UNC SCHOOL OF LAW

NORTH CAROLINA BANKING INSTITUTE

Volume 23 | Issue 1

Article 19

3-1-2019

# The Potential Effect of the Economic Growth Act of 2018 on Bank Mergers and Acquisitions: What This Means for De Novo Banks and CRA Lending

Joseph C. Fields

Follow this and additional works at: https://scholarship.law.unc.edu/ncbi

Part of the Banking and Finance Law Commons

Recommended Citation

Joseph C. Fields, *The Potential Effect of the Economic Growth Act of 2018 on Bank Mergers and Acquisitions: What This Means for De Novo Banks and CRA Lending*, 23 N.C. Banking Inst. 359 (2019).
Available at: https://scholarship.law.unc.edu/ncbi/vol23/iss1/19

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Banking Institute by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

# THE POTENTIAL EFFECT OF THE ECONOMIC GROWTH ACT OF 2018 ON BANK MERGERS AND ACQUISITIONS: WHAT THIS MEANS FOR DE NOVO BANKS AND CRA LENDING

## I. INTRODUCTION

During the 2008 Financial Crisis, bank merger and acquisition ("M&A") activity came to a near standstill.[1] Banks lost fortunes on large-scale mortgage defaults, interbank and consumer lending froze, and financial institutions once seen as cornerstones of Wall Street began to fail.[2] The financial turmoil risked instability of the financial market as a whole.[3] The initial culprit was seen to be weaknesses in regulation.[4] In response to the Financial Crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") to decelerate the crisis and re-stabilize the financial industry.[5] Once fears of complete financial meltdown were allayed, Congress focused on increasing regulatory oversight to prevent future risky behavior.[6] Post-Financial Crisis regulations purposefully slowed certain financial

1. *See* Jacqueline Doherty, *Rekindling the Urge to Merge*, BARRON'S (Sept. 25, 2010, 12:01 AM), https://www.barrons.com/articles/SB50001424052970204277704575508291090222902?tesla=y (discussing M&A dropoff during the Finacial Crisis and how regulations enacted in response to the crisis was intended to increase merger activity).

2. *See* Nick Mathiason, *Three Weeks that Changed the World*, THE GUARDIAN (Dec. 27, 2008), https://www.theguardian.com/business/2008/dec/28/markets-credit-crunch-banking-2008 (providing a timeline of the Financial Crisis and highlighting events that led to the collapse of several major banks in 2008).

3. *Id*.

4. Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES (Jan. 3, 2010), https://www.nytimes.com/2010/01/04/business/economy/04fed.html?mtrref=www.google.com&gwh=3158ECCE7E41650E3795698E0C123923&gwt=pay.

5. The Emergency Economic Stabilization Act of 2008 was passed by Congress and signed into law by President George W. Bush on Oct. 3, 2008. Its main purpose was to prevent collapse of the United States' financial system during the subprime mortgage crisis by restoring liquidity to credit markets. Martin N. Baily et al., *The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth*, 3 THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 1, 29 (2017).

6. Greg Ip, *The Financial Crisis Made Us Afraid of Risk—For a While*, WALL ST. J. (Sept. 10, 2018), https://www.wsj.com/articles/the-financial-crisis-made-us-afraid-of-risk-for-a-while-1536379306.

activities.[7] The fragile economy and increased regulatory oversight over all banks stunted banking activity, lessened credit availability, and prevented the formation of de novo banks.[8]

Progressing from the Financial Crisis, Congress reevaluated elements of Dodd-Frank.[9] One of the most significant deregulation efforts was the Economic Growth, Regulatory Relief, and Consumer Protection Act ("Economic Growth Act") signed by President Trump on May 24, 2018.[10] Section 165 of the Economic Growth Act raised the total asset threshold at which financial institutions were automatically labeled systemically important financial institutions ("SIFI") and subjected to heightened regulatory oversight from $50 billion to $250 billion.[11] Raising the total asset threshold will give financial institutions that are slightly below $50 billion the freedom to grow significantly through increased M&A activity before they need to fear SIFI regulatory oversight.[12] This growth will strengthen the overall financial economy in two primary ways.[13] First, it will facilitate and incentivize the creation of de novo banks.[14] Second, it will alleviate the unbanked and underbanked by increasing access to credit and banking tools in needed communities.[15]

This Note proceeds in six parts. Part II provides a general overview of Dodd-Frank and the $50 billion threshold's impact on M&A activity.[16] Part III discusses factors that led to the passage of the Economic Growth Act.[17] Part IV explains how the total asset threshold increase will

7. Doherty, *supra* note 1.

8. *See* Thomas P. Vartanian, *How Dodd-Frank Makes M&A More Difficult*, AM. BANKER, Aug. 21, 2013, https://www.americanbanker.com/opinion/how-dodd-frank-makes-m-amp-a-more-difficult (discussing factors that were seen to impede M&A activity).

9. David W. Perkins et al., *Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174) and Selected Policy Issues*, CONG. RES. SER. (June 6, 2018).

10. Economic Growth, Regulatory Relief, and Consumer Protection Act § 2155, 4 U.S.C. § 401 (2012); 82 Fed. Reg. 9308 (Mar. 6, 2017).

11. § 2155.

12. *See infra* Part III.

13. Lea Nonninger, *M&A Activity is on the Upswing at Retail Banks*, BUSINESS INSIDER (May 30, 2018, 9:27 AM), https://www.businessinsider.com/merger-acquisition-activity-up-swing-banking-2018-5.

14. The term de novo bank refers to a newly chartered bank or bank that has been in operation for five years or less. It is typically the case that a de novo bank is subject to stricter regulatory scrutiny in its start-up years, including higher than minimum capital and a requirement that there be a preset business plan. BANK HOLDING COMPANY SUPERVISION MANUAL, THE FED. RES. DIV. SUPERVISION & REG. (2017), *available at* https://www.federalreserve.gov/publications/files/bhc.pdf.

15. *See infra* Part III.

16. *See infra* Part II.

17. *See infra* Part III.

likely increase M&A activity.[18] Part V discusses the impact on subsequent M&A activity and why M&A activity will strengthen the financial industry.[19] Part VI concludes the Note.

## II. Restrictions on $50 Billion Bank Holding Companies in Dodd-Frank and Merger and Acquisition Activity

Dodd-Frank was enacted in the aftermath of the Financial Crisis to increase oversight and regulatory authority over large financial institutions that were seen as major drivers of the crisis.[20] One of the main purposes of the legislation was to "prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions."[21] To accomplish this, Dodd-Frank originally required the Federal Reserve Board of Governors ("the Fed") to apply heightened regulations—often referred to as Enhanced Prudential Standards ("EPS")—to bank holding companies[22] ("BHCs") and banks with total assets of at least $50 billion.[23] Under the statute, these financial institutions with total consolidated assets of $50 billion or greater were automatically designated as SIFIs.[24] The statute grants the Fed a significant amount of discretion to apply the increased regulations and enhanced scrutiny to financial institutions based on their unique risk.[25] These "enhanced supervision and prudential standards" established in section 165 of Dodd-Frank were designed to be more stringent than the standards applicable to smaller institutions that "do not present similar risks to the financial stability of the United States."[26]

18. *See infra* Part IV.

19. *See infra* Part V.

20. Christine Daleiden, *The Legal Parameters of the Financial Crisis*, 13 HAW. B.J. 6 (2009).

21. Dodd-Frank Wall Street Reform and Consumer Protection Act § 165(a), 12 U.S.C. § 5365 (2012) [hereinafter Dodd-Frank].

22. 12 U.S.C. § 1841 (defining a bank holding company as "any company which has control over any bank" with activities "closely related to banking.").

23. *Fact Sheet: Everything You Need To Know About the $50 Billion Threshold*, BETTER MKTS. (Nov. 2, 2015), https://bettermarkets.com/sites/default/files/Fact%20Sheet%20-%20$50%20billion%20Threshold%20-%2011-02-2015.pdf.

24. § 165(a)(1); MARC LABONTE & DAVID W. PERKINS, CONG. RES. SERV., R45036, THE $50 BILLION THRESHOLD IN THE DODD-FRANK ACT: KEY FINDINGS (DEC. 6, 2017), *available at* https://fas.org/sgp/crs/misc/R45036.pdf.

25. § 165(b)(3).

26. § 165(a).

The regulatory requirements that accompany SIFI designation include annual stress tests, capital requirements, resolution plans, liquidity requirements, counterparty limits, and risk management.[27] Resolution plans are required to untangle failing SIFIs by identifying any affiliates and how they are protected from risks arising from subsidiary activities, ownership structure, and identification of all assets owned.[28] Dodd-Frank also requires reports of any credit exposure with other organizations.[29]

A primary reason why financial institutions attempt to avoid SIFI designation is the costs associated with the EPS. For example, Zions Bancorporation merged with its national bank subsidiary, Zions Bank, N.A. and grew to $66 billion in total assets as a result of the merger.[30] After the merger, the FSOC approved its application to shed the SIFI status, a status that reportedly cost Zions "hundreds of millions of dollars in terms of software . . . and 500 full-time compliance, risk and audit professionals."[31] Zions is the largest banking organization to shed its designation to date.[32] Non-bank financial institutions have also saved money as a result of shedding their SIFI designation.[33] AIG reported that it would save as much as $150 million in annual compliance costs after losing SIFI designation.[34] Within months of the regulations being lifted, AIG's chief executive stated that he expected M&A activity to increase with this new extra money.[35] Since 2016, all four non-bank financial institutions that were once designated as SIFIs—General Electric Capital, AIG, Metlife, and Prudential—have applied and reversed their SIFI designation.[36] Upon shedding their SIFI designation, chief executives from

27. §§ 165(b)(1)(A)–(B).

28. § 165(d).

29. *Id*.

30. V. GERARD COMIZIO & NATHAN S. BROWNBACK, FSOC CLEARS ZION'S PLAN TO ELIMINATE SIFI STATUS, CLEARING THE WAY TO SHED ITS BANK HOLDING COMPANY, FRIED FRANK (JULY 23, 2018), https://www.friedfrank.com/siteFiles/Publications/072318Financial-ServicesAlertFSOCClearsZionsPlan2.pdf.

31. *Zions Bank Sheds SIFI Status,* ABA BANKING J. (Sept. 12, 2018), https://bankingjournal.aba.com/2018/09/zions-bank-sheds-sifi-status/.

32. Comizio, *supra* note 30.

33. *See* Allstair Gray, *AIG Sheds $150m in Costs Along with SIFI Label*, FIN. TIMES (Oct. 1, 2017), https://www.ft.com/content/31b36b9a-a662-11e7-93c5-648314d2c72c ("The insurer will also no longer be required to clear as big regulatory hurdles to complete large acquisitions.").

34. *Id.*

35. *Id.*

36. Ted Mann, *GE Files to End Fed Oversight After Shrinking GE Capital*, WALL ST. J. (Mar. 31, 2016), https://www.wsj.com/articles/ge-files-to-end-fed-oversight-after-shrinking-ge-capital-1459423851.

General Electric Capital and Metlife believe the regulatory savings will allow the companies to focus on industry innovations and get back to company roots.[37]

Dodd-Frank impeded M&A activity due to its enhanced regulatory oversight.[38] The 2,300-page bill promulgated 400 new rules and mandates for all financial institutions, not just those with over $50 billion in total assets.[39] Previously, BHCs were exempt from capital requirements once they reached $500 million in assets, but Dodd-Frank ended that exemption.[40] Under Dodd-Frank, financial institutions with greater than $10 billion in total assets were required to enhance their risk management programs and become supervised by the Consumer Financial Protection Bureau ("CFPB").[41]

BHCs below $50 billion in total assets were reluctant to undertake M&A activity that pushed them above the $50 billion threshold due to the additional regulatory costs associated with complying with the EPS.[42] There are nearly seventy BHCs with total assets ranging from $10 billion and $50 billion.[43] Banks below $10 billion would still merge at a rapid pace to offset regulatory costs, but they were cognizant of the SIFI regulations that would be implemented if they surpassed the $50 billion threshold.[44] Any new M&A activity considerations now incorporate

37. *See* Ted Mann & Ryan Tracy, *GE Capital Sheds 'Systemically Important' Label*, WALL ST. J. (June 29, 2016), https://www.wsj.com/articles/ge-capital-sheds-systemically-important-label-for-too-big-to-fail-firms-1467205963 ("The FSOC vote clears the way for GE to borrow and spend like an industrial company again, a potential boon to investors who have cheered Chief Executive Jeff Immelt's decision to move back town the company's roots as a manufacturer of high-tech machines like wind turbines, locomotives and medical scanners.").

38. Vartanian*, supra* note 8.

39. Vartanian*, supra* note 8.

40. Vartanian*, supra* note 8.

41. *See* Dodd-Frank § 1002, 12 U.S.C. § 5481 (2012) ("Title X, referred to in par. (4), is title X of Pub. L. 111-203, July 21, 2010, 124 Stat. 1955, known as the Consumer Financial Protection Act of 2010, which enacted subchapter V (§5481 et seq.) of this chapter . . . .").

42. DAVID C. INGLES & SVEN G. MICKISCH, INCREASE IN SIFI THRESHOLD SHOULD SPUR MORE BANK M&A ACTIVITY, SKADDEN (APR. 25, 2018), https://www.skadden.com/insights/publications/2018/04/quarterly-insights/increase-in-sifi-threshold-should-spur-more-bank.

43. *Id*.

44. *Why Dodd-Frank Increased Banking Industry Consolidation*, THE WHARTON SCHOOL U. PA. (Sept. 5, 2017), http://knowledge.wharton.upenn.edu/article/banking-industry-acquisitions/.

regulatory costs into decisions to acquire banks that would increase total assets above $50 billion.[45]

One such example of the $50 billion threshold and SIFI designation influencing bank M&A activity occurred in 2015.[46] CIT Group's acquisition of OneWest Bank pushed it over the $50 billion (assets now $67 billion), the first time since the passage of Dodd-Frank that a transaction created a SIFI.[47] The viability of the deal centered around a significant acquisition to put CIT Group comfortably above the $50 billion asset level as opposed to just slightly above.[48] This is because the SIFI regulations that come with exceeding the $50 billion threshold are not economically feasible unless the projected earnings offset costs and provide enough profit to justify the additional regulatory costs.[49] Had the deal put CIT Group at $52 billion—just above the $50 billion threshold—and not $67 billion, CIT Group Chief Executive John Thain stated the acquisition would not have been worth the regulatory costs.[50]

## III. THE ECONOMIC GROWTH, REGULATORY RELIEF AND CONSUMER PROTECTION ACT AND THE NEED FOR THE THRESHOLD INCREASE

In March of 2018, the United States Senate passed the Economic Growth Act to amend parts of Dodd-Frank.[51] The bipartisan bill[52] adjusted the asset threshold at which BHCs become designated SIFIs,[53] while also exempting smaller banks from certain loans, mortgages, and trading requirements.[54] Under this new legislation, BHCs with assets between $100 billion and $250 billion—while stripped of SIFI designation—may still face periodic stress tests and other enhanced supervision

45. Louise Bowman, *US Regional Banks Gear Up for M&A Bonanza,* EUROMONEY (July 23, 2018), https://www.euromoney.com/article/b1965794qm479g/us-regional-banks-gear-up-for-mampa-bonanza.

46. *Id*.

47. *Id.*

48. *Id*.

49. *See* Saabira Chaudhuri, *CIT Group to Buy OneWest; Profit Tops Estimates*, WALL ST. J. (Sept. 30, 2018), https://www.wsj.com/articles/cit-group-to-buy-onewest-profit-tops-estimates-1406025881 ("That is because the avalanche of regulations that comes with topping $50 billion isn't worth itwithout a significantly bigger earnings engine.").

50. *Id*.

51. Economic Growth, Regulatory Relief, and Consumer Protection Act § 2155, 4 U.S.C. § 401 (2012); 82 Fed. Reg. 9308 (Mar. 6, 2017).

52. *Id*.

53. *Id.*

54. *Id*.

at the discretion of the Fed.[55] With this discretion, the Fed considers other factors of a BHC to determine whether to impose enhanced regulatory scrutiny.[56] These factors include the BHC's complexity of services, cross-jurisdictional activities, interconnectedness with other financial institutions, and the likelihood that the BHC's services can be substituted with those of another bank in the event of dissolution.[57] Additionally, financial institutions with $250 billion in assets automatically remained subject to the EPS under the Economic Growth Act, a threshold previously set at $50 billion.[58]

There are numerous reasons why the $50 billion threshold was sensible at the time it was set.[59] The future of many banks and financial institutions was unclear when Congress passed Dodd-Frank.[60] This uncertainty understandably justified a lower threshold at a time when public confidence in the financial system was wavering.[61] In the middle of the Financial Crisis, moral hazard was predominate in discussions regarding bailouts and was potentially overstated at the time.[62] Legislatures felt that banks would engage in riskier behavior after watching the federal government bail out financial institutions such as Bear Stearns, Fannie Mae, Freddie Mac, and AIG with infusions of capital after passage of the Emergency Economic Stabilization Act and the creation of Troubled Asset Relief Program ("TARP").[63] To combat this moral hazard issue, legislators agreed on a $50 billion threshold to regulate a greater number of bank holding companies, provide greater oversight, and prevent risky behavior.[64]

Arguments against the need for an increased threshold are not convincing.[65] Some have argued that the increase in total asset threshold

---

55. *Id.*

56. Economic Growth, Regulatory Relief, and Consumer Protection Act §2155, 4 U.S.C. § 401 (2012); 82 Fed. Reg. 9308 (Mar. 6, 2017).

57. *Id.*

58. *Id.*

59. *See* BAIRD WEBEL & MARC LABONTE, CONG. RES. SERV., R43413, COSTS OF GOVERNMENT INTERVENTIONS IN RESPONSE TO THE FINANCIAL CRISIS: A RETROSPECTIVE (SEPT. 12, 2018) (discussing waning confidence in the economy and the governmental goal to end the financial panic).

60. Webel, *supra* note 59.

61. Webel, *supra* note 59.

62. Labonte, *supra* note 24, at 14–17.

63. James Surowiecki, *Moral Hazard and the Crisis*, THE NEW YORKER (Jan. 14, 2010), https://www.newyorker.com/business/james-surowiecki/moral-hazard-and-the-crisis.

64. Labonte, *supra* note 24, at 14–17.

65. Labonte, *supra* note 24, at 14–17.

raises the riskiness of the financial industry because the newly exempted banks might take greater risks.[66] This is unlikely, however, because banks are still regulated by multiple regulators and are still accountable to shareholders with the Financial Crisis fresh in their minds.[67] For example, state banks are regulated by the Federal Deposit Insurance Corporation ("FDIC") or the Federal Reserve System and their specific state's bank regulator.[68] Nationally chartered banks are regulated by the Office of the Comptroller of the Currency.[69] Banks are also accountable to their shareholders who pressure bank officers to reduce riskiness and strengthen capital if banks become risky and start to report losses.[70]

Former supporters of Dodd-Frank's $50 billion threshold now agree the threshold was set too low.[71] Barney Frank, former chairman of the House Financial Services Committee, admitted that the $50 billion number was a "mistake"[72] and that he would vote against it now.[73] Senator Chris Dodd recently agreed that the $50 billion threshold was a mistake in September of 2018 at a conference for the ten year anniversary of the Financial Crisis in Washington, D.C.[74] Daniel Tarullo, former member of the Board of Governors of the Fed, also agreed that the threshold was set too low.[75]

---

66. Labonte, *supra* note 24, at 14–17.

67. Julie Stackhouse, *Why Didn't Bank Regulators Prevent the Financial Crisis?*, FED. RES. BANK OF ST. LOUIS, (May 2017), https://www.stlouisfed.org/on-the-economy/2017/may/why-didnt-bank-regulators-prevent-financial-crisis.

68. LISSA L. BROOME & JERRY W. MARKHAM, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 209 (5th ed. 2018).

69. *Id*.

70. Bert Ely, *Big Banks, Medium Banks and Why the Distinction Really Matters*, THE HILL, (June 02, 2017), https://thehill.com/blogs/pundits-blog/finance/335965-big-banks-medium-banks-and-why-the-distinction-really-matters.

71. Daniel K. Tarullo, Member of the Board of Governors, Fed. Res. Bd., Departing Thoughts at The Woodrow Wilson School, Princeton University, Princeton, New Jersey (Apr. 4, 2017).

72. *Dodd-Frank Author: Current SIFI Threshold is 'Mistake',* ABA BANKING J. (Nov. 21, 2016), https://www.cnbc.com/2018/03/01/barney-frank-why-i-would-vote-no-on-senate-bill-to-amend-dodd-frank-commentary.html.

73. Barney Frank, *Why I Would Vote 'No' on Senate Bill to Amend Dodd-Frank*, CNBC (Mar. 1, 2018), https://www.cnbc.com/2018/03/01/barney-frank-why-i-would-vote-no-on-senate-bill-to-amend-dodd-frank-commentary.html..

74. Senator Christopher Dodd, U.S. Senate, Remarks at the September 2008 Financial Crisis: A Legal Retrospective Conference (Sept. 21, 2018).

75. *See* Daniel K. Tarullo, Member of the Board of Governors, Fed. Res. Bd., Departing Thoughts at The Woodrow Wilson School, Princeton University, Princeton, New Jersey (Apr. 4, 2017), https://www.federalreserve.gov/newsevents/speech/tarullo20170404a.htm (discussing how the $50 billion cutoff was "too low").

Opponents of the $50 billion threshold argue that financial institutions with total assets slightly above $50 billion are not systemically important and that total assets is but one factor that may make a bank systemically important to the financial industry.[76] Rather, they suggest that other factors may better assess how important a financial institution is to our economy.[77] These factors include interconnectedness, substitutability, complexity, and cross-jurisdiction activity.[78] Raising the SIFI asset threshold and giving the Fed discretion to use different factors in assessing a financial institution's systemic importance was needed as we move forward from the Financial Crisis.[79]

## IV. Immediate Impact of Raising SIFI Threshold within the Financial Industry and the Increase of M&A Activity

The Economic Growth Act targeted the enhanced regulations of the Dodd-Frank Act's $50 billion threshold and immediately provided regulatory relief for numerous financial institutions.[80] Upon enactment, BHCs with total consolidated assets of less than $100 billion were immediately freed from the EPSs.[81] The Economic Growth Act gives the Fed discretion to release banks in the $100 billion to $250 billion bracket from SIFI designation prior to the eighteen months from the enactment date deadline if it deems fit, and to reinstate them as SIFIs afterward if necessary.[82]

The original $50 billion threshold was applicable to thirty-eight BHCs, while the new $250 billion threshold leaves eight BHCs regulated as SIFIs.[83] The thirty BHCs deregulated by the legislation hold a combined $5.3 trillion in assets,[84] or roughly twenty-five percent of the total assets in the banking sector.[85] Collectively these thirty-eight BHCs

76. Labonte, *supra* note 24, at 20.
77. Labonte, *supra* note 24, at 20.
78. Labonte, *supra* note 24, at 13.
79. Labonte, *supra* note 24, at 1.
80. Economic Growth, Regulatory Relief, and Consumer Protection Act § 2155, 4 U.S.C. § 401 (2012); 82 Fed. Reg. 9308 (Mar. 6, 2017); *see also* Gregg Gelzinis, *Scrapping $50B Threshold will let 30 Big Banks off the Hook*, AM. BANKER, Dec. 18, 2017.
81. § 2155.
82. § 2155.
83. Gelzinis, *supra* note 80.
84. *Holding Companies with Assets Greater Than $10 Billion*, NAT'L INFO. CTR. (June 30, 2018), https://www.ffiec.gov/nicpubweb/nicweb/hcsgreaterthan10b.aspx (last visted Feb. 9, 2019).
85. Gelzinis, *supra* note 80.

received $65 billion in TARP bailout funds and hundreds of billions more in additional forms of government support.[86] This new legislation frees twenty of the thirty-eight BHCs with less than $250 billion in assets from the subjective portion of the Fed's annual stress tests.[87] However, Federal Reserve Chair Jerome Powell said during his nomination hearing that he would continue to have "meaningful" stress tests for banks in that range.[88]

Banks slightly below the previous $50 billion threshold can now reach $100 billion in total assets before fearing a SIFI designation.[89] The deregulation creates a favorable atmosphere for M&A activity for financial institutions with slightly less than $50 billion in total assets.[90] Previously, BHCs with assets just less than $50 billion shied away from M&A activity that would have pushed them above the $50 billion threshold. For example, Astoria Financial Corporation proposed a merger with New York Community Bancorp.[91] Because the transaction would have pushed New York Community over the $50 billion total asset threshold it was ultimately abandoned.[92] Astoria was ultimately sold to Sterling Bancorp—with roughly $30 billion in assets—which as a result remained well below the $50 billion threshold.[93] As of this Note, it has only been several months since passage of the legislation and already retail bank M&A activity is on the upswing.[94]

### *A. Fed Regulatory Discretion over BHCs between $100 and $250*

86. Gelzinis, *supra* note 80.

87. Donna Borak, *Fed: Banks Under $250 Billion Threshold Get Break on Stress Test*, WALL ST. J. (Jan. 30, 2017), https://www.wsj.com/articles/fed-banks-under-250-billion-threshold-get-break-on-stress-tests-1485812085.

88. Emily Stewart, *The Bank Deregulation Bill the Senate Just Passed, Explained*, VOX (Mar. 14, 2018), https://www.vox.com/policy-and-politics/2018/3/6/17081508/senate-banking-bill-crapo-regulation.

89. Economic Growth, Regulatory Relief, and Consumer Protection Act § 2155, 4 U.S.C. § 401 (2012).

90. *See generally* Jith Jayaratne & Philip E. Strahan, *The Finance-Growth Nexus: Evidence from Bank Branch Deregulation*, 111 THE Q. J. OF ECON. 639 (1996) (discussing how deregulation of bank branching and other areas of banking can result in positive economic growth).

91. DAVID INGLES & SVEN MICKISCH, UPCOMING UPTICK IN BANK M&A ACTIVITY?, SKADDEN. ARPS, SLATE, MEAGHER & FLOM LLP (MAY 14, 2018), https://www.skadden.com/insights/publications/2018/05/upcoming-uptick-in-bank-ma-activity.

92. Ben Levisohn, *Astoria Financial & New York Community Bancorp: No Merger For You!,* BARRONS (Dec. 21, 2016), https://www.barrons.com/articles/astoria-financial-new-york-community-bancorp-no-merger-for-you-1482340847.

93. Ingles, *supra* note 91.

94. Nonninger, *supra* note 13.

*Billion*

Dodd-Frank's heightened regulatory scrutiny for SIFIs of $50 billion or greater was enacted at a time when the public and legislators demanded more accountability from financial institutions.[95] Other factors other than asset size may provide better metrics in determining which financial institutions warrant the enhanced SIFI regulations.[96] A BHC with assets between $100 and $250 billion experiencing distress or failure could potentially destabilize the financial system due to its complexity.[97] Large BHCs can engage in various sophisticated financial services, such as securities trading, insurance, swap dealing, custodial services, and clearing and settlement services, as well as a myriad of other specialized services.[98] While these activities are not considered risky individually, "they are outside the traditional prudential regulatory model for commercial banking and increase the number of markets and activities through which an institution could trigger a systemic event or spread systemic risk."[99]

Even though the Economic Growth Act will create fertile ground for M&A activity, the Fed's regulatory discretion for BHCs between $100 billion to $250 billion will allow for proactive prevention of risky behavior, while examining a BHC's overall importance to the economy.[100] First, the Fed can determine if a financial institution is systemically important by examining the interconnectedness of the financial institution as compared to other financial companies.[101] During the Financial Crisis, bank interconnectedness impacted third parties[102] and worsened the financial crisis.[103] When a distressed bank is connected to other financial institutions, the distress can spread to connected organizations and weaken the financial industry as a whole.[104]

95. *See* WALL STREET REFORM: THE DODD-FRANK ACT, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform (last visited Feb. 8, 2019) ("Financial reform includes a number of provisions that will curb excessive risk taking and hold Wall Street accountable.").

96. Labonte, *supra* note 24, at 13.

97. Labonte, *supra* note 24, at 15.

98. Labonte, *supra* note 24, at 21

99. Labonte, *supra* note 24, at 21.

100. Labonte, *supra* note 24, at 16

101. Labonte, *supra* note 24, at 36.

102. Labonte, *supra* note 24, at 36.

103. Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. Colo. L Rev. 1, 4 (2014).

104. *Id.*

Second, the Fed may also look at the substitutability of the institution to determine "whether other banks or financial institutions could perform the critical functions currently performed by the bank in question should it fail."[105] This is important because a BHC that offers unique services that another financial institution cannot replicate in a time of distress, that BHC should be considered systemically important.[106] If a specific BHC can be substituted for another in the event of failure, then it is less likely that BHC is systemically important. [107]

Third, the Fed can examine a bank's cross-jurisdiction activity, which considers how far a BHC's services reach and how many jurisdictions will suffer from any distress or failure.[108] If a BHC operates in numerous jurisdictions and the distress potentially impacts markets locally, nationally, and globally, then that BHC should be seen as systemically important to the financial industry as a whole.[109] These factors are helpful in identifying a BHC's overall importance to the economy in conjunction with an increased asset size threshold.[110]

## V. IMPACT OF INCREASED M&A ACTIVITY

There are numerous incentives for financial institutions to merge or acquire other financial institutions.[111] Merging is a viable way to scale operations by expanding the customer base, consolidating operations, expanding geographic footprint, and increasing capital to lend and invest.[112] Acquiring another BHC also provides an opportunity to fill any financial product gaps that would be easier to incorporate as opposed to developing the product by scratch.[113] Larger banks are incentivized to merge because they already have infrastructure in place for compliance, risk

105. Labonte, *supra* note 24, at 21.
106. Labonte, *supra* note 24, at 21.
107. Labonte, *supra* note 24, at 21.
108. Labonte, *supra* note 24, at 21.
109. Labonte, *supra* note 24, at 21.
110. Labonte, *supra* note 24, at 21.
111. *Mergers and Acquisitions*, PARTNERSHIP FOR PROGRESS, https://www.fedpartnership.gov/bank-life-cycle/grow-shareholder-value/mergers-and-acquisitions (last visited Feb. 8, 2019).
112. Karen Grandstrand, *The Trends, Conditions and Issues Driving Bank M&A*, BANKBEAT (Jan. 29, 2019), https://bankbeat.biz/trends-conditions-issues-driving-bank-ma.
113. *Mergers and Acquisitions*, *supra* note 111.

management, accounting, operations, and information technology.[114] These larger banks can absorb smaller banks without much increase in compliance costs as long as they stay below any SIFI thresholds.[115]

Growing an organization through a merger or acquisition can benefit the organization and the industry overall.[116] In particular, bank M&A activity promotes improving the quality of bank staff who bring with them new skills and knowledge of the industry.[117] Bank mergers in the same markets can facilitate cost savings by reducing redundant personnel and facilities, which can improve operational efficiencies.[118] Merging also increases the access to funds or assets to contribute to new research and development, which in turn diversifies products and services that an organization can offer.[119] These new skills and resources help organizations serve a wider customer base while reducing overhead costs.[120] With the numerous incentives for banks to merge or acquire other banks, an increase in M&A activity is likely. An increase in such activity will have certain effects, the most prevalent of which will be (1) the incentive for formation of de novo banks due to the increased likelihood of the new bank getting acquired by BHCs now free to increase total assets greater than $50 billion and (2) the increased access to credit in smaller communities.[121]

### *A. De Novo Banks and Their Impact*

De novo banks are a sign of economic growth.[122] De novo banks refer to newly chartered banks or banks that have been in operation for five years or less.[123] New banks help fill gaps in the provision of banking

114. Michael Deely, *The Benefits (And Dangers) Of Bank Mergers and Acquisitions*, BIG SKY, https://www.bigskyassociates.com/blog/the-benefits-and-dangers-of-bank-mergers-and-acquisitions (last visted Feb. 9, 2019).

115. *Id.*

116. *Id.*

117. *Id.*

118. Michal Kowalik et. al., *Bank Consolidation and Merger Activity Following the Crisis*, FED. RES. BANK KAN. CITY (2015), https://www.kansascityfed.org/publicat/econrev/pdf/15q1Kowalik-Davig-Morris-regehr.pdf.

119. Deely, *supra* note 114.

120. Deely, *supra* note 114.

121. Deely, *supra* note 114.

122. *De Novo Banks*, AM. BANKERS ASS'N., https://www.aba.com/Advocacy/Issues/Pages/de-novo-banks.aspx (last visited Feb. 9, 2019).

123. BANK HOLDING COMPANY SUPERVISION MANUAL, THE FED. RES. DIV. SUPERVISION & REG. (2017), *available at* https://www.federalreserve.gov/publications/files/bhc.pdf.

services, increase competition, and ultimately strengthen the community bank sector.[124] In addition to difficulties for de novo banks to raise capital from the public after the financial crisis, these banks became subject to stricter regulations as regulators intentionally made opening new banks more difficult.[125] De novo banks are seen as riskier because they fail at a rate of almost double to that of more established banks.[126] As a result, the FDIC was criticized for approving deposit insurance for new banks leading up to the financial crisis.[127] Consequently, the FDIC increased regulatory burdens to make it harder for de novo banks to gain FDIC insurance.[128] Some of the regulatory burdens include requiring higher capital ratios and increasing emphasis on compliance with the Bank Secrecy Act and anti-money laundering requirements, implementation of enterprise risk management systems, and effective corporate governance.[129]

From 1990 to 2008, over 2,000 de novo banks were formed.[130] In the last quarter of 2016, the FDIC only approved two new banks—the most since 2008.[131] From 2009 to 2015, the FDIC approved only three applications for deposit insurance—one per year from 2013 to 2015.[132] This is drastically low compared to a high of 299 applications for new banks in 2005 alone, 237 of which were approved.[133] Historically, de novo activity has decreased during recessions.[134] This was true in the 2008 Financial Crisis as there was an average of 154 annual approvals leading up to it, and only seven de novo banks approved by the FDIC following it.[135] As we claw back from the Financial Crisis, we have seen

124. *De Novo Banks, supra* note 122.

125. *See* Trey Sullivan, *2017 Likely to be a Record-Breaking Year for De Novo Banks*, TRUPOINT PARTNERS, (Feb. 15, 2017), https://www.trupointpartners.com/blog/de-novo-banks-2017 (citing Rachel Witkowski, *Two California Groups Test Washington's Tolerance for New Banks*, WALL ST. J. (Aug. 2, 2016), https://www.wsj.com/articles/two-california-groups-test-washingtons-tolerance-for-new-banks-1470160705); *see also*, Kylee Wooten, *The Role of de novo Banks in Community Banking*, SAGEWORKS (Aug. 14, 2018), https://www.sageworks.com/blog/the-role-of-de-novo-banks-in-community-banking.

126. Wooten, *supra* note 125.

127. James M. Kane et al., *Phoenix Rising: De Novo Bank Formation*, VEDDER PRICE (Mar. 22, 2018), https://www.vedderbanking.com/2018/03/update-de-novo-bank-formation-2015-2018.

128. *Id.*

129. *Id.*

130. ROISIN MCCORD ET AL., EXPLAINING THE DECLINE IN THE NUMBER OF BANKS SINCE THE GREAT RECESSION, FED. RES. BANK RICHMOND (MAR. 2015).

131. Sullivan, *supra* note 125.

132. Sullivan, *supra* note 125.

133. Sullivan, *supra* note 125.

134. Wooten, *supra* note 125.

135. Wooten, *supra* note 125.

an increase of de novo activity.[136] As of September of 2018, just six months after passage of the Economic Growth Act, there have been twenty-one applications for federal deposit insurance filed with the FDIC, more than double the applications filed in all of 2017.[137]

BHCs with total assets just below $50 billion will begin targeting de novo banks and other BHCs to acquire, which is a direct result of raising the SIFI asset threshold.[138] This M&A activity will allow BHCs to both enter new markets as they acquire new customers and create a fertile environment for the formation of de novo banks.[139] As M&A activity increases, de novo banks formation may increase as investors hope their newly formed banks may be acquired by growing BHCs.[140] In addition, as mergers increase, senior officers of acquired banks often sell their stock positions during the merger and then lose their job because of personnel efficiencies and consolidations.[141] Once their non-compete agreements expire, these senior officers can use their experience and capital to start de novo banks.[142]

This deregulation effort is helping reduce the cost of capital needed to operate BHCs, thus allowing for reinvestment in technology and other infrastructure.[143] Bank investors view the Economic Growth Act's deregulation as an opportunity to create de novo banks due to lessened economic burden related to regulatory oversight for BHCs overall.[144] This will create a fertile environment for an increase in the number of community banks, which will provide financial services like access to credit to the previously underbanked and unbanked.[145] As more banking needs are met, BHCs that previously fell just under the $50 billion

---

136. Wooten, *supra* note 125.
137. Wooten, *supra* note 125.
138. Wooten, *supra* note 125.
139. Wooten, *supra* note 125.
140. Richard X. Bove, *Let the Bank Merger Boom Begin*, CNBC (July 14, 2017), https://www.cnbc.com/2017/07/14/let-the-bank-merger-boom-begin.html.
141. Margaret Engel, *Compensation Implications of Mergers and Acquisitions*, COMPENSATION ADVISORY PARTNERS (Oct. 16, 2017), https://www.capartners.com/cap-thinking/compensation-implications-mergers-acquisitions/.
142. Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html.
143. Ray Grace, *De Novo Banks: Viable Business Model or Quaint Relic from the Past*, 20 N.C. BANKING INST. 7, 13 (2016).
144. Kylee Wooten, *Community Banking Today—The Role of De Novo Banks*, SAGEWORKS (Aug. 20, 2018) http://www.sageworks.com/wp-content/uploads/2018/08/Community-Banking-Today-the-role-of-de-novo-banks-.pdf.
145. *Id*.

threshold will now have the freedom to acquire these de novo banks and continue to serve new consumers.[146]

De novo banks help fill gaps in banking services, increase competition, and ultimately strengthen the community bank sector.[147] In fact, de novo banks increase credit and capital access to the agricultural industry, small businesses, and residential mortgage borrowers.[148] According to the FDIC, de novo banks invest a large share of their assets into small business loans and are responsible for approximately forty to fifty percent of small business loans nationwide.[149] De novo banks are also instrumental in alleviating unbanked and underbanked segments of the population.[150] In 2017, six and a half percent (6.5%)—approximately eight million—of United States households were unbanked.[151] Approximately an additional eighteen percent (18.7%) of U.S. households (24.2 million) were underbanked, meaning that the household had a checking or savings account but also obtained financial products and services outside of the banking system.[152] De novo banks will enter these markets to serve a banking need, but smaller de novo banks might not have resources to offer the same state of the art technology as larger banks.[153] New consumers will continue to be financially served when middle market banks—who are now able to grow without gaining the SIFI designation—acquire these de novo banks.[154] These middle market banks will begin to serve the underserved and increase the community's access to sophisticated financial products.

146. Grace, *supra* note 143.

147. *De Novo Banks*, *supra* note 122.

148. Wooten, *supra* note 144.

149. Wooten, *supra* note 144.

150. Wooten, *supra* note 144.

151. FED. DEPOSIT INS. CORP., 2017 FDIC NAT'L SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS (2018), *available at* https://www.fdic.gov/householdsurvey/2017/2017report.pdf.

152. *Id.*; *See generally* Joseph A. Smith, Jr. *Saving for the Poor: The Hidden Benefits of Electronic Banking: A Review and Response*, 5 N.C. BANKING INST. 1 (2001) (discussing the benefits of technology for alleviating issues of unbanked and underbanked).

153. Paul Davis, *Window May be Closing for Small Banks to Compete for Small Business*, AM. BANKER, Nov. 6, 2018.

154. FINANCIAL INCLUSION IN THE UNITED STATES, COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF (June 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/20160610_financial_inclusion_cea_issue_brief.pdf.

### B. *Increase in Access to Credit As a Result of De Novo Banks*

The federal government has emphasized the importance of financial inclusion and access to credit for local communities.[155] Financial inclusion and access to credit strengthen communities by serving as a catalyst to combat poverty and spur economic enterprises.[156] However, the credit needs of small businesses tend to not attract larger, multijurisdictional banks, which leads to small businesses relying on their local banks to fill the credit void.[157] Medium-sized businesses may be able to access lenders and providers from larger areas, but they still do not generally have the access to national capital markets which may be available to larger corporations.[158] As part of the Community Reinvestment Act ("CRA"), banks must provide their regulators with their records of meeting the community credit needs, including low and moderate income neighborhoods, consistent with the safe and sound operations of the institution.[159] Acquisition of de novo banks allows larger banks to meet CRA requirements by offering more sophisticated financial services, which should expand their consumer base.[160]

More consumers will soon enjoy modern financial technology with increased M&A activity.[161] Technology capabilities improve efficiencies for banks and differentiate banks in the marketplace.[162] Informational technology alone significantly contributes to productivity, and consumers attribute technology to better customer experience.[163] Small banks can outsource their technology capabilities, but that does not mean

155. *See* Community Reinvestment Act, 12 U.S.C. § 2901(b) (2012) ("It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.").

156. Heywood W. Flesig & Nuria de la Pena*, Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit*, L. & BUS. REV. OF THE AMS. 33 (1997).

157. Ruth Simon, *Big Banks Cut Back on Loans to Small Business*, WALL. ST. J. (Nov. 26, 2015, 8:10 PM), https://www.wsj.com/articles/big-banks-cut-back-on-small-business-1448586637.

158. *Id*.

159. 12 U.S.C. §§ 2901–2907 (2012).

160. Allen N. Berger, *The Economic Effects of Technological Progress: Evidence from the Banking Industry*, 35 J. MONEY, CREDIT, BANKING 141 (2002).

161. *Id.*

162. *Id.*

163. LN Revathy, *For Banks, Technology is now a Key Tool for Improving Customer Service*, BUS. LINE (Oct. 27, 2017), https://www.thehindubusinessline.com/money-and-banking/for-banks-technology-is-now-a-key-tool-for-improving-customer-service/article9928315.ece.

thier access costs the same as large banks access.[164] Larger banks may benefit from volume discounts that are not offered to small banks which may explain why smaller institutions are slower to adopt new technologies.[165] Banking applications have made waiting in a queue at the bank to deposit money, withdraw money, and even get a loan a thing of the past. Now, mobile smartphones allow consumers to access financial tools at any time, not just during banking hours.[166]

### C. *Mitigating Concerns of Reduced Competition Among Community Banks*

Technology, antitrust laws, and competing factors mitigate arguments that increased M&A activity will reduce the number of community banks that are important for rural communities.[167] Some have argued that the increased M&A activity will result in fewer total banks serving communities because of an overall reduced number of competitors.[168] This reasoning is unfounded because the resulting bank's regulator will review prospective mergers to determine if they violate antitrust laws by substantially lessening competition.[169] With any bank M&A activity, the Antitrust Division of the Department of Justice will also examine the market and weigh different factors when evaluating competitive effects of the proposed M&A activity.[170] These factors include deposit concentration figures, branch networks, and both the entry of small firms and their ability to expand quickly.[171] This antitrust oversight assuages arguments of consolidated marketplaces that may result from increased M&A activity.[172]

M&A activity is also affected by competing factors, and raising the SIFI threshold is but one element of why banks will merge or acquire

164. Berger, *supra* note 160.

165. Berger, *supra* note 160.

166. Constance Gustke, *5 Reasons to Use Mobile Banking*, BANKRATE (Mar. 10, 2010), https://www.bankrate.com/banking/checking/5-reasons-to-use-mobile-banking.

167. *See* Stewart, *supra* note 88 ("Community banks are four times more likely to operate in rural counties than larger institutions, according to a study from the FDIC.").

168. Rick Nilson, *Increased M&A Activity Creates Opportunity for Your Community Bank*, CLIFTONLARSONALLEN (Sept. 20, 2016), https://www.claconnect.com/resources/articles/increased-ma-activity-creates-opportunities-for-your-community-bank.

169. Simon M. Lorne & Joy M. Bryan, *Practical Law Acquisitions & Mergers: Negotiated and Contested Transactions*, WESTLAW (database updated Nov. 2018).

170. *Id.*

171. *Id.*

172. *Id.*

other banks.[173] Many financial institutions are subject to regulatory obligations and remediation stemming from deficiencies in their compliance infrastructure, such as compliance functions surrounding anti-money laundering, the Bank Secrecy Act, and consumer finance compliance.[174] These previous regulatory obligations generally prohibit BHCs from making substantial expansionary acquisitions or investments.[175]

Technology is also playing a role in mitigating M&A activity concerns.[176] Banks have begun to reconsider their brick-and-mortar locations as technology reduces the need for consumers to visit physical locations for their banking needs.[177] Financial institutions can now introduce themselves to a community via technology and not necessarily through physical location. [178]

## VI. CONCLUSION

After the 2008 Financial Crisis, Congress focused efforts on mitigating future risky behavior in the financial industry.[179] As a result, heightened financial regulation slowed banking activity to allow for recovery.[180] It is now clear after a decade later that the SIFI threshold was set too low to mitigate concerns of moral hazard and lack of financial oversight.[181] Raising the SIFI threshold from $50 billion to $250 billion was long overdue and will result in a stronger and healthier financial industry. The Economic Growth Act will support increased M&A activity among BHCs with total assets just below $50 billion.[182] The biggest target of acquisitions in this M&A rich environment will be de novo banks which will help larger BHCs expand banking services to the unbanked and underbanked consumers by expanding their financial services offered.[183]

---

173. *Id.*
174. Ingles, *supra* note 91.
175. Ingles, *supra* note 91.
176. Berger, *supra* note 160.
177. Berger, *supra* note 160.
178. Ingles, *supra* note 91.
179. Ip, *supra* note 6.
180. Perkins, *supra* note 9.
181. Tarullo, *supra* note 71.
182. Wooten, *supra* note 125.
183. BANK HOLDING COMPANY SUPERVISION MANUAL, THE FED. RES. DIV. SUPERVISION & REG. (2017), *available at* https://www.federalreserve.gov/publications/files/bhc.pdf.

JOSEPH C. FIELDS*

*This Note is the culmination of a collaborative effort by a wonderful group of talented individuals to whom I am tremendously indebted. I am grateful for the comments and advice from Professor Lissa L. Broome, Patrick D. Morris, Peter J. Cline, and the entire North Carolina Banking Institute editors and staff. I am also grateful for my mom, dad, brothers, Shelby, and all the others who inspire me daily.