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FOREWORD

"Developments in banking" have been rapid in recent years, following the industry's extended period of adjustment to the traumatic experiences of the 1930s. This symposium seeks to document some of the recent changes in the banking industry and its legal environment and to recognize or forecast some of the conditions that will affect the industry's future. While conceding that a complete panorama has not been provided—such important matters as conflicts of interest, the legal issues involved in automating the transfer of funds, and experience under the Uniform Commercial Code are not dealt with—the editors are satisfied that the symposium conveys an accurate impression of the pace and direction of change as well as valuable insights on important specific issues.

We may note here a few of the themes that recur in the symposium and seem to characterize large segments of the banking industry. The most prominent issue is, of course, the proper scope to be allowed competition as a force in banking. This question is no doubt a hard one when it comes down to seeking precise answers, but legislative and regulatory solutions seem in most places to have been unduly cautious and protective of existing banks. Few, if any, cases have been heard of in recent years where experience has convincingly demonstrated that legislatures or regulators have allowed too much competition to exist, it being far from clear that a bank failure constitutes such a demonstration. More importantly, state policies restraining competition inhibit realization of Congress's procompetitive goals, as Messrs. Smith and Greenspun aptly demonstrate in their article herein. Mr. Liffand's article details the manner in which antitrust policy has recently been brought to bear more substantially on banking, an important step in restoring competition to a leading role in the industry.

Another theme to be noted is a reticence throughout the banking community concerning public disclosure of information about individual banks. This secretiveness is best illustrated by the bank financial reporting practices described by Mr. Shipley in his article, but it seems fair to attribute to the same general attitude at least some of the procedural backwardness of the banking agencies that was discussed by Professor Davis and Mr. Bloom in articles in our previous issue on banking regulation.¹ Likewise, undue secretiveness seems to be embodied in an overbroad provision, inserted in the new Public Information Act at the request of the banking agencies, which limits the public availability of data "contained in or related to examination,

¹ Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713 (1967); Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, *id.* at 723.

operating, or condition reports" respecting individual banks.² Each of these instances of nondisclosure seems almost anomalous when placed alongside banking's obvious public responsibilities; they are surely anachronisms in an age where deposit insurance and depositor sophistication protect against banking panics and at a time when industry in general is beginning to be prodded on not reporting earnings on a product-by-product or divisional basis.

A third theme of significance is the recurring question of the performance of the banking industry as an innovator, a matter that is hard to judge. Mr. Dahl and Mr. McKinney describe important areas where banking has developed new techniques in response to new opportunities, but Governor Mitchell's article expresses grave doubts, though a degree of hope, about the banking system's innovative capacities.

Finally, one can note a long-standing dependence by bankers on legislative protection, a favoritism which is perhaps ultimately to blame for much that has been criticized in banking today. Having bred this dependence, legislatures have often been counted on for solutions to bankers' problems and have often responded as desired. Bankers' ability to perpetuate this tradition of legislative recognition of themselves as a class apart may be weakening, however, as outsiders—such as the Justice Department, the Special Study of Securities Markets, the accounting profession, scholars like Professor Davis, and the courts—have more and more occasions to insist that banking may not be all that special a case. Of course, Congress continues to make concessions to the banking industry—for example, by assigning enforcement of the securities laws against banks to the banking agencies. Nevertheless, substantive policies in the securities and antitrust field have been modified materially to lessen special privileges previously accorded. State legislatures may also be improving their ability to see banking issues in a wider perspective.³

Bankers must now cease considering their industry to be a privileged one, exempt from disclosure requirements applicable to other industries, free of Clayton Act prohibitions and Sherman Act enforcement efforts, and entitled to protections—against competition and other hazards—not accorded other segments of the competitive economy. The task of developing bankers' awareness of their position in the mainstream of public policies requires that legal scholars, economists, and journals serving a public broader than the banking community must play a part, reviewing regulatory and legislative developments with a view to criticism of those aspects of banking policy that appear to neglect wider interests. The editors hope that the two issues of *Law and Contemporary Problems* devoted to banking have made a beginning along these lines.

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² 5 (Appendix) U.S.C. § 1002(e)(8) (Supp. II, 1965-66).

³ Interestingly, Professor Haskell's article deals with proposed state legislation that, in his opinion, inadequately recognizes that banks acting as fiduciaries ought not to have all the same protections that an amateur trustee might be entitled to. Apparently in this area banks would prefer not to be singled out as a class for special legislative treatment.