Hutchins Center on Fiscal & Monetary Policy at BROOKINGS

Talking to Dan Tarullo about bank mergers, stress tests, and supervision
By David Wessel
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Dan Tarullo is the Nomura Professor of International Financial Regulatory Practice at Harvard Law School and a non-resident fellow at the Hutchins Center of Brookings. He was a member of the Federal Reserve Board from January 2009 to April 2017 and was the oversight governor for supervision and regulation while the Fed was implementing the Dodd-Frank Act and other regulatory reforms that followed the Global Financial Crisis. David Wessel, director of the Hutchins Center, recently talked with Tarullo about developments in the banking industry and his views on the appropriate regulatory response, as well as the government's changing stance on bank mergers. This a lightly edited and slightly condensed version of that July 31, 2023 conversation.

David Wessel: In March 2022, you wrote a piece for the Hutchins Center on bank mergers in which you said, "Realizing public benefits from a retooled approach to bank mergers requires more than just an instinct to get tougher (though more rigor is certainly warranted). What's needed first is an analysis by the involved agencies of the dynamics of the financial services industry that will enable them to assess specific bank merger applications with more of an eye to where the industry is heading, and not just where it has been." A lot has changed since March 2022. We've had a couple of bank failures. There has been a lot of talk about bank mergers. Assistant Attorney General Jonathan Kanter has articulated a new standard for evaluating bank mergers. Step back and tell us what you think is the right way to look at bank mergers and what the big questions are.

Dan Tarullo: As you say, Assistant Attorney General Kanter gave a speech at Brookings in which he addressed bank mergers specifically. Shortly thereafter, the Antitrust Division and the Federal Trade Commission came out with a new set of proposed generally applicable merger guidelines. If we meld those two pieces of information together, we have a reasonable idea of where the antitrust agencies intend to take bank merger policy.

I welcome the renewed attention to mergers generally and in the financial services industry, in particular. There was a lot in the Assistant Attorney General's speech that resonated with me – such as not relying on deposit shares as the way to define markets, looking at the different submarkets within financial services, and being a little skeptical that branch divestitures can actually cure competition problems. It was also useful that the proposed guidelines took account of trends in the industry, particularly trends of concentration. For instance, they may look at a new merger proposal in light of the last three acquisitions by the same company, as opposed to looking at it in isolation. What I think is still missing – including in the Assistant Attorney General's speech, which was specifically about banks -- is a sense of where the industry is going. The competitive position of most mid-size regional banks of the approximate size of Silicon Valley Bank, First Republic, and Signature is a very challenging one. I think it's going to be challenging for the indefinite future. These banks are caught between, on the one hand, the G-SIBs [global systemically important banks] with their scale advantages and, on the other, the smaller regionals and community banks, which are better positioned to take advantage of such relationship banking opportunities as remain.

Unit costs have always been an element of scale. But in the last 15 years or so, the capacity to invest in technology and digitization in consumer-facing technological advances has become more and more important. That's obviously something that advantages the bigger institutions with more capital to invest. The larger the institution, the more accounts that it has, the more customers it has, the more information it has. As algorithms become more sophisticated, as AI begins to enter into credit decision-making and perhaps other forms of risk management, a bank gets increasing returns to scale. There are no diseconomies of scale in information when you are using computers and AI. So these mid-size regional banks whose returns on equity have already declined by several percentage points are facing an even tighter competitive situation. That leads to the question of how a proposed merger involving one or more of those banks should be assessed.

Based on the proposed merger guidelines and the Assistant Attorney General's speech, it looks as though mergers involving mid-sized regionals might not be cleared if there's any actual, or even potential, competition between the merging parties. But it’s important to keep in mind that merger decisions rest on at least an implicit view of how the economics of the industry are affecting its structure. The medium-term competitive situation of the banking industry depends on the interaction of those economics with both competition policy and regulatory policy.

Let me try to illustrate this point with a concrete scenario: Suppose that, in light of the three bank failures earlier in the year, more stringent regulatory requirements are imposed on these mid-size regionals, but because of more stringent antitrust policies, they are not able to merge with one another, or to be acquired by a larger regional such as Truist.

What happens then? Well, if I’m right about the mid-sized banks being in a kind of competitive squeeze, they don't have great growth or profitability prospects. They're probably losing some of their best people to more profitable banks. So what are their choices? One option is the path we’ve seen squeezed banks follow in the past: making riskier, higher return (though not higher *risk-adjusted* return) loans in the hopes of increasing profitability. Hopefully the tighter regulation and supervisory oversight would prevent banks from going too far down this road. But in that case, they will be kind of stuck, and in danger of slipping into a kind of quasi-zombie state. They may just stagnate, steadily losing market share. I suspect that some of the business that they can’t retain or win will be captured by the G-SIBs. And so, ironically, as applied to the mid-size regionals, the combination of tough merger policy and tough regulation might end up redounding to the benefit of the largest institutions and thus increasing overall industry concentration. Note, by the way, that if – in my scenario – the economics are working against the mid-size regionals and merger policy restrains acquisitions, then it would be a mistake to relax regulation, since that would allow banks more opportunity to make riskier decisions that could lead to another disruptive wave of failures.

We've already got six non-custodial G-SIBs plus the four super regionals (Truist, Capital One, U.S. Bank, and PNC). The banking agencies and Antitrust Division should be asking themselves what, as a matter of competition policy, would be wrong with a world that had the six G-SIBs and, say, eight super regionals, a smaller number of idiosyncratic banks in the middle, and then a fair number of smaller regionals and community banks. My answer is that I'm not sure there would be anything wrong. Or, more precisely, such a circumstance might on balance be the most competitive environment we could hope for, given the industry economics and regulation to which I referred a few moments ago. If you have six G-SIBs and eight super regionals, the odds of there being real competition in most local markets, not to mention nationally, increases quite a bit. I don't offer this view with enormous assurance, of course. My point, though, is that this is the kind of assessment that the agencies and the Justice Department need to be making as they formulate merger policy. They need to look at the different likely configurations of the industry over the medium term, contingent on the merger policy they adopt. To date, I haven't seen the evidence that they’re doing so.

David Wessel: To restate what you said, if we don't let the regional banks merge, the business will go to the big banks and the regionals won't be able to provide much competition for the really big banks.

Dan Tarullo: Right. It's not a sure thing of course, and there would certainly be some individual exceptions. But the odds are that one way or another, what we currently think of as the mid-size regionals are going to become less important over time. Now part of that may just reflect some needed downsizing of capacity in the banking industry generally. But then the question is, where will their lost business go? While we can't know for certain, it seems unlikely that in the main it goes to community banks. Maybe it goes to some of the existing super regionals, maybe it goes to the G-SIBs. But over some period of years, you could end up with less competition than might be the case if you had a merger policy that was quite rigorous with respect to the very largest banks making any acquisitions, but somewhat more flexible with respect to mid-size regionals merging with one another.

David Wessel: The test is: If one of those banks wants to buy a significant bank, will the merger guidelines interfere with that? Or in your view, should they see this as actually pro-competitive, even if it means we have fewer banks?

Dan Tarullo: The easier case is when the mid-size regionals are proposing to merge with one another. I think the acquisition of one of them by a super-regional is a question that needs more thought. To echo in a different context what Assistant Attorney General Kanter kept saying when he was at Brookings, this would be a "fact-specific" decision. But I would not rule out the possibility of allowing PNC, for example, to acquire a regional in a part of the country in which it does not currently do business.

Now, the Justice Department and FTC have emphasized potential competition in these proposed merger guidelines. And so they might be inclined to say, well, if PNC can't make an acquisition, maybe they will enter the market by opening branches there. That's certainly possible. But if one thinks that the mid-size regional business model is going to be under increasing stress anyway, then you might wonder whether you'd prefer to buttress one of the super regionals vis-à-vis the G-SIBs. And here's another question about industry dynamics: Might an acquisition of smaller regionals by bigger ones be more likely to produce a competitive bank than the merger of two mid-sized regionals? And, of course, one needs to have a view as to how much the erosion of the competitive position of the mid-size regionals will end up benefiting Bank of America and JP Morgan and Wells.

David Wessel: And is all this within the purview of the Justice Department and the bank regulatory agencies? Or is this something that's going to get tested in court or even require congressional action?

Dan Tarullo: That's a good question. Many websites of law firms that do a lot of defense antitrust work quickly posted summaries and analyses of the Justice Department and FTC proposed changes to the merger guidelines. Most of their posts consist of a pretty objective statement of the proposal, but towards the end there was a statement noting that the agencies haven't been doing very well in court lately, and they might not do very well with these guidelines either. That's certainly a fair point as to what is likely to happen, as opposed to what the courts *should* do. But with bank mergers we have a different process. While the courts may ultimately decide these cases, a bank merger has to be approved by one or more of the banking agencies. That fact could turn out to be pretty important. Let me explain why.

When the Fed considers a merger, it is required by statute to consider not just competitive effects, but other factors, including financial stability, the "convenience and needs of the community," and managerial capacities of the banks. Suppose now that people at the Fed subscribe to my supposition on the shaky business model of many mid-sized regionals. In evaluating the merger of two such banks, they take a dynamic view of where the industry is headed and, accordingly, conclude that they are not too worried about anti-competitive effects. They might even think the merger could end up being somewhat pro-competitive over time if it affords sufficient scale to the merged bank. But then the Fed receives advice from the Justice Department saying that it believes the merger to be anti-competitive. How likely is it that the Fed will go forward with approval anyway? By statute, the Justice Department has the prerogative to bring suit in federal district court to stop the merger on competition grounds, regardless of the views of the banking agencies. I found it notable that the Assistant Attorney General in his Brookings speech made a point of mentioning that in the 1963 *Philadelphia Bank* case on which much of his case for tighter merger policies was based, the Comptroller of the Currency had approved a merger. But the Justice Department went to court to challenge it, and the Supreme Court sided with the Justice Department, thereby effectively ruling against the Comptroller as well as the merging banks.

I think that the banking agencies will be pretty reluctant to approve a merger that the Antitrust Division opposes. Of course, the courts may still be less than enthusiastic about the new merger guidelines. But here's the twist in the banking context: If the banking agencies decide to disapprove the merger, they can cite numerous reasons beyond competition – factors such as management competence, a judgment made by supervisors and one probably less likely to be second-guessed by courts. So, the merger guidelines may well have more influence on bank mergers than mergers in unregulated industries where the merging parties know that they can go to court and argue their case on antitrust grounds alone.

David Wessel: Over the past year, in part because Michael Barr succeeded Randy Quarles as Federal Reserve vice chair for supervision, and in part because of the concern about the health of the banking system following the SVP, First Republic, and Signature failures, there's now talk among the banking agencies about asking banks to hold more capital, including the regional banks. How do you look at this? Do the banks not have enough capital? Is this going too far, as the big banks have said? Have the regulators calibrated it about right, given the tension between the costs of having too much and the costs of not having enough capital?

Dan Tarullo: Since I left the Fed, my view has continued to be that it's probably a good idea to get the required capital levels of the G-SIBs and the super regionals up some. The right capital requirements for the mid-size regionals is a somewhat distinct issue. So let me separate the two in answering.

With respect to the biggest banks, there are several reasons why somewhat higher minimum capital requirements would get us closer to the best trade-off between financial stability and the maturity transformation that helps move the economy forward.

First, as the regulators' Notice of Proposed Rulemaking pointed out (though with less discussion than might have been useful), the weight of academic work that's been done in the past decade or so suggests that the optimal trade-off between financial and current maturity transformation would place minimum risk-weighted capital requirements in the mid-teens, perhaps 14 or 15%.

Second, I continue to be skeptical that Title II of Dodd-Frank will ever be used to resolve a G-SIB in a period of stress. It's possible that if there were an idiosyncratic failure at one of the institutions in a period of relative calm, Title II would be used to wind the firm down and sell off its remnants. But my guess is that no matter how credible a resolution plan has been drafted by the bank and worked on by the agencies, in a period of stress carrying high risks of contagion, the government – including the Treasury Department – will think that even a modest risk of igniting a financial crisis by letting a G-SIB fail is not worth taking. If that's the case, we need to rely more on the resiliency and recovery capacities of those very largest banks, unless we're prepared to keep bailing out large banks, their counterparties, and their uninsured depositors, as the government did in 2008. And, of course, higher capital levels are a key element of greater resiliency.

David Wessel: So let me be sure I understand your point. Under Dodd-Frank, if a big bank gets in trouble, the government can step in and wind them down without spending a lot of taxpayer money. And that sounds like a great idea, as long as you just have one bank going bust and everything else is fine – but that seems unlikely, as we saw recently with Silicon Valley Bank, which was a small bank. These failures tend to happen because the economy is under stress. So if we're not going use that Dodd-Frank system to deal with banks that are failing, you're saying they need bigger capital cushions so they don't get to the point of failure.

Dan Tarullo: Correct.

My third point on the biggest banks pertains to stress testing. For the last dozen years, the binding capital constraint on the biggest banks has been the stress test. But the stress test has over time become less of a real *test* and more of a compliance exercise. With the additional information revealed by the Fed in recent years, the banks have largely reverse-engineered the supervisory model. Although this year the scenario was somewhat different and led to a few unexpected results, in general the scenario had become predictable. And now some of the major bank trade associations are petitioning the government to have a notice-and-comment rulemaking process every time the Fed wants to put out a scenario or make a change in the models. Presumably, they want this additional procedure to discourage the Fed from making significant changes and, at the least, to delay the process in order to allow the banks to adjust their balance sheets before the test is actually applied.

So we've been gradually losing the principal benefits of a stress test – its dynamic, forward-looking characteristics – in favor of a predictable stress test. Good results in a stress test supposedly tell us that the banks can endure severe stress. In truth, though, tests over the last five years have really only told us that the banks can endure the type of stress that we've all been thinking about, and for which the banks have adjusted their balance sheets for the last decade. Thus there's an increasingly compelling case for shifting back to using point-in-time capital requirements as the binding constraints upon banks and using stress testing more to provide information to supervisors about the resilience of banks under a variety of possible stresses, without automatically tying the results to minimum capital requirements.

If that's the route the Fed eventually takes, then there's a good argument for raising the point-in-time capital requirements higher than at present, since those requirements will no longer be more or less regularly augmented by stress test results, which up until a few years ago were adding a couple of percentage points to the capital requirements of most big banks.

In sum, both because of the high uncertainty that resolution is truly an option for the G-SIBs, and because we've already effectively lost some capital cushion because of the predictability of the stress test, I think higher capital requirements are a good idea. Again, though, before the agencies adopt their final rule, I think they would be well advised to dig into that economic research on optimal capital levels, to give their own views on the research, and to explain with some specificity how it applies to the proposals in the Basel III endgame package.

David Wessel: Is this inevitable? You start to stress test after the global financial crisis. They're very new, they provide valuable information about the health of the banks. We learn the way that some banks aren't prepared for the scenarios that the Fed has devised. But over time, banks and their lawyers and their economists are very sophisticated. They begin to game the system and the stress tests lose the value, and they become more of a hassle for the banks than really helping the regulators decide how much capital is enough. Is that basically what you're saying?

Dan Tarullo: Yes. I think there's a type of organizational inertia that is present in most contexts – certainly in the government, where there's a premium placed on accountability and, to some degree, predictability. I think that's been having an impact, along with the choice to vary the scenarios less and to give the banks enough information that they can reverse engineer the supervisory model. During my last year at the Fed, we were thinking in terms of a more dynamic stress test, including taking account of second-order effects such as fire sales. We were pretty enthusiastic about the possibilities for a continually evolving stress testing regime. But I guess what I learned over the course of the last five years is that the reliability of stress test as a rigorous dynamic evaluation of bank resiliency is something that can change pretty quickly, based on the discretion of the people in charge of the Fed, without any rulemakings or other public announcement of reduced rigor. So I don't think we can rely on it as much as we had hoped. That's why we may need to rely more on conceptually second-best, but in practice more transparent, point-in-time capital requirements.

I sidetracked us a bit when I brought up stress testing, so I should return to the issue of capital requirements for the non-G-SIBs. It was a mistake to move regionals above $100 billion from an annual to a biannual stress test cycle. They've got the systems in place to do it every year. If we're going to continue to use stress testing as a key part of setting minimum capital requirements, the mid-size regionals should participate every year. Also, it's pretty clear that exempting a $200 billion institution like Silicon Valley Bank from passing through unrecognized changes in the value of their bond portfolios to their reported capital position is a bad idea. The agencies are proposing to remove the exemption for banks over $100 billion for "available for sale" securities. The agencies also propose to apply the last set of negotiated Basel III rules to these banks. These changes would mean that minimum capital requirements for mid-size banks will be somewhat higher, though not nearly as much higher as the agencies' proposal for G-SIB requirements. And I think they probably should be.

Still, getting back to my earlier observations about their competitive position, the question is how much more you ask the mid-size regionals to do. Are the agencies going to make them hold significant amounts of long-term debt, which is an expensive form of debt? What kind of changes are needed to address the funding fragility of banks with very high proportions of uninsured deposits? What about some of the other requirements that go along with being what we now call a

Category I or Category II bank, the biggest banks? I think the agencies need to be especially careful here not to overreact to the events of this spring. It’s of course critical to address the vulnerabilities that were exposed and, as I said earlier, to make sure banks that are undershooting their profit targets do not take excessive risks. But the agencies need to think through whether some ideas for increased regulation would just exacerbate the competitive problems of these banks while not efficiently containing those vulnerabilities.

David Wessel: Are we now in an era where the pendulum on bank regulation will swing every time the White House changes hands and we get different appointees? The vice chair for supervision has a four-year term, which means that at least into a year or so into the next president's term, Michael Barr could be replaced by someone who had a different philosophy. This seems to me to be a bit of a change. There didn’t used to be such partisan swings in bank regulation.

Dan Tarullo: I agree with that. Prior to the global financial crisis and even in its immediate aftermath later in 2009, the views of members of Congress did not necessarily align strictly by party affiliation. I think you had quite a few Republicans, particularly from somewhat rural states in the South and the Mountain regions who were concerned about community banks, were worried about the impact that very large banks were having on the economy and were supportive of higher capital requirements for large banks. By the same token, there were some Democrats from states with very large banks, who were somewhat more sympathetic to the banks (though they were not standing up as their champions publicly).

That's changed, as so much in the country has changed. Issues that were formerly a little bit blurred have become increasingly partisan. It's almost as if, when people from one party have a position, there's a reflexive instinct on people from the other party to oppose that position. And we saw that play out in the fight over Dodd-Frank itself. It was really 2010 when I felt the dynamic changing. The dominant, though not universally Republican, view became one of skepticism of bank regulation generally, as opposed to the prior more nuanced view. The Supreme Court has facilitated the increasing polarization through its controversial holdings saying that the president can freely remove the heads of the Consumer Financial Protection Bureau and the Federal Housing Finance Agency, despite the fact that Congress gave the heads of those agencies protection from removal except for cause. So the short answer to your question is: Yes. And just to drop a footnote here I'm even beginning to get a little bit worried that there may be a greater politicization of the Board of Governors on monetary policy, but we'll see how that evolves.

David Wessel: I'm not usually one to express a lot of sympathy for big bank management, but I can imagine how difficult it is to plan if the regulatory climate keeps swinging from one presidential term to another.

Dan Tarullo: I agree. You would think that the biggest banks might argue for regulation somewhat stronger than they would like over time in return for not having so much whipsawing of regulation. I suspect that if you talk privately to senior management of the banks themselves, some of them would see the merit of that view. But the incentive of trade associations is to create controversy with the government, so as to demonstrate their importance to their member banks. That incentive seems to translate into pushing for as much deregulation as they can.

David Wessel: A lot of what we've been talking about is regulation – the rules, the capital requirements that bank regulators make. But in the wake particularly of Silicon Valley Bank, there's been a lot of focus on supervision, which is the Fed and other regulators looking over the shoulders of the bankers to make sure they're not screwing things up. And I wonder whether you think we've learned anything about a quality of supervision or the capacity of supervisors to oversee the banks in today's complex world as in the last few months?

Dan Tarullo: First, as with stress testing, the relative intensity and focus of supervision is quite opaque to the rest of the world – or, at least to the rest of the world beyond the regulatory agencies and the banks themselves. Supervisory intensity can be dialed down or up at the discretion of the leadership of the banking agencies, without notice-and-comment rulemaking or much public statement of any sort. The Fed's own report on the failure of Silicon Valley Bank specifically pointed at to a dial down in supervisory intensity as one of the contributing factors. When supervisory intensity is dialed up, the banks feel it and some of them complain, either directly or through their trade associations. But when it's dialed down, the banks keep quiet, and the public cannot observe the reduction in supervisory rigor.

Second, supervision is a hard thing to do well. What goes into making a really good supervisor of a big, complicated bank is a lot of knowledge, intellectual acumen, and experience. There are many capable supervisors at the banking agencies who will follow manuals and guidelines quite well and are very conscientious. But there's a much more limited group of people whom you would feel comfortable putting into PNC, much less JP Morgan, with confidence that they will spot things, that they'll know where to ask questions, and that they'll see some latent issues before they mature into real problems. So, as important as supervision is, you can't fully rely on it, particularly as you go down the scale of the size and complexity of banks.

By the way, issues with supervisory expertise and experience have a parallel in the risk management function in banks. I think the number of first-rate risk managers throughout the banking system is rather lower than should be the case. But of course, those folks don't have the kind of incentive compensation packages and capacity to make huge amounts of money as their colleagues in other parts of the banks. And they are the ones who are supposed to say "no" to the other parts, which is uncomfortable. So it doesn't attract as many really top people as one would like to see.

Third, we always have to remember supervision sits on top of the regulatory structure. As we saw in March, the over-tailored liquidity regulation system did not apply to most of the mid-sized banks. And the liquidity regulation we did have had not been adjusted for the accelerated runnability of uninsured deposits, something that neither banks nor regulators had seen before. Supervision can fill in regulatory gaps, but not gaping holes.

A few years ago the bank trade associations, the same ones who put in that request for a rulemaking on stress testing last month, put in what ended up being a successful petition for rulemaking on guidance, which is an important form of supervisory action. The banking agencies responded favorably to the trade associations and adopted a rule that line supervisors perceived as an order to lighten up on the banks. They were told they needed to have more extensive documentation of problems at banks before they could take supervisory action. These persistent efforts to rein supervision in, added to the issues that I mentioned earlier, should make one a little bit hesitant to rely too much on it.

Now, having said that, there's certainly more that can be done. I applaud the Fed for putting out those extensive primary supervisory materials on Silicon Valley Bank, so that we all can get some insight into how the supervisory process fell short. And I suspect that Vice Chair Barr and Acting Comptroller Michael Hsu and FDIC Chair Martin Gruenberg have given the message to their supervisors that they should return to a more rigorous supervisory approach. But it takes a sustained effort to push supervisors, to make sure they have the right incentives, and that they are not regarded as problems when they step forward and urge some sort of action against a bank – even if in the end their superiors decide not to take that action.

David Wessel: Finally, do you have views on what we ought to do about the deposit insurance system, given that we covered a lot of uninsured deposits after this recent episode?

Dan Tarullo: As a realistic matter, I don't think that there's going be big deposit insurance legislation in the Congress. The FDIC came up with an interesting idea about maybe providing higher levels of insurance for the deposits of non-financial firms that are used for payrolls, paying suppliers, and similar business expenses. But whatever the merits of the idea, it's not going to solve the run issue. And, quite apart from what's a likely outcome for extending deposit insurance, I don't think my preference would be to insure all deposits, as some have proposed. The danger is that you allow there to be true zombie banks – no matter how badly they're doing, they can offer high interest rates and draw large deposits, with the FDIC holding all the risk. Then there would really be dangerously excessive reliance on supervision to keep such banks in line.

My provisional sense is we should adjust either the liquidity coverage ratio or some other part of the current regulatory structure to take account of the increased run risk of uninsured deposits. I mean, no bank (except perhaps for a custody bank like State Street) should have 90% uninsured deposits, no matter what.

We can do this graduated fashion – as the proportion of uninsured deposits at a bank increases beyond a certain level, they should become progressively more expensive. Either the bank is required to post higher amounts of collateral at the Fed (so banks can borrow quickly at the discount window to obtain funds when unexpectedly large deposit withdrawals occur), or they have to hold more High Quality Liquid Assets than the current Liquidity Coverage Ratio regulation requires. In thinking about the relative stringency of such a graduated regulation, we need to ask to what degree uninsured deposits have been funding lending, and to what degree they just get turned over into bond holdings. If it's predominantly the latter, as at some data suggest, then there wouldn't be much of an impact on economic growth if fairly stringent regulation were imposed. Indeed, there would be no better argument for banks taking customer deposits to invest in Treasuries or agency securities than there is for Fidelity and Vanguard to do so in their mutual funds. On the other hand, if a more extensive inquiry concludes that a significant portion of highly runnable uninsured deposits do fund productive lending to businesses and households, then policymakers will have to make a more difficult judgment on how much to disfavor them through regulatory measures.