Modernizing Bank Merger Review

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Sixty years ago, Congress established a federal pre-approval regime for bank mergers to protect consumers from then-unprecedented consolidation in the banking sector. This process worked well for several decades, but it has since atrophied, producing numerous "too big to fail" banks.

This Article contends that regulators' current approach to evaluating bank merger proposals is poorly suited for modern financial markets. Policymakers and scholars have traditionally focused on a single issue: whether a bank merger would reduce competition. Over the past two decades, however, changes in bank regulation and market structure—including the repeal of interstate banking restrictions and the emergence of nonbank financial service providers—have rendered bank antitrust analysis largely obsolete. As a result, regulators have rubber-stamped recent bank mergers, despite evidence that such deals could harm consumers and destabilize financial markets.

This Article asserts that contemporary bank merger analysis should instead emphasize statutory factors that regulators have long neglected: whether a proposed merger would increase systemic risks, enhance the public welfare, and strengthen the relevant institutions. This Article urges regulators to modernize their approach, and it proposes a novel framework to ensure that bank merger oversight safeguards the financial system. The proposals contained herein have far-reaching implications not only for bank regulation but also for the ongoing debate over merger policy in technology, agriculture, and other industries.

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Introduction

The biggest irony of the 2008 financial crisis is that the market crash was both initially triggered and ultimately alleviated by massive bank mergers. A wave of mergers by Bank of America, Citigroup, JPMorgan, and Wells Fargo in the late 1990s created the "too big to fail" banks that became so central to the crisis.[1] Less than a decade later, the federal government orchestrated multibillion-dollar emergency acquisitions by several of these firms to stem the panic.[2] Thus, these four dominant banks—which control 42% of the assets in the U.S. banking system—owe their existence to megamergers.[3] Now, critics worry that that these firms are not only "too big to fail," but also "too big to jail," "too big to manage," and "too big to supervise."[4]

1. *See* Donald I. Baker, *From* Philadelphia National Bank *to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 359-62 (2015) (tracing the acquisition history of the United States' largest banks).

2. *See id*. at 358-60 (discussing Bank of America's crisis-driven acquisition of Merrill Lynch, JPMorgan's takeover of Bear Stearns and Washington Mutual, and Wells Fargo's merger with Wachovia).

3. *See* Jeff Cox, *5 Biggest Banks Now Own Almost Half the Industry*, CNBC (Apr. 15, 2015), https://www.cnbc.com/2015/04/15/5-biggest-banks-now-own-almost-half-the-industry.html [https://perma.cc/5G66-NMW9] (noting that JPMorgan, Bank of America, Wells Fargo, and Citibank own 42.04% of U.S. bank assets).

4. *See, e.g.*, Jeremy C. Kress, *Solving Banking's 'Too Big to Manage' Problem*, 104 MINN. L. REV. 171, 186-92 (2019) (explaining banking's "too big to manage" phenomenon); Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1583 (2018) (examining why some banks may be "too big to supervise"); Saule T. Omarova, *The "Too Big to Fail" Problem*, 103 MINN. L. REV. 2495, 2499-504

Of course, this is not the first time that bank mergers have raised public policy concerns. In the 1950s, for example, a "massive merger movement" sparked fears of then-unprecedented consolidation in the financial sector.[5] Many of these deals did not require federal approval.[6] Several years later, Congress established a comprehensive oversight regime for bank mergers in an attempt to rein in unregulated consolidation. Under the Bank Merger Act of 1960, banks would have to get approval from their federal regulators before combining.[7]

This pre-approval system worked well for several decades. While the Federal Reserve, Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC) signed off on the majority of bank merger applications, they regularly exercised their power to block transactions they determined would not be in the public interest.[8] This Article contends, however, that policymakers have allowed the once-powerful bank merger review process to atrophy over time, and the current framework is no longer adequate to safeguard modern financial markets. In many respects, the United States has reverted to pre-1950s policies favoring bank consolidation, thereby increasing risks to consumers and the broader financial system.

The Bank Merger Act and its companion statute, the Bank Holding Company Act, direct the federal banking agencies to consider four main factors when evaluating a proposed merger: (1) the proposal's potential anticompetitive effects, (2) possible risks to financial stability, (3) the transaction's probable effect on the public interest, and (4) the companies' financial and managerial resources.[9] The statutes authorize the agencies to reject a merger proposal if any one of these factors weighs against approval.[10]

Although Congress instructed the banking agencies to consider multiple factors when reviewing bank merger proposals, legal scholarship on bank mergers has focused almost exclusively on just one: competition. Since the 1950s, dozens of law review articles have analyzed competitive considerations

(2019) (discussing the "too big to fail" problem); Nizan Geslevich Packin, *Breaking Bad? Too-Big-To-Fail Banks Not Guilty as Charged*, 91 WASH. U. L. REV. 1089, 1092-94 (2014) (describing the "too big to jail" issue).

5. *See* BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT 85 (2001).

6. *See* Benjamin J. Klebaner, *Federal Control of Commercial Bank Mergers*, 37 IND. L.J. 287, 298 (1962).

7. Act of May 13, 1960 (Bank Merger Act), Pub. L. No. 86-463, 74 Stat. 129 (codified as amended at 12 U.S.C. § 1828(c) (2018)).

8. *See* SHULL & HANWECK, *supra* note 5, at 97 (discussing denials of merger applications).

9. Bank Merger Act, 12 U.S.C. § 1828(c) (2018); Bank Holding Company Act of 1956 § 3(c), 12 U.S.C. § 1842(c) (2018). This Article refers to the Bank Merger Act and Bank Holding Company Act collectively as the "bank merger statutes."

10. *See* Bd. of Governors v. First Lincolnwood Corp., 439 U.S. 234, 243-48 (1978) (holding that each Bank Holding Company Act factor provides an independent, solely sufficient basis on which the Federal Reserve may deny a merger application).

in bank mergers.[11] Yet scholars have devoted virtually no attention to the other, equally relevant statutory considerations.[12] Federal Reserve officials have noted the dearth of scholarship on bank merger factors other than competition and urged academics to fill the void.[13]

Due to scholars' narrow focus on antitrust issues in bank mergers, the legal literature has not assessed the extent to which the banking agencies have fulfilled their mandate to rigorously review merger proposals under all the applicable statutory standards. Recent evidence suggests that the agencies are falling short. Bank merger approval rates are at historic highs. The Federal Reserve, for example, signed off on 95% of merger applications in 2018—its highest approval rate since it began keeping track.[14] Meanwhile, the agencies are greenlighting merger proposals at record speed. In the past, the banking agencies have taken nearly a full year, on average, to review bank mergers that attract adverse public comments.[15] But in 2018, the Federal Reserve approved

11. *See, e.g.*, Adolf A. Berle, Jr., *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589 (1949); Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, 1983 DUKE L.J. 580; Joseph E. Casson & Bernie R. Burrus, *Federal Regulation of Bank Mergers*, 18 AM. U. L. REV. 677 (1969); Rodgin Cohen, *The New Phase of Bank Consolidation: Regulatory Issues and Considerations*, 27 WAKE FOREST L. REV. 63 (1992); Earl W. Kintner & Hugh C. Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COM. L. REV. 213 (1972); Klebaner, *supra* note 6; J. Robert Kramer II, *Antitrust Review in Banking and Defense*, 11 GEO. MASON L. REV. 111 (2002); William T. Lifland, *The Supreme Court, Congress, and Bank Mergers*, 32 LAW & CONTEMP. PROBS. 15 (1967); William A. Mogel, *Bank Mergers and the Antitrust Laws*, 17 AM. U. L. REV. 57 (1967); Robert F. Roach, *Bank Mergers and the Antitrust Laws: The Case for Dual State and Federal Enforcement*, 36 WM. & MARY L. REV. 95 (1994); J. William Via, Jr., *The Administration of the Bank Merger and Bank Holding Company Acts: Confusion Compounded*, 51 VA. L. REV. 1517 (1965); William Wemple & Kenneth Cutler, *The Federal Bank Merger Law and the Antitrust Laws*, 16 BUS. LAW. 994 (1961). In addition, several excellent student notes have addressed antitrust considerations in bank mergers. *See, e.g.*, Note, *Commercial Bank Mergers: The Case for Procedural and Substantive Deregulation*, 95 HARV. L. REV. 1914 (1982); Gina M. Killian, Note, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857 (1994); Tim McCarthy, Note, *Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 DUKE L.J. 865 (1997); John S. Watson, Comment, *Bank Mergers: A New Standard of Evaluation?*, 46 TEX. L. REV. 81 (1967).

12. Professor Mehrsa Baradaran has written the most complete analysis of the public interest factor to date. *See* Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1284, 1337-42 (2014). No legal scholarship has addressed the financial stability factor or financial and managerial considerations in bank-merger regulation.

13. *See, e.g.*, Daniel K. Tarullo, Governor, Bd. of Governors of the Fed. Reserve Sys., Distinguished Jurist Lecture at the University of Pennsylvania Law School: Financial Stability Regulation 19-20 (Oct. 10, 2012), https://www.federalreserve.gov/newsevents/speech/files/tarullo20121010a.pdf [https://perma.cc/22KN-G6M3] (encouraging scholarly research on the financial-stability factor).

14. BD. OF GOVERNORS OF THE FED. RESERVE SYS., 6 SEMIANNUAL REPORT ON BANKING APPLICATIONS ACTIVITY: JULY 1–DECEMBER 31, 2018, at 3 (2019) [hereinafter SEMIANNUAL REPORT ON BANKING APPLICATIONS—YEAR-END 2018], https://www.federalreserve.gov/publications/files/semiannual-report-on-banking-applications-20190329.pdf [https://perma.cc/763S-EM3H]; *see also* Jeremy Kress, *Fed Is a Rubber Stamp for Bank Mergers—It's a Problem*, AM. BANKER (Apr. 10, 2019), https://www.americanbanker.com/opinion/fed-is-a-rubber-stamp-for-bank-mergers-its-a-problem [https://perma.cc/RD2V-D5ZD].

15. *See* SEMIANNUAL REPORT ON BANKING APPLICATIONS—YEAR-END 2018, *supra* note 14, at 4.

such applications in an average of four months.[16] The agencies, moreover, have not formally denied a merger application in more than fifteen years.[17] Although by no means conclusive, this track record raises serious doubts about the efficacy of the agencies' existing bank merger framework.

From a strictly antitrust perspective, the speed with which the agencies have signed off on recent bank mergers is unsurprising. In contrast to the mid-twentieth century, modern-day bank mergers are less likely to have significant anticompetitive effects. That is because two long-term trends in bank regulation and market structure have increased competition in many local banking markets. First, liberalized geographic restrictions in the 1980s and 1990s 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.[18] Second, the emergence of various nonbank financial companies—from depository institutions like thrifts and credit unions to more recent "fintech" firms—has enhanced competition for many financial products that were once exclusively offered by banks.[19] As a result of these trends, today's bank mergers are less likely to exceed quantitative Herfindahl-Hirschman Index (HHI) thresholds established by the banking agencies and the Department of Justice (DOJ) in jointly promulgated Bank Merger Guidelines.[20] Thus, the vast majority of bank merger proposals appear to pose minimal competitive issues and earn the banking agencies' quick approval.

From a broader societal perspective, however, the agencies' rubber-stamping of bank mergers is deeply troubling. The weight of the available evidence suggests that bank consolidation hurts consumers and could imperil the financial system. By most accounts, for example, consolidation among large banks elevates risks to financial stability.[21] Indeed, according to the Federal Reserve's own research, distress at a single large bank poses a significantly greater threat to the economy than distress at several smaller banks with equivalent total assets.[22] Meanwhile, large bank mergers pose serious integration risks and tend not to deliver promised efficiency gains or

16. *See id.*

17. Based on the author's comprehensive review of bank merger and acquisition decisions by the Federal Reserve, FDIC, and OCC, the agencies last denied a merger application in 2003. *See* Illini Corp., 89 Fed. Res. Bull. 85 (2003).

18. *See* SHULL & HANWECK, *supra* note 5, at 93.

19. *See* Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended* Philadelphia National Bank *Holiday*, 13 FORDHAM J. CORP. & FIN. L. 595, 631 (2008).

20. Antitrust Div., *Bank Merger Competitive Review—Introduction and Overview*, U.S. DEP'T JUST. (Sept. 2000) [hereinafter *Bank Merger Guidelines*], https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf [https://perma.cc/L5VG-ZLAJ]; *see also infra* Section II.A (discussing decline in local banking market concentration).

21. *See, e.g.*, Gregor N.F. Weiss et al., *Systemic Risk and Bank Consolidation: International Evidence*, 40 J. BANKING & FIN. 165, 174-77 (2014) (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors).

22. *See* Amy G. Lorenc & Jeffery Y. Zhang, *The Differential Impact of Bank Size on Systemic Risk* 12-18 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2018-066, 2018), https://www.federalreserve.gov/econres/feds/files/2018066pap.pdf [https://perma.cc/5ULZ-ABG9].

public benefits.[23] Moreover, numerous empirical studies have found that bank mergers lower the availability and increase the cost of credit for borrowers, especially small businesses.[24] And merging banks typically close branches, inconveniencing customers who rely on proximity to branch offices.[25] In this light, the banking agencies' recent track record of quickly approving nearly every merger proposal suggests that they are neglecting their responsibility to consider all the statutory factors as Congress intended.

This Article therefore urges the banking agencies to modernize their approach to mergers and acquisitions. In particular, the 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.

First, the banking agencies should adopt quantitative systemic risk limits for bank mergers using commonly accepted financial stability metrics. In the decade since Congress added the financial stability factor to the bank merger statutes, the agencies have relied on ad hoc assessments of a merged bank's size, complexity, interconnectedness, and activities to determine whether a proposal would increase systemic risks.[26] This approach, however, is rudimentary compared to quantitative financial stability metrics—such as the Basel Committee on Bank Supervision's assessment methodology for global systemically important banks (G-SIBs)—that the agencies have incorporated into their regulations and supervisory practices.[27] To ensure that bank consolidation does not threaten financial stability, the agencies should rely on these well-developed metrics to establish systemic risk limits for merger proposals akin to the HHI thresholds they use to assess a merger's anticompetitive effects.

23. *See, e.g.*, Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1010-12 (1992) (discussing integration problems in large bank mergers); *see also* Erik Devos et al., *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1029 (2016) (finding that mergers resulting in banks with more than $150 billion in assets do not produce efficiency gains).

24. *See* discussion *infra* Section II.B.

25. *See* Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J.: APPLIED ECON. 1, 15-17 (2019) (finding evidence of significant branch closures by merging banks); Lydia DePillis, *The Internet Didn't Kill Bank Branches. Bank Mergers Did.*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did [https://perma.cc/E5HS-TNZR].

26. *See* Capital One Fin. Corp., 98 Fed. Res. Bull. 5, 23-27 (2012) (describing the Federal Reserve's framework for analyzing financial stability considerations in bank merger and acquisition proposals).

27. *See* Basel Comm. on Banking Supervision, *Global Systemically Important Banks: Updated Assessment Methodology and the Higher Loss Absorbency Requirement*, BANK FOR INT'L SETTLEMENTS 4-11 (2013) [hereinafter *BCBS Assessment Methodology*], https://www.bis.org/publ/bcbs255.pdf [https://perma.cc/K94S-9BFM] (discussing methodology for assessing a bank's systemic importance). The banking agencies rely on the Basel Committee's methodology and other quantitative financial stability metrics for several regulatory and supervisory purposes. *See infra* Section IV.A.

Second, the agencies should demand more convincing evidence that a proposed merger will benefit the public. Despite their statutory mandate to consider "the convenience and needs of the community to be served," the agencies' public interest analyses are typically perfunctory and focus on advantages to the banks themselves—such as projected cost savings—rather than to their customers.[28] Given the aforementioned negative consequences of bank consolidation, however, the agencies should begin reviewing a merger proposal with a presumption that the combination will not produce benefits to the public, absent strong evidence to the contrary. Similarly, the agencies should insist that bank merger applicants have outstanding records of serving low- and moderate-income (LMI) communities under the Community Reinvestment Act (CRA).[29] Historically, the agencies have signed off on mergers by banks with merely satisfactory CRA ratings.[30] Elevating this standard would ensure that only firms committed to meeting the credit needs of LMI communities are permitted to expand. Finally, Congress should authorize the Consumer Financial Projection Bureau (CFPB) to block a bank merger on consumer protection grounds, similar to the DOJ's power to prevent an anticompetitive bank merger.

Third, the banking agencies should strengthen the financial criteria they use to evaluate bank merger proposals. By law, the Federal Reserve may approve an interstate acquisition by a bank holding company (BHC) only if the BHC is "well capitalized."[31] Lawmakers insisted that acquiring BHCs should have substantially more than the minimum amount of capital to provide a buffer against the uncertainties inherent in bank mergers.[32] By regulation, however, the Federal Reserve has set the well-capitalized threshold just barely above its minimum capital requirements.[33] This weak standard leads to the odd result that an acquiring BHC could be considered well capitalized and nonetheless fail the Federal Reserve's annual stress tests. The Federal Reserve should therefore substantially increase its definition of "well capitalized" to ensure that only strong BHCs may expand via merger.

This Article comes at a critical time. The Economic Growth, Regulatory Relief and Consumer Protection Act of 2018 (EGRRCPA) weakened regulations on many of the largest U.S. banks,[34] leading commentators to

28. *See* Baradaran, *supra* note 12, at 1338-39; Mitria Wilson, *Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions*, 130 BANKING L.J. 351, 372 n.8 (2013).

29. 12 U.S.C. §§ 2901-2908 (2018).

30. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., SR 14-2, ENHANCING TRANSPARENCY IN THE FEDERAL RESERVE'S APPLICATIONS PROCESS 3 (2014) [hereinafter ENHANCING TRANSPARENCY IN THE FEDERAL RESERVE'S APPLICATIONS PROCESS], https://www.federalreserve.gov/supervisionreg/srletters/sr1402.pdf [https://perma.cc/RM93-9WN7].

31. 12 U.S.C. § 1842(d)(1)(A) (2018).

32. *See* Cohen, *supra* note 11, at 72.

33. *See infra* Section IV.C.

34. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (codified in scattered sections of the U.S. Code). For analysis of how the

predict a wave of consolidation among regional banks.[35] Shortly thereafter, regional banks BB&T and SunTrust announced a "merger of equals," creating the sixth-largest bank in the United States—by far the biggest bank merger since the financial crisis.[36] Federal regulators swiftly approved the BB&T-SunTrust deal, sparking speculation of further consolidation among large banks.[37] It is essential, therefore, that regulators enhance their scrutiny of bank merger proposals to ensure that future bank consolidation serves the public interest and does not increase risks to the financial system.

More generally, this Article extends an emerging theme in the antitrust literature. Over the past several years, antitrust scholars have increasingly argued that policymakers should take into account a broader range of public interest considerations when evaluating mergers.[38] The antitrust laws' traditional focus on pricing, the argument goes, is too narrow and overlooks potentially harmful effects of corporate "bigness," ranging from stagnant wages to poor product quality and loss of privacy.[39] In contrast to the general antitrust laws, the bank merger statutes expressly authorize the banking agencies to consider these and other expansive public-interest factors when evaluating a merger proposal. As policymakers trend toward enlarging the scope of

EGRRCPA eased regulations on big banks, see Michael S. Barr, *Dear Congress: Reg Relief Bill Is a Giveaway for Large Banks*, AM. BANKER (Mar. 5, 2018), https://www.americanbanker.com/opinion/dear-congress-reg-relief-bill-is-a-giveaway-for-large-banks [https://perma.cc/PLX5-GDRS]; Jeffrey Gordon, *Stock Market Gyrations a Reminder Wall Street Banks Need Regulation*, THE HILL (Mar. 2, 2018), https://thehill.com/opinion/finance/376439-stock-market-gyrations-a-reminder-wall-street-banks-need-regulation [https://perma.cc/2VWF-3JNM]; Jeremy Kress, *Beware of the Bank Deregulation Trojan Horse*, THE HILL (Feb. 7, 2018), https://thehill.com/opinion/finance/372764-beware-of-the-bank-deregulation-trojan-horse [https://perma.cc/GL5K-BEW4]; Jennifer Taub, *Mitch McConnell's Big Gift to the Big Banks*, CNN (Mar. 5, 2018), https://www.cnn.com/2018/03/05/opinions/mitch-mcconnell-bank-lobbyist-act-opinion-taub/index.html [https://perma.cc/2UGW-YM93]; and Arthur E. Wilmarth, Jr., *Raising SIFI Threshold to $250B Ignores Lessons of Past Crises*, AM. BANKER (Feb. 7, 2018), https://www.americanbanker.com/opinion/raising-sifi-threshold-to-250b-ignores-lessons-of-past-crises [https://perma.cc/SZX8-HFGU].

35. *See, e.g.*, Ben Walsh, *Expect More Bank Mergers After Dodd-Frank Rollback*, BARRON'S (May 26, 2018), https://www.barrons.com/articles/expect-more-bank-mergers-after-dodd-frank-rollback-1527292801 [https://perma.cc/K7MX-XNS3].

36. *See* Rachel Louise Ensign & Allison Prang, *BB&T to Buy SunTrust in Largest Bank Deal Since the Financial Crisis*, WALL ST. J. (Feb. 7, 2019), https://www.wsj.com/articles/suntrust-bb-t-to-combine-in-all-stock-merger-11549537817 [https://perma.cc/H2E3-9EU7].

37. *See, e.g.*, Jim Dobbs, *Three Takeaways from Regulators' Approval of the BB&T-SunTrust Merger*, AM. BANKER (Nov. 20, 2019), https://www.americanbanker.com/news/three-takeaways-from-regulators-approval-of-the-bb-t-suntrust-merger [https://perma.cc/FP8K-QL35] ("The speed of the regulators' approval, and a lack of onerous conditions or restrictions, likely will be viewed favorably by other big banks that are mulling a merger or acquisition."); *see also The Biggest Bank Merger Since the Crisis May Herald More*, ECONOMIST (Feb. 16, 2019), https://www.economist.com/finance-and-economics/2019/02/16/the-biggest-bank-merger-since-the-crisis-may-herald-more [https://perma.cc/C92N-SVBQ]. Morgan Stanley's February 2020 agreement to acquire online brokerage E*Trade triggered further speculation of large bank acquisitions. *See* Jennifer Surane, *Morgan Stanley Ignites Banking Takeover Buzz with Gorman's Deal*, BLOOMBERG (Feb. 21, 2020), https://www.bloomberg.com/news/articles/2020-02-21/morgan-stanley-ignites-banking-takeover-buzz-with-gorman-s-deal [https://perma.cc/Z33Y-MPTL].

38. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

39. *See* WU, *supra* note 38, at 68-73, 135-39; Khan, *supra* note 38, at 739.

traditional merger review, therefore, it is especially critical that the banking agencies modernize their approach to bank merger oversight.

This Article proceeds as follows. Part I examines the bank merger review process and its traditional emphasis on competitive considerations. Part II then identifies weaknesses in regulators' current approach to bank mergers. It presents evidence that the banking agencies have become increasingly permissive of bank consolidation over time, and it explains the risks that unrestrained bank mergers pose to consumers and the financial system. Next, Part III demonstrates that more expansive bank merger oversight is consistent with longstanding justifications for financial regulation. Part IV proposes a novel framework for modernizing bank merger regulation, including specific recommendations to prevent excessive consolidation by reviving long-neglected statutory factors.[40] Finally, Part IV explores how effective bank merger regulation could inform general antitrust enforcement. The Article concludes that the recommendations to modernize bank merger review presented herein are essential to protect consumers and safeguard the financial system.

I. Traditional Bank Merger Review

This Part examines the regulatory framework governing U.S. bank consolidation. Section I.A explores how and why Congress originally authorized the banking agencies to pre-approve merger proposals. It also lays out the statutory factors the agencies must use when evaluating bank merger applications. Section I.B then focuses on one of these factors—antitrust—that originally dominated bank merger oversight. It contends that, despite antitrust's initial prominence in the bank merger review process, competitive considerations have now become nearly obsolete due to significant changes in bank regulation and market dynamics.

A. Bank Merger Regulation: History and Statutory Standards

Bank merger regulation has evolved dramatically within the past century, moving from a laissez faire system in the early 1900s to a comprehensive federal pre-approval regime today. Early on, the federal government played an extremely limited role in overseeing bank merger proposals. Today, however, the federal banking agencies have nearly unfettered authority to review bank

40. After an initial draft of this Article was made public, Senator Elizabeth Warren and Representative Chuy Garcia introduced legislation that is substantially based on these policy recommendations. *See* Bank Merger Review Modernization Act of 2019, H.R. 5318, 116th Cong. (2019); *see also* Press Release, Senator Warren and Representative Garcia Announce Introduction of the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications (Dec. 4, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-representative-garca-announce-introduction-of-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications [https://perma.cc/77TN-3TS5].

mergers based on several far-reaching statutory factors. This Section explores the expansion of the federal banking agencies' role in bank merger regulation.

Congress's initial attempts to regulate bank mergers in the early twentieth century were largely ineffective. The National Bank Consolidation Act of 1918 and the Federal Deposit Insurance Act of 1950 each required a bank to obtain a federal banking agency's approval before merging.[41] These statutes, however, were deficient in two critical respects. First, the laws did not specify standards the agencies were to use when assessing a merger proposal. Lacking congressional direction, the agencies generally approved mergers after only cursory, unsophisticated evaluations.[42] Second, these early statutes were plagued by serious gaps, which in many cases allowed banks to structure deals in ways that avoided review entirely.[43] For example, a bank merger was exempt from federal pre-approval as long as the transaction did not deplete the capital and surplus of the combining banks.[44] As a result of these shortcomings, the federal banking agencies were not a meaningful constraint on early bank mergers.

The DOJ's Antitrust Division, meanwhile, generally ignored consolidation in the banking sector, as well. Early twentieth century policymakers regarded banks as exempt from the Clayton and Sherman Antitrust Acts.[45] As Professors Bernard Shull and Gerald Hanweck observed, "through the mid-1940s, banking's effective immunity from the antitrust laws was unquestioned."[46] Thus, neither the federal banking agencies nor the DOJ took a significant interest in bank mergers during the first half of the twentieth century.

Negligible federal oversight contributed to a "massive merger movement" in the 1950s.[47] Over the course of the decade, more than 2,600 banks combined—often without federal approval.[48] Two of the three largest U.S. banks—Chase National and National City—solidified their market dominance through sizable mergers.[49] In 1959 alone, twenty-five of the one hundred

41. National Bank Consolidation Act of 1918, Pub. L. No. 65-240, 40 Stat. 1043, 1043-44 (codified as amended at 12 U.S.C. §§ 215-215b (2018)); Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 2, 64 Stat. 873, 892 (codified as amended at 12 U.S.C. § 1828(c) (2018)).

42. *See* Casson & Burrus, *supra* note 11, at 682; Kintner & Hansen, *supra* note 11, at 218.

43. *See* Lifland, *supra* note 11, at 18 n.19.

44. *See* Klebaner, *supra* note 11, at 298.

45. *See* Berle, *supra* note 11, at 590. Sections 1 and 2 of the Sherman Act, which prohibit the monopolization or restraint of "commerce," were thought not to apply to banking, which lawyers generally considered to be distinct from commerce. *See id.* (citing Paul v. Virginia, 75 U.S. 168 (1869)); *see also* Casson & Burrus, *supra* note 11, at 681; Lifland, *supra* note 11, at 18 n.19. Similarly, section 7 of the Clayton Act, which governs a company's acquisition of stock that substantially lessens competition, was thought to be inapplicable to bank mergers, which were usually structured as asset sales rather than stock acquisitions. *See* Casson & Burrus, *supra* note 11, at 682; Lifland, *supra* note 11, at 16.

46. SHULL & HANWECK, *supra* note 5, at 80.

47. *See id.* at 85.

48. *See id.*; *see also* Casson & Burrus, *supra* note 11, at 683.

49. *See* SHULL & HANWECK, *supra* note 5, at 85.

largest U.S. banks grew through acquisition.[50] As a result of this merger spree, many banking markets reached unprecedented levels of concentration, stoking widespread concerns about excessive consolidation in the financial sector.[51]

In an effort to rein in unregulated mergers, Congress adopted the Bank Merger Act of 1960, which established a federal regulatory regime for bank combinations.[52] The Act mandated that, before merging, a bank must obtain approval from its primary regulator—the OCC for national banks, the Federal Reserve for state member banks, or the FDIC for state nonmember banks.[53] The Act enumerated three factors the agencies must consider when evaluating a merger: (1) "the effect of the transaction on competition," (2) "the convenience and needs of the community to be served," and (3) "the financial . . . condition of each of the banks involved" and "the general character of [their] management."[54] Proponents of the Act believed that these "uniform and appropriate standards" would streamline federal oversight of bank mergers and slow the consolidation of the financial sector.[55]

Rather than clarifying the federal government's role in bank mergers, however, the Bank Merger Act amplified confusion about antitrust enforcement in banking. Despite its traditional indifference to bank mergers, the DOJ began attempting to exercise antitrust authority over the banking sector in the 1950s.[56] Then, shortly after the passage of the Bank Merger Act, the Supreme Court held that—contrary to conventional wisdom—bank mergers were subject to both the Clayton and Sherman Acts.[57] This surprising result created significant uncertainty within the banking sector.[58] The Supreme Court's rulings meant that even if the relevant banking agency approved a merger proposal under the Bank Merger Act, the DOJ could later challenge the transaction under the federal antitrust statutes.[59] Thus, in the span of a decade, bank mergers went from being effectively unregulated to being subject to review by both the federal banking agencies and the DOJ.

50. *See Regulation of Bank Mergers: Hearing on S. 1062 Before the H. Comm. on Banking & Currency*, 86th Cong. 2-3 (1960) (statement of Rep. Paul Brown).

51. *See* Casson & Burrus, *supra* note 11, at 683.

52. Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c) (2018)).

53. *Id*. For a discussion of the Federal Reserve's role as a bank regulator, see PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 158-75 (2016).

54. 12 U.S.C. § 1828(c)(2) (2018).

55. *Regulation of Bank Mergers: Hearing on S. 1062 Before the S. Comm. on Banking & Currency*, 86th Cong. 1 (1960) (statement of Sen. A. Willis Robertson).

56. *See* Casson & Burrus, *supra* note 11, at 684-85.

57. United States v. Phila. Nat'l Bank, 374 U.S. 334, 335-49 (1963) (concluding that bank mergers are subject to section 7 of the Clayton Act); *see also* United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 655, 672-73 (1964) (holding that the challenged bank merger created an unreasonable restraint of trade under section 1 of the Sherman Act).

58. *See* Casson & Burrus, *supra* note 11, at 690; Lifland, *supra* note 11, at 28.

59. The potential for ex post antitrust enforcement was uniquely burdensome for banks, which would face serious challenges reversing an already-consummated merger. *See* Casson & Burrus, *supra* note 11, at 690.

Congress promptly amended the Bank Merger Act to address the financial sector's concerns about dual bank merger enforcement. The Bank Merger Act Amendments of 1966 established a revised regulatory framework for bank mergers that is still in effect today.[60]

From an antitrust perspective, the 1966 amendments rationalized bank merger review in two ways. First, to enhance consistency between the banking agencies and the DOJ, the amendments require the banking agencies to analyze a merger's potential anticompetitive effects under standards similar to the federal antitrust laws. Thus, the banking agencies are prohibited from approving "any proposed merger transaction which would result in a monopoly . . . in any part of the United States."[61] Likewise, the banking agencies may not approve a merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly."[62] Congress, however, provided an exception to this second standard: the agencies may approve a merger that substantially lessens competition or tends to create a monopoly if it finds that the anticompetitive effects "are 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."[63]

The second way in which the 1966 amendments rationalized bank merger antitrust review is by preserving a modified role for the DOJ. The amendments direct the banking agencies to notify the DOJ of pending merger applications.[64] The DOJ, in turn, must provide the agencies with a "competitive factors" report within 30 days.[65] In theory, this mandatory consultation helps resolve disagreements between the banking agencies and the DOJ before the agencies act on an application.[66] The 1966 amendments, moreover, provide the DOJ a limited timeframe in which to challenge a merger on antitrust grounds. After the relevant banking agency approves a merger, the applicants must wait 30 days before consummating the transaction.[67] The DOJ may file a lawsuit seeking to block the proposed merger within that timeframe. After the

60. Pub. L. No. 89-356, 80 Stat. 7 (codified as amended in 12 U.S.C. § 1828(c) (2018)).

61. 12 U.S.C. § 1828(c)(5)(A) (2018). This rule resembles section 2 of the Sherman Act. *See* 15 U.S.C. § 2 (2018).

62. 12 U.S.C. § 1828(c)(5)(B) (2018). This standard resembles section 7 of the Clayton Act. *See* 15 U.S.C. § 18 (2018). The Bank Merger Act also prohibits the agencies from approving a merger that "would be in restraint of trade," similar to section 1 of the Sherman Act. *See* 12 U.S.C. § 1828(c)(5)(B); 15 U.S.C. § 1 (2018).

63. 12 U.S.C. § 1828(c)(5)(B) (2018).

64. *Id*. § 1828(c)(4)(A).

65. *Id*. § 1828(c)(4)(B)(i). The original Bank Merger Act also required the DOJ to furnish a competitive factors report to the relevant banking agency. *See* Pub. L. No. 86-463, 74 Stat. 129, 129 (1960).

66. *See* 12 U.S.C. § 1828(c)(4)(A) (2018) (noting that Congress required the DOJ competitive factors report "[i]n the interests of uniform standards").

67. *Id*. § 1828(c)(6). The waiting period may be shortened to 15 days if the DOJ does not submit an adverse competitive factors report to the relevant banking agency or to 5 days if the agency advises the DOJ of an emergency requiring expeditious action to prevent the probable failure of an insured depository institution. *Id*.

expiration of the 30 days, however, the merger is immune from antitrust challenge.[68] By limiting the time period in which the DOJ may challenge a bank merger, Congress prevented the DOJ from seeking to reverse a bank merger after it has been completed.

More broadly, the 1966 amendments enumerate two factors for the agencies to consider in addition to potential anticompetitive effects. These additional factors resemble the original Bank Merger Act. First, the amendments maintain the requirement that the agencies consider the "convenience and needs of the community to be served."[69] Although lawmakers recognized the potential ambiguity in this statutory language,[70] a committee report accompanying the amendments clarified that "convenience and needs" generally refers to the banking system's ability to "provide banking services essential to the full development of the economy, to full employment and full production."[71] Second, in a slight modification of the original Bank Merger Act, the amendments require the agencies to consider "the financial and managerial resources and future prospects of the existing and proposed institutions."[72] Critically, the amendments emphasize that the relevant agency must take these factors into account "in every case," regardless of the competitive effects of the transaction.[73]

In the decades following the Bank Merger Act amendments, Congress expanded the list of factors the agencies must consider when evaluating merger proposals. In 1977, for example, Congress adopted the CRA, which directs the agencies to take into account a merger applicant's "record of meeting the credit needs of its entire community, including [LMI] neighborhoods."[74] In effect, the CRA requires the agencies to focus on a proposed merger's effect on underserved populations, in addition to the convenience and needs of the broader community.[75] Moreover, after the failure of numerous large banks during the 2008 financial crisis, Congress further amended the Bank Merger Act to require the agencies to consider systemic risk.[76] Thus, the relevant agency must now take into account a proposed merger's "risk to the stability of

68. *Id.* § 1828(c)(7).

69. *Id.* § 1828(c)(5).

70. *See* 112 CONG. REC. 2,349 (1966) (statement of Rep. Ryan) (criticizing the convenience and needs factor as "vague and unfamiliar"); *id.* (statement of Rep. Todd) (noting that lawmakers had difficulty defining convenience and needs).

71. H.R. REP. NO. 89-1179, at 5 (1965).

72. 12 U.S.C. § 1828(c)(5).

73. *Id.*

74. Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 804, 91 Stat. 1111, 1148 (codified at 12 U.S.C. § 2903 (2018)).

75. For a discussion of the relationship between the "convenience and needs" and CRA factors, see *infra* notes 263-265, 325 and accompanying text.

76. *See* Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010) (codified at 12 U.S.C. § 1828(c)(5) (2018)).

the United States banking or financial system."[77] The Bank Merger Act, in sum, requires the agencies to consider a broad range of factors in addition to competition.

Similar statutory standards apply to mergers and acquisitions by BHCs under the Bank Holding Company Act (BHC Act).[78] In the early twentieth century, numerous banks adopted a holding company structure to evade restrictions on interstate banking.[79] Congress passed the BHC Act in 1956 to combat this practice.[80] Today, the BHC Act subjects BHC mergers and acquisitions to pre-approval by the Federal Reserve using standards nearly identical to those in the Bank Merger Act.[81] Although the precise language in the two statutes varies slightly, these differences are rarely consequential.[82] Unless otherwise specified, therefore, this Article refers to the BHC and Bank Merger Acts collectively as the "bank merger statutes."

In sum, federal regulation of bank mergers has expanded significantly during the past century. While bank consolidation was largely unregulated in the early twentieth century, modern banks and BHCs must now obtain pre-approval from the appropriate federal regulator before merging. The bank merger statutes establish four wide-ranging factors that the agencies must take into account when evaluating a merger proposal: (1) potential anticompetitive effects, (2) risks to financial stability, (3) the convenience and needs of the community, including the applicant's CRA performance, (4) and the firms' financial and managerial resources. Despite these broad factors, however, policymakers and scholars have tended to focus narrowly on just one consideration—competition—as the next Section demonstrates.

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77. 12 U.S.C. § 1828(c)(5). In addition, the USA PATRIOT Act of 2001 mandated that the agencies consider the merging banks' effectiveness in combatting money laundering. *See* Pub. L. No. 107-56, § 327, 115 Stat. 272, 318-19 (codified at 12 U.S.C. § 1828(c)(11) (2018)).

78. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-52 (2018)).

79. As Professors Saule Omarova and Margaret Tahyar explained, "before the passage of the [BHC Act], banks could form or reincorporate themselves as holding companies and hold separately incorporated banks in different states to engage in interstate banking without running afoul of the then-ubiquitous interstate banking restrictions." Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 121 (2012).

80. *See id*. at 120-29. In addition to preventing the evasion of interstate banking restrictions—which have since been repealed—the BHC Act also limits excessive concentration in banking and preserves the traditional separation of banking and commerce in the United States. *See id*.

81. *See* 12 U.S.C. § 1842(c) (2018). The BHC Act also requires Federal Reserve pre-approval for certain nonbank acquisitions by BHCs. *See id*. § 1843(j). Nonbank acquisitions are generally outside the scope of this Article. For a discussion of BHCs' authority to engage in nonbanking activities, see Kress, *supra* note 4, at 183-85, 213-19.

82. *See infra* note 204 (discussing minor differences between the BHC Act's and Bank Merger Act's financial stability standards). Modern bank deals often require parallel applications under both the BHC and Bank Merger Acts because they generally involve both holding-company-level acquisitions and the merger of subsidiary banks. *See, e.g.*, Fifth Third Bancorp, 105 Fed. Res. Bull. 70, 75-82 (2019).

B. The Diminishing Relevance of Bank Antitrust

As the preceding discussion suggests, antitrust considerations dominated early bank merger policy in the United States. That trend continued throughout the latter half of the twentieth century, when policymakers and scholars focused primarily on antitrust in bank merger oversight, to the exclusion of the other statutory factors. Over the past several decades, however, competitive considerations have become increasingly irrelevant in bank merger reviews due to recent regulatory and market developments. This Section examines how antitrust considerations originally dominated bank merger regulation but have since largely lost relevance.

1. Early Focus on Competition

Throughout the 1970s and 1980s, regulators routinely challenged bank mergers on competitive grounds. The Federal Reserve alone denied sixty-three merger applications because of antitrust concerns between 1972 and 1982.[83] Competitive considerations dominated merger oversight for each of the banking agencies. Indeed, a 1982 General Accounting Office analysis of the bank merger review process concluded that competition was the "area that receives the most consideration by the agencies and involves the most controversy."[84] Even when the banking agencies approved an application, the DOJ often sued to block a merger it deemed to be anticompetitive.[85] Frequent litigation between the DOJ and the banking agencies led to a sizeable body of judicial precedent on competitive considerations in bank merger applications.[86]

Informed by this early experience, the banking agencies and the DOJ developed a cooperative framework for analyzing competitive considerations in bank mergers. Under joint screening guidelines published in 1995, the banking agencies and DOJ rely on the HHI to flag potentially problematic merger proposals.[87] The HHI is a widely recognized measure of market concentration calculated by summing the squared market share of every competitor in a market.[88] The banking agencies and the DOJ state that they are unlikely to challenge a proposal if the post-merger HHI does not exceed 1,800 and the merger does not cause the HHI to increase by more than 200 points in any

83. *See* SHULL & HANWECK, *supra* note 5, at 97.

84. U.S. GEN. ACCOUNTING OFFICE, GAO-82-53, BANK MERGER PROCESS SHOULD BE MODERNIZED AND SIMPLIFIED 10 (1982), https://www.gao.gov/assets/140/138428.pdf [https://perma.cc/SY9X-ZW6W].

85. *See* Kramer, *supra* note 11, at 116 (discussing early court battles between the DOJ and the banking regulators).

86. *See id*. (noting numerous Supreme Court cases involving bank antitrust).

87. *See Bank Merger Guidelines, supra* note 20, at 1-2.

88. *See* Aaron C. Stine & Eric D. Gorman, *Ebbing the Tide of Local Bank Concentration: Granting Sole Authority to the Department of Justice to Review the Competitive Effects of Bank Mergers*, 62 SYRACUSE L. REV. 405, 416 n.56 (2012).

relevant banking market.[89] For proposals that exceed these thresholds in a given market, the banking agencies and DOJ scrutinize potential competitive effects more closely and may ultimately deny or challenge the merger.[90] The banking agencies and DOJ differ in how they apply the HHI screens; for example, they generally define the relevant product markets differently.[91] The guidelines, however, provide a unified framework for competitive analysis in bank mergers.

Consistent with regulators' traditional emphasis on competitive factors, legal scholarship on bank mergers has focused almost exclusively on antitrust. Numerous law review articles in the 1960s analyzed the enactment of the Bank Merger Act and subsequent Supreme Court cases clarifying the application of the federal antitrust laws to bank mergers.[92] Later scholarship focused on the framework for evaluating antitrust standards in banking—for example, the delineation of relevant product and geographic markets.[93] Even after the financial crisis, legal scholars have continued to view bank consolidation primarily through the lens of antitrust.[94]

While policymakers and scholars focused intently on competitive considerations in early bank mergers, they paid comparatively little attention to the bank merger statutes' other factors. Few scholars, for example, even acknowledged considerations other than competition in bank merger applications until Congress adopted the CRA in 1977. Even then, scholarship on the CRA tended to focus on the theoretical basis for the law and its effect on LMI areas, rather than on the CRA's role in bank merger applications.[95] The banking agencies, moreover, deemphasized statutory factors other than competition throughout the 1980s. The agencies rarely addressed the convenience and needs or financial and managerial standards in their public orders on bank merger applications, other than to note that they were consistent

89. *See Bank Merger Guidelines*, *supra* note 20, at 1-2.

90. *See id*. at 3-4.

91. The banking agencies traditionally define the relevant product market in bank mergers as the market for deposits, whereas the DOJ analyzes both deposit and commercial loan markets. *See* Stine & Gorman, *supra* note 88, at 416-17.

92. *See, e.g*., Casson & Burrus, *supra* note 11; Klebaner, *supra* note 11; Lifland, *supra* note 11; Mogel, *supra* note 11; Via, *supra* note 11; Wemple & Cutler, *supra* note 11.

93. *See, e.g*., Carstensen, *supra* note 11; Cohen, *supra* note 11; Kintner & Hansen, *supra* note 11; Kramer, *supra* note 11; Daniel J. Mahoney, *"When Bank Mergers Meet Antitrust Law, There's No Competition." Why Antitrust Law Will Do Little to Prevent Overconsolidation Within the Banking Industry*, 14 ANN. REV. BANKING L. 303 (1995); Roach, *supra* note 11.

94. *See, e.g*., Baker, *supra* note 1; Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too Big to Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261 (2011); Pekarek & Huth, *supra* note 19; Stine & Gorman, *supra* note 88; Lawrence J. White, *Antitrust and Financial Regulation in the Wake of* Philadelphia National Bank*: Complements, Not Substitutes*, 80 ANTITRUST L.J. 413 (2015); Robert P. Zora, Note, *The Bank Failure Crisis: Challenges in Enforcing Antitrust Regulation*, 55 WAYNE L. REV. 1175 (2009).

95. *See, e.g*., Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 340-41 (1993) (asserting that the CRA harms the very LMI areas it was designed to help by reducing the amount of available credit).

with approval.[96] Even after the 2008 financial crisis and the addition of the financial stability factor, scholars paid little attention to how the agencies assess systemic risk in bank merger proposals.[97] Thus, the bank merger statutes' other factors have largely been met with indifference.

In sum, the federal banking agencies have traditionally prioritized competitive considerations in bank merger applications. The DOJ, reviewing courts, and legal scholars have reinforced this emphasis through extensive critiques and analyses of the agencies' approach to the antitrust factor. This near-exclusive focus on competitive considerations, however, effectively crowded out regulatory and scholarly attention to the bank merger statutes' other considerations, which to date remain largely unexplored.

2. The Declining Importance of Competition in Bank Merger Reviews

Despite the initial emphasis policymakers and scholars placed on competitive considerations, antitrust has become increasingly irrelevant in bank merger applications over the past several decades. Compared to the 1960s and 1970s, modern-day bank mergers are less likely to have significant anticompetitive effects as measured by the HHI. That is because two trends in bank regulation and market structure have substantially increased competition in many local banking markets and, as a result, rendered traditional bank antitrust functionally obsolete.

First, liberalized 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. Historically, federal and state laws prohibited a bank from operating outside of its home state.[98] In the 1970s, however, some states eased these geographic restrictions, permitting banks to branch and merge across state lines.[99] It was not until 1994, though, that the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal) eliminated the remaining barriers to interstate banking, thereby allowing banks to branch and merge without geographic restrictions.[100] Since then, the advent of online banking has enabled firms to compete in areas where they do not have a physical presence.[101] Although

96. *See* Wilson, *supra* note 28, at 372 n.8 ("In the vast majority of the financial regulatory institutions' orders on bank merger or acquisition applications . . . there is no discussion of the regulators' analysis of the public-interest provision beyond a single reference to the fact that the regulator considered the issue.").

97. *See* Tarullo, *supra* note 13, at 19-20.

98. *See* Kress, *supra* note 4, at 180-81.

99. *See id.* at 181-82.

100. Pub. L. No. 103-238, 108 Stat. 2338 (1994) (codified in scattered sections of 12 U.S.C. (2018)).

101. *See, e.g.*, Gabriel T. Rubin, *Mobile Banking Grows More Popular*, WALL ST. J. (Mar. 30, 2016), https://www.wsj.com/articles/mobile-banking-grows-more-popular-1459352120 [https://perma.cc/YA7F-HU4Z].

empirical evidence on bank concentration since Riegle-Neal is mixed,[102] the relaxation of geographic restrictions has, at a minimum, increased potential competition in many local markets.[103]

Second, the recent emergence of nonbank financial companies has enhanced competition for many financial products that were once exclusively offered by banks. 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.[104] In the 1980s, however, policymakers began easing these constraints in an effort to enhance nonbank depository institutions' profitability.[105] This deregulatory trend has continued to the point that numerous savings and loan associations and credit unions now compete directly with banks under comparable regulatory regimes.[106] The banking agencies now regularly take these nonbank depository institutions into account when performing HHI calculations.[107] Moreover, at the same time that banks have faced increased competition from other depository institutions, non-depository fintech companies have emerged as popular providers of loans, savings products, and investment advice.[108] Many commenters have observed that fintech firms' ability to serve traditional bank customers without a banking license and concomitant regulation poses a major competitive threat to banks.[109] Thus, while banks previously were insulated from competition from

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102. On the national level, the U.S. banking market has become significantly more concentrated since the 1990s, with the five largest banks now comprising 46% of all bank assets, compared to 29% in 1997. *See* Econ. Research Div., *5-Bank Asset Concentration for United States,* FED. RES. BANK SAINT LOUIS, https://fred.stlouisfed.org/series/DDOI06USA156NWDB [https://perma.cc/C2CH-VJ4H]. This consolidation, however, is not reflected at the local level, where concentration levels have generally declined during this time. *See* Robert M. Adams, *Consolidation and Merger Activity in the United States Banking Industry from 2000 to 2010*, at 10, 14-15 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2012-51, 2012), https://ssrn.com/abstract=2193886 [https://perma.cc/5TLH-XP9J] (concluding that average local banking market concentration fell between 2000 and 2010 despite an increase in national banking concentration); *see also* Letter from Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., to Sen. Elizabeth Warren 5-6 (May 10, 2018) [hereinafter Powell Letter], https://www.warren.senate.gov/imo/media/doc/Powell%20Response%20re%20Mergers.pdf [https://perma.cc/SBR5-9Y93] (noting that the average local banking market concentration declined or remained constant between 2006 and 2018 despite an increase in national banking concentration).

103. *See* SHULL & HANWECK, *supra* note 5, at 93.

104. *See* Omarova & Tahyar, *supra* note 79, at 174-88.

105. *See id*. at 175, 180-81.

106. *See* SHULL & HANWECK, *supra* note 5, at 92-93; *see also* Pekarek & Huth, *supra* note 19, at 631.

107. *See* R. Alton Gilbert & Adam M. Zaretsky, *Banking Antitrust: Are the Assumptions Still Valid?*, FED. RES. BANK SAINT LOUIS REV., Nov.-Dec. 2003, at 29, 31.

108. *See* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 238-42 (2018) (discussing the competitive challenges fintech poses to banking).

109. *See, e.g*., Hilary J. Allen, *Driverless Finance*, 10 HARV. BUS. L. REV. (forthcoming 2020) (manuscript at 10-15), https://ssrn.com/abstract=3366016 [https://perma.cc/4LP9-V3H9] (discussing fintech business models); 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 to bank lending).

outside the banking sector, nonbank entrants have substantially increased competition in the financial services marketplace.

The competitive landscape in banking has changed so significantly in light of these trends that traditional antitrust concerns have become anachronistic. Antitrust used to be a significant worry in the 1960s and 1970s, when geographic restrictions and other barriers to entry shielded incumbent banks from competition. Today, however, numerous diversified financial conglomerates offer similar products and services through interstate branches and widely accessible electronic platforms. Meanwhile, the nascent fintech sector promises to continue challenging banks by giving consumers new options for obtaining financial services. Thus, while bank consolidation at the national level has increased over time, local market concentration has generally declined.[110] Collectively, the elimination of competitive barriers and the emergence of new financial services providers have alleviated long-standing competitive concerns in local banking markets.

In practice, competitive considerations are no longer a meaningful constraint on bank consolidation. After an initial torrent of antitrust-related denials in the 1970s, the banking agencies have not denied a bank merger application involving an institution with more than $1 million in assets on competitive grounds since 1980.[111] The DOJ, meanwhile, has not challenged a bank merger since 1985.[112] In part, this lack of antitrust enforcement is attributable to market participants' understanding of the bank merger guidelines and their proactive planning to divest branches when a merger would exceed the applicable HHI thresholds.[113] But the drastic reduction in antitrust enforcement also signifies that increased competition has rendered antitrust irrelevant in most bank merger applications.[114] Several scholars have advanced proposals to revive antitrust considerations in bank merger reviews, suggesting that the current framework does not measure bank competition

110. *See supra* note 102 and accompanying text.

111. *See* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1391 (2011).

112. *See* Kramer, *supra* note 11, at 116. Some commentators have criticized the DOJ for outsourcing bank merger analysis to the banking agencies. *See, e.g.*, Stine & Gorman, *supra* note 88, at 417 (characterizing the DOJ as a "junior partner" in the bank merger review process); Van Loo, *supra* note 108, at 264-65 (discussing DOJ's reliance on the banking agencies); *see also* Samuel N. Weinstein, *Financial Regulation in the (Receding) Shadow of Antitrust*, 91 TEMP. L. REV. 447, 485-87 (2019) (contending that financial regulatory agencies are likely to be less effective antitrust enforcers relative to the DOJ).

113. *See* SHULL & HANWECK, *supra* note 5, at 97; *see also Regulated Industries, Hearing Before the Antitrust Modernization Comm'n* 14 (Dec. 5, 2005) (statement of Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Alvarez_Statement.pdf [https://perma.cc/4MXX-VPX9].

114. *See* Pekarek & Huth, *supra* note 19, at 631-36 (asserting that the traditional approach to competition in bank merger review is outdated because banks are no longer insulated from competition).

appropriately.[115] To date, however, policymakers have made no effort to reinvigorate antitrust enforcement as a significant constraint on bank mergers.

In sum, after initially dominating the bank merger review process, antitrust has diminished in importance. For all the attention that policymakers, scholars, and courts paid to competitive considerations during the 1960s and 1970s, recent changes in banking regulation and market composition mean that antitrust is now rarely relevant in bank merger applications. Due to their long-standing focus on competition, meanwhile, both the banking agencies and academics have neglected the bank merger statutes' other, equally important factors. By misplacing attention on increasingly irrelevant competitive considerations at the expense of financial stability, consumer protection, and other statutory factors, the banking agencies have undermined the efficacy of bank merger oversight.

II. Weaknesses in Bank Merger Oversight

As antitrust concerns have faded, the banking agencies have become a rubber stamp for merger proposals. Today, the banking agencies approve merger applications at historically high rates and in record-low time. This permissive approach is troubling in light of evidence that lax oversight of bank consolidation hurts consumers and could threaten financial stability. This Part examines the disturbing trend toward laissez faire merger regulation and the risks of unrestrained bank consolidation.

A. The Trend Toward Permissive Bank Merger Approvals

The regulatory agencies have become increasingly tolerant of bank mergers over time. While the agencies regularly denied merger applications in the 1970s and 1980s, they now approve nearly all filings. Today's overwhelming approval rates are due, in part, to informal procedures that permit banks to consult confidentially with the agencies before executing a merger agreement. In practice, these secret conversations predispose regulators to approve a merger once an application is filed. This Section reviews the agencies' exceptionally high merger approval rates and scrutinizes their procedures that tip the scales heavily in favor of continued consolidation.

Historically, the banking agencies have always approved the majority of merger applications. Although data on early merger applications are limited, the available data suggest that approval rates hovered around 90% for much of the latter half of the twentieth century.[116] Notwithstanding the agencies'

115. *See, e.g.*, *id.* at 604 (proposing narrower product and broader geographic market definitions); Van Loo, *supra* note 108, at 271-75 (suggesting the CFPB as a new competition enforcer).

116. *See* Watson, *supra* note 11, at 85 n.37 (noting that the agencies approved 90% of bank mergers between 1960 and 1965); *see also* Michael A. Jessee & Steven A. Seelig, *An Analysis of the Public Benefits Test of the Bank Holding Company Act*, FED. RES. BANK OF N.Y. MONTHLY REV., June 1974, at 159 (noting that the Federal Reserve approved 90% of BHC applications in the 1970s).

generally favorable disposition toward mergers, however, the agencies regularly denied applications during this time. Between 1960 and 1965, for example, the agencies formally rejected thirty-one applications.[117] As discussed above, the Federal Reserve denied sixty-three applications between 1972 and 1982 on competitive grounds alone.[118] Thus, although the agencies have historically acted favorably on merger applications, they regularly denied merger proposals when necessary to curb potentially harmful consolidation in the banking sector.

Over time, however, the agencies' approach to merger applications has become even more favorable to banks in two critical ways. First, the agencies' approval rates have reached record highs. The Federal Reserve recently began releasing comprehensive data on merger applications beginning in 2011. The data, reproduced in Table 1, reveal that the Federal Reserve initially cracked down on bank consolidation after the financial crisis, with approval rates falling to around 80%.[119] More recently, however, approval rates have climbed steadily, exceeding the historical average and reaching a peak of 95% in 2018. The Federal Reserve is also approving these proposals with record speed.[120] In the past, the Federal Reserve has taken nearly a year, on average, to consider merger proposals that attracted adverse public comment. In 2018, it approved such proposals in an average of four months.

117. *See Hearings on S. 1698 Before the Subcomm. on Domestic Fin. of the S. Comm. on Banking and Currency*, 89th Cong. 15 (1965) (statement of William Martin, Chairman, Board of Governors of the Federal Reserve System).

118. *See supra* note 83 and accompanying text.

119. Data for Table 1 are collected from SEMIANNUAL REPORT ON BANKING APPLICATIONS—YEAR-END 2018, *supra* note 14, at 3-4, and BD. OF GOVERNORS OF THE FED. RESERVE SYS., 2 SEMIANNUAL REPORT ON BANKING APPLICATIONS ACTIVITY: JULY 1–DECEMBER 31, 2014, at 3-4 (2015), https://www.federalreserve.gov/bankinforeg/201504-semiannual-report-on-banking-applications-activity.pdf [https://perma.cc/BN57-4Y7T]. Federal Reserve Chairman Jerome Powell has suggested that the decline in the approval rate in the years following the financial crisis was attributable to numerous applicants withdrawing their filings when they were not the winning bidder for a failed bank in an FDIC liquidation process. *See* Powell Letter, *supra* note 102, at 7.

120. *See* Lalita Clozel, *Bank Mergers Get Faster Under Trump*, WALL ST. J. (Feb. 13, 2019), https://www.wsj.com/articles/bank-mergers-get-faster-under-trump-11550059200 [https://perma.cc/8SFU-NRHM].

Table 1: Federal Reserve Merger and Acquisition Applications (2011-2018)

	2011	2012	2013	2014	2015	2016	2017	2018
Approved	194	226	190	248	279	245	238	190
Withdrawn	43	43	40	25	21	28	15	10
% Approved	82%	84%	83%	91%	93%	90%	94%	95%
Average Processing Time of Proposals Receiving Adverse Public Comment (Days)	212	283	203	209	297	159	173	113

The second way in which the agencies have encouraged consolidation is by manipulating their application procedures to cater to the banking sector. 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.[121] A voluntary withdrawal shields the bank from bad publicity and the negative market reaction a public denial might cause.[122] This informal process, however, leaves no publicly available, written record of the deficiencies in the merger proposal. The Federal Reserve has now approved 3,506 merger applications since 2006 without issuing a single denial.[123]

The most significant end-run around the application process, however, occurs before a bank even executes a merger agreement. It is now common practice for the banking agencies to allow firms to vet potential deals confidentially before announcing a merger.[124] In these private meetings, a bank may ask regulators whether they foresee potential barriers to approval of a

121. *See* FED. DEPOSIT INS. CORP., APPLICATIONS PROCEDURES MANUAL § 1.3-1 (2019) (noting that applicants may be offered the opportunity to withdraw a problematic filing at the FDIC's discretion).

122. *See* Kress, *supra* note 14.

123. *See* Powell Letter, *supra* note 102, at 3 (noting that the Federal Reserve approved 3,316 mer nnger applications between 2006 and 2017 without a single denial); *see also* SEMIANNUAL REPORT ON BANKING APPLICATIONS—YEAR-END 2018, *supra* note 14, at 3-4 (noting that the Federal Reserve approved 190 merger applications and denied zero in 2018).

124. *See* Kress, *supra* note 14; *see also* Alvarez, *supra* note 113, at 14 ("[S]taffs of the Board and Reserve Banks often provide guidance to [BHCs] and banks that are considering a merger prior to the filing of an application . . . .").

transaction.[125] If regulators raise a concern about a proposal, the bank might not pursue the merger. But when regulators express no reservations, the bank may enter into a merger agreement with the agencies' implicit blessing.[126] Federal Reserve Chairman Jerome Powell has acknowledged that these private conversations occur.[127] Meanwhile, BB&T CEO Kelly King admitted that regulators told him there would be no barriers to his company's merger with SunTrust.[128] The agencies, in sum, cater to banks by permitting them to pre-screen their merger proposals outside of the formal application process.

These unorthodox procedures undermine bank merger reviews in three ways. First, the confidential pre-screening of proposals and the absence of formal denials decrease transparency in the application process. The agencies have recently enhanced transparency in many areas, including monetary policy,[129] bank supervision,[130] and financial stability monitoring.[131] At the same time, however, the agencies have obscured the bank merger review process by permitting confidential pre-screening and ceasing to issue formal denials. This opacity impedes the public's understanding of the application process and could prevent interested parties from offering valuable perspective on merger proposals.[132]

Second, pre-vetting of potential mergers predisposes regulators to approve an application when one is ultimately filed. Due to several cognitive biases, regulators are reluctant to change their minds after initially giving a bank the

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125. These meetings differ from a pre-filing process, in which some agencies allow potential applicants to file a draft application and obtain feedback from staff. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., SR 12-12, IMPLEMENTATION OF A NEW PROCESS FOR REQUESTING GUIDANCE FROM THE FEDERAL RESERVE REGARDING BANK AND NONBANK ACQUISITIONS AND OTHER PROPOSALS (2012), https://www.federalreserve.gov/supervisionreg/srletters/sr1212.pdf [https://perma.cc/UV7A-UKPE]. The pre-filing process is typically limited to small firms that do not usually file merger applications, while bigger banks use informal conversations to vet proposals with the agencies. *See id*. at 2.

126. *See* Kress, *supra* note 14.

127. *See* Powell Letter, *supra* note 102, at 3.

128. Paul Davis, *Truist Rising: With Megamerger Done, Pressure on to Deliver*, AM. BANKER (Dec. 9, 2019), https://www.americanbanker.com/news/truist-rising-with-megamerger-done-pressure-on-to-deliver [https://perma.cc/64HD-8DDV] ("I was told by several senior regulators there was no legal reason to object to the deal." (quoting BB&T CEO Kelly King)). King described the bank merger approval process as "basically frictionless." *Id*.

129. *See* Janet L. Yellen, Vice Chair, Bd. of Governors of the Fed. Reserve Sys., Remarks at Society of American Business Editors and Writers 50th Anniversary Conference: Communication in Monetary Policy 3-9 (Apr. 4, 2013), https://www.federalreserve.gov/newsevents/speech/files/yellen20130404a.pdf [https://perma.cc/4ZGH-PBKU].

130. *See* Press Release, Fed. Deposit Ins. Corp., FDIC Chairman McWilliams Announces Transparency and Accountability Initiative (Oct. 3, 2018), https://www.fdic.gov/news/news/press/2018/pr18069.pdf [https://perma.cc/S692-E885].

131. *See* Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at 350 Years of Central Banking Conference: Financial Stability and Central Bank Transparency 4-6 (May 25, 2018), https://www.federalreserve.gov/newsevents/speech/files/powell20180525a.pdf [https://perma.cc/P2Q3-4B9E].

132. *See* Brian Cheung, *Warren Accuses Fed of Approving Bank Mergers with "Rubber Stamp,"* YAHOO FIN. (Feb. 27, 2019), https://finance.yahoo.com/news/elizabeth-warren-fed-chair-powell-140135534.html [https://perma.cc/NJK3-EGMB].

go-ahead to enter a merger agreement. Under the consistency principle, for example, people tend to conform their behavior to maintain consistency with their prior actions and statements.[133] Similarly, confirmation bias causes people to accept data that supports their beliefs and discount information that contradicts them.[134] Thus, even though agencies eventually solicit public comment on merger applications after they are formally filed, regulators are highly unlikely to change their minds because of these cognitive biases.[135] In this way, pre-screening of a potential merger greases the wheels and creates internal momentum within a regulatory agency. After regulators give a bank the green light to announce an acquisition, the deal becomes difficult to stop.

Finally, because the agencies have stopped denying merger proposals, they have effectively excluded the judiciary from the merger review process. In the 1960s and 1970s, courts exerted significant influence over bank merger regulation in light of frequent litigation among the banking agencies, the DOJ, and merger applicants concerning the disposition of merger applications.[136] The judiciary, for example, helped shape the geographic and product market definitions the agencies now use for competitive analysis.[137] Since the agencies have stopped denying merger applications, however, "the judiciary has not had an opportunity to review the policy it was instrumental in establishing . . . since the early 1980s."[138] Today, the agencies' merger decisions are effectively immune from judicial review because they no longer issue formal denials, and the public generally lacks standing to challenge merger approvals.[139] Excluding the judiciary in this way reduces the agencies' accountability and allows the merger review process to atrophy without appropriate oversight.

Collectively, these practices have weakened merger regulation and resulted in more permissive merger approvals. By refusing to deny problematic merger proposals and permitting banks to screen potential mergers in advance of filing an application, the agencies bias the review process in favor of continued consolidation. As one might expect given these biases, the agencies now speedily approve a record proportion of merger applications. This trend

133. *See generally* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 57-113 (3d ed. 2007) (discussing the consistency principle).

134. *See* Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, NEW YORKER (Feb. 27, 2017), https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds [https://perma.cc/ML8L-PRLE].

135. As Professor Terri Freidline and coauthors have asserted, federal bank regulators often overvalue positive comments and undervalue negative comments on bank mergers. *See* Terri Friedline et al., The Promises and Perils of Community Benefits Agreements: Evidence from Public Comments to a Large Bank Merger 11-19 (unpublished manuscript) (on file with author).

136. *See* SHULL & HANWECK, *supra* note 5, at 98-100.

137. *See id.*

138. *Id.*

139. *See id.* at 99 (noting that an agency's request that a bank voluntarily withdraw its application is not a final judgment and is therefore unreviewable); Wilson, *supra* note 28, at 365 (discussing precedent denying consumers standing to challenge bank merger approvals).

toward permissive bank merger review is especially troubling given mounting evidence that bank mergers can be detrimental, as the next Section documents.

B. The Risks of Lenient Bank Merger Oversight

Without appropriate regulation, bank mergers can harm consumers and increase systemic risks. Indeed, the weight of the empirical evidence suggests bank mergers generally reduce the availability and increase the cost of credit, with LMI areas and small businesses being particularly hard hit. Moreover, consolidation among larger banks intensifies risks to financial stability, yet often does not provide promised efficiency gains. This Section reviews research on the effects of bank mergers and concludes that the agencies' laissez faire approach to bank consolidation increases risks to consumers and the financial system.

Lax oversight of bank mergers often results in higher costs and greater inconvenience for consumers. Notwithstanding the trend toward heightened competition in the banking sector,[140] empirical research demonstrates that mergers still increase the price of credit for many borrowers.[141] At the same time, 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.[142] Meanwhile, bank consolidation typically leads to branch closures, inconveniencing customers who rely on proximity to branch offices.[143] Without appropriate oversight, therefore, bank mergers can be detrimental to customers in numerous ways.

The negative effects of bank mergers are often especially severe for LMI communities. Branch closures following a merger are typically concentrated in LMI areas.[144] High-fee check-cashing companies and other predatory financial service providers tend to proliferate in LMI areas affected by bank mergers.[145] When banks merge, households in LMI neighborhoods are more likely to have

140. *See supra* Section I.B.2.

141. *See, e.g.*, Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 509-14 (2006) (finding that mergers among banks with at least $1 billion in assets between 1992 and 1999 increased interest rates on loans).

142. *See* Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry*, 46 J. INDUS. ECON. 433, 442-449 (concluding that deposit rates offered by banks that merged between 1991 and 1994 declined relative to those offered by non-merging banks); Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 6-9 (Dec. 1, 2018) (unpublished manuscript), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf [https://perma.cc/7G6V-Y76B] (finding significant increases in account fees following acquisitions of banks with less than $10 billion in assets by banks with more than $10 billion in assets between 1994 and 2016).

143. *See* Nguyen, *supra* note 25, at 15-17; DePillis, *supra* note 25.

144. *See* GARY A. DYMSKI, THE BANK MERGER WAVE: THE SOCIAL AND ECONOMIC CONSEQUENCES OF FINANCIAL CONSOLIDATION 95 (1999) (noting that post-merger branch closures are typically spread evenly among LMI and upper-income areas, but LMI areas are hit harder because they have fewer branches per capita to begin with).

145. *See* Bord, *supra* note 142, at 23-25.

debts sent to collection agencies and experience evictions.[146] The detrimental effects of bank mergers on LMI communities are particularly pronounced when the acquiring bank is large and headquartered out-of-state.[147] Bank mergers are even associated with increases in burglary and other property crimes, with the largest effects in LMI areas.[148]

Small businesses also bear the brunt of a laissez faire approach to bank mergers. Numerous empirical studies have shown that small businesses credit availability drops following bank consolidations.[149] For small businesses that are able to obtain loans, the cost of credit increases, while loan sizes shrink.[150] As a result, when banks merge, fewer small businesses are formed.[151] This reduction in small business lending and formation, meanwhile, has knock-on effects for economic development. Research has found, for example, that bank mergers are associated with decreases in commercial real estate development, new construction activity, and local property prices.[152] Meanwhile, in areas affected by bank mergers, unemployment increases, median income declines, and income inequality becomes more severe.[153] Weak bank merger oversight, therefore, adversely impacts not only small businesses, but by extension, the general social welfare.[154]

146. *See id*. at 30-32 (finding that bank mergers caused 9,000 evictions in LMI areas between 2009 and 2012).

147. *See* DYMSKI, *supra* note 144, at 249-50 (concluding that large acquirers without local branches perform poorly in lending to LMI areas).

148. *See* Garmaise & Moskowitz, *supra* note 141, at 518-23.

149. *See, e.g.*, Allen N. Berger et al., *The Effects of Bank Mergers and Acquisitions on Small Business Lending*, 50 J. FIN. ECON. 187, 217, 222 (1998) (finding that mergers involving large banks between 1977 and 1992 were associated with decreases in small business lending); Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237, 1248-58 (2007) (concluding that bank consolidation has reduced credit availability for small businesses); Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 J. FIN. 329, 364 (2002) (finding that acquisitions by large banks decrease the supply of loans to small businesses). The detrimental effects on small business lending are particularly severe when a community bank merges with a nonlocal acquirer. *See* Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* 18-20 (Fed. Res. Bank of Phila., Working Paper No. 18-18), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2018/wp18-18.pdf [https://perma.cc/H2X7-HS53].

150. *See* Garmaise & Moskowitz, *supra* note 141, at 515 (concluding that bank mergers between 1995 and 1997 significantly increased the cost of commercial credit and decreased loan size); Sapienza, *supra* note 149, at 354 (finding that acquisitions by large banks increase the cost of credit for small businesses).

151. *See* Bill Francis et al., *Bank Consolidation and New Business Formation*, 32 J. BANKING & FIN. 1598, 1603-09 (2008).

152. *See* Garmaise & Moskowitz, *supra* note 141, at 516-17.

153. *See id*. at 518.

154. To be sure, some detrimental effects of bank mergers are temporary and diminish over time as the competitive marketplace equilibrates. Some research, for example, documents that credit availability and interest rates mostly normalize three years following a merger. *See id*. at 514-15 (finding that the impact of mergers on local banking markets lasts approximately three years); *see also* Dario Focarelli & Fabio Panetta, *Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits*, 93 AM. ECON. REV. 1152, 1166 (finding that large Italian bank mergers between 1990 and 1998 temporarily depressed interest rates on deposit accounts, but this effect disappears after three years). Importantly, however, these studies generally conclude that the negative effects of bank

In addition to harming consumers, lax bank merger oversight increases risks to financial stability. The 2008 financial crisis demonstrated unequivocally that large financial institutions can pose a threat to the financial system.[155] This intuitive conclusion is supported by empirical evidence.[156] Bank mergers are a critical driver of increases in systemic risk. Indeed, mergers by Bank of America, JPMorgan, and Citigroup in the lead-up to the crisis allowed them to attain "too big to fail" status.[157] By most accounts, consolidation among regional and super-regional banks continues to contribute to financial stability risks.[158] Weak bank merger regulation, therefore, not only hurts consumers, it could imperil the broader financial system.[159]

Moreover, bank mergers can pose serious integration risks. Integration challenges have disrupted numerous financial sector mergers, including Bank of New England's repeated acquisitions in the 1980s and the infamous Citicorp-Travelers merger in the late 1990s.[160] These disruptions can harm not

consolidation never completely disappear, even after other firms adapt. *See, e.g.*, Berger et al., *supra* note 149, at 212-13 (showing that the reactions of other banks only partially offset the post-merger reduction in small business lending after three years); Craig & Hardee, *supra* note 149, at 1254-58 (concluding that nonbanks make up much, but not all, of the decline in small business lending when banks merge). *But see* Garmaise & Moskowitz, *supra* note 141, at 515 (finding that credit supply and pricing returns to normal three years after a merger). Moreover, for small businesses and other potential borrowers who require loans, even a relatively short disruption in credit markets following a merger can be costly.

155. *See, e.g.*, Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Crisis*, 41 CONN. L. REV. 963, 994 (2009) (discussing the role of financial conglomerates in the financial crisis).

156. *See, e.g.*, Simone Varotto & Lei Zhao, *Systemic Risk and Bank Size*, 82 J. INT'L MONEY & FIN. 45, 53-54 (2018) (concluding that a bank's size, while not determinative, is the primary driver of its systemic riskiness).

157. *See supra* note 1 and accompanying text.

158. *See* Weiss et al., *supra* note 21, at 174-77 (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors); *see also* Andre Uhde & Ulrich Heimeshoff, *Consolidation in Banking and Financial Stability in Europe: Empirical Evidence*, 33 J. BANKING & FIN. 1299, 1305-10 (2009) (concluding that national banking market concentration has a negative effect on financial stability).

159. Some financial sector representatives contend that consolidation among regional banks enhances financial stability by creating viable competitors to JPMorgan, Citigroup, Bank of America, and Wells Fargo. *See, e.g.*, BB&T CORP., APPLICATION TO THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM FOR PRIOR APPROVAL TO ACQUIRE BY MERGER SUNTRUST BANKS, INC. AND SUNTRUST BANK HOLDING CO. 35, 42 (Mar. 8, 2019), https://www.federalreserve.gov/foia/files/Application-by-BBT-Corporation-to-Acquire-SunTrust%20Banks-Inc-Pursuant-to%20Sections-3(a)(3)-and-(a)(5)-of-BHC-20190308.pdf [https://perma.cc/CWX3-VYDK]. There is scant empirical evidence for this assertion, however. Moreover, creating more big banks via merger seems to be an odd strategy to combat systemic risks arising from the largest institutions. If policymakers are concerned that the four biggest banks are threats to financial stability, the most logical response is to break them up or otherwise shrink them—not to encourage growth among their competitors. For a discussion of policy options to break up the largest banks, see Kress, *supra* note 4, at 29-37, 40-43, 50-52.

160. *See* Wilmarth, *supra* note 23, at 1010-12 (discussing Bank of New England's failure following numerous acquisitions); Eric Dash, *A Stormy Decade for Citi Since Travelers Merger* N.Y. TIMES (Apr. 3, 2008), https://www.nytimes.com/2008/04/03/business/03citi.html [https://perma.cc/3QF2-RFYB]; *see also* STEVEN I. DAVIS, BANK MERGERS: LESSONS FOR THE FUTURE 73-81 (2000) (discussing cultural conflicts in bank mergers); INGO WALTER, MERGERS AND ACQUISITIONS IN BANKING AND FINANCE: WHAT WORKS, WHAT FAILS, AND WHY 129-52 (2004) (discussing the post-merger challenge of integrating information technology).

only the banks themselves, but also their customers, communities, and employees.[161]

All of this is not to say that bank mergers are per se problematic. In some cases, mergers can create cost savings, which banks might pass along to consumers. Indeed, according to several empirical studies, banks experience economies of scale.[162] Moreover, scale has become even more important in recent years, as banks invest heavily in technology.[163] Consistent with this intuition, a few studies have found that mergers—particularly those among the smallest banks—generate some cost savings.[164] And, merging banks appear to pass at least part of these savings along to consumers in the form of lower interest rates on or wider availability of commercial loans.[165] With appropriate oversight, therefore, bank mergers can benefit the institutions themselves and their customers.

In many cases, however, banks vastly overstate the purported benefits of merging. Indeed, numerous studies contest the existence of economies of scale in banking entirely.[166] The weight of the empirical evidence suggests that any

161. *See, e.g.*, Lee Schafer, *Wells Fargo Fiasco Had Roots in Norwest Strategy*, STAR TRIBUNE (Sept. 18, 2016), http://www.startribune.com/lee-schafer-wells-fargo-fiasco-had-roots-in-norwest-strategy/393750451 [https://perma.cc/L5EA-2GS5] (describing how Wells Fargo's merger with Norwest contributed to the scale of Wells Fargo's subsequent scandals).

162. *See, e.g.*, Joseph P. Hughes & Loretta J. Mester, *Who Said Large Banks Don't Experience Scale Economies? Evidence from a Risk-Return-Driven Cost Function*, 22 J. FIN. INTERMEDIATION 559, 581-82 (2013) (finding evidence of scale economies in BHCs with more than $100 billion in assets); Anna Kovner et al., *Do Big Banks Have Lower Operating Costs?*, 20 FED. RESERVE BANK N.Y. ECON. POL'Y REV. 1, 22 (2014) (finding an inverse relationship between U.S. BHC asset size and noninterest expense ratios, suggesting economies of scale); Diego Restrepo-Tobón et al., *Obelix vs. Asterix: Size of US Commercial Banks and Its Regulatory Challenge*, 48 J. REG. ECON. 125, 160 (2015) (concluding that most U.S. commercial banks with more than $1 billion in assets experience economies of scale); David C. Wheelock & Paul W. Wilson, *The Evolution of Scale Economies in US Banking*, 33 J. APPLIED ECON. 16, 23-27 (2018) (finding that U.S. BHCs experienced increasing returns to scale between 2006 and 2015).

163. *See* Mike Dionne, *More Regional Banks May Merge to Meet Tech Challenges*, AM. BANKER (Mar. 19, 2019), https://www.americanbanker.com/opinion/regional-banks-must-merge-to-meet-tech-challenges [https://perma.cc/6ZNK-XA5W].

164. *See, e.g.*, John H. Boyd & Stanley L. Graham, *Consolidation in U.S. Banking: Implications for Efficiency and Risk*, *in* BANK MERGERS AND ACQUISITIONS 113, 125-33 (Yakov Amihud & Geoffrey Miller eds., 1998) (concluding that mergers resulting in banks with less than $400 million in assets yielded efficiency gains); Adel A. Al-Sharkas et al., *The Impact of Mergers and Acquisitions of the US Banking Industry: Further Evidence*, 35 J. BUS. FIN. & ACCT. 50, 62-64 (2008) (finding that mergers in which small banks are involved result in bigger improvements in cost efficiency compared to larger bank mergers).

165. *See* Isil Erel, *The Effect of Bank Mergers on Loan Prices: Evidence from the United States*, 24 REV. FIN. STUD. 1068, 1077-86 (2011) (concluding that an acquiring bank typically reduces spreads on commercial and industrial loans, as long as the merger does not significantly increase market concentration); *see also* Ricardo Correa, *Bank Integration and Financial Constraints: Evidence from U.S. Firms* 19-22 (Bd. of Governors of the Fed. Reserve Sys., Int'l Fin. Discussion Paper No. 925, 2008), https://www.federalreserve.gov/pubs/ifdp/2008/925/ifdp925.pdf [https://perma.cc/QYB5-QSVW] (finding that U.S. bank mergers increased the availability of commercial credit between 1978 and 1994).

166. *See* Hulusi Inanoglu et al., *Analyzing Bank Efficiency: Are "Too-Big-to-Fail" Banks Efficient?*, *in* THE HANDBOOK OF POST CRISIS FINANCIAL MODELING 110, 113 (Emmanuel Haven et al. eds., 2016) (finding negative returns to scale among the fifty largest U.S. commercial banks); Richard Davies & Belinda Tracey, *Too Big to Be Efficient? The Impact of Implicit Subsidies on Estimates of*

efficiencies from large bank mergers derive from implicit "too big to fail" subsidies, rather than any actual cost savings.[167] Ignoring these implicit subsidies, bank mergers produce often little or no cost efficiencies.[168] Despite dubious benefits and significant risks of consolidation, however, bank executives nonetheless continue to pursue mergers to grow market share, increase their own compensation, and entrench themselves in their positions.[169]

In sum, although bank mergers are not per se problematic, lenient bank merger oversight can expose consumers and the financial system to serious risks. Absent appropriate oversight, bank mergers often hurt consumers and increase systemic risks, without producing societal benefits. The cautionary evidence cited above suggests that regulators should more carefully scrutinize merger proposals—and reject or attach conditions to potentially harmful combinations. Yet the agencies' recent track record indicates that they generally ignore the downsides of bank consolidation. Under their current laissez faire approach, the agencies deemphasize issues like financial stability, the convenience and needs of the community, and the future prospects of the institutions. Reviving these long-neglected factors is critical to protecting the public from the risks of unrestrained bank consolidation.

III. The Case for Broader Bank Merger Regulation

The adverse consequences of excessive bank consolidation underscore the need for bank merger regulation that emphasizes factors other than competition. As a practical matter, a more expansive approach is necessary because traditional competitive analysis is limited in its ability to protect consumers from higher prices and lower availability of financial services. Even if competitive analysis could safeguard customers from these adverse effects, however, it would still be appropriate for regulators to consider factors in

Scale Economies for Banks, 46 J. MONEY, CREDIT & BANKING 219, 243-44 (2014) (finding no evidence of economies of scale in BHCs with more than $50 billion in assets after controlling for the too-big-to-fail subsidy); Guohua Feng & Xiaohui Zhang, *Returns to Scale at Large Banks in the US: A Random Coefficient Stochastic Frontier Approach*, 39 J. BANKING & FIN. 135, 144 (2014) (concluding that 90% of U.S. commercial banks with more than $1 billion in assets do not experience economies of scale).

167. *See* Erik Devos et al., *supra* note 23, at 1029 (finding that merger-related efficiency gains disappear when the acquirer exceeds $150 billion in assets); Robert DeYoung et al., *Mergers and Acquisitions of Financial Institutions: A Review of the Post-2000 Literature*, 36 J. FIN. SERVS. RES. 87, 96-97 (2009) (concluding that efficiency gains in large bank mergers derive from "too big to fail" subsidies rather than genuine cost savings).

168. *See, e.g.*, Berger et al., *supra* note 149, at 162 ("The studies of U.S. banking generally show very little or no cost X-efficiency improvement on average from . . . M&A."); Stephen A. Rhoads, *Efficiency Effects of Horizontal (In-Market) Bank Mergers*, 17 J. BANKING & FIN. 411, 419-22 (1993) (concluding that bank mergers in the 1980s generally did not result in efficiency gains); *see also* Allen N. Berger & David B. Humphrey, *Megamergers in Banking and the Use of Cost Efficiency as an Antitrust Defense*, 37 ANTITRUST BULL. 589, 598 (1992) (concluding that sample of bank mergers in the 1980s resulted in cost inefficiencies).

169. *See* Wilmarth, *supra* note 23, at 1013-15; *see also* Zhian Chen et al., *The Impact of Bank Merger Growth on CEO Compensation*, 44 J. BUS. FIN. & ACCT. 1398, 1415 (2017) (concluding that CEO compensation is positively correlated with merger growth); DeYoung et al., *supra* note 167, at 87.

addition to competition in order to achieve other important objectives of financial regulation. This Part explains why Congress was correct to include factors other than competition in the bank merger statutes and why it is critical that the agencies evaluate these criteria more stringently than they have in the past.

A. Competitive Considerations Alone Cannot Prevent Adverse Consequences of Bank Mergers

It is imperative that regulators broaden their approach to bank mergers because competitive analysis, on its own, is insufficient to address the risks of excessive bank consolidation. The agencies' traditional focus on competitive considerations has not even served its primary goal of limiting price increases and preserving access to credit, as Section II.B demonstrated.[170] Moreover, the competitive analysis is not well suited to address other drawbacks of consolidation, such as elevated financial stability risks.

There are several possible explanations why traditional competitive analysis has not adequately protected consumers from higher costs and reduced availability of financial services. For one, because the banking agencies define the relevant product market as the full "cluster" of commercial banking services, they might fail to detect anticompetitive effects in certain submarkets, such as small business loans.[171] Moreover, several commenters have suggested that the Bank Merger Guidelines' 1,800/200 HHI threshold is too high and permits some mergers that could result in anticompetitive effects.[172] Finally, regulators often make exceptions to the Bank Merger Guidelines and approve transactions that exceed the 1,800/200 threshold in one or more geographic markets.[173] Taken together, these weaknesses suggest that regulators' current approach to antitrust analysis may be too lenient to preserve robust competition.

Although strengthening the competitive analysis could help mitigate the adverse consequences, it is unlikely that a more robust antitrust approach, in isolation, will adequately protect consumers. Indeed, the traditional HHI framework is simply not well suited to detect some anticompetitive effects. For example, nascent empirical scholarship suggests that large asset managers' common ownership of banks is associated with higher prices and fees in a way that is unobservable by traditional HHI analysis.[174] The current bank merger

170. *See supra* notes 140-154 and accompanying text.

171. *See, e.g.*, William F. Jung, Note, *Banking Mergers and 'Line of Commerce' After the Monetary Control Act: A Submarket Approach*, 1982 U. ILL. L. REV. 731, 765-73; McCarthy, *supra* note 11, at 887-88; Stine & Gorman, *supra* note 88, at 418-20.

172. *See, e.g.*, SHULL & HANWECK, *supra* note 5, at 194.

173. *See id*. at 97.

174. *See* Jose Azar et al., Ultimate Ownership and Bank Competition 34-35 (May 4, 2019) (unpublished manuscript), https://ssrn.com/abstract=2710252 [https://perma.cc/P9YA-PSX6]; *cf.* Yesha

review process—which is predicated on the HHI—is thus unequipped to assess how common ownership might aggravate a merger's anticompetitive effects. Moreover, as former Federal Reserve Governor Jeremy Stein and coauthors have observed, a narrow focus on HHI obscures the mix of large and small banks remaining in a market after a merger.[175] Because smaller banks tend to excel at serving the credit needs of local businesses, large bank acquisitions of small firms often hurt customers even when the HHI does not indicate a problem.[176] These considerations may help explain why rapid bank consolidation in the past several decades has generally not led to higher local market HHIs,[177] but it has resulted in increased prices and reduced availability of credit for consumers.[178]

Furthermore, traditional competitive analysis is unable to address other downsides of bank consolidation, such as systemic risk. Some commentators have urged the banking agencies and the DOJ to use the federal antitrust laws to limit the size of "too big to fail" banks.[179] The competitive analysis in bank merger applications, however, is not designed for this purpose.[180] The bank merger statutes' antitrust factor focuses on preserving competition within local banking markets—not on limiting a bank's overall size or its nationwide market share.[181] Moreover, even if the banking agencies or DOJ were to consider nationwide market concentration, it is unlikely that the current U.S. market structure—with four major competitors—would support limits on bank size based on competitive considerations alone.[182] Finally, even if the agencies were to take into account nationwide HHI in an effort to alleviate the "too big to fail" problem, this simple size metric ignores other important contributors to a firm's systemic risk, such as its complexity and interconnectedness.[183] In sum, despite some exhortations to the contrary, the competitive analysis in bank merger applications is not well suited to address the risks of "too big to fail" banks.

Yadav, *Too-Big-To-Fail Shareholders*, 103 MINN. L. REV. 587, 656-57 (2018) (discussing the role of large asset managers in bank governance).

175. *See* Allen N. Berger et al., *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 266 (2005).

176. *See id*.

177. *See supra* note 102.

178. *See supra* notes 140-143 and accompanying text.

179. *See, e.g*., Markham, *supra* note 94, at 269, 305-11; Zora, *supra* note 94, at 1192-94.

180. To his credit, Professor Markham acknowledges that antitrust alone "can come nowhere near solving [the too-big-to-fail problem] or preventing recurrences of recent systemic failures." Markham, *supra* note 94, at 261.

181. *See* 12 U.S.C. §§ 1828(c)(5), 1842(c)(1) (2018).

182. *See, e.g*., Baker, *supra* note 1, at 370 ("[L]ooking back at the merger transactions that have created the largest financial institutions . . . I find it quite improbable that the DOJ could have mounted an antitrust enforcement program that could have had any serious impact on the major expansions in size of the largest [BHCs].").

183. *See* OFFICE OF FIN. RESEARCH, SIZE ALONE IS NOT SUFFICIENT TO IDENTIFY SYSTEMICALLY IMPORTANT BANKS 1-2 (2017), https://www.financialresearch.gov/viewpoint-papers/files/OFRvp_17-04_Systemically-Important-Banks.pdf [https://perma.cc/5R9D-K7CE].

The foregoing discussion helps explain why the agencies should broaden their bank merger analyses beyond their longstanding focus on competition. Traditional HHI metrics suggest that local banking markets generally remain competitive, yet bank mergers continue to result in higher costs and lower availability of financial services, particularly for LMI communities.[184] Moreover, competitive analysis is poorly suited to address financial stability risks arising from nationwide bank consolidation. Thus, antitrust analysis alone cannot prevent bank mergers from adversely affecting consumers and the financial system. As a practical matter, therefore, regulators must shift the emphasis of bank merger oversight beyond competition to the other statutory factors.

B. The Normative Justification for Expansive Bank Merger Review

From a normative perspective, Congress was correct to instruct the agencies to consider a broad range of factors when evaluating a bank merger. Banks, it is commonly said, are special.[185] Because of banks' inherent riskiness and unique role in the economy, policymakers have long regulated banks more heavily than other industries.[186] According to many observers, this additional scrutiny is warranted in order to (1) protect public claimants, (2) limit externalities, and (3) preserve equitable norms.[187] Each of these traditional justifications for financial regulation militate in favor of multifactorial bank merger oversight.

Bank regulation's primary goal—protecting the FDIC's Deposit Insurance Fund (DIF) and other public claimants—supports strong prudential oversight in the bank merger process. One needs to look no further than Bank of America's ill-fated combination with Countrywide and other unsuccessful pre-crisis mergers for evidence that regulators should closely scrutinize the financial and managerial strength and future prospects of the merging firms.[188] Bank failures not only inflict costs on uninsured creditors and the DIF, they also have the potential to impose losses on taxpayers through government assistance to troubled institutions or advances to the DIF.[189] To protect these public claimants, therefore, the banking agencies must critically evaluate whether merger applicants are capable of expanding in a safe and sound manner.

184. *See supra* notes 144-148 and accompanying text.

185. *See, e.g.*, E. Gerald Corrigan, *Are Banks Special?: A Revisitation*, FED. RES. BANK MINNEAPOLIS (Mar. 1, 2000), https://www.minneapolisfed.org/publications/annual-reports/are-banks-special [https://perma.cc/MWA9-C5ND].

186. *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW & POLICY 76-78 (2d ed. 2018).

187. *See id.*

188. *See supra* note 1 and accompanying text.

189. *See, e.g.*, CONG. OVERSIGHT PANEL, MARCH OVERSIGHT REPORT: THE FINAL REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL 51 (2011) (estimating that the federal government guaranteed at least $4.4 trillion of financial assets under emergency programs at the peak of the financial crisis); *see also* 12 U.S.C. § 1824(a)(1) (2018) (authorizing the FDIC to borrow from the Treasury Department).

Broad bank merger regulation is likewise appropriate to mitigate externalities and systemic risk. A bank's financial distress can impose costs not only on the public claimants discussed above, but also on other parties with direct or indirect exposures to the firm.[190] Banks may transmit systemic risk by defaulting on counterparty exposures or by triggering a domino effect among interconnected financial institutions.[191] Similarly, a bank's financial distress may spark copy-cat bank runs or a contraction of the money supply.[192] And, as the 2008 crisis vividly demonstrated, bank failures can have widespread societal costs in the form of higher unemployment, lost household wealth, and foregone economic growth.[193] For all of these reasons, it is imperative that regulators assess potential externalities when evaluating a bank's proposal to expand via merger. It is therefore appropriate that Congress amended the bank merger statutes in 2010 to require the agencies to consider financial stability separately from the traditional competitive analysis.[194]

Finally, bank merger regulation should take into account equitable norms and other social considerations, such as an applicant's consumer protection record and its ability to serve diverse communities. Professor Mehrsa Baradaran calls this the social contract in banking: banks enjoy the unique right to accept deposits backed by explicit and implicit government support, and in return they agree to make credit and other financial services broadly available to the general public.[195] This social contract demands that banks do more than merely abide by banking laws and regulations. Rather, as Baradaran contends, the social contract necessitates that banks affirmatively serve the public in exchange for their continued license to operate.[196] Against this background, it is rational for the agencies to consider the effect of a merger on the "convenience and needs of the community to be served."[197] Banks enjoy government protection and support, and the public should therefore expect that when a bank expands via merger, its growth will affirmatively benefit society. To be sure, banks may incur private costs when pursuing socials goals—

190. *See* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198-204 (2008) (defining systemic risk).

191. *See id.* at 198.

192. *See* Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 401-02 (1983) (discussing bank runs); *see also* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1158-61 (2017) (justifying bank regulation on the basis of government control over the money supply); Morgan Ricks, *Money and (Shadow) Banking: A Thought Experiment*, 31 REV. BANKING & FIN. L. 731, 743 (2012) (characterizing depository banking as a public-private partnership for the distribution of the money supply); Lev Menand, The Monetary Basis of Bank Supervision 155-70 (Aug. 6, 2019) (unpublished manuscript), https://ssrn.com/abstract=3421232 [https://perma.cc/2MJP-4D48] (asserting that bank supervision is principally justified by the government's need to oversee the money supply).

193. *See* BARR ET AL., *supra* note 186, at 59-64 (discussing social and economic consequences of the financial crisis).

194. *See supra* notes 76-77 and accompanying text.

195. *See* Baradaran, *supra* note 12, at 1285-86.

196. *See id.*; *see also* Corrigan, *supra* note 185 (asserting that banks have "unique public responsibilities" in light of the public safety net they enjoy).

197. 12 U.S.C. §§ 1828(c)(5), 1842(c) (2018).

providing financial services in LMI areas tends to be less profitable than in upper-income areas.[198] But the social contract in banking justifies the public-oriented mandates in the bank merger statutes and the CRA.

Despite the compelling normative rationale for the banking agencies to consider a broad range of factors in bank merger reviews, they have rarely done so in practice. Instead, the agencies have generally deemphasized statutory factors other than competition. A more expansive approach to policing bank mergers is needed in order to protect public claimants, limit externalities, and preserve equitable norms. The next Part proposes a framework for how the agencies should revive long-neglected factors in the bank merger statutes and thereby safeguard the public from the risks of unrestrained bank consolidation.

IV. Modernizing Bank Merger Review

This Part analyzes three statutory factors that the agencies have typically glossed over in merger reviews: financial stability, public interest considerations, and the applicant's financial resources. It explains why the agencies' current approach to each factor is lacking, and it proposes reforms to correct these deficiencies. By adopting the recommendations herein, the banking agencies can strengthen the application process to ensure that a bank is permitted to expand through merger only if it can do so safely and while enhancing the public welfare.

A. Financial Stability

Before the 2008 financial crisis, the banking agencies generally did not consider potential financial stability risks when evaluating merger applications. If anything, policymakers viewed consolidation as a net positive for financial stability because mergers were thought to increase bank profits and thereby improve safety and soundness.[199] Thus, policymakers approved record-breaking mergers in the 1990s without closely scrutinizing possible stability risks.[200] A decade later, of course, the 2008 crisis exposed the danger of such megamergers.[201] Ironically, to save the financial system from complete collapse, policymakers orchestrated emergency mergers by Bank of America, JPMorgan, and Wells Fargo, leading to widespread critiques that these combinations further exacerbated the "too-big-to-fail" problem.[202]

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198. *See* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS 140-43 (2015).

199. *See* Macey & Holdcroft, *supra* note 111, at 1394.

200. *See, e.g*., Travelers Grp. Inc., 84 Fed. Res. Bull. 985 (1998); NationsBank Corp., 84 Fed. Res. Bull. 858 (1998).

201. For a discussion of how megamergers created the "too-big-to-fail" institutions at the center of the 2008 crisis, see Baker, *supra* note 1, at 357-62.

202. *See supra* notes 2-4 and accompanying text.

In response to the crisis and the ensuing public backlash, Congress added a new financial stability factor to the BHC and Bank Merger Acts in 2010.[203] Specifically, when the agencies evaluate a merger proposal, they now must take into account possible "risk[s] to the stability of the United States banking or financial system."[204] Thus, Congress insisted that the agencies consider whether a proposed merger could either create or intensify a too-big-to-fail problem.[205]

To fulfill this mandate, the banking agencies established an analytical framework to assess a proposed merger's financial stability implications. The Federal Reserve explained its approach in a 2012 order approving Capital One's acquisition of ING Bank.[206] Under this framework, the Federal Reserve assesses both the resulting firm's systemic footprint and the incremental effect of the proposed acquisition on the firm's systemic importance. The agency considers a variety of metrics, including the resulting firm's size, complexity, interconnectedness, cross-border activities, and the availability of substitute providers for the firm's products and services.[207] As the core of its analysis, the Federal Reserve calculates the resulting firm's share of assets, deposits, wholesale funding, intra-financial system assets, and other key metrics relative to the entire U.S. financial sector.[208] The Federal Reserve may deny a merger if it concludes, based on these data, that "the failure of the resulting firm, or its inability to conduct regular-course-of-business transactions, would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader economy."[209]

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203. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 604(d)-(f), 124 Stat. 1376, 1601-02 (2010) (codified in scattered sections of 12 U.S.C. (2018)).

204. 12 U.S.C. § 1828(c)(5) (2018). This language in the Bank Merger Act differs slightly from the financial stability factor in the BHC Act. The BHC Act requires the Federal Reserve to consider "the extent to which a proposed merger, acquisition, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system." 12 U.S.C. § 1842(c)(7) (2018). The rationale for the different wording is unclear and, in any event, the functional differences between the two standards do not appear to be significant. *See* Tarullo, *supra* note 13, at 28-29 n.21.

205. *Cf.* Hilary J. Allen, *What Is "Financial Stability"? The Need for Some Common Language in International Financial Regulation*, 45 GEO. J. INT'L L. 929, 932-35 (2014) (discussing divergences in the ways international financial regulators approach financial stability standards).

206. *See* Capital One Fin. Corp., 98 Fed. Res. Bull. 7, 23-27 (2012). For Bank Merger Act applications that involve a parallel BHC Act filing, the OCC and FDIC generally defer to the Federal Reserve's financial stability analysis. *See, e.g.*, Letter from Stephen A. Lybarger, Deputy Comptroller, Office of the Comptroller of the Currency, to Lisa Goodglick, Associate Gen. Counsel, Capital One Fin. Corp. 7-8 (Oct. 17, 2012), https://www.occ.gov/topics/licensing/interpretations-and-actions/2012/crad153.pdf [https://perma.cc/VLU6-PXLY].

207. *Capital One Fin. Corp.*, 98 Fed. Res. Bull. at 23-24. The Federal Reserve also considers qualitative factors, including the likely difficulty of resolving the resulting firm if it were to fail. *See id.* at 24.

208. *See id.* at 24-27. For example, the Federal Reserve calculated that, after acquiring ING Bank, Capital One would control 1.5% of assets, 2.3% of deposits, 1% of wholesale funding, and 1% of intra-financial system assets in the entire U.S. financial sector. *See id.*

209. *Id.* at 23.

This framework is undoubtedly an advancement over the agencies' pre-financial crisis merger analysis, which ignored systemic risk considerations entirely. Despite this improvement, however, the agencies' current approach to financial stability analysis is still suboptimal in three critical respects.

First, the agencies' financial stability framework lacks clarity and analytical rigor. Although the Federal Reserve has identified relevant quantitative metrics—e.g., the resulting firm's share of U.S. financial system assets, or its proportion of outstanding U.S. credit card balances—it has not explained how it evaluates these data. It is unclear, for example, whether the Federal Reserve considers certain metrics to be more important than others or how the agency ultimately decides, based on these data, whether the resulting firm's distress would destabilize financial markets. The Federal Reserve's financial stability analysis, moreover, omits metrics that other regulators have found relevant in assessing an institution's systemic importance. The Financial Stability Oversight Council (FSOC) evaluates a broad range of data when deciding whether a nonbank financial company is sufficiently systemically important to warrant enhanced regulation.[210] For instance, FSOC considers the volume of outstanding credit-default swap contracts on the company's debt and the potential for the firm to depress asset prices through an emergency fire sale—factors omitted from the Federal Reserve's framework.[211] Thus, the agencies' financial stability analysis is both vague and relatively rudimentary.

Second, the agencies have not established an upper limit on financial stability risks in bank merger proposals. In the decade since Congress enacted the financial stability factor, the agencies have not denied a merger on financial stability grounds. Nor have they issued rules or guidance identifying the types of mergers that they would deem impermissible under the financial stability factor.[212] In 2013, former Federal Reserve Governor Daniel Tarullo stated that he would presumptively deny an acquisition by any of the eight U.S. firms deemed to be G-SIBs by the Basel Committee on Bank Supervision.[213] Tarullo, however, left the Federal Reserve in 2017, and it is unclear whether his

210. *See* Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations, 12 C.F.R. § 1310, app. A, § III (2020).

211. *See, e.g.*, FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING PRUDENTIAL FINANCIAL, INC. 21, 44-49 (Oct. 26, 2018), https://home.treasury.gov/system/files/261/Prudential-Financial-Inc-Rescission.pdf [https://perma.cc/YC7D-JYGQ].

212. The Federal Reserve has, however, established a safe harbor for certain transactions that presumptively would not increase risks to financial stability. Specifically, the Federal Reserve presumes that a transaction will not raise financial stability concerns if it involves the acquisition of less than $10 billion in assets or results in a firm with less than $100 billion in total assets. *See* People's United Fin., Inc., 103 Fed. Res. Bull. 50, 63 (2017).

213. Tarullo, *supra* note 13, at 21. The eight U.S. G-SIBs are Bank of America, Bank of New York Mellon, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street, and Wells Fargo. *See* FIN. STABILITY BD., 2018 LIST OF GLOBAL SYSTEMICALLY IMPORTANT BANKS (G-SIBS) 3 (2018), https://www.fsb.org/wp-content/uploads/P161118-1.pdf [https://perma.cc/J8GQ-7WQM].

successors would apply the same presumption.[214] The absence of well-defined limits creates uncertainty and could, over time, result in the agencies approving larger and riskier mergers.

Finally, the agencies have not only failed to establish sensible ex ante systemic risk limits, but they also have demonstrated unreasonably high systemic risk tolerance. Despite the new financial stability factor, the agencies have continued approving mergers among the largest U.S. banks. In 2011, the agencies signed off on PNC Bancorp's acquisition of RBC Bank, creating the United States' fifth largest bank with $290 billion in assets.[215] The following year, the agencies approved Capital One's purchase of ING Bank, surpassing PNC as the country's fifth largest bank with $292 billion in assets.[216] In late 2019, regulators unanimously approved BB&T's "merger of equals" with SunTrust, creating a firm with $450 billion in assets.[217] In each case, the agencies concluded that the mergers would not materially increase risks to U.S. financial stability.[218]

The agencies' high tolerance for these recent mergers is in tension with empirical research and historical experience suggesting that such deals can pose a risk to the financial system. As discussed above, numerous empirical studies have demonstrated that greater consolidation in the financial sector increases systemic risks.[219] One particularly relevant study by Federal Reserve economists showed that the collapse of a single $250 billion bank would be far worse for the economy than if five $50 billion banks failed separately.[220] Moreover, depository institutions like Washington Mutual, Countrywide, and National City—all similar in size to Capital One, PNC, BB&T, and SunTrust—proved to be systemically important when they collapsed in 2008.[221] The agencies, however, have not even acknowledged—let alone rebutted—this cautionary evidence in the context of their recent bank merger approvals.

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214. *See* Press Release, Fed. Reserve Bd., Daniel K. Tarullo Submits Resignation as a Member of the Board of Governors, Effective on or Around April 5, 2017 (Feb. 10, 2017), https://www.federalreserve.gov/newsevents/pressreleases/other20170210a.htm [https://perma.cc/JUK8-Z9AZ].

215. *See* PNC Bancorp., Inc., 98 Fed. Res. Bull. 16, 16-17 (2012).

216. *See* Capital One Fin. Corp., 98 Fed. Res. Bull. 7, 7-8 (2012).

217. *See* Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Announces Approval of Application by BB&T Corporation to Merge with SunTrust Banks (Nov. 19, 2019), https://www.federalreserve.gov/newsevents/pressreleases/orders20191119a.htm [https://perma.cc/6ZQZ-WKGP]; Press Release, Fed. Deposit Ins. Corp., FDIC Approves the Merger Between BB&T and SunTrust (Nov. 19, 2019), https://www.fdic.gov/news/news/press/2019/pr19111.html [https://perma.cc/64SM-4PS4].

218. *See Capital One Fin. Corp.*, 98 Fed. Res. Bull. at 27; *PNC Bancorp.*, 98 Fed. Res. Bull. at 25.

219. *See supra* notes 156, 158 and accompanying text.

220. *See* Lorenc & Zhang, *supra* note 22, at 12-18.

221. *See* Arthur E. Wilmarth, *Raising SIFI Threshold to $250B Ignores Lessons of Past Crises*, AM. BANKER (Feb. 7, 2018), https://www.americanbanker.com/opinion/raising-sifi-threshold-to-250b-ignores-lessons-of-past-crises [https://perma.cc/P4BJ-5BPV].

Taken together, these shortcomings suggest that the agencies should adopt a more systematic and stringent approach to their financial stability analyses. The agencies' ill-defined financial stability framework contrasts sharply with their clear-cut approach to competitive considerations in bank merger applications. Recall that the agencies rely on the HHI—calculated by summing the squared market shares of each firm in the market—to determine if a proposed merger would substantially lessen competition in a geographic market.[222] The agencies use the HHI to assess both the post-merger market concentration and the incremental change in concentration, just as the financial stability analysis attempts to assess the resulting firm's systemic footprint and the incremental change in the firm's systemic importance. The HHI, however, is significantly more systematized than the nebulous financial stability framework. Adopting an analogous index-based framework for systemic risk could significantly enhance the clarity, analytical rigor, and efficacy of the agencies' financial stability analyses.

Conveniently, over the past decade, scholars and policymakers have developed numerous quantitative metrics to assess a financial institution's systemic importance. SRISK, for example, measures a firm's expected capital shortfall in a severe market decline, based on its size, leverage, and risk.[223] Conditional Value-at Risk (CoVaR) quantifies the extent to which distress at a single firm would increase the riskiness of the broader financial system.[224] The Basel Committee on Bank Supervision (BCBS), meanwhile, has developed a formula to compute a firm's systemic risk score based on a its size, complexity, interconnectedness, cross-jurisdictional activity, and substitutability—the same criteria the banking agencies use in their financial stability analyses.[225] These metrics "back test" well—that is, if they had been in use before 2008, they would have been remarkably accurate in predicting ex ante which firms would become the most systemically important during the crisis.[226]

These quantitative systemic risk measurements can be important regulatory tools. Indeed, policymakers already rely on these metrics in several contexts. For example, the Federal Reserve uses the BCBS's systemic risk formula to assign risk-based capital requirements to the most systemically important banks.[227] In 2018, the Federal Reserve proposed to further

222. *See supra* note 88 and accompanying text. The agencies follow a clear-cut rule: a merger generally does not pose competitive concerns unless the post-merger HHI is at least 1,800 and merger increases the HHI by more than 200 points. *See supra* note 89 and accompanying text.

223. *See* Christian Brownlees & Robert F. Engle, *SRISK: A Conditional Capital Shortfall Measure of Systemic Risk*, 30 REV. FIN. STUD. 48, 51-56 (2017) (describing SRISK).

224. *See* Tobias Adrian & Markus K. Brunnermeier, *CoVaR*, 106 AM. ECON. REV. 1705, 1706 (2016).

225. *See BCBS Assessment Methodology*, *supra* note 27, at 4-11. For a comprehensive overview of these and other systemic risk metrics, see Diimtrios Bisias et al., *A Survey of Systemic Risk Analytics*, 4 ANN. REV. FIN. ECON. 225 (2012).

226. *See* Brownlees & Engle, *supra* note 223, at 62-63; Adrian & Brunnermeier, *supra* note 224, at 1730.

227. *See* 12 C.F.R. §§ 217.400-.404 (2020).

incorporate the BCBS's systemic risk formula in the U.S. regulatory regime by using it to determine a systemically-important bank's leverage capital requirements.[228] Moreover, the FSOC has considered a nonbank financial company's SRISK when evaluating whether to designate the firm for enhanced regulation.[229] Policymakers, in sum, deem these metrics sufficiently reliable to use them when making significant regulatory decisions.

Building on this trend, the banking agencies should systematize their bank merger analysis by creating an HHI equivalent for financial stability. The agencies could use SRISK, CoVaR, the BCBS systemic risk score, or other systemic risk metrics to assess both the resulting firm's systemic footprint and the incremental change in the firm's systemic importance.[230] The agencies could issue a rule or guidance establishing thresholds beyond which they would presumptively deny a merger on financial stability grounds. For example, the agencies could adopt a presumption against a merger where the resulting firm's BCBS systemic risk score exceeds 50 and the merger increases the score by at least 5 points.[231] Alternatively, they could set a threshold based on the firm's SRISK—for example, when the firm's post-merger SRISK is at least $2.5 billion and the merger increases the firm's SRISK by at least $250 million, given a 40% market decline.[232] These threshold levels, of course, are merely suggestions, and the agencies would set limits that are informed by econometric analyses and public notice and comment.[233] Further, the agencies

228. *See* Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for U.S. Global Systemically Important Bank Holding Companies and Certain of Their Subsidiary Insured Depository Institutions; Total Loss-Absorbing Capacity Requirements for U.S. Global Systemically Important Bank Holding Companies, 83 Fed. Reg. 17317 (Apr. 19, 2018) (codified at 12 C.F.R. § 217.11 (2020)).

229. *See, e.g.*, FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. 49 n.133 (2017), https://www.treasury.gov/initiatives/fsoc/designations/Documents/American_International_Group,_Inc._(Rescission).pdf [https://perma.cc/2T8R-YKFD].

230. Other systemic risk metrics the agencies might use for this purpose include codependence risk, which measures how a firm's credit risk affects other institutions' credit risk, and lower tail dependence, which assesses the likelihood of a firm's stock collapsing given a systemic crisis. *See* INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: RESPONDING TO THE FINANCIAL CRISIS AND MEASURING SYSTEMIC RISK 14-18, 77 (2009), https://www.imf.org/~/media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/gfsr/2009/01/pdf/text.ashx [https://perma.cc/T5PU-69DZ] (describing codependence risk); Weiss et al., *supra* note 21, at 168 (describing lower tail dependence).

231. As a reference point, U.S. Bancorp's and PNC Financial Services Group's most recent publicly available BCBS systemic risk scores were 41 and 34, respectively. *See* OFFICE OF FIN. RESEARCH, *supra* note 183, at 7 (2017).

232. By way of comparison, Regions Financial Corporation's SRISK was approximately $2.2 billion in July 2019, given a 40% market decline. *See Systemic Risk Analysis*, V-LAB, https://vlab.stern.nyu.edu/analysis/RISK.USFIN-MR.MESSIM [https://perma.cc/TS65-BAY9]. SRISK may be suboptimal relative to the BCBS systemic risk score because a firm may be able to temporarily decrease its SRISK by increasing its reported capital ratios or otherwise altering its balance sheet composition before filing a merger application.

233. The agencies could retain discretion to approve a merger in excess of the systemic risk limits in an emergency situation, when denial of the merger would jeopardize financial stability. By

need not rely exclusively on a single quantitative metric. Instead, the optimal approach might be to create a composite financial stability score combining these metrics.

An HHI equivalent for financial stability would be a significant improvement over the current ad hoc approach. A systematized methodology would enhance the analytical rigor of the financial stability framework by standardizing how the agencies evaluate systemic risk data. If codified in rulemaking or guidance by appropriately precautionary regulators, a systemic risk limit could prevent agencies from approving increasingly risky mergers in the future.[234] Furthermore, an HHI equivalent would add clarity to an otherwise opaque process and thereby reduce confidential pre-merger consultations between banks and their regulators.[235] If banks have greater certainty about how the agencies will evaluate systemic risk, they will have less need to confer confidentially with the agencies before signing a merger agreement.

Previous efforts to systematize bank merger financial stability analysis have been dismissed as premature. The Federal Reserve initially considered issuing a rule or guidance on the financial stability factor but ultimately rejected the idea because "[t]here simply isn't the accumulation of experience and of thoughtful evaluation of these issues by people both in and out of government to inform something akin to the merger guidelines published by the antitrust agencies."[236] As Former Federal Reserve Governor Daniel Tarullo noted, the DOJ and Federal Trade Commission (FTC) only codified their antitrust merger guidelines after 60 years of experience with merger analysis.[237]

Despite these objections, it is now appropriate—indeed, necessary—for the agencies to formalize their approach to the financial stability factor. First, systemic risk analysis has advanced dramatically in the decade since the Federal Reserve first considered issuing a rule or guidance on the financial stability factor. While reliable systemic risk metrics might not have existed in the immediate aftermath of the 2008 crisis, scholars and policymakers have now developed a wide array of sophisticated tools that the agencies could use to create an HHI equivalent for financial stability.[238] Second, the banking agencies cannot afford to wait as long as the antitrust agencies to develop formal guidelines because the societal consequences of lax financial stability policy are far greater than weak antitrust enforcement. While the DOJ and FTC could spend decades refining their antitrust analyses without significant harm

contrast, the agencies could also retain discretion to deny a merger below the systemic risk limits if other factors indicated that the transaction would increase risks to financial stability.

234. A quantitative systemic risk limit for bank mergers would be an example of what Professor Robert Weber has called a "structural regulation" response to "complexity capture"—using a structural approach to overcome limitations in discretionary financial regulation. *See generally* Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643 (2012).

235. *See supra* Section II.A.

236. Tarullo, *supra* note 13, at 19.

237. *Id*. at 16.

238. *See, e.g.*, Bisias et al., *supra* note 225, at 260 (discussing various systemic risk metrics).

to consumers, delaying the implementation of an HHI equivalent for financial stability risks triggering another financial crisis. Finally, time is of the essence for the agencies to establish appropriate systemic risk limits in light of anticipated consolidation among regional and super-regional banks in the near future.[239]

In sum, the banking agencies' approach to the financial stability factor has been vague and ineffective. The good news, however, is that researchers have developed numerous quantitative tools that could be used to systematize and strengthen the financial stability analysis in bank merger applications. The agencies should incorporate these metrics into the bank merger review process to ensure that bank consolidation does not imperil the financial system yet again.

B. Public Interest Factors

In addition to financial stability, the banking agencies consider the public interest as a distinct factor in merger applications. In fact, under the BHC and Bank Merger Acts, the public interest is of paramount importance. As the Supreme Court asserted in *United States v. Third National Bank in Nashville*, the public interest is "the ultimate test imposed" in a bank merger application.[240]

The banking agencies take into account the public's interest in three ways when evaluating a merger proposal. First, the agencies consider "the convenience and needs of the community to be served."[241] At its core, this inquiry assesses whether a proposed merger will produce benefits to the public, such as increased access to credit or expanded product offerings.[242] Second, the agencies weigh the relevant banks' records of compliance with fair lending and other consumer protection laws.[243] Third, the agencies consider the banks' records of serving LMI communities under the CRA.[244] Collectively, these considerations reflect Congress's intent that "a merger should be judged in terms of its overall effect on the public interest."[245]

Despite this mandate, however, the agencies have not prioritized the public interest in bank merger reviews. To the contrary, the agencies' public interest analyses are typically perfunctory and often focus on advantages to the merging banks—such as projected cost savings—rather than to their

239. *See* Walsh, *supra* note 35.

240. 390 U.S. 171, 184 (1968).

241. 12 U.S.C. §§ 1828(c)(5), 1842(c)(1)-(2) (2018).

242. *See infra* Section IV.B.1.

243. *See, e.g.*, ENHANCING TRANSPARENCY IN THE FEDERAL RESERVE'S APPLICATIONS PROCESS, *supra* note 30, at 3.

244. *See* 12 U.S.C. §§ 1831u(b)(3), 1842(d)(3), 2903(a)(2) (2018).

245. *Third National Bank in Nashville*, 390 U.S. at 185. In that case, the Supreme Court struck down a merger on the ground that the lower court had not considered whether the relevant banks could achieve the purported public benefits through means other than the merger. *See id*. at 190-92.

consumers.[246] Similarly, the agencies regularly approve applications by banks with only marginal consumer compliance and CRA records, despite public protests opposing such mergers.[247] The agencies, in sum, too often subordinate the interests of the public to those of merging banks.

This Section proposes a framework to reinvigorate public interest considerations in bank merger oversight. It recommends several reforms. For example, in light of the potential negative effects of bank consolidation, the agencies should begin reviewing a merger proposal with a strong presumption that the combination will not produce benefits to the public. Moreover, Congress should empower the CFPB—the agency with the most insight into large banks' consumer compliance records—to block a bank merger on public interest grounds, similar to the DOJ's power to enjoin an anticompetitive bank merger. Finally, the agencies should insist that applicants have outstanding CRA records as a condition of bank merger approval. Collectively, these reforms would help elevate the public interest as the paramount consideration in bank merger regulation.

1. Convenience and Needs of the Community

Under the BHC and Bank Merger Acts, the banking agencies must take into account "the convenience and needs of the community to be served" when evaluating a proposed bank merger or acquisition.[248] The agencies, in essence, are supposed to analyze how a proposed merger will affect the public welfare. In practice, however, rather than conducting a searching inquiry, the agencies typically assume that a transaction will benefit the public. To fulfill their statutory mandate, therefore, the agencies need a new paradigm for evaluating the public benefits of proposed bank mergers.

The "convenience and needs" standard appears twice—and serves two distinct purposes—in the bank merger statutes. "Convenience and needs" first appears as part of the competitive analysis. That is, under the BHC and Bank Merger Acts, an agency may approve a merger that would substantially lessen competition or create a monopoly if it concludes that "the anticompetitive effects of the proposed transaction are 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."[249] Thus, an agency may balance a merger's potential anticompetitive effects against its welfare-enhancing outcomes.

246. *See infra* Section IV.B.1. Professor David Zaring has noted that the banking agencies have likewise deemphasized the public interest in de novo bank charter applications. *See* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. (forthcoming 2020) (on file with author) ("The agency spends no time evaluating the public interest in a new bank, or nudging a bank towards policy priorities of the government. Instead, it [sets] . . . an ultimately low bar . . . .").

247. *See infra* Sections IV.B.2, IV.B.3.

248. 12 U.S.C. §§ 1828(c)(5), 1842(c)(1)-(2) (2018).

249. *Id*. §§ 1828(c)(5)(B), 1842(c)(1)(B).

By contrast, the second instance of the "convenience and needs" standard clarifies that the public welfare is its own, independent consideration in bank merger applications, separate from the competitive analysis. Congress specifically required that "*[i]n every case*, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served."[250] Therefore, even in an application with no antitrust concerns, the agencies must assess whether the merger will enhance the public welfare.[251] The "convenience and needs" factor thus serves a dual purpose—it is both a potential counterweight for anticompetitive effects and an independent consideration in every merger application.

Substantively, the "convenience and needs" standard is expansive, encompassing a wide range of public welfare considerations. The "convenience and needs" factor includes the merging banks' records of compliance with consumer protection laws and their histories of meeting the credit needs of LMI populations under the CRA.[252] But "convenience and needs" is significantly broader than the banks' consumer compliance and CRA records alone.[253] Indeed, as the Supreme Court stated, the "convenience and needs" standard asks whether the proposed merger would "secur[e] better banking service for the community."[254] Thus, the "convenience and needs" factor assesses the extent to which the proposal will enhance the public welfare, broadly defined.[255]

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250. *Id*. § 1828(c)(5) (emphasis added); *see also id*. § 1842(c)(2) (requiring the Federal Reserve to take into account convenience and needs in BHC Act applications).

251. *See* Wilson, *supra* note 28, at 351 (emphasizing that the "convenience and needs" standard is broader than the antitrust balancing test).

252. *See, e.g*., Fifth Third Bancorp, 105 Fed. Res. Bull. 70, 75-82 (2019) (assessing banks' consumer compliance and CRA records as part of the "convenience and needs" analysis). Consumer compliance and CRA considerations are discussed in Sections IV.B.2 and IV.B.3.

253. *See* Warren L. Dennis, *The Community Reinvestment Act of 1977: Defining "Convenience and Needs of the Community"*, 95 BANKING L.J. 693, 711 (1978); Wilson, *supra* note 28, at 362-63.

254. United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 188 (1968).

255. The "convenience and needs" standard that applies to a bank merger or a BHC's acquisition of a bank differs somewhat from the "public benefit" standard that governs a BHC's acquisition of a nonbank financial company. When a bank merges with another bank or when a BHC acquires a bank, the Bank Merger Act and section 3 of the BHC Act provide that the relevant agency must take into account "the convenience and needs of the community to be served." 12 U.S.C. §§ 1828(c)(5), 1842(c)(1)-(2) (2018). By contrast, when a BHC acquires a nonbank financial company such as a broker-dealer or insurance underwriter, section 4 of the BHC Act requires that the Federal Reserve assess whether the acquisition "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects." 12 U.S.C. § 1843(j)(2)(A) (2018). The biggest difference between these standards is procedural. Under section 4 of the BHC Act, the Federal Reserve must affirmatively find that a proposal's expected public benefits outweigh the possible adverse effects in order to approve a nonbank acquisition. *See id*. Under the Bank Merger Act and section 3 of the BHC Act, however, the relevant agency is only required to "take into account" the convenience and needs of the community and need not make an affirmative finding of public welfare enhancement, absent anticompetitive effects. *See* 12 U.S.C. §§ 1828(c)(5), 1842(c)(1)-(2) (2018). Substantively, however, the "convenience and needs" and the "public benefit" standards both require consideration of a proposed transaction's effect on the public welfare. *See, e.g*., Baradaran, *supra* note 12, at 1337 & n.311 (conflating the public interest standards under sections 3 and 4 of the BHC Act).

At first, the agencies took seriously their responsibility to analyze the convenience and needs of the community under the BHC and Bank Merger Acts. In the 1960s and 1970s, for example, the agencies often noted that a proposed merger would increase a bank's lending limit.[256] At the time, federal law generally prohibited a bank from lending more than 10% of its capital to any one borrower.[257] An expansionary merger typically increased a bank's capital base and, accordingly, its lending limit.[258] In many cases, therefore, a bank merger proposal directly benefitted businesses and consumers who previously had been unable to obtain substantial loans due to a bank's restrictive lending limits.[259]

Early on, the agencies also seriously considered whether a proposed merger would enhance the convenience and needs of the community by expanding the range of banking products and services available to consumers. An acquirer might introduce new products or services that the target bank previously had not offered.[260] For example, the agencies found the introduction of overdraft checking, credit-card services, and extended banking hours via merger to be significant enhancements to the convenience and needs of the public.[261] By contrast, when a proposed merger would not affirmatively benefit the public through expanded products or services, the agencies often denied the application.[262] Thus, throughout the 1960s and 1970s, the agencies prioritized the "convenience and needs" standard and insisted that bank merger proposals benefit the public welfare.

More recently, however, the agencies have treated the "convenience and needs" standard as an afterthought. After Congress adopted the CRA in 1977, the agencies began neglecting the "convenience and needs" standard as an independent consideration in bank merger applications. As Professor Baradaran observed, "After the enactment of the CRA . . . the focus of the public benefit

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256. *See, e.g.*, Detroitbank Corp., 63 Fed. Res. Bull. 926, 927 (1977); Union Bank, 57 Fed. Res. Bull. 247, 248 (1971).

257. 12 U.S.C. § 84 (1970).

258. *See* Casson & Burrus, *supra* note 11, at 679.

259. *See Detroitbank Corp*., 63 Fed. Res. Bull. at 927 ("[A]ffiliation with Applicant would increase bank's lending limits at a time when there appears to be an increasing demand by local industries for large loans."); *Union Bank*, 57 Fed. Res. Bull. at 248 ("Customers . . . would benefit by the merger because Union Bank . . . through its larger lending limit would be better able to meet the needs of medium-sized business customers.").

260. *See* David R. Allardice, *Convenience and Needs: A Post-Audit Survey*, 4 ECON. PERSP. 20, 20 (1978).

261. *See id.*; *see also* Jessee & Seelig, *supra* note 116, at 152 ("Improvements affecting the convenience and needs of the community . . . have often taking the form of new services . . . not yet offered in a locale.").

262. *See, e.g.*, Associated Bank Servs., Inc., 58 Fed. Res. Bull. 284, 285 (1972) ("[C]onsummation of Applicant's proposal would result in no significant benefit to the convenience or needs of the community to be served. The record indicates that the area's needs are being served adequately by the banks serving the area."); Fla. Nat'l Banks of Fla., Inc., 58 Fed. Res. Bull. 57, 58 (1972) ("Consummation of the proposed transaction would have little impact on the convenience and needs of banking customers in the area since Applicant proposes no new service not already offered by other banks in the area.").

test shifted to ask whether the bank was in compliance with the CRA, which served as a rubber stamp for meeting the public benefit test."[263] Although the agencies now consider the banks' history of meeting the credit needs of LMI communities under the CRA, "there [is] no inquiry as to the *benefits* of the merger."[264] This distinction is significant—the CRA evaluates a bank's past performance, but the "convenience and needs" standard is supposed to assess whether a merger will produce future public benefits.[265]

Over the past several decades, the "convenience and needs of the community" has virtually evaporated as an independent issue in bank merger applications. Today, the agencies barely mention convenience and needs in their merger decisions. When the agencies do refer to convenience and needs, they merely repeat the applicant's "representations" about benefits that will accrue from the merger.[266] The agencies, however, analyze neither the significance of these purported benefits nor the likelihood that they will materialize.[267] At times, the agencies consider anticipated benefits *to the companies*—such as projected cost savings and profitability—as public benefits.[268] Mitria Wilson confirmed the agencies' indifference toward the "convenience and needs" standard in a comprehensive review of post-financial crisis bank merger decisions. Wilson concluded that "[i]n the vast majority of the financial regulatory institutions' orders on bank merger or acquisition applications [since the crisis], there is no discussion of the regulators' analysis of the public-interest provision beyond a single reference to the fact that the regulator considered the issue."[269]

One explanation for the disappearance of the "convenience and needs" standard is that bank mergers no longer benefit the public as they did in the past. Consider increased lending limits, which the agencies traditionally cited as a benefit of bank mergers.[270] Modern-day bank mergers are unlikely to enhance the public welfare through elevated lending limits for two reasons. First, Congress increased the loan-to-one-borrower threshold from 10 to 15%

263. Baradaran, *supra* note 12, at 1339-40.

264. *Id*.

265. Wilson, *supra* note 28, at 362-63; *see also id*. at 362 ("[T]here is nothing in the applicable langue of the [CRA] that would support the view that a record of past performance . . . could, by itself, be dispositive of the issue of whether a proposed merger satisfies the public-interest inquiry required under the [BHC] and Merger Acts.").

266. *See, e.g*., Fifth Third Bancorp, 105 Fed. Res. Bull. 70, 81-82 (2019) (noting that Fifth Third represented that the proposed merger would expand consumers' access to its retail and commercial banking services); Synovus Bank, 103 Fed. Res. Bull. 67, 77 (2017) (noting that Synovus Bank represented that the proposed merger would increase its deposit base and thereby allow it to provide more loans).

267. *See* Baradaran, *supra* note 12, at 1338 ("Despite the public benefit test's salience, in practice no searching inquiry into the actual needs of the public is undertaken.").

268. *See id*. at 1338-39.

269. Wilson, *supra* note 28, at 372 n.8.

270. *See supra* notes 256-259 and accompanying text.

of a bank's capital and surplus in 1982.[271] Thus, banks are significantly less constrained in making large loans than they were in the 1960s and 1970s. Second, many U.S. banks have grown so large that no single borrower is likely to require a loan in excess of the bank's lending limit.[272] Accordingly, increasing a bank's lending limit is no longer a compelling justification for most bank mergers.

Similarly, it is questionable whether many modern-day bank mergers introduce new financial products and services to underserved communities. Innovative product offerings are already more widely available today than they were in the 1960s and 1970s due to increased competition and internet banking.[273] Even in mergers where the acquirer offers a broader range of products and services than the target bank, the target is often capable of providing expanded offerings on its own.[274] Moreover, some of the expanded products and services that the agencies cite as public benefits, such as appraisal services, are of only marginal value to consumers.[275] Thus, the public generally does not need bank mergers in order to access critical financial products and services.[276]

In sum, modern-day bank mergers do not appear to benefit the public as they might have in the mid-twentieth century. Yet the agencies have largely abandoned their statutory duty to assess the public welfare in bank merger deals. Today, the agencies typically address the "convenience and needs" standard perfunctorily, without seriously questioning whether a merger would, in fact, benefit consumers. Banks, in turn, have recognized the banking agencies' disinterest in the public welfare. In Capital One's application to

271. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-230, § 401(a), 96 Stat. 1469, 1508 (codified as amended at 12 U.S.C. § 84 (2018)). A bank may lend an additional 10% of its capital and surplus to such borrower if the loan is fully secured by readily marketable collateral. *See* 12 U.S.C. § 84(a)(2) (2018).

272. *See generally* Kress, *supra* note 4, at 179-88 (documenting dramatic growth of U.S. banks). Moreover, even if a potential loan exceeds a bank's lending limit, the bank may comply with the lending limit by reducing its exposure through loan participations. *See* 12 C.F.R. § 32.2(q)(2)(vi)(A) (2020).

273. *See, e.g*., Catherine J. Bell & Jeanne M. Hogarth, *U.S. Households' Access to and Use of Electronic Banking, 1989-2007*, 95 FED. RES. BULL. A99, A104-07 (2009) (discussing trends in consumer adoption of electronic banking).

274. The agencies previously denied mergers where the target bank was capable of providing expanded products and services on its own, in the absence of an acquisition. *See, e.g*., First Fin. Corp., 58 Fed. Res. Bull. 480, 481 (1972); First Fin. Corp., 56 Fed. Res. Bull. 654, 655-56 (1970); *see also* Carstensen, *supra* note 11, at 588.

275. *See, e.g*., Nat'l City Corp., 93 Fed. Res. Bull. C44, C47 (2007).

276. To be sure, many consumers and small businesses still lack adequate banking services, especially in so-called banking deserts. *See The Community Reinvestment Act: Assessing the Law's Impact on Discrimination and Redlining: Hearing Before the H. Comm. on Fin. Servs*., 116th Cong. (2019) (statement of Mehrsa Baradaran, Professor of Law, University of Georgia School of Law), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba15-wstate-baradaranm-20190409-u2.pdf [https://perma.cc/G55Q-WYC5]. Bank mergers and acquisitions, however, are unlikely to enhance banking access in LMI neighborhoods. *See supra* note 144 and accompanying text (discussing post-merger branch closures in LMI areas).

acquire ING Bank in 2011, for example, Capital One included just a single paragraph purporting to describe the public benefits of the merger.[277]

The banking agencies' indifference to the "convenience and needs" standard is cause for concern. Congress expected the agencies to prioritize the public welfare in bank merger reviews—indeed, it repeated the "convenience and needs" standard twice in each of the bank merger statutes. In practice, however, the agencies simply assume that bank merger proposals benefit the public, without serious analysis. This assumption is deeply flawed, in light of evidence suggesting that modern-day bank mergers, on balance, reduce the availability of credit, increase costs to consumers, and exacerbate financial stability risks.[278]

In light of this evidence, the banking agencies should establish a new paradigm for analyzing the "convenience and needs" standard in bank merger applications. In an optimal framework, the agencies would: (1) begin with a presumption that a proposed merger would *not* benefit the public; (2) insist that the applicant identify concrete, verifiable ways in which the transaction would create better banking services for the community; and (3) quantify these public benefits where possible. Collectively, these reforms would ensure that the agencies fulfill their statutory obligation to assess whether a merger proposal is in the public interest.

First, the agencies should apply a presumption that bank mergers generally do not enhance the public welfare. The agencies, in essence, should flip their current presumption. Whereas recent bank merger approvals have implicitly assumed that consolidation benefits the public, going forward, the agencies should expressly acknowledge the empirical evidence that bank mergers tend to result in detriments to the public. These detriments, of course, include increased loan costs, lower deposit rates, and less small business lending.[279] The agencies' presumption against public benefits should be particularly strong for mergers among the United States' largest banks, wherein concerns about market power are most acute and benefits of scale are doubtful, at best.[280]

Second, in order to overcome this presumption, the agencies should require bank merger applicants to identify concrete, verifiable ways in which a proposed transaction will help the community. Although modern-day bank

277. CAPITAL ONE FIN. CORP., NOTIFICATION PURSUANT TO SECTION 4 OF THE BANK HOLDING COMPANY ACT BY CAPITAL ONE FIN. CORP. TO ACQUIRE ING BANK, FSB, SHAREBUILDER ADVISORS, LLC AND ING DIRECT INVESTING, INC. 38-39 (July 15, 2011), https://www.federalreserve.gov/foia/files/Notification-re-Captial-One-to-acquire-ING.pdf [https://perma.cc/6YB9-JRHR].

278. *See supra* Section II.B.

279. *See id.*

280. Professor Jesse Markham has noted the paradox that the agencies consider potential economies of scale in bank merger proposals, but they do not take into account possible diseconomies of scale. *See* Markham, *supra* note 94, at 302 ("While efficiencies of scale are considered in approving transactions, inefficiencies of scale are not, such that mergers resulting in inefficiently large scale are not disapproved on that particular ground.").

mergers generally do not create the types of public benefits the agencies previously recognized,[281] such mergers could enhance the convenience and needs of the community in other ways. For example, an acquisition might save a troubled bank from potential failure, or it might replace a target's ineffective management. Moreover, there may be some situations in which an acquiring bank offers critical products or services, such as small business loans, that otherwise would be unavailable to the target bank's customers. Rather than merely restating an applicant's "representations" about public benefits, however, the agencies must carefully evaluate the likelihood that the purported benefits will, in fact, occur.[282] The purported benefits should be definite and not "speculative"—a standard to which the agencies previously adhered but have since relaxed considerably.[283]

Finally, the agencies should attempt to quantify the value of public benefits arising from a merger in order to more accurately weigh policy trade-offs inherent in bank consolidation. In the past, the agencies have not been transparent about how they balance the societal costs of reduced competition and greater systemic risk against purported enhancements to convenience and needs, suggesting a lack of analytical rigor in their review process.[284] Attempting to quantify the value of purported public benefits would help alleviate this concern. To be sure, some scholars have expressed skepticism about recent efforts to introduce quantitative cost-benefit analyses into financial regulation on the ground that imprecise "guesstimates" expose regulations to ex post second-guessing by reviewing courts.[285] But the agencies need not subject a bank merger proposal to a complete cost-benefit analysis; simply attempting to quantify the expected benefits to the community will enhance the analytical rigor and clarity of bank merger reviews. Even a rudimentary attempt to quantify public benefits will make it more likely that bank mergers actually enhance the convenience and needs of the community.

In sum, over the past forty years, the banking agencies have effectively ignored the "convenience and needs" standard as an independent criterion in bank merger reviews. As a result of this omission, the agencies now routinely approve bank mergers despite little evidence of public benefits and without acknowledging the compelling data on the social costs of bank consolidation.

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281. *See supra* notes 270-272 and accompanying text.

282. As one federal district court stated, the agency "should specify particularly what [it] finds to be the convenience and needs of the community" and "what [it] considers will be the effect of the merger thereon . . . ." United States v. Crocker-Anglo Nat'l Bank, 263 F. Supp. 125, 138 (N.D. Cal. 1966).

283. *See* N. Star Fin., Inc., 86 Fed. Res. Bull. 609, 610 (2000) (denying proposed acquisition because purported financial and managerial improvements were "speculative").

284. *See* Jessee & Seelig, *supra* note 116, at 162.

285. John C. Coates, IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 960 (2015); *see also* Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. 351, 373-75 (2014); Jeremy C. Kress, Patricia A. McCoy & Daniel Schwarcz, *Regulating Entities and Activities: Complementary Approaches to Nonbank Systemic Risk*, 92 S. CAL. L. REV. 1455, 1487-88 (2019).

To rectify this inequity, therefore, the agencies should insist on persuasive, quantifiable evidence of social benefits to overcome a presumption that bank mergers generally do not benefit the public. Only then can the agencies fulfill their statutory obligation to ensure bank mergers enhance the convenience and needs of the communities to be served.

2. Consumer Compliance

As part of the public interest analysis, the agencies also consider the merging banks' records of compliance with fair lending and other consumer protection laws. Although not specifically required by statute, the agencies have traditionally taken into account the merging banks' compliance records to assess whether the combined institution would have the capacity to implement effective consumer protection systems.[286] Over time, however, the agencies have neglected their consumer protection responsibilities, including consumer compliance evaluations in bank merger applications.[287] After the financial crisis, Congress transferred many of the federal banking agencies' consumer protection authorities to the CFPB.[288] Lawmakers, however, did not give the newly created consumer agency a formal role in bank merger applications. This Section contends that, in order to restore consumer compliance as a central consideration in bank merger oversight, Congress should empower the CFPB to block bank merger proposals, similar to the DOJ's authority to enjoin anticompetitive mergers.

The banking agencies began considering merger applicants' consumer compliance records during the 1970s, when Congress enacted a wave of consumer protection legislation. As part of the merger review process, the agencies evaluated the acquiring and target banks' histories of compliance with the Equal Credit Opportunity Act,[289] Fair Housing Act,[290] Truth in Lending Act,[291] and numerous other consumer protection laws and regulations. At the time, the federal banking agencies had primary authority to supervise banks' compliance with these rules, and they drew on their supervisory experience in

286. *See* Matthew Z. Zamora, *Mergers and Acquisitions: A Compliance Perspective*, 10 SUPERVISORY INSIGHTS 10, 10 (2013). The agencies originally considered a bank's consumer compliance record as part of their assessment of the firm's management. *See, e.g.*, Johnson Int'l, Inc., 81 Fed. Res. Bull. 507, 508 (1995). More recently, however, the agencies have clarified that consumer compliance is a component of the "convenience and needs" assessment. *See* SEMIANNUAL REPORT ON BANKING APPLICATIONS—YEAR-END 2018, *supra* note 14, at 4.

287. For an analysis of how federal banking agencies neglected their consumer protection responsibilities in the lead-up to the financial crisis, see Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 86-95 (2008).

288. *See* Dodd-Frank Act, Pub. L. No. 111-203, §§ 1022, 1025, 124 Stat. 1376, 1980-85, 1990-93 (2010) (codified at 12 U.S.C. §§ 5512, 5515 (2018)).

289. 15 U.S.C. §§ 1691-1691f (2018).

290. 42 U.S.C. §§ 3601-3619 (2018).

291. 15 U.S.C. §§ 1601-1667f (2018).

assessing merger applicants' consumer compliance records.[292] The agencies explicitly stated that a poor consumer compliance record could warrant denial of an application, even if the banks had satisfactory CRA performance.[293] And, in fact, the agencies often denied mergers on consumer compliance grounds up until the 1990s.[294]

In the lead-up to the 2008 financial crisis, however, the agencies largely abandoned their consumer compliance responsibilities. As the consumer-focused ethos of the 1970s faded, the agencies relaxed their enforcement of consumer protection rules, focusing instead on their core responsibility of bank safety and soundness.[295] During this time, consumer compliance effectively evaporated as a constraint on bank mergers. Despite frequent fair lending protests by community groups and consumer advocates, the banking agencies regularly approved sizeable mergers by banks with questionable consumer compliance records.[296]

The financial crisis exposed the inadequacy of the banking agencies' *laissez faire* approach to consumer protection, leading to a comprehensive overhaul of the financial regulatory system. Many observers blamed the banking agencies' lax consumer protection policies for exacerbating the subprime mortgage crisis.[297] In response, Congress created the CFPB and transferred rulemaking and enforcement authority over most consumer protection laws from the banking agencies to the new consumer bureau.[298] In addition, Congress gave the CFPB exclusive jurisdiction to supervise banks with more than $10 billion in assets and their affiliates for compliance with most consumer financial protection laws.[299] Thus, the federal banking agencies

292. *See, e.g.*, Bar-Gill & Warren, *supra* note 287, at 86-89 (discussing the banking agencies' authority to supervise compliance with consumer protection laws prior to the Dodd-Frank Act).

293. *See* Totalbank Corp. of Fla., 81 Fed. Res. Bull. 876, 878 (1995) ("[D]isregard for consumer compliance laws provides a separate basis for concluding that convenience and needs considerations do not warrant approval of an application, even if an applicant has a satisfactory record of performance under the CRA.").

294. *See id.*; *see also* Johnson Int'l, Inc., 81 Fed. Res. Bull. 507 (1995); First State Holding Co., Inc., 67 Fed. Res. Bull. 802 (1981).

295. *See* Bar-Gill & Warren, *supra* note 287, at 90-91, 93-95; Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 329-34 (2013); *see also Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 60 (2009) (statement of Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury) [hereinafter Barr Testimony].

296. *See, e.g.*, Wachovia Corp., 92 Fed. Res. Bull. 183, 189-90 (2006); Bank of Am. Corp., 90 Fed. Res. Bull. 217, 224-25, 231-32 (2004); JPMorgan Chase Bank, 2004 WL 1369433, at *2, *9 (2003).

297. *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 167-205 (2011); Barr Testimony, *supra* note 295, at 60-63.

298. *See* Levitin, *supra* note 295, at 357-58.

299. 12 U.S.C. § 5515(a) (2018); *see also id.* § 5481(12), (13) (enumerating relevant consumer financial protection laws). The federal banking agencies retain supervisory authority over consumer compliance by banks with $10 billion or less in assets. *See* Levitin, *supra* note 295, at 358. In addition, the federal banking agencies retain supervisory authority over banks with more than $10

now play a comparatively minor role in consumer financial protection, especially with respect to the largest banks.

Despite this significant regulatory revamp, Congress did not give the CFPB a formal role in bank merger review. Even though the CFPB now has exclusive supervisory authority over consumer compliance by large banks, it has no independent voice in bank merger applications. Instead, the banking agencies—which lack direct oversight of big banks' consumer compliance—continue to assess bank merger applicants' consumer compliance records. To be sure, the banking agencies consult with the CFPB about bank merger applications on an informal, confidential basis.[300] And the CFPB may share consumer compliance examination reports with the banking agencies.[301] But the agencies are not required to accept the CFPB's recommendations on a merger application, and the CFPB lacks a formal mechanism to stop a merger it believes will harm consumers.

The CFPB's exclusion from the bank merger application process is problematic. The banking agencies have a well-documented history of downplaying banks' consumer compliance problems—indeed, that is why Congress created the CFPB in the first place.[302] Vesting the federal banking agencies with final authority to assess consumer compliance in merger applications therefore increases the risk that banks with deficient compliance systems will be permitted to expand. Furthermore, knowing that the banking agencies deemphasize consumer compliance, prospective merger applicants will have insufficient incentives to maintain strong compliance systems. Excluding the CFPB from bank merger review minimizes the importance of consumer compliance and thereby imperils the public welfare.

Mere consultation between the banking agencies and the CFPB as part of the application process is insufficient for two reasons. First, informal consultation provides no mechanism for resolving conflicts when the banking agencies and the CFPB disagree about the merits of a merger proposal. Instead, if the banking agencies and CFPB differ on a merger application, the banking agencies automatically prevail by virtue of their final decision-making authority, leaving the CFPB without recourse to protect consumers. Second, relegating the CFPB to a consultative role reduces its incentive to evaluate bank merger proposals carefully. The CFPB might choose not to devote resources to interagency discussions on bank merger proposals, knowing that it is not accountable for rendering final decisions on merger proposals and that, in

billion in assets for compliance with certain consumer financial protection laws, including the Fair Housing Act, the Servicemembers Civil Relief Act, and section 5 of the Federal Trade Commission Act. *See* FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL § II-13.4 n.7 (2017), https://www.fdic.gov/regulations/compliance/manual/complianceexaminationmanual.pdf [https://perma.cc/UP5H-ENYT].

300. *Cf.* Fifth Third Bancorp, 105 Fed. Res. Bull. 70, 81 (2019) (noting that the Federal Reserve consulted with the CFPB about Fifth Third's consumer compliance record).

301. 12 U.S.C. § 5512(c)(6)(C)(i) (2018).

302. *See supra* notes 295-299 and accompanying text.

any event, the banking agencies might ignore its input. Accordingly, the banking agencies' informal consultation with the CFPB cannot substitute for the Bureau's formal participation in bank merger reviews.

Nor is it adequate that the Director of the CFPB sits on the FDIC's Board of Directors.[303] Almost all of the largest U.S. banks are chartered as national banks and overseen by the OCC, not the FDIC.[304] As a result, the FDIC, and by extension the CFPB Director, is excluded from merger applications involving the biggest banks—the precise deals on which the CFPB is likely to have supervisory insight.[305] Moreover, even in the rare cases when the FDIC has jurisdiction over a big-bank merger, the FDIC's four other board members—whose primary focus is bank safety and soundness, not consumer protection—can outvote the CFPB Director.[306] This divergence between bank safety-and-soundness and consumer protection as regulatory objectives is the exact reason why the CFPB was created in the first place.[307] The CFPB Director's representation on the FDIC's Board of Directors is far from sufficient to ensure that consumer compliance is a central consideration in bank merger oversight.

For these reasons, Congress should establish an official role for the CFPB in the bank merger application process. The CFPB's formal participation in reviewing the consumer compliance aspects of bank merger proposals would mirror the DOJ's official role in assessing the antitrust effects of bank consolidation. Recall that, in addition to the banking agencies' antitrust analyses under the bank merger statutes, Congress directed the DOJ to independently review bank mergers' potential anticompetitive effects under the antitrust laws.[308] Just as the DOJ has expertise in antitrust analysis that the banking agencies lack, so too does the CFPB have unique insight into

303. *Cf.* Thomas P. Vartanian, *Fix CRA Before Cracking Down on Bank Mergers*, AM. BANKER (Dec. 18, 2019), https://www.americanbanker.com/opinion/fix-cra-before-cracking-down-on-bank-mergers [https://perma.cc/8J97-X2K4] ("[T]he CFPB already has an approval role in bank mergers since the agency's head sits on the board of the FDIC, which decides on many bank mergers.").

304. *See* BARR ET AL., *supra* note 186, at 174 (noting that the largest U.S. banks tend to be chartered as national banks).

305. Consider, for example, TCF National Bank's acquisition of Chemical Bank in 2019. TCF had well more than $10 billion in assets and was therefore supervised by the CFPB. TCF had well-documented consumer compliance deficiencies—according to one measure, consumers lodged more complaints against TCF than any other U.S. bank in 2018. *See* Jeremy Kress, *CFPB Should Have a Say in Bank Mergers*, AM. BANKER (Sept. 3, 2019), https://www.americanbanker.com/opinion/cfpb-should-have-a-say-in-bank-mergers. But because TCF was chartered as a national bank the OCC—and not the FDIC—was responsible for reviewing the merger application. *See* Letter from Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, to Spencer A. Sloan, Simpson Thatcher & Bartlett LLP (June 20, 2019), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/crad197.pdf [https://perma.cc/ZQ27-RM5F]. Like most big bank mergers, therefore, the CFPB Director's seat on the FDIC Board therefore did not afford the CFPB an opportunity to review TCF's acquisition.

306. *See* 12 U.S.C. § 1812(a)(1) (2018) (establishing the membership of the FDIC Board of Directors); *see also* FED. DEPOSIT INS. CORP., MISSION, VISION, AND VALUES, https://www.fdic.gov/about/strategic/strategic/mission.html [https://perma.cc/8ZL9-SXEJ] (stating that the FDIC's mission is to "maintain stability and public confidence in the nation's financial system").

307. *See supra* notes 297-298 and accompanying text.

308. *See supra* notes 64-68 and accompanying text.

consumer compliance, especially at larger banks. Likewise, both the DOJ Antitrust Division and the CFPB are singularly focused on protecting consumers, while the banking agencies tend to concentrate on bank safety and soundness.[309] It is sensible, therefore, for both the DOJ and the CFPB to have official roles in bank merger applications.

In many ways, the CFPB's formal participation in the bank merger process is even more essential than the DOJ's. In the antitrust arena, the banking agencies at least have access to underlying market structure data to calculate the HHI in geographic markets that would be affected by a merger proposal.[310] In the consumer arena, however, the banking agencies lack critical information necessary to assess a firm's compliance systems. The supervisors that conduct day-to-day oversight of consumer compliance systems at the largest banks are housed within the CFPB. Although the CFPB may share its examination reports with the banking agencies,[311] the banking agencies may lack the institutional knowledge, context, and experience to interpret these findings. The case for including the CFPB in bank merger oversight is therefore even more compelling than involving the DOJ.

The CFPB's role in bank merger reviews could be structured in several different ways. For example, Congress could authorize the CFPB to challenge a bank merger in court if a banking agency approves a proposal without the CFPB's concurrence, similar to the DOJ's authority.[312] Alternatively, Congress could require bank merger applicants to file concurrent applications with the relevant banking agencies and the CFPB, thereby giving the Bureau formal authority to approve or deny a merger.[313] Regardless of how the CFPB's authority is structured, it is essential that Congress give the CFPB a formal role in bank merger oversight and thereby correct a significant omission from the CFPB's original statutory authorities.

Accordingly, it makes little sense for the banking agencies, which have been stripped of their consumer-focused supervisory authority, to evaluate merger applicants' consumer compliance records, while the CFPB is relegated to an informal advisory role. Excluding the CFPB from the application process reduces consumer compliance to an afterthought in bank merger reviews, thereby threatening the public welfare. Accordingly, just as Congress has authorized the DOJ to bring its antitrust expertise to bear in bank merger applications, lawmakers should likewise empower the CFPB to protect consumers by giving it an independent voice in bank merger reviews.

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309. *See supra* note 295 and accompanying text.

310. The Federal Reserve Bank of St. Louis maintains the Competitive Analysis Structure Source Instrument for Depository Institutions, or CASSIDI, a publicly available database of geographic banking markets and concentration levels. *See CASSIDI*, FED. RESERVE BANK OF ST. LOUIS, https://cassidi.stlouisfed.org [https://perma.cc/6GFN-U2GX].

311. *See supra* note 301 and accompanying text.

312. *See* 12 U.S.C. §§ 1828(c)(7), 1849(b)(1) (2018).

313. An ex ante application requirement might be preferable to ex post enforcement authority so that the CFPB need not disclose confidential supervisory information in a judicial proceeding.

3. Community Reinvestment Act Performance

In addition to the foregoing factors, Congress directed the banking agencies to consider whether a merging bank serves traditionally neglected populations. Specifically, the agencies must assess an applicant's performance under CRA, which instructs banks to meet the credit needs of their entire communities, including LMI areas.[314] In practice, however, the agencies have undermined the CRA's objectives by allowing banks with marginal CRA records to merge. This Section recommends that the banking agencies apply more rigorous CRA performance standards in bank merger applications to ensure that only firms genuinely committed to serving LMI communities are permitted to expand.

Congress adopted the CRA in 1977 to combat redlining—the practice of banks refusing to lend to borrowers in minority areas.[315] The CRA imposes an "affirmative obligation" on banks "to help meet the credit needs of [their] local communities," with a special emphasis on LMI neighborhoods.[316] The banking agencies periodically examine banks to assess their performance under the CRA.[317] The agencies evaluate a bank on three metrics: (1) lending activities, including home mortgage, small business, and community development loans (the lending test);[318] (2) investment activities, including grants and other support for affordable housing and community development financial institutions (the investment test);[319] and (3) the efficacy of the bank's systems for delivering retail banking and community development services (the service test).[320] Based on these factors, the relevant agency assigns the bank one of four overall CRA ratings: Outstanding, Satisfactory, Needs to Improve, or Substantial Noncompliance.[321]

Policymakers enforce the requirements of the CRA primarily through the bank merger application process. As Professors Macey and Miller have noted,

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314. 12 U.S.C. § 2901(a)(3) (2018).

315. For background on the CRA, see DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 133-67 (2004); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 523-26 (2005); Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561, 1573-74 (1995); and Macey & Miller, *supra* note 95, 298-303.

316. 12 U.S.C. § 2901(a)(3) (2018).

317. *Id.* § 2903(a)(1). The agencies typically evaluate banks with more than $250 million in assets every three years. *See Community Reinvestment Act (CRA) Questions and Answers*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/compliance-bsa/cra/questions-and-answers.html [https://perma.cc/74SX-263H]. Banks with less than $250 million in assets are evaluated at least every five years. 12 U.S.C. § 2908(a) (2018).

318. 12 C.F.R. §§ 25.22(a)(1), 228.22(a)(1), 345.22(a)(1) (2020). For small banks, the agencies apply streamlined versions of these tests. *See id.* §§ 25.26, 228.26, 345.26.

319. *Id.* §§ 25.23, 228.23, 345.23.

320. *Id.* §§ 25.24, 228.24, 345.24. For each test, the relevant agency assigns a rating of Outstanding, High Satisfactory, Low Satisfactory, Needs to Improve, or Substantial Noncompliance. *See Id.* §§ 25 app. A, 228 app. A, 345 app. A.

321. *Id.* §§ 25.28(a), 228.28(a), 345.28(a).

a bank is "not automatically sanctioned for failing to satisfy [its] CRA obligations."[322] Instead, the main consequence of a poor CRA rating is a potential restriction on the bank's ability to merge.[323] Congress specifically directed the agencies to take a bank's CRA record into account in all bank merger applications.[324] In practice, the agencies place great weight on a merger applicant's CRA record. Although a bank's CRA rating is supposed to be just one component of the overall "convenience and needs" analysis, the agencies often treat it as dispositive of the public interest inquiry.[325]

The agencies, however, apply the CRA in a way that is highly permissive of bank consolidation. Neither the bank merger statutes nor the CRA establish a minimum CRA rating for a bank to be eligible to merge. Like the other bank merger statutory factors, Congress simply directed the banking agencies to *consider* an applicant's CRA rating.[326] And like the other statutory factors, the agencies have chosen to interpret this mandate in a way that is unduly favorable to merging banks.

The agencies have established lenient standards for merger applicants' CRA performance, and they have continued to relax these rules over time. In the 1980s, the agencies adopted an unwritten policy favoring approval of a merger application if the bank had at least a Satisfactory overall CRA rating, even if the firm received a Low Satisfactory or Needs to Improve rating on one or more of its performance tests.[327] The agencies denied applications on CRA grounds only in the rare case that the applicant had received a Needs to Improve or Substantial Noncompliance overall rating on its most recent CRA exam.[328] The agencies have since codified this policy of presumptively approving proposals by firms with at least Satisfactory CRA ratings, as long as other statutory factors are consistent with approval.[329] The agencies, however, have suggested that a less-than-satisfactory CRA rating may no longer be a barrier to a merger approval. In November 2018, agency officials indicated that they are open to approving merger applications by banks with Needs to Improve or Substantial Noncompliance ratings if the firms demonstrate

322. Macey & Miller, *supra* note 95, at 300.

323. The bank can also be restricted from opening new branch offices. *See id*.

324. *See* 12 U.S.C. § 2903(a)(2) (2018); *see also id*. § 1842(d)(3).

325. *See, e.g*., First Colonial Bankshares Corp., 79 Fed. Res. Bull. 706, 707 (1993) ("[A] CRA examination is an important *and often controlling* factor in determining whether convenience and needs factors are consistent with approval of an expansionary proposal." (emphasis added)).

326. *See* 12 U.S.C. § 2903(a)(2); *see also id*. § 1842(d)(3).

327. *See* Cohen, *supra* note 11, at 80 (describing informal discussions with Federal Reserve staff).

328. *See, e.g*., First Colonial Bankshares Corp., 79 Fed. Res. Bull. 706, 707 (1993); Gore-Bronson Bancorp, Inc., 78 Fed. Res. Bull. 784, 785-86 (1992); First Interstate BancSystem of Mont., Inc., 77 Fed. Res. Bull. 1007, 1008-10 (1991); Continental Ill. Bancorp, Inc., 75 Fed. Res. Bull. 304, 304-06 (1989).

329. *See* ENHANCING TRANSPARENCY IN THE FEDERAL RESERVE'S APPLICATIONS PROCESS, *supra* note 30, at 3; FED. DEPOSIT INS. CORP., APPLICATIONS PROCEDURES MANUAL § 1.10 (2019); OFFICE OF THE COMPTROLLER OF THE CURRENCY, PPM 6300-2, POLICIES AND PROCEDURES MANUAL: IMPACT OF CRA RATINGS ON LICENSING APPLICATIONS 1-2 (2017).

progress since their last CRA evaluations.[330] The agencies, in sum, have generally welcomed expansion by banks with questionable records of serving LMI areas.

The agencies' permissive approach to the CRA in bank merger applications has grave consequences for LMI areas. Banks have responded by "satisficing," or doing the bare minimum to achieve a Satisfactory CRA rating, and no more.[331] As Professor Kenneth Thomas has observed, "there are few if any real incentives for banks to go for CRA gold," so firms "tend to be happy with the middle ground."[332] As a result, more than 90% of banks are currently rated Satisfactory, and few even try for an Outstanding rating.[333] Meanwhile, many LMI areas continue to lack access to traditional banking services.[334] Thus, although the CRA represents a potentially powerful tool to increase credit to LMI areas, the agencies undermine this goal by applying lenient standards to bank merger proposals.

To address this problem, the agencies should strengthen their standards for the CRA factor in bank merger applications. The agencies could reform their approach in several ways to ensure that a bank is permitted to expand only if it effectively serves LMI neighborhoods. For example, the agencies could establish a presumption against a merger by a bank with a Low Satisfactory rating or below on any of its performance tests. Additionally, the agencies could take into account all of a bank's CRA performance evaluations, rather than only its most recent evaluation, to assess its long-term commitment to LMI areas.[335] Most significantly, the agencies could require that a bank receive an Outstanding overall CRA rating to obtain regulatory approval for a merger proposal. Thus, rather than rewarding minimally compliant banks with merger approvals, the agencies should insist that merger applicants demonstrate exceptional records of serving LMI populations under the CRA.

To be sure, the CRA is imperfect and could be improved. As banking markets evolve, for example, policymakers may need to adapt banks' CRA

330. *See* Joe Mantone, *Banks Could Get out of M&A Penalty Box Sooner, Regulator Says*, S&P GLOBAL MKT. INTELLIGENCE (Dec. 3, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/trending/0xccl6qtxfgklta1awkpmg2 [https://perma.cc/FC5L-NW22].

331. Kenneth H. Thomas, *Banks Learn the Price of 'Satisfactory' CRA Grades*, AM. BANKER (Sept. 8, 2016), https://www.americanbanker.com/opinion/banks-learn-the-price-of-satisfactory-cra-grades [https://perma.cc/PUH9-T7ZQ].

332. *Id*.

333. *See id*. Only when a bank anticipates filing a merger application does it strategically increase its lending to LMI populations. *See* Raphael Bostic et al., *Regulatory Incentives and Consolidation: The Case of Commercial Bank Mergers and the Community Reinvestment Act*, ADVANCES ECON. ANALYSIS & POL'Y, 2005, at 1, 8-11.

334. *See, e.g.*, BARADARAN, *supra* note 198, at 102-37 (discussing challenges faced by LMI borrowers).

335. Under current practice, the agencies typically ignore all but a bank's most recent CRA performance evaluation. *See, e.g.*, Compass Bank, 102 Fed. Res. Bull. 58, 61 n.18 (2016).

assessment areas to take into account their online activities.[336] Likewise, the CRA could be updated to give banks credit for a wider variety of community development activities than are recognized under current CRA performance standards.[337] In addition, commentators have raised concerns about community groups using CRA-focused protests to delay merger applications in an effort to extract community development pledges or other concessions from the banks.[338] In response to these critiques, the FDIC and OCC proposed revisions to the CRA's implementing regulations in late 2019.[339] However, community groups have alleged that the proposed reforms would weaken the CRA, and the Federal Reserve has not signed on.[340] Nonetheless, if appropriately designed, targeted CRA reforms could address some important shortcomings in the current law.

To the extent that policymakers eventually revise the CRA, they should also enhance their expectations for bank merger applicants' CRA performance. The application process is regulators' primary mechanism for enforcing banks' obligation to provide financial services to traditionally neglected populations. As they currently apply the CRA, however, the agencies incentivize banks to do the bare minimum to achieve a Satisfactory rating. Going forward, the agencies should strengthen their standards in merger applications to ensure that banks strive for excellence, rather than mediocrity, in meeting their CRA obligations.

* * *

Sixty years ago when Congress established a comprehensive pre-approval regime for bank mergers, lawmakers expected that the banking agencies would prioritize the public interest in their assessment of merger proposals. Today, however, the agencies too often subordinate the public interest to those of merging banks. The proposals advanced above would reinvigorate the public benefits test, consumer compliance analysis, and CRA evaluations in connection with merger oversight. The agencies should adopt these recommendations to ensure that bank mergers enhance, rather than impede, the convenience and needs of the communities to be served.

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336. *See* Lael Brainard, Governor, Fed. Reserve Bd. of Governors, Remarks at the 2019 Just Economy Conference: The Community Reinvestment Act: How Can We Preserve What Works and Make it Better? 4-9 (Mar. 12, 2019), https://www.federalreserve.gov/newsevents/speech/files/brainard20190312a.pdf [https://perma.cc/4FUS-DJ7V].

337. *See id.* at 9-11.

338. *See, e.g.*, Macey & Miller, *supra* note 95, at 333-37.

339. *See* Press Release, Office of the Comptroller of the Currency, FDIC and OCC Propose to Modernize Community Reinvestment Act Regulations (Dec. 12, 2019), https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-ia-2019-147.html [https://perma.cc/5XFT-RN43].

340. *See* Neil Haggerty, *House Democrats Implore Regulators to Get in Sync on CRA*, AM. BANKER (Dec. 4, 2019), https://www.americanbanker.com/news/house-democrats-implore-regulators-to-get-in-sync-on-cra [https://perma.cc/AEK4-MXPG].

C. Financial Resources

Finally, the banking agencies should modernize their approach to assessing a merger applicant's financial wherewithal. The bank merger statutes direct the agencies to consider "the financial . . . resources and future prospects of the existing and proposed institutions."[341] When evaluating a bank merger application, however, the Federal Reserve applies financial criteria that are so weak as to be functionally meaningless. This Section therefore urges the Federal Reserve to bolster its standards to ensure that only financially sound firms are permitted to expand.

The rationale for considering a bank's financial resources as part of a merger application is straightforward. Bank mergers inherently involve uncertainty, so consolidating banks should maintain an appropriate financial cushion to withstand unexpected challenges.[342] Moreover, policymakers generally expect larger banks to maintain bigger financial buffers in light of their potential systemic importance.[343] Thus, when a bank proposes to expand via acquisition, the relevant agency typically assesses its current and projected capital levels, liquidity, asset quality, level of indebtedness, and other financial metrics.[344] Historically, the agencies have denied mergers when the applicants would incur too much debt or maintain insufficient capital.[345] Most of these denials involved small banks. In the 1980s and 1990s, however, the agencies occasionally denied significant mergers—such as The Bank of New York's proposed acquisition of Northeast Bancorp—on financial grounds.[346]

Although the bank merger statutes originally gave the agencies unfettered discretion to evaluate applicants' financial resources, Congress established minimum capital requirements for merger applicants when it authorized interstate bank mergers in the 1994. The Riegle-Neal Act allowed the agencies to approve an interstate merger only if the resulting institution would be "adequately capitalized."[347] At the time, the agencies' regulations deemed a bank to be adequately capitalized if it had at least a 4% Tier 1 risk-based capital ratio and an 8% total risk-based capital ratio, as well as a 4% leverage

341. 12 U.S.C. § 1828(c)(5) (2018); *see also id.* § 1842(c)(2).

342. *See* Cohen, *supra* note 11, at 72.

343. *See* BARR ET AL., *supra* note 186, at 756-59.

344. *See, e.g.*, 12 C.F.R. § 225.13(b)(1) (2020).

345. *See, e.g.*, Guar. Dev. Co., 72 Fed. Res. Bull. 255, 256 (1986); Holcomb Bancshares, Inc., 69 Fed. Res. Bull. 804, 805 (1983); Spur Bancshares, Inc., 69 Fed. Res. Bull. 806, 807 (1983); Fin. Sec. Corp., 58 Fed. Res. Bull. 832, 834 (1972).

346. *See* Bank of N.Y. Co., Inc., 76 Fed. Res. Bull. 867, 869 (1990) (denying a merger application by New York's fifth largest bank).

347. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, §§ 101(a), 102(a), 108 Stat. 2338, 2339, 2346-47 (codified as amended at 12 U.S.C. §§ 1831u(b)(4), 1842(d)(1)(A) (2018)).

ratio.[348] In practice, the agencies encouraged organizations anticipating mergers to maintain capital ratios above these required minimums.[349] These standards, however, were insufficient to prevent numerous recently merged banks from failing during the 2008 crisis.[350]

After the crisis, Congress toughened financial standards for bank mergers. The Dodd-Frank Act provided that, rather than being merely "adequately capitalized," merger applicants now needed to be "well capitalized" to obtain regulatory approval.[351] Under the capital rules in effect when Dodd-Frank was enacted in 2010, firms had to maintain capital ratios roughly 50% higher than the minimum requirements to be considered well capitalized.[352] Thus, Congress directed the agencies to approve bank mergers only if the firms' capital levels are significantly above the minimum requirements.

The problem, however, is that the Federal Reserve has now set the "well capitalized" threshold for BHCs so low that this standard is functionally meaningless. Soon after Congress passed Dodd-Frank, the banking agencies adopted the Basel III international capital accord, which substantially increased minimum capital requirements.[353] Under Basel III, the Federal Reserve raised its minimum BHC capital requirements to a 4.5% common equity tier 1 ratio, 6% tier 1 ratio, 8% total capital ratio, and a 4% leverage ratio.[354] The Federal Reserve, however, barely changed the "well capitalized" threshold for BHCs.[355] A BHC is now considered "well capitalized" if it maintains only a 6% tier 1 ratio—the same as the minimum requirement—and a 10% total capital ratio—just 25% above the minimum.[356] The "well capitalized" standard,

348. *See* 12 C.F.R. §§ 6.4(b)(2), 208.33(b)(2), 325.103(b)(2) (1997). A bank that received the highest possible rating on its annual supervisory exam was deemed adequately capitalized if it maintained the applicable risk-based capital ratios and at least a 3% leverage ratio. *See id*.

349. *See* 12 C.F.R. § 225, app. A, § IV (1997) ("[Banking o]rganizations experiencing or anticipating significant growth are also expected to maintain capital . . . well above the minimum levels.").

350. *See, e.g.*, Heidi N. Moore, *Wachovia-Golden West: Another Deal From Hell?*, WALL ST. J. (July. 22, 2008), https://blogs.wsj.com/deals/2008/07/22/wachovia-golden-west-another-deal-from-hell [https://perma.cc/T2BP-R5XW]; Shira Ovide, *Bank of America-Countrywide: Worst Deal in History?*, WALL ST. J.: DEAL J. (June 29, 2011, 2:25 PM ET), https://blogs.wsj.com/deals/2011/06/29/bank-of-america-countrywide-worst-deal-in-history [https://perma.cc/B3G6-HT47].

351. Dodd-Frank Act, Pub. L. No. 111-203, § 607(a)-(b), 124 Stat. 1376, 1607-08 (2010) (codified as amended at 12 U.S.C. §§ 1831u(b)(4)(B), 1842(d)(1)(A) (2018)).

352. *See* 12 C.F.R. §§ 6.4(b)(1), 208.33(b)(1), 325.103(b)(1) (2010) (providing that a bank is well capitalized if it has at least a 6% Tier 1 and 10% total risk-based capital ratio, as well as a 5% leverage ratio); *see also id*. § 225.2(r) (providing that a BHC is well capitalized if it has at least a 6% Tier 1 and 10% total risk-based capital ratio).

353. *See* Michael R. Crittenden & Dan Fitzpatrick, *Big U.S. Banks Face Tougher Standards*, WALL ST. J. (July 2, 2013), https://www.wsj.com/articles/SB100014241278 87323297504578581373434862806 [https://perma.cc/5X8R-U7E8].

354. 12 C.F.R. § 217.10(a) (2020).

355. The agencies meaningfully increased the "well capitalized" thresholds for banks, but not BHCs. *See* 12 C.F.R. §§ 6.4(c), 208.43(b)(1), 325.103(b)(1) (2020) (providing that a bank that is a member of the Federal Reserve System is well capitalized if it has at least a 6.5% common equity tier 1 ratio, 8% tier 1 ratio, 10% total capital ratio, and a 5% leverage ratio).

356. 12 C.F.R. § 225.2(r)(1) (2020).

moreover, ignores a bank's common equity tier 1 and leverage ratios. As depicted in Table 2, the current threshold for BHCs to be considered "well capitalized" is barely distinguishable from the minimum capital requirements.

Table 2: Comparison of Minimum Capital Requirements and "Well Capitalized" Threshold for Interstate Bank Mergers

	Minimum Capital Requirements	Well Capitalized Threshold
Common Equity Tier 1 Ratio	4.5%	N/A
Tier 1 Ratio	6%	6%
Total Capital Ratio	8%	10%
Leverage Ratio	4%	N/A

The Federal Reserve's "well capitalized" standard for BHCs is so lenient that it has no practical effect on merger applications. That is because a separate regulatory requirement—the Federal Reserve's stress tests—effectively require BHCs to maintain capital that exceeds the "well capitalized" threshold. Stress tests are an annual exercise in which the Federal Reserve uses economic models to predict how a BHC's balance sheet would perform in a recession.[357] By regulation, a BHC is not permitted to pay dividends or buy back shares unless it would exceed the minimum regulatory capital ratios in a hypothetical severe downturn.[358] Oddly, a BHC that is merely "well capitalized"—with 6% tier 1 and 10% total capital ratios—would almost certainly fail the Federal Reserve's stress tests. Capital One Financial Corporation, for example, nearly failed the 2019 stress tests despite maintaining 12% tier 1 and 15% total capital ratios.[359] The stress tests, therefore, are far more demanding than the "well capitalized" standard.

Because the Federal Reserve's "well capitalized" threshold has not kept pace with the post-financial-crisis capital regime, the financial screening of

357. For background on the Federal Reserve's stress tests, see Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247, 1283-94; Robert F. Weber, *A Theory for Deliberation-Oriented Stress Testing Regulation*, 98 MINN. L. REV. 2236, 2291-94 (2014); and Matthew C. Turk, *Stress Testing the Banking Agencies*, 105 IOWA L. REV. (forthcoming 2020) (manuscript at 5-14), https://ssrn.com/abstract=3367546 [https://perma.cc/S66D-E65Z].

358. 12 C.F.R. § 225.8(f)(2)(iv) (2020).

359. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., COMPREHENSIVE CAPITAL ANALYSIS AND REVIEW 2019: ASSESSMENT FRAMEWORK AND RESULTS 14 (2019), https://www.federalreserve.gov/publications/files/2019-ccar-assessment-framework-results-20190627.pdf [https://perma.cc/2E94-GNNM].

BHC merger applicants is no longer meaningful. The Federal Reserve does not publicly stress test merger applicants' consolidated balance sheets. Rather, when approving a BHC application, the Federal Reserve simply notes that the applicant is well capitalized and would remain so on consummation of the merger.[360] A BHC, therefore, could be considered well capitalized—and thus able to merge—even if it were unable to withstand a hypothetical recession. This perverse outcome defies explanation.

To address these shortcomings, therefore, the Federal Reserve must toughen its analysis of merger applicants' financial resources. As an initial step, the Federal Reserve should substantially increase the "well capitalized" threshold for BHCs. In addition to raising the applicable tier 1 and total capital ratios, the Federal Reserve should establish common equity tier 1 and leverage components of the "well capitalized" test, because these metrics tend to be the most binding on BHCs.[361] Strengthening the "well capitalized" threshold would ensure that firms are permitted to expand only if they hold significantly more financial resources than is expected of non-merging companies, consistent with congressional intent. Moreover, for larger firms that would be subject to stress tests on consummation of a merger, the Federal Reserve should conduct a stress test of the pro forma balance sheet as part of the merger application to assess how the consolidated firm would perform during a downturn. This dynamic, forward-looking exercise would ensure that the Federal Reserve evaluates the firm's "future prospects," as required by the BHC Act.

In sum, to preserve rigor in the bank merger application process, the Federal Reserve must update and strengthen its approach to assessing applicants' financial resources. The Dodd-Frank Act directed the banking agencies to ensure that merger applicants hold significantly more financial resources than non-merging banks in light of the uncertainties inherent in bank mergers. The Federal Reserve, however, has neglected to modernize the "well capitalized" standard for BHCs consistent with this mandate. Going forward, therefore, the Federal Reserve should toughen the "well capitalized" threshold and stress test merger applicants to ensure that only strong BHCs may expand through acquisition.

* * *

This Part has proposed a comprehensive approach to reinvigorating traditionally overlooked factors in the bank merger statutes. In order to safeguard the financial system, the agencies should establish quantitative systemic risk limits for bank mergers using widely accepted financial stability

360. *See, e.g.*, Fifth Third Bancorp, 105 Fed. Res. Bull. 70, 72 (2019).

361. *See* Jill Cetina et al., *Capital Buffers and the Future of Bank Stress Tests*, OFF. FIN. RES. 6 (2017), https://www.financialresearch.gov/briefs/files/OFRbr_2017_02_Capital-Buffers.pdf [https://perma.cc/Z2SS-XFN4].

metrics. In order to protect consumers, the agencies ought to demand compelling evidence that a proposed merger will benefit the public. Furthermore, the agencies should insist that a merger applicant have an Outstanding CRA rating, and Congress should give the CFPB an independent voice in bank merger oversight. Finally, to ensure that merging banks are financially strong enough to withstand unforeseen challenges, the agencies should increase their expectations for a merged bank's capital buffer. In total, this comprehensive framework would refocus the agencies' attention on these statutorily mandated factors and thereby strengthen bank merger oversight.

V. Implications for Contemporary Merger Policy in Other Industries

The 2020 presidential election has thrust the United States' merger policy into the public debate, as policymakers seek tools to combat perceived concentration in numerous industries. Senator Elizabeth Warren, for example, has called for the reversal of agriculture mergers, such as Monsanto's 2018 combination with Bayer, which she says have hurt small farmers.[362] Several presidential candidates have proposed breaking up big technology companies by undoing mergers like Facebook's acquisitions of WhatsApp and Instagram, Amazon's takeover of Whole Foods, and Google's purchase of Waze.[363] Proponents of breaking up big technology firms contend that these mergers limit customers' choices, invade consumers' privacy, and hurt employees.[364] In July 2019, the DOJ announced it was opening antitrust investigations into Facebook, Google, Amazon, Apple, and other technology firms.[365]

Within the legal scholarship, there is considerable debate about whether U.S. antitrust laws permit authorities to consider nonprice factors such as consumer privacy and income inequality. Some scholars, such as Tim Wu and Lina Khan, insist that the existing antitrust laws encompass a broad range of public interest considerations and that policymakers should use these tools to address social ills.[366] Other scholars, however, counter that broad populist concerns are outside the scope of the antitrust laws and that policymakers

362. *See* Jeff Daniels, *Elizabeth Warren Slams Big Agriculture, Unveils Plan for Reversing 'Anti-Competitive Mergers,'* CNBC (Mar. 27, 2019), https://www.cnbc.com/2019/03/27/elizabeth-warren-slams-big-agriculture-calls-to-reverse-mergers-to-aid-farmers.html [https://perma.cc/SEQ7-24S6].

363. *See, e.g.*, Astead W. Herdon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html [https://perma.cc/4S36-YHSN]; Cristiano Lima, *Bernie Sanders Says He Would 'Absolutely' Try to Break up Facebook, Google, Amazon*, POLITICO (July 16, 2019), https://www.politico.com/story/2019/07/16/bernie-sanders-facebook-google-amazon-1416786 [https://perma.cc/X729-LRTA].

364. *See* Herdon, *supra* note 363.

365. *See* Daisuke Wakabayashi et al., *Justice Department Opens Antitrust Review of Big Tech Companies*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/technology/justice-department-tech-antitrust.html [https://perma.cc/N9G2-RW3W].

366. *See* WU, *supra* note 38, at 68-73, 135-39; Khan, *supra* note 38, at 739.

should maintain their traditional focus on price effects.[367] The debate over this so-called "hipster antitrust" movement shows no signs of slowing.[368]

Whatever one thinks of the general antitrust laws, however, the bank merger statutes are unambiguous: the banking agencies must consider factors other than the HHI when evaluating merger proposals. In the bank merger context, Congress specifically provided that financial stability, the convenience and needs of the community, and the future prospects of the institutions are all relevant considerations, in addition to competition.

Despite this clear statutory mandate, however, the banking agencies have neglected factors outside of the traditional antitrust realm. After decades of near-complete focus on competitive considerations, policymakers and scholars have paid little attention to how they evaluate financial stability or consumer protection in merger proposals. In the meantime, the public has suffered the negative effects of bank consolidation in the form of branch closures, lower credit availability, higher crime, and increased systemic risk.[369]

While scholars debate the reach of the general antitrust statutes, therefore, the banking agencies should lead the way by exercising their broad merger authority. In contrast to the general antitrust laws, the bank merger statutes clearly mandate consideration of non-price factors in merger proposals. It makes sense, of course, that merger standards for banks are broader than for other companies. The law has long recognized that banking poses unique risks to financial stability and consumer welfare that are less prevalent in other industries.[370] As policymakers trend toward enlarging the scope of traditional merger review, therefore, it is especially critical that the banking agencies modernize their approach to bank merger oversight.

Conclusion

Over the past sixty years, financial regulators have allowed the once powerful bank merger review process to atrophy. This weakening is due, at least in part, to policymakers' and scholars' near-exclusive focus on antitrust, which has grown increasingly irrelevant as long-term trends in bank regulation and market structure have bolstered competition for financial services. Meanwhile, the banking agencies have failed to carefully consider whether proposed mergers would increase systemic risks, enhance the public welfare, and strengthen the relevant institutions. As a result, the agencies now rubber

367. *See* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 326-40 (2019) (purporting to debunk the claim that lax antitrust enforcement has caused economic inequality).

368. *See id*. at 293.

369. *See supra* Section II.B.

370. *See, e.g*., Corrigan, *supra* note 185 (concluding that banks perform economically unique functions).

stamp nearly all bank mergers despite evidence that such deals can harm consumers and destabilize the financial system.

Collectively, the proposals advanced in this Article would modernize bank merger reviews and ensure that regulators apply appropriately stringent criteria for all of the factors in the bank merger statutes. The banking agencies should use all the analytical tools at their disposal to evaluate a merger's financial stability risks. The CFPB should have an independent voice in the merger review process. Regulators should insist that merging banks invest more than the bare minimum in LMI communities. And merger applicants should maintain an extra capital cushion to protect against unforeseen challenges. If put into practice, these reforms would not only enhance the analytical rigor of the bank merger application process but also reorient the banking agencies' focus onto the public welfare and financial stability, where it rightfully belongs.