Cleveland State University
Cleveland-Marshall College of Law
2121 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2344

STATEMENT OF CHRISTOPHER L. SAGERS
Associate Professor of Law, Cleveland State University

Before the
SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

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

Concerning
"TOO BIG TO FAIL: THE ROLE FOR ANTITRUST AND BANKRUPTCY LAW IN FINANCIAL REGULATION REFORM, PART II"

November 17, 2009

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

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

I will address antitrust aspects of (1) Title VII of the Administration's financial regulatory reform package, entitled the Over-the-Counter Derivatives Markets Act of 2009 ("OTC Act"); and (2) Title XII, The Resolution Authority for Large, Interconnected Financial Companies Act of 2009 ("Resolution Bill").[2] I have been asked to address the explicit ways in which these bills modify the antitrust laws, and such other consequences they might have on antitrust through the "implied repeal" doctrine or otherwise. I have studied the law of antitrust exemptions and immunities throughout my career. I was co-author, with Peter Carstensen of the University of Wisconsin, of the American Bar Association's book *Federal Statutory Exemptions from Antitrust Law* (2007), and Professor Carstensen and I were called for testimony on exemptions issues before the Antitrust Modernization Commission ("AMC") in 2006. I have also published articles concerning statutory exemptions in the ocean shipping, airline and railroad industries, as well as judicially created antitrust exemptions like the *Parker* and *Noerr-Pennington* doctrines.

Summary

While I applaud the Administration's effort to bring much needed regulatory oversight back to financial markets, it is fairly clear that the drafters of these bills did

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

[2] I was also asked to consider antitrust aspects of Title X of that package, entitled the Consumer Financial Protection Agency Act of 2009 ("CFPA Bill"). I will not address the CFPA Bill in any detail here, because it does not appear to raise significant antitrust problems. The only risk I see is that because it would create a new regulatory authority with power over conduct that might also violate antitrust, it may limit antitrust through the "implied repeal" doctrine. I will address that doctrine in detail with respect to the OTC Bill, and I will explain in footnotes what consequences I think it may pose for the CFPA Bill. *See infra* note 35.

have much concern for antitrust or competition in drafting them.[3] I believe there are specific, technical antitrust problems in both of these bills, and also an overarching antitrust problem as to the Administration's entire financial reform package.

1. *OTC Bill.* Even though it contains no explicit exemptions or modifications of antitrust, the OTC Bill is fairly likely to immunize anticompetitive conduct from antitrust under either the implied repeal doctrine or the Supreme Court's recent *Trinko* decision.[4]

In my opinion two modifications of this bill would be very wise. First, it contains five specific provisions requiring that entities subject to it comply with certain "antitrust considerations" whenever they make rules or agreements. These provisions, however pro-competitive they may superficially appear, are likely to serve very little purpose other than immunizing anticompetitive conduct. They should be removed. Second, the general antitrust savings clause contained in the bill should be modified to ensure that it survives certain reasoning in the *Trinko* opinion.

2. *Resolution Bill.* From the antitrust perspective there are two significant criticisms of this bill. First, it would make one potentially very significant change to the familiar review of mergers under the Hart-Scott-Rodino Act ("HSR"). Second, as to every other situation it incorporates a system of bank merger law that is itself inadequate.

As to HSR, the bill would make two changes:

> (1) Where a financial holding company ("FHC") that is put into federal receivership owns both bank and non-bank assets—as will usually be the case—sales of its non-bank assets would be forced into a super-fast period of review with the benefit of only very limited information

[3] *See infra* note 74; *see also* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION (2009) (88-page report explaining Administration's financial regulatory reform package, including the Resolution Bill, which never mentions antitrust and only very obliquely discusses competition).

[4] Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

(whereas under current law those sales would be subject to the familiar HSR process); and

(2) Where particular exigencies are found to exist, those transactions could be exempted from any antitrust review whatsoever.

As to the other criticism, the Resolution Bill preserves our Byzantine, idiosyncratic and dubious system of bank merger law. The sense of general disappointment in this system was captured in the thoughts of an eminent banking scholar at a recent Symposium:

> What I have seen [in the last fifteen years] is that the number one bank in the country will merge with the number five bank in the country and create a multi-state institution, with billions of dollars in assets, and if it is found to violate the antitrust laws, the solution is to knock off half a dozen branches in the Peoria area or something like that, which makes me wonder: Do we really have an effective law of antitrust for banks?[5]

But indeed the Reslution Bill not only preserves this system, it does so in a context in which competition risks are most acute. The transactions to take place under the bill will almost by definition involve the largest entities, within markets that are already the most concentrated and interdependent, and they will at least sometimes result in making those entities even *bigger.*

* * *

But a larger criticism is that neither these bills nor the rest of the Administration's financial regulatory reform package appears to conceive of competition itself as any part of the solution, or seeks meaningfully to constrain the breathtaking consolidation that has

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

been the salient feature of financial institutions markets since the 1980s. These bills simply take entities that are Too Big To Fail ("TBTF") as a given or a necessary evil.

Admittedly, in this particular context—the search for better regulatory solutions in the financial sector—competition could not fix some persistent and difficult problems. On the one hand, as to some financial products price competition is already fierce and yet those markets are rife with problems needing regulatory attention. And on the other hand, even where price competition is not healthy, merely improving it will not solve all the problems they present. And yet, as it will be my goal to show, competition in the financial sector, along with reinvigorated regulatory oversight, must be a component of policy. It is needed to generate efficiency, encourage innovation and product quality, and to reduce risk.

Competition and the encouragement of deconcentration could in reasonable, easy to imagine ways be made part of a solution to TBTF dilemmas. In fact, the Administration's reform package happens quietly to include one important step in that direction. Another Title of the package contemplates that regulators will from time to time designate systemically significant firms as "Tier 1 Financial Holding Companies," a step that would subject those firms to enhanced (and more costly) prudential oversight. The drafters observe that in addition to the hoped-for risk reduction, this designation will have the effect of "compel[ling] these firms to internalize the costs they could impose on society in the event of failure."[6] But the more important benefit is that by creating and actually using this designation, the government will raise the costs of bigness itself. In this particular context opposition to bigness in and of itself is not just knee-jerking populism, and rather goes to the central problem of the current financial crisis.

[6] TREASURY REPORT, *supra* note 3, at 20.

Analysis

I. Antitrust in the OTC Bill

The OTC Bill sets up regulatory controls on derivatives markets that in some specific ways are either similar to the constraints that antitrust would impose or are in tension with it. Without careful drafting, either sort of provision could limit the applicability of antitrust to the transactions in question.

A. Specifics of the Legislation

The bill enhances regulatory oversight of derivatives trades outside of formal markets, which under current law are largely unregulated. It does this by describing a set of entities that will exist to make those markets work and subjecting them to various registration, prudential and oversight requirements. It contemplates that these entities will be regulated by either the Securities and Exchange Commission ("SEC") or the Commodity Futures Trading Commission ("CFTC").

As to each of the entities the bill contemplates, it requires that they adopt whatever rules and procedures they are permitted to adopt subject to certain "antitrust considerations." There are five of these "antitrust considerations" provisions, and they are nearly identical:

(a) Section 713(b)(3) (adding a new subsection (2)(N) to 7 USC 7a-1(c)), concerning "derivatives clearing organizations";
(b) Section 717 (adding a new 7 USC 4s(j)(5)), concerning "swap dealers and major swap participants";
(c) Section 719 (adding a new 7 USC 5h(e)(10)), concerning "swap execution facilities";
(d) Section 753(b) (adding a new section 3B(e)(10) to the Securities Exchange Act of 1934), concerning "alternative swap execution facilities"; and
(e) Section 753(d) (adding a new section 15F(j)(5) to the '34 Act), concerning "security-based swap dealers and major security-based swap participants."

Each provision requires that the particular entity to which it applies, "[u]nless necessary or appropriate to achieve the purposes of this Act, . . . shall avoid (A) adopting any [rule or process, depending on the context] or taking any actions that result in any unreasonable restraints of trade; or (B) imposing any material anticompetitive burden . . . ."

The SEC and CFTC would apparently be empowered to take action against these various entities for agreements or rules that would be in violation of these "considerations."

The bill also contains a general antitrust savings clause. Section 733 of the bill[7] provides in full as follows:

> Nothing in the amendments made by this title shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of this subtitle, the term "antitrust laws" has the same meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.

B. Competition Issues: Implied Repeal and the *Trinko* Decision

Since the beginning of federal antitrust, defendants have argued that they should be excused from it because they are subject to some other federal regulatory regime.[8] Until quite recently the courts were almost uniformly hostile to these arguments and they did not often succeed. The courts long observed the "cardinal principal" that "repeals by

[7] It is not quite clear why this provision appears in Subtitle A of the bill, even though it purports to apply to the whole of Title VII. (Sections 732-34 are actually all quite general and apply to the whole Title, but appear only in subtitle A; § 757 seems similarly out of place.)

[8] Among the very first important antitrust cases to reach the Supreme Court was one in which several railroad defendants argued that their price-fixing agreement was exempt because they were separately regulated by the Interstate Commerce Commission. The Court rejected that argument, *see* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), and it was an ironic one light of the fact that alleged abuses by railroads were among the chief motivations for the Sherman Act.

implication are not favored,"[9] and said that repeals of antitrust are "strongly disfavored . . . ."[10] Even where Congress explicitly calls for them, limitations on antitrust are at least nominally disfavored by the courts,[11] and a broad consensus, across the political spectrum, continues to hold that they are rarely justified.[12]

And yet, the Supreme Court has always been willing to entertain the possibility that Congress intends some other statute to constitute an "implied repeal" of antitrust. As originally envisioned, implied repeal was to be reserved for cases of "plain repugnancy between the antitrust and regulatory provisions . . . ."[13] It was to be found "only if necessary to make [some other statute] work, and even then only to the minimum extent necessary."[14] Historically the courts rejected almost all such pleas,[15] except where some

[9] Silver v. NYSE, 373 U.S. 341, 357 (1963) (quoting United States v. Borden, 308 U.S. 188, 198 (1939)).

[10] United States v. Phila. Nat'l Bank, 374 U.S. 321, 350 (1963).

[11] *See, e.g.,* Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982) (narrowly construing the McCarran-Ferguson Act); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973) (narrowly construing the Shipping Act of 1916); U.S. v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956) (narrowly construing the Miller-Tydings and McGuire Act exemptions for resale price maintenance); Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 671-72 (7th Cir. 1992) (because "special interest legislation enshrines results rather than principles," the "courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.").

[12] Limits on antitrust have long been opposed by the enforcement agencies, the Antitrust Modernization Commission and its many predecessors, and the ABA Section of Antitrust Law. *See generally* AM. BAR ASS'N, SECTION OF ANTITRUST L., FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 333-37 (2007); Stephen Calkins, *Antitrust Modernization: Looking Backward,* 31 J. CORP. L. 421 (2006) (discussing history of opposition to antitrust limitations by the AMC's predecessor commissions); Albert A. Foer, *Putting the Antitrust Modernization Commission Into Historical Perspective,* 51 BUFF. L. REV. 1029 (2003) (same); http://www.abanet.org/antitrust/at-comments/comments.shtml (collecting the ABA Antitrust Section's many congressional and other policy statements over the years opposing various antitrust limitations).

[13] United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963).

[14] *Silver,* 373 U.S. at 357.

[15] *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding exclusionary conduct by an incumbent electric power company subject to antitrust notwithstanding the power of the Federal Power Commission to order interconnection services by incumbents, to allow access by competing power companies); *Seatrain Lines,* 411 U.S. at 726 (narrowly reading antitrust exemption under Shipping Act of 1916); *Phila. Nat'l Bank,* 374 U.S. at 321 (holding bank merger subject to Clayton Act § 7 notwithstanding merger review authority of the Office of the Comptroller of the Currency, under the recently adopted Bank Merger Act of 1960); California v. Fed. Power Comm'n, 369 U.S. 482 (1962) (rejecting immunity for merger of natural gas concerns from Clayton Act § 7 challenge, even though Federal Power Commission had concurrent review authority); United States v. Radio Corp. of Am., 358 U.S. 354 (1959) (holding an

agency was given explicit power to oversee conduct plainly in violation of antitrust,[16] and there was apparently some requirement that the agency actually used its oversight power.[17]

However, in recent times the Court has shown an apparently much greater willingness to find implied repeal, and seems less concerned about finding explicit and irreconcilable conflict between antitrust and some other statute. In its decision two years ago in *Credit Suisse Securities, LLC v. Billing,*[18] the Court seems to have eased its longstanding test quite a bit. At least with respect to questions involving securities regulation, the Court explicitly changed its inquiry from a search for "plain repugnancy" to a search for "clear incompatibility,"[19] and held that clear incompatibility exists where:

(1) the antitrust challenge is to "an area of conduct squarely within the heartland of securities regulations";
(2) there is "clear and adequate SEC authority to regulate";
(3) there has been "active and ongoing agency regulation"; and
(4) there is some "serious conflict between the antitrust and regulatory regimes."[20]

---

agreement to exchange television stations subject to antitrust challenge even though it was approved by the Federal Communications Commission); *Borden,* 308 U.S. at 188 (holding conspiracy among milk producers' cooperative and various milk distribution businesses subject to antitrust notwithstanding oversight powers of Secretary of Agriculture under the Agricultural Adjustment Act, the Capper-Volstead Act, and § 6 of the Clayton Act); *Trans-Missouri,* 166 U.S. at 290 (finding price-fixing agreement among railroads subject to antitrust notwithstanding that they were also subject to regulation by the Interstate Commerce Commission).

[16] *See* Gordon v. NYSE, 422 U.S. 659 (1975) (finding immunity for securities exchange rules fixing brokerage commission rates, but only where Securities Exchange Act of 1934 explicitly empowered SEC to regulate such rates and SEC actively did so); United States v. Nat'l Ass'n of Secs. Dealers, 422 U.S. 694 (1975) (finding immunity for vertical restraints on distribution of mutual fund shares in secondary markets, but only where Investment Company Act of 1940 explicitly empowered SEC to oversee such restraints).

[17] *Borden,* 308 U.S. at 198 (holding that mere regulatory authority vested in a federal official, even if "plenary," does not in itself grant antitrust immunity); *cf. Gordon,* 422 U.S. at 692-93 (Stewart, J., concurring) (noting that, in the concurring Justices' view, the Court did not and never had held that immunity could be found merely on the basis of an unexercised power in some federal official).

[18] 551 U.S. 264 (2007).

[19] 551 U.S. at 275.

[20] 551 U.S. at 285.

What seems especially problematic is not so much the specific result in the case,[21] as the potential consequences of the new formulation. Given the breadth of the SEC's jurisdiction, elements 1-3 should be fairly easy for most defendants to meet.[22] Moreover, the Court implied that "conflict," under element 4, requires only that the pendency of an antitrust suit—taking into consideration the costs and risks of false positives that the Court claimed would exist—would "prove practically incompatible with the SEC's administration of the Nation's securities laws . . . ."[23] Over Justice Steven's objection,[24] the Court held that the difficulties imposed on market participants in complying with both antitrust and securities regulation would constitute the requisite "conflict."

A related case is the Court's 2004 decision in *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko.*[25] Plaintiff challenged the allegedly exclusionary conduct of a "Baby Bell" telephone company, which was said to have frustrated access into local telephone markets of would-be competitors, as had been required by the Telecommunications Act

---

[21] The challenged conduct involved agreements amongst syndicates of underwriters relating to how they would market securities in initial public offerings ("IPOs"). As the Court pointed out, much of the challenged conduct was subject to explicit statutory oversight powers, and was also the focus of existing and proposed regulations. Thus, for better or worse, the actual result in *Credit Suisse* could follow from a straightforward application of the *Gordon* and *NASD* decisions, discussed in notes above.

[22] Importantly, the Court seemed to hold that conduct is in the "heartland," and therefore satisfies element number 1, merely where it is important to securities markets. The Court held that syndicated underwriting—including collusively anticompetitive restraints—was important in this sense because certain efficiencies arise when an issuance is underwritten jointly. *See* 551 U.S. at 276. But the efficiencies the Court identified were no different than in any other, garden-variety joint venture arrangement.

[23] 551 U.S. at 277. The Court's discussion of the costs of antitrust and their relevance to "clear incompatibility" appears at *id.* at 282-85.

The Court also added the highly novel observation that the availability of *private* relief under the securities laws should be relevant to whether antitrust applies to the challenged conduct. 551 U.S. at 277. That seems rather a large change, since it will frequently be the case that that anticompetitive conduct could be the gravamen for more than one cause of action.

[24] 551 U.S. at 288 (Stevens, J., concurring) ("Surely I would not suggest . . . that either the burdens of antitrust litigation or the risk 'that antitrust courts are likely to make unusually serious mistakes' . . . should play any role in the analysis").

[25] 540 U.S. 398 (2004).

of 1996 ("1996 Act").[26] Notwithstanding a very broad antitrust savings clause—providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws"[27]—the Court wrote that "careful account must be taken of . . . pervasive federal and state regulation" in any given case, and that a "factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[28] Because under 47 U.S.C. § 271—a provision added by the 1996 Act, and therefore subject to its savings clause—the FCC could condition a Baby Bell's entry into long-distance service on its compliance with the competitiveness rules of the 1996 Act, the Court found it unwise to permit antitrust liability on the grounds alleged. In other words, even a very broad, very explicit antitrust savings clause will not stop the Court from taking "the existence of a regulatory structure" as a reason for constraining antitrust liability, at least where that structure has some theoretical potential to "remedy anticompetitive harm."

Accordingly there is a significant chance, under *Credit Suisse* and its predecessors and under *Trinko,* that the OTC Bill would immunize anticompetitive conduct. Under the bill, participants in OTC derivatives markets will be pervasively regulated and will inevitably face some difficulties in knowing whether specific conduct is legal under both antitrust and OTC derivatives market regulation (seemingly the new test for "conflict"

[26] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), now codified at scattered sections of U.S.C. The "Baby Bells" were parts of the former AT&T organization, which had been broken up in a prior antitrust suit, and they were largely prohibited after that break-up from providing long distance telephone service. The Baby Bells by and large owned the only infrastructure capable of providing communications access to homes and businesses, and that infrastructure would have been prohibitively expensive to duplicate. They therefore held effective monopoly over local service. The 1996 Act required them to provide access to their infrastructure so that would-be competitors for local service could enter their markets.

[27] 110 Stat. 143, 47 U.S.C. § 152 note.

[28] 540 U.S. at 411-12.

under *Credit Suisse.*) In fact, the OTC Bill's "antitrust considerations" provisions, however pro-competitive they may superficially appear, seem well tailored to ensure that outcome. In both the implied immunity cases and particularly in *Trinko* the Court has found it relevant whether some administrative apparatus exists to enforce competition values, and therefore to replace antitrust. Moreover, the antitrust savings clause currently contained in § 733 of the bill is not well drafted to overcome the reasoning in *Trinko.* In fact, it is nearly identical.

Antitrust immunity under the OTC Bill is potentially quite a bad consequence, because concentration and collusion are serious problems in financial markets. The vast bulk of derivatives business has been concentrated in a small number of large financial companies, a fact that poses both systemic risks and more traditional anticompetitive concerns.[29] More traditional securities exchanges and their appurtenant businesses have been characterized by anticompetitive conduct throughout their history,[30] as have banks and other financial institutions.[31]

On the other hand, one might wonder whether preemption of antitrust might actually be tolerable in this case, since there would be another federal enforcement regime—either

---

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

[30] *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (2d ed. 1995); HANS R. STOLL, REGULATION OF SECURITIES MARKETS: AN EXAMINATION OF THE EFFECTS OF INCREASED COMPETITION (1979); Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks,* 2002 U. ILL. L. REV. 215.

[31] Prior to 1944, when it was made clear that banks could be subject to U.S. antitrust law, they engaged in open and extensive price-fixing as to deposit rates, and even thereafter they apparently did not work very hard to conceal price-fixing until well into the 1960s. *See* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective,* 41 ANTITRUST BULL. 255, 263 (1996). (During the 19th century the Supreme Court had held that the business of insurance was not within "interstate commerce" for constitutional purposes, Paul v. Virginia, 75 U.S. 168 (1868), and it widely was presumed that other financial businesses were not, either. The Court reversed this rule as to insurance in United States v. S.E. Underwriters Ass'n, 322 U.S. 533 (1944), and, again, it was presumed that the reversal would be effective as to other financial businesses as well. *See* Shull, *supra,* at 260-63.)

the CFTC or the SEC—empowered to enforce "antitrust considerations." History suggests that that instinct would be a very poor one. Industry-specific regulators have generally tended to be weak and ambivalent enforcers of competition, much to the frustration of Congress and outside observers. As one pertinent example, for the first forty years of its existence the SEC facilitated an uninterrupted, naked price-fixing conspiracy as to brokerage commission rates, which by universal acknowledgement increased those rates astronomically and distorted the organization of the securities markets. The Commission did not relent and finally allow competition until 1975, by which time commission rates had become the focus of litigation in the U.S. Supreme Court,[32] direct congressional intervention, and extensive public and congressional criticism.[33]

Accordingly, competition values would be well served by two changes to the OTC Bill. First, the "antitrust considerations" provisions should be removed completely. They seem likely to serve very little purpose except immunizing anticompetitive conduct.

---

[32] *Gordon,* 422 U.S. at 659.

[33] The fixing of NYSE member commission rates actually began with the agreement that created the exchange in the first place—the so-called Buttonwood Tree Agreement of 1792, which was little more than a naked price-fixing conspiracy. As originally enacted, the Securities Exchange Act of 1934 authorized the SEC to regulate "the fixing of reasonable rates of commission, interest, listing and other charges." Ch. 404, Title I, § 19(b), 48 Stat. 898 (June 6, 1934). For the next forty years the Commission oversaw a system of fixed commission rates, in which it was periodically asked to approve increases. It ordinarily did so without inquiry. Admittedly, in 1961 it began a process of study that would lead to the end of fixed commissions. However, the process took nearly fifteen years—the Commission largely ended commission rate fixing in 1975, when it adopted Exchange Act Rule 19b-3—and it proceeded only under prodding and criticism from an impatient Congress, *see* SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, SECURITIES INDUSTRY STUDY 4 (1972) (containing report of the Subcommittee on Securities critical of SEC for delay in addressing rate-fixing and lack of clarity in the Commission's various statements); H.R. REP. No. 92-1519, pp. xiv, 141, 144-145, 146 (1972) (report of the House Commerce Committee stating similar criticisms). Indeed Congress itself was finally forced to take action in 1975 to fully complete the process of deregulation of commission rates. *See* Pub. L. No. 94-29, § 16, 89 Stat. 146 (1975) (replacing the Commission's original rate regulation authority with an entirely new provision largely prohibiting commission rate fixing).

Second, the savings clause in § 733[34] should be modified along lines like the following:

> Nothing in the amendments made by this title shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. No court shall be permitted to determine that because of the particular structure of circumstances of any industry that the antitrust laws are modified, impaired or superseded with respect to any entity or organization identified in this title by reason of any provision of this title. For purposes of this ~~sub~~title, the term "antitrust laws" has the same meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.[35]

II. Antitrust in the Resolution Bill

The Resolution Bill contemplates a system under which, in emergency circumstances, the Federal Deposit Insurance Corporation ("FDIC") would be empowered to take over a failing financial holding company that is determined to have systemic significance to the economy. The bill in certain ways would impose severe constraints on the ability of antitrust law—the only one of our thousands of federal statutes with any hope of controlling the size and power of private entities—and would do so in just that context in which competitive and systemic risks seem most important. These limitations on antitrust seem very serious and unfortunate. Competitiveness in the financial sector is important, and in that special context it plays two distinct roles. First, these markets' lack of "competitiveness," in the sense that they lack numerous competitors, has been a key contributor to the increase in world-wide systemic financial risk. The fewer financial institutions there are, given their growing interconnectedness,

[34] For what it may be worth, I believe it would be advisable to move this provision to a new § 702, or to some other place that makes clear that it applies to the entire Title, rather than just to Subtitle A.

[35] As I mentioned, *see supra* note 2, I believe the implied repeal doctrine and *Trinko* pose some risks as to the CFPA Bill as well. That bill would create a new regulatory authority with power to regulate conduct that could also implicate antitrust. While the risks here seem smaller than under the OTC Bill, I believe it would be wise to include an antitrust savings clause identical to the one I suggested in the text in the CFPA Bill as well.

the more likely that failure of one of them will pull down many others.[36] Second, competition is the only discipline for price and output of the many products and services financial institutions provide so that our system of savings, investment and corporate finance works.

A. Competition in the Financial Sector

On any measure, U.S. financial markets have transformed completely since the early 1970s. There is little doubt that the transformation is irreversible.[37] Change began most prominently with deregulatory steps in the 1970s that were designed to remove regulatory barriers to competition in banking and securities, which caused them to lose access to traditional sources of legally protected, supra-competitive revenues. Insurance companies began to face similar pressures as well.[38] Then, throughout the 1980s and 1990s, regulators gradually loosened restraints on the lines of business in which traditional financial institutions could engage. Geographical restraints on banking were loosened as well, and interstate branching was generally authorized by Congress in 1994.[39] The crowning event so far has been the adoption of the Gramm-Leach-Bliley Act ("GLB")[40] in 1999, which finally permitted banking businesses to branch into unrestricted securities

---

[36] *See generally* Wilmarth, *supra* note 30, at 316-17.

[37] *See, e.g.,* Shull, *supra* note 31, at 257 (so arguing).

[38] The major step in banking was to lift rules that set very low maximum interest rates for deposits. This was accomplished by repeal of the Federal Reserve Board's Regulation Q in the 1980s. In the securities industry the most important deregulatory step was in 1975, when congressionally mandated SEC action finally prohibited the centuries old practice of stock exchange members of fixing the brokerage commissions they charged their clients for executing securities trades. The Securities and Exchange Commission prohibited fixed commissions on May 1, 1975 by adopting its Rule 19b-3, 17 C.F.R. § 240.19b-3. In insurance the problem was that changing interest rates and the growing availability of competing consumer investment products caused consumers to lose interest in traditional life insurance. As to all these changes, see generally Wilmarth, *supra* note 30.

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

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

and insurance businesses. Though we may tend to forget it now, arguments supporting all of these regulatory changes were framed relentlessly in the language of *competition,* and indeed one early version of the GLB bill actually bore as its formal short name the Financial Services *Competition* Act.[41]

However, while the increased competition that resulted from these reforms should have been and for a time was fairly unequivocally pro-consumer, it also caused certain unforeseen consequences. The loss of legally protected sources of excess profits caused the traditional institutions to invade one another's geographic and line-of-business territories in search of new revenues. But this new competitiveness also set off a mad scramble of consolidation, which has generally been seen as an effort to stave off competitive inroads.[42] Thus we have seen waves of consolidation in banking and other financial markets since the early 1980s that, from the aggregate national perspective, has increased concentration substantially. Indeed, a large wave of mergers during the 1990s involved a whole series of bank and financial institution combinations each of which was the single largest merger of its kind to date.[43]

One salient trait of this merger wave has been that the larger mergers, and especially the very large mergers of financial conglomerates, have had disappointing economic results.[44] In part this reflects what appear simply to be significant scale and scope

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

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

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

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

[44] Wilmarth, *supra* note 30, at 272-79.

diseconomies in bank operation beyond a certain size.[45] Much of this failure among the larger conglomerate mergers also has resulted from the mistaken prediction of consumer enthusiasm for "one-stop shopping" in financial products.[46] There is no serious doubt that—since the claimed efficiencies probably aren't the real goal of these mergers—some part of the motivation has been the self-interest of managers, who among other things seek the implicit federal subsidy of TBTF status.[47]

As a result of this period of consolidation, the financial sector has come to have an essentially two-tiered structure. Banking for consumers and small to mid-size businesses remains a predominantly local affair, engaged in by smaller and regional banks, and to a lesser extent by branches of larger banks. But large scale banking—major commercial loans, loan syndications, mass-marketed commodity products like credit cards and mortgages—is mainly now the domain of very large banks. Moreover, there remains a two-tiered aspect to bank concentration. While aggregate concentration in banking—the number of entities representing banking business nationally—has increased dramatically during the period of transformation, concentration in local banking markets has remained relatively constant throughout that period.[48] That, though, is not necessarily cause for much optimism, as it also seems widely acknowledged that local banking has always been subject to some concentration and is prone to some market power.[49] Concentration

[45] *Id.* at 279-81.

[46] *See id.* at 432.

[47] *See* Rhoades, *supra* note 43, at 340-41; Wilmarth, *supra* note 30.

[48] *See* Shull, *supra* note 31, at 257.

[49] *See* Shull, *supra* note 31. As to market power in local banking markets, see Wilmarth, *supra* note 30, at 293-300. Interestingly, the one isolated context in which short-term stock price improves for both an acquiring and a target bank in large bank mergers, and that is where the two banks previously competed in the same geographic markets. *Id.* at 293

is also prevalent in other sectors, as among investment banks and securities dealers,[50] and the immense global duopoly that now dominates the credit rating business.[51]

On top of this evidence concerning concentration, there also remains persistent evidence of serious, collusive anticompetitive conduct among financial institutions. Prior to 1944, when it was made clear that banks could be subject to U.S. antitrust law,[52] banks engaged in open and extensive price-fixing as to deposit rates, and even thereafter they apparently did not work hard to conceal price-fixing until well into the 1960s.[53] Other financial markets have been rife with collusion as well. Indeed, the New York Stock Exchange ("NYSE") is generally said to find its origin in a naked horizontal price-fixing conspiracy, and throughout its history it was governed by a series of explicit (and for the most part legally protected) price and output restraints, which were enforced by horizontal boycotts. In more recent times anticompetitive conspiracies have been more secretive, of course, but major conspiracies plainly persist in the financial sector, like the spectacular rings of fraud and collusion among Wall Street firms broken up by the New York Attorney General during the past 15 years.[54]

Still, having said all that, assessing the price competitiveness of financial product markets is complex. Traditional banking products—taking deposits and making loans—

---

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

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

[52] During the 19th century the Supreme Court had held that the business of insurance was not within "interstate commerce" for purposes of the Commerce Clause jurisdiction of Congress, Paul v. Virginia, 75 U.S. 168 (1868), and it widely was presumed that other financial businesses were not, either. The Court reversed this rule as to insurance in United States v. S.E. Underwriters Ass'n, 322 U.S. 533 (1944), and, again, it was presumed that the reversal would be effective as to other financial businesses as well. *See* Shull, *supra* note 31, at 260-63.

[53] *See* Shull, *supra* note 31, at 263.

[54] *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (2d ed. 1995); HANS R. STOLL, REGULATION OF SECURITIES MARKETS: AN EXAMINATION OF THE EFFECTS OF INCREASED COMPETITION (1979); Wilmarth, *supra* note 30.

is fairly prone to market power wherever concentration increases. Entry is thought to be difficult not only because it requires regulatory approval, but because traditional banking involves a "relational" aspect under which consumers smaller business clients value long-term relationships and personal attention.[55] However, some financial products have come to be effectively commodity-like, in that they can be mass-marketed directly to consumers. Examples include mortgages, consumer loans, and credit cards. It is thought that because the products can be sold at low cost and entry is easy, price competition as to these products tends to be fierce. Thus, the core business of smaller banks is thought by many—including DOJ and the bank regulators—to be much less competitive than the core businesses of very large banks and financial conglomerates. But, as will be explained below, this narrow focus on specific products—which happens to guide current bank merger law—may be importantly incomplete.

B. Specifics of the Legislation

1. *In General.* The Resolution Bill contemplates that the Secretary of the Treasury will, when certain specified exigencies arise, determine that the default of a financial company ("FC") would pose systemic consequences.[56] Upon that finding the Secretary

---

[55] *See* Wilmarth, *supra* note 30.

[56] As a practical matter FCs are defined to include (1) bank holding companies ("BHCs"); and (2) financial holding companies within the meaning of the Gramm-Leach-Bliley Act ("FHCs"). *See* Resolution Bill at § 1602(9). BHCs, which are primarily governed by the Bank Holding Company Act, 12 U.S.C. §§ 1841-50, include any corporation, partnership, or other entity that holds control of one or more banks. BHCs are ordinarily permitted to engage only in banking or activities that are closely related to banking, like some limited securities and insurance work. Only a company that complies with the terms of the Bank Holding Company Act may own control of a bank, and it must first seek approval of the Federal Reserve Board before it may do so. *See* 12 U.S.C. §§ 1841(a), 1842, 1843. *See generally* CARL FELSENFELD, BANKING REGULATION IN THE UNITED STATES (2004).

FHCs, by contrast, were a creation of the Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999), now codified at scattered provisions of U.S. Code (GLB). Prior to GLB, no bank or BHC was permitted to own any non-banking asset except those engaged in a handful of activities specified by the Federal Reserve Board (FRB) as "closely related to banking," like trust services, data processing, or the operation of an ATM network. *See* 12 U.S.C. § 1843(c)(8); 12 C.F.R. § 225.28(b). But following GLB, an FHC can own both banking entities and non-bank affiliates, which can engage in a whole series of

may invoke either of two federal corrective measures, one of which is to place the FC under the control of the FDIC as its receiver.[57] The conservator/receiver would then hold a number of powers to resolve the FC's crisis, among them being to merge the FC with another company or transfer any of its assets.[58] There lie the Act's antitrust consequences. Mergers of banks, BHCs and other financial institutions, and transfers of their assets, are subject to Clayton Act § 7, which prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18.[59] They are also subject to a complex series of special statutory rules that will require either review under the HSR process or a pre-transaction review process that roughly mirrors it, under banking regulatory law. (Non-bank transactions are usually subject to HSR. Bank and BHC transactions are ordinarily

---

financial activities, like insurance, securities underwriting, and merchant banking. To qualify as an FHC, a firm must first be approved by the FRB as a BHC, and then file a declaration of intent to act as an FHC with the FRB. FHCs must maintain certain minimum capitalization and managerial standards to retain their FHC status, but there is no requirement they first receive FRB approval. *See* 12 U.S.C. 1843(*l*)(1). That last fact is relevant to the antitrust treatment of mergers and acquisitions involving FHCs. *See infra* note 77.

With one limited exception, no other business in the United States may own both banking and non-banking businesses. The exception is that national banks may own operating subsidiaries that engage in a more limited schedule of the same non-banking financial activities open to FHCs. *See* CARL FELSENFELD, BANKING REGULATION IN THE UNITED STATES 106.9 – 106.15 (2004).

[57] *See* Resolution Bill at § 1604. The bill provides that the FDIC may be appointed either as receiver or "qualified receiver," with more power to preserve the ailing FC outside of liquidation, but the latter appointment can be made only if the Secretary of the Treasury overcomes a "strong presumption" against it. The other corrective measure provided for under the Resolution Bill is that, whether or not a conservator/receiver is appointed, FDIC may make loans or provide other assistance to the BHC. *Id.* at § 1604(a).

[58] First, the conservator/receiver may cause the seized company to be merged into another or may transfer any of its assets. *See id.* at § 1609(a)(1)(G)(i). Second, the conservator/receiver may create a "bridge financial company," which would be a temporary, federally chartered corporation fully controlled by the FDIC, to which to transfer the assets of a seized entity. Following creation of the bridge FC, either the entire company or its assets would be transferred to their ultimate owner. *See id.* at § 1609(h).

[59] There was actually uncertainty on this point during the first half of the twentieth century, but it was resolved by the seminal decision in United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963). *Philadelphia National Bank,* which remains a fundamental decision in merger law generally, established that bank mergers are subject to Clayton Act § 7, even if they have been previously approved by a federal banking regulator. *See generally* Shull, *supra* note 31, at 260-75.

exempt from it, though in some cases they are not.[60] Where they are exempt, they are subject to a separate system of merger review that applies only to banks and BHCs.[61])

The Resolution Bill deals with these antitrust issues in two explicit, identical provisions. Presumably, they were included simply to make clear that antitrust continues to apply to the FDIC's remedial actions, even though they are ordered by a federal entity. For the most part these provisions preserve the existing system of bank merger review, and indeed they are written in such a way as mainly just to reference that system obliquely. Existing bank merger law requires that bank and BHC mergers and significant acquisitions cannot proceed until the parties seek permission to the appropriate federal banking regulator.[62] The responsible bank regulator must request and consider the views

---

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

[61] That law differs from the more familiar HSR review in four main respects. First, bank mergers are one of only four situations in U.S. law in which the antitrust agencies share their merger review duties with an industry specific regulator. (The other three are railroad mergers, certain electricity mergers, and telecommunications.) *See* AMC REPORT, *supra* note 12. Second, bank merger law is virtually unique in that an otherwise anticompetitive merger can be approved if it is found to be in the "public interest." Next, if DOJ decides to formally challenge a bank merger, it must file a lawusit within 30 days of receipt of the parties' application. Its lawsuit during that period forces an absolute and automatic stay on the proposed transaction for the pendency of litigation, but if DOJ fails to sue within 30 days, then neither DOJ nor any other party can *ever* challenge the merger itself on antitrust grounds. Finally, bank merger law allows the responsible bank regulator to determine that one of the banks might imminently fail, in which case the regulator can speed the process up, or, in some cases, do away with antitrust review entirely. *See generally* ABA BANK MERGER HANDBOOK , *supra* note 60, at 5-33.

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

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

of both the Justice Department ("DOJ") and the other bank regulatory agencies as to competitive issues. They prepare their opinions under a process that largely tracks the analysis that the antitrust enforcement agencies perform in HSR review, though with one significant substantive difference: regulators can approve an otherwise illegally anticompetitive bank merger if they find its competitive costs to be "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[63] In any case, this system of bank merger rules contains a series of safety-valve provisions, which allow the responsible bank regulator to speed up the approval process substantially, and even to exclude antitrust review entirely, where it finds there to be a risk of imminent failure of one of the banks.

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

> (1) If a receiver transaction "requires approval by a Federal agency," then it cannot be consummated before the 5th calendar day after the approval is made.
>
> (2) Where such an approval requires a "report on competitive factors," then DOJ must be notified "promptly," and DOJ must then provide the report within 10 days of the request.
>
> (3) If a transaction requires an HSR filing, then the antitrust review agency must make its determination within 30 days after receipt of the filing, and it may not seek any extension of time or make any "second request" for additional information.
>
> (4) If the Treasury Secretary and Federal Reserve Chairman determine that a conservator/receiver transaction must proceed "immediately," in

[63] 12 U.S.C. § 1828(c)(5)(B).

> order "to prevent the [BHC's] probable failure," then no regulatory approvals or antitrust review are required at all and it may consummate with no delay.

See Act § 1209(a)(1)(G)(ii); § 1209(h)(10). The one significant modification of existing law—a potentially massive and dangerous modification—is in items 3 and 4. I will address that below.

An important aspect of existing bank merger law—which has consequences both for the process of review and for the substantive standards applied—is that there has been a substantial amount of interagency coordination to make bank merger review work. Much of this was necessary because bank merger law read literally, would allow approval of mergers under time frames that could be extremely burdensome for DOJ. There is also plenty of room in the law for what could have been disruptive substantive conflicts among the agencies, and indeed disagreements arose between DOJ and the banking regulators in the early 1960s, almost as soon as the present bank merger review framework was put in place.[64] The consequence has been certain formal agreements among DOJ and the banking regulators,[65] as well as informal norms, like the common practice of merging parties of providing DOJ with their application materials well before the banking regulator is legally required to do so.[66]

Why exactly the special system of bank merger review persists is a bit of a mystery. It has long been clear that, for reasons of its own, "Congress . . . has determined to deal with banking in a manner different from other forms of 'commerce . . . .' "[67] Banking

---

[64] *See* Shull, *supra* note 31, at 274.

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

[66] *See* Quinn, *supra* note 60, at 93-94.

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

thus remains one of only four industries in which the antitrust enforcement agencies must share merger review with an industry-specific regulator,[68] and is virtually unique in that anticompetitive mergers can be approved on a finding of "public interest." But the explanation exactly *why* that should be has changed over time and is not at the moment particularly persuasive. During the nineteenth century and the early part of the twentieth banking policy was dominated by explicit "destructive competition" arguments, of the sort that at one time supported broad antitrust exemptions and invasive economic regulation in sectors throughout the economy, including transportation, communications, utilities, insurance, and banking. (Those arguments are now largely dead, as applied to any industry other than one that can credibly claim natural monopoly effects, and for this reason much of the U.S. economy has been deregulated since the 1970s.) But by the time the bank merger review legislation was initially adopted, between 1956 and 1966, Congress's overriding concern was the alarming growth in (for the times) very large bank holding companies. At that time, there remained substantial doubt that bank mergers could be subject to Clayton Act § 7, even under the recent Celler-Kefauver amendment of 1950,[69] and banking law also imposed much more severe limits on the extent to which banks could compete with each other.[70] In other words, the law was originally set up to impose *more* competitive discipline on bank mergers than was thought to be available. Now, however, it imposes less invasive (or at least more rushed and less information-intense) review than might be available were banks and BHCs simply subject to the same

[68] *See* AMC REPORT, *supra* note 12, at 363-64. The others are certain aspects of electricity, in which merger review is shared with the Federal Energy Regulatory Commission, telecommunications, in which merger review is shared with the Federal Communications Commission, and the special case of the railroads, in which mergers are subject solely to review by the Surface Transportation Board. *See id.*

[69] *See infra* note 35.

[70] *See infra* note 21-22.

rules as the rest of American industry. To the extent that this persistent difference in treatment has any theoretical foundation, it is different than the one that originally underlay bank merger law. It now appears to be justified by some sense that banks need special *protection* from competition policy, because their failures are damaging to communities and impose taxpayer costs through the deposit insurance system. In other words, to the extent that bank merger review law has any current justification, it has reverted to the old fear of destructive competition.[71]

2. *The Change to HSR Review.* A separate issue is the one significant change the Resolution Bill would make to existing merger law. At a hearing held October 22 before the Subcommittee on Commercial and Administrative law, the question was raised and discussed at some length whether the bill would make any changes to antitrust at all. The answer is, unequivocally, yes. The Resolution Bill would modify existing antitrust law, and it would do so in a way that is potentially *breathtaking*.

At the hearing, Administration witnesses[72] were asked whether there would be any modification. I believe they answered in perfectly good faith,[73] but their replies were in one major respect legally incorrect, and, overall, seriously misleading. In both their written and in-person testimony, both witnesses implied that the Resolution Bill would simply preserve "existing bank failure law" in most respects. In effect, they said that the special, idiosyncratic regime of bank merger review that currently exists would just be

---

[71] *See* Shull, *supra* note 31; Lawrence J. White, *Banking, Mergers, and Antitrust: Historical Perspectives, and the Research Tasks Ahead,* 41 ANTITRUST BULL. 323 (1996).

[72] Michael S. Barr, Assistant Secretary of the Treasury for Financial Institutions, and Michael Krimminger, Special Advisor for Policy of the Federal Deposit Insurance Corporation.

[73] Neither Secretary Barr nor Mr. Krimminger purported to be an antitrust specialist, and, in their defense, the law in this respect is extremely complex.

extended a bit to cover resolution of failing bank holding companies, which might happen to own some non-bank assets.[74]

This is incorrect. On the one hand, it is true that the Resolution Bill in many cases merely incorporates existing bank merger law, which in many respects is idiosyncratic and under emergency conditions can be made to go rather fast.[75] However, the bill would exempt transfers of *non-bank* financial entities from the ordinary HSR process that currently governs them, and subject them to a new, hybrid HSR process would be very fast and very limited. The bill would do this notwithstanding that the transfers at stake might involve some of the largest mergers of financial institutions in U.S. history.

While this end result can be generalized simply enough, the legal details driving it turn out to be exceedingly complex. For the sake of clarity I explain every bit of the complexity in the footnotes. It is complex in part because the FCs to which the bill's resolution authority would apply would include companies that are permitted to own both

---

[74] In reply to questions, both witnesses said that the Resolution Bill would not modify the antitrust review regime that currently applies in "bank failure" situations, though they apparently acknowledged that the bill would extend it to transactions to which it does not currently apply. *See* Hearing Transcript at 2:38:00 (testimony of Michael S. Barr) ("In our judgment the proposal mirrors the proceedings that are used with respect to bank failure law. So in the event of the need for merger and acquisition there's a process for appropriate Department of Justice review. As under existing bank failure law there are emergency exceptions . . . . Those would apply also in this case . . . . In our judgment . . . they are the same as currently provided under bank failure law. We're extending the exact type of regime that exists today with respect to antitrust review to this narrow context and in our judgment that's appropriate."); Hearing Transcript at 2:39:12 (testimony of Michael Krimminger) ("With regard to antitrust protections . . . there typically is a requirement to go through Department of Justice review on bank failures, but there can be exceptions . . . . In a systemic context there can be cases in which there is an override of the anticompetitive consequences.").

The witnesses' written statements did not specifically address antitrust, a fact perhaps reflecting the Administration's lack of concern for competition issues in this overall reform effort. But in both statements they implied that the Resolution Bill would simply follow (with some possible, unspecified modifications) existing law. *See* Statement of Michael S. Barr, at 4 (Oct. 22, 2009) (not specifically addressing antitrust, but noting that the overall resolution process would simply follow "the approach long taken for bank failures."); Statement of Michael Krimminger, at 2 (Oct. 22, 2009) (noting only that "our antitrust and bankruptcy laws will continue to play a key role in ensuring robust competition in our free economy").

[75] *See supra* note 61.

bank and non-bank financial entities.[76] It is also complex because knowing when HSR applies and when it does not—especially in the banking context—is extremely thorny.[77]

---

[76] *See supra* note 56.

[77] The best simple summary that can be given is that, again, most bank mergers and acquisitions are exempt from HSR, *see* 15 U.S.C. § 18a(c)(7), but most transfers of non-banking financial institutions are subject to HSR, regardless of whether the acquiror or seller happens to be a bank or BHC.

But to be clear, a receiver attempting to resolve a failing FC could cause any of a complicated set of different transactions that might in one way or another trigger an HSR filing. Where a resolution involves transfer of an entire FC to one buyer, the DOJ or FTC would review the non-banking parts of the transaction under the normal HSR process. *See* 16 C.F.R. § 802.6(b) (rule of the FTC's Premerger Notification Office providing that in all "mixed" transactions involving some assets exempt from HSR and some not, the non-exempt portions will be reviewed under the normal HSR process); Premerger Not. Off., FTC, Formal Interpretation 17, 65 FED. REG. 17,880 (Apr. 5, 2000) (clarifying that this rule would apply to mixed acquisitions by FHCs). In other cases, the failing FC will be broken up and sold to different buyers. The banking pieces of the FC would have to be sold to entities legally permitted to own banks; most such transfers would be exempt from HSR and would be reviewed under the existing bank merger review process (though not all of them, because occasionally acquisitions of bank stock or assets are subject to HSR; see below). The non-banking pieces could be bought by all different sorts of buyers, and the merger review rules that would apply will depend on who the buyer is. The possibilities are:

(1) Any transfer of a non-banking asset to any buyer that is not itself a bank or a BHC would trigger HSR. For example, an FC that owns securities underwriting business might sell it to a competing firm that is not itself owned by an financial holding company that also owns banks. Under current law, such a transfer would be simply a garden variety HSR transaction.

(2) The situation is more complex where the acquiror is either a bank or another FHC that owns banks. (Strictly speaking, the only bank that could purchase non-banking assets would be a national bank that makes the purchase through a subsidiary. *See supra* note 56.) Sometimes HSR applies to such acquisitions and sometimes it does not, as follows:

  (a) Under current law, if the acquiring entity is an FHC, then its acquisition of non-bank entities is fully subject to HSR. *See* 12 U.S.C. § 1843(k)(6) (providing that an FHC may commence non-banking "financial" activities without prior FRB approval); 15 U.S.C. § 18a(c)(8) (providing the HSR applies to FHC acquisitions of non-banking financial entities that are exempted from FRB prior approval).

  (b) However, if an FHC, a BHC that is not permitted to act as an FHC, or a national bank acquires a non-banking entity, *and* that acquired entity engages in activities "closely related to banking or managing or controlling banks" as defined in Federal Reserve Board regulations, then the acquiror may elect *either* to make an HSR filing or apply for FRB approval. *See* 12 U.S.C. § 1843(c)(8); 12 C.F.R. § 225.28(b). "Closely related" activities include such things as trust services, data processing, and ATM network operation.

(3) Finally, there will be cases in which transfers of *banking* assets will be subject to HSR review. Bank acquisitions are exempt from HSR only where they are subject to pre-merger review by a banking regulator. *See* 15 U.S.C. § 18a(c)(7), (c)(8). But they are reviewed by banking regulators only where the acquisition of control is itself large enough to trigger the bank merger review statutes. It is possible that an acquiror could acquire a share in the voting stock of a banking entity that is too small to trigger bank merger review but large enough to trigger HSR review. For example, a BHC may acquire up to 5% of the voting stock of a bank without FRB approval. *See* 12 U.S.C. § 1842. But if value of the stock is $50 million or more (as it would be if the target bank's total voting securitites are worth more than $1 bilion) and the BHC has total assets or annual net sales of more than $10 million (as seems likely), then the transaction is reportable under HSR. *See* STEPHEN M. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT § 6.06[3][f] (2006).

See generally id. at § 6.06[3][g]; ABA BANK MERGER HANDBOOK, *supra* note 60, at 8-9.

But the bottom line remains that under this bill, transfers of very big financial companies would be subjected only to a hybrid HSR process so fast and so constrained as to constitute no meaningful antitrust review at all.

The Act reaches this result in two identical provisions. They first provide the following as to any transfers made by a federal conservator/receiver under the Act:

> If a filing is required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 with the Department of Justice or the Federal Trade Commission, the waiting period shall expire not later than the 30th day following such filing notwithstanding any other provision of Federal law or any attempt by any Federal agency to extend such waiting period, and no further request for information by any Federal agency shall be permitted.

Resolution Bill at § 1609(a)(1)(G)(ii)(I); § 1609(h)(10)(A). Both of the identical provisions then continue with the following, separate rule:

> If the Secretary, in consultation with the Chairman of the Federal Reserve Board, has found that the [FDIC] must act immediately to prevent the probable failure of the covered bank holding company involved, the approvals and filings [that would otherwise be required under the Resolution Bill] . . . shall not be required and the transaction may be consummated immediately by the [FDIC].

Id. at § 1609(a)(1)(G)(ii)(II); § 1609(h)(10)(B).

This is a big change. Under HSR, both parties to an acquisition must make an initial application on the agencies' "Form HSR-1." The application gives the agencies a chance to decide whether the transaction would violate § 7 of the Clayton Act. It therefore requires detailed discussion of the parties' markets, their market shares, and their competitors. So long as the agencies deem the filing complete, it triggers a statutory waiting period under which the parties may not consummate their transaction earlier than 30 calendar days after the filing is received.

As a practical matter, the agencies approve the vast majority of transactions before them during this initial 30-day waiting period. However, where they believe that a transaction may pose substantial competitive risks, they routinely take a few months and occasionally as much as a year or more to consider them. They also enjoy the benefit of interviews, depositions, interrogatories, and document production requests, all of which they may direct to the parties or to third persons. They enforce those disclosure requests through what are in effect very powerful civil discovery tools.[78]

All of this remains true, incidentally, even of transactions involving firms that are in financial distress or even in bankruptcy. HSR still applies in these cases, without any meaningful differences. Bankruptcy law makes only a small timing modification in some cases.[79]

But under the Resolution Bill, this would all be quite different. The agencies would have 30 (presumably calendar) days to make their judgment, period. They must make that judgment solely on the basis of the information initially given on Form HSR-1, and

[78] *See generally* AXINN ET AL., *supra* note 77, at §§ 7.04 – 7.05.

[79] By 1994 amendments, the bankruptcy code provides that where a bankruptcy trustee causes a transfer of assets that would trigger an HSR filing, the trustee must make the filing, but that the initial waiting period and other procedures operate as if the transfer were a "cash tender offer." The HSR causes review of cash tender offers to proceed more quickly than review of other transactions, but otherwise works in the ordinary way. The cash tender offer rules are in no way like the super-fast, constrained review under the Administration's resolution authority bill. *See* 11 U.S.C. § 363(b)(2); *see generally* AXINN ET AL., *supra* note 77, at § 7.03[3][a][iii]. In fact, a purpose of the 1994 amendments was to make clear that the agencies retain their power to make second requests even where the seller is a trustee in bankruptcy. *See id.* at § 7.04[3].

The fact that the firm in receivership is "failing" is of antitrust significance only in that, were an acquisition of that failing entity challenged under Clayton Act § 7, the merging parties might be able to raise the so-called "failing firm" defense. On HSR review, the agencies will consider whether a failing firm defense could be raised successfully if an agency were to challenge a transaction under § 7. A persuasive failing firm argument might cause the agencies to terminate an HSR review more quickly than they otherwise would, but the availability of the defense does not otherwise alter the HSR process. *See* U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES § 5 (1997).

there is a serious possibility under the bill as written that that might amount to only whatever information the FDIC decides is enough.[80]

C. Competitive Consequences

However infrequently the government might use its new powers under the Act, any government remedy that causes yet further concentration in these already highly concentrated markets should be taken as a grave matter. Indeed, conservator/receiver transactions under the Act will normally involve transactions in which, at least at the national aggregate level, concentration issues are particularly acute. Virtually by definition they will involve the largest entities in already concentrated, interconnected markets, because by definition those entities will be systemically significant.

Incidentally, while the Resolution Bill does not explicitly exempt or affect the antitrust treatment of collaborative conduct, it is relevant to that conduct. Elementary theory suggests that collusion is easier the fewer competitors there are in any given market.[81] If the bill facilitates more consolidation then it will aggravate the risk of collusion.

1. *Incorporation of Bank Merger Law.* Because the Resolution Bill deals with competitive issues in part by simply incorporating existing bank merger law, assessment

[80] A possibly serious issue of interpretation under the Resolution Bill is whether the agencies could have any say at all in how much information must be included with the HSR-1 filing. Under current law, the agencies can deem an initial filing incomplete and demand a revised filing, in which case the statutory time period does not begin until the subsequent filing is made. 16 C.F.R. § 803.10(c)(2). But the bill provides that once the filing is made (which presumably would be made on Form HSR-1), the waiting period "shall expire not later than the 30th day following such filing," and that once the filing is made, "no further request for information . . . shall be permitted." This might indicate that no matter what information is included, the agencies would have no recourse to deem the filing incomplete.

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

begins with the existing system. Criticism of that system has been extensive.[82] It has focused in large part on the substantive standard the regulators follow, first formulated during the sharp narrowing of antitrust enforcement of the 1980s and ultimately codified by agreement among DOJ and the bank regulatory agencies in 1995.[83] While nominally that standard is more or less the same ordinarily applied under Clayton Act § 7 and HSR, DOJ and the bank regulators have decided that the only serious competitive issues in bank mergers concern the credit needs of small and mid-sized businesses. In the regulators' view both consumers and large business have sufficient alternatives for their needs that consolidation in those areas simply will not restrict competition.

Accordingly—while in and of itself this fact is not a criticism—DOJ's actual enforcement of antitrust against bank mergers is vanishingly slight. DOJ has not formally challenged a bank merger since 1993, and on average it requests divestiture concessions in only about one out of the 1000 or more bank mergers it reviews each year.[84] Somewhat more directly in critique of the agencies' approach is the poor economic performance of most of the large bank mergers and especially the super-sized conglomerate mergers that they approve. That performance is important because a guiding premise of bank merger law has been the conviction that larger banks, other things equal, are more economically efficient and desirable than small ones. That is, the

---

[82] Peter C. Carstensen, *A Time to Return to Competition Goals in Banking Policy and Antitrust Enforcement: A Memorandum to the Antitrust Division,* 41 ANTITRUST BULL. 489 (1996); Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits,* 1983 DUKE L. J. 580; Felsenfeld, *supra* note 5; Margaret E. Guerin-Calvert, *Current Merger Policy: Banking and ATM Network Mergers,* 41 ANTITRUST BULL. 289 (1996); *See generally* AMC REPORT, *supra* note 12, , at 363-64 (criticizing all statutory limits on merger review in regulated industries, calling for full application of Clayton Act § 7 and the HSR to all such mergers, and calling for full competition review authority as to such mergers to be returned to the antitrust enforcement agencies).

[83] That policy is contained in DOJ REVIEW POLICY, *supra* note 65.

[84] Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets,* 13 FORDHAM J. CORP. & FIN. L. 581, 582 (2008) (reviewing records of DOJ bank merger reviews).

currently very permissive approach effectively begins with a strong presumption that mergers will be efficiency enhancing. In quite a lot of these mergers that premise is evidently false, and there being no pro-competitive motive for these transactions the question remains what their other motives might be and whether they should have relevance to an antitrust policy.

Indeed, while large bank and financial institution mergers tend not to produce anything *good* for the economy, they do appear to give merging parties some market power. This may be true not only as a consequence of immediate increase in concentration in those local markets to which the current merger review policy is calibrated. As my collaborator Peter Carstensen has frequently pointed out, there may be significant constraints associated with the fact that local branches in a given market are acquired by a national firm, even if the acquisition does not cause any substantial, immediate change in concentration there.[85] Moreover, it is now widely accepted in the industrial organization literature that firms that experience multiple contacts—firms that compete in many markets, and face each other in more than one—are more prone to oligopolistic interdependence than might otherwise be thought to be the case on the basis of concentration levels alone.

But, as mentioned, a wholly separate concern, that is in some sense a competitive one, is increasing systemic risk and the related problem of increasing numbers of TBTF firms. Even though American law really contains only one, isolated rule that could hope to constrain this problem in banking and financial markets—Clayton Act § 7, as applied through our regime of bank merger law—the government has refused to use it to reduce risk. Indeed, strenuous TBTF objections were made to DOJ in its review of the

[85] *See* Carstensen, *supra* note 82.

Citicorp/Travelers merger of 1998—the largest financial merger in history at the time, the first major merger of banking and non-banking businesses since the Great Depression, and one of the largest mergers in world history—but DOJ's view as that "this [w]as primarily a regulatory issue to be considered by the [Federal Reserve Board.]"[86] The merger was approved in all respects.

2. *The HSR Limitation.* The transactions at issue are certain to be complex, because by definition the firms at stake will be systemically significant and are likely to hold massive assets throughout the entire world. Moreover, the risk of getting the analysis wrong is significant. The assets to be sold will be large and the buyer will ordinarily be a very large competitor (or else it would lack the resources to buy all or part of a systemically significant financial holding company) that might be well positioned to use them to anticompetitive ends.[87] Bear in mind that the two federal agencies that perform HSR review are already responsible for oversight of *every other significant merger and acquisition in the entire U.S. economy.* It is hard to imagine how they could provide any meaningful check on anticompetitive transfers under these circumstances.

3. *In Application.* Having laid out all that regulatory detail, let us consider a practical example. The company that is now Citigroup has been the beneficiary of four different, ad hoc government bailouts since the Great Depression. Assuming that it can regain stability following the current rescue, it will remain an immense entity. Though it has shed some of the assets that as of 1998 made it the largest financial firm in world history—most importantly the Travelers insurance company, which it spun off in 2002—

[86] Kramer, *supra* note 43, at 6.

[87] As Mr. Krimminger made clear, the FDIC would be obliged in making any transfer to find the highest bidder for the assets in question. But much of the time the highest bidder will be the firm that can use the assets to their most anticompetitive and therefore most profitable end.

and though it intends to sell more, Citigroup retains about 200 million business and consumer customers in more than 140 countries. Along with its core banking business, the company apparently intends to retain a large investment banking operation, a global private banking/wealth management operation, and significant businesses in hedge funds, private equity, and other investment vehicles. Also, though it apparently intends to sell them, for the time being it retains the Smith Barney brokerage firm, the large life insurance and financial services firm known as Primerica, and significant businesses in real estate and consumer finance.[88] But Citigroup remains a severely troubled institution, and if the Resolution Bill were to pass there is no small chance that it would be the first firm put into a federal receivership. If so, when a buyer is found for Citigroup's traditional banking businesses, their transfer would be subject only to review by the FRB under existing bank merger law, and the Resolution Bill would automatically trigger the emergency time periods contained in that law. In other words, the FRB would probably make its decision in about one or two months, and the DOJ would have to provide a "report on competitive factors" *in ten days* of FRB's request for it.[89] These decisions would have to be made about transfer of a firm that, by number of customers, remains the world's single largest bank.[90] Then, when buyers are found for the non-banking parts, DOJ would get a filing on Form HSR-1, which really might include only as much or as little information as the conservator/receiver wants to give, and must decide within 30

---

[88] *See generally* Andrew Martin & Gretchen Morgensen, *Can Citigroup Carry Its Own Weight?,* N.Y. TIMES, Nov. 1, 2009, at BU1 (discussing Citigroup's history of government rescues and its current state); http://www.citigroup.com/citi/business/ (company website explaining its current businesses).

[89] Resolution Bill §§ 1209(a)(1)(G)(ii)(I) and 1209(h)(10)(A) both trigger this 10-day competition report provision. That provision is also available under existing bank merger law where the responsible bank regulator determines that one of the banks might fail; the Resolution Bill triggers it automatically.

[90] All the same would be true of the many lines of Citigroup's business that are "closely related" to banking, and therefore exempt from HSR, like some of its real estate investment businesses, much of the Smith Barney brokerage business, mergers-and-acquisitions advisory functions, and some other affairs. *See* 12 C.F.R. § 225.28.

days whether it would be anticompetitive to sell a large range of non-banking assets, including a massive securities underwriting operation and the Primerica firm, which among other things manages tens of billions of dollars of life insurance obligations for six million clients. Finally, if the Treasury Secretary and the FRB Chairman deem there to be emergency conditions, then *all* of Citigroup, one of the world's largest financial institutions, could be sold to one or many buyers *with no antitrust review of any kind.* The last part is the most breathtaking. Recent events make it seem likely that in many cases of failing, systemically significant FHCs the federal government will consider there to be an "emergency."

* * *

All of this criticism, it should be added, is wholly aside from the fact that our antitrust law currently refuses to consider concentrations of *power* as of any relevance. It focuses instead purely on costs and elasticities in narrowly defined relevant markets (as if allocational efficiency were a concept even yet dreamed of by the Congress of 1890). That is a bit of a shame in this context, as many of the major bank and financial holding company mergers since the boom began in the 1980s have been among *the largest consolidations of wealth and power in U.S. history.* Of course, though it was not always so,[91] addressing that concern through antitrust is a ship that for the time being has definitely sailed. But why we have convinced ourselves that the Congress of the Unites States should be prohibited from caring about concerns of this magnitude, and making them part of some coherent federal policy, is beyond me.

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

One final and completely separate issue deserves mention, as it relates to competition policy. The Resolution Bill contains a special provision that requires the FDIC to consider certain policy goals to guide the use of its powers, and among these goals is the protection of competition. This provision will be irrelevant on any practical level. The Act requires the conservator/receiver to exercise all of its § 1209 powers in accordance with a list of six policy aspirations, *see* § 1609(a)(10)(E), and one of them is to "ensure[] timely and adequate competition and fair and consistent treatment of [potential buyers of the failing BHC]," *id.* at § 1209(a)(10)(E)(v). For two reasons this provision will lack meaning. First, the other five values the conservator/receiver may consider are different, equally vague, and sometimes inconsistent with the competition duty. Most importantly, the conservator/receiver is directed, "to the greatest extent practicable," to "maximize[] the net present value return from the sale or disposition of . . . assets." *Id.* at § 1209(a)(10)(E)(i). At least some times the acquiror who would be most willing to pay for assets held by the conservator/receiver will be the one who can use them most anticompetitively, because their use in that acquiror's hands will lead to supra-competitive profits. Second, the duty is effectively unenforceable by any party that would have any concern for competition. Even assuming there could be a plaintiff with standing, and even assuming judicial review is available,[92] it seems extremely unlikely

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

any decision of the conservator/receiver would ever be reversed for failure to give effect to these six factors.[93]

Conclusion

Both under the traditional bank merger review and the new, hybrid HSR review, the time constraints and the magnitude of the transactions will ensure that major transactions under the Resolution Bill will not get meaningful antitrust review. This is sufficiently clear to beg the question why the Act fails just to exempt these transactions from antitrust altogether; it is fairly clear that the bill's drafters have no concern for it.[94] Presumably doing so explicitly would have seemed too impolitic. But if outright exemption from antitrust review is in some way a bad thing, then one must acknowledge that the procedures in the Resolution Bill are also inadequate, as they will reach much the same result.

But this reflects a much larger consideration: the Administration's financial regulatory reform package largely ignores competition as any part of any solution. This is a shame, because consolidation and concentration are part of some of the financial sector's worst problems.

---

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

[94] *See supra* note 4; *see also* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION (2009) (88-page report explaining Administration's financial regulatory reform package, including the Resolution Bill, which never mentions antitrust and only very obliquely discusses competition).