October 15, 2020

Via Electronic Mail

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

Re: Department of Justice enforcement policy respecting bank mergers

Dear Assistant Attorney General Delrahim:

The Bank Policy Institute (**BPI**[1]) submits this letter in response to the request of the Department of Justice's Antitrust Division for comments on the question of whether the Antitrust Division should revise the 1995 Bank Merger Competitive Review guidelines (**1995 Bank Merger Guidelines**[2]). For the reasons explained below, BPI encourages the Division to redress the sole, and unjustified, exception to its otherwise generally applicable merger enforcement policy—the banking industry. This revision is necessary not merely for consistency of approach, but to recognize and incorporate the fundamental changes that have occurred in the competitive landscape for the banking industry since industry guidelines were last promulgated 25 years ago.

In the final paragraph of its press release announcing the 2010 Horizontal Merger Guidelines (**2010 HMGs**[3]) adopted shortly after the Great Recession, the Department

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[1] BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States.

[2] U.S. DEP'T OF JUSTICE, BANK MERGER COMPETITIVE REVIEW – INTRODUCTION AND OVERVIEW (1995).

[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010).

carved the banking industry alone out of the Department's otherwise generally applicable merger-enforcement policy:

> The Bank Merger Competitive Review guidelines, which the federal banking agencies and the Department of Justice developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged. The Bank Merger Competitive Review guidelines can be found at http://www.justice.gov/atr/merger-enforcement.[4]

The Department provided no explanation for the carve-out, and special treatment of the banking industry was not a subject of any of the five public hearings preceding the 2010 HMGs. Neither the Department nor the Federal Trade Commission carved any other industry out of the 2010 HMGs. The carve-out was unnecessary at that time and remains unnecessary and inappropriate today given the realities of competition in today's banking markets. It imposes undue costs and burden on bank merger applicants, the bank regulatory agencies, and the Department, and thus stands in the way of efficient functioning of markets and government. And it is particularly inapt because, as discussed in more detail below, banks compete directly against non-banks in a wide range of areas, making disparate treatment particularly unsupportable.[5]

Executive Summary

This letter provides an overview of the framework governing the review of bank mergers and proposes to bring the banking industry in line with every other industry by applying the Herfindahl-Hirschman Index (**HHI**) threshold set forth in the 2010 HMGs (under which the Department presumes competitive harm from mergers): a post-merger HHI above 2,500 points. This would replace the 1,800-point threshold that the Department originally set forth in the 1982 Merger Guidelines and is the linchpin of the 1995 Bank Merger Guidelines.

A comprehensive solution will require the Department to coordinate with federal banking regulators, which currently apply the 1,800-point standard as well. But in view of the Department's expertise, revising the Department's approach will be an essential step toward ensuring analytical consistency of merger review across industries and making sure that

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4 Department of Justice, *Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines* (Aug. 19, 2010), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-issue-revised-horizontal-merger-guidelines.

5 To further a range of other policies, banks are subject to consolidated supervision of many aspects of their business, including capital, liquidity, and resolution-planning requirements. To the extent that disparate treatment of banks and non-banks under the antitrust laws discourages the efficient operation of banks, antitrust threatens to undermine these other policy priorities by discouraging the use of banks and encouraging the use of non-bank substitutes.

the banking industry is afforded the same enhanced transparency and updated judgments reflected in the 2010 HMGs.

As detailed below, this update is compelling given the significant changes to the competitive landscape in banking since 1995, including important developments just over the past decade. In the new competitive environment, there is a national dimension of competition, especially via Fintech firms and online banking, that is affecting all traditional banking product segments.

Banks currently face competition from other kinds of firms that were either not competitors at all or only minor competitors in 1995 or even, in many cases, as recently as 2010. Specifically, competition has increased from: (1) nonbank firms, including new and disruptive financial technology (**FinTech**) competitors, that compete in all aspects of consumer lending, (2) money market funds (**MMFs**), (3) internet banks focused on providing a wide range of banking services to individuals, and (4) other providers of commercial-banking products that are not based on local branches, including FinTech competitors focused on small-business and other commercial lending and a wide variety of so-called credit funds and other pools of money competing for middle-market and other specified commercial lending. In addition, local depository institutions increasingly face competition from non-local depository institutions offering various deposit and loan options via the internet to consumers across the country.

Moreover, banking markets have been made more competitive as a result of major advances in data production and analytics. These include new data sources and analytical tools that financial service providers can use for marketing and for credit evaluations, as well as informational tools for use by consumers in making financial decisions to compare product offerings from different institutions. Not only has this new informational environment facilitated the growth of FinTech firms and online banking services, but it has of itself enhanced competition, even among local depository institutions. In other words, banking markets have become more informationally efficient, which may be as important a factor for ensuring competition as the number of competing firms.

We recognize, of course, that banking markets are increasingly complex and that use of a single, local market deposit-based HHI threshold for assessing degree of competition represents a simplification of reality. We believe however, that more complicated approaches are unlikely to be workable, and that simply raising the current threshold to 2,500 points as an overarching approach is the best way forward.

Background

The Department and the three federal bank regulators—(1) the Board of Governors of the Federal Reserve System (**Federal Reserve**), (2) the Office of the Comptroller of the Currency (**OCC**), and (3) the Federal Deposit Insurance Corporation (**FDIC**)—have authority

to review the competitive effects of bank mergers within their respective jurisdictions.[6] Congress has generally exempted bank mergers from the premerger notification requirements of the Hart-Scott-Rodino Act,[7] but has given the Department the independent authority to prevent consummation of bank mergers irrespective of whether they have received approval from the applicable banking regulator.[8]

What has emerged out of this statutory scheme is a laudable process of inter-agency coordination under which banking regulators typically defer their approval of proposed banking mergers raising competition concerns until receipt of a report from the Department of Justice setting forth what divestitures, if any, would be appropriate to ensure that a proposed combination does not threaten harm to competition, accompanied, if a divestiture is deemed necessary, by the parties' agreement to make those divestitures. The Antitrust Division has played a leading role in fostering effective inter-agency coordination.

The coordination among banking regulators and the Department has traditionally accounted for changes in the Department's merger-enforcement practice. For instance, the Department's 1982 Merger Guidelines gave an enhanced role to the HHI in merger reviews by explaining that the Department was "likely to challenge mergers" resulting in a post-merger HHI above 1,800 points and an increase in the HHI of more than 100 points.[9] In 1985, the Acting Assistant Attorney General issued a letter explaining what came to be known as the Mississippi Rule (because it arose in connection with a merger involving a Mississippi bank), under which the Department would generally not challenge banking mergers in which the post-merger HHI is less than 1,800 points or results in an increase of less than 200 points.[10] The 200-point change threshold (higher than the 100-point change threshold otherwise applicable under the 1982 Merger Guidelines) reflected "the competitive effect of nonbank competitors, including limited-purpose lenders (for example, consumer finance companies) and other nondepository financial entities (for example, production credit associations)."[11]

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6 12 U.S.C. § 1828(c).

7 15 U.S.C. §§ 18a(c)(7)-(8).

8 12 U.S.C. §§ 1828(c)(7)(A), 1849(b).

9 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § III.A.1.c (1982).

10 *See* STEPHEN A. RHODES & JIM BURKE, ECONOMIC AND POLITICAL FOUNDATIONS OF SECTION 7 ENFORCEMENT IN THE 1980'S, 35 ANTITRUST BULL. 373, 433-34 (Summer 1990).

11 *Id.* at 434.

The Department's 1995 Bank Merger Guidelines provide a description of the Department's application of those HHI thresholds.[12] In general, the Department preliminarily derives market shares of financial institutions within specified geographic regions (often a county or a group of contiguous counties, and often consistent with the way in which the Federal Reserve defines geographic markets[13]) from the local deposit levels of banks, thrifts, and credit unions[14] with branches in the region, in line with the approach of the Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321, 331, 364-65 (1963). Local deposit-based HHIs are, of course, only one kind of evidence relevant to the assessment of a bank merger's competitive effects.[15] But because of the significant number of bank mergers reviewed by the Department every year,[16] the Department's HHI screens based on deposits

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[12] A year before issuance of the 1995 Bank Merger Guidelines, Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which hastened removal of historical restrictions on interstate banking and benefitted consumers by facilitating entry. *See, e.g.*, Randall S. Kroszner, *The Effect of Removing Geographic Restrictions on Banking in the United States: Lessons for Europe,* 17 FIN. MARKETS, INSTITUTIONS & INSTRUMENTS 5 (Feb. 2008); Alan N. Berger et al., *The Dynamics of Market Entry: The Effects of Mergers and Acquisitions on Entry in the Banking Industry*, 77 J. BUS. 797 (2004); Alan N. Berger et al., *The Effects of Dynamic Changes in Bank Competition on the Supply of Small Business Credit*, 50 EUR. FIN. REV. 115 (2001); Jith Jayaratne & Philip E Strahan, *Entry Restrictions, Industry Evolution, and Dynamic Efficiency: Evidence from Commercial Banking*, 41 J. LAW & ECON. 239 (1998).

[13] The Federal Reserve Bank of St. Louis maintains a website called the Competitive Analysis and Structure Source Instrument for Depository Institutions (known as CASSIDI), which collects the geographic market definitions established by the regional banks of the Federal Reserve System. The regional banks periodically refine those definitions to reflect changing competitive dynamics.

[14] As they expand their eligible customers, as well as their product and service offerings, credit unions have sharply increased their competitive significance. Indeed, a number of credit unions have recently acquired banks. In addition, "[i]n rural markets where agriculture is a primary business activity, the Farm Credit System's retail lenders, known as Farm Credit Associations (Associations), are particularly important nonbank competitors." Charles S. Morris et al., *Competition in Local Agricultural Lending Markets: The Effect of the Farm Credit System*, FED. RES. BANK OF KANSAS CITY ECON. REV. 51-52 (4th Quarter 2015), https://www.kansascityfed.org/~/media/files/publicat/econrev/econrevarchive/2015/4q15morriswilkinsonhogue.pdf.

[15] In its list of topics and issues, the Division welcomed public comment on the delineation of other candidate product and geographic markets in addition to those underlying the initial HHI screens. In its 1995 Bank Merger Guidelines, the Department reserved the right to review the effects of a proposed merger "in all relevant markets," an approach consistent with the 2010 HMGs.

[16] *American Banker* reports 294 bank mergers in 2015, 250 in 2016, 263 in 2017, 259 in 2018, and 271 in 2019. Paul Davis, *6 takeaways from bank M&A in 2019*, AM. BANKER (Jan. 5, 2020), https://www.americanbanker.com/list/6-takeaways-from-bank-m-a-in-2019#:~:text=Overall%2C%20271%20mergers%20were%20announced,fiscal%2C%20market%20and%20other%20factors.

provide the banking community transparency and predictability about the Department's merger-review process.[17]

The 1,800-point threshold has come to play an important part in the Federal Reserve's merger-review procedure as well. Mergers that exceed the threshold cannot be subject to streamlined review procedures.[18] The 1,800-point standard similarly plays a central role in the review processes at the OCC[19] and FDIC for bank mergers within their respective jurisdictions.[20]

The 2010 HMGs

To provide greater transparency into enforcement policy, the Department issued updated Horizontal Merger Guidelines in 2010. The 2010 HMGs reflect "the legal and economic developments since the 1992 guidelines were issued" and were "not intended to represent a change in the direction of merger review policy."[21] Instead, they reflect how the Department and the Federal Trade Commission actually enforce the merger laws and were thus intended to "offer more clarity on the merger review process to better assist the business community and, in particular, parties to mergers and acquisitions."[22]

As part of that effort to better reflect the agencies' actual practices, the Department "[u]pdate[d] the concentration thresholds that determine whether a transaction warrants further scrutiny."[23] Of particular relevance here, the Department stated in the 2010 HMGs that only those mergers resulting in an HHI over 2,500 points (and an increase in the HHI of more than 200 points) trigger a presumption of competitive harm.[24] That increase from 1,800 points is consistent with the Department's actual record of merger challenges outside the banking context (both before and after issuance of the 2010 HMGs).

Several months of public hearings and comment preceded the 2010 HMGs. BPI is unaware of any public debate raising the need for a different analytical framework for assessing the competitive effects of bank mergers. Nonetheless, the Department carved the banking industry out of the 2010 HMGs without explanation.

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[17] A competition-advocacy project for the Department to consider as part of its review of the 1995 Bank Merger Guidelines is working with the FDIC to develop more precise guidance on how institutions should assign deposits to their branches for annual reporting purposes.

[18] 12 C.F.R. § 225.14(c)(5)(i)(B).

[19] OCC, *Comptroller's Licensing Manual, Business Combinations* 59-62 (2017), https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/bizcombo.pdf.

[20] FDIC, *FDIC Statement of Policy on Bank Merger Transactions*, https://www.fdic.gov/regulations/laws/rules/5000-1200.html.

[21] Department 2010 Press Release, *supra* note 4.

[22] *Id*.

[23] *Id*.

[24] 2010 HMGs § 5.3.

Competitive dynamics

Reconciling the HHI threshold applicable to bank mergers with the HHI threshold applicable to other industries is compelling because of the many competitive alternatives that exist today but are not accounted for in deposit-based HHIs applicable to the banking industry. The magnitude of out-of-market forces has increased sharply since 1985 when the Mississippi Rule was promulgated on the basis that out-of-market competitive threats counseled in favor of a higher HHI threshold for the banking industry than what was applicable at that time to other industries (the opposite of the situation today). These sources of additional competition should provide the Department substantial assurance that a move to a 2,500-point threshold would not threaten harm to any user of banking services.

First, individuals today have an impressively broad array of bank and non-bank alternatives to meet their borrowing needs. All four of the largest categories of household debt—(1) mortgages (69% of total household debt), (2) student loans (11%), (3) auto loans (9%), and (4) credit cards (6%)[25]—are offered by competitors without local retail bank branches. The largest originator of home mortgages in the country is a nonbank—QuickenLoans—an independent mortgage company that operates nationally without a retail-branch network,[26] as does SallieMae, the "leader of the education finance market" with an "[i]ndustry leading 54% market share."[27] Similarly, consumers are able to obtain auto loans from the lending arms of car manufacturers, and many large issuers of credit cards compete to attract cardholders nationally, without the need for local branches and deposit-taking.

Second, banks directly compete to attract the deposits and savings of individuals against retail MMFs, which are mutual funds that are required under the Investment Company Act of 1940 to invest in short-term, high-quality securities (such as government notes, certificates of deposit, and commercial paper). Financial institutions developed MMFs in the 1970s as an option for customers to purchase a pool of securities that generally provided higher returns than interest-bearing bank accounts.[28] In addition to typically earning higher rates of

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25 *See* Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (August 2020), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2020Q2.pdf.

26 Consumer Finance Protection Bureau, *Data Point: 2019 Mortgage Market Activity and Trends* 61 (June 2020) ("With about 541,000 originated loans, Quicken Loans continued to be the highest volume lender."), https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.

27 SLM Corp., *Investor Presentation* (First Quarter 2020) https://www.salliemae.com/assets/investors/webcasts/2020_Q1_Investor_Presentation.pdf.

28 *See* U.S. Securities and Exchange Commission, *Money Market Funds*, https://www.sec.gov/spotlight/money-market.shtml.

return than bank accounts, many retail MMFs offer services such as check-writing and other retail-banking functions.[29]

That is, retail MMFs are directly focused on competing for the business of retail-banking customers and are designed to serve the needs of individuals whose primary goal is the preservation of principal and who are willing to accept a modest return in exchange for safety and liquidity.[30] However, this dimension of competition is not factored into the deposit-based HHIs that are calculated to assess local market competitiveness. Major retail MMF providers include Fidelity Investments, Vanguard Group, and Charles Schwab Corporation (which is also a banking organization). Retail MMF assets totaled about $1.37 trillion in 2019.[31]

Third, internet banks (which generally book their deposits at a central location and are thus excluded from deposit-based shares based on branch location) are a growing and vibrant alternative for consumers seeking a bundle of retail banking services. Although precise data are unavailable, some analysts suggest that online banks have "about 10% of the overall deposit market."[32] COVID-19 has accelerated consumer usage of online-banking tools.[33]

Fourth, the commercial-banking space has also experienced a surge in non-branch-based competition. FinTech competitors are very active commercial lenders: the Federal Reserve reports that 20% of the country's small businesses sought financing in 2019 from "nonbank alternative and marketplace lenders, including Lending Club, OnDeck, CAN Capital, and PayPal Working Capital."[34] This is again an entire competitive category that did not exist when the Department announced the Mississippi Rule. There is also a large group of so-

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[29] U.S. Department of the Treasury Financial Stability Oversight Council, *Proposed Recommendations Regarding Money Market Mutual Funds Reform* 23 (November 2012).

[30] *See* Jonathan Macey, *Reducing Systemic Risk: The Role of Money Market Mutual Funds as Substitutes for Federally Insured Bank Deposits*, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3100&context=fss_papers.

[31] INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACT BOOK 231 (2018), https://www.ici.org/pdf/2020_factbook.pdf. The FDIC reported total domestic deposits of about $14.3 trillion in March 2020. *See* https://www.fdic.gov/bank/statistical/stats/2020mar/industry.pdf.

[32] Reuters Staff, *Online banks to take bigger share of U.S. deposit market: Evercore* (Sept. 23, 2019), https://www.reuters.com/article/us-onlinesavings-evercore/online-banks-to-take-bigger-share-of-u-s-deposit-market-evercore-idUSKBN1W81F5. *See also supra* n.17.

[33] *See* Ellen Sheng, *Coronavirus crisis mobile banking surge is a shift that's likely to stick* (May 27, 2020), https://www.cnbc.com/2020/05/27/coronavirus-crisis-mobile-banking-surge-is-a-shift-likely-to-stick.html.

[34] FEDERAL RESERVE BANKS OF ATLANTA, BOSTON, CHICAGO, CLEVELAND, DALLAS, KANSAS CITY, MINNEAPOLIS, NEW YORK, PHILADELPHIA, RICHMOND, ST. LOUIS, AND SAN FRANCISCO, SMALL BUSINESS CREDIT SURVEY (2020), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/2020-sbcs-employer-firms-report.

called credit funds and other pools of money competing for middle-market and other specified commercial lending.[35]

And no less importantly, the nation's largest banks compete for commercial-banking opportunities throughout the country through internet services and other digital-delivery methodologies. As previously noted,[36] the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 had just been enacted when the 1995 Bank Merger Guidelines were issued, and banking organizations now, 25 years on, compete much more aggressively for deposit and loan customers in geographies across the country without needing to rely on a branch presence.

These powerful competitive realities, which are not part of the HHI thresholds derived from local branch deposits, should provide the Department considerable comfort that upwardly revising the bank HHI thresholds to the thresholds applicable to all other industries (which are nonbinding in any event, because the Department always has the right to challenge proposed mergers that threaten consumer harm no matter the HHI[37]) will not give rise to consumer harm.

In addition to these new dimensions of competition for bank deposit and loan customers, a new informational environment has evolved that has sharpened competition in banking markets. FinTech firms and online lenders, as well as traditional banking institutions via their own, proprietary innovations or in partnership with FinTech companies, are turning to new sources of data (including unstructured "big data") and developing new analytic approaches based on machine learning, to inform their credit evaluation decisions and product marketing strategies. Such innovation enhances competition for banking customers by mitigating informational barriers that may have advantaged local lenders or those with pre-existing relationships with borrowers.

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35 *E.g.,* David Brooke, *Direct lenders ready for bonanza as US economy cool* (Nov. 14, 2019), https://www.reuters.com/article/direct-lending/direct-lenders-ready-for-bonanza-as-us-economy-cools-idUSL2N27U179.

36 *Supra* n.12._

37 In its list of topics and issues, the Division welcomed public comment on whether competitive dynamics could differ in different geographies (for instance, rural and urban regions). In its 1995 Bank Merger Guidelines, the Department reserved the right to investigate mergers that did not cross the HHI threshold to take into account local dynamics, an approach consistent with the 2010 HMGs. As noted above, *supra* n.14, farm credit associations may play a particularly significant role in rural communities.

Indeed, the federal banking agencies and the CFPB have recognized the benefits of using alternative data in credit underwriting for banking customers in their Interagency Statement on the Use of Alternative Data in Credit Underwriting, issued in December 2019.[38] The agencies noted that the use of alternative data (information not typically found in core credit files of nationwide consumer reporting agencies; for example, cash flow data) may improve the speed and accuracy of credit evaluations. Thus, alternative data can enable consumers to obtain additional products or more favorable pricing or terms. In addition, the CFPB has opined that, for some consumers, the use of unconventional sources of information or "alternative data," along with the expanded use of machine learning, may be a way to increase access to credit or decrease the cost of credit. Increased computing power and the expanded use of machine learning can potentially identify relationships not otherwise readily discoverable, enabling increased credit access or lower borrowing costs for some consumers, including small businesses.[39]

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[38] FRB, CFPB, FDIC, NCUA, and OCC, *Interagency Statement on the Use of Alternative Data in Credit Underwriting* (Dec. 3, 2019), https://files.consumerfinance.gov/f/documents/cfpb_interagencystatement_alternative-data.pdf.

[39] Patrice Ficklin & Paul Watkins, *An update on Credit Access and the Bureau's First No-Action Letter*, CFPB Blog (Aug. 6, 2019), https://www.consumerfinance.gov/about-us/blog/update-credit-accessand-no-action-letter/.

For the foregoing reasons, BPI requests that the Division (1) revise the 1995 Bank Merger Guidelines to reflect that proposed bank mergers do not give rise to a presumption of competitive harm unless the post-merger exceeds 2,500 points and increases more than 200 points, and (2) thereafter coordinate with the Federal Reserve, the OCC, and the FDIC to help ensure consistent assessment of the competitive effects of proposed bank mergers. In summary, there should be compelling circumstances for treating bank mergers more restrictively than all other industries—but the compelling circumstances here show that bank mergers should be analyzed at least under no more exacting standards than other industries.

Sincerely,

Gregg Rozansky

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