

# Bank Consolidation Caused by the Financial Crisis: How Should the Antitrust Division Review “Shotgun Marriages”?

**Jonathan M. Rich and Thomas G. Scriven**

The consolidation of large financial institutions was thrust into the spotlight repeatedly in the last few months as the government arranged a series of “shotgun marriages” to save the financial system. This wave of consolidation will continue if institutions continue to deteriorate and the government must act quickly to stave off bank failures.

The Department of Justice’s Antitrust Division faces a fundamental problem when considering a transaction that must be consummated quickly—proper review of a transaction that raises competition issues takes much more time than is available when a quick closing is necessary to protect depositors, minimize the cost to the government and, in some cases, protect the financial system. As the nation will be better served by competitive banking and financial markets, it would be unfortunate if policy makers found they had no alternative but to disregard competition issues because of the urgency of the situation.

Fortunately, the antitrust enforcement agencies have tools with sufficient flexibility to cope with such exigent circumstances—the “pocket decree” or “blank check” that both the Antitrust Division and the Federal Trade Commission have used when a transaction had to close before the agencies could complete a full investigation. Such a solution could work well in an emergency situation if all parties are willing to be sufficiently flexible and if competition problems and the potential solutions are clearly defined.

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## The Bank Merger Review Process

The review process for bank mergers differs from that for other transactions. As a general rule, bank mergers are exempt from the Hart-Scott-Rodino Act.<sup>1</sup> Instead, for any particular transaction, one of four banking agencies (the Federal Reserve Board (Fed), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS) or the Office of the Comptroller of the Currency (OCC)) shares jurisdiction with the Antitrust Division.<sup>2</sup> Because the Fed has jurisdiction

<sup>1</sup> 15 U.S.C. §§ 18a(c)(7) and 18a(c)(8). Bank holding company acquisitions of non-banking operations and financial holding companies remain subject to the HSR Act.

<sup>2</sup> Banking industry-specific statutes, including the Bank Merger Act (BMA), 12 U.S.C. § 1828(c)(4), the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1828 (c)(2), the Home Owners’ Loan Act, 12 U.S.C. §§ 1461–1700, and the Change in Bank Control Act, 12 U.S.C. § 1817(j), govern most bank merger reviews. The BMA requires that, except where the relevant banking agency determines that “it must act immediately in order to prevent the probable failure of one of the banks . . . involved,” both the banking agency and the Antitrust Division assess the competitive impact of the transaction. 12 U.S.C. § 1828(c)(6). The Fed reviews transactions involving bank holding companies and banks that are members of the Federal Reserve System, 12 U.S.C. § 1842(a)(3)–(4); the FDIC reviews transactions in which the acquirer is a state bank that is not a member of the Federal Reserve System, 12 U.S.C. § 1828(c)(2)(C); the OTS reviews acquisitions of savings associations and savings and loan holding companies (unless the acquirer is a bank holding company, in which case the Fed is responsible), 12 U.S.C. § 1828(c)(2)(D); and the OCC reviews transactions in which the acquirer is a national bank, 12 U.S.C. § 1828(c)(2)(A).

over bank holding company acquisitions, it is the agency most likely to review a large crisis-induced acquisition. Indeed, the Fed reviewed Wells Fargo's application to acquire Wachovia Corporation<sup>3</sup> and Bank of America's acquisition of Countrywide.<sup>4</sup> The FDIC handled the JP Morgan Chase acquisition of Washington Mutual because the bank was in FDIC receivership.<sup>5</sup> The Fed's role in financial institution mergers will only increase as investment banks, such as Goldman Sachs and Morgan Stanley, become bank holding companies to qualify for a portion of the \$700 billion TARP bailout.<sup>6</sup>

After an acquirer files an application with the appropriate banking agency, the agency forwards it to the Antitrust Division and the two agencies analyze the competitive effects of the transaction concurrently.<sup>7</sup> The agencies' statutory standards differ. While the Antitrust Division applies Section 7 of the Clayton Act, the Fed must consider, in addition to competitive effects, "the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."<sup>8</sup> Generally, the Fed waits for the Antitrust Division to submit a report on the likely competitive effects of the transaction before reaching its own conclusion.

The banking agencies and the Antitrust Division begin their review of a transaction with the Bank Merger Guidelines, which were developed by the Antitrust Division, the Fed and the OCC. The Fed's analysis of competitive effects under the Bank Merger Guidelines relies largely on the so-called 1800/200 test applied to deposits. If, with respect to deposits, a transaction does not cause the Herfindahl-Hirschman Index (HHI) to exceed 1800 and to increase more than 200 points in any relevant banking market, the Fed is unlikely to challenge the transaction.<sup>9</sup> When the Fed finds that a transaction would exceed those thresholds, it often will approve the transaction contingent upon divestiture of branches with sufficient deposits to reduce the HHI change to less than 200 points. The Antitrust Division uses the 1800/200 as a screen to determine which transactions require further review and relies on the Horizontal Merger Guidelines to analyze transactions that exceed the threshold.

In applying the 1800/200 test, the two agencies define relevant geographic and product markets differently, with the banking agencies using pre-determined market definitions, such as "traditional banking," as the relevant product market and standard metropolitan statistical areas as

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<sup>3</sup> See Press Release, Federal Reserve Board, Approval of Proposal by Wells Fargo & Company to Acquire Wachovia Corporation (Oct. 12, 2008), available at <http://www.federalreserve.gov/newsevents/press/orders/20081012a.htm>.

<sup>4</sup> See Press Release, Federal Reserve Board, Approval of Proposal by Bank of America (June 5, 2008), available at <http://www.federalreserve.gov/newsevents/press/orders/20080605a.htm>.

<sup>5</sup> The FDIC, after being appointed by the OTS as receiver of Washington Mutual and acting pursuant to its responsibility to resolve the problems of failing insured depository institutions, approved JP Morgan Chase's acquisition of WaMu. See 12 U.S.C. § 1831o(a); Press Release, FDIC, JPMorgan Chase Acquires Banking Operations of Washington Mutual (Sept. 25, 2008), available at <http://www.fdic.gov/news/news/press/2008/pr08085.html>.

<sup>6</sup> See Press Release, Federal Reserve Board, Board Announces that Goldman Sachs and Morgan Stanley Transactions May Be Consummated Immediately (Sept. 22, 2008), available at <http://www.federalreserve.gov/newsevents/press/orders/20080922a.htm>. The Troubled Asset Relief Program—part of the Emergency Economic Stabilization Act of 2008—authorizes the Treasury Department to purchase or insure a financial institution's troubled assets. 12 U.S.C. §§ 5201–5261.

<sup>7</sup> See 12 U.S.C. § 1828(c)(4).

<sup>8</sup> 12 U.S.C. § 1828(c)(5)(B).

<sup>9</sup> See Bank Merger Competitive Review—Introduction and Overview § 1 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/6472.pdf>.

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the relevant geographic markets. The Antitrust Division defines relevant markets under the Horizontal Merger Guidelines in terms of consumer demand.<sup>10</sup>

The Antitrust Division has concluded that the provision of banking services to small and medium-sized businesses can comprise a relevant product market because those businesses tend to rely on relationships with a local bank, which in many communities is likely to be a local branch of one of the few large banks present in the area.<sup>11</sup> According to the Antitrust Division, small and medium-sized businesses have “fewer credit alternatives and options available than retail consumers or large businesses.”<sup>12</sup> Such middle market consumers require expertise and services that small banks may not be able to provide, including payroll, collection, and disbursement services; business expertise and advice; international banking services; and trade financing services.<sup>13</sup> Those customers’ credit needs, however, are unlikely to be sufficient to attract interest from distant banks.<sup>14</sup> When the Division concluded its review of the PNC Financial Services Group acquisition of National City Corporation just this month, they found that the relevant product market was retail banking, small business banking, and middle market banking services and that the relevant geographic market was eight counties in Western Pennsylvania.<sup>15</sup>

The analytic framework that the banking agencies apply when they assess the likely competitive effects of a combination dates back to the *Philadelphia National Bank* case of 1963.<sup>16</sup> Antitrust case law and enforcement have, of course, evolved substantially since then. The sudden increase in concentration caused by the “shotgun marriages” of the financial crisis provides a welcome opportunity for the banking agencies and the Antitrust Division to retool their approach to competitive effects analysis to incorporate concepts such as the impact of potential entry, and the risk of coordinated or unilateral anticompetitive effects.

If the Fed approves a transaction that the Antitrust Division believes will be anticompetitive, the Antitrust Division can challenge the transaction in federal district court.<sup>17</sup> Under the Bank Merger Act, the court must automatically stay the transaction, giving the Antitrust Division enormous leverage in settlement negotiations.<sup>18</sup> The Antitrust Division has challenged few bank mergers,

<sup>10</sup> U.S. Dep’t of Justice and Federal Trade Comm’n, Horizontal Merger Guidelines § 1.0 (1992, revised 1997), 4 Trade Reg. Rep. (CCH) ¶ 13,104, available at <http://www.ftc.gov/bc/docs/horizmer.htm>. See also Robert Kramer, Chief, Litigation II Section, Antitrust Div’n, U.S. Dep’t of Justice, Mega-Mergers in the Banking Industry, Address Before ABA Section of Antitrust Law 2 (Apr. 14, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2650.htm>.

<sup>11</sup> Kramer, *supra* note 10, at 2. See also Notice of a Proposed Final Judgment, Stipulation and Competitive Impact Statement in United States v. Fleet/Norstar Financial Group, Inc., 56 Fed. Reg. 33,458–02, 33,464 (DOJ July 22, 1991) (“Many other financial institutions compete with Fleet and NMNB in the provision of consumer banking services. Only commercial banks and state chartered savings banks, however, are competitors for business customers in Maine.”).

<sup>12</sup> Kramer, *supra* note 10, at 2.

<sup>13</sup> See, e.g., Notice of a Proposed Final Judgment, Stipulation and Competitive Impact Statement in United States v. Fleet/Norstar Financial Group, Inc. 17–18 (DOJ July 22, 1991).

<sup>14</sup> See Kramer, *supra* note 10, at 2. See also Proposed Final Judgment, Stipulation and Competitive Impact Statement, First Hawaiian, Inc., and First Interstate of Hawaii, Inc., 56 Fed. Reg. 10,916–02, 10,922 (DOJ Mar. 14, 1991).

<sup>15</sup> Press Release, U.S. Dep’t of Justice Requires Divestitures in Acquisition of National City Corporation by the PNC Financial Services Group (Dec. 11, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/240315.htm](http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm).

<sup>16</sup> United States v. Phila. Nat’l Bank, 374 U.S. 321 (1963).

<sup>17</sup> See 12 U.S.C. § 1828(c)(7)(A).

<sup>18</sup> See *id.* After a transaction has been approved, the Justice Department is estopped from seeking to unwind it. 12 U.S.C. § 1828(c)(7)(C).

with the last contested action dating back more than fifteen years,<sup>19</sup> and has lost most of the bank merger cases that have gone to trial.<sup>20</sup>

### How Should the Antitrust Division Apply the Failing Firm Doctrine?

Many of the recent transactions occurred when an institution faced imminent failure—its capital was deteriorating rapidly and the firm was in danger of failing in a matter of days. In these instances, “failure” means that the institution is unable to meet its obligations, such as repayment of short term loans or withdrawals. Absent government involvement in a disposition of the assets, such a situation could very well meet the test for a “failing firm” under the Horizontal Merger Guidelines. Under the Guidelines, a failing firm is one that: (1) “would be unable to meet its financial obligations in the near future,” (2) “would not be able to reorganize successfully” in Chapter 11 bankruptcy, (3) has in good faith, but unsuccessfully, tried to find an alternative purchaser that would “pose a less severe danger to competition,” and (4) the assets of which would exit the relevant market absent the acquisition.<sup>21</sup> When the Antitrust Division concludes that a firm satisfies all four elements of the test, it will permit a transaction to proceed, even if it would otherwise attempt to block it.<sup>22</sup>

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Virtually every one of the recent transactions would meet at least three of the four elements of the failing firm test:

**1. The institution will be unable to meet its obligations in the near future.** Several recent examples have shown how rapidly an institution can fail. Bear Stearns’ liquidity deteriorated in a matter of days as the market speculated that it would not be able to make delivery of securities or cash; counterparties and customers began withdrawing assets and refusing to extend credit to or trade with the firm. Just three days earlier the firm appeared to have sufficient capital to continue operating,<sup>23</sup> but once it lost the confidence of investors and trading counterparties, the firm was no longer able to do business.<sup>24</sup> Likewise, Washington Mutual was unable to continue as a going concern when it experienced a “run on the bank”—when depositors grew concerned that their funds were endangered and they began to withdraw money rapidly. After eight days, the government had to step in and put the bank in FDIC receivership because the bank had lost so much capital that it faced a liquidity crisis and imminent failure.<sup>25</sup>

<sup>19</sup> See John M. Nannes, Deputy Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, Mergers in the Financial Services Industry, Statement before the Committee on the Judiciary, U.S. House of Representatives 2, 6–8 (June 3, 1998), available at <http://www.usdoj.gov/atr/public/testimony/1787.pdf>; United States v. Texas Commerce Bankshares, Inc., No. 93-368, 1993 U.S. Dist. LEXIS 11698 (N.D. Tex. Aug. 10, 1993).

<sup>20</sup> See, e.g., United States v. Central State Bank, 817 F.2d 22 (6th Cir. 1985), aff’g United States v. Central State Bank, 621 F. Supp. 1276 (W.D. Mich. 1985); United States v. First Nat’l State Bank Corp., 499 F. Supp. 793 (D.N.J. 1980).

<sup>21</sup> Horizontal Merger Guidelines, *supra* note 10, § 5.1.

<sup>22</sup> *Id.*

<sup>23</sup> Landon Thomas, *Run on Big Wall St. Bank Spurs Rescue Backed by U.S.*, N.Y. TIMES, Mar. 15, 2008, at A1, available at <http://www.nytimes.com/2008/03/15/business/15bear.html>.

<sup>24</sup> Floyd Norris, *The Regulatory Failure Behind the Bear Stearns Debacle*, N.Y. TIMES, Apr. 4, 2008, at C1, available at <http://www.nytimes.com/2008/04/04/business/04norris.html>.

<sup>25</sup> Robin Sidel et al., *WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History*, WALL ST. J., Sept. 26, 2008, at A1, available at <http://online.wsj.com/article/SB122238415586576687.html>. Most depositors need not have been so concerned because their deposits were insured by the FDIC, but the bank nonetheless lost so much capital so quickly that it could no longer survive on its own.

**2. Chapter 11 reorganization is not feasible.** Lehman Brothers, the only institution actually allowed to fail, moved directly into Chapter 7 liquidation.<sup>26</sup> Chapter 11 was not feasible because financial institutions rely heavily on short term loans to fund their day-to-day business. When a highly leveraged institution (as financial institutions all are) cannot meet its obligations (or even if counterparties become concerned that it is unlikely to meet its obligations), it immediately loses access to funding and can no longer trade securities, make loans or undertake any business that requires capital. Chapter 11 would not rescue such an institution because once the business has moved elsewhere it need not come back, especially when counterparties cannot be confident that they will receive delivery or be paid in full. Similarly, depositors would see no reason to put their funds at risk when they have any other options.

**3. There is no identifiable purchaser that would not pose antitrust concerns.** This element could arguably be harder to satisfy than the other three in some instances. When the Fed or FDIC is willing to take over some of an institution's bad assets, there could be many firms that would be interested in buying the business. Several recent "fire sales" have attracted multiple bidders, but might have attracted fewer or none in the absence of government willingness to take on the bad assets. Thus, several bidders were interested in purchasing Lehman Brothers, but they ultimately declined to do so because the government was unwilling to assume or guarantee any of Lehman's holdings, some of which had the potential to decline substantially in value.<sup>27</sup> Citigroup was similarly interested in purchasing Wachovia only if the FDIC would assume some of its bad assets<sup>28</sup> and JP Morgan Chase's interest in Bear Stearns was contingent on the Fed assuming some of the bad assets held in Bear Stearns's portfolio.<sup>29</sup> The Antitrust Division could be faced with a situation in which a transaction fails to satisfy this prong of the test solely because the FDIC or Fed is willing to assume bad assets. Alternative purchasers could, however, appear to be less attractive to the banking agencies, however, for reasons unrelated to competition. For example, the FDIC could prefer a purchaser that might create a competition issue because alternative purchasers would require a greater commitment of FDIC funds, when its insurance fund is already challenged.

**4. The assets would likely exit the market, absent the transaction.** In the case of Chapter 7 liquidation or a shutdown by the FDIC, an institution's ability to compete instantly evaporates—the portfolio is sold, the people are laid off and the deposits are returned to individual depositors or transferred to another institution. The assets that previously constrained competition disappear.

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<sup>26</sup> Some Lehman divisions remained viable and were sold as going concerns as part of the liquidation. C. Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J., Sept. 16, 2008, available at <http://www.gmjobs.net/article/SB122145492097035549.html>. Prior to Lehman's collapse, Barclays (which bought the investment banking and capital markets business) made clear that it would only purchase the Lehman Brothers holding company with government assistance. David Teather & Jill Treanor, *Barclays Pulls Out of Move to Rescue Ailing US Banking Giant*, GUARDIAN, Sept. 14, 2008, at 2, available at <http://www.guardian.co.uk/business/2008/sep/14/lehmanbrothers.barclay>. As the problematic assets were owned by the holding company, Barclay's was able to buy the investment banking and capital markets business without taking on the risks they identified in the holding company. Randall Smith et al., *Lehman, Workers Score Reprieve*, WALL ST. J., Sept. 17, 2008, at C1, available at <http://online.wsj.com/article/SB122163100282247355.html>.

<sup>27</sup> Mollenkamp et al., *supra* note 26.

<sup>28</sup> David Enrich & Dan Fitzpatrick, *Wachovia Chooses Wells Fargo, Spurns Citi*, WALL ST. J., Oct. 4, 2008, at A1, available at <http://online.wsj.com/article/SB122303190029501925.html>. Wells Fargo, as it turned out, was willing to purchase Wachovia with no government help, reducing pressure on the FDIC's insurance fund. *Id.*

<sup>29</sup> Landon Thomas Jr., *Bear Stearns Gets a Lifeline from Fed and a Rival*, INT'L HERALD TRIB., Mar. 14, 2008, at <http://www.ihf.com/articles/2008/03/14/business/bear.php>.

### How Can the Antitrust Division Address a Competition Issue?

When a firm is not “failing” as defined by the Merger Guidelines simply because of government willingness to participate in the transaction, the Antitrust Division has a challenge when the transaction poses a competition issue: rather than accept the transaction or try to block it (and endanger the government’s bailout) is there a way that it can help the transaction to close while still addressing the competition concern? Such a situation can arise even though banking is not terribly concentrated nationwide (the Reigle-Neal Act limits concentration by barring any transaction that would cause an institution to hold more than 10 percent of deposits nationwide or 30 percent of the deposits in a single state).<sup>30</sup>

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A transaction could raise competition issues in two ways. First, a transaction could result in the combined firm’s share of deposits exceeding the Fed’s statutory thresholds.<sup>31</sup> Second, the Antitrust Division might identify a specific area of competitive concern, such as lending or credit card processing services or other business banking services for small and medium-sized businesses.<sup>32</sup>

In either case, it is likely that a divestiture of a clearly defined set of assets that are a small portion of the acquired institution could address the concern. The history of bank mergers shows that divestitures designed to reduce the increase in concentration in a discrete geographic area can be a small fraction of the total transaction. There would, however, be a legitimate concern that the timetable for investigating an issue and reaching a resolution could be too long to prevent an institution from collapsing.<sup>33</sup> A shaky institution that is in imminent danger of collapse must be sold in a matter of days or weeks, not the months that an antitrust review normally requires. Even the lightning-quick pace of the Antitrust Division’s investigation of PNC Financial Services Group’s acquisition of National City Corp.—completed just seven weeks after the merger was announced—may be too slow when the target institution is in imminent danger of collapse, as was the case with Bear Stearns and Washington Mutual. There was less urgency to close the PNC-National City Corp. merger as compared to other recent shotgun mergers because National City, while shaky, reportedly was adequately capitalized at the time PNC announced the merger, which is backed by \$7.7 billion in TARP funds. The PNC-National City transaction does, however, show the potential impact of a government-assisted transaction—the government’s involve-

<sup>30</sup> 12 U.S.C. § 1842 (d)(2)(A).

<sup>31</sup> For example, press reports have speculated that the Wells Fargo acquisition of Wachovia could raise issues in California, where both institutions have a substantial presence. *See, e.g.,* Victoria Collier & James Temple, *Wells Fargo, Citigroup Vie for Wachovia*, SAN FRAN. CHRON., Oct. 8, 2008, at C1. Bank of America currently already controls 10.9 percent of U.S. bank deposits following its acquisition of Countrywide Financial Corp. in June 2008. *See* Federal Reserve System, Order Approving the Acquisition of a Savings Association and Other Nonbanking Activities 5 n.13 (June 5, 2008) (order approving Bank of America’s acquisition of Countrywide), available at <http://www.federalreserve.gov/newsevents/press/orders/orders20080605a1.pdf>. The 10 percent limit did not apply to this acquisition because the Reigle-Neal Act exempts acquisitions of federally chartered savings associations and savings banks. *See id.* Presumably, if a transaction would violate the statutory limit, the Fed would be unable to approve it and, therefore, would search for another option in the first instance.

<sup>32</sup> The Antitrust Division has made clear that lending to smaller-sized commercial customers is likely to remain an area of concern. *See* Kramer, *supra* note 10, at 2; Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets*, 13 FORDHAM J. CORP. & FIN. L. 581 (2008). *See also* DOJ Press Release, *supra* note 15; Press Release, U.S. Dep’t of Justice, Justice Department Reaches Agreement Requiring Divestitures in Merger of First Busey Corporation and Main Street Trust Inc. (June 12, 2007), available at [http://www.usdoj.gov/opa/pr/2007/June/07\\_at\\_426.html](http://www.usdoj.gov/opa/pr/2007/June/07_at_426.html) (concluding that the merger would “adversely affect competition in the local markets for commercial banking and retail banking services”).

<sup>33</sup> Because the Bank Merger Act requires a court to stay a transaction upon the filing of suit by the United States, the Division could, at least theoretically, “sue first and investigate later” during discovery, but such a course of action likely would doom a transaction that the banking agencies consider essential—a step the Division would understandably be very reluctant to take.

ment alone can reduce the urgency of closing and can give the Antitrust Division enough time if they are willing to move extremely quickly.<sup>34</sup>

Antitrust enforcement and competition policy generally, nonetheless, can and should be relevant. They can be relevant because the existing framework and practices are flexible enough to enable the Antitrust Division to do more good than harm and should be relevant because a rapid and potentially substantial increase in concentration in a vital part of the economy creates the opportunity for anticompetitive effects in an area in which the economy can ill afford them.

The Antitrust Division's first option is likely to be discussion with the banking agencies to find a solution that does not interfere with their goals, but which also does not raise competition problems. A tool for the Antitrust Division to consider in conjunction with the inter-agency approach is the so-called "pocket decree," which permits a transaction to close immediately, but, within limits, permits the Antitrust Division to file a consent decree and require a divestiture at a later date if it concludes that a remedy is necessary. There is precedent for such a solution. In 2006, the Antitrust Division permitted Mittal Steel Company to pursue a hostile takeover of Arcelor S.A. before the expiration of the initial HSR waiting period and the conclusion of the Antitrust Division's investigation because Mittal entered into a letter agreement with the Antitrust Division in which it agreed to divest specific assets if the Antitrust Division concluded that the acquisition was likely to result in a substantial lessening of competition.<sup>35</sup> The letter agreement required Mittal to hold those assets separate while the Antitrust Division investigation was pending.<sup>36</sup>

Then-Assistant Attorney General Thomas O. Barnett described some of the circumstances in which the Antitrust Division is likely to use a pocket decree, noting particularly those circumstances in which the Antitrust Division's review process "itself can affect the outcome of the marketplace competition for control of companies."<sup>37</sup> Barnett cited as an example certain tender offers in which the Antitrust Division's issuance of a second request would trigger foreign regulatory notice or filing requirements that would automatically foil the tender offer.<sup>38</sup> Preservation of the FDIC insurance fund or Fed capital would certainly be analogous—the banking agencies cannot wait for the Antitrust Division to complete an investigation without endangering depositors or the system generally, and they will have to move on to another bidder, at a greater cost to taxpayers.<sup>39</sup>

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<sup>34</sup> DOJ Press Release, *supra* note 15; *La Tourette Asks Paulson to Reconsider National City Bailout Snub*, STATES NEWS SERVICE, Nov. 18, 2008.

<sup>35</sup> See Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture in Mittal Steel's Acquisition of Arcelor (Aug. 1, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/217516.htm](http://www.usdoj.gov/atr/public/press_releases/2006/217516.htm).

<sup>36</sup> *United States v. Mittal Steel Co.*, No. 06-1360, 2007 U.S. Dist. LEXIS 45386, at \*25 (D.D.C. May 23, 2007).

<sup>37</sup> Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Merger Review: A Quest for Efficiency*, Address Before N.Y. State Bar Ass'n, Antitrust Section 9 (Jan. 25, 2007), available at <http://www.usdoj.gov/atr/public/speeches/221173.htm>.

<sup>38</sup> *See id.*

<sup>39</sup> The FTC used a similar device in 1995 when Hoechst gave the Commission a "blank check" to proceed with the purchase of Marion Merrell Dow before the Commission completed its investigation. Hoechst agreed that when the FTC completed its investigation, Hoechst would take the actions the Commission concluded would be necessary to address any competitive problem the Commission found in four specific areas (four specified drugs) up to and including divestiture of one company's products in that area. The agreement required Hoechst to hold Marion Merrill Dow separate while the FTC investigation was pending. Hoechst AG; Proposed Consent Agreement with Analysis to Aid Public Comment, 60 Fed. Reg. 49,609, 49,615 (FTC Sept. 26, 1995). Then FTC-Director of the Bureau of Competition William Baer set out the conditions that a party would need to satisfy to employ the blank check option: (1) the "relevant markets must be easily defined," (2) the maximum necessary relief must be readily identifiable with specificity, and (3) the parties must be willing to let the agency decide unilaterally how much of the maximum remedy is necessary ("you have to leave your negotiating leverage at the door"). William Baer, Director, Bureau of Competition, Fed. Trade Comm'n, *A Report on Recent Antitrust Developments at the FTC, Remarks Before the ABA Section of Antitrust Law* (Aug. 9, 1995), available at <http://www.ftc.gov/speeches/other/baersp.shtm>.

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The pocket decree or blank check option could work well for an urgent merger of financial institutions that raises competition issues because in many instances, the lines of business that raise issues can be defined readily—such as banking in a geographic area—and could be a reasonably small part of the troubled institution.<sup>40</sup> The maximum relief would likely be a divestiture of that portion of the business, which the Division likely would require the purchaser to hold separate pending the completion of its investigation.<sup>41</sup> Those assets might not be difficult to sell at a later date (without the burden of bad assets) and in a reasonable auction, unlike the institution as a whole. Finally, because of the often extremely low prices in these transactions, giving an agency a blank check might not be an unreasonably high price.

The pocket decree might not always present a viable solution (if, for example the competition problem relates to a substantial portion of the target), and there could be times when the Antitrust Division will have to rely solely on moral suasion to persuade the banking agencies to avoid options that pose threats to competition at the banking agencies. There is also a danger that even a pocket decree could cause unacceptable delay. In those situations the Antitrust Division's options might be limited. Finally, the Antitrust Division would have to be careful to implement the approach in a manner that would not deter potential bidders—it would have to show a willingness and ability to move quickly, a willingness to put clear limits on the extent of relief that it could demand, and a commitment to navigate the Tunney Act process successfully. Absent such flexibility and assurances, the Antitrust Division could find itself with the unpalatable choice of thwarting a much-needed transaction in a vital sector of the economy or standing aside when it is concerned that a transaction could pose long term harm to competition. ●

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<sup>40</sup> The PNC acquisition of National City shows that a transaction can work for a purchaser even when the divestiture is large. Although PNC agreed to divest sixty-one branches (in a geographic area in which PNC already has numerous branches) with \$4.1 billion of deposits, the combined institution will have about \$180 billion of deposits. See DOJ Press Release, *supra* note 15.

<sup>41</sup> Holding the entire target institution separate, as the FTC required Hoechst to do with Marion Merrill Dow, would not likely be feasible in a forced sale of a bank because the troubled institution would have immediate capital needs and rapid cost cutting would likely be necessary. But it is possible that the part of the business that raises the competitive issue could be held separate, even if the entire institution could not, particularly if the parties agree to shift certain assets that need immediate attention to other parts of the institution.