2005

Riegle-Neal's 10% Nationwide Deposit Cap: Arbitrary and Unnecessary

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Riegle-Neal's 10% Nationwide Deposit Cap: Arbitrary and Unnecessary

I. INTRODUCTION

In 2004 Bank of America bought FleetBoston in a $49.3 billion all-stock transaction, giving it 9.9% of all federally-insured deposits in the United States. In the same year, Morgan Chase announced that it would acquire Bank One, increasing its share of the nation's deposits to 6.7%. These mergers made Bank of America and J.P. Morgan first and second, respectively, in share of national deposits held.

United States banking laws limit the expansion of banks and bank holding companies, primarily by prohibiting transactions that would result in the consolidated bank holding more than ten percent of the nation's bank deposits. These constraints stem from the established tradition of decentralized banking, aimed at protecting smaller banks and promoting market competition. This theory has been the foundation upon which bank expansion regulation has traditionally rested.

As the recent J.P. Morgan and Bank of America mergers demonstrate, an increasing number of banks are using mergers to

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3. BANK OF AMERICA, supra note 1, at 11; Barbara A. Rehm, The Beltway Perspective on Quest to Be 'National', AM. BANKER, Feb. 6, 2004, at 1.

4. A bank holding company is a company that has control over any bank or over any other company that has control over any bank. 12 U.S.C. § 1841(a)(1) (2000).


7. See generally WILLIAM A. LOVETT, BANKING AND FINANCIAL INSTITUTIONS LAW 185 (5th ed. 2001); JONATHAN R. MACEY ET AL., BANKING LAW AND REGULATION 345-70 (3d ed. 2001); see infra notes 25-38 and accompanying text.
expand into new geographic and product markets. According to Bank of America chief executive Kenneth D. Lewis, if the deposit cap were not a constraint, Bank of America might be interested in solidifying its position in the Midwest, the one region where it still lacks a commanding presence. However, the current law virtually forecloses the possibility that Bank of America could merge again, absent growth in the national deposit base or an expansion of the nationwide deposit cap. Thus, as more banks expand, the effects of the national deposit cap will become more important, making this a real and pressing issue in the industry.

Part II of this note briefly describes the legislative history of interstate banking and branching restrictions and the motivations that have traditionally driven geographic banking expansion regulations. It also details the legislative purpose behind the enactment of the Riegle-Neal Act Interstate Banking and Branching Efficiency Act ("the Riegle-Neal Act"), as well as the ten percent nationwide deposit cap set forth as part of that Act. Part III discusses why the national deposit cap is arbitrary, unnecessary and harmful to consumers. Part IV illustrates that the formula used to calculate the deposit cap has been applied inconsistently among mergers, detracting from the significance of the deposit cap as a means of measuring market concentration.

II. STATUTORY FRAMEWORK OF THE RIEGLE-NEAL ACT

A. History of Interstate Banking and Interstate Branching Prior to the Riegle-Neal Act

Bank branching and ownership are the two ways to expand a bank's service area. Bank branching involves the establishment of

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8. Rehm, supra note 3, at 1.
11. See supra notes 8-10 and accompanying text.
12. See discussion infra Part II.A.
13. See discussion infra Part II.B.
14. See discussion infra Part III.
15. See discussion infra Part IV.
16. See generally MACEY ET AL., supra note 7, at 18-20, 24-25.
separate but dependent banking facilities that are part of the central bank.\textsuperscript{17} The branches perform many of the same banking functions as the main bank, but are physically separate from the main office.\textsuperscript{18} Through the establishment of these new branches, banks can physically expand their operations into geographic areas not previously serviced, as well as easily move money from one locality to another.\textsuperscript{19} Prior to the enactment of the Riegle-Neal Act, national banks could only branch within a state to the same extent allowed for state banks in that state.\textsuperscript{20} This authorization was very limited, as states only had the authority to authorize branching within their home state.\textsuperscript{21}

Bank ownership involves expansion of the bank's service area through either purchasing an already existing institution or establishing a new institution in the state where a presence is desired.\textsuperscript{22} This method of expansion was also restricted prior to the Riegle-Neal Act by legislation precluding bank holding companies from owning banks in other states unless the host state law specifically authorized out-of-state ownership.\textsuperscript{23} Although several states passed statutes permitting such ownership in limited circumstances, the majority of these state statues were predicated on reciprocal agreements between states and therefore led to regional groups of states across which bank ownership was allowed.\textsuperscript{24}

A driving force behind these restrictive pieces of legislation was Congress' desire to ensure competitive equality between banks.\textsuperscript{25} Many

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\textsuperscript{17} See generally id. at 13.
\textsuperscript{19} See generally MACEY ET AL., supra note 7, at 18-20; Hirtle, supra note 18.
\textsuperscript{20} LISSA L. BROOME & JERRY W. MARKHAM, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 57 (2d ed. 2004). This legislation was entitled the McFadden Act. \textit{Id.}
\textsuperscript{21} Id. National banks with main offices close to a state border could take advantage of a limited ability to relocate their main office across the state line and retain the former main office as an interstate branch. \textit{Id.} at 682.
\textsuperscript{22} See generally BROOME & MARKHAM, supra note 20.
\textsuperscript{23} MACEY ET AL., supra note 7, at 368. This provision was part of the Bank Holding Company Act known as the Douglas Amendment. \textit{Id.; see also Michael P. Malloy, Bank Regulation 83 (1999) (stating that the Bank Holding Company Act is the product of congressional concern that economic concentration could lead to conflicts of interest, self-dealing, involuntary tying arrangements, and generally to a derogation of competition).}
\textsuperscript{24} BROOME & MARKHAM, supra note 20, at 702; MACEY ET AL., supra note 7, at 357-58.
\textsuperscript{25} See Wilmarth, supra note 6, at 973.
\end{flushright}
members of Congress feared that unrestricted branching and ownership would lead to large consolidated banks with monopolistic power over access to credit in their respective trade areas. This would impede the ability of those attempting commercial expansion, putting the power of industrial growth in the hands of the banks and giving inordinate economic power to a few private entities. In addition, these members feared consolidation because they believed that large banks would prefer the interests of the wealthy few, disregarding the interests of the common people. During Senate discussions, Senator Douglas explained that the legislation restricting geographic expansion would prevent an “undue concentration of banking and financial power” and “keep the private control of credit diffused as much as possible.”

Proponents of geographic restrictions argued that such restrictions prevent undue concentration and that concentration reduces competition, thus lowering service quality and increasing price. In a monopolistic market, typically, fewer desired goods and services are distributed at a higher price, thus harming consumers. The goal of decentralized banking, therefore, is to protect consumers against the high prices and lack of choice associated with market consolidation.

Another argument in support of branching and banking restrictions was that only community-oriented banks could be relied on to provide the loans and other banking services needed to develop the economies of smaller cities, towns, and rural areas. Proponents of

26. See id.; see also MACEY ET AL., supra note 7, at 346.
27. Wilmarth, supra note 6, at 973.
29. Wilmarth, supra note 6, at 976. Senator Douglas contended that the highly concentrated banking systems in Britain and Canada contributed to the widespread development of industrial cartels and monopolies in those countries. Id. He further charged that the dominant banks in Germany supported the German industrial cartels and had facilitated the rise of Hitler. Id. Douglas declared that his amendment was part of “the fighting tradition of Andrew Jackson who wanted a competitive and free America and not one dominated by a relatively small group of financiers and industrialists.” Id.; see also First Nat’l. Bank v. Dickinson, 396 U.S. 122 (1969).
30. MACEY ET AL., supra note 7, at 346.
32. Id.
33. Community-oriented banks are banks whose branches were limited to their home community. See 67 CONG. REC. H3,248 (1926) (statement of Rep. Cannon); Wilmarth, supra note 6, at 973.
34. 65 CONG. REC. H11,297 (1924) (statement of Rep. McFadden); 66 CONG. REC.
the restrictions believed that local community-based control over banking preserved a close relationship between those in the community who needed credit and those who provided credit.\textsuperscript{35} Supporters argued that community banks reinvest their deposits and profits by lending to small businesses and farmers within their home areas, while large banks drain funds from rural areas, redirecting them to large cities or overseas.\textsuperscript{36}

This legislative paradigm helped shape the banking landscape as an industry, favoring heavy regulation and division of market share and power among many institutions.\textsuperscript{37} This legacy can be seen in recent legislation, even that which is supposed to provide for industry-wide consolidation and growth.\textsuperscript{38}

\textbf{B. The Riegle-Neal Act}

In 1994, Congress enacted the Riegle-Neal Act,\textsuperscript{39} which preempted the many different state banking regulations and established a consistent nationwide standard for interstate expansion by national and state banks.\textsuperscript{40} It accomplished this by instituting a provision that permits a bank holding company ("BHC") to acquire a bank located in a state other than the home state of the BHC without regard to state law.\textsuperscript{41} Thus, the national banks no longer needed permission from state law to acquire banks in that state.\textsuperscript{42} The Riegle-Neal Act also permits interstate branching.\textsuperscript{43} Thus, the Riegle-Neal Act removed the vast

\begin{itemize}
\item 35. Wilmarth, supra note 6, at 976.
\item 37. See generally Lovett, supra note 7, at 184.
\item 38. See discussion infra Part II.B.
\item 42. Id.
\item 43. Hal S. Scott, International Finance: Transactions, Policy and Regulation 79 (11th ed. 2004). The Act gave the states the discretion to remove themselves from the statute (to opt out) and to reject branching attempts inside their states. Id. If they did not choose to opt out prior to June 1, 1997, then branching through mergers fell within the confines of the Act. Id. Currently, no states have legislation opting them out of the Act.
majority of the barriers remaining to interstate banking and branching, leading many to regard it as the single most important piece of banking legislation enacted in the last four decades.\textsuperscript{44}

The Riegle-Neal Act also contained restrictions reminiscent of the perceived need for regulation, promoting decentralized banking.\textsuperscript{45} Under the Riegle-Neal Act, interstate bank acquisitions must comply with concentration limits; these limits set a maximum share of deposits an organization can acquire both within a state and nationwide.\textsuperscript{46} The Act also holds that the Federal Reserve Board (the “Board”) may not approve an application for merger if the merging bank (including all insured depository institutions which are affiliates of that bank) controls, or after the merger would control, more than ten percent of the total amount of deposits of insured depository institutions in the United States.\textsuperscript{47} The Board also may not approve the application if the applicant would control thirty percent or more of the insured deposits in any state.\textsuperscript{48} A state may waive or amend the thirty percent deposit limit, provided that it does not discriminate against out of state entrants.\textsuperscript{49}

\textbf{C. Purpose and Intent of Drafters of the Riegle-Neal Act}

According to Under Secretary of the Treasury Frank N. Newman, the purposes of enacting the Riegle-Neal Act were many.\textsuperscript{50} First, it gives banks an opportunity to structure themselves more efficiently by eliminating duplicative functions and reducing expenses.\textsuperscript{51} Prior to enactment of the Riegle-Neal Act, an enterprising banker could

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\item \textit{Id.; see also} Jennifer Gordon, \textit{States Easing Interstate Branch Curbs}, 166 \textit{Am. Banker}, Mar. 19, 2001, at 1 (stating that most states have abandoned restrictions on interstate branching).
\item 45. \textit{See supra} notes 25-38 and accompanying text.
\item 46. \textit{Spomg, supra} note 40, at 177.
\item 48. \textit{Id.} § 1842(d)(2)(B).
\item 49. \textit{Id.} § 1842(d)(2)(C). A state may override this provision in either direction with an alternative deposit cap. \textit{Spomg, supra} note 40, at 177. About two-thirds of the states have chosen not to adopt their own deposit cap or have officially adopted the same thirty percent deposit cap specified in the legislation. \textit{Id.} The remainder of the states have adopted a different deposit cap and in most cases, this cap is less than thirty percent. \textit{Id.; see also} 12 U.S.C. § 1828(c)(5) (2000).
\item 51. \textit{Id.}
simply own a number of separate banks to avoid restrictions on
interstate branching, where regional laws permitted. However, this
form of banking was not conducive to centralized management or ready
access to the capital markets because the banks were necessarily a set of
entirely independent institutions united only by common individual
ownership. By allowing a bank to branch without restrictions, these
banks were able to consolidate duplicative managerial and financial
functions, allowing for increased efficiency and ease of management.

The Riegle-Neal Act also encourages a more safe and sound
banking system by allowing banks to gather deposits across a wider
geographic area, thus allowing them to diversify their holdings. Diversification insulates a bank from the negative economic effects of
regional economic downturns. History supports the positive aspects of
geographic diversity; during the 1920s and early 1930s unit banks failed at a significantly higher rate than banks with branches. Branched banks were able to weather bank runs and, therefore avoid failure, because of their more extensive sources of deposits and earnings.

In addition, the Riegle-Neal Act promotes customer convenience, allowing consumers for the first time to bank at the branch
most convenient to them, whether that branch is across town or across the country. Large, centralized banks mean that customers will no
longer have to pay excessive fees for using other institutions' ATMs

52. See MACEY ET AL., supra note 7, at 19.
53. Id.
54. See H.R. REP. NO. 103-448, at 19.
57. Unit banks are single bank units which own and operate in only one location.
MACEY ET AL., supra note 7, at 12-13.
58. Wilmarth, supra note 6, at 983. In addition, a bank with branches in several
geographic areas should be able to attract a higher percentage of its deposits from individual
consumers. Id. FDIC-insured deposits owned by consumers are generally less volatile than
uninsured deposits owned by institutional investors. Id. Therefore, a geographically diverse
bank is likely to have a more stable deposit base and a lower risk of a run by depositors than
a unit bank. Id. at 984; see also Eugene N. White, A Reinterpretation of the Banking Crises
were disproportionately concentrated in the category of small, local banks that did not have
branches and therefore were not geographically diverse).
59. Wilmarth, supra note 6, at 983.
simply because they are away from their home bank. In addition, geographic expansion permits banks to offer full-service banking at remote locations. Note, however, that the realization of this goal of the Riegle-Neal Act is limited by the ten percent deposit cap.

Though the Riegle-Neal Act eliminates many federal barriers to interstate banking, the state and national deposit caps preserve the federal government’s tendency to strictly regulate the banking industry and its concerns for adequate competition in financial markets. According to Representative Roukema, “anti-concentration limits . . . are extremely important in maintaining local competitiveness.”

Those in favor of the deposit caps also argue that excessive consolidation actually threatens the soundness of the banking system, as some banks have become so large that the regulatory system cannot allow them to fail. This is known as the too big to fail policy. If these banks failed, the government would be forced to intervene to prevent the potential damage to the nation’s economy.

The most famous case of “too big to fail” occurred in 1984 when a bank run by corporations and large financial institutions threatened to bring down Continental Illinois National Bank. Many small banks had deposits at Continental, and regulators feared that

61. Id.
62. MACEY ET AL., supra note 7, at 346.
63. See infra discussion Part III.
64. See supra notes 25-38, 50-63 and accompanying text; see also 140 CONG. REC. H6,774-75 (1994) (statement of Rep. Neal); Helen A. Garten, Devolution and Deregulation: The Paradox of Financial Reform, 14 YALE L. & POL’Y REV. 68-75 (1996) (stating that between 1924 and 1933 Congress repeatedly considered but rejected proposed legislation that would have permitted nationwide banking by national banks free from state interference).
66. Id.
67. Wilmarth, supra note 6, at 994-96. Under the too big to fail policy, as established during the FDIC’s rescue of Continental Illinois in 1984, federal bank regulators have consistently protected both insured and uninsured depositors in large failing banks. Id.
68. Id. at 966. The FDIC, the Board, and the Secretary of the Treasury may jointly decide to protect uninsured depositors or creditors in a failed bank, if they determine that such action is necessary to avoid or mitigate “serious adverse effects on economic conditions or financial stability.” 12 U.S.C. § 1823(c)(4)(G)(i)(I) (2000).
69. A bank run occurs when more depositors demand to withdraw their money at one time than the bank has on hand. MACEY ET AL., supra note 7, at 57-58. This generally occurs when there is a generalized loss of confidence in the banking system. Id.
70. Id. at 336. At the time of the bank run, Continental Illinois was the seventh largest bank in the country. Id. at 58.
allowing Continental to fail might also cause many of those banks to fail. Regulators also feared that Continental’s failure might topple other large banks. Accordingly, the Federal Deposit Insurance Corporation (the “FDIC”) disregarded the limit on deposit insurance coverage and fully protected all Continental creditors. Although subsequent analysis refuted the regulators’ argument, the regulatory agencies were not willing to take this chance.

Thus, as was demonstrated by the case of Continental Illinois, excessive banking industry consolidation could give rise to costly federal bailouts of large national banks. The FDIC (and ultimately the taxpayers) could be called upon to invest billions to save these behemoths. This “too big to fail” status could in turn give rise to moral hazard, a theory which states that an insured actor takes excessive risks because the loss will not be borne directly by the risk-taker but by the insurer, in this instance the FDIC. Thus, regular market pressures to act in a risk-adverse manner would not apply because the banks have a bail-out mechanism in place for their risky actions. This puts smaller banks at a disadvantage, as they are not free to act with impunity. In addition, to compete for the funds of the larger, uninsured depositors, smaller banks may be forced to offer higher interest rates to compensate depositors for the increased risk associated

71. Id. at 336.
72. Id.
73. The FDIC insures deposits at banks and thrift institutions. Id. at 71.
74. MACEY ET AL., supra note 7, at 336-37. The FDIC’s current limit on bank deposits is $100,000 per depositor per institution. Id.
75. Id.
76. Wilmarth, supra note 6, at 1002-04.
77. Id.
78. BROOME & MARKHAM, supra note 20, at 517.
80. FEDERAL DEPOSIT INSURANCE CORPORATION, VOLUME I: AN EXAMINATION OF THE BANKING CRISIS OF THE 1980S AND EARLY 1990s 248 (1997) at http://www.fdic.gov/databank/hist80 (last visited Jan. 17, 2004) [hereinafter BANKING CRISSES]. There was a correlation between bank size and resolution method. Id. During the period 1986-91, for example, the average asset size of institutions that were resolved by insured-deposit payoff and liquidation was approximately $65 million, whereas the average asset size of institutions that were resolved with the protection of uninsured depositors, was about $200 million. Id.; see also Kenneth Bacon, Failures of a Big Bank and a Little Bank Bring Fairness of Deposit-Security Policy into Question, WALL ST. J., Dec. 5, 1990, at A18; Wilmarth, supra note 6, at 1003.
with banking at such institutions.  

III. THE NATIONAL DEPOSIT CAP: ARBITRARY AND UNNECESSARY

A. Antitrust Provisions are Already Present

Many laws and regulations strictly regulate banks and BHCs beyond the simple prohibition of the national deposit cap. The Bank Merger Act and the Bank Holding Company Act provide the antitrust guidelines by which banks and BHCs must abide. These regulations involve the application of both general antitrust principles, as well as strict regulations pertaining specifically to the banking industry.

There are two basic statutes in American antitrust law that apply to all mergers and acquisitions, in all industries. The Sherman Act provides that any person who shall monopolize trade, or attempts to monopolize trade, is guilty of a criminal offense. The Clayton Act prohibits transactions whose effects would substantially lessen competition or to create a monopoly. The banking antitrust laws in the Bank Merger Act and the Bank Holding Company Act are borrowed from these two principal antitrust statutes and also focus on whether a merger will substantially lessen competition. Thus, in many important respects, the antitrust standards applicable under the banking laws are

81. Bank Failures, supra note 79, at 1182.
82. MACEY ET AL., supra note 7, at 378-81.
84. 12 U.S.C. § 1842(c) (2000). The Bank Holding Company Act governs mergers, consolidations or acquisitions of banks or bank holding companies by institutions that are or will become bank holding companies. Id.
85. MACEY ET AL., supra note 7, at 378-81.
86. Id. at 379-80.
87. Id.
88. 15 U.S.C. § 2 (2000). The Sherman Act provides that “every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several States” is guilty of a criminal offense. Id.
89. Id. § 18. The Clayton Act prohibits transactions “where in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.” Id.
90. MACEY ET AL., supra note 7, at 379-80. See generally LOVETT, supra note 7, at 198-204.
identical to those applicable under the general antitrust laws.\textsuperscript{91}

However, general antitrust law does not require prior regulatory approval for mergers; general antitrust law only requires that, in certain instances, the Department of Justice and the Federal Trade Commission be notified of any pending merger plans.\textsuperscript{92} Conversely, any BHC willing to consolidate or merge is required to submit a written application to its regulating agency, either the Office of the Comptroller of the Currency or the Federal Reserve Board, prior to approval.\textsuperscript{93} The relevant agency will consider many factors including monopolization, anti-competitiveness, traditional banking factors, and supervisory factors in deciding whether to approve the application.\textsuperscript{94} It also considers the "financial and managerial resources and future prospects of the existing and proposed institutions."\textsuperscript{95} Further, each merger application is subject to double review; once the merger has been approved by the responsible bank regulatory agency, the merger is stayed for thirty days pending a second, independent review of the competitive factors by the Department of Justice.\textsuperscript{96} Thus, both the banking regulatory agency and the Department of Justice perform antitrust analysis of pending bank mergers.\textsuperscript{97}

\textsuperscript{91} MACEY ET AL., supra note 7, at 379-80.

\textsuperscript{92} DALE A. OESTERLE, MERGERS AND ACQUISITIONS 277-78 (1st ed. 2001). There are certain thresholds that must be met in order for the filing requirement to apply. \textit{Id.} After notification, there is a mandated waiting period before any deal closes. \textit{Id.} If either the Department of Justice or the Federal Trade Commission issues a request for additional information, the request tolls the waiting period. \textit{Id.}

\textsuperscript{93} 12 U.S.C. § 1842(a)-(b) (2000). This regulatory agency may be the Office of the Comptroller of the Currency or the Federal Reserve Board, depending on whether the resulting entity is national or state in nature. 12 U.S.C. § 1828(c)(2) (2000).

\textsuperscript{94} 12 U.S.C. § 1828(c) (2000); 12 U.S.C. § 1842(c) (2000); see also MALLOY, supra note 23, at 86-87 (1999) (listing explanations and examples of the factors considered by the Federal Reserve Board when reviewing a BHC merger or consolidation application).


\textsuperscript{97} MACEY ET AL., supra note 7, at 378-81. Once the antitrust analysis is completed, if the banking regulatory agency approves the merger but the Department of Justice challenges it, the court review of the Department of Justice action is de novo. United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 178 (1968). This often occurs when the regulatory agency utilizes the public interest exception and the Department of Justice disagrees, or when the agencies disagree on the relevant product or geographic markets. \textit{Id.} See generally United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967); United States v. Conn. Nat'l Bank, 418 U.S. 656 (1974). The burden of establishing the applicability of the exception falls on the regulatory agency and on the banks seeking to merge. First City Nat'l Bank, 386 U.S. at 366. Once the matter is subject to judicial review, the merger is stayed until the hearings are completed. \textit{Id.} at 369-70.
When performing the antitrust analysis, although there are no exact quantitative or qualitative tests to determine whether a merger is likely to ‘substantially’ lessen competition, the regulatory agency takes into account 1) the market share of the parties to the merger, 2) the market shares of other participants in the same market, and 3) other relevant factors. Such factors help the regulators to gauge the merger’s probable effects on competition and call for the regulator to make inquiries such as whether the merger would create barriers to entry in the relevant market.

In order to determine the market shares to be used, the regulator must first identify the relevant geographic and product markets in which the merger will or may impair the competition. The geographic market must reflect commercial and banking realities and should consist of the local area where the banks in question offer their services and where local customers can practicably turn for alternatives. The appropriate product market has consistently been recognized as the cluster of products and services offered by banking institutions.

Once the relevant geographic and product markets have been identified, the analysis turns to an assessment of the degree of concentration in the relevant market before and after the proposed transaction. To calculate this, both the applicable federal banking

98. BROOME & MARKHAM, supra note 20, at 729-30.
99. Id. Market share figures reflect the extent to which the market is concentrated and the extent to which consummation of the proposed merger will increase market concentration. Id. The more concentrated the market is, the more likely it is that one participant could successfully exercise market power. Id.
100. MACEY ET AL., supra note 7, at 383.
102. NationsBank, supra note 101, at 130-31. The Department of Justice defines product market as a region such that a hypothetical profit-maximizing firm that was a monopolist likely would impose at least a “small but significant and by the nontransitory” increase in price. Definition of a Product Market: U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992); see also United States v. Phila. Nat’l Bank, 374 U.S. 321, 356 (1963) (determining that the relevant product market for commercial banking is the “cluster of products and services denoted by the term commercial banking”).
103. MACEY ET AL., supra note 7, at 415.
agency and the Department of Justice use the Herfindahl-Hirschman Index (HHI) to measure market concentration; the Index measures the market share of each firm in the market and is measured for every merger applicant.\(^{104}\) In the banking industry, traditionally, market shares of banks have been approximated by the percentage of deposits held by each bank in the relevant geographic market.\(^{105}\) This is calculated for both the pre-merger market, and then again, assuming that the proposed merger has taken place, to determine the post-merger market's HHI.\(^{106}\)

For banking mergers, the HHI analysis is completed on a more specific level than for those in other industries.\(^{107}\) In 1996, the Department of Justice and the federal bank regulators issued additional, informal guidelines to be used when assessing the HHI for bank mergers.\(^{108}\) The guidelines set up two different levels of measuring concentration; if the resulting concentration figures from the standard test exceeds a specified level, the agency applies a second test to further explore the proposed changes to competition in that market.\(^{109}\)

The index, while helpful, is not determinative.\(^{110}\) It is only a guideline used by regulators to help identify cases in which a more detailed competitive analysis is appropriate.\(^{111}\) Any additional analysis would explore the specific effects on each market and whether any additional factors mitigate the potential effects of the proposed merger on competition.\(^{112}\) The regulators then challenge a merger if analysis

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104. BROOME & MARKHAM, supra note 20, at 729. The HHI analysis is used by the Department of Justice for all mergers; it is not specific to the banking industry. \textit{Id.}
105. \textit{Id.} at 729-30.
106. \textit{Id.}
107. MACEY ET AL., supra note 7, at 417.
108. \textit{Id.}
109. \textit{Id.}
110. NationsBank, supra note 101, at 131-32. A proposal that fails to pass the HHI market screen may, nonetheless, be approved because other information indicates that the proposal would not have a significantly adverse effect on competition. \textit{Id.}
111. \textit{Id.}
112. \textit{Id.} For example, in the NationsBank and Barnett Bank merger, the bank overlooked the HHI numbers in seventeen of the banking markets, finding that additional factors mitigated the potential effects of the proposal on competition. \textit{Id.} Additional information taken into account includes evidence that the merging parties do not significantly compete with one another, evidence that market shares are not an adequate indicator of the extent of competition in the market, and evidence concerning entry conditions. MACEY ET AL., supra note 7, at 417-18.
shows that the resulting market would be too concentrated. Thus, by applying antitrust standards such as the HHI and the specifics of the actual market to be affected, the regulatory agencies are already taking into account the effect of a bank's market share of deposits on a more effective, specific level than an analysis of a national deposit average.

The above-mentioned safeguards alone contain more strict requirements than those required for mergers within any other industry, subjecting banks to an additional layer of complexity, delay and expense. This regulatory scrutiny ensures that large banks cannot gain concentrated power in a particular market or market segment. By analyzing market concentration consequences for each merger, the regulatory agency adequately addresses the fear of industry concentration. For example, in inter-market mergers (in which one bank purchases another bank in the same geographic market), the increased market share of the newly expanded bank would come under scrutiny.

B. Competitive Market Processes Should Be Left Untouched

Competitive market forces, along with antitrust regulations currently in place, adequately police the marketplace to ensure adequate competition and lack of undue concentration. Representative Neal, for whom the Act was named, noted the importance of allowing the market to govern the industry and stated "the Act will give banks the ability to expand pursuant to market forces, by eliminating artificial

113. MACEY ET AL., supra note 7, at 417-18.
114. See supra notes 82-113 and accompanying text.
115. MACEY ET AL., supra note 7, at 380. Under conventional antitrust analysis, a market in which no one firm controls more than ten percent of the action would be viewed as highly unconcentrated and there would be no thought of regulation. Id. at 370.
116. Id. at 378-81.
117. See supra notes 82-116 and accompanying text.
118. MACEY ET AL., supra note 7, at 369. However, in the situation of market extension mergers, in which a bank merges with or acquires another bank in a new geographic area, the number of competitors in the new market is not being reduced and therefore traditional antitrust principles would not apply. Id.; see also Chad F. Brown, Bank Mergers in Concentrated Markets: The Role of Mitigating Factors, 2 N.C. BANKING INST. 345, 351 (1998) (stating that there are other options in place to mitigate the decrease in competition including divestiture of various branches); LOVETT, supra note 7, at 203-04.
119. See infra notes 120-40 and accompanying text.
geographic boundaries.”

The national deposit cap hampers the traditional means of consolidation and growth, and the governing ability of competitive market process, while placing artificial constraints on the market. Government regulators have noted this negative effect on traditional bank mergers. In 1999, Federal Reserve Board Governor Laurence H. Meyer, while praising the Riegle-Neal Act for lifting some barriers, noted that the law imposes deposit caps that may force some banks to walk away from mergers. In fact, not only do many of the industry’s regulators find the cap to be intrusive, but many believe that it should be eliminated all together. “We have a market-driven system that is based on disclosure and opportunity and transparency and mobility,” said former Comptroller of the Currency Eugene A. Ludwig. “That has really been essential in terms of the U.S.’s leadership in the world. Standing in the way of that is very dangerous.”

These regulators believe in the benefit of allowing the market to regulate itself through economic forces. There is no sound economic rationale for deposit caps, according to Federal Reserve Board Governor Roger W. Ferguson, Jr., “caps are a second line of defense that focuses more on perceptions of concentration of power as opposed to the science of economics.” Federal Deposit Insurance Corporation Chairman Don Powell stated “My bias is to let market forces determine the evolution of the banking industry. If... banks show signs of becoming too big to manage, I would expect the market to slow, if not reverse, the course of consolidation and regulators to impose stricter sanctions,” noting that banking is less consolidated than

121. See generally MACEY ET AL., supra note 7, at 369-70.
123. Id.
125. Rehm, supra note 7, at 1. He is now the managing partner of Promontory Financial Group LLC in Washington. Id.
126. Heller, supra note 124, at 4; see also Federal Reserve Board Chairman Alan Greenspan, Address at the Chicago Bank Structure Conference (May 6, 1993).
ten other major U.S. industries. Banks should be allowed to take advantage of perceived opportunities to increase profitability by improving efficiency and leave it to the market to discipline errors in this regard.

In any freely competitive market, the market will gravitate toward the equilibrium price and supply, maximizing both market efficiency and consumer satisfaction. Market regulations that stifle the efficient market process impose a burden on the efficiency of the banking industry. With the elimination of geographic constraints, banks have become free, assuming antitrust requirements were met, to expand into any geographic area in which they felt they could be efficient, competitive, and profitable. The need to survive would move banks toward healthy competition, thus allowing consumers to enjoy the benefits of potentially lower borrowing rates, expanded services, and more favorable credit provisions.

This cannot be accomplished while deposit caps, an artificial constraint on the market, are in place. According to Steven C. Sunshine, the Justice Department’s former top bank merger lawyer, the deposit caps may hurt consumers. “You prevent efficiencies and raise costs, which is the antithesis of what you want to achieve.” In addition, instead of allowing the regulating agency to weigh the benefits to consumers against the costs to competition, the nationwide deposit

129. Id. Chairman Powell stated “This approach seems to be a better gauge of the appropriate scale of banking organizations than does an arbitrary fixed cap.” Id. The comments were in a prepared statement to a Senate Banking Committee hearing where federal and state regulators reported the robust health of the banking, thrift and credit union industries. Id.; see also Seiberg, supra note 122, at 1.

130. Seiberg, supra note 122, at 1 (quoting Federal Reserve Board Governor Laurence H. Meyer).


132. Greenspan, supra note 126.

133. See HARRISON, supra note 131, at 7-14 (explaining general economic analysis of supply and demand).

134. See id.; see also HELEN A. GARTEN, US FINANCIAL REGULATION AND THE LEVEL PLAYING FIELD 34 (2001) (stating that to the extent that regulation tries to interfere with that structure, market players find ways around regulatory impediments, making them superfluous); Greenspan, supra note 126 (stating that “consumers of financial services are denied the lower prices, increased access, and higher quality services that would accompany the increased competition associated with permitting banking companies to expand their activities”).

135. See infra notes 136-38 and accompanying text.


137. Id.
cap imposes an objective limit which does not take into account subjective factors.138

Finally, if the market power shifts and becomes out of balance, the market should correct itself.139 If the market shifts towards a monopoly, the monopoly price will attract other banks from distant markets who could not have covered their entrance and transactions costs had the competitive price been charged.140 This self-policing character of the market, when coupled with an already robust regulatory regime, relegates the cap to an unnecessary regulation.

C. "Too Big to Fail" Concerns Not Protected by the Deposit Cap

As a measure of prevention against the undue concentration of financial size and power, one possible justification for the deposit cap is that it protects the industry against a bank becoming too big to fail.141 The cap, however, does not prevent this situation, as evidenced by historical federal intervention of bank failures and a comparison of the size and influence of those institutions to the giants of today’s banking industry.142

At the time of its rescue by the FDIC, Continental was the seventh largest bank in the United States, with approximately $40 billion in assets.143 In January 1991, the FDIC again aided three banking subsidiaries of the Bank of New England Corporation, with total assets at the time of failure of $21.9 billion.144 In fact, in the late 1980s, the FDIC was protecting uninsured depositors at banks with less than $1 billion in assets.145 During that period, the Comptroller of the Currency stated that the nation’s eleven largest banks, with total assets

138. See discussion infra Part IV.
140. Id. For example, a bank that, upon obtaining a large market share statewide or nationwide, begins to raise prices will be susceptible to other state and national banking firms willing to compete at lower prices. MACEY ET AL., supra note 7 at 371.
141. See supra notes 66-81 and accompanying text; see also MACEY ET AL., supra note 7, at 369-70.
142. See infra notes 143-53 and accompanying text.
143. BANKING CRISES, supra note 80, at 237-38.
144. Id. at 252.
ranging from $30 to $118 billion, were too big to fail.\textsuperscript{146}

In today’s banking industry, there are currently forty-one institutions with assets over $30 million.\textsuperscript{147} The largest banks have assets in excess of $1 trillion.\textsuperscript{148} If the failure of much smaller banks could potentially cause a national crises and necessitate federal rescue, then clearly the failure of dozens of today’s banks could as well.\textsuperscript{149} It is apparent that many banks have already passed over the too big to fail threshold.\textsuperscript{150} Note, however, that all of today’s potentially crises-causing banks fall within the ten percent deposit cap.\textsuperscript{151} Critical mass, therefore, is clearly reached well before ten percent of deposits are obtained.\textsuperscript{152} Thus, while the concern remains that banks will become too big to fail, the ten percent deposit cap is an ineffectual method of managing this problem.\textsuperscript{153}

In addition, legislative reforms have decreased the risk of bank failure, thus diminishing the import of the too big to fail doctrine.\textsuperscript{154} Since the FDIC rescued Continental Illinois in 1984, Congress has sought to curtail the impact of the too big to fail doctrine on bank risk through legislative reforms.\textsuperscript{155} The implementation of risk-based capital adequacy guidelines has reduced the probability that a large institution will fail.\textsuperscript{156} These guidelines are especially effective in preventing bank failures, the linchpin of the too big to fail problem, because they impose a series of increasingly stringent, nondiscretionary regulatory

\textsuperscript{146} Tim Carrington, \textit{U.S. Won’t Let 11 Biggest Banks in Nation Fail}, \textit{WALL ST. J.}, Sept. 20, 1984, at 2 (quoting testimony of Comptroller of the Currency Conover at House Banking Committee hearing on Sept. 18-19, 1984); \textit{see also BANKING CRISIS}, \textit{supra} note 80, at 237-38.

\textsuperscript{147} \textit{Bank and Thrift Holding Companies with the Most Assets}, 201 AM. BANKER, Oct, 19, 2004, at 8 [hereinafter \textit{Banker Assets}].

\textsuperscript{148} Id.

\textsuperscript{149} \textit{See supra} notes 143-58 and accompanying text.

\textsuperscript{150} \textit{See generally \textit{Banker Assets}, supra} note 147.

\textsuperscript{151} \textit{See generally id}.

\textsuperscript{152} \textit{See supra} notes 143-51 and accompanying text.

\textsuperscript{153} \textit{See supra} notes 143-51 and accompanying text.

\textsuperscript{154} \textit{MACEY ET AL., supra} note 7, at 336-38.

\textsuperscript{155} Geoffrey P. Miller, \textit{Legal Restrictions on Bank Consolidation: An Economic Analysis}, 77 IOWA LAW REV. 1083, 1106 (1992); \textit{see also MACEY ET AL., supra} note 7, at 337.

\textsuperscript{156} Miller, \textit{supra} note 155, at 1106. The guidelines take explicit account of the risk of off-balance sheet activities, which were principally engaged in by the larger banks. \textit{Id}. The effect of the risk-based guidelines has been to increase the capital cushion—the protection against insolvency. \textit{Id}.
requirements as an institution’s capital falls below acceptable levels.\textsuperscript{157} Thus, the deposit cap does not prevent banks from becoming too big to fail, and Congress has addressed the problem of bank failures directly.\textsuperscript{158}

\textbf{D. State Deposit Cap Should Suffice}

In addition to the nationwide deposit cap, the Riegle-Neal Act provides that the regulatory agency may not approve the merger application if the applicant would control thirty percent or more of the total amount of insured depository institution deposits in the state in which the bank to be acquired is located.\textsuperscript{159} States are allowed to raise or lower the rates for their states as their state legislatures see fit, allowing them to regulate market concentration within their own state.\textsuperscript{160} Many states have chosen to exercise this option and alter their state deposit cap.\textsuperscript{161} Some states, such as Arkansas and New Mexico, have increased the cap to as high as fifty percent, while other states, such as Missouri and Nebraska, have decreased the deposit cap to as

\textsuperscript{157} Id.; see also Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1823(c)(4)(E) (2000).

\textsuperscript{158} See supra notes 141-57 and accompanying text.

\textsuperscript{159} 12 U.S.C. § 1842(d)(2)(B) (2000). The concern for state autonomy from national banking regulation has been shown throughout the history of American banking law. MACEY ET AL., supra note 7, at 12, 110-15. A driving force behind early pieces of bank branching legislation was Congress’ desire to ensure competitive equality in branching between national and state banks. Wilmarth, supra note 6, at 973. This concern over state control of the banking industry was expressed repeatedly during Congressional hearings and debates concerning the passage of the Riegle-Neal Act. 140 CONG. REC. H6,774 (1994). The deposit cap, in particular, was an important state’s rights issue put into the Riegle-Neal Act to reassure bankers, consumer groups, and state officials who were concerned about the loss of state control to federal regulation. 140 CONG. REC. H6,774, 6778 (1994) (statement of Rep. Bereuter). The cap was addressed specifically by Representative Vento, who stated that “as an additional protection for state rights, the legislation specifically protects state deposit caps.” 140 CONG. REC. H6,774, 6,781 (1994) (statement of Rep. Vento); see also statements of Rep. Roukema and Rep. Castle. In a letter mailed to members of the House of Representatives, the Independent Bankers Association of America stated that state rights must be protected and must not be pre-empted by federal law. Letter from Kenneth A. Guenther, Executive Vice President, the Independent Bankers Association of America, to Honorable Henry B. Gonzalez, U.S. House of Representatives (June 7, 1994) (on file with author).

\textsuperscript{160} Anti-Bigness, supra note 127, at 3; see also MACEY ET AL., supra note 7, at 370.

low as thirteen percent. Michigan and Utah abolished the deposit cap entirely. Since the passage of the Riegle-Neal Act, there has been a drastic increase in the number of cases where an institution holds a share of deposits in a state that either approaches or exceeds the market-share cap for that state. Five states have banks or holding companies within five percent of their deposit cap; thirteen states have banks or holding companies within ten percent of the state deposit cap.

State regulators are more familiar with the active markets being regulated and have an improved view of the circumstances surrounding the markets. They are in the best position to determine matters that affect the financial and economic development of their states. The states, through the state deposit caps, can protect community-oriented banks and monitor the effects of increased concentration and lessened competition on local citizens more effectively than can be done through the nationwide cap.

IV. UNCERTAINTY SURROUNDING CALCULATION OF THE DEPOSIT CAP

In addition to the policy arguments against the deposit cap discussed in Section III, many facets of the calculation of the deposit cap are uncertain. These uncertainties detract from the significance of the deposit cap as a means of measuring market concentration.

The Riegle-Neal Act does not currently provide a legislatively mandated formula to be used in calculating the deposit cap. The statute simply provides that no newly merged bank can hold "more than ten percent of the total amount of deposits of insured depository

163. Anti-Bigness, supra note 127, at 3.
164. Branching, supra note 161.
165. Id.
166. See Wilmarth, supra note 6, at 1069-76. In view of the repeated failures by federal bank regulators in the 1980s to discern serious managerial errors and dangerous operational risks at large banks and to take appropriate supervisory measures to deal with such problems, the states should be allowed to play a supporting role in regulating local branches of out-of-state banks. Id. at 1070.
167. See Letter from Kenneth A. Guenther, supra note 159.
168. See supra notes 159-67 and accompanying text.
169. See infra notes 170-203 and accompanying text.
170. BANK OF AMERICA, supra note 1, at 8.
institutions in the United States.” As the terms used in the Act are not defined, the Board, who has responsibility for regulatory approval of mergers between nationally chartered banks, has adopted the definitions of the terms as contained in the Federal Deposit Insurance Act (the “FDI Act”). However, because these definitions are not clear, they have been applied inconsistently to different mergers. During the recent Bank of America merger, several commentators presented differing views on how to calculate the deposit cap, demonstrating the uncertainty with which the cap is applied.

The variables in applying the cap are many. There has been ambiguity as to which geographic areas should be included in the calculation, as the FDI Act does not define the terms “state” and “United States.” The Board has read the terms to include any territory of the United States, including Guam, Puerto Rico, and American Samoa. Many commentators have asserted that deposits held in these territories and Puerto Rico should not be included because these areas are not “states.” The Board reasons, however, that this interpretation is consistent with the purpose of the nationwide deposit cap, as all banks operating in these areas are eligible for federal deposit insurance and are thus subject to the jurisdiction of the FDIC. The Board argues that these areas must be included in order to ensure the antitrust purpose of the deposit cap is met; if these areas were not included then an institution could enter them without limit, thereby increasing that institution’s control of the market.

In addition, there has been argument over what represents the

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172. See supra note 93 and accompanying text. Recent issues concerning deposit cap calculation have mainly concerned nationally chartered banks, and, thus, the Federal Reserve Board has been the regulating agency. See generally BANK OF AMERICA, supra note 1; NationsBank, supra note 101.
173. BANK OF AMERICA, supra note 1, at 8.
174. See generally id.
175. Id.
176. Id. at 8-10.
177. Id.
178. BANK OF AMERICA, supra note 1, at 8-10.
179. Id.
180. Id.
181. Id. This definition is also consistent with the definition of “United States” contained in the Board’s Regulation Y, which governs applications under § 3 of the BHC Act. Id.
best and most complete data to be used to calculate the deposit cap. The FDI Act's definition of "deposit" does not specify what source the information should be obtained from; different sources take into account different factors, and thus give different results. In the past, the Board has used assorted sources of information to calculate the deposit cap for different mergers. For example, the Board has used Summary of Deposits data for the calculation of the deposit cap in past merger applications, however, the Board used a different source of information for the 2004 Bank of America-FleetBoston merger. The lack of a uniform source of information negatively affects the meaningfulness of the final calculation, and hinders the ability to compare the percentage of deposits held among newly merged institutions.

Finally, disagreement persists as to whether the Federal Reserve Board should include credit union deposits in their figures. The definition of "bank" adopted by the Board does not include credit unions, even though credit unions perform virtually the same functions as banks. These functions include checking accounts, nonresidential real estate loans, non-mortgage consumer loans (including credit cards), commercial loans, and the ability to exercise trust and fiduciary powers. In addition, credit union deposits are federally insured. It has been stated that banking regulatory agencies now view credit unions as the functional equivalent of commercial banks.

Looking at the similarities between credit unions and banks, a

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182. Id. at 8-10.
183. Id. at 8-10.
184. BANK OF AMERICA, supra note 1, at 8.
185. Id. The Summary of Deposits information was used for the Fleet Financial and BankBoston merger. Id. The FDIC used the figures from the Consolidated Report of Condition and Income, which is reported to the FDIC each quarter, to calculate the total amount of deposits of insured depository institutions in the United States and the total amount of deposits held by Bank of America, both before and upon consummation of the proposed transaction, for purposes of applying the nationwide deposit cap. Id.
186. See supra notes 170-85 and accompanying text.
187. Credit unions are nonprofit cooperative financial institutions that provide credit to its members. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 304 (9th ed. 1984).
189. BROOME & MARKHAM, supra note 20, at 116-17.
190. Id. at 98.
191. Influence, note 188, at 797.
strong argument can be made that the inclusion of credit unions is consistent with the purpose of the nationwide cap. The main justifications given for the deposit cap are the prevention of undue market concentration and the fear of lack of competition in the banking industry. However, as credit unions continue to service banking customers, particularly those who prefer local credit unions to large national banks, they should be taken into account.

In addition, competition from credit unions may be considered by the Department of Justice when evaluating the antitrust consequences of a merger and calculating the HHI. The Department of Justice may decide that a credit union within the relevant product or geographic market offers such services that it should be considered to be in the market and thus part of the calculation. It is not logical to have credit unions considered when analyzing other aspects of marketplace competition, but not to have their deposits counted when measuring the deposit cap.

In considering the importance of this debate, note that there are about 9,600 credit unions. Inclusion of credit union deposits would increase the current amount of nationwide deposits by 8.8%. This would reduce Bank of America's total share to 8.78%, a tremendous shift.

The continuing uncertainties over all facets of the calculation of the deposit cap dilute its value and the confidence in its application. At the very least, the Board should issue an official interpretation to ensure uniformity in application. In addition, Congress should take

192. See supra notes 187-91 and accompanying text.
193. See supra notes 25-38 and accompanying text.
194. See generally Influence, note 188.
195. MACEY ET AL., supra note 7, at 418.
196. Id.; see also Influence, note 188, at 826-27.
197. See supra notes 187-96 and accompanying text.
198. Talcott, supra note 10, at E1.
199. Boraks, supra note 9, at 1; Talcott, supra note 10, at E1.
200. Boraks, supra note 9, at 1; Talcott, supra note 10, at E1; see also Rob Blackwell, Market Beats Congress to a Deposit Cap "Fix," AM. BANKER, June 6, 2001, at 1. A Bank of America spokeswoman said "We consider this to be an artificial cap that doesn't apply to any other company, industry, or country. We are very much in favor of redefining the denominator of the cap... we would like to see it include both domestic and foreign banks and credit unions." Id.
201. See supra notes 169-200 and accompanying text.
202. This rule-making will be given great deference upon judicial review. See generally
these uncertainties into consideration and consider either clarifying the cap or repealing it altogether.\textsuperscript{203}

V. CONCLUSION

By allowing bank expansion without artificial geographic constraints, the Riegle-Neal Act was intended to promote the consolidation of banks and BHCs, to increase bank efficiency and effectiveness, and to benefit consumers through increased convenience and expanded services.\textsuperscript{204} The Riegle-Neal Act also contains many restrictions reminiscent of the perceived need for heavy regulation and decentralized banking, particularly through the provisions in the national and state deposit caps.\textsuperscript{205} Proponents of the geographic restrictions cite the need for protection of community-based banks and the lack of undue concentration in banking markets in order to protect consumers and ensure competitive equality.\textsuperscript{206} However, there are already adequate measures in place to address these concerns without resorting to an artificial deposit cap.\textsuperscript{207}

First, antitrust regulations are already in place which will effectively handle the inquiry into market concentration and competition concerns.\textsuperscript{208} Through implementation of both general antitrust regulations and those specific to the banking industry, regulators take into account a bank's share of deposits on a more effective, specific level than is considered in the deposit cap.\textsuperscript{209}

Second, market forces are capable of deriving stable and efficient markets, allowing for increased customer satisfaction and a more stable banking industry.\textsuperscript{210} There is no sound economic rationale for the deposit cap; market forces should determine the evolution of the

\textsuperscript{203} See supra notes 169-202 and accompanying text.
\textsuperscript{204} See supra notes 25-38, 50-68 and accompanying text.
\textsuperscript{205} See supra notes 50-65 and accompanying text.
\textsuperscript{206} See supra notes 25-38, 64-68 and accompanying text.
\textsuperscript{207} See discussion supra Part III.
\textsuperscript{208} See discussion supra Part III.A.
\textsuperscript{209} See discussion supra Part III.A.
\textsuperscript{210} See discussion supra Part III.B.
banking industry.\textsuperscript{211} The self-policing character of the market will help to ensure competitive equality.\textsuperscript{212}

In addition, the deposit cap is not effective in preventing too big to fail situations.\textsuperscript{213} As the critical size for too big to fail is reached well before banks arrive at the ten percent deposit threshold, the cap is an inadequate means for controlling bank size.\textsuperscript{214} Also, there are state deposit caps already in place in each state, which are more effective at protecting local communities and community banks against undue concentration.\textsuperscript{215} State governments are in the best position to determine matters that affect the financial and economic development of their states.\textsuperscript{216}

Finally, many facets of the calculation of the deposit cap are uncertain; including which geographic areas should be considered, what source of data should be used and whether credit union deposits should be included.\textsuperscript{217} These uncertainties detract from the significance of the deposit cap and the confidence in the resulting number.\textsuperscript{218}

According to Federal Reserve Chairman Alan Greenspan, "once [banking] legislation is passed, it must be implemented in a way that preserves its value to the banking system, by not confining banks in a regulatory straitjacket that stifles innovation and prudent risk management."\textsuperscript{219} Thus, as effective measures are already in place that more efficiently address the concerns of competition and concentration, Congress should repeal the ten percent nationwide deposit cap.

\begin{quote}
\textbf{Cybil White}
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\textsuperscript{211} See discussion supra Part III.B.
\textsuperscript{212} See discussion supra Part III.B.
\textsuperscript{213} See discussion supra Part III.C.
\textsuperscript{214} See discussion supra Part III.C.
\textsuperscript{215} See discussion supra Part III.D.
\textsuperscript{216} See discussion supra Part III.D.
\textsuperscript{217} See discussion supra Part IV.
\textsuperscript{218} See discussion supra Part IV.
\textsuperscript{219} Greenspan, supra note 126.