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By electronic submission to ATR.BankMergers@usdoj.gov

Mr. Makan Delrahim
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Antitrust Division Banking Guidelines Review

Dear Assistant Attorney General Delrahim:

As representatives of organizations that work on issues related to financial policy, competition, and economic equity, we write to offer comments on the Department of Justice's review of its Bank Merger Competitive Review guidelines. We oppose many aspects of the Department's Review proposal because they would hasten the longstanding harmful trends of deregulation and consolidation in the banking industry. Increased concentration in the banking sector threatens financial stability, consumer and small business access to credit, and undermines corporate accountability. Many of these costs are disproportionately borne by low- and moderate-income communities and communities of color, while the benefits flow to bank executives, creditors, and shareholders.

Instead of exacerbating the damage caused by deregulation and lax merger enforcement over the past four decades, we urge the Department to adopt a different course. The public is better served by proposals that take meaningful steps to reverse consolidation in the banking industry, and finance more broadly, so as to promote equity, efficiency, stability, and justice in our financial system. In particular, the Department should focus its energies on the following policies:

- Implementing more stringent enforcement of chartering and restrictions on banking activities;
- Revisiting bank ownership limitations;
- Imposing more stringent limits on concentration, tying, and management interlocks; and
- Reconsidering the role of settlements in penalizing and deterring illegal and improper conduct within large banking conglomerates.

I. Banking is a public provision that is distinct from other industries

Banks are private entities carrying out a public function on behalf of the central bank and Treasury Departments; this monetary function is their most important purpose, above credit intermediation and generation.[1] Our monetary system derives its value and stability from the legitimacy of the

[1] *See* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1150-1157 (2017); *see also* Morgan Ricks, *A Regulatory Design for Monetary Stability*, 65 VAND. L. REV. 1289, 1343-1347 (2013)(establishing a public-private partnership (PPP) model for all issuers of money claims); *see also* Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 850 (2018) (the "money view" conceptualizes the "bank

underlying chartering, regulatory, and supervisory systems, especially the banking laws.[2] The absence of adequate protections for claims issued outside of this structure is problematic: it makes nonbank financing inherently less reliable, and more volatile, for customers and the public. Hence, the creation of a federal bank chartering agency was both important to ensuring the stability of banking but also a "major victory for the federal government's control of the money supply and authority over the monetary system."[3]

The National Bank Act created an agency, the Office of the Comptroller of the Currency (OCC), to federally charter banks with limited authority to engage in the "business of banking," and identified a list of permissible banking activities in the "bank powers clause."[4] Through these laws, in combination with the Federal Reserve Act of 1913 and the Banking Acts of 1933 and 1935, Congress established a series of authorities, structures, and guarantees that ensured the stability of the banking system and restricted the issuance of money claims. The totality of these New Deal laws effectively drew a line of government support around a specific type of money claim – the bank deposit – that the government would stand behind.

While the public provides banks with a special license to engage in a vital activity that undergirds all economic activity, laws also sought to prevent them from abusing this privilege. That is why the banking laws have always had an anti-monopoly, pro-competition component, but through a more restrained approach than other competition laws.[5] Banking laws sought to balance several interests that are at times harmonious and at times conflicting, including preserving an important public function that benefits from public subsidies, promoting open competition, and preventing excessive market power within banking and over adjacent industries. Banks had caps on the interest rates that they could pay, limits on interstate branching, structural separations between banking and commercial business, and so on.[6] At the center of these laws was a recognition that types of unfettered competition in banking can lead to a race-to-the-bottom dynamic that breeds financial instability and has profound ramifications for the very public that grants banks their privileged position.

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charter as a monetary outsourcing contract."); *see also* Lev Menand, *Why Supervise Banks? The Forgotten Past and Uncertain Future of a Distinctive Form of Governance*, 71 VAND. L. REV. __ (forthcoming), at 27 ("[B]anks are government instrumentalities acting in a quasi-statal capacity … The banking system, on this view, is analogous to an outsourcing scheme in which (1) banks are minting money, (2) on behalf of the government, with (3) the banking agencies acting as franchisors, franchising banks and supervising the money they create.").

[2] *See* Joseph H. Sommer, *Where is a Bank Account?*, 57 MD. L. REV. 1, 6 (1998) ("The legitimacy of money, therefore, arises from our acceptance of the underlying payment system rules. These rules are nothing more than the homely law of bank liabilities and the law governing the transfer of these liabilities."); *see also* Dan Awrey, *Bad Money*, 106 CORNELL L. REV. __ (forthcoming), at 33 ("[B]ank *regulation* is why we think of bank deposits as, fundamentally, *good money*.").

[3] MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 38 (1st ed. 2016).

[4] 12 U.S.C. §24 (Seventh).

[5] *See* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 27 J. REPRINTS ANTITRUST L. & ECON. 75, 88 (1997) (quoting the 1959 Senate accompanying the Bank Merger Act: "It is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest.").

[6] *See id.*, at 84; *see also* Saule T. Omarova. *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013).

It is this balance that the Department should be seeking to preserve. As described more below, however, the shift to greater deregulation in the name of competition has beget greater financial instability and inequality. From a competition standpoint, many of these deregulatory policies have, in fact, had the exact opposite of their intended effect—producing a more consolidated banking sector and increasing the myriad anti-competitive harms that come with it.

II. Decades of banking deregulation and consolidation have gone hand-in-hand

As described above, banks have a license to charge interest on the money that they issue, which is printed by the U.S. government through its central bank. The post-New Deal period, with its robust banking regulation and a Federal safety net, is known as the "Quiet Period" in U.S. banking—essentially a 74-year period without any banking panics.[7] Serving as a monetary franchisee produces a stable but limited amount of return for businesses that are publicly traded corporations and are therefore evaluated on the basis of the returns they produce for their shareholders,[8] so financial institutions have long sought to engage in banking activities without the added costs imposed on banks, such as regulation, chartering, and other restrictions.[9]

The Quiet Period began its gradual end in the last 40 years as Congress and regulators took a series of incremental steps to deregulate the banking sector by repealing interest rate caps, prohibitions on interstate branching, limits on banks' activities and other restrictions. Beginning in the 1980s, the OCC gradually redefined the "business of banking" to include a wide range of derivative products.[10] By 1987, the Federal Reserve had weakened the firewalls between banking and securities by interpreting the limitation in the Banking Act prohibiting banks from affiliating with any entity "engaged principally" in the underwriting and distribution of securities to allow nonbank subsidiaries to earn up to 25 percent of their revenue from securities activities.[11] Finally, in 1999, the Gramm-Leach-Bliley Act (GLBA) repealed the "Glass-Steagall" components of the '33 Banking Act, authorizing chartered bank holding companies to invest in and trade in a variety of securities, commodities, and derivatives, and combine with insurance companies.[12] At the same time, there was no update to the regulatory apparatus for these firms.

This is where the "shadow banking" model – namely, "the creation of assets that are thought to be safe, short-term, and liquid, and as such, cash equivalents similar to insured deposits in the

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[7] *See* Gary Gorton, *Slapped in the Face by the Invisible Hand: Banking and the Panic of 2007*, at 2 (May 9, 2009) (prepared for the Federal Reserve Bank of Atlanta's 2009 Financial Markets Conference: Financial Innovation and Crisis). This is something of an oversimplification. There were the savings and loan crisis and the failure of Penn Central bank in the 1980s, the failure of the hedge fun Long-Term Capital Management in 1998 that threatened the banking system, and the Enron debacle in the early 2000s that involved a web of banks, investment banks, and exotic financial derivative instruments. All of these mini-crises are consistent with our analysis, however, as all shared one or more attributes of the larger financial crises.

[8] *See* Anat R. Admati, *A Skeptical View of Financialized Corporate Governance*, 31 J. OF ECON. PERSPECTIVES 131, 137-39 (2017).

[9] *See* Hockett & Omarova, *supra* note 1, at 1164

[10] *See* Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed The "Business of Banking"*, 63 U. MIAMI L. REV. 1041 (2009).

[11] Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 472-73 (2017).

[12] *See* Omarova, *supra* note 10.

commercial banking system"[13] – exploded. This includes nonbanks engaging in bank-like activities as well as banking entities engaging in activities that replicate banking with lighter regulation. The outsized growth of these activities, markets, and instruments over recent decades means that "shadow banking is not some troubling excrescence on the healthy body of traditional banking," but instead it has become the "centrally important channel of credit for our times[.]"[14]

In addition to deregulating the banking franchise, policymakers have weakened their enforcement of competition as a policy goal. Over the course of recent decades, the original purposes of banking laws as fundamentally anti-monopoly, and in opposition to the excessive concentration of credit, have given way to other policy goals, a shift that has had important competitive implications.[15] Merger reviews have also become more permissive.[16] The implications of these trends are fairly clear, as the banking industry has become substantially more concentrated during the last four decades. The number of mergers has increased, the number of banks has shrunk, and the share of banking assets held by the largest institutions has grown.[17] Today, the largest banking

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[13] Daniel K. Tarullo, Shadow Banking After the Financial Crisis 2, Remarks to the Fed. Reserve Bank of S.F. Conference on Challenges in Global Finance, June 12, 2012. Others define "shadow banking" as "money market funding of capital market lending." Perry Mehrling *et al*, *Bagehot was a Shadow Banker: Shadow Banking, Central Banking, and the Future of Global Finance* 3 (Nov. 5, 2013), available at SSRN: https://ssrn.com/abstract=2232016.

[14] *Id.*, at 2.

[15] *See* Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. OF BANKING & FIN. L. 113, 120 (2012)("As enacted in 1956, the [Bank Holding Company Act] was designed principally as an anti-monopoly law that sought to close the key 'routes to a national banking empire.' The primary policy goal of the new statute was to restrict geographic expansion of large banking groups and, more broadly, to prevent excessive concentration in the commercial banking industry."); *see also id.*, at 123-24 ("[T]he tendency toward increasing concentration of bank lending has severely compromised the broader policy of preventing excessive concentration of credit. In the decades following the enactment of the BHCA, the wave of bank mergers, acquisitions, and consolidations, in response to the growing competitive pressures and search for the economies of scale, effectively created a two-tiered banking system in the United States, where a small number of large financial groups hold the vast majority of the banking industry's assets and liabilities, with the rest dispersed widely among a far greater number of small and medium-sized banks.").

[16] *See* Shull, *supra* note 5, at 105-06 ("[S]ince the early 1980s, merger denials by the agencies have been infrequent, despite consolidation of some of the largest banking organizations in the United States. Between 1972 and 1982, the Federal Reserve Board denied sixty-three proposed acquisitions on competitive grounds. From 1983 to 1994, with far greater numbers of proposals, it denied only eight. Denials on competitive grounds, when they have occurred, have generally involved small banks in small markets. Litigation resulting in court decisions has, for the most part, disappeared."); *see also* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 438-39 (2020)("Bank merger approval rates are at historic highs. The Federal Reserve, for example, signed off on 95% of merger applications in 2018—its highest approval rate since it began keeping track … The agencies, moreover, have not formally denied a merger application in more than fifteen years.").

[17] *See* Shull, *supra* note 5, at 79 ("Between 1980 and 1994 there were over 6300 mergers of independent banking organizations ... Primarily due to mergers, and secondarily as the result of almost 1500 failures over the period, the number of independent banking organizations has declined more than one-third, from about 12,200 in 1980 to 7900 in 1994. There has not been a comparable structural reorganization in banking since the failures of the 1920s and 1930s cut the number of banks in half."); *see also* Robert M. Adams, *Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010*, FEDS Working Paper No. 2012-51 (Aug. 8, 2012) ("Since 1980, the structure of the U.S. banking industry has changed considerably, with over 10,000 mergers involving more than $7 trillion in acquired assets taking place … There were 19,069 banks and thrifts operating in the U.S. in 1980 and 7,011 in 2010, a decline of over 60 percent. In 1980, the 10 largest banking organizations held only 13.5 percent of banking assets, increasing to 36 percent by 2000. By 2010, the 10 largest organizations held approximately 50 percent of banking assets."); *see also* Troy Davig *et al*, Bank Consolidation and Merger Activity Following the Crisis, *Economic Review*, issue Q I, p. 31-49, at 34 (2015) ("From 2011 through 2014, the number of voluntary mergers increased each year. Mergers increased from 73 in 2011 to 162 in 2014."). While regulation is often blamed

conglomerates are enterprises that are sweeping in their size and scope, as characterized by their number of legal entities, geographic reach, and range of banking and nonbanking activities.[18]

The impact of these changes is that, today, we essentially have a bifurcated banking system that is is extremely concentrated at the top, making it more difficult for the smallest institutions to compete. This is additionally problematic because, as recent market disruptions resulting from COVID-19 demonstrate, it is more difficult for the government to tightly control the stability of money markets and to limit or otherwise address the subsidies enjoyed by the largest banks, discussed more below. The differences in products, activities, and business models of the various tiers of banking organizations also hinder the ability of traditional competitive-effect analyses to evaluate these and other issues, all of which arise from the banking industry's unique status.

III. Increased banking consolidation and financialization harms communities and the public by increasing incidences of predatory lending, financial instability, and unfair competition

The financial crisis of 2008 was the definitive end of the Quiet Period in banking. Financial crises are essentially the consequence of the financialization that occurs when money is created outside of the traditional strictures of bank charters, regulation, and the Federal backstop.[19] The function of money creation had been increasingly deregulated and privatized,[20] and, as the Financial Crisis Inquiry Commission found, the crisis was the result of having "a 21st-century financial system with 19th-century safeguards."[21] For example, the Federal Reserve elected not to regulate the mortgage lending of nonbank subsidiaries of bank holding companies, allowing for the proliferation of risky lending within the banking system. Similarly, the Federal Reserve and the OCC allowed bank holding companies to create off-balance sheet structured investment vehicles made up of securitized subprime mortgage loans without capital to absorb losses.[22]

There is an irony in the simultaneous decline of both traditional regulation and antitrust enforcement: antitrust and regulation traditionally have been viewed as complementary, and particularly in banking a great deal of competition has been created and preserved though the relevant statutory and regulatory frameworks.[23] Instead, the increased privatization and deregulation of banking has created a one-way ratchet to drive up fees and income, and otherwise increase financial activity, a condition generally known as "financialization."

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for consolidation, there are a variety of business reasons for bank consolidation, *see id.*, at 32-34, and, ironically, as the above statistics demonstrate, increased consolidation has coincided with greater deregulation.

[18] *See* Dafna Avraham, Patricia Selvaggi & James Vickery, *A Structural View of U.S. Bank Holding Companies*, FRBNY Econ. Pol'y Rev., July 2012, https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf.

[19] *See* Hockett & Omarova, *supra* note 1, at 1213-14; *see also* Menand, *supra* note 1, at 74 ("Not since 1837-41, after the Second Bank's charter expired, had the federal government permitted such a large portion of the money supply to issue from private hands in such an unrestricted and unregulated fashion.").

[20] *See* Wilmarth, *supra* note 11, at 463 ("[T]he rapidly increasing volume of shadow-bank funding after 1990 'can be understood as an increasing privatization of the broad money supply in the pre-crisis years.'" (quoting Morgan Ricks)).

[21] *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, at xx (2011).

[22] *See* Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J. L & PUB. AFF. 107 (2017).

[23] *See* Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 309 (2010).

The inevitable result of this process was a financial crisis that caused millions of lost homes and jobs. The 2008 crisis was an important reminder that the "lure of money, and the temptation to create more of it, can fuel growth and wealth, but if pushed too far, it can have corrosive effects on the economy."[24] To prevent crises, states need to keep private money creation under control, because "the more they bend to the will of private debt minters in boom times, the more they will be on the hook when it turns out the economy cannot sustain the debt burden they created."[25]

These policy decisions have distributional consequences, as we know that more vulnerable populations tend to bear the brunt of financial crises.[26] The Great Recession saw more than a third of unemployed workers experiencing long stretches of joblessness, being unemployed for 27 weeks or more.[27] We also know that the effects are long-lasting, as it took until 2017 for median household income to get back to pre-crisis levels.[28]

These sustained periods of joblessness led to poorer health, shorter life expectancies, and worse academic performance for children.[29] The eviction crisis during and after the Great Recession produced heightened levels of stress, health crises, addiction, child abuse, and myriad other negative family outcomes.[30] The apex of the global financial crisis, 2009, marked the year when business deaths most strongly outpaced business births, and for 3 months that year, new business creation reached its lowest point since the U.S. Bureau of Labor Statistics began collecting the information.[31] Finally, and perhaps most troublingly, one study from the U.S. Centers for Disease Control and Prevention found that suicides doubled in the years just before and after the Great Recession, spurred by severe housing stress, including evictions and foreclosures.[32]

Unfortunately, policymakers have seemingly unlearned the lessons of the 2007-2008 financial crisis just a decade later. In 2018, Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), which weakened key elements of the Dodd-Frank Wall

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[24] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 106 (2019).
[25] *Id.*
[26] *See*, *e.g.*, William R. Emmons & Bryan J. Noeth, Household Financial Stability: Who Suffered the Most from the Crisis?, The Regional Economist, at 11, July 2012 (finding that younger, less-educated, and minority families suffered the greatest wealth declines during the financial crisis.), https://www.stlouisfed.org/~/media/files/pdfs/publications/pub_assets/pdf/re/2012/c/financial_stability.pdf.
[27] *See* U.S. Bureau of Labor Statistics, "TED: The Economics Daily. Unemployment in October 2009" (2009), https://www.bls.gov/opub/ted/2009/ted_20091110.htm?view_full.
[28] *See* Binyamin Appelbaum & Robert Pear, *U.S. Household Income Rises to Pre-Recession Levels, Prompting Cheers*, N.Y. TIMES, Sept. 12, 2018, https://www.nytimes.com/2018/09/12/us/politics/median-us-household-income-increased-in-2017.html.
[29] *See* Austin Nichols, Josh Mitchell & Stephan Lindner, "Consequences of Long-Term Unemployment," Urban Institute (2013), https://www.urban.org/sites/default/files/publication/23921/412887-Consequences-of-Long-Term-Unemployment.PDF.
[30] *See* Thomas G. Kingsley, Robin Smith & David Price, "The Impacts of Foreclosures on Families and Communities, Urban Institute (2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF.
[31] *See* U.S. Bureau of Labor Statistics, "The Recession of 2007-2009" (2012), https://www.bls.gov/spotlight/2012/recession/.
[32] *See* Katherine A. Fowler *et al*, "Increases in Suicides Associated with Home Eviction and Foreclosure During the U.S. Housing Crisis: Findings from 16 National Violent Death Reporting System States, 2005-2010," *Am. J. of Pub. Health* (2015), https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2014.301945.

Street Reform and Consumer Protection Act.[33] Among other provisions, S.2155 increased the asset-size threshold above which banks face heightened regulatory safeguards, from $50 billion to $250 billion. The bill also increased a series of other regulatory size thresholds for smaller banks and exempted them from an array of requirements. In addition, President Trump's financial regulators have used their discretion to roll back post-crisis regulations on banks with more than $250 billion in assets, including the largest Wall Street banks in the country. It was clear to industry analysts and insiders that these deregulatory efforts, like the ones in the preceding four decades, would drive consolidation and harm healthy competition in the banking sector.[34] That is exactly what has played out in the years since these actions.

For example, BB&T, a $236 billion bank, and SunTrust, a $227 billion bank, merged in 2019 to form the eighth largest bank holding company in the country.[35] This was the largest merger since the financial crisis. Other banks have also merged in the wake of this deregulatory push, and further consolidation is expected.[36] This not just the case for traditional banks with traditional business models; we have seen two recent mergers that will substantially increase concentration in wealth management.[37]

The banking industry is currently extremely concentrated in a handful of giant banking conglomerates, in everything from retail checking accounts to derivatives.[38] Research has shown that greater banking industry concentration alone implicates a variety of potential harms for customers, the financial system, and the economy more broadly.[39] The harms witnessed in communities impacted by bank consolidation include reduced small business formation and access to credit, greater income inequality, increased reliance on predatory financial products due to the

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[33] *See* The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115–174, 132 Stat. 1297 (2018).

[34] *See*, *e.g.*, Zach Fox, *US Regulatory Relief Should Trigger Large-Bank M&A*, S&P Global Market Intelligence, May 11, 2018, https://platform mi.spglobal.com/web/client?auth=inherit#news/article?id=44560353&cdid=A-44560353-12592.

[35] *See* Press Release, "BB&T and SunTrust Complete Merger of Equals to Become Truist," Dec. 9, 2019, https://media.truist.com/2019-12-09-BB-T-and-SunTrust-complete-merger-of-equals-to-become-Truist.

[36] *See* Zach Fox & Zain Tariq, *Megadeal in US Southeastern States Could Start New Chase for Banking Scale*, S&P Global Market Intelligence, Feb. 8, 2019, https://www.spglobal.com/marketintelligence/en/news-insights/trending/mll2hgnwK5r5uS-JuMrXnw2; *see also* Jason Langan *et al*, Time is Right for a Wave of Bank Consolidation 3, Deloitte (2019)(citing the "favorable regulatory environment" resulting from the passage of EGRRCPA), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-fsi-pov-banking-mergers-equals.pdf.

[37] *See* John Baguios & Declan Harty, *Facing Revenue Pressure, Schwab, TD Ameritrade Ink $26B Transformative Deal*, S&P Global Market Intelligence, Nov. 25, 2019, https://www.spglobal.com/marketintelligence/en/news-insights/trending/DLgZwLH2YxfgQOw2BOuE0A2; *see also* Liz Hoffman, *Morgan Stanley Is Buying E*Trade, Betting on Smaller Customers*, WALL ST. J., Feb. 20, 2020, https://www.wsj.com/articles/morgan-stanley-is-buying-e-trade-betting-on-littler-customers-11582201440.

[38] *See* Ronamil Portes & Harry Terris, *Biggest US Banks Dominate Competition for Retail Checking Accounts*, S&P Global Market Intelligence, Jan. 7, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/trending/ujwGP8YQEfMy0vZsnDWJAA2; *see also* Ofc. of the Comptroller of the Currency, *Quarterly Report on Bank Trading and Derivatives Activities*, June 2020 (four large banks held 86.7 percent of the total banking industry notional amount of derivatives as of the first quarter of 2020), https://www.occ.gov/publications-and-resources/publications/quarterly-report-on-bank-trading-and-derivatives-activities/files/q1-2020-derivatives-quarterly.html.

[39] *See* José Azar, Sahil Raina, & Martin C. Schmalz, Ultimate Ownership and Bank Competition 1 (May 4, 2019), available at SSRN: https://ssrn.com/abstract=2710252.

reduced availability of traditional banking services, increased crime and evictions, and decreased economic growth.[40] Bank consolidation has also led to the closure of large swaths of pre-existing bank branch networks, decreasing the quality and convenience of the banking services available to impacted communities.

The effects of banking consolidation on the provision of credit to the "real economy" have come into stark relief during the recent recession brought on by the COVID-19 pandemic. To wit, evidence suggests that the size and types of financial institutions had a large role in determining which small businesses received Paycheck Protection Program (PPP) loans, with firms in areas with the highest shares of big banks less likely to receive funding than areas served by greater number of community financial institutions. For example, researchers at the Federal Reserve Bank of New York found a strong relationship between the market share of mid-sized and community banks in a state and the share of small businesses within a state that received a PPP loan.[41] This conclusion is consistent with the findings of other research that areas predominately served by the largest banks underperformed in the provision of PPP loans, given those banks' market share of typical small business lending. Indeed, while these four large banks originated 36 percent of all small business loans before the pandemic, they originated just 3 percent of PPP loans.[42]

While neither study offers a hypothesis on why the largest banks underperformed in PPP lending, some rough data and anecdotal evidence provide some potential explanations for why smaller institutions generally did a better job than the largest U.S. lending institutions in deploying small business funding. SBA data show that the average PPP loan size for banks with more than $50 billion in assets was nearly $120,000, while the average loan size for banks with less than $1 billion in assets was around $85,000, and the average loan size for community development financial institutions—some of the very smallest financial institutions—was around $51,000.[43] This suggests that perhaps large banks prioritized making fewer, bigger loans due to the fee income structure of the program and the more complex bureaucracies at the institutions.

Additionally, past research from the Federal Deposit Insurance Corporation notes that community banks "are said to be relationship lenders, which rely to a significant degree on specialized knowledge gained through long-term business relationships. They are likely to be owned privately or have public shares that are not widely traded, and therefore tend to place the long-term interest of their local communities high relative to the demands of the capital markets."[44] In the case of the PPP, the relationship lending model may have meant that community banks had better pre-existing relationships with local small businesses and a greater focus on lending rather than, say, investment banking or trading.

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[40] *See id.*

[41] *See* Haoyang Liu & Desi Volker, "Where Have the Paycheck Protection Loans Gone So Far?" Federal Reserve Bank of New York, May 6, 2020 available at Liberty Street Economics: https://libertystreeteconomics.newyorkfed.org/2020/05/where-have-the-paycheck-protection-loans-gone-so-far html.

[42] *See* João Granja *et al*, "Did the Paycheck Protection Program Hit the Target?" Becker Friedman Institute Working Paper 2020-52, available at https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202052-1.pdf

[43] *See* U.S. Small Bus. Admin., Paycheck Protection Program (PPP) Report, June 2020, https://www.sba.gov/sites/default/files/2020-06/PPP_Report_Public_200606%20FINAL_-508.pdf.

[44] FDIC Community Banking Study, December 2012, available at https://www.fdic.gov/regulations/resources/cbi/report/cbsi-1.pdf.

In addition to the effects on the provision of credit, large banking entities that result from deregulation and lax antitrust enforcement also tend to enjoy certain financial benefits from their size, and the resulting perception among financial market participants that the government will provide them with support during times of financial stress,[45] including the ability to borrow more cheaply than they otherwise would given their risk profiles.[46] Financial regulators have found that the potential perception, and its potential associated funding advantage, gives financial institutions a financial incentive to grow larger;[47] this funding disparity therefore creates "competitive distortions" that are "unfair to smaller companies, damaging to fair competition, and tends to artificially encourage further consolidation and concentration in the financial system."[48]

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[45] This is known as the "Too Big to Fail" (TBTF) dynamic, defined as "the receipt of discretionary government support by a bank's uninsured creditors who are not automatically entitled to government support[.]" Gary H. Stern & Ron J. Feldman, *Too Big to Fail: The Hazards of Bank Bailouts*, THE REGION, Dec. 2003, https://www.minneapolisfed.org/publications_papers/issue.cfm?id=163.

[46] There is a growing body of literature seeking to quantify the precise borrowing advantages enjoyed by the largest financial institutions. *See* Tryggvi Gudmundsson, Whose Credit Line is it Anyway: An Update on Banks' Implicit Subsidies, IMF Working Paper 16/224 (Nov. 2016)(finding that the implicit subsidy for the 11 largest banks grew to 170 basis points (bps) and $130 billion per year in 2009, to 30-40 bps and $62 billion in 2015), https://www.imf.org/external/pubs/ft/wp/2016/wp16224.pdf; *see also* GOV'T ACCOUNTABILITY OFC., LARGE BANK HOLDING COMPANIES: EXPECTATIONS OF GOVERNMENT SUPPORT, July 2014, https://www.gao.gov/assets/670/665162.pdf; *see also* Int'l Monetary Fund, Global Fin. Stability Report, Apr. 2014 (estimating that government support provided US G-SIBs with a funding benefit of at least 15 bps in 2013, with an estimated dollar value of $15-70 billion in 2011-12), available at http://www.imf.org/External/Pubs/FT/GFSR/2014/01/pdf/text.pdf; *see also* João Santos, *Evidence from the Bond Market on Banks' "Too-Big-to-Fail" Subsidy*, 20 FRBNY ECON. POL'Y REV., Mar. 2014 (finding that the five largest banks by assets borrowed at a 41 bps advantage over smaller banks from 1985-2009), http://www newyorkfed.org/research/epr/2014/1403sant.pdf; Viral V. Acharya, Deniz Anginer & A. Joseph Warburton, *The End of Market Discipline? Investor Expectations of Implicit State Guarantees* (June 2014) (finding that large institutions had a borrowing advantage of 30 bps per year from 1990 to 2012, peaking at more than 100 bps in 2009, with an estimated average total value of the subsidy at about $30 billion per year over that period, and exceeding $150 billion in 2009), http://ssrn.com/abstract=1961656; *see also* John Lester & Aditi Kumar, *Do Bond Spreads Show Evidence of Too Big To Fail Effects?* (Apr. 2014) (finding that the large bank funding advantage peaked at over 100 bps in 2009, declined to approximately 40 bps by 2011, and had disappeared by 2013), https://www.theclearinghouse.org/~/media/Files/Association%20Documents/Oliver%20Wyman%20study%20-%20Do%20bond%20spreads%20show%20evidence%20of%20too%20big%20to%20fail.pdf; *see also* Zoe Tsesmelidakis & Robert C. Merton, The Value of Implicit Guarantees (July 2013) (estimating an implicit subsidy of $129.2 billion and $236.1 billion for equity holders and debt holders, respectively, of 74 large US financial institutions), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231317; *see also* Priyank Gandhi & Hanno Lustig, *Size Anomalies in U.S. Bank Stock Returns: A Fiscal Explanation* 5, NBER Working Paper 16553 (Jan. 2012) (estimating that implicit governmental guarantees provide a subsidy of 3.10 percent per year to the cost of equity capital for the largest banks, and impose a 3.25 percent tax on the smallest banks, amounting to an annual subsidy of $4.71 billion per bank, and that a 100% increase in the size of market cap relative to GDP increases the subsidy by 68 bps per year) http://www nber.org/papers/w16553.pdf; *see also* Andrew G. Haldane, "The $100 Billion Question," Comments at the Institute of Regulation & Risk, Mar. 30, 2010 (estimating that the average annual subsidy for the top five banks in the world from 2007-09 was about $60 billion.), available at http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech433.pdf; *see also* Dean Baker & Travis MacArthur, *The Value of the "Too Big to Fail" Big Bank Subsidy*, Center for Economic and Policy Research (2009) (estimating an average borrowing advantage of 78 bps, implying a subsidy of $34.1 billion a year), http://www.cepr.net/documents/publications/too-big-to-fail-2009-09.pdf.

[47] Daniel K. Tarullo, Financial Stability Regulation 23, Remarks at the Distinguished Jurist Lecture, U. of Penn. Law School, Oct. 10, 2012 (the perception of government support, and its associated funding advantage, "reinforces the impulse to grow") available at http://www.federalreserve.gov/newsevents/speech/tarullo20121010a.pdf.

[48] Ofc. of the Comptroller of the Currency, Bd. of Governors of the Fed. Reserve Sys. & Fed. Deposit Ins. Corp., Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank

The last two major economic crises before COVID-19 – the Savings & Loan Crisis and the Great Financial Crisis – were marked by preceding periods of deregulation during which the United States saw the greatest number of small bank failures and a high volume of mergers.[49] Lax oversight combined with increased financialization harms competition in the banking sector as community banks fail or are forced to merge when they find themselves underprepared for a downturn.[50] This is exacerbated by regulators facilitating quick mergers of larger banking entities during a crisis in order to prevent failures with dire costs to the public.

A particular source of concern is the Department's review's implied willingness to allow banks to grow based upon the size of the nonbank lending sector, while also leaving nonbank lenders without entry restrictions or comprehensive regulation. While financial technology companies, or "fintechs," tend to couch their services in the language of increased competition and democratized credit, they are fundamentally shadow banking entities that create money either by renting bank charters, exploiting loopholes in banking law, or otherwise partnering with banks to engage in banking functions. This model raises serious issues of systemic risk,[51] and consumer protection.[52] Treating fintech as part of the banking sector for merger review purposes, without actually chartering, regulating, and supervising fintechs like banks would create a perverse effect wherein the volume of regulated credit is essentially outsourced to private shadow banks. This exacerbates the threats to financial stability, competition and consumer protections.

Finally, the growth of large firms, and large financial firms in particular, raises important issues of political economy and the outsized influence of finance over other businesses and public authorities based upon their privileged position.[53] Indeed, the New Deal legislation limited banks' activities as much to prevent the undue concentration of political power as to protect public resources from risky financial practices.[54]

Holding Companies and Their Subsidiary Insured Depository Institutions, 78 Fed. Reg. 51101, 51102-03 (Aug. 20, 2013).

[49] *See* Fed. Deposit Insurance Corp., *Structural Change Among Community and Noncommunity Banks*, Ch. 2 in FDIC COMMUNITY BANKING STUDY (Dec. 2012), https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.

[50] *See* Kress, *supra* note 15, at 468 ("Ironically, to save the financial system from complete collapse, policymakers orchestrated emergency mergers by Bank of America, JPMorgan, and Wells Fargo, leading to widespread critiques that these combinations further exacerbated the 'too-big-to-fail' problem.").

[51] *See* Saule T. Omarova, *New Tech vs. New Deal: Fintech as a Systemic Phenomenon*, 36 YALE J. ON REG. 735 (2019).

[52] *See* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking* (Aug. 19, 2020), IOWA L. REV., Forthcoming, available at SSRN: https://ssrn.com/abstract=3677283. Of further concern, the discourse around these issues frames credit generally, and small-dollar credit provided to low-income Americans specifically, as a critical tool of social policy, an approach that has been shown to be deeply flawed both because it does not solve any of the root causes of the social problem, and in fact exacerbates many such problems. *See* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019).

[53] *See* Bush, *supra* note 23, at 308 ("The size of some banks and large corporations begets enormous political power, as liquidity in financial markets affects all other industries and therefore the entire economy.").

[54] *See* RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE 375-76 (2010).

IV. More, not less, stringent limits and restrictions on the banking franchise will increase competition

Rather than super-charging bank consolidation by instituting more permissible merger guidelines, there are a number of critical policy issues that warrant the Department's attention. Moreover, given the cross-cutting nature of these considerations and the traditional role of bank regulators in merger approval, the Department should undergo this review process on an interagency basis with the appropriate banking regulatory agencies, including the Consumer Financial Protection Bureau. The following are just a few examples of policies that the Department should prioritize.

- *More stringent enforcement of chartering and restrictions on banking activities.*— Which entities should be permitted to engage in banking and money creation is a struggle between private industry and public authorities that dates back more than a century. The proliferation of shadow banking necessarily implies that public authorities are permitting the creation of money – a state-sanctioned and highly regulated activity – to be conducted by private, lightly regulated actors. Given the view the public importance of banks' monetary function for the financial system and the economy, it is critical that this function be returned to the exclusive realm of regulated banking.[55] To accomplish this, the Department must work with financial regulators to ensure that banking and money creation is limited to chartered institutions, and that these activities are appropriately regulated to address safety and soundness, financial stability, and consumer protection through its role in issuing legal opinions, participating in litigation, and the like.[56]

- *Revisiting bank ownership limitations.*—This is a time in which "a vigorous and welcome debate is in full swing about the development and use of appropriate, theoretically motivated and empirically effective measures of common ownership."[57] The ownership of large publicly traded companies is heavily concentrated in the hands of a few large asset managers, and the same is true of the

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[55] *See* Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV., at 815 ("[M]oney creation is an intrinsically public activity—and if private encroachment into money creation implicates sensitive issues of systemic stability, macroeconomic management, and private capture of seigniorage—then it almost goes without saying that money creation needs to be *confined* to the government itself and its designated franchisees." Therefore, "entry restriction is indispensable.").

[56] For examples of legal action the Department of Justice could take to limit the proliferation of nonbank credit that undermines stability, competition, and consumer safety, it could intervene in the litigation challenging the OCC's extralegal creation of a federal "fintech charter," *see Lacewell v. OCC*, No. 19 Civ. 4271 (2d Cir., July 29, 2020), or challenge the OCC's specious attempt to overrule the Second Circuit's decision in *Madden v. Midland Financing*, *see* Ofc. of the Comptroller of the Currency, National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 44223 (July 22, 2020). The Department could also reverse its prior opinions sanctioning the operation of money market mutual funds, a deposit substitute that was a central player in the financial crisis. *See* Wilmarth, *supra* note 11, at 459 (noting that, at one point, a banker sought the Justice Department's intervention to charge the money market fund industry with providing illegal deposits, but the Department rejected this claim); *see also* Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV., at 812 explaining that the SEC consulted the Justice Department for its opinion on the question of whether money market funds should be considered "deposits," and describing the Justice Department's determination that they were not was described as "a masterpiece of legal formalism.").

[57] Azar, Raina, & Schmalz, *supra* note 39, at 34.

largest banks in particular.[58] The Federal Reserve recently amended its control rules in a manner that is likely to further concentrate the ownership of the largest banks.[59] The implications of this situation are still not fully understood. Researchers have examined the impacts of large ownership stakes in concentrated industries, including banking, and proposed common ownership limits well below those contained in the Board's proposal.[60] Others have suggested that large shareholders could actually provide some benefits from a financial stability perspective.[61]

- *More stringent limits on concentration, tying, and management interlocks.*—To the extent that the Department's review posits that certain financial activities are fungible, there are various financial laws that do not reflect this reality. Anti-tying provisions and prohibitions against management interlocks should be strengthened to ensure that nonbanking entities are included in the prohibitions against these anti-competitive practices, including covering nonbank lenders that engage in partnerships with banks.[62] Banking law also prohibits any single bank from accumulating more than 10% of the nation's deposits through merger or acquisition.[63] These limitations were instituted at the same time that Congress relaxed restrictions on interstate branching to prevent excessive concentration of financial power.[64] This restriction could be revised to both lower the concentration limit and close loopholes that allow institutions to continue growing through other means.[65]

Other policies that warrant the Department of Justice's attention and reconsideration include the role of settlements in failing to appropriately penalize and deter illegal and improper conduct within large banking conglomerates. [66]

In conclusion, the answer to reinvigorating competition in the financial sector, and improving its capacity to serve the rest of the industrial economy, is better regulation and antitrust enforcement.

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[58] *See* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership* 73 J. OF FIN. 1513 (2018); *see also* Azar, Raina, & Schmalz, *supra* note 39, at 2 ("The same four institutional investors are among the top 5 shareholders of the nation's five largest banks. The fifth important player is Berkshire Hathaway, which ranks among the top five shareholders of three of the top six banks.").

[59] *See* Bd. of Governors of the Fed. Reserve Sys., Control and Divestiture Proceedings, 85 Fed. Reg. 18427 (Apr. 2, 2020).

[60] *See*, *e.g.*, Eric A. Posner, Fiona Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors* (Mar. 22, 2017) (recommending a 1 percent limit on ownership in "oligopolistic" industries), available at SSRN: https://ssrn.com/abstract=2872754.

[61] *See* Yesha Yadav, *Too-Big-to-Fail Shareholders*, 103 MINN. L. REV. 587 (2018).

[62] *See* 12 U.S.C. § 1972(1); *see also* 12 U.S.C. §§ 3202 & 3203; *see also* Adam J. Levitin, *Rent-a-Bank: Bank Partnerships and the Evasion of Usury Laws* (September 16, 2020), available at SSRN: https://ssrn.com/abstract=3684244.

[63] *See* 12 U.S.C. §§ 1831u(b)(2), 1842(d)(2)).

[64] *See* Arthur E. Wilmarth Jr., *Reforming Financial Regulation to Address the Too-Big-To-Fail Problem*, 35 BROOK. J. INT'L L. 707, 750 n. 170 (2010).

[65] *See* Fin. Stability Oversight Council, *Study & Recommendations Regarding Concentration Limits on Large Financial Companies*, Jan. 2011, at 8-9 (discussing the limitations of the Riegle-Neal Act's deposit concentration and large banks' deposit concentration growth).

[66] *See*, *e.g.*, Patrick Hardouin, *Too Big to Fail, Too Big to Jail: Restoring Liability a Lesson from HSBC Case*, 24 J. OF FIN. CRIME 513 (2017).

We are concerned that the Department's review would take the banking system in the opposite directions, and we therefore oppose many of the Department's proposed changes.

Thank you for considering our views on this important matter.

Sincerely,

Graham Steele
Senior Fellow
American Economic Liberties Project

Amanda Fischer
Policy Director
Washington Center for Equitable Growth

Sandeep Vaheesan
Legal Director
Open Markets Institute