

The United States considered the following alternatives regarding divestiture of bank branches. In the Beaumont market, the United States considered the alternative of divesting one or two branches, without the commercial loans that are to be divested under the proposed Final Judgment. In the Midland market, the United States considered the alternative of divestiture of a TCB branch, together with the grant of an option on the facility currently occupied by another TCB branch. The United States concluded in each instance that such divestitures would be unlikely to provide a sufficient entry vehicle so that a new competitor could enter the market for business banking services to medium-sized businesses, and that therefore the alternative would not be sufficient to ameliorate the likely anticompetitive effect of the acquisitions.

The United States also considered requiring TCB to divest all of the assets and deposits of the New First City bridge banks. The United States concluded that divestiture of less than all of those assets and deposits would be sufficient to provide an effective remedy to the government's concerns, and that acquisition of those assets that TCB would acquire, in light of the divestiture of other assets to competitively suitable purchasers, would not be significantly adverse to competition.

As a final alternative to the proposed Final Judgments, the United States considered litigation seeking a permanent injunction preventing TCB's acquisition of New First City. The United States rejected that alternative because the sale of the commercial bank branches will establish viable independent competitors to TCB in all the relevant markets and likely will prevent the proposed acquisition from having significant anticompetitive effects in those markets, and will avoid delaying the final resolution of

these bank failures by the FDIC. The United States also recognized that such litigation would require determination of several disputed issues of law and fact, and that there could be no assurance that the position of the United States would prevail.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination,

> the court may consider--
>
> > (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
> >
> > (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the"public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In

conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[20] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[21]

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[20] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[21] United States v. Bechtel, 648 F.2d at 666 (citations omitted); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a merger or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[22]

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[22] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1982) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

VIII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgments. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

March 8, 1993

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing upon the following by placing same in the United States Postal Service mail, first class, postage prepaid this 8th day of March, 1993.

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