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Before the
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

of the
COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

Concerning
"TOO BIG TO FAIL: THE ROLE OF ANTITRUST AND BANKRUPTCY LAW IN CRAFTING A SOLUTION"

October 22, 2009

Chairman Cohen and members of the Subcommittee, my name is Chris Sagers and I am a professor of law at Cleveland State University in Cleveland, Ohio. With my gratitude I am pleased to offer these thoughts on antitrust aspects of the Administration's proposed financial regulatory reforms. I applaud the emphasis that Judiciary

Subcommittees have given this year to antitrust issues, because I believe that our competition policy is in need of attention.[1]

At the request of Subcommittee counsel, my testimony will concern Title XII of the Administration's financial regulatory reform package, entitled The Resolution Authority for Large, Interconnected Financial Companies Act of 2009 ("Act"). I have been asked to address the explicit ways in which the Act modifies the antitrust laws, and such other consequences it might have on antitrust through the "implicit repeal" doctrine or otherwise. I have studied the law of antitrust exemptions and immunities throughout my career. I was co-author, with Peter Carstensen of the University of Wisconsin, of the American Bar Association's book *Federal Statutory Exemptions from Antitrust Law* (2007), and Professor Carstensen and I were called for testimony on exemptions issues before the Antitrust Modernization Commission ("AMC") in 2006. I have also published articles concerning statutory exemptions in the ocean shipping, airline and railroad industries, as well as judicially created antitrust exemptions like the *Parker* and *Noerr-Pennington* doctrines.

Summary

If there is a criticism of the Act itself, from the perspective of competition policy, it is merely that it preserves our Byzantine, idiosyncratic and dubious system of bank merger law. The sense of general disappointment in this system was captured in the thoughts of an eminent banking scholar at a recent Symposium:

> What I have seen since [in the last fifteen years] is that the number one bank in the country will merge with the number five bank in the country

[1] I do not represent any party with any interest in this matter. I have received no compensation in connection with my testimony, I appear here at my own expense, and the views expressed are my own. I submit this testimony at the request of counsel for the Subcommittee.

> and create a multi-state institution, with billions of dollars in assets, and if it is found to violate the antitrust laws, the solution is to knock off half a dozen branches in the Peoria area or something like that, which makes me wonder: Do we really have an effective law of antitrust for banks?[2]

But indeed the Act not only preserves this system, it does so in a context in which concerns for competition seem more acutely needed than in other bank regulatory contexts. The transactions to take place under the Act that would raise antitrust concerns will almost by definition involve the largest entities, within markets that are already the most concentrated and interdependent (since, by definition, they will involve systemically significant entities), and they will at least sometimes result in making those entities even *bigger*. In fact, the Act manages in at least one case to make the system of bank merger review even more hasty and less careful.

Possibly it will seem unfair to criticize the Administration for failure in this narrowly tailored, special purpose bill to revise the general law of bank merger review. But the larger criticism is that neither the Act nor the rest of the Administration's financial regulatory reform package appears to conceive of competition itself as any part of the solution, or seeks meaningfully to constrain the breathtaking consolidation that has been the salient feature of financial institutions markets since the 1980s. This particular Act simply takes entities that are Too Big To Fail ("TBTF") as a given or a necessary evil.

Admittedly, in this particular context—the search for better regulatory solutions to financial sector problems—competition could not fix some persistent and difficult problems. On the one hand, as to some financial products price competition is already fierce and yet those markets are rife with problems needing regulatory attention. And on

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[2] *Panel Discussion I: The Development of Bank Merger Law, Symposium: The Antitrust Aspects of Bank Mergers,* 13 FORDHAM J. CORP. & FIN. L. 511, 512 (2008) (comments of Professor Carl Felsenfeld, Fordham Law School).

the other hand, even where price competition is not healthy, merely improving it will not solve all the problems they present. And yet, as it will be my goal to show, competition in the financial sector, along with reinvigorated regulatory oversight, must be a component of policy. It is needed to generate efficiency, encourage innovation and product quality, and to reduce risk.

Competition and the encouragement of deconcentration could in reasonable, easy to imagine ways be made part of a solution to TBTF dilemmas. In fact, the Administration's reform package happens quietly to include one important step in that direction. Another Title of the package contemplates that regulators will from time to time designate systemically significant firms as "Tier 1 Financial Holding Company," a step that would subject those firms to enhanced (and more costly) prudential oversight. The drafters observe that in addition to the hoped-for risk reduction, this designation will have the effect of "compel[ling] these firms to internalize the costs they could impose on society in the event of failure."[3] But the more important benefit is that by creating and actually using this designation, the government will raise the costs of bigness itself. In this particular context opposition to bigness in and of itself is not just knee-jerking populism, and rather goes to the central problem of the current financial crisis.

Analysis

I. Specifics of the Pending Legislation and Their Relation to Existing Bank Merger Law

The Act contemplates that the Secretary of the Treasury will, when certain specified exigencies arise, determine that the default of a bank holding company ("BHC") would

[3] DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 20 (2009) [hereinafter "TREASURY REPORT"].

pose systemic consequences.[4] Upon that finding the Secretary may invoke either of two federal corrective measures, one of which is to place the BHC under the control of a federal conservator or receiver.[5] The conservator/receiver would then hold a number of powers to resolve the BHC's crisis, among them being to merge the BHC with another company or transfer any of its assets.[6] There lie the Act's antitrust consequences. Mergers of BHCs and transfers of their assets are subject to Clayton Act § 7, which prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18,[7] and also to a complex series of special statutory rules that require a pre-transaction review process that roughly mirrors the Hart-Scott-Rodino ("HSR") process. BHC transactions are ordinarily exempt from HSR filing, though in some cases they are not.[8]

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[4] BHCs are primarily governed by the Bank Holding Company Act, 12 U.S.C. §§ 1841-50. A BHC is a corporation, partnership, or other entity that holds control of one or more banks, and ordinarily is permitted to engage only in banking or activities that are closely related to banking, like some limited securities and insurance work. Only a company that complies with the terms of the Bank Holding Company Act may own control of a bank, and it must first seek approval of the Federal Reserve Board before it may do so. *See* 12 U.S.C. §§ 1841(a), 1842, 1843. *See generally* CARL FELSENFELD, BANKING REGULATION IN THE UNITED STATES (2004).

[5] In cases in which the BHC's largest subsidiary is a securities firm, the conservator/receiver will be the Securities and Exchange Commission ("SEC"). Act at § 1202(1). In other cases, it will be the Federal Deposit Insurance Corporation ("FDIC"). *See id.* at § 1204(b). The other corrective measure provided for under the Act is that, whether or not a conservator/receiver is appointed, FDIC may make loans or provide other assistance to the BHC. *Id.* at § 1204(a).

[6] First, the conservator/receiver may cause the seized company to be merged into another or may transfer any of its assets. *See id.* at § 1209(a)(1)(G)(i). Second, the conservator/receiver may create a "bridge bank holding company," which would be a temporary, federally chartered corporation fully controlled by the conservator/receiver, to which to transfer the assets of a seized entity. Following creation of the bridge BHC, either the entire company or its assets would be transferred to their ultimate owner. *See id.* at § 1209(h).

[7] There was actually uncertainty on this point during the first half of the twentieth century, but it was resolved by the seminal decision in United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963). *Philadelphia National Bank,* which remains a fundamental decision in merger law generally, established that bank mergers are subject to Clayton Act § 7, even if they have been previously approved by a federal banking regulator. *See generally* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective,* 41 ANTITRUST BULL. 255, 260-75 (1996).

[8] *See generally* SECTION OF ANTITRUST LAW, AM. BAR ASS'N, BANK MERGERS AND ACQUISITIONS HANDBOOK1-12 (2006)[hereinafter "BANK MERGER HANDBOOK"]; Yvonne S. Quinn, *Practical Aspects of Defending Bank Mergers Before the Federal Reserve Board and the Department of Justice,* 62 ANTITRUST L. J. 91 (1994).

The Act deals with these antitrust issues in two explicit, identical provisions. Presumably, they were included simply to make clear that antitrust continues to apply to the conservator/receiver's remedial actions, even though they are ordered by the federal government. For the most part these provisions preserve the existing system of bank merger review, and indeed they are written in such a way as mainly just to reference that system obliquely. Existing bank merger law requires that BHC mergers and significant acquisitions cannot proceed until the parties seek permission to the appropriate federal banking regulator.[9] The responsible bank regulator must request and consider the views of both the Justice Department ("DOJ") and the other bank regulatory agencies as to competitive issues. They prepare their opinions under a process that largely tracks the analysis that the antitrust enforcement agencies perform in HSR review, though with one significant substantive difference: regulators can approve an otherwise illegally anticompetitive bank merger if they find its competitive costs to be "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."[10] In any case, this system of bank merger rules contains a series of saftey-valve provisions, which allow the responsible bank

[9] The identification of the appropriate regulator is itself a complex little statutory problem. It will most often be the Federal Reserve Board, as it is given authority over acquisitions by BHCs of any bank, 12 U.S.C. § 1842, as well as most acquisitions by state bank members of the federal reserve system, *id.* at § 1828(c)(2)(B). But if the acquiror is a national bank or a District of Columbia ban the regulator is the Office of the Comptroller of the Currency; if the acquiror is either a state bank that is federally insured by not a member of the federal reserve system, or is any federal insured bank that seeks to acquire a non-insured entity, the regulator is the Federal Deposit Insurance Corporation; and if the acquiror is a thrift the regulator is the Office of Thrift Supervision. *Id.* at § 1828(c)(2).

Technically, the particular rules that apply to any given bank merger or acquisition depend on exactly what is being transferred and to whom. Because conservator/receiver remedial actions might both cause the merger of an entire BHC or merely the transfer of some of its assets, a given case under the Act might involve a merger of two BHCs or the transfer of bank or banking related assets to anohter BHC or to a financial holding company. In each case the appointed regulator could be different, and the precise rules that apply could vary. But overall the same substantive standard would apply, and the overall process would be roughly the same.

[10] 12 U.S.C. § 1828(c)(5)(B).

regulator to speed up the approval process substantially, and even to exclude antitrust review entirely, where it finds there to be a risk of imminent failure of one of the banks.

The Act's approach to competition review is to provide that this whole process of merger review will occur as it ordinarily would, except that the Act automatically triggers all the emergency time period provisions, and it also makes one potentially significant modification. The Act's two, identical antitrust provisions provide that:

> (1) If a conservator/receiver transaction "requires approval by a Federal agency," then it cannot be consummated before the 5th calendar day after the approval is made.
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> (2) Where such an approval requires a "report on competitive factors," then DOJ must be notified "promptly," and DOJ must then provide the report within 10 days of the request.
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> (3) If a transaction requires an HSR filing, then the antitrust review agency must make its determination within 30 days after receipt of the filing, and it may not seek any extension of time or make any "second request" for additional information.
>
> (4) If the Treasury Secretary and Federal Reserve Chairman determine that a conservator/receiver transaction must proceed "immediately," in order "to prevent the [BHC's] probable failure," then no regulatory approvals or antitrust review are required at all and it may consummate with no delay.

See Act § 1209(a)(1)(G)(ii); § 1209(h)(10). The one apparent modification of existing law is in item number 4. At present, where some component of a bank merger transaction *is* subject to HSR review,[11] that review proceeds according the ordinary rules applied under HSR. Therefore, the reviewing agency would be free to make a "second request" for information in addition to information supplied with the HSR form, and thereby trigger an additional time period under which to continue review of the transaction.

[11] As can be the case when a financial holding company is involved that owns some non-banking asset, as well as banking assets.

An important aspect of existing bank merger law—which has consequences both for the process of review and for the substantive standards applied—is that there has been a substantial amount of interagency coordination to make bank merger review work. Much of this was necessary because bank merger law read literally, would allow approval of mergers under time frames that could be extremely burdensome for DOJ. There is also plenty of room in the law for what could have been disruptive substantive conflicts among the agencies, and indeed disagreements arose between DOJ and the banking regulators in the early 1960s, almost as soon as the present bank merger review framework was put in place.[12] The consequence has been certain formal agreements among DOJ and the banking regulators,[13] as well as informal norms, like the common practice of merging parties of providing DOJ with their application materials well before the banking regulator is legally required to do so.[14]

Why exactly this special system of bank merger review persists is a bit of a mystery. It has long been clear that, for reasons of its own, "Congress . . . has determined to deal with banking in a manner different from other forms of 'commerce . . . .' "[15] Banking thus remains one of only four industries in which the antitrust enforcement agencies must share merger review with an industry-specific regulator,[16] and is virtually unique in that anticompetitive mergers can be approved on a finding of "public interest." But the

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[12] *See* Shull, *supra* note 7, at 274.

[13] *See* U.S. DEP'T OF JUSTICE, BANK MERGER COMPETITIVE REVIEW—INTRODUCTION AND OVERVIEW(2000) [hereinafter "DOJ REVIEW POLICY"] (a document initially agreed to among DOJ and the banking regulators in 1995, which governs both the process and substantive standards applicable to the review).

[14] *See* Quinn, *supra* note 8, at 93-94.

[15] Adolph A. Berle, Jr., *Banking Under the Antitrust Laws,* 49 COLUM. L. REV. 589, 590 (1949).

[16] *See* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 363-64 (2007) [hereinafter "AMC REPORT"]. The others are certain aspects of electricity, in which merger review is shared with the Federal Energy Regulatory Commission, telecommunications, in which merger review is shared with the Federal Communications Commission, and the special case of the railroads, in which mergers are subject solely to review by the Surface Transportation Board. *See id.*

explanation exactly *why* that should be has changed over time and is not at the moment particularly persuasive. During the nineteenth century and the early part of the twentieth banking policy was dominated by explicit "destructive competition" arguments, of the sort that at one time supported broad antitrust exemptions and invasive economic regulation in sectors throughout the economy, including transportation, communications, utilities, insurance, and banking. (Those arguments are now largely dead, as applied to any industry other than one that can credibly claim natural monopoly effects, and for this reason much of the U.S. economy has been deregulated since the 1970s.) But by the time the bank merger review legislation was initially adopted, between 1956 and 1966, Congress's overriding concern was the alarming growth in (for the times) very large bank holding companies. At that time, there remained substantial doubt that bank mergers could be subject to Clayton Act § 7, even under the recent Celler-Kefauver amendment of 1950,[17] and banking law also imposed much more severe limits on the extent to which banks could compete with each other.[18] In other words, the law was originally set up to impose *more* competitive discipline on bank mergers than was thought to be available. Now, however, it imposes less invasive (or at least more rushed and less information-intense) review than might be available were banks and BHCs simply subject to the same rules as the rest of American industry. To the extent that this persistent difference in treatment has any theoretical foundation, it is different than the one that originally underlay bank merger law. It now appears to be justified by some sense that banks need special *protection* from competition policy, because their failures are damaging to communities and impose taxpayer costs through the deposit insurance system. In other

[17] *See infra* note 35.
[18] *See infra* note 21-22.

words, to the extent that bank merger review law has any current justification, it has reverted to the old fear of destructive competition.[19]

II. Competitive Consequences of the Legislation

A. Competition in the Financial Sector

Competitiveness in the financial sector is important, and in that special context it plays two distinct roles. First, these markets' lack of "competitiveness," in the sense that they lack numerous competitors, has been a key contributor to the increase in wolrd-wide systemic financial risk. The fewer financial institutions there are, given their growing interconnectedness, the more likely that failure of one of them will pull down many others.[20] Second, competition is the only discipline for price and output of the many products and services financial institutions provide so that our system of savings, investment and corporate finance works.

On any measure, U.S. financial markets have transformed completely since the early 1970s. There is little doubt that the transformation is irreversible.[21] Change began most prominently with deregulatory steps in the 1970s that were designed to remove regulatory barriers to competition in banking and securities, which caused them to lose access to traditional sources of legally protected, supra-competitive revenues. Insurance companies began to face similar pressures as well.[22] Then, throughout the 1980s and 1990s,

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[19] *See* Shull, *supra* note 7; Lawrence J. White, *Banking, Mergers, and Antitrust: Historical Perspectives, and the Research Tasks Ahead,* 41 ANTITRUST BULL. 323 (1996).

[20] *See generally* Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks,* 2002 U. ILL. L. REV. 215, 316-17.

[21] *See, e.g.,* Shull, *supra* note 7, at 257 (so arguing).

[22] The major step in banking was to lift rules that set very low maximum interest rates for deposits. This was accomplished by repeal of the Federal Reserve Board's Regulation Q in the 1980s. In the securities industry the most important deregulatory step was in 1975, when congressionally mandated SEC action finally prohibited the centuries old practice of stock exchange members of fixing the brokerage commissions they charged their clients for executing securities trades. The Securities and Exchange Commission prohibited fixed commissions on May 1, 1975 by adopting its Rule 19b-3, 17 C.F.R. §

regulators gradually loosened restraints on the lines of business in which traditional financial institutions could engage. Geographical restraints on banking were loosened as well, and interstate branching was generally authorized by Congress in 1994.[23] The crowning event so far has been the adoption of the Gramm-Leach-Bliley Act ("GLB")[24] in 1999, which finally permitted banking businesses to branch into unrestricted securities and insurance businesses. Though we may tend to forget it now, arguments supporting all of these regulatory changes were framed relentlessly in the language of *competition,* and indeed one early version of the GLB bill actually bore as its formal short name the Financial Services *Competition* Act.[25]

However, while the increased competition that resulted from these reforms should have been and for a time was fairly unequivocally pro-consumer, it also caused certain unforeseen consequences. The loss of legally protected sources of excess profits caused the traditional institutions to invade one another's geographic and line-of-business territories in search of new revenues. But this new competitiveness also set off a mad scramble of consolidation, which has generally been seen as an effort to stave off competitive inroads.[26] Thus we have seen waves of consolidation in banking and other

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240.19b-3. In insurance the problem was that changing interest rates and the growing availability of competing consumer investment products caused consumers to lose interest in traditional life insurance. As to all these changes, see generally Wilmarth, *supra* note 18.

[23] Interestate branching was authorized in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (Sept. 29, 1994) (codified in scattered sections of 12 U.S.C.). The Riegle-Neal Act permitted states to "opt out" of the Act in several respects, but most did not do so. For the most part, BHCs are free to hold banks in multiple states and individual banks are free to engage in interstate branching.

[24] Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999), now codified at scattered provisions of U.S. Code.

[25] Financial Services Competition Act of 1997, H.R. 10, 105th Cong., 1st Sess. (Jan. 7, 1997) (emphasis added).

As for the competition rhetoric that always surrounded the bill, see for example H.R. REP. NO. 106-434 (1999) (conference report); S. REP. NO. 106-44 (1999) (committee report accomanying bill that would be enacted as Gramm-Leach-Bliley Act); H.R. REP. NO. 105-164 (1997) (committee report accompanying H.R. 10, 105th Cong., 1st Sess. (1997)).

[26] *See* sources cited at n. 38, *infra.*

financial markets since the early 1980s that, from the aggregate national perspective, has increased concentration substantially. Indeed, a large wave of mergers during the 1990s involved a whole series of bank and financial institution combinations each of which was the single largest merger of its kind to date.[27]

One salient trait of this merger wave has been that the larger mergers, and especially the very large mergers of financial conglomerates, have had disappointing economic results.[28] In part this reflects what appear simply to be significant scale and scope diseconomies in bank operation beyond a certain size.[29] Much of this failure among the larger conglomerate mergers also has resulted from the mistaken prediction of consumer enthusiasm for "one-stop shopping" in financial products.[30] There is no serious doubt that—since the claimed efficiencies probably aren't the real goal of these mergers—some part of the motivation has been the self-interest of managers, who among other things seek the implicit federal subsidy of TBTF status.[31]

As a result of this period of consolidation, the financial sector has come to have an essentially two-tiered structure. Banking for consumers and small to mid-size businesses remains a predominantly local affair, engaged in by smaller and regional banks, and to a lesser extent by branches of larger banks. But large scale banking—major commercial loans, loan syndications, mass-marketed commodity products like credit cards and mortgages—is mainly now the domain of very large banks. Moreover, there remains a two-tiered aspect to bank concentration. While aggregate concentration in banking—the

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[27] *See* Robert Kramer, Speech Before the Section of Antitrust Law, American Bar Association, *"Mega Mergers" in the Banking Industry* (April 14, 1999); Stephen A. Rhoades, *Competition and Bank Mergers: Directions for Analysis From Available Evidence,* 41 ANTITRUST BULL. 339 (1996).

[28] Wilmarth, *supra* note 18, at 272-79.

[29] Wilmarth, *supra* note 18, at 279-81.

[30] *See* Wilmarth, *supra* note 18, at 432.

[31] *See* Rhoades, *supra* note 25, at 340-41; Wilmarth, *supra* note 18.

number of entities representing banking business nationally—has increased dramatically during the period of transformation, concentration in local banking markets has remained relatively constant throughout that period.[32] That, though, is not necessarily cause for much optimism, as it also seems widely acknowledged that local banking has always been subject to some concentration and is prone to some market power.[33] Concentration is also prevalent in other sectors, as among investment banks and securities dealers,[34] and the immense global duopoly that now dominates the credit rating business.[35]

On top of this evidence concerning concentration, there also remains persistent evidence of serious, collusive anticompetitive conduct among financial institutions. Prior to 1944, when it was made clear that banks could be subject to U.S. antitrust law,[36] banks engaged in open and extensive price-fixing as to deposit rates, and even thereafter they apparently did not work hard to conceal price-fixing until well into the 1960s.[37] Other financial markets have been rife with collusion as well. Indeed, the New York Stock Exchange ("NYSE") is generally said to find its origin in a naked horizontal price-fixing conspiracy, and throughout its history it was governed by a series of explicit (and for the most part legally protected) price and output restraints, which were enforced by

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[32] *See* Shull, *supra* note 7, at 257.

[33] *See* Shull, *supra* note 7. As to market power in local banking markets, see Wilmarth, *supra* note 18, at 293-300. Interestingly, the one isolated context in which short-term stock price improves for both an acquiring and a target bank in large bank mergers, and that is where the two banks previously competed in the same geographic markets. *Id.* at 293

[34] *See generally* FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS (2002).

[35] *See* Thomas J. Fitzpatrick, IV & Chris Sagers, *Faith-Based Financial Regulation: A Primer on Oversight of Credit Rating Organizations,* 61 ADMIN. L. REV. 557 (2009).

[36] During the 19th century the Supreme Court had held that the business of insurance was not within "interstate commerce" for purposes of the Commerce Clause jurisdiction of Congress, Paul v. Virginia, 75 U.S. 168 (1868), and it widely was presumed that other financial businesses were not, either. The Court reversed this rule as to insurance in United States v. S.E. Underwriters Ass'n, 322 U.S. 533 (1944), and, again, it was presumed that the reversal would be effective as to other financial businesses as well. *See* Shull, *supra* note 7, at 260-63.

[37] *See* Shull, *supra* note 7, at 263.

horizontal boycotts. In more recent times anticompetitive conspiracies have been more secretive, of course, but major conspiracies plainly persist in the financial sector, like the spectacular rings of fraud and collusion among Wall Street firms broken up by the New York Attorney General during the past 15 years.[38]

Still, having said all that, assessing the price competitiveness of financial product markets is complex. Traditional banking products—taking deposits and making loans—is fairly prone to market power wherever concentration increases. Entry is thought to be difficult not only because it requires regulatory approval, but because traditional banking involves a "relational" aspect under which consumers smaller business clients value long-term relationships and personal attention.[39] However, some financial products have come to be effectively commodity-like, in that they can be mass-marketed directly to consumers. Examples include mortgages, consumer loans, and credit cards. It is thought that because the products can be sold at low cost and entry is easy, price competition as to these products tends to be fierce. Thus, the core business of smaller banks is thought by many—including DOJ and the bank regulators—to be much less competitive than the core businesses of very large banks and financial conglomerates. But, as will be explained below, this narrow focus on specific products—which happens to guide current bank merger law—may be importantly incomplete.

B. Consequences of Conservator/Receiver Transactions Under the Act

However infrequently the government might use its new powers under the Act, any government remedy that causes yet further concentration in these already highly

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[38] *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (2d ed. 1995); HANS R. STOLL, REGULATION OF SECURITIES MARKETS: AN EXAMINATION OF THE EFFECTS OF INCREASED COMPETITION (1979); Wilmarth, *supra* note 18.

[39] *See* Wilmarth, *supra* note 18.

concentrated markets should be taken as a grave matter. Indeed, conservator/receiver transactions under the Act will normally involve transactions in which, at least at the national aggregate level, concentration issues are particularly acute. Virtually by definition they will involve the largest entities in already concentrated, interconnected markets, because by definition those entities will be systemically significant.

Because the Act deals with competitive issues by simply incorporating existing bank merger law, assessment begins with the existing system. Criticism of that system has been extensive.[40] It has focused in large part on the substantive standard the regulators follow, first formulated during the sharp narrowing of antitrust enforcement of the 1980s and ultimately codified by agreement among DOJ and the bank regulatory agencies in 1995.[41] While nominally that standard is more or less the same ordinarily applied under Clayton Act § 7 and HSR, DOJ and the bank regulators have decided that the only serious competitive issues in bank mergers concern the credit needs of small and mid-sized businesses. In the regulators' view both consumers and large business have sufficient alternatives for their needs that consolidation in those areas simply will not restrict competition.

Accordingly—while in and of itself this fact is not a criticism—DOJ's actual enforcement of antitrust against bank mergers is vanishingly slight. DOJ has not formally challenged a bank merger since 1993, and on average it requests divestiture

[40] [Peter C. Carstensen, *A Time to Return to Competition Goals in Banking Policy and Antitrust Enforcement: A Memorandum to the Antitrust Division,* 41 ANTITRUST BULL. 489 (1996); Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits,* 1983 DUKE L. J. 580; Felsenfeld, *supra* note 2; Margaret E. Guerin-Calvert, *Current Merger Policy: Banking and ATM Network Mergers,* 41 ANTITRUST BULL. 289 (1996); *See generally* AMC REPORT, *supra* note 16, , at 363-64 (criticizing all statutory limits on merger review in regulated industries, calling for full application of Clayton Act § 7 and the HSR to all such mergers, and calling for full competition review authority as to such mergers to be returned to the antitrust enforcement agencies).

[41] That policy is contained in DOJ REVIEW POLICY, *supra* note 13.

concessions in only about one out of the 1000 or more bank mergers it reviews each year.[42] Somewhat more directly in critique of the agencies' approach is the poor economic performance of most of the large bank mergers and especially the super-sized conglomerate mergers that they approve. That performance is important because a guiding premise of bank merger law has been the conviction that larger banks, other things equal, are more economically efficient and desirable than small ones. That is, the currently very permissive approach effectively begins with a strong presumption that mergers will be efficiency enhancing. In quite a lot of these mergers that premise is evidently false, and there being no pro-competitive motive for these transactions the question remains what their other motives might be and whether they should have relevance to an antitrust policy.

Indeed, while large bank and financial institution mergers tend not to produce anything *good* for the economy, they do appear to give merging parties some market power.[43] This may be true not only as a consequence of immediate increase in concentration in those local markets to which the current merger review policy is calibrated. As my collaborator Peter Carstensen has frequently pointed out, there may be significant constraints associated with the fact that local branches in a given market are acquired by a national firm, even if the acquisition does not cause any substantial, immediate change in concentration there.[44] Moreover, it is now widely accepted in the industrial organization literature that firms that experience multiple contacts—firms that compete in many markets, and face each other in more than one—are more prone to

[42] Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets,* 13 FORDHAM J. CORP. & FIN. L. 581, 582 (2008) (reviewing records of DOJ bank merger reviews).
[43] *See supra* note 31.
[44] *See* Carstensen, *supra* note 38.

oligopolistic interdependence than might otherwise be thought to be the case on the basis of concentration levels alone.

But, as mentioned, a wholly separate concern, that is in some sense a competitive one, is increasing systemic risk and the related problem of increasing numbers of TBTF firms. Even though American law really contains only one, isolated rule that could hope to constrain this problem in banking and financial markets—Clayton Act § 7, as applied through our regime of bank merger law—the government has refused to use it to reduce risk. Indeed, strenuous TBTF objections were made to DOJ in its review of the Citicorp/Travelers merger of 1998—the largest financial merger in history at the time, the first major merger of banking and non-banking businesses since the Great Depression, and one of the largest mergers in world history—but DOJ's view as that "this [w]as primarily a regulatory issue to be considered by the [Federal Reserve Board.]"[45] The merger was approved in all respects.

Incidentally, while the Act does not explicitly exempt or affect the antitrust treatment of collaborative conduct, it is relevant to that conduct. Elementary theory suggests that collusion is easier the fewer competitors there are in any given market.[46] If the bill facilitates more consolidation then it will aggravate the risk of collusion.

All of this criticism, it should be added, is wholly aside from the fact that our antitrust law currently refuses to consider concentrations of *power* as of any relevance. It focuses instead purely on costs and elasticities in narrowly defined relevant markets (as if allocational efficiency were a concept even yet dreamed of by the Congress of 1890).

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[45] Kramer, *supra* note 25, at 6.

[46] *See* U.S. DEP'T OF JUSTICE & F.T.C., HORIZONTAL MERGER GUIDELINES § 2.1 (1997); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 132-45 (3d ed. 2000); George Stigler, *A Theory of Oligopoly,* 72 J. POL. ECON. 44 (1964).

That is a bit of a shame in this context, as many of the major bank and financial holding company mergers since the boom began in the 1980s have been among *the largest consolidations of wealth and power in U.S. history.* Of course, though it was not always so,[47] addressing that concern through antitrust is a ship that for the time being has definitely sailed. But why we have convinced ourselves that the Congress of the Unites States should be prohibited from caring about concerns of this magnitude, and making them part of some coherent federal policy, is beyond me.

One final and completely separate issue deserves mention, as it relates to competition policy. The Act contains a special provision that requires the conservator/receiver to consider certain policy goals to guide the use of its powers, and among these goals is the protection of competition. This provision will be irrelevant on any practical level. The Act requires the conservator/receiver to exercise all of its § 1209 powers in accordance with a list of six policy aspirations, *see* § 1209(a)(10)(E), and one of them is to "ensure[] timely and adequate competition and fair and consistent treatment of [potential buyers of the failing BHC]," *id.* at § 1209(a)(10)(E)(v). For two reasons this provision will lack meaning. First, the other five values the conservator/receiver may consider are different, equally vague, and sometimes inconsistent with the competition duty. Most importantly, the conservator/receiver is directed, "to the greatest extent practicable," to "maximize[] the net present value return from the sale or disposition of . . . assets." *Id.* at § 1209(a)(10)(E)(i). At least some times the acquiror who would be most willing to pay for assets held by the conservator/receiver will be the one who can use them most

[47] *See, e.g.,* Robert Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979) (article by longtime FTC Chairman and leading antitrust academic, arguing that one of the purposes of antitrust should be to constrain unwelcome concentrations of private *power,* in addition to improving allocational efficiency in specific markets).

anticompetitively, because their use in that acquiror's hands will lead to supra-competitive profits. Second, the duty is effectively unenforceable by any party that would have any concern for competition. Even assuming there could be a plaintiff with standing, and even assuming judicial review is available,[48] it seems extremely unlikely any decision of the conservator/receiver would ever be reversed for failure to give effect to these six factors.[49]

C. Drafting Ambiguities and Unintended Consequences

Finally, some consideration should be given to a handful of drafting ambiguities that have relevance to competition matters.

First, the Act provides that where any portion of a transfer of assets made by a conservator/receiver would be subject to HSR, the antitrust enforcement agencies are barred from making a "second request" for information. *See* Act at §§ 1209(a)(1)(G), 1209(h)(10)(A). This is slightly ambiguous because even where bank merger reviews are not subject to HSR (as is almost always the case), the agencies have access to civil investigative demands ("CID") under the Antitrust Civil Process Act,[50] and indeed DOJ has issued CIDs in bank mergers in the recent past, both to the merging entities and third

[48] The conservator/receiver would constitute an "agency" under the Administrative Procedures Act ("APA"), and its final actions would therefore ordinarily be subject to judicial review under 5 U.S.C. § 702. However, given the ambiguity and range of discretion implied in these six factors, the conservator/receiver's asset sales under the Act might conceivably be exempt from review as being "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). That exception applies to decisions made under "statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

[49] The decision would be subject only to the very deferential standard of review under APA § 706(2)(A), that the decision be upheld unless it was "arbitrary [or] capricious." A decision by a federal agency is "arbitrary or capricious" where (1) the agency failed to consider those factors in making its decision that are made relevant by the underlying legislation, or (2) the agency failed to show that its decision drew some rational connection between facts contained in the record at the time of the decision and the policy actually adopted. *See Overton Park*, 401 U.S. at 416.

[50] 15 U.S.C. §§ 1311-14.

parties that might hold relevant information.[51] Those powers are available to the agencies even where the responsible banking regulator triggers emergency time periods. Presumably the limitation on HSR second requests was not meant to affect the CID power, and is meant only to avoid the time delays that can occur under HSR. This point should be clarified.

Second, under § 1204(a) of the Act, whether or not the Treasury Secretary chooses to appoint a conservator/receiver, the Act empowers FDIC to provide loans and make other assistance available to BHCs whenever the Secretary makes the determination required under § 1203(b). Among FDIC's assistance powers, it may "purchas[e] assets" of the BHC or "acquir[e] any type of equity interest" in it. Act § 1204(a)(2), (4). It may then "sell[] or transfer[] all, or any part thereof . . . ." *Id.* at § 1204(a)(6). What seems ambiguous is that on its terms of this section, FDIC could apparently acquire a controlling interest in the failing BHC or any of its subsidiaries, and then transferring it to another bank, BHC or financial holding company. If this section has the effect of exempting such a transaction from antitrust altogether, that would seem unambiguously bad. But if not, then it would seem to subject to such a transaction to fairly different treatment (namely, more thorough, unrushed review) than conservator/receiver transactions receive under §§ 1209(a)(1)(G) and 1209(h)(10) of the Act.

One more minor peculiarity is that one of the Act's two antitrust provisions, § 1209(a)(1)(G), says that merger or transfer of assets may be undertaken "without obtaining any approval, assignment, or consent with respect to such transfer." Presumably this language is meant to waive requirements for shareholder or board approval that might have been required as a matter of corporate law, or state regulatory

[51] *See* Quinn, *supra* note 8, at 94.

approval. It is made fairly clear that this language is not meant to waive regulatory approval under bank merger law, because the power to make mergers or transfers is made explicitly "[s]ubject to clause (ii)" of the subsection. Clause (ii) implies that regulatory approvals are not waived. I might note, though, that clause (ii) does not explicitly *require* approvals to be gotten, and so this remains a non-trivial ambiguity that might lead to uncertain consequences in the event of litigation.

Conclusion

From the perspective of competition norms, the narrow problem with the Act is just its incorporation of an idiosyncratic and dubious system of merger review that itself calls for serious reconsideration. But this reflects a much larger consideration: the Administration's financial regulatory reform package largely ignores competition as any part of any solution. This is a shame, because consolidation and concentration are part of some of the financial sector's worst problems.