INTERNATIONAL BANCSHARES
CORPORATION

February 4, 2022

Via email:

Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
ATR.BankMergers@usdoj.gov

Re: Comments on Request for Comment Regarding Bank Merger Competitive Analysis

Dear Sir or Madam:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 170 facilities and 263 ATMs, serving 76 communities in Texas and Oklahoma through five separately chartered banks ("IBC Banks") ranging in size from approximately $475 million to $9.5 billion, with consolidated assets totaling over $15 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

This letter responds to the request for comment ("Request") issued by the Department of Justice's Antitrust Division ("DOJ") regarding the revision of the 1995 Banking Guidelines or its competitive analysis of bank mergers. Specifically, the DOJ is seeking input on the extent to which its competitive scrutiny of bank mergers should apply standards and incorporate factors beyond those applicable to other industries, as well as feedback on what factors should be considered, how should they be incorporated into the review process and any additional remedies the DOJ should consider obtaining. The Request generally builds on a previous 2020 request for feedback in which, given the rise in non-traditional banks and finance companies, the DOJ sought information on the inclusion of non-traditional banks and nonbanks in its merger guidelines, among other things.

The Request comes in the midst of uncertainty within the Federal Deposit Insurance Corporation ("FDIC") regarding its bank merger review and control over the FDIC's agenda, including a failed attempt to add review of its bank merger policies to its recent agenda. As noted by the DOJ in its Request press release, it "shares with its federal partners an interest in ensuring bank mergers do not harm competition and the competitive process." Current FDIC leadership is conflicted regarding changes to bank merger reviews, and the Request (in addition to the DOJ's publicly announced approval for Consumer Financial Protection Bureau ("CFPB") Director Rohit Chopra, the FDIC board member strongly supportive of efforts to revise bank merger review policies) shows that the DOJ appears to be on the side of such changes to the bank merger guidelines.

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Based on the DOJ's public statements and the Request, it appears set on exploring more stringent requirements for its review of mergers and acquisitions by banks. The Request focuses "on 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."

There is no doubt that the competitive landscape of the banking industry has changed substantially since the bank merger guidelines were adopted in 1995. IBC believes that it is appropriate for the DOJ to update its approach to reviewing bank mergers. The Request lists six specific requests for comment. IBC has provided general comments and comments to the specific requests as noted below.

General Comments

IBC supports the enactment of a de minimis exception for mergers involving institutions under a certain asset threshold. Under such exception, the DOJ could automatically provide a general report on the competitive factors of the transaction to the applicable federal bank regulator, but would not conduct an independent competitive effects analysis of the specific proposed merger. The applicable federal bank regulator would still be required to consider the DOJ report to ensure that the merger would not substantially lessen competition. See 12 U.S.C. 1828 and 1842. In this way, anticompetitive deals would still be prohibited. But the exception would ensure that certain small mergers could be consummated in a timely way, without protracted and costly investigations by the DOJ. An appropriate threshold for this exception may be if any merging institution has $10 billion or less in assets.

Specific Requests for Comment

Scope of Division Review

- To what extent should the Division's competitive scrutiny of bank mergers apply standards, and incorporate factors, beyond those applicable to other industries solely under Section 7 of the Clayton Act?

  IBC Comment: Historically, antitrust law has been applied differently to bank mergers than to mergers in other industries. Indeed, until the Supreme Court ruled otherwise in the early 1960s, bank mergers were considered outside the reach of review under Section 7 of the Clayton Act. Even then, the unique position of banking in the economy of this country, both in regards to the nature of the operations performed and the degree of governmental supervision involved, was recognized. Banking, for better or worse, is fundamentally different from other industries in the United States, such as manufacturing businesses, and deserves special consideration related to merger activities.

  While IBC does not disagree in general to inclusion of other merger considerations under the Clayton Act, IBC urges the DOJ to be mindful of the unique nature of banking and the finance industry, including the singular role banks play in conducting this country's fiscal and monetary operations, and to consider the public policy goal of financial stability of our economy.

- In so doing, (1) what factors should the Division consider, (2) how should those factors be incorporated into the Division's competitive review process, and (3) what additional remedies should the Division consider obtaining?

  IBC Comment: Unlike most other businesses, entry into the banking space is not straightforward. In order to engage in the business of banking, generally one must first receive a charter and deposit insurance, both of which require comprehensive regulatory review and approval. This high burden to entry is a natural limit on competition, and is soundly based on the need to ensure that depository institutions are operated in a safe and sound manner. This is in stark contrast with other markets and business sectors where the anti-competitiveness of a merger is typically the sole basis of antitrust review. In banking, it is both prudentially appropriate and legally mandatory to consider the public interest more broadly and not myopically mere competitiveness.

  Currently under the Bank Merger Act, bank regulators may not approve a merger if its effect would be "substantially to lessen competition, or to tend to create a monopoly" *unless* they find that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." More than a mere weighing of competitive effects, bank regulators conduct a more holistic review of the proposed merger, and consider the unique facts surrounding the transaction, including the public needs of the specific geographic area at issue. If required for the specific merger transaction, the review of competitive factors includes a report on the competitive factors of the merger furnished by the DOJ. The bank regulators must also consider "the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system."

  After the appropriate federal regulator completes its review and approves a proposed merger, it must notify the DOJ, which must then decide whether to bring an action under antitrust laws within the time limits prescribed in the Bank Merger Act. IBC believes that DOJ should provide significant deference to the decision of the federal bank regulators regarding whether to approve or decline a merger application. The federal regulators are in the best position to review and consider the institutions, geographies, and populations involved and whether such a merger is appropriate for the needs of the applicable affected communities.

  IBC believes that, in addition to deference, the DOJ should revise its bank merger guidelines to prioritize allowing mergers in rural and other small markets in order to preserve the financial viability of small and mid-sized community banks so that these (typically underserved) areas can continue to have a robust physical banking presence. Non-traditional and alternative financial institutions can offer increased access to banking services in these areas, but this typically comes with a loss of physical presence which can be incredibly detrimental to banking customers. Increased regulatory costs and burdens and the loss of non-interest revenue streams have forced many small and mid-sized banks to realize economies of scale through merger to remain economically viable and competitive. These mergers, while they may quantitatively appear anticompetitive, often result in stronger financial institutions that are better able to meet compliance burdens and shoulder the related substantial costs associated with them, deploy technology, serve local households and small business with upgraded products and services, and compete with non-local, internet-based institutions that do not have a physical presence in rural and/or underserved areas. Small and mid-sized banks in rural and underserved markets may struggle to gain regulatory approval for mergers, and the process of seeking merger approval can drag on for over a year. IBC notes that the time between application and the approval or denial of a merger application over the last five years appears to have greatly increased, resulting in many institutions facing an interminable period of uncertainty. Such uncertainty can be costly, as the institutions have to carry on as though the merger will be approved in order to accomplish all of the regulatory requirements in a timely fashion once a decision has been made on the application. By contrast, large banks are often more easily able to satisfy the quantitative anticompetitive analysis by divesting branches in certain concentrated markets. In addition, long and time consuming approval processes negatively impact the institutions involved because the lasting uncertainty fuels personnel losses and customer defections.

A merger between smaller, rural-based institutions can be more easily declined by a regulator or the DOJ even though it would result in a stronger local bank that is better able to serve its community and improve its service offerings. In the case of a merger of large, urban-based institutions, the surviving institution may simply divest a few branches in order to receive an anti-competitive regulatory blessing, but the overall banking system becomes more concentrated and more systemically risky.

Data Submissions

- What additional information and data should banks submit with their bank merger application to facilitate the competitive review?

- The Division often considers the FDIC's Summary of Deposits, and the Federal Financial Institutions Examination Council's ("FFIEC") Community Reinvestment Act data during the review of a bank merger application. Should the data submission requirements for these sources be updated—and in what way—to assist the competitive review of bank mergers? What additional information and data should the banking agencies collect on a routine basis to better analyze the competitive effects of bank mergers?

IBC Comment: In order to conduct a competitive effects analysis that is in line with the current financial services industry and markets, the DOJ should include consideration of additional data points and sources. This will provide a more holistic review of and insight into the relevant market. As noted below, one potential source is the Office of the Comptroller of the Currency's ("OCC") recent Community Reinvestment Act Rule ("CRA Rule"), under which OCC-supervised banks (including online-exclusive banks) will be required to track and report the location of their retail depositors. Another source of data to consider is that reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), which would include reporting from non-depository mortgage lenders. This data could provide new insight into the competition traditional banks face from online banks. IBC believes this and other available data would likely highlight the fact that customers often travel farther within rural and underserved markets to obtain financial products and services than the current geographic market definitions (relied on by the DOJ and federal bank regulators) assume, as well as obtain products and services through online channels or otherwise not through physical locations. IBC believes this data would provide clear insight into the actual, realistic degree of concentration in a market and thus the competitive landscape that would exist following a proposed merger. The DOJ should broaden its competitive analysis review to account for such physical and online products, services, and institutions. In today's markets, the only way many small and mid-size community banks can avoid failure and survive in order to ensure a reasonable profit to their stockholders, is to merge. In such circumstances, competition doesn't matter. Either the bank fails and the total number of banks with a physical presence decreases by one, or the bank is allowed to merge, either with a local or non-local institution, and the total number of banks with a physical presence decreases by one or stays the same, respectively. Declining a merger application does not guarantee the competitive landscape of a given geographic footprint will remain the same. Competition may decrease if the bank will fail without an appropriate merger partner.

<u>Updates</u>

- When seeking comments in September 2020, the Division asked interested parties to address whether and how it should include non-traditional banks in its competitive effects analysis. Commentary in response focused on the use of online banking services. We are also interested in whether and how internet-only banks (i.e. banks with no, or an extremely limited, physical branch network) factor into bank merger competitive review.

  IBC Comment: IBC believes the DOJ should consider the greatly increased proliferation and availability of non-traditional and online-only banking options in its consideration of the competitive effects of bank mergers. When evaluating competition in rural or underserved markets, IBC urges the DOJ to acknowledge the structural differences between such markets and urban markets, including by considering competition from outside the confines of narrow geographic limits. Generally, the DOJ's competitive analysis and bank merger review relies on consideration of geographic markets as defined by the Federal Reserve Board or by county. Practically, this results in a finding that a proposed merger will reduce competition in the geographic market. These market definitions frequently fail to take into account how customers in those markets actually seek, obtain, and use banking services. In rural areas with relatively few banks, the most significant competitors for loans and deposits may be financial institutions that are located or available only online, in neighboring counties, or in larger urban areas within a reasonable driving distance. IBC believes that in those instances, it would be appropriate for the DOJ to consider areas larger than one county as the applicable geographic market.

To reflect this new reality and address the increase in online-only financial institutions, the geographic markets for banking products and services should no longer be just based on local institutions and physical presence competition. Instead, the bank regulators and DOJ should account for the presence of fintechs and other exclusively online institutions by examining the level of competition in these markets on a national level. Online institutions with no or limited physical presence are already generally doing business on a national level and are accessible to anyone with internet access. These institutions are currently competing with banks in both urban and rural markets, despite lacking a physical presence in their geographic market. While it is admittedly more difficult to obtain relevant information from and about such institutions in order to assess their presence for purposes of a competitive effects analysis, one potential source is the Office of the OCC's CRA Rule, under which OCC-supervised banks (including online-exclusive banks) will be required to track and report the location of their retail depositors. This data could provide new insight into the competition traditional banks face from online banks. The DOJ should broaden its competitive analysis review to account for such physical and online products, services, and institutions.

Thank you for the opportunity to share IBCs views on these matters.

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Dennis E. Nixon
President and CEO