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Back to Basics: The Principles of Bank Merger Review

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Back to Basics: The Principles of Bank Merger Review

I. INTRODUCTION

When one bank seeks to merge with another, the bank must do so with the approval of a federal regulatory agency. The Department of Justice (“DOJ”) plays a key role in this process by reporting whether the proposed merger violates any antitrust laws. In September of 2020, the DOJ requested public comments as to whether it should revise the 1995 Bank Merger Competitive Review guidelines to reflect emerging trends in the banking and financial services sector and modernize its approach to bank merger review under antitrust laws. A review of bank merger jurisprudence and an appraisal of the DOJ’s bank merger review both support the assertion that the DOJ’s current guidelines for bank merger review are outdated. Therefore, the DOJ’s guidelines should be reconsidered in order to implement a more dynamic analysis.

There is indication that bank merger regulations for a subset of banks are yielding anticompetitive effects. In 1963, United States v. 1

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4. Id.
Philadelphia National Bank\(^7\) established that commercial banking in the United States is “primarily unit banking.”\(^8\) In other words, the American banking system consisted of a decentralized system of independent local banks and community banks at the time of the case.\(^9\) However, consumer access to banks has changed significantly—even since the release of the 1995 Bank Merger Competitive Review guidelines—with innovations like credit cards, debit cards, direct deposit, electronic money transfer, nationwide ATM networks, and online banking.\(^10\) Moreover, small banks in rural markets face considerable challenges in keeping up with these innovations where there are regulatory burdens that make merging more difficult.\(^11\)

Consequently, there is a need to reign in bank consolidation.\(^12\) Insufficient oversight of merger activity among the country’s financial institutions has resulted in “trillions of dollars in economic costs” and an “unquantifiable level of harm” to American consumers.\(^13\) A litany of academics agree that the current bank merger regulation requires reform that prioritizes the interest of the individuals and small businesses who rely on banking institutions for deposits, commercial transactions, and loan services.\(^14\) Furthermore, the percentage of bank mergers approved over a year. By contrast, large banks are often more easily able to satisfy the quantitative anticompetitive analysis by divesting branches in certain markets.”).

9. See id. (“[C]ontrol of commercial banking is diffused throughout a very large number of independent, local banks . . . rather than concentrated in a handful of nationwide banks . . . .”).
13. Id. at 7–8.
14. See id. at 2 (identifying a considerable number of sources to support the argument that low- and moderate-income individuals are discreetly impacted by bank consolidation); see also Jeremy C. Kress, Modernizing Bank Merger Review, 37 YALE J. ON REG. 435, 440 (2020) (“[Banking] agencies should substantially enhance their scrutiny of bank merger proposals using the three statutory factors that to date have been overlooked in the legal literature—namely, financial stability, the public interest, and financial and managerial considerations.”); see also Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 9 (Dec. 1, 2018) (unpublished manuscript),
in the past few years shows that regulators are accelerating the approval process at an unprecedented pace.\textsuperscript{15} Research shows that banking fees increase when large banks consolidate with small banks through mergers.\textsuperscript{16} This indicates that bank mergers not only affect other banks within the relevant market but also the consumers who rely on those banking services.\textsuperscript{17} Additionally, there is a relationship between mergers and accessible, inclusive banking for low-income households.\textsuperscript{18} In particular, bank branch density has been observed to correlate negatively with county poverty, indicating how access to banking services decrease when bank branch density decreases.\textsuperscript{19} Thus, it’s likely the case that households with a bank account are less likely to face financial strain.\textsuperscript{20}

For example, there were 13,460 local banks and approximately 10,000 branch banks in 1960.\textsuperscript{21} Over a few short years, the Supreme Court noted in \textit{Philadelphia National Bank} that the number of commercial banks in America had declined by 714, despite an additional 887 new banks and “a very substantial increase in the Nation’s credit needs.”\textsuperscript{22} Of the 1,601 independent banks that were no longer in business, 1,503 ceased to exist due to a merger.\textsuperscript{23} More recently, the 2019 merger between Branch Banking and Trust Company (“BB&T”) and SunTrust

\begin{itemize}
\item \textsuperscript{15} See Kress, \textit{supra} note 14, at 455 (“More recently . . . approval rates have climbed steadily, exceeding the historical average and reaching a peak of 95% in 2018.”); see also Lalita Clozel, \textit{Bank Mergers Get Faster Under Trump}, \textit{WALL ST. J.} (Feb. 13, 2019, 7:00 AM), https://www.wsj.com/articles/bank-mergers-get-faster-under-trump-11550059200.
\item \textsuperscript{16} See Kress, \textit{supra} note 14, at 459 (“[B]ank mergers tend to inflate the fees that banks charge consumers to maintain deposit accounts and depress the interest rates that banks pay to those accountholders [sic].”); see also Bord, \textit{supra} note 14, at 6–9 (suggesting that some financially fragile and unbanked households close their deposit accounts and exit the banking system when they experience high account fees or minimum required balances that result from bank consolidation).
\item \textsuperscript{17} Id. at 4774.
\item \textsuperscript{18} See Claire Celerier & Adrien Matray, \textit{Bank-Branch Supply, Financial Inclusion and Wealth Accumulation}, 32 REV. OF FIN. STUDIES 4767, 4770 (2019) (suggesting that unbanked households are constrained by the supply of banking services and can benefit from them)
\item \textsuperscript{19} \textit{Id.} at 4769–70 (“[W]e find that financial inclusion leads to the accumulation of both liquid assets in households savings accounts, allowing them to earn interest, and durable assets, namely vehicles. Banked households have a 56% higher probability of owning a vehicle, and around $5,900 more dollars in their vehicle than their unbanked counterparts.”)
\item \textsuperscript{20} \textit{Id.} at 325–26.
\item \textsuperscript{22} \textit{Id.} at 325–26.
\end{itemize}
Bank resulted in the closure of 175 branches as of early October of 2020 and is expected to close up to 800 branches in the following years.\textsuperscript{24} The DOJ played a significant role in this result because it conditioned its merger approval on the future divestment of branches.\textsuperscript{25} Accordingly, the DOJ’s efforts to update its merger guidelines are not without significant consequence.

A proper evaluation and recommendation for future bank merger guidelines should begin with a review of bank merger jurisprudence, namely \textit{United States v. Philadelphia National Bank}\textsuperscript{26} and \textit{United States v. Phillipsburg National Bank & Trust Company}.\textsuperscript{27} Bank merger jurisprudence informs the review standards codified by the Bank Merger Act of 1966, which is also used by the DOJ and other bank regulators.\textsuperscript{28} The Bank Merger Act of 1966 instructs federal agencies to consider three equally-weighted priorities: (1) preventing bank mergers that would result in a monopoly; (2) preventing anticompetitive bank mergers; and (3) ensuring that the convenience and needs of the communities to be served are met.\textsuperscript{29} All things considered, these principles should remain consistent with the jurisprudence, indicating that the substance of the 1995 Bank Merger Competitive Review guidelines and the 2010 Horizontal Merger Guidelines do not require any major changes unless they contradict the priorities inherent in bank merger law and jurisprudence.

This Note proceeds in four parts. Part II provides a brief review of bank merger legislation.\textsuperscript{30} Part III offers an overview of the Supreme Court’s bank merger jurisprudence, identifying key areas in which the

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\textsuperscript{25} Press Release, Dep’t of Justice, Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger [https://perma.cc/UMA5-8LJS] (“The Department of Justice announced today that BB&T Corporation (BB&T) and SunTrust Banks Inc. (SunTrust) have agreed to divest 28 branches across North Carolina, Virginia, and Georgia with approximately $2.3 billion in deposits to resolve antitrust concerns arising from BB&T’s proposed merger with SunTrust.”).
\textsuperscript{26} 374 U.S. 321 (1963).
\textsuperscript{27} 399 U.S. 350 (1970).
\textsuperscript{28} See Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (2018) (outlining the way regulators should review a bank merger as informed by legislation and case law).
\textsuperscript{30} See infra Part II.
\end{flushleft}
legal principles inform the aforementioned priorities. Part IV outlines the current government structure of bank merger regulatory oversight. Finally, Part V considers how some recommendations reconcile with said statutory intent and jurisprudence and concludes that any revision of the current guidelines should remain wholly consistent with the Bank Merger Act, as well as bank merger case law.

II. A BRIEF HISTORY OF BANK MERGER LEGISLATION

In the early 1900s, Congress struggled to balance the interests of free competition while reigning in the power of banks amassed through mergers and acquisitions. The primary laws that regulate anticompetitive business practices are the Sherman Antitrust Act of 1890 (“Sherman Act”) and the Clayton Antitrust Act of 1914 (“Clayton Act”). The Sherman Act specifies that any proposed merger “in restraint of trade or commerce” is illegal, while the Clayton Act states that no business engaged in commerce shall participate in a merger that would “substantially lessen competition[,] or restrain such commerce.” Banks were largely considered exempt from federal antitrust laws because it was commonly understood that banking was not commerce as referred to in the Sherman Act and the Clayton Act. The National Bank Consolidation and Merger Act of 1918 designated the Office of the Comptroller of the Currency (“OCC”) to supervise mergers between state and national banks while the Banking Act of 1933 delegated authority to the Board of Governors of the Federal Reserve System (“Federal

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31. See infra Part III.
32. See infra Part IV.
33. See infra Part V.
39. See Transamerica Corp. v. Bd. of Governors of Fed. Res. Sys., 206 F.2d 163, 166 (3d Cir. 1953) (noting that the members of Congress had not specifically contemplated that the antitrust laws classified banking entities as corporations engaged in commerce).
NORTH CAROLINA BANKING INSTITUTE

Reserve Board”) and the Federal Deposit Insurance Corporation (“FDIC”) over member and nonmember banks. However, antitrust standards had not yet been contemplated to a degree sufficient to determine whether a combination was truly anticompetitive.42 Up until the 1950s, bank mergers proliferated and created much larger banking institutions with an unprecedented amount of capital.43 For example, Congressman Emanuel Celler bemoaned a merger between two of the largest banks in New York City in 1959—Manufacturers Trust Co., the third largest bank, and Bankers Trust Co., the sixth largest bank.44 Manufacturers Trust maintained over $3 billion in total assets, while Bankers Trust reported total assets in excess of $2.8 billion.45 After the merger, 70% of the city’s total bank assets were left in the hands of four financial institutions.46 Despite the concerns raised by Congressman Cellar, the increasing frequency of bank mergers remained unchecked by the Clayton Act and the Sherman Act.47 While focused on antitrust generally, Congress reexamined the Clayton Act and amended it with the Celler-Kefauver Anti-Merger Act of 1950 (“C-K Anti-Merger Act”).48 The C-K Anti-Merger Act revised the Clayton Act to clarify that no business could engage in an asset acquisition, a type of merger used by banks, that would substantially lessen competition.49 The amendment also restricted antitrust laws to apply only to corporations regulated by the Federal Trade Commission (“FTC”).50

Armed with the newly-amended Clayton Act, the Federal Reserve Board challenged the acquisition of stocks of certain...
independent commercial banks by Transamerica Corporation in 1953.\textsuperscript{51} However, the Third Circuit would not hold that the bank merger violated the recently revised Clayton Act.\textsuperscript{52} Instead, the court delivered a minor success for the statute by acknowledging that there was a legal justification for applying the Clayton Act to review the antitrust implications of bank mergers.\textsuperscript{53} The court acknowledged that even though Congress customarily dealt with banks through legislation separate and apart from general antitrust legislation, the power to extend the scope of the Clayton Act to bank mergers still existed through the Commerce Clause of the Constitution.\textsuperscript{54} In other words, banking would be considered commerce under the purview of antitrust legislation.\textsuperscript{55}

Certain restrictions to Federal Reserve Board, FDIC, and OCC oversight made it possible for some banks to avoid review by any of the three federal banking agencies.\textsuperscript{56} For example, the Federal Reserve Board could only review a merger if it would create a member bank with a smaller capital or surplus than the combined capital or surplus of the banks involved in the transaction.\textsuperscript{57} Similarly, the FDIC could not review mergers of FDIC-insured state banks that were not members of the Federal Reserve System unless the total capital stock or surplus of the resulting or assuming bank was less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumptions of the liabilities.\textsuperscript{58} Finally, if a national bank purchased assets and assumed liabilities of another bank, the OCC’s approval was not directly required unless the capital stock or surplus of the assuming bank would be less than the aggregate capital stock or surplus of the combining banks.\textsuperscript{59}

\textsuperscript{52} \textit{Id.} at 170.
\textsuperscript{53} \textit{Id.} at 165.
\textsuperscript{54} See \textit{Id.} at 166 (“We find nothing in the legislative history . . . to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent.”).
\textsuperscript{55} Casson & Burrus, \textit{supra} note 42, at 683 (“While the Federal Reserve failed to accomplish its ultimate purpose [in Transamerica Corp. v. Bd. of Governors of the Fed. Reserve Sys.], it succeeded in establishing that banking operations did constitute ‘commerce’ within the meaning of the Clayton Act.”).
\textsuperscript{56} Kintner & Hansen, \textit{supra} note 34, at 221; \textit{see also} Stanley D. Waxberg and Stanley D. Robinson, \textit{Chaos in Federal Regulation of Bank Mergers: A Need for Legislative Revision}, 82 BANKING L. J. 377, 385 (1965).
\textsuperscript{57} Kintner & Hansen, \textit{supra} note 34, at 221.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
Despite the clarifications made by the C-K Anti-Merger Act amendments, the language of the Clayton Act was still not sufficient to prevent anticompetitive bank mergers because the Act stated that antitrust laws only applied to corporations subject to FTC’s jurisdiction. Implicitly, this meant that the DOJ could not conclude that section 7 of the Clayton Act applied to bank mergers. Congress attempted to resolve these issues by enacting the Bank Merger Act of 1960, which gave the three federal bank regulatory agencies and the DOJ approval rights over bank mergers. The Bank Merger Act of 1960 charged the agencies with considering two main factors: banking and competitiveness. The banking factor included consideration of: (1) the financial history and condition of each of the banks involved; (2) the adequacy of the resulting bank’s structure; (3) the merged bank’s future earnings prospects; (4) the general character of the resulting bank’s management; (5) the convenience and needs of the community to be served; and (6) whether or not the bank’s corporate powers were consistent with the purpose of the Act. The competitive factor referred to the effect of the transaction to substantially lessen competition and any tendency toward monopoly. Accordingly, the Bank Merger Act of 1960 empowered regulatory agencies to review bank mergers; however, it did not provide guidance on how to weigh the various anticompetitive factors listed in the legislation.

The prevailing question for the DOJ and the banking regulatory agencies is how to determine whether a merger has substantially lessened competition. Procedurally, the legislation instructed the merging banks to apply to the responsible agency for approval. The responsible agency

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61. The position of “most observers before 1960” was that section 7 failed to cover asset acquisition by banks. See Kintner & Hansen, supra note 34, at 220 (highlighting a 1955 congressional testimony by the Assistant Attorney General in charge of the Antitrust Division).
63. Id.
64. Id. § 1828(i)(4)(D).
65. Id. § 1828(c)(1)(C).
66. See Kintner & Hansen, supra note 34, at 223 (“As a result of this ambiguity [regarding the competitive factor element], the three banking agencies developed different policies in applying the criteria set up in the statute.”).
67. It is necessary to note that the DOJ, OCC, FDIC, and the FRB do not individually review all merger applications. Instead, the regulatory agency responsible for issuing a merger approval will depend upon the nature of the merged entity. See infra Part IV.
must then notify the Attorney General of any approval. Once notified, the DOJ provides final comment on the competitive factors observed in the application process. After the Bank Merger Act of 1960, there were two opposing philosophies as to how the DOJ should evaluate bank merger applications. On one hand, some argue that banks were so central to the proper functioning of the economy that the traditional antitrust goal of restraining undue concentration “is as important to banking as in any other field.” On the other hand, some believed that increased concentration would yield stronger institutions able to “safeguard against failure.” In search of an answer, the DOJ filed five bank merger suits in 1961. Philadelphia National Bank was the first of these five cases to reach the Supreme Court and its holding effectively ratified the bank merger test as it exists today.

III. THE BANK MERGER TEST

Pursuant to the Bank Merger Act of 1960, a bank merger review consists of a two-step analysis. First, the entity tasked with oversight must decide whether the proposed merger would possess any anticompetitive effects or incur “any tendency toward monopoly.” Then, if the entity tasked with oversight finds that the combination violates the first step, it must decide whether “the transaction [is] in the public interest.” Philadelphia National Bank initiated the process of interpreting and fine tuning the language of the Bank Merger Act of 1960.

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69. Id.
70. Id.
71. See Kintner & Hansen, supra note 34, at 213–16 (outlining a “dichotomy of views” regarding the value of competition in banking).
72. Id. at 216.
73. Id.
78. Id.
to more clearly indicate how the language of the statute contemplates antitrust values. 79

A. United States v. Philadelphia National Bank

In Philadelphia National Bank, 80 the named bank proposed a merger agreement by which Girard Trust Corn Exchange Bank’s (“Girard Trust”) shareholders would surrender their shares in exchange for shares in the consolidated bank. 81 Philadelphia National Bank’s shareholders would retain their original shares. 82 Pursuant to the Bank Merger Act of 1960, 83 the OCC presided as the primary regulatory agency and would receive reports from the Federal Reserve Board, FDIC, and the DOJ with their recommendations. 84 Each of the three disagreed with the OCC and advised that the proposed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area. 85

The Supreme Court began its analysis by considering whether section 7 of the Clayton Act applied to bank mergers. 86 The answer turned on a chain of inferences rooted in the text of the Clayton Act. 87 The statute applies to acquisitions of corporate stock or share capital by any corporation engaged in commerce. 88 Furthermore, the text of section 7 applies where there are acquisitions of corporate stock or share capital by corporations, but only if those corporations are subject to the jurisdiction of the FTC. 89 In other words, if the Court decided to label the merger between Philadelphia National Bank and Girard Trust as an

80. Id. at 321.
81. Id. at 331–32.
82. Id. at 331.
85. Id. at 332–33.
86. Id. at 335.
87. Id. at 335–37.
88. Id. at 340 n.18.
89. See 15 U.S.C. § 45 (a)(2) (1914) (“The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”); see also Philadelphia Nat’l Bank, 374 U.S. at 335–36 (1963) (“By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation engaged in commerce, but it reaches acquisitions of corporate assets only by corporations ‘subject to the jurisdiction of the Federal Trade Commission.’”).
asset acquisition, then the merger would not be considered illegal.\textsuperscript{90} This is because, according to the text of the Clayton Act, an asset acquisition between banks was not illegal, whereas an asset acquisition by any corporation subject to the jurisdiction of the FTC would be illegal.\textsuperscript{91} This line of reasoning exposed a loophole in the Bank Merger Act of 1960.\textsuperscript{92}

In order to proceed, the Court turned to legislative intent.\textsuperscript{93} Indeed, the Court reasoned that because Congress intended to “control corporate concentrations tending to monopolies,” the Clayton Act at a minimum applied to mergers and consolidations.\textsuperscript{94} In amending the Clayton Act with the C-K Anti-Merger Act, Congress further sought to close a loophole in the statute to prevent one corporation from acquiring another corporation by pure asset acquisition.\textsuperscript{95} The Supreme Court worked around the loophole by holding that “the specific exception for acquiring corporations not subject to the FTC’s jurisdiction excludes from the coverage of [section] 7 only assets acquisitions by such corporations when not accomplished by merger.”\textsuperscript{96}

The Supreme Court supported this decision with three reasons: (1) any other interpretation would defeat the acknowledged purpose of section 7 of the Clayton Act; (2) Congress had contemplated the type of merger at issue in \textit{Philadelphia National Bank} and; (3) legislative history proves that the phrase limiting the Clayton Act to corporations subject to the FTC was meant to define the role of the FTC rather than to limit the jurisdiction of the antitrust law itself.\textsuperscript{97} After the Court resolved this issue, it designated the bank merger test to determine whether the proposed merger violated antitrust law.\textsuperscript{98}

\textsuperscript{90} See \textit{Philadelphia Nat’l Bank} 374 U.S. at 336 n.13 (distinguishing the legal difference between a merger and an asset acquisition).

\textsuperscript{91} See Clayton Antitrust Act of 1914, § 7, 15 U.S.C. § 18 (establishing in pertinent part that no person subject to the jurisdiction of the FTC shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly).

\textsuperscript{92} \textit{Philadelphia Nat’l Bank}, 374 U.S. at 337 (“[A] merger fits neither category neatly.”)

\textsuperscript{93} See \textit{id}. (“We must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute.”).

\textsuperscript{94} \textit{id}. at 338.

\textsuperscript{95} See \textit{id}. at 341 n.19 (“The purpose of the [C-K Anti-Merger amendments to Section 7] is to prevent corporations from acquiring another corporation by means of the acquisition of its assets . . . [where failure to do so] has been inconsistent and paradoxical as to the over-all effect of existing law.”).

\textsuperscript{96} \textit{id}. at 342.

\textsuperscript{97} \textit{id}. at 343–49.

\textsuperscript{98} \textit{id}. at 355–72.
Philadelphia National Bank applies a statutory test that centers on whether the proposed merger substantially lessens competition in “any line of commerce” in “any section of the country.” For this reason, the Court determined the relevant product (or services market) and the relevant geographical market in which to assess the anticompetitive nature of the proposed merger. Also, consistent with Congress’ legislative intent to prevent undue concentration, the Supreme Court restricted this standard to “proving illegality only with respect to mergers whose size makes them inherently suspect.” For example, the merger of the appellees in Philadelphia National Bank would have resulted in a single bank controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. The Court refrained from establishing a bottom threshold for this standard, emphasizing that the test is not only whether small competitors flourish but also whether consumers are well-served. Furthermore, the Court insisted that its ruling on the competitive nature of the proposed merger was not arbitrary since neither the antitrust laws nor legislative history allude to a particular percentage being sufficient to determine whether the merger substantially lessens competition.

At its core, Philadelphia National Bank exposed the insufficiency of the Bank Merger Act of 1960 in adequately addressing bank merger review. Once that problem was solved, the Philadelphia National Bank court applied a traditional antitrust review that culminated in the analysis and application modeled seven years later in United States v. Phillipsburg National Bank and Trust Co.

99. Id. at 355.
100. Id. at 356; see also United States v. Phillipsburg Nat’l Bank & Trust Co. 399 U.S. 350, 357–58 (1970) (“We entertain no doubt that this factual pattern requires a determination whether the merger passes muster under the antitrust standards of United States v. Philadelphia National Bank . . .”).; see also Brown Shoe Co. v. United States 370 U.S. 294 (outlining the merger analysis in further detail).
102. Id. at 364.
103. See id. at 365 n.41 (“Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase than in the instant case, does not raise an inference that the merger is not violative of § 7.”) (emphasis added).
104. Id. at 367 n.43.
105. Id. at 365.
106. See id. at 337 (“[W]e have been directed to no previous case in which a merger of consolidation was challenged under § 7 of the Clayton Act, as amended, where the acquiring corporation was not subject to the FTC’s jurisdiction.”).
two cases, the DOJ proceeded to challenge bank mergers in an effort to scale back a “rising tide of unhealthy bank mergers.”

Shortly after Philadelphia National Bank, the DOJ brought another challenge to a bank merger pursuant to sections one and two of the Sherman Act, which gives the DOJ the authority to enjoin any bank merger with a tendency towards forming a monopoly. In United States v. First National Bank & Trust Company of Lexington, the Court held that the Sherman Act applied to the facts, rather than the Clayton Act, because the merger’s standard of legality changed from assessing stock or asset acquisitions to a contract in restraint of trade or commerce. Looking for an unreasonable restraint of trade, the Court considered the size of the consolidated bank’s trust departments after the proposed merger and found that they would hold 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts within the established geographic area. Additionally, testimony on the record from three of the four remaining banks indicated that the consolidation would seriously affect their ability to compete effectively. As a result, the Supreme Court agreed and found that significant competition would be eliminated by consolidation.

B. Post-Philadelphia National Bank Changes to the Bank Merger Test

After the Philadelphia National Bank decision, Congress passed the Bank Merger Act of 1966. This law clarified procedure and established standards consistent with both the Sherman Act and the Clayton Act. The DOJ would now be required to report on the competitive factors for all bank merger applications and provide a final

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112. Id. at 669.
113. Id.
114. Id.
116. See Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(1) (providing that no insured bank may merge or consolidate in any manner without the approval of the banking agency having jurisdiction over it); see also Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(5) (reestablishing the antitrust standards for a bank merger evaluation).
check on any anticompetitive inquiry.\textsuperscript{117} It was argued that the OCC’s decision on a bank merger would function like a final administrative ruling; however, the Supreme Court held that a challenge on antitrust grounds would need to be adjudicated.\textsuperscript{118} The Bank Merger Act of 1966 clarified that any proposed merger transaction “[resulting] in a monopoly . . . in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States” shall not be approved.\textsuperscript{119} The Act also stated that any proposed merger transaction “whose effect in any section of the country may be substantially to lessen competition, or . . . in any other manner would be in restraint of trade” shall not be approved.\textsuperscript{120} This revision removed the loophole problem encountered in \textit{Philadelphia National Bank} by explicitly stating that the “responsible agency” would evaluate the merger transaction with the intent of applying the standards of the antitrust laws.\textsuperscript{121} Finally, the 1966 amendment rewrote the public interest component of the review by allowing bank merger approval even when anticompetitive effects are present, “if the proposed transaction [is] clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.”\textsuperscript{122}

In 1968, the Supreme Court decided \textit{Third National Bank}, which clarified the standard of review for claims made pursuant to the Bank Merger Act of 1966 and defined the convenience-and-needs-of-the-community analysis of the Bank Merger Act.\textsuperscript{123} The District Court, considered the challenge to the proposed bank merger by the DOJ and asserted that the Bank Merger Act altered the standards used in evaluating whether a bank merger violates the antitrust laws.\textsuperscript{124} However, the Supreme Court disagreed, stating that Congress intended bank mergers

\textsuperscript{117} Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(4)(A)(i)–(ii) (“In the interests of uniform standards and subject to subparagraph (B), before acting on any application for approval of a merger transaction, the responsible agency shall (i) request a report on the competitive factors involved from the Attorney General of the United States; and (ii) provide a copy of the request to the Corporation (when the Corporation is not the responsible agency”).

\textsuperscript{118} United States v. First City Nat’l Bank of Houston, 386 U.S. 361, 367–69 (1967) (“A determination of the effect on competition within the meaning of § 7 of the Clayton Act is a familiar judicial task.”)


\textsuperscript{120} Id. § 1828(c)(5)(B).

\textsuperscript{121} Id. § 1828(c)(2)–(5).

\textsuperscript{122} Id. § 1828(c)(5).


\textsuperscript{124} The District Court justified its reasoning with a case that had been deemed “confined to its special facts.” \textit{Id.} at 181.
to be subject to the usual antitrust analysis. The Court held that if a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, “the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.”

By the late 1960s, the general understanding was that antitrust law held firm as a strong roadblock for many large banks that aimed to grow through consolidation. The Bank Merger Act of 1966 established the convenience-and-needs-of-the-community defense and provided the DOJ with the ability to automatically stay a merger approval once it has filed suit. This proved beneficial even though the same legislation only provided the DOJ with thirty days after the notice of a bank merger proposal to bring an action. Nonetheless, the DOJ proceeded to challenge anticompetitive practices, making a significant case of United States v. Phillipsburg National Bank & Trust Company.

When Phillipsburg National Bank and Second National Bank of Phillipsburg proposed their merger, the requisite independent reports obtained from the Federal Reserve Board, the FDIC, and the DOJ all viewed the problem as involving commercial banking in Phillipsburg-Easton and reported that the merger would have a “significantly harmful effect” on competition in that area. The OCC disagreed, finding that the other agencies had defined the product and geographic markets too narrowly and that those agencies should have treated the greater Lehigh Valley region as the relevant geographic area. In effect, this would have required the agencies to evaluate competition from thirty-four finance companies and thirteen savings and loan institutions, as well

125. Id. at 182.
126. Id. at 185.
127. See Kintner & Hansen, supra note 34, at 233 (“Bankers were upset because [the Philadelphia National Bank decision] not only presented problems for future bank mergers but also threatened the legality of approximately two thousand bank mergers that occurred since the [C-K Anti Merger Act].”).
129. Id. § 1828(c)(6); see also Kintner & Hansen, supra note 34 at 237 (“Mergers consummated prior to June 17, 1963, the date of the Philadelphia Bank decision, were conclusively presumed to have not been in violation of any antitrust laws other than Section 2 [of the Sherman Act]. This gave immunity to . . . two thousand mergers as well as to the Manufacturers-Hanover, Continental-Illinois and Lexington Bank mergers.”).
131. Phillipsburg-Easton is a region consisting of a small city (Phillipsburg) and a small town (Easton) separated by the Delaware River in the southwestern corner of Warren County, New Jersey. Id. at 353–54.
132. Id. at 358.
133. Id.
as from the more than thirty commercial banks in the area. This contention was significant because the merging banks in Phillipsburg National Bank were noted as smaller banks than previously challenged in bank merger violations, indicating that bank size no longer mitigates whether a bank merger violates antitrust laws.

The Supreme Court evaluated the issue by outlining the terms of the bank merger test as it has been finalized in the Bank Merger Act of 1966. The first step is whether a merger substantially lessens competition in any line of commerce in any section of the country. An analysis under this first step involves: (1) identifying the relevant product market; (2) identifying the relevant geographic market; and (3) assessing the anticompetitive effect of the merger. For the second step, if a proposed merger substantially lessens competition, the proposed merger shall not be approved unless the anticompetitive effects are clearly outweighed by the public interest in meeting the convenience and needs of the community to be served. The community to be served must be the geographic market established earlier in the bank merger analysis. Evaluation of convenience and needs in an area smaller than the geographic market could result in the approval of a merger that has a countervailing beneficial impact in only part of the market.

IV. CURRENT OVERSIGHT AND ENFORCEMENT OF BANK Mergers

The Bank Merger Act of 1966 provides the current legal standard for reviewing bank mergers and enlists the coordination of four federal agencies to oversee and enforce the application process, depending on the

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134. Id. at 358–59.
135. Id. at 358 (“Mergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities, are subject to scrutiny under these standards.”).
136. Id. at 357–58 (“We entertain no doubt that this factual pattern requires a determination whether the merger passes muster under the antitrust standards of United States v. Philadelphia National Bank . . . which were preserved in the Bank Merger Act of 1966.”)
139. Id. § 1828(c)(5); Phillipsburg Nat’l Bank and Tr. Co., 399 U.S. at 370–71.
141. Id.
regulator of the merging banks and the resulting bank. \footnote{142} The OCC reviews the merger application if the acquiring, assuming, or resulting bank will become a national bank. \footnote{143} The Federal Reserve Board reviews merger applications if the acquiring, assuming, or resulting bank will become a state member bank. \footnote{144} The FDIC reviews a merger application if the acquiring, assuming, or resulting bank will become a state nonmember insured bank. \footnote{145} The DOJ must also furnish a report regarding the competitive factors arising from any proposed merger, unless an exception applies. \footnote{146}

Regulators could, in theory, apply inconsistent and confusing standards to bank merger applications. \footnote{147} The Supreme Court’s holding in \textit{Philadelphia National Bank} contravened “conventional wisdom” by imposing the Clayton and Sherman Acts onto bank merger review standards, effectively subverting liberal interpretations of the standard of anticompetitive effects. \footnote{148} Furthermore, each of the cases decided after \textit{Philadelphia National Bank} arose from conflicting regulatory agency views on the competitive effects of bank mergers, affirming how the respective goals and missions of the OCC, Federal Reserve Board, FDIC, and DOJ play an appreciable role in the intergovernmental conflicts that arise when approving bank mergers amid anticompetitive concerns. \footnote{149}

\begin{footnotes}
\item[143] \textit{Id.} § 1828(c)(2)(A).
\item[144] \textit{Id.} § 1828(c)(2)(B).
\item[145] \textit{Id.} §1828(c)(2)(C).
\item[146] \textit{Id.} § 1828(c)(4)–(5).
\item[148] Kress, supra note 14, at 445.
\item[149] All cases reflect that the Federal Reserve Board, FDIC, and DOJ advise that the proposed mergers would have substantial anticompetitive effects while the Office of the Comptroller of the Currency approved the mergers. \textit{See e.g.}, United States v. Phila. Nat’l Bank, 374 U.S. 321, 332–33 (1963) (“All three reports advised that the proposed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area[,] . . . [h]owever, . . . the Comptroller approved the merger.”); \textit{see also} United States v. First Nat’l Bank & Trust Co. of Lexington, 376 U.S. 665, 667 (1964) (“Each report concluded that the consolidation would adversely affect competition among commercial banks in Fayette County[,] . . . [n]etheless, the Comptroller of the Currency approved the consolidation . . . ”); \textit{see also} United States v. Third Nat’l Bank in Nashville, 390 U.S. 171, 178–79 (1968) (“The Comptroller of the Currency . . . concluded that the merger would not lessen competition and would ‘improve the charter bank’s ability to serve the convenience and needs
The DOJ’s interest in regulating bank mergers lies in the enforcement of antitrust guidelines.150 This interest is jurisprudential in nature, with a primary focus on defining the law as it pertains to public policy.151 For example, the Attorney General shapes bank merger antitrust jurisprudence by deciding which bank mergers to challenge, a decision guided by the public interest.152 On the other hand, the OCC must ensure the safety and soundness of fair access to financial services while also enforcing the fair treatment of customers by their banks.153 This interest diverges from the DOJ because the OCC’s interest more likely prioritizes the economic impact of the merger.154 Moreover, the FDIC is responsible for insuring the deposits of all banks and savings associations which are entitled to said benefits.155 Within the context of a bank merger, the interest of the FDIC prioritizes the strength of the

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150. The mission of the Antitrust Division is the “promotion and maintenance of competition in the American economy . . . .” through participation in the Executive Branch activities and in regulatory and legislative processes, the Division seeks to ensure the Government action is procompetitive or not unnecessarily anticompetitive. Through its own litigation, amicus filings, and in a variety of other public forums, the Division also seeks to guide the advancement of antitrust jurisprudence.” DeP’t of Just., Antitrust Division Manual Chapter I—Organization and Functions of the Antitrust Division (5th ed. 2018) [hereinafter DOJ Antitrust Division Manual] https://www.justice.gov/atr/file/761126/download [https://perma.cc/JTX5-2YPY].

151. See Judiciary Act of 1789, Sept. 24, 1789, ch 20, 1 Stat. 73, 93 (“[The Attorney General] shall . . . prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments . . . .”).

152. Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(7) (providing that any action by a defendant bank or the Attorney General may be taken within the earliest time to challenge a bank merger).

153. Id. § 1(a).

154. Compare 12 U.S.C. § 1(a) (“[T]he Office of the Comptroller of the Currency . . . is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”) (quotations omitted), with Judiciary Act of 1789, Sept. 24, 1789, ch 20, 1 Stat. 73, 93 (“[The Attorney General] shall . . . prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments . . . .”).

merging bank and its impact on surrounding banks.\footnote{156}{See id. (“[The FDIC] shall . . . insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.”)} Finally, the Board of Governors is charged with serving the public interest by promoting “the effective operation of the U.S. economy.”\footnote{157}{Fed. Res. Bd., The Federal Reserve System Purposes & Functions 1 (10th ed. 2016) [https://perma.cc/Y5TC-XS62].}

The OCC evaluates a broad array of factors in evaluating a proposed bank merger.\footnote{158}{12 C.F.R. § 5.33(e) (2020).} The agency considers the following factors: (1) the combined amount of capital resulting from the merger; (2) the legality of the merger; (3) the purpose of the merger; (4) the impact of the merger on the safety and soundness of the national bank; and (5) the effect of the transaction on the national bank’s shareholders, depositors, other creditors, and customers.\footnote{159}{Id. § 5.33(e)(A)–(E).} These factors address the anticompetitive effects of the merger, the financial and managerial resources of the banks in their current form and their proposed mergers, the convenience and needs of the community, the merged bank’s ability to combat money laundering, the merged bank’s impact on the financial stability of the banking and financial system and whether the merged bank would exceed any deposit concentration limits.\footnote{160}{Id. § 5.33(e)(ii).} Finally, the OCC takes into account an evaluation under information obtained through the Community Reinvestment Act.\footnote{161}{Id. § 5.33(e)(iii).}

When evaluating a proposed merger, the Federal Reserve Board considers three factors that focus on the strength of the bank itself and the likely benefit of the merger on the banking system.\footnote{162}{Id. § 225.13(a).} Specifically, the Federal Reserve Board considers: (1) whether the proposed transaction would violate antitrust laws by establishing a monopoly or significantly lessen competition;\footnote{163}{Id. § 225.13(a)(1)–(2).} (2) whether the merging banks have provided the Board with adequate information regarding its operations;\footnote{164}{12 C.F.R. § 225.13(a)(3).} and (3) whether the convenience and needs of the communities are served by the proposed merger.\footnote{165}{Id. § 225.13(b)(3).}
The DOJ first indicates the product and geographic market as determined by the Federal Reserve Board. It then analyzes the competitive effect by using calculations made with the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by squaring the market shares controlled by the individual market participants and adding the totals together. The DOJ then uses the Horizontal Merger Guidelines to conduct a five-part test almost identical to the bank merger test outlined in Phillipsburg National Bank. The guidelines consider: (1) market concentration; (2) adverse competitive effects; (3) the effects of market entry by the merging bank; (4) the gains in efficiency by the merger; and (5) the impact of not approving the merger on the relevant market.

The DOJ also provides a unique perspective through its enforcement role solely for the purpose of ensuring that government action is "procompetitive or not unnecessarily anticompetitive.”

While there is some overlap, each agency may make its own determination for what kind of standards should be held in order to consider a bank merger anticompetitive which can make the final outcome of a bank merger analysis more unpredictable and contentious.


169. The Department of Justice issues guidelines in collaboration with the Federal Trade Commission to regulate mergers across all industry lines, including bank mergers. It consists of a five-part test to determine market concentration by assessing (1) market concentration; (2) the adverse competitive effects of that market concentration; (3) the timeliness, likeliness, and sufficiency of entry to counter the adverse effects of decreased competition; (4) assessing gains in efficiency that could not be accomplished by other means; and (5) assessing whether or not a company would ultimately fail if a particular merger were not allowed. Killian explores the relationship between these guidelines and bank merger review more broadly. See Killian, supra note 147 at 859–60.

170. Killian, supra note 147 at 859–60.

171. Through participation in Executive Branch activities and in regulatory and legislative processes, the Division seeks to ensure that Government action is procompetitive or not unnecessarily anticompetitive. Through its own litigation, amicus filings, and in a variety of other public forums, the Division also seeks to guide the advancement of antitrust jurisprudence. See DOJ Antitrust Division Manual, supra note 130 (stating that the mission of the Antitrust Division is the “promotion and maintenance of competition in the American economy. . . ”).
than expected. However, when left to judicial review, the Supreme Court weighs the considerations based on a more absolute finding that almost any consolidation reduces competition. This result likely contributed to the strategic shift whereby the regulators began to favor the interests of banks over the integrity of the review process. Banking regulators would engage in “unorthodox procedures” such as notifying applicants of issues with the application to allow for voluntary withdrawal or allowing firms to vet deals before announcing proposed mergers, effectively creating a pre-process. The impact preserves the reputation of the banks that receive approval. For example, the Federal Reserve has now approved 3,506 merger applications since 2006 without issuing a single denial.

V. CONCLUSION

Banks merge in part because a merger increases the bank’s capital assets, allows the bank to take the best personnel of the merging banks, and diversifies its deposits and services. Consequently, there is a strong incentive for banks to merge in order to expand retained earnings. Increasing capital assets not only supports the growth of the institution’s ability to function within regulatory constraints, but also enables the bank to acquire stronger management personnel. Acquiring better talent to manage the bank or increasing its branches across a wider geographic location could maximize efficacy, grow clientele, and enhance the ability to compete for larger clients. While the incentive to merge may be significant, bank merger regulation

172. See Killian, supra note 147, at 857 (“Tension exists between [Fed. Reserve Board and the Department of Justice] because at times they disagree on the presence of anticompetitive effects in the post-merger environment.”); see also Kress, supra note 14, at 445 (“Rather than clarifying the federal government’s role in bank mergers . . . the Bank Merger Act amplified confusion about antitrust enforcement in banking.”).

173. See Kintner & Hansen, supra note 34, at 231 (“[T]he Supreme Court served notice that the antitrust laws were to be applied to bank mergers and that this industry was not going to be treated differently from any other, notwithstanding the Bank Merger Act . . . .”).

174. See Kress, supra note 14, at 455–56 (“In the late 1990s, the agencies effectively stopped denying merger applications. Instead, when an agency discovers a problem with a merger proposal, it now informs the applicant of the issue and gives the bank an opportunity to withdraw its application.”).

175. Id. at 456–57.
176. Id. at 456.

177. Kintner & Hansen, supra note 34, at 216–17.
178. Id. at 216.
179. Id. at 217.
180. Id. at 216–17.
functions as a check on consolidation because it “protect[s] the FDIC’s Deposit Insurance Fund” and “supports strong prudential oversight . . .”.181

Such incentives have led to banks growing and taking on forms that have challenged the traditional notions of what a bank is and does to the extent that federal regulation of bank mergers has expanded significantly in the past century.182 For example, the easing of geographic restrictions in state law and advent of online banking has increased potential competition in many local markets in ways not previously contemplated by the Bank Merger Act.183 In 1995, the Reagle-Neal Interstate Banking and Branching Efficiency Act (“Reagle-Neal”) removed significant barriers to merging banks across state borders.184 Additionally, the emergence of nonbank financial companies has complicated the way regulators assess competition for financial products that were once exclusively offered by banks.185 In more recent years, innovation has brought about non-depository fintech companies that now provide loans, savings products, and investment advice in direct competition to traditional banks.186

As the DOJ seeks greater clarity on how the Antitrust Division applies merger guidelines, it should maintain a clear focus on the core principles of bank merger review as they are stated in the Bank Merger Act and interpreted by the Supreme Court.187 The Court is clear that if a

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181. See Kress, supra note 14, at 466–68.
182. See id. at 448 (“Over the past several decades . . . competitive considerations have become increasingly irrelevant in bank merger reviews due to recent regulatory and market developments.”).
183. See id. at 451 (“[L]iberalized geographic restrictions in the late twentieth century permitted banks to expand interstate for the first time, freeing firms to enter out-of-state banking markets that had long been insulated from competition.”).
185. See Kress, supra note 14, at 452 (“Traditionally, banks were shielded from competition with savings and loan associations and credit unions under regulations that limited nonbank depository institutions’ product offerings and restricted their potential customer base . . ., however, policy makers began easing these constraints in an effort to enhance nonbank depository institutions’ profitability.”).
186. See id.; see also Saule T. Omarova, New Tech v. New Deal; Fintech as a Systemic Phenomenon, 36 Yale J. on Reg. 735, 782–86 (2019) (discussing the threat of fintech in bank lending).
187. 12 U.S.C. § 1828(c); see also United States v. Phillipsburg Nat’l Bank and Tr. Co., 399 U.S. 350 (1970) (“[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects. That principle is applicable to this case”) (quotations omitted).
merger posed a choice between preserving competition and satisfying the requirements of convenience and need, “the injury and benefit [are] to be weighed and decision . . . to rest on which[ever] alternative better serve[s] the public interest.” 188 Several comments advocate for this prioritization of interests, however, their focus requires a divergence from looking at the problem strictly from an antitrust perspective. 189 In particular, the DOJ should reconsider its use of the 1995 Bank Merger Competitive Review Guidelines. 190

The current bank merger review process, which relies significantly on the HHI, is unequipped to detect some anticompetitive effects. 191 The HHI does not account for how loan pricing or payment services don’t necessarily correlate with deposits, a key distinction when the DOJ considers the effects of mergers between large financial institutions and financial institutions whose core business does not involve taking deposits. 192 Financial institutions that innovate by offering financial products other than taking deposits, like fintech companies, 188. United States v. Third Nat’l Bank, 390 U.S. 171, 185 (1968).

189. See Kress, supra note 14, at 453 (2020) (“The competitive landscape in banking has changed so significantly in light of [recent] trends that traditional antitrust concerns have become anachronistic.”). See also Chopra & Kress, supra note 12, at 8 (“In order to prevent further harms to consumers, honest businesses, and the public, it is critical that the agencies demonstrate that they their responsibilities under [the] Bank Merger Act . . . .”); Heather Sturgill, Comments in Response to the Department of Justice Antitrust Division Request for Public Comments on Updated Bank Merger Review Analysis 1 (Oct. 9, 2020), https://www.justice.gov/atr/page/file/1330146/download [https://perma.cc/RB5A-464Z] (“[T]he Bank Merger Act requires federal agencies to consider the convenience and needs of the communities to be served as a paramount criterion of merger review in addition to antitrust and safety and soundness considerations.”); Elizabeth Warren, Comments in Response to the Department of Justice Antitrust Division Request for Public Comments on Updated Bank Merger Review Analysis 2 (Oct. 16, 2020), https://www.justice.gov/atr/page/file/1330251/download [https://perma.cc/GYC7-8GF2] (“These reforms [of bank merger review procedure] are important, and necessary, because the effects of bank mergers go far beyond their immediate impact on market concentration, with wide-ranging implications for financial stability and consumer well-being.”).

190. DOJ BANK MERGER COMPETITIVE REVIEW, supra note 166.


192. See Kress, supra note 14 at 465 (“A narrow focus on HHI obscures the mix of large and small banks remaining in a market after a merger.”).
credit unions, and savings institutions, should be factored in for a more
dynamic assessment of the relevant product and geographic market. Many public comments in response to the DOJ Antitrust Division request either a more dynamic adjustment to the HHI or scrapping it for something else altogether. Ultimately a change from the current approach must be considered in order to ensure that bank merger review adheres to the standards set by statute and enables the successful application of antitrust law.

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193. See Indep. Cmty. Bankers of America, supra note 6, at 5 (“[T]he geographic markets for consumer and small business lending products should no longer be considered local. Instead, the Department should account for the presence of fintechs and online peer-to-peer lending services by examining the level of competition in these markets on a national level.”); see also Conf. of State Bank Supervisors, Comments in Response to the Department of Justice Antitrust Division Request for Public Comments on Updated Bank Merger Review Analysis 2 (Oct. 16, 2020), https://www.justice.gov/atr/page/file/1330331/download [https://perma.cc/4FJ6-YQSU] (“State bank regulators believe that it is appropriate to account for competition from credit unions and non-depository financial institutions in calculating market concentration in bank merger reviews.”).


195. See Kress, supra note 14, at 465 (“[A]ntitrust analysis alone cannot prevent bank mergers from adversely affecting consumers and the financial system.”).

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