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Gina M. Killian

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I. Introduction

The Federal Reserve Board ("Fed") and the Department of Justice ("DOJ") are two agencies with regulatory jurisdiction over bank mergers. Both agencies are required by law to review the competitive impact of proposed merger transactions. Tension exists between these federal agencies because at times they disagree on the presence of anticompetitive effects in the post-merger environment.

This disagreement stems from the fact that bank agencies such as the Fed tend to advocate bank mergers. In light of past savings and loan failures, the Fed favors banking consolidations in order to advance the safety and soundness of the banking industry. Conversely, the DOJ, along with the Federal Trade Commission ("FTC")[1] tends to scrutinize mergers more closely.[2] As a result, at times, the Fed will approve a proposed merger and the acquirer will move forward under the impression that the application process is essentially complete. Then, the DOJ will file suit based on antitrust implications of the merger, or, at a minimum, delay the transaction based on potential anticompetitiveness in the post-merger environment.[3]

The purpose of this Note is to analyze the approval processes of the Fed and the DOJ with regard to intramarket bank mergers

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1 A statutory exemption precludes the FTC from involvement in banking mergers. 15 U.S.C. § 45(a)(2) (1988).

2 *See* Kenneth A. Letzler & Michael B. Mierzewski, *Antitrust Policy Poses Greater Burdens for Bank Mergers and Acquisitions*, BANKING POL'Y REP., Apr. 20, 1992, at 1; David Balto et al., *Recent Developments in Bank Merger Competition Policy*, 4 BANKING L. REV. 8, 9 (1992).

3 Examples of this or similar occurrences include the following mergers: Society Corporation/Ameritrust Company NA; First Hawaiian/First Interstate Hawaiian; Fleet-Norstar/Bank of New England (where the bank regulatory agency was the FDIC); and BankAmerica/Security Pacific. The DOJ can delay transactions since it has been granted the power of an automatic stay by the Bank Merger Act, 12 U.S.C. § 1828(c)(7)(A) (1988 & Supp. IV 1992), and the Bank Holding Company Act, 12 U.S.C. § 1849(b)(1) (1988).

by focusing on the DOJ's recently revised Horizontal Merger Guidelines.[4] In order to fully appreciate the magnitude of the bank merger approval process, Part II discusses the complex regulatory burden unique to banking. Additionally, Part II sets forth the Fed's concise method of reviewing merger applications. Part III discusses the DOJ's more complex and intricate method of review under the Horizontal Merger Guidelines. Part IV dissects and examines the Guidelines, a product of joint action between the DOJ and the FTC, for their positive and negative effects on the post-merger environment.[5] After delineating the merger approval processes of both the Fed and the DOJ, Part V summarizes how these agencies disagree and agree with regard to merger standards.

The overall effect of the revisions to the DOJ's Guidelines is that the DOJ has abandoned its past rigid position in merger analysis by explicitly denouncing pure reliance on market structure as the primary indicator of anticompetitiveness. By moving toward a more flexible approach in the evaluation of proposed bank mergers,[6] the DOJ has increasingly come to resemble the Fed as a facilitator of banking mergers. Although tension between the DOJ and the Fed still exists, the extent of their disagreements may narrow as the DOJ's new Guidelines are applied in a more liberal fashion than permitted under prior Guidelines. As that happens, the DOJ's and the Fed's efforts in merger analysis will overlap and become redundant. Thus, Part VI advocates eliminating that redundancy by vesting exclusive jurisdiction over bank mergers with the Fed.

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4 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

5 In the past, the DOJ and the FTC issued separate merger standards. The 1992 Guidelines replace the DOJ's 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,823 (1984), and the FTC's 1982 Statement Concerning Horizontal Mergers, *reprinted in* 4 Trade Reg. Rep. (CCH) 13,200 (1982); *see also* Barbara Franklin, *Antitrust Guidelines: Changes are Few, but Potentially Significant*, N.Y. L.J., Apr. 9, 1992, at 5 (discussing highlighted changes in Merger Guidelines).

6 This flexible approach results from an overall relaxation of merger standards. *See Antitrust Agency Heads Cite Guidelines As Major Administration Accomplishment*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1590, at 584 (Nov. 12, 1992); *Arquit Describes Enforcers' Experience Applying 1992 Horizontal Merger Guides*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1584, at 426 (Oct. 1, 1992); *Justice Department and FTC Issue Horizontal Merger Guidelines*, U.S. Newswire, Apr. 2, 1992, *available in* LEXIS, Nexis Library, Omni File.

II. SPECIAL CONSIDERATIONS REGARDING BANK MERGERS

A. *Regulatory Agency and Jurisdiction*

The 1992 Horizontal Merger Guidelines issued by the DOJ and the FTC, discussed at length below, govern mergers across all industry lines, including bank mergers. However, bank mergers, unlike mergers in other industries, implicate special considerations which contribute to the tension between the DOJ and the Fed.[7]

A primary differentiating feature of the banking industry is that banking is heavily regulated by both federal and state agencies.[8] Hence, to complete a bank merger, bank executives must satisfy the requirements of the relevant federal regulatory agency, which, depending on the circumstances, may be the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), or the Fed.[9] These agencies, along with the following statutes, govern banking acquisitions and mergers: the Bank Holding Company Act[10] ("BHCA"); the Change in Bank Control Act;[11] and the Bank Merger Act ("BMA").[12] Moreover, bank officials must meet the requirements imposed by the Clayton Act[13] and the Sherman Antitrust Act,[14] both of which are administered by the DOJ.

The circumstances that dictate which banking agency will have

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7 *See* Balto et al., *supra* note 2, at 10.

Tensions between the Fed and the DOJ have waxed and waned depending on the type of transaction involved. In the 1980s, bank mergers aimed to extend geographic markets, resulting in a lesser degree of tension between these agencies. In contrast, the recent trend of bank mergers focuses on in-market consolidations, which raises the level of tension between these agencies. Cynthia A. Glassman, *Merger Plans Need Careful Antitrust Analysis*, AM. BANKER, June 24, 1992, at 4. This increased tension is explained in that horizontal mergers have a stronger potential to foreclose competition, which causes the DOJ much concern. Banks, however, are moving toward horizontal mergers in order to take advantage of resulting efficiencies which favorably impact their bottom lines.

8 James A. Bernstein, *Mergers and Acquisitions: The Legal Hurdles Banks Face in Choosing to Consolidate*, 109 BANKING L.J. 205, 206 (1992); *see generally* THE BANKERS' HANDBOOK 1222-26 (William H. Baughn et al. eds., 1988) (noting various regulations guiding banking mergers).

9 Bernstein, *supra* note 8, at 221-23.

10 12 U.S.C. §§ 1841-1850 (1988 & Supp. IV 1992).

11 12 U.S.C. § 1817(j) (1988 & Supp. IV 1992).

12 12 U.S.C. § 1828(c) (1988 & Supp. IV 1992).

13 15 U.S.C. §§ 12-27 (1988). Section 7 is most relevant to bank mergers. *See* Bernstein, *supra* note 8, at 225.

14 15 U.S.C. §§ 1-7 (1988 & Supp. IV 1992). Sections 1 and 2 are most relevant to bank mergers. *See* Bernstein, *supra* note 8, at 225.

jurisdiction primarily depends on the nature of the transaction involved. Where the proposed transaction is an acquisition, the type of institution of the target bank is the determining factor.[15] In the case of a merger, the type of institution that will be formed is the determining factor.[16] If the entity considering consolidation is a national or a District bank, then the OCC regulates the proposed transaction.[17] If the entity is a state non-member, non-District bank, then the FDIC regulates the acquisition.[18] If the entity is a non-District, state-member insured bank, then the Fed has jurisdiction.[19]

The nature of the transaction (merger or acquisition), however, does not always determine which federal agency has jurisdiction over the merger. Whenever a bank holding company is a party to the transaction, the Fed must have jurisdiction under the BHCA.[20] Under the BHCA, the Fed has promulgated Regulation Y, which requires the Fed's approval for any consolidation involving bank holding companies except where the merger involves the consolidation of subsidiary banks of a bank holding company.[21] Since most notable bank mergers involve a bank holding company, this Note will focus on the actions of the Fed as the relevant federal banking regulatory agency.

B. *Banking Statutes*

After determining which regulatory agency has jurisdiction, the appropriate banking statutes must be applied to the transaction.[22] The BMA mandates that, whenever state-member insured banks are merging, the Fed must consider the financial and managerial impact in the post-merger environment.[23] The BMA also requires the regulatory agency to consider the convenience and

15 Bernstein, *supra* note 8, at 221.

16 *Id.* at 223.

17 *Id.* at 222.

18 *Id.*

19 *Id.* at 222 n.84.

20 *Id.* at 222.

21 *Id.* at 216 n.56, 228; *see* Bank Holding Companies and Change in Bank Control. Revision of Regulation Y, 12 C.F.R. § 225 (1984).

22 A statute not frequently implicated is the Change in Bank Control Act, which affords the responsible federal agency the authority to disapprove changes in control of insured banks. 12 U.S.C. § 1817(j). This provision has an exemption for bank holding companies and bank mergers, which are governed by their own statutes. The provision applies specifically to persons acquiring control of banks. 12 U.S.C. § 1817(j)(1).

23 12 U.S.C. § 1828(c)(5)(B).

needs of the community in evaluating the anticompetitive effects of the proposed combination.[24] As indicated above, the BHCA is the applicable banking statute that governs consolidations by bank holding companies. The purpose of this statute is twofold. First, the statute prohibits the restraint of trade in the banking industry by regulating banking consolidations.[25] Second, the statute limits the scope of a bank holding company's non-banking activities in order to differentiate between banking and commerce.[26]

C. Banking Consolidations

In completing a bank merger, compliance with the applicable rules and regulations is a complex and burdensome task. The process is further complicated because, in addition to meeting the banking industry's requirements, the DOJ's Merger Guidelines must also be followed.

Bank merger analysis begins when the applicable bank agency assumes jurisdiction and commences an examination of the merger application. The bank agency must notify the DOJ of the proposed transaction under the BMA or the BHCA.[27] Concomitantly, the DOJ and the relevant bank agency issue separate opinions regarding the anticompetitive effects of the merger.[28]

With the recent wave of bank mergers, the docket of joint Fed and DOJ merger applications has steadily increased.[29] This onslaught of banking mergers is due to the collapse of interstate banking barriers under state reciprocity agreements.[30] The Douglas Amendment to the BHCA prohibits a bank holding company operating in one state from acquiring a bank in another state

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24 *Id.*; *see* Bernstein, *supra* note 8, at 226.

25 12 U.S.C. § 1842(a).

26 12 U.S.C. § 1843(c)(8). Historically, banks were prohibited from engaging in non-bank activities. Today, the distinction between banking and commerce is, to an extent, a mere exaggeration since most banks do engage in non-bank financial endeavors through banking subsidiaries. *See* Carl Felsenfeld, *The Bank Holding Company Act: Has It Lived Its Life?*, 38 VILL. L. REV. 2 (1993).

27 12 U.S.C. §§ 1828(c)(7)(A), 1849(b)(1).

28 12 U.S.C. §§ 1828(c)(6), 1849(b)(1).

29 *See* Terry Calvani & W. Todd Miller, *Antitrust Analysis of Bank Mergers: Recent Developments*, 9 Rev. Banking & Fin. Serv. No. 13, at 127, 128 (July 1993) (The United States is "in [the] midst of an ongoing process of bank consolidation."); Margaret Guerin-Calvert & Janusz Ordover, *The 1992 Agency Horizontal Merger Guidelines and the Department of Justice's Approach to Bank Merger Analysis*, 37 ANTITRUST BULL. 667 (1992) ("The banking industry is currently undergoing a period of substantial consolidation and reorganization.").

30 *See* Bernstein, *supra* note 8, at 212.

unless the second state, by express statute, permits such an acquisition.[31]

Increasingly, states have adopted reciprocity agreements that allow a bank holding company from another state to acquire a bank within their state if the bank holding company's state has a reciprocal statute. As more and more states have adopted these agreements, banking mergers have increasingly crossed state borders. The increasing frequency of banking consolidations across state lines, in conjunction with the banking crisis and the need for industry-wide consolidation,[32] has also triggered mergers of banks within a singular market. Mergers of banks within the same market pose antitrust implications.[33]

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31 12 U.S.C. § 1842(d) (1988).

32 The need for large-scale banking consolidation stems from a variety of reasons. These reasons range from the fact that failing banks can become healthy by merging into a stronger institution, to the fact that decentralized banking has inhibited United States banks from competing in the global markets. *See* Arthur Wilmarth, Jr., *Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banking*, 77 IOWA L. REV. 957 (1992); *see also* Felsenfeld, *supra* note 26, at 24 (noting that no United States bank ranks in the world's top twenty). An additional reason for the need for banking consolidation is derived from the fact that until the 1980s, interest payments on deposits were heavily regulated. As a result, banks were forced to compete on non-price factors such as service and convenience, which led to extensive branch openings. Accordingly, the banking industry became plagued by excess capacity; the current trend toward consolidation is a marked effort to correct this excess. Donald Baker, *Searching for an Antitrust Beacon in the Bank Merger Fog*, 37 ANTITRUST BULL. 651 (1992).

33 A striking example of such a situation is the BankAmerica/Security Pacific merger, which combined the third and seventh largest bank holding companies in the nation. Neither the DOJ nor the Fed opposed the merger after the banks agreed to divest 211 branches because such a divestiture would dilute the perceived anticompetitive effects throughout all relevant geographic markets. *See Division Won't Attack Proposed Bank Mergers*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1555, at 284 (Mar. 5, 1992); *see also* Nevins D. Baxter, *No Red Light Ahead for Mergers*, AM. BANKER, Jan. 14, 1993, at 4 (discussing BankAmerica/Security Pacific merger); *Orders Issued Under Section 3 and 4 of the Bank Holding Company Act: BankAmerica Corporation*, 78 FED. RES. BULL. 338 (1992) (Fed's analysis of merger); *Federal Reserve Board Approves Merger of BankAmerica Corp., Security Pacific*, BNA BANKING DAILY, Mar. 26, 1992, at 1 (the DOJ called the transaction the largest bank merger in United States history). *See generally Orders Issued Under Sections 3 and 4 of the Bank Holding Company Act: BankAmerica Corporation*, 78 FED. RES. BULL. 299 (1992) (discussing BankAmerica's acquisition of Nevada First Development Corporation).

However, the majority of bank mergers do not take place within the confines of a single geographic market and, therefore, do not raise antitrust concerns. *Rill Says No Change In Law Is Necessary To Address Megamergers*, BANKING POL'Y REP., Oct. 21, 1991, at 5; *see also Bank Mergers: Hearings Before the Comm. of Banking, Finance and Urban Affairs. House of Rep.*, 102d Cong., 1st Sess. 234 (1991) (statement of James F. Rill, Assistant Attorney General of the Antitrust Division). Furthermore, merging small banks within a market does not normally raise antitrust concerns. Indeed, such mergers are encouraged by both the Fed and the DOJ because they typically provide substantial efficiencies to the merging banks. *Id. See also Division Finds Most Bank Mergers Do Not Create Competitive Prob-*

Generally, under Regulation Y, the Fed considers three primary factors in deciding whether to approve a merger application.[34] First, the Fed evaluates whether the proposed transaction would establish a monopoly or significantly lessen competition.[35] Second, the Fed evaluates the sufficiency of the institution's financial condition as well as the managerial competence and character of the merged institution.[36] Third, the Fed evaluates whether the convenience and needs of the community will be served by the transaction.[37]

The Fed analyzes these three considerations using an organized methodology. Specifically, the Fed's merger process begins at one of the twelve Federal Reserve Banks by analyzing the appropriate geographic market and the relevant product market.[38] This includes collecting data on shopping and commuting patterns of consumers within the relevant market and determining their effect on banking relationships.[39] The Federal Reserve Bank may also collect data by conducting telephone surveys and on-site interviewing sessions.[40]

Next, officials at the Federal Reserve Bank measure pre- and post-merger environments by calculations made under the Herfindahl-Hirschmann Index ("HHI").[41] This calculation is primarily used to determine whether the proposed transaction falls within the DOJ's thresholds, and indicates whether the transaction

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lems, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1570, at 808 (June 18, 1992) (stating that the DOJ rarely opposes mergers of small banks in unconcentrated markets); *Competitive Factors Dominate First Quarter 1992 Regulatory Actions*, BANKING POL'Y REP., May 4, 1992, at 10 (stating that more than half of the bank consolidations did not pose anticompetitive concerns).

Edward C. Ettin, Deputy Director, Division of Research and Statistics, Board of Governors of the Federal Reserve System, remarked that banking combinations in urban markets "could increase considerably without raising any questions about competition under the antitrust laws or the merger guidelines of the Justice Department." *Statement before the Subcomm. on Treasury, Postal Service and General Gov't Comm. on Appropriation in the U.S. Senate, reprinted in* 78 FED. RES. BULL. 262, 263 (1992) [hereinafter *Statement*].

34 12 C.F.R. § 225.13; *see* Bernstein, *supra* note 8, at 229.

35 12 C.F.R. § 225.13(a).

36 12 C.F.R. § 225.13(b).

37 12 C.F.R. § 225.13(b).

38 *Statement, supra* note 33, at 263. The Fed analyzes the relevant product market according to a "cluster of banking services" approach as set forth by the Supreme Court. *See infra* note 81 and accompanying text.

39 *Statement, supra* note 33, at 263.

40 *Id.*

41 *Id.*

will hinder competition in the marketplace.[42] The Fed has discretion under Regulation Y to ignore even a relatively high HHI where the proposed merger's beneficial effect to the community clearly outweighs the anticompetitive factors.[43]

If, after this analysis, the officials at the Federal Reserve Bank reach a satisfactory conclusion, the review ceases and the approval of the merger is issued. However, if the results are unsatisfactory (including exceeding the DOJ's thresholds), further review will proceed. This review must be conducted by the Federal Reserve Board.[44]

Further review includes (1) looking to thrifts as commercial bank substitutes; (2) analysis of entry as well as analysis of existing competitors; (3) looking to credit unions, finance companies, and other supply responses; (4) financial conditions of the merging firms; (5) overall appraisal of the health of the market; and (6) the competitive importance of the target bank.[45] Lastly, the Fed has authority to override anticompetitive concerns in an aggregate "convenience and needs" approach. If the public benefits outweigh anticompetitive concerns, the merger will proceed.[46]

These evaluations, in conjunction with the bank's adherence to the procedural notice requirements,[47] result in either approval or rejection by the Fed. As a general rule, a federal bank agency will not approve a proposed merger where the transaction would lead to a monopoly or other monopolistic situation, or where such consolidation would lead to an unreasonable restraint on trade.[48]

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42 Bernstein, *supra* note 8, at 225. HHI measures market concentration by squaring the sums of the market share of market participants. HHI can theoretically range from 10,000 (pure monopoly) to a number approaching zero. For banks, total deposits are considered in market concentration measurement. For example, if four banks in a market have market shares of 30%, 30%, 20%, and 20%, respectively, then the HHI would be calculated as follows: (30x30) + (30x30) + (20x20) + (20x20) = 2600, resulting in an HHI of 2600 points. *See* United States v. Society Corp. and Ameritrust Corp., 57 Fed. Reg. 10,371 (1992).

43 Bernstein, *supra* note 8, at 226 n.102.

44 *Statement*, *supra* note 33, at 263.

45 *Id.*; *see also* Baker, *supra* note 32, at 653 (banking regulators of the 1980s advocating inclusion of thrifts in product market analysis).

46 *Statement*, *supra* note 33, at 264. The Fed's "convenience and needs" defense is analogous to the DOJ's "failing firms" defense. *See infra* Part IV.E. However, it is "clear that the failing company doctrine does not literally apply to bank mergers." Baker, *supra* note 32, at 658 (analyzing past and present treatment of "convenience and needs" doctrine by courts).

47 Notice requirements dictate the timing of merger applications. 12 U.S.C. § 1828(c)(3); *see* Bernstein, *supra* note 8, at 214.

48 12 U.S.C. §§ 1817(j)(7), 1828(c)(5), 1841(c).

If the Fed rejects the proposed transaction, the DOJ's merger review is presumably terminated.[49] If the Fed approves the transaction, then the DOJ has thirty days from the approval date to challenge the merger by filing suit under the Clayton Act.[50] After these thirty days lapse, the DOJ can only sue to challenge the merger under section 2 of the Sherman Act.[51]

III. The Horizontal Merger Guidelines

The bank merger process is very complex and convoluted. Merger analysis entails numerous levels of evaluation with varying degrees of complexity. In an attempt to simplify and improve the approval process, the DOJ has revised the Horizontal Merger Guidelines.

A. *A Five-Part Test*

To fully understand the antitrust conflict between the DOJ and the Fed, it is necessary to examine the provisions and effects of the Horizontal Merger Guidelines that were issued on April 2, 1992.[52] The Guidelines set forth a methodical framework for determining whether or not horizontal mergers will be challenged on antitrust grounds.[53] The new Guidelines are intended to bene-

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49 This determination is based on the traditional notion that the DOJ applies more stringent standards. *See* Letzler & Mierzewski, *supra* note 2, at 1.

50 12 U.S.C. §§ 1828(c)(6), 1849(b)(1).

51 12 U.S.C. §§ 1828(c)(7), 1849(b)(1).

52 Former Assistant Attorney General James F. Rill has called the revised Guidelines the DOJ's greatest accomplishment during his nearly three years as Chief of the Antitrust Division. The DOJ and the FTC exchanged proposals for the revision for almost a year before they were actually issued. *Interview with Former Assistant Attorney General James F. Rill*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1580, at 254 (Aug. 27, 1992).

Rill took office in July 1989 and sought to update the Guidelines to coincide with contemporary antitrust cases that the DOJ brought to court. Ironically, judges often cited the 1984 Guidelines in deciding against the DOJ, which prompted the government to undertake a complete revision of the merger framework. Barbara Franklin, *Trouble in Merger City; Agency Rivalries Stall Revisions of Guidelines*, N.Y. L.J., Jan. 9, 1992, at 5; *see also* Neal R. Stoll & Shepard Goldfein, *A Progress Report on Merger Enforcement*, N.Y. L.J., Mar. 20, 1992, at 3 (reporting that Rill announced a redirection in merger enforcement).

53 *See Antitrust Arquit Describes Enforcers' Experience Applying 1992 Horizontal Merger Guides*, Daily Rep. for Executives (BNA), Sept. 30, 1992, at 190; *Justice Department, FTC Issue Unified Federal Guidelines on Horizontal Mergers*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1559, at 404 (Apr. 2, 1992). According to the drafters of the 1992 Guidelines, the revisions are not intended to bind the agency in its conduct of antitrust litigation. Neal R. Stoll & Shepard Goldfein, *The 1992 Merger Guidelines - Practical Advice*, N.Y. L.J., May 19, 1992, at 3 ("In the litigation context, therefore, one can expect to see the usual reliance on market share evidence."). However, very few cases are litigated because of the

fit businesses by providing guidance for planning future mergers.[54] According to the drafters, the Guidelines should enable businesses to determine whether or not a proposed merger will be challenged, and, if so, in what regard or in what capacity.[55]

The principal goal of the Guidelines is to ensure competition in the post-merger environment which can be accomplished by preventing excessive market power and evaluating market concentration.[56] Under the Guidelines, regulators assess market concentration using the following five step process: (1) assessing market concentration; (2) assessing the adverse competitive effects of that market concentration; (3) assessing the timeliness, likeliness, and sufficiency of entry to counter the adverse effects of decreased competition; (4) assessing gains in efficiency that could not be accomplished by other means; and (5) assessing whether or not a company would ultimately fail if a particular merger were not allowed.[57] All mergers do not require the complete five step analysis. For instance, if a proposed transaction is found to be in a "clearly unconcentrated" market, then analysis starts and stops with the first step and the merger is approved.[58]

B. Reaction to the Guidelines

The 1992 Horizontal Merger Guidelines have received ample commentary, both critical and otherwise, from the business, legal, and regulatory communities. While the DOJ and the FTC have repeatedly praised the utility of the new Guidelines as marked improvements from prior horizontal merger standards,[59] many in

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expense involved and because the proposed transaction would be indefinitely delayed during the litigation, thus defeating the purpose of the merger. Consequently, compliance with the Guidelines is necessary, as a practical matter, for approval of a merger.

54 James F. Rill, *An Antitrust Screen for Merger Masters of the 1990s*, 27 MERGER AND ACQUISITIONS 52, 54 (1992).

55 *Id.*

56 *See Antitrust Merger Guidelines Receive Mixed Reaction; Merger Guidelines At a Glance*, NAT'L L.J., Apr. 20, 1992, at 19.

57 *Id.*

58 *See Justice's Five-Factor Merger Test*, ABA BANKING J., Aug. 1992, at 36.

59 Former FTC chairman Janet D. Steiger claimed the revised Guidelines were a significant improvement in "substantive merger analysis." *Antitrust Agency Heads Cite Guidelines as Major Administration Accomplishment, supra* note 6, at 584; *see generally Justice Department and FTC Issue Horizontal Merger Guidelines, supra* note 6 (noting favorable comments made by Rill and Former Attorney General William Barr).

the banking and legal fields do not share in this enthusiasm.[60] Rather, they view this new version as an unpredictable amalgamation of loopholes that will lead to inconsistent regulatory actions. Specifically, some critics fear that the DOJ will approve some proposed transactions when the numbers, as well as the other criteria, tend to indicate that a DOJ challenge is likely to occur based on the analytic, case-by-case approach advanced in the Guidelines.[61] These critics fear that, at other times, the same or similar numbers and other criteria will be analyzed and lead the DOJ to challenge the proposed transaction.[62]

Critics further note that the 1992 version no longer explicitly states when a merger is likely to be challenged.[63] Instead, the Guidelines speak in terms of mergers that may raise competitive concerns or that are presumptively likely to "create or enhance market power or facilitate its exercise."[64] For some, the result is that recent revisions "make it difficult to determine whether federal merger enforcement policy has become more or less stringent."[65]

Another problem with the Guidelines arises from the fact that they are purposefully flexible rather than rigid. This flexibility raises potential problems for practitioners, the DOJ, and the FTC, especially with respect to ongoing application of the Guidelines.[66] Specifically, regulators may use this flexibility to approve more

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60 Michael A. Greenspan noted that the new Guidelines "make it more difficult for merging banks to know the standards and seek to structure their deals." *Division Official, Bank Counselor Cross Swords Over Bank Merger Reviews*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1572, at 17 (July 2, 1992). Thus, the end result will be increased costs in the merger application process. *Id.*; *see also Dissenting Statement of Commissioner Mary L. Azcuenaga On the Issuance of Horizontal Merger Guidelines*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1559, at 450 (Apr. 2, 1992) [hereinafter *Dissenting Statement*] (opposing revisions).

61 *Dissenting Statement*, *supra* note 60, at 450. *Contra* Stoll, *supra* note 52, at 3 (consistent practice by the DOJ in disclosing enforcement rationale will foster predictability in merger analysis).

62 *See Dissenting Statement, supra* note 60, at 450. Commissioner Azcuenaga noted that the "government policy . . . may, in some situations encourage mergers that are likely to be challenged and, in others, discourage efficient mergers . . . [which] will impose costs." *Id.*

63 Neal R. Stoll & Shepard Goldfein, *Merger Enforcement for the Nineties and Beyond*, N.Y. L.J., Apr. 21, 1992, at 3.

64 *Id.* (citing 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552).

65 *Id.*

66 *Id.*

mergers than the drafters had anticipated or intended.[67] Conversely, current regulators may use their discretionary power, afforded by the flexible approach, to disapprove mergers that the drafters would have favored. Since the framework provides for a high degree of subjectivity, future merger analysis could be plagued by inconsistency.

IV. DISSECTING THE GUIDELINES

A. *Market Definition, Measurement, and Concentration*

As stated above, the 1992 Guidelines promulgate a five step approach with respect to merger analysis. The first step involves evaluation of the market by measuring structure and concentration. The first aspect of concentration analysis requires that the appropriate market be defined.

1. Market Definition

A market is defined as:

> a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a small but significant and nontransitory increase in price assuming the terms of sale of all other products are held constant.[68]

Therefore, a market is defined in terms of both a product market and a geographic market. In the banking industry, product markets are determined by describing the products offered by financial institutions and recognizing where these products overlap. In contrast, geographic markets consist of areas within which providers of the same type of product are subject to the same demands by customers. This entails discovering where customers currently obtain services, and where they would go if prices were increased.[69]

In practice, defining the geographic market for banks may be

67 *See id.* ("[G]uidelines . . . [may] become subject to radical reinterpretation by the drafters' successors.").

68 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,554, § 1.0.

69 Glassman, *supra* note 7, at 4.

difficult, depending on the product market in question.[70] If the product market for large business customers is under evaluation, the relevant geographic market could feasibly be the entire United States. However, the product market for banks is usually comprised of banking services to individual consumers or to small and mid-sized companies.[71] The relevant geographic market is more limited for these product markets. According to one commentator, "realistic approximations" of the relevant geographic market can be discerned from "population densities, commuting patterns, newspaper distribution routes, public transportation routes, and toll-free telephone" numbers.[72]

2. Market Measurement

The next aspect of market analysis, market measurement, significantly changed from the prior Guidelines. Market measurement involves identifying the firms that participate in the relevant market. The 1992 version of the Guidelines broadens the scope of market measurement to include more market participants.[73] Specifically, uncommitted entrants, those who are not yet in the market but may be within one year without incurring significant expenditures, are included as market participants.[74] Production substituters (i.e., non-banks that offer substitute products) are also included as market participants even though they are not currently in the market, but may be, if within one year, they are likely to alter production by producing the relevant products without incurring significant costs.[75]

Lastly, all other supply responses, which could be newly organized firms or existing firms not currently in the production of the relevant product, are included as market participants if, within one year, they would be likely to produce the relevant product in

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70 *Id.*

71 *See* Letzler & Mierzewski, *supra* note 2, at 3; Balto et al., *supra* note 2, at 11.

72 Glassman, *supra* note 7, at 4.

73 *See* 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,556-57, § 1.31.

74 *Id.* § 1.32.

75 James F. Rill, *Speech Before ABA Section of Antitrust Law* (Apr. 3, 1992), *in* 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 485 (Apr. 9, 1992). Another example of a supply side substitute includes the increasing use of commercial paper as a source of financing. *See* David S. Neill, *Economic Developments and International Finance*, 60 Banking Rep. (BNA) 812 (May 31, 1993).

response to small but significant nontransitory increases in prices.[76] In contrast, those firms with the technological capacity to produce the relevant product are excluded from the scope of market participation if they would not likely opt to enter the relevant market.[77] In measuring market participants, speed (the one year requirement) and sunk cost (an expenditure that cannot be recouped within one year) are of critical importance.

3. Market Concentration

The third aspect of market analysis is market concentration. HHI measures market concentration and is broken down into three benchmarks. An unconcentrated market is one with an HHI of less than 1000.[78] A moderately concentrated market has an HHI between 1000 and 1800.[79] Lastly, an HHI over 1800 is considered to be evidence of a highly concentrated market.[80]

In the banking arena, overall market concentration analysis depends upon analysis of the product market. In *United States v. Philadelphia National Bank*, the Supreme Court defined a banking product market as a cluster of banking services.[81] In comparison, the DOJ segregates consumer from business banking markets, and within business banking differentiates between small and middle market companies on one hand, and large companies on the oth-

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76 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,557, § 1.321; *see* Rill, *supra* note 75, at 486.

77 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,556-57, § 1.32. Such firms are excluded from analysis of market participants, but are included in analysis of entry.

78 *Id.* at 41,558, § 1.51(a). Definitions of market concentration levels have remained relatively unchanged from prior Guidelines.

79 *Id.* § 1.51(b).

80 *Id.* § 1.51(c).

81 374 U.S. 321, 324-27 (1963) (ruling that a cluster of banking services includes unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans); *see also* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974) (ruling that commercial banking's cluster of products approach remained distinct from all other financial institutions); Donald Baker, *Financial Networks Avoid Antitrust Ills*, NAT'L L.J., June 21, 1993, at 21 (in *Philadelphia Nat'l Bank*, the Supreme Court established the applicability of antitrust laws to banking). *Philadelphia Nat'l Bank* marked the first antitrust suit filed by the DOJ against the merger of commercial banks. *See* Lee B. David, Comment, *Banking Mergers—Is Banking Still A Distinct Line of Commerce?*, 57 TUL. L. REV. 958, 962 (1983).

Today, the Fed continues to utilize the "cluster" approach in defining the relevant product market in banking. Calvani & Miller, *supra* note 29, at 130; *see also* David S. Neill, *Fed Antitrust Change Could Boost Thrift Acquisitions by Banks*, BANKING POL'Y REP., Sept. 6, 1993, at 1 (the Fed is currently evaluating whether it should continue to use the "clustering" approach); Neill, *supra* note 75 (same).

er.[82] The DOJ's differentiation of business markets is derived from the fact that in a global economy, large business customers have access to a variety of financing options.[83] However, according to the DOJ, the small and mid-sized business customers may not enjoy this same variety.[84] Accordingly, the DOJ has defined the product market for small and mid-sized companies differently, thereby affecting the Department's overall conclusions about market concentration.

These conclusions about market concentration represent marked departures from prior Guidelines, which resulted in differences in evaluating the importance of HHI.[85] First, in the 1984 Guidelines the DOJ claimed that moderate to high market concentration meant that the agency was "likely to challenge."[86] In contrast, the 1992 version indicates that a multiplicity of factors will be taken into account in determining whether a merger will be challenged.[87] Similarly, under the 1984 Guidelines, if the post-merger HHI increase in a moderately concentrated market was less than 100 points, the Department was unlikely to sue.[88] The 1992 Guidelines describe the same situation more emphatically as "unlikely to have adverse competitive consequences."[89] Similarly, in the 1984 version, a highly concentrated market with a post-merger incremental HHI increase of over 100 points indicated that the DOJ was likely to sue, except in extraordinary circumstances.[90] The 1992 Guidelines simply say that such an increase

82 *See* Lynn Adkins, *Small Business: Antitrust Focus on Loan Availability*, AM. BANKER, May 27, 1992, at 6; *see also*, *Banks Should Review New Guidelines on Mergers, Justice Dep't Official Says*, 59 Banking Rep. (BNA) 1 (July 6, 1992); *Banks Should Review New Guidelines on Mergers, Justice Official Says*, BNA BANKING DAILY, June 30, 1992, at 1.

83 Stephen A. Rhoades, *Consolidation of the Banking Industry and the Merger Guidelines*, 37 ANTITRUST BULL. 689, 690-91 (1992).

84 *Id.*

85 *See* Stoll & Goldfein, *supra* note 63, at 3 (suggesting HHI analysis has remained unchanged from prior Guidelines).

86 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,831, § 3.11(b).

87 As Charles A. James noted, the fundamental thrust of the 1992 Guidelines was to "make a significant movement away from wooden adherence to structural standards and toward a more balanced assessment of market conditions." *Antitrust Agency Heads Cite Guidelines As Major Administration Accomplishment*, *supra* note 6, at 584.

88 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,831, § 3.11(b); *see* Rill, *supra* note 75, at 486.

89 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,558, § 1.51(b).

90 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,831, § 3.11(c); *see* Rill, *supra* note 75, at 486.

may "potentially raise significant competitive concerns."[91]

These differences strongly indicate that market concentration, standing alone, will not determine whether the DOJ will file an antitrust suit. In the 1992 Guidelines, the DOJ recognizes the fallibility of the HHI and acknowledges that "in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger."[92] The downside of this flexible approach is that it is difficult to predict when the HHI level is sufficient or when the DOJ will consider it to be too high.

This shift in focus away from a strict numerical analysis of market concentration to a "whole picture" approach epitomizes the flexible methodology of the 1992 Guidelines. Under the new framework, high market concentration is not necessarily dispositive. However, the DOJ has not stated the extent to which mergers will be favored where market concentration is high. Nor has the DOJ stated how the factors that offset high HHI will be weighted.[93]

This relaxation of merger policy with respect to market concentration marks another departure from the prior Guidelines. In the past, it was believed that market concentration, or more precisely market structure, determined anticompetitive behavior.[94] The new Guidelines replace the idea that market structure signifies the anticompetitiveness in the post-merger environment with the idea that the conduct of firms determines anticompetitiveness.[95] Accordingly, the new Guidelines are based

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91 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,558, § 1.51(c); *see* Rill, *supra* note 75, at 486.

92 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,558, § 1.52.

93 For factors that can be used to offset high HHIs, see *infra* Part IV.B. An example of the DOJ's relaxed view of the HHI is seen in the Fed's approval of Barnett Banks, Inc.'s acquisition of 7L Corp. and First Florida Banks, Inc. The DOJ did not challenge the merger even though market concentration was high. For example, in the Citrus County market, pre-divestiture HHI was 2302 points, an increase of 539 points. Barnett's willingness to divest itself of three branches brought the HHI down to 2093 points, which, in the past, would have invoked a DOJ challenge to the transaction. *Fed Approves Barnett Acquisition As Justice Shows Flexibility on HHI*, 59 Banking Rep. (BNA) 622, 623 (Nov. 2, 1992).

94 Rill, *supra* note 75, at 487.

95 Nonetheless, the DOJ still cautions that structure can influence the effect of conduct. *Id. See* Rill, *supra* note 54, at 52. Kenneth Scherer, an economic theorist who has written extensively on the subject, is largely credited with this transition away from reliance on market structure, and toward reliance on market conduct. Neal R. Stoll & Shepard Goldfein, *Administrative Changes: Fasten Your Seatbelts*, N.Y. L.J., Nov. 21, 1989, at

on the premise that the conduct of firms determines possible adverse effects of a merger through the exercise of market power based on market concentration,[96] which brings merger analysis to its second step.

B. The Potential Adverse Competitive Effects of Mergers

The structuralist approach of the past "assumed that adverse effects flow ineluctably from increases in concentration."[97] Today, antitrust analysis proceeds on the assumption that conduct and not structure determines the course of anticompetitive effects. Thus, potential anticompetitive effects are given greater attention now than in the past. Indeed, the 1992 Guidelines dedicate an entire section to competition in the post-merger environment. There, anticompetitive effects are broken down into two categories: coordinated interaction and unilateral activity.

1. Coordinated Interaction

The previous Guidelines defined anticompetitive effects largely in terms of collusion. Central to the notion of collusion was the concept of a cartel, in which a conglomeration of firms, acting together, could dictate the local market.[98] However, the DOJ no longer views the existence of a cartel as necessary to adversely affect the post-merger environment.[99] Rather, the DOJ looks for "coordinated interaction,"[100] which is far broader and more inclusive of overall anticompetitive effects than simple collusion.

The new Guidelines define "coordinated interaction" as consisting of three factors.[101] First, terms of coordination, under which similar firms act together, must exist.[102] Second, a mechanism to detect any deviation or differentiation from the terms of

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96 *See* Rill, *supra* note 75, at 486-87.

97 *Id.* at 487.

98 *See* Stoll & Goldfein, *supra* note 63, at 3.

99 Gregory Werden, former Senior Economist of the Antitrust Division and an author of the 1984 Guidelines, believes that repeated use of the word collusion has "misled some commentators" because the Guidelines did not require explicit collusion in order to have an adverse impact on competition. Neal R. Stoll & Shepard Goldfein, *A Decade of Impressions*, N.Y. L.J., Aug. 20, 1991, at 3.

100 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,558-59, § 2.1.

101 Rill, *supra* note 75, at 487.

102 *Id.*

coordination must exist.[103] Finally, punishment must be invoked against those who deviate from the prescribed scheme of coordination.[104]

In determining the existence of coordinated interaction, all three elements do not have to be present for a negative impact on competition to manifest. Indeed, "the terms of coordination may be imperfect and incomplete . . . and still result in significant competitive harm."[105] Kevin J. Arquit, former director of the FTC's Bureau of Competition, noted: "When market share and concentration data raise presumptive concerns regarding the merger, we will look carefully at evidence that market conditions make coordinated interaction unlikely to occur or succeed."[106] However, he continued, "the [G]uidelines do not compel us to engage in exhaustive polling of firms in the market to determine their individual cost-benefit analyses of collusion versus cheating."[107]

Coordinated interaction poses a real threat to banking competition. Prevalent throughout the industry is an informal manner of cooperative pricing. Typically, when the Fed eases monetary policy by lowering the federal funds rate, large banks react first by lowering their prime lending rate. Such a rate reduction starts a domino effect as smaller financial institutions quickly follow suit by mimicking the prime rate at the larger institutions. This type of coordinated activity could lead to anticompetitive problems in the post-merger environment if large banks lowered their rates independently of the Fed. In fact, large banks could effectively price their smaller competitors out of the market. Such a situation could create substantial predatory pressures as smaller financial institutions exited the market, while a select number of bank holding companies controlled the market.[108]

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103 *Id.*

104 *Id.*

105 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,559, § 2.11.

106 *FTC Official Assures Bar of Flexibility In Using New Guidelines to Assess Mergers*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1563, at 563, 564 (Apr. 30, 1992).

107 *Id.*

108 Suppose, for example, Bank A (a bank holding company) is formed by the combinations of Banks B and C. Post-merger, Bank A begins to lower its base lending rate independent of the Fed's actions. To keep pace in the market, smaller financial institutions begin to lower their rates. Bank A, as well as other bank holding companies within the market, could offset lost margins associated with the rate reduction by increasing prices on the products of their non-banking subsidiaries. However, smaller banks (as opposed to bank holding companies) would be unable to offset losses associated with the rate reduction.

The DOJ is also concerned about what would happen if the large bank increased

2. Unilateral Activity

In addition to coordinated interaction, the DOJ also looks for the existence of unilateral activity. Essentially, unilateral activity creates anticompetitive effects where one firm is strong and large enough to create the same adverse effect that would have resulted had several firms coordinated their conduct.[109] "A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output."[110]

(a) Substitute Products.—Any analysis of unilateral effect must take into account substitute products. The market process through which differentiated products can enter commerce via various producers can be manipulated or disrupted by the unilateral exercise of market power by a merged entity.[111] Accordingly, in a market where the two best products remain with the same firm, unilateral activity such as price increase can greatly affect buyer behavior. In such a situation, product substitutes would gain attention as buyers switched to the next best product available in the market. This could potentially hinder competition to a great extent.

For example, assume Bank A offers a line of credit that is neither subject to annual review (by bank officials to determine whether the creditworthiness of the customer remains at an acceptable level) nor annual clearance (where the credit facility

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its price. First, other banks might follow suit and increase their prices, thus resulting in a situation of virtual coordination throughout the local industry. The DOJ encountered a potential example of this and "considered whether market participants (*i.e.*, smaller banks) had the incentive and ability to expand their capacity to serve affected customers with loans or depository services in response to a price increase and whether this capacity expansion was sufficient to make successful coordination unlikely." Guerin-Calvert & Ordover, *supra* note 29, at 668.

Second, the DOJ is concerned that the large bank (in the hypothetical) would exert such force in the market that it could sustain a unilateral price increase without sacrificing any customers regardless of the behavior of the smaller banks. Thus, if Bank A raised its prices and maintained its customer base (which can be explained by a variety of factors such as reputation of the bank and the prestige of being associated with it), an anticompetitive result would manifest.

109 *See* Rill, *supra* note 54, at 52.

110 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,560, § 2.2.

111 *See* Rill, *supra* note 75, at 488.

must be fully repaid for a specific amount of time). This line of credit is comparably priced to lines offered by other banks. However, other banks require annual clearance for thirty consecutive days and require that the line be reviewed annually. Hence, their customers have to provide financial statements, accounts receivable agings, and various other financial data for review on a more frequent basis.

Next, assume that the absence of an annual review and annual clearance requirement creates the perception that Bank A has a far superior product. Then, Bank A begins to price its lines of credit at rates higher than lines offered by other institutions. Instead of moving away from Bank A and utilizing credit facilities at other financial institutions, some customers close their line of credit and open a revolving line of credit at Bank A, thereby funding their working capital requirements. This revolver differs from the original line of credit in that it has a lower rate and is subject to annual review though not annual clearance. In practice, this revolver has no better attributes than the lines of credit offered by other banks, yet customers perceive a difference (since they do not have to fully repay for a set time during the year) and switch products rather than switch banks. The hypothetical result is a situation with a monopolistic potential which could hinder competition. The exercise of this type of unilateral activity is what the DOJ is trying to avoid.

This phenomenon of switching products rather than switching banks is further encouraged by the fact that often a bank will provide all of a customer's banking needs rather than merely providing one or two products.[112] Switching banks is especially cumbersome, since a customer must close all accounts at one institution and then open new ones at a rival.

(b) Two Theories Of Unilateral Activity.—The DOJ employs two distinct theories of unilateral activity. First, unilateral activity may arise where the merged firms have two products that act as close substitutes to one another and where the same firm produces the two best products.[113] In that situation, the firm might raise the price of one product. Some customers would be unwilling to bear

112 *See* Gregory Elliehausen & John Walker, *Small Business Clustering of Financial Service and the Definition of Banking Markets for Antitrust Analysis*, 37 ANTITRUST BULL. 707, 735 (1992) (viewing commercial banking as a line of commerce since certain bank products are "nearly always purchased as a cluster").

113 *See* Rill, *supra* note 75, at 488.

the burden of the increased cost, and thus would switch to the next best product. As a result, the merged entity would receive the profit from the price increase without losing any customers, just realigning them (toward the second best product).[114] This customer diversion, arising from a form of price discrimination, will occur when other firms in the market lack the capacity to supply the output necessary to restrain the price increase. Consumer perception is vital to this theory since, in fact, the second best product may be produced by another firm. However, this fact is irrelevant if the consumer thinks that the second best product originates with the same firm that produces the best product.[115]

The second theory of unilateral activity relates to markets where products are identical and the feature distinguishing competitive firms is their capacity for production. In such a scenario, a merged firm may find that decreasing output while simultaneously increasing price is profitable because "the lost mark-ups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales."[116] This would only be successful if alternative supply was not readily available either because competitors lacked capacity to increase their supply or the market simply lacked competitors. The DOJ advises that such unilateral activity is unlikely if it would be more cost-efficient to maintain existing output.[117]

Merging banks theoretically could engage in either theory of unilateral activity. With regard to the first theory, banking products are highly substitutable both from the standpoint of credit sources (term loans or leases) and deposit sources (one can invest in a certificate of deposit or a money market fund). In a market where one bank has significant market share, customers could logically substitute products rather than switch to a different financial institution.

With regard to the second theory, in a market where one bank has a fairly high market concentration, the bank could decrease its output of loans to a particular sector (such as to small

114 *See also id.* ("What formerly was an unprofitable strategy, now is a profitable strategy because the merged firm has internalized or captured what used to be a diversion of sales.").

115 *See* Stoll & Goldfein, *supra* note 63, at 3.

116 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,561, § 2.22; *see* Rill, *supra* note 75, at 488.

117 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,561, § 2.22; *see* Rill, *supra* note 75, at 488.

businesses), thereby diminishing the availability of financing. Next, the bank could decrease costs by eliminating staff (which would result in the same effect as if they had increased profits by increasing prices), while reducing output of a certain product.

This second theory especially concerns the DOJ. For instance, suppose Bank A merges with Bank B, creating a new, large entity called Bank C. Prior to the merger, Banks A and B both actively sought out small to mid-sized business banking customers. After the merger, Bank C is larger and stronger and better able to service large business clients. Such an endeavor is more profitable for Bank C since Bank C could maintain a loan portfolio equal to the size of the portfolios of both Bank A and Bank B but could employ fewer bankers (less personnel would be needed to service the customer base since less customers exist). In such a scenario, the small and mid-sized business customers are clearly the losers, which is what the DOJ is trying to avoid by watching unilateral actions that hinder competition.

C. Entry Analysis

Entry analysis is the third step in the revised merger analysis process and its treatment in the 1992 Guidelines represents yet another move away from a structural emphasis to a conduct oriented focus. Under entry analysis, the DOJ considers whether or not a prospect will be deterred from entering a market based on the proposed merger, or whether the prospect's entry is likely and will counteract some of the anticompetitive effects of the merger.[118]

Entry analysis for banking is unique in that under the Douglas Amendment, a state has the power to prevent out-of-state bank holding companies from entering its borders.[119] This law is a vital consideration in the DOJ's entry analysis.

1. Timeliness

The new Guidelines break entry analysis into three components: timeliness, likeliness, and sufficiency. A prospect is considered timely if entry could transpire within two years of the merger. This two year period must include all phases of entry, beginning with initial planning, which entails due diligence by the po-

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118 Rill, *supra* note 75, at 488.
119 12 U.S.C. § 1842(d).

tential entrant to determine whether or not to proceed with the entry based on forecasts of profitability and feasibility.[120]

2. Likeliness

Next, the entry must be likely, which means economically feasible in terms of a sunk cost analysis that evaluates capital expenditures that could not be recouped within one year.[121] "[C]ompanies in industries such as financial services, for instance, presumably would have fewer sunk costs and therefore would be more likely to enter the market."[122] Specifically, the likeliness of entry is measured by comparing the minimum viable scale of entry at pre-merger prices against a hypothetical five percent reduction in output.[123]

The minimum viable scale is defined as "the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at pre-merger prices."[124] To simplify, this means that regulators predict a five percent reduction in output by the merged entity, which in banking means a five percent reduction in credit availability. To offset this reduction, an entrant must be able to provide ample supply (by providing financial services and products). However, if the minimum level of sales needed to sustain the prospective entrant exceeds potential sales (which is assumed to coincide with the reduction in output from the merged entity), then entry is unlikely since it would not be profitable for the entrant to move into the market.[125] As a result of entry analysis, the relationship between estimated scale of entry and hypothetical reduction in output is highly significant.[126]

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120 *See* Rill, *supra* note 75, at 488.

121 *See* Rill, *supra* note 54, at 56.

122 Franklin, *supra* note 52, at 5.

123 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,562, § 3.3 n.32.

124 *Id.* § 3.3; *see* Rill, *supra* note 75, at 489.

125 "Prospective entrants" refers to committed entrants. The primary distinction between committed entrants and uncommitted entrants is based upon the step in the merger analysis process in which they are evaluated. Uncommitted entrants are included in market share analysis as market participants. Committed entrants, however, are excluded from market share analysis but included in entry analysis because they are potential future entrants. *See* Rill, *supra* note 54, at 56-57.

126 The five percent standard is an untested assumption, which has caused Azcuenaga to fear that in practice, the degree of precision required to appropriately measure the likelihood of entry may be unattainable. *Dissenting Statement, supra* note 60, at 451. She has further commented that the incorporation of an untested assumption into the Guidelines was premature. *Id.* Azcuenaga's point is quite valid. For instance, assume regulators postulate that the hypothetical five percent decrease in output is a likely result of the

3. Sufficiency

The third component of entry analysis, sufficiency, evaluates the overall effect of multiple entrants. In broad terms, sufficiency analysis is a regulatory escape mechanism. "Sufficiency . . . [essentially] requires that entry be of a character and scope that is responsive to the competitive effect of concern."[127] For instance, if an entrant is deemed to be likely, then the sufficiency requirement is automatically met. But when a particular entrant is deemed to be unlikely, then the sufficiency component allows regulators to nevertheless approve the merger based on the overall effect of multiple entrants. This could happen where market concentration is high and where a realistic entrant is nonexistent. If regulators want to approve the merger, they could do so in terms of potential sufficiency of multiple entrants and their presumed combative effect against restrained competition.

Overall, entry analysis in the 1992 Guidelines appears to be an improvement over the 1984 Guidelines, which simply said that "if entry into the market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market."[128] This nebulous directive was difficult to apply.[129] The three-part analysis in the 1992 Guidelines was a needed clarification and should enable regulators to more clearly identify a committed

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merger. Assume further analysis indicates that a possible entrant could maintain a minimum level of annual sales that would result in four percent of the market share. Hence, the minimum viable scale test favors the entrant, and regulators would thereby approve the merger on the basis that entry is likely. However, a committed entrant may still be engrossed in the initial planning phase at the time the merger is approved. As the prospective entrant continues with due diligence, it is ascertained that the minimum viable scale is indeed four percent. Meanwhile, the merged entity has reduced output by a mere two percent, rather than the anticipated five percent. The entrant then acknowledges the impracticality of entry and aborts the plan to enter the market. The result: competition is hindered as entrants are deterred from entering the market.

127 Rill, *supra* note 75, at 489. The scope of entry may be deemed to be sufficient based upon the source of the anticompetitive concern. *See* Stoll & Goldfein, *supra* note 63, at 3. For instance, if the concern arose from a unilateral price increase by the merged entity and an entrant's product was such that it could disrupt what would otherwise be a loss of sales (from the price increase), then such scope of entry would likely be deemed sufficient. Rill, *supra* note 75, at 489.

128 Rill, *supra* note 75, at 488 (citing 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,832, § 3.3).

129 *See* Rill, *supra* note 54, at 56; *see also* Rand McQuin, *More Direction Required from DOJ Merger Guidelines*, N.Y. L.J., Sept. 11, 1989, at 39 (criticizing the DOJ's 1984 Merger Guidelines).

entrant. Moreover, in the event that a committed entrant is not easily identifiable, regulators have the flexibility to approve a merger based on the potential for multiple entrants.

D. *Efficiencies*

The fourth step in the merger process considers efficiencies and gains therefrom. This step of the analysis has undergone little change from the 1984 Guidelines, apart from the burden of proof required. The 1984 Guidelines required merging entities to provide "clear and convincing" evidence of efficiencies.[130] In the 1992 Guidelines the language requiring "clear and convincing" proof is gone. FTC Commissioner Mary L. Azcuenaga (the sole dissenter to the Guidelines) has argued that the omission means there has been no change from prior policy.[131] However, she expressed concern that some regulators may interpret the omission as indicative that clear and convincing evidence is no longer required.[132] In contrast, former Assistant Attorney General James F. Rill has expressed the view that a lesser burden of proof is now sufficient.[133]

Presumably, Rill is correct and the DOJ will evaluate proposed gains in efficiencies under a lesser burden of proof than required in the past. Aspects of efficiencies to be considered include economies of scale, enhanced integration of production facilities, transportation costs, and/or plant specialization.[134] Although gains in efficiencies are somewhat easier to prove, any gain will be discounted if regulators believe that an out-of-market participant could achieve the same or similar gains.[135] Essentially, the DOJ has discretion to disregard potential efficiencies of scale in the horizontal merger setting if a merger between two firms who do not already compete in the same market could reach the same efficient results.

Attaching significance to gains in efficiencies is yet another

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130 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,834, § 3.5.

131 *Dissenting Statement*, *supra* note 60, at 451.

132 *Id.*

133 Rill, *supra* note 75, at 489.

134 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,562, § 4.

135 Rill, *supra* note 54, at 57. Gains in efficiencies for banks have traditionally been analyzed as reductions in overhead such as rent and wages. Edward Dillon, *A Better Gauge of Merger Success: Looking at Net Operating Expenses*, AM. BANKER, Dec. 8, 1993, at 4. However, a merger's effect on net operating expense is increasingly seen as a more accurate method of analysis. *Id.*

mechanism that allows regulators to approve a merger that otherwise would be challenged on grounds of hindered competition. The check in this discretionary power is seen in the addition to the Guidelines that regulators "will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means."[136]

E. Failing Firms

The fifth and final step in the merger analysis process applies only to merger applicants that are in imminent danger of financial failure.[137] The importance of this prong is diminished in the bank merger context. In the 1984 as well as the 1992 Guidelines, the first three prongs in failing firm evaluation remain intact. However, the 1992 Guidelines differ by adding a fourth prong. First, in order to invoke the failing firm doctrine, the merging firm must establish that it cannot meet its financial obligations in the near future.[138] Second, the firm must establish that it cannot successfully reorganize under Chapter 11.[139] Third, the firm must establish that it has made unsuccessful good faith efforts to elicit other reasonable offers.[140] The fourth factor, new in the 1992 Guidelines, requires the firm to establish that, without approval, its assets would leave the market.[141] This last prong effectively requires proof that no alternative purchaser of the assets exists.[142]

In the 1984 Guidelines, a proposed transaction was deemed unlikely to create, enhance, or facilitate the exercise of market

136 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, § 4. The DOJ has highlighted three reasons for this rejection: (1) accurate evidence of merger related cost saving is frequently not available; (2) efficiencies may not be recognized until the future; and (3) the parties are often unable to articulate their method of efficiency without giving rise to a conflict of interest. Guerin-Calvert & Ordover, *supra* note 29, at 683.

137 Rill, *supra* note 54, at 52.

138 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,563, § 5.1.

139 *Id.*

140 *Id.*

141 *Id.*

142 The alternative purchaser theory played a role in the Fleet-Norstar acquisition of New Maine National Bank, which had previously been a subsidiary of Bank of New England. Maine's bank was in danger of failing, yet the DOJ discounted the failing firm defense since such a merger would have adversely affected competition, and other bidders did exist. Eventually, the merger was consummated after the merged entity agreed to divestitures. Andrew L. Sandler, *Mergers and the Justice Department*, AM. BANKER, Oct. 29, 1991, at 4; *see also Maine Antitrust Official Criticizes Fed on Antitrust Enforcement in Bank Mergers*, BNA BANKING DAILY, Apr. 2, 1992, at 1 (Maine's Deputy Attorney General claimed that both the Fed and the DOJ misapplied the failing firm defense.).

power if the merger candidate was in imminent danger of failure if the merger was not approved.[143] This language created confusion because, in the past, companies construed a weak financial condition to indicate that anticompetitive effects would be ignored.[144] Federal Trade Commissioner Janet D. Steiger believes that the addition of the fourth prong in the 1992 Guidelines will alleviate some of the misunderstandings of the past since there is a big difference between a "weak financial position . . . [and] imminent failure."[145]

V. FED/DOJ MERGER STANDARDS

A. *Where They Disagree*

In light of the dual levels of regulatory scrutiny that banks are subject to in accomplishing a merger, it is a wonder that banking combinations ever occur. Even more amazing is that, of the nearly two thousand bank merger applications[146] reviewed each year between 1990 and 1992, only four were challenged on antitrust grounds.[147] According to one commentator, Edward C. Ettin, this staggering number of approvals is explained by the fact that the thoroughness of the review process probably deters banks from filing merger applications that would "clearly be anticompetitive."[148] Ettin believes that the self-screening process is highly effective, which relieves the agencies of having to unneces-

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143 *See* 1984 Horizontal Merger Guidelines, 49 Fed. Reg. 26,837, § 5.1.

144 Janet D. Steiger, *Speech Before ABA Section of Antitrust Law* (Apr. 2, 1992), *in* 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 490 (Apr. 9, 1992).

145 *Id.*

146 This number encompasses mergers, consolidations, and acquisitions. *Rill Says No Change In Law Is Necessary To Address Megamergers*, *supra* note 33; *see* Rill, *supra* note 54, at 53.

147 The most recent notable challenge was the Society/Ameritrust merger, which was approved by the Fed on February 13, 1992. The DOJ expressed concern that Cleveland's business would be negatively affected by the proposed combination. As a result, the DOJ did not approve the merger until March 16, 1992, after Society agreed to divest $1 billion in branch deposits to Star Bank N.A. *See* United States v. Society Corp. and Ameritrust Corp., 57 Fed. Reg. 10,371; Baxter, *supra* note 33; *Competitive Factors Dominate First Quarter 1992 Regulatory Actions*, *supra* note 33; Letzler & Mierzewski, *supra* note 2, at 2; *Society Corporation, Cleveland, Ohio: Order Approving the Acquisition of a Bank Holding Company*, 78 FED. RES. BULL. 302 (1992); *Antitrust Division Resolves S. 7 Concerns Regarding Acquisition in Banking Sector*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1558, at 374, 375 (Mar. 26, 1992); *Society Corp. Agrees to $1 Billion Deposit Sale*, Bloomberg Newswire, Mar. 16, 1992; *Fed Approves Society-Ameritrust Merger Over Objections of Justice Department*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1553, at 223 (Feb. 20, 1992).

148 *Statement*, *supra* note 33, at 263.

sarily review unmeritorious merger applications.[149]

Nevertheless, the DOJ and the Fed do disagree over antitrust issues, which causes tension between the two agencies. When the agencies disagree on antitrust concerns, the Fed generally must give way to the DOJ pursuant to statutory mandates that govern the course of mergers.[150] The DOJ is ultimately responsible for ensuring the integrity of the Sherman Antitrust Act and the Clayton Act, which can be accomplished by merger applicants' compliance with the DOJ's Merger Guidelines.[151] Hence, the DOJ's application of the 1992 Guidelines is dispositive of bank mergers.

1. Definition Of Product Market

In recent times, a major point of contention between the DOJ and the Fed with regard to antitrust policy has been the DOJ's reliance on small to mid-sized business loans in defining relevant product market.[152] This point of contention was seen in the merger between Society Corporation and Ameritrust Corporation

149 *Id.*

150 *See supra* notes 9-14 and accompanying text.

151 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,553, § 0. However, "it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws." *Id.*.

152 In 1990, for the first time in five years, the DOJ challenged a proposed bank merger, that of First Hawaiian, Inc. and First Interstate Hawaiian, Inc. The DOJ was concerned with the probable adverse competitive effect of the transaction. The DOJ arrived at this conclusion as it departed from its tradition of defining the relevant market in terms of a cluster of banking services and instead analyzed the product market in terms of small and mid-sized business banking services. Sandler, *supra* note 142, at 6. *See* Balto et al., *supra* note 2, at 11. The DOJ's focus on small to mid-sized business banking services and products was rejected in the only reported case in which the DOJ utilized the concept of business services as the relevant product market. *See* United States v. Central State Bank, 817 F.2d 22 (6th Cir. 1987), *aff'd*, 891 F.2d 292 (6th Cir. 1989) (table opinion).

The emphasis on small to mid-sized business loans has led to an overall change in the procedures the DOJ uses to conduct merger review. In the past, the DOJ analyzed bank mergers by perusing regulatory filings and supplementing such data by telephone or personal interviews with customers and competitors. Letzler & Mierzewski, *supra* note 2, at 1. Now, the DOJ demands substantial documentation from the merging banks as well as from rival banks. *Id.* The DOJ now completes a more thorough process of interviewing customers and competitors. *Id.*

Rill expressed his intent that merger analysis move away from using "opinion polls" as evidence in determining whether or not the proposed transaction should proceed. Stoll & Goldfein, *supra* note 53. The 1992 Guidelines are silent on the role of customer commentary and it appears that Rill's intent has not been fully implemented, because customer testimony does have an effect on the approval process. *See generally* Dan Shingler. *City Looks for More Lending Agreements*, CRAINS CLEVELAND BUS., Jan. 13, 1992, at 1.

where a dispute between the Fed and the DOJ arose over the applicable product market.[153] The Fed's merger analysis focused on the traditional cluster of banking services.[154] The DOJ's analysis focused on supply of and demand for credit to small and mid-sized businesses.[155]

This small to mid-sized business market was first explicitly described as the relevant product market by Margaret E. Guerin-Calvert, Assistant Chief of the Antitrust Division's Economic Regulatory Section, at a Federal Reserve conference in Chicago.[156] Her remarks made one point quite clear, namely, that the DOJ will scrutinize bank mergers for their effect on small business customers because there are relatively few suppliers to meet the credit needs of this market.[157]

Lending to such companies is a core part of a bank's business and is typically a very profitable marketing segment. However, some middle market business customers have been foreclosed from credit availability. The bottom line is that small and mid-sized companies have felt the impact of the "credit crunch" as

153 *Competitive Factors Dominate First Quarter 1992 Regulatory Actions, supra* note 33, at 10.

154 *See Society Corporation, Cleveland, Ohio: Order Approving the Acquisition of a Bank Holding Company, supra* note 147, at 304; United States v. Society Corp. and Ameritrust Corp., 57 Fed. Reg. 10,371; *Fed Approves Society-Ameritrust Merger Over Objections of Justice Department,* 62 Antitrust & Trade Reg. Rep. (BNA) No. 1553, at 223, 224 (Feb. 20, 1992).

155 *See Society Corporation, Cleveland, Ohio: Order Approving the Acquisition of a Bank Holding Company, supra* note 147; United States v. Society Corp. and Ameritrust Corp., 57 Fed. Reg. 10,371; *Fed Approves Society-Ameritrust Merger Over Objections of Justice Department, supra* note 154.

156 Adkins, *supra* note 82, at 6.

157 *Id.* Prior to Guerin-Calvert's speech, the availability of low income mortgage lending "was seen as the most sensitive regulatory barrier to [bank] merger[s]." *Id.*

Generally, most bankers disagree that small business lending should be scrutinized so closely for antitrust reasons. Bankers note that each loan is unique and requires the evaluation of a multiplicity of factors, and for that reason, large (merged) banks have no advantage over small banks and thrifts. *Id.* Similarly, H. Rodgin Cohen has vigorously disagreed with the DOJ's reliance on small business lending availability by noting that in fact "competitive alternatives are extremely broad for small businesses . . . ." Adkins, *supra* note 82, at 6. He supports this theory by arguing that small business gets ample credit from its suppliers in the form of extended payment plans and in the form of leasing options for what would otherwise be capital expenditures. *Id.*

Cohen also believes that small businesses are favorably affected by banking consolidations, rather than harmed by them. He claims that small community banks can revitalize a local distressed economy when they are owned by large commercial banks. Hence, the smaller institutions benefit in that the larger institutions can more readily supply the necessary capital. H. Rodgin Cohen, *Changes on Horizon; Lawyers Predict Boost in Business Under Clinton,* N.Y. L.J., Nov. 12, 1992, at 5.

banks have tightened their credit standards.[158] For this reason, the DOJ ascribes great importance to this area because "sources of credit for small businesses have been diminishing rapidly in some markets," said Guerin-Calvert.[159] The Fed strongly disagrees with the DOJ's analysis and claims that the DOJ failed to provide sufficient evidence of the reliance on this product market in the Society/Ameritrust merger.[160]

2. Definition Of Geographic Market

Disagreement over the relevant product market has led to other agency differences. Based on different views of the product market, the Fed and the DOJ's determinations as to geographical concentration often differ. In the Society/Ameritrust merger, for example, the Fed concluded that the two product markets for clusters of banking services where concentration level was relatively high were in Ashtabula County, Ohio, and Starke County, Indiana.[161] In Ashtabula County, post-merger and post-divestiture of four Ameritrust branches would have resulted in HHI of 1851, an 81 point increase.[162] In Starke County, Ameritrust's only branch was divested and resulted in no net change in HHI.[163] Conversely, the DOJ concluded there was high concentration in two Ohio markets, namely Cuyahoga County and Lake County,[164] based on a narrower product market that was comprised of non-mortgage commercial loans, commercial loans, commercial demand deposit accounts, cash and coin, lockbox, cash management, and expert

158 As President Clinton's goal to ease the credit crunch on small business continues to materialize, definition of relevant product market may have to be reformulated. *See* Neill, *supra* note 75, at 812 (Clinton's proposals may create excess lending capacity with the rise of securitization and use of commercial paper); *see also* John P. LaWare, *Statement before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the Comm. on Gov't Operations in the U.S. House of Rep, reprinted in* 79 FED. RES. BULL. 466 (1993) (highlighting five areas of focus in order to reduce credit crunch). *See generally Bank and Thrift Agencies Issue Policy Reducing Loan Documentation Standards,* 60 Banking Rep. (BNA) 449 (Apr. 5, 1993).

159 Adkins, *supra* note 82, at 6.

160 *Banks Should Review New Guidelines on Mergers, Justice Dep't Official Says, supra* note 82, at 1.

161 *Competitive Factors Dominate First Quarter 1992 Regulatory Actions, supra* note 33, at 10.

162 *Id.*

163 *Id.*

164 *Antitrust Division Resolves S. 7 Concerns Regarding Acquisition in Banking Sector, supra* note 147, at 375.

business advice.[165] In the end, the Society/Ameritrust merger was approved after the merging banks agreed to massive divestitures.[166]

3. Other Differences

Another aspect of merger analysis over which the DOJ and the Fed disagree concerns supply and substitute bank products. In an analysis of substitute bank products, the Fed looks closely to the marketplace to discover who is providing financial services and products.[167] The Fed considers banks and bank holding companies, as does the DOJ. However, the Fed also considers the supply response and the impact of non-bank financial institutions such as finance companies, savings and loan institutions, and credit unions.[168] In contrast, the DOJ will only consider a thrift to be a market participant if it is currently providing the relevant product or if it is an uncommitted entrant.[169]

B. Where They Agree: Divestiture

Divestitures are a common precondition of banking mergers since they serve as a relatively simple remedy to cure potential anticompetitive effects of mergers. Although the Fed and the DOJ may disagree over what constitutes the relevant product market, one reason that both agencies ultimately end up approving the merger is due to divestiture. Specifically, both the Fed and the

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165 *Id.*

166 Glassman, *supra* note 7, at 4; *see Division Finds Most Bank Mergers Do Not Create Competitive Problems*, *supra* note 33, at 809 (noting that divestiture is cure for anticompetitive problems); *see also supra* note 33. Michael A. Greenspan, former Assistant General Counsel for the Fed, noted that the Society divestitures were different than past divestitures because the Fed typically allows the merger applicant to determine which branches to divest. Here, divestitures were dictated by the Fed and the DOJ. *Fed Approves Society-Ameritrust Merger over Objections of Justice Department*, *supra* note 154, at 224.

167 *See Statement*, *supra* note 33, at 263.

168 *Id.*; *see also* Balto et al., *supra* note 2, at 12. *See generally Antitrust Implications of Bank Mergers and the Role of Several States In Evaluating Recent Mergers: Hearing Before the House of Rep. Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 2nd Sess. 3 (1992) (statement of Carol Smith, Chief of the Antitrust Division, State of Washington, regarding role of thrifts in merger analysis).

169 In practice, the DOJ rarely considers thrifts as market participants. On those occasions when thrifts are included in market concentration calculations, the DOJ typically assigns thrifts 20% of the weight afforded a commercial bank. In contrast, the Fed typically accords thrifts at least 50%, and as much as 100%, of the weight afforded commercial banks. Sandler, *supra* note 142, at 5; *see also* Neill, *supra* note 81 (the Fed contemplates changing general methodology with regard to evaluation of thrift acquisitions).

DOJ agree that appropriate divestitures will lessen potential anticompetitive problems with respect to all product markets, however defined.[170]

The Society/Ameritrust merger is just one example of how the Fed and the DOJ can and do disagree. Such disagreement also arose in the First Hawaiian, Inc. acquisition of First Interstate Hawaiian, Inc., and in the acquisition by the Fleet-Norstar Financial Group of Bank of New England's subsidiaries. The Fed approved both these mergers, but the DOJ challenged them as restraining competition for small to mid-sized business customers.[171] Later, both mergers were amicably resolved when the banks agreed to divestitures.[172] Essentially, divestiture is effectively used to resolve conflicts between the DOJ and the Fed.

C. *Evaluation of Bank Merger Standards*

The DOJ claims that uniformity in merger analysis was the intent of the revised Guidelines.[173] Yet, if the DOJ and the Fed cannot even agree on the definitional components (i.e., product market, geographic market, and market participants) of merger standards, it is difficult for bank officials to know which definitions to apply and which mergers will be challenged. The overall thrust of the DOJ's Guidelines seems to be that the DOJ will allow more mergers than in the past since the focus is no longer on strict adherence to HHI. But the resulting agency disagreement over bank merger analysis shows that the approval process is still shrouded in considerable confusion. To dissipate this confusion, the Guidelines would be more helpful if they contained a special section on bank mergers and if the DOJ gave clearer guidance on how relevant product markets are to be defined.

In sum, the 1992 Guidelines do provide tangible improvements over earlier versions, such as section 2 of the Guidelines, which relaxed the old exclusive focus on HHI. Further improvements include stylistic considerations in that the 1992 Guidelines are more concise and refined. Nonetheless, this new, flexible approach has spawned uncertainty about what standards apply (as seen in the DOJ's and the Fed's disagreements) to various steps of

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170 *See Fed Approves Society-Ameritrust Merger over Objections of Justice Department*, *supra* note 154, at 224.

171 *Id.* at 225.

172 *Id.*

173 *See Justice Department and FTC Issue Horizontal Merger Guidelines*, *supra* note 6.

bank merger analysis. Thus, the DOJ's new merger standards with regard to bank mergers are better than past standards. However, room for further improvement remains, since the DOJ standards are not specifically banking oriented.

VI. ELIMINATING REDUNDANCY: A PROPOSAL

In many respects, bank merger analysis is a wasteful redundancy. It is repetitive to have two government agencies expend vast amounts of time, energy, and taxpayer money for the same end through essentially the same means. The overall similarities in philosophies and analytical frameworks between the Fed and the DOJ in merger analysis raise a serious question, namely, whether it is necessary to have both organizations conduct essentially the same due diligence. One commentator, Michael Greenspan, has advocated amendments to the Clayton and Sherman Acts that would give bank agencies sole authorization to approve mergers, thus removing jurisdiction from the DOJ.[174]

It makes sense that only one agency should undertake the task of reviewing bank merger applications. Other industries are only subject to one merger review (that done by the DOJ). Such a singular review should be conducted by the agency with the most expertise in the industry.

There are several reasons for the Fed to have sole jurisdiction. First, the Fed's overriding purpose is to promote the safety and soundness of the banking industry, whereas the DOJ's purpose is to minimize anticompetitive effects. Second, the Fed's expertise is industry-specific, whereas the DOJ's merger review is general and employed across all lines of industry. Third, the Fed, as an independent agency, is somewhat immune from political pressures, whereas the DOJ's philosophies mirror those of the administration. Fourth, the Fed and the DOJ undertake similar merger review, which is a wasteful and redundant use of resources.[175] Indeed,

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174 *Division Official, Bank Counselor Cross Swords Over Bank Merger Reviews, supra* note 60, at 17; *see also Banks Should Review New Guidelines on Mergers, Justice Official Says, supra* note 82 (remarks by Guerin-Calvert show that the DOJ and the Fed generally agree on most issues, which strengthens Greenspan's proposal for a Congressional amendment giving the bank agencies authority for approvals on bank mergers).

175 This redundancy is apparent in the Fed and the DOJ's similarities in merger review, which include analysis of HHI, market concentration, anticompetitive effects, and efficiencies. *See supra* notes 38-49 and accompanying text; *see also* Guerin-Calvert & Ordover, *supra* note 29, at 673 ("In large part the framework for analysis and focus of

between 1300 and 2000 transactions are reviewed by the DOJ each year, yet rarely are these challenged.[176]

Currently, the Fed and the DOJ conduct independent, yet parallel merger reviews. For instance, in every transaction where the Fed has jurisdiction, many efforts are undertaken to ensure competition in the post-merger environment.[177] The Fed, as the regulator of banks and banking, has a vested interest in ensuring that the safety and soundness of the banking industry is furthered by banking mergers. As Federal Reserve Governor John LaWare remarked: "The Board has made clear its general policy that institutions seeking approval for expansionary applications must be soundly capitalized and that mergers and acquisitions should result in even stronger and better capitalized institutions."[178]

Consequently, "the weakened condition of many banks as a result of bad loans here and abroad, the decline of U.S. banks among the world leaders, and a weakening U.S. economy,"[179] have created a need for domestic banking consolidation.[180] Banking in the 1980s was plagued by deregulation and saturation. The excess capacity led to a virtual banking crisis. For this reason, the Fed actively advocates a healthy, well-capitalized banking environment. This can best be accomplished by allowing banking consolidations to occur in the course of business.

Furthermore, the approach to merger analysis undertaken by the Fed is banking specific. In contrast, the DOJ's Guidelines are drafted for general horizontal mergers and are not tailored to the banking industry. Accordingly, the Fed's familiarity with and close supervision of the banking industry is further support for the proposition that sole jurisdiction over banking consolidations should lie with the Fed.

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concerns is very similar as between the Department and the Federal Reserve Board.").

176 Guerin-Calvert & Ordover, *supra* note 29, at 669. The DOJ rarely challenges mergers of banks in separate geographic markets or mergers of smaller banks. *Id.*; *see also* Calvani & Miller, *supra* note 29 (only in-market mergers will be subject to intense review).

177 *Statement, supra* note 33, at 263-64.

178 John P. LaWare, *Statement before the Comm. on Banking, Housing, and Urban Affairs in the U.S. Senate, reprinted in* 78 FED. RES. BULL. 597, 600 (1992); *see* Donna Smith, *Fed's LaWare Sees Mergers Strengthening Banks*, Reuters, Jan. 24, 1991, *available in* LEXIS, Nexis Library, Omni File.

179 Rhoades, *supra* note 83, at 689; *see* Calvani & Miller, *supra* note 29, at 127 (comparing United States banks in relation to international banks).

180 *Contra* EDWARD HILL & ROBERT VAUGHN, BANKING ON THE BRINK: THE TROUBLED FUTURE OF AMERICAN FINANCE ch. 4 (1992) (United States banks no longer hold a position among the largest in the world, but dominate in profits).

Stephen Rhoades, Chief of Financial Structure for the Fed, has completed an in-depth investigation into whether or not existing antitrust laws (and the manner in which they are applied by the DOJ) impede banking consolidation.[181] Rhoades focused on an HHI numerical analysis as well as consideration of various other factors to determine how the DOJ would act with regard to situations exceeding HHI safe harbors. He concluded: "In view of these findings, it does not appear that the antitrust laws are a significant impediment to consolidation in the banking industry."[182] This analysis strengthens the position that sole jurisdiction of banking mergers should remain with the Fed. If, as Rhoades poses, the DOJ does not impede consolidation, why require the costly, time-consuming, and redundant effort of the DOJ?[183] The inclusion of the DOJ in the overall promotion of the Fed's goals is repetitive and unnecessary.

VII. CONCLUSION

The Fed's goal is to promote the safety and soundness of the banking industry. The DOJ's goal is to ensure that competition is fostered in the marketplace. In essence, the DOJ's global goal is implicitly incorporated into the Fed's industry-specific goal. Although the Fed is recognized as the banking industry expert, it must defer to the DOJ in merger analysis. This results in a situation where the Fed is thwarted from accomplishing its objectives, as it must accept a secondary position to an agency lacking banking expertise. In past situations, industry nuances appreciated by the Fed have remained unrecognized by the DOJ (as evidenced by the fact that the Fed has approved mergers which the DOJ later challenged).

Realistically, amendments to the Clayton and Sherman Acts

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181 *See* Rhoades, *supra* note 83, at 690.

182 *Id.* at 705.

183 The redundancy in a literal sense has been appreciated by the agencies themselves. Indeed, throughout the last few decades the trend has been that only one agency predominates on the banking merger scene. "In the 1960's and early 1970's, the [DOJ] was the ultimate controlling force on horizontal bank mergers," but then the Fed replaced the DOJ as the dominating force until 1990. Baker, *supra* note 32, at 651; *see also* Baker, *supra* note 81, at 21 (the Fed turned down bank mergers during the 1960s and early 1970s).

are not imminently forthcoming.[184] Until the time comes when Congress does recognize the redundancy of the DOJ and the Fed in evaluating bank mergers, the DOJ should defer to the Fed in approving such consolidations. The 1992 Horizontal Merger Guidelines legitimately pave the way for the DOJ's deference to the Fed.

Gina M. Killian[*]

184 The likelihood of such amendments in the near future is, at best, slim. However, realistic and practical joint initiatives are likely to occur in the near future. Indeed, bank merger experts have suggested that the Fed and the DOJ work together in order to make the process of "bank consolidations simpler and more efficient." *Bank Merger Experts Offer Tips on Murky Scene for Acquisitions*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1629, at 293 (Aug. 26, 1993). Specifically, a panel of bank merger specialists recommended that the agencies "team up for a comprehensive review of all present geographic bank market definitions." *Id.*

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