Before the
DEPARTMENT OF JUSTICE
Antitrust Division
Washington, D.C. 20530

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Antitrust Division	)
Banking Guidelines Review	)
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COMMENT OF FTC COMMISSIONER ROHIT CHOPRA* AND PROFESSOR JEREMY C. KRESS†

We write to urge the Department of Justice (DOJ) and the federal banking agencies to strengthen the Bank Merger Competitive Review Guidelines (the Bank Merger Guidelines) and avoid reforms that would further increase concentration in the financial sector. To date, the Bank Merger Guidelines have failed to protect consumers, businesses, and the broader financial system from the harmful effects of bank consolidation.

We make four points in this comment. First, the DOJ's lax oversight of bank mergers has harmed small businesses and consumers, especially in low- and moderate-income (LMI) communities. Second, the DOJ's current approach ignores many of the non-price harms that stem from bank mergers, including increased systemic risks, expansion of "too big to fail" subsidies, exacerbated conflicts of interest, and reductions in key measures of product quality, such as consumer privacy. Third, the DOJ should strengthen its review standards rather than adopt approaches that would make bank merger review even less rigorous. Finally, to preserve consistency in bank merger oversight, the DOJ should work jointly with the federal banking agencies in reviewing the interagency Bank Merger Guidelines.

1. DOJ's Lax Merger Oversight Harms Consumers and Small Businesses by Increasing Prices and Restricting Credit

Based on traditional measures of competitiveness, the Bank Merger Guidelines have failed to protect U.S. consumers and businesses from the negative consequences of bank consolidation.

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* This comment represents Commissioner Chopra's own views and does not necessarily reflect those of the Federal Trade Commission or any other Commissioner.

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Bank mergers have increased the cost and reduced the availability of credit,[1] inflated the fees that banks charge for basic financial services,[2] and depressed the interest rates that banks pay to their accountholders.[3] Moreover, these direct consequences of bank consolidation have led to several disturbing knock-on effects, including wider income inequality in areas affected by bank mergers and less small business formation. The current Bank Merger Guidelines, in sum, are woefully inadequate to protect consumers and the broader economy.

Critically, the negative effects of bank consolidation have been especially severe for LMI communities, which have borne the brunt of the DOJ's laissez-faire approach. In the aftermath of bank consolidation, already-underserved LMI neighborhoods have even fewer options for obtaining basic financial services. Thus, high-fee check-cashing companies and other predatory financial service providers have proliferated in LMI areas affected by bank consolidation.[4] The detrimental consequences for LMI neighborhoods are particularly pronounced when an acquiring bank is from out-of-state, since the acquirer is not rooted in the local community.[5] As a result of this disconnect, households in LMI neighborhoods have been more likely to experience evictions and have debts sent to collection agencies following bank mergers.[6] Due to the ensuing economic hardships, bank consolidation has even been associated with increases in burglary and other property crimes, with the largest effects in LMI areas.[7]

Small businesses also suffer because of the DOJ's inadequate oversight of bank mergers. According to numerous empirical studies, bank mergers have led to a decline in small business credit availability.[8] For small businesses that have been able to obtain loans after a merger, credit has become more expensive and average loan size has shrunk.[9] As a result, fewer entrepreneurs have started small businesses following bank consolidation.[10] This reduction in small business

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1 *See, e.g.*, Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 509-14 (2006).

2 *See, e.g.*, Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 6-9 (Dec. 1, 2018).

3 *See* Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry*, 46 J. INDUS. ECON. 433, 442-449 (1998).

4 *See* Bord, *supra* note 2, at 23-25.

5 *See* GARY A. DYMSKI, THE BANK MERGER WAVE: THE SOCIAL AND ECONOMIC CONSEQUENCES OF FINANCIAL CONSOLIDATION 249-50 (1999).

6 *See* Bord, *supra* note 2, at 30-32.

7 *See* Garmaise & Moskowitz, *supra* note 1, at 518-23.

8 *See, e.g.*, Allen N. Berger et al., *The Effects of Bank Mergers and Acquisitions on Small Business Lending*, 50 J. FIN. ECON. 187, 217, 222 (1998); Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237, 1248-58 (2007); Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 J. FIN. 329, 364 (2002). The detrimental effects on small business lending are particularly severe when a community bank merges with a nonlocal acquirer. *See* Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* 18-20 (Fed. Res. Bank of Phila., Working Paper No. 18-18), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2018/wp18-18.pdf.

9 *See* Garmaise & Moskowitz, *supra* note 1, at 515; Sapienza, *supra* note 8, at 354.

10 *See* Bill Francis et al., *Bank Consolidation and New Business Formation*, 32 J. BANKING & FIN. 1598, 1603-09 (2008).

lending and formation has had a broader impact on economic development. For example, with fewer small businesses forming and expanding, bank mergers have been associated with decreases in commercial real estate development, new construction activity, and local property prices.[11] Meanwhile, fewer small businesses have led to fewer good jobs. Indeed, in areas affected by bank mergers, unemployment has increased, median income has declined, and income inequality has become even more severe.[12]

Thus, the DOJ's lax approach to bank merger oversight has raised costs, restricted credit, and has been particularly harmful to LMI communities and small businesses. Nonetheless, the DOJ continues to greenlight bank mergers with, at best, only modest divestitures. The current Bank Merger Guidelines, in sum, are insufficient to protect consumers from increased prices, lower credit availability, and all of the ensuing consequences.

2. DOJ's Current Approach Ignores Systemic Risks and Other Non-Price Merger Harms

The detrimental consequences of bank mergers are not limited to higher prices and lower availability of financial products. As Assistant Attorney General Makan Delrahim said in June, "competition has price and non-price dimensions," and "[p]rice effects alone do not provide a complete picture of market dynamics."[13] In the banking sector, non-price consequences of bank consolidation have harmed society in numerous ways. Specifically, bank consolidation has weakened the resilience of the financial system, intensified the "too big to fail" subsidy, exacerbated conflicts of interest, and impaired product quality. Under the current Bank Merger Guidelines, however, the DOJ has ignored these harmful consequences.

First, lax oversight of bank mergers has intensified risks to U.S. financial stability. In the lead-up to the 2008 financial crisis, the DOJ authorized a series of megamergers that created "too big to fail" banks and ultimately inflicted severe damage on the global economy.[14] In response to the crisis, policymakers compounded the damage by orchestrating several more megamergers, forming even bigger banks.[15] Numerous empirical studies have demonstrated that large bank mergers threaten the resilience of the financial sector.[16] When excessive consolidation triggers a

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[11] *See* Garmaise & Moskowitz, *supra* note 1, at 516-17.

[12] *See id*. at 518.

[13] Makan Delrahim, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at the Antitrust New Frontiers Conference: "…And Justice for All": Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers.

[14] *See* Donald I. Baker, *From* Philadelphia National Bank *to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 359-62 (2015).

[15] *See id.* (discussing Bank of America's crisis-driven acquisition of Merrill Lynch, JPMorgan's takeover of Bear Stearns and Washington Mutual, and Wells Fargo's merger with Wachovia).

[16] *See, e.g*., Simone Varotto & Lei Zhao, *Systemic Risk and Bank Size*, 82 J. INT'L MONEY & FIN. 45, 53-54 (2018) (concluding that a bank's size, while not determinative, is the primary driver of its systemic riskiness); Gregor N.F. Weiss et al., *Systemic Risk and Bank Consolidation: International Evidence*, 40 J. BANKING & FIN. 165, 174-77 (2014) (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors); Andre Uhde & Ulrich Heimeshoff, *Consolidation in Banking and Financial Stability in Europe: Empirical Evidence*, 33 J.

financial crisis—as it did in 2008—consumers suffer the consequences. Financial sector resilience, therefore, should be a central consideration in bank merger competitive analysis. Unfortunately, the DOJ's current approach unwisely ignores the risks that bank consolidation poses to the resilience of the financial system.

Megamergers not only threaten financial stability, they also give large banks unfair funding advantages over smaller firms, thereby distorting competition and deterring new entrants. Market participants believe that the government will continue to bail out "too big to fail" banks, rather than let them collapse.[17] These firms are able to borrow at favorable rates and therefore enjoy cost advantages over their smaller peers.[18] When larger banks merge, they obtain the advantage of this "too big to fail" subsidy and distort the competitive dynamics of the banking sector. To date, however, the DOJ has not considered the extent to which merging banks would benefit from this financial advantage.

Moreover, cross-sectoral mergers have harmed competition by exacerbating conflicts of interest. The current Bank Merger Guidelines were developed in 1995, before the Gramm-Leach-Bliley Act of 1999 permitted certain bank holding companies to engage in nonbanking activities including brokering, dealing, and insurance underwriting. Banks' expansion into these activities—in many cases, by merger—has created the potential for exploitative conflicts of interest across banks' different business lines. Most recently, this problem surfaced this summer when Citigroup resigned as lead arranger for a collateralized loan obligation managed by Brigade Capital Management in apparent retaliation for a dispute over a $175 million loan payment Citi erroneously sent to Brigade on behalf of its client, Revlon.[19] The DOJ's outdated approach to bank mergers myopically ignores the potential for such conflicts of interest across business lines.

Excessive consolidation also impairs the quality of bank products and services. As Assistant Attorney General Delrahim recognized, "diminished quality is … a type of harm to competition."[20] In banking, consumer access to branches is a critical aspect of quality because of the benefits of in-person service, such as convenience and familiarity with one's banker.[21] Indeed, despite the proliferation of online banking, the overwhelming majority of consumers still rely on brick-and-

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BANKING & FIN. 1299, 1305-10 (2009) (concluding that national banking market concentration has a negative effect on financial stability).

[17] *See* Jeremy C. Kress, *Solving Banking's "Too Big to Manage Problem,"* 104 MINN. L. REV. 171, 192 (2019).

[18] *See, e.g.*, Bhanu Balasubramnian & Ken B. Cyree, *Has Market Discipline Improved After the Dodd-Frank Act?*, 41 J. BANKING & FIN. 155, 165 (2014); Viral V. Acharya et al., *The End of Market Discipline? Investor Expectations of Implicit Government Guarantees* 30–33 (Munich Personal RePEc Archive, Working Paper No. 79700, 2016).

[19] *See* Sally Bakewell & Katherine Doherty, *Citi Resigns Role on Brigade CLO Deal Amid Escalating Loan Feud*, BLOOMBERG (Aug. 18, 2020), https://www.bloomberg.com/news/articles/2020-08-18/citi-resigns-role-on-brigade-clo-deal-amid-escalating-loan-feud.

[20] Delrahim, *supra* note 13.

[21] For many consumers, convenience is so critical that they choose to bank with institutions with nearby branches, even if those institutions offer less favorable product terms. *See* Mary Wisniewski, *Survey: While Checking Fees Vary Wildly By Race and Age, Americans Stay Loyal to Their Banks*, BANKRATE (Jan. 15, 2020), https://www.bankrate.com/banking/best-banks-consumer-survey-2020/.

mortar branches.[22] Bank mergers, however, have led to widespread branch closures, inconveniencing customers who previously benefitted from proximity to bank offices.[23] Troublingly, branch closures following bank mergers are typically concentrated in LMI areas, further disadvantaging vulnerable populations.[24] To date, though, the DOJ has failed to consider reductions in branch access in its bank merger analysis.

The DOJ's existing bank merger review framework has likewise ignored harms to consumer privacy and exploitation of consumer data. As Assistant Attorney General Delrahim noted, "privacy can be an important dimension of quality."[25] The current Bank Merger Guidelines, however, overlook the ways in which financial institutions gain a competitive advantage by harvesting and monetizing customer data. Bank mergers are increasingly motivated by the acquisition of customers' personal data in order to cross-sell additional financial products.[26] Moreover, some banks sell transaction-level data to retailers, which target specific promotions to consumers based on their unique purchasing habits.[27] Mergers allow banks to collect and combine more customer data in new ways. This merged data trove not only undermines customers' privacy, it also exposes them to more risks given the data breaches that have plagued large banks in recent years.[28] Accordingly, the DOJ's bank merger framework ought to take into account the effect that consolidation has on consumer data and privacy.

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[22] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2016, at 9 (2016) (noting that 84 percent of survey respondents use bank branches), https://www federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf.

[23] *See* Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J.: APPLIED ECON. 1, 15-17 (2019) (finding evidence of significant branch closures by merging banks); Lydia DePillis, *The Internet Didn't Kill Bank Branches. Bank Mergers Did.*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did.

[24] *See* DYMSKI, *supra* note 5, at 95.

[25] Delrahim, *supra* note 13.

[26] For example, Morgan Stanley's recent takeover of E*Trade was reportedly prompted by Morgan Stanley's desire to acquire E*Trade's five million customer accounts. *See* Liz Hoffman, *Morgan Stanley Is Buying E*Trade, Betting on Smaller Customers*, WALL ST. J. (Feb. 20, 2020), https://www.wsj.com/articles/morgan-stanley-is-buying-e-trade-betting-on-littler-customers-11582201440. Morgan Stanley's acquisition of voluminous customer data is problematic given the recent data breach for which the Office of the Comptroller of the Currency fined Morgan Stanley $60 million. *See* Jesse Hamilton, *Morgan Stanley Fined $60 Million in Failed Data-Center Oversight*, BLOOMBERG (Oct. 8, 2020), https://www.bloomberg.com/news/articles/2020-10-08/morgan-stanley-fined-60-million-over-failed-hardware-oversight.

[27] *See* Anick Jesdanun, *For Banks, Data on Your Spending Habits Could Be a Gold Mine*, L.A. TIMES (Dec. 3, 2019), https://www.latimes.com/business/story/2019-12-03/banks-mining-data-on-your-spending-habits; Blake Ellis, *The Banks' Billion-Dollar Idea*, CNN MONEY (July 8, 2011), https://money.cnn.com/2011/07/06/pf/banks_sell_shopping_data/index.htm.

[28] *See, e.g.*, Emily Flitter & Karen Weise, *Capital One Data Breach Compromises Data of Over 100 Million*, N.Y. TIMES (July 29, 2019), https://www nytimes.com/2019/07/29/business/capital-one-data-breach-hacked.html; Jessica Silver-Greenberg et al., *JPMorgan Chase Hacking Affects 76 Million Households*, N.Y. TIMES (Oct. 2, 2014), https://dealbook nytimes.com/2014/10/02/jpmorgan-discovers-further-cyber-security-issues/.

In sum, the current Bank Merger Guidelines not only fail on traditional metrics of pricing and availability of financial services, they also completely overlook important non-price aspects of competition and thus expose consumers and the financial system to unwarranted harms.

3. The DOJ Should Apply More Rigorous Merger Standards to Better Protect Consumers and Reduce Systemic Risks

The DOJ should strengthen the Bank Merger Guidelines by adopting a more rigorous approach that better protects consumers and the U.S. financial system. The DOJ could apply several strategies to enhance bank merger review and thereby mitigate competitive harms. Among other approaches, the DOJ could:

- Lower the Herfindhahl-Hirschman Index (HHI) screening threshold for enhanced scrutiny of a proposed bank merger, since the current 1800/200 screen has proven insufficient to prevent harmful consequences;
- Consider how common ownership of banks by large asset managers may affect post-merger competition in ways that are unobservable by traditional HHI analysis;[29]
- Evaluate the mix of large and small institutions in a market following a merger, in light of evidence that smaller banks tend to excel at serving the credit needs of local businesses;[30]
- Take into account financial sector resilience, the "too big to fail" subsidy, potential conflicts of interest, product quality, and privacy and data protection as a routine part of its bank merger analysis, as discussed above.

By contrast, the DOJ should not apply greater weight to nontraditional financial service providers in bank merger reviews because doing so would weaken the competitive analysis. As discussed above, the current Bank Merger Guidelines are already inadequate to prevent competitive harms. Including nontraditional financial service providers in bank merger calculations would reduce the rigor of these already insufficient standards. As a result, according greater weight to nontraditional firms would permit further consolidation in the banking sector and compound the deleterious effects discussed above.

Moreover, including nontraditional financial service providers in the DOJ's analysis of bank mergers would be inconsistent with the economic realities facing American consumers and small businesses. Traditional banks remain a unique source of financial services for the vast majority of Americans. Federal Reserve Board data demonstrate that 84 percent of consumers rely on access to brick-and-mortar branches that online banks do not offer.[31] Further, many nontraditional

[29] *See* Jose Azar et al., Ultimate Ownership and Bank Competition 34-35 (May 4, 2019) (unpublished manuscript), https://ssrn.com/abstract=2710252.

[30] *See* Allen N. Berger et al., *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 266 (2005).

[31] *See supra* note 22.

financial service providers are not licensed as banks, do not offer a full range of financial products, and are hampered by regulatory uncertainty that clouds their competitive future.[32]

The COVID-19 pandemic and ensuing growth of the country's largest banks have underscored traditional banks' dominant role in the U.S. financial sector.[33] The pandemic has likewise reinforced the unique role of small, locally based banks in responding to the economic needs of their community. Indeed, small, local banks have far surpassed larger and online-only banks in providing emergency relief to small businesses in their communities through the Paycheck Protection Program and Main Street Lending Program.[34] Accordingly, it would be inappropriate for the DOJ to accord greater weight to nontraditional financial services providers.

Any reforms to the Bank Merger Guidelines should be designed to strengthen the DOJ's bank merger review standards and mitigate competitive harms. Any effort to weaken the Bank Merger Guidelines would almost certainly facilitate more bank consolidation and economic harm.

4. The DOJ Should Work Jointly with the Federal Banking Agencies in Reviewing the Interagency Bank Merger Guidelines

Finally, if the DOJ proceeds with its review of the interagency Bank Merger Guidelines, we strongly encourage the DOJ to work closely with the federal banking agencies. The DOJ's request for comment does not indicate that it has coordinated, or intends to coordinate, with the federal banking agencies in its review. Revising the Guidelines unilaterally, however, would be a grave mistake. Since the adoption of the interagency Bank Merger Guidelines in 1995, the DOJ and the federal banking agencies have worked closely on bank merger reviews. The banking agencies offer unique perspective on the competitive effects of bank mergers, as the Bank Merger Act and Bank Holding Company Act charge them with balancing the anticompetitive effects of a proposal against the "convenience and needs of the community to be served."[35] Any review of the Bank Merger Guidelines, therefore, should proceed on an interagency basis.

In conclusion, we thank the DOJ for soliciting public input on this critical topic. In the last two decades, our understanding of financial markets has increased substantially. Rigorous analysis has shown the enormous costs of lackluster oversight, resulting in trillions of dollars in economic costs

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32 *See* Lalita Clozel, *'Fintech Charter' Has No Early Takers as Lawsuit Looms*, WALL ST. J. (Sept. 12, 2018), https://www.wsj.com/articles/fintech-charter-has-no-early-takers-as-lawsuit-looms-1536764426 (describing legal uncertainty surrounding OCC's proposed fintech charter).

33 *See* David Benoit, *Coronavirus Made America's Biggest Banks Even Bigger*, WALL ST. J. (Apr. 23, 2020), https://www.wsj.com/articles/coronavirus-made-america-s-biggest-banks-even-bigger-11587639602.

34 *See, e.g.*, Jessica Menton & Mark Fahey, *Small Banks and Small Businesses Turned Out to Be a Good Combination When It Came to PPP Loans,* USA TODAY (June 2, 2020), https://www.usatoday.com/story/money/usaandmain/2020/06/02/ppp-loans-community-banks-more-helpful-small-businesses/5300871002/; Eric S. Rosengren, Fed. Reserve Bank of Bos., Pres. & Chief Exec. Officer, The Economy's Outlook, Challenges, and Way Forward 13 (Sept. 23, 2020), https://www.bostonfed.org/-/media/Documents/Speeches/PDF/20200923-text.pdf (noting that "[n]one of the nation's largest banks … are currently active" in the Main Street Lending Program).

35 12 U.S.C. §§ 1828(c)(5), 1842(c)(1).

and an unquantifiable level of harm to American families. Undoubtedly, the status quo approach to financial sector oversight by the DOJ and the banking agencies is insufficient. In order to prevent further harms to consumers, honest businesses, and the public, it is critical that the agencies demonstrate that they take their responsibilities under Bank Merger Act, the Bank Holding Company Act, and the antitrust laws seriously, rather than assuming that the financial sector can be trusted to police itself.