LEGISLATION

The 1966 Amendment to the Bank Merger Act: Economic Perspective and Legal Analysis

I. INTRODUCTION

In *United States v. Philadelphia Nat'l Bank,*[1] the Supreme Court enjoined a proposed merger of the second and third largest commercial banks in Philadelphia. The Court held, *inter alia,* that section 7 of the Clayton Act[2] applied to bank mergers,[3] and that the merger in question might substantially lessen competition.[4] Central to the reasoning of the majority was the premise that an unchecked trend toward concentration of market power in commercial banking is contrary to the public interest in maintaining competition among existing commercial banks.[5] Since commercial banking had traditionally been considered exempt from section 7 prosecution,[6] the cry for legislative response was immediate.

The 1966 amendment[7] to the Bank Merger Act of 1960 reflects the congressional reaction. The amendment attempts to reconcile the judicial application of section 7 with the standards applied by the federal banking agencies in evaluating merger applications under the 1960 act. It is anticipated that this reconciliation will develop from the

1. 374 U.S. 321 (1963).

2. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). The pertinent portion states: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

3. 374 U.S. at 349.

4. *Id.* at 363.

5. The Court declared: "We noted in *Brown Shoe Co.* (citation omitted), that '[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy.' This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 362-63.

6. Senate Committee on Banking and Currency, *Regulation of Bank Mergers,* S. REP. No. 196, 86th Cong., 1st Sess. 1 (1959); *Regulation of Bank Mergers,* H.R. REP. No. 1416, 86th Cong., 2d Sess. 5 (1960); KAYSEN & TURNER, ANTITRUST POLICY 42 (1959).

7. Pub. L. No. 89-356, 89th Cong., 2d Sess. (Feb. 21, 1966) (will be 12 U.S.C. § 1823(c)).

establishment of a single set of standards against which future merger applications may be measured. These standards are applicable to "the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws."[8] This note, by combining legal analysis of the amendment with pertinent economic considerations, will attempt to evaluate the effectiveness of the legislation and expose those areas which require more intensive congressional consideration.

II. Economic Perspective: Regulation, Competition and Concentration in Commercial Banking

A. *Regulation of Commercial Banking*[9]

While generally the occasional failure of business concerns is not considered undesirable in light of the overall benefits to be derived from unrestricted competition,[10] the central role of banking in the national economy has fostered widespread recognition that bank solvency and liquidity are sufficiently important to require a check on competitive forces.[11] Therefore, public regulation of commercial banking reflects an attempt to obtain the benefits of competition while guarding against widespread bank failure as a method of eliminating the less efficient competitors from the market structure. As a result the regulatory scheme is characterized by the somewhat conflicting objectives of efficiency through competition and stability through regulation.

The most fundamental regulation imposed upon the market structure of commercial banking is limitation of entry. A charter for a new national bank will not be granted unless the capital structure, earnings prospects and management capabilities of the prospective bank give adequate assurance that entry will not produce excessive competition and possible failure.[12] Similarly, inability to meet these

8. House Committee on Banking and Currency, *Bank Merger Act Amendment,* H.R. Rep. No. 1221, 89th Cong., 2d Sess. 1 (1966); Pub. L. No. 89-356, 89th Cong., 2d Sess. (Feb. 21, 1966) (will be 12 U.S.C. § 1823(c)(7)(B)).

9. Commercial banking is subject to comprehensive regulation under state and federal law. Congress has created three agencies which share supervisory responsibility at the federal level. They are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. For an outline of federal-state supervisory responsibility and the division of responsibility among the federal agencies see Subcomm. on Domestic Finance, House Comm. on Banking and Currency, 88th Cong., 1st Sess., Comparative Regulations of Financial Institutions 57 (Subcomm. Print 1963) [hereinafter cited as Comparative Regulations]. Congress is studying the feasibility of reorganizing and consolidating the tripartite agency structure. Staff of Subcomm. on Banking and Currency, 89th Cong., 1st Sess., Reorganization of Federal Bank Supervision (Subcomm. Print 1965).

10. Berle, *Banking Under the Anti-Trust Laws,* 49 Colum. L. Rev. 589, 592 (1949).

11. "A bank failure is a community disaster. . . ." *Ibid.*

12. Rev. Stat. § 5169 (1875), as amended, 12 U.S.C. § 27 (1958) (national banks);

standards may cause the Federal Deposit Insurance Corporation (FDIC), in effect, to prevent entry by denying an application for deposit insurance.[13] The FDIC, Federal Reserve Board (FRB), and the Comptroller of the Currency may refuse permission to open new branches on the same grounds.[14] Furthermore, national banks are apparently subject to state law with regard to branching limitations.[15]

Banks are also subject to numerous provisions designed to insure sound banking practices. For example, banks belonging to the Federal Reserve System (member banks) and insured non-member banks are precluded from paying interest on demand deposits.[16] This discourages competitive efforts to attract demand deposits and the correlative tendency to make speculative loans and investments to cover the interest costs. Federal law also requires the FRB and FDIC to specify maximum rates of interest that insured banks may pay on savings and time deposits.[17] A number of states also limit the rate of interest payable,[18] and, where the state rate is below the federal maximum, federal law requires that national banks not exceed the state maximum rate.[19]

Regulation of competition also extends to the market for bank loans. The area within which competitive forces operate is circumscribed as to maximum rates by state usury laws,[20] and is affected as to the minimum charge by FRB manipulation of the rediscount rate, open-market operations and modification of reserve requirements.[21] While the FRB operations are not regulatory in the strict sense, they affect the supply of money and credit in the economy and thereby influence the "prime" or minimum bank interest rate. In the range between the practical minimum set by Federal Reserve policy and

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see COMPARATIVE REGULATIONS 60-61; U.S. ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE, FEDERAL CONTROL OF BANKING 21-22 (1940). Entry of state banks is generally governed under similar requirements or broad discretionary power given to the approving board or official.

13. 64 Stat. 873 (1950), 12 U.S.C. § 1815 (1957), grants power to deny. The grounds are specified in 64 Stat. 873 (1950), 12 U.S.C. § 1816 (1957).

14. 64 Stat. 873 (1950), 12 U.S.C. § 1828(d)(1957); 38 Stat. 259 (1913), as amended, 12 U.S.C. § 321 (1965); REV. STAT. § 5155 (1875), as amended, 12 U.S.C. § 36 (1965).

15. REV. STAT. § 5155 (1875), as amended, 12 U.S.C. § 36 (1965).

16. 48 Stat. 181 (1933), as amended, 12 U.S.C. § 371(a) (1945); 64 Stat. 873 (1950), as amended, 12 U.S.C. § 1828(g) (1965).

17. 48 Stat. 182 (1933), as amended, 12 U.S.C. § 371(b) (1965); 64 Stat. 873 (1950), as amended, 12 U.S.C. § 1828(g) (1965).

18. COMPARATIVE REGULATIONS 13-15.

19. *Id.* at 13.

20. REV. STAT. § 5197 (1875), as amended, 12 U.S.C. § 85 (1945). In the absence of state law a federal limit is applicable.

21. ALHADEFF, MONOPOLY AND COMPETITION IN BANKING 150 (1954) [hereinafter cited as ALHADEFF]; AMERICAN BANKERS ASS'N, THE COMMERCIAL BANKING INDUSTRY 86-96 (1962) (monograph prepared for the Commission on Money and Credit).

the maximum allowed under state usury laws, competitive forces are free to operate. Moreover, national banks are precluded from lending more than an amount equal to ten per cent of their paid-in capital and unimpaired surplus to any one obligor,[22] and state banks are generally subject to similar limitations.[23] National and state member banks are also prohibited from investing in common stocks, and from holding for their own account investment securities of a single obligor in excess of ten per cent of the bank's unimpaired capital and surplus.[24] Such investment prohibitions, while helping to insure continued stability, have the added effect of limiting the control which banks might otherwise exert over industry in general. In addition, the broad visitorial powers of federal bank examiners provide the agencies with a flow of information based on frequent and intensive examinations. The banks must furnish detailed periodic reports of their operations,[25] and the agencies have the power to order examinations whenever they are deemed necessary.[26] Numerous sanctions are provided,[27] but the vast majority of banks go to great lengths to avoid grounds for criticism.

The foregoing restrictions on private initiative have caused economists to question the extent to which antitrust policy can foster a type of competition conducive to improved bank performance.[28] Those questioning the appropriateness of antitrust enforcement argue that under current public policy, banking is essentially a regulated industry, with basic decisions such as entry, expansion, competition for loanable funds and pricing all controlled to some degree.[29] As a result, the private decision-making process, through which competitive forces

22. REV. STAT. § 5200 (1906), as amended, 12 U.S.C. § 84 (1965).

23. COMPARATIVE REGULATIONS 29.

24. REV. STAT. § 5136 (1875), as amended, 12 U.S.C. § 24 (1965); 48 Stat. 165 (1933), 12 U.S.C. § 335 (1945).

25. REV. STAT. § 5211 (1877), as amended, 12 U.S.C. § 161 (1965); 38 Stat. 259 (1913), as amended, 12 U.S.C. § 324 (1965); 64 Stat. 873 (1950), 12 U.S.C. § 1820(b) (1957).

26. "National banks are required to be examined at least three times every two years by examiners appointed by the Comptroller of the Currency. The policy of the Federal Reserve Banks and Board is to examine each state member bank once a year, and the Federal Deposit Insurance Corporation has the same policy for insured banks not members of the Federal Reserve System." COMPARATIVE REGULATIONS 59; REV. STAT. § 5240 (1875), as amended, 12 U.S.C. § 481 (1965); 40 Stat. 232 (1913), as amended, 12 U.S.C. § 325 (1945); REV. STAT. § 5240 (1875), as amended, 12 U.S.C. § 483 (1945); 64 Stat. 873 (1950), 12 U.S.C. 1820(b), (g) (1957).

27. U.S. ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE, *op. cit. supra* note 12, at 17.

28. Phillips, *Competition, Confusion and Commercial Banking*, 19 J. FINANCE 32 (1964); *cf.*, Abramson, *Private Competition and Public Regulation*, 1 NAT'L BANKING REV. 101 (1963).

29. Phillips, *supra* note 28, at 39; Carson & Cootner, *The Structure of Competition in Commercial Banking in the United States*, in PRIVATE FINANCIAL INSTITUTIONS 55, 131 (1963) (monograph prepared for the Commission of Money and Credit).

find expression, is restrained. Therefore, given the existing complex of public regulation and the character of the industry,[30] it is considered impossible to achieve, through conventional antitrust policy, a competitive system which will significantly improve performance.[31]

Diametrically opposed to this view is the position taken by the Supreme Court in the *Philadelphia* case. There, while recognizing the extent of banking regulation,[32] the Court implicitly indicated that where market entry is controlled the public is in greater need of viable competition among existing firms than where added protection is provided by free entry.[33] This conflict will have continued importance in future cases, since it appears certain that the Antitrust Division will urge the application of section 7 to bank mergers in spite of the purpose of the 1966 amendment.[34]

B. *Line of Commerce: Commercial Banking or Financial Institutions*

A critical problem in section 7 cases is the determination of the relevant "product market" or "line of commerce." Since this concept serves as a competitive frame of reference within which the competitive effects of a merger will be evaluated, the breadth of the definition becomes important. Current decisional law aside, "line of commerce" is best understood as groups of products or services in competition with one another, and therefore, to some extent, interchangeable from the consumer's standpoint.[35] Thus, a line of commerce definition including a great many alternatives will likely lead to the conclusion that a proposed merger does not substantially lessen competition. On the other hand, a line of commerce containing only a few alternatives is more likely to result in a conclusion that merger lessens

30. Commenting on the effect of the public regulatory structure and private inter-organizational arrangements snch as correspondent banking and clearinghouse associations, Phillips concludes that . . . "public regulation and private organization [have] the necessary effect of producing ostensibly non-competitive results." Phillips, *supra* note 28, at 39.

31. "For the entire economy, more banks do not mean a larger total supply in the same sense as is the case in other industries. . . . Rather, if the number of banks increases and the supply of credit is fixed, the size of the average bank decreases, and, assuming the existence of economies of scale, the system moves away from the most efficient allocation of resources." Phillips, *supra* note 28, at 41.

32. 374 U.S. at 324-35.

33. "There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical." *Id.* at 369. "The fact that banking is a highly regulated industry . . . makes the play of competition not less important but more so." *Id.* at 372.

34. See Shapiro & Kareken, *Lines of Commerce, Standards of Illegality, and Section 7 Predictability*, 40 N.Y.U.L. REV. 628 (1965).

35. "[A] meaningful line of commerce would be an output type which is sufficiently differentiated from other outputs in the minds of buyers to make other products appear distinctly inferior snbstitutes." Herman, *The Philadelphia Bank Merger Decision and its Critics*, 1 NAT'L BANKING REV. 391, 392 (1964).

competition. The distinction between narrow and broad definitions is particularly relevant in the context of bank mergers, since commercial banks provide a greater variety of products (credit) and services than any other single financial institution. This is not to say, however, that many financial institutions do not offer comparable products and services which are able to compete vigorously with those offered by commercial banks.

In *Philadelphia* the Supreme Court found that the appropriate line of commerce was "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration), denoted by the term 'commercial banking'. . . ."[36] This is a narrow definition in that no other single "producer" of financial services offers the variety available to the commercial bank customer.[37] It is important to note, however, that the Supreme Court did not foreclose completely the possibility of considering financial institutions generally as the appropriate line of commerce.[38] As a result, the line of commerce definition could be broadened to include the services of other financial institutions, and, in the event other institutions provide the requisite competition in the services examined, the chances of upholding a proposed merger would be enhanced. Thus it may prove valuable to consider the relation between the services of commercial banks and the services of other financial institutions.

Commercial banks are in a dominant competitive position with regard to demand deposit (checking) accounts.[39] They are the only financial institutions which may accept demand deposits, the primary

36. 374 U.S. at 356.

37. "The principal banking 'products' are . . . various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconcilation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice." *Id.* at 326-27 n.5.

38. The Court recognized a number of financial institutions as "more or less in competition with commercial banks . . . ." *Id.* at 327 n.5, and later indicated there was no evidence in the record to rebut the inherently anticompetitive tendency of the merger. The latter statement indicates implicitly that the Court would acknowledge proof of competition from other financial institutions.

39. Herman, *supra* note 35, at 393-94. Whereas other lending institutions rely heavily on bank credit for loanable funds, the demand deposit-fractional reserve technique allows commercial banks, in effect, to create credit. Thus Bank *A* may receive a deposit of $100.00, and if it is required to keep a 20% cash reserve it can make an $80.00 loan to a new customer. Assuming that this customer were to deposit the entire $80.00 in his checking account, the bank could lend up to $64.00, or 80%, keeping $16.00 on hand to meet the reserve requirement of 20%.

function of which is to serve as a means of payment.[40] This is a distinct advantage since available substitutes, such as cash, postal money orders and registered checks, do not offer comparable alternatives based on convenience or cost per check.

Several writers have criticised the Supreme Court's unwillingness to consider the competitive position of alternative sources of short-term business credit.[41] Suggested alternative sources are the commercial paper market, finance companies, and trade credit. Since finance companies rely heavily upon banks for their supply of funds their cost factor is necessarily higher than a bank's. Therefore, their interest rates are higher, diminishing their competitive effectiveness.[42] The commercial paper market has apparently been overestimated as a source of competition for commercial banks,[43] and while there is some difference of opinion[44] it would appear that trade credit is not a substitute for bank credit since trade credit will normally be exhausted prior to seeking bank funds.[45] Insurance companies are generally regarded as increasingly active competitors for long-term business and government loans,[46] and there is some authority to the effect that commercial banking's share of the consumer credit and mortgage lending markets has decreased in recent years.[47] The

40. AMERICAN BANKERS ASS'N, THE COMMERCIAL BANKING INDUSTRY 63-66 (1963) (monograph prepared for the Commission on Money and Credit). Occasionally demand deposit accounts are mentioned as a facility for the storage of wealth. As a corollary of the demand deposit function this may be the case, but normally the availability of desirable income producing alternatives is sufficient to discourage mainteuance of unnecessarily high demand account balances.

41. Motter, *Bank Mergers and Public Policy*, 1 NAT'L BANKING REV. 89, 94 (1963); Shull, *Commercial Banking as a "Line of Commerce,"* 1 NAT'L BANKING REV. 187, 202 (1963).

42. Recognizing that price differences result partly from differences in risk assumed by finance companies, Alhadeff writes: "In part, the price differences are a reflection of cost differences. When finance companies are heavily dependent upon banks for their loanable funds, the cost of funds to the finance company is likely to be higher than for a bank. The banks must cover their costs and seek to make a profit on finance company loans. Thus, the cost of finance company funds must start from a base which already includes the full cost of funds to the bank. Partly, the price differences are owing to the fact that banks can get greater leverage on their equity capital than finance companies. For an individual bank, the important source of loanable funds is not equity capital but demand and time deposits. . . . The greater leverage in banks . . . means that the same rate of interest on loans by both lenders would . . . yield a higher net rate of return on capital to banks than to finance companies." ALHADEFF 18.

43. Herman, *supra* note 35, at 395-96, indicating that even though total borrowings in the commercial paper market have increased, apparently the number of borrowers has decreased thereby lessening the competitive force with regard to banking.

44. *Id.* at 394. Herman concludes that trade credit is an inferior alternative due to higher cost. Carson & Horvitz, *Concentration Ratios and Competition*, 1 NAT'L BANKING REV. 105, 109 (1963), reflects the position that trade credit is extremely important to small business borrowers.

45. ALHADEFF 14-15, 19.

46. COMPARATIVE REGULATIONS 293-95.

47. BOGEN, THE COMPETITIVE POSITION OF COMMERCIAL BANKS 23, 27 (1959).

Supreme Court recognized the possibility of competition between banks and savings institutions in "terms of cost and price." The Court added, however, that banks "enjoy a settled consumer preference, insulating them, to a marked degree, from competition . . . ."[48] Economic analysis indicates that this conclusion is questionable as a general proposition,[49] though apparently accurate in context.

Future merger cases, whether under paragraph 5(B) of the 1966 amendment[50] or section 7, will involve a line of commerce determination. Whether the services of financial institutions other than commercial banks will be considered in evaluating a proposed merger is an open question, particularly in view of the wording of the amendment and its legislative history.[51] Commercial banking is certainly a unique industry. The combined effect of the demand deposit function, business lending dominance, and the convenience of extensive financial services in one location are not to be denied. However, by characterizing commercial banking as *the* line of commerce, it appears that the Court has placed excessive reliance upon uniqueness, thereby indicating the need for more detailed analysis of whether, and to what extent, other financial institutions compete with commercial banks.[52] Indeed, this question deserves thoughtful congressional consideration if the larger issues presented by the bank merger problem are to be resolved.

C. *Concentration and Its Anti-Competitive Effect*

Concentration ratios reflect the size-distribution of firms in a particular industry.[53] Since degrees of concentration are usually

48. 374 U.S. at 357.

49. Alhadeff & Alhadeff, *The Struggle for Commercial Bank Savings*, 72 Q.J. ECON. 1 (1958), provides a comprehensive analysis of the reasons for the decline in commercial bank savings in relation to the growth of savings and loan associations (SLA). See COMPARATIVE REGULATIONS 103 for a table of asset growth. It is interesting to note that SLA assets increased approximately 77 billion dollars during the period 1950-1962. This represents an increase of almost 600%. See S. REP. No. 196, 86th Cong., 1st Sess. 13 (1959), for a compilation reflecting the growth of credit unions, life insurance companies, and SLA's.

50. Phillips, *supra* note 28, at 32-33.

51. See notes 64 & 146 *infra*. See also Note, *The 1966 Amendment to the Bank Merger Act*, 66 COLUM. L. REV. 764, 779-81 (1966).

52. Analysis of the competitive influence of other financial institutions should include: mutual savings banks, SLA's, credit unions, casualty and property insurance companies, investment banks, investment companies, life insurance companies, sales finance companies and business finance companies.

53. "Concentration" is utilized in economic and legal analysis in two ways. General concentration is the measure of the share of economic activity accounted for by the largest firms in the total economy, or a broad segment thereof. The second type of concentration measures the share of an industry or produet that is accounted for by the largest firms in the industry or the largest firms producing the product. The latter measure is used in this discussion. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 16-17 (1957).

expressed in terms of a firm's percentage share of the total business conducted, an industry or line of commerce is characterized as highly concentrated when a few firms control a significant share of the existing business. While there is general agreement that concentration and competition are related,[54] the reasoning of the Supreme Court in *Philadelphia* leaves ground for comment. The Court's reliance upon the proposition that competition is greatest where there are many sellers, none having a significant market share,[55] discloses an oversimplified conception of the effects of bank mergers, and perhaps of mergers in general. Implicit in this reasoning is the view that the degree of competition is a function of the number of competitors in the market.[56] To draw any meaningful conclusions regarding the 1966 amendment, and the bank merger problem generally, a closer examination of the impact of concentration on commercial banking is essential.

Banking concentration is measured in several ways, but the method most often employed is to measure the percentage of assets, loans or deposits held by the largest banks in the market sampled. Levels of concentration and their fluctuations, when viewed as isolated statistics, may not accurately reflect the degree of competition among existing firms.[57] For example, a one-bank town has a concentration level of 100 per cent but the local bank may compete vigorously with several banks in adjacent communities. Similarly, in a city where three banks are dominant, an increase in concentration may result from aggressive competition on the part of these banks to attract new industry to the area, while a decrease in concentration may reflect a decline in local business. It also appears doubtful that the merger

54. *Id.* at 32; KAYSEN & TURNER, ANTITRUST POLICY 14 (1959).

55. 374 U.S. at 363.

56. Performance does not necessarily increase as the number of banks increases. Phillips, referring to a study by the Bank Markets Unit, Board of Governors of the Federal Reserve Board, stated that "there was a slight but significant tendency for the rates charged by individual banks to decrease as the share of the market possessed by the bank increased. The number of banks in the markets, the size of the largest banks and the proportion of the market accounted for by the three largest banks all possessed no explanatory value . . . ." Phillips, *supra* note 28, at 37. Referring to the type of structural hypothesis applied by the Court, another writer stated, "[t]here are serious problems connected with the use of this yardstick. First, not every firm contributes equally to competition. In particular, there may be a fringe of firms too small to be able to affect price and production policies in the market as a whole. Alternatively, certain firms may be marginal in the sense that their costs and financial situations preclude them from having much, if any, impact on market conditions; indeed they may be able to remain in operation only because excessive profits are being earned by the stronger firms. An influx of companies of this sort would have much less significance than a counting of corporate heads would imply." Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 312 n.261 (1960). See United States v. Von's Grocery Co., 384 U.S. 270 (1966), 19 VAND. L. REV. 1373, 1377.

57. *Ibid.*

of banks providing complementary, rather than competitive, services, would necessarily result in a lessening of competition, even though the level of concentration would be increased. Unquestioned reliance upon concentration ratios as a measure of competition is also discredited by the existence of "economies of scale." While these economies may benefit the customer through lower costs,[58] they may also raise questions as to anti-competitive effects since they result from increases in size which allow more efficient internal organization and greater dispersion of risk. Realizing, therefore, that concentration itself does not necessarily cause a true lessening of competition, a brief examination of the effects of concentration on borrowers will be helpful.

Price competition among commercial banks is generally centered in the market for customer loans. Analysis of credit markets indicates that the geographic area within which banks compete for loans is segmented according to the credit requirements of the borrower.[59] Large borrowers participate in the national or wholesale credit market, and, since there are many alternative suppliers available, it is highly unlikely that merger would have an adverse effect upon large-borrower interest rates.[60] The situation confronting the small- and intermediate-size borrower, however, is less encouraging. The intermediate-size borrower generally seeks credit in a regional market, and merger would, therefore, decrease the number of alternative suppliers.[61] Similarly, the withdrawal by merger of an alternative source may adversely affect the small borrower, particularly in view of the personal nature of his credit standing and the difficulties flowing therefrom.[62] With credit markets segmented in terms of borrower-size, it is also possible that a merger will create a bank which is highly competitive in one borrower-market while assuming the position of an oligopolist or monopolist in another. The Supreme Court refused to weigh these anti-competitive effects against beneficial effects in *Philadelphia*,[63] but the 1966 amendment apparently requires

58. GRAMLEY, SCALE ECONOMIES IN BANKING 59 (1962) (Federal Reserve Bank of Kansas City).

59. ALHADEFF 40-46. See United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 901, 916 (S.D.N.Y. 1965), in which the court recognized the metropolitan area of New York City as the relevant market for "retail" banking, and the entire United States as the geographic market for "wholesale" banking.

60. ALHADEFF 41. Phillips apparently disagrees with this analysis but does not offer data to support his conclusion. Phillips, *supra* note 28, at 38.

61. ALHADEFF 41-44.

62. *Id.* at 45. To a great extent the small borrower maintains a continuing relationship with "his" bank. Therefore there is probably very little "shopping" for credit, so that the very nature of the relationship may curtail price competition. Phillips, *supra* note 28, at 37.

63. "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved beeause, on some ultimate reékoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371.

the courts to apply such a balancing test[64] in the future.

It is evident that analysis of bank mergers is an exceedingly difficult task. Relatively little is known about such critical factors as the competitive role, if any, of other financial institutions, the impact of concentration on price and performance, and the extent to which the current regulatory structure fosters effective competition. This ignorance stems, in part, from the fact that the antitrust history of bank mergers began just seven years ago.[65] Obviously, there are pitfalls in reliance on concentration ratios, although there is authority to the effect that "[m]arket concentration . . . [is] . . . significantly associated with the pricing, output, and profits of banks—high concentration being associated with high loan rates, low rates on time and savings deposits, and high profits."[66] Furthermore, even though analysis of the segmented borrower-market indicates that the small- and intermediate-size borrowers may be adversely affected by merger, there is also authority indicating that bank interest rates tend to remain stable after merger.[67] Even in a monopolistic situation it is unlikely that a bank would charge unreasonably high interest rates, due to fear of entry and out-of-town competition.[68] This fundamental difference of opinion illustrates that anti-competitive effects cannot be evaluated realistically when they are regarded as proportionate to the number of competitors in the market.[69]

At this point in the evolution of the commercial banking industry there are many questions and relatively few readily available answers. Prior to *Philadelphia* the situation was less troublesome—banking was thought to be exempt from antitrust prosecution. In a sweeping reaction to the market structure developed during the period of exemption, the Supreme Court applied the antitrust laws to commercial bank mergers. In *Philadelphia*, as in subsequent merger

64. "[T]he bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, *but permits an exception* in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served . . . that it would be in the public interest to permit it." (Emphasis added.) House Committee on Banking and Currency, *Bank Merger Act Amendment*, H.R. Rep. No. 1221, 89th Cong., 2d Sess. 3-4 (1966).

65. United States v. Firstamerica Corp., Civil No. 38139, N.D. Cal., filed March 30, 1959. The case was settled by consent decree.

66. Edwards, *The Banking Competition Controversy*, 3 Nat'l Banking Rev. 1, 25 (1965).

67. Lent, The Changing Structure of Commercial Banking 16 (1960).

68. Alhadeff 223. Conversely, an increase in the number of banks in a small town would not lower rates to the small borrower. The new entrant would merely share in the existing business and each bank would be driven to a higher point on its cost curve and would therefore have to charge higher rates to maintain earnings at previous levels. Alhadeff 219.

69. See note 56 *supra*.

cases,[70] the Court has relied upon Congress' intent "to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency."

If antitrust prosecution is to be meaningful, it would appear that its force must be applied to a market structure within which competition can be preserved. It has been suggested that the current regulatory complex surrounding commercial banking actually renders antitrust enforcement meaningless.[71] This conclusion, it is urged, follows from the fact that public regulation and private inter-bank cooperation tend to produce noncompetitive results, as evidenced by (1) the low bank failure rate,[72] (2) the continued existence of firms of less than the optimal scale, and (3) the lack of strong price competition.[73] Thus the fundamental questions are raised—whether, and to what extent, banks should be subject to the antitrust laws. The Supreme Court has already replied, but Congress, through the 1966 amendment to the Bank Merger Act, has chosen to leave its answer unclear.[74]

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70. *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

71. Phillips, *supra* note 28, at 32-33.

72. See *Hearings on S. 1698 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 1st Sess. 22 (1965) [hereinafter cited as *Senate Hearings*] (table 18 indicating the bank suspension rate has remained at a very low level since 1943).

73. "The apparent lack of strong price competition, the continued existence of many banks of less than optimal scale and the insensitivity of market performance to market structure are not difficult to explain. They arise because of a vastly complex system of public regulation and supervision working in conjunction with a well-developed, yet generally informal, private market organization. Most of the public regulation appears in the guise of instruments desigued to protcct the safety of banks and the liquidity of the payments mechanism—that is, to prevent bank failures and banking practices which might lead to failures. Much, but not all, of the private rationalization of competition is a side effect of certain cooperative arrangements among bankers—clearing houses, loan participations, and correspondent relations, for example—which add to the efficiency of the system. The point is not that there are conscious efforts to arrange conspiracies in restraint of trade, but rather that public regulation has the express purpose and private organization has the necessary effect of producing essentially noncompetitive results . . . . The most important single policy would be to permit freer entry . . . . The elimination of restrictions on interest rates paid on deposits would be another important step." Phillips, *supra* note 28, at 38-39, 44. See Shull & Horvitz, *Branch Banking and the Structure of Competition*, 1 NAT'L BANKING REV. 301, 340-41 (1963), for an analysis suggesting that current branching controls are too stringent.

74. Apparently the banking industry, at this point, is unwilling to encourage Congress to consider the underlying issues. Witness the efforts of the interested banks to discredit the unfavorable report of an American Bar Association task group appointed to study the original bill. See REPORT OF SPECIAL SUBCOMMITTEE OF THE CLAYTON ACT SUBCOMMITTEE OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION ON S. 1698:

The subcommittee is opposed to the enactment of S. 1698 for the reason that it considers the bill to constitute an attempt to deal with only a small part of a much larger problem. The subcommittee does not believe that the Congress has addressed itself to the basic question of whethcr and to what extent thc antitrust laws should apply to banking.

III. Pre-Amendment Bank Merger Regulation

A. *Historical Background*

1. *Pre-1950: Antitrust Exemption for Banks.*—Prior to 1950, bank mergers were exempt from section 7 of the Clayton Act.[75] In that year, the Celler-Kefauver Amendment to section 7[76] was enacted to reach undue concentration of economic power in its incipiency[77] by increasing the strictness of anti-competitive merger standards and extending the statute's scope to include stock as well as asset acquisitions by any "corporation subject to the jurisdiction of the Federal Trade Commission." Bank mergers remained immune from coverage since banks had never been subject to Commission jurisdiction and

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Congress has not seen fit in many instances to grant immunity from the antitrust laws, and has done so only where the nature of the industry involved is such that competition would not be in the public interest. In those cases where Congress has seen fit to grant exemptions from the antitrust laws, for example with respect to airlines, shipping and railroads, it has accompanied such exemptions with a comprehensive system of regulation, more extensive in nature and of a different character than that which presently exists in the banking field.

The subcommittee is of the view that it is inappropriate to deal with bank mergers independently rather than as an integral part of the overall problem of whether and to what extent regulation should replace competition in banking. It strongly recommends that Congress make a study of the banking industry to determine whether or not banking should be treated as being so infused with the public interest as to require pervasive regulation.

The subcommittee does wish, however, to state its conviction that uniformity in the regulation of banking is desirable. For this reason, the subcommittee wishes to express its belief that, in any event, a single Federal banking agency would be clearly preferable to the present situation which involves three separate agencies.

Hearings on S. 1698 Before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 89th Cong., 1st Sess. 996 (1965) [hereinafter cited as *House Hearings*]. "The law firms representing the favored banks charged several members of the Task Gronp with conflict of interest in light of their association with firms having bank customers for clients or their previous employment in the Antitrust Division. Pursuant to an organized campaigu, letters were sent to the members of the Section 7 Clayton Act Subcommittee attacking the Subcommittee for making reports on matters concerning pending litigation and private litigates and challenging the report on the basis of special or partisan interest." Note, *supra* note 51, at 776 n.91 (1966). See *House Hearings* 993-1022, 1769-1908.

75. Section 7 provides in part that no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the assets of another corporation and that no corporation (whether or not subject to the jurisdiction of the FTC) shall acquire the stoek of another corporation if in either case the "effect . . . may be to substantially lessen competition, or to tend to create a monopoly." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958). Since application of antitrust laws to banks is not within FTC jurisdiction, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1958); 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (6) (1958); 38 Stat. 721 (1914), as amended, 15 U.S.C. § 46(b) (1958), bank mergers could not be governed by § 7 unless regarded as stock acquisitions. See Wemple & Cutler, *The Federal Bank Merger Law and The Antitrust Laws*, 16 Bus. Law. 994, 999 (1961).

76. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

77. S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950).

the term "stock acquisition" was believed to include only acquisitions in the holding company sense.[78]

2. *Post Celler-Kefauver Amendment Period.*—In *Transamerica Corp. v. Board of Governors,*[79] a 1953 decision, the Third Circuit, relying heavily upon the reasoning of *United States v. South-Eastern Underwriter Ass'n,*[80] held the Clayton Act applicable to banking. This marked the first time that a court had considered the advancement of credit as being equivalent to "commerce"[81] and had thus brought banking within the antitrust law. However, until 1960, bank mergers could still be effected without federal approval, and where approval was required,[82] competitive effects were not evaluated by banking agencies. No effective administrative control existed to compensate for Sherman and Clayton Act weaknesses. Dissatisfaction with the Celler-Kefauver Amendment's failure to reach bank mergers was frequently expressed in Congress,[83] and the Justice Department requested that Congress amend section 7 so as to cover bank mergers specifically. At the same time, the banking agencies proposed that they be delegated power to consider competitive effects in evaluating merger applications.[84] By 1959, Congress, expressing "concern for the maintenance of vigorous competition in the banking system . . . [and a need for] legislation for uniform and effective regulation of mergers,"[85] adopted the banking agencies' proposal.

78. See Berle, *Banking Under The Anti-Trust Laws,* 49 COLUM. L. REV. 589, 591 (1949).

79. 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

80. 322 U.S. 533, 558 (1944). The court there held that the Sherman Act covered interstate insurance writing because "Congress wanted to go to the utmost extent of its Constitutional power . . . ."

81. See, *e.g.,* Nathan v. Louisiana, 49 U.S. (8 How.) 73, 81 (1850); Berle, *supra* note 78, at 590.

82. Act of Nov. 7, 1918, as amended, 12 U.S.C. § 32 (1964), requires the Comptroller of the Currency to approve mergers between two or more national banks. Sections 3 and 4 of this act, 12 U.S.C. §§ 34a, 34b(1964), likewise provide for Comptroller approval where a state bank merges into a national bank. Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c) (1964), requires federal approval of mergers involving insured and uninsured banks, or involving the merger of an insured bank into an insured state bank if the capital and surplus of the resulting bank are less than the aggregate of the capital and surplus of the participants. Since the capital and surplus of resulting banks are usually equal to the capital and surplus of constitutent institutions, FDIC approval is rarely required. None of the provisions of the Federal Reserve Act specifically dealt with mergers, but generally Federal Reserve Board approval must be obtained under Regulation H for maintenance of branches by resulting banks.

83. See, *e.g.,* S. REP. No. 196, 86th Cong., 1st Sess. 5 (1959); H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

84. See Funk, *Antitrust Legislation Affecting Bank Mergers,* 75 BANKING L.J. 369, 376-77 (1958).

85. S. REP. No. 196, 86th Cong., 1st Sess. 8 (1959).

B. *Bank Merger Act of 1960*

1. *Purpose and Provisions.*—The 1960 Bank Merger Act[86] was passed to combat a trend toward increased banking concentration and to reconcile policies of competition and stability in banking.[87] Responsibility for merger approval was delegated among three regulatory agencies—the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation.[88] This division of authority was to achieve evaluation of mergers "by the agency most thoroughly familiar with the bank involved."[89] The jurisdictional agencies were directed to request reports concerning "competitive factors involved" in proposed mergers from other banking agencies and the Attorney General.[90] Agency reports were designed to promote uniformity; the Justice Department's report was directed toward utilizing "the Justice Department's long years of experience in the anti-trust field."[91] Report requirements could be waived if immediate action was necessary "to prevent the probable failure of one of the banks."[92]

The 1960 act applied to all banks insured by the Federal Deposit Insurance Corporation.[93] Banking agencies were directed to evaluate:

> (1) the financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter . . . [t]he appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.[94]

86. The Bank Merger Act of 1960 amended section 1828(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c) (1964).

87. S. Rep. No. 196, 86th Cong., 1st Sess. 6 (1959).

88. H.R. Rep. No. 1416, 86th Cong., 2d Sess. 12 (1960). The regulatory agency to approve mergers is the Comptroller of the Currency when the resulting bank is a national bank; the Federal Reserve Board when the resulting bank is a state-chartered member of the Federal Reserve System; and the FDIC when the resulting bank is a state non-member of the Federal Reserve System.

89. H. R. Rep. No. 1416, 86th Cong., 2d Sess. 12 (1960).

90. 76 Stat. 953 (1962), 12 U.S.C. § 1828(c) (1964).

91. S. Rep. No. 196, 86th Cong., 1st Sess. 23 (1959); H. R. Rep. No. 1416, 86th Cong., 2d Sess. 13 (1960).

92. 76 Stat. 953 (1962), 12 U.S.C. § 1828(c) (1964).

93. Approximately 95% of banks in the United States are insured, and these banks hold 97% of the country's assets. See H. R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960).

94. 12 U.S.C. § 1828(c) (1964). The finding of public interest was tenuous in many merger cases. In approving an application under the 1960 act, the Federal Reserve Board stated: "In the present case . . . (the banking factors do not) weigh for or against approval, and there are both favorable and unfavorable considerations under

The 1960 Bank Merger Act does not affect state requirements for bank mergers.[95]

2. *Applicability of the Antitrust Laws.*—The 1960 act contains no express exemption from antitrust laws, nor is there a clause providing for continued antitrust law applicability despite agency merger approval. Construing this omission as a manifestation of congressional intent to preserve previous antitrust power, the Attorney General attacked agency-approved mergers under both the Sherman and Clayton Acts.[96] Clearly, Congress intended Sherman Act standards to have continued applicability to bank mergers under the 1960 act.[97] It was believed that section 7 did not apply to ordinary bank mergers, but that Sherman Act provisions did apply.[98] Section 7 standards were too stringent when applied to the unique structure of banking enterprises; and they were inappropriate to evaluate dangers of excessive competition among competing banks.[99] Since Sherman Act standards had been imposed infrequently against bank mergers,[100] possibility of conflict with agency-approved transactions appeared unlikely.

Under the 1960 Bank Merger Act, a merger might have anti-competitive effects and still promote "public interest"—the ultimate standard for evaluating bank mergers.[101] Theoretically, the act sought to establish a balancing process between competitive and banking factors. In practice, regulatory agencies found this solution unworkable due to extensive overlap between the competitive effects of merger and the "convenience and needs of the community."[102] Although the

the competitive factor. Although the decision is a close one, the Board feels that, on balance, permitting the merger . . . would beneficially stimulate competition . . . ." Liberty Bank & Trust Co., 49 FED. RESERVE BULL. 14, 16 (1962). See also Commercial & Savings Bank, 51 FED. RESERVE BULL. 821, 822 (1965); Union Trust Co., 49 FED. RESERVE BULL. 326, 328 (1963). The seven factor considerations specified in the Bank Merger Act of 1960 were not drafted specifically for the act but were taken from prior regulatory legislation. Federal Deposit Insurance Act § 6, 66 Stat. 633 (1952), 12 U.S.C. § 322 (1964); see H. R. REP. No. 1221, 89th Cong., 2d Sess. 4 (1966).

95. H.R. REP. No. 1416, 86th Cong., 2d Sess. 15 (1960).

96. See 6 ANTITRUST BULL. 55-56, 57-59 (1961).

97. See H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

98. S. REP. No. 196, 86th Cong., 1st Sess. 5, 20 (1959); H.R. REP. No. 1416, 86th Cong., 2d Sess. 9 (1960).

99. S. REP. No. 196, 86th Cong., 1st Sess. 20 (1959); Wemple & Cutler, *supra* note 75.

100. Due perhaps to the influence of United States v. Columbia Steel Co., 334 U.S. 495 (1948), only one action under § 1 of the Sherman Act was brought against bank mergers during the period 1950 to 1960 and this case was settled by consent decree. See United States v. Firstamerica Corp., *supra* note 65.

101. H.R. REP. No. 1416, 86th Cong., 2d Sess. 10-12 (1960).

102. *House Hearings* 707 (1965). The Federal Reserve Board attempted to clarify the categories by establishing three classifications: competitive effects, banking factors, and convenience and need. *Id.* at 384-91. The banking factors were composed of earnings, adequacy of capital, and adequacy of management while convenience and need of the community involved considerations such as expanded services and increased loan limits.

competitive factor was not defined by the 1960 act, reference to Clayton Act monopoly standards was intended.[103] However, the latter was not to be considered completely definitive of the former since: (1) increased competition in one market could cancel corresponding loss in another; (2) mergers were not to be invalidated solely on the basis of size;[104] and (3) past merger history was irrelevant in determining approval or rejection of proposed mergers.[105]

3. *Congressional Attempt at Uniform Bank Regulation Defeated by the Judiciary.*—The 1960 act intended that bank mergers be subjected to uniform standards appropriate to the banking industry.[106] "Competitive factor" reports were required "in the interest of uniform standards." In order to achieve this uniformity, agency approval should have been conclusive as to the legality of a proposed merger.[107] In *United States v. Philadelphia Nat'l Bank,*[108] section 7 of the Clayton Act was expanded to include bank mergers, and substantive standards different from banking agency standards were applied. *Philadelphia* held, *inter alia,* that "convenience and needs of the community" and other banking factors applied by regulatory agencies under the 1960 act would not be applied by the court in considering section 7 violations. The court stated:

> [a] merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. . . . Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike . . . .[109]

The Court reasoned further that:

> Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition, *read together,* reach mergers, which fit neither category perfectly but lie somewhere between the two

103. See 106 CONG. REC. 7258 (1960) (statement by Congressman Cellar).

104. A definite prejudice against size per se survives in our antitrust law. See United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

105. See 106 CONG. REC. 9713 (1960).

106. H.R. REP. No. 1416, 86th Cong., 2d Sess. 13 (1960); S. REP. No. 196, 86th Cong., 1st Sess. 2 (1959).

107. The House Report stated that the "bill vests the ultimate authority to pass on mergers in the . . . bank supervisory agencies." H.R. REP. No. 1416, 86th Cong., 1st Sess. 3 (1960). This position appears irreconcilable with congressional reports that the bill would not affect applicability of the Sherman Act to bank mergers. *Id.* at 9; S. REP. No. 196, 86th Cong., 1st Sess. 3 (1959). See also 105 CONG. REC. 8076, 8129, 8143 (1959).

108. United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348 (E.D. Pa. 1962), *rev'd,* 374 U.S. 321 (1963).

109. *Id.* at 371.

> ends of the spectrum . . . . So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.[110]

Under the *Philadelphia* holding, approved bank mergers could be attacked collaterally as violative of the Clayton Act.[111] In merger proposals, banking agencies applied the seven "banking factors" in the 1960 act, including, but not dominated by, anti-competitive considerations. "All of these seven factors must be considered and weighed together, and the merger should be approved only if, after consideration of all of these factors, the net result is in favor of the proposal."[112] Congress stated that the competitive factor should not receive greater emphasis than the other six banking factors.[113]

Subsequent to *Philadelphia*, the *Lexington* case[114] held that, where merging banks are major competitors in a relevant market, the elimination of significant competition between them constitutes a violation of section 1 of the Sherman Act. In the only other case to be decided under the 1960 act,[115] the intended merger was held to violate both section 1 and section 7. As a result of these decisions, 2,200 banks which had merged subsequent to the Celler-Kefauver

110. *Id.* at 342. This decision and its rationale caused much uncertainty as to the proper public policy for bank merger transactions. See, *e.g.*, Note, 77 HARV. L. REV. 81, 159-63 (1963); Williams, *Banking and the Antitrust Laws*, 81 BANKING L. J. 377 (1964).

111. The vulnerability of agency-approved merger to Clayton Act suits under the 1960 act was due, in part, to the restrictive judicial definition of product market as commercial banking. In United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964), the Supreme Court reaffirmed commercial banking as the "line of commerce" laid down in *Philadelphia*. Both cases measured the degree of concentration in commercial banking by examining the respective percent of commercial bank assets, deposits and loans held by merging banks and, based on these figures, made an approximation of the "commercial banking business" controlled. This test is consistent with the Court's apparent belief that demand deposits are the important factor reflecting uniqueness of the economic rule of banking services and products. Note 39 *supra* and accompanying text.

112. 106 CONG. REC. 9710-13 (1960) (remarks of Senator Fulbright).

113. The Senate Committee made "crystal clear its intention that the various banking factors in a particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling of the decision." S. REP. No. 196, 86th Cong., 1st Sess. 20, 24 (1959).

114. United States v. First Nat'l Bank & Trust Co., *supra* note 111, at 671-72 (1964). This holding was unexpected since it had been assumed that elimination of the acquired bank was merely one of several factors which determined whether a merger substantially lessened competition. See United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 951-53 (S.D.N.Y. 1965).

115. United States v. Manufacturers Hanover Trust Co., *supra* note 114. The court stated: "Thus, the Bank Merger Act [of 1960] would appear to sanction agency approval of a merger, even though it violated the antitrust laws, if, on a balance of all the designated factors, the agency decided that, nevertheless, it was in the overall public interest. A court, however, would be obliged to invalidate a merger found to violate the antitrust laws even though it served the public interest." *Id.* at 884.

Amendment, in reliance upon agency approval, were subject to divestiture. Congressional intent to provide special industry standards for determining the legality of bank mergers was judicially defeated.[116] In antitrust proceedings against approved mergers, the Justice Department proceeded as if the 1960 act did not exist; and courts referred to administrative banking factors only as they reflected special industry characteristics relevant to antitrust issues.[117] Supremacy of judicial standards in evaluating competitive effects of mergers was predicted by Mr. Justice Harlan's dissent in *Philadelphia*:

> The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy . . . the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not satisfactory a § 7 suit may be commenced immediately. The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar to banking . . . . The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.[118]

Evaluating mergers under broad regulatory standards where competition is one of several factors and testing the same transaction under antitrust laws solely or primarily on anti-competitive effects will inevitably result in conflicting decisions as to legality of the merger.

4. *Principal Defects of the 1960 Act.*—The 1960 act's major fault was failure to grant regulatory agencies authority to apply antitrust laws per se. This thwarted the congressional intent to premise bank merger legality upon a balanced assessment of competitive and banking factors.[119] Strict administrative control of anticompetitive bank mergers was not achieved.[120] Agency findings without antitrust con-

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116. See note 112 *supra.*

117. The *Philadelphia* case held that the traditional "failing company" doctrine, whereby a defendant can interpose as a defense the dangers to liquidity or solvency facing the acquired company, might have "somewhat larger contours" as applied to bank mergers. 374 U.S. at 372 n.46 (1963).

118. 374 U.S. at 384-85. Dissatisfaction with the *Philadelphia* and *Lexington* decisions led to a proposal that transactions approved under the 1960 Bank Merger Act be exempt from antitrust laws unless attacked by the Justice Department within 30 days of approval. S. REP. No. 299, 89th Cong., 1st Sess. 61965 (1965).

119. See 106 CONG. REC. 7257-59 (1960): "This (Bank Merger Act of 1960) puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger."

120. Between May 13, 1960, and May 12, 1965, the Federal Reserve Board approved 142 applications and denied 17; the Comptroller approved 450 and denied 12; and the FDIC approved 193 and denied only 2. See *Senate Hearings* 16-17. These approvals are unusual since the Justice Department had reported adverse competitive effects with

siderations were ineffectual and harmful to judicial efficiency. Furthermore, they created a trap for banks merging in good faith reliance upon agency approval.[121] Requesting "competitive factor reports" from other agencies by the jurisdictional agency did not result in application of uniform standards among banking agencies since some were more lenient than others in merger approval.[122]

The 1960 act was intended to immunize banks from direct antitrust law application.[123] Maximum competition was not regarded as an absolute goal, but rather a benefit to be considered in evaluating "public interest." Strengthening of weak or poorly managed banks and enlarging service capabilities of acquiring banks were equally relevant benefits. Preliminary responsibility for weighing these benefits was vested in specialized administrative agencies rather than delegated to general court competence.[124] The *Philadelphia* holding undermined the 1960 act's provisions and philosophy. Subsequent to *Philadelphia,* banking factors served as the basis for initial veto, but approved mergers could be attacked under antitrust laws where the sole criteria was competition. The balancing of competitive and banking factors provided for under the 1960 act was judicially superseded.

IV. An Analysis of the 1966 Amendment

A. *Purpose*

The 1966 amendment seems a clear response to the *Philadelphia* Court's refusal to balance social and economic advantages against

respect to 470 of the applications. *House Hearings* 175. An early attempt to cope with lack of uniformity was the "freeze agreement" which provided that banking agencies would not approve mergers as to which the Attorney General had filed an adverse opinion pending final decision of the *Philadelphia* case. *House Hearings* 211-12.

121. *Cf.,* United States v. Manufacturers Hanover Trust Co., *supra* note 114, at 885-86 where the court stated: "The obvious purpose of [the agency approval procedure of the Bank Merger Act of 1960] was to . . . enable customers, businessmen, and the community to place confidence in the lawfulness and stability of approved mergers"; and that a construction of the *Philadelphia* case which permits agency approval to be totally disregarded in a subsequent antitrust action "turn[s] the Bank Merger Act into a trap so repugnant to fundamental fairness that it would make a mockery of a court of equity."

122. Although Congress recognized that under pre-1960 law refusal by one agency to approve merger application might result in conversion of the applicant to a status which would bring it under the jurisdiction of a more lenient agency, it was assumed that interagency "competitive factor reports" would reduce forum-shopping. See, *e.g.,* S. Rep. No. 196, 86th Cong., 1st Sess. 15, 23 (1959); H.R. Rep. No. 1416, 86th Cong., 2d Sess. 12-13 (1960). This assumption was incorrect. See, *e.g.,* Wall St. J., Aug. 5, 1964, p. 10, col. 2.

123. Kaysen & Turner, Antitrust Policy 42 (1959), includes commercial banking in the category of industries exempt from antitrust laws.

124. 106 Cong. Rec. 7188 (1960).

competitive disadvantages of merger transactions.[125] The amendment's purpose is to provide a single substantive standard for determining bank merger validity to be applied both by banking agencies and courts.[126] This standard includes antitrust and banking criteria,[127] and embodies the balanced-judgment approach of the 1960 act—*i.e.*, the "reckoning of social and economic debits and credits" in merger proposals. Mergers violative of section 2 of the Sherman Act may not be approved under any circumstances.

B. *Substantive Standards*

The 1966 amendment differs from the 1960 act in emphasis rather than substantive change. Banking factors utilized in the 1960 act are present in the amendment, but the emphasis is upon balancing the "convenience and needs" criteria against anti-competitive effects (if any) of proposed mergers.[128] To effectuate this balancing process, the amendment provides for consideration of: (1) the merging institutions' financial resources; (2) managerial resources; and (3) future prospects of existing and proposed institutions.

125. "The bill before us will reinstate the manifest congressional design and intent of the 1950 and 1960 Acts. It will strike the Philadelphia, Lexington, and New York decisions and opinions from the books . . . . The legislative history . . . should convince the courts that Cougress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other institutions . . . . We do not want the court to say as it did in the Philadelphia case, that a merger which may substantially lessen competition in one line of business in one section of the country is not saved because, on some ultimate reckoning of social debits and credits it may be deemed beneficial. We do not want the court to apply a statute which . . . proscribes 'auticompetitive mergers, the benign and the malignant alike.'" 112 CONG. REC. 2540-41 (daily ed. Feb. 9, 1966).

126. H.R. 12173, 89th Cong., 2d Sess. (1966) § 1(a): "(B) In any judicial proceeding attacking a merger approved (by the appropriate banking agency) on the ground that the merger transaction alone and of itself constituted a violation of any anti-trust laws other than section 2 (of the Sherman Act), the standards applied by the court shall be identical with those that the banking agencies are directed to apply . . . ."

127. H.R. 12173, 89th Cong., 2d Sess. (1966) § 2(c): "(c) Any court having peuding before it on or after the date of the Act and litigation instituted under the anti-trust laws by the Attorney General after June 16, 1963, shall apply the substantive rule of law (that the approving agencies are directed to apply under the Amendment)."

128. The Bank Merger Act of 1960 listed seven co-equal banking and competitive factors. The amendment makes the administrative standards of the 1960 act applicable to judicial antitrust proceedings. "The bill reaffirms, by establishing a clear set of standards, what the Congress sought to do six years ago. These standards are not essentially different from the criteria set up in the Bank Merger Act of 1960. Under the latter act, the banking agencies must weigh the competitive impact in relation to six banking factors in arriving at an ultimate decision to approve or reject a merger application. The banking agencies, however, were to have the final say in a merger case. H.R. 12173 establishes basically the same ground rules, but it more precisely states the conditions under which the banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore, the bill gives the courts clear guidelines for weighing banking factors against competitive factors." 112 CONG. REC. 2335 (daily ed. Feb. 8, 1966) (remarks of Congressman Widnall).

Mergers consummated prior to the *Philadelphia* decision are granted antitrust immunity regardless of whether or not they are involved in pending litigation.[129] Mergers consummated subsequent to *Philadelphia,* and subject to pending litigation, are judged by standards applied to future mergers.[130] Notice of proposed mergers must be published in those communities where merging banks maintain offices in order to provide residents an opportunity to express their views,[131] and "competitive factor" reports must be obtained from other banking agencies and from the Attorney General.[132] Agency approval is still required for future mergers, and those violating section 2 of the Sherman Act must be disapproved.[133] Substantially anti-competitive mergers are prohibited, but an exception is made where it clearly appears that a proposed combination is so beneficial to the community's convenience and needs that public interest would be better served through merger.

Subsequent to the earliest date on which approved mergers may be consummated (usually thirty days after agency approval), the merger may not be judicially attacked as violating antitrust laws per se, unless there is a section 2 violation of the Sherman Act.[134]

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129. H.R. REP. No. 299, 89th Cong., 1st Sess. 7 (1965); 112 CONG. REC. 2538 (daily ed. Feb. 9, 1966); Pub. L. No. 356, 89th Cong., 2d Sess. (Feb. 21, 1966). Mergers consummated before *Philadelphia* are "conclusively presumed" not to constitute antitrust violations; a post-*Philadelphia* merger cannot "alone and of itself" constitute violation. This phraseology may eliminate use of prior merger history in bank merger cases. Clearly, in non-bank merger antitrust suits past acquisitions may be used to show the intent of the acquiring company. See United States v. Columbia Steel Co., 334 U.S. 495, 532 (1948). By exempting mergers consummated prior to *Philadelphia,* § 2(a) of the 1966 amendment to the Bank Merger Act immunized several previously invalidated mergers. See Comment, 15 CATHOLIC U.L. REV. 69, 90 (1966).

130. See H.R. REP. No. 1221, 89th Cong., 2d Sess. 4-5 (1966). Since bank mergers effected prior to *Philadelphia* occurred when banks had reasonable grounds to rely upon agency approval, Congress felt that these banks had acted in "good faith" and should not be forced to suffer divestiture. The issue of "good faith" reliance by banks prior to *Philadelphia* is debatable. See *House Hearings* 38, 173, 195, 960-61.

131. *House Hearings* 161-63.

132. Banks desiring to merge must file a detailed application form containing such information as the bank's financial and management situation, the reasons for merging, the new services which will be offered, and considerations relevant to competition. Informal negotiations are utilized to settle merger issues, rather than formal hearings. See 1 DAVIS, ADMINISTRATIVE LAW § 4.04 (1958). See *House Hearings* 1357-1416, for sample forms.

133. 76 Stat. 953 (1962), 12 U.S.C. § 1828(c) (1964); H.R. REP. No. 1416, 86th Cong., 2d Sess. 12 (1960). Preservation of § 2 in the 1966 amendment has been interpreted to indicate that banking monopoly can never be consistent with "public interest." See S. Doc. No. 1698, 89th Cong., 1st Sess. (1965). No bank merger has ever been held violative of § 2 of the Sherman Act.

134. Paragraph (7) of the amendment establishes a statute of limitations for antitrust actions and no particular plaintiff is specified. The statute will run against both governmental and private litigants. The wisdom of a statute of limitations is reflected by problems of divestiture in bank merger cases. See Funk, *Antitrust Legislation Affecting Bank Mergers,* 75 BANKING L.J. 369, 381 (1958).

In emergency situations, the interim between agency approval and merger consummation may be reduced to five days. If one bank is threatened with financial failure, merger may be effected immediately and antitrust immunity is extended, except for section 2 suits.[135] Institution of a timely suit under paragraph (7)(A) automatically suspends agency approval unless otherwise provided by the court.[136] Courts must review issues de novo and apply the same substantive standards applied by banking agencies under paragraph 5.[137] Under section 3 of the 1966 amendment, banks may renew merger applications formerly withdrawn due to Justice Department opposition.[138]

1. *The Monopoly Standard of Paragraph 5(A).*—Under paragraph 5(A) the jurisdictional agency may not approve "any proposed merger transaction which would result in a monopoly or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States." The 1960 Bank Merger Act did not contain a strict prohibition against approval of monopolistic mergers. Paragraph 5(A) states the illegality standard employed in section 2 and strengthens considerably the monopoly standard embodied in the 1960 act.

2. *The Competitive Standard of Paragraph 5(B).*—The jurisdictional agency may not approve "any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade," unless the anti-competitive effects are clearly outweighed in the public interest by the

135. See H.R. REP. No. 1221, 89th Cong., 2d Sess. 4-5 (1966). Potential failure of merging banks would probably be a valid defense to antitrust suits. 374 U.S. 321, 372 n.46 (1963).

136. The 1966 amendment's provision permitting courts to lift an automatic stay of agency approval is intended to deprive the Justice Department of absolute veto power over most mergers. 112 CONG. REC. 2539 (daily ed. Feb. 9, 1966). The burden of proof rests with banks on motion to lift stay of approval. 112 CONG. REC. 2334 (daily ed. Feb. 8, 1966).

137. Representative Patman explained that the court is to make a decision "completely on its own," based upon evidence before it, and is not to give any weight to agency determination. 112 CONG. REC. 2335 (daily ed. Feb. 8, 1966). See also H.R. REP. No. 1221, 89th Cong., 2d Sess. 1 (1966). There is serious doubt whether this statement reflects congressional intent as to the scope of judicial review of agency approved mergers. See H.R. REP. No. 1221, 89th Cong., 2d Sess. 1 (1966): "[T]he legal effects of the bill may be summarized as follows: (1) The bill would establish a single set of standards for the consideration of future mergers by the banking agencies, the Department of Justice, and the courts . . . which include both the effect of the merger on competition and the convenience and needs of the community to be served." Representative Patman's statement would appear to open bank mergers to collateral attack under antitrust laws reminiscent of *Philadelphia*.

138. H.R. REP. No. 1221, 89th Cong., 2d Sess. 7 (1966).

convenience and needs of the community to be served. Pragmatically, "any section of the country" in which competitive effect is measured should be co-extensive with "community to be served." Congress did not intend to limit "community to be served" to that geographical area within which state law would permit banks to establish branches.[139] In defining "community to be served," Senator Robertson stated:

> This means the entire area to which services are or could be supplied by the proposed merged institution, and such area is of course not limited by city, county or state geographical boundaries . . . . ; the emphasis here should properly be on the words 'to be served' . . . Artificial boundary lines, branching areas limited in one way or another by the different States have little or no significance.[140]

The phrase "may be substantially to lessen competition or to tend to create a monopoly" is identical to section 7 of the Clayton Act; and "in restraint of trade" is derived from section 1 of the Sherman Act. This use of prior antitrust language was "not merely a coincidence"; it was intended to demonstrate that antitrust standards (relative to competition) which have developed through judicial decisions are now incorporated into the 1966 amendment.[141] The 1966 amendment's legislative history indicates that the phrase "convenience and needs" was adopted to alleviate "floundering" or "stagnating" banks and to emphasize the importance of considering the acquired bank's service to customers and the community generally.[142] The amendment does not specify whether convenience and needs of the community must totally outweigh any anti-competitive effect or need only reduce the merger's overall impact below a substantial lessening of competition.

3. *Relevant Market Standards.*—Although established competitive standards are utilized in the 1966 amendment, relevant market concepts are changed substantially. Under antitrust theory, the relevant market is composed of two elements: the product and services market which is denominated by the phrase "line of commerce"; and the geographic market which encompasses "section of the country"—*i.e.*,

139. 112 CONG. REC. 2542 (daily ed. Feb. 9, 1966).

140. 112 CONG. REC. 2549-50 (daily ed. Feb. 9, 1966). Although *Philadelphia* defined a four-county area in which branching was permitted as the "section of the country," the logical extension of such a standard would limit competition to a single city block in a unit (non-branching) state.

141. 112 CONG. REC. 2337 (daily ed. Feb. 8, 1966).

142. It was repeatedly stated during debates that one purpose of the amendment was to permit elimination of inefficient banks, in order to improve service quality to customers of the acquired bank. See 112 CONG. REC. 2335, 2338 (daily ed. Feb. 8, 1966) (statements of Congressman Widnall and Congressman Reuss); *House Hearings* 14 (statement of William M. Martin).

the area in which both companies operate and product interchangeability exists.[143] Since merger validity may depend upon percentage evaluations of market concentration, relevant market definition is vital. Determining competitive effects of proposed mergers (as distinguished from the weight accorded it) involves factual inquiry into market reality.[144]

(a) *Product Market.*—Legislative history indicates that the *Philadelphia* Court's definition of product market as "commercial banking" is expanded under the 1966 amendment to cover financial institutions providing the same or similar services.[145] Criticism of the Supreme Court's refusal in *Philadelphia* to include non-commercial banking enterprises in the line of commerce was expressed in Congress.[146] In spite of the legislative history, however, it is doubtful that the 1966 amendment has effectively changed the definition of line of commerce

143. See Brown Shoe Co. v. United States, 370 U.S. 294 (1961); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1957). See also Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Acts: Two New Cases—Two Different Views*, 47 VA. L. REV. 1014 (1961).

144. United States v. Aluminum Co. of America, *supra* note 104; United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). Although no precise method of measuring effects of mergers upon competition has been found, Bok, *Section 7 of the Clayton Act and The Merging of Law and Economics*, 74 HARV. L. REV. 226, 238-49 (1960), the per cent of market held by the resulting corporation considered with respect to "the strength of the remaining competition" is an important factor. It is therefore necessary to delimit the market in which change has occurred. United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948).

145. *Cf.*, Statement by Senator Robertson: "The text of paragraph (B) of the new bill follows the terms of Section 1 of the Sherman Act and Section 7 of the Clayton Act, with the exception that the reference to 'any line of commerce' in the Clayton Aet is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an apprasial of the *overall effects* of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts . . . are not intended and are not permitted to seleet some single, perhaps minor aspeet of the bank's business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions whieh may result from other aspects of the merger are irrelevant and may not be eonsidered." 112 CONG. REC. 2541 (daily ed. Feb. 9, 1966).

146. See, *e.g.*, 112 CONG. REC. 2541 (daily ed. Feb. 9, 1966); 374 U.S. at 356-57 (1963). The *Philadelphia* Court acknowledged that other financial institutions supply credit and hence are more or less in competition with commercial banks, (374 U.S. at 326 n.5), but the Court found commercial banks to be unique among financial institutions: "[T]hey alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply. Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions . . . . [B]anks are the chief source of the country's short-term business credit." *Id.* at 326. For discussions as to how line of commerce should be defined see Shull, *Commercial Banking as a "Line of Commerce,"* 1 NAT'L BANKING REV. 187 (1963); Note, 75 HARV. L. REV. 756, 773-74 (1962). See generally KAYSEN & TURNER, ANTITRUST POLICY 131, 134-35 (1959).

established in *Philadelphia* and *Lexington*. These cases analyzed percentages of commercial bank assets, deposits and loans to make an approximation of the "commercial banking business" controlled.

(b) *Geographic Market.*—In resolving section 1 and section 7 issues, acquisitions must be evaluated against competitive effects within some particular area of the country. This geographic market must be based on a "pragmatic factual approach and not a formal legalistic one,"[147] and must "correspond to commercial realities."[148] The *Philadelphia* Court indicated relevant geographic market should be based on geographic structure of the supplier-customer relationship.[149] While section 7 prohibits mergers that have anti-competitive effects "in any line of commerce in any section of the country," paragraph 5(B) forbids mergers "whose effects in any section of the country" may be substantially anti-competitive. Under section 7, the phrase "in any line of commerce" permits, in non-bank merger cases, the testing of mergers in a sub-market of some broader area of competition.[150] Deletion of "in any line of commerce"[151] was intended to require evaluation of the merger's *overall impact* on competition and to implement the balancing process implicit in the 1966 amendment. This will not exonerate anti-competitive mergers, but anti-competitive effects in a sub-market will not defeat mergers otherwise beneficial to the community. The achievement of uniform results depends upon application of identical relevant geographic and product market concepts by agencies and courts.[152]

4. *Balancing Factor of Paragraph 5(B).*—If a proposed merger may substantially lessen competition, it must be determined whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Senator Robertson stated that competitive factors must be considered equally with convenience and needs of the community,

147. Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1961).

148. American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

149. 374 U.S. at 358. "In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance." See also Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3d Cir. 1953).

150. See Brown Shoe Co. v. United States, *supra* note 143, at 325.

151. Senator Robertson stated that omission of "in any line of commerce" was designed to require appraisal of overall competitive effects. 112 CONG. REC. 2541 (daily ed. Feb. 9, 1966).

152. 112 CONG. REC. 2542 (daily ed. Feb. 9, 1966). See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

neither being decisive of merger legality.[153] In authorizing a consideration of benefits resulting from anti-competitive mergers, prior antitrust law has been altered.[154] The basic policy that competition best serves the convenience and needs of the community is reflected in the 1966 amendment's requirement that merging banks establish benefits to the community which "clearly outweigh" anti-competitive effects.[155] Under a "convenience and needs" criterion, improved services through increased size and efficiency are valid grounds for approving mergers.[156] Financial and managerial services, and future prospects of existing and proposed institutions are relevant in analyzing capacity to serve the community.[157] Banks in failing, or precarious, positions may merge with impunity since they would not be adequately serving community needs and anti-competitive effects would be *de minimis.* Substantially anti-competitive mergers, on the other hand, would not in all probability be in the public interest, and approval would be denied.[158]

Although substantially anti-competitive mergers will not be approved, the amendment does not provide criteria for determining whether "convenience and needs" clearly outweigh anti-competitive harm. The antitrust basis against accumulation or exercise of market power[159] requires that the benefits of an anti-competitive merger be substantial to justify agency approval.

5. *Relevance of Competitive Factor When Merger Not Substantially Anti-competitive.*—The competitive factor is important even when proposed mergers are not substantially restrictive of competition, thus avoiding application of paragraph 5(A) or (B). Paragraph 5 does not provide expressly for consideration of competition per se but this is implicit in requiring consideration of community convenience and needs. Paragraph 5 provides: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institu-

153. 112 CONG. REC. 2538 (daily ed. Feb. 9, 1966).

154. See H.R. REP. No. 1221, 89th Cong., 2d Sess. 3-4 (1966).

155. The burden of establishing that anticompetitive mergers would be in the public interest is substantial. In presenting the amendment to the House, Representative Patman stated that it was intended to place a "heavy burden" upon banks and any exception to antitrust standards would "indeed be rare." 112 CONG. REC. 2334 (daily ed. Feb. 9, 1966); see also H.R. REP. No. 1221, 89th Cong., 2d Sess. 3-4 (1966).

156. See *House Hearings* 77, 521, 713. The argument was made in *Philadelphia* that the resulting bank would better compete with New York banks for large business and industrial loans because of increased lending limits.

157. H.R. REP. No. 1221, 89th Cong., 2d Sess. 4 (1966). Present antitrust law provides that an otherwise unlawful merger may be justified by proof of "the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position." Brown Shoe Co. v. United States, *supra* note 143, at 346.

158. See Holland, Smith, Hall & Smith, *Research Into Banking Structure & Competition,* 50 FED. RESERVE BULL. 1383 (1964).

159. See KAYSEN & TURNER, ANTITRUST POLICY 44-45 (1959).

tions, and the convenience and needs of the community to be served."[160]

C. *Additional Considerations*

1. *"Positive Repugnancy" of 1966 Amendment and Antitrust Laws.* —A strong argument could be made that antitrust language utilized in the 1966 amendment was intended to reject court imposed supremacy of antitrust principles. After incorporating anti-competitive provisions of the Sherman and Clayton Acts in the amendment, the act authorizes the balancing of competitive effects against "convenience and needs of the community to be served." If the latter outweighs the adverse effects upon competition (if any), a proposed merger may be approved; and the court, in assessing merger legality must apply "standards . . . identical with those that the banking agencies are directed to apply under paragraph (5)."[161] This standard is "the substantive rule of law" for bank mergers.[162]

Under the reasoning of *United States v. Borden Co.*,[163] when a subsequent regulatory statute such as the 1966 amendment is "positively repugnant" to antitrust laws, the latter must be superseded. The positive repugnance of section 1 and section 7 with the 1966 amendment is apparent. Attempting to reconcile a "substantive rule of law," under which public interest denominated as "convenience and needs of the community" may outweigh adverse competitive effects, with antitrust laws, under which courts "invalidate a merger found to violate the antitrust laws even though it served the public interest,"[164] is impossible. Since agencies now have authority to determine anti-

160. The competitive factor and convenience and needs faetor were listed separately in the 1960 Bank Merger Act as they are in paragraph 5(B) of the 1966 amendment.

161. Paragraph (7) (B) provides: "(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act 15 U.S.C. § 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)." 12 U.S.C. § 1828 (7) (B) (1965).

162. Section 2(c) of the 1966 amendment states: "Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption or liabilities of an insured bank consummated after June 16, 1963, shall apply the *substantive rule of law* set forth in Section 18(c) (5) . . . ." 12 U.S.C. § 1828(c) (1964), as amended, 80 Stat. 10 (Feb. 21, 1966).

163. 308 U.S. 188, 197-206 (1939). The Court in United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 879 (S.D.N.Y. 1965) stated: "In United States v. Borden Co., 308 U.S. 188, 197-206, the Court emphasized that when a later regulatory statute, such as the Bank Merger Act (of 1960) shares common ground with the antitrust laws, we should not resort to repeal of the antitrust laws by implication unless there is a 'positive repugnancy' and then only to the extent of the repugnancy . . . ."

164. United States v. Manufacturers Hanover Trust Co., *supra* note 163, at 884.

trust issues "as such" under the competitive standard of paragraph 5(B), their findings should be presumptively correct as to competitive effects of proposed mergers.[165] Agency evaluation of the competitive factors is guided by antitrust principles and, as stated in *Philadelphia,* the traditional "failing company" doctrine, whereby dangers to liquidity or solvency may be utilized as a defense to antitrust actions, might "have somewhat larger contours" as applied to bank mergers.[166]

2. *Weight of Banking Agencies' Decisions.*—Significantly, in *Philadelphia, Lexington* and *Manufacturers-Hanover,* the courts admittedly utilized standards separate from those applied by banking agencies to test merger legality under the 1960 act.[167] Agency findings on anti-competitive effects of merger were not considered conclusive by courts. The 1966 amendment directs courts to apply the same standards employed by banking agencies.[168] Since impartial agency decisions are doubtful,[169] courts should continue to re-examine the weight which agencies accord to competitive factors of merger. This supervision will avoid substantially anti-competitive combinations which violate the public interest as well as the provisions of the 1966 amendment.

3. *Jurisdiction Over Stock Acquisitions.*—The 1966 amendment provides that no insured bank may "merge or consolidate with any

165. Compare United States v. Manufacturers Hanover Trust Co., *supra* note 163, at 880.

166. 374 U.S. 370, 372 n.46. Under non-bank merger antitrust principles, International Shoe Co. v. FTC, 280 U.S. 291 (1930), established as a defense to § 7 of the Sherman Act that if, before merger, "there being no other prospective purchasers," one of the firms "faced the grave probability of business failure." When the Clayton Act was amended in 1950, Congress expressed approval of the "failing company doctrine" and indicated intent to preserve it as a permanent principle of antitrust law. See H. R. REP. No. 1191, 81st Cong., 1st Sess. (1949); S. REP. No. 1175, 81st Cong., 2d Sess. (1950). The Supreme Court reaffirmed the doctrine in United States v. Brown Shoe Co., *supra* note 143.

167. See United States v. Manufaeturers Hanover Trust Co., *supra* note 163, at 881.

168. The Justice Department's limited knowledge of banking problems was recognized by Congress: "[I]t is clear that the Federal bank supervisory agencies have more intimate knowledge of banking competition than any other agency of Covernment. Yet, those who want the final word left up to the Justice Department would, in its practical application, deny the public the expert knowledge these banking authorities bring to bear on a bank merger case." 112 CONG. REC. 2338 (daily ed. Feb. 8, 1966). Likewise, Congressman Ottinger, an author of the 1966 amendment stated: "The Justice Department has no real interest or expertise in applying banking factors, while the agencies do." 112 CONG. REC. 2349 (daily ed. Feb. 8, 1966).

169. Other agencies set up to regnlate industries in the public interest have often regulated in the industry's interest. See CELLHORN & BYSE, ADMINISTRATIVE LAW 1011-15 (4th ed. 1960). In the first action filed under the 1966 amendment, the Comptroller indicated partiality toward the banking position. See Wall St. J., April 1, 1966, p. 5, col. 2.

other bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank." The *Philadelphia* Court stated that the 1960 Bank Merger Act "applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions."[170] Congressional intent is enigmatic as to whether one bank may acquire stock of another and avoid regulation,[171] but since there is an established distinction between assets and stock acquisitions it would appear that the 1966 amendment leaves acquisitions by one bank of the stock of another bank unregulated.

4. *Agency Performance Under 1966 Amendment.*—Paragraph 5 prohibitions apply only if anti-competitive effects are shown—a finding the agencies have consistently failed to discern despite adverse competitive reports by the Justice Department.[172] Since the phrase "in any line of commerce" is deleted from the 1966 amendment, agency discretion is greatly augmented: they may find anti-competitive effects in one market offset by benefits in another; and when substantial anticompetitive effects are found, the balancing test may immunize the transactions. Uniformity between banking agencies and court decisions is fortuitous since standards are not provided to determine whether: (1) there is a substantial lessening of competition; (2) benefits in one market offset harmful effects in another; and (3) community benefits clearly outweigh anti-competitive effects. Likewise, agency definition of relevant market is broad while courts tend to apply a narrower market concept.[173]

V. Conclusion

The 1966 amendment has failed to answer specifically the question of whether, and to what extent, the antitrust laws should apply to banking. Congress has chosen to rely upon vague concepts such as the "community to be served," "competitive factors," "convenience

170. 374 U.S. 321, 344-45 n.22 (1963).

171. Under the Bank Holding Company Act of 1956, a holding company is defined as one which "directly or indirectly owns, controls, or holds with power to vote, 25 percentum or more of the voting shares of each of *two or more* banks." 70 Stat. 133 (1956), 12 U.S.C. § 1841(a) (1) (1964). Acquisition of the voting shares of a single bank might make the acquiring bank a "holding company affiliate" within the meaning of § 2 of the Banking Act of 1933, 48 Stat. 162, as amended, 12 U.S.C. § 221a (1964), thereby requiring permission from the Federal Reserve Board to vote the acquired stock.

172. *Senate Hearings* 16-17; *House Hearings* 187, 712.

173. The Board of Governors of the Federal Reserve System has considered services available from sources other than commercial banks. "Non-banking financial institutions are extremely active . . . and provide a significant amount of competition for real estate mortgage loans and installment loans. . . . Strong and effective competition will

and needs," and "public interest." Unfortunately, these concepts remain undefined. Agency discretion, in effect, is unlimited.

The significant changes from the 1960 Bank Merger Act are: (1) agencies now decide antitrust issues per se, and (2) courts apply the same substantive standards as the banking agencies. The substantive standard is based on the balancing of competition against the convenience and needs of the community to be served. Merger approval or rejection based on this test will assuredly depend upon to whom the adjudicating task falls. Just as the three banking agencies disagree among themselves as to standards of strictness,[174] so the agencies and the courts will tend to evaluate competitive effects with varying degrees of emphasis. Courts will undoubtedly emphasize competitive aspects of merger despite the admonition of section 2(c) of the 1966 amendment that identical substantive standards be applied by courts and agencies. Furthermore, deletion of the words "in any line of commerce" fails to indicate whether the *Philadelphia* definition of "commercial banking" as the line of commerce remains applicable.

It is doubtful that the 1966 amendment will solve the myriad problems involved in bank merger regulation. This may be attributed to the reluctance of Congress to consider the underlying question of competition versus regulation as the best method of maintaining a sound banking system. A complete re-evaluation of the banking regulatory structure is needed with a view toward establishing a single final arbiter for merger adjudication. The dual authoritative system of banking agencies and courts maintained under the 1966 amendment is inadequate.

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continue to be maintained by a variety of banking and other financial institutions . . . which offer a wide range of services to the residents and businesses of the community." West Branch & Trust Co., 49 FED. RESERVE BULL. 1512, 1514 (1963). See also Riverside Trust Co., 51 FED. RESERVE BULL. 819 (1965).

174. See note 122 *supra*.