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October 13, 2020

VIA ELECTRONIC SUBMISSION

Makan Delrahim
Assistant Attorney General for the Antitrust Division
Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Shore United Bank's Support for Revising the 1995 Banking Guidelines and the Competitive Analysis of Bank Mergers

Dear Assistant Attorney General Delrahim:

Shore United Bank submits this letter to advocate for the revision of the 1995 Banking Guidelines currently utilized by the Department of Justice's Antitrust Division in reviewing and analyzing competitive considerations in bank mergers. We believe the current Banking Guidelines have become outdated over the last 25 years and should be revised to reflect both the emerging trends in the banking and financial services sector and to modernize the Department of Justice's approach to bank merger review under the antitrust laws, particularly with respect to community banks. We write in full support of the arguments made by our colleagues at the Independent Community Bankers of America in their comment letter, dated September 29, 2020.

Shore United Bank provides commercial banking products and services, including trust, wealth management and financial planning services to individuals, businesses, and other organizations in the local communities supported by our branch network in Maryland, Delaware and Virginia. While we provide many of the same services offered by larger regional institutions that compete with us, as a community bank focused on relationship banking, we are intimately familiar with our local markets and can provide customized products and services that are vital to consumers and small businesses on Main Street. This support for consumers and local businesses facilitates the growth and success of the local economies in the markets in which we operate.

Congress adopted the Bank Merger Act of 1960 in order to establish a process for federal regulatory review and approval of bank merger combinations. Following passage of the Bank Merger Act, and its subsequent amendments, both the relevant banking regulator (i.e., the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation) and the Department of Justice were given the power to challenge bank combinations. Traditionally, federal banking agencies consider three main factors when evaluating a proposed

bank merger: (1) “the effect of the transaction on competition,” (2) “the convenience and needs of the community to be served,” and (3) “the financial condition of each of the banks involved” and “the general character of [their] management.”¹ However, the Department of Justice often denied mergers solely on anticompetitive grounds even when the banking regulators approved an application, causing a schism in competitive review and uncertainty among banks.

In 1995, the Department of Justice and the banking regulators worked together to develop the 1995 Banking Guidelines as a cooperative framework for reviewing anticompetitive considerations in bank merger proposals. Under the Banking Guidelines, the Department of Justice and the Federal Reserve Board use a common measure of market concentration – the Herfindahl-Hirschman Index (“HHI”) – to determine market concentration and identify proposed mergers as potentially anticompetitive. For banking markets, the HHI is calculated by summing the squared market share of every competitor in a market. The Department of Justice generally presumes that a proposed transaction will lead to significant reduction in a competition market in which it will result in: (1) a post-merger HHI of at least 1,800, and (2) an increase in the HHI by more than 200 points. Therefore, current guidelines evaluate a market’s competitiveness by calculating deposit concentrations from *physical locations*. The Banking Guidelines were meant to provide a unified framework for competitive analysis, and did just that.

The Community Banking Landscape Has Evolved Significantly Over the Past 25 Years

We believe the Department of Justice should modernize its approach to reviewing bank mergers. Over the last 25 years, the banking landscape has changed with the rise of virtual banks, online and mobile banking, financial technology competitors, and significant credit union growth (due in large part to relaxed restrictions on membership). The evolution of the industry has rendered the HHI calculation, and its ties to physical locations of traditional banks, outdated. The current HHI analysis overstates deposit concentrations by not taking into account the significant presence of virtual banks and Fintech competitors. Although the HHI analysis contemplates a virtual bank’s headquarters location when calculating deposit data, this analysis falls short of capturing a realistic picture of deposit data in any given location. Since virtual banks do not provide data for determining the geographic locations of their customers, all of a virtual bank’s deposits are listed as being located at the virtual bank’s headquarters even though this is obviously not the case.

The 2017 FDIC National Survey of Unbanked and Underbanked Households found that 52% of consumers use online banking or mobile banking as their primary method of account access. This is as opposed to only 44% of consumers that use a primary method of account access that requires going to a branch or other brick-and-mortar location (i.e., a teller, an ATM, or a kiosk).² The Department of Justice’s review process is based upon the analysis of a quickly shrinking method of banking – banking with brick-and-mortar locations. The HHI analysis forces regulators to overstate the significance of brick-and-mortar banks, while understating the significance of virtual banks. This bias is most detrimental to community banks because, as we

¹ 12 U.S.C. §1828(c)(2).

² FED. DEPOSIT INS. CORP., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS, at 5, tbl. ES.4 (Oct. 2018)

will discuss below, community banks serve the market in a specific way that relies more heavily on brick-and-mortar banking.

A Disproportionate Disadvantage Suffered By Community Banks Suggests That the HHI Threshold Should be Revised

Depending upon its HHI, a geographic market can be considered unconcentrated, moderately concentrated, or highly concentrated. Under the current guidelines for bank mergers, a geographic market is considered unconcentrated if the HHI is below 1,000 after the merger or acquisition, moderately concentrated if the HHI is between 1,000 and 1,800, and highly concentrated if the HHI is above 1,800.

The Department of Justice's narrow focus limits the ability of banks to combine when those banks operate in a highly concentrated market as measured by an HHI analysis. As would be expected given their sparse populations, most rural markets are considered highly concentrated by HHI thresholds. Local community banks are much more likely to service rural areas. Therefore, community banks are often operating solely in highly concentrated markets. This makes combinations among local community banks untenable under the Department of Justice's current regulatory review.

The current market concentration regulations can often prevent two local community banks operating in the same rural area from combining. Although retaining the local community nature of the institutions is in the best interest of the community, as we discuss below, an HHI analysis will usually flag such a merger as monopolistic. Therefore, the heightened regulatory and technological burdens faced by community banks often coerce these banks to merge with larger out-of-market institutions to remain economically competitive. This regulatory scheme is directly contributing to a decreased physical presence of local community banks – the existence of which remains vital to the customers and local businesses in these rural communities.

Community banks such as ours maintain close ties to residents and an in depth knowledge of the intricacies of local businesses. This specialized and personalized approach is how we excel at serving the needs of the community. Large acquirers have less vested interest in local businesses and the community, less knowledge about market conditions, and are not equipped to develop the same community relationships. In order for community banks to remain competitive, the Department of Justice must account for virtual banks, Fintech competitors, and credit unions in its competitive analysis. In accounting for these new forms of banking, the reduced market share and lesser competitive effects will provide community banks with increased opportunities for in-market bank mergers.

Geographic markets and the markets for banking services are considerably larger than they were when considered, decades ago, by the Court in *U.S. v. Philadelphia National Bank*.³ It is imperative that the Department of Justice redefine geographic markets, specifically, distinguishing between urban and rural markets, and include virtual banks, Fintech competitors and credit unions in its competitive analysis to preserve the presence of local banks and promote local combinations.

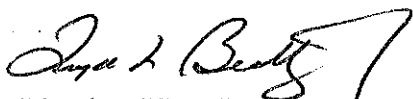
³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

This is crucial for local community banks like ours to provide a competitive foothold relative to large out-of-market institutions in the communities we serve.

Ultimately, the HHI should be revised, at least with respect to rural areas, to reflect the public policy goal of meeting the convenience and needs of the communities to be served by permitting the merger of certain community banks which will ironically provide greater competition with other typically larger financial institutions through economies of scale, greater managerial resources and expanded services.

Please feel free to contact me at [REDACTED] if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Lloyd L. Beatty, Jr.", written in a cursive style.

Lloyd L. "Scott" Beatty, Jr.
President and Chief Executive Officer
Shore United Bank