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WELCOME AND INTRODUCTION:

AARON KLEIN
Miriam K. Carliner Chair and Senior Fellow, Center on Regulation and Markets
The Brookings Institution

KEYNOTE:

JONATHAN KANTER
Assistant Attorney General, Antitrust Division, U.S. Department of Justice

PANEL DISCUSSION:

Moderator: SONALI BASAK
Global Finance Correspondent, Bloomberg

H. RODGIN COHEN
Senior Chairman, Sullivan & Cromwell LLP

JONATHAN V. GOULD
Partner, Jones Day

KATHRYN JUDGE
Harvey J. Goldschmid Professor of Law, Columbia University

JONATHAN WALLEN
Assistant Professor of Business Administration
Harvard Business School

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AARON KLEIN: Good morning. If I could ask people to take their seats, we're about to begin. It's a pleasure to have so many folks in person and also online. My name is Aaron Klein. I'm the Miriam Carliner chair and senior fellow in Economic Studies here at Brookings at the Center on Regulation and Markets. And it's my distinct honor and privilege to kick off today's conversation, which is theme about competition in banking and thinking about it from a bit of a new and different perspective, bringing in some of the thoughts regarding antitrust and legal frameworks that have garnered competition policy. You know, banking is different and special for a variety of reason. Banks are chartered, not licensed. Banks produce money and have are insured by the federal government. And so for a long time, banks have been thought of as being structurally different from other parts of the economy, which are subject to antitrust. But as well here, the law views the world differently. The laws that govern antitrust, the Sherman Act and the Clean Air Act do not exempt banking. Banking is no baseball. Baseball would be the one exempted sport or acting activity, I should say business industry. And so how is that to be played? For a long time? There's been tremendous difference, I would say it's fair to say given to the bank regulators and the world of banking has changed substantially. What is competition in banking in a world in which all of us have access to hundreds, if not thousands of banks and growing number of credit unions who seem to accept anybody who can click a button. That seems to be the new common bond for some credit unions. And so how should we rethink ways to promote competition? You know, this conversation was incredibly important before the recent banking turmoil in March that led to the failure of multiple major banks, some of which were bought and consolidated, creating even greater consolidation in the marketplace. All of these questions, I think, could benefit from a historic and legal perspective, one that I am very honored to introduce. Our keynote speaker, Assistant Attorney General Jonathan Kantor, who I think is uniquely qualified to provide that. Assistant Attorney General Kantor is a true native New Yorker. My family may have roots in Queens, but Jonathan grew up there. After getting his law degree from Washington University in Saint Louis, he went on to become a partner in two major U.S. law firms, then founding his own firm before being confirmed to the United States Senate with, I think, about 68 votes, which itself is a pretty impressive mark in this current polarized context. And as the head of the antitrust division, Assistant Attorney General Kantor has tremendous power and insight, not just into the current state of how to apply these questions in the banking industry, but in the broader U.S. economy. And combining those two insights, I think will be incredibly valuable. So with that, if I could, welcome to the stage. This is an attorney general and hand over the conversation to him.

JONATHAN KANTER: Hello. Good morning, everybody. How's everyone doing today? Good. Thank you for having me. And thank you, Aaron, for that kind introduction. Let's go, Mets. It's true. I'm from Queens. Long suffering Mets fan. But one of these days. One of these days. And thank you to Brookings for hosting this event. 60 years ago this very week, the Supreme Court handed down its decision in the United States versus Philadelphia National Bank. Today, I would like to discuss the impact of this landmark case. Philadelphia National Bank was well known in banking circles for recognizing the essential role that the antitrust laws have in protecting competition in the banking sector. But the legacy of Philadelphia National Bank, or, as we like to call it in the biz, PNB, is much broader. It's a foundational decision that has paved the way for merger enforcement across all industries. And as we revise our broader merger guidelines, PNB looms large in its impact on antitrust. Merger law is enduring and undeniable for enforcement agencies and for courts. As we reflect on the legacy of Philadelphia National Bank. I hope we can all agree that bank competition is critically important for all Americans. Bank competition affects the interest you earn on your savings account, the monthly payment on your mortgage or on your car loan, and the fees you pay to withdraw cash from an ATM. The variety of financial products that you can choose from, and whether your business can get an affordable loan. Simply put, bank competition affects people's pocketbooks and their daily lives. Recognizing the importance of banking competition, President Biden has encouraged the Department of Justice and the federal banking agencies to revitalize bank merger oversight, to, quote, ensure Americans have choices among financial institutions and to guard against excessive market power, unquote. The time is indeed ripe for us to reexamine how we assess bank mergers under the statutory framework that Congress has enacted, the Department of Justice and the banking agencies issued the current bank merger guidelines in 1995. Much has changed, and as we can all see from our personal experience, Who out here remembers the Palm Pilot? Yeah. Did anyone actually have one? Okay. The PalmPilot was introduced two years after the current bank merger guidelines. With the popularization of interstate banking, the world today is radically different. We have interstate banking, financial conglomeration online and mobile banking and the digital transformation of our economy. The banking system of today bears so little resemblance to the banking system of three decades ago. Against this backdrop, it is appropriate and responsible for us to reassess whether the prevailing approach to bank merger enforcement is fit for purpose, given the current market realities of today. Asking whether the financial, the factual and economic assumptions underlying the 1995 guidelines are adequate to measure and assess the many different dimensions of competition that exist today is indeed the responsible course of action. I should note 1995 I had a full head of hair, and so I'll give you a context is how much time actually has gone by. Of course, I would be remiss if I did not address the elephant in the room. We are examining bank merger policy against the backdrop of an industry that has experienced some recent turmoil. There are many considerations relevant to bank merger policy. I will limit my comments in remarks today to the narrow but important question of how best to apply the antitrust laws to competition in the banking space, with an eye toward preserving the benefits of competition. Broader considerations regarding bank merger regulation are better left to the expert bank regulators. Today, I will discuss why bank competition is essential, how bank competition has evolved over time, and how the Antitrust division at the Department of Justice will fulfill its statutory obligation to protect competition in the banking sector going forward. In keeping with our celebration, the Philadelphia National Bank, I will also discuss the impact of this seminal case on trust enforcement more broadly. 1961, the Department of Justice sued to block the merger of the second and third largest banks in Philadelphia on June 17th, 1963. The Supreme Court sided with the DOJ holding that the merger violated Section seven of the Clayton Act. In its decision, the Supreme Court held that certain changes in market structure alone can create a presumption that a merger may substantially lessen competition. In doing so, the court underscored that a fundamental purpose of the Clayton Act, the antitrust laws, among other things, was to arrest trends toward competition, conscious risk trends toward concentration in their incipient sea. Philadelphia National Bank has made an indelible mark on merger enforcement. In its decision, the court acknowledged that certain mergers are so clearly likely to lessen competition that they must be prohibited in the absence of clear and contrary evidence. Courts have closely followed this presumption, simplifying the test of presumptive illegality for certain mergers. And allowing decision makers to cut to the heart of the merger inquiry, though PNB, as most cited for its articulation of this presumption. The court also set forth numerous other key principles of antitrust enforcement, merger enforcement that remain true today and loud starts of our enforcement program. Philadelphia. National Bank's holdings are still binding. The Supreme Court has not since reversed or criticized these holdings, and the basis for their structural presumption and merger review is even stronger today than it was in 1963. And it is cited consistently and authoritatively by courts throughout the country. 60 years on, Philadelphia National Bank has stood the test of time like its classmates from the 1963 term Gideon versus Wainwright and Brady versus Maryland. Philadelphia National Bank is a seminal decision in its area of law. As law enforcers, our job is to apply these holdings in a manner that is consistent with modern tools and the realities of our markets as we find them today. Of course, Philadelphia National Bank is uniquely relevant to banking, not just merger enforcement broadly. Although it may seem hard to believe today. For much of the 20th century, it was widely assumed that banks were actually exempt from the antitrust laws. Pub changed that assumption and firmly established that banking is indeed within the purview of federal antitrust law. PNB emphasized the importance of competition in banking because of banking's unique role in the economy. In reaching its decision, the Supreme Court recognized that bank competition is critically important for families who are trying to take out a mortgage or earn an interest on their savings. Of course, bank competition also affects our commercial economy. As the Supreme Court wrote, if businesspeople are, quote, denied credit because banking alternatives have been eliminated by mergers, the whole edifice of our entrepreneurial system is threatened, unquote. The court underscored that excessive consolidation in the banking sector could imperil free and fair functioning of the broader economy. In the court's words, quote, Concentration in banking accelerates concentration generally, unquote. It was true then, and it remains true today. Competition in banking and competition throughout our economy go hand in hand. After Philadelphia National Bank Congress codified the Department of Justice's role in bank antitrust merger enforcement under the bank merger and bank holding company acts. The federal banking agencies are the primary authorities on bank merger review. The Department of Justice has an important but specific role in the process. As amended, the bank merger statutes prohibit the banking agencies from approving any merger that violates the antitrust laws, unless the banking agency finds that the mergers in a competitive facts are, and I quote, clearly outweighed by the public interest in the probable effect of the transaction in meaning the convenience and needs of the community be served, unquote. This assessment of convenience and needs is a distinctive feature of bank merger statutes, which empower the bank regulators, not the DOJ, to conduct this assessment. Indeed, the Supreme Court cautioned in Philadelphia National Bank that an otherwise illegal merger under the antitrust laws. Quote is not saved because of some ultimate reckoning of social or economic debits and credits it may be deemed beneficial. Close quote. Congress directed the department to serve instead in an advisory capacity to the banking agencies by providing a report on competitive factors involved in a bank merger. At the same time, Congress authorized a DOJ to serve in its law enforcement capacity by challenging in court any in a competitive bank merger that violates the antitrust laws. On this milestone of Philadelphia National Bank, it is appropriate to take stock of how the department is fulfilling its statutory role in bank merger enforcement. As I frequently said, we need to make sure our approach to investigating and analyzing mergers across our entire economy is consistent with market realities and how competition actually presents itself today. The department's view of bank mergers should follow this path as well. The department in the federal banking agencies issued bank merger guidelines in 1995 to, quote, identify proposed mergers that clearly do not have significant efforts. Effects on Competition. The 1995 guidelines reflect that era's approach to bank antitrust enforcement based on the industry realities, perhaps, of that day. These guidelines from 1995 attach great significance to market shares based on local deposits, using those deposits as a proxy for concentration and competition. For transactions that exceeded certain competition threshold concentration thresholds based on deposits. The 1995 guidelines invite the merging banks to resolve the problem by agreeing to make an appropriate divestiture. It has since become standard practice for the DOJ to address such mergers by negotiating branch divestitures and entering into a letter of agreement or settlement of sorts with parties. Much has changed, of course, since 1995, when the agencies issued the current guidelines. Congress had only months earlier removed legal barriers that prevented many banks from expanding beyond their home state. Congress was still years away from authorizing banks to affiliate with investment banks and insurance companies. The time agencies issued the 1995 guidelines, the largest bank holding company had 250 billion in assets. That's less than one seventh the size of the largest bank holding company today. After adjusting for inflation. Fast forward almost 30 years and the number of community banks or smaller banks that focus on lending in their local neighborhoods has dropped more than half, according to the FDIC. At the same time, the six largest bank holding companies have amassed as many assets as all other bank companies combined. To put it plainly, policymakers in 1995 confronted a much different banking system than the one that we have today. Against this backdrop, there are good reasons, aside just from the passage of time to question whether the 1995 guidelines sufficiently reflect current market realities. Few examples. First, from financial conglomerates today may compete more geographic areas across more many more business lines in many different dimensions than they did decades ago. The 1995 guidelines narrow focus on local market deposit concentration may therefore be inadequate to assess the likely competitive effects of a modern bank merger and may also disproportionately focus enforcement on transactions involving small local banks and understate network concerns relating to large national and multinational banks. Second is the global economy has evolved and become more diverse. So too have customers financial needs. A multinational corporation demands a much different cluster of financial services than a local business owner. Likewise, the needs of high net worth, High net worth C-suite executives differ from those of a local schoolteacher like my parents. Finally, the emergence of fintech and other non-bank financial companies has been notable. How these companies should be factored into the competition analysis course is appropriately fact specific. In his executive order on promoting competition, President Biden recognized the need for banking antitrust policy to better reflect today's market realities and support a more resilient banking system that serves all types of customers and communities. Consistent with the President's executive order. The Antitrust Division invited public comments in late 2021 on whether and how to revise the 95 guidelines. We received numerous thought responses, thoughtful responses from a wide range of stakeholders, and we are carefully considering those responses and comments. Let me now described describe what the Antitrust Division is doing to ensure that we fulfill our statutory obligation to protect the competitive process in the banking sector. The Antitrust Division takes seriously its statutory responsibility to advise the relevant federal banking agencies about the competitive effects of a proposed merger, including our responsibility to analyze relevant, competitive, competitive factors through the lens of current market realities the world as it exists today. To that end, the division is modernizing its approach to investigating and reporting on the full range of competitive factors involved in banking in a bank merger. To ensure that we are taking into account today's market realities and the many dimensions of competition in the modern banking sector. In preparing the competitive factors reports, we are required by law to submit to the banking agencies. The DOJ will assess the relevant competition in retail, banking stress, small business banking and large and mid-sized banking in any given transaction. These analysis will include consideration of concentration levels across a wide range of relevant and appropriate metrics, not just local deposits and branch overlaps. Indeed, the division and the federal banking agencies are working together to augment the data sources we use when calculating market concentration to ensure that we are relying on the best data possible and using state of the art tools to assess all relevant dimensions of competition. A competitive factors report should evaluate the many ways in which competition manifests itself in a particular banking market, including through fees, interest rates, branch locations, product variety, network effects, interoperability and customer service are competitive factors. Reports will increasingly address these dimensions of competition that may not be observable simply by measuring market concentration based on deposits and branch overlaps alone. Let me highlight two areas that will be of particular interest to the Antitrust division as it prepares its competitive factors reports. First, the division will see closely scrutinized mergers that increase the risk of coordination and multi market contacts with other banks. The division will also examine the extent to which a transaction threatens to entrench power of the most dominant banks by excluding existing or potential disruptive threats or rivals. All of this is consistent with Philadelphia National Bank and the relevant antitrust precedent. Our competitive Factors reports must take into account these potential threats to competition, just as we do in mergers throughout other areas of the economy. Why we will scrutinize any transaction that presents substantive legal concerns. We will not limit our analysis to small local bank acquisitions where appropriate. We will also scrutinize the largest and most powerful actors. Second, the division will carefully consider how a proposed merger may affect competition in different customer segments. Though far from perfect, the modern banking system features a wide variety of types of banks that serve different customer needs. For example, some banks specialize in relationship lending and personalized service, leveraging their unique knowledge of local communities. Other banks operate extensive regional or nationwide branch networks and offer sophisticated mobile banking capabilities. This diversity creates choices for customers who may comparison shop and choose the type of bank that best meets their needs. To protect competition, antitrust enforcers must ensure that customers retain a meaningful choice as to the type of bank with which they do business. By recognizing that different segments of customers have different needs and that substitution across different types of banks may be limited. Few words on remedies. Our job at the antitrust Division is to enforce the law, not to micromanage or regulate the private sector. We owe it to the public to maintain a high bar for divestitures that we will accept as remedies and to evaluate fully the risks associated with carving out divestitures in particular. Branch divestitures may not always be adequate to address the broader range of competitive and antitrust concerns, including interoperability and network effects, among many other potential areas that may be relevant to a particular review. Nor is it with we're not within our statutory mandate or consistent with the holding in Philadelphia National Bank to consider how, if at all, an otherwise competitive merger might impact the convenience needs of a community. This is a role the bank statutes specifically reserved for the bank regulators. We are in the process of reorienting the Antitrust division's role to focus on providing our advisory opinion as required by the statute, not remedies agreements with parties. And it's become customary over the last many years. The goal is for this revised procedure to faithfully effectuate the department's limited but essential statutory role in bank antitrust enforcement and facilitate the banking agency's analysis of competition and other factors as part of their broader bank merger review framework and statutory approval authorities. This approach preserves our authority to challenge a bank merger under the antitrust laws, consistent with the statutory framework that Congress established. Of course, our work does not end there. Our bank merger guidelines need updating. Guidelines are certainly valuable tools that we use to identify harms to competition and the types of evidence that we use to investigate a merger's likely could have resulting in those harms. Updated bank merger guidelines have the potential to provide valuable guidance to the antitrust bar and to the banking community more generally. However, guidelines are not law and the precedents like Philadelphia National Bank, the statutory text. Are ultimately our guides and we plan to anchor any revisions to the guidelines in binding President precedent and statutory text. We very much look forward to continuing to collaborate with the talented leadership and staff of the FDA, of the Federal Reserve, the FDIC, the FCC on new bank merger guidelines. Our staffs have been engaged in productive discussions, and I am optimistic that we will develop new guidelines that reflect our responsibility to protect competition in the banking system system consistent with the President's executive order. As we update the bank merger guidelines, we must ensure that enforcement decisions are tuned to current market realities and not based on an outdated conception of banking. Let me close by saying that I have deep nostalgia for our banking system as it existed a long time ago, including 1995. Like many of you, I remember the excitement of being handed a free toaster when signing up for a new account. And I recall the weekly ritual when members of the local community would wait in line on Friday to deposit a check and withdraw cash for the current week. I have fond memories of standing alongside my parents as they did so. But a lot has changed since then. People at the time were not even looking down at their Palm Pilots. Why? Because doesn't exist yet. As we stare down the realities of our financial system in 2023, the time is right for us to revisit the bank merger guidelines and to make sure that we are applying the legal holdings and principles which are still incredibly sound from Philadelphia National Bank and its progeny, but in a manner that is consistent with today's market realities. Thank you so much for having me today.

AARON KLEIN: Thank you very much. There's a lot to dissect and I want to leave some ample time because we have an audience of some some really great people, too, to ask you some questions. But I want to start by digging in with what I think is the big news here. So you're saying that since 1995, basically DOJ hasn't written a memo by merger, by merger analysis and sent it in, and that's now what's going to happen going forward.

JONATHAN KANTER: I don't know if that's quite accurate. I mean, the DOJ has provided competitive factors reports since that time. What we're saying is that the guidelines, the public facing document that explains the analysis we use to assess competition, any particular merger and the dimensions of competition that we consider in those competitive active factors. Reports are due for an update, are due for a refresh. The world has changed and competition presents itself in so many different ways and across so many different dimensions. And just like we have in other parts of our economy, it's extremely important that we are doing an antitrust analysis and a competition assessment that adequately reviews all of those different dimensions and then reports on those to the bank regulators.

AARON KLEIN: So when you change the dimensions upon which your analysis is occurring, the corollary to that would be the conclusion may change. Is that fair?

JONATHAN KANTER: Well, it's fact specific. So ultimately, our job is to assess competition. It's a competitive factors report. All we're saying is that we're going to look at all the competitive factors. We're not going to artificially limit ourselves to just one or two dimensions of competition when in a modern economy, competition occurs in so many different ways in a very dynamic way.

AARON KLEIN: So I want to pause on that because I want to go into different areas of competition. But I want to return to one thing you said in your speech, which was that you're going to be looking at competition, not just in terms of the provision of total banking services, but very specific subsections. You talked about different consumers with different needs. Banks specialize in reaching different types of consumers. Talk a little bit about how you're thinking, how you're currently thinking about those distinctions within I mean, banks that look at small businesses, commercial real estate serving low and moderate income people, ripping people off with overdraft fees. I mean, there are all sorts of different subspecialties within the banking industry.

JONATHAN KANTER: Sure. So this is not any different than what we do across our entire tier merger enforcement program. There are lots of different markets, there are lots of submarkets, there are lots of customer segments. And in any merger, the first thing we do is we examine what are the different ways in which competition presents itself in this particular market with respect to this particular transaction. And then we evaluate whether the merger will substantially less than that competition. And so all we're saying is that we have to look at the various different measures of competition, the various different ways in which competition presents itself, and then evaluate whether the transaction substantially lessens competition in any of those areas. I think that's a very in many respects that is heartland antitrust enforcement. And for the antitrust lawyers in the room, you know, incredibly consistent with how we've conducted antitrust merger enforcement since Philadelphia National Bank was two sided.

AARON KLEIN: So one way to think about that, the recent experiences at Silicon Valley Bank highlight, for example, there weren't many banks engaged in their business model, right? A lot of people have mistakenly thought of Silicon Valley Bank as a regional bank. Silicon Valley Bank had four branches. That's not a regional mega regional bank of that size is about 1000, right? What they did was a very specialized type of sub banking. They just did a huge scale, right. So hold aside the exigent circumstances that led to its demise, because sometimes you can think about bank mergers in kind of normal times and then in times of stress. And the process you're talking about is a little more in terms of normal times, right? Not in terms of what's happening when you're closing a bank and trying to get rid of it over the weekend.

JONATHAN KANTER: Exactly. So the as folks probably know, in a series of emergency or bank failure, we don't submit a competitive factors report and the emergency measures that are undertaken by the bank regulators without our input. I'm what what I'm talking about today and our focus is on building and preserving a resilient, competitive banking economy. And I've said in, you know, quite often that competition isn't a switch, that you can flip on and off when you need it. You have to invest in a competitive and resilient economy. And if we want competition. Be strong. And resilient. And consumers needs to be met during a time of crisis. We have to be willing to invest in that competitive economy when we are not in crisis.

AARON KLEIN: So using I know having been in government, you're loath to use specific examples. Being outside, it's much easier to think in that way. Right. So you have First Republic, Jp morgan merger time of stress, you have TD and First Horizon potential merger during normal times. Right. So that's kind of one way. TD First Horizon would have triggered this new review process in a way that's very different from First Republic and JP just as a simple way of putting it.

JONATHAN KANTER: Yeah, let me let me try to, you know, back a layer of abstraction here. There's not a new the law hasn't changed. Right. The law is exactly the way it's always been. What we're saying is that market realities have a have shifted. And so when we apply the law, we have an obligation to make sure that we are addressing the world as it exists today, not as it may have existed on a blackboard in 1995. And so we're going to look at those market realities and we're going to understand what the dimensions are of competition. And then we're going to engage in a very fact based inquiry to determine whether the transaction harms or threatens to harm competition in any of those dimensions using an antitrust analysis.

AARON KLEIN: So let's get back to the kind of main theme of of your speech was, you know, how much competition has changed since 1995. So one thing I think that's always struck me as interesting in banking laws, we love to name our laws after members of Congress, and I gather antitrust has a bit of that. In other parts, you don't. I worked on transportation legislation where members named it after their wives with code words and things like that. But in banking, right. So you have. RIGELL Neal, which is, I think, a transformative law that doesn't get the name recognition among the American public, but that basically liberalized multistate banking and that had right in 1995. Right. That that really Neal's basically in its infancy. So subsequent to that, we've seen, you know, huge growth in multistate banking. In 1995, when you joined a credit union, you actually had to have a real field of membership bond with the other people in the credit union space. Right. Today, you know, anybody who's a friend of space can join a federal credit union and the local one here, Ben Fed literature advertised. Their slogan is Great rates for everyone. I mean, quite saying universal. So we now have more credit unions in America than banks. I know as you ticked off the regulators and Sheila wasn't there, but thinking about the the credit union space and thinking about multistate banking, and then I'll turn to fintechs and other things later. Would your competitive factor analysis take into account not just banks, but other entities like credit unions that offer deposits in in a broader space?

JONATHAN KANTER: Yeah, I know this is a deep area of thought and scholarship for you and appreciate the question. It's highly fact specific. And so to the extent that credit unions are relevant to the dynamics of competition in connection with a particular transaction, of course we'll evaluate it.

AARON KLEIN: Well, I encourage you and your office to look into the growth of of the of the things where basically anytime you hear an advertisement, see if you're eligible to join because you are. That's that's the structure and that really is a change. Let's talk another area about fintechs. Neobanks right. Things in which people feel like they're having a banking relationship, even if the entity isn't itself a bank but uses a subsidiary. Is that type of competition in your different subsectors? Basic accounts, small dollar loans, loans for different types of businesses? How are you going to incorporate fintechs didn't exist in the nineties.

JONATHAN KANTER: Sure. So again, first we have to ask what is the relevance of this particular company to this particular transaction? And we also have to recognize that competition presents itself in many different dynamic ways. And so one of the things that we've learned, the antitrust enforcement authorities over the years is that sometimes competition presents itself from a direct competitor that looks exactly like one of the merging parties. But sometimes competition can present itself from something that is not a perfect substitute, but nonetheless has a disruptive impact. And so if a transaction can deepen a moat or entrench power by somehow removing a disruptive impact that has the potential to violate the antitrust laws, just like a horizontal merger of two direct competitors that look exactly like. Again, these are all very fact specific questions that we have to evaluate in the context of any specific deal, recognizing that market realities in a world with network effects. Interoperability have changed and the considerations that go into understanding whether a market will be or remain competitive have also evolved.

AARON KLEIN: So I'm trying to think back to when I studied some of these things in in grad school, and I thought, I remember one of the big cases had to do with like satellite television, right? Like, is that a substitute to cable or not? And should we allow the different satellite things to to merge or is what you're saying when you're thinking about this in a fact specific case, you're thinking about whether or not the competition in this sector that's impacted, how you're then going to look for other people that provide products that may be similar, even if it's not provided by a insured depository institution.

JONATHAN KANTER: What we're going to say is how does competition present itself in this particular industry with respect to this transaction? And is competition can be one direct competitor or another direct competitor, but it could also be technologies that facilitate multi homing or technologies that have the potential to disrupt or provide greater transparency to consumers. All of those are relevant to the competitive dynamics. How that interacts and how that factors into any particular transaction depends on the facts of the specific transaction. I want to be very careful. We are not prejudging any fact pattern here. We are simply saying that we are going to start with the question like we were doing in all of our merger analysis. Now how does competition present itself here, understand the different dimensions of competition and then work to determine whether the merger substantial lessons that competition?

AARON KLEIN: I'm going to turn to the audience because in a competitive landscape, I shouldn't assume that I have all the great questions. But as folks start to get their question in, I'm going to ask you one. One final question about branch divestiture, because you kind of seemed to indicate in your speech that you're moving beyond that as a sole remedy are the major I don't want to say soul, but as the major remedy in in these spaces. And I you know, it's interesting because often the conversation about serving the underserved focuses on branch access. And then when you see a survey like the FDIC survey of the on and under bank and you ask people without a bank account, what's stopping you? Right. The number one reason is cost. The number two reason is fees. The number three reason is cost and fees. And you got to trust in the banking system. And lo and behold, like access to branches and ours appears very low on the list. Something like around less than one in 20 people cite that as the make up people without a bank account. The main reason they don't are. Do you think that's different than it would be? We don't have the data, I think going all the way back to nineties. But in your decision to go kind of beyond branch analysis, how do you contemplate the thinking on branching as it relates to the changing in competition, the changing and technology in that space?

JONATHAN KANTER: So I'll flip it back in and forgive me for trying to be clever here, but I'll ask you a question. Yeah. Which is who do you think in today's world that branch overlaps and deposits are the only appropriate measure of competition?

AARON KLEIN: Absolutely not. There you go. All right, Start with the woman in the front row, and then we'll get to Dennis. And there's going to be no shortage of questions After that. You can please identify yourself. I'd appreciate.

AUDIENCE MEMBER: Sure. Meredith Whitney, a longtime banking analyst. I ask this question with the intention of being constructive on having this competitive.

AARON KLEIN: I should say, ask ask questions. So, yeah, go right ahead. Okay.

AUDIENCE MEMBER: It seems as if the horse has already left the barn in terms of bank consolidation with the top banking banks dominating the banking industry. So if I just want to make sure that I understand this clearly, what you're suggesting is what you're suggesting today is the prospective changes on mergers. Isn't that punitive to what we really need is a the small banks getting larger to compete with the larger banks, and I think the larger banks would welcome that. So we certainly need consolidation with the industry. How are you going to be proactive or encouraging of that healthy consolidation?

AARON KLEIN: Great.

JONATHAN KANTER: So let me answer that quickly. Appreciate it. First of all, I want to be very clear that every bank merger is fact specific, and we need to understand the implications of that particular transaction on the different dimensions of competition. What I saying is, as we go forward, we need to be thoughtful about how competition presents itself and then be thorough and. Rigorous in evaluating that competition. There are lots of different considerations that are relevant in any particular transaction and into any particular market, and we're going to consider all of that going forward. But but it would be, I think, lacking in rigor and nuance if we simply said that we're going to take the world as it existed in 1995 and continue applying that just because that's what we've done in the past.

AARON KLEIN: Great. I think we have Dennis and then Paul. We'll get the woman there.

AUDIENCE MEMBER: Dennis Keller, a better markets appreciate your speech, particularly your recognition of the real world implications for Main Street and competitive economy. I would encourage you not to give a free pass to the bankers or the bank regulators in an emergency situation. You know, if you look at Silicon Valley Bank was systemic risk perception was invoked versus First Republic where it was not. One might think one might want to look pretty hard at the first Republic acquisition or disposition in connection with Jp morgan Chase. And at a minimum, you would think that in Sherk there are plenty of circumstances that are characterized. This emergency's where DOJ's interest should be at the table. And I'm not an expert in a trust law, but I don't actually recall in the statute there being a free pass for banking regulators when they say something is an emergency regardless of whether it is or not.

JONATHAN KANTER: Yes, it's a great question. I appreciate the clarification. There are no free passes where law enforcement agencies we apply the law. I was simply referring to a procedural step in which when when there's a bank failure, the role of the competitive factors report is is different. And the process for providing our views is different. And so the law continues to apply always.

AARON KLEIN: Right. But the law governing when the FDIC gets involved is different.

JONATHAN KANTER: Correct.

AARON KLEIN: Paul, and then behind Paul.

AUDIENCE MEMBER: Very interesting. Paul Saltzman I'm general counsel of the community bank. You talk about the new market reality. I want to follow up a little bit more on what Dennis said, which is, as part of your new market reality, are you recognizing the too big to fail subsidy that is implied and that has been clearly demonstrated over the past several months where you had a massive migration of deposits and lending relationships from community and regional banks to the too big to fail banks. You have regional and community banks that are trading at fractions of tangible book value. So the marketplace has recognized an unstated policy of too big to fail banks. Is that part of your new market reality when you're looking at competition in the banking industry?

JONATHAN KANTER: I think all of that has to be part of a new market reality. I mean, if things are happening, we need to understand it and we need to address it. Less of me. Also be very clear that local community banks provide an incredibly important function to our local economies. And so a local economy without banking is a local economy that's not competitive. We want our banks to invest in local businesses and local communities. It's the beating heart of that economy. It's especially in rural areas. And so we need to think about the needs of those banking customers in the context of any particular transaction, just as we do the needs of multinationals who might bank for different reasons.

AARON KLEIN: Okay. I think we have time right there.

AUDIENCE MEMBER: Good morning, Alexa Philo with Americans for Financial Reform. Thank you for your great remarks today. Since the DOJ will no longer be playing a leading role negotiating with banks to mitigate anti-competitive effects. To what extent will the DOJ be willing to interject if it thinks the banking agencies aren't adequately resolving the anti-competitive effects of a merger flagged by the DOJ?

JONATHAN KANTER: Yeah, so thank you for the question. Let me again try to clarify. You know, we are playing the role that we are mandated to play by statute, which is to enforce the antitrust laws and to advise the bank regulators of the competitive factors and implications of a transaction so that they can be appropriately weighed in the context of other considerations that are outside the ambit of antitrust law. And so that's what we're going to do, and we're going to do it thoughtfully and in a way that communicates openly and dynamically with our bank regulator partners, where we are still very much a part of the process. Our role has not changed. We are working to fulfill our statutory obligations under the relevant acts.

AARON KLEIN: So. In the Philadelphia case, which you start right, as I recall the history --

JONATHAN KANTER: The OCC approved that deal

AARON KLEIN: The OCC approved the deal and DOJ said, No, no, no, no nooo, and you won.

JONATHAN KANTER: That is true. Now, that's still that has been and continues to be the case that if that's the appropriate course of action, as a matter of law enforcement, that is the action they could pursue.

AARON KLEIN: Are you aware of a time where the Federal Reserve has said no to a bank merger in the last 20 years?

JONATHAN KANTER: I'll leave it to others in the room.

AARON KLEIN: Well, on your parting thoughts as we let you go, because I'm not aware of such a of such a time where the bank regulator said no to a merger. If the public wants to engage more with you guys in the process, if people there's tremendous demand in this in the audience. What's the next step?

JONATHAN KANTER: We always want to hear from the public. We always welcome input, submissions, thoughts on how to make sure that we are calibrating our merger enforcement to reflect market realities. We also want to make sure that we understand the impact of a transaction in the real in know in based on real world realities. And so figuring communicating with us, whether it's in particular in connection with a specific transaction or more broadly in the context of how we think about analysis, is something we always welcome and we're eager for all points of view.

AARON KLEIN: Great. Well, join me in thanking. Thank you, Attorney General Kanter. And let's involve let's bring up four of the smartest people in the room on this to talk about it. And I'm going to introduce them as they take the stage. I'll start. You guys, come on up. Sonali, I'll. I'll start. Thank you. Thank you. That was fantastic. Excellent. Sonali Basak is senior Wall Street reporter for for Bloomberg. I think she describes herself as a reporter by day and a reporter by night. And so she if you're getting news from her constantly, she's always on the beat. Prior graduate of NYU Stern School and you see her on TV and then Rodgin Cohen, who is the vice chair of the Economic Studies Council here at the Brookings Institution and the senior partner at Sullivan Cromwell. And we thank Rodgin for his continued support of the Brookings Institution. And I think the best introduction from Rodgin is that if there's a situation, he is the senior counsel to it. Kate Judge is the Harvey Goldschmidt professor of law at Columbia University, the author of a new book Direct, which I strongly recommend reading and legal major legal scholar in the banking space, Jonathan Wallen, assistant professor at Harvard Business School, a Ph.D. from Stanford University who's been applying some new and innovative research into this space. And Jonathan Gould, who's a partner at Jones Day and was the general counsel for the Office of Comptroller of the Currency, where he's actually had real world experience in approving bank mergers and looking underneath the hood and making these decisions. So Sonali, I'll turn it over to you.

SONALI BASAK: You. Thank you, Aaron, so much. And remember, we do have time for questions at the end. So what we've last 10 to 15 minutes open for questions. First, we'll get started by having all of you react to what the assistant attorney general had to say. There's already an alphabet soup of regulators in the United States, four banks with very different views on how to handle them, and particularly with mergers. So where do you see, Rodgin, maybe we start with you on where the DOJ stands relative to these other agencies.

RODGIN COHEN: So I thought the assistant attorney general's remarks were enlightening very much in this respect, and they conform with what the statute says and congressional actions which have been taken over decades. And that is a specific as the assistant attorney general said, a specific and limited role in bank mergers. It's to advise the bank regulatory agencies. And if the DOJ disagrees with an approval to sue in court and that's it. So suggestions that the DOJ in its competitive analysis should take into account convenience and needs, for example, seem to be directly and again, I think, correctly repudiated by the remarks.

SONALI BASAK: Kate.

KATHRYN JUDGE: Yeah, I would agree. I think they were incredibly productive remarks. I think it's more than overdue that we revisit the guidelines for all the reasons that Assistant Attorney General Carter laid out. And though he did not use the term holistic, and that's been thrown around in banking a lot, I mean, I think what we really heard is he is going to take and his department's going to take a much more holistic approach in terms of trying to understand across sector by sector what are the range of different competitive factors that are at play. I would hope they would do so Thinking over the credit cycle. One of the differences that often comes to light when you're looking through the credit cycle is that there are a number of factors that might be more than willing to provide credit and other financial services when times are good that are not necessarily going to be as available when times get tight. And of course, like what we need for the healthy economy in the balance economy is for those providers who will be there through the cycle. So hopefully they'll be thinking through the cycle terms, particularly as you start to look at non-banks. But I think overall the more holistic approach makes very good sense. And I mean, I would emphasize that yeah, there are two different roles, so they might be well defined, but there's two different roles. One is the advisory opinion and the second is an enforcement. And I think the second does play a very important role. And hopefully if well used, can provide a really important check in the event that bank regulators aren't giving the appropriate weight or assessment that they need to to the competitive analysis.

SONALI BASAK: We'll get to whether it could result in a greater increase in suits in a second. But I think, Jonathan, one thing that's interesting about his speech was that it kind of responded to a white paper you wrote about a year ago where you said more than 4500 commercial banks compete in the deposit banking market, but that market is far from competitive. And part of that was due to deposit savings rates. But I'm wondering this expansive view that the DOJ seems to be taking. He named more than a half dozen new factors on top of deposit rates. Do you think that that will be a more adequate way of defining competition?

JONATHAN WALLEN: So I love the phrase that you use multi market contact. That's the idea that these banks are meeting each other and not. Just in a narrow setting. Now, regulation in the past has focused on local concentration. This works if you're in a very sort of fragmented world where you're competing against your local competitor. But when JPMorgan competes with Bank of America on the deposit market, they don't compete locally. They meet each other in many different markets. In the white paper, we show that try this work with John Hatfield, my coauthor at the University of Texas. We show that this multi market contact the meeting in many markets repeatedly fosters less competition. In other words, if you compete with someone in just one market, you can keep more fiercely than if you meet in many markets and you compete in the same market over and over again. There's a lot of interesting theory. I'm sorry if you had to read that right. But this sort of key, basic empirical insight is that when the Fed increases interest rates, less of that gets passed through the consumers. When banks meet each other in many markets.

SONALI BASAK: So what does this mean for how the DOJ will interact with other regulators? The other Jonathan, you've just been at the FCC. Do you think that the DOJ's approach will complement or compete with the existing stances?

JONATHAN GOULD: Well, I think that's a great question. I mean, you know, the the assistant attorney general acknowledged the different remits of the the DOJ versus the federal banking entities. And one of the things that I was kind of left wondering about really is the the interaction between the two, particularly in an enforcement setting, where, you know, I could see factors that are unique that the federal banking agencies have to consider, including things like financial stability, convenience and needs. Those could potentially be in tension with the competitive analysis, perhaps at times that the DOJ might be doing. So how does that actually play out? So so that was kind of one thing that I that I thought I was just, you know, thinking about how that would play out. We're kind of, I think, left wondering, too, what it means to have a meaningful choice. Are you talked about, you know, making sure customers by different segments have a meaningful choice? What does that mean exactly? I think it was refreshing to hear his his his acknowledgment that deposits as the sole proxy of competition, you know, is at once both probably under and an oh, excuse me, an over inclusive depending upon what specific market you're considering. And then obviously his his discussion about, you know, thinking about the non-banks. But, you know, I think you know, I think these the fact fundamentally that federal banking agencies have to weigh different factors, whereas the DOJ does not. And the DOJ, as you emphasize, does have an important role as an enforcement agency. You know, how that plays out will be quite interesting in the future.

SONALI BASAK: I think that was going to be my question. Do you think that this kind of inherent conflict that could exist, Rodg, could result in more suits and maybe disincentivize certain bank mergers?

RODGIN COHEN: Well, I think the greatest disincentive to bank mergers is probably unpredictability. You know, if you go back in time, what really made the difference in the eighties and nineties was that you could figure out if you're two banks, whether you would get your transaction through the bank regulators and the Department of Justice. And I think what most concerns me about the presentation is that there seem to be potentially a vast array of factors which will be behind a screen where nobody can really know going in. So if you're a seller, who is going to sell? If you cannot predict whether the transaction will be challenged? And I think therefore, the real effort here, not saying that I agree fully with Catherine 1995 and the age is a long time ago. We need change. But that change has to be transparent. It just cannot be obscure and up to the whim of an individual regulator or an individual A.G..

SONALI BASAK: So what does this mean for the types of deals that can be cut in the future? Kathryn, do you think that to the point that would've been made earlier also that there's going to be some incentive for smaller banks to merge? I think after kind of the most recent wave of bank failures and purchases, fortune has favored the big in many regards.

KATHRYN JUDGE: Yeah, a couple of things. So first, I do think we actually heard him say quite explicitly that one of the challenges with the current guidelines is it might impose too much of a friction on a community bank merging with another small community bank while perhaps imposing too little friction or an ill designed friction on mergers involving larger banks. And so I think that does suggest that small community banks that want to merge with one another probably will have an easier path. I think there's some good reasons to support that. I mean, there's some really nice empirical work that shows when two small community banks merge and they're both intrastate banks, you could have an increase in small business lending. Whereas we have a community bank that's acquired by an out-of-state bank, you're afraid of a decline in small business lending. So we think overall about the balance economy, and I think you did a really nice job talking, highlighting the way going back to Philadelphia Bank that we've cared about the structure of the banking system, not just because we care about the structure of the banking system, but the structure of the banking system plays a very meaningful role shaping and informing the structure of the real economy. So understanding kind of what is this actually going to mean for lending and of provision of services broadly, but also in particular to to small and mid-sized enterprises, does suggest that those types of mergers might be easier to do. But again, just to push back a little, I mean, I think clarity has a place and I think over time there will be clarity around the new guidelines. But I think the effort at trying to have predictability can also really undermine other aims. I mean, we've seen this right now with stress testing with a bank person, right? And so we spend a lot of time right now looking at the stress test. And I was like, why were the stress test, like, so poorly suited to all of the challenges we're currently facing? And one of the things is there was a lot of pressure to make them predictable, and I understood the pressure to make them protectable. But it really undermined the the distinct function that they were supposed to play of the different tools that we had. So I do think you want there's a place for predictability, and predictability might come over time. But I also think if you have guidelines that are very ill suited relative to what they're trying to achieve, there might be a transition process as an appropriate transition process.

JONATHAN GOULD: One thing that might help on the predictability side would just be having more transparency around timeframes. You know, we you know, the question was raised earlier, does anybody now, when the Fed's denied an approval rate. So one of the things that the federal banking agencies too often find convenient to do is to more or less through inaction, cause a pending licensing application, whether whether bank M&A or something else to just die of its own accord by, again, through inaction. And so I think having some predictability around timeframes might be also useful.

SONALI BASAK: Is the undertone there kind of what happened recently When you think about what happened at TD and First Horizon?

JONATHAN GOULD: It Well, it's hard to say what happened in that particular scenario and there's some press reporting on it, but I would just speak more generally that this happens in the licensing contest context writ large, whether we're talking about de novo chartering, bank M&A or other types of licensing applications, this has a tendency to occur where, you know, the agencies can essentially make decisions through an action. And I think that is less than optimal. And I would also note, too, that we know we're talking about promoting competition in banking. Another part of the equation here is de novo chartering.

SONALI BASAK: Another question I would have for you guys is thinking back to what has happened recently and the FDIC process. And Roger Sullivan Campbell had worked on SVP as well as First Republic. And I should also note Credit Suisse as well. When you think about international banking, did the process itself work? And does the process, given that JPMorgan ended up with First Republic, really encourage, you know, the idea of smaller banks merging and getting bigger when when really at the end of the day, the objective was to lower the cost of the FDIC.

RODGIN COHEN: So I do think that the first Republic JPMorgan transaction is basically mandated by the way the statutes currently work, whether that's the way they should work or not, I think it's a debatable issue because you're right, of course, JPM see the largest bank holding company grows even larger. Is that the right policy objective? Certainly once the comptroller approved the transaction, that was it for the FDIC, they had to accept the least cost.

SONALI BASAK: Does the FDIC process I mean, does it require changes, Kate, or is it is it a failed process, frankly at this point?

KATHRYN JUDGE: I think to call it a failed process is to go too far. I think the FDIC is actually very good at what it does the great majority of the time. I do think what we learned recently is I mean, we learned two things. One, when it comes to large regional banks that they cannot oftentimes be resolved in a way that doesn't impose significant costs on the deposit insurance fund. Right. So we saw systemic risk invoke the specter, too. But three of the four regional banks that have failed this year had significant hit to the deposit insurance fund. So I think that raises a whole host of regulatory issues there. There are ex-ante issues, too, to try to avoid those outcomes. In terms of the process in distress, I would agree with Rodg that actually the least cost resolution is another standard that was put into place in a very different era when the banking system looked very different than it does today. And so the notion that that needs to be the sole priority and that other aims like competition that we normally promote, have to go completely out the window during those periods of time might not be the optimal policy if we considered the issue anew today and perhaps should be revisited.

SONALI BASAK: Yeah, I mean, how does the government then, especially in these kinds of instances, Jonathan, really think about kind of the broader array of constituents here when they're thinking about how banks merge this. This is awfully quiet in the Harvard. Jonathan.

JONATHAN GOULD: So, I mean, I would you know, you ask the broader question about the processes. You know, I would I guess, number one, clarify the outset, you know, what processes we're talking about, right? Because I think things went very differently for the SBP Signature Bank failures versus the First Republic failure. Right. Notably, there seems to have been more time with the latter for the FDIC and other stakeholders to think about what made sense and perhaps the way you know, more thoughtfully and come out with a better conclusion, you know, one versus the other. The other thing I notice that we are really limited, at least as members of the public, excuse me, in understanding what went on, because these processes occur in relatively opaque fashion. And so it's very, very hard for me to sit here and to, you know, answer your question about, well, what what were they weighing, you know, over Thursday, Friday with Signature and SBB? I mean, I think their congressional testimony provided some insight into what was going on. But we're still left to some extent guessing. And there's, you know, plenty of kind of rumors flying around about, well, this should have been done and kind of armchair after the fact quarterbacking. But but seemingly, you know, the resolution processes to the point we're talking about avoiding disorderly failure. Those did not work so well. Right. Because we were left with a situation where we did not have an orderly failure of the first two banks. And I think almost by definition, the government had to invoke something that is and it was meant to be at the time it was passed, an extraordinary determination. And, you know, and so, you know, I think that that leaves us all with, I think, a general sense of kind of unease about what went down.

SONALI BASAK: Other Jonathan now too. Here, I think the reason we're having this conversation is not only because we saw so many kind of distressed bank failures, but also because of the expectation that so much of the banking system might look to another wave of bank mergers to get through kind of this sluggish period that they're experiencing. So when the regulators are thinking about the criteria that will make the system more competitive, what are the criteria that they should be looking at and what are they missing?

JONATHAN WALLEN: So I'd say in thinking long term in terms of competition and such, when the house is on fire, I think is is an incorrect party order in the sense that when the house is on fire, you want to a feature of deposit markets is that customers are problematically sticky. It's a huge problem for competition. Research shows that customers choose which banks to stick with based off of like 80% of their choices within five miles of their home. What branch exists within five months long? That's how I picked my bank. And I'm still with them. I pick them in high school, I could walk from my house to their local branch. So you have that geographic proximity and that's an issue. Now during crises, that's when consumers become less stickY, and then consumers tend to flock to the largest banks in terms of their deposits. And having the Fed act quickly in terms of preventing that sort of contagion, that fear from spreading, I think, is the near-term top priority. The long term priority then is how do we develop predictable measures by which we can then regulate competition. What's wonderful about the simple HHI, the Herfindahl Index of local competition, is that so straightforward? It's very predictable. When you start thinking about multi market contact, it's a lot harder in developing those measures. In my paper I develop one such measure, but I think that having sort of measures of other types of competition can give us both holistic and predictable means of regulating competition.

SONALI BASAK: There's a lot changing at the same time. I think you mentioned stress tests earlier and we should kind of notice that as the stress tests potentially change that the bar might change. There was kind of this concept in the market that if you were under 250 billion in assets, you would kind of merge until that point. And then after that point, it would you know, you would merge to get much, much bigger to handle the compliance costs If that asset base goes down to 100 billion, say, how does that change the calculus for banks that are seeking to merge large?

RODGIN COHEN: You know, I think you when you look at this, you decide, are you prepared? Let's say it goes down to 100. I think that's a good hypothesis. No bank is going to merge to be a 101. If over the next five years you don't anticipate being greater than 110. So it would only make sense because there is more regulatory burden and more regulatory costs. Just take the long term debt requirement, which is almost inevitable at this point. That is a major earnings hit. And so you're not going to do that at 101 or 110 for 200 billion. You may very well. So it's the question, is this the last duel in the foreseeable future, in which case you're probably not going to cross the barrier.

SONALI BASAK: Do you think that in some ways it would encourage banks to merge more quickly before they hit that new hurdle?

RODGIN COHEN: I don't really think so. I think the real question today about merging is whether the bank regulators are open for business. And I maybe I'm going to go out on a limb and there's no tree attached, but I really do give credence to what the SCC has said. The Fed has been saying. Treasury has been saying that they are open for business, particular particularly in the regional bank sphere. So I do think this view that you can't get a merger through may have been true a couple of months ago or it may have been true only if you were waiting willing to wait 15 months. I think it's not true today.

SONALI BASAK: You know, for two academics in the room as well, if you think about kind of the direction of travel, do you think it's a good thing for banks to be merging of a smaller scale to become healthier through this, or do you think it does reduce competition in the United States?

KATHRYN JUDGE: I mean, I guess the answer would probably be both. And one thing that's important to note is community banks have actually come through this relatively well. Again, deposits are a poor proxy, but a helpful proxy for some things. And so if you look at just the data coming out of the New York Fed where they've aggregated this together, I mean, there's been two different ways for deposit outflows, right? The first was just interest rates were going up. Depositors wanted to get a better rate, so they were leaving their bank and going into other substitutes. And so if you look at the period from like interest rates going up, up through March 2020 before the turmoil hit, people are leaving the largest banks at the fastest rates because it's primarily transactional. And they were sophisticated customers who could get more elsewhere. They were leaving regional banks at lower rates and they were sticking around for community banks. You look at the post-March period, Regional banks, of course, have had massive outflows. You're still having outflows, but a lower rate from the bigger banks when you aggregated together because there's a lot of money going in along with some money still coming out. Community banks have continued to be relatively stable. Those are aggregate numbers. So it ignores that there's a lot of heterogeneity in terms of what's going on at the community bank space. But I don't want to assume that community banks are actually struggling right now as much as some people suggest, because again, it's a different business model. A lot of them have come through relatively well. Sorry, it's a slightly different point. But but related concern, I think, for the regionals, I think the big challenge is going to be a lot of the resolve ability question. We're trying to the systemic risk analysis, like how do you merge current realities with what a merger entity might look like in terms of how realistically resolvable it is?

SONALI BASAK: You know, Jonathan, over at Harvard, have you given a lot of thought? You kind of started to talk about the the fact that people go to their local bank that they can walk to. But how has the Internet started to change those behaviors, especially as we think about kind of non-bank competitiveness when it comes to fintech mergers.

JONATHAN WALLEN: Because that's a still a very small fraction of the deposit base. So it's hard to estimate some estimates at less than 3%. True. I completely agree with you that that's a trend to pay attention to far out into the future, whether deposits are still sort of tied to the payment system, tied to the local bank branching network. But today, it very much still is. So in the near term, I'm not so worried about that.

SONALI BASAK: How do you think about this given over at the FCC, Jonathan, You had made a lot of advancements when it came to fintech and its role on the banking system. What do you think that role is moving forward when it comes to bank mergers? And do you think that based on what the assistant attorney general said, that there would be some pushback?

JONATHAN GOULD: Well, I think, you know, consistent with what the assistant attorney general said, you know, when they think about bank, you know, merger or acquisition applications, they will look at all the competitive factors. It was, you know, very fact specific. But presumably where these non-banks, fintechs or otherwise are competing with banks, that should be a factor in the analysis, because I do think, you know, the the sole reliance on deposits as as a proxy for kind of market power has has again both been under and over inclusive and particularly around. You know, non depositories or non-banks, including fintechs, that are offering these products. Those are in fact competing with banks again, depending upon the market segment, the population and so forth. And I think, you know, that was refreshing to hear him say that and I think an acknowledgment of reality.

SONALI BASAK: Rodg, another form of non-bank. I mean, after the FDIC process, there's been a lot of complaining, if you will, from the private equity community about the ability to not be a part of the process. Do you think that they should have been do you think that when we look into the future that there will be a lot more private capital? And do you think the regulators will change their stance on them?

RODGIN COHEN: You know, I think most of the complaints related to the ECB and signature failures and their resolution and I think Jonathan got it exactly right. There was a timing issue there and a very serious one because nobody anticipated it. It was one of these overnight or virtually overnight over weekend and maybe over a week transaction. That's very little time. And it's difficult, I think, for the FDIC and the bank regulators to wrap their minds around the private equity firm, given that very little time. But I think to your question, which I think is very well put, ultimately, if the regulators want more capital in the banking system, which they clearly do and they should, and if they shut out private equity, that is a major source of capital that is going to never be tapped.

SONALI BASAK: Does anyone else have more views on the role of private capital here?

JONATHAN GOULD: No. I mean, I 100% agree with that. You know, for a variety of reasons, whether because we're concerned about, you know, future conditions in the banking sector, because we're intentionally raising capital levels, if you have pockets of under a capitalization or less than adequately capitalized banks, you know, frankly, beggars can't be choosers. You need to be prepared to allow, you know, non-bank sources of capital and you need to be prepared to allow bank M&A, which is a kind of a tried and true tool for dealing, at least in certain circumstances, with undercapitalized or otherwise troubled banks. And there are mechanisms to allow non-bank players to get into the banking sector, including through things like the shelf charter, you know, which were, you know, mechanisms that were created to facilitate the flow of non-bank capital into the banking system, You know, 15 years ago or so.

SONALI BASAK: Now, the other thing that's changing pretty drastically is the utilization as well as potentially the written word of the Community Reinvestment Act. Kathyn, how do you think about how this is being used as a tool in bank mergers and the effectiveness to promote competitiveness?

KATHRYN JUDGE: Yeah, I mean, it's but I mean, bank merger, one of the interesting choices that was made around the Community Reinvestment Act is not to give it independent teeth, but only to give it independent teeth in particular settings. Mergers has been one of those critical settings. So that's kind of where a lot of the action has played out. Whether that's an optimal design is probably something that that could be revisited, generally speaking. And I think that that right now it is going to be, I think, really interesting going forward, trying to figure out in light of the changes being made, but also the broader changes being considered for bank mergers, not only by the DOJ but by the bank regulators, if that's going to be as much of the sole driving process or kind of like one component among many that has to be considered in this in this environment.

SONALI BASAK: Do you have any kind of recommendations to make for the C.R.A., Jonathan, about, you know, what should be considered as they as they change the rules?

JONATHAN WALLEN: This is getting awfully confusing.

SONALI BASAK: There's a lot changing. Oh, yes.

JONATHAN WALLEN: Yeah, so I very much take the point earlier that if you only give it teeth in the context of mergers, if you're a bank that's not planning on doing a merger or engagement for merger, than the regulation doesn't have teeth.

SONALI BASAK: Do you have any thoughts on the CRA?

JONATHAN GOULD: I would just echo something that Rodg said earlier in a different context, which is that objectivity is valuable. And I think that would I would I would hope to see any CRA final rule create some level of objectivity.

SONALI BASAK: One more thing about the Fed stress test, and then I'll open it up to the audience. It's not just the bar that's changing in terms of the asset base. It's the idea that more bank activities could be scrutinized, fee based activities. You saw a lot of the largest banks in the United States really diversify into different business lines. Do you think that the change in the way that the Fed thinks about stress tests could really start to change the way that banks also diversify in terms of mergers?

RODGIN COHEN: Oh, I think absolutely. Mergers are not necessarily going to be linear. That's what some banks do. It's the same basic product suite and customer base, but others see the real benefits and diversity of of both. So I think you will see more of this. And there's a really intriguing example of this with which is first citizens of bank probably very few people would even heard of until they bought First City, which was a major project diversification, and then bought the remnants of SBB. That is very different than their format before their whole product approach. And so I think you will see different banks taking very different approaches.

SONALI BASAK: Okay. Any questions from the audience? Back over there.

AUDIENCE MEMBER: A question. So it seems that. Thank you. It seems that would be where we go is that we're going to have a number of large institutions that are, you know, I would say Jack of all trades and master of none, you can say. And then we're going to have some more niche banks, you know, community banks and nothing really in the middle. Is that a good thing or a bad thing, in your opinion?

KATHRYN JUDGE: I mean, I'll jump in quickly. I mean, I think what you're describing is I tend to think of it as the barbell where there's a possibility that we end up with a bunch of sibs that are regulated in ways that really minimize the possibility of failure. There's heterogeneity actually in the business models, but they kind of like fit over here and the community banks that are still more relational. I think that it very much is a possibility. I may think. We don't yet know whether regional banks, when regulated in a way that is commensurate with the risk they pose and the difficulty with resolution are going to continue to be really successful business models. It's coming at a time when I know you're skeptical of this, but I do think digitalization is sorry, this Jonathan, digitalization I think is potentially attuned to the competitive dynamics around deposits. And and I think I mean, partly because stress test, you know, a lot of the commercial real estate ended up on regional community banks and unless less of that so there's a lot of stresses I think the regional banks might be facing for me, whether that's a good or bad thing really isn't about like again, what the banking structure should look like in and of itself. It is who are they actually serving in the real economy? So when we think about the challenges that we're still facing and that were alluded to earlier, like do small and mid-sized enterprises actually have access to financing? Do they have access to financing through the cycle? We still have a problem of unbanked and underbanked. They've gotten much better, but there's incredible racial disparities there. Kind of like, is this like helping us make progress or is it moving away? And are there more affirmative policies that we need? Are there ways that we can actually do more to incent kind of community banks to actually reinvest in their communities and into our banks? So I don't think I have a prior over kind of here's what we need your overall banking system to look like. I do think we want to be really proactive in managing that process and really proactive and trying to make sure that the real economy has the support that we need. So again, we have the the resilient and balanced economy that we've been talking about all day.

JONATHAN WALLEN: I'll touch on that point of danger by echoing Aaron's comment earlier, which is what's special about SBB, is they were specialized and larger. So when you think about banks, the value of diversification is that you can get idiosyncratic risk to cancel out. Right now if you have a very large bank that specialized in a very nice area, then it starts to pose more risk.

RODGIN COHEN: Could I just add quickly? I think I agree it's a possibility. My view, it is highly a highly undesirable outcome if you do away with this whole group. And the reference to a barbell I think is exactly the right one, which is with concern. These banks specialize in a set of lending sets of lending. Middle market both middle middle market. Lower middle market, upper small business, commercial real estate, with all its problems, is still critical to the economy. Do away with that middle tier of banks. Who's going to pick up that lending and what does that do to the overall economy and to employment? So I fear this is a risk. This is one reason why consolidation within that group is important.

JONATHAN GOULD: And this also raises financial stability concerns. I think, too, if you're concerned about the substitute substitute ability of products being offered by the very largest banks, are you concerned about their resolve ability? It seems to me the last thing you want to do is create a large scale structure where you have the middle hold out.

SONALI BASAK: There's another question over here.

AUDIENCE MEMBER: Thanks so much just for returning to a point those brought up earlier on the panel about the cap at 250 versus 100 before a certain stress does come in, just as someone of the super interested in this space, but looks at it from the outside. I see. You know, for example, I read I don't know if anyone read that piece in The New Yorker right after recent bank collapses, that Barney Frank, who's now sitting on the board of Signature Bank talking about and whose name is so affiliated with Dodd-Frank and then went to lobby to raise that cap. How do you what what steps do you think can be taken to not only provide teeth to regulators, but to instill public confidence that people who are currently regulating today are not then going to go around and flip their position when it's personally convenient? Because I think that undermines the strength of even really critical legislation that does get passed on the rare occasion that it does.

JONATHAN WALLEN: Thank you. I'll reference the work of a Mitsuru professor at Stanford. He found that there is a big academic concern about this revolving door in terms of regulatory capture. But he found in his research that it's primarily a narrative of regulatory schooling, that when it is, the industry hires regulators, they tend to hire some of the best regulators because they're precisely very good at their job. And that's not to say that the revolving door doesn't exist. But there are competing narratives to that concern.

SONALI BASAK: Aaron?

AARON KLEIN: I'd like to ask this of of everyone, and particularly the practitioners. My take from Kanter is that his DOJ is going to be more involved in the process and hold their ability to block something a little more depending on that factor analysis. Some people argue there are already too many bank regulators and we have too many people involved in any merger review. Others say you may have too many people, but they're all the same and they kind of think about things somewhat similarly and come out of the same analysis. And DOJ has some power and may actually have a different voice. Is it a good or bad thing to add one more agency and one more perspective into this? If we're going to see essentially a more aggressive DOJ opining or do is adding one more cook in the kitchen a good idea or a bad idea in this space there?

RODGIN COHEN: And I'll I'll be glad to start on this one. I've never found the DOJ to be a shrinking violet in the past. I think they have been often the determinative agency in terms of the competitive effect. And you know what struck me? The assistant attorney general multiple times, obviously based his entire presentation on Philadelphia National Bank. Well, I don't care what standards you use. Then somewhere between now and then or now, I think if you have the second and third banks to merge in a major city that was going to create an antitrust problem no matter what, no matter what theory you were utilizing.

JONATHAN GOULD: Now, I would just note, I think it's important that everyone play their roles to the hilt. And so, you know, I perhaps it's accident and Congress got it all wrong. But I'd like to think there's some intentional design and reason for the for the for assigning different stakeholders, different missions, different things to consider for different statutory factors to consider. So to me, I think the system works best when people play their roles to the fullest. And what what I what gives me concern is when you have at least, for example, the three federal banking agencies all talking on the same page sometimes, right, at least around certain areas where they have different factors to consider. These agencies have very different priorities. They have very different missions, at least on some level, and that should be reflected in their outputs and their conclusions.

KATHRYN JUDGE: Oh, I'll echo that really quickly. We were talking about crypto before this, and I did a panel right after SBF was indicted with my colleague Danny Richman, who's a former prosecutor, and he's like, People always give prosecutors a hard time because they don't have specialized knowledge. But the one thing we have because, you know, specialized knowledge is we're not captured like we're willing to look at things anew and approach. And I think part of what we heard, again, I think consistent with what Jonathan was just saying, is that candor and we can expect the DOJ more broadly to come in and really do what they do well, which is like, let's take a robust look at what this is actually going to mean for competition. And going back to the statutory scheme, that is precisely the role that they were given in the statutory scheme. So for me, it's it's really kind of like honoring what Congress asked them to do. And it does bring somebody who is not a bank regulator into the process for a reason.

SONALI BASAK: Okay. We'll leave it there. Thank you so much for having us. And thank you all for the discussion today.