February 10, 2022

Via Electronic Mail

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

Re: Enforcement policy respecting bank mergers

Dear Assistant Attorney General Kanter:

The Bank Policy Institute (**BPI**)[1] and the Mid-Size Bank Coalition of America (**MBCA**)[2] submit this letter in response to the December 17, 2021, request of the Department of Justice's Antitrust Division (**DoJ**) for comments on the policies for assessing the competitive effects of bank mergers.[3] Because President Biden called upon "DOJ and the agencies responsible for banking (the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency) to update guidelines on banking mergers to

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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 MBCA is a business, economic, and financial policy alliance comprised of America's mid-size banks.

3 Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis* (Dec. 17, 2021), https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis.

provide more robust scrutiny of mergers"[4] in the July 2021 Executive Order on Promoting Competition in the American Economy,[5] we also address the procedural steps that will be necessary to ensure the availability of judicial review of any changes to the various bank regulations reflecting those policies. Judicial review will be particularly important to ensure that any changes are consistent with the underlying laws, the relevant provisions of which Congress has not changed since 1966.[6]

The existing approach to assessing the legality of bank mergers was developed incrementally over decades at the DoJ and the Federal Bank Regulators under the leadership of individuals nominated by both Democratic and Republican Administrations and based upon analyses conducted by highly professional and expert career staff. Consistent with the underlying statutes and the case law, the current approach focuses on the risk of harm in local geographic markets and divestiture of branches in any local markets in which competition would be harmed. DoJ and the Federal Bank Regulators have had the opportunity to refine their approach over the course of hundreds of mergers, over decades, as banks responded to Congress's passage of laws designed to deal with the nation's previously highly fragmented banking system and enable the formation of branch networks that customers value.

We present below a summary of evidence illustrating the fruit of the DoJ's and the Federal Bank Regulators' approach to assessing competitive effects: (1) a banking industry that is unconcentrated at the national level, (2) a banking industry that is less concentrated in the United States than other economies, and, of most importance, (3) essentially unchanged concentration levels in local banking markets across the United States for at least the past 25 years. These facts help illustrate that current policy is fundamentally sound. Indeed, those measures of competition materially understate the competitiveness in the U.S. marketplace for banking services because they ignore the technological advancements that have increased the ease with which both financial institutions without a banking license and bank competitors without a local branch can and do compete for the business of customers in local communities across the country.

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4 Press Release, The White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (**White House Fact Sheet**). In this submission, we refer to the Board of Governors of the Federal Reserve System as the **FRB**, the Federal Deposit Insurance Corporation as the **FDIC**, and the Office of the Comptroller of the Currency as the **OCC**. We collectively refer to the FRB, the FDIC, and the OCC as the **Federal Bank Regulators** herein.

5 Exec. Order 14036, 86 Fed. Reg. 36987, 36992 (July 14, 2021) (**Executive Order on Competition**).

6 *See* Pub. L. No. 89-356, 80 Stat. 7, 8 (1966); Pub. L. No. 89-485, § 7(c), 80 Stat. 236, 237-38 (1966). Both banking statutes contemplate DoJ's concurrent review of (and comment on) the same competitive factors that the Federal Bank Regulators are also tasked with reviewing. 12 U.S.C. §§ 1828(c)(4); 1849. DoJ authority to review proposed bank mergers arises under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Although antitrust analysis is not static, any change in that analysis that would depart from long existing and widely accepted standards should only reflect actual changes in the competitive environment. This approach is essential if antitrust analysis is to be governed by the rule of law and not the individual views of those who, at any particular point in time, head the relevant agencies. It is also crucial to support a vibrant economy, which requires a consistent, predictable government approach.

It is also worth prominent consideration that most bank mergers involve community and mid-size banks, and the majority of those mergers involve two such banks (as opposed to a larger bank acquiring a community or mid-size bank).[7] Many factors drive mergers of community and mid-size banks, including the need for scale, diversification of risk through geographic or product expansion, and generational change in ownership. Any change in antitrust policy making bank mergers more difficult risks disproportionately impacting community and mid-size banks.

Part I of this letter provides an overview of the development of bank merger policy at DoJ and the Federal Bank Regulators in view of judicial interpretations of the competition portions of the relevant statutes (which, as noted above, have not changed since 1966). Part II describes how the long-standing approach to assessing the competitive effects of bank mergers has effectively preserved and enhanced competition. Part III addresses a question DoJ raised in its request for comments and outlines why the DoJ may not broaden the scope of its bank-merger review to encompass systemic risk, an issue which Congress has tasked the Federal Bank Regulators, not DoJ, with assessing as a matter of financial stability.[8]

As described further herein, we urge the DoJ and the Federal Bank Regulators to (1) continue to adhere to the basic approach that has successfully governed bank-merger policy for over 40 years, (2) take into account more comprehensively the sharply increased competition for banking services from nonbank financial institutions and banks that do not have physical branches in the relevant geographic market, (3) provide notice, public comment, and an opportunity for judicial review of any new bank-merger policy, and (4) apply any changes to bank-merger policy prospectively.

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7 Stephen A. Rhoades, *Bank mergers and banking structure in the United States, 1980-98*, 174 FRB Staff Studies (2000), https://www.federalreserve.gov/pubs/staffstudies/174/default.htm; Robert M. Adams, *Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010*, FEDS Working Paper No. 2012-51 (2012), https://ssrn.com/abstract=2193886. Appendix B provides additional details.

8 Moreover, we are aware of no evidence that mergers involving larger banks inherently create increased competitive risk if they fail. Indeed, they may actually create less risk because they are required to develop, and have approved by the Federal Bank Regulators, comprehensive resolution plans. In any event, any suggestion that a merger would produce a bank that would fail and that such a failure would cause increased competitive harm as a result of the merger is so highly speculative as to be far removed from rational antitrust analysis.

The analysis in this letter is based on facts about market conditions and the rigorous analytical work about market conditions conducted by skilled professionals both within and outside the government over decades. We respectfully submit that this should not be replaced by philosophies or narratives that are untethered to an equally validated approach. The benefits of competition can be stifled by both an overly relaxed and an overly rigorous competitive approach.

I. Background

In response to the needs of customers and the economy for efficient, effective, and convenient banking, Congress removed, during the last 50 years, geographic restrictions that existed for most of the history of the banking industry and that had created a highly and artificially fragmented industry. Historically, Congress and various States had imposed two principal restrictions on bank expansion. The first applied to the bank itself. The second applied to affiliated banks.

Before the 1927 McFadden Act,[9] state laws and OCC policy largely confined banks to a single location, a regulatory scheme often referred to as a prohibition against branch banking. Although the McFadden Act enabled national banks to establish branches in accordance with state law, many States continued to prohibit branches or limited branches to a single municipality, county, or other geographic area. Moreover, branching across state lines was prohibited. As a result, expansion through consolidation was highly restricted. Although some States ultimately relaxed or eliminated their restrictions on in-state branching, several States continued to prohibit branching entirely (e.g., Illinois) or limited it geographically (e.g., Mississippi).

Seeking to counter this restraint on branches and enable the formation of networks that customers desired, a small number of banks formed holding companies that established or acquired banks in geographic areas where the original bank could not branch. This approach was considerably less efficient than branching, but often represented the only avenue to meeting customer demand for geographic flexibility.

Congress engaged in comprehensive regulation of bank holding companies and bank mergers in the Bank Holding Company Act (**BHCA**) in 1956[10] and the Bank Merger Act

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9 Pub. L. No. 69-639, 44 Stat. 1224 (1927) (codified at 12 U.S.C. §§ 36, 81).

10 Pub. L. No. 84-511, 70 Stat. 133 (1956) (codified at 12 U.S.C. §§ 1841 et. seq.). The BHCA (as originally enacted in 1956) generally restricted the subsidiary banks of bank holding companies to a single State. *Id.* at 135. Although individual States were enabled to authorize entry by out-of-state bank holding companies, not a single State did. During the 1980s, a number of States formed so-called “interstate compacts,” which permitted entry by out-of-state bank holding companies on a reciprocal basis. *See, e.g.*, Mass. Gen. Laws Ann., ch. 167A, 2 (West 1984); 1983 Conn. Pub. Acts 83-411. Notably, however, none of those compacts included New York, California, Illinois, or Texas, where many of the largest banks in the country were located.

(**BMA**) in 1960.[11] From their inceptions, both the BHCA and the BMA have required the applicable Federal Bank Regulator to assess the likely competitive effects of a proposed merger.[12] In its 1963 *Philadelphia National Bank* decision, the Supreme Court held that the DoJ also had the ability to bring a Clayton Act challenge to a merger that a Federal Bank Regulator had approved under the BMA.[13] In response, Congress amended the BHCA and the BMA in 1966, effectively mirroring the substantive provisions of the Clayton and Sherman Acts in the two banking statutes and thereby clarifying that the competition standards to be enforced by the Federal Bank Regulators and DoJ were the same.[14]

In *Philadelphia National Bank*, the Court focused on the level of concentration in the four-county region in which the merging parties competed.[15] A series of Supreme Court and lower decisions followed over the next several years, focusing on harm to competition in the local geographic markets where the merging parties competed. In its 1974 *Marine Bancorporation* decision, the Supreme Court was clear that the appropriate analytical focus was on actual, local competition and precluded the DoJ's attempt to block a merger based on concerns relating to issues other than local competition, noting that the Clayton Act "deals in 'probabilities,' not 'ephemeral possibilities.'"[16] In that decision, the Court rejected DoJ theories of harm that amounted to "a *per se* rule against geographic market extension mergers."[17] A summary of the eight most recent judicial decisions ruling on DoJ and Federal Bank Regulator actions involving the competitive effects of bank mergers is provided below; courts focused on alleged loss of competition in local geographic markets in all (and decided all in favor of the merging parties):

Supreme Court

- *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975) (affirming district court decision rejecting the DoJ's case against six bank acquisitions in DeKalb County, Fulton County, and North Fulton County in the Atlanta area, because the acquisitions did not threaten competition)

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[11] Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified at 12 U.S.C. § 1828(c)).

[12] 70 Stat. at 135; 74 Stat. at 129.

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

[14] Pub. L. No. 89-356, 80 Stat. 7, 8 (1966) (codified at 12 U.S.C. § 1828(c)(5)) (BMA); 80 Stat. 236, 237-38 (1966))(codified at 12 U.S.C. § 1842(c)(1)) (BHCA).

[15] 374 U.S. at 359-64. The Court found that a broader geographic market was inappropriate because, at the time, state law effectively prohibited the parties from establishing branches outside that four-county region. *Id.*

[16] *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974).

[17] *Id.*

Courts of Appeals

- *County National Bancorporation* v. *Board of Governors*, 654 F.2d 1253 (8th Cir. 1981) (rejecting the FRB's denial of bank-acquisition application in St. Louis, Missouri, because the FRB failed to make adequate findings substantiating a threatened loss of competition)

- *Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255 (5th Cir. 1981) (rejecting the FRB's denial of bank-merger application in El Paso and Waco, Texas, because the FRB failed to make adequate findings substantiating a threatened loss of competition)

- *Republic of Texas Corp.* v. *Board of Governors*, 649 F.2d 1026 (5th Cir. 1981) (rejecting the FRB's denial of bank-merger application in Waco, Texas, because the FRB failed to make adequate findings substantiating a threatened loss of competition)

- *United States* v. *Central State Bank*, 817 F.2d 22 (6th Cir. 1987) (affirming district court decision rejecting the DoJ's case challenging joint control of two banks in Benzie County, Michigan, holding that the acquisitions did not threaten competitive harm)

District Courts

- *United States* v. *First National State Bancorporation*, 499 F. Supp. 793 (D. N.J. 1980) (rejecting the DoJ's case against bank merger in Atlantic County, Atlantic City, and Burlington County, New Jersey, on ground that branch divestitures accepted by the OCC resolved any competitive concerns and finding that no additional relief was warranted)

- *United States* v. *Virginia National Bankshares*, 1982-2 Trade Ca. (CCH) ¶ 64,871 (W.D. Va. 1982) (rejecting the DoJ's case against bank merger in Wise County, Virginia, because the acquisition did not threaten competition)

- *United States* v. *Central State Bank*, 621 F. Supp. 1276 (W.D. Mich. 1985) (rejecting the DoJ's case challenging joint control of two banks in Benzie County, Michigan, holding that the acquisitions did not threaten competition)

In the ensuing decades, the DoJ and Federal Bank Regulators applied these judicial instructions and coalesced around common principles for assessing when a proposed bank merger threatens harm to competition in a local market. This approach developed over many years under the leadership of individuals nominated by Administrations of both political parties. For instance, the Bank Merger Competitive Review guidelines were issued in 1995, during President Clinton's Administration. They explain that "the banking agencies and the Department" had a common approach to screening proposed mergers "that clearly do not have significant adverse effects on competition."[18] In a speech later that year, the Assistant Attorney General in charge of the Antitrust Division discussed the role of the Bank Merger Guidelines in assuring competitive banking markets and providing transparency to the business community:

> "The success of our program today is illustrated by the fact that the Congressional goals have been attained with relatively little litigation. The legal standards have been articulated with sufficient clarity that most bank merger agreements do not pose significant risks to competition, and for those that do, a productive dialogue develops early in the process to address those issues."[19]

The AAG also discussed the salutary ability of the business community to use the Bank Merger Guidelines to avoid presenting anticompetitive transactions in the first place:

> "[W]e do not measure success by the number of law suits that we file, but by the degree to which bank merger activity is channeled away from competitive harm."[20]

On the merits, the AAG also explained the well-acknowledged ability of bank mergers to allow banks to achieve efficiencies that help customers:

> "The great majority of bank mergers do not cause antitrust concerns, and the Antitrust Division is quite cognizant of that fact. We have on staff some fifty highly-trained economists. As a result, we are familiar with the types of efficiencies that may be produced by bank mergers. To the extent that a bank merger allows the merging firms to achieve significant economies of scale or scope, consumers may benefit from lower costs and/or

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18 U.S. Dep't of Justice, *Bank Merger Competitive Review – Introduction and Overview* (1995), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf (**Bank Merger Guidelines**).

19 Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Banking* (Nov. 16, 1995). It has been widely accepted that a transparent process that minimizes litigation is in the public interest. *E.g.*, Malcom B. Coate & Shawn W. Ulrick, *Transparency At The Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, 73 ANTITRUST L. J. 531, 531 (2006). Similarly, accepting settlements that preserve competition without the need for a contested, protracted litigation is widely acknowledged as having the beneficial effect of conserving our nation's limited judicial resources. William J. Baer, *Reflections on Twenty Years of Merger Enforcement under the Hart-Scott-Rondino Act*, 65 ANTITRUST L. J. 825, 834, 837 (1997).

20 *Id.*

improved services, and our competitive analysis takes into account such factors."[21]

The Bank Merger Guidelines were released the year after Congress largely eliminated the archaic geographic restraints on banks and banking expansion. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,[22] Congress repealed the one-state restriction on bank holding companies (while permitting States to limit the level of deposits that any banking organization could hold within a State[23]) as well as the McFadden Act's rules allowing a national bank to branch only within the city in which it was situated[24]. Importantly, Congress directly imposed a restriction on industry concentration in the statute, prohibiting interstate bank acquisitions if, following the acquisition, the resultant bank holding company would hold more than 10% of nationwide deposits or, subject to a waiver by the relevant State, more than 30% of the deposits in any State.[25] Consolidation ensued to fill customer demand for banks with branch networks. In 1999, Congress further enabled banks to meet customer demand by passing the Gramm-Leach-Bliley Act (**GLBA**), enabling bank holding companies to engage in most, but not all, financial services.[26]

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21 *Id.* There is a rich literature recognizing the efficiencies of bank mergers, including (1) the creation of regional and national branch networks that benefit customers, (2) economies of scale that lower costs, and (3) the ability to offer more products and services to more customers. In Appendix B, we provide relevant citations.

22 Pub. L. No. 103-328, 108 Stat. 2338 (1994).

23 *Id.* at 2340 ("No provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company (including all insured depository institutions which are affiliates of the bank or bank holding company) to the extent the application of such limitation does not discriminate against out-of-State banks, out-of-State bank holding companies, or subsidiaries of such banks or holding companies.").

24 *Id.* at 2339.

25 *Id.* In the Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank Act**), Pub. L. No. 111-203, 124 Stat. 1376, 1633 (2010), Congress reinforced this limitation by prohibiting any transaction in which the resultant bank holding company would hold 10% or more of the liabilities of all financial institutions.

26 Pub. L. No. 106-102, 113 Stat. 1338 (1999). The BHCA forbid bank holding companies from engaging in any activities except banking and other activities deemed "so closely related to banking or managing or controlling banks as to be a proper incident thereto." *Id.* at 1343. Before the GLBA, the FRB had interpreted this exception very narrowly.

As BPI detailed in its October 2020 letter in response to DoJ's earlier call for public comment about the Bank Merger Guidelines,[27] the DoJ recognized in its updated 2010 Horizontal Merger Guidelines (which generally apply across all industries) that experience had shown that a merger was unlikely to cause competitive harm absent significant post-merger concentration.[28] Accordingly, the DoJ (and the Federal Trade Commission) substantially raised the post-merger concentration threshold from which competitive harm was presumed, from a Herfindahl-Hirschman Index (**HHI**) of 1,800 points to an HHI of 2,500 points. Only one industry was subject to a more restrictive standard than the revised threshold for inferring competitive harm: the banking industry.[29] Neither then, nor subsequently, has the DoJ explained why the banking industry alone was not included in that revised guidance. Whatever the rationale, however, the impact today is clear: banks are subject to considerably more rigorous prohibitions against mergers than any other industry. In percentage terms, the concentration standard for all other industries is 39% higher than for the banking industry.

In 2014 (during President Obama's Administration), the DoJ published on its website answers to frequently asked questions regarding applications filed with the FRB, providing further explanation of "how the Federal Reserve and the U.S. Department of Justice, Antitrust Division … conduct their statutory responsibilities to evaluate the competitive effects of mergers, acquisitions, and other transactions when determining whether to approve these applications."[30] Several rules and regulations at the Federal Bank Regulators reflect these policies as well. For instance, the FRB has issued a rule such that mergers exceeding the thresholds set forth in the Bank Merger Guidelines cannot be subject to streamlined review

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27 BPI, *Response Letter regarding Department of Justice Enforcement Policy Respecting Bank Mergers* (Oct. 15, 2020), https://bpi.com/wp-content/uploads/2020/10/BPI-Comment-Letter-to-the-DOJ-on-Bank-Merger-Review-October-15-2020-1.pdf (**2020 BPI Response Letter**).

28 U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

29 Press Release, 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.

30 U.S. Dep't of Justice, Board of Governors of the Federal Reserve System, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?*, (2014), https://www.justice.gov/atr/page/file/1232171/download.

procedures.[31] The OCC[32] and the FDIC[33] have also issued similar rules for bank mergers falling within their respective jurisdictions.

In September 2020, the DoJ sought public comment on whether bank-merger policies should be updated "to reflect emerging trends in the banking and financial services sector," noting that "'[i]nnovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector.'"[34] BPI submitted a comment in response to that announcement, urging more recognition of the competition that banking entities without a banking charter, or a bank lacking a branch in a local community, can have in that community.[35]

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31 12 C.F.R. § 225.14(c)(5)(i)(B).

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

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

34 Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments On Updating Bank Merger Review Analysis* (Sep. 1, 2020), https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

35 BPI's prior submission details ways in which bank-merger policy should account more systematically for the variety of competition that banks face when competing to serve the needs of customers located near their branches. Several flaws in the current approach are worth highlighting. Excluded from current analysis, partially or even entirely, is the competitive impact of many kinds of financial-services providers. These include non-local *insured* depository institutions (lacking a local branch presence) that market their deposit and loan products online, plus: (1) money-market funds (which are direct competitors for deposits, holding $1.37 trillion of deposit-like accounts in 2019, (2) online mortgage companies such as QuickenLoans, and (3) popular online lending services, including Lending Club, OnDeck, CAN Capital, and PayPal Working Capital (which are discussed in the 2021 Small Business Credit Survey annually conducted by the Federal Reserve Banks of Atlanta, Boston, Chicago, Cleveland, Dallas, Kansas City, Minneapolis, New York, Philadelphia, Richmond, St. Louis, and San Francisco, https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report). The exclusion of money-market funds is particularly unjustified because they offer the same basic product as banks, including immediate access to funds and check-like service (at typically higher rates of interest). Although money market funds are not directly federally insured, they have been demonstrated to offer the same basic protection as bank accounts because the federal government has guaranteed them (in 2008) and offered extraordinary programs to assure their liquidity (in 2020). Moreover, money market funds do not, unlike banks, pay a premium for government insurance, helping them to offer higher interest rates. To illustrate these other forms of competition in mathematical terms, if this myriad of competitors holds as little as 15% of the relevant market (and there are strong arguments that their actual share is materially higher), then an 1,800-point concentration

Neither the DoJ nor the Federal Bank Regulators has acted on DoJ's 2020 call for public comments. In July 2021, President Biden issued the Executive Order on Competition. The Executive Order did not call for new antitrust legislation (which, if passed, could of course change the legal standards for assessing the legality of proposed bank mergers). Instead, it called for, among other things, new Bank Merger Guidelines and new merger guidelines governing other industries.[36] During the signing ceremony remarks, the "misguided philosophy" that has guided the last "[f]orty years" of antitrust enforcement—a period encompassing six Administrations, including both Republican and Democratic Presidents—was criticized.[37]

In December 2021, the Consumer Financial Protection Bureau (**CFPB**) published on its website a Request for Public Comment on the BMA, questioning whether "any merger transaction that results in a financial institution that exceeds a predetermined asset size threshold, for example $100 billion in total consolidated assets," should be "presume[d]" to "pose[] a systemic risk concern."[38] A blanket prohibition against mergers resulting in a bank with $100 billion or more in assets would, as a practical matter, act as a *per se* rule against

standard based on recognition of only a portion of the actual competitors represents an actual concentration standard of approximately 1,500 points.

36 White House Fact Sheet; Executive Order on Competition.

37 Press Release, The White House, *Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy* (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

38 *Request for Public Comment on the Bank Merger Act* (Dec. 9, 2021), https://files.consumerfinance.gov/f/documents/cfpb_bank-merger-act-rfi_joint-statement_2021-12.pdf. As noted, Congress assigned jurisdiction over the competitive effects of bank mergers to the Federal Bank Regulators; when the CFPB was established in the Dodd-Frank Act, there was no suggestion in the statute or legislative history that the CFPB should have any sort of concurrent jurisdiction over mergers, or even be accorded a special right of comment, as Congress did provide to the OCC and state banking authorities. Likewise, the BHCA does not give the FDIC the specific right to present its views and any recommendation. 12 U.S.C. § 1842(b)(1). Similarly, both the BHCA and the BMA authorize a state banking authority, but not the FDIC or CFPB, to appear in any action brought under the antitrust laws. §§ 1849(c), 1828(c)(7)(D). Although not relevant to the competitive analysis, the CFPB's suggestion that $100 billion in consolidated assets could presumptively be a systemic-risk concern represents a clearly impermissible regulatory attempt to nullify a congressional decision. Just two and a half years ago, Congress raised the floor for heightened prudential standards from $50 billion to $250 billion. *See also* Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017) (revising the threshold for systemically important financial institutions under the Dodd-Frank Act from $50 billion to $250 billion).

mergers, including geographic market extension mergers, involving any bank holding as little as 0.5% of the nation's total bank assets or 0.5% of the nation's total deposits.[39]

On December 17, 2021, the DoJ again requested public comment on whether bank-merger policy should be updated. In the press release accompanying the new request for comment, DoJ asked, among other things, "whether bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws."[40]

II. The approach that has governed bank mergers for decades has not been too lenient

Assertions that the bank-merger policy that has formed over the preceding decades is inadequate are wrong. Indeed, as BPI explained in its 2020 comment, today's approach is too restrictive: the banking industry is treated more stringently than any other industry, which is particularly inappropriate in view of the growing and substantial choices available to customers beyond those banks with branches in their local community (in the form of both banks without a branch presence in the local geographic market and financial-services firms without a banking license).[41] Accordingly, the DoJ should be making it easier for bank customers to benefit from the substantial efficiencies and increased competition that can come from procompetitive mergers.

Summarized below are basic facts about the banking industry that attest to the competitiveness of the industry and the effectiveness of the views that have heretofore governed bank-merger policy. It is also worth noting that, when emphasizing the 40-year bipartisan, consensus approach to assessing the competitive effects of proposed bank mergers, we do so not just because it is consensus or bipartisan, but because it has been carefully evaluated, tested, and reevaluated by highly skilled professionals at the DoJ and the Federal

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[39] S&P Global Market Intelligence's S&P Capital IQ Platform, *U.S. Banks' Total Asset and Deposit Data as of September 2021* (2022), https://www.capitaliq.spglobal.com/; *see also* BPI, *Op-Ed: A Bank-merger Moratorium Isn't Just Bad Policy. It's Illegal* (Jan. 5, 2022), https://bpi.com/op-ed-a-bank-merger-moratorium-isnt-just-bad-policy-its-illegal/. The Financial Stability Board and the Basel Committee on Banking Supervision have developed a formula that encapsulates the factors that create an institution of systemic importance. Press Release, Basel Committee on Banking Supervision , *The G-SIB assessment methodology – score calculation* (Nov. 6 2014), https://www.bis.org/bcbs/publ/d296.htm. Under this formula, a bank is classified as systemically important if it has a score of 130 or more under method 1. *Id.* As of the third quarter of 2021, all U.S. lending banks with total assets under $150 billion have a systemic score of less than 10—that is, one-thirteenth or less the score that, after evaluating multiple factors, experts have found to create an issue. Press Release, Federal Stability Board, *FSB publishes 2021 G-SIB list* (23. Nov. 2021), https://www.fsb.org/2021/11/fsb-publishes-2021-g-sib-list/.

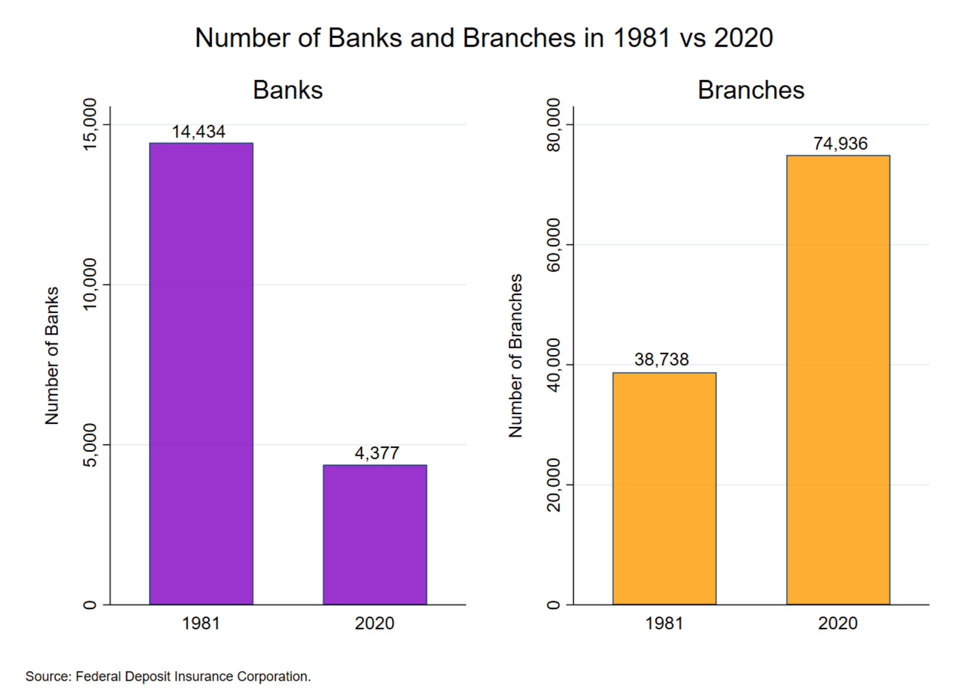
[40] *Supra* note 3.

[41] BPI 2020 Response Letter.

Bank Regulators over many years through a wide variety of economic and financial circumstances.

A. The number of bank branches has nearly doubled over the last 40 years

The White House Fact Sheet states that "Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 bank closures," and that "[m]any of these closures are the product of mergers and acquisitions," thus implying a reduction in the competitive landscape in the banking market.[42] But any analysis-based discussion of the competitiveness of the banking industry must also recognize the substantial growth in the number of bank branches in the country over that same period. Between 1981 and 2020, the number of banks did decline by more than half, from 14,434 to 4,377.[43] But over the same 40-year period, the number of bank branches nearly doubled, from 38,738 to 74,936, meaning that customer access to a bank branch in communities across the country is far easier today than 40 years ago.[44] The following chart illustrates both changes:



42 White House Fact Sheet. This reduction in banks is, in fact, largely attributable to three factors other than buyer-initiated mergers: bank failures (2,279 between 1980 and 2020), affiliate bank mergers, and numerous mergers that were prompted by the seller due to a variety of conditions such as generational changes in leadership and weakened financial conditions.

43 *See* FDIC, *Annual Historical Bank Data* (2022), https://banks.data.fdic.gov/explore/historical/?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2021&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc.

44 *Id.*

The result of those changes is that the size of the average bank's branch network grew from 2.7 branches to 17.1 branches over forty years.[45] That network expansion is exactly what Congress encouraged in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Geographic expansion of banking institutions through mergers is thus correlated with branch expansion—more branches available to more people in more communities across the United States, consistent with congressional intent.

Indeed, branch counts understate the growth of competition for the banking industry, as more and more consumers turn to competitors—both banks and non-banks—without a local branch. But branch counts alone surely provide important context in which to evaluate the White House Fact Sheet's statements regarding the reduction in the total number of banks in the country because branch counts are more telling about the options available to consumers in communities across the United States than the nominal number of banks.

B. National banking concentration levels are low

Concentration in the banking industry on the national level is low. Using the traditional measure of domestic deposits as a proxy for competitive significance, the national HHI for the banking industry is only 417 points as of June 30, 2021. That is extraordinarily low under any reasonable measure of competitiveness.

It is also low relative to other relevant industries in the United States. Based on the 2017 Census Bureau compilation of concentration (which is the most recent available), the banking industry (which falls within "depository credit intermediation") ranks below, and in most cases far below, many other industries serving the consumer:

Industry	Concentration Level (%)[46]
Couriers and express delivery	91
General merchandise	84
Department stores	73
Air transportation	69

45 In addition, low- and moderate-income (**LMI**) communities are well served by bank branches, with 96 percent of residents living in LMI areas covered by a branch, according to research published by BPI. BPI, *Some Facts About Bank Branches and LMI Customers* (Apr. 4, 2019), https://bpi.com/some-facts-about-bank-branches-and-lmi-customers/. In addition, according to a recent study, average distance to a branch remained at 1 mile for low- and moderate-income communities in urban areas during the past 20 years. Federal Reserve Bank of Cleveland, *Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch?* (Oct. 6, 2021), https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access.aspx.

46 Concentration level is defined as the share of sales that the top four firms capture in a given industry.

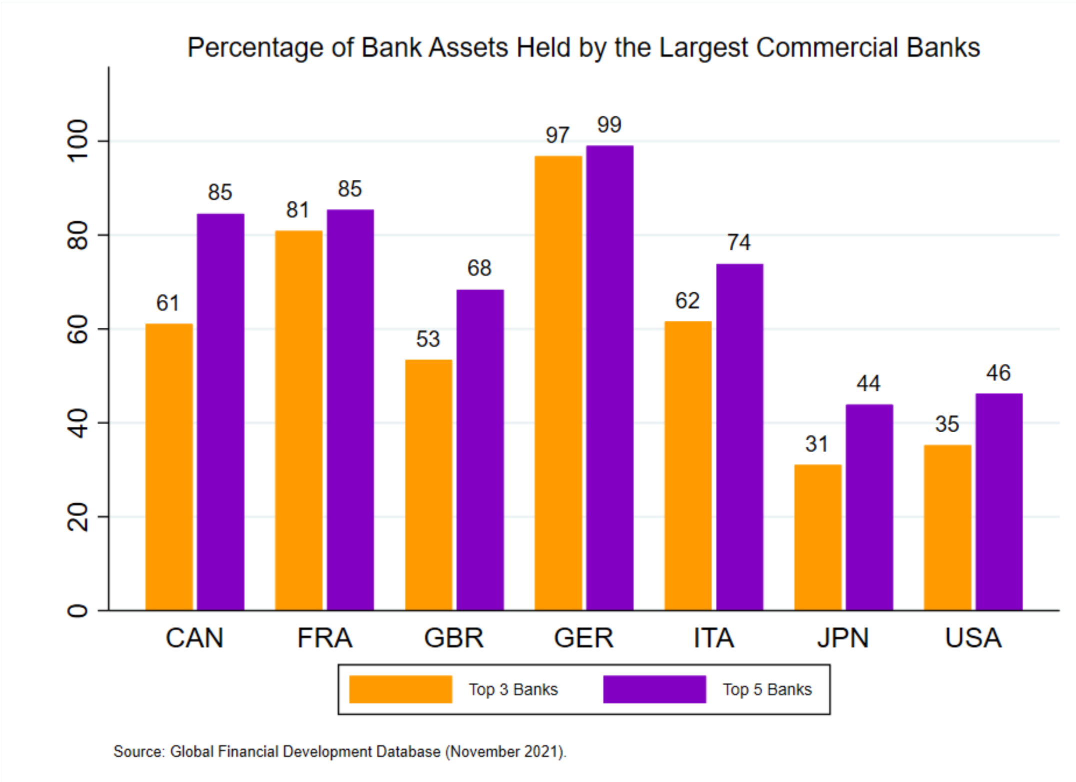
Industry	Concentration Level (%)[46]
Telecommunication carriers	62
Cable programming	62
Motor vehicle manufacturing	62
Health and personal care stores	60
Electronics and appliance stores	58
Automotive rental and leasing	57
Taxi service	56
Building materials and supplies dealers	55
Non-depository credit intermediaries	41
Consumer goods retail	39
Electronic shopping and mail order houses	37
Shoe stores	36
Grocery stores	35
Home furnishing stores	32
Dry cleaning and laundry	30
Clothing stores	30
Brokerage	30
Jewelry, luggage and leather goods stores	29
Travel arrangements	24
Furniture stores	22
Depository credit intermediation	20
Gasoline stations	17

Part A of Appendix A discusses the Census Bureau data.

Even these statistics greatly understate the level of competition for banking products and services. As noted above, unlike many other industries for which there are no viable substitutes, there are direct and effective competitors for nearly every bank service.

C. Banking in the United States is less concentrated than banking in other countries

Just as the U.S. banking industry is unconcentrated relative to other industries in the United States, it is also unconcentrated relative to the banking industries in other countries. The World Bank reports the share of total assets at the three largest and five largest financial institutions in various countries. The following charts illustrate U.S. concentration under both measures relative to the other Group of Seven countries: the U.S. banking industry is the second-least concentrated under both the three-firm and five-firm concentration ratios.



Again, the U.S. banking industry is unconcentrated relative to its peers. Part B of Appendix A describes the details of this analysis.[47]

D. Concentration in local geographic markets has not increased

A narrative has been developed that, following the passage of the BHCA and BMA, bank-merger policy was properly construed and applied but that those congressional standards have been improperly relaxed in recent years.[48] The facts refute that notion.

Using FDIC annual reports on the deposits reported at bank and thrift branches across the country, BPI examined how market concentration (as measured by HHIs) in the local geographic markets that the FRB has most recently defined evolved between 1998 and 2021. (1998 is the earliest year available in the S&P Global Market Intelligence dataset.) Over the last 23 years, weighted average HHI (weighting by market size) is consistently below 1,400 points.

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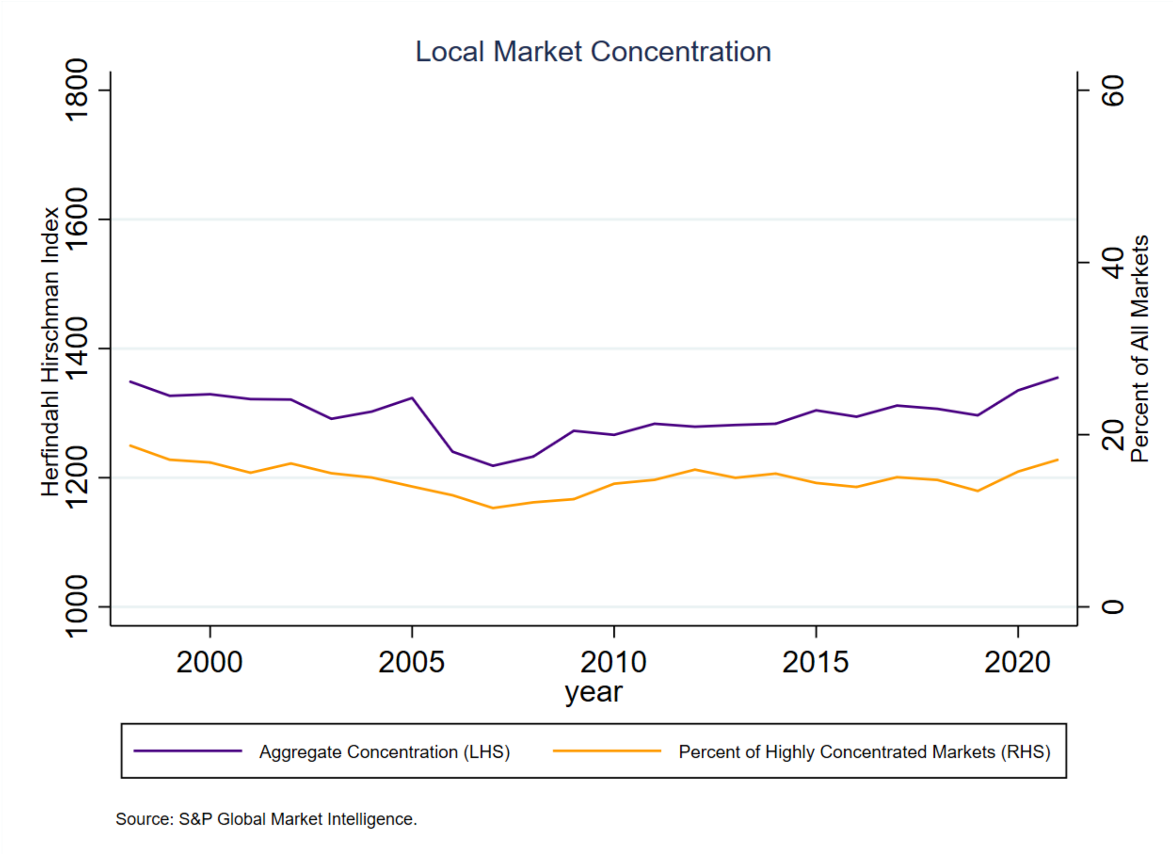
47 Includes only bank data available in Bankscope and Orbis. For additional details see https://www.worldbank.org/en/publication/gfdr/data/global-financial-development-database.

48 *See, e.g.*, Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435 (2020).

And between 1998 and 2021, there is an immaterial change in the average HHI and likewise an immaterial change in the percentage of local markets that are considered highly concentrated under the Bank Merger Guidelines.[49]



Part C of Appendix A contains details on this BPI study, which BPI considers a critical contribution to this debate. If, as critics of the long-standing approach assert, merger policy has been fundamentally misguided and misapplied in recent decades, significant increases in local concentration would have been the inevitable result. That, however, is *not* the case as the actual data demonstrate.

It also worth noting again that these figures materially overstate actual concentration levels because they systematically ignore many choices available to customers insofar as they account only for competition from banks and thrifts with branches in the relevant geographic market. Many banks and thrifts serve customers in geographic areas where the banks and thrifts do not have a branch, a phenomenon that has only increased as online banking tools become more sophisticated and in more widespread use. Moreover, the last twenty years have seen enormous growth in credit unions (and their expansion of both

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[49] Between 2020 and 2021, there is a slight increase in local market concentration that is most likely owing to the FRB's asset purchases resulting in growth in reserve balances and deposits, concentrated at the largest banks. *See* Appendix A for further discussion.

(1) membership eligibility criteria, to the point where they are often virtually universal, and (2) their range of products and services), money market funds, and new forms of competition in the form of nonbank "fintech" companies that provide banking products and services, such as PayPal, Square, and QuickenLoans. Indeed, some of these non-bank lenders already dominate certain traditional bank product markets, such as mortgage loans and mortgage servicing, and are rapidly expanding into other traditional bank product markets, such as consumer and small business payments. The financial services industry is in the midst of revolutionary change with rapid introduction of new products, new services, new delivery mechanisms, and new entrants in every aspect of the business.[50] There is a vibrant online market for mortgages, auto loans, small business loans, certificates of deposit, commercial loans and many other financial products, which consumers and other customers can access at any point. Those conditions are the very opposite of a non-competitive, non-vibrant market. This state of affairs further repudiates the notion that the banking market is concentrated.[51]

E. Substantial research offers evidence of many beneficial effects of mergers and underscores the appropriateness of the long-standing approach to bank mergers

Appendix B details multiple studies illustrating the beneficial effects of mergers, namely economies of scale, risk-diversification benefits, and other efficiencies. Also set forth in Appendix B are critiques of research studies that some proponents of major change to bank-merger policy selectively have cited to demonstrate that mergers cause harm. At most, these

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[50] Will Hernandez, *A battle royal for online deposits*, AMERICAN BANKER (Oct. 6, 2019), https://www.americanbanker.com/list/a-battle-royal-for-online-deposits; Ryan Brown, *Banks must behave 'more like technology companies' to survive, finance execs say*, CNBC (Nov. 18, 2019), https://www.cnbc.com/2019/11/18/banks-must-behave-like-tech-companies-to-survive-amid-fintech-threat.html; Ryan Browne, *Big Tech will push deeper into finance this year — but avoid the 'headache' of being a bank*, CNBC (Jan. 3, 2020), https://www.cnbc.com/2020/01/03/big-tech-will-push-into-finance-in-2020-while-avoiding-bank-regulation.html; Taylor Locke, *JP Morgan Chase CEO Jamie Dimon: Fintech is an 'enormous competitive' threat to banks*, CNBC (Apr. 7, 2021), https://www.cnbc.com/2021/04/07/jpmorgan-chase-ceo-jamie-dimon-why-fintech-is-a-big-threat-to-banks.html; Till Lauer, *How fintech will eat into banks' business*, ECONOMIST (May 6, 2021), https://www.economist.com/special-report/2021/05/06/how-fintech-will-eat-into-banks-business; Misyrlena Egkolfopoulou, *Fintech's Pitch: We're Cheaper, More Mobile, More Focused*, BLOOMBERG (Jan. 13, 2022), https://www.bloomberg.com/news/articles/2022-01-13/fintech-winning-young-consumers-by-being-cheaper-and-better-banking-alternative.

[51] As BPI noted in its prior submission, there are substantial regulatory concerns about the limited oversight of many of these non-traditional competitors. Those concerns are beyond the scope of this submission. *See, e.g.*, Agustín Carstens, Stijn Claessens, Fernando Restoy & Hyun Song Shin, *Regulating big techs in finance*, 45 BIS BULLETIN (Aug. 2 2021), https://www.bis.org/publ/bisbull45.pdf; BPI, *Tangled Up in Technicalities – An Historical Perspective on the Current ILC Debate* (Mar. 11, 2021), https://bpi.com/tangled-up-in-technicalities-an-historical-perspective-on-the-current-ilc-debate/.

papers show limited effects in narrow contexts that are unrelated to antitrust considerations and are instead criticisms of the industry unrelated to mergers. Considering the significant potential benefits from mergers, and the lack of any evidence that the current approach to assessing mergers is inadequate to preserve competition, calls for DoJ to tighten merger policy are misguided.

Crucially, technological change is a key driver of consolidation in the banking industry. Digitization and regulation have increased the benefits of scale and scope as the best technological capabilities, needed to attract and retain customers, require major investments in fixed capital projects that for efficiency must be spread across more customers. Part D of Appendix A shows that the share of bank profits relative to total assets has not increased over the past three decades, a fact that is again inconsistent with the notion that the long-standing approach has failed to preserve competition.

III. DoJ lacks congressional authority to review proposed mergers for systemic-risk issues

In its most recent call for comments, the DoJ asked whether it should consider additional factors in its competitive analysis beyond those that have been developed over decades. There has been a specific focus by some on systemic risk and financial stability. This section addresses the issue of whether DoJ may consider systemic risk when assessing the competitive effects of bank mergers under the antitrust laws. In short, because Congress has authorized the Federal Bank Regulators—not DoJ—to assess systemic risk, it would be arbitrary and capricious for DoJ to incorporate systemic risk into its competition analysis.[52] DoJ review would also be inconsistent with congressional intent, because, even with the Federal Bank Regulators, Congress identified systemic risk as a prudential, rather than a competitive, consideration.

Although this issue is conclusive, it is made even more compelling by concomitant suggestions that the consequence of this focus should be a per se prohibition against acquisitions resulting in a bank with more than $100 billion in assets, ostensibly on systemic-risk grounds. As discussed above,[53] a systemic-risk barrier based on $100 billion in assets departs radically from binding congressional determinations and the comprehensive evaluation of systemic risk conducted by skilled regulatory professionals in the United States and globally. Two statistics about a $100 billion asset cap are worth repeating: (1) it would represent only one-half of 1% of U.S. banking assets (even excluding credit unions and financial

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52 Agency action that relies on "factors which Congress has not intended it to consider" is arbitrary and capricious under the Administrative Procedure Act (**APA**). *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

53 *See supra* notes 38 and 39 and accompanying text.

services companies providing banking services) and (2) it would be only about one-thirteenth of the global standard for systemic significance.[54]

In the Dodd-Frank Act, Congress added the “financial stability factor” to the prudential considerations that the Federal Bank Regulators are to evaluate when assessing bank mergers.[55] There was no comparable revision to the Sherman or Clayton Acts providing for similar DoJ review. Nor did Congress amend the BHCA and BMA to require that the reports on competitive factors that DoJ is to provide to the Federal Bank Regulators include the new systemic-risk considerations that Congress charged the Federal Bank Regulators to consider.

The way in which Congress charged the Federal Bank Regulators with assessing systemic risk further illustrates that Congress did not believe that DoJ already possessed, or was implicitly being granted, this authority. The BHCA requires the FRB to consider seven factors when reviewing a proposed bank merger or acquisition. One of those factors, labeled “Competitive Factors,” requires the FRB to consider whether the proposed merger would result in a monopoly or an attempt or conspiracy to create a monopoly, whether the merger would substantially lessen competition or tend to create a monopoly, or in another way restrain trade.[56] That language mirrors the substantive standards of the Clayton and Sherman Acts.[57] Another—separate—factor labeled “Financial Stability,” which Congress added in 2010, requires the FRB to consider the “risks to the stability of the United States banking or financial system.”[58] The BHCA contemplates DoJ consideration of only the first category: “competitive factors.”[59] Similarly, the BMA instructs the relevant Federal Bank Regulators separately to consider both (1) competitive factors (which are the same as in the BHCA) and (2) the risk to U.S. financial stability (as well as other factors similar to those in the BHCA).[60] Once again, the

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54 The adverse competitive impact of any artificial cap should also be recognized. It would preclude the creation of banks that could most effectively challenge banks that are above that cap.

55 Pub. L. No. 111-203, § 604(d), (e)(1), (f), 124 Stat. 1376, 1601, 1602 (2010).

56 § 1842(c)(1).

57 *See supra* note 14 and accompanying text. *See also, e.g.*, Martin A. Traber, *Legislative History of the 1960 Bank Merger Act and Its 1996 Amendment: Judicial Misuse and a Suggested Approach*, 44 IND. L. J. 598, 615-16 (1969).

58 12 U.S.C. § 1842(c)(7); *see also* § 1843(j)(2). Other pruidential factors for consideration under the BHCA include “Banking and Community Factors,” “Supervisory Factors,” and “Managerial Resources.” § 1842(c)(2)-(3), (5). *See also* M. Maureen Murphy, Congressional Research Service, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Titles III and VI, Regulation of Depository Institutions and Depository Institution Holding Companies* (Jul. 23, 20010), https://www.llsdc.org/assets/DoddFrankdocs/crs-r41339.pdf (showing that competition was not a relevant factor for the Dodd-Frank Act’s reforms of the BHCA). Similarly, Congress added financial stability as a separate paragraph in the BMA. § 1828(c)(5).

59 12 U.S.C. § 1849(b)(1).

60 § 1828(c)(5).

BMA distinguishes between competitive issues and systemic-risk issues and contemplates DoJ consideration of only the competitive factor.[61]

These distinctions are determinative. Congress knows how to instruct an agency to consider systemic risk, as it explicitly directed the Federal Bank Regulators to do. It declined to provide the same authority to DoJ. DoJ may not override Congress's judgment by considering a factor that Congress authorized only the Federal Bank Regulators to review.[62]

The statutory scheme confirms what the text and history make clear: the antitrust laws do not authorize DoJ to consider systemic risk as part of its review under the antitrust laws because systemic risk is not a competitive factor but rather a prudential issue. DoJ and the Federal Bank Regulators have distinct roles under the statutes because the agencies have different institutional focuses and goals. DoJ's expertise lies in the enforcement of the antitrust laws, and DoJ's role in reviewing proposed bank mergers is (1) to provide commentary to the Federal Bank Regulators to aid their decision-making on competitive issues and (2) to determine whether to bring a suit under the antitrust laws if a Federal Bank Regulator approves a merger that DoJ believes would harm competition. Congress authorized the Federal Bank Regulators, however, to conduct a review of proposed mergers based on multiple factors—including systemic risk.

It would be a particularly egregious rejection of Congress's scheme were DoJ, under the guise of systemic-risk concerns, to adopt a blanket prohibition against mergers based on an absolute size threshold that differs from the threshold that Congress adopted.[63] The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 prohibits transactions that would result in the bank holding company holding more than 10% of the nation's bank deposits.[64] And the Dodd-Frank Act supplemented this prohibition by adding a rule that prohibits transactions that would lead the resulting financial company to hold more than 10% of the aggregate consolidated liabilities of the nation's financial companies.[65] A radically different *per se* rule (or a rule that has the same practical impact) would be a repudiation of

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61 § 1828(c)(4).

62 *See generally Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)).

63 *See supra* pp. 11-12.

64 § 1842(d)(2)(A). The inclusion of the 10% cap was a considered congressional decision reflecting the view that "anti-concentration limits … are extremely important in maintaining local competitiveness" and that excessive consolidation threatens the soundness of the banking system. 140 CONG. REC. H6, 774-75 (1994) (statement of Rep. Roukema).

65 § 1852(b).

Congress's considered judgment about the appropriate cap on bank mergers.[66] The $100 billion asset cap that has been suggested would reduce Congress' own rule by *95%*. When Congress directly speaks on a policy issue in one statute, an agency is precluded from assuming that a different statute obliquely gives it the authority to adopt a conflicting policy.[67]

IV. Improvements to the current regime

In the DoJ's most recent request for comments, DoJ asked for suggestions on several technical aspects of its review under the prevailing merger policy. We incorporate BPI's 2020 suggestions and address below DoJ's renewed request for comments on appropriate remedies.

The DoJ also asked whether the approach to remedies over the last several decades—branch divestitures—are adequate. The answer to that question is "yes," but it first must be placed in context. Divestitures are only required in a small fraction of bank mergers because most involve either no horizontal overlap (that is, they are geographic market-extension mergers) or occur in geographic markets with many other competitors and thus necessitate no divestiture to maintain a competitive environment.

It is well-established that divestitures are an appropriate merger remedy when "business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise" so that the "divestiture has a high degree of success."[68] This is the case for bank branches, as recognized for decades by DoJ

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66 A cap would also be directly at odds with the Supreme Court's rejection of "a per se rule against geographic market extension mergers" in *Marine Bancorporation* as it would introduce a *per se* rule against *any* mergers above the cap, including geographic market extension mergers. 418 U.S. at 623.

67 *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Senator Elizabeth Warren recently introduced a bill that *would* make systemic risk a consideration in the analysis of competitive effects. Bank Merger Review Modernization Act, S. 2882, 117th Cong. (2021). The bill proposes to amend both bank merger statutes to require that, when the Federal Bank Regulators evaluate the "competitive effects" of a merger, they must consider how any "proposed transaction could impair the resilience of the United States or global financial systems." *Id.* at § 8(a), (b)(1), (b)(2). There is an obvious negative inference from this proposal that systemic risk is not currently a competitive factor. In any event, it is up to Congress to debate and decide whether systemic risk or "resilience" is a competitive factor.

68 Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Remarks to the New York State Bar Association Antitrust Section* (Jan. 24, 2022).

leaders from both political parties[69] and the Federal Bank Regulators.[70] A federal court judge found that branch divestitures effectively eliminate any anticompetitive harm from a proposed bank merger because they "eliminate any direct competition between the [merger parties], and decrease immediately the concentration ratios and increase immediately the number of banking options in each of the relevant markets."[71] We are unaware of criticisms of current bank-merger policy that identify instances of a remedy that did not adequately restore pre-merger competition in a relevant market—let alone a robust comparison of market conditions that followed a divestiture to market conditions that would have prevailed without the merger and its resulting efficiencies.

It is also worth noting that analytically justified remedies must be based on competitive concerns created by the proposed merger. The Division's Policy on Merger Remedies requires that any remedy must be "closely related to the identified competitive

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69 *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Approves Fleet/Shawmut Bank Merger After Parties Agree To $3.7 Billion Divestiture* (Oct. 31, 1995), https://www.justice.gov/archive/atr/public/press_releases/1995/0454.htm ("The restructured deal will ensure that competition in the New England banking industry, particularly in services to small and medium-sized businesses, will remain competitive."); Press Release, U.S. Dep't of Justice, *Justice Department Clears Bank Merger Between First Bank/First Interstate After Parties Agree To $170 Million Divestiture* (Jan. 6, 1996), https://www.justice.gov/archive/atr/public/press_releases/1996/0504.htm ("The divestiture resolves the Department's concerns that First Bank's acquisition would lessen competition for banking services available to small and medium-sized businesses."); Press Release, U.S. Dep't of Justice, *Southern National and United Carolina Bancshares Agree To Sell 20 North Carolina Bank Branches To Gain Justice Department Approval of Their Merger* (Apr. 29, 1997), https://www.justice.gov/archive/atr/public/press_releases/1997/1114.htm ("'Without divestiture, this merger could have stifled competition among North Carolina lenders,' said Joel I. Klein, Acting Assistant Attorney General in charge of the Department's Antitrust Division" and "'These divestitures allow Southern National to become a more efficient statewide bank while preserving competition for loans and other banking services.'").

70 Press Release, FRB, *Federal Reserve Board announces approval of application by Huntington Bancshares Incorporated* (May 25, 2021), https://www.federalreserve.gov/newsevents/pressreleases/orders20210525a.htm ("In particular, the Board has considered … commitments made by Huntington to divest branches in certain markets."); Press Release, FDIC, *FDIC Approves the Merger Between BB&T and SunTrust* (Nov. 19, 2019), https://www.fdic.gov/news/press-releases/2019/pr19111.html ("The FDIC's approval is conditional upon the compliance of Truist Bank to divest 30 branches."); OCC, *Conditional Approval #454* (Feb. 12, 2001), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2001/ca454.pdf ("Accordingly, while the proposed merger would eliminate a direct competitor from the Atlantic City market, the formal divestiture plan and the continuing presence of other banking alternatives would mitigate any adverse effects.").

71 *United States* v. *First National State Bancorporation*, 499 F. Supp. 793, 803, 813 (D.N.J. 1980).

harm."[72] As the Manual aptly explains, the "Division should not seek remedies that are unnecessary to prevent anticompetitive effects because that could exceed its law enforcement function, unjustifiably restrict companies' ability to compete, and raise costs to consumers."[73] We also submit that the DoJ should explicitly take into account the efficiencies, lower costs, additional services, and other benefits that most bank mergers provide.

In particular, it has become a common feature of larger mergers for the parties to make major investments in their communities. The community investment programs, typically developed with significant input from community groups in the areas impacted by the proposed merger, are made possible by the parties devoting a portion of the merger's synergies to their communities. A policy that choked off mergers would preclude these programs.

V. Important procedural steps necessary to ensure fairness and consistency with law

The DoJ and the Federal Bank Regulators must subject any proposed amendments to the Bank Merger Guidelines to notice-and-comment rulemaking to enable judicial review and ensure their fidelity to the law. *First*, the APA requires the agencies to provide notice and comment if new guidelines are to have substantive legal effect. *Second*, if new guidelines do not have substantive legal effect, they will nevertheless be an "economically significant guidance document" requiring notice and comment under the rules of the Office of Management and Budget (**OMB**). We also note that a notice-and-comment process is necessary to ensure the accuracy, fairness, and legitimacy of any new guidelines, especially in view of the acknowledgement that the Executive Order on Competition is designed to depart from the settled policies of the last forty years even though there has been no change in the underlying laws.[74] Finally, we observe that any new guidelines on bank mergers must have only prospective application to avoid unfair, retroactive application.

1. If new Bank Merger Guidelines contain substantive changes, they must be promulgated through notice and comment rulemaking. The APA requires notice-and-comment rulemaking when agencies promulgate "legislative rules" that have the "force and effect of law."[75] A "legislative rule" is a rule that expresses a change in substantive law or policy that the agency intends to make binding.[76] An agency pronouncement may be binding in application,

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72 U.S. Dep't of Justice, *Merger Remedies Manual* (2020), https://www.justice.gov/atr/page/file/1312416/download.

73 *Id.*

74 Press Release, The White House, *Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy* (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

75 5 U.S.C. § 553(b); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 303 (1979).

76 *Gen. Elec. Co.* v. *EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002).

even if the document is facially labeled as nonbinding. For example, if private parties are reasonably led to believe that they will suffer adverse consequences if they fail to conform to the agency's pronouncement, the pronouncement is binding and qualifies as a legislative rule.[77]

If DoJ were to set new standards for bank mergers (regardless of whether they are characterized as guidelines), they would have the practical effect of substantially lessening the likelihood of banks initiating mergers that do not comply with those standards. To ensure that the guidelines satisfy the APA's procedural requirements, DoJ and the Federal Bank Regulators should employ notice-and-comment rulemaking executed jointly by both DoJ and the Federal Bank Regulators. In his Executive Order on Competition, President Biden specifically directed DoJ to coordinate with all three Federal Bank Regulators about any revisions to the Bank Merger Guidelines.[78] And consistent with the President's directive, DoJ has already acknowledged that it is consulting with the Federal Bank Regulators in deciding how to revise the existing Bank Merger Guidelines.[79] Because the Executive Order on Competition contemplates joint action by both the Federal Bank Regulators and DoJ, the Federal Bank Regulators should also have a role in the notice-and-comment process.[80]

Joint rulemaking is especially critical because DoJ review and the Federal Bank Regulators' approval of bank mergers are closely interwoven. The banking statutes require the Federal Bank Regulators to consider DoJ's analysis of the "competitive factors" when reviewing a proposed merger application (absent emergency circumstances).[81] Moreover, if DoJ decides to initiate a suit under the antitrust laws after reviewing the "competitive factors," the Federal Bank Regulators' review of the merger application is automatically stayed.[82] Formal rulemaking would thus ensure that the different agencies continue to apply broadly consistent standards when reviewing bank mergers.[83] Put another way, DoJ revision of the Bank Merger Guidelines

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77 *Id.* at 383.

78 The Executive Order on Competition states: "[T]he Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency, is encouraged to review current practices and adopt a plan … for the revitalization of merger oversight." Exec. Order 14036, 86 Fed. Reg. 36987, 36992 (July 14, 2021).

79 S*upra* note 3 ("The division has and will continue to consult with the Federal Reserve, the Office of the Comptroller of Currency and the Federal Deposit Insurance Corporation.").

80 *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1168 (2012) ("[T]he most prominent example of joint rulemaking to date was undertaken by executive branch agencies at the urging of the President, and not in response to a congressional mandate.").

81 §§ 1828(c)(6); 1849(b)(1).

82 §§ 1828(c)(7)(A); 1849(b)(1).

83 *See* Freeman & Rossi, *supra*, at 1167-69.

would require notice and comment by both DoJ and the Federal Bank Regulators given the deep entwinement of the Bank Merger Guidelines and practice at the Federal Bank Regulators.

2. Even if notice and comment were not required under the APA, it would be required under the OMB's Final Bulletin on Agency Good Guidance Practices.[84] OMB's rule requires agencies to use notice and comment when they issue "economically significant guidance documents" that would not otherwise require notice and comment under the APA.[85] An "economically significant guidance document" is a "significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy."[86] Any new guidelines will adversely affect the banking sector in a material way if they reject decades of practice at the DoJ and the Federal Bank Regulators and impose standards that deviate materially from long-standing policy and even more so if they replaced predictability and objectivity with uncertainty and subjectivity. More broadly, the economy would be significantly harmed by new guidelines that choked off mergers that would provide synergies, enhanced products and services, and other community benefits. As just one example, a recently announced community investment program that would be enabled by merger synergies would provide for over $40 billion (that is, 400 times the OMB's $100 million standard) in investment in low and moderate income and majority minority communities.[87] Revising the guidelines through notice-and-comment rulemaking will help ensure that any new guidance conforms with OMB's requirements.

3. As a matter of fair and transparent process, the DoJ and the Federal Bank Regulators should employ a notice-and-comment procedure to ensure the accuracy, fairness, and legitimacy of any new Bank Merger Guidelines. As a general matter, notice-and-comment rulemaking facilitates better rules by ensuring that agencies obtain information from the widest range of relevant stakeholders.[88] Agencies may not be able to foresee all the possible consequences of their proposed actions on their own, and the various questions that DoJ's 2020 and 2021 calls for comment have raised are no substitute for consideration of an actual set of draft guidelines. Greater public input and participation ensures that agencies consider the broadest range of perspectives and data before making decisions. Finally, notice-and-

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84 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

85 *Id.* at 3440. DoJ is an "agency" under the bulletin. *See id.* at 3439 (giving that term the same meaning that it has under the Paperwork Reduction Act, 44 U.S.C. § 3502(1)).

86 *Id.* at 3439.

87 Press Release, M&T Bank, *M&T Bank Outlines $43 Billion Community Growth Plan To Support Underserved, Communities of Color and Small Businesses* (Oct. 25, 2021), https://newsroom.mtb.com/2021-10-25-M-T-Bank-Outlines-43-Billion-Community-Growth-Plan-To-Support-Underserved,-Communities-of-Color-and-Small-Businesses.

88 *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65-68 (1971).

comment rulemaking legitimizes agency rules, by taking into consideration the views of regulated parties and others on the rules and guidelines that will affect them going forward.

For those reasons, a wide range of commentators recommend that the government should employ notice-and-comment rulemaking when promulgating important guidance documents that will influence the conduct of regulated parties, even if the APA does not clearly require the procedure.[89] In practice, interpretive rules and general statements of policy can shape the conduct of regulated entities. Regulated parties often have little choice but to follow agency guidance, even if it is nominally non-binding, when they need an agency's affirmative approval.[90] In the bank merger context, banks, as a practical matter, seek approval from both the Federal Bank Regulators and from DoJ. The practical consequences of the Bank Merger Guidelines are therefore typically determinative of the actual course of bank mergers. Notice-and-comment rulemaking is critical to ensure openness, transparency, accuracy, and legitimacy of any new guidelines.

Our recommendation to use notice-and-comment rulemaking is consistent with agency stated policy and practice. When the Federal Bank Regulators have issued significant regulations on bank mergers, they have used notice-and-comment procedures. For example, the FRB used notice and comment for two significant revisions to Regulation Y.[91] The FDIC has used notice and comment for significant rules that affect its review of bank mergers.[92] Similarly, the OCC has used notice and comment for its guidelines establishing heightened standards for certain larger banks.[93]

The DoJ (and the Federal Trade Commission) have promised that they will provide notice and comment regarding any new merger guidelines, consistent with the process

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[89] *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L. J. 1311, 1373 (1992); *see also* Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rule*, 68 ADMIN. L. REV. 491, 504 (2016) (observing that "a statutory change, generally requiring significant policy statements to be preceded by a period for public comment, would probably be a good idea"); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 398 (2009) (proposing that all agencies be required to employ a "limited notice-and-comment" process for most guidance).

[90] Nicholas R. Parrillo, Administrative Conference of the United States, *Federal Agency Guidance: An Institutional Perspective*, at 37 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf.

[91] Bank Holding Companies and Change in Bank Control, 49 Fed. Reg. 794 (Jan. 5, 1984); Bank Holding Companies and Change in Bank Control (Regulation Y), 62 Fed. Reg. 9290 (Feb. 28, 1997).

[92] *See, e.g.*, Bank Merger Transactions, 62 Fed. Reg. 52877 (Oct. 9, 1997).

[93] 79 Fed. Reg. 4282 (Jan. 27, 2014) (proposed rule).

used for the 2010 Horizontal Merger Guidelines.[94] Moreover, revising the Bank Merger Guidelines through notice and comment would be consistent with the longstanding recommendation of the American Bar Association (**ABA**). In 1987, the ABA recommended that all DoJ antitrust guidelines be promulgated through notice and comment.[95]

4. Finally, any amendment to the Bank Merger Guidelines should have prospective application only and not apply to mergers that have already been announced. Administrative law generally disfavors retroactivity because of the fundamental unfairness of holding parties to standards they could not have anticipated at the time of their actions. Agencies therefore may not promulgate legislative rules with retroactive effect absent a clear grant of statutory authority.[96] Policy statements also, by definition, are prospective in nature.[97] It would be fundamentally unfair and inconsistent with principles of administrative law for an agency to rely on revised merger guidelines to review any merger agreement signed before the guidelines' revision.

* * *

94 Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal; Press Release, U.S. Dep't of Justice, *Department of Justice and Federal Trade Commission to Hold Workshops Concerning Horizontal Merger Guidelines* (Sep. 22, 2009), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-hold-workshops-concerning-horizontal-merger; Press Release, Fed. Trade Comm'n, *Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines* (Apr. 20, 2010), https://www.ftc.gov/news-events/press-releases/2010/04/federal-trade-commission-seeks-views-proposed-update-horizontal. A notice and comment period was not provided in connection with issuance of the Bank Merger Guidelines in 1995, although notice and comment was provided when the FDIC published its competition policy. Bank Merger Transactions, 62 Fed. Reg. 52877 (Oct. 9, 1997).

95 American Bar Ass'n Report to the House of Delegates #108A (1987).

96 *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

97 The original Attorney General's Manual on the Administrative Procedure Act from 1947 defines "general statements of policy" as "statements issued by an agency to advise the public *prospectively* of the manner in which the agency proposes to exercise a discretionary power." (emphasis added).

For the foregoing reasons, we request that the Division and the Federal Bank Regulators (1) adhere to the well-developed approach that has governed bank-merger policy for 40 years, (2) take into account competitors lacking a physical branch in a local geographic market when assessing a merger's likely competitive effects (especially the exclusion of financial institutions that offer banking services but do not have a banking license from the analysis), (3) provide notice, public comment, and an opportunity for judicial review of any new Bank Merger Guidelines, and (4) apply any changes to bank-merger policy only prospectively.

Sincerely,

Gregg Rozansky

Senior Vice President, Senior
Associate General Counsel

Bank Policy Institute

Brent Tjarks

Executive Director

Mid-Size Bank Coalition of America

cc: Owen Kendler
Erin C. Grace
(U.S. Department of Justice)

Mark Van Der Weide
Board of Governors of the Federal Reserve System

Benjamin W. McDonough
Office of the Comptroller of the Currency

Harrel M. Pettway
Federal Deposit Insurance Corporation

Appendix A

Technical Appendix on the Analysis of National and Local Concentration Trends

A. National Concentration Trends

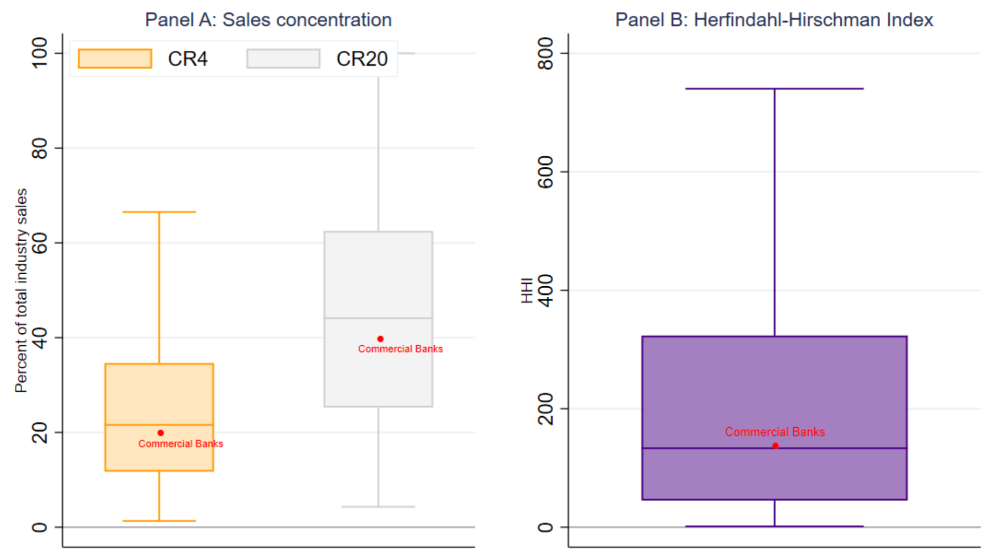
BPI economists conducted an analysis of concentration trends at the industry level using U.S. Economic Census data. The analysis shows that national concentration levels in the commercial banking industry are low relative to other industries and have been trending downwards for some time.

The Census Bureau carries out surveys every five years of individual establishments in selected sectors. The survey collects information on each establishment's economic activity, which can be used to derive industry concentration based on total output of each firm. The most recent data point in the U.S. Economic Census is 2017. The survey covers six large sectors: manufacturing, retail trade, wholesale trade, services, utilities and transportation, and finance. For this analysis, we focus on the four-digit NAICS codes to be able to distinguish the banking industry from all other industries within the finance sector. The other industries within finance include nondepository credit intermediation, securities and commodity contracts intermediation, insurance carriers, other insurance related activities, exchanges and central banks. The banking sector corresponds to the four-digit NAICS code 5221 (Depository Credit Intermediation).

Our sample includes 274 four-digit industries that cover approximately 80% of total U.S. employment. For each establishment in the survey, the Census reports total output, total employment, and the mapping between the establishment and the firm to which it belongs. The exact definition of output varies across industries but is generally intended to capture total sales, shipments, receipts, or any business done by the establishment. For the commercial banking sector, total output includes all revenues from all business activities, including commissions and fees from all sources.

Following Autor et al (2017), industry concentration is measured as (i) the share of total sales that the top 4 firms capture in an industry (denoted CR4), (ii) the share of total sales that the largest 20 firms capture in an industry (CR20), and (iii) the industry's Herfindahl-Hirschman Index (**HHI**). Exhibit 1 displays boxplots characterizing the distributions of these concentration measures across four-digit industries. The solid circle in each chart represents the banking industry. The banking industry concentration is at or below the median across all three measures.

Exhibit 1: National Concentration Level Across Four-Digit Industries

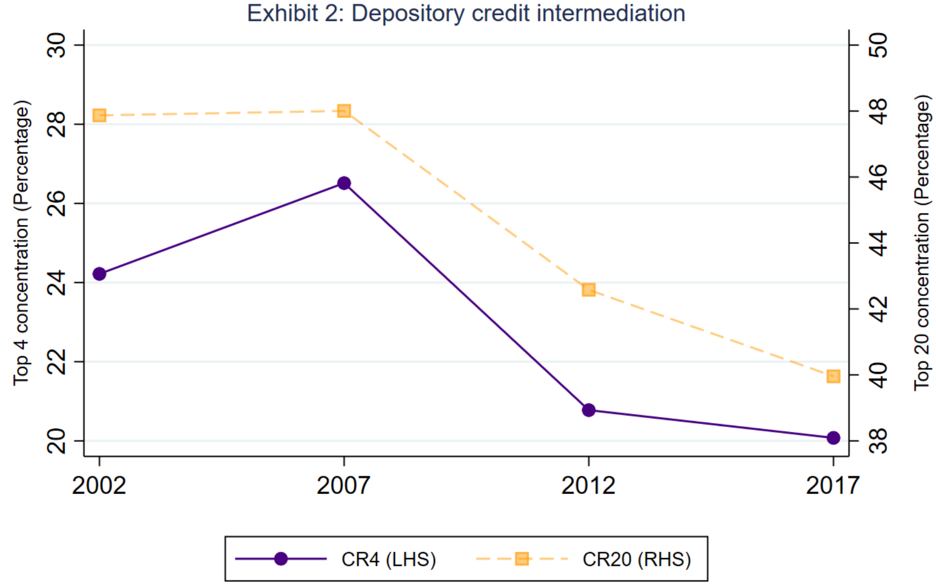


Source: U.S. Census Bureau

Note: CR4 (20) concentration is defined as the share of sales that the top four (twenty) firms capture in an industry.
HHI is calculated as the sum of squares of the market shares of the 50 largest firms within an industry.

Industries that have higher national concentration levels than banking include (1) couriers and express delivery, (2) general merchandise, (3) department stores, (4) air transportation, (5) telecommunication carriers, (6) cable programming, (7) motor vehicle manufacturing, (8) health and personal care stores, (9) electronics and appliance stores, (10) automotive rental and leasing, (11) taxi service, (12) building materials and supplies dealers, (13) non-depository credit intermediaries, (14) consumer goods retail, (15) electronic shopping and mail order houses, (16) shoe stores, (17) grocery stores, (18) home furnishing stores, (19) dry cleaning and laundry, (20) clothing stores, (21) brokerage, (22) jewelry, luggage and leather goods stores, (23) travel arrangements, and (24) furniture stores.

Exhibit 2: Depository credit intermediation



Source: U.S. Census Bureau.

Note: CR4 (20) concentration is defined as the share of sales that the top four (twenty) commercial banks capture in the banking industry.

Exhibit 2 plots the CR4 and CR20 concentration measures in the banking sector between 2002 and 2017. The publicly available Census data do not report the HHI for years prior to 2017. The share of sales of the top four firms increased from 24 percent to just over 26 percent between 2002 and 2007 but has fallen since then to represent only 20 percent as of 2017. Similarly, the top twenty firms show a declining trend in concentration from the 2007 peak of 48 percent and to 40 percent in 2017.

B. International Bank Concentration

The World Bank publishes a variety of national banking sector characteristics for many economies all over the world. The dataset includes two widely used measures of concentration in the banking sector: the share of total assets held by the top 3 and top 5 commercial banks.[98] Exhibit 3 plots the share of assets held by the top 3 and top 5 commercial banks in 2020 across the Group of Seven countries. There are two important results that can be gleaned from the distribution of bank concentration. First, there is a large variability in the commercial banking concentration measures, with five of the seven countries having highly concentrated banking industries. For instance, Germany, Canada, and France have top 5 bank concentration at or above 85 percent. Second, Japan and the United States have the lowest level of bank concentration among the Group of Seven, at 44 and 46 percent, respectively.

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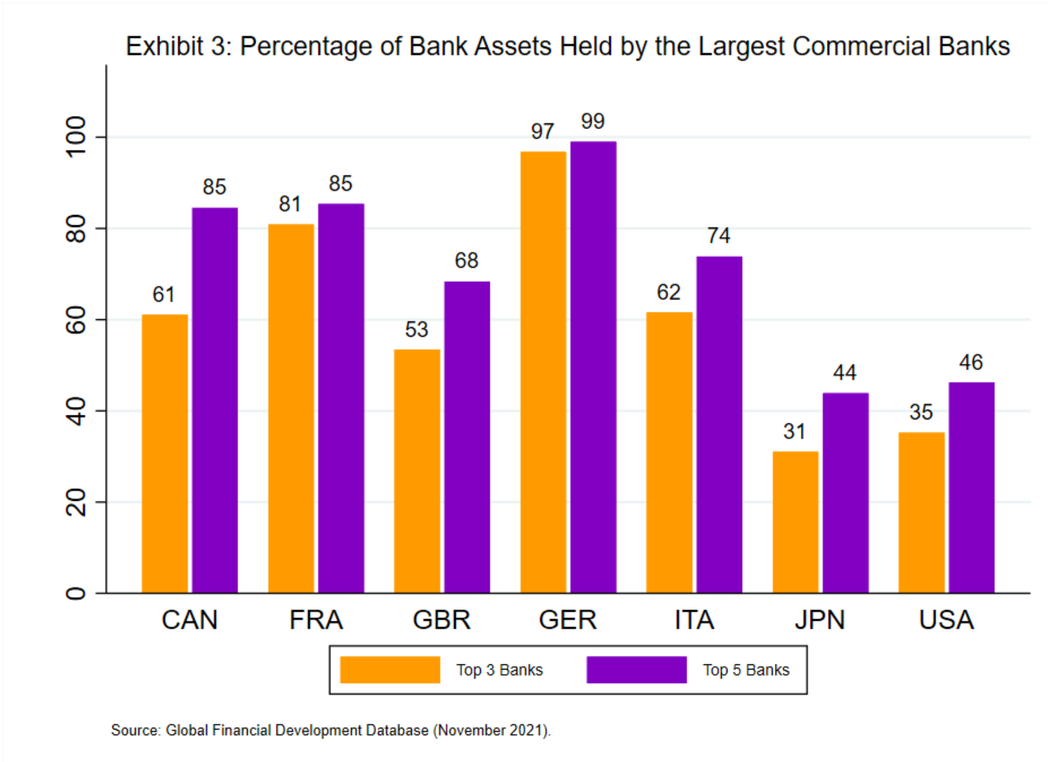
[98] The World Bank, *Global Financial Development Report 2019 / 2020: Bank Regulation and Supervision a Decade after the Global Financial Crisis* (2021), https://www.worldbank.org/en/publication/gfdr/data/global-financial-development-database.

Thus, from an international perspective, the level of concentration of the U.S. banking industry is modest.



C. <u>Local Concentration Trends</u>

BPI economists conducted an analysis of local market concentration trends using an expanded version of the FDIC's Summary of Deposits (**SOD**) data that have been supplemented with the FRB's banking market definitions. This expanded version is obtained from S&P Global Market Intelligence (SNL Financial) and is available annually for the years 1998 through 2021.[99] The dataset provides total deposits at the branch level for all branches of U.S. banks and thrift institutions (but not credit unions), along with identifying the institution, its top parent holding company (if it belongs to a BHC or THC), and the branch location (state, county, and banking market).

Following standard practice when using SOD data to examine local banking market concentration, only branch offices identified as "full-service brick and mortar" and "full-service retail" are included in the analysis.[100] In addition, a small number of large, wholesale

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99 Recorded deposit amounts are as of June 30 of each year.

100 Offices with service type codes other than 11 and 12 are excluded. Offices for which the FRB market is unknown, corresponding to fewer than 3 percent of branches in any given year, also are excluded.

banks and banks that operate a single branch and serve as deposit custodians for large, nationwide non-bank financial service companies are excluded.[101]

In addition, a conservative, branch-level deposit cap is applied to address extreme outliers in the data—branches with massive amounts of deposits.[102] These correspond to offices that house non-retail deposits or deposits collected from outside the local market. Specifically, branch-level deposits are capped at nine times the 99th percentile of the distribution of branch-level deposits in a market.[103] These outliers would otherwise have a material, undue influence on weighted average concentration and cause it to be volatile from year-to-year.

Market shares of each institution in each locality each year are then calculated and used to calculate the time series of each locality's HHI of banking market concentration, which are used to calculate the results shown in Exhibit 4.[104] The purple line shows average HHI across local markets by year, measured along the left axis. The yellow line shows the percentage of markets that would be considered highly concentrated based on current DoJ guidelines (an HHI exceeding 1,800 points), measured along the right axis. Each market is weighted by its total deposits for these calculations.

Both concentration measures declined between 1998 and 2019. Weighted average HHI decreased from 1349 to 1302 and the percentage of markets that are highly concentrated also declined from 19 to 14 percent.

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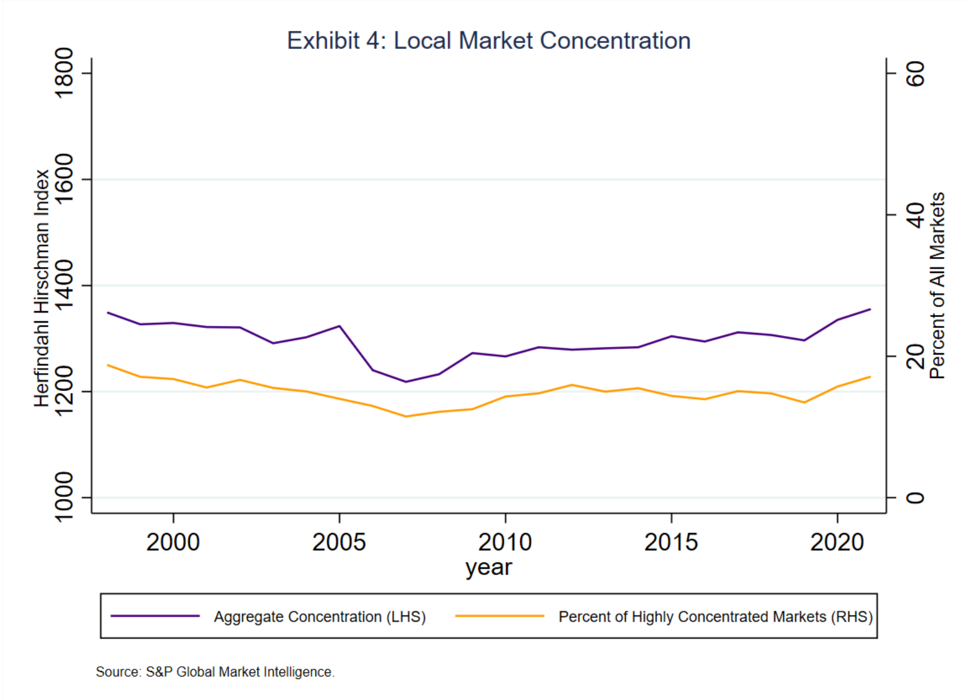
101 These are Stifel Bank, Stifel Trust Co., Delaware NA, Raymond James Bank, Ameriprise Bank, FSB, MetLife Bank NA, Merrill Lynch Bank USA, Scottrade Bank, State Farm Bank FSB, Bank of New York Mellon, State Street Bank and Trust Co., Morgan Stanley Bank NA, and Northern Trust Co. In addition, the single branch of Capital One, FSB in the Washington DC market area, present in the sample in 1998 through 2007, and the single branch of U.S. Bank NA in the Sacramento, CA market area, present only through 2001, are excluded. The latter exhibit highly volatile deposits, including extreme outlier observations in some years.

102 Also, eight markets that exhibit extremely volatile market deposits over time are excluded. These include Wilmington, DE and Sioux Falls, SD, which have many special-purpose banks serving a national market. The others are Columbus Area, GA; Columbus, IN; Las Vegas, NV; Ogden, UT; Red Wing, MN; and Winston-Salem, NC. The latter are characterized by outlier branches that are present only in some years or by an extremely skewed distribution of branch sizes in some years (such that the 99th percentile is more than 15 times the size of the 95th percentile.) Results are not materially affected by these exclusions.

103 The number of branches subject to the cap ranges from 46 to 65, fewer than a tenth of one percent of the total branch count, by year. In 2021, for example, deposit amounts at the 46 branches subject to the cap range from 10.4 to 631 billion dollars.

104 In calculating the HHI, deposits of thrift institutions are weighted 50 percent, in accordance with the Bank Merger Guidelines (another conservative factor).



Between 2020 and 2021, there is a slight increase in local market concentration, most likely owing to the FRB's asset purchases and resulting growth in reserve balances and deposits. As indicated in statistics released by the Federal Reserve Bank of New York, the growth in deposits was biased towards the largest banks, likely reflecting their broker-dealer activities and their greater balance sheet capacity.[105] As the FRB normalizes its balance sheet, we expect deposits at the largest banks to fall and consequently both aggregate concentration measures would decline.

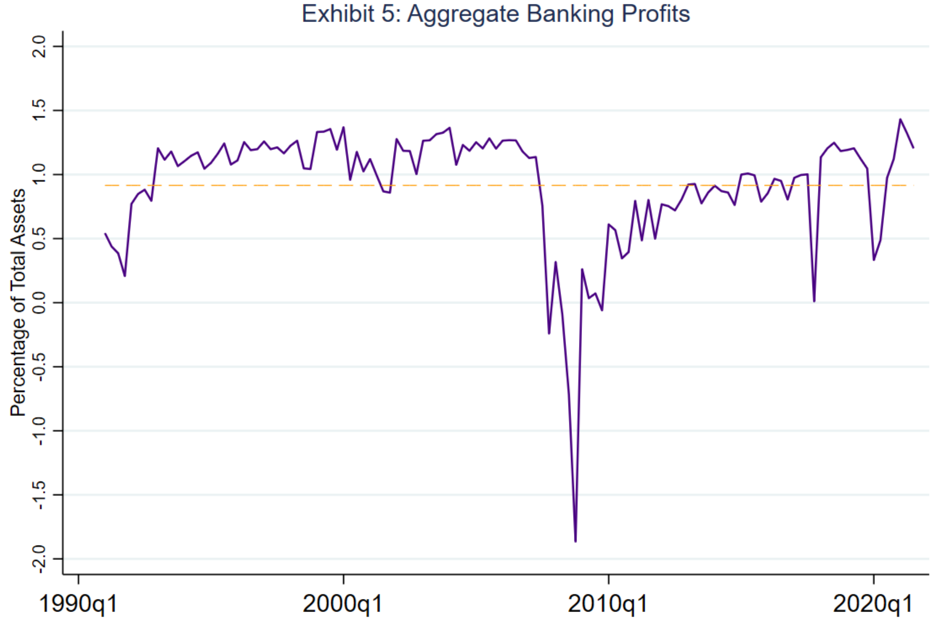
D. Bank Profitability

Another way of assessing the degree of concentration in the banking industry is to analyze the evolution of the share of bank profits over time. If there are concerns that the banking industry is getting overly concentrated, the share of bank profits would be rising over time as banks would be earning "monopolistic rents." A natural way of analyzing the share of bank profits is to calculate the ratio of net income to total assets in the banking industry (results are similar looking at the share of profits to nominal GDP). The Federal Reserve Bank of New York publishes a variety of banking statistics including the aggregate amount of bank profits

105 Additionally, more stringent liquidity regulation has increased the incentive for large banks (those with over $250 billion in assets or with more than $100 billion in assets and $50 billion in weighted short-term wholesale funding) to expand their insured deposit base, as this source of funding receives favorable treatment under liquidity risk measurement standards and resolution requirements.

relative to assets, also known as the return on assets.[106] Exhibit 5 shows the ratio of profits to assets between the first quarter of 1991 (the earliest period available) and the third quarter of 2021. Overall, the share of bank profits relative to total assets has been quite stable and averaged around 0.9% over the entire sample period. The ratio of profits to assets was slightly above 1% between the mid-1990s and the onset of the global financial crisis. After the crisis, this ratio has slowly risen from about 0.5% in the first quarter of 2010 to 1% at the onset of COVID. Naturally, during economic recessions, such as the ones experienced in 1991, 2008-2009, and 2020, bank profitability is considerably lower than the average profit share.

Exhibit 5: Aggregate Banking Profits



Source: Federal Reserve Bank of New York.

106 Federal Reserve Bank of New York, *Quarterly Trends for Consolidated U.S. Banking Organizations* (2021), https://www.newyorkfed.org/research/banking_research/quarterly_trends.html.

Appendix B

Technical Appendix with an Overview of Research on Effects of Bank Mergers

A. Benefits of Bank Mergers

Numerous studies demonstrate beneficial effects of bank mergers. These include scale economies and other efficiency benefits to the combining institutions. Scale economies derive from large, fixed costs of production being distributed over a large volume of output, such that average (per-unit) cost of production declines as the rate of production (quantity produced over a specified interval of time) increases. In the banking context, physical capital, including brick-and-mortar branches, information technology infrastructure, regulatory compliance costs, and other overhead expenses, may translate into large, fixed costs and the associated economies of scale that can make mergers beneficial.

Older studies, that use data from the 1980s, find evidence of scale economies up to a modest size, implying efficiency benefits from mergers between community banks or from small banks being acquired by larger ones.[107] In fact, according to a series of FRB studies (Rhoades 2000, Adams 2012, and Kowalik et al. 2015), most mergers are between community banks, and as such have long been recognized as yielding significant scale economies.

Studies that rely on more recent data demonstrate that economies of scale are far more extensive than the early literature suggests. Hughes, Mester, and Moon (2001) (using data from 1994) and Hughes and Mester (2013) (using data from 2003, 2007, and 2010) find significant returns to scale for banking organizations of all sizes. Feng and Serletis (2010), analyzing data on U.S. banks with over $1 billion in assets over the period 2000 to 2005, find that scale economies contributed to productivity growth among the largest banks. Wheelock and Wilson (2012), using data on all U.S. commercial banks from 1984 through 2006, find evidence of increasing returns to scale up to the largest size banks. The study concludes that "industry consolidation has been driven, at least in part, by scale economies."

As described by Mester (2010), the differences from earlier studies "reflect improvements in methods used for measuring scale economies," including in accounting for a bank's risk and capital structure."[108] Also, they "likely reflect real changes in banking

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107 McAllister and McManus (1993), among the later of these studies, find declining average cost up to about $500 million of total assets. According to the authors, previous studies that indicated more limited scale economies "were biased by problems in the statistical techniques used and by the fact that the models ignored an important input required for the intermediation process, financial capital.

108 According to Mester (2010), "At its heart, banking is about handling risk, and the amount of risk to take on is a management choice. The standard analysis used in earlier studies might not have detected scale economies that actually exist because standard analysis does not account for the risk or capital structure that a bank chooses."

technology, such as computing and telecommunications, and environmental factors, such as a relaxation of governmental restrictions on geographic and product expansion, that have led to a larger efficient scale."

Kovner, Vickery, and Zhou (2014) similarly suggest that the differences reflect "greater statistical power, attributable to the use of larger datasets with many more observations for large banking firms, as well as the evolution of empirical techniques. The difference in time periods may also play a role (for example, the greater use of information technology may have changed the extent to which scale economies are present)."

Rather than estimate overall economies of scale, Kovner, Vickery, and Zhou (2014) investigate the relationship between bank size and detailed components of noninterest expense. The analysis demonstrates a "robust inverse relationship between the size of bank holding companies and scaled measures of operating costs." The estimates imply that, "an additional $1 billion in assets reduces noninterest expense by $1 million to $2 million per year." Moreover, "these results hold across the size distribution of banking firms, and over different parts of our sample period" and are consistent with "operational and technological efficiencies related to size."

Economies of scale are not the only source of efficiency benefits from mergers. Mergers can provide complementarities that mitigate risks, reduce costs, or benefit consumers. For instance, Goetz, Laeven, and Levine (2016) find that geographic expansion reduces asset portfolio risk when banking organizations expand into economically disparate localities, consistent with diversification of idiosyncratic local risks.[109] Pugachev (2021) provides evidence that mergers and acquisitions equilibrate deposit and loan imbalances across markets, and that this equilibration leads to improved regional economic outcomes. That is, "in markets where loans are scarce relative to deposits, acquirers lend more and gather fewer deposits; where deposits are scarce, the opposite holds." In sum, these studies demonstrate that mergers and acquisitions often allow for a more efficient allocation of banking resources across regions.

In banking, as in other industries, merger or acquisition may be a manifestation of the natural, competitive process by which weakly performing, less efficient, or less effectively managed organizations are absorbed by stronger firms, improving overall market efficiency. There are plenty of examples of banks in weak financial condition, or with managerial or other deficiencies, being acquired by stronger institutions.[110] More systematic evidence of such a beneficial role of bank mergers and acquisitions is presented in Hannan and Pilloff (2009). That paper examines a large sample of individual banking organizations, observed from 1996 through 2005, identifying factors associated with greater likelihood of being acquired. The analysis supports the view that target banks tend to be less efficient than

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109 Similarly, Hughes, J.P, W. Lang, LJ. Mester, and C.G. Moon, (1999) demonstrate economic benefits from "interstate expansion that diversified banks' macroeconomic risk."

110 In addition, the least cost or most efficient way of resolving a failed bank often is to find a suitable bank acquirer, see, for example, Bennett and Unal (2014).

acquirers, such that “acquisitions serve to transfer resources from less efficient to more efficient uses.”

The efficiency-enhancing effect of a merger or acquisition sometimes extends to other banks operating in the same local markets as the merging institutions themselves. Evanoff and Ors (2008) find that when a local institution merges with or is acquired by an out-of-market institution, other local banks respond by increasing their level of cost efficiency. This effect is consistent with the argument that mergers and acquisitions can enhance competition in local banking markets by allowing for the creation of a stronger local competitor.[111]

In addition, Papadimitri, Staikouras, Travlos, and Tsoumas (2019) find that being subject to a recent regulatory enforcement action increases the likelihood of a bank being the target of a merger or acquisition. “Furthermore, these acquisitions improve the operating performance of post-acquisition combined entity, lending support to the hypothesis that punished banks’ M&As serve as a means to replace inefficient management and restore the target banks’ performance.”

B. Impact of mergers and acquisitions on small business lending

Proponents of a more restrictive merger policy characterize bank mergers as leading to a reduced supply of small business credit. Overall, however, the academic literature rejects the view that bank mergers lead to a systematic decline in the supply of bank loans to small businesses.

Where declines are indicated, they are tied to changes in organizational culture or to loan-origination processes that affect lending relationships, not to competitive effects. That is, in general, reduced market competition is not why some papers find a negative correlation between bank mergers and small business lending. Thus, their findings have no antitrust implications.

An important takeaway from the academic papers is that the relationship between bank mergers and bank lending to small businesses is complex and depends on many factors such as bank size, the location of the bank, its culture, ownership structure, and the period of analysis. One important result that has broad support is that merger activity among community banks boosts small business lending.

More generally, some types of bank mergers, such as between banks with a similar lending focus or strategy (Minton, Taboada and Williamson 2021), are associated with increases in small business loan originations, while other types of mergers have the opposite effect. An oft-cited reason is that lending to small businesses often relies on building relationships and on “soft” information that is acquired over time and not easily transmitted to

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111 For example, Calem (1987) and Jayaratne and Strahan (1997) develop this argument in the context of assessing the procompetitive effects of interstate banking.

other types of lenders.[112] This explanation receives empirical support in Nguyen (2019), although the results of that paper apply narrowly to mergers between large banks with overlapping branch networks.

Another interesting dimension is the broader market context around the merger. Some studies analyze the period when geographic restrictions on intrastate and interstate banking were being relaxed. Protected from competition by such restrictions, some banks may have been operating inefficiently, such as by investing too little effort in screening borrowers or engaging in other, suboptimal lending practices. Once the entry restrictions were lifted, such banks were apt to become targets of acquirers seeking to mitigate their weaknesses.

Thus, for example, Berger, Kashyap and Scalise (1995) present evidence that the relaxation of geographic restrictions on banking is associated with a decline in the supply of small business loans, because some of these loans would never have been made had the geographic restrictions not been in place. While it may seem that this evidence is specific to this historical period examined, the broader lesson remains relevant—that some declines in small business lending following a merger may reflect the implementation of more careful underwriting practices.

An important, albeit older, paper examining the impact of bank consolidation on small business lending is Berger, Saunders, Scalise and Udell (1998). The authors find that mergers tend to have a negative effect on small business lending initially, but it is offset by the reaction of other banks in the same market or in some cases by changes in the organizational structure of the merged entity.

Berger, Rosen, and Udell (2001) similarly emphasize the importance of distinguishing between short-run and longer-run outcomes. This paper demonstrates that the size distribution of banks in a market is an important determinant of cost and availability of small business loans; in general, markets where large banks are present have lower-priced credit. Moreover, "when large banks enter small bank dominated markets, they may charge high interest rates consistent with those charged by small banks in these markets rather than compete aggressively for market share. However, as the presence of large banks grows to a critical mass, competition may intensify, and prices may decline."

Peek and Rosengren (1998) and Strahan and Weston (1996, 1997) find that mergers involving small banks increased small business lending. However, these papers yield differing conclusions regarding the impact on small business loans when two large institutions merge. Peek and Rosengren find a decrease in small business lending while Strahan and Weston find that there is no significant impact on small business lending.

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112 For a detailed discussion of the role of relationship lending in small business finance, *see* Berger and Udell (2002).

Avery and Samolyk (2004), find that the impact of M&A involving large banks on small business lending depends on the period examined. Mergers occurring between 1994 and 1997 led to lower small business loan growth but the association was no longer present in the period between 1997 and 2000.

Examining bank mergers that occurred after 2000s, Jagtiani, Kotliar and Maingi (2016) find that the post-merger entity reports higher small business loan originations compared to the sum of small business originations by the target and acquiror banks prior to the merger. They find even stronger results when the acquiring bank is large. However, as shown by Jagtiani and Maingi (2019), the increase in small business originations is more likely to occur in markets served by the acquirer bank before the merger.

Minton, Taboada and Williamson (2021) examine outcomes in the target bank's market from mergers that occurred in 1999 through 2019. The study reports that small business loan originations tended to increase following acquisitions of small banks by other small banks, especially for in-state mergers, while lending tended to decline in cases in which the acquirer was a large bank. In addition, study suggests that the results are driven by acquirers' business strategies; small local acquirers tended to choose target banks that were already focused on small business lending, whereas large acquirers tended to be less oriented toward small business lending.

BPI is unaware of any papers showing a decline in small business lending in some context along with providing a full, cost-versus-benefit assessment. One potential offsetting benefit, in the case of reduced lending in the target bank's market, may be increased lending in other markets served by the acquirer. Another, as highlighted in Berger, Kashyap and Scalise (1995), may be a shift to higher quality loans due to improved risk management. In addition, when mergers lead to a decline in small business originations for the combined entity, the decline can be offset by increased lending by other banks or nonbanks operating in that market, as suggested by Berger, Saunders, Scalise and Udell (1998) and Gopal and Schnabl (2020).

C. <u>Socioeconomic effects of bank mergers</u>

Critics of banking merger policy have promulgated the claim that bank mergers lead to adverse socioeconomic effects on lower-income neighborhoods, including increased property crime, citing the analysis in Garmaise and Moskowitz (2006). This paper, which examines local commercial real estate (CRE) lending activity and socioeconomic outcomes following mergers, falls short of supporting such a harsh verdict concerning the effects of mergers.

The study finds that outcomes differed depending on whether the merging institutions ex-ante were major competitors in the same local area (each having a substantial share of the CRE loans originated in the market pre-merger.) Such mergers were associated with relatively large post-merger declines in CRE lending and CRE property development and construction activity in the local area. Also, particularly in low- and moderate-income neighborhoods, local property prices declined, median income dropped, income inequality increased, and burglaries and property crime increased post-merger.

First and foremost, the paper's empirical findings pertain to a specific, historical economic context—namely, the collapse of commercial real estate markets in the late 1980s and early 1990s and its aftermath—that is not generalizable. Also, while the study documents associations between bank mergers and elements of neighborhood change, the analysis does not establish that the mergers caused those outcomes.

Of the various elements of neighborhood change examined, the critics selectively have singled out the negative aspects of the paper dealing with crime association. Other aspects, such as increased housing affordability, seem more positive.

Historical relevance. Garmaise and Moskowitz (2006) compare local area outcomes before and after bank mergers, with particular emphasis on commercial real estate (CRE) lending, community development, demographic shifts, and crime rates. The period examined is 1992 through 1999, and attention is restricted to mergers that occurred between large banks.

However, in critically important respects, this was not a normal period in CRE lending markets. Much of this period was a time of recalibration of CRE lending, following the major downturn in commercial real estate markets in the late 1980s and early 1990s that had been in reaction to previous overbuilding.[113]

In other words, CRE markets had experienced a speculative boom during the 1980s, with eased credit standards and rapid appreciation of commercial property values. The collapse of the boom near the end of that decade brought a spike in default rates, as shown in Figure B-1. This led to a tightening of credit standards and contraction of CRE lending for some time thereafter as documented in FDIC (1997).

Although the performance of merging, large banks that were major competitors in the same local area, and outcomes in neighborhoods served by these banks, may have differed from those associated with other banks and other neighborhoods during this period, the experience is not generalizable. That is, lessons cannot be drawn regarding the effects of mergers in general.

Did bank mergers cause the crime? There is no compelling reason to believe that the distinct neighborhood outcomes highlighted in Garmaise and Moskowitz (2006) were *caused* by the mergers in question. A more plausible explanation of the findings, given the historical context, is that acquirers were taking action to remediate weaknesses they had

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[113] See FDIC (1997) for a detailed examination of the role of commercial real estate lending in driving credit losses and bank failures during the late 1980s and early 1990s.

inherited.[114] Such actions would have included a tightening of CRE lending standards and curtailment of CRE lending in the localities that had generated high credit losses.

These tended to be localities where there had been an oversupply of credit, properties had been overvalued and overbuilding had occurred, such that the end of the boom brought forth the various outcomes identified in the study. Although it might appear that these outcomes were consequences of the reduced CRE lending associated with the mergers, fundamentally they were not—the post-merger curtailment of credit and the various neighborhood outcomes reflected the same underlying economic dynamics.[115]

Nor can the post-merger curtailment of CRE lending be judged to have been harmful overall. Lower-income families may have been harmed during prior years when an overheated CRE market caused rent payments to be less affordable, and because prior overbuilding led to vacancies followed by neighborhood instability. But with the collapse of the boom, the neighborhoods became more affordable.

The set of neighborhood outcomes highlighted in the study suggests that the results may in part reflect situations of neighborhood gentrification being partially reversed. Thus, the neighborhoods in question experienced a restoration of affordability and an inflow of lower-income households, reflected in a wider income distribution of area residents, along with some increase in property crime.[116]

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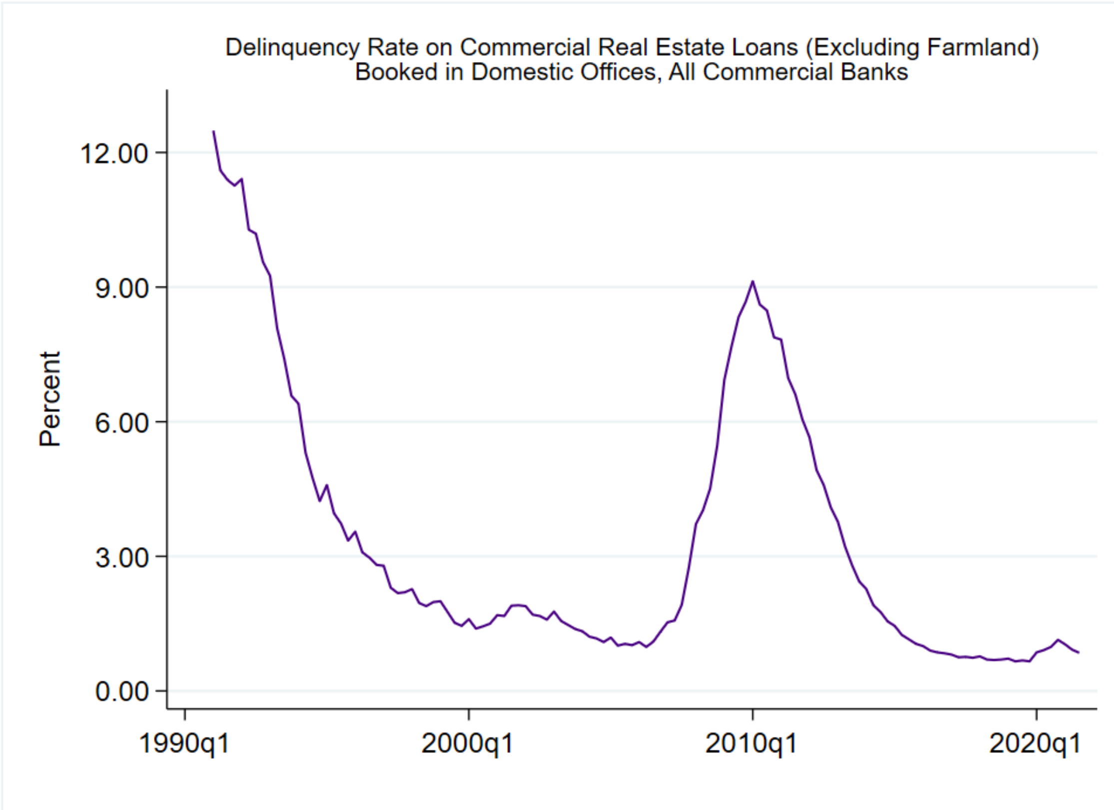
114 Particularly in the case of mergers of banks operating in many of the same geographic markets, the acquirers were likely in stronger financial condition than acquirees—more well capitalized and less hampered by credit losses.

115 Germaise and Moskowitz (1998) provide evidence that the observed association between mergers and crime is not due to a "reverse causality," whereby worsening socioeconomic conditions in neighborhoods lead to bank mergers. However, ruling out reverse causality is not equivalent to causality or ruling out that common factors underlie the association.

116 As noted in Germaise and Moskowitz (1998), a general finding of the crime literature is that income and income dispersion are strongly related to property crime.

Figure B-1: Delinquency Rate on Commercial Real Estate Loans (Q1 1991- Q3 2021)



Source: Board of Governors of the Federal Reserve System (pre-1991 data are unavailable)

D. Effects of bank consolidation on affordability of bank transactions accounts

A third criticism that has been directed at bank mergers and acquisitions—particularly the case of a large bank acquiring a smaller one—is that they tend to lead to higher fees for retail transaction account customers, on the margin causing some customers to become unbanked. This concern is based on studies showing that large banks tend to charge higher monthly fees on transactions accounts and to require larger minimum balances to avoid the fee.

The most recent of these studies is Bord (2018), which utilizes deposit pricing data from 1994 through 2016.[117] However, as acknowledged in many of the earlier studies, these studies do not demonstrate that the customers of larger banks are worse off, because important price as well as non-price dimensions of transactions are not measured. Most notably, larger banks offer the convenience of more extensive branch networks along with a network of proprietary ATM locations. Customers of small banks often are disadvantaged not

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117 Earlier studies include Hannan (2006), which focuses on pricing differences based on the extensiveness of a bank's branch network.

only by their convenience limitations, but also because of account-related fees not captured in the data used by these studies, including ATM surcharge fees and fees for check usage.

Bord (2018) also presents evidence that when a large bank acquires a small bank, the latter's depositors face higher monthly fees for checking accounts, consistent with the finding above and the large bank maintaining a uniform fee schedule across multiple branches. Again, for the reasons just articulated, this does not imply that those customers face higher overall costs or are worse off.

To the contrary, as demonstrated in Calem and Nakamura (1998), by extending a uniform price schedule across a broad geographic area, a large bank can mitigate pricing disparities between more populated, competitive areas and less populated, more concentrated areas. That is, the large bank may effectively "export" competition via its branch network. Evidence consistent with this view is found in Mester (1987) and in Hannan (2006), which find that the greater the presence of multimarket banks in a local market, the weaker is the positive relationship between market concentration and the cost of banking services.

Bord (2018) further purports to show that after a small bank is acquired by a large bank, neighborhoods where the small bank had a branch are more likely to experience the opening of a check-cashing outlet compared to other areas. This finding is viewed as evidence of consumers becoming unbanked due to the acquisition.

This part of the analysis also is subject to serious data limitations. The data identify only independent check cashing outlets, whereas check cashing services have been widely available at many large retail and supermarket chains such as Walmart and are provided for a fee to non-customers at some banks. Thus, the opening of a new check-cashing outlet in the neighborhood may reflect factors not controlled for, such as elimination of high-fee check-cashing at the acquired branch post-merger, or that the neighborhood is relatively far from large retail stores offering check-cashing.

Aside from these shortcomings, in today's banking environment the study has diminishing relevance. Financial inclusion, as measured by the percentage of the population that is unbanked, has improved significantly over the past decade. As explained in a recent BPI study, much of this improvement reflects expanded offering of low-cost transactions accounts at both large and small banks.[118]

In fact, a forthcoming analysis conducted by BPI staff strongly contests the assertion that when large banks absorb small banks (or otherwise expand their presence in a local market) financial inclusion is harmed. This analysis compares the percentage of unbanked households in 2013 versus 2019 at the metropolitan area level using data from the FDIC's biennial financial inclusion survey. The analysis distinguishes between MSAs that experienced a

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118 *Bank-On Transaction Accounts and Financial Inclusion*, available at: "Bank On" Transaction Accounts and Financial Inclusion - Bank Policy Institute (bpi.com).

substantial decrease (15 percentage points or more) in the share of branches belonging to small banks over this period, and those that had a lesser decline or an increase in small banks' share. No essential difference is observed between these two groups of MSAs—both experienced significant improvement in financial inclusion (reduction in percent unbanked.) If anything, greater improvement occurred in MSAs experiencing substantial decline in small bank presence.

Consumers ultimately will choose a bank that provides them with their overall, preferred combination of convenience, benefits, and fees. In recent years, with the growth of internet banking and expanded offering of low-cost transactions accounts, consumers are less limited than ever in selecting the banking relationship that best meets their needs.

E. Impacts of mergers on financial stability

Proponents of major changes to bank-merger policy also cite papers on too-big-to-fail (**TBTF**) and on the effect of bank size on systemic risk. The post-crisis changes in the regulation and supervision of the largest U.S. banks have significantly increased the resilience of the U.S. and global financial systems. As a result, a growing body of academic papers shows that large banks in the United States do not benefit from a lower cost of funding resulting from a perception that they are too-big-to-fail.

In a 2014 study, the Government Accountability Office used 42 different approaches to determine if bigger banks had lower funding costs. Most specifications used in the report found that, while prior to 2010 (the year the Dodd-Frank Act was enacted) large banks had lower funding costs than small banks, after 2010 large banks faced higher, not lower, funding costs than small banks. More recently, Berndt, Duffie, and Zhu (2021) show a "dramatic and persistent reduction in market-implied probabilities of government bailouts of U.S. GSIB holding companies … [and] similar but smaller effects for domestically important non GSIB banks …" (p.2) They also find that the decline in bailout probability has reduced the market value of banks by nearly one-third. Atkeson, d'Avernas, Eisfeldt and Weill (2018) show that in the period between 1996 and 2007, variation in the perceptions of an implicit government guarantee accounted for substantial variation in the market-to-book ratios of U.S. banks. By contrast, after 2011, the paper shows that such perceptions no longer account for a material share of bank value. Lastly, Minton, Stulz and Taboada (2019) find that the Tobin's q (the ratio of the market value of assets to the book value of assets) and the market-to-book ratio of bank equity decrease with bank size rather than increase as would be expected if larger banks benefitted from a perception of being TBTF.

As part of the post-crisis response to the TBTF issue, the United States has implemented several types of policies. First, the cost of failure in terms of externalities or adverse consequences to the financial system and broader economy have been reduced by increased resolvability of banks. This increased resolvability is the result of several factors, including the requirement that large holding companies prepare plans for their orderly resolution under the Bankruptcy Code, better known as "living wills;" hold sufficient liquidity to fund orderly resolution under the Bankruptcy Code; and issue, at the holding company level, substantial minimum amounts of long-term debt that can be converted to equity to capitalize the new institution after failure. In addition, the enactment of Orderly Liquidation Authority under Title II of the Dodd-Frank Act empowers the FDIC—in specified “backstop” circumstances—to resolve a bank holding company in an orderly fashion at no taxpayer cost—authority that did not exist during the financial crisis. Legal obstacles to implementing such a plan have been addressed, including through the issuance of final regulations banning cross default clauses in derivatives contracts and strictly limiting issuance of short-term debt at the holding company, each of which had been identified as holding the potential to complicate resolution.

The perceived likelihood of government intervention has been reduced by eliminating the ability of the FRB to lend to an individual non-bank, restricting the ability of the FDIC to guarantee bank liabilities, restricting the ability of the Treasury to tap the funding source used to insure money market mutual funds, and ending the TARP funding authority that Treasury used to recapitalize banks.

Another key element of the Basel III regulatory framework was to introduce a capital surcharge on systemically important banks to address the impact of the failure of large banks on the rest of the financial system. For that purpose, the Basel Committee developed a framework for identifying systemically important banks that depends on five bank characteristics: size, interconnectedness, complexity, cross-border activities, and how easy it is to substitute for the bank’s provision of products and services. In addition, recent legislative and regulatory tailoring to establish more graduated tiers for applying enhanced prudential standards has added to the marginal impact of becoming materially more systemic.

In response to the financial crisis, the Dodd-Frank Act added a financial stability factor to the BHC and Bank Merger Acts in 2010. Currently, the FRB uses the five indicators included in the Basel Committee’s assessment methodology for global systemically important banks (GSIB) based on the proforma characteristics of the merged entity to assess financial stability risks. In addition, the FRB also looks at qualitative factors, such as the degree of complexity of the combined entity to gauge the relative difficulty in resolving the combined entity in case of default.

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