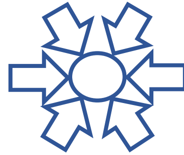
Bank Mergers, Bank Survival, Market Concentration, Economic Opportunity, and Financial Stability: An Analysis of Merger Policy Under Current Market Conditions



Federal Financial Analytics, Inc.
2101 L Street, NW
Washington, D.C. 20037

www.fedfin.com

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- Banks that do not safely make enough money to reward investors are banks that cannot survive.
- Mid-sized banks are directly challenged by concentrated giant-bank and unregulated nonbank competitors, including tech platforms. They thus must have economies of scope and scale to innovate, compete, serve key communities, and even survive.
- Not all bank mergers are safe and sound bank mergers, but arbitrarily limiting mid-sized bank mergers will solidify the domination of the banking sector by a small number of giant banks and nonbanks such as tech-platform companies.
- Academic and regulatory research on the impact of bank mergers does not substantiate many fears that mid-sized mergers will lead to adverse community service, competitiveness, or financial stability consequences.
- Baseline-scenario outcomes based on current bank-merger policy: Fewer banks and more failures, greater giant-bank concentration, and more rapid product migration outside regulated banking leading to product commoditization based on economies of scale and scope that disadvantages LMI/community opportunity and leads to slower macroeconomic growth.
- Severely-adverse scenario outcomes based on proposed merger policy: Higher systemic risk, fewer and even bigger banks, boom-bust cycles, and monopolization and even ossification that undermines innovation, financial stability, and macroeconomic dynamism.

Many advocates and policy-makers today know that they do not like big-bank mergers. What they do not know is what they would like instead.

If banks are to stay close to home and know their individual customers as they once did, then banks will need to make a market rate of return when they do. Banks that do not satisfy investors are banks that do not survive over the long-term. Bank investors, like investors in any other company, will move their money if there is more of it to be made elsewhere. Fewer bank investors mean fewer banks, far bigger banks, considerably more systemic risk, and higher barriers to economic opportunity and equality.

Current and proposed bank-merger policy presumes that all but the simplest and smallest of bank mergers are problematic. This presumption is premised on expectations that leaving the competitive landscape as is for banks will somehow ensure that the big-four U.S. banks now dominating retail finance will somehow lose market power and many nonbanks now actively cherry-picking key banking business lines will think better of it.

Bank-merger policy now also assumes that organic growth achieved without merger or acquisition will suffice for small and mid-sized banks, and that the very largest banks will somehow shrink and someone will do something about giant tech-platform companies and other nonbank financial intermediaries (NBFIs) that effectively substitute for and even transform banks in part because they offer the same services without anything close to the same regulatory burden.[1]

The Director of the Consumer Financial Protection Bureau (CFPB), Rohit Chopra, has said that bank mergers are launched only to "make more money."[2] This, he suggests, is an ignoble strategy. But what if a target bank that is not acquired loses lots of money?

Director Chopra goes on to posit a U.S. policy preference for organic growth. However, banks that put themselves up for sale are likely banks that have determined that organic growth will not save their franchises because the economies of scope and scale essential for organic growth are out of reach without a merger. Are they just wrong?

There is no question in both policy and law that bank mergers must benefit communities. However, policy and law also stipulate that bank-merger policy must promote safety and soundness along with financial stability. As this paper will demonstrate, merger policy premised on what may well be an anachronistic archetype of small-town banking puts smaller and mid-sized banks at grave risk.[*] The facts demonstrate the challenge of organic growth for all but the largest banks: on one hand, the largest two banks in the U.S. are *growing* their assets at a rate that equals the assets held by all of the next largest mid-sized banks.[3] On the

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[1] Viral V. Acharya, Nicola Cetorelli, and Bruce Tuckman, "Where Do Banks End and NBFIs Begin?" *National Bureau of Economic Research (NBER)* Working Paper 32316, (April, 2024) https://www.nber.org/system/files/working_papers/w32316/w32316.pdf.

[2] National Community Reinvestment Coalition (NCRC), "Video: CFPB Director Rohit Chopra At The 2024 Just Economy Conference" (April 3, 2024), https://www.ncrc.org/video-cfpb-director-rohit-chopra-at-the-2024-just-economy-conference/.

[*] This paper defines mid-sized banks as banking organizations from $10 billion in assets (below which are community banks) to those with less than $750 billion in assets (above which are the very largest banks that at the bank or parent-company level are generally designated GSIBs).

[3] JPMorgan Chase & Co., "4Q19 Earnings Supplement," (January 14, 2020), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2019/4th-quarter/4q19-earnings-supplement.pdf; JPMorgan Chase & Co., "1Q24 Earnings Press Release," (April 12, 2024), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2024/1st-quarter/6678012b-9242-492b-acd0-1473eabade3c.pdf; Bank of America, "4Q19 Bank of America Supplemental Information" (January 15, 2020), https://d1io3yog0oux5.cloudfront.net/_9a3970a4f5087378dd6e33f1131bed65/bankofamerica/db/806/7016/supplemental_information/4Q19_Supplemental_Package.pdf; Bank of America, "Supplemental Information First Quarter 2024" (April 16, 2024) https://d1io3yog0oux5.cloudfront.net/_9a3970a4f5087378dd6e33f1131bed65/bankofamerica/db/806/10044/supple

other, once a bank charter disappears, it is most unlikely to be replaced by a new entrant – in 2023, there were only four new, active de novo deposit insurance charters granted in the U.S.,[4] averaging $76.2 million in assets,[5] nowhere near enough to compete with banks topping $4.1 trillion[6] or giant tech-platform companies offering payment services[7] or asset managers holding as much as $10.5 trillion in products that often look a lot like savings accounts to many retail investors.[8]

This paper assesses current bank-merger policy as practiced by the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board (FRB or Fed), and the Department of Justice (DOJ). We also assess merger-policy rewrites from the OCC[9] and FDIC,[10] as well as the uncertain status of the FRB's policy and new guidelines from DOJ and the Federal Trade Commission.[11] [*] Pending merger policy could in fact lead to the continuing erosion of smaller banks made still more costly by a heightened number of bank failures, still greater market dominance by the top four banks, and a still more

mental_information/The+Supplemental+Information_1Q24_ADA.pdf; PNC Financial Services Group, Inc., "Q1 2024 Earnings Release" (April 16, 2024) https://d1io3yog0oux5.cloudfront.net/_241f7a31ff3f204c58cb685da4b93659/pnc/db/2250/21495/earnings_release/1Q24+Earnings+Release_Final.pdf; Truist Financial Corporation, "Truist Reports First Quarter 2024 Results" (April 22, 2024) https://ir.truist.com/2024-04-22-Truist-reports-first-quarter-2024-results; and US Bancorp, "Earnings Release (1Q24)" (April 17, 2024) https://ir.usbank.com/files/doc_financials/2024/q1/Q1-2024-Earnings-Release.pdf.

[4] Federal Deposit Insurance Corporation (FDIC), "Bank Application Actions," (accessed May 31, 2024), https://www.fdic.gov/regulations/applications/rmsbankapp/result.html?start_date=01%2F01%2F2023&end_date=12%2F31%2F2023&date_range_type=1&applicant_name=&ddlstate=&applTypes_hidden=7&applTypes_desc_hidden=Deposit+Insurance+-+New+Bank&cert=&ddlaction=1&action_desc_hidden=Approve.

[5] Federal Financial Institutions Examination Council (FFIEC), "Nova Bank - Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $5 Billion - FFIEC 051" (March 31, 2024) https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=59326&date=03312024; FFIEC, "Nave Bank - Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $5 Billion - FFIEC 051" (March 31, 2024) https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=59324&date=03312024; FFIEC, "Zenith Bank & Trust - Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $5 Billion - FFIEC 051" (March 31, 2024) https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=59318&date=03312024; and FFIEC, "Icon Business Bank - Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $5 Billion - FFIEC 051" (March 31, 2024) https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=59314&date=03312024.

[6] JPMorgan Chase & Co., "1Q24 Earnings Press Release," (April 12, 2024), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2024/1st-quarter/6678012b-9242-492b-acd0-1473eabade3c.pdf.

[7] Consumer Financial Protection Bureau (CFPB), "Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications," 12 CFR 1090 (November 7, 2023), https://files.consumerfinance.gov/f/documents/cfpb_nprm-digital-payment-apps-lp-rule_2023-11.pdf.

[8] Blackrock Inc., "1Q24 Earnings Release," (April 12, 2024), https://s24.q4cdn.com/856567660/files/doc_financials/2024/Q1/BLK-1Q24-Earnings-Release.pdf.

[9] Office of the Comptroller of the Currency (OCC), "Business Combinations Under the Bank Merger Act: Notice of Proposed Rulemaking," *Federal Register* 89 no 30 (February 13, 2024), https://www.occ.gov/news-issuances/federal-register/2024/89fr10010.pdf.

[10] FDIC, "Request for Comment on Proposed Statement of Policy on Bank Merger Transactions," *Federal Register* 89 no 77 (April 19, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-19/pdf/2024-08020.pdf.

[11] U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), "Merger Guidelines," (December 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[*] Note: As shall become clear, this paper does not presume that all aspects of current or proposed merger policy have adverse effect; in fact, several restrictions on bank mergers and those to come are both overdue and essential.

significant and systemic role for the NBFIs once less-politely called shadow banks that now hold a significantly higher share of U.S. financial assets than regulated banks.[12]

As the International Monetary Fund (IMF) has found,[13] many banks have been unable to diversify their income streams and must thus resort to "partnerships" with fintechs. In these arrangements, smaller banks essentially allow themselves to be cannibalized in order to gain a new revenue stream that might well have been possible under bank, consumer-protection, and interest-rate standards if mergers-and-acquisitions were feasible under current U.S. policy.

A survey of the literature on fintech and bank competition conducted by global bank regulators finds that fintechs indeed take market share from all banks but the largest incumbent institutions able to use their formidable resources to avoid these "partnerships" that turn smaller banks into little more than fintech-service providers.[14] As a recent case (Synapse) has demonstrated anew, these arrangements also put consumers at risk because fintech relationships with banks may convey the impression that a consumer's funds are backed by FDIC insurance when this is not in fact the case for the consumer's funds unless those funds are held by a bank and the bank fails.[15] What happened in the Synapse case was a fintech failure, not that of its partner banks, leaving consumers behind unless or until complex account reconciliation finds something left over for them.

This paper[*] thus looks hard at merger policy and, deploying a scenario-analytic methodology, finds that the de facto ban on all but the simplest and smallest bank mergers already embodied in merger policy that could be codified and heightened in pending proposals would have a raft of perverse consequences. These would result in still more concentration of banking services in a few big banks and nonbanks, force more activities outside systemic-risk guardrails, and adversely affect vulnerable communities and consumers. Indeed, in the severely-adverse scenario, we find significant and adverse results are also likely for national resilience and macroeconomic growth.

Importantly, we do not assert that all bank mergers are sound bank mergers. Sound mergers must be judged on criteria such as the ability of an acquirer seamlessly and quickly to integrate the target bank into its operations, the combined bank's ability to meet the convenience and needs of its communities, and the ability of the combined bank to have the sustained profitability, robust capital, and operational resilience to withstand even acute stress. Deals that pass rigorous muster are deals that make the regulated U.S. banking system stronger.

- In 2023, there were only four new, active de novo deposit insurance charters averaging $76.2 million in assets, nowhere near enough to compete with banks topping $4.1 trillion or giant tech-

[12] Financial Stability Board (FSB), "Global monitoring report on non-bank financial intermediation 2023," (December 18, 2023), https://www.fsb.org/wp-content/uploads/P181223.pdf.
[13] Sami Ben Naceur et. al. "Is FinTech Eating the Bank's Lunch?" *International Monetary Fund (IMF) Working Papers,* (November 17, 2023) https://www.imf.org/en/Publications/WP/Issues/2023/11/18/Is-FinTech-Eating-the-Bank-s-Lunch-540817.
[14] Hein Bogaard et al., "Literature review on financial technology and competition for banking services," *Basel Committee on Banking Supervision Working Paper 43*, (June 7, 2024) https://www.bis.org/bcbs/publ/wp43.htm.
[15] Yuliya Chernova, "Why the Synapse Bankruptcy Has the Fintech World on Edge," *Wall Street Journal*, (July 15, 2024) https://www.wsj.com/articles/why-the-synapse-bankruptcy-has-the-fintech-world-on-edge-f83cbe6d.
[*] This paper represents the views of Federal Financial Analytics, Inc. Funding was provided by The PNC Financial Services Group, Inc. FedFin retained editorial control and takes full responsibility for all views and methodologies presented.

platform companies offering payment services or asset managers holding as much as $10.5 trillion in products that look a lot like savings accounts to many retail investors.

- A Basel Committee survey finds that fintechs take market share from all banks but the largest incumbent institutions.
- The IMF finds that all but the largest banks have been unable to diversify their income streams.

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I. Banking As We Know It And Need It

A. Why Making Money Matters to Sound Merger Policy

Before turning to current merger-policy factors and how these influence banking-system outcomes, it is important to assess a key assumption on which this analysis is founded: banks that do not make money are no longer viable charters delivering essential financial services to communities of all sizes, prosperity levels, and product requirements. This assumption may not hold if, as some suggest, the U.S. banking system was comprised of a few indispensable providers governed much like electric utilities. This has never been U.S. policy, but CFPB Director Chopra has said that, "It's [banks] as essential to our lives as the electricity grid or our roadways."[16] It should be noted that utilities are drastically different from banks in many ways, but they nonetheless must make money to survive.

It is thus an indisputable fact that banks, even if radically redesigned, must satisfy investor demand. Banks that do not make sufficient income to entice investors are banks with fragile market capitalization posing a significant safety-and-soundness risk. Sometimes these risks redound only to the harm of the communities a bank serves, but sometimes – indeed, all too often – safety-and-soundness risk morphs into systemic threats contained only at great cost to taxpayers or, worse, not contained at all.

Postponing bank acquisitions until a once-viable bank has failed and landed in FDIC receivership destroys not just investor value, but also regulated finance serving communities that might well not receive essential banking services after the FDIC simply closes a bank down or sells the failed bank's skeleton at a distressed valuation that is costly to other banks and to taxpayers.[17] These failures also result in still more banking concentration and a larger role for nonbanks outside the reach of many of the rules governing banks that ensure fair competition and market access (see below).

Quite simply, even if banks have robust regulatory capital, liquidity, and supervisory ratings, when investors lose confidence in them, depositors flee and risk rises. It takes only memories of the "meme-stock" markets in 2021 to see how companies with otherwise-strong franchises can be brought close to failure when investor sentiment turns against them.[18]

Bank regulatory policy in fact recognizes the risk that market sentiment poses to bank safety and soundness, frequently using threats to market confidence due to "reputational risk" as a criterion for both regulatory and supervisory policy.[19] Bank regulation and supervisory policy also recognizes the importance of earnings as a buffer against short- and long-term risk. The "CAMELS" supervisory ratings consider issues subject to express regulation such as capital, asset quality, management, liquidity, and

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[16] CFPB Director Rohit Chopra, "Prepared Remarks of CFPB Director Rohit Chopra at the National Community Reinvestment Coalition," (April 4, 2024) https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-national-community-reinvestment-coalition/.

[17] FDIC, "Special Assessment Pursuant to Systemic Risk Determination," *Federal Register* 88 no 228 (November 29, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-29/pdf/2023-25813.pdf.

[18] Securities and Exchange Commission (SEC), "Staff Report on Equity and Options Market Structure Conditions in Early 2021," (October 14, 2021) https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf.

[19] Comptroller of the Currency Thomas J. Curry, "Remarks Before the Eighth Annual Community Bankers Symposium," (November 9, 2012) https://www.occ.gov/news-issuances/speeches/2012/pub-speech-2012-161.pdf.

sensitivity (i.e., risk tolerances). However, the "E" stands for earnings, which supervisors assess because without earnings investors deem to suffice, banks fail.

The link between robust market capitalization and bank viability is so strong that a senior official at the Bank of England has suggested making it an addition or even alternative to traditional regulatory-capital measures.[20] Former U.S. Treasury Secretary Summers also co-wrote a research paper substantiating the importance of market capitalization to safety and soundness.[21]

Given this, we now turn to an overview of banking-industry profit drivers to provide context for our findings about how different merger-policy decisions affect franchise value and, thus, the viability of banks of different sizes. Mergers are not always the answer, but mergers intended to enhance franchise value that do not threaten further weakness, fair competition, or community service may well be.

- If investor sentiment changes, depositors leave or even flee and a bank's market capitalization erodes, sometimes to the point of failure.
- Sound mergers can arrest investor concern, restore franchise value, and secure continuing community service.
- Bank regulatory policy rightly recognizes the risk that market sentiment poses to bank safety and soundness. Baseline and severely-adverse scenario policy fails to do so.

B. How Banks Make Money

Banking has long been the business of "financial intermediation," that is the business of gathering deposits and making loans. As the quarterly analyses of bank profitability issued by the FDIC make clear,[22] banks depend on net interest income (NII) derived from the net interest margin (NIM) banks wrest from the difference between the cost of funding and the return provided by loans or other assets. Importantly, banks are limited in the investments they are allowed to make, with these generally restricted to government obligations because most commercial investments are prohibited and holdings in other banking organizations must remain small to avoid a determination of "control" – i.e., a de facto merger.[23]

Larger banks are also required to hold significant balances of "high-quality liquid assets" (HQLAs) principally comprised of government obligations[24] to meet various liquidity regulations.[25] As a result, bank investments do not match the breadth allowed for nonbank financial competitors, generally earning

[20] Andrew G Haldane, "Capital Discipline," *Remarks before the American Economic Association, Denver, Colorado*, (January 9, 2011), https://www.bis.org/review/r110325a.pdf.
[21] Natasha Sarin and Lawrence H. Summers, "Have big banks gotten safer?" *Brookings Papers on Economic Activity*, 57-109 (Fall, 2016), https://www.brookings.edu/wp-content/uploads/2017/02/sarintextfall16bpea.pdf.
[22] FDIC, "Quarterly Banking Profile – First Quarter 2024," (May 29, 2024) https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2024mar/qbp.pdf#page=1.
[23] Bank Holding Companies, 12 U.S.C. 1841 (2022), https://www.govinfo.gov/content/pkg/USCODE-2022-title12/pdf/USCODE-2022-title12-chap17-sec1841.pdf.
[24] FDIC, Board of Governors of the Federal Reserve System (FRB), OCC, "Liquidity Coverage Ratio: Liquidity Risk Measurement Standards," *Federal Register* 79 no 197 (October 10, 2014), https://www.occ.treas.gov/news-issuances/federal-register/2014/79fr61440.pdf.
[25] FDIC, FRB, OCC, "Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements," *Federal Register* 86 no 27 (February 11, 2021), https://www.occ.gov/news-issuances/federal-register/2021/86fr9120.pdf.

a lower return due not only to the safety of permissible investments, but also the regulatory-capital buffers required even for no-risk U.S. Treasury obligations.[26]

Until recent years, funding for loans and the other assets banks hold came largely from deposits. Banks now fund themselves not only from deposits, but also from selling debt into the capital markets and from advances (i.e., loans) from Federal Home Loan Banks (FHLBs). Smaller banks are generally unable to access the capital markets in a cost-effective way because their scale of bond issuance is too low.

As interest rates rise, the NIM widens and banks become more profitable, but this is only the case if funding costs do not match or exceed the interest-rate increases banks can charge on their loans or receive from other assets. This has proved increasingly difficult since the Federal Reserve sharply raised rates beginning in March of 2022 because many banks had so many long-term assets acquired when rates were low over the past thirteen years.

The extent to which funding costs exceed asset returns is a major profit consideration, and it is also a safety-and-soundness risk if, as was the case at Silicon Valley Bank and other 2023 failures,[27] banks fail to anticipate low-cost funding shortfalls and cannot liquidate low-yield assets without so much adverse cost as to jeopardize solvency. The longer rates stay high, the harder it will be for banks – especially smaller ones without access to capital-market funding – to generate acceptable NIM with appropriate liquidity resilience even as portfolios of low-cost assets begin to run off.

The advent of NBFIs also challenges this bank funding model by virtue of making it harder for banks to attract low-cost deposits or charge loan rates sufficient to absorb not only funding costs, but also those due to the regulatory capital and other standards that sharply increase the cost for banks offering like-kind lending or other products in which they compete with NBFIs.[28]

Low-cost deposits are challenged because large-balance depositors have options other than keeping their money in the bank when interest rates rise. More affluent depositors can and indeed do invest in money-market funds (MMFs) and mutual funds, with mutual funds focused on corporate loans – i.e., "bond funds" – essentially supplanting the deposit/loan intermediation nexus with an investment-based model largely outside the reach of safety-and-soundness rules and completely immune from the community-service obligations that bind banks (see below).

Wealthier customers who once held their funds in bank deposits or gave banks funds to manage for them (a source of the fee income discussed below) now can easily move deposits and invest not only in MMFs and investment funds, but also in the global equity and debt market made still more easily and inexpensively available to them via index-funds, exchange-traded funds, and similar vehicles. These may well invest in banks and thus provide funding, but funding that demands competitive yield and can move out of a bank in a moment following basis-point interest-rate shifts or altered market conditions. As a

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[26] Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) § 201, 12 U.S.C. 12 (5371) (2022), https://www.govinfo.gov/app/details/USCODE-2022-title12/USCODE-2022-title12-chap53-subchapI-partC-sec5371.

[27] FRB, "Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank," (April 28, 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf.

[28] Anna Kovner and Peter Van Tassel, "Evaluating Regulatory Reform: Banks' Cost of Capital and Lending," *Federal Reserve Bank of New York,* Staff Report 854, (July 2020), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr854.pdf?sc_lang=en.

recent Federal Reserve study made clear,[29] the more funds move outside the banking system into NBFIs subject to acute flight risk without regulatory buffers, the greater the threat to financial stability.

NBFIs now also originate private credit and often package it into loans, with this sector standing at $1.6 trillion compared to the total portfolio of bank commercial-and-industrial loans of $2.8 trillion.[30] Business development companies (BDCs) are another form of nonbank commercial lending, with assets now totaling about $300 billion.[31] The competition from private-credit funds and BDCs is unsurprisingly most damaging to mid-sized banks,[32] precisely because these nonbank lenders target mid-sized corporate borrowers[33] which have long been the bread-and-butter business of mid-sized banks.[34]

Other data also show the sharp transformation of banking as technology changed and regulation redefined bank competitiveness. As a recent paper documents,[35] the balance-sheet share of overall private-sector lending in the U.S. has declined from sixty percent for banks in 1970 to 35 percent in 2023. As a share of savings, deposits dropped from 22 to thirteen percent over this same period while loans, once seventy percent of bank balance sheets, now account for little more than half.

One reason behind this radical realignment in the business of banking is the growing importance of fee income as a vital earnings driver. Fee income comes from activities usually viable only in bigger banks such as holding funds in trust or custody for others, credit- and debit-card transactions, other fees associated with customer service, underwriting loans or client capital market activities such as initial public offerings, and certain other sources. Importantly, fee income does not come with the capital and liquidity costs engendered by the bank-only rules briefly cited above, but the activities that are fee-related income sources are still subject to capital requirements designed to capture "operational risk," that is risks due to human error, fraud, natural disasters, and similar events. This capital charge is set for a major increase under the capital rules recently proposed by the banking agencies.[36]

Finally, larger banks and certain other specialized banking organizations make money by offering advisory services related to large transactions and by trading – i.e., engaging in the financial markets for their own account to the extent permitted by rule. This is of course an activity that requires considerable expertise

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[29] Anni T. Isojaervi and Sam Jerow, "Inequality and financial sector vulnerabilities" *FRB FEDS Notes*, (April 19, 2024), https://doi.org/10.17016/2380-7172.3482.

[30] SEC Chair Gary Gensler, "Jack Bogle, Haystacks, and Putting the Interest of the Clients First," *Prepared Remarks Before the 2024 Conference on Emerging Trends in Asset Management*, (May 16, 2024), https://www.sec.gov/news/speech/gensler-etam-051624.

[31] Evan M. Gunter, "Credit Trends: Business Development Companies' Assets Provide A Glimpse Into the Private Credit Market," *S&P Global* (October 2, 2023) https://www.spglobal.com/ratings/en/research/articles/231002-credit-trends-business-development-companies-assets-provide-a-glimpse-into-the-private-credit-market-12865113.

[32] Samuel G. Hanson et. al., "The Evolution of Banking in the 21st Century: Evidence and Regulatory Implications," *Brookings Papers on Economic Activity* (March 2024) https://www.brookings.edu/wp-content/uploads/2024/02/6_Hanson-et-al_unembargoed_updated.pdf.

[33] FRB, "Record of Meeting: Federal Advisory Council and Board of Governors -Thursday, February 8, 2024" (February 8, 2024) https://www.federalreserve.gov/aboutthefed/files/fac-20240208.pdf.

[34] Matt Wirz, "Move Aside, Big Banks: Giant Funds Now Rule Wall Street," *Wall Street Journal*, (April 22, 2024) https://www.wsj.com/finance/investing/investment-funds-new-financial-supermarkets-9b8187d7.

[35] Greg Buchak et al. "The Secular Decline of Bank Balance Sheet Lending," *NBER Working Paper 32176* (February 2024) https://www.nber.org/papers/w32176#:~:text=We%20document%20that%20the%20balance,from%2070%25%20to%2055%25.

[36] FDIC, FRB, OCC, "Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity," *Federal Register* 88 no 179 (September 18, 2023), https://www.occ.gov/news-issuances/federal-register/2023/88fr64028.pdf.

and scale to be a reliable revenue source and it is also one that comes with a "market-risk" capital charge also set for a significant increase in the pending capital rule.[37] Nonbanks in these business lines carry no such capital costs nor are they subject to the "Volcker Rule" restrictions on proprietary trading imposed in 2010 to reduce bank market risk by limiting trading only to government and certain other obligations and barring what were deemed high-risk investment positions even where underlying assets were otherwise allowed.[38]

II. Economies of Scope, Scale, and Survival

As this analysis of earnings drivers makes clear, banking is also in most respects now a business defined by economies of scope and scale forced by technological changes that make it more profitable to do a lot of the same business (i.e., "commoditize" it) than to deal with individual depositors and borrowers on a customer-by-customer basis. "Relationship banking" that provides targeted services to key customers and markets is possible, but it is at best difficult for a smaller bank to offer to small businesses and lower- and middle-income households when they face overwhelming, empowered competitors.

The benefits of these economies of scale are evident in many traditional measures of bank efficiency. For example, the four largest U.S. retail banks hold a 35 percent share of all U.S. deposits even though they only have a 19.5 percent share of bank branches, or a deposit-share-to-branch-share ratio of 1.8.[39] U.S. banks with total assets between $250 billion and $1 trillion hold only a thirteen percent deposit share and a thirteen percent branch share, a comparable ratio of just one.[40]

Economies of scale and scope are often called "network effects" because entities that also capture these economies are able to seamlessly integrate product delivery, pricing, and (for banks) compliance in ways that smaller, regulated competitors or new entrants are unable to match. These network effects also pose significant safety-and-soundness or even systemic risks as they further concentrate market power.

This is particularly true when bank competition comes from tech-platform companies such as Amazon, Meta, Google, and the largest, diversified fintech firms such as PayPal. One recent study unsurprisingly finds that network effects, including funding via non-deposit sources and online origination, makes technology-based nonbanks more efficient than banks.[41] The study does not measure the operational costs of bank regulation, but these are significant and afford tech-platform firms still more comparative advantage.

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[37] *Id.*

[38] DFA *§* 204, 12 U.S.C. 1851 (2022), https://www.govinfo.gov/content/pkg/USCODE-2022-title12/pdf/USCODE-2022-title12-chap17-sec1851.pdf.

[39] FDIC, "BankFind Suite: Summary of Deposits - Market Share Reports," (June 30, 2023) https://banks.data.fdic.gov/bankfind-suite/SOD/marketShare?displayResults=&instType=&institutionType=banks&institutionTypeTimeSeries=&lastYear=2023&locations=marketSelect&pageNumber=1&reportType=depositMarketShare&resultLimit=25&searchPush=true&sortField=STNAME&sortOrder=ASC&totalsType=; FDIC, "BankFind Suite: Find Annual Historical Bank Data" (accessed June 14, 2024) https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2023&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc; and FRB, "Federal Reserve Statistical Release - Large Commercial Banks," (March 31, 2024) https://www.federalreserve.gov/releases/lbr/current/

[40] *Id.*

[41] Bogaard et al., *supra* note 14.

Capitalizing on these economies of scale, tech-based finance companies also adroitly use economies of scope, increasingly bundling products to create a suite of financial-intermediation, advisory, and fee-based services akin to those in bank earnings streams.[42] A recent study from the "central bank of central banks," the Bank of International Settlements (BIS), provides a troubling assessment of the range of nonbank and digital market participants.[43] It concludes that these firms are better positioned than most regulated banks to capture the network effects of big data easily mobilized for market dominance thanks to powerhouses of personal data and their capacity to deploy them for a wide range of direct and indirect financial-product offerings largely outside the reach of privacy, safety-and-soundness, consumer-protection, payment-finality, and other vital safeguards.[44]

The rapid development of artificial intelligence (AI) atop machine learning (ML) also gives dominant competitors an ever clearer path to network effects due to powerful computational benefits and the absence of regulatory barriers to innovation.[45] We shall return to the question of how bank consolidation affects bank branching, but note here a recent study showing that the ability of banks to generate economies of scale thanks to internal processing power is one of the most potent drivers of the reduced number of bank branches evident in recent years, significantly outstripping adoption of retail technology such as ATMs.[46] Tech-based finance companies also have competitive power thanks not only to the absence of the costly legacy branching systems banks have long used to offer suites of deposit, loan, and payment services, but also their ability to bundle limited services targeted via online delivery to selected, often wealthy or vulnerable consumers.[47]

The very largest banks are also better able to gain economies of both scope and scale via organic growth than even super-regional banks (those with over $500 billion in assets that are not GSIBs). This is because both capital and funding costs are considerably lower when banks can reach global capital markets.[48] Indeed, Acting Comptroller Hsu has pointed to the challenges many banks, especially smaller banks, have reaching effective economies of scale and scope to prevent undue risk in one of the most critical services essential to financial intermediation: accepting deposits and enabling payments.[49]

It is for all these reasons that a recent study also calling for tougher bank regulation finds that, "changes in the industry have threatened the business model of many mid-sized regional banks,"[50] going on to conclude that, "mergers within the mid-sized regional sector might be one helpful mechanism in moving the process of consolidation along, while minimizing harmful medium-term effects on competition and

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[42] *Id.*

[43] Erik Feyen, Jon Frost, Leonardo Gambacorta, Harish Natarajan, and Mathew Saal, "Fintech and the Digital Transformation of Financial Services," BIS Paper No. 117 (July 2021), https://www.bis.org/publ/bppdf/bispap117.pdf.

[44] Karen Croxson, Jon Frost, Leonardo Gambacorta, and Tommaso Valletti, "Platform-Based Business Models and Financial Inclusion," *BIS Working Paper* 986, (January 10, 2022) https://www.bis.org/publ/work986.pdf.

[45] US Under Secretary for Domestic Finance Nellie Liang, "Remarks on Artificial Intelligence in Finance," (June 4, 2024) https://www.fsb.org/2024/06/remarks-by-nellie-liang-on-artificial-intelligence-in-finance/.

[46] Jan Keil and Steven Ongena, "The demise of branch banking – Technology, consolidation, bank fragility," *Journal of Banking and Finance (2024) 107038*, (January 2024) https://doi.org/10.1016/j.jbankfin.2023.107038.

[47] Bogaard et al., *supra* note 14.

[48] Nikos Maragopoulos, "When the banking gets tough, the large get going: How capital regulation is driving consolidation," *European Banking Institute Working Paper Series 2021 No. 89*, (April 12, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824585.

[49] Acting Comptroller of the Currency Michael J. Hsu, "Testimony Before the Committee on Financial Services of the U.S. House of Representatives," (May 15, 2024), https://www.occ.gov/news-issuances/congressional-testimony/2024/ct-occ-2024-51-written.pdf.

[50] Hanson et. al., *supra* note 32.

financial stability."[51] The paper goes on to conclude that the rules needed to prevent more regional-bank failures such as those in 2023 will only make it harder for regional banks to sustain franchise value unless they are allowed to obtain essential economies of scale and scope via appropriate mergers.

- A Basel Committee study finds that network effects, including funding via non-deposit sources and online origination, make technology-based nonbanks more efficient than banks.
- A BIS study concludes that nonbank and digital market participants are better positioned than most regulated banks to capture the network effects of big data easily mobilized for market dominance thanks to powerhouses of personal data and the capacity to deploy them for a wide range of direct and indirect financial-product offerings largely outside the reach of privacy, safety-and-soundness, consumer-protection, payment-finality, and other vital safeguards.
- A recent study also calling for tougher bank regulation finds that, "changes in the industry have threatened the business model of many mid-sized regional banks," going on to conclude that, "mergers within the mid-sized regional sector might be one helpful mechanism in moving the process of consolidation along, while minimizing harmful medium-term effects on competition and financial stability."

III. Regulation and Consolidation

A. The Public-Good Purpose of Regulated Banking

After the reforms of the 1930s and those that followed,[52] the business of taking deposits and making loans is perhaps the most regulated business in the United States in which public health or safety is not at immediate and direct risk. The reason for this costly regulatory construct is the view that these activities are so critical to national prosperity that they warrant what are meant to be unique taxpayer-funded backstops, starting with the Federal Reserve's discount window in 1913,[53] federal deposit insurance, and once-sole access to the payment system controlled by the Federal Reserve.[54] In return for these privileges, banks are subject not only to the capital and liquidity standards referenced above, but also to ongoing examinations of their safety and soundness by three federal banking agencies and, for those

[51] Hanson et. al., *supra* note 32, at 5.
[52] See for example: Federal Deposit Insurance Act of 1933, Pub. L. No. 117–263, 64 Stat. 873 (December 23, 2022), https://www.govinfo.gov/content/pkg/COMPS-265/pdf/COMPS-265.pdf; Banking Act of 1933, Pub. L. No. 106–569, 48 Stat. 162 (December 27, 2000), https://www.govinfo.gov/content/pkg/COMPS-255/pdf/COMPS-255.pdf; Bank Holding Company Act of 1956, Pub. L. No. 117–263, 70 Stat. 133 (December 23, 2022) https://www.govinfo.gov/content/pkg/COMPS-252/pdf/COMPS-252.pdf; Bank Holding Company Amendments Act of 1970, Pub. L. No. 111–203 (July 21, 2010) https://www.govinfo.gov/content/pkg/COMPS-251/pdf/COMPS-251.pdf; Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 https://www.govinfo.gov/content/pkg/STATUTE-105/pdf/STATUTE-105-Pg2236.pdf; and DFA, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.
[53] Federal Reserve Act of 1913, Pub. L. No. 117-263, 38 Stat. 251 (December 23, 2022) https://www.govinfo.gov/content/pkg/COMPS-270/pdf/COMPS-270.pdf.
[54] Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (March 31, 1980) https://www.congress.gov/96/statute/STATUTE-94/STATUTE-94-Pg132.pdf.

electing state charters, their home state. The OCC and states have the authority to charter banks – no company can become a bank without regulatory blessing ensuring that it will operate in the public interest, a unique buffer that also limits the extent to which untrammeled competition among companies with express taxpayer backstops can put taxpayers at risk.

Congress also mandated still higher barriers to unfair competition through the Bank Merger Act,[55] a level of antitrust and safety-and-soundness protection that gives bank regulators a yes-or-no say over bank mergers in addition to the power the Department of Justice has to override any mergers it believes violate broader antitrust law. Banks are also subject to additional restrictions on their competitive power, most notably through express prohibitions on engaging in commerce,[56] restrictions on forcing customers to buy one service to get another critical one,[57] the Depository Institutions Interlock Act,[58] and numerous other direct restrictions recently highlighted in a paper by two banking-industry critics as essential market safeguards.[59]

This sweeping framework would be a robust bulwark against unfair competition in core deposit and lending activities if it bound all firms engaging in core deposit and lending activities. However, as briefly described above, it does not.

Customers might be loath to rely on unregulated or lightly-regulated companies offering like-kind products if they thought their funds would be at risk placed in a nonbank, but systemic rescues since at least 1999 have led customers to believe their money is as safe in a high-risk mutual fund as in a bank.[60] Counterparties are also willing to trade with nonbanks or buy their assets because, as demonstrated in 2008 and again in 2020, the Federal Reserve will step in to backstop high-risk investments even in sectors as speculative as "junk" bonds.[61]

The Dodd-Frank Act attempted to correct for systemic nonbank bailouts in 2010 by giving the Financial Stability Oversight Council (FSOC) the authority to designate systemic nonbank providers of services akin to those in regulated banking or that otherwise pose systemic risk on either an institution or activity-or-practice basis.[62] FSOC initially designated four nonbank systemically-important financial institutions (SIFIs), but all have been de-designated and there has been only one activity-and-practice designation proposal (for MMFs in 2012).[63] That FSOC is now unwilling or unable to ensure that nonbanks operate

[55] Bank Merger Act, Pub. L. No. 86-463, 72 Stat. 129 (1960); Bank Merger Act Amendments of 1966, Pub. L. 89-356, 80 Stat. 7 (2018) fdic.gov/regulations/laws/rules/1000-2000.html#1000sec.18c.

[56] Bank Holding Company Amendments Act of 1970, Pub. L. No. 111–203 (July 21, 2010) https://www.govinfo.gov/content/pkg/COMPS-251/pdf/COMPS-251.pdf.

[57] Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133, as amended through 12 U.S.C. §§ 1841-52 (December 23, 2022) https://www.govinfo.gov/content/pkg/COMPS-252/pdf/COMPS-252.pdf.

[58] Depository Institution Management Interlocks Act of 1978, Pub. L. No. 95-630, §§ 201-209, 92 Stat. 3641, 3672-75 (1978) https://uscode.house.gov/statviewer.htm?volume=92&page=3672#.

[59] Saule T. Omarova and Graham Steele, "Banking and Antitrust," 133 Yale L. J. 1162, *Cornell Legal Studies,* Research Paper No. 24-03, (January 1, 2024) https://ssrn.com/abstract=4700435.

[60] Roger Lowenstein, *When Genius Failed: The Rise and Fall of Long-Term Capital Management* (Penguin Random House, 2001).

[61] FRB, "Federal Reserve Takes Additional Actions to Provide up to $2.3 trillion in Loans to Support the Economy," (April 9, 2020) https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm.

[62] DFA Title I, 12 U.S.C. *§* 5311 et seq. (2022) https://www.govinfo.gov/content/pkg/USCODE-2022-title12/pdf/USCODE-2022-title12-chap53-subchapI.pdf.

[63] Financial Stability Oversight Council (FSOC) Proposed Recommendations Regarding Money Market Mutual Fund Reform (proposed November 19, 2012) https://www.govinfo.gov/content/pkg/FR-2012-11-19/pdf/2012-28041.pdf.

under like-kind rules to banks is evident most recently in its 2024 report taking no action but urging Congress to address nonbank mortgage-company systemic risk even though FSOC found them to be a near and present danger.[64]

Finally, banks are not only unique in their safety-and-soundness rules and anti-concentration standards, but also in unique requirements to serve the public good. The most important requirement here is the 1977 Community Reinvestment Act (CRA),[65] which requires banks to make loans and community-development investments in the communities from which they take deposits or, as in a recent rule, provide other services.[66] It should be noted that the CRA heavily emphasizes branching networks, with banks applying for mergers judged harshly on this question under current bank-merger policy and perhaps barred from M&A under pending proposals (see below) even if consolidation could lead only to elimination of overlapping branches that make it still more difficult for the subsequent banks to counter nonbank competition.

Banks are also covered by two layers of consumer-protection standards, one from their federal regulators and another from the Consumer Financial Protection Bureau, with the extent of these powers targeted to some degree by bank size. Nonbank financial companies also fall under the CFPB, but CFPB supervision is allowed only if they are large and meet certain other criteria. Those critical to banking in the payment arena are among those where the Bureau's authority is both limited and uncertain.[67]

B. What Merger-Policy Research Reveals

The only thorough research-literature survey of U.S. bank M&A dates to 2009.[68] Even though this followed a period of rapid interbank consolidation and branch closing, it concludes that, "extant literature provides no consistent evidence regarding whether, on average, the participating financial firms benefit from M&As, whether the customers of these firms benefit, or whether societal risks have increased or decreased as a result of this activity."

More recently, the Congressional Research Service in 2021 concluded that:

> …[W]ith almost 5,000 institutions, most of which are small community banks, there is still a reasonable amount of competition in the market for smaller banks. … A merger between two mid-size banks might make those banks better able to directly compete with the very largest banks. In other words, there may be competition concerns with the largest banks, but they have not been caused by mergers in the post-crisis period.[69]

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[64] FSOC, "Report on Nonbank Mortgage Servicing," (May 10, 2024) https://home.treasury.gov/system/files/261/FSOC-2024-Nonbank-Mortgage-Servicing-Report.pdf.

[65] Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147, as amended through Pub. L. No. 111-203 (July 21, 2010) https://www.govinfo.gov/content/pkg/COMPS-258/pdf/COMPS-258.pdf.

[66] *Id.*

[67] CFPB, "Procedures for Supervisory Designation Proceedings," 12 CFR Part 1091 (April 23, 2024) https://www.govinfo.gov/content/pkg/FR-2024-04-23/pdf/2024-08430.pdf.

[68] Robert DeYoung, Douglas D. Evanoff, and Philip Molyneux, "Mergers and Acquisitions of Financial Institutions: A Review of the Post-2000 Literature," *Journal of Financial Services Research 36*, 87-110 (July 24, 2009), https://link.springer.com/article/10.1007/s10693-009-0066-7.

[69] CRS, "Bank Mergers and Acquisitions," (October 28, 2021), *CRS In Focus 11956*, https://crsreports.congress.gov/product/pdf/IF/IF11956.

Vital insights are also found in a recent empirical study of the market impact of banking-sector consolidation.[70] While it studies only bank-to-bank competition, its look at the markets in which M&A actually took place and shows significant differences in social-welfare and competitiveness impact based on market characteristics. In general, bank consolidation is found often to benefit consumers and communities. This challenge to conventional thinking is based on an important research advance: market-by-market analytical differentiation.

This 2021 study goes beyond past research by looking at transactions from 1998 to 2016 as well as by analyzing virtually all U.S. bank M&A, rather than sub-samples, such as transactions during a short period of increasingly anachronistic time, or single products. It does so by differentiating banking markets based on whether they are loan- or deposit-heavy ahead of the merger or acquisition. The study also differentiates between in-market mergers, likely to be more consolidating and thus potentially problematic, and out-of-market mergers that bring a new player into a market able to add value above that delivered by the acquired bank.

Differentiating market impact in this fashion leads the paper to conclude that larger-bank M&A "equilibrates markets"[71] with no clear cost-benefit impact for customers in terms of either deposit pricing or loan competition because rivals to the newly-merged bank absorb market costs and supply services terminated by the new bank. A model-based study supplements these empirical findings, concluding that large-bank entry into a market enhances loan competition, especially in concentrated markets and reduces deposit concentration in less-concentrated markets.

Despite these studies, a frequently-heard assertion from those opposing mid-sized bank mergers is that bank consolidation reduces the interest rates banks pay on consumer deposits. This simple assertion ignores many complicating factors such as the too-big-to-fail (TBTF) status presumed for U.S. global systemically-important banks (GSIBs) which leads depositors to seek safety in expectation of bailout, a bank's ability to raise low-cost funding in global capital markets, and current business conditions.[*]

It also flies in the face of empirical analysis, with a 2022 study using hundreds of thousands of deposit records and bank-health indicators (e.g., supervisory ratings) available only to regulators found that the biggest impact on the interest and fees depositors pay is not market concentration, bank size, or even bank efficiency. Instead, it is bank health.[72] The health of banks in a particular market is found not just to differentiate one bank from others, but also to influence deposit rates across a market because other banks are forced to pay higher rates to retain essential funding.

Some bank-merger literature and President Biden's competition order[73] also attribute the decline of branch banking to bank consolidation. For example, a 2018 paper finds adverse results when larger

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[70] Leonid Pugachev, "Market Deposit-Loan Imbalances and Bank M&A Outcomes," *Rochester Institute of Technology*, (August 31, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916274.
[71] *Id.*
[*] Note: This paper principally considers the role of the four largest U.S. GSIBs active in retail finance, JPMorgan, Bank of America, Citicorp, and Wells Fargo. The remaining four designated GSIBs have little to no retail-banking services for any but the wealthiest households.
[72] Allen N. Berger, Troy Kravitz, and Lynn Shibut, "The Many Facets of Bank Competition: Evidence from an Extraordinary Dataset" (February 9, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4030784.
[73] The White House, "Fact Sheet: Executive Order on Promoting Competition in the American Economy," (July 9, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

banks buy smaller ones,[74] evidence it finds in what it says is a growing number of unbanked urban households in these areas. It does not square this finding over a period of continuing bank-to-bank merger activity with the sharp drop in unbanked households over this same period evident in FDIC data showing a drop of these households as a percentage of the population from 28.3 percent in 2011 to 4.5 percent as of 2021.[75]

Better-designed studies also do not support the assumption that fewer banks lead to less branch banking. For example, a 2021 study from the Federal Reserve Bank of Cleveland concludes that bank consolidation does not create "banking deserts" when banking access is judged not by the number of branches, but by the distance both urban and rural customers need to travel to find a full-service branch.[76]

As noted above, another study finds that the sharp reduction in U.S. bank branches in recent years results from technology often out of reach of smaller banks, the propensity of weaker banks to close branches to reduce operating costs, and consolidation.[77] However, consolidation is just one of these factors and only a comparably powerful one to technology and fragility when acquisitions combine banks with overlapping branch systems.

Earnings pressure also affects bank branching networks. As regional banks experience the stress on market capitalization described above, they are increasingly selling branches to real-estate firms.[78] Banks often lease the branches back, but they may also simply close the branch after it is no longer theirs. Either way, the bank experiences short-term revenue gains from the branch sale and the number of the bank's branches is likely to be significantly reduced. Mergers that do not protect franchise value could lead to significantly more of these branch sales even if technology and other factors did not adversely affect them.

Failure to consider growing digitalization may also distract attention from changes essential to understand bank-merger policy. For example, the Federal Reserve Bank of Atlanta's recent research suggests that phones – not bank branches – are increasingly the most important financial-service access point from which inclusion and equality will be most expeditiously advanced.[79] Mobile-service delivery is of course an area in which economies of scope and scale and resulting network effects are particularly powerful.

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[74] Vitaly M. Bord, "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," Harvard University, (December 1, 2018), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf.

[75] FDIC, "2021 FDIC National Survey of Unbanked and Underbanked Households," (October 2022) https://www.fdic.gov/analysis/household-survey/2021report.pdf; FDIC, "2011 FDIC National Survey of Unbanked and Underbanked Households," (September 2012) https://www.fdic.gov/analysis/household-survey/2011/2011-unbankedreport.pdf.

[76] Kyle Fee and Erik Tiersten-Nyman, "Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch?" Federal Reserve Bank of Cleveland, (October 7, 2021), https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access.aspx.

[77] Keil et al., *supra* note 46.

[78] Polo Rocha, "Banks, Navigating Choppy Seas, Tap Their Branch Networks for Cash," *American Banker*, (June 13, 2024) https://www.americanbanker.com/news/banks-navigating-choppy-seas-tap-their-branch-networks-for-cash

[79] Raphael Bostic, Shari Bower, Oz Shy, Larry Wall, and Jessica Washington, *Shifting the Focus: Digital Payments and the Path to Financial Inclusion*, FRB Atlanta, (September 30, 2020), https://www.atlantafed.org/-/media/documents/promoting-safer-payments-innovation/publications/2020/09/30/shifting-the-focus-digital-payments-and-the-path-to-financial-inclusion/Shifting-the-Focus-Digital-Payments-and-the-Path-to-Financial-Inclusion.pdf.

Further and importantly, many pessimistic assessments of bank mergers look only at banks in broad swaths, not at the retail financial system as it is. The study noted above looking at what happens when "large" banks acquire smaller ones measures these large banks as banks with assets over $10 billion.[80] Regulators now generally do not consider banks below $50 billion and, in many cases, even $100 billion to be large enough to warrant special rules and even banks above this threshold are small by comparison to the GSIBs that exercise unparalleled market power in the small-dollar lending and deposit-taking essential to economic opportunity and financial security.

Taken together, the retail deposit share of just the two largest U.S. retail banks – JPMorgan and Bank of America – was over twenty percent in the first quarter of 2024.[81] These two banks alone also hold over $7 trillion in assets,[82] or about 27 percent of total U.S. bank assets.[83] The $2.2 trillion growth in these two GSIBs' total assets from just 2019 to the first quarter of 2024 is larger than the total size of the three banks called "super-regionals," PNC, Truist, and U.S. Bancorp.[84]

And, even this is apparently only a starting point. JPMorgan's most recent investor presentations indicate that it plans to hold fifteen percent of all U.S. consumer deposits,[85] up almost fifty percent from its still-formidable share only a year ago. The bank also wants to issue credit cards accounting for twenty percent of national consumer spending, up from an already formidable seventeen percent.[86] Perhaps other GSIBs could compete with JPMorgan's dominant position, but this would still house tremendous market power in just four banks.

- A U.S. bank M&A research-literature survey by the Congressional Research Service concluded that, "there may be competition concerns with the largest banks, but they have not been caused by mergers in the post-crisis period."
- The biggest impact on the prices depositors receive is not market concentration, bank size, or even efficiency, but bank health.

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[80] Bord, *supra* note 74.

[81] FDIC, "Quarterly Banking Profile – First Quarter 2024," (May 29, 2024) https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2024mar/qbp.pdf#page=1; JPMorgan Chase & Co., "1Q24 Earnings Press Release," (April 12, 2024), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2024/1st-quarter/6678012b-9242-492b-acd0-1473eabade3c.pdf; Bank of America, "Supplemental Information First Quarter 2024" (April 16, 2024) https://d1io3yog0oux5.cloudfront.net/_9a3970a4f5087378dd6e33f1131bed65/bankofamerica/db/806/10044/supplemental_information/The+Supplemental+Information_1Q24_ADA.pdf.

[82] *Id.*

[83] Federal Reserve Bank of St. Louis, "Total Assets, All Commercial Banks," *Federal Reserve Economic Data* (accessed May 31, 2024) https://fred.stlouisfed.org/series/TLAACBW027SBOG; JPMorgan Chase & Co., "1Q24 Earnings Press Release," (April 12, 2024), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2024/1st-quarter/6678012b-9242-492b-acd0-1473eabade3c.pdf; Bank of America, "Supplemental Information First Quarter 2024" (April 16, 2024) https://d1io3yog0oux5.cloudfront.net/_9a3970a4f5087378dd6e33f1131bed65/bankofamerica/db/806/10044/supplemental_information/The+Supplemental+Information_1Q24_ADA.pdf.

[84] JPMorgan Chase & Co., Bank of America, PNC Financial Services Group, Inc., Truist Financial Corporation, and US Bancorp, *supra* note 3.

[85] Nupur Anand and Lananh Nguyen, "JPMorgan aims to amass 15% of US consumer deposits, boost credit card share," *Reuters,* (July 11, 2024) https://www.reuters.com/business/finance/jpmorgan-aims-amass-15-us-consumer-deposits-boost-credit-card-share-2024-07-11/.

[86] *Id.*

- The retail deposit share of just the two largest U.S. retail banks – JP Morgan and Bank of America – was over twenty percent in the first quarter of 2024. According to recent investor presentations, JP Morgan plans to hold fifteen percent of all U.S. consumer deposits and wants to issue credit cards accounting for twenty percent of national consumer spending.
- These two banks alone also hold over $7 trillion in assets, or about 27 percent of total U.S. bank assets.
- The $2.2 trillion growth in JP Morgan and Bank of America's total assets from just 2019 to the first quarter of 2024 is larger than the total size now of the three banks called "super-regionals," PNC, Truist, and U.S. Bancorp.
- A recent study finds that larger-bank M&A "equilibrates markets" with no clear cost-benefit impact for customers in terms of either deposit pricing or loan competition.
- A study from the Federal Reserve Bank of Cleveland concludes that bank consolidation does not create "banking deserts" when banking access is judged not by the number of branches, but by the distance both urban and rural customers need to travel to find a full-service branch.

IV. Merger Policy: Market, Financial-Stability, and Equality Outcomes

The analysis above summarizes the current state of regulated banking, showing it as a business under strategic stress due to a dangerous combination of market challenges, regulatory costs, and powerful competition from as few as two dominant consumer-finance banks and competitors outside the reach of market discipline, safety-and-soundness, resolution, community-service, and – all too often – consumer-protection rules. This competitive, consumer, and stability threat is compounded because the once-unique privileges of a regulated-bank charter – federal backstops – are now enjoyed by many nonbanks free of the costs associated with a bank charter or the market discipline these restrictions were meant to impose.

Nonbank competitors are also not bound by market-integrity restrictions and thus have the power barred even for the smallest banks to require the purchase of one essential product for that of an otherwise-undesired one and to benefit from taxpayer backstops without any obligation to serve the public good. Banking law and rule also stipulate extensive safety-and-soundness and systemic-risk controls that, while imperfect for banks, are non-existent for even the most market-dominant and inter-connected nonbank financial intermediaries.

As has also been demonstrated, bank-merger research does not substantiate claims that almost all bank consolidation is bad bank consolidation. Decades of objective analyses find no better than inconclusive evidence that some bank mergers lead to undue market power, but none of this research defines the criteria necessary to tell good from bad based on sophisticated factors such as meaningful differentiation of bank size and affected markets, operational-integration capability, and new-product offerings. Research that focuses on how mergers affect customers and communities also finds that many transactions benefit the public good even if they may be bad for smaller banks.

Bank-merger policy thus cannot be viewed in the sole context of banking as a stand-alone business as shall be shown is still the case in both the OCC and FDIC's merger proposals. The Federal Reserve's views

are uncertain because it has not changed its merger policy since 1995,[87] almost thirty years ago when banking was still a business comprised mostly of banks. The Federal Reserve may be planning a new approach – one of its most senior officials recently told Congress that it is working on some form of inter-agency policy.[88] However, until it is released, one can assess bank-merger policy only by what is known of pending proposals, Federal Reserve practice, and the DOJ 2023 guidelines noted above which may override banking-agency determinations.

We now use baseline and severely-adverse scenarios to forecast the likely result of continuing current merger policy as is and that of changing it as two of the three banking agencies propose and the Department of Justice prefers.[89] Scenario analyses are by definition multivariant exercises using quantitative and qualitative data to project likely outcomes from known facts, trends, and prior, proven experience. As shall be seen, it is most illuminating for bank-merger policy, dispositively demonstrating that current policy has had perverse consequences and that revising it as proposed could compound these negative effects in dangerous ways that actually accelerate concentrated market power and resulting risk instead of reducing it as proponents earnestly hope.

- Decades of objective analyses find no better than inconclusive evidence that some bank mergers lead to undue market power, with much of this research defining the criteria necessary to differentiate good from bad based on sophisticated criteria such as meaningful differentiation of bank size and affected markets.

V. Baseline Scenario: Current Merger-Policy Construct and Outcomes

A. Inconsistency

In the past ten years, U.S. bank-merger policy approved – some would say "rubber-stamped" – all but the few bank merger applications that were withdrawn after discussion with the federal regulator. All publicly-filed M&A applications were approved until very recently and some of these deals were for high-risk banks engaging in serial acquisitions without the resources or governance needed for essential operational integration and regulatory compliance.

When President Biden took office, he issued the executive order described above laying out a new merger policy that took aim at bank consolidation.[90] The banking agencies are independent agencies not bound by this EO, but key policy-makers are also appointed by the White House and thus often aligned with its views. DOJ and the FTC are directly governed by the EO, with the sum total impact of the EO creating a

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[87] DoJ, Bank Merger Competitive Review (1995) https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf.

[88] "Oversight of U.S. Financial Regulators: Accountability and Financial Stability: Hearing before Senate Committee on Banking, Housing, and Urban Affairs," 118th Congress, (May 16, 2024) (remarks of Vice Chair Michael S. Barr) https://www.banking.senate.gov/hearings/oversight-of-us-financial-regulators-accountability-and-financial-stability.

[89] FRB, "Pilot Climate Scenario Analysis Exercise: Summary of Participants' Risk-Management Practices and Estimates," (May 9, 2024) https://www.federalreserve.gov/publications/files/csa-exercise-summary-20240509.pdf.

[90] Exec. Order No. 14036, *Federal Register* 86 No. 132 (July 14, 2021) https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

framework in which all but the smallest, simplest bank mergers may face lengthy delays and uncertain approval prospects.

However, there have still been significant exceptions to all of the edicts in the President's executive order, the processes the banking agencies appear to have adopted, and the criteria laid out in the DOJ/FTC guidelines. Indeed, bank regulators up to and until the crises of 2023 were still so ready to approve acquisitions by high-risk banks such as Silicon Valley Bank, Signature Bank, and New York Community Bank that they even agreed to charter conversions accepting deals that another federal regulator rejected.[91]

Even now, when a bank fails, the FDIC arranges acquisitions as quickly as overnight, selling insured depositories in an opaque process to buyers the agency says meet the statutory requirement for least-cost FDIC resolution.[92] That the FDIC is not able to do so is evident most recently in the significant – approximately 25 percent – miscalculation it made of the cost of the March 2023 failures when it first imposed a special assessment on banks to offset the FDIC's resolution cost.[93]

In 2023, one failed bank, Signature, was sold by the FDIC to a banking organization, New York Community Bank, that was itself the result of the same serial acquisitions the agencies now recognize helped to topple failed banks at the time and almost led to yet another failure less than a year later. This would have been anything but "least cost," with the predicament in which the FDIC found itself not only due to lax supervision,[94] but also high-risk agency merger policy.

Even more striking was the FDIC's decision in May of 2023 to sell First Republic Bank to JPMorgan,[95] making use of a systemic exception not only to approve a deal in sharp contrast to the FDIC's espoused merger policy,[96] but also a key provision in the Riegle-Neal Act barring banking organizations from acquiring more than ten percent of national deposits.[97] Even regulators proposing stringent merger policies are approving charters from nonbanks with the sole purpose of acquiring troubled banks in ways that pose precisely the risks current and proposed merger policies and DOJ guidelines are intended to prevent.[98]

Perhaps the most striking aspect of baseline merger-policy inconsistency is the relentless growth of the two largest U.S. retail banks even as far smaller banks face significant growth obstacles unless or until another bank fails, by which point the FDIC may arrange so hasty a merger as to exacerbate systemic risk. As noted, JPMorgan and Bank of America grew their assets since 2019 by over $2 trillion, more than the

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[91] Lauren Hirsch, "Silicon Valley Bank Sold to First Citizens in Government-Backed Deal," *New York Times*, March 27, 2023, https://www.nytimes.com/2023/03/27/business/silicon-valley-bank-first-citizens.html; Claire Williams, "Warren, Blumenthal Press OCC on NYCB-Flagstar Deal Approval," *American Banker*, April 16, 2024, https://www.americanbanker.com/news/warren-blumenthal-press-occ-on-nycb-flagstar-deal-approval.
[92] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 https://www.govinfo.gov/content/pkg/STATUTE-105/pdf/STATUTE-105-Pg2236.pdf
[93] Polo Rocha, "Banks knock FDIC over growing tab for last year's failures" *American Banker,* (March 13, 2024) https://www.americanbanker.com/news/banks-knock-fdic-over-growing-tab-for-last-years-failures.
[94] FDIC, "FDIC's Supervision of Signature Bank," (April 28, 2023), https://www.fdic.gov/sites/default/files/2024-03/pr23033a.pdf.
[95] FDIC, "JPMorgan Chase Bank, National Association, Columbus Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California" (May 1, 2023) https://www.fdic.gov/news/press-releases/2023/pr23034.html.
[96] FDIC*, supra* note 10.
[97] Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994) https://www.congress.gov/103/statute/STATUTE-108/STATUTE-108-Pg2338.pdf.
[98] OCC, "Conditional Approval #1315 Re: Application to charter Porticoes National Bank" (December 21, 2023) https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2024/ca1315.pdf.

total combined size of the three U.S. banks known as super-regionals (PNC, U.S. Bancorp, and Truist) – banks often considered by those seeking stringent M&A controls to be too big.[99]

B. Uncertainty

Despite occasional exceptions during emergencies and even in the ordinary course of business, M&A applications have often taken so long that many banking organizations in urgent need of restructuring have been wary of making acquisition plans public even though M&A could afford essential economies of scale and scope or other franchise-value preservation options impossible via organic growth.

As shall be discussed in more detail in the severely-adverse scenario, both acquiring and target banks take considerable reputational and market-capitalization risk if an announced transaction falters, let alone fails. Even investors who initially hike the acquirer's stock price based on earnings-accretion expectations (i.e., bets on greater economies of scale or scope) turn tail when a deal takes too long, fearing that delays mean that bank regulators harbor supervisory fears hidden from view that are thus not reflected in equity valuations. Target banks are at still more risk if investors fear that the franchise has scant earnings prospects without the economies of scale and scope achieved via acquisition.

Even deals that are ultimately approved now often take so long that franchise value suffers due to prolonged uncertainty. It took U.S. Bancorp 437 days to gain approval of its acquisition of Union Bank in 2022 even though Union Bank's parent bank in Japan was eager to sell a bank with severe earnings problems and massive internal-control weaknesses.[100] This delay stands in sharp contrast to the FDIC's rapid-fire decision to sell another weak bank, First Republic, to JPMorgan even though the FDIC had ample advance warning of First Republic's travails and other M&A options were possible without making JPMorgan a still more dominant market power.[101]

The FDIC's approval of the $13.8 billion Provident Bank takeover of a still-smaller regional, Lakeland Bank, earlier this year took 555 days.[102] Canada's TD Bank withdrew its deal to buy First Horizon after 15 months.[103] It subsequently came out that TD had acute money-laundering problems,[104] but why the banking agencies did not know this sooner and thus permit First Horizon's franchise value to escape without undue damage remains unknown.

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[99] JPMorgan Chase & Co., Bank of America, PNC Financial Services Group, Inc., Truist Financial Corporation, and US Bancorp, *supra* note 3.

[100] Kevin Wack, "U.S. Bancorp Sheds Consent Order Inherited from Union Bank," *American Banker*, March 7, 2024, https://www.americanbanker.com/news/u-s-bancorp-sheds-consent-order-inherited-from-union-bank#:~:text=U.S.%20Bancorp%20made%20an%20%248,as%20part%20of%20the%20deal.

[101] Hannah Levitt et. al "First Republic Talks Extend Into Night After Banks Place Bids," *Bloomberg,* (updated April 30, 2023) https://www.bloomberg.com/news/articles/2023-04-29/fdic-asks-jpmorgan-pnc-for-final-first-republic-bids-due-sunday?sref=BSO3yKhf.

[102] Zoe Sagalow and Zuhaib Gull, "Provident-Lakeland Unusual Deal Approval Conditions Tell Cautionary Tale," *S&P Global* (April 8, 2024) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/provident-lakeland-unusual-deal-approval-conditions-tell-cautionary-tale-81117160.

[103] Nivedita Balu and Niket Nishant, "TD Pulls $13.4 billion First Horizon Purchase, Leaves US Bank in Limbo," *Reuters*, May 4, 2023, https://www.reuters.com/markets/deals/td-first-horizon-call-off-134-bln-deal-2023-05-04/.

[104] Paul Vieira, "TD Bank Sets Aside $450 Million for Possible U.S. Anti-Money Laundering Penalties," *WSJ*, (April 30, 2024) https://www.wsj.com/finance/banking/td-bank-sets-aside-450-million-for-possible-u-s-anti-money-laundering-penalties-94c76ce1.

- Recent bank merger approvals took as long as 437 days even though the target bank was far smaller and high-risk.

C. Additional Scenario Outcomes

We turn now to how this baseline case affects critical public interests such as financial resilience, economic equality, and the future of retail banking. Conclusions here as above are not projections because the baseline scenario is based on announced banking-agency policy and actual actions.

1. Fewer Mergers, More Failures

Facing the dominant competitors detailed above in core intermediation products and services along with formidable, berry-picking NBFIs, it is likely under baseline merger policy that more and more banks will be victims of adverse selection, faltering or failing without the option of merging to gain the size sufficient to ensure continuing economies of scale and scope.[105]

This risk is real and present. Treasury's Office of Financial Research (OFR) has found that 519 largely-small banks (less than $10 billion in assets) are at risk of failure due to the combination of large commercial real estate portfolios, unrealized securities losses, and uninsured-deposit reliance.[106] Looking at this issue in a different way, another recent study found that 282 U.S. smaller banks now face acute stress due to the combination of commercial real estate loans and higher interest rates.[107] A Federal Reserve study also found that, while only two banks succumbed to the March 2023 liquidity crisis, twenty-two experienced severe runs.[108] That they survived was in part due to robust market capitalization. These banks are most unlikely to grow organically out of this stress and even the largest banks short of the GSIBs may be hard-pressed to maintain attractive market capitalization in current interest-rate, macroeconomic, and competitive circumstances since baseline bank-merger policy, let alone that perhaps to come, effectively bars consolidation (see below).

That is, mergers now are few and far between unless or until a bank succumbs. When a bank fails, the FDIC may close it in a receivership, but it rarely does so because the law as noted requires "least-cost" resolutions and the FDIC's bank-resolution methodology is, at best, uncertain.[109] The FDIC thus often determines that the sale of the failed bank in whole or parts is the best way to meet this test, but these resolution decisions may well have adverse consequences when it comes to further concentrating GSIB

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[105] Marc Rubenstein, "When $500 Billion Isn't Enough to Take on the Giants," *Bloomberg* (April 24, 2024) https://www.bloomberg.com/opinion/articles/2024-04-25/for-pnc-500-billion-of-assets-isn-t-enough-to-take-on-jpm-and-bac?sref=BSO3yKhf.

[106] Tom Doolittle et. all, "Bank Health and Future Commercial Real Estate Losses," *Office of Financial Research*, (July 11, 2024) https://www.financialresearch.gov/briefs/files/OFRBrief-24-04-bank-health-and-future-commercial-real-estate-losses.pdf.

[107] Brian Graham, "Is the Banking System in Crisis or Just Fine?" *Klaros Group*, March 19, 2024, https://www.klaros.com/post/is-the-banking-system-in-crisis-or-just-fine.

[108] Marco Cipriani, Thomas M. Eisenbach, and Anna Kovner, "Tracing Bank Runs in Real Time," *FRBNY*, Staff Report 1104, (May 2024) https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr1104.pdf?sc_lang=en.

[109] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 https://www.govinfo.gov/content/pkg/STATUTE-105/pdf/STATUTE-105-Pg2236.pdf.

market power as proved the case with First Republic even though several large regional banks reportedly bid for the bank.[110]

The FDIC has also been urged by at least one of its directors to consider acquisitions by nonbank entities, including private-equity firms.[111] Allowing acquisitions outside the banking sector of any failed bank's strategic assets, let alone its charter, is likely to lead to further migration of core intermediation services outside the reach of safety-and-soundness and consumer-protection regulation. That the OCC has provisionally authorized a nonbank to make such bids for failed bank charters makes this outcome still more likely given that the nonbank parents of the special-purpose charter will surely beat a successful bank bidder since the nonbank does not operate under like-kind capital or governance standards.[112]

- 519 U.S. banks are at risk of failure due to the combination of large commercial real estate portfolios, unrealized securities losses, and uninsured-deposit reliance.
- While only two banks succumbed to the March 2023 liquidity crisis, twenty-two experienced severe runs.

2. Product Commoditization and Scarcity

As noted earlier, almost all of this growth at the two largest U.S. retail banks was organic, powered by increasingly omnipotent economies of scale and scope. This operational power bolsters strong earnings and a positive feedback loop of revenue growth that supports dominant marketing along with cost-efficient technological evolution and internal controls. These same economies of scope and scale are, however, achieved only by "commoditization" of consumer and small-business lending and deposit offerings because gigantic size makes it increasingly impossible to provide niche services. If other regulated providers are not able to do so, then niche services will move outside safety-and-soundness, consumer-protection, and community-service rules or may simply cease to be available at all.

- Economies of scope and scale are achieved from the "commoditization" of consumer and small-business lending and deposit offerings because gigantic size makes it increasingly impossible to provide niche services.

3. Taxpayer Risk

Baseline merger policy presents direct and indirect taxpayer risks. Taxpayers may well need yet again to backstop the FDIC in the event of future systemic rescues or Deposit Insurance Fund shortfalls, with this risk even greater if bank failures require OLA intervention by the FDIC for banks or nonbank financial institutions.

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[110] Chris Prentice, Nupur Anand and Saeed Azhar, "PNC, JPMorgan putting in final bids for First Republic Bank in FDIC auction," *Reuters* (updated May 1, 2023) https://www.reuters.com/business/finance/pnc-jpm-putting-final-bids-first-republic-fdic-auction-sources-2023-04-30/.
[111] FDIC, "Statement by Jonathan McKernan, Director, FDIC Board of Directors, on Reinstating Board Oversight Over Failed-Bank Resolutions," (August 29, 2023) https://www.fdic.gov/news/speeches/2023/spaug2923h.html.
[112] OCC*, supra* note 98.

While expenditures of Federal Reserve funds come nominally from the central bank's balance sheet, the FRB acts on behalf of the taxpayer to the extent Treasury participates in Federal Reserve facilities as was the case in 2020. Losses to the Fed also exacerbate the losses it is already experiencing on its balance-sheet investments that sharply reduce the amount of money the FRB sends to the Treasury which must be offset by additional taxpayer revenue.

4. *Macroeconomic Risk*

We know that resilient financial intermediation is not only essential to financial stability, but also to macroeconomic growth.[113] For example, a recent study from the Federal Reserve Bank of San Francisco found that surviving banks sharply curtailed lending in 2023 after bank failures, leading to a significant spike in unemployment and a more subdued impact on inflation.[114] Neither this study nor most others extrapolate the well-known finding about bank stress and reduced intermediation to make clear if curtailed bank lending is caused by competitive pressures and/or earnings and capital stress or if it is only correlated to these factors.

However, one recent study has at least sought to anticipate the macroeconomic impact of still more banking-market concentration within the regulated-banking sector. This study is theoretical and model-driven, but it is unusual in its effort to look at the extent to which bank concentration leads to the commoditization described above, favoring the largest firms in each sector of the U.S. economy and discouraging new entrants. Based on a model applied from the 1990s to 2015, bank concentration is said to explain almost sixty percent of overall concentration in the U.S. business sector, reducing new entrants by about 25 percent, and explaining 2.3 percent of declining productivity.[115]

- Banks sharply curtailed lending in 2023 after the bank failures, leading to a significant spike in unemployment with a more subdued impact on inflation.
- From the 1990s to 2015, bank concentration is said to explain almost sixty percent of overall concentration in the U.S. business sector, reducing new entrants by about 25 percent and accounting for 2.3 percent of declining productivity.

VI. Severely-Adverse Scenario

Here, we proceed from our analysis of current bank-merger policy and its ramifications to assess the likely outcome of pending proposals to pose still higher barriers to all but the simplest and smallest bank mergers. We design this severely-adverse scenario based on the likely outcomes observed from

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[113] See for example: Leyla Yusifzada and Aytan Mammadova, "Financial intermediation and economic growth," *University of Michigan's William Davidson Institute Working Paper No. 1091*, (April, 2015), available at https://deepblue.lib.umich.edu/bitstream/handle/2027.42/132992/wp1091.pdf?sequence=1.

[114] Vasco Cúrdia, "Economic Effects of Tighter Lending by Banks," *FRBSF Economic Letter* (May 6, 2024) https://www.frbsf.org/wp-content/uploads/el2024-11.pdf.

[115] Lei Ye, "Bank Concentration, Product Market Competition and Firm Dynamics," *CUHK* (January 8, 2023) https://www.bschool.cuhk.edu.hk/wp-content/uploads/Bank-Concentration-Product-Market-Competition-and-Firm-Dynamics_20230108.pdf.

the known results of current policy as detailed in the baseline scenario if these pending proposals are implemented. Because the Department of Justice also has the power to override banking-agency merger decisions, the impact of its new guidelines is also forecast.

A. Proposed Construct

It is not possible in this paper to go in-depth on the OCC and FDIC proposals given their length and complexity. Key points in each are summarized below, in concert with an assessment of Fed policy and of germane provisions in the DOJ guidelines.

1. OCC

As noted, the OCC on January 29th of this year issued a Notice of Proposed Rulemaking and Policy Statement related to its merger-approval process.[116] In releasing the proposal, Acting Comptroller Hsu portrayed it as an effort to add certainty and streamline merger approvals because different types of transactions pose differing approval considerations.[117] However, the proposal in fact goes considerably farther and may undermine Acting Comptroller Hsu's intent. If finalized, the policy would:

- set timelines and criteria for OCC merger review which the agency retains full discretion to change at any time for any transaction. This would increase the uncertainties and the adverse consequences evident in the baseline scenario;
- end the presumption of approval for even small and simple deals, including simple internal reorganizations designed to achieve the legal entity rationalization required in resolution planning as well as applications to acquire failed banks prepared and filed in rapid timelines often with only days' notice. This adds additional uncertainty and likely delay along with still more franchise-value risk;
- establish as a criterion for disapproval of non-emergency transactions that the parties are not only named GSIBs, but even large regional banking organizations or others raising GSIB-like risk concerns for the OCC. This policy would apply even if the target is small or a specialized nonbanking company unlikely to concentrate banking markets which the acquirer believes would add a necessary technological skill or product option. This would surely increase concentration above already-high levels due to GSIB organic growth and emergency acquisitions;
- set a $50 billion asset size for a combined institution after which merger approval becomes considerably more difficult. This undermines essential economies of scale and scope, so threatening smaller-bank short-term market capitalization that those approaching the $50 billion threshold may eschew problematic mergers in favor of short-term profit maximization that may raise new risks;
- challenge transactions if the target's assets are more than fifty percent of the acquirer's, limiting resulting economies of scale and scope;
- rewrite current merger policy to the extent it continues to approve mergers from banks that have grown rapidly either through organic activities or recent acquisitions. The OCC now

[116] OCC, *supra* note 9.

[117] OCC Acting Comptroller Michael J. Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," *Remarks Before the University of Michigan School of Business,* (January 29, 2024) https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

expressly looks at potential challenges to operational integration, a change from prior practice that, as noted in the baseline scenario, led to high-risk regional banks; and
- consider merger denial based on any issues raised by commenters, pending enforcement actions, or any other reason deemed appropriate by the OCC. This may enhance community service and regulatory compliance following bank mergers, but it nonetheless adds greater risk of inconsistency and uncertainty.

Despite these significant changes, it should be noted that the OCC's impact analysis concludes that this policy is unlikely to alter the course of bank-merger decisions. This seems unlikely given that many new presumptions, thresholds, and criteria established by the policy are likely to exacerbate the adverse effects already obvious in the baseline policies described above.

2. FDIC

The FDIC has also released proposed merger-policy changes.[118] Its approach would:

- assert broad jurisdiction beyond the FDIC's clear authority over state-chartered, nonmember banks. This adds considerable uncertainty to national bank and state-member bank transactions;
- lay out express authority to make public merger applications that are withdrawn following adverse FDIC feedback, exposing applicants to franchise-value risk that could adversely affect market capitalization and the ability to pursue other transactions;
- withdraw the current presumption of approval when quantitative market-concentration tests are met in favor of a series of FDIC competition-impact determinations that could block deals that meet all other approval criteria. The policy extends analysis beyond deposits, but does not say how this would be done or which products and services are to be considered, increasing uncertainty;
- require that mandatory divestitures, branch closings, or other actions needed to satisfy the FDIC's decision related to fair competition are completed prior to merger approval. This would add further franchise-value and market-capitalization risk because banks could significantly alter their operations and then not achieve the merger meant to replace and enhance them;
- bar acquirers from entering into non-compete agreements with employees of target firms, likely adversely affecting franchise value;
- apply industrial-policy considerations such as resulting employment for bank staff. This adds additional uncertainty as well as hindering efficiency;
- impose barriers to acquisitions of larger, weaker banks, increasing the risk of failure;
- require demonstration that community convenience and needs will be better served by an acquisition than would be the case if each bank remained independent. This criterion might be removed to prevent failure, but uncertainty may delay or even block transactions prior to failure;
- set and implicit approval cut-off size threshold of $100 billion;
- deny applications if it finds that it may be difficult to resolve a merged institution, with the FDIC not explaining why its abilities would be so inhibited given the agency's statutory

[118] FDIC*, supra* note 10.

responsibilities and alternatives up to and including the "orderly liquidation authority" in systemic situations;[119] and

- apply tougher supervisory criteria akin to those also proposed by the OCC.

3. FRB

As noted, the Federal Reserve has not revised its merger policy since 1995. This exacerbates uncertainty given the obstacles evident in recent transactions such as the delays to a decision described above. The Fed appears to be operating under merger guidance issued in 1995,[120] guidance that does not include the problematic provisions evident in the OCC and FDIC proposals but also fails to reflect current market reality. Current Fed policy also leads to the extensive delays described above in recent transactions that compound uncertainty in the absence of specific deadlines and agency feedback. That said, the Fed may well recognize the need for at least some merger approvals and resulting consolidation, with FRB Chair Powell recently stating that:

> The number of banks in the country has been coming down for forty years. There's consolidation going on for a whole range of reasons, and we're not trying to foster that, we're not trying to push that, and we're aware that high fixed costs from regulation may be one of the reasons for that, so we do try to keep that in mind, particularly for smaller institutions.[121]

4. DOJ

The Department of Justice has authority over all bank mergers should it choose to intervene, with this now decided under a new antitrust paradigm established with the Federal Trade Commission.[122] Notably, the guidelines do not directly overrule the 1995 bank-merger policy even though senior DOJ officials have said the guidelines apply[123] even as they acknowledged the need to rewrite the 1995 policy.[124] Different DOJ standards combine with the Fed's uncertain approach and the new proposals to create still more uncertainty and barriers to sound transactions. Key considerations that could overrule a merger approval should one make it past the banking agencies include:

- review of transactions in which a bank takes a minority position in another firm, or another firm does the same in a bank, extending antitrust review to transactions the banking agencies

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[119] DFA Title II, 12 U.S.C. § 5381 et seq. (2022), https://www.govinfo.gov/content/pkg/USCODE-2022-title12/pdf/USCODE-2022-title12-chap53-subchapII-sec5381.pdf.

[120] DoJ, Bank Merger Competitive Review (1995) https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf.

[121] "The Federal Reserve's Semi-Annual Monetary Policy Report: Hearing before the U.S. House of Representatives Committee on Financial Services," 118 Cong. (July 10, 2024) (statement of FRB Chair Jerome Powell in response to Rep. Houchin) https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409311.

[122] DOJ and FTC*, supra* note 11.

[123] Peterson Institute for International Economics, "Revitalizing Bank Merger Review" (March 21, 2024) (Remarks by Assistant Attorney General Jonathan Kanter) https://www.piie.com/events/2024/revitalizing-bank-merger-review.

[124] Assistant Attorney General Jonathan Kanter, "Merger Enforcement Sixty Years After Philadelphia National Bank," *Keynote Address at the Brookings Institution's Center on Regulation and Markets Event*, (June 20, 2023) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

may not review in the absence of a finding of "control." Indeed, DOJ may intervene even if there is only a minority stake if it finds that this permits indirect control;

- additional industrial-policy considerations such as employment and worker-rights impact;
- consideration of factors such as a combined firm's ability to gain informational, network-effect, patent-control or other undue advantages;
- consideration of "combinations" that could for example lead DOJ to rule negatively on a merger between banks in consortia if DOJ found this to result in undue control;
- end the merger-approval presumption, with new qualitative factors such as possible new-entrant impact added to any finding related to quantitative concentration measurement; and
- review industry merger trends, with DOJ retaining the right to deny a transaction that does not on its own raise antitrust concerns if trends are worrisome.

B. Structural Impact

Here, we lay out the severely-adverse scenario most likely if proposed changes to bank-merger policy are combined with what is known of the Fed's policy along with DOJ's new guidelines atop the forces already challenging all but the very biggest banks evident in the baseline scenario. It should be noted again that this analysis does not presume that any or all of the policy changes described above are pernicious. Some are well-founded responses to earlier banking-agency and DOJ failures to spot high-risk acquisitions as well as reverse the willingness of all of the banking agencies in some cases even to encourage them as detailed above. However, uncertainty, inconsistency, and heightened risk of application denial are likely to prevent or unduly delay mergers that do not pose the prudential risks the agencies have belatedly recognized.

Key structural results with potentially severely-adverse consequences compounding those evident in current merger policy are likely to include:

1. Heightened Systemic Risk

As noted, the baseline scenario demonstrates a dangerous negative feedback loop in which merger-decision uncertainties make it difficult for larger banking organizations to acquire a faltering bank. The severely-adverse scenario exacerbates this risk by virtue of strict limits on bank size and a prohibition on acquisitions if the acquirer would be weaker as a result. This is of course surely the result of buying a weaker bank, but banks with effective internal controls, the ability to quickly ensure operational integration, and sufficient resources are nonetheless often able successfully to acquire weaker banks – indeed, most banks willing to sell have recognized their own strategic fragility and thus seek a market-based resolution prior to problematic supervisory results.

More weak banks that cannot be sold to sound acquirers lead to more bank failures. More bank failures create investor fears that put strong banks under more market-capitalization stress, forcing them to secure their own positions instead of considering acquisitions of weaker entities. This in turn leads to more bank failures even if merger-policy criteria are relaxed or even waived as in 2023.

The new policies constituting the severely-adverse scenario thus accelerate the negative feedback loop because many banks may be unwilling to contemplate a merger due to the heightened franchise risks outlined above even if a merger seems viable on traditional criteria such as quantitative market share thresholds and the new safety-and-soundness guardrails. Banks large enough to acquire a sizeable bank will face even higher hurdles and, if the target is deemed weaker by one or more

supervisors, still more obstacles to acquisition. As a result, still more banks may fail, the overall condition of the industry will become more fragile, depositors will be far warier, run risk will grow, and strong banks not considered too big to fail could face acute stress with no market alternatives to avoid failure.

Bank-merger policy proposals do not address how the banking agencies would deal with nonbanks seeking to acquire a troubled or failed bank. DOJ has indicated that it will defer decisions related to safety and soundness to the banking agencies,[125] but when it would in practice still apply its new guidelines is unclear. These might thus be waived only after bank failure or in systemic-risk situations. Given that the banking agencies are already contemplating nonbank acquisitions of failed banks, it seems likely that they would find themselves forced to do so under stress. However, this would come at a time when well-governed nonbanks are likely to be as unwilling or unable to acquire weak banks as strong banking organizations. Resorting to high-risk entities such as speculative bank-acquisition vehicles funded by private-equity firms might avert a costly resolution, but perhaps only until conditions grow still worse – see as described above the acquisitions by speculative banks of high-risk institutions as precursors to weak-bank acquisition by firms without sufficient capital or internal controls readily at hand.

Were weak-bank stress to threaten major NBFIs as well as stronger banks, then the scope of systemic risk could prove well beyond the FDIC's capacity, especially given its proven inability now to make use of its OLA systemic-resolution option.[126] This could force a massive taxpayer bailout via Federal Reserve emergency-liquidity windows akin to, but likely even larger than, the backstops created during the 2020 crisis.[127]

This is essentially a systemic-risk scenario of sizeable proportions that could be mitigated if stronger mid-sized banks were willing and able to acquire weaker ones with remaining franchise value. Not all bank mergers are sound mergers, but no bank mergers or mergers deferred until a crisis is already upon the banking system are a severely-adverse event for financial stability. To the extent regulators turn to the very largest banks considered too big to fail as has often been the case, market consolidation will sharply increase further and merger policy designed to prevent it will have a most perverse consequence indeed.

2. Monetary-Policy Transmission

One reason bank concentration in massive banks deemed too big to fail and the largest NBFIs/tech-platform companies undermines robust and resilient macroeconomic growth is that the transformation of financial intermediation upsets the fundamental bank-centric premises on which monetary-policy transmission via the Federal Reserve has relied for over a century. One might think the central bank would redesign its monetary-policy construct as NBFIs began to dominate U.S. finance and the four biggest banks gained de facto central-banking power on their own, but it has yet to do so. Instead, the Federal Reserve has done little more than fiddle with its model, revising it first

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[125] *Id.*
[126] FDIC Office of Inspector General, "The FDIC's Orderly Liquidation Authority," (September 2023) https://www.fdicoig.gov/sites/default/files/reports/2023-09/EVAL-23-004.pdf.
[127] FRB, "Federal Reserve Announces Extensive New Measures to Support the Economy," (March 23, 2020) https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm.

in 2019 in hopes of figuring out why inflation remains so low even though employment seemed so robust.[128]

As has of course been clear ever since, this 2019 policy had little time to affect the economy because the "lower-for-longer" rates in place since 2008 despite reasonably-strong economic growth combined with financial-market transformation led first to the repo-market crisis of 2019[129] and then to the collapse of the global financial system in 2020.[130] The 2020 crisis was of course sparked by the pandemic, but this spark fell on dry kindling thanks to lower-for-longer, longstanding expectations of Fed market rescues such as the one barely six months before, and the massive presence of nonbanks such as MMFs.

3. The Big Four Become Still Bigger

It is also clear that concentrating so much market power in so few hands poses significant safety-and-soundness and systemic risk. In the biggest financial crisis since the Great Depression from 1980 to 1995, almost 3,000 insured depository institutions holding $2.2 trillion of assets failed or closed without bailouts other than those provided by the FDIC.[131] This crisis was costly to the nation but banks ultimately repaid the government for the FDIC support and the national economy was not materially damaged by all these failures, in part because many were clustered in discrete U.S. regions.

Could this happen now when just one global bank operating around the nation and the world has $4.1 trillion in assets which is $2.05 trillion in 1995 dollars and thus the same size in real dollars as the cost of thousands of bank failures, not just one? This seems most unlikely.

Network theory posits that "scale-free" networks comprised of many actors with complex interactions are considerably more resilient than "small-world" networks comprised of a few, highly inter-connected actors.[132] Network theory is complex and model-driven; common sense shows plainly that more than four freestanding banks with viable business models are much less likely to succumb to risk because risk is far less correlated among them.

As noted above, the four largest U.S. retail banking organizations differ from mid-sized banks because they can generate the powerful growth necessary for robust market capitalization with organic growth and without resort to M&A due to strong economies of scale and scope, access to global funding and capital sources at lower cost than even super-regional banks, network effects, and TBTF market confidence in the very largest banks in the face of stress scenarios such as those posited in the baseline scenario.

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[128] FRB, "Review of Monetary Policy Strategy, Tools, and Communications – 2019-2020 Review: Overview" (August 27, 2020) https://www.federalreserve.gov/monetarypolicy/review-of-monetary-policy-strategy-tools-and-communications.htm.

[129] FRB, "Statement Regarding Monetary Policy Implementation," (October 11, 2019) https://www.federalreserve.gov/newsevents/pressreleases/monetary20191011a.htm.

[130] FRB, "Federal Reserve issues FOMC statement," (March 15, 2020) https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a.htm.

[131] Drew Desilver, "Most U.S. bank failures have come in a few big waves." *Pew Research Center,* (April 11, 2023) https://www.pewresearch.org/short-reads/2023/04/11/most-u-s-bank-failures-have-come-in-a-few-big-waves/.

[132] Shouwei Li and Chao Wang, "Network structure, portfolio diversification and systemic risk." *Journal of Management Science and Engineering 6*, 235-245 (June 2021) https://doi.org/10.1016/j.jmse.2021.06.006.

Even if none of the systemic-risk consequences outlined above were to occur in the severely-adverse scenario, the de facto freeze on most bank M&A will weaken even the largest "super-regionals." As a result, fewer and fewer banks will have competitive economies of scale and scope, challenging their ability to serve local markets and threatening the franchise value of weaker institutions which might have been preserved in concert with service to their markets had a merger been allowed.

As we have shown, many critical market-resilience, competition, access, and equality "eggs" are already in all too few baskets. A freeze on larger-bank mergers, let alone the proposed de facto ban, would concentrate still more power and thus create still more risk. This would further concentrate market power in retail banking in the hands of the Big Four GSIBs.

Indeed, market power could be concentrated in just two GSIBs, JPMorgan and Bank of America, firms already dominant in retail banking that are planning to grow still more omnipotent as described above. Two other GSIBs – Citibank and Wells Fargo – have significant retail-banking presences, but these so far are of somewhat smaller scale than JPMorgan and BofA. Still, Citibank could alter its current strategy to renew its national ambitions and Wells Fargo may be freed of the enforcement action limiting asset growth.[133] Two dominant retail banks already pose significant risks to most smaller communities and niche markets that require relationship-based products and services. If the smaller two of the "big four" grow thanks to taking share from the two other retail-focused GSIBs, then this could reduce at least some concentration but it would still do little, if any good for smaller communities and customers. All this would mean is still more empowered competition from a very small number of giant banks, not the vibrant competition and community-level service likely if mid-sized banks are able to grow and compete.

Concentration among two or four giant banks would also have significant adverse impact on banking services for low-and-moderate income households and the communities in which they live. Banks are evaluated under the Community Reinvestment Act generally with regard to the communities they serve, not all the communities they could serve or that banks once served. As a result, low-and-moderate income households and communities would be at risk when big banks pull out and just one giant bank or perhaps no bank is left to meet their needs within safety-and-soundness and consumer-protection guardrails.

It should be noted that the new DOJ/FTC guidelines postulate the ability of these agencies to force divestiture or restructuring even in the absence of a merger application if a firm's market power grows too large. This could help to contain the very largest banks, giving regional banks a better chance even in the severely-adverse scenario. However, it goes without doubt that any such effort would be met with a vigorous legal challenge sure at the least to prevent a final ruling for years. And, even if antitrust regulators successfully force one or more GSIBs to break itself up, it is most unclear how any could do so given the absence of banks large enough to make a meaningful dent in the banking marketplace by the point at which one of the already super-powerful GSIBs is restructured in some way. Divested activities would thus either be sold to nonbanks (see above for risks) or shuttered, removing the essential capacity for financial intermediation which is key to macroeconomic growth and resilience.

[133] FRB, "Responding to widespread consumer abuses and compliance breakdowns by Wells Fargo, Federal Reserve restricts Wells' growth until firm improves governance and controls." (February 2, 2018) https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm.

- In the biggest financial crisis since the Great Depression from 1980 to 1995, almost 3,000 insured depository institutions holding $2.2 trillion of assets failed or closed without bailouts other than those provided by the FDIC. Today, just one global bank operating around the nation and the world has $4.1 trillion in assets, or $2.05 trillion in 1995 dollars.
- Network theory posits that "scale-free" networks comprised of many actors with complex interactions are considerably more resilient than "small-world" networks comprised of a few, highly inter-connected actors.

4. Monopolization and Ossification

Perhaps the most troubling finding of the severely-adverse scenario is that, as noted, the big four U.S. retail banks will get still bigger as the U.S. regulated-banking system's structure turns into a barbell. This is no idle speculation; it is in fact the banking system in most other advanced countries which have only a few massive banks that are known as "national champions" because they are both wards of and extensions of their sovereign governments.[134]

This is a very different model than the one long preferred in the U.S. In sharp contrast to America's historic preference for thousands of community-focused charters and many mid-sized banks able to challenge the largest ones, national-champion banking systems are those where the national government and a dominant bank or two are inextricably interconnected and dominant banks assuredly are too big to fail. As FTC Chair Lina Khan has said, "A basic tenet of the American experiment is that real liberty means freedom from economic coercion and from the arbitrary, unaccountable power that comes with economic domination."[135]

Despite this threat to economic freedom, would a concentrated banking system at least be a safer banking system? As demonstrated above, the answer first is no because too-big-to-fail expectations would be validated if the largest four U.S. banks become still more immune from any form of resolution other than bailout or still greater consolidation because only one giant bank could absorb another in distress. Switzerland – a national-champion banking system – experienced this risk in 2023 when it bailed out Credit Suisse and then transferred it to UBS, a clear example of both the risk of GSIB failure and the increased moral hazard and market consolidation in its wake. Thus, the absence of a middle-size tier of competitive banks able to serve national need in the absence of one or more giant banks makes national-champion status still more inevitable for the biggest banks and the adverse result of concentration due to recent proposals still more perverse.

Still, it is sometimes argued that massive companies advance innovation thanks to their power to invest capital in high-risk ventures few others might afford. However, as the Department of Justice/FTC guidelines make clear,[136] concentrated market power often derives from such strict control over the key drivers of innovation such as intellectual property and patents that new entrants are either finished before they start or gobbled up quickly by a concentrated powerhouse. Sometimes, this is a "catch-and-kill" effort to prevent a new firm's threat to the powerhouse; sometimes, it's intended to move the

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[134] Bank for International Settlements (BIS), "Locational Banking Statistics: Reporting Institutions," (July 31, 2023), https://www.bis.org/statistics/count_rep_practices/locstatsrepinst.xlsx.
[135] Chair Lina M. Khan, "Remarks by Chair Lina M. Khan As Prepared for Delivery at Carnegie Endowment for International Peace," (March 13, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.13-chair-khan-remarks-at-the-carnegie-endowment-for-intl-peace.pdf.
[136] DOJ and FTC*, supra* note 11.

powerhouse more quickly into another activity that will profit it more than anyone else thanks to its network-effect dominance. Either way, it undermines innovation and economic resilience.

A recent IMF study describes the U.S. economy as a "winner-takes-most" system in which powerful competitors use their network effects to drive out both new entrants and potential mid-sized competition.[137] This study looked at one million companies across 27 mostly-advanced countries over the past two decades, concluding that concentration undermines innovation in general and especially in the U.S., which was found to be the most concentrated of all the economies studied.

For a less abstract look at the impact national champions have on innovation, one need go no farther than Boeing, a company cited as a national champion in 1997 that has since been slow to innovate and sorely lacking in providing safety to the traveling public.[138] A recent *Financial Times* article posits that, "The Great American Transport Crisis tells Us Something."[139] The article contemplates Boeing's travails as the sole U.S. airplane manufacturer, havoc due to a concentrated and fragile airline system, poorly-maintained roads, antiquated trains, and even Key Bridge's collapse in Baltimore. Laying out a vision with frightening implications for a highly-concentrated banking system bound by fewer and fewer rules, none of these transport-system problems is a discrete event: "What the US has is in some cases the worst of both worlds — hyper-concentration in key industries in the name of security, combined with all the perils of short-term financial market pressures."

Ossification is the process in which economies, like once agile bodies, become increasingly immobile in immovable business and government processes that overwhelm the small and nimble and favor the powerful with formidable political resources to wreak their will. Ossified economies make some people much richer, but nations become more vulnerable, small towns are left behind, lower-income households can find no one to serve their banking needs at reasonable cost or safety, and too-big-to-fail banking embodied by the four largest banks and a few giant nonbanks becomes the norm.

Surely, allowing sound mergers of smaller banks provides urgent balance to a process otherwise likely to overwhelm the best intentions of those who seek to promote vibrant banking competition that meets the convenience and needs of the nation as a whole, rewards well-managed banks with the power to remain profitable and the controls to remain safe and sound, and protects vulnerable consumers and financial stability.

- The banking system in most other advanced countries have only a few massive banks that are known as "national champions" because they are both wards of and extensions of their sovereign governments.
- FTC Chair Khan: "A basic tenet of the American experiment is that real liberty means freedom from economic coercion and from the arbitrary, unaccountable power that comes with economic domination."
- IMF: the U.S. is now a "winner-takes-most" economy.

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[137] IMF, "World Economic Outlook" (Chapter 2, *The Rise of Corporate Market Power and its Macroeconomic Effects),* (April 2019) https://www.imf.org/~/media/Files/Publications/WEO/2019/April/English/ch2.ashx?la=en.
[138] Jonathan O'Connell & Dan Lamothe, "U.S. and Boeing Have Long Had a Special Relationship," *Washington Post*, (Mar. 18, 2019), https://www.washingtonpost.com/business/economy/us-and-boeing-have-long-had-a-specialrelationship/2019/03/16/abcebe8a-475a-11e9-aaf8-4512a6fe3439_story.html.
[139] Rana Foroohar, "The great American transport crisis tells us something," *Financial Times*, (April 7, 2024) https://www.ft.com/content/387717ad-5d65-4ecb-ab02-ffbb787ae53e.

- The only official U.S. national champion is Boeing. Its risk to safety and macroeconomic stability shows the risk of monopolization and how they lead to economic ossification.
- A few U.S. national-champion banks would have like-kind effects on U.S. economic dynamics and financial stability.