Americans for Financial Reform Education Fund

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Submitted electronically to ATR.BankMergers@usdoj.gov

RE: Antitrust Division Banking Guidelines Review

Dear Assistant Attorney General Delrahim:

Americans for Financial Reform Education Fund respectfully submits comments on the U.S. Department of Justice's consideration of whether to revise the 1995 Bank Merger Competitive Review for the consideration of proposed bank mergers. Americans for Financial Reform Education Fund is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups deeply concerned about the negative impacts of the highly-consolidated financial system, including large depository banking institutions, on the economy, communities, consumers, and businesses. These damaging impacts historically have disproportionately disadvantaged people of color, women, people with limited English proficiency as individuals as well as the communities where these people live.

The current merger review process by both the Department of Justice and banking regulators has failed to protect the public and public interest from ever larger banks exercising market power to impose higher costs on consumers, reduce the volume or quality of banking services, or prevent the biggest banks from becoming so large that they pose a risk to the entire financial system and real economy. Unfettered bank mergers contributed to the rise in megabanks and systemic fragility that led to the 2008 financial crisis, which imposed widespread and long-lasting economic costs on everyone but especially lower-income people and people of color.

The Department of Justice must not weaken or loosen its evaluation of proposed banking mergers in any way. The review of proposed bank mergers must instead become more rigorous and skeptical given the unique role banks play in the economy and household finances and the explicit government subsidies banks receive and implicit too-big-to-fail backstopping the government often provides to the biggest banks if they become distressed.

The Department of Justice should pursue a retrospective analysis of the impact of prior banking mergers on consumers and communities, the costs and prices of banking products, the availability and quality of credit for households and small businesses, and the extent to which the merged banks actually served the convenience and needs of the communities where they do business. The Justice Department should also investigate whether the biggest banks created by a series of mergers constitute illegal monopolies, oligopolies, or cartels that should be broken up to protect the public interest, consumers, communities, and the economy.

The Bank Holding Company Act requires antitrust authorities at banking agencies and the Department of Justice to reject proposed bank mergers that are anticompetitive (that would create a monopoly or where the effect may substantially lessen competition), that harm the convenience and needs of the community, that pose risk to the banking or financial system, or that have insufficient managerial capacity.[1] The "convenience and needs of the community" includes banks' performance under the Community Reinvestment Act in providing both depository and credit services to lower-income customers and people of color and lower-income areas and communities of color where a bank operates.[2]

The Department of Justice must consider the implications on market concentration and competition much more robustly, with greater attention to the potential negative impact on people of color, women, people with language access difficulties, and lower-income people as well as communities of color and lower-income areas. Additionally, the Department should evaluate, in coordination with federal and state banking regulators and state Attorneys General, the potential negative impact proposed mergers could have on systemic risk, including wholesale investment banking, managerial competence, and compliance with consumer protection and other banking laws.

The Department of Justice should be especially skeptical of proposed mergers involving banks subject to enforcement actions or with large numbers of consumer complaints at the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB); banks that have a record of harming, disadvantaging, or defrauding consumers or violating fair lending, fair housing, and fair credit laws should not be rewarded with merger approvals. The Department should coordinate with the FTC and the CFPB to review the consumer protection and fair lending record of proposed merging banks, the cost structure and availability of account and loan products, the performance serving lower-income applicants and applicants of color in providing mortgage, small business, and other loan products.

A. The current bank merger evaluation process is insufficient to address impact of mega-mergers and hyper-consolidation

The Department of Justice is soliciting comments on whether the current bank merger review process needs to be updated. There is little evidence that the current process and evaluation metrics have been sufficient to stop a wave of bank mergers that have been largely detrimental to bank customers, consumers, communities, and the real economy. Big bank mergers contributed to the 2008 financial crisis and the current merger review process has been plainly insufficient to prevent the systemic risks the merger-driven mega-banks pose to the financial system and the real economy.

The bank merger review process must be strengthened, not weakened, to better protect consumers and customers from banks exerting market power to impose small but significant price increases or service reductions. Merger review should consider the impact potential mergers have on the banking market and the tendency for mergers to lessen competition, and they should safeguard the convenience and needs of communities and banking consumers, and prevent mergers from posing outsized risks to the entire economy in conjunction with federal banking regulators.

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[1] 12 USC §1828(c)(5).

[2] 12 USC §2901 and §2903.

These commonsense merger review considerations are already enshrined in federal law. The 1956 Bank Holding Company Act requires banking regulators to consider not only the impact on competition (the primary consideration of the Department of Justice), but also public interest considerations to serve the "convenience and needs of the community" and whether the merger would pose "greater or more concentrated risks to the stability of the United States banking or financial system."[3]

The Department of Justice and banking regulators developed the 1995 bank merger guidelines in part to minimize the antitrust enforcement conflicts between Justice and the Federal Reserve by establishing a market concentration threshold measured by the Herfindahl-Hirschman Index (HHI).[4] The 1995 Department of Justice Bank Merger Competitive Review establishes a concentration threshold for more thoroughly reviewing a proposed merger that created an HHI of over 1,800 points or an increase of over 200 points as potentially creating competition problems.[5] These concentration metrics are generally applied to deposit market shares for the geographic markets where the banks take deposits, but can and should apply to credit markets as well.[6]

Under the current guidelines, proposed mergers that approach but do not exceed these thresholds could nonetheless be reviewed by the Department of Justice,[7] but this discretion has not led to higher scrutiny of bank mergers, as almost all are approved. The 1995 bank merger guidelines even include a range of justifications for *not* further investigating mergers (such as the contention by the merging parties that they are not really competitors, that other rivals are becoming larger, that non-bank entities are significant competitors).[8]

The Department of Justice bank merger review process primarily evaluates the competition and market concentration but this review has not significantly slowed the steady and detrimental increase in banking concentration over the past decades (see section B, below). The current evaluation of proposed bank mergers is overly sympathetic to the purported efficiency gains and cost savings the larger scale could deliver to consumers.[9] Instead, the increased market power has actually raised costs for consumers and customers and disadvantaged many communities, especially lower-income areas and communities of color (see Section C).

[3] 12 USC §1842(c); The antitrust limitations on anticompetitive mergers, however, do not prevent regulators from approving the takeover of failed banks even if the merger would increase concentration and potential harms from the exercise of increased market power. Wheelock, David. Federal Reserve Bank of St. Louis. "Banking industry consolidation and market structure: Impact of the financial crisis and recession." *Federal Reserve Bank of St. Louis Review*. November/December 2011 at 420.

[4] Kress, Jeremy C. "Modernizing bank merger review." *Yale Journal on Regulation*. Vol. 37, No. 435. 2020 at 449. The Herfindahl-Hirschman Index is the sum of the squared market shares of all market participants, but the antitrust enforcement agencies typically focus on the top set of market participants, the top four firm concentration ratio (CR-4) or top ten firm concentration ratio (CR-10).

[5] U.S. Department of Justice (DOJ). Bank Merger Competitive Review 1995. Updated September 2000 at 1; Further, federal banking law prohibits mergers that would create a bank that controlled 10 percent of total national deposits or 30 percent of any state total deposits and some states have lower deposit concentration limits. 12 USC §1831u(b)(2); Wheelock (2011) at 420.

[6] Wheelock (2011) at 422.

[7] *Ibid.* at 2.

[8] DOJ. Bank Merger Competitive Review 1995 at 3 to 4.

[9] Kress (2020) at 441.

Banking is a unique sector that warrants closer scrutiny by antitrust regulators: The Department of Justice should maintain a distinct merger review process for banks that is more stringent than the process it applies to other sectors of the economy. Banks play a critical role in the monetary system, in providing credit to households and business, and in providing a utility-like service to retail customers connecting households to the financial system.

The federal government's regulatory oversight of banks recognizes the unique role the institutions play in the economy and household finances. The federal government charters banking institutions, delineates permissible banking activities, supervises the safety and soundness of banks, and guarantees deposits. The Community Reinvestment Act requires banks to serve the credit needs of all the communities the bank serves, including lower-income areas and communities of color.

Moreover, the federal government provides many direct and implicit subsidies to the banking industry that justify increased scrutiny and skepticism towards bank mergers. The federal deposit insurance guaranteed protection of deposit accounts subsidizes the banking industry from the costs of risk-taking, stabilizes the banking industry, and provides a confidence and a sense of security for depositors.[10] Consolidation through mergers creates larger banks that receive other financial subsidy benefits, such as paying less for funds.[11]

A related implicit subsidy it the perception that some banks are considered so large, so interconnected, or so complex that the government would act to prevent their potential failure to prevent economic disruption to their customers, creditors, and the economy. The Federal Reserve Bank of San Francisco noted before the financial crisis that merging banks could grow to a scale sufficient to "earn a 'too-big-to-fail' subsidy due to the market's perception of a de facto government backing of a megabank in times of crisis."[12] A 2000 Federal Reserve Bank of Chicago publication noted that "too-big-too-fail considerations may have been important in megamergers of the 1990s."[13] These perverse incentives and economic distortions can be created by size alone, given assumptions about the preferential treatment of too-big-to-fail banks by regulators.[14]

Banks have been willing to pay handsomely to pursue mergers to achieve a too-big-to-fail size. A Federal Reserve Bank of Philadelphia study found that acquiring banks paid a $15 billion premium to takeover targets that would create $100 billion asset firms perceived to be too-big-to-fail.[15] Not only were acquiring banks willing to pay a premium, but these larger takeover deals also received bigger stock price bumps in the 1990s.[16]

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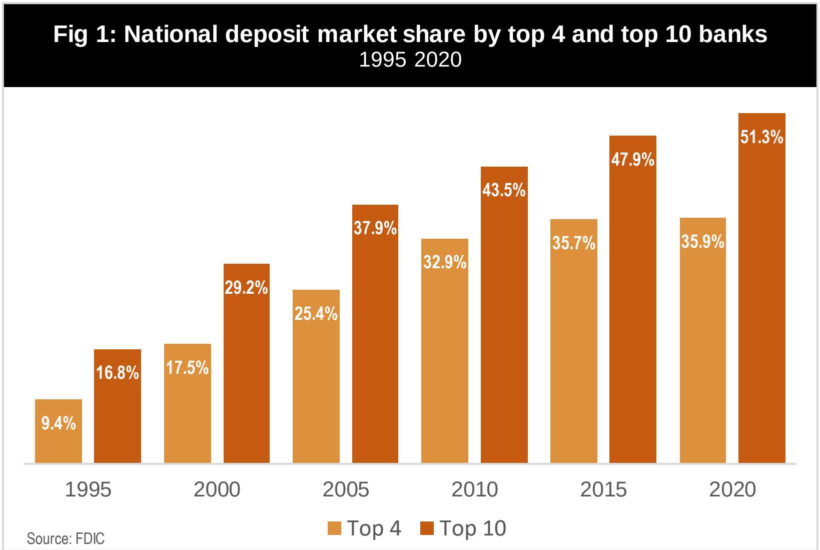
[10] Ellis, Diane. FDIC. "Deposit Insurance Funding: Assuring Confidence." November 2013.
[11] Kim, JinAh and Katja Seim. University of Pennsylvania. Wharton School of Business. "Effects of Bank mergers on risk leading up to the 2007-2008 financial crisis." 2016 at 7.
[12] Kwan, Simon. Federal Reserve Bank of San Francisco. "Banking Consolidation." *FRBSF Economic Letter*. No. 2004-15. June 18, 2004 at 2
[13] Brewer, Elijah III et al. Federal Reserve Bank of Chicago. "The price of bank mergers in the 1990s." *Economic Perspectives*. Vol. 24, Iss. 1. February 2000 at 3.
[14] Americans for Financial Reform Education Fund (AFREF). Letter to the Financial Stability Oversight Council. May 13, 2019 at 4.
[15] Brewer, Elijah III and Julapa Jagtiani. Federal Reserve Bank of Philadelphia. Working Paper 11-37. "How Much Did Banks Pay to Become Too-Big-to-Gail and Become Systemically Important?" September 2, 2011 at 5.
[16] Brewer et al. (2000) at 4.

The federal involvement in banking is and should be more robust than in other sector's given the importance of banking's role in the economy. The explicit and implicit government subsidies create a moral hazard for banks that encourages greater risk-taking that could imperil the institution because of the knowledge that the federal government will backstop depositors and prevent too-big-to-fail institutions from failure.[17]

B. Decades of deregulation-driven bank mergers have substantially increased concentrated bank market power

The 1990s banking deregulation encouraged and facilitated the wave of banking mergers that have consolidated today's financial industry, reduced regulatory oversight, and posed increasing risk to the financial system. The 1994 Reigle-Neal Interstate Banking and Branching Efficiency Act deregulation of interstate banking allowed bank holding companies to acquire banks across the country and led to an unprecedented wave of bank mergers from 1995 to 1999.[18] The 1999 Gramm-Leach-Bliley Act weakened regulatory oversight on banks and allowed banks to affiliate with other financial firms, including eliminating the Glass-Steagall prohibitions on combining with securities firms, that encouraged even more and more complex banking mergers and acquisitions.[19]



This deregulation helped drive what the Federal Reserve Bank of Chicago called an "unprecedented pace of bank mergers" in the 1990s with an average of over 500 acquisitions a year between 1990 and 1998.[20] The 2008 financial crisis further significantly reduced the number of U.S. banks. Several banks and financial firms collapsed and were absorbed into other giant banks, like Washington Mutual, Wachovia, Countrywide Financial, and Bear Stearns.[21] The number of U.S. banks declined by 12 percent between the beginning of 2007 and the end of 2010.[22]

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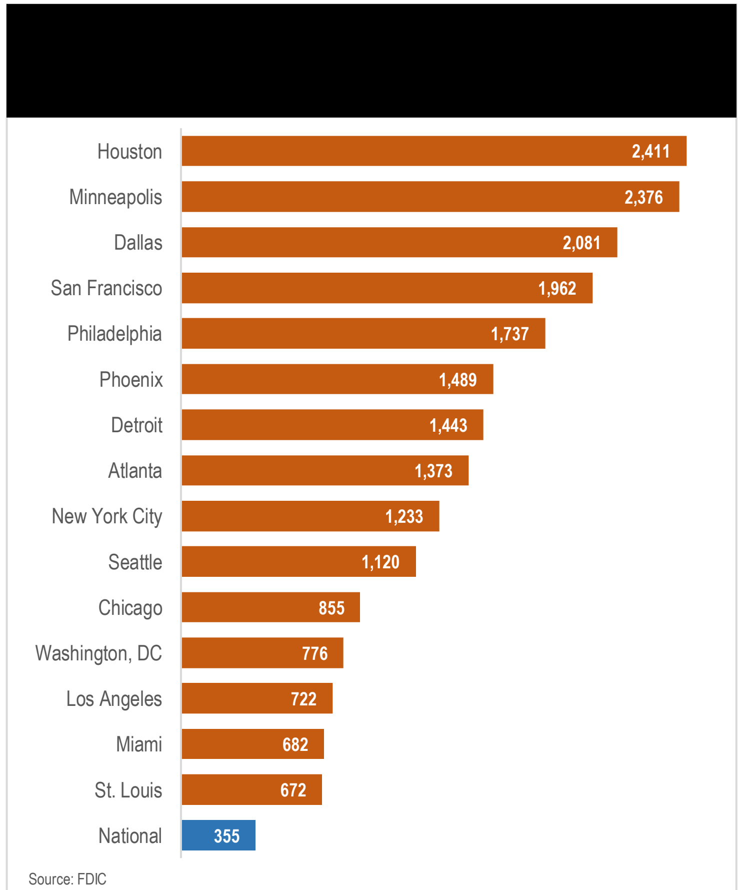
[17] Moch, Nils. "The contribution of large banking institutions to systemic risk: What do we know? A literature review." *Review of Economics*. Vol. 69, No. 3. 2018 at 232.
[18] Zhang, Jeffery Y. Harvard University. John M. Olin Center for Law, Economics, and Business. Discussion Paper No. 69. "The Costs and Benefits of Banking Deregulation." April 25, 2017 at 8; Carletti, Elena, Philipp Hartmann, and Giancarlo Spagnolo. "Implications of the bank merger wave for competition and stability." *Risk Measurement and Systemic Risk, Proceedings of the Third Joint Central Bank Research Conference*. January 2002 at 38.
[19] Jackson, William D. Congressional Research Service. "Mergers and Consolidation between Banking and Financial Services Firms: Trends and Prospects." RL-30516. August 8, 2003 at CRs-4 to CRS-6.
[20] Brewer et al. (2000) at 2.
[21] "Timeline: Key events in financial crisis." *USA Today*. September 9, 2013.
[22] Wheelock (2011) at 419.

In many cases, the ballooning size has created mammoth banks that are too big to manage. These megabanks can be so large that its executives, board, and shareholders cannot monitor the companies' activities, which can lead to excess risk-taking and misconduct.[23] For example, the Financial Crisis Inquiry Commission found that the Citigroup's size contributed to excessive risk-taking in the runup to the 2008 financial crisis.[24] Wells Fargo's string of consumer abuses, scandals, and mismanagement has been attributed in part to its unmanageable size.[25]



Decades of bank mergers have unsurprisingly consolidated the banking industry. Since the Department of Justice 1995 merger guidelines went into effect, banking mergers have substantially increased consolidation nationally and in local markets. The national deposit share of the top four banks nearly quadrupled from 1995 to 2020 from under 10 percent in 1995 to 35.9 percent in 2020 (see Figure 1).[26] By 2020, the top four banks controlled one-third of national deposit dollars and the top 10 banks controlled more than half of deposit dollars.[27] The national HHI index rose more steeply, increasing 15-fold for the top four banks to 355 points and increasing 12-fold for the top 10 banks to 398 points in 2020.

Importantly, two bank holding companies (Bank of America and JPMorgan Chase) each control more than 11 percent of national deposits. This deposit concentration appears to be organic (not through recent mergers) but these institutions on their own already exceed the federal prohibition of approving mergers that would create a bank that would control more 10 percent of the national deposit market.[28]

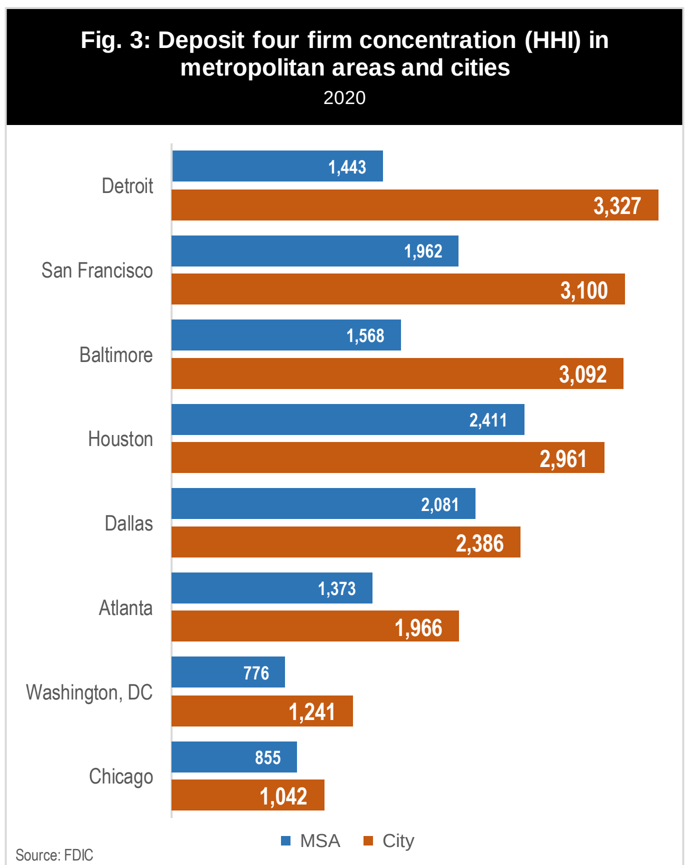
Banking customers and consumers face far higher concentration levels at the local level than the national concentration levels would suggest. All of the fifteen major metropolitan areas have

[23] Kress (2020) at 173.
[24] Financial Crisis Inquiry Commission. "[The Financial Crisis Inquiry Report](#)." January 2011 at XIX.
[25] House Financial Services Committee. U.S. Congress. "The Real Wells Fargo: Board & Management Failures, Consumer Abuses, and Ineffective Regulatory Oversight." Report Prepared by the Majority Staff of the Committee on Financial Services, U.S. House of Representatives. March 2020.
[26] AFREF analysis of Federal Deposit Insurance Corporation (FDIC) Statistics on Depository Institutions data. Available at https://www7.fdic.gov/sdi/index.asp. Accessed October 2020.
[27] *Ibid.*
[28] 12 USC §1831u(b)(2).

significantly higher concentration levels than the national deposit concentration level; 7 of the metropolitan areas are at least four times more concentrated (see Figure 2).[29] The top four banks controlled half the deposits in 13 of the 15 major metro areas and controlled two-thirds of the deposits in 7 of them. Four of the metro areas are already above the 1,800 HHI index threshold for merger scrutiny.

The need for greater scrutiny in urban and rural areas where concentration is higher: The antitrust product-market evaluation is generally performed on deposit market share on the metropolitan area basis and on the county level for non-metropolitan areas (rural areas).[30] The merger evaluation approach should be the same for urban and rural banks, but urban core (cities) and rural areas should receive greater scrutiny because these markets are already considerably more concentrated than metropolitan areas. The FDIC reported that rural banking markets are generally more concentrated than metropolitan area markets, with fewer banks competing for a smaller and more dispersed population.[31] The mergers that regulators approved between 2007 and 2010 raised typical concentration levels considerably in rural areas — above the 200 HHI point threshold for closer merger scrutiny — and the median rural HHI index was above the 1,800 HHI point threshold *prior* to the proposed mergers.[32]

These higher concentration levels in rural markets mean that the Department of Justice should not establish de minimus thresholds to approve smaller transactions without assessing the competitive effects of the mergers. In rural markets, it is possible for the merger of two smaller institutions to considerably increase the market concentration and give the merged bank impermissible market power to impose price hikes on customers. The current HHI thresholds are a better metric for assessing the potentially anticompetitive impacts of possible mergers than an arbitrary size limit that would leave rural communities vulnerable to local bank monopolies, cartels, or oligopolies.



In metropolitan areas, the Justice Department and banking regulators also must focus not just on the broader metropolitan areas but also the urban city centers which often have higher concentrations of lower-income residents

[29] AFREF analysis of FDIC Statistics on Depository Institutions data. Figures for June 2020 deposit survey.
[30] Wheelock (2011) at 422.
[31] *Ibid.* at 427.
[32] *Ibid.* at 435 to 436.

and people of color. In many places, there is a far higher deposit concentration in the urban centers than in the overall metropolitan areas (see Figure 3).[33] The top four banks controlled more than three-quarters of the deposits in 5 of the central cities but none of the overall metropolitan areas in 2020. In Baltimore city, the top four banks control 93.5 percent of deposits and the top four control more than 80 percent of deposits in Detroit and San Francisco cities. Six of these central cities already exceed the 1995 bank merger review 1,800 HHI index threshold but only 3 of the metropolitan areas exceed that threshold for higher scrutiny.

Concentration thresholds should not be raised or aligned with 2010 Horizontal Merger Guidelines: Either the 1995 bank merger guidelines or the application of these guidelines has been insufficient to curb hyper-consolidation in the banking industry and there is no need to loosen these standards to enable more mergers. Antitrust regulators have blocked few mergers and many markets are now considerably more concentrated than the 1995 HHI thresholds.

There is little evidence that the current regulatory review of potential bank mergers has hindered or slowed merger activity in any way. From 2009 through the first half of 2019, there have been over 14,400 bank merger applications; the federal review typically took only 30 days (only a few months even for proposed mergers with public opposition) and 89.3 percent of these applications were completed.[34] Almost all the applications that were uncompleted were withdrawn; only 2 merger applications were denied over more than a decade — only 0.01 percent of all applications.[35] (For comparison purposes, the Federal Reserve denied 63 merger applications between 1972 and 1982.)[36]

While the Department of Justice should consider, and likely already employs, many of the approaches in the 2010 Horizontal Merger Guidelines (HMG) in considering proposed bank mergers, it should not raise the concentration thresholds in the bank merger guidelines to meet the HMGs. These merger guidelines covering all other industries are generally more lenient than the 1995 bank merger guidelines and would be inappropriate to assess proposed banking mergers.

The 1995 bank merger guidelines provide enhanced scrutiny for mergers that would exceed an HHI threshold of 1,800 points, but the HMG would assess that threshold as only "moderately concentrated" (between 1,500 and 2,500 HHI) that could "potentially raise significant competitive concerns and often warrant scrutiny."[37] Even the most concentrated metropolitan markets in Fig. 2 would be considered "moderately concentrated." The 2010 guidelines only view mergers that exceed an HHI of over 2,500 points as creating "highly concentrated" markets that are presumed likely to enhance market power. Raising the banking concentration thresholds to the 2010 merger guideline levels would allow even the largest bank mergers to largely escape any substantial antitrust scrutiny.

The Department of Justice *should* consider adopting the HMG's more inclusive scrutiny for the mergers that increase concentration by less than 200 HHI points. The 1995 bank merger guidelines

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[33] AFREF analysis of FDIC Statistics on Depository Institutions data. Figures for June 2020 deposit survey. Chicago, Houston, and Chicago use central counties for cities (Cook, Harris, and Wayne, respectively), the rest use city definitions.
[34] Board of Governors of the Federal Reserve Board (FRB). "Semiannual Report on Banking Applications Activity January 1-June 30, 2020." Vol 7, No. 2. September 2020; FRB. "Semiannual Report on Banking Applications Activity: July 1-December 31, 2015." Vol. 3, No. 1. March 2016; FRB. "Semiannual Report on Banking Applications Activity." Vol. 1, No. 1. November 2014.
[35] *Ibid.*
[36] Kress (2020) at 449.
[37] DOJ and Federal Trade Commission. "2010 Horizontal Merger Guidelines." August 19, 2010 at 19.

give more thorough assessment of mergers that increase market concentration by more than 200 HHI points, but the HMG recommends increased scrutiny of mergers that raise market concentration between 100 and 200 HHI points and presumes that in more concentrated markets HHI increases of over 200 points would create anti-competitive markets that would enable the merged firm to exercise market power. Although the HMG market concentration bands are too high (generally and for banking), the evaluation of mergers that increase market concentration by 100 points should be adopted in considering bank mergers.

C. Bank mergers enable larger banks to exert market power to disadvantage consumers, customers, and communities

The past two decades of banking consolidation created larger institutions that have enhanced and entrenched market power that has allowed banks to exercise their market power over consumers, customers, and communities by raising prices and or reducing the quality or range of services, including suppressing interest rates on savings accounts. Banks with greater market shares and market power have greater ability to impose small but significant costs on customers and to erode the quality or range of services.

Depositors are practically captive consumers of banks, making it difficult to avoid higher fees. First, many markets are overwhelmingly dominated by a few big banks, making it harder to find alternatives. Second, they bear significant costs to switch to other banks to close and open accounts and change banking relationships like direct deposits and automated bill payments. These switching costs may be higher today since more consumers have a wider array of more complex automated banking transactions.

There are also significant barriers to entry for new market participants to offer comparable insured deposit products that prevent new potential rivals from capturing market share from monopolistic banks that raise fees on their depositors. There are very high regulatory, financial, and market barriers to potential new entrants for insured deposits. The FDIC approved about 1,000 new charters for deposit insurance between 2000 and 2008; in several years after the financial crisis there were no new bank charters and there were only 34 new charters between 2016 and 2018.[38]

There is significant evidence that merger-driven consolidation and branch closures related to merger divestiture agreements have disadvantaged consumers, raised prices and costs for accountholders, reduced access and raised prices for home mortgages, and raised loan rates and borrowing costs for small businesses and consumers. These negative impacts have been more detrimental for people of color, lower-income people, communities of color, and lower-income areas that have reinforced the long-standing inequities and discrimination that have perpetuated racial and economic inequality in the United States.

Over the last decades, the merger review process has allowed hundreds of mergers that individually and in aggregate have harmed banking consumers. The Department of Justice should more fully evaluate the competitive effects of mergers with special attention to how consumers would be potentially disadvantaged by the exercise of market power. This is in line not only with the merger

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[38] FDIC. "De Novo banks: Economic trends and supervisory framework." *FDIC Supervisory Insights*. Summer 2018 at 3; Green, Rachel. "The FDIC's recent upward tick in applications marks a turning point for new banks." *Business Insider*. July 11, 2019.

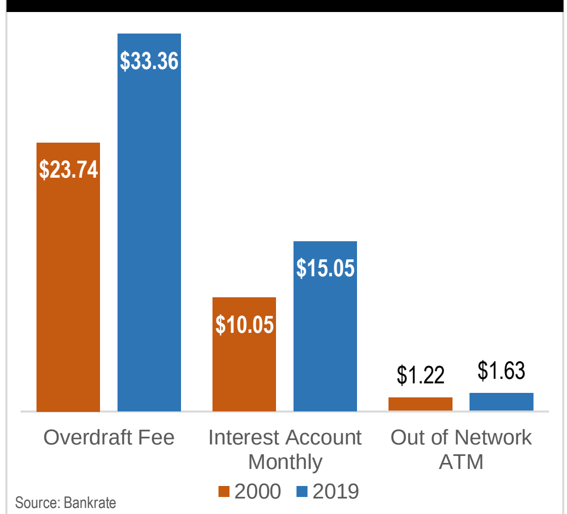
review guidelines but also the "convenience and needs" requirement in the Bank Holding Company Act and the service and lending tests under the Community Reinvestment Act, which requires especial attention to the detrimental impact on people of color, lower-income people, and the communities where people of color and lower-income people live.

Bank mergers raise fees and costs and lower service quality: Bank mergers have driven higher bank fees and higher costs to maintain accounts, which has an especially disadvantageous impact on lower-income households. Larger banks generally have higher bank fees and higher minimum balance requirements that make it harder for lower-income households to get or maintain an account.[39] A 2005 *Journal of Business* study found that a 100-point increase in HHI increased the cost of personal consumer loans by 11.9 to 14.5 basis points.[40] Big banks not only charge higher fees, but they also pay less in interest. The majority of literature has found that increased bank concentration significantly lowers the interest rates paid to depositors even when controlling for purported increases in efficiency or scale from mergers.[41]

These growing fees make having a bank account more costly, which is especially burdensome on lower-income households. The acquisition of smaller, community banks by larger banks can raise the costs of maintaining depository accounts and cause lower-income depositors to exit the banking system and become unbanked, compromising their ability to save to withstand household financial emergencies.[42] High bank account fees were a primary reason unbanked households did not have a bank account according to the FDIC.[43] People of color are substantially more likely to be unbanked. Black households were nearly six times more likely than white households to be unbanked and Latinx households were nearly five times more likely to be unbanked (16.9 percent, 3.0 percent, and 14.0 percent, respectively).[44]

National bank fees have risen steeply as mergers drove consolidation. Because larger banks generally have higher bank fees and higher minimum balance requirements that make it harder for lower-income households to get or maintain an account,[45] mergers effectively shut out consumers who cannot afford those fees or maintain balances from the banking

Fig. 4: Average National Bank Fees
2000 2019



Source: Bankrate

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[39] Bord, Vitay M. Harvard University. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors." December 1, 2018 at 8.
[40] Kahn, Charles, George Pennacchi, and Ben Spranzetti. "Bank consolidation and the dynamics of consumer loan interest rates." *Journal of Business*. Vol. 78, No. 1. 2005 at 109.
[41] Carletti, Hartmann, and Spagnolo (2002) at 42; Weinberg, Matthew. University of Georgia, Center for Economic Policy Studies. "The Price Effects of Horizontal Merges: A Survey." CEPS Working Paper No. 140. January 2007 at 5.
[42] Bord (2018) at 1.
[43] Appam, Gerald et al. FDIC. "2017 FDIC National Survey of. Unbanked and underbanked Households." October 2018 at 4.
[44] *Ibid.* at 3.
[45] Bord (2018) at 8.

system by limiting other options. A 2005 Federal Reserve Board study found that bank fees were higher in more concentrated markets and that banks operating in multiple markets charged substantially higher fees than banks operating in only one market.[46]

Over the past two decades, the ten largest banks share of deposit accounts rose by 75 percent so that by 2020 the top ten banks controlled more than half (51.3 percent) of all deposits.[47] The minimum balance to open a bank account grew 66 percent, from $347 in 2000 to $575 in 2020, according to the Bankrate bank account cost survey.[48] Account fees rose dramatically over the same period, with monthly fees for checking accounts rising by one-third over the past two decades to over $15 (or $180 annually). Fees imposed on overdrafts and out-of-network ATM fees have risen comparably and these are fees that disproportionately impact lower-income depositors (see Figure 4).

A 2018 Harvard study found that when bigger banks take over smaller banks, the increase in deposit account fees and minimum balance requirements causes nearly 2 percent of deposits to exit annually and that deposit growth is 12 percent lower after 4 years.[49] Lower-income neighborhoods that had branches taken over in mergers had higher levels of depositor flight, an inflow of check cashing outlets, and when these areas experienced subsequent financial shocks, there was an uptick in debt collection activity and evictions.[50]

Bank mergers reduce access to home mortgage credit and the negative impact is more severe for people of color and lower-income people: The Justice Department should carefully assess the potential impact of bank mergers on the home mortgage market. Homeownership is an important component of wealth building in the United States and the long-standing and continued racial homeownership gulf is a major factor in widening racial inequality. The Community Reinvestment Act requires banks to provide access to credit including home mortgage credit to all the communities that banks serve, but the lending industry has a long record of poorly serving Black, Latinx, and lower-income families that face greater difficulty accessing mortgage credit.[51] Mortgage credit is also a key element in meeting the convenience and needs of the community, as required of merging banks under the Bank Holding Company Act.

The literature has found that merging banks reduce the volume, increase the cost, and lower the access to affordable mortgage credit and that these detrimental effects are more pronounced for families of color, lower-income families, lower-income areas, and communities of color. The bank merger wave contributed to the rising concentration in the home mortgage lending market.[52] This concentration increased substantially at the national level between 1994 and 2011 and local market

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46 Hannan, Timothy H. Federal Reserve Board. "Retail Deposit Fees and Multimarket Banking." Staff Paper 2005-65. December 2005 at 27.

47 AFREF analysis of FDIC Statistics on Depository Institutions data.

48 Dixon, Amanda. "Survey: Rising ATM and overdraft fees leave consumers paying much more than they did 20 years ago." *Bankrate*. October 2, 2019.

49 Bord (2018) at 18 and 21.

50 *Ibid.* at 22, 24, and 30.

51 Center for Responsible Lending. "Despite Growing Market, African Americans and Latinos Remain Underserved." September 2017; Glantz, Aaron and Emmanuel Martinez. "Kept out: For people of color, banks are shutting the door to home ownership." *Reveal News*. February 15, 2018; Richardson, Jason, Bruce Mitchell, and Nicole West. National Community Reinvestment Coalition. "Home Mortgage and Small Business Lending in Baltimore and Surrounding Areas." November 2015.

52 Ratnadiwakara, Dimuthu and Vijay Yerramilli. Louisiana State University and University of Houston. "Effect of Bank Mergers on the Price and Availability of Mortgage Credit." September 2020 at 1.

concentration has risen as well, which is especially important because mortgage markets continue to have an import local component.[53]

Merging banks tend to reduce their mortgage lending after completing a deal and the decline in mortgage lending is more pronounced to Black borrowers.[54] A 2020 study found that while merging banks made more loans to prime borrowers, they curtailed lending to subprime borrowers after the merger.[55] Another study found that counties with higher concentration levels had 35 percent less refinance activity because these markets offered less attractive refinance rates, it also found that those who did refinance paid more for these loans.[56]

Market concentration can also increase the price borrowers pay for home mortgages.
Merging banks can use their enhanced market power to raise the cost of home mortgages for borrowers and reduce access to credit for lower-income borrowers and borrowers of color.[57]
A 2020 study by Louisiana State University and Houston University researchers found that merging banks increased the interest rates they charged to home mortgage borrowers and that every 5 percent increase in market share raised conventional mortgage rates by 42 basis points and imposed even larger increases on subprime, Alt-A, and refinance loans.[58] A 2013 Harvard study found that in more concentrated markets mortgage lenders were less likely to lower mortgage rates in response to declining yields for mortgage backed securities than less concentrated markets.[59]

Bank consolidation has an especially negative impact on people of color and lower-income people that face reduced access to credit and more expensive terms. One study found that Black mortgage applicants are less likely to get mortgages in counties where bank mergers occur and that divestitures from mergers exacerbate racial mortgage disparities.[60] Another study found that banks that have merged increase the approvals of conventional mortgages generally, but not to Black, Latinx, and lower-income mortgage applicants.[61] The study also found that merging banks reduced the approval of FHA loans and increased the rejection of FHA applications by Black, Latinx, and lower-income applicants.[62] The reduction of FHA credit especially damages families of color and lower-income families since FHA has been a substantial and often primary source of mortgage credit for lower-income households and borrowers of color.[63]

Bank mergers make it harder for small businesses to get access to affordable credit: Bank consolidation can reduce small business lending and have a disproportionate impact on the ability of businesses owned by people of color and women as well as very small businesses to access credit.

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53 Scharfstein, David and Adi Sunderam. Harvard University and National Bureau of Economic Research. "Concentration in Mortgage Lending, Refinancing Activity, and Mortgage Rates." NBER Working Paper No. 19156. June 2013 at 2.
54 Gam, Yong Kyu and Yunqi Zhang. Southwestern University of Finance and Economics and Nankai University. "Dismembered Giants: Bank Divestitures, Local Lending, and Housing Markets." 55th American Real Estate and Urban Economics Association. San Diego. January 3-5, 2019 at 4 and 41..
55 Ratnadiwakara and Yerramilli (2020) at 21.
56 Scharfstein and Sunderam (2013) at 3.
57 Ratnadiwakara and Yerramilli (2020) at 2.
58 *Ibid.* at 3 and 18 to 19.
59 Scharfstein and Sunderam (2013) at 3.
60 Gam and Zhang (2019) at 6 and 8.
61 Ratnadiwakara and Yerramilli (2020) at 4.
62 *Ibid.*
63 Bhutta, Neil and Aurel Hizmo. Board of Governors Federal Reserve. "Do Minorities Pay More for Mortgages?" Working Paper No. 2020-007. 2020 at 2.

Smaller banks provide the majority of credit to small businesses, originating over 90 percent of small business loans between 2000 and 2016.[64] Small businesses are especially affected by the availability of credit in local bank markets.[65]

Larger banks may be less likely to provide small business credit and more likely to provide larger loans to larger businesses because it is easier to underwrite and monitor fewer, larger loans.[66] The presence of larger institutions and more dominant presence with greater market share effectively shifts local markets away from smaller banks that may be more likely to provide flexible credit needed for small businesses; larger more complex banks may be more likely to offer fewer, standardized loan products more targeted to larger businesses.[67]

Mergers between larger banks that create more concentrated markets reduce small business credit access, especially for more marginal firms, and leave fewer credit alternatives in local markets.as mergers reduce the number of banks.[68] Studies have found that small businesses pay higher interest rates in more concentrated banking markets.[69]

A 2014 Massachusetts Institute of Technology paper found that large bank merger-driven branch closures reduced small business lending for several years and that the decline was concentrated in lower-income areas and communities of color.[70] A preliminary 2019 paper found that counties with more acquisitions of smaller banks by larger banks and more takeovers by out-of-state banks had a decline in small business lending.[71] A 2003 FDIC working paper found that merging banks had much lower small business loan growth than non-merging banks and that when mergers increased local market concentration there was significantly lower small business lending growth especially in urban areas.[72]

D. Fintech firms should not dilute the analysis of concentration in markets where mergers are under review, but they do warrant careful antitrust and consumer protection scrutiny

The Department of Justice should not include online banks or other financial technology ("fintech") companies in its competitive assessments of proposed bank mergers. As the Department notes, it would be nearly impossible to attribute the geographic distribution of fintech companies, either online transaction accounts or online fintech lenders. Including these fintech companies in the competitive

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[64] Minton, Bernadette A., Alvaro G. Taboada, and Rohan Williamson. Ohio State University, Mississippi State University, and Georgetown University. "Bank Mergers and Small Business Lending: Implications for Community Development." Paper presented at Financial Management Association 2019 Conference, New Orleans. October 23 to 26 at 3.
[65] Samolyk, Katherine and Christopher A. Richardson. Federal Deposit Insurance Corporation. Working Paper 2003-02. "Bank consolidation and small business lending within local markets." April 2003 at 22.
[66] Carletti, Hartmann, and Spagnolo (2002) at 40.
[67] Samolyk and Richardson (2003) at 7.
[68] *Ibid.* at 9.
[69] Carletti, Hartmann, and Spagnolo (2002) at 40.
[70] Nguyen, Hoai-Luu. Massachusetts Institute of Technology. "Do Bank Branches Still Matter? The Effect of Closing on Local Economic Outcomes." December 2014 at 3.
[71] Minton, Taboada, and Williamson (2019) at 14.
[72] Samolyk and Richardson (2003) at 23.

analysis of proposed mergers would show diminished market concentration of banks even when that does not reflect the reality of markets that consumers encounter.[73]

Most banking services are tied to their local geographies; most people have bank accounts near their homes or jobs. A 2018 study that found that every branch shuttered by big mergers reduced small business lending in the surrounding neighborhoods also concluded that this decline was unaffected by the rise in online lenders.[74] Additionally, online accounts are imperfect substitutes for chartered depository institutions. People rely on deposit insurance to protect their savings from bank failures, which is not the case with online accounts, and many consumers rely on services that fintech companies do not provide. Because online lenders are inadequate substitutes for banking services, they should be excluded from the competitive analysis for a potential merger.

While these fintech platforms should not be considered as part of the market when considering proposed bank mergers, the Justice Department should vigorously enforce and monitor the fintech companies and major technology platforms that enter into quasi-banking businesses for antitrust concerns relating to product tying, collusion, vertical mergers and arrangements as well as horizontal mergers between fintech companies. This should include evaluating third-party partnerships and service contracts that can expose banks to risk and expose consumers to data privacy breaches or other data privacy concerns about how personal information is shared and protected. We have already seen that how some of these "institution-affiliated parties" that have engaged in knowing or reckless conduct have adversely affected insured depository institutions.[75]

The rise of virtually unregulated fintech companies has occurred alongside the broad-based deregulation of the banking industry over the past quarter century. Fintech firms that offer "shadow payment platforms" that store consumer funds in long-term custody should not be permitted outside bank or bank type regulation and the FDIC's federal deposit insurance protection.[76] Any firm offering "deposit-like" obligations of online platforms should be regulated as "deposits" that could not be issued without the approval of banking regulators. Otherwise fintech companies that offer online accounts and payment services could effectively engage in banking services while evading the comprehensive regulatory oversight imposed on banks and bank holding companies and jeopardize the safety and soundness of the financial system and the economy. [77]

But the market actions and potential future mergers of fintech companies raise significant antitrust and consumer protection issues that warrant attention by the Department of Justice. A recent Department of Justice speech on updating the bank merger guidelines highlighted the fintech industry's purported "innovative, low cost, and convenient products and services,"[78] but made no

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[73] Kress (2020) at 439.
[74] Xu, Yichen. "The Importance of Brick-and-Mortar Bank Offices for Lending: Evidence from Small Business and Home Mortgage Lending." January 1, 2018 at 5.
[75] Swinehart, Matthew W. "Modeling payments regulation and financial change." *Kansas Law Review*. Vol. 67, No. 1. 2018 at 113.
[76] Awrey, Dan and Kristin van Zweiten. SWIFT Institute. "Mapping the Shadow Banking System." Working Paper NO. 2019-001. October 4, 2019.
[77] Omarova, Saule T. "The merchants of Wall Street: Banking, Commerce, and Commodities." *Minnesota Law Review*. Vol. 98. 2013 at 275.
[78] Murray, Michael. Deputy Assistant Attorney General. U.S. Department of Justice. Remarks at University of Michigan Law School. "The muscular role for antitrust in fintech, financial markets, and banking: The Antitrust Division's decision to lean in." October 14, 2020.

note of the many consumer protection problems that these companies have raised, including high-cost loans, privacy concerns, predatory lending, and potentially discriminatory algorithm-driven scoring and underwriting.[79] These issues fall squarely within the purview of bank merger assessments to meet the convenance and needs of communities under the Bank Holding Company Act and the service and lending tests of the Community Reinvestment Act.

Fintech lenders have been using underwriting or automated scoring that have a potentially disparate impact on people of color.[80] Due to the history of lending discrimination, lack of access to traditional banking services, lower wages, and higher poverty rates, communities of color are often disproportionately harmed by high-cost loans. Fintech companies often target the lower-income families outside the traditional banking system with new financial products that can come with problematic terms and unaffordable interest rates that can violate state laws.

The fintech company Square had long failed to disclose the APR loan rates to its customers on its website.[81] Square also offered high-priced loans (up to 40 percent APR) to firms that process their credit card transactions through Square's payments system.[82] This kind of potentially conditioned cross-marketing raises concerns about potential tying one product or service to another over which the company has monopolistic or significant market power.[83]

There are also concerns about whether fintechs are meeting the needs of communities or providing service and investments equitably. Several fintechs have applied for or received industrial loan company (ILC) charters but have failed to adequately address Community Reinvestment Act issues that are relevant for merger review and enforcement. Square's ultimately successful ILC application proposed taking national online deposits and investing solely in Salt Lake City to meet its CRA obligations.[84] The fintech company SoFi's application to form an ILC proposed to serve lower-income consumers only with substandard products and its proposed assessment area did not mirror the geography where it did business.[85]

These real antitrust and consumer protection concerns would only be amplified by potential future alliances, vertical arrangements, or horizontal mergers that would consolidate the market power, range, and scope of these companies. The combination of a payments or online transaction provider with a retailer or a cryptocurrency or any of the biggest technology monopolists should raise alarm bells for antitrust and consumer protection authorities.

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79 Saunders, Lauren. National Consumer Law Center. "Fintech and Consumer Protection: A Snapshot." March 2019.

80 Saunders, Lauren. National Consumer Law Center. Testimony before the U.S. House of Representatives. Committee on Financial Services. Task Force on Financial Technology. "Banking on your data: The role of big data in financial services." November 21, 2019 at 16 to 20.

81 California Reinvestment Coalition. Letter to FDIC San Francisco Office. Re: Community group opposition to Square application for ILC charter. February 19, 2019 at 2.

82 Seppala, Erica. "Understanding your Square Capital loan offer." *Merchant Maverick*. June 13, 2019.

83 Freeman, Wilson C. and Jay B. Sykes. Congressional Research Service. "Antitrust and 'Big Tech.'" R45910. September 11, 2019 at 15 to 17.

84 California Reinvestment Coalition (2019) at 2.

85 AFREF. Letter to FDIC San Francisco Office. "Re: SoFi Bank—Deposit Insurance (New Bank)." August 20, 2017.

E. Bank mergers substantially contribute to systemic risk that threatens the entire economy

The Department of Justice should also assess whether the significant and negative effects of proposed bank mergers could pose "greater or more concentrated risks to the stability of the United States banking or financial system," as required by the Bank Holding Company Act. Bank mergers contribute significantly to the fragility of the financial system. The outcome of widespread financial crises is often a sharp consolidation across the economy as firms fail and are purchased by their rivals, something which should be of concern to antitrust authorities. Indeed, banks are permitted (and often encouraged) to purchase or acquire failed financial institutions irrespective of the possible negative effects on competition or the enhanced exercise of market power.[86]

The deregulation that facilitated and encouraged the past two decades of mergers was predicated on the idea that larger, more diversified, more complex financial institutions would be more efficient for consumers and more resilient to financial shocks. Any efficiency gains that have occurred were likely captured by shareholders and executives, since bank mergers tend to raise prices and reduce services for consumers (see Section C). The 2008 financial crisis demonstrated the fallacy of the contention that larger, more complex, more diversified, and more interconnected financial institutions are more resilient. This lesson was learned at great cost to the public, especially the most economically vulnerable people and communities.

Increased interconnectedness of larger financial institutions can make the financial system more fragile and pose more systemic risk to the economy.[87] Bigger banks can contribute to systemic risk by either contributing to a financial crisis or by being overly exposed to other firms that spark a financial crisis.[88] Asset size is the single clearest and most important element of bank significance to the financial system and the broader economy. Each dollar of bank assets represents a dollar of credit extended to the economy that may be withdrawn or go unsupported if a bank becomes distressed. Furthermore, bank size is directly related to the difficulty of resolving a failing bank, and deposit insurance exposure during such resolutions.

While interconnectedness could help absorb shocks, if the shocks permeate more of the system eventually a sufficiently large collapse can cause systemic economic harm.[89] For example, a run on short term liabilities of a highly leveraged large bank could require massive fire sales of the bank's assets in order to meet its commitments, which could likely lead to a system-wide collapse in asset prices. This would affect the valuation of other banks' balance sheets and potentially create a classic Fisher debt-deflation spiral.[90]

Before the financial crisis, there were many observers that worried that the merger wave could pose significant systemic risks to the financial system. In 2004, the Federal Reserve Bank of San Francisco warned that mergers that lead to "the creation of megabanks also heightens concerns about systemic risk. When banking activities are concentrated in a few very large banking companies, shocks to these

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[86] Wheelock (2011) at 420.
[87] Zhang (2017) at 27.
[88] Moch (2018) at 237.
[89] Zhang (2017) at 31.
[90] Fisher, Irving. "The Debt-Deflation Theory of Great Depressions." *Econometrica,* Vol. 1, No.4. October 1933.

individual companies could have repercussions to the financial system and the real economy."[91] A 2003 International Monetary Fund paper analyzed the mergers of the 1990s and found that larger financial firms took on more risk than smaller firms and that "the moral hazard induced incentives appear to have outweighed the risk reductions potentially available through scale or scope economies."[92]

These risks are magnified for banks that have ballooned through mergers to become too-big-to-fail. These institutions can be deemed to be "so large and interconnected with other financial institutions or so important in one or more financial markets that their failure would have caused losses and failures to spread to other institutions."[93] If too-big-to-fail banks experienced financial distress, the government would face a substantial incentive to intervene and prevent their failure, in order to prevent economic fallout.[94] The implicit too-big-to-fail rescue subsidy increases the fragility of the system where large banks are shielded from the negative consequences of their risk-taking and have an incentive to take greater risks than they otherwise would.[95]

The bigger banks like Wachovia and Washington Mutual (WaMu) that had been built through mergers were more likely to fail during the financial crisis than other banks.[96] These two banking behemoths were built through a series of large mergers. In 1997, Wachovia bought Central Fidelity National Bank in 2001 it merged with First Union (which had previously bought CoreStates Financial and The Money Store in 1998 as well as many smaller institutions in the early 1990s).[97] WaMu bought Great Western Financial in 1997, A.H. Ahmonson in 1998, and Dime Bancorp in 2001.[98] At the cusp of the financial crisis, the mergers built these two banks into some the biggest in the country. Wachovia was the third largest depository institution and WaMu was the sixth largest by 2005.[99] And when larger banks like Wachovia and WaMu do fail, the "larger the bank is, the more likely and widespread the banking crisis will be."[100]

After the crisis, multiple academic studies identified bank mergers as a substantial cause of the financial meltdown. A 2016 University of Pennsylvania paper found that the bank mergers and rising concentration led to higher leverage levels and lower levels of capitalization.[101] A 2017 Harvard University paper noted that deregulation that led to accelerated bank mergers and consolidation increased interconnectedness that "increased the chances of a large shock occurring."[102] A 2014 *Journal*

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[91] Kwan (2004) at 3.
[92] De Nicoló, Gianni. International Monetary Fund. "Bank Consolidation, Internationalization, and Conglomeration: Trends and Implications for Financial Risk." IMF Working Paper WP/03/158. July 2003 at 5.
[93] Financial Crisis Inquiry Commission (2011) at 386.
[94] AFREF. Letter to the Financial Stability Oversight Council. May 13, 2019 at 6.
[95] Omarova, Saule T. Cornell University Law School. "The 'Too Big To Fail' Problem" *Minnesota Law Review*. Vol. 103. January 2019.
[96] Kim and Seim (2016) at 2.
[97] Singletary, Michelle. "Acquisition will make Wachovia top Va. Bank." *Washington Post*. June 25, 1997; Day, Kathleen. "First Union to acquire Wachovia." *Washington Post*. April 17, 2001; "First Union merger is final." *CNN*. April 28, 1998; "First Union completes Money Store merger." *Charlotte Business Observer*. June 30, 1998; First Union Corporation. U.S. Securities and Exchange Commission. Form 10-K. Fiscal year ended December 31, 1994 at 62.
[98] Stavro, Barry. "Shareholders approve Great Western merger." *Los Angeles Times*. June 14, 1997; "Washington Mutual buys rival, purchase of A.H. Ahmanson creates nation's seventh-largest banking firm." *Spokane (WA) Spokesman-Review*. March 18, 1998; "Washington Mutual to buy Dime." *Baltimore Sun*. June 26, 2001.
[99] AFREF analysis of FDIC Statistics on Depository Institutions data.
[100] Moch (2018) at 243.
[101] Kim and Seim (2016) at 14.
[102] Zhang (2017) at 38.

of Banking & Finance study of 440 bank acquisitions between 1991 and 2009 found that "mergers coincide with statistically and economically significant increase in the contribution of the acquirer to the systemic risk of the financial sector."[103] A 2018 *Review of Economics* assessment of academic literature after the financial crisis concluded that "bank size is a key predictor for systemic risk and that the largest banks disproportionately contribute to overall risk."[104] A 2018 Federal Reserve Board paper empirically found that "stress experienced by banks in the top 1 percent of the size distribution leads to a statistically significant and negative impact on the real economy. This impact increases with the size of the bank."[105]

The Department of Justice must consider the impact proposed bank mergers might have not only on market competition and banking consumers but also on the resiliency of the financial system and the potential to exacerbate systemic risk to the economy. The fallout from these crises can further accelerate anticompetitive consolidation, which should make the Department of Justice more skeptical of mergers that could contribute to systemic risk.

Regulators are often forced to resolve large banks through the acquisition of the distressed bank by a still larger bank, a method that contributes to financial contagion and concentration of market power in the financial system.[106] Ultimately, Wells Fargo absorbed Wachovia and JP Morgan Chase took over WaMu after it became the largest bank failure in U.S. history.[107] Limiting the size of banking institutions through much more vigorous antitrust enforcement is a vital tool to mitigate the too-big-to-fail problem and to limit potential risks to financial stability that would require massive capital and liquidity stabilization programs, frequently with some degree of government support or backstop and ultimately delivering public funds if the government acts as lender of last resort to bail them out.

The 1995 Guidelines must also be reconsidered to address investment banking considerations: Since the Guidelines were written in 1995, several momentous changes have occurred which permitted bank holding companies to expand into what were previously markets dominated by investment banks and non-bank dealers. These include the Gramm-Leach-Bliley Act of 1999, which loosened restrictions on connections between commercial and investment banking, and the designation of several of the nation's largest investment banks as bank holding companies at the end of 2008.

We believe the changes since 1995 mean that bank mergers may require a close look at market concentration in wholesale investment banking markets as well as more localized markets. Mergers between banks and non-bank dealers or service providers in the capital markets may require such review as well. Over the past decade we have seen large-scale abuse of market power by dealers in the capital markets, including involvement by some of the largest American banks in the rigging of benchmark rates in the interest rate derivatives markets, involvement of large banks in bid-rigging in municipal securities markets, alleged bid rigging in Treasury markets, and more. These scandals clearly

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103 Weiss, Gregor N.F., Sascha Neumann, and Denefa Bostandzic. "Systemic risk and bank consolidation: International evidence." *Journal of Banking & Finance*. Vol. 40. 2014 at 166.
104 Moch (2018) at 231.
105 Lorenc, Amy G. and Jeffery Y. Zhang. Board of Governors of the Federal Reserve System. "The Differential Impact of Bank Size on Systemic Risk." Finance and Economics Discussion Series 2018-066. Washington: 2018 at 2.
106 AFREF. Letter to the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. January 22, 2019 at 4.
107 *USA Today* (2013).

demonstrate that cartelization and price manipulation in wholesale banking occurs in oligopoly situations with a small number of ostensibly competitive firms.

Jurisdiction over antitrust abuses in these markets is spread across a number of different agencies, including the Commodity Futures Trading Commission.[108] However, their authority is limited and does not include the right to review bank mergers. The large bank mega-mergers permitted over the past 20 years have certainly enhanced oligopoly power in wholesale banking markets.[109] The Division must be attentive to these considerations in its bank merger reviews.

The Department of Justice should also be concerned that a broader financial crisis could spur a broader consolidation in the economy that undermines competition, enhances market power of acquiring firms, and disadvantages rivals and consumers. Mergers declined in the immediate aftermath of the 2008 financial crisis relative to the pre-crisis boom, but the deal activity quickly resumed and those companies that did make acquisitions fared better than their competitors. Many firms are now looking at the Coronavirus downturn as a merger opportunity.[110]

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The 1995 bank merger guidelines failed to prevent massive consolidation in the banking industry that contributed to the systemic fragility that led to the 2008 financial crisis. Now is not the time to weaken the already insufficient bank merger guidelines. Instead, the Justice Department should undertake a thorough retrospective assessment of the impact of prior large bank mergers on consumers, customers, communities, and the stability of the financial system. Moreover, the Department should investigate whether the biggest banks are so large and exert so much market power, either alone or in coordination with their bigger rivals, that they should be broken up into smaller institutions that better serve the public.

The Justice Department must review future proposed bank mergers under a broader lens to consider not only the statutory requirements under the Clayton Act but also the Bank Holding Company Act and the Community Reinvestment Act that require merging banks to meet the convenience and needs and provide service and credit to the communities the banks' serve. This review must also consider the proposed merger's potential impact on the risk that a larger bank could pose to the financial system and the overall economy.

We appreciate the opportunity to comment on this important issue. If you have any further questions or would like to discuss our comments, please contact Patrick Woodall at
[redacted]

Respectfully submitted,

Americans for Financial Reform Education Fund

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108 Scopino, Gregory. "Expanding the reach of the Commodity Exchange Act's antitrust consideration." *Hofstra Law Review*. Vol. 45, No. 2. 2016.

109 See Baker, Donald I. "From Philadelphia National Bank to Too Big to Fail: How modern financial markets have outrun antitrust law as a source of useful structural remedies." *Antitrust Law Journal*. Vol. 80, No. 2. 2015.

110 Salsberg, Brian. "The case for M&A during a downturn." *Harvard Business Review*. May 17, 2020.