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Bank Merger Reform Takes an Extended Philadelphia National Bank Holiday

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**BANK MERGER REFORM TAKES AN EXTENDED
*PHILADELPHIA NATIONAL BANK HOLIDAY***

*By Edward Pekarek and Michela Huth**

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*It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*¹

I. INTRODUCTION

The landscape of the United States dual banking system² changed dramatically in recent decades. The extent of this change, and the consolidation trend in the financial services industry, challenge the assumption that commercial banks provide services which are unique and insulated from non-bank competition.³ Today, commercial banks face increasing competition from various industries, and much of that new competition recognizes no geographic boundaries. Those charged with overseeing this industry in turmoil must move beyond old assumptions about banking products, services, and markets, as embodied within outdated merger review methodologies. This Article addresses the past, present, and future of banking consolidation with an aim to propose modern reforms to the multi-agency approach to banking antitrust analysis.

“The market increasingly is being taken by non-banking entities, both on the credit and deposit side,” according to a banking consultant in 1993.⁴ Customers are taking their business to non-traditional institutions (brokerages, mortgage lenders, and insurers) for their online banking services.⁵ The advent of “pure Internet banks” presents additional

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. The U.S. banking system is comprised of the main components, national and state banks, the former are chartered by the Office of the Comptroller of Currency (“OCC”) and the latter by a state-level banking authority. For a detailed discussion of this system, including the implications of the Federal Deposit Insurance Corporation Improvement Act, see CARL FELSENFELD, BANKING REGULATION IN THE UNITED STATES 19-32.5 (Juris Publ., 4th ed. 2001).

3. *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963) (providing Court’s discussion of unique and insulated nature of traditional commercial banking).

4. Steven Greenhouse, *Nonbanks’ Community Role Will Be Target of U.S. Study*, N.Y. TIMES, June 9, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE0DE163FF93AA35755C0A965958260&n=Top/Reference/Times%20Topics/Organizations/T/Treasury%20Department> (quoting Joann Barefoot, banking consultant).

5. See Deborah Salus & Mary Weeks, *Do Community Banks Gain Competitive Advantage with Online Banking?* 3 J. BEHAV. & APPLIED MGMT. 263 (Winter 2002),

borderless competition with traditional banking institutions, sans the “brick and mortar” overhead.⁶ Moreover, non-traditional banks, though not regulated in the same manner as traditional banks,⁷ have increasingly ventured into service areas previously dominated by commercial banks.⁸ Yet, the erstwhile separation of commerce and banking has less to do with tradition, however, than it is attributable to regulatory restrictions.⁹ In short, administrative standards differ for banks and non-bank competitors, which in turn inhibits the competitiveness of the banks “in areas where the two intersect.”¹⁰ According to the Department of Justice

available at http://www.ibam.com/pubs/jbam/articles/vol3/article3_17.htm.

6. *Id.* at 263.

7. *See* Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 364 (1986).

In 1984, the Board promulgated rules providing that nonbank banks offering the functional equivalent of traditional banking services would thereafter be regulated as banks. The Board accomplished this by amending its definition of a bank, found in ‘Regulation Y,’ in two significant respects. First, the Board defined ‘demand deposit’ to include deposits, like NOW accounts, which are ‘as a matter of practice’ payable on demand. Second, the Board defined the ‘making of a commercial loan’ as ‘any loan other than a loan to an individual for personal, family, household, or charitable purposes,’ including ‘the purchase of retail installment loans or commercial paper, certificates of deposit, bankers’ acceptances, and similar money market instruments.’

Id. (citations omitted). Regulation Y in its complete form can be found at <http://www.bankersonline.com/regs/225/225.html>. The Federal Reserve is currently proposing changes to Regulation Y. *See* John Poirier, *Fed’s Bank Merger Rule Changes May Come By Yr-end*, REUTERS, Oct. 18, 2007, available at http://today.reuters.com/news/articleinvesting.aspx?type=etfNews&storyID=2007-10-18T185833Z_01_N1837770_5_RTRIDST_0_FED-ACQUISITIONS.XML.

8. For example, CapitalOne is a hybrid financial holding company, offering a wide range of both traditional and non-traditional products and services to a broad customer base. *See* Capital One, About Capital One, Corporate Information, History, http://www.capitalone.com/about/corpinfo/history.php?linkid=WWW_Z_Z_Z_ABT1_C1_01_T_ABT3. Wells Fargo & Co “is a diversified financial services company providing banking, insurance, investments, mortgage and consumer finance through almost 6000 stores, the Internet and other distribution channels across North America and internationally.” *See* Wells Fargo, <https://www.wellsfargo.com/>.

9. *See* Christine E. Blair, *The Future of Banking in America*, *The Mixing of Banking and Commerce: Current Policy Issues*, 16 FDIC BANKING REV. 97, 100 (2004), available at <http://www.fdic.gov/bank/analytical/banking/2005jan/article3.pdf>.

10. Comment Letter from R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Comments On the Federal Reserve Bank’s Interpretive and Compliance Guide to the Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, Docket No. R-1159, Nov. 7, 2003, available at <http://www.usdoj.gov/atr/public/comments/201459.htm> (“[T]he competitive benefit offered by banks may be reduced because the banks are not able to competitively respond to multi-product bundles and discounts offered by non-banks. Consumers are

(“DOJ”), the repeal of interstate banking prohibitions over the last three decades has “erode[ed] banks’ monopoly power in ‘traditional’ products.”¹¹ Only a vestige of the traditional regulatory opposition remains to what now appears to be an almost inevitable trend¹² “toward a greater blending of banking and commerce.”¹³

Geographic variables must also be prominent on the regulatory agenda. Purveyors of banking products now include numerous non-traditional entities, and the markets for bank products and services and the firms offering them are no longer just locally situated. Increases in the locations and diversity of a market’s participants can influence the competitive landscape. Bank mergers enable companies that do not traditionally provide commercial banking services to compete at the local level with commercial banks. For example, consolidations have expanded the geographic scope of credit card giants—which have expansive reach into almost all communities in the nation. When these credit card giants acquire regional banks, such transactions facilitate a broader market for both the targeted bank and the acquirer.

Consolidation in any industry inevitably leads to a discussion that contemplates competitive fairness. The United States Supreme Court took up the issue in 1963. *United States v. Philadelphia National Bank*, the seminal banking antitrust case, is such a result, applying the Sherman Act of 1890 and the Clayton Act of 1914¹⁴ to commercial

harmed when banks cannot respond to competitive tying and bundling of products offered by non-banks.”).

11. *Id.*

12. *See* Blair, *supra* note 9, at 97.

13. *Id.* at 99, 101.

[D]espite the regulations and prohibitions on certain activities and forms of control, . . . certain charter types—including limited purpose consumer banks and ILCs—permit a mixing of banking and commerce. These charter types do not fit the definition of a bank under the BHCA and technically are not banks; in certain states, they can be owned by commercial firms. These firms, in turn, are not subject to the BHCA and are not required to become bank holding companies.

Id. at 99 (citations omitted).

14. *See* Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 *IND. L.J.* 345, 346 n.1 (2007).

Section 1 of the Sherman Act prohibits ‘every contract, combination . . . or conspiracy, in restraint of trade,’ 15 U.S.C. § 1 (2004); section 2 of the Sherman Act makes it illegal for a firm to ‘monopolize, or attempt to monopolize’ interstate commerce, *Id.* § 2; and section 7 of the Clayton Act prohibits any mergers the effect of which ‘may be substantially to lessen competition, or to tend to create a monopoly.’ *Id.* § 18. Because of the broad wording of these statutes, ‘[p]erhaps uniquely, American antitrust law is a creature of judicial, as opposed to legislative, creation.’

banks. The *Philadelphia National Bank* Court established a long-standing common law bank merger competition analysis, and introduced to the banking antitrust competitive analysis key analytical concepts such as “product or services market” and “relevant geographical market,” which became commonplace in the evaluation of probable competitive effects of a proposed merger.¹⁵ The seminal banking antitrust case continues to considerably influence the regulatory review paradigm for bank merger analysis.

The anticompetitive test minted by *Philadelphia National Bank* was designed to determine whether the proposed bank merger might lessen competition in any line of commerce in any section of the country.¹⁶ The Court defined “line of commerce” as a cluster of products and services¹⁷ which banks specially provide to customers, also referred to as “commercial banking.”¹⁸ The Court noted that “[i]ndividuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance.”¹⁹ Thus, the analysis created nearly half-century

Id. (citations omitted).

15. *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *see also* *United States v. Conn. Nat'l Bank*, 418 U.S. 656 (1974); Elijah Brewer III et al., *The Price of Bank Mergers in the 1990s*, ECON. PERSPECTIVES, 2000 (Fed. Reserve Bank of Chi., Chicago, Ill.), at 7, available at <http://www.chicagofed.org/publications/economicperspectives/2000/EPARTL1.PDF>.

16. *Phila. Nat'l Bank*, 374 U.S. at 355 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)).

17. *See id.* at 356 (“[T]he ‘line of commerce’ (relevant product or services market) and ‘section of the country’ (relevant geographical market) . . .”).

18. *See id.*; *see also* James V. DiSalvo, Federal Reserve Geographic Banking Market Definitions, 1 n.1 (1999), available at www.philadelphiafed.org/files/bm/fedmks.pdf.

The Court held that banking was a ‘unique line of commerce,’ represented by the cluster. The cluster consists of the following: unsecured personal and business loans, loans secured by securities or accounts receivable, automobile and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds, demand deposits, time and savings deposits, estate and trust planning, trusteeship services, lock boxes, safety deposit boxes, account reconciliation services, correspondent services, and investment advice.

Id. (citing and quoting *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963)).

19. *Phila. Nat'l Bank*, 374 U.S. at 357-58; *see also id.* at 358 (“The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries.”).

ago construed a section of the country, or relevant geographic market, as being the local community of the bank's customers.²⁰

Philadelphia National Bank is not without its critics. Former Assistant Attorney General for Antitrust, Lee Loevinger, the attorney who argued the case for the government in *Philadelphia National Bank*, observed:

‘[F]rom the viewpoint of economic or antitrust analysis, the [cluster approach] has become virtually meaningless.’ Because of state and federal regulations on the lending activities of financial institutions, it is now necessary to measure possible price discrimination by commercial banks by delineating narrow submarkets, which consist of available substitutes to consumers who have limited alternatives.²¹

Eugene A. Ludwig, former Comptroller of the Currency,²² criticized *Philadelphia National Bank* for its failure to anticipate the increasing nonbank competition that banks would face: “Unlike [thirty-five] years ago, there are now [1995] nonbank competitors for nearly all commercial bank services.”²³ Ludwig questioned whether it was even possible for a bank to gain a monopoly over financial services in any given market in the face of modern technology, the disappearance of interstate banking barriers, and an “explosion” of financial services offered by nonbanks.²⁴ Another former Comptroller of the Currency, Robert Clarke, observed that “commercial banks no longer perform a unique function, which was the critical factor in the Supreme Court’s

20. See *id.*; see also *id.* at 361 (acknowledging that the four-county Philadelphia metropolitan area, which was recognized as a “meaningful banking community” in state law, best defines the “section of the country” for the purposes of evaluating the merger).

21. Michael T. Sheehan, *Irving Bank Corp. v. Board of Governors: Recognition of the Submarket Approach in Bank Merger*, 9 ANN. REV. BANKING L. 677, 702 (1989) (quoting and citing Loevinger & Lehr, *A New Look at Bank Mergers*, 4 BANKING EXP. REP. 1, 13 (1985) (citations omitted)). (brackets in original).

22. See Office of the Comptroller of the Currency, About the OCC, <http://www.occ.treas.gov/aboutocc.htm> (“The Office of the Comptroller of the Currency (OCC) charters, regulates, and supervises all national banks. It also supervises the federal branches and agencies of foreign banks.”).

23. See Eugene A. Ludwig, Comptroller of the Currency, Remarks Before the OCC Antitrust Conference (Nov. 16, 1995), available at <http://www.occ.treas.gov/ftp/release/95-127.txt> (“[N]onbank competitors . . . enjoyed relatively unrestrained access to the market and could develop specialized expertise in one or two areas of the financial services universe.”).

24. See *id.*

adoption of the cluster approach in *Philadelphia National Bank*.²⁵ Clarke emphasized that “[w]hile banking functions continue to be essential to our economy, [commercial] banks themselves are not.”²⁶

William Baxter, President Reagan’s first nominee to head the DOJ’s Antitrust Division, was a vocal proponent of a new antitrust enforcement paradigm.²⁷ He believed that a continuing process was necessary in order to accurately appraise “how our economy works, [and] how enterprises in different kinds of markets interact with one another,” and appropriate antitrust policy should be “based on whatever it is we know at any particular moment about the economics of industrial organization.”²⁸ In practicality, some of the government agencies which review bank merger proposals do not conform their antitrust competitive banking analysis to the dictates mandated by *Philadelphia National Bank*. However, adherence to the traditional geographic market and product market definitions mandated by that decision has endured. The Federal Trade Commission recognizes that antitrust policy and laws are works in progress.²⁹

The Board of Governors of the Federal Reserve System has acknowledged that since the 1970s many changes have occurred in banking technology, market dynamics, regulations and the economy, and these changes “have raised questions regarding the traditional definition of locally limited commercial banking.”³⁰ The Board has also

25. Sheehan, *supra* note 21, at 701 (citing *A Clear Message: Expand Banks’ Product Line*, ABA BANKING J., 52 (Dec. 1987)).

26. *Id.* at 700-01 (quoting *A Clear Message: Expand Banks’ Product Line*, ABA BANKING J., 52 (Dec. 1987)).

27. See Thomas B. Leary, FTC, Guidelines for Merger Remedies: Prospects and Principles, Remarks at the Joint U.S./E.U. Conference (Jan. 17, 2002), available at <http://www.ftc.gov/speeches/leary/learyuseu.shtm>.

28. *Id.*

29. See Debra A. Valentine, FTC, Assistant Dir. for Int’l Antitrust, The Evolution of U.S. Merger Law, Remarks at the INDECOPI Conference (Aug. 13, 1996), available at <http://www.ftc.gov/speeches/other/dvperumerg.shtm> (“At its best, antitrust is a pragmatic tool designed to achieve important social and economic goals. In U.S. merger policy, those goals have not always been constant, or consistent with each other, and our enforcement tools have not always been perfectly adapted to their tasks.”).

30. Supporting Statement for the Survey to Obtain Information on the Relevant Market in Individual Merger Cases (FR 2060; OMB No. 7100-0232), at 2, available at http://www.federalreserve.gov/reportforms/formsreview/FR2060_20070530_omb.pdf [hereinafter Supporting Statement].

Since the [*Connecticut National Bank*] decision, numerous changes in bank regulation, technology, and the economy have raised questions regarding the

noted that large firms have access to national and sometimes international markets for their financial services, and that some U.S. banks compete with foreign banks (and the domestic and foreign capital market) for large business customers.³¹

The Supreme Court has not “repudiated the pillars of its merger jurisprudence of the 1960s.”³² The Court recognized, in a 1986 case, the changing dynamics of the domestic banking markets and the interrelationship between commerce and banking,³³ but has not yet exercised jurisdiction over any cases that would permit the Court to begin fashioning an updated analytical framework for bank merger regulatory review. The competitive analysis conducted by the federal banking agencies and the DOJ should not be based upon the outdated localized geographic concept that was mandated by *Philadelphia National Bank* almost a half-century ago, nor should the regulatory analysis proceed under the presumption that commercial banks remain unique because of their cluster of products and services. Courts and banking regulator should craft a competitive effect analysis that accounts for the changing financial environment, considers the realistic geographic competition, and considers the range of services and

traditional definition of locally limited commercial banking. The most notable changes are: [] thrift institutions are now permitted to offer the majority of banking products, including transaction accounts and commercial loans, [] nondepository institutions offer various financial services, [] securitization and loan sales have increased, and [] electronic technology has increased the potential for very quick delivery of financial services to final users, including small businesses and consumers.

Id. at 2.

31. *See id.*

32. William E. Kovacic, Gen. Counsel, Fed. Trade Comm’n, Toward a Domestic Competition Network, Address Before the American Enterprise Institute Conference on “The New Antitrust Paradox: Policy, Proliferation in the Global Economy” (Apr. 21, 2003), at 4, *available at* <http://www.ftc.gov/speeches/other/040421domesticcomp.pdf>.

33. *See* Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 363-64 (1986).

This case is about so-called ‘nonbank banks’- institutions that offer services similar to those of banks but which until recently were not under Board regulation because they conducted their business so as to place themselves arguably outside the narrow definition of ‘bank’ found in § 2(c) of the Act. Many nonbank banks, for example, offer customers NOW (negotiable order of withdrawal) accounts which function like conventional checking accounts but because of prior notice provisions do not technically give the depositor a ‘legal right to withdraw on demand.’ Others offer conventional checking accounts, but avoid classification as ‘banks’ by limiting their extension of commercial credit to the purchase of money market instruments such as certificates of deposit and commercial paper.

Id. (citations omitted).

products offered by competitors in the context of the state of the domestic economy at the time of the proposed banking combination.

The authors contend that the local market analysis established by *Philadelphia National Bank* is no longer an appropriate measure of anticompetitive effects of proposed banking combinations. While it remains among the worthy metrics for the evaluation of market concentration, its exclusive use is no longer reliable. Moreover, the cluster of services and products once delineated as the “line of commerce” do not accurately determine the competitive effects of a bank merger in today’s market for financial products and services. The authors believe that U.S. courts and regulatory agencies should consider the utilization of a competitive effect analysis which takes into account the changing financial environment, realistically contemplates geographic competition, and accounts for the growing range of service and products offered by competitors, from bank and non-bank entities alike.

II. AN OVERVIEW OF RELEVANT BANK CONSOLIDATION AND STATISTICS

The United States has “more banks per capita . . . than in any other developed economy,” and a majority of these banks are community banks.³⁴ Between 1980 and 2003, the number of banks was halved, from 16,000 to approximately 8000.³⁵ During the 1990s, an average of over 500 bank mergers occurred annually, up from roughly 345 per year during the 1980s.³⁶ The number of operating banks in the U.S. declined by some 30% since 1990 during this consolidation period.³⁷ As of 2006,

34. Robert DeYoung et al., *Whither the Community Bank? Relationship Finance in the Information Age*, 178 CHI. FED. LETTER (Fed. Reserve Bank of Chi., Chicago, Ill.), June 2002, available at www.chicagofed.org/publications/fedletter/2002/cfljune2002_178.pdf. Community banks are “identifiable by their small size, their limited geographic reach, and their traditional array of banking services.” *Id.*; “[N]ine out of every ten bank mergers have eliminated a community bank.” *Id.*

35. Steven J. Pilloff, Fed. Reserve Sys., *Staff Study 176: Bank Merger Activity in the United States, 1994-2003*, at 1 (2004), available at <http://www.federalreserve.gov/pubs/staffstudies/2000-present/ss176.pdf>.

36. Brewer III et al., *supra* note 15, at 2.

37. *Id.* For a detailed statistical economic analysis of banking merger data, see Bronwyn, Kathleen Richards, *The Economics and Law of a Semi-Regulated Industry: The Philadelphia National Bank Case (1981)* (unpublished Ph.D. dissertation, Columbia University) (on file with Authors); see also Samuel Richardson Reid, *Legislation, Regulation, Antitrust, and Bank Mergers*, 92 BANKING L.J. 6 (1975).

there were some “7900 separately insured banking entities operating in the United States.”³⁸

Domestic banks remain relatively small compared to their overseas competitors. For example, only one of the twenty largest banking companies is located in the United States, with the others dispersed in Japan (10), France (4), Germany (2), United Kingdom (1), and Switzerland (1).³⁹ However, Chairman and CEO of JPMorgan Chase, Jamie Dimon, “expects the current market turmoil to unleash a wave of bank mergers” and that these mergers will be “big.”⁴⁰ This prediction is based upon the necessity for companies to reorganize and the need for more capital, long-term financing, and access to goods, which generally occurs after a crisis—not during the crisis.⁴¹ Among the biggest of these mergers proposed in the shadow of the subprime fallout, was Dimon’s JPMorgan Chase bidding \$2 per share to acquire investment bank and broker Bear Stearns & Co. with the support of, and “prodding” by, the Federal Reserve, including as much as \$30 billion in government backing of distressed assets.⁴²

Fewer banks controlling an increasingly higher concentration of domestic banking assets has been the trend in the U.S. for decades.⁴³ In

There were less than 100 bank mergers per year from 1940 through 1951. From that date forward the pace quickened. During the entire decade of the 1950s, the Comptroller of the Currency approved 904 mergers involving national banks and 735 mergers were approved by the various state regulators. In the latter half of that decade there were 883 approved mergers involving resources amounting to \$16.6 billion.

Id. at 6-7.

38. United States Delegation, Working Party No. 2, Organisation for Economic Co-operation and Development (OECD), *Roundtable on Competition and Regulation in Retail Banking*, at 2, DAF/COMP/WP2/WD(2006)60, available at http://www.ftc.gov/bc/international/docs/Banking_US.pdf [hereinafter *Roundtable*].

39. See Terry Calvani et al., *Antitrust Analysis of Bank Mergers: A Survey of Recent Developments*, n.2 (Dec. 1, 1996), available at <http://library.findlaw.com/1996/Dec/1/129882.htm>.

40. John O’Donnell, *JP Morgan Heads Predicts Wave of Bank Mergers*, REUTERS, Dec. 7, 2007, available at <http://uk.reuters.com/article/bankingfinancial-SP/idUKL076221020071207?feedType=RSS&feedName=bankingfinancial-SP>.

41. See *id.*

42. Robin Sidel et al., *J.P. Morgan Buys Bear in Fire Sale, As Fed Widens Credit to Avert Crisis*, WALL ST. J., Mar. 17, 2008, at A1, available at http://online.wsj.com/article/SB120569598608739825.html?mod=hpp_us_inside_today.

43. See 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, 302 (1995) “Total domestic banking assets held by the largest 100 banking organizations increased from 50.2% in

2006 the DOJ screened 1048 bank mergers, of which 592 required competitive analysis.⁴⁴ By contrast, the DOJ screened 1850 bank mergers and required competitive analysis of 1197 (approximately 64%) of these bank merger proposals in 1997. A majority of the nation's banking customers have experienced at least one merger where their accounts were switched to another bank.⁴⁵

The consolidation trend is not limited to banks themselves, but extends to the banking advocacy associations as well. America's Community Bankers and American Bankers Association merged on December 1, 2007.⁴⁶ The now unified Association, which retained the American Bankers Association name,⁴⁷ represents a majority of the banking industry and comprises more than 95% of the domestic banking industry's \$12.7 trillion in assets.⁴⁸ The Association boasts membership comprised of "large money-center banks and community banks," and a majority of its constituents are banks with less than \$125 million in assets.⁴⁹

Various theories exist regarding the trend of increased banking consolidation via mergers and similar transactions. According to a former FTC commissioner, some of the more notable contributing causes to this acquisition trend include "deregulation, competition, the desire to improve bank capital ratios, the S&L crisis, [and] a growing

1977 to 61.5% in 1987." *Id.* at 303 (citation omitted).

44. U.S. Dep't of Justice, Antitrust Div., Workload Statistics, Fiscal Year 1998-2007 (2008), *available at* <http://www.usdoj.gov/atr/public/workstats.htm>.

45. *See* Bank Mergers Provide Opportunity for Phishing, NETCRAFT.COM, 2007, http://news.netcraft.com/archives/2005/06/09/bank_mergers_provide_opportunity_for_phishing.html.

46. Press Release, Am. Bankers Ass'n, America's Community Bankers Merger Takes Effect (Dec. 3, 2007), *available at* http://acbankers.org/news_center/aba_american_community_bankers_merger_takes_effect [hereinafter America's Community Bankers Merger Takes Effect].

47. *See* Press Release, Am. Bankers Ass'n, America's Community Bankers Board Unanimously Approves Merger Plan with ABA (Sept. 14, 2007), *available at* http://www.acbankers.org/news_center/americas_community_bankers_board_unanimously_approves_merger_plan_with_aba/.

ACB and the ABA are the nation's two leading advocates for banks of all charter types and sizes. When combined, the new organization's members will represent 95% of the assets of the nation's \$11.5 trillion banking industry. The organization will be the premier bank trade association in Washington and the nation.

Id.

48. America's Community Bankers Merger Takes Effect, *supra* note 46.

49. *Id.*

perception that we have too many banks.”⁵⁰ A Federal Reserve economist remarked that the Federal Deposit Insurance Corporation Improvement Act of 1991 mandates that “regulators . . . promptly close a depository institution when their capital falls below predetermined quantitative standards” and the Act may motivate banking organizations to become larger so that the “FDIC will cover 100 [%] of their deposits.”⁵¹

A 2004 Federal Reserve study identified “the most important factor” facilitating bank consolidation as “the gradual easing of geographic restrictions on banks.”⁵² “Widespread deregulation of geographic limits started in the mid-1970s and culminated with the Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994[;] [t]he easing enabled banking organizations to increase the size and reach of their operations by making acquisitions outside of their markets, including in other states.”⁵³

The DOJ attributed the trend of swelling bank mergers in the early 1990s to “the fragmented way in which the law has required banks to operate: confining them to their home states, and in some cases, to their home counties or cities.”⁵⁴ Banks were prevented from expanding internally, but were generally able to expand into other geographic markets, such as across state lines,⁵⁵ by acquiring banks in target markets.⁵⁶ The DOJ, in response to the hike in merger activity, assessed

50. Calvani et al., *supra* note 39.

51. Brewer III et al., *supra* note 15, at 2-3.

52. Pilloff, *supra* note 35, at 1.

53. *Id.*

54. Robert E. Litan, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Address before the Antitrust Section of the ABA: Antitrust Assessment of Bank Mergers (Apr. 6, 1994), *available at* <http://www.usdoj.gov/atr/public/speeches/litan.htm> The reason for the low challenge rate is because:

In many cases, the banks involved in these mergers have not competed with each other and thus have not posed antitrust risks. In the overwhelming majority of the others where the banks have competed against each other, it was clear that the market would continue to be competitive even after the merger.

Id.

55. *See* Brewer III et al., *supra* note 15, at 2 (stating that the Riegle-Neal Act of 1994 permitted banks to “branch interstate by consolidating existing out-of-state bank subsidiaries or by acquiring banks or individual branches through mergers and acquisitions”). In 1995, the Riegle-Neal Act permitted bank holding companies to acquire banks in any state, and in 1997, the Riegle-Neal Act enabled banks located in different states to merge. *Id.*

56. *See* Litan, *supra* note 54; *see also* David C. Wheelock & Paul W. Wilson,

approximately 2000 bank merger proposals each year in the early 1990s.⁵⁷ The enactment of the Gramm-Leach-Bliley Act of 1999 facilitated new types of banking combinations,⁵⁸ permitting “banks to merge with securities firms and insurance companies within financial holding companies.”⁵⁹

The vast majority (94% of 3313 bank mergers) effected between 1994 and 2003 involved combinations in which the target bank operated exclusively in a single state.⁶⁰ Most of the smaller bank mergers of that era were “fairly limited,” at least in terms of the geographical market scope, which together “tended to account for a relatively small share of the assets, deposits, and offices that were purchased.”⁶¹

Consolidation in U.S. Banking: Which Banks Engage in Mergers (Fed. Reserve Bank of St. Louis, Working Paper Series, Dec. 2002), available at <http://research.stlouisfed.org/wp/2001/2001-003.pdf>. Prior to 1997, when the Riegle-Neal Act was amended, the ability to acquire a domestic bank and operate it as a branch across state lines (“branching”), with few exceptions, was not permitted. *See id.* The Riegle-Neal Amendment Act of 1997 was enacted in 1997. *See* Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238 (1997); *see also* Pa. Ass’n of Cmty. Bankers, Bank Geographic Structure, available at http://www.pacb.org/banks_and_banking/geography.html (“The Riegle-Neal Interstate Banking and Branching Efficiency Act allows national banks to operate branches across state lines after June 1, 1997.”).

57. *See* Litan, *supra* note 54.

58. Gramm-Leach-Bliley Act, Pub. L. No. 106-102 (1999). The Financial Modernization Act of 1999 is also known as the Gramm-Leach-Bliley Act.

59. Brewer III et al., *supra* note 15, at 2; *see also* Blair, *supra* note 9, at 97-100 (“After repeated congressional attempts to address financial modernization, GLB was passed in 1999, effectively acknowledging and extending the degree to which banking organizations were permitted to engage in nonbank financial activities.”) *Id.* at 100; *see also* Robert DeYoung et al., *The Past, Present, and Probable Future for Community Banks* 13 (Fed. Reserve Bank of Chi., Working Paper No. 2003-14, 2003), available at <http://www.chicagofed.org/publications/workingpapers/papers/wp2003-14.pdf>.

Feeling pressure from a series of rulings by the Office of the Comptroller of the Currency that granted increased product powers to national banks, and an announced merger between the largest bank in the U.S. and one of the world’s largest insurance companies (CitiBank and Travelers), Congress followed nationwide geographic deregulation with broad-based deregulation of banking powers. Specifically, in 1999 Congress passed the Graham-Leach-Bliley Act which effectively repealed the Glass-Steagall Act.

These congressional acts ratified the decades-long deregulation movement, and as such they marked the culmination of story lines that began in the 1970s and 1980s.

Id.

60. *See* Pilloff, *supra* note 35.

61. *Id.* at 21-22.

Which banks are typical takeover targets? The most likely to be absorbed have been banks with low capital ratios and those that are cost-efficient operators.⁶² Larger national banks also have a greater than average likelihood of engaging in mergers.⁶³ The acquiring bank tends to be a large bank, often one which has experienced recent rapid growth, “lower average capital ratios,” and “higher ratios of total loans to assets.”⁶⁴

A slim minority of proposed bank mergers are denied according to a review of the Board’s Orders on Banking Applications.⁶⁵ During the ten year period from 1997 to 2007, there was apparently only one denial of a merger application,⁶⁶ and this denial did not appear to be based upon competitive or public interest factors.⁶⁷ The Board appears to have approved all applications for acquisitions, purchases or mergers brought pursuant to the Bank Merger Act during the same period.⁶⁸ Out of the several hundred bank merger and acquisition applications reviewed by the Federal Reserve each year, as required by law, fewer than a dozen

62. See Wheelock & Wilson, *supra* note 56, at 3 (citing D.C. Wheelock & P.W. Wilson, *Why Do Banks Disappear? The Determinants of U.S. Bank Failures and Acquisitions*, REV. OF ECON. & STATISTICS 82, 127-38 (2000)); see also *id.* at 15 (“One can reasonably expect that the more concentrated the market in which an acquiring bank is located, the less likely it will absorb other banks.”).

63. *Id.* at 15-16.

64. *Id.* at 18; see also Brewer III et al., *supra* note 15, at 6 (noting that where a target bank operates in a less competitive market, the price of the acquisition will increase).

65. For a list of the Board of Governors’ Orders on Banking Applications, visit <http://www.federalreserve.gov/boarddocs/press/orders/2007/> and click the link for each year to view the orders by year (last visited Mar. 30, 2008).

66. See Fed. Reserve Sys., 2002 Orders on Banking Applications, available at <http://www.federalreserve.gov/boarddocs/press/orders/2002/> (last visited Mar. 30, 2008). The authors reviewed each merger application from the period of 1996 to 2007, by visiting <http://www.federalreserve.gov/boarddocs/press/orders/2007/> and click the link for each year to view the orders by year. There is the possibility, however, that banks voluntarily withdraw their merger applications prior to a denial of their proposal, and this could skew the statistics.

67. See, e.g., Illini Corp., 89 Fed. Res. Bull. 85, 86 (2003), available at <http://www.federalreserve.gov/boarddocs/press/orders/2002/20021223/attachment.pdf> (denying the acquisition).

68. To see each order for applications filed under the Bank Merger Act during the 1997-2007 period, visit <http://www.federalreserve.gov/boarddocs/legaldevelopments/ordsother/1997.htm>, click the link for each year, and view under the heading “Bank Merger Act.” The Bank Merger Act is codified as 12 U.S.C. § 1828(c)(4) (2007).

evaluated by the Federal Reserve raise any potentially serious anti-competitive problems that might jeopardize the application.⁶⁹

Statistics and examples of approvals and denials can be misleading, however. It may appear that the current bank merger review process has become something of a bureaucratic “rubber stamp” where some 99.5% of all bank merger applications were ultimately approved between 1996 and 2007.⁷⁰ Yet, banks contemplating a merger or acquisition will often remedy any regulatory issues which may bar approval, or withdraw their application, which a skewed view of the statistics would not reflect.⁷¹

Although it is not yet clear what will be the end result of the subprime lending market’s 2008 collapse, an increased pace of bank merger activity is a reasonable expectation, especially combinations involving community banks located in hard hit real estate markets. According to at least one sector analyst, “you’re going to see companies merge to survive.”⁷² A cottage industry has even developed recently that

69. See Supporting Statement, *supra* note 30.

70. See Litan, *supra* note 54 (“For the period 1989 to 1994, the DOJ only conducted a full investigation into forty-three (0.5% of all proposed transactions) of the roughly 9000 applications filed with the relevant supervisory banking authorities, and challenged only four (0.05%) of those forty-three, requiring divestiture of branches.”).

71. Brewer III et al., *supra* note 15, at 6, 8. For example, Homestone Mortgage Inc., one of Washington State’s largest mortgage brokers, applied to the FDIC for a bank charter. When the FDIC recommended that Homestone Mortgage make changes to the bank’s initial business plan (recommending a broadening of some of its lending areas), Homestone withdrew its application. Homestone had hoped to “transition[] from a mortgage firm to a bank,” thereby expanding its “footprint and help it tap into the Puget Sound region’s booming banking business.” Apparently Washington state regulators are familiar with this sort of “transitioning,” because banking rules make it fairly easy for a mortgage company to convert itself into a bank. See Justin Matlick, *Mortgage Firm Withdraws Application to Open Bank*, PUGET SOUND BUS. J., May 25, 2007, available at http://seattle.bizjournals.com/seattle/stories/2007/05/28/story11.html?f=et143&b=1180324800^1467880&hbx=e_vert; see also William Jason, *Sterling Savings Bank, North Valley Bank Merger Delayed*, NORTH BAY BUS. J., Oct. 26, 2007, available at <http://www.northbaybusinessjournal.com/article/20071026/BUSINESSJOURNAL/71026020/1209>. Sterling Financial Corp. recently submitted a proposal to the FDIC seeking to merge with North Valley Bancorp, but the delayed regulatory approval process took “longer-than-expected” and the firm sought additional time to comply with FDIC requirements.

72. See Kevin Duffy, *Local Banks Reeling from Housing Downturn*, ATLANTA J. CONST., Apr. 13, 2008, available at http://www.ajc.com/services/content/business/stories/2008/04/11/bankhangover_0413.html.

Banks with soaring loan amounts that were at least 30 days past due at year’s end include First Georgia Community Bank in Jackson, up 4,061 percent; Neighborhood

performs “early triage” on behalf of prospective bank merger participants in order to improve the approval chances of related merger applications.⁷³ Those who seek to predict the outcome of bank merger proposals, and the resultant regulatory scrutiny, would be well served to remain mindful of the relevant doctrinal approaches that preceded this era.

III. ORIGINS OF U.S. BANKING AND ANTITRUST LAW—BRIEF OVERVIEW

[T]here can be no single, consistent sketch of the developments in banking law in the period under review. Only the perspective that comes when time provides the proper spacing will reveal whether the storm or the quiet was the theme of the picture, or whether it was all just a happening.⁷⁴

The Sherman Act, passed on July 2, 1890, “forbids mergers effecting an unreasonable restraint of trade.”⁷⁵ The Clayton Act, enacted in 1914, “prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired companies, or tend to create a monopoly in any line of commerce.”⁷⁶

In 1950, the Cellar-Kefauver Act amended the Clayton Act. Cellar-Kefauver, viewed as the beginning of the “modern era of merger control,”⁷⁷ broadened the reach of section 7 of the Clayton Act. The

Community Bank in Newnan, up 10,097 percent; and FirstBank Financial Services in McDonough, up 3,072 percent. The list goes on.

“You’re going to see companies fail, you’re going to see companies merge to survive,” said Christopher Marinac, an analyst at FIG Partners in Atlanta, a bank research firm.

Id.

73. See Wachtell, Lipton, Rosen & Katz, *Financial Institutions M&A 2007: Continued Rich Diversity in an Active M&A Market an Annual Review of Leading Developments*, 1638 PLI/CORP 209, 737-78 (2007).

74. John J. Brennan, *Developments in Banking Law – 1964-1965*, 83 BANKING L.J. 189 (1966).

75. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 354-55 (1963) (citations omitted).

76. *Brown Shoe Co. v. United States*, 370 U.S. 294, 312-13 (1962).

77. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 433 n.184 (2003) (“Brown Shoe Co. v. United States, 370 U.S. 294 (1962), a case DOJ initiated in the 1950s, supplied the

1950 legislation “eliminated the artificial distinction between acquisitions of assets and acquisitions of stock,”⁷⁸ and removed the perception that there was a “rising tide of economic concentration in the American economy”⁷⁹ [and] . . . that increased economic concentration might threaten other fundamental values of a non-economic nature.”⁸⁰ These changes were the impetus for this amendment.⁸¹ The objective of section 7 of the Clayton Act is to prohibit only those acquisitions that may allow the combined entities to exercise market power by raising prices and restricting the availability of a product or service to customers.”⁸² “[T]he Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act.”⁸³

Prior to the enactment of the Bank Holding Company Act in 1956 (“BHCA”),⁸⁴ bank holding companies were not subject to existing regulatory restrictions that otherwise prevented banks from blending banking with commerce.⁸⁵ Further, non financial companies, such as

Supreme Court’s first interpretation of the 1950 statute.”); *see also* Cellar-Kefauver Act of 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)). This Act amended the Clayton Act. *See Brown Shoe Co.*, 370 U.S. at 311 n.18.

78. Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 107 (2002).

79. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 260 (2001) (quoting *Brown Shoe Co.*, 370 U.S. at 315).

80. *Id.* (citation and quotation omitted).

81. *Id.* The Clayton Act was again amended in 1976. Section 7A of the Act, known as the Hart-Scott-Rodino Act, requires the relevant regulatory agency to give prior notification of large merger proposals to the U.S. DOJ. *See* Clayton (Hart-Scott Rodino) Act § 7, 15 U.S.C. § 18a (1976) (amended 2001).

82. *FTC v. Foster*, No. Civ. 07-352 JBACT, 2007 WL 1793441, at *51 (D. N.M. May 29, 2007) (citations omitted).

83. *Id.*

84. 12 U.S.C. § 1841 *et seq.* (2006); *see also* Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 365-66 (1986) (quoting 12 U.S.C. § 1841(c)) (“Since 1970 the statute [Bank Holding Company Act] has provided that a bank is any institution that ‘(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.’”).

85. *See* Carl Felsenfeld, *The Bank Holding Company Act: Has It Lived Its Life?*, 38 VILLANOVA L. REV. 1, 34-86 (1993) [hereinafter Felsenfeld, *The Bank Holding Company Act*]; *see also* Christian Johnson & George G. Kaufman, *A Bank By Any Other Name . . .*, 4Q/2007 ECONOMIC PERSPECTIVES (Fed. Reserve Bank of Chi.,

Ford Motors and Sears, the titans of traditional “commerce,” openly operated banks.⁸⁶ Concerns mounted in the 1950s that combinations such as these might eventually result in a disproportionate concentration of economic and social power, and served as a catalyst for promulgation of the Bank Holding Company Act of 1956 and its 1970 amendment.⁸⁷ The Bank Holding Company Act prohibits companies which own banks from acquiring banks across state lines and disallows these companies from partaking in “activities that are not closely related to banking.”⁸⁸

The Bank Holding Company Act “vests broad regulatory authority in the [Federal Reserve] Board over bank holding companies ‘to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit,’”⁸⁹ and “authorizes the Board to regulate ‘any company which has control over

Chicago, Ill.), at 44, *available at* http://www.chicagofed.org/publications/economicperspectives/ep_4qtr2007_part3_johnson_etal.pdf.

The mixing of banking and commerce in ‘universal’ banks, as exists in many countries, has long been controversial in U.S. banking history. Most state charters for banks and the federal charter for national banks limit the activities of banks to accepting deposits and making loans, but permit other services viewed as incidental to banking. This was generally interpreted by regulators as prohibiting the banks from engaging in some financial activities, such as insurance underwriting and real estate brokerage, and all nonfinancial activities. Until the enactment of the BHCA in 1956, these limitations were not generally applied to bank holding companies, so that commercial firms could own banks.

Id.

86. *See id.*

Ford Motors and Sears, among other large nonfinancial firms, operated banks. But, as discussed earlier, growing fears in the 1950s that such combinations could lead both to excessive economic and social power and to potential conflicts of interest favoring sellers resulted in the enactment of the BHCA in 1956 and its expansion in 1970. Since then, the thrust of legislation, which often is preceded by changes in the marketplace, has reversed. The financial powers of BHCs have been expanded significantly, most recently in the Gramm–Leach–Bliley Act of 1999, and the nonfinancial powers have been expanded moderately. However, unlike ILCs, commercial banks may still not be owned by commercial firms.

Id.

87. *See id.*; *see also* Bank Holding Company Act Amendments of 1970 (Pub. L. No. 91-607, 84 Stat. 1760); Bank Holding Company Act of 1956 (Pub. L. No. 511; 70 Stat. 133).

88. Carol Conjura, Comment, *Independent Bankers Assoc. v. Canover: Nonbank Banks Are Not in the Business of Banking*, 35 AM. U.L. REV. 429, 430 (1986) (quoting 12 U.S.C. § 1843 (1982)).

89. *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 365 (1986) (quoting S. REP. No. 91-1084, at 24 (1970)).

any bank.”⁹⁰ The Bank Holding Company Act contains the same standards as those contained within section 2 of the Sherman Act⁹¹ and section 7 of the Clayton Act.⁹² The Bank Holding Company Act has redefined banks and bank holding companies several times.⁹³

It is evident from this chronology of the evolution of the definition of both ‘bank’ and ‘bank holding company’ for regulatory purposes that the legal definition at any moment in time reflects the pressing public concerns of the time. As the concerns changed, so frequently did the definitions.⁹⁴

The definitional evolution of “bank” ensures that prevention of excessive economic concentration in banking, one of primary purposes of the Bank Holding Company Act, is accomplished.⁹⁵

90. *Dimension Fin. Corp.*, 474 U.S. at 365 (quoting 12 U.S.C. § 1841(a)(1)).

91. 15 U.S.C. § 2 (2007).

92. *Id.* § 18; *see also Dimension Fin. Corp.*, 474 U.S. at 368-69.

[The Bank Holding Company Act] provides that, even if an institution accepts deposits that the depositor has a legal right to withdraw on demand, the institution is not a bank unless it ‘engages in the business of making commercial loans.’ Under Regulation Y, ‘commercial loan’ means ‘any loan other than a loan to an individual for personal, family, household, or charitable purposes,’ including ‘the purchase of retail installment loans or commercial paper, certificates of deposit, bankers’ acceptances, and similar money market instruments.’

Id. (citations omitted).

93. *See Johnson & Kaufman, supra* note 85, at 39, table 1 (In 1956 the definition of bank was “[a]ny national or state-chartered commercial, savings, or trust bank.” In 1966 the definition was narrowed to “any institution that accepts deposits that the depositor has a legal right to withdraw on demand.” In 1970 it was further narrowed to only include “[a]ny institution that both accepts demand deposits and makes business loans.” In 1987 the definition of banking was again changed to “[a]ll banks insured by the FDIC except thrifts, credit cards banks, and industrial loan companies and banks.”); *see also id.* at 39, table 2. In 1970, Congress further narrowed the definition of “bank” to include only those domestic institutions ““which 1) accepts deposits that the depositor has a legal right to withdraw on demand and 2) engages in the business of making commercial loans.”” *Id.* at 40 (quoting Bank Holding Company Act of 1970 (Public Law 91-607) Sect. 2(c), Dec. 31, 1970, 84 Stat. 1760. In *Dimension Fin. Corp.*, the Federal Reserve attempted to change the definition of “banks” within the Bank Holding Company Act; however the Supreme Court did not permit the change. *See Dimension Fin. Corp.*, 474 U.S. at 365-69.

94. Johnson & Kaufman, *supra* note 85, at 41. The Federal Reserve Board, in 1984, amended Regulation Y to clarify the Act’s definition of bank. *See Dimension Fin. Corp.*, 474 U.S. at 364.

95. Johnson & Kaufman, *supra* note 85, at 39.

A. A Tide Not Stemmed

During the five years from 1955 to 1960, legislation was introduced in response to the “apparently accelerating trend toward concentration in the commercial banking system in this country, a trend which existing laws were evidently ill-suited to control.”⁹⁶ Both the Bank Holding Company Act of 1956⁹⁷ and the Bank Merger Act of 1960⁹⁸ were promulgated during this period. The Bank Merger Act of 1960, while augmenting the regulatory agencies’ bank merger review powers,⁹⁹ did little to slow the merger wave.¹⁰⁰ Criticism of the “permissive approach” by bank regulators, who in the early 1960s approved “a substantial majority” of merger proposals, led to *Philadelphia National Bank*, the first court action challenging a proposed and approved merger.¹⁰¹ Domestic bank merger analysis was henceforth based on a new animating set of principles.

The Bank Merger Act of 1960 required bank regulators to evaluate competitive effects prior to approving a proposed bank merger.¹⁰²

96. United States v. Phila. Nat’l Bank, 374 U.S. 321, 373 (1963) (Harlan, J., dissenting) (citing Wemple & Cutler, *The Federal Bank Merger Law and the Antitrust Laws*, 16 BUS. LAW. 994, 995 (1961). Many of the bills are summarized in Funk, *Antitrust Legislation Affecting Bank Mergers*, 75 BANKING L.J. 369 (1958).

97. 12 U.S.C. § 1841. The Bank Holding Company Act of 1956 empowered Federal bank regulators, in part, to restrict anticompetitive mergers. See 12 U.S.C. § 1841; see also SIFMA Primer on Securities – Bank Holding Company Act of 1956, http://www.sifma.org/legislative/bank_holding_company_act_of_19.html (last visited Mar. 30, 2008).

The Bank Holding Company Act of 1956 was implemented in response to banks forming bank holding companies in order to own both banking and non-banking businesses. This Act, among other things, generally prohibited a bank holding company from engaging in most non-banking activities or acquiring voting securities of certain companies that are not banks.

Id.; see also Felsenfeld, *The Bank Holding Company Act*, *supra* note 85.

98. 12 U.S.C. § 1828 (2007).

99. *Id.* § 1828(c)(4); see also Ludwig, *supra* note 23 (“In the banking area, the Bank Holding Company Act of 1956 and the Bank Merger Act of 1960 gave federal bank regulatory agencies power to restrict anticompetitive mergers.”).

100. Reid, *supra* note 37, at 11.

101. See *id.* at 8-9.

102. See 12 U.S.C. § 1828(c)(4) (1982); see also Ralph P. DeSanto, *Product Expansion in the Banking Industry: An Analysis and Revision of Section 4(c)(8) of the Bank Holding Company Act*, 53 FORDHAM L. REV. 1127, 1127 n.137 (1985).

The Bank Merger Act of 1960 requires bank regulators to take into account competitive effects in the approval of bank mergers. The Bank Merger Act of 1966 required bank regulators to disapprove mergers that violated § 7 of the Clayton Anti-

Supervisory banking agencies were required by statute to employ a fact-specific test that contemplated a variety of factors, including:

[T]he financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, whether the bank's corporate powers are consistent with the purposes of the federal deposit insurance act, and the effect of the transaction on competition (including any tendency toward monopoly).¹⁰³

Upon due consideration of the preceding factors, the relevant agency could approve only those proposed mergers which it determined were consistent with the "public interest."¹⁰⁴ The examining agency was also required to request a report detailing an evaluation of the competitive factors from the U.S. Attorney General, as well as similar reports from the non-reviewing agencies (Federal Deposit Insurance

Trust Act, unless '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.' Bank regulatory decisions applying more stringent standards than § 7 have been reversed.

Id. (citations omitted); *see also* Fed. Reserve Bank of Chi., A Brief History of the Conference on Bank Structure & Competition (2007), available at http://www.chicagofed.org/news_and_conferences/conferences_and_events/2007_bsc_history.cfm.

103. H.R. REP. No. 86-1416 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1995 (S. 1062 is the bill which became the Bank Merger Act of 1960); *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 378 (1963) (The statutory test for the banking regulators is whether or not the merger proposal is in "the public interest," utilizing six banking factors and the impact of the merger on competition.).

104. H.R. REP. No. 86-1416 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1995; *see also* Stanley D. Waxberg & Stanley D. Robinson, *Chaos in Federal Regulation of Bank Mergers, A Need for Legislative Revision*, 82 BANKING L.J. 377, 379 (1965).

Thus, even if all four agencies see eye to eye on the antitrust issue -- let us suppose that they are unanimous that the merger will have adverse effects on competition -- the supervisory agency may, nevertheless, conclude that the transaction is in the public interest because one or more of the banking factors outweighs the antitrust consideration. For example, the agency may decide that the merger will solve an acute management succession problem at one of the banks by the infusion of new executive blood; or that it will lend financial stability to a bank with an erratic pattern of earnings and improve its prospects; or that it will provide important banking services in a community which does not presently enjoy them; or that it will enable the bank to meet the expanding credit needs of its customers by increasing its lending limit; and so on.

Id. at 380 (citations omitted).

Corporation (“FDIC”), Office of the Comptroller of the Currency (“OCC”), and the Federal Reserve).¹⁰⁵

Even if a proposed merger had the potential to adversely effect competition, the supervisory agency was authorized to find that a proposed merger was in the “public interest”—and therefore lawful under the 1960 Bank Merger Act—if the factor(s) detailed above outweighed antitrust competitive considerations.¹⁰⁶ Thus, even if a proposed combination might ultimately reduce banking competition, the transaction could still be approved if certain market benefits would arguably be realized from the proposed merger, because the proposed combination would be in the “public interest.”¹⁰⁷ For example, a planned merger might be approved if the combination would expand service to customers by way of increased lending limits;¹⁰⁸ or if the merger would bring financial stability to a target bank with inconsistent earnings;¹⁰⁹ or perhaps where a merger would bring needed banking services to an underserved community.¹¹⁰

After the enactment of the Bank Merger Act in 1960, regulatory agencies appeared to largely disregard the competitive factors in their review of merger applications and, in 1961, one year after the enactment of the Bank Merger Act, roughly \$6 billion in bank resources were involved in the mergers approved by regulators.¹¹¹ The DOJ entered the fray and began a period of judicial action in order to “correct this deficiency of regulatory discretion.”¹¹² It is believed by some, however,

105. See H.R. REP. No. 86-1416 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1995, at 2005-06; see also Waxberg & Robinson, *supra* note 104, at 378-79 (citing H.R. REP. No. 1416 (1960); S. REP. No. 196 (1959)) (The Bank Merger Act of 1960 authorized three banking agencies (FDIC, OCC, and Federal Reserve) to approve bank mergers.).

106. See Waxberg & Robinson, *supra* note 104, at 379.

107. *Id.* at 380.

108. See *id.* (citing 1963 FDIC Rep. Cas. No. 19; 1963 Fed. Reserve Rep. Cas. No. 29; 1963 Compt. Curr. Rep. at 216-17).

109. See *id.* (citing 1963 FDIC Rep. Cas. No. 1; 1963 Fed. Reserve Rep. Cas. No. 24; 1963 Compt. Curr. Rep. at 135).

110. See *id.* (citing 1963 FDIC Rep. Cas. No. 23; 1963 Fed. Reserve Rep. Cas. No. 30; 1963 Compt. Curr. Rep. at 129-30).

111. See Reid, *supra* note 37, at 8.

The opinions of the agencies appeared to concede little relevance to the oligopoly theory in these matters; rather, the focus was on the traditional concern of bank solvency and the assumed efficiency and other benefits of large banking institutions. The result was that the 1960 Act had little effect in curbing mergers.

Id.

112. *Id.* (citations omitted).

and apparently by the regulatory agencies prior to *Philadelphia National Bank*, that the Bank Merger Act of 1960 (with inferences drawn from legislative history) authorized regulatory agencies to approve bank mergers if “resulting benefits to the banking system more than offset any concomitant lessening of competition.”¹¹³ One thing is clear: “the 1960 Act had little effect in curbing mergers.”¹¹⁴ Consequently, a new era in banking antitrust analysis emerged, as the *Philadelphia National Bank* analysis became law.

There were few impediments to bank mergers in the 1960s and 1970s. Antitrust challenges brought by the Department of Justice, and the adverse DOJ opinions in merger reviews, did not slow the merger trend.¹¹⁵ There were 190 approved mergers one year after *Philadelphia National Bank*.¹¹⁶ Statistical review of early 1960s bank merger activity also suggests that the Bank Merger Act of 1960 was not entirely effective at reigning in anticompetitive mergers. During the five-year period between May 13, 1960 and May 12, 1965, the bank merger approval rate was 97%, with 859 mergers approved by the banking supervisory agencies, and a mere 28 merger proposals denied,¹¹⁷ although aggregate average annual mergers fell from 175 to roughly

The agencies approved a substantial majority of the merger applications which came before them; more significantly, they continued to approve horizontal mergers between large banks in major metropolitan areas such as Philadelphia, Chicago, and New York in the early 1960s. The result of this permissive approach by the bank regulatory agencies was the initiation of the first court action challenging a proposal and approved merger involving the Philadelphia National Bank and the Girard Trust Corn Exchange Bank during 1961.

Id.

113. Waxberg & Robinson, *supra* note 104, at 380. The approval of a bank merger by the supervising regulatory agency deemed in the public interest and whose benefits offset the reduction in competition, was:

[S]pecifically contemplated by the Congress that enacted the Bank Merger Act of 1960. The Senate Committee on Banking and Currency cited a number of examples ‘where the public interest would clearly require that the proposed merger should be approved even though a definite and substantial lessening of competition could be expected’ which is why ‘the committee concluded that the strict rule of the 1950 amendment of Section 7 of the Clayton Act was inappropriate to the field of banking.’ And the House Committee was ‘convinced the Senate’s approach is basically sound.’

Id. at 380-81 (citations omitted).

114. Reid, *supra* note 37, at 8. (citation omitted).

115. *See id.*

116. *See id.*

117. *Id.* at 11.

150.¹¹⁸ The substantial difference in banking antitrust policy between the DOJ and bank regulatory agencies was evident during this period. The DOJ found adverse anticompetitive effects in 494 (58%) of the 859 mergers approved by the regulatory agencies.¹¹⁹ In contrast to the statutory public interest standard employed by bank regulators, the Justice Department's market competition scrutiny involved a "more doctrinaire approach to the problem of competition than the agencies."¹²⁰ Less than 1% of these approved mergers, however, were ever actually challenged in court.¹²¹

The DOJ invariably denied bank merger proposals where the effect on competition was something greater than insignificant, employing a "more penetrating" antitrust inquiry than the banking regulatory agencies.¹²² The DOJ typically opposed a bank merger application if the proposed transaction enabled two (or more) local banks to better compete in a larger market area with larger rivals, because the merger effectively eliminated significant competition between these two smaller local banks.¹²³ In 1963, while using its "more penetrating" scrutiny, the

118. See Warren, Gorham & Lamont, Inc., *The 1966 Amendment to the Bank Merger Act*, 83 BANKING L.J. 753, 764 (1966) (citation omitted).

Furthermore, an appreciable decline is evidenced in the merger activity of the largest banks. While the banking agencies displayed a high rate of approvals, it is possible that many merger schemes never developed because of apprehension of administrative scrutiny by the banking agencies or the increasingly active Justice Department. Moreover, market concentration in the banking industry has apparently lessened since enactment of the Act. An appreciable increase in the number of new banks chartered has raised the net number of commercial banks from 13,486 in 1959 to 13,775 in 1964. In addition, there has been a significant increase averaging 1,000 per year in the number of additional branches.

Id. at 764 (citations omitted).

119. Reid, *supra* note 37, at 11.

120. Waxberg & Robinson, *supra* note 104, at 381.

121. Reid, *supra* note 37, at 11.

122. Waxberg & Robinson, *supra* note 104, at 381 (citation omitted).

Going beyond the question of what quantum of competition will be lost as a result of the merger, they [DOJ] also focus on the vigor of remaining competition—the variety of alternative sources for bank services and credit—in an effort to forecast the effect of the transaction in the market as a whole.

Id.

123. See *id.* at 382 (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963)). The DOJ position was apparently that a "gain to competition in one market cannot erase a loss in another," and if a bank merger would increase competition in one area where competition was already vigorous, the DOJ would oppose even slight increases in market concentration, because the concentrated status "bespeaks a lack of effective competition." *Id.* (citation omitted).

DOJ objected to roughly two-thirds of all proposed mergers that were otherwise approved by the relevant banking regulator.¹²⁴ For example, the OCC approved ninety-one bank mergers in 1963, and the DOJ took issue with sixty-four of these proposals under its anticompetitive effect policy.¹²⁵ The DOJ rejected proposed mergers approved by the Board by a similar margin, approving thirty-one merger proposals and finding injury to competition in twenty-two merger proposals. The DOJ similarly rejected a number of the FDIC's merger approvals—of thirty-one approved mergers, the DOJ voiced disapproval with seventeen mergers.¹²⁶ The DOJ may have been the lone government entity to not perceive the 1960 Bank Merger Act as overtly permissive policy. The differing antitrust methodologies between the DOJ and bank regulators, and the divergent results of the disparate analysis, was conspicuous.

B. Philadelphia National Bank and its Progeny

Incongruent approaches between supervisory banking agencies and the Justice Department led to a seachange in the review of proposed bank mergers.¹²⁷ One such interpretive difference, coupled with the “permissive approach” of bank regulators, sparked litigation that questioned the regulatory oversight of a proposed merger between Philadelphia National Bank and the Girard Trust Corn Exchange Bank.¹²⁸ Soon after the passage of the 1960 Bank Merger Act, the Comptroller of the Currency approved the merger of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank.¹²⁹ The U.S.

124. *See id.* (Where a potential bank combination could conceivably result in the “elimination of substantial competition between two banks,” the Justice Department would typically reject the merger proposal).

125. *See id.*

126. *See id.* (citation omitted).

127. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 373 (1963) (Harlan, J., dissenting).

During this period, [1955 to 1960] the Department of Justice and the federal banking agencies advocated divergent methods of dealing with the competitive aspects of bank mergers, the former urging the extension of [§] 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest.

Id. (citations omitted).

128. *See Reid, supra* note 37, at 9.

129. *See Walter E. May, Redefining the Product Market: Commercial Bank Mergers in the New Competitive Era*, 103 BANKING L.J. 124, 128 (1986).

Attorney General objected to the proposed merger, citing antitrust grounds, and sought to block the consummation of the combination, arguing that it violated both section 7 of the Clayton Act and section 1 of the Sherman Act.¹³⁰ A District Court approved the merger in 1962, but the U.S. Supreme Court reversed the decision “squarely—and solely—on an application of section 7 of the Clayton Act.”¹³¹ *United States v. Philadelphia National Bank*¹³² started a trend of local bank branch divestitures in order to obtain approval for proposed mergers, and ushered in the application of section 7 of the Clayton Act¹³³ and section 1 of the Sherman Act¹³⁴ to proposed bank mergers. Soon thereafter, in 1964, the Supreme Court in *United States v. First National Bank & Trust Company of Lexington*¹³⁵ “removed any doubt that the Sherman Act applied to bank mergers,” finding the “competitive impact” of the merger as the overriding factor.¹³⁶

During the period from 1964 to 1966, the Justice Department filed a host of lawsuits attacking bank mergers already approved by the relevant supervisory agency.¹³⁷ These lawsuits often resulted in court orders that

130. *See id.*; *see also* *United States v. Phila. Nat'l Bank*, 201 F. Supp. 348 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963).

131. *May, supra* note 129, at 129 (citing *Phila. Nat'l Bank*, 374 U.S. 321).

Philadelphia National Bank and, to a lesser extent, the *Lexington* decision establish that antitrust challenges to bank mergers are to be viewed in terms of the effects of those mergers on the product market known as commercial banking. In essence, the only competitors of commercial banks that those decisions recognize are other commercial banks. Savings and loan associations, credit unions, commercial finance companies, money market funds, and a host of other participants in the financial markets also occupied by commercial banks are to be ignored when the competitive impact of a bank merger is considered.

Id.

132. *Phila. Nat'l Bank*, 374 U.S. 321.

133. Clayton Act § 7, 15 U.S.C. § 18 (2000).

134. Sherman Act § 1, 15 U.S.C. § 1-7 (2000).

135. *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964); *see also* C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas and the Curse of the Curse of Bigness*, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=c_paul_rogers. In *Lexington*, Justice Douglas, writing for the majority, held that “one relevant market” was commercial banking, but “[b]ecause he determined that the merger was illegal with the market so defined, he avoided deciding whether trust department services constituted another relevant market.” *Id.* at 72.

136. Reid, *supra* note 37, at 9 (citing *Phila. Nat'l Bank*, 374 U.S. 321; *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665).

137. *See First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665; *Phila. Nat'l Bank*, 374 U.S. 321; *United States v. Mercantile Trust Co.*, 263 F. Supp. 340 (E.D. Mo.

appeared to detrimentally affect banks and the public; creeping uncertainty grew regarding the bank merger approval process. Banks subject to the court orders were required to “unscramble their affairs as a result of antitrust litigation subsequent to agency approvals of mergers.”¹³⁸ Intended to foster stability and predictability, antitrust laws as applied to banking only yielded borderline chaos for those seeking to perform mergers and acquisitions among banks.

Three years after promulgation of the Bank Merger Act of 1960, the *Philadelphia National Bank* Court held that “contrary to the prevailing conventional wisdom,” bank mergers were indeed subject to section 7 of the Clayton Act.¹³⁹ The *United States v. Manufacturers Hanover Trust Co.*¹⁴⁰ decision also “carried antitrust doctrines into the banking field in an unprecedented way.”¹⁴¹ Prior to this case, the District Court for the Southern District of New York held that antitrust laws were violated when the combined “market” percentages were substantially lower than the benchmarks in the *Philadelphia National Bank* and *Lexington* cases.¹⁴² The court also required prophylactic divestitures because the

1966), *rev'd* 389 U.S. 27 (1967); *United States v. Mfrs. Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965); Brennan, *supra* note 74; *see also* Hearing on S. 1968 Before the Subcomm. on Financial Institutions of the S. Comm. on Banking and Currency, 89th Cong. 3-4 (1965) (statement of William McChesney Martin, Jr., Chairman, Board of Governors of the Federal Reserve System), *available at* http://fraser.stlouisfed.org/historicaldocs/wmm65/download/30999/martin65_0519.pdf, at 5 [hereinafter statement of William McChesney Martin].

My study of the situation makes it crystal clear to me that the test for the validity of bank mergers today is not what the Congress thought it was to be at the time it enacted the Bank Merger Act. . . . This litigation [Philadelphia National Bank] --as well as other pending antitrust court cases to overturn bank mergers--makes it unmistakably clear that banks and their customers now face the uncertainty that, even though merger proposals receive the advance approval of the appropriate Federal banking agency, the transactions are subject to veto in the courts on the basis of competitive factors alone.

Id. at 6.

138. Statement of William McChesney Martin, *supra* note 137, at 5.

The problems that have followed in the wake of these court cases are well known. A high degree of public confidence is peculiarly essential to a sound and vigorous banking structure. Indeed, the uncertainty regarding agency approvals and protracted antitrust litigation to unscramble mergers risk detrimental effects on the banks involved and the public.

Id. at 6.

139. Ludwig, *supra* note 23.

140. *See Mfrs. Hanover Trust Co.*, 240 F. Supp. 867.

141. Brennan, *supra* note 74.

142. *See id.* (citing *Mfrs. Hanover Trust Co.*, 240 F. Supp. 867). *But see* *United*

proposed merger “accelerat[ed] a trend toward oligopoly” and caused a “permanent elimination of significant competition between major competitors,” which violated the Sherman and Clayton Acts.¹⁴³ Incidentally, the Federal Reserve had approved the merger of the Manufacturers Trust Company and The Hanover Bank in September, 1961.¹⁴⁴

States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 377 (1970) (Harlan, J., concurring in part and dissenting in part).

I cannot concur in the simplistic way in which the Court applies the numbers test here.

Philadelphia Bank did not hold that all bank mergers resulting in an ‘undue percentage share of the relevant market’ and ‘in a significant increase in the concentration of firms in that market’ necessarily violated [§] 7 of the Clayton Act. Instead that case established a rule by which the percentage figures alone do no more than ‘raise an inference’ that the merger will significantly lessen competition. Philadelphia Bank left room, however, for the merging companies to show that the ‘merger is not likely to have such anti-competitive effects.’ In short, under the Philadelphia Bank test, the percentage figures create a rebuttable presumption of illegality.

In this case there are two aspects of market structure, each largely ignored by the Court, that I think might well rebut the presumption raised by the percentage figures that the merger will have a significant effect on competition. Consequently, I think the appellees should on remand be given an opportunity to show by ‘clear evidence’ that despite the percentage figures, the anticompetitive effects of this merger are not significant.

Id. (citations omitted).

143. Brennan, *supra* note 74 (quoting *Mfrs. Hanover Trust Co.*, 240 F. Supp. 867). Some criticize the DOJ’s divestiture as an apparent solution to an anticompetitive merger. See *Rep. Kucinich Sends Letter to Federal Reserve Bank Requesting A Public Hearing in Cleveland*, U.S. FED NEWS, Mar. 23, 2007, available at <http://kucinich.house.gov/News/DocumentPrint.aspx?DocumentID=61247>.

Representative Kucinich publicly commented on the proposed acquisition by Huntington Bancshares of Sky Financial, and stated the following:

Despite efforts by Huntington Bank to comply with the Community Reinvestment Act, depository banks are shutting down throughout my district. Cropping up like weeds in their place are payday lenders and check-cashing institutions with usurious interest rates and fees. This trend, while pandemic in the inner city, is notable throughout my district.

Id.

144. See Statement of William McChesney Martin, *supra* note 137, at 7.

The merger of Manufacturers Trust Company and The Hanover Bank, which the Board approved under the Bank Merger Act in September 1961, was held to violate the Federal antitrust laws last March by the Federal District Court in New York. That merger is the only one approved by the Board under the Bank Merger Act that has been the subject of antitrust litigation.

Id.

Decided in 1963, *Philadelphia National Bank* held definitively that bank mergers are subject to application of both the Sherman Act¹⁴⁵ and section 7 of the Clayton Act, and that “regardless of economic benefit, a bank merger could still be a legal violation of the Clayton Antitrust Act.”¹⁴⁶ Prior to *Philadelphia National Bank* and its progeny, the legislative history of the Bank Merger Act of 1960 specifically contemplated Clayton Act scrutiny of bank mergers, and expressly rejected its application as excessively “rigid,” and argued that “it would be unwise to attempt to anticipate all possible situations where a merger would benefit the public.”¹⁴⁷

In applying the antitrust statutes to bank mergers, the Court established the test for determining the competitive effects of a proposed bank merger and “whether the effect of the merger [] may be substantially to lessen competition [] in any line of commerce in any section of the country.”¹⁴⁸ The majority defined “line of commerce” as the “relevant product or services”¹⁴⁹ offered by a commercial bank, concluding that banks were “unique and insulated” from competition because of the distinctive conglomeration or cluster of products and services offered by these banks.¹⁵⁰ The Court also defined “section of the country” as the “relevant geographical market,”¹⁵¹ and this market is the area where the “effect of the merger on competition will be direct and immediate.”¹⁵²

145. See *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 666 n.1 (1964).

Sections 1 and 2 of the Sherman Act provide in pertinent part:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

SEC 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

Id. (citations omitted).

146. *How Not to Get Married*, TIME, Feb. 18, 1966, available at <http://www.time.com/time/magazine/article/0,9171,899042,00.html?> (citation omitted).

147. H.R. REP. No. 86-1416 (1960), reprinted in 1960 U.S.C.C.A.N. 1995, 2003.

148. *Phila. Nat'l Bank*, 374 U.S. at 355.

149. *Id.* at 356.

150. See *id.*

151. *Id.*

152. *Id.* at 358 (“In banking, as in most service industries, convenience of location is

In 1964, *United States v. First National Bank & Trust Company* determined that “merging companies are major competitive factors in a relevant market, [and that] the elimination of significant competition between them constitutes a violation of [section 1] of the Sherman Act.”¹⁵³ *United States v. Phillipsburg National Bank and Trust*,¹⁵⁴ decided in 1970, held that:

[F]or the purposes of analyzing a proposed merger under the Clayton Act, regulators should consider both the level of concentration and the change in concentration of firms in the appropriate geographical market, and a merger application may be accepted if it can be shown that the transaction provides substantial public benefits even though it may violate antitrust guidelines.¹⁵⁵

C. *The Aftermath of Philadelphia National Bank*

Philadelphia National Bank spawned “one of the more significant developments for banking in the 1965 Congressional session – the failure to amend the Bank Merger Act.”¹⁵⁶ Frustrated federal regulators sponsored legislation to combat the recent court decisions, with stalwart support from the American Bankers Association and other influential lobbyists.¹⁵⁷ In a 1965 statement to Congress, Federal Reserve Chairman Martin noted:

essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance.”)

153. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. at 673.

154. 399 U.S. 350 (1970).

155. Brewer III et al., *supra* note 15, at 7 box 1 (citing *United States vs. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970)).

156. Brennan, *supra* note 74; *see also* S. 1698, 89th Cong. (1965); *see also* Reid, *supra* note 37, at 9-10 (citing Benjamin J. Klebaner, *The Bank Merger Act: Background of the 1966 Version*, 34 S. ECON. J. 250, 250 (1967)).

Stirred into action by a series of Antitrust Division victories, the American Bankers Association sponsored legislation introduced by Senator Robertson within a month after the Manufacturers Hanover decision was announced. Bankers (other than those sponsoring the Independent Bankers Association) were convinced that under the 1960 law, competition was not intended to be the controlling factor in bank merger cases, and the Attorney General was assigned only an advisory role, but the courts had decided otherwise.

Id.

157. *See* Warren, Gorham & Lamont, Inc., *supra* note 118, at 769 (stating that the American Bankers Association “had expressed no concern over the relationship

In a very real sense, S. 1698 would merely restore to the bank merger situation the rules that were generally understood to apply at the time of enactment of the Bank Merger Act in 1960 and until the decision in June 1963 of the United States Supreme Court in the Philadelphia National Bank case that section 7 of the Clayton Act applied to bank mergers, even though approved under the 1960 statute. . . . The best evidence of this is in the legislative history of the Bank Merger Act.¹⁵⁸

Senate Bill S. 1698 would have conferred “exclusive and plenary” authority to the OCC, FDIC and the Reserve Board, to disapprove or approve proposed mergers within the ambit of the Bank Merger Act.¹⁵⁹ In 1964, only one month after the *Manufacturers Hanover* litigation was resolved,¹⁶⁰ President Lyndon B. Johnson, under the impression that federal agencies responsible for banking regulation lacked coordination regarding procedures and actions, “ventured into the morass of banking regulation in an effort to bring some order out of chaos.”¹⁶¹ President Johnson ordered the Treasury Secretary “to establish procedures which will insure that every effort is made by these agencies to act in concert and compose their differences.”¹⁶² The bill, which would have exempted bank mergers from the federal antitrust laws,¹⁶³ survived a

between bank mergers and the antitrust laws prior to the *Manufacturers Hanover* decision”).

158. Statement of William McChesney Martin, *supra* note 137, at 3.

159. *See id.* at 2.

160. *See generally Settling an Account*, TIME, Mar. 19, 1965, available at <http://www.time.com/time/magazine/printout/0,8816,833593,00.html>.

By a short 30 minutes, the Justice Department failed in 1961 in its bid to block a merger between New York’s Manufacturers Trust Co. and the Hanover Bank. Aware that Justice viewed the merger as a violation of the antitrust laws, the banks speeded up their negotiations, legally joined to form the nation’s fourth largest bank half an hour before the trustbusters filed suit to stop the action. Faced with *a fait accompli*, a federal judge refused to consider the Justice Department’s bid for a restraining order. Furious over the maneuver, particularly since the two banks had not discussed their plans with it, Justice immediately filed another suit.

Last week the trustbusters had their revenge. In Manhattan, Federal Judge Lloyd MacMahon ruled that the Manufacturers Hanover union had indeed conflicted with antitrust laws, and declared it illegal. It was the first bank merger to be declared illegal by any federal court below the Supreme Court, and it made the bank the largest firm ever to lose a merger case in the courts.

Id.

161. Waxberg & Robinson, *supra* note 104, at 377.

162. *Id.* (citations omitted).

163. *See* Statement of William McChesney Martin, *supra* note 137.

Senate vote, but later “disintegrated” in the House Banking Committee.¹⁶⁴

Congress succeeded in amending the Bank Merger Act in 1966,¹⁶⁵ which effectively “adopted the Supreme Court’s approach and brought banking directly under the Sherman and Clayton Acts,”¹⁶⁶ and directed bank regulators to deny a merger application if it violated the Sherman and Clayton Acts. It provided more defined guidelines for dealing with the antitrust aspects of proposed bank mergers and “establish[ed] a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks.”¹⁶⁷ The 1966 Amendment also added a definition of “antitrust laws” which included the Sherman

164. Brennan, *supra* note 74; see also *How Not to Get Married*, *supra* note 146.

Congress moved to reframe the law, but unfortunately the task fell to the House banking committee, which is run as a fief by Chairman Wright Patman. Patman, a moonfaced country lawyer from Patman’s Switch (pop. 25), Texas, dislikes big banks, tight money and Federal Reserve Chairman William McChesney Martin in about equal degree. Sympathetic to the Supreme Court, Patman stalled the revised bill for 25 weeks. When Attorney General Nicholas deB. Katzenbach wrote Patman that he favored a liberalized bank-merger law, Patman just tucked the letter into his pocket. That was too much for committee members who wanted a clarifying bill. One morning when Patman was away, a rump majority secretly met and defiantly approved a bill strengthening the 1960 act.

Caught between an outraged chairman and an angry majority, House Speaker John McCormack worked out a compromise. The bill could be reported out, he ordered, but only in proper style and session, and with the chairman’s name on it. ‘Sometimes,’ grumped Wright Patman as he went through the motions, ‘we have to take something that is considered bad in order to keep from taking something worse.’

Waiting for President Johnson to sign the bill last week, some Congressmen were afraid that something worse might still be ahead. The bill bars monopolies, re-establishes the principle of community benefit, allows the Justice Department 30 days to object to mergers it dislikes. But the wording is so vague that it will almost certainly end up in the courts again for definition.

Id. (citations omitted).

165. See Bank Merger Act of 1966, 12 U.S.C. § 1828 (2000). Several factors led to the passage of the Bank Merger Act of 1966:

[A] continued high level of merger activity among banks, an outraged banking community, and an unparalleled antagonism between the Justice Department and Federal bank regulatory agencies, all combined to pressure Congress into once again tackling the knotty problem of bank mergers. The result was the Bank Merger Act of 1966, a confusing compromise at best.

Reid, *supra* note 37, at 13 (quoting Mitchell, *Getting the Most Out of the Banking System in the ‘70s*, THE ECON. & BUS. BULL., Winter 1969, p 2).

166. Reid, *supra* note 37.

167. Pub. L. No. 89-356, 80 Stat. 7 (quoting the Act’s preamble).

and Clayton Acts, “and any other Acts *in pari materia*.”¹⁶⁸ The Amendment divided the authority to approve (or disapprove) prospective bank mergers among the banking agencies and the Justice Department,¹⁶⁹ and required the relevant banking agency to request competitive factor reports from the other federal banking agencies and the DOJ.¹⁷⁰

Among the key differences between bank mergers and other types of business combinations, at least in terms of the regulatory review process, was that under the 1966 Bank Merger Act bank regulators could approve a proposed merger even if the combination might ultimately have an anticompetitive residue.¹⁷¹ Regulators were vested with the exclusive authority to determine whether a proposed merger was “clearly outweighed in the public interest by the probable effect of the transaction in meeting the ‘convenience and needs’ of the community served.”¹⁷²

The amended bank merger law provided relief to consummated bank merger participants,¹⁷³ countering the transactional uncertainty caused by *Philadelphia National Bank*.¹⁷⁴ Bank mergers consummated prior to the 1966 Amendment, but not yet challenged in court, were

168. See 12 U.S.C. § 1828(c)(8).

169. See 12 U.S.C. § 1828(c)(4); see also Rose Marie Kushmeider, Federal Deposit Insurance Corporation, *The U.S. Federal Financial Regulatory System: Restructuring Federal Bank Regulation*, FDIC BANKING REV., available at <http://www.fdic.gov/bank/analytical/banking/2006jan/article1/index.html>.

170. See 12 U.S.C. § 1828(c)(4); see also *Phila. Nat'l Bank*, 374 U.S. at 332 (“[U]nder the Bank Merger Act of 1960 . . . the Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effects of the proposed transaction on competition”).

171. See 12 U.S.C. § 1828(c)(5)(B).

(5) The responsible agency shall not approve

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds 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.

Id.

172. *Id.*; see also DeSanto, *supra* note 102, at n.137 (citing 12 U.S.C. § 1828(c)(5)(B) (1982)).

173. See 12 U.S.C. § 1828(c)(2)(A),(B); see also Reid, *supra* note 37, at 13 (“[T]he new law immunized all mergers unchallenged before February 21, 1966, from subsequent litigation.”).

174. See Warren, Gorham & Lamont, Inc., *supra* note 118 (citations omitted).

exempted from future antitrust challenges.¹⁷⁵ Even combinations that violated antitrust laws, or which were the subject of pending court challenges, were exempted if consummated prior the *Philadelphia National Bank* decision.¹⁷⁶ As a result, the previously nullified *Manufacturers Hanover Trust Co.* and *First National Bank & Trust Co. of Lexington* transactions were among those that could be lawfully consummated.

*D. Regulation in the 1990s Produced the Highest Ever
Run on Bank Mergers*

Perhaps the banking deregulation “zenith” occurred in the 1990s, when the Riegle-Neal Interstate Banking and Branching Efficiency Act (“Riegle-Neal Act”) was passed in 1994.¹⁷⁷ Prior to the passage of Riegle-Neal, state laws permitted out-of-state bank holding companies to enter a state’s market primarily by way of the acquisition of a state chartered bank.¹⁷⁸ The Riegle-Neal Act created the “highest-ever five-year run of bank mergers in U.S. history, in terms of both the number and the value of the banks acquired.”¹⁷⁹ A majority of the acquired banks were community banks, and a majority of combinations during the period involved two (or more) community banks.¹⁸⁰ The 1997

175. *See id.*

However, an apparent distinction is made between mergers consummated before and after the decision in *Philadelphia*: a merger consummated before the decision is ‘conclusively presumed’ not to constitute a violation, while a post-*Philadelphia* merger can not ‘alone and of itself’ constitute a violation. The significance of this distinction, however, is not readily apparent, for both types of mergers appear immune from antitrust attack. The difference in phraseology may be designed to restrict the use of the earlier mergers as evidence in later cases so as to allow banks with pre-*Philadelphia* merger histories to stand on equal footing with other banking institutions.

Id.

176. *Id.*; *see also* Statement of William McChesney Martin, *supra* note 137, at 2-3 (“Any bank merger or similar transaction consummated prior to the date of enactment of the Bank Merger Act (May 13, 1960) following approval of the transaction by the appropriate State or Federal bank supervisory authority, also would be exempted from the Federal antitrust laws by the bill.”).

177. Robert DeYoung et al., *The Past, Present, and Probable Future for Community Banks* 13 (Fed. Reserve Bank of Chi., Working Paper No. 2003-14, 2003), available at <http://www.chicagofed.org/publications/workingpapers/papers/wp2003-14.pdf>.

178. *See id.* at 2.

179. *Id.* (citation omitted).

180. *See id.* (citation omitted).

amendments to the Riegle-Neal Act (the 1997 Riegle-Neal Amendments Act)¹⁸¹ permitted commercial banks to operate “with complete freedom across state lines.”¹⁸²

Riegle-Neal supporters opined that decreased federal regulation on interstate banking would almost certainly increase competition, which in-turn would “generally improve the quality and availability of all types of financial services.”¹⁸³ Proponents also speculated that market concentration would be less of an issue, because “with greater geographic mobility, the potential for entry [would] be a stronger deterrent.”¹⁸⁴ Prior to Riegle-Neal’s passage, the DOJ expressed concern that “two contradictory trends [would] be unleashed,”¹⁸⁵ and removal of interstate branching restrictions from previously constrained regional and national banks might prompt some to expand their geographic market coverage.¹⁸⁶ This sort of market expansion was generally not the source of significant antitrust concern.¹⁸⁷ Interstate branching was considered a likely stimulus for the mergers of a substantial number of smaller banks which previously competed within the same market, perhaps because the combinations of these smaller banks would be equipped to compete effectively with the national and regional mega banks with newfound economies of scale.¹⁸⁸ This latter variety of “within-market mergers” typically raises greater antitrust concerns than do “market-extension mergers.”¹⁸⁹

181. Riegle-Neal Amendments Act, Pub. L. No. 105–24, 111 Stat. 238 (1997).

182. Robert DeYoung et al., *Out-of-State Entry and the Cost Efficiency of Local Commercial Banks* (OCC Economics Working Paper No. 97-7, 1997), available at www.occ.treas.gov/ftp/workpaper/wp97-7.pdf.

183. *Id.* at 1-2.

184. *Id.*

185. Litan, *supra* note 54.

186. *See id.*

187. *Id.*

188. *See id.*; see also Leo King, *RBS in Talks Over Job Cuts as ABN Integration Progresses*, COMPUTERWORLD UK, May 2, 2008, available at <http://www.computerworlduk.com/management/it-business/it-organisation/news/index.cfm?newsid=8895> (according to Chris Skinner, chief executive at think-tank Balatro, “The whole point of any bank merger is you’re going to get efficiencies, . . .”).

189. *Id.*

IV. U.S. BANKS ARE NO LONGER “UNIQUE” NOR “INSULATED”

The test articulated in *Philadelphia National Bank* is no longer reflective of the current financial environment. The majority concluded that commercial banks offered services that were “unique” and “insulated,”¹⁹⁰ and “it [was] []clear that commercial banking is a market ‘sufficiently inclusive to be meaningful in terms of trade realities.’”¹⁹¹ Today, commercial banks are not the only financial institutions offering financial products and services, and banks cannot be set apart as “unique” providers of a “clustering of financial products and services.” The distinctive characteristic of “commercial banking,” unquestionably valid in 1963, now appears antiquated.¹⁹² Other institutions now provide

190. *Phila. Nat'l Bank*, 374 U.S. 321. The Court found that commercial banks were unique because of:

The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of ‘money,’ a function which is indispensable to the maintenance of the structure of our national economy. And the amount of the funds held by commercial banks is very large indeed; demand deposits alone represent approximately three-fourths of the money supply in the United States. Since a bank’s assets must be sufficiently liquid to accommodate demand withdrawals, short-term commercial and industrial loans are the major element in bank portfolios, thus making commercial banks the principal source of short-term business credit. Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.

Id. at 326 (citations omitted); The Court also found that banks were “insulated” because:

Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies’ rates are invariably much higher than the banks’, in part, it seems, because the companies’ working capital consists in substantial part of bank loans. Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits.

Id. at 356-57.

191. *Phila. Nat'l Bank*, 374 U.S. at 357 (quoting *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 811 (9th Cir. 1961)).

192. See B. Frank King et al., *Is Commercial Banking a Distinct Line of Commerce?*, *ECON. REV.*, Oct. 1, 2000, available at <http://www.encyclopedia.com/doc/1G1-71764057.html>.

even greater clusters of services, meaning that the cluster concept might not even be a valid means of analysis in the present financial environment.¹⁹³ Nonetheless, the Federal Reserve has continued to employ the *Philadelphia National Bank* “cluster” approach to define the relevant product market for banking services.¹⁹⁴ The consequence of adhering to the 1963 judicial mandate has resulted in a sometimes rigid competitive analysis that seems unwilling to consider the nation as a legitimate geographic market, and appears unable to bury the “cluster of products and services” concept despite significant and ongoing evolution of the financial market.

It would have been accurate, during the *Philadelphia National Bank* era, to state that commercial banks in the 1960s and 1970s were the only institutions that provided the cluster of products and services “denoted by the term ‘commercial banking.’”¹⁹⁵ As the domestic financial services sector experienced industry-wide consolidation, with banks, brokers, and lenders of all sorts operated in forms often

193. *See id.*

194. *See, e.g.,* First Hawaiian, Inc., 79 Fed. Res. Bull. 966, 967 (1993).

The Board has long held that the product market for evaluating bank mergers and acquisitions is the cluster of products and services offered by banking institutions. The Supreme Court has emphasized that it is this cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce. According to the Court, this clustering facilitates the convenient access to these products and services, and vests the cluster with economic significance beyond the individual products and services that constitute the cluster. The courts have continued to follow this position. In addition, a recent study conducted by Board staff supports the conclusion that customers still seek to obtain this cluster of services.

Id. (citations omitted); *see also* Cent. Pac. Fin. Corp., 90 Fed. Res. Bull. 93 (2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/winter04_legal.pdf (approving the acquisition).

According to the Supreme Court, the clustering of banking products and services facilitates convenient access to these products and services, and vests the cluster with economic significance beyond the individual products and services that constitute the cluster. Several studies support the conclusion that both businesses and households continue to seek this cluster of services. Consistent with these precedents and studies, and on the basis of the facts of record in this case, the Board concludes that the cluster of banking products and services represents the appropriate product market for analyzing the competitive effects of this proposal.

Id. at 94-95 (citations omitted); *see also* The Chase Manhattan Corp., 87 Fed. Res. Bull. 76, 77-79 (2001); Fleet Fin. Group, Inc., 85 Fed. Res. Bull. 747, 750-51, 751 n.19 (1999) (“The Supreme Court has emphasized that it is the cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce”).

195. *Phila. Nat’l Bank*, 374 U.S. at 356.

indistinguishable from their rivals, the reality of five decades began to fade into the background. The *Philadelphia National Bank* Court observed that the consumer checking account was a hallmark commercial banking product or service “so distinctive that [it is] entirely free of effective competition.”¹⁹⁶ Today a wide range of companies exist that are not traditional “commercial banks,” including auto manufacturers, traditionally considered a classic example of commerce, which provide checking account services and a range of banking services.¹⁹⁷

Mergers have created an environment that has altered banking to such an extent that the traditionally “insulated” services, once “unique” to commercial banks, are now offered by firms such as Volkswagen. Car makers entered the banking market and now compete directly with commercial banks. According to the *Wall Street Journal*, Toyota Motor Corp. began in 2004 to “develop[] a host of banking products, including money-market accounts, CDs and savings.”¹⁹⁸ Volkswagen Bank USA¹⁹⁹ offers internet banking services and products, including savings accounts, CDs, home-equity lines of credit, auto financing, credit cards, and checking accounts.²⁰⁰ Specialty lenders are able to offer personal or

196. *Id.*

197. See Jennifer Saranow, *Now Open: The Bank of VW*, WALL ST. J., Nov. 3, 2004, available at http://online.wsj.com/article/SB109943562479362790.html?mod=today_s_us_personal_journal; see also Pallavi Gogoi, *What's Next—the Bank of Burger King?*, BUSINESSWEEK, June 18, 2001, available at http://www.businessweek.com/magazine/content/01_25/b3737104.htm.

Why are upscale carmakers and retailers surging into the business? BMW, for one, figures that having an actual bank, rather than just the credit unit it had before, gives it a cheaper way to raise capital for its credit business than the debt markets. It has access to depositor funds and can borrow from other banks at low federal funds rates, says John M. Christman, head of BMW financial services for the Americas. Since July, 2000, when the bank opened, Christman has signed up 25,000 customers with \$1 billion in assets, and the bank is now operating profitably. Retailers hope to run credit-card operations without having to split profits with outsiders. And a federal bank charter would let such outfits as General Motors Acceptance Corp. override state usury laws and charge higher uniform interest rates nationwide.

Id.

198. Saranow, *supra* note 197.

199. Volkswagen Bank USA was established as an Industrial Loan Company. Its parent is Volkswagen AKTIENGESELLSCHAFT (VW AG). See Volkswagen Bank USA, Application for Federal Deposit Insurance, FDIC (Dec. 11, 2001), available at <http://www.fdic.gov/regulations/laws/bankdecisions/DepIns/VolkswagenBank.html> (approving the application).

200. See Saranow, *supra* note 197 (“Both General Motors Corp. and BMW AG

small loans at very competitive rates, often lower than commercial banks. The *Philadelphia National Bank* premise that banks are “insulated” from competition because they could offer loans at much lower rates,²⁰¹ has been revealed as an anachronism.²⁰²

According to the Federal Reserve Bank of Atlanta, the U.S. payment system²⁰³ is being reshaped by “banking consolidation and conglomeration, thriving community banks, nonbanks providing payment services, and technological advances,” and increasingly, consumers are choosing to utilize nonbank electronic payment services.²⁰⁴ For example, “[a]lmost daily [consumers] [] are bombarded by announcements from existing technology firms and ‘new economy start-ups’ of innovative products designed to meet e-commerce requirements [that] [] cross over into traditional business lines of banks.”²⁰⁵

already have U.S. banks offering personal banking products.”).

201. See *Phila. Nat'l Bank*, 374 U.S. at 356.

202. See King et al., *supra* note 192.

203. See FFIEC Glossary, <http://www.ffiec.gov/ffiecinbase/booklets/Wholesale/18.html> (last visited Mar. 30, 2008). According to the Federal Financial Institutions Examination Council, the definition of “Payment Systems” is “[t]he mechanism, the rules, institutions, people, markets, and agreements that make the exchange of payments possible.” *Id.*

204. Fed. Reserve Bank of Atlanta, *Financial Services Strategic Plan*, FIN. UPDATE, Oct.-Dec. 2000, available at <http://www.frbatlanta.org/invoke.cfm?objectid=5AC8E901-B0FE-11D5-898400508BB89A83&method=display>.

205. See Jamie B. Stewart, Jr., First Vice President & Chief Operating Officer, Fed. Reserve Bank of New York, Remarks before the SIBOS 2000 Conference: The Implications of Advancing Technology for Bankers and Central Bankers (Sept. 11, 2000), available at <http://www.ny.frb.org/newsevents/speeches/2000/js000911.html> (“Banks are . . . moving into business areas that bear little resemblance to traditional banking--a development that regulators are clearly monitoring.”); see also Press Release, Merrill Lynch, Merrill Lynch Announces Beyond Banking: The Power of Advice for Smarter Cash Management - New Offering Marks Key Component of ‘Total Merrill’, A Broad Financial Management Platform For Clients (Jan. 8, 2003), available at http://www.ml.com/index.asp?id=7695_7696_8149_8688_8591_7705 (offering Merrill Lynch customers both traditional and non-traditional services in a comprehensive package).

Beyond Banking®, a new comprehensive cash management service that offers all the typical features of a checking and savings account, including ATM access, web bill payment and a variety of short-term investment products. Clients also have access to innovative mortgage, credit and lending products together with the advice and guidance of a skilled Merrill Lynch financial advisor.

Id.

From retailers to manufacturers, non-traditional banking companies now offer consumer banking services, and have expanded into more traditional banking areas such as CDs and checking accounts.²⁰⁶ Department Store Nordstrom offers a wide range of banking services through its Nordstrom Federal Savings Bank.²⁰⁷ At the deep discount end of the retail spectrum, Walmart has been an aggressive provider of a host of consumer financial products and services.²⁰⁸ Even universities offer banking services today; for example, Drexel University offers banking services through AJDrexelBank.com.²⁰⁹

Many small business owners still consider a traditional commercial bank to be a critical multi-purpose “financial channel,” where banking and other financial services are provided.²¹⁰ Competition has eroded relationships that banks have traditionally enjoyed with small business customers.²¹¹ For example, many of the small business-centered services traditionally offered by banks, such as loans, are now aggressively offered by nonbanks, such as “American Express Small

206. See Saranow, *supra* note 197.

207. See Nordstrom Credit Card and Banking Services, <http://about.nordstrom.com/aboutus/credit/credit.asp?origin=bankurl1>.

Nordstrom Bank is a wholly owned subsidiary of Nordstrom, Inc. and is a federally chartered savings bank. Our goal is to enhance your Nordstrom shopping experience by providing convenient banking and credit products, such as the Nordstrom Visa Signature® Card, Nordstrom Platinum Visa® card, Nordstrom credit card, Nordstrom MOD® card, interest-bearing checking accounts with the Nordstrom Visa® check card and nationally competitive certificates of deposit.

Id.; see also About Nordstrom Bank, <http://about.nordstrom.com/aboutus/credit/about.asp>; Saranow, *supra* note 197 (“Nordstrom Federal Savings Bank has offered a checking account, among other banking products, since 2001.”).

208. See Kris Hudson, *Wal-Mart Pushes Financial Services Menu*, WALL ST. J., June 6, 2007, available at http://online.wsj.com/article/SB118108758438025751.html?mod=home_whats_news_us.

209. See AJDrexelBank.com, <https://secure.ajdrexelbank.com/frameset.asp> (last visited May 8, 2008).

210. Maggie Scarborough, *Must Banks Give Away Their Small Business Franchise?*, 92 ABA BANKING J. 51, (2000), 2000 WLNR 6884287.

211. See Penny Crosman et al., *2008 IT Budgets Up More than 10% for Financial Services Firms*, WALL ST. & TECH., Nov. 27, 2007, available at <http://www.wallstreetandtech.com/showArticle.jhtml?articleID=204204039>; see also Scarborough, *supra* note 210 (“There is a statistical correlation between the number of financial services used by a customer and account retention. The odds of retention are increased exponentially with each additional service. Therefore, selling additional services to small business customers is not only desirable but also essential to continued growth and profitability.”).

Business Services.”²¹² The *New York Times* reported that three of the five most popular small business bankers were not banks at all, but instead credit card issuers (Mountain West Financial, American Express, and Advanta Corporation).²¹³ These three card issuers accounted for roughly one-third of all corporate lending in loan amounts up to \$100,000 in 1997.²¹⁴

Studies also demonstrate that consumers no longer tend to use just one bank for all of their banking needs.²¹⁵ Customers who traditionally utilized commercial banking for their financial products and services, such as savings deposit accounts, can turn to nonbank alternatives such as “thrifts, credit unions, annuities, mutual funds, and other securities and insurance products.”²¹⁶ This market reality challenges the contemporary relevance of the *Philadelphia* Court’s finding that commercial banking “enjoy[ed] a settled consumer preference” which insulated banks from competition²¹⁷ Moreover, the market reality also challenges the Court’s “repeatedly held” position that “it is the unique cluster of services provided by commercial banks that sets them apart for purposes of § 7.”²¹⁸

212. Crosman et al., *supra* note 211.

213. Joseph Kahn, *Banking on the Unbanks; Tellerless Wonders Are Reinventing Small-Business Lending*, N.Y. TIMES, Feb. 4, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0DE6D61138F937A35751C0A96F958260>.

214. *Id.*

215. See Daniel J. Mahoney, *supra* note 43, at 315 (citing Peter Bronsteen, *Product Market Definition in Commercial Bank Merger Cases*, 30 ANTITRUST BULL. 677, 687 n.29 (1985)); see also *id.*

[I]ncreased competition that banks now face from nonbank financial institutions has opened up myriad alternatives for customers, sometimes making it more prudent and less costly to select services from a variety of sources. As a result, the rationale that the Supreme Court provided for its cluster approach in *Phillipsburg National Bank* deteriorates as fewer and fewer consumers engage in ‘full-service’ banking.

Id.

216. King, *supra* note 192.

217. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963).

218. *Conn. Nat’l Bank*, 418 U.S. at 664 [citations omitted]; see also *Phila. Nat’l Bank*, 374 U. S. 321.

V. HAS THE COMPETITIVE ANALYSIS EVOLVED SINCE *PHILADELPHIA NATIONAL BANK*? WHAT'S IN YOUR WALLET?

Differing merger review methodologies resulted in some efforts by banking regulators and the DOJ to coordinate and clarify merger approval processes. Despite those efforts, and despite recognition that what is considered to be “banking” has indeed evolved, regulators nonetheless continue their use of local geographic market and cluster of banking services analyses. Perhaps the lone exception to this entrenched posture has been the DOJ.

Congress was cognizant of the “special needs and characteristics of banking” when it defined the scope of bank regulators’ supervisory authority.²¹⁹ However, it was the Supreme Court in *Philadelphia National Bank* which “confirmed” the Department of Justice’s jurisdiction to review bank mergers.²²⁰ Further complicating the issue, the Bank Merger Act and the Bank Holding Company Act (and the related amendments) provided statutory authority for the applicable supervisory agency *and* the DOJ to conduct concurrent independent reviews of proposed bank merger combinations.²²¹ Moreover, beginning in the mid-1980s, the state attorneys general became yet another “second[ary] public institution for antitrust merger control.”²²² The varying methodologies of the regulatory agencies, the DOJ, and the

219. Statement of William McChesney Martin, *supra* note 137, at 3-4.

The special needs and characteristics of banking, however, is the central theme running throughout the legislative history. It was emphasized that banking is a licensed, strictly regulated, and closely supervised industry that offers problems acutely different from other types of business, whether regulated or not. Because of this, [] Congress in enacting the Bank Merger Act deliberately chose to place the authority to pass on bank mergers in the Federal bank supervisory agencies.

Id. at 3-4.

220. Stuart M. Chemtob, Special Counsel for Int’l Trade, Antitrust Div., U.S. Dep’t of Justice, *The Role of Competition Agencies in Regulated Sectors*, Address at the 5th International Symposium on Competition Policy and Law, Institute of Law (May 11-12, 2007), available at <http://www.usdoj.gov/atr/public/speeches/225219.htm> (citing *Phila. Nat’l Bank*, 374 U.S. 321).

221. *See id.*

Under the Bank Merger Act of 1966, the bank regulator is required to seek a report on competitive factors involved in the merger from the Department of Justice. The bank regulator must take this report into consideration in its decision-making on the competitive effects of the transaction, but may not be required to follow the Justice Department’s advice, depending on other factors.

Id. (citations omitted).

222. *See Kovacic, supra* note 32, at 3.

states' involvement created an uncertain environment whereby banks confronted inconsistent approaches to bank mergers. The almost chaotic regulation by committee mirrors that of the subprime mortgage market and may have been among the motivating factors behind Treasury Secretary Henry ("Hank") Paulson's recent proposal to substantially consolidate power over financial services regulation with the Federal Reserve as an "umbrella regulatory agency."²²³

The Federal Reserve Board, the OCC, and the DOJ, in an effort to streamline the regulatory process, published bank merger guidelines in 1995, titled "Bank Merger Competitive Review Screening Guidelines."²²⁴ This joint guideline screening resource was established to ensure that the DOJ and the supervisory regulatory agencies applied similar regulatory standards to evaluate the competitive effects of a merger proposal.²²⁵ However, the regulatory agencies and the DOJ have

223. See Edmund L. Andrews & Stephen Labaton, *Democrats Seek Stronger Regulator for Wall Street*, INT'L HERALD TRIBUNE, Mar. 23, 2008, available at <http://www.iht.com/articles/2008/03/23/business/23credit.php>; see also U.S. DEP'T OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008), available at <http://www.treas.gov/offices/domestic-finance/regulatory-blueprint/>; Symposium: *The Subprime Mortgage Meltdown and the Global Financial Crisis*, 14 Fordham J. Corp. & Fin. L. __ (forthcoming 2008) (transcript on file with the Fordham Journal of Corporate & Financial Law) (remarks of Mr. Giovanni P. Prezioso, Esq.).

But I think one of the things we have is, if you think about where we are now in terms of [regulatory] accountability, a system that has grown up with a history at the state level, a history at the federal level, a division between regulation of banks and thrifts and broker-dealers and so forth, that isn't very well suited to the kind of marketplace that we have today, the kinds of international institutions that we have.

Id.

224. U.S. DEP'T OF JUSTICE, BANK MERGER COMPETITIVE REVIEW—INTRODUCTION AND OVERVIEW (1995), available at <http://www.usdoj.gov/atr/public/guidelines/6472.pdf> [hereinafter BANK MERGER COMPETITIVE REVIEW]; see also Calvani et al., *supra* note 39 ("[The] 'Bank Merger Competitive Review' was first issued in March 1995, and has been commonly referred to as the 'Bank Merger Screening Guidelines.'"). The DOJ has also produced its own merger guidelines in conjunction with the FTC. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>. The FDIC elected not to join with the DOJ and other banking regulators, instead issuing its own statement of policy. See FDIC Statement of Policy on Bank Merger Transactions, available at <http://www.fdic.gov/regulations/laws/rules/5000-1200.html>.

225. See Chemtob, *supra* note 220 (citing BANK MERGER COMPETITIVE REVIEW, *supra* note 224); see also Roundtable, *supra* note 38 ("The purpose of this screening is to identify quickly proposed mergers that clearly do not have significant adverse effects on competition and allow them to proceed.").

not used consistent standards in bank merger regulatory analysis.²²⁶ According to a former Commissioner of the Federal Trade Commission, “unfortunately” the states have also promulgated their own merger guidelines, “which are different from those employed by either the DOJ or the bank regulators,” and results in further confusion and produces different results.²²⁷

Banking regulators and the Justice Department, to some extent, seem to recognize the changing banking market and the need for reforming antitrust banking analysis. To that end, the DOJ has not used the *Philadelphia National Bank* antitrust analysis and will instead define product and geographic markets on the basis of the specific services offered and the location in which these services are offered.²²⁸ The

226. See David S. Neill, *Geographic Market Definition in the Antitrust Analysis of Bank Mergers*, 123 BANKING L.J. 291, 298-300 (2006) (“[The DOJ’s] formulation does not appear to conform with the ‘chain reaction’ theory of market definition underlying the Federal Reserve methodology.”); see also Chemtob, *supra* note 220.

[T]he screening guidelines make clear that the regulatory agencies and the Department of Justice, in practice, do not necessarily use the same product market or geographic market definitions. For example, the Department of Justice examines the competitive effects of the transaction in disaggregated product markets (including retail, small business and middle-market lending) while the banking agencies look at the cluster of banking services. Remedies recommended by the Justice Department and the bank regulators may also differ, with Justice Department remedies more likely to be focused on ensuring that market competition is protected, rather than simply on restoring the pre-merger structural characteristics of the market.

Id.

227. Calvani et al., *supra* note 39 (citing Nat’l Ass’n of Attorneys General, *NAAG 1993 Horizontal Merger Guidelines*, *Trade Reg. Rep. (CCH)* No. 256 (Supplement) (Mar. 30, 1993)). The differences between the states competitive review approach and the Feds is “real:”

For example, in the *BankAmerica/Security Pacific* transaction, California and Arizona disagreed with the conclusions reached by the federal antitrust authority, and demanded additional divestitures. States have also caused modifications to bank acquisitions even before the federal government has had an opportunity to review the transaction. In Fleet Bank’s planned acquisition of 32 Chemical Bank branch offices, New York forced Fleet to divest a branch office by threatening to file an objection with the Fed. The differences are real.

Id. at n.32 (citations omitted).

228. See Litan, *supra* note 54.

Whereas the Fed looks at deposit data as an adequate proxy for the ‘cluster’ of services that banks often provide (loans, deposits, and various fee-based services), we at DOJ have long treated banks as multi-product firms and, accordingly, have assessed the competitive impact of mergers in each relevant product or service (deposits, various types of loans, and so on).

.....

Board, however, still employs the *Philadelphia National Bank* traditional antitrust analysis,²²⁹ despite its admitted “diminishing faith in the cluster approach.”²³⁰ While the Board has also stated that its banking merger analysis could involve a review of competitors spanning the “the entire country,”²³¹ the authors, have thus far not located a single bank merger approval order which utilized an analysis of competitors in the entire country, or even in a region of the country. The Board has continued, for almost a half century, to define the relevant geographic

Although we will endeavor to use the Fed’s market definitions, in some cases those definitions may not accurately reflect the nature of competition for a particular service. This is especially likely to be true where the Fed’s markets are drawn quite broadly, but the particular services the parties offer actually are bought by purchasers in a smaller region -- for example, the inner city rather than a wider metropolitan area. Moreover, it is important to keep in mind that we may define different geographic markets for each of the different product markets. Our touchstone is where customers for specific services are willing to turn, not some arbitrary geographic area that may be developed for some other purpose.

Id.

229. See, e.g., *First Bancorp.*, 86 Fed. Res. Bull. 696, 2000 WL 1185522, *2 (2000) (“Board and the courts repeatedly have held that the geographic market for the cluster of banking products and services is local in nature.”).

230. Sheehan, *supra* note 21, at 699.

In *United Bank Corp. of New York*, the Fed stated that although it continued to view commercial banking as the relevant line of commerce in determining the competitive effects of a proposal, it might be appropriate in particular cases to take into consideration direct competition from financial institutions other than commercial banks.

Id. (citing *United Bank Corp. of New York*, 67 Fed. Res. Bull. 358, 359 (1981)); see also *id.* (quoting Letter from Michael Bradfield, Gen. Counsel, Fed. Reserve Bd., to Barry Grossman, Chief, Comm’ns & Fin. Section, Antitrust Div. (Jan. 10, 1986), in Reply Brief of Appellant at app., *United States v. Cent. State Bank*, 621 F. Supp. 1276 (W.D. Mich. 1985), *aff’d*, 817 F.2d 22 (6th Cir. 1987).

The Board has not read the *Philadelphia* . . . case as prohibiting the Board from a reevaluation of the appropriateness of the product market in commercial bank mergers as described in that case to reflect changing conditions in the financial services marketplace that directly impact commercial banking services.

Id.

231. See Supporting Statement, *supra* note 30, at 1.

Applying the theoretical concept to specific situations requires the determination of the geographic area that includes all direct competitors (this area could be a town, a county, a state, a region of the country, or the entire country) and the relevant product market (this requires identifying the firms within the relevant geographic area that compete with one another).

Id.

market for bank merger proposals as local in nature,²³² irrespective of whether or not such an analysis ignores the modern market dynamics.

For example, in its 2004 approval of Bank of America's acquisition of FleetBoston Financial, the Board determined "that the cluster of banking products and services represents the appropriate product market for analyzing the competitive effects of this proposal."²³³ The Federal Reserve determined that the appropriate cluster of products and services was the local market, finding that the "geographic markets for considering the competitive effects of this proposal are the four local banking markets in which the subsidiary banks of Bank of America and FleetBoston compete directly."²³⁴ The competitive effects of the proposed merger were considered in a manner consistent with Supreme Court "precedent,"²³⁵ with the Board's previous market studies,²³⁶ and with the fact-finding of record.²³⁷

232. See, e.g., First Union Corp., 84 Fed. Res. Bull. 489, 491-92 (1988) (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 359 (1963)) ("In defining the relevant geographic market in the case of bank acquisitions, the Board and the courts consistently have held that the geographic market for the cluster of banking services is local in nature." (citation omitted)); see also First Bancorp., 86 Fed. Res. Bull. 696, 2000 WL 1185522 (2000).

First Bancorp has suggested that the relevant geographic market includes not only Moore County, but also all the counties that are contiguous to Moore County.

In defining the relevant geographic market, the Board consistently has sought to identify the area in which the cluster of banking products and services is provided by competing institutions and in which purchasers of the products and services seek to obtain these products and services. In applying these standards to bank acquisition proposals, the Board and the courts repeatedly have held that the geographic market for the cluster of banking products and services is local in nature.

Id. at 2-3 (citations omitted).

233. See Bank of Am. Corp., 90 Fed. Res. Bull. 217 (2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/spring04_legal.pdf (approving the merger); see also *id.* at 221 n.18 ("The Supreme Court has emphasized that it is the cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce." (citations omitted)).

234. *Id.* at 221.

235. *Id.* at 221 n.18 (citing *Phila. Nat'l Bank*, 374 U.S. at 357); accord *United States v. Conn. Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Phillipsburg Nat'l Bank*, 399 U.S. 350 (1969).

236. See *id.* at 221 ("Several studies support the conclusion that businesses and households continue to seek this cluster of services." (citations omitted)).

237. *Id.* at 221 ("In defining the relevant geographic market, the Board and the courts have consistently held that the geographic market for the cluster of banking products and services is local in nature.").

Credit card issuers have found mergers to be an effective method to enter banking markets, and to establish synergistic “brick and mortar” branches. Capital One Financial Corp., among the world’s “largest providers of MasterCard and Visa credit cards,”²³⁸ and a provider of a host of online banking services,²³⁹ acquired the Louisiana-based regional bank Hibernia in 2005²⁴⁰ and now boasts of “over 700 Capital One Bank branches and over 1100 ATMs in Connecticut, Louisiana, New Jersey, New York and Texas.”²⁴¹

Capital One’s Hibernia acquisition typifies the holding company’s expansion strategy to branch into “other forms of consumer and commercial banking.”²⁴² The Federal Reserve approved Capital One’s Hibernia acquisition²⁴³ with minimal apparent scrutiny of the product or geographic markets, or line of commerce or cluster of service analyses, as mandated by *Philadelphia National Bank*.²⁴⁴

The Federal Reserve determined that the Capital One-Hibernia combination did not directly encroach onto any relevant banking market, and viewed the merger as having “no significant adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive factors are consistent with approval.”²⁴⁵ The Board also determined that the combination would enable the combined entity “to offer a broader variety of products to its

238. *Capital One Seen Buying Hibernia*, BOSTON GLOBE, Mar. 7, 2005, available at http://www.boston.com/business/articles/2005/03/07/capital_one_seen_buying_hibernia/.

239. See Capital One, <https://onlinebanking.capitalone.com/capitalone/>. For a list of Capital One products, see <https://onlinebanking.capitalone.com/capitalone/> (Credit Cards, Auto finance, Direct banking, Personal Loans, Healthcare Finance, Home Improvement Loans, Business Credit Cards, Business Line of Credit, Business Loans, etc.).

240. Capital One Financial Corp., 91 Fed. Res. Bull. 513 (2005), available at <http://www.federalreserve.gov/boarddocs/press/orders/2005/20050816/attachment.pdf>.

241. See Capital One, Find ATM and Branch Locations, <http://maps.capitalone.com/locator/>; see also Capital One, About the Capital One and Hibernia Merger, http://www.capitalone.com/welcome/mergerfaq.php#branch_and_atm (“Capital One does not currently have other branches or ATMs beyond the Hibernia network. We will be expanding our network of bank and ATM locations over time.”).

242. Terence O’Hara, *Hibernia Helped Capital One Profit Grow*, WASH. POST, Jan. 20, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/19/AR2006011903154.html>.

243. Capital One Financial Corp., *supra* note 240.

244. *Id.*

245. *Id.*

customers,”²⁴⁶ and for the acquired Hibernia to “broaden its geographic reach” and “enhance [its] ability to service its customers,” due to Capital One’s managerial and financial resources and its “national presence.”²⁴⁷

Capital One was the “26th largest depository”²⁴⁸ when it applied for merger approval, and Hibernia was also among the top fifty depository institutions, with the resulting combined entity joining the top twenty-five largest U.S. depository entities.²⁴⁹ The phrase “geographic market” or “product market” or “line of commerce” were conspicuously absent from the Fed’s merger approval.²⁵⁰ Shortly after obtaining the Fed’s regulatory *imprimatur*, Capital One applied to the OCC for permission to open seven new commercial bank branches in the New Jersey, New York, and Dallas metropolitan markets.²⁵¹ As this Article reached the cusp of publication, Capital One was marketing its new “brick and mortar” branches, a number of which are located in Manhattan, in an aggressive televised advertising campaign.²⁵²

Some commentators contend that the Federal Reserve does employ a more expansive geographic area than the local one dictated by *Philadelphia National Bank*.²⁵³ In fact, sources point toward a period in the 1980s when the Federal Reserve “indicated that it would look at entire metropolitan areas” in its competitive review process.²⁵⁴ The Board has also recognized that “issuing credit cards is an activity that is

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Capital One Seeks OK for 7 Branches*, YAHOO FIN., Aug. 16, 2007, available at http://ca.us.biz.yahoo.com/ap/070816/capital_one_branches.html?.v=1.

252. Press Release, Capital One, Capital One Bank Celebrates Grand Opening of Third Harlem Branch (Apr. 17, 2008), available at http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20080417005788&newsLang=en.

253. Wachtell, Lipton, Rosen & Katz, *Financial Institutions M&A 2007: Continued Rich Diversity in an Active M&A Market—An Annual Review of Leading Developments*, **1638 PLI/CORP 209**, 712-13 (2007).

It should be noted that, as localized as the Federal Reserve Banks’ predefined markets are, in some sense they are larger than would be suggested by the formulation expressed in *United States v. Philadelphia National Bank*. In particular, the markets are not so narrow that an individual customer at one end of a market would need to consider banks at the opposite end of the market to be practical alternatives. Rather, it is assumed that the economic integration of the market will transmit banking competition via a ‘chain reaction’ effect.

Id.

254. See Doug Bandow, *The Merger Barriers Fall*, 78 ABA BANKING J. 46 (1986).

conducted on a national or global scale, with relatively low barriers to entry and with numerous other large financial organizations providing these services.”²⁵⁵ The definition of a product market or geographic market often determines whether a proposed merger is lawful, and it is therefore critical to the antitrust merger analysis that an evolving and pragmatic paradigm exists to ensure effective antitrust policy, especially in a fast-changing and increasingly borderless market for many financial services. Yet, General Counsel of the Fed’s Board of Governors, Scott G. Alvarez, conceded in 2005 that “the Federal Reserve ha[s] not found persuasive evidence to alter the general framework for analyzing bank mergers and acquisitions.”²⁵⁶

The environment within which the DOJ has operated in the bank merger context is worth noting. Prior to the passage of the Bank Merger Act of 1966,²⁵⁷ the DOJ lacked statutory authority to prevent a bank merger. *Philadelphia National Bank*, however, brought bank mergers within section 7 of the Clayton Act²⁵⁸ and consequently placed bank merger applications within the auspices of the DOJ.²⁵⁹ The passage of the 1966 Bank Merger Act and the Bank Holding Company Act empowered the DOJ to independently review bank merger proposals, along with concurrent review by other bank regulators.²⁶⁰ The Bank Merger Act also required the relevant regulatory agencies to “request reports on the competitive factors . . . from the Attorney General and the other two banking agencies.”²⁶¹ During the last decade the DOJ

255. Federal Reserve System, Order Approving the Merger of Bank Holding Companies, Bank of America Corporation, Dec. 15, 2005, *available at* <http://www.federalreserve.gov/boarddocs/press/orders/2005/20051215/attachment.pdf>.

256. Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System, Statement before the Antitrust Modernization Commission, at 9 (Dec. 5, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/Alvarez_Statement.pdf; *see also id.* at 8-9 (“[T]he courts have consistently held that arguments for changing these long-standing product and geographic market definitions must be based on persuasive economic evidence and, to date, have found such persuasive evidence to be lacking.”).

257. 12 U.S.C. § 1828 (2000).

258. The Bank Merger Act of 1966 terms “antitrust laws” to include the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, the Clayton Act, 15 U.S.C. §§ 12-27, “and any other Acts in pari material.” *See* 12 U.S.C. § 1828(c)(8).

259. *See Chemtob, supra* note 220 (citing *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 321 (1963)).

260. *See id.*

261. Pub. L. No. 89-356 (1966) (codified at 12 U.S.C. § 1828(c)(4)); *see also Chemtob, supra* note 220 (“[T]he bank regulator must take this report into consideration in its decision-making on the competitive effects of the transaction, but may not be

Antitrust Division reviewed roughly 1000 bank merger applications annually,²⁶² of which ten percent were subjected to an in-depth competitive analysis in 1998.²⁶³ By contrast, from 1989 to 1994, the DOJ investigated forty-three (0.5%) of the roughly 9000 proposed bank mergers that received approval from the relevant supervisory banking authority, and challenged only four (0.05%) of those.²⁶⁴ Branch divestitures resulted in compromised approval for the four challenged deals.²⁶⁵

Although federal bank supervisors and the DOJ conduct independent competitive reviews, the DOJ will inform the agencies of its conclusions and any divestiture requirements.²⁶⁶ For example, the DOJ recently required divestiture of five branch offices to resolve perceived antitrust concerns created by the proposed merger of First Busey Corporation and Main Street Trust Inc.²⁶⁷ Rather than test its

required to follow the Justice Department's advice, depending on other factors.'').

262. *Roundtable, supra* note 38, at 5. The DOJ expects to receive a similar number of bank merger proposals in 2008. See DEP'T OF JUSTICE, ANTITRUST DIVISION, CONGRESSIONAL SUBMISSION FY 2008 PERFORMANCE BUDGET 23 (2008), available at http://www.usdoj.gov/jmd/2008justification/pdf/21_atr.pdf.

263. *Mergers in the Financial Services Industry: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 2 (1998) (statement of John M. Nannes, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice), available at <http://www.usdoj.gov/atr/public/testimony/1787.htm> [hereinafter Nannes].

264. Litan, *supra* note 54.

265. *Id.*

266. See *Roundtable, supra* note 38, at 5. For example, the DOJ required the divestiture of bank branches in the following merger proposal:

Among the most notable surprises was the DOJ's enforcement position in the merger of Society Corporation and Ameritrust Corporation in 1992. That transaction would have raised few if any market concentration concerns in the Federal Reserve's pre-defined Cleveland market. The DOJ, however, split the market into two segments, one of which was very concentrated. The DOJ then required a curative divestiture of branches holding approximately \$1 billion in deposits. The lack of transparency in the DOJ's policies prompted significant criticism from antitrust practitioners in the early 1990s.

Id.

Neill, *supra* note 226, at 291 n.1 (citations omitted).

267. See Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement Requiring Divestitures in Merger of First Busey Corporation and Main Street Trust Inc. (June 12, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/223869.htm. The Federal Reserve approved the merger on June 14, 2007. See First Busey Corp., 2007 WL 2506471, available at <http://www.federalreserve.gov/newsevents/press/orders/orders20070614b1.pdf>.

market definition and concentration measures, the DOJ will instead require divestiture as the “main event of bank merger review.”²⁶⁸

As required by federal statute, bank regulators must forward a copy of a merger application to the DOJ for its review,²⁶⁹ and the DOJ may then formally submit, to the applicable regulatory agency, a report addressing the competitive factors of the proposed combination. The DOJ can also attempt to block a prospective deal by filing suit under section 7 of the Clayton Act, not more than thirty days after the relevant regulatory agency has approved a proposed merger.²⁷⁰ The DOJ contends that its antitrust analysis has the flexibility to “readily account for any change in market dynamics.”²⁷¹ The DOJ has consistently adopted the most enlightened analytical model, one which is attuned to contemporary market variables, instead of a monolithic adherence to half-century old doctrine.

VI. RELEVANT MARKETS

Federal statutes governing mergers do not provide a specific framework for defining geographical and product markets, nor a means to measure the competitive effects of a consummated merger. The U.S. Supreme Court’s *Philadelphia National Bank* decision was the first to subject commercial banking, like other prospective business combinations, to Sherman and Clayton Act scrutiny.²⁷² The regulatory

268. Calvani et al., *supra* note 39.

269. See 12 U.S.C. § 1828(c)(4).

270. See 12 U.S.C. § 1828(c)(7)(A) (2006); see also 12 U.S.C. § 1828(c)(6) (In non-emergency cases “the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.”).

271. Roundtable, *supra* note 38, at 2. The DOJ-analysis is detailed in its Antitrust Division Manual, and includes statutory provisions and enforcement guidelines, which supplements the 1995 Merger Guidelines. See U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL ch. II, available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm> (providing statutory provisions and guidelines of the Antitrust Division); see also BANK MERGER COMPETITIVE REVIEW, *supra* note 224.

272. See *United States v. Phila. Nat’l Bank*, 374 U.S. 359, 324 n.1 (1963).

Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act, provides in pertinent part: “No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a

mechanism for analyzing competitive effects was refined by case law, most notably by three seminal high court decisions: (1) *Philadelphia National Bank*; (2) *Phillipsburg National Bank*;²⁷³ and (3) *Connecticut National Bank*.²⁷⁴ This trio established the primary method by which regulators determine whether the market effects of a proposed bank merger are anticompetitive.²⁷⁵ Before a regulator can even begin to perform a competitive analysis of a proposed bank merger, the agency must first define the “‘line of commerce’ (relevant product or services market) and the ‘section of the country’ (relevant geographic market).”²⁷⁶ A “necessary predicate” to determine whether a bank merger is likely to violate the Clayton Act is to evaluate the scope of the relevant product and geographic markets.²⁷⁷ This trio of decisions did not provide specific standards for qualifying what constitutes a local geographic market, and each supervisory agency was left to its own devices to develop a working geographic market definition.²⁷⁸ A lack of clarity and predictability resulted with respect to the boundaries of bank merger scrutiny.

The Supreme Court has not revisited the competitive antitrust issue in the banking context since the 1970s, and while some of the circuit courts have decided such cases, they have not deviated from the local geographic market and cluster of product and services approaches first articulated in *Philadelphia National Bank*.²⁷⁹ The Federal Reserve reinforces these outdated concepts, insisting that the law governing bank

monopoly.’

Id.

273. United States v. Phillipsburg Nat’l Bank, 399 U.S. 350 (1969).

274. United States v. Conn. Nat’l Bank, 418 U.S. 656 (1974); see also United States v. Marine Bancorp., Inc., 418 U.S. 602 (1974).

275. See Brewer III et al., *supra* note 15, at 7, Box 1. The key determinants of the degree of competition as set forth in the holdings of the three seminal cases are: “(1) the cluster of bank products is the relevant product line for competitive analysis; (2) this cluster is typically viewed as being consumed in geographically local banking markets; and (3) market structure.” *Id.* (citations omitted).

276. *Phila. Nat’l Bank*, 374 U.S. at 356; see also DiSalvo, *supra* note 18, at 1.

277. *Marine Bancorp., Inc.*, 418 U.S. at 618 (citations omitted).

278. DiSalvo, *supra* note 18, at 1.

279. Alvarez, *supra* note 256, at 8; see also United States v. Cent. State Bank, 817 F.2d 22 (6th Cir. 1987); Wyo. Bancorp. v. Bd. of Governors, 729 F.2d 687 (10th Cir. 1984); Republic of Tex. Corp. v. Bd. of Governors, 649 F.2d 1026 (5th Cir. 1981) (using cluster and local banking market to analyze competitive effects of bank acquisition while recognizing inherent limitations in traditional market share analysis); Mid-Neb. Bancshares, Inc. v. Bd. of Governors, 627 F.2d 266 (D.C. Cir. 1980).

merger activity remains unchanged.²⁸⁰ The Fed's general counsel explained recently that courts have shown a willingness to consider that commercial banking services can command an expanded product market due to a changing financial sector, and that competition reaches beyond local markets.²⁸¹ In spite of such speculation, continued judicial reluctance leaves the "long-standing product and geographic market definitions" carefully intact, unless presented with "persuasive economic evidence" that compels the charting of a new course for scrutinizing bank mergers.²⁸²

The Justice Department has adopted a different analytical approach from bank regulators. According to the Federal Reserve, the DOJ usually employs the Board's traditional local banking market definition.²⁸³ The DOJ, however, has noted that its screening guidelines [Bank Merger Competitive Review]²⁸⁴ indicate that the supervisory regulatory agencies and the DOJ "do not necessarily use the same product market or geographic market definitions."²⁸⁵ It is correct that

280. DiSalvo, *supra* note 18, at 1 n.1 (citing *Phila. Nat'l Bank*, 374 U.S. 321).

281. *See Alvarez*, *supra* note 256, at 8-9.

282. *Id.* at 9 (citation omitted).

283. *Alvarez*, *supra* note 256, at 15. According to the Fed, some differences exist in their [DOJ and Federal Reserve] respective approaches to competitive analysis, specifically regarding where bank merger proposals might have the potential for significant adverse competitive effects.

The DOJ places substantial weight on the potential effect of a merger on lending to small businesses, while the Board considers all lending in the context of the more general analysis of the cluster of banking products and services. The DOJ also has discretion to pay less attention to certain mergers or acquisitions, such as mergers involving small or medium-sized banks in rural and small urban banking markets, while the Board is mandated to review the competitive effects of these and all other proposed bank mergers or acquisitions within its jurisdiction. Because of these differences, the Board and the DOJ may reach different conclusions regarding the competitive effects of a proposed merger or acquisition. However, that is rare and always known in advance.

Id.

284. BANK MERGER COMPETITIVE REVIEW, *supra* note 224.

285. Chemtob, *supra* note 220.

[T]he Department of Justice examines the competitive effects of the transaction in disaggregated product markets (including retail, small business and middle-market lending) while the banking agencies look at the cluster of banking services. Remedies recommended by the Justice Department and the bank regulators may also differ, with Justice Department remedies more likely to be focused on ensuring that market competition is protected, rather than simply on restoring the pre-merger structural characteristics of the market Unlike the laws applicable to mergers in the telecommunications or energy areas, however, the bank regulators are authorized to

the DOJ does employ something that resembles the *Philadelphia National Bank* analysis in its HHI Index-driven review.²⁸⁶ However, the DOJ excludes some of the variables evaluated by bank regulators while adding others, and considers the pedigree local market factor but one of multiple data points for consideration, and may include the effect of nonbank rivals, including those operating within national or even global markets, as relevant competitors when determining whether a proposed combination would ultimately result in anticompetitive market effects.²⁸⁷

Nonetheless, neither the Federal Reserve's traditional local market approach, nor the DOJ's modified metrics, take into meaningful account a host of other variables in the manner advocated by the authors. Many economic factors, both macro and micro, are worthy of evaluation during a proposed merger's scrutiny. Examples of such relevant variables that a reviewer should consider include at what point in an economic cycle a merger was proposed and the underlying reasons for that prospective combination (e.g., business synergies versus "going concern" survival), as well as the general health of the domestic financial services sector and broader economy.²⁸⁸ These and numerous other endogenous and exogenous factors warrant due consideration because they offer the prospect of improved efficacy of the review, by way of an enhanced insight into the proposed transaction. Accordingly, these are points that should be plotted on a reviewer's data curve in order to more accurately evaluate the competitive impact of a given transaction, and ultimately, to discern whether the public interest is served by a transaction's approval.

approve an anticompetitive merger if they find that the anticompetitive effects are 'clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served.'

Id. (citations omitted).

286. For example, the "DOJ distinguishes banking from other industries . . . by allowing it more latitude for increases in HHI," but typically does not include, for example, thrift deposits into its analysis, whereas the Federal Reserve factors in the market effects of thrifts, but only assesses them with a half-weighted value in their antitrust analysis. See Gilbert & Zaretsky, *Banking Antitrust: Are the Assumptions Still Valid?*, FED. BANK OF ST. LOUIS REV. (2003), at 30-31, available at <http://research.stlouisfed.org/publications/review/03/11/gilbert.pdf>.

287. See Litan, *supra* note 54; see also *id.* ("[B]anks face competition in virtually all of their services from non-banks . . ."); HORIZONTAL MERGER GUIDELINES, *supra* note 224; see generally Gilbert & Zaretsky, *supra* note 286.

288. Ben Bernanke et al., *The Financial Accelerator and the Flight to Quality*, 78 REV. OF ECON. & STATISTICS 1, 1-15 (1996).

A. The Federal Reserve's Competitive Analysis

As a starting point for the Federal Reserve's competitive effects analysis of a bank merger application, the Board typically "defines the scope of the local geographic banking markets that are likely to be affected by a proposed acquisition or merger."²⁸⁹ The Board next examines the competitive effects of a proposed combination in each of the local banking markets where an acquirer and prospective target compete. The Fed will typically factor into its review:

[T]he number of competitors that would remain in the market, the relative market shares of total deposits in depository institutions in the market ('market deposits'), the concentration level of market deposits in the market and the projected increase in this level as measured by the Herfindahl-Hirschman Index ('HHI') under the DOJ Merger Guidelines, and other characteristics of the market.²⁹⁰

If a merger "results in a HHI change of 200 points or more to a post-merger HHI level of 1800 or more, or a post-merger market share of 35 [%] or more," the Board will conduct a more detailed review to assess whatever anticompetitive effects might exist, and determine whether there are mitigating factors (in each respective local banking market) that might offset any potential anticompetitive effects.²⁹¹ Some of the mitigating factors considered by the Board are a makeup of the local banking market, including the "number and relative market share of the remaining competitors,"²⁹² and the attractiveness of entry into that

289. Alvarez, *supra* note 256, at 10.

Under the Board's procedures, these geographic banking markets are defined by staff at the Federal Reserve Bank in whose District the acquiring banking organization and the target depository institution directly compete, with oversight by Board staff in Washington. The Federal Reserve System's specialized expertise, data, and market knowledge provide critical resources for competitive analysis, including in defining local geographic banking markets. In delineating local banking market boundaries within their Districts, the Federal Reserve Banks consider a number of factors, including population density, worker commuting patterns, advertising patterns of financial institutions and additional banking data, and other indicia of economic integration and the transmission of competitive forces among banks.

Id. (citation omitted).

290. Alvarez, *supra* note 256, at 10 (citations omitted).

291. *See id.* at 12.

292. *Id.* at 13.

market, as determined by “recent entry and favorable economic conditions.”²⁹³

The Federal Reserve’s “active economic research program” reviews the local banking market and cluster approach used in the merger analysis,²⁹⁴ and has “not found persuasive evidence to alter the general framework for analyzing bank mergers and acquisitions.”²⁹⁵ It is unclear what the Fed might consider to be “persuasive,” but these reviews do confirm, at least for the Fed, that the “cluster of commercial banking products and services and the local area continue to provide reliable guidance for defining the appropriate product and geographic markets in banking for the vast majority of households and small businesses.”²⁹⁶ A large body of research conducted in the past few years by the Federal Reserve Board revealed conflicting data regarding geographic markets.²⁹⁷ Some Federal Reserve research has supported the traditional localized geographic market approach, whereas other research suggests “considerably larger markets.”²⁹⁸ For banking mergers, the Fed

293. *Id.* Other factors include:

The competitive significance of the target institution also can be a relevant factor in some cases. For example, if the bank to be acquired is in a failing condition or otherwise is not a reasonably active competitor in the market due to its financial condition or other circumstances, the loss of competition would not be considered to be as severe as otherwise indicated by the HHI measurement. Adverse competitive effects also may be offset somewhat if the bank to be acquired is located in a fundamentally declining market such that it cannot sustain the existing banking organizations. In addition, the Board might consider other evidence on the nature and degree of competition in a particular market, including information on actual pricing behavior and the quality of services provided, in assessing the effects of a particular transaction.

Id. at 13-14.

294. *See id.* at 9.

295. *Id.*

296. *Id.*

For example, the Board’s 1998 Survey of Small Business Finances indicates that small businesses tend to obtain multiple financial services from their primary financial institution and from depository institutions in general, most of which are commercial banks. In contrast, this Survey suggests that small businesses typically obtain only one financial service from non-depository suppliers. With respect to geographic markets, the 1998 Survey of Small Business Finances indicates that the majority of small businesses obtain most of their financing from local financial institutions, primarily commercial banks. In addition, the Board’s 2001 Survey of Consumer Finances indicates that households still, to a substantial degree, obtain many financial services at local depository institutions.

Id.

297. Neill, *supra* note 226, 302 n.11.

298. *Id.* (citations omitted).

continues to use a two-decade old geographic market and product market framework,²⁹⁹ with the FDIC and the OCC following suit.³⁰⁰ The Treasury Department has recently sought to advance a “blueprint” for the Fed to become an “umbrella” agency for the financial services/banking sector.³⁰¹

B. The Department of Justice’s Competitive Analysis

The DOJ utilizes the same antitrust competitive analysis for banking industry as it does for all other industries.³⁰² The standards used by the DOJ to assess the competitive effects of all mergers are found in the DOJ’s Merger Guidelines³⁰³ According to a former Federal Reserve Commissioner, “[w]hile the bank regulatory agencies have not officially endorsed DOJ’s segmented ‘Horizontal Merger Guidelines Approach’ to market definition, it has captured the day.”³⁰⁴

In reviewing a bank merger proposal, the pragmatic DOJ approach can “refine” its definitions of the relevant product and geographic market by evaluating specific services that each merger participant

299. See *id.* at 292 (citations omitted).

300. See DiSalvo, *supra* note 18, at 1

301. Press Release, U.S. Dep’t of the Treasury, Treasury Releases Blueprint for a Stronger Regulatory Structure (Mar. 31, 2008), available at <http://www.treas.gov/press/releases/hp896.htm>.

302. Litan, *supra* note 54.

303. HORIZONTAL MERGER GUIDELINES, *supra* note 224; see also Timothy J. Muris, Chairman, Fed. Trade Comm’n, Prepared Remarks On the Occasion of the Celebration of the Twentieth Anniversary of the 1982 Merger Guidelines (June 10, 2002), available at http://www.ftc.gov/speeches/muris/1982mergerguidelines.shtm#N_14_.

The merger guidelines initiative begun in June of 1982 continues to exercise considerable intellectual power because the 1982 Merger Guidelines were not frozen in time. The Justice Department issued its first merger guidelines in 1968, revised them in 1982, amended them further in 1984, and, joined by the Federal Trade Commission, amended them again in 1992 and 1997. Driving this evolution has been an institutional attentiveness to developments in theory and the lessons of practical experience. These Merger Guidelines will retain their vitality only if the federal agencies remain open to future adjustments informed by improvements in economic and legal learning, and if the agencies make efforts to analyze and learn from the results of past implementation.

Id. (citations omitted).

304. Calvani et al., *supra* note 39 (“Moreover, by jointly adopting the Bank Merger Screening Guidelines, both DOJ and the regulatory agencies have adopted a method of approach that minimizes conflict. The centerpiece is the method of defining the relevant product market and measuring concentration.”).

offers and the location(s) in which the services are offered.³⁰⁵ If finance companies or credit unions compete with merger candidates, the DOJ will include those businesses in its relevant product market analysis.³⁰⁶ The DOJ also employs a “looser” HHI threshold than suggested by its own Merger Guidelines,³⁰⁷ because the competition facing banks comes from non-banks who offer virtually the same services, and from out-of-state banks.³⁰⁸ These circumstances, according to the DOJ, “often cannot be captured by computing HHI’s based solely on deposits.”³⁰⁹

The HHI concentration result will be different when markets are defined differently. For example, in the Central Savings and Huntington

305. See Litan, *supra* note 54.

The way we analyze markets should cause no more uncertainty than our procedure in all other types of mergers, which often present unique product and geographic markets. Merger analysis is fact-sensitive in banking as elsewhere. The analytical principles and goals are the same, but the answers they produce depend on the facts of specific cases.

Id.; see also Martin Frederic Evans & Kevin P. Lewis, *Bank Mergers and Acquisitions: Antitrust Considerations and Developments*, 608 PLI/CORP 27, 40 (1988) (“[T]he Department insists that the ‘[a]ccurate assessment of the competitive effects of a merger requires the definition of a unique geographic market for each relevant product market.’” (citations omitted)).

306. *Id.*; see also Sheehan, *supra* note 21, at 703-04.

In *United States v. National Bank and Trust Company of Norwich*, the Justice Department, in suing to enjoin the merger of two New York banks, stated that “[t]he relevant product markets in this case are appropriately defined as banking services provided to consumers (‘consumer banking’) and banking services provided to businesses (‘business banking’).” Furthermore, the Justice Department stated that within the two markets ‘there are a number of component services that can be considered separately as distinct product markets.’ Within consumer banking markets, the Justice Department included demand deposit accounts, savings deposits, time deposits, money market deposit accounts, consumer loans, and residential mortgage loans. As providers of many of these services, commercial banks, thrifts, credit unions, and other financial institutions should all be included in the product market when in fact their products compete with one another.

Id. (citation omitted).

307. HORIZONTAL MERGER GUIDELINES, *supra* note 224.

308. See Litan, *supra* note 54.

309. *Id.* According to the DOJ:

[S]ome have questioned why we, in some cases, have not used the Fed’s pre-defined markets. . . . [W]e will depart from the Fed’s regions where the market realities suggest we should. Moreover, unlike the Fed, which views banks as providing a cluster of services, we view banks as multi-product firms. As a result, we sometimes have to use different geographic market definitions for each of the products we examine.

Id.

National merger,³¹⁰ the Board defined the geographic market as a three-county area, increasing the post-merger HHI by 934 points for a total HHI score of 2856 points, and a 43% combined market share.³¹¹ The DOJ, however, defined the geographic market for the same proposed merger as a “single county market,” with a 70% combined market share and a post-merger HHI of 5242, an increase of 2462 points.³¹² The Department of Justice treats banks as “multi-product firms” and assesses the competitive impact of a proposed combination for each relevant product or service.³¹³ The Department of Justice employs a flexible and pragmatic analytical approach to its review of proposed banking combinations, examining bank competitors in various markets if those entities are meaningful participants in market(s) at issue in a proposed bank merger.

C. Relevant Product Market

The *Philadelphia National Bank* Court concluded that the “relevant product market” was comprised of the “cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking.’”³¹⁴ The Court determined that these clusters of products constitute a distinct line of commerce.³¹⁵ When conducting a Clayton Act analysis of a proposed bank merger, the relevant product market generally includes only competing commercial banks.³¹⁶ The *Philadelphia National Bank* Court determined in 1963 that “commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category.”³¹⁷

The Supreme Court has resisted attempts to expand the definition of what constitutes a “product market,” despite the changing banking

310. Maribeth Petrizzi & Erin Carter Grace, *Bank Merger Process Overview – Powerpoints*, 1467 PLI/CORP 181, 210 (2005). The merger of Central Savings/Huntington National - Sault Ste. Marie, Michigan (1999) was considered a small business market merger. *Id.*

311. *See id.*

312. *Id.*

313. Calvani et al., *supra* note 39, at n.36 (citation omitted).

314. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356 (1963).

315. *See id.*

316. *See Brewer III et al.*, *supra* note 15, at 7, Box 1.

317. *Phila. Nat’l Bank*, 374 U.S. at 356.

landscape and the expansion of financial services offered by non banks. Meanwhile, banking regulators have occasionally expanded the product market definition, and the DOJ has utilized an evolving product market analysis. The Federal Reserve Board, however, recently stated that based upon “empirical data,” the relevant banking market for most U.S. households and small business remains generally limited to small geographic areas (e.g., counties), and “there is a tendency [for consumers] to purchase a cluster of services from commercial banks.”³¹⁸

I. DOJ's Relevant Product Market

Although the DOJ generally attempts to use the Federal Reserve's geographic market definitions, the Fed's definitions, according to the DOJ, do not precisely recognize the attributes of competition for a particular service, in some instances.³¹⁹ The DOJ's relevant product market analysis includes:

Look[ing] separately at the markets for deposits (commercial and retail), various types of loans (mortgages, consumer, and commercial), and any other services the parties may offer (trust, cash management, correspondent banking services, etc.). We tend to look especially hard at the type of commercial lending in which the parties are engaged. If, for example, they concentrate their attention on small business borrowers (for example, with loans no more than \$1 million) or on mid-size borrowers (with larger loan limits) then those are the markets we will look at.³²⁰

The DOJ's product market analysis also “looks at disaggregated product markets.”³²¹ This entails an examination of the types of products offered by banks to various entities, such as retail, small businesses,³²² middle market,³²³ syndicated lending,³²⁴ and activities

318. Supporting Statement, *supra* note 30, at 2.

319. See Litan, *supra* note 54 (“This is especially likely to be true where the Fed's markets are drawn quite broadly, but the particular services the parties offer actually are bought by purchasers in a smaller region—for example, the inner city rather than a wider metropolitan area.”).

320. *Id.*

321. Petrizzi, *supra* note 310, at 204.

322. *Id.* (“Small business” means sales less than \$10 million and credit less than \$1 million).

323. *Id.* (Middle market means sales of \$10 million to \$100 million and credit of \$1 million to \$10 million).

which are generally considered nonbank activities, such as credit cards, merchant card processing, ATM networks, and custody services.³²⁵ Although the Federal Reserve uses the cluster of products and services analysis set forth in *Philadelphia National Bank*, the DOJ rejects the approach “because banks are not constrained to raise the prices of all the services they offer uniformly.”³²⁶

The DOJ challenged the merger of First Hawaiian and First Interstate Bank of Hawaii³²⁷ after it was approved by the Federal Reserve Board.³²⁸ The DOJ submitted its report to the Fed, concluding that if the transaction was consummated, it would result in substantially anticompetitive effects.³²⁹

The [DOJ] Report’s conclusion appears to be based primarily on the determination that commercial lending to small-and medium-sized businesses—rather than the cluster of banking products and services—constitutes the relevant product market, and the State of Hawaii in its entirety constitutes the relevant geographic market.³³⁰

324. *Id.* at 204. Syndicated lending is “participation in a large loan by more than one institution, and is generally for amounts that exceed the level that those institutions are comfortable lending on their own . . . which includes investment grade, leveraged and highly leveraged loans.” *Id.*

325. *Id.* at 204.

326. *Id.* at 205 (“For example, banks are not deterred from raising the price of one product, such as a small business line of credit, by the possibility that prospective loan customers would substitute other products in the cluster.”); *see also* Neill, *supra* note 226, at 297 (citing Constance K. Robinson, Dir. of Operations, Antitrust Div., U.S. Dep’t of Justice, Address Before the Ass’n of the Bar of the City of New York (Sept. 30, 1996), <http://www.usdoj.gov/atr/public/speeches/1004.htm>).

Moreover, the DOJ does not adhere to the Federal Reserve Board’s ‘cluster-of-services’ product market. Rather, the DOJ disaggregates the product cluster into its constituent components and defines a different geographic market for each of the component product markets and type of customers using those products. Thus, the DOJ asserts that retail depositors, small businesses, middle-market businesses, and large corporations demand different banking products and access those products across different geographic distances.

Id.

327. *United States v. First Hawaiian, Inc.*, Civ. No. 90-00904, 1991 WL 126314 (D. Haw. May 29, 1991) (The banks were ordered to divest branches).

328. *First Hawaiian, Inc.*, 77 Fed. Res. Bull. 52, 56 (1991), *available at* 1991 WL 267202 (approving the acquisition).

329. *See id.*

330. *Id.* (citation omitted).

The Federal Reserve noted that the DOJ's competitive effects analysis was premised upon a product market definition that deviated from the tradition definition established by the Supreme Court.³³¹ The Board also noted that the DOJ's product market definition "is not supported by recent studies of the market behavior of bank customers," and contended the DOJ failed to provide any specific empirical or legal justification for its product market definition.³³² The Board also disagreed with the DOJ's "statewide geographic market"³³³ and concluded, based upon precedent, "that the geographic market for the cluster of services is local in nature."³³⁴ *First Hawaiian* highlights the differences between DOJ bank merger analysis,³³⁵ and the Federal

331. *See id.* at 56-57.

[A]fter reviewing the record in this case in light of relevant Board and judicial precedents, the Board believes that the appropriate product market in this case is the cluster of banking products and services, and the relevant geographic markets for analyzing the effects of this expansion proposal are the five local markets identified above.

Id.

332. *Id.*

The Report indicates that, even if the relevant product market is viewed to be a 'package' of banking services that includes loans and transaction accounts, the market share of a particular institution does not differ significantly when measured by reference to the commercial loan market or measured by reference to transaction accounts. Comparable loan data are not readily available, and the Board believes that deposits represent the best available measure of an institution's market share. The Report also states summarily that the proposal would be anticompetitive if market share were measured on the basis of deposit data. According to the Report, the HHI would increase by 273 points to 3379 on that basis. This calculation does not account for the presence of thrift institutions in the market (with the exception of one thrift that is fully included), does not account for any of Applicant's planned divestitures, and assumes a statewide geographic market. As explained above, the Board believes that an analysis of these data, as well as the other relevant factors, supports the conclusion that the proposal is not likely to lessen competition substantially in any relevant market.

Id. at 57 n.32.

333. *Id.* at 57 n.32.

334. *Id.* at 54.

335. For other examples of the DOJ's challenges to Board approved mergers, *see* *United States v. Society Corp*, No. 1:92CV 0525, 1992 WL 191096 (N.D. Ohio June 4, 1992) (DOJ's challenge to Society Corp merger); 77 Fed. Res. Bull. 750 (1991) (Federal Reserve's approval of Fleet/Norstar Merger); *United States v. Fleet/Norstar Fin. Group, Inc.*, Civ. No. 91-0221-P, 1991 WL 299117 (D. Me. Dec. 3, 1991) (DOJ's challenge to the Federal Reserve Approved merger of Fleet and Norstar Financial Group).

Reserve Board's cluster of product and services and local geographic market definitions, first enunciated by *Philadelphia National Bank*.³³⁶

2. Failed Attempt to Diversify the Product Market

[T]he Supreme Court's pronouncements in *Philadelphia* and *Phillipsburg* on the subject were not intended to be ironclad, hard and fast rules which require a court to don blinders to block out the true competitive situation existing in every set of circumstances. Lower courts have split on the issue.³³⁷

Almost a decade after *Philadelphia National Bank*, the District Court's product market definition in *United States v. Connecticut National Bank* departed from the Supreme Court's earlier holdings,³³⁸ when the lower court determined that the "line of commerce" within a Clayton Act section 7 analysis "included both commercial banks and savings banks."³³⁹ The trial court opined that the edicts of *Philadelphia National Bank* and *Phillipsburg National Bank* should not prevent an analysis of "the true competitive situation," depending upon the circumstances.³⁴⁰

The United States Supreme Court in *Connecticut National Bank* considered savings banks almost irrelevant in the commercial bank merger context and took issue with the lower court's inclusion of such components of a product market analysis.³⁴¹ The Court agreed with the trial court's assessment that *Philadelphia National Bank* and *Phillipsburg National Bank* "do not require a court to blind itself to economic realities,"³⁴² and stated that it "must recognized meaningful

336. *Id.* at 532-54.

337. *United States v. Conn. Nat'l Bank*, 362 F. Supp. 240, 280 (D. Conn. 1973).

338. *See id.* at 240.

339. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 660 (1974) (citing *Conn. Nat'l Bank*, 362 F. Supp. at 281).

340. 418 U.S. at 660-61 (quoting *Conn. Nat'l Bank*, 362 F. Supp. at 281).

[C]ountervailing legal and factual arguments persuade this Court that, while other financial institutions may not be significant in determining the appropriate line of commerce in the instant case, savings banks are in direct and substantial competition with commercial banks in providing product-services to the banking consumers in Connecticut. The cold, hard realities of the situation are that savings and commercial banks are fierce competitors in this state.

Id.

341. *See Conn. Nat'l Bank*, 418 U.S. at 662.

342. *Id.*

competition where it is found to exist.”³⁴³ Although the Court acknowledged that commercial banks and savings banks in the state offer basically equivalent services and, thus, are “‘fierce competitors,’”³⁴⁴ it found that the lower court “mistaken[ly]” included commercial and savings banks in its product market analysis, despite its recognition that each offered customers “identical or essentially fungible services.”³⁴⁵ The Court also determined that the District Court “overestimated” the degree of overlap in competition between commercial and savings banks in the state.³⁴⁶

Despite substantial similarity in the services offered by savings and commercial banks, according to the Court “the overlap is not sufficient at this stage in the development of savings banks in Connecticut to treat them together with commercial banks in the instant case,” and commercial banks provided a cluster of services that savings banks were unable to offer, especially to commercial customers.³⁴⁷ Direct competition between commercial and savings banks, in “some submarkets,” is not the endpoint of an appropriate bank merger market

343. *Id.* (quoting *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964)).

344. *Id.* (quoting *Conn. Nat'l Bank*, 362 F. Supp. at 280).

345. *Id.* at 662.

[The District Court also] erred as a matter of law in concluding that the absence of a ‘line of commerce’ phrase in the Bank Merger Act of 1966 alters traditional standards under [§] 7 of the Clayton Act for defining the relevant product market in a bank merger case.

The commercial banks in both [*Philadelphia National Bank* and *Phillipsburg National Bank*] faced significant competition from savings and loan associations and other credit institutions. The [District] Court in both instances nevertheless viewed the business of commercial banking as sufficiently distinct from other credit institutions to merit treatment as a separate ‘line of commerce’ under [§] 7. Analogous distinctions, although perhaps not as sharply defined, are controlling here.

Id. at 663-64 (citations omitted).

346. *See id.* at 663.

To be sure, there is a large measure of similarity between the services marketed by the two categories of banks.

In our view, however, the overlap is not sufficient at this stage in the development of savings banks in Connecticut to treat them together with commercial banks in the instant case. Despite the strides that savings banks in that State have made toward parity with commercial banks, the latter continue to be able to provide a cluster of services that the former cannot, particularly with regard to commercial customers, and this Court has repeatedly held services that the former cannot, particularly provided by commercial banks that sets them apart for purposes of [§] 7.

Id. at 663-64.

347. *Id.* at 663-64.

analysis.³⁴⁸ The District Court noted that “it would be ‘ostrich-like’ to assume that the two types of banks are not in direct and vigorous competition with regard to the services they share or are not viewed by many bank customers as more or less fungible *for* purposes of those services.³⁴⁹ Despite such clarity of thought, the Federal Reserve only gives a 50% weighting to thrift deposits, and the DOJ often does not consider them at all.³⁵⁰

Aggregation of financial services and products, particular to commercial customers, apparently justifies the view that commercial banks deserve a specialized method to evaluate proposed mergers.³⁵¹ Because commercial banks service business constituencies with clusters of products and services that, in the aggregate, are not offered by savings banks, “the differences in what commercial banks . . . offer to that important category of bank customers are sufficient to establish commercial banking as a distinct line of commerce.”³⁵²

The Supreme Court cautioned that nothing in *Connecticut National Bank*, *Phillipsburg National Bank*, or *Philadelphia National Bank* prevented future analysis as to whether savings banks and commercial banks might co-exist within the same line of commerce. The *Connecticut National Bank* Court also noted specifically that “[a]t some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act.”³⁵³ The Court was apparently not yet persuaded that the lines between commercial and savings banks had blurred sufficiently, and so it adhered to the *Philadelphia National Bank* and *Phillipsburg National Bank* tests.³⁵⁴ The District Court was therefore required, despite other

348. *Id.* at 664 n.3.

349. *Id.* (citations omitted).

350. Gilbert & Zaretsky, *supra* note 286; *see also* First Hawaiian, Inc., 77 Fed. Res. Bull. 52, 55 (1991), available at 1991 WL 267202 (“The Board also believes that thrift institutions must be recognized as competitors in the market. As explained above, the Board has previously indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks.”).

351. *Conn. Nat’l Bank*, 418 U.S. at 664.

352. *Id.* at 664.

353. *Id.* at 666.

354. *Id.*

We do not say, and *Phillipsburg National Bank*, . . . and *Philadelphia National Bank*, . . . do not say, that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them

decisions that realistically expanded the product market in the nonbanking context,³⁵⁵ to proceed on remand with the use of a relevant product market that excluded, *inter alia*, savings bank competitors.³⁵⁶ However, the Court would soon begin to re-evaluate the role of thrifts and other financial institutions as it continued to refine its bank merger antitrust analysis.

3. Justice Harlan Criticizes Narrow Cluster Approach

The Court eschews all analysis of the composition of the products and services offered by appellee banks, however. The Court thus manages to ignore completely the extent to which competition from savings and loan companies, mutual savings banks, and other financial institutions that are not commercial banks affects the market power of the appellee banks.³⁵⁷

In 1970, the United States Supreme Court, in *United States v. Phillipsburg National Bank and Trust*, observed that “[c]ommercial realities in the banking industry make clear that banks generally have a very localized business.”³⁵⁸ The Court viewed the cluster of products and services offered by full service banks as sufficient to construe

from commercial banks for purposes of the Clayton Act.

Id.

355. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (recognizing submarkets and interchangeability necessitated the examination of the effect of a shoe company merger’s effect on those submarkets which are independently subject to antitrust scrutiny); *Berlyn Inc. v. The Gazette Newspapers, Inc.*, 73 Fed. Appx. 576, 582 (4th Cir. 2003) (evaluating a media merger where the relevant product market was constructed of “products that have reasonable interchangeability for the purposes for which they are produced”) (citations omitted).

356. See *Conn. Nat’l Bank*, 418 U.S. at 666 (“[I]n adherence to the tests set forth in our earlier bank merger cases, which we are constrained to follow, we hold that such a point has not yet been reached. Accordingly, on remand the District Court should treat commercial banking as the relevant product market.”).

357. *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 380 (1970).

358. *Id.* at 362.

The District Court selected as the relevant geographic market an area approximately four times as large as Phillipsburg-Easton, with a 1960 population of 216,000 and 18 banks. The area included the city of Bethlehem, Pennsylvania. The court explicitly rejected the claim of the United States that Phillipsburg-Easton constitutes the relevant market. We hold that the District Court erred.

Id. (citations omitted).

commercial banking as a distinct line of commerce,³⁵⁹ noting “that the relevant product market is determine[ed] by the nature of the commercial entities involved and by the nature of the competition that they face.”³⁶⁰ Harlan jabbed sardonically that the Court’s simplistic bank merger analysis was “an exercise in ‘antitrust numerology.’”³⁶¹ Justice Harlan developed two “aspects of market structure” to rebut the inferences that percentage figures are somehow determinative of whether or not the merger will have significant anticompetitive effects.³⁶² The first aspect of Harlan’s market structure which may alleviate the significance of the competition required a determination of the “conditions of entry in a particular market.”³⁶³ Justice Harlan posited that percentage figures alone do not reveal anything meaningful about the conditions for market entry.³⁶⁴ Free market conditions and the regulatory environment are among the variables that have an effect on ease of (or barriers to) entry into a respective market.³⁶⁵

359. *See id.* at 360-61.

360. *Id.* at 360 (citing *United States v. Cont’l Can Co.*, 378 U.S. 441, 456-57 (1964)).

361. *Id.* at 376-77 (Harlan, J., with Chief Justice, concurring in part and dissenting in part). *But see id.* at 376 n.4 (Justice Harlan “accept[ed] the Court’s conclusion that the appropriate geographic market here is the Phillipsburg-Easton area, and agree[d] that the geographic market designated by the District Court was too broad, given the small size of the banks involved in this case.”).

362. *Id.* (“Consequently, I think the appellees should on remand be given an opportunity to show by ‘clear evidence’ that despite the percentage figures, the anticompetitive effects of this merger are not significant.”).

363. *Id.* (“New entry can, of course, quickly alleviate ‘undue’ concentration. And the possibility of entry can act as a substantial check on the market power of existing competitors.”); *see also* Calvani et al., *supra* note 39, at n.8 (“The Supreme Court has expressly accepted the perceived potential entrant theory in a bank case.”).

364. *Phillipsburg Nat’l Bank*, 399 U.S. at 377.

365. *Id.* at 377-82.

Quite apart from entry, there is another aspect of the market structure relevant here that affects the significance of the percentage figures cited by the Court. Relying on *Philadelphia Bank*, the Court concludes that the ‘cluster of products * * * and services * * * denoted by the term ‘commercial banking’ * * * composes a distinct line of commerce’ for purposes of this case. The Court eschews all analysis of the composition of the products and services offered by appellee banks, however. The Court thus manages to ignore completely the extent to which competition from savings and loan companies, mutual savings banks, and other financial institutions that are not commercial banks affects the market power of the appellee banks.

Id. at 379-80.

The second prong of Justice Harlan's "aspects of market structure" is an analysis of the cluster of products and services which tends to reveal facets of banking market competition and the significance (if any) of percentage figures.³⁶⁶ The dissent criticized the majority's product market delineation because it "largely ignores" the "subtleties."³⁶⁷ Justice Harlan's *Phillipsburg* dissent viewed the proper approach as being an evaluation of the competition from other industries, or even sub-industries, in addition to commercial banks, because both the target and acquirer bank "have more in common with savings and loan institutions and mutual savings banks than with the big city commercial banks considered in Philadelphia [National] Bank."³⁶⁸ Harlan's dissent also recognized that "nonbank financial institutions offer close substitutes for the products and services that are most important to the appellee banks."³⁶⁹

According to the minority view, the Court instead "emphasized the cluster of services and products which in the Court's words 'makes commercial banking a distinct line of commerce.'³⁷⁰ The reform advocated by the authors—specifically, an updated model for evaluating proposed bank mergers—finds its origins in Harlan's rebuttal of the *Phillipsburg* majority.

366. *Id.* at 378-82.

367. *Id.* at 380-81. "[T]he Court's mode of analysis makes too much turn on the all-or-nothing determination that the relevant product market either includes or does not include products and services of savings and loan companies, and other competition." *Id.* at 382.

368. *Id.* at 380-81.

368. *Id.* at 392.

369. *Id.* at 381. *But cf.* *United States v. Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (In *Visa USA, Inc.*, the Second Circuit agreed "that other forms of payment—such as cash, checks, debit cards, and proprietary cards (e.g., the Sears or Macy's cards)—are not considered by most consumers to be reasonable substitutes for general purpose credit or charge cards."); *see also id.* at 239 (citations omitted) ("A distinct product market comprises products that are considered by consumers to be "reasonabl[y] interchangeable[le]" with what the defendant sells.).

370. *Id.*

[E]ven assuming that for purposes of a preliminary analysis one were to use commercial banking as the line of commerce for the antitrust analysis—if only for the sake of convenience—that does not excuse the majority's failure to consider the competitive realities of the case in appraising the significance of the concentration percentages thus calculated.

Id. at 381-82 (citations omitted).

4. Stare Decisis and Shifting Market Conditions

The Justice Department challenged the proposed merger between the National Bank of Commerce (“NBC”) and Washington Trust Bank (“WTB”) on Clayton Act grounds.³⁷¹ The DOJ opposed the prospective merger because it believed the combination might substantially lessen competition in a variety of ways.³⁷² The District Court adopted the defendant’s proposed findings of facts and conclusions of law, including the finding that the merger would have “no inherent anticompetitive effect,” and would “substantially’ increase competition in commercial banking in the Spokane metropolitan area.”³⁷³ The trial court dismissed the DOJ’s complaint,³⁷⁴ having concluded that, even if the proposed merger would violate section 7 of the Clayton Act, it was otherwise lawful under the Bank Merger Act of 1966 because the acquirer (NBC) would provide a broad range of banking services to the Spokane area market.³⁷⁵ The Supreme Court concurred with the trial court’s findings, and determined its view was “in full accord with [its] precedents,”³⁷⁶ specifically that the relevant product market was “the ‘business of

371. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 606-07 (1974) (“NBC is a wholly owned subsidiary of a registered bank holding company, Marine Bancorporation, Inc. (Marine).”).

372. *See id.* at 614-15.

The merger ‘may . . . substantially . . . lessen competition’ within the meaning of [§] 7 in three ways: by eliminating the prospect that NBC, absent acquisition of the market share represented by WTB, would enter Spokane de novo or through acquisition of a smaller bank and thus would assist in deconcentrating that market over the long run; by ending present procompetitive effects allegedly produced in Spokane by NBC’s perceived presence on the fringe of the Spokane market; and by terminating the alleged probability that WTB as an independent entity would develop through internal growth or through mergers with other medium-size banks into a regional or ultimately statewide counterweight to the market power of the State’s largest banks. The Government’s first theory—alleged likelihood of de novo or foothold entry by NBC if the challenged merger were blocked—was the primary basis upon which this case was presented to the District Court.

Id. (citation omitted).

373. *Marine Bancorp.*, 418 U.S. at 615-16.

374. *Id.* at 618.

375. *Id.*; *see also id.* at 618 n.15 (NBC was a full-service bank with “increased loan limits, different types of loans, international banking services, computer services, enhanced trust services, and other benefits,” whereas the target bank (WTB), due to its smaller size, could not provide this array of services.).

376. *Id.* at 619 (citing *United States v. Phillipsburg Nat’l Bank*, 399 U.S. 350, 359-62 (1970); *United States v. Third Nat’l Bank*, 390 U.S. 171, 182 n.15 (1968); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356-57 (1963)).

commercial banking (and the cluster of products and services denoted thereby).³⁷⁷ The Supreme Court has acknowledged that precedent is not “sacrosanct,”³⁷⁸ and slavish adherence to prior decisions can be eliminated “where the necessity and propriety of doing so has been established.”³⁷⁹ In some circles the question continued as to whether the financial markets had yet sufficiently shifted away from the *Philadelphia National Bank* Court’s perception that banking was “unique” and “insulated,” due to its particular array of traditional products and services, as well as a tendency towards predominantly local customer constituencies.

D. Geographic Market

The *Philadelphia National Bank* Court determined that the relevant geographical market is not determined by “where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”³⁸⁰ The Court found that banking was like “most service industries” and must have customer-convenient locations in order to effectively compete, and that both corporate and retail customers “typically” use “banks in their local community” because of the impracticality of distant banking.³⁸¹ The Supreme Court acknowledged that the area where the offices of the acquirer and target bank are located is not a perfect benchmark for the “section of the country” on which to assess any anticompetitive effects of the proposed merger.³⁸² The Court ultimately compromised with the four-county

377. *Marine Bancorp.*, 418 U.S. at 618 (citation omitted).

378. *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (citations omitted).

379. *Ring*, 536 U.S. at 608 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

380. *Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963) (citation omitted).

381. *Id.* at 358 (citation omitted).

382. *Id.* at 360-61.

Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. . . . [S]ome banking services are evidently more local in nature than others.

Id.

Philadelphia metropolitan area and avoided extreme delineations of the relevant market boundaries.³⁸³

Impracticality of banking at a distance is a non-issue in most instances today. Modern banking markets call for a pragmatic analytical framework that recognizes the ubiquity of technology and services that affordably transcend physical space and make the existing standard obsolete. Today's era is one where mortgages can be originated over toll-free telephone numbers and applications can be made via the Internet,³⁸⁴ credit card issuers provide customers with "convenience checks," kiosks frequently replace bank branches, and retail shopping outlets often offer ATMs and other financial services.³⁸⁵

The *Connecticut National Bank* dissent argued that potential competition from adjacent markets should also be incorporated into an appropriate competitive effect analysis, and that as a result, the analysis may necessarily include more than one relevant geographic market.³⁸⁶ However, there still remains an almost luddite resistance to an alteration

383. *Id.*

384. *See, e.g.*, Capital One's Home Online Loan/Mortgage Application, http://www.capitalonehomeloans.com/newhome/?ref=bank&linkid=WWW_Z_Z_Z_B_MRT_C1_01_T_Z (last visited Mar. 30, 2008).

385. *See, e.g.*, Karen Epper Hoffman, *A 2nd Act for ATMs; ATMs and Financial Kiosks Are Back in Vogue as Banks Look to Strengthen Self-service Options in the Branch*, BANKING STRATEGIES, May/June 2007, available at <http://www.bai.org/bankingstrategies/2007-may-june/ASecondAct/print.asp>.

7-Eleven Inc.'s Vcom terminals . . . boasts more than 1,000 such machines, which enable users to cash checks, get cash, pay bills and buy money orders. Exxon Mobil installed 130 of its own bill-paying terminals in its convenience stores in 2006, and announced plans to roll out nearly 1,000 more by yearend 2007. Banks recognize the need to compete with such retailers and other would-be rivals on the self-service front, and one counter-attack strategy is to offer new ATMs with greater functionality. *Id.*; *see also* Kris Hudson, *Wal-Mart Pushes Financial Services Menu*, WALL ST. J., June 6, 2007, available at http://online.wsj.com/article/SB118108758438025751.html?mod=home_whats_news_us.

386. *See* United States v. Conn. Nat'l Bank, 418 U.S. 656, 673-75 (1974).

Section 7 of the Clayton Act speaks to lessening competition 'in any section of the country' . . . and as the majority acknowledges in *Marine Bancorporation*, the Court 'held that the Government had established three relevant markets in which the acquired firm actually marketed its products—a single State, a multi-state area, and the Nation as a whole.' To be sure, the selection of any relevant geographic market in a banking case must be chosen in terms of the needs of the customers and the area in which sellers operate, but this may result in several possible markets, especially in a potential . . . competition case where a merger might affect the economic behavior of existing firms in various markets.

Id. at 674 (citations omitted).

of the review methods to accurately reflect the present state of the financial services market. At least one Federal Reserve Bank has recognized that the changing banking landscape has led to a shift in geographic boundaries,³⁸⁷ but it remains convinced that its local market definition remains reasonably reflective of the current state of the financial services sector.³⁸⁸

Innovations such as advanced-function ATMs have added to the ease of delivering financial services and products,³⁸⁹ and expand a bank's potential offerings to the extent that the West Coast bank Wells Fargo "view[s] the ATM as an extension of the bank, not just a glorified point-of-sale device, . . . We see it as a place to do banking."³⁹⁰ Technology advances have afforded even greater convenience, allowing customers to receive financial services via terrestrial fiber optic lines or wi-fi signals, whether from a hotel or living room, or while at a golf course or an airport concourse. More than a decade ago, the CEO of Chemical Bank even remarked that "[n]ot having branches could be an

387. See Fed. Reserve Bank of Boston, Elements of Antitrust Analysis, available at <http://www.bos.frb.org/bankinfo/struct/antitrst.htm> [hereinafter FRB Elements of Antitrust Analysis].

Recently, the geographic boundaries of the banking markets have been affected by technological changes, such as the growth of automated teller machine networks and remote banking services, and by financial innovations, such as money market funds and deposit brokerage. Such technological and financial changes could create difficulty in establishing geographic boundaries that accurately separate groups of banking competitors into distinct geographic markets.

Id.

388. See *id.*

In a 2001 paper, Amel and Starr-McCluer study the Federal Reserve Board's 1998 Survey of Consumer Finances and conclude that although financial institutions face increasing competition from distant and/or non-depository institutions, consumers still rely predominantly on local depository institutions for many key banking products. Consequently, they argue, current market definitions still accurately reflect competitive conditions for these products.

Id. (citation omitted).

389. See, e.g., the 'Unmanned Bank Branch ATM,' available at http://www.kioskmarketplace.com/products_411.php; see also Bill Yackey, Advanced-function ATMs Register on College Campuses, ATM MARKETPLACE.COM, Aug. 29, 2007, <http://www.atmmarketplace.com/article.php?na=1&id=9187> (Wilmington Savings Fund Society Financial Corp.'s moved to unmanned banking at the University of Delaware, and "replace[d] its existing on-campus branch ATMs with NCR Corp.'s line of Personas M Series 86 no-envelope ATMs. The ATMs, in addition to cash dispensing, offer intelligent-deposit features.").

390. See Hoffman, *supra* note 385.

advantage as we leapfrog the physical delivery system.”³⁹¹ The nature of the contemporary financial services market has unquestionably advanced to such an extent that the analytical modalities for bank merger evaluation should also necessarily evolve. While the physical “brick and mortar” branch is not yet decidedly anachronistic, an increasing number of customers, retail and commercial alike, have already elected to fulfill many of their banking needs online, and some even bank with an institution that has no physical branch locations at all.³⁹²

1. Federal Reserve Continues to Utilize a Localized
Geographic Market

In the context of the banking merger analysis, the Federal Reserve continues to define the relevant geographic market as one that is predominantly local by nature.³⁹³ In setting the geographic market, “the Board and the courts have consistently found that the relevant geographic market for analyzing the competitive effects of a proposal must reflect commercial and banking realities and should consist of the

391. Saul Hansell, *500,000 Clients, No Branches*, N.Y. TIMES, Sept. 3, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE5DB1F39F930A3575AC0A963958260&sec=&spon=&pagewanted=1>.

392. See Carolyn Bigda, *Break the Bank: Go Online*, CNN MONEY.COM, Aug. 3, 2007, available at http://money.cnn.com/2007/08/02/pf/online_banks.money.com/?postversion=2007080308.

The first virtual banks were generally limited to high-yield savings accounts, but today’s ‘pure play’ Web banks such as E-Trade and EverBank offer free ATMs and check writing.

There are no branches, but you probably use those less frequently anyway: 41 million households now do some form of banking online, a number that’s expected to nearly double by 2011, according to Forrester Research. (Even some old-style banks are trying to get into the game by setting up Web-only divisions.)

Id.

393. Bank of Am. Corp., 92 Fed. Res. Bull. C5, C7-C8 (2006), available at <http://www.federalreserve.gov/pubs/bulletin/2006/legal06-508.pdf>; see also J.P. Morgan Chase & Co., 90 Fed. Res. Bull. 352 (2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/summer04_legal.pdf; Bank of Am. Corp., 90 Fed. Res. Bull. 217, 221 (2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/spring04_legal.pdf; Cent. Pac. Fin. Corp., 90 Fed. Res. Bull. 93, 95 (2004), available at http://www.federalreserve.gov/pubs/bulletin/2004/winter04_legal.pdf (“[T]he Board and the courts repeatedly have held that the geographic market for the cluster of banking products and services is local in nature.”); Fin. Group, Inc., 85 Fed. Res. Bull. 747, 750 & n.19 (1999); NationsBank Corp., 84 Fed. Res. Bull. 858, 860 n.15 (1998).

local area where customers can practicably turn for alternatives.”³⁹⁴ Each Federal Reserve Bank is responsible for defining its own geographic market, some of which are closer to a contemporary view than others.³⁹⁵ The varying methodologies can be attributed to “the decentralized organization of the Federal Reserve System, but it is more a result of the diverse geography and demography of the United States.”³⁹⁶ For example, the Boston Federal Reserve Bank utilizes the following relevant geographic market analysis:

[C]onsiders a local, economically integrated area to be a banking market. It assumes that the boundaries of these markets coincide with the boundaries of mutually exclusive predefined economically integrated regions. A banking organization in a region is assumed to compete directly with all of the other banking organizations within that region, but not with banking organizations outside the region.³⁹⁷

Given that the Federal Reserve Banks play a “critical role in defining the proper scope of local banking markets throughout the United States,”³⁹⁸ the bank merger analysis employed by the twelve regional banks has wide-ranging implications.

394. Cmty. Bankshares, Inc., 93 Fed. Res. Bull. C59, C60 (2007), available at <http://www.federalreserve.gov/pubs/bulletin/2007/legalq107.pdf> (citations omitted). “In defining a geographic market, the Board and the courts have consistently found that the relevant geographic market for analyzing the competitive effects of a proposal must reflect commercial and banking realities and should consist of the local area where customers can practicably turn for alternatives.” *Id.* at C60 n.7.

395. See DiSalvo, *supra* note 18, at 1.

There is fairly diverse opinion as to how banking markets should be defined. Some Reserve Banks define markets according to a fixed methodology applied uniformly across the entire District. Federal Reserve Banks taking this approach generally update their markets at regular intervals, usually coinciding with the publication of the United States Census. The second approach is to define markets on a case-by-case basis, using whatever information is available for a particular area. There are advantages and disadvantages to both approaches.

Id. at 1-2; see also Neill, *supra* note 226, at 293-94 (2006).

It has been suggested that the Federal Reserve Bank’s pre-defined markets are larger than the local market delineation set forth by the Court in *Philadelphia National Bank* because the Banks’ markets are not so narrow that an individual customer at one end of a market would need to consider banks at the opposite end of the market to be practical alternatives. Rather, it is assumed that the economic integration of the market will transmit banking competition via a ‘chain reaction’ effect.

Id.

396. DiSalvo, *supra* note 18, at 1.

397. FRB Elements of Antitrust Analysis, *supra* note 387.

398. Alvarez, *supra* note 256, n.28; see also Supporting Statement, *supra* note 30.

2. Federal Deposit Insurance Corporation and Comptroller
of the Currency

The Federal Deposit Insurance Corporation defines the relevant geographic market as inclusive of the area where: a target bank's offices are located; the area from which those offices derive a majority of their business, such as loans, deposits, etc.; and "the areas where existing and potential customers impacted by the proposed merger may practically turn for alternative sources of banking services."³⁹⁹ The FDIC rejected the joint Bank Merger Competitive Review,⁴⁰⁰ and has set forth its own test for competitive review in a Statement of Policy on Bank Merger Transactions and its Interagency Bank Merger Act Application.⁴⁰¹ The FDIC, in 1989, stated that the cluster approach is no longer relevant in the current environment,⁴⁰² and proposed a redefining and expansion of product market to include "functional equivalent" services offered by non-banks, such as securities firms, finance companies, and depository institutions.⁴⁰³ This approach, the FDIC believed, would reflect a more realistic competitive approach. "[T]his product market analysis further undermine[d] the cluster approach because it [was] based on financial competition, rather than on competition solely within the commercial

399. See FDIC Statements of Policy on Bank Merger Transactions, 63 Fed. Reg. 44,763 (Aug. 20, 1998) ("In delineating the relevant geographic market, the FDIC will also consider the location of the acquiring institution's offices in relation to the offices to be acquired."); see also Evans & Lewis, *supra* note 305, at 39-40.

The 1980 FDIC Statement of Policy (hereinafter 'FDIC Policy Statement') makes no reference to the determination of a particular product market, or, therefore, to the standards the Agency uses to determine the market. In a subsequently withdrawn policy proposal, the FDIC proposed to determine the relevant product market by delineating 'those individual products or services which are material to the proponent's overall business. . . .' The policy proposal also expressly recognized that thrifts and 'similar financial service firms' should consistently be included in the relevant line of commerce. While the proposal was never adopted by the FDIC, the Agency regularly considers the presence of thrift institutions in the relevant geographic market.

Id. (citations omitted).

400. BANK MERGER COMPETITIVE REVIEW, *supra* note 224.

401. See Neill, *supra* note 226, at 296 ("The FDIC's supplemental application instructions call for merger applicants to provide detailed deposit account information based on the locations of the depositors. It also invites the parties to propose broader markets based on where customers could turn for alternative sources of banking services.").

402. See Sheehan, *supra* note 21, at 701.

403. See *id.* (citing and quoting 53 Fed. Reg. 39,803-04 (1988)).

banking industry.”⁴⁰⁴ The FDIC framework’s inclusion of nonbank competitors is pragmatic, especially as such market participants continue to innovate and offer new financial products and services that increasingly press traditional banks for market share, while consumers demand greater options, service and convenience.

The Office of the Comptroller of the Currency often defines a relevant geographic market as inclusive of an area which surrounds the branches of the target bank,⁴⁰⁵ but generally uses the Federal Reserve Bank’s market definition to delineate the relevant geographic market.⁴⁰⁶ Officially, the OCC follows the Fed’s pre-defined geographic markets,⁴⁰⁷ but has demonstrated a willingness to employ a submarket approach when it reviews bank mergers, stating in a 1980 decision:

The reality of the marketplace, as well as the state of the law, indicates that it is no longer satisfactory to rely solely on the traditional cluster of services known as ‘commercial banking’ to determine whether a particular merger will result in a substantial lessening of competition. The competitive overlap of services provided by commercial banks and thrift institutions has increased, both quantitatively and qualitatively, such that thrift institutions are

404. *Id.* at 701 (citing *FDIC Proposes Policy on Bank Mergers, Delays Policy on Foreign Exchange Exposure Limits*, 51 Banking Rep. (BNA) 606 (Oct. 10, 1989)).

405. See Cameron Savings & Loan Ass’n, 20-2 O.C.C. Q.J. 84 (2001), 2001 WL 1002346 (approving the application to merge Cameron Savings & Loan Association into Bank Midwest), available at www.occ.treas.gov/interp/feb01/cd01-02.doc (“The Bank Merger Act requires the OCC to consider ‘the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.’”); see also Interagency Bank Merger Act Application, <http://www.occ.treas.gov/ftp/release/bma-fnl.pdf> (last visited Mar. 30, 2008). But see Evans & Lewis, *supra* note 305, at 40-41 (“The Comptroller includes within the cluster of banking services ‘thrift institutions, nonbank financial institutions and financial institutions based outside of the delineated geographic market . . . when such institutions exert significant competitive pressure in the geographic market for banking services.’”) (citations omitted).

406. See Old Nat’l Bank, 19-4 O.C.C. Q.J. 72 (2000), 2000 WL 33173092, at *2 n.3, available at www.occ.treas.gov/interp/jul00/ca406.pdf (“In defining the geographic markets, the OCC considered the Federal Reserve Bank of St. Louis’ market delineation, as well as evidence of the areas from which the involved banks derive the bulk of their deposits.”); see also Wheeling Nat’l Bank, 1999 WL 1426078, available at www.occ.treas.gov/interp/jan00/cd99-48.pdf (approving the application by Wheeling National Bank in St. Clairsville, Ohio, to purchase certain assets and to assume certain liabilities of the Barnesville Branch of Sky Bank, Salineville, Ohio).

407. Neill, *supra* note 226, at 296.

now direct competitors or potential direct competitors of commercial banks for almost all consumer financial services and an ever-increasing number of commercial services.⁴⁰⁸

While the OCC reviews the “impact of the proposed transaction on competition for the cluster of products and services traditionally offered by banks,”⁴⁰⁹ it now recognizes that the *Philadelphia National Bank* approach to treating commercial banks as unique is obsolete.⁴¹⁰ However, the OCC apparently does not yet embrace the idea that nonbanks are important competitors and worthy of consideration when conducting a market competition analysis.

3. DOJ's Relevant Geographic Market

The Justice Department's approach allows for a host of different geographic market definitions for the relevant product markets in a proposed bank merger, and considers various factors such as barriers to entry and nonbank competitors.⁴¹¹ A basic underlying assumption of the

408. Sheehan, *supra* note 21, at 700.

409. Zions First Nat'l Bank, 1997 WL 580870, *1 n.1, available at <http://www.occ.treas.gov/interp/sep97/cd97-82.pdf> (approving the application of Zions First National Bank in Salt Lake City, Utah, to purchase certain assets and to assume certain liabilities of the Logan, North Logan, Cedar City and St. George branch offices (all in Utah), of Wells Fargo Bank)

Separately analyzing the products and services banks offer, without considering the impact on competition for the cluster of products and services, however, was explicitly rejected by the Supreme Court, in [*Phillipsburg National Bank*]. In that case, the Court stated that ‘submarkets are not a basis for the disregard of a broader line of commerce that has economic significance.’ Thus, even though ‘submarket’ analysis would show little impact on competition as a result of the proposed transaction because of Wells Fargo’s retention of assets and the presence of non-bank suppliers of traditional bank products and services, the analysis in this decision will focus on the impact of the proposed transaction on competition for the cluster of products and services traditionally offered by banks.

Id. (citations omitted).

410. See Sheehan, *supra* note 21, at 701 (“Robert Clarke, the Comptroller of the Currency, in comparing the banking industry to other financial industries . . . emphasized that commercial banks no longer perform a unique function, which was the critical factor in the Supreme Court’s adoption of the cluster approach in *Philadelphia*.”) (citation omitted).

411. See Litan, *supra* note 54 (“Our touchstone is where customers for specific services are willing to turn, not some arbitrary geographic area that may be developed for some other purpose.”); see also *id.*

[W]e will assess the strength of all non-bank competition, including individual thrifts

DOJ geographic market formulation is that each category of banking, such as large corporate customers, retail depositors, middle-market business,⁴¹² small business,⁴¹³ and even subprime borrowing,⁴¹⁴ has a clientele with different needs and expectations, requiring different banking products and access to products spanning different geographic distances using a variety of delivery technologies.⁴¹⁵ For proposed mergers of large corporations, the DOJ has employed a national geographic market due to the following rationale:

Most corporations demanding these types of services are public companies required to disclose financial statements in public filings with the Securities & Exchange Commission, and are also likely to conduct operations on broader geographic scales that make them less dependent on local economic conditions. Accordingly, the costs associated with gathering information about corporations of this size are not dependent on geographic proximity, as compared with small businesses and non-public middle-market firms.⁴¹⁶

The DOJ distinguishes each product offered by a prospective bank merger participant, undertakes a separate analysis for each particular product,⁴¹⁷ and uses a different geographic market for different product

and such non-banks as finance companies. Finally, if we receive customer complaints in a market we will probe more deeply to ensure that the merger won't result in competitive harm.

Id.

412. See Neill, *supra* note 226, at 300-01.

413. Small business customers have the smallest geographic market, according to the DOJ. See Neill, *supra* note 226, at 298 (citation omitted).

414. See Petrizzi, *supra* note 310, at 216.

415. Neill, *supra* note 226, at 297.

416. *Id.* at 302.

417. See Calvani et al., *supra* note 39, at n.25. Some of the ways the DOJ evaluates bank merger proposals includes the following:

DOJ analyzed the bank merger by considering competition in the retail banking products market, the business banking market and the medium-size business banking market, and found that the merger had no significant adverse effect. The Federal Reserve Board characterized DOJ's analysis as an 'alternative analysis' but reached the same conclusion as DOJ.

During the early 1990s when this transition was first taking place, DOJ staff suggested even more narrowly defined markets. Specific type of small business loan (e.g., an agricultural loan) might constitute a separate relevant product market. Thus a merger that is otherwise unobjectionable might pose problems simply because the merging banks have a high market share of loans to the commercial fishing industry. Indeed, it was suggested that a specific type of cash management service (e.g., lock boxes) may

markets.⁴¹⁸ For example, if the product market is small business loans, the DOJ will likely define the geographic market as “[w]ithin 3-5 miles of the business location,”⁴¹⁹ and if the product market is a retail bank, the DOJ might define the geographic area as the area “[w]here customers live and work.”⁴²⁰

As part of its review process, Justice Department officials often interview local bankers who assist the government in determining the scope of the geographic market, the extent of competition from “in-market” and “out-of-market” participants, and other relevant local market conditions.⁴²¹ Additionally, if a bank does not yet operate a local branch, but does make loans in that particular area, from the DOJ’s perspective, that implies a larger geographic market.⁴²² Critics suggest

be an antitrust market.

Id. at n.26 (citations omitted).

418. See Petrizzi, *supra* note 310, at 208 (“In the CoreStates/First Union investigation, DOJ analyzed a different geographic market for each product market at issue. For small business lending, the geographic market was essentially Philadelphia alone, roughly a two-county market compared to the eight county [Federal Reserve Bank] market definition (which spanned two states).”).

419. *Id.* at 206.

420. *Id.* (If the product market is the “middle market” the geographic area will “likely [be] a larger area than the market for small business.”) Some have criticized the DOJ’s narrow geographic scope in the small business merger context. See Neill, *supra* note 226, at 298-300.

Some practitioners have argued that the DOJ’s view regarding the narrow geographic scope of small business lending does not account for advances in information technology. In particular, the application of credit scoring software to small business lending has reduced the information costs associated with such lending and has reduced or eliminated the relationship between distance and information costs posited by the DOJ’s methodologies. While monitoring these developments, the DOJ has thus far not given them much weight. In the *Central Savings Bank Letter*, for instance, the DOJ stated that it had ‘excluded limited purpose banks and certain out-of-market banks in its calculation [of loan market shares] because those institutions typically offer credit card loans or nationally-marketed small business loans that tend to have a limited credit line. These loan products are often distinguishable from business loans offered by local commercial banks in terms of fees, rates, terms and conditions, and often serve as a secondary source of credit to small business owners.’

Id. (citations omitted).

421. Petrizzi, *supra* note 310, at 209. The “DOJ will also use [Community Reinvestment Act small business loan] data to support geographic market definition.”

Id.

422. *Id.* For example in the DOJ’s review of the Central Savings/Huntington National merger in 1999:

DOJ found, through interviews with local banks, and credit unions:

that the DOJ's divergence from the pre-defined geographic market of the Federal Reserve banks can create substantial uncertainty in the bank merger application process.⁴²³ The 99.5%⁴²⁴ degree of certainty of a proposed merger application being approved during 1996-2007, however, is likely overlooking more than a few anti-competitive bank combinations.

4. Rejection of the "State as a Whole" Geographic Market

In *United States v. Marine Bancorporation*⁴²⁵ and *United States v. Connecticut National Bank*,⁴²⁶ the DOJ argued "that the State as a whole, although not a banking market, is nonetheless a 'section of the country' within the meaning of [section] 7 of the Clayton Act."⁴²⁷ The government maintained in *Connecticut National Bank* that the statewide geographic market approach should apply because the merger "would eliminate one of eight banks in Connecticut with the potential for statewide operation," thereby causing a statewide effect because it would "impact . . . every local market in the state where that bank does not currently operate but which it might otherwise enter."⁴²⁸ The *Connecticut Nat'l Bank* Court rejected the statewide argument asserted by the DOJ, and viewed the relevant geographic market not as that of the acquirer bank, nor that of the combined market footprint of the acquirer and proposed target, but instead placed its analytical emphasis only on

Local banks tend to have better information about local economic conditions and can better evaluate the credit worthiness of small businesses. As a result, local banks are more willing to make loans to small businesses and offer better terms than more distant banks; [and]

Small business customers have a preference for local banks because it minimizes transaction costs by dealing with one bank and is more convenient (reconciling accounts, making daily cash deposits, acquiring cash/coins for the business, cashing payroll checks).

Id. at 212.

423. Neill, *supra* note 226, at 299.

424. See Litan, *supra* note 54. During the period 1989 to 1994, the DOJ only conducted a full investigation of [forty-three] of the roughly 9000 applications filed with the relevant supervisory banking authorities (0.5% of all proposed transactions), and challenged only four (0.05%) of those [forty-three], requiring divestiture of those branches that created competitive issues.

425. *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 606-07 (1974).

426. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 672 (1974).

427. *Id.*

428. *Id.* (citation omitted).

the localized area of the target in which it competed directly with other banks, and justified the position because anything else was “foreclosed by the precedents.”⁴²⁹

The *Marine Bancorp.* Court, decided on the same day as *Connecticut Nat'l Bank*, considered the relevant geographic market to be the greater metropolitan area of Spokane, Washington.⁴³⁰ The DOJ had stipulated to greater Spokane as the relevant geographic market, but contended that the “entire state” was a “section of the county” that should be considered as part of the analysis.⁴³¹ The Court rejected the DOJ’s attempt to expand the “section of the country,” because the relevant geographic market is where the “acquired firm is an actual, direct competitor.”⁴³² The Court sent a clear signal with the companion cases that it had unambiguously discarded the DOJ’s “state-as-a-whole” relevant geographic market theory.⁴³³

The Court did embrace the district court’s finding that “common sense” dictates the relevant market, for a bank is where that bank has existing branch offices.⁴³⁴ Of course, the “common sense” employed in these twin decisions preceded the Internet (and electronic banking) by decades. The *Marine Bancorp.* Court also did not factor into its analysis the nonbank entities who were providers of competing financial services, and criticized the trial court’s geographic market conclusion

429. *Id.* (citing *Marine Bancorp.*, 418 U.S. at 620-22).

430. *Marine Bancorp.*, 418 U.S. at 619.

431. *Id.* at 619-20.

It is conceded that the State is not a banking market. But the Government asserts that the State is an economically differentiated region, because its boundaries delineate an area within which Washington banks are insulated from most forms of competition by out-of-state banking organizations. The Government further argues that this merger, and others it allegedly will trigger, may lead eventually to the domination of all banking in the State by a few large banks, facing each other in a network of local, oligopolistic banking markets. This assumed eventual statewide linkage of local markets, it is argued, will enhance statewide the possibility of parallel, standardized, anticompetitive behavior. This concern for the possible statewide consequences of geographic market extension mergers by commercial banks appears to be an important reason for the Government’s recent efforts to block such mergers through an application of the potential-competition doctrine under [section] 7.

Id. at 620.

432. *Id.* at 621-22.

433. *See generally Marine Bancorp.*, 418 U.S. 602; *see also Conn. Nat'l Bank*, 418 U.S. at 672-73 (rejecting the government’s “State as a whole” geographic market argument).

434. *Id.*

because it, too, conflicted with *Philadelphia National Bank*.⁴³⁵ The relevant geographic market of a target bank remained the “localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank.”⁴³⁶

An additional impact of the *Marine Bancorp.* and *Connecticut Nat’l Bank* decisions was the rejection of the government’s expansive treatment of the Clayton Act’s “any section of the country,” which was found to be “at variance with this Court’s [section] 7 cases.”⁴³⁷ There are no section 7 Clayton Act cases in which the Court had analyzed a bank merger by measuring effects on areas where the target bank did not directly compete.⁴³⁸ The Court did allow for the existence of more than one relevant geographic market where a target marketed financial services and/or products to local, regional and national markets.⁴³⁹ Nonetheless, the Court has still not acknowledged that various financial services feature a national market, and many of those services and products fall squarely within the ambit of what is widely considered to be “banking.”

The banking market experienced substantial changes by the 1980s, including the advent of NOW accounts and the ATM, the latter of which was, incidentally, first utilized by Philadelphia National Bank,⁴⁴⁰ and which represents one of the many devices and services offered nationally by both traditional banks and nonbanks. Nonbank competitors argued that the relevant geographic market was the entire world for certain computer software in the 2002 Tenth Circuit case,

435. See *Conn. Nat’l Bank*, 418 U.S. at 667.

436. *Id.* (citing *Marine Bancorp.*, 418 U.S. 602); see also *Conn. Nat’l Bank*, 418 U.S. at 667.

Although the two banks presumably market a small percentage of their loans to large customers on a statewide or broader basis, it is undoubtedly true that almost all of their business originates locally. For example, ‘about 88% of CNB’s total deposit business derive(s) from the towns in which CNB had offices.’ As the District Court noted in a finding that is inconsistent with its conclusion on the appropriate section of the country, ‘[common] sense . . . would indicate that the relevant market areas of CNB and FNH generally coincide with where each has established branch offices.’

Id. (citations omitted).

437. *Marine Bancorp.*, 418 U.S. at 620.

438. *Id.* at 621.

439. See *id.* at 621 & n.20 (collecting cases that have acknowledged more than one relevant geographic market existed).

440. James J. McAndrews, *The Evolution of Shared ATM Networks*, FED. RESERVE BANK OF PHILA. BUS. REV., May-June 1991, at 3.

*Lantec, Inc. v. Novell, Inc.*⁴⁴¹ The trial and appellate courts both rejected this expansive market application because “[t]he geographic market consists of the area of effective competition,”⁴⁴² and it is “the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market.”⁴⁴³ The conceivable area of effective competition could eventually encompass the entire universe (e.g., satellite transmission of content and data of all sorts).

In *Apani Southwest, Inc. v. Coca-Cola Enterprises*⁴⁴⁴ (a nonbanking merger case), the Fifth Circuit exhibited a willingness to accept multiple geographic market determinations if the facts warranted it. Apani manufactured and marketed purified bottled water “in and around the Lubbock, Texas area.”⁴⁴⁵ The *Apani* court held that “although the geographic market in some instances may encompass the entire [n]ation, under other circumstances it may be as small as a single metropolitan area.”⁴⁴⁶ The court analyzed “[t]he area of effective competition in the known line of commerce . . . [with a] careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies.”⁴⁴⁷ The court reasoned that “[t]he geographic market must correspond to the ‘commercial realities’ of the industry and ‘be economically significant.’”⁴⁴⁸

441. 306 F.3d 1003, 1026-27 (10th Cir. 2002).

442. *Id.* at 1026 (quoting *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 893 (10th Cir. 1991)).

443. *Id.* at 1026-27 (citations omitted).

The size of the relevant geographic market depends on a number of factors, including ‘[p]rice data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors.’

‘[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product.’

Id. (citations omitted).

444. *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620 (5th Cir. 2002).

445. *Id.* at 623.

446. *Id.* at 626 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)).

447. *Id.* (citation omitted).

448. *Id.* at 626 (quoting *Brown Shoe Co.*, 370 U.S. at 336-37).

When determining whether a geographic market corresponds to commercial realities, courts have taken into account practical considerations such as the size, cumbersomeness, and other characteristics of the relevant product. In addition,

The Fifth Circuit affirmed the *Apani* trial court decision,⁴⁴⁹ which was thorough in its geographic area considerations of the bottled water industry.⁴⁵⁰ The *Apani* court found, at a minimum, that the relevant geographic market should include the city of Lubbock because there was no geographical limit on the sales market, and there were no regulatory restrictions or shopping limitations affecting bottle water distribution.⁴⁵¹ After defining the relevant geographic market, the trial court weighed “whether the restraint on the alleged geographic market was economically significant,”⁴⁵² and whether the geographic area included a large enough segment⁴⁵³ of the product market.⁴⁵⁴

5. A More Expansive Geographic Market

The Deputy Assistant U.S. Attorney General correctly predicted that mergers “of an entirely new type,” between large banks and large

determinants that affect the behavior of market participants may also be considered such as regulatory constraints impeding the free flow of competing goods into the area, perishability of products, and transportation barriers.

Id. (citations omitted); *see also id.* at 627.

[I]t is not required that an area encompass a large percentage of all business activity in the relevant product market to be considered economically significant. An area containing only a small percentage of business activity may qualify as being economically significant if the relevant competition in that specific area is insulated from equivalent competition elsewhere.

Id. (citations omitted).

449. *See id.*

450. *See id.* at 628-29.

451. *Id.*

452. *Apani Southwest*, 300 F.3d at 629.

453. *See id.* (“Whether a segment is appreciable depends on whether the segment includes either an appreciable proportion of the product market as a whole, or a proportion of the product market largely segregated from, independent of, or not affected by, competition elsewhere.”) (citation omitted).

454. *See id.* (citations omitted); *see also id.* at 626.

In ascertaining the relevant product market, courts consider the extent to which the seller’s product is ‘interchangeable in use’ and the degree of ‘cross-elasticity of demand between the product itself and substitutes for it.’ Within the product market, there may exist submarkets which, in themselves, represent product markets for antitrust purposes. ‘The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.’ The district court properly determined, and neither of the parties contest, that the relevant product market is bottled water.

Id. (citations omitted).

financial services companies, would soon become prevalent, during testimony before the House of Representatives in 1998.⁴⁵⁵ That same year, the Federal Reserve approved Travelers Group, Inc.'s application to become a bank holding company through an acquisition of Citicorp, as well as its bank and nonbanking subsidiaries.⁴⁵⁶ The Board analyzed the competitive effect in nonbanking services, including a number of Citicorp's nonbank subsidiaries which competed with Travelers companies in numerous geographic and product markets,⁴⁵⁷ and determined that the relevant geographic market was regional or national for almost all those markets.⁴⁵⁸ Travelers Group requested approval under the Bank Holding Act⁴⁵⁹ to become a bank holding company through acquisition of all Citicorp shares, and those of its subsidiary banks.⁴⁶⁰ The combined entity, to be called Citigroup Inc.,⁴⁶¹ would represent the largest commercial banking organization not just in the United States, but worldwide, with total assets of approximately \$751

455. See Nannes, *supra* note 263, at 1.

456. Travelers Group, Inc. 84 Fed. Res. Bull. 985, 985 (1998), 1998 WL 801352 (approving the formation of a bank holding company, and providing notice to engage in non-banking activities). Travelers Group, is "a holding company for securities, insurance and other financial services." *Id.*

457. See Travelers Group, Inc., 84 Fed. Res. Bull. at 1009, 1012 & n.114 (discussing the concentration of resources and related effects of the proposal).

458. See *id.* at 1009; see also Bradley K. Sabel, *The Citicorp/Travelers Merger and the Bank Holding Company Act*, 1091 PLI/CORP 71, 117 (1998) ("Travelers and Citicorp offer complementary products with few significant overlaps in competition. In any product market in which one party to this merger has a significant presence, the other party has a relatively small market share."); see also *id.* (The Board concluded that there would result in only a "*de minimis* effect on competition in any relevant market," because many competitors provide the same services and products, and the market for those services and products are not concentrated.).

459. The Bank Holding Company Act is codified as 12 U.S.C. § 1841. Under the Bank Holding Company Act, the Fed uses the following factors when reviewing acquisitions of banks or mergers of bank holding companies:

[1] the competitive effects of the proposal in the relevant geographic markets; [2] the financial and managerial resources and future prospects of the companies and banks involved in the transaction; [3] the convenience and needs of the communities to be served, including the records of performance under the Community Reinvestment Act (12 U.S.C. §2901 *et seq.*) ("CRA") of the insured depository institutions involved in the transaction; [4] and the availability of information needed to determine and enforce compliance with the BHC Act.

Bank of Am. Corp., 90 Fed. Res. Bull. 212, 218 (2004).

460. Travelers Group, Inc. 84 Fed. Res. Bull. 985 (1998).

461. *Id.* at 985-86.

billion.⁴⁶² The new company would engage in wide-ranging banking and nonbanking activities,⁴⁶³ including insurance (Travelers), and securities (Salomon Smith Barney) businesses, a combination formerly considered a Glass-Steagall Act *third rail*.⁴⁶⁴ The Board approved the merger and, interestingly, made no mention of *Philadelphia National Bank* or its progeny, nor did the Board discuss the antitrust test mandated by that case, as the mega-merger glided without significant resistance to its consummation.⁴⁶⁵ Less than a decade after what was then the largest banking combination in history, deal architect John Reed now considers the merger to be a “mistake.”⁴⁶⁶

The DOJ opposed what it asserted was the anticompetitive organizational structure of Visa and MasterCard⁴⁶⁷ who, at that time, comprised roughly half of the “four major network systems in the payment card industry,” and were both owned by many various banking institutions who were also members of a network.⁴⁶⁸ The circuit court affirmed and held that “exclusivity rules violated [the] Sherman Act . . . and imposed permanent injunctive relief.”⁴⁶⁹ Although there was no discussion of the relevant geographic market in the Visa decision, the

462. *Id.*

463. *See id.* at 1003.

464. *See* Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.) (also known as the Banking Act of 1933); Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.); *see also Symposium: Panel I: Strategic Planning For Financial Institutions In A New Legal And Economic Environment*, 6 FORDHAM J. CORP. & FIN. L. 23, 45 (2001) (citing H. Rodgin Cohen, *Landmark Legislation Passes; Examining Impact on Financial Services Global Consolidation*, N.Y. L.J., Nov. 15, 1999, at S3) (stating that the “[Gramm-Leach-Bliley Act] . . . removes restrictions now imposed on banks under the Glass-Steagall Act of 1933 and the Bank Holding Company Act of 1956 (BHCA) The BHCA restrictions generally apply to foreign banks that conduct U.S. operations through a branch or agency.”); William Safire, *On Language: Third Rail*, N.Y. TIMES, Feb. 18, 2007, available at <http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html>.

465. *See* Comment of Inner City Press, available at <http://www.innercitypress.org/samprot.html> (Comment filed with the Federal Reserve Board Opposing the Citicorp – Travelers Merger, 1998).

466. Francesco Guerrera, *Citi Merger Architect Calls Deal ‘Mistake,’* FIN. TIMES, April 4 2008, available at <http://www.ft.com/cms/s/0/adb7e4a6-019d-11dd-a323-000077b07658.html>.

467. *United States v. Visa, Inc.*, 344 F.3d 229 (2d Cir. 2003).

468. *Id.*; *see also id.* at 234-35.

469. *Id.* at syllabus.

lower court determined that the United States was the relevant geographic market “for the general purpose card product market and the general purpose card core system services market.”⁴⁷⁰ The attorneys general of twenty-seven states, and for the District of Columbia, argued for the government in a joint amicus brief that asserted “[w]hen a defendant is a participant in geographic markets outside the one under scrutiny, as Visa and MasterCard [are] in this case, courts may look at [its] activity in those markets.”⁴⁷¹

Paycom Billing Services, an internet credit card transaction processor, sued MasterCard International (a national bank card association), for alleged Sherman Antitrust Act violations and claimed that MasterCard conspired with member banks to restrain trade.⁴⁷² Paycom cited *United States. v. Visa* as support and claimed that the relevant geographic market was the United States as a whole because there were six distinct types of markets.⁴⁷³ The *Paycom* court agreed and defined the geographic market as the entire country, in large part, because MasterCard did not challenge Paycom’s market definition, but

470. *United States v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 339-40 (S.D.N.Y. 2001).

471. Brief for Connecticut, Ohio, Alaska et al. as Amici Curiae Supporting Plaintiff-Appellee, *United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2002) (No. 02-6074(L)), 2002 WL 32828496, *13 (2d Cir. July 3, 2002) (citing *Aspen Ski Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985)).

472. *Paycom Billing Servs., Inc. v. Mastercard Int’l, Inc.*, No. CIVA03CV6150DGT RLM, 2005 WL 711658, at *1 (E.D.N.Y. Mar. 29, 2005), *aff’d* 467 F.3d 283 (2d Cir. 2006) (granting defendant’s motion to dismiss).

473. *Id.* at *2; *see also id.* at *2-*3 (citations omitted) (“A ‘brick and mortar’ merchant sells goods and/or services in person, not over the internet.”). *Id.* at *3 n.3 (citation omitted).

The broadest market is the ‘general purpose card network services’ market. The next three markets are the ‘general purpose credit card services to merchants,’ the ‘general purpose credit and T & E card services to merchants’ and the ‘general purpose debit card services to merchants.’ For these purposes, defendant does not challenge plaintiff’s market definitions, and precedent supports their adequacy at this stage of the proceedings.

In addition, plaintiff claims two distinct ‘payment card processing services’ markets. The first is broader and includes the processing of all payment card transactions, regardless of whether performed over the internet or through a ‘brick and mortar’ merchant. The second is a submarket of the first and includes only those transactions made over the internet. Defendant also does not challenge the definition of these two markets for purposes of this motion.

Id. at 2-3 (citations omitted).

also because precedent supported an expanded geographic delineation.⁴⁷⁴ Signs of a shifting paradigm were beginning to surface.

Federal regulators have had success in expanding the relevant geographic market in nonbanking mergers. The Federal Trade Commission (“FTC”) also argued, for Clayton Act section 7 purposes, that the relevant geographic market was the United States as a whole, twenty-five years before the *Paycom* decision.⁴⁷⁵ The Ninth Circuit accepted the nationwide geographic market determination,⁴⁷⁶ and allowed two lead smelting firms, RSR Corporation and Quemetco, to continue combined operations.⁴⁷⁷ The FTC contended that the companies were in competition to a significant degree in more than just the Midwest market, and the court concurred.⁴⁷⁸ The FTC had filed an administrative complaint alleging that RSR (a lead company) violated section 7 of the Clayton Act when it acquired the stock of two competitors.⁴⁷⁹ Similar to the banking market, the lead smelting market in the United States is also highly concentrated.⁴⁸⁰ Although the FTC argued that the relevant geographic market for a section 7 analysis was the entire United States,⁴⁸¹ RSR countered that the companies were not

474. See *Paycom*, 2005 WL 711658 at *2 (citations omitted).

475. See *RSR Corp. v. FTC*, 602 F.2d 1317, 1320 (9th Cir. 1979).

Both sides appealed to the full FTC, which adopted the ALJ’s decision with some modifications. The FTC agreed that the secondary lead market was the proper submarket, that secondary lead was the relevant product market, that the United States as a whole was the appropriate geographic market, and that the RSR/Quemetco merger could substantially lessen competition in the national secondary lead market.

Id.

476. See *id.* at 1322-23. “Here these considerations indicate nationwide competition in the secondary lead market. Thus, the relevant geographic market is, as found by the FTC, the entire United States.” *Id.* at 1324. The Court held that the FTC’s plan requiring “divestiture by petitioner of all premerger assets, except for one plant, was proper remedy.” *Id.* at 1325-26.

477. See generally *RSR Corp. v. FTC*, 602 F.2d 1317.

478. See *id.* at 1322-23.

Evidence on the pre-merger competition between RSR and Quemetco, coupled with evidence of pricing interdependence nationwide and evidence of the ability of secondary producers to ship lead into states in which most secondary lead is consumed, is substantial. That evidence is sufficient to support the FTC’s factual findings on the relevant geographic market issue.

Id. at 1323.

479. *In re RSR Corp.*, 88 F.T.C. 800 (1976), 1976 WL 180019, *3.

480. See *id.* at *18.

481. *RSR Corp.*, 602 F.2d at 1322; see also *In re RSR Corp.* at *33 (“The relevant geographic market for the purposes of this proceeding is the United States as a

in direct competition with one another anywhere in the country.⁴⁸² The administrative law judge not only found that the companies directly competed in the Midwest, but also that the entire country was the relevant geographic market⁴⁸³ “because the merger lessened competition in the nationwide secondary lead market.”⁴⁸⁴

The Ninth Circuit turned to *Brown Shoe Co. v. United States*⁴⁸⁵ for guidance regarding the delineation of the geographic market boundaries and found the criteria sufficiently similar to that used to determine the relevant product market.⁴⁸⁶ RSR, however, attempted to advance the view that *Connecticut National Bank* and *Marine Bancorporation* should apply, and that therefore, the relevant geographic market should be “the area in which the acquired firm is in direct competition with other firms in the industry or in which it is marketing a significant degree of goods or services.”⁴⁸⁷ The Ninth Circuit disagreed with RSR’s position that the geographic market should be defined by the banking antitrust cases, precisely because those decisions concerned “the heavily-regulated banking industry,” in which the relevant geographic market was historically limited to only those areas where regulatory agencies had permitted the banks to provide services.⁴⁸⁸ Thus, the *Philadelphia National Bank* legacy, at least according to the Ninth Circuit, was distinguishable, not because banks are “unique” and

whole.”).

482. *Id.* The parties did agree, however, that the relevant geographic market for the overall U.S. lead market (not the secondary lead market) was the nation as a whole. *See In re RSR Corp.*, 88 F.T.C. 800 (1976), 1976 WL 180019, at *78.

483. *Id.*

484. *Id.*

485. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

486. *RSR Corp.*, 602 F.2d at 1323 (citing *Brown Shoe Co.*, 370 U.S. at 336-37).

The geographic market selected must, therefore, both ‘correspond to the commercial realities’ of the industry and be economically significant. . . . The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of [§] 7. That section speaks of ‘any . . . section of the country,’ and if anticompetitive effects of a merger are probable in ‘any’ significant market, the merger at least to that extent is proscribed.

Id. (citations omitted); *see also id.* at 1323 (“To decide that the merger violated Section 7, the FTC was not required to find that Quemetco and RSR competed on a nationwide basis.”).

487. *Id.* at 1323.

488. *Id.* at 1323-24 (citing *United States v. Marine Bancorp.*, 418 U.S. 602, 641 (1974)).

“insulated,” but rather because they are highly regulated. The fact that the secondary lead market in which RSR competed was not nearly as regulated as banking, in turn aided the court in determining the relevant competitive region.⁴⁸⁹

6. Conspicuous Absence of Relevant Geographic Market Analysis in Recent Bank Mergers

Wachovia Corp. consummated a merger with Golden West Financial Corp.⁴⁹⁰ on October 2, 2006⁴⁹¹ In the Federal Reserve approval order, the phrase “relevant geographic market” was altogether absent. The Board’s analysis of the competitive effects of the proposed acquisition in terms of nonbanking subsidiaries, however, noted that both banks engage in various services, including “credit extension, trust company, investment advisory, and securities brokerage activities [,] [t]he markets for these activities are regional or national in scope and unconcentrated [sic], and there are numerous providers of these services.”⁴⁹² Accordingly, Wachovia’s acquisition of Golden West’s nonbanking subsidiaries would ostensibly not have any substantial anticompetitive effect upon any relevant market,⁴⁹³ at least from the Fed’s perspective.

The Federal Reserve approved Wachovia’s application to acquire Golden West,⁴⁹⁴ and also permitted Wachovia “to acquire two of Golden West’s savings associations, World Savings Bank FSB of Oakland, Calif., and World Savings Bank FSB of Houston, along with Golden West’s non-banking subsidiaries.”⁴⁹⁵ The Federal Reserve considered a variety of factors in its merger approval analysis, such as the number of remaining competitors in the market, market deposits controlled by both banks,⁴⁹⁶ the increase in market deposit concentration levels as measured

489. See *RSR Corp.*, 602 F.2d at 1324.

490. See *Wachovia Corp.*, 92 Fed. Res. Bull. C183, C183 (2006).

491. Press Release, Wachovia Corp., Wachovia Completes Golden West Merger (Oct. 2, 2006), http://www.wachovia.com/inside/page/0,,134_307%5E1403,00.html.

492. *Wachovia Corp.*, 92 Fed. Res. Bull. at C186.

493. *Id.*

494. *Wachovia Corp.*, 92 Fed. Res. Bull. C183.

495. See *Federal Reserve Gives Nod to Wachovia’s Acquisition of Golden West*, BIRMINGHAM BUS. J., Sept. 29, 2006, available at <http://www.bizjournals.com/birmingham/stories/2006/09/25/daily24.html>.

496. See *Wachovia Corp.*, 92 Fed. Res. Bull. at C184 (Market deposits are “the relative shares of total deposits in depository institutions in each market.”).

by the HHI,⁴⁹⁷ and various other market competition measures.⁴⁹⁸ The word “geographic” only appeared once in the Fed’s approval order, but not in the context of a relevant geographic market.⁴⁹⁹ The Board did acknowledge in its order that, as part of its public interest evaluation, it reviewed “the effect of the proposal on competition in the relevant markets.”⁵⁰⁰ There was also no mention of the now antiquated *Philadelphia National Bank* antitrust test, nor did there appear to be any evaluation of the cluster of products and services.⁵⁰¹

Although the following merger was approved without apparent adherence to *Philadelphia National Bank*’s local geographic market analysis, the Fed’s merger analysis appears to be evolving. Citizens Bank completed its acquisition of Republic Bank in late 2006.⁵⁰² The combined entity, dubbed Citizens Republic Bancorp,⁵⁰³ became the country’s 45th largest bank.⁵⁰⁴ Before the combination, Republic was Michigan’s second largest bank holding company, and its merger into Citizens created the state’s third-largest bank holding company.⁵⁰⁵ The

497. The HHI is set forth in the DOJ’s Merger Guidelines. HORIZONTAL MERGER GUIDELINES, *supra* note 224; *see also Wachovia Corp.*, 92 Fed. Res. Bull. at C184 n.16 (The DOJ Guidelines consider a market “highly concentrated if the post-merger HHI exceeds 1800,” and “moderately concentrated if the post-merger HHI is between 1000 and 1800.”).

498. *See Wachovia Corp.*, 92 Fed. Res. Bull. at C184. Wachovia and the target bank, Golden West, competed directly in 26 banking markets. *Id.* Of the 24 banking markets listed in Appendix B of the Order, 20 banking markets had a resulting moderately concentrated HHI, three banking markets had a unconcentrated HHI (under 1000), and one banking market had a resulting HHI above 1800 indicating a highly concentrated market post merger, *id.* at C192, “without an increase in market concentration as measured by the HHI.” *Id.* at C184.

499. *See id.* at C188-89.

500. *Id.* at C183.

501. Subsequent to the merger, the Comptroller of the Currency agreed to hold public hearings regarding the closing of branches in Philadelphia. *See Federal Agency to Discuss Wachovia Branch Closings*, PHILA. BUS. J., Dec. 14, 2006, available at <http://philadelphia.bizjournals.com/philadelphia/stories/2006/12/11/daily37.html>.

502. Citizens Banking Corp., 93 Fed. Res. Bull. C9 (2007), available at <http://www.federalreserve.gov/pubs/bulletin/2007/pdf/legalq406.pdf>.

503. *See* Press Release, Citizens Bank, Citizens Bank Completes Successful Merger Integration with Republic Bank (May 7, 2007), <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/05-07-2007/0004582701&EDATE=>

504. Greg Morcroft, *Citizens to Buy Republic Bancorp for \$1.05 Billion*, MARKETWATCH, June 27, 2006, <http://www.marketwatch.com/News/Story/Story.aspx?guid={FDD0A7C3-4DC9-4272-9E0D-0BEECD79CE0F}>.

505. *See* Mark Brooky, *Republic Bank Transforming into Citizens*, GRAND HAVEN

Fed scrutinized two particular Michigan banking markets where Citizens and Republic had competed directly—Flint and Jackson.⁵⁰⁶ Scrutiny of those local markets was warranted because, even with branch divestitures, the HHI concentration levels in the two banking markets exceeded the DOJ’s Guideline threshold.⁵⁰⁷ The Board considered various mitigating competitive factors favorably and ultimately concluded that the merger between the two Michigan banks “would not have a significantly adverse impact on competition.”⁵⁰⁸ The Board also found that increased market share concentration, as represented by the HHI, was not preclusive and in fact, overstated the potentially adverse competitive effects to some degree because: (1) seventeen other depository institutions co-existed in the market; (2) competing community credit unions⁵⁰⁹ were vibrant in that market;⁵¹⁰ and (3) the Flint market was attractive for new entrants.⁵¹¹ The DOJ determined that the merger would produce insignificant adverse competitive effects

TRIBUNE, Apr. 26, 2007 (“Citizens Republic Bancorp will become the largest Michigan-based bank holding company and 43rd largest in the county . . .”).

506. *See id.* at C10-11.

507. *See id.* “The DOJ has stated that the higher-than-normal HHI thresholds for screening bank mergers and acquisitions for anticompetitive effects implicitly recognize the competitive effects of limited-purpose and other nondepository financial entities.” *Id.* at C10 n.9.

508. *Id.* at 5.

509. Credit Unions are often a good counter measure to anticompetitive effects. *See Local Control Lost in Iowa Banks, but not in CUs, Credit Union National Association, NEWS NOW*, Feb. 9, 2004, available at <http://www.cuna.org/newsnow/archive/list.php?date=020604#15579>. Credit unions can help to counter to increased concentration of national bank power, according to a 2003 study: “Credit unions provide an important and necessary check-and-balance to these banking conglomerates, says the report. While local control of financial institutions in Iowa is rapidly disappearing, ‘credit unions are locally controlled and are countering the trend toward out-of-state banking control.’” *Id.*

510. *See Citizens Banking Corp.*, 93 Fed. Res. Bull. at C10-11 (“Eight community credit unions control approximately \$887.5 million in deposits in the market, which represents approximately 9 [%] of market deposits on a 50 [%] weighted basis.”).

511. *Id.* at C11.

Within the past five years, six de novo bank branches and one credit union have opened in the Flint market, and all remain operational. Other factors indicate that the Flint banking market remains attractive for entry. For example, from 2002 to 2005, the market’s average annualized deposit growth exceeded the average annualized deposit growth for all metropolitan areas in Michigan.

Id.

and the other governing banking agencies did not object.⁵¹² While the Fed has begun to look beyond the narrow *Philadelphia National Bank* pedigree analysis, a discussion of geographic market was absent from the Fed's order.⁵¹³

VII. MERGERS CAN STILL BE CONSUMMATED DESPITE ANTICOMPETITIVE EFFECTS

The fundamental legislative purpose of the Bank Merger Act of 1966⁵¹⁴ was to allow bank mergers even where a reduction in competition might result in the relevant market.⁵¹⁵ The rationale is that if the public interest is served, despite a consequential dampening of competition, the merger should still be approved and consummated.⁵¹⁶ Although mandating Sherman and Clayton Act application, the 1966 Act established a new defense once an action is brought to challenge a bank merger on anticompetitive grounds.⁵¹⁷ An otherwise anticompetitive combination can still be consummated if the prospective merger participants can demonstrate “that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the

512. *See id.*

513. *Citizens Banking Corp.*, 93 Fed. Res. Bull. C9.

514. Pub. L. No. 89-356 (1966) (codified at 12 U.S.C. § 1823(c)).

515. *United States v. Third Nat'l Bank*, 390 U.S. 171, 192 (1968); *see also* *Wachovia Corp.*, 92 Fed. Res. Bull. C183 (2006) (Under the BHC [Section 4(j)(2)(A) of the BHC Act] the Fed is required to determine whether or not the benefits to the public outweigh adverse effects such as decreased competition and undue concentration.).

516. *Third Nat'l Bank*, 390 U.S. at 192.

517. *See id.* at 178 (citing *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967)).

Last Term, in *United States v. First City National Bank of Houston* this court interpreted the procedural provisions of the 1966 Act, holding that the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. The task of the district courts was to inquire de novo into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by ‘the convenience and needs of the community to be served.’ *Houston Bank* reserved ‘all questions’ concerning the substantive meaning of the ‘convenience and needs’ defense.

Id. at 178 (citations omitted).

probable effect of the transaction in meeting the convenience and needs of the community to be served.”⁵¹⁸

The Federal Reserve has relied on the public interest factor⁵¹⁹ to approve a proposed merger where the public interest factor outweighed any likely adverse competitive effect.⁵²⁰ The Fed widened the scope of its review for public interest benefits, and found a host of public interest factors.⁵²¹ Mitigating public interest factors can be “weighted against the increase in concentration,” and offset anticompetitive effects.⁵²² The DOJ Merger Guidelines⁵²³ explain that the effect of the merger on market concentration, as measured by HHI,⁵²⁴ is the “logical economic ‘starting point’ for merger analysis,” and if the proposed combination does not significantly increase concentration, no further analysis is required.⁵²⁵ But even where a proposed transaction’s HHI suggests that substantially lessened competition may result, mitigating public interest factors can outweigh the HHI and allow the combination to be consummated.⁵²⁶

518. *First City Nat’l Bank of Houston*, 386 U.S. at 363-64 (quoting 12 U.S.C. § 1828(c)(5)(B)).

An application for approval of the Texas merger was made to the Comptroller of the Currency pursuant to 12 U.S.C. § 1828(c)(5)(B), which provides that he shall not approve the merger ‘whose effect in any section of the country may by substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless (he) finds 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.’

Id. at 364.

519. *Wachovia Corp.*, 92 Fed. Res. Bull. at C190-91 (In this particular application, the public interest factor was cited under section 4 of the Bank Holding Company Act.).

520. *Id.*

521. *See id.* These benefits include an array of banking products and services, such as various mortgages, an extensive ATM network, access to online banking functions, Spanish language capabilities, online functions for deposit and credit accounts, and a wide-range of services through non-bank subsidiaries and affiliates, like investment banking, securities brokerage, trust services, and asset management services. An increased array of credit instruments and lending opportunities for corporate and retail customers might also result.

522. Brewer III et al., *supra* note 15, at 6.

523. HORIZONTAL MERGER GUIDELINES, *supra* note 224.

524. *See, e.g.*, *FTC v. Foster*, No. Civ. 07-352 JBACT, 2007 WL 1793441, at *26 (D. N.M. May 29, 2007) (citation omitted).

525. *Id.* (citation omitted).

526. Brewer III et al., *supra* note 15, at 6.

If market concentration is significantly increased, mitigating factors might outweigh anticompetitive effects, and the merger may still be approved.⁵²⁷ An example of mitigating factors might be the lack of “competitive viability of the target, [the] presence of active competition from thrifts and other financial institutions in the market, competition from out-of-market financial institutions, and market attractiveness.”⁵²⁸ If mitigation will not justify the increased concentration, then divestiture of offices and branches⁵²⁹ might be required in order to bring the “concentration indicator” to the level that the DOJ guidelines mandate, and, for this reason, according to the Federal Reserve, very few bank mergers are ever rejected for antitrust reasons.⁵³⁰ While inching towards a new analytical framework like the one proposed, the divestiture approach, as adopted, tends to ultimately frustrate the spirit of the Community Reinvestment Act (“CRA”), especially in low income markets where the stability of bank branches is often sacrificed, with predatory check cashing operators filling the void.⁵³¹ The authors’ interpretation of “public interest” definitely does not exclude under-represented constituencies who are precisely the population the CRA was designed to protect.⁵³²

527. See, e.g., *Foster*, 2007 WL 1793441, at *29.

528. Brewer III et al., *supra* note 15, at 8.

529. There are critics of the DOJ’s and Regulators requirement of divestiture. The effect of regulatory divestiture requirements appears to sometimes render a detrimental effect on communities. See *Rep. Kucinich Sends Letter*, *supra* note 143 (“The disappearance of depository bank branches throughout Cuyahoga County has ushered in a crisis of foreclosures, predatory mortgage and payday lending.”).

530. See Brewer III et al., *supra* note 15, at 8. The author points out that the statistics may be skewed because bank merger applications which raise antitrust issues may be voluntarily withdrawn. See *id.*

531. See Off. of Congressman Anthony D. Weiner, *Many More Banks in New York (But Only For Some)*, Dec. 18, 2005, available at http://www.house.gov/weiner/bank_report.pdf; see also *Rep. Kucinich Sends Letter*, *supra* note 143.

532. See Federal Financial Institutions Examination Council, Community Reinvestment Act, Background and Purpose, <http://www.ffiec.gov/cra/> (last visited May 12, 2008).

The Community Reinvestment Act is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods, consistent with safe and sound banking operations. It was enacted by the Congress in 1977 (12 U.S.C. 2901) and is implemented by Regulations 12 CFR parts 25, 228, 345, and 563e.

Id.

Ease of entry into the market is another mitigating factor. In *FTC v. Foster*, the Commission revealed sufficient increases in market concentration and high market shares, “trigger[ing] the presumption” that the contested merger would likely result in anticompetitive effects.⁵³³ This presumption can be successfully rebutted, however, with a showing of minimal barriers to market entry, which would mitigate the anticompetitive effect.⁵³⁴ Competitive influence of credit unions and other nonbank market participants is another mitigating factor which the Federal Reserve can consider when analyzing the competitive effect of a proposed merger.⁵³⁵ Nonetheless, these factors do not go far enough, and the 2008 credit crunch and economic fallout reveals that relevant market factors have not yet been given due consideration in the bank merger review context.

533. *Foster*, 2007 WL 1793441, at *26; see also Brief of Petitioner, *United States v. Sungard Data Sys., Inc.*, No. 01-2196, (D.D.C. Oct. 22, 2001), available at <http://www.usdoj.gov/atr/cases/f9400/9439.htm>.

Once the United States establishes a presumptive violation of the Clayton Act, the defendants may introduce evidence to attempt to rebut that presumption. However, the Supreme Court has directed that the presumption will not easily be overcome. To rebut the presumption, the defendants must produce evidence that “show[s] that the market-share statistics [give] an inaccurate account of the acquisitions’ probable effects on competition.

Id. (citations omitted).

534. See *Foster*, 2007 WL 1793441, at *26 (The DOJ’s “*Merger Guidelines* require that entry must be timely, likely, and sufficient.” (citation omitted)); see also *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 320, 367-68 (1970). The District Court in *Phillipsburg Nat’l Bank & Trust Co* stated:

‘Ease of access to the market is also a factor that deserves consideration in evaluating the anticompetitive effects of a merger. It is not difficult for a small group of business men to raise sufficient capital to establish a new small bank when the banking needs of the community are sufficient to warrant approval of the charter.’ Appellees, however, made no attempt to show that a group of businessmen would move to start a new bank in Phillipsburg-Easton, should the proposed merger be approved.

399 U.S. at 367-68 (citations omitted).

535. See *First Citizens Banc Corp.*, 94 Fed. Res. Bull. C1, C2 (2008), available at <http://www.federalreserve.gov/pubs/bulletin/2008/pdf/legalq407.pdf>.

[T]he Board notes that one community credit union also exerts a competitive influence in the Logan County banking market. This institution offers a wide range of consumer products, operates street-level branches, and has membership open to almost all the residents in the market.

The Board previously has considered the competitiveness of certain active credit unions as a mitigating factor.

Id. at C2 & n.12.

VIII. SUBPRIME MELTDOWNS AND CREDIT MARKET BEATDOWNS BEGET
BANK MERGER SHOWDOWNS

Unprecedented lending practices of the last two decades and aggressive pooling, packaging and securitizing of real estate-based credit have led the United States toward an economic downturn that will likely be labeled a recession with the benefit of hindsight. At least one critic has attributed the crisis to the “Fed’s monetary policy having created the housing bubble, characterized by a spectacular escalation of real estate values in every American city”⁵³⁶ The credit crunch of 2008 spread like a contagion, and will likely shape public sentiment. It may also whet the American appetite for fundamental change of our financial system, including the manner in which banks, and bank-like financial services firms combine operations through mergers and acquisitions. The collapse of many former subprime “players” has already begun to lead to mergers by necessity and a host of distressed asset sales.

In August 2007, America’s biggest bank,⁵³⁷ Bank of America made a \$2 billion equity investment in Countrywide Financial Corp., but claimed that it had a merely passive investment stake in Countrywide.⁵³⁸ However, Bank of America’s long desired market share dominance in

536. Thomas J. DiLorenzo, *The Government-Created Subprime Mortgage Meltdown*, LEWROCKWELL.COM, Sept. 6, 2007, available at <http://www.lewrockwell.com/dilorenzo/dilorenzo125.html>.

537. Valerie Bauerlein, *Will BofA Laugh Last?—Bet on Countrywide Looks Funny To Some, But Patience May Pay*, WALL ST. J., Nov. 29, 2007 (“Bank of America, the biggest U.S. bank by market value, grew to its gargantuan size by gobbling up companies coast to coast. Often those banks were in major distress, and Bank of America seized that advantage.”); see also James R. Hagerty & Valerie Bauerlein, *Countrywide, Bank of America Courted for Years*, WALL ST. J., Aug. 24, 2007.

Bank of America reached its scale by scooping up banks, many of them in hardship. Predecessor NCNB kicked off the growth spree with the 1988 purchase of the remnants of FirstRepublic Bank of Dallas, what was once one of Texas’s largest banks, at the urging of federal regulators. That deal gave it a backdoor to expansion in Texas and, thus, interstate banking.

NCNB later made a \$200 million strategic investment in MNC Financial Inc. of Baltimore and quickly bought the distressed bank, extending its reach up the East Coast.

Id.

538. Bauerlein, *supra* note 537; see also *Bank of America Takes Countrywide Stake*, N.Y. TIMES, Aug. 22, 2007, available at <http://www.nytimes.com/2007/08/22/business/apee-mortgage.html> (last visited Dec. 23, 2007).

the mortgage business led to discussions between the two companies that the leading retail lender's staff and technology⁵³⁹ would be inserted into Bank of America's omnipresent branches. Countrywide CEO Angelo Mozilo claimed there were no plans for the two companies to merge, but hinted about vague future mortgage business collaborations.⁵⁴⁰

Despite Mozilo's poker player bluster, Bank of America offered roughly \$4 billion to acquire Countrywide in the second week of 2008 and in effect, "doubl[ed] down on a previous investment in the troubled firm and catapult[ed] the buyer into the top spot among mortgage lenders and loan servicers in the U.S."⁵⁴¹ Bank of America now has more branches (and customers) than any other bank in the United States.⁵⁴² According to one analyst, if Countrywide "were indeed to fail, the federal government would facilitate a sale to Bank of America, much as many believe that regulators encouraged Bank of America to take the stake in the first place."⁵⁴³ Kenneth D. Lewis, Bank of America CEO, "flatly denied that his deal with Countrywide was at the behest of regulators."⁵⁴⁴

539. "Countrywide's computer technology also is considered a big plus in holding down loan-origination and servicing costs." See Hagerty & Bauerlein, *supra* note 537.

540. *Id.*

541. Alistair Barr & Steve Goldstein, *Bank of America to Buy Countrywide Financial*, MARKETWATCH, Jan. 11, 2008, available at, <http://www.marketwatch.com/news/story/bank-america-buy-countrywide-financial/story.aspx?guid=39417545-5DC7-4CD1-862D-5939F89D9667>.

542. Hagerty & Bauerlein, *supra* note 537 ("Countrywide has roughly 61,000 employees, nearly 1,000 branch offices for mortgage loans and a stock-market value of about \$12.7 billion. Bank of America has nearly 200,000 employees, 5,700 branches and a market capitalization of \$233.14 billion -- second only to Citigroup Inc. among banks.").

543. Bauerlein, *supra* note 537 (quoting analyst Richard X. Bove of Punk Ziegel & Co.).

In that respect, Mr. Bove compares a potential takeover to the legendary maneuver in 1988 of FirstRepublic, then the largest bank in Texas. Bank of America got its foothold in Texas for a bargain, with huge tax benefits.

Mr. Bove says that if Countrywide got in deeper trouble, regulators might also be willing to waive regulatory limits that bar any U.S. bank from an acquisition giving it more than 10 percent of total U.S. bank deposits.

Id.

544. Gretchen Morgenson, *Fair Game In the Fed's Cross Hairs: Exotic Game*, N.Y. TIMES, Mar. 23, 2008, available at, <http://www.nytimes.com/2008/03/23/business/23gr et.html>.

As market pundits speculated about the veracity of Countrywide's financials,⁵⁴⁵ and whether its bondholders would be confronted with default risks, Bank of America noted far less conspicuously in an amended registration statement filed with the Securities and Exchange Commission that the likelihood it would back Countrywide's bond debt, which had been downgraded to "junk" just days earlier,⁵⁴⁶ was a rapidly diminishing prospect with "no assurance that any such debt would be redeemed, assumed or guaranteed."⁵⁴⁷ Meanwhile, the senior Senator from New York, Charles Schumer, could barely couch his support for the mega-bank when he remarked that Bank of America should actually receive a deeper discounted purchase price due to the widening belief that Mozilo's Countrywide crew cooked its books.⁵⁴⁸

545. See, e.g., Christopher Whalen, *Are Countrywide Financial Bond Holders Bankruptcy Remote?*, SEEKINGALPHA.COM, May 02, 2008, available at <http://seekingalpha.com/article/75342-are-countrywide-financial-bond-holders-bankruptcy-remote>. The columnist cited the opinion below for the premise that government assisted "bail out" deals ultimately increase systemic market risk over time:

Ever since the government bailout of Chrysler in 1979-80, this country has been on a course of raising the safety net so that the market's discipline, in a capitalistic economic system, has been truncated. We have witnessed a growing level of decisions that are based upon expediency rather than sound long-term decision making. Each time these expedient decisions are made, the level of risk within the U.S. economy has been increased. The market's discipline is not allowed to work for fear of the potential economic fallout.

Id.; see also John Spence, *B. of A. Should Exit Countrywide Deal: Analyst*, MARKETWATCH, May 5, 2008 available at http://www.marketwatch.com/news/story/analyst-says-bank-america-should/story.aspx?guid=%7B479AEC2B-AEF7-477F-94DE-4AA90EC59156%7D&dist=msr_14; David Mildenberg & Eric Martin, *Bank of America Should Skip Countrywide, Analyst Says (Update3)*, BLOOMBERG, May 5, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aQmoleDHU.Ts&refer=home>.

546. David Mildenberg, *Countrywide Rating Cut to 'Junk' By Standard & Poor's (Update4)*, BLOOMBERG, May 2, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aNssWctbuukA&refer=home>.

547. David Mildenberg, *Bank of America May Not Guarantee Countrywide's Debt (Update6)*, BLOOMBERG, May 5, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a0qQd39LDI7c&refer=home>; see also, *BofA Gives 'No Assurance' on Portion of Countrywide Debt*, DALLAS BUS. J., May 2, 2008, available at <http://dallas.bizjournals.com/dallas/stories/2008/04/28/daily66.html>; Bank of America Amended Registration Statement Form S-4/A, available at <http://www.sec.gov/Archives/edgar/data/70858/000095014408003445/g11537a2sv4za.htm> (filed with the SEC Apr. 30, 2008).

548. Christopher S. Rugaber, *Countrywide Financial Admits Loan Officers Made Errors*, ASSOCIATED PRESS (via Yahoo!), May 6, 2008, available at

Bank of America was not the only mega-bank positioned to pick from the smoldering subprime rubble in 2008 and acquire big brand financial assets with government assistance and fire-sale prices. JPMorgan Chase Bank, the nation's third-largest bank in terms of total assets, received far more than just matchmaking services and deal-friendly legislator rhetoric. According to the *New York Times*, the "Federal Reserve Bank of New York pushed Bear Stearns into the arms of JPMorgan Chase."⁵⁴⁹ In fact, JPMorgan Chase was the beneficiary of a \$29 billion Federal Reserve *imprimatur* that effectively insulated the bank from substantial risk in the acquisition of distressed subprime assets.⁵⁵⁰ The Fed's backing facilitated the investment bank bailout buyout, the primary purpose of which, "according to regulators, was to forestall a toppling of financial dominoes on Wall Street, in the event that Bear Stearns skidded into bankruptcy and other firms began falling apart as well."⁵⁵¹ Central Bank Chairman Ben Bernanke reportedly "helped broker the buyout, after liquidity evaporated at Bear."⁵⁵²

Sighs of relief were heard overseas, where at least one experienced market crisis manager, Bank of Israel governor Stanley Fischer, opined that the Fed's willingness to back a Bear bailout "marked a "turning

http://news.yahoo.com/s/ap/20080506/ap_on_bi_ge/countrywide_hearing. According to the AP account, the senior Senator from New York made the following rather ironic remarks during Senate Panel testimony regarding Bank of America's planned purchase of Countrywide:

Sen. Charles Schumer, D-N.Y., chairman of the panel, criticized what he called a broader 'vulture mentality' in the mortgage lending industry. 'Companies have repeatedly sought to foreclose on homes where owners were current on payments, sought attorneys fees in bankruptcy court for motions that they have lost, and failed to keep even the most basic records to justify their claims in bankruptcy court,' he said. Schumer also said that Bank of America Corp., which agreed to buy Countrywide in January [2008] for approximately \$4 billion, should reconsider the deal's price tag. If the purchase price for Countrywide was 'based in part on profits from these bad practices, Bank of America should demand a lower price, because these practices will not be allowed to continue,' he said.

Id.

549. Morgenson, *supra* note 544; see also Jonathan Stempel, *Buffett Says Fed Avoided Chaos in Bear Bailout*, REUTERS, May 3, 2008, available at <http://www.reuters.com/article/idUSN0332203020080503>.

550. Henry Blodget, *Bear Stearns Bailout Paves Way For \$1+ Trillion U.S. Homeowner Rescue Plan*, HUFFINGTONPOST.COM, Mar.24, 2008, available at http://www.huffingtonpost.com/henry-blodget/bear-stearns-bailout-pave_b_93052.html; see also Stempel, *supra* note 549.

551. Morgenson, *supra* note 544.

552. Stempel, *supra* note 549.

point” in the latest financial market turmoil,” although other economics experts were far less sanguine about the Fed’s maneuver.⁵⁵³ Anna Schwartz, a contemporary of Nobel Laureate economist Milton Friedman, called the Bear Stearns bailout a “rogue operation,” and that “the Fed had no business intervening there.”⁵⁵⁴ Timothy F. Geithner, Federal Reserve Bank of New York president, has since called for “more stringent supervision over financial institutions and urged banks to put in place more fail-safes to prevent the liquidity problems that claimed Bear Stearns last month.”⁵⁵⁵ According to Minneapolis Fed president Gary Stern, there is simply “no way to put the genie back in the bottle,” while Harvard University professor, and former International Monetary Fund research director, Kenneth Rogoff quipped, “[I]t is very hard in the middle of a crisis to know where to draw lines.”⁵⁵⁶

Former regulators have also spoken publicly about the political climate for change.⁵⁵⁷ Counted among them is former SEC Chairman

553. John Thornhill et al., *Bear Stearns Rescue a ‘Turning Point,’* FIN. TIMES, Apr. 6, 2008, available at http://www.ft.com/cms/s/0/3325b50a-03fb-11dd-b28b-000077b07658,dwp_uid=8cd8eda0-f1d7-11dc-9b45-0000779fd2ac.html; see also Janet Morissey, *Nouriel Roubini – Superbear Says There’s More to Come*, INVESTMENTNEWS, Mar. 24, 2008, available at <http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20080324/REG/767507756>.

It’s the beginning of a radical change in monetary policy. It’s not just the \$30 billion that the Fed confirmed to Bear Stearns via JPMorgan — there were two other major options that went in the same direction. One was the decision [two weeks ago] to provide \$200 billion so that all primary dealers, including non-bank financial institutions, would be able to swap their illiquid and toxic MBS [paper] for safe Treasuries. The other was the Fed giving any primary dealer, including non-banks, access to the Fed discount window on the same terms as banking institutions. This is a radical change; we haven’t seen anything like this since the Great Depression. These are financial institutions that are not regulated or supervised by the Fed. The Fed has no idea of whether they are just illiquid or insolvent, which creates a massive moral hazard problem. It’s a radical shift in the way the Fed operates — and a dangerous way, I would argue.

Id.

554. Craig Torres, *Fed ‘Rogue Operation’ Spurs Further Bailout Calls (Update 1)*, REUTERS, May 2, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a1ctn1Xfq5Do&refer=home>.

555. Michael Grynbaum, *Fed Officials Defend Rescue of Bear Stearns*, N.Y. TIMES, Apr. 3, 2008, available at <http://www.nytimes.com/2008/04/03/business/03cnd-fed.htm> (Mr. Geinther’s “recommendations were vague and came at the close of an often-gripping testimony [as he] recounted the weeklong process by which the Fed mediated the fire sale of Bear Stearns to its Wall Street rival, JPMorgan Chase.”).

556. Torres, *supra* note 554.

557. Brian Blackstone, *Real Time Economics: Volcker Warns of Precedent Set by*

William Donaldson, who announced his support for Senator Barack Obama's candidacy, based in large part upon the issue of financial market regulatory reform, and noted that Sen. Obama "saw the 'need to take a good hard look at how things are organized' and 'just exactly what went wrong in terms of the regulatory oversight that we have.'"⁵⁵⁸

Formerly America's fifth-largest investment bank, Bear Stearns was widely reputed for having among the largest appetites for subprime risk on Wall Street, and as two of its hedge funds imploded under the weight of excessive leverage,⁵⁵⁹ its stock slid from a peak of roughly \$120 per share, to JPMorgan Chase's initial bid of \$2, later upped to \$10 per share.⁵⁶⁰ Bear Stearns shareholders have asserted a host of derivative claims, connected principally to the bank's subprime collapse and subsequently proposed takeover, and as a class they seek, *inter alia*, injunctive relief to block the proposed merger.⁵⁶¹ Meanwhile, Bear's

Fed Moves, WALL ST. J., May 14, 2008, available at <http://blogs.wsj.com/economics/2008/05/14/volcker-warns-of-precedent-set-by-fed-moves/?mod=WSJBlog>. Former U.S. Federal Reserve Chairman Paul Volcker cautioned during prepared testimony to the Joint Economic Committee of Congress that use of what he characterized as "long-dormant" Fed powers may be seen subsequently as a precedent for future periods of economic stress:

'Whatever claims might be made about the uniqueness of current circumstances, it seems inevitable that the nature of the Fed's response will be taken into account and be anticipated, by officials and market participants alike, in similar future circumstances,' [] Volcker hinted at the Fed's recent role facilitating the rescue and proposed takeover of Bear Stearns by J.P. Morgan Chase. The Fed, he said, 'felt it necessary to extend that safety net' to systemically important institutions by 'providing direct support for one important investment bank experiencing a devastating run, and then potentially extending such support to other investment banks that appeared vulnerable [to] speculative attack,' Volcker said.

'Hence, the natural corollary is that systemically important investment banks should be regulated and supervised along at least the basic lines appropriate for commercial banks that they closely resemble in key respects,' he said.

Id.

558. Christopher Cooper et al., *Obama to Receive Endorsement Of 3 Former SEC Chairmen*, WALL ST. J., May 14, 2008, available at <http://online.wsj.com/article/SB121073227421390697.html>.

559. Joe Bel Bruno, *Hedge Fund Collapse at Bear Stearns Trickle Down to Pension Funds, Ordinary Investors*, ASSOCIATED PRESS, June 26, 2007, available at <http://www.signonsandiego.com/news/business/20070626-1135-bearstearns-fallout.html>.

560. Francesco Guerrera et al., *JPMorgan Faces \$9bn Charge for Bear Clean-Up*, FIN. TIMES, May 13, 2008, available at <http://www.ft.com/cms/s/0/c44bc2d8-2113-11dd-a0e6-000077b07658.html>; see also Stempel, *supra* note 549.

561. See Second Amended Complaint, *Cohen v. Bear Stearns Companies, Inc.*, No.

bailout was examined during House Oversight and Government Reform Committee hearings.⁵⁶²

JPMorgan Chase was not the only firm to benefit from the Federal Reserve's historic largesse. During a rare crisis avoidance move, the Fed opened its "discount window" to investment banks who were all too willing to scoop up "tens of billions of dollars from the Federal Reserve, rushing to get hard-to-sell mortgage bonds off their battered balance sheets."⁵⁶³ One month later, "as Washington beg[an] to consider how to modernize a hodgepodge of banking regulations," the Senate Banking Committee conducted post-mortem hearings aimed at "examin[ing] the collapse of Bear Stearns and its implications for taxpayers, regulators and future financial crises."⁵⁶⁴ Senate Banking Committee Chairman, Sen. Christopher Dodd, has also expressed recent concerns about a "potential crisis in the student-loan market," and House Financial Services Committee Chairman, Rep. Barney Frank, has noted that "new rules are needed to deal with a lack of regulation of risk."⁵⁶⁵ The approach advocated here, solely with regard to the prospective financial services merger review process, favors neither business combinations nor opposition thereto, but instead promotes a "new baseline for fairness,"⁵⁶⁶ one which effectively equips those empowered to review proposed banking mergers with whatever tools are reasonably available to accurately evaluate relevant micro and macro market conditions as they relate to a prospective transaction.

07 Civ. 10453 (S.D.N.Y. 2007).

562. See James Politi, *House Panel Questions Bear Rescue Plan*, FIN. TIMES, Apr. 8, 2008, available at http://www.ft.com/cms/s/0/4e041ddc-04f8-11dd-a2f0-000077b07658,dwp_uuid=8cd8eda0-f1d7-11dc-9b45-0000779fd2ac.html.

563. Stephen Foley, *Brokers Rush to Borrow Funds from the Fed*, INDEPENDENT (UK), Mar. 21, 2008, available at <http://www.independent.co.uk/news/business/news/brokers-rush-to-borrow-funds-from-the-fed-799127.html>.

564. Grynbaum, *supra* note 555.

565. See Torres, *supra* note 554.

566. John Poirier, *Fed Backs Credit Card Reforms*, REUTERS, May 2, 2008, available at <http://www.reuters.com/article/idUSWBT00892120080502>.

'The proposed rules are intended to establish a new baseline for fairness in how credit card plans operate,' Fed Chairman Ben Bernanke said at a meeting to approve the proposal. 'Consumers relying on credit cards should be better able to predict how their decisions and actions will affect their costs.'

Id.

IX. CONCLUSION

The last half-century has been a period of incredible social, technological, and economic advancement for much of the world, as an electronic “information age” has brought unprecedented enlightenment to billions. The benefits have also extended to financial services, as money now moves around the world daily with enhanced information processing and at the speed of light, allowing for efficient delivery of financial services in virtually every currency known and at every location on earth. Formerly provincial economies now operate globally and trading partners cooperate from virtually all locales. The domestic market for financial services is no exception, and has realized vast improvements in efficiencies, largely through the use of technology, but also through combinations of financial services firms with complimentary skills, markets, products and services. Regrettably, much of the law that still governs the antitrust review process of bank mergers remains rooted in a doctrine that was developed years before humans first explored the surface of the moon.

Financial services are no longer an exclusive domain of commercial banks. In fact, market sectors for virtually every financial product and service, once associated with “insulated” traditional banks, are now filled with nonbank competitors of all sorts, including toll-free telephone mortgage originators, purely internet “banks,” credit card companies offering checking accounts, auto and home loan markets financed by hedge funds, check cashing and predatory “pay day advance” outfits that litter struggling urban neighborhoods, and firms like American Express dominate the small business lending market.

There can be little debate that beyond the last classic bastion of the banking industry—the purely depository account—almost every other imaginable financial product or service has a competitive landscape that includes non-banks. These advancements only increased during the last decade, as the Internet became commercialized and the Gramm-Leach-Bliley Act ushered in the era of combined banking, securities, and insurance businesses organized under one corporate umbrella. Since the Citicorp and Travelers mega-merger, others have followed suit, and still hundreds, if not thousands, of other smaller transactions have resulted in combinations of traditional banks with a host of nonbank firms.

The U.S. Supreme Court established once prudent and effective boundaries to govern the scope of regulatory reviews for proposed mergers involving businesses that were considered “unique”—banks.

Those boundaries were delineated mostly in the 1960s and 1970s, well before the most significant economic and technological changes served as catalysts for an evolving financial services industry. *Philadelphia National Bank* was the common law progenitor of what was indeed sound policy for an era when a commercial bank was a clearly identifiable creature. The *Philadelphia National Bank* Court labored to craft a workable rule that “was substantively strong and administrable,” and that would presumably stand the test of time.⁵⁶⁷

Today, the entities that provide many of the bank-like functions are often, although not always, components of a bank holding company structure that include a variety of products and services that may have been unimaginable when the Supreme Court first fashioned those regulatory standards of review. The *Philadelphia National Bank* approach remains quite relevant in some respects, but it is believed that the test created in 1963 should only be among the sharpest arrows in a bank regulator’s quiver, instead of its entire arsenal of review.

The Department of Justice moved away from bank merger reviews dominated by the local market analysis that has been the hallmark of the *Philadelphia National Bank* legacy, and which has become an inflexible metric when employed exclusively. Federal bank regulators have not yet been liberated from the constraints of an antiquated standard created almost a half century ago. Local market analysis has indirectly engendered a trend of closure and divestiture, designed to secure merger approval, which in the abstract might seem to be innocuous, until one carefully considers the adverse secondary effects attendant to the elimination of long-standing relationships at the neighborhood and community level, in addition to frustration of the spirit and intent of the Community Reinvestment Act.

Consolidation typically promises greater efficiencies and lower delivery costs, although it seems that all too often any realized savings quickly morph into one-time higher net profits, and consumers are

567. ABA Section of Antitrust Law, Monograph No. 12, HORIZONTAL MERGERS: LAW AND POLICY p. 58 n.296 (1986) (citing and quoting Richard Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 105 (1976)).

Philadelphia National Bank placed considerable weight upon devising a rule that was substantively strong and administrable. Noting ‘the danger of subverting congressional intent by permitting a too-broad economic investigation,’ the Court said that ‘in any case in which it is possible . . . to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.’ (citing *Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963)).

Id.

rarely, if ever, the beneficiaries of any of the merger upside. The downside can of course include higher fees, fewer choices, decreases in staff and customer service, and worse still, a market vacuum that all too often replaces depository institutions that were once community pillars with “pay-day” lenders, check-cashing stores and outfits of similar predatory ilk.

With virtually 100% of all merger applications garnering approval during the last decade, approval has been a veritable “rubber stamp,” provided that overtly monopolistic market share did not result directly from a proposed transaction. The DOJ has been consistently more pragmatic in its approach to bank merger analysis over the years, and continues to factor in market elements that federal bank regulators might ignore, due to what seems to be an overly devoted deference to *Philadelphia National Bank* precedent. A DOJ review typically includes evaluation of any market participants that provide competing products or services, regardless of whether the potential competitor is a credit card issuer, or some other nonbank operation. However, federal bank regulators do partially consider savings and loans and similar thrifts that are not considered part of the traditional commercial banking sector, or a component of the DOJ merger application analysis.

The divergence between the DOJ and federal banking regulators creates inconsistency, contradiction, and increased regulatory uncertainty, save for the consistent fact that virtually every merger application has been approved during the last decade. It also offers a skewed vision of the actual amount of anticompetitive activity present in various banking markets. Perhaps an aspect of provincialism is at work that causes factions of the federal government to resist adopting standards developed in another portion of that same government. Nonetheless, the DOJ position, on balance, is more adaptable to the market realities of consolidation in today’s financial services sector.

The *Philadelphia National Bank* standard endures to some degree, even if unspoken, and unquestionably deserves to hold a meaningful place amongst all of the tools available to the DOJ and banking regulators, as future proposed transactions are evaluated. Yet, adherence to that standard has all too often been the totality of the analysis, in such devoted deference to *stare decisis*, that it seems misguided. The United States Court of Appeals for the District of Columbia Circuit made the following observations some two decades ago:

Whether, in view of the dynamic changes in the banking industry over the past decade, discrete and highly specialized banking

practices, such as those involved here, may realistically be included in a general commercial banking product market, however, is a difficult question which the time constraints of the decision making process in this case simply do not allow us to probe with the necessary care.⁵⁶⁸

The U.S. Supreme Court has more than once wisely recognized that as times change, so too must legal standards adapt to evolving circumstances.⁵⁶⁹ This is almost certainly one of those occasions. During its last term, the Court eliminated a nearly century-old antitrust-based ban on minimum retail pricing,⁵⁷⁰ in a direct acknowledgement that as markets evolve, U.S. laws must keep the pace.⁵⁷¹ This is especially true as the domestic economy will eventually rebound from the recession in which it is eventually mired, and an upswing of M&A activity will be a likely occupant of the leading edge of that recovery.⁵⁷²

568. Irving Bank Corp. v. Bd. of Governors, 845 F.2d 1035, 1041 (D.C. Cir. 1988).

569. Payne v. Tennessee, 501 U.S. 808, 849 (1991) (Marshall, J. Blackmun, J., joining, dissenting). The Supreme Court has also stated:

[T]his Court has never departed from precedent without 'special justification.' []. Such justifications include the advent of 'subsequent changes or development in the law' that undermine a decision's rationale, []; the need 'to bring [a decision] into agreement with experience and with facts newly ascertained,' []; and a showing that a particular precedent has become a 'detriment to coherence and consistency in the law.' [].

Id. (citations omitted).

570. Leegin Creative Leather Products, Inc. v. PSKS, Inc., ___ U.S. ___, 127 S.Ct. 2705 (2007). Justice Kennedy, writing for the 5-4 majority, noted that long-standing precedent can evolve with time:

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. [] It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason.

Id. at 2721.

571. *Id.*; see also Giang Nguyen, Leegin Creative Leather Prods, Inc. v. PSKS, Inc. d/b/a Kay's Closet, MEDILL NEWS SERVICE, Dec. 12, 2006, <http://docket.medill.northwestern.edu/archives/004185.php>.

572. Ben Steverman, *M&A: The Big Thaw?*, BUSINESSWEEK, May 15, 2008, available at http://www.businessweek.com/print/investor/content/may2008/pi20080515_859749.htm. It has been reported that:

So far this year [2008], the total value of announced M&A deals is . . . down 39% in the U.S. and 34% worldwide from this time a year ago. . . . [but] [b]ankers and experts said the shrinking of available credit has acted as a brake on the M&A

The Court can, and should, take prudent steps to modify and modernize the governing standard of bank merger review and equip banking regulators with all the tools available to perform application scrutiny in a manner truly consistent with their regulatory charge.

The Authors urge that whatever the future analytical framework for evaluating proposed bank mergers might be, the last thing it should be is dutiful devotion to *stare decisis* merely for the sake of not offending a half-century of doctrinal deference. Regulatory reform trial balloons have been advanced throughout the year, including the dramatic release of the U.S. Treasury Department's "blueprint," which advocates for the adoption of a "less is more" approach, and urges for the consolidation and closure of federal financial regulators, with the Federal Reserve filling the void by utilizing substantially enhanced powers over the banking sector.

The Fed recently advanced substantive reforms regarding consumer credit card issuer practices, including "a proposal that would limit interest rate hikes, abolish certain fees, and modify controversial billing practices—targeting what officials consider to be abuses,"⁵⁷³ and further suggesting receptiveness to systemic regulatory overhaul. Considering that the Fed has arguably been the most devout adherent to the monolithic and now outdated *Philadelphia National Bank* standard, the Court is stridently urged to soon revisit the question of what might constitute an appropriate measure of bank merger scrutiny, and craft an adaptable new standard that is mindful of the path already traveled, but also responsive to the rate of change fast afoot on Wall and Main streets, and perhaps soon within the "Beltway" and also on Pennsylvania Avenue.

market. The credit crisis began last summer, but it really started to slow dealmaking in the fall. The M&A market hit its roughest patch in February and March, when investment bank Bear Stearns [] collapsed.

Id.

573. Jessica Silver-Greenberg, *The Brewing Credit-Card Storm*, May 15, 2008, BUSINESSWEEK, available at http://www.businessweek.com/print/magazine/content/08_21/b4085034662866.htm.