Prepared Statement of the
Federal Trade Commission

Presented by

William J. Baer
Director, Bureau of Competition

Before the

Committee on Commerce
Subcommittee on Finance and Hazardous Materials
United States House of Representatives

July 17, 1997

I. Introduction

Mr. Chairman and members of the Subcommittee, I am William J. Baer, Director of the Federal Trade Commission's Bureau of Competition. I am pleased to appear before you today to present the testimony of the Federal Trade Commission ("Commission" or "FTC") concerning H.R. 10, The Financial Services Competition Act of 1997.[(1)] Competition in the banking and financial services industries is vital to the stability and growth of the American economy. Although the Federal Trade Commission Act does not apply to banks or savings and loan institutions,[(2)] the Commission has played an important role in eliminating unlawful restrictions on competition and in protecting consumers from fraud and deceptive practices in financial as well as other industries. The Commission enforces the Clayton Act and the FTC Act against anticompetitive conduct, both merger and nonmerger. On the consumer protection side, the Commission has an entire division devoted to policing unlawful practices in the credit industry, excluding banks and

Subtitle C would establish a National Council on Financial Services, with regulatory authority regarding the relationship between depository institutions and their subsidiaries and affiliates. The Council is directed, in consultation with the FTC, to study and report to Congress on the broader affiliations between financial and non-financial companies, on the increasing use of technology in the provision of financial services, and on allowing consumers to protect the use of their financial information under proposed section 122. Finally, Subtitle I would streamline the review of competition issues that arise from bank mergers, by removing those issues from the scope of the banking agencies' review, while continuing to provide for review by the Department of Justice. The standards that apply under the antitrust laws to mergers and other similar transactions would apply to these transactions. The banking agencies would continue to consider the financial and managerial resources of the companies and banks involved in the transaction, as well as the convenience and needs of the community to be served.

III. Antitrust Enforcement in a Changed Regulatory Environment

The antitrust laws were designed by Congress to apply to all industries. However, in certain industries, including banking, special regulatory agencies rather than the FTC were given significant jurisdiction over competitive issues, including mergers. In the banking industry, each special regulatory agency has been obligated to consider the competitive consequences of every proposed merger within its jurisdiction.[(8)] H.R. 10 would change much of the regulatory environment in the banking and financial services industries. Competition concerns would no longer be a part of the financial regulatory agencies' review of every proposed merger.

In addition, H.R. 10 would enable banks to move into businesses outside the banking agencies' experience. This would mean that banks could make acquisitions and conduct business in nonbanking areas that frequently fall within the FTC's expertise. Some merger proposals may substantially increase the risk of collusion or the unilateral exercise of market power. While some of these risks may be in banking itself, others may be in nonbanking industries, both within financial services and in other industries.

As a result, after the changes made by H.R. 10, expanded analysis by the antitrust agencies of competitive risks arising both within and outside traditional banking will be necessary to protect consumers and competition from anticompetitive mergers. As in other industries, merger review in the financial services sector will involve identifying and investigating the few anticompetitive transactions amid the many hundreds of procompetitive or competitively neutral transactions.

The Commission has had some experience in merger review in financial services industries. In 1995, we reviewed First Data's acquisition of First Financial Management Corp., which would have merged the only two competitors in the consumer money wire transfer market, Western Union and MoneyGram.[(9)] Consumers use wire transfers often in emergency situations, such as when a person loses a wallet or when a traveler runs out of money. They are also extensively used by consumers without banking relationships, which constitute about 20-25 percent of the total population. The Commission's enforcement action required First Data to divest one of the competing services. Based on our preliminary estimates we believe our enforcement action saved consumers $15-30 million per year.

The First Data matter illustrates the importance of not weakening the FTC's merger jurisdiction as regulatory barriers between banks and nonbanks diminish. Both First Data and First Financial were two of the largest nonbank participants in the merchant processing business. The Commission conducted an extensive investigation of that market but no enforcement action was taken. The current restriction on the FTC's jurisdiction over banks, however, if left intact, could mean that the FTC may not be able to review a future merger in the merchant processing market involving a bank and a nonbank.

As a general rule, the FTC and the Department of Justice share jurisdiction over mergers and other anticompetitive conduct. The two antitrust agencies routinely cooperate to determine the single agency that will review each particular merger proposal, to avoid duplication of efforts or burdens on the parties. The two agencies have standard clearance procedures that assign each matter to one agency or the other, considering each agency's expertise in the particular markets or firms involved. Thus, preserving in the restructured financial services industry the ordinary rule of shared jurisdiction between the antitrust agencies would not be inconsistent with the goal of H.R. 10 to streamline regulation.

H.R. 10 would streamline antitrust enforcement responsibilities for bank mergers by removing them from the scope of the banking agencies' review while preserving Department of Justice review. The provisions do not address mergers between banks and nonbanks, which are likely to occur in the wake of the legislation. Depending on the nonbank industries involved, the Commission's expertise and experience could be particularly relevant to some of these mergers, and the Commission should therefore not be prohibited from addressing such bank-nonbank mergers. We suggest that H.R. 10 make clear that the Commission would not be excluded from jurisdiction over mergers between banks and nonbanks.

In addition to merger cases, there could be increased opportunities for nonmerger anticompetitive conduct as a result of the opening of markets contained in H.R. 10. When potential horizontal competitors were kept in separate markets by regulators, there was little incentive or ability to engage in horizontal restraints. Distributional restraints were likewise absent when the 3d aJbs w

8. *See* Bank Merger Act of 1996, 12 U.S.C. § 1828(c); Bank Holding Company Act, 12 U.S.C. §§ 1842-43; and Home Owners' Loan Act, 12 U.S.C. § 1467a(e). Financial institution mergers are exempt from the filing obligations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a(c).

9. First Data Corp., C-3635 (April 8, 1996).

10. *See* FTC v. Mead Johnson & Co., No. 92-1366 (D.D.C. June 11, 1992) (consent order); FTC v. American Home Products Corp., No. 92-1365 (D.D.C. June 11, 1992) (consent order) (settling Commission charges that two infant formula manufacturers engaged in unilateral facilitating practices to eliminate competitive sole source bidding in the federal government's Women, Infants, and Children (WIC) program in Puerto Rico); YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993) (Commissioner Azcuenaga dissenting in a separate statement; Commisiontwante sldg i, ant