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Competition Policy in the Financial Crisis

The financial crisis of 2008 forced the United States government to take unprecedented measures in facilitating a recovery for the banking industry. Though they were arguably the cause of the crisis, certain institutions within this industry were considered "too big to fail" by the federal government. Federal regulators responded by distributing billions of dollars to the relatively stronger banks, allowing them to not only stay afloat, but in some cases acquire other banks that were struggling and gain an even larger market share.[1]

The Federal Reserve and the Treasury Department worked hand-in-hand with the leaders of these financial institutions in developing the bailout packages and facilitating the mergers that took place. Careful review of such mergers often takes a year or more to accomplish; but because of the potentially rapid deterioration of the financial industry, these mergers were quickly processed and approved by the Federal Reserve. Despite the fact that these mergers significantly altered the market shares in the financial industry, it is unclear whether or not competition issues were adequately addressed in consummating and approving these mergers. The purpose of this article is to examine what role, if any, competition policy and advocacy played in the U.S. during the recovery

[1] David Cho, *Banks 'Too Big to Fail' Have Grown Even Bigger*, Washington Post, Aug. 28, 2009, at A01(Market share as measured by share of deposits and loans).

from the financial crisis. Competition policy is the area of public policy, including antitrust, sectoral regulation, taxation, capital markets, trade, intellectual property, etc., that determines the role of competition within the economy. In times of crisis, some government officials might consider such advocacy as a hindrance to emergency actions and the ensuing recovery process. But it is important that the concerns of competition policy at least be voiced so that the market that results from the government's decisions does not create adverse conditions that lead to yet another crisis.

Pre-Crisis

How the Crisis Happened

The financial crisis was caused by a combination of imprudent practices on the part of the financial industry and regulatory failure on the part of the government.[2] The crisis' origins arguably began with government's public policy too strongly promoting home ownership, coupled with the repeal of the Glass-Steagall Act, which had originally required commercial and investment banks to be separate entities. Low interest rates combined with a general culture of excessive risk taking from commercial banks (which were typically more risk-averse) led to the distribution of bad loans being given out. The banks then created financial instruments based on these pooled mortgages, called "collateralized debt obligations" (CDO's); though many of the loans were likely to default, the credit rating agencies failed to adequately assess the risk. These instruments became a fundamental part of the financial industry, which depended on them heavily as a basis for short-term borrowing.[3] Furthermore, firms like American International Group sold billions of dollars in insurance contracts on these instruments. Excessive demand for housing, fueled by cheap credit, created a massive amount of debt where debtors could not afford their payments. The oversupply of housing then depressed prices dramatically, leaving debtors further under water. This led the "bubble" to burst in 2007, causing mortgage borrowers to eventually default. As a result of this, the CDO's dramatically lost value, sending the heavily dependent financial industry into a panic.

The Federal Crisis Inquiry Commission (FCIC) laid much of the blame on the leaders of these financial institutions, finding that "failures of corporate governance and risk management at many systemically important financial institutions were a key cause of th[e] crisis."[4] Within the federal government, the FCIC found that there was a "pervasive permissiveness" for such risky practices and that the regulatory institutions ignored the systemic risk throughout the industry, convinced that the risk would be contained.[5] Although the creation of such a system of risk-taking

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[2] Much literature has been devoted to detailing the causes of the financial crisis. For excellent overviews, *see* SIMON JOHNSON & JAMES KWAK, 13 BANKERS (2009); ANDREW ROSS SORKIN, TOO BIG TO FAIL (2009); and MICHAEL LEWIS, THE BIG SHORT (2010).

[3] Leverage Ratios, from 2000 to 2007: JP Morgan: 20:1 to 22:1; Wells Fargo: 16:1 to 17:1; Bank of America: 18:1 to 27:1; Citibank: 18:1 to 32:1; Goldman Sachs: 17:1 to 32:1; Morgan Stanley and Lehman: 40:1 in 2007. FINANCIAL CRISIS INQUIRY COMMISSION (*hereinafter* FCIC), FINAL REPORT, at xx (2011).

[4] *Id.*at xviii

[5] *Id.*at xvii

was largely to blame, the FCIC found that "an erosion of standards of responsibility and ethics" exacerbated the crisis.[6]

Antitrust's Role in Preventing the Crisis?

Many have argued that because the crisis resulted from the banks and other financial institutions growing "too big to fail", antitrust should embrace a skepticism of larger firms. There are two prongs to the additional argument that "too big to fail" banks should be broken up: 1) the size of the banks and the interconnectedness among them and with insurance and other financial companies further exacerbates the systemic risk; 2) firms of such size can use their wealth and centrality to the economic well-being of the nation to influence government officials into permitting excessively risky behavior, at the expense of the rest of society.[7]

Under the current antitrust paradigm, the recent financial crisis does not appear to be a failure of antitrust enforcement. This article does not focus on whether or not antitrust should seek to prevent such failures from occurring; instead, it accepts the current reality that antitrust is concerned with market power and competition, not preventing political capture or regulating systemic risk. But competition policy has a broader scope than antitrust law and is obviously familiar turf for antitrust lawyers and economists; there is a potential role for them to play in the midst of a financial crisis that results in the restructuring of important industries.

Capitalization

To deal with the rapidly deteriorating stability of the financial sector (and potentially the rest of the economy), the federal government decided to keep the largest and most important bank holding companies, investment banks, and clearing and settlement banks afloat by recapitalizing them in return for preferred shares of stock. At the time, these institutions held more than $11 trillion in assets, or about 75% of all assets held in banks in the country.[8] The design of the capital assistance program was largely motivated by a perceived need to get the financial institutions to take the deal so that they could resume lending to businesses and households.[9]

It is unclear whether or not competition policy was at all considered in the decision to recapitalize these institutions. The mere acquisition of funding, from the government or other sources, does not in itself raise competitive concerns. Furthermore, the goal in these decisions was not to make these institutions more "powerful" in any sense of the word, but instead to prop them

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[6] *Id.*at xxii
[7] For more of these arguments, see Johnson & Kwak, *supra* note 2, at187-222; Zephyr Teachout, Trustbusting 2.0? (April 7, 2009), http://www.thenation.com/blog/trustbusting-20.
[8] FCIC *supra* note 3 at 373, Johnson & Kwak, *supra* note 7 at 168-68.
[9] FCIC *supra* note 3 at 375.

up so that the financial industry would avoid a collapse. But it is worth noting the lack of conditions that were attached to the grant of these funds. The government wanted to avoid the appearance of a "nationalization" of these institutions and to make the packages as attractive as possible so that they would be accepted as quickly as possible.[10] It is thus somewhat unlikely that competition policy was much of a concern, if any, in this stage of devising the bailout strategy. In fact, despite our varied inquiries, we have found no evidence to suggest that competition policy played any role during the emergency period or the longer range planning for recovery, other than as described below.

Mergers

In addition to recapitalizing, much of the government's recovery plan consisted of facilitating acquisitions of endangered banks by the relatively stronger banks it had helped to stay afloat. Treasury Secretary Henry Paulson helped facilitate the sale of Bear Stearns to JPMorgan Chase, and advised Merrill Lynch in its sale to Bank of America.[11] In order to save Countrywide from going under, the Federal Reserve made Bank of America's acquisition of it easier by relaxing capital requirements.[12] The Federal Deposit Insurance Corporation (FDIC) seized Washington Mutual (WaMu), pursuant to its authority under the Federal Deposit Insurance Act, and sold it to JPMorgan, all without informing WaMu's managers.[13] In addition to these, there were a number of deals encouraged by government officials such as Paulson and Timothy Geithner that did not end up going through.[14]

Bank mergers are exempt from the Hart-Scot Rodino Act. Instead, the Department of Justice must share jurisdiction with the Federal Reserve, the FDIC, the Office of Thrift Supervision, or the Office of the Comptroller of the Currency. Among these four, the Federal Reserve has jurisdiction over mergers involving bank holding companies.[15] In the financial crisis, most of the large bank mergers involved bank holding companies, such as Bank of America, JPMorgan Chase,

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[10] *Id.* This might be contrasted with the European Union's contemporaneous handling of the crisis, where nationalization of the institutions was considered relatively appropriate. *See* Jonathan DeVito, *The Role of Competition Policy and Competition Enforcers in the European Union's Response to the Financial Crisis: Applying the State Aid Rules of the TFEU to Bank Bailouts in Order to Limit Distortions of Competition in the Financial Sector* (American Antitrust Institute Working Paper No. 11-01, April 14, 2011), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%20State%20Aid_0.pdf.

[11] Sorkin *supra* note 2 at 37, 353-55.

[12] *Id.* at 251.

[13] Steven M. Davidoff and David Zaring, Big Deal: The Government's Response to the Financial Crisis, 41, *available at* http://www.law.upenn.edu/academics/institutes/ile/CRTPapers/0509/Davidoff%20and%20Zaring,%20Big%20Deal.pdf.

[14] Davidoff & Zaring, *supra* note 13 at 41-42.

[15] 15 U.S.C. §§18a(c)(7), (8); *see also* Jonathan M. Rich & Thomas G. Scriven, Bank Consolidation Caused by the Financial Crisis: How Should the Antitrust Division Review "Shotgun Marriages"?, The Antitrust Source 1 (December 2008).

and Wells Fargo, and thus were subject to review from both the Federal Reserve and the Department of Justice. The following discussion will thus be limited to the procedures of the Department of Justice and the Federal Reserve.

The acquiring bank will first file an application with the Federal Reserve (or one of the other three governing agencies), which will then pass on the application to the Department of Justice's Antitrust Division. The two agencies then review the application concurrently.[16] Although both agencies employ a "structural" approach to analyzing the competitive effects of bank mergers,[17]each uses different definitions for the variables and has different procedures in place to approve a merger despite finding anticompetitive effects.

Bank Merger Review Process: Federal Reserve

The Federal Reserve adheres to the product market definitions for banking determined in *United States v. Philadelphia National Bank*, which held that the products offered by commercial banks are the "cluster" of products (various kinds of credit) and services (checking accounts, trust administration).[18] To measure concentration in this market, the Federal Reserve uses commercial bank and thrift deposits as a proxy for the "cluster" of products and services.[19] The Federal Reserve also looks to *Philadelphia National Bank* for the geographic market definitions in banking. The Supreme Court held that geographic markets for commercial banking are local areas, because consumers typically choose among banks within their vicinity.[20]

The Federal Reserve's competition analysis uses the traditional 1800/200 Herfindahl-Hirschman Index (HHI) threshold used by the Department of Justice Antitrust Division. Unless either the HHI exceeds 1800 post-merger or there is an increase greater than 200 in the HHI in any relevant bank market, the Federal Reserve is unlikely to challenge the transaction. In situations where either of these does occur, the Federal Reserve usually favors requiring divestiture of branches to reduce the HHI change to less than 200.[21] Where a merger results in the acquiring bank holding a 35% or more share of the market, the Federal Reserve would take a closer look to see if there exist any mitigating factors to counteract the anticompetitive effects of the merger.[22] The Federal Reserve will also restrict mergers where the resulting bank will hold more than 10 percent of nationwide deposits.[23] But a merger can still be approved by the Federal Reserve despite a finding of anticompetitive impact where the agency finds that impact is "clearly outweighed in the public

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[16] Rich & Scriven, *supra* note 15 at 2.
[17] Anthony W. Cyrnak, *Bank Merger Policy and the New CRA Data*, Federal Reserve Bulletin 705 (September 1998).
[18] 374 U.S. 321, 356 (1963).
[19] Cyrnak, *supra* note 17 at 706.
[20] *Philadelphia National Bank*, 374 U.S. at 358.
[21] Rich & Scriven, *supra* note 15 at2.
[22] R. Alton Gilbert & Adam M. Zaretsky, *Banking Antitrust: Are the Assumptions Still Valid*, Federal Reserve Bank of St. Louis Review 32 (November 2003).
[23] 12 U.S.C. 1831U(b)(2)(A).

interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[24]

Bank Merger Reviews: DOJ Antitrust Division

The Department of Justice's analysis of bank mergers differs in its definitions of both product and geographic markets. Unlike the Federal Reserve, the Department of Justice does not solely rely on deposits or any other single measure as a proxy for the "cluster" of products and services offered by commercial banks. Instead, the Department of Justice often looks separately at markets for products such as consumer and commercial mortgages, commercial and retail deposits, and services such as trust administration and cash management. The Department of Justice will also disaggregate product markets into customer classes, such as retail, small businesses, and individual consumers.[25]

The Department of Justice's geographic market definitions are similarly less constrained than those of the Federal Reserve. The agency uses different geographic market definitions that correspond with the different product markets. The size of the geographic market is usually positively correlated with factors such as the information costs incurred by the banks in offering products such as loans, the transaction costs for the customer to use the bank's services, and the size of the customers.[26]

Although the Department of Justice does not have a statutory "public interest" exception like the Federal Reserve, it can apply the Failing Firm Doctrine for mergers that would otherwise be blocked on competition grounds. Under the Horizontal Merger Guidelines, the firm being acquired must meet three conditions in order to be considered a "failing firm": 1) the firm "would be unable to meet its financial obligations in the near future"; 2) "it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;" 3) "it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger."[27] Banks that were struggling during the financial crisis would likely have met conditions 1) and 3), and probably condition 2) as well.[28]

Another tool the Department of Justice has is a "pocket decree", which permits a merger to close immediately but (with some limitations) allows the Department of Justice to file a consent

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[24] 12 U.S.C. 1828(c)(5)(B).

[25] Edward Pekarak & Michela Huth, *Bank Merger Reform Takes an Extended Philadelphia National Bank Holiday*, 13 Fordham J. Corp. & Fin. L. 595, 655-56, n.321-25 (*citing* Maribeth Petrizzi & Erin Carter Grace, Bank Merger Process Overview - Powerpoints, 1467 PLI/Corp 181, 204 (2005)).

[26] David S. Neill, *Geographic Market Definitions in the Antitrust Analysis of Bank Mergers*, 123 Banking L.J. 291, 297-98 (2006).

[27] U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines §11 (2010).

[28] Because of the high debt-to-asset ratios and the reliance on short-term loans, many of the banks would not be able to utilize Chapter 11 bankruptcy.[28]

decree and require a divestiture later on if it finds the merger has anticompetitive effects.[29] In situations such as the financial crisis where time is of the essence, a pocket decree could have been utilized to allow the merger to go through for the sake of maintaining overall economic stability, while leaving open the door for antitrust officials to step in should the merger eventually reveal anticompetitive effects. The downside to using pocket decrees is the risk of resistance from the merging parties, who may not want to close a transaction that could later be undone. One suggestion is to preserve the majority of the deal and separately hold the portions of the resulting bank pending further investigation from the Department of Justice.[30]

Expedited Bank Merger Review Process

Numerous mergers were being proposed to help salvage the financial industry, with a short period of time to review and approve them. Many would argue that in a potentially catastrophic situation such as this, competition policy should take a back seat so that the economy can be stabilized.[31] The bank merger statutes provide the Federal Reserve procedures for emergency situations. Under normal conditions, the Department of Justice must provide a report detailing the competitive factors involved in the merger within 30 days of receiving notice. But under the emergency procedures, the Department of Justice only has 10 days to provide the report; if one of the banks involved in the merger faces "probable failure" if the merger is not consummated, the Federal Reserve may dispense with the report on competitive factors.[32]

The Financial Crisis Mergers

There is limited information on what role competition policy played in arranging and approving the mergers as the government was trying to steer the financial industry out of crisis. Statements from the Department of Justice imply that it was involved in the review of these transactions, and that the emergency procedures allowing the Federal Reserve to dispense with the Department of Justice's report on competitive factors was not utilized. The Federal Reserve's press releases announcing the financial crisis mergers and their approval typically offered the agency's antitrust analysis, as well as a statement that the Department of Justice reviewed the merger and found no evidence of anticompetitive effects.

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[29] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies, pp. 22-23, fn. 47.

[30] *Id* at 7-8 ("There is precedent for such a solution. In 2006, the Antitrust Division permitted Mittal Steel Company to pursue a hostile takeover of Arcelor S.A. before the expiration of the HSR waiting period and the conclusion of the Antitrust Division's investigation because Mittal entered into a letter agreement with the Antitrust Division in which it agreed to divest specific assets if the Antitrust Division concluded that the acquisition was likely to result in a substantial lessening of competition. The letter agreement required Mittal to hold those assets separate while the Antitrust Division investigation was pending.")

[31] Howard Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L.J. 229 (2010) (arguing against the belief that antitrust enforcement should step aside during times of crisis).

[32] 12 U.S.C. §§1828 (c)(4)(B), 1828(c)(6).

In a note issued in February 2010 the Antitrust Division said, "In analyzing the potential effects of [the financial crisis] mergers, the Department applied the same antitrust principles and analytical framework that it applies in every merger review. . . . The Department has reviewed all of these mergers, and they have raised few competitive concerns."[33] The note states that most of the bank mergers were approved under the emergency provisions of the bank merger statutes with a five-day post-approval waiting period. The Department of Justice received prior notification of the proposed mergers, and provided comments to the regulatory agencies prior to the approval of the application.[34] The note assures that the emergency review processes are adequate, due to the availability of voluminous public information, the bank application screening system, and the announced principles for competitive review of bank mergers.[35]

Assistant Attorney General Christine Varney, in charge of the Antitrust Division at the time of the crisis, was asked about the extent to which the Department of Justice was at the table in the decision-making process when these mergers were being put together. Her response was similarly vague:

> Well I'm obviously not going to disclose what happens inside the councils of government, who's at the table and who's at what meetings. I think it's sufficient to say as you see in all of the activity that has come out of the first year and a half of the Obama administration, I think there's no lack of evidence of the administration's commitment to competition policy. It is a widely held commitment, and we are routinely involved in conversations at all levels across the government, with our sister agencies and inside the administration on how best to promote consumer welfare and competition policy and antitrust law is, in my view, extremely well represented across the government, sometimes too well represented because we get lots of requests for meetings and participation; so we're there, and we're happy to be there.[36]

Bank of America-Merrill Lynch

Bank of America announced its intentions to acquire Merrill Lynch on September 14, 2008.[37] The merger was then announced in the Federal Register on October 15, 2008,[38] and the Federal

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[33] Department of Justice, Roundtable on Competition, Concentration and Stability in the Banking Sector, January 30, 2009, at 5.
[34] *Id.*
[35] *Id.*
[36] American Antitrust Institute, "Public and Private: Are the Boundaries in Transition?" Annual Conference, Keynote Address, Christine Varney, Transcript 12-13, http://www.antitrustinstitute.org/sites/default/files/Transcript%20-%20Christine%20Varney's%20Keynote%20Address.pdf.
[37] *Wachtell, Shearman, Cravath on Bank of America-Merrill Deal*, Law.com, *available at* http://www.law.com/jsp/article.jsp?id=1202424529176&slreturn=1&hbxlogin=1.
[38] Fed. Reg. 61,130 (2008).

Reserve issued a press release announcing its approval of the merger on November 26, 2008 (The agencies took 73 days available to review the merger).[39] The Federal Reserve's HHI analysis used market deposits ("relative shares of total deposits in depository institutions in each market") as the "product", and found competition in 11 geographic markets; all of these were below the 1800/200 HHI threshold. In allowing this merger to go through, the Federal Reserve also considered the number of competitors that would remain in the markets "and other characteristics of the markets."[40]

In 2007 Bank of America held 9.6% of the nation's deposits.[41] After its acquisitions of Countrywide in June 2008 and Merrill Lynch later that year, Bank of America's share of the nation's bank deposits grew to 12.9%, exceeding the statutory cap prohibiting any bank from holding more than 10% of the nation's deposits.[42] From the fourth quarter of 2007 to the first quarter of 2009, Bank of America's market share of residential mortgages increased from 13.8% to 16.6%. Its combined assets grew by 138% during this time.[43]

PNC-National City

PNC, a regional banking franchise operating primarily in the Midwest, announced its acquisition of the Cleveland-based National City Bank on October 24, 2008.[44] The proposed merger was first announced in the Federal Register on November 5, 2008. The Federal Reserve announced its approval of the merger on December 15, 2008 (52 days after the deal was originally reported in the press, and 40 days after it was announced in the Federal Register).

According to the Federal Reserve's analysis, the merger created direct competition in 10 different banking markets. PNC's acquisition of National City was allowed to go through in five markets. Among these five, the Cincinnati, Ohio market was highly concentrated before the merger, with a resulting HHI of 2421; but because the change in concentration was small (+48, with 82 remaining competitors), the Federal Reserve did not require any divestiture.

The Federal Reserve required divestitures in two markets that were both concentrated before the merger. In the Franklin-Titusville-Oil City (Pennsylvania) market, the post-merger HHI would have been 2319, with a change of +254; following the divestiture, the HHI was 1863, with a change of -202 (nine competitors remained in the market). In the Warren County (Pennsylvania) market,

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39 Press Release, Board of Governors of the Federal Reserve System (November 26, 2008).
40 *Id.* at 4-5.
41 Cho, *supra* note 1.
42 The Federal Reserve noted that both Countrywide Bank and Merrill Lynch were chartered as federal savings banks under the Home Owners' Loan Act. 12 U.S.C. § 1461. §2(c)(2)(B) of the Bank Holding Company Act exempts federally chartered savings banks from the definition of "bank". Thus, the Federal Reserve reasons, the statutory cap prohibiting a bank from holding more than 10% of the nation's deposits do not apply. Press Release, Board of Governors of the Federal Reserve System (November 26, 2008), fn. 13.
43 *Id.*
44 *PNC to Buy National City for $5.2 Billion*, DealBook, *available at* http://dealbook.nytimes.com/2008/10/24/pnc-to-buy-national-city-for-52-billion/

the pre-divestiture HHI would have been 4766 with a change of +871; post-divestiture, the HHI was 2779, with a change of -117 (five competitors remained in the market).

At the time of application, PNC had already made commitments to divest 61 National City branches, which accounted for approximately $4 billion in deposits across five different geographic markets in the state of Pennsylvania. Of these five, the Federal Reserve found that three required a more detailed review. The Federal Reserve concluded that the merger did not have competitive effects requiring further divestitures in these three markets despite high levels of resulting concentration, finding that in each case there existed mitigating factors (including the presence of credit unions, thrift institutions, and ease of entry).[45]

The merger resulted in PNC becoming the largest bank in Pennsylvania, Ohio, and Kentucky, and the second largest bank in Maryland and Indiana. PNC doubled its size after acquiring National City and increased the amount of deposits held to $180 billion, making it the fifth largest bank in the United States.[46]

Wells Fargo-Wachovia

Wells Fargo's acquisition of Wachovia was announced on October 3, 2008.[47] The Federal Reserve board approved the application to merge on October 12, 2008. It announced its approval of the merger a mere nine days later, and 18 days after the deal was initially announced. The press release acknowledges "the unusual and exigent circumstances affecting the financial markets", as well as Wachovia's financial instability. In light of this, the Federal Reserve "determined … that emergency conditions existed that justified expeditious action on this proposal", and cited the statutory exceptions allowing for a shortened or eliminated notice and comment period.[48]

The Federal Reserve found that Wells Fargo and Wachovia competed in 49 geographic markets. Of these, Wells Fargo committed to making divestitures in six markets, including complete divestitures of the acquired branches in three markets. These divestitures account for $1.46 billion.[49]

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[45] Press Release, Board of Governors of the Federal Reserve System (December 15, 2008); the Department of Justice also issued a press release, stating "the Department reviews proposed bank mergers to ensure that, consistent with the Nation's antitrust laws, they do not harm consumers by reducing competition substantially" and that this particular merger "would not have a significantly adverse effect on competition in local markets for retail banking, small business banking and middle market banking services." Press Release, Department of Justice (December 11, 2008).
[46] *PNC to Acquire National City, Doubles in Size*, PNC Financial Services Group, Inc. Press Release, *available at* https://www.pnc.com/webapp/unsec/NCProductsAndService.do?siteArea=/PNC/Home/About+PNC/PNC+to+Acquire+National+City+Corporation&WT.ac=NATCITY_1008_P_LN
[47] *Wells Fargo to Buy Wachovia in $15.1 Billion Deal*, DealBook, *available at* http://dealbook.nytimes.com/2008/10/03/wells-fargo-to-merge-with-wachovia/
[48] Press Release, Board of Governors of the Federal Reserve System (October 21, 2008) at 2 , *citing* 12 U.S.C. §§ 1842(b)(1) and 1843(i)(4).
[49] *Id.* at 11-12

Of the 49 geographic markets that were reviewed by the Federal Reserve, seven were found to warrant "special scrutiny" because of high levels of concentration exceeding the 1800/200 HHI threshold.[50] The Federal Reserve did not require any further divestitures in these seven markets because of mitigating factors, such as ease of entry, and a high number of competitors with significant presence in the market. The Federal Reserve was also persuaded that the competitive influence held by community credit unions had a mitigating effect on the high levels of concentration.[51] The Federal Reserve's analysis provided adjusted HHI figures accounting for the presence of community credit unions. In all markets the adjusted resulting change in HHI was above the 200 points, ranging from 294 to 628. The adjusted HHI figures ranged from 1644 to 2149. The market shares in these geographic areas range from 26.6% to 40.7%, and 25.6% to 36.7% after adjusting for the presence of community credit unions.[52]

Prior to the merger, Wells Fargo and Wachovia were the fifth and third largest depository organizations in the county, respectively. After the merger, Wells Fargo became the second largest in the country, with total assets of approximately $1.37 trillion.[53] From June 2007 to March 2009, its combined assets grew by 43%. Wells Fargo's market share of loans issued increased from 6.1% in 2007 to 14.3% in 2009, and its market share of deposits increased from 4.4% in 2007 to 11% in 2009. The last figure was cause for concern, as the combined entity was close to being above the nationwide deposit cap of 10% at the time of a merged entity's consummation.[54]

Was Competition Policy a Factor in the Merger Review Process?

Press Releases

The Federal Reserve's press releases offer detailed overviews of their analyses of the competitive effects of these mergers. In the case of the PNC-National City merger, the Federal Reserve took a relatively aggressive approach to enforcing competition policy by requiring further divestitures. But the Bank of America-Merrill Lynch and Wells Fargo-Wachovia mergers were approved without requiring further divestitures, despite creating more market concentration. One could speculate that because of their size and national prominence, Bank of America and Wells Fargo held more political clout and were able to use that to negotiate more favorable terms with the government.

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[50] *Id.* at 12.
[51] *Id.* at 13-21.
[52] *Id.*
[53] *Id.* at 3.
[54] *Id.* at 5-11.

The Department of Justice's role in this is more difficult to discern. The press releases announcing the Federal Reserve's approval of the mergers all include the same statement regarding the Department of Justice's analysis:

> The [Department of Justice] also has reviewed the proposal and has advised the Board that it does not believe that the proposal would likely have a significant adverse effect on competition in any relevant banking market at this time. The appropriate federal supervisory agencies have been afforded an opportunity to comment and have not objected to the proposal.[55]

It would be easy to dismiss this as a blanket statement pasted into the press release to avoid criticism that the Department of Justice did not play a role in the review of these mergers. But previous press releases approving mergers consummated well before the financial crisis show that the Department of Justice's analysis typically is not included in detail beyond this vague statement.[56] Aside from this and the Department of Justice's prior statement that it was involved in the merger review process,[57] there is little evidence that the Department of Justice played a meaningful role in analyzing these mergers for competitive effects.

Competitive Effects of the Mergers

The other way we might infer the presence of competition advocacy is by looking at the mergers' effects on competition. The presence of anticompetitive effects in the aftermath of a merger would hint at the lack of competition advocacy in the merger review process. Thus far, the results of the emergency mergers is unclear. On a national level, there appears to be some cause for concern. A study conducted by the Federal Reserve Bank of Dallas revealed that after the crisis, Wells Fargo, Bank of America, and J.P. Morgan Chase held three-quarters of the deposit market across the country. From 2007 to 2009, Wells Fargo went from holding 6.1% of the market share of residential mortgages to 14.3%. Similarly, J.P. Morgan Chase and Bank of America went from holding 6.0% and 13.8% to 10.9% and 16.6%, respectively. These banks all saw marked increases in the share of bank deposits held from 2007 to 2009. Prior to the mergers, Wells Fargo, J.P. Morgan Chase and Bank of America held 4.4%, 7.0% and 9.6% of the nation's deposits, respectively. In 2009, those percentages were at 10.0%, 11.0% and 12.9%, respectively. Furthermore, the top four banks' income from service charges on deposit accounts increased by an average of 8 percent. By contrast, smaller banks on average collected 12 percent less in similar fees, arguably because they were striving to stay competitive by lowering their fees.[58]

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[55] *Supra* note 36 at 14; *supra* note 40 at 21; *supra* note 44 at 21.
[56] *See, e.g.*, JPMorgan Chase-Bank One 15 (June 14 2004); WestStar Bank-Superior Federal Bank (August 3, 1998).
[57] *Supra* note 32 & 33.
[58] *Supra* note 1.

But antitrust law looks at bank mergers at the local market level. A study by David Wheelock shows that from 2006 to 2010, there was little change in the average level of concentration in local banking markets, even in markets where bank regulators assisted in merging large banks, such as Wachovia and Wells Fargo, and National City and PNC, suggesting that the divestitures were successful in maintaining competition in those local markets.[59] However, Wheelock's study also shows that deposit concentration continued to increase during this time at the level of the U.S. census region, continuing the trend that began in the mid-1980's into the latest financial crisis.[60]

Earlier, we referred to the "current antitrust paradigm" saying that under this paradigm, the financial crisis does not seem to be the result of poor antitrust enforcement. It is time to elaborate on this by explaining the limitations of the paradigm. The paradigm, as reflected in the Guidelines and in practice, rests on definitions of the "relevant antitrust market," and whether a merger is likely to cause a significant diminution of competition within such a market. When a bank whose branches are in the east mergers with one whose branches are in the west, there is no reduction of competition unless the two banks happen to have some overlapping branches in the Midwest. When a bank acquires an insurance company or a brokerage, there is probably no geographic market in which competition is reduced, since different products are involved. Antitrust enforcers do not pay attention to whether a bank merger increases the absolute size of a bank and they do not worry about aggregate shares of financial assets because these mix applies and oranges and do not reflect diminished competition in particular markets. If the antitrust enforcers took a different position, they would be bucking long-established precedents for interpreting the Clayton Act and would likely lose in court.

Possibly the law itself should be changed, although there is no consensus on what form a devised Clayton Act should take. But the fact that antitrust enforcement did not stop a small number of giant firms from being created prior to the financial crisis should not keep us from applying the competition perspective within a regulatory environment, to the extent feasible.

How to Ensure Competition Policy Plays a Role "Next Time"

The first step in ensuring that competition policy plays a role when the government is confronted with a financial crisis to accept that there will likely be another economic crisis at some point in the future that will require important decisions to be made under emergency conditions, potentially requiring mergers to be completed in a limited amount of time. In 2008-09, one had the sense that there was no plan in place. Establishing a role for competition policy to play in the future

[59] David C. Wheelock, Banking Industry Consolidation and Market Structure: Impact of the Financial Crisis and Recession, Federal Reserve Bank of St. Louis Review, November/December 2011, 419, 437.
[60] *Id.* at 431-37.

requires finding a balance between advocacy and flexibility.[61] The government must be able to sufficiently address the on-going crisis while remaining aware of potential competition issues. Some observers suggest the use of forward-looking remedies, such as post-consummation monitoring and pocket decrees, to allow an expedited merger to go through while providing antitrust officials the opportunity to step in if anticompetitive effects later arise.[62] But in situations where the acquiring firm needs the government to prod it into the deal (such as the recent financial crisis), the specter of continued regulatory oversight could potentially be a roadblock to closing. Smaller divestitures at the time of the deal's approval that intentionally assist potential competitors to grow may be preferred. This may require the government to provide loans or other financial incentives to smaller companies, so that they can be part of the solution.

To achieve the balance between advocacy and flexibility, an antitrust official should be given a "seat at the table" when the government is assembling these mergers. By being present during critical decisionmaking, this official will be in a position to advise, for example, whether less competitive alternatives are realistic and whether some are conditions are necessary to preserve competition in the aftermath of the merger. This is not to say that the antitrust official "at the table" should impact every merger that goes through. In the recent financial crisis, it is unlikely that an antitrust official would have been able to block an anticompetitive merger given how rarely successful such challenges are under normal circumstances. But the presence of an antitrust official will provide greater assurance that competition is being protected by alerting the other government regulators of the potential anticompetitive effects of such mergers and explaining to them the full range of options to mitigate or avoid them. The official could come from either the Federal Trade Commission or the Department of Justice; Senate confirmation could be a requirement, if there are concerns that the appointed official would be "getting in the way" of the recovery or that he or she would simply be ignored by other officials or regulators.

The Horizontal Merger Guideline's Failing Firm Doctrine and the emergency bank merger procedures represent an acknowledgment that compromises to the accepted antitrust standards may occasionally be necessary to save an industry, or possibly even the economy, in times of crisis. For an antitrust official to be able to effectively advocate competition policy in a crisis, Congress should establish a more general set of guidelines setting forth the values that should be prioritized during such times. Preservation or restoration of a competitive market in the aftermath of the merger would be on the list; the guidelines could also include a general objective of avoiding perpetuation of the conditions that led to the crisis in the first place. Such guidelines need not lay out specific

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[61] Shelanski, *supra* note 30 at 237.
[62] *Id.*; *see also* Rich & Scriven, *supra* note 15.

thresholds for achieving these goals (such as the 1800/200 HHI), but should instead simply define the tools and remedies available.[63]

Conclusion

Although the absence of antitrust enforcement was not a cause of the crisis (some would disagree on the theory that antitrust philosophy was too cramped), the government's role as "deal maker" was one where competition advocacy should have been present. Aside from the assurances of the Department of Justice that it reviewed the mergers consummated during the financial crisis, there is little evidence to suggest that competition policy was advocated for in the government's facilitation of the recovery. In the aftermath of the crisis, these mergers have left the banking industry far more concentrated than before. In addition to antitrust concerns, many argue that this has left the industry vulnerable to the same problems that caused the crisis in the first place.[64] Regardless of whether we see another financial crisis or one in another industry, it is important that competition policy be prepared to play a role in the recovery process.

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[63] The Dodd-Frank Act established the Financial Stability Oversight Council ("FSOC") to monitor the practices of large financial institutions for excessive risks. The Council consists of regulators from various financial industry regulators, such as the Department of Treasury, and the Securities and Exchange Commission. Section 121 of the Dodd Frank Act allows the FSOC to break up a financial institution when it believes the financial institution poses a "grave threat" to the financial stability of the economy. Not surprisingly, the FSOC does not seem to take into consideration competition policy in making such determinations. It is instead more concerned with the financial practices of the large banks, as opposed to their structure. Guidelines to be followed in assembling emergency mergers should consider both the practices of the financial institutions and the resulting effects on competition.

[64] Johnson & Kwak, *supra* note 2.