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The Antitrust Laws and One-Bank Holding Companies: Breaking into the Piggy Bank

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Recent Developments

The Antitrust Laws and One-Bank Holding Companies: Breaking into the Piggy Bank*

The phenomenon of the one-bank holding company, at one extreme, has been called a "great threat"[1] to our nation; at the other, it has been branded "the most attractive thing that has come down the pike since the mini-skirt."[2] All labels aside, however, the recent proliferation of one-bank holding companies[3] is raising many eyebrows as to their purpose and possible dangers.

Realistically, the purpose underlying the formation of a one-bank holding company is to evade certain bank regulatory statutes,[4] the foremost of which is the Bank Holding Company Act of 1956.[5] The Congress has long professed the policy that banks should be restricted to the "business of banking"[6] and should not be allowed to expand their activities to the possible detriment of the banking public.[7] In 1938, President Roosevelt called upon Congress to enact legislation aimed at controlling the activities of bank holding companies,[8] but his request was not fulfilled until Congress passed the Bank Holding Company Act in 1956.[9] This Act represented the first comprehensive

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*The author of this Recent Development is the recipient of the Washington D. C. Metropolitan Area Alumni Award for the best Recent Development or Case Note to appear in Volume XVIII.

1. Statement of Rep. Wright Patman, Chairman of the House Comm. on Banking and Currency, N. Y. Times, Oct. 16, 1968, at 65, col. 1.

2. This is the attitude of Mr. Justin T. Watson, First Deputy Comptroller of the Currency. *See* Janssen, *One-Bank Holding Companies: A Treasury Preoccupation*, Wall Street J., March 11, 1969, at 20, col. 3.

3. In 1965 there were 550 one-bank holding companies which held $15.1 billion in commercial deposits. By 1968 there were 783 one-bank holding companies with $108.2 billion in commercial bank deposits. *See* STAFF OF HOUSE COMM. ON BANKING AND CURRENCY, 91st Cong., 1st Sess. REPORT ON THE GROWTH OF UNREGISTERED BANK HOLDING COMPANIES—Problems and Prospects 5 (Comm. Print 1969) [hereinafter cited as STAFF REPORT]. As of Dec. 31, 1968, 34 of the nation's 100 largest commercial banks had either set up a holding company or had announced plans to do so in the near future. This figure includes the top five commercial banks, with assets totalling approximately $74 billion. *Id.* at 6. *See also* Washington Post, March 1, 1969, § D, at 6, col. 1.

4. This was admitted by Mr. William S. Renchard, Chairman of the Board of the Chemical Bank New York Trust Company. He asserted that rather than trying to evade the law the bank was taking advantage of the law as it was now written. N. Y. Times, Dec. 31, 1968, at 46, col. 5.

5. 12 U.S.C. §§ 1841-49 (Supp. III, 1965-67), *amending* 12 U.S.C. §§ 1841-48 (1964) [hereinafter cited as the Act].

6. The term "business of banking" is popular in the banking statutes. *See, e.g.*, National Bank Act § 8, 12 U.S.C. § 24 (¶ 7) (1964); Federal Reserve Act § 4, 12 U.S.C. § 341 (¶ 7) (1964). The problem is that no absolute limits have ever been given the term. *But see* National Bank Act § 28, 12 U.S.C. § 29 (1964), which prohibits, except under certain circumstances, a bank from holding real property.

7. Kirst, *Diversification by National Banks*, 21 STAN. L. REV. 650, 654 (1969).

8. S. Doc. No. 173, 75th Cong., 3d Sess. (1938).

9. For a capsule history of proposed bank holding company legislation between 1938 and 1956, see P. HOGENSON, THE ECONOMICS OF GROUP BANKING 152-54 (1955); S. REP. No. 1095, 84th Cong., 1st Sess. 3-4 (1955).

treatment of bank holding companies.[10] Its passage was based in part on the philosophy that bank holding companies should confine their activities to management and control of banks, with such activities being consistent with the public interest.[11] More important, however, was the belief that "bank holding companies ought not to manage or control nonbanking assets having no close relation to banking."[12] Congress took great pains to ensure the implementation of this philosophy. Section 4 of the Act[13] was designed to prohibit a bank holding company from acquiring any nonbanking assets and, for those companies which had acquired such assets before the passage of the Act, there was a provision ordering complete divestiture.[14] In addition to this restriction, Section 6[15] of the Act effectively prohibited a bank which was subject to the control of a holding company from lending either "horizontally" or "vertically," that is, either to its parent company or to a sister subsidiary.[16]

It would appear that Congress had effectively stripped the bank holding company of its most advantageous characteristics, but this is not the case, for the Act is applicable *only* to a bank holding company which holds 25 percent or more of the voting shares of *each* of *two or more* banks.[17] This limitation leaves at least two prominent loopholes. First, a holding company is free to acquire as many banks as desired without regulation so long as it does not hold more than 25 percent of the voting shares in any two of them. Use of this technique would probably not present a regulatory problem, for there is little advantage in holding a minority interest in a series of banks. The second loophole, which is more clearly an exemption, is the one-bank holding company. Such a company can completely avoid regulation under the Act if it holds the voting stock in only one bank.[18]

The theoretical justifications for this exemption are questionable. In 1966, while considering amendments to the 1956 Act, the Senate Banking and Currency Com-

10. By § 19 of the Banking Act of 1933, 12 U.S.C. § 61 (1964), Congress made "holding company affiliates" subject to limited Federal Reserve Board control by requiring the affiliate to get a voting permit from the Board before being allowed to vote their stock in any member bank. The granting of the permit was conditioned upon the "holding company affiliate" allowing the Federal Reserve Board to examine its relationship to the bank. The effect of this provision was not very profound because it applied only where a member bank was involved and could easily be avoided if the "holding company affiliate" chose not to vote its stock.

11. S. Rep. No. 1095, 84th Cong., 1st Sess. 1 (1955).

12. *Ibid.*

13. 12 U.S.C. § 1843 (1964).

14. 12 U.S.C. § 1843(d) (Supp. III, 1965-67).

15. Act of May 9, 1956, ch. 240, § 6, 70 Stat. 137 (repealed 1966).

16. In repealing Section 6, Congress did not completely rescind its prohibitions. Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c (1964), was amended to include bank holding companies. This change is quite dramatic. There is a shift from the absolute prohibitions of Section 6 to the flexible standards of Section 23A, which allows a bank to lend to its parent or sister subsidiary an amount up to ten percent of its capital stock and surplus in the case of any one affiliate and an absolute maximum of 20 percent to all its affiliates.

17. Bank Holding Company Act of 1956, § 2(a), 12 U.S.C. § 1841(a) (1964).

18. At first blush this would not appear to be advantageous to a holding company. But if the bank held is the Bank of America with $23.3 billion in assets or the Chase Manhattan Bank with $16.7 billion, the focus becomes more clear. *See* Washington Post, Mar. 1, 1969, § D, at 6, col. 1.

mittee concluded that there was no evidence to sustain a finding of abuse on the part of one-bank holding companies, and that "repeal of the exemption would make it more difficult for individuals to continue to hold or to form small independent banks. The repeal of the exemption would, therefore, be likely to result in causing the forced sale of large numbers of banks and in a diminution of competition rather than in an increase of competition."[19] While sounding appealing to a small-business oriented Congress, this argument fails to recognize the potential abuse which may result from continuance of the exemption. In 1955, when the Act was being considered by Congress, Federal Reserve Board Chairman William McChesney Martin opined that a holding company controlling only one large bank may be the cause of far more serious abuse than a company which controls a cluster of smaller banks. Thus, he argued, any definition of a bank holding company should be written to include the one-bank variety.[20] Again, in 1958 the Board of Governors of the Federal Reserve System, in reporting to Congress on the effectiveness of the Act after two years of operation, observed:

> [i]f the act related only to regulation of the expansion of bank holding companies, such a "two bank" definition would be unobjectionable. It is not adequate, however, to effectuate another major purpose of the statute—divestment of nonbanking interests of bank holding companies. Since a company controlling only one bank is not covered by the definition, it is not required to divest itself of any nonbanking organization it might control. Yet, if it is contrary to the public interest for banking and nonbanking businesses to be under the same control, the principle is applicable whether the company controls one bank or a hundred banks and the possibility of abuses from such control is the same.[21]

Under current law, a bank which sets up a holding company can become a viable commercial entity, for it is free to invest in nonbanking commercial enterprises[22] by loaning funds to its parent holding company or to a sister subsidiary.[23] This investment ability, however, is only part of the impact on nonbanking commerce. Banks are

19. S. REP. No. 1179, 89th Cong., 2d Sess. 5 (1966).

20. *Hearings on H.R. 2674 (superseded by H.R. 6227)Before the House Comm. on Banking and Currency,* 84th Cong., 1st Sess. 15 (1955). *See also Hearings on S. 880, S. 2350, and H.R. 6227 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 84th Cong., 1st Sess. 45 (1955).

21. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 85th Cong., 2d Sess., REPORT TO COMM. ON BANKING AND CURRENCY ON BANK HOLDING COMPANY ACT, 8-9 (1958).

22. Mr. R. A. Peterson, President of the Bank of America has indicated that the bank's holding company may become active in leasing, warehousing, mutual funds, land development financing, travel bureaus, and "other industries closely related to financing." N. Y. Times, Sept. 18, 1968, at 59, col. 7. Bank of America has in fact been granted approval to purchase an 80 percent interest in Digitran Corp., a computer software company, for $5 million. *See* 404 ANTITRUST & TRADE REG. REP. A-10 (April 8, 1969). The Chemical New York Corp. (Chemical Bank New York Trust Co.) has indicated that it will seek to enter such nonbanking areas as temporary help, protective services, automobile rental agencies, cleaning services, oil and gas property appraisals, and computer service bureaus. N. Y. Times, Dec. 31, 1968, at 37, col. 1.

23. See discussion *supra* note 16 and 12 U.S.C. §§ 371c, d (Supp. III, 1965-67).

the major and in some cases the only source of credit in our economy. The danger of manipulation of this credit system to fullfill the desires of a bank to expand its activities can only have adverse effects upon the nation's competitive economy. There is a real danger that banks which set up holding companies for their own purposes will concentrate their attention on these companies and will sometimes be compelled to extend credit to them "to the detriment of other competitive businesses in the community and possibly also to a degree which would be unsound from a banking viewpoint."[24] "Compelled" lending is perhaps the most subtle of the dangers lurking in the unregulated bank holding company; yet more obvious and important are the antitrust ramifications.

Antitrust Policy

An inquiry into the antitrust question requires reference to the Bank Merger Act of 1960,[25] since one of the purposes of both the Bank Merger Act and the Bank Holding Company Act is to prevent concentration of economic power within the banking system.[26] To enforce this policy against bank holding companies, Congress in 1956 provided that the antitrust laws[27] were to apply to such companies notwithstanding other provisions of the Act.[28] This declaration was a recognition by Congress of the 1953 holding of the Third Circuit Court of Appeals that Section 7 of the Clayton Act[29] is applicable to a bank holding company where it is shown that an acquisition by such a company of the stock in another commercial bank tends to lessen competition or create a monopoly.[30] Thus, it became firmly established that a bank holding company could be subjected to antitrust proceedings.

After the passage of the 1956 Act, a two-pronged attack against an acquisition thus was possible—through the Act and through the antitrust statutes.[31] This favorable

24. H. R. REP. No. 609, 84th Cong., 1st Sess. 7, 16 (1955).

25. 12 U.S.C. § 1828(c) (Supp. III, 1965-67), *amending* 12 U.S.C. § 1828(c) (1964).

26. Most of the applications filed with the Federal Reserve Board pursuant to Section 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842 (1964), involve a registered holding company seeking to acquire the shares of another bank. *See, e.g., In re* Barnett Nat'l Sec. Corp., 1967 FED. RESERVE BULL. 1913.

27. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1964); Clayton Antitrust Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1964).

28. This was provided in the saving provision incorporated into the 1956 Act. *See* Bank Holding Company Act of 1956, § 11, 70 Stat. 146 (1956), *as amended,* 12 U.S.C. § 1849 (Supp. III, 1965-67).

29. 15 U.S.C. § 18 (1964).

30. Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

31. Since the Act was comprehensive, the need for application of the antitrust statutes seldom arose. *See* Bank Holding Company Act of 1956, §§ 3, 4, 12 U.S.C. §§ 1842, 1843 (1964), *as amended,* 12 U.S.C. §§ 1842, 1843 (Supp. III, 1965-67). However, in one instance the Federal Reserve Board granted permission for an acquisition which the Department of Justice felt was clearly anticompetitive. In United States v. Marshall & Ilsley Bank Stock Corp., 255 F. Supp. 273 (E.D. Wis. 1966), the district court held that the Federal Reserve Board was to be the final arbiter as to whether or not the Clayton Act was to be invoked against the bank. The court relied on 15 U.S.C. § 21(a) (1964), which gives the Federal Reserve Board antitrust jurisdiction over those cases which in-

situation, however, was to last but ten short years. In 1966, Congress amended the Act, and in so doing undercut the full force of the Clayton Act.[32] Justification for this action was based upon the belief that the antitrust provisions of the Bank Holding Company Act should be consistent with those of the Bank Merger Act as amended in 1966.[33]

The above discussion, although not presently relevant to the one-bank holding company in light of its exemption, is germane if the best possible solution to the problem is being sought. On February 17, 1969, Rep. Wright Patman introduced a bill into the House of Representatives[34] which would make the Bank Holding Company Act appli-

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volve banks, banking associations and trust companies. The Supreme Court disagreed, however, and reversed, 387 U.S. 238 (1967), relying upon the reasoning in United States v. First City Nat'l Bank, 386 U.S. 361 (1967), to the effect that an agency ruling is not determinative in light of the statutory provision for de novo judicial review. *Id.* at 368.

32. *See* 12 U.S.C. § 1849(b)-(f) (Supp. III, 1965-67). Subsection (b) provides for a 30 day statute of limitations, *i.e.,* the Attorney General must commence an antitrust action within 30 days from the date an acquisition is approved by the Federal Reserve Board, or he is barred. This provision does not apply to an action brought pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2 (1964). Should the Attorney General institute an action in time, subsection (e) provides that the court before which the action is pending must apply the same substantive law which the Federal Reserve Board must apply under Section 3 of the Bank Holding Company Act. 12 U.S.C. § 1842(c) (Supp. III, 1965-67).

Section 3(c) provides that the Board shall not approve any acquisition "whose effect . . . may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or [*sic*] trade, *unless* it 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." (Emphasis added.) Thus, even if a transaction clearly violates Sherman or Clayton, it will be allowed if an overriding public interest can be shown. The Supreme Court, interpreting these same provisions under the Bank Merger Act has held that the burden of proving an overriding public interest is upon the bank. United States v. First City Nat'l Bank, 386 U.S. 361 (1967). *See also* United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

33. Compare the Bank Merger Act of 1966 § 1, 12 U.S.C. §§ 1828(c)(7)(A),(B) (Supp. III, 1965-67), with the Bank Holding Company Act of 1966 § 11, 12 U.S.C. § 1849(c)-(e) (Supp. III, 1965-67). The Department of Justice vehemently argued that there was no justification for such a consistent application. The argument was based upon the fact that the 1966 amendment to the Bank Merger Act of 1960 was a reaction by Congress to United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), which held that Section 7 of the Clayton Act was applicable to bank mergers. On the other hand, Congress felt the antitrust laws should be applicable to bank holding companies when it passed the Bank Holding Company Act in 1956. This was evidenced by the inclusion of the saving provision (12 U.S.C. § 1849(a) (Supp. III, 1965-67), *formerly,* 70 Stat. 146 (1956)). *See* Letter from Attorney General Ramsey Clark to former Chairman A. Willis Robertson of the Senate Committee on Banking and Currency, May 18, 1966 (112 CONG. REC. 12,385, 89th Cong., 2d Sess. (1966)). It is interesting to note that the amendments to Section 11 of the Bank Holding Company Act of 1956 were "tacked on" after the hearings and after the House report, during consideration in the Senate Committee on Banking and Currency. See the remarks of Senator Phillip Hart, 112 CONG. REC. 12,433-34, 89th Cong., 2d Sess. (1966).

34. H.R. 6778, 91st Cong., 1st Sess. (1969).

cable to a holding company controlling *any* bank.[35] By adopting this approach, Representative Patman hopes to prevent the abuse which can result from the present loopholes[36] and in so doing to effectuate the purposes of the 1956 Act.

A somewhat different approach has been recommended by Senator William Proxmire in a bill introduced into the Senate on February 18, 1969.[37] Although he recommends that the one-bank holding company be made subject to the Act, he adopts this only as a temporary approach to the problem.[38] The Senator is of the opinion that the one-bank holding company phenomenon is a reaction by the banks to the strict regulations presently applicable to the banking industry. Based upon this philosophy, he does not think that an adequate solution can be achieved solely by the inclusion of the one-bank holding company in the Act.[39] It is his belief that any nonbanking acquisition "must be considered on its own merits and the competitive impact of bank entry must be carefully assessed."[40] From a policy standpoint then, it seems to this author that it will be better to deal with the problem through the antitrust statutes.[41]

Confronted with these two potential solutions, it is clear that a straight antitrust approach would offer the better and more effective solution.[42] Pursuant to Representative Patman's proposal, the one-bank holding company would be granted the opportunity to defend against charges of antitrust violations if it can show that an acquisition will serve the "convenience" and "needs" of the community.[43] There can be no possible justification for giving a holding company this privilege, especially when its activities have extended beyond the sphere of bank related business. A holding company is a corporation like any other, and the fact that a bank is one of its subsidiaries should not be the basis for special treatment, especially with regard to application of the antitrust statutes.[44]

Application of the antitrust statutes would require a case-by-case approach. Although this process would undoubtedly be slow and complicated compared with mere inclusion of the one-bank holding company in the Bank Holding Company Act, it affords a mechanism more finely attuned to prevention of abuses which may result

35. *Id.* § 1(a).
36. *See* 115 CONG. REC. H903, 91st Cong., 1st Sess. (daily ed. Feb. 17, 1969).
37. S. 1052, 91st Cong., 1st Sess. (1969).
38. *See* 115 CONG. REC. S1696, 1698, 91st Cong., 1st Sess. (daily ed. Feb. 18, 1969).
39. *Id.* at S1697.
40. *Ibid.*
41. Senator Proxmire's proposal is indeed complex. He believes that a new institutional framework for assessing competitive effects is necessary as the existing bank regulatory agencies are ill-equipped to make such judgments. The Senator also seems to be of the opinion that present antitrust policy must also be re-evaluated. *Ibid.* The bill calls for the creation of a National Committee on Banking. This committee will appraise the role of banking in the national economy. *Id.* at S1698.
42. *See* Comment, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated,* 71 YALE L.J. 502, 535 (1962); Berle, *Banking under the Anti-Trust Laws,* 49 COLUM. L. REV. 589, 602-03 (1949). *But see* Mogel, *Bank Mergers and the Antitrust Laws,* 17 AM. U.L. REV. 57 (1967).
43. *See* note 32 *supra* and accompanying text.
44. It is maintained that the antitrust statutes apply to banking in exactly the same way as they apply to other businesses. *See* Seeley, *Banks and Antitrust,* 21 BUS. LAW. 917, 921 (1966). *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352 (1963).

from the utilization of the one-bank holding company device. Since proliferation of the large one-bank holding companies did not begin until the summer of 1968,[45] actual abuses cannot be pinpointed. The following anticompetitive effects may, however, result if the one-bank holding company remains unregulated.

Anticompetitive Effects of One-Bank Holding Companies

Aside from factors previously mentioned,[46] others compel the forceful application of the antitrust laws. The foremost perhaps is the so-called "tie-in" arrangement whereby a bank "ties" an essential bank service—*e.g.*, the extension of credit—to the purchase of other services from either the bank, its parent holding company, or a sister subsidiary.[47] The obvious effect of such an arrangement is to channel business to the other participants in the holding company structure to the detriment of other businesses competing within the same geographical area. The anticompetitive effect is brought more clearly into view if the bank is the only source of the necessary service within a particular area. The Department of Justice has reacted strongly against such arrangements, arguing that they constitute an effective restraint of trade[48] and therefore are in direct violation of Section 1 of the Sherman Antitrust Act.[49]

Application of the Sherman Act is difficult however, because of its requirement that an action be presently in restraint of trade before there is a violation.[50] This showing of present restraint is not required under Section 7 of the Clayton Act.[51] All that need be shown is that a particular transaction will tend to lessen competition or restrain trade.[52] Thus, Section 7 of the Clayton Act is designed to prevent an anticompetitive

45. As of Sept. 1, 1968, there were 684 one-bank holding companies which held $17.8 billion in total deposits. Between Sept. 1, 1968 and Dec. 31, 1968, seven new one-bank holding companies were formed and 92 were proposed. These figures represent $90.4 billion in bank deposits. *See* STAFF REPORT, *supra* note 3, at 7.

46. *See* note 25 *supra*.

47. *See* Kirst, *Diversification by National Banks*, *supra* note 7, at 656 (1969). The potential abuses of this "tie-in" arrangement were recognized by Rep. Wright Patman. His bill, H.R. 6778, would amend the Federal Deposit Insurance Act to prohibit a bank, a bank holding company, or any subsidiary of a bank holding company from conditioning an agreement to provide a customer one bank service on the requirement that the customer agree to give the bank, or another subsidiary of the parent holding company, business in other areas.

48. *See, e.g.*, United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (auto manufacturer's coercion of dealers to finance their wholesale purchases through a particular finance company held violative of Section 1 of the Sherman Act). Private parties have also been successful in challenging "tie-in" arrangements. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 89 S. Ct. 1252 (1969). The "tie-in" arrangement is similar to the reciprocal purchasing agreement, forbidden by Section 3 of the Clayton Act 15 U.S.C. § 14 (1964). *See* United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963). "Tie-in" arrangements have been called illegal per se. C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 146-47 (1965).

49. 15 U.S.C. § 1 (1964).

50. Section 1 reads, "Every contract, combination . . . or conspiracy, in restraint of trade . . . ."

51. 15 U.S.C. § 18 (1964).

52. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 115-18 (1955).

transaction before it can effectively be consummated.[53] The criteria which courts have utilized to determine whether or not a transaction will have long-run anticompetitive effects are many and varied; yet most of them can be effectively applied to transactions involving a one-bank holding company.

In *United States v. Wilson Sporting Goods Co.*,[54] the district court issued a preliminary injunction blocking a proposed merger between Wilson, the leading manufacturer of sporting goods in the nation, and another corporation which was a leader in the manufacture of gymnastic equipment, an area into which Wilson desired to expand. The court based its decision in part upon the fact that the proposed merger would prevent market entry by a potential competitor—*i.e.*, Wilson.[55] This, the court reasoned, ultimately lessened potential competition within this particular market.

It is not difficult to envision a similar set of circumstances in a case involving a one-bank holding company where market entry is more likely to be accomplished by way of acquisition rather than by formation. This fact, taken in combination with others, may lead a court to decide that the holding company, instead of increasing competition by entering the market as a "new" competitor, is effectively reducing the level of competition.[56] This is not to say, however, that a "new" entrant will automatically be sanctioned. The entry into the market of a highly financed holding company may have the effect of dissuading a smaller potential competitor from entering the same market.[57] Consider, for example, the case of a "small" independent businessman who wishes to invest some of his capital in speculative real estate transactions but is hesitant to do so because his foremost competitor is the Bank of America, acting through a holding company.[58] Coupling this possibility with the entry problem discussed above, clearly the mere presence of a one-bank holding company at the doorstep of a nonbanking commercial activity reduces potential competition to a significant degree.

The potential entry problems affect competition primarily from the "outside"—*i.e.*, the addition of a "new" independent competitor to an existing market is prevented. A far more dangerous reaction may occur within the market; existing participants in the market may seek to create a formidable competitive mechanism in the hope that they can maintain their relative competitive position within the market. Thus entry into a

53. *Ibid. See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

54. 288 F. Supp. 543 (N.D. Ill. 1968). For a treatment of the problems presented by the *Wilson* case, see 18 CATHOLIC U.L. REV. 219 (1968).

55. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 562-63 (N.D. Ill. 1968).

56. Suppose, for example, that a bank holding company desires to enter the auto leasing business. Instead of forming its own leasing company, it acquires either Hertz or Avis. Surely the holding company has lessened competition to the degree that it would have advanced had a "new" entrant been formed. For an example of how a court might treat such a transaction, see General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967).

57. *See* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1356 (1965). *See also* United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 557 (N.D. Ill. 1968).

58. One-bank holding companies are more inclined to enter into real estate transactions than any other nonbanking, nonfinancial area of activity. For example, as of Sept. 1, 1968, 111 out of 397 one-bank holding companies which engage in nonbanking, nonfinancial activities were engaged in leasing and operating real estate. *See* STAFF REPORT, *supra* note 3, at 51.

given commercial area by a one-bank holding company may trigger a series of responsive mergers,[59] finally resulting in market control becoming concentrated in two or more commercial "giants." This type of activity will only further raise the barriers against successful market entry and increased competition by existing potential entrants. The court in *Wilson* recognized this when it said, "[s]uch a trend would decrease the possibility of long run deconcentration of [an] industry by eliminating potential additional competitors, and would tend to decrease existing competition by eliminating as potential competitors the very firms on the edge of the market who are able to exert an effect upon the pricing decision of existing firms."[60] There is also the possibility, the court reasoned, that competing giants may tend to reach different competitive decisions than would smaller firms in a more highly competitive market. This is especially true where the threat of entry by other possible competitors has been substantially diminished.[61]

All of the criteria thus far discussed, taken singularly,[62] would probably not constitute anticompetitive effects sufficient to hold a proposed aquisition by a one-bank holding company violative of Section 7 of the Clayton Act. These criteria however, cannot be considered separately but are dependent upon, and complementary to each other. This being the case, it is clear that the entry of a one-bank holding company, being a combination comprised of both commercial skill and financial power, may have an inherent deleterious effect upon competition but whether or not these effects are sufficient to restrain such an entry can only be determined after due consideration is given to the facts of a particular case. In those situations where anticompetitive effects are found, the appropriate remedies can be obtained under existing antitrust legislation.[63]

Another approach which should be considered is based upon the hypothesis that a distinction should be made between entry by a one-bank holding company into an area closely related to its financial activities and entry into a strictly commercial area.[64]

59. In *Brown Shoe Co. v. United States,* 370 U.S. 294, 343-44 (1962), the Supreme Court noted that the possibility that a given merger will foster other mergers, thus leading to further concentration of economic power, is a relevant factor in assessing the anticompetitive effects of that merger.

60. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 558 (N.D. Ill. 1968).

61. *Ibid.*

62. With the possible exception of the "tie-in" arrangement. *See* note 48 *supra* and accompanying text.

63. Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b) (1964) provides for the issuance of a cease and desist order requiring a person to cease and desist from violating the Act and to divest himself of stock or other capital or assets held in violation of Section 7 of the Act.

64. This distinction has been incorporated in the administration bill introduced into both the House and the Senate on March 24, 1969. *See* S. 1664, 91st Cong., 1st Sess. § 4 (1969); H.R. 9385, 91st Cong., 1st Sess. § 4 (1969). This bill would require that the three bank regulatory agencies determine together whether or not an acquisition is financially related, with each agency having a veto power. This procedure is not presently desirable since each agency has a different attitude toward the one-bank holding company. The Federal Reserve Board favors strict regulation while the Comptroller of the Currency is more disposed to allowing the expansion of such companies in the belief that they are conducive to a healthy economy. The Federal Deposit Insurance Corp. takes a middle ground, *i.e.,* that the one-bank holding company may be good for the

Some persons believe that banks have been unduly restricted in the types of activities in which they can engage and consequently have not been able to diversify to meet the threat of external competition.[65] There is therefore some justification for allowing a bank to acquire an interest in activities closely related to its functions as a bank.[66]

Proposed Solution

With this distinction in mind, the best solution would be to amend the Bank Holding Company Act to include the one-bank holding company. Such an amendment would confer jurisdiction upon the Federal Reserve Board to evaluate the proposed acquisitions of such companies pursuant to regulations promulgated by the Board.[67] It is suggested that this jurisdiction should be limited to evaluating acquisitions closely related to banking activities. Such an approach would be appropriate since the Board has expertise in this area but not in nonbanking and nonfinancial commercial matters. In such cases, the *ultimate* decision should be made by the executive authority responsible for protecting the nation against activities which may tend to lessen competition or to restrain trade—the Antitrust Division of the Department of Justice.

It would not be difficult to accomplish this shift of jurisdiction. The repeal, with the exception of subsection (a), of Section 11[68] of the Bank Holding Company Act would have the effect of making the antitrust statutes applicable in their full force. In order to prevent undue burden upon the administrative machinery of the Department of Justice, the initial determination as to whether a proposed acquisition is financial or nonfinancial in nature should be made by the Federal Reserve Board. This determination should be based upon an independent set of criteria to be formulated by the Board. Once there has been a determination that the proposed acquisition is of a nonbanking or nonfinancial character, the executive authority would determine whether any action should be brought under the antitrust laws, just as it does in the case of any ordinary non-banking merger or acquisition.

This proposal would restore the antitrust statutes to their full strength as they might apply to bank holding companies. The 30 day statute of limitations, and the affirmative defense of public need and convenience would both be discarded in favor of the time-tested antitrust statutes.

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economy but it should to some extent be regulated. *See,* N. Y. Times, Nov. 9, 1968, at 47, col. 1.

65. This basically was the view put forth by Senator Proxmire on the occasion of the introduction of his bill, S. 1052, to the Senate. 115 CONG. REC. S1697, 91st Cong., 1st Sess. (daily ed. Feb. 18, 1969). In accord are the views of Chairman K. A. Randall of the F.D.I.C. *See* Speech before the Baltimore Chapter of the American Marketing Association, Oct. 18, 1968. (CCH FED. BANKING L. REP. ¶ 95,049 at 80,037).

In fact, the Federal Reserve Board has frequently granted permission to registered bank holding companies to acquire stock or assets in other banks where there is no showing of any adverse competitive effects. *See, e.g., In re* Valley Bancorp., 1963 FED. RESERVE BULL. 178; *In re* United Virginia Bankshares, Inc., 1962 FED. RESERVE BULL. 1620. *See also In re* Charter New Corp., 1966 FED. RESERVE BULL. 527 (where permission was granted upon a showing that there were benefits to the community).

66. *See, e.g.,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 326n.5 (1963).

67. 12 C.F.R. §§ 222.101-222.122 (1968).

68. 12 U.S.C. § 1849(b)-(f) (Supp. III, 1965-67).