Statement of

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before the

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Thank you for the opportunity to discuss the Federal Reserve's role in enforcing the antitrust laws in the banking industry. The Board has for many years played an active role, and one that complements the Department of Justice ("DOJ"), in assessing the competitive effects of proposed bank acquisitions and mergers in the United States. In my remarks, I will provide a brief history of the statutory and judicial framework for the Board's review of the competitive impact of bank acquisitions and mergers and describe how the Board currently analyzes bank mergers and acquisitions under this framework. In addition, I will highlight some of the special antitrust-type rules that apply only to banks and review the legislative recommendations that the Board has made to streamline the competitive review process in bank mergers and acquisitions.

The Board's role in reviewing bank mergers and acquisitions emanates principally from two sources: the Bank Holding Company Act of 1956 ("BHC Act")[1] and the Bank Merger Act ("Merger Act").[2] The BHC Act requires that a bank holding company—that is a company that owns more than 25 percent of any class of voting shares of a bank or that otherwise controls a bank—obtain the Board's approval prior to acquiring an additional bank. The Merger Act requires that the surviving depository institution in a proposed depository institution merger obtain the prior approval of its appropriate Federal bank supervisor. The Board shares responsibility under the Merger Act for reviewing merger proposals with the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of Thrift Supervision ("OTS"). The Board is the appropriate banking agency for Merger Act transactions where

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[1] 12 U.S.C. §§ 1841 et seq.

[2] 12 U.S.C. § 1828(c). A separate statute, the Change in Bank Control Act (12 U.S.C. § 1817(j)), requires that a person (including an individual) provide the appropriate Federal banking agency prior notice before acquiring direct or indirect control of an insured depository institution or depository institution holding company. Competitive issues rarely arise in transactions under the Change in Bank Control Act and, for that reason, my remarks will focus on transactions under the BHC Act and Merger Act.

the surviving institution is a state member bank.[3] While the four banking agencies have identical statutory responsibilities under the Merger Act in our areas of respective jurisdiction, my remarks today are limited to the manner in which the Board of Governors reviews bank merger and acquisition proposals under its purview.

Importantly, the BHC Act and Merger Act require the Board to review the competitive effects of each application filed under these statutes and prohibit agency approval of a transaction if the agency finds that the transaction would violate the antitrust standards embodied in these statutes.[4] Unlike DOJ, the Board can not and does not have the discretion to review only those transactions that involve large organizations or that occur in particular markets. In 2004 alone, the Federal Reserve considered 649 bank merger and acquisition proposals under these acts. We devote considerable care and substantial resources to analyzing individual merger applications, and coordinate our review with the review conducted by the DOJ under the Clayton and Sherman Acts.

Although not the focus of my remarks, I should note that the Board also plays a role in reviewing the competitive effects of proposed acquisitions of nonbank firms by bank holding companies under section 4(c)(8) of the BHC Act. That section permits bank holding companies, with the Board's prior approval, to acquire nonbank firms that are engaged in activities that the Board has determined to be "so closely related to banking as to be a proper incident thereto."[5] In considering whether to approve a nonbanking transaction under section 4(c)(8), the Board must consider whether the bank holding company's conduct of the proposed nonbanking activities can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition or gains in

[3] The OCC, FDIC or OTS is the responsible agency to review a Merger Act transaction where the surviving institution is a national bank, a state non-member bank or a savings association, respectively.
[4] See 12 U.S.C. §§ 1828(c)(5), 1842(c)(1).
[5] See id. at § 1843(c)(8).

efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests or unsound banking practices.[6] Nonbank acquisitions that require the Board's approval under section 4(c)(8) of the BHC Act are subject to a streamlined filing process under the Hart-Scott-Rodino Act ("HSR Act"). Under this process, the acquiring bank holding company does not have to prepare a separate HSR Act filing (and pay the related fees), but must provide the DOJ and the Federal Trade Commission ("FTC") with a copy of its submission to the Board at least 30 days prior to consummation of the proposed transaction.[7] This process ensures that the DOJ and FTC are aware of the transaction and have an opportunity to review it under the antitrust laws.

The Board's role in reviewing nonbank transactions has declined following passage of the Gramm-Leach-Bliley Act of 1999 ("GLB Act").[8] That act amended the BHC Act to allow bank holding companies that meet certain capital, managerial and other criteria (referred to as "financial holding companies) to acquire companies engaged in a wider range of nonbanking activities that are found to be "financial in nature" or incidental thereto, and permits financial holding companies to make such acquisitions without the Board's prior approval.[9] Due in large part to this streamlined Federal Reserve notice process available to financial holding companies, the number of nonbank acquisition proposals reviewed by the Federal Reserve declined from 450 in 1999 to 144 in 2004. Nonbank acquisitions made by financial holding companies under the new post-consummation notice procedures established by the GLB Act are not exempt from

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[6] See id. at § 1843(j)(1)(A) and (2)(A).

[7] See 15 U.S.C. § 18a(c)(8).

[8] Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[9] See 12 U.S.C. § 1843(k)(1)(A) and (6)(b). A financial holding company, however, must notify the Board within 30 days after acquiring a nonbanking company under the GLB Act's new authority.

the HSR Act's filing requirements and are subject to review by the DOJ and FTC under the antitrust laws.[10]

Development of Competitive Analysis in Banking

When initially enacted, competition was only one of several factors that the Board was required to consider and balance under the BHC Act (1956) and Merger Act (1960). Other factors included the financial condition and managerial character of the organizations, the effect of the transaction on the convenience and needs of the community and the future prospects of the organization. The law and judicial precedents gave little guidance as to how the Board should assess or weight the potential competitive effects of a proposal. In fact, at the time these statutes were enacted, it was unclear how the federal antitrust laws applied to bank transactions since bank acquisitions were largely accomplished by bank-to-bank mergers and mergers were, as a general rule, thought to be outside the purview of the Clayton Act.

The Supreme Court's seminal 1963 decision in United States v. Philadelphia National Bank[11] changed all this. In Philadelphia National, the court determined that section 7 of the Clayton Act (15 U.S.C. § 18) does apply to bank combinations. This decision rendered the banking agencies' review of the competitive effects of bank-to-bank mergers under the Merger Act largely superfluous. It also raised concern that bank mergers might be challenged by the DOJ after approval by the banking agencies and consummation of the transaction by the parties.

Congress, however, determined that the banking agencies should continue to play an important role in reviewing the competitive effects of bank mergers and acquisitions. Specifically, in 1966, Congress amended both the BHC Act and Merger Act in three key respects. First, it amended the antitrust standards in the

[10] See 15 U.S.C. § 18a(c)(8).

[11] 374 U.S. 321 (1963)

BHC Act and Merger Act to mirror the standards in section 2 of the Sherman Act (15 U.S.C. § 2) and section 7 of the Clayton Act.[12]

Second, in recognition of the critical and unique role that banks play in communities and the importance of ensuring that banks operate in a safe and sound manner, Congress specifically authorized the banking agencies to approve a bank merger or acquisition that would otherwise violate the standards of the Clayton Act if the banking agency finds that "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."[13] In adopting this exception, which is not included in the general antitrust laws, Congress found that "the public interest [may] sometimes be served by a bank merger even though the merger lessened competition."[14] The Board has used this exception on rare occasions, primarily involving acquisitions of troubled banks.[15]

Third, Congress determined that it was important to provide certainty to bank mergers and avoid the potential disruption that might occur from a significant delay of bank mergers or potential unwinding of consummated mergers. Accordingly, Congress amended the BHC Act and Merger Act to generally prohibit the parties from consummating a bank acquisition or merger for 30 days after approval by the relevant banking agency, and to prohibit DOJ or any

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[12] See Pub. L. No. 89-356. 80 Stat. 7 (1966); Pub. L. No. 89-485, 80 Stat. 236 (1966). Although the language in the BHC Act and the Merger Act does not precisely track the language of section 7 of the Clayton Act, the courts have held that the 1966 amendments were intended to incorporate the standards of the section 7 of the Clayton Act into the banking laws. See, e.g., U.S. v. Connecticut Nat'l Bank, 418 U.S. 656, 662-63 (1974); U.S. v. Third Nat'l Bank in Nashville, 390 U.S. 171, 181 (1968); County Nat'l Bancorporation v. Board of Governors of the Fed. Reserve Sys., 654 F.2d 1253, 1256 (8th Cir. 1981).

[13] See 12 U.S.C. §§ 1828(c)(5)(B), 1842(c)(1)(B). This "public interest" exception is not available for transactions that would violate the anti-monopoly prohibition of section 2 of the Sherman Act, which also is incorporated into the BHC Act and Merger Act.

[14] See U.S. v. Third Nat'l Bank of Nashville, 390 U.S. 171, 185 (1968).

[15] See, e.g., Fleet/Norstar Financial Group, Inc., 77 Federal Reserve Bulletin 750 (1991).

other party from challenging on antitrust grounds any bank merger or acquisition approved under these statutes after the end of this post-approval waiting period.[16] Congress also provided that any antitrust challenge made within this timeframe must be reviewed by the relevant court using the antitrust standards set forth in the banking laws, including the "public interest" exception described above.[17] These provisions were designed to grant finality to bank mergers and acquisitions once approved by the banking agencies and consummated by the parties, and to ensure that transactions approved by the banking agencies under the banking laws are not reversed under a different standard if judicially challenged.

Congress also adopted several provisions to encourage consistency among the banking agencies and the DOJ in the review of bank acquisitions. For example, the Merger Act requires that the banking agency reviewing a transaction request a report from the Attorney General, as well as from the other banking agencies, on the competitive impact of each proposed merger. The 1966 amendments also require the Board or other appropriate banking agency to notify DOJ immediately upon the approval of any bank acquisition or merger under the BHC Act or Merger Act. This notice requirement is designed to provide DOJ with an opportunity to challenge the merger or acquisition within the mandatory post-approval waiting period if it believes the transaction would have a significantly adverse effect on competition.

Board's Analysis of Competitive Factors

With this background in mind, let me describe our practice in analyzing the competitive effects of transactions filed under the BHC Act and Merger Act. Our analysis of the competitive effects of bank combinations also has roots in the Philadelphia National case. In that case, the Court found that the relevant product

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[16] 12 U.S.C. §§ 1828(c)(6) and 1849(b)(1). The normal 30-day waiting period can be shortened unilaterally by the relevant banking agency in cases involving a failing bank or other emergency requiring expeditious action, and can be shortened to 15 days in other cases by the relevant agency with the concurrence of the Attorney General.

[17] See id. at §§ 1828(c)(7)(B) and 1849(b)(1) and (e).

market for analyzing the competitive effects of a bank merger is the "cluster of products," including various kinds of credit, deposit accounts and trust services, generally encompassed within the term "commercial banking."[18] In reaching this conclusion, the Court noted that some commercial bank products, such as the checking account, "are so distinctive that they are entirely free of effective competition from products or services of other financial institutions." The Court also found that other commercial bank products enjoy such a cost advantage or "settled consumer preference" that the products were effectively insulated from competition from potential substitutes offered by competitors.[19]

The Court in Philadelphia National also found that important classes of bank customers are locally limited when seeking bank services. Using the cross-elasticity standard first developed under Brown Shoe,[20] the Court held that the appropriate geographic area in which to assess the impact of a bank merger is local in nature. In reaching this conclusion, the Court found that:

> "[i]n 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. The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries."[21]

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[18] See Philadelphia National, 374 U.S. at 356.

[19] Id. The Court found that personal loans fell into the former category (distinctive products), and savings deposits fell into the latter category (cost advantage or settled consumer preference), of products effectively insulated from competition.

[20] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

[21] Philadelphia National, 374 U.S. at 358 (citations omitted). The Court recognized that the local area was not a perfectly accurate geographic market because some large customers might find it practical to do a large part of their banking business outside their home community. Nevertheless, the Court reasoned that the local banking market was a "workable compromise" that avoided the "indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place [the merging banks] in different markets, because only the smallest customers are considered." Id. at 361.

In the years following Philadelphia National, the Supreme Court in several cases reaffirmed its view that it is the "cluster of products and services that full-service banks offer that as matter of trade reality makes commercial banking a distinct line of commerce" for purposes of assessing the competitive effects of a bank merger or acquisition under the Clayton Act and banking statutes.[22] In doing so, the Court noted that full-service banking can create longstanding relationships between customers and financial institutions that make the cluster of products and services take on economic significance well beyond the individual constituent products and services involved.[23] In these cases, the Supreme Court also reaffirmed its view that the relevant geographic area for assessing the competitive effects of a bank merger is the localized area where the bulk of a bank's customers may turn for alternative commercial bank services.[24]

While the Supreme Court has not reviewed the competitive issues in a banking case since the 1970s, lower courts that have addressed this issue since that time have continued to follow the "cluster" and local geographic market approach to analyzing bank mergers and acquisitions.[25] This is not to say, however, that the courts have blindly followed the Philadelphia National decision without regard to economic realities--a path the Supreme Court itself expressly warned against.[26] Rather, the courts have demonstrated a willingness to consider the argument that, due to changes in the financial sector, commercial banking services as a whole

[22] U.S. v. Phillipsburg Nat'l Bank, 399 U.S. 350, 361 (1970); see also U.S. v. Connecticut Nat'l Bank, 418 U.S. 656, 661-66 (1974).
[23] Phillipsburg Nat'l Bank, 399 U.S. at 360-361.
[24] Connecticut Nat'l Bank, 418 U.S. at 666-69 (rejecting claim that relevant geographic market was the entire state in which merging banks operated).
[25] See United States v. Central State Bank, 817 F.2d 22 (6th Cir. 1987); Wyoming Bancorporation v. Board of Governors, 729 F.2d 687 (10th Cir. 1984); Republic of Texas Corp. v. Board of Governors, 649 F.2d 1026 (5th Cir. 1981)(using cluster and local banking market to analyze competitive effects of bank acquisition while recognizing inherent limitations in traditional market share analysis); Mid-Nebraska Bancshares, Inc. v. Board of Governors, 627 F.2d 266 (D.C. Cir. 1981).
[26] See Connecticut Nat'l Bank at 662 ("We are in complete agreement . . . that Phillipsburg National Bank and Philadelphia National Bank do not require a court to blind itself to economic realities.")

may not always represent a single product market, and competition may extend beyond local markets. However, the courts have consistently held that arguments for changing these long-standing product and geographic market definitions must be based on persuasive economic evidence and, to date, have found such persuasive evidence to be lacking.[27]

Like these courts, we at the Federal Reserve have not found persuasive evidence to alter the general framework for analyzing bank mergers and acquisitions. The Federal Reserve maintains an active economic research program, both at the Board and at the regional Reserve Banks, that reviews the continuing economic validity of the "cluster" and local banking market approach to assessing bank mergers and acquisitions.[28] These reviews indicate that the cluster of commercial banking products and services and the local area continue to provide reliable guidance for defining the appropriate product and geographic markets in banking for the vast majority of households and small businesses. For example, the Board's 1998 Survey of Small Business Finances indicates that small businesses tend to obtain multiple financial services from their primary financial institution and from depository institutions in general, most of which are commercial banks. In contrast, this Survey suggests that small businesses typically obtain only one financial service from non-depository suppliers. With respect to geographic markets, the 1998 Survey of Small Business Finances indicates that the majority of small businesses obtain most of their financing from local financial institutions, primarily commercial banks. In addition, the Board's 2001 Survey of Consumer Finances indicates that households still, to a substantial degree, obtain many financial services at local depository institutions.

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[27] See United States v. Central State Bank, 817 F.2d 22 (6th Cir. 1987) (rejecting attempt to redefine the relevant product market as transactional accounts and small business lending).

[28] As discussed below, the Reserve Banks also play a critical role in defining the proper scope of local banking markets throughout the United States.

In practice, the Board's analysis of competitive effects begins by defining the scope of the local geographic banking markets that are likely to be affected by a proposed acquisition or merger. Under the Board's procedures, these geographic banking markets are defined by staff at the Federal Reserve Bank in whose District the acquiring banking organization and the target depository institution directly compete, with oversight by Board staff in Washington. The Federal Reserve System's specialized expertise, data, and market knowledge provide critical resources for competitive analysis, including in defining local geographic banking markets. In delineating local banking market boundaries within their Districts, the Federal Reserve Banks consider a number of factors, including population density, worker commuting patterns, advertising patterns of financial institutions and additional banking data, and other indicia of economic integration and the transmission of competitive forces among banks.[29]

The Board then carefully reviews the competitive effects of the proposal in each local banking market where the applicant and target directly compete. In analyzing the competitive effects, the Board considers the number of competitors that would remain in the market, the relative market shares of total deposits in depository institutions in the market ("market deposits"), the concentration level of market deposits in the market and the projected increase in this level as measured by the Herfindahl-Hirschman Index ("HHI") under the DOJ Merger Guidelines,[30] and other characteristics of the market.

The Board's approach to competitive analysis entails a comparison and analysis of pre-merger market concentration and post-merger market concentration, as measured by market share and the HHI. The HHI is defined as

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[29] The Federal Reserve Banks make the definitions of all local geographic banking markets in their Districts available to the DOJ and to the public. On rare occasions, an applicant or commenter questions the Federal Reserve's geographic market definition. In these cases, Reserve Bank and Board staff carefully review the evidence and, if appropriate, modify the market definition if appropriate.

[30] 49 Federal Register 26,823 (1984).

the sum of the squared market shares of depository institutions in a local banking market. Market shares are calculated using total deposits, which are used as a proxy for banks' ability to produce the cluster of banking products and services.

The Board and the DOJ use HHI measures and market share as a preliminary screen of a proposed banking merger or acquisition. The Board's guidelines for screening mergers are nearly identical to those of the DOJ. A proposed transaction generally would not be regarded as anticompetitive if the resulting concentration index, the HHI, and the increase in that index do not exceed the criteria in the DOJ Merger Guidelines for banking, and the applicant's resulting market share would be less than 35 percent. The DOJ has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-transaction HHI is at least 1800[31] and the transaction increases the HHI by more than 200 points.[32] Importantly, this second criteria—that is, a change of more than 200 points in the market HHI—is substantially higher than the 50-point threshold that the DOJ applies to mergers in other industries. The higher than normal change required in HHI thresholds for screening bank mergers and acquisitions recognizes the competitive effect of limited-purpose lenders and other nondepository financial institutions that offer some, though not all, of the sub-products that comprise the commercial banking cluster.

In the HHI calculations, deposits of commercial banks are weighted at 100 percent. The Board has recognized that thrift institutions have become, or have the potential to become, significant competitors of commercial banks.[33]

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[31] Under the DOJ Merger Guidelines, a market is considered unconcentrated if the post-merger HHI is less than 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI is more than 1800.

[32] Letter to Chairman Volcker from Charles Rule, Assistant Attorney General for Antitrust, U.S. Department of Justice (May 15, 1985).

[33] See, e.g., Midwest Financial Group, 75 Federal Reserve Bulletin 386 (1989); National City Corporation, 70 Federal Reserve Bulletin 743 (1984).

However, thrifts continue to have restrictions on their ability to offer the full range of bank products and historically have not been significant providers of commercial credit. Therefore, the Board regularly has included deposits of thrift institutions in the market share calculation for the HHI analysis on a 50 percent weighted basis.[34] In some instances when a thrift is actively engaged in unsecured commercial lending, the thrift's deposits may receive a 100 percent weight.[35] The Board also on occasion has included a weighting of a particular credit union in its analysis when the credit union has broad membership and street level offices.

If the resulting HHI and the change in the HHI in a relevant local banking market are within the Board's guidelines and the resulting market share of the applicant in the local banking market is less than 35 percent, there is a presumption that the proposed transaction is acceptable. When a merger or acquisition results in a HHI change of 200 points or more to a post-merger HHI level of 1800 or more, or a post-merger market share of 35 percent or more, the Board conducts a more thorough economic analysis to determine whether the proposed merger is likely to be anticompetitive or whether there are factors that mitigate the potential anticompetitive effects of the proposal in each local banking market where the guidelines are exceeded.

Mitigating Factors. To identify and evaluate relevant mitigating factors, the Board uses information from surveys it conducts, investigations by staff, and various databases with information on market income, population, deposits, and other variables. This information and results of empirical research by Federal Reserve staff and others are used to assess the importance of various factors that may affect competition in the relevant local banking market and to evaluate whether the deposit data calculations overstate the competitive effects of the proposal.

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[34] See, e.g., First Hawaiian, Inc., 77 Federal Reserve Bulletin 52 (1991).

[35] For purposes of calculating the HHI in a local banking market, the DOJ usually weights thrift deposits at 0 percent or, if a particular thrift's unsecured commercial loans-to-assets ratio is sufficiently high, at 100 percent.

The number and strength of factors necessary to mitigate the competitive effects of a proposal that exceeds the guidelines depends on the level of market concentration and the size of the increase in market concentration in the relevant local banking market.[36] As the HHI increases or the change in the HHI becomes larger, increasingly stronger mitigating factors are required to support a determination that the competitive effects of the proposal are not significantly adverse.[37]

The Board has considered the structure of the local banking market to be a particularly important factor, including the number and relative market shares of the remaining competitors. Equally important, the Board evaluates potential competition, or the likelihood that other firms may enter the market. A banking market's attractiveness for entry, as evidenced by recent entry and favorable economic conditions in the market, indicates that barriers to entry (legal or otherwise) are low and that other banks are willing and able to respond to anti-competitive pricing within the market.

The competitive significance of the target institution also can be a relevant factor in some cases. For example, if the bank to be acquired is in a failing condition or otherwise is not a reasonably active competitor in the market due to its financial condition or other circumstances, the loss of competition would not be considered to be as severe as otherwise indicated by the HHI measurement. Adverse competitive effects also may be offset somewhat if the bank to be acquired is located in a fundamentally declining market such that it cannot sustain the existing banking organizations. In addition, the Board might consider other evidence on the nature and degree of competition in a particular market, including

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[36] E.g., Wachovia Corporation, 91 Federal Reserve Bulletin 77 (2005); First Union Corporation, 84 Federal Reserve Bulletin 489 (1998).

[37] See Wachovia Corporation, 91 Federal Reserve Bulletin 77 (2005).

information on actual pricing behavior and the quality of services provided, in assessing the effects of a particular transaction.[38]

Divestitures. In cases that raise competitive concerns, the Board has been willing to condition its approval on commitments by the applicant to divest one or more branches in the relevant market. The Board generally requires that a divested branch be in a viable retail location and that a divestiture include the branch's assets and liabilities. The divestiture must be to a suitable purchaser that can operate the divested branches in a manner competitive with the divesting organization.

Public Guidance. The Board makes a concerted effort to provide the banking industry and other market participants with well-defined analytical standards and procedures for assessing competitive effects in banking mergers and acquisitions in order to make the regulatory process as efficient as possible. This is accomplished especially through published Board orders on applications. In addition, staffs of the Board and Reserve Banks often provide guidance to bank holding companies and banks that are considering a merger prior to the filing of an application and to applicants after the filing. Because this information regarding the principles applied by the Board in its competitive analysis is so readily available, applicants are able to structure proposals so that few merger applications are denied on competitive grounds. Some potential applicants have chosen not to file an application after being advised of the Board's competitive analysis policies and precedent. Others who recognize that their application raises significant competitive concerns choose to make divestitures of branches to remedy concerns.

Coordination with the DOJ. The Board and the DOJ closely coordinate in the sharing of information about, and competitive analyses of, banking consolidations through a combination of formal and informal procedures. These procedures ensure that the two agencies share information that is relevant to the competitive analysis of proposals for bank mergers or acquisitions that raise a

[38] See J.P. Morgan Chase & Co., 90 Federal Reserve Bulletin 23 (2005).

serious competitive issue. They also ensure that the analysis of each agency is known to the other. In addition, the DOJ typically uses the local banking market definition developed by the Federal Reserve.

Coordination is facilitated through the exchange of documents and direct communications, including through meetings when appropriate. The Board provides a copy of all applications under the BHC Act and the Merger Act to the DOJ (and to the relevant banking agencies) immediately upon receipt. The DOJ regularly sends the Board (and other banking agencies) a document listing those mergers and acquisitions that it believes are not likely to have significantly adverse competitive effects. In applications with proposed divestitures, the Board sends the DOJ a copy of the applicant's commitments to divest branches and related documents. Similarly, in cases involving DOJ-required divestitures, the DOJ sends the Board a copy of the Department's "letter of agreement" with the applicant that identifies the terms of the divestitures.

Differences in the Board's approach to competitive analysis complement the DOJ's antitrust analysis, particularly in proposals with potential significant competitive effects. The DOJ places substantial weight on the potential effect of a merger on lending to small businesses, while the Board considers all lending in the context of the more general analysis of the cluster of banking products and services. The DOJ also has discretion to pay less attention to certain mergers or acquisitions, such as mergers involving small or medium-sized banks in rural and small urban banking markets, while the Board is mandated to review the competitive effects of these and all other proposed bank mergers or acquisitions within its jurisdiction. Because of these differences, the Board and the DOJ may reach different conclusions regarding the competitive effects of a proposed merger or acquisition.[39] However, that is rare and always known in advance.

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[39] See, e.g., First Hawaiian, Inc., 77 Federal Reserve Bulletin 52 (1991).

Special Antitrust Restrictions Applicable to Banks

There are two special antitrust-type restrictions that I'd like to mention that apply to banks, but do not apply to other types of firms under the general antitrust laws. First, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal Act") prohibits the Board or other relevant banking agency from approving an interstate bank acquisition or merger under the BHC Act or Merger Act if the holding company or resulting bank, along with its insured depository institution affiliates, would control more than 10 percent of total deposits held by all insured depository institutions in the United States or more than 30 percent of deposits held by institutions in the relevant state.[40] Although individual states may raise or lower the 30 percent limit applicable within their state, the national 10 percent limit can not be modified administratively.

These deposit caps were enacted in 1994 at the time Congress removed most of the barriers to interstate bank transactions and were designed to serve as a general limit on the concentration of banking resources on both a nationwide and state-by-state basis. However, they do not apply to bank mergers or acquisitions conducted within the relevant banking organization's home state, nor do they restrict the ability of banks or bank holding companies to grow their banking business organically.[41] In addition, the state-specific deposit cap does not apply to a banking organization's initial entry into a state.[42]

Banks also are subject to special anti-tying restrictions under section 106 of the Bank Holding Company Act Amendments of 1970.[43] These restrictions, which apply only to banks and thrifts, are in addition to the tying restrictions that

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[40] See 12 U.S.C. §§ 1831u, 1842(d).

[41] The home state of a bank holding company is the state in which the total amount of deposits of the company's banking subsidiaries was the greatest on the later of July 1, 1966, or the date on which the company became a bank holding company. See id. at § 1841(o)(4)(C). The home state of a state-chartered bank is the state by which it was chartered, and the home state of a national bank is the state in which its main office is located. See id. at §§ 1831u(g)(4) and 1841(o)(4).

[42] See id. at §§ 1831u(b)(2)(B), 1842(d)(2)(B).

[43] 12 U.S.C. §§ 1971 et seq.

apply to banks and other firms under the Sherman and Clayton Acts.[44] Congress adopted these special anti-tying restrictions in 1970 out of concern that banks might use their ability to offer bank products—credit in particular—in a coercive manner to gain an unfair competitive advantage in markets for nonbanking products and services (such as insurance sales).

Section 106 generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer also obtain another product from the bank or an affiliate of the bank. Thus, for example, section 106 prohibits a bank from requiring that a prospective borrower purchase an insurance product from the bank or an affiliate of the bank in order to obtain a loan from the bank or a discount on the loan. There are a number of important statutory and regulatory exceptions to the anti-tying restrictions in section 106,[45] which can make applying the statute in practice a difficult and fact-intensive process. The most important of these exceptions permits a bank to condition the availability or price of a product on a requirement that the customer obtain a loan, discount, deposit, or trust service (collectively referred to as "traditional bank products) from the bank or an affiliate of the bank.[46] This exception allows banks to make ancillary services available only to customers that also obtain a loan, deposit, or trust service from the bank or an affiliate. To help banks and their customers understand the special anti-tying restrictions in section 106, the Board in 2003 requested public comment on a comprehensive interpretation of the statute that, among other things, clarifies the types of bank actions that are permitted and prohibited by section 106.[47]

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[44] Although savings associations are not subject to section 106, they are subject to substantially similar tying restrictions under the Home Owner's Loan Act. See 12 U.S.C. § 1464(q).

[45] Section 106 permits the Board to grant, by regulation or order, exceptions to its restrictions if the Board determines that such action will not be contrary to the purposes of the statute. See 12 U.S.C. § 1972(1).

[46] See id. at § 1972(1)(A) and 12 C.F.R. 225.7(b)(1).

[47] See 68 Federal Register 52024 (Aug. 29, 2003).

Although section 106 was modeled on the anti-tying restrictions in the general antitrust laws, it has some unique characteristics. First, as I alluded to before, the statute applies only to banks and thrifts; it does not apply to nonbank firms, including the nonbank affiliates of a bank. In addition, the courts interpreting section 106 have held that, unlike under the general antitrust laws, a tying arrangement by a bank may violate section 106 *without* a showing that the bank has economic power in the market for the customer's desired product and *without* a showing that the bank's tying arrangement has anti-competitive effects.[48]

In light of the statute's stricter standard and its application only to banks and thrifts, DOJ has indicated that section 106 may itself harm competition by limiting the ability of banking institutions to compete with nonbank firms, and by limiting the ability of banking institutions to offer consumers price discounts on packages of bundled products or services.[49] To avoid this result, DOJ has requested that the Board interpret section 106, to the extent possible, in a manner consistent with the general antitrust laws or, alternatively, grant an exemption from the statute for transactions between banks and mid-size and large corporate customers. The Board is carefully reviewing the views of the DOJ and other commenters as it evaluates the proposed interpretation, which has not yet been finalized. The Board already has granted some carefully limited exceptions that, among other things, allow consumers to obtain discounts from banking institutions based on the size of the consumer's deposit and other relationships with the institution.[50]

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[48] See, e.g., Highland Capital, Inc. v. Franklin Nat'l Bank, 350 F.3d 558, 565 (6th Cir. 2003); S&N Equipment Co. v. Casa Grande Cotton Finance, 97 F.3d 337, 346 (9th Cir. 1996); Integon Life Insurance Corp. v. Browning, 989 F.2d 1143, 1150 (11th Cir. 1993); Davis v. First Nat'l Bank of Westville, 868 F.2d 206, 208 (7th Cir. 1989); Parsons Steel, Inc. v. First Ala. Bank of Montgomery, 679 F.2d 242, 245 (11th Cir. 1982).

[49] See Letter from R. Hewitt Pate, Assistant Attorney General, DOJ, to Jennifer J. Johnson, Secretary of the Board, dated Nov. 7, 2003.

[50] See 12 C.F.R. 225.7(b)(2).

Board's Legislative Recommendations

In connection with proposed "regulatory relief" legislation for banking organizations, the Board has supported amendments that would streamline the competitive review process in bank acquisitions and mergers in three ways. These proposals would not, however, fundamentally alter the role of the Board, the other Federal banking agencies, or DOJ in reviewing bank transactions.

First, the Board has supported an amendment that would allow the Board or other appropriate Federal banking agency to shorten the normal 30-day post-approval waiting period under the BHC Act and Merger Act to as low as 5 days in cases where both the banking agency and the Attorney General concur that the transaction would not have significantly adverse effects on competition. As noted above, the post-approval waiting period is intended to allow the Attorney General an opportunity to initiate legal action if the Attorney General determines that the transaction will have a significantly adverse effect on competition. Although the BHC Act and Merger Act currently allow the banking agencies, with the Attorney General's concurrence, to reduce this post-approval waiting period to 15 days, these acts do not allow the agencies to shorten this period to less than 15 days in non-emergency situations even where the agency and the Attorney General agree in advance that the transaction will not have adverse competitive consequences.

The Board also has supported an amendment that would eliminate the need for the Federal banking agencies to request a competitive factor report from the other banking agencies in connection with Merger Act transactions. The agencies' public orders and frequent consultation on regulatory and supervisory matters have significantly reduced the need for all agencies to review every bank merger for consistency sake. The Board's proposed amendment would continue to require that the relevant agency request a competitive factor report from the Attorney General and provide a copy of this request to the FDIC (as the deposit insurer).

Finally, the Board has supported an amendment that would eliminate the post-approval waiting period altogether and allow the agencies to avoid requesting a competitive factor report from the other banking agencies and the Attorney General in Merger Act transactions involving affiliated institutions. The merger of depository institutions that already are under common control typically do not have any impact on competition.

Conclusion

I appreciate the opportunity to outline the competitive analysis of bank combinations as performed by the Board and welcome any questions.