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Antitrust Division
Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Via email: ATR.BankMergers@usdoj.gov

Department of Justice Review of Bank Merger Policy

Dear Officers,

On behalf of more than 500,000 members and supporters we are pleased to submit the following comments in response to the Department of Justice's (DOJ) invitation for public input regarding its review of antitrust policy regarding bank mergers. The DOJ's guidelines when reviewing bank mergers have not been revised since 1995, despite the fact that over the last quarter century bank mergers have made this industry highly consolidated. Currently, there fewer than 4,300 banks in the United States. In 1994, before the last DOJ bank merger policy was adopted, that figure was 10,421.[1]

At the apex of the industry stand four banks that control nearly half of all deposits and loan-making: JP Morgan, Bank of America, Citigroup, and Wells Fargo.[2] These mega-banks resulted from a series of mergers over the decades. JP Morgan, for example, includes Washington Mutual, Chase, Banc One, Chemical Bank, Bear Stearns, Great Western Financial, and many others.

The impact on consumers of this loss of banks and concentration by the mega-banks has been measurably harmful. Bank mergers have increased the cost of credit.[3] Small businesses have struggled to find credit amid this persistent wave of mergers.[4] These mergers have led to an escalation in fees

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[1] *BankFind Suite*, FEDERAL DEPOSIT INSURANCE CORP, (website visited Jan. 20, 2022) https://bit.ly/34YcIKHc
[2] Bartlett Naylor, *Too Big*, PUBLIC CITIZEN (2016) https://www.citizen.org/wp-content/uploads/toobig.pdf
[3] Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition,* 61 J. FIN. 495, 509-14 (2006). https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2006.00847.x
[4] Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition,* 61 J. FIN. 495, 509-14 (2006). https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2006.00847.x

charged to customers.[5] It has depressed the amount of interest that banks pay to depositors.[6] The disappearance of banks has been especially profound in communities of color, leaving these populations vulnerable to high cost lenders, such as payday operators and high-fee check cashing shops.[7]

Mergers do not simply result in fewer competitors, but fewer branches as well. The merger in 2019 between Branch Banking and Trust Company (BB&T) and SunTrust Bank (SunTrust) created the sixth largest bank in the nation, with a combined 2,950 branches. But after the merger, the newly named Truist closed 175 branches and is expected to close a total of 800, according to analysts.[8]

In 2008, the nation suffered perhaps the most dramatic result of lax control of merger policy when the concentrated banking industry's reckless, fraudulent mortgage-making sector forced a massive government bailout because the government determined that the mega-banks had become "too-big-to-fail."[9]

Beyond this precipitous calamity, this too-big-to-fail status has meant lower borrowing costs for these mega-banks relative to their smaller peers, as creditors know that no matter the risk taken by these behemoths, taxpayers will be forced to make good on the banks' debts. [10]

DOJ's Tools

Currently, the primary tool the DOJ uses is the Herfindhahl-Hirschman Index (HHI).[11] This mathematical tool uses the sum of the squares of participant market shares. If two firms each control 50 percent of the market, the HHI would be 50x50 plus 50x50, or 5,000. The DOJ considers markets with more than 2,500 HHI points to be "highly concentrated." Any merger than increases the HHI by 200 points in a

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[5] Vitaly M. Bord, *Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors,* HARVARD UNIVERSITY (Dec. 1, 2018), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf

[6] Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry,* 46 J. INDUS. ECON. 433, 442-449 (1998) https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-6451.00082

[7] Rohit Chopra, *Comment,* DEPARTMENT OF JUSTICE (website visited Jan. 20, 2022) https://www.justice.gov/atr/page/file/1330326/download

[8] Lauren Sullivan, Ali Shayan Sikander, *Majority Of BB&T, SunTrust Branch Closures Still To Come*, S&P GLOBAL MARKET INTELLIGENCE, (October 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261.

[9] Bartlett Naylor, *Too Big*, PUBLIC CITIZEN (2016) https://www.citizen.org/wp-content/uploads/toobig.pdf

[10] Bhanu Balasubramnian & Ken B. Cyree, *Has Market Discipline Improved After the Dodd-Frank Act?* 41 J. BANKING & FIN. 155, 165 (2014) https://econpapers.repec.org/article/eeejbfina/v_3a41_3ay_3a2014_3ai_3ac_3ap_3a155-166.htm

[11] The term "HHI" means the Herfindahl–Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$).

The HHI considers the relative size distribution of the firms in a market. It approaches zero when a market is occupied by many firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

highly concentrated market would be scrutinized more carefully and may be barred. The DOJ views a market with HHI of less than 1,000 to be unconcentrated; a market with 1,000 to 1,800 to be moderately concentrated. Under current guidelines, a bank merger that does not result in a post-merger HHI of more than 1800 and an increase of more than 200 will not precipitate further review of the competitive effects of the merger.

One merger review found that the average HHI for U.S. banking markets was 3468. More than 78 percent of markets had HHI of more than 1800. In rural areas, this figure was 89 percent.[12] Clearly, the DOJ has failed to honor its own simple metric.

Yet the existing HHI guidelines themselves may be too lenient. In 1968, the DOJ used another metric that led to automatic challenges. In a market where four firms controlled more than 75 percent of the market, a firm with four percent of the market would face a DOJ challenge if it sought a firm that also held a four percent market share. If it held 10 percent of the market, it would be challenged if it sought a firm that held a 2 percent share. And if it held 15 percent of the market, it would automatically face a DOJ challenge if it sought a firm with even a 1 percent market share. In less highly concentrated markets, (defined where the four largest firms controlled less than 75 percent of the market) a firm with 5 percent share would be prevented from purchasing another firm with a 5 percent share.[13]

The Clayton Antitrust Act, Section 7, governs mergers and bars acquisition "when the effect may be to substantially lessen competition."[14] This language grants regulators latitude to establish a strict metric. We believe the metric should be strengthened, especially considering the increased burdens on consumers devolving from the recent merger wave. Moreover, the incipiency language of the statute, namely, regarding whether a proposed merger "may" reduce competition, mandates that the DOJ should exercise bias toward rejection of mergers. [15]

Further, the framers of early antitrust law not only wanted to protect customers from reduced competition, but they also aimed to reduce the power of big business and to promote small business.[16] Surely, the rise of mega-banks and the dwindling number of community lenders insults the legislative intent of the nation's foundational antitrust laws.

We appreciate that the notion of a geographical bank market has evolved in the last few decades with the advent of the internet. Customers need not enter a bank frequently such as to deposit a paycheck or withdraw cash. These activities can be accomplished through direct deposit, automated teller machine, or a smart phone. Bills can be paid online. Investments can also be secured through the internet. But loan-making to small business and homebuyers generally requires a bricks-and-mortar establishment. The number of banking offices has declined by 10 percent in the last decade, from more than 100,000 to less than 90,000, but the demand for such branches remains robust. In fact, more institutions (1,259)

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[12] Andrew Meyer, *The ABCs of HHI,* FEDERAL RESERVE BANK OF ST. LOUIS, (June 11, 1918) https://www.stlouisfed.org/on-the-economy/2018/june/hhi-competition-community-banks

[13] *1968 Merger Guidelines,* DEPARTMENT OF JUSTICE (website visited Jan. 21, 2022) https://www.justice.gov/archives/atr/1968-merger-guidelines

[14] 16 USC 18, https://www.law.cornell.edu/uscode/text/15/18

[15] Richard Steuer, *Incipiency*, LOYOLA CONSUMER LAW REVIEW (Vol. 32:2) https://www.luc.edu/media/lucedu/law/students/publications/clr/pdfs/31-2/6-Steuer.pdf

[16] Richard Steuer, *Incipiency*, LOYOLA CONSUMER LAW REVIEW (Vol. 32:2) https://www.luc.edu/media/lucedu/law/students/publications/clr/pdfs/31-2/6-Steuer.pdf

increased the number of branches than decreased them (1,013) since 2010. Most banks (60 percent), reported no change in their number of branches.[17]

Bank closures are most prominent among banks with many branches. Moreover, half of these closures follow bank mergers.[18] Arguably, a bank can ask its customers to travel further to a remaining branch if it is not competing with a rival in the same area where it intends to close a branch.

We propose that the DOJ return to the 1968 standard, including automatic challenges. The guidelines should indicate a deep skepticism for further consolidation, an acknowledgement that previous guidelines failed to result in meaningful merger enforcement, and a bias towards challenging mergers even where previous guidelines would have indicated a less aggressive approach. The harms associated with highly concentrated banking markets affect consumers, small businesses, and communities of color in measurable and well documented ways. It is time to take an aggressive approach to scrutinizing bank mergers to stop any further consolidation, and potentially review recent past mergers that went unchallenged despite existing concentration.

While online services can bridge some loss of physical stores in a geographic market, the guidelines should demonstrate a bias toward the need for local in-person facilities, particularly in rural and underserved urban areas. Ultimately, the guidelines should require an analysis of consumer and small business access to services that also includes a bias toward more physical store access. The combination of already highly concentrated markets and limited access to in-person banking options in rural communities and communities of color necessitates an analysis on physical stores that is not influenced by the availability of online services.

More than the average corporation, banks enjoy public benefits, such as taxpayer-backed deposit insurance, access to subsidized funding from the Federal Reserve, and other benefits. Consequently, bank mergers should be subject to greater public accountability. The merger process, however, is largely opaque. The DOJ and other banking agencies engage in private discussions about mergers ahead of an official application.[19] During these non-public communications, regulators conduct an analysis without a chance for public input. Once the deal is announced publicly, there is little for the public to contest since regulators have already been satisfied.

The new guidelines must be improved so that discussions between banks involved in proposed mergers and DOJ staff should be made public, including any analyses and research conducted prior to the

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[17] *Factors Shaping Recent Trends In Banking Office Structure For Community And Noncommunity Banks,* FDIC QUARTERLY *(2017)* https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2017-vol11-4/fdic-v11n4-3q2017-article1.pdf

[18] *Exposing Some Serious Untruths About Bank Mergers, Bank Branches and Banking Access,* BANK POLICY INSTITUTE, (Jan. 18, 2022) https://bpi.com/exposing-some-serious-untruths-about-bank-mergers-bank-branches-and-banking-access/

[19] *Bank Merger Competitive Review -- Introduction and Overview (1995)*, DEPARTMENT OF JUSTICE (AUG 26, 2020) https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995 "Parties planning a merger transaction may wish to consult with the relevant banking agency or the Department before submitting an application. Where a proposed merger causes a significant anticompetitive problem, it is often possible to resolve the problem by agreeing to make an appropriate divestiture. In such cases, it may be useful to discuss the matter with the Department and the relevant regulatory agency."

filing of the official application. Further, the DOJ should make its analysis public as there is a need for greater transparency into the competitive analysis itself.

There should be a chance for the public to comment, both in a comment docket, and, ideally, also in a public forum.

Conclusion

In summary, we recommend that merger metrics be returned to the 1968 standard; that transparency be improved, and that the public be involved before decisions are finalized.

In conclusion, we compliment the DOJ for undertaking this review and urge that bank mergers be considered with far greater rigor.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,

Public Citizen