BANK MERGERS ARE SYSTEMICALLY IMPORTANT: A REVIEW OF BANK MARKETS AND THE MERGER REVIEW PROCESS

BY ROBERT C. MACKAY[1]

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I analyze several aspects of recent changes in the banking industry, some of which correspond to the financial crisis in 2008 and the government's subsequent financial reforms. The banking industry was greatly impacted by the crisis, including the types of banks that persist. Specifically, I analyze: the decreasing number of community banks, the tends of increasing banking assets and deposits, the consolidation within the banking industry, and distributional implications related to bank size. I discuss the antitrust motivations for reviewing mergers and how bank merger reviews combine traditional priorities of protecting competition with additional priorities to provide financial stability and services within a community. The outcomes and review processes corresponding to bank mergers are therefore different from those corresponding to mergers in non-banking sectors.

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I. INTRODUCTION

The enforcement of antitrust policy intends to protect competition and avoid related inefficient market outcomes, which include customers paying higher prices, reduced market output, decreased product quality, or diminished incentives for producers to innovate. Mergers that are suspect of violating antitrust laws might include those that: (1) lessen competition or tend to create a monopoly;[2] (2) constitute a contract or conspiracy in restraint of trade;[3] or (3) constitute an unfair method of competition.[4] The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have provided guidance on criteria they use to determine whether or not a merger will lead to sufficient loss to competition.[5] Generally, the guidance of these enforcement agencies seeks to avoid mergers that "create, enhance, or entrench market power or to facilitate its exercise."[6]

In the banking sector, mergers of national banks, state banks, and nonmember insured banks are reviewed by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), and the Federal Deposit Insurance Corporation ("FDIC"), respectively.[7] In addition to the criteria used to review mergers in non-financial sectors, the banking enforcement agencies have an additional charge to review a merger's impact on ensuring financial stability, including the impact on the merged entity on the community it serves.[8]

Over the last 30 years, there has been consolidation in the banking sector. Given the additional criteria to review mergers and the unique role of banking in the economy, it is worth understanding what types of mergers are occurring in the banking industry and considering whether too few banking mergers are being denied.[9] While most bank mergers may be executed without negatively impacting efficiency in the banking industry, there may be antitrust implications if the market becomes too concentrated. As mentioned above, the direct result of mergers that harm competition can be that customers pay higher prices, reduced output of financial services, and diminished quality and innovation within the industry, as suggested above.

Additional potential indirect effects of bank mergers may impact other industries due to the way the banking industry interacts throughout the economy. The 2008 financial crisis highlighted some of the moral hazard risks that can exist when banks are considered to be systemically important banks and/or "too big to fail." In describing the problem, the Financial Stability Board stated, "(f)inancial institutions may become so large and complex or interconnected that their distress or failure would cause serious harm to the financial system and the economy."[10]

2 See section 7 of the Clayton Act, 15 U.S.C. § 18.

3 See section 1 of the Sherman Act, 15 U.S.C. § 1.

4 See section 5 of the FTC Act, 15 U.S.C. § 45.

5 U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," issued August 19, 2010, "Vertical Merger Guidelines," issued June 30, 2020.

6 U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," issued August 19, 2010, p.2. Adverse competitive effects where a merger leads to no changes in the behavior of non-merging parties is referred to as "unilateral effects." Adverse competitive effects where a merger leads to "increasing the risk of coordinated, accommodating, or interdependent behavior among rivals" is referred to as "coordinated effects."

7 See the Bank Merger Act, 12 U.S.C. § 1828(c) and the Bank Holding Company Act, 12 U.S.C. § 1842.

8 See Director Rohit Chopra, "How Should Regulators Review Bank Mergers?" Consumer Financial Protection Bureau, Dec. 9, 2021.

9 Divestiture, in contrast to an outright denial of a proposed merger, may be an acceptable resolution to loss of competition in the market. The "1995 Banking Guidelines" state,

> "(w)here a proposed merger causes a significant anticompetitive problem, it is often possible to resolve the problem by agreeing to make an appropriate divestiture… A divestiture will resolve the problem if it ensures the presence of a strong and vigorous competitor that replaces the competition lost because of the merger."

See DOJ, "1995 Banking Guidelines," "Bank Merger Competitive Review – Introduction and Overview (1995)," current as of 9/2000.

10 See Financial Stability Board, "Evaluation of the Effects of Too-big-to-fail Reforms: Final Report," 31 March, 2021.

For this paper, I will first review the banking industry and recent trends, including bank mergers within the last twenty years. Next, I will discuss mergers through the lens of current antitrust priorities, and how bank merger reviews differ from non-bank merger reviews. Finally, I will provide some concluding thoughts.

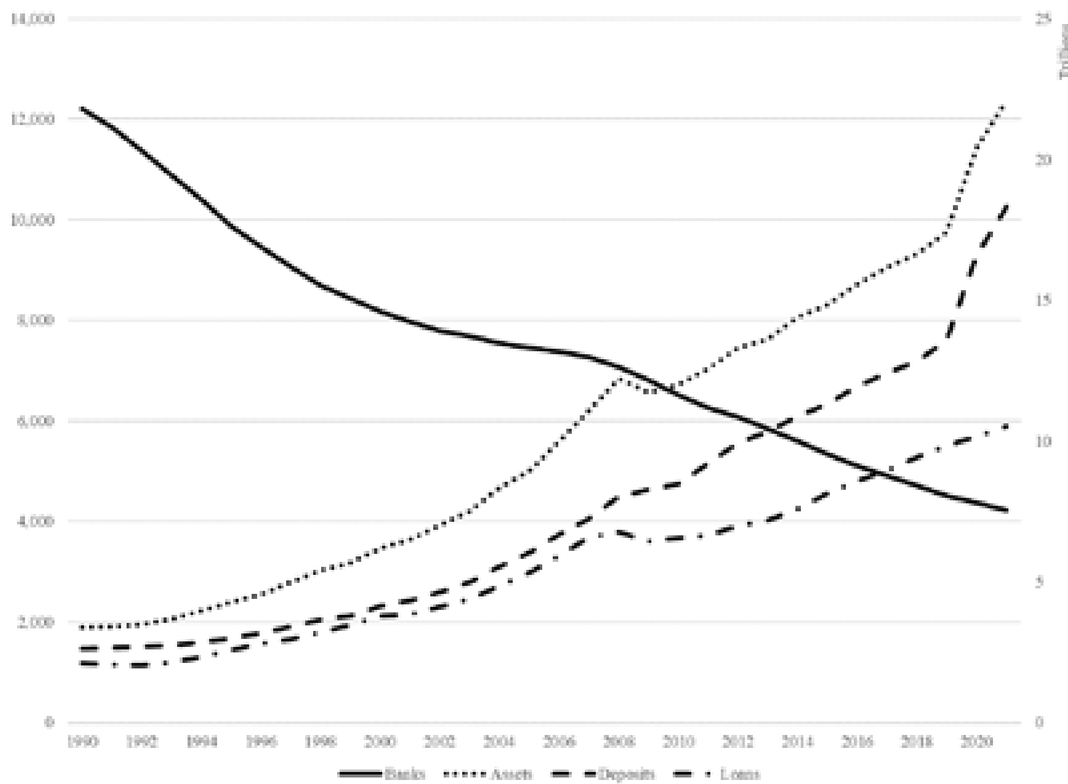
II. BANKING MARKET AND MARKET CONSOLIDATION

The banking sector is becoming more consolidated due, in part, to the number of banks decreasing significantly, while the total value of banking assets, deposits, and loans are increasing. The Acting Comptroller of the Currency Michael J. Hsu recently described the industry consolidation,

> "The banking system has changed significantly since 1995. Industry assets, which totaled $5 trillion in 1995, now total nearly $25 trillion. At the same time, the number of insured depository institution charters has decreased by about 60 percent. As a result, the size of the average bank has increased to almost $5 billion. Assets have become concentrated in the largest banks… The largest bank in 1995 had approximately $250 billion in total assets. Today, there are 13 banks with more than $250 billion in total assets, and the largest bank has over $3 trillion in total assets."[11]

Figure 1 shows the number of FDIC-insured banks in the United States decreased from 12,211 in 1990 to about 4,229 in 2021 (by about 65 percent or by 5.2 percent annually). In 1990, the total assets, deposits, and loans for these banks were about $3.4 trillion, $2.6 trillion, and $2.1 trillion, respectively. By 2021, the total assets had increased to $22.1 trillion (9.9 percent annually), deposits had increased to about $18.3 trillion (10.2 percent annually), and total loans increased to about $10.5 trillion (8.4 percent annually).

Figure 1 FDIC-insured Banks in the United States (1990-2021)



Source: FDIC.

The distribution of FDIC-insured banks suggests that the small or community banks are responsible for the reduction in the overall number of banks.[12] Table 1 below shows that banks with assets of less than $10 billion reduced from 15,099 in 1990 to 4,851 in 2020 (a decrease

11 Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 3.

12 According to the Economic Growth, Regulatory Relief, and Consumer Protection Act, section 201, depository institutions and holding companies with less than $10 billion in total consolidated assets are considered community banking organizations.

of 67.9 percent). The assets and deposits held by these banks with assets less than $10 billion decreased more than the number of banks did (a decrease of 78 percent), which is likely a result of the largest of the banks becoming much bigger over time.[13]

Table 1 FDIC-insured Banks by Asset Size (1990 vs 2020)[14]

	Number of Banks		**Percent of Assets Held**		**Percent of Deposits Held**	
Asset Size	**1990**	**2020**	**1990**	**2020**	**1990**	**2020**
<$10B	15,099	4,851	66.4%	14.7%	73.9%	16.4%
$10B - $50B	52	102	20.2%	10.5%	18.5%	11.4%
$50B - $100B	7	16	10.0%	5.3%	6.4%	5.9%
$100B - $250B	1	20	3.4%	13.3%	1.2%	13.9%
$250B - $500B	0	8	0.0%	13.9%	0.0%	14.3%
$500B - $700B	0	1	0.0%	2.5%	0.0%	2.6%
≥$700B	0	4	0.0%	39.8%	0.0%	35.5%
Total	15,159	5,002	100.0%	100.0%	100.0%	100.0%

Source: FDIC.

The overall reduction in the number of banks can further be attributed to very small banks, or banks with assets less than $300, based on my review of nationally or state-chartered banks with assets greater than $300 million. For this report, I refer to community banks as banks with less than $10 billion in assets and non-community banks as banks with assets greater than $10 billion regardless of the year. Figure 2 below shows indices of the number of non-community banks (with assets greater than $10 billion) and the number of community banks (with assets less than $10 billion and greater than $300 million), both indices normalized to equal 1 for 2001 values. The number of community banks with assets greater than $300 million grew by 78 percent over the last twenty years (from 1,115 banks to 1,990 banks).[15] This is in stark contrast to the above results where FDIC data shows that the overall number of community banks (all banks with assets of less than $10 billion) went down from 15,099 banks in 1990 to 4,851 banks in 2020 — suggesting the reduction in community banks is concentrated in the segment of community banks with assets less than $300 million. Regarding the larger banks, Figure 2 shows the number of banks with assets greater than $10 billion was fairly flat from 2001 to 2011 (growing from 77 banks to 78 banks), but then increased by 70.5 percent from 2011 to 2022 (from 78 banks to 133 banks).[16] Overall, the total number of banks with at least $300 million in assets grew by 78.1 percent from 2001 to 2022 (from 1,192 banks to 2,123 banks).

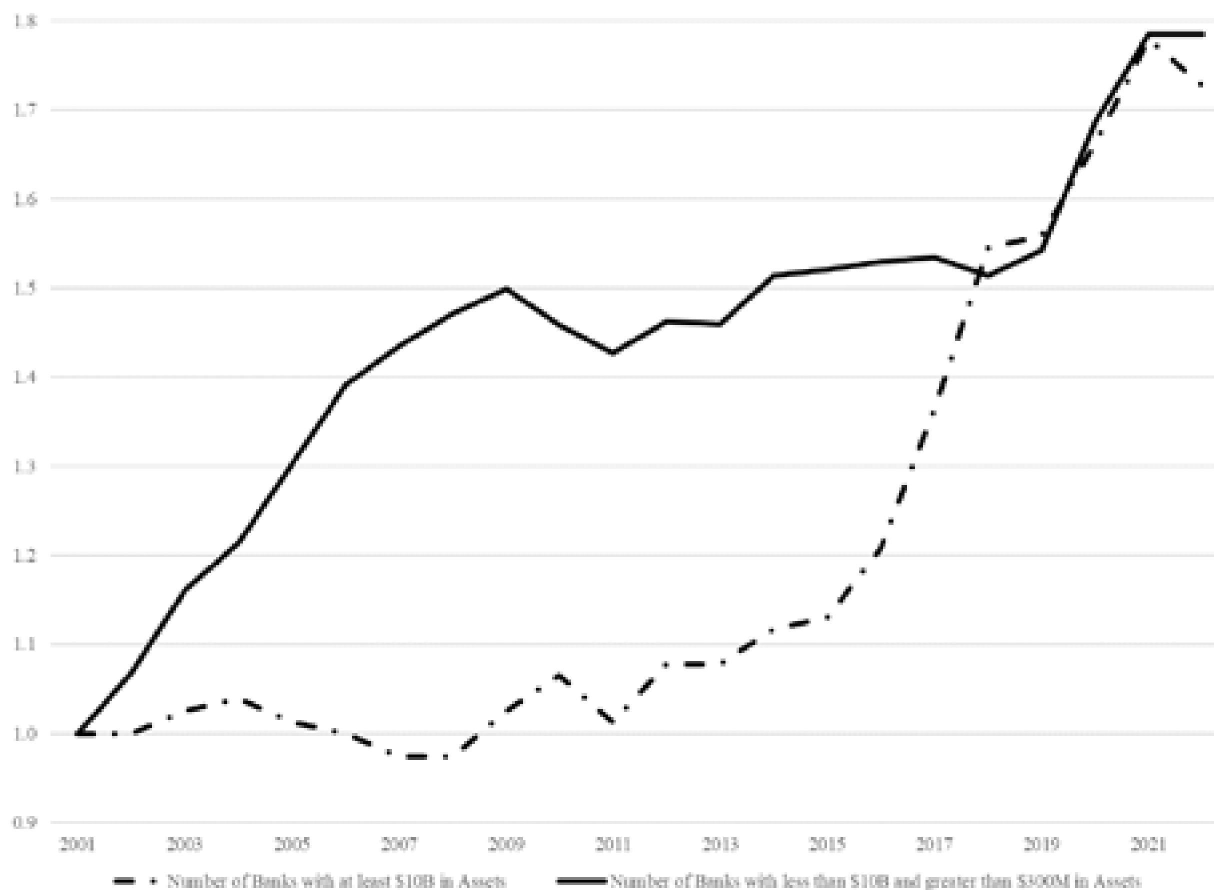
13 The percent of assets held by FDIC-insured banks went down from 66.4 percent to 14.7 percent. The decrease of 77.9 percent is measured as the percentage change in these percentages, or (14.7 percent – 66.4 percent) / 66.4 percent. The decrease of deposits held by FDIC-insured banks is calculated to be 77.8 percent using the same methodology.

14 The FDIC presented these data to show how the banking sector has become more consolidated over the last 30 years. See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303).

15 Small nationally or state-chartered banks include those with assets of more than $300 million, but less than $10 billion. From 2009 to 2019, there was not a lot of growth in banks with less than $10 billion in assets. This is likely related to the financial crisis in 2008 and macroeconomic conditions impacting the banking industry, including higher compliance costs due to financial reforms like the Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010.

16 The Federal Reserve reports the number of insured US-chartered commercial banks with consolidated assets of $300 million or more. I compare annual data from 2001 to 2022 (as of September 30).

Figure 2 Indices of Non-community and Community Banks with at Least $300 million in Assets (2001-2022)



Source: Federal Reserve.

As noted above, the assets of banks increased over time. For banks with at least $300 million in assets, total assets grew from $5.8 trillion to $21.6 trillion from 2001 to 2022 (an annual growth rate of 6.5 percent). Figure 3 shows some of the distributional effects of bank assets held based on bank size.[17] The data suggest that rate of asset growth is positively correlated with bank size, with much of the growth in the industry assets over the last 20 years occurring for the 4 largest banks. For example, the following annual growth rates of bank assets from 2001 to 2022 are greatest for the 4 largest banks and smallest for banks with assets less than $10 billion and more than $300 million:

- 8.44 percent for the 4 largest banks,[18]
- 5.60 percent for the 5 to 10 largest banks,[19]
- 6.21 percent for the 11 to 25 largest banks,[20]
- 6.54 percent for banks with at least $10 billion in assets, not including the 25 largest banks,[21] and
- 3.31 percent for banks with less than $10 billion, but at least $300 million in assets.[22]

17 Figure 3 total assets are shown as indices normalized to equal 1 for 2001 values.

18 The total assets for the 4 largest banks grew from $1.7 trillion in 2001 to $9.1 trillion in 2022.

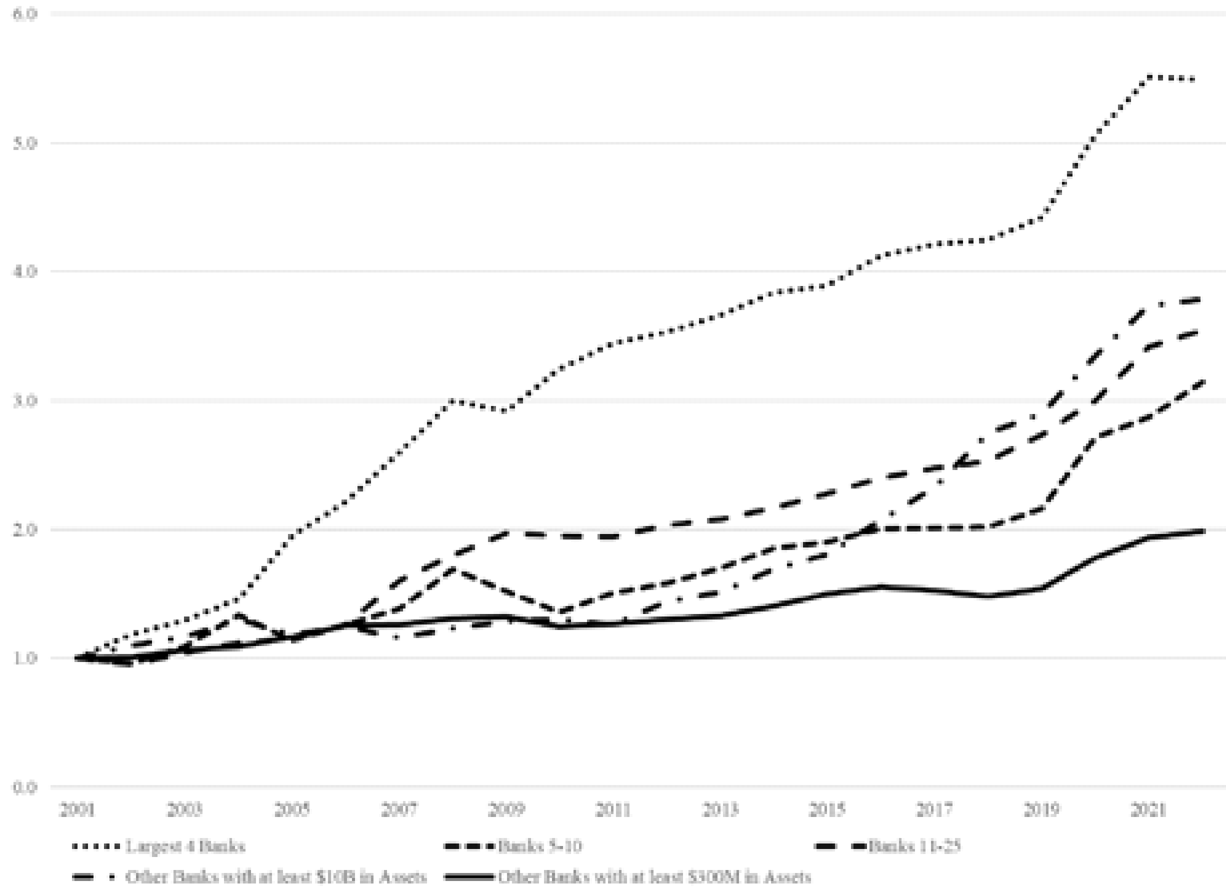
19 The total assets for the 5 to 10 largest banks grew from $950 billion in 2001 to $3.0 trillion in 2022.

20 The total assets for the 11 to 25 largest banks grew from $880 billion in 2001 to $3.1 trillion in 2022.

21 The total assets for banks with at least $10 billion in assets (not including the 25 largest banks) grew from $1.0 trillion in 2001 to $3.8 trillion in 2022.

22 The total assets of banks with less than $10 billion in assets and greater than $300 million grew from $1.3 trillion in 2001 to $2.6 trillion. The size categorizations are allowed to change each year. That is, a bank with less than $10 billion in assets during the earlier years might grow and cross the $10 billion threshold during later years. The analysis is based on the consolidated assets of banks. Some of the larger banks hold substantial foreign assets, but the designation of assets as domestic verses foreign does not impact this analysis.

Figure 3 Indices of Total Assets Held by Bank Size (2001-2022)



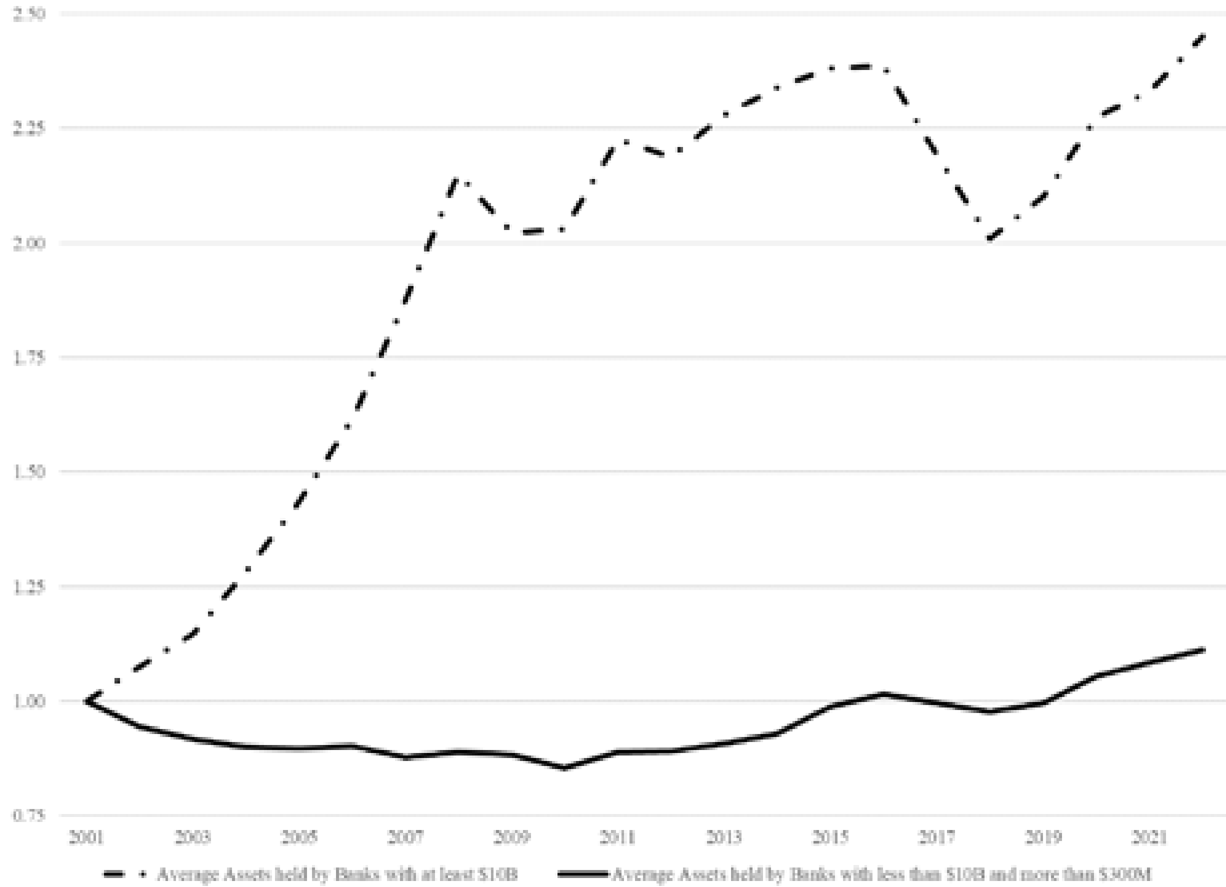
Source: Federal Reserve.

Combining the analyses of the total number of banks and total assets held by banks allows us to look at the average assets per bank and how it changes over time. Figure 4 shows the average total assets held by bank and how that changes over time.[23] The average assets per bank for banks with at least $10 billion in assets more than doubled from 2001 to 2008 (from $58.5 billion to $125.7 billion per bank) but is otherwise relatively flat from 2008 to 2022 ($143.3 billion per bank in 2022). In contrast, the average assets per bank for banks with less than $10 billion and more than $300 in assets decreased from 2001 to 2010 (from $1.2 billion per bank to $990 million per bank) and increased from 2010 to 2022 ($1.3 billion per bank in 2022).[24]

23 Figure 4 average assets are shown as indices normalized to equal 1 for 2001 values.

24 The series of average assets held by smaller banks is relatively smooth because those annual averages are taken over many more banks. There were 1,990 banks with assets of less than $10 billion and more than $300 million—compared to 133 banks with assets of at least $10 billion.

Figure 4 Indices of the Average Assets Per Bank (2001-2022)



Source: Federal Reserve.

Consistent with the disproportionate growth in the very large banks in the 2000s, we see the 4 largest banks grew more from 2002 to 2012 than they did from 2012 to 2022. Table 2 below shows the top 20 commercial banks based on consolidated assets in 2002, 2012, and 2022. JP Morgan Chase, Bank of America, Citibank, and Wells Fargo/Wachovia have maintained the top four positions since 2002. From 2002 to 2022, JP Morgan Chase, Bank of America, Citibank, and Wells Fargo/Wachovia, each increased their assets by $2.7 trillion (an increase of 446.8 percent), $1.8 trillion (an increase of 318.0 percent), $1.2 trillion (an increase of 256.1 percent), and $1.2 trillion (an increase of 258.7 percent), respectively.[25]

25 In 2008, Wells Fargo purchased Wachovia, which had been the fourth largest bank in 2002. See Table 2 and the Wells Fargo 2008 Annual Report, at https://www.wellsfargohistory.com/our-story/annual-reports/.

Table 2 Top 20 Commercial Banks by Consolidated Assets (2002, 2012, 2022)

Rank	Bank (2002)	Assets (Bil $)	Bank (2012)	Assets (Bil $)	Bank (2022)	Assets (Bil $)
1	JPMORGAN CHASE	605.1	JPMORGAN CHASE	1,850.2	JPMORGAN CHASE	3,308.6
2	BANK OF AMERICA	576.0	BANK OF AMERICA	1,448.3	BANK OF AMERICA	2,407.9
3	CITIBANK	481.4	CITIBANK	1,365.0	CITIBANK	1,714.5
4	WACHOVIA	311.9	WELLS FARGO	1,218.8	WELLS FARGO	1,712.4
5	BANK ONE (IL)	206.2	US BANK	342.6	US BANK	591.2
6	FLEET	175.5	PNC	292.5	PNC	553.4
7	US BANK	169.6	BANK OF NY MELLON	265.0	TRUIST	534.2
8	WELLS FARGO (CA)	165.5	STATE STREET	200.7	GOLDMAN SACHS	513.9
9	SUNTRUST	109.6	TD BANK	200.5	TD BANK	394.3
10	HSBC	87.0	HSBC	196.2	CAPITAL ONE	391.8
11	BANK OF NEW YORK	78.4	BB&T	176.4	BANK OF NY MELLON	344.7
12	KEYBANK	73.7	SUNTRUST	169.0	STATE STREET	300.0
13	STATE STREET	72.8	BANK OF AMERICA (DE)	161.9	CITIZENS	224.5
14	BB&T	62.9	CAPITAL ONE	161.3	SILICON VALLEY	210.2
15	PNC	61.0	REGIONS	120.8	FIRST REPUBLIC	205.1
16	LASALLE	59.3	GOLDMAN SACHS	120.4	FIFTH THIRD	204.3
17	BANK ONE (OH)	55.5	CHASE (DE)	115.9	M&T	197.7
18	WELLS FARGO (MN)	52.4	FIFTH THIRD	115.0	MORGAN STANLEY (NY)	194.9
19	SOUTHTRUST	49.7	RBS CITIZENS	107.2	MORGAN STANLEY (UT)	190.5
20	MBNA	48.0	NORTHERN TC	93.8	KEYBANK	187.7

Source: Federal Reserve.

Note: Commercial banks include nationally chartered member and state-chartered member and nonmember banks.

In Table 2, the instances of relatively higher growth in assets held by banks may have been accomplished via bank mergers. A few examples of bank mergers include:

· JP Morgan Chase acquired Bank One in 2004, Bear Stearns and Washington Mutual in 2008, and JP Morgan Cazenove in 2010.[26] JP Morgan Chase's assets grew by 206 percent from 2002 to 2012 (from $605.1 billion to $1,850.2 billion).
· Bank of America acquired Merrill Lynch in 2009, Countrywide in 2007, LaSalle in 2007, U.S. Trust in 2007, MBNA in 2006, and Fleet-Boston in 2004.[27] Bank of America's assets grew by 151 percent from 2002 to 2012 (from $576.0 billion to $1,448.3 billion).
· Wells Fargo acquired Wachovia in 2008 and Greater Bay Bancorp and ABD Insurance and Financial Services in 2007.[28] Wells Fargo's assets grew by 636 percent from 2002 to 2012 (from $165.5 billion to $1,218.8 billion) and it moved up from the eighth largest bank in 2002 to the fourth largest bank in 2012.
· BB&T and SunTrust merged in 2019 to become Truist.[29] BB&T and SunTrust were the 11th and 12th largest banks in 2012, respectively, and merged to become Truist, the 7th largest bank in 2022. Truist (consolidated assets of $534.2 billion in 2022) represents growth of over 200 percent from either perspective of BB&T or SunTrust (with consolidated assets in 2012 of $176.4 billion and $169.0 billion, respectively).

The FDIC reports the number of bank mergers, bank creations, problem institutions, and failed institutions. Each year, there have been:

· between 165 and 342 mergers (2002-2021);
· between 95 and 194 banks created (2002-2008) and between 0 and 13 banks created (2010-2021);[30]
· between 44 and 291 problem institutions (2002-2008, 2014-2021) and between 467 and 884 problem institutions (2009-2013); and
· between 0 and 25 failed institutions (2002-2008, 2013-2021) and between 51 and 157 failed institutions (2009-2012).

26 See JP Morgan Chase, "History of Our Firm," www.jpmorganchase.com.

27 See Bank of America 2008, 2007, and 2004 10-Ks, at https://investor.bankofamerica.com/regulatory-and-other-filings/annual-reports.

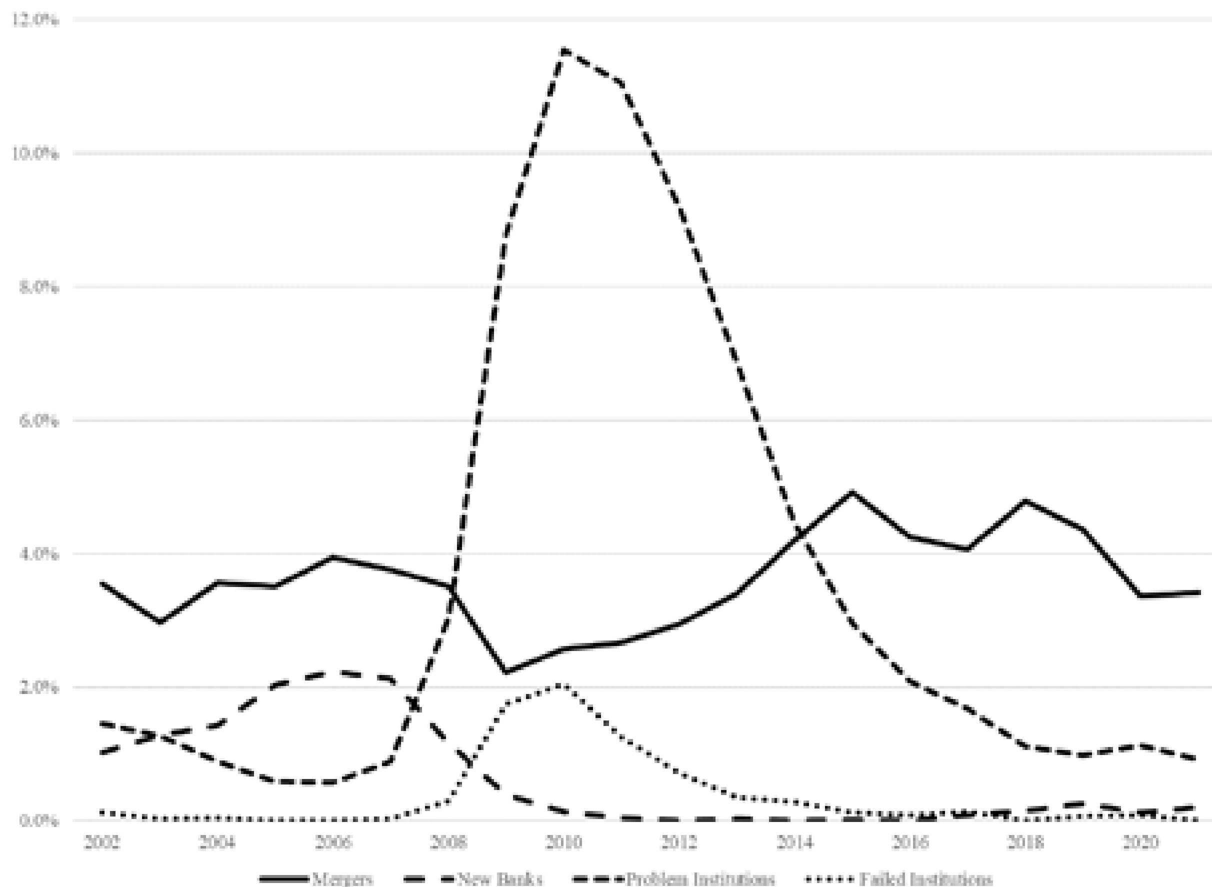
28 See Wells Fargo 2008 and 2007 Annual Reports, at https://www.wellsfargohistory.com/our-story/annual-reports/.

29 The creation of Truist resulted in the "sixth largest U.S. commercial bank, serving approximately 10 million customer households and a full range of business clients, with leading market share in many of the most attractive, high-growth markets in the country." See https://media.truist.com/2019-12-09-BB-T-and-SunTrust-complete-merger-of-equals-to-become-Truist.

30 There were 31 banks created 2009, which left out of the above bullet due to its value appears to be a transitional value.

These bank events are shown in Figure 5 below in terms of the number of existing banking institutions.[31] The number of bank mergers each year occurs somewhat regularly (between 2.2 and 4.9 percent of the existing banks). Bank creation used to be a common market practice (peaking at 2.1 percent of the existing banks), but bank creation has all but ceased since the financial crisis in 2008. Problem institutions were not too common prior to 2008 (around 1 percent of the existing banks) and failed institutions were rare events. As expected, both the problem and failed institution bank event trends show spikes in 2010 relating to the 2008 financial crisis, with as many as 11.5 percent of the bank population becoming problem institutions and 2.1 percent becoming failed institutions. While problem or failed institutions seem likely targets of mergers, the merger trend dips somewhat at the point where problem and failed institutions peak. This is likely a result of market participants experiencing wider spread financial distress and exercising caution when facing market uncertainty at that time.

Figure 5 Bank Events – Mergers, Bank Creations, Institution Failures (2002-2021)



Source: FDIC.

III. MERGERS SUBJECTED TO CURRENT ANTITRUST PRIORITIES

As previously mentioned, the DOJ and FTC have provided guidance on criteria they use to determine whether or not a merger will lead to sufficient loss to competition.[32] Generally, the guidance encourages the avoidance of mergers that "create, enhance, or entrench market power or to facilitate its exercise."[33] The direct result of exercising market power (resulting from or facilitated by mergers that harm competition) could be customers paying higher prices, reduced market output, inferior product quality, and diminished incentives for innovation within an industry.

Alternatively, mergers may be justified when they are found to be procompetitive. Below I discuss procompetitive and anticompetitive justifications of allowing mergers to occur. Subsequently, I discuss agreement as alternatives to mergers. Lastly, I discuss how bank mergers and their reviews differ from other types of mergers.

31 While the number of banks with assets greater than $300 million increase over this period, the overall number of banks decreased. See Figure 1 and Table 1. To account for this trend of fewer banks over time, I report the bank events as a percent of the overall number of banks.

32 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010, and "Vertical Merger Guidelines," issued June 30, 2020.

33 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010, p.2.

A. Procompetitive Arguments

Mergers may be efficiency enhancing. Combining entities can increase resources and capital (existing physical capital, intellectual property, human resources, customer lists, etc.) in a way that can improve the current practices and processes. For example, mergers can help a company expand and take advantage of economies of scale — allow the company to meet changes in demand and reduce costs, increasing the company's competitiveness within the market. Acquiring a company through merger can also take advantage of economies of scope — where product portfolio diversification can reduce risks and insulate the company in times of economic downturns.

Mergers may expedite growth in a way that reduces costs and limits risks. Acquiring technology may increase a company's efficiency in internal processes and provide security, therefore improving the quality of products offered. Mergers may allow a company to avoid developing its own, new technology. Saving time and resources by acquiring existing technology may reduce waste and increase a company's profitability. Technologies can also aid a company to expand its market presence, e.g. technology that increases a company's online capabilities.

Certain opportunities may benefit from quick expansion in production or capacity. Merging may allow the company to more quickly pivot when facing changing market conditions. For example, a merger could open up a geographic segment that would otherwise have taken much longer to expand organically without the merger.

B. Anticompetitive Arguments

The potential benefits of a merger must be considered against the potential harm to competition or harm from removing a competitor. Antitrust policy exists to avoid harming competition, which can occur through mergers and monopolizing behaviors. The "Horizontal Merger Guidelines" identifies two types of effects that they consider when trying to determine whether potential mergers harm competition, unilateral and coordinated effects.[34] Unilateral effects are adverse effects, where a merger enhances market power by eliminating competition. Coordinated effects come from a merger that enhances market power by increasing the risk of coordination among rivals. The competition regulating agencies predict the impact of a merger on competition by constructing a relevant market and calculating and comparing market shares presuming the proposed merger were to take place (treatment group) to market shares assuming the merger does not take place (control group).[35]

Market consolidation can reduce incentives to compete aggressively and can facilitate coordination among would be competitors—resulting in higher company profits (higher market prices) and inefficient markets (decreased market output)—both of which harm consumers.

C. Alternatives to Mergers

Companies may prefer other options for interfirm cooperation to mergers.[36] Effectively similar to mergers, agreements between companies can facilitate market coordination that is procompetitive or anticompetitive. These agreements can define market coordination that is horizontal or vertical in nature and may include a contract, licensing agreement, or joint venture agreement.

A horizontal agreement within the banking industry could be between a bank and a third-party service provider, such as a FinTech company. For example, a bank customer opening a deposit account may also be interested in banking-related services, such as online banking, applying for a mortgage, insurance, or various other services. The bank may be better off contracting or partnering with a third-party service provider to provide such a service. Antitrust concerns may exist depending on the substitutability of the provided service. For example, suppose the bank is providing traditional debit card services to its customer. The debit card market is very concentrated, with only two dominant brands, Visa and MasterCard. In response to the potential for debit card companies to exercise market power, the federal government adopted policy governing interchange transaction fees of debit cards.[37]

Vertical agreements allow upstream and downstream companies to work together. For example, a company seeking a vertical agreement may desire to increase market influence, reduce costs, and share risk with partner(s). For example, recognizing the potential financial

34 See the DOJ and FTC, "Horizontal Merger Guidelines," issued August 19, 2010.

35 To measure the impact of a hypothetical merger, relevant markets must be defined along product and geographic dimensions. The impact of the merger may be estimated based on the predicted change in prices, output, capacity, innovation, etc. The predicted change in market shares and market concentration can also inform on the merger's risk.

36 See Marshal, Robert C. & Leslie M. Marx, "The Economics of Collusion: Cartels and Bidding Rings," Massachusetts Institute of Technology, 2012, p. 5.
"Firms can potentially overcome the difficulty associated with not being a single corporate entity by mergers; however, there are legal and administrative issues related to mergers as well as potentially increasing costs of control as firm size increases."

37 See the Durbin Amendment as part of the Dodd Frank Act.

incentives loan originators may have to steer customers to a certain mortgage product that compensates the originators better, the loan originator may be required to disclose alternative financial products available to the borrower and any compensation incentives the originator may have.

D. Banking Merger Guidance

The current banking guidelines were published nearly 30 years ago and provide information about how the bank regulatory agencies and DOJ are to review the impact of bank mergers on competition.[38] These banking guidelines provide guidance specific to bank mergers and are intended to provide guidance beyond what is provided in the 2010 "Horizontal Merger Guidelines." As part of the review process for the Federal Reserve, the Federal Reserve Banks use certain initial screens based on market shares and market concentration to determine whether an application can be approved. Approval is not granted if: (i) the merger does not raise the Herfindahl-Hirschman index (HHI) by 200 points or more to a level of 1800 or higher or (ii) the merger or acquisition would not lead to the acquiring firm increase its market share to 35 percent or more. Applications that do not pass initial screens are then reviewed by the Board of Governors.[39]

President Joseph R. Biden, Jr. recently requested that the DOJ, Federal Reserve, FDIC, and OCC review their current practices and adopt a plan for revitalizing merger oversight in order to "ensure Americans have choices among financial institutions and to guard against excessive market power."[40] On March 31, 2022, the FDIC issued a request for comment (RFC) regarding the framework in meeting the requirements of section 18(c) the Bank Merger Act.[41] In addition to the traditional criteria for reviewing mergers, the Bank Merger Act also asks that the responsible agency:

> "…consider certain additional factors, including the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States banking or financial system, and the effectiveness of any insured depository institution involved in the merger at combatting money laundering."[42]

This additional charge may at times be a competing priority to the traditional antitrust priorities. The complication may be exacerbated by the fact that banks often offer many financial products and compete in many different geographic markets, where different levels of competition may exist in each of the markets.[43] There have been recent requests for proposed bank mergers to be assessed by product, in addition to geography.[44] However, without further guidance, it may not be clear how to assess mergers when the competition in product markets is both encouraged for some products and harmed for other products.[45]

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38 See DOJ, "1995 Banking Guidelines."

39 See Federal Reserve, https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm.

40 See White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021.

41 See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303).

42 See "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Bank Merger Transactions," 87 Fed. Reg. 18,740 – 18,744 (March 31, 2022) (addressing 12 C.F.R. Part 303), p.18,742.

43 Benson, et al. discuss improving bank antitrust enforcement by incorporating criteria on geographic proximity because "(c)urrent HHI-based policy effectively gave safe harbor to 61% of close-proximity banking acquisitions that potentially have adverse outcomes due to the substitutability of the merging banks." See Benson, David, Samuel Blater, Serafin Grundl, You Suk Kim, & Ken Onishi, "Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers," SSRN id#3873502, September 21, 2021, p.6.

44 See Governor Michelle W. Boman, "The New Landscape for Banking Competition," Federal Reserve Speech, September 28, 2022. See Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 6. See Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," Brookings, March 16, 2022, at https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

45 Acting Comptroller of the Currency Michael J. Hsu said,

> "From my perspective, the frameworks for analyzing bank mergers need updating. Without enhancements, there is an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risks. On the other hand, imposing a moratorium on mergers would lock in the status quo and prevent mergers that could increase competition, serve communities better, and enhance industry resiliency."

See Acting Comptroller of the Currency Michael J. Hsu, "Bank Mergers and Industry Resiliency," Remarks at Brookings, May 9, 2022, p. 1.

IV. CONCLUSION

The extent to which bank mergers harm competition must be weighed against the extent to which the merger may improve banking services in the community. The reviewing of the "1995 Banking Guidelines" may provide an opportunity to clarify the distinctions between local and national banking services, since online banking is becoming ubiquitous.[46] There may also likely be a need to update some of the thresholds used to assess the risks of a bank merger.[47]

For the reason of transparency, a merger may be preferable to agreements between otherwise independent companies. For instance, a merger triggers the review process and the scrutiny of the competition regulating agencies that would not have occurred without the merger.[48] However, this scrutiny may be misplaced and wasteful, if banks are regularly assessed as systematically important banks based on the merger guidelines. A review of the "1995 Banking Guidelines" could help determine if bank mergers are being approved too frequently and whether the criteria to assess bank mergers should be updated.[49]

The disappearance of new bank creation following the financial crisis in 2008 would be worth studying further. For example, are fewer banks being created because there are cost savings from taking over existing banks instead? The timing of the change suggests bank creation may have been negatively impacted by the financial reforms enacted as part of the Dodd-Frank Act.[50] If that is the case, the banking industry may benefit from softening the compliance burdens for small, newly formed banks.

46 Daniel K. Tarullo from Brookings suggests that the way banking markets are evolving from local geographies to national markets is one illustration of the complexity of reviewing mergers. See Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," Brookings, March 16, 2022, at https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

47 Benson, et al. suggest improvements can be made to current guideline processes, "incorporating objective criteria on determinants of substitutability can improve antitrust policy for differentiated product industries, in keeping with modern merger guidelines and complementing a broader body of work aiming to improve antitrust policy based on size and the HHI." See Benson, David, Samuel Blater, Serafin Grundl, You Suk Kim & Ken Onishi, "Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers," SSRN id#3873502, September 21, 2021, p.2.

48 See Marshal, Robert C. & Leslie M. Marx, "The Economics of Collusion: Cartels and Bidding Rings," Massachusetts Institute of Technology, 2012, p. 8.

> "Although it would seem that a merged entity could do anything a cartel could do, plus many other things, a cartel has the key advantage over a merged entity in that a merger is common knowledge to all market participants, but a cartel is a clandestine operation."

49 Governor Michelle W. Bowman of the Federal Reserve recently discussed the need to modernize the processes for competitive analysis to include: more systematic including of credit unions in analyses, factor in deposits at digital banks, and consider nonbank financial firms. Additionally, Governor Bowman pointed out the HHI criteria to review bank mergers is stricter than the criteria to review nonbank mergers. See Governor Michelle W. Boman, "The New Landscape for Banking Competition," Federal Reserve Speech, September 28, 2022.

50 The Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010.

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