# **Banking Mergers and Acquisition Reviews: A Potential for Increased Scrutiny under the Clayton Act?**

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Abstract

*This Note** reviews the existing regulatory regime governing bank mergers, including the Bank Holding Company Act of 1956 and § 7 of the Clayton Antitrust Act of 1914. Next, it discusses how a bank merger would be reviewed under the standards recently advocated for by Federal Trade Commission ("FTC") Chair Lina Khan. Finally, it discusses proposed reforms to the existing regulatory regime, as the FTC under Chair Khan takes antitrust enforcement in a different direction.*

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** This Note was written in anticipation of an update to the previous Horizontal Merger Guidelines, which was published in 2010. On December 18, 2023, The Department of Justice and the Federal Trade Commission released a final version of the 2023 Merger Guidelines, accessible at https://www.justice.gov/atr/2023-merger-guidelines.

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## I. Introduction to the Existing Regulatory Regime

Banks regularly engage in merger and acquisition practices, which offer benefits such as increased capital assets, valuable entry into new markets, and a strengthened portion of market share.[1] While these activities have slowed as a result of the COVID-19 pandemic and the subsequent economic decline, this area has been historically active, with approximately 16,000 mergers over forty years, with a Bank Merger Rate of 3.6%.[2]

Regulation of such merger activities are essential for economic stability. This is well illustrated by the impact of the 2008 financial crisis, in which firms such as Bank of America, Citigroup, JPMorgan, and Wells Fargo were deemed "too big to fail." However, the concentration of wealth in these institutions, which controlled forty-two percent of assets in the U.S. banking system,[3] was saved by federal multibillion-dollar acquisitions.[4]

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[1] *See* Christopher E. Rhodes Jr., *Back to Basics: The Principles of Bank Merger Review*, 25 N.C. BANKING INST. 273, 293 (2020).

[2] *Bank Merger Trends*, BANKING STRATEGIST, https://www.bankingstrategist.com/bank-merger-trends [https://perma.cc/L354-WQQA] (last visited Nov. 16, 2023).

[3] *See* Jeff Cox, *5 Biggest Banks Now Own Almost Half the Industry*, CNBC (Apr. 15, 2015), https://www.cnbc.com/2015/04/15/5-biggest-banks-now-own-almost-half-the-industry.html [https://perma.cc/736H-M8JT].

[4] *See* Donald I. Baker, *From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 358-60 (discussing the effects of crisis-driven acquisitions in the aftermath of the 2008 financial crisis, including Bank of America's acquisition of Merrill Lynch, J.P. Morgan's takeover of Bear Sterns and Washington Mutual, and Wells Fargo's merger with Wachovia Bank).

The rise in banking mergers and acquisitions has drawn attention from politicians. In August 2021, Senator Elizabeth Warren criticized federal regulators, accusing them of having an insufficient bank merger review process.[5] Specifically, Senator Warren harped on the FDIC's zero denials of proposed bank mergers in the last fifteen years, calling it a "rubber stamp."[6]

The executive branch has also weighed in on bank mergers. In July of the same year, President Biden issued an Executive Order on "Promoting Competition in the American Economy."[7] The Order noted that banking consolidation can have deleterious effects, specifically that "in the financial-services sector, consumers pay steep and often hidden fees because of industry consolidation."[8] Thus, it is likely that the Biden Administration will aim to seek reform of the existing regulatory regime.

The existing framework that Senator Warren and President Biden seek to reform is complicated and involves several agencies. The Federal Reserve, the Office of the Comptroller of Currency (the "OCC"), and the Federal Deposit Insurance Corporation (the "FDIC") review bank merger applications and have the authority to approve or deny them.[9] Additionally, merger activities are further regulated under federal law, specifically The Bank Merger Act of 1960 and the Bank Holding Company Act of 1956.[10] The approval process, governed by the Bank Merger Act and the Bank Holding Company Act, requires regulators to consider four factors: (1) the potential anticompetitive effects of the proposed merger, (2) the effects of the proposed merger on financial stability, (3) the effect of the transaction on the public interest, and (4) the managerial and financial resources of the institutions involved in the proposed transaction.[11]

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[5] Press Release, Sen. Elizabeth Warren, Senate Banking, Hous., and Urb. Aff. Comm., At Hearing, Warren Blasts Federal Regulators for Lack of Bank Merger Oversight (Aug. 3, 2021), https://www.warren.senate.gov/newsroom/press-releases/at-hearing-warren-blasts-federal-regulators-for-lack-of-bank-merger- [https://perma.cc/TG5W-CGNU] [hereinafter Press Release, Warren Blasts Federal Regulators].
[6] *Id.*
[7] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (Jul. 9, 2021).
[8] *Id.*
[9] *See* BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT 87 (2001).
[10] 12 U.S.C. § 1828(c); Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50.
[11] *See* Christopher E. Rhodes Jr., *supra* note 1 at 291.

This framework emerged in 1960, concurrent with the introduction of the Bank Merger Act, which Congress passed following a period of widespread and rapid consolidation in the financial sector, where 2,600 banks combined with little regulatory oversight.[12] To limit the effects of the changing dynamics and consolidation within the banking industry, the Bank Merger Act required that banks in a proposed merger gain approval from a regulatory agency.[13] Primarily, these agencies are the FDIC for state nonmember banks, the OCC for national banks, the Federal Reserve for state member banks, and the U.S. Department of Justice ("DOJ") for an independent concurrent review of the anti-competitive effects of all proposed mergers.[14] The Bank Holding Act specifically directs the Federal Reserve to review mergers involving bank holding companies (the "BHCs") using the same standards as the Bank Merger Act.[15]

The approval process begins prior to any public announcement of the merger transaction, where institutions preparing to initiate the merger or acquisition transaction engage in a discussion with the applicable regulatory agency to determine both the approval's viability and the regulators' expectations for the approval of the application.[16] These pre-filing meetings can inform parties of the obstacles that they may encounter as well as highlight regulators' concerns.[17] This process also benefits the parties seeking to merge, as this transparency with the agency may allow them to avoid sinking significant resources into preparing an application that has little chance of approval, or a certainty of withdrawal.[18] Should the parties elect to proceed with the merger or acquisition transaction, regulators from the appropriate agency initiate an extensive review process of the application that can vary in duration, ranging from as short as one month to over a year. [19] Various factors affect the review's timeline, including adverse public comments.[20]

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[12] *See id.* at 276 (2020); Earl W. Kintner & Hugh C. Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. L. REV. 213, 213-16 (1972).
[13] 12 U.S.C. § 1828(c).
[14] *Id.*; 12 U.S.C. § 1842(c).
[15] 12 U.S.C. § 1842(d)(1)(A).
[16] *See* Bd. of Governors of the Fed. Reserve Sys., Comment Letter on Implementation of a New Process for Requesting Guidance from the Federal Reserve Regarding Bank and Nonbank Acquisitions and Other Proposals (July 11, 2012) https://www.federalreserve.gov/supervisionreg/srletters/sr1212.htm [https://perma.cc/GN2M-4HGH].
[17] *See id.*
[18] *See id.*
[19] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., SEMIANNUAL REPORT ON BANKING APPLICATIONS ACTIVITY: JULY 1–DEC. 31, 2021 4 (2022).
[20] *See id.*

This competition analysis is two-tiered. In addition to review from the appropriate regulatory agency, the DOJ reviews the proposed transaction for potential anti-competitive effects.[21] The agencies use a measure of market concentration, the Herfindahl-Hirschman Index ("HHI") to measure levels of concentration of deposits in a small number of banks in the applicable market.[22] Applications exceeding the HHI threshold in the applicable market often result in divestiture requirements as a condition for approval, as seen in the SunTrust-BB&T merger.[23] The SunTrust-BB&T transaction prompted the DOJ to raise antitrust concerns and required the banks to divest 28 branches across North Carolina, Virginia, and Georgia with approximately $2.3 billion in deposits – representing the largest divestiture in the industry since 2009.[24] Further, review of the transaction is not exclusively limited to review of HHI. Federal and state laws that establish deposit caps and prevent banks from acquiring a substantial share in the relevant market may also inform the review process.[25] For instance, at the federal level, President Clinton signed into law the Riegle-Neal Interstate Banking and Branching Efficiency Act in 1994, establishing a uniform state deposit cap of thirty percent of federally-insured deposits within a state, and ten percent nationally.[26] But even if a transaction would surpass the HHI threshold or the federally-mandated maximum deposit cap, mitigating factors may weigh the transaction towards approval because they encourage competition, including circumstances where non-bank institutions (such as credit unions) comprise a significant share of the market, necessitating the entry of additional banks to improve competitiveness in the market.[27]

Regulators are also required to conduct a financial stability analysis, in which they determine the extent to which a proposed transaction "would result in greater or more concentrated risks to the

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[21] *See* U.S. DEP'T OF JUST., BANK MERGER COMPETITIVE REVIEW—INTRODUCTION AND OVERVIEW 1 (2000), https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995 [https://perma.cc/T7RX-JBVA] [hereinafter BANK MERGER COMPETITIVE REVIEW].

[22] *See id.*

[23] *See* Press Release, U.S. Dep't of Just., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019).

[24] *See id.*

[25] *See* David R. Hakes et al., *The Impact of State Deposit Caps on Bank Merger Premiums*, 63 S. ECON. J. 652, 652 (1997).

[26] *See id.*

[27] *See* BANK MERGER COMPETITIVE REVIEW, *supra* note 21 at 4.

stability of the United States banking or financial system."[28] The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") first introduced this element of the approval process to the regulatory scheme following the 2008 financial crisis, amending the Bank Holding Company Act of 1956.[29] In assessing the financial stability of the transaction, regulators use a variety of factors, including: (i) measures of size of the resulting firm, (ii) availability of substitute providers for essential goods and services offered by the resulting firm, (iii) the interconnectedness of the resulting firm with the banking or financial system, (iv) the extent to which the firm contributes to the complexity of the financial system, and (v) the extent of cross-border activities.[30] After analyzing these factors, regulators may determine that a significant adverse effect on financial stability exists based on qualitative factors, such as the "opaqueness and complexity of an institution's internal organization that are indicative of the relative degree of difficulty of resolving the resulting firm. A financial institution that can be resolved in an orderly manner is less likely to inflict material damage to the broader economy."[31] Notably, the Federal Reserve has stated that "a proposal that involves an acquisition of less than $2 billion in assets, that results in a firm with less than $25 billion in total assets, or that represents a corporate reorganization may be presumed not to raise material financial stability concerns."[32] The emerging benchmark of a presumption of systemic risk has led to a presumption that proposals involving less than $10 billion in assets acquired, or resulting in a firm with less than $100 billion in total assets, generally will not pose such a risk.[33] However, this standard is limited by "evidence that the transaction would result in a significant increase in interconnectedness, complexity, cross-border activities, or other risk factors."[34]

The Bank Merger Act dictates that the responsible agency shall not approve "[a] proposed merger transaction . . . unless it finds

[28] 12 U.S.C.A. § 1842(c)(7) (West 2011).
[29] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 604(d)(7), 124 Stat. 1376, 1601 (2010).
[30] *See* Bd. Of Governors of the Fed. Rsrv. Sys., Order Approving the Merger of Bank Holding Companies, FRB Order No. 2019-16 (Nov. 19, 2019), https://www.federalreserve.gov/newsevents/pressreleases/files/orders20191119a1.pdf [https://perma.cc/YT6M-5KVX] [hereinafter FRB Order No. 2019-16].
[31] Bd. of Governors of the Fed. Rsrv. Sys., Order Approving the Merger of Bank Holding Companies, FRB Order No. 2017-08 (Mar. 16, 2017), https://www.federalreserve.gov/newsevents/pressreleases/files/orders20170316a1.pdf [https://perma.cc/KN2B-VDJ3].
[32] *Id.*
[33] *See id.*
[34] *Id.*

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."[35] Public interest, however, is not a self-defining term, and commentators have noted the difficulty in discerning the meaning and substance of the "public interest" factor used in analyzing the validity of a merger under the Bank Merger and Holding Company Acts.[36] In *United States v. Third National Bank of Nashville*, the Supreme Court analyzed the merger of Third National Bank of Nashville, and the Nashville Bank and Trust Company under § 7 of the Clayton Act, weighing "the convenience and needs of the community to be served."[37] In analyzing the merger under this standard, the Court noted that "securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition."[38] When considering whether a proposed merger would be in the public interest because of potential benefits, courts look at the convenience and needs of the community to be served, a view that is further strengthened by congressional discussions regarding the interpretation of the statute.[39]

The statutory requirement that federal agencies consider financial stability when considering the approval of a merger or acquisition was added in 2010,[40] with the Dodd-Frank Act, to consider "the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system."[41] Regulatory agencies have assessed financial stability on a case-by-case basis, without promulgating broad rules.[42] However in 2012, the Federal Trade Commission ("FTC") in Capital One's acquisition of ING's U.S. retail banking operations, set forth the standards used: that it would find an adverse effect if "failure of the firm. . . would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader

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[35] 12 U.S.C. § 1828(c)(5)(B).
[36] *See* Mitria Wilson, *Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions*, 130 BANKING L.J. 350, 355 (2013) (listing examples of the difficulties commentators have when defining "public interest").
[37] United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 173 (1968).
[38] *Id.* at 188.
[39] *See id.* at 185.
[40] 12 U.S.C. § 1842(c)(7).
[41] 12 U.S.C. § 1842(c)(5).
[42] *See* Greg Baer et al., *Financial Stability Considerations for Bank Merger Analysis* 2022 BANK POL'Y INST. 1.

economy."[43] Relevant metrics used to determine the likelihood that failure would inflict material damage on the broader economy include "size of the resulting firm; availability of substitute providers;…interconnectedness of the resulting firm with the banking or financial system; extent to which the resulting firm contributes to the complexity of the financial system; and extent of cross border activities of the resulting firm."[44] While the existing regime is complex and involves multiple players, proposals for modifications to the existing regulatory system are at play.

## II. Calls for Reform: Competing Views Regarding Merger Guidelines

The Department of Justice began a review, seeking additional public comments on Bank Merger Competitive Analysis as of December 17, 2022.[45] These comments seek to address a dual aim of both protecting consumers, by ensuring choice, and protecting other institutions, by taking active measures to ensure a single entity cannot attain a threatening market share via systematic mergers.[46]

The review calls for responses as to whether bank merger review specifically requires standards and factors to be incorporated beyond § 7 of the Clayton Act.[47] In obtaining comments on the new review guidelines, two competing views emerged, with the members of the U.S. Chamber of Commerce advocating for deregulation in the industry, reflecting the view that the self-correcting market is

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[43] Bd. of Governors of the Fed. Rsrv. Sys., Order Approving the Acquisition of a Savings Association and Nonbanking Subsidiaries, FRB Order No. 2012-2 (Feb. 14, 2012) https://www.federalreserve.gov/newsevents/pressreleases/files/order20120214.pdf [https://perma.cc/U4WZ-MW4E].
[44] *Id.*
[45] *See* Press Release, U.S. Dep't of Just., Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis (Dec. 17, 2021) https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis [https://perma.cc/7F2K-UCKU].
[46] *See id.*
[47] U.S. DEP'T OF JUST., ANTITRUST DIVISION BANKING GUIDELINES REVIEW: PUBLIC COMMENTS TOPICS & ISSUES GUIDE (2022) https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide [https://perma.cc/43JB-K2AD].

able to handle threats to competition independently,[48] contrasted by the FTC's view, under the leadership of Chairperson Lina Khan.[49]

### A. Chicago School Approach, as exemplified by the Chamber of Commerce

Specifically, Quaadman and Heather emphasize that "bank concentration does not impair competition," and that HHI calculations "do not accurately measure the amount of competition in the marketplace."[50] In addition, the Chamber of Commerce cites pro-consumer justifications, including increased competition and financial stability, as larger institutions have larger liquidity and more resources to invest in low-income communities, and increased competition on the global banking market.[51] This approach is reflective of an approach to antitrust competition policy reflected by the Chicago School of Economics, emphasizing consumer welfare as the sole goal of antitrust policy,[52] as well as forming policy to reflect the self-correcting nature of the market, viewing government intervention into the market as more harmful than a policy of passivity.[53] However, the prominence of this approach to antitrust policy has been waning.

### B. The FTC's New Approach under Khan's Leadership

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[48] Comment Letter on Bank Merger Competitive Analysis from Tom Quaadman & Sean Heather, U.S. Chamber of Com., to Hon. Jonathan Seth Kanter, Assistant Attorney Gen., Dep't of Just., Antitrust Div. (Feb. 15, 2022) [hereinafter Comment Letter on Bank Merger Competitive Analysis].

[49] *See* Comment Letter on Antitrust Division's Review of the 1995 Bank Merger Competitive Review Guidelines from Lina M. Khan, Chairperson, U.S. Fed. Trade Comm'n, to Hon. Jonathan Seth Kanter, Assistant Attorney Gen., Dep't of Just., Antitrust Div. (Feb. 15, 2022) [hereinafter Comment Letter on 1995 Bank Merger Competitive Review].

[50] Comment Letter on Bank Merger Competitive Analysis, *supra* note 48.

[51] *Id.* Notably, a similar argument was made in United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963), where Philadelphia National Bank argued in defense of its proposed merger that the merger would allow it to compete with larger New York financial institutions. This argument is analogous to the Chamber of Commerce's alleged justification pointing to a pro-global competition resulting from a merger that could nonetheless lessen competition in a more regional market. This conundrum emphasizes the need to carefully define markets, because market shares tend to be dispositive. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. OF ECON. PERSPS. 43, 51 (2000).

[52] Laura P. Sawyer, *U.S. Antitrust Law and Policy in Historical Perspective* 3 (Harvard Bus. Sch., Working Paper 19-110).

[53] *Id.* at 18.

Lina Khan, Chairperson of the FTC, proposes a differing approach in her comment to Assistant Attorney General (AAG) Jonathan Kanter.[54] Where Quaadman of the Chamber of Commerce sees concentration in banking as independent of competition, Khan takes a contradictory approach, pointing that "concentration in banking accelerates concertation generally."[55] Khan also points to harmful results of consolidation, including harms to small business lending, reduced consumer access to services, and consumer preference for local branches.[56] This approach was prominent between 1936 and 1972, when antitrust policy emphasized market structure prior to the Chicago School's influence.[57] Importantly a prima facie case of illegality based on a structural presumption of market share was introduced during this era, which was used to challenge, and ultimately enjoin, a bevy of proposed mergers resulting in market share concentrations as low as five percent.[58] While the structural presumption was technically rebuttable, in practice during this era most such challenges to the structural presumption ultimately failed.[59]

Khan's advocacy for dramatic change to the existing regime of antitrust review of bank mergers is unsurprising given her approach to competition policy holistically. Khan's appointment to the FTC was significant, as it represented an appointment of a "transformationalist" to a significant policy-making position.[60] Khan's influence was embodied in President Biden's Executive Order No. 14,036 proposing changes to antitrust policy to target consolidation in industry, thereby protecting small and medium enterprises.[61] The order was accompanied by remarks, in which President Biden lamented the rise and influence of the Chicago School's laissez faire approach to competition policy, and advocated for a return to the egalitarian view of promoting not only competition and consumer welfare, but also a broader range of factors under the egalitarian vision, including small and medium

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[54] *See* Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[55] *Id.*
[56] *See id.* (quoting *Phila. Nat'l Bank*, 374 U.S. at 370).
[57] William E. Kovacic & Carl Shapiro, *supra* note 51 at 52.
[58] Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).
[59] William E. Kovacic & Carl Shapiro, *supra* note 51 at 51.
[60] William E. Kovacic, *Root & Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?* 35 ANTITRUST L.J. 46, 46 (2021). Kovacic distinguishes transformationalists from other advocates for antitrust reform by noting their focus for the restoration of the egalitarian aims of antitrust, looking beyond consumer welfare alone.
[61] Exec. Order No. 14,036, 86 Fed. Reg. 132 (Jul. 14, 2021).

enterprise.[62] Further, Khan questioned whether the existing merger guidelines adequately consider harms to competition in labor markets,[63] signaling her intent to return to an egalitarian vision of antitrust law and policy. An adoption of this view could lead to drastic changes in antitrust enforcement and merger review under § 7 of the Clayton Act.

## III. The Clayton Act and Its Relevance in Bank Merger Guidelines

U.S. antitrust law has its roots in The Sherman Antitrust Act of 1890.[64] The Clayton Act amended the Sherman Act and expanded its reach. Specifically, § 7 of the Clayton Act governing mergers, prohibits acquisition of stock and assets where the effect would "substantially. . .lessen competition, or to tend to create a monopoly."[65] This approach substantially broadens the relatively narrow scope of the Sherman Act, by allowing for antitrust enforcement against mergers in their incipient phase, a result that would not be possible under the Sherman Act, which requires an extant harm to competition in order to recover.[66]

In challenging a proposed merger under § 7 of the Clayton Act, it is ultimately required for plaintiffs, whether that be a private party or government agency, to define the market, a critical step that could ultimately define the outcome of the case.[67] In *United States. v. E.I. DuPont Nemours & Co.*, the Supreme Court emphasizes the importance of defining the market, noting that "determination of the relevant market is a necessary predicate to finding a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition *within the area of effective competition.*"[68] Thus, in defining the market, an antitrust plaintiff, by narrowing the market, or defendant, by broadening the market, can substantially determine the outcome of the case.

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[62] President Joseph R. Biden, Remarks by President Biden at Signing of An Executive Order Prompting Competition in the American Economy (Jul. 9, 2021).
[63] Lina Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022).
[64] Richard Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act* 83 GEO. WASH. L. REV. 1919, 1920 (2015); The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7.
[65] 15 U.S.C. § 18.
[66] *Brown Shoe Co.*, 370 U.S. at 317.
[67] United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 593 (1957).
[68] *Id.* at 594 (emphasis added).

In addition to defining the market, a plaintiff must prove a likelihood that "competition *may* be foreclosed in a substantial share of that market."[69] Once again, this standard allows for mergers to be challenged prior to their consummation, by allowing plaintiffs to speculate and predict the subsequent market foreclosure resulting from the commencement of the merger.[70]

### A. Effects of a Merger Under § 7: Consider Harm to Competition and Tendency to Create Monopoly

According to the DOJ, the market definition in an agency merger investigation varies depending on the circumstances of the merger.[71] They note that "in some investigations, before having determined the relevant market boundaries, the Agencies may have evidence that more directly answers the ultimate inquiry in merger analysis . . . whether the merger is likely to create or enhance market power or facilitate its exercise."[72]

While defining the market is essential in a merger under § 7 of the Clayton Act, a showing of a specified market concentration on its own is not likely to be sufficient to warrant intervention. Although § 7 of the Clayton Act does allow for mergers to be challenged in their incipiency,[73] there is nonetheless a requirement that a merger will pose some harm to competition in order to do so, per the text of the statute, which denotes that "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[74] However, these effects may be felt differently

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[69] *Id.* at 595 (quoting Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949) (emphasis added)).
[70] *E.I. DuPont de Nemours & Co.*, 353 U.S. at 597.
[71] Org. for Econ. Cooperation and Dev., *Roundtable on Market Definition: Note by the Delegation of the United States* (June 7, 2012) https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf [https://perma.cc/V4KM-638E].
[72] U.S. DEP'T OF JUST. & U.S. FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 10 (2006) (internal quotations omitted) [hereinafter COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES]. By analyzing future effects of the merger, agency enforcers can target mergers prior to their consummation.
[73] *See Brown Shoe Co.*, 370 U.S. at 317-18 ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to break this force at its outset and before it gathered momentum.").
[74] 15 U.S.C. § 18.

based on the definitions of the market. In *United States v. Philadelphia National Bank*,[75] the Supreme Court expanded on the commands of § 7 by focusing on the "*relevant market,*" which is composed of the product market and the geographic market.[76] Specifically, the court notes that:

> in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.[77]

In defining the relevant market, the court considered the product market, which pointed to a benign result from the merger given the national significance and competition among financial institutions between Philadelphia and New York.[78] However, the court looked at the relevant geographic market as well, narrowly defined as the four-county Philadelphia metropolitan area.[79] The court emphasized that the "vast bulk of appellees' business originates in the four-county area."[80] In deciding to enjoin the merger, the court turned to the "the ultimate question" under § 7 of the Clayton Act: whether the effect of the merger may be substantially to lessen competition in the relevant market.[81]

### B. The SSNIP – Hypothetical Monopolist Test

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[75] *Phila. Nat'l Bank*, 374 U.S. at 321.
[76] *Id.* at 335.
[77] *Id.* at 361.
[78] *Id.* at 370. The Court rejected claims that the merger under review would strengthen Philadelphia National Bank's ability to compete with more prevalent firms in New York City. This pro-consumer justification was rejected by the Court.
[79] *Id.* at 359, 361.
[80] *Id.* at 359.
[81] *Phila. Nat'l Bank*, 374 U.S. at 364. The Court found that the merger would indeed result in a lessening of competition. It found that the post-merger market share of the new entity would be 30% in the relevant geographical market of Philadelphia, which was deemed to be too high and thus within the scope of § 7 of the Clayton Act.

Supreme Court jurisprudence indicates that the broader market may not be a sufficient market definition when a separate submarket exists.[82] While a broader market, defined by "the reasonable interchangeability of use or the cross-elasticity of demand . . . within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[83] This approach to defining the market has been used by courts to show that while an injury to competition in the broader market may be negligible, a serious consolidation within a submarket could warrant enjoinment of a merger.[84] In 2011, the court in *United States v. H & R Block, Inc.* expanded on the principles of defining the relevant market.[85] Specifically, the court expounded that while a broader market may exist, the relevant inquiry may look to intrabank competition within the markets for purposes of scrutiny under a Section 7 analysis.[86] The proposed merging parties, Tax Act and H & R Block, were deemed to be operating in a submarket that was separate from the broader market of all tax preparation methods, with the smaller market focusing on assisted "Digital DIY" tax preparation methods.[87]

To determine whether a relevant submarket exists when analyzing if a harm to competition is posed by the merger under § 7 of the Clayton Act, the courts apply what has been termed "the hypothetical monopolist test" to determine the relevant parameters of the market.[88] This test, brought forward by Phillip Areeda and Herbert Hovenkamp,[89] is embraced by the DOJ's Horizontal Merger Guidelines,[90] and requires pondering whether post-merger, "the hypothetical profit maximizing firm . . . likely would impose at least a small but significant and non-transitory increase in price (SSNIP)

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[82] *See Brown Shoe Co.*, 370 U.S. at 325.
[83] *Id.*
[84] *See, e.g., id.* at 366; Fed. Trade Comm'n v. H.J. Heinz Co., 116 F. Supp. 2d 190, 195 (D.C. Cir. 2000); United States v. H & R Block, Inc., 833 F. Supp 2d 36, 91 (D.D.C. 2011).
[85] *H & R Block, Inc.*, 833 F. Supp. 2d at 51.
[86] *Id.* "A broad, overall market may contain smaller markets which themselves constitute product markets for antitrust purposes" (citing *Brown Shoe Co.*, 370 U.S. at 325). "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." (quoting Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997)).
[87] *H & R Block, Inc.*, 833 F. Supp 2d at 52.
[88] *Id.* at 51-52.
[89] PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 536 (Wolters Kluwer, 5th ed. 2020).
[90] U.S. DEP'T OF JUST. & U.S. FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 8-9 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES].

on at least one product in the market."[91] This test can be used to ensure that relevant markets are defined appropriately, and further aids in determining whether a submarket exists for the purposes of a relevant antitrust inquiry under § 7 of the Clayton Act.[92] In the case of the H & R Block merger, it was determined via economic expert testimony that the merged entity would be able to exercise its newfound market power to execute a small but significant non-transitory increase in price in the relevant submarket of Digital DIY tax preparation.[93]

### C. The Structural Presumption of Illegality in a Merger Review and the Burden-Shifting Framework in Merger Review under § 7

To prevail on a litigated case challenging a merger under § 7 of the Clayton Act, the government bears the burden of showing "that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in concentration of firms in that market."[94] Per the Horizontal Merger Guidelines, the relevant inquiry is based off the HHI, a measure used to determine market concentration, typically analyzed both pre- and post-merger.[95] The tool is used to measure markets holistically, and classifies markets into three categories: (1) unconcentrated markets with an HHI below 1500, (2) moderately concentrated markets with an HHI between 1500 and 2500, and (3) highly concentrated markets with an HHI above 2500.[96] The market determination is relevant in determining the level of scrutiny applied in analyzing the effects of a merger on changes in concentrations on the market.[97] Significant changes in HHI in highly concentrated markets, over 200, results in a

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[91] *Id.*
[92] *Id.*; *See also H & R Block, Inc.*, 833 F. Supp. 2d at 51-52.
[93] *H & R Block, Inc.*, 833 F. Supp. 2d at 60.
[94] *Phila. Nat'l Bank*, 374 U.S. at 363.
[95] HORIZONTAL MERGER GUIDELINES, *supra* note 90 at 18-19 (noting that the HHI involves squaring the proportion of concentration in the market, accounting for the presence of dominant firms with significant market share in analyzing of the market).
[96] *Id.*
[97] *Id.* In unconcentrated markets, for example, mergers are unlikely to have adverse effects and thus require no HHI inquiry. However, mergers resulting in moderately concentrated markets are scrutinized if an increase in HHI of more than 100 HHI points warrants scrutiny from officials, and in highly concentrated markets an increase of 100-200 HHI points results in increased scrutiny. However, if the HHI increase in a concentrated market is over 200 points then there will be a rebuttable presumption that market power will be enhanced, and thus likely to be challenged under § 7 of the Clayton Act.

presumption that the merger yields anticompetitive effects and thus will be challenged by regulators.[98]

The 2010 Horizontal Merger Guidelines concerning HHI under § 5.3 represents a dramatic departure from the previous 1982 guidelines, as the 2010 guidelines had higher concentration thresholds for HHI to justify antitrust scrutiny.[99] These changes represent an important reflection of the evolution of the modern economy, where markets (and thus ultimately consumers) benefit from economies of scale that yield natural concentration in industries.[100] Therefore, relatively higher levels of concentration do not, *per se* result in a harm to competition, but may in fact be justified on the basis of efficiencies passed on to consumers.[101] Efficiency arguments cannot be used to justify a merger of competitive incumbents with large market shares.[102] However, when the increase in HHI is more moderate, efficiency justifications can be successful in rebutting the presumption.[103]

**1. Efficiency Justifications and the Burden-Shifting Framework**

During a period of merger scrutiny, although the government bears the initial burden of showing that the merger would result in an increased concentration in the market, the burden shifts to the defendant, who may offer pro-competitive or pro-consumer justifications that a court may consider in allowing the merger to proceed.[104] The considerations of such justifications stem from the Supreme Court decision in *United States v. General Dynamics Corp.*, where the United States sought to enjoin a merger between two competitors in the coal industry.[105] The defendants were able to show that while the market concentration of firms in the relevant geographic market would be increased as a result of the merger, the effect of that concentration on the market, and on consumers, was benign as one of the merging parties had all of their output assigned

[98] *Id.*
[99] Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2003-04 (2018) [hereinafter Hovenkamp & Shapiro].
[100] *Id.* at 2005.
[101] *Id.*
[102] *Id.* at 2007.
[103] *Id.* at 2008 n.49.
[104] *See, e.g.*, United States v. Gen. Dynamics Corp. 415 U.S. 486, 488 (1974); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).
[105] *Gen. Dynamics Corp.*, 415 U.S. at 491.

via long term contracts, and as such there could be no adverse effects felt by consumers or the market.[106]

As applied, the defendant is given the opportunity to rebut the structural presumption as per the HHI test.[107] However, structural presumption is strongly supported by economic theory.[108] Specifically, the structural presumption operates on two assumptions: (i) that the loss of a competitor in a concentrated market will enhance market power, and (ii) that concentrated markets have barriers to entry that affect the ability of new competitors to emerge.[109] This makes the structural presumption an effective tool in evaluating the banking industry, given the high barrier to entry associated with competition in the field.[110]

While the structural presumption is certainly a useful tool for antitrust enforcers to determine where a harm to competition would ensue, historically the deeper underlying concerns of antitrust policy have been consumer welfare.[111] Thus, in instances where such a harm to competition would not ensue from the merger, it is more likely that the merger will be approved.[112] In the case that a defendant is successful in rebutting the initial structural presumption, the burden is then shifted back to the plaintiffs, who are tasked with proving that regardless of the justifications, the transaction will substantially lessen competition.[113] Should a merger be deemed problematic, it can either be enjoined entirely, or be subject to a structural remedy in order to allow for clearance.[114]

## IV. The BB&T-SunTrust Merger and Structural Remedies

On February 7, 2019, BB&T Corporation and SunTrust announced a merger of equals in an all-stock deal valued $66

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[106] *Id.* at 501-02 (1974).
[107] Hovenkamp & Shapiro, *supra* note 99 at 1998.
[108] *Id.* at 1996.
[109] *Id.* at 1998 ("Importantly, if those conditions do apply in particular markets, the structural presumption can be rebutted with industry-specific evidence.").
[110] *See generally* David A. Alhadeff, *Barriers to Bank Entry*, 40 S. ECON. J. 589 (1974).
[111] Hovenkamp & Shapiro *supra* note 99 at 1998.
[112] *See Gen. Dynamics Corp.*, 415 U.S. at 511.
[113] *See, e.g.*, United States v. Anthem, Inc., 236 F. Supp. 3d 171, 192, 215 (D.D.C. 2017).
[114] *Negotiating Merger Remedies*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/negotiating-merger-remedies [https://perma.cc/LE8Q-2SAE] (last visited Nov. 24, 2023).

billion.[115] The merger between BB&T and SunTrust created a new entity, Truist Bank, to become the sixth-largest bank holding company by assets and deposits in the United States.[116] While mergers and acquisitions of banks do occur on a regular basis, this deal was staggering, representing the largest bank merger in 15 years.[117] The merger's swift approval was evidence of the favorable regulatory environment for bank mergers and acquisitions.[118] While the merger ultimately did gain approval from regulators, conditions were imposed, including the divestiture of 30 branches and $2.4 billion in deposits.[119]

### A. Systematic Shortcomings: Wide Nets Catching the Little Fish

Despite the elaborate process required for merger review under the Bank Holding Company Act of 1956, the merger between BB&T and SunTrust to form Truist Bank represented a shortcoming of the review process. While there were several structural considerations in the market that were raised by legislators who were concerned about the deleterious effects of consolidation in the banking industry,[120] the significant shortcomings are procedural.[121] Banking agencies have begun to allow firms to vet potential deals confidentially prior to announcing mergers, largely rendering the regulatory mechanism that exists obsolete.[122] This, however, comes

[115] *BB&T to Buy SunTrust in All-Stock Deal Worth $66 Billion That Will Create the Sixth Largest U.S. Bank*, CNBC (Feb. 8, 2019, 5:34 AM), https://www.cnbc.com/2019/02/07/bbt-and-suntrust-to-combine-in-an-all-stock-merger-of-66-billion.html [perma.cc/PPF5-R3PE].
[116] *Id.*
[117] Jim Dobbs, *Three Takeaways from Regulators' Approval of the BB&T-SunTrust Merger*, AM. BANKER (Nov. 20, 2019, 4:38 PM), https://www.americanbanker.com/news/three-takeaways-from-regulators-approval-of-the-bb-t-suntrust-merger [https://perma.cc/DUV7-MV4T] [hereinafter Jim Dobbs].
[118] Aparajita Saxena et al., *BB&T to buy SunTrust in Biggest U.S. Bank Deal in a Decade*, REUTERS (Feb. 7, 2019, 6:15 AM), https://www.reuters.com/article/us-suntrust-banks-m-a-bb-and-t/bbt-to-buy-suntrust-in-biggest-u-s-bank-deal-in-a-decade-idUSKCN1PW156 [https://perma.cc/DH78-SK2Q].
[119] Jim Dobbs, *supra* note 117.
[120] *See* Letter from Sen. Elizabeth Warren to Makan Delrahim, Assistant Attorney Gen., Dep't of Just., Antitrust Div. (Oct. 16, 2020), https://www.warren.senate.gov/imo/media/doc/2020.10.16%20Comment%20Letter%20to%20DOJ%20on%20Bank%20Merger%20Review%20Process.pdf [https://perma.cc/FT4D-58FH].
[121] Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 456 (2020).
[122] *Id.*

at a cost that should be analyzed, given that 88% of bank mergers involve an acquired bank with less than $1 billion in assets.[123] It is unclear if these smaller parties benefit from this treatment from regulators, but it is clear that the industry trend in banking mergers and acquisitions shows that the vast majority of merger activity involves firms who have fairly small asset holdings, and thus smaller market shares.[124]

## V. Applying § 7 Analysis to the BB&T SunTrust Merger Under the "Pre-Chicago" Structural Presumption

The analysis postulates how the Court would rule applying the structural presumption to challenge mergers, using thresholds and standards from the antitrust era of 1936 to 1972, prior to the rise of the Chicago School's approach to antitrust.[125] In determining how a traditional antitrust merger review would govern in the case of BB&T and SunTrust, it first requires defining the market. Notably, the two entities did not have strong national presences. BB&T, which was headquartered in Winston Salem, North Carolina, conducted business in 15 states and the District of Columbia, and SunTrust operated in 10 states and the District of Columbia.[126] Distinctly, these two players had heavily competed against each other in a specific geographic region, namely the Southeast.[127] Thus, it begs the question: should this merger have been reviewed assuming that the Southeast consists of a separate geographic market, under a *Brown Shoe* analysis, where the structural presumption is implemented? Further, how could such an analysis differ under leadership that is more willing to argue for an

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[123] MARC LABONTE & DAVID PERKINS, CONG. RSCH. SERV., IN11146, BB&T AND SUNTRUST: MERGER APPROVAL PROCESS AND TRENDS (2019).
[124] *Id.*
[125] William E. Kovacic & Carl Shapiro, *supra* note 51 at 49-52
[126] *See* Press Release, U.S. Dep't of Just., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019).
[127] SunTrust operated in Alabama, Arkansas, Washington D.C., Florida, Georgia, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. *SunTrust Now Truist Branch Status by State*, TRUIST BANK (2021), https://www.truist.com/content/dam/truist/us/en/documents/st_branchhours.pdf [https://perma.cc/M5HD-8T8Y]. BB&T operated in Alabama, Washington D.C., Florida, Georgia, Indiana, Kentucky, Maryland, North Carolina, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *BB&T Now Truist Branch Status by State*, TRUIST BANK (2021), https://www.truist.com/content/dam/truist/us/en/documents/bbt_branchhours.pdf [https://perma.cc/UW5U-CQZJ].

egalitarian view of antitrust policy,[128] which had prominence prior to the rise of the Chicago School's ideology, as Khan envisions?[129]

### A. Defining the Market and The Need to Preserve Regional Competition: Southeast Banking Market

The relevant market definition can be determinative in analyzing a merger under § 7 of the Clayton Act.[130] In approving the transaction, the Federal Reserve Board ("The FRB") notes that "in defining the relevant geographic market, . . . [it] must reflect commercial and banking realities."[131] The FRB found that the consummation of the proposal would not lead to a lessening of competition overall, and considered the effects of the merger in individual localities.[132] Notably, the FRB's language concedes that the majority of these markets are already considered concentrated, and out of 68 markets, 41 are moderately concentrated, 10 more would become moderately concentrated, with 10 markets remaining highly concentrated and 2 markets becoming highly concentrated as a result of the merger.[133] While the FRB, in assessing the anticompetitive effects of the merger, has led to divestitures of certain local markets, this approach is inconsistent with the rationale given by the Court in *United States v. Philadelphia Nat'l Bank*.[134] There, the Court focused on the "cluster of products" offered in a relevant geographical market, defined as "a section of the country."[135] Brennan's opinion hones in on the fact that commercial banks can compete against smaller entities for loans.[136] Defining the market narrowly in this instance could have dramatic implications for how a merger would be reviewed under § 7 of the Clayton Act. Specifically, the Clayton Act ponders whether the harm is felt by the

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[128] *See* Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[129] William E. Kovacic & Carl Shapiro, *supra* note 51 at 49.
[130] *See H & R Block, Inc.*, 833 F. Supp. 2d at 36.
[131] *See* FRB Order No. 2019-16, *supra* note 30.
[132] *Id.*
[133] *Id.* "High concentration" refers to a market in which the HHI is in excess of 2,500 points, and "moderate concentration" refers to a market with the HHI ranging from 1,500 to 2,500 points. *See Herfindahl-Hirschman Index* U.S. DEP'T OF JUST., ANTITRUST DIV. (July 31, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/SE2J-B9ZL].
[134] *Phila. Nat'l Bank*, 374 U.S. at 356.
[135] *Id.*
[136] *See id.*

relevant product in the relevant geographic market.[137] Thus, in a narrower market for loans in the Southeast, harm to competition in the loan market could be seen as more significant by courts, as the effects of consolidation are disproportionately felt in the Southeast. This concern would be of even greater concern in the loan market, especially given the importance of smaller financial institutions in this space.[138] This also may be of particular concern in markets under strained financial conditions, where a high interest rate environment can lead to increased cost of acquired capital.[139]

Consolidation in this market may be particularly questionable given Khan's emphasis on protecting local banks.[140] Small banks are critical in the small business loan market.[141] Community banking is, after all, geographically determined.[142] Thus, a merger which leads to significant consolidation could harm not only small banks, but also local businesses in the relevant geographic area.

Ultimately, the task of defining a market is complex, and per Justice Brennan, requires a balancing act: the market must be adequately defined so as to avoid "an overexpansive [area], drawing to make the effects of the merger seem competition seem insignificant . . . or so narrowly as to place appellees [banks] in different markets."[143] As applied to the SunTrust- BB&T Merger, it is likely that in an analysis of the merger under the strict structural presumption, the government could challenge the FRB's definition of the market to be limited to the Southeastern United States. In addition to a threat to competition in the relevant geographic area, Khan would be inclined to define the market in this way in order to

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[137] Stephen Mann & Thomas Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases. Two Different Views,* 47 U. VA. L. REV. 1014, 1016 (1961).
[138] Paul Bergeron, *Private Capital, Regional, and Local Banks Step Up to Make Loans*, ALM GLOBEST.COM (Feb. 7, 2023), https://www.globest.com/2023/02/07/private-capital-regional-and-local-banks-step-up-to-make-loans/?slreturn=20230201140809 [https://perma.cc/T2VY-UP5U].
[139] Benjamin Curry & Michael Adams, *What Happens When the Fed Raises Interest Rates*? FORBES ADVISOR (June 21, 2023, 3:25 PM), https://www.forbes.com/advisor/investing/fed-raises-interest-rates/ [https://perma.cc/AS93-4YRA].
[140] Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[141] Paul Bergeron, *supra* note 138.
[142] FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY 3-1 (2012).
[143] *Phila. Nat'l Bank*, 364 U.S. at 361.

protect local and community banks from the harmful effects of consolidation.[144]

**B. Harm to Competition: Moving Beyond HHI in Banking Industry**

The Clayton Act, in its review of mergers, takes aim at addressing two potential harms resulting from the merger: coordinated interaction and unilateral effects.[145] The former concerns inter-firm behavior, by allowing remaining firms to coordinate more easily on a competitive dimension, while the latter is concerned with the individual firm's ability to exercise unilateral market power in order to raise prices. Under the current DOJ merger guidelines, an HHI analysis is typically used to measure harm to competition via coordinated effects.[146] Currently, the requisite question in analyzing a merger based on HHI requires both a post-merger HHI over 1800, as well as an increase of 200.[147] However, Khan proposes looking past the HHI analysis, and suggests a separate analysis focused on protection of small and local banks.[148] Nationally, small and local banks have been rapidly disappearing, with numbers declining from 14,400 in 1980 to 4,600 in 2020.[149] This decline is poignant, and specifically in the Southeast, banks have been particularly vulnerable.[150] Between 2007 and 2010, approximately thirty percent of bank failures were within the Atlanta Federal Reserve Bank's region, predominantly composed of community banks.[151] Thus, even without an HHI analysis, under Khan's suggested revisions, harm to competition may be inferred based on considerations for small and local banks that would be adversely affected by the merger.

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[144] *See* Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[145] *See Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects [https://perma.cc/AM3R-9NH8].
[146] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 90 at 18-19.
[147] *Id.*
[148] *See* Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[149] EMREHAN AKTUG ET AL., U.S. SMALL BUS. ADMIN., EFFECTS OF SMALL LOANS ON BANK AND SMALL BUSINESS GROWTH 6 (Mar. 2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/09094530/De-Novo-BankFormation.pdf [https://perma.cc/5GM6-XS88].
[150] Dennis P. Lockhart, President & Chief Exec. Officer, Fed. Rsrv. Bank of Atlanta, Keynote Address to Alabama Bankers Association (June 4, 2010) (*transcript available at* https://www.atlantafed.org/news/speeches/2010/100604-lockhart.aspx [https://perma.cc/LQB5-8YAU]).
[151] *Id.*

Unilateral effects of a merger do not depend on general market concentration, rather the effects concern the firm's ability to independently exercise market power.[152] This theory of harm occurs when a merged firm moves to reduce output and unilaterally raise prices.[153] As applied to the banking industry, the effects of bank consolidation on the loan market would be analyzed.

Consolidation in the bank industry has been linked to a number of adverse consequences.[154] Bank mergers have resulted in a chilling effect on loan activity, leading to higher interest rates.[155] Consolidation may also directly harm consumers by leading to higher transaction fees and decreased interest paid into savings accounts.[156]

In *United States v. Philadelphia National Bank*, the Court reframed the burden on the government in challenging mergers.[157] Rather than showing direct harm to competition from the merger, the court used an alternative mechanism, whereby "a merger which produces a firm controlling an undue percentage share of the relevant market *is so inherently likely to lessen competition . . . that it must be enjoined*."[158] However, such a presumption is rebuttable, and in circumstances where cognizable pro-competitive justifications can be offered and accepted by the court, the structural presumption of illegality can be set aside.[159] However, such justifications are limited, and include unique factual situations in which the defendants can offer distinctly pro-consumer justifications, such as efficiencies or the offering of a novel product

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[152] Hovenkamp & Shapiro, *supra* note 99 at 2014.
[153] Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, FED. TRADE COMM'N (Aug. 6, 1996), https://www.ftc.gov/news-events/news/speeches/unilateral-competitive-effects-theories-merger-analysis [https://perma.cc/S2N7-UCXE].
[154] Jeremy Kress, *Biden Wants to Crack Down On Bank Mergers – Here's Why That Could Help Consumers and the Economy,* THE CONVERSATION (July 27, 2021, 8:03 AM), https://theconversation.com/biden-wants-to-crack-down-on-bank-mergers-heres-why-that-could-help-consumers-and-the-economy-164689 [https://perma.cc/AF4Q-5WV8].
[155]*See* Mark J. Garmaise & Thobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495 (2004) (finding that a correlation exists between bank consolidation and loan rates; the effects of such a strain on the loan market hampers economic development, and ultimately has spillover effect on crime).
[156] Jeremy Kress, *supra* note 154.
[157] *Phila. Nat'l Bank*, 374 U.S. at 363.
[158] *Id.* (emphasis added).
[159] *See, e.g.*, *Anthem, Inc.*, 236 F. Supp. 3d at 191-192, 213.

to market,[160] or show that no harm to competition would ensue from the merger.[161]

It is unclear in the case at hand what efficiencies BB&T and SunTrust would offer. In a 2019 interview, BB&T's chief executive, Kelly King claimed that the merger would result in cost savings, allowing the newly formed Truist Bank to invest more significantly in technology, which would ultimately benefit their customers.[162]

Courts tend to be skeptical of such efficiency justifications. The nature of such a justification is ultimately based on cost-savings to the firm. Whether or not the firm invests significantly in technology is unlikely to offer unique benefits to consumers. However, Supreme Court decisions applying the structural presumption do not recognize such justifications as a defense for a merger.[163] Additionally, it is important to note that the Supreme Court has not heard a case concerning mergers or an application of § 7 of the Clayton Act since 1974.[164] Thus, the ultimate direction that a court could take with regard to efficiencies is unclear, however, this could directly inform the FTC's current decisions to scrutinize and prosecute mergers. Without an efficiency defense angle, merging parties would be subject to a rigorous strict analysis of the market and would be more closely scrutinized.

## VI. Conclusion

The regulatory regime for bank merger analysis is under review. The existing regime under the Bank Merger Act and Bank Holding Company Act has long been criticized by lawmakers.[165] While these procedures do stem from statutory law,[166] its jurisdiction operates concurrently with antitrust regulation by both the DOJ's Antitrust Division and the FTC.[167] Under the Clayton Act,

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[160] *See* Broad Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).
[161] *See Gen. Dynamics Corp.*, 415 U.S. at 486.
[162] Squawk on the Street, *Truist CEO Kelly King on the Completed BB&T and SunTrust Merger*, CNBC (Dec. 9, 2019, 12:04 PM), https://www.cnbc.com/video/2019/12/09/truist-ceo-kelly-king-on-the-completed-bbt-and-suntrust-merger.html [https://perma.cc/9V4H-NTR9].
[163] Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE WESTERN L. REV. 381, 402 (1980).
[164] Bradley C. Weber, *Antitrust 101 For Young Lawyers: Section 7 of the Clayton Act*, 7 AM. BAR ASS'N SECT. OF LITIG.: THE ANTITRUST LITIG. 21 (Fall 2007).
[165] Press Release, Warren Blasts Federal Regulators, *supra* note 5.
[166] Bank Merger Act, 12 U.S.C. § 1828(c) (1960); Bank Holding Company Act of 1956 § 3(c), 12 U.S.C. § 1842(c).
[167] *Phila. Nat'l Bank*, 374 U.S. at 335.

§ 7, antitrust enforcers are able to enjoin a merger that substantially lessens competition,[168] and guidance for enforcement is currently set by the 1995 Bank Merger Competitive Review Guidelines.[169] These guidelines are currently under review, and different organizations have submitted comments to AAG Jonathan Kanter as the DOJ works to update the guidelines. Of particular note is FTC Chairperson Lina Khan's submission, which advocates for a broader range of considerations, beyond competition alone, when evaluating a bank merger.[170] This position is reflective of the transformationalist view of antitrust policy, which advocates for a return to the egalitarian vision of antitrust, in which harm to competition is no longer the sole factor to be considered by antitrust regulators, but rather accounts for other factors such as the needs of workers and the community.[171]

Adoption of such a regulatory regime for merger review could have vast implications on banks seeking to merge. Between an increase in enforcement and taking a broader range of factors into consideration, antitrust regulators from both the DOJ and the FTC could make up for shortcomings that exist under both the current regulatory regime and the current, highly criticized "rubber-stamping" regime under the Bank Merger Act and the Bank Holding Company Act.[172] Such a regime would also be less cumbersome to banks seeking to merge when no threat to competition exists, and harmful results from the merger are unlikely, given that the regulators would have latitude to be selective about which mergers to scrutinize. While there is a potential for § 7 of the Clayton Act to complement the regime under the Bank Merger Act and Bank Holding Company Act, it is ultimately the DOJ's decision on how to update the guidelines, and for courts to determine how to use them.[173]

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[168] *See* 15 U.S.C. §§ 12-27.
[169] *See* BANK MERGER COMPETITIVE REVIEW, *supra* note 21.
[170] Comment Letter on 1995 Bank Merger Competitive Review, *supra* note 49.
[171] William E. Kovacic, *Root & Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?* 35 ANTITRUST L.J. 46, 49 (2021).
[172] Press Release, Warren Blasts Federal Regulators, *supra* note 5.
[173] *See generally* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015).